

The Human Right to Development in Nigeria

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Declaration

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Summary

Africa is desperately in need of development. Several efforts have been employed to deal with underdevelopment issues with little or no successes. At all levels, efforts are being put in place to deal with poverty, hunger, malnutrition, disease and other issues that are connected to development. The situation is worrying and desperately in need of lasting solutions. It is in this regard that the right to development was conceived. The right to development is a right that seeks to make development a human right for all. It is a right that encompasses all categories of rights whether civil, political, economic, social or cultural. Thus, the right to development seeks to combine human rights and development together so that the individual and indeed all peoples may participate in, contribute to and enjoy development. The right to development is being supported at international and African regional levels. Although the right is enmeshed in ideological skirmishes between the developed countries of the world and developing ones, efforts to make it acceptable are still ongoing. Examples of such efforts include the Sustainable Development Goals, the Millennium Development Goals, and the New Partnership for Africa's Development amongst others. Therefore, I examine the role of the right to development as a tool for genuine human development in Africa and specifically for Nigeria. I analyse the legal character of the right from an international, regional and domestic legal perspectives. In this dissertation, I argue that the right to development is a human right capable of enforcement in Nigeria. Its enforceability is found within the Nigerian legal system through international and domestic legal arrangements. In addition to international obligations, the constitution, other pieces of domestic legislation as well as the domesticated treaties strengthen the case for the enforceability of the right in Nigeria. Similarly the dissertation notes that aside from justiciability of the right before courts, good governance, legislative and development planning approaches can aid the effective realisation of this right. On the overall, I argue that, the right to development, if effectively implemented, has the potential of dealing with the myriad of development challenges faced in Nigeria and in Africa at large.

Opsomming

Afrika het 'n desperate behoefte aan ontwikkeling. Verskeie pogings is reeds gemaak om kwessies van onderontwikkeling te hanteer, maar met min of geen sukses nie. Op all vlakke word pogings ingestel om kwessies soos armoede, honger, wanvoeding, siekte en ander wat met ontwikkeling te doen het, te hanteer. Die situasie is kommerwekkend en daar is 'n desperate behoefte aan blywende oplossings. Dit is in hierdie opsig wat die reg op ontwikkeling tot stand gekom het. Die reg op ontwikkeling is 'n reg wat poog om ontwikkeling 'n mensereg vir almal te maak. Dit is 'n reg wat al die kategorieë van regte insluit, hetsy burgerlike, politiese, sosiale of kulturele. Die reg op ontwikkeling poog dus om menseregte en ontwikkeling te kombineer sodat die individu, en trouens all mense, aan ontwikkeling mag deelneem, daartoe bydra en dit geniet. Die reg op ontwikkeling word internasionaal and op die streekvlak van Afrika ondersteun. Hoewel die reg vasgewikkel is in ideologiese skermutselings tussen die ontwikkelde lande van die wêreld and die ontwikkelende lande, is daar voortgesette pogings om dit aanvaarbaar te maak. Voorbeelde van sulke pogings sluit in die Volhoubare Ontwikkelingsdoelwitte (*Sustainable Development Goals*), die Millennium Ontwikkelingsdoelwitte, en die Nuwe Vennootskap vir die Ontwikkeling van Afrika (*New Partnership for Africa's Development*). Ek ondersoek dus die rol van die reg op ontwikkeling as 'n egte instrument vir werklike menslike ontwikkeling in Afrika, en veral in Nigerië. Ek analiseer die wetlike karakter van die reg vanuit internasionale, streeks- en binnelandse perspektiewe. In hierdie proefskrif argumenteer ek dat die reg op ontwikkeling 'n mensereg is wat in Nigerië afdwinging kan word. Die afdwingbaarheid daarvan berus in die Nigeriese regstelsel op grond van internasionale en binnelandse wetlike skikkings. Benewens die internasionale verpligtinge, versterk die grondwet, ander stukke binnelandse wetgewing sowel as ingeburgerde verdrae die afdwingbaarheid van die reg in Nigerië. Eweneens wys die proefskrif daarop dat, buiten die bereikbaarheid van die reg voor die howe, goeie bestuur en beheer and wetlike en ontwikkelingsbeplanningsbenaderings tot die doeltreffende totstandkoming van hierdie reg kan bydra. Oor die algemeen argumenteer ek dat indien die reg op ontwikkeling doeltreffend geïmplementeer word, dit die potensiaal het om te handel met die magdom ontwikkelingsuitdagings wat Nigerië, en Afrika oor die algemeen, in die gesig staar.

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Dedication

This dissertation is dedicated to the glory of Allah and to the entire families of Malam Salihi and Alkali Hamza Muhammad (all of blessed memory).

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List of Abbreviations

ACP	African Caribbean and Pacific States Organisation
ADB	African Development Bank
AIDS	Acquired Immune Deficiency Syndrome
ACHPR	African Charter on Human and Peoples' Rights
ACRWC	African Charter on the Rights and Welfare of the Child
AG	Attorney-General
AGF	Attorney-General of the Federation
Art	Article
ASEAN	Association of South East Asian Nations
AU	African Union
BCE	Before the Common Era
CBN	Central Bank of Nigeria
CDC	Constitutional Drafting Committee
CEDAW	Committee for the Elimination of all Forms of Discrimination against Women
CERD	Convention on the Elimination of all Forms of Discrimination
CJN	Chief Justice of Nigeria
CIL	Customary International Law
CRC	Child Rights Convention
CRDS	Charter on the Rights and Duties of States
CSOs	Civil Society Organisations
DFID	Department for International Development
DNIEO	Declaration on the Establishment of a New International Economic Order
EAC	East African Community
ECA	Excess Crude Account
ECCJ	ECOWAS Community Court of Justice
ECOWAS	Economic Community of West African States
EFCC	Economic and Financial Crimes Commission
EU	European Union
FCT	Federal Capital Territory
FGN	Federal Government of Nigeria
FODPSP	Fundamental Objectives and Directive Principles of State Policy
FRA	Fiscal Responsibility Act
FRC	Fiscal Responsibility Commission

FREP	Fundamental Rights Enforcement Procedure
FRN	Federal Republic of Nigeria
GDP	Gross Domestic Product
HDR	Human Development Report
HIV	Human Immunodeficiency Virus
HLTF	High Level Task Force
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic Social and Cultural Rights
ICJ	International Court of Justice
ICPC	Independent Corrupt Practices Commission
ICRC	International Committee of the Red Cross
IE	Independent Expert
IFI	International Financial Institutions
IGOs	International Governmental Organisations
IGWG	Intergovernmental Working Group
ILO	International Labour Organization
IMF	International Monetary Fund
LEEDS	Local Government Economic Empowerment Development Strategy
LFN	Laws of the Federation of Nigeria
MCA	Millennium Challenge Account
MDGs	Millennium Development Goals
MNDA	Ministry for the Niger-Delta Affairs
NAFDAC	National Agency for Food, Drug Administration and Control
NAM	Non-Allied Movement
NAPEP	National Poverty Alleviation Programme
NEEDS	National Economic Empowerment Development Strategy
NEPAD	New Partnership for Africa's Development
NDDC	Niger Delta Development Commission
NIEO	New International Economic Order
NGOs	Non-Governmental Organisations
NHA	National Health Act
NHIS	National Health Insurance Scheme
NNPC	Nigerian National Petroleum Corporation
NPC	National Planning Commission
NPHCDA	National Primary Health Care Development Agency

NTF	Nigeria Trust Fund
NSIA	Nigerian Sovereign Investment Act
OAU	Organisation of African Unity
ODA	Official Development Assistance
OECD	Organisation for Economic Cooperation and Development
OHCHR	Office of the United Nations High Commissioner for Human Rights
RBA	Rights Based Approach to Development
RMFAC	Revenue Mobilisation and Fiscal Allocation Commission
S	Section
SADC	Southern African Development Community
SDGs	Sustainable Development Goals
SAPs	Structural Adjustment Programmes
Ss	Sections
SEEDS	State Economic Empowerment Development Strategy
SERVICOM	Service Compact
TAC	Technical Aid Corps
TETF	Tertiary Education Trust Fund
TNCs	Transnational Corporations
TSA	Treasury Single Account
UBEC	Universal Basic Education Commission
UDHR	Universal Declaration on Human Rights
UK	United Kingdom
UN	United Nations
UNCTAD	United Nation Commission on Trade and Development
UNDP	United Nation Development Programme
UNDRD	United Nations Declarations on the Rights to Development
UNGA	United Nation General Assembly
UNDRIP	United Nation Declaration on the Rights of Indigenous People
UNESCO	United Nations Educational, Scientific and Cultural Organisation
UNICEF	United Nations Children’s Fund
UNHRC	United Nations Human Rights Council
USA	United States of America
VCLT	Vienna Convention on the Law of Treaties
WTO	World Trade Organisation

Chapter 1

Introduction

“Where globalisation means, as it so often does, that the rich and powerful now have new means to further enrich and empower themselves at the cost of the poorer and weaker, we have a responsibility to protest in the name of universal freedom. Globalisation opens up the marvellous opportunities for human beings across the globe to share with one another, and to share with greater equity in the advances of science, technology and industries. To allow it to have the opposite effect is to threaten freedom in the longer term.”¹

Nelson Mandela

1.1 Background to the study

In a renewed, post 2015, development agenda, the United Nations (UN) recently adopted the Sustainable Development Goals (SDGs) in a bid to establish a more humane and responsible world order.² In this regard, and key to many other international interventions to promote development and ultimately the dignity of human beings, human rights and development have become two mutually related concepts that remain vital for any genuine, equitable global structuring or restructuring. The ostensible imbalance and inequity of the global economic system in the areas of international economic development, visible especially on the African continent, has pre-occupied numerous academic discourses since the era of decolonisation of the least developed countries, spanning through the so-called development era and beyond. Economic development has clearly eluded many African countries and as such they are enmeshed in unending economic crisis with its negative trickling down effect on the human worth and dignity of the overwhelming majority of the populace. Abject poverty, pauperisation, maternal mortality, diseases, hunger and malnutrition have therefore become notable hallmarks and are common to parts of the population in virtually all African countries.

In the words of Nelson Mandela, as quoted above, human development is essential to human freedom. As the UN departs on yet another strategy of human development

¹ N Mandela Speech on receiving the Freedom Award from the National Civil Rights Museum, presented on 22 November 2000 *Nelson Mandela Speeches* available at http://db.nelsonmandela.org/speeches/pub_view.asp?pg=item&ItemID=NMS919&txtstr=22+November (accessed 24-10-2015).

² Adopted during the United Nations Sustainable Development Summit between 25 and 27 September 2015 in New York. See UN Transforming our world: the 2030 Agenda for Sustainable Development (adopted 18 September 2015) General Assembly Resolution A/70/L.1. The SDGs aim to transform the world through an agenda that will span through to 2030. It strives to end poverty and hunger through sustained global partnerships.

through the adoption of the newly adopted SDGs following the official expiry of the Millennium Development Goals (MDGs) this year, the same challenges to freedom highlighted above continue to exist and are in some cases even increasing geometrically. Therefore, as I suggest in this dissertation we have to re-consider the feasibility of the application of the right to development, as a human right, to the many developmental challenges faced on the African continent.

Although widely acknowledged by the international community, the concept of the right to development has generated heated, tendentious debates polarising the world according to political and economic interests. Besides integrating aspects of human rights and development theory and practice, the concept broadly demands comprehensive and human-centred development policy, participatory development processes, social justice and equity. At the international plane the economic imbalance and ideological differences have been recognised and several efforts have been made to address the development challenges of Africa even as countries struggle to actualise their development aspirations through reform efforts. Law has constantly been employed and has played a pivotal role in all these reform projects leading to the formulation and enactment of several pieces of legislation and similar legal instruments to augment and intensify structural reforms. However, many of these development efforts have not approached development as a basic entitlement in the form of either an individual or communal “right” even after the evolution and official declaration of the right to development in 1986.³

The apparent economic development disparities among nations in the globalised world have produced severe socio-economic consequences that challenge the universal concepts of equality, equity and fairness, concepts that are at the heart of both human rights and development discourses.⁴ Almost three decades after the UNDRD was launched, little progress has been recorded in the aspects of its juridical character and status. The UNDRD has not yet been accepted by a number of countries who are both the beneficiaries and benefactors of globalisation.⁵ Some of these states argue that while the

³ United Nations Declarations on the Rights to Development (adopted 4 December 1986) UN Doc A/RES/41/128 (UNDRD).

⁴ See A Sengupta “The Human Right to Development” in BA Andreassen & SP Marks *Development as a Human Right: Legal, Political and Ethical Dimensions* 2 ed (2010) 13 1-15; ME Salomon “International Human Rights Obligations in Context: Structural Obstacles and the Demand of Global Justice” in BA Andreassen & SP Marks *Development as a Human Right: Legal, Political and Ethical Dimensions* 2 ed (2010) 121 122, 140.

⁵ See for example A Eide “Human Rights-Based Development in the Age of Economic Globalisation: Background and Prospects” in BA Andreassen & SP Marks *Development as a Human Right: Legal, Political, and Economic Dimensions* (2010) 275 275,279,282; See also S Osmani “Globalization and Human Rights

right to development is a synthesis of rights recognised universally, it is not, on its own, a claimable right.⁶ Nevertheless, the right to development is seen by many as a viable means to an end, one of several ways to alleviate poverty and balance the imbalanced international economic order.⁷ It is also a right that should govern states in designing a development path for their people.

The birth of the right itself is critical to my research. Mrs. Eleanor Roosevelt has been credited as the first advocate of the right to development when she declared at the time of crafting the Universal Declaration on Human Rights⁸ (UDHR) that “we are writing a bill of rights for the world, and (...) one of the most important rights is the opportunity for development.”⁹ Following her declaration and the consequent adoption of the UDHR many other legal instruments have underscored development as a cornerstone of human survival, justice and equality.¹⁰ But it was the global economic imbalance that forced a conscious effort to formally create and concretise the right. This was spurred by the outcome of the Bandung Conference of 1955 and the increasing challenges of poverty and its manifestations in the developing countries as a result of the apparent global economic inequities. In addition, the demands of the United Nations Conference on Trade and Development (UNCTAD), motivated the Senegalese jurist, Keba Mbaye, to advance and make a call for the “right to development” in his address delivered at the International Institute for Human Rights, in Strasburg in 1972. This was to strengthen international co-operation, reduce poverty, create some level of parity amongst nations and ameliorate the economic woes of the Afro-Asian countries.¹¹

Approach to Development” in BA Andreassen & SP Marks *Development as a Human Right: Legal, Political, and Economic Dimensions* (2011) 315 315.

⁶ S Marks “The Human Right to Development: Between Rhetoric and Reality” (2004) 17 *Harv Hum Rts J* 137 137-168.

⁷ A Sen “Human Rights and Development” in BA Andreassen & SP Marks *Development as a Human Right: Legal, Political and Ethical Dimensions* 2 ed (2010) 3 3, 5 and 8; JK Boesen & H Sano “The Implications and Value Added of a Human Rights-Based Approach” in BA Andreassen & SP Marks *Development as a Human Right: Legal, Political and Ethical Dimensions* 2 ed (2010) 45 54-63; D Beetham “The Right to Development and its Corresponding Obligations” in BA Andreassen & SP Marks *Development as a Human Right: Legal, Political and Ethical Dimensions* 2 ed (2011) 101 101, 112; M Schenin “Advocating the Right to Development through Complaint Procedures under Human Rights Treaties” in BA Andreassen & SP Marks *Development as a Human Right: Legal, Political and Ethical Dimensions* 2 ed (2010) 339 339.

⁸ UN General Assembly Universal Declaration of Human Rights (adopted 10 December 1948) GA Res 217 A (III) (UDHR).

⁹ See M. Glen Johnson, “The Contributions of Eleanor and Franklin Roosevelt to the Development of International Protection for Human Rights,” (1987) 9 *Hum Rts Q* (1987): 19 19–48.

¹⁰ ID Bunn “Right to Development: Implications for International Economic Law” (2000) 15 *American University International Law Review* 1425 1425.

¹¹ See K Mbaye, “Le Droit du Développement comme un Droit de l’Homme,” (1972) 5 *Revue des Droits de l’Homme* 503 503-534.

Mbaye reasoned that since all human beings are entitled to the same basic rights then all men should have a right to development because “every man has a right to live and a right to live better.” This triggered extensive theoretical postulations and debates particularly with regard to the legal framework, normative content, enforceability and practical implementation and limitations of the right within the existing international legal and economic orders.¹² Ever since Mbaye’s thesis was presented, the right has become a subject of contemporary international and regional discourse leading to the adoption of several instruments both at the international and regional levels.¹³ As an example the preamble of the ACHPR states that:

“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”

The concretisation of the right assumed much significance in the 1970s and 80s and was largely shaped by the euphoria instigated by the so-called development decade. The right to development emanated out of the pressing international concern for human dignity caused by the deepening poverty and the quest for sovereign equality amongst nations.¹⁴ It is principally a child of the human rights jurisprudence and development studies, a by-product of the flexibility of the human rights movements.

But even prior to the development decade, several development-based human rights instruments, with provisions on right-based approach to development, were enacted. For instance, article 1 of the UN Charter states that one of the purposes of the UN is the promotion and encouragement of “respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language or religion.”¹⁵ This was followed by the

¹² SP Marks “Obligations to Implement the Right to Development: Philosophical, Political and Legal Rationales” in BA Andreassen & SP Marks *Development as a Human Right: Legal, Political and Ethical Dimensions* 2 ed (2011) 73 73-100.

¹³ K Mbaye “Le Droit du Development comme un Droit de l'Homme”(1972) 5 *Revue des Droits de l'Homme* 503 503-534.

¹⁴ For instance one of the Preambles to the UNDRD states: “Considering that the elimination of the massive and flagrant violations of the human rights of the peoples and individuals affected by situations such as those resulting from colonialism, neo-colonialism, apartheid, all forms of racism and racial discrimination, foreign domination and occupation, aggression and threats against national sovereignty, national unity and territorial integrity and threats of war would contribute to the establishment of circumstances propitious to the development of a great part of mankind” The ACHPR provides in its preamble that: “Conscious of their duty to achieve the total liberation of Africa, the peoples of which are still struggling for their dignity and genuine independence, and undertaking to eliminate colonialism, neo-colonialism, apartheid, zionism and to dismantle aggressive foreign military bases and all forms of discrimination, language, religion or political opinions”

¹⁵ See also Articles 13, 55, 60 and 68 of the United Nations, Charter of the United Nations (adopted 24 October 1945) 1 UNTS XV (UN Charter); See also article 28 of the UDHR.

adoption of the International Bill of Rights comprising, among others, the UDHR and the two politically and ideologically polarised but interconnected Covenants, namely the International Covenant on Civil and Political Rights¹⁶ (ICCPR) and the International Covenant on Economic, Social and Cultural Rights¹⁷ (ICESCR). The First World Conference on Human Rights was held in Tehran in 1968. At the conference the close relationship between human rights and development was underscored. For instance, it was declared that “the achievement of lasting progress in the implementation of human rights is dependent upon sound and effective national and international policies of economic and social development.”¹⁸

A number of World Conferences were held in the 1980s and 1990s to emphasise the interdependence between human rights and development.¹⁹ They include the UN Conference on Environment and Development, Rio de Janeiro (1992)²⁰; the World Conference on Human Rights, Vienna, (1993); the World Conference on Women, Beijing, (1995)²¹; the World Summit for Social Development, Copenhagen, (1995)²² amongst others. While recognising the right to development as a “universal and inalienable right” and an integral part of the corpus of fundamental human rights, the Vienna Declaration, affirmed the interdependence and mutual reinforcements of human rights and development, calling for international support and co-operation in the development process and for sound, effective development policies on the national and international levels.²³

The UN Human Rights Commission furthermore formally recognised the right in 1977.²⁴ Although some aspects of the right to development have been covered under some of these instruments, it was not until the adoption of the ACHPR, in 1981 that it became

¹⁶ UN General Assembly International Covenant on Civil and Political Rights (adopted 16 December 1966 and entered into force 23 March 1976) 999 UNTS 171.

¹⁷ UNGA International Covenant on Economic, Social and Cultural Rights (adopted 16 December 1966 and entered into force 3 January 1976) 993 UNTS 3.

¹⁸ The Proclamation of Tehran, The Final Act of the International Conference on Human Rights (1968) UN Doc. A/ CONF.32/41 para 13.

¹⁹ UNGA Vienna Declaration and Programme of Action (12 July 1993) A/CONF.157/23.

²⁰ UNGA Report of The United Nations Conference on Environment and Development (3-14 June 1992) A/CONF.151/26 (Vol. I).

²¹ UNGA Beijing Declaration and Platform for Action, Fourth World Conference on Women, (15 September 1995) A/CONF.177/20 (1995)

²² UNGA World Summit for Social Development (19 April 1995) A/CONF.166/9

²³ The Proclamation of Tehran, Para.13, the Final Act of the International Conference on Human Rights, UN (1968) Doc. A/ CONF.32/41.

²⁴ Vienna Declaration Paras 1, 8, 9,10,12,14.

sufficiently concretised and projected into the mainstream human rights jurisprudence, at least at the regional level.

However, almost 30 years after its evolution, the right to development has not been fully developed and, unlike the other categories of human rights, is yet to be universally accepted as a right, largely because of the politicisation of the concept. The UN is still vigorously moulding and working on the concept and established an intergovernmental Working Group on the Right to Development in 1998²⁵ and a High-Level Task Force (HLTF)²⁶ on the implementation of the right to development in 2004. Furthermore an Independent Expert (IE) has also been appointed with broad mandates.²⁷ These are working on defining and actualising the concept in addition to the practical implementation of the right to development through the MDGs and more recently, the newly conceived SDGs.

Most African countries have shown willingness to commit to the right to development. This is gleaned from the affirmation of this right as a peoples' right in the African Charter on Human and Peoples' Rights (ACHPR)²⁸ and their contemporaneous continuous commitment to development at regional, sub-regional and national levels.²⁹ Based on the foregoing, I advance the thesis that the right is an important right worth examining.

1 2 Problem statement

Nigeria is a country endowed with abundant human and natural resources, thus it has enormous potentials for development. However, development has eluded the country, with inequality, poverty, malnutrition, wretchedness and deaths being its abiding characteristics. Development is seen as one of the supreme purposes of the state under

²⁵ See United Nations Commission on Human Rights (UNCHR) "Report of the Open-Ended Working Group on the Right to Development" (20 March 2001) E/CN.4/2001/26; UNCHR "Report of the Open-ended working group on the right to development" (24 March 2003) E/CN.4/2003/26; UNCHR Report of the Working Group on the Right to Development (18 March 2004) E/CN.4/2004/23; Report of the Working Group on the Right to Development on its sixth session (3 March 2005) E/CN.4/2005/25; Human Rights Council Report of the Working Group on the Right to Development on its thirteenth session (26 June 2012) A/HRC/21/19.

²⁶ Recommended to be appointed in the fifth session of the Working group in 2005. See for instance the first report of the HLTF UN ECOSOC Report of the High-Level Task Force on the Implementation of the Right to Development (24 January 2005) E/CN.4/2005/WG.18/2.

²⁷ UNCHR Study on the current state of progress in the implementation of the right to development submitted by Mr. Arjun K. Sengupta, independent expert, pursuant to Commission resolution 1998/72 and General Assembly resolution 53/155 (27 July 1999) E/CN.4/1999/WG.18/2.

²⁸ African [Banjul] Charter on Human and Peoples' Rights (adopted 27 June 1981 entered into force 21 October 1986) OAU Doc. CAB/LEG/67/3 rev. 5, 21 ILM 58 (1982) (ACHPR).

²⁹ African [Banjul] Charter on Human and Peoples' Rights (Ratification and Enforcement) Act Cap A9 Laws of the Federation of Nigeria (LFN) 2004 (African Charter Act)

the Constitution of the Federal Republic of Nigeria (Constitution).³⁰ However, notwithstanding this constitutional objective and the ratification and domestication of key international human rights instruments, such as the ACHPR mentioned above, development is not, at least in functional terms, treated or considered as a human right in Nigeria.³¹ In the midst of its abundant resources, it is inexplicable why development should elude Nigeria despite the many development initiatives, as discussed in this dissertation.

Aside from ratifying the ACHPR, Nigeria has domesticated it thereby, making it enforceable law within the Nigerian legal system. Furthermore, the Constitution contains strong-worded provisions on civil, political, economic, social and cultural rights as well as on the implementation of some people-centred economic development policies.³² The inherent interdependence of civil and political rights on the one hand and economic, social and cultural rights on the other has been recognised in some jurisdictions³³ and under international human rights law. However, the Nigerian legal system has consistently maintained the “unrealistic unenforceability” position of the latter group of rights. This approach has had a number of implications on the realisation of the right to development, which is the point of departure for my research endeavour in this dissertation.

Many of the economic and political reforms, theories and policies in the form of democratisation, good governance, SAPs, privatisation, poverty reduction strategies that have been conceived, formulated and implemented have not truly resulted in reducing or alleviating poverty and providing development in Nigeria. On the contrary, some of these have aggravated and perpetuated what Zein Elabdin calls the “interminable African crisis”.³⁴ The effect is that the viability of the developmental policies and processes conceived and implemented have been questioned. On the one hand the “African tragedy” as visible in Nigeria, is arguably directly rooted in the historical injustices of slavery, slave trade, racism and imperial colonialism. As such these historical injustices would constantly impede any development agenda in African countries such as Nigeria.³⁵ Thus, path

³⁰ Constitution S 14.

³¹ Constitution S 6 (6) (c) and Chapter II which is entitled Fundamental objectives and directive principles of state policy.

³² Constitution chapters II and IV.

³³ For example in Kenya recently and in South Africa earlier. See S Liebenberg “Making a Difference: Human Rights and Development- Reflecting on the South African Experience” in BA Andreassen & SP Marks *Development as a Human Right: Legal, Political and Economic Dimensions* 2 ed (2010) 209-244.

³⁴ EO Zein Elabdin “Post Coloniality and Development: Development as a Colonial Discourse” in L Keita (ed) *Philosophy and African Development: Theory and Practice* 215-219.

³⁵ B Rajagopal *International Law from Below: Development, Social Movements and Third World Resistance* (2003) 9.

determination and path dependency as colonial choices and policies determine and condition post-colonial Africa.³⁶ As Rodney contends:

“The concept of metropole and dependency automatically came into existence when parts of Africa were caught up in the web of international commerce. On the one hand, there were the European countries who decided on the role to be played by the African economy; and on the other hand, Africa formed an extension to the European capitalist market. As far as foreign trade was concerned, Africa was dependent on what Europeans were prepared to buy and sell.”³⁷

He therefore concludes that the “only things which developed [in Africa] were dependency and underdevelopment.”³⁸ On the other hand, perpetual exploitation of Africa through the new wave of external domination through neo-colonialism exemplified by the hegemonic powers of the United States of America (USA) and China is instrumental in plunging Nigeria and other African states, similarly positioned, into the current imbroglio.³⁹ Additionally, at the national level, there are the issues of bad governance and lack of political will to pursue a development path that contributes to development by the political leadership. Simply put, the global economic superstructures coupled with deliberate destruction, negligence or inefficiency of governments affect the level of development of African countries such as Nigeria. The internal structures, as I argue in this dissertation that should ensure national development in Nigeria have been misused, abused or neglected. The participation of the Nigerian people, in development, has remained elusive and has been cornered by a few people mostly in the political class.

Thus, the right to development faces enormous challenges. Firstly, almost three decades since its evolution, there is still no universal international treaty that guarantees general acceptability while entrenching positive legal obligations on relevant international actors. Hamm argues that the right to development may be invoked to stimulate discussion and to strengthen the justiciability of socio-economic rights but it cannot function as a substitute for a human rights approach to development because of its vagueness, lack of explicit legal obligation laid down in an international treaty and lack of consensus.⁴⁰ Arguably however, there are existing international treaties that recognise the right and

³⁶ See W Rodney *How Europe Underdeveloped Africa* (1972) 21, 118, 369; I Shivji *The Concept of Human Rights in Africa* (1989) 9-16; and also I Shivji “Pan-Africanism or Imperialism? Unity and Struggle towards a New Democratic Africa” (2008) 1 *LGD* 2 7.

³⁷ Rodney *How Europe Underdeveloped Africa* 118.

³⁸ Rodney *How Europe Underdeveloped Africa* 369.

³⁹ RH Wade “Is Globalization Reducing Poverty and Inequality?” (2004) 32 *World Dev* 567 567-589; H Campbell “China in Africa: Challenging US Global Hegemony” (2008) 29 *Third World Q* 89 89-105.

⁴⁰ BI Hamm “A Human Rights Approach to Development” (2001) 23 *Hum Rts Q* 1005 1005-1031.

impose legal obligation on state parties. But the lack of explicit universal consensus on the right has rendered it a mere “foreign policy tool” that further polarise the world.

Secondly, there are questions regarding the justiciability of the right and its undefined content. This calls for the determination of the right within legal boundaries. But while some rights have assumed the status of *jus cogens* under international human rights, others are still in the process of evolving as enforceable rights at different levels. The right to development is thus, among the rights that are trying to find its footing at the international, regional and domestic levels. Lankford argues that today the relationship between human rights and development is defined more by its distinctions, points of diversion and disconnect than by its points of convergence.⁴¹

Thirdly, full integration of human rights and development is seen by many as a mirage. And if this cannot be achieved the concept of right to development would be meaningless. But the practice of the global community supports the interrelationship between human rights and development. This in fact informs the need for this research as further espoused in my hypotheses.

1.3 Research questions and hypotheses

In this dissertation I consider the feasibility of the application of the right to development, as a human right, to the many developmental challenges faced in Nigeria. Therefore, the primary research question that guides my research is, whether the right to development can be employed to ensure human rights based development in Nigeria. To answer this overarching question six secondary research questions have been employed; enquiring firstly, what the basic components of the right to development are or should be. Secondly, whether the traditional African societies had conceptualised human rights and development and therefore the right to development? Thirdly, whether the new, emerging right to development has crystallised into an effective legal norm capable of creating rights and obligations under international human rights law? Fourthly, whether the right to development has similarly crystallised into an effective legal norm capable of creating rights and obligations under the African regional human rights systems? Fifthly, what is the legal status and significance of the right to development under the Nigerian legal system especially in view of its domestication under the ACHPR? Sixthly, if so, has law been

⁴¹ See SM Lankford “Human Rights and Development: A Comment on Challenges and Opportunities from a Legal Perspective” (2009) 1 *JHRP* 51 51-82.

adequately employed in the formulation and implementation of the right to development and what could be the challenges of implementing the right in Nigeria?

My main hypothesis is that the right to development, like all other human rights protected under the ACHPR, has assumed the status of an enforceable right in Nigeria. The basis for this assertion lies firstly in the fact that Nigeria is bound by its international obligations. The right to development, as I show in this dissertation, is an international obligation that all states must uphold and implement. The right to development is moreover, as I further show in this dissertation, an obligation that is contained in several international legal instruments which Nigeria is party to. In this regard therefore, Nigeria must respect promote and fulfil its international obligations on the right to development. This entails making every effort to ensure the realisation of the right by enacting laws, earmarking resources for development and also providing good governance as I further show in chapter 6 and 7 of this dissertation. This duty further entails that the Nigerian state provides opportunity for its people to participate in their development. Likewise, the Nigerian state must ensure that all obstacle to development are removed so that the people can contribute to and enjoy development as a human right. Secondly, Nigeria has a responsibility to conform to its Constitution and extant laws on national development including its duty to respect, promote and fulfil all human rights.⁴² This obligation as set out in the Constitution and other extant laws comprise largely of right to development obligations. Thirdly, there is abundant evidence to show that the right to development has an indigenous African cultural fingerprint which makes or should make it appropriately acceptable to Africans, including Nigerians, to serve as a basis for solving the myriad of challenges facing them. Lastly and most importantly, Nigeria has domesticated the ACHPR, which is the first international instrument to provide for a right to development and therefore is bound to realise it and be subject to all legal and judicial machineries to compel its implementation. Therefore, in line with my primary hypothesis set out above, the right to development is far from being rhetoric, especially in Nigeria.

In view of the research problem, research questions and hypotheses identified above, the aim of my research is in general to advance the course of the right to development internationally, regionally and domestically. My research moreover specifically aims at establishing an understanding of the position of the right to development within the Nigerian legal system. I therefore firstly set out to examine the debates surrounding the

⁴² *Social and Economic Rights Action Centre (SERAC) and Another v Nigeria* (2001) AHRLR 60 (*Ogoni*) para 44-48.

right to development with the aim of narrowing its application to Nigeria. This latter approach entails examining the Nigerian corpus juris with a view to determining how the right to development applies and ought to apply within it keeping in mind the challenges that may hinder such a process.

1.4 Methodology

To address the above stated primary and secondary research questions and hypotheses I use traditional methods in the discipline of law and legal theory in the study of relevant international, regional and domestic instruments and jurisprudence. My research is generally doctrinal in nature. Therefore, the corpus of the research consists mainly of primary and secondary legal sources. References are made to international treaties, the Nigerian Constitution and other statutory provisions relating to the right to development. The UN and AU mechanisms are used extensively to examine the right to development together with documents established within these processes. References are also made to the development of the right through various judicial bodies that have had effect on the Nigerian legal system. This dissertation puts much emphasis on secondary materials on the right to development. Generally, archival sources as well as other specialised texts parliamentary debates, statutory instruments, administrative records and judicial proceedings or pronouncements have been relevant in the research of this dissertation.

1.5 Limitations and scope

Geographically, my research focuses on Nigeria. However, since the right under review is evolutionarily a child of international human rights law and can hardly be divorced from its international base, it is imperative to juxtapose the current status of the right in Nigeria vis-à-vis its international origin. But broadly, the focus of this dissertation is international human rights law. It is equally necessary to briefly examine the recognition, acceptability and implementation of the right to development in Africa in view of the economic status and historical antecedents of the region.

The research area, human rights and development, is relatively novel. In my dissertation, I re-examine the marriage of the human rights jurisprudence with economic development from the international, African sub-regional and Nigerian contexts. I generally focus on the legal aspects of development while leaving out any extensive discussion on its historical, economic and ideological undertones.

The dissertation does not exhaustively deal with all the possible issues on the right to development. Development is broad and the right to development seeks to cover all its aspects. Thus, the right to development comprises of economic, social, cultural, civil and political rights. But this dissertation focuses on the right to development as an umbrella right and therefore treats these issues collectively from the lens of interrelatedness, indivisibility and interdependence of human rights. However, using the rights to health and education, I show how Nigeria has adopted legislative methods and mechanisms to uplift and implement non-justiciable obligations indicative of the rights based approach to development as advanced in this dissertation.

Similarly, the dissertation does not set out to examine the effectiveness of the right to development or any of its constituent elements such as any of the issues that form part of development. It also does not aim to examine the efficacy of any particular development effort whether at the UN or AU (formerly Organisation for African Unity [OAU]) levels such as SDGs, MDGs or NEPAD initiatives. The aim of the dissertation is to examine the concept of the right to development as a human right *per se* and to consider its application and possible challenges within the Nigerian legal system. In examining the challenges, my aim is not to exhaustively discuss each of the challenges but rather to show how they affect the implementation of the right in Nigeria. Thus, as an example, because corruption is not the primary concern of this dissertation I only discuss it in relation to how it affects good governance in chapter 7.

This dissertation is furthermore not a comparative study between Nigeria and any other domestic or regional system. But because the right to development is an international concept especially at the UN and AU levels, their jurisprudence are utilised in the study. In view of this, developments in other human rights systems, such as European Union (EU) and inter-American, except where relevant or for emphasis, are beyond the scope of this dissertation and are consequently, excluded from this study. Consequently, I predominately analyse only the UN and African human rights system as they intricately connect to the Nigerian legal system.

1.6 Significance of the study

This dissertation aims to contribute to the ongoing debate dealing with development issues in developing countries particularly in Nigeria using the rights based approach to development. The right to development as an all-encompassing human right provides an opportunity for development to be viewed and implemented from a human rights

perspective. Using existing legal frameworks, the right to development can serve the twin purpose of adjudication and implementation for realising human rights and development. The right to development if properly utilised, articulated and promoted can serve the purposes of policy formulation and execution on the one hand while at the same time forming the basis for its enforcement through adjudication on the other.

Similarly, this study promotes the right to development as a viable alternative to existing development models by tying it to human rights. If the necessary adjustments are made, as I advance in this dissertation, the right to development will open a window of opportunity to protect individuals, groups and minorities from the negative responses of governments. Generally, the right to development seeks to ensure accountability and good governance and therefore ensure that governments are responsible and responsive to its people. At the same time, the right to development will reduce proliferation and duplicity of human rights and development models by bringing them all under it. A successful implementation of the right to development, which I argue for in this dissertation, can ensure the universality, interdependence and interconnectivity of human rights. Therefore, the dissertation seeks to contribute successfully to policy formulation and execution in the area of human rights and development in Nigeria and beyond. Furthermore, through this right, more windows of accountability can be opened for the beneficiaries of the right to development as not only the state but also all juridical persons have a responsibility to provide the right to development. Thus, if the right to development were to be successfully implemented, direct and indirect violations of human rights by state and non-state actors alike could be sanctioned and protected. But, importantly, the right to development affords its beneficiaries to participate in, contribute to and enjoy development.

1.7 Overview of chapters

Chapter 2 attempts to answer the first research sub question which is to determine what the basic components of the right to development are or should be. Therefore, I discuss the main concepts in the dissertation and how they are related. More specifically, I examine the concept of human rights, development and the right to development particularly with regards to their general understanding in contemporary affairs. I therefore examine the various debates on these concepts using various primary and secondary materials. I scrutinise whether the right to development is a moral or legal obligation or both. I further engage in the problematic concept of development. Additionally, I discuss the relationship between the two concepts of human rights and development and how they have been inseparable for any genuine and progressive development effort to take place.

On a final note, I deal with the concept of the right to development itself. The discussion in this regard centres basically on the content, character and implementation of the right.

The second secondary question is considered in chapter three. The assumption here is that traditional African societies did not exist in a vacuum. These societies had human rights and developed accordingly based on their own understanding of these concepts. In view of this, I categorise the discussion in this chapter into five mostly using a historical and descriptive approach. The discussion in this chapter shows that the right to development is not an isolated phenomenon for Africa but rather an ingrained concept that has been resuscitated to solve African challenges. I firstly examine the notion of development in traditional African societies. Secondly, I discuss the notion of human rights in relation to these societies. The third section examines human rights and development in pre-colonial Africa. The fourth section discusses the nature of human rights and development in Africa during the colonial period and shows how colonialism distorted the traditional African set-up and understanding of human rights and development. In the fifth section I, highlight the interface of westernisation through colonialism and Africa's renewed agenda to pursue and institutionalise human rights and development. It briefly ascertains the African human rights system and demonstrates how it internalises both human rights and development. Finally, in the fifth section of this chapter, I consider the debate about universalism and cultural relativism debate on human rights.

Having established the conceptual issues and historical perspectives of human rights and development in Africa in chapters 2 and 3, I move on to examine the legal status of the right to development in chapters 4, 5 and 6. In chapter 4, I deal particularly with the legal status of the right to development at the international level. I therefore undertake to investigate the third research sub question which seeks to answer whether the new, emerging right to development has crystallised into an effective legal norm capable of creating rights and obligations under international human rights law? I have put forward the hypothesis that the right to development is an international obligation contained in a series of international legal instruments and therefore enforceable by states. I start initially with examining the international bill of rights and how it relates to the right to development. Furthermore, I investigate the nature of the right to development as a customary international law (CIL) principle. Because international human rights are meant to be applied in domestic legal systems, I show how and what rules govern its application therein. I follow this up with an examination of the justiciability of the right to development paying particular attention to the actors of the right. In this regard, I begin with illustrating

who the beneficiaries of the right are or should be. Subsequently, I conclude the discussion in this chapter by analysing who the duty holders of the right to development are. Basically, this chapter uses international human rights instruments and secondary sources to reach its conclusions.

I narrow the discussion in chapter 5 to the African human rights system. Consequently, I seek to respond to the research sub question on whether the right to development has similarly crystallised into an effective legal norm capable of creating rights and obligations under the African regional human rights systems. To deal with this issue effectively, I divide the chapter into four main sections capitalising on the hypothesis that the African human rights system fully and adequately enshrines the right to development. Firstly, I highlight the sources of the right under this system emphasising importantly on the ACHPR. Secondly, I elaborate on the beneficiaries of the right to development, which I discuss in chapter 4, paying special attention to groups or peoples in this regard. Thirdly, I review the enforceability of the right to development under this system. My discussion on enforceability of the right to development in this section is two-fold. Firstly, I examine the development of the right under the AU jurisprudence. Thus, I concentrate on the developments of the right to development under the judicial mechanisms hereunder. In the second segment, I analyse the jurisprudence of the right to development under the ECOWAS sub regional human rights system.

I push further the inquiry in this dissertation by scrutinising the legal status and significance of the right to development under the Nigerian legal system in chapter 6. This is in consonance with the already set out fifth research sub question. I depart by explaining the nature of the Nigerian legal system. Based on the earlier discussion on the right to development at the international plane as presented in chapters 4 and 5, I descend on inquiring into the relationship between international law and the Nigerian legal system. I set out to highlight the nature of Nigeria's legal obligations. Moreover, based on my discussion in chapter 4 on the status of the right as CIL, I reassess that discussion within the purview of the Nigerian legal system. Furthermore, in my discussion under this sub section, I concentrate on the status of the right as a treaty obligation. Afterwards, I evaluate the right to development under the Nigerian legal system by articulating what I presume to constitute the right thereunder. Under this discussion, I depart from the lenses of domesticated treaties through to the contents of the Nigerian Constitution. I specifically examine the status of the right to development under the Constitution as a human right

and as a specific obligation. Similarly, I discuss the right from a Nigerian indigenous cultural practice.

In chapter 7, I examine the implementation of the right to development coupled with the challenges that come along with it. The aim is to respond to the sixth research sub question as I have outlined earlier. To achieve this, I divide the chapter into three main sections. The first section highlights Nigeria's resources and resource allocation structure. I then proceed in the second section to discuss the Nigerian political structure. Finally, in the last section, I espouse the methods the Nigerian state has employed in implementing the right to development. I do this under three sub sections. Firstly, I demonstrate how good governance can be utilised to implement the right to development. I similarly, show how corruption and bad governance impugn on this method. Secondly, I display how Nigeria uses the legislative method to realise aspects of the right to development. I use two main examples in the area of health and education to buttress this method. Lastly, the third sub section examines the development planning and policy method in the realisation of the right to development in Nigeria. In all the chapters, primary and secondary materials are utilised. Specifically, in chapters 6 and 7, I use local legislation, including the Nigerian Constitution, domesticated treaties, and other legislation as well as international instruments which Nigeria is party to, scholarly contributions and case law to reach my conclusions and put across my arguments.

Chapter 2

Contextualising the Concepts of Human Rights, Development and the Right to Development

2.1 Introduction

The right to development is an evolving concept. Implicit in this concept are the two interrelated concepts of rights and development; concepts that have epitomised Africa's age long struggle for equity and fairness in the global economic, social and political landscapes. Consequently, there has been an increasing desire to marry the concepts of human rights and development together. Ultimately, this gave rise to the concept of the right to development, seeking to remedy a myriad of problems related to underdevelopment. There is a general assumption put forward by scholars like Sen¹, Sengupta² and Sano³, that attaining these twin goals is as fundamental to the realisation of the right to development as it is to all other human rights.⁴ Hence, the need to root out injustice and ensure global economic balance by making human dignity a cornerstone cannot be overemphasised. Human rights therefore become indispensable tools through which equality, justice and freedom, the cardinal principles of humanity, may be realised. This chapter seeks to answer the first research sub question which asks what the basic components of the right to development are or should be.

As outlined in the introduction this chapter sets out to discuss the concepts of human rights, development and the right to development to underscore their conceptual interconnections. I have divided this chapter into three main sections. In the first section, I consider the nature of human rights as a concept and I try to determine whether it is a moral or legal obligation. In the second part, I discuss the concept of development and how it is related to human rights. Lastly, I examine the concept of the right to development, which is the central concept of discussion throughout my dissertation. The purpose is to

¹ A Sen *Development as Freedom* (2000) 3, 13.

² A Sengupta "Realizing the Right to Development" (2000) 31 *Development and Change* 553-578; A Sengupta "On the Theory and Practice of the Right to Development" (2002) 24 *Hum Rts Q* 837-889; A Sengupta "The Human Right to Development" (2004) 32 *Oxford Development Studies* 179-203; A Sengupta "The Human Right to Development" in BA Andreassen & SP Marks (eds) *Development as a Human Right: Legal Political and Economic Dimensions* 2 ed (2008) 13-44.

³ HO Sano "Development and Human Rights: The Necessary, but Partial Integration of Human Rights and Development" (2000) 22 *Hum Rts Q* 734-752.

⁴ See generally BA Andreassen & SP Marks (eds) *Development as a Human Right: Legal Political and Economic Dimensions* 2 ed (2010) 3.

lay the foundation for the discussions in the subsequent chapters analysing the history, internationalisation, domestication and politics of human rights and development in Africa and more importantly in Nigeria. Therefore, this chapter sheds light on the first research question by examining the key issues and concepts that are strategic to a general appreciation of the right to development from a Sub-Saharan African perspective.

2.2 Human rights as legal or moral obligations

There are many different theories and theorisations about human rights.⁵ The dominant philosophical conceptions revolve around the tendentious divide between the natural law scholars and the legal positivists. The latter views human rights as products of laws duly posited or enacted by an authority empowered by law to do so, commanding people to obey, failure of which attracts sanctions.⁶ Accordingly, it is devoid of any moral or religious influence. The naturalists on the other hand maintain that human rights accrue to persons because they are humans; they are inherent, fundamental and inalienable, universal, eternal and unalterable moral truths that attach to all human beings by virtue of their humanity.⁷ This view is the most common description of the concept and is reflected in the international human rights instruments.

However, within this broader philosophical understanding, courts, scholars and institutions have attempted to describe the concept of human rights. For instance, Justice Eso of the Nigerian Supreme Court while leaning towards the naturalist's proposition describes human rights as those rights that stand "above the ordinary laws of the land" and are in fact "antecedent to the political society itself".⁸ He adds that a human right "is a primary condition to a civilised existence."⁹ Thus, human rights stand above the society because they entitle human beings to make claims against duty bearers.

⁵ There are various schools of thought on human rights. For more on the theories of human rights see, JI Shestack "The Philosophic Foundation of Human Rights" (1998) 20 *Hum Rts Q* 210; J Donnelly *Universality of Human Rights: Theory and Practice* 3 ed (2013) 1; M Cranston *What are Human Rights* (1977) 1; AS Rosenbaum (ed) *The Philosophy of Human Rights: International Perspectives* (1977) 1; R Stone *Civil Liberties and Human Rights* 5 ed (2004) 1; J Waldron (ed) *Theories of Rights* (1984) 1; RP Claude & BH Weston (eds) *Human Rights in the World Community: Issues and Action* 2 ed (1992) 1; and H Fenwick *Civil Liberties and Human Rights* (2007) 6-39.

⁶ John Austin influenced by Jeremy Bentham propounded the legal positivist school. See generally Waldron *Theories of Rights* 1 and Rosenbaum *The Philosophy of Rights* 1.

⁷ See generally M Macdonald "Natural Rights" in J Waldron (ed) *Theories of Rights* (1984) 1-40.

⁸ *Ransome Kuti v AG of Nigeria* (1985) NWLR (part 6) 211.

⁹ *Ransome Kuti v AGF* (1985) NWLR (part 6) 211. Sen argues that human rights are "foundationally, commitments in social ethics, comparable to (...) accepting utilitarian reasoning... Like other ethical tenets, human rights can, of course, be disputed, but the claim is that they will survive open and informed scrutiny."

The Office of the United Nations High Commissioner for Human Rights (OHCHR) describes human rights as:

“Inherent to all human beings, whatever our nationality, place of residence, sex, national or ethnic origin, colour, religion, language, or any other status. We are all equally entitled to our human rights without discrimination. These rights are all interrelated, interdependent and indivisible.”¹⁰

The above assertion captures the entire gamut of the theoretical, idealistic and practical nature of human rights. However, the positivist understanding of the concept seems widely favoured in modern jurisprudence.¹¹ This is because etymologically, the word “right” is a broad term covering wide latitude of concepts such as entitlements, wants, desires, wishes, aspirations, yearnings amongst others.¹² These claims are either morally grounded or legally protected. Moral rights culminate into legal rights over time particularly as the need warrants.¹³ Hart argues that moral rights become important subject matters in a human rights discourse whenever people want to incorporate them into a legal system.¹⁴ Consequently, many moral rights have been incorporated into legal systems and their utility acknowledged. Thus, as I will subsequently show in chapter 6 4 2, moral rights can be enforceable if agreed upon through recognised forms. Legal rights are *ab initio* enforceable rights, which have surpassed the realm of wants and aspirations.¹⁵ Unlike moral rights, legal rights are enshrined in constitutions and other binding instruments so that the rights are “immutable to the extent of the non-immutability of the Constitution itself”.¹⁶

See A Sen “Human Rights and Development” in BA Andreasen & SP Marks (eds) *Development as a Human Right* (2008) 3 5-8.

¹⁰ Office of the High Commissioner for Human Rights “What are Human Rights?” (2015) <<http://www.ohchr.org/EN/Issues/Pages/WhatareHumanRights.aspx>> (accessed 16-09-2013).

¹¹ However, scholars like Amartya Sen would not want human rights to remain “parasitic” or “putative proposals” to legislation (positivism). See A Sen “Consequential Evaluation and Practical Reason” (2000) 97 *The Journal of Philosophy* 477 498; See also Sen *Development as Freedom* 228; and Sengupta “Human Right to Development” in *Development as a Human Right* 27-28.

¹² UO Umozurike *The African Charter on Human and Peoples’ Rights* (1997) 2.

¹³ Waldron *Theories of Rights* 1; Sen “Human Rights and Development” in *Development as a Human Right* 6-7.

¹⁴ HLA Hart “Are there any Natural Rights” in J Waldron *Theories of Rights* 79 (human rights are powerful moral claims).

¹⁵ Many scholars (such as WN Hohfeld “Fundamental Conceptions as Applied in Judicial Reasoning” in WW Cook (ed) *Fundamental Legal Conceptions as Applied in Judicial Reasoning and other Essays* (1923); J Salmond *Jurisprudence* 12 ed (1966); & HLA Hart “Definition and Theory of Jurisprudence” (1994) 70 *LQR* 37-46 have differently espoused on the various connotations of legal rights. For these expositions see Umozurike *The African Charter* 2-3; JM Elegido *Jurisprudence* (2010); and Shestack (1998) 20 *Hum Rts Q* 210.

¹⁶ See *Ransome Kuti v AGF* (1985) NWLR (part 6) 211.

Importantly, the ideas of natural law have significantly influenced modern conceptions of human rights. For instance, Umozurike regards human rights as: “[C]laims, which are invariably supported by ethics and which should be supported by law, made on society, especially on its official managers, by individuals or groups on the basis of their humanity. They apply regardless of race, sex, colour or other distinction.”¹⁷ To Eze, human rights “represents demands or claims which individuals or groups make on society, some of which are protected by law and have become part of *lex lata* while others remain aspirations to be attained in the future.”¹⁸

From the foregoing, human rights are essentially law-based. That is, a right should derive its status, relevance and enforceability from the law even though its origin may lay elsewhere.¹⁹ Arguably however, some human rights (like the right to development) may remain mere aspirations yet recognised as human rights which complicate its application, implementation and monitoring as is discussed below under 2.5. It is in this regard that Sen introduced the notion of a “meta-right”.²⁰ A meta-right seeks to bridge the gap between a moral right and a legal right. It is a right that seeks to deny the relevant duty bearers of any particular right not to derail from their responsibility towards providing such a right. Sen uses the right to food as an example where a meta-right is likely to be productive. Nevertheless, the need for a meta-right is legally speaking a misplaced one because a legal right either is or is not. As I will show in chapters 6 and 7, realising human rights does not rest solely on their justiciability.

In line with the positivists’ postulation, to be enforceable a right must be derived from a recognised source. Most economic, social and cultural rights have identifiable sources. In chapters 4 and 5 I demonstrate that the right to development equally has identifiable sources. These sources determine the legal place of the right to development. In certain instances, human rights may be underscored within certain identifiable parameters especially where it is problematic for them to exist as standalone rights. For instance, where a human right is not categorically recognised within a legal order, it may be tied to other interrelated rights. As an example, in the absence of express provision for the

¹⁷ Umozurike *The African Charter* 5 (Emphasis added).

¹⁸ O Eze *Human Rights in Africa* (1984) 5; See also Umozurike *The African Charter* 4.

¹⁹ Most human rights have their roots in morality and religion. However, they only become recognised and enforceable when they receive a legal flavouring. A good example is the enshrinement of human rights in the Universal Declaration on Human Rights adopted 10 December 1948 (UDHR). Without this declaration, perhaps, human rights would have remained non-existent in modern societies.

²⁰ A Sen “The Right Not to be Hungry” in P Alston & T Tomasevski (eds) *The Right to Food* (1984) 9-68; See also Sengupta “Human Right to Development” in *Development as a Human Right* 36.

realisation of the right to food, the rights to health and life become the latitude for which it may be realised.²¹

In addition, since many laws generally speaking were founded on morality, human rights are often considered essentially as claims rooted in morality. For instance, Feinberg defines a human right as a *valid moral claim* based on all primary human needs.²² The validity essentially refers to law, which allows for a specific right, the desired recognition and acceptability it deserves. Feinberg's definition arguably supports the assertions for the right to development because the normative content of the right to development²³ encompasses human needs cutting across a plethora of claims such as food, shelter, education, health and freedoms generally.²⁴

The most significant contribution of the naturalists is the idea that human rights are inherent and inalienable. As such, they are equal rights because, as Donnelly suggests, "we either are or are not human beings, equally."²⁵ Human rights are also inalienable rights because being or not being human is unalterable. For this reason the state of humanness can neither be denied nor modified.²⁶ In this context, therefore, rights are claims or entitlements, which accrue to human beings requiring the performance of certain obligations or abstaining from acting in an inimical manner against a beneficiary resulting from a legal or moral requirement. Boucher describes such claims as encompassing three different elements. The first is the element of power; the second is the recognition of such power by the society and the third is that it is a contribution to a common good.²⁷

But human rights have been enmeshed in a circle of classification which affects their status as legal or moral obligations.²⁸ Human rights are traditionally classified into different categories depending upon their emergence and juridical character. However, Vasak, in

²¹ See Ogoni case.

²² Emphasis added. Cited in Rossenbaum "The Editor's Perspective" in *The Philosophy of Human Rights* 1 25.

²³ As will be discussed later in 2 5 2.

²⁴ Shue calls these basic rights:

"There are two kinds of basic rights: security rights and subsistence rights. Security rights correspond primarily to civil rights and refer to rights to be free from murder, torture, rape, and assault. Subsistence rights correspond primarily to economic rights and refer to rights to unpolluted air and water, adequate food, clothing, shelter, and health care. Taken together, both kinds of rights are indivisible because both are indispensable to one another and also equally necessary for the enjoyment of any other right."

See H Shue *Basic Rights: Subsistence, Affluence, and US Foreign Policy* (1996) 9.

²⁵ J Donnelly "The Relative Universality of Human Rights" (2007) 29 *Hum Rts Q* 281 283.

²⁶ 283.

²⁷ D Boucher "Recognition of the Theory of Rights, Customary International Law and Human Rights" (2011) 59 *Political Studies* 753 756.

²⁸ See Viljoen *International Human Rights* 5-9.

1977 popularly invoked the terminology of generational rights and classified human rights into three groups: first generation rights consisting of civil and political rights; second generation rights consisting of economic, social and cultural rights; and third generation rights which consists of the so-called 'solidarity rights' that are to some extent undefined and are still evolving.²⁹ His use of generations to distinguish among human rights portrays on the one hand, the politics of international human rights and on the other hand, their moral or legal nature in fact. The latter raises the question of justiciability of human rights. This distinction creates a dichotomy and a perceived preferential treatment of certain human rights at various quarters. Thus, the division of the global community into at least two groups is noteworthy.³⁰ Similarly, classifying human rights, *prima facie*, denotes them as either positive or negative rights. Negative rights entails that the State abstains or refrains from violating human rights. Most civil and political rights fall hereunder. Positive rights require the State to participate actively in providing the rights. All rights perhaps, have positive and negative connotations.³¹ According to Vasak:

"The first generation [of human rights] concerns 'negative' rights, in the sense that their respect requires that the state do nothing to interfere with individual liberties, and correspond roughly to the civil and political rights. The second generation, on the other hand, requires positive action by the state to be implemented, as is the case with most social, economic and cultural rights. The international community is now embarking upon a third generation of human rights, which may be called 'rights of solidarity'. Such rights include the right to development, the right to a healthy and ecologically balanced environment, the right to peace, and the right to ownership of the common heritage of mankind."³²

Since Vasak's work, classification of human rights³³ in that order to refer to rights of similar genre has become commonplace. The making of two otherwise important international legal instruments instead of one in the furtherance of member States'

²⁹ These rights include the right to self-determination, the right to development, the right to peace, the right to a healthy environment all of which are still contentious and controversial in human rights practice. See A Kiss & D Shelton 2004 *International Environmental Law* (2004) 12; Ruppel OC "Third-generation human rights and the protection of the environment in Namibia" Human rights and the Rule of Law in Namibia. Windhoek: Macmillan Education Namibia (2008) 101 103
<<http://www.kas.de/upload/auslandshomepages/namibia/HumanRights/ruppel1.pdf>> (25-01-2016)

³⁰ This division prevails between the Northern capitalists/liberalists against the Southern socialists/communists.

³¹ For example protecting civil and political rights like conducting periodic elections as contemplated under domestic and international human rights regimes requires a great deal of resources to fulfil. Similarly, ensuring the rights of an accused person to fair hearing (fair trial) requires resources too. Protecting the right to property of persons, which is an economic, social and cultural right, extends to non-interference with enjoyment of the property by the State as discussed further in 5 4 1 5. See also S Fredman *Human Rights Transformed: Positive Rights and Positive Duties* (2008) 1-4.

³² K Vasak "30 Years of Struggle" *UNESCO The Courier* (1977) 32.

³³ For more on classification of human rights see J D Whelan & J Donnelly "The West, Economic and Social Rights and the Global Human Rights Regime: Setting the Record Straight" (2007) 29(4) *Hum Rts Q* 908-949; A Kirkup & T Evans "The Myth of Western Opposition to Economic, Social, and Cultural Rights?: A Reply to Whelan and Donnelly" (2009) 31(1) *Hum Rts Q* 221-237.

commitment under the UDHR contributed to bolstering this misconceived continuum.³⁴ In other words, the ICCPR and ICESCR are mutually related covenants reinforcing the classification of human rights. As stated earlier, this classification raises the questions of superiority between civil and political rights on the one hand and economic, social and cultural rights on the other. Each of the two covenants however, recognises the third generation rights.³⁵ But the indivisibility and interdependence of human as “the birth right of all human beings” has been reiterated several times and especially in the Vienna Declaration.³⁶

At times the concept of human rights may be referred to as “rights”, “human rights” or “fundamental rights”. The latter arguably refers to those rights that constitutions embody as justiciable constitutional guarantees, which arguably differs from constitution to constitution.³⁷ Nevertheless, human rights according to Cranston are the twentieth century’s name for what traditionally were referred to as natural rights or, in a more exhilarating phrase, “the rights of man”.³⁸ Even though these may mean the same thing, Alston argues that, “human rights are more fundamental and basic than other rights in the sense that they are foundational norms of the society- the standards that bind the agents of a society.”³⁹ Alston adds that human rights have to pass certain tests of legitimacy and coherence to attain such a position.⁴⁰ These tests elevate them above the “rank and file” of competing social goals to a degree of immunity from challenge.⁴¹ In this regard, human rights are endowed with an aura of timelessness, absoluteness, and validity.⁴² In line with

³⁴ The European Union also adopts similar approach in its human rights regime whereby the European Convention on Human rights covers rights that are distinct from those in the European Social Charter. The latter takes care of economic, social and cultural rights. See Fredman *Human Rights Transformed 2*.

³⁵ Article one common to the two covenants provide that “All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.”

³⁶ Vienna Declaration para 5.

³⁷ Most written constitutions of the world contain such provisions. See for instance Chapters II and IV of the Nigerian Constitution of the Federal Republic of Nigeria (1999 as amended). In *Uzoukwu v. Ezeonu II* (1991) 6 NWLR (Part 200) 708, the Court of Appeal observed: “There is a clear distinction between ‘Fundamental Human Rights’ and ‘Human Rights’. ‘Fundamental rights’ (...) are fundamental because they have been guaranteed by the fundamental law of the country, that is, the Constitution. There are certain rights pertaining to a person, which are neither fundamental nor justiciable in the courts. These may include, for instance, rights given by the Constitution under the Fundamental Objectives and Directive Principles of State Policy contained in Chapter II of the Constitution of the Federal Republic of Nigeria, 1979.”

³⁸ M Cranston *What are Human Rights?* (1973) 7.

³⁹ P Alston “Making Space for New Human Rights: The Case for Right to Development” (1988) 1 *Harvard Human Rights Yearbook* 3-40; See also Sengupta “The Human Right to Development” in *Development as a Human Right* 33.

⁴⁰ Sengupta “The Human Right to Development” in *Development as a Human Right* 33.

⁴¹ 33.

⁴² 33; See also Alston (1988) *Harvard Human Rights Yearbook* 3-40.

Alston's proposition, rights, regardless of their incorporation into constitutions, have legal recognition.⁴³ Applying Dworkin's proposition that some rights trump other rights thereby making them more important than others further supports this.⁴⁴ However, the modern trend has been to adopt the terminology of human rights,⁴⁵ which Cranston defines as a, "universal moral right, something which all men, everywhere, at all times ought to have, and something of which no one may be deprived without grave affront to justice, something which is owing to every human being simply because he is human."⁴⁶

Flowing from the above, the inherent, inalienable and unalterable nature of human rights justifies that they are to be observed, respected and protected. The African Commission on Human and Peoples' Rights (African Commission) in *the Ogoni case*⁴⁷ reiterated this position by reinforcing the duties of states related to the human rights as contained in the ACHPR. Human rights, regardless of where they belong in the perceived hierarchical divide and whether they are moral or legal, ought to be respected, protected and enforced. Hence, there is a need for the protection of all forms of rights irrespective of their classification.

The duty to respect, protect, promote and fulfil human rights rests primarily on the state.⁴⁸ These obligations are a mixture of both negative and positive obligations on the part of states depending on the human rights instrument providing for such obligations. The obligation to respect requires the state to refrain from and prevent human rights infringement.⁴⁹ In the same vein, the obligations to promote and fulfil entail that the state takes proactive steps to ensure the actual realisation and non-violation of the human rights in question.⁵⁰ Economic, social and cultural rights instruments impose a positive obligation on states to ensure a progressive realisation of the said rights; this duty applies equally to

⁴³ Sengupta "The Human Right to Development" in *Development as a Human Right* 33.

⁴⁴ See R Dworkin "Rights as Trumps" in J Waldron (ed) *Theories of Rights* (1984) 153-167. This is why human rights are categorised into generations with civil and political rights comprising of first generations; economic, social and cultural rights forming part of second generation and other solidarity rights as third generation. The whole idea of generational and hierarchical rights is based on ideological differences between the global South and North.

⁴⁵ Shivji *Human Rights in Africa* 20; The terminology of human rights is relatively new and traceable to the formation of the United Nations in 1945, adopted to replace "natural rights" which was rejected for being too natural law-like and also the phrase "rights of man" which was not feminist friendly. See Claude & Weston (eds) *Human Rights* 14.

⁴⁶ Cranston *What are Human Rights?* 7.

⁴⁷ *Ogoni case*.

⁴⁸ Para 44.

⁴⁹ *Ogoni case* para 45; M Langford (ed) *Social Rights Jurisprudence: Emerging Trends in International and Comparative law*. (2008); S Freidman *Human Rights Transformed: Positive Rights and Positive Duties* (2008) 40.

⁵⁰ *Ogoni case* Para 46, 47.

the right to development.⁵¹ The heavy reliance of the human rights system on states to ensure the protection of human rights rests on the doctrine of *pacta sunt servanda*. In consonance with this doctrine, article 26 of the Vienna Convention on the Law of Treaties (VCLT)⁵² provides that, “every treaty in force is binding upon the parties to it and must be performed by them in good faith.” Thus, consent and good faith are or should be the driving force that obligates states to protect human rights in their domain.⁵³ This becomes important especially in view of the fact that some human rights are not justiciable but only recognised as objectives of government as further discussed in chapter 6 4 2 and 6 4 3.

Suffice to point out here that under international law, the state being a sovereign entity must ensure the protection of the rights of not only its citizens but also of all persons living within its territories within the limit of the law.⁵⁴ While the state is the essential protector of human rights, it is also its greatest violator.⁵⁵ The state in tune with the Lockesian theory of the social contract is indispensable towards protecting human rights.⁵⁶ This is because, as Locke suggests, human rights “cannot be effectively enjoyed in a state of nature.”⁵⁷ Individuals must therefore relinquish some of their personal rights in order to get their other rights protected by the state. However, when the state fails or is unwilling to protect those rights and ensure development, the state should lose its legitimacy. The consequence of which will be disobedience and in extreme circumstances may be overthrown or replaced. Heyns refers to this as a human rights/legitimate resistance approach.⁵⁸ He argues that the approach emphasises that, to the extent that the state fails to protect and promote human rights then the corresponding duty to obey it lapses.⁵⁹ Sub-Saharan Africa has had its own fair share of resistance central of which is military coup d'états due to tribalism and

⁵¹ See UNDRD Arts 3-8.

⁵² Vienna Convention on the Law of Treaties (adopted 23 May 1969 and entered into force on 27 January 1980) 1115 UNTS 331.

⁵³ C Anyangwe “Obligations of States Parties to the African Charter on Human and Peoples' Rights” (1998) 10 *Afr J Int'l & Comp L* 625 627-628.

⁵⁴ Modern international law has however extended the parties in and recognises such other actors like international institutions, multinational companies, non-governmental organisations etc.

⁵⁵ Donnelly *Universality of Human Rights* 33; & Umozurike *The African Charter* 8; Alston *International Human Rights in Context*.

⁵⁶ See J Locke *The Second Treatise of Government* (1698); and J Rawls *The Theory of Justice* (1972); S Foster *Human Rights and Civil Liberties* (2003) 11-12; H Fenwick *Civil Liberties and Human Rights* (2007) 6; Shestack *Philosophic Foundations of Rights* 207; & Rossenbaum “The Editor's Perspective in *The Philosophy of Human Rights* 12.

⁵⁷ Donnelly *Universality of Human Rights* 34.

⁵⁸ C Heyns “Struggle Approach in Human Rights” in A Soeteman (ed) *Pluralism & Law* (2001) 171-190.

⁵⁹ 187.

religious bigotry, corruption and authoritarianism, and poverty.⁶⁰ As is discussed in chapter 3, most African states are administrative creations of erstwhile colonial powers. They are largely conglomerations of people that may have some similarities but who would otherwise have chosen not to remain countrymen. In most cases too, the representation of the people that make up the state is uneven and the majority are usually those that assume the leadership of the state. In this kind of scenario, sentiments and tribalism becomes the order of the day and hence, it becomes practically difficult to challenge a kinsman because such kinsmen ostensibly represent their people.

Corruption and authoritarianism are other factors that make the people unable to challenge the authority of the state.⁶¹ Hence, the state becomes so powerful and corrupt that it is the sole decision-maker on how resources are distributed. Any perceived enemy of the state automatically loses out since nobody gets any government benefits on merit. The resultant effect therefore is authoritarianism. Finally, the compound effects of the foregoing pauperises the people. Thus, poverty and its attendant effects such as illiteracy renders people unable to come together to challenge a ruthless or non-performing government. During elections, when the people are expected to exercise their franchise, apart from rigging the elections by those in power, the people end up voting along tribal or religious lines; money and other inducements of a temporary nature are distributed to voters (who have been deliberately pushed into poverty) to achieve victory in elections.⁶²

As I further discuss in chapter 7, the above issues, amongst others have hampered the genuine realisation of human rights and consequently meaningful development in Sub-Saharan Africa including Nigeria. This is essential, because ideally, the state has the responsibility to ensure that the welfare and security of the people (whether its citizens or residents) are protected. It is on this premise that once individuals performs the duties required of them by the state in line with the underlining social contract the state on its part must ensure that they enjoy their civil, political, economic, social, and cultural rights. It is important to also note that because of the inherent deficiency of international law in the area of enforcement, the international or global human rights system heavily relies on individual states to ensure domestic implementation of human rights.⁶³ This is further discussed in chapters 4 and 5. Aside from certain international issues such as genocide,

⁶⁰ Only very few countries in Africa did not experience military rule. For example more than one-third of Nigeria's political existence since independence was governed by the military.

⁶¹ C Ake "The African Context of Human Rights" (1987) 34 *Africa Today* 8 8.

⁶² 8.

⁶³ Donnelly (2007) 29 *Hum Rts* Q 284.

crimes against humanity and war crimes, the system allows states, subject to existing judicial review mechanisms at the international and regional levels, a high level of control within their jurisdiction in the area of implementing human rights. Thus, institutions such as the African Commission, the African Court of Human and Peoples Rights (African Court) and the ECCJ, exist to regulate the excesses of states. Even though in practice the decisions of the African Commission for example, are of mere persuasive influence because, as states argue, it can only make recommendations to the political bodies of the AU such as the AU Assembly, and the AU Executive Council.⁶⁴ These recommendations only become final upon publication in the African Commission's Activity Report and approved by the aforementioned political bodies.⁶⁵ Viljoen however argues that once this process is carried out, the African Commission's recommendation becomes binding.⁶⁶ In other words, the African Commission may only hand down recommendations, which are subject to adoption by the Executive Council over which the decisions were made in the first place.⁶⁷ Arguably, this requirement limits the proper enforceability of the decisions of the African Commission within domestic domain of member states. One of the powers of the Assembly of the head of states as enshrined under article 9 (e) of the AU Constitutive Act is to monitor compliance of AU member states. Similarly, the Executive Council has a similar mandate under article 13 (2) of the AU Constitutive Act. Under article 23 of the Constitutive Act of the AU, the Assembly may impose sanctions on defaulting member states. It provides:

1. The Assembly shall determine the appropriate sanctions to be imposed on any Member State that defaults in the payment of its contributions to the budget of the Union in the following manner: activity or commitments, therefrom;
2. Furthermore, any Member State that fails to comply with the decisions and policies of the Union may be subjected to other sanctions, such as the denial of transport and communications links with other Member States, and other measures of a political and economic nature to be determined by the Assembly.

On the overall however, refusal to abide by the decisions of regional or sub-regional authorities and human rights bodies and courts tantamount to breaching the good faith obligation undertaken by the states under international human rights law.⁶⁸ However, this lacuna resulted in the establishment of the African Court of Justice and Human Rights⁶⁹

⁶⁴ F Viljoen *International Human Rights Law in Africa* 2 ed (2012) 339.

⁶⁵ 339.

⁶⁶ 339.

⁶⁷ See African Court Protocol Art 59 (3).

⁶⁸ 339.

⁶⁹ Protocol on the Statute of the African Court of Justice and Human Rights (adopted 1 July 2008).

which until now is yet to enter into force due to insufficient number of ratification by member states.⁷⁰ This will take care of the need of the African Commission's decisions to go through the Assembly of Heads of State and Government. It is noteworthy to add that military influence as highlighted above affected the design of the structure of the African Union itself and has arguably, led to this kind of checks by the Assembly of Heads of State and Government. At the time when the organisation was formed the majority of the Heads of State and Government, especially the most influential ones, were military dictatorships.

2.3 The concept of development

One of the major problems of the right to development is defining the concept of development. It is a malleable and difficult concept, which has defied a comprehensive definition. This is because development means different things to different people. Political, social and economic factors shape and produce different perspectives. Often, political and economic ideologies undergird the understanding of the concept. For instance, the capitalist understanding is different from the socialists and Marxist understandings. Similarly, cultural and religious backgrounds may also influence the perception of the concept. For instance, as discussed in the following chapter, an African's understanding of development may signify many things including particular societal changes reflective of the evolving customary and religious norms and values of such society.⁷¹ Thus, such conception is obviously inconceivable for many Western scholars.

The popular thinking in the modern world is to conceive development in terms of economic growth of a country and the Gross Domestic Product (GDP) is often used to measure it. Initially, only economists were interested in analysing development and its related issues like economic growth.⁷² In the 1970s, the concept underwent a standard shift and became a multidisciplinary phenomenon incorporating social issues at different levels of a country's economy.⁷³ Nonetheless, the Human Development Report (HDR) suggests that development is an end while economic growth is the means to such end.⁷⁴ In other words, a growing economy presupposes that the beneficiaries, being the people, appreciate and enjoy the growth experienced.

⁷⁰ See for example NJ Udombana "An African Human Rights Court and an African Union Court: A Needful Duality or a Needless Duplication?" (2003) 28 *Brook J Int'l L* 811.

⁷¹ TO Elias *Law in a Developing Society* (1972).

⁷² Sano (2000) *Hum Rts Q* 739.

⁷³ 739.

⁷⁴ UNDP *HDR* (1996)1.

It is common to label the term development as opposite of underdevelopment but the term does not necessarily mean the absence of development.⁷⁵ According to Rodney, development is a relative term, which is determined by comparing two or more states or two or more periods. As he succinctly puts it, “one of the ideas behind underdevelopment is a *comparative* one.”⁷⁶ It is possible to compare the economic conditions at two different periods for the same country and determine whether it has developed or not. It is also possible to compare the economies of any two or more countries at any given period in time to underscore their level of development.⁷⁷ An example of the former is to consider the presence and level of development between traditional African societies and modern African states (pre- and post-colonial entities) as discussed further in the following chapter. An example of the latter is when Sub-Saharan states and European States are compared with regard to the level of current development. Therefore, from this perspective, a country’s development cannot be understood in isolation, it involves comparison between two or more countries using different indices. Rodney further claims that the term “development” suggests many different things depending on the context. It may mean for example personal or economic development.

In the same vein, the UNDP has categorised the concept of development into human,⁷⁸ economic and sustainable⁷⁹ development. For Rodney, personal (individual) development implies increased skill and capacity, greater freedom, creativity, self-discipline, responsibility and material well-being.⁸⁰ On economic development, Rodney observes that, “a society develops economically as its members increase jointly their capacity for dealing with the environment.”⁸¹ This suggests the ability of the society to be educated, explore, and utilise science and technology amongst others.⁸² It also implies the optimal utilisation of a country’s environmental resources for enhanced productivity, wealth generation, increased health and wellbeing of the population.

⁷⁵ Rodney *How Europe Underdeveloped Africa* 10.

⁷⁶ 10.

⁷⁷ 10.

⁷⁸ Human development is the expansion of people’s freedoms to live long, healthy and creative lives; to advance other goals they have reason to value; and to engage actively in shaping development equitably and sustainably on a shared planet. People are both the beneficiaries and the drivers of human development, as individuals and in groups. See UNDP Human Development Report (2010).

⁷⁹ The expansion of the substantive freedoms of people today while making reasonable efforts to avoid seriously compromising those of future generations, UNDP *HDR* (2011).

⁸⁰ Rodney *How Europe Underdeveloped Africa* 6.

⁸¹ 6.

⁸² 6.

Allot considers development in general “as the enhancement of life and of life possibilities for the ordinary individual, not merely his betterment in a strictly economic, still less a purely statistical sense.”⁸³ In practical and functional terms, development professes itself from a list of services that ordinarily suffer from neglect such as an effective and efficient transportation system for the people, access to affordable communication services like radio, television, telephone, postal services, internet⁸⁴ and an effective, efficient and reliable public service administration.⁸⁵ Udombana views these as the elementary components of a developed society because they make its smooth running possible.⁸⁶

Chambers defines development to mean a “good change”.⁸⁷ Aside from its moralistic undertones, this approach raises “questions about what is ‘good’ and what sort of ‘change’ matters.”⁸⁸ According to Sen⁸⁹ and Sumner⁹⁰, “development” encompasses continuous change in a variety of aspects of human society. The continuous change should cover diverse areas including economic, social, political, legal, cultural and institutional structures.

However, Udombana, while focusing on its purposes, suggests that “the primary aim of development is to satisfy man’s spiritual and material needs” and thus benefiting him/her tangibly and intangibly with the aid of available resources.⁹¹ He concludes that the absence of these conditioning material needs, as is usually the case in third world countries, is what determines the status of a country “as underdeveloped” or, to put it euphemistically, “developing.”⁹²

Undoubtedly, development is the accomplishment of human potentialities.⁹³ Sen and Nussbaum seminally captured this as “human capabilities”.⁹⁴ For instance, Sen suggests that development must go beyond economic growth. To him, development should entail “a

⁸³ Allot (1984) *Third World Legal Studies* 1-9.

⁸⁴ NJ Udombana “The Third World and the Right to Development: Agenda for the Next Millennium” (2000) 22 *Hum Rts Q* 756.

⁸⁵ 756.

⁸⁶ 756.

⁸⁷ R Chambers “Ideas for Development” (2004) *IDS Working Paper* 238 2-3.

⁸⁸ A Sumner “What is ‘Development’” (2015)

<http://www.sagepub.com/upmdata/18296_5070_Sumner_Ch01.pdf> (accessed 08-04-2013).

⁸⁹ See Sen *Development as Freedom* 3.

⁹⁰ Sumner “What is ‘Development’” (accessed 08-04-2013).

⁹¹ Udombana (2000) *Hum Rts Q* 753 756.

⁹² 756.

⁹³ 757.

⁹⁴ MC Nussbaum *Creating Capabilities: The Human Development Approach* (2011) 1-45; Sen *Development as Freedom* 74.

process of expanding the real freedoms that people enjoy.”⁹⁵ Importantly, the UNDRD in its preamble recognises development as a comprehensive process involving the economic, social, cultural and political processes. The aim of which is to sustainably improve people’s well-being based on their meaningful participation in the development process. Sengupta also insists that “development is not a finite event but a process over time.”⁹⁶ Therefore, to achieve development, there is the need for planning, resources, skill and commitment over time. It also entails, in the spirit of the UNDRD, the free and meaningful participation of the population resulting in the fair distribution of benefits from such processes.

Development indicators have been generally identified and are being used by different institutions to determine the level of development of a particular country. These development indicators include the level of health, education, poverty and inequality, social cohesion, safety and security, and employment. According to the UNDP, these include life expectancy at birth, a population with access to health services, a population with access to safe water, a population with access to sanitation, daily calorie supply per capita and the adult literacy rate.⁹⁷

These indicators suggest that the human person is at the centre of any modern development effort. Life expectancy, health services, drinking water, sanitation, daily calorie and literacy rate are all necessarily tied to human natural demands. Furthermore, these development indicators when compared between and among countries determine the level of development of a given country, hence, the classification of a country into developed, developing or even underdeveloped. The progressive realisation of these development indicators is essential for the better and general well-being of the populace. Accordingly, the standard of living as well as the level of poverty of a country is generally dependent on the positive realisation of these indicators. For instance, Allot illustrates the point by cautioning that building a theatre for example is not development because development means expanding ones horizon by using that theatre for entertainment and expression of talents.⁹⁸ Thus, if the efforts of government do not translate to affecting the lives and general well-being of the people positively, then such efforts are certainly fruitless and hence not affiliated to development. The efforts should maximise happiness

⁹⁵ Sen *Development as Freedom* 3.

⁹⁶ Sengupta “The Human Right to Development” in *Development as Human Right* 22.

⁹⁷ UNDP Human Development Report (1997) 137.

⁹⁸ Allot (1984) *Third World Legal Studies* 2.

and enhance human capabilities. They must ensure and protect the dignity of the human person. As I show later,⁹⁹ development as a human right with human dignity and human needs as watchwords must maximise human potential because, as noted earlier, the human person is the subject of development and globalisation.¹⁰⁰ Suffice to state that law, as observed earlier in chapter 1, is an essential mechanism for ensuring effective governance, equity, social justice and cohesion in any society. Hence, the next subsection briefly outlines the relationship between human rights as accepted legal mechanisms and development. The question is what is the relationship between human rights and development?

2 3 1 The relationship between human rights and development

From the above discussion, it is clear that no development, regardless of how well designed and conceptualised, can flourish without some form of legal prescriptions. Arguably, law and development are two mutually inclusive concepts.¹⁰¹ Until the 1990s human rights did not operate within the development practice or domain.¹⁰² However, Uvin argues that the current trend is nothing but rhetoric.¹⁰³ The Vienna Declaration recognised the importance of the right to development and equated it with other internationally recognised human rights.¹⁰⁴ This has resulted in some of the major international institutions like the World Bank, European Union (EU) and the UNDP amongst others to include human rights as part of their developmental mandate. For instance, the World Bank claims: “lending over the past 50 years for education, health care, nutrition, sanitation, housing, environmental protection and agriculture have helped turn rights into reality for millions.”¹⁰⁵ Although this is the theoretical position, some scholars do not favour this marriage. Donnelly and Uvin do not support this integration. For instance, Donnelly argues:

⁹⁹ In chapter 4 of this dissertation.

¹⁰⁰ ICD “Development as an Inalienable Right” (Video) (04-12-2012) YouTube <<http://www.youtube.com/watch?v=9tmHXhi9wS8> > (accessed 08-04-2015).

¹⁰¹ M Lawan “Law and Development in Nigeria: The Need for Judicial Activism” (2011) 55 *JAL* 59-85; A Solimano *Globalization and National Development at the End of the 20th century: Tensions and Challenges* Vol 2137 (1999) 1-4.

¹⁰² Sano (2000) *Hum Rts Q 734*; P Uvin “On High Moral Ground: The Incorporation of Human Rights by the Development Enterprise” (2002) 17 *Praxis: The Fletcher Journal of Development Studies* 19 19.

¹⁰³ Uvin (2002) *Praxis* 19.

¹⁰⁴ Vienna Declaration Para 10.

¹⁰⁵ World Bank *Development and Human Rights: The Role of the World Bank* (1999) 3-4. For UNDP’s effort on including human rights in development see UNDP “Integrating Human Rights with Sustainable Development” *UNDP Policy Document 2* (1998) 6. <http://www.crin.org/docs/resources/publications/hrbap/UNDP_integrating_hr.pdf> (accessed 08-04-2015).

“Human rights and sustainable human development are inextricably linked only if development is defined to make this relationship tautological. Sustainable human development simply redefines human rights, along with democracy, peace, and justice, as subsets of development. Aside from the fact that neither most ordinary people nor governments use the term in this way, such a definition fails to address the relationship between economic development and human rights. Tensions between these objectives cannot be evaded by stipulative definitions.”¹⁰⁶

Uvin on his part opines that “typically, until now, what this approach has produced is not only a simple sleight-of-hand; it is also wrong, for it overlooks the tensions between the logics of human rights and development.”¹⁰⁷ Sano advocates for a partial integration of the concepts arguing thus:

“The areas [human rights and development] share a basic notion of justice and dignity and a common interest in regulating power and participation. These are the perspectives that have attracted increased attention in developing ideas about governance, poverty eradication, human development, basic needs, participation, non-discrimination, rule of law, and economic, social, and cultural rights.”¹⁰⁸

Nevertheless, in spite of these variations, the global trend seems to favour the marriage of the two concepts. In this regard, the UNDRD defines development as a human right.¹⁰⁹ Article 10 of the Vienna Declaration provides that the right to development as contained in the UNDRD is “a universal and inalienable right and an integral part of fundamental human rights.” Similarly, the Millennium Development Goals (MDGs)¹¹⁰ the New Partnership for Africa’s Development (NEPAD) initiatives as well as the renewed SDGs initiative all have human rights undertones.¹¹¹

One of the main arguments presented in the following chapter is that the African perspective considers human rights and development as inseparable because they are both premised on justice and human dignity. As will be discussed below under 2.4, the right to development has been a major inspiration and bedrock in combining human rights and development. The right to development considers not only the marriage of human rights and development but also that development is in itself a human right.

¹⁰⁶ J Donnelly “Human Rights, Democracy and Development” (1999) 21 *Hum Rts Q* 611; See also Donnelly *Universality of Human Rights* 217-234.

¹⁰⁷ Uvin (2002) *Praxis* 19.

¹⁰⁸ Sano (2000) *Hum Rts Q* 744.

¹⁰⁹ UNDRD Art 1.

¹¹⁰ There are eight goals set by the initiative: to eradicate extreme poverty and hunger; to achieve universal primary education; to promote gender equality and empower women; to reduce child mortality; to improve maternal health; to combat HIV/AIDS, malaria, and other diseases; to ensure environmental sustainability; and to develop a global partnership for development.

¹¹¹ See for example M Darrow “The Millennium Development Goals: Milestones or Millstones? Human Rights Priorities for the Post-2015 Development Agenda” (2012) 15 *Yale Hum Rts & Dev LJ* 55-128; G Sabelo “NEPAD and Human Rights” (2006) 22 *S Afr J on Hum Rts* 144; N Udombana “The Unfinished Business: Conflicts and the New Partnership for Africa’s Development” (2003) 35 *Geo Wash Int L Rev* 55.

2.4 The concept of the right to development

The right to development is one of the most controversial concepts in modern human rights. Its controversy circles around its meaning, justiciability and implementation. Since the initial conception of the right to development, it remains enmeshed in politics, debates and resistance within diplomatic and academic circles. Ibhawoh describes this situation as “the politics and polemics of resistance” between the North and the South.¹¹² Ideology remains a driving force for this misunderstanding despite the fact that series of international discourses have tried to make all human rights, including the right to development indivisible, interrelated and interdependent.¹¹³

Scholars that have sympathy for the right to development describe it in exhilarating phrases to support their claim. For instance, Abi Saab argues that it is an enabling right,¹¹⁴ while others consider it as a vector¹¹⁵, synthesis¹¹⁶ of existing rights. To Bedjaoui the right to development is “[t]he precondition of liberty, progress, justice and creativity. It is the alpha and omega of human rights, the first and last human right, the beginning and the end, the means and the goal of human rights.”¹¹⁷ Each of these permutations makes the right to development relevant in the human rights discourse. For example, Sengupta notes that the right to development being a vector is only realisable if at least one aspect of all human rights is fulfilled and none of its other aspects is violated.¹¹⁸ Accordingly, he defines the right to development as:

“the right to the process of development, consisting of a progressive and phased realisation of all the recognised human rights, such as civil and political rights, and economic, social and cultural rights (and other rights admitted in international law) as well as a process of economic growth consistent with human rights standards.”¹¹⁹

¹¹² B Ibhawoh “The Right to Development: The Politics and Polemics of Resistance” (2011) 33 *Hum Rts Q* 76-104.

¹¹³ Vienna Declaration Art 10.

¹¹⁴ G Abi-Saab “The Legal Formulation of the Right to Development” in R-J Dupuy (ed) *The Right to Development at the International Level* (1980) 159.

¹¹⁵ Sengupta (2002) *Hum Rts Q* 837-889.

¹¹⁶ J Donnelly In Search of the Unicorn: The Jurisprudence and Politics of the Right to Development” (1985) 15 *Cal W Int'l LJ* 473 480.

¹¹⁷ M Bedjaoui *The Right to Development in International Law: Achievement and Prospects* (1991) 1177-1182.

¹¹⁸ Sengupta “The Human Right to Development” in *Development as Human Rights* 15-23.

¹¹⁹ 20.

From this definition, the right represents an underlying right, which lays the foundation for the realisation of other rights.¹²⁰ This is why the right to development has garnered serious opposition. Those opposed to the idea of the right to development dismiss such claims and in extreme cases regard the concept as a “disaster”, “catastrophic”, “dangerous” or a “total failure” to the human rights edifice for its vagueness, fuzziness and ambiguity.¹²¹ In fact, others attack the UNDRD as being a “bad law, vague, internally contradictory, duplicating other already codified rights, and devoid of identifiable parties bearing clear obligations.”¹²²

Suffice to state that the right to development has polarised the human rights community.¹²³ Although, since the Vienna Declaration, the right has gained a reasonable level of identification and momentum in development practice of global institutions,¹²⁴ it may not be completely so in the academic, legal and diplomatic circles. The right is, in concrete terms, not a right per se in international law. As I further discuss in chapter 4 2, it is best described as a product of soft laws because virtually all the legal instruments except the ACHPR, provide for the right are non-binding.¹²⁵ However, in development practice the right to development is gaining popularity so much so that some scholars argue that it has assumed the status of customary international law (CIL).¹²⁶ To many leading international institutions, supported and funded by developed countries, development is rather not to be viewed as a right per se, but that in carrying out any developmental agenda, a human right perspective should be added to it. Thus, instead of a right to development some scholars would rather have a rights-based approach to development (RBA).¹²⁷ For instance, Hamm opines that the right to development may not be used to stimulate discussion on how to strengthen and foster the justifiability of

¹²⁰ Uvin argues that although this is a beautiful innovation, it is operationally meaningless. See P Uvin “From the Right to Development to Rights Based Approach: How ‘Human Rights’ entered Development Freedom” (2007) 17 *DEV PRAC* 597-599.

¹²¹ Uvin *Right to Development* 589; Donnelly (1985) *Cal W Int'l LJ* 480; P Uvin *Human Rights and Development* (2004) 1.

¹²² Uvin (2007) *DEV PRAC* 598; See also A Rosas “The Right to Development” in A Eide, C Krause & A Rosas (eds) *Economic Social and Cultural Rights: A Text Book* (1995) 247-256; AL Obiora “Beyond the Rhetoric of the Right to Development” (1996) 18 *Law and Policy* 355-418.

¹²³ Ibhawoh (2011) *Hum Rts Q* 78-81.

¹²⁴ 76-104.

¹²⁵ The UNDRD is the arrowhead legal instrument that is dedicated to the right to development.

¹²⁶ ME Salomon “Legal Cosmopolitanism and the Normative Contribution of the Right to Development” (2008) *LSE Law, Society and Economy Working Papers* 16/2008; SR Chowdhury & PJIM de Waart “Significance of the Right to Development: An introductory View” in SR Chowdhury, EMG Denters & PJIM de Waart (eds) *The Right to Development in International Law* (1993) 7-23.

¹²⁷ Uvin (2007) *DEV PRAC* 602.

economic, social and cultural rights, because as it is, the right to development cannot function as a standalone right due to its vagueness and lack of legal obligation.¹²⁸ Thus, she advocates for a human rights-based approach to development, which should give priority to social and economic rights as a better option.¹²⁹

Obviously, the RBA is not the same thing as a right to development¹³⁰ because the latter recognises development and its processes as human rights. It seeks to make the means of development a right.¹³¹ Describing the utility of the RBA Kofi Anan observes:

“The rights-based approach to development describes situations not simply in terms of human needs, or of developmental requirements, but in terms of society’s obligation to respond to the inalienable rights of individuals. It empowers people to demand justice as a right, not as charity, and gives communities a moral basis from which to claim international assistance where needed.”¹³²

However, those that are opposed to the right are quick to dismiss these claims. Recently, Vandenberghe called for the dissolution of the right to development because it is detracting genuine implementation and effective realisation of existing human rights norms particularly the economic, social and cultural rights, hence a dispensable duplication.¹³³ Also, as noted above, Uvin portrays the right to development as rhetoric.¹³⁴ Ghai and Donnelly also oppose the notion of the right to development. Ghai notes:

“If it achieves any significance, the right of development will divert attention from the pressing issues of human dignity and freedom, obfuscate the true nature of human rights, and provide increasing resources and support for the state manipulation (not to say repression) of civil society and social groups. It will keep the international and diplomatic community engaged for many years in useless and feigned combat on the urgency and parameters of the right.”¹³⁵

Donnelly likened the history and notion of the right to development as “a search for a unicorn” that is a hopeless venture. He argues:

“A philosopher is a person who goes into a dark room on a moonless night to look for nonexistent black cat. A theologian comes out claiming to have found the cat. A human rights

¹²⁸ Hamm (2001) 23 *Hum Rts Q* 1010.

¹²⁹ Hamm (2001) *Hum Rts Q* 1010; See also Uvin (2007) *DEV PRAC* 597; Uvin *Human Rights and Development* (2004) 1.

¹³⁰ Sengupta “The Human Right to Development” in *Development as a Human Right* 16.

¹³¹ Okafor *Afr J Int'l & Comp L* 865 867-867.

¹³² ID Bunn “Right to Development: Implications for International Economic Law” (2000) 15 *American University International Law Review* 1425 1455.

¹³³ A Vandenberghe “The Right to Development In International Human Rights Law: A Call for its Dissolution” (2013) 13 *NQHR* 187-209KM M’baye “Le Droit Development comme un de l’homme” (1982) 5 *Revue de Droit de l’homme* 632-626 See also SAD Kamga *Human Rights in Africa: Prospects for the Realisation of the Right to Development under the New Partnership for Africa’s Development* LLD Thesis University of Pretoria (2011) 71.

¹³⁴ Uvin *Human Rights and Development* (2004) 1.

¹³⁵ Y Ghai “Whose Human Right to Development?” (1989) *Human Rights Unit Occasional Paper* 5-6.

lawyer, after such an on-site visit, sends a communication to the Commission on Human Rights; and a member of the Commission leaves the room drafting a resolution on the treatment of black cats. I readily joined the quest for the right to development, but came up empty handed. I did however come upon the idea of turning on the light; the room, alas, proved empty. This, in a nutshell, is uncomfortably close to the history of the so-called human right to development.”¹³⁶

On her part, Shelton opposed a right to development that would end up as an “economic right”. She argues for an all-encompassing human right to development, which synthesises all existing rights.¹³⁷ Those opposed to the concept of a right to development are quick to remind the targeted beneficiaries of the right that development should begin and be pursued vigorously from within the State. Thus, aid, help and co-operation or an internationally recognised enforceable right to development should remain, if at all, secondary.¹³⁸ According to this view, development should be the deliberate result of good governance and accountability to the people through well-planned and executed development policies.¹³⁹ Even the Working Group on the right to development expressed its concern on this when it stated that:

“[s]tates have the primary responsibility to ensure the conditions necessary for the enjoyment of the right to development, as both an individual and a collective right. Development cannot be seen as an imported phenomenon or one that is based on the charity of developed countries.”¹⁴⁰

Although this is true, cosmopolitanism and globalisation affects this especially because global superstructures constitute obstacles to internal development.¹⁴¹ The case of the right to development may be likened to this analogy. Countries ought to have the right to develop at their pace but for the global superstructures which subjects, limits and even places a ceiling to how well and far this is realisable.

Others would prefer that economic, social and cultural rights be given more attention instead of diverting attention to the right to development. I argue however, that the right to

¹³⁶ Donnelly (1985) *Calif W Int'l LJ* 473.

¹³⁷ Shelton (1985) *Cal W Int'l LJ* 524-527.

¹³⁸ See for example S Marks “The Human Right to Development: Between Rhetoric and Reality” (2004) 17 *Harv Hum Rts J* 137-168.

¹³⁹ Y Ghai ‘Redesigning the State for ‘Right to Development’ in BA Andreassen & S Marks (eds) in *Development as Human Right* 177-207; See also Marks (2004) *Harv Hum Rts J* 137-168 (outlining the US position on the right to development).

¹⁴⁰ Commission On Human Rights Report of the Working Group on the Right to Development on its Third Session in Geneva, 3-14 October 1994 UN Doc E/CN.4/ 1995/27.

¹⁴¹ M Ozden “The Right to Development” (4 December 1986) *CETIM* 1-40

<<http://www.cetim.ch/en/documents/bro6-develop-A4-an.pdf>> (accessed 14-04-2015); Salomon *Law, Society and Economy Working Papers* 16/2008; ME Salomon “International Human Rights Obligations in Context: Structural Obstacles and the Demand of Global Justice” in BA Andreassen & S Marks (eds) *Development as a Human Right* 121-146; Shivji *Human Rights in Africa* 3; & Rodney *How Europe Underdeveloped Africa*.

development has the character of adding value to the human rights discourse and possesses the potential to achieve development especially in third world countries. Writing on the added value of the right to development Shelton claims that:

“[T]o the extent that the right to development is seen as a synthesis of existing human rights, it reintegrates the civil and political and the economic, social and cultural groups of rights. It brings together into a coherent whole the concept of human rights and rejects any notion that there must be a priority given to one set of rights over another. Each document of the United Nations on the right to development emphasises the indivisibility of human rights and the inextricable linkage between the civil and political rights and the economic, social and cultural rights. No notion of priority permits sacrificing one set of rights for another.”¹⁴²

Another “added value” of the right to development is that it breaks the traditional notion of human rights as a duty of States and introduces the international co-operation paradigm into it because States rarely implement existing human rights within their jurisdiction.¹⁴³ Shelton adds that “one valuable aspect of the right to development is that it encompasses a more broad-based legal obligation of States: the duties corresponding to the right to development are not exclusively domestic in nature but have an international component.”¹⁴⁴ On his part Alfredson is of the view that the right to development and its implementation may serve as the “ultimate test” of the commitment of the global community to achieve the universality of human rights and the realisation of equal equality and opportunities for all.¹⁴⁵ He adds that it is unlikely “that respect for the previous generations of rights would solve the problems which the new right is supposed to address” and he concludes, “that the benefits of the right to development probably outweigh [its] drawbacks.”¹⁴⁶

2 4 1 The normative character of the right to development

The foundational thread of the right to development as advocated and conceptualised by its proponents such as Mbaye¹⁴⁷, Alston¹⁴⁸, Bedjaoui¹⁴⁹ Rich¹⁵⁰ and Abi Saab¹⁵¹, which the

¹⁴²Shelton (1985) *Cal W Int'l LJ* 524-527.

¹⁴³ 526; and Alston *Harvard Human Rights Yearbook* 3-40.

¹⁴⁴ Shelton (1985) *Cal W Int'l LJ* 527.

¹⁴⁵ G Alfredson “The Right to Development: Perspectives from Human Rights” in LA Rehof & C Gulmann (eds) *Human Rights in Domestic Law and Development Assistance Policies of the Nordic Countries* (1989) 83-86.

¹⁴⁶ 86-88.

¹⁴⁷ Mbaye (1982)” *Revue de Droit de l'homme* 632.

¹⁴⁸ Report of the Secretary-General (on) “The International Dimensions of the Right to Development as a Human Right in Relation with other Human Rights based on International Co-operation, including the Right to Peace taking into account the Fundamental Human Needs” (1979) UN Doc E/CN. 4/1334.

¹⁴⁹ M Bedjaoui “The Right to Development in International Law” in *International Law: Achievements and Prospects* (1991) 1177-1204.

likes of Marks¹⁵² and Sengupta¹⁵³ built upon, is an internationally recognised norm involving sustained participation which is supported through international co-operation. In fact, as highlighted above, the international economic structures have something to do with underdevelopment of many countries. Perhaps, the Senegalese jurist, Mbaye, was motivated by this reality in calling for the recognition of the right to development in 1972.¹⁵⁴ His idea of the right was based on the need for international co-operation of all countries, rich or poor with developed countries as major duty bearers of the right. He drew his inspiration from and relied on international law at that time to advocate for a right to development. To make a case for the right, Mbaye relied on articles 55 and 56 of the UN Charter and Articles 22-28 of the UDHR that deal with international co-operation and solidarity.

From Mbaye's conception, the beneficiaries of the right to development would be third world countries including states in Africa who suffered gravely from the uneven global economic arrangement.¹⁵⁵ Thus, the right to development represents a classical example of a protest against the unending domination by a few cliques of countries in the world. In the words of Bedjaoui "it is reparation for past injustices."¹⁵⁶ Third world countries sought "to negotiate reforms in the global economy of trade, finance investment, aid, and information flows."¹⁵⁷

Clearly, the African notion of the right to development has a strong nexus with the concept of the right to self-determination as provided in article 20 of the ACHPR. It provides:

"All peoples shall have right to existence. They shall have the unquestionable and inalienable right to self-determination. They shall freely determine their political status and shall pursue their economic and social development according to the policy they have freely chosen. Colonised or oppressed peoples shall have the right to free themselves from the bonds of domination by resorting to any means recognised by the international community. All peoples shall have the right to the assistance of the state parties to the present Charter in their liberation struggle against foreign domination, be it political, economic or cultural."

¹⁵⁰ RY Rich "The Right to Development as an Emerging Human Right" (1983) *Va J Int'l L* 287 287.

¹⁵¹ G Abi-Saab "The Legal Formulation of the Right to Development" in *The Right to Development at the International Level* (1980) 167.

¹⁵² Marks (2004) *Harv Hum Rts J* 137.

¹⁵³ Sengupta (2004) *Oxford Development Studies* 179-203.

¹⁵⁴ Mbaye (1982) *Revue de Droit de l'homme* 632.

¹⁵⁵ The beneficiaries of the right to development are one of the most contentious issues of the right. See Chapters 4 5 1 1 and 5 3 of this dissertation.

¹⁵⁶ Bedjaoui *The Right to Development* 1177.

¹⁵⁷ Uvin (2007) *DEV PRAC* 598.

This is because like the right to development, the right to self-determination is built on the same philosophy, which is to ensure wilful participation of every people including marginalised groups, in the determination of their economic, social, cultural and political development. Accordingly, article 1(2) of the UNDRD stipulates that:

“[t]he human right to development also implies the full realisation of the right of peoples to self-determination, which includes, subject to the relevant provisions of both International Covenants on Human Rights, the exercise of their inalienable right to full sovereignty over all their natural wealth and resources.”

The assumption is that the developing countries of the world represent both colonised and oppressed people. What these countries seek is the freedom to determine their own development free from domination, let or hindrance. The UNDRD equally supports this drive when it emphasises the elimination of human rights violations, foreign domination and discrimination.¹⁵⁸

Therefore, in both the right to development and the right to self-determination, the beneficiaries of the rights have the same objective. Salomon argues that the right to development is in fact an extension of the right to self-determination.¹⁵⁹ In addition, the right to development seeks to eliminate all obstacles to development through sustained international co-operation.¹⁶⁰

Furthermore, the right to development like the right to self-determination has two dimensions: internal and external. The internal dimension of the right focuses on the duties of each independent State to design and pursue domestic policies that could engender meaningful participation, foster the realisation of all fundamental human rights and ensure sustainable development.¹⁶¹ This represents a classical international human rights relationship of the State as a duty holder and the individuals or groups as beneficiaries of human rights. It equally supports the social contract theory of human rights as highlighted in 2.3 above. The external dimension deals with the “disparities of the international political economy which evidence massive global inequities.”¹⁶² The external aspect of the right to development like the right to self-determination “demands liberation from power and

¹⁵⁸ UNDRD Art 5.

¹⁵⁹ ME Salomon “The Right to Development as a Legal Norm” in SP Marks (ed) *Implementing the Right to Development: The Role of International Law* (2008)17. (She argues that the right to development is a legal norm with the potential to humanise the global market place by challenging the existing global and economic arrangements).

¹⁶⁰ UNDRD Art. 3(3).

¹⁶¹ Salomon “The Right to Development as a Legal Norm” in *Implementing the Right to Development* 18.

¹⁶² 17.

control located outside developing States.”¹⁶³ Interestingly, these two dimensions are interrelated. For instance, as I argue in chapter 6 3, it is the domestic legal system that allows for how the external dimension of the right to development should operate. In view of this, whereas the external dimension is being formulated and ready for implementation, it is the internal aspects of the right that ensures that this is achieved. These dimensions have further politicised the right. While one group of countries demand that the right to development must support the external dimension, the other group staunchly maintains that it must be an internal right only.¹⁶⁴ As the discussion shows subsequently, this has to do with the identification of duty holders and beneficiaries of the right to development. The ACHPR epitomises an internal right to development only or a right to development within the African continent as intricately echoed within the purview of communitarian philosophy.¹⁶⁵ Arguably, the right to development is a concept that is deeply rooted in African philosophy of communitarianism.¹⁶⁶ Undoubtedly, the principles that colour the concept of the right are solidarity and co-operation. Salomon refers to this as legal cosmopolitanism.¹⁶⁷ As shown in chapter 3, these are cardinal characteristics of traditional African societies, which the supranational African system retains.

Although positivists would argue that the right to development is not a full-blown legal right under international law, the right has found its way into several legal instruments, resolutions at both the regional AU and the global UN levels. Chapter 4 elaborates further on this subject matter.

2 4 2 Elements of the right to development

The UNDRD defines the right to development as: “An inalienable human right by virtue of which every human person and all peoples are entitled to participate in, contribute to, and

¹⁶³ 25. The right to self-determination has assumed an *erga omnes* character as held in the *Case concerning East Timor (Judgement) (Portugal v Australia)* [1995] ICJ Rep 90 para 29; See also *Barcelona Traction Case* 32 para 33;

¹⁶⁴ Marks (2004) *Harv Hum Rts J* 137.

¹⁶⁵ ACHPR Preamble which provides:

“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.”

¹⁶⁶ See ACHPR Preamble which provides that: “Taking into consideration the virtues of their historical tradition and the values of African civilization which should inspire and characterize their reflection on the concept of human and peoples’ rights” See also Chapter 3 3 1 on communitarianism.

¹⁶⁷ Salomon “The Right to Development as a Legal Norm” in *Implementing the Right to Development* 17-18; See also SAD Kamga & CM Fombad “A Critical Review of the Jurisprudence of the African Commission on the Right to Development” (2013) 57 *JAL* 196 197-198.

enjoy economic, social, cultural and political development, in which all human rights and fundamental freedoms can be fully realised.” Three elements are deducible from this definition; these are participation, contribution and enjoyment. Other attributes include inalienability; not only the individual, but also groups are beneficiaries/claimants of the right; and that it is a solidarity right or a right that requires sustained co-operation for it to be realised.¹⁶⁸

According to Kamga “participation” is the “cornerstone” of the right to development.¹⁶⁹ Thus, participation is an important component of development. Article 8(2) of the UNDRD provides that “States should encourage popular participation in all spheres as an important factor in development and in full realisation of all human rights.” Participation must be encouraged in the design of policies that will affect the people. As observed earlier, most governments do not take this important component of the right to development seriously. In the *Endorois* case, the African Commission held that participation was the missing link between the Endorois peoples’ right to development amongst others and the decision of the Kenyan government to confiscate their land. Had the government engaged the Endorois people prior to the act leading to litigation, they probably would have been able to mitigate the consequence of their action.

The right to participation is so important that it has been re-echoed in a plethora of legal instruments.¹⁷⁰ For effective realisation of this component of the right, every person regardless of creed, sex, age, race, religion, ability or disability must be able to participate in actions, programmes and activities that affect him. In democracies, it is not enough for the people to have the right to exercise their franchise only or be represented by parliamentarians; they should have the opportunity, from time to time, to participate in the determination of the fruits of development.¹⁷¹

¹⁶⁸ This is further elaborated on in chapter 3.

¹⁶⁹ Kamga *Human Rights in Africa* 122-123; See also Sengupta “The Right to Development” in *Development as a Human Right* 16 (Participation is one of the characteristics of RBA); Hamm (2000) *Hum Rts Q* 1005-1031.

¹⁷⁰ UDHR art 25; ICCPR and ICESCR art 1; African Charter for Popular Participation in Development and Transformation UN Doc A/45/472 (adopted 22 August 1990); See Kamga *Human Rights in Africa* 122-123.

¹⁷¹ For more on participation see K Ginther “The Domestic Policy of Function of a Right of Peoples to Development: Popular Participation a New Hope for Development and Challenge for the Discipline” in SR Chowdhury EMG Denters & PJIM de Waart, (eds) *Right to Development in International Law* 61-82. (Arguing that despite the significance of popular participation in the right to development, it appeared only three times in the UNDRD. Participation will therefore remain on the agenda of the elaboration of the operational meaning to be given to the terms of the UNDRD in the course of its realisation).

The other component of the right to development is the ability of every person to contribute to and enjoy development. States must therefore create the enabling environment for every person to contribute towards development. The sole aim is for people to enjoy development. The independent expert on the right to development stresses that “transparency and accountability, in a participatory and non-discriminatory manner, and even with equity and justice” are the cornerstones of a participatory human right to development.¹⁷² Therefore, for the right to development to be successfully achieved, policies in addition to being participatory must be transparent, non-discriminatory based on equity and justice.

Although the right to development may not be justiciable universally, in the African parlance, it is the trajectory of a robust and sustainable human rights system because it is recognised as a right that seeks to rectify the existing economic imbalance of the global system spanning over centuries. The African states jointly and in some cases severally support the right to development. Interestingly, it is only on this continent that the right is not merely a political ideal; it is a recognised and enforceable right.¹⁷³ Since the so-called developmental age spanning from the social movements against domination by western powers to date, the right to development has remained a core concept, principle and ideology of African States. This began with the need for the establishment of a just, equitable and free interrelationship of nations and calling for the rectification of the existing uneven trend in 1974 when the Declaration on the Establishment of a New International Economic Order (DNIEO) was adopted.¹⁷⁴ The DNIEO sought to enhance the participation of developing countries and afford them the opportunity to participate in the global economic system. The preamble of DNIEO declares that New International Economic Order (NIEO):

“based on equity, sovereign equality, interdependence, common interest and cooperation among all States, irrespective of their economic and social systems which shall correct inequalities and redress existing injustices, make it possible to eliminate the widening gap between the developed and the developing countries and ensure steadily accelerating economic and social development and peace and justice for present and future generations (...)”

¹⁷² Second Report of the Independent Expert on the Right to development (11 September 2000) UN Doc E/CN.4/2000/WG.18/CRP.1 para 22.

¹⁷³ ACHPR Art 22; see also chapter 5 of this dissertation.

¹⁷⁴ UNGA Declaration on the Establishment of a New International Economic Order (adopted 1 May 1974) A/RES/S-6/3201 See art 4 on the principles of NIEO.

Prior to the movement for NIEO, Africans and other nations and peoples that suffered similar perceived injustices of domination and colonialism fought for and realised their right to self-determination from western powers.¹⁷⁵ The battle did not end there. The combined numerical strength of African countries and their supporters from Eastern Europe, Asia and Latin America contributed in striking deals within the UN system to their advantage.¹⁷⁶ In their case, Africans felt marginalised in the global scheme since the global system favours their erstwhile acclaimed detractors- the western powers of Europe and America. This was and still is because of two reasons. International trade was and still is determined and regulated by the western powers. Secondly, the western powers own reserve and retain exclusively, the know-how, resources and technology to harness, explore and exploit natural resources even though these resources are largely situated in Africa.¹⁷⁷ Additionally, the western powers dominate and determine how these resources are traded. Paradoxically, the triangular trade experienced during slave trade, colonialism continued to perpetuate itself by way of neo-colonialism and most recently “globalisation”. Realising these, third world countries supported by Eastern European countries (having not participated in colonialism and do not share the same ideology with the western countries) called first for a NIEO and later the right to development. The call for a NIEO was unsuccessful owing to its radicalism and lack of realism.¹⁷⁸ Rajagopal argues that although this call may have been unsuccessful, the NIEO had indeed recorded some successes in many cases. This includes the introduction of new dimensions into the international law system like the doctrine of Permanent Sovereignty over natural resources.¹⁷⁹ Others include expanding the UN as an institution through the creation of plethora of developmental agencies and instruments as well as radicalising the ideological drives that emerged from the third world countries.¹⁸⁰ The latter is exemplified for example in the move by the OAU to establish a unique human rights instrument, the African Charter. Thus, NIEO has helped in “expanding and strengthening international institution as the apparatuses of management of social reality in the third world, and, thereby, of

¹⁷⁵ UDHR or UN Charter, ICESCR and ICCPR common art1

¹⁷⁶ Rajagopal *International Law from Below* 73.

¹⁷⁷ Rodney *How Europe Underdeveloped Africa* 143-174.

¹⁷⁸ Rajagopal *International Law from Below* 73.

¹⁷⁹ 73-74.

¹⁸⁰ 74.

international law itself.”¹⁸¹ Similarly, as a result of NIEO and later the right to development, development practitioners were forced to include human rights in their agenda.

The Bandung Conference of 1955 further helped third world countries in strengthening an alliance against the world super powers of the West. This culminated in the formation of strong blocs like the G-77 and the non-aligned movement (NAM) comprising of African and Asian countries for the sole reason of pursuing a common goal: decolonisation and economic development.¹⁸²

However, the concretisation of the right to development in international affairs was only possible after the right was included in the ACHPR. Thereafter, the right to development was adopted in the UNDRD with all States adopting it except the eight States that abstained and the USA casting the only negative vote. However, subsequent UN efforts¹⁸³ continued to include the right to development in UN resolutions until 1993 when the right was finally adopted under the Vienna Declaration with a unanimous vote. This marked the beginning of the concrete and meaningful pursuit of a right to development by the UN through the office of Human rights Commission, its other agencies like UNDP, UNICEF as well as other development partners and International financial Institutions (IFIs).

2 4 3 Implementation of the right to development

Generally, the implementation of human rights obligations occur both at the international (external) and national (internal) levels. States are duty bearers at both levels especially with respect to treaty obligations based on the principle of good faith. Thus, the three forms of obligations to respect, to protect and to fulfil ought to be seen from this perspective.¹⁸⁴ This view reflects the key implementation provision of the ICESCR to the effect that:

“Each State Party to the present Covenant undertakes to take steps, individually and through international assistance and co-operation, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant by all appropriate means, including particularly the adoption of legislative measures.”¹⁸⁵

¹⁸¹ 74.

¹⁸² 74.

¹⁸³ See Chapter 4. of this dissertation.

¹⁸⁴ See S Leckie “Another Step Towards Indivisibility: Identifying the Key Features of Violations of Economic, Social and Cultural Rights” (1998) 20 *HRQ* 90-123.

¹⁸⁵ ICESCR art 2(1).

Clearly, implementing these (internal and external) obligations require international co-operation particularly with the increasing impacts of economic globalisation which is propelled by the ideals of the Washington Consensus which emphasises liberalisation of trade.¹⁸⁶ Staggering poverty and malnutrition in the poor countries offered an impetus for a shared international responsibility towards the realisation of the right to development.¹⁸⁷ It has been argued that the incidents of poverty cannot be divorced from the global inequity that “produces and perpetuates it” thereby putting the poor countries at a disadvantage.¹⁸⁸ The UNDRD emerged to give credence to this notion. In fact, it seems plausible to argue that the UNDRD’s principal aim was to restructure the inequitable international economic order and to provide equal opportunities for poor countries to alleviate poverty, malnutrition and starvation. The current structural arrangement of the international economic order constrains the ability of these states to develop and fulfil their internal human rights obligations.¹⁸⁹ It is for this reason that the UNDRD adopts a peculiar and distinctive duty-based approach that is concerned “not with a state’s duties to its own nationals, but with its duties to people in far-off places.”¹⁹⁰ The assumption that the right to development is a secondary external obligation has been strenuously questioned because of the “gross inequality that characterises world poverty, the power differentials that accompanies it and the reality of global economic interdependence.”¹⁹¹ And although the UNDRD is not a legally binding instrument, its normative values are enormous as is further discussed in chapter 5¹⁹²

With the adoption of the right to development in the UNDRD and following its inclusion in the ACHPR, the right received considerable recognition globally.¹⁹³ Mainly the United

¹⁸⁶ The difficulty of implementing the Washington Consensus and its apparent effect on the realisation of the right to development (arguably) led to its review. See for example WHO *Trade, Foreign Policy, Diplomacy and Health: Washington Consensus* available at: <<http://www.who.int/trade/glossary/story094/en/>> (accessed 16-10-2015).

¹⁸⁷ ME Salomon “Legal Cosmopolitanism and the Normative Contribution of the Right to Development” in S Marks (ed) *Implementing the Right to Development in International Law* (2008) 17.

¹⁸⁸ 17.

¹⁸⁹ 17.

¹⁹⁰ 24.

¹⁹¹ 21.

¹⁹² U Baxi “Normative Content of a Treaty as Opposed to the Declaration on the Right to Development: Marginal Observations” in S Marks (ed) *Implementing the Right to Development in International Law* (2008) 47.

¹⁹³ The adoption of the right to development followed the work of a working group appointed for that purpose. Their recommendation gave birth to the UNDRD which was adopted in 1986 with a resounding acceptability except for 8 abstentions (Denmark, Finland, Germany, Iceland, Israel, Japan, Sweden and Great Britain) and a single opposing vote from non-other but the United States of America (USA) see Marks *Harv Hum Rts J* 137-152.

Nations Commission on Human Rights now replaced by the UN Human Rights Council (UNHRC) has piloted the implementation of the right to development internationally.¹⁹⁴ This is to say that major developments in respect of the right to development resulted from the sustained actions carried out by that intergovernmental body. Thus, as a policy concern, the right to development is unarguably largely being implemented by the UN human rights system. This is further buttressed by the level of recognition and promotion the right enjoys at such a high level. Alston, as far back as 1979, noted that recognising the right to development as a human right standard would require the painstaking input of the Human Rights Commission to lay down the practical guide and inspirational perspective of the right within a developmental context.¹⁹⁵ Alston further outlined the need to draw a concrete boundary in the relationships between domestic and international efforts towards the realisation of the right to development. This is to argue that each of the divides must know and act within its set boundaries without dispensing with the need of cooperating with one another.¹⁹⁶ In this regard, therefore, participation becomes a central element.¹⁹⁷ As it is today, Salomon contends rightly that the right to development remains the most frequently mentioned right in all international discourses, conferences, declarations, summits and in the annual resolutions of the General Assembly and the Commission on Human Rights.¹⁹⁸ More so, a rights-based approach to development has become a mainstay in the agenda of UN institutions especially the human rights bodies¹⁹⁹ as well as global development partners.²⁰⁰ It is worth noting that one of the mandates of

¹⁹⁴ See generally UNHRC (ed) *Realizing the Right to Development: Essays in Commemoration of 25 Years of the United Nations Declaration on the Right to Development* (2013).

¹⁹⁵ Report of the Secretary-General on "The International Dimensions of the Right to Development as a Human Right in Relation with other Human Rights based on International Co-operation, including the Right to Peace taking into account the Fundamental Human Needs", (2 January 1979) UN doc. E/CN. 4/1334 para 316; see also SP Marks "The Politics of the Possible: The Way Ahead for the Right to Development" (2011) *Globalisation Dialogue International Policy Analysis 2*.

¹⁹⁶ Report of the Secretary-General on "The International Dimensions of the Right to Development as a Human Right in Relation with other Human Rights based on International Co-operation, including the Right to Peace taking into account the Fundamental Human Needs", (1979) U N Doc E/CN.4/1334 (2 January 1979) UN doc. E/CN. 4/1334 Paras 34 and 37.

¹⁹⁷ Para 252.

¹⁹⁸ See Marks *Globalisation Dialogue: International Policy Analysis 5*.

¹⁹⁹ These include Charter-based bodies such as Human Rights Council, Universal Periodic Review, Commission on Human Rights (replaced by the Human Rights Council), Special Procedures of the Human Rights Council, Human Rights Council Complaint Procedure. See Human Rights Bodies (including Treaty based bodies) <<http://www.ohchr.org/EN/HRBodies/Pages/HumanRightsBodies.aspx>> (accessed 01-08-2014). There also exists the Office of the High Commissioner on Human Rights (OHCHR) distinct from the Human Rights Council see <<http://www.ohchr.org/EN/Pages/WelcomePage.aspx>> (accessed 14-04-2015).

²⁰⁰ Hamm (2001) *Hum Rts* Q 1005.

the OHCHR is to establish a special branch whose sole purpose would be to seek measures towards a sustainable implementation of the right to development.²⁰¹

However, this is not to dispel the fact that the right enjoys significant implementation elsewhere especially in Africa and some developed countries even if utilised for political motives at certain level. As shown earlier, international co-operation between the EU and Africa is significant and is arguably essential to the right the development as further exemplified in 3 5.

Nevertheless, the right to development has also been applied to promote rights that have effect on the collective good of a vast majority. The key idea is to have the human being as the subject and not the object of development so that social justice and respect for his/her person becomes the resultant effect of policies domestically and internationally.²⁰² According to Marks, achieving this giant stride remains an essential quest for the international community till this day.²⁰³

Some of the implementation efforts towards the realisation of the right to development from its inception include the establishment of an Intergovernmental Working Group (IGWG), appointment of an Independent Expert (IE) and the creation of a High Level Task Force (HLTF) for the implementation of the right to development. The right to development evolved right from Declaration of Philadelphia, General Conference of the International Labour Organization (1944).²⁰⁴ The working group was instrumental in shaping and developing the right to its current status. In fact, the outcome of this work actually metamorphosed into the UNDRD which has become the most central but contentious instrument on the right. This, however, was just the beginning of further implementation efforts for the realisation of the right to development.

2 5 Concluding remarks

In this chapter I endeavoured to contextualise the three main concepts of this dissertation namely human rights, development and the right to development. Importantly, these

²⁰¹ Marks *Globalisation Dialogue: International Policy Analysis* 5.

²⁰² 1-16.

²⁰³ 3.

²⁰⁴ The Conference declared that: "all human beings, irrespective of race, creed or sex, have the right to pursue both their material well-being and their spiritual development in conditions of freedom and dignity, of economic security and equal opportunity". See generally OHCHR "Landmarks in the recognition of development as a human right. Chronology of major developments before and after the adoption of the UN Declaration on the Right to Development" (2011).

<<http://www.ohchr.org/EN/Issues/Development/Pages/Landmarksintherecognitiondevelopmentasahumanright.aspx>> (accessed 14-04-2015).

concepts are interrelated concepts in the international discourse. Human rights and development are important and inseparable concepts that combined produce the right to development. The latter represents a clear challenge to global economic imbalance that has for decades constrained the ability of poor countries to make a substantial progress in their economies. Not surprisingly, it was conceived, supported and advocated by the poor countries while strenuously resisted by the developed countries. Thus, it is a politically charged concept that polarises the world along various interests. This has affected its concretisation as a universally accepted international legal norm like a host of other human rights. However, in spite of this politicisation, the right to development has been substantially accepted as an important right founded and nurtured by the UN human rights system thereby enhancing its status and significance in the international human rights arena. It has the backing of both hard and soft laws under international human rights law as if further discussed in chapters 4 and 5. However before I turn my attention to international law I will explore the often-ignored context of development in the African setting which constitutes the subject of the next chapter.

Chapter 3

Human Rights and Development: Traditional African Perspectives

3.1 Introduction

The Nigerian human rights system reflects the broader African system, which is distinctively characterised by Africa's experiences over several centuries. Arguably the right to development needs to be mirrored within this historical context. Slavery, slave trade, colonialism, neo-colonialism and globalisation are key historical phenomena that have generated immense academic interests over the past century. They are important issues that collectively and uniquely reflect and influence the polemics of human rights and development on the African continent. These concepts have defined most contemporary human rights instruments. In fact, both the general African and Nigerian human rights instruments were largely imbued with some traditional African nuances, a reflection of a cultural mix founded in history. Because the right to development did not emerge vacuously, it is important to view the discussion within this broader context. Thus, the aim of this chapter is to consider whether the traditional African societies had conceptualised human rights and development and therefore the right to development. In Chapter 1, I gave a hypothesis that there is abundant evidence to show that the right to development has an indigenous African cultural fingerprint which makes or should make it appropriately acceptable to Africans, including Nigerians, to serve as a basis for solving the myriad of challenges facing them.

The discussion in this chapter refers to communal characteristics which are common among Africans including Nigerians. Nigeria shares similar characteristics with states within Sub-Saharan Africa. The similarities range from race, culture and geography to common colonial history, as well as common economic and social challenges especially those relating to human rights and development.¹

¹See art 22 of the ACHPR. Africans share common features. See for instance, T Metz & JBR Gaie "The African Ethic of *Ubuntu/Botho*: Implications for Research on Morality" (2010) 39 *J Moral Educ* 273-274. There is no denying therefore, that Sub-Saharan African States shared (and still share) common characteristics prior to their dislocation by colonialism. In present day West Africa for example, people speak languages across borders. Cultural and traditional practices have traces of similarities between and among different tribes, clans, communities or societies now situated within different States. These similarities are not limited to neighbouring states. They exist widely among different African tribes. Therefore, there are abundant similarities between and among peoples of the African continent which calls for a collective analysis of subject matters affecting them.

In order to understand the right to development in this context, it is especially important to first analyse the notions of human rights and development in Africa prior to colonialism. My aim is to examine whether the pre-colonial, traditional African societies had any recognisable systems bearing the character of a modern human right to development. But because of the significant similarities in African characteristics, the discussion looks beyond Nigeria to focus on Africa generally. The chapter is broadly divided into six sections: in the second section I explore the notion of development in the traditional African context. In the third to fifth sections, I carry the discussion forward by examining human rights and development in pre-colonial, colonial and post-colonial African societies respectively. In the sixth section, in view of the ideological skirmishes that exist about specificity of human rights, I discuss the theoretical divide between cultural relativism and universalism with the aim to demonstrate the African position.

3.2 The notion of development in traditional African societies

Understanding development in the traditional African context requires a broader appreciation of development itself. According to Hagen “a society is traditional if ways of behaviour in it continue with little change from generation to generation” thus, remaining “custom-bound, hierarchical, ascriptive, and unproductive”.² This appears to be too Eurocentric, confusing stagnation with tradition. Suffice to argue that traditional African societies in the context of this dissertation are those societies that are held together politically, socially and economically by the spirit of communalism. Traditional African societies may not conceive development in the same manner as human rights jurists or western proponents. Their conceptions are largely drawn from human nature and the in-born desire for self-preservation and freedom to survive through the exploration and exploitation of the natural environment.³

Development is autonomous in the traditional African society. Simply put, development is about people, both in their individual and collective forms.⁴ The development of the human society into what it is today and the series of historical milestones that shaped this process lend support to the notion that development is a constant process that reflects the dynamism of the human nature. In this context, development approximates “the movement

² EE Hagen *On the Theory of Social Change* (1962) 56; see also cited in M Kebede “African Development and the Primacy of Mental Decolonization” in L Keita (ed) *Philosophy and African Development: Theory and Practice* (2011) 97-97.

³ JC Chukwuokolo “Afrocentrism or Eurocentrism: The Dilemma of African Development” (2009) 6 *OGIRISI: a New Journal of African Studies* 24-39.

⁴ This is expressly captured in art 2 of the UNDRD.

of life and spirit which is the effort to go uphill.”⁵ It is not merely the passage of time but the changes brought about by human ingenuity to adapt to the natural environment. From philosophical and historical perspectives, all countries, peoples and societies are in the process of development because of the involuntary consciousness and inherent transformational capacity of people to make advances in life for the purpose of enhanced welfare and self-preservation.⁶ This dispels the dichotomous notion of “developed” and “underdeveloped” economies and supports the contention that Africa has been developing just like all other continents.

There is some historical evidence to this effect. In particular, there is archaeological evidence showing the manufacturing of stone and bone implements and other technological developments in East and Southern Africa as early as 2.5 million years ago.⁷ Archaeological evidence also shows that agricultural activities occurred some ten thousand years ago in some parts of North East Africa and the Middle East.⁸ Metal smelting, use of copper and bronze, writing, engineering, surgery, mathematics and building with stones were all traceable to this sociological environment from at least 4000 BCE.⁹ These technological developments later diffused into Western Europe were instrumental in the subsequent explorations and opening up of immense economic opportunities there.¹⁰ Archaeological evidence show that the Nok culture of northern Nigeria had existed as early as 900 BCE.¹¹ Thus Davidson suggests that the Nok culture, popularly known for its terracotta, had “flourished at least during half of the first millennium BCE and for some two centuries into the Christian era.”¹²

African labour and the lands and gold reserves of the Americas “served as the catalysts for trans-continental trade, urbanisation, and qualitative transformations in technology.”¹³ Therefore, capitalism incentivised colonisation and there is a widely held view that this

⁵ See SB Diagne, “On Prospective: Development and a Political Culture of Time” in L Keita (ed) *Philosophy and African Development: Theory and Practice* (2011) 57-65.

⁶ L Keita “Philosophy and Development: On the Problematic African Development- a Diachronic Analysis” in L Keita (ed) *Philosophy and African Development: Theory and Practice* (2011) 115-117 and M Kebede “African Development and the Primacy of Mental Decolonization” in L Keita (ed) *Philosophy and African Development: Theory and Practice* (2011) 97-97.

⁷ Keita “Philosophy and Development” in *African Development* 117; see also JD Fage *A History of Africa* (1986) 4-54.

⁸ Keita “Philosophy and Development” in *Philosophy and African Development* 117.

⁹ Keita “Philosophy and Development in *Philosophy and African* 118-119; Fage *Africa* 3.

¹⁰ Keita “Philosophy and Development in *Philosophy and African Development* 119.

¹¹ B Davidson *The African Past: Chronicles from Antiquity to Modern Times* (1964) 65.

¹² 65.

¹³ Keita “Philosophy and Development” in *Philosophy and African Development* 119.

polarised the world along a zero-sum game line.¹⁴ This is because the economic relations then were characterised by an unequal exchange. In the words of Keita:

“The economic and technological gains of Western Europe resulted in economic and technological losses and disadvantages for the rest of the world, especially for the indigenous peoples of the Americas and Africa. The economic relations between African societies then under European sway and the relevant West European nations were in reality those of unequal exchange. Europe advanced and developed economically at the expense of its colonies in Africa, Asia and the Americas.”¹⁵

Aside from its constant character, development is sometimes viewed as more or less a cultural question in Africa.¹⁶ The entire society is held by and governed in accordance with age-long traditions and cultural norms and values with a view to ensuring individual and communal welfare, collective security and to strengthen cultural bonds. Viewed in this light, development is inextricably linked to society’s overall wellbeing. The formula is found in the ancient collective memories, knowledge about, and utilisation of the natural environment.¹⁷ The cultural element is significant because it shows both the tangible and intangible creativity and ingenuity of a people. It is also within this context that the traditional Africans view communal rights and corresponding individual duties as components of general societal wellbeing and development. This is where the significance of human rights and development in Africa features clearly. Therefore, it is important to explore, in a more detailed fashion, these phenomena within the three historical epochs: pre-colonial, colonial and post-colonial.

3 3 Human rights and development in pre-colonial Africa

Drawing from the above set out, broader, African conception of development, the pre-colonial societies in Africa exhibited remarkable determination to explore and exploit their natural environment while adhering to their cultural norms and values. Trade and commerce flourished among neighbouring communities as evident in for example the trans-Saharan trade between North and West African communities.¹⁸ Empires were built, diplomacy existed, technologies were invented and there was relative peace and stability. There were several societies with comprehensive legal, political, economic and social

¹⁴ 119.

¹⁵ 119-120.

¹⁶ See KK Prah “Culture: The Missing Link in Development Planning in Africa” in L Keita (ed) *Philosophy and African Development: Theory and Practice* (2011) 155-168.

¹⁷ 160.

¹⁸ Chukwuokolo (2009) *OGIRISI* 24.

structures.¹⁹ The archaeological evidence referred to in 3 2 above attests to the level of technological advancement of the pre-colonial African societies. In as much as “the goal of development is greater human, material, technological and cultural welfare”²⁰ these communities had recorded developments. In other words, development flourished in this atmosphere although not without disruption by tribal and communal wars and enslavement.²¹ Since societies progressed through observation of legal prescriptions, the traditional African societies were founded on and controlled by their respective customs.

There are different academic views with respect to human rights in the traditional African societies.²² Broadly, scholars fall into two main groups. The first group maintains that the traditional African societies either separately or collectively had neither law nor any notion of human rights prior to its interaction with the western world.²³ The second group conversely opposes this notion.²⁴ Clearly, the proponents of the former view based their understanding of the concept of human rights from the positivist angle as discussed in chapter 2, that is, law is the command of the sovereign in an organised civil state. They argue that the native Africans did not possess any law in this strict positivist sense. These scholars compared what they experienced in various African societies with the European state (the “civil state”) and concluded that the African peoples did not possess an organised state as such. One of the prominent scholars championing this view was Hegel

¹⁹ See K Wiredu *Cultural Universals and Particulars: An African Perspective* (1996) 157-181; I Nguema “Human Rights Perspectives in Africa” (1990) 2 *HRLJ* 261 266-271; NKA Busia “The Right to Self-determination, The State and the Quest for Democracy in Africa: An Explanatory Analysis” *Proceedings of the fourth annual Conference, African Society of International Comparative Law* (1992) 29-48 38-39; UO Umozurike *The African Charter on Human and Peoples Rights* (1997) 12-19; M Mutua “Banjul Charter and the African Cultural Fingerprint: An Evaluation of the Language of Duties” (1994-1995) 35 *Va J Int’l L* 339 345-346; and JAM Cobbah “African Values and the Human Rights Debate: An African Perspective” (1987) 9 *Hum Rts Q.* 309. For example, Nguema categorises traditional African societies into gregarious societies, family societies, hierarchical societies and societies en route to statehood. On his part, Busia categorises them into near state of nature societies, stateless or acephalous societies, semi-feudal societies and feudal societies. However, any of this categorisation can conveniently fall into organised and unorganised societies. Writing on the nature of the organised African societies, Elias argued that: “African societies with strong centralised political systems tended to have a more advanced body of legal principles and judicial techniques than had those with more or less rudimentary political organisation. In the former, there were usually hierarchically graded courts ranging from the smallest chiefs to kings’ courts, with well-defined machinery for the due enforcement of judicial decisions. In the latter, rules rather than rulers, functions rather than institutions, characterised the judicial organisation of these societies.” See TO Elias *The Nature of African Customary Law* (1972) 30.

²⁰ Keita “Philosophy and Development” in *Philosophy and African Development* 120.

²¹ 120-124.

²² J Donnelly “The Relative Universality of Human Rights” (2007) 29 *Hum Rts Q* 281-306.

²³ 281.

²⁴ See inter alia M Mutua “Savages, Victims, and Saviors: the Metaphor of Human Rights” (2001) 42 *Harv Int’l LJ* 201-245. ;Mutua *Va J Int’l L* 346; Z Motala “Human Rights in Africa: A Cultural, Ideological, and Legal Examination” (1988) 12 *Hastings Int’l & Comp L Rev* 373; NI Udombana “Interpreting Rights Globally: Courts and Constitutional Rights in Emerging Democracies” (2005) 5 *Afr Hum Rts LJ* 47-69.

who argued that Africa was “unhistorical, undeveloped, unspirit, still involved in the conditions of mere nature” and doomed perpetually never to develop “because the Negro [African] exhibits the natural man in his completely wild and untamed state.”²⁵ Hegel’s understanding of history was also in relative terms. He maintained that:

“Africa had no history prior to direct contact with Europe. Therefore, the Africans, having made no history of their own, had clearly made no development of their own. Therefore they were not properly human, and could not be left to themselves, but must be led towards civilization by other peoples: that is, by the peoples of Europe, especially of Western Europe, and most particularly of Britain and France.”²⁶

It is hard to ignore the inherent fallacies in this view. Firstly, the Hegelian historical narrative was unsupported by history itself as demonstrated by the technological developments before the birth of Western civilisation. Secondly, the problem with this assertion simply is the yardstick utilised to determine and understand mechanisms for social control and the underlying basis for what governed the life of Africans at that time. In other words, Eurocentric modalities were used to judge and weigh the life, traditions, culture, values and mores, as well as the level of development of the African people. Like Keita notes, for other non-European societies to be seen as developed they need to resemble the European societies.²⁷ This Eurocentric yardstick completely neglected the Africans’ own idea of law and further ignored their sense of social control, cohesion and innovation as demonstrated by their flexible customs and traditions. Kebede authoritatively argues:

“Doubtless, Africans strongly reject the characterisation of their legacy as primitive. All the same, both the process of Western education and the normative equation of modernisation with Westernisation condition them to endorse the charge of backwardness. Worse still, their denial only succeeds in pushing the charge to the dark corners of the unconscious. Take the teaching of world history. Not only are all the great breakthroughs and achievements of modern history mostly assigned to European actors, but the whole historical scheme is constructed so as to exclude Africa while presenting the West as the centre and the driving force of history. The example shows that modern schooling is for Africans nothing else than the learning of self-contempt through the systematic exposure to Africa’s utter insignificance. Africans cannot but internalise this view, given that their ability to echo the Western idea of Africa is how they acquire modern education.”²⁸

A related tension is the absence of a coherent historical account of traditional African societies to counter the level and philosophy behind human rights and development in

²⁵ WH Hegel “The Philosophy of History” (1956) *Georg Hegel on Africa* <http://www.umass.edu/afroam/aa254_hegel.html>accessed 06-10-2015).

²⁶ B Davidson *Africa in History* (1966) cited in Mutua *Harv Int’l L J* 213.

²⁷ Keita “Philosophy and Development” in *Philosophy and African Development* 116.

²⁸ For instance Kebede “African Development” in *Philosophy and African Development* 98.

African societies.²⁹ In Mutua's view, the use of oral means to document history, which was and to certain extent still is a common feature in Africa, had its own imprecision even prior to its misconfiguration with the emergence of colonialism.³⁰ This affects the cogency of the arguments advanced by supporters of African humanism. Because, without proper record it will be difficult to examine the propriety or otherwise of claims made by supporters of African humanism, a position ardently supported by their antagonists. It is in this light that scholars like Donnelly³¹ and Howard³² maintain that notions of human dignity are being confused with human rights. In addition, the fact that African culture itself is a conglomeration of both indigenous and foreign cultures further obscures African humanism or the concept of traditional notion of human rights and development. This raises the question of originality and ownership of a cherished culture as protected by Africans.

Finally, the assertion by antagonists of African humanism is further revitalised through the account of Europeans; obtained in the early days of contact with the continent. This was also influenced by their superior ability to correctly or otherwise document these accounts in writing, an art that was not readily available to the Africans.³³ This does not mean that whatever historical accounts the Europeans documented were accurate accounts of what existed in Africa. The reason is simple. For example, the first white explorers who arrived in what is today Nigeria, its northern part, (which transcended beyond Nigeria deep into Niger Republic) was fully organised as a Caliphate (akin to a modern State). In fact, the inhabitants had engaged in warfare to conquer, expand and establish their might across the region. This penetration protruded as far as the Atlantic region of today's Nigeria. Sir Fredrick Lugard attested to the fact that at the time he brought northern Nigeria to British control the area had an established system of courts in line with the Islamic law.³⁴ This points to the fact that prior to colonialism, African societies had their peculiar and in some instances fully and comprehensively developed systems of

²⁹ M Mutua *The Banjul Charter and the African Cultural Fingerprint: An Evaluation of the Language of Duties* (2003-2004) *Va J Int'l L* 339 346.

³⁰ 347.

³¹ Donnelly *Hum Rts Q* 281-306.

³² RE Howard "Human rights and the search for community" (1995) *JPR* 1 1-8; RE Howard *Human Rights in Commonwealth Africa* (1986) 1.

³³ In Africa, knowledge was transmitted from generation to generation orally. In some cases, such knowledge resulted from tales told by elderly members of the society.

³⁴ The courts were manned by an *Alkali* - a man referred to as a man of great respectability and considerable learning. See A Yadudu "Colonialism and the Transformation of the Substance and Form of Islamic Law in the Northern States of Nigeria" (1991) 9 *J L & Relig* 23.

law, influenced not only by African customs and traditions but also by religion and foreign cultures.³⁵

As I discuss hereunder, the traditional African societies promoted human rights somewhat akin to but uniquely different from those which emanated from and promoted by the West. It is clear that these societies had notions of human rights, not just human dignity. They had economic and social systems based on recognised and enforceable customary laws. It is within this context that the African ideas of development could be understood. No individual can claim rights in isolation, nor can any person advance morally, economically and spiritually without other members of the society. This highlights the significance of communitarianism in the African system.

Communal elements influenced the African understanding of development, rights and duties. The traditional African conception of human rights and development is based on the platform of communitarianism. Communitarianism or communalism promotes co-operation within the group as opposed to individualism.³⁶ In Africa, the individual cannot be dissociated from the group and the group must at all times act, live and die together; no member of the group should also remain isolated from the group except when such person was declared *persona non grata* (a pariah) or was suffering from diseases such as insanity, dangerous or contagious diseases. It is an idea identified with the sub-Saharan African societies, giving emphasis to the “group”.³⁷ Essentially, the group was significant to the continued existence of the society. Rights were identified with all members of the societies. The implication of this communal identity is that not only the state or the community (as a body corporate) but also the individual members thereof had certain duties to perform. Thus, while rights were recognised, duties were also imposed.

In addition to this, traditional African societies were humanist in orientation.³⁸ Some scholars refer to this unique character as the “African personality”.³⁹ Senghor refers to it as “negritude”⁴⁰, while Mutua refers to it as the “African cultural fingerprint”.⁴¹ Nyerere on his

³⁵ For more discussion on this see J Iliffe *Africans the History of a Continent* (1996) 1-186; and ME Chamberlain *The Scramble for Africa* 3 ed (2010) 1-25.

³⁶ See generally AAA Naim (ed) *Human Rights in Cross-cultural Perspectives: A Quest for Consensus* (1995) and Motala (1988) *Hastings Int'l & Comp L Rev* 381.

³⁷ Motala (1988) *Hastings Int'l & Comp L Rev* 381.

³⁸ 381.

³⁹ Mutua contends that these scholars are mostly from America. See Mutua *Va J Int'l L* 351-353.

⁴⁰ LS Senghor “*Problematique de la negritude*, in *LiberM 3: Negritude et civilisation de l'universel*” 269-270 (1977) cited in Mutua (2004) *Va J Int'l L* 352.

⁴¹ Mutua (2004) *Va J Int'l L* 339.

part portrayed it in Kiswahili as “*Ujaama*”, which translates to “African socialism”. Metz refers to it as Afro-communitarianism or as an African philosophy *ubuntu/botho*.⁴² The Hausas in Northern Nigeria call this “*zumunta*”. All these signify the character of African communitarianism, which as Mutua suggests, represents an index for respect, protection, deference, commitment, responsibility, solidarity, tolerance, reciprocity, generosity and consultation.⁴³ Mbiti aptly but figuratively captures the point thus: “I am because we are and because we are therefore I am.”⁴⁴ Thus, Africans emphasise more on group solidarity, societal welfare, common interests and collective security.⁴⁵

Donnelly⁴⁶ and Howard⁴⁷ are among the scholars who reject the African notion of human rights and conclude that Africans confuse human rights with the notion of human dignity. To them, human rights have its origin in the West although they have the character of universal application. Other scholars have argued to the contrary claiming that Africans had notions of human rights. For instance, Asante “rejects the notion that human rights are bourgeois or western.”⁴⁸ To him, the philosophy of human rights, as stated earlier, is concerned with protecting human dignity and “ultimately based on a regard for the intrinsic worth of the individual” which is “as vital to Nigerians and Malays as to Englishmen and Americans.”⁴⁹ Conceptually, human dignity is about protecting and preserving human self-worth and self-respect in a given culture. Human rights essentially developed to translate this idea functionally and imbue it with some modernistic formalism to make for easy universal acceptability. Both ideas are intricately and conceptually connected. They deal with human persons living in a human society. In other words, the human person is the subject of human rights promotion and protection and the object is the person’s dignity as such. It is difficult to conceive human rights without human dignity, and vice versa. And if the society enhances the dignity of the person then, I suggest, development becomes the ultimate result.

⁴² Ubuntu is a Zulu word referring to the idea that people are not only individuals but live in a community and must share things and care for each other (Oxford dictionary’s definition] and it resonates in the maxim “a person is a person through other persons.” See generally Metz & Ghae (2010) *J Moral Educ* 273-290; T Metz “Towards an African Moral Theory” (2007) 15 *J Polit Philos* 321–341.

⁴³ Mutua (2004) *Va J Int’l L* 339.

⁴⁴ JS Mbiti *African Religions and Philosophy* (1970) 141; also cited in Cobbah (1987) *Hum Rts Q* 320.

⁴⁵ Cobbah (1987) *Hum Rts Q* 321.

⁴⁶ J Donnelly *Universal Human Rights in Theory and Practice* (2013) 93-103, 106-112.

⁴⁷ Howard *Human Rights in Commonwealth Africa* 23.

⁴⁸ Quoted from Shivji *Human Rights in Africa* (1989) 12.

⁴⁹ 12.

This relationship is clearly established by and situated in the preamble and article 1 of the UDHR that: “[w]hereas recognition of *the inherent dignity* and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world”.⁵⁰ It adds therefore that “[a]ll human beings are born free and equal in dignity and rights.” Thus, human dignity and human rights, even if different, are inseparable and this relationship is recognised in a number of African societies. The rights to education, participation, shelter, land, health, security and the enjoyment of the common resources of the society, as well as fair trials, are examples of human rights that traditional African societies recognised and protected as further illustrated as follows.

In traditional African societies, education may not entail attending formal schools as we have it today. Africans traditionally imparted knowledge from generation to generation through direct narration and folk tales, a tradition which still exists today.⁵¹ The elders of the community were the custodians of tradition and culture. Community-based learning was also practiced where the young, categorised into age groups, were taught their traditions and cultures, including respecting norms and values.⁵² Teaching the young the family trade or any other trade was the responsibility of members of the society. Every member of the society participated in the governance and decision-making processes based on their level of growth.⁵³ Young children may not participate in governance but had influence over their younger siblings. Women could contribute to strictly women related affairs, such as in the provision of health services, education and other social services, but otherwise they were under the guidance and protection of men such as their fathers or husbands.⁵⁴ Hence, the societies practiced “democracy” of a sort because participation was encouraged and unilateral decisions by the rulers were discouraged.⁵⁵

⁵⁰ Emphasis added.

⁵¹ AP Ndofirepi & ES Ndofirepi “(E)ducation or (e)ducation in Traditional African Societies? A Philosophical Insight” (2012) 10 *Stud Tribes Tribals* 13-28.

⁵² 13-28.

⁵³ Motala (1988) *Hastings Int'l & Comp L Rev* 381.

⁵⁴ Also some cultures allows a woman full inheritance rights see Umozurike *The African Charter* 17; The Hausas for example allows a woman to inherit as a right from all her close male relatives like her father, children and husband and even brothers subject to conditions. See Quran 4:22.

⁵⁵ For example, The Ashanti's of Ghana admonish a ruler before his installation with the following words: “We do not want you to abuse us. We do not want you to be miserly; we do not want one who disregards advice; we do not want you to regard us as fools; we do not want autocratic ways; we do not want bullying; we do not like beating. Take the Stool. We bless the Stool and give it to you. The Elders say they give the Stool to you.”

Quoted in the Committee of Experts that drew up a proposal for a draft Constitution for Ghana's Fourth Republic, 1992. Cited in EA El-Obaid & K Appiagyei-Atua “Human Rights in Africa -A New Perspective on Linking the Past to the Present” (1996) 41 *McGill LJ* 820 829.

The community through age groups volunteered to build shelter or housing especially for male children proceeding into adulthood at the time of marriage. In addition, a member of the society upon attainment of adulthood, automatically became entitled to land and seedlings to cultivate as a means of employment and to contribute his quota to the development of the society.⁵⁶ Land was an important acquisition in this context. It was cherished and protected probably more than any other possession. The belief was and still is in many traditional societies that land belongs to the past, present and the unborn generations.⁵⁷ The health of every member was a concern for the collective group because the number of group members available at any given time determined the speed and efficiency of group-based endeavours like farming, security and sanitation.⁵⁸

The African human rights system was not without its excesses. Obviously, it was male-centric and was not fair to women and aliens as it encouraged discrimination towards them. In addition, the fact that Africans unified in mythology and belief in magic, death sentence, banishment and other practices generally considered repugnant in the modern context prevailed in many pre-colonial African societies. Some African cultures legitimised the killing of twins upon birth because they regarded them as “evil”. Slavery was a common practice in traditional African societies.⁵⁹ These customary practices were the products of the societies themselves and were largely abandoned on account of colonialism.⁶⁰ Importantly, customary practices are flexible. In the words of Ibhawo:

“societies are constantly in the process of change wrought by a variety of cultural, social, and economic forces. It seems an elementary but necessary point to make that so called traditional

⁵⁶ This is a pictorial example of the Igbos in Nigeria as portrayed by Ejidike. See OM Ejidike “Human Rights in the Cultural Traditions and Social Practice of the Igbo of South-Eastern Nigeria” (1999) 43 *J Afr L* 93.

⁵⁷ See the *locus classicus* case of *Amodu Tijani v Secretary, Southern Nigeria* (1921) 2 A.C. 399.

⁵⁸ Umozurike *The African Charter* 17.

⁵⁹ But, a slave could aspire to become a King in other societies, as was the case with King Jaja of Opobo. See SJS Cookey *King Jaja of the Niger-Delta: His life and times* (1974). See also Umozurike *The African Charter* 15.

⁶⁰ A Yakubu *Colonialism, Customary Law and Post-Colonial State in Africa: The Case of Nigeria* (2002) paper presented at 10TH General Assembly on *Africa in the new Millennium* hosted by CODESRIA in Kampala, Uganda, 8-12 December, 2002 (copy on file with author). The African culture as any other was and still is dynamic. Osborne CJ poignantly captures this when he observed that, “One of the most striking features of West African native custom... is its flexibility; it appears to have been always subject to motives of expediency and it shows unquestionable adaptability to altered circumstances without entirely losing its character.” See *Lewis v Bankole* (1969) 1 NLR 100. Similarly, in *Eshugbayi Eleko v. Government of Nigeria* (1913) AC 662 the Judicial Committee of the Privy Council observed that: “the more barbarous customs of earlier days (...) may, under the influence of civilisation, become milder without losing their essential character of custom...It is the assent of the native community that gives a custom its validity, and, therefore, barbarous or mild, it must be shown to be recognised by the native community whose conduct it is supposed to regulate.”

societies —whether in Asia, Africa, or in Europe—were not culturally static but were eclectic, dynamic, and subject to significant alteration over time.”⁶¹

3 4 Colonialism and the distortion of the traditional African system

Colonialism involved “control of one people by an alien one.”⁶² Colonialism fundamentally restructured the socio-economic and political landscapes while distorting the autonomous nature of development in Africa, the human dignity and cultural norms and values of Africans.⁶³ According to Joireman:

“Everywhere the colonial metropolises established their own systems of law and dispute resolution, disregarding pre-existing mechanisms of conflict resolution as primitive or appropriate for ‘natives’ only. Since the establishment of colonial legal institutions, anthropologists and historians have investigated the relationship between state and traditional law.”⁶⁴

The entire colonial enterprise was founded on economic, social and political subjugation, discrimination and inequality. Because of these “colonial anchors”, civil, political and socio-economic rights were almost non-existent.⁶⁵ Because individual and communal rights were undermined, it was not easy to conceive any idea of genuine development besides perpetuating the objectives of colonialism. It has been pointedly observed that:

“Development under colonialism was geared towards developing the sort of infrastructure which enabled the exploitative extraction of minerals and the production of colonial agricultural produce, the disengagement of the colonized from their traditional modes of livelihood through the imposition of taxes, requiring wages and the engagement of the labour of colonial subjects, their submission to the colonial consumer market, and their compliance with the laws and by-laws promulgated under colonial sponsorship and sanctioned by police and military force.”⁶⁶

Therefore, colonialism had a clear agenda that was not genuine development and human rights.⁶⁷ A majority of scholars⁶⁸ agree that colonialism was more of a business-

⁶¹ Ibhawoh (2000) *Hum Rts Q* 841-842.

⁶² B Stuchtey “Colonialism and Imperialism” 1450-1950” <<http://ieg-ego.eu/en/threads/backgrounds/colonialism-and-imperialism/benedikt-stuchtey-colonialism-and-imperialism-1450-1950>> (accessed 20-04-2015).

⁶³ Mutua (2001) *Harv Int'l LJ* 156.

⁶⁴ References omitted. SF Joireman “Inherited Legal Systems and Effective Rule of Law: Africa and the Colonial Legacy” (2001) 39 *JMAS* 571-596.

⁶⁵ There are arguments to the contrary. See A Jauhari “Colonial and Post-Colonial Human Rights Violations in Nigeria” (2011) 1 *IJHSS* 53-57.

⁶⁶ Mutua (2001) *Harv Int'l L J* 162.

⁶⁷ I Shivji “Law in Independent Africa: Some Reflections on the Role of Legal Ideology” (1985) 46 *Ohio St LJ* 689 690.

⁶⁸ M Lange “British Colonial Legacies and Political Development” (2004) 32 *World Development* 905-922; Joireman (2001) *JMAS* 571-596.

making venture than a humanitarian agenda towards development.⁶⁹ The colonial masters ruled by force to assert their might and maintain their grip on the territories. Thus, colonialism denied the people the right to participate in their governance and much less towards their development. Hence, human rights and development could not have been the philosophy for colonial rule in Africa. Howard argues rightly that “the administrators of African colonies were products of their own times, and they certainly did not consider establishing rights in the colonies which did not exist in their own societies”.⁷⁰ This is true for both the direct and indirect rules of the British.⁷¹ It was more so too for the system of assimilation adopted by the French.⁷² In fact, colonialism is synonymous with gross violations of human rights, of political and economic self-determination that collectively manifested in clear denial of development. In other words, colonialism was the antithesis of human rights.⁷³ In all the colonial territories however, political participation was limited and consequently denying the people their important human rights.⁷⁴ In reality, there was grave denial of civil and political rights during this period. In fact, Howard observes that at a point, the British opposed the inclusion of human rights within colonial territories, as it

⁶⁹ Umozurike *The African Charter* 20. The Berlin conference of 1884-1885 delineated the African continent into parts, with the various European powers taking chunks of the vast African territories otherwise referred to as “the scramble for Africa”. There is contestation what exactly the European powers were looking for in Africa. The general belief is that colonialism was an expansionist scheme and the need to tap wealth and resources from the virgin African land – whether for agriculture or industrialisation. The period also tallies with the growth of industrial activities within the European continent. This agenda also corresponded with the growth of Christianity, which eventually attracted Christian evangelism into Africa wherein the larger part of the population practised traditional religions considered generally by the Europeans as backward. By and large, the escapade carried out then was in truth not to develop the African people but of a proprietary nature, in that the Europeans were more interested in economic gain than in reforming the native black people of Africa. Slavery and slave-trade were viable ventures at that time. The African people were transported overseas to work on European owned plantations under terrible physical conditions. With the end of slavery and slave trade, the attention of the Europeans turned to exploiting natural resources in Africa. With the end of World War II and the internal out roar for self-determination and government, slave-trade and all forms of external domination including colonialism were abolished and African countries progressively achieved their independence. Following Winston Churchill’s and Roosevelt’s Atlantic Charter, countries like Ghana received their independence in 1957. Many others received theirs in 1960 including Nigeria and progressively all the African countries became independent states in due course. See generally Chamberlain *The Scramble* 1; Iliffe *Africans* 1.

⁷⁰ R Howard “Evaluating Human Rights in Africa: Some Problems of Implicit Comparisons” (1984) 6 *Hum Rts Q* 160-179 170.

⁷¹ Indirect rule facilitated the British colonial administrators to control their colonial territories with less manpower and financial cost. It enabled them to assert their presence through existing local chiefs or British appointed chiefs (warrant chiefs) where existing ones were not cooperating Umozurike *The African Charter* 20.

⁷² The system of assimilation adopted by the French colonial administration allowed natives of their colonies to assume French nationality subject to certain qualifications such as a minimum level of western education, participation in war and the practice of monogamy Uwozurike *The African Charter* 20.

⁷³ Uwozurike *The African Charter* 20.

⁷⁴ On the effects of colonialism on the development of Africa see L Minkler & S Sweeney “On the Indivisibility and Interdependence of Basic Rights in Developing Countries” (2011) 33 *Hum Rts Q* 351 358-359 (That the British promoted democracy and development better than other colonial administrators did).

would require them to observe and protect them accordingly.⁷⁵ In addition, apart from development meant for easy conveyance of goods and services, as well as to maintain the status quo, there was wanton denial of economic, social and cultural rights as well. Importantly, colonialism also promoted discrimination.⁷⁶

However, inadvertently, colonialism came with some development agendas especially with regard to infrastructures originally meant to export resources for the purposes of the so-called triangular trade.⁷⁷ This is visible in the construction of vast railway lines that cut across those regions that produced the necessary raw materials intended for export abroad. The imposition of Western culture and political patterns of relationship were also consequences of colonialism.⁷⁸ For instance, native customs could apply only to the extent that they satisfied certain western standards⁷⁹ found in western style forms. This replacement was a contemplated conception by the Europeans to “civilise”, but not to develop the Africans. In other words, colonialism replaced traditional law-making institutions and standards often found in the kings and their courts with legislation and western styled courts. Cobbah argues, “through colonialism, western concepts of individual rights and law have found a place in many non-western parts of the world.”⁸⁰ He adds, “during the colonial period the political and legal systems of the colonial masters were superimposed upon the traditional and customary political and legal processes of African peoples.”⁸¹ Clearly therefore, colonialism battered aboriginal norms and values, language, religion, culture and geography.⁸²

It is noteworthy that the Berlin treaty of 1884 provided for a minimum level of human rights protection.⁸³ Article 27 thereof required all the parties to suppress slave trade and

⁷⁵ Howard (1984) *Hum Rts* Q 170.

⁷⁶ This is evidenced by the early 90s Rwandan crisis between the Tutsi who were favoured by the Belgians against the Hutus.

⁷⁷ Triangular trade was a practice whereby resources from Africa were extracted and transported to Europe and America for further development into consumer products and subsequently re-channelled back to Africa for consumption. See Chamberlain *The Scramble* 18 and 44 This practice is very much in existence especially in Nigeria where crude oil is explored and taken abroad only for the country to import petroleum products from abroad to be used for domestic consumption. See also B Rajagopal *International Law From Below: Development, Social Movements and Third World Resistance* (2003) 24-36.

⁷⁸ See Joireman (2001) *JMAS* 571-596.

⁷⁹ For example, that a custom was repugnant to natural justice, equity, good conscience and public policy. It will also not apply if it contravenes any written law for the time being in force at both the region and in the colonial master's country of origin.

⁸⁰ Cobbah (1987) *Hum Rts* Q 315.

⁸¹ 315.

⁸² Umozurike *The African Charter* 22.

⁸³ See art 27 of the Berlin Treaty, 1884.

bring “civilization” to their territories. Thus, colonialism was not exclusively about tapping resources from Africa, it was also to “civilise” the Africans. However, civilisation, modernisation, socialisation and globalisation looked at from a different perspective may perhaps be the reason for the current imbroglio facing Africa. This is because on the one hand, there is a crisis of identity and the desire to hold on to cherished cultural ideals aimed at enhancing the lives of the African people in their own way and pace. On the other hand, there a need to “catch up” with a standard set by the colonisers. Also, “catching up” requires a redefinition of the African self which does not seem easy to achieve. This has resulted in a breakdown of moral values and a complete loss of the African identity. In addition, colonial administrators used compulsion as opposed to participation, a key element of human rights and development.

The communal system of life adopted by the Africans gradually lost ground, hence assuming individualism. Colonialism in addition to denigrating customary values had three other implications. Firstly, it created statehood thereby disregarding or not recognising the need to retain the separateness and peculiarities of the various cultures, tribes and languages in Africa.⁸⁴ Asante noted that African boundaries are generally “artificial and arbitrary” and are even “absurd and capricious” within the West African sub-region.⁸⁵ Secondly, colonialism institutionalised the western styled administration and governance through bureaucracy. Thirdly, the codification of European laws directly subjugated the traditional African customs and laws.

3 5 The post colonial period and Africa’s continued quest for development

Arguably, colonialism put in motion the current imbroglio of Africa and the crisis about human rights and development as discussed above in 3 3. The end of the Second World War marked the beginning of struggle for independence in Africa. Colonial rule suffered from serious opposition from organised groups, political parties and trade unions. The call for self-determination had increased and the situation had become volatile. The UN had

⁸⁴ See M Mutua “Conflicting Conceptions of Human Rights: Rethinking the Post-Colonial State” (1995) 89 *Am Soc’y Int’l L Proc.* 487. Howard paints the picture thus:

“Up to the time of decolonization, individual Africans simply saw themselves as members of particular ethnic groups who happened to live in a territory which the British occupiers designated X. Overnight, X became a country whose new masters had new tasks to fulfil, requiring much more interference in the day-to-day life of its citizens; yet, at the last minute, the British had also granted new political rights such as suffrage. The result was conflict between citizens and state, and in their confusion the new citizens looked to traditional symbols of their identity, such as ethnicity, religion, or language, which they could use against the state. See R Howard “The Dilemma of Human Rights in Sub-Saharan Africa” (1980) 35 *International Journal* 724 739.

⁸⁵ SKB Asante *The Political Economy of Regionalism in Africa: A Decade of West African States (ECOWAS)* (1986) 37.

recognised self-determination as an inviolable right under international law in the various international instruments including the UN Charter, UDHR, and the twin covenants amongst others. By 1957, Ghana became the first independent African State. Most other African States followed in the 1960's. By 1994, all African States were potentially free from all forms of external domination.⁸⁶

The expectation was that the leaders of these new independent African States, being conversant with the African terrain as natives, would pursue development aggressively for their respective States. The political and legal landscape gave them the opportunity to do so, largely because they came into power through legitimate, democratic and popular means. In addition, they inherited or created new Constitutions containing human rights protection provisions. These leaders had also promised rapid socio-economic development considering the decades of neglect and backlog of underdevelopment they inherited from the colonial administrators.

On the contrary however, this new breed of leaders became mostly avaricious and self-centred. In addition to their political inexperience in the management and experimentation of western styled democracy, their self-centeredness led them to bequeath and set the appalling precedence for the subsequent political and socio-economic quagmire, poverty and underdevelopment that enmeshed virtually the entire African continent. Part of the reasons for the failure was because the modern African States "strived to fashion themselves with the image of western liberalism with little success."⁸⁷ As noted earlier, one of the implications of colonialism was the irregular, administrative and non-participatory State creation, which did not take into account the peculiarities of the various African cultures and tribes. Also, there were no adequate political culture and institutional framework to guarantee accountability, rule of law and constitutionalism.⁸⁸ The results were grave violations of human rights, corruption, nepotism, single party domination, general insecurity, instability in governance and incessant military coups.⁸⁹ It has been

⁸⁶ See generally Umozurike *The African Charter* 22-28.

⁸⁷ NJ Udombana "Articulating the Right to Democratic Governance in Africa" (2003) 24 *Mich J Int'l L* 1209 1210.

⁸⁸ Udombana (2003) *Mich J Int'l L* 1211; See also P Clements "Challenges for African States" (2001) 36 *J Asian & Af. Stud* 295 297.

⁸⁹ Udombana (2003) *Mich J Int'l L* 1209-1217.

argued by many that although the situation was initially volatile after independence, most sub-Saharan African states fared better during the first two decades after independence.⁹⁰

But globalisation compounded the situation. Things deteriorated following the implementation of the structural adjustment programmes across Africa.⁹¹ At the regional level, there were no mechanisms, legal documents or institutions to checkmate the excesses of governments of the newly independent State. This was solely because of the doctrine of sovereignty and non-interference into the activities of States under international law at the time. However, some nationalist leaders (such as Kwame Nkrumah of Ghana) made an effort to bring about unity of African States based on collective and shared history, traditions and experiences. Some even opted for Pan-Africanism, an offshoot of the erstwhile traditional communal arrangement found in African societies.⁹² By 1961, the International Commission of Jurists agreed on the “Law of Lagos”, which stressed the need for African States to have a Convention on human rights and to encourage and establish a local chapter of the commission to enhance human rights protection on the continent.⁹³ By 1963, African States formed the Organisation of African Unity.

Initially the African regional system under the auspices of the Organisation of African Unity (OAU) did not emphatically envisage human rights protection as either its principles or objectives. The OAU Charter only required that, for the OAU to achieve its legitimate aspirations there was the need to pursue and give prominence to freedom, equality and dignity.⁹⁴ At its inception, the OAU was more interested in political and economic independence from colonial domination.⁹⁵ The OAU Charter did not warrant intervention by member states into the activities of other member states even for the most inhuman violations of human rights.⁹⁶ This was a major setback for the AU then, paving the way to

⁹⁰ M Kpessa, D Béland & A Lecours “Nationalism, Development, and Social Policy: The Politics of Nation-Building in Sub-Saharan Africa” (2011) 34 *Ethnic and Racial Studies* 2115-2116.

⁹¹ Kpessa et al (2011) *Ethnic and Racial Studies* 2116; see also T Mkandawire “Thinking about the Developmental States in Africa” (2001) 25 *Cam J E* 289-313.

⁹² See G Shepperson “Pan-Africanism ‘and Pan-Africanism’: Some Historical Notes” (1962) 23 *Phylon* (1960) 346-358.

⁹³ The African Conference on the Rule of Law consisting of 194 judges, practicing lawyers and teachers of law from 23 African nations, as well as 9 countries of other continents assembled and made the Law of Lagos 1961 See declarations 4 and 5

<http://www.globalwebpost.com/genocide1971/h_rights/rol/10_guide.htm#lagos>(accessed 25-09-2013).

⁹⁴ See the Preamble of the Charter of Organisation of the African Union 1963 (OAU Charter).

⁹⁵ Art 2(d) and Preamble of the OAU Charter.

⁹⁶ See art 3(2) of the OAU Charter.

wanton violation of human rights by some member states at that time.⁹⁷ Based on the foregoing and coupled with the need for the continent to follow the emerging global trend as exemplified by other continental based human rights systems like the European and the inter-American systems, as well as the UN, the AU initiated the creation of an African human rights regime.⁹⁸ Hence, the ACHPR⁹⁹ amongst other human right instruments evolved.¹⁰⁰ Thus, in addition to the ACHPR, the AU¹⁰¹ has other instruments that cater for, deal with and foster human rights and development for the region. The issues covered include an African economic community¹⁰², the welfare of the child¹⁰³, rights of women¹⁰⁴, youth¹⁰⁵, corruption,¹⁰⁶ governance, elections and good governance,¹⁰⁷ as well as establishment of a single court on human and peoples' rights.¹⁰⁸

Each of the issues mentioned above envision human rights and development. In fact, the African human rights system upholds the right to development as an integral and most

⁹⁷ Idi Amin's Uganda, the Apartheid regime in South Africa, frequent military take-overs, extradition of foreigners from different parts of Africa, including Africans themselves, are but a few examples of such human rights violations.

⁹⁸ Although a core human rights protection instrument was missing prior to the African Charter, the OAU other instruments that had bearing on human rights and development were put in place before the African Charter. These include the Convention Governing the Specific Aspects of Refugee Problems in Africa (adopted on 10/09/1969 and entered into force 20/06/1974); The African Convention on the Conservation of Nature and Natural resources (adopted on 15 September 1968 and entered into force 16 June 1969) CAB LEG 24.1; The Cultural Charter for Africa (adopted 5 July 1976 and entered into force on 19 September 1990); and the Convention for the Elimination of Mercenarism in Africa (adopted 3 July 1977 and entered into force 22 April 1985) OAU Doc CM/817 (XXIX) Annex II Rev 1.

⁹⁹ In 1979, the OAU authorised the drafting of the ACHPR in Dakar, Senegal. However, its formal adoption took place in 1981 at Banjul, The Gambia and it came into force in the same year at Kenya. See C Heyns "The African Human Rights System: The African Charter" (2003-2004) 108 *Penn St L Rev* 679 685; SA Yeshanew *The Justiciability of Economic, Social and Cultural Rights in the African Regional Human Rights System Theories, Laws, Practices and Prospects* (2011) 101-105; CO Umozurike "The African Charter on Human and Peoples' Rights: Suggestion for more Effectiveness" (2007) 13 *Ann Surv Intl & L* 179- 190.

¹⁰⁰ For the history of the evolution of the African Charter "History of the African Charter" *African Commission on Human and Peoples' Rights* <<http://www.achpr.org/instruments/achpr/history/>> (accessed 25-09-2013).

¹⁰¹ Constitutive Act of the African Union (adopted on 11 July 2000 and entered into force on 26 May 2001) CAB/LEG/23.14.

¹⁰² Treaty Establishing the African Economic Community (adopted 3 June 1991, entered into force on 12 May 1994) 30 *ILM* 1241 (1994).

¹⁰³ African Charter on the Rights and Welfare of the Child (adopted 1 July 1990, entered into force 29 November 1999) CAB/LEG/24.9/49 (1999) (ACRWC).

¹⁰⁴ Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (adopted 11 July 2003 and entered into force 25 November 2005) CAB/LEG 66.6 (2005) (Women's protocol).

¹⁰⁵ The African Youth Charter (adopted 2 July 2006 and entered into force 8 August 2009) (Youth Charter).

¹⁰⁶ African Convention on Preventing and Combating Corruption (adopted 11 July 2003, entered into force 05 August 2005).

¹⁰⁷ African Charter on Democracy, Elections and Good Governance (adopted 30 January 2007 entered into force 15 February 2012).

¹⁰⁸ Protocol on the Statute of the African Court of Justice and Human Rights (adopted 1 July 2008); Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights (adopted 9 June 1998, entered into force 25 January 2004) Doc.OAU/LEG/EXP/AFCHPR/PROT (III).25.

highly regarded aspect of its collective existence. This is visible from the rate at which the institution reiterates the right in every of its forum, document, resolution, vision, practice and even judicial pronouncements as shown in the following chapters. For instance, New Partnership for Africa's Development (NEPAD) is one important human rights and development programme that African States are pursuing vigorously. The main aims of NEPAD are to eradicate poverty, promote sustainable growth and development, integrate Africa in the world economy as well as accelerate the empowerment of women.¹⁰⁹ While this is true, the practical realisation of the right to development within Africa remains largely unsatisfactory in spite of the political and legal commitments by the members of the AU.¹¹⁰

It follows therefore that it is incumbent upon states to ensure that they take measures to sustain "equality of opportunity for all [peoples] in access to basic resources, education, health services, food, housing, employment and the fair distribution of income."¹¹¹ This requirement extends to vulnerable groups including minorities, women and children with a view to eradicating all forms of social injustices and ginger economic and social reforms.¹¹² Although the ACHPR does not directly include important rights such as food, shelter and adequate housing, rights that are directly essential within the African impoverished situation,¹¹³ states must design people-centred policies and programmes that drive inclusive and all in-compassing development. The African Commission has tried to fit some of these issues within the right to development paradigm and made them essential responsibilities of the states.¹¹⁴ Therefore, states have a responsibility of ensuring that their people participate actively in designing policies that will eventually affect them.¹¹⁵ Along the same path the revised ECCJ Supplementary Protocol¹¹⁶ makes the application of international human rights law essential for the realisation of human rights of individuals within member states.¹¹⁷ In this regard, the various enforcement mechanisms available

¹⁰⁹ The Presidency NEPAD Nigeria *About NEPAD* available at <http://www.nepad.gov.ng/index.php/about-us/about-nepad>

¹¹⁰ Constitutive Act of the African Union (adopted on 11 July 2000 and entered into force on 26 May 2001) CAB/LEG/23.14.

¹¹¹ UNDRD Art 8(1).

¹¹² UNDRD Art 8(1) and (2); see also the African Women Protocol, ACRWC, United Nations Declaration on the Rights of Indigenous Peoples (adopted 2 October 2007), A/RES/61/295 (UNDRIP)

¹¹³ Viljoen *International Human Rights* 215.

¹¹⁴ See the *Ogoni* case in 5 3 1 3.

¹¹⁵ UNDRD Art 2.

¹¹⁶ Supplementary Protocol A/SP.1/01/05 of 19 January 2005 (ECCJ Supplementary Protocol 2005) (ECCJ Protocol) art 19 (making reference to ICJ Statute art 38).

¹¹⁷ See 5 4 2 below.

under the African regional system, as I will demonstrate in chapter 5 2 ,are not restricted to sources of law within the African domain.

It is important to note that although states are the central duty bearers of the right to development, due to existing realities and constraints in our current world, they must work in concert with other states, regionally and globally, to ensure the realisation of the right to development.¹¹⁸ They are required to co-operate among themselves to design policies nationally and internationally towards the realisation of the right to development.¹¹⁹ Any obstacles that may hinder such requirement must be removed as a matter of duty including those resulting from neglect or refusal to protect civil and political rights.¹²⁰ Consequently, “[s]ustained action is required to promote more rapid development of developing countries.”¹²¹ This requirement mirrors the neighbourhood principle pertinent to the right to development. Hence, in *Democratic Republic of the Congo v Burundi, Rwanda and Uganda*¹²² (DRC), the African Commission found neighbouring states (Burundi, Rwanda and Uganda) of the applicant in violation of this collective legal and moral duty as discussed in 5 4 1 2.¹²³ It is rational that states not only act positively towards developing other states but also that they must not endanger or hinder one another’s development.

The right to development is unlikely to be effectively realised without “international co-operation”. Chapter 2 noted this to be one of the inherent complications of the right to development. Therefore, in addition to the efforts made by developing countries, developed countries have a duty to “complement these efforts with appropriate means and facilities to foster their comprehensive development.”¹²⁴ As noted earlier, in chapter 3 4, the politics of development in Africa did not come to fruition in isolation. The global economic and trade system operate as a whole system and therefore developing countries, the greatest beneficiaries of the right to development cannot develop without the support of that underlining system. In his attempt to buttress this point, Kariyawasam endeavoured to argue the indispensable link between the right to development and economic law.¹²⁵ He argues that the right to development “is a function of an equitable

¹¹⁸ UNDRD Art 3 (3) & 4 (1).

¹¹⁹ UNDRD Art 4 (1) provides: “States have the duty to take steps, individually and collectively, to formulate international development policies with a view to facilitating the full realization of the right to development.”

¹²⁰ UNDRD Art 6(3)

¹²¹ UNDRD Art 4(2).

¹²² (2004) AHRLR 19 (ACHPR 2003).

¹²³ See 5 4 1 2.

¹²⁴ UNDRD Art 4 (2).

¹²⁵ R Kariyawasam “Jekyll and Hyde Equation 5: Enforcing the Right to Development through Economic Law” in J Dine & A Fagan *Human Rights and Capitalism* (2006) 198 198-227.

economic environment at the international plane.”¹²⁶ It is in this regard that the independent expert on the right to development suggests a “development compact” as practical model for international co-operation in realising the right to development.¹²⁷ The independent expert describes the development compact as a mechanism for ensuring that stakeholders recognise the mutuality of their obligations to provide the right to development.¹²⁸ The development compact¹²⁹ therefore ties the obligations of the international community dependent on the satisfaction of basic responsibilities of developing countries in realising rights-based programmes.¹³⁰ This is in consonance with the independent expert’s description of the right to development as a “vector” wherein at least one component of the right is realised and no other is violated.¹³¹ The compact recognises the cardinal place of states to exercise and achieve development as a primary duty for its people.

For example, it is understood that the international community were fully aware of their responsibility when they established and are vigorously pursuing the MDGs. The United Nations Millennium Declaration (Millennium Declaration) adopted by the UN General Assembly in 2000 proclaimed the responsibility of member states to be collectively responsible in upholding the principles of human dignity, equality and equity at global level.¹³² The Millennium Declaration further restates the duty of world leaders to the “people, especially the most vulnerable and, in particular, the children of the world, to whom the future belongs.”¹³³ Importantly, the Millennium Declaration reaffirmed collective “effort to free (...) fellow men, women and children from the abject and dehumanizing

¹²⁶ 203.

¹²⁷ See Fourth Report of the Independent Expert on the Right to Development UN Doc. E/CN.4/2002/WG.18/2 (20 December 2001) paras 56-74; See also A Sengupta “The Human Right to Development” in *Development as a Human Right* 43-44.

¹²⁸ Sengupta “The Human Right to Development” in *Development as a Human Right* 43.

¹²⁹ It is noteworthy that earlier, there have been other international cooperation efforts lead by leading world powers like the USA and the European Union which are more or less reflective of the development compact. The USA although a staunch opponent of the right to development has adopted its own model of development aid similar to what the development compact necessitates which it calls Millennium Challenge Account (MCA) to be administered by a Millennium Challenge Corporation (MCC). The MCA is to support developing countries that are serious-minded in the areas of good governance, health, education and to encourage sound economic policies that foster enterprise and entrepreneurship See S Marks *The Right to Development: Between Rhetoric and Reality* (2000) 156. In a 2002 speech, the then USA President George W Bush, noted that: “Developed nations have a duty not only to share our wealth, but also to encourage sources that produce wealth: economic freedom, political liberty, the rule of law and human rights.” See <http://www.un.org/ffd/statements/usaE.htm> (accessed 12-03-2014).

¹³⁰ A Sengupta “The Human Right to Development” in *Development as a Human Right* 43

¹³¹ Third Report of the Independent Expert on the Right to Development UN Doc. E/CN.4/2001/WG.18/2 (2 January 2001) para 24.

¹³² UN Millennium Declaration Para 2.

¹³³ Para 2.

conditions of extreme poverty, to which more than a billion of them are currently subjected.”¹³⁴ The UN General Assembly re-emphasised further that they are “committed to making the right to development a reality for everyone and to freeing the entire human race from want.”¹³⁵ Upon its expiration, the global community have embarked on SDGs to replace MDGs with more targets for human development.

On the African regional level, states under the AU have collectively worked towards realising the right to development.¹³⁶ The Abuja Treaty, for example, sets out “[t]o promote economic, social and cultural development and the integration of African economies in order to increase economic self-reliance and promote an endogenous and self-sustained development.”¹³⁷ This African development is based on the principles of human rights promotion, “[a]ccountability, economic justice and popular participation in development.”¹³⁸ Additionally, the ECOWAS organisation seeks to “promote co-operation in all fields of human endeavour in order to raise the standard of living of African peoples, and maintain and enhance economic stability”¹³⁹

Another important milestone on co-operative development is exemplified in the Cotonou Agreement¹⁴⁰ between the African, Caribbean and Pacific (ACP) countries on the one hand and the European Union (EU) on the other. The three complementary pillars of the agreement are development co-operation, economic and trade co-operation, and the political dimension including human rights with the sole aim of reducing and possibly eradicating poverty.¹⁴¹ In its preamble, the agreement reads that the parties: “resolve to make, through their cooperation, a significant contribution to *the economic, social and cultural development* of the ACP States and to the greater well-being of their population, helping them facing the challenges of globalisation.”¹⁴² The NEPAD initiative and the

¹³⁴ Para 11.

¹³⁵ Para 11.

¹³⁶ These efforts include: The Lagos Plan of Action (1980), the Final Act of Lagos (1980), Africa's Priority Programme for Economic Recovery (1986-1990), the African Alternative Framework to Structural Adjustment Programme (1989), the African (Arusha) Charter for Popular Participation and Development (1990), the Abuja Treaty (1991) and the Cairo Agenda (1994) amongst others. .See <<http://www.nepad.org/history>> (accessed 12-03-2014); See also <http://www.dfa.gov.za/au.nepad/au_nutshell.htm>(accessed 12-03-2014)

¹³⁷ Treaty Establishing the African Economic Community (Abuja Treaty) (adopted 3rd June 1991 and entered into force 12th May 1994) Art 4(a).

¹³⁸ Abuja Treaty Art 3(g-h).

¹³⁹ Abuja Treaty Art 4 (c).

¹⁴⁰ Cotonou Agreement between Africa, Caribbean and Pacific (ACP) – European Union (EU) Countries (Revised in Ouagadougou on 22 June 2010).

<http://ec.europa.eu/europeaid/where/acp/overview/documents/devco-cotonou-consol-europe-aid-2012_en.pdf> (accessed 02-04-2014 (Cotonou Agreement).

¹⁴¹ See Cotonou Agreement Art 9.

¹⁴² Cotonou Agreement Preamble 3 (emphasis added).

African Peer Review (APRM) Mechanism are perhaps the most significant blueprints for collective African development. NEPAD is an initiative which strives to ensure that economic growth, good governance, democracy, and human rights are realised in Africa.¹⁴³ Importantly, NEPAD is a home-grown African blueprint, the first of its kind for the African continent.

At the sub-regional level, The ECOWAS places high emphasis on the continental human rights system that is on the ACHPR.¹⁴⁴ In addition, the community members have recognised and emphasised the right to development through other related efforts. The ECOWAS system has developed other legal mechanisms including the establishment of the ECOWAS Community Court of Justice (ECCJ). The mandate of the ECCJ includes the determination of human rights violation and interpretation that occur within member States. So far, the ECCJ has handed down the ground-breaking decision in the *SERAP* case; referring to aspects of the right to development.¹⁴⁵ The case involved the right to basic education in Nigeria as provided for under both domestic and international law. I further discuss this case under chapter 5 4 2.

It is clear that the various global human rights systems had significantly influenced the African regional human rights system particularly with respect to human rights and development. For instance, it is evident that the right to development has an origin in the UN protection of human rights. Specifically, articles 1 (3), 55 and 56 of the UN-Charter as well as the preamble of the UDHR provide for international co-operation and protection of human dignity as the cornerstones towards ensuring a global human rights edifice. Thus, the traditional African perspectives of human rights and development have been subsume by globalisation and cosmopolitanism.

¹⁴³ R Ngamau "The Role of NEPAD in African Economic Regulation and Integration" (2004) 10 *Law & Bus. Rev. Am.* 515 516.

¹⁴⁴ Art 4(g) of the Revised ECOWAS Treaty provides: "recognition promotion and protection of human and peoples' rights in accordance with the provisions of the African Charter on Human and Peoples' Rights" However, art 3(1) of the Treaty further provides that one of the aims of the community is to ensure progress and development, thus:

"The aims of the Community are to promote co-operation and integration, leading to the establishment of an economic union in West Africa in order to raise the living standards of its peoples, and to maintain and enhance economic stability, foster relations among Member States and contribute to the progress and development of the African Continent."

¹⁴⁵ *Registered Trustees of Socio Economic Rights and Accountability Project (SERAP) v Federal Republic of Nigeria & Another* SUIT NO ECW/CJJ/APP/08/08, 2009 <www.eccj.net> (accessed 02-02-2014).

3.6 Development and human rights in the context of universalism and cultural relativism debate

The fact that the objectives of development and human rights as concepts are not strange in the traditional African setting carries home the theoretical contestations between universalism and cultural relativism. Whether radical or weak, cultural relativism is about the significance of culture as a source of validity of a moral right.¹⁴⁶ Universalism portrays human rights as internationally accepted moral standards that bind the conscience of humanity. In functional terms, cultural variations are inevitable realities of a complex, diverse world made up of different peoples. Because of this, it seems realistic to accept a “substantive moral variability including variability in human rights practices.”¹⁴⁷ Moral autonomy and communal self-determination are the key determinants and justifications of cultural variability.¹⁴⁸ They justify deviating from international or universal moral standards. However, modern intrusion has in reality led to cultural confusion that questions the pure traditional notion of human dignity coloured by cultural variability.¹⁴⁹ This has compelled many theorists to reject the idea of cultural relativism especially because “human rights are inherently individualistic” and relativism was often invoked to justify tyranny and gross human rights abuses that might be unknown to various cultures and traditions.¹⁵⁰

Therefore, the proponents of universalism expose a cynicism in cultural relativism and insist that human nature is relatively universal and as such human rights should similarly be universal.¹⁵¹ Human rights are seen as appropriate core mechanisms for protecting this basic, relatively universal core of human nature and dignity.¹⁵² Donnelly argues that the UDHR itself reflects this desire of protecting the core of human nature.¹⁵³ The UDHR certainly set the human rights agenda for the world and created a universal standard and

¹⁴⁶ J Donnelly “Cultural Relativism and Universal Human Rights”(1984) 6 *Hum Rts Q* (1984) 400-419.

¹⁴⁷ 402.

¹⁴⁸ 407.

¹⁴⁹ 413.

¹⁵⁰ 413.

¹⁵¹ 415. For more on the cultural relativists/universalists debate see Donnelly *Hum Rts Q* 281; M Goodhart “Neither Relative nor Universal: A Response to Donnelly” (2008) 30 *Hum Rts Q* 183-193; Mutua (2001) *Harv Int'l L J* 201-245; B Ibhawoh (2000) 22 *Hum Rts Q* 838-860; Cobbah *Hum Rts Q* 309-331; A Pollis “Cultural Relativism Revisited: Through a State Prism” (1996) 18 *Hum Rts Q* 316-344; MK Addo *International Law on Human Rights* (2006) 73-193 (Addo Reprinted articles by leading scholars on universalism/cultural relativism such as Teson, Mutua, Donnelly and Otto).

¹⁵² Addo *International Law on Human Rights* 73-193.

¹⁵³ Donnelly *Hum Rts Q* 281.

platform for subsequent human rights treaties and their enforcement mechanisms.¹⁵⁴ This Universalist position may seem plausible in view of the significant contributions of the UDHR. They advanced the presumption of universality because “as all humans worldwide share in their humanness, they must also share their right to human rights.”¹⁵⁵

The foregoing discussion points to the fact that those that consider the non-universality of human rights may not altogether be correct after all. The need for universality of human rights is desirable as well as inevitable. This is in spite of the fact that pre-colonial African societies valued economic, social and cultural rights and group rights more than they valued civil and political rights.¹⁵⁶ This is why, when the UDHR was to be applied to them upon independence and there was a move for universal human rights, they objected. First, because of their non-participation in the process that conceived the declaration and secondly on the basis that some of the rights they held sacred were missing in the declaration. To them, the declaration skewed heavily towards individual rights neglecting the principle of collectivities or the African brand of communal spirit.

Many African states subscribed to the cultural relativists' views arguing that since the individual was not primarily within their understanding of human rights, a better and more acceptable model was needed to represent their interest and cultures.¹⁵⁷ The Universalists see this position as pretence for justifying human rights violations. However, I suggest that consensus is possible for the following reasons; firstly, the dynamic nature of African customs makes it possible for them to attune to international best practices. This must not be a hook, line and sinker approach. Thus, in drawing up international (universal) standards, there is a need to consider and respect cultural specificities. To achieve international human rights there is need to tow this line.

Secondly, by the event of history, the African human rights system has been transformed. As such, most of the cultural practices in Africa are now virtually “history” except a few. The entire system of human rights in Africa is more or less an admixture of Africanism and Universalism. Hence, naturally, through the conduct and relational patterns of the Africans themselves, cultural intrusiveness has been systematically out-modelled.

¹⁵⁴ MO Hinz “Human Rights between Universalism and Cultural Relativism? The Need for Anthropological Jurisprudence in the Globalizing World” <http://www.kas.de/upload/auslandshomepages/namibia/Human_Rights_in_Africa/1_Hinz.pdf> (accessed 20-04-2015) 1-78.

¹⁵⁵ See C Good “Human Rights and Relativism” (2010) 19 *Macalester Journal of Philosophy* 27-52.

¹⁵⁶ C Ake “The African Context of Human Rights” (1987) 34 *Africa Today* 8

¹⁵⁷ Mutua (2001) *Harv Int'l L J* 207.

Thirdly, international law and more importantly the Vienna Declaration amongst others have tried to achieve that desired consensus on universality of human rights. Arguably, this approach is important in achieving human rights like the right to development.

The primacy of the cultural relativism theory still holds sway today but as far as the right to development is concerned, the theory bears little or no meaning. This is because the very philosophical foundation of the right to development rests upon international co-operation among the global community. Mbaye's calls for the recognition of the right to development revolved around an internationally acclaimed right. It endeavoured to usher in and maintain a strong symbiotic relationship between and among states or better still a "global phenomenon" with significant international flavour.

Perhaps because of historical factors and current development deficit, most Africans are more concerned about economic, social and cultural rights than civil and political rights. Therefore, a collective and equal consideration of all human rights is the only sensible way to make human rights acceptable to most Africans.¹⁵⁸ It is in this context that development becomes relevant. The outcomes of the Vienna Declaration and the Tehran Proclamation pushed for and anchored intense international effort towards general acceptability of all human rights as necessarily related and interconnected.¹⁵⁹ Within the context of these international efforts, human rights are perceived as indivisible, interdependent and interconnected. This means that the realisation of one automatically leads to the realisation of the others, and the violation of one automatically affects the others. This approach to conceptualising human rights necessarily downplays prioritisation of one or more classes of rights over the others. Universalism certainly colours this understanding of necessary interconnectivity. The implication is that states are required to place all human rights on an equal pedestal.

Therefore, the recognition of the right to development as part and parcel of international human rights necessarily ties it to the chain that connects all human rights as indivisible whole. Right to development experts further maintain that "development" is only attainable when it is properly defined and all related human rights receive equal treatment that is approached with the same seriousness and dedication.¹⁶⁰

¹⁵⁸ See C Ake "African Context of Human Rights" (1987) 32 *Africa Today* 5-12; See also SA Yeshanaweh *The Justiciability of Social Rights* (2011)58; S Freidman *Human Rights Transformed* 8.

¹⁵⁹ Vienna Declaration Art 10.

¹⁶⁰ Scholars such as Sengupta (2002) *Hum Rts* Q 837-889; Sen *Development as Freedom*; Sano (2000) *Hum Rts* Q 739; K Feyter "Towards a Framework Convention on the Right to Development" (2013)

However, the interconnectivity notion has a huge downside in the context of Africa particularly regarding its history and current state of affairs, as well as the increasing resistance by the developed countries to recognise international co-operation as component of the right to development. The effects of colonial dislocation in Africa are still visible in nearly all facets of life. The classical manifestation of this has been the increasing political instability and economic turmoil bedevilling the continent. Good governance has eluded these countries as further examined in chapter 7 with respect to Nigeria. More often than not, governments in Africa tend to prioritise those issues that mean nothing to their people and tag them “development projects” or, to use a popular Nigerian phrase, “dividends of democracy” while the most fundamental things, which bear meaning to the people, suffer dire and constant neglect. Examples include societal peace and harmony; access to fertilizer and seedlings for agricultural purposes; providing access to water, health and education; ensuring the security of their lives and properties; refraining from distorting their life patterns;¹⁶¹ protecting their environment against degradation¹⁶² and refraining from encroaching into their cultural practices and other things that would generally improve their lives and communities.¹⁶³ As portrayed in chapter 1, the current social and political complications in Africa stems from governmental neglect partly due to the colonial antecedents. These are not mere political matters, they are undisputed facts

International Policy Analysis < <http://library.fes.de/pdf-files/bueros/genf/09892.pdf> > (accessed 01-10-2013). Cf with Donnelly *Universal Human Rights* 217-233; Whelan (2008) 7 *University of Connecticut, Human Rights Institute*; and A Vandenberg “The Right to Development in International Human Rights Law: A Call for Its Dissolution” (2013) 21 *NQHR* 187–209.

¹⁶¹ *Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council v Kenya* (2009) AHRLR 75.

¹⁶² Ogoni case.

¹⁶³ An example is the amount of money spent by donor agencies in fighting polio in polio-prone countries of the world including Nigeria. While that is done, malaria kills more people and faster than polio does. In many African societies polio immunisation suffers from negative posturing as a backdoor to family planning. To some Africans, especially those attached to religious fraternities and those with purely traditional views, any attempt to deny him/her the right to reproduce unlimitedly is reprehensible and unacceptable. While the West considers eradicating polio as development, some Africans consider it as anti-development and a violation of their culture. For more on the polio vaccine issue in northern Nigeria, see M Yahya “Polio Vaccines—‘No Thank You!’ Barriers to Polio Eradication in Northern Nigeria” (2007) 106 *African Affairs* 185-204. However, the issue has been resolved officially even though there are pockets of resistance that still persist from some people. In essence, intervening in cultural practices is *sine qua non* to interfering with development in Africa. Again, analysing the concept of development from a comparative perspective would raise other non-socio-economic issues. Take for instance the right to fair hearing in most African countries from a comparative perspective with a non-African country. The results are often staggering. In addition, another self-evident index is the issue of conducting free and fair elections. This has become a source of serious disappointment over the years. Again, the rule of law and primarily equality thereto are in a strict legal sense not duly regarded. In these examples, when compared with other relatively “developed” countries, it is possible to discern the level of development of African countries. These examples reflect civil and political rights enshrined under both national and international law. Hence, the conclusion that development is a multidimensional concept cutting across a wide range of human endeavours—civil, political, social, economic and cultural.

that squarely relate to the question regarding the effectiveness of the legal and constitutional mechanisms primarily built and entrenched to install and ensure accountability in these countries.

I should mention, as indicated above under in chapter 2 4 that development has both internal and external dimensions. The external dimension is understood from the relationship of States in a myriad of areas including trade, investment and migration. The external dimension is bolstered through globalisation. Arguably, no country can exist and continue to do so, whether as an industrial or consumer nation, without synergy with other states, regionally or globally. As this is the case, development is determined by a pre-arranged global economic system that is largely unbalanced in favour of developed States. Ideological allegiances to dominant economic blocs also affect development of independent States especially in Africa.¹⁶⁴ Thus, the politics of development is a living reality that affects the development of African States. The existing development superstructures at global level, through various concerted efforts such as debt, conditionality on debt relief, aid and technology transfer seem to set a ceiling for African States as far as development is concerned.

3 7 Concluding remarks

This chapter highlighted the nature of human rights and development from a traditional African perspective. Adopting a historical approach, I have demonstrated how the continent practiced and promoted human rights and development which are akin to western practices. Importantly, I showed that the cornerstone of human rights and development in this region is communitarianism. I further presented that with time, the age-long practice of communitarianism began to drift because of the intercourse the African region had with the western world. Hence, there was the need to revisit and reapproach the issues of human rights and development from a modern perspective.

However, there is little doubt that traditional African societies have notions of human rights and development. They are necessarily intertwined with communal prosperity, shaped by the traditional norms and values designed to secure collective security, individual freedom and personal dignity and integrity. Thus, rights do not exist without communal responsibilities. However, the meanings of these concepts in the traditional

¹⁶⁴ The on-going popularity stunt in Europe between Russia and EU on Chile is a good example of this. President Viktor Yanukovich has to make a concerted decision either to join the EU or to accept Russia's aid. Russia is not a member of the EU.

setting clearly vary from the contemporary understandings. In modern human rights jurisprudence, the tendency has been to categorise human rights in line with political and economic ideologies as well as the history and sociological environments that shaped their emergence. Over the years, there has been an increasing shift of emphasis towards a holistic indivisibility of all rights because experience has shown that prioritisation of rights and politicisation in the human rights arena had only exacerbated human suffering, malnutrition and starvation while ignoring the core issues that require urgent solution. This is further supported by the fact that globalisation has imposed itself on nations. International co-operation has become even more critical particularly in the light of increasing economic inequality among nations. The effects of this widening inequality among nations and individuals can only be imagined. Having examined human rights and development within the traditional African perspectives, I now turn to examine the concept of the right to development under international law in the next chapter.

Chapter 4

The Right to Development under International Law

4 1 Introduction

As noted in chapter 2, the nature of the right to development has generated one of the most tendentious debates amongst human rights scholars. From the broader context of international human rights law, some have argued that the right is nothing but a right conveniently employed in international relations and no more.¹ Others, however, consider it as an emerging right having all the characteristics of customary international law (CIL).² One of the central research questions that guides this research is whether the new, emerging right to development has crystallised into an effective legal norm that can create obligations or rights under international law. I have advanced the hypothesis that the right is an enforceable right in international law in view of the fact that it is contained in many international legal instruments. The aim of this chapter therefore, is to test this hypothesis. As indicated in the introduction I will, in this chapter, consider the third secondary research question, which is to determine whether the right to development has developed to become a legal norm under international human rights law. By international human rights law I, in this chapter, identify the legal products of the UN human rights system.

For a right to be recognised as a *lex lata* it must be grounded in a legally enforceable agreement or accepted state practice. Unlike in international law, it is generally not as difficult to identify the *lex lata* under domestic law.³ This circumstance however is compounded in many domestic legal systems by the way international law is applied within it.⁴ For instance, most domestic legal systems do not recognise group rights or economic, social and cultural rights as justiciable. This will become clear as I discuss the Nigerian approach to the right to development in chapter 6 4 and specifically 6 4 1.

¹ P Alston & R Goodman *International Human Rights: The Successor to International Human Rights in Context* (2013) 1516-1536; Also see generally chapter 2 5.

² Alston & Goodman *International Human Rights* 1516-1536; Salomon argues "The right to development today forms an integral part of the canon of human rights and is supported through the UN human rights machinery." See ME Salomon "Legal Cosmopolitanism and the Normative Contribution of the Right to Development" *LSE Law, Society and Economy Working Papers* (16/2008) <http://eprints.lse.ac.uk/24586/1/WPS2008-16_Salomon.pdf> (accessed 10-01-2015) 11; See generally chapter 2 5.

³ See chapter 6 3.

⁴ There are two main relationship theories on the application of international law – monism and dualism.

Nonetheless, the classical position of modern international law emphasises consent and state sovereignty as the foundation of international law.⁵ This gives domestic law an edge over international law on how the latter is regulated domestically. Thus, according to Goldmann “an international agreement is only legal if its authors agreed on its legally binding character, which may be inferred from its form, its content, and the context of its conclusion.”⁶ Although the underlying principle of *pacta sunt servanda* applies to every agreement, in the case of enforceability of human rights, the document in question must be capable of bestowing duties and rights as consensually agreed upon by the parties concerned. This is signified by ratification of human rights instruments thereby making a party to it bound by its provisions under international human rights law. The implication would therefore be that any violation of a human rights treaty becomes enforceable not only before international judicial bodies but also in domestic courts. Hence, regardless of what governs the application of international law within a legal system, the need for strong commitment and political will towards realising its core tenets, cannot be over-emphasised. Similarly, the intention of the parties bestows an international agreement with binding obligations to attain the status of a *lex lata*. But in the following discussion, I reiterate the pre-eminence of domestic legal systems in determining which and how international law applies in 4.4.

It is noteworthy that under international law, sources are classified as either formal or material.⁷ Formal sources “are those legal procedures and methods for the creation of rules of general application which are legally binding on the addressees.”⁸ Material sources indicate where the rules may be found. Brownlie argues that unlike domestic law where detailed law-making machineries like the legislature, executive and judiciary abound international law lacks such machineries.⁹ He concludes that to that extent, international law does not have formal sources of law and to use such language is “awkward and misleading”.¹⁰ Schwarzenberger however, disagrees with Brownlie and argues that article 38 of the ICJ Statute constitutes a display of the formal sources of international law.¹¹ Article 38 outlines the important sources of law that the ICJ may rely upon in its

⁵ M Goldmann “We Need to Cut Off the Head of the King: Past, Present, and Future Approaches to International Soft Law” (2012) 25 *Leiden J Int'l L* 335-343; and Viljoen *International Human Rights* 31.

⁶ Goldmann (2012) *Leiden J Int'l L* 344.

⁷ See in general I Brownlie *Principles of Public International Law* 7 ed (2008) 3; RMM Wallace & O Martin-Ortega *International Law* (2010) 8; J O'Brien *International Law* (2002).

⁸ Brownlie *International Law* 3.

⁹ 3-4.

¹⁰ 3-4.

¹¹ G Schwarzenberger *International Law* 3 ed (1957) 26-27; See also O'Brien *International Law* 67; Wallace & Martin-Ortega *International Law* 6-7.

proceedings. To determine the juridical character of the right to development, article 38 is utilised as a reference point to consider how the various sources of law relate to the right.¹² Any norm of international law, including the right to development, should be able to conveniently fit into any of the formal or material sources, set out in article 38, for general acceptability and legitimacy on the international plane. Below I focus my attention on CIL and treaty law.

The right to development is still being developed. In this regard the question of the justiciability of the right to development under international, regional and domestic law becomes relevant in order to identify the relevance of the right to development as a legal concept. I engage with this discussion in turn in this chapter and the following chapters 5 and 6. In this chapter I firstly discuss the sources of the right to development under international human rights law. This discussion shows the legal nature of the right to development as a treaty obligation using the international bill of human rights. Secondly, I consider the right to development as a legal norm based on CIL. The aim is to try to assuage and consider the possibility of not relying on treaties as the sole source of the right thereby making it a flexible right. Thirdly, I examine the reception of international human rights law under domestic legal systems. Basically, this is aimed at elaborating the rules that govern this procedure before I apply it specifically to the Nigerian legal system in chapter 6. Finally, I discuss the issue of justiciability of the right to development. Thus, I identify the various actors of the right to development particularly, the beneficiaries and the duty holders that are essential in the implementation of the right.

4 2 The right to development as a treaty obligation: the international bill of rights

As far as development enhances and ensures the realisation of human dignity as contended in chapter 2, the right to development was envisaged at the very beginning of

¹² Statute of the International Court of Justice art. 49, (adopted June 26 1945) 33 UNTS. Art 31 of the Protocol on the Statute of the African Court of Justice and Human Rights (adopted 1 July 2008 and entered into force 1 January 2013) is in *pari materia* with art 38 of the ICJ Statute:

“1. The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply:

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

2. This provision shall not prejudice the power of the Court to decide a case *ex aequo et bono*, if the parties agree thereto.”

the post-World War II human rights discourse.¹³ Eleanor Roosevelt, one of the framers of the UDHR, thus observed, “[W]e will have to bear in mind that we are writing a bill of rights for the world, and that *one of the most important rights is the opportunity for development*. As people grasp that opportunity they can also demand new rights if these are broadly defined.”¹⁴ This idea is further reflected in the UDHR and the UN Charter.

The right to development is directly an offshoot of the initial human rights discourses and although connected to economic development, it is different from international development law. The latter is based strictly on legal positivism and mainly covers areas of international trade and finance. It deals mainly with international economic law and hence can be said to be the economic aspect of international law.¹⁵ The right to development is premised on bridging global inequities on the one hand and reducing the scourge of poverty, disease and underdevelopment on the other, with the sole objective of realising human welfare based on human dignity. However, in striving to achieve the fundamental objectives of the right to development, some aspects of international development law may be affected. This is so because some of the areas that the right to development seek to address include areas within international economic law such as balance of trade, debt and the transfer of technology, which have great influence on human welfare.¹⁶ But the right to development has a wider scope based on the promotion and protection of the human rights of persons and groups.

It is worth reiterating that the right to development being an all-encompassing right has its roots in the major UN human rights instruments including the UN Charter, the UDHR, the ICCPR, the ICESCR, the CRC and other human rights declarations as further discussed in this section. To buttress this, the UDHR contains provisions on all existing rights including economic, social, cultural, civil and political¹⁷ which arguably are all aspects of the right to development.¹⁸ Article 28 of the UDHR provides that: “[e]veryone is

¹³ Note the UNDRD preamble 3, which proclaims: “Considering that under the provisions of the Universal Declaration of Human Rights everyone is entitled to a social and international order in which the rights and freedoms set forth in that Declaration can be fully realized (...).”

¹⁴ Emphasis added. See MG Johnson “The Contributions of Eleanor and Franklin Roosevelt to the Development of International Protection for Human Rights” (1987) 9 *Hum Rts Q* 19 36.

¹⁵ I D Bunn “The Right to Development: Implications for International Economic Law” (2000) 15 *Am U L Rev* 1425-1467.

¹⁶ 1425-1467; see also Ghai “Restructuring the State for the Right to Development” in BA Andreassen & SP Marks (eds) *Development as a Human Right: Legal, Political and Economic Dimensions* 2 ed (2010) 177-208; *The Declaration on the Establishment of a New International Economic Order A/RES/S-6/3201 (DNIEO)* Art 4.

¹⁷ UDHR Art 21-29.

¹⁸ In art 1 of the UNDRD the right to development is defined as “an inalienable human right by virtue of which every human person and all peoples are entitled to participate in, contribute to, and enjoy *economic, social,*

entitled to a social and international order in which the rights and freedoms set forth in this Declaration can be fully realized.” The rights contained in the UDHR, if aggregately considered, reinforce the all-encompassing character of the right to development. To this end, Chowdhury and De Waart argue that by including this provision in the UDHR, the global community has pledged to take steps jointly and individually to ensure that all rights including the right to development are achieved.¹⁹

In addition, the UDHR provides that, “recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world”²⁰. This again constitutes another platform for the right to development and the UDHR further adds that it is “essential to promote the development of friendly relations between nations”.²¹ This signifies that development must be pursued collectively as a matter of responsibility and friendly interactions.

On its part, the UN Charter stresses the need for international co-operation, as a prerequisite for the achievement of all human rights and to this end shall “employ international machinery for the promotion of the economic and social advancement of all peoples”.²² The preamble of the UN Charter is explicit in its objective of reaffirming “faith in fundamental human rights” and “in the dignity and worth of the human person.”²³ It also seeks “to promote social progress and better standards of life” through a machinery that would promote the economic and social advancement of all peoples”²⁴ Rich argues that the right to development stems primarily from morality, solidarity, equity and justice.²⁵ Its realisation is therefore, a duty owed by developed countries to developing ones.²⁶ He further claims that the preamble of the UN Charter, which calls for co-operation, constitutes an important source of the right to development.²⁷

Articles 55 and 56 of the UN Charter gives the UN and its member states a role in the promotion of “economic and social progress and development” together with “universal

cultural and political development, in which all human rights and fundamental freedoms can be fully realized.” (Emphasis added).

¹⁹ SR Chowdhury & PIJM de Waart “Significance of the Right to Development: An Introductory View” in SR Chowdhury, EMG Denters & PJIM de Waart *The Right to Development in International Law* (1992) 8-10.

²⁰ UDHR Preamble.

²¹ UDHR Preamble.

²² See UN Charter Preamble; See also UNDRD Preamble which proclaims:

“Bearing in mind the purposes and principles of the Charter of the United Nations relating to the achievement of international co-operation in solving international problems of an economic, social, cultural or humanitarian nature, and in promoting and encouraging respect for human rights and fundamental freedoms for all without distinction as to race, sex, language or religion”

²³ UN Charter Preamble.

²⁴ UN Charter Preamble.

²⁵ RY Rich “The Right to Development as an Emerging Human Right” (1983) 23 *Va J Int'l L* 287 289-295.

²⁶ 289.

²⁷ 291.

respect for human rights”, thereby constituting an important reference point for the right to development.²⁸ Consequently, the UN Charter marked the beginning of a transition from the old order of international law, which emphasised rights and duties to that of an “international law of cooperation”, with the latter being an important corpus of the right to development.²⁹ The latter has been described as “the organisation and implementation of joint endeavours on a bi-national, regional or multinational level directed to human welfare.”³⁰ Furthermore, by introducing the language of development into the UN Charter, it has dovetailed the concept into the arena of legalism.³¹

From the above, it is clear that the UN Charter is an important foundation of the right to development being the first international document which institutionalised post-World War II human rights practice. Additionally, the UDHR, which followed the UN Charter, advances the rights and freedoms of the human person. Although the UDHR is a declaration, its underlying legitimacy and binding force as a cradle for human rights cannot be overemphasised. In fact, it is accepted as a gingering document for all human rights and many of its provisions have been recognised as “custom” under international law and hence forms part of the so-called international bill of human rights.³² I will address the importance of CIL in the context of the right to development below under 4.3.

In the same vein, further international human rights instruments support the right to development thesis. As I discussed in chapter 2.4, the right to development is a synthesis of existing rights. To this end, the twin Covenants (the ICCPR and the ICESCR) constitute important sources of the right since in substance and spirit, they were drawn from the UDHR.³³ This is even more so considering that two vital components of the right to development, which are self-determination and international co-operation, are recognised under these Covenants.³⁴ Additionally, the twin Covenants contain specific rights that have

²⁸ 291; See UN Charter Arts. 55-56.

²⁹ Rich (1983) *Va J Int'l L* 290; See also CG Fenwick “International Law: The Old and the New” (1966) 60 *Am J Int'l L* 475 482.

³⁰ Rich (1983) *Va J Int'l L* 290 (citing Friedmann).

³¹ MM Kenig-Witkowska “Development Ideology in International Law” in SR Chowdhury, EGM Denters & PJIM de Wart (eds) *The Right to Development in International Law* (1992) 35 35-41.

³² C Tomuschat *Human Rights: Between Idealism and Realism* (2003) 63-64; Viljoen *International Human Rights* 30; B Simma & P Alston “The Sources of Human Rights Law: Custom, Jus Cogens, and General Principles” (1988-1989) 12 *Aust YBIL* 82 90-95.

³³ The UNDRD Preamble 4 provides: “Recalling the provisions of the International Covenant on Economic, Social and Cultural Rights and of the International Covenant on Civil and Political Rights...”

³⁴ See common art 1 ICCPR and ICESCR; See also UNDRD Preamble 6 which provides: “Recalling the right of peoples to self-determination, by virtue of which they have the right freely to determine their political status and to pursue their economic, social and cultural development.” At present 167 States have ratified the ICCPR and 161 States have ratified the ICESCR. Nigeria ratified both on 29th July, 1993. See <https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-4&chapter=4&lang=en> (accessed 02-01-2014) and

direct positive implications on the right to development as an umbrella right. For example, the ICESCR recognises the right of everyone to work³⁵, to social security³⁶, to cultural life,³⁷ to education which must be free and compulsory, at least at the primary level and accessible at higher levels.³⁸ Similarly provision of adequate standard of living, adequate food, clothing, housing, continuous improvement of living conditions of persons are recognised under this instrument.³⁹ The ICESCR even goes ahead to recognise that everyone must be free from hunger.⁴⁰ With regard to the right to health, article 12 (1) of the ICESCR provides the right of everyone to the enjoyment of the highest attainable standard of physical and mental health. To achieve this, states must take charge by ensuring the reduction of stillbirth and infant mortality rate as well as ensuring the healthy development of the child.⁴¹ States must also ensure that all aspects of hygiene and the environment are improved, in addition to putting genuine efforts in the “prevention, treatment and control of epidemic, endemic, occupational and other diseases” as well as in the creation of conditions which would assure medical services to all and medical attention in the event of sickness.⁴²

As I have noted in chapter 2 4, the right to development as a concept, only came into existence at the UN level in 1986 with the adoption of the UNDRD.⁴³ The UN mandated the High Commissioner for Human Rights to “recognise the importance of promoting a balanced and sustainable development for all people and of ensuring realisation of the right to development, as established in the Declaration on the Right to Development.”⁴⁴ The High Commissioner was further mandated to establish a branch to be responsible for the promotion and protection of right to development.⁴⁵ It should be noted that the UNDRD is not a unique document in the sense of containing completely new rights not previously covered.⁴⁶ It more or less reproduced existing human rights and obligations contained in the twin Covenants into a single document with the purpose of harmonising them and

https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-3&chapter=4&lang=en
(accessed 02-01-2014)

³⁵ ICESCR Art 6.

³⁶ ICESCR Art 9.

³⁷ ICESCR Art 15 (1) (a).

³⁸ ICESCR Art 13

³⁹ ICESCR Art 11 (1).

⁴⁰ ICESCR Art 11 (2).

⁴¹ ICESCR Art 12 (2) (a)

⁴² ICESCR Art 12 (c) & (d)

⁴³ UNDRD; See also SP Marks “The Right to Development: Between Rhetoric and Reality” (2004) 17 *Harv Hum Rts J* 137 138.

⁴⁴ 138

⁴⁵ 139.

⁴⁶ Ibhawoh (2011) *Hum Rts Q* 76 82.

pursuing them together. Its uniqueness lies in its articulation of development related rights and where necessary, expanding these rights.⁴⁷ Like the instruments highlighted earlier, the UNDRD emphasises the need for international co-operation as a universal remedy for its achievement.⁴⁸ It is arguably that one of the few known international instruments that defines human rights as an entitlement of both individuals and peoples at the same time.⁴⁹ Human rights are largely conceived as individual entitlements.⁵⁰ Article 8 (1) of the UNDRD provides for some of examples of rights considered to be essential for development:

“States should undertake, at the national level, all necessary measures for the realization of the right to development and shall ensure, inter alia, equality of opportunity for all in their access to basic resources, education, health services, food, housing, employment and the fair distribution of income. Effective measures should be undertaken to ensure that women have an active role in the development process. Appropriate economic and social reforms should be carried out with a view to eradicating all social injustices.”

Interestingly, the UNDRD was a deliberate consequence of the unsuccessful Declaration on the New International Economic Order (DNIEO). Consequently, the New International Economic Order (NIEO) intended to:

“correct inequalities and redress existing injustices, make it possible to eliminate the widening gap between the developed and the developing countries and ensure steadily accelerating economic and social development in peace and justice for present and future generations.”⁵¹

The philosophy of NIEO through the DNIEO was first reflected in the Charter on the Rights and Duties of States (CRDS).⁵² Each of these Declarations was based on the need to upturn the existing unequal global economic arrangement in favour of the North. So far, they have remained engulfed in global ideological skirmishes with little hope for success. In fact, it may be argued that these two ideas, with far reaching consequences on balancing global inequities, exist at best in our past. In my opinion, NIEO and CRDS are abandoned ships with no hope of salvation. It is through the UNDRD that the UN has tried to reintroduce some of these philosophies with some modifications.

The UNDRD is the only declaration that squarely enshrines, in detail, a multifaceted right to development at the global level. Baxi suggests that a parallel may be drawn

⁴⁷ 82.

⁴⁸ UNDRD Art 3(3).

⁴⁹ UNDRD Art 1(1).

⁵⁰ See 4 3 2 below.

⁵¹ UN General Assembly “Declaration on the Establishment of a New International Economic Order” (adopted 1974) A/RES/S-6/3201, (1974) 68 *Am j Int'l L* 798-801 preamble.

⁵² UN Commission on Human Rights, *The New International Economic Order and the Promotion of Human Rights*. (adopted 22 February 1983) E/CN.4/RES/1983/16, UN Doc E/CN.4/RES/1983/16 (CRDS).

between UNDRD and the UDHR as a model.⁵³ According to him, “the problematic content of the [right to development] has attained over the decades, a wider endorsement from the community of states”.⁵⁴ On his part, Rosas argues that the UNDRD reflects general international law and some of its elements may even reflect CIL, as is further discussed under 4.3.⁵⁵ Nevertheless, the concept, as developed in UNDRD as was highlighted above under 2.4, has received critique and resistance.⁵⁶

Furthermore, other declarations such as the UNDRIP equally make provision for the right to development. For instance, article 23 of UNDRIP provides that:

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

In view of the fact that the UNDRD and the UNDRIP are soft laws, the legal rationalisation of the right to development, as such, becomes highly contentious. In this regard it is important to point out that as the right to development, as discussed above, is a conglomeration of various rights ranging from economic, social, cultural, civil and political rights. This has been re-echoed even under the UNDRD when it provides that:

“All human rights and fundamental freedoms are indivisible and interdependent; equal attention and urgent consideration should be given to the implementation, promotion and protection of civil, political, economic, social and cultural rights.”⁵⁷

This is further intensified in subsequent notable undertakings like the Vienna Declaration and Programme of Action (Vienna Declaration)⁵⁸, which gave the right to development a higher impetus, reaffirmed its importance in 1993.⁵⁹ Although the Vienna Declaration shares the same legal significance as the earlier mentioned declarations, it

⁵³ U Baxi “Normative Content of a Treaty as Opposed to the Declaration on the Right to Development: Marginal Observations” in S Marks (ed) *Implementing the Right to Development: The Role of International Law* (2008) 47-51.

⁵⁴ 47.

⁵⁵ A Rosas “The Right to Development” in A Eide, C Krause & A Rosas (eds) *Economic Social and Cultural Rights* 2 ed (2001) 119-123.

⁵⁶ See P Uvin *Human Rights and Development* (2004) 1.

⁵⁷ UNDRD Art 6 (2), see also Preamble.

⁵⁸ UN General Assembly, Vienna Declaration and Programme of Action (adopted 12 July 1993) A/CONF.157/23.

⁵⁹ Vienna Declaration Arts. 10 & 11. Since the Vienna Declaration, virtually every Conference reaffirms the right to development. See for example Rio Declaration on Environment and Development (adopted 12 August 1992) A/CONF.151/26 (Principle 3 and 4); Conference on Population and Development 1994; World Summit for Social Development 1995; Fourth World Conference on Women 1995; World Food Summit 1996; UN Second UN Conference on Human Settlements 1996; World Conference against Racism, Racial Discrimination and Xenophobia and other Related Intolerance 2001; Millennium Summit 2000; World Social Summit 2002; Doha Declaration on Financing for Development 2008; United Nations Conference on Sustainable Development, Rio+20 2012.

turned out to be a rallying point on the general nature of international human rights.⁶⁰ I must therefore reemphasise that the right to development is an aggregation of all existing human rights and can only be realised if and when at least one or more of them is being implemented and non, is violated. Thus, it is a right that uncompromisingly seek to ensure the indivisibility and interdependence of all human rights.

I should stress that a declaration per se constitutes soft law and does not create any binding obligations if its provisions, or part thereof, has not been accepted as CIL as I discuss below in 4.3. Most of these highlighted sources fall within the category of soft law which arguably have not been generally accepted as CIL and are therefore, prima facie, unenforceable. In other words, they do not ordinarily bestow any legal right.

But soft law is not all together irrelevant. Importantly, non-compliance with soft law obligations may have damaging consequences for states in their international relations.⁶¹ Tomuschat is of the opinion that lawyers would be in default if they fail to support their arguments with relevant soft law instruments in their submissions before any court or tribunal because soft law is acquiring “an ever-growing weight” in international law.⁶² Hence, soft law often set off and eventually contribute to the development of international customary law and legally binding treaties as exemplified in the case of the UDHR.⁶³ The right to development enjoys significant support from soft law. Thus, the following sections examine the legal nature of the right to development under international human rights law.

Conventionally, international agreements are evidenced in written form as treaties.⁶⁴ A treaty possesses the necessary force, which the parties to it intend.⁶⁵ Simma and Alston are of the opinion that “treaty law provides a solid and compelling legal foundation.”⁶⁶ As noted earlier, the right to development has developed through soft law. However, most of the treaties (general or particular) as discussed by various scholars⁶⁷, except in the case of the ACHPR as further discussed in the next chapter, are not apt on the right to development as they only outline aspects and in some cases philosophise the constituent framework of the right. At best, the right draws inspiration from documents like the UN

⁶⁰ Vienna Declaration Arts 5 & 10.

⁶¹ Viljoen *International Human Rights* 30.

⁶² See Tomuschat *Human Rights* 36.

⁶³ Viljoen *International Human Rights* 30.

⁶⁴A treaty is “an international agreement concluded between States in written form and governed by international law, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation” See VCLT Art 2 (1) (a).

⁶⁵ VCLT Art 6-24.

⁶⁶ Simma & Alston (1988-1989) *Aust YBIL* 82.

⁶⁷ For example Bunn (2000) 15 *Am U L Rev* 1425-1467 (using the term fundamentals of the RTD); Kamga *Human Rights in Africa* chapters 2 and 3.

Charter, UDHR, ICCPR, ICESCR and other African human rights treaties as I have in this section above. The question remains as to what extent this indirect method gives credence to the right to development as a legal norm. Alfredson is of the view that this indirect allusion to treaties not directly related to the right to development amounts to “a risky form of gymnastics”.⁶⁸ He also added that political preferences are not good conclusions to create legal obligations.⁶⁹ However, most scholars, when outlining the evolutionary character of the right to development, always begin with articles 55 and 56 of the UN Charter.⁷⁰ In addition, the UNDRD itself defines the right generously as an underlying right whereby “all human rights and fundamental freedoms can be fully realized”.⁷¹ Furthermore, Kamga notes that justiciability based on legal positivism is not enough to obfuscate the right to development as a human right.⁷² Sen suggests that social and political activism may serve as a sufficient rallying point for recognising and achieving human rights.⁷³ Therefore, my contention is that the right to development significantly forms part of the human rights system albeit through the principle of interconnectedness of human rights. Undoubtedly, the right to development is a child of international treaty law at the international level. This I have shown in 4 2 above. Unarguably, the right to development, with the exception of Africa, is not rooted in any enforceable treaty *stricto sensu*. However, many of its important components are fully supported in the international bill of rights as discussed in in this section above. Nevertheless, the relationship between international and domestic law affects the application of treaties within domestic legal systems. This is further examined in chapter 6 3 of this dissertation.

4 3 Right to development as CIL

The common practice in international relations is to use treaties as the acceptable forms of agreements in inter-state relationships. But like Simma and Alston argue, “treaty law on its own provides a rather unsatisfactory basis on which to ground the efforts of international institutions whose reach is truly universal.”⁷⁴ Treaties signify strong commitments to terms agreed but may nevertheless remain so without establishing any legal rights as such.

⁶⁸ G Alfredson “The Right to Development: Perspectives from Human Rights” in LA Rehof & C Gulmann (eds) *Human Rights in Domestic Law and Development Assistance Policies of the Nordic Countries* (1978) 84.

⁶⁹ 84.

⁷⁰ Rosas “The Right to Development” in *Economic Social and Cultural Rights* 121; Chowdury et al *The Right to Development* 10; M Ozden “The Right to Development” *CETIM* 9.

⁷¹ UNDRD Art 1.

⁷² Kamga *Human Rights in Africa* 133-152

⁷³ Sen “The Right to Development” in *Development as a Human Right* 8-9.

⁷⁴ Simma & Alston (1988-1989) *Aust YBIL* 82.

Strong reliance on these agreements may raise their status and significance in law. Simma and Alston expressed their reservation on the efficiency of treaty law thus: “[r]eliance upon treaty law is likely to be even less rewarding in relation to domestic legal argumentation in the courts, legislatures and executives of countries which have ratified few if any of the major international treaties.”⁷⁵ They argue that CIL tends to be “the formal source which provides, in a relatively straight-forward fashion, the desired answers” to institutionalising international law in domestic legal systems.⁷⁶ Therefore, depending on certain circumstances, as discussed hereunder, international commitments may be construed as legally binding as in the case of UDHR and the Vienna Declaration. Thus, a key interrogation is whether the right to development qualify as a norm under CIL in view of its antecedents.

A practice becomes CIL if it has become consensually a general one.⁷⁷ Arguably, the principles of CIL belong to that class of international law that is *sui generis*.⁷⁸ It is a source of law in its own right and hence needs no other source to validate it.⁷⁹ In Dahlman’s words, “customary law is not law because the court applies it; it is applied by the court because it is law.”⁸⁰ In other words, once CIL is established, it applies automatically without the need for a court to validate it. While this is the most popular opinion about the status of CIL, its application may be limited to a large extent by domestic legal systems as I further discuss in chapter 6 2 with reference to the Nigerian context.⁸¹ Under article 38 (1) (b) CIL must satisfy two conditions.⁸² These are (a) State practice or actual conduct of State (evidence of material fact) and (b) evidence of subjective belief that the actual conduct constitutes law (psychological requirement).⁸³ The second requirement, also referred to as *opinio juris sive necessitate*, is the central ingredient of CIL.⁸⁴ *Opinio juris* as

⁷⁵ 83.

⁷⁶ 83.

⁷⁷ O’Brien *International Law* 68-69;

⁷⁸ C Dahlman “The Function of *Opinio Juris* in Customary International Law” (2012) 81 *Nordic J Int’l L* 327-328 For further exposition on custom see MN Shaw *International Law* 5 ed (2003) 68-88; DH Ott *Public International Law in the Modern World* (1987) 13-22; E Kadens & EA Young “How Customary is Customary International Law” (2013) 54 *Wm & Mary L Rev* 885-920; AE Roberts “Traditional and Modern Approaches to Customary International Law: A Reconciliation” (2001) 95 *Am J Int’l L* 757-791; S Walt “Why Jurisprudence Doesn’t Matter for Customary International Law” (2013) *Wm & Mary L Rev* 1052-1055.

⁷⁹ Dahlman (2012) 81 *Nordic J Int’l L* 378.

⁸⁰ 378; See also H Steiner and P Alston *International Human Rights in Context: Law, Politics and Morals* (1996) 27.

⁸¹ J Austin *Lectures on Jurisprudence* (1885) 536–537 cited in Dahlman (2012) *Nordic J Int’l L* 329.

⁸² O’Brien *International Law* 69; See also Posner & Goldsmith Working paper No 63 (1998) 5; and Dahlman (2012) *Nordic J Int’l L* 327.

⁸³ O’Brien *International Law* 69; Dahlman refers to them as the objective and subjective tests, see Dahlman (2012) *Nordic J Int’l L* 329-330.

⁸⁴ O’Brien *International Law* 69; See also Posner & Goldsmith Working Paper No 63 5.

it is simply referred to, serves as a “filter” to prevent “generally unwanted general practice from becoming customary international law.”⁸⁵

State practice is discernible through the representation (acts, pronouncements and conducts) of the different arms of government (executive, legislative and judicial)⁸⁶. Generally, state practice can be demonstrated especially in our modern world through various modes including policy statements, national legislation, and diplomatic correspondence.⁸⁷ Even treaties, UN resolutions and writings of jurists can form evidence of state practice.⁸⁸

The more difficult aspect of state practice is determining the duration of the practice before it can be recognised as such. In the *Nicaragua case*, the ICJ held that:

“The Court does not consider that, for a rule to be established as customary, the corresponding practice must be in absolutely rigorous conformity with the rule. In order to deduce the existence of customary rules, the Court deems it sufficient that the conduct of States should, in general, be consistent with such rules, and that instances of State conduct inconsistent with a given rule should generally have been treated as breaches of that rule, not as indications of the recognition of a new rule.”⁸⁹

Brownlie argues that, provided consistency and generality of practice can be ascertained, duration is not a basic requirement.⁹⁰ He adds that evidence of long practice is not necessary.⁹¹ However, other scholars consider that at least two, five, ten or even 40 years should pass for a custom to be established.⁹² Some literalists argue that even a single evidence of a states’ conduct is enough to establish a custom so long as it is a general and consistent practice.⁹³

Another important consideration is whether all the state parties must be in agreement on the practice for it to be recognised as CIL. This is important in view of the acceptable definition of the ICJ Statute, which requires that the custom must be a “general practice accepted as law”. Accordingly, a practice must be widespread and largely acceptable to

⁸⁵ Dahlman (2012) *Nordic J Int'l L* 328.

⁸⁶ O'Brien *International Law* 70.

⁸⁷ Posner & Goldsmith Working Paper No 63 5.

⁸⁸ 5; see also Restatement (3rd) Foreign Relations Law of the United States (1987) section 102 which provides that state practice: “includes diplomatic acts and instructions as well as public measures and other governmental acts and official statements of policy, whether they are unilateral or undertaken in cooperation with other states, for example in organizations.”

⁸⁹ *Nicaragua v US* (Merits) (1986) ICJ 14, para186.

⁹⁰ I Brownlie *Principles of Public International Law* 6 ed (2000) 7.

⁹¹ 7.

⁹² Kadens & Young (2013) *Wm & Mary L Rev* 890-891.

⁹³ Kamga *Human Rights in Africa* 153-154; B Cheng “United Nations Resolutions on Outer Space: ‘Instant’ Customary Law?” (1995) 5 *Ind J Int'l L* 23-24 arguing that a strongly worded UN resolution could establish instant custom; See also Brownlie *Principles of International Law* 7.

the parties concerned in such a manner that consent is given to it.⁹⁴ In this regard, states must have voluntarily accepted the practice. This is referred to as the acceptance theory. There is also the belief theory, which only requires states to recognise the practice as a norm of international law.⁹⁵ Both theories have been supported by the sources of international law. While, article 38 of the ICJ Statute supports the acceptance theory as exemplified above, in another instance, the ICJ's opinion supported the belief theory when it observed:

"Not only must the acts concerned amount to a settled practice, but they must also be such, or be carried out in such a way, as to be evidence of a belief that this practice is rendered obligatory by the existence of a rule of law requiring it. The need for such a belief, i.e. the existence of a subjective element, is implicit in the very notion of the *opinio juris juris sive necessitatis*. The States concerned must therefore feel that they are conforming to what amounts to a legal obligation. The frequency, or even habitual character of the acts is not in itself enough. There are many international acts, e.g., in the field of ceremonial and protocol, which are performed almost invariably, but which are motivated only by considerations of courtesy, convenience or tradition, and not by any sense of legal duty."⁹⁶

Dahlman argues that *Opinio juris* should be interpreted to mean general or widespread acceptance.⁹⁷ He points out that "the formation of customary international law requires the existence of a general practice, and the subjective element (*Opinio juris*) requires a widespread approval of the practice."⁹⁸ Thus a practice does not become CIL merely because it exists but because it has widespread acceptability.⁹⁹ Acceptance should not imply that every state accepts the practice.¹⁰⁰ In Dahlman's proposition, acceptance "does not even mean that an individual state must accept it in order to be legally bound by it. It only means that there should be a broad approval among states." Importantly CIL should be "construed or approached in such a way as to supply a relatively comprehensive package of norms which are applicable to all States."¹⁰¹ There is however the need to be reminded of a "persistent objector" against the state practice. Some states may remain resolute in their resolve not to accept a state practice as binding upon them.¹⁰² The notion of persistent objector has however waned away and what is required is that a state practice is general.¹⁰³ Nevertheless, it is still not irrelevant altogether because some states

⁹⁴ Dahlman (2012) *Nordic J Int'l L* 330-331; Viljoen *International Human Rights* 29.

⁹⁵ Dahlman (2012) *Nordic J Int'l L* 330.

⁹⁶ *North Sea Continental Shelf*, Judgment, ICJ Reports (1969) para. 77. See also Dahlman (2012) *Nordic J Int'l L* 330.

⁹⁷ Dahlman (2012) *Nordic J Int'l L* 336.

⁹⁸ 335.

⁹⁹ 335.

¹⁰⁰ 336.

¹⁰¹ Simma & Alston (1988-1989) *Aust YBIL* 83.

¹⁰² Viljoen *International Human Rights* 29.

¹⁰³ Viljoen *International Human Rights* 29; *North Sea Continental Shelf* (1986) ICJ Rep 3 para 63.

have continued to employ it in disputed areas like rights of women, children and minorities as I exemplify in 6 4 1. Therefore, Simma and Alston conclude that: “given the fundamental importance of the human rights component of a just world order, the temptation to adapt or re-interpret the concept of customary law in such a way as to ensure that it provides the 'right' answers is strong, and at least to some, irresistible.”¹⁰⁴

So, can it be argued that the right to development has assumed the status of CIL? Firstly, as noted earlier, a norm binding as a CIL emerges out of repeated state practice and *opinio juris* or the psychological conviction by states that they are behaving out of a legal obligation to act in a certain way.¹⁰⁵ The result is that CIL norms are generally imprecise, flexible, ambiguous and not easily ascertainable. According to Shaw, CIL reflects “the consensus approach to decision-making with the ability of the majority to create new law binding upon all, while the very participation of states encourages their compliance with customary rules.”¹⁰⁶ This means that a norm may crystallise into a custom under international law without any conscious deliberation by states or specific time frame except in the case of instant customs.¹⁰⁷

Development is the hope of all societies. Sustained development has become an aspiration, guiding the laws and policies of countries. Thus, the Vienna Declaration resoundingly produced a universal consensus recognising the right to development as an inalienable human right interconnected with other recognised human rights in the world thereby satisfying the state practice aspect of CIL.¹⁰⁸ UN Resolutions, Declarations and Conferences as well as the increasing significance of development affecting national and international policies also confirm this. Shaw maintains that where the “vast majority of states consistently vote for resolutions and declarations on a topic, that amounts to a state practice and a binding rule may very well emerge provided that the requisite *opinio juris* can be proved.”¹⁰⁹ This has always been the case with the right to development. In the *Legality of the Threat or Use of Nuclear Weapons*¹¹⁰ it was noted as follows:

“General Assembly resolutions, even if they are not binding, may sometimes have normative value. They can, in certain circumstances, provide evidence important for establishing the

¹⁰⁴ Simma & Alston (1988-1989) *Aust YBIL* 83.

¹⁰⁵ *Anglo-Norwegian Fisheries case* ICJ Reports (1951) 116, 131 and 138; *North Sea Continental Shelf cases* ICJ Reports (1969) 3; *Nicaragua v. United States* ICJ Reports (1986) 14; See also M. Mendelson, “The Formation of Customary International Law” (1999) 272 *Hague Academy of International Law, Collected Courses* (1999) 155-410 159.

¹⁰⁶ M Shaw *International Law* 6 ed (2008) 74.

¹⁰⁷ 74.

¹⁰⁸ Rudolf “The Relation of the Right to Development” in *Implementing the Right to Development* 105

¹⁰⁹ Shaw *International Law* 115.

¹¹⁰ *The Legality of the Threat or Use of Nuclear Weapons* ICJ Reports (1996) 226.

existence of a rule or the emergence of an *opinio juris*. To establish whether this is true of a General Assembly resolution, it is necessary to look at its content and the conditions of its adoption; it is also necessary to see whether an *opinio juris* exists as to its normative character. Or a series of resolutions may show the gradual evolution of the *opinio juris* required for the establishment of a new rule."¹¹¹

Nonetheless its opposition, there is increasing consensus that the UDHR has now assumed the status of CIL and is therefore binding.¹¹² Most legal systems have since incorporated its provisions into their legal order and thus a primary source of human rights standards.¹¹³ In Hannum's opinion the UDHR:

"[R]ecognition as a source of rights and law by states throughout the world distinguishes it from conventional obligations. Virtually every international instrument concerned with human rights contains at least a preambular reference to the Universal Declaration, as do many declarations adopted unanimously or by consensus of the UN General Assembly."¹¹⁴

In view of this, under this UDHR:

"[E]veryone, as a member of society, has the right to social security and is entitled to realization, through national efforts and international cooperation and in accordance with the organization and resources of each state, of the economic, social and cultural rights indispensable for his dignity and the free development of his personality."¹¹⁵

In addition, it can be argued that the same Vienna Conference, which produced the Vienna Declaration, indicated the general psychological feelings of the global community towards the right to development. This is revitalised by the repeated and constant resolutions and declarations endorsing the right including the UNDRD. Plus, practices of developed countries in respect of official development assistance (ODA) go to demonstrate the inherent universality of the right as well as the *opinio juris* giving it some customary value under international law. During the Vienna conference, even the USA, which is a staunch opponent of the right, voted in its favour. More so, no universality of state practice is required to produce a CIL norm.¹¹⁶ Almost all developed countries feel compelled, even in the absence of a specific treaty obligation, to offer development assistance to developing countries. Incidentally, the international bill of human rights

¹¹¹ *The Legality of the Threat or Use of Nuclear Weapons* ICJ Reports (1996) 226.

¹¹² See for instance VP Nanda "Development as an Emerging Human Right Under International Law" (1983-1984) 13 *Denver Journal of International Law and Policy* 161-180; SP Marks *The Human Rights Framework for Development: Seven Approaches* 257-290 (François-Xavier Bagnoud Center for Health and Human Rights, Harvard School of Public Health, 2003), available at http://www.hsph.harvard.edu/fxbcenter/FXBC_WP18--Marks.pdf (accessed 01-08-2015); RJ Dupuy (ed) *The Right to Development at the International Level, Workshop, the Hague*, 16-18 October 1976 (1980).

¹¹³ Hannum *Human Rights and Health* 146.

¹¹⁴ 146.

¹¹⁵ UDHR Art 22.

¹¹⁶ *North Sea Continental Case* ICJ Reports (1969) 3.

support the right at the global level as discussed in 4 2 while at the same time African treaties as discussed in 5 2 also do so.

There are other global development actors under the auspices of the UN, EU, AU, ASEAN, etc. that continue to insist on the implementation of the right to development. The members of these global institutions are directly and indirectly committed to this right. In fact, it has become the norm to sanction countries that ignore the internal dimension of right to development.¹¹⁷ Rudolf observes that by virtue of general international law practice, there is a suggestion that the right to development is justiciable.¹¹⁸ In his words:

“Although the Vienna Declaration is not binding as such, its solemn and unequivocal proclamations of rights reflect the participating states’ understanding of present-day international law. Therefore, it is a strong argument in favor of the states’ recognition of a right to development, *i.e.* their *opinio iuris*”¹¹⁹

For Rudolf therefore, the UNDRD has endeavoured to define the content of the right to development such that the right must be viewed as satisfying the requirements of CIL.¹²⁰ In any case, rules of international law should be viewed as flexible rules. As far back as 1915, Sir Samuel Evans opined that international law should not be considered as shackles which deter the development of laws.¹²¹ Hence he authoritatively argued:

“In the domain of international law, in particular, there is room for the extension of old doctrines or the development of new principles, where there is, or is even likely to be, a general acceptance of such by civilised nations. Precedents handed down from earlier days should be treated as guides to lead, and not as shackles to bind. But the guides must not be lightly deserted or cast aside.”

Applying these principles to the right to development reveals that the right recurs in virtually every international discourse on human rights. As earlier discussed in 2 4 3, at the time the UN General Assembly voted to adopt the UNDRD in 1986, it received positive votes across a wide spectrum of interests and ideologies that were present. Except for the USA which casted a negative vote and a few European countries that abstained, every other country voted in favour of the UNDRD. The voting pattern signified the level of acceptability of the global community’s resolve for a right to development. Going further, during the adoption of the Vienna Declaration, which contained a restatement of the acceptance of the right to development, the entire global community, including the USA

¹¹⁷ This is especially the case with the USA. See S Marks “The Human Right to Development: Between Rhetoric and Reality” 17 (2004) *Harv Hum Rts J* 137-168

¹¹⁸ S Marks “A Legal Perspective on the Evolving Criteria of the HLTF on the Right to Development” in S Marks *Implementing the Right to Development in International Law* (2008) 72-83 74

¹¹⁹ Rudolf “The Relation of the Right to Development” in *Implementing the Right to Development* 105.

¹²⁰ 106.

¹²¹ *The Odessa* [1915] 52, 61-62 cited in *Trendtex Trading Corporation v. Central Bank of Nigeria* [1977] 2 WLR 356

which had earlier casted a negative vote against the UNDRD, voted in favour of the Declaration.¹²² Thus, the voting pattern whenever it occurred, including during the adoption of UNDRD, shows that the global community is committed to the realisation of the right to development. The USA cannot therefore be considered as a “persistent objector” against a right to development. Even if it is, the fact that the right to development is acceptable to majority of states therefore reduces the effect of such objection on the realisation of the right. Although, the position of the USA as a super power and the most influential country in global politics calls for caution before its opinion may be dismissed. Interestingly however, by its conduct, the USA has made several efforts to promote the development of less privileged states and those in need of help. It has therefore promoted and contributed to one of the cornerstones of the right to development, which is international co-operation, in such a manner as to give meaning to it.¹²³

Furthermore, the debates and the implementation of the right to development spans over 38 years from when Mbaye made the first formal call as discussed in chapter 2.¹²⁴ This was followed by a series of diplomatic and academic discourses on the right culminating in formal discussions at the UN level. The establishment of an inter-governmental working group; appointment of an independent expert; and the creation of a HLTF on the right to development further suggest substantial efforts towards concrete recognition of the right at the international level. Salomon argues unequivocally that no other human right has consistently featured in international discourses as the right to development.¹²⁵ I therefore argue that the state practice on the promotion of the right to development have been resounding given the widespread acceptance.

By the year 2000, the MDGs Declaration was adopted.¹²⁶ Just this year, the SDGs replaced MDGs as the most recent resolve by the global community to institutionalise the right to development. Until the SDGs were adopted, MDGs have become the most important activity of the global community’s resolve to fight poverty and ensure that together, development is achieved across board. This is supported by the concomitant

¹²² The votes recorded were 146 in favour, 1 against (USA), with 8 abstentions (mostly developed countries). Among those who favoured the Declaration include some developed countries: Australia, Canada, France, Netherlands and New Zealand see for instance I Iqbal “The Declaration on the Right to Development and Implementation” (2007) 1 *Political Perspectives* 1 1-2.

¹²³ S Marks “The Human Right to Development: Between Rhetoric and Reality” (2004) 17 *Harv Hum Rts J* 137 137-168.

¹²⁴ See chapter 2 4.

¹²⁵ ME Salomon “Legal Cosmopolitanism and the Normative Contribution of the Right to Development” in S Marks (ed) *Implementing the Right to Development* 17-26.

¹²⁶ UN General Assembly, United Nations Millennium Declaration (adopted 18 September 2000) UNGA A/RES/55/2.

change in the modus operandi by the UN and its agencies such as the UNDP speak volumes of the commitment to reduce poverty and ensure global development.

In Africa, official development assistance (ODA) programmes and policies add to the comprehensiveness of the commitment by global partners for development. The post 1993 recognition of the right to development has significantly affected even the Bretton Wood institutions of the world. International financial institutions (IFIs) such as the World Bank and the International Monetary Fund (IMF) now recognise and uphold human rights in the conduct of their activities. In fact, Alston suggests that the right to development is *fait accompli*: “Whatever reservations different groups may have as to its legitimacy, viability or usefulness, such doubts are now better left behind and replaced by efforts to ensure that the formal process of elaborating the content of the right is a productive and constructive exercise.”¹²⁷

I therefore argue that considering the efforts channelled towards the realisation of the right to development, in whatever form or name, the concept has assumed the status of an important legal norm. Regardless of all these permutations on the right to development it will however be speculative to conclude that the right to development is in fact CIL, in view of the raging opposition and varying interpretations it receives from the major stakeholders, especially states and international institutions that can help towards its realisation. But the truth of the matter is apart from the opinion of scholars, there exist no concrete evidence that suggests that the right to development has been widely accepted as CIL. It has however been recognised as an important legal concept and principle. This proposition is strengthened by the fact that at international level the right to development is still contained in a declaration and not in a binding treaty. As I further discuss in chapter 6 3 1, the Nigerian legal system itself is bound to obey, promote and implement the right to development on this basis even in the absence of express legal provision to that effect. This is mitigated by the express recognition of the right in the ACHPR as I further discuss in the following chapter. Thus, in this regard, it is a treaty obligation.

Overall, while state practice favours the right to development as CIL, the *opinio juris*, unfortunately, does not appear to support it as such. Thus, until such time when a treaty on the right to development is adopted and ratified it is doubtful whether there will be any uniform state practice in this regard. Nevertheless, the right is not altogether impotent. It has in many ways, as I have shown above, contributed to global efforts for reducing

¹²⁷ P Alston “Development and the Rule of Law: Prevention versus Cure as a Human Rights Strategy”, in International Commission of Jurists (Eds) *Development, Human Rights and The Rule of Law* (1981) 31 31, 106.

poverty and for fashioning the psyche of states' development institutions on the importance of a rights-based approach to development. Moreover, as Tomuschat and Viljoen have separately observed custom is less significant in the area of human rights because, empirically, ascertaining state practice is problematic.¹²⁸

4.4 The reception of international human rights law

Before I discuss the justiciability of the right to development under international human rights law, I would like to highlight the relationship between international and domestic law. The reason is to lay a foundation for the discussion of the application of international law within the Nigerian legal system.

It is commonplace that the scope of international law is no longer limited to state-to-state affairs or rules of warfare and diplomatic relationships.¹²⁹ Like domestic law, international law is concerned with development and its attendant issues such as health, education, the environment and human rights generally, as discussed in chapter 2.4.¹³⁰ However, international law is only applicable in any domestic legal system based on the dictates of the latter. It is the domestic legal regime of any given country that ignites and paves way for the application of international law within domestic domain.¹³¹ In this regard the external obligation vis-à-vis a right may exist under international law however it will only become meaningful if the domestic legal system internalises the right either through the creation of legislation or through viewing the right as self-executing.¹³² However, before this becomes relevant it is important to highlight the two main theories (monism and dualism) on the application of international law in domestic legal systems in addition to that which argues that international law is no law at all.¹³³ However, the latter is not being supported by the current reality on the propriety or otherwise of international law. In fact, as far back as 1936 Starke opined that such notion "is hardly taken seriously" hence international law, as law is *fait accompli*.¹³⁴ The two main theories for the application of international law are monism and dualism.¹³⁵ What these theories do is to determine how international law should apply in domestic legal systems.

¹²⁸ Viljoen *International Human Rights* 29; C Tomuschat *Human Rights: Between Idealism and Realism* (2003) 34.

¹²⁹ RMM Wallace & O Martin-Ortega *International Law* 7 ed (2013) 37.

¹³⁰ 37.

¹³¹ See generally Viljoen *International Human Rights Law* 517-559.

¹³² 524

¹³³ JG Starke "Monism and Dualism in the Theory of International Law" (1936) 17 *Brit YB Int'l L* 66 70.

¹³⁴ Starke (1936) *Brit YB Int'l L* 69.

¹³⁵ See J Dugard *International Law: A South African Perspective* (2005) 47-48.

Monism treats all forms of law, including both international and domestic law, as one and the same, being integral parts of one system.¹³⁶ To the monists, both international law and domestic law are “manifestations of a single conception of law.”¹³⁷ Thus, international law applies domestically without recourse to any legal impediments constitutional or otherwise. As a result, domestic courts may apply international law as they deem fit.¹³⁸ For example, to buttress monism, the Kenyan Constitution states that “general rules of international law shall form part of the law of Kenya.”¹³⁹ Therefore, the basic requirement for the application of international treaty law in monist states is that the treaty has been ratified and published by the relevant authorities, mostly, the executive arm of a government. By so doing, such international treaty, being of international law status becomes part of the laws of that state.¹⁴⁰ Consequently, any conflict between international law and municipal law is resolved in favour of international law.¹⁴¹

However, this is not altogether a universal rule. In Viljoen’s opinion, monism promises more than it delivers¹⁴² because, according to him the notion of direct application of international law in monist states is fallacious.¹⁴³ Even in France, the spearhead of civil law countries, the *Conseil d’Etat* makes it clear that article 55 does not apply to provisions of a constitutional nature.¹⁴⁴ Hence, constitutional provisions prevail over and above those of international treaties. However, in the case of Kenya, no such limitation is provided for. Apparently, general rules of international law apply regardless of what the Constitution enshrines.¹⁴⁵ The Kenyan Constitution therefore becomes the most instructive example of monism in Africa. In any case, most civil law countries attempt to avoid any potential conflict between the two systems by ensuring that their constitutional council or courts bring any international law treaty into conformity with their domestic legal order, prior to

¹³⁶ Wallace & Martin-Ortega *International Law* 38; Klabbbers argues that they are branches of the same tree, see J Klabbbers *International Law* (2013) 290.

¹³⁷ M Killander & H Adjolahoun *International Law and Domestic Human Rights Litigation in Africa: An Introduction* (2010) 5; Dugard *International Law* 47.

¹³⁸ Killander & Adjolahoun *International Law and Domestic Human Rights* 5; Dugard *International Law* 47.

¹³⁹ Constitution of Kenya 2010 S 2 (5). The French Constitution provides in article 55 that: “Treaties or agreements duly ratified or approved shall, upon publication, prevail over Acts of Parliament, subject, with respect to each agreement or treaty, to its application by the other party.” Constitution of France, 1958; See also the constitutions of Benin, 1990 art 147; Burkina Faso, 1991 (as amended) art 151; Burundi 2005 art 292; Cameroon, 1972 (as amended) art 45; Central African Republic, 2004 art 69; Niger 2010 art 171, Congo-Brazzaville 2002, art 185, Côte d’Ivoire 2000 art 87, Democratic Republic of Congo 2005 (DRC) art 215, and Guinea 2010 art 149.

¹⁴⁰ Killander & Adjolahoun *International Law and Domestic Human Rights* 6.

¹⁴¹ Wallace & Martin-Ortega *International Law* 38; see also Klabbbers *International Law* 290.

¹⁴² Viljoen *International Human Rights* 521.

¹⁴³ 518.

¹⁴⁴ Killander & Adjolahoun *International Law and Domestic Human Rights* 6.

¹⁴⁵ Constitution of Kenya S 2 (5).

ratification.¹⁴⁶ Nevertheless, the direct application of international law by the so-called monists' states is largely avoided even if invoked by counsel.¹⁴⁷ Less frequently however, these courts refer to international law in order to give more vigour to constitutional provisions.¹⁴⁸ In the area of human rights, monist states have endeavoured to enact elaborate provisions on the protection of human rights within their domestic legal structure, thereby limiting recourse to international law sources.¹⁴⁹ Therefore, as argued by Killander and Adjolohoun, while the constitutional framework of African civil law countries is monist their judicial culture is practically dualist.¹⁵⁰ It follows that the elaborate human rights provisions in their constitutions delimits the extent to which they refer to and rely on direct application of international law.¹⁵¹ On its part, dualism requires that international law must first be incorporated into the legal system in question because each of them belongs to a class of its own.¹⁵² Thus, each of the two is mutually exclusive and operates within their designated domains.¹⁵³

The idea of domestication is hinged on promoting the sanctity of the doctrine of separation of powers. Since parliament is the supreme lawmaker, no law, including international law should apply within a dualist state without first being part of its *corpus juris*. Accordingly, international law is not superior to domestic law. In fact, a likelihood of conflict under this theory, would not even arise between the two systems since international law must first become part of the *corpus juris* before it assumes any force of law. Fitzmaurice contended that such a conflict is unreal and imaginary because neither international law nor domestic law ever operates in each other's domain.¹⁵⁴ His contention

¹⁴⁶ 6. See also Algeria (art 165), Benin (art 146), Burkina Faso (art 150), Cameroon (art 44), Central African Republic (art 68), Madagascar (art 118), Mali (art 90). The Republic of Benin has even gone ahead to incorporate the ACHPR as an annex into its constitution, see The Constitution of The Republic of Benin art 7. See also Viljoen *International Human Rights* 520.

¹⁴⁷ Killander & Adjolohoun *International Law and Domestic Human Rights* 6.

¹⁴⁸ 10.

¹⁴⁹ 10.

¹⁵⁰ 10.

¹⁵¹ 10.

¹⁵² Basically treaty obligations begin with adoption, then signing, ratification before it finally enters into force. VCLT arts 6-24.

¹⁵³ Wallace & Martin-Ortega *International Law* 38. Loveland explains the rationale for domesticating international law thus:

"The 1688 revolution produced an agreement between William of Orange and Parliament which provided that the constitutional role of the King's government was to govern within the laws made by Parliament. The government itself could not create new laws simply by coming to an agreement with foreign countries. If one allowed that to happen, one would essentially be saying that it is government rather than Parliament that is the sovereign law-maker, as the government could bypass the refusal of the House of Commons and/or the House of Lords to consent to its proposed laws."

I Loveland *Constitutional law, Administrative Law and Human Rights: A Critical Introduction* (2006) 35-36.

¹⁵⁴ G Fitzmaurice *The General Principles of International Law: Considered from the Standpoint of the Rule of Law* (1968) cited in Wallace & Ortega *International Law* 38-39.

has become known as the “Fitzmaurice compromise” which argues that should there be a conflict between domestic and international law, it must not be considered as a conflict of legal systems but rather as a conflict of obligations. Thus, if a legal system is unable to apply international law within its domain it is not because its domestic laws do not allow it but because the state deliberately chooses not to fulfil its international obligations.¹⁵⁵ Otherwise, it would have done the needful to pave way for the realisation of such international obligation. It is therefore incumbent upon a state to aspire to ensuring that its international obligations are respected, protected and promoted in any way possible.

Noting the inescapable requirement of domesticating international law, international treaties enjoin states to take necessary and reliable steps to realise their international obligations. For instance, article 2(1) of the ICESCR provides that:

“Each State Party to the present Covenant undertakes to take steps, individually and through international assistance and co-operation, especially economic and technical, to the maximum of its available resources, *with a view to achieving progressively the full realization of the rights recognized in the present Covenant by all appropriate means, including particularly the adoption of legislative measures.*”¹⁵⁶

The ICCPR on its part is to the effect that:

“Where not already provided for by existing legislative or other measures, each State Party to the present Covenant undertakes to take the necessary steps, in accordance with its constitutional processes and with the provisions of the present Covenant, to adopt such legislative or other measures as may be necessary to give effect to the rights recognized in the present Covenant.”¹⁵⁷

The ACHPR equally replicates this requirement by enshrining that:

“The Member States of the Organization of African Unity parties to the present Charter shall recognize the rights, duties and freedoms enshrined in this Chapter and *shall undertake to adopt legislative or other measures to give effect to them.*”¹⁵⁸

The UNDRD, even though not having the character of a legally binding agreement provides that: “States have the primary responsibility for the creation of national and international conditions favourable to the realization of the right to development.”¹⁵⁹ Similarly, article 10 of the UNDRD provides that: “Steps should be taken to ensure the full exercise and progressive enhancement of the right to development, including the formulation, adoption and implementation of policy, legislative and other measures at the national and international levels.”

¹⁵⁵ Wallace & Martin-Ortega *International Law* 39.

¹⁵⁶ Emphasis added.

¹⁵⁷ ICCPR Art 2 (2).

¹⁵⁸ Emphasis added, see of the ACHPR Art 1.

¹⁵⁹ UNDRD Art3 (1).

These international legal instruments require states to take steps to avoid a situation whereby the rights contained will not be realised. As I have indicated, domestic legal systems determine how international law applies and thus, most African civil law jurisdictions have subscribed to monism while the common law ones are dualists.¹⁶⁰ Justice Ocran of the Supreme Court of Ghana argued that African judiciaries with a common law background have been stuck with dualism bequeathed to them by the colonial masters.¹⁶¹ He added that dualism as a colonial heritage still is like an albatross around the necks of common law African countries.¹⁶² But the same is true with African civil law countries. Monism sticks to them as a colonial heritage. Therefore, both monism and dualism “emanate from rather different conceptions of state sovereignty and variations in the adherence to legal positivism.”¹⁶³ Ocran, a distinguished advocate of harmonising the interplay of domestic and international law, has attempted to bridge the relationship between monism and dualism in the following way:

“I believe the case for monism is stronger if we confine its claims to treaty law — written laws specifically agreed upon between international legal persons — and if we also eschew the notion that international law has inherent primacy over municipal law. The process of formation of customary international law, and the problem of ascertainment of its content as well as that of the so-called general principles of law derived from mature legal systems, makes the wholesale incorporation of these sources of international law into the domestic legal system rather unpalatable for many of the newer, post-colonial nations of the world, which reject the wholesale succession to international norms as handed down to them by their colonial masters.”¹⁶⁴

Ordinarily, a state becomes bound by its international obligations after all the requirements contained in the VCLT, that is conclusion, signature and ratification, have been met.¹⁶⁵ However, the question of efficacy would remain an issue especially under domestic law. Thus, the provisions of an international obligation on the one hand and the court’s ability to enforce the obligation are two different things.¹⁶⁶ The latter being the most important concern of the legal system. What use is international human rights law if it remains relevant only in writing without corresponding efforts on the part of a state to apply these obligations to protect their people? Even though international human rights law creates legally binding obligation on the inter-state level, in practical terms, treaties must

¹⁶⁰ See Killander & Adjolahoun *International Law and Domestic Human Rights* 4.

¹⁶¹ M Ocran Access to Global Jurisprudence and Problems in the Domestic Application of International Legal Norms (Keynote address at the 2nd West African Judicial Colloquium Accra, Ghana 8-10-2007) *Brandeis University* <<http://www.brandeis.edu/ethics/pdfs/internationaljustice/WAfricaColloq.pdf>> (accessed 01-10-2015).

¹⁶² 8.

¹⁶³ 30-31.

¹⁶⁴ 30-31.

¹⁶⁵ VCLT Art 6-19.

¹⁶⁶ 31.

either be transformed into municipal law or be qualified as self-executing by the domestic courts before they become enforceable. This would arguably be true even in states that approach international law from a monist perspective as is evident in the Kenyan Constitution where section 2 (5) and 2(6), as referred to above have been supplemented by section 21(4) indicating that "[t]he State shall enact and implement legislation to fulfil its international obligations in respect of human rights and fundamental freedoms". Treaties therefore do not have direct application in domestic affairs even in monist states. The important point of these instruments is therefore that states ultimately determine how and when international law applies. It is important also to understand why states accept to be bound by international law. In this regard, different theories have been advanced ranging from rationalism, constructivism and liberalism.¹⁶⁷ Obedorster has succinctly explained these theories as follows:

“Rationalism predicts that states ratify treaties when ratification offers material benefits or when coerced by a more powerful state. Constructivism posits that states ratify treaties when they share the values embodied in the treaty. If a state does not share these values initially, it may be persuaded by normative arguments. Liberal theories expect that states ratify treaties when domestic actors support and lobby for ratification and predict that if powerful domestic actors oppose ratification, then ratification is unlikely.”¹⁶⁸

Largely, states only undertake to ensure that everything necessary to make that happen will be done, especially under their human rights obligations “to express a political position”¹⁶⁹ or to succumb to domestic pressure. Thus, in Maluwa’s words “a state may ratify a treaty in order to obtain a gain in international reputation, or primarily to satisfy the demands and expectations of politically significant groups or constituencies within its own population.”¹⁷⁰ However, if they fail to implement the treaty, neither the international institution nor the system itself can do much about that. For instance, the article 23(2) AU Constitutive Act provides “any Member State that *fails to comply with the decisions and policies of the Union* may be subjected to other sanctions, such as the denial of transport and communication links with other Member States, and other measures of a political and economic nature to be determined by the Assembly.” The operative word in this provision, “may”, is discretionary and may not carry the force of law such as to compel Member States to fulfil their obligations. In principle, as required by the VCLT, states are

¹⁶⁷ See generally T Maluwa “Ratification of African Union Treaties by Member States: Law, Policy and Practice” (2012) 13 *Melb J Int'l L* 1 9-14; U Oberdörster “Why Ratify? Lessons from Treaty Ratification Campaigns” (2008) 61 *Vand L Rev* 681-712; RA Nielsen & AS Beth “Rewards for Ratification: Payoffs for Participating in the International Human Rights Regime?” (2013) *Int Stud Q* 1 1-12.

¹⁶⁸ Oberdörster (2008) *Vand L Rev* 694.

¹⁶⁹ Maluwa (2012) *Melb J Int'l L* 11.

¹⁷⁰ 12 (Footnotes omitted).

responsible for their international obligations. Nevertheless, there are other factors such as the requirement of the legal system and the political will of the state itself, which may limit it or its domestic institutions, especially the courts, from carrying out its obligations, no matter how beautifully designed.

This is regardless of the provisions of the treaties themselves. For instance, article 9 of the Revised ECOWAS Treaty is to the effect that decisions of the Authority of the Head of States of the Economic Community members shall be binding on the Member States and institutions of the Community. However, the binding-ness of any decision by the Authority of the Head of States cannot supersede the requirement enshrined in article 5 of the Revised ECOWAS Treaty, which provides:

“1. Member States undertake to create favourable conditions for the attainment of the objectives of the Community, and particularly to take all necessary measures to harmonise their strategies and policies, and to refrain from any action that may hinder the attainment of the said objectives.

2. Each Member State shall, in accordance with its constitutional procedures, take all necessary measures to ensure the enactment and dissemination of such legislative and statutory texts as may be necessary for the implementation of the provisions of this Treaty.

3. Each Member State undertakes to honour its obligations under this Treaty and to abide by the decisions and regulations of the Community.”

Again, decisions from these regional and sub-regional judicial organs may not become law *suo motu* and may only have persuasive influence on domestic courts. For instance, judgments from the ECCJ “shall be binding on the Member States, the Institutions of the Community and on individuals and corporate bodies”.¹⁷¹ In the same vein, states “undertake to comply with the judgment in any case to which they are parties within the time stipulated by the Court and to guarantee its execution” under the African Court Protocol.¹⁷² Once more, the Protocol on Statute of the African Court of Justice and Human Rights (not yet in force)¹⁷³ provides that:

“1. The decision of the Court shall be binding on the parties.

2. Subject to the provisions of paragraph 3, Article 41 of the present Statute, the judgment of the Court is final.

3. The parties shall comply with the judgment made by the Court in any dispute to which they are parties within the time stipulated by the Court and shall guarantee its execution.

4. Where a party has failed to comply with a judgment, the Court shall refer the matter to the Assembly, which shall decide upon measures to be taken to give effect to that judgment.

¹⁷¹ Revised ECOWAS Treaty Art 15 (4).

¹⁷² Protocol on the Establishment of the African Court on Human and Peoples’ Rights Art 30 (5).

¹⁷³ Protocol on The Statute Of The African Court Of Justice And Human Rights Article 46.

5. The Assembly may impose sanctions by virtue of paragraph 2 of Article 23 of the Constitutive Act.”

To buttress this, the ECOWAS system attempted to overcome this problem when its Supplementary Protocol¹⁷⁴ sought to make decisions of the ECCJ equivalent to foreign judgements. It provides that:

“2. Execution of any decision of the Court shall be in form of a writ of execution, which shall be submitted by the Registrar of the Court to the relevant Member State for execution according to the rules of civil procedure of that Member State.

3. Upon the verification by the appointed authority of the recipient Member State that the writ is from the Court, the writ shall be enforced.

4. All Member States shall determine the competent national authority for the purpose of recipient and processing of execution and notify the Court accordingly.

5. The writ of execution issued by the Community Court may be suspended only by a decision of the Community Court of Justice.”¹⁷⁵

This requirement is being treated with less commitment by member states. As argued by Ocran “without the appropriate ratifications and possible constitutional amendments in some cases, it is difficult to imagine how the well-intentioned and progressive provisions of the Supplementary Protocol can be constitutionally implemented by a number of ECOWAS member states.”¹⁷⁶ Good examples are the African Commission’s decisions in the *Endorois* and *Ogoni* cases and the ECCJ’s judgment in the SERAP case on the right to education in Nigeria which are all discussed in chapter 5. In the *Endorois* case, it was only recently, after more than six years of the decision, that the Kenyan government attempted to consider the possibility of implementing the decision.¹⁷⁷ With regard to the *Ogoni* case, the plight of the *Ogoni* people have remained more or less the same since the recommendations of the African Commission, about 15 years ago. The issues that led to the action have continued unabated. Similarly, in the ECCJ’s SERAP case, there is no concrete evidence that the Nigerian state has done anything to further that judgement. Thus, it remains a challenge for Africans to enjoy the fruits of adjudication from regional and sub-regional bodies, in light of the unwillingness of states, including Nigeria, to implement or accept the enforcement of these kind of decisions. Noting the challenges of realising international law in domestic systems, I now turn to the justiciability of the right to development under international law.

¹⁷⁴ Supplementary Protocol A/SP.1/01/05 Art 24.

¹⁷⁵ Supplementary Protocol A/SP.1/01/05 Art 24.

¹⁷⁶ Ocran *Access to Global Jurisprudence* 33.

¹⁷⁷ See chapter 4 of this dissertation.

4.5 Justiciability of the right to development

As I have noted above, the right to development is not, strictly speaking, an enforceable right under international law. It is therefore not a justiciable right capable of any adjudicatory remedy. However, as I show in the following chapter, the African human rights system recognises the right to development as an enforceable right.¹⁷⁸ Nevertheless, justiciability of the right to development under mainstream international law remains contentious.¹⁷⁹

As I have argued in 4.2 above, the right to development draws its inspiration from different sources and this raises the fundamental question whether based on these diverse sources the right to development could be considered a legal norm under international human rights law alone. This question is important in view of the fact that the right to development is idealistically structured on a perceived and ambitiously driven globalisation paradigm.¹⁸⁰ As I argue in the following chapter, the ACHPR alone structures the right to development as a legally binding human right; however as previously stated this right has arguably been conceived as an international right and thus the elements of its enforceability under international human rights law become relevant.

¹⁷⁸ Note that the Association of South East Asian Nations (ASEAN) Declaration (adopted in Phnom Penh, Cambodia on 18/11/2012) <<http://www.mfa.go.th/asean/contents/files/other-20121217-165728-100439.pdf>> [accessed 17/03/2014] has provisions for the right to development in Arts 35-36 thereof. The Declaration provides:

“35. The right to development is an inalienable human right by virtue of which every human person and the peoples of ASEAN are entitled to participate in, contribute to, enjoy and benefit equitably and sustainably from economic, social, cultural and political development. The right to development should be fulfilled so as to meet equitably the developmental and environmental needs of present and future generations. While development facilitates and is necessary for the enjoyment of all human rights, the lack of development may not be invoked to justify the violations of internationally recognised human rights.

36. ASEAN Member States should adopt meaningful people oriented and gender responsive development programmes aimed at poverty alleviation, the creation of conditions including the protection and sustainability of the environment for the peoples of ASEAN to enjoy all human rights recognised in this Declaration on an equitable basis, and the progressive narrowing of the development gap within ASEAN.

37. ASEAN Member States recognise that the implementation of the right to development requires effective development policies at the national level as well as equitable economic relations, international cooperation and a favourable international economic environment. ASEAN Member States should mainstream the multidimensional aspects of the right to development into the relevant areas of ASEAN community building and beyond, and shall work with the international community to promote equitable and sustainable development, fair trade practices and effective international cooperation.”

Similarly, the Arab Charter on Human Rights (adopted 15 September 1994) reprinted in (1997) 18 *Hum Rts LJ* 151 provides in its Art 1 (a): “All peoples have the right of self-determination and control over their natural wealth and resources and, accordingly, have the right to freely determine the form of their political structure and to freely pursue their economic, social and cultural development.”

¹⁷⁹ See 4.2 above.

¹⁸⁰ Shivji *Human Rights in Africa* 89.

For any right to be enforceable, it must be determinable in relation to its duty bearers, beneficiaries and mode of enforcement. Thus, justiciability¹⁸¹ connotes the ability of a court of law or any other recognised body to adjudicate (in case of a court) or determine any contentious matters arising from a recognised duty.¹⁸² Arambulo describes justiciability as “a right’s faculty to be subjected to the scrutiny of a court of law or another (quasi-) judicial entity.”¹⁸³ It is a concept that clearly spells out the nature of an obligation, the bearer of the obligation, the beneficiary of the right correlating with the obligation and the manner in which the obligation and right may be enforced. Therefore, justiciability is not merely a moral obligation; it must be a legal right.¹⁸⁴ Thus, justiciability has greater impetus among legal positivists, who emphasise legal rights.¹⁸⁵ For instance, Wang¹⁸⁶ stresses that “no right will ever be realised if its justification for being valuable and legitimate is only through natural law instead of positivism.” Hence, he opines that “legislation” is the only possible way of making human rights legal norms.¹⁸⁷ This is not different from the supposition of earlier positivist scholars such as Bentham who observed: “Right is the child of law; from real law come real rights; but from imaginary laws, from ‘law of nature,’ come imaginary rights (...). Natural right is simple nonsense; natural and imprescriptible rights (...) rhetorical nonsense, nonsense upon stilts.”¹⁸⁸

Therefore, justiciability has remained a contentious matter with respect to rights not being negative rights including the right to development. Moral obligations, no matter how articulated, cannot set alive a legal claim. Hence, it is axiomatic that whenever there is a right there is a corresponding obligation to provide such right; failing which entitles the right-holder to seek remedy before a competent body. It is arguable whether the right to

¹⁸¹ For an exposition of the concept of Justiciability see SA Yeshanew *The Justiciability of Economic, Social and Cultural Rights in the African Regional Human Rights System: Theories, Laws, Practice and Prospects* (2011) 59-100.

¹⁸² HC Black *Black’s Law Dictionary* (1999).

¹⁸³ KS Fyanka “Justiciability of Social Rights Myth or Reality” (2010) 1 *Human Rights Review* 437. (“[a] right is said to be justiciable when a judge can consider this right in a concrete set of circumstances and when this consideration can result in the further determination of this rights significance.”).

¹⁸⁴ See chapter 2 4.

¹⁸⁵ The American Realist OW Holmes emphatically concludes that “The prophecies of what the courts will do and nothing more pretentious are what I mean by the law”. See OW Holmes (Jr.) “The Path of the Law” (1897) 10 *Harv L Rev* 457 460-61.

¹⁸⁶ X Wang “On the Right to Sustainable Development: Foundation in Legal Philosophy and Legislative Proposals” in SP Marks *Implementing the Right to Development: The Role of International Law* (2008) 39 46.

¹⁸⁷ 46.

¹⁸⁸ J Bentham “Anarchical Fallacies; Being An Examination of the Declarations of Rights Issued During the French Revolution by Jeremy Bentham” in J Bowring (ed) *The Works of Jeremy Bentham* (1843) 489 501; See also J Bentham “Jeremy Bentham’s Anarchical Fallacies” in J Waldron (ed) *Nonsense upon Stilts: Bentham, Burke and Marx on the Rights of Man* (1987) 29 34; SG Engelman et al (ed) *Selected Writings: Jeremy Bentham* (2011) 318 and P Schofield “Jeremy Bentham Nonsense upon Stilts” (2003) 15 *Utilitas* 1-27.

development satisfies this requirement especially under mainstream international human rights law. Wang instructively notes that:

“[T]he legal systems of sustainable development all over the world suffer from the same defects: they always affirm values and meanings of sustainable development through strategies, slogans or creeds, but only rarely and with difficulty build effective legal mechanisms of responsibility and punishment based on the inextricable connection between right and obligation, with the consequential lack of affirmation and relief of sustainable development.”¹⁸⁹

It follows therefore, that for the right to development to be meaningfully appreciated especially in modern legal circles where the court is seen as the last hope of the common man, the right must find a place within the justiciability paradigm. As suggested further by Wang, emphasis must be placed on “construction of mechanisms to affirm and provide relief for rights in the future, inspire people’s enthusiasm for sustainable development, and finally raise sustainable development from a romantic ideal to the realm of positive legal reality.”¹⁹⁰ This view is a symptomatic reality of our times amidst raging poverty and unwavering preference for black letter law.

In light of the above, it is of importance to examine the jurisprudential basis of the justiciability debate within international human rights law and especially within the African context. The following two parts attempt to break down the right to development into its various elements and place these elements in the contexts of *rights*, *obligations*, *right bearers* and *obligation holders*. Understanding the juridical character of the right to development from this perspective will become useful in examining its character under the ACHPR and within the Nigerian domestic system. As was put forward above, neither the regional African nor the Nigerian legal systems are isolated legal systems bereft of international influences.

4 5 1 Actors in the right to development thesis

4 5 1 1 Beneficiaries

According to article 1 of the UNDRD “*every human person and all peoples* are entitled to participate in, contribute to, and enjoy economic, social, cultural and political development, in which all human rights and fundamental freedoms can be fully realized.”¹⁹¹ However, as will I further discuss in the following chapter, under the ACHPR the right to development is

¹⁸⁹ Wang “On the Right to Sustainable Development” in *Implementing the Right to Development* 45-46.

¹⁹⁰ 46.

¹⁹¹ Emphasis added.

a peoples' right only.¹⁹² This dichotomy further reiterates the debate on communal rights against individual rights. Interestingly however, the UNDRD¹⁹³ projects the right to development as both an individual and a communal right.¹⁹⁴ It must be emphasised that at the time of mooted the right to development, Third World states and the Soviet bloc considered States as beneficiaries of the right.¹⁹⁵ Western countries have consistently rejected this notion, particularly the USA, which cast the only negative vote against the adoption of the UNDRD, based on the foregoing reason, as discussed above under 4.3. Moreover, except in the case of the right to self-determination, virtually all international human rights instruments recognise the individual as the exclusive beneficiary of human rights.¹⁹⁶

In light of the above, I will firstly explore the position of States as claimants of the right to development. Secondly, I analyse the positions of the individual/group as claimants of the right vis à vis the state.

For Sanson, the right to development is a right of peoples against the State.¹⁹⁷ However, as indicated above, it is a generally acceptable norm in modern international human rights law that the individual is the central subject of human rights. The UNDRD emphasises this when it provides that “[t]he human person is the central subject of development and should be the active participant and beneficiary of the right to development.”¹⁹⁸ Both the independent expert and the inter-governmental working group on the right to development have re-emphasised this position.¹⁹⁹ The contention about whether an individual is or should be the beneficiary of human rights is arguably a settled one.²⁰⁰

¹⁹² See ACHPR Art 22.

¹⁹³ K Iqbal “The Declaration on the Right to Development and Implementation” (2007) 1 *Political Perspectives* 14 (He describes it as a compromise document due to its unsettled contestable areas).

¹⁹⁴ See UNDRD Art 1 (1).

¹⁹⁵ In fact, the 1983 version of the draft Declaration on the Right to Development included States as beneficiaries of the right. This was removed in the final Declaration. It provided that the right is “a right of all states and peoples for peaceful, free and independent development.” See Report of the Working Group of Governmental Experts on the Right to Development (4th Session, 09/12/1982) UN Doc E/CN.4/1983/11 annex IV para 2; see also Donnelly (1985) *Cal W Int'l LJ* 499; and ME Salomon *Global Responsibility for Human Rights: World Poverty and The Development of International Law* (2007) 114.

¹⁹⁶ ICESCR & ICCPR common Art 1.

¹⁹⁷ See Sanson, *Droits des peuples sous-développés au développement au droits des hommes et des communautés à être soigné, on seulement par soi, mais aussi par autres* in Academie De Droit International De La Haye, Colloque (1979) 195 Cited in Donnelly (1985) 15 *Cal. W. Int'l L.J.* 501.

¹⁹⁸ UNDRD Art 2; see also the Vienna Declaration Art 10.

¹⁹⁹ See for instance the Second Report of the Independent Expert on the Right to Development E/CN.4/2000/WG.18/CRP.1 (11 September 2000) 1-6.

²⁰⁰ At the formative stage of the right to development, the United Nations Study on the International Dimension on the Right to Development made the individual the sole beneficiary of the right. It enumerated the following as the elements of development:

“(i) The realization of the potentialities of the human person in harmony with the community should be seen as the central purpose of development;

However, the burning issue related to the rights set out in the ACHPR resonates around peoples or groups as discussed in 5.3.²⁰¹ Rich argues that under international human rights, although the individual remains the subject, the existence of groups is recognised.²⁰² He further argues that certain human rights enjoyed by individuals entail that it first “devolves upon groups” but in any case, the individual ultimately remains the primary beneficiary of that right.²⁰³ Donnelly argues that if a right to development exists at all, then it must be an individual right thereby excluding any possibility of a collective right to development.²⁰⁴ He further argues that to suggest that states should hold human rights is not only incoherent and dangerous but an illogical contradiction.²⁰⁵ However, Rich views this differently and contends that there is “no effective means of implementing the right to development other than through States and their governments” because in the post-colonisation era peoples are indeed represented through their governments.²⁰⁶ Thus, according to Rich the right to development ought to be a right of States as a representative of the people, to be enjoyed solely by the people.

The basic contention remains whether groups as well as individuals should be the claimants of the right to development, as enshrined in the UNDRD; in which case they are entitled to the positive realisation of their right to development. There is also the question of whether the holders of the right to development cover ethnic minorities within a state. Ougergouz has observed that such groups should be considered as holders of the right to development.²⁰⁷ Ankumah suggests that the right to development is strengthened especially if the claimants are a minority or an oppressed people.²⁰⁸

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- (ii) The human person should be regarded as the subject and the object of the development process;
 - (iii) Development requires the satisfaction of both material and non-material basic needs;
 - (iv) Respect for human rights is fundamental to the development process;
 - (v) The human person must be able to participate fully in shaping his own reality;
 - (vi) Respect for the principles of equality and non-discrimination is essential; and
 - (vii) The achievement of a degree of individual and collective self-reliance must be an integral part of the process.”

See UN ESCOR 35th session Agenda Item 8, 27, UN Doc E/CN.4/1334 (1979); See also Udombana “The Third World and the Right to Development: Agenda for the Next Millennium” (2000) 22 *Hum Rts Q* 753 768-769.

²⁰¹ Groups, collectivities and States are used interchangeably.

²⁰² R Rich “The Right to Development: A Peoples Right?” (1985) 9 *Bull Austl Soc Leg Phil* 120 123.

²⁰³ 123-123.

²⁰⁴ Donnelly (1985) 15 *Cal W Int'l LJ* 495.

²⁰⁵ 499. Donnelly further argues: “The very concept of human rights, as it has heretofore been understood, rests on a view of the individual person as separate from, and endowed with inalienable rights held primarily in relation to, society, and especially the state.” See Donnelly (1985) *Cal W Int'l LJ* 497.

²⁰⁶ Rich (1985) *Bull Austl Soc Leg Phil* 131.

²⁰⁷ F Ougergouz *The African Charter on Human and Peoples' Rights* (2003) 320.

²⁰⁸ A Ankumah *The African Commission on Human and Peoples' Rights: Practice and Procedures* (1996) 167.

Nevertheless, others feel that the beneficiaries of the right to development should be the entire state, suggested by Sanson and Rich in the discussion above.²⁰⁹ Arguably, for the right to be optimally beneficial, it has to be viewed from two perspectives. As noted in chapter 2, the right to development has two dimensions, the internal and external.²¹⁰ Accordingly, for the claimants of the right to be ascertained, the issue must be considered in that light. I therefore argue that if the right to development is settled as a synthesis of all existing rights or in the words of Udombana as “an aggregate of the social, economic, and cultural rights of all the individuals constituting a collectivity”, it should become effective as an individual right.²¹¹ If the right is viewed as an appendage to the concept of self-determination, it should become effective as a collective right.²¹²

The “collective” notion raises further concern if the right is viewed as an internal right, the issue of representation. Who represents the collective? Can States be considered as “peoples” for the purpose of the right to development? How about various tiers of government within a State, should they qualify as claimants of the right to development since they represent a people? These issues are important in the light of the fact that most states in Africa, including Nigeria, express their human rights obligations according to the western individualistic pattern and where, as in Nigeria, various levels of government are established to counter central domination of power. The reason is to maintain the hegemony and superiority of a strong national bloc and to avoid any possibility of having nations within the state. Hence, this raises fundamental issues, especially regarding the right to development as contained in the ACHPR.

Nevertheless, Kunig while ascribing the right to development as a group right argues that development is necessarily a collective venture and process and that an individual cannot in fact develop all by him or herself.²¹³ Therefore, Okafor concludes that “[t]he development of the collectivity and that of the individual are thus interdependent,

²⁰⁹ J Oloka-Onyango “Human Rights and Sustainable Development in Contemporary Africa: A New Dawn or Retreating Horizons” (2000) 6 *Buff HRL Rev* 39 59; See also OC Okafor “Righting the Right to Development: A Socio-Legal Analysis of Article 22 of the African Charter on Human and Peoples’ Rights” in CN Okeke *Contemporary Issues on Public International Law* (2009) 197 208-210.

²¹⁰ See chapter 2 5 1.

²¹¹ IN Udombana “The Third World and the Right to Development: Agenda for the Next Millennium” (2000) 22 *Hum Rts Q* 753 769. The ICESCR and ICCPR are clear on their provisions as inuring to individuals and not collectivities with the exception of the right to self-determination. See generally ICESCR Arts. 6, 7, 9, 11, 12, 13 & 15 which uses the term ‘everyone’. See also ICCPR Arts. 6-26 which uses terms like ‘every human being’, ‘every one’, ‘all persons’, ‘no one’, ‘every citizen’, & ‘every child’ to denote the individual character of the rights contained therein.

²¹² Udombana (2000) *Hum Rts Q* 753 769; See also ICCPR & ICESCR common Art 1.

²¹³ See P Kunig “Human Rights Approach to the Right to Development: Merits and Shortcomings” in Chowdury et al (eds) *Right to Development in International Law* 83.

complementary and mutually reinforcing.”²¹⁴ Furthermore, in view of the UNDRD’s allusion to the recognition of the right of women,²¹⁵ should the right of women be considered as an individual right or a collective one? Referring to the Protocol to the African Charter on Human and Peoples’ Rights on the Rights of Women in Africa (Women Protocol)²¹⁶ and the African Charter on the Rights and Welfare of the Child (ACRWC)²¹⁷, Viljoen argues that the rights contained therein are individual in nature and does not include the notion of people’s rights.²¹⁸ Arguably therefore, the right to development must be interpreted as a right accruing to the entire people enjoyed by individuals.

4 5 1 2 Duty holders

There is little doubt that states are the primary duty holders of the right to development either individually or collectively. However, there has been a raging debate over the responsibility of non-state actors and their role in the protection and promotion of human rights. This however is not the primary issue in this discourse.²¹⁹ The argument nevertheless is that just as states have the responsibility for the right to development, the polycentric nature of the world today, which involves a variety of active players, makes it pertinent for non-state actors to also be considered as duty-holders of the right to development.²²⁰ Alston and Goodman have highlighted some of the reasons why non-state actors should be responsible for human rights to include inter alia, the privatisation of hitherto governmental responsibilities in mostly the areas of social welfare, prisons, schools, healthcare services, and other basic social amenities; the increase in mobility of capital and growing emphasis on foreign investment flows assisted through market deregulation and trade liberalisation; and the expansion of the responsibilities of

²¹⁴ OC Okafor “The Status and Effect of the Right to Development in Contemporary International Law: Towards A South-North ‘Entente’” (1995) 7 *Afr J Int'l & Comp L* 865 870.

²¹⁵ UNDRD Art 8(1).

²¹⁶ Protocol to the African Charter on Human and Peoples’ Rights on the Rights of Women in Africa (adopted 01 July 2003, entered into force 25 November 2005). (Women Protocol).

²¹⁷ African Charter on the Rights and Welfare of the Child (ACRWC) (adopted 01 July 1990, entered into force 29 November 1999).

²¹⁸ Viljoen *International Human Rights* 221.

²¹⁹ On the role of non-state actors see for instance P Alston “The ‘Not-a-Cat’ Syndrome: Can the International Human Rights Regime Accommodate Non-State Actors?” in P Alston (ed) *Non State Actors and Human Rights* (2005) 3-36; A Reinisch “The Changing International Framework for Dealing with Non-State Actors” in P Alston *Non State Actors and Human Rights* (2006) 37-89; Alston & Goldman *International Human Rights* 1461-1515; A Clapham “*Human Rights Obligations of Non-State Actors*” (2006) 1.

²²⁰ BA Andressean “Development and the Human Rights Responsibilities of Non-State Actors” in BA Andressean & S Marks (eds) *Development as a Human Right (2010)* 149 150; see also DM Chirwa “*Towards Binding Economic, Social and Cultural Rights Obligations of Non-State Actors in International and Domestic Law: A Critical Survey of Emerging Norms*” LLD Thesis University of the Western Cape (2005).

multilateral organisations.²²¹ These have direct consequences for realising the right to development. The state therefore has a positive obligation not to allow human rights violations by non-state actors operating within its territory.²²² In turn, non-state actors have a general responsibility not to violate human rights in the course of their operations.²²³ The state should equally allow non-state actors ample latitude to promote human rights within their domain.

The inclusion of non-state actors as duty bearers of the right to development stems from the requirement that:

“All human beings have a responsibility for development, individually and collectively, taking into account the need for full respect for their human rights and fundamental freedoms as well as their duties to the community, which alone can ensure the free and complete fulfilment of the human being, and they should therefore promote and protect an appropriate political, social and economic order for development.”²²⁴

The use of the phrase “all human beings individually and collectively” comprises the involvement of active players that directly or indirectly have the potential and often do affect the implementation of human rights positively or negatively. Non-state actors are therefore “development agents” in the right to development praxis.²²⁵ The Independent Expert on the right to development expressed his opinion on the role of non-state actors when he argued that the obligation to facilitate human rights rests not only on the states (as primary duty bearers) but also on international institutions, the civil society and on every other “body in the civil society in a position to help”.²²⁶ Therefore, non-state actors contemplated here, would include the international community made up of multilateral institutions, International Governmental Organisations (IGOs), the international financial institutions (IFIs), Transnational Corporations (TNCs)²²⁷, and the Civil Society Organisations (CSOs) especially the Non-Governmental Organisations (NGOs). These are all identifiably duty holders of the right to development and in a position to help achieve the right to development. It follows therefore that IGOs, IFIs and TNCs should be recognised as identifiable duty bearers in the realisation of the right to development.

²²¹ Alston & Goodman *International Human Rights* 1461.

²²² *Commission Nationale des Droits de l'Homme et des Libertés v Chad* (2000) AHRLR 66 (ACHPR 1995) para 22. See also Viljoen *International Human Rights* 216.

²²³ See generally B Rajagopal “Right to Development and Global Governance: Old and New Challenges” (2013) 35 *Hum Rts Q* 893-909.

²²⁴ UNDRD Art 2(2); See also UDHR art 29.

²²⁵ BA Andreassen “Development and the Human Rights Responsibilities of Non-State Actors” in Andreassen & Marks *Development as a Human Right* (2010) 149 151.

²²⁶ “Third Report of the Independent Expert on the Right to Development” UN Doc. E/CN.4/2001/WG. 18/2 (2 January 2001) para 25.

²²⁷ Also referred to as Multinational Corporations.

The extent of responsibility that is attached to each of these development agents depends on the degree in which they are involved in the violation or realisation of human rights. In the case of multilateral institutions such as the UN, AU, ECOWAS and organisations under their auspices such as the UNDP, UNICEF, Child Rights Committee, Committee for the Elimination of all Forms of Discrimination against Women (CEDAW) and NEPAD have the duty to ensure that human rights are not only implemented by member states but also that implementation monitoring are carried out by them. These institutions are bound by the general principles of international law. Thus, in its Advisory Opinion, the ICJ observed that: “International organizations are subjects of international law and, as such, are bound by any obligations incumbent upon them under general rules of international law, under their constitutions or under international agreements to which they are party.”²²⁸

The UN system and other regional and sub-regional multilateral institutions are primarily established to promote global peace and development. To achieve this, numerous thematic bodies have been established under the UN machinery to realise this important goal, many of which are closely related to the right to development.²²⁹ Practically speaking, the UNDP for instance has contributed immensely in institutionalising the rights based approach to development.²³⁰ Another milestones is the MDGs and the SDGs under the auspices of the UN. For instance MDG goal 8 clearly spells out the need for global partnership for development. Such partnership should be capable of comprehensively dealing with pressing global concerns such as poverty, the trading system, debt and debt relief in “an open based, predictable and non-discriminatory” manner.²³¹ The African Caribbean and Pacific States Organisation (ACP), composed of 79 states, whose main objective include sustainable development of its member states in order to reduce poverty and establish a new, fairer and more equitable order, is one such multilateral effort capable of promoting the right to development.²³² Within Africa, NEPAD is worth mentioning as a collaborative approach towards realising the right to development as earlier discussed in chapter 3 5.

²²⁸ Advisory Opinion on the Interpretation of the Agreement of March 25, 1951 between the WHO and Egypt ICJ Reports (1980) 73 89–90 <<http://www.icj-cij.org/docket/files/65/6303.pdf>> (accessed 10-11-2014).

²²⁹ See Alston & Goodman *International Human Rights* 685 889.

²³⁰ See for instance UNDP “Human Rights for Development” (2012) 4 *UNDP News Brief* 1-20. On the UK DFID see LH Piron “The Right to Development: A Review of the Current State of the Debate for the Department for International Development” (2002):<http://www.odi.org.uk/publications/1562-right-development-current-state-debate> (accessed 13-06-2014).

²³¹ ME Salomon “International Human Rights Obligations in Context: Structural Obstacle and the Demands of Global Justice” in BA Andressean & SP Marks *Development as a Human Right* (2010) 121-147 123

²³² See www.acp.int/content/secretariat-acp (accessed 01-11-2014).

For some time now, the World Bank has added different human rights perspectives to its mandate.²³³ These efforts have been pivotal in shaping the policy direction of the World Bank. As I discuss in chapter 7, the activities of these institutions affect the realisation of human rights domestically. Take for example the effect of debt and debt relief on the economy of developing countries.²³⁴ Similarly, the World Bank Structural Adjustment Programmes (SAP), which most African countries accepted and applied in the 1980s, exacerbated their economic situation because of the effect they had on government policy such as subsidies, liberalisation of trade, rightsizing and downsizing of labour as well as commercialisation of government utilities.²³⁵ This has effect on the effective realisation of human rights in Africa. From this perspective therefore, such institutions have an implicit duty to contribute towards the realisation of the right to development. Chapter 7 elaborates further on the implication of debt, debt relief and allied matters on the realisation of the right to development in the context of Nigeria.

NGOs are important role players in promoting human rights in Africa. They are indispensable in the realisation of human rights, including the right to development.²³⁶ The legal battles in *SERAP* and *Endorois*, the foremost cases on the right to development were fought, won and lost by NGOs on behalf of the claimants. But these battles do not end with the cases. As suggested by Sen, social activism is a necessary ingredient for achieving human rights. Hence, NGOs play a key role in creating awareness of the existence of their human rights. NGOs must also build for themselves, as many reputable NGOs have over the years, reliable portfolios so that they may be trusted by the people, government and institutions with whom they interact. Many times, governments are also put in a defensive position whenever reports of these institutions are released to the public. NGOs go a long way in promoting human rights and development especially because they operate on grassroots level where poverty, disease and underdevelopment have more impact. Their participation at this level coupled with effectual documentation and reporting of these experiences, are key to the right to development. The role of NGOs as speed response intuitions in times of need, including in the representation of interest groups at different levels globally, is also instructive to the realisation of a just world economic order and the

²³³ See generally, D Bradlow "The World Bank, the IMF, and Human Rights" (1996) 6 *Transnat'l L and Contemp Probs* 47.

²³⁴ Viljoen *International Human Rights* 82-83.

²³⁵ 77-79.

²³⁶ See MT Kamminga "The Evolving Status of NGOs under International Law: A threat to Inter-State System?" in *Non State Actors and Human Rights* 93-111; and M Ndulo "The African Commission and Court under the African Human Rights System" Akokpari J & Zimble DS *Africa's Human Rights Architecture* (2008) 182 182-203.

right to development. These experiences become important reference points for policy-making at the domestic and international levels.

With respect to TNCs, whose activities directly affect the communities where they operate, it is important that responsibility to contribute to the realisation of the right to development is part of their memorandum.²³⁷In the *Darfur* case, the African Commission observed that, “States as well as non-state actors, have been known to violate the right to life, but the State has dual legal obligations, to respect the right to life, by not violating that right itself, as well as to protect the right to life, by protecting persons within its jurisdiction from non-state actors.”²³⁸

Furthermore, in the *Ogoni* case, the African Commission found the Nigerian government to be complicit in the violation of human rights of the Ogonis and had in fact facilitated in the destruction of their land.²³⁹ The African Commission observed unequivocally that “the Nigerian government [gave] the green light to private actors and the oil companies in particular, to devastatingly affect the well-being of the Ogonis.”²⁴⁰ This conduct, it concluded, was far below the threshold required under domestic and international law especially under article 21 of the ACHPR.²⁴¹ The Nigerian government is duty bound to protect its people against the impediment of their human rights and to also ensure that their people enjoy their rights.²⁴²

Evidently, the power controlled by TNCs was manifested even at the UN level whereby it took approximately thirteen years before a Code of Conduct for international businesses could be developed by the UN Commission on Transnational Corporations.²⁴³ The Code of Conduct has not been fully adopted yet.²⁴⁴ The Organisation for Economic Cooperation and Development (OECD) has similarly drawn up and over time revised a Code of Conduct for Businesses which it refers to as the Guidelines for Multinational Businesses.²⁴⁵ Under the OECD Guidelines, “governments have the right to prescribe the conditions under which multinational enterprises operate within their jurisdictions, subject

²³⁷ D Weissbrodt & M Kruger “Human Rights Responsibilities of Businesses as Non-State Actors” in P Alston *Non-State Actors and Human Rights* (2006)315 315-350; Clapham *Human Rights Obligations of Non-State Actors* 195-266.

²³⁸ *Darfur* para 148.

²³⁹ *Ogoni* Para 58.

²⁴⁰ Para 58.

²⁴¹ Para 58.

²⁴² Para 58.

²⁴³ United Nations Draft International Code of Conduct on Transnational Corporations UN Doc. E/1990/94 (1984) 23 ILM 626.

²⁴⁴ D Weissbrodt & M Kruger “Human Rights Responsibilities of Businesses as Non-State Actors” in P Alston (ed) *Non-State Actors and Human Rights* (2005) 315 318.

²⁴⁵ OECD Guidelines for Multinational Enterprises <http://www.oecd.org/corporate/mne/1922428.pdf> (accessed 21-11-2014)

to international law.”²⁴⁶ Under the general policies of the guidelines enterprises are required to “contribute to economic, social and environmental progress with a view to achieving sustainable development”, as well as to “respect the human rights of those affected by their activities consistent with the host government’s international obligations and commitments.”²⁴⁷ The compliance with these guidelines is voluntary. However, businesses should not only be concerned with making money while their activities cause serious harm to local communities. They must endeavour to make human rights a key factor for their operations. Therefore, TNCs must be responsible at best for not violating the rights of the people where they operate. How can TNCs be made responsible for the realisation of the right to development? Governments are chiefly responsible for this to happen. They should be indirectly responsible through the states with which they have a direct dealing so that their enormous resources can be channelled towards developmental concerns like provision of health facilities, medication, employment, scholarships for education, dealing with environmental pollution amongst several others. Thus, bilateral agreements between states and TNCs should capture development of operational territories in addition to whatever contractual relationship between the parties. Where possible, TNCs must undertake to be bound by international best practices in writing and not just in principle. In the agreements between states and TNCs, a clause for non-violation of human rights should arguably be included. Considering the significance and growing acceptability of the right to development today, the clause should preferably require TNCs to participate towards the realisation of the right to development of the state where they operate.

In all, non-state actors’ role in achieving the right to development is important and indispensable. It is argued once again that the cooperative angle of the right to development remains secondary for its effective realisation. The states in their individual actual presence must ensure the realisation of their development. In other words, as will be argued in chapter 6, Nigeria has the onerous, unconditional and constitutional duty to ensure the realisation of the right to development. It follows therefore that whoever operates within its precincts must in any case work towards that trajectory; including non-state actors.

²⁴⁶ OECD Guideline I (7).

²⁴⁷ OECD Guideline II (1) & (2).

4 6 Concluding remarks

In this chapter I have endeavoured to determine the place and status of the right to development under international human rights law. I have noted that a right must not be a mere *lex lata* for it to be recognised as enforceable, it must be capable of being a *lex feranda*. I noted that the right to development has been articulated directly or indirectly by major human rights instruments, chiefly, the UDHR, UN Charter, the ICCPR, the ICESCR, as well as in certain declarations like the UNDRIP. Importantly, the right to development at this level is unambiguously contained in its prime declaration, the UNDRD, which I have argued is a declaration with no force of law. The contention therefore is the right to development, having not been promoted into a legally binding treaty, is not an enforceable right as such under international law.

It is, however, an important legal norm that is being developed and hopefully, with time could evolve into a binding concept. Using the various sources of international law as detailed in the ICJ Statue, I equally found that the concept of the right to development cannot be a principle of CIL. Although it has expansive acceptability and has frequently, been a subject matter of international discourses, there is no evidence of it being accepted as state practice as such. Nevertheless, in the area of implementation towards realising the right to development, there has been appreciable milestones. The duty holders of this right have been identified to be the global community which consists of states and non-state actors. Each of these, based on the co-operation paradigm set, right from the formation of the UN right through the present, has an important role to play in realising the right. The right to development must be interpreted as a right accruing to the entire people enjoyed by individuals.

While the broader international human rights law has not developed the concept into an enforceable legal norm, I find that it is an effective legal norm. The African system, which I discuss in the next chapter, considers the right as such. But the paradox is that although enforceable, could the right to development be declared an effective legal norm in Africa and more specifically in Nigeria? The following two chapters are dedicated to this inquiry.

Chapter 5

The Right to Development under the African Human Rights System

5.1 Introduction

In this chapter, I set out to analyse the character of the right to development under the regional African human rights system as set out in the fourth secondary research question. As I noted in chapters 2 and 3, the ACHPR was the first enforceable document to contain the right to development thereby making the African continent to be the first in conceiving it. The ACHPR unambiguously provides that, “States shall have the duty, individually or collectively, to ensure the exercise of the right to development.”¹ Article 1 of the ACHPR necessitates the AU member states to take steps to “recognise the rights, duties and freedoms enshrined in the Charter and shall undertake to adopt legislative or other measures to give effect to them.” In essence, therefore, the responsibilities required of states in this regard include formulating “appropriate national development policies that aim at the constant improvement of the well-being of the entire population and of all individuals.”² Likewise, states must do this by creating “national and international conditions favourable to the realization of the right to development.”³ Therefore, states bear the responsibility of ensuring that human rights, welfare, security and consequently development are achieved. According to the UNDRD, the duty imposed on states is a proactive duty, not only to ensure development but also to ensure that they take active steps to pursue and accomplish about development.⁴ In the same vein, states must be active advocates of the rights of their people in order to achieve the right to development on their behalf. This, as is I argue below, encapsulates the agency relationship between the state and its people in accepting and distributing benefits of development from within and outside the country. I also emphasise the place of groups, being of particular persuasion to Africa, as the beneficiaries of the right to development. In this chapter, I further discuss the development of the right to development primarily under the AU and ECOWAS human rights courts.

Within the African human rights system, there exist three layers of human rights protection arrangement, which are the domestic, sub-regional and regional. These

¹ UNDRD Art 22 (2).

² UNDRD Art 2(3). Hence, states must ensure the realisation of the right to development see UNDRD Art. 8(1).

³ UNDRD Art 3(1)

⁴ UNDRD Art 5(1).

systems arguably operate independently from each other but have a certain form of interconnectedness. Viljoen refers to this as international human rights law in Africa.⁵ However, there is a fourth tier of the human rights arrangement, which is the umbrella of the human rights system, which is the UN system. Undoubtedly, the global, domestic and regional systems operate autonomously.⁶ While some regard the sub-regional human rights system as an offshoot of the regional system, the sub-regional system seems to operate independently from the main regional system (especially) at least in practice. This is not however absolute, as concerns have been raised on the fact that both the regional and sub-regional structures operate within the same territory, the same parties and deal with the same human rights issues.⁷ The sub-regional system assumes some of its authority from the regional system as for example in the area of human rights in ECOWAS.⁸ Aside from this, the sub-regional system operates autonomously in every other respect.⁹ It may therefore be concluded that each segment of the African human rights protection mechanisms is independent, although they may yet give room to forum shopping, conflicting decisions thereby affecting the efficacy of the objectives of human rights protection.¹⁰

On a different note, the multiplicity gives people the opportunity to enforce their rights at a forum that is most convenient for them. However, the fact that a case has been settled by the ECCJ forecloses the chances for the case to be reinstated before another international regional court in which the litigants are parties. For instance, once the ECCJ settles a matter, the matter may not be resurrected or appealed to the African Court on Human and Peoples Rights.¹¹ However, this will not apply in the case of the African Commission, which is strictly speaking not a court.¹² Conversely, however, where a case was initially instituted before the African Commission, the same case may be reinstated before an international court such as the African Court on Human and Peoples Rights and the ECCJ.

⁵ Viljoen *International Human Rights Law* 3-4; See also D Shelton "The Promise of Regional Human Rights System" in BH Weston & SP Marks *The Future of International Human Rights* (1999) 352.

⁶ ST Ebovrah *Legitimacy and Feasibility of Human Rights Realisation through Regional Economic Communities in Africa: The Case of the Economic Community of West African States* LLD thesis University of Pretoria (2009) 139.

⁷ 139.

⁸ See SB Ajulo "Sources of the Law of the Economic Community of West African States (ECOWAS)" (2001) 44 *JAL* 73-96.

⁹ Ebovrah *The Case of the Economic Community Of West African States* 139.

¹⁰ 139.

¹¹ Viljoen *International Human Rights* 453.

¹² F Viljoen "From a cat into a Lion? An Overview of the Progress and Challenges of the African Human Right System at the African Commission's 25 Year Mark" (2013) 17 *LDD* 298 298-316.

More specifically, the discussion in this chapter relates to the African Commission and the ECCJ. As I will show in this chapter, the right to development is a right that has been considered by both the African Commission¹³ and the ECCJ¹⁴. The African Court on Human and Peoples' Rights (African Court)¹⁵ has before it a case on the right to development.¹⁶ To be able to expose the position and justiciability of the right to development within the African context, this chapter builds on the previous one by identifying the sources of the right to development within the African human rights system. Even though the ACHPR offers a legally binding obligation vis-à-vis the right to development, international human rights law is nevertheless an important source of reference. Articles 60 and 61 of the ACHPR stipulates that the African Commission may draw inspiration from international human rights law in order to make its decisions. Similar provisions exist in the African Court Protocol.¹⁷ But the aim of this chapter is to examine the development of the right to development under the African human rights system.

5.2 Sources of the right to development under African human rights law

The ACHPR is the most important African treaty on human rights. It has been domesticated by Nigeria and has automatic application in monist states with the relevant qualifications as set out above in chapter 4 as is further discussed in chapter 6. The implication of such domestication suggests unambiguously that the right to development enjoys significant recognition within these legal systems, thereby forming part of their *corpus juris*. Generally, however, most African states, including Nigeria, provide for developmental rights, especially economic, social and cultural rights in the form of fundamental objectives and directive principles of state policy (FODPSP).¹⁸ However,

¹³ The African Commission for Human and Peoples' Rights was established by virtue of ACHPR art 30 "to promote human and peoples' rights and ensure their protection in Africa". The mandates of the Commission are contained in art 45 of the ACHPR.

¹⁴ Economic Community of West African States (ECOWAS), Revised Treaty of the Economic Community of West African States (adopted 24 July 1993) Art. 15; Protocol A/P1/7/91 of 6 July 1991 (ECCJ Protocol); Supplementary Protocol A/SP.1/01/05 of 19 January 2005 (ECCJ Supplementary Protocol 2005); Supplementary Protocol A/SP.2/06/06 of 14 June 2006 (ECCJ Supplementary Protocol 2006); Regulation of 3 June 2002; and Supplementary Regulation C/REG.2/06/06 of 13 June 2006.

¹⁵ Protocol on the Statute of the African Court of Justice and Human Rights (adopted 1 July 2008); Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights (adopted 9 June 1998, entered into force 25 January 2004) Doc.OAU/LEG/EXP/AFCHPR/PROT (III).25.

¹⁶ A background check on the progress of the African Court reveals that decided cases from the Court neither dealt with the right to development nor any of its components. Checks on the African Court's website show that most of the existing decisions dealt with the merit of the cases.

¹⁷ Organization of African Unity (OAU), Protocol to the African Charter on Human and People's Rights on the Establishment of an African Court on Human and People's Rights (adopted 10 June 1998)

¹⁸ Constitution of the Federal Republic of Nigeria (1999) Chapter II, Constitution of the Republic of Ghana 1992 Chapter 006; and Constitution of United Republic of Tanzania (1977) Part II,

Ethiopia¹⁹, Malawi²⁰, Cameroon²¹ and Uganda²² have gone further and recognised the right to development as a constitutional right.²³ The challenge of non-express recognition of human rights, through fundamental objectives and directive principles of state policy, as in the case of Nigeria, usually results in legal tension relating to questions of supremacy between constitutions and international law; at times even involving extant laws.

Generally, the African human rights system is fully grounded in its articulation of the right to development as a human right. The combined effect of articles 19-24 of the ACHPR reinforces this claim.²⁴ The rights covered under these provisions include right of people to equality²⁵, to existence and self-determination²⁶, to dispose freely of their wealth and natural resources²⁷, to economic, social and cultural development²⁸, national and international security²⁹ and to a general satisfactory environment³⁰. Each of these, together with other civil and political and socio-economic rights, reflects aspects of the right to development. In addition to the ACHPR, the African Charter on the Rights and Welfare of the Child (ACRWC)³¹ contains explicit provisions on the right to development

¹⁹ The right to development is provided in art 43 of the Ethiopian Constitution 1994 in the following words:
 “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.”

²⁰ S 30 of the Malawi Constitution 1994 provides:

- (1) 1. All persons and peoples have a right to development and therefore to the 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 realization 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 a responsibility to respect the right to development and to justify its policies in accordance with this responsibility.”

²¹ Constitution of Cameroon, 1996 Preamble para 3.

²² Constitution of Uganda, 1995 art IX.

²³ See generally an analysis of the right to development in these countries in Kamga *The Right to Development* 202-217.

²⁴ Interestingly the approach of the African Commission follows this trend. See 5 4 1 below.

²⁵ ACHPR Art 19.

²⁶ ACHPR Art 20.

²⁷ ACHPR Art 21.

²⁸ ACHPR Art 22.

²⁹ ACHPR Art 23.

³⁰ ACHPR Art 24.

³¹ ACRWC.

and survival of the child.³² The Protocol to the African Charter on the Rights of Women (Women's Protocol)³³ is even more captivating on the right to development. Considering that women suffer more disadvantage in the society, their sustainable development is therefore sine qua non to the effective realisation of the right to development.³⁴ Thus, article 20 of the Women's Protocol provides that "Women shall have the right to fully enjoy their right to sustainable development" and it imposes obligations on states to empower women through unhindered participation in government, access to credit and guarantee of property rights.³⁵ The Women's Protocol, like the ACHPR, furthermore identifies other issues that have bearing on the right to development such as discrimination³⁶, dignity³⁷, participation in decision-making³⁸, education³⁹, economic and social welfare⁴⁰, health and reproductive health⁴¹, food security⁴², adequate housing⁴³, healthy and sustainable environment⁴⁴ as well as rights of women with disabilities⁴⁵. These rights are important to the right to development especially when considered in line with the provisions of Article 8 of the UNDRD, which is to the effect that:

"States should undertake, at the national level, all necessary measures for the realization of the right to development and shall ensure, inter alia, equality of opportunity for all in their access to basic resources, education, health services, food, housing, employment and the fair distribution of income. Effective measures should be undertaken to ensure that women have an active role in the development process. Appropriate economic and social reforms should be carried out with a view to eradicating all social injustices."

In view of this, both the Women's Protocol and the UNDRD show the importance of promoting the right to development of women. This entails affording them the opportunity to participate in the process of their development in accordance with recent global trends. The African Youth Charter⁴⁶ has further re-emphasised the significance of the right to development within the African human rights system. Article 10 of the Youth Charter

³² See generally ACRWC Art 3-30 which provides for the rights and duties of the child including survival and development, education, parental care and love, health etc.

³³ Women Protocol.

³⁴ J Ngwakwe "Realizing Women's Economic, Social, and Cultural Rights: Challenges and Strategies in Nigeria" (2002) 14 *Can. J. Women & L.* 142 149.

³⁵ Women Protocol Art 19.

³⁶ Art 2.

³⁷ Art 3.

³⁸ Art 9.

³⁹ Art 12.

⁴⁰ Art 13.

⁴¹ Art 14.

⁴² Art 15.

⁴³ Art 17.

⁴⁴ Art 18.

⁴⁵ Art 23.

⁴⁶ The African Youth Charter.

behoves on states to encourage youth participation in the development process of any particular country. While insisting that states shall ensure the exercise of the right to development, the Charter provides that, “[e]very young person shall have the right to social, economic, political and cultural development with due regard to their freedom and identity and in equal enjoyment of the common heritage of mankind.”⁴⁷

In addition to the provisions of various international documents, other policy efforts such as NEPAD and the MDGs support the right to development in Africa. The UNDRD requires that policies nationally and internationally must be put in place to drive development. It follows therefore that in addition to policies made by States at various levels, initiatives at regional (NEPAD) and international (MDGs) levels had been rolled out with a strong persuasion towards realising the right to development globally. These initiatives often overlap with one another, signifying the nature of the right to development, which is co-operation generally. This truism has however not diminished the importance of the question of the justiciability of the right to development. This is even more so when the right is scaled as a right to international co-operation which is popularly supported by the South. Thus, identifying the juridical nature of the right, as well as those responsible for providing it and those to benefit therefrom, is crucial to this discourse as was highlighted in chapter 4.

The emerging African jurisprudence, as discussed below, reflects the uniqueness of the African system designed to command higher respect and recognition within its applicable domain. In other words, the African human rights system, which reflects the peculiar African situation, is more in tandem with the African cultural setting as outlined in chapters 3. For instance, the uniqueness of the system in recognising both individual and peoples’ rights and their corresponding duties, clearly gives a concrete pre-eminence to the indivisibility and the interconnectedness of all human rights. Thus, the legitimacy and efficacy of the decisions emanating from within the system can add to the justiciable character of the right to development as argued hereunder. In view of this, the African regional human rights bodies have taken cognisance of African peculiarities in the light of the still contentious issue of universalisation of human rights.⁴⁸ This is important in order to

⁴⁷ Art 10.

⁴⁸ See MT Ladan *Introduction to ECOWAS Community Law and Practice: Integration, Migration, Human Rights, access to Justice, Peace and Security* (2009) 273-274.

secure the effective realisation of human rights especially the right to development, which is both an individual⁴⁹ and collective right.⁵⁰

5.3 Groups or peoples as beneficiaries of the right to development

Articles 19-24 of the ACHPR are provisions of a communal nature.⁵¹ Each of the provisions contained therein deals with rights of peoples as further buttressed by the jurisprudence of the African Commission⁵² and the ECCJ.⁵³ The major lacuna thus far is the unavailability of the meaning of the term “peoples”. Yet, none of the international judicial bodies has been able to provide concrete definition of the term.⁵⁴ The term has been left without a clear definition to avoid controversy; attempts have only been made to give meaning to it depending on circumstances.⁵⁵ According to Kiwanuka the term “peoples” has the character of “commonality of interests, group identity, distinctiveness and a territorial link.”⁵⁶ Other definitions include “common historical tradition; racial or ethnic identity; cultural homogeneity; linguistic unity; religious or ideological affinity; territorial connection; common economic life; and being a certain number.”⁵⁷ To Kiwanuka “people could refer to a group of persons within a specific geographical entity (for example, the Alur of Uganda or the Amandebele of Zimbabwe) as well as to all the persons within that entity (for example, Ugandans or Zimbabweans).”⁵⁸ His definition suggests that sub-groups within an independent state with common distinctive features as enumerated above could qualify as a “people” too. In this line the African Commission has recognised the Katanges,⁵⁹ the Endorois,⁶⁰ and the Ogoni⁶¹ as “peoples”. In each of the

⁴⁹ See ACHPR Arts-2-18 for individual rights.

⁵⁰ See 5.3.3 below. It is noted once again that the notion of communal rights is not readily acceptable to the western world. However, in the case of the right to development, the UNDRD acknowledges it as both an individual and a group right with the individual as the subject and purpose of any human rights and development agenda. See UNDRD Art. 1.

⁵¹ See *Pinhero* case below in 5.4.2.

⁵² See *Endorois*, *SERAC*, *Bakwere*, *Gumne* cases below in 5.4.1.

⁵³ See *Kemi Pinheiro v Republic of Ghana* Suit no. ECW/CCJ/APP/07/10 (2012) (Pinheiro).

⁵⁴ “[T]he result has been that the precise meaning of the term ‘people’ remains somewhat uncertain”. See *Reference re Secession of Quebec* (1998) 2 S.C.R. 217, Para 124, (Canadian Supreme Court). See also *Endorois* below in 5.4.1.5 para 147.

⁵⁵ Viljoen *International Human Rights in Africa* 219.

⁵⁶ RN Kiwanuka “The Meaning of ‘People’ in the African Charter on Human and Peoples’ Rights” (1980) 82 *AJIL* 87-88.

⁵⁷ R McCorquodale “Self-Determination: A Human Rights Approach” (1994) 43 *I C L Q* 857-866.

⁵⁸ Kiwanuka (1980) 82 *AJIL* 88.

⁵⁹ *Katangese Peoples’ Congress v Zaire* (2000) AHRLR 72, although the African Commission recognised the Kanga people qualifies as a people, it, however, rejected the claim for their self-determination under art 20(1) of the ACHPR, because evidence before the commission showed that the Katanga people were active participants in Zaire’s distribution of resources and benefits. See Para 6.

⁶⁰ *Endorois* para 145-157.

⁶¹ *Ogoni case* (2001) AHRLR 60.

aforementioned cases, the group represents a people with common tribal, linguistic or religious affiliation. The African Commission has equally in the past alluded that the people of Nigeria⁶² as a whole and as part of the Congo⁶³ are a people and have the right to development against their States. To this effect, the Canadian Supreme Court had observed within the context of a peoples' right to self-determination that:

“[R]eference to ‘people’ does not necessarily mean the entirety of a state’s population. To restrict the definition of the term to the population of existing states would render the granting of a right to self-determination largely duplicative, given the parallel emphasis within the majority of the source documents on the need to protect the territorial integrity of existing states, and would frustrate its remedial purpose.”⁶⁴

The African Commission followed this reasoning when it held that the Katanga people were entitled to a variant of self-determination that did not include self-secession taking cognisance of the sanctity of territorial integrity of the then Zaire.⁶⁵ This goes to show that a people could refer to a whole State or a part of it. It is within this context that the notion of people is mirrored within domestic systems. Consequently, as will be further discussed in the following chapters, a people is understood as any group having a legitimate claim against their government. It should be noted also that the fear expressed by Donnelly regarding states being the claimants of the right to development, is that the state may end up violating some human rights while claiming to provide others.⁶⁶ This fear is adjudged valid considering the exclusion of political rights in article 22 of the ACHPR.⁶⁷ Of course, at the time of drafting the ACHPR, African governments were tactical in committing themselves to political rights since a sizeable number of them were dictatorships.⁶⁸ Interestingly, many African States seem to have outgrown dictatorship and have settled for participatory democracies (although still imperfect). In fact, African states have agreed to fight and illegalise unconstitutional changes of government as an important step towards realising human rights, democracy and development.⁶⁹

⁶² Para 64.

⁶³ *Democratic Republic of the Congo v Burundi, Rwanda, and Uganda* (2004) AHRLR 19 para 87.

⁶⁴ *Reference re Secession of Quebec* (1998) 2 S.C.R. 217, Para 124, Canadian Supreme Court.

⁶⁵ *Katagese Peoples' Congress v Zaire* (2000) AHRLR 72 para 5.

⁶⁶ See Donnelly (1985) *Cal W Int'l LJ* 498-499; This may have been the case during the post-colonial period whereby African States hid under the umbrella of economic development to trample upon civil and political rights of its people. See Chapter 3; see also A Orford “Globalization and The Right to Development” in P Alston *Peoples'* (2001) 127 136 (citing similar example on Asian countries pursuing economic development at the expense of civil and political rights). See also Ghai “Human Rights and Governance: The Asian Debate” (1994) 15 *Aust YBIL* 1 9.

⁶⁷ For emphasis Art 22(1) provides: “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.” (Emphasis added).

⁶⁸ See Chapter 3.

⁶⁹ See OAU Declaration on Unconstitutional Changes of Government (adopted 10-12 July 2000)

The African Commission seems to view the right to development as both an individual and a group right.⁷⁰ It holds the view that the ACHPR was enacted by African States to protect human and peoples' rights of the African peoples against both *external and internal abuse*.⁷¹ The gross inequality that characterises the world today in terms of poverty, the power differential that accompanies it, and the reality of global economic interdependence, serve to erode the legitimacy of this model that assigns secondary as opposed to shared responsibility to a developed state to fulfil the basic rights, for example, to food, water, and health of people elsewhere.⁷²

Often, constitutional arrangements categorise, demarcate and recognise people into smaller units. In view of this and with respect to the right to development, it is important to consider the nature of peoples' as claimants of the right from two perspectives, the internal and external. To realise the external right to development there is no other way except through the State as an agent of the people.⁷³ This component of the right is where international co-operation is mirrored. It will be practically impossible for any person whether as a State, individual or institution to assist people without first going through the State. Moreover, the Montevideo Convention proclaims the sanctity of the State when it provided that "the federal state shall constitute a sole person in the eyes of international law"⁷⁴ and that "[n]o state has the right to intervene in the internal affairs of another."⁷⁵ In this respect therefore, as argued by Rich⁷⁶ and Sengupta⁷⁷ the state ought to be a claimant of the right for onward transmission of the benefits therefrom to the people whether individually or collectively. As Sengupta contends, "the right to development would still be recognized as a collective right, which is to be exercised collectively so that it can be enjoyed by all citizens together."⁷⁸ He however, cautioned that appropriate mechanisms must be established to channel the benefits to the people.⁷⁹ By analogy and as an example a Nigerian President holds land in trust for the people according to section 1 of

⁷⁰ See *Ogoni's case*.

⁷¹ *Dafur case*.

⁷² ME Salomon "Legal cosmopolitanism and the normative contribution of the right to development" (2008) LSE Law, Society and Economy Working Papers, 16-2008. Department of Law, London School of Economics and Political Science, London, UK 7.

⁷³ Salomon *Global Responsibility for Human Rights* 115.

⁷⁴ Montevideo Convention on the Rights and Duties of States Uruguay (adopted 26 December 1933 and entered into force 26 December 1934 165 LNTS 19 Art 2. (Montevideo Convention).

⁷⁵ Art 8.

⁷⁶ R Rich "The Right to Development: A Peoples Right?" (1985) 9 *Bull Austl Soc Leg Phil* 120 131.

⁷⁷ Sengupta "The Right to Development" in *Development as a Human Right* 34-36.

⁷⁸ 35.

⁷⁹ 35-36.

the Land Use Act of 1979. The State therefore, is the only vehicle for the realisation of the rights of its citizens as will be further discussed in following chapters.⁸⁰

Internally, the individual in his or her separate capacity should be able to claim the right to development from the State on matters falling squarely (health, education, health services, food, housing, employment and the fair distribution of income⁸¹) on the State as its duty or for receiving development aid on their behalf. Thus, people may be identified as a people for belonging to a state/province, local government/municipality and so forth as the case may be. Based on the principle of the people's right of association,⁸² they ought to be recognised as a group when they wilfully organise themselves for whatever purpose as a group. This would therefore cover vulnerable groups such as women and persons with disability to be able to come together to speak with one voice in respect of their right to development.⁸³

Tiers of government should represent their constituencies in claiming the right to development from a higher (central or federal) government; just as lower units should claim such right from every higher government in the hierarchy until the individual is able to claim it from the government that is closest to him or her.⁸⁴ This vertical arrangement is without prejudice to the right of the individual to skip the hierarchy and claim the right from the authority he or she feels is best suited to provide him or her with the right. The relationship between the various tiers of government is usually governed by the constitution. As will be shown in chapter 6 the Nigerian Constitution apportions responsibilities on each tier of government. This apportionment determines the nature of claim or responsibility attached to a tier at every particular moment. Horizontally, federating states or provinces and other tiers of government will co-operate among them *inter se*. For example, as will be advanced further in chapter 7, richer states within a

⁸⁰ Salomon *Global Responsibility for Human Rights* 116.

⁸¹ See UNDRD Art. 8(1).

⁸² ICCPR Art. 22; & ACHPR Art 10.

⁸³ The practice of the African Commission for instance recognises that communications may be presented to the Commission on an individual, group or representative basis. This could serve as an avenue to claim the right to development by a group of like-minded people. See Guidelines for the Submission of Communications Organisation of African Unity the African Commission Human And Peoples' Rights Information Sheet No.2 2.

<http://www.achpr.org/files/pages/communications/guidelines/achpr_infosheet_communications_eng.pdf> (accessed 07-03-2014): "Any person, group of persons of State party alleging a violation, should first of all ascertain whether the State committing the violating has ratified the Charter, and in the case of a State, it must have ratified the Charter before submitting a complaint against another State party to the Charter."

⁸⁴ For example, a state/provincial government should claim from the federal/national government; the local/municipality government should claim from the state/provincial government; the wards should claim from the local/municipal government; and the individual should hold its wards accountable.

federal system who receive much more allocation and generate more revenue should endeavour to help states that do not get as much. This is to argue that even within a country co-operation is feasible.

The state only represents or plays a representative role towards the realisation of the right to development of its citizens and not a beneficiary itself. Thus, the basic principles of equality, accountability, non-discrimination and popular participation must be observed accordingly.⁸⁵ The state is at best a “legal trustee”⁸⁶ or “plenipotentiary”⁸⁷ of its people’s right to development. The question remains how the people can enforce such a right within the African human rights and domestic systems. The next part analyses the enforceability of the right to development from within the African human rights system.

5 4 Enforceability of the right to development in the African human rights system

The African human rights system has institutions within it, charged with the responsibility of watching over the implementation and respect for human rights contained in the various human rights documents. Primarily and most significantly in this regard is the African Commission, which was initially established in and together with the ACHPR⁸⁸. In addition to the African Commission, the broad AU human rights system subsequently established the African Court for Human and People’s Rights. Its main mandate is to complement the protective mandate of the African Commission.⁸⁹ The establishment of the African Human Rights Court was to fill in the apparent loopholes of the African Commission, which has been described as a “toothless bulldog” or a body without “teeth”⁹⁰ for its inability to get its decisions enforced by member states.⁹¹ However, subsequent pro-activism of the African Commission now questions the validity of such a description. As I will show below, the African Commission has endeavoured to step up in its responsibilities and has handed down some far-reaching decisions that have impacted positively on the African human rights system.⁹² Viljoen even likens the development as growing from a cat to a lion⁹³; an

⁸⁵ Salomon *Global Responsibility for Human Rights* 114-116.

⁸⁶ K Mbaye Introduction to Human and Peoples Rights” in M Bedjaoui (ed) *International Law: Achievements and Prospects* (1993) 1041 1049 cited in Salomon *Global Responsibility for Human Rights* 119.

⁸⁷ LA Obiora “Beyond the Rhetoric of a Right to Development” (1996) 18 *Law & Pol* 1 3.

⁸⁸ ACHPR Art. 30.

⁸⁹ African Court Protocol Art. 2.

⁹⁰ F Viljoen & L Louw (2007) “State Compliance with the Recommendations of the African Commission on Human and Peoples’ Rights 1994-2004” 101 *AJIL* 1 3.

⁹¹ See NJ Udombana “Towards the African Court on Human and Peoples’ Rights: Better late than never” (2000) 3 *Yale Human Rts & Dev L J* 45 64; and F Viljoen “From a Cat into a Lion? An Overview of the Progress and Challenges of the African Human Right System at the African Commission’s 25 Year Mark” (2013) 17 *LDD* 298 299.

⁹² See *Endorois & Ogoni* cases below/ in 5 4 1 3 and 5 4 1 also Viljoen (2013) *LDD* 298-304.

appreciable trend. Moreover the African Commission has started to use its mandate to refer cases to the African Court.⁹⁴

An important contribution in this regard is the African Commission's conclusions on whether states' performance of its responsibilities on the realisation of the right to development should be constrained to progressive realisation or available resources. Although economic, social and cultural rights are realisable progressively under the ICESCR, the ACHPR does not specifically make room for such. As argued severally, the right to development encompasses all the different classes of rights and brings them under one single umbrella. The ACHPR does not, however, make room for human rights under the ACHPR to be dependable on progressive realisation or on available resources.⁹⁵ Nevertheless, states cannot give what they do not have something which have been recognised by the African Commission by the introduction of the progressive realisation of rights.⁹⁶ In spite of the raging poverty and underdevelopment in Africa, states cannot be ingenious in solving their poverty and underdevelopment problems. Planning and support are required for these to be realistically realisable as discussed in chapter 2.

The African Commission introduced the available resources qualification in the realisation of the right to health, an important aspect of the right to development, in the *Purohit* case.⁹⁷ In certain cases however, progressive realisation is completely insulated, as for example in the case of the right to education.⁹⁸ Nevertheless, states must take "concrete, targeted and non-discriminatory steps" in realising the rights in the ACHPR.⁹⁹ The requirement of state reporting therefore aids in determining the extent states have gone in realising their human rights responsibilities.¹⁰⁰

Furthermore, the African human rights system has other sub-regional offshoots such as ECOWAS, East African Community (EAC)¹⁰¹ and Southern African Development

⁹³ Viljoen (2013) *LDD* 298-316.

⁹⁴ Rules of Procedure of the African Commission on Human and Peoples' Rights of 2010 (First adopted 2-13 February 188, revised 2-11 October, 1995 and re-approved on 12-16 May 2010).

⁹⁵ Viljoen *International Human Rights* 217.

⁹⁶ *Nemo dat quad non habet*; although a commercial contract principle, the relationship between the state and its people is arguable one of contract, albeit a social contract.

⁹⁷ *Purohit and another v The Gambia* (2003) AHRLR 96 (ACHPR 2003) para 84; see also Viljoen *International Human Rights* 217.

⁹⁸ See ACHPR Art 17(1).

⁹⁹ Viljoen *International Human Rights* 217.

¹⁰⁰ See ACHPR Art 62.

¹⁰¹ See The East African Community Treaty 2006 (as amended), Art 2 which establishes the EAC. Reproduced in S Ebobrah & A Tanoh (eds) *Compendium of African Subregional Human Rights Documents* (2007) 37 also found at <<http://www.eac.int/treaty/>> (accessed 19-06-2014). The EAC has 5 members Kenya, Tanzania, Uganda, Rwanda and Burundi. The East African Community Court of Justice is

Community (SADC)¹⁰², which are largely development co-operation vehicles with human rights annexures. The ECOWAS system is moreover relevant because it promotes and protects the right to development. The ECOWAS has established the ECCJ, which has the mandate of applying, interpreting and giving effect to the ACHPR as is discussed below under 5 4 2. Thus, in the following sub-sections I discuss the pronouncements of the African Commission on the juridical character of the right to development while briefly noting the potential of the ECCJ. It must be noted that although the ECCJ jurisprudence underscores the right to development, the court appears to follow the style of the African Commission in the area of treating the right as a group right.¹⁰³ Similarly, the ECCJ seems to be bogged down by technical justice rather than a more human-centred approach to human rights, especially economic, social and cultural rights and the right to development. Hence, while ECCJ is briefly discussed below, other sub-regional treaty bodies within Africa are not.¹⁰⁴ The jurisprudence of the African Court on Human Rights and Peoples Rights is equally not analysed in any detail because it has not yet pronounced on the right to development. Nevertheless, the African Commission has referred a matter on the right to development to the African Court which until the conclusion of this dissertation is still under review.¹⁰⁵ However, the Court has previously adjudicated on other violations under the AHCPH with its first judgment given in 2008.¹⁰⁶ Its mandate is to complement the protective mandate of the African Commission as contained in the protocol establishing it¹⁰⁷.

5 4 1 African Commission

The Commission has had cause to adjudicate directly on the right to development on a number of occasions. There are also a number of decisions made by the Commission that are related to the right to development.¹⁰⁸ The discussion in this sub-section centres on

established by The EAC Treaty Art. 9. For a lucid exposition of the EAC see S Ebovrah "Human Rights Developments in African Sub-regional Economic Communities during 2010" (2011) 11 AHRLJ 216-250.

¹⁰² See SADC Treaty 1992 (as amended) Art. 2 (establishment); The SADC Tribunal is established under Articles 9 and 16 of the Treaty.

¹⁰³ See *Penheiro's case*.

¹⁰⁴ However, for an analysis of the jurisprudence of the entire African jurisprudence or "international human rights law in Africa" as used by C Heyns *Human Rights Law in Africa* 1 (2004) 620-675; Viljoen *International Human Rights* 489-502; & GW Mugwanya *Human Rights in Africa : Enhancing Human Rights through the African Regional Human Rights System* (2003).

¹⁰⁵ *African Commission v. The Republic of Kenya* Appl.No 006/2012.

¹⁰⁶ *Michelot Yogogombaye v The Republic of Senegal* Appl.No 001/2008.

¹⁰⁷ African Court Protocol Art 2.

¹⁰⁸ However, on the justiciability of economic, social and cultural rights by the African Commission see Yeshanew *The Justiciability of Economic, Social and Cultural Rights* 1. Viljoen *International Human Rights* 261-268; Viljoen (2013) *LDD* 298-304; NJ Udombana "Keeping the Promise: Improving Access to

determining the juridical value of the right to development within the African human rights system in order to highlight the point that the right is enforceable and not just a policy tool for international politics. It must be noted that in deciding on any communication before it, the Commission shall draw inspiration from international law on human rights, as indicated in chapter 4.¹⁰⁹ The approach of the Commission has been to consider the right to development as a collective right only, as contemplated by the ACHPR. In the spirit of the Commission's practice and procedure, communications are initiated before it through representative actions or what is now known as *action popularis* or class actions. This allows for certain representatives of the petitioners to represent the entire group with or without their knowledge. The decisions of the African Commission are not binding as such as discussed in chapter 2 2; it is not required to give orders to member states but rather gives recommendations in its annual activity report in line with article 54 of the ACHPR.¹¹⁰

In light of the above, the following sub-section analyses the *Kevin Mgwanga Gunme & Others v Cameroon (Gunme)*¹¹¹, *Democratic Republic of Congo v Burundi, Rwanda & Uganda (DRC)*¹¹², *Ogoni, Sudan Human Rights Organisation and Another v Sudan (Darfur)*¹¹³ and the *Endorois* cases, which were all decided on the merits by the African Commission. However, at the admissibility stage the African Commission in two separate instances had the opportunity to determine another two communications on the right to development. The first instance was in the case of *Courson v Zimbabwe*¹¹⁴ where a group of homosexuals sought the jurisdiction of the Commission to determine the propriety of their status relying *inter alia* on their right to development¹¹⁵ based on discrimination under the ACHPR.¹¹⁶ The second instance was in the case of the *Bakweri* people¹¹⁷ of Cameroon wherein they sought to enforce their rights to have a cause to be heard,¹¹⁸ to

Socioeconomic Rights in Africa" (2012) 18 *Buff Hum Rts L Rev* 135-191 and S Liebenberg *Socio-economic Rights: Adjudication under a Transformative Constitution* (2010).

¹⁰⁹ It is noted however that art 60 and 61 of the ACHPR allows the African Commission to draw inspiration from international law; See also *Congo v Burundi, Rwanda and Uganda* para 70.

¹¹⁰ Viljoen & Louw (2007) 101 *AJIL* 2. This article is also important in understanding the level of compliance with the recommendations of the African Commission by state parties, which is generally full, partial or unclear.

¹¹¹ *Kevin Mgwanga Gunme & Others v Cameroon* (2009) AHRLR 9 (Gunme) Para 1.

¹¹² *Democratic Republic of Congo v Burundi, Rwanda & Uganda* (2004) AHRLR 19 (ACHPR 2003) (DRC).

¹¹³ *Sudan Human Rights Organisation and Another v Sudan* (2009) AHRLR 153 (ACHPR 2009) (*Dafur*)

¹¹⁴ *William A. Courson v Zimbabwe Communication* 136/94 (2000) AHRLR 335 (ACHPR 1995)

¹¹⁵ ACHPR Art. 22.

¹¹⁶ ACHPR Arts 1-6, 11, 16-20, 22 & 24; see generally EA Ankumah *The African Commission on Human and Peoples' Rights: Practice and Procedures* (1996) 165-167; see also VOO Nmehielle *The African Human Rights System: Its Laws, Practice, and Institutions* (2001) 149-151.

¹¹⁷ AHRLR (2004) 43.

¹¹⁸ ACHPR Art 7(1) (a).

property,¹¹⁹ to wealth and natural resources¹²⁰ as well as the violation of their right to development.¹²¹ As noted, both these cases did not pass the admissibility stages because they were withdrawn. Yet, since the right to development was mentioned in both communications before the African Commission, they add the support of the legal validity of the right as a justiciable right.¹²² In fact, in the Zimbabwean case, the Rapporteur of the complaint found that the complaint raised legal issues suitable for determination by the Commission.¹²³ *Bakweri* also reinforces the position of the right to development as a group right because the complainants sought to enforce their claim as a people.

5 4 1 1 *Gunme*

In *Gunme* 14 individuals complained on behalf of the people of Southern Cameroon over alleged violations of their rights under the ACHPR including the right to development.¹²⁴ The alleged violations dated back to the period shortly after the formation (following the UN plebiscite by the people of Southern Cameroon) of the Federal Republic of Cameroon between the South and '*La Republique du Cameroun*'. This was on 1st October 1961 against the wishes of the parties.¹²⁵ The people of Southern Cameroon alleged that because the federal government of the republic marginalised and denied them basic infrastructure, the government had violated their right to development.¹²⁶ The complainants also alleged denial of their right to participation and equal representation¹²⁷, education¹²⁸ and discrimination.¹²⁹ The African Commission found, importantly, that the right to development of the people of Southern Cameroon had not been violated.¹³⁰ The Commission reasoned that the right to development as well as other economic, social and

¹¹⁹ Art 14.

¹²⁰ Art 21.

¹²¹ SAD Kamga & CM Fombad "A Critical Review of the Jurisprudence of the African Commission on the Right to Development" (2013) 57 *JAL* 196 205.

¹²² 205; see also Ankumah *The African Commission* 166.

¹²³ In the case of Zimbabwe however, it is left to be determined by the Commission whether vulnerable groups have the competency to seek the enforcement of their right to development. It is opined that vulnerable groups ought to have the right to complain before the Commission. Ankumah argues that, people's claims before the Commission should be synonymous to class action suits. Hence, a suit such as one claiming the enforcement of rights of homosexuals' right to development is not "devoid of legal validity." She relied on the Zimbabwean legislation, which identifies homosexuals as a group and consequently beneficiaries of collective rights. She however noted the likelihood of frivolous claims that may result from such expansive recognition of beneficiaries of the right to development. See generally Ankuma *The African Commission* 166-167.

¹²⁴ Para 1.

¹²⁵ Paras 2-3.

¹²⁶ Para 9.

¹²⁷ Para 8.

¹²⁸ Para 10.

¹²⁹ Para 11.

¹³⁰ Para 205.

cultural rights could only be realised progressively.¹³¹ Thus, the African Commission was satisfied with the respondent states' explanation and statistical data outlining how it allocated various development resources in the socio-economic sectors.¹³² It noted that such allocation may not reach the entire country due to scarce resources common to developing countries and such reality did not warrant a violation of Article 22 of the ACHPR.¹³³

In finding against the Applicants, the Commission adopted the "reasonable test" requirement rather than the "minimum core obligations" enunciated by the United Nations Committee on Economic, Social and Cultural Rights.¹³⁴ This approach is similar to that applied in the South African case of *Government of the Republic of South Africa v Grootboom*¹³⁵ where Yaqoob J observed that the question a court should ask as exemplified in this case is "whether the measures that have been adopted are reasonable."¹³⁶ He however noted that: "The state is obliged to act to achieve the intended result, and the legislative measures will invariably have to be supported by appropriate, well-directed policies and programmes implemented by the executive."¹³⁷

Thus, although there was no violation in this case, it essentially outlines that failure to provide infrastructural development and to involve actively the people in their development raises a potential breach of the right to development. This is particularly so if the programmes as in this case affects essential human rights such as participation, education and equality. Any policy or programme, which neglects reasonableness, falls short of the legal requirement. It is argued that the defence of progressive realisation of rights ought to be construed from the minimum core obligations of state. Lack of resources must not hinder a state from fulfilling the right to development minimally. This is supported by the Commission's recommendations to the respondent State, which included abolishing discriminatory practices, equitable location of national projects, and the transformation of

¹³¹ Para 206.

¹³² Para 206.

¹³³ Para 206.

¹³⁴ Committee on Economic, Social and Cultural Rights, General Comment 3, The nature of States parties' obligations (Fifth session, 1990), U.N. Doc. E/1991/23, annex III at 86 (1991) Comments 10-12.

¹³⁵ 2001 1 SA 46 (CC); For arguments on the minimum core see S Liebenberg "Making a Difference: Human Rights and Development-Reflecting on the South African Experience" in BA Andreassen & SP Marks (eds) *Development as a Human Right* (2010) 209 209-244; KG Young "The Minimum Core of Economic and Social Rights: A Concept in Search of Content" (2008) 33 *Yale J Int'l L* 113 113-175; D Olowu *An Integrative Rights Based Approach to Human Development in Africa* (2009); M Langford (ed) *Social Rights Jurisprudence: Emerging Trends in International and Comparative Law* (2008).

¹³⁶ *Democratic Republic of Congo v Burundi, Rwanda & Uganda* (2004) AHRLR 19 (ACHPR 2003) (DRC). Para 41.

¹³⁷ Para 42

representatives of the people of Southern Cameroon into political parties to ensure their full representation in their development decisions.¹³⁸

5 4 1 2 DRC

In *DRC* the Democratic Republic of Congo (Congo) filed a communication against Burundi, Rwanda and Uganda alleging that the trio jointly and severally violated a number of its peoples' rights under the ACHPR and international law.¹³⁹ In this first and only inter-state complaint to be heard by the African Commission the DRC alleged that the respondents invaded its eastern provinces and maimed, raped and destroyed hydroelectric plants, schools and medical facilities in contravention of its people's rights under the ACHPR. The right to development and the right to freely dispose of natural resources were therefore allegedly violated. The Commission in this communication, unlike in *Gunme*, found that these rights were violated. In the first instance, the African Commission "condemned the indiscriminate dumping and mass burial of victims of the series of massacres and killings perpetrated against the peoples of the eastern provinces of the Complainant State while the armed forces of the Respondent States were in actual fact occupying the said provinces."¹⁴⁰ It found these "acts [to be] 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 historical tradition and values enunciated in the preamble to the African Charter."¹⁴¹ The Commission's perspective reiterated the interdependence of human rights as well as the peculiarity of the cultural nexus of human rights in Africa.

Secondly, by depriving the Congolese people the right to freely dispose of their wealth and natural resources,¹⁴² their right to economic, social and cultural development was thereby violated.¹⁴³ This, according to the Commission, is because the respondents failed in their duty to individually and collectively ensure the realisation of the right to development under article 22 of the ACHPR.¹⁴⁴

Three main issues stem from the decision in this communication. Firstly, the Commission stressed the cultural perspective of the right to development by relating it to

¹³⁸ *Gunme* para 215.

¹³⁹ *DRC* Para 66 & 72.

¹⁴⁰ Kamga & Fombad (2013) 57 JAL 207.

¹⁴¹ 207.

¹⁴² ACHPR Art 21.

¹⁴³ *DRC* Para 95.

¹⁴⁴ Para 95.

the traditional practices of the Congolese people. The Commission buttressed the philosophical underpinnings of the African culture being *sine qua non* to development. Secondly, the Commission re-emphasised the apparent relationship between the right to internal self-determination and the right to development. In fact, according to the Commission, it was the violation of the right to freely dispose of wealth and natural resources that constituted the basis for the violation of the right to development. Similarly, this approach goes to show the nature of the interconnectedness of human rights. Thirdly, the decision accentuates the co-operation component of the right to development. States must not only positively contribute to the economic development of one another within the African region but also avoid acting inconsistently with such an end. In other words, development is a co-operative venture, which requires states to contribute towards its realisation jointly and severally. By their conducts, the respondents in this case had not shown their commitment towards contributing to the right to development of the Congolese people but rather, participated in denying them that right.

5 4 1 3 Ogoni case

In an interesting twist, the African Commission *suo motu* also referred to the right to development, in the *Ogoni* case, even though the complainants did not specifically allege it. In this case, two NGOs¹⁴⁵ alleged violations of Articles 2, 4, 14, 16, 18(1), 21, and 24 of the ACHPR. The case reflects the interconnected nature of human rights contained in the ACHPR. This is buttressed by the way the African Commission drew some analogical deductions over the alleged violation of certain rights in order to reach its conclusions. For instance, in finding for the violation of the right to housing and shelter which the ACHPR does not directly recognise, the African Commission agreed with the complainants that “military government of Nigeria massively and systematically” violated these rights. It did so when it violated the Ogoni’s rights to property,¹⁴⁶ physical and mental health¹⁴⁷ and family.¹⁴⁸ The Commission categorically stated that right to shelter includes the right not to be forcefully evicted¹⁴⁹ and thus maintained:

“At a very minimum, the right to shelter obliges the Nigerian government not to destroy the housing of its citizens and not to obstruct efforts by individuals or communities to rebuild lost homes. The state’s obligation to respect housing rights requires it, and thereby all of its organs

¹⁴⁵ Social and Economic Rights Action Centre (SERAC) and the Centre for Economic and Social Rights (CESR) based in Nigeria and New York respectively.

¹⁴⁶ ACHPR Art 14.

¹⁴⁷ ACHPR art 16(1).

¹⁴⁸ ACHPR art 18(1).

¹⁴⁹ *Ogoni case* Para 63

and agents, to abstain from carrying out, sponsoring or tolerating any practice, policy or legal measure violating the integrity of the individual or infringing upon his or her freedom to use those material or other resources available to him or her in a way he or she finds most appropriate to satisfy individual, family, household or community housing needs. Its obligations to protect obliges it to prevent the violation of any individual's right to housing by any other individual or non-state actors like landlords, property developers, and landowners, and where such infringements occur, it should act to preclude further deprivations as well as guaranteeing access to legal remedies. The right to shelter even goes further than a roof over one's head. It extends to embody the individual's right to be left alone and to live in peace - whether under a roof or not."¹⁵⁰

However, without being elaborate the African Commission found that like the right to housing and shelter, which are implicit in the ACHPR, the right to food is also implicit therein. It observed, “[b]y its violation of these rights, the Nigerian government disregarded not only the explicitly protected rights but also the right to food implicitly guaranteed.”¹⁵¹

Unlike its approach in finding a violation of the rights to housing and shelter, the African Commission was brief in its determination of the right to development, in spite of the opportunity it had to define the content of the right. It therefore only introduced it in finding for the violation of the right to food by stating 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 (article 16) and the right to economic, social and cultural development (article 22). By its violation of these rights, the Nigerian government disregarded not only the explicitly protected rights but also upon the right to food implicitly guaranteed.”¹⁵²

Olowu and Kamga suggest that this was a good opportunity for the African Commission to define the content of the right to development but it chose to play the ostrich game.¹⁵³ Olowu further questions the inspirational approach used by the African Commission for not presenting a “universal method” of interpretation particularly concerning States that are not party to the ICESCR, which the African Commission relied on for its interpretation.¹⁵⁴ Thus, States including those that are not signatories to the ICESCR cannot be brought within the fold of this decision.¹⁵⁵

All the same, the *Ogoni* decision is instructive in many ways. Firstly, it brings to the fore the importance of individual or collective participation in decisions that affects the people - an important component of the right to development. The African Commission noted that

¹⁵⁰ Para 61.

¹⁵¹ Para 64.

¹⁵² Para 64.

¹⁵³ Olowu *Integrative Approach to Human Based Development* 155-156; and Kamga & Fombad (2013) 57 *JAL* 207.

¹⁵⁴ Olowu *Integrative Approach to Human Based Development* 155.

¹⁵⁵ 154.

the Ogonis were in fact not involved in any decisions that affected their rights to wealth and resources.¹⁵⁶ Secondly, this decision significantly restates the duties as well as the extent of those duties which states as primary duty bearers of human right obligations must fulfil.¹⁵⁷ The Commission found that:

“The government’s treatment of the Ogonis has violated all three minimum duties of the right to food. The government has destroyed food sources through its security forces and state oil company; has allowed private oil companies to destroy food sources; and, through terror, has created significant obstacles to Ogoni communities trying to feed themselves. The Nigerian Government has again fallen short of what is expected of it under the provisions of the African Charter and international human rights standards, and hence, is in violation of the right to food of the Ogonis.”¹⁵⁸

The African Commission nevertheless shied away from the “people” debate. It impliedly recognised the Ogonis as a people without delimiting the concept itself. This omission is significant for obvious reasons. The Ogonis are only a fraction of the people that make up the Niger-Delta region of Nigeria which is the oil-producing region of the country.¹⁵⁹ The Nigerian Government never referred to the victims in this case as Ogoni people; instead, they used the term the Niger-Delta region. Yet, the Commission ignored this. A claim for the violation of the Ogoni’s right to wealth and natural resources defeats the character of Nigeria’s federalism with the state, not the separate federal entities, being the holder of all natural resources.¹⁶⁰ Therefore, in this case, the Nigerian state itself, as an entity, has the sole right to the natural resources in, on, beneath or forming part of its lands, waters or exclusive economic zones.¹⁶¹ It is in this regard that this aspect of the African Commission’s decision is considered suspect especially in Nigeria because the Ogoni’s are seen not as a separate people but as Nigerians.

5 4 1 4 Darfur

In this case, gross, massive and systemic violations of the human rights of mainly three tribes (Fur, Marsalit and Zaghawa) making up the population of the Darfur region in Western Sudan were alleged.¹⁶² The complaint outlined that the respondent state supported by the Janjaweed and *Murhaleen* militias unleashed upon the aforementioned tribes: “large-scale killings, the forced displacement of populations, the destruction of

¹⁵⁶ *Ogoni* para 55.

¹⁵⁷ Para 57.

¹⁵⁸ Para 57.

¹⁵⁹ See Olowu *Integrative Approach to Human Based Development* 154-156.

¹⁶⁰ Petroleum Act of 1968 Chapter 350 LFN 1990. S 1 provides that “[t]he entire ownership and control of all petroleum in, under or upon any lands to which this section applies shall be vested in the State.”

¹⁶¹ Petroleum Act S 1(2); See *AG of Abia State & Others v AGF* (2003) LPELR-610 (SC).

¹⁶² *Darfur case* Para 2.

public facilities, properties and disruption of life through bombing by military fighter jets in densely populated areas.”¹⁶³ The complainants therefore urged the Commission to find the respondent state liable for human rights violations in the Darfur region for violating articles 4, 5, 6, 7, 12 (1), 14, 16, 18 (1) and 22 of the ACHPR.¹⁶⁴ Elaborating further, the complainant argued that, “attacks by militias prevented Darfurians from farming land, collecting firewood for cooking, and collecting grass to feed livestock, which constitute a violation of their right to adequate food”.¹⁶⁵ There was also total disregard of their right to life (article 4), security (article 6)¹⁶⁶, residence (article 12), property and forced displacements from their habitual places of residence.¹⁶⁷

This case re-emphasises the important correlation between socio-economic rights and the right to development.¹⁶⁸ The African Commission, in a detailed decision, elaborated on each of these rights drawing inspiration from international law. It found the respondent State in violation of its duties under the ACHPR. The African Commission noted that the period when these violations occurred coincided with a war period. Nevertheless, it decided that the primary responsibility of the respondent state is to protect at all times the life and property of its citizens including during peacetime and in times of disturbances and armed conflicts; where necessary, people in harm’s way must be brought to safety in a dignified manner.¹⁶⁹ The Commission further decided that the attacks and forced displacement of the Darfurians denied them the opportunity to engage in any economic, social and cultural activities; hence, such displacement affected the Darfurian children’s right to development.¹⁷⁰

Interestingly, the approach of the Commission maintained that the right to development is a collective right of peoples. The Commission elaborated on the fluid concept of “peoples”.¹⁷¹ It found that the people of Darfur, a collective of three tribes satisfied in their collective form as “a people”.¹⁷² Interestingly also, the Commission found that the right to development is not only claimable externally but that it can be claimed internally against a

¹⁶³ Para 3-4.

¹⁶⁴ Para 15.

¹⁶⁵ Para 112.

¹⁶⁶ Para 113.

¹⁶⁷ Paras 114-115.

¹⁶⁸ Yeshanew *The Justiciability of Economic, Social and Cultural Rights* 261-268.

¹⁶⁹ *Darfur Case* Para 201

¹⁷⁰ Para 224.

¹⁷¹ Para 220

¹⁷² Para 220.

domineering state.¹⁷³ Therefore the Darfurian people being a people “do not deserve to be dominated by a people of another race in the same state.”¹⁷⁴ Hence, their “claim for equal treatment arose from the alleged underdevelopment and marginalization.”¹⁷⁵ Thus their rights in this regard are clearly protected under the ACHPR.¹⁷⁶ The ACHPR was passed to re-energise states to protect human and peoples’ rights of the African people internally and externally.¹⁷⁷ In other words, the people of Darfur have the right not to be victimised or dominated by another, let alone by a group within their country. In fact, they have a right to equality and to the enjoyment of all their human rights.¹⁷⁸ In the same way, the African Commission underscored the interconnectedness of human rights when it decided that the systemic violence against the complainants resulted in the denial of their economic, social and cultural rights. Specifically, the violence denied their children the right to education. In sum, according to the African Commission, the magnitude of the violation that occurred in this case gave reason to the violation of the right to development.¹⁷⁹

5 4 1 5 Endorois

The Endorois decision instructively heralds an important trend towards the understanding of the concept of the right to development. It can be argued to be the maiden attempt by the African Commission to elaborately analyse the concept. The decision by the African Commission not only requires States to realise the right to development by designing policies and programmes to improve people’s rights, it likewise sets minimum indices aimed at ensuring that, while providing the right other rights of the beneficiaries are not violated.

The complaint was filed on behalf of the Endorois, an indigenous pastoralist community 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 (COHRE).¹⁸⁰ The complainants alleged that the Endorois community were displaced from their ancestral lands without adequately being compensated for the loss of their property. The displacement affected their livelihood including their ability to practice their culture and

¹⁷³ Para 222.

¹⁷⁴ Para 223.

¹⁷⁵ Para 223.

¹⁷⁶ See ACHPR Arts. 2 & 19.

¹⁷⁷ *Darfur* case para 222.

¹⁷⁸ Para 221.

¹⁷⁹ Para 224.

¹⁸⁰ Para 1; See also J Murphy “Extending Indigenous Rights by Way of the African Charter” (2012) 24 *Pace Int’l L Rev* 151-189.

religion, undertake their pastoral enterprise and generally the overall process of their development.¹⁸¹

It was alleged that the Kenyan Government violated the ACHPR, its Constitution and international law when it forcibly removed the Endorois from the ancestral lands without proper prior consultations, adequate and effective compensation.¹⁸² The Respondent State (through the Kenyan Wildlife Service) only informed certain Endorois elders when the game reserve had been earmarked for development that families would be compensated with plots of fertile land, 25 per cent of the tourist revenue from the game reserve and 85 per cent of the employment generated would go to them.¹⁸³ Additionally, cattle dips and fresh water dams would be constructed for them by the respondent State.¹⁸⁴ These promises were never fulfilled.

The complainants further submitted to the Commission how the Endorois held their land in very high esteem noting that “tribal land, in addition to securing subsistence and livelihood, is seen as sacred, being inextricably linked to the cultural integrity of the community and its traditional way of life.”¹⁸⁵ In view of this they argued that to them land “belongs to the community and not the individual and is essential to the preservation and survival as a traditional people.”¹⁸⁶ Therefore, the Endorois peoples “health, livelihood, religion and culture are all intimately connected with their traditional land, as grazing lands, sacred religious sites and plants used for traditional medicine are all situated around the shores of Lake Bogoria.”¹⁸⁷

Consequently, the actions of the Kenyan Government not only forced the Endorois community away from fertile lands to semi-arid area but also divided them as a community and displaced them from their traditional and ancestral lands.¹⁸⁸ Thus, the community was denied effective participation in decisions affecting their own land, in violation of their right to development.¹⁸⁹ Therefore, the complainants alleged the violation of their rights to religion,¹⁹⁰ property,¹⁹¹ education and cultural life,¹⁹² freely dispose of their wealth and

¹⁸¹ *Endorois* Para 1.

¹⁸² Para 2.

¹⁸³ Para 7.

¹⁸⁴ Para 7.

¹⁸⁵ Para 16.

¹⁸⁶ Para 16.

¹⁸⁷ Para 16.

¹⁸⁸ Para 17.

¹⁸⁹ Para 17.

¹⁹⁰ ACHPR Art. 8.

¹⁹¹ Art 14.

¹⁹² Art 17.

natural resources¹⁹³ and their right to economic, social and cultural development¹⁹⁴ under the ACHPR. The Kenyan domestic courts were also allegedly unwilling to enforce the Endorois' rights hence the application before the African Commission.

On its part, the Kenyan Government disagreed with the complainants in different respects. Firstly, it argued that the Endorois' claim of lack of participation was untrue in that a Country Council, where all decisions are deliberated, duly represented them.¹⁹⁵ The council itself evolved through a participatory model of free and fair election.¹⁹⁶ The Respondent State further added that to ensure that the right to development of the Endorois people is realised, they pursued ambitious programmes in the areas of education, agriculture, and rural poverty reduction strategies.¹⁹⁷ They remarked that the action only intended to portray the Kenyan State in a bad light as all efforts to secure their rights including consultation, the payment of compensation and proper resettlement of families were carried out in good faith.¹⁹⁸

However, having considered the arguments of both parties, the African Commission decided in favour of the Endorois people. It found that the Endorois people's right to development amongst other rights had been violated. The African Commission went ahead to espouse the most important details of the right to development wherein it observed that the right to development consist of both a constitutive and instrumental elements each of which must be contemporaneously realised.¹⁹⁹ Violation of either of the elements renders the realisation of the right impossible; hence, according to the African Commission the two-pronged test is "useful as both a means and an end."²⁰⁰ Similarly, the African Commission, while agreeing with the opinion of the UN independent expert on the right to development's position on the elements of the right to developments, which outlined that any efforts towards its realisation must be "equitable, non-discriminatory, participatory, accountable, and transparent, with equity and choice as important, overarching themes."²⁰¹ The three important pillars of the right to development, as stressed in this decision, are choice, effective participation and the right to enjoy wealth and natural resources. For instance, individuals and peoples should have the right to choose where to

¹⁹³ Art 21.

¹⁹⁴ Art 22.

¹⁹⁵ Para 276 *Endorois case*.

¹⁹⁶ Para 269 and 276.

¹⁹⁷ Para 271.

¹⁹⁸ Para 273 and 274.

¹⁹⁹ Para 277.

²⁰⁰ Para 277.

²⁰¹ Para 277.

live. The State must not arbitrarily trample upon this right of choice. Hence, “[f]reedom of choice must be present as a part of the right to development.”²⁰²

On effective participation, the African Commission noted that mere consultation is not enough to discharge the State from its responsibility to meaningfully engage the people over their rights. The people in addition to being consulted must give their “free, prior, and informed consent, according to their customs and traditions.”²⁰³ This raises the threshold of what the States must ordinarily do especially in taking over land for public use. Thus, in the instant case, what the State did was insufficient because it did not give room for effective participation of the Endorois people. In the words of the African Commission, “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.”²⁰⁴ Consequently, community members were thus put at a disadvantage as there apparently existed, at the time of the said consultation “unequal bargaining power” against the Endorois people.²⁰⁵ The Commission further noted the vulnerability of the Endorois people being illiterates and incapable of understanding the content of the documents given to them in the course of negotiations.²⁰⁶ For there to be effective participation, consultations must be in good faith, through culturally appropriate procedures and with the objective of reaching an agreement as laid down by the Inter American Court of Human Rights in *Saramaka*.²⁰⁷ Again, people ought to enjoy from the benefit sharing as enunciated under global best practices such as those provided under the African Charter on Popular Participation in Development and Transformation (African Charter on Popular Participation)²⁰⁸ as well as the Convention on the Elimination of all forms of Discrimination (CERD)²⁰⁹ guaranteeing benefit sharing as vital to the development process.²¹⁰ The former enshrines:

“[T]hat at the heart of Africa’s development objectives must lie the ultimate and overriding goal of human-centered development that ensures the overall well-being of the people through sustained improvement in their living standards and the full and effective participation of the

²⁰² Para 278.

²⁰³ Para 291.

²⁰⁴ Para 281.

²⁰⁵ Para 282.

²⁰⁶ Para 292.

²⁰⁷ Para 289; *Samaraka People v Suriname* Judgment of Nov 28, 2007 Inter American Court (Ser C) .

²⁰⁸ The African Charter for Popular Participation in Development and Transformation (Arusha 1990) Adopted during the International Conference on Popular Participation in the Recovery and Development Process in Africa was held, in Arusha, the United Republic of Tanzania from 12 to 16 February 1990.

²⁰⁹ Convention on the Elimination of All Forms of Racial Discrimination, (adopted 21 December 1965, entered into force 4 January 1969) 660 UNTS 195 (CERD)

²¹⁰ *Endorois case* para 294-296.

people in charting their development policies, programmes and processes and contributing to their realization.” We furthermore observe that given the current world political and economic situation, Africa is becoming further marginalized in world affairs, both geo-politically and economically. African countries must realize that, more than ever before, their greatest resource is their people and that it is through their active and full participation that Africa can surmount the difficulties that lie ahead.”²¹¹

The CERD on its part seeks to eliminate all forms of discrimination and promote participation by all. The Commission therefore observed:

“In the present context of the Endorois, the right to obtain ‘just compensation’ in the spirit of the African Charter translates into a right of the members of the Endorois community to reasonably share in the benefits made as a result of a restriction or deprivation of their right to the use and enjoyment of their traditional lands and of those natural resources necessary for their survival.”²¹²

This decision has been referred to as historic by repositioning the utility of the right to development. It has succeeded in prompting states on their responsibility of putting round pegs in round holes. In other words, the people have a right to participate in their development without being coerced. Doing so is what satisfies the requirement of UNDRD’s “active, free and meaningful participation in development under article 2(3).”²¹³ The African Commission therefore concluded that it:

“is convinced that the inadequacy of the consultations left the Endorois feeling disenfranchised from a process of utmost importance to their life as a people. Resentment of the unfairness with which they had been treated inspired some members of the community to try to reclaim the Mochongoi Forest in 1974 and 1984, meet with the President to discuss the matter in 1994 and 1995, and protest the actions in peaceful demonstrations. The African Commission agrees that if consultations had been conducted in a manner that effectively involved the Endorois, there would have been no ensuing confusion as to their rights or resentment that their consent had been wrongfully gained. It is also convinced that they have faced substantive losses - the actual loss in well-being and the denial of benefits accruing from the game reserve. Furthermore, the Endorois have faced a significant loss in choice since their eviction from the land. It agrees that the Endorois, as beneficiaries of the development process, were entitled to an equitable distribution of the benefits derived from the game reserve.”²¹⁴

Although this decision received accolades globally, its implementation by the Kenyan Government is yet to be actualised.

This is one of the major constraints of realising the human rights including the right to development. Chapter 7 considers this problem in the light of the Nigerian legal system. Meanwhile, on the Endorois case, Murphy opines, “[t]he decision exemplifies a pinnacle of

²¹¹ African Charter on Popular Participation para 8.

²¹² *Endorois case* para 297.

²¹³ UN Non-Governmental Liaison Service “The Endorois and their struggle for the realization of the right to development: NGLS interviews Wilson Kipsang Kipkazi of the Endorois Welfare Council and Lucy Claridge of the Minority Rights Group International” <http://www.un-ngls.org/spip.php?page=article_s&id_article=3607> (accessed 17-04-2014).

²¹⁴ Para 298 of *Endorois case*

legal recognition for indigenous peoples and a decisive rejection of the kind of law-making that once soiled their rights.”²¹⁵ The decision further exemplifies the nature of the right to development as both an interconnected right and a right belonging to peoples.²¹⁶ In the opinion of the Human Rights Watch, the Endorois decision is the “first of its kind” where any international tribunal has found a violation of the right to development.²¹⁷ Hence, the decision “can help many others across Africa who have [sic] been forced from their homes.”²¹⁸ Interestingly, the right of peoples, which is one of the important milestones achieved by this decision, has its advantages. Eventually, the individual who forms the group enjoys the benefits of the right. It will make more logical sense especially with developmental issues for claimants to come as a group for the purposes of making a claim. After all, the beneficiaries of any programme and policy are unlikely to be a single person.

On the status of implementation, the Complainants approached UNESCO in 2012 urging it to regarding its “concerns over the designation of the Lake Bogoria site as a World Heritage Site without obtaining the free, prior and informed consent of the Endorois.”²¹⁹ The letter argued that the Endorois were entitled to enjoy the fruits of the African Commission’s decision. The letter noted:

“This violation is intensified and continued by the fact that to date [18/11/2013], the Endorois have not been involved in any aspect of management over the designated land, nor do they receive any share of the benefits from the World Heritage site. In failing to involve the Endorois within the management of Lake Bogoria, and in the sharing of benefits, the Government is acting in contravention of the [African Commission’s] decision and in violation of the Endorois’ right to development under Article 22 of the [ACHPR].”²²⁰

Similarly, the decision highlights the relationship between human rights and those cardinal principles of equity, non-discrimination, accountability and participation. The right

²¹⁵ Murphy (2012) 24 *Pace Int’l L Rev* 189. See also Kamga *Human Rights in Africa* 235; A Sengupta “The Political Economy of Legal Empowerment of the Poor” in D Banik (ed) *Rights and Legal Empowerment in Eradicating Poverty* (2008) 31 31.

²¹⁶ Kamga *Human Rights in Africa* 235-237; and Kamga & Fombad (2013) *JAL* 212.

²¹⁷ Human Rights Watch “Kenya: Land Mark Ruling on Indigenous Land Rights People” (04-02-2010) *Human Rights Watch* <<http://www.hrw.org/news/2010/02/04/kenya-landmark-ruling-indigenous-land-rights>> (accessed 17-04-2014).

²¹⁸ Human Rights Watch “Kenya: Land Mark Ruling on Indigenous Land Rights People” (04-02-2010) *Human Rights Watch* <<http://www.hrw.org/news/2010/02/04/kenya-landmark-ruling-indigenous-land-rights>> (accessed 17-04-2014).

²¹⁹ Letter to UNESCO titled “UNESCO World Heritage Designation of Lake Bogoria, Kenya / ‘Kenya Lake System in the Great Rift Valley’” (18-11-2013) *IWGIA* <http://www.iwgia.org/iwgia_files_news_files/0870_Letter_to_UNESCO_re_Endorois_1811133.pdf> (accessed 17-04-2014).

²²⁰ Letter to UNESCO titled “UNESCO World Heritage Designation of Lake Bogoria, Kenya / ‘Kenya Lake System in the Great Rift Valley’” (18-11-2013) *IWGIA* <http://www.iwgia.org/iwgia_files_news_files/0870_Letter_to_UNESCO_re_Endorois_1811133.pdf> (accessed 17-04-2014).

to development like any other human right is achievable “if and when” these principles are vigorously pursued especially in Africa where authoritarianism and corruption are commonplace. The decision hovers specifically on participation which, if recognised and effected, will ensure that the people become active stakeholders in their development.

Some of the most controversial aspects of the recommendations of the African Commission are the extent to which its decisions bind the member states as well as the extent to which these states comply thereto. However, following the series of intervention from stakeholders mostly NGOs like ESCR-Net²²¹, pushing for the implementation of the decision in this case, the African Commission²²² noted the unwillingness of the Kenyan government to report to it within 90 days and to file a comprehensive report including a road map with timelines and commitments for implementation of the Commission’s recommendations.²²³ The Commission also noted with dismay the absence “of the Kenyan Government representatives at the ‘Workshop on the Status of Implementation of the Endorois Decision of the African Commission on Human and Peoples’ Rights’ organised by the Working Group on Indigenous Populations/Communities in collaboration with the Endorois Welfare Council held in Nairobi, Kenya on 23 September 2013”²²⁴ Hence concerned about these events the African Commission made the following important decisions thus:

- “1. Urges the Government of Kenya, as State Party to the African Charter, to comply with its obligations under the Charter, including giving effect to the rights and freedoms guaranteed therein;
2. Calls on the Government of Kenya to inform the Commission of the measures proposed to implement the Endorois decision, and more particularly, the concrete steps taken to engage all the players and stakeholders, including the victims, with a view to giving full effect to the decision;
3. Exhorts the Government of Kenya to immediately transmit to the Commission, a comprehensive report, including a roadmap for implementation as pledged during the oral hearing at the 53rd Ordinary Session of the Commission.”²²⁵

²²¹ ESCR-NET Letter of Support Communication No. 276/2003: Centre for Minority Rights Development (Kenya) and Minority Rights Group (on behalf of Endorois Welfare Council) / Kenya <<http://www.escr-net.org/sites/default/files/ESCRNet%20WGSL%20letter%20of%20support%20to%20the%20Endorois%20case.pdf>> (accessed 06-11-2014)

²²² During its 54th session held in Banjul, The Gambia, from 22 October to 5 November 2013.

²²³ See ACHPR Resolution 257: Resolution Calling on the Republic of Kenya to Implement the Endorois Decision 5 November 2013

²²⁴ ACHPR Resolution 257: Resolution Calling on the Republic of Kenya to Implement the Endorois Decision 5 November 2013

²²⁵ ACHPR Resolution 257: Resolution Calling on the Republic of Kenya to Implement the Endorois Decision 5 November 2013.

Interestingly, the Kenyan government responded positively to these far-reaching calls. Recently through a gazette notice number 6708, dated 19th September, 2014 they set up a task force to look at the possible implementation of the decision in the Endorois case.²²⁶ The global community eagerly awaits the outcome of this process. Apart from this effort, unfortunately, nothing tangible has been done on record, neither to ease the plight of the Endorois people nor to implement the decision of the African Commission.

5 4 2 ECOWAS jurisprudence

As observed in chapter 3 5, ECOWAS was established as a sub-regional economic organisation for the purposes of achieving economic development, integration and stability through co-operation among member states with the aim of improving the living standards of its peoples.²²⁷ The organisation further encourages “accountability, economic and social justice and popular participation in development”.²²⁸ Similarly, the fundamental principles of ECOWAS includes “recognition promotion and protection of human and peoples’ rights” as enshrined in the ACHPR.²²⁹ In essence, therefore, the ECOWAS regime is an important avenue towards the effective realisation of the right to development. Viljoen observes that the ECOWAS human rights enforcement mechanism is an exception to the general rule because unlike other regional economic communities, the ECOWAS Treaty is itself a human rights treaty.²³⁰ The ECOWAS human rights regime has given unqualified jurisdiction to the ECCJ to entertain human rights violations resulting from the ACHPR.²³¹ Therefore, this commitment by the ECOWAS system stands out to give meaning to the organisation’s activities and efforts, which arguably may serve as a conduit for the realisation of the right to development. Indeed, practically, the ECCJ has had course to contribute to this endeavour as will be shown below.

²²⁶ Gazzete Notice 6708: Task Force on the Implementation of the Decision of the African Commission on Human and Peoples’ Rights Contained in Communication No. 276/2003 Centre for Minority Rights Development v Republic of Kenya found: <http://www.escrnet.org/sites/default/files/Government%20Task%20Force%20%28Gazette%20Notice%29.pdf> >(accessed 07-11-2014).

²²⁷ See ECOWAS Treaty Art. 3 (1).

²²⁸ ECOWAS Treaty 4(h).

²²⁹ ECOWAS Treaty Art. 4 (g).

²³⁰ Viljoen *International Human Rights* 453-454.

²³¹ This is by virtue of the Supplementary Protocol A/SP.1/01/05 Amending Protocol A/P.1/7/91 relating to the Community Court of Justice adopted in 2005. See also Viljoen *International Human Rights* 451-456; Ebobrah (2011) *AHRLJ* 231; MT Ladan *Introduction to ECOWAS Community Law and Practice* 273-274. Viljoen further argues that even though most sub-regional institutions such as EAC and SADC make provision for human rights, with the exception of the ECOWAS system they are in reality human right treaties. See 453.

The ECCJ has thus far been faced with one matter involving the alleged violation of the right to development. However, it found that the right had not been so violated. This is without prejudice to an instance where the ECCJ found for the violation of other related rights such as environment²³² and education.²³³ That notwithstanding, the jurisprudence of the ECCJ is pivotal for at least two reasons. Firstly, the ECCJ has followed the African Commission in holding that the right to development is a peoples' right. Secondly, the jurisprudence buttresses the legal potentials of the right and opens up avenues for people to utilise the ECCJ as a remedial human rights body. To support this claim, even while the AU mechanisms are available, many litigants have opted for the ECCJ for the resolution of their disputes.²³⁴ This is even more so for Nigerians as the headquarters of the ECCJ is situated in the Nigerian domain wherein, many Nigerians may take advantage of its presence to seek the enforcement of their rights under various international legal instruments. The ECCJ observed in SERAP that:

“[E]ven though ECOWAS may not have adopted a specific instrument recognising human rights, the Court's human rights protection mandate is exercised with regard to all the international instruments, including the African Charter on Human and Peoples' Rights, the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights, etc. to which the Member States of ECOWAS are parties.”²³⁵

Thus, in *Pinheiro*²³⁶, the ECCJ held that the allegation of the complainant was baseless because peoples' rights provided under article 22 are to be enjoyed collectively and not individually. The complainant, a Nigerian, sought to enforce his right as an individual to practice law in Ghana claiming that refusal by Ghanaian authorities to let him do so, infringed on his right to development.²³⁷ Apparently, the complainant's understanding of the right to development was not in line with that of the ECCJ. After all, the right is an all-encompassing right as advanced many times in this dissertation. As an underlying right, it may be tied to his other rights that are personal to him including the right to reside and

²³² *SERAP v FRN ECW/CCJ/APP/08/09* (2009) ECCJ (2012) (SERAP).

²³³ *SERAP* case.

²³⁴ This is proved by the myriad of cases reported in the ECCJ's website.

²³⁵ *SERAP* 2012 para 28; The ECCJ added:

“That these instruments may be invoked before the Court reposes essentially on the fact that all the Member States parties to the Revised Treaty of ECOWAS have renewed their allegiance to the said texts, within the framework of ECOWAS. Consequently, by establishing the jurisdiction of the Court, they have created a mechanism for guaranteeing and protecting human rights within the framework of ECOWAS so as to implement the human rights contained in all the international instruments they are signatory to.”

Para 29. See also *Amouzou Henri v. Republic of Côte d'Ivoire* (2009) ECW/CCJ/JUG/04/09 para 57-62; *Aliyu Tashoku v. Federal Republic of Nigeria* (2012) ECW/CCJ/RUL/12/12 para 16

²³⁶ *Kemi Pinheiro (SAN) v. Republic Of Ghana ECW/CCJ/APP/07/10* ECCJ (2012) (*Pinheiro*).

²³⁷ *Pinheiro* para 37-40.

earn a living anywhere especially within the West African Community. The ECCJ specifically observed that based on *opinio juris communis*, articles 19 to 24 of the ACHPR are rights of peoples and not the right of individuals.²³⁸ It further noted that even if the action was instituted in a representative capacity, the applicant would eventually, as an individual, be the beneficiary of that right. The ECCJ drew a distinction between what was before it, and what was before the African Commission in the case of the Katanga people whereby in the latter case, the entire Katanga people were the beneficiaries of the communication.²³⁹

The facts of *SERAP* are similar and serve the same purpose as the case filed before the African Commission in the *Ogoni* case with the only exception being that one of the rights alleged to have been violated in *SERAP* was the right to development.²⁴⁰ However, the ECCJ unlike the African Commission only found in favour of the violation of articles 1 and 24 of the ACHPR.²⁴¹ Unfortunately, the ECCJ appears to be beclouded by prioritising technical justice as is clear in *SERAP*²⁴², *Uwechue*²⁴³ and *Tandja*^{244, 245}. In *SERAP* the ECCJ declined jurisdiction to entertain the petition brought before it, which alleged the violation of the right to development amongst other composite human rights violations because the complainant was not a state.²⁴⁶ It refused to do so, on the grounds that local remedies had not been exhausted before the petition was brought before it. The ECCJ argued that its responsibilities are not geared towards usurping the original human rights jurisdictions of domestic courts.²⁴⁷

This dimension, according to Nwauche also serves to protect the ECCJ against a flood of unscrupulous applications and abuse of court process.²⁴⁸ The ECCJ further acknowledged that in cases of violations of the ACHPR, it will be predisposed to accepting jurisdiction in so far as the allegation is against an ECOWAS member State (as defendant)

²³⁸ Para 37.

²³⁹ Para 37.

²⁴⁰ Ebobrah (2011) *AHRLJ* 243.

²⁴¹ *SERAP* para 120.

²⁴² *SERAP*.

²⁴³ *Peter David V. Ambassador Raph Uwechue* ECW/CCJ/APP/06/09

²⁴⁴ *Mamadou Tandja V. General Salou Djibo & Anor* ECW/CCJ/APP/05/10 (2010) (Tandja).

²⁴⁵ See generally Ebobrah (2011) *AHRLJ* 231-244.

²⁴⁶ *SERAP* paras 52 to 64 and 71; see also ES Nwauche "The ECOWAS Community Court of Justice and the Horizontal Application of Human Rights" (2013) 13 *AHRJ* 30-54. (2009) ST Ebobrah "Litigating Human Rights before Sub-Regional Courts in Africa: Prospects and Challenges" (2009) 17 *Afr. J. Int'l & Comp. L.* 79-101; ST Ebobrah "A Rights-Protection Goldmine or a Waiting Volcanic Eruption? Competence of, and Access to, the Human Rights Jurisdiction of the ECOWAS Community Court of Justice" (2007) 7 *AHRLJ* 307-329.

²⁴⁷ *Nwachue* para 37.

²⁴⁸ Nwauche (2013) 13 *AHRJ* 35.

and not an individual.²⁴⁹ However, the ECCJ raised fundamental issues arising from domestic law on the justiciability of the rights alleged before it. In *SERAP*, relying on Nigerian judicial precedence, the ECCJ opined that despite the constitutional lacunae within the human rights enforcement paradigm, domestic courts have in the past devised means and measures to enforce all genres of human rights.²⁵⁰ Consequently, the ECCJ serves as a complementary court towards an integrated human rights system in Africa.²⁵¹

In a different strand however, the ECCJ found that the right to education, which is an important component of the right to development, was a justiciable right in Nigeria.²⁵² It held that the Nigerian government was obliged to design policies that will ensure the realisation of the right in line with constitutional and extant law provisions.

5 4 Concluding remarks

This chapter endeavoured to discuss the legal nature of the right to development as it has developed and as it is understood under the African human rights regime. It highlights that the right to development has its sources from the myriad of African legal instruments and as discussed in chapter 4, signifying the interconnection of the human rights regime under international human rights law. It is important to note that it is only the African system that recognises the right to development as an enforceable right under international human rights law. Hence, the jurisprudence of the African human rights system is important as it shows that as far as the African continent the right is not only *fait accompli* but also capable of enforcement with its identifiable duty bearers as well as claimants as shown above. This is visible especially through the lens of the African Commission. Importantly, the cornerstone of the right to development, as buttressed particularly by the African Commission include self-determination, equality, non-discrimination and ultimately the right of the people to participate in their development whether as a group or individually. While the jurisprudence is still evolving, its application so far will be tested within the Nigerian legal system in the following chapters 6 and 7.

²⁴⁹ See *SERAP* Para 8.

²⁵⁰ See chapter 7.

²⁵¹ Nwauche (2013) *AHRJ* 31.

²⁵² *SERAP* case Para 28.

Chapter 6

Nigeria's Domestic Obligations under the Right to Development

6.1 Introduction

As was established in chapter 4 and 5, the right to development is primarily an international obligation to be implemented by states individually and collectively. Hence, it is the domestic legal systems that determine the nature, extent and method of its application. This raises important questions about the interrelationship between international law and domestic law. This relationship was generally examined in chapter 4. In essence therefore, this chapter examines the fifth secondary research question formulated as follows: what is the legal status and significance of the right to development under the Nigerian legal system especially in view of its domestication under the ACHPR?

The analysis offered in this chapter demonstrates specifically how the Nigerian legal system attempts to accommodate international standards; especially those related to human rights and ultimately the right to development. This sets the stage for the central discussion of my research namely the effectiveness of the implementation of the right to development in Nigeria through legislative means and the creation of relevant institutions. To facilitate this discussion the main thrust of this chapter is to contextualise the reception of the right to development as a product of the international human rights system within the Nigerian legal system.

As one of the few countries on the continent Nigeria (as a dualist state) has domesticated the ACHPR.¹ As was discussed in chapter 5, the ACHPR enshrines all the cardinal aspects of the right to development including, more specifically, a provision on the right itself. The domestication of the ACHPR has created conflict between Nigeria's international human rights obligations as contained in the ACHPR on the one hand and implementing these obligations within the Nigerian legal context on the other. As I show hereunder, the demarcation between civil and political rights and economic, social and cultural rights in the Nigerian Constitution has left the realisation of the latter rights, together with other non-civil and political rights (including the right to development) without constitutional fortification. This approach calls for serious reflection based on legal analysis.

¹ African Charter Act.

In the previous chapters I advanced, building on the regional and international systems of international law, the thesis that the right to development is part of a broader international and regional human rights obligation. In this chapter I argue that this obligation applies to Nigeria, failing which constitutes a breach of international commitments as well as its domestic laws. This is clearly a departure from the traditional view that the enforceability of economic, social and cultural rights, which theoretically, have been conditioned by the passivity often exhibited by most states in dire need of development. To prove such violations is not the end game of this analysis *per se* as it is evident that these often go undetected by the international and regional community.² However the methodology used in this chapter is to use these obligations to map the legal interventions, if any, under Nigerian domestic law. In this regard I argue that Nigeria's direct obligations under international and domestic law, is supported by four key factors. Firstly, the Nigerian legal system is receptive in nature, in the sense that it evolved over the years largely through legal transplantation. This indicates that there is a room for a continuing development of the legal system over time and as the need arise. Secondly, the system (not its operators) is dynamic in the sense that it is nurtured by a flexible legal culture that allows diverse mechanisms for legal development such as judicial creativity and discretion as anchors for its sustainability. This dynamism, if viewed within the context of the reception of laws, is arguably advantageous to the development of the right to development. Although this is so, the operators have maintained a rather unwilling posture towards this discretion. Thirdly, the reality of economic underdevelopment in Nigeria as a result of decades of massive and systemic corruption has led to the need for immediate reorientation and agitation for answers to these impending problems, amongst others, seeking legal explanations. The right to development provides a good context within which to analyse these legal explanations as its main purpose is to reorganise the global economic system, ensure good governance and reduce poverty. Fourthly, international human rights law goes hand in hand with the gradual "internationalisation" of domestic laws largely through the influence of globalisation and the need to protect "human dignity", an important cornerstone of the right under review.

These factors provide a solid base for the argument constituting the main theme of the present chapter. I argue, throughout this chapter that the right to development has gone beyond rhetoric in Nigeria through a combination of national and international commitments and that contrary to popular assumptions, constitutes a judiciable right. What

² There have been exceptions as further related to in chapter 5. See *Ogoni* case in 5 4 1 3.

is suspect is the enforcement of the right within this system and the efficacy of inputs through targeted, concrete, comprehensive and well-designed legal, institutional and policy frameworks as is discussed in the following, final, substantial chapter.

This chapter is divided largely into three parts. In the first part, I briefly discuss the relevant structures of the diverse Nigerian legal system to present the reader with a foundation for a further understanding of the reception of international law into the Nigerian legal system. In the second part I discuss the application of international law within the Nigerian legal system. In this part, the discussion centres on the basic obligations of Nigeria with respect to international human rights. I also analyse how this system absorbs international law particularly, the principles of CIL and treaty obligations on the right to development. The third part discusses the consequences of the absorption of the right to development into the Nigerian legal system as an embedded human rights obligation in the constitution. The right is also gleaned as a specific constitutional obligation and as an indigenous customary practice.

6 2 The Nigerian legal system

The Nigerian legal system is a conglomeration of the British, Islamic and indigenous cultural systems operating together and sometimes conflicting with one another.³ With about 170 million people and an estimated 250 ethnic groups with 400 languages, Nigeria is among the most diverse countries in the world.⁴ From the outset, Nigeria became a single geographic entity with the amalgamation of the Northern and Southern Protectorates in 1914. Originally, many separate independent societies existed prior to the

³ See generally C Mwalimu *The Nigerian Legal System: Public Law Vol 1* (2005) 1; OO Obilade *The Nigerian Legal System* (1979) 1; N Tobi *Sources of Nigerian Law* (1996) 1; JO Asein *Introduction to Nigerian Legal System* (2005) 1.

⁴ Central Intelligence Agency *The World Factbook: Nigeria* (2014) 1. Found at <https://www.cia.gov/library/publications/the-world-factbook/geos/print/country/countrypdf_ni.pdf> [accessed 02/12/2014]. Three ethnic groups, Hausa, Yoruba and Igbo make up about 70 percent of Nigerian population. This heterogeneity has had a negative impact on the unity and progress of the country. As far back as 1963 when Nigeria became a republic, Odumosu noted that the different ethnic groups in Nigeria were not united; each group paid allegiance to its ethnicity and inter-marriages rarely occurred. Unfortunately, the situation has not improved since then. If anything at all, the reservation expressed by Odumosu as to the mutual distrust shared among the different ethnic groups being possibly imaginary, it is indeed real today. The country has been in reverse gear as a result of this and many other factors, hence affecting its development. See OI Odumosu *The Nigerian Constitution: History and Development* (1963) 3-4. Nigeria covers an expanse land of 923,768 square kilometres, which is arguably small compared to its population. It is the largest economy in Africa ahead of its erstwhile rival South Africa which currently stands at over 500 billion dollars. Some of the natural endowments, which contribute to Nigeria's economy, include petroleum resources as well as agriculture, telecommunication, entertainment and export especially to West African countries, etc. Despite these, Nigeria is a low-income country, reliant mainly on import goods including refined petroleum products.

colonial incorporation but now as a federation. In 1960, following the consolidation, the Nigerian state got its independence from colonial rule.

Like in many constitutional democracies, the Nigerian Constitution is the *grund norm*, the basic or supreme law of the land that prescribes and designs the entire structure of the legal system. It subjects every legal norm, authority or institution to its cardinal test of constitutionality.⁵ Since 1999, the country has been operating around a presidential federal constitution founded on the ideals of separation of powers, checks and balance and judicial review to constrain arbitrariness, abuse of powers and to guarantee individual liberties and fundamental freedoms.⁶ Therefore, all human rights, including the right to development, must derive their legal basis and existence directly or indirectly through or from the constitution.⁷ In the same vein, all legal and institutional frameworks in the country must have some basis in the constitution.⁸

However, the Constitution and the governance structures embedded therein are a reflection of Nigeria's history of diverse cultural, ethnic and religious configurations.⁹ It is also a reflection of its political history as an erstwhile colonial territory comprising communities that were frequently at war with one another in the pre-colonial, colonial and the immediate post-colonial periods.¹⁰ From the pre-colonial era, the various components of the Nigerian geo-political system developed independently. In the case of Nigeria, the Constitution recognises the peculiar nature of the Nigerian state in determining the sub-components of the legal system. These sub-components are of internal and external origin. Interestingly, the indigenous and endogenous systems both promoted the common good of the people. The opening statement of the Constitution therefore provides that the people of the Federal Republic of Nigeria have resolved: "to live in unity and harmony as one indivisible and indissoluble sovereign nation under God, dedicated to the promotion of inter-African solidarity, world peace, international co-operation and understanding."¹¹ The Constitution adds that its cardinal principles will be that of "promoting the good government

⁵ Constitution of the Federal Republic of Nigeria 1999 (as amended, 2011) S. 1 (Constitution). See also *Lakanmi v AG Western Nigeria* (1971) 1 UILR 201 SC; *Momoh v Fashe* (2007) 42 WRN 131 at 144. See also the famous *Marbury V. Madison* 5 U.S.(Cranch) 137 (1803), on this principle.

⁶ CFRN Ss 4, 5, 6 and Chapter IV

⁷ CFRN S 1.

⁸ See A Ojo *Constitutional Law and Military Rule in Nigeria* (1987) 40; see also Asein *Nigerian Legal System* 1.

⁹ U Udoma *History and the Law of the Constitution of Nigeria* (1994) 40.

¹⁰ 40.

¹¹ Constitution Preamble.

and welfare of all persons in our country, on the principles of freedom, equality and justice, and for the purpose of consolidating the unity of our people.”¹²

The sources of Nigerian law, as stated above, are both internal and external. The basic sources include English law consisting of the common law of England, doctrines of equity and statutes of general application; and Nigerian legislation, judicial precedents and customary law which includes Islamic law.¹³ The sources of Nigerian law, which are essential for the realisation of the right to development, may be categorised into three.¹⁴ These are statutory laws, domestic indigenous laws and external laws. Statutory laws refers to all laws in the country that were promulgated by a constituted legitimate authority and includes the Constitution, Acts and Laws of the legislative assemblies, statutes of general application as well as policies and regulations of the executive arms of government. Domestic indigenous laws refer to all indigenous laws whether customary or religious that the Nigerian people have accepted and which apply to their day-to-day lives. External laws refer to all foreign laws, which apply within the Nigerian legal system including the principles of common law of England, doctrines of equity, and importantly international law principles and treaties, which are yet to be incorporated into the legal system.

Nigeria operates a federal system of government, which essentially reflects the doctrine of separation of powers. Thus, the country has the legislative, executive and judicial arms of government whose roles are clearly spelt out in the constitution.¹⁵ As noted above, Nigeria is a heterogeneous society, which is prone to pave way for dominance by bigger or more influential ethnic groups.¹⁶ The federal system was therefore established to facilitate a certain level of participation among the different ethnicities in the country. To counterweigh any domineering tendencies federal states were created. The fall of the first republic which, ushered in the first military regime, headed by Aguiyi Ironsi attempted to reintroduce a unitary system of government. The idea was that it would be less complicated to govern the country from the centre. However, this was short-lived. Since the initial replacement of the three¹⁷ and later four¹⁸ regions more states have been

¹² See Constitution Preamble.

¹³ On the sources of law see Asein *Nigerian Legal System 1*; Mwalimu *Nigerian Legal System 1*, Tobi *Sources of Nigerian Law 1*; Obilade *The Nigerian Legal System 1*; etc.

¹⁴ Asein *Nigerian Legal System 1*; Mwalimu *Nigerian Legal System 1*, Tobi *Sources of Nigerian Law 1*; Obilade *The Nigerian Legal System 1*.

¹⁵ See Constitution Ss. 4, 5 & 6.

¹⁶ This is deducible from the federal character principle in Nigeria. See Constitution S 14 (3) & (4).

¹⁷ From 1960 -1963, Nigeria had three regions namely Northern, Western and Eastern regions.

progressively created from 12¹⁹, 19²⁰, 21,²¹ and 30²². Currently, Nigeria has 36 states and the Federal Capital Territory (FCT), Abuja, the seat of power.²³ Similarly, Nigeria has 774 local government areas and seven Area Councils for the FCT.²⁴ The agitation for more states has been to appease the overbearing call against marginalisation by the various ethnic groups in the country. As noted by the late President Murtala Muhammed, the demand for state creation resulted from poor leadership that was incapable of satisfying all sections of the country.²⁵

Although proven imperfect in the Nigerian context, federalism has had some advantages for Nigeria. Firstly, the distribution of power between the central government and the component states is advantageous because each of them is not completely independent from the other.²⁶ This correlates with Wheare's definition of federalism as "the method of dividing powers so that the federal and regional governments are each, within a sphere, co-ordinate and independent."²⁷ The people maintain a relationship with both tiers and may move, trade and choose to reside freely in any part of the federation.²⁸ Secondly, Nigeria operates federalism but in a real sense, the component states do not have absolute control over their public revenue or to their natural resources. In many respects, the federal government acts as a trustee over every resources belonging to the geographical entity called Nigeria.²⁹ These resources, including all public revenue, are collated in a central pool called "the Federation Account" to be distributed based on an agreed formula.³⁰ The sharing formula is to be guided by what the Constitution refers to as "allocation principles" which includes "population, equality of states, internal revenue generation, landmass, terrain as well as population density" of each tier of government.³¹ Importantly, allocation of public revenue must consider a "principle of derivation [which]

¹⁸ Between 1963 and 1967 a fourth region was added namely, Mid-Western Region, see the 1963 Constitution.

¹⁹ Created between 1967-1976.

²⁰ Created between 1976-1987.

²¹ Created between 1987-1991.

²² Created between 1991-1996.

²³ See Constitution First Schedule Part I.

²⁴ See Constitution First Schedule Part II.

²⁵ Cited in S Okungbowa & CE Ekpu "Federalism: Problems and Prospects of Power Distribution in Nigeria" (2011) 13 *Journal of Sustainable Development in Africa* 172 173.

²⁶ TO Elias *Federation vs Confederation and The Nigerian Federation* (1960) 11.

²⁷ KC Wheare *Federal Government* (1956) 11.

²⁸ Elias *Federation vs Confederation* 11; see also Constitution Ss. 41 (freedom of movement) & 43 (right to acquire property anywhere in Nigeria).

²⁹ See *Attorney General of the Federation (AGF) v Attorney General (AG) of Abia & Others* (2002) 6 NWLR (Part 764) 542.

³⁰ Constitution S. 162 (1).

³¹ Constitution S. 162 (2).

shall be constantly reflected in any approved formula not less than thirteen per cent of the revenue accruing to the federation account directly from any natural resources.”³²

Thirdly, the principle of separation of powers permeates the Nigerian political and legal systems often times serving as a check between and among the tiers and arms of government.³³ In view of this, three cardinal arms of the Nigerian stewardship exists on which the Constitution places the responsibility of governing the country based on the principles of democracy and social justice³⁴; the legislature³⁵, the executive³⁶, and the judiciary³⁷. None of these arms should exercise the whole or part of another’s powers.³⁸ The Constitution has effectively limited the legislative competence of the law-making and enforcement machineries of the various tiers of government. Hence, the national assembly, to the exclusion of states’ houses of assembly, may make laws for the peace, order and good-government of the entire federation as contained in the exclusive legislative list³⁹ of the federal government of Nigeria (FGN).⁴⁰ Interestingly, as I show hereunder, it is only the FGN through the national assembly that has the power to make laws in connection with external affairs⁴¹ the implementation of treaties relating to matters on the exclusive list⁴², and for the realisation of the fundamental objectives and directive principles of state policy. Thus, by necessary implication, it is the FGN that is responsible for the realisation of the right to development as further discussed in the following chapter.⁴³ In addition to the power to make laws contained in the exclusive legislative list, the national assembly is also competent to make laws with respect to the concurrent legislative list of the Constitution.⁴⁴ From the title of this list, both the national assembly and the states houses of assemblies are “concurrently” competent to promulgate laws on matters on this list.⁴⁵ However, in case of any conflicts between legislation made by the

³² Constitution S. 162 (2) Proviso.

³³ See generally KM Mowoe *Constitutional Law* (2008) 23-33; YA Yakubu *Constitutional Law in Nigeria* (2004) 92-105

³⁴ Constitution S.14 (1).

³⁵ Constitution S.4.

³⁶ Constitution S.5.

³⁷ Constitution S.6.

³⁸ *Lakanmi & Anor. v The AG of Western State & Ors.* (1974) 4 ECSR 713 731.

³⁹ The exclusive legislative list is contained in the Constitution Schedule II Part I. Importantly, Item 60 (a) provides: “The establishment and regulation of authorities for the Federation or any part thereof - (a) To promote and enforce the observance of the Fundamental Objectives and Directive Principles contained in this Constitution”

⁴⁰ Constitution S. 4 (1) – (3).

⁴¹ Constitution Item 26 Schedule II Part I.

⁴² Constitution Item 31 Schedule II Part I.

⁴³ Constitution Item 60 (a) Schedule II Part I

⁴⁴ See Constitution Second Schedule Part II.

⁴⁵ Constitution S. 6 (7) (b) & (c).

national assembly and a state house of assembly, the former prevails.⁴⁶ Nwabueze argues that the concurrent list serves to “safeguard the states’ reserved powers against unilateral takeover by the federal government as well as to ensure that the states participate effectively in judging the necessity of legislation implementing treaty on a concurrent or exclusively state matter.”⁴⁷

It is moreover important to point out that by separation of powers and checks and balances in Nigeria, the diversity of the country is being reflected. Thus, the Constitution makes it a matter of national importance that in all activities of the country, a federal character principle must be considered and applied.⁴⁸ What this means is that, no group must dominate the political, economic, social or legal space in the country. This has direct effect on ensuring popular participation.⁴⁹ However, this is not without its disadvantages for national development as highlighted above, but federal character is arguably a safeguard for national cohesion in a federal system like Nigeria's.

By the principles of separation of powers and checks and balances, the three arms of government are empowered and mandated by the constitution to entrench the spirit of constitutionalism, the rule of law and good governance as anchors for the overall development of the country and its people.⁵⁰ These arms of government are

⁴⁶ Constitution S.6 (5); See also *Mamacass & 2 Others Vs Federal Board Of Inland Revenue & Another* (2010) 2 TLRN 99 & of *Oseni Vs. Dawodu* (1994) 4 NWLR (Part 339) 406 (SC) where Justice Iguh observed that:

“I would only wish to add that, where identical legislations on the same subject matter are validly passed by virtue of their constitutional powers to make laws by the National Assembly and a state house of Assembly, it would be more appropriate to invalidate the identical law passed by state house of Assembly on ground that the law passed by the National Assembly has covered the whole field of that particular subject matter. To say that law is ‘inconsistent’ in such a situation would not in my view, sufficiently portray clarity on preciation of language”.

⁴⁷ BO Nwabueze *Federalism under the Presidential Constitution* (1983) 258.

⁴⁸ Constitution S.14 (3).

⁴⁹ Constitution S. 14 (2) (c).

⁵⁰ *AG Abia State & Ors v AG Federation* (2003) LPELR-610 (SC) See also *Ahmad V Sokoto State House of Assembly & anor* (2002) LPELR-10996(CA) where the court held thus:

“The organic structure created by part II of Chapter 1 of both Constitutions of the Federal Republic of Nigeria, 1979 and 1999, are three organs of powers of the Federal Republic of Nigeria. Of these powers, legislative powers are vested in the legislature at both Federal and State levels; the executive i.e. President at the Federal and the Governor at the State levels. Judicial powers both at the Federal and State levels are vested in the Courts established for the Federation and the States under Section 6 of the Constitution. The doctrine of separation of powers has three implications:- (a) that the same person should not be part of more than one of these three arms or divisions of government. (b) that one branch should not dominate or control another arm. This is particularly important in the relationship between executive and the Courts. (c) that one branch should not attempt to exercise the function of the other, for example a President however, powerful ought not to make laws indeed act except in execution of laws made by legislature. Nor should a legislature make interpretative legislation if it is in doubt it should head for the Court to seek interpretation. We owe this concept or doctrine to the French political philosopher, and one of proponents of American revolution Baron De Montesquieu who reasoned as follows: ‘Political liberty is to be found only when there is no abuse of power. But constant experience shows us that every

constitutionally responsible for the making, implementing and application of the laws in the country and are therefore, as will be further analysed below, the primary duty bearers of the right to development in Nigeria.⁵¹

6.3 International law and the Nigerian legal system

As I discussed in chapter 4.4, monism and dualism are the two basic theories on the relationship between international and domestic law. In this part, having highlighted the nature of the Nigerian legal system above, I discuss its relationship with international law. As I contended in chapter 4.4, it is the domestic legal system that usually provides for how international law applies within it. Therefore understanding the relationship between international law and the Nigerian legal system is significant in determining how the sources of the right to development, as discussed in chapters 4 and 5, are relevant to Nigeria. Of importance to this discussion is the status of CIL and treaties within the Nigerian legal system. Thus, it is essential to underscore whether the right to development, as an international human right, has been or is being acknowledged by the Nigerian legal system.

Section 12 of the Constitution provides for the means through which international law may apply in Nigeria. This section provides:

“(1) No treaty between the Federation and any other country shall have the force of law to the extent to which any such treaty has been enacted into law by the National Assembly.

(2) The National Assembly may make laws for the Federation or any part thereof with respect to matters not included in the Exclusive Legislative List for the purpose of implementing a treaty.

(3) A bill for an Act of the National Assembly passed pursuant to the provisions of subsection (2) of this section shall not be presented to the President for assent, and shall not be enacted unless it is ratified by a majority of all the House of Assembly in the Federation.”

The above provision refers to the way and manner through which treaties are recognised in Nigeria. The following discussion considers the application of international law including CIL and treaties. As Liebenberg notes an engagement between various sources of law, nationally and internationally “can generate new ways of understanding and interpreting [human] rights and thereby support transformative adjudication.”⁵²

man invested with power is liable to abuse it and to carry his authority as far as it will go (...) To prevent this abuse, it is necessary from the nature of things that one power should be a check to another... There will be an end of everything if the same person or body, whether of the nobles or of the people, were to exercise all three powers.”

⁵¹ Constitution S 13.

⁵² S Liebenberg *Socio-Economic Rights: Adjudication under a Transformative Constitution* (2010) 102.

6 3 1 Nature of Nigeria's internal obligations

The realisation of the right to development depends on the commitment of the states as primary duty bearers to, on the one hand, provide for the specific right to development and on the other provide for the enabling environment for the enjoyment of all human rights within their territories. These obligations are derived from international treaty law, CIL, soft law and decisions of international tribunals in interpreting the preceding obligations. As noted in chapter 2 4, the right to development is broad enough to include within its purview all categories of recognised human rights, i.e. economic, social, cultural, civil and political rights.⁵³ In fact, realising these rights equals the effective fulfilment of the internal dimension of the right to development. Therefore, at the national level, Nigeria has the responsibility to undertake specific measures for the realisation of its international obligations as I show hereunder, with respect to the right to development. This is achievable by on the one hand guaranteeing civil and political rights and thus providing an enabling environment for the other rights to be implemented; and on the other by ensuring "equality of opportunity for all in their access to basic resources, education, health services, food, housing, employment and the fair distribution of income."⁵⁴ In other words, economic underdevelopment is no excuse for human rights violations, structural poverty, corruption and bad governance. Kumar observes that "an improvement in realization of the Right to Development means that at least some rights should improve while no rights are violated."⁵⁵ Thus, this is a broad responsibility that traverses the entire legal and human rights systems.

Therefore, under international human rights law, the three forms of obligations to respect, protect and fulfil extend to all human rights and may consist simultaneously as both the obligation of conduct and obligations of results.⁵⁶ As the right to development is part and parcel of the recognised human rights, it means that all global actors and other duty bearers are under obligation to ensure its realisation. Firstly, the obligation to respect requires the FGN not to interfere with or prevent the continued enjoyment of facilities

⁵³ See A Sengupta "On the Theory and Practice of the Right to Development" (2002) 24 *Hum Rts Q* 837–889; and A Sengupta A Eide, S P Marks & Bård A. Andreassen *The Right to Development and Human Rights in Development: A Background Paper Prepared for the Nobel Symposium organized in Oslo from 13-15 October 2003* (Nobel Symposium 125) Research Notes 07/2004 1 3.

⁵⁴ UNDRD Art 8 (1).

⁵⁵ S Kumar "The Right to Development: A Sustainable Approach to Substantive Equality" *Indraprastha Public Affairs Centre Discussion Paper* 4.

⁵⁶ See S Leckie "Another Step Towards Indivisibility: Identifying the Key Features of Violations of Economic, Social and Cultural Rights" (1998) 20 *Hum Rts Q* 90-123 92; See also B Rudolf in *Implementing the Right to Development* 106

necessary for self-development.⁵⁷ For instance, states must not suspend free education or stop social welfare programmes such as social security, petroleum and agricultural subsidies. It must also not confiscate lands or other properties without overriding justifications or reasonable compensation.⁵⁸ In the same vein, the FGN must avoid introducing legislation or policies that could have adverse effects on the livelihoods of vulnerable people whose lives revolve around subsistence farming such as local farmers, fishermen and pastoralists.⁵⁹ Thus, it means that the state must not obstruct the continued enjoyment of the basics of life such as food, water, electricity and generally all services that have direct effect on development.⁶⁰ It also means that in entering into bilateral or multilateral trade agreements, FGN must respect the cultural, scientific, technological and agricultural needs of its people as well as the environmental concerns that accompany them.⁶¹ Denying an individual access to natural means of subsistence is therefore a violation of the right to personal development and by extension the right to life.⁶²

Secondly, the obligation to protect requires the FGN to safeguard its citizens' economic, social, cultural, civil and political rights from any form of interference by third parties as well as ensure their security, safety and well-being.⁶³ This means that necessary constitutional or legislative measures are needed to entrench good governance and to eliminate or control adverse socio-economic phenomena like the incidents of land grabbing, water grabbing, pollution and other forms of environmental degradation especially by private enterprises or multinational corporations.⁶⁴ Hence there is a need for proper and effective regulation. Similarly, the peoples free and informed consent must be respected.⁶⁵

⁵⁷ See CESCR, General Comment 12 Geneva 3-6.

⁵⁸ *Endorois case* para 144-162 discussed in chapter 5 of this dissertation.

⁵⁹ J Ziegler "Promotion and Protection of all Human Rights, Civil, Political, Economic, Social and Cultural Rights, including the Right to Development: Report of the Special Rapporteur on the Right to Food, submitted to the UN Human Rights Council, A/HRC/7/5 (10 January 2008) 8.

⁶⁰ *Ogoni Case* paras 54, 62-69.

⁶¹ Ziegler "Promotion and Protection of all Human Rights" 8-9.

⁶² S Sollner The Breakthrough of the Right to Food: the Meaning of the General Comment 12 and the Voluntary Guidelines for the Interpretation of the Human Right to Food, in AV. Bogdandy and R Wolfrum (eds) *Max Planck Year Book of United Nations Law* (2007) Vol.II 391 396-397.

⁶³ OHCHR, Fact Sheet No. 34, Geneva 17.

⁶⁴ See J Ziegler Economic, Social and Cultural Rights: the Right to Food, Report submitted by the Special Rapporteur on the Right to Food, UN Economic and Social Council, Commission on Human Rights, E/CN.4/2004/10 9 (February 2004), at pp.13-15; J Ziegler "Peasant Farmers and the Right to Food: a History of Discrimination and Exploitation" (2009) *Human Rights Council Advisory Committee A/HRC/AC/3/CRP.5* (4 August 2009)10, para.28.

⁶⁵ *Endorois case* See Chapter 5 4 1 5.

Thirdly, the obligation to fulfil imposes three forms of responsibilities on the duty bearer: to facilitate, to promote and to provide.⁶⁶ The obligation to fulfil (facilitate) requires the duty the FGN to proactively strengthen the access and utilisation of resources by the citizens in order to enhance their livelihoods and guarantee their safety and security. The obligation to fulfil (promote) requires the FGN to take the right to development into consideration in public matters and decision-making. The obligation to fulfil (provide) requires the FGN to directly provide services or supplies to certain individuals or groups who are unable, for reasons beyond their control such as natural disasters, to enjoy or obtain same.⁶⁷

In addition, there are three related obligations: to create an institutional framework conducive to the realisation of right to development, to engage in conduct consistent with the principles of the right to development as captured in international human rights instruments, and to achieve results defined by the right to development.⁶⁸ The creation of an institutional framework reflects the principle of sovereign equality and responsibility of a state to provide effective governance atmosphere where all categories of rights may flourish unimpeded. The engagement in conduct consistent with right to development principles is both a negative and a positive obligation reflecting national and international commitments. A combination of these two should produce the ultimate results of improved human welfare and development in the Nigeria. All these obligations I have highlighted so far, are interestingly complementary to the general nature of the duties of states under economic, social and cultural rights and therefore essential for realising the right to development.⁶⁹

At the international level, Nigeria moreover has a broad duty to co-operate with other global actors towards creating an enabling environment where right to development could be realised.⁷⁰ Along with other developing countries, Nigeria has championed and promoted the idea of the right to development as a human right issue.⁷¹ Every state is required to co-operate in accordance with the UN Charter and by respecting all the

⁶⁶ CESCR, General Comment 12 18.

⁶⁷ See J Ziegler "Preliminary report of the Special Rapporteur of the Commission on Human Rights on the Right to Food" UNGA A/56/210 (23 July 2001) 9; and Ziegler UN Human Rights Council, A/HRC/7/5 (10 January 2008) 15.

⁶⁸ Rudolf "The Relation of the Right to Development" in *Implementing the Right to Development* 106.

⁶⁹ Committee on Economic, Social and Cultural Rights, General Comment 3, The nature of States parties' obligations (Fifth session, 1990), U.N. Doc. E/1991/23, annex III at 86 (1991), reprinted in *Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies*, U.N. Doc. HRI/GEN/1/Rev.6 (2003) 14.

⁷⁰ See UN Charter Arts 55 & 56.

⁷¹ Nigeria was a member of Nonaligned Movement (NAM).

principles of international law on friendly relations.⁷² This entails respect for all human rights and promoting sovereign equality, interdependence and mutual co-operation to remove obstacles to development,⁷³ formulate international development policies,⁷⁴ and to cooperate towards establishing and maintaining international peace and security.⁷⁵ Remarkably, this form of right to development obligation is rooted in the ideals and cardinal principles of the UN as captured in the UN Charter.⁷⁶ This means that the requirement of international co-operation is not specific to the right to development but is fundamental to any meaningful implementation of the right. In fact, this has been considered the fulfilment of basic human rights as part of the development process.⁷⁷

Thus, this external dimension is a reinforcement of the internal dimension. While the latter is a primary responsibility, the former is generally seen as a secondary responsibility because international co-operation or support will yield no results where government fails in its traditional responsibility of providing security and welfare to its citizens.⁷⁸ As discussed in chapter 2, a state is also entitled to realise its right to a just international order.⁷⁹ This is understandable giving the divisive context in which the right to development evolved as well as the politics it engendered. This has led to several claims that it was conceived to restructure the inequities of the global economic system in favour of developing countries. However, this tension is gradually fading as the content of right to development is becoming clearer with the efforts of for example the UNCHR to interpret and define this right.⁸⁰

Today, international co-operation is seen not from the perspective of imposing duties on developed countries to directly support the developing countries but from the viewpoint

⁷² UNDRD Art 3 (2).

⁷³ UNDRD Art 6 (3).

⁷⁴ UNDRD Art 4 (1).

⁷⁵ UNDRD Art 7.

⁷⁶ UN Charter Arts 55 and 56.

⁷⁷ K Arts *Integrating Human Rights Into Development Cooperation: The Case of the Lomé Convention* (2000) 51-88

⁷⁸ K Feyter "Towards A Multi-Stakeholder Agreement on the Right to Development" in S Marks *Implementing the Right to Development: The Role of International Law* 97 97-99.

⁷⁹ UNDRD Art 3 (3).

⁸⁰ See for instance, OHCHR *Report of the High-level Task Force on the Implementation of the Right to Development on its First Meeting* U.N.Doc. E/CN.4/2005/WG.18/2 (24 January 2005); OHCHR *Report of the High-level Task Force on the Implementation of the Right to Development on its Second Meeting*, UN.Doc E/CN.4/2005/WG.18/TF/3 (8 December 2005); OHCHR *Report of the High-level Task Force on the Implementation of the Right to Development on its Third Meeting*, U.N.Doc. A/HRC/4/WG.2/TF/2 (13 February 2007); OHCHR, *Second Report of the Independent Expert on the Right to Development, Dr. Arjun Sengupta*, U.N.Doc. E/CN.4/2000/WG.18/CPR.1 (11 September 2000); OHCHR, *Third Report of the Independent Expert on the Right to Development, Dr. Arjun Sengupta*, U.N.Doc. E/CN.4/2001/WG.18/2 (2 January 2001); OHCHR *Fourth Report of the Independent Expert on the Right to Development, Dr. Arjun Sengupta*, U.N.Doc. E/CN.4/2002/WG.18/2 (5 March 2002).

that all nations are to share the responsibility and collectively address the general imbalance in global economic relations.⁸¹ Thus, the right to development is not according to Salama “a right to assistance, not a license to claim the fruit of the work of others or share their wealth, not a negation of the voluntary basis of international commitments and not a romantic remnant of a certain idea of social justice.”⁸² It is not “an act of charity, a wishful thinking” but that of genuine commitment to collective progress and human development.⁸³ This does not mean that the right is not tilted towards the developing countries. In fact, its current content also reflects its ideological base. According to the UNHRC, the right:

“[F]osters friendly relations between states, international solidarity, cooperation and assistance in areas of concern to developing countries, including technology transfer, access to essential medicines, debt sustainability, development aid, international trade and policy space in decision-making.”⁸⁴

Giving the increasing poverty, malnutrition and illiteracy that characterises most developing countries, such as Nigeria, and the structural inequality feeding the global economic system, the external dimension must not be relegated to the status of a mere secondary obligation.⁸⁵ In the words of Salomon “[t]he gross inequality that characterizes world poverty today, the power differential that accompanies it, and the reality of global economic interdependence, serve to erode the legitimacy of this model that attributes secondary as opposed to shared responsibility to a developed state to fulfil the basic rights, for example, to food, water, and health of people elsewhere.”⁸⁶ Therefore, while it is an obligation on each developing country (Nigeria inclusive) to strive to address its internal problems, these countries must cooperate to ensure that the international system is restructured so that the benefits of genuine co-operation will produce the desired equality and development. Nigeria’s obligation in this regard extends to a commitment to global peace and security as well as compliance with general international law. In fact, as will be

⁸¹ M Salomon “Legal Cosmopolitanism and the Normative Contribution of the Right to Development” in S Marks *Implementing the Right to Development: The Role of International Law* 17 17-26; De Feyter “Multi-Stakeholder Agreement” in *Implementing Human Right* 99-104

⁸² I Salama, “The Right to Development: Renewal and Potential” in S Marks (ed) *Implementing the Right to Development: The Role of International Law* 117 122.

⁸³ 122.

⁸⁴ OHCHR “The Right to Development at a Glance” *Development and Economic and Social Issues Branch (DESIB) of the Research and Right to Development Division (RRDD)*, OHCHR 2. available at <<http://www2.ohchr.org/english/issues/development/right/index.htm>> (accessed 01/08/2015)

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⁸⁶ M Salomon “Legal Cosmopolitanism” in *Implementing the Right to Development* 27.

examined under 6 4 2 this obligation has been incorporated into the Nigerian constitution.⁸⁷

6 3 2 The right to development as an obligation under CIL in Nigeria

In this section I explore the important issue whether the right to development may apply as a CIL obligation under the Nigerian legal system. I am however aware of the fact that the right to development has not, in fact, as I discussed in 4 3, evolved into a CIL norm. However, the aim in this section is to argue that, assuming the right to development crystallises into CIL in the future, and I hope it does, how would it apply in Nigeria? In other words, does the Nigerian legal system accommodate the application of international human rights sources other than treaties? This discussion is important in view of my analysis in 4 3 on the status of the right to development as CIL. Jurisdictional rules in Nigeria does not allow for the application of international human rights law without incorporation into domestic law. Unlike in countries like South Africa⁸⁸ and Kenya⁸⁹, the Nigerian legal system, allows for the application of common law principles but precludes the direct application of CIL (at least on the surface as is further explained below).⁹⁰ This is evidenced by the non-express embodiment in any of the sources of Nigerian law not flowing from international obligations to this effect.⁹¹ Thus, neither the Constitution nor legislation embodies any provisions on the application of CIL.

The application of CIL as a source of law is therefore not straightforward within the Nigerian legal context. However, I argue hereunder that CIL is understood and accepted under the common law presumption. This is not peculiar to Nigeria; it is true for most legal systems in Africa constituting a challenge for them.⁹² Most African constitutions are silent on the application of CIL within their jurisdiction.⁹³ Of the all the African countries⁹⁴, only the constitution of South Africa and lately, that of Kenya, have express provisions on the

⁸⁷ Constitution S 19.

⁸⁸ Constitution of South Africa (1996) Art. 232.

⁸⁹ Constitution of Kenya (2010) S. 2 (5).

⁹⁰ As expressly provided in Constitution S 12; See also AO Enabulele "Implementation of Treaties in Nigeria and the Status Question: Whither Nigerian Courts?" (2009) 17 *Afr J Int'l & Comp L* 326 331-333.

⁹¹ See for example B Akirnade "Nigeria" in D Shelton (ed) *International Law and Domestic Legal Systems: Incorporation, Transformation and Persuasion* (2011) 448-467 461-464.

⁹² Viljoen *International Human Rights* 518.

⁹³ See EA Oji "Application of Customary International Law in Nigerian Courts" (2010) *NIALS Law and Development Journal* 151-169 161; MT Ladan *Materials and Cases on Public International Law* (2007) 6; MT Ladan Introduction to International Law Being A Paper Presented To The Participants of The National Defence College, Course 16 at the National Defence College Auditorium, Abuja on Monday 7 January 2008 12.

⁹⁴ See African Union Member states details at <http://au.int/en/member_states/countryprofiles> (accessed 09-03-2015).

application of CIL.⁹⁵ The South African Constitution on its part expressly states that CIL is part of the *corpus juris* of its legal system while that of Kenya, as discussed under 4 3, makes a general statement on the application of all general rules of international law.⁹⁶

This notwithstanding, Egede argues that treaties that have assumed the status of CIL apply in Nigeria automatically without substantiating this with a cogent legal authority.⁹⁷ He writes:

“Arguably, it could be said that a significant part of the provisions of these treaties have the character of customary international law. Such human rights treaty provisions, which have crystallized into customary international law, escape the ambit of section 12(1) of the 1999 constitution and have automatic domestic application without the need for specific domestic legislation.”⁹⁸

Egede’s contention is plausible but difficult to promote especially because his position is unsupported by any legal backing in Nigeria. Nevertheless, predicated on the fact that states are bound by their international obligations which they have entered into in good faith, this proposition is conceivable.⁹⁹ However, in the first place, identifying any practice as CIL is still a contentious task. Arguably, not all the rights in the UDHR, such as the right to property, are universally accepted to have assumed the status of CIL.¹⁰⁰ The right to development is bedevilled by the same treatment as some of the rights set out in the UDHR. Thus, as discussed under 4 3 it is difficult to find any treaty or principle containing the right to development that has satisfied the requirements of CIL so as to, for example, be applied as a self-executing law or obligation.¹⁰¹ There is therefore a strong presumption that there exists no concrete evidence, where the Nigerian legal system, intentionally, allows for the application of CIL whether on the right to development or on international human rights generally. Not even the Fundamental Human Rights (Enforcement Procedure) Rules, which came into force in 2009, (FREP Rules) allude to CIL as a direct source of law. The FREP Rules only refer to the bill of human rights.

Because the right to development is a treaty obligation, as discussed in chapters 4 and 5, on Nigeria, it may seem futile to determine whether it is also a CIL norm particularly because the latter is unascertained while the former is clear and unambiguous (from the

⁹⁵ See Constitution of South Africa (1996) Art. 232 and Constitution of Kenya (2010) S. 2 (5).

⁹⁶ See Constitution of South Africa (1996) Art. 232 and Constitution of Kenya (2010) S. 2 (5). The latter provides: “The general rules of international law shall form part of the law of Kenya.”

⁹⁷ E Egede “Bringing Human Rights Home: An Examination of the Domestication of Human Rights Treaties in Nigeria” (2007) 51 *JAL* 249 276-278.

⁹⁸ 277.

⁹⁹ See chapter 2 of this dissertation.

¹⁰⁰ See for example H Hannum “The UDHR in National and International Law” (1998) 3 *Health and Human Rights* 144 146.

¹⁰¹ Viljoen *Human Rights in Africa* 520.

perspective of being binding). Nevertheless, this is an important question for the purpose of the present inquiry particularly because the right has crucial external dimensions. Virtually every international discourse promotes the right to development especially considering the raging effect of poverty and underdevelopment globally, as I have demonstrated in chapter 4 3. Noting the gaps that exist, I argue that, the right to development is a recognised right under CIL in Nigeria.¹⁰² The dynamic and flexible nature of CIL as a norm creating process behoves on Nigeria the international obligation under CIL to ensure its realisation for the benefit of its citizens. This is supported by the following arguments.

As an international actor, Nigeria's behaviour, for example, regarding right to development is such that it sees the right as important and worth the status of a binding norm under international law.¹⁰³ This is supported by the fact that CIL is generally a source of law in Nigeria pursuant to the doctrine of incorporation which means that, unlike treaties, customary international norms automatically form part of Nigeria's domestic system without the necessity of any further constitutional ratification procedure or process.¹⁰⁴ This reflects the position under the Common Law that "the law of nations in its full extent was part of the law of England".¹⁰⁵ As further captured by Blackstone: "The law of nations, wherever any question arises which is properly the object of its jurisdiction, is here adopted in its full extent by the common law, and it is held to be a part of the law of the land."¹⁰⁶

Arguably, the above statements were referring to CIL and not the entire representation of international law.¹⁰⁷ Nations are the direct makers of CIL and while some may actively

¹⁰² Rudolf "The Relation of the Right to Development" in *Implementing the Right to Development* 105-106 and 108; Salomon "Legal Cosmopolitanism" in *Implementing the Right to Development* 17-26; .ID Bunn *The Right to Development and International Economic Law: Legal, Moral and Ethical Dimensions* (2012) 127-140; MA Stein & JE Lord "The Normative Value of a Treaty as Opposed to a Declaration: Reflections from the Convention on the Rights of Persons with Disabilities" in S Marks *Implementing the Right to Development: The Role of International Law* 27 30; P Alston "Development Human Rights and the Rule of Law: Prevention versus Cure as a Human Right" International Commission of Jurists (eds) *Development Human Rights and the Rule of Law* (1981) 31 106. UNHRC (eds) *Realizing the Right to Development Essays in Commemoration of 25 Years of the United Nations Declaration on the Right to Development* (2013) 186, 388, 451 & 458.

¹⁰³ National Action Plan for the Promotion and Protection of Human Rights in Nigeria (2009-2013) <<http://www.ohchr.org/EN/Issues/PlansActions/Pages/PlansofActionIndex.aspx>> (accessed 25-05-2015).

¹⁰⁴ *Trendtex Trading Corporation v. Central Bank of Nigeria* [1977] 2 WLR 356; *Chung Chi Cheung v. R* [1939] AC 160 169.

¹⁰⁵ *Buvot v. Barbuil* (1736) 3 Burr 1481; *Talbot* 281; *Triquet v. Bath* (1764) 3 Burr. 1478; *R v. Keyn* (1876) 2 Ex. D. 63; *West Rand Gold Mining Co. case* [1905] 2 KB 391; *Mortensen v Peters* (1906) 8 F(J.) 93.

¹⁰⁶ W Blackstone *Commentaries on the Laws of England* IV (1966) 67. See also *Kay v. Lambeth Borough Council* [2006] UKHL 10.

¹⁰⁷ Shaw *International Law* 141.

participate in the process, others may not. But as an international custom it binds both the active and the passive makers of the law except a persistent objector.¹⁰⁸ Nigeria has never been a persistent or even a transient objector to the right to development.¹⁰⁹ In furtherance of its international obligations, Nigeria captures the right to development including its efforts towards realising it such as legislative, institutional and policy drive in its national action plan submitted to the UN.¹¹⁰

In the absence of express provisions under Nigerian law on the application of CIL, one available option is to have recourse to the common law.¹¹¹ Therefore, in so far as right to development is a norm under CIL, it will apply in Nigeria with full force by way of automatic incorporation.¹¹² The constitution under sections 12 and 19 implicitly gives credence to the automatic incorporation principle. In other words, only treaties require specific legislative actions to become part of the applicable Nigerian laws. Denning buttresses this perspective when he noted that courts can ordinarily on their own, with or without precedence contribute to the development of international law. He avers:

“Seeing that the rules of international law have changed – and do change – and that the courts have given effect to the changes without any Act of Parliament, it follows to my mind inexorably that the rules of international law, as existing from time to time, do form part of our English law. It follows, too, that a decision of this court – as to what was the ruling of international law 50 or 60 years ago – is not binding on this court today. International law knows no rule of stare decisis. If this court today is satisfied that the rule of international law on a subject has changed from what it was 50 or 60 years ago, it can give effect to that change – and apply the change in our English law – without waiting for the House of Lords to do it”.¹¹³

Therefore, in the case of Nigeria, judges do not have to wait for the Supreme Court or the national assembly whenever they are satisfied that a rule of international law such as the right to development, which has positive consequences on the majority of Nigerian citizens well-being, the government and the economy, to give effect to it. The African Charter Act, which is an enforceable law in Nigeria, expressly reinforces this position as follows:

¹⁰⁸ *Abacha V. Fawehinmi* (2000) LPELR-14 (SC).

¹⁰⁹ For instance Africa: New Agenda for Development G.A. Res. 56/150, U.N. GAOR, 56th Sess., Supp. No. 49, at 341, U.N. Doc. A/56/150 (2001); UNDRD, UN General Assembly Res. 41/128 of (adopted 4 December 1986). See also S Marks *The Human Right to Development: Between Rhetoric and Reality* (2004) 17 *Harvard Human Rights Journal* 137 138-140; S Marks *The Politics of the Possible The Way Ahead for the Right to Development* (2011) *International Policy Analysis* 3-6.

¹¹⁰ National Action Plan for the Promotion and Protection of Human Rights in Nigeria (2009-2013) <<http://www.ohchr.org/EN/Issues/PlansActions/Pages/PlansofActionIndex.aspx>> (accessed 25-05-2015).

¹¹¹ Akirnade “Nigeria” in *International Law and Domestic Legal Systems* 461-464.

¹¹² *Trendtex Trading Corporation v. Central Bank of Nigeria* [1977] 2 WLR 356.

¹¹³ *Trendtex Trading Corporation v. Central Bank of Nigeria* [1977] 2 WLR 356

“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 Organization 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 Specialized Agencies of the United Nations of which the parties to the present Charter are members.”¹¹⁴

This approach is also supported by in *Trendtex Trading Corporation v. Central Bank of Nigeria (Trendex)*¹¹⁵ where Denning averred:

“Which is correct? As between these two schools of thought, I now believe that the doctrine of incorporation is correct. Otherwise I do not see that our courts could ever recognise a change in the rules of international law. It is certain that international law does change. I would use of international law the words which Galileo used of the earth: ‘But it does move.’ International law does change: and the courts have applied the changes without the aid of any Act of Parliament. Thus, when the rules of international law were changed (by the force of public opinion) so as to condemn slavery, the English courts were justified in applying the modern rules of international law (...).¹¹⁶

However, it should be pointed out that any rule of CIL is subject to the constitutionality test under the Nigerian constitution and must not counter any Act of parliament or any principle arising out of judicial precedent in Nigeria.¹¹⁷ This was the position of the court in *Trendtex* where it was held that:

“The courts acknowledge the existence of a body of rules which nations accept among themselves. On any judicial issue they seek to ascertain what the relevant rule is, and having found it they will treat it as incorporated into the domestic law, so far as it is not inconsistent with rules enacted by statutes or finally declared by their tribunals.”¹¹⁸

Thus, CIL is judicially noticed in Nigeria. And with the widespread acceptance of the right to development on the international plane and the role Nigeria played in its emergence, it will seem farfetched to deny any international responsibility for right to development as CIL.

In addition, every international human right norm has specifiable subjects with obligations and beneficiaries with rights.¹¹⁹ In the context of right to development, the duty bearers and right holders are known, of course with some little ambiguity about the place

¹¹⁴ ACHPR, Art 60. Art 61 further provides: “The Commission shall also take into consideration, as subsidiary measures to determine the principles of law, other general or special international conventions, laying down rules expressly recognized by member states of the Organization of African Unity, African practices consistent with international norms on human and people's rights, customs generally accepted as law, general principles of law recognized by African states as well as legal precedents and doctrine.”

¹¹⁵ [1977] 2 WLR 356.

¹¹⁶ *Trendtex Trading Corporation v. Central Bank of Nigeria* [1977] 2 WLR 356

¹¹⁷ *Trendtex Trading Corporation v. Central Bank of Nigeria* [1977] 2 WLR 356.

¹¹⁸ *Trendtex Trading Corporation v. Central Bank of Nigeria* [1977] 2 WLR 356.

¹¹⁹ P Wiel “Towards Relative Normativity in International Law” (1983) 77 *American Journal of International Law* 413.

and status of non-state actors. Notwithstanding, there are identifiable duty bearers and right holders and the jurisprudence is still growing.

Admittedly, as discussed in chapter 2 4 the main challenge to the above argument is the “uncertainty” of the content of right to development because a “norm can only be deemed to exist if at least its main features are discernible.”¹²⁰ This however, is insufficient to deprive the right of the status of CIL, because of its general nature as an umbrella right with some specifically defined obligations as identified above. Moreover, the right to development is implicitly supported by other international human rights treaties, principles and jurisprudence as discussed in the preceding chapters.¹²¹

6 3 3 The right to development as an obligation under treaty law in Nigeria

As indicated above in 6 3 Nigeria uses a dualist approach to international treaty law. This necessitates a discussion, in this section, of the manifestations of Nigeria’s external and internal legal obligations. In other words when and how does its external obligations vis-à-vis other member states to a treaty and the international community through international organisations and sub-bodies set to monitor the treaty compliance occur; and when and how is its internal obligations vis-à-vis individuals within its jurisdiction created. In this section I mainly focus on how the internal obligations are created, using the ACHPR as my primary example, but before I examine this process further I will add a few reflections to the main discussion on external obligation under the right to development as set out in chapter 5.

There is no doubt that the right to development is a binding international legal norm in and on Nigeria i.e. externally and internally. As detailed in chapter 2, 4 and 5, traces of the right in its broader context and the obligations of states to ensure its realisation could be found in several international law-making treaties such as the UN Charter, the twin Covenants, the CEDAW and the CRC as earlier discussed in chapter 4. Nigeria is a party to these treaties. Therefore, obligations related the right to development covered by these treaties are binding on Nigeria and must be complied with in good faith.¹²² This reflects the principle of *pacta sunt servanda*.¹²³ Nigeria “has the duty to fulfil in good faith its

¹²⁰ Rudolf “The Relation of the Right to Development” in *Implementing the Right to Development* 105.

¹²¹ 106.

¹²² See VCLT Arts 26, 31, 46 and 69.

¹²³ II Lukashak “The Principle Pacta Sunt Servanda and the Nature of Obligation Under International Law” (1989) 83 (3) *The American Journal of International Law* 513-518

obligations under international agreements valid under the generally recognized principles and rules of international law.”¹²⁴

These treaties are all encompassing. For instance, by the provisions of the UN Charter Nigeria has committed itself to take joint and separate action to “promote higher standards of living, full employment and conditions of economic and social progress and development.”¹²⁵ Similarly, under the twin covenants Nigeria is bound to establish legal and institutional frameworks for the protection of life, liberty and dignity of its citizens¹²⁶ while taking concrete and targeted steps to realise a number of rights such as the right to gain a living by work, right to food and freedom from hunger, to have safe and healthy working condition, to receive social security, possess adequate housing and clothing, obtain highest attainable standards of health and the right to education.¹²⁷ Specific obligations of the country in respect of the weak and the vulnerable have also been taken care of under the CEDAW and the CRC.¹²⁸ All these are necessary for the realisation of both the internal and external dimensions of the right to development.

It may be argued that these treaties capture the obligations of Nigeria without any specific right to development obligation. But the treaties restate these obligations in respect of general human rights in view of their universally accepted interconnections and interdependence. Some of these treaties specifically deal with the right to development in a special context. For example, the CRC, through the Child Rights Act (CRA), as is further discussed under 6 4 1, in line with my analysis above under 6 3 2 aids in realising these rights by individual countries and therefore will satisfy their individual and collective responsibilities in respect of the right to development.

By virtue of CIL, as expressed in the provisions of VCLT, Nigeria has consented to these treaties and therefore must observe their provisions in good faith.¹²⁹ As reasoned by Shaw, “in the absence of a certain minimum belief that states will perform their treaty obligations in good faith, there is no reason for countries to enter into such obligations with each other.”¹³⁰ The significance of this is that with or without domestication of human rights treaties, the country is bound under international law.

¹²⁴ Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations A/RES/25/2625 Reprinted in 14 ILM 1292 (1975).

¹²⁵ UN Charter Arts 55 and 56.

¹²⁶ See ICCPR Arts 1-12.

¹²⁷ See ICESCR Arts 1-16.

¹²⁸ See CEDAW Arts 1-10 and CRC Arts 1-20.

¹²⁹ VCLT Art 26.

¹³⁰ Shaw *International Law* 904.

Because realising the right to development entails fulfilling other human rights, no country can succeed in the former without achieving the latter. In essence, the right to development is necessarily intertwined with the general human right system and has been accepted as part and parcel of the system. That is why Scheinin argues that the right can be realised “under existing human rights treaties and through their monitoring mechanisms, provided that an interdependence-based and development-informed reading can be given to the treaties in question.”¹³¹

With regard to the internal aspect of a treaty obligation a treaty is only applicable in Nigeria after the national assembly enacts it into law.¹³² This means that in case the President presents an international treaty to the national assembly as a bill, it must undergo the usual rudiments of law-making before it is passed into law.¹³³ For such a bill to become law, the assent of the President is not required.¹³⁴ Once the national assembly passes the bill into law coupled with its acceptance by the majority of states houses of assemblies, the international treaty, *prima facie*, becomes law in the country.

The national assembly is only competent to make laws for the federation on matters contained in the exclusive legislative list of the Constitution as explained above in 6 3 1. However, if the subject matter of the domesticated treaty is contained in the concurrent legislative list of the Constitution, the respective state assemblies must correspondingly enact the federal law in their jurisdictions. Thus, matters contained in the concurrent legislative list must undergo a second enactment by each state assembly, depending on their specific interest in the subject matter of the legislation before it becomes binding on that state.¹³⁵ This is because such matters are not within the exclusive preserve of the national assembly and therefore a national Act does not cover the field in this situation.

By way of example, the Nigerian CRA is an adaptation of two international human rights instruments, the CRC and the ACRWC. These treaties were not directly domesticated in Nigeria. Rather, the national assembly, based on the spirit of these treaties, enacted the CRA to conform to international and regional specificities.¹³⁶ As matters relating to the family are not contained in the exclusive legislative list the CRA can only be universally

¹³¹ M. Scheinin “Advocating the right to development through complaint procedures under human rights treaties” in BA Andreassen, & S Marks (eds.) *Development as a Human Right* (2006) 274 274-276.

¹³² Constitution S. 12 (1).

¹³³ Constitution S. 12 (3).

¹³⁴ Constitution S. 12 (3).

¹³⁵ See Constitution S.12 (3).

¹³⁶ Viljoen *International Human Rights* 524; see also Egede *J Afr L* 268-272.

applicable within Nigeria upon enactment by each state house of assembly.¹³⁷ Because some federal states have not enacted the CRA in to law it does not have full operation of law across the country. Nevertheless, the approach of the CRA would not be the same had the lawmakers viewed the treaties in question as flowing from economic, social and cultural rights and by extension, the right to development. Arguably children's right to development is protected under the CRC and the ACRWC as discussed in chapters 4 and 5 respectively. Contrary to the ICESCR's approach to disregard the internal demarcations that exist in federal arrangements¹³⁸ economic, social and cultural rights, in Nigeria, fall exclusively under the preserve of the exclusive list as FODPSP. Thus, in accordance with the Constitution, an Act is all that is required to ensure that these rights are taken beyond their current status as exemplified in 7 4 2. Also, by virtue of the powers of the FGN, it can enact laws that have a national coverage on matters that are not expressly assigned to any of the legislative lists. This is especially so because, it has exclusive right over matters of external affairs as discussed above. Therefore, I argue that, should a national legislation on the right to development be conceived in Nigeria, the national assembly could use its prerogative to enact it as a national law. This is further supported by the fact that giving effect to the FODPSP is a national concern and therefore exclusively a federal matter.

The courts in Nigeria have generally upheld the supremacy of the Constitution and have insisted on strict compliance with it for any international treaty to apply internally in the country.¹³⁹ The Supreme Court has therefore given literal interpretation to the provisions of the Constitution and has not shown any willingness to depart from that path. In the words of the Supreme Court:

“By virtue of section 12(1) of the 1999 Constitution, no treaty between the Federation and any country has the force of law except to the extent to which any such treaty has been enacted into law by the National Assembly. Thus, an international treaty entered into by the government of Nigeria does not become binding until enacted into law by the National Assembly.”¹⁴⁰

The Nigerian legal system applies the doctrine of judicial precedence as a colonial heritage. As a consequence courts of lower jurisdiction are bound by the decisions of superior courts. On the question of the application of international treaties, all the courts in

¹³⁷ SB Magashi, “Education and the Right to Development of the Child in Northern Nigeria: A Proposal for Reforming the Almajiri Institution” (2015) 61 *Africa Today* 61 64-83.

¹³⁸ ICESCR Art 28. “[T]o extend to all parts of federal States without any limitations or exceptions.”

¹³⁹ *The Registered Trustees of National Association of Community Health Practitioners of Nigeria & Others v. Medical and Health Workers Union of Nigeria & Others* (2008) LPELR -3196.

¹⁴⁰ *The Registered Trustees of National Association of Community Health Practitioners of Nigeria & Others v. Medical and Health Workers Union of Nigeria & Others* (2008) LPELR -3196 (SC) Per Mukhtar, JSC and Per Onu, JSC see also *Abacha v. Fawehinmi* (2000) LPELR-14(SC).

Nigeria have followed the Supreme Court to hold that only a domesticated treaty may have the force of law in Nigeria.¹⁴¹ As an example the Court of Appeal refused to recognise the Confederation of African Football Statute as valid law in Nigeria since, although ratified, has not been domesticated. The Court of Appeal relied on the dictum of Ogundare Justice of the Supreme Court (JSC) who observed that: “an international treaty entered into by the government of Nigeria does not become binding until enacted into law by the National Assembly.”¹⁴²

As stated above, Nigeria inherited dualism from colonial times. In *Ibidapo v. Lufthansa Airlines*, Wali JSC observed that, “Nigeria, like any other Commonwealth country, inherited the English common law rules governing the municipal application of international law.”¹⁴³ Interestingly, Nigeria has ratified a significant number of treaties, which are yet to be domesticated. Among those that have been domesticated, which I have placed substantial reliance on in this dissertation especially in chapter 5 2 and further discussed below, are the ACHPR and (partially) CRC ACRWC. The ICCPR and ICESCR and the African Women Protocol, as well as the African instruments on Corruption, Election and good governance are also yet to be domesticated. Nonetheless, as I have argued above in 6 3 1, regardless of domestication, Nigeria is bound by these treaty obligations as presumed under the doctrine of *pacta sunt servanda*.

6 4 Articulating the right to development in Nigeria

6 4 1 The domestication of the ACHPR and the CRC

As discussed in chapters 1 and 5 2, the ACHPR is the first and only human right treaty that has concretised the right to development into a legal norm. On 22 June 1983, pursuant to section 12 of the 1979 Constitution (retained in the 1999 Constitution), Nigeria domesticated the ACHPR thereby making it part of the laws of the federation of Nigeria. The approach was a wholesome domestication of the ACHPR without any modification.

A brief background to its domestication sheds light on how and why the ACHPR is bound to conflict with the Nigerian Constitution. In 1983 when the ACHPR was domesticated as the African Charter Act, the 1979 Constitution was ostensibly the enforceable constitution in Nigeria. The Constitution operated as a decree of the federal

¹⁴¹ *Oshevire v. British Caledonian Airways Ltd* (1990) 7 NWLR (pt. 163) 607; *The Registered Trustees of National Association of Community Health Practitioners of Nigeria & Others v. Medical and Health Workers Union of Nigeria & Others* (2008) LPELR -3196 (SC); *Abacha v. Fawehinmi* (2000) LPELR-14(SC); *UAC (NIG) Ltd v. Global Transport S.A* (1996) 5 NWLR (pt. 448) 291.

¹⁴² See *Nnaji v. Nfa & Anor* (2010) LPELR-4629(CA).

¹⁴³ (1997) 4 NWLR (Pt.498) 124.

military government.¹⁴⁴ Therefore, the ACHPR was arguably domesticated without a competent democratic legislative body. To ensure that the ACHPR formed part of Nigerian laws going forward, a compilation of all existing laws of the federation was published in 1990. This compilation included all military decrees including the African Charter Act. By 1999, a new civilian administration and constitution came into existence without any constituent assembly to consider, reflect on and bring existing laws into conformity with the adopted 1979 Constitution that was renamed the 1999 Constitution. However, the new constitution kept all existing laws of the federation including the African Charter Act.¹⁴⁵ Hence, in *Garba v AG of Lagos State*¹⁴⁶ the High Court of Lagos State held that the African Charter Act formed part of Nigerian law. The implications of this haphazard approach of retaining the African Charter Act are in my view as follows. Firstly, the 1999 Constitution takes a binary approach to human rights as I discuss in 6 4 2 hereunder. Thus, while civil and political rights are justiciable, economic, social and cultural rights are not. In contradistinction, the African Charter Act, which replicates the ACHPR provides for enforceable human rights of all categories without any qualification. Secondly, human rights under the Nigerian Constitution appear to be couched in individual terms whereas the African Charter Act contains provisions that are people centred.¹⁴⁷ Thirdly, as I show below, under the Constitution the right to development is conceived as an individual and group right. However, based on the explicit provisions of the ACHPR and therefore the African Charter Act and the ensuing jurisprudence of the African Commission and the ECCJ, the right is framed as a peoples' rights as discussed under 5 3.¹⁴⁸ Therefore, as I discuss below, the significance of the African Charter Act becomes questionable in view of the supremacy of the Nigerian Constitution.¹⁴⁹ This is further compounded by the instruction contained in the preamble of the Act, which provides:

“As from the commencement of this Act, the provisions of the African Charter on Human and Peoples' Rights which are set out in the Schedule to this Act shall, subject as thereunder provided, have *force of law in Nigeria and shall be given full recognition and effect and be*

¹⁴⁴ Viljoen *International Human Rights* 533-537.

¹⁴⁵ See Constitution S. 315. Existing law is defined as “any law and includes any rule of law or any enactment or instrument whatsoever which is in force immediately before the date when this section comes into force or which having been passed or made before that date comes into force after that date” See Constitution S 315 (4) (b).

¹⁴⁶ *Garba v AG of Lagos State* (1991) Suit ID/559M/91 (HC Lagos State) See also Viljoen *International Human Rights* 534.

¹⁴⁷ African Charter Act S.19-24.

¹⁴⁸ The language used in chapters II and II of the Constitution confirm this. For example the use of terms such as Everyone etc.

¹⁴⁹ See Constitution S. 1 (3); *Abacha v Fawehinmi* (2000) LPELR-14(SC).

*applied by all authorities and persons exercising legislative, executive or judicial powers in Nigeria.*¹⁵⁰

Based on the peculiarities of the Nigerian legal system as I elaborate hereunder, the fact remains that the African Charter Act runs subsidiary to the Constitution and whatever differences that may exist between its provisions and those of the Constitution, those of the latter prevail.¹⁵¹ Unlike the general human rights treaties examined in chapters 4 2 and 5 2, the ACHPR is explicit in the form of obligations it imposes on state parties with respect to the right to development¹⁵²

From both the text and the available jurisprudence of the African Commission,¹⁵³ it is clear that the preamble to the African Charter Act imposes an obligation on Nigeria to ensure the exercise of the right to development conferred on the people and this extends to their “economic, social and cultural development”. Read in conjunction with the provisions of article 1 of the ACHPR, which requires state parties to adopt legislative measures to give effect to the rights and duties under the charter, the following duties are also imposed on Nigeria.¹⁵⁴ Firstly, the duty to enact laws in order to establish an environment in which people can realise their right to development. This is a primary obligation and is further supported by the Nigerian Constitution which requires laws to be made for the “peace, order and good government” of the country.¹⁵⁵ The laws therefore, must be specifically designed to ensure proper resource management, active citizen

¹⁵⁰ Emphasis added.

¹⁵¹ See Constitution S. 1 (3); *Abacha v Fawehinmi* (2000) LPELR-14(SC); MO Unegbu “Resolving the dilemma of hierarchy between the African Charter and the Nigerian Constitution” (1999) 6 *Abia State University Law Journal* 19; AA Oba “The African Charter on Human and Peoples’ Rights and ouster clauses under the military regimes in Nigeria: Before and after September 11” (2004) 4 *African Human Rights Law Journal* 275 288-289.

¹⁵² See generally M Ssenyonjo (ed) *The African Regional Human Rights System: 30 Years after the African Charter on Human and Peoples’ Rights* (2012). On Civil and Political Rights see O Amao “Civil and Political Rights in the African Charter” in M Ssenyonjo (ed) *The African Regional Human Rights System: 30 Years after the African Charter on Human and Peoples’ Rights* (2012) 29 29-53; On Socio-economic rights see M Ssenyonjo “Economic Social and Cultural Rights in the African Charter” in M Ssenyonjo (ed) *The African Regional Human Rights System: 30 Years after the African Charter on Human and Peoples’ Rights* (2012) 55-100; and on Group rights see B Ugochukwu, O Badaru & O Okafor “Group Rights under the African Charter on Human and Peoples’ Rights: Concept, Praxis and Prospects” in M Ssenyonjo (ed) *The African Regional Human Rights System: 30 Years after the African Charter on Human and Peoples’ Rights* (2012) 101 101-117.

¹⁵³ See *Social and Economic Rights Action Center and another v. Nigeria*, Communication No. 155/96, <http://www1.umn.edu/humanrts/africa/comcases/155-96b.html>, para. 54 and African Commission on Human and Peoples’ Rights. *Bakweri Land Claims Committee v. Cameroon*, Communication No.260/2002, *African Human Rights Law Reports* (2004) 43

¹⁵⁴ OC Okafor, “Righting” the Right to Development: A Socio-Legal Analysis of Article 22 of the African Charter on Human and Peoples’ Rights, in S Marks (ed) *Implementing the Right to Development in International Law* (2008) 60.

¹⁵⁵ Constitution S 4 (2).

participation, transparency and accountability. These are some of the key elements of the right to development as examined in chapter 2 4 2.

Secondly, Nigeria has a duty under the ACHPR to actively support the process of establishing the legal environment conducive for the exercise of the right to development. In other words, it is not enough to simply establish the desired framework; it has to demonstrate some sustained level of commitment to maintaining such environment. Thus, it equally has the duty to ensure that the benefits of development are equitably shared among all the peoples entitled to such right.¹⁵⁶ Thirdly, Apart from the general right to development related obligations enumerated above, Nigeria has specific treaty obligations to its people under the ACHPR. Mindful of its responsibility under the ACHPR, Nigeria has domesticated it as local legislation as noted above. It is noteworthy that these obligations are people-based. In other words, the right to development under the ACHPR focuses on the people and not the individual.¹⁵⁷ This is a narrow conception of the right holders unlike what is conceived under the UNDRD, CRC and other general human rights treaties examined in 4 2 and 5 2. The reasons are the historical antecedents of the continent and the influence of the right to self-determination on the evolution of the right to development.

Importantly, one of my key arguments is that the right to development is justiciable in Nigeria. The ACHPR is not merely creating external obligations by virtue of Nigeria's regional commitment as supported by the principle of good faith under international law. It is also domestic legislation that is currently part of Nigerian law. By the African Charter Act, the provisions of the ACHPR have the "force of law in Nigeria and shall be given full recognition and effect and be applied by all authorities and persons exercising legislative, executive or judicial powers in Nigeria."¹⁵⁸ Thus, the effect of domestication of any treaty in Nigeria is that it further reinforces the international commitment by making the treaty directly applicable legislation like all other Acts of parliament in the country. The African Charter Act and the CRA arguably strengthen Nigeria's international resolve to ensure the effective realisation of all the rights enshrined therein.

Unlike the ACHPR, which was not altered, the CRC and ACRWC were significantly modified to suit the peculiarities of the country. In fact, no reference is made to these treaties in the CRA. The CRA recognises the rights of the child to survival and

¹⁵⁶ Okafor "Article 22" in *Implementing the Right to Development* 60.

¹⁵⁷ 60.

¹⁵⁸ African Charter Act S 1.

development.¹⁵⁹ The CRA does not contain any detailed principles defining the nature of the right or the responsibilities resting on the duty-bearer. The Act defines development to mean “physical, intellectual, emotional, social or behavioral development”.¹⁶⁰ The context and objectives of the Act has arguably influenced the meaning attached to development. The right under the CRA is broader than the African Charter Act because it directly ties development to survival (life). It goes further than the provisions of article 22 of the ACHPR which limits the right to “economic, social and cultural development.” Admittedly, this lack of uniformity may further strengthen the perception of the uncertainty and misgivings of the content of the right under international human rights law. However, we should not lose sight of the general character of the right. In other words, it will be a mistake to treat the right to development like all other rights because, while all other rights fall within its purview, it does not fall exclusively under any specific right.

As indicated above, the ACHPR as a domesticated treaty through the African Charter Act automatically forms part of the body of laws of Nigeria. However, since the ACHPR is an international treaty, the question of hierarchy of the ACHPR, the Constitution, the African Charter Act and other pieces of legislation may arise. In this regard, the status of domesticated treaties in Nigeria was considered in the case of *Abacha v. Fawehinmi*. In that case, the Respondent (on appeal), a legal practitioner and a human rights activist was arrested and detained without warrant by members of the Nigerian State Security Service and the police. He applied to the court of first instance to enforce his fundamental human rights guaranteed under both the 1979 Constitution and the ACHPR. Thus, the respondent (on appeal to the Supreme Court) had sought for a declaration rendering his arrest and continued detention illegal and unconstitutional. The judge found inter alia that “the African Charter on Human and Peoples’ Rights has no legs to stand on its own under Nigerian law.”¹⁶¹ The reason for this finding was that at that time, the 1994 Constitution (Suspension and Modification) Decree 107 of the Military regime of Sani Abacha had suspended chapter IV of the Constitution. Thus, the courts were seized of their jurisdiction to enforce the human rights of litigants. Consequently, the court could neither rely on the 1994 Constitution to enforce human rights protection nor the African Charter Act to achieve such

¹⁵⁹ CRA 2003 S 4.

¹⁶⁰ CRA S 277.

¹⁶¹ *Abacha v. Fawehinmi* (2000) LPELR-14(SC).

purposes. Hence, under these circumstances the African Charter Act could not “be enforced as a distinct law as such, it is subject to our domestic law and ouster decrees.”¹⁶²

Dissatisfied, the respondent appealed to the Court of Appeal where he sought to enforce his rights under the ACHPR, which had not been specifically suspended by the military regime. The Court of Appeal held that:

“[[t]he provision of Cap. 10 (The African Charter on Human and Peoples' Rights Act) of the Laws of the Federation 1990 are provisions in a class of their own. While the Decrees of the Federal Military Government may over-ride other municipal laws, they cannot oust the jurisdiction of the court whenever properly called upon to do so in relation to matters pertaining to human rights under the African Charter. They are protected by the International law and the Federal Military Government is not legally permitted to legislate out of its obligations.”¹⁶³

The implication of the judgment of the Court of Appeal was that international law was superior to domestic law including the Constitution. As quoted above, this is because the government cannot legislate out of its international obligations. This decision was appealed by the federal government. The Supreme Court disagreed with the appellant on the status of domesticated treaties and the constitution and held in favour of constitutional supremacy. With regard to the relationship between treaties that have been domesticated in Nigeria and the Constitution, the Constitution provides that it is the supreme law of the land and should therefore prevail.¹⁶⁴ Any other law, which conflicts with the Constitution, is void to the extent of the inconsistency.¹⁶⁵ Hence, the Constitution is the *grundnorm* for which all persons and authorities derive their powers.¹⁶⁶ The respondent's counsel in *Fawehinmi* argued before the various courts that the ACHPR being a statute of international character supersedes the Nigerian Constitution. In a unanimous judgment on this point, the Supreme Court was however quick to disagree and held that the supremacy of the Constitution is sacrosanct.¹⁶⁷ The Supreme Court was correct to uphold the supremacy of the constitution as any decision otherwise could endanger the collective wish of the people. How then should conflicts between the provisions of domesticated treaties such as the African Charter Act and the Constitution be resolved? This question is relevant in view of the wholesome domestication of the ACHPR that took place in 1983 without any attempt to first consider the areas of potential conflict with national laws especially the Constitution, as expressed above. It is also important because, the

¹⁶² *Abacha v. Fawehinmi* (2000) LPELR-14(SC).

¹⁶³ *Abacha v. Fawehinmi* (2000) LPELR-14(SC).

¹⁶⁴ Constitution S. 1 (3).

¹⁶⁵ See Constitution S. 1 (3).

¹⁶⁶ Constitution S. 1; see also *Abacha v Fawehinmi* (2000) LPELR-14(SC).

¹⁶⁷ All the Justices agreed on the supremacy of the Constitution over domesticated international treaties.

domestication of the ACHPR was carried out by a military regime and not by a democratic legislative body and therefore did not consider other circumstances that would make it less effective. Prime among the reasons being its apparent conflict with the Constitution in the area of the enforcement of economic, social and cultural rights.

Whereas there is agreement on the relationship between domesticated treaties and the Constitution, the same is not true for the relationship between domesticated treaties and other statutes. There are two conflicting opinions about this relationship in Nigeria. The first is that domesticated treaties should supersede existing legislation. Egede categorises the Supreme Court justices who decided *Fawehinmi* as liberal constructionists and strict constructionists.¹⁶⁸ Accordingly, the liberal constructionists were of the opinion that international treaties should be construed to rank superior to legislation. The reason being that “it is presumed that the legislature does not intend to breach an international obligation”¹⁶⁹ Consequently, an international treaty has a “greater vigour and strength” than statutes. Therefore, according to the majority of the Supreme Court “if there is a conflict between [a domesticated statute] and another statute, the provisions of the other statute must take a second place.” Thus, in accordance with the reasoning of the Court of Appeal above and the principle of *pacta sunt servanda*, domesticated treaties prevail over other statute.¹⁷⁰

The other opinion, which was a dissenting opinion of one of the justices was that there is no reason whatsoever why domesticated treaties should rank higher than domesticated treaties. Rejecting the opinion of the justices of the Court of Appeal, Achike JSC maintained that domesticated treaties cannot be superior to statutes such that they will be given a higher status than Nigerian legislation.¹⁷¹ Achike JSC held:

“No authority was given in support of this far-reaching proposition. On the contrary, the proposition is manifestly at variance with section 12(1) of the 1979 Constitution which stipulates that ‘no treaty between the Federation and any other country shall have the force of law except to the extent to which any such treaty has been enacted.’ Indeed, in enacting the African Charter as an Act of our municipal law and as a schedule to the only two sections of the Act. i.e. Cap 10 LFN 1990 a close study of that Act does not demonstrate directly or indirectly that it had been ‘elevated to higher pedestal’ in relation to other municipal legislations. The provisions of the only two sections of Cap 10, LFN 1990 incorporating the African Charter into our municipal law are conspicuously silent on a ‘higher pedestal’ to which the learned Justice of the lower court arrogates to the African Charter vis-a-vis the ordinary laws. The general rule is that a treaty which has been incorporated into the body of the municipal laws ranks at par with the municipal laws. It is rather startling that a law passed to give effect to a treaty should stand on a

¹⁶⁸ Egede (2007) *JAL* 249 256.

¹⁶⁹ *Abacha v Fawehinmi* (2000) LPELR-14(SC).

¹⁷⁰ *Abacha v Fawehinmi* (2000) LPELR-14(SC) SC para 15.

¹⁷¹ *Abacha v Fawehinmi* (2000) LPELR-14(SC).

'higher pedestal' above all other municipal laws without more, in the absence of any express provision in the law that incorporated the treaty into the municipal law"¹⁷²

Oluwatoyin¹⁷³ and Babatunde¹⁷⁴ have separately criticised the majority opinion of the Supreme Court and prefer the dissenting judgment of Achike. In reality, Achike's opinion should be preferable in our circumstances despite the fact that it adds little value to the realisation of international law. Dualism itself limits the realisation of international law even though as discussed above, monism is not flawless. Thus, in Egede's view the liberal and strict constructionists' perspectives reveals the deficiency of section 12 (1) of the Constitution and by extension dualism.¹⁷⁵ This is because, as correctly pointed out by the Supreme Court, the legislature has the power to vary or repeal a treaty even against the wishes and aspirations of the ordinary citizen. However, I am of the opinion that in the absence of unqualified application of international law, the liberalists' construct is more advantageous to the realisation of human rights. The liberalists endeavoured to carry out their duty under law in such a manner as not to be "unnecessarily rigid and legalistic" to preserve and not to proscribe the provisions of international domesticated treaties.¹⁷⁶

6 4 1 1 FREP Rules

To further strengthen the internal enforcement of Nigeria's international human rights obligations through the interpretative role of courts, the Constitution has empowered the Chief Justice of Nigeria (CJN) to make rules for the practice and procedure of enforcing human rights.¹⁷⁷ In view of this power, the CJN revised the FREP Rules in 2009 due to its apparent inadequacies.¹⁷⁸ One of the innovations contained therein is the recognition of treaty law as well as foreign law of other countries as bases for human rights enforcement and interpretation in the country. It is important to note that the FREP Rules has fascinatingly brought within its purview the need for judges to consider international law and therefore give purposive interpretation to human rights. Thus, part of the objectives of the 2009 FREP Rules reads:

¹⁷² References omitted. See *Abacha v Fawehinmi* (2000) LPELR-14(SC).

¹⁷³ BI Olutoyin "Treaty Making and Its Application under Nigerian Law: The Journey So Far" (2014) 3 *International Journal of Business and Management Invention* 7-18.

¹⁷⁴ IO Babatunde "International Law before Municipal Tribunal: Has the Last been said by the Nigerian Supreme Court?" (2005) 3 *Igbinedion University Law Journal* 91-99.

¹⁷⁵ Egede (2007) *J. Afr. L.* 258-259.

¹⁷⁶ 258-259.

¹⁷⁷ See Constitution S.46 (3).

¹⁷⁸ These inadequacies included clarity of commencement of action, duplicity of action, locus standi etc. See A Sanni "Fundamental Rights Enforcement Procedure Rules, 2009 as a tool for the enforcement of the African Charter on Human and Peoples' Rights in Nigeria: The need for far-reaching reform" (2011) 11 *African Human Rights Law Journal* 511 515-521.

“(b) For the purpose of advancing but never for the purpose of restricting the applicant’s rights and freedoms, the Court shall respect municipal, regional and international bills of rights cited to it or brought to its attention or of which the Court is aware, whether these bills constitute instruments in themselves or form parts of larger documents like constitutions. Such bills include;

(i) The African Charter on Human and Peoples’ Rights and other instruments (including protocols) in the African regional human rights system,

(ii) The Universal Declaration of Human Rights and other instruments (including protocols) in the United Nations human rights system,”

Therefore, although undomesticated treaty laws are not binding on the courts, the FREP rules enjoin judges to take note of them. Hence, these instruments are useful tools of interpretation for judges in human rights litigations. Thus, based on the FREP rules, undomesticated treaties and instruments generally, may be utilised to advance the human rights of litigants. It must be noted however, that the FREP rules were made in furtherance of rights contained in chapter IV of the Constitution only (discussed in 6 4 1 below). Thus, the FREP rules may seem to only be utilised to advance the course of chapter IV rights (civil and political rights) to the exclusion of all others.¹⁷⁹ In essence, therefore, the FREP Rules may only guide the Nigerian Courts in interpreting human rights that are not in direct confrontation with the Constitution.¹⁸⁰ In which case, economic, social and cultural rights contained in chapter II and the ACHPR do not enjoy the interpretive latitude of international instruments established by the FREP rules. Nevertheless, a purposeful judiciary could arguably extend this latitude to give effect to Nigeria’s international obligations.

However, the inclusion of the ACHPR in the list of treaties to aid the interpretative role of courts raises a fundamental question. The fact that the ACHPR has been domesticated and therefore forms part of Nigerian law, calls for its direct application in Nigeria and not just a guide for advancing human rights. Courts should arguably enforce the rights under the African Charter Act. Therefore, its inclusion in the FREP Rules is incorrect (and arguably meaningless) firstly because of the foregoing reason. Secondly, for being repetitive; and thirdly for ranking it alongside treaties that do not have the same legal value under the Nigerian legal system. As argued earlier, undomesticated treaties apply in Nigeria as international obligations while domesticated ones like the ACHPR apply as part

¹⁷⁹ See E Nwauche “The Nigerian Fundamental Rights (Enforcement) Procedure Rules 2009: A fitting response to problems in the enforcement of human rights in Nigeria?” (2010) 10 *African Human Rights Law Journal* 502 511-512; See also Sanni (2011) *African Human Rights Law Journal* 521, 524-530.

¹⁸⁰ See *Abacha v. Fawehinmi* (2000) LPELR-14(SC).

of the legal system. My contention therefore is that without the inclusion of the ACHPR in the FREP Rules, it will still apply *suo motu*.

6 4 2 Right to development under the Nigerian Constitution

The 1979 Constitution, which is considered the only autochthonous constitution in Nigeria, contained a number of innovations.¹⁸¹ This included the embodiment of certain human rights, which the Constitution refers to as fundamental human rights. The current Nigerian Constitution¹⁸² retained virtually all the provisions including the way and manner human rights are embodied therein.¹⁸³ As briefly mentioned above human rights are generally classified into two groups in Nigeria; Justiciable and non-justiciable. They are provided for in two separate chapters of the Constitution.¹⁸⁴ The first group, which was largely dubbed from the European Convention on Human rights¹⁸⁵, are civil and political rights. These rights are purely individual (libertarian) rights and include amongst others the rights to life, equality, fair hearing as well as religious freedom and freedom of association.¹⁸⁶ These rights have traditionally formed part of the Nigerian constitutional order and legal system

¹⁸¹ The 1979 Constitution was the only constitution in Nigeria that was a product of a constituent assembly of eminent Nigerians headed by Sir Udo Udoma who deliberated on it following a draft drawn up by a constitutional drafting committee set up by Late General Murtala Muhammad headed by distinguished Chief FRA Williams. However, the Constituent assembly had no executive powers but was composed by a wide spectrum of Nigerians representing the various interests in the country. Some of the innovations introduced to the 1979 Constitution included presidential system of government, three tier federal structure that is the federal, state and local government, the FODPSP. See Udoma *History and the Law of the Constitution* 309-321; See also O Oyewo *Constitutional Law in Nigeria* (2012) 24-25.

¹⁸² In fact, at the verge of reintroducing a democratic government in Nigeria, the then military Head of State, Abdulsalami Abubakar constituted a panel of 15 eminent Nigerians to review the 1979 Constitution and make recommendations for enactment into what is now the 1999 version of the constitution. Therefore, the 1999 constitution is mutatis mutandis with the 1997 version. Both have provisions on human rights in the same manner. The categories of human rights which are justiciable in the Nigerian constitution are classically those that are referred to as civil and political rights or individuals' rights. See Oyewo *Constitutional Law* 24-25.

¹⁸³ Chapter IV of the Nigerian Constitution which covers section 34-45 consists of the following rights, rights to life, dignity of the human person, personal liberty, fair hearing, privacy, religion, freedom of expression, assembly, movement, freedom from discrimination, property amongst a few others. These rights have been made inalienable however some of them may be derogated but only in accordance with section 45 of the Constitution. Thus, the right to privacy, freedom of religion, freedom of expression, freedom of assembly, and freedom of movement may be curtailed in the interest of defence, public safety, public order, public morality or public health. See Mowoe *Constitutional Law* 271.

¹⁸⁴ Chapter II dealing with economic, social and cultural rights and chapter IV dealing with civil and political rights. See DCJ Dakas "Judicial Reform of the Legal Framework for Human Rights Litigation in Nigeria: Novelties and Perplexities" in E Azinge & DCJ Dakas (eds) *Judicial Reform and Transformation in Nigeria* (2012) 334 335-338.

¹⁸⁵ C Heyns "African human Rights Law and the European Convention" (1995) 11 *South African Journal on Human Rights* 252 257; see also A Adeola We the People V the Nigerian Constitution: And the Grundnorm is...? (2012) 14 *J. Juris* 253 258; & M Kilander The Role of International Law in Human Rights Litigation in Africa in EK Quansah & W Binchy (eds) *Judicial Protection of Human Rights in Botswana: Emerging Issues* (2009) 255-273 257.

¹⁸⁶ See generally Constitution chapter IV.

as justiciable human rights.¹⁸⁷ By and large, rights under chapter IV are unconditionally justiciable in Nigeria. Thus, there is evidence of their enforcement by Nigerian courts.¹⁸⁸ The second group of rights, economic, social and cultural rights are contentious in Nigeria. In fact, while international human rights law regards them as rights¹⁸⁹, as I discussed in chapter 2 2, the Nigerian legal system considers them as directive principles of the state and therefore non-justiciable.¹⁹⁰ While chapter IV of the Constitution contains civil and political rights, chapter II contains economic, social and cultural rights. According to the National Action Plan on the implementation of human rights in Nigeria, “the discrimination between chapter II and IV of the Constitution has adversely affected the progress in the development of civil liberties and socio-economic rights in Nigeria.”¹⁹¹ This is predicated on universality of human rights under international human rights law as I discussed in chapter 2 of this dissertation. In addition to the Constitution, the African Charter Act also contains human rights provisions that are similar to but wider in scope than those contained in the Constitution. As I show hereunder, by virtue of the domestication of the African Charter Act, all human rights have been recognised in Nigeria. However, whether all human rights are being protected and fulfilled remains a subject of further inquiry and interpretation. In *Asemota v Yesufu*¹⁹² the court observed that a:

“[F]undamental right is an undoubted inalienable right which corresponds to a *jus naturale*. It is the greatest right and when it is contained in the Constitution of a nation, it enshrines a peoples expression of political and civil rights (as endowed by nature); but only to the extent that the strictness of largeness of modern system of government does permit.”

Thus, as noted above, the rights under chapter IV are immutable rights only to the extent that section 45 (1) of the Constitution is not invoked by the state.¹⁹³ However the right to development is an umbrella right, as discussed in chapter 2 4, which is effectively realised if and when at least one human right is protected and none is, violated. Due to the

¹⁸⁷ See for example Chapter III of the 1960 and 1963 Constitutions which contained civil and political rights provisions.

¹⁸⁸ See for example Mowoe *Constitutional Law* 289-555.

¹⁸⁹ See for example the ACHPR, The ICESCR and the VCLT.

¹⁹⁰ See Constitution S. 6 (6) (c).

¹⁹¹ Nigeria *National Plans of Action for the Promotion and Protection of Human Rights 2007-2012* 3 accessible at <<http://www.ohchr.org/EN/Issues/PlansActions/Pages/PlansofActionIndex.aspx>> [accessed 13/01/2015]. The VCLT recommended to States to consider the desirability of drawing up a national action plan on the level of implementation (promotion and protection) of human rights. Between 2006 till date Nigeria has submitted two reports, one in 2006 and the other in 2012 covering the period between 2007 and 2012.

¹⁹² (1982) 3 NCLR 419.

¹⁹³ This section provides: (1) Nothing in sections 37, 38, 39, 40 and 41 of this Constitution shall invalidate any law that is reasonably justifiable in a democratic society (a) in the interest of defence, public safety, public order, public morality or public health; or (b) for the purpose of protecting the rights and freedom or other persons.

universality of human rights generally, effective enforcement of all human rights is essential to the comprehensive realisation of the right to development. Interestingly, the Nigerian legal system has established substantive and institutional mechanisms to enforce rights under chapter IV. Thus, whenever a person's right which is contained in chapter IV has been, is being or is likely to be violated, they may approach a high court for the enforcement of that right.¹⁹⁴

While the Nigerian legal system recognises and enforces the civil and political rights set out in chapter IV, economic, social and cultural set out in chapter II are recognised but not justiciable. The latter rights arguably, create duties and obligations on the state; however without any form of judicial intervention.¹⁹⁵ Muhammad JSC observed that:

“An enactment is justiciable if only it can be properly pursued before court of law or tribunal for a decision. But where a court or tribunal cannot enforce such enactment then it becomes non-justiciable that is non-enforceable. This means that the executive does not have to comply with the enactment unless and until the legislature enacts specific laws for its enforcement. In Nigerian constitutional law, there are typical examples of such enactments particularly those contained in Chapter II of the Constitution of the Federal Republic of Nigeria, 1999, placed under the caption, ‘Fundamental Objectives and Directive Principles of State Policy’. These are not justiciable, generally, they run subsidiary to the fundamental rights contained in Chapter IV of the 1999 Constitution.”¹⁹⁶

This observation represents the general view expressed by Nigerian judges.¹⁹⁷ They appear to give literal interpretation to the provisions of the Constitution. The non-justiciability of chapter II is rooted in the history of Nigeria's constitutional development. Chapter II cover areas such as education, health, environment, housing, and participation. According to the constitutional drafting committee (CDC) of the 1979 Constitution, while the fundamental objectives are those identified ultimate objectives of the nation, the directive principles are the path towards realising those objectives:

“By Fundamental Objectives we refer to the identification of the ultimate objectives of the Nation whilst Directive Principles of State Policy indicate the paths which lead to those objectives. Fundamental Objectives are ideals towards which the Nation is expected to strive whilst Directive Principles lay down the policies which are expected to be pursued in the efforts of the Nation to realise the national ideals.”¹⁹⁸

¹⁹⁴ Constitution S. 46 (1). See also *Federal Polytechnic Bauchi & Another v Aboaba & Another* (2013) LPELR- 21916 (CA). See also *Nnabuchi v IGP* (2006) LPELR- 9312 (SC).

¹⁹⁵ See DCJ Dakas “Judicial Reform of the Legal Framework for Human Rights Litigation in Nigeria: Novelties and Perplexities” *Judicial Reform and Transformation in Nigeria: E Azinge & DCJ Dakas (eds) A Tribute to Hon. Justice Dahiru Musdapher* (2012) 334-356 336.

¹⁹⁶ *Engr. Charles Ugwu & Another. V. Senator Ifeanyi Ararume & Another.* (2007) LPELR-3329(SC).

¹⁹⁷ *Okogie v The AG of Lagos State* (1981) 2 NCLR 337 (SC); & *AG of Ondo v. AGF* (2002) LPELR- 623 (SC).

¹⁹⁸ Mowoe *Constitutional Law in Nigeria* 273.

The Nigerian idea of FODPSP was borrowed from India as set out in the Tej Bahadur Sapru (Sapru) committee report of 1945.¹⁹⁹ The Sapru committee report recommended that certain rights of minorities should be subject to judicial pronouncements while others should not be given such privilege. However, the result was the enshrinement of FODPSP containing some economic, social and cultural rights that were and still are unenforceable.²⁰⁰ While Nigeria treats them as FODPSP, economic, social and cultural rights are being enforced in other national jurisdictions.²⁰¹

A sub-committee of the CDC on the FODPSP recommended that the provisions of the FODPSP should be capable of judicial remedy to a limited extent.²⁰² This was rejected because the CDC was not comfortable with having a trial and error situation that may end up not working for the country should the provisions turn out to be unrealistic, unsuitable or ineffective.²⁰³ However, in the opinion of the CDC, there was a need to shift away from the traditional powers and rights approach to a more responsive duty based relationship between the state and the people it governs, as this would make the state more conscious and responsive to its obligations.²⁰⁴ The CDC emphatically noted that:

“A constitution should not be simply a code of legally enforceable rules and regulations; it is a charter of government, and a government involves relations and concepts that are not amenable to the test of justiciability or capable of enforcement only in the courts of law (...) Unless the goals and the fundamental attitudes and values of that should inform the behaviour of its members and institutions are clearly stated and accepted, a new nation is likely to find itself rudderless, with no sense of purpose or direction. By defining the goals of the society and prescribing the institutional forms and procedures for pursuing them, a statement of fundamental objectives and directive principles in our constitution seeks to direct and concert the efforts and actions of the people towards the achievement of those goals (...) The need for such provision in the Nigerian constitution is all the greater because of the heterogeneity of the society, the increasing gap between the rich and the poor, the growing cleavage between the social

¹⁹⁹ 273; India copied the idea of FODPSP from the Irish revolutionary movement and the Irish Constitution of 1938. R Abeyratne “Socioeconomic Rights in the Indian Constitution: Toward a Broader Conception of Legitimacy” (2014) 39 *Brook. J. Int'l L.* 39 1-71. For the SAPRU Committee Report see <http://archive.org/stream/saprucommittee035520mbp/saprucommittee035520mbp_djvu.txt> (accessed 14-01-2015).

²⁰⁰ Part III of the Constitution of India contains provisions on Civil and political rights under the heading ‘Fundamental Rights’ while IV contains non-justiciable socio-economic rights termed ‘FODPSP’. Article 37 of the Indian constitution is to the effect that while it is the duty of the state to apply the principles contained in part III they shall not be enforced by the courts. Similarly, the Irish Constitution enshrines FODPSP which should guide the legislature but shall not be cognisable by any court. See Irish Constitution Article 45.

²⁰¹ See S Liebenberg “South Africa’s evolving jurisprudence on socio-economic rights: An effective tool in challenging poverty?” (2002) 6 (2) *Law, Democracy & Development* 159-191; see also S Liebenberg S Liebenberg *Socio-Economic Rights: Adjudication under a Transformative Constitution* (2010).

²⁰² Mowoe *Constitutional Law* 274.

²⁰³ Ministry of Information *Report of the Constitution Drafting Committee* (CDC Report) (1976) volume 1 VII para 33; See also Mowoe *Constitutional Law* 274.

²⁰⁴ CDC Report para 3.2; Mowoe *Constitutional Law* 272.

groupings, all of which combine to confuse the nation and bedevil the concerted march to orderly progress”²⁰⁵

Accordingly, the FODPSP are to be considered as a “charter of government” and “the Constitution should make it clear that powers are bestowed upon the organs and institutions of government, not for the personal aggrandisement of those who wield them from time to time, but for the welfare and advancement of society as a whole.”²⁰⁶ As further elaborated below, the objections of making the FODPSP non-justiciable was based on the fear that it may lead to constant confrontation among the arms of government especially between the executive and legislature on one end and the judiciary on the other. The CDC noted that the policymaking is an arena where “professional lawyers who preside over courts of law are not necessarily the most competent judges”²⁰⁷ Similarly, the FODPSP are policy goals and objectives that are not usual of legal rights of persons or groups within the purview of judicial intervention.²⁰⁸ The CDC added on the one hand that:

“by their nature, [FODPSP provisions] are rights which can only come into existence after the Government has provided facilities for them. Thus, if there are facilities for education or medical services one can speak of the ‘right’ to such facilities. On the other hand, it will be ludicrous to refer to the ‘right’ to education or health where no facilities exist.”

Hence, this highlights the need for available resources in order for economic, social and cultural rights as well as the right to development to be effectively realised. The objections against the justiciability or otherwise of socio-economic rights basically centres around the issues of ideology and classification of human rights, separation of powers and the capacity of the judiciary to handle policy matters, as well as resources constraints and the need for progressive realisation of these rights. This is further complicated by the difference that exist between the African system and the UN system on the availability of resources. Unfortunately, while the Nigerian system follows the UN system on resource availability, the African human rights system does not make the realisation of human rights subject to availability of resources. However, in *Purohit*, the African Commission recognised the need for resource availability in realising human rights as is further the case in Nigeria.²⁰⁹

²⁰⁵ CDC Report Vol. 1 Para 3.1-3.2.

²⁰⁶ CDC Report Vol 1 v-vi; BO Okere “Fundamental Objectives and Directive Principles of State Policy under the Nigerian Constitution” (1983) 32 (1) *The International and Comparative Law Quarterly* 214 221.

²⁰⁷ 221; CDC Report vol. 1 vii.

²⁰⁸ Okeke *The International and Comparative Law Quarterly* 221; CDC Report Report vol 1 vii.

²⁰⁹ *Purohit and Another v The Gambia* (2003) AHRLR 96 para 84; See also C Mbazira “The Right to Health and the nature of Socio-economic Rights Obligations under the African Charter: The Purohit Case (2005) 6 *ESR Review* 15 18-20; and SA Yashenew “Approaches to the Justiciability of Economic, Social and Cultural

The arguments that were advanced by the CDC in order to make economic, social and cultural rights non-justiciable in Nigeria apply with equal force to the right to development. It is true that enforceability is not the only means of achieving human rights. This was the intendment of the CDC. Government should be responsible enough to design programmes and policies that benefit its people without the intervention of courts. Ideally, this is possible. But as An-Naim observes, “unfettered discretion of governments, however democratic without the possibility of judicial guidance and supervision” may be injurious to the realisation of human rights.²¹⁰ Genuine implementation may very well be a successful way to make human rights meaningful. In other words, to speak of realisation of human rights is not to limit its scope to enforceability or justiciability. Realisation includes implementation and efforts made towards achieving a set goal. It may involve careful designing and purposeful implementation of policies and programmes by a government whether it is being monitored or not.

This is to argue that judicial activism by Nigerian judges is more or less lacking even though the legal system itself has provided room for it. Judicial activism is achievable through for example, considering the interrelationship between rights under chapter II with those under Chapter IV, which are justiciable.²¹¹ For example juxtaposing the relationship between the right to life and non-discrimination etc.²¹² The High Court of Lagos State adopted this approach to uphold the obligation to eradicate illiteracy under Chapter II of the Constitution. In *Adewole v Alhaji Jakande*²¹³ the court tied the right to education to the right to freedom of expression through the establishment of schools. A similar approach could work well in enforcing the right to development and other people’s rights under the Constitution with the right to life, non-discrimination and participation under both the Constitution and the African Charter Act. This follows the jurisprudence in other emerging common law countries such as India.²¹⁴ This is also in tandem with the indivisibility of all human rights as proclaimed in the Vienna Declarations to the effect that “all human rights are universal, indivisible, interdependent and interrelated.”²¹⁵ For example, the Supreme Court of India is notable in this regard where Justice Bagwati relates socio-economic rights

Rights in the Jurisprudence of the African Commission on Human and Peoples’ Rights: Progress and Perspectives” (2011) 11 *AHRLJ* 317 317-340.

²¹⁰ AA An-Na’im ‘To affirm the full human rights standing of economic, social & cultural rights’ Y Ghai & J Cottrell (eds) *Economic, Social & Cultural Rights in Practice* (2004) 7.

²¹¹ Duru (2012)” Available at SSRN 2140361. 65.

²¹² CRA section 3; Constitution section 34, 39 and 42.

²¹³ (1981)1 NCLR 262 HC (Lagos).

²¹⁴ *State of Madras v. Champakam* (1951) S.C.R. 525

²¹⁵ See Vienna Declaration.

to the right to life in the case of *Minerva Mills v Union of India*.²¹⁶ In this famous decision Justice Bagwati noted:

“[T]o the large majority of people who are living in almost sub-human existence in conditions of abject poverty and for whom life is one long unbroken story of want and destitution, notions of individual freedom and liberation, though representing some of the most cherished values of a society, would sound as empty words bandied about in the drawing rooms of the rich and well to do and the only solution for making these rights meaningful to them was to re-make the material conditions and usher in a new social order where socio economic justice will inform all institutions of public life so that the preconditions of fundamental liberties for all may be secured.”²¹⁷

It is therefore, clear that the indivisibility of human rights further reinforces the idea of a right to development as a vector of all rights. This means the improvement in one right leads directly or indirectly to improvement in other rights. Accordingly, “the value of the vector improves, if at least one right improves and no right deteriorates. If any right is violated then the vector deteriorates and the right to development is violated.”²¹⁸

The implementation of African Charter Act, following its domestication is arguably an avenue for ensuring the universality of human rights in Nigeria. Nevertheless, it is being bugged down by the dictates of the constitution and an unwilling judiciary that promotes literal as opposed to purposive rule of interpretation.²¹⁹

The FREP rules has in its own way expanded the discretion of Nigerian judges as to how they can give more strength and vigour to the countries international obligations. If the current practice by Nigerian courts is anything to go by, it will take a long time before the judges would begin to give purposive interpretation to human rights obligations despite the opportunity afforded them to do so by the FREP Rules. The implication therefore is that except there is a precedent from the higher courts, especially the Supreme Court, lower courts would remain indifferent towards giving effect to economic, social and cultural rights contained in the African Charter Act. Alternatively, litigants must show, before the courts that the cause of action before a court is justiciable under a legislation in Nigeria which does not conflict with the Constitution.

Thus, in view of the non-justiciability of chapter II rights, there is a need to enact laws on its different subject matters, which would allow courts to exercise their jurisdiction over

²¹⁶ *Minerva Mills v Union of India* (1978) AIR 1789 SC.

²¹⁷ *Minerva Mills v Union of India* (1978) AIR 1789 SC.

²¹⁸ Na'im "To Affirm the Full Human Rights Standing" in *Economic, Social & Cultural Rights in Practice 4*.

²¹⁹ *AG of Ondo v. AGF* (2002) LPELR- 623 (SC).

them or at least for these rights to have some legal backing.²²⁰ The Constitution contains a provision under which this can be achieved. Item 60 (a) of the second schedule of the Constitution is to the effect that the national assembly may establish institutions for the whole or part of the country “to promote and enforce the observance of” FODPSP (this is further exemplified in the following chapter 7 4 2). Item 67 of the same schedule gives the national assembly a blanket power to make laws over “any other matter with respect to which [it] has power to make laws in accordance with the provisions of this Constitution.” In interpreting these provisions, the Supreme Court observed in *AG of Ondo v AGF*²²¹ that it is “for the executive and the legislature, working together to give expression to [chapter II provisions] through enactment. Thus, they can be made justiciable through legislation.”²²² According to the Supreme Court, there is no need to seek uncertain ways of enforcing FODPSP since there exist, within the Constitution, a leeway to uplift the contents of chapter II from the status of declarations into enforceable obligations.²²³ Without doing so however, chapter II remains non-justiciable as was held in *Okogie v The AG of Lagos State*.²²⁴ Thus, following the decision in *AG of Ondo v AGF*²²⁵, it is clear that for any heading under chapter II to be justiciable, the relevant authorities must enact a law that establishes an institution for the purpose of realising that objective.²²⁶ Uwais has averred that enacting such laws:

“[I]s definitely one avenue that could be meaningfully exploited by the legislature to assure the betterment of the lives of the masses of Nigeria, whose hope for survival and developments in today’s Nigeria have remained bleak, and are continuously diminishing. The utilisation of this power would ensure the creation of requisite bodies to oversee the needs of the weak and often overlooked and neglected in our society. It would also provide a unique and potent opportunity to our legislators to monitor and regulate the functions of these bodies, where the Executive, for

²²⁰ See generally, EP Amechi “Litigating Right to Healthy Environment in Nigeria: An Examination of the Impacts of the Fundamental Rights (Enforcement Procedure) Rules 2009, in Ensuring Access to Justice for Victims of Environmental Degradation.” (2010) 6 *Law Env’t & Dev. J.* 320-334; KSA Ebeku “Environment and Human Rights Approaches to Environmental Protection in Nigeria: Gbemre v. Shell Revisited” (2007) 16 (3) *RECIEL* 16 (3) 312-320; S Ibe “Implementing economic, social and cultural rights in Nigeria: Challenges and opportunities” (2010) 10 *African Human Rights Law Journal* 197-211; NI Aniekwu “Health Sector Reform in Nigeria: A Perspective on Human Rights and Gender Issues” 2006 11 *Local Environment* 127-140; GN Okeke & C Okeke “The Justiciability of the Non-Justiciable Constitutional Policy of Governance in Nigeria” (2013) 7 *IOSR Journal of Humanities And Social Science* 9-14; D Olowu “Human Rights and the Avoidance of Domestic Implementation: The Phenomenon of Non-Justiciable Constitutional Guarantees” (2006) 69 *Saskatchewan Law Review* 39-78 & Mowoe *Constitutional Law* 281-287.

²²¹ *AG of Ondo State v. AGF* (2002) LPELR-623(SC).

²²² *AG of Ondo v. AGF* (2002) LPELR- 623 (SC).

²²³ *AG of Ondo v. AGF* (2002) LPELR- 623 (SC).

²²⁴ *Okogie v The AG of Lagos State* (1981) 2 NCLR 337 (SC).

²²⁵ *AG of Ondo State v. AGF* (2002) LPELR-623(SC).

²²⁶ O Duru “The Justiciability of the Fundamental Objectives and Directive Principles of State Policy under Nigerian Law” (2012) Available at SSRN 2140361.

reasons best known to it, fails or neglects to prioritise and implement the provisions of Chapter II, and by extension, the welfare of Nigerians.”²²⁷

6 4 3 The right to development as a specific constitutional obligation in Nigeria

The following discussion envisions the nature of the right to development as an existing constitutional obligation as anticipated by the Nigerian Constitution. International law enjoins states parties to ensure the realisation of international human rights. For instance, the African Charter Act provides specifically in article 22 (2) that states have a duty “individually or collectively, to ensure the exercise of the right to development.”²²⁸

Unfortunately, Nigeria does not expressly provide for a right to development in its constitution.²²⁹ However, a close reading of the provisions of the Constitution undoubtedly presents hope for the right. The Constitution obligates Nigeria to realise the right by ensuring its essential attributes are implemented. Forecasting back to chapter 2 3 1, I argued that development is the improvement of the human person, individually and collectively. It is achieved through proper implementation of plans and it has a human right dimension. Similarly, in 2 4, I argued that the right to development itself is an umbrella right capable of enhancing the life worth of the human person. I equally, discussed the interrelationship between development and human rights and noted that whole idea is to institutionalise social justice and progress in a State. Applying these issues to the Nigerian legal system, Ladan argues that, sections 16 (1) (b)²³⁰, (d)²³¹ and 2 (b)²³² of the Constitution are the closest constitutional provisions that attempt to provide for the right to development.²³³

²²⁷ ML Uwais “Fundamental Objectives and Directive Principles of State Policy in Modern Constitutions: Possibilities and Prospects” in C. C. Nwaeze (ed.), *Justice in the Judicial Process: Essays in Honour of Honourable Justice Eugene Ubaezeonu JCA* (2002) 179. See also GN Okeke & C Okeke “The Justiciability of the Non-Justiciable Constitutional Policy of Governance in Nigeria” (2013) 7 *IOSR Journal Of Humanities And Social Science* 9-14 12.

²²⁸ ACHPR Art. 22 (2).

²²⁹ See chapter 5 where I outlined that countries like Ethiopia and Cameroon have constitutional provisions on the right to development.

²³⁰ The section provides that the state shall “(b) control the national economy in such manner as to secure the maximum welfare, freedom and happiness of every citizen on the basis of social justice and equality of status and opportunity”

²³¹ “(d) without prejudice to the right of any person to participate in areas of the economy within the major sector of the economy, protect the right of every citizen to engage in any economic activities outside the major sectors of the economy.”

²³² “(b) that the material resources of the nation are harnessed and distributed as best as possible to serve the common good”

²³³ See MT Ladan “Should all Categories of Human Rights Justiciable?” in MT Ladan *Law Human Rights and the Administration of Justice in Nigeria: Essays in Honour of Hon. Justice Muhammed Lawal Uwais* (2004) 86.

However, in my opinion the right to development goes beyond these provisions. It should extend to all the other provisions of the Constitution, which have the slightest connection with the right to development. Arguably, all but few provisions of chapter II have relevance to the right. Chapter II outlines certain objectives ranging from political²³⁴, economic²³⁵, social²³⁶, education²³⁷, health²³⁸, environment²³⁹, foreign policy²⁴⁰, and cultural²⁴¹ each of which have a relation not only to development and human dignity but by extension, with the right to development as well. In the absence of a right to development under Nigerian laws, except in the African Charter Act, the right is conveniently situated within Nigeria's development paradigm as contained in its FODPSP. Thus, Lawan correctly notes that the content of chapter II is a gesture indicative of the Nigerian state's commitment to development.²⁴²

The UNDRD defines the right to development as "an inalienable human right by virtue of which every human person and all peoples are entitled to participate in, contribute to, and enjoy economic, social, cultural and political development, in which all human rights and fundamental freedoms can be fully realized."²⁴³ Leading experts in the field of the right to development note that development "is a comprehensive process that goes beyond economics to cover social, cultural and political fields and aims at "constant improvement" meaning progressive and regular improvement of well-being."²⁴⁴ The process of development according to these experts "must be genuinely participatory, with the community fully involved in the decisions and the execution of development projects, and with a fair and equitable distribution of benefits, resulting in the progressive improvement of the well-being of all people, and not just a section or region."²⁴⁵

Bearing this in mind, it follows therefore that most of the provisions in chapter II support the notion that the right to development is indeed a "vector" for which human needs are

²³⁴ Constitution S. 15.

²³⁵ Constitution S. 16.

²³⁶ Constitution S. 17.

²³⁷ Constitution S. 18.

²³⁸ Constitution S. 17 (3) (c) & (d).

²³⁹ Constitution S. 20.

²⁴⁰ Constitution S. 19.

²⁴¹ Constitution S. 21.

²⁴² MA Lawan *The Paradox of Underdevelopment amidst Oil in Nigeria: a Socio-Legal Explanation* (2008) Doctoral dissertation, University of Warwick 256.

²⁴³ UNDRD Art. 2 (1).

²⁴⁴ A Sengupta A Eide, S P Marks & Bård A. Andreassen *The Right to Development and Human Rights in Development: A Background Paper Prepared for the Nobel Symposium organized in Oslo from 13-15 October 2003* (Nobel Symposium 125) Research Notes 07/2004 1 3.

²⁴⁵ 3.

interrelated and interdependent.²⁴⁶ Accordingly, “the value of the vector improves, if at least one right improves and no right deteriorates. If any right is violated then the vector deteriorates and the right to development is violated.”²⁴⁷ Thus, the right to development is both composite and inviolable. Composite in the sense that all human rights, civil, political, economic, social and cultural, are all realised, in equal measure as both being interrelated and interdependent.²⁴⁸ Inviolable because at least one right is being realised and none violated.²⁴⁹

The composite and inviolability characters of the right to development as seen from the Nigerian perspective thus becomes challenging in view of the categorisation of human rights under the Constitution. However, the most important consideration is that the different classes of human rights are recognised under the Nigerian legal system. What remains is finding a way for either their justiciability or implementation as the case may be (I will explore this aspect further in the following chapter). Marks’ categorisation of state duties becomes instructive in this regard. He divides state obligations into perfect and imperfect where he places the obligations to respect and protect as perfect obligations while obligations to promote and fulfil as imperfect obligations. While perfect obligations can be squarely justiciable and enforced by courts the imperfect obligations are only legal but unenforceable obligations calling for genuine and sound steps towards their progressive realisation.²⁵⁰

The opening statement of chapter II of the Constitution raises an intriguing dimension about the extent of responsibility contemplated therein. Section 13 of the Constitution proclaims that: “It shall be *the duty and responsibility* of all organs of government, and of all authorities and persons, exercising legislative, executive or judicial powers, to conform to, observe and apply the provisions of this Chapter of this Constitution.”²⁵¹ A definition of the term *duty* is essential in determining the scope of the duty and responsibility required of those the constitution refers. A duty ordinarily suggests “a legal obligation that entails mandatory conduct or performance.”²⁵² Duties are always correlatives of rights; whenever

²⁴⁶ 3.

²⁴⁷ 4.

²⁴⁸ 6.

²⁴⁹ 6.

²⁵⁰ Stephen P. Marks, “The human rights framework for development: seven approaches”, AK Sengupta, A Negi and M Basu, (eds.) *Reflections on the Right to Development* (2005) 23-60.

²⁵¹ Emphasis added.

²⁵² Free Dictionary Online < <http://legal-dictionary.thefreedictionary.com/duty> > (accessed 29-01-2015).

there is a right there is a duty as it is commonly argued.²⁵³ As succinctly explicated by Sengupta et al:

“Rights give their holders a basis for claiming that other agents within society have certain duties, which they must fulfil to enable the right-holders to enjoy those rights. If a particular right provides the basis for making ‘justified’ claims, which are grounds of duties of others within society, it is essential to establish this justification. Members of society - national or international - must be persuaded to accept the right as a moral or legal claim on society. That justification has to be both normative and procedural. The normative justification may be derived from a set of moral and legal principles that members of the society are willing to accept as their common standards of achievement. The procedural justification has to be consistent with appropriate norm-creating procedures acceptable to most if not all members in a society, so that the abstract principles of what is good is translated into concrete norms of social behavior.”²⁵⁴

Interestingly therefore, by section 13 of the Constitution, realising the provisions of chapter II is not a question of justiciability alone. Chapter II provisions are normative moral and legal claims and responsibilities for certain duty holders to fulfil. All the arms of government, together with members of other sectors of the economy in a position to help, are arguably, responsible to fulfil these obligations.

Chapter II obligations are so important that the Constitution requires all political parties, who are ultimately responsible for sponsoring candidates for elections to govern different parts of the country, to include its provisions in the aims and objectives of their articles of association.²⁵⁵ If this is the case, is it possible for political parties to be sued for non-compliance with this requirement? Section 224 of the Constitution bolsters the social contract theory. Including the provisions of Chapter II as the aims and objectives the programmes of political parties gives these provisions some teeth in law. They have interestingly been upgraded from mere aspirational ideals to proper legal requirements. This is because, arguably, unlike the Chapter II provisions, Nigerians may enforce the memorandum and articles of association of political parties in their own right without tying their claims to the Constitution. The relationship between political parties and the people should be viewed from a contractual perspective. Thus, political parties should be considered as part of the duty holders of the right to development. This is to argue that, every representation made during that process should be justiciable not only on a moral ground but also in law. A breach of these representations may therefore attract a legal sanction to perform. In essence therefore, this requirement is an important innovation that need to be tested before Nigerian courts to determine the justiciability of economic, social

²⁵³ See chapter 2 2.

²⁵⁴ Sengupta et al Research Notes 07/2004 9.

²⁵⁵ Constitution S. 224. It provides: “The programme as well as the aims and objectives of a political party shall conform with the provisions of Chapter II of this Constitution.”

and cultural rights in Nigeria from this perspective. It is this kind of provision that social and human rights activists must use, for the courts to interpret and enforce human rights violations against governments, whom have been elected through political parties.

Going further, chapter II contains important items that can promote the dignity of the human person. Firstly, sovereignty is essential to the right to development. Without sovereignty, no state will be able to determine its path to national development.²⁵⁶ Section 14 (1) (a) of the Constitution provides that “sovereignty belongs to the people of Nigeria from whom government through this Constitution derives all its powers and authority.”²⁵⁷ This provision is therefore a basis for the right to development especially in connection with the beneficiaries of the right. Based on this provision, the people’s perspective of the right becomes crucial. It must be reiterated that the common article 1 of the twin covenants emphasises the right to self-determination, which would not be realisable without sovereignty. Hence, only a sovereign Nigeria can guarantee the right to development both internally and externally. Internally because government will be able to concentrate on designing policies that can guarantee development for its people. Externally because as a sovereign state, government may seek, receive and utilise development aid and support for its people. In this regard too, the state represents its people in the international arena.

According to section 14 (1) (b) “the security and welfare of the people shall be the primary purpose of government.” Thus, this provision becomes equally important in identifying the nature and duty bearers of the right to development. I argue that the scope of duty under this provision appears to be all-encompassing thereby supporting the discussion in chapter 2 3, that welfare of the people is paramount to development. As such, to achieve the realisation of the welfare of the people requires a wide range of issues including designing plans and ensuring that the people participate in the process. Hence, the Constitution provides that “the participation by the people in their government shall be ensured in accordance with the provisions of this Constitution.”²⁵⁸ The participation requirement goes further to discourage domination of any group in the country. In other words, based on the federal character principle enshrined in the Constitution, all Nigerians have equal stake in the development of their country.²⁵⁹ Participation is an indispensable element of the right to development, as stipulated by the

²⁵⁶ UN Charter Art. 2; UNDRDS Arts. 1-6; see also DNIEO Art. 4 (a).

²⁵⁷ Under the 1960 Constitution, sovereignty belonged to the Queen of England. However, when Nigeria became a republic in 1963, this sovereignty was transferred to the Nigerian people.

²⁵⁸ Constitution S.14 (2) (c).

²⁵⁹ Constitution S. 14 (3) & (4).

African Commission in the *Endorois* case referred to in chapter 5 4 1 5 which anchors on principles such as non-discrimination, and the equitable distribution of resources.²⁶⁰ It entails not only the active participation of the people but also the involvement of all relevant stakeholders in the development compact. On the part of the government, the Constitution is to the effect that:

“The composition of the Government of a State, a local government council, or any of the agencies of such Government or council, and the conduct of the affairs of the Government or council or such agencies shall be carried out in such manner as to recognise the diversity of the people within its area of authority and the need to promote a sense of belonging and loyalty among all the people of the Federation.”²⁶¹

The Constitution therefore adds: “national integration shall be actively encouraged, whilst discrimination on the grounds of place of origin, sex, religion, status, ethnic or linguistic association or ties shall be prohibited.”²⁶² In achieving national integration, it is the duty of the state to encourage mobility of persons, goods and services as well as “the formation of associations that cut across ethnic, linguistic, religious and or other sectional barriers.”²⁶³ The foregoing therefore endeavours to make development as close as possible to the people. Accordingly, section 21 provides that the government shall “protect, preserve and promote the Nigerian cultures which enhance human dignity and are consistent with the fundamental objectives as provided in this Chapter.”²⁶⁴ It shall also “encourage development of technological and scientific studies which enhance cultural values.”²⁶⁵

Importantly, as a panacea for national development, the Constitution behoves on the Nigerian state to abolish all forms of corrupt practices.²⁶⁶ As is discussed in chapter 7, corruption is one of the banes of Nigeria’s development. As a matter of duty, every stakeholder is required accordingly to tackle it so that the country may move forward developmentally. The economic objectives of the government of Nigeria shall be to:

“harness the resources of the nation and promote national prosperity and an efficient, a dynamic and self-reliant economy; control the national economy in such manner as to secure the maximum welfare, freedom and happiness of every citizen on the basis of social justice and equality of status and opportunity; without prejudice to its right to operate or participate in areas of the economy, other than the major sectors of the economy, manage and operate the major sectors of the economy; and without prejudice to the right of any person to participate in areas

²⁶⁰ See Chapter 2 3 of this dissertation.

²⁶¹ Constitution S. 14 (4).

²⁶² Constitution S. 15 (2).

²⁶³ Constitution S. 15 (3) (a) & (d).

²⁶⁴ Constitution S. 21 (a).

²⁶⁵ Constitution S. 21 (b).

²⁶⁶ Constitution S. 15 (5).

of the economy within the major sector of the economy, protect the right of every citizen to engage in any economic activities outside the major sectors of the economy.”²⁶⁷

To achieve the economic development in line with the above, there is need to articulate a national development plan which shall be balanced and which shall promote the equitable distribution of the resources of the country for the common good of all Nigerians.²⁶⁸ The most interesting provision that squarely encapsulates the plight of the people is contained in section 16 (2) (d). The section requires the state to design policies that are geared towards the provision of: “suitable and adequate shelter, suitable and adequate food, reasonable national minimum living wage, old age care and pensions, and unemployment, sick benefits and welfare of the disabled are provided for all citizens.” As important as this provision appears, it is pregnant with ambiguities. The following chapter 7 considers the available means through which the duty bearers have endeavoured to achieve these responsibilities. As I attempt to show in chapter 7 Nigeria has designed many economic plans, backed by law to promote and realise its obligations under the Constitution. In chapter 7, I examine the reason why, despite these economic plans, the country has remained perpetually on the brink of underdevelopment.

Moreover, closely related to the right to development are provisions, which appear to reinforce the universality of the composite and inviolable character of the right itself. Thus, the Constitution highlights certain social objectives, which must be “founded ideals of Freedom, Equality and Justice.”²⁶⁹ In view of this all citizens must have equal rights, obligations and opportunities.²⁷⁰ The dignity of human person must be elevated above every other consideration including in the actions of government.²⁷¹ The Constitution behoves on the government not to exploit any human or natural resources of the state “in any form whatsoever” other than for the “good of the community”.²⁷² It further guarantees “the independence, impartiality and integrity of courts of law, and easy accessibility thereto shall be secured and maintained.”²⁷³

In the spirit of the Constitution, state policy must be non-discriminatory such that all Nigerians will have the opportunity to secure “adequate means of livelihood as well as

²⁶⁷ Constitution S. 16(1).

²⁶⁸ Constitution S. 16 (2) (a) & (b).

²⁶⁹ Constitution S. 17 (1).

²⁷⁰ Constitution S 17 (2) a

²⁷¹ Constitution S 17 (2) (b) & (c).

²⁷² Constitution S 17 (2) (d).

²⁷³ Constitution S 17 (2).

adequate opportunity to secure suitable employment.”²⁷⁴ Furthermore, the Constitution requires that government policy must be capable of ensuring that the labour force gets humane conditions and facilities that will ensure their leisure, religious and cultural.²⁷⁵ Similarly, “the health, safety and welfare of all persons in employment are safeguarded and not endangered or abused” while ensuring that adequate medical and health facilities for all persons are provided.²⁷⁶ Children, young persons, the aged and persons deserving public assistance and the protection of family life must all be provided for.²⁷⁷

It should be noted that the government is mandated to direct its policies towards the attainment of “equal and adequate educational opportunities at all levels.”²⁷⁸ Thus, government shall promote science and technology, eradicate illiteracy, and provide free, compulsory primary education, free secondary, university, and adult literacy education.²⁷⁹ Lastly, it is behoved on the state to ensure the protection and improvement “of the environment and safeguard the water, air and land, forest and wild life of Nigeria.”²⁸⁰

Remarkably, the realisation of these ideals is enshrined in section 19 of the Constitution, which captures the international dimension and cosmopolitan character of development. Firstly, it requires the Nigerian state to participate in building a just economic order, which I maintained in chapter 2 4, is the bulwark of the right to development.²⁸¹ Similarly, the state must strive to promote African integration and support African unity that I have also argued in chapter 3 5, is essential for Africa’s development.²⁸² Other ideals are that the state shall ensure the: “promotion of international co-operation for the consolidation of universal peace and mutual respect among all nations and elimination of discrimination in all its manifestations”; and “respect for international law and treaty obligations as well as the seeking of settlement of international disputes by negotiation, mediation, conciliation, arbitration and adjudication.”²⁸³

This goes further to support the thesis that development is not an isolated phenomenon. Regional, sub-regional and global co-operation are indispensable to making development sustainable and realistic. No country can develop alone. The Nigerian constitution clearly

²⁷⁴ Constitution S 17 (3) (a).

²⁷⁵ Constitution S. 17 (3). (b)

²⁷⁶ Constitution S 17 (3) (c) & (d)

²⁷⁷ Constitution S 17 (3) (f)-(g).

²⁷⁸ Constitution S 18 (1).

²⁷⁹ Constitution S 18 (2) & (3) (a)-(d).

²⁸⁰ Constitution S 20.

²⁸¹ Constitution S 19 (e).

²⁸² Constitution S 19 (b).

²⁸³ Constitution S 19.

notes this, especially in encouraging the promotion of African integration and “a just world economic order”.²⁸⁴

In summary, the Nigerian constitution contains the basic elements of the right to development as discussed above. Categorically, elements, which the UNDRD singles out, are clearly reflected in the Constitution.²⁸⁵ It has arguably reinforced the ideals laid down in the UNDRD, which are capable of eradicating poverty and ensuring participatory national development. But what the Constitution does not do is to marshal out in detail form how this can be achieved. Matters are furthermore complicated by the fact that the Constitution does not make these rights justiciable in courts and therefore crippling the checks and balance capability of Nigerian courts in this regard.

However, it is worth mentioning that in furtherance of its obligations under international law, the Nigerian state has shown its commitment to the realisation of the right to development. The National Action Plan on the Implementation of Human Rights, submitted to the OHCHR evidences the efforts the Nigerian state has undertaken in realising the right to development. The government has noted in its 2009-2014 report that it “recognizes its obligation to ensure that all Nigerians should be given equal and meaningful opportunity to develop to their maximum potential.”²⁸⁶ In furtherance of this obligation, government has identified the need to “improve the quality of life of all citizens”; “free the potential of every person in Nigeria” and respect, protect, promote and fulfil all political, civil, social, economic and cultural rights.²⁸⁷ The Nigerian state has put considerable reliance on the UNDRD and other international obligations that have contemplated the right to development as guide to realising the right.²⁸⁸ The government claims that it has passed a

²⁸⁴ Constitution S 19 (b) & (e).

²⁸⁵ Article 8 of the UNDRD provides: “1. States should undertake, at the national level, all necessary measures for the realization of the right to development and shall ensure, inter alia, *equality of opportunity for all in their access to basic resources, education, health services, food, housing, employment and the fair distribution of income*. Effective measures should be undertaken to ensure that women have an active role in the development process. Appropriate economic and social reforms should be carried out with a view to eradicating all social injustices.

2. States should encourage popular participation in all spheres as an important factor in development and in the full realization of all human rights.”

²⁸⁶ National Action Plan 2009-2014 78.

²⁸⁷ 78.

²⁸⁸ This include the following: The general provisions of Universal Declaration of Human Rights; United Nations Conference on Environment and Development, a.k.a. Rio Declaration of 1992; The Vienna Declaration and Programme of Action, Adopted by the 1993 UN World Conference on Human Rights; United Nations Convention Against Corruption, 2002; The UN Global Conferences on: Population and development (Cairo) Women (Beijing)Development (Copenhagen); The African Charter on Human and Peoples’ Rights; African Charter for Popular Participation in Development, 1990; African Union Convention on Prevention and Combating Corruption, 2003; Conference on Security, Stability, Development and Cooperation (Solemn Declaration, 2000); New Partnership for Africa’s Development (NEPAD); United Nations Framework

plethora of legislation for the purposes of realising its right to development obligations.²⁸⁹ Again these efforts form the basis of the discussion in next chapter.

6 4 4 The right to development as an indigenous customary practice

As the final component of the laws of Nigeria and following my discussion in chapter 3 on the nature of the African human rights system, it is important to extend the discussion about the relevance of indigenous customary practice on the right to development to Nigerian context. I noted in chapter 3 that human rights and development are obviously reflected in African humanism encapsulated as communitarianism. The Nigerian constitution specifically encourages the promotion of “Nigerian cultures which enhance human dignity and are consistent with the fundamental objectives.”²⁹⁰ Indigenous custom is “the organic or living law of an indigenous people of Nigeria regulating their lives and transactions.”²⁹¹ It is flexible and reflects centuries of accepted usages.²⁹² It therefore binds the people subject to them but not the government. This is because customary law has been reduced to the private spheres only. Nevertheless it commands significant influence on those running governments in the country because customs constitute the mirror of the entire society.²⁹³ According to the Supreme Court of Nigeria customary law is not a law enacted by any competent legislature in Nigeria but is enforceable and binding on the people subject to it.²⁹⁴

It seems inconceivable to expect a right to development in its current, double dimensional form to operate under this system of law not least because of the diversity and multiculturalism of Nigeria as noted earlier. However, the notion of communal development is undoubtedly catered for under the various customs in the country as

Convention on Climate Change 1992; Kyoto Protocol to the Convention on Climate Change. 1997; Millennium Development Goals (MDGs); Vienna Declaration and Programme of Action (1993), Article 8, Article 10, Article 11; United Nations Convention on the Rights of the Child, Article 6(2); African Charter on the Rights and Welfare of the Child 1989, Article 5 (2) Other relevant International and Regional Instruments relating to this right. See National Action plan 78-79.

²⁸⁹ These include: National Council on Privatization Act; Nigerian Investment Promotion Commission Act, 1995; Security and Exchange Commission Act, 1998; Niger Delta Development Commission Act, 2000; The Independent Electoral Commission (Establishment, Etc.) Act, 1998; Corrupt Practices and Other Related Offences Act (ICPC Act), 2000; Economic and other Financial Crimes Commission Act (EFCC Act), 2004; Federal Road Maintenance Agency Act; National Human Rights Commission Act, 1995; Code of Conduct Bureau and Tribunal Act, 1991; African Charter on Human and Peoples’ Rights (Ratification and Enforcement) Act, 1983; and Child Rights Act, 2003.

²⁹⁰ Constitution S. 21 (a).

²⁹¹ *Kharie Zaidan V. Fatima Khalil Mohssen* (supra)

²⁹² *Oyewunmi v. Ogunesan* (1990) 3 NWLR 182 at 207.

²⁹³ *Owoniyi v Omotoso* (1961) 1 All NLR 304 at 309. See also FA Ajayi “The Interaction of English Law with Customary Law in Western Nigeria: II” (1960) *Journal of African Law* 4 (2) (1960) 98-114 108.

²⁹⁴ *Kharie Zaidan V. Fatima Khalil Mohssen* (1973) LPELR-3542 (SC) Per Elias CJN (as he then was).

argued in chapter 3.3. Therefore in the context of developing principles for communal development, this is not unknown to customary laws and traditions in Nigeria. But it should be admitted that the right to development would hardly fit into customary laws and traditions. While the communities may be right holders under the principles of self-determination and by extension the right to development, they assume such position by way of the Constitution, conventional human rights and international law and not customary laws and traditions. Oji even goes further to liken CIL with indigenous customary laws. She maintains that “ethnic customary law and international customary law share a lot of characteristics. They are both mostly unwritten; require generality, duration and acceptance as possessing a positive force of law.”²⁹⁵ Therefore, the only precondition to applying CIL in Nigerian courts should be passing the same tests that indigenous customary laws pass.²⁹⁶ Although this is plausible, this approach grossly misconceives CIL under the common law system. CIL is not and does not resemble the indigenous customs in Nigeria beside their dynamism and flexibility. CIL emerges out of conducts of states and is therefore subject to no applicability tests under the international system, unlike the indigenous customs under Nigerian legal system.

However, the right to development as a communal endeavour is recognised under indigenous customs but to advance a legal principle from this perspective may be overstressing the concept and could hamper its effective realisation. This is basically because of the impossibility of determining which particular custom should be the standard for evaluation. It will therefore be best to use indigenous customs as guides as opposed to standards of determining whether the right to development is being achieved or not. It will also be an important determinant in the reception of the instruments as set out and discussed in the following chapter.

6.5 Concluding remarks

This chapter engaged with the nature of the Nigerian legal system particularly as it relates to the workings within the legal system, its application of international law and the nature of human rights. The Nigerian legal system is a federal dualist system which recognises the application of multiple diverse legal systems. Importantly, the system has a procedure for

²⁹⁵ Oji “Application of Customary International Law in Nigerian Courts” *NIALS Law and Development Journal* 151- 169 164.

²⁹⁶ Repugnancy, compatibility and public policy tests since passing these tests is just a matter of procedure having been accepted as a wholesome practice by the majority of the members of the international community. See Oji *NIALS Law and Development Journal* 164-165.

the application of international law. Although the system is dualist, I argued that CIL applies by way of automatic incorporation through the common law assumptions. Whereas treaties, in accordance with the dualist approach, carry a requirement for domestication before they are engrained into the legal system. Based on this, the right to development is a recognised human right as I have argued in chapter 4, 5 and this chapter.

Similarly, drawing on this obligation and in view of the fact that Nigeria was instrumental in the advancement of the right to development as an international legal obligation, the right forms part of the Nigeria's policy drive. Thus, the right to development is enforced and implemented as an aspect of human right or a specific constitutional obligation in Nigeria. A possible setback for the realisation of the right to development is the non-express recognition of the right in the Nigerian legal arrangement. Nevertheless, human rights are not realisable through adjudication only.

As I will discuss in the next chapter, there exists other methods through which the right to development becomes realisable. These strategies together with their limitations are examined in the next chapter. The difficulty therefore lies not only in the law or in fulfilling international obligations but equally in the implementation thereof coupled with other challenges, such as institutional handicap and social and other challenges. Furthermore, in chapter 7, I examine the measures undertaken by the Nigerian state to realise its development ideals as required of it by the Constitution as discussed in this chapter. Thus, the discussion considers the effort that has been made to achieve these through legislation and the establishment of thematic institutions.

Chapter 7

Implementing the Right to Development in Nigeria

7 1 Introduction

Realisation of a right is as important as the substance of the right itself. Therefore, implementation is central to the right to development debate.¹ In the preceding chapters, I set out to establish the legal status of the right to development under international, regional and Nigerian law. Through my research I found many compelling arguments supporting the idea that the right to development is an enforceable human right demanding domestic implementation. In the previous chapter, I established that the right to development is recognised under the Nigerian Constitution as an international obligation, a human right, an aspect of the larger development paradigm and as a complementary feature of indigenous customary practices. Thus, there is no doubt that the right is intricately tenable within the Nigerian legal system. Admittedly, aside from the African Charter Act and the CRA (in connection with children), that expressly mentions the right to development, as discussed in chapter 6, the right is essentially deducible when the Nigerian legal frameworks are read closely. Nevertheless, the right is usually identified without much difficulty because development is, or should be, a key concern of any government. This is remarkably implicit in the Nigerian Constitution, as I have noted many times in the previous chapter. Thus, Nigeria is a development actor in itself and has the mandate of ensuring that human rights and development related issues of all Nigerians are realised. The government carries out this mandate through different methods. Accordingly, this final chapter examines the role and limitations of Nigeria as a development actor and the methods it implores in the implementation of the right to development as set out in the sixth secondary research question.

It would be recalled, as discussed in chapters 4, 5 and 6 3 1, that states' obligations under international human rights law require proactive measures or taking steps to implement and realise human rights obligations. The African Commission has interpreted the obligations under article 1 of the ACHPR as a duty to respect, protect, promote and fulfil the rights set out in chapter 5 4.² Steiner, et al have jointly enumerated states' duties in this regard. These obligations include respecting the rights of others, establishing

¹ S Marks "Human Right to Development: Between Rhetoric and Reality" 17 *Harv Hum Rts Journ* 137.

² *Nigeria: Social and Economic Rights Action Centre (SERAC) and Another v Nigeria* (2001) AHRLR 60 (Ogoni case) para 44.

institutions to realise human rights, protecting and preventing human rights' violations, providing goods and services to the people to satisfy human rights obligations, and generally, promoting human rights.³ Nigeria as a development actor is expected to oblige to these obligations as elaborated extensively in this dissertation especially in chapter 6 and in this chapter. Thus, the Nigerian state must take all necessary steps to implement the right to development by adopting legislation and administrative measures to fulfil or redress the violation of obligations.⁴

It should be pointed out at the outset that in the context of the present chapter, the Nigerian state refers to all the tiers and arms of government in the country including the institutions established to assist in achieving its responsibilities. Section 14 of the Constitution notes that all organs, authorities and persons exercising legislative, executive or judicial powers, must conform to, observe and apply development related obligations under the Constitution. The federal government of Nigeria (FGN) is at the forefront of this obligation. Therefore, it should be guided by certain benchmarks for the realisation of the right to development. These include, allowing its people to participate in their development; making human dignity a central consideration in all their decisions, the adherence to the principle of non-discrimination and the proper planning and implementation of development objectives as well as safeguarding access to justice of the public.⁵

Primarily therefore, based on the discussion in chapter 6 3 1 regarding the responsibility of the Nigerian state to ensure national development, it must pass laws on specific subject matters in this regard.⁶ Thus, regardless of the approach adopted, law is an important instrument for driving development.⁷ Besides, government formulates and sets out to achieve national development plans that are geared towards execution of its national development programmes as required by the ACHPR, and others treaties as discussed in chapters 4 and 5.⁸ The foregoing therefore forms part of the processes for realising the right to development, bearing in mind that the right is a right to a particular process of

³ H J Steiner et al *International Human Rights in Context: Law, Politics, Morals* 3ed (2008) 185-189.

⁴ AK Sengupta "Conceptualizing the Right to Development for the Twenty-First Century" in OHCHR (ed) *Realizing the Right to Development: Essays in Commemoration of 25 Years of the United Nations Declaration on the Right to Development* (2013) 67 77.

⁵ RA Atuguba "Equality, Non-discrimination and Fair Distribution of the Benefits of Development" in OHCHR (ed) *Realizing the Right to Development: Essays in Commemoration of 25 Years of the United Nations Declaration on the Right to Development* (2013) 109 111.

⁶ UNDRD Art 8 (1) which provides that "States should undertake, at the national level, all necessary measures for the realization of the right to development (...).

⁷ M Lawan "Law and Development in Nigeria: A Need for Activism" (2011) 55 *JAL* 59 85; See also F Viljoen "National Legislation as a Source of Justiciable Socio-Economic Rights" (2005) 6 *ESR Review* 6 6-10.

⁸ See for example ACHPR Art 22 and UNDRD Arts 4 and 8.

development.⁹ Another dimension is that which sees the collaboration between government domestic policies and the existing international policy framework for national development. However, any of these methods may be implemented concurrently, just as the methods may be subsidiary to one another. In the same vein, the adoption of a particular approach may give rise to the inclusion of another. A legislative approach can, for example, stem from an international obligation under a treaty such as ACHPR, ICESCR or the CRC. Having set this approach in motion, the need for a development planning method may arise to strengthen and give effect to achieving the objective set out under the legislative approach or flowing from international human rights law.¹⁰ In all the approaches, their success lies in good and effective governance from those responsible for ensuring it.

After exploring the many facets of the rights to development throughout this dissertation, I aim to draw on my findings in this chapter. In this final substantial chapter, I set out to analyse the role of Nigeria in providing the right to development in view of its resource allocation and governing structures. I examine the methods the Nigerian state has adopted in realising its obligations under the right to development while also discussing some of the important challenges that hamper its effective realisation. I must mention, however, that the aim is not to engage in detailed examination of these challenges and methods but rather to exemplify how they affect the realisation of the right the development.

7 2 Nigeria's resources and resource allocation structure

Nigeria is blessed with human and capital resources, especially oil. It relies almost solely on oil revenues, and other aspects of the economy have received mere lip service.¹¹ Unfortunately, it does not have the technological knowhow to harness and refine these resources. In most cases, countries like Nigeria end up being short-changed in the process of utilising their resources by those who have the capacity and knowhow to exploit them especially non-state actors. The right to development seeks to ensure equitable and just engagement between and among states and other entities involved in development.

Furthermore, in view of the fact that resources are always limited and that demands are insatiable, to realise resources for development, states engage in borrowing from domestic

⁹ UNDRD Preamble; Sengupta "The Human Right to Development" in *Development as a Human Right* 15.

¹⁰ AK Shiva Kumar "National Experience with the Right to Development" in OHCHR (ed) *Realizing the Right to Development: Essays in Commemoration of 25 Years of the United Nations Declaration on the Right to Development* (2013) 365 365-371.

¹¹ OPEC *Nigeria Facts and Figures* available at: <http://www.opec.org/opec_web/en/about_us/167.htm> (accessed 05-10-2015).

and foreign entities. According to the independent expert on debts, borrowing, added with favourable terms and conditions prudent use of the resources borrowed, proper debt management and financing can contribute to economic development and establish favourable conditions for realising human rights.¹² However, in contrast, the World Bank and the IMF have acknowledged that Highly Indebted Poor Countries are badly affected by debts and are unable to fulfil their human rights and development obligations.¹³ In this regard Nigerian federating states are so overpowered by domestic and foreign debt that some of them are unable to meet their development objectives including payment of salaries.¹⁴ This is due largely to over reliance on petroleum resources the price of which recently crashed in the international market.¹⁵ Additionally, corruption, vandalism and oil theft had affected oil outputs. Most of the Nigerian states therefore experienced a recession recently especially from 2014 and the FGN had to step in to reorganise the huge domestic and foreign debts of these states by taking them over and converting them to bonds.¹⁶ These are the visible results from the largely mono-economy Nigeria has stuck to in the midst of failing to explore other opportunities that could generate additional income and reduce overdependence on oil revenues. Every part of Nigeria has arable cultivatable land and solid minerals that can be tapped into. But, as I discuss further below under 7 4 1, bad governance, lack of planning and corruption have not allowed the country to buy into these.

In the previous chapter I discussed Nigeria's obligations as a development actor. The following discussion highlights how this responsibility is carried out with regard to the access and allocation of Nigeria's resources together with some of the broad challenges that accompany the Nigerian political landscape in realising these critical responsibilities. In chapter 6 2, I noted that although Nigeria practices federalism, the federating units do not have absolute control over their resources and revenues. These are shared, based on certain constitutional principles determined by the FGN as further discussed in the

¹² Human Rights Council "Report of the Independent Expert on the effects of foreign debt and other related international financial obligations of States on the full enjoyment of all human rights, particularly economic, social and cultural rights, Cephias Lumina" A/HRC/20/23 (10 April 2011) 3.

¹³ 4.

¹⁴ Thisday "Buhari Okays N413.7bn Bailout for FG, States" *Thisday Newspaper* 7th July, 2015 available at: <http://www.thisdaylive.com/articles/buhari-okays-n413-7bn-bailout-for-fg-states/214095/> (accessed 22-09-2015).

¹⁵ International Energy Agency *World Oil Market Report* (2015) available: <https://www.iea.org/oilmarketreport/omrpublic/> (04-10-2015).

¹⁶ Thisday "Buhari Okays N413.7bn Bailout for FG, States" *Thisday Newspaper* 7th July, 2015 available at: <http://www.thisdaylive.com/articles/buhari-okays-n413-7bn-bailout-for-fg-states/214095/> (accessed 22-09-2015).

previous chapter.¹⁷ The implication is that although the federating states have their internally generated revenues, they rely customarily on the allocation from the centre to perform most of their functions. In this kind of arrangement some federating states have shown that they have the capacity to operate independently whereas most others are unable to do anything outside the common resources from the federation.¹⁸

As mentioned above, Nigeria's mainstay is its revenue from petroleum resources which is found only in a few federating states.¹⁹ Arguably, this is not enough to deal with all the developmental challenges in the country. Nevertheless, the income from this resource is shared accordingly, among all the tiers of government. Resources are crucial for the realisation of the right to development and so is effective planning and utilisation of these resources for national development.²⁰ Resources are limited and states alone do not often have the capacity to pool sufficient resources to go round in fulfilling their human rights and development objectives. Resource availability in Nigeria is dependent on its political structure.²¹ The FGN plays a larger role in determining how the nation's resources are to be shared among the three main tiers of government.²² The FGN maintains a federation account into which all revenues of the federation are paid.²³ The Revenue Mobilisation and Fiscal Allocation Commission (RMFAC) monitors government revenues and advises the President of the state of the federation account.²⁴ The President tables a proposal, every year, before the national assembly on how to share the amount, in credit, among the three tiers of government.²⁵ As I noted in chapter 6 2, an allocation and derivation (in favour of the oil producing states) principle is followed in determining the formula to be adopted in

¹⁷ See also generally RT Suberu *Federalism and Ethnic Conflict in Nigeria* (2001) 47.

¹⁸ 47-77.

¹⁹ 47-77; B Onimode "Fiscal Federalism in the 21st Century-Options for Nigeria" in AT Gana & SG Egwu *Federalism in Africa: Framing the National Question* Vol 1 (2003) 161 162.

²⁰ See chapter 2; See also UNDRD, ICESCR Art 2.

²¹ All land and mineral resources belong to the FGN except otherwise signified. See Land Use Act S 1; Petroleum Act Chapter 350, LFN 1990 S. 1; Minerals and Mining Act S 1.

²² BO Nwabueze *Federalism in Nigeria under the Presidential Constitution* (1983); PO Okolo and AO Raymond "Federalism and Resource Control: The Nigerian Experience" (2014) 4 *Public Policy and Administration Research* 99-109; D Arowolo "Fiscal Federalism in Nigeria: Theory and Dimensions" (2011) 2 *Afro Asian Journal of Social Sciences* 1-21; RT Suberu "Reinventing the Architecture of Nigerian Federalism" (2005-2006) 12 *Brown J World Aff* 139-154; CM Tela, AW Doho & A Bapeto "The Evolution, Development and Practice of Federalism in Nigeria" (2014) 2 *Public Policy and Administration Review* 51-66; AA Anyebe "Federalism and National Development Planning in Nigeria" (2014) 2 *Public Policy and Administration Review* 17-36.

²³ With the exception of "the proceeds from the personal income tax of the personnel of the armed forces of the Federation, the Nigeria Police Force, the Ministry or department of government charged with responsibility for Foreign Affairs and the residents of the Federal Capital Territory, Abuja." See Constitution S 162 (1).

²⁴ Constitution Third Schedule Part I S 32.

²⁵ Constitution S 162 (2).

the sharing.²⁶ Currently, the sharing formula is as follows: the federal government gets 52.68 per cent of total revenue generation while 26.72 per cent and 20.6 per cent goes to the federating states and local governments respectively.²⁷

In *AG of Abia & Others v AGF*²⁸ the applicants, the 36 states of the federation sought the Supreme Court's interpretation of a subsidiary legislation entitled, Statutory Instrument No. 9 of 2002. The President issued this instrument, which modified the existing sharing formula thereby amending the Allocation of Revenue (Federation Account Etc.) Act of 1990.²⁹ The applicants disagreed with the changes made and therefore challenged the validity of the instrument. The Supreme Court held that the President's power to modify the Allocation of Revenue Act was constitutional. It constituted an "appropriate authority" under section 315 (4) (a) of the Constitution and therefore the President possessed the power to modify the existing law in line with section 315 (4) (c). The Supreme Court observed:

"Thus the President has wide power when modifying any existing law to bring it in conformity with the Constitution. It is true that 'separation of powers' is essential to a healthy democracy, the power given the President and also to State Governors in existing law of the State by the Constitution is not an abuse of the principle or doctrine of separation of powers, it is essential to giving meaning to an existing law so that the Constitution itself is not abused."³⁰

The main problem with this arrangement is that resources are shared not in accordance with the output of states but rather in accordance with allocation principles. The FGN therefore ends up getting a lion's share of resources whereas other tiers get much less. Similarly, as discussed in chapter 6 2, some states with more population or entitled to the extra resources by virtue of the derivation principle also end up getting more resources. Upon final sharing and distribution of revenues to each tier of government, they become entitled to their share of the allocation and cannot be unduly tempered with by any other tier. On this note, the Supreme Court observed:

"Once the Federation Account is divided amongst the three tiers of government, the State Governments collectively become the absolute owners of the share that is allocated to them [now 26.72 percent]. So that it would normally be their prerogative to exercise full control over the share. Consequently, it will not be appropriate for the Federal Government to administer the share without the authorisation of the State Governments. This appears to be logical and in

²⁶ Constitution S 162 (2) and Proviso.

²⁷ Website of the RMAFC <<http://www.rmafc.gov.ng/departments-and-units/>> (03-09-205)

²⁸ *AG of Abia State & Others v AGF* (2003) LPELR-610 (SC).

²⁹ as amended by Allocation of Revenue (Federation Account, Etc.) Decree (No. 106) of 1992.

³⁰ *AG of Abia State & Others v AGF* (2003) LPELR-610 (SC).

keeping with the fundamental principle of federalism on the autonomy of the constituent States.”³¹

Thus, for the FGN to make withdrawals or set aside any amount for a collective national purpose, as discussed in the above statement, the other tiers, especially the state governments must be consulted.³² Similarly, state governments must not unduly withhold funds meant for the local governments.³³ Each state of the federation is to “maintain a special account to be called ‘State Joint Local Government Account’ into which (...) all allocations to the Local Government Councils of the State from the Federation Account and from the Government of the State [shall be paid].”³⁴ Each state is therefore required to pay to local government Councils “such proportion of its total revenue on such terms and in such manner as may be prescribed by the National Assembly.”³⁵ In *AG of Lagos v AGF*³⁶, the Plaintiff sought to determine whether or not there is power vested in the President of the FRN (by executive or administrative action) to suspend or withhold the statutory allocation due and payable to Lagos State. The Plaintiff had established additional local governments within its territory through its state assembly without correspondingly satisfying the requirement of section 8 (1) (d) of the Constitution.³⁷ The Supreme Court held that:

“[t]he President has no power vested in him (by executive or administrative action) to suspend or withhold for any period whatsoever the statutory allocation due and payable to Lagos State Government pursuant to the provision of section 162(5) of the 1999 Constitution but in respect of the 20 Local Government Areas for the time being provided by section 3 subsection (6) of the Constitution and not the new Local Government Areas created which are not yet operative.”³⁸

Similarly an order of perpetual injunction was granted against the President and any of his functionaries restraining them from such action.³⁹ This case signifies how the FGN can exert its trusteeship role beyond legal limits. It shows how the FGN unlawfully denied other tiers of government their lawful share of resources because it had an advantage over them.

³¹ *AG of Bendel State v. AGF* (1983) LPELR-3153(SC).

³² Presently, there is a case by the state governments before the Supreme Court challenging the FGN action in allegedly withdrawing monies to fund the Sovereign Wealth Fund.

³³ Constitution S 162 (8).

³⁴ Constitution S 162 (6).

³⁵ Constitution S 162 (7).

³⁶ *AG of Lagos State v. AGF* (2004) LPELR-SC.70/2004.

³⁷ Section 8 (1) (d) provides that “An Act of the National Assembly for the purpose of creating a new State shall only be passed if (...) the proposal is approved by a resolution passed by two-thirds majority of members of each House of the National Assembly.”

³⁸ *A.G of Lagos State v. AGF* (2004) LPELR-SC.70/2004.

³⁹ *A.G of Lagos State v. AGF* (2004) LPELR-SC.70/2004.

Two examples should suffice here. Firstly, during the dispensation of former President Olusegun Obasanjo, a method of benchmarking the price of Nigerian crude oil at an average price was introduced in 2004. The surplus realised, against the constitutional instruction requiring all monies to be paid into a federation account as discussed in chapter 6 2, was paid into an account named the excess crude account (ECA).⁴⁰ The ECA serves as a stabilisation fund against volatility in oil prices and also to be used as an infrastructure fund. The FGN continued to operate the ECA against the wishes of most federating state governments. Thus, the ECA is an imposition by the FGN to save some revenue for a rainy day.

Secondly, in 2011, the Nigerian Sovereign Investment Authority Act (NSIA) was enacted to give the ECA some legal backing.⁴¹ The NSIA established three funds the Future Generations Fund, the Nigeria Infrastructure Fund and the Stabilisation Fund.⁴² The aim of these funds is to invest for the future generation of Nigerians by building a savings base for the Nigerian people, developing Nigerian infrastructure, serving as stabilisation fund to support the economy in the event of any stress amongst others.⁴³ The implication of these funds however is that although it was created under an Act of the national assembly, it violates the principles of the Constitution which dictates that all revenues standing in the credit of the federation account is to be shared among the three tiers of government.⁴⁴ Therefore, most of the federating states who are required under the NSIA Act to contribute to these funds argue that it is an unconstitutional law. An initial fund of one billion US dollars was voted as take-off fund of which the FGN contributed 45.83 per-cent, the federating states 36.25 per-cent, the local governments 17.76 per-cent and the FCT 0.16 per-cent.⁴⁵ Moreover, aside from the legality argument, the federating states do not trust the FGN with task of managing their resources.⁴⁶ After all, the FGN has not proved itself more effective in running the country better than the governors have. At the eve of the last elections, the state governments accused the FGN of depleting the ECA.⁴⁷ Only recently, a

⁴⁰ SWFI "Nigeria's Sovereign Investment Authority" available at: <http://www.swfinstitute.org/swfs/excess-crude-account/> (accessed 23-10-2015).

⁴¹ Nigerian Sovereign Investment Authority (Establishment etc.) Act of 2011 (NSIA) S 1 (1).

⁴² NSIA Act Part IV, V, VI

⁴³ NSIA Act S 2 (a) – (d).

⁴⁴ O Adeniyi "The Lesson From Jonathan" *Thisday Newspaper* 22 October 2015 available at: <http://www.thisdaylive.com/articles/the-lesson-from-jonathan/223392/> (accessed 22-10-2015).

⁴⁵ O Adeniyi "The Lesson From Jonathan" *Thisday Newspaper* 22 October 2015 available at: <http://www.thisdaylive.com/articles/the-lesson-from-jonathan/223392/> (accessed 22-10-2015).

⁴⁶ O Adeniyi "The Lesson From Jonathan" *Thisday Newspaper* 22 October 2015 available at: <http://www.thisdaylive.com/articles/the-lesson-from-jonathan/223392/> (accessed 22-10-2015).

⁴⁷ SWFI "Nigeria's Sovereign Investment Authority" available at: <http://www.swfinstitute.org/swfs/excess-crude-account/> (accessed 23-10-2015).

committee setup to review the resources and revenue of the federation accused the NSIA of mismanaging and even squandering the funds.⁴⁸

Nevertheless, since 2012, the federating states have instituted an action before the Supreme Court seeking to determine the constitutionality or otherwise of the NSIA particularly with regards to the deductions being made by the FGN. The case is yet to be heard by the Supreme Court. It is expected that the Supreme Court in its usual approach of giving literal interpretation, would declare the NSIA Act unconstitutional in view of its apparent conflict with the express provisions of section 162 (2) of the Constitution and in line with its earlier decision in *AG Bendel* above. In which case, without the express permission of the federating states, the FGN being a trustee, cannot do as it wishes with the resources of the federation. Except a constitutional amendment is effected to give room for the NSIA Act, the Supreme Court should hold against it. This is further supported by the current reality of economic hardships faced by the federation. Saving for the future generation is to say the least, misguided.

Arguably state governments are also culpable in withholding resources meant for local governments. There is virtually no federating state that allows its local governments unlimited free hand to their revenues and in executing their responsibilities.⁴⁹ As important as the local governments are, the Constitution has created a huge lacuna with regards to how they should be constituted and operated. Firstly, unlike the other tiers of government whose mode of establishment is explicit, the Constitution is unclear about the establishment of local governments. Section 7(1) of the Constitution provides in a miserly fashion that:

“The system of local government by democratically elected local government councils is under this Constitution guaranteed; and accordingly, the Government of every State shall, subject to section 8 of this Constitution, ensure their existence under a Law which provides for the establishment, structure, composition, finance and functions of such councils.”

The Constitution leaves each federating state with the discretion to determine how this important tier of government is to be run. Section 7 (3) of the Constitution adds that: “it shall be the duty of a local government council within the State to participate in economic planning and development.” Secondly, local governments in Nigeria are not ipso facto an

⁴⁸ O Adeniyi “The Lesson From Jonathan” *Thisday Newspaper* 22 October 2015 available at: <http://www.thisdaylive.com/articles/the-lesson-from-jonathan/223392/> (accessed 22-10-2015).

⁴⁹ PO Oviasuyi, W Idada & L Isiraojie “Constraints of local government administration in Nigeria” (2010) 24 *J Soc Sci* 81 85.

independent tier of government.⁵⁰ Their powers are neither contained in the exclusive nor concurrent list of the Constitution but their functions are spelt out in the fourth schedule to the Constitution.⁵¹ Hence, local government affairs are residual matters that state governments have exclusive powers over. Although they are referred to as the third tier of government, local governments are truly speaking, an agency of the state governments.⁵² This informs the idea of a joint account for both the states and local governments and the absolute dependence on state governments to finance local governments. Therefore, local government administration in Nigeria is not uniform in that it varies from state to state. The powers of the state government over local governments are however restricted in certain circumstances as the establishment and delineation of local governments is controlled by the Constitution. Thus, state governments may not unilaterally tamper with existing local governments without a corresponding constitutional involvement of the national assembly as required in section 8 of the Constitution.⁵³ Similarly, the functions of local governments are constitutional matters.⁵⁴ Although elections of the local government administrators is conducted under the aegis of state electoral bodies, the registration of voters is a concurrent constitutional matter between the FGN and the states governments.⁵⁵ This being so, the doctrine of covering the field applies and consequently, a federal legislation supersedes a state legislation in this regard.⁵⁶

As a result, local governments have remained inefficient and easy vehicles for corruption. The joint state and local government account is at the centre of their inefficiency. Ordinarily, the local government as a tier of government ought to be at the forefront of realising the right to development because it is closest to the poorest segment of the society. However, because their roles are being determined and funds controlled by the federating states, they have not been able to function satisfactorily efficiently.⁵⁷ A more effective, clearly articulated local government administration is inevitable and *sine qua non* to the effective realisation of the right to development. This is realisable if and when the elections and tenure of the council members, direct funding and general administration are secured in a federal legislation to ensure uniformity. The existing practice whereby states

⁵⁰ See BO Nwabueze *Federalism in Nigeria under the Presidential Constitution* (1983) 129.

⁵¹ Constitution Fourth Schedule.

⁵² Nwabueze *Federalism in Nigeria* 129.

⁵³ See specifically Constitution S 8 (5) and (6); See also Nwabueze *Federalism in Nigeria* 132-133.

⁵⁴ See Constitution Fourth Schedule; see also Nwabueze *Federalism in Nigeria* 136-137.

⁵⁵ Constitution Second Schedule Part II S 11.

⁵⁶ Constitution S 4 (5).

⁵⁷ Oviasuyi et al (2010) 24 *J Soc Sci* 84-85.

control the affairs of local government councils is counter-productive to the effective realisation of development as a human right.⁵⁸

A related implication of Nigeria's resource structure as a development actor is evident when the exclusive legislative list of the federation is brought into perspective. The Constitution places onerous responsibilities on the FGN even though the system of government practiced is ostensibly a "federalism"⁵⁹ which I discussed in chapter 6 2 to portray independent devolution of powers among the units. In other words, federalism should ordinarily place more burden of national development on the states and local governments who are closer to the electorates in the delivery of social services. In Nigeria however, the FGN's role is more tasking compared to those of the states and local governments as contained in the exclusive list and therefore grossly against the other tiers of government.⁶⁰

To illustrate this, all the tiers of government are engaged in the provision of education, health services and in the development of agriculture. In other words, the FGN is engaged in activities contained in the concurrent list in almost equal measure with federating states. The result is unnecessary duplication of roles. The exclusive legislative list is packed with all sorts of responsibilities that would otherwise be performed by the federating units. Similarly, the FGN can legislate beyond the exclusive list and may at the same time, make and enforce laws under the concurrent legislative matters.⁶¹ The implication is that the FGN retains the right to garner national resources into its pool being the trustee of national resources. As noted by the Supreme Court in *AG Bendel State v. AGF*:

"The position of the Federal Government in maintaining the Federation Account is, by virtue of [Section 162 (1)] of the Constitution, is that of a trustee for the State Governments and the Local Government Councils of the States. It is settled that it is the duty of a trustee to keep a proper account of the trust he administers. And the beneficiary has a right to call upon the trustee for accurate information as to the state of the trust. Consequently, it is imperative for the Federal Government to render accurate and regular account to the beneficiaries of all moneys paid into the Federation Account when requested to do so."⁶²

⁵⁸ EA Anam-Ndu "Renewing the Federal Paradigm in Nigeria: Contending Issues and Perspectives" in AT Gana & SG Egwu *Federalism in Africa: Framing the National Question* Vol 1 (2003) 47 57

⁵⁹ See *Chief Adebisi Olafisoye V. Federal Republic of Nigeria* (2004) LPELR-2553(SC) where Niki Tobi observed: "Ideal federalism or true federalism is different from specific or individual federal constitutions of nations, which may not be able to achieve the utopia of that ideal federalism or true federalism but which in their own sphere are called federal constitutions. I think Nigeria falls into the latter category or group. It will therefore, be wrong to propagate theories based on ideal or true federalism in a nation's Constitution which does not admit such utopia."

⁶⁰ See also *AGF v. AG of Lagos State* (2013) LPELR-20974 (SC).

⁶¹ Constitution, S 4 and Second Schedule Part II.

⁶² *AG Bendel State v. AGF*(1983) LPELR-3153(SC).

For instance, land and all solid minerals belong to the federation (except otherwise is provided under a law) regardless of where situated in Nigeria. This is against true federalism where states reserve the right to harness and utilise their resources subject to contributing a percentage thereof to the central government to carry out functions that are best handled at that level.⁶³ The FGN is too powerful under Nigeria's current political structure. These wide powers, coupled with huge responsibilities, entice the FGN to deviate and lose focus of its obligations under the exclusive list. It is nevertheless limited to the FGN and therefore subsists as such.⁶⁴ Some of the powers in this list could actually, be conveniently exercised by the federating states to mitigate overbearing effects against the latter. For example, the FGN controls all security agencies including the Police and the armed forces.⁶⁵ While it is appropriate for other security agencies and the armed forces to be controlled by the FGN, the case of the police is arguable. Considering its role in national development, being the institution that relates with the people closely and usually the first point of call in security and social matters, it is appropriate for states to have and control their own police. Presently, states cannot establish their own police, as is the case in the USA, the very model of Nigeria's federalism. This has implication for multi-party politics especially in Nigeria where impunity reigns.⁶⁶ The Constitution has given a State Governor the power to issue lawful directives to the Commissioner of Police of a state. Section 215 of the Constitution provides:

“(4) Subject to the provisions of this section, the Governor of a state or such Commissioner of the Government state as he may authorise in that behalf, may give to the Commissioner of Police of that state such lawful directions with respect to the maintenance and securing of public safety and public order within the state as he may consider necessary, and the Commissioner of Police shall comply with those directions or cause them to be complied with:

Provided that before carrying out any such directions under the foregoing provisions of this subsection the Commissioner of Police may request that the matter be referred to the President or such minister of the Government of the Federation as may be authorised in that behalf by the President for his directions.”

However, the political party and personal disposition of the governors often clash with the overzealousness of some of the Commissioners hence causing disharmony or quest for superiority between the parties.⁶⁷ The Constitution does not help the situation as the

⁶³ Suberu *Federalism* 1-3.

⁶⁴ *AGF v. AG of Lagos State* (2013) LPELR-20974 (SC).

⁶⁵ Constitution Second Schedule Part I Ss 16, 38, 45, 48.

⁶⁶ See T Falola *The History of Nigeria* (1999) 165.

⁶⁷ F Falana “The Limits of Police Powers In Nigeria” *Daily Headlines* 24th November 2013 available at <<http://nigerianecho.com/the-limits-of-police-powers-in-nigeria/>> (accessed 19-09-2015); F Nwaneri “Amaechi vs Mbu: The Battle Rages” *New Telegraph* 19th September 2014 available at: <<http://newtelegraphonline.com/amaechi-vs-mbu-the-battle-rages/>> (19-09-2015).

proviso above makes any lawful directive from a Governor to the Commissioner subject to confirmation from the FGN either directly from the President or the Minister in charge of the Police. This has irreparable consequences on development of people of the state affected especially if political party affiliation of the dramatis personae differ.⁶⁸ The Supreme Court has reiterated that the purport of federalism is to allow each of their tiers to exercise their powers for the benefit of their people's development and wellbeing in an unfettered manner subject only to the limitations provided by the constitution.⁶⁹ However, the current procedure is not conducive to the realisation of the right to development as it paves way for the perpetuation of lapses in providing security to the people by creating superfluous bureaucracy. To add to this misgiving, section 215 (5) of the Constitution provides that: "The question whether any, and if so what, directions have been given under this section shall not be inquired into in any court." Therefore, a state governor may not approach a court of law to challenge refusal by a commissioner of police from obeying his/her lawful orders. This is problematic for the realisation of the security component of the right to development.

In spite its imperfection, the FGN would arguably be more effective if it concentrated on realising its exclusive legislative list mandate and allowed the state governments to deal with other issues. Federalism aims at ensuring national unity and cohesion among Nigerians and accordingly to avoid dominance by any group over others. Achieving this has not been easy for Nigeria as outcries continue to exist depending on which particular bloc of the country controls the federal government. By extension, the same situation exists within the states and local governments depending on how homogenous they are. This is expected from the multi-culturalism and regionalism that exists in the midst of parochialism and injustice that is common trend in the country.⁷⁰ Hence, there has been constant call for fiscal federalism, political restructuring or even secession from various quarters. The South-South region for example have maintained that more resources (resource control or fiscal federalism) should be voted to it because it provides the oil resources the country enjoys while at the same time being the epicentre of environmental

⁶⁸ The Governor of Rivers and Kano states had to contend with the overzealousness of the Nigerian Police Force at different times in the course of carrying out their roles as Governors.

⁶⁹ *AGF v. AG of Lagos State* (2013) LPELR-20974 (SC).

⁷⁰ See Achebe *The Trouble with Nigeria* 5-9.

degradation.⁷¹ As cogent as their reasoning seem, corruption, mis-governance and inequity are at the centre of these agitations.⁷²

7 2 1 The Niger-Delta

The Niger-Delta region arguably constitutes an interesting example within the context of resource allocation and the implementation of the right to development. Historical antecedence and the feeling of marginalisation have provided an avenue for special intervention in the Niger-Delta region of Nigeria.⁷³ Popularly referred to as “the goose that lays the golden egg”, the oil rich Niger-Delta region of South-South Nigeria is being given special treatment. This has raised some fundamental questions on the equality among Nigerians and the sustainability of such treatment. As mentioned in chapter 6, a special derivation formula of at least 13 percent of oil derivation must be earmarked for the development of this region.⁷⁴ Thus, a Niger Delta Development Commission Act (NDDC Act)⁷⁵ was enacted for the economic development of the Niger-Delta region.⁷⁶ The act established a Niger-Delta Development Commission to handle this task.⁷⁷ The functions of this Commission as provided for in section 7 of the NDDC Act is to formulate policies for the development of the region.⁷⁸ To achieve this, the NDDC Act enshrines that the NDDC should conceive, plan and implement policies and programmes that provides sustainable development for the Niger-Delta region in the areas of “transportation including roads, jetties and waterways, health, education, employment, industrialization, agriculture and fisheries, housing and urban development, water supply, electricity and telecommunications”⁷⁹ Generally, the NDDC Act seeks to ensure and promote the physical and socio- economic development of the region.⁸⁰

⁷¹ Thisday “S’South Speakers Demand 50% Derivation” *Thisday* 31st March 2012 <<http://www.thisdaylive.com/articles/s-south-speakers-demand-50-derivation/112681/>> (accessed 06-09-2015).

⁷² N Takon “Distribution of oil revenue to Niger delta of Nigeria in post-2000: Is the debate how fairly the federal government has redistributed oil revenue?” (2014) 3 *Int’l J of Dev & Sust* 586-607; B Babalola “The Underdevelopment of Nigeria’s Niger Delta Region: Who is to Blame?” (2014) 7 *J of Sus Dev* 118 124-125.

⁷³ This method has also been deployed to promote environment protection rights. A law established the NASREA to regulate and ensure environmental standards in Nigeria. National Environmental Standards and Regulations Enforcement Agency (NESREA) Act, 2007.

⁷⁴ See Constitution S 162 (2) Proviso

⁷⁵ Niger-Delta Development Commission (Establishment etc.) Act, 2000 (NDDC Act) S 1

⁷⁶ NDDC Act S1.

⁷⁷ NDDC Act S1.

⁷⁸ NDDC Act S 7 (a).

⁷⁹ NDDC Act S 7 (b).

⁸⁰ NDDC Act S 7 (c).

The special intervention for the development of the Niger-Delta region is based on its history of marginalisation of its people and subsequent advocacy that resulted therefrom at various fora including at the African Commission and the ECCJ.⁸¹ Before the NDDC, there were other special interventions in this area.⁸² Nevertheless, this region has continued to experience similar challenges as other parts of the country despite the extra resources it receives and the relatively lower population it has in comparison with other regions.⁸³

Unlike any other region in Nigeria the Niger-Delta region is governed by the NDDC Act which is geared specifically for the development of the rights of a people. The scope of the right has been clearly delineated, as provided for above, to promote the physical socio-economic development of this region. Importantly, there are clear instructions under the NDDC Act for the adoption of key components of the right to development such as planning, non-discrimination and international co-operation through mineral prospecting and producing companies.⁸⁴ Furthermore, a fund established by the Commission finances the activities of the Commission.⁸⁵ Nevertheless, this region has remarkably not fared better than other regions in Nigeria.

7.3 Nigeria's political structure

As resource allocation is one of the key considerations in the context of the right to development the structures within which and the manners by which the resources are managed are central to the discussion. Before I engage with the issue of good governance

⁸¹ For instance, see the Ogoni case discussed in Chapter 5. In addition, Ken Saro Wiwa was tried, sentenced by a Military Tribunal and was subsequently executed for his staunch advocacy against the underdevelopment of the Ogoni people.

⁸² See generally OP Jack-Akhigbe "The State and Development Interventions in the Niger Delta Region of Nigeria" (2013) 3 *Int'l J of Hum and Soc Sci* 255-263; SE Odeh et al "The Niger Delta Crisis in Nigeria: Pre and Post Amnesty Situation" (2013) 4 *Mediterranean J of Soc Sci* 421-427; AO Benedict "Breaking Barriers to Transformation of the Niger Delta Region of Nigeria: A Human Development Paradigm" (2011) 3 *J of Sust Dev* 210-222;

⁸³ B Abah "When Blessing Becomes a Curse in the Niger Delta" (2009) 2 *Women in Action* 22-30; JB Asuni "Blood Oil in the Niger Delta" (2003) United States Institute of Peace *Special Report* 1-20.

⁸⁴ NDDC Act S 7.

⁸⁵ NDDC Act S14 (1). The finances for administering the activities of the NDDC are collated:
 "(a) from the Federal Government, the equivalent of 15 percent of the total monthly statutory allocations due to member States of the Commission from the Federation Account; this being the contribution of the, Federal Government to the Commission-
 (b) 3 percent of the total annual budget of any oil producing company operating, on shore and off shore, in the Niger-Delta Area; including gas processing companies;
 (c) 50 percent of monies due to member States of the Commission from the Ecological Fund,
 (d) such monies as may from time to time, be granted or lent to or deposited with the Commission by the Federal or a State Government, any other body or institution whether local or foreign;
 (e) all moneys raised for the purposes of the Commission by way of gifts, loan, grants-in-aid, testamentary disposition or otherwise; and
 (f) proceeds from all other assets that may, from time to time, accrue to the Commission.

in the following sub-section I will make some remarks on the implications of the general political structure of Nigeria on the right to development.

One important practice that hampers development in Nigeria is the cost of governance resulting from Nigeria's political structure. At the executive level, the President appoints unlimited number of aids to help carry out the responsibilities of the office. This is in addition to the existing civil service of the federation. Most of the appointments are made from outside of the civil service thereby adding additional running cost for the federation. In addition, the Vice President and the Ministers also appoint retinue of support staff all at the expense of the federation. The Constitution furthermore adds to this challenge. Each state of the federation must have at least a minister and this is just the minimum.⁸⁶ This is as a result of the federal character principle and it is ostensibly in place to check domination and ensure national cohesion. To appease other interests, no less than forty ministers are appointed by the President with many of them performing elementary roles or duplicative roles of state governments. In spite of the number of aids appointed at the executive level, development has remained elusive. In fact, these appointments have become conduit pipes for self-patronage and self-enrichment.

At the level of the legislature, the cost of running a bicameral legislature in Nigeria has more than any other institution raised serious concern and costs the federation enormous amount of resources. In the Senate with 109 senators⁸⁷ and the House of Representatives with 360 members⁸⁸ gulp in excess of 150 billion Naira yearly (approximately one billion US dollars).⁸⁹ This raises concerns about whether Nigeria needs such waste in the quagmire of its underdevelopment. This concern has reached the level that Nigerians are becoming agitated and restless considering the pittance paid to public servants (18,000 Naira minimum wage). Recently, the RMAFAC informed Nigerians that it has resolved to make a downward review of the emoluments received by especially Nigeria's legislators.⁹⁰ Basically, the current structure does not create what Oyewo refers to as a "capable state". A capable state according to him is "characterized by transparency, accountability, the ability to enforce law and order fairly throughout the country, respect for human rights, the

⁸⁶ Constitution S 147 (3).

⁸⁷ Three from each state and one from the FCT See Constitution S. 48.

⁸⁸ Constitution S. 49.

⁸⁹ New Telegraph "How N'Assembly Shared N120bn Budget" *New Telegraph* 24th August 2015 <<http://newtelegraphonline.com/how-nassembly-shared-n120bn-budget/>> (accessed 06-09-2015).

⁹⁰ Thisday "RMAFAC: New Salary Package for Political Office Holders Ready Next Month" *Thisday* 26th August 2015: <<http://www.thisdaylive.com/articles/rmafca-new-salary-package-for-political-office-holders-ready-next-month/218467/>> (accessed 06-09-2015).

effective sharing of resources between the rural and urban populations” amongst other governance activities.⁹¹ The implication of the excess spending on maintaining the governance structures per se is that there have been calls for political restructuring.

In addition, remembering that states were created unilaterally without them evolving, mutual distrust has continued to downplay national development. The popular thinking has remained that Nigeria is a conglomeration of nations and not a nation itself with each nation pursuing a separate selfish agenda. Taking the sharp differences in culture and religion in the country which is being reflected even in the legal system⁹², a move towards regionalism, as obtained in the first republic or more state creation reflecting essential sensibilities for national cohesion becomes imperative. Awolowo opined: “Nigeria is not a nation: it is a mere geographical expression. There are no ‘Nigerians’ in the same sense as, there are ‘English’ or ‘Welsh’ or ‘French’: the word ‘Nigeria’ is merely a distinctive appellation to distinguish those who live within the boundaries of Nigeria from those who do not.”⁹³ Similarly, Balewa also noted: “[s]ince the amalgamation of Southern and Northern provinces in 1914, Nigeria has existed as one country only on paper, it is still far from being united – Nigerian unity is only a British intention for the country.”⁹⁴ Awolowo and Balewa are considered the founding fathers of Nigeria and made these statements before Nigeria’s independence. Unfortunately, these statements, which ought to have died with them as they are based on the understanding of their times, are still mundane in Nigeria’s political discourse.⁹⁵ Peace is essential to national unity and development. The current wave of security challenges in the country, particularly that of the *Jama’atul ahnus sunna lidda’awati wal jihad*, otherwise called *Boko Haram* (western education is forbidden) has close link with the political Nigeria’s system. To buttress this, northern Nigeria operates a legal system which has sharia as part of it. In the southern part, the legal system is completely secular. The Nigerian Constitution prohibits state religion in section 10. Nevertheless, since prior to Nigeria’s independence as I noted in chapter 3 3, northern Nigeria operated sharia. After independence, the Penal Code was modified to reflect the secular state that was agreed. But in the year 2000, full sharia implementation, mainly in

⁹¹ O Oyewo *The Challenges of Constitutionalism, Good Governance and Corruption in Nigeria: Lessons for Other Democratizing States* available at: http://www.academia.edu/6526852/THE_CHALLENGES_OF_CONSTITUTIONALISM (accessed 23-09-2015) 6.

⁹² The Penal Code applies in the North (with stints of sharia application) and Criminal Code in the South.

⁹³ O Awolowo *Path to Nigerian Freedom* (1947) 47-48.

⁹⁴ Cited in J Osuntokun “The Historical Background of Nigeria Federalism” in A B Akinyemi, P Dele Cole & WI Ofanagoro (eds) *Reading on Federalism* (1979) 98-99

⁹⁵ RT Suberu “Prebendal Politics and Federal Governance in Nigeria” in W Adebawo & E Obadare *Democracy and Prebendalism in Nigeria: Critical Interpretations* (2013) 79-101.

criminal matters was reintroduced. Currently, about 12 states implement it alongside the conventional legal system. Sharia therefore applies to Muslims and consenting non-Muslims. However, Boko Haram seeks to establish full sharia across the country and has used violence to ensure this. Unfortunately, the current security challenges affect the realisation of the right to development because enormous resources are being challenged into fighting insurgency. These resources could have been utilised for development. In order to ensure participation and equitable distribution of resources among all, Nigeria's political structure needs solemn and urgent revisiting.

Furthermore, indigene settler questions have continued to threaten peaceful coexistence such that some view themselves as more entitled to geography and economic opportunities.⁹⁶ There is total neglect of rural communities where disease has taken over with no access to medical services and good environmental sanitation as outlined in chapter 1. The Constitution has contributed to some of these challenges. For instance, citizenship is determined by indigeneity and so is access to opportunities and residence. Ethnic rivalries have resulted from determining the national status of Nigerians. For instance, one must be an indigene of a group indigenous to a particular place to have access to government services such as education, scholarships, and government appointments or to contest elections.⁹⁷ These issues have severely affected national development and the effective realisation of people's right to develop.

Based on the foregoing, in order to achieve the right to development the political and geographical landscape needs reviewing to support the realisation of the right under review. This could result in more states creation to be carved out of existing ones to represent as closely as possible the peculiarity of any given area. In the alternative, states need to be dispensed with altogether and in their place regions and sufficient local governments created. There is a deliberate effort to divide Nigeria into six political zones based on common Nigerian peculiarities. In view of the decision of the African Commission in the *Katangese Peoples' Congress v Zaire*⁹⁸ case, self-determination may not necessarily take the form of secession or territorial independence.⁹⁹ It may be in the form

⁹⁶ K Toure "A discourse on the citizenship question in Nigeria" (2005) 4 *Democracy & Development* (2005) 41 41-63; O Alubo "Citizenship and Nation Making in Nigeria: New Challenges and Contestations" (2004) 5 *Identity, Culture and Politics* 135 135-161.

⁹⁷ Achebe *The Trouble with Nigeria* 9, 15, and 19.

⁹⁸ *Katangese Peoples' Congress v Zaire* (2000) AHRLR 72

⁹⁹ The African Commission averred: "self-determination may be exercised in any of the following ways - independence, self-government, local government, federalism, confederalism, unitarism or any other form of

of political restructuring of a sovereign state to allow for the participation of marginalised groups. Except therefore there is evidence to suggest violation of human rights or denial from participation in governance of the state, the African Commission will be unwilling to support, and rightly so, a self-determination that will end in territorial or sovereign integrity.¹⁰⁰ Therefore, the most important way to ensure that no group is marginalised in view of the mutual distrust highlighted above is to pay particular attention to the political structure. The political structure ought to ensure that no group is marginalised or is denied participation in government.

Implicitly connected to the issue of reliance on oil is the question of viability of federalism in Nigeria. Federalism in Nigeria did not evolve as a deliberate resolve of the different blocs that form Nigeria as it happened in the earlier stages before state creation. This affects the viability of existing states and their corporate existence to survive as states. Unlike when Nigeria was sharply divided into three or four regions, these regions were more self-sufficient. Each region worked assiduously to initiate revenue generation ventures and survived competitively well without any federal allocation.¹⁰¹ However, the 1979 Constitution (followed in the 1999 Constitution) centralised power, resources and distribution thereof thereby making states reliant on the federal allocation. Similarly, more states were created to appease parochial interests without consideration of their viability or sustainability. Thus, states were created with the understanding that the FGN would ensure their survival. It is therefore incomprehensible to expect them to survive without the federation. Nonetheless, the following discussion considers the methods that are akin to the implementation of the right to development in the midst of these structural quagmires.

7 4 Implementation methods

7 4 1 Good governance

Central to the discussions about resource allocation and the governance structures set out above is the issue of good governance. For the right to development to be effectively realised, good governance is an indispensable tool. In fact, development cannot take place

relations that accords with the wishes of the people, but is fully cognisant of other recognised principles such as sovereignty and territorial integrity." See para 4.

¹⁰⁰ The African Commission specifically 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 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." See para 6.

¹⁰¹ *Falola History* 95-114.

without it. Human rights and good governance are therefore mutually reinforcing and therefore a sum total for the right to development.¹⁰² Generally, good governance entails strengthening democratic institutions, enforcing the rule of law, improving service delivery and combating corruption.¹⁰³ The OHCHR has also recognised the role of good governance for the realisation of human rights and contends “that transparent, responsible, accountable and participatory government, responsive to the needs and aspirations of the people, is the foundation on which good governance rests, and that such a foundation is a sine qua non for the promotion of human rights.”¹⁰⁴ Moreover, the UNDRD, as discussed in chapters 2 4 and 4 2 enshrines that all persons “are entitled to participate in, contribute to, and enjoy economic, social, cultural and political development”¹⁰⁵

The World Bank has described governance to simply mean “the exercise of political power to manage a nation’s affairs.”¹⁰⁶ Its key components include but are not limited to transparency, responsibility, accountability, participation and responsiveness (to the needs of the people).¹⁰⁷ Unfortunately, as noted by the World Bank “underlying the litany of Africa’s development problems is a crisis of governance”.¹⁰⁸

Corruption is one of the greatest challenges to the effective realisation of the right to development in Nigeria.¹⁰⁹ Any discussion about the right to development without a reference to corruption would be incomplete. It has eaten deeply into the fabric of the Nigerian society. The 2014 Transparency International Index puts Nigeria at number 136 out of 174 countries. Nigeria scored 27 out of 100 (100 indicating very clean and 0 indicating very corrupt).¹¹⁰ This indicates that Nigeria is perceived as a corrupt country.

¹⁰² See OHCHR *Good Governance Practices for the Protection of Human Right* (2007) 1-2.

¹⁰³ 9-26, 29-43 45-57 and 59-74.

¹⁰⁴ The Role of Good Governance in the Promotion of Human Rights Commission on Human Rights Resolution 2000/6466th meeting 26 April 2000. (adopted by 50 countries with 2 abstentions.)

¹⁰⁵ UNDRD Art 1.

¹⁰⁶ World Bank Report *Sub-Saharan Africa from Crisis to Sustainable Growth* (1989) 60-61.

¹⁰⁷ See OHCHR “Good Governance and Human Rights” available at:<http://www.ohchr.org/EN/Issues/Development/GoodGovernance/Pages/GoodGovernanceIndex.aspx> (accessed 25-09-2015).

¹⁰⁸ World Bank *Sub-Saharan Africa* 60.

¹⁰⁹ Report of the Global Consultation on the Right to Development as a Human Right “The challenge of implementing the right to development in the 1990s” in *Realizing the Right to Development* 49 61

¹¹⁰ Transparency International CORRUPTION PERCEPTIONS INDEX 2014: RESULTS *Transparency International*: <<https://www.transparency.org/cpi2014/results>> (accessed 31-08-2015).

Muhammadu Buhari, the recently elected President of Nigeria has consistently maintained that unless it is “killed”, corruption will kill Nigeria.¹¹¹

Corruption denies the realisation of human rights because a few selfish people siphon resources earmarked for human development. Hence, no matter how well the human right to development is designed, it will be bogged down by corruption. There is a popular saying that “[k]eeping an average Nigerian from being corrupt is like keeping a goat from eating yam”.¹¹² However, Achebe noted that it is misconceiving to draw such an analogy because a goat must eat yam to survive whereas “[a] Nigerian does not need corruption neither is corruption necessary nourishment for Nigerians.”¹¹³ Achebe therefore opined that it is the system that makes Nigerians corrupt because it is a profitable venture.¹¹⁴ When corruption becomes an inconvenience, Nigerians will cease to be corrupt.¹¹⁵ Thus, Nigerians like all other people of the world can be corrupt free. As eloquently captured by Hassan:

“Corruption has existed in all societies at all times in different manifestations. It knows no boundaries, and no society, rich or poor, industrialized or under-developed, is immune from it. Its practice varies only in degrees and in subtlety, but its effects nonetheless are the same in every State, namely, a varying combination of: loss of image and prestige of the State, weakening of the moral fiber of the people, lowering of ethical standards in governance, increased social instability and insecurity due to widening rifts between the ‘haves’ and the ‘have-nots’, and a particularly heavy economic burden on the poor and the weak. Today, corruption is widely regarded as a cancer in the international body politic.”¹¹⁶

Simply, “corruption is the abuse of entrusted power for private gain.”¹¹⁷ Corruption gives undue advantage to persons in authority to short-change the government and the people and therefore unlawfully enriching themselves to the detriment of all others. Ogbwuegbu averred in *AG of Ondo v AGF*¹¹⁸ that:

“It is a notorious fact that one of the ills which have plagued and are plaguing the Nigerian nation is corruption in all facets of our national life. It is an incontrovertible fact that the present economic morals and or quagmire in which the country finds itself is largely attributable to the virus which is known as corruption.”

¹¹¹ Punch Newspaper “We must unite to kill corruption – Buhari” *Punch Newspaper* 15th January 2015 : <<http://www.punchng.com/news/we-must-unite-to-kill-corruption-buhari/> > (accessed 31-08-2015).

¹¹² See Achebe *Trouble with Nigeria* 38.

¹¹³ 38.

¹¹⁴ 38.

¹¹⁵ 38.

¹¹⁶ S Hassan “Corruption and the Development Challenge” (2004) 1 *Journal of Development Policy and Practice* 25-40; See also D Kaufmann “Corruption Matters: Evidence-Based Challenge to Orthodoxy” (2004) 1 *Journal of Development Policy and Practice* 1-24.

¹¹⁷ Transparency International “How do you Define Corruption?” (2015) *Transparency international?* <<http://www.transparency.org/what-is-corruption/#define>> (01-09-2015).

¹¹⁸ *AG of Ondo State v. AGF & Others* (2002) LPELR-623(SC).

The fight against corruption requires all hands on deck and the genuine implementation of extant laws. Importantly, it needs an unassuming application of section 13 of the Constitution which requires “all organs of government, and of all authorities and persons, exercising legislative, executive or judicial powers, to conform to, observe and apply”¹¹⁹ the provisions of the Constitution. This is essential in order to “abolish all corrupt practices and abuse of power”.¹²⁰ This is conspicuously so if the forgoing institutions make “the security and welfare of the people” the core of their priorities over any other objective.¹²¹ Emphasis should consequently be on making corruption difficult through clearly laid down rules and principles as well as through government’s deliberate efforts.

Corruption manifests itself in various forms and in Nigeria. Thus, the legal system takes care of some of its aspects whereas others remain only morally reprehensible and are largely dealt with within the quarters of public opinion. Adeniyi captures these various forms of corruption to include:

“[I]nflation/diversion of budgetary allocations, the demand and supply of bribes, inflation/unauthorized variation of contracts, payment for jobs either not done or poorly executed, overpayment of salaries and allowances to staff (including non-existent ones called ‘ghosts’), brazen diversion of government revenue, violation of procurement regulations, non-payment/under payment of tax by private sector operators, compromised auditing of public and private sector institutions etc.”¹²²

Corruption is a global concern and its prevention is not left to states alone. At the UN¹²³ and AU¹²⁴ levels, treaties have been enacted to prevent corruption and allow for international co-operation towards fighting it. Thus, in dealing with corruption, both the UN and AU systems requires an international collaboration “with each other and with relevant international and regional organizations in promoting and developing the measures” to

¹¹⁹ Constitution S 14 (1).

¹²⁰ Constitution S 15 (5).

¹²¹ Constitution S 14 (2) (b).

¹²² O Adeniyi “The Atmosphere of Corruption” *Thisday* 3rd September 2015 online at: <http://www.thisdaylive.com/articles/the-atmosphere-of-corruption/219186/> (03-09-2015)

¹²³ United Nations Convention against Corruption UNGA 58/4 (adopted 31 October 2003 and entered into force 14 December 2005) (UN Convention against Corruption)

¹²⁴ African Union, African Union Convention on Preventing and Combating Corruption (adopted 11 July 2003. entered into force on 5 August 2006). Art 2 Provides:

- “1. Promote and strengthen the development in Africa by each State Party, of mechanisms required to prevent, detect, punish and eradicate corruption and related offences in the public and private sectors.
2. Promote, facilitate and regulate cooperation among the State Parties to ensure the effectiveness of measures and actions to prevent, detect, punish and eradicate corruption and related offences in Africa.
3. Coordinate and harmonize the policies and legislation between State Parties for the purposes of prevention, detection, punishment and eradication of corruption on the continent.
4. Promote socio-economic development by removing obstacles to the enjoyment of economic, social and cultural rights as well as civil and political rights.
5. Establish the necessary conditions to foster transparency and accountability in the management of public affairs.”

tackle corruption.¹²⁵ The “collaboration may include participation in international programmes and projects aimed at the prevention of corruption.” but nevertheless, the states are primarily responsible for dealing with it¹²⁶. For instance, the UN Convention against Corruption enjoins each state party to “develop and implement or maintain effective, coordinated anti-corruption policies that promote the participation of society and reflect the principles of the rule of law, proper management of public affairs and public property, integrity, transparency and accountability.”¹²⁷ States are also required to periodically evaluate “relevant legal instruments and administrative measures with a view to determining their adequacy to prevent and fight corruption.”¹²⁸

The AU system approach adds that to fight corruption, states must “promote socio-economic development by removing obstacles to the enjoyment of economic, social and cultural rights as well as civil and political rights” as well as “establish the necessary conditions to foster transparency and accountability in the management of public affairs.”¹²⁹ Thus, fighting and combating corruption shall, in accordance with the AU Convention on Preventing and Combating Corruption be guided by the principles of “respect for democratic principles and institutions, popular participation, the rule of law and good governance.”¹³⁰ Similarly, combating corruption requires respect for human and peoples’ rights as enshrined under the ACHPR and other instruments.¹³¹ This reinforces the interrelatedness and interdependence of human rights and development. Additionally, transparency, accountability, promotion of social justice and condemnation of corrupt practices are essential to curbing corruption and ensuring good governance.¹³²

At the domestic level, the Nigerian legal system has never condoned corruption and has always treated it as a crime. The Penal Code¹³³ and the Criminal Code¹³⁴ criminalise corruption. In addition to these two main criminal laws, other legislative measures have been undertaken to deal with the menace of corruption at different times in the past. These include Public Officers (Investigation of Assets) Decree,¹³⁵ Corrupt Practices Decree,¹³⁶

¹²⁵ UN Convention against Corruption Art 5 (4).

¹²⁶ United Nations Convention against Corruption Art. 5.

¹²⁷ United Nations Convention against Corruption) Art. 5(1).

¹²⁸ UN Convention against Corruption Art. 5 (3).

¹²⁹ Arts 2 (4) and (5).

¹³⁰ African Union, African Union Convention on Preventing and Combating Corruption Art 3.

¹³¹ Art 3 (2).

¹³² Arts 3 (3)-(5).

¹³³ Applicable in northern Nigeria. Penal Code Law, Northern Region of Nigeria, 1963.

¹³⁴ Applicable to Southern Nigeria. See Criminal Code Act 1966 S. 98.

¹³⁵ No. 5 of 1966.

¹³⁶ No. 38 of 1975.

the Code of Conduct Bureau and Tribunal,¹³⁷ and Recovery of Public Property (Special Military Tribunals) Decree¹³⁸ amongst others. These efforts have not proved effective in fighting corruption in Nigeria. In fact, corruption has become more cancerous and seems to be defying legal solutions. As discussed hereunder, from 1999 to date, a number of strategies were deployed to deal with corruption through legislative and institutional mechanisms with little or no results. Most of these initiatives have focused mainly on its investigation and prosecution with little focus on preventing it.¹³⁹ Therefore, the problem lies not in the strategy but in the porous opportunities that allow corruption to thrive including government's direct or covert participation, condoning or inefficiency. Hassan further opines:

"The pre-conditions for a development strategy or plan to succeed, one might posit, are the existence of political will to raise the standard of life as the first principle of the State; the existence of a responsive administrative infrastructure which is disposed to, and capable of, implementing the political will of the government; people-oriented policies where the public interest reigns supreme; national participation to create space and opportunities for public knowledge, debate and input; broad ownership to ensure equity and justice spread beyond those who control the State; public monitoring to ensure there is no abuse or misuse, and that things are on the right track and proceeding according to plan and timelines; appropriate resource allocation to ensure the full implementation and timely completion of the plan; a bottom-up approach to incorporate the experience, wisdom and expectations of the bottom two-thirds of society, when the avowed goal is poverty reduction; and last but not least, a peaceful and secure environment where development goals may be pursued without security constraints."¹⁴⁰

Therefore, to reduce corruption Hassan has encapsulated the formula for doing so as: "C(corruption) = M(monopoly) + D(discretion) - A(accountability)."¹⁴¹ The explanation being that reducing corruption equals controlling and monitoring monopoly power, reducing discretion of public officials by promoting rule of law and transparency while also making accountability key in standards and practices.¹⁴² It follows therefore that winning the fight against corruption should not be a one-way approach; it must be multi-dimensional. Hence, the key benchmarks of the right to development as discussed in chapter two are essential in fighting corruption. In retrospect, I noted that the key elements of the right to development include non-discrimination, accountability, transparency, and participation. All these elements are reflected in Hassan's thesis above. If these key elements are brought

¹³⁷ The Code of Conduct Bureau and Tribunal Act 1990; section 3, part of the Third Schedule of the Constitution.

¹³⁸ Decree No. 3 of 1984; Amendment Decree, 1996; and also Tribunals (Certain Consequential Amendments, Etc.) Decree, 1999

¹³⁹ As is evident from the role of some of the institutions.

¹⁴⁰ Hassan *Journal of Development Policy and Practice* 32.

¹⁴¹ 34.

¹⁴² 34.

to bear in governance, the right to development could have been achieved and is therefore an indispensable tool for the fight against corruption.

In the recent past, two institutions, the Independent Corrupt Practices Commission (ICPC)¹⁴³ and the Economic and Financial Crimes Commission (EFCC),¹⁴⁴ in line with both the UN¹⁴⁵ and AU obligations to fight corruption have been established in Nigeria. While the former focused on fighting corruption within the public service, the latter's web was spread across all conceivable human endeavour. The ICPC Act established the ICPC¹⁴⁶ with the function of among other things dealing with corruption relating to public officers, which is defined by the ICPC Act as including "bribery, fraud and other related offences".¹⁴⁷ Sections 11-29 of the ICPC Act specify various corrupt practices, which the ICPC may prosecute in the name of the AGF. It is important to mention that the ICPC was established in furtherance of the corruption objectives of the Constitution and international obligations discussed above and in the last chapter, thereby exemplifying further the legislative technique undertaken by Nigeria to foster its development objectives. At the time it was established, the government of Ondo State instituted an action before the

¹⁴³ Corrupt Practices and other Related Offences Act 2003- CAP C31 LFN 2004 (ICPC Act)

¹⁴⁴ Economic and Financial Crimes Commission (Establishment) Act, 2004 (EFCC Act).

¹⁴⁵ Convention against Corruption Art 6 provides:

"1. Each State Party shall, in accordance with the fundamental principles of its legal system, ensure the existence of a body or bodies, as appropriate, that prevent corruption by such means as: (a) Implementing the policies referred to in article 5 of this Convention and, where appropriate, overseeing and coordinating the implementation of those policies; (b) Increasing and disseminating knowledge about the prevention of corruption.

2. Each State Party shall grant the body or bodies referred to in paragraph 1 of this article the necessary independence, in accordance with the fundamental principles of its legal system, to enable the body or bodies to carry out its or their functions effectively and free from any undue influence. The necessary material resources and specialized staff, as well as the training that such staff may require to carry out their functions, should be provided.

3. Each State Party shall inform the Secretary-General of the United Nations of the name and address of the authority or authorities that may assist other States Parties in developing and implementing specific measures for the prevention of corruption."

¹⁴⁶ ICPC Act S3 (1).

¹⁴⁷ ICPC Act S 2. The functions of the Commission are contained in section 10 as follows:

"(a) where reasonable grounds exist for suspecting that any person has conspired to commit or has attempted to commit or has committed an offence under this Act or any other law prohibiting corruption, to receive and investigate any report of the conspiracy to commit, attempt to commit or the commission of such offence and, in appropriate cases, make its recommendation for prosecution or otherwise to the office of the Attorney-General of the Federation or of the State.

(b) examine the practices, systems and procedures of public bodies and where, in the opinion of the Commission, such practices, systems or procedures aid or facilitate fraud or corruption, to direct and supervise a review of them;

(c) instruct, advise and assist any officer, agency or parastatals on ways by which fraud or corruption may be eliminated or minimised by such officer, agency or parastatal;

(d) advise heads of public bodies of any changes in practices, systems or procedures compatible with the effective discharge of the duties of the public bodies as the Commission thinks fit to reduce the likelihood or incidence of bribery, corruption, and related offences;

(e) educate the public on and against bribery, corruption and related offences; and

(f) enlist and foster public support in combating corruption."

Supreme Court to seek the interpretation of the federal government's powers under the exclusive list of the Constitution to fight corruption as a crime.¹⁴⁸ The Supreme Court held *inter alia* that the national assembly was competent to make laws for the peace, order and good government of the federation and any part thereof.¹⁴⁹ Consequently, to guarantee the common good of all, the national assembly is empowered by the Constitution to make laws against corruption and abuse of office across the federation against any person in or out of authority.¹⁵⁰ The Supreme Court however noted that the power to legislate over corruption matters is concurrent and can be exercised by the federal and state governments.¹⁵¹ Uwais CJN averred that the power of the national assembly to legislate on matters relating to the observance of the FODPSP, are not in contention:

"Therefore, it is incidental or supplementary for the National Assembly to enact the law that will enable the ICPC to enforce the observance of the fundamental objectives and directive principles of state policy. Hence the enactment of the act which contains provisions in respect of both the establishment and regulation of ICPC and the authority for the ICPC to enforce the observance of the provisions of section 15 subsection (5) of the constitution. To hold otherwise is to render the provisions of item 60(a) idle and leave the ICPC with no authority whatsoever. This cannot have been the intendment of the constitution."¹⁵²

In addition to the ICPC, the EFCC has the mandate, albeit in a more proactive style, to fight corruption. The EFCC is more dogged in the fight against corruption because firstly, it is manned largely but not exclusively by members of the Nigeria Police force, unlike the ICPC which has a retired judge as its Chairman. By their training, police officers are specialised investigators and therefore unlike judges, have the capacity to detect corruption and related offences. Secondly, its scope of operation transcends beyond public officers, as is the case with the ICPC. It is not clear where the dividing line between the role of the ICPC and the EFCC is located. To add to this possible duplication, the Nigerian Police Force is still involved in the prosecution of corruption-related matters such as bribery.¹⁵³ The Supreme Court has expressed the opinion that the powers of the ICPC

¹⁴⁸ *AG of Ondo State v. AGF & Others* (2002) LPELR-623(SC).

¹⁴⁹ *AG of Ondo State v. AGF & Others* (2002) LPELR-623(SC).

¹⁵⁰ *AG of Ondo State v. AGF & Others* (2002) LPELR-623(SC).

¹⁵¹ *AG of Ondo State v. AGF & Others* (2002) LPELR-623(SC).

¹⁵² *AG of Ondo State v. AG of the Federation & Others* (2002) LPELR-623(SC).

¹⁵³ BBC Nigerian Farouk Lawan charged over \$3m fuel scam 'bribe' <<http://www.bbc.com/news/world-africa-21294154>> (accessed 31-08-2015). Farouk Lawan's case was interesting. A legislative panel was constituted by the House of Representatives to look into a fuel subsidy scam which saw the rise of subsidy payments from 250 billion naira in 2009 to over 1 trillion Naira in 2010. Interesting revelations were found and the committee was about to round up its investigation and submit its report when suddenly a video clip was released featuring the Chairman of the Committee, Farouk Lawan receiving a bribe from one of the beneficiary oil marketers involved in the fuel subsidy regime. That marked the end of that report which would have resulted in the prosecution of many oil marketers in Nigeria.

(and by extension the EFCC) to prosecute are “co-extensive” with those of the Police.¹⁵⁴ This kind of duplication contributes to the lack of effectiveness of fighting corruption in Nigeria.

Ordinarily, the EFCC should be a department of the Nigeria Police Force and the ICPC a department under the Ministry of Justice. However, because of the mutual suspicion and compromise that were experienced in the past with these institutions of government, the need for independent bodies was put forward. Above all, judicial corruption hinders the prosecutorial approach to fighting corruption. The judiciary, which should be seen as the arrowhead in this fight, is being accused of complicity, delay or frustrating corruption cases.¹⁵⁵ At times, the judiciary has handed down sentences that are not capable of deterring corruption in Nigeria.¹⁵⁶

In spite of the insignificant successes recorded in securing conviction of corrupt officials in Nigeria, there are many other cases that are still pending in the courts, which are yet to be concluded.¹⁵⁷ However, these cases have been running in the courts for years without any hope of them being concluded. Arguably, the Nigerian approach to corruption has always been that of cure and not prevention and that is why the attention is placed more on investigation and prosecution. To complicate the fight against corruption, the Nigerian Constitution has bestowed immunity on the most likely persons culpable in corruption incidences. These include the President, the Vice-President, Governors and their

¹⁵⁴ *AG of Ondo State v. AGF & Others* (2002) LPELR-623(SC).

¹⁵⁵ This is a general belief expressed by most Nigerians including the author of this dissertation.

¹⁵⁶ For instance, Cecilia Ibru, a former Bank Chief Executive, was convicted on a three-count charge of authorising loans beyond her credit limit, rendering false accounts and approving loans without adequate collateral. She was sentenced to only six months imprisonment while her assets, worth 191 billion Naira (almost a billion US dollars), which she siphoned through her selfish activities, were forfeited. O Coker “Plea bargaining: a developing trend in the criminal justice system” (2010) *International Law Office* available at : <<http://www.internationallawoffice.com/newsletters/detail.aspx?g=58dbee89-846d-44dd-aed4-a91dc5680bcd>> (accessed 31-08-2015). Similarly, a former Inspector General of Police, Tafa Balogun, was sentenced to only six months after entering a plea bargain for stealing over 16 billion Naira (around 800 million US dollars). BBC “Nigerian ex-police chief jailed” 22 November 2005 <<http://news.bbc.co.uk/2/hi/africa/4460740.stm>> (accessed 31-08-2015). John Yusuf, a former Director at the Police Pensions Board admitted to stealing two billion Naira (over 100 million US dollars) and was sentenced upon conviction to 2 years imprisonment or an option to pay 750 thousand Naira (less than four thousand US dollars). The Punch Newspaper “Nigerian Wonder: N27bn pension thief gets N750,000 fine” *The Punch Newspaper* 29 January 2013 available at: <<http://www.punchng.com/news/nigerian-wonder-n27bn-pension-thief-gets-n750000-fine/>> (31-08-2015). However, in the last case, the National Judicial Council acted swiftly by suspending the judge who gave the unreasonable sentence, for failing to exercise his discretion judicially and judiciously, for 12 months without pay. TVC News “Nigeria’s NJC Suspends Judge Over Pension Scam Judgment” available at: <http://www.tvcnews.tv/?q=article/nigerias-njc-suspends-judge-over-pension-scam-judgment#sthash.rBjgDm5Q.dpuf> (accessed 31-08-2015).

¹⁵⁷ Many cases involving former governors are still pending. These include those of Attahiru Bafarawa, Bukola Saraki, Sam Egwu, Adamu Aliero, Danjuma Goje, Abdullahi Adamu etcetera.

deputies.¹⁵⁸ Hence, no civil or criminal proceedings shall be instituted or continued against the aforementioned public officers.¹⁵⁹ Similarly, these officers may neither be arrested nor imprisoned as well as there is a restriction against issuing any court process requiring or compelling their appearance in court.¹⁶⁰ In essence, none of the aforementioned can be prosecuted or arrested during the subsistence of the tenure in office.¹⁶¹

Nevertheless, a Code of Conduct Bureau¹⁶² and a Code of Conduct Tribunal¹⁶³ have been established under the Constitution to check and determine the legitimacy of sources of assets of public servants in Nigeria. The Bureau is the administrative body that receives, examines and retains custody of asset declarations made by public officers in Nigeria.¹⁶⁴ The Bureau also has the power to receive complaints about non-compliance with or breach of the provisions of the Code of Conduct law and in appropriate circumstances refer any breach to the Code of Conduct Tribunal.¹⁶⁵ The Tribunal has the adjudicatory power to punish defaulters.¹⁶⁶ The efficacy of these institutions, coupled with proliferation of others with similar mandates, has seemingly not helped in decreasing corruption. This is coupled with the institutional capacity of the Bureau to handle the broad spectrum of the entire Nigerian public service efficiently to determine breaches. As an example the Nigerian legal system prohibits public servants from owning and operating personal foreign account.¹⁶⁷ The Code of Conduct Bureau is to ensure compliance with this prohibition. Recently, the President of the Nigerian Senate was arraigned before the Code of Conduct Tribunal for amongst other things, allegedly operating a foreign account whilst a public servant.¹⁶⁸ The Tribunal has the power to order a guilty public office holder to vacate their seats; or disqualify them from holding office for a period no longer than ten years or even to seize or ask the officer to forfeit their property to the state if acquired in abuse or corruption of office.¹⁶⁹

¹⁵⁸ Constitution S 308 (3).

¹⁵⁹ Constitution S 308 (1) (a).

¹⁶⁰ Constitution S 308 (1) (b) and (c)

¹⁶¹ Constitution S 308.

¹⁶² Established under Constitution S 153 (a).

¹⁶³ Code of Conduct Bureau and Tribunal Act, 1991 S. 20.

¹⁶⁴ Constitution Third Schedule Part I section 3 (a-c).

¹⁶⁵ Constitution Third Schedule Part I section 3 (d).

¹⁶⁶ Code of Conduct Bureau and Tribunal Act S 23.

¹⁶⁷ Code of Conduct Bureau and Tribunal Act S 7.

¹⁶⁸ Inochiri "Saraki Docked, Pleaded not Guilty to Corruption Charges" *Vanguard Newspaper* 22nd September 2015 available at: <<http://www.vanguardngr.com/2015/09/saraki-docked-pleaded-not-guilty-to-corruption-charges/>> (accessed 22-09-2015).

¹⁶⁹ See Code of Conduct Bureau and Code of Conduct Tribunal Act S 23 (1) (a)-(c).

As a preventive mechanism, through the doctrine of separation of power, no single arm of government has exclusive control over government resources.¹⁷⁰ Thus, it does not allow only the executive arm of government to determine solely the distribution and utilisation of the nation's resources. As discussed in the previous chapter, the executive arm is disempowered from expending any monies without legislative approval. Furthermore, the legislature exercises oversight over the activities of the executive and judicial arms of government. In which case, these arms of government annually present and defend their budgets prior to the promulgation of an Appropriation Act. All expenditures of government are ordinarily supposed to be within the Appropriation Act. Unfortunately, no one oversees the expenditure of the legislature. Sadly, because of corruption, monies have been spent arbitrarily without legislative approval. An example of this is the situation whereby government-generating institutions only remit to the federation account the balance of what they have realised after having made unapproved expenditures.¹⁷¹ To buttress this, a former Governor of the Central Bank of Nigeria (CBN) made an allegation against the Nigerian National Petroleum Corporation (NNPC) for not remitting over 20 billion US dollars accruing from Nigeria's oil sales.¹⁷² The Governor was suspended until the end of his tenure for making a corruption allegation of such magnitude to the public.¹⁷³ However, the Accountant General of the Federation ordered an independent audit, which revealed that the NNPC had actually expended huge amounts of money without initial approval by the national assembly. The report further revealed shady practices against extant laws.¹⁷⁴ These kinds of illegal expenditures continues unhindered to loot the government coffers.

In 2007, a preventive approach was initiated through the Fiscal Responsibility Act (FRA).¹⁷⁵ The FRA seeks to compel all public institutions to remit government accruals into

¹⁷⁰ Constitution S 4, 5 and 162.

¹⁷¹ Federal Government of Nigeria "Investigative Forensic Audit into the Allegations of Unremitted Funds into the Federation Accounts by the NNPC" available at: <<http://www.vanguardngr.com/wpcontent/uploads/2015/04/Audit-Report-on-NNPC.pdf> > (accessed 03-09-2015).

¹⁷² Federal Government of Nigeria "Investigative Forensic Audit into the Allegations of Unremitted Funds into the Federation Accounts by the NNPC" available at: <<http://www.vanguardngr.com/wpcontent/uploads/2015/04/Audit-Report-on-NNPC.pdf> > (accessed 03-09-2015).

¹⁷³ Federal Government of Nigeria "Investigative Forensic Audit into the Allegations of Unremitted Funds into the Federation Accounts by the NNPC" available at: <<http://www.vanguardngr.com/wpcontent/uploads/2015/04/Audit-Report-on-NNPC.pdf> > (accessed 03-09-2015).

¹⁷⁴ Federal Government of Nigeria "Investigative Forensic Audit into the Allegations of Unremitted Funds into the Federation Accounts by the NNPC" available at: <<http://www.vanguardngr.com/wpcontent/uploads/2015/04/Audit-Report-on-NNPC.pdf> > (accessed 03-09-2015).

¹⁷⁵ Fiscal Responsibility Act, 2007 (as amended).

the federation account. To ensure compliance, the FRA established the Fiscal Responsibility Commission and granted it power to sanction non-compliance.¹⁷⁶ However, the commission does not have the power to prosecute violators. The FRA provides instead that if a person has committed any punishable offence under the FRA, the commission shall forward a report of the investigation to the Attorney-General of the Federation for a possible prosecution.¹⁷⁷ By this provision, the Attorney-General is at liberty to decide whether or not to prosecute.¹⁷⁸

With a new government in place, which won election on the mantra of change and a resolve to fight corruption, new strategies are being introduced, different from what has been the norm. This time around, the government is trying to tighten avenues of corruption even without reference to the FRA. The FRA and the Commission it established are duplicative of the roles of the Revenue Mobilisation and Fiscal Allocation Commission (RMFAC).¹⁷⁹ The RMFAC has been empowered to monitor, revenue accruals and disbursement; review revenue allocation formulae and principles; advise government on suitable efficient fiscal methods; and determine the remuneration of political public office holders including heads and members of the legislature, executive, and judiciary.¹⁸⁰ The RMAFC was not imbued with sanction power, which affected its efficiency to monitor the accruals into the federation account. But instead of empowering the RMAFC powers of sanction, new institution was established (The Fiscal Responsibility Commission). Simply, an amendment of the RMAFC to give it this power in addition to its existing powers would have been more appropriate.

To ensure compliance with extant laws on government accruals and to ensure transparency and accountability, all revenues are to be paid into a treasury single account

¹⁷⁶ Fiscal Responsibility Act of 2007 S 1 and 2(1) & (2). Section 2 (1) provides:

“(a) inspect all offices of the corporations, be given access at all times thereto and all available information it may require with regard to revenues generated/operating surplus and all documents and records in respect thereof;

(b) Compel any person or government institution to disclose information relating to public revenues and expenditure;

(c) Cause an investigation into whether any person has violated any provisions of this Act;

(d) Enforce remittance of operating surplus of corporations to the Consolidated Revenue Fund of the Federation and publish same at the commencement of every fiscal year;

(e) Sanction revenue diversion, failure to remit collections, delayed remittance and revenue consumption without appropriation and related corrupt practices.”

¹⁷⁷ Fiscal Responsibility Act S 1 (2).

¹⁷⁸ See Constitution S 174.

¹⁷⁹ Constitution Part I of the Third Schedule S. 32; Revenue Mobilisation, Allocation and Fiscal Commission Act, 2004

¹⁸⁰ Constitution Part I of the Third Schedule S 32 (e).

(TSA) maintained by the CBN in line with the Constitution.¹⁸¹ The new government for the first time has instructed all government institutions to abide by this constitutional provision. It has also put in place an anti-corruption advisory committee of eminent Nigerians, mostly legal academics and criminologists, to advise it on the best possible ways of tackling corruption especially since the old ways of doing so have not been successful.¹⁸² Achebe opined:

“The trouble with Nigeria is simply and squarely a failure of leadership. There is nothing basically wrong with the Nigerian character. There is nothing wrong with the Nigerian land or climate or water or air or anything else. The Nigerian problem is the unwillingness or inability of its leaders to rise to the responsibility, to the challenge of personal example underway to which are the hallmark of true leadership.”¹⁸³

Due to the failure of existing courts to dispose corruption cases in an effective and timely manner, the new government is making a move to establish special court to fight corruption. This move is supported and strengthened by the newly enacted Administration of Justice Act seeks to, among other things, harmonise criminal procedure practices in the country and ensure speedy trial and disposition of criminal cases by ensuring that criminal cases are heard on a daily basis. In the interim, there is a proposal to select a number of judges who are perceived not to be corrupt to try corruption cases. Unfortunately, this is a misconceived proposal arguably, because any judge that is not eventually selected may be seen as a corrupt judge and therefore this proposal will tarnish the image of the judiciary. Preferably, the establishment of special courts, with new judges' should augur better for the proposed fight against corruption. However, since the new government is still in its infancy, only time will tell the successes of these endeavours.

7 4 2 Legislative methods

In chapter 6, I noted that the Nigerian Constitution charges the national assembly with the task of making laws to ensure the observance of its fundamental objectives and directive principles. Not only that, international human rights instruments establish similar responsibilities as I discussed in chapter 6 3 1. Therefore, through the enactment of well-articulated laws, human rights obligations may be realised.¹⁸⁴ Thus, through the legislative

¹⁸¹ Daily Post “Buhari orders revenue-generating agencies to operate Treasury Single Account” *Daily Post* 9th August 2015 available at: <<http://dailypost.ng/2015/08/09/buhari-orders-revenue-generating-agencies-to-operate-treasury-single-account/>> (03-09-2015).

¹⁸² Thisday “Buhari Constitutes Advisory Committee on Anti-corruption” *Thisday* 10th August 2015 available at: <<http://www.thisdaylive.com/articles/buhari-constitutes-advisory-committee-on-anti-corruption/217092/>> (accessed 03-09-2015).

¹⁸³ Achebe *The Trouble with Nigeria* 1.

¹⁸⁴ Viljoen *International Human Rights* 546-548.

method, the Nigerian state has passed and applied thematic laws on various rights that coincide with Nigeria's international and domestic obligations. The combined effect of this method equals in part or as a whole, a move towards the realisation of Nigeria's right to development obligations discussed in chapter 6. Thus, a legislative method "converts an 'in-principle-valid' right into a justifiable legal right as one of the measures taken to realise a human right obligation"¹⁸⁵ As Sengupta further suggests: "Implementing all civil, political, economic, social, and cultural rights, as they are indivisible and interdependent, and that enhancement of the right to development would imply the adoption and implementation of policies, legislation and other measures at the national and international levels."¹⁸⁶ The concern in this section is the utilisation of legislation to promote human rights as it affects the realisation of the right to development.

In view of this, Nigeria has passed many laws at both the federal and federating state levels, which anchor its right to development objectives. Some of these laws stem from the need to fulfil human rights obligations, which Nigeria has undertaken to be bound to. To strengthen key areas of human development, Nigeria has employed the legislative method in realising health and education related rights and obligations.¹⁸⁷ The forgoing is Nigeria's attempt to ensure the realisation of some of the most crucial development challenges. Translating these obligations into rights would effectively enrich the right to development especially if other rights are not being violated. Developing the rights to health and education through legislation is essential to the right to development, but the non-violation of other rights is equally as important as I have elucidated in chapter 4 2. Health and education, if effectively realised could have taken care of many of the problems plaguing poor people. For instance Mandela has opined that "[e]ducation is the most powerful weapon which you can use to change the world."¹⁸⁸ The CESCR have noted in their general comment 3 that legislation is an indispensable tool towards the realisation key socio-economic rights like health, the protection of children and mothers, and education.

¹⁸⁵ AK Sengupta "Conceptualizing the right to development for the twenty-first century" In *Reasliing the Right to Development* 67 68.

¹⁸⁶ Sengupta "Conceptualizing the right to development for the twenty-first century" In *Reasliing the Right to Development* 72 74 (effectiveness of ethical considerations through legislation).

¹⁸⁷ UNDRD provides in section 8 (1) provides: "all necessary measures for the realization of the right to development and shall ensure, inter alia, equality of opportunity for all in their access to basic resources, education, health services, food, housing, employment and the fair distribution of income. Effective measures should be undertaken to ensure that women have an active role in the development process. Appropriate economic and social reforms should be carried out with a view to eradicating all social injustices."

¹⁸⁸ http://www.brainyquote.com/quotes/authors/n/nelson_mandela.html#6C8FjWEjDmdb5FtB.99

The legislative method as an important tool for realising human rights manifests itself in at least four ways.¹⁸⁹ Firstly, legislation may set out in express terms rights, obligations and method of implementation of specific matters such as health or education. Secondly, legislation may establish an institution (a Commission, Agency or Board) that is to be responsible for the day-to-day running and the realisation of the objectives of the human rights related issues as contained in the legislation. Thirdly, a legislative approach may establish a “Fund” from which resources are generated towards the implementation and realisation of a determined human rights linked issue. Lastly, the legislative approach may require an institution to design, formulate and ensure the observance of a policy in relation to national development objectives. In certain cases, two or more of these approaches may be required to accomplish the objective. This is illustrated further hereunder.

The legislative method has been used extensively in Nigeria to fill in the gaps created by the non-justiciability of chapter two rights. Systematically, Nigeria is implementing many of these rights with less friction that may arise from making these rights justiciable. Unfortunately, however, this approach may be open to neglect especially from a docile government that may not be interested in promoting the objectives of a development-related legislation. In which case, implementation may be haphazard or completely abandoned with little or no funds voted for realising the rights created. However, checks and balances by various arms of government could help in ensuring that laws are not just passed for the sake of doing so. The legislative arm may ensure that through its oversight function the executive body gives effect to such legislation. They can also put pressure on the executive to ensure the execution of the contents of such legislation and to provide the necessary funds required for the smooth realisation of the objectives of these laws. The legislative method is not an end in itself. It is a means to an end and therefore may not be the only way of realising the right to development. This applies to human rights obligations generally. Thus, development planning may be required to set out clearly how a legislative method may be realised. Importantly, the legislative method should be capable of embodying not only legislative commands but also formulate the provisions as enforceable rights.¹⁹⁰ The effect of this will be to give individuals the right to seek redress before a competent court of law.¹⁹¹

¹⁸⁹ Viljoen *International Human Rights* 546-548.

¹⁹⁰ 548.

¹⁹¹ 548.

7 4 2 1 Health

The National Health Act (NHA)¹⁹² is a recent addition to the Nigerian legal landscape. It was passed by the national assembly in 2014 and signed by the president in 2015. Importantly it clearly makes health and emergency health services justiciable human rights in Nigeria. The NHA seeks to “provide for persons living in Nigeria the best possible health services within the limits of available resources”¹⁹³ It equally seek to “protect, promote and fulfil the rights of the people of Nigeria to have access to health care services.”¹⁹⁴ The NHA makes the right to emergency medical services a right and therefore criminalises any health practitioner or establishment’s refusal to help for whatever reason.¹⁹⁵

The implication of the NHA therefore is that it makes the right to health services no longer mere state policy but full-fledged human right in Nigeria. In the case of emergency medical services, the NHA is a development in Nigeria’s health practice. In the past, emergency medical services required police clearance in cases of motor accidents and wounds from gunshots or suspicious circumstance amongst others. Now, under the NHA, refusal to provide emergency medical services attracts a penalty of fine, imprisonment or both.¹⁹⁶

To commit further to the realisation of the right to health in Nigeria, a fund has been established under the NHA. The fund will be financed by not less than two percent of the Consolidated Revenue Fund (as discussed in 7 2), grants from international donors and from any other unspecified sources.¹⁹⁷ The fund mandates government to its right to health obligations and therefore it cannot claim lack of resources in providing minimum basic health services to the people. Thus, regardless of how much is realised in the Consolidated Revenue Fund, the NHA requires that a minimum of not less than two percent to be earmarked to protect, promote and fulfil the health rights of Nigerians.

This provision is an applauded and realistic development even as there is no prescribed sanction in the NHA for breaching it because, at least, it is a step towards the realisation of the right to health through the several available approaches as required under international obligations. It is worth mentioning that in practice, health services have always gotten as

¹⁹² National Health Act of 2014.

¹⁹³ NHA S 1 (c).

¹⁹⁴ NHA 2014 S 1 (e).

¹⁹⁵ NHA S 20 (1) & (2).

¹⁹⁶ Section 20 (2) provides: “Any person who contravenes this section is guilty of an offence and is liable on conviction to a fine of N100,000.00 (one hundred thousand naira) or to imprisonment for a period not exceeding six months or to both fine and imprisonment.”

¹⁹⁷ See NHA S 11 (2) (a)-(c).

much as two percent or more of budgetary allocation and therefore the NHA only reinforces this practice. Nevertheless, the NHA has strengthened this responsibility, which could call for judicial intervention based on the NHA should the government fail to comply.¹⁹⁸ In the *Ogoni* case¹⁹⁹, discussed in chapter five, having failed to actualise their rights under the Nigerian legal system, the African Commission found that the right to health, amongst other rights under the ACHPR, is guaranteed and was violated by FGN.²⁰⁰ Similarly, in addition to the right to health provided under the ACHPR²⁰¹, the CRA has guaranteed the right to health of children and consequently penalises non-conformity with this obligation.²⁰² It follows therefore that the NHA adds to already existing legal instruments on the right to health in Nigeria. The difference being that, unlike the ACHPR and the CRA, which only provide for the right to health, the NHA details how the right is to be realised. According to the NHA, disbursement of the funds established under it is done accordingly 50 per-cent is to be earmarked for National Health Insurance Scheme (NHIS), 25 per-cent for the provision of essential drugs for eligible primary healthcare facilities 15 per-cent for the provision and maintenance of facilities, equipment and transport for eligible primary healthcare facilities; and 10 per-cent the development of Human Resources for Primary Health Care.²⁰³

From the above, the distribution prioritises areas that affect the poor, which is good for national development. Furthermore, other important institutions have been established through the same legislative approach to support the implementation of the right to health in Nigeria. These include the National Primary Health Care Development Agency (NPHCDA)²⁰⁴, the National Agency for Food, Drug Administration and Control (NAFDAC)²⁰⁵, the National Health Insurance Scheme²⁰⁶ and a National Health Research

¹⁹⁸ KSA Ebeku "Constitutional Right to a Healthy Environment and Human Rights Approaches to Environmental Protection in Nigeria: *Gbemre v. Shell Revisited*" (2007) 16 *RECIEL* 312-320; O Nnamuchi "Kleptocracy and Its Many Faces: The Challenges of Justiciability of the Right to Health Care in Nigeria" (2008) 52 *JAL* 1 1-42; AN Ijeoma "Health Sector Reform in Nigeria: A Perspective on Human Rights and Gender Issues" (2006) 11 *Local Environment* 127-140,.

¹⁹⁹ *Social and Economic Rights Action Centre and Another v Nigeria* (2001) AHRLR 60 para 70.

²⁰⁰ F Coomans "The Ogoni Case Before the African Commission on Human and Peoples' Rights" *Int'l & Comp LQ* (2003) 52 749 754-755; Ijeoma (2006) *Local Environment* 128-131.

²⁰¹ *Jonah Gbemre & Others v Shell Petroleum Development Company of Nigeria Ltd & Others* Suit FHC/CS/B/153/2005, Federal High Court, Benin City, judgment of 14 November 2005 (unreported).

²⁰² Child Rights Act S 13.

²⁰³ NHA S 11 (3) (a)-(d).

²⁰⁴ NHA S 11 (1); National Primary Health Care Development Agency Act CAP N9 LFN 2004, S1.

²⁰⁵ National Agency for Food and Drug Administration and Control Act, CAP N1 LFN 2004 S1. NAFDAC was established "to regulate and control the importation, exportation, manufacture, advertisement, distribution, sale and use of food, drugs, cosmetics, medical devices, bottled water and chemicals." See NAFDAC Act Preamble, S5, 6, 7 and 21.

²⁰⁶ NHA S40; National Health Insurance Scheme Act No 35 of 1999 LFN

Committee.²⁰⁷ For example, the NPHCDA, in addition to its functions under the NPHCDA Act,²⁰⁸ is responsible for disbursing funds in (a) - (c) above through State Primary Health Care Boards for distribution to Local Government Health Authorities.”²⁰⁹ Therefore, this institution works on grassroots level to ensure that rural people get access to health services. The NHIS is another innovation that subsidises health care services for employees and draws significantly from the National Health Fund (50%). However, the scheme has proved effective only in providing subsidised basic health services for government employees to the exclusion of other Nigerians. This has denied Nigerians not in government service from benefitting from the scheme. Therefore, until the scope of the scheme is extended, its full effect may not be measured although it is an essential measure for realising the right to development in part.

Overall, the Federal Ministry of Health is responsible for designing and formulating a national health policy together with guidelines for implementation, which the aforementioned institutions are expected to implement.²¹⁰ Fundamentally, the Ministry must ensure that “all Nigerians shall be entitled to a basic minimum package of health services” especially “vulnerable groups such as women, children, older persons and persons with disabilities”²¹¹ In order to ensure that the national health system is effectively developed, the NHA prohibits the use of public resources to sponsor any public officer on any medical investigation or treatment except in extremely investigated circumstances.²¹² If implemented properly, this could arguably add good governance to the Nigerian health sector. However, the fragmentation of institutions has resulted in duplicative roles of health care institutions and lack of an integrative approach to designing policies in the health sector. This has also culminated in waste of resources and unclear health policies.²¹³

7 4 2 2 Education

In the area of the right to education, a similar approach as with the right to health has been employed. Through the legislative method, a law, the Compulsory, Free Universal Basic Education Act (UBEC Act)²¹⁴ has been enacted. The UBEC Act provides that government, at all levels shall, ensure compulsory, free, universal basic education. Under the Act, a

²⁰⁷ NHA S 31;

²⁰⁸ NPHCDA Act S 3.

²⁰⁹ NHA S 11 (4).

²¹⁰ NHA 2 (1) (a).

²¹¹ NHA S. 3(2) (d) & (3)

²¹² NHA S. 47.

²¹³ Ijeoma (2006) *Local Environment* 131.

²¹⁴ Compulsory, Free Universal Basic Education Act (UBEC Act) 2004

Universal Basic Education Commission (UBEC) has been established to implement the UBEC Act and therefore ensure access to education in the country.²¹⁵ To ensure compliance, parents are to ensure that their children enrol and complete primary and secondary school, failing which a magistrate may impose a fine or imprisonment on the parents or guardians.²¹⁶ Furthermore, the UBEC Act establishes a Fund similar to that of the NHA of not less than two percent of total accruals of the Consolidated Revenue Fund.²¹⁷ Likewise, the Education Fund may be supported by credit transfers from the federal government, as well as by local and international donors.²¹⁸ The Universal Basic Education Commission (UBEC) manages the fund at federal level and at state level the States Universal Basic Education Boards and the Local Government Education Authority will manage it.²¹⁹

In view of the obligation to provide compulsory free education, the federal government acting under the UBEC Act, as an example, has prioritised the provision of education to some disadvantaged areas of the country where the traditional educational system, the *almajiri* practice, is largely patronised. The *almajiri* is a system of education whereby children are sent to destinations other than their own to learn the Holy Qur'an. The practice is popular in Nigeria and other parts of West Africa.²²⁰ Initially, the society endeavoured to contribute to the welfare and development of the children involved. But as time went by, the society became individualistic and poverty became widespread, the children were generally no longer being taken care of by the society. Hence, many of the children's rights were violated including the right to health, education and survival and development as contemplated under the ACRWC, CRC, CRA and the ACHPR amongst others.²²¹ Thus, intervention undertaken by the FGN was in order to bring this practice under the auspices of conventional education practices.²²² This was because the *almajiri* practice hitherto promoted the right to education but had outlived its usefulness in contemporary times by denying the child other basic rights such as shelter, parental love and care, health and

²¹⁵ UBEC Act S 2 (1), S 7 (1).

²¹⁶ UBEC Act S 2(2) 2 (4), & S 6.

²¹⁷ UBEC Act S 11.

²¹⁸ UBEC Act S 11.

²¹⁹ UBEC Act S 12 & 13.

²²⁰ Magashi (2015) 61 *Africa Today* 65

²²¹ 65.

²²² F Olorokor "Almajiri Schools Improving Lives of Northern Children – UBEC" *Punch Newspaper* 4th March 2015 online at <<http://www.punchng.com/news/almajiri-schools-improving-lives-of-northern-children-ubec/>> (accessed 21-08-2015); Federal Ministry of Education "Education for All 2015 National Review Report: Nigeria" Nigeria EFA Review Report 2000-2014 (2015) online at <<http://unesdoc.unesco.org/images/0023/002310/231081e.pdf>> (accessed 21-08-2015).

even the right to access refined education itself.²²³ As argued by Okoye and Ya'u "Instead of educating their pupils and giving them skills and knowledge necessary for functioning effectively in society as they used to, Koranic schools have deteriorated to the extent that many people regard them as no more than a breeding ground for street beggars."²²⁴ Thus, the *almajiri* practice, which has over 10 million child attendees, clearly violates the right to development of the child especially under the CRA and the UBEC Act.²²⁵ Hence, the FGN through UBEC have built what it calls the *almajiri* model schools where both western and Islamic education are taught concurrently. However, expectedly, corruption and inadequate planning are constituting huge challenges to the effective realisation of this initiative.

However, the question remains to what extent these laws may be utilised to compel and ensure the right to education in Nigeria. As discussed in chapter 5 4 2, the ECOWAS Community Court of Justice has found the UBEC Act to be a strong basis for a right to education in Nigeria because it domesticates Nigeria's international obligations on the right to education.²²⁶ In *SERAP* (discussed in 5 4 2) it was alleged that Nigeria had violated amongst other rights, the right to education, dignity of the human person and the right to development under the ACHPR, the UBEC Act and the CRA.²²⁷ Nigeria raised an objection that the UBEC Act, one of the pieces of legislation relied upon in the application was a domestic law to which the ECCJ had no jurisdiction over.²²⁸ The applicants also argued that education was not a right under the Constitution but a mere fundamental objective of state policy hence, the action should fail.²²⁹ The objections were however overruled on the grounds that the ECCJ was competent to determine human rights violations occurring in member states.²³⁰ Thus, the ECCJ held that the right to education was not a mere state policy but an enforceable human right, which it can adjudicate upon.

The *almajiri* practice is arguably one of the biggest challenge for the realisation of the right to development and education of the child in Nigeria. Although the practice is not completely irrelevant, its current approach is no longer supported by existing realities. For

²²³ Magashi (2015) 61 *Africa Today* 65, 69-72.

²²⁴ F Okoye and YZ Ya'u "The Condition of Almajirai in the Northwest Zone of Nigeria, Kaduna" (1999) *Human Right Monitor* 14

²²⁵ CRA S & UBEC Act S 2.

²²⁶ See *Socio-Economic Rights and Accountability Project (SERAP) v Nigeria and UBEC* (2009) ECW/CCJ/APP/12/07.

²²⁷ Art 1, 2, 17 & 22 of the ACHPR. See *Socio-Economic Rights and Accountability Project (SERAP) v Nigeria and UBEC* (2009) ECW/CCJ/APP/12/07 para 2 (*SERAP*).

²²⁸ *SERAP* Para 3.

²²⁹ *SERAP* Para 3.

²³⁰ *SERAP* Para 11-14.

instance, the will to help through communalism has been eroded as a result of either extreme poverty or the adoption of modern patterns of livelihood by those in a position to help. Similarly, government has been unwilling to enforce the responsibility portions of the UBEC Act and CRA for largely political or cultural reasons.²³¹

7 4 3 The development planning and policy method

Development planning is essential for the realisation of the right to development as discussed in chapter two.²³² Under the FODPSP, this requirement features centrally as an obligation of the state in designing sustainable development policies for Nigeria.²³³ Thus, the responsibility for development planning falls squarely under the exclusive discretion of the FGN. The federating states have a duty to the extent the law permits, to replicate this responsibility in their various states. Overall, the FGN is primarily responsible for this in collaboration with the federal states and other stakeholders. To buttress this, the Constitution establishes the National Economic Council with the Vice-President, governors of each federating state and the Governor of the Central Bank as members.²³⁴ Importantly, the National Economic Council has the power to “advise the President concerning the economic affairs of the Federation, and in particular on measures necessary for the co-ordination of the economic planning efforts or economic programmes of the various Governments of the Federation.”²³⁵ The implication of this therefore is that the Council is the highest body that advises the President on economic planning thereby confirming the sole responsibility of the FGN in this regard. Furthermore, a National Planning Commission (NPC), which is also a federal institution, was established under the National Planning Commission Act (NPC Act), with the responsibility for rolling out a national development plan for Nigeria.²³⁶ The objectives of the NPC are set out in section 2 of the NPC Act.²³⁷

²³¹ At the tertiary level, a Tertiary Education Trust Fund (TETF) has furthermore been established. Unlike the NHA and the UBEC Acts, the private sector finances the TET Fund through a compulsory contribution of one per cent of their total ascertained annual income. The fund is utilised to build and maintain education facilities, train academic staff, fund research of public owned tertiary institutions particularly, universities, polytechnics and colleges of education. See Ss 1 and 7 of the TETF Act.

²³² See also UNDRD Arts 2 (3), 3-8.

²³³ Constitution S 16 (2) (a).

²³⁴ Constitution Third Schedule Part I H S 18.

²³⁵ Constitution Third Schedule Part I H S 19.

²³⁶ NPC Act S 1 (1).

²³⁷ NPC Act S 2, “(a) determine and advise on policies that will best promote national unity and integration and sustain the Nigerian nation;

(b) ensure social justice and human welfare at all levels of the Nigerian society;

(c) focus on key national development issues and suggest ways for their efficient resolution;

Among other functions, the NPC shall “provide policy advice to the President in particular and Nigeria in general on all spheres of national life” in the formulation and preparation of “long-term, medium-term and short-term national development plans and to co-ordinate such plans at the Federal, State and local Government levels.”²³⁸ An important objective of the NPC is contained in section 2(d) of the NPC Act that is determining how best to realise the FODPSP for optimal development under the Constitution. Therefore, in designing any policy, the NPC is bound to consider the human rights and development dimension of that policy and where necessary, according to the NPC Act, suggest a legislative method of achieving that objective. This is a powerful tool at the disposal of the NPC to institutionalise national development by proposing a national development planning law based on the right to development model.²³⁹

The key aspect of the interrogation into the development planning method is determining how Nigeria has put it into practice. Conspicuously, the development-planning approach has never been consistent in Nigeria but law has remained an important component in aiding it.²⁴⁰ Since its independence, the FGN’s development planning methods can be categorised into three phases.²⁴¹ Sanusi argues that all “plans, programmes and visions” were designed “to guarantee Nigeria’s economic development by altering the model of economic structure of production and consumption pattern, reduce dependence on oil, diversify the economic base, generate employment, [and] create a globally competitive and stable economy.”²⁴²

(d) determine how best the Fundamental Objectives and Directive Principles of State Policy contained in the Constitution of the Federal Republic of Nigeria 1999 can achieve the major objectives of optimal development and suggest amendments that may be required, from time to time, to achieve those objectives in the light of encountered realities;

(e) provide a national focal point for the co-ordination and formulation of national policies and programmes;

(f) draw up, from time to time, national economic priorities and programmes and map out implementation strategies;

(g) co-ordinate the formulation and implementation of government programmes as contained in annual plans, budgets, medium-term and perspective plans at the Federal, State and local Government levels;

(h) enhance the efficiency of public sector spending and general national economic management;

(i) continuously visualise the international economic system in target horizons and identify the activities likely to become dominant or strategic globally; and

(j) determine how Nigeria can best adapt to realise the objectives set out in paragraph (i) of this section and compete efficiently in the global system”

²³⁸ NPC Act S 4

²³⁹ See also NPC Act S 5 (g) & (k) on the power of the NPC “to make representation in the legislature for and on behalf of the President” and “express its opinion on any matter it considers pertinent to the national development process.”

²⁴⁰ M Lawan *Law and Development in Nigeria: A Need for Activism* (2011) 55 *JAL* 66.

²⁴¹ Lawan *JAL* 55-89.

²⁴² SL Sanusi “Nigeria’s Economic Development Aspirations and the Leadership Question – Is there a Nexus?” *BIS Central Bankers’ Speeches*.

The first phase was the pre-structural adjustment era that saw at least four national plans.²⁴³ The first national development plan (1962–1968), intended to put the Nigerian economy on the road of accelerated growth with emphasis on agriculture, industrial development and capable manpower.²⁴⁴ The second national development plan (1970–1974) and third national development plan (1975–1980) came after the Civil War and therefore were concerned with reconstruction and rehabilitation of destroyed infrastructure.²⁴⁵ Sanusi argues that the fourth national development plan (1981–1985) “was designed to reduce the dependence of the economy on a narrow range of activities and broaden the economic base as well as develop the technological base.”²⁴⁶ Notably, the first phase tried to promote an indigenisation policy to allow for local participation in the economic activities of Nigeria. Arguably, this is in consonance with the duty of the FGN “to formulate appropriate national development policies that aim at the constant improvement of the well-being of the entire population and of all individuals, on the basis of their active, free and meaningful participation in development and in the fair distribution of the benefits resulting therefrom.”²⁴⁷ For example, the second development plan noted:

“It has long been government’s objective to increase the participation of Nigerians in domestic trade, industry and other economic activities. This policy, which was given effect in the Nigerian Enterprises Promotion Decree of 1972, will be consolidated during the Plan period. Nigerians will be encouraged, through the provision of information, financial and technical assistance to branch into activities now dominated by foreigners. While foreign enterprise will continue to be welcome, policy will be directed at ensuring that Nigerian entrepreneurship is present and dominant in all sectors of the economy.”²⁴⁸

The FGN participated actively during the first phase of development planning and implementation in Nigeria. Foreign participation in the economy was de-emphasised and

²⁴³ SL “Nigeria’s Economic Development Aspirations and the Leadership Question – Is there a Nexus?” Speech by Mr Sanusi Lamido Sanusi, Governor of the Central Bank of Nigeria, at the 2nd General Dr Yakubu Gowon Distinguished Annual Lecture, Lagos, 19 October 2012. BIS central bankers’ speeches; See also T Lawal & O Abe “National development in Nigeria: Issues, challenges and prospects”(2011) 3 *Journal of Public Administration and Policy Research* 237-241; NA Darma & B Tijjani “Institutionalizing Development Planning in Nigeria: Context, Prospects and Policy Challenges” (2014) 5 *Journal of Economics and Sustainable Development* 74-81; C Agwu “Analysis on why Development Policies fail in Nigeria” (2015) 1 *Journal for Studies in Management and Planning* 107-116; EG Ekpung “Planning as an Instrument for National Development in Nigeria” (2015) 15 *Global Journal of Management and Business Research* 15-20; EO Ojo “Constraints on Budgeting and Development Plan Implementation in Nigeria: an Overview” (2012) 1 *European Journal of Sustainable Development* 445-456 BO Kolawole & TV Ojapinwa “Economic Planning Models for Development: The Relevance for a Developing Economy” (2013) 3 *International Journal of Humanities and Social Science* 208-214

²⁴⁴ SL Sanusi “Nigeria’s Economic Development Aspirations and the Leadership Question – Is there a Nexus?” *BIS Central Bankers’ Speeches*.

²⁴⁵ SL Sanusi “Nigeria’s Economic Development Aspirations and the Leadership Question – Is there a Nexus?” *BIS Central Bankers’ Speeches*.

²⁴⁶ SL Sanusi “Nigeria’s Economic Development Aspirations and the Leadership Question – Is there a Nexus?” *BIS Central Bankers’ Speeches*.

²⁴⁷ UNDRD Art 2 (3).

²⁴⁸ The *Second National Development Plan* 30; Lawan *JAL* 70.

sanctioned while the empowerment of local participation and indigenisation of public utilities was prioritised and promoted. However, change of government surpassed this phase. The challenges posed by this state-centric development planning method gave birth to the articulation of the method used in the second phase. Hence, the development space was opened up to the international community especially the Bretton Woods institutions that introduced structural adjustment initiatives and the private sector, thereby prioritising free-market liberalism.²⁴⁹ Structural Adjustment Programmes (SAPs) introduced initiatives such as deregulation of the economy, more private ownership of business enterprises, fiscal austerity measures, devaluation of the Nigerian currency, and downscaling of the labour force.²⁵⁰ According to Rapley, the SAPs sought “to increase the powers and freedoms of entrepreneurs and investors, increase pecuniary incentives and competition, lower costs, restore macro-economic stability, and make the state leaner and reduce its presence in the economy.”²⁵¹

Unfortunately, the law was used during this phase, not to protect social policy, but to defend and protect the interest of investors.²⁵² The World Bank and the IMF pressurised the Nigerian state to carry out legal reforms mainly in the area of trade and investment to allow the private sector to thrive.²⁵³ However, government continued to remain responsible for basic social services like provision of access to education and health services, which were not privatised.²⁵⁴ But the SAPs had a negative consequence as a development planning method especially on the poor who experienced widespread poverty.²⁵⁵ The SAPs era emphasised economic growth to the detriment of human development.²⁵⁶ It was during this era that the right to development as a human right movement took the centre stage. Thus, in the 1990s, even the initiators and promoters of the SAPs had to review its unwholesome implementation for a more humane development agenda that was more people-centred. For instance, the World Bank noted, “that development must move beyond economic growth to encompass important social goals - reduced poverty,

²⁴⁹ Lawan *JAL* 71.

²⁵⁰ 71.

²⁵¹ J Rapley *Understanding Development: Theory and Practice in the Third World* 2 ed (2002) 66.

²⁵² Lawan *JAL* 72.

²⁵³ DM Trubek, & A Santos “Introduction: The third moment in law and development theory and the emergence of a new critical practice” in DM Trubek & A Santos (eds) *The New Law and Economic Development: A Critical Appraisal* (2006, Cambridge University Press) 1 2. See also Lawan *JAL* 72. For instance the following laws were promulgated the Second-Tier Foreign Exchange Market Decree of 1986 Cap 405 LFN 1990; Privatization and Commercialization Act Cap 369 LFN 1990.

²⁵⁴ Lawan *JAL* 74.

²⁵⁵ Viljoen *International Human Rights* 118.

²⁵⁶ JO Adeniran, et al “The Impact of Exchange Rate Fluctuation on the Nigerian Economic Growth: An Empirical Investigation” (2014) 4 *IJARBSS* 224-233.

improved quality of life, enhanced opportunities for better education and health, and more.”²⁵⁷ This renewed effort gave rise to the third phase of development planning in Nigeria, which is a hybrid of state intervention and the free market. Between the periods of 1985-1998, the different military regimes that held sway during that period did not employ development planning effectively.²⁵⁸ Therefore, this had “a serious negative implication for planning and development” because of jumbled implementation or complete abandonment of development plans for ad-hoc development measures.²⁵⁹ Thus, the first of these rolling plans came into force in 1990 and this continued until the end of the military era.²⁶⁰

There was an attempt during the Abacha regime to have a sustainable people-centred development plan for Nigeria called the Vision 2010. A committee, consisting of 248 members from the length and breadth of Nigeria plus 25 foreign stakeholders resident in Nigeria, was setup.²⁶¹ The task of the Vision 2010 Committee was: “to develop a blueprint of measures and action plans which when implemented can ensure the realization of Nigeria’s widely acknowledged potential.”²⁶² This initiative died with the sudden death of Abacha in 1998. Vision 2010 has been commended as one of the most sophisticated, holistic and people-centred development-planning initiatives in Nigeria.²⁶³ The report was however stillborn and never made it to the implementation stages.²⁶⁴

Since the Vision 2010 initiative and the return to democracy, Nigeria’s development planning method has remained enmeshed with inconsistencies. Between 1999 and 2007, President Obasanjo’s administration tried to chart a new development path for Nigeria, albeit through a medium-term policy. Prime of the initiatives of that dispensation was the introduction of the New Economic Empowerment Strategy (NEEDS) to tackle the development challenge of the country, which was to run for four years from 2004 to

²⁵⁷ The World Bank *World Development Report 1999/2000: Entering the 21st Century* (2000) III.

²⁵⁸ Darma & Tijjani *Journal of Economics and Sustainable Development* 74

²⁵⁹ 74.

²⁶⁰ Kolawole & Ojapinwa *International Journal of Humanities and Social Science* 209.

²⁶¹ Nigeria World *Vision 2010 Report Full Text* Online:

<<http://nigeriaworld.com/focus/documents/vision2010.html>> (accessed 22-08-2015).

²⁶² Report of the Vision 2010 Committee (1997) 5 cited in Lawan *JAL* 75. Other objectives included: “To define our country, its correct bearing and sense of economic, political, social and cultural direction”; “To set appropriate goals and targets and time frames for achieving our economic, political, social and cultural objectives and to propose the strategies and the institutional arrangements required to attain the set goals and targets;” ;“To forge a plan which will ensure that Nigeria is en route by year 2010, to becoming a developed nation in terms of economic prosperity, political stability and social harmony;”; and “Propose a comprehensive plan for the country that will enable it to optimize its economic prospects and prepare it as a major economic power in the African region and the emerging market.” See Human Rights Watch *Vision 2010* Online: <http://www.hrw.org/reports/1997/nigeria/Nigeria-08.htm#P535_134618> (accessed 22-08-2015).

²⁶³ Ibietan & Ekhosuehi *Journal of Sustainable Development in Africa* 305.

²⁶⁴ 305.

2007²⁶⁵ NEEDS was a poverty reduction strategy and a development plan for a prosperous Nigeria.²⁶⁶ Accordingly NEEDS:

“[I]s the people’s way of letting the government know what kind of Nigeria they wish to live in, now and in the future. It is the government’s way of letting the people know how it plans to overcome the deep and pervasive obstacles to progress that the government and the people have identified. It is also a way of letting the international community know where Nigeria stands—in the region and in the world—and how it wishes to be supported.”²⁶⁷

NEEDS was reflective of the key cornerstones of the right to development, especially in the area of participation. It claimed to be, “the people’s plan. It focused on “wealth creation, employment generation, poverty reduction, elimination of corruption, and values reorientation.”²⁶⁸ Federating states and Local Governments were encouraged to replicate NEEDS in their various domains; hence, State Economic Empowerment Strategies (SEEDS) and Local Government Economic Empowerment strategies (LEEDS) were established respectively.

While NEEDS and its offshoots were being implemented, complimentary development strategies were also put in place such as National Poverty Alleviation Programme (NAPEP) and Service Compact with all Nigerians (SERVICOM). While the former was a poverty reduction strategy, the latter was to ensure effective service delivery from public servants to the people. The private sector was highly motivated to participate in national development and the government tried to cut the cost of governance by laying off many public utilities and introducing monetisation policies and pay-as-you-earn pension reforms.

At the expiration of Obasanjo’s two terms in office, President Umaru Yaradua came into office and introduced his Seven Point Agenda with a view to getting Nigeria among the 20 top economies by the year 2020 (Vision 20:2020). The Seven Point Agenda focused mainly on sustainable growth in the real sector of the economy; physical infrastructure: power, energy and transportation; agriculture; human capital development: education and

²⁶⁵ Meeting Everyone’s Needs: National Economic Empowerment and Development Strategy Nigerian National Planning Commission Abuja 2004; See also IMF Nigeria: Poverty Reduction Strategy Paper—National Economic Empowerment and Development Strategy IMF Country Report No. 05/433 (December 2005). NEEDS was birthed under the Kuru Declaration in 2001 with a vision “to build a truly great African democratic country, politically united, integrated and stable, economically prosperous, socially organized, with equal opportunity for all, and responsibility from all, to become the catalyst of (African) Renaissance, and making adequate all-embracing contributions, subregionally, regionally, and globally.” See “Meeting Everyone’s Needs” *NPC* viii.

²⁶⁶ IMF Country Report No. 05/433 viii.

²⁶⁷ Viii.

²⁶⁸ 4.

health; security, law and order; combating corruption; and Niger Delta development.²⁶⁹ Of these issues, President Yaradua focused his attention more on the Niger-Delta development because militancy and insecurity at that time had reached its peak. The quantity of oil production, Nigeria's mainstay, had dropped from over two million barrels per day to less than 400 thousand barrels per day. Therefore, to appease the people of this region who have suffered widespread environmental degradation, poverty and underdevelopment amidst huge deposits of natural resources, a special Ministry for the Niger-Delta Affairs (MNDA) was established in addition to the NDDC.²⁷⁰ Similarly, an Amnesty Programme was launched to rehabilitate ex-militants through immediate permanent and temporary jobs, skills acquisition trainings at home and abroad, as well as physical cash and entrepreneurial development incentives.²⁷¹ The Amnesty Programme proved successful in ensuring peace in the Niger-Delta region because, in addition to the measures taken, prosecution of militants and their leaders was dropped.

Ordinarily, it could have been expected that President Goodluck Jonathan would carry on with the Seven Point Agenda. However, he introduced a medium-term plan entitled "Transformation Agenda 2011-2015" with Vision 20:2020 in focus.²⁷² Virtually all the plans from 1999 to 2015 have focused on the same key areas of national development as explicitly captured in the Seven Points Agenda.

²⁶⁹ The World Bank *The Nigeria Project Agenda*

<http://siteresources.worldbank.org/NIGERIAEXTN/Resources/7Point_Policy_Nigeria.pdf> (accessed 24-08-2015); R Ola "Yar'Adua's Seven Point Agenda: any hope for the Nigerian people?" (2009) *In Defence of Marxism* (2009) online at: <<http://www.marxist.com/yaraduas-seven-point-agenda-nigeria.htm>> (accessed 24-08-2015).

²⁷⁰ MNDA *History* online at: <<http://www.nigerdelta.gov.ng/index.php/the-ministry/history-of-mnda>> (accessed 24-08-2015) The MNDA has the following mandate: "Oversee the implementation of Government policies on the development and security of the Niger Delta region; Coordinate the formulation of the development plan for the region; Formulate policies and programmes for youth mobilization in the Niger Delta region; Advice Government on security issues concerning the region; Liaise with relevant Government, non-government and private sector organizations; Formulate and coordinate policies for environmental management; Liaise with host communities for the enhancement of the welfare of the people and the development of the region; Facilitate sector involvement in the region; Plan and supervise programmes on public education/enlightenment.

Liaise with oil companies operating in the region to ensure environmental protection and pollution control; Organize human capacity development as well as skills acquisition programmes for the youths; Take adequate measures to ensure peace, stability, and security with a view to enhancing the economic potentials of the area; and Submit reports periodically to Mr. President on all matters concerning the region." See MNDA *About MNDA* online at: <<http://www.nigerdelta.gov.ng/index.php/the-ministry/our-structure>> (accessed 24-08-2015).

²⁷¹ Office of the Special Adviser to the President on Amnesty Program online at: <<http://osapnd.gov.ng/uc/>> (accessed 24-08-2015); see also BEN Thom-Otuya & VT Eremie "Amnesty to Niger Delta Militants: Challenges and Opportunities for Future Peace Missions" (2011) 13 *Sophia: An African Journal of Philosophy* 70-77.

²⁷² FGN *The Transformation Agenda Summary of Federal Government's Key Priority Policies, Programmes and Projects* (2011-2015) available at: <<http://www.statehouse.gov.ng/doc/TransformationAgenda.pdf>> (accessed 24-08-2015).

Arguably, despite these varying development-planning efforts, only modest achievements have been recorded. The same development issues have continued to pervade the Nigerian economic, political, social and legal landscape. However, what has remained lacking is the utilisation of law to establish a legal framework for development planning in Nigeria. A national development law with a view to establishing and stabilising a national development legal framework has been lacking in all the efforts discussed above. At best, law has been used as a component of the various development planning methods but not as a vehicle for assuring it. Similarly, although the philosophy of these development plans have been to develop Nigeria and its people, based on the FODPSP, the economics as opposed to human rights are mostly given emphasis. Thus, human rights have rarely been the basis for formulating these policies. A development plan ought to reflect human rights concerns in order to effectively realise the right to development. Such a law should take into consideration the various dimensions of the right to development including international co-operation. As noted earlier, the NPC has opened up for the use of legislative techniques to safeguard the unification and stabilisation of development planning in Nigeria. Consequently, this is not mere rhetoric; it is a constitutional and legal requirement.

7.5 Concluding remarks

Having established the nature of the right to development at different levels in chapters 4, 5 and 6, in this final substantial chapter, I discussed the various challenges faced by the Nigerian political structure as an actor of the right to development. I further examined the methods through which the right to development is being successfully or unsuccessfully implemented in Nigeria. Importantly as I pointed out in chapter 6 the Nigerian legal landscape supports the right to development. In this chapter I showed that the Nigerian government is alive to its responsibilities to provide the right to development through multidimensional methods. The challenges involved are however multifaceted and range from policy inconsistencies, governance issues including corruption, resource availability, distribution and application, lack of a clear legal framework for Nigeria's development, as well as duplications in legal and policy frameworks.²⁷³

In this chapter I furthermore illustrated that through the legislative method Nigeria has been able to raise the status of some FODPSP into human rights. This has given an indication of how it intends to execute these rights. Institutions have been established and

²⁷³ Nigerian National Action Plan 2009-2013 (2014) 142.

funds earmarked thereto for ensuring that development is meaningfully and progressively realised. Not only that, clearly articulated policies have been supplemented to support the effective implementation of the objectives of these pieces legislation.

In this chapter I also showed that a development-planning approach in line with the dictates of the right to development has been deployed to reinforce the realisation of the right to development. The right to development presupposes that it is a right to a process of development and only if planning were incorporated into any of its methods it would be sufficiently realised. My analysis in this chapter has demonstrated that several efforts have been applied in this direction, which are evocative of the right under review. The Constitution has given leeway to development planning towards the realisation of human centred development. Although human rights may not have been key in development planning, its objectives have always been that of enhancing the wellbeing of the people.

Generally, the Nigerian political structure is a clog to national development because it creates room for injustice, inefficiency and lop-sidedness. More importantly, many Nigerians do not appreciate it, as I discussed in this chapter, who perceive it as a conduit for domination.²⁷⁴ It may be argued therefore that the current system does not embrace sufficiently the challenges that exist within the country. Until Nigerians come together and speak genuinely on what method is best to deal with competing demands, the political structure would not adequately support the right to development effectively. Ad-hoc measures notwithstanding, there is need for long lasting solutions for Nigeria's unity based on tenets of the right to development. The effect of the political structure has given rise to other social challenges. Nigeria is saddened by mutual distrust that exists among Nigerians; it is an unstable country largely due to its heterogeneity. As I noted in this last substantive chapter, Nigeria is a diverse multi-religious and multicultural country that is struggling to continue to survive. In the midst of its socio-economic challenges, nepotism and tribalism have continued to pervade the Nigerian atmosphere. Without unity and social harmony, development will continue to elude the country. Civil unrest, religious and ethnic clashes abound with alarming alacrity as a result of quest for political power and economic opportunism. Allegation of marginalisation and feeling of superiority complex of major ethnic groups has remained the order of the day. Each and every government policy is viewed with suspicion no matter how carefully thought out it is. As I proposed in this chapter, the prime concern is that of corruption. Although strategies have been adopted to

²⁷⁴ See Suberu *Federalism* 111-140.

deal with the menace of corruption, many of them have not really proved effective. Corruption therefore affects meaningful realisation of the right to development as I portrayed in this chapter. These are challenges that can be overcome and do not represent Nigeria's inability to implement the right to development.

Chapter 8

Conclusion

Africa faces myriads of challenges one of which is the need for development. Hence, development is a critical issue in Africa. Achieving it has become one of the most pressing concerns today. This dissertation has thus far endeavoured to advance the right to development as a human right that can serve the purpose of dealing with the critical issue of development through combining it with human rights. Specifically, the aims of this study, as set out in chapter 1, were firstly to establish an understanding of the position of the right to development within the Nigerian legal system; and secondly to examine the role of the right to development as a tool for genuine human development in Nigeria. The overarching task was therefore to determine whether the right to development could be used to ensure a human rights-based development for Nigeria. Moreover, I wanted test my hypothesis that the right to development can be enforced, as an obligation, not only under the African human rights system but also within the Nigerian legal system.

In order to substantiate my primary research question and assumptions as set out under 1 3, I explored and analysed in detail the international and regional understandings of the right to development through the lens of CIL, treaty law and case law. To achieve the above aims, the study was divided into 6 substantial chapters in an attempt to interrogate and answer the primary and secondary research questions, referring to each chapter, as set out under 1 7. This chapter concludes the dissertation by providing a synopsis of the findings, linking my findings together and putting forward my final recommendations for the effective implementation of the right to development in Nigeria.

In the first substantial chapter, chapter 2, I set out to explore what the basic components of the right to development are or should be. To achieve this aim, I demarcated the important concepts explored in this dissertation. The aim of this chapter was to delineate the main concepts of the study in order to lay a solid foundation for the further discussion. Thus, I examined the interrelated concepts of human rights and development and noted that these concepts epitomise Africa's age long struggle for equity and fairness in the global economic and political landscapes, hence leading to the rise of the concept of the right to development.¹ Therefore, attaining human rights and development are ultimate to realising the right to development. I argued that human rights are both moral and legal

¹ See Chapter 2 1.

obligations.² Considering the politicisation of the notion of human rights along ideological lines, I repeated that the concept is still struggling to gain universal acceptance. In spite of the various efforts that have been put in place to ensure that all human rights are universally accepted, the practicality of this has remained implausible. Nonetheless, whether as legal or moral obligations, human rights are being implemented with law being a necessary supportive element.³ Thus, it is inconceivable to rely solely on justiciability to achieve human rights. In this regard therefore, I showed how the notion of meta-right as articulated by Sen is instructive to implementing human rights obligations.⁴ I moreover indicated how the reasons given, as to why ideological differences exist on which class of human rights should or should not be realised, are grossly inadequate.

Similarly, I demonstrated in chapter 2 3 how the concept of development should no longer be viewed from the precepts of economics or economic growth only. While noting the difficulty of delimiting the concept of development, I argued that the most important consideration must be the enhancement of the lives of people based on human dignity. However, to be able to determine this malleable concept, a comparative approach is important. Thus, development should mean good change and the enhancement of life's capabilities especially as contemplated by the UNDRD as if further analysed under 2 4 1⁵ However, development should also recognise the peculiarities of the beneficiaries so that it becomes not only a deliberate participatory process but also a sustainable one.

It is in in this regard that I illustrated the relationship between human rights and development in chapter 2 3 1. To guarantee development, law and human rights need to be incorporated into the process. I therefore identified that the right to development is a classical representation of interfacing the concepts of human rights and development.⁶ Consequently, I outlined the various skirmishes that exist in relation to the concept to accentuate the preliminary issues of the right to development. This was done in order to be able to determine, in the following chapters, whether as an emerging right, it had crystallised into an effective legal norm that can create obligations and rights under international, regional and domestic law.

² See Chapter 2 2.

³ See Chapter 2 2 of this dissertation.

⁴ See Chapter 2 2 of this dissertation; A Sen "The Right Not to be Hungry" in P Alston & T Tomasevski (eds) *The Right to Food* (1984) 9-68.

⁵ See Chapter 2 3.

⁶ See Chapter 2 4.

Thus, I showed that the concept is still controversial to some while others consider it an important or even the most important articulation made to deal with contemporary development issues using human rights.⁷ I argued in 2 4 2 that the right to development is a right to a particular process of development, which has influenced a wide spectrum of active players to include it to improve lives. Thus, a rights-based approach to development, reflective of a particular process of participatory development, has become centrally attached to the activities of active players in development. However, whereas I argued that the right is beneficial to human development, I equally underlined how it is duplicative of other existing efforts. However, I established that the right to development conveniently subsumes these other efforts as an umbrella right without messing up the idea of human rights altogether. This is because while other rights can form part of the right to development, the right to development cannot be subsumed under any other right. The right to development is therefore broader and encapsulates the values of other human rights.

Because the right to development is a contemporary concept for solving contemporary human rights and development challenges promoted essentially by African countries, it was important for me to analyse the specific issues that gave birth to the right and how its challenges were tackled on the African continent. Hence, in chapter 3, I sought to answer the second research sub question that seeks to find whether the traditional African societies had conceptualised human rights and development and therefore the right to development? I exemplified Africa's traditional development methods together with an analysis of how and why these methods became ineffective.⁸ Importantly, I revealed that unlike what some scholars like Hegel and Donnelly argue, Africa had its particular process of development and notions of human rights.⁹ In the right to development therefore, being a participatory and co-operative tool for human development, Africans, revived communitarianism, which is intricately ingrained in their erstwhile traditional development pattern. I exposed that Africa has survived without western influences and could have continued to do so without it.¹⁰ I further illustrated that westernisation, colonialism and globalisation influence and affect the level of development most African countries have achieved giving reasons such as dislocation of hitherto common borders and the need to catch up with the said developed world. Similarly, I noted under 3 3 that the yardstick set

⁷ See Chapter 2 4.

⁸ See Chapter 3 4.

⁹ See Chapter 3 3.

¹⁰ See Chapter 3 3.

to determine human rights and development of Africans were Eurocentric and thus, grossly ignored African perspectives.

In the midst of these misunderstandings, I nevertheless concluded that, Africa, having lost its original African identity through dilution with westernisation, focus ought to be on how to ensure human rights and development by whatever standards available. Hence, in Africa's continued quest for development, the right to development was conceived to serve that purpose. After independence of most African countries, regional co-operation efforts in line with communitarian blueprint became a panacea for their development collectively and individually. Regional co-operation vehicles were established, such as AU and ECOWAS, to amongst other things make dealings among African states and between them and other parts of the world as convenient as possible.¹¹ Thus, the right to development is, I argue, an African cultural fingerprint and is, or should be, at the hub of dealing with African contemporary challenges.

In chapter 4 I, focused on determining whether the right to development has evolved into an enforceable right at the international level in order to answer the third secondary research question as set out in chapter 1 3. Thus, I attempted to identify the right to development as a treaty obligation and/or as a norm developed under CIL. I furthermore evaluated the justiciability of this right at this level. In chapter 4, I moreover wanted to identify the actors involved as duty bearers and right holders in relation to the right to development. In this regard I found firstly that the right to development aside from its incorporation in the UNDRD is also situated in the international bill of rights.¹² I further showed that from the beginning of modern human rights, the right to development was intricately conceived as a human right. Accordingly, I argued that starting with the UN Charter and the UDHR, the right to development has been in contention largely because the primary concern of human rights is the protection and promotion of human dignity.¹³ Both the UN Charter and UDHR have been precise on this. Thus, the UDHR comprehends the need for everyone to be "entitled to a social and international order in which the rights and freedoms set forth in this Declaration can be fully realized."¹⁴ Similarly, according to the UDHR the "recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the

¹¹ See Chapter 3 5.

¹² See Chapter 4 2.

¹³ Chapter 4 2.

¹⁴ UDHR Art 28.

world.”¹⁵ I reasoned that the UN Charter on its part stresses the need for international co-operation to achieve all human rights and promote economic and social advancement.¹⁶ Thus, both the UN Charter and UDHR are important foundations for the realisation of the right to development. In chapter 4 2, I discussed how international human rights instruments such as the ICESR, ICCPR support the right to development. The twin covenants provide the right to self-determination, which I suggested, is intertwined with the right to development.¹⁷ Each of these covenants also reinforces the umbrella dimension of the right because they enshrine human rights that are *sine qua non* to the realisation of the right to development. Nevertheless, the rights under these covenants promote the general welfare of democratic societies, which are essential to the realisation of the right to development. I further highlighted the contribution of other international instruments especially declarations that have either directly provided for the right to development or its constitutive elements. In this regard I analysed the DNIEO, CRDS, UNDRIP, and more instructively, the UNDRD.

In the case of the UNDRD, I noted that some scholars such as Baxi and Rosas have argued, separately, that it should be promoted to the status similar to the UDHR.¹⁸ In other words, the UNDRD ought to be upgraded to the status of CIL considering the importance of human and development to current realities and in view of the wide acceptability of the declaration at international discourses. But this is not a settled issue as I demonstrated in 2 4. Nevertheless, I am of the opinion that the UDHR and UNDRD are important legal instruments that are essential to the implementation of the right to development.

I noted the pivotal contribution of the Vienna Declaration, which I argued changed the perception of human rights practice with regard to the right to development. From that point onwards, the global community as I discussed in chapter 4 2 reiterated the legal status of the right to development as a human right while also emphasising the universality of all human rights.

Nevertheless, I argued that human rights should not be mere *lex ferenda*. For human rights to be *lex lata* therefore, the domestic legal system is the determining factor. Thus, I considered the two main theories, monism and dualism, for the application of international law in domestic legal systems. This analysis was conducted to facilitate the further discussion on the application of the right to development as either a treaty obligation or as

¹⁵ UDHR Preamble.

¹⁶ UN Charter Preamble, Art 55 and 56.

¹⁷ Also discussed in 2 4 2.

¹⁸ See Chapter 4 2.

CIL under the Nigerian domestic system in chapter 6 3. Furthermore relying on article 38 of the ICJ Statute, which provides for the sources of international law, I discussed the main sources through which the right to development is being advanced. Therefore, I highlighted a number of instruments where the right to development features. I equally noted the indispensability of treaties as a common form for international obligations.

On the legal character of the right to development as CIL, I examined in chapter 4 3, the basic requirements to be satisfied for a concept to assume such status. There appears to be significant efforts and evidences of state practice on the right to development. However, there is little or complete lack of evidence to show that the psychological element that will make the right assume the status of. This is not only in relation to the USA but also most other states at the global level view the right to development as a moral but not a legal obligation. Consequently, I did not convincingly find that the right to development has assumed the status of CIL at the international levels because, for now, the *opinio juris* does not signify actual intent to have an enforceable right to development. I found however that the state practice of most states at the UN level signifies commitment to development but not to an enforceable right to development. I therefore concluded that the right is a treaty obligation and an important legal norm. But as yet, it cannot be enforced as CIL.

On the question of justiciability as I discussed in chapter 4 5, I identified the main actors of the right. I found that the cosmopolitan nature of the world today, coupled with the requirements under the various legal instruments, identifies states and non-state actors alike as the duty holders of the right to development.¹⁹ I found that at the international level the individual as well as groups are the beneficiaries of the right to development. Interestingly, this is a variation from other international human rights whereby, the individual is considered to be the beneficiary. Nevertheless, under the African human rights system, groups and not the individual are the beneficiaries of the right.²⁰ I also established importantly that international co-operation is a key element in identifying the main actors of the right. I expounded on the actors of the right to development and concluded that the international community made up of multilateral institutions, IGOs, the IFIs, TNCs, and the CSOs especially the NGOs are all identifiable duty bearers of the right to development.²¹

¹⁹ Chapter 4 5 1.

²⁰ Chapter 4 5 1 1 and 5 3.

²¹ Chapter 4 5 1 2.

While chapter 4 3 highlighted right to development related instruments at the UN level, chapter 5 concentrated in examining the status of the right to development as an enforceable human right under the African human rights system. The hypothesis I put forward in this regard is that the African human rights system is explicit both in express terms and through developments under the system on the right to development. With respect to the sources of the right under the African system, I cited the ACHPR, ACRWC, African Women Protocol and the African Youth Charter which all textually provide the right to development. Similarly, I noted that some countries, including Ethiopia²², Malawi²³, Cameroon²⁴ and Uganda²⁵, have since provided for the right to development in their respective constitutions.²⁶

I found that there is a difference between the UNDRD (and generally the UN human rights system) and the ACHPR on the beneficiaries of the right to development. While the former uses a comprehensive approach to the matter as shown in 4 5, the latter maintains that the right to development is a right of peoples or groups. The African Commission and the ECCJ as discussed in chapter 5 4 1 and 5 4 2 respectively, have confirmed this approach. Nevertheless, I propelled the argument that the right to development should be considered in the light of the relationship in question. In other words, considering that the right to development has both internal and external dimensions, these dimensions should be considered at any given time to identify the beneficiaries. Thus, the group, state or peoples should rightly be the beneficiaries in the case of the external dimension of the right. That is to say, in claiming development aid for instance, the state should rightly be the “trustee” of the right for onward dissemination of the fruits of development to its people. Internally, the beneficiaries should be considered from a vertical and horizontal relationship. In the vertical relationship as shown in chapters 5 3, the tiers of government should each claim the right on behalf of those they represent. Horizontally, nothing should stop individuals from crossing the vertical arrangement to claim their right to development from any of the governments in the hierarchy should they feel it is appropriate to do so. I reiterated in the dissertation that all persons, especially non-state actors, in a position to help must be duty bound to provide the right to development.²⁷

²² The Ethiopian Constitution 1994 art 43.

²³ S 30 of the Malawi Constitution 1994.

²⁴ Constitution of Cameroon, 1996 Preamble para 3.

²⁵ Constitution of Uganda, 1995 art IX.

²⁶ Chapter 5 2.

²⁷ Chapter 4 4 1 2.

In order to show the level of the concretisation of the right to development as a human right especially in Africa, I explored its adjudication in two regional adjudicatory bodies. I also noted that there is currently a case before African Court on the right to development which is under consideration.²⁸ The outcome of which will greatly add value to the juridical character of the right because at least, the right has received the African Courts attention and interpretation. Thus, the jurisprudence of the African Commission and the ECCJ were explored. I exposed that the African Commission has so far, adjudicated on the right to development as a human right in *Gunme, DRC, Ogoni, Darfur* and *Endorois*²⁹ while the ECCJ did so in *Pinheiro* and *SERAP*.³⁰ Each of these cases was examined and contributes further to concretising the right to development as human right. In some of the cases, no violation was found³¹ whereas in others the right was violated.³² Yet again, some of the cases discussed in chapter 5 only show that constituent aspects of the right to development were violated and not the right itself.³³ The analysis of these cases therefore, further demonstrated that the right to development has indeed assumed that character of an enforceable human right within the African human rights system. Primarily, these cases portray the right to development as a peoples' rights. Importantly, I concluded in chapter 5, that the right to development is a full-fledged right not only under the ACHPR and other African human rights treaties but also it is a right the judicial bodies are willing to enforce.

In chapter 6, I focused on determining whether law has been adequately employed in the formulation and implementation of the right to development Nigeria. Thus I focused on the secondary question on the legal status and significance of the right to development under the Nigerian legal system especially in view of its domestication under the ACHPR. I discussed the nature of the Nigerian legal system in order to identify the way and manner the right to development applies within it and also to determine how law has been used to develop the right. Specifically, I examined the application of international human rights law considering that the right to development is a concept of international law human rights law as expressed in chapter 4 and 5. I outlined the nature of Nigeria's obligation with regards to international human rights. Accordingly, I noted that Nigeria like every other state has

²⁸ *African Commission v. The Republic of Kenya* Appl.No 006/2012.

²⁹ Chapter 5 4 1.

³⁰ Chapter 5 4 2.

³¹ For example *Kemi Pinheiro (SAN) v. Republic Of Ghana* ECW/CCJ/APP/07/10 ECCJ (2012).

³² *Center for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council v Kenya* (2009) AHRLR 75 (*Endorois* case).

³³ *Social and Economic Rights Action Centre (SERAC) and Another v Nigeria* (2001) AHRLR 60 (*Ogoni*) and *Socio-Economic Rights and Accountability Project (SERAP) v Nigeria and UBEC* (2009) ECW/CCJ/APP/12/07 (*SERAP*) cases.

the duty to respect, protect and fulfil human rights and the right to development. Moreover, I argued that Nigeria equally has an obligation to create institutional framework conducive for realising the right to development with the rationale to cater for the welfare of the Nigerian people. Additionally, Nigeria's obligations extend to co-operating with others at the international level to establish an atmosphere where the right to development will be realised.

More specifically, I focussed attention on identifying whether the right to development applies in Nigeria as a treaty obligation, especially through the ACHPR. Also, I inquired into whether and how the right to development may apply as a principle of CIL. As Nigeria is a dualist state international human rights treaties can only apply when they have been domesticated.³⁴ I also found that there exists no express procedure for the application of CIL in Nigerian courts. However, I found through this dissertation that CIL may apply in Nigeria through the common law. Hence, CIL could apply in Nigeria through automatic incorporation.³⁵ But there is no express legal provision whether in the Constitution or in any extant law that supports this assertion. It is important to also reiterate that there is no consensus on the status of the right as CIL as exemplified in chapter 4 3. However, when the right to development crystallises to the status of CIL, I argue that it should apply in Nigeria automatically, without the need for incorporation.³⁶ But since the Nigerian legal system is not express o the application of other forms of international human rights sources other than treaties, I relied on case law to draw a conclusion on this. To support my supposition, I placed strong reliance on the case of *Trendtex Trading Corporation v. Central Bank of Nigeria*³⁷ where it was held that international law ought to be interpreted flexibly and purposively. The only limitation I identified is that CIL must apply subject to express provisions of the law whether contained in the Constitution or an Act of parliament.

In articulating the right to development in Nigeria, I reviewed the Constitution and other legislation to determine its legal status. I established in 6 4 that the Constitution and Acts of parliament reinforce its application in Nigeria. Hence, the African Charter Act and the CRA which are part of the Nigerian corpus juris contain strongly-worded provisions on the right to development. Nevertheless, I exposed the potential challenges that exist in the enforcement of these laws that are of international character. Indeed, the Constitution is

³⁴ Constitution S 12; *Abacha v Fawehinmi* LPELR-14(SC).

³⁵ Generally discussed in Chapter 6 3.

³⁶ Chapter 6 3 2.

³⁷ [1977] 2 WLR 356.

supreme law in Nigeria and every other law must conform to it. The right to development being a composite right requires full implementation of all human rights in order for it to be effectively realised. In Nigeria, the distinction that has been created in the Constitution between civil and political rights and economic, social and cultural rights impedes the practical implementation of the right to development including as constituted under both the African Charter Act and the CRA. It therefore, becomes complicated for judges to assume jurisdiction under these statutes in view of non-justiciability of some of the rights (economic social and cultural which are considered fundamental objectives and directive principles of state policy) contained in them.³⁸ Thus, I noted that the apparent challenges, judicial and administrative, that hinders the realisation of the right following its adoption and domestication under the African Charter Act and the CRA.

Furthermore I revealed that the right to development is contemplated by the Nigerian legal system other than as an international obligation. I noted that it is contemplated as a human right under both chapter II and IV of the Nigerian Constitution.³⁹ Furthermore, I argued that the right to development is ensured by the Nigerian legal system as a specific constitutional obligation and as an aspect of indigenous customary practices.⁴⁰

Having established the status of the right in Nigeria, chapter 7 specifically considered its implementation in Nigeria. In this final substantive chapter I examined whether law has been adequately employed in the formulation and implementation of the right to development as well as identifying the implementation challenges. I examined the right in view of the resource and political structure of the country with the aim of understanding how they support its implementation. It found that these structures do not effectively support the genuine realisation of the right to development. There is disharmony and apparent insufficiency of coordination and synergy between and among the various tiers of government in the midst of insufficient resources for national development.⁴¹ The exclusive list of the constitution has also seemingly charged with the federal government with more responsibilities than it ordinarily should have under a federal structure.⁴² The local governments have consequently been neglected in their roles for human development even though they ought to be essential drivers for human development.⁴³ Additionally, it was found that Nigeria is characterised by marginalisation and duplication of certain

³⁸ Chapter 6 4 2.

³⁹ Chapter 6 4 2.

⁴⁰ Chapter 6 4 3 and 6 4 4.

⁴¹ Chapter 7 2.

⁴² Chapter 7 2.

⁴³ Chapter 7 2.

people and institutions in its current structure.⁴⁴ In essence therefore, in addition to the finding relating to the adoption and application of international instruments on the right to development, other challenges exist. These challenges are evident in the methods in which the right to development is being implemented in the country.

The three main methods of implementation of the right to development as I argued in chapter 7 4 are good governance, legislative and development planning methods. I noted that good governance has become elusive in Nigeria primarily because of corruption. I demonstrated that despite legal and administrative techniques that have been employed to checkmate corruption, it has remained a menace and a bane to ensuring national development in Nigeria. Similarly, I showed that in achieving the right to development, the Nigerian state has adopted specific legislative techniques to make certain rights justiciable and implementable. In essence, making specific reference to efforts in realising the rights to health and education, laws have been enacted which create institutions and funds for the realisation of these rights. However, the effect of this method makes the realization of the right to development segmented as opposed to holistic. The legislative method focuses on thematic areas and may neglect others. Realising the right to development should be in such a manner that no other right is being violated. Nevertheless, in view of resources availability, a progressive realisation of the right warrants a systemic progression in its realisation. Furthermore, I showed to implement the right to development, Nigeria has employed a development planning method. It however showed that absence of a sustainable development planning law has rendered this approach inconsistent and the implementation has therefore become haphazard.

While acknowledging that there are several efforts, some not even related to law as demonstrated in the beginning of this dissertation, that are being or have been implemented to achieve development, the thesis I advanced in this dissertation is not a one dimensional way to solving challenges of poverty and underdevelopment. For development to be sustainable, the approach should therefore be comprehensive. The right to development should be considered beyond rhetoric and be viewed essentially as a legal entitlement. As I have demonstrated in this dissertation, it can answer a lot of current challenges and ensure stability, justice, peace and progress for a majority of downtrodden population. This is especially so if genuine attention is paid into its implementation. The right to development simply requires those responsible for governance, whether domestically or globally, or those whose actions or inactions have effect on others to be

⁴⁴ Chapter 7 3.

responsive and responsible in their conducts and affairs. The right similarly aims at ensuring that the beneficiaries actually participate in, contribute to and enjoy development. Therefore the right is a model for ensuring justice in action. The right to development is a classic example of utilitarian principle of greatest good for the greatest number.⁴⁵ However, the challenges many of which have been identified in the dissertation are however enormous but not insurmountable.

It is important to mention at this juncture that one of the main contributions of this dissertation is that it argues for the adoption of the right to development as a method of dealing with the challenges of poverty not just as an international human rights effort but also as a human right capable of enforcement within domestic legal systems in Africa as discussed in chapters 3, 4, 5 and 6. This is because unlike other categories of human rights which have been embroiled in ideological debates the right to development is a right conceived and pursued by Africans themselves. Therefore, the right to development is an integral part of Africa and a possible solution to African challenges. Arguably therefore, to solve these challenges, there is no better way than through an integral domestic alternative. Thus, the dissertation advocates the adoption of the right to development, which should be viewed as both a right of individuals and groups, as a guide to achieving development as a human right.

In order to make the right to development more effective at all levels I make the following recommendations. It is important to upgrade the UNDRD into an enforceable treaty.⁴⁶ The treaty should clarify the exact content and method of implementation of the right to development. This should include ensuring global responsibility for human rights and identifying especially non-state actors as necessary duty bearers of the right.

The issue of justiciability is at the centre of realising the right to development. As an all-encompassing human right, the right to development can only be justiciable when all categories of human rights are justiciable within domestic legal systems. Therefore, the non-justiciability of chapter II of the Nigerian Constitution is a pressing matter that needs to be reviewed. There is need for section 6 (6) (c) to be expunged from the Constitution and in its place, a provision that emphasises a progressive realisation of all human rights. A situation whereby the judiciary is completely shut out of implementing human rights should be de-emphasised. Connected to this, is fourthly, the enforceability of the African Charter

⁴⁵ J Driver "The History of Utilitarianism" EN Zalta (ed) The Stanford Encyclopedia of Philosophy (2014) available at: <<http://plato.stanford.edu/archives/win2014/entries/utilitarianism-history/>>.

⁴⁶ Already experts interested in this right have started making efforts towards this direction. See generally SP Marks (ed) *Implementing the Right to Development: The Role of International Law* (2011).

Act and the CRA. Reviewing section 6 (6) (c) of the Nigerian Constitution will affect the utility of the African Charter Act and the CRA so that Nigerian judges may have the powers to assume jurisdiction over acclaimed non-justiciable human right provisions under these laws. Moreover, in their role of interpreting statutes including the Constitution, Nigerian courts ought to move away from strict literal interpretation. Instead, judges must consider the economic, social and other dimensions which can help reduce development challenges of the people. Thus, Nigerian judges must endeavour to contribute towards the realisation for the right to development by for example upholding the indivisibility, interconnectivity and interdependence of human rights. This window has been opened to them by the FREP Rules and the African Charter Act. Thus, a purposeful application of these laws presents Nigerian judges the opportunity to uphold the right to development so as to contribute their quota in making the Nigerian people free from the bondage of bad governance. The legislature should also step up to the occasion by enacting laws that are people centred as well as ensuring that they engage the executives in the implementation of these laws. After all, as the representatives of the people, they have the power to check other arms of government just as the people have the power to check them.

There is need for the legal profession to collaborate and give purposive interpretation of laws. This entails seeking avenues of interpreting human rights like the right to development, purposively. So doing, would reduce overreliance on legal positivism especially in view of the effects underdevelopment, poverty and related challenges have on the majority of the population. But more importantly, there is a need to add a more realistic and proactive statement in section 12 of the Constitution which will accommodate other international law principles like CIL. In this regard, the Kenyan example is germane. Therefore, a section 12 (2) is desirable which should provide this innovation. The national assembly could therefore amend the Constitution to add as follows: "The general rules of international law shall form part of the law of Nigeria."

Connected to the issue of universality of human rights is the issue of a national development law to stabilise long term development planning for Nigeria. This is missing in the development planning method adopted in Nigeria. Thus, there is a need to conceive, enact and apply a National Development Law for Nigeria which will make development a human right. The laws should provide consequences by way of sanctions against any arm and tier of government which fails to implement it. Similarly, the law should provide for short, medium and long term development methodologies in line with the basic requirements of the right to development as discussed in chapter 2 4. Emphasis ought to

be given also to the fight against corruption at sub-regional and inter-regional co-operation especially in Africa through the right to development.

I have argued that indigenous customary practices contribute to national development. It is therefore important for government to take this dimension seriously. Nigerians respect and cherish their cultures and cultural authorities. Thus, more engagement in this direction is essential especially in establishing peace and security. Nevertheless, cultural practices must not be upheld against other fundamental rights of the people. Any practice that violates the rights of its members and other members of the society should be discarded.

Importantly, I have expressed the need for the political and resource allocation structure of Nigeria to be reviewed to support more participation, social justice, non-discrimination and equity. This will entail primarily reviewing the powers of each tier of government as presently enshrined under the exclusive and concurrent lists. But also importantly, it is the lack of fairness and unequal distribution of resources, coupled with corruption that brings about division in the country. If more local governments and states are created that genuinely reflect the diversity and cultural inclusivity of the various groups, most of the existing agitation that threaten Nigeria's unity would naturally go away. Most of the problems in Nigeria are not accurately caused by ethnicity or religion but rather as a result of access to resources and political leadership. Thus, if everyone is given a sense of belonging in the distribution and access to resources and opportunities, as of right, based on the beautiful elements of the right to development, peace, stability and development will be the end and desirable result.

Consequently, the federal character principle should be retained. The vulnerable nature of the country due to its diversity is a good reason why it should be retained. The right to development is a right that gives each and every person and groups the right to participate in their development. Therefore, I argue that the federal character principle enunciated in the Nigerian Constitution seeks to do just that. If other aspects of the right to development such as education and health are accessible to every part of the country, the lapses of the present federal character principle would have been taken care of. Thus, local governments and state governments should be given more responsibilities, resources and powers in order to give them the opportunity to provide benefits of development to their constituents. Decentralising power and making the federal government lean and unattractive will go a long way in reducing the gluttony of politicians from insisting on becoming part of the central government. This will in turn reduce the burden of the federal government and save resources for national development. To buttress this, a bi-cameral

legislature at the centre is too expensive for Nigeria to maintain. A single legislative body, working on a part time basis should suffice. Similarly, a Presidential system of government is also proving too expensive to sustain. This is coupled with duplication of administrative bodies at the federal government level. With good governance at other levels of government and a law that establishes a national development plan, containing sanctions for violation, Nigeria can be on the path of development whereby everyone and all groups can participate in, contribute to and enjoy development as a right.

The issue of good governance which is being hindered by corruption needs serious consideration. In this regard, there is need to review Nigeria's current corruption laws to deal with duplicity of both the laws and the institutions that are responsible for dealing with it. Similarly, the institutions I noted in chapter 7 4 1 need to be strengthened, funded and depoliticised for efficiency in carrying out their functions. The fight against corruption itself should be based on the rule of law, such that leadership by example should be emphasised and at the same time every person found culpable must be prosecuted and punished accordingly. Similarly, avenues that encourage corrupt practices must be reduced and awareness must be created by government, religious and traditional leaders as well as parents and schools about the negative effects of corruption in the society. In the allocation and utilisation of resources, those in authority must ensure transparency and accountability.

Above all, and in conclusion, development must be the primary concern of Nigeria before any secondary measures by way of international support or co-operation should be considered. Thus, there is urgent need to reorganise, resuscitate and pursue good governance as an intricate measure for achieving development. It is hoped that using the rights based approach to development can go a long way in reducing poverty and other development challenges facing Nigeria, Africa and indeed the world.

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