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African Lessons for Post-2015 Global Right to Development Conceptualization and Practice

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AFRICAN LESSONS FOR POST-2015 GLOBAL RIGHT TO DEVELOPMENT CONCEPTUALIZATION AND PRACTICE⁺

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AS I NOTED IN AN EARLIER ITERATION OF MY CHAPTER in the book that we are celebrating today, the specific version of the right to development (RTD) that has become ascendant globally is deeply rooted in the academic, socio-economic and political struggles of many African individuals, peoples, and states.¹ Africa's contribution to what Upendra Baxi has strikingly described as the "development of the right to development,"² has therefore been immense, non-the-least because Article 22 of the *African Charter on Human and Peoples' Rights* is one of the precious few hard law guarantees of the RTD in international law in the whole world. Thus, the "Africa-toward-the-Globe" gaze of this presentation is only fitting.

What I will do in the short time that I have is to flag four important lessons that I think that those engaged in RTD conceptualization and practice ought to learn both from the path-breaking treatment of the RTD as a binding and justiciable legal obligation within the African human rights system, and the actual real life "adjudication" of that right by the African Commission on Human and Peoples Rights. What then are these lessons?

⁺ This is an edited version of a presentation made at the launch of the United Nation's book published in celebration of the silver jubilee of the UN Declaration on the Right to Development, entitled: *Realizing the Right to Development* (New York and Geneva: United Nations, 2013). This presentation was based on the chapter I contributed to this book.

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¹. See Fatsah Ougergouz, *The African Charter on Human and Peoples' Rights* (The Hague: Martinus Nijhoff, 2003) .298-9. See also Akinola Aguda, *Human Rights and the Right to Development in Africa*, Lecture Series No. 55, Nigerian Institute of International Affairs,; and Joe Oloka-Onyango, "Human Rights and Sustainable Development in Contemporary Africa: A New Dawn, or Retreating Horizons?" (2000) 39:6 Buffalo Human Rights Law Review 59. See also the *Declaration on the Right to Development*, G.A. Res. 41/128, annex, 41 UN. GAOR Supp. (No.53) at 186, U.N. Doc. A/41/153 (1986). [*The Declaration*].

². See Upendra Baxi, "The Development of the Right to Development," in *Human Rights in a Post Human World: Critical Essays* (Delhi: Oxford University Press, 2007)124.

The first such lesson is that the RTD (or at least some dimensions or aspects thereof) can very usefully be included in a treaty and can clearly function as a hard law guarantee that can be adjudicated (and is not somehow only meant to function as a moral or political or social exhortation). In the now celebrated *Endorois case*, for instance, the Commission made a bold move and stressed the fact that the peoples that constitute each of the various countries on the African continent (such as the Endorois community of Kenya which had brought this communication) must be properly consulted and compensated in cases where the State embarks on major developmental projects that would affect their lives. Importantly, part of their land has now been reportedly returned to them by Kenya as a result of their victory at the African Commission.³ The Commission has also considered the right to development in a number of other cases, including *D. R. Congo v. Burundi, Rwanda and Uganda* (where it found a violation of the RTD);⁴ *Association Pour la Sauvergarde de la Paix au Burundi v. Tanzania et al.*⁵ *Bakweri Lands Claims Committee v. Cameroon case*;⁶ and the *Southern Cameroons case*.⁷ Somewhat regrettably, there does not yet appear to be sufficient consensus at the global level that the backbone of the RTD needs to be firmed up through the adoption post-2015 of the kind of hard law approach that has been practiced for decades now on the African continent. The lack of any real accountability mechanisms in the framework of the

³. See Minority Voices Newsroom, on-line: <http://www.minorityvoices.org/news.php/fr/1462/Kenya-mrgrs-head-of-law-visits-endorois-community-in-the-rift-valley> (visited 4 December 2013).

⁴. Communication 227/99, 33rd Ordinary Session of the African Commission on Human and Peoples' Rights - May 2003.

⁵. Communication 157/96, 33rd Ordinary Session of the African Commission on Human and Peoples' Rights - May 2003.

⁶. (2004) African Human Rights Law Reports 43.

⁷. Communication 266/2003, 26th Activity Report 2009, Annex IV.

recently adopted United Nations sustainable development goals testifies eloquently to this state of affairs.⁸

The second African lesson for global RTD conceptualization and practice, which is implied in the discussion above, is that the RTD properly belongs not to states, but to “peoples”, i.e. either the entire population of a given country or any one or more of the sub-state groups that compose that country. The jurisprudence of the African Commission has made this explicitly clear. The *Endorois case* and all of the other cases mentioned above aptly illustrate this point. It is hoped that the recognition in the Reports of the High Level Panel and the Secretary-General that “people [civil society groups and local authorities] must be central to a new global partnership translates to a lived appreciation of this important lesson from African theory and practice on the RTD.⁹

The third African lesson for global RTD conceptualization and practice is that we need to take much more seriously the requirement that the peoples, who are prominent among the right-holders of the RTD must have an active and meaningful in the conception and execution of their own development process. In the *Endorois case*, the non-consultation of and non-participation in a meaningful way by the Endorois peoples in the Kenyan government’s attempt to “develop” their lands by moving them off it and alienating the land to foreign investors was held to be a violation of their RTD. Even in the now famous *Ogoni case* (a case in which Article 22 of the African Charter was not even at issue and which concerned Article 21 – a related but different provision), the African Commission explicitly adopted the language of the complainant in chiding Nigeria’s development praxis and condemning the fact that Nigeria “did not involve the

⁸. See United Nations, “Sustainable Development Knowledge Platform,” online: <https://sustainabledevelopment.un.org/> (visited 11th January 2016).

⁹. See *A New Global Partnership: Eradicate Poverty and Transform Economies through Sustainable Development*, on-line: <http://www.post2015hlp.org/the-report/> (visited 29th November 2013)

Ogoni communities (the Ogoni people) in the decisions that affected the *development* of Ogoniland.”¹⁰ Happily, it appears that the Reports of both the High Level Panel and the Secretary-General on the post-2015 development agenda, especially their discussions of the need a new global partnership, did take this imperative fairly seriously. And so did the eventually adopted sustainable development goals.¹¹ Yet, this point can never be over-emphasized.

The fourth and last African lesson for global RTD conceptualization and practice that I will discuss is that as the African Commission found, sub-state groups and not merely the state of which they form a part, must be adequately compensated for any taking of their means of development, or resources. This is not merely a matter of securing their economic resources so they can make money off it and reduce or end their poverty, or an issue of a government being accountable to its people (as the Reports of both the High Level Panel and Secretary-General emphasize). It is also a deep and important question of statecraft; one that implicates the question of the very ownership of those resources. If these peoples have to be so compensated by their own state, then does the state really enjoy exclusive ownership of those resources as is asserted by and practiced in all-too-many countries? As most of us might recognize, such direct ownership rights can be highly consequential for ending extreme poverty in particular contexts, including where a minority people tend to be discriminated against by a majority-dominated central government.

These are some of the lessons from African RTD thought and practice that I think bear serious or more serious reflection by those charged with advancing the post-2015 RTD agenda. Already the need for real accountability mechanisms has been avoided in the framework for the implementation of the sustainable development goals. The hope is that the disappointments are

¹⁰. *Ibid* at para. 55.

¹¹. See United Nations, “Sustainable Development Knowledge Platform, *supra* note 8.

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kept to the minimum as the years progress. Either way, the significant point remains that African RTD thought and practice can point its global counterpart in the right directions.