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International Accountability in the Implementation of the Right to Development and the “Wonderful Artificiality” of Law: An African Perspective

Obiora C. Okafor* and Uchechukwu Ngwaba**

Abstract

The landscape for the implementation of the right to development has undergone significant transformative shifts with the recent establishment of a new expert mechanism on the right to development by the UN Human Rights Council, and the finalisation of a draft treaty on the right to development. Yet, much more can clearly still be done to strengthen UN, state and non-state actors thinking on accountability in the implementation of the right to development, to add to the already considerable progress that has taken place. Our paper explores what can be done, focusing on the African and international context. We conclude that by reflecting on the benefits which a greater focus on accountability in UN development thinking post-2015 can bring to the table, the chances of success of the right to development is heightened.

I. Introduction

If the report of the High-Level Panel on the post-2015 Development Agenda and the Sustainable Development Goals adopted by the United Nations were anything to go by, then the implementation of the “right to development”¹ was supposedly poised to take centre stage in the international human rights agenda post-2015.¹ By many accounts, this was a significant and dramatic turn of events considering the antecedents of this right as an agenda championed by

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¹ See A New Global Partnership: Eradicate Poverty and Transform Economies through Sustainable Development, (hereafter “the High Level Panel Report” or “the report”) (2013), online: <<http://www.post2015hlp.org/the-report>>. On these UN Sustainable Development Goals, see The United Nations, “Sustainable Development Knowledge Platform,” (visited on 13 January 2016), online: <<https://sustainabledevelopment.un.org/>>.; and Obiora C. Okafor, “The SDGs and Africa” *Global Brief Magazine* (Fall 2015), online: <<https://globalbrief.ca/2015/10/for-africa-the-new-sustainable-development-goals-sdgs/>>.

“jurists from the South and contested by jurists from the North”.² The adoption in 1986 by the UN General Assembly of the Declaration on the Right to Development (DRD)³ was a defining moment for the right as it paved way for its widespread recognition⁴ - although the vagueness of the DRD greatly fuelled jurisprudential speculations on its basis and applicability.⁵ The DRD was not well-received by many states in the North.⁶ Scholars and policy makers from the North and South pitched tent in opposite camps debating the “subjects and objects”⁷ of the right. Real progress towards widespread recognition of the right only began following its reaffirmation in subsequent international instruments (such as the Rio Declaration on Environment and Development 1992,⁸ and the Vienna Declaration and Program of Action 1993⁹) and series of intergovernmental conferences.¹⁰ The international human rights community marked the third decade of the DRD in

² See Russel Lawrence Barsh, “The Right to Development as a Human Right: Results of the Global Consultation” (1991) 13:3 Hum Rts Q 322 (“Barsh”); and Bonny Ibhawoh, “The Right to Development: The Politics and Polemics of Power and Resistance” (2011) 33 Hum Rts Q 76 at 77 (“Ibhawoh”).

³ Declaration on the Right to Development, UN Doc A/RES/41/128 (4 December 1986) (hereafter “the Declaration”).

⁴ Arjun Sengupta, “On the Theory and Practice of the Right to Development” (2002) 24:4 Hum Rts Q 837 at 840-841.

⁵ James C.N. Paul, “The Human Right to Development: Its Meaning and Importance” (1992) 11:(1/2) Third World Legal Stud 17; *Supra* note 3.

⁶ When the DRD was adopted by a majority of the UN General Assembly several countries (mostly from the North) abstained, while the United States cast the sole dissenting vote. The abstaining countries were: Denmark, Finland, The Federal Republic of Germany, Iceland, Israel, Japan, Sweden, and the United Kingdom. Four countries which did not vote include: Albania, Dominica, South Africa, and Vanuatu. In the third committee vote on the Declaration (draft resolution U.N. Doc A/C.3/41/L.4) Norway also abstained (see U.N. Doc. A/C/3/41/SR.61). See also *supra* note 4 at 840.

⁷ See Barsh, *supra* note 2 at 323; See Ibhawoh, *supra* note 2 at 87; Upendra Baxi, *Mambrino’s Helmet: Human Rights for a Changing World* (New Delhi: Har-Anand Publications, 1994); Yash P. Ghai & Y.K. Pao, *Whose Human Right to Development?* (Commonwealth Secretariat, 1989); Jack Donnelly, “Human Rights, Democracy, and Development” (1999) 21:3 Hum Rts Q 608.

⁸ Rio Declaration on Environment and Development (visited on 6 November 2015), online: *Principle 3* <<http://www.unep.org/Documents.Multilingual/Default.asp?documentid=78&articleid=1163/>>.

⁹ Vienna Declaration and Programme of Action, adopted by the World Conference on Human Rights on 25 June 1993: UN Doc. A/CONF. 157/23 (12 July 1993) (hereafter “Vienna Declaration”) Art. 10.

¹⁰ The right to development has been recognized as a human right at many international conferences since the Vienna Declaration: At the 1994 International Conference on Population and Development, it was stated “the right to development must be fulfilled so as to equitably meet the population, development and environment needs of present and future generations” (see A/CONF.171/13: Report of the ICPD (94/10/18); The report from the 1995 World Summit for Social Development mentioned that “the international community should promote effective international cooperation, supporting the efforts of developing countries, for the full realization of the right to development and elimination of obstacles to development, through, inter alia, the implementation of the provisions of the Declaration on the Right to Development as reaffirmed by the Vienna Declaration and Programme of Action” (A/CONF.166/9 (19 April 1995)); The Platform for Action at the 1995 Fourth World Conference on Women “reaffirm[ed] that all human rights – civil, cultural, economic, political and social, including the right to development – are universal,

2016. Since then, the landscape for the implementation of the right to development has undergone a number of significant changes. Most notably in this regard is the recent establishment of a new Expert Mechanism on the right to development by the UN Human Rights Council, and the finalisation of a draft treaty on the right to development.¹¹

Yet, much more can clearly be done to strengthen UN, state and non-state actors thinking on accountability in the implementation of the right to development, to add to the already considerable progress that has taken place. Our paper sets out to explore what can be done, focusing on the African and international context. The African context is particularly important as Article 22 of the African Charter¹² guarantees the right to development, and stands out as “...one of the precious few *hard law* guarantees of a right to development...in the realm of international human rights.”¹³ In furtherance of our objective(s), we advance three arguments along the way.

indivisible, interdependent and interrelated, as expressed in the Vienna Declaration and Programme of Action adopted by the World Conference on Human Rights” (See Beijing Declaration and Platform for Action (visited on 7 November 2015), online (pdf): <<http://www.un.org/womenwatch/daw/beijing/pdf/BDPfA%20E.pdf>>); The 1996 World Food Summit emphasized the need for “democracy and the promotion and protection of all human rights and fundamental freedoms, including the right to development and the full and equal participation of men and women as essential determinants of success in achieving sustainable food security for all” (see World Food Summit (visited on 7 November 2015), online <<http://www.fao.org/docrep/003/w3613e/w3613e00.HTM>>); The report from the Second United Nations Conference on Human Settlements (Habitat II) in 1996 stated that “while the significance of national and regional particularities and various historical, cultural and religious backgrounds must be borne in mind, it is the duty of all States to promote and protect all human rights and fundamental freedoms, including the right to development” (A/CONF.165/14 (7 August 1996)); and at the 2001 World Conference against Racism, Racial Discrimination, Xenophobia and Related Intolerance, the report affirmed “the solemn commitment of all States to promote universal respect for, and observance and protection of, all human rights, economic, social, cultural, civil and political, including the right to development, as a fundamental factor in the prevention and elimination of racism, racial discrimination, xenophobia and related intolerance” (see World Conference against Racism, Racial Discrimination, Xenophobia and Related Intolerance” (visited on 7 November 2015), online (pdf): <<http://www.un.org/WCAR/durban.pdf>>.

¹¹ See UN HRC, “Human Rights Council Closes Forty-Second Regular Session, Adopts 38 Texts, Establishes a Fact-Finding Mission on Venezuela and an Expert Mechanism on the Right to Development” (visited on 3 April 2020), *reliefweb*, online: <<https://reliefweb.int/report/world/human-rights-council-closes-forty-second-regular-session-adopts-38-texts-establishes>>; See also *The right to development* (A/HRC/39/L.12); and *Draft Convention on the right to development* (A/HRC/WG.2/21/2).

¹² See the African Charter on Human and Peoples’ Rights, adopted 27 June 1981, OAU Dco. CAB/LEC/67/3 Rev. 521 I.L.M. 58 (1982) entered into force on October 21, 1986 (hereafter the “African Charter”).

¹³ See Obiora C. Okafor, “Righting’ the Right to Development: A Socio-Legal Analysis of Art. 22 of the African Charter on Human and Peoples’ Rights” in Stephen Marks (ed) *Implementing the Right to Development: The Role of*

Firstly, we claim that not enough appears to have been done by states in the African human rights system (both individually and collectively) to bring about the realization of the right to development envisaged by Article 22 of the African Charter. This shortcoming, we argue, is largely the result of the inadequacy in the workings (and not necessarily in the structure or design) of the accountability mechanisms of the right to development in the praxis of the African human rights system.

Secondly, we argue that the tenet of international accountability in the implementation of the right to development is often refracted to suit the different agendas of different actors – national and international. The national and international actors involved in the implementation of the right to development tend to elide obligations to be accountable while demanding accountability of others. This argument applies in two ways: first to national actors in the South engaged in the debate on the priority of the right to development in the global political economy; and second to national and international actors in the North involved in development work in the South who often demand transparency, accountability and good governance from Southern states but seldom observe these standards in their encounters with Southern states.

Thirdly, we apply Martti Koskenniemi's "wonderful artificiality" thesis¹⁴ to the treatment of the right to development in international law. We argue in this regard that there is a spectrum of legal norms, from soft law, through a number of in-between forms of law, to hard law which

International Law (Geneva: FES, 2008) at 52; Art. 17 of the Charter of the Organization of American States accords the right to development to the state and obligates the state (in the pursuit of this right) to respect the rights of the individual and the principles of universal morality. See Dante M. Negro, "Article 17 and Chapter VII of the Revised OAS Charter and Relevant Experience of OAS Institutions" in Stephen Marks (ed) *Implementing the Right to Development: The Role of International Law* (Geneva: FES, 2008) at 64 ("Negro"); the OAS Charter provision contrasts with Art. 22 of the African Charter which accords the right to development to the individual and obligates states to individually and collectively ensure the exercise of this right.

¹⁴ For an exposition of this thesis see Part V of this article.

can be deployed in service of the implementation of the right to development in a transparent and accountable manner. Whilst not discounting the imperative need for hard law in the realization of the right to development (and indeed whilst extolling its virtues in the current context and pushing for its robust incorporation into the struggle to realize the right to development), we argue in favour of the value that the technically non-binding DRD may still bring to the table, despite its status as a non-hard law text.¹⁵ The point here is that like most international lawyers who work in this area, we accept that there is a spectrum of bindingness of legal norms and that, although hard international law must be deployed to the task at hand if it is to be achieved, even those norms that are low in that traditional “hierarchy” can still be useful in the struggle.

Following the above arguments, we conclude that by reflecting on the benefits which a greater focus on accountability in UN development thinking post-2015 can bring to the table, the chances of success of the right to development is heightened.

II. The Right to Development: Reflections on Recent Changes

Two critical and related events signal the modest but important changes that have occurred in the context of the right to development in the last several years. The first is the publication (on 30 May 2013) of the High Level Panel Report (hereinafter “the HLPR”) calling upon the UN, its member-states, regional organizations, civil society and all concerned, to make what its authors refer to as “five big transformative shifts,”¹⁶ namely: move from reducing to ending poverty (with no one left behind); put sustainability at the core of development; transform economies for jobs and inclusive

¹⁵ See Obiora C. Okafor, "The Status and Effect of the Right to Development in Contemporary International Law: Towards a South-North Entente" (1995) 7 African J of Intl and Comparative L 865.

¹⁶ See the Executive Summary of the High Panel Report, *supra* note 1.

growth; build peace, as well as effective, open and *accountable* institutions for all; and forge a new global partnership (based at least in part on mutual *accountability*).¹⁷

The second critical event was the need to fill the development-vacuum created when the Millennium Development Goals (MDGs) expired at the end of 2015. Admittedly, the implementation of the MDGs did record remarkable successes in reducing poverty, child death rates, and deaths from malaria etc. However, there were a number of shortcomings with the implementation of those goals; deficits which are highlighted in the HLPR:

“They did not focus enough on reaching the very poorest and most excluded people. They were silent on the devastating effects of conflict and violence on development. The importance to development of good governance and institutions that guarantee the rule of law, free speech and open and accountable government was not included, nor the need for inclusive growth to provide jobs. Most seriously, the MDGs fell short by not integrating the economic, social, and environmental aspects of sustainable development as envisaged in the Millennium Declaration, and by not addressing the need to promote sustainable patterns of consumption and production. The result was that environment and development were never properly brought together. People were working hard – but often separately – on interlinked problems.”¹⁸

The HLPR, and the UN Secretary-General’s report which followed drew attention to what was already known – that there was a need to develop a new paradigm of development for the post-2015 period.¹⁹ In the ideation of this new paradigm, the authors of the HLPR warned that “business-as-usual is not an option”.²⁰ Thus, their recommendation of five big transformative shifts

¹⁷ *Ibid.*

¹⁸ *Ibid.*

¹⁹ See *A Life of Dignity for all: Accelerating Progress towards the Millennium Development Goals and Advancing the United Nations Development Agenda beyond 2015*, Report of the Secretary-General, A/68/202, 26 July 2013 (hereafter “the UN Secretary-General’s report”).

²⁰ See the Executive Summary of the High Panel Report, *supra* note 1.

was a significant departure from the incremental approach to development favoured by the MDGs.²¹

To this end, Paragraph 75 of the UN Secretary-General's report, which itself was based on the HLPR, stated firmly that if the kind of "sustainable development agenda" that the Secretary-General desires is to "take root", there is a need to establish "a participatory monitoring framework for tracking progress" and "mutual accountability mechanisms for all stakeholders".²² Paragraph 81 of the same report spoke to the need to "ensure that the international community is equipped with the right institutions and tools for addressing the challenges of implementing the sustainable development agenda at the national level."²³ Paragraph 95 then stated quite interestingly that:

"Sustainable development cannot be fully realized without respect for human rights and the rule of law. Transparency and accountability are powerful tools for ensuring citizens involvement in policymaking and their oversight of the use of public resources, including to prevent waste and corruption. Legal empowerment...can also be critical for gaining access to public services."²⁴

Thus, the idea that "everyone involved (in the development process the world over) must be fully accountable" appeared at that point to have a central (and even critical) place in UN thinking about the ways and means of advancing the development agenda post-2015.²⁵ However, it also appears

²¹ Paul Nelson argues for instance that "[t]he MDGs are a careful restatement of poverty-related development challenges, in language that avoids reference to rights; they are a donor country interpretation of the key issues, for a donor-country audience." By contrast, "rights-based approaches...seek to link the development enterprise to social movements' demands for human rights and inclusion, and to tie development to the rhetorical and legal power of internationally recognized human rights." See Paul J. Nelson, "Human Rights, the Millennium Development Goals, and the Future of Development Cooperation" (2007) 35:12 *World Development* 2041-42 ("Nelson"); see also Charles Mutasa, "The Politics of the Millennium Development Goals in Africa: Is Global Partnership Really Working?" (2005) 6:1 *Sustainable Development L & Policy* 21 ("Mutasa").

²² *Supra* note 19.

²³ *Ibid.*

²⁴ *Ibid.*

²⁵ One of the criticisms leveled against the MDGs is the absence of "meaningful accountability mechanisms". While the MDGs "call for greater generosity by the rich countries and commitment by the poor countries...they introduce no mechanism for accountability by either." *Supra* note 21 (Nelson) at 2046; although MDG advocates would argue in favour of its capacity to strengthen accountability, the meaning of that accountability is rarely clarified. For instance, Fukuda-Parr argues that "the MDGs are a global commitment and a framework of accountability...MDGs are more

that the conception of accountability that had been espoused in these two UN documents was a very limited one. For one, it appears that it was limited by its near-entire focus on accountability at the *national* level. Not nearly as much was said about the role of good governance on the *international* plane in fostering the kind of mutual accountability that is envisaged. Despite this slight shortfall, it did seem like a measure of careful thought went into considering the role that the *international* rule of law could play in fostering the desired level of mutual accountability. From the “monitoring and peer review mechanisms”²⁶ proposed by the HLPR to the “participatory monitoring frameworks for tracking progress” and “mutual accountability mechanisms for all stakeholders”²⁷ suggested by the Secretary General, the UN appeared at this point to have been on the right (albeit quite modest) path in its desire to embed living forms of accountability in international development thought and practice post-2015.

Disappointingly, to say the least, the (eventually adopted) Sustainable Development Goals (SDGs), the end-product of the process that produced the above thinking, failed to include any meaningful mechanisms for holding the relevant actors accountable for delivering on the resources without which almost all of those ambitious goals cannot be achieved. Instead, the SDG document is filled with now quite tired and historically less than effective platitudes about the need for greater international partnerships in realising the right to development, including presumably across the South-North axis. Such mere platitudes have rarely if ever convinced, let alone cajoled or even forced states, to deliver on their ambitious promises to provide the capital, technology, market

powerful tools than mere UN declarations because time limits and quantifiable outcomes, by which progress can be objectively measured and monitored, are specified. They provide a framework for accountability at local, national, and international levels.” See Sakiko Fukuda-Parr, “Millennium Development Goals: Why they Matter” (2004) 10:4 *Global Governance* 395 at 397.

²⁶ *Supra* note 1 at 21.

²⁷ *Supra* note 19 at 12.

access, and human resources to the African and other countries of the Global South which may need them.

The recent establishment of a new Expert Mechanism on the right to development (noted in Section I above) and the finalisation of a draft treaty on the right to development suggests that a measure of gradual change is occurring in the international human rights system. Yet, it cannot be completely ignored that support for these measures have largely come from the Global South, and that – on the formal level within the United Nations – these changes have been almost entirely driven by Global South states. If, and when, the draft treaty on the right to development is adopted by the UN system (as is likely to be the case), it will largely be on account of the considerable majority of the voting bloc of the Global South in the UN General Assembly, rather a genuine embrace of the right by Global North *states* and the international institutions they control. Regardless, it should be emphasised that many Global North citizens and civil society actors do strongly support these measures.

III The African Human Rights System, the Right to Development and the Accountability Question

Notwithstanding the controversy about the status of the right to development on the international plane, it is a legally binding human and peoples' right in the context of the African human rights system. The African Charter on Human and Peoples Rights,²⁸ the “constitutional” document of that system, guarantees for all peoples “...the right to their economic, social and cultural development with due regard to their freedom and identity and in the equal enjoyment of the

²⁸ See the *African Charter on Human and Peoples' Rights, 1981* (1982) 21 I.L.M. 59 (hereinafter “the African Charter” or the “Charter”). For a study of this charter and its implementation, see Obiora C. Okafor, *The African Human Rights System, Activist Forces and International Institutions* (Cambridge: Cambridge University Press, 2007).

common heritage of mankind.”²⁹ The African Charter further imposes upon its states parties, “...the duty, individually or collectively, to ensure the exercise of the right to development.”³⁰ These provisions make groups of human beings (peoples), and not the state, the direct subjects of the right to development and impose a duty on the state, individually or collectively with other states, to ensure the fulfilment of that right. This approach has not always been followed elsewhere in the world. For example, in the Charter of the Organization of American States (as opposed to in the jurisprudence of the Inter-American Court of Human Rights) where a similar right is guaranteed,³¹ the right to development is couched as that of the state, which in turn has a duty to respect the rights of the individual and the principles of universal morality.³²

To what extent then have the guarantees of the right to development in the African Charter translated into the realization of that right within its states parties? Are there mechanisms in the African human rights system through which states can individually or collectively be held accountable for the (non)fulfilment of the right to development? If such mechanisms exist, how robust and effective are they?

(a) The Fulfilment of the Right to Development in the African System

An increasingly settled proposition in the literature is that the right to development straddles four dimensions: the national dimension; the international dimension; the collective, group, or peoples

²⁹ *Ibid*, Art. 22(1) African Charter. For an in-depth analysis of the meaning, relevance and implementation of this provision, see Obiora C. Okafor, “A Regional Perspective: Article 22 of the African Charter on Human and Peoples’ Rights” in *Realizing the Right to Development: Essays in Commemoration of 25 Years of the United Nations Declaration on the Right to Development* (New York and Geneva: United Nations, 2013) at 373.

³⁰ *Ibid*, Art. 22(2) African Charter.

³¹ Negro however argues that the emphasis of the OAS Charter is “...less on the right to develop and more on the right to develop *freely and naturally*.” See Negro *supra* note 13 at 69.

³² Art. 17 of the OAS Charter reads: “Each State has the right to develop its cultural, political, and economic life freely and naturally. In this free development, the State shall respect the rights of the individual and the principles of universal morality.” See Charter of the Organization of American States (visited on 14 November 2015), online (pdf): <http://www.oas.org/dil/treaties_A-41_Charter_of_the_Organization_of_American_States.pdf>.

dimension; and the stand alone or composite dimension.³³ Each of these dimensions is critical to the fulfilment of the right. However, under the theoretical and practical framework of the DRD, it is in its national dimension that the right takes root and comes to fruition. This is because the DRD regards the state as the primary site within which the fulfilment of the right to development is to occur.³⁴ This is not to argue, of course, that the sub-state group (i.e. a people) cannot claim or enjoy the right to development. Far be it – especially in the context of the African system where the African Commission courts has settled the question in favour of such peoples.³⁵ As such, states are expected to ensure the realization of the right to development for its peoples – including for specific sub-state groups –through the enactment and implementation of adequate constitutional, policy/legislative and judicial safeguards/measures.

The critical importance of paying heed to the international dimension of the right to development is largely justified by “the interconnectedness of national economies due to globalization and regionalization.”³⁶ The DRD itself contemplates this fact; hence, it provides for the individual and collective duty of states to fulfil the right to development.³⁷ The individual and collective dimension of the extant right acknowledges the dual character of the right to development as a right which empowers human beings and states as beneficiaries (or subjects) of the right.³⁸ Sengupta rightly observes that the classification of this right as a collective right opens

³³ Serges A.D. Kamba & Charles M. Fombad, “A Critical Review of the Jurisprudence of the African Commission on the Right to Development” (2013) 57:2 J Afr L 196 at 203.

³⁴ *Supra* note 3, see Art. 3(1) of the Declaration which reads as follows: “States have the primary responsibility for the creation of national and international conditions favourable for the realization of the right to development.”

³⁵ *Supra* note 29.

³⁶ *Supra* note 33.

³⁷ *Supra* note 3; In this regard, Art. 4(1) of the Declarations provides that: “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.”

³⁸ The Declaration recognizes the collective right of peoples in Article 1 “...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.” However these collective rights are not to be seen as opposed to or superior to, the right of the individual,

it up to persistent criticism by First World critics. However, “it is perfectly logical to press for collective rights to be recognized as human rights. Care must, however, be taken to define collective rights properly and not in opposition to individual rights per se.”³⁹ There is thus an integral relationship between the collective and individual human rights approach to development. Hence in 1979, the UN Commission on Human Rights adopted Resolution No. 5 (XXXV) stating “that the right to development is a human right and that equality of opportunity is as much a prerogative of nations as of individuals within nations.”⁴⁰

Finally, the stand alone or composite dimension of the right to development highlights the indivisibility, interdependence, and interconnectedness of all human rights.⁴¹ As a composite human right, the right to development “comprises civil, political and socio-economic rights. It comprises the human rights principles of equality, non-discrimination, participation, transparency and accountability as well as international cooperation.”⁴²

All in all, it bears some repetition to note here again that it is at the national level that action is expected to commence for the fulfilment of the right to development, even though the international and other dimensions of the right are equally important for its fulfilment. In the context of the African system where the African Charter guarantees the right, states within that system have the primary duty of adopting the necessary constitutional, policy/legislative and

indeed Art. 2 contemplates that “the human person is the central subject of development and should be the active participant and beneficiary of the right to development.” See also *supra* note 4 at 862.

³⁹ *Supra* note 4 at 862.

⁴⁰ United Nations Economic and Social Council, Official Records, Supp. No. 6, U.N. Doc. E/CN.4/1347 (1979).

⁴¹ Art. 5 of the Vienna Declaration sums up this understanding as follows: “All human rights are universal, indivisible and interdependent and interrelated. The international community must treat human rights globally in a fair and equal manner, on the same footing, and with the same emphasis....” See *supra* note 10.

⁴² *Supra* note 33 at 204.

judicial measures to bring about its fulfilment.⁴³ As such, the enquiry whether the guarantees in the African Charter have been translated into the realization of the right to development for individuals in member states is one that requires the examination of the situation of that right in each of the member states that have acceded to the African Charter. As meaningful as that level of scrutiny will be for our analysis in this paper, space constraints severely limit us. As such, our focus will shift more towards analysing the availability, robustness, and effectiveness of mechanisms in the African human rights system for giving bite to the hard law guarantee of the right to development in the African Charter.

(b) Accountability for the Realization of the Right to Development in the African Human Rights System

That mechanisms abound in the African human rights system through which states can be held to account for the fulfilment of the right to development (and other human rights contained in the African Charter) is not a matter for debate. What is debatable is the robustness and effectiveness of such mechanisms. As such, this section aims, first, to identify the mechanisms in the African human rights system for holding states accountable for the fulfilment of the right to development; and second, to analyse the robustness and effectiveness of such mechanisms.

(i) Accountability Mechanisms

Through a combination of periodic reporting,⁴⁴ the creation by the African Commission of subsidiary mechanisms (such as the system of rapporteurships, committees and working groups),⁴⁵

⁴³ See Clive Baldwin & Cynthia Morel “Group Rights” in Malcolm Evans and Rachel Murray (eds) *The African Charter on Human and Peoples’ Rights – The System in Practice, 1986-2006* (Cambridge: Cambridge University Press, 2008) at 244 at 270.

⁴⁴ See Art. 62 of the African Charter, *supra* note 12; See also Rule 73 of the *Rules of Procedure of the African Commission on Human and Peoples’ Rights*, (hereafter “Rules of Procedure 2010”) (visited on 17 November 2015), online (pdf): <http://www.achpr.org/files/instruments/rules-of-procedure-2010/rules_of_procedure_2010_en.pdf>.

⁴⁵ *Ibid*, Rule 23(1) Rules of Procedure 2010.

the Communications (i.e. petitions) procedure of the African Commission,⁴⁶ and judicial scrutiny by the African Court on Human and Peoples' Rights (hereafter "the African Court"),⁴⁷ member states of the African human rights system can – to a significant degree – be held to account for the realization or failure to realize the various human rights contained in the African Charter and other human rights treaties in that system (including the right to development). The next section offers a critique of the robustness and effectiveness of these mechanisms.

(ii) Robustness, Effectiveness and Critique

A tidy way of considering the mechanisms for accountability in the African human rights system is to classify them into two broad categories: the relatively non-contentious and the generally contentious accountability mechanisms. The relatively non-contentious mechanisms include the submission of periodic reports, the system of rapporteurships, committees and working groups. While the generally contentious mechanisms include the Communications procedure of the African Commission and the assumption of jurisdiction by the African Court for human rights violations brought before it.

The relatively non-contentious mechanisms

Article 62 of the African Charter and Rule 73 of the Rules of Procedure 2010 obligate state parties' to submit periodic reports every two years to the African Commission on "...the measures they have taken to give effect to the provisions of the African Charter and on the progress they have

⁴⁶ See Art. 47, 48, 49 and 55 of the African Charter, *supra* note 12; see also *supra* note 44, Rules 83, 84, 85, 86, 87 and 88 of the Rules of Procedure 2010.

⁴⁷ Art. 3 *Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Right* (hereafter "Protocol of the African Court") (visited on 17 November 2015), online (pdf): <<http://en.african-court.org/images/Basic%20Documents/africancourt-humanrights.pdf>>.

made.”⁴⁸ The African Charter goes as far as specifying that the report is to reflect “...the legislative or other measures taken with a view to giving effect to the rights and freedoms recognized and guaranteed by the...Charter.”⁴⁹ Assuming compliance with this obligation is a measure of the extent of accountability for the implementation of the right to development (and other human rights) in the African system, then the situation (i.e. the picture of the process of holding states to account through this means) appears to be somewhat disappointing. This is because out of the 54 African states that have ratified the African Charter⁵⁰ only five states are up to date with their reporting obligations: 12 states are late by one or two reports; 31 states are late by three or more reports; and 7 states have not submitted any report.⁵¹

However, one must note that compliance with reporting obligations by states is hardly a measure of the extent of their accountability for the implementation of the right to development. This is because even in respect of those states which are up-to-date in the submission of their reports, doubts remain about the *optimal* effectiveness of the entire process and whether it amounts to what Hilary Charlesworth and Emma Larking have aptly described as the observance of “rituals and ritualism.”⁵² The African Commission itself once bore this out in its frank assessment of its reporting system, observing that:

⁴⁸ *Supra* note 44, see Rule 73 Rules of Procedure 2010.

⁴⁹ *Supra* note 12, see Art 62 African Charter.

⁵⁰ South Sudan which gained its independence from Sudan in 2011 is the latest African State to have ratified the African Charter. See “Ratification Table: African Charter on Human and Peoples’ Rights” (visited on 28 March 2020), online: <<http://www.achpr.org/instruments/achpr/ratification/>>; The Sahrawi Arab Democratic Republic (SADR) is a partially recognized defacto sovereign state claiming the non-self-governing territory of Western Sahara which has also ratified the African Charter. But for the purpose of our analysis here, it is not a fully recognized state in the AU system.

⁵¹ See “State Reporting Map” (visited on 28 March 2020), online: <<http://www.achpr.org/states/>>.

⁵² They make this critique in respect of the Universal Periodic Review Mechanism of the UN system which they argue may sometimes lend itself to the mere observance by states of the ritual and ritualism of state reporting without any meaningful impact to the situation of human rights in their domestic systems. See Hillary Charlesworth and Emma Larking (ed) *Human Rights and the Universal Periodic Review: Rituals and Ritualism* (Cambridge: Cambridge University Press, 2014).

“The State reporting system of the African Commission is still in its [relative] infancy. Unlike the UN Human Rights Committee, the African Commission examines very few reports during each of its sessions. To develop this system further, the Commission would need the cooperation of States, NGOs and civil society.”⁵³

With regards to the other aspects of the non-contentious mechanisms, namely, the system of rapporteurships, committees and working groups, it is telling that till date, no Special Rapporteur mandate on the right to development has been established by the African Commission to monitor the situation of the implementation of the right to development.⁵⁴ This may, in a way, reflect the relative priority (or lack thereof) that the African Commission has so far accorded to the right to development; and this despite its path-breaking interpretive work in relation to this same right. Equally so, no Working Group or Committee has been established on the right to development.

The generally contentious mechanisms

The generally contentious mechanisms include communications submitted to the African Commission, and the assumption of jurisdiction by the African Court over cases brought before it. For reasons that will become clear as the discussion unfolds, the jurisdiction of the African Court will first be treated before a consideration of the jurisprudence of the African Commission on the right to development.

The rules governing the jurisdiction of the Court are contained in the Protocol of the African Court. Article 3 thereof says the Court has jurisdiction over “...all cases and disputes

⁵³ See “State Reporting Procedure” (visited on 28 March 2020), online: <<http://www.achpr.org/states/reporting-procedure/>>.

⁵⁴ Since 1996 to date, five Special Rapporteur mandates have so far been created by the African Commission as follows: Special Rapporteur on Prisons, Conditions of Detention and Policing in Africa (1996); Special Rapporteur on Rights of Women (1999); Special Rapporteur on Freedom of Expression and Access to Information (2004); Special Rapporteur on Human Rights Defenders (2004); Special Rapporteurs on Refugees, Asylum Seekers, Migrants and Internally Displaced Persons (2004). See “Special Mechanisms” (visited on 19 November 2015), online: <<http://www.achpr.org/mechanisms/>>.

submitted to it concerning the interpretation and application of the Charter, this Protocol and any other relevant Human Rights instrument ratified by the States concerned.”⁵⁵ Article 5 prescribes the rules on access to the Court, restricting access to the Commission; a state party which has lodged a complaint to the Commission; a state party against which a complaint has been lodged at the Commission; a state party whose citizen is a victim of human rights violation; and an African Intergovernmental Organization.⁵⁶ As importantly, Article 34(6) provides that:

“At the time of the ratification of this Protocol or any time thereafter, the State shall make a declaration accepting the competence of the Court to receive cases under article 5(3) of this Protocol. The Court shall not receive any petition under article 5(3) involving a State Party which has not made such a declaration.”

As at March 2020, only 30 out of 54 African states have ratified the Protocol of the African Court. Out of this number, only nine states have deposited a declaration in conformity with Article 34(6).⁵⁷ For states that have not done so, this has placed the Court out of the *direct* reach of its citizens. As the case of *Femi Falana v. African Union*⁵⁸ demonstrates, this is a hindrance to the activation of the jurisdiction of the Court over claims of violations of the right to development and other human rights protected by the African Charter. It is, however, possible for the African Commission to, as it were, take up cases to the court, in a sense, on behalf of the individuals and groups.

The communications procedure of the African Commission is dealt with under Chapter III of the African Charter. The relevant provisions for our purpose are Articles 47, 48, 49 and 55 of the Charter. Article 47 allows a state party which has reasons to believe that another state party

⁵⁵ *Supra* note 47, see Article 3 Protocol of the African Court.

⁵⁶ *Ibid*, see Article 5.

⁵⁷ These include the following: Benin, Burkina Faso, Côte d’Ivoire, The Gambia, Ghana, Mali, Malawi, Tanzania, and Republic of Tunisia. See “African Court on Human and Peoples’ Rights” (visited on 28 March 2020), online: <<https://www.african-court.org/en/index.php/12-homepage1/1208-welcome-to-the-african-court1>>.

⁵⁸ See *Femi Falana v African Union* (Application No. 001/2011), Judgment.

has violated the provisions of the Charter, to draw the attention of the violating state to such violation by written communication which is also addressed to the Secretary-General of the AU and Chairman of the Commission. Where the matter is not resolved bilaterally by the two states, Article 48 allows either state to submit the matter to the Commission. Article 49 provides that a state may choose to by-pass the procedure in Article 47 and refer a matter directly to the Commission. The procedural rules regulating the communication process is contained in the Rules of Procedure 2010.⁵⁹

The landscape of the right to development as emergent from the jurisprudence of the African Commission can be seen in several communications it has treated. These include

⁵⁹ *Supra* note 44, see Rules 83, 84, 85, 86, 87 and 88 of the Rules of Procedure 2010.

Bakweri,⁶⁰ *DRC*,⁶¹ *SERAC*,⁶² *Gumne*,⁶³ and *Endorois*.⁶⁴ The *Endorois* case is particularly important because for the first time the African Commission was able to define the substantive nature of the right to development and what its violation entails. The case concerned the violation of freedom of conscience and religion, rights to property, culture, natural resources and the right to development of indigenous peoples. This occurred following the forced eviction of the Endorois (a pastoralist group) from their ancestral land at Lake Bogoria in central Kenya in the 1970s, to set up a national games reserve and tourist facilities.⁶⁵ In examining the violation of the right to

⁶⁰ *Bakweri Land Claims Committee v Cameroon* (2004) (Communication No 260/02, AHRLR), 43. This involved a claim to historic lands on behalf of the traditional rulers, notables and elites of the indigenous minority Bakweri peoples of Cameroon before the African Commission on Human and Peoples' Rights for violations of various provisions of the African Charter by a state-owned agro-industrial corporation, the Cameroon Development Corporation. The communication was grounded on the violation of the right to have the cause heard, the right to property, wealth and natural resources as well as the violation of the right to development. Unfortunately, the case did not proceed beyond the admissibility phase because the Commission came to the conclusion that the applicants had not exhausted local remedies. See *supra* note 33 at 205; see also Kofele N. Kale "Asserting Permanent Sovereignty Over Ancestral Lands: The Bakweri Land Litigation Against Cameroon" (2007) 13:1 Annual Survey of International & Comparative Law 103 at 107 ("Kale").

⁶¹ *Democratic Republic of Congo v Burundi, Rwanda, and Uganda* (hereafter "DRC case") Comm 227/99: 20th Annual Activity Report of the African Commission, annex IV, 111. This was the first case the African Commission had to deal with the merits. It concerned a complaint lodged by DRC against Burundi, Rwanda and Uganda concerning an alleged military assault by these states when they invaded its eastern border provinces and committed mass violations of human rights and international law. Amongst other things, the Commission equated the killings and barbaric acts against the Congolese people to a violation of their right to cultural development. The Commission also saw a direct link between the right to wealth and national resources and the right to development. See *supra* note 33 at 205.

⁶² *Social and Economic Rights Action Center and the Center for Economic and Social Rights v Nigeria* (hereafter "SERAC case") Comm 155/96 of 2001 AHRLR 60 (ACHPR 2001). This case concerns the communication brought by two NGOs before the African Commission on behalf of the Ogoni people against Nigeria concerning contracts for oil exploration on their land. They alleged *inter alia*, the violation of the right not to be discriminated against and violation of the right to life, property, health, a family, wealth and natural resources and a satisfactory environment. The African Commission agreed with the complainants that the various rights they alleged had indeed been violated. Although the Commission found the violation of the right to development, it was not contained in its ruling. See *supra* note 33 at 207.

⁶³ *Kevin Mgwanga Gumne et al v Cameroon* (hereafter "Gumne") Comm 266/2003: 26th Annual Activity Report of the African Commission, annex IV – This case involved a complaint by 14 individuals on behalf of the people of Southern Cameroon against the Republic of Cameroon alleging violations of numerous rights including the right to self-determination, wealth and natural resources and the right to development. The African Commission concluded that there was no violation of the right to development because natural resources are scarce in Cameroon as in any developing country and the government of Cameroon had provided explanations and statistical data showing how resources were being allocated in Southern Cameroon. See *supra* note 33 at 207-208.

⁶⁴ *Centre for Minority Rights Development (CEMIRIDE) (on behalf of the Endorois) v Kenya* (hereafter "Endorois case") Comm 276/2003: 27th Annual Activity Report of the African Commission 2009, annex 5.

⁶⁵ For an extensive discussion of this case see Serges A.D Kamga, "The Right to Development in the African Human Rights System: The Endorois Case" (2011) *De Jure* 381.

development alleged, the African Commission found that lack of “meaningful participation”⁶⁶ by the Endorois people who “were informed of the impending project [on their land] as a *fait accompli*”⁶⁷ was a violation of their right to development. The Commission also found that the right to development was violated as a result of the encroachment upon the Endorois peoples’ choices and capabilities.⁶⁸ As Serges Kamga argues, relying on Amartya Sen, “put differently, the right to development is underpinned by empowerment and freedom of the beneficiaries.”⁶⁹

To sum up this section, although the African Charter remains the only international instrument (so far) with a firm hard law guarantee of the right to development,⁷⁰ the mechanisms available in the African human rights system for ensuring the accountability of states for the implementation of that right could still be bolstered in order to optimize their positive effect on the realization of this right.

IV. Implementation of the Right to Development in the International System and the Difficult Problem of Accountability

Even though, as already discussed, there is now widespread recognition – albeit with varying degrees of enthusiasm – of the right to development, there remains insufficient consensus on the nature of commitments required of states to implement the right. In large part, this is the legacy of the polarity that characterised the emergence of the right in the 1970s. Advocacy from the Global South for a New International Economic Order (“NIEO”) in the early 1970s⁷¹ marked the earliest push for the recalibration of the global economic system to accommodate the South based on

⁶⁶ *Supra* note 3, see Art. 2(3) of the Declaration.

⁶⁷ *Supra* note 64 at 281.

⁶⁸ *Supra* note 66 at 382.

⁶⁹ *Ibid*; see also Amartya Sen, *Development as Freedom* (Oxford: Oxford University Press, 1999) at 35.

⁷⁰ The provision of Art. 17 of the OAS Charter has been shown to be a very limited right to development in that it is a right which belongs to the state and not individuals in the Inter-American Human Rights System.

⁷¹ For a concise history of the NIEO movement see *supra* note 4 at 876.

principles of self-determination and the right of people to freely pursue their economic, social, and cultural development.⁷² Subsequent claims made largely from the Global South regarding the existence and need to formally recognize a right to development also greatly polarized scholars and policy makers largely along a South/North axis. Two conceptually opposed stances soon developed. As Bonny Ibhawoh rightly argues (on the “uses and misuses of human rights talk”⁷³), Southern states deployed the right to development as a “rhetoric of opposition” to challenge “the orthodoxies and hegemonies of the global political economy”⁷⁴ while at the same time tending to eschew scrutiny of their own domestic records of human rights violations and the economic disempowerment of their local populations.⁷⁵

All-too-many Northern states, on the other hand, repackaged the right to development (from its original mould in the DRD) and deployed it to serve the interests of existing power structures in the global political economy. The dominant Northern approach has led to the supplanting of the more transformative kind of Southern discourses – considered too disruptive of the international *status quo* – with a rather tamer (and allegedly more benign and tolerable) “rights-based development” approach. The rights-based development approach of the North tends to over-emphasize state (read Global South state) right to development obligations and accountability, while under-emphasizing, and at times even obscuring, transnational and international obligations and accountability.⁷⁶ While this approach correctly calls upon Southern states to promote good

⁷² See Ibhawoh, *supra* note 2; *Supra* note 4.

⁷³ See Ibhawoh, *supra* note 2 at 79.

⁷⁴ *Ibid* at 89.

⁷⁵ *Ibid* at 78/79. This is a phenomenon which Bonny Ibhawoh fittingly describes as “the paradox of the right to development talk”. He uses the examples of China and South Africa to illustrate this paradox. Chinese officials for instance invoke the right to development to demand more favourable trade terms but also use it to deflect criticisms of its human rights record, or to resist pressure to cap environmental emissions. South African officials on the other hand invoke the right in demanding radical changes in international pharmaceutical patent laws while using it to also rationalize their failure to demand political reforms in Mugabe’s Zimbabwe.

⁷⁶ *Ibid* at 98.

governance and eschew corruption and other practices that hinder the enjoyment of the right to development by local populations, it is rather too silent on the corresponding obligations placed by the DRD on others in the international community, to open up spaces for the “fundamental reshuffling of [the] cards of power, or [the] redistribution of international resources worldwide.”⁷⁷

This section therefore examines these contradictory discourses on the right to development in the international system and enquires firstly, whether the rhetoric of opposition deployed by Southern states in support of claims of a right to development has served more to shield than advance accountability for the implementation of the right in their domestic systems. Secondly, whether Northern states and the international institutions they control, have in truth imbibed enough of the values of accountability which they frequently espouse in their encounters with Southern states over the fulfilment of the right to development. Thirdly, whether it is possible to redefine the agenda of the realization of the right to development to meet the challenges confronting the international community post-2015, and if so, how this can be achieved.

(a) Unpacking the Dominant Southern Rhetoric on the Right to Development

We argue here that the dominant discourse from the Global South on the realization of the right to development has a number of salient features: firstly, these states have (for historically understandable reasons) exhibited the tendency to emphasize this right as flowing from the right to self-determination or as having the same character as this latter right. Secondly, these states have somewhat understandably (if still problematically) tended to prioritize the developmental right over other rights. Thirdly, too-many (but certainly not all) states of the geo-political South have historically used claims as to the urgent need to realize the right to development as a way of

⁷⁷ *Ibid.*

strengthening state and regime power to the detriment of individual or community empowerment; and fourthly is the reluctance of some states in the Global South to accept responsibility for the implementation of the right to development. While the items on this list of features are by no means exhaustive, they deserve closer scrutiny.

The right to development as an extension of the right to self-determination

The global political changes of the 1950s and 1960s (which followed the process of decolonization) were highly influential in shaping the tenor of the discourse on the right to development. This period witnessed the emergence of demands by the newly independent states of the South for a restructuring of the global political economy on the principles of self-determination and the right of people to freely pursue their economic, social, and cultural development.⁷⁸ As a result of the closeness in time to the anti-colonial struggles of mid-to-late 1900s of the movements of resistance against the economic hegemony of the North,⁷⁹ claims about the existence of a right to development have often been regarded (by most states in the South) as a continuation of earlier claims of the existence of a right to self-determination. The significance of this parallel stems from the essential character of the right to self-determination as a right which channelled “resentment over the negative consequences of colonialism” and strengthened demands for “reparations”⁸⁰ for such colonial harms by newly independent states of the South. It was essentially an insistence that “greater attention be paid to economic and social rights and that colonialism – and neo-colonialism – were gross violations of international law” for which “the

⁷⁸ *Ibid* at 90; see also *supra* note 29 at 867; Mesenbet A. Tadeg, “Reflections on the Right to Development: Challenges and Prospects” (2010) 10 African Human Rights L J 325; Noel G. Villaroman, “Rescuing a Troubled Concept: An Alternative View of the Right to Development” (2011) 85 Philippine LJ 140.

⁷⁹ The movement of resistance here refers to the decolonization struggle, the advocacy for a New International Economic Order and the clamour for the recognition of the right to development.

⁸⁰ Nsongurua J. Udombana, “The Third World and the Right to Development: Agenda for the Next Millennium” (2000) 22:3 Hum Rts Q 753 at 763.

imperialist world had a legally binding obligation” to redress by putting in place “some form of development cooperation”.⁸¹ This was the deep linkage that the leaders and indeed most peoples of the states of the South easily appreciated.

The right to development as superior to other rights

Although not always evident (or widely accepted), there is a sense in which the right to development was and is still sometimes portrayed by many Global South actors as *superior* to other human rights (especially civil and political rights). This is an approach that was in the past often favoured by states with a poor record of action in protecting human rights. Perhaps the “strongest arguments for prioritizing development rights” over other rights “has come from China in ways reflecting the old ‘Asian values’ debate”.⁸² As stated by the 1991 Chinese Government White Paper on Human Rights: “It is a simple truth that, for any country or nation, the right to subsistence is the most important of all human rights, without which the other rights are out of the question.”⁸³ Given the lived reality of all-too-many Southern states, this approach is not necessarily as problematic as it may seem at first sight. For, in the living international human rights law/praxis, some prioritization of rights is inevitable in the interest of national development, national security, and so on. But, while, the priority that should be attached to development is – to us – not in doubt, one need not flatly and inflexibly subordinate other rights to it to accord it such – often sorely needed – emphasis.

⁸¹ *Ibid*; see also Philip Alston, “Revitalising United Nations Work on Human Rights and Development” (1992) 18 MELE. U.L. REV 216 at 218.

⁸² See Ibhawoh, *supra* note 2; For a discussion of the Asian values debate see Xiarong Li, “‘Asian Values’ and the Universality of Human Rights” in P. Hayden (ed) *The Philosophy of Human Rights* (St. Paul: Paragon House, 2001) at 397 (“Li”).

⁸³ Central Government of the People’s Republic of China, *Whitepaper on Human Rights* (1991), chapter 1.

The right to development and regime power

The right to development features prominently as one strategy that has been deployed by some in the Global South to help with their attempts to preserve their own regime power. Referring to the Chinese example once more, official Chinese discourse on the right to development appears to tend to aim to strengthen the state and regime, at times at the expense of community and individual empowerment.⁸⁴ Others have pointed out the tendency in these discourses to collapse “community” into the state, and the state into the current regime.⁸⁵ This kind of tendency also characterizes the discourse of some other states of the South, and mirror the kind of anti-individual rights national security rhetoric that is prevalent in all-too-many other states, including the USA.

Reluctant assumption of responsibility for implementation

Although the African Charter holds the enviable position of being the only international treaty with a hard law guarantee of the right to development, the analysis of the enforcement of that right in the African human rights system suggests that there remains much room for improvement in the records of implementation of the right to development of the (African) states parties to that treaty. To be clear, developments at the African Commission with respect to the robust interpretation and application of the right to development guaranteed in Article 22 of the African Charter, via their utilization of the African Commission’s communications procedure have been quite promising. However, it is telling that all other mechanisms in the African human rights system for ensuring

⁸⁴ Chinese Government White Papers on Human Rights have devoted considerable attention to the “right to subsistence and development”. Rejecting the conventional wisdom that the individual is at the center of collective well-being, the Chinese delegation to the UNCHR in 1992 stressed that the right to development is a “collective right, primarily speaking, for the destiny of the state or nation. It is the prerequisite and basis for the development of the individual...The development of the individual depends on the development of a nation or state.” See “Chinese Delegate Speaks on Human Rights at Geneva Meeting”, *Xinhua News Agency broadcast* (5 February 1992), *BBC re-broadcast* (8 February 1992).

⁸⁵ *Supra* note 82 (Li).

individual and collective accountability by states for the implementation of the right to development have not been well utilized in the efforts to realize this right on the African continent. The extent to which human development has in fact occurred on the continent has also been suboptimal. This state of affairs is argued to be symptomatic of a deeper problem, namely, the reluctance of too many (and not by any means all) African states to accept primary responsibility for the implementation of the right to development.

(b) Deconstructing the Opposition of Most Northern States to the Right to Development

Northern states (and the many international institutions they more or less effectively control in practice) have engaged a different kind of rhetoric – the deployment of the “language of power”⁸⁶ – in their encounter/struggle with Southern states over the realization of the right to development. There are two aspects to this language of power. The first is the denial of the very existence of a right to development in international law; or in the alternative, reframing the content of that right to shift the vast majority of the responsibility for its implementation to Southern states.

The Denial of the existence of the right to development

The initial response of the North to Southern claims of the existence of a right to development was outright denial. The likes of the otherwise fair-minded US Scholar, Jack Donnelly, typified this response. Donnelly compared claims about the right to development to the search for a non-existent black cat on a moonless night in a dark room.⁸⁷ At the adoption of the DRD, many

⁸⁶ *Supra* note 2 at 96 (Ibhawoh).

⁸⁷ See Jack Donnelly, “In Search of the Unicorn: The Jurisprudence and Politics of the Right to Development” (1985) 15 Cal W Int’ LJ 473.

Northern states did not support the declaration.⁸⁸ Critics described the right as “catastrophic”⁸⁹ and politically and practically a “total failure”.⁹⁰ However, this form of Northern resistance to the right has since given way to forms of qualified acceptance. As we have seen, armed with the power and influence they wield in the global political economy, Northern states have led the fashioning of an alternative “rights-based development” approach to supplant the allegedly far more disruptive claims (by the South) of the need to codify and realize a right to development. A key sticking point for many regarding the rights-based development approach is that its concern is not so much with the goals of development, but with the normative framework within which it is articulated.⁹¹

The ‘Rights-based’ development approach: an alternative vision of the right to development?

Since the 1990s international institutions, UN-affiliated and bilateral agencies and many NGOs in the North have adopted a “human rights approach to development” as their official policy.⁹² This approach sets the achievement of human rights as an objective of development by utilising thinking about human rights as the scaffolding of development policy.⁹³ Competing understandings of the rights-based approach abound “in ethical debates about social justice and in conceptual disagreements over the meaning of core terms such as *rights, development and accountability*.”⁹⁴

⁸⁸ For a list of Northern states that did not support the DRD, see *supra* note 6; see also *supra* note 2 (Barsh).

⁸⁹ Peter Uvin, “From the Right to Development to the Rights-Based Approach: How ‘Human Rights’ Entered Development” (2007) 17 Dev. Prac. 598.

⁹⁰ Peter Uvin, *Human Rights and Development* (Bloomfield: Kumarian Press, 2004) at 42.

⁹¹ See Ibhawoh, *supra* note 2 at 98.

⁹² See Andre Frankovits, “Introduction: A Rights-Based Approach to Development and the Right to Development” (2002) Human Rights Development Yearbook 3.

⁹³ Overseas Development Institute, “What Can We Do With a Rights-Based Approach to Development?” (3 September 1993), online: <www.odi.org.uk/briefing/3_99.html>.

⁹⁴ Kate Manzo, “Africa in the Rise of Rights-Based Development” (2003) 34 Geoforum 437.

For instance, the World Bank makes the attainment of human rights a goal of development⁹⁵ whereas the United Nations Development Programme asserts the opposite, insisting that human rights are critical to achieving development and should not be considered a reward for it.⁹⁶ The rights-based development approach embraces a state-centric interpretation of the right to development. It treats the state as the central actor in achieving the right to development and holds the state accountable for development (or the lack thereof) under international law.⁹⁷ Whatever be the case, this rights-based development framework is of greater appeal to the North whose opposition to the right to development hinges on two critical points: firstly, the assumption that the global redistributive justice framework undergirding the right to development is incompatible with the overly individual-centred, free market and capitalist, structure of the existing, Western-dominated, global economy;⁹⁸ secondly, the supposition that the very notion of framing development as a human rights entitlement with binding obligations (and even worse, binding extraterritorial obligations), is somehow inherently flawed.⁹⁹

(c) **The Right to Development: Redefining the Agenda**

As should be evident now, the not fully resolved South-North debate about the right to development¹⁰⁰ casts the HLPR, the UN Secretary-General's Report, and even the recently adopted SDGs, respectively, in very important light – as an attempt to redefine the agenda on the right to development post-2015. From whichever perspective it is considered, the controversy about the

⁹⁵ World Bank, *Development and Human Rights: The Role of the World Bank* (Washington DC: The World Bank, 1998) at 2.

⁹⁶ United Nations Development Programme, *Human Development Report 2000: Human Rights and Human Development* (New York: Oxford University Press, 2000) at iii.

⁹⁷ *Supra* note 94 at 438.

⁹⁸ Makau Mutua, "Standard Setting in Human Rights: Critique and Prognosis" (2007) 29 Hum Rts Q 564.

⁹⁹ See Ibhawoh, *supra* note 2 at 97; *Supra* note 87.

¹⁰⁰ One of us has earlier written calling for "a possibly viable consensus-position on the more controversial aspects of the South-North debate relating to the normative status and effect of the right to development." See *supra* note 29 at 867.

right to development boils down to the question of obligation and accountability in the implementation of the right. While the South wants the formal legal as well as substantive burden to be borne to a far more significant extent by the North (and the international institutions they control), the North has almost always insisted on the vast formal and substantive responsibility of Southern states for the realization of this right.

It was for this reason that the focus of the HLPR on building consensus on implementation and accountability for the right to development,¹⁰¹ and the concomitant focus of the UN Secretary-General's Report on mobilizing means of implementation and "a participatory monitoring framework for tracking progress and mutual accountability mechanisms for all stakeholders"¹⁰² held the promise of a fresh breath of life for the right to development. As we have noted, it is rather unfortunate that, while it did emphasise domestic accountability, the SDG document recently adopted by the UN regressed rather than progressed in this regard, and does precious little, if anything at all, to advance the quest for international accountability in the implementation of the right to development.

This aside, and assuming the necessary political consensus can ever emerge in the direction of instituting meaningful international accountability, another troubling question remains: What kind of international legal instrument is best suited? Would a treaty (in the mould of the African Charter) or a declaration (in the mould of the DRD) be best suited for the task? Apart from these obvious categories are there any in-between forms of law which can assist the UN and indeed the entire international community actualise the aspirations captured by these reports post-2015? A suggestion was put forth in the HLPR that the goals and targets set out in the report should (like

¹⁰¹ *Supra* note 1 at 21.

¹⁰² *Supra* note 19 at 12.

the MDGs) “not be legally binding but must be monitored closely”.¹⁰³ There are obvious challenges with this suggestion. Not the least is the fact that a non-binding set of goals would result in business being done in exactly the same way that it has been done – with little success – in the past several decades, whilst expecting a different result to materialize! The next section deals with this issue more closely.

V. The “Wonderful Artificiality” of Law

Martti Koskenniemi writes about “the wonderful artificiality of states.”¹⁰⁴ Inspired by this turn of phrase, we have coined the phrase “the wonderful artificiality of law” for use in the present context. Essentially what Koskenniemi argues is that in spite of its perceived shortcomings, the state remains an important site for moulding “the social reality in which we live”.¹⁰⁵ It provides “a prior system of decision” required to “sort out priorities and hierarchies and to adjust conflicting values”.¹⁰⁶ Koskenniemi appears to suggest that the state can lend itself to many purposes and in this sense, overcomes the shortcomings of other visions for organising society like the creation of “non-state self-defense communities.”¹⁰⁷ It is in this sense that we have borrowed from Koskenniemi in our ideation of the “wonderful artificiality of law”.

As most international lawyers recognize, there is a spectrum of legal norms, from soft law, through several in-between forms of law, to hard law. In the area of the implementation of the right to development, many of the contributors to the important edited collection jointly published over

¹⁰³ *Supra* note 1 at 21.

¹⁰⁴ See Martti Koskenniemi, “The Wonderful Artificiality of States” (1994) 88 *American Society of Intl L Proceedings* 22.

¹⁰⁵ *Ibid* at 28.

¹⁰⁶ *Ibid* at 27.

¹⁰⁷ See Basil Davidson, *The Black Man’s Burden. Africa and the Nation-State* (New York: Three Rivers Press, 1992) referred to in *supra* note 104 at 25.

a decade ago by the Friedrich Ebert Stiftung (FES) and the Harvard School of Public Health recognize this reality in a very clear way.¹⁰⁸ Whilst not discounting the imperative need for hard law to be deployed in the service of the effort to realize the right to development, the early work of one of us on the right to development argues in favour of the value that the technically non-binding DRD still brings to the table, despite its status as a non-hard law text.¹⁰⁹ The point here is that there is a spectrum of bindingness of legal norms and that, while even those norms that are low in that traditional “hierarchy” can still be useful in the real world, we would much prefer the deployment of hard international law specifically enunciating the right to development.

For, the framing and naming of a norm as something called “law” is almost never an idle exercise and is hardly ever inconsequential. At a minimum, classifying a violation *as a violation of law* takes away from relevant actors the often-heard excuse that they will not comply with a norm because it is non-binding. Law limits the field of argument available to the actors addressed by a norm and constricts the size of the ballpark within which they can play. In this way does it strengthens the hands of those who would demand the vindication of the relevant norm. In sum, hard law matters! This is exactly why all-too-many actors on the global level have historically resisted the classification of the right to development as a legal norm. And that is why the widespread tendency today is to subject the most heinous or egregious international crimes to hard law norms and processes and not merely to non-law or soft law norms. For example, most people would tend to be shocked by an argument that those who commit the most serious crimes against humanity should be exclusively dealt with through soft law or non-law norms and mechanisms. Interestingly, in the international criminal law realm, there is now a kind of graduated and

¹⁰⁸ See Stephen P. Marks, ed., *Implementing the Right to Development: The Role of International Law* (Geneva: FES, 2008) at 131.

¹⁰⁹ *Supra* note 29.

calibrated scale of responsibility and accountability in which the more heinous the international crime and the more responsible for it one is, the more there is a tendency to use hard law to deal with it.

A broad analogy with international criminal law would suggest that if we take the task of bringing an end to politically and socio-economically produced extreme poverty as seriously as we ought to; and do really see the post-2015 development agenda as a way to bring it to an end, (as do the High Level Panel and the Secretary General); then a similar kind of graduated and calibrated scale of responsibility and accountability might be in order in the realm of the international law of development. This approach will likely strengthen the accountability mechanisms correctly suggested by the High Level Panel and the Secretary-General, and disappointingly betrayed and discarded (yet again) during the final negotiations leading up to the adoption of the SDGs.

For example, we can as a first step identify a very small core (or umbra) of the most egregious or serious violations of the right to development and deploy hard law norms and mechanisms to advance greater compliance with these norms. One way of doing so is to include these core violations either in a new treaty (as is likely to be done soon at the UN), or in a new Protocol to the *Covenant on Economic Social and Cultural Rights*. In this respect, Article 22 of the African Charter and the increasing number of interesting decisions which have interpreted and applied it to real life situations are a kind of avatar.¹¹⁰

As a second step, we can then identify for inclusion in the penumbra a larger set of violations of the right to development which may be suitably dealt with in softer ways, including in some of the

¹¹⁰ *Supra* note 64; See for instance the Endorois case and other cases discussed above.

ways canvassed in the FES/Harvard edited collection (such as enhancing the status of the Declaration on the Right to Development, preparing new guidelines or compacts for implementing that right, establishing a standing commission, and mainstreaming the right into the Universal Periodic Review process). The methods of peer-review, monitoring and tracking proposed by the High Level Panel, or by the Secretary-General's Report, are of course still highly relevant in this respect, and perhaps even more significant.

More reflection and work is of course needed to firm this idea up, but pointers already exist in the relevant literature¹¹¹ as to what kinds of violations of the right to development ought to be dealt with via hard law instruments and mechanism and what should rather be dealt with through non-law or soft law norms and processes.

All in all, what should be kept in mind is that, as the wise Canadian thinker and diplomat Ivan Leigh Head once noted, an element of law, some measure of it, will be needed in the effort to realize the right to development.¹¹²

VI. Conclusion

In this paper we have examined the situation of the right to development in the African and international human rights system. Our analysis focused principally on accountability for the implementation of the right. Forming the backdrop of our paper is the report of the High Level Panel commissioned by the UN (which was followed by a report by the UN Secretary-General) outlining five big transformative shifts that need to take place post-2015 in order to achieve better

¹¹¹ For example by Upendra Baxi in the FES/Hard Book (see Upendra Baxi, "Normative Content of a Treaty as Opposed to the Declaration on the Right to Development: Marginal Options" in Stephen P. Marks (ed) *Implementing the Right to Development: The Role of International Law* (Geneva: FES, 2008) at 47).

¹¹² See Ivan L. Head, "The Contribution of International Law to Development" (1987) 25 Can YB Intl Law 30.

implementation of the right to development; as well as the recently adopted SDG document. A major theme that runs through the reports that preceded the adoption of the SDGs is the question of accountability for the right to development. The reports agree on the need for participatory monitoring mechanisms for ensuring mutual accountability by all stakeholders for the implementation of the right.

However, they recommend that a legally *non-binding* instrument (just like the case with the MDGs) should be adopted to secure these aspirations. The SDGs, as we have shown, do even less about advancing legal accountability for the implementation of the right to development. We have argued, however, for the consideration of a wide variety of legal forms, ranging from hard law instruments (like the draft treaty that is currently being considered by the UN) to in-between forms of law and non-law forms as vehicles for ensuring that all actors and stakeholders in the international community are made accountable for this right. We have also argued that law being an artificial device, can be malleable and made to achieve any purpose provided the objectives being pursued are clarified from the outset. All in all, the idea is not to repeat the mistakes of the past and yet expect a different result. Sadly, this seems to be the track that the recently adopted SDG framework did (yet again) put us on. However, given the recent developments at the UN (regarding the development and impending adoption of a draft treaty and the establishment of an Expert Mechanism on the RTD), hope, it seems, must spring eternal!