

ANALYSING THE LEGALITY OF THE RIGHT TO DEVELOPMENT IN SOUTH AFRICA



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30 November 2024

DECLARATION

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DEDICATION

This doctoral thesis is dedicated to my late father, Ntate Thabo Richard Moseli.

My father's dream centred on my education. He firmly believed that education is the only weapon capable of lifting us out of poverty. Having not had the privilege of formal education himself, he often spoke passionately about its importance. As this year marks ten years since he left us, I dedicate this body of work to him in honour of his unwavering belief in the transformative power of education.

*Keya leboha Mohlakoana. Moya wa hao o phomole ka kgotso le bafu bohle ba
falletseng!*

ABSTRACT

This doctoral dissertation undertakes a critical examination of the legal status of the right to development in the South African context. It engages with the core research question: What is the legality of the right to development in South Africa? The study situates this inquiry within a broader historical and theoretical milieu, tracing the evolution of the right to development through international human rights instruments and analysing its incorporation and recognition within domestic legal frameworks. Through a comprehensive analysis of constitutional provisions, statutory laws, and relevant case law, this thesis critically evaluates the formulation and practical enforcement of the right to development in South Africa. The thesis also considers the socio-economic realities facing marginalised communities and the implications of these realities for the realisation of the right to development. Employing a multidisciplinary approach, the thesis highlights the nexus between legal, political, and social factors that shape the practical application of the right to development. Ultimately, the findings reveal the complexities surrounding the legal recognition and enforceability of the right to development in South Africa, emphasising the need for enhanced legal recognition and implementation strategies to ensure equitable access to development opportunities for all citizens, especially the poor, vulnerable and marginalised. This thesis enriches the broader discourse on human rights and development, offering nuanced insights for policymakers, legal practitioners, and scholars through an interdisciplinary lens.

Key words

Human Rights, Right to Development, Development, South Africa

LIST OF ABBREVIATIONS

ACRWC	African Charter on the Rights and Welfare of the Child
ANC	African National Congress
AU	African Union
BBBEE	Broad-Based Black Economic Empowerment
CEDAW	Convention on the Elimination of All Forms of Discrimination against Women
CSO	Civil society organisations
CRC	Convention on the Rights of the Child
ECOWAS	Economic Community of West African States
UNDRIP	Declaration on the Rights of Indigenous Peoples
DPME	Department of Planning, Monitoring and Evaluation
ECOSOCC	Economic, Social and Cultural Council
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
ICRC	International Committee of the Red Cross
ILO	International Labour Organisation
IMF	International Monetary Fund
IFIs	International Financial Institutions
LoN	League of Nations
NAM	Non-Aligned Movement
NEMA	National Environmental Management Act
NIEO	New International Economic Order
NPC	National Planning Commission

NDP	National Development Plan
NGO	Non-Governmental Organisation
OAU	Organisation of African Unity
OHCHR	Office of the United Nations High Commissioner for Human Rights
PAC	Pan Africanist Congress
PAP	Pan-African Parliament
PAJA	Promotion of Administrative Justice Act
PFMA	Public Finance Management Act
RDP	Reconstruction and Development Programme
RBAs	Rights-Based Approaches
SADCC	South African Development Coordinating Commission
SAHRC	South African Human Rights Commission
SDGs	Sustainable Development Goals
SAPs	Structural Adjustment Programmes
UDHR	Universal Declaration of Human Rights
UN	United Nations
UNHRC	United Nations Human Rights Council
UNDRTD	United Nations Declaration on the Right to Development
UNDP	United Nations Development Programme
WHO	World Health Organisation
WTO	World Trade Organization

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CHAPTER 1

OUTLINING THE DISCOURSE

1.1 INTRODUCTION AND BACKGROUND

South Africa's historical trajectory, shaped by the legacy of racial discrimination under the apartheid regime, has produced persistent socio-economic inequalities between affluent and impoverished communities. During the apartheid era, Black South Africans were subjected to systematic marginalisation, institutionalised racial oppression, exploitation, and widespread dispossession of land. Notably, their political rights were egregiously violated through the denial of voting rights and exclusion from political participation.¹ Furthermore, they faced restricted access to quality and affordable services, opportunities, and resources, leading to widespread poverty and systemic oppression.² This historical context illustrates the apartheid government's profound failure to safeguard human rights, including the right to development an inherent and universal entitlement indispensable to the realisation of human rights and fundamental freedoms. International bodies, notably the United Nations General Assembly, together with national institutions such as the Southern Africa Litigation Centre, have denounced apartheid as a crime against humanity in view of its devastating impact on human dignity and the effective enjoyment of human rights, including the right to development.³

¹ Liebenberg S 2000. 'Human Development and Human Rights: South African Country Study.' *Human Development Report*, 3.

² Kehler J 2001. 'Women and Poverty: The South African Experience.' *Journal of International Women's Studies* 3(1): 41-53, 41.

³ Kisla A 2019. 'Prosecuting Apartheid Atrocities-Why an Indictment for a Single Murder in the Ahmed Timol Case is not Enough.' *The Daily Maverick*. Available at: <https://www.southernafricalitigationcentre.org/2019/04/10/salc-in-the-news-prosecuting-apartheid-atrocities-why-an-indictment-for-a-single-murder-in-the-ahmed-timol-case-is-not-enough/#:~:text=There%20is%20a%20legal%20basis%20that%20apartheid%20was,crime%20of%20apartheid%20was%20a%20crime%20against%20humanity> (accessed 23 August 2022).

Since its inception, the right to development has progressively been recognised as a fundamental human right, embedded within the broader architecture of human rights and development, and regarded as indispensable to the realisation of human dignity and overall well-being. The concept, which emerged in the latter half of the 20th century, posits that development is not merely an economic process but a multidimensional phenomenon that encompasses social, cultural, and political dimensions. It emphasises that individuals and communities have a legitimate claim to participate in and benefit from development processes, which are intrinsically linked to the fulfilment of all human rights.

In South Africa, the right to development holds particular significance, given the country's historical legacy of apartheid, socio-economic disparities, and ongoing challenges in governance and service delivery.⁴ The persistence of political, social, and economic inequalities has resulted in widespread impoverishment, as evidenced by the Equality Court's finding in *Social Justice Coalition v Minister of Police*,⁵ which recognised poverty as a basis for indirect discrimination. South Africa is consistently ranked among the most unequal societies in the world, with the World Bank attributing this disparity to the persistent legacy of historical exclusion and to patterns of economic growth that remain insufficiently inclusive and fail to generate adequate employment opportunities.⁶ The Quarterly Labour Force Survey by Statistics South Africa (StatsSA) reports an unemployment rate of 34.5% for the first quarter of 2022, highlighting the high prevalence of individuals living below the poverty line.⁷ Consequently, the poor, vulnerable, and

⁴ Kehler 2001: 41.

⁵ *Social Justice Coalition v Minister of Police* 2019 (4) SA82 (WCC); Van der Linde D 2020. 'Poverty as a Ground of Indirect Discrimination in the Allocation of Police Resources—A Discussion of *Social Justice Coalition v Minister of Police* 2019 4 SA 82 (WCC).' *Potchefstroom Electronic Law Journal*, 23(1).

⁶ The World Bank in South Africa, 2021. 'The World Bank's Strategy in South Africa Reflects the Country's Development priorities and its Unique Leadership position at Sub-Regional and Continental levels.' Available at: <https://www.worldbank.org/en/country/southafrica/overview#1> (accessed 12 July 2022).

⁷ Statistic South Africa. Statistics South Africa to Release the Quarterly Labour Force Survey (QLFS), Quarter 1 of 2022. Available at: <https://www.statssa.gov.za/?s=Quarterly%20labour%20force%20survey> (accessed 13 July 2022).

marginalised populations struggle to achieve a minimum standard of living.⁸ These prevailing socio-economic conditions impede the full realisation of socio-economic rights and the right to development, both of which are fundamental to ensuring the freedom to attain comprehensive economic, social, political, and cultural development in South Africa. The South African Constitution adopted in 1996,⁹ enshrines a comprehensive Bill of Rights that reflects the principles and values of equality, dignity, and freedom.¹⁰ However, despite these constitutional guarantees, the explicit recognition and operationalisation of the right to development remains contentious and underexplored within the domestic legal framework. This gap raises critical questions about the legal status of the right to development in South Africa and its implications for the marginalised and vulnerable populations that continue to face systemic barriers to their full participation in societal progress. The lack of a clearly defined legal framework for the right to development presents considerable obstacles to its effective realisation. Although international and regional human rights instruments such as the African Charter on Human and Peoples' Rights (the African Charter)¹¹ and the United Nations Declaration on the Right to Development (UNDRTD),¹² establish a normative foundation for this right, their integration into domestic law and policy frameworks remains inadequate.¹³ This situation is compounded by issues such as corruption, inadequate governance, and socio-economic inequalities, which impede the effective implementation of development policies aimed at benefiting all citizens.

⁸ United Nations Human Development Report 2020. 'South Africa, Human Development Indicators', Available at: <http://hdr.undp.org/en/countries/profiles/ZAF> (accessed 13 July 2022).

⁹ Sect 1 of the Constitution of the Republic of South Africa, 1996.

¹⁰ National Planning Commission, 2013. National Development Plan Vision 2030, 460

¹¹ African Charter on Human and Peoples' Rights (adopted 27 June 1981 entered into force 21 October 1986), Art 22(2) states that 'States shall have the duty, individually or collectively, to ensure the exercise of the right to development.'

¹² United Nations Declaration on the Rights to Development (adopted 4 December 1986) UN Doc A/RES/41/128.

¹³ Muchhala B 2018. The Right to Development and Illicit Financial Flows: Realizing the Sustainable Development Goals and Financing for Development. *Human Rights Council, Working Group on the Right to Development, Nineteenth Session, Geneva, 23-27.*

This doctoral thesis analyses the legality of the right to development within the South African legal and institutional context, focusing on its status, enforceability, and the corresponding obligations of the South African government. By employing a socio-legal approach, the study examines the interplay between legal norms and social realities, considering how the right to development can be operationalised to address the developmental challenges faced by the country. This research advances the existing scholarship by offering a thorough analysis of the right to development as both a legal and social imperative, thereby advocating for its formal recognition and incorporation within South Africa's human rights framework. The examination of the right to development in the South African context transcends purely legal inquiry, constituting a vital endeavour to guarantee that all individuals and communities are able to fully exercise their right to development.

1.2 RESEARCH PROBLEM

The right to development is internationally recognised as a fundamental human right, integral to the enhancement of both individual and collective human capabilities. Despite its recognition, the implementation and enforcement of this right in South Africa encounter significant legal and practical challenges. Currently, there is a notable deficiency in comprehensive scholarly analysis regarding the alignment of South African legal frameworks with international standards pertaining to the right to development, as well as an assessment of the efficacy with which this right is being realised in the country. This doctoral thesis addresses the central issue of evaluating whether the South African legal system adequately upholds the right to development as defined by international law. It involves identifying existing gaps or obstacles in the application of this right and proposing actionable recommendations for improving its realisation in the South African context. Using the right to development as provided for in the UNDRTD,¹⁴ the Draft International Covenant on the Right to Development,¹⁵ which has been submitted at the UN General

¹³ UNDRTD.

¹⁵ Draft International Covenant on the Right to Development. Available at: <https://www.ohchr.org/en/news/2023/09/intergovernmental-working-group-right-development-presents->

Assembly for deliberation and potential adoption and its legal basis under the African Charter,¹⁶ as the entry point, This study demonstrates that the absence of formal recognition of the right to development in the South African legal system constitutes not only a barrier to its realisation but also a violation of fundamental human rights.

1.3 ASSUMPTIONS/HYPOTHESES

This thesis contends that the explicit legal recognition and practical enforceability of the right to development represent a fundamental component of South Africa's human rights framework, especially in confronting the nation's complex developmental challenges. At the core of this argument is the proposition that the lack of clear legal acknowledgment and implementation of the right to development substantially compromises the rights and entitlements of impoverished, vulnerable, and marginalised people. This deprivation restricts their access to human development, freedom, prosperity, and the comprehensive enjoyment of all human rights. In light of this concern, the principal hypothesis of this research is formulated as follows: despite the right to development being only implicitly acknowledged within the South African constitutional framework, it has attained a de facto legal status and enforceability.

The assertion is grounded in South Africa's obligations under various international and African human rights instruments, which mandate the country to respect, protect, promote, and fulfil human rights broadly, including the right to development. The obligations arising from these instruments necessitate the establishment of conducive conditions for the realisation and implementation of the right to development. This entails a multifaceted approach, involving legislative action, policy development, resource allocation for developmental initiatives, and the dismantling of barriers that hinder progress. Such efforts are essential to empower individuals to contribute to and partake in development as an inherent human right.

human-rights-council-draft and <https://digitallibrary.un.org/record/4018149?ln=en&v=pdf> (accessed 30 September 2024).

¹⁵ The African Charter.

1.4 RESEARCH QUESTIONS

The central question guiding this study is: What is the legality of the right to development in South Africa? To comprehensively address this overarching question, five subsidiary questions are examined: First, what is the historical context of human rights and development, and how did the right to development emerge? Second, what are the substantive components of the right to development as articulated in international human rights law, and what corresponding obligations arise from these components? Third, what are the substantive components of the right to development within the framework of African regional human rights systems, and what corresponding obligations are associated with these components? Fourth, what is the legal status of the right to development within the South African legal and institutional framework, and what measures are necessary to ensure its realisation? Fifth, what specific obligations does the South African government have regarding the right to development?

These questions collectively, aimed to elucidate the complexities surrounding the right to development in South Africa and its implications for human rights and the domestic framework for development.

1.5 MOTIVATION

The motivation for this doctoral thesis arises from the pressing need to critically analyse the legality of the right to development within the South African context, a topic that has gained increasing relevance amid ongoing socio-economic challenges and historical injustices. The right to development is fundamental for addressing the multifaceted issues of poverty, inequality, and exclusion that persist in South Africa, particularly for marginalised and vulnerable people. Despite the constitutional guarantees of human rights,¹⁷ the explicit recognition and operationalisation of the right to development remain insufficiently explored, thereby necessitating an in-depth investigation into its legal status

¹⁶ Miller H & Redhead R 2019. 'Beyond Rights-Based Approaches? Employing a Process and Outcomes Framework.' *The International Journal of Human Rights* 23(5): 699-718, 706.

and implications. South Africa's transition to democracy marked a significant turning point in its commitment to human rights, enshrined in the Constitution.¹⁸ However, the practical realisation of these rights, including in particular the right to development, continues to be hampered by systemic issues such as corruption, inadequate governance, and socio-economic disparities. This disjunction between constitutional promises and lived realities highlights the importance of assessing the legal frameworks that govern the right to development. Understanding how this right can be effectively integrated into national legislation and policy is crucial for advancing social justice and sustainable development.¹⁹

Traditionally, development has been conceptualised primarily in terms of economic prosperity and growth. Scholars such as Arndt²⁰ and Todaro et al,²¹ and Sant'Ana²² have noted that many countries have historically associated development with resource maximisation to enhance wealth and status.²³ This viewpoint was frequently grounded in the assumption that economic advancement would inherently benefit society via market-driven 'trickle-down' effects or state-led social policies.²⁴ However, such a limited focus neglected the profound implications of economic growth on poverty alleviation, unemployment, inequality, and broader measures of human well-being. A global consensus has now emerged regarding the interdependence and convergence of human rights and development, this convergence of human rights and development discourse presents a unique opportunity to reframe development as an inalienable human right

¹⁷ Constitution of South Africa.

¹⁹ Decker K, McInerney-Lankford S & Sage C 2005. 'Human Rights and Equitable Development': Ideals, Issues and Implications, 4.

²⁰ Arndt H 2008. 'Economic Development: A Semantic History'. In Chari & Corbridge, 51-57.

²¹ Todaro MP & Smith SC 2003. *Economic Development*. 6th edn. Pearson Education: London; Sant'Ana M 2008. 'The Evolution of the Concept of Development: From Economic Growth to Human.'

²² Sant'Ana M 2008. 'The Evolution of the Concept of Development: From Economic Growth to Human.' *Inter-University Attraction Pole Working Paper*.

²³ Arndt 2008:54.

²⁴ Sant'Ana 2008:5.

rather than a mere economic objective.²⁵ This perspective aligns with global development and human rights instruments, such as the UNDRTD, which advocate for a holistic approach to human development.²⁶ By situating the right to development within this broader human rights framework, this research highlights its significance in fostering equality and dignity for all South Africans, especially the poor, vulnerable and marginalised.

The interdisciplinary nature of this study further enhances its relevance. By drawing on theories from law, development studies, and social sciences, the research not only contribute to legal scholarship but also inform policy discourse and advocacy efforts aimed at promoting the right to development. The findings of this thesis are expected to provide practical recommendations for the South African government, civil society, and international organisations, facilitating the implementation of the right to development in ways that empower individuals and communities.

Therefore, the motivation for this research is rooted in the urgent need to critically examine the legal status of the right to development in South Africa, as well as its potential to drive meaningful change in the lives of those who continue to face systemic barriers. This study aspires to contribute to the ongoing dialogue on human rights and development, advocating for a more equitable and just society where the right to development is recognised and realised as a fundamental human right.²⁷

²⁵ McInerney-Lankford S 2009. 'Human Rights and Development: A Comment on Challenges and Opportunities from a Legal Perspective.' *Journal of Human Rights Practice* 1(1): 51-82; McInerney-Lankford and Sano 2010:35.

²⁶ Tomás A 2003. A Human Rights Approach to Development: Primer for Development Practitioners. *Prepared for a Training Course on a Human Rights Approach to Development Organised by UNDP Nepal (August 2003)*.

²⁷ Ngang CC 2018. 'Towards a Right-to-Development Governance in Africa.' *Journal of Human Rights* 17(1): 107-122, 112.

1.6 REVIEW OF THE LITERATURE

The right to development has extensively been explored in scholarly literature, reflecting its contentious nature and the ongoing debates surrounding its conceptual clarity and international acceptance. This section of the chapter offers a comprehensive review of the historical evolution of human rights and development, charting the emergence of the right to development. It delineates the substantive content of the right to development as enshrined in international human rights law, examines the associated government obligations, and analyses its normative status within the African regional human rights framework. Furthermore, the section evaluates the legal position of the right to development in South Africa, investigating the institutional and legal mechanisms available for its realisation, alongside the corresponding duties incumbent upon the South African government.

1.6.1 What is the historical context of human rights and development and the emergence of the right to development?

In the aftermath of the Second World War, the establishment of international institutions such as the League of Nations later succeeded by the United Nations (UN) played an essential role in addressing human rights and development concerns, including the redefinition of the global development agenda.²⁸ Hopper proffers that this period 'provided the overarching institutional framework within which contemporary development takes place.'²⁹ During this transformative era, Rist states that the UN shifted its focus from an economic growth paradigm to a social development framework, emphasising

²⁸ LoN 1919. 'Covenant of the League of Nations' (adopted on 29 April 1919 and entered into force on 10 January 1920); Ware A 2010. 'Human Rights and the Right to Development: Insights into the Myanmar Government's Response to Rights Allegations. In ASAA 2010: *Proceedings of the 18th Asian Studies Association of Australia Biennial Conference of the ASAA: Crises and Opportunities: Past, Present, and Future*. Asian Studies Association of Australia, 1-20).

²⁹ Hopper P 2012. *Understanding Development: Issues and Debates*. Cambridge: Polity Press, 7.

decolonisation, human rights,³⁰ and community participation as essential components for successful social development initiatives.³¹ This was corroborated by the UN Development Programme (UNDP),³² through the merger of the Expanded Programme of Technical Assistance, advocating for a collaborative approach that connected communities and governments to enhance knowledge sharing and resource allocation, ultimately aimed at improving national standards of living.³³ This period also marked initial efforts to recognise the theoretical links between development and human rights. The UN Charter³⁴ advanced the protection of both human rights and development on economic and social fronts, with Article 55 explicitly acknowledging their interrelated nature.³⁵ However, Jolly et al. argue that the connection between human rights and development remained largely rhetorical, failing to translate into practical applications during the early years of the UN's existence.³⁶

Despite the adoption of the Universal Declaration of Human Rights (UDHR),³⁷ scholars like Alston and Uvin stress that the relationship between human rights and development remained tenuous, as these concepts were often treated separately.³⁸ Sano corroborates

³⁰ Rist G 2008. *The History of Development: From Western origins to Global Faith*. London & New York: Zed Books, 89.

³¹ Midgley 2014:28-39.

³² The UNDP's mandate focuses on eradicating poverty, promoting democratic governance, upholding the rule of law, and fostering inclusive institutions. The organisation advocates for transformative change and connects countries with knowledge, experience, and resources to empower people in improving their lives.

³³ Rist 2008: 85-89.

³⁴ United Nations General Assembly 1945. United Nations Charter (adopted 26 June 1945 and entered into force 24 October 1945).

³⁵ Art 55 of the UN Charter.

³⁶ Jolly R et al 2009. 'The UN and Human Development.' United Nations Intellectual History Project (Briefing note 8), 1.

³⁷ United Nations General Assembly 1948. Universal Declaration of Human Rights (adopted on 10 December 1948).

³⁸ Alston P 2004. 'A Human Rights Perspective on the Millennium Development Goals.' *Background paper for the UN Millennium Project Task Force on Poverty and Economic Development*. UN Millennium Project, New York, Para 10; Uvin P 2007. 'From the Right to Development to the Rights-Based Approach: How "Human Rights" Entered Development.' *Development in Practice* 17(4-5): 597-606, 597.

this by stating that development was frequently viewed as outside the purview of human rights,³⁹ leading to a lack of attention from development organisations towards how the recognition and fulfilment of rights could facilitate developmental progress.⁴⁰ Gready and Ensor,⁴¹ along with Filmer-Wilson⁴² further elucidate that the adoption of the International Covenant on Civil and Political Rights (ICCPR)⁴³ and the International Covenant on Economic, Social and Cultural Rights (ICESCR)⁴⁴ as distinct sets of rights exacerbated the complexities surrounding the interplay of human rights and development. While the relationship between human rights and development remained complex globally, significant obstacles continued in achieving comprehensive human development.

Through this context the right to development emerged and changed the global development discourse. The origins of the right to development can be traced back to a pivotal moment in 1966, when Senegalese Foreign Minister Doudou Thiam articulated the need for developing countries to reaffirm their right to development during the 21st Session of the UN General Assembly.⁴⁵ Kéba M'baye, a Senegalese jurist, later provided a foundational definition of the right to development in a 1972 lecture at the International Institute for Human Rights in Strasbourg, France, positing that 'development is a right for

³⁹ Sano HO 2000. 'Development and Human Rights: The Necessary, but Partial Integration of Human Rights and Development.' *Human Rights Quarterly* 22: 734–752, 739.

⁴⁰ de Man A 2018. 'Tracing the Evolution of the notion "development": From economic interests to human welfare; See also Filmer-Wilson 2005:214.

⁴¹ Gready P & Ensor J 2005. *Reinventing Development: Translating Rights-Based Approaches from Theory into Practice*. London & New York: Zed Books, 17.

⁴² Filmer-Wilson 2005:215.

⁴³ United Nations General Assembly 1966(a). International Covenant on Civil and Political Rights (adopted on 16 December 1966 and entered into force on 23 March 1976).

⁴⁴ United Nations General Assembly 1966(b). International Covenant on Economic, Social and Cultural Rights (adopted on 16 December 1966 and entered into force 3 January 1976).

⁴⁵ Whelan DJ 2015. 'Under the Aegis of Man': The Right to Development and the Origins of the New International Economic Order.' *Humanity: An International Journal of Human Rights, Humanitarianism, and Development* 6(1): 93-108.

all [including individuals and peoples].⁴⁶ M'baye's proposal offered a fresh perspective on the subject of development. According to Romola, this perspective redirected the conception of development from a state-centered priority to a fundamental human right,⁴⁷ drawing a distinction between development as a human right and as a legal construct.⁴⁸ To elucidate the scope of the right to development, the United Nations General Assembly in 1977 commissioned a study to examine its international dimensions in relation to other human rights, explicitly taking into account the principles of the New International Economic Order.⁴⁹ In response, the UN entrusted the High Commissioner for Human Rights with the mandate to promote balanced and sustainable development for all,⁵⁰ thereby affirming the realisation of the right to development as articulated in the UNDRTD.

The right to development was first codified in the African Charter, adopted in 1981,⁵¹ and subsequently reaffirmed by the UNDRTD in 1986,⁵² marking a significant turning point in the international discourse on development. This declaration recognised development as an inalienable human right, entitling every individual to participate in, contribute to, and benefit from economic, social, cultural, and political development.⁵³ The incorporation of human rights principles into the development process forms the foundation of this right,

⁴⁶ See Kéba M'Baye 1972. 'Le Droit au Développement Comme un Droit de l'Homme: Leçon Inaugurale de la Troisième Session d'Enseignement de l'Institut International des Droits de l'Homme' 5 *Revue des Droits de l'Homme*, 503.

⁴⁷ Adeola R 2018. 'The Right to Development under the African Charter: Is there an Extraterritorial Reach?.' *Perspectives on the Right to Development*, 34-46, 35; M'baye 1972:515.

⁴⁸ Dieng A 1987. 'Background to the Growth of the Right to Development: The Role of Law and Lawyers in Development.' *Refugees and Development in Africa*, 55.

⁴⁹ United Nations High Commissioner for Human Rights 2010.

⁵⁰ Marks S 2004. 'The Human Right to Development: Between Rhetoric and Reality.' *Harvard Human Rights Journal* 17: 137-168, 138.

⁵¹ African [Banjul] Charter on Human and Peoples' Rights (adopted 27 June 1981 entered into force 21 October 1986).

⁵² United Nations Declaration on the Right to Development ((adopted 4 December 1986)).

⁵³ Art 1(1) of the UNDRTD provides that '[t]he right to development is 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.'

thereby imposing binding obligations upon governments. Sengupta emphasises that the right to development encompasses both the processes and outcomes of development.⁵⁴ Furthermore, the UN Charter, the UDHR, and the two international human rights covenants implicitly contain provisions supporting this right.

Article 1 of the UNDRTD affirms the right to economic, social, cultural, and political development, underscoring the centrality of self-determination to the realization of all human rights and fundamental freedoms.⁵⁵ Udombana observes that the Declaration illustrate the composite nature of the right to development, acknowledging the interdependence of all human rights rather than treating them as discrete and isolated entitlements.⁵⁶ South Africa's legal framework reflects this perspective, as evidenced in Chapter 2 of the 1996 Constitution, which reaffirms the intrinsic connection between civil and political rights and economic, social, and cultural rights.⁵⁷ Sengupta contends that the right to development is achievable when at least one right (e.g., the right to adequate housing) is progressively realised without infringing upon others.⁵⁸ Kamga further argues that any violation of civil and political rights or socio-economic rights undermines the right to development, which inherently calls for active participation and cooperation at international, regional, and national levels to advance human rights and enhance overall quality of life.⁵⁹

Since the adoption of the UNDRTD, there has been a growing consensus that human rights and development mutually reinforce each other. The 1990s saw a more assertive

⁵⁴ Sengupta 2004:189.

⁵⁵ Art 1 of the UNDRTD.

⁵⁶ Udombana NJ 2000. 'The Third World and the Right to Development: Agenda for the Next Millennium.' *Human Rights Quarterly* 22(3): 753-787, 767.

⁵⁷ Constitution of the Republic of South Africa, 1996.

⁵⁸ Sengupta 2004: 183.

⁵⁹ Kamga SAD 2012. *Human Rights in Africa: Prospects for the Realisation of the Right to Development Under the New Partnership for Africa's Development* (Doctoral Dissertation, University of Pretoria), 67; Ware 2010: 4; Bunn I 2000. 'The Right to Development: Implications for International Economic Law.' *American University International Law Review*, 15(60): 1425-1468.

linkage, marked by the emergence of rights-based approaches (RBA),⁶⁰ which integrate human rights 'principles and standards' into development practices.⁶¹ This shift fundamentally altered the global development landscape,⁶² positing that human rights are essential to fostering a socially oriented order.⁶³

1.6.2 What is the content of the right to development under international human rights law and its corresponding obligations?

The notion of the right to development has been a central topic in the discourse surrounding international human rights since the formulation of the UNDRTD. During the establishment of the international Bill of Rights, as cited by Johnson and referencing Eleanor Roosevelt, significant emphasis was placed on the importance of development rights. As such, Roosevelt asserted that 'we 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.'⁶⁴ This perspective resonates throughout the UN Charter and the UDHR, both of which implicitly underline development as an essential human entitlement.

According to Arts and Tamo, the right to development is imbued with legal obligations within international human rights law.⁶⁵ As such, the UN Charter highlights the necessity of 'international cooperation' as a prerequisite for the realisation of all human rights and promotes the 'economic and social progress of all peoples.'⁶⁶ The Preamble to the UN Charter affirms a commitment to fundamental human rights, dignity, and worth, while

⁶⁰ Marks SP 2003. 'The Human Rights Framework for Development: *Seven Approaches. Reflections on the Right to Development.*' SAGE Publications, India 1-29, 5.

⁶¹ Sano 2000: 740-741.

⁶² Sano 2000: 740-751.

⁶³ Banik D 2010. 'Support for Human Rights-Based Development: Reflections on the Malawian Experience.' *The International Journal of Human Rights* 14(1): 34-50, 37-38.

⁶⁴ Johnson MG 1987. 'The Contributions of Eleanor and Franklin Roosevelt to the Development of International Protection for Human Rights.' *Human Rights Quarterly* 19-36.

⁶⁵ Arts K & Tamo A 2016. The Right to Development in International Law: New Momentum Thirty Years Down the Line? *Netherlands International Law Review* 63: 221-249.

⁶⁶ See the Preamble to the UN Charter; See also UNDRTD.

advocating for social progress and improved living standards through economic and social advancement.⁶⁷ Rich posits that the right to development embodies principles of morality, solidarity, equality, and justice, thus placing an obligation on developed nations to assist developing countries.⁶⁸ Articles 55 and 56 of the UN Charter assigns both the UN and its member states the responsibility of promoting economic and social development alongside universal respect for human rights,⁶⁹ serving as critical references for the right to development.

Tomuschat proffers that the UDHR is widely regarded as a foundational document for human rights, with many of its provisions recognised as customary international law.⁷⁰ It articulates that 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 world.'⁷¹ Article 28 further stipulates that 'everyone is entitled to a social and international order in which the rights and freedoms set forth in this Declaration can be fully realized.'⁷² Collectively, the rights enshrined in the UDHR reinforce the comprehensive nature of the right to development. Chowdhury and De Waart argue that by including provisions related to development in the UDHR,⁷³ the global community has committed to taking both collective and individual actions to ensure the realisation of all rights, including the right to development.

⁶⁷ The Preamble to the UN Charter calls on the international community 'to employ international machinery for the promotion of the economic and social advancement of all peoples.'

⁶⁸ Rich RY 1983. 'The Right to Development as an Emerging Human Right.' *Virginia Journal of International Law* 23: 289-295, 289.

⁶⁹ Art 55 & 56 of the UN Charter.

⁷⁰ Tomuschat C 2003. *Human Rights: Between Idealism and Realism*. Oxford University Press, 63-64; Viljoen F 2012. *International Human Rights Law in Africa*. Oxford University Press, Oxford, 30; Simma B and Alston P 1988. 'The Sources of Human Rights Law: Custom, Jus Cogens, and General Principles.' *Australian Yearbook of International Law* 82, 90-95.

⁷¹ The Preamble to the UDHR.

⁷² Art 28 of the UDHR.

⁷³ Chowdhury SR & de Waart, PIJM 1992. 'Significance of the Right to Development: An Introductory View.' In Chowdhury SR, Denters EMG & de Waart PJIM (eds) 8-10.

Kamga posit that the right to development is intrinsically linked to existing human rights.⁷⁴ In support, Hoag proffers that the ICCPR and the ICESCR serve as vital legal sources that stem from the UDHR, sharing a common content and conceptual framework.⁷⁵ Both Covenants recognise key components of the right to development, namely self-determination and international cooperation, and they enshrine specific rights—such as the right to work, education, and social security—that positively influence the right to development.⁷⁶ In a dissenting view, Vandenberghe contends that the current human rights framework sufficiently addresses the right to development, rendering its explicit accommodation unnecessary and potentially duplicative.⁷⁷ This perspective overlooks the fact that the right to development is a recognised inalienable human right, characterised by unique terms (such as creation of domestic policies for state parties) that give it significance and meaning.⁷⁸

Ibhawoh posits that the UNDRTD of 1986 consolidates the principles outlined in the ICCPR and ICESCR into a cohesive framework, emphasising the indivisibility and interdependence of all human rights.⁷⁹ It asserts that equal attention must be given to the implementation, promotion, and protection of civil, political, economic, social, and cultural rights.⁸⁰ Subedi provides that the UNDRTD uniquely articulates development-related rights and extends these rights where applicable, representing one of the few international instruments that define human rights as entitlements of both individuals and peoples.⁸¹

⁷⁴ Kamga 2012: 67.

⁷⁵ Hoag RW 2007. 'International Covenant on Civil and Political Rights.' *Human Rights*, 544–545.

⁷⁶ See common Article 1 of the ICCPR and the ICESCR; See also the Preamble to the UNDRTD.

⁷⁷ Vandenberghe A 2013. 'The Right to Development in International Human Rights Law: A Call for its Dissolution.' *Netherlands Quarterly of Human Rights* 31(2): 187-209, 209.

⁷⁸ Teleki M 2017. 'Framing of the Right to Development Policy in the Context of South Africa.' *Africa Insight* 47(3): 78-94.

⁷⁹ Ibhawoh B 2011. 'The Right to Development: The Politics and Polemics of Power and Resistance.' *Human Rights Quarterly* 33: 76-82, 75.

⁸⁰ Art 6(2) of the UNDRTD; see also Preamble.

⁸¹ Subedi SP 2021. Declaration on the Right to Development. *United Nations Audiovisual Library of International Law* 1-9; See also Art 1(1) of the UNDRTD.

As such, Article 8(1) of the UNDRTD specifies essential rights for development, stating 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.⁸²

As provided, the right to development has garnered recognition in various international declarations, such as the 1992 Rio Declaration on Environment and Development⁸³ and the Vienna Declaration of Human Rights and Programme of Action,⁸⁴ which reaffirmed the right's significance in 1993. Additionally, the right to development was addressed at the 2012 United Nations Conference on Sustainable Development.⁸⁵ Also, a Draft International Covenant on the Right to Development has been formulated and submitted to the UN General Assembly for consideration and potential adoption.⁸⁶ South Africa, alongside other nations of the Group of 77 (G77), which currently includes 136 developing countries, has played a significant role in advocating for the drafting of this Covenant.⁸⁷ The Draft Covenant comprises a Preamble and 38 provisions that delineate the

⁸² Art 8(1) of the UNDRTD.

⁸³ United Nations General Assembly 1992. Rio Declaration on Environment and Development (adopted 14 June 1992).

⁸⁴ Right to development is provided in Art 10 and 11 of the Vienna Declaration and since the Vienna conference, virtually every Conference reaffirms the right to development. See United Nations 1993. *Vienna Human Rights Declaration and Programme of Action*.

⁸⁵ United Nations General Assembly 2015. Transforming our World: The 2030 Agenda for Sustainable Development (adopted on 25 September 2015).

⁸⁶ Draft International Covenant on the Right to Development. Available at: <https://digitallibrary.un.org/record/4018149?ln=en&v=pdf> (accessed 30 September 2024).

⁸⁷ Intergovernmental Working Group on the Right to Development Presents to the Human Rights Council a Draft International Covenant on the Right to Development. Available at https://www.ungeneva.org/en/news-media/meeting-summary/2023/09/le-conseil-est-prie-de-transmettre-le-projet-de-pacte?utm_source=chatgpt.com (accessed 07 July 2025).

fundamental principles guiding its implementation, clarify its relationship with other human rights, and outline general obligations for State Parties.

The Draft Covenant, when it is eventually adopted, will complement the African Charter in enhancing the right to development as an enforceable human right with legally binding obligations. This integration will enhance the framework for promoting and protecting this right within the international and African regional context, reinforcing the commitment of states to uphold and fulfil their obligations on the right to development.

1.6.3 What is the right to development under the African regional human rights system?

Development is widely recognised as a multifaceted concept encompassing legal, economic, social, and cultural dimensions. Despite its comprehensive nature, the international status of the right to development remains contested and non-binding. According to Mahalu, in contrast to many other human rights frameworks globally, the African human rights system uniquely elevates the right to development to the status of a fundamental human right.⁸⁸ Moreover, it goes beyond mere recognition by institutionalising mechanisms within the African Charter to enforce and uphold its legal binding status.⁸⁹ Thus, within the African context, the right to development is not only affirmed but also protected through legally enforceable provisions, distinguishing the African human rights system in its approach to promoting the right to development.

Murray proffers that the African regional human rights system is rooted in the historical struggles against colonialism and apartheid.⁹⁰ As Gawanas notes, the establishment of this system arose from a concrete social and economic struggle, emphasising self-

⁸⁸ Mahalu CR 1988. 'Human Rights and d Development: An African Perspective.' *Leiden Journal of International Law* 1(1): 15-24,15.

⁸⁹ Mahalu 1998: 23.

⁹⁰ Murray R 2004. *Human Rights in Africa. From the OAU to the African Union*. Cambridge University Press: Cambridge.

determination and freedom from foreign domination.⁹¹ The Organisation of African Unity (OAU),⁹² which later evolved into the African Union (AU), laid the groundwork for this system by adopting several significant instruments, including the African Charter,⁹³ including the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa,⁹⁴ the African Youth Charter,⁹⁵ the African Charter on the Rights and Welfare of the Child,⁹⁶ and the African Convention on the Conservation of Nature and Natural Resources.⁹⁷ These instruments explicitly engage with the right to development, thereby consolidating its status within the regional legal framework. Notably, the African Charter stands out as the first legally binding instrument to articulate the right to development. Article 22 affirms that all peoples possess the right to development and places a corresponding obligation on state parties to ensure its realisation. This provision underscores the indivisibility and interdependence of civil, political, economic, social, and cultural rights, emphasising that the fulfillment of one cannot be separated from the enjoyment of the others.

The transition from the OAU to the AU marked a significant shift in the approach to human rights in Africa. The AU's Constitutive Act reaffirms the commitment to promote and protect human rights,⁹⁸ with Article 3(h) mandating adherence to the African Charter and other relevant instruments.⁹⁹ Rudman notes that key bodies like the African Commission

⁹¹ Gawanas B 2009. 'The African Union: Concepts and Implementation Mechanisms Relating to Human Rights', 136.

⁹² Organisation of African Unity (adopted on 25 May 1963). Available at <https://au.int/en/treaties/oau-charter-addis-ababa-25-may-1963>. (accessed 23 November 2024).

⁹³ Art 22 of the African Charter on Human and Peoples Rights.

⁹⁴ Art 19 of the Protocol on the Rights of Women in Africa.

⁹⁵ Art 10 of the African Youth Charter.

⁹⁶ Art 5 of the ACRWC.

⁹⁷ Art 3(2) of the African Convention on the Conservation of Nature and Natural Resources.

⁹⁸ Constitutive Act of the African Union 2000 (Adopted in Lomé, Togo, on 11 July 2000 and entered into force on 26 May 2001).

⁹⁹ Art 3(h) of the Constitutive Act of the African Union provide that the objectives of the Union shall be to: 'Promote and protect human and peoples' rights in accordance with the African Charter on Human and Peoples' Rights and other relevant human rights instruments.

on Human and Peoples' Rights (the African Commission) and the African Court of Human and Peoples' Rights (the African Court) have been established to oversee the implementation of these rights.¹⁰⁰ Unlike its predecessor, the AU has integrated human rights considerations across all its organs and activities, facilitating a more comprehensive approach to development and human rights. The African Commission has been instrumental in interpreting and enforcing the right to development, emphasising the need for states to formulate national policies that enhance the well-being of their populations. According to Magashi, the African Commission, the African Court, and the African Committee of Experts bear the mandate to monitor states' compliance with human rights standards and to adjudicate cases involving alleged human rights violations.¹⁰¹

Ayeni posits that the AU has significantly advanced the human rights protection system in Africa by adopting various human rights instruments and strengthening existing institutions.¹⁰² Gawanas asserts that this development has fostered an enabling environment conducive to the vigorous promotion and protection of human rights.¹⁰³ The key institutions within this framework include the Pan-African Parliament (PAP) and the Economic, Social and Cultural Council (ECOSOCC), among others.¹⁰⁴ In Stapel's view, unlike its predecessor, the OAU, which limited human rights oversight primarily to the African Commission, the AU has proactively integrated human rights, including the right to development into all its organs, activities and programmes.¹⁰⁵

¹⁰⁰ Rudman A 2021. 'The African Charter: Just one Treaty Among Many? The Development of the Material Jurisdiction and Interpretive Mandate of the African Court on Human and Peoples' Rights. *African Human Rights Law Journal* 21(2): 699-727.

¹⁰¹ Magashi SB 2016. *The Human Right to Development in Nigeria* (Doctoral Dissertation, Stellenbosch University).

¹⁰² Ayeni VO 2023. 'The African Human Rights System: A Critical Appraisal.' In *Research Handbook on the Politics of Human Rights Law*. Edward Elgar Publishing, 365-389.

¹⁰³ Gawanas 2009: 140.

¹⁰⁴ Mayrhofer M, Chavez C, Hegde VG, Killander M, Larik J, Nkrumah B & Salmón E 2014. *International Human Rights Protection: Institutions and Instruments*. FRAME.

¹⁰⁵ Stapel S 2022. 'The Organization of African Unity and African Union: Following the Design of Reference Models.' *Regional Organizations and Democracy, Human Rights, and the Rule of Law: The African Union, Organization of American States, and the Diffusion of Institutions* 237-275.

Odinkalu proffers that the African Charter stands out as the foremost treaty in Africa for the promotion and protection of human rights.¹⁰⁶ Notably, Path asserts that the African Charter is the first enforceable instrument to explicitly enshrine the right to development.¹⁰⁷ Path's perspective highlights the African Charter as a pioneering enforceable instrument that explicitly incorporates the right to development, marking a critical advancement in international legal frameworks. In the same breath, Heyns stresses that the African Charter stipulates that all individuals and states, including South Africa, must contribute to the realisation and enjoyment of rights and freedoms, particularly emphasising the right to development.¹⁰⁸ Heyns' assertion highlights the imperative outlined in the African Charter that mandates the collective responsibility of individuals and states in advancing the fulfilment and enjoyment of rights and freedoms, with specific emphasis placed on the right to development. Dike posits that the African Charter underlines the interdependence of civil and political rights with economic, social, and cultural rights, advocating for a holistic understanding of human rights.¹⁰⁹ Article 1 of the Charter mandates AU member states, including South Africa, to take measures to recognise and implement the rights, duties, and freedoms enshrined within it,¹¹⁰ specifically addressing the right to development as articulated in Article 22.¹¹¹

¹⁰⁶ Odinkalu CA 2003. 'Back to the Future: The Imperative of Prioritizing for the Protection of Human Rights in Africa. *Journal of African Law* 47(1): 1-37; Special Reports, Advertorial 26 June 2014. Protecting human rights in Africa. Available at: <https://mg.co.za/article/2014-06-26-protecting-human-rights-in-africa/> (accessed 1 May 2024).

¹⁰⁷ Plath C 2019. 'Nairobi, 1981: The African Charter on Human and Peoples.' *Rights In Online Atlas on the History of Humanitarianism and Human Rights* 4.

¹⁰⁸ Heyns C 2003. 'The African Regional Human Rights System: The African Charter.' *Penn St. L. Rev.* 108: 679; Preamble to the African Charter.

¹⁰⁹ Dike F 2023. 'Analysis of African Charter on Human and Peoples' Rights (ACHPR).' Available at: https://www.researchgate.net/publication/370977902_Analysis_Of_African_Charter_on_Human_And_Peoples'_Rights_ACHPR_By_Frank_Dike_2023#:~:text=It%20draws%20inspiration%20from%20the%20Universal%20Declaration%20of,of%20peoples%2C%20such%20as%20the%20right%20to%20self-determination. 1-7 (accessed 1 May 2024).

¹¹⁰ Art 1 of the African Charter.

¹¹¹ Art 22 of the African Charter.

Nevertheless, South Africa continues to confront deep-seated challenges most notably pervasive poverty, high unemployment, and entrenched inequality which significantly hinder the realisation of human development and well-being, as well as the full enjoyment of human rights, including the right to development. Drawing from Amartya Sen's framework, Ngang posits that freedom is important for development and that the elimination of impediments limiting human capabilities is essential.¹¹² As a state party to the African Charter, South Africa is obliged to eliminate barriers to development to ensure the realisation of the right to development. Article 22 of the Charter unequivocally guarantees the right to development for all peoples and imposes a collective and individual obligation on state parties to ensure its realisation.¹¹³ This obligation necessitates that governments formulate appropriate national development policies aimed at the continuous improvement of the well-being of the entire population, while also creating favourable national and international conditions conducive to the realisation of the right to development.¹¹⁴ In fulfilling this obligation, countries such as Cameroon,¹¹⁵ Ethiopia,¹¹⁶ Uganda,¹¹⁷ Democratic Republic of Congo,¹¹⁸ Benin¹¹⁹ and Malawi¹²⁰ have incorporated the right to development into their domestic constitutions, thereby giving it legal recognition and protection.¹²¹

The African Commission on Human and Peoples' Rights has adjudicated several landmark cases that elucidate the right to development, including the *Centre for Minority*

¹¹² Ngang CC 2019. 'Radical Transformation and a Reading of the Right to Development in the South African Constitutional Order.' *South African Journal on Human Rights* 35(1): 25-49, 26.

¹¹³ Art 22(1) of the African Charter. See also Art 3(1) of the UNDRTD.

¹¹⁴ See Art 2(3) of the UNDRTD,

¹¹⁵ Constitution of Cameroon, 1996 Preamble, Para 3.

¹¹⁶ Art 43 of the Ethiopian Constitution, 1994.

¹¹⁷ Art 9 of the Constitution of Uganda, 1995.

¹¹⁸ Art 58 of the Constitution of the Democratic Republic of Congo, 2005.

¹¹⁹ Art 9 of the Constitution of the Republic of Benin, 1990.

¹²⁰ Section 30 of the Malawi Constitution, 1994.

¹²¹ See analysis of the right to development in these countries in Kamga, *The Right to Development* 202-217.

Rights Development (CEMIRIDE) v Kenya (on behalf of the *Endorois*).¹²² In this case, the applicants contended that the *Endorois* community had been forcibly evicted from their ancestral lands without adequate compensation, severely impacting their livelihoods and cultural practices.¹²³ In its ruling, the African Commission elucidated the right to development as encompassing both constitutive and instrumental elements that must be realised concurrently.¹²⁴ The decision highlighted three essential pillars of the right to development: freedom of choice, effective participation, and the right to enjoy wealth and natural resources.¹²⁵ In alignment with these principles, the UN independent expert¹²⁶ on the elements of the right to development emphasised the necessity for active,¹²⁷ free, and meaningful participation in development processes, advocating for equity, non-discrimination, and accountability.¹²⁸

The African Commission's decision not only urges states to ensure the realisation of the right to development through the formulation of policies and programmes aimed at enhancing individuals' rights but also establishes minimum standards to protect the rights of beneficiaries during the pursuit of development objectives. This comprehensive approach reflects a commitment to a rights-based framework that recognises the complexities of development and the imperative of promoting human rights throughout the process.

¹²² *Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council v Kenya*.

¹²³ *Endorois*, Para 1.

¹²⁴ *Endorois*, Para 277; Lynch G 2012. 'Becoming Indigenous in the Pursuit of Justice: The African Commission on Human and Peoples' Rights and the Endorois.' *African Affairs* 111(442): 24-45.

¹²⁵ Art 21 of the African Charter.

¹²⁶ United Nations Centre for Human Rights 1995: 2.

¹²⁷ *Endorois*, Para 277.

¹²⁸ Art 2(3) of the UNDRTD

1.6.4 What is the legal status and how to ensure the realisation of the right to development in the South African legal and institutional framework?

In the South African legal and institutional framework, the realisation of the right to development is underpinned by a comprehensive adherence to international and regional human rights instruments. According to Sengupta, development is viewed as the process through which human rights are ultimately achieved.¹²⁹ Sengupta's assertion resonates with South Africa's post-apartheid vision, where addressing historical injustices and fostering inclusive development are central goals. The integration of human rights into development efforts not only supports socio-economic progress but also helps to create an environment where people can exercise their rights fully.

Hassen posits that in South Africa, the Constitution plays an important role, recognised globally for its robust Bill of Rights that includes justiciable socio-economic rights.¹³⁰ Winkler state that these rights (such as the right to water) are crucial for addressing the needs of the poor, vulnerable, and marginalised.¹³¹ Viljoen and Orago underscore the fact that the South African government's commitment to international and regional human rights law is evident through its ratification and accession to numerous treaties, including the ICESCR, the ICCPR, and regional instruments such as the African Charter and its protocols.¹³² These instruments enshrine provisions explicitly addressing the right to development, affirming South Africa's obligation to ensure comprehensive development that respects human rights. In Langford's view, the influence of international and regional human rights law on South African jurisprudence is profound, shaping the interpretation

¹²⁹ Sengupta A 2017. 'On the Theory and Practice of the Right to Development.' In *Challenges in International Human Rights Law*, 667-720.

¹³⁰ Hassen E 1998. *The Soul of a Nation: Constitution-making in South Africa*, Oxford University Press, Cape Town.

¹³¹ Winkler I 2008. 'Judicial Enforcement of the Human Right to Water—Case Law from South Africa, Argentina and India.' *Law, Social Justice and Global Development Journal*, 1-19, 4.

¹³² Viljoen F & Orago N 2014. An Argument for South Africa's Accession to the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights in the Light of its Importance and Implications. *Potchefstroom Electronic Law Journal* 17(6): 2555-2599.

and justiciability of human rights within the national legal system.¹³³ By incorporating these principles into its legal framework, Ngang posits that South Africa has fostered a human rights culture that aims to protect and promote the rights of all individuals, particularly in the context of socio-economic development.¹³⁴ However, as Heywood notes, challenges persist in translating these legal commitments into tangible improvements in the lives of all South Africans, especially the marginalised groups.¹³⁵ In other words, the implementation of these commitments remains inconsistent, often hindered by socio-economic inequalities and institutional challenges. To ensure realisation of the right to development in South Africa, effective implementation of these legal commitments is essential. This includes robust enforcement mechanisms, adequate resource allocation, and proactive policies aimed at addressing socio-economic disparities. Furthermore, fostering a participatory approach that engages civil society, and affected communities is crucial for monitoring progress and holding government accountable for fulfilling its obligations under international, regional, and national human rights law.

The core principles of the UDHR are profoundly internalised in the South African Constitution, which enshrines a comprehensive array of universally recognised human rights and fundamental freedoms.¹³⁶ Following its transition to democracy, Sarkin observes that the South African government has actively engaged with international human rights frameworks, having signed most of the relevant international and regional instruments in 1995.¹³⁷ Notably, South Africa has ratified and acceded to key treaties, including the ICESCR (12 January 2015), the ICCPR (10 December 1998), the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW)

¹³³ Langford M 2008. 'Social Rights Jurisprudence: Emerging Trends in International and Comparative law.'

¹³⁴ Ngang CC 2021. 'Human Rights and Socio-Economic Transformation in South Africa.' *Human Rights Review* 22(3): 349-370.

¹³⁵ Heywood M 2021. 'Economic Policy and the Socio-Economic Rights in the South African Constitution, 1996–2021: Why Don't They Talk to Each Other?' *Constitutional Court Review* 11(1): 1-37.

¹³⁶ Sect 7(1) of the South African Constitution.

¹³⁷ Sarkin J 1998. 'The Development of a Human Rights Culture in South Africa.' *Human Rights Quarterly* 20(3): 628-665.

(15 December 1995), the Convention on the Rights of the Child (CRC) (16 June 1995), the African Charter, and the Protocol to the African Charter on Human and Peoples' Rights on the Establishment of the African Court on Human and Peoples' Rights (3 July 2002), among others. These instruments enshrine provisions that explicitly recognise the right to development. In Viljoen's perspective, the interplay between international and regional human rights law and South African jurisprudence shows the significance and justiciability of human rights within the national legal framework.¹³⁸ In other words, the incorporation of these principles not only reinforces the importance of human rights in the South African legal context but also enhances the mechanisms through which individuals can claim and enforce their rights, thereby promoting the realisation of development as a fundamental human right.¹³⁹ This according to Goldewijk, Baspineiro and Carbonari reflects a broader understanding of development as an integral component of human dignity and a catalyst for the realisation of all human rights.¹⁴⁰

The provisions enshrined in the international human rights law, including the African Charter are reflected in the 1996 Constitution of South Africa. Specifically, Sections 231(3), (4), and (5) of the Constitution articulate that international treaties bind the Republic of South Africa upon domestication.¹⁴¹ While the African Charter has not been formally incorporated into South African law, Section 233 of the Constitution facilitates the application of international law, thereby allowing for the influence of the African Charter in the domestic legal framework.¹⁴²

¹³⁸ Viljoen F 2011. 'Human rights in Africa: Normative, Institutional and Functional Complementarity and Distinctiveness.' *South African Journal of International Affairs* 18(2): 191-216; See also Viljoen F 2012. *International Human Rights Law in Africa*. Oxford University Press, Oxford.

¹³⁹ Yeshanew SA 2011. 'Approaches to the Justiciability of Economic, Social and Cultural Rights in the Jurisprudence of the African Commission on Human and Peoples' Rights: Progress and perspectives.' *African Human Rights Law Journal* 11(2): 317-340.

¹⁴⁰ Goldewijk B, Baspineiro A & Carbonari P 2021. *Dignity and Human Rights: The Implementation of Economic, Social, and Cultural Rights*. BRILL: Leiden.

¹⁴¹ Sect 231(3)(4)(5) of the South African Constitution.

¹⁴² Sect 233 of the South African Constitution.

While refraining from engaging directly in the contemporary discourse on constitutionalism, borrowing from Klare's perspective scholarly consensus often regards the South African Constitution as one of the most progressive in the world,¹⁴³ positioning it as the 'supreme law' of the country that governs the legal system.¹⁴⁴ However, contrasting viewpoints, such as those articulated by scholars like Ramose, critique the Constitution, perceiving it as a barrier to achieving genuine economic emancipation.¹⁴⁵ Chapter 2 of the Constitution is dedicated to the Bill of Rights, with Section 8(1) asserting that 'the Bill of Rights applies to all law, and binds the legislature, the executive, the judiciary, and all organs of state.'¹⁴⁶ It is important to note that this integration underscores the commitment to uphold human rights at all levels of government. Moreover, the Bill of Rights is designed to align with international norms and standards, as evidenced by Section 39(1)(b), which mandates that 'when interpreting the Bill of Rights, a court, tribunal, or forum must consider international law.'¹⁴⁷ This provision, in conjunction with Section 233, oblige the courts to prioritise any reasonable interpretation of legislation that is consistent with international law over interpretations that may contradict it. Consequently, this legal framework ensures that South African courts are guided by international norms and that interpretations of these norms by international bodies are considered in domestic rulings. To illustrate this application of international human rights law, notable cases such as *S v Makwanyane*¹⁴⁸ and *Ex Parte Gauteng v Provincial*

¹⁴³ Klare KE 1998. 'Legal Culture and Transformative Constitutionalism.' *South African Journal on Human Rights* 14(1): 146-188; Rapatsa M 2014. Transformative Constitutionalism in South Africa: 20 years of Democracy. *Mediterranean Journal of Social Sciences* 5(27): 887-895.

¹⁴⁴ Botha C & Bekink B 2018. 'Law Reform in South Africa: 21 Years since the Establishment of a Supreme Constitutional Dispensation.' *The Theory and Practice of Legislation* 6(2): 263-289; Gardbaum S 2012. 'The Place of Constitutional Law in the Legal System.'

¹⁴⁵ Ramose MB 2018. 'Towards a Post-Conquest South Africa: Beyond the Constitution of 1996. *South African Journal on Human Rights* 34(3): 326-341.

¹⁴⁶ Sect 8(1) state that '[t]he Bill of Rights applies to all law, and binds the legislature, the executive, the judiciary and all organs of state.'

¹⁴⁷ Sect 39(1)(b) of the South African Constitution.

¹⁴⁸ *Gauteng Provincial Legislature in re: Gauteng School Education Bill of 1995* (CCT39/95) [1996] ZACC 4; 1996 (4) BCLR 537; 1996 (3) SA 165 (4 April 1996).

Legislature In re Dispute concerning the Constitutionality of Certain Provisions of the Gauteng School Education Bill of 1995 have employed international law to inform judicial decisions.¹⁴⁹ These cases exemplify the judiciary's obligation to integrating international human rights standards within the South African legal context, further solidifying the relationship between domestic law and international human rights obligations.

South Africa also embodies the principle of self-determination, as articulated in Section 235 of the Constitution.¹⁵⁰ This principle is a crucial component of the right to development, reflecting a broader obligation to empowering individuals and communities to determine their own socio-economic and political futures.¹⁵¹ Shrinkhal further explains that beyond its role in establishing justice, order, and peace, self-determination also contributes to the development of an epistemological framework that legitimises authoritative entitlements.¹⁵² In other words, this allows communities and individuals to define their own identities, rights, and responsibilities within a legal context, fostering a sense of ownership over their socio-political and economic circumstances.¹⁵³ This alignment is further reinforced by Article 20 of the African Charter, which emphasises the right to self-determination,¹⁵⁴ and is echoed in Article 1 of the UNDRTD, which states that 'the human right to development also implies the full realisation of the right of peoples to self-determination.'¹⁵⁵

The provisions show that while the right to development has not been formally domesticated in the South African legal framework, various components of this right can

¹⁴⁹ *S v Makwanyane and Another* (CCT3/94) [1995] ZACC 3; 1995 (6) BCLR 665; 1995 (3) SA 391; [1996] 2 CHRLD 164; 1995 (2) SACR 1 (6 June 1995).

¹⁵⁰ Sect 235 of the South Africa Constitution.

¹⁵¹ De Villiers B 2014. Section 235 of the Constitution: Too Soon or too Late for Cultural Self-Determination in South Africa? *South African Journal on Human Rights* 30(3): 458-483.

¹⁵² Shrinkhal R 2021. "Indigenous Sovereignty" and Right to Self-Determination in International Law: A Critical Appraisal.' *Alter Native: An International Journal of Indigenous Peoples* 17(1): 71-82.

¹⁵³ Shrinkhal 2021:72.

¹⁵⁴ Art 20 of African Charter states that '[a]ll peoples shall have the right to existence. They shall have the unquestionable and inalienable right to self-determination.'

¹⁵⁵ Art 1 of the UNDRTD.

be identified within existing legal provisions. Scholars like Gutto,¹⁵⁶ Kamga,¹⁵⁷ and Ngang¹⁵⁸ argue that the right to development possesses legal status in South Africa, a view that is reinforced by the Constitution's enshrinement of socio-economic rights.¹⁵⁹ In this support of this view, former Chief Justice, Pius Langa has emphasised the integral relationship between socio-economic rights and national development, asserting that true development cannot be achieved unless these rights are realised.¹⁶⁰ By this, Justice Langa further solidifies that although there is no specific legal and institutional mandate that directly addresses the right to development, the protection of socio-economic rights within South Africa's legal system effectively complements the realisation of this right. Liebenberg proffers that by protecting these rights, the South African Constitution not only aligns with international norms but also supports the broader objective of fostering an environment conducive to sustainable development and the enhancement of human dignity.¹⁶¹ Thus, while the right to development may not be explicitly articulated in South African law, its foundational principles are embedded within the legal and constitutional framework, thereby contributing to its practical realisation.¹⁶²

At the 38th Ordinary Session of the African Commission, the South African Periodic Report acknowledged the implicit recognition of the right to development within its constitutional framework. It reported that:

¹⁵⁶ Gutto S 2006. 'The Right to Development: An Implied Right in South Africa's Constitutional Order.' *Reflections on Democracy and Human Rights* 109, 109-118.

¹⁵⁷ Kamga 2011: 210.

¹⁵⁸ Ngang 2019.

¹⁵⁹ Gutto 2006: 110-112.

¹⁶⁰ Langa P 2006. 'Human Rights, the Rule of Law, and the Right to Development.' Speech Presented at the Birchwood Conference Centre in Johannesburg, 24 November 2006.

¹⁶¹ Liebenberg S 2005. 'The Value of Human Dignity in Interpreting Socio-Economic Rights. *South African Journal on Human Rights* 21(1): 1-31; See also Ruppel OC & Murray R 2024. 'The Future of the SDGs: A Comparative Constitutional Rescue Plan? One Does not Discover New Lands without Consenting to Lose Sight of the Shore. *Environmental Policy and Law* 54(2-3): 155-187.

¹⁶² Plagerson S, Patel L, Hochfeld T & Ulriksen MS 2019. 'Social Policy in South Africa: Navigating the Route to Social Development. *World Development* 113: 1-9.

Although the Constitution does not provide for the right to development, this right is implied since the Constitution provides social, economic and cultural rights, including political rights, which are features of the right to development defined in article 1 of the UN Declaration as comprehensive economic, social, cultural and political processes which aim at the constant improvement of the well-being of the entire population and of all individuals, in which human rights and fundamental freedoms can realised.¹⁶³

In this context, South Africa's acknowledgment of the importance of socio-economic rights emphasises the complementary nature of these rights in enhancing the quality of life for its citizens. As noted by Sengupta, the primary responsibility for the implementation of development initiatives rests with developing nations, which must enact comprehensive public policies and activities to fulfil the right to development.¹⁶⁴

Furthermore, the South African Constitution supports the realisation of constitutionally guaranteed rights, including the right to development, through a series of legislative and policy measures.¹⁶⁵ Key institutions and instruments such as the Department of Planning, Monitoring and Evaluation (DPME),¹⁶⁶ the National Planning Commission (NPC),¹⁶⁷ and the Integrated Development Planning (IDP)¹⁶⁸ are tasked with formulating policies and strategies to foster development, yet their effectiveness is often constrained by bureaucratic inefficiencies and limited resources. Additionally policies such as the Reconstruction and Development Programme (RDP),¹⁶⁹ the National Development Plan (NDP), along with critical legislation such as the Local Government: Municipal Systems Act 32 of 2000,¹⁷⁰ the Children's Act 38 of 2005,¹⁷¹ the Community Development Act 3 of

¹⁶³ First Periodic Report of South Africa to the African Commission, Para 325.

¹⁶⁴ Sengupta A 2017. 'On the Theory and Practice of the Right to Development.' *International Human Rights Law*, 667-720.

¹⁶⁵ Section 5.5 of Chapter 5 extensively discusses legislative policy measure hereto.

¹⁶⁶ Department of Planning, Monitoring and Evaluation.

¹⁶⁷ National Planning Commission 2011. National Development Plan Vision 2030.

¹⁶⁸ Integrated Development Planning.

¹⁶⁹ Reconstruction and Development Programme.

¹⁷⁰ Local Government: Municipal Systems Act 32 of 2000

¹⁷¹ Children's Act 38 of 2005

1966,¹⁷² the Employment Equity Act 55 of 1998,¹⁷³ the Labour Relations Act 66 of 1995,¹⁷⁴ and the Public Service Act 103 of 1994 among others,¹⁷⁵ collectively illustrate South Africa's implicit obligation to operationalising the right to development. Liebenberg observes that these frameworks not only promote democratic governance but also strive to enhance the socio-economic conditions of the populace,¹⁷⁶ and in so doing, reinforce the foundational principles of human rights and development.

South African case law and jurisprudence significantly contribute to the advancement of international human rights instruments related to socio-economic rights, thereby reinforcing the right to development. Notably, in *Government of the Republic of South Africa and Others v Grootboom and Others*,¹⁷⁷ the court highlighted the critical importance of socio-economic rights, particularly the right to access housing, which is integral to the realisation of the right to development in South Africa. In *Minister of Health and Others v Treatment Action Campaign and Others*,¹⁷⁸ the Constitutional Court affirmed that Section 27(1) and (2) of the Constitution obliges the government to formulate and implement a comprehensive and coordinated programme to progressively realise the right of pregnant women and their newborns to access healthcare services aimed at combating mother-to-child transmission of HIV.¹⁷⁹ This ruling emphasises that while socio-economic rights may be contingent upon the availability of resources, this limitation should not be exploited to evade accountability. Andreassen and Marks argue that the principle of 'progressive

¹⁷² Community Development Act 3 of 1966.

¹⁷³ Employment Equity Act 55 of 1998.

¹⁷⁴ Labour Relations Act 66 of 1995

¹⁷⁵ Public Service Act 103 of 1994.

¹⁷⁶ Liebenberg 2005:11.

¹⁷⁷ *Government of Republic of South Africa and Others v Grootboom and Others* 2000 11 BCLR 1169 (CC).

¹⁷⁸ *Minister of Health and Others v Treatment Action Campaign and Others* (TAC case) (No 2) 2002 5 SA 721(CC).

¹⁷⁹ TAC case; Sect 27(1) of the Constitution of South Africa.

realization' does not permit the government to neglect its duty to protect socio-economic rights.¹⁸⁰

Furthermore, South African jurisprudence extends beyond socio-economic and political rights to encompass environmental law, which plays a vital role in safeguarding human well-being and consequently impacts the right to development. The case *Fuel Retailers Association of South Africa v Director-General Environmental Management, Department of Agriculture, Conservation and Environment, Mpumalanga Province and Others* illustrates the significance of environmental preservation.¹⁸¹ This case reinforces Principle 3 of the Rio Declaration,¹⁸² which stipulates that 'the right to development must be fulfilled so as to equitably meet developmental and environmental needs of present and future generations.'¹⁸³

To enforce the rights enshrined in the Constitution, the South African Human Rights Commission (SAHRC) a constitutional body established to protect, promote, and fulfil human rights was created in terms of Section 184.¹⁸⁴ The SAHRC is tasked with investigating human rights violations, thus reinforcing the accountability mechanisms for socio-economic rights.¹⁸⁵ In a similar vein, the Public Protector, as established under Section 182 of the Constitution, has the authority to investigate alleged improper conduct in state affairs and public administration,¹⁸⁶ while Section 188(1) mandates the Auditor-General to audit and report on financial management within government.¹⁸⁷ These institutions collectively demonstrate that South Africa possesses robust mechanisms to

¹⁸⁰ Andreassen BA & Marks SP (eds) 2010. *Development as a Human Right: Legal, Political, and Economic Dimensions*. Intersentia.

¹⁸¹ *Fuel Retailers Association of South Africa v Director-General Environmental Management, Department of Agriculture, Conservation and Environment, Mpumalanga Province and Others* Case No CCT67/06.

¹⁸² United National General Assembly 1992. *Rio Declaration on Environment and Development*.

¹⁸³ See Principle 3 of the Rio Declaration.

¹⁸⁴ Sect 184 of the South African Constitution.

¹⁸⁵ Sect 184(1)(2) of the South African Constitution.

¹⁸⁶ Sect 182 of the South African Constitution.

¹⁸⁷ Sect 188(1) of the Constitution empowers the Auditor-General to 'audit and report on the accounts, financial by the Auditor-General.'

ensure the realisation of the right to development, thereby reinforcing its commitment to the protection of socio-economic rights as foundational to human dignity and progress.

1.6.5 What are the South African government's obligations on the right to development?

The South African government's obligations regarding the right to development encompass a multifaceted framework aimed at protection and promotion human rights, as articulated by many scholars. According to Sengupta, the right to development inherently encompasses all recognised categories of human rights.¹⁸⁸ This perspective coagulates the comprehensive nature of the right to development, which includes civil, political, and socio-economic rights. In South Africa, the domestication of these rights through constitutional provisions can be articulated as the government's obligation to realising the right to development. Ngang further delineates the obligations imposed by international human rights law on governments, including the South African government.¹⁸⁹ These obligations consist of three core elements: the duty to respect, protect, and fulfil human rights.¹⁹⁰ Nationally, Section 7(2) of the Constitution mandates the government must respect, protect, promote, and fulfil the rights enshrined in the Bill of Rights.¹⁹¹ Khoza proffers that these obligations meant to prevent the government from interfering with the enjoyment of human rights, and thus, compel the government to take the necessary measures to achieve those rights.¹⁹²

¹⁸⁸ Sengupta 2002: 24.

¹⁸⁹ Ngang CC 2014. 'Judicial Enforcement of Socio-Economic Rights in South Africa and the Separation of Powers Objection: The "Obligation to Take Other Measures".' *African Human Rights Law Journal* 14(2): 655-680, 662.

¹⁹⁰ Fukuda-Parr S 2013. 'Human rights and politics and development.' In M Goodhart, *Human rights: Politics and Practice*. 2nd Edn, Oxford University Press, Oxford, 167-170.

¹⁹¹ Sect 7(2) of the South African Constitution states that '[t]he State must respect, protect, promote and fulfil the rights in the Bill of Rights.'

¹⁹² Khoza S 2007. *Socio-economic Rights in South Africa: A Resource Book*. Community Law Centre, University of the Western Cape, 35.

The duty to respect requires the government to refrain from interfering with or obstructing the enjoyment of human rights by individuals or communities.¹⁹³ For example, government must avoid incorporating laws or policies that could adversely affect the livelihood of vulnerable people whose lives revolve around subsistence agriculture, such as local farmers, fishermen and shepherds.¹⁹⁴ To support this viewpoint, the Constitutional Court in the *Grootboom* case ruled that the government had failed in its duty to respect the rights of occupiers of privately owned land. Also, in the *Endorois* case, it was decided that the free and informed consent of the people must be respected.¹⁹⁵

Scholars like Sollne argue that denying access to essential resources such as water and food constitutes a violation of the right to personal development and, consequently, the right to life.¹⁹⁶ In addition to respecting rights, the duty to protect necessitates that the government develop and implement laws and policies that prevent third parties from violating human rights.¹⁹⁷ For example, government should protect the right to food as a negative right by passing and enforcing laws to prevent individuals and businesses from violating that right.¹⁹⁸ According to Welch, the government must also enforce these laws by establishing bodies to investigate and provide effective remedies when the rights are

¹⁹³ ICESCR, General Comment 12 Geneva 3-6.

¹⁹⁴ Ziegler J 2008. '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.

¹⁹⁵ See *Endorois* case.

¹⁹⁶ Sollner S 2007. '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 Bogdandy AV & Wolfrum R (eds) *Max Planck Yearbook of United Nations Law* Vol.II 391 396-397.

¹⁹⁷ Rudol 2008: 106.

¹⁹⁸ Ziegler J 2004. '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), 13-15.

violated.¹⁹⁹ This underlines the interconnectedness of socio-economic rights and underscores the government's obligation to ensure access to these resources.²⁰⁰

The obligation to fulfil encompasses the responsibility to promote and ensure human rights.²⁰¹ Hence, governments are tasked with the duty to advance the right to development through proactive engagement in public awareness efforts.²⁰² This involves disseminating information about policies and programs aimed at facilitating access to socio-economic benefits that directly contribute to the realisation of the right to development.²⁰³ For example, leveraging media channels enables governments to inform the populace about their entitlement to development and avenues to assert this entitlement. The obligation to promote necessitates that governments establish a conducive environment wherein rights holders can assert and exercise their rights. According to Mubangizi, achieving this goal hinges on the government's capacity to cultivate widespread awareness of human rights, thereby educating the public on their rights and available remedies for violations.²⁰⁴

Furthermore, the obligation to fulfil (deliver) requires the government enable individuals or groups, who due to circumstances beyond their control such as natural disasters, to enjoy the benefits of human rights, including the right to development.²⁰⁵ An example of this occurred in KwaZulu-Natal, where residents sought government assistance following

¹⁹⁹ Welch AR 2005. 'Obligation of State and Non-state Actors Regarding the Human Right to Water Under the South African Cohabitation.' *Sustainable Development Law & Policy* 62; Landman T 2004. 'Measuring Human Rights: Principle, Practice, and Policy.' *Human Rights Quarterly* (26):908-931, 906.

²⁰⁰ Hawksley C & Georgeou N 2021. 'Right to Development: Theory, Practice, and Articulation with SDGs.' In *No Poverty*. Cham: Springer International Publishing, 815-825.

²⁰¹ ICESCR, General Comment 12, 18.

²⁰² Osuji OK & Obibuaku UL 2016. 'Rights and Corporate Social Responsibility: Competing or Complementary Approaches to Poverty Reduction and Socioeconomic Rights?' *Journal of Business Ethics* 136: 329-347.

²⁰³ Network, US 2003. Expanding Socio-Economic Rights and Access to Housing. *Paper Commissioned by the Department of Housing*. Pretoria: Mega-Tech, 3-4.

²⁰⁴ Mubangizi JC 2004. 'Protection of Human Rights in South Africa: Public Awareness and Perceptions.' *Journal for Juridical Science* 29(1): 62-87.

²⁰⁵ Ziegler UN Human Rights Council, A/HRC/7/5 (10 January 2008) 15.

devastating floods between 8 and 21 April 2022, which claimed over 400 lives in the province.²⁰⁶ Kende highlights that the Constitution of South Africa recognises the long-term nature of achieving socio-economic rights.²⁰⁷ Sections 26 and 27 outline the government's duty to fulfil these rights, stipulating that '[t]he State must take reasonable legislative and other measures within its available resources, to achieve the progressive realization of each of these rights.'²⁰⁸ Taking action within available resources recognises that resources are not unlimited and that government must do as much as possible with available resources.²⁰⁹ The Constitutional Court has developed guidelines that can help in the understanding of what is meant by the obligation to take reasonable measures, which includes the government's obligation to involve the public in the development of critical social policies or laws.²¹⁰

The reliance on legal mechanisms warrants scrutiny, given that pursuing judicial avenues to enforce rights can often be protracted, costly, and inaccessible, particularly for marginalised populations.²¹¹ Nevertheless, the Constitution empowers the judiciary to uphold the rights enshrined within it.²¹² Furthermore, all branches of government are obligated by the Bill of Rights to uphold human rights. Section 34 specifically mandates that everyone should have access to courts and justice, particularly when individuals, groups, or communities perceive their rights to be infringed or disregarded.²¹³ Section 38

²⁰⁶ van Diemen E 2022. 'Why KZN was Flooded and Why it's Likely to Happen Again.' *Daily Maverick*. Available at <https://www.dailymaverick.co.za/article/2022-04-14-explainer-why-kzn-was-flooded-and-why-its-likely-to-happen-again/> (accessed 23 August 2024).

²⁰⁷ Kende M S 2003. 'The South African Constitutional Court's Embrace of Socio-Economic Rights: A Comparative Perspective.' *Chapman Law Review* (6): 137-160, 139.

²⁰⁸ Sect 27(2) of the South African Constitution.

²⁰⁹ De Vos P *et al* 2015. *South African Constitutional Law in Context*. Oxford: Oxford University Press, 684.

²¹⁰ Khoza 2007: 37.

²¹¹ Ebi EAO 2016. *Enforcing the Right of Access to Healthcare Services in South Africa*. (PhD dissertation). Pretoria: University of South Africa, 123.

²¹² Sect 8(1) of the South African Constitution.

²¹³ Sect 34 of the South African Constitution states that '[e]veryone has the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court or, where appropriate, another independent and impartial tribunal or forum.'

further grants the courts expansive authority to grant appropriate remedies in cases where a violation or imminent violation of rights is established.²¹⁴

1.7 METHOD AND THEORETICAL APPROACH

This thesis is grounded in the concept of the right to development, which is increasingly recognised as a fundamental human right, as well as the understanding of development as a desirable and necessary process in the South African context.²¹⁵ Thus, the thesis has adopted a socio-legal approach, where the analysis of law is intricately connected to the social realities it seeks to address. This perspective emphasises that law should be contextualised within the social situation it governs, highlighting the role of law in the creation, maintenance, and transformation of that situation.²¹⁶ The socio-legal framework is employed to assess the social implications of utilising the right to development as a foundation for promoting development in South Africa. This approach allows for a nuanced understanding of how legal norms influence social outcomes and vice versa.

In terms of methodology, a desktop approach is utilised, which encompasses a systematic process of reading, analysing, reflecting, writing, re-reading, re-thinking, and re-writing. This method involves engaging exclusively with publicly available data and information, thereby ensuring a comprehensive review of existing literature and legal texts.²¹⁷ The desktop approach will facilitate the analysis, description, explanation, and conceptualisation of relevant data related to the right to development. The thesis is not only limited to legal analysis; it also integrates arguments and theories from development studies and the social sciences, fostering an interdisciplinary perspective. This broader

²¹⁴ Sect 38 of the South African Constitution.

²¹⁵ Rist G 2008. *The History of Development: From Western Origins to Global Faith*. Zed Books: London & New York, 3.

²¹⁶ Schiff DN 1976. 'Socio-Legal Theory: Social Structure and Law.' *The Modern Law Review* 39(3): 287-310.

²¹⁷ Management Study Guide 2013. 'Desk Research–Methodology and Techniques.' Available at <https://www.managementstudyguide.com/desk-research.htm> (accessed 18 October 2022).

lens enhances the understanding of the right to development within the complexities of socio-economic and political contexts.

The thesis relies predominantly on both primary and secondary sources. Primary sources include traditional human rights law instruments, as well as relevant international, regional, and domestic legal frameworks and jurisprudence. While secondary sources encompass scholarly articles, books, policy documents and commentaries that provide critical insights into the intersection of law, development, and human rights. This comprehensive approach aims to yield a thorough understanding of the legal status and practical implications of the right to development in South Africa.

1.8 CHAPTER OUTLINE

1.8.1 Chapter one: Introduction and background

This introductory chapter presents the research problem, assumptions and hypotheses, research questions, motivation and background, methodology, and an outline of the thesis.

1.8.2 Chapter two: Evolution of the concept of human rights, development and the right to development

This chapter addresses the first research sub-question by exploring the historical context of human rights and development, as well as the emergence of the right to development. It examines historical development theories, relevant human rights instruments, and interdisciplinary theories from law and social sciences. Additionally, various debates surrounding these concepts are analysed using primary and secondary materials, culminating in a discussion of the current discourse on the right to development.

1.8.3 Chapter three: Framing the right to development under international human rights law

In this chapter, the focus is on the right to development within the framework of international human rights law. The status of the right at the international level is critically examined, including its legal status within the international bill of rights and other pertinent instruments. The chapter also addresses the enforceability of the right to development internationally and conclude with an analysis of how this legal status informs its understanding and applicability in South Africa.

1.8.4 Chapter four: The right to development under the African human rights architecture

This chapter focuses specifically on the African human rights system, addressing the nature of the right to development in this context. It explores the legal norms established by the African Charter that create rights and obligations within the regional system. The development of the right through AU jurisprudence is also examined, alongside the enforceability of the right and South Africa's obligations as a member state.

1.8.5 Chapter five: The right to development in South Africa's constitutional framework

This chapter furthers the investigation by examining the legal status of the right to development within the South African legal and institutional framework. It explores the nature of the South African legal system as defined by the Constitution, assess the right to development within this system, and articulate its implications for implementation and enforcement. The development of relevant jurisprudence is also discussed in relation to the right to development.

1.8.6 Chapter six: South African Government's obligations in realising the right to development

In this chapter, the focus is on the South African government's international, regional, and national obligations in implementing the right to development domestically. The chapter illustrates how the government can leverage policy development and legislative measures to realise this right. By examining local policies, legislation, and case law, it demonstrates that the government has a duty to implement the right to development, with recommendations for enhancing good governance and the overall fulfilment of human rights.

1.8.7 Chapter seven: Conclusion and recommendations

This final chapter summarises the findings of the thesis, draws conclusions based on the research conducted, and offers recommendations for further action and research on the right to development.

1.9 CONCLUSION

This chapter has introduced and provided an overview of the legal status of the right to development in South Africa, highlighting its foundational components within the international, regional and national legal framework. Through an examination of relevant literature, it has become evident that significant gaps exist in the current discourse surrounding this right, particularly in relation to its practical implementation and the interplay with socio-economic inequalities. The identified gaps highlight the necessity for further scholarly inquiry and advocacy to enhance the understanding and realisation of the right to development in South African. As this doctoral thesis progresses, the subsequent chapters will delve into the evolution of the concept of human rights, development, and the right to development. This exploration will contextualise the right to development within broader historical and theoretical frameworks, thus enriching the discourse and contributing to a more nuanced understanding of its implications for policy and practice in South Africa.

CHAPTER 2

EVOLUTION OF THE CONCEPT OF HUMAN RIGHTS, DEVELOPMENT AND THE RIGHT TO DEVELOPMENT

2.1 INTRODUCTION

The concepts of human rights, development, and the right to development represents a complex and intertwined narrative in the realm of international law, politics, and social justice. Each concept has evolved over time, shaped by historical events, philosophical underpinnings, and global socio-economic dynamics. Human rights, as a concept, traces its origins to ancient legal systems, philosophical traditions in Greece and Rome, and religious doctrines that emphasised the inherent dignity and worth of every individual.¹ Over centuries, the notion of human rights evolved through various historical milestones,² such as the Magna Carta, the Enlightenment period, and the Universal Declaration of Human Rights (UDHR) in 1948.³ The UDHR, does not possess inherent legal binding force. Nevertheless, it articulates a set of principles and rights that are grounded in established human rights norms, many of which are codified in legally binding international instruments, such as the ICCPR and ICESCR that are universally applicable and binding on all member states.

Development, on the other hand, initially focused primarily on economic growth and material progress. The early 20th century witnessed the emergence of international efforts to promote economic development, particularly in the aftermath of World War I, which devastated economies worldwide.⁴ The establishment of institutions like the International Trade Organisation, World Bank and the International Monetary Fund (IMF) aimed to foster economic stability and growth in war-torn regions. However, the narrow

¹ Shestack JJ 2017. 'The Philosophic Foundations of Human Rights.' *Human Rights* 3-36.

² De Lafayette M 2023. 'Declaration of the Rights of Man and of the Citizen 1789.'

³ United Nations 1948. Universal Declaration of Human Rights (adopted 10 December 1948).

⁴ International Monetary Fund (IMF), 2000. 'The world economy in the twentieth century: Striking developments and policy lessons.' *World Economic Outlook*,149-180.

focus on economic indicators alone proved insufficient in addressing the broader aspirations of human well-being and social justice. This realisation prompted a paradigm shift towards a more holistic understanding of development that encompasses not only economic prosperity but also social equity, environmental sustainability, and respect for human rights. This broader conception of development gained traction particularly through initiatives such as the Sustainable Development Goals (SDGs) adopted by the United Nations in 2015, which integrate economic, social, and environmental dimensions of development.⁵ The right to development emerged as a response to the limitations of traditional development paradigms. First articulated in the UN Declaration on the Right to Development (UNDRTD) in 1986, the right to development posits that development is a comprehensive process that must be pursued in such a way that all human rights and fundamental freedoms can be fully realised. It emphasises the importance of participatory development strategies, equitable distribution of benefits, and international cooperation to enable countries, particularly developing nations, to achieve sustainable development goals. Despite significant efforts by the UN and other entities to promote human development since the advent of the UNDRTD, global poverty and inequality have persisted and, in some cases, worsened.⁶ According to the Human Development Report of 2021, approximately 9.2% of the global population, equating to around 734 million people, continues to live below the poverty line defined by the World Bank.⁷ The widening disparity between rich and poor poses a substantial barrier to achieving universal human rights and well-being, perpetuating cycles of inequality, poverty, and unemployment. Addressing these challenges remains a critical imperative for advancing human rights globally and achieving sustainable development goals.

Notwithstanding its conceptual clarity, the right to development has encountered challenges and criticisms, particularly regarding its operationalisation and

⁵ UN General Assembly 2015. Transforming Our World: The 2030 Agenda for Sustainable Development. Resolution Adopted by the General Assembly on 25 September 2015, 42809, 1-13.

⁶ UNDP Human Development Report 2022. Uncertain Times, Unsettled Lives: Shaping our Future in a Transforming World 2021-22. Available at <https://hdr.undp.org/content/human-development-report-2021-22> (accessed 17 October 2023).

⁷ UNDP 2022.

implementation. Issues such as unequal global power dynamics, insufficient financial resources, and competing national interests have posed obstacles to realising the full potential of the right to development in practice.

In section 2.2 of this chapter, the historical foundations of human rights are explored, while subsection 2.2.1 scrutinises human rights as both a moral imperative and a legal construct and while subsection 2.2.2 define human rights. Section 2.3 investigates the multifaceted concept of development, extending beyond mere economic growth. Subsection 2.3.1 provides a definition of development in broader terms. Subsections 2.3.2 and 2.3.3 respectively analyse development within the frameworks of the League of Nations and the United Nations systems. Section 2.4 of this chapter examines the intricate relationship between human rights and development. Section 2.5 delves into the genesis and inherent contradictions of the concept of the right to development. Subsection 2.5.1 deconstructs the elements and nature of the right to development, considering its theoretical underpinnings and practical applications. Lastly, in subsection 2.5.2, an empirical examination of the right to development in action is conducted, highlighting its implementation and effectiveness in real-world contexts.

2.2 ORIGINS OF THE CONCEPT OF HUMAN RIGHTS

In contemporary discourse, the concept of human rights undergoes continual evolution, responding to shifting international social, political, and cultural landscapes. These dynamics fuel ongoing debates regarding the universality of rights, cultural relativism, and the intersection of rights with critical issues like gender equality, environmental sustainability, and economic justice. The historical trajectory of human rights reveals foundational ideas that have paved the way for the emergence of the right to development. This evolution is shaped by diverse historical, philosophical, and legal developments, each contributing to an evolving understanding of human rights and laying the groundwork for conceptualising the right to development. Human rights have evolved significantly through historical milestones that span diverse civilisations and epochs. These milestones have not only shaped contemporary interpretations of human rights but

also provided frameworks for addressing past injustices such as slavery, colonialism, and apartheid. In pre-modern societies lacking formal institutionalised political structures, norms and customs often governed societal interactions and provided a basis for fairness and protection within communities.

The concept of human rights can be traced to ancient legal systems documented in Babylonian, Jewish, and Indian traditions, as well as through philosophical teachings like Confucianism, Greek and Roman law, and religious doctrines.⁸ According to Stearns while not explicitly articulated in modern terms, early legal and philosophical systems laid foundational principles that resonate with contemporary conceptions of human rights.⁹ This highlights the inherent dignity and entitlements of individuals, forming the bedrock upon which modern human rights frameworks are built.

The concept of human rights has been a focal point of extensive and intricate debates over time, shaping contemporary political discourse and terminology.¹⁰ Its historical origins, objectives, and lexicon have profoundly influenced the current global vocabulary on justice and governance. While some scholars argue that human rights are a product of Western thought recently universalised, the principles underlying human rights can be traced back to ancient civilisations, notably evidenced in the Code of Hammurabi, one of the oldest surviving legal texts.¹¹ Dating back to ancient Mesopotamia under Babylonian King Hammurabi's rule, the Code of Hammurabi articulated foundational principles that resonate with modern human rights ideals, albeit not explicitly framed as such. This legal code emphasised justice, fairness, and accountability, setting standards for societal

⁸ Ishay M 2008. *The history of human rights: From ancient times to the globalization era*. University of California Press.

⁹ Stearns PN 2012. *Human Rights in World History*. Routledge: London, 1.

¹⁰ Mamdani in *Neither Settler nor Native* view the concept of human rights as a 'faulty vision', he propounds that 'the criminal model of contemporary human rights was inaugurated by the Nuremberg Tribunals after the Second World War. According to Mamdani, the Tribunals were based on the neoliberal conviction, *Avant la Lettre*, that all violence is the act of individuals.' Mamdani M 2020. *Neither Settler nor Native*. In *Neither Settler nor Native*. Harvard University Press, 21.

¹¹ Prince JD 1904. 'The Code of Hammurabi.' *The American Journal of Theology* 601-609, 602.

conduct and providing protections against arbitrary treatment.¹² It included detailed provisions defining legal obligations, offences, and corresponding punishments, thereby ensuring equality before the law—a principle encapsulated in the *lex talionis*, or ‘eye-for-an-eye’ concept.¹³ The Code of Hammurabi protected rights such as the right to property and the right to life, imposing severe penalties not only on ordinary citizens but also on corrupt judges, officials, and witnesses.¹⁴

Similarly, in the Jewish tradition, the Ten Commandments encompassed principles akin to those in the Code of Hammurabi, emphasising the protection of property rights and the sanctity of life.¹⁵ These foundational legal texts laid the groundwork for subsequent legal and ethical frameworks that recognise and protect human dignity and rights. In ancient India, the ‘Laws of Manu’ similarly embodied principles of justice and dignity, encompassing norms governing legal, social, and religious life.¹⁶ These laws provided protections against torture and upheld the sanctity of life, contributing further to the development of ethical and legal standards that resonate with contemporary human rights principles.¹⁷ Incorporating elements of justice, fairness, and accountability, these ancient legal codes laid the groundwork for subsequent legal developments in organised states and societies. While not explicitly articulated in modern human rights language, these foundational texts served as precursors to the evolving concepts of human rights and contributed significantly to the development of comparable legal frameworks observed in contemporary international law and governance.

The evolution of human rights concepts has been enriched by traditional philosophies like Confucianism, which predates modern human rights discourse but nonetheless offers insights into foundational principles relevant today.¹⁸ Confucianism emphasises moral

¹² Prince 1904: 601-609; Stearns 2012:27.

¹³ Stearns 2012: 27-28.

¹⁴ Prince 1904: 605.

¹⁵ Stearns 2012: 29.

¹⁶ Lenzerini F 2014. *The Culturalization of Human Rights Law*. Oxford University Press: Oxford, 33-47.

¹⁷ Lenzerini 2014: 37.

¹⁸ Ames RT 2011. *Confucian Role Ethics: A Vocabulary*. The Chinese University of Hong Kong Press, 21-24.

cultivation, respect for human dignity, social harmony, and compassionate leadership as essential for societal well-being and the fulfilment of human needs and interests.¹⁹ These ethical values, rooted in ancient Chinese thought, continue to influence contemporary understandings of human rights, contributing to ongoing efforts to reconcile cultural diversity with universal human rights norms and foster a more inclusive global society. The integration of Confucian values into modern human rights frameworks exemplifies a broader trend of drawing upon diverse philosophical traditions to enrich the discourse on human rights. Kamga highlights China's use of Confucianism to underpin its approach to global human rights issues, suggesting a model that African countries could similarly adopt by drawing on the humanitarian philosophy of *Ubuntu*.²⁰ This approach features the adaptability of human rights principles across different cultural contexts while promoting respect for human dignity and social justice. Furthermore, ancient Greek and Roman philosophies also contributed foundational concepts that later shaped the language of human rights. Scholars such as Snell, observe that these civilisations introduced ideas about justice, the inherent value of the individual with spirit and soul, universal truths, and fundamental human values.²¹ These philosophical developments challenge assertions that human rights are exclusively Western in origin, demonstrating instead a rich historical tapestry of global contributions to the evolution of human rights concepts.

Human rights as a political challenge predominantly within national borders persisted until the latter half of the 20th century, characterised by widespread inequalities and injustices. A pivotal moment in the evolution of human rights occurred during the 19th century with

¹⁹ Hall DL & Ames RT 1987. *Thinking Through Confucius*. State University of New York Press, 41.

²⁰ Kamga SD 2018. 'Realizing the Right to Development: Some Reflections.' *History Compass* 16(7): 1-10, 5; see also Stearns 2012: 33.

²¹ Snell B 1953. 'The Discovery of the Mind: The Greek Origins of European Thought.'; Stoic philosophers also believed in this concept of universal moral community and individual soul govern by common natural law. See Stearns 2012: 34-5.

the abolitionist movement, which aimed at eliminating slavery.²² This movement marked a significant milestone in the advancement of human rights, highlighting the global struggle against institutionalised oppression and exploitation. The abolition of slavery not only symbolised a fundamental victory for human dignity but also served as a catalyst for subsequent human rights movements that sought to address various forms of social and political injustice on both national and international levels.²³

The Berlin Conference of 1885²⁴ played a significant role in addressing the issue of slavery by outlawing the slave trade on the basis that it contravened principles of international law.²⁵ Despite this prohibition, slavery persisted and was further addressed within the framework of the League of Nations through the Slavery Convention adopted during the Paris Peace Conference after World War I.²⁶ At the 1926 Slavery Convention, nations committed to abolishing the practice of slavery, described it as an affront to human dignity.²⁷ The buying and selling of slaves were unequivocally condemned as wrongful acts. The abolition of slavery marked a watershed moment in the history of human rights, signalling a global shift towards acknowledging and safeguarding the inherent rights and freedoms of individuals. This historic development set a precedent for subsequent human rights movements and continues to inspire efforts to combat contemporary forms of exploitation and injustice internationally.²⁸

²² Mawarni SD, Ribawati E and Sumantri TNA 2023. The Importance of the Human Rights Movement in the United States: from Abolition to the Civil Rights Movement (1865-1968). *Interdisciplinary Journal of Advanced Research and Innovation*, 1(1), 21-30.

²³ Moyn S 2012. *The last utopia: human rights in history*. Harvard University Press.

²⁴ Craven M 2012. *The Invention of a Tradition: Westlake, the Berlin Conference and the Historicisation of International Law* (363-403). Klosterman.

²⁵ Kolb R & Gaggioli G (eds) 2013. *Research Handbook on Human Rights and Humanitarian Law*. Edward Elgar Publishing, 3-35; see also the international slave trade available at <https://www.britannica.com/topic/slavery-sociology/The-law-of-slavery> (accessed 15 May 2023).

²⁶ 1926 League of Nations treaty, (Slavery Convention) (amended 1953); Lenzerini 2014: 76-77.

²⁷ Gutteridge JA 1957. 'Supplementary Slavery Convention 1956.' *International and Comparative Law Quarterly* 6(3): 449-471.

²⁸ Kolb and Gaggioli 2013: 3-7.

Additionally, the evolution of international humanitarian law, previously known as the martial law, has deep roots in the realm of human rights.²⁹ Emerging from concerns over the protection of war victims, Swiss businessman Henry Dunant³⁰ proposed two pivotal ideas. Firstly, he advocated for shielding the wounded and the sick from hostilities and providing them with independent care. Secondly, he suggested the establishment of national societies dedicated to responding to medical emergencies on the battlefield.³¹ Dunant's proposals were instrumental in the founding of the International Committee of the Red Cross (ICRC) and were integrated into the Geneva Conventions aimed at improving conditions for the wounded and the sick during armed conflicts. Subsequently, national Red Cross and Red Crescent societies were established worldwide, culminating in the formation of the International Federation of Red Cross and Red Crescent Societies in 1919.³² These organisations continue to play crucial roles in humanitarian efforts globally, reflecting ongoing efforts to protect and uphold human dignity even in times of conflict and crisis.

The League of Nations (LoN), particularly through its Treaty of Versailles,³³ exerted significant influence during its time, regarded by Slavicek as the foremost Allied peace treaty following World War I.³⁴ Central to this treaty were ground breaking provisions

²⁹ Lenzerini 2014:57; Panasiuk V, Poliuk Y, But I, Zhyvotovska I, & Synytsyn P 2022. 'Constitutional Human Rights under Martial Law: Legal Realities.' *Amazonia Investiga* 11(54): 76-83, 77-80; See also Yu NG 2006. 'Interrogating Social Work: Philippine Social Work and Human Rights Under Martial Law.' *International Journal of Social Welfare* 15(3): 257-263.

³⁰ Kolb R, & Gaggioli G (eds), 2013. *Research handbook on human rights and humanitarian law*. Edward Elgar Publishing.

³¹ International Committee of the Red Cross, 1949. Summary of the Geneva Conventions of 1949 and Their Additional Protocols. Available at https://www.redcross.org/content/dam/redcross/atg/PDF_s/International_Services/International_Humanitarian_Law/IHL_SummaryGenevaConv.pdf#:~:text=In%20%E2%80%9CA%20Memory%20of%20Solferino%2C%E2%80%9D%20his%20book%20about,to%20the%20adoption%20of%20an%20additional%20distinctive%20emblem (accessed on 19 April 2023).

³² Kolb and Gaggioli 2013.

³³ 1919, Treaty of Peace with Germany (The Treaty of Versailles).

³⁴ Slavicek LC 2010. *The Treaty of Versailles*. Infobase Publishing.

aimed at promoting non-discrimination based on race and protecting religious tolerance, seen as essential for maintaining peace. Despite their innovative nature, these ideas encountered resistance at the international level. The Treaty of Versailles also established provisions concerning the administration of territories under the mandate system, focusing on ensuring the security and welfare of the populations residing within these areas.³⁵ The LoN emphasised the protection of freedom of conscience and religion, the abolition of the slave trade, and the promotion of decent labour standards globally. One of its significant contributions was advocating for the international protection of workers' rights and striving for equitable and just working conditions for men, women, and children across member states.³⁶

Moreover, the Treaty of Versailles set forth regulations mandating certain labour practices to be adopted and implemented by industrial committees. These regulations included the principle of equal pay without discrimination based on gender, the prohibition of child labour, and limits on working hours set at a maximum of 48 hours per week.³⁷ Additionally, the treaty led to the establishment of the International Labour Organisation (ILO), the first specialised agency affiliated with the UN, tasked with overseeing and ensuring adherence to these labour standards on a global scale. The ILO remains pivotal in advancing social justice and promoting decent work conditions globally.³⁸

Similarly, the protection of minority rights represents a critical aspect within the framework of international human rights, encompassing a range of essential freedoms and protections. This includes protecting the right to freedom of religion, ensuring language rights in both public and private sectors, guaranteeing access to education, and combating discrimination based on race, nationality, religion, or language.³⁹ Throughout the 19th and 20th centuries, significant strides were made in the development of human

³⁵ Neiberg MS 2017. *The Treaty of Versailles: A Concise History*. Oxford University Press.

³⁶ Kolb and Gaggioli 2013: 10-14.

³⁷ Keeling FH 1914. *Child Labour in the United Kingdom: A Study of the Development and Administration of the Law relating to the Employment of Children*. PS King & Son, 11-12.

³⁸ Kolb and Gaggioli 2013: 10-14.

³⁹ Stearns 2012.

rights, particularly following the establishment of contemporary international law frameworks. Nations were compelled to adhere to these evolving legal standards, marking a concerted effort to bridge the disparities that had accumulated over many centuries.⁴⁰ This era witnessed the recognition and codification of fundamental human rights principles into international legal instruments, treaties, and declarations. These efforts aimed not only to establish universal norms but also to ensure their implementation and enforcement globally. The evolving concept of minority rights became an integral component of these frameworks, reflecting a commitment to protect the rights and dignity of all individuals, irrespective of their minority status.

The concept of human rights gained prominence on the international stage in 1945 with the adoption of the UN Charter, which committed to promoting belief in fundamental human rights, human dignity, and the equality of all individuals regardless of national status.⁴¹ This foundational document set the stage for subsequent developments in international human rights law. A pivotal moment occurred on 10 December 1948, when the UN General Assembly unanimously adopted the UDHR.⁴² The UDHR exerted profound political, social, economic, and cultural influence, shaping both international human rights law and the legal frameworks of numerous nations.⁴³ It supplanted earlier

⁴⁰ Smith RK & van der Anker C 2005. *The Essentials of Human Rights*. Hodder Arnold, London, 151-154.

⁴¹ United States. President (1945-1953: Truman). *The Charter of the United Nations with the Statute of the International Court of Justice Annexed Thereto: Address by the President of the United States Delivered Before the Senate on July 2, 1945 Presenting the Charter of the United Nations, with the Statute of the International Court of Justice Annexed Thereto: and a Message from the President of the United States Transmitting a Certified Copy of the Charter of the United Nations, with the Statute of the International Court of Justice Annexed Thereto* US Government Printing Office, 1945. For Cranston, human rights are a matter of “paramount importance.” Cranston 1967.

⁴² United Nations General Assembly 1948. Universal Declaration of Human Rights. (adopted on 10 December 1948); Eide A 1998. The Historical Significance of the Universal Declaration. *International Social Science Journal* 158, 475-497. See also Glendon MA 1998. ‘Knowing the Universal Declaration of Human Rights.’ *Notre Dame Law Review* 73(5): 1153-1190.

⁴³ Chowdhury AR & Bhuiyan JH 2012. *An Introduction to International Human Rights Law*. https://therights.files.wordpress.com/2012/07/an_introduction_to_international.pdf (accessed on 29 June 2022).

concepts such as *natural rights and rights of man* that had prevailed in the 19th century. The UDHR was established 'as a common standard of achievement for all peoples and all nations.'⁴⁴ Article 1 of the UDHR asserts that all human beings are inherently free and equal in dignity and rights.⁴⁵ Article 2 extends this principle, affirming that every individual is entitled to all rights and freedoms detailed in the UDHR without discrimination of any kind, including race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth, or other status.⁴⁶

2.2.1 Human rights as a both moral and legal concept

Human rights have been conceptualised through various theoretical lenses,⁴⁷ broadly categorised into natural law and legal positivism.⁴⁸ According to Dembou, human rights are inherent, fundamental, inalienable, universal, eternal, and unchanging moral truths

⁴⁴ The UDHR '[p]roclaims this Universal Declaration of Human Rights as a common standard of achievement for all peoples and all nations, to the end that every individual and every organ of society, keeping this Declaration constantly in mind, shall strive by teaching and education to promote respect for these rights and freedoms and by progressive measures, national and international, to secure their universal and effective recognition and observance, both among the peoples of Member States themselves and among the peoples of territories under their jurisdiction.

⁴⁵ Art 1 of the UDHR states that '[a]ll human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood.'; See also Smith and Van den Anker, 2005.

⁴⁶ Art 2 of the UDHR states that '[e]veryone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status. Furthermore, no distinction shall be made based on the political, jurisdictional or international status of the country or territory to which a person belongs, whether it be independent, trust, non-self-governing or under any other limitation of sovereignty.

⁴⁷ Kafka F & Schloss D 2023. 'The Concept of Human Rights.' In Mahlmann M (ed) *The Concept of Human Rights and the Global History of an Idea*. Cambridge University Press, 44-47.

⁴⁸ George RP 2008. 'Natural Law.' *Harvard Journal of Law and Public Policy* 31: 171. See also George RP 2008. 'Natural Law and Positive Law.' *Arguing About Law*, 144-152; Stearns 2012:45.

that belong to all human beings simply by virtue of their humanity.⁴⁹ This perspective underlines the foundational influence of natural law on shaping the modern understanding of human rights. Umozurike posits that human rights are assertions or claims made by individuals or groups against society based on their inherent humanity, and these claims are grounded in both ethical principles and legal frameworks.⁵⁰ This view emphasises that human rights apply universally, irrespective of differences in race, gender, or other characteristics. Eze argues that human rights are demands or claims individuals assert against society, some of which are already protected by existing laws (*lex lata*), while others represent aspirations for future legal recognition.⁵¹ This perspective highlights the dynamic nature of human rights discourse and the ongoing evolution of legal protections. Cranston contributes to the discourse by defining universal moral rights as entitlements that all human beings should inherently possess, across all times and cultures, and which cannot be justly denied without grave injustice.⁵² This conception highlights the inherent entitlement of every individual to certain rights solely by virtue of being human. Together, these theoretical perspectives illuminate the diverse philosophical foundations underpinning the concept of human rights, reflecting ongoing debates and developments in international law and ethics.

For moral theorists, the prevailing approach to the normative foundations of international human rights posits that human rights are inherent moral claims that all individuals possess by virtue of their shared humanity.⁵³ According to this perspective, the determination of what constitutes a human right is not contingent upon any specific legal

⁴⁹ Dembour MB 2010. 'What are Human Rights? Four Schools of Thought.' *Human Rights Quarterly* 32: 1-20, 2.

⁵⁰ Umozurike UO 1997. *The African Charter on Human and People's Rights*. Martinus Nijhoff Publishers, 5.

⁵¹ Eze OC 1984. *Human Rights in Africa: Some Selected Problems*. Nigerian Institute of International Affairs, 5. See also Madubuike-Ekwe NJ & Obayemi OK 2018. 'Assessment of the Role of the Nigerian Police Force in the Promotion and Protection of Human Rights in Nigeria.' *Annual Survey of International and Comparative Law* 23: 19-48, 19.

⁵² Cranston MW 1977. *What are Human Rights?* Taplinger: New York, 7.

⁵³ Tasioulas J 2012. 'Towards a Philosophy of Human Rights.' *Current Legal Problems* 65(1): 1-30, 26.

instrument or institution. Tasioulas argues that human rights maintain primacy and exist independently of positive international human rights law; simply being declared a human right within a legal system does not inherently grant it the status of a human right.⁵⁴ The integration of moral rights into legal systems becomes significant within human rights discourse when individuals or groups seek to formalise these rights within a legal framework.⁵⁵ The absence of international legal protection for a particular human right does not negate its moral validity.⁵⁶ The existence of a human right is grounded in abstract qualities inherent to human beings and the corresponding obligations that stem from these qualities. The overarching objective of human rights discourse is to ensure that these universal human characteristics receive international legal protection. From a moral standpoint, human rights protect essential qualities and attributes that are universally shared, irrespective of diverse historical, geographic, cultural, communal, or other contextual factors that shape human life and relationships.⁵⁷ These qualities give rise to identifiable duties that individuals owe to one another, grounded in ethical recognition of what it means to be human. Additionally, rights and obligations may also emerge from historical, communal, religious, cultural, or national affiliations.⁵⁸ In instances where a human right lacks positive recognition within a legal system, it may still be connected to related rights or principles that uphold similar ethical imperatives.⁵⁹ This approach underlines the dynamic interplay between moral principles and legal frameworks in the ongoing evolution and protection of human rights globally.

Legal positivists perceive human rights as constructs that emerge from laws enacted by authorities, which impose obligations on individuals to adhere to and respect them,

⁵⁴ Tasioulas J 2007. 'The Moral Reality of Human Rights.' *Freedom from Poverty as a Human Right: Who Owes What to the Very Poor*, 75-101, 76.

⁵⁵ Hart HL & Waldron J 1984. 'Are there any Natural Rights?' *Arguing About Law*, 315-316.

⁵⁶ Tasioulas 2007: 76.

⁵⁷ Macklem P 2015. *The Sovereignty of Human Rights*. Oxford University Press: USA, 6.

⁵⁸ Neff SC 2022. 'The Rights and Duties of Neutrals: A General History.' In *The Rights and Duties of Neutrals*. Manchester University Press.

⁵⁹ Killander M 2008. 'International Human Rights in Context – Law, Politics, Morals.' *African Human Rights Law Journal* 8(2): 617-619.

backed by penalties for non-compliance.⁶⁰ Within the realm of legal theory concerning human rights, the prevailing assumption is that their existence is determined by international law rather than moral theory. For example, an international human right such as the right to food exists because it is enshrined in legal instruments like the ICESCR. The status of such rights as human rights under international law stems from the principle of *pacta sunt servanda*, which dictates that treaties binding two or more sovereign states are obligatory on the parties involved and must be upheld in good faith.⁶¹ Similarly, the right to development is recognised as a human right under international law because the UN General Assembly has officially acknowledged and declared its legal existence.⁶² This acknowledgment within international legal frameworks solidifies the right to development as a binding obligation that states are expected to respect, protect, and fulfil in accordance with their international commitments.

The international validity of a norm is established through a straightforward application of legal positivism, where a norm achieves legal validity if its enactment, promulgation, or elaboration adheres to the general rules of international law governing the creation of specific legal rights and obligations.⁶³ Determining whether an international human right is valid is thus a relatively uncomplicated legal task within this framework. However, legal validity alone does not fully capture the normative purpose of a human right. Legalistic conceptions of human rights that seek to explain their purpose beyond positivist accounts risk reintroducing moral and political considerations into what is intended to be understood in strictly legal terms. Despite potential differences in substance, these theories contribute collectively to shaping the understanding of the right to development from both moral and legal perspectives, particularly within the context of international human rights instruments.

⁶⁰ Priel D 2015. 'Toward Classical Legal Positivism.' *Virginia Law Review*, 987-1022.

⁶¹ United Nations 1969. Vienna Convention on the Law of Treaties (adopted on 23 May 1969 and entered into force on 27 January 1980), 331; Liebenberg S 2001. 'The Protection of Economic, Social and Cultural Rights in Domestic Legal Systems.' *Netherlands: Kluwer Academic Publishers*.

⁶² Thirlway H 2010. 'The Sources of International Law.' *International Law* 2:115.

⁶³ Tebbit M 2017. *Philosophy of Law: An Introduction*. Routledge: London, 6-7.

2.2.2 Defining human rights

The relationship between the moral and legal dimensions of human rights is intricate. In many instances, moral concepts of human rights provide the philosophical basis upon which legal human rights are constructed. The legal recognition and enforcement of these rights serve to formalise and institutionalise the moral principles that underlie them, reinforcing their importance and ensuring their practical application in global human rights frameworks. It is important to note that while human rights are universal in principle, their interpretation and implementation can vary across different cultures and legal systems. Debates often arise regarding the scope and prioritisation of specific rights, reflecting the dynamic interplay between moral and legal perspectives on human rights. Nevertheless, the recognition of human rights as both a moral and legal concept reflects their profound significance in promoting human dignity, equality, and justice on a global scale.

Based on a broader understanding of human rights, scholars, courts, and many other institutions have described human rights as they see them. Scholars like Rosenbaum who lean towards the naturalistic view, define human rights as a valid moral entitlement based on all primary human needs.⁶⁴ As noted by Kanu, human rights are rights that individuals and groups are entitled to, simply because they are human.⁶⁵ The UDHR recognises the inherent dignity, equality, and inalienable rights of all human beings as the basis for freedom, justice, and peace throughout the world.⁶⁶ The UDHR defines human rights as:

⁶⁴ Rosenbaum AS (ed) 1977. *The Philosophy of Human Rights: International Perspectives*. Aldwych Press: Westport, 1.

⁶⁵ Kanu IA 2021. 'Igwebuiké Philosophy and Human Rights Violation in Africa. *AGORA-A Journal of Philosophical and Theological Studies* 2(1): 280-304, 281.

⁶⁶ UNG Assembly 1948. Universal Declaration of Human Rights (adopted on 10 December 1948).

basic universal legal or moral guarantees, which belong to all human beings, and that protect individuals and/or groups, from actions and omissions of the state and some non-state actors that affect fundamental human dignity.⁶⁷

Echoing the UDHR, 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.⁶⁸

The Preamble to the UDHR qualifies human rights as a ‘common standard of achievement for all peoples and nations’.⁶⁹ The Vienna Declaration reaffirms the indivisibility and interdependence of all human rights.⁷⁰ Stanford reiterates the fact that human rights are norms that seek to protect everyone regardless of the colour of their skin, race, sex, social status, religion and culture.⁷¹ The South African Constitution is notable for its explicit inclusion of human rights, affirming democratic values such as human dignity, equality, and freedom for all individuals within the country.⁷² Miller and Redhead assert that human rights are formally enshrined and integrated into national

⁶⁷ Tomás A 2003. ‘A Human Rights Approach to Development: Primer for Development Practitioners.’ *Prepared for a Training Course on a Human Rights Approach to Development Organised by UNDP Nepal (August 2003)*; Decker K, McInerney-Lankford S & Sage C 2005. *Human Rights and Equitable Development: “Ideals”, Issues and Implications*. World Bank, 4; See also Smith RKM 2007. *Textbook on International Human Rights*. Oxford University Press: Oxford.

⁶⁸ Office of the High Commissioner for Human Rights 2015. ‘What are Human Rights?’. Available at <http://www.ohchr.org/EN/Issues/Pages/WhatareHumanRights.aspx> (accessed on 20 March 2023). See also Alston P & Goodman R 2013. *International Human Rights*. Oxford University Press: Oxford, 139.

⁶⁹ UDHR.

⁷⁰ United Nations General Assembly 1993. *Vienna Human Rights Declaration and Programme of Action*.

⁷¹ UNDRTD.

⁷² Constitution of the Republic of South Africa, 1996; See also Currie I & De Waal J 2013. *The Bill of Rights Handbook*. Juta & Company Ltd: Cape Town, 451-573.

legislation, thereby mandating their direct application across all official procedures.⁷³ This interpretation of the South African Constitution emphasises that the Bill of Rights applies universally to all laws and imposes binding obligations on all branches of government.⁷⁴ In practice, the government is obligated to demonstrate its commitment to upholding human rights through proactive measures, including advocacy efforts and establishing mechanisms for monitoring human rights at the domestic level.⁷⁵ According to McInerney-Lankford and Sano adherence to international covenants and conventions on human rights represents a crucial step towards fulfilling these obligations, signifying a commitment to advancing human rights protections both domestically and internationally.⁷⁶

As embodied in the UDHR and other international human rights instruments, the interdependence, interdependence and indivisibility of human rights also apply to the right to development, which is discussed later in this chapter as part of the broad spectrum of justiciable human rights. Although there is much debate about the relevance of some rights, a right should derive its status, relevance and enforceability from law, even though its origins may lie elsewhere. The right to development is one such right, notwithstanding that rights are not absolute and come with justifiable limitations. These restrictions are designed to protect rights from infringement and misuse. Griffiths et al, point out that restrictions balance rights with their respective obligations.⁷⁷ For example, one has the right to freedom of religion, which does not extend to harming the public and exploiting people.

⁷³ Miller H & Redhead R 2019. 'Beyond Rights-Based Approaches?: Employing a Process and Outcomes Framework.' *The International Journal of Human Rights* 23(5): 699-718, 706.

⁷⁴ Constitution of South Africa.

⁷⁵ Reif LC 2000. 'Building democratic institutions: The role of national human rights institutions in good governance and human rights protection.' *Harvard Human Rights Journal*, 13, 1.

⁷⁶ McInerney-Lankford S & Sano HO 2010. *Human Rights Indicators in Development: An Introduction*. The World Bank: Washington DC, 35.

⁷⁷ Griffiths MA, Albinsson PA, & Perera BY 2023. 'Balancing Rights with Responsibilities: Citizens' Responses to Expert Systems.' In: *COVID-19: Individual Rights and Community Responsibilities*. Routledge, 28-53.

According to Vasak, there are so-called generational rights, which fall into three groups that affect their status as legal or moral obligations, namely: first-generation rights, which include civil and political rights; second-generation rights, which include economic, social and cultural rights; and third generation rights, which consist of solidarity or group rights, which are arguably undefined and evolving.⁷⁸ The classification of human rights into these groups has raised serious questions about the fairness of doing so, and the priority associated to each group, including the enforceability of certain rights over others, even though rights are internationally recognised as equivalent in status. The classification of rights further designates them as either positive or negative rights.⁷⁹ Goodhart argues that first-generation rights are negative in nature as they reflect political beliefs and aspirations related to human freedoms and equality.⁸⁰ In other words, these rights require the government to refrain from violating or abusing them, particularly concerning the right to freedom from slavery, torture, arbitrary arrest, and interference, to say the least. On the contrary, positive rights require the government to be actively involved in their provision.⁸¹ 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

⁷⁸ Vasak K 1977. '30 Years of Struggle' *UNESCO – The Courier*, 32. 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 also Kiss A & Shelton D 2004. *International Environmental Law*. Brill, 12; Ruppel OC 2008. *Third-Generation Human Rights and the Protection of the Environment in Namibia: Human Rights and the Rule of Law in Namibia*. Macmillan Education Namibia, Windhoek 101-103; Holder C & Eider D 2013. *Human Rights. The Hard Questions*. Cambridge University Press, 104.

⁷⁹ Fredman S 2008. *Human Rights Transformed: Positive Rights and Positive Duties*. Oxford University Press, 1-4.

⁸⁰ Goodhart M 2013. *Human Rights: Politics and Practice*. Oxford University Press: Oxford.

⁸¹ Whelan D & Donnelly J 2007. 'The West, Economic and Social Rights, and the Global Human Rights Regime: Setting the Record Straight.' *Human Rights Quarterly*, 908-949; Kirkup A & Evans T 2009. 'The Myth of Western Opposition to Economic, Social, and Cultural Rights?: A Reply to Whelan and Donnelly.' *Human Rights Quarterly* 31: 221-237, 222-225.

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.⁸²

The categorisation of human rights gained significant traction with the adoption of the ICCPR) and the ICESCR by the UN General Assembly in 1966. The ICCPR mandates governments to uphold rights such as the right to life, the right to vote, freedom of conscience, opinion, and religion, alongside other civil and political rights. On the other hand, the ICESCR encompasses entitlements such as the rights to food, education, health, shelter, and various socio-economic rights.⁸³ Both covenants also acknowledge certain third-generation rights, including the right to self-determination and the right to development.⁸⁴ While the right to development does not carry the same level of legal binding as some other human rights, it holds substantial legal and moral significance. Governments are legally obliged to take measures to promote and protect the right to development, a commitment emphasised by numerous international instruments and declaration.

2.3 HISTORICAL OVERVIEW OF THE CONCEPT OF DEVELOPMENT

The concept of development has undergone a transformative evolution from its early focus on economic advancement to encompass broader dimensions such as human well-being, social justice, and environmental sustainability. This evolution mirrors ongoing

⁸² Vasak 1977: 32.

⁸³ Shue H 2020. *Basic Rights: Subsistence, Affluence, and US Foreign Policy*. Princeton University Press, 9; See also Ngang CC 2014. 'Judicial Enforcement of Socio-Economic Rights in South Africa and the Separation of Powers Objection: "The Obligation to Take Other Measures".' *African Human Rights Law Journal* 14(2): 655-680.

⁸⁴ Art 1 common to the two covenants provide that '[a]ll 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.'

debates and diverse perspectives on how societies can achieve balanced and sustainable development in an increasingly interconnected global context. In this section, I illuminate the historical trajectory of the concept of development within the frameworks of the two eras of the UN system. This exploration will elucidate how these frameworks reflect theoretical debates surrounding the right to development, as well as the practical challenges encountered in advancing inclusive, sustainable, and rights-based approaches to human development.

2.3.1 Development beyond economic growth

Development within the UN system represents an ongoing and dynamic process aimed at addressing global challenges while fostering a more equitable and sustainable future. It involves collaborative efforts from the international community and is guided by shared principles and values. According to Chambers, development can be understood as positive change.⁸⁵ Scholars like Sen⁸⁶ and Sumner⁸⁷ further elaborate that development encompasses continuous transformations across various dimensions of human society, including economic, social, political, legal, cultural, and institutional structures.⁸⁸ This evolution gained momentum in the aftermath of World War I, when the international community established institutions such as the LoN (later succeeded by the UN) with mandates encompassing human rights and development.⁸⁹ Hopper argues that this era provided the foundational institutional framework within which contemporary development initiatives unfolded.⁹⁰ During this period, the UN reshaped the development agenda,

⁸⁵ Chambers R 2004. 'Ideas for Development.' *IDS Working Paper* 238, 2-3.

⁸⁶ Sen A 2000. *Development as Freedom*. Oxford University Press, 3.

⁸⁷ Sumner Propounds that development has 'overall multiplicity of definitional debates includes a general agreement on the view that 'development' encompasses continuous 'change' in a variety of aspects of human society.' For further reading see Sumner A 2006. 'What is Development Studies?' *Development in Practice* 16(6): 644-650.

⁸⁸ See above.

⁸⁹ LoN 1919. 'Covenant of the League of Nations' (adopted on 29 April 1919 and entered into force on 10 January 1920); Ware 2010: 1-20.

⁹⁰ Hopper P 2012. *Understanding Development: Issues and Debates*. Polity Press: Cambridge 7.

moving beyond mere economic growth metrics to emphasise social development, particularly in the context of decolonisation⁹¹ and human rights.⁹² The UN's approach included promoting economic development through community-driven projects that encouraged active participation, thereby enhancing the effectiveness of social development programmes.⁹³ This pivotal era marked significant strides towards the theoretical integration of development and human rights, laying the groundwork for their interconnectedness within global discourse and policy frameworks.

The terminological challenge surrounding the right to development primarily stems from the varied and complex definitions of development itself, influenced by diverse factors spanning political, social, economic, cultural, and religious contexts. Arndt highlights that the concept of development, as understood today, has historical roots extending over centuries, previously referred to by terms such as modernisation, industrialisation, and, to some extent, westernisation.⁹⁴ Historically, development has been primarily associated with the economic advancement of nations, serving as a yardstick to gauge their progress on a global scale. Walter Rodney, in *How Europe Underdeveloped Africa*, underscores that development is a relative concept, often qualified by comparisons between countries or different time periods.⁹⁵ During earlier epochs, little attention was devoted to human development, with predominant focus placed on economic growth.⁹⁶ The prevailing rationale was that economic advancement would inherently benefit society at large, either

⁹¹ Sindane in *Morena Mhloni le Badimo: Reading Decolonial Articulations into the Intellectual Property Law Curriculum* correctly propounds that '[d]ecolonisation is an inevitably violent phenomenon in that it entails the de centring of long-standing hegemonic orders.'

⁹² Rist 2008: 89; See Midgley J 2014. *Social Development: Theory and Practice*. Sage Publications: London.

⁹³ Midgley 2014: 28-39; See also Thomas T & Narayanan P 2015. *Participation Pays: Pathways for Post-2015*. Practical Action Publishing Ltd: Warwickshire, 164.

⁹⁴ Arndt HW 1987. *Economic Development: The History of an Idea*. The University of Chicago Press: Chicago/London, 9.

⁹⁵ Rodney W 1972. *How Europe Underdeveloped Africa*. Bogle-L'Ouverture Publication : London, 10.

⁹⁶ Sant'Ana M 2008. 'The Evolution of the Concept of Development: From Economic Growth to Human Development.' *Inter-University Attraction Pole Working Paper*, 5. See also Payne A & Phillips N 2010. *Development*. Polity Press: Cambridge.

through market-driven mechanisms or state-driven social policies.⁹⁷ Arndt further notes a distinction between the notions of development and well-being, suggesting that the former historically prioritised economic growth without necessarily addressing issues like poverty, unemployment, inequality, or overall human welfare.⁹⁸ Thus, the historical evolution of development concepts underscores the multifaceted nature of the term and its evolution over time, reflecting shifting priorities and perspectives within global discourse on progress and societal advancement.⁹⁹

The concept of development encompasses various dimensions, including human,¹⁰⁰ economic, and sustainable development, as categorised by scholars like Walter Rodney and the United Nations Development Programme (UNDP).¹⁰¹ Rodney emphasises that development can take on different meanings depending on the context, ranging from personal to economic development.¹⁰² Economically, Rodney suggests that a society achieves economic development when its members collectively enhance their ability to manage their environment effectively.¹⁰³ This perspective integrates environmental stewardship with economic development, highlighting the interconnectedness of human activities with natural resources. On the other hand, personal or human development, as Rodney describes it, involves enhancing individual capabilities such as increased abilities, freedom, creativity, self-discipline, responsibility, and material well-being.¹⁰⁴ Udombana state that the fundamental aim of development is to fulfil both the spiritual and material needs of individuals, encompassing their holistic well-being.¹⁰⁵ Rios adds

⁹⁷ Sant'Ana 2008: 5.

⁹⁸ Arndt HW 2008. 'Economic Development: A Semantic History.' *Economic Development and Cultural Change* 29(3): 55.

⁹⁹ Moseli K 2022. 'A Rights-Based Approach to Development: The Link Between Human Rights and Development.' *Pretoria Student Law Review* 16(3): 196-205, 198.

¹⁰⁰ UNDP Human Development Report 2010.

¹⁰¹ UNDP Human Development Report 2011.

¹⁰² Rodney 1972: 10.

¹⁰³ Rodney 1972: 10.

¹⁰⁴ Rodney 1972: 10.

¹⁰⁵ Udombana NJ 2000. 'The Third World and the Right to Development: Agenda for the Next Millennium.' *Human Rights Quarterly* 22(3): 753-787, 756.

another dimension by framing development as a concept aimed at improving the quality of life for all individuals, especially the most vulnerable.¹⁰⁶ This human-centric approach aligns with Sen's concept of development as freedom, which emphasises enhancing human capabilities.¹⁰⁷ Sen defines human capabilities as the capacity for individuals to lead lives they value, advocating for the removal of significant barriers that curtail freedom, including poverty, social deprivation, lack of economic opportunities, and oppressive state actions.¹⁰⁸ In essence, these perspectives collectively contribute to a nuanced understanding of development, highlighting its multidimensional nature and the imperative to address human needs and capabilities while promoting sustainable and equitable progress.

Building on Sen's perspective, Allot views development as not merely economic development but as an enhancement in the quality of life and opportunities available to ordinary individuals.¹⁰⁹ This perspective diverges from viewing development purely through economic or statistical lenses. Sen and Nussbaum similarly argue that development fundamentally pertains to human capabilities.¹¹⁰ Fudaka-Parr extends this viewpoint by emphasising human well-being as the central aim of development, emphasising agency as a crucial element in this process.¹¹¹ This holistic framework provides a philosophical basis for addressing diverse development challenges, starting with the fundamental question of how development should be conceptualised.¹¹² Sen advocates that development should encompass more than economic development; it

¹⁰⁶ Rios JMC 2001. 'Development, Communication, Information and Training.' *Research Institute for Development Communication* (Runa).

¹⁰⁷ Sen 2000: 87.

¹⁰⁸ Sen 2001: 87.

¹⁰⁹ Allot 1984: 1-9.

¹¹⁰ Nussbaum MC 2011. *Creating Capabilities: The Human Development Approach*. Cambridge: Harvard University Press 1-45; Sen 2000.

¹¹¹ Fudaka-Parr S 2011. 'Theory and Policy in International Development: Human Development and Capability Approach and the Millennium Development Goals.' *International Studies Review* 13(1): 122-132, 123.

¹¹² Fudaka-Parr 2011: 123.

should also focus on expanding the real freedoms that people can enjoy.¹¹³ Sengupta adds that development is an ongoing process rather than a finite event, requiring sustained planning, resources, skills, and commitment over time.¹¹⁴ In line with the UNDRTD,¹¹⁵ development entails the meaningful participation of the population, ensuring a fair distribution of the benefits derived from these processes. This participatory approach aligns with Sen's vision of development as enhancing individuals' capabilities and freedoms, thereby promoting human well-being beyond mere economic metrics.

2.3.2 Development under the League of Nations System

Traditional theories in the 19th century, particularly classical and neo-classical economic theories, primarily concentrated on resource development as a means to increase wealth and enhance national status. These theories often neglected the broader impacts on poverty and human well-being, focusing instead on economic growth and accumulation of resources. The rise of colonialism during the 19th century further exacerbated this focus on Western values of spreading wealth and development, often at the expense of non-Western societies and their indigenous ideas of development.¹¹⁶ Colonial powers imposed their economic and cultural ideologies on colonised regions, marginalising local perspectives from the discourse on development. Colonial administrations typically pursued development and welfare as distinct objectives.¹¹⁷ Development initiatives were geared towards exploiting resources and enhancing economic productivity, while welfare measures were often minimal and focused on maintaining social order and economic

¹¹³ Sen 2000: 3.

¹¹⁴ Sengupta A 2004. 'The Human Right to Development.' *Oxford Development Studies* 32(2): 179-203.

¹¹⁵ United Nations General Assembly 1986. *United Nations Declarations on the Rights to Development* (adopted 4 December 1986).

¹¹⁶ McMichael P 2012. *Development and Social Change: A Global Perspective*. 5th Edn, Los Angeles: Sage Publications, 3, 26-38; Fieldhouse DK 1983. *Colonialism, 1870-1945: An Introduction*. Macmillan, Johannesburg; Elkins C & Pedersen S (eds) 2005. *Settler Colonialism in the Twentieth Century: Projects, Practices, Legacies*. Routledge: New York.

¹¹⁷ Arndt 2008: 55.

extraction.¹¹⁸ Following World War I, there was a shift in international governance towards administering defeated nations under colonial oversight by international organisations. Socialists and philanthropists advocated for this approach, viewing it as a means to stabilise and rebuild war-torn regions under a framework of international supervision.¹¹⁹

After World War I, a significant shift in global perspectives on development began to take shape, largely influenced by the formation of the LoN. Established on 10 January 1920, the LoN was intended to serve as a forum for addressing international disputes and promoting cooperation among nations.¹²⁰ It is important to note, however, that its formation primarily involved European nations, giving rise to criticisms that it reflected a Eurocentric view of international affairs, where European concerns were equated with global issues.¹²¹ The Covenant of the LoN, particularly Article 22, introduced for the first time, the concept of well-being and development within the framework of international organisations.¹²² This marked a departure from earlier notions where development was

¹¹⁸ Arndt 2008: 55.

¹¹⁹ Rist 2008: 59.

¹²⁰ Rist 2008: 59; LoN 1919. Covenant of the League of Nations (adopted on 29 April 1919 and entered into force on 10 January 1920).

¹²¹ Kuru D 2016. 'Historicising Eurocentrism and anti-Eurocentrism in IR: A revisionist account of disciplinary self-reflexivity.' *Review of International Studies*, 42(2), 351-376.

¹²² Art 22 of the Covenant of the League of Nations state that '[t]o those colonies and territories which as a consequence of the late war have ceased to be under the sovereignty of the States which formerly governed them and which are inhabited by peoples not yet able to stand by themselves under the strenuous conditions of the modern world, there should be applied the principle that the well-being and development of such peoples form a sacred trust of civilisation and that securities for the performance of this trust should be embodied in this Covenant. The best method of giving practical effect to this principle is that the tutelage of such peoples should be entrusted to advanced nations who by reason of their resources, their experience or their geographical position can best undertake this responsibility, and who are willing to accept it, and that this tutelage should be exercised by them as Mandatories on behalf of the League. The character of the mandate must differ according to the stage of the development of the people, the geographical situation of the territory, its economic conditions and other similar circumstances. Certain communities formerly belonging to the Turkish Empire have reached a stage of development where their existence as independent nations can be provisionally recognised subject to the rendering of administrative advice and assistance by a Mandatory until such time as they are able to stand alone. The wishes of these communities

primarily seen through the lens of economic growth and colonial expansion. This epoch introduced the developmental stages of previously colonised countries, suggesting that these nations could progress through various stages of growth to achieve development status.¹²³ This idea became influential in development thinking during the 1950s and early 1960s, shaping policies and interventions aimed at fostering economic and social progress in colonised regions.¹²⁴ Furthermore, the Covenant justified international interventions in humanitarian terms, invoking universal values of civilisation, material and moral well-being, and social progress.¹²⁵ This humanitarian discourse introduced a new form of imperialism that focused more on the development and welfare of indigenous

must be a principal consideration in the selection of the Mandatory. Other peoples, especially those of Central Africa, are at such a stage that the Mandatory must be responsible for the administration of the territory under conditions which will guarantee freedom of conscience and religion, subject only to the maintenance of public order and morals, the prohibition of abuses such as the slave trade, the arms traffic and the liquor traffic, and the prevention of the establishment of fortifications or military and naval bases and of military training of the natives for other than police purposes and the defence of territory, and will also secure equal opportunities for the trade and commerce of other Members of the League.'

¹²³ According to De Man, the 1960s, marked as the UN first decade of development and the global community were able to create general framework for development and it was characterised as the most pressing developmental decade in relation to addressing issues of poverty around the world. This led to countries being required to achieve a certain minimum annual growth (5%) and were also required to promote measures to eradicate illiteracy, poverty and health issues. This further produced advanced talks around the development of human wellbeing. However, it was discovered that as much as growth was achieved it couldn't really advance the living standard for all due to the missing element of participation and accountability. It is obvious that the first decade of development failed to address and reduce universal poverty due to increase in unequal distribution of wealth. For further explanation, see Nations Encyclopaedia. *Economic and Social Development – First UN Development Decade* available at <http://www.nationsencyclopedia.com/United-Nations/Economic-and-Social-Development-FIRST-UN-DEVELOPMENT-DECADE.html>; The second decade of development was pronounced in 1970 after the adoption of the International Development Strategy on 24 October 1970. This decade called for financial resources to assist those nations who seek aid to gain access in a global and integrated manner.

¹²⁴ Rist 2008: 61; Todaro MP & Smith SC 2003. *Economic Development*. 6th edn, Pearson Education Ltd: London 111.

¹²⁵ Rist 2008: 62.

colonial communities.¹²⁶ However, these developments were often implemented without sufficient regard for local realities, beliefs, and cultures, limiting opportunities for local populations to participate meaningfully in decisions that affected their lives. Despite its progressive steps in integrating human well-being into development discourse, references to human rights within the context of development for colonised countries remained minimal. The Covenant's approach implied a singular path to development that disregarded diverse local contexts, further highlighting the challenges and limitations of early international efforts to promote development and well-being on a global scale.

By the end of the 1940s, the perspectives on development in third world countries were evolving significantly, marked by shifting priorities and emerging challenges. Jawaharlal Nehru, a prominent leader in the Indian independence movement and later Prime Minister of India, articulated a vision emphasising the comprehensive upliftment of the masses. He stressed the need to address both material needs and cultural and spiritual development, highlighting a broader understanding of development beyond economic metrics alone.¹²⁷ Historically, economic and social development in third world countries had been prioritised by colonial rulers only to the extent that it served their own interests.¹²⁸ The colonial era was marked by exploitation and extraction of resources, often neglecting the holistic development of local populations. This paradigm persisted until the end of World War II, which brought about significant shifts in global power dynamics and led to widespread decolonisation across Africa and Asia.¹²⁹ The LoN, formed after World War I, faced numerous challenges during its existence, including its inability to prevent the outbreak of World War II. Ultimately, the League was disbanded in 1946, and its functions and responsibilities were assumed by the UN. The UN took on a broader and more comprehensive role in promoting global development, peace, and international cooperation. UN agencies such as UNICEF (United Nations Children's

¹²⁶ Craggs R 2014. '1 Development in a Global-Historical Context. In *The Companion to Development Studies*. Routledge: London, 27-31.

¹²⁷ Arndt 1987: 21.

¹²⁸ Thorbecke E 2007. The Evolution of the Development Doctrine 1950-2005. In *Advancing Development: Core Themes in Global Economics*. Palgrave Macmillan: London, 3-36.

¹²⁹ Arndt 1987: 49.

Fund), United Nations Development Plan (UNDP) and the World Health Organisation (WHO) have since played pivotal roles in addressing global development issues. They continue to work collaboratively with member states and other international organisations to tackle challenges related to health, education, economic development, and human rights globally.

2.3.3 Development under the United Nations system

The concept of development under the UN system is a multifaceted and evolving framework that aims to improve the well-being and living conditions of people around the world. Development, as understood within the UN system, encompasses economic, social, and environmental dimensions, and it is guided by principles of sustainability, equity, and human rights.

According to Powaski following the devastation caused by World War II, Europe had to rely on both the United States and the Soviet Union for reconstruction efforts.¹³⁰ The LoN was dismantled because neither country wanted to protect Europe's colonial empires.¹³¹ On 26 June 1945, officials from 50 countries signed the UN Charter to solve this gap and govern international peace, security, ties, and cooperation. The United Nations was established on 24 October 1945,¹³² and currently has 193 member States.¹³³ On 10 December 1948, the UN General Assembly adopted the UDHR to guarantee that the crimes perpetrated during the holocaust would never be repeated. Hopper argues that the UN 'provides the overarching institutional framework within which contemporary development takes place.'¹³⁴ Until the end of World War II, human rights and development

¹³⁰ Powaski RE 1997. *The Cold War: The United States and the Soviet Union, 1917-1991*. Oxford University Press.

¹³¹ Rist 2008: 69.

¹³² UN 1945. *UN Charter* (signed on 26 June 1945 and entered into force on 24 October 1945).

¹³³ Schaaf R 2013. *Development Organizations*. Routledge, Abingdon, 38; Rist 2008: 69; Thakur R 2012. 'From the Millennium Development Goals to Global Development Goals'. In Wilkinson & Hulme 2012:54-83, 54-55.

¹³⁴ Hopper 2012: 7.

were viewed as distinct.¹³⁵ Jolly notes that likened to the LoN's restricted mission, the adoption of the UN Charter marked a significant step towards theoretical recognition of the link between development and human rights.¹³⁶ Some of the primary goals of the UN's formation include the advancement and protection of human rights, as well as economic and social development.

The idea that economic development should also increase per capita income and thus, living standards received increasing attention.¹³⁷ However, and although Article 55 of the Charter recognises that human rights and development include interrelated activities, recognition of the relationship between human rights and development has not been put into practice. As a result, in the first years of existence, the UN failed to develop an integrated approach to economic and social development in a people-centred framework.¹³⁸ Alston argues that even after the adoption of the UDHR, development and human rights agendas were 'deliberately completely separated' and formulated in isolation from one another.¹³⁹ Alston further states that including human rights in the development agenda would be inappropriate, unproductive or politically unacceptable.¹⁴⁰ Human rights were viewed as outside the development sphere, and development organisations paid little or no attention to evidence of development progress achieved

¹³⁵ Cornwall A & Nyamu-Musembi C 2004. 'Putting the "Rights-Based Approach" to Development into Perspective.' *Third World Quarterly* 25(8): 1415-1437, 1421; Darrow M & Tomas A 2005. 'Power, Capture, and Conflict: A Call for Human Rights Accountability in Development Cooperation.' *Human Rights Quarterly* 27(2): 471-538, 477.

¹³⁶ Jolly R et al 2009. 'The UN and Human Development.' United Nations Intellectual History Project (Briefing Note 8), 1.

¹³⁷ Gready P & Ensor J 2005. *Reinventing Development: Translating Rights-Based Approaches from Theory into Practice*. Zed Books: London/New York, 17.

¹³⁸ Jolly et al 2009: 1.

¹³⁹ Alston P 2004. *A Human Rights Perspective on the Millennium Development Goals*. Paper prepared as a contribution to the work of the Millennium Project Task Force on Poverty and Economic Development. Retrieved from http://pacific.ohchr.org/docs/A_HR_perspective_on_MDGs_P_Alston.doc, Para 10; See also Uvin P 2007. 'From the Right to Development to the Rights-based Approach: How "Human Rights" Entered Development'. *Development in Practice* 17(4-5): 597-606, 597.

¹⁴⁰ Alston 2004: 10.

through the recognition and fulfilment of rights.¹⁴¹ In addition, the human rights framework included separate departments. As a result of the Cold War, civil and political rights were pitted against economic, social and cultural rights. Gready and Ensor propound that this led to the adoption of two separate international covenants, one focused on civil and political rights and the other on economic, social and cultural rights.¹⁴² Filmer-Wilson adds that this separation had the unfortunate consequence of causing further problems.¹⁴³

In 1945, the United Nations Economic and Social Council (ECOSOC) was established to coordinate the work of the UN relating to economic and social rights in accordance with Article 55 of the UN Charter.¹⁴⁴ The ECOSOC stated at its first meeting that ‘there is a need for a long-term and balanced development program that should cover not only economic aspects but also the social, scientific, health, educational and cultural aspects of community life.’¹⁴⁵ The Council explains its current role as at ‘the heart of the United Nations system for promoting the three dimensions of sustainable development – economic, social and environmental.’¹⁴⁶ The Council has been instrumental in ensuring that the promotion of human well-being is considered in international and national development programmes. In response to the adoption of the UN Charter, the International Monetary Fund (IMF), the World Bank and other international development organisations were also founded.¹⁴⁷ The establishment of the World Bank was indeed, a significant milestone aimed at promoting economic development and reducing poverty globally, including in third world countries.¹⁴⁸ However, its impact and effectiveness in achieving these goals have been subject to considerable debate and criticism over the

¹⁴¹ Filmer-Wilson E 2005. ‘The Human Rights-based Approach to Development: The Right to Water.’ *Netherlands Quarterly of Human Rights* 23(2): 213-241, 214.

¹⁴² Gready & Ensor 2005: 16-17.

¹⁴³ Filmer-Wilson 2005: 215.

¹⁴⁴ Hopper 2012: 8.

¹⁴⁵ Arndt 1987: 53.

¹⁴⁶ ECOSOC. *About Us*. Available at <https://www.un.org/ecosoc/en/about-us> (accessed on 22 September 2024).

¹⁴⁷ Hopper 2012: 8-9.

¹⁴⁸ Hopper 2012: 8.

years. The World Bank's policies, particularly its structural adjustment programmes (SAPs), imposes stringent conditions on borrowing countries.¹⁴⁹ These conditions often included fiscal austerity measures, deregulation, privatisation of state-owned enterprises, trade liberalisation, and currency devaluation. While intended to promote economic stability and growth, these policies frequently led to negative social impacts such as increased unemployment, reduced social spending, and heightened inequality.¹⁵⁰ In other words, the focus on economic indicators and fiscal discipline often overlooks the broader social and human rights dimensions of development, leading to disenchantment among local populations and civil society groups.

2.4 HUMAN RIGHTS AND DEVELOPMENT NEXUS

The nexus between human rights and development underscores the importance of integrating rights-based approaches into development policies and practices. It has significantly shaped the global development agenda by integrating principles of human dignity, equality, and justice into policies and practices. Therefore, in this section, I analyse the nexus between human rights and development and how this connection has shaped the global development agenda over the years.

Historically, the concepts of human rights and development have often been viewed as separate domains with distinct objectives and approaches.¹⁵¹ This perceived separation persisted despite efforts by the international community to address both issues through various bodies established after World War II.¹⁵² The UN Charter laid the foundation for

¹⁴⁹ Emeagwali G 2011. 'The neo-liberal agenda and the IMF/World Bank structural adjustment programs with reference to Africa.' In *Critical Perspectives on Neoliberal Globalization, Development and Education in Africa and Asia*, Rotterdam: Sense Publishers, 3-13.

¹⁵⁰ Emeagwali 2011: 7-8.

¹⁵¹ Uvin 2007: 163.

¹⁵² LoN 1919. Covenant of the League of Nations (adopted on 29 April 1919 and entered into force on 10 January 1920); Ware A 2010. 'Human Rights and the Right to Development: Insights into the Myanmar Government's Response to Rights Allegations. *Proceedings of the 18th Asian Studies Association of*

promoting both human rights and economic and social development.¹⁵³ Article 55 of the UN Charter explicitly recognises the interconnection between these two areas, emphasising the importance of promoting higher standards of living, full employment, and conditions of economic and social progress and development, as well as respect for human rights and fundamental freedoms for all.¹⁵⁴

However, scholars like Jolly et al. argue that while there is rhetorical acknowledgment of the link between human rights and development within international frameworks, this connection has often not been effectively translated into practice. The early years of the UN operations struggled to develop an integrated approach that places human beings at the centre of economic and social development efforts. One of the key challenges has been the compartmentalisation of human rights and development agendas within international organisations and national policies.¹⁵⁵ Human rights have traditionally been seen as a set of norms and principles focused on civil and political liberties, while development has often been narrowly interpreted in economic terms, centred on growth and material progress.

According to Alston and Uvin the adoption of the UDHR did not immediately integrate human rights and development as interconnected agendas. Instead, these concepts were often treated separately.¹⁵⁶ Development efforts, particularly those led by international organizations, typically focused on economic growth and material progress, while human rights were viewed more narrowly as civil and political liberties.¹⁵⁷ Furthermore, Gready and Ensor argue that the subsequent adoption of the ICCPR and the ICESCR as separate

Australia Biennial Conference of the ASAA: Crises and Opportunities: Past, Present, and Future. Asian Studies Association of Australia, 1-20.

¹⁵³ Jolly et al 2009: 1; Landman T 2004. 'Measuring Human Rights: Principle, Practice, and Policy.' *Human Rights Quarterly* 26: 908-931, 906.

¹⁵⁴ Jolly et al 2009: 1.

¹⁵⁵ Emmerij L, Jolly R, & Weiss TG 2005. 'Economic and social thinking at the UN in historical perspective.' *Development and Change*, 36(2), 211-235.

¹⁵⁶ Uvin 2007: 597; Alston 2004: 10.

¹⁵⁷ de Man A 2018. 'Tracing the Evolution of the Notion "Development": From Economic Interests to Human Welfare; Filmer-Wilson 2005: 214.

sets of rights further complicated the relationship between human rights and development.¹⁵⁸ The ICCPR emphasised civil and political freedoms, while the ICESCR focused on economic, social, and cultural rights. The Tehran Conference on Human Rights in 1968 marked a significant turning point in efforts to link development and human rights.¹⁵⁹ During this conference, the UN General Assembly noted the importance of integrating human rights into development frameworks. The resolution from the conference urged governments to incorporate human rights and fundamental freedoms into their economic and social development plans. This approach was seen as essential for promoting progress in human rights and ensuring their observance and respect at both national and international levels. Subedi asserts that the Tehran Conference resolution aimed to create a comprehensive framework for advancing human rights through development initiatives.¹⁶⁰

The work of the ILO and other development organisations as well as practitioners advocating for a more people-centred approach to development bore fruit in the work of the United Nations in the late 1970s.¹⁶¹ Charged with exploring the relationship between human rights and development, as well as the international elements to a possible right to development, the UN Secretary General at the time, Kurt Waldheim stated:

[T]he central purpose of development is the realization of the potentialities of the human person in harmony with the community; the human person is the subject not the object of development; both material and non-material needs must be satisfied; respect for human rights is fundamental; the opportunity for full participation must be accorded; the principles

¹⁵⁸ Gready P & Ensor J 2005. *Reinventing Development: Translating Rights-Based Approaches from Theory into Practice*. Zed Books: London/New York, 17.

¹⁵⁹ In April and May 1968, representatives of 84 states, 4 regional organisations, and 57 non-governmental organisations (NGOs) met in Tehran, Iran, for the first United Nations International Conference on Human Rights.

¹⁶⁰ Subedi SP 2021. 'Declaration on the Right to Development.' *United Nations Audiovisual Library of International Law* 1-9, 2.

¹⁶¹ Filmer-Wilson 2005: 215.

of equality and non-discrimination must be respected; and a degree of individual and collective self-reliance must be achieved.¹⁶²

In 1979, the UN Secretary General published a report that established the ethical and legal foundations for the right to development. The report states that:

[T]here are a variety of ethical arguments which may be considered to support the existence in ethical terms of a right to development. These include the fact that development is the condition of all social life, the international duty of solidarity, the duty of reparation for colonial and neocolonial exploitation, increasing moral interdependence, economic interdependence, and the cause of world peace, which is threatened by underemployment.¹⁶³

The main reason for conceptualising the right to development is highlighted in the report. There was a call for justice at the international level. Developing countries believe that not only the country state but the entire international community should be responsible for ensuring that human rights are realised for all. With the adoption of the UNDRTD in 1986, the UN officially recognised that there is indeed a link between human rights and development.¹⁶⁴ The idea of incorporating human rights into the development process is at the heart of this right, which imposes duties on the government. Sengupta states that the right to development is a right involving both the process and the outcome of development.¹⁶⁵ Other provisions of the law are included, albeit not explicitly, in the UN Charter, the UDHR, and the two international human rights treaties.

Article 1 of the UNDRTD states that ‘the right to development is 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.’¹⁶⁶ Articles 2 and 3 are also

¹⁶² Gready & Ensor 2005: 18.

¹⁶³ Rich RY 1983. ‘The Right to Development as an Emerging Human Right.’ *Virginia Journal of International Law* 23: 322.

¹⁶⁴ UNDRTD.

¹⁶⁵ Sengupta 2004: 189.

¹⁶⁶ Art 1 of the UNDRTD.

relevant as they reaffirm that people should be at the centre of development and that it is the responsibility of states to ensure the fulfilment of the right to development. According to Filmer-Wilson, the UNDRTD recognises development as a people-centred, participatory process and links human development to the implementation of international human rights obligations.¹⁶⁷ Even as the Third World celebrated the recognition of the right to development, the First World triumphed in a sense, as civil and political rights still took precedence over socio-economic rights. In addition, the right to development has remained non-binding and carries no legally binding obligations internationally.¹⁶⁸ However, it is noted that the right to development has evolved directly from the 1944 Philadelphia Declaration and the General Conference of the ILO.¹⁶⁹

The UNDRTD articulates the composite nature of the right to development, in which all human rights can be realised together, recognising their interdependence and not just their synergy.¹⁷⁰ The South Africa constitutional order replicates this standard by acknowledging the composite nature of this right and affirming the close relationship between civil and political rights and economic, social, and cultural rights, as enshrined in chapter 2 of the 1996 Constitution.¹⁷¹ According to Sengupta, the right to development is achievable if at least one right is fulfilled and none is violated.¹⁷² A violation of civil and political rights or socio-economic rights compromises the right to development.¹⁷³ Thus,

¹⁶⁷ Filmer-Wilson 2005: 215; See also UNDRTD Preamble; Art 10 of the UNDRTD; Seabrook J 2009. *The No-Nonsense Guide to World Poverty*. Oxford: New Internationalist, 27.

¹⁶⁸ Uvin 2007: 598.

¹⁶⁹ The General Conference of the International Labour Organisation 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 2011. '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.'

¹⁷⁰ Udombana 2000: 767.

¹⁷¹ Constitution of the Republic of South Africa, 1996; See also Kende MS 2003. 'The South African Constitutional Court's Embrace of Socio-economic Rights: A Comparative Perspective.' *Chapman Law Review* 6: 137-160.

¹⁷² Sengupta 2004: 183.

¹⁷³ Sengupta 2004: 183.

the right to development encourages full participation and contribution at the international, regional, and national levels through the formation of partnerships to bring human rights under one authority with the aim of improving people's lives and thereby enabling human flourishing.¹⁷⁴

Since the adoption of the UNDRTD, human rights and development have increasingly been recognised as mutually reinforcing. The connection became even clearer with the emergence of rights-based approaches (RBAs) in the 1990s,¹⁷⁵ which involved the incorporation of human rights principles and standards into development practice.¹⁷⁶ Uvin notes that the period of 1990s saw a shift in development thinking due to the end of the Cold War, the failure of structural adjustment programmes, and the focus on human rights, leading to a more holistic definition of development.¹⁷⁷ This radically transformed the global development order.¹⁷⁸ During this time, the integration of human rights into development practice was increasingly discussed. The RBA emphasises the fact that human rights are a central factor in creating a socially oriented order and that development is a process of change, and that incorporating human rights norms, obligations, and principles can give meaning to the process of change and thus, significantly influence development outcomes.¹⁷⁹

¹⁷⁴ Kamga SD 2011. *Human Rights in Africa: Prospects for the Realisation of the Right to Development under the New Partnership for Africa's Development* (Doctoral Dissertation, University of Pretoria), 67; Ware 2010: 4; Bunn I 2000. 'The Right to Development: Implications for International Economic Law.' *American University International Law Review* 15(60): 1425-1468; see also Cazabat C 2016. 'Integrating Civil Participation into Sustainable Development Practice.' *European Journal of Sustainable Development* 5(4): 25-32, 30.

¹⁷⁵ Marks SP 2003. *The Human Rights Framework for Development: Seven Approaches. Reflections on the Right to Development*. India: SAGE Publications 1-29, 5.

¹⁷⁶ Sano 2000: 741.

¹⁷⁷ Uvin 2007: 164.

¹⁷⁸ Sano 2000: 751.

¹⁷⁹ Banik D 2010. 'Support for Human Rights-Based Development: Reflections on the Malawian Experience.' *The International Journal of Human Rights* 14(1): 34-50, 37-38; See also Appleyard S 2002. *Rights-Based Approach to Development: What the Policy Documents of the UN Development Co-operation*

Sengupta defines RBA as development pursued in 'a manner that follows the procedures and norms of human rights laws, and which is transparent, accountable, participatory, non-discriminatory with equity in decision making and sharing of the fruits or outcomes of the process.'¹⁸⁰ Sengupta's interpretation of the RBA is based on the need to draw a distinction between 'recognizing the right to development as a human right ... and the creating of legally binding obligations relating to the right.'¹⁸¹ For Darrow and Tomas, a RBA is essential because it provides both a normative and an instrumental approach to development.¹⁸² On the one hand, the normative approach ensures that human rights are a mandatory part of an institutional frame of reference through legal and moral obligations. Normative standards reflect that human rights are ends in themselves and must be clearly considered in development processes. On the other hand, the instrumental approach rests on the belief that an RBA will produce more effective poverty reduction and development programmes.¹⁸³ Darrow and Tomas maintain that the integration of human rights, norms, and standards into development is fundamental, and that the integration increases the potential for enjoying human rights in the development process.¹⁸⁴

At this period, both the UNDP and the World Bank published policy papers on development and human rights. This was affirmed by the first Human Development Report published in 1990, which introduced the idea of measuring development in terms of the Human Development Index which fully incorporated human rights language in the development framework.¹⁸⁵ The United Nations Development Assistance Framework and the Common Country Assessments are some of the mechanisms that integrate human

and NGO Agencies Say. Bangkok: UN Office of the High Commissioner for Human Rights, Asia-Pacific Office, 29.

¹⁸⁰ Sengupta A 2001. 'Fourth Report of the Independent Expert on the Right to Development.' "E/CN.4/2002/WG.18/2 20. December 2001, Para 54.

¹⁸¹ See above.

¹⁸² Darrow & Tomas 2005: 492.

¹⁸³ Darrow and Tomas 2005: 493.

¹⁸⁴ Darrow and Tomas 2005: 501.

¹⁸⁵ Stanton EA 2007. *Inequality and the Human Development Index*. University of Massachusetts Amherst.

rights into development processes.¹⁸⁶ Some bilateral development agencies have also developed rights-based approaches. Within the UN, the UNDP adopted its policy of integrating human rights into sustainable human development in 1998. Subsequently, the UNDP human development reports from the year 2000 onward affirmed that human development is essential for the realisation of human rights and the right to development in general.¹⁸⁷

This position was further upheld at the 1993 Vienna World Conference on Human Rights, which concluded that 'development, and respect for human rights and fundamental freedoms are interdependent and mutually reinforcing.'¹⁸⁸ The conference reaffirmed the traditional position that all human rights are equal, valid, and interconnected. Article 10 of the Vienna Declaration recognises that development is part of the human rights framework.¹⁸⁹ It specifically states that:

The World conference on human rights reaffirms the right to development, as established in the Declaration on the Right to Development, as a universal and inalienable right and an integral part of fundamental human rights.¹⁹⁰

The Vienna Declaration was crucial as it articulated the fundamental understanding of the inalienable, universal, and interrelated nature of human rights in general. All 171 UN member states that attended the Vienna Conference unanimously, recognised the right to development as a fundamental human right, including the United States, which is the only country that voted against the adoption of the UNDRTD in 1986, besides the several other nations that UNDRTD abstained from voting. This position was endorsed by the Human Rights Council of Australia following publication of 'The Rights Way to

¹⁸⁶ *Renewing the United Nations, A Programme for Reform*, A/51/950, 14 July 1997.

¹⁸⁷ Ibhawoh B 2011. 'The right to development: The politics and polemics of power and resistance.' *Human Rights Quarterly*, 33(1), 76-104.

¹⁸⁸ United Nations Human Rights Declaration and Program of Action (Vienna Declaration) (adopted 25 June 1993), Para 8.

¹⁸⁹ Art 10 of the Vienna Declaration; Payne A & Phillips N 2010. 'Development.' *Polity*, 122

¹⁹⁰ Art 10 of the Vienna Declaration.

Development',¹⁹¹ which viewed development activities as an integral part of human rights work. Since then, the international consensus on development, guided by the human rights framework (including the right to development), has gained momentum. At its fifty-fifth session in 1999, the UNHCR recognised the link between human rights and development, noting that democracy, development, and respect for all human rights and fundamental freedoms are interdependent and mutually reinforcing.¹⁹² Since then, the debate on human rights and development has changed significantly. It has taken different forms and directions, including in the transition from the Millennium Development Goals to the Sustainable Development Goals in response to the changing global, regional, and national contexts.¹⁹³

Some scholars, however, did not agree to the connection between human rights and development. Donnelly for example, argues that:

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

¹⁹¹ Human Rights Council of Australia (eds) 1995. *The Rights Way to Development: A Human Rights Approach to Development Assistance: Policy and Practice*. Available at <https://www.hrca.org.au/hrca-projects-and-resources/international/human-rights-approach-to-development/#:~:text=The%20human%20rights%20approach%20to%20development%20takes%20the%20International%20Bill,end%20poverty%20%E2%80%93%20nationally%20and%20internationally>. (accessed 17 October 2023).

¹⁹² Sepulveda M 2004. *Human Rights Reference Handbook*. University of Peace: Costa Rica, 405.

¹⁹³ Ilze Brands Kehris, Assistant Secretary-General for Human Rights. 7th session of the Expert Mechanism on the Right to Development. New York 03 April 2023. Available at <https://www.ohchr.org/en/statements-and-speeches/2023/04/statement-assistant-secretary-general-7th-session-expert-mechanism> (accessed on 14 April 2023); Mcinerney-Lankford S 2009. 'Human Rights and Development: A Comment on Challenges and Opportunities from a Legal Perspective.' *Journal of Human Rights Practice* 1(1): 51-82.

between economic development and human rights. Tensions between these objectives cannot be evaded by stipulative definitions.¹⁹⁴

Uvin contends that what this approach has produced so far is typically not just a simple sleight of hand; it is also wrong because it overlooks the tensions between the logic of human rights and development.¹⁹⁵ Sano argues for a partial amalgamation of the concepts, noting that:

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.¹⁹⁶

Although there are differing views on the link between human rights and development, the impact of human rights has become clear following the adoption of several development declarations, such as the 2000 Millennium Declaration, which incorporate the Millennium Development Goals (MDGs).¹⁹⁷ It provided the world with a global compact on development priorities that the international community and individual countries could use as a guide to their respective development plans. It placed the eradication of poverty and inequality at the heart of the international development agenda. Progress has been made in meeting the goals and targets, but not all goals and targets have been met.

In response, on 25 September 2015, UN member states adopted the 2030 Agenda for SDGs, which consists of 17 new goals to be pursued in cooperation at global and national

¹⁹⁴ Donnelly J 1999. 'Human Rights, Democracy, and Development.' *Human Rights Quarterly* 21(3): 608-632. See also Donnelly J 2007. 'Relative Universality of Human Rights.' *Human Rights Quarterly* 29: 217-234.

¹⁹⁵ Uvin 2002: 19.

¹⁹⁶ Sano 2000: 744.

¹⁹⁷ UN General Assembly (UNGA) 2000. Millennium Declaration (adopted on 18 September 2000); see also Cecchini S & Notti F 2011. 'Millennium Development Goals and Human Rights: Faraway, so Close?' *Journal of Human Development and Capabilities: A Multi-Disciplinary Journal for People-Centred Development* 12(1): 121-133.

levels.¹⁹⁸ The adoption of the SDGs reaped renewed support from governments, high-level organisations, and civil society for the realisation of global human well-being.¹⁹⁹ The SDGs are based on a set of commitments made at UN conferences, which referred to the human rights framework, particularly to the right to development in their final declarations and programmes of action. The Working Group on the Right to Development has emphasised that the right to development implies more than just the pursuit of development itself; it implies a human rights-approach to development.²⁰⁰ From these perspectives, the right to development has indeed, been an important inspiration and basis for linking human rights and development. The right to development recognises not only the link between human rights and development but also that development is itself a human right.

2.5 ORIGINS AND CONTESTATIONS OF THE CONCEPT OF THE RIGHT TO DEVELOPMENT

In this section, I examine the genesis and controversies surrounding the notion of the right to development. The concept emerged in response to profound global disparities in living standards, reflecting a call for equitable advancement across economic, social, and

¹⁹⁸ UN General Assembly 2015. Transforming our World: The 2030 Agenda for Sustainable Development (adopted on 25 September 2015); Kercher J & Mahler C 2015. 'Sustainable Development Goals: An Opportunity for the Realisation of Human Rights in and by Germany.' Available at https://www.ssoar.info/ssoar/bitstream/handle/document/43813/ssoar-2015-kercher_et_al-Sustainable_Development_Goals__an.pdf?sequence=1&disAllowed=y&linkname=ssoar-2015-kercher_et_al-Sustainable_Development_Goals__an.pdf, 2 (accessed on 31 March 2023).

¹⁹⁹ UN 2015(a). United Nations Summit on Sustainable Development 2015: Informal Summary. Retrieved from <https://sustainabledevelopment.un.org/content/documents/8521Informal%20Summary%20-%20UN%20Summit%20on%20Sustainable%20Development%202015.pdf>, 1. See also Nabarro D 2016. Transforming our World: How Sustainable Development will Help us Achieve Zero Hunger. *International Food Policy Research Institute*, 22-27.

²⁰⁰ de Man A 2019. 'The Sustainable Development Goals and the Rights-Based Approach to Development: Compatible or Missing the Point?' *African Human Rights Law Journal* 19(1): 445-469; E/CN.4/1995/11, 4 September 1994, Para 44.

cultural dimensions for all individuals. I contend that while the right to development has evolved into a pivotal component of the global human rights discourse, its practical application remains a topic of extensive debate and disagreement, notably in contexts such as South Africa. Despite its theoretical advancement and advocacy, the operationalisation of the right to development has encountered formidable challenges. These challenges encompass divergent national priorities, geopolitical complexities, and varying interpretations regarding the equitable distribution of developmental benefits. Within South Africa and elsewhere, deliberations over economic policies, resource allocation, and social equity reflect broader global discussions on translating the theoretical principles of the right to development into effective policy frameworks. Effectively addressing these challenges necessitates sustained international collaboration, unwavering political dedication, and transformative policies geared toward promoting fairness, justice, and sustainable development for all segments of society.

During the 1960s and 1970s, the entrance of newly independent third world nations into the United Nations sparked renewed efforts to integrate human rights with the development agenda, prompting governments of these countries to advocate for the recognition of the right to development. The concept of the right to development has its roots in Africa, notably emerging in 1966 during a speech delivered by Senegalese Foreign Minister Doudou Thiam at the 21st UN General Assembly.²⁰¹ Thiam articulated the imperative for developing nations to assert their right to development and to implement measures aimed at realising this entitlement.²⁰² As widely recognised, the Senegalese jurist Kéba M'baye first introduced the concept of the right to development during discussions on establishing the New International Economic Order (NIEO) in 1972, delivering a lecture at the International Institute for Human Rights in Strasbourg, France.²⁰³ This marked the initial incorporation of the concept of development into the

²⁰¹ Whelan DJ 2015. 'Under the Aegis of Man': The Right to Development and the Origins of the New International Economic Order.' *Humanity: An International Journal of Human Rights, Humanitarianism, and Development*, 6(1), 93-108, 93.

²⁰² Whelan 2015: 93-94.

²⁰³ Kéba M'baye 1972. 'Le Droit au Développement Comme un-Droit de l'Homme: Leçon Inaugurale de la Troisième Session d'Enseignement de l'Institut International des Droits de l'Homme.' *Revue des Droits de*

discourse of human rights. M'baye's proposal envisioned that Third-World countries would possess both legal and ethical grounds to advocate for the 'international redistribution of resources.'²⁰⁴ He contended that 'development is a right for all,' encompassing both individuals and peoples.²⁰⁵ M'baye's conception provided a novel perspective on development, framing it not merely as a state objective but as a fundamental human entitlement.²⁰⁶ He delineated between development as a human right and development as a legal principle.²⁰⁷

Following M'baye's thesis, the right to development continued to evolve, including for example, Abi Saab who further argues that it is an enabling right,²⁰⁸ while others view it as a vector²⁰⁹ and as a synthesis of existing rights.²¹⁰ For 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.'²¹¹ Each of these permutations makes the right to development relevant in the human rights discourse. For example, Sengupta states that the right to development as a vector can only be realised if at least one aspect of all

l'Homme 5, 503. [The Right to Development as a Human Right: Inaugural Address of the Third Teaching Session of the International Institute of Human Rights]. *Human Rights Journal* 5, 503.

²⁰⁴ Uvin 2007: 598.

²⁰⁵ M'baye 1972: 515.

²⁰⁶ Romola A 2018. 'The Right to Development Under the African Charter: Is There an Extraterritorial reach.' In Ngang CC, Kanga SD & Gumede V (eds) *Perspectives on the Right to Development*. PULP: Pretoria, 34-46, 35.

²⁰⁷ Dieng A 1987. 'Background to the Growth of the Right to Development: The Role of Law and Lawyers in Development. *Refugees and Development in Africa*, 55.

²⁰⁸ Abi-Saab G 1980. 'The Legal Formulation of the Right to Development.' In Dupuy R-J (ed) *The Right to Development at the International Level*, 159.

²⁰⁹ Sengupta A 2002. 'On the Theory and Practice of the Right to Development.' *Human Rights Quarterly* 24: 837 -889.

²¹⁰ Donnelly J 1985. 'In Search of the Unicorn: The Jurisprudence and Politics of the Right to Development.' *California Western International Law Journal* 15: 473.

²¹¹ Bedjaoui M 1991. *The Right to Development in International Law: Achievement and Prospects*, 1177-1182.

human rights is fulfilled and none of its other aspects are violated.²¹² 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.²¹³

For purposes of clarity on the right to development, the UN General Assembly commissioned a study in 1977 on ‘the international dimensions of the right to development as a human right in relation with other human rights... [considering] the requirements of the NIEO.’²¹⁴ The UN subsequently, 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.’²¹⁵ Thus, the right to development was first enshrined in the 1981 African Charter and reaffirmed by the adoption of the UNDRTD in 1986, which reshaped the international development discourse by recognising development as an inalienable human right in which everyone can participate in economic, social, cultural, and political development.²¹⁶ In Zwart’s view, the adoption of the UNDRTD marked not only the formal recognition of the right to development but also the first effective concerted effort by countries in the Global South to advance human rights on a global scale.²¹⁷

Since its inception, the UNDRTD has been the subject of considerable controversy among diplomats, researchers, and practitioners, which demonstrates an enduring North-

²¹² Sengupta 2001: 15-23.

²¹³ Sengupta 2001: 20.

²¹⁴ United Nations High Commissioner for Human Rights 2010.

²¹⁵ Marks 2004: 138.

²¹⁶ See UNDRTD.

²¹⁷ Zwart T 2017. ‘The Declaration on the Right to Development as a First Step Towards a Comprehensive Southern Vision on Human Rights.’ *Journal for Human Rights* 16: 50.

South intellectual duality.²¹⁸ Uvin, for example, views the concept as rhetorically and operationally meaningless,²¹⁹ while Donnelly presents it as a quest for a unicorn, disaster, catastrophic, dangerous, or a total failure of the human rights framework due to its vagueness, fuzziness, and ambiguity.²²⁰ Others attack the UNDRTD as being 'bad law, vague, internally contradictory, duplicating other already codified rights, and devoid of identifiable parties bearing clear obligations.'²²¹ For Jha, the '[i]mplementation of the Articles of the Declaration is even more serious issue than enforceability.'²²² Despite being characterised as 'specifically African contribution to international human rights discourse',²²³ it has also faced criticisms from scholars such as Rhoda Howard²²⁴ and Issa Shivji.²²⁵ Nevertheless, the UNDRTD and several other declarations and resolutions by the UN General Assembly and its subsidiary bodies, have remain steadfast in reaffirming the right to development as a legitimate human right.

The right to development is part of existing rights and therefore, is viewed as 'a conglomeration of rights'²²⁶ encompassing both civil and political as well as socio-economic rights. Ashukem and Ngang propound the view that the right to development

²¹⁸ Okafor OC 1995. 'The Status and Effect of the Right to Development in Contemporary International Law: Towards a South-North Entente.' *African Journal of International and Comparative Law* 7: 865-885, 877.

²¹⁹ Uvin P 2004. *Human Rights and Development*. Kumarian Press: Bloomfield, CT 1; Uvin argues that although this is a beautiful innovation, it is operationally meaningless; See also Uvin 2007: 597.

²²⁰ Uvin 2007: 589; Uvin 2004: 1.

²²¹ Uvin 2007: 598; see also Rosas A 1995. 'The Right to Development.' *Economic Social and Cultural Rights: A Textbook*, 247-256; Obiora AL 1996. 'Beyond the Rhetoric of the Right to Development.' *Law and Policy* 18: 355-418.

²²² Jha S 2012. 'A Critique of Right to Development.' *Journal of Politics and Governance* 1(4): 17-22, 21.

²²³ Santos BS 1995. *Toward a New Common Sense: Law, Science, and Politics in the Paradigmatic Transition* (Vol. 111). Routledge, New York, 357; See also Bedjaoui M 1991. 'The Right to Development in International Law: Achievements and Prospects' cited in cited in Perry RW 1996. 'Rethinking the Right to Development: After the Critique of Development, after the Critique of Rights.' *Law and Policy*, 18, 228.

²²⁴ Howard R 1983. 'The Full Belly Thesis: Should Economic Rights Take Priority in Over Civil and Political Rights? Evidence from Sub Saharan Africa.' *Human Rights Quarterly* 5: 467-490.

²²⁵ Shivji IG 1989. 'The Concept of Human Rights in Africa,' 82, cited in Perry, 228.

²²⁶ Andreassen BA & Marks S (eds) 2006. 'Development as a Human Right: Legal, Political and Economic Dimensions', 5.

rests not only on its inalienability as a human right but essentially as a compound vector entitlement.²²⁷ The composite nature of the right means that 'all other human rights and fundamental freedoms can be realised in their entirety through a particular process of development that is rights based and focuses on maximising the human productive potential.'²²⁸ For this purpose, the two Covenants (ICCPR and ICESCR) represent important legal sources, as they are based on the UDHR in terms of content and conceptual framework. The two essential components of the right to development, namely self-determination and international cooperation, are recognised in the twin human rights Covenants.²²⁹

The Covenants contain specific rights (such as the right to work, the right to education, and the right to social security, among others) that have a direct positive impact on the right to development. Like others, Vandenbogaerde believes that the current human rights framework explicitly covers the right to development and that it is therefore, unnecessary to address this right as it is a duplication of the two international human rights covenants.²³⁰ Furthermore, Mansell and Scott have dismissed claims to the right to development as a hopeless utopian proposition, based largely on the belief that development and human rights are separate ideals.²³¹ This view is however, callous in that the right to development is a recognised inalienable human right with its own prerequisites (for example, the creation of domestic policies for states parties) that give meaning to the right to development.²³²

The UNDRTD of 1986 combines the two Covenants into a single document with the purpose to harmonise and pursue them together. It provides that:

²²⁷ Ashukem JC & Ngang CC 2022. 'Land Grabbing and the Implications for the Right to Development in Africa.' *African Human Rights Law Journal*, 22(2): 403-425, 410.

²²⁸ Ashukem & Ngang 2022: 410.

²²⁹ See Common Article 1 ICCPR and ICESCR; See also UNDRTD, Preamble.

²³⁰ Vandenbogaerde 2013: 209.

²³¹ Mansel W & Scott J 1994. 'Why Bother about a Right to Development?' *Journal of Law and Society* 171.

²³² Teleki M 2017. 'Framing of the Right to Development Policy in the Context of South Africa.' *Africa Insight* 47(3): 78-94.

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.²³³

Its uniqueness lies in the articulation of development-related rights and, where appropriate, in the extension of these rights.²³⁴ The UNDRTD is probably one of the few well-known international instruments that defines human rights as the rights of individuals and peoples at the same time.²³⁵ Article 8(1) of the UNDRTD gives some examples of rights that are considered 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.²³⁶

Many development and human rights declarations recognise the right to development, including the 1992 Rio Declaration on the Environment and Development, the 1993 Vienna Declaration, which further expanded the legal character of the right to

²³³ Art 6(2) of the UNDRTD state that '[a]ll 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.'; see also Preamble.

²³⁴ Ibhawoh B 2011. 'The Right to Development: The Politics and Polemics of Power and Resistance.' *Human Rights Quarterly* 33: 76-82, 75.

²³⁵ Art 1(1) of the UNDRTD provide that '[a]ll 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.'

²³⁶ Art 8(1) of the UNDRTD state 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.'

development by reaffirming its importance,²³⁷ and the 2012 Conference of the United Nations on Sustainable Development, which requires all governments to treat the right to development as a human right in all business and dealings.²³⁸ This was the beginning of the concrete and meaningful pursuit of a UN right to development by the Office of the High Commission for Human Rights, and its other organs such as the UNDP and UNICEF, as well as other development partners and international financial institutions (IFIs) that have gradually embraced the idea of a human right to development. Again, although the right has since gained a fair degree of recognition and momentum in the development practices of global institutions, this may not quite be the case within academic, legal, and diplomatic circles. Ghai for example, notes that:

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 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.²³⁹

It is argued that the right to development under international law is not a right per se. It is best described as a product of soft laws, as virtually all the declarations that make provision for it are non-binding, except for the African Charter.²⁴⁰ Even if the right does not enjoy the status of a treaty, it does not diminish the state's duty to realise the right to development at the national and international level. Shai argues that the right to development does not have a clear textual presence in many constitutions, including South Africa's.²⁴¹ Kamga argues on the contrary that while the South African Constitution does not mention the right to development as a human right, the Bill of Rights, which

²³⁷ Art 10 and 11 of the Vienna Declaration. Since the Vienna Declaration, virtually every global conference has reaffirmed the right to development.

²³⁸ UN 2016. Transforming our World: The 2030 Agenda for Sustainable Development.

²³⁹ Ghai Y 1989. 'Whose Human Right to Development?' *Human Rights Unit Occasional Paper*, 5-6.

²⁴⁰ The UNDRTD is the arrowhead legal instrument that is dedicated to the right to development.

²⁴¹ Shai I 2019. 'The Right to Development, Transformative Constitutionalism and Radical Transformation in South Africa: Post-colonial and De-colonial Reflections.' *African Human Rights Law Journal* 19(1): 494-509, 507.

guarantees socio-economic rights, does include protections for the right to development.²⁴²

In section 3 of Chapter 3, I argue that because the right to development has become popular in development practice, some scholars have argued that it has attained the status of customary international law.²⁴³ The right to development has continued to evolve.

The Draft International Covenant on the Right to Development, which was extensively deliberated upon during the twenty-fourth session of the Human Rights Council, holds significant importance within the realm of international human rights law.²⁴⁴ At the subsequent fifty-fourth session of the Human Rights Council, the Working Group on the Right to Development submitted this Draft Covenant to the UN General Assembly for intergovernmental negotiations and eventual adoption, after renaming it from the Draft Covenant on the Rights to Development. South Africa has been a vocal proponent of this initiative, advocating for enhanced international cooperation and supporting the creation of a legally binding instrument on the right to development, aimed at bolstering the implementation of the SDGs.²⁴⁵

The name changes from 'Draft Convention on the Rights to Development' to 'Draft International Covenant on the Right to Development' reflects a shift from a preliminary document to a formal international instrument that is envisaged to have legally binding status under international law.²⁴⁶ This alteration underlines the international community's

²⁴² Kamga SD 2018. *The Right to Development in the African Human Rights System*. Routledge: New York, 210.

²⁴³ Salomon 2008; Chowdhury SR & de Waart PJIM 1993. 'Significance of the Right to Development: An Introductory View.' In Chowdhury SR, Denters EMG & de Waart PJIM (eds) *The Right to Development in International Law*, Dordrecht: Brill Nijhoff, 7, 7-23.

²⁴⁴ UN Human Rights Council. Report of the Working Group on the Right to Development on its Twenty-Fourth Session (Geneva, 15–19 May 2023). A/HRC/54/40, 10.

²⁴⁵ UN Human Rights Council. Report of the Working Group on the Right to Development on its Twenty-Fourth Session, 6.

²⁴⁶ Draft International Covenant on the Right to Development. Report by the Chair-Rapporteur of the Working Group on the Right to Development. A/HRC/54/50.

commitment to acknowledging and safeguarding the right to development as a fundamental aspect of global human rights.²⁴⁷ Zamir Akram remarks that the change emphasises the equal priority of the right to development alongside other established human rights instruments, thereby elevating its status and the mechanisms available for its enforcement.²⁴⁸ The Draft International Covenant on the Right to Development codifies and protects the right to development, emphasising the significance of economic, social, cultural, and political rights for individuals and nations globally. This initiative highlights the global commitment to fostering equitable opportunities for development across the world. The revised draft was discussed by the Working Group on the Right to Development at the Human Rights Council's twenty-fourth session in May 2023 and subsequently, forwarded to the UN General Assembly for intergovernmental deliberation and eventual adoption. The proposed Draft International Covenant on the Right to Development Draft contains a Preamble which states that:

The States Parties to the present Convention, [g]uided by the purposes and principles of the Charter of the United Nations, especially those relating to the achievement of international cooperation in solving international problems of an economic, social, cultural, environmental or humanitarian nature, and in promoting and encouraging respect for human rights and fundamental freedoms for all, without distinction of any kind.²⁴⁹

The Draft International Covenant on the Right to Development encompasses 39 provisions that outline its fundamental principles, application guidelines, and the relationship with other human rights instruments. It delineates general obligations for States parties and specifies international obligations pertaining to the right to development.²⁵⁰ The Covenant establishes the framework on how the right to

²⁴⁷ UN Human Rights Council. Second Revised Text of the Draft of the Convention on the Right to Development, with Commentaries. A/HRC/WG.2/24/2/Add.1.

²⁴⁸ Second Revised Text of the Draft of the Convention on the Right to Development, with Commentaries. A/HRC/WG.2/24/2/Add.1.

²⁴⁹ Draft International Covenant on the Rights to Development 30 November 2022, A/HRC/WG.2/24/2.

²⁵⁰ Draft International Covenant on the Rights to Development, 18 July 2023, A/HRC/WG.2/24/2; Draft Convention on the Right to Development with Commentaries ('the Commentary'), 20 January 2020,

development will be implemented and upheld internationally. It covers various aspects such as ensuring equitable development opportunities, promoting economic, social, cultural, and political rights, and fostering international cooperation to achieve sustainable development. Additionally, the Covenant clarifies how the right to development interacts with existing human rights frameworks and underlines the collective responsibility of States to respect and protect this right.

2.5.1 Elements and nature of the right to development

The right to development signifies the entitlement of affected individuals to assert their human rights through the development process. Piron stresses that the right to development serves as a tool to integrate human rights principles into development initiatives programmatically.²⁵¹ Kamga highlights that the right to development is grounded in cosmopolitanism,²⁵² where justice is universally applied under *jus gentium*, emphasising the universal applicability of all human rights, including the right to development.²⁵³ Ibhawoh identifies four essential elements of the right to development: first, the conceptualisation of development as a process that realises human rights; second, the recognition of the universality, indivisibility, interdependence, and interrelatedness of all human rights; third, understanding that denial of any right can impede the right to development; fourth, acknowledging that the right to development is both an individual and collective entitlement, with responsibilities extending to both national governments and the international community.²⁵⁴ Supporting this perspective, Ngang draws attention to the fact that the right to development is fundamentally, a

A/HRC/WG.2/21/2/Add.1; Daum I 2020. 'First Draft of an International Convention on the Right to Development.'

²⁵¹ Piron 2002: 12.

²⁵² Jones 1990: 51; Kamga & Fombad 2013: 198.

²⁵³ Kamga & Fombad 2013: 198.

²⁵⁴ Ibhawoh 2011: 83-84; Holder & Reidy 2013: 104.

collective right that is envisaged to empower communities to achieve sustainable and autonomous standards of living through transformative means.²⁵⁵

There are recognised international norms and standards, including democracy and participation, which are seen as important elements of national development strategies. Such strategies should also contain explicit provisions for the realisation of all human rights. Participation, supported by international cooperation, is the cornerstone of the right to development, according to Kamga.²⁵⁶ The right to development is defined in the UNDRTD as '[a]n 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 realised.'²⁵⁷ Participation is therefore, a fundamental part of the right to development. Article 8(2) of the UNDRTD provides that 'States should encourage popular participation in all spheres as an important factor in development and in the full realisation of all human rights.'²⁵⁸ Participation in the design and implementation of policies that affect people must be encouraged. Broad-based participation as part of the right to development is however, being undermined by many governments, including the South African government.

²⁵⁵ Ngang 2019: 371.

²⁵⁶ Kamga 2011: 122-123.

²⁵⁷ Art 1(1) of the UNDRTD '[a]ll 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. (2) All peoples may, for their own ends, freely dispose of their natural wealth and resources without prejudice to any obligations arising out of international economic co-operation, based upon the principle of mutual benefit, and international law. In no case may a people be deprived of its own means of subsistence. (3) The States Parties to the present Covenant, including those having responsibility for the administration of Non-Self-Governing and Trust Territories, shall promote the realization of the right of self-determination, and shall respect that right, in conformity with the provisions of the Charter of the United Nations.'

²⁵⁸ Art 8(2) of the UNDRTD notes that 'States should encourage popular participation in all spheres as an important factor in development and in the full realization of all human rights.'

The aspect of participation is contained in and supported by many international legal instruments.²⁵⁹ For the effective realisation of the right to development, every person, regardless of gender, race, religion, ability, or disability, must be able to participate in actions, programmes, and activities that affect them. It means that people (through their right to development) should have the opportunity to participate in and shape the processes of development that affect them. Sengupta argues that even if people as collective human persons are entitled to other rights such as the full sovereignty over their natural wealth and resources, humans must be the active participants and beneficiaries of the right to development.²⁶⁰

Equally, within the framework of the right to development, everyone must contribute to and enjoy development, which entails that the government must create conditions that allow everyone to contribute to development.²⁶¹ These conditions must include government commitments to transparency, accountability, non-discrimination, and equality, which are key elements of the right to development.²⁶² The right promotes 'people-centred development'²⁶³ in the sense that the beneficiaries or rights holders are peoples and individuals. Article 2(2) of the UNDRTD states that all human beings have

²⁵⁹ Art 25 of the UDHR state that (1) 'everyone has the right to a standard of living adequate for the health and well-being of himself and of his family, including food, clothing, housing and medical care and necessary social services, and the right to security in the event of unemployment, sickness, disability, widowhood, old age or other lack of livelihood in circumstances beyond his control. (2) Motherhood and childhood are entitled to special care and assistance. All children, whether born in or out of wedlock, shall enjoy the same social protection.'; ICCPR and ICESCR Art 1 state that ' [a]ll 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.'; African Charter for Popular Participation in Development and Transformation UN Doc A/45/472 (adopted 22 August 1990).

²⁶⁰ Sengupta 2000: 563.

²⁶¹ Alston 2005: 801-805.

²⁶² Sengupta 2002: 847.

²⁶³ Sengupta 2002: 853.

an individual and collective responsibility to ensure the right to development and their duties to the community, with full respect for human rights and fundamental freedoms.²⁶⁴

The right to development has two important dimensions: the one external and the other internal. The external dimension focuses on international inequalities and seeks to close the gap between developed and underdeveloped governments through international cooperation. Internally, the right focuses on individual governments' obligations to ensure that domestic development policies are designed in a way that contributes to the enjoyment and realisation of human rights and the well-being of the people. Salomon states that both dimensions are interrelated.²⁶⁵ In support, the UNDRTD points out that the government bears the primary responsibility for implementing the right to development. However, the individual also has an obligation in the realisation of the right: (i) to be an active participant²⁶⁶ and (ii) to act collectively as a member of the community.²⁶⁷ The international community has the responsibility to co-operate in enabling state governments to realise the right to development both individually and as members of the international community by formulating international development policies.²⁶⁸ This is reiterated in Articles 55 and 56 of the UN Charter,²⁶⁹ Article 28 of the UDHR²⁷⁰ and Article 2(1) of the ICESCR,²⁷¹ which specifically make reference to international co-operation and solidarity which the right to development draws aspirations from. In other words, realising the right to development requires not only appropriate national development policies but also appropriate international development policies and cooperation.

²⁶⁴ Art 2 of the UNDRTD states that '[t]he human person is the central subject of development and should be the active participant and beneficiary of the right to development.'

²⁶⁵ Salomon ME 2008. 'Legal Cosmopolitanism and the Normative Contribution of the Right to Development' *LSE Law, Society and Economy Working Papers*, 2.

²⁶⁶ Art 2(1) of the UNDRTD.

²⁶⁷ Art 2(2) of the UNDRTD.

²⁶⁸ Art 4(1) of the UNDRTD.

²⁶⁹ Art 55 & 56 of the UN Charter.

²⁷⁰ Art 28 of the UDHR.

²⁷¹ Art 2(1) of the ICESCR.

The right to development is frequently viewed as non-justiciable at the international level. Despite this perception, I argue that the UNDRTD, while not legally binding, carries substantial normative weight in promoting and advancing the right to development globally. In Africa, however, the right to development holds legal binding force through Article 22 of the African Charter.²⁷² This provision emphasises the commitment of African states to ensure development that is inclusive, sustainable, and respects human dignity. It mandates states to take measures, both nationally and internationally, to promote and protect the right to development for all individuals and peoples in the region.

In section 4.3 of Chapter 4, I present a substantial argument asserting that the right to development is recognised as a justiciable right in Africa, signifying that it can be enforced through legal mechanisms within the judicial system. This recognition reflects a commitment by African nations, evidenced by their ratification of the African Charter, to ensure that citizens have access to the economic, social, and cultural rights essential for their development. Through establishing the right to development as justiciable, African countries aim to provide their populations with legal recourse and protection against violations that impede their capacity to realise their full developmental potential.²⁷³ Thus, the right to development in Africa transcends a mere political ideal; it is acknowledged as an enforceable right under the African Charter. The African Charter mandates state parties to implement domestic policies and legislation that ensure the respect, protection, promotion, and fulfilment of the right to development, thereby facilitating the full enjoyment of all human rights and fundamental freedoms within the developmental process. This framework underscores the region's commitment to human rights and sustainable development.

Kamga ascertains that the right to development must be understood locally from the grassroots in order for people to 'identify with the right, own it, and contribute to its

²⁷² Baxi 2008: 47.

²⁷³ Art 22 of the ACHPR states that (1) '[a]ll peoples shall have the right to their economic, social and cultural development with due regard to their freedom and identity and in the equal enjoyment of the common heritage of mankind. (2) States shall have the duty, individually or collectively, to ensure the exercise of the right to development.'

realisation.²⁷⁴ For example, in the *Endorois* case,²⁷⁵ the African Commission on Human and Peoples' Rights (African Commission) held that the lack of consultation and the exclusion of local peoples in the development process, which affected their lives, constituted a violation of their right to development.²⁷⁶ The inclusion of beneficiaries of the right to development in the development processes entails non-discriminatory policies and legal frameworks aimed at alleviating poverty, promoting people's empowerment, and improving quality of life.

It's important to note that while the right to development is widely recognised in theory, its practical implementation and realisation can be complex and challenging, especially in the context of global economic and political dynamics. Nonetheless, it remains a fundamental human right and a guiding principle for sustainable and inclusive development internationally.

2.5.2 The right to development in practice

I noted above that the right to development has since its inception, increasingly received recognition and support globally, including at international discourses, conferences, summits, the UN Human Rights Commission, and resolutions of the General Assembly.²⁷⁷ On the contrary, despite over 38 years since the adoption of the UNDRTD, the right to development has not yet fully been implemented due to differences in perception between developed and developing countries and international systematic problems and ideological divergences. These differences have undermined the international community's efforts in implementing the UNDRTD, despite the use of different

²⁷⁴ Kamga 2018: 5.

²⁷⁵ *Centre for Minority Rights Development (CEMIRIDE) (on behalf of the Endorois) v Kenya* (Communication 276/2003).

²⁷⁶ *Endorois* case, Para 248.

²⁷⁷ Salomon 2008: 17-26; Marks 2011: 5.

mechanisms led by the UN Secretary-General, the High Commissioner for Human Rights, and the Working Group on the Right to Development.²⁷⁸

While the right to development remains a subject of international contention, it provides African governments with alternative development pathways and the autonomy to reject development models, particularly charitable systems, that do not serve the interests of African populations. Sengupta asserts that countries have various avenues for development; however, when these diverse approaches fail to ensure equal opportunities, they infringe upon the right to development.²⁷⁹ The realisation of this right necessitates that the government acknowledges development at the initial stages of policy formulation. This process should delineate clear and substantive roles for development professionals and government officials, which includes identifying the obligations of the state, as well as those of multilateral agencies, civil society, and the international community.²⁸⁰

The practical implementation of the right to development must occur at both national and international levels.²⁸¹ At the national level, governments are required to maintain their obligations to the right to development alongside all other human rights obligations assumed at international, regional, and domestic levels. On the international stage, state parties must adhere to their human rights treaty obligations, including those derived from customary international law as articulated in the UNDRTD.²⁸² The Preamble to the UNDRTD calls upon states to promote and protect human rights, a commitment that should be accompanied by efforts to establish a new international economic order.²⁸³

²⁷⁸ Akram 2019: 11.

²⁷⁹ Sengupta 2000: 848.

²⁸⁰ Piron 2002: 32.

²⁸¹ United Nations Human Rights Office of the High Commission 2013. *Realising the Right to Development: Essays in Commemoration of 25 Years of the United Nations Declaration on the Right to Development*. United Nations Publication: Geneva/New York.

²⁸² Subedi 2021: 1-5.

²⁸³ UNDRTD Preamble states that '[r]ecognizing that the creation of conditions favourable to the development of peoples and individuals is the primary responsibility of their States, Aware that efforts at the international level to promote and protect human rights should be accompanied by efforts to establish

The right to development faces challenges due to its non-binding legal status at the international level. While the concept is widely recognised and supported in various declarations and resolutions, its implementation is hindered by several factors.²⁸⁴ For example, one key issue is the reluctance of governments to commit to enforceable obligations under international law regarding the right to development. Existing development mechanisms often focus on economic growth and poverty reduction without adequately addressing the broader spectrum of rights encompassed by the right to development, such as cultural, social, and political rights. Russell posits that institutions such as the UNHRC and other organisations continuously pushes for the enforcement of the right to development at the international level.²⁸⁵ To promote and ensure implementation of the right to development, the then Commission for Human Rights established the Intergovernmental Working Group on the Right to Development in 1998. In 2004, the Commission established the High-level Task Force on the Implementation of the Right to Development to support the Intergovernmental Working Group. Despite the frequent references to the right to development in international and regional discourse, its implementation continues to pose significant challenges. This ongoing concern has consequently hindered both its enforcement and realisation at the national level.

In this context, Fukuda-Parr identifies three essential obligations within the human rights framework that must be upheld to respect, promote, and fulfil human rights, including the right to development.²⁸⁶ These obligations are reflected in 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

a new international economic order, Confirming that the right to development is an inalienable human right and that equality of opportunity for development is a prerogative both of nations and of individuals who make up nations.'

²⁸⁴ Villaroman NG 2010. 'The Right to Development: Exploring the Legal Basis of a Supernorm.' *Florida Journal of International Law* 22(2): 299-331.

²⁸⁵ Russell 2010: 1-23.

²⁸⁶ Fukuda-Parr 2013: 167-170.

realization of the rights recognized in the present Covenant by all appropriate means, including particularly the adoption of legislative measures.²⁸⁷

The implementation of these obligations necessitates a strong commitment and political will to realise the right to development. Rodriguez emphasises that measures aimed solely at promoting economic growth are insufficient for the realisation of this right.²⁸⁸ While sustained economic growth remains a critical engine of development, human experience reminds us that rising GDP figures alone do not guarantee improved lives for all. China's remarkable transformation over the past four decades is often cited as a powerful example: more than 800 million people have been lifted out of poverty, and millions more have gained access to education, healthcare, and essential infrastructure.²⁸⁹ Yet, behind these impressive statistics lie the everyday realities of individuals and communities navigating complex social and economic transitions. China's success was not merely the product of market reforms or industrial expansion, it was also shaped by deliberate public policies, rural pension schemes, universal health coverage, and targeted poverty alleviation, that aimed to include those historically left behind.²⁹⁰ These efforts reflect a broader truth recognised across development scholarship, economic growth must be coupled with inclusive institutions and redistributive strategies to ensure that its benefits are not just widespread, but meaningful. In the absence of such policies, growth can deepen social divides, concentrate opportunity among the privileged, and undermine long-term stability. Development, in this sense, is not simply about expanding markets—it is about expanding human dignity, agency, and equity. According to Marks, achieving this transformative vision remains a central goal for the international community.²⁹¹

²⁸⁷ Art 2(1) of the ICESCR.

²⁸⁸ Rodriguez 2019: 197.

²⁸⁹ Liu M, Feng X, Wang S and Qiu H 2020. 'China's poverty alleviation over the last 40 years: Successes and challenges.' *Australian Journal of Agricultural and Resource Economics*, 64(1), 209-228.

²⁹⁰ State Council Information Office of the People's Republic of China, 2021. Poverty alleviation: China's experience and contribution.

²⁹¹ Marks 2011: 1-16; See also Gready & Ensor 2005.

It is important to distinguish that the practical implementation of the right to development can vary significantly from one country to another, influenced by their specific circumstances, capacities, and priorities. Achieving the right to development necessitates a holistic and context-specific approach that takes into account the unique challenges and opportunities present in each setting. Moreover, international organisations and civil society can play an essential role in advocating for and supporting the implementation of the right to development at both global and national levels. In practice, collaboration among governments, civil society organisations, and international institutions is important for the promotion and realisation of the right to development. This often involves the development of national plans, poverty reduction strategies, and policies aimed at achieving sustainable development goals as envisaged by UN. International organisations, including the UN, ought to provide technical assistance, financial support, and expertise to countries working to fulfil their development commitments.

2.6 CONCLUSION

In this Chapter, I have provided a contextual framework for understanding the concepts of human rights, development, and the right to development. These fundamental concepts are intricately linked and mutually supportive. The historical evolution of human rights and development has culminated in the emergence of the right to development, conceived as a response to addressing global disparities and enhancing the capabilities of less developed nations on both international and domestic fronts. The right to development, as explored in this chapter, introduces a transformative perspective into the international human rights discourse. Positioned as a progressive instrument for sustainable development, it has garnered varied responses, receiving substantial endorsement from developing nations while encountering resistance from wealthier states. Nonetheless, the right to development has steadily gained international legitimacy through the United Nations human rights framework and holds binding status within the African human rights system.

In the forthcoming chapter, I will delve deeper into an analysis of the right to development within the framework of international human rights law. My objective is to elucidate its expansive scope, foundational principles, and the challenges associated with its implementation. Through this examination, I aim to demonstrate how the evolving legal landscape continues to shape global initiatives aimed at realising the right to development as an integral component of the broader endeavour to protect and advance human rights internationally.

CHAPTER 3

FRAMING THE RIGHT TO DEVELOPMENT UNDER INTERNATIONAL HUMAN RIGHTS LAW

3.1 INTRODUCTION

This chapter advances the argument that since the right to development is implicit in the South African constitutional order, the legal system, legislation, and the implementation of public policy should uphold the right. Examining the international dimension of the right to development in the context of South Africa reveals its obligations under numerous international human rights instruments. South Africa's commitment to various treaties underscores its engagement in global efforts to protect and promote human rights, including those related to development. In section 5.1 of Chapter 5, I reaffirm the assertions made by scholars such as Gutto,¹ Kamga,² and Ngang³ regarding the legal recognition of the right to development in South Africa. The 1996 Constitution of South Africa serves as a crucial legal instrument that enshrines both civil and political rights as well as socio-economic rights, thereby reinforcing the notion that the right to development is implicit in the constitutional order. Former Chief Justice Pius Langa has articulated that the realisation of socio-economic rights is essential for national development.⁴ While the Constitution protects socio-economic rights—embodying the right to development—there exists no specific institutional mandate dedicated solely to its advancement.

The right to development has its roots in the UDHR. In addition to the UDHR, as highlighted in the previous chapters, the General Assembly adopted the UN Declaration on the Right to Development (UNDRTD) in 1986, marking a significant step in the codification of the right to development as a human right. The UNDRTD emphasises that

¹ Gutto S 2006. 'The Right to Development: An Implied Right in South Africa's Constitutional Order.' *Reflections on Democracy and Human Rights* 109, 109-118.

² Kamga 2011: 210.

³ Ngang 2019: 26.

⁴ Langa PN 2006. 'Human Rights, the Rule of Law, and the Right to Development.' Speech presented at the Birchwood Conference Centre in Johannesburg, 24 November 2006.

development is a comprehensive process that should promote and protect all human rights and fundamental freedoms.⁵ It encompasses both individual and collective dimensions, recognising the rights of both individuals and peoples to development.⁶ The right to development should be exercised equitably, without discrimination, and should benefit all individuals and communities.⁷ The right highlights the importance of active participation by all stakeholders, including marginalised and vulnerable groups in the decision-making processes related to development.⁸ The implementation and realisation of the right to development has been a challenge at the international level, with the African Charter for example, being a leading treaty that provides for enforcement of the right to development. However, countries are still expected to report on progress in achieving the development goals through various mechanisms, including reporting to UN bodies, and participating in international development initiatives. The right to development gained prominence during the era of decolonisation and the emergence of newly independent states in the mid-20th century.⁹

I emphasised in section 2.3 of Chapter 2 that the concept of development is largely derived from the economic and political developments after World War II. Since then, the goal of the United Nations and the international community has been to reduce poverty and promote human well-being. The historical foundations of the right to development can be attributed to the adoption of the 1945 UN Charter. Its platforms enabled the establishment of the UNDRTD, which reflected a growing consensus among governments, which affected the development of other international development accords

⁵ Tadeg MA 2010. 'Reflections on the Right to Development: Challenges and Prospects.' *African Human Rights Law Journal* 10(2): 325-344, 330.

⁶ Iqbal K 2007. 'The Declaration on the Right to Development and Implementation.' *Political Perspectives* 1(10): 1-39, 6-7.

⁷ Miyawa M 2016. 'The International Dimension of the Right to Development: Where is the Gapping Crack of Accountability for Non-State Actors.' *The Transnational Human Rights Review* 3(1): 1-37, 3-4.

⁸ Tadeg 2010: 330.

⁹ Ibid.

and policies.¹⁰ Adoption of the UNDRTD was the culmination of a long process of international human rights campaigning. From the beginning, the idea of human rights as an international concern was understood as an integrated whole, encompassing all civil, political, economic, social, and cultural rights. In 1969, the Declaration on Social Progress and Development further emphasised the interdependence of civil and political rights, and in the early 1970s, the concept of the right to development evolved into latent recognition as a human right.¹¹ The international context of the right to development can thus, be analysed using international human rights instruments.¹²

The aim of this chapter is to test the international dimension of the right to development. I, therefore, consider the third secondary research question, which is to ascertain the content of the right to development under international law and its corresponding obligations. In section 3.2, I first discuss the sources of the right to development under international human rights law. Using the International Bill of Rights, this discussion demonstrates the legal status of the right to development as a treaty obligation. In section 3.3, I consider the right to development as a legal norm based on customary international law. The goal is to give it more flexible interpretation by considering the possibility of not relying solely on treaties as its source. In section 3.4, I look at how national legal systems respond to international human rights law. This is meant to provide details on the regulations governing this process before I proceed to apply it to the legal system in South Africa in Chapter 5. Lastly, I address the question whether the right to development is justiciable under international law in section 3.5.

¹⁰ *Declaration on the Establishment of a New International Economic Order*, GA Res 3201 (S-VI), UNGAOR, 6th Special Session, Supp 1, UN Doc A/RES/S-6/3201 3 [NIEO].

¹¹ Akinsanya A & Davies A 1984. 'Third World Quest for a New International Economic Order: An Overview.' *International and Comparative Law Quarterly* 33(1): 208-217, 209.

¹² Sengupta A 2014. '*On the Theory and Practice of the Right to Development*.' Routledge: London, 54.

3.2 RIGHT TO DEVELOPMENT IN THE INTERNATIONAL BILL OF RIGHTS

The International Bill of Rights refers to the three key documents, namely the UDHR, the ICCPR and the ICESCR, which form the cornerstone of international human rights law. The International Bill of Rights is critical to human rights protection in South Africa because it constitutes the core framework for human rights recognition and protection globally and thus, informs the country's legal and institutional systems. It guides constitutional interpretation, influences legislative and policy formation and provides the basis for upholding the country's international obligations. The principles of the International Bill of Rights are incorporated into South Africa's human rights protection regime through the various processes that maintain alignment with global norms in promoting a strong human rights culture. Thus, I argue that the right to development is implicit in the South African constitutional framework.

In the past, only laws governing relations between nation-states¹³ made up the conventional setting of international law. In other words, the legal rights and obligations established by international law applied solely to countries. According to this interpretation of international law, human beings were considered objects rather than subjects because international law did not apply to how nations treated their own populations. The creation and application of international human rights law, which placed people at the centre of rights and obligations thus, fundamentally altered this understanding.¹⁴

The promotion and protection of internationally recognised rights for both individuals and groups are central to the human rights paradigm. In section 2.5.1 of the previous Chapter, I emphasise that the right to development incorporates both the individual and collective characters of human rights. As noted, the right to development is an international law concept that encompasses the idea that all individuals and peoples have the right to participate in, contribute to, and enjoy economic, social, cultural, and political

¹³ Buergenthal T, Shelton DL & Stewart DP 2009. 'International Human Rights in a Nutshell.' *GWU Legal Studies Research Paper*, 1-28, 2.

¹⁴ Viljoen F 2012. *International Human Rights Law in Africa*. Oxford University Press: Oxford, 8.

development.¹⁵ Although its precise definition and scope have been the subject of contention among nations and legal scholars, it is recognised in several international instruments such as the ICCPR, and the ICESCR. And as such, ‘the prevailing view is that the right to development is, at the very least, on the threshold of acceptance as a principle of positive international law.’¹⁶

The right to development is not expressly enumerated in the International Bill of Rights, despite the claim that it is a concept of international human rights law. However, the International Bill of Rights serves as the historical foundation of the principles governing the right to development. The key ultimate objectives of the right to development are to mitigate the scourge of poverty, diseases, and underdevelopment on the one hand and to bridge global inequities on the other, with the primary goal of attaining human well-being based on human dignity. Its foundations are rooted in the major UN human rights declarations and treaties such as the UN Charter, the UDHR, the ICCPR, the ICESCR, the CRC, and other human rights instruments.

3.2.1 United Nations Charter

Being the first international instrument to institutionalise human rights practice post-World War II, the UN Charter is a crucial pillar of the right to development. The UN Charter states that international cooperation is a requirement for the achievement of all human rights, including the right to development and to this end, international mechanisms should be utilised to promote the economic and social progress of all peoples.¹⁷ The Preamble to

¹⁵ UNDRTD, Art 1 state that ‘[t]he right to development is 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.’

¹⁶ Bunn 1999: 1433.

¹⁷ UN Charter Preamble assert ‘to establish conditions under which justice and respect for the obligations arising from treaties and other sources of international law can be maintained, and to promote social progress and better standards of life in larger freedom’; See also the Preamble to the UNDRTD, 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

the UN Charter specifically, strives to restore faith in fundamental human rights as well as in the worth and dignity of human beings.¹⁸ Through a system that supports the economic and social progress of all individuals, it also aspires to promote social progress and higher living conditions.¹⁹ Similarly, morality, solidarity, equality, and justice are the primary sources of the right to development.²⁰ The Preamble to the UN Charter, which calls for cooperation, represents an important source of the right to development.²¹ A key reference to the right to development is contained in Articles 55 and 56 of the UN Charter, which give the UN and its member states a role in promoting 'economic and social progress and development' together with 'universal respect for human rights.'²² As a result, the UN Charter signalled the start of a shift from the previous system of international law, which placed a strong focus on rights and obligations, to one that is based on 'international law of cooperation,' which Rich posits, is a significant body of legislation relating to the right to development.²³ The organisation and implementation of joint endeavours on a bi-national, regional, or multinational level directed to human welfare have been used to characterise the latter.²⁴

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.'

¹⁸ UN Charter, the Preamble establishes the commitment 'to reaffirm faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women and of nations large and small.'

¹⁹ UN Charter, the Preamble proclaims the need 'to promote social progress and better standards of life in larger freedom.'

²⁰ Rich 1983: 287.

²¹ Rich 1983: 291.

²² UN Charter Art 55(a) proclaim the 'higher standards of living, full employment, and conditions of economic and social progress and development' while Art 56 provides that '[a]ll Members pledge themselves to take joint and separate action in cooperation with the Organization for the achievement of the purposes set forth in Article 55.'

²³ Rich 1983: 290.

²⁴ Rich 1983: 290.

3.2.2 Universal Declaration of Human Rights

The UDHR, which proceeded the UN Charter, enhances the rights and freedoms of the human person. A full list of civil, political, economic, social, and cultural rights to which every person is entitled is outlined in the non-binding UDHR. Although the right to development is not officially mentioned in the UDHR, it is intimately tied to other rights relating to an individual's well-being and dignity. Ssenyonjo has advanced the argument that it is impossible to overstate the UDHR's inherent validity and binding force as a foundation for human rights, notwithstanding the fact that it is a declaration.²⁵ In actuality, it is acknowledged as the guiding document for all human rights, and many of its provisions are included in the International Bill of Rights since they are established as customary international law,²⁶ which I discuss comprehensively below in section 3.3.

Taken as a whole, the rights outlined in the UDHR reinforce the all-encompassing nature of the right to development. The UDHR contains provisions on all currently recognised rights, all of which are debatably components of the right to development.²⁷ Article 28 of the UDHR emphasises that '[e]veryone is entitled to a social and international order in which the rights and freedoms set forth in this Declaration can be fully realised.'²⁸ Article 22 of the UDHR states that everyone has the right to social security and is entitled to realisation, through national effort and international cooperation and in accordance with the organisation and resources of each state of the economic, social, and cultural rights

²⁵ Ssenyonjo M 2011. 'Reflections on State Obligations with Respect to Economic, Social and Cultural Rights in International human rights law.' *The International Journal of Human Rights* 15(6): 969-1012, 969.

²⁶ Tomuschat C 2003. *Human Rights: Between Idealism and Realism*. Oxford University Press, 63-64; Viljoen 2012: 30; Simma B & Alston P 1988. 'The Sources of Human Rights Law: Custom, Jus cogens, and General Principles.' *Australian Yearbook of International Law* 12, 82.

²⁷ 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, cultural and political development, in which all human rights and fundamental freedoms can be fully realized.'

²⁸ UDHR, Art 28 provide that '[e]veryone is entitled to a social and international order in which the rights and freedoms set forth in this Declaration can be fully realized.'

indispensable for their dignity and the free development of their personality.²⁹ By including these provisions in the UDHR, nations and the international community committed to taking action collectively and individually, to ensure that all rights, including the right to development are realised.³⁰ The UDHR provides that recognition of the inherent dignity and equal and inalienable rights of all members of the human family is the basis for freedom, justice, and peace in the world.³¹ This in turn provides another platform for the right to development, and the UDHR also adds that it is essential to promote the development of friendly relations between nations.³² This means that development must be driven forward collectively and responsibly.

3.2.3 ICCPR and ICESCR

South Africa is a state party to the ICCPR and the ICESCR, which are the two key legally binding international human rights treaties. South Africa's ratification of the ICCPR and ICESCR reflects its commitment to upholding a broad spectrum of human rights, encompassing civil, political, economic, social, and cultural rights, including the right to development under consideration in this thesis. The incorporation of these rights into domestic law demonstrates South Africa's dedication to ensuring that people enjoy fundamental freedoms and are protected from discrimination, while also working towards improving their socio-economic conditions.

²⁹ UDHR, Art 22 provide that '[e]veryone, as a member of society, has the right to social security and is entitled to realization, through national effort and international co-operation 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.'

³⁰ Chowdhury SR, Denters EM & de Waart PJ 1992. *The Right to Development in International Law*. Dordrecht: Martinus Nijhoff Publishers, 8-10.

³¹ UDHR, the Preamble provides 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.'

³² See above.

Similarly, as stated in section 2.5 of Chapter 2 the right to development is a synthesis of traditional human rights and may serve as ‘a means by which to reinforce the importance of existing rights and to emphasise the interdependence and indivisibility’ of human rights.³³ For this purpose, the two Covenants are fundamentally based on the UDHR and serve as significant sources of the right to development. This is even more true when one considers that these treaties recognise two fundamental elements of the right to development, namely, self-determination and international cooperation.³⁴ One enduring aspect of international law is the obligation to cooperate internationally, particularly for development. More specifically, it is a long-standing component of many internationally ratified UN human rights treaties. For example, the ICESCR’s general implementation provision already requires states parties to ‘take steps, individually and through international assistance and cooperation, especially economic and technical,’ to implement the Covenant.³⁵ The Millennium Development Goals (2000-2015) now superseded by the Sustainable Development Goals as well as other international agreements and conventions, have highlighted the significance of the right to development and the necessity of fostering international cooperation in that regard. Also, declarations such as the Declaration on the Rights of Indigenous Peoples (UNDRIP) equally make provision for the right to development. For example, Article 23 of UNDRIP provides that:

³³ Alston P 1981. *Development and the Rule of Law: Prevention Versus Cure as a Human Rights Strategy*. International Commission of Jurists. Report of the Conference held in The Hague by the International Commission of Jurists (27 April – 1 May 1981), 102, 107, quoted in Donelly, ‘In Search of the Unicorn,’ 501.

³⁴ Art 1 of the ICCPR and ICESCR; See also UNDRTD, the Preamble which notes; ‘[r]ecalling 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.

³⁵ Art 2(1) of the ICESCR proclaims that ‘[e]ach 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.’

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.³⁶

Additionally, the twin Covenants provide for rights that directly relate to the right to development. The ICESCR for instance, affirms that everyone has the right to work,³⁷ social security,³⁸ cultural life,³⁹ and education, which must be free and mandatory at least at the elementary level and accessible at higher levels.⁴⁰ Assurances of an adequate standard of living, sufficient food, clothing, and housing, as well as ongoing improvements to people's living situations, are all recognised under this instrument.⁴¹ Even further, the ICESCR acknowledges the requirement that no one should experience hunger.⁴²

³⁶ United Nations General Assembly 2009. *Declaration on the Rights of Indigenous Peoples*.

³⁷ Art 6 of the ICESCR provide that '[t]he States Parties to the present Covenant recognize the right to work, which includes the right of everyone to the opportunity to gain his living by work which he freely chooses or accepts and will take appropriate steps to safeguard this right.'

³⁸ Art 9 of the ICESCR provide that '[t]he States Parties to the present Covenant recognize the right of everyone to social security, including social insurance.'

³⁹ It is provided in Art 15(1) of the ICESCR that '[t]he States Parties to the present Covenant recognize the right of everyone (a). To take part in cultural life.'

⁴⁰ In ICESCR Art 13 '[t]he States Parties to the present Covenant [must] recognize the right of everyone to education. They agree that education shall be directed to the full development of the human personality and the sense of its dignity and shall strengthen the respect for human rights and fundamental freedoms. They further agree that education shall enable all persons to participate effectively in a free society, promote understanding, tolerance and friendship among all nations and all racial, ethnic or religious groups, and further the activities of the United Nations for the maintenance of peace.'

⁴¹ Art 11(1) of the ICESCR states that '[t]he States Parties to the present Covenant recognize the right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing and housing, and to the continuous improvement of living conditions. The States Parties will take appropriate steps to ensure the realization of this right, recognizing to this effect the essential importance of international cooperation based on free consent.'

⁴² In ICESCR Art 11(2) '[t]he States Parties to the present Covenant, recognizing the fundamental right of everyone to be free from hunger, shall take, individually and through international co-operation, the measures, including specific programmes, which are needed.'

Regarding the right to health, Article 12(1) of the ICESCR states that everyone has the right to the best possible level of both bodily and mental health.⁴³ To accomplish this, states must assume responsibility for lowering the rate of stillbirth and infant death as well as ensuring the child's healthy development.⁴⁴ Along with making sincere efforts to 'prevent, treat, and control epidemic, endemic, occupational, and other diseases,' states must also see to it that all aspects of hygiene and the environment are improved. Additionally, they must work to ensure that conditions exist that guarantee medical services to all and medical attention in the event of illness.⁴⁵ Although the right to development is not specifically mentioned in the ICESCR, it is emphasised as a vital component of human well-being, which is intimately tied to the idea of development. The right to development declaration complements these instruments by highlighting the importance of development as a human right and emphasising the interdependence of various human rights in the context of development.

3.2.4 Declaration on the Right to Development

The right to development as a concept was first recognised at the level of the UN in 1986 with the adoption of the UNDRTD,⁴⁶ as indicated in Chapter 2. The UN instructed the High Commissioner for Human Rights to 'recognise the importance of promoting 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.'⁴⁷

⁴³ Art 12(1) of the ICESCR states that '[t]he States Parties to the present Covenant recognize the right of everyone to the enjoyment of the highest attainable standard of physical and mental health.'

⁴⁴ In ICESCR Art 12(2)(a) '[t]he steps to be taken by the States Parties to the present Covenant to achieve the full realization of this right shall include those necessary for: (a) The provision for the reduction of the stillbirth-rate and of infant mortality and for the healthy development of the child.'

⁴⁵ In ICESCR Art 12(c) provide for 'the prevention, treatment and control of epidemic, endemic, occupational and other diseases; (d) The creation of conditions which would assure to all medical service and medical attention in the event of sickness.'

⁴⁶ UNDRTD; Marks 2004:138.

⁴⁷ Marks 2004: 138.

Further instructions were given to the High Commissioner to set up a branch that would oversee the promoting and safeguarding of the right to development.⁴⁸ It should be highlighted that the UNDRTD is not a special document in the sense that it does not contain any entirely new rights that have not been covered before.⁴⁹ It essentially, reproduces existing human rights and obligations contained in the twin Covenants into a single document to harmonise and advance them together. Its distinctiveness is found in the way it articulates and, when necessary, expands the rights associated with development.⁵⁰ The UNDRTD underlines the necessity of international cooperation as a universal solution for its achievement. The UNDRTD is one of the few known international instruments that define human rights as the rights of both persons and peoples at the same time.⁵¹ Most people think of human rights as personal entitlements. Article 8(1) of the UNDRTD provides rights considered to be essential for development:

States should undertake, at the national level, all necessary measures for the realisation 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.⁵²

⁴⁸ Villaroman 2010: 301.

⁴⁹ Ibhawoh 2011: 82.

⁵⁰ Ibhawoh 2011:82.

⁵¹ Art 1(1) of the UNDRTD recognises that '[t]he right to development is 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.'

⁵² In UNDRTD Art 8(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.'

It is crucial to note in this regard that the right to development, as stated above, is a conglomeration of various rights, including economic, social, cultural, civil, and political rights. The UNDRTD reiterates this when it states 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.⁵³

Subedi advances the view that the UNDRTD establishes equity, equality, dignity, and justice as primary determinants of development, thereby heralding a new rights-based approach to development.⁵⁴ As noted in section 2.5, the UNDRTD laid the foundation for advancing the UN agenda designed to integrate development into human rights and vice versa. It has been a catalyst for the recognition of the right to development in several subsequent regional and international instruments dealing with human rights and sustainable development. The right to development is grounded in the idea that all individuals and peoples have the right to live in dignity and to have their basic needs met. It recognises that development is not merely about economic growth but importantly about improving people's quality of life, including access to education, healthcare, and social security. Achieving human well-being and, consequently, human dignity and sustainable development is central to the right to development. This means that economic growth should be inclusive and provide opportunities for all people to achieve their full potential through decent work, the eradication of poverty, quality education, and the reduction of income and gender inequality. In addition to opportunity and equality, human dignity and well-being also require access to the basic necessities of life, including water and sanitation, electricity, and food.⁵⁵ This is a fundamental principle of international human rights law.

⁵³ Art 6(2) of the UNDRTD provide that '[a]ll 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.' See also Preamble.

⁵⁴ Subedi 2021: 1.

⁵⁵ United Nations 2016. 'Human Dignity and Wellbeing.' Available at <https://www.un-ilibrary.org/content/books/9789210584685c006/read> (accessed 30 September 2023); see also

Amplified further in subsequent instruments, such as the Vienna Declaration and Programme of Action (Vienna Declaration) adopted in 1993,⁵⁶ the right to development was given a sturdier recognition and significance.⁵⁷ Although the Vienna Declaration only has the same legal weight as other declarations in terms of its soft law nature, it serves as a focal point for discussion on the overall concept of international human rights law.⁵⁸ Recognition of the right to development in the Vienna Declaration essentially serves the purpose of emphasising the interconnectedness of human rights and thus, plays a vital role in the human rights system. The need for its full implementation and realisation has, accordingly, continually being underlined, necessitating the formulation of 'comprehensive and effective measures to achieve that purpose.'⁵⁹

The UNDRTD is the only declaration that squarely enshrines in detail the multifaceted right to development at the global level. Fukuda-Parr points out that the UNDRTD is 'the only international human rights instrument that addresses the need for joint international action to address the human rights consequences of global economic arrangements.'⁶⁰ Acknowledging such to be the case, the UNDRTD mandates that actions 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

<https://www.humanrights.is/en/human-rights-education-project/human-rights-concepts-ideas-and-fora/human-rights-in-relation-to-other-topics/human-rights-and-development> (accessed 30 September 2023).

⁵⁶ Vienna Declaration.

⁵⁷ Art 10 of the Vienna Declaration proclaim that 'the World Conference on Human Rights reaffirms the right to development, as established in the Declaration on the Right to Development, as a universal and inalienable right and an integral part of fundamental human rights.'

⁵⁸ Vienna Declaration, Art 5 state that '[a]ll 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. 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 States, regardless of their political, economic and cultural systems, to promote and protect all human rights and fundamental freedoms.'

⁵⁹ Ibid, Para, 72.

⁶⁰ Fukuda-Parr 2012: 840.

measures at the national and international levels.⁶¹ Without a doubt, international treaty law frames the international and regional development of the right to development.⁶²

It should be emphasised that a declaration represents soft law and does not impose any legal obligations if any of its components, or a portion of it is not recognised as customary international law. However, soft law cannot be completely avoided. It is important to note that states' international relations may suffer if they violate their commitments under soft law.⁶³ As demonstrated by the UDHR, soft law frequently initiates and ultimately contributes to the establishment of international treaties and customary law.⁶⁴ Many of the crucial elements of the right to development are completely supported in the International Bill of Rights, and it receives substantial support from soft law. Although, as in the case of the South African legal system, which I shall further examine in Chapter 5, the link between international and domestic law influences the application of declarations and treaties inside domestic legal systems.

3.3 RIGHT TO DEVELOPMENT AS CUSTOMARY INTERNATIONAL LAW

The right to development is an important component of international human rights discourse. In Chapter 5, subsection 5.4.1.2, I explain how the rules of customary international law are integrated into the South African legal and policy frameworks through constitutional mandates and international commitments. The country's adherence to international human rights standards informs its approach to development and human rights protection, guaranteeing consistency with global norms and contributing to the broader realisation of the right to development.

⁶¹ In UNDRTD Art 10 '[s]teps 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.'

⁶² Arts K & Tamo A 2016. 'The Right to Development in International Law: New Momentum Thirty Years Down the Line?' *Netherlands International Law Review* 63: 221-249, 229; Rosas 2001: 119 123.

⁶³ Viljoen 2012: 30.

⁶⁴ Viljoen 2012: 30.

Internationally, there is continuing discussion and negotiation about the right to development. While some nations and organisations, including the UN, continue to support its acceptance and application as a binding legal standard,⁶⁵ others have reservations or objections to certain elements of the concept. Although, at least for the time being (considering that there is a Draft International Covenant on the Right to Development),⁶⁶ there is yet no binding treaty at the international level that codifies the right to development, it has been acknowledged and incorporated into several international agreements and declarations.

International law is derived from both treaty law and customary international law. Written conventions known as treaties, allow for the official establishment of rules by states. On the other hand, customary international law is derived from a general practice that is regarded as law rather than being codified.⁶⁷ It is crucial to remember that state practice (what states do) and *opinio juris* (the conviction that a specific practice is legally needed) are the two main factors that shape customary international law.⁶⁸ According to Greenwood, the acceptance of a treaty provision by states is in and of itself a significant aspect of state practice. It could swiftly become a part of customary international law if states go on to apply the treaty provisions, particularly if they are not treaty parties.⁶⁹ The phrase ‘international obligations’ refers to responsibilities carried out by a sense of a duty to comply with legal obligations and resulting from established state practice.⁷⁰ O’Brien

⁶⁵ UN Meetings Coverage and Press Releases 13 October 2023. Third Committee Underscores Need for Legally Binding Tool to Enforce Right to Development, Unrealised by Millions Worldwide, Directed also at Businesses Seventy-Eighth Session, 20th and 21st Meeting GA/SHC/4383. Available at <https://press.un.org/en/2023/gashc4383.doc.htm> (accessed 20 October 2023).

⁶⁶ Draft Convention on the Right to Development (the Draft Convention), 17 January 2020, A/HRC/WG.2/21/2; Draft Convention on the Right to Development with Commentaries (‘the commentary’), 20 January 2020, A/HRC/WG.2/21/2/Add.1; See also Teshome 2022.

⁶⁷ International Committee of the Red Cross (ICRC) Customary international humanitarian law (29 October 2010). Available at <https://www.icrc.org/en/document/customary-international-humanitarian-law-0> (accessed 20 October 2023).

⁶⁸ Dahlman 2012: 327-328.

⁶⁹ Greenwood C 2008. ‘Sources of International Law: An Introduction.’ *United Nations Treaty Collection*.

⁷⁰ de Tagle 2015: 115.

contends that when a state practice becomes generally accepted, it automatically becomes customary international law.⁷¹

According to Dahlman, customary international law is a distinct category of international law that is *sui generis*.⁷² He posits that ‘customary law is not law because the court applies it; it is applied by the court because it is law.’⁷³ Once established, customary international law operates automatically without requiring judicial validation, although its application may be confined to the domestic legal system. Article 38(1)(b) of the International Court of Justice (ICJ) affirms that customary international law comprises rules derived from ‘a general practice accepted’ as law, existing independently of treaty law.⁷⁴ For a rule to be recognised as customary, it must be evidenced in state practice, with the international community acknowledging that such practice is necessary for legal recognition.⁷⁵ The representation of various state organs—including the executive, legislative, and judicial branches—can be utilised to identify state practice. Elements such as policy pronouncements,⁷⁶ domestic legislation, diplomatic correspondence, and the actions of international organisations, conferences, and judicial or quasi-judicial bodies all contribute to the body of state practice that informs customary international law.

Treaties, UN resolutions, and legal documents can all be used as examples of state practice.⁷⁷ While there are numerous international agreements and resolutions that

⁷¹ O'Brien 2017: 68-69.

⁷² Dahlman 2012: 327-328; Kadens E & Young EA 2013. ‘How Customary is Customary International Law.’ *William and Mary Law Review*, 885-920.

⁷³ Dahlman 2012: 378.

⁷⁴ It is provided in Art 38(1) of the ICJ that ‘[t]he Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply: (b) international custom, as evidence of a general practice accepted as law.’

⁷⁵ See note 348 above.

⁷⁶ Goldsmith JL & Posner EA 1999. ‘A Theory of Customary International Law.’ *University of Chicago Law Review* 66: 1113-1177, 1114.

⁷⁷ 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.’

promote the right to development, some scholars feel that it has not yet become a universally accepted customary norm. Marks for example notes that despite the significant declarations and resolutions on the right to development, there is still insufficient state practice and consensus to establish it as a customary norm.⁷⁸ Also, Alston highlights the limitations and challenges in making the right to development universally accepted and legally binding.⁷⁹ In contrast, there is a strong contention that over time, the right to development has gained recognition as a norm of customary international law. For example, Baxi argues that the right to development has evolved into a norm of customary international law. He emphasises the increasing recognition and implementation of the right in various international and domestic contexts.⁸⁰ Gready and Ensor affirms that the right to development has become increasingly recognised as a normative principle in international law, albeit with challenges in implementation.⁸¹ The right to development is strongly argued to have been recognised as a standard of international law through time. The fact that it has not been enshrined in a single treaty has not stopped it from developing due to state practice and international acceptance. This dynamic evolution highlights the growing consensus on the importance of development as a human right. For example, in 2016, China adopted a White Paper on the Right to Development.⁸² The White Paper outlines China's perspective and approach towards the right to development and reflects its stance on integrating development and human rights, emphasising a comprehensive approach to improving living standards. Importantly, the right to development under the African Charter benefits from robust state practice and international acceptance due to its universal ratification by all African countries. This collective commitment underscores the importance of promoting inclusive and sustainable development across the continent, reflecting a shared vision for

⁷⁸ Marks 2004.

⁷⁹ Alston 2005.

⁸⁰ Baxi 2019: 99-116.

⁸¹ Gready & Ensor 2016: 453-470; Gready P 2008. 'Rights-Based Approaches to Development: What is the Value-Add? *Development in Practice* 18(6): 735-747.

⁸² Republic of China White Paper 2016. 'The Right to Development: China's Philosophy, Practice and Contribution.'

improving the quality of life and well-being of African peoples. Countries have an obligation to promote and protect the right to development, both domestically and through international cooperation. In addition to being authoritative tools for treaty interpretation, General Assembly resolutions, in Villaroman's opinion, can be used to show a state's *opinio juris*, which is a crucial part of customary international law.⁸³

The adoption of the UNDRTD in 1986 demonstrates the commitment of the international community to achieving the right to development. Rudolf believes that the UNDRTD has made an effort to define the right to development's scope in a way that ensures the right complies with customary international law. He adds that by convincingly establishing the right to development as a human right and linking it to other rights, the Vienna Declaration satisfied the state practice requirement of customary international law.⁸⁴ Even the USA, a vehement opponent of the right to development voted in favour of the right to development at the Vienna conference. Additionally, no uniformity of state practice is necessary to create a standard of customary international law.⁸⁵ Almost all developed nations feel obligated to aid developing nations in their development, even in the absence of a particular treaty commitment. In this way, the practices of developed nations regarding official development assistance serve to illustrate both the intrinsic universality of the right to development and the *opinio juris* that accords it some customary status under international law. Marks notes that the right to development is implied to be justiciable by ordinary international legal practice.⁸⁶ 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

⁸³ Villaroman 2010: 305.

⁸⁴ Rudolf 2008: 105.

⁸⁵ *North Sea Continental Shelf Cases Reports*. Denmark/Federal Republic of Germany/Netherlands [1969] ICJ 1, 3.

⁸⁶ Marks SP 2008. 'A Legal Perspective on the Evolving Criteria of the HLTF on the Right to Development.' In Marks SP (ed) *Implementing the Right to Development in International Law* 72-83, 74.

international law. Therefore, it is a strong argument in favor of the states' recognition of a right to development, i.e., their *opinio iuris*....⁸⁷

Several other international commitments have reaffirmed the right to development, including the Addis Ababa Action Agenda (General Assembly Resolution 69/313 of 27 July 2015),⁸⁸ the Sendai Framework for Disaster Risk Reduction 2015-2030,⁸⁹ the Paris Climate Agreement,⁹⁰ and the SDGs, demonstrate a current commitment to the right to development at the global level. These instruments collectively reflect a renewed global commitment to the right to development. Through their implementation, nations have revitalized efforts to protect, promote, and fulfil this right at both national and international levels. The significance of the UNDRTD is highlighted by its dependence on the right to development as recognised by numerous national and international organisations, particularly those within the UN system. Goal 1 of the SDGs aims to eradicate all forms of poverty, while the remaining goals are intrinsically linked to development and human rights objectives. As Khor notes, there is a close connection between the right to development and the SDGs. Fulfilling the SDGs would go a long way to realising the right to development'.⁹¹ And

[the] approach and instruments of the right to development would be useful to apply when implementing the SDGs. In turn [,] the fulfilment of the SDGs would be helpful for the realisation of the right to development. At the same time [,] we should be mindful that there are limitations to the set of SDGs and to the SDG approach. This should be supplemented

⁸⁷ Rudolf 2008:105.

⁸⁸ Addis Ababa Action Agenda 2015. Addis Ababa Action Agenda of the Third International Conference on Financing for Development. *UN Development* 2, 37.

⁸⁹ Center ADR 2015. Sendai Framework for Disaster Risk Reduction 2015–2030. United Nations Office for Disaster Risk Reduction: Geneva, Switzerland.

⁹⁰ Paris Agreement to the United Nations Framework Convention on Climate Change (adopted 12 December 2015, T.I.A.S. No. 16-1104).

⁹¹ South Centre 2016. 'The Right to Development at 30: Looking Back and Forward', South News, 16 August 2016. Available at <https://www.southcentre.int/question/the-right-to-development-at-30-looking-back-and-forwards/> (accessed 10 October 2023); General Assembly resolution 70/1 of 25 September 2015);

by other instruments and approaches that are needed for a comprehensive understanding of the dynamics of development and, thus, of the right to development...⁹²

Although the sustainable development agenda and other UN resolutions are not legally binding, they reflect the international community's commitment to advance the right to development. According to Shaw, 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.'⁹³ This is supported by the accompanying change in the functioning of the UN and its organisations, such as UNDP, which speaks volumes about the commitment to fighting poverty and ensuring global development. Recognition of the right to development is also significantly reflected in bilateral and multilateral agreements, including with international financial institutions (IFIs) such as the World Bank and the International Monetary Fund (IMF), which now recognise and uphold human rights in the exercise of their activities.⁹⁴ The agreements lay out commitments to encourage social and economic development both within each state's borders and in collaboration with other states. In fact, Alston suggests that the right to development is *fait accompli*; '[w]hatever 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.'⁹⁵

Additionally, some regional human rights treaties expressly recognise the right to development. For instance, the African Charter contains provisions on the right to

⁹² Ibid, 7–8.

⁹³ Shaw MN 2008. *International Law*. Cambridge University Press, 115.

⁹⁴ For example, the World Bank's 2017 Environmental and Social Framework ensures that its projects go beyond infrastructure or finance by protecting vulnerable communities and promoting fairness and inclusion. In addition, the IMF's 2021 strategy for fragile and conflict-affected countries highlights the importance of gender equality, social protection, and inclusive growth as essential foundations for lasting economic stability. On a more direct level, agreements like the Cotonou Partnership between the European Union and countries in Africa, the Caribbean, and the Pacific explicitly tie development aid to respect for human rights, democracy, and the rule of law, making these values a core part of international cooperation.

⁹⁵ Alston 1981: 106.

development. The Charter provisions constitute commitments undertaken by states to promote economic, social and cultural development, poverty alleviation, and international cooperation, which can be viewed as evidence of state practice supporting the emergence of the right to development as a customary norm. However, its development as a customary norm is an ongoing process, and its precise legal status may evolve as states and international organisations work to advance the Draft International Covenant on the Right to Development.⁹⁶ According to Teshome, the normative content of the Draft International Covenant on the Right to Development draws profoundly on the existing human rights framework, including among others, the UDHR, the two Covenants, and above all, the UNDRTD.⁹⁷

3.4 RESPONSE TO INTERNATIONAL HUMAN RIGHTS LAW

South Africa human rights culture is characterised by a strong constitutional commitment, active participation in international treaties and mechanisms, and the establishment of domestic institutions (such as the South African Human Rights Commission) and legislation to protect human rights. I would like to highlight the relationship between international and domestic law before proceeding to discuss the right to development treaty obligations under international law. This is to lay the foundation for the discussion of the justiciability of the right to development within the South African legal system in section 5 of Chapter 5.

International law is no longer primarily limited to the regulation of state-to-state relations. As in domestic law, international law is concerned with development and its attendant issues such as health, education, the environment, and human rights generally. International law is applicable in any domestic legal system based on the dictates of domestic laws. It is the domestic legal regime of any given country that illuminates and

⁹⁶ Draft Convention on the Right to Development (the Draft Convention), 17 January 2020, A/HRC/WG.2/21/2.

⁹⁷ Teshome 2022: 2.

paves the way for the application of international law within the domestic arena.⁹⁸ A right (such as the right to development) may exist under international law. It will however, 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.⁹⁹ However, the application of international law in domestic law rests on two schools of thoughts, 'monism' and 'dualism'.¹⁰⁰ They determine how international law ought to apply at the domestic level.

On one the hand, monism treats both international and domestic law as integral parts of one legal system. Proponents of monism argue that international and domestic law manifest from a single conception of law.¹⁰¹ In this regard, international law applies domestically without recourse to any legal complications. Courts are empowered to apply international law as they deem appropriate.¹⁰² The Kenyan Constitution, for example, allows for the application of general international law rules in the Kenyan legal system.¹⁰³ It means that all international treaties that the Kenyan government has ratified and published become part of the laws of that country.¹⁰⁴ According to Viljoen, the direct application of international law in monist states, such as Kenya is unrealistic.¹⁰⁵ Making reference to the French Constitution, the *Conseil d'Etat* makes it clear that Article 55 does not apply to provisions of a constitutional nature.¹⁰⁶ Hence, constitutional provisions prevail over and above those of international treaties.¹⁰⁷ However, in the case of Kenya,

⁹⁸ Viljoen 2012: 517-559.

⁹⁹ Viljoen 2012: 524.

¹⁰⁰ Dugard 2005: 47-48.

¹⁰¹ Killander 2010: 5; Dugard 2005: 47.

¹⁰² See above.

¹⁰³ Constitution of Kenya 2010 Sect 2(5) states that 'general rules of international law shall form part of the law of Kenya.'

¹⁰⁴ Wallace & Martin-Ortega 2020: 38; see also Klabbers 2020: 290.

¹⁰⁵ Viljoen 2012: 521.

¹⁰⁶ Art 55 of the Constitution of France provides that the '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.'

¹⁰⁷ Killander & Adjolahoun 2010: 6.

no such limitation is provided for. General rules of international law apply regardless of what the Constitution enshrines.¹⁰⁸ The Kenyan Constitution provides one of the clearest examples of monism in Africa, as it directly incorporates international law into domestic law without requiring further legislative action. In contrast, South Africa presents a more complex, mixed approach. Section 232 of the South African Constitution reflects monism,¹⁰⁹ by automatically incorporating customary international law unless it conflicts with legislation or the Constitution. However, Section 231 introduces a dualist element,¹¹⁰ requiring that international agreements be approved by Parliament and enacted into law before they have domestic legal effect. Thus, while South Africa leans toward monism in principle, it maintains dualist procedures for treaty incorporation. On international law, Section 39(1)(b) of the South African Constitution, states: When interpreting the Bill of Rights, a court, tribunal or forum [...] must consider international law.¹¹¹ This includes international agreements that South Africa is a party to, such as human rights treaties as well as rules that have developed over time and are recognised as binding, even if not codified in a specific treaty. Use of the word ‘must consider international law’ indicates that international law serves as a guiding or interpretive tool, not as a binding source unless it has been incorporated into domestic law. Therefore, while international law influences constitutional interpretation, its application is not automatic or enforceable unless expressly adopted through legislation (in the case of treaties) or unless it forms part of customary international law under Section 232.

imply that the application of international law in South Africa is direct and obligatory.

Dualism on the other hand, 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. Thus, each of the two is mutually exclusive and operates within their designated domains.¹¹² In a dualist state no law, including international law, should apply without first being part of

¹⁰⁸ Sect 2(5) of the Constitution of Kenya.

¹⁰⁹ Sect 232 of the Constitution of South Africa

¹¹⁰ Sect 231 of the Constitution of South Africa

¹¹¹ Sect 39(1)(b) of the Constitution of South Africa.

¹¹² Wallace et al, 2020: 38.

its *corpus juris*. In other words, international law is not above domestic law. There are no conflicting interests under this system because international law must first become part of the *corpus juris* before it assumes any force of law within the domestic jurisdiction. In Fitzmaurice's view, any form of conflict that arises is unreal and imaginary because neither international law nor domestic law ever operate in each other's domain.¹¹³ This argument is termed the 'Fitzmaurice compromise', which holds that should there be a conflict between domestic and international law, it must not be considered a conflict of legal systems but rather a conflict of obligations.¹¹⁴ For Wallace and Martin-Ortega, 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.¹¹⁵

On clarifying international obligations, each country must ensure that its international obligations are respected, protected, and promoted in any way possible. This is provided in Article 2(1) of the ICESCR which states that; 'Each State Party to the present Covenant undertakes to take steps, individually and through international assistance and co-operation [...].'¹¹⁶ Also, Article 2(2) of the ICCPR provides 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.¹¹⁷

¹¹³ Fitzmaurice G, Bastid S, Lachs M, Landheer MB, Luna MAM & Zorek J 1957. *The General Principles of International Law Considered from the Standpoint of the Rule of Law*. cited in Wallace & Ortega, 38-39.

¹¹⁴ Fitzmaurice et al 1957: 38-39.

¹¹⁵ Wallace et al, 2020: 39.

¹¹⁶ ICESCR.

¹¹⁷ Art 2(2) ICCPR of the provide that '[w]here 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.'

The UNDRTD, even though it does not have 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.'¹¹⁸ Article 10 also provide that '[s]teps 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 level.'¹¹⁹

Even though international human rights law creates legally binding obligation on the inter-state level, in practical terms, treaties must either be transformed into municipal law or be qualified as self-executing by the domestic courts before they become enforceable. The important point of these instruments is, therefore, that states ultimately determine how and when international law applies. It is also important to understand why states accept being bound by international law. 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.¹²⁰ Ocran notes that both monism and dualism 'emanate from rather different conceptions of state sovereignty and variations in the adherence to legal positivism.'¹²¹ In line with Viljoen's argument, even in states that approach international law from a monist perspective, as is evident in the South African Constitution, Section 39(1)(b) and the Kenyan Constitution, Sections 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.'¹²² Following this logic, it means that treaties do not have direct application in domestic affairs, even in monist states.

¹¹⁸ In Art 3(1) of the UNDRTD 'States have the primary responsibility for the creation of national and international conditions favourable to the realization of the right to development.'

¹¹⁹ See Above.

¹²⁰ Killander & Adjolahoun 2010: 4; see also Fagbayibo 2021: 20-27.

¹²¹ Ocran M 2007. 'Access to Global Jurisprudence and Problems in the Domestic Application of International Legal Norms.' In *Keynote Address at the 2nd West African Judicial Colloquium*, 8-10.

¹²² Constitution of Kenya, Sect 21(4) provide that '[t]he State shall enact and implement legislation to fulfil its international obligations in respect of human rights and fundamental freedoms.'

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.'¹²³ However, if they fail to implement the treaty, neither the international institution nor the system itself can do much about that. There are other factors, such as the requirements of the legal system and the political will of the state itself that may limit it or its domestic institutions especially, the courts from carrying out its obligations, no matter how beautifully designed. For example, Article 23(2) of the Constitutive Act of the African Union provides that '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.'¹²⁴ The key 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. This requirement is being treated with less commitment by member states.

Good examples are the African Commission's decisions in the *Endorois* and *Ogoni* cases, which I extensively discuss in section 4 of Chapter 4. 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.¹²⁵ With regard to the *Ogoni* case, the plight of the Ogoni people has remained more or less the same since the recommendations of the African Commission about 15 years ago.¹²⁶ The issues that led to the action have continued unabated.

¹²³ Maluwa 2012: 11.

¹²⁴ Constitutive Act of the African Union of 2000, Art 15 provides that '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.'

¹²⁵ *Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council v Kenya* Comm No 276/2003.

¹²⁶ *Social and Economic Rights Action Centre (SERAC) and Another v Nigeria* (2001) AHRLR 60 (ACHPR 2001).

3.5 JUSTICIABILITY OF THE RIGHT TO DEVELOPMENT AT THE INTERNATIONAL LEVEL

The right to development is a relatively modern concept in international law, and thus, the question of its justiciability at the international level is a complex and heavily debated issue within the field of international human rights law. The right to development is currently, not an enforceable right under international law. It is therefore, not a justiciable right capable of any adjudicatory remedy. With this, it has been suggested that the right to development may still be enforced vicariously through other legally binding conventions.¹²⁷ Considering this, in section 3 of Chapter 4, I show that the African human rights system recognises the right to development as an enforceable right. As shown in 3.2 above, the right to development draws inspiration from diverse sources, which raises the question of whether the right can be considered a legal norm under international law.¹²⁸ In responding to this overarching question, I contend that the legal foundation of the right to development can be sought in the UDHR, which has attained the status of customary international law. Also, the ICCPR and the ICESCR provide sufficient mechanisms for the indirect enforceability of the right to development as a human right, while the African Charter provides direct enforceability of the right within the African human rights system. For this purpose, Aguirre observes that local development is covered by the right to development, which increases the relevance of human rights law in regional and national human rights law.¹²⁹

For a right to be enforceable in any legal system, including under South African law, hinges on several key factors such as the determinability for duty-bearers and beneficiaries. These factors ensure that the right is not only recognised but also practical and actionable. The justiciability of a right refers to whether the right can be subject to legal enforcement and adjudication, either at the domestic or international level.¹³⁰ For

¹²⁷ Kirchmeier 2006: 9.

¹²⁸ Shivji 1989: 89.

¹²⁹ Aguirre 2021.

¹³⁰ For an exposition of the concept of Justiciability see Yeshanew SA 2011. *The Justiciability of Economic, Social and Cultural Rights in the African Regional Human Rights System*. Åbo Akademi University, 59-100.

Fyanka, justiciability means a 'right's faculty to be subjected to the scrutiny of a court of law or another (quasi-) judicial entity.'¹³¹ For example, many economic, social, and cultural rights cases have been decided by national judicial and quasi-judicial institutions, and their number is growing exponentially.¹³² Justiciability 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.¹³³ Justiciability has greater impetus among legal positivists who emphasise legal rights.¹³⁴ For example, Wang stresses that 'no right will ever be realised if its justification for being valuable and legitimate is only through natural law instead of positivism.'¹³⁵ It is arguable whether the right to development satisfies this requirement especially, under mainstream international human rights law. 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.¹³⁶ Nonetheless, at the national level such as in South Africa, the question ought to be how courts can meaningfully fulfil their role in upholding the right to development, rather than whether or not it is a justiciable right and whether or not they have a role to play in its enforcement. This is because South Africa is a state party to the African Charter, which makes the right to development enshrined in Article 22 therein, legally binding.

¹³¹ Fyanka KS 2010. 'Justiciability of Social Rights Myth or Reality.' *Human Rights Review* 1: 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.).

¹³² de Albuquerque C 2014. 'Access to Justice for Violations of the Human Rights to Water and Sanitation.' *A Handbook by the UN Special Rapporteur* 7.

¹³³ Oduwole OO 2014. 'International Law and the Right to Development: A Pragmatic Approach for Africa. *International Institute of Social Studies*, 6.

¹³⁴ The American Realist Holmes emphatically concludes that 'The prophecies of what the courts will do and nothing more pretentious are what I mean by the law'. See Holmes OW 1897. 'The Path of the Law.' *Harvard Law Review* 10: 457, 460-461.

¹³⁵ Wang 2008: 39 46; Wang 2008: 45-46.

¹³⁶ Oduwole 2014: 6.

In 2018, in response to the inquiry regarding the justiciability of the right to development, the UN Human Rights Council (HRC) asked the Working Group on the Right to Development to draft a legally binding instrument (the Draft International Covenant of the Right to Development) through a collaborative process of engagement on its scope and content.¹³⁷ A study report on the significance of a legally binding document on the right to development was requested by the HRC from the Advisory Committee that same year. The Advisory Committee discussed the report's second draft by January 2020, and in September 2020, they brought it before the HRC.¹³⁸

The report stresses *inter alia*, the obstacles faced within the Working Group that 'made it impossible' to fulfil its mandate; that the potential of the UNDRTD remains unseized after 38 years of its adoption; and that millions of people continue to live in poverty and suffer from hunger.¹³⁹ The report also touches upon the legally binding treaty on the right to development:

[S]everal States, while reiterating support for the right to development, have not favoured the elaboration of a binding international legal standard on the right to development. Presenting its view that, at this stage, a legally binding instrument would be counter-productive, as it does not enjoy universal support.¹⁴⁰

However, the Advisory Committee also presented findings on how a legally binding instrument is necessary to promote the development of states, improve the living conditions of their populations, and address growing inequalities.¹⁴¹ The report specifies that under international law, states are the duty-bearers of universal human rights within

¹³⁷ Human Rights Council Resolution 39/9, The Right to Development, 25 September 2018, A/HRC/39/L.12.

¹³⁸ Human Rights Council Resolution 42/23, The Right to Development, 20 September 2019, A/HRC/42/L.36; Draft Convention on the Right to Development (the Draft Convention), 17 January 2020, A/HRC/WG.2/21/2; Draft Convention on the Right to Development with Commentaries ('the commentary'), 20 January 2020, A/HRC/WG.2/21/2/Add.1.

¹³⁹ The Commentary, Para 2, 2.

¹⁴⁰ Ruiz JJ, Daudí MC & Franch VB 2011. *Lecciones de Derecho Internacional Público*. Tirant lo Blanch.

¹⁴¹ OHCHR. The Essential Elements of a Legally Binding Instrument on the Right to Development. Available at <https://www.ohchr.org/en/essential-elements-legally-binding-instrument-right-development> (accessed 30 October 2023).

their territories, however, developing countries may not reach the position to fulfil these rights for their populations due to a lack of financial resources and technical capacities. Realising the right to development for all peoples implies carrying out global economic and democratic reforms of financial institutions, international cooperation schemes, global trade terms, tax havens, technology transfer, and foreign debt for the least developed countries.

Lamentably, support for the legally binding instrument on the right to development mainly and almost solely stems from the Non-Aligned Movement (NAM) member states.¹⁴² The NAM has strongly supported the recognition of development as a human right. In recent years, it has unequivocally reiterated the importance of the elaboration of a legal instrument and the operationalisation of the right to development in the context of the 2030 Agenda for Sustainable Development.¹⁴³ Furthermore, NAM Summits have over the years, repeatedly called for a 'Convention on the Right to Development.'¹⁴⁴ With Azerbaijan in the Chairmanship since 2019, the NAM participated in joint statements with the Group of 77 (G77) at the High-Level Segment of the UNGA, reiterating the importance of the right to development and expressing concern on possible impairments to the right

¹⁴² Ruiz et al 2011: 30-37.

¹⁴³ NAM comments on the Draft Framework of the Chairperson-Rapporteur of the Working Group on the Right to Development to improve the effectiveness and efficiency of the Working Group with a view to accomplishing its mandate. Provide that '[t]he Non-Aligned Movement would like to express its gratitude to the Chairperson-Rapporteur of the Working Group for submitting the 'Draft Framework to improve the effectiveness and efficiency of the Working Group on the Right to Development with a view to accomplishing its mandate' in accordance with the HRC resolution 27/2. The NAM has supported the work of the Working Group over the years and would continue to support its mandate. We note the strides made by the Working Group on the right to development over the past years. At the same time, it is a matter of concern that, after a long effort by the international community to realize the right to development, we still witness obstacles, emanating from improper work of the global economic and financial system. The challenges of our current world are becoming more complicated and that's why, today, the realization of the right to development is a necessity more than ever.' Available at <https://www.ohchr.org/sites/default/files/Documents/Issues/Development/DraftFramework/NAM.pdf> (accessed 04 November 2023).

¹⁴⁴ Davis P 2011. 'The Non-Aligned Movement: A Struggle for Global Relevance.' Available at SSRN 2594478; Ruiz et al, 2011: 34.

to development, such as apartheid, racism, colonialism, foreign domination and occupation, aggression, threats against national sovereignty, and refusal to recognise the right to self-determination. Further advancements on the legal instrument face significant opposition from western states and their allies, including Switzerland.¹⁴⁵

The HRC Resolution A/HRC/RES/45/6, adopted in October 2020, expresses appreciation for the submission of the draft legally binding instrument by the Working Group. It emphasises the significance of constructive engagement during the 21st session of the Working Group, scheduled to review the draft in May 2021. Furthermore, the Resolution encourages relevant bodies within the UN system and the World Trade Organization to take the right to development into account in their implementation of the 2030 Agenda. This resolution was adopted following a recorded vote, with 27 votes in favour, 13 against (including Australia, Austria, Bulgaria, Czechia, Denmark, Germany, Italy, Japan, the Netherlands, Poland, Slovakia, Spain, and Ukraine), and 7 abstentions.¹⁴⁶

It is noteworthy that the viability of a legally binding treaty on the right to development has been debated.¹⁴⁷ Scholars like Schrijver, contend that a stand-alone treaty is neither desirable nor feasible because the standards regarding the right to development are already acknowledged in the human rights frameworks that already exist and because states may not support a binding treaty enough for it to take effect.¹⁴⁸ 'Putting the cart before the horse', as Schrijver puts it, may have the unintended consequence of undermining the advancements made in the recognition of the right to development.¹⁴⁹ Some argue that a legally binding agreement on the right to development is essential and

¹⁴⁵ Aghayarov 2022.

¹⁴⁶ OHCHR, UPEACE and UNU-IIGH 2019. E-Learning Module on Operationalizing the Right to Development in Implementing the Sustainable Development Goals: -Chapter 1-2, Geneva, Ciudad Colon and Kuala Lumpur.

¹⁴⁷ Feyter 2013. 'Towards a Framework Convention on the Right to Development.' Available at <https://archive.globalpolicy.org/component/content/article/211-development/52393-towards-a-framework-convention-on-the-right-to-development.html> (accessed 13 November 2023) 3.

¹⁴⁸ Schrijver 2020: 91.

¹⁴⁹ See above.

long overdue.¹⁵⁰ On the contrary, Vandenbogaerde believes that the current human rights framework explicitly covers the right to development and that it is therefore, unnecessary to address this right because it is a duplication of the two international human rights covenants.¹⁵¹

In this context, there is a big possibility that future negotiations on the binding international instrument will continue to be perceived as contentious and might face challenges in maintaining its essential content in the process of seeking multilateral consensus. Much of civil society and scholars' expectations regarding this treaty are that developed states increase their cooperation with developing states and desist from creating obstacles to the right to development, including in the areas of international trade and foreign debt.¹⁵² The right to development continues to face a long and challenging evolution process under international law. With that said, considering the progress achieved thus far since the post-war period, and the slow nature of international law, gleams of hope for strengthening the advocacy movement towards the finalisation of a binding document with solid content remain strong.¹⁵³

There is also great potential and expectation for the actual implementation and enforcement measures for the right to development at the global level, to reach a more equal world with fairer conditions and universal fulfilment of all human rights: economic, social, cultural, civil, and political, including the right to development for all.¹⁵⁴ Ultimately, the enforcement and justiciability of the right to development depend on states' willingness to implement development policies and programmes in line with their international obligations. The national legal system may also play a role in addressing violations of development-related rights.¹⁵⁵ Countries like Cameroon, Ethiopia, Uganda,

¹⁵⁰ Feyter 2013: 4.

¹⁵¹ Vandenbogaerde 2013: 209.

¹⁵² Boada JT 'Half-Century Update: The Evolution of the Right to Development in International Law, from the Post-WWII to Present Times.' Available at <https://ideasforpeace.org/content/evolution-of-the-right-to-development-in-international-law/> (accessed 04 November 2023).

¹⁵³ See above.

¹⁵⁴ Akintoye & Joshua 2019: 93.

¹⁵⁵ Maxwell 2016: 39-42.

the Democratic Republic of Congo and Malawi have incorporated the right to development into their domestic legal frameworks, allowing individuals or groups to bring claims related to development policies before national courts.¹⁵⁶

While the right to development is at the moment, not directly justiciable as a standalone right at the international level, it is intertwined with other recognised human rights and can be addressed through various mechanisms, including international and regional human rights bodies. The enforceability of this right largely depends on the interpretation of existing legal instruments and the commitment of states to fulfil their obligations related to development, while a legally binding instrument is debated at the UN level.

¹⁵⁶ de Albuquerque 2014: 7.

3.6 CONCLUSION

In this chapter, I have articulated that the understanding of the right to development within international law is both nuanced and subject to ongoing change. While it is recognised as a fundamental right, its precise definition and application remain contentious and are the focus of negotiation among nations and international organisations. I highlight key documents, including the UN Charter, the UDHR, the ICCPR, the ICESCR, as well as significant declarations such as the Vienna Declaration, have all addressed the right to development, either directly or indirectly. At this level, the right to development is explicitly embodied in its principal instrument, the UNDRTD, which I argue lacks binding legal force. Consequently, since the right to development has not yet been elevated to the status of a legally binding treaty, it is not an enforceable right under international law. However, it remains a crucial legal norm that is evolving, with the hope that the Draft International Covenant on the Right to Development will ultimately be adopted as a binding instrument.

Regarding the right to development as customary international law, despite some nations and legal scholars contending that it lacks the consistent and widespread state practice necessary for the establishment of customary law, there is a strong argument that the right to development has gained recognition as a customary international law norm over time. It is increasingly viewed as a standard of international law, and its absence from formal treaty codification has not impeded its evolution through state practice and international acceptance. Moreover, while broader international human rights law has yet to transform this concept into an enforceable legal norm, I insist that it functions effectively as a legal norm.

The African human rights system, which I discuss in the following chapter, recognises the right to development in this context.

CHAPTER 4

RIGHT TO DEVELOPMENT UNDER THE AFRICAN HUMAN RIGHTS ARCHITECTURE

4.1 INTRODUCTION

The UDHR was adopted shortly after the conclusion of World War II, at a time when few African nations were sovereign participants in the process. This milestone document marked the first explicit articulation of the principle that all individuals are free and equal, regardless of race, creed, or religion, within a globally recognised framework.¹ However, it is important to note that colonialism continued to be a pervasive reality in many African states. At the time of adopting the UDHR, three of the four African member states of the UN—namely Egypt, Ethiopia, and Liberia—signed the declaration, while South Africa abstained due to concerns that it would threaten the apartheid system of racial segregation that was entrenched and operational in the country from 1948 to 1994.² South Africa chose not to sign. Several years later, the declaration would aid in the independence of colonised African territories and also later served as the impetus for the adoption of the African Charter on Human and People's Rights on 21 October 1986, which was designed to uphold and defend fundamental freedoms and human rights across the continent.

¹ It is provided in Art 2 of the Universal Declaration of Human Rights that '[e]veryone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status. Furthermore, no distinction shall be made on the basis of the political, jurisdictional or international status of the country or territory to which a person belongs, whether it be independent, trust, non-self-governing or under any other limitation of sovereignty.

² Dubow S 2014. *Apartheid, 1948-1994*. Oxford University Press, Oxford; Aremu JO 2011. 'Origin, Nature and Dismantling of Apartheid Policy in the Union of South Africa (1948-1994).' *African Research Review* 5(1): 496-509, 497.

Developed under the auspices of the African Union (AU), the African human rights system is the newest of the three judicial or quasi-judicial regional human rights systems in the world. Similar to both the inter-American and the original European systems, the African human rights system consists of an African Commission on Human and Peoples Rights (the African Commission) and an African Court on Human and Peoples Rights (the African Court) with complementary functions. The African Committee of Experts on the Rights and Welfare of the Child (ACERWC), the African Court and the African Commission have a mandate to evaluate how well countries adhere to international human rights standards, including by making decisions regarding specific complaints of violation of human rights, including the right to development. Nonetheless, each body has its own particular set of responsibilities and actions. The concept of the right to development gained prominence in Africa through the contribution of Doudou Thiam and Keba M'baye.³ The concept of the right to development indeed, originated from Africa and is arguably Africa's most prominent contribution to the global human rights discourse.⁴ Unlike other human rights systems around the world, the African human rights system not only recognises the right to development as a fundamental human right, it also makes provision for, and champions its legally binding status under the African Charter.⁵

The objective of this chapter is to test the right to development under the African human rights system. I consider the fourth secondary question, which is to ascertain the right to development under the African human rights system. Therefore, I embark in section 4.2, to highlight the existence of human rights in Africa prior to the colonial era that continued until the establishment of formal colonial institutions. In subsection 4.2.1, I posit that African traditional philosophies like *Ubuntu*, which place a strong focus on interconnectedness, communalism, and the idea that one's humanity is entwined with the welfare of others, are the source of human rights protection in Africa. I posit that *Ubuntu*

³ In the late 1960s, then Senegalese Foreign Minister, Doudou Thiam, in a 1967 speech to the Group of 77 argued that 'Africa demands a new international law' to replace colonial international law (*Pacte du Conquete*). That new international law would have a right to development for the third world: '*nous devons proclamer ... pour les nations du Tiers-Monde le droit au développement.*'

⁴ Midgley 2007: 110.

⁵ Mahalu 1988: 23.

underscores the collective nature of human existence and highlights the importance of community, cooperation, and shared development. Section 4.2.2 of this chapter traces various sources of human rights protection in the African continent, ranging from the formation of the Organisation of African Unity (OAU), (which later transformed into the AU) and the adoption of the African Charter. In section 4.3, I discuss the sources of the right to development under the African human rights framework, relying on the African Charter, the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa, the African Youth Charter and the African Committee of Experts on the Rights and Welfare of the Child. Finally, in section 4.4, I investigate the African human rights system's enforcement of the right to development by examining the African Commission's and the African Court's roles as well as the relevant jurisprudence relating to protection of the right to development in Africa.

4.2 HUMAN RIGHTS PROTECTION IN AFRICA

I intend in this section to illustrate that human rights existed in Africa as early as the pre-colonial period, and survived through the colonial period, when the structures and forces that influenced African societies were transformed into models of social institutions, which eventually emerged in the post-colonial era into some of the factors that continued to influence the promotion and protection of human rights across the continent.⁶ The existence of human rights in pre-colonial African communities has been a topic of discussion. For example, Donnelly claims that the concepts of democracy and constitutionalism, as well as the idea of human rights, were foreign to Africans.⁷ To counter this Eurocentric perspective, Mamdani notes that the assertion of western 'paternity' for human rights has been misrepresented, emphasising that:

It is difficult to accept, even in the case of Europe, that human right was a concept created by 17th century enlightenment philosophy. True, one can quote Aristotle and his ideological justification of slavery as evidence that the idea of human rights was indeed

⁶ Motala 1988: 373; Ibhawoh 2008.

⁷ Donnelly 2019.

foreign to the conscience of the ruling classes in ancient Greece...what was unique about enlightenment philosophy, and about the writings of the French and American revolutions, was not a conception of human rights, but a discussion of these in the context of a formally articulated philosophical system.⁸

Quashigah equally argues in favour of the idea that human rights existed in pre-colonial African societies but simply lacked a well-defined philosophical form.⁹ If the arguments of western scholars were sound, then any society, regardless of development level, should logically recognise rights that fall under the category of human rights.¹⁰ The worldwide human rights movements and native African traditions are the sources of the African human rights system. James Anaya has observed that the African human rights system developed in a distinct historical and culturally diverse environment, which must be acknowledged even though the international human rights framework has had a considerable effect.¹¹

African customs regarding living arrangements can be argued to constitute the source of the African human rights system. In Africa, human rights were understood through the lens of a group or community, despite the fact that the term itself is relatively new and was not officially used as such previously. Individuals were viewed as less significant than the group, giving credence to the idea that in pre-colonial African societies, the individual was seen as an integral part of a group and that defending the rights and freedoms of the entire group, meant protecting those of the individual.¹² According to Mbiti, this thinking was influenced by the idea that 'I am because we are, and because we are, therefore I am'.¹³ African human rights were traditionally viewed through a humanist lens.¹⁴ The laws

⁸ Mamdani M, Mkandawire T & Wamba-dia-Wamba 1988. 'Social movements, Social Transformation and Struggle for Democracy in Africa.' *Economic and Political Weekly*, 973-981.

⁹ Quashigah 1992: 30.

¹⁰ Quashigah 1992: 30.

¹¹ Anaya 2004: 13; Grant 2006: 2-23.

¹² M'Baye & Ndiaye 1992 in Vasak, K 1982. 'The International Dimensions of Human Rights'. *The Organisation of African Unity (OAU)*, 588.

¹³ Mbiti J 1970. *The African Religions and Philosophy*. Heinemann, 141.

¹⁴ Kaunda 1966; 24-25.

that regulated the group did not fall under the purview of modern governments. Political, economic, and social control were upheld in these highly organised pre-colonial African cultures.¹⁵

According to Mutua, because pre-colonial African cultures were similar to one another in terms of language, culture, and ethnicity, the various communities were able to identify with one another and foster togetherness.¹⁶ Traditional African societies were extraordinarily democratic and had a sense of fairness because everyone in the society took part in decision-making, which was done by consensus and for the benefit of the collective.¹⁷ Within the collective framework, wealth and property were also enjoyed. Nyerere and Wai emphasise that there was very little tolerance for significant disparities among members of the group and that the individual well-being and dignity of members of the society were promoted.¹⁸ Even so, African traditional societies experienced their fair share of battles, just like every other society. African wars, however, seldom brought about total devastation like it often happened in Europe. For example, violence would cease around sundown, having begun in the morning. Ploughing and harvesting seasons brought an end to all warfare. The fact that some of the most horrible acts in African history, such as the killing of twins, the burying of slave owners alongside their slaves, and the offering of human sacrifices were carried out during this period is unavoidable.¹⁹

The advent of colonial rule, which restricted many traditional African freedoms and customs for the sake of improving Africans, significantly undermined the idea of traditional African societies.²⁰ This era is referred to by Williams as ‘the destruction of black civilizations.’²¹ In the ‘savages, victims and saviors metaphor of human rights’, Mutua

¹⁵ Eze 1984: 10.

¹⁶ Mutua 1995: 346-349.

¹⁷ Odinga 1967: 12.

¹⁸ Nyerere 1987: 8; Wai 1979: 116.

¹⁹ Imbua DL 2013. ‘Robbing others to Pay Mary Slessor: Unearthing the Authentic Heroes and Heroines of the Abolition of Twin-killing in Calabar.’ *African Economic History* 41(1): 139-158.

²⁰ Busia 2023: 48-49.

²¹ William C 1987. ‘The Destruction of Black Civilization: Great Issues of a Race from 4500 BC to 2000 AD.’ *Third World Press*.

argues that a historical understanding of the struggle for human dignity should locate the impetus of a universal conception of human rights in those societies that were subjected to European tyranny and imperialism.²² Africa was greatly impacted by European imperialists' exploitation of the continent for their resources and the imposition of their legal and social systems throughout the colonial era. During this time, the rights of indigenous peoples were disregarded, which paved the way for the eventual acceptance of human rights as an essential component of post-colonial governance.²³ Gawanas asserts that a real social and economic battle against colonialism and the legacy of apartheid led to the creation of the African human rights framework.²⁴

4.2.1 *Ubuntu* as foundation for the observance of human rights in Africa

In an effort to Africanise human rights and the right to development in particular, I argue that African philosophies such as *Ubuntu* have shaped the traditional outlook of the African human rights system. I have mentioned above that human rights existed in African societies before their formal recognition, and through the practice of *Ubuntu* in African societies, human rights found their historical roots. The South African Constitution, which I opine, implicitly guarantees the right to development, is based on the ideals of the *Ubuntu* philosophy. *Ubuntu* is relevant to this argument because it serves as the foundation of South African human rights culture. Hence, tracing human rights and the right to development through the *Ubuntu* philosophy is an important contribution to the analysis of the legality of the right to development in South Africa. Section 1(a) of the South African Constitution states that South Africa is founded on values such as human dignity, the achievement of equality, and the advancement of human rights and freedoms.²⁵ These values align with the *Ubuntu* emphasis on respect for human dignity

²² Mutua 2001: 201-207.

²³ Gathii 2020: 29.

²⁴ Gawanas 2009: 136.

²⁵ Sect 1(a) of the South African Constitution provide that '[t]he Republic of South Africa is one, sovereign, democratic state founded on the following values: (a) Human dignity, the achievement of equality and the advancement of human rights and freedoms.'

and the collective well-being of South Africa as a community. Metz asserts that human dignity is the fundamental value of human rights, and this view has become the prevalent one among moral philosophers, jurisprudential scholars, UN theorists, and the South African Constitutional Court.²⁶

The concept of *Ubuntu* is used in politics, social sciences, law, and development just to name a few. There are several definitions that highlight distinct aspects of the notion, making it challenging to accurately define due to its diversity. According to Battle, the concept emanates from the isiXhosa phrase *Umntu ngumntu ngabanye abantu*.²⁷ Also, Moloketi offers an isiZulu proverb that is not far from the latter, *umuntu Ngumuntu Ngabantu*.²⁸ Put together alongside the Sesotho aphorism *motho ke motho ka batho* signifies that a person's humanity is best realised in relationship with other people.²⁹ *Ubuntu* is made up of the stem *ntu* and the prefix *ubu*, which together suggest the concept of 'being'.³⁰ Thus, *ubu-ntu* is the fundamental ontological and epistemological category in the African thought of the Bantu-speaking people.³¹

Ubuntu is more than just a concept. It is a comprehensive worldview, and a way of life deeply rooted in African cultures and traditions. It encapsulates a set of values and

²⁶ Metz T 2011. 'Ubuntu as a Moral theory and Human Rights in South Africa.' *African Human Rights Law Journal* 11(2): 532-559, 542.

²⁷ Battle M 1996. The Ubuntu Theology of Desmond Tutu. In Hulley L, Kretzchmar L & Pato LL (eds) *Archbishop Tutu: Prophetic Witness in South Africa*. Human and Rousseau: Cape Town 93-105, 99.

²⁸ Moleketi G 2009. Towards a Common Understanding of Corruption in Africa. *Public Policy and Administration* 24(3): 331-338, 243.

²⁹ Ramose MB 2020. 'Motho ke motho ka batho, as African Perspective on Popular Sovereignty and Democracy. *The Oxford Handbook of Comparative Political Theory*, 261-272.

³⁰ Dladla N 2017. 'Towards an African Critical Philosophy of Race: Ubuntu as a Philo-Praxis of Liberation.' *Filosofia Theoretica: Journal of African Philosophy, Culture and Religions* 6(1): 39-68, 51; Moloketi, 2009: 243; Wright J & Jayawickrama, J 2021. 'We Need Other Human Beings in Order to be Human': Examining the Indigenous Philosophy of Umunthu and Strengthening Mental Health Interventions. *Culture, Medicine, and Psychiatry* 45(4): 613-628; Nussbaum B 2003. 'Ubuntu: Reflections of a South African on our Common Humanity.' *Reflections* 4(4): 21-26.

³¹ Ramose M 2023. The Meaning of Sharing under Marketised Education: An Ubu-ntu Perspective. *Education Ouverte et Libre-Open Education*, 2: 1-20, 7.

principles that guide how people interact with one another and relate to their communities. *Ubuntu* also resonates with the communitarian conception of the right to development.³² Africans possess a unique collective consciousness that is reflected in their conduct, expressions, and spiritual fulfilment. These areas serve as physical manifestations of values that are central to African cultures, like sharing and respecting others as fellow humans and the idea of African brotherhood.³³ Other African intellectuals have expressed similar concepts about universal brotherhood, including sensitivity to the needs and desires of others, comprehending other people's frames of reference, and the belief that man is a social being.³⁴ That *Ubuntu* implies 'I am because we are', is a foundational human rights principle that represents the communal character of African communities.³⁵ Archbishop Tutu corroborates this view by stating that;

[a] person is a person through other persons. None of us comes into the world fully formed. We would not know how to think, or walk, or speak, or behave as human beings unless we learned it from other human beings. We need other human beings in order to be human.³⁶

Ramose argues that *Ubuntu* is akin to human nature with emphasis on the fact that aspects of human nature such as forgiveness, acknowledgment, humanity, respect, and politeness are the fundamental ideals of *Ubuntu*.³⁷ According to Ramose, the most essential aspects of the African way of life are interdependence, communal

³² Ngang CC 2020. 'Complexity in balancing the pursuit of FDI with the obligation to achieve the right to development in Africa: A focus on China-Africa relations.' In: Ngang CC & Kamga SD (eds) *Insights into Policies and Practices on the Right to Development*. Rowman & Littlefield International: London/New York 270-272.

³³ Dladla 2017: 49-50.

³⁴ Mabovula NN 2011. 'The Erosion of African Communal Values: A Reappraisal of the African Ubuntu Philosophy.' *Inkanyiso: Journal of Humanities and Social Sciences* 3(1): 38-47, 40.

³⁵ Moyo ON & Moyo ON 2021. 'Unpacking Public Discourses of Ubuntu a Decoloniality Approach.' *Africanity and Ubuntu as Decolonizing Discourse*, 49-102.

³⁶ Tutu, 2004: 25

³⁷ Ramose MB 2002a. The Philosophy of Ubuntu and Ubuntu as a Philosophy: In Coetzee PH & Roux APJ 2002. *Philosophy from Africa: A Text with Readings*. 2nd Edn. Oxford University Press: London/New York.

consciousness, and a communalist worldview.³⁸ Khoza defines *Ubuntu* as ‘an African value system that means humanness or being human, a worldview characterised by values like sharing, compassion, caring, communalism, and related predispositions.’³⁹ *Ubuntu*, according to Khoza, ‘constitutes the spiritual cradle of African religion and culture [that] finds expression in virtually all walks of life social, political, and economic.’⁴⁰

Accordingly, the concept is interpreted widely to include the ability within African cultures to exhibit and/or demonstrate empathy, reciprocity, humanity, dignity, and mutuality in the service of creating and preserving just and caring communities.⁴¹ Teffo asserts that although human worth is highly valued in African communities, humanism rather than individualism found expression in a communal setting.⁴² For Mbiti, ‘[w]hatever happens to the individual happens to the whole group and whatever happens to the whole group happens to the individual’, which illustrates the relation between the individual and the collective.⁴³ Starting at the familial and cultural community and working its way out to the global society, the collectivism that underpins *Ubuntu*, promotes social peace and cohesiveness, which are tantamount to universal human rights protection. Almost everywhere on the African continent, *Ubuntu* philosophy is widely used; shared by all the tribes in southern, central, west, and east Africa and is incorporated into every facet of daily life.⁴⁴ The ideas and definitions of *Ubuntu* remain the same in various cultures and languages, despite having evolved since its inception.

³⁸ Ramose MB 2002b. The Ethics of Ubuntu. In: Coetzee PH & Roux APJ (eds) *Philosophy from Africa: A Text with Readings*. 2nd Edn, Oxford University Press of Southern Africa: Cape Town, 324-330.

³⁹ Khoza RJ 2005. *Let Africa Lead*. Vezubuntu: Sunninghill, 269.

⁴⁰ Khoza 2005: xxi.

⁴¹ Nzimakwe TI 2014. Practising Ubuntu and Leadership for Good Governance: *The South African and Continental Dialogue*, 30-41, 31; Luhabe W 2002. *Defining Moments: Experiences of Black Executives in South Africa's Workplace*. University of KwaZulu-Natal Press, 103.

⁴² Teffo LJ 1998. ‘Both/Ubuntu as a way Forward for Contemporary South Africa.’ *Word and Action*, 38(365): 3-5, 3.

⁴³ Mbiti JS 1970. *African Religions and Philosophy*. 1st Edn, Heinemann: London, 108.

⁴⁴ Rwelamila PD, Talukhaba AA, & Ngowi AB 1999. ‘Tracing the African Project Failure Syndrome: The significance of ‘ubuntu’.’ *Engineering, Construction and Architectural Management* 6(4): 335-346, 338.

In South African, following the end of apartheid, *Ubuntu* has become more popular. Comparing *Ubuntu* to the English word 'humanity', Justice Mokgoro observes that it upholds the Bill of Rights provisions of sections 9⁴⁵ and 15⁴⁶ of the South African Constitution. After much resistance to apartheid and colonial tyranny, the Bill of Rights was created and has consistently been used to restore human dignity as well as to uphold ideas and beliefs that have long been suppressed or marginalised. To this end, Justice Sachs stated in the *Makwanyane* case that the notion of *Ubuntu* should be evoked.⁴⁷ The Bill of Rights, which was derived from the African concept of *Ubuntu*, is a component of the African Renaissance, which is the revival of South African and African institutions.⁴⁸

Group unity according to the *Ubuntu* ideology, is essential to African communities' existence. An African is a member of a community, not a rough and tumble individual. Because of the community's brotherly and sisterly concerns, collaboration, caring, and sharing, hunger, isolation, deprivation, poverty, and other developing obstacles can only be withstood in such a hostile environment through communal solidarity.⁴⁹ People live in communities, and the welfare of one person is entwined with the welfare of the entire community. In addressing issues of hunger, isolation, and poverty, *Ubuntu* provides a foundational framework for promoting collaboration and shared responsibility. By prioritising collective well-being over individual success, harness the strength of community solidarity to tackle obstacles effectively.

It is argued here that the concept of *Ubuntu*, which places the individual at the core of the collective, is the cornerstone of the African human rights system. The practice of *Ubuntu*

⁴⁵ Sect 9 of the South African Constitution provide that '[e]veryone is equal before the law and has the right to equal protection and benefit of the law. (2) Equality includes the full and equal enjoyment of all rights and freedoms.'

⁴⁶ Sect 15 of the South African Constitution states that '[e]veryone has the right to freedom of conscience, religion, thought, belief and opinion'.

⁴⁷ *S v Makwanyane* (1995) (3) SA 39, (CC) 1995 (6) BCLR 665 CC.

⁴⁸ Thomas CG 2008. 'Ubuntu: The Missing Link in the Rights Discourse in Post-Apartheid Transformation in South Africa'. *International Journal of African Renaissance Studies* 3(2): 39-62, 39-40.

⁴⁹ Prilleltensky I & Prilleltensky O 2007. *Promoting Well-Being: Linking Personal, Organizational, and Community Change*. John Wiley & Sons, 231.

therefore, unlocks the potential of African cultures where people show humanity, compassion, and dignity in the service of creating and sustaining just communities.⁵⁰ *Ubuntu* serves as a foundation that reinforces the preamble of the African Charter, '[t]aking into consideration the virtues of their historical tradition and the values of African civilisation, which should inspire and characterise their reflection on the concept of human and people's rights'.⁵¹ African values prioritise respect, fairness, and equitable treatment for all individuals, as embodied in the *Ubuntu* philosophy.⁵² According to Letseka, a person has a duty to give the same respect, dignity, value and acceptance to each member of the community.⁵³ In the same spirit, the human rights framework calls for the respect, promotion and fulfilment of human rights. An inherent worth and dignity among members of the community play an important role and as such aligns with the principle of human dignity, which is central to the human rights frameworks.⁵⁴ Traditional African societies, which are influenced by *Ubuntu*, put strong emphasis on treating others with respect and consideration, regardless of their background or status.

The African view of human dignity rejects the notion that a person can be identified in terms of physical and psychological features. *Ubuntu* is the basis of African communal cultural life. It expresses the interconnectedness, common humanity and the responsibility of individuals to each other.⁵⁵ Put differently, *Ubuntu* espouses inclusivity and equality by acknowledging the interdependence of individuals and the significance of valuing difference. In African societies where *Ubuntu* is prevalent, there may be a greater emphasis on social cohesion and inclusiveness, which are essential aspects of human

⁵⁰ Poovan N, Du Toit MK & Engelbrecht AS 2006. 'The Effect of the Social Values of Ubuntu on Team Effectiveness.' *South African Journal of Business Management* 37(3): 17-27, 23-25.

⁵¹ Para 5 of the African Charter provides that '[t]aking 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'.

⁵² Metz T 2014. 'African Values and Human Rights as Two Sides of the Same Coin: A Reply to Oyowe' *African Human Rights Law Journal* 14: 306-321.

⁵³ Letseka M 2000. *Africana Philosophy and Educational Discourse*. In: Higgs P, Vakalisa NCG, Mda TV & Assie-Lumumba NT (eds) *African Voices in Education*. Juta: Lansdowne, 179-193.

⁵⁴ See Gilabert P 2019. *Human Dignity and Human Rights*. Oxford University Press: USA.

⁵⁵ Nussbaum 2003: 2126.

rights principles. This entails fighting for the rights of underrepresented groups with the aim to end inequality and discrimination. Achieving this requires collective participation, emphasised in the preamble to the African Charter, as follows:

[c]onsidering that the enjoyment of rights and freedoms also implies the performance of duties on the part of everyone; Convinced that it is henceforth essential to pay a particular attention to the right to development...⁵⁶

The right to development is a human right concept recognised by the United Nations and encapsulated in the Declaration on the Right to Development (UNDRTD) as far back as 1986.⁵⁷ The UNDRTD asserts that development is a fundamental human right and accordingly, calls for its realisation for all individuals and peoples.⁵⁸ It emphasises the idea that all individuals and communities have the right to participate in, contribute to, and enjoy economic, social, cultural, and political development.⁵⁹ In the context of *Ubuntu*, the well-being of individuals is inseparable from the well-being of the community. It encourages a sense of shared responsibility for the welfare of all members of society. *Ubuntu* is not just a philosophical concept; it has practical implications for how

⁵⁶ Para 7 of the African Charter state that '[c]onsidering that the enjoyment of rights and freedoms also implies the performance of duties on the part of everyone; Convinced that it is henceforth essential to pay a 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 a guarantee for the enjoyment of civil and political rights.'

⁵⁷ Fukuda-Parr S 2012. 'The Right to Development: Reframing a New Discourse for the Twenty-First Century.' *Social Research* 79(4): 839-864, 839-840.

⁵⁸ Villaroman NG 2010. 'The Right to Development: Exploring the Legal Basis of a Supernorm.' *Florida Journal of International Law* 22(2): 299.

⁵⁹ Art 1 of the UNDRTD provide that '[t]he right to development is 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.'

communities and societies organise themselves, make decisions, and address challenges.⁶⁰

In the realm of development, *Ubuntu* suggests that sustainable development should prioritise the needs and interests of the community, rather than focusing solely on individual advancement. It emphasises the importance of social justice, human dignity, and inclusivity in development efforts.⁶¹ It also puts emphasis on the importance of community and collective well-being. In African cultures that are guided by *Ubuntu*, there's a sense of collective responsibility for the welfare of all members of society. This communal ethos contributes to the promotion of the right to development by fostering a culture of solidarity and mutual support, where individuals stand up for each other's rights and interests. When considering *Ubuntu* in relation to the right to development, there is a natural synergy between the two concepts. *Ubuntu* emphasises collective well-being and the interconnectedness of individuals within a community, which aligns with the notion of development as a human right which is envisaged to benefit everyone, particularly the most marginalised and vulnerable members of society.

In practical terms, applying *Ubuntu* principles and the right to development entail participatory approaches that engage communities in decision-making processes, promote equitable distribution of resources, and prioritise the fulfilment of basic needs such as healthcare, education, housing, and access to clean water and sanitation. By integrating *Ubuntu* philosophy into the development framework, policymakers and practitioners can foster more inclusive, sustainable, and people-centred approaches to development that uphold the dignity and rights of all individuals. This can contribute to building more resilient and harmonious societies where everyone has the opportunity to thrive.

⁶⁰ Msengana NW 2006. *The Significance of the Concept 'Ubuntu' for Educational Management and Leadership during Democratic Transformation in South Africa* (Doctoral Dissertation, University of Stellenbosch), 91.

⁶¹ Kotze LJ, Adelman S & Dube F 2023. 'The Problem with Sustainable Development in the Anthropocene Epoch: Reimagining International Environmental Law's Mantra Principle Through Ubuntu.' In *The Routledge Handbook of Law and the Anthropocene*. Routledge: London, 3-17.

4.2.2 Sources of human rights protection in Africa

Despite being the OAU's youngest member state,⁶² at the time it was admitted into the continental body, Maluwa opines that South Africa has steadily acquired leadership on the continent, and has been at the forefront of shaping the AU's collective agenda.⁶³ As a leading voice for reform, the South African government, particularly under Nelson Mandela and later Thabo Mbeki,⁶⁴ supported the push for a new organisation that would build on the OAU's legacy but with a renewed focus on economic development, political stability, and integration.⁶⁵ South Africa's support for the AU reflects its commitment in promoting the right to development by supporting development as a fundamental human right as provided for in the African Charter and in shaping the continent's future. In support of my analyses on the legality of the right to development in South Africa, I proceed to look at the various human rights treaty instruments in Africa which South Africa is a state party to.

4.2.2.1 Human rights protection under the OAU/AU

Most African states emerged out of the struggle for control of political and economic self-determination from European colonialism,⁶⁶ which began after the implementation of the 1941 Atlantic Conference and Charter.⁶⁷ The Atlantic Charter was significant because it

⁶² South Africa joined AU on 6 June 1994 after the end of the apartheid and the April 1994 general election.

⁶³ Maluwa 2005: 103.

⁶⁴ Esidene EC & Onyebuchi UR 2012. 'The Development of the African Union.' *European Scientific Journal* 8(1), 164-179.

⁶⁵ Ani KJ & Ojokrotu V 2017. Pan-Africanism, African Union and the Challenge of Transformative Development in Africa. *Journal of African Union Studies* 6(1): 5-23.

⁶⁶ The Berlin Conference of 1884 initiated the international policy for the acquisition of African territories even after the establishment of European empires, in particular: Great Britain, France and Portugal had already claimed large territories for themselves. This conference initiated the scramble and provided guidelines that ensured that European nations did not go to war with each other over Africa.

⁶⁷ The Atlantic Conference and Charter grew out of the post-war US-UK discussion on February 12, 1941, between British Prime Minister Churchill and US President Roosevelt, which included provisions for the

laid the foundation for the establishment of the UN and other international organisations aimed at fostering global cooperation and preventing future conflicts.⁶⁸ Following this development, a majority of African countries acquired independence between 1957 and 1961, perhaps motivating others to adopt the right to self-determination as a foundational argument for their liberation.⁶⁹ Adequate human rights protection was non-existent in the African colonies because the colonisers were more interested in political and economic control, which conflicts with human rights tenets.⁷⁰ In 1958, President Kwame Nkrumah of Ghana organised the All African People's Conference, which was attended by representatives of all the independent African countries, including Ghana, Ethiopia, Liberia, Morocco, Tunisia, Sudan, United Republic of Egypt, and Libya. The African leaders vehemently denounced the various forms of racial and discriminatory laws and practices that many colonised African countries continued to implement, which discriminated against certain races.⁷¹ Specifically, the conference focused on African unity, non-alignment, anti-racism, anti-colonialism, and anti-imperialism.⁷² Apart from highlighting the right to self-determination, the conference did not address the respect of human rights and by extension the right to development in any significant way.

autonomy of the imperial colonies. Thereafter, post-World War II pressure from US and African elites on imperialist nations, and particularly Great Britain, to adhere to this charter led to the independence of individual African states.

⁶⁸ Macdonald RSJ 2000. The Charter of the United Nations as a World Constitution. *International Law Studies* 75(1): 264-300, 276.

⁶⁹ Mutua M 2000. 'The African Human Rights System: A Critical Evaluation.' *Prepared for United Nations Development Programme, Human Development Report 2000*, 1-39, 4; Oloka-Onyango J 2000. 'Human Rights and Sustainable Development in Contemporary Africa: A New Dawn or Retreating Horizons?'. *Buffalo Human Rights Law Review* 6: 39-76, 47.

⁷⁰ Oloka-Onyango 2000: 47.

⁷¹ Boahen AA (ed) 1985. *Africa under Colonial Domination 1880-1935* (Vol. 7). University of California Press, 3-7.

⁷² Adi H & Sherwood M 2003. *Pan-African History: Political Figures from Africa and the Diaspora since 1787*. Routledge: London, 143; All African Conference 1958' Available at <https://www.sahistory.org.za/dated-event/all-african-people-conference-held-accra-ghana> (Accessed 18 February 2024).

Given the difficulties the newly independent African nations faced, they made the decision to focus their efforts on eliminating colonialism from the continent and developing an indigenous solution to the persistent violations of human rights and the right to development.⁷³ These concerns served as the cornerstone of Ghana's foreign policy after independence. President Kwame Nkrumah made a clear connection between Ghana's independence and that of the continent, stating that 'the independence of Ghana is meaningless unless it is linked up with the total liberation of the continent.'⁷⁴ Kannyo acknowledges that the imperative to eradicate colonialism in Africa and overthrow the apartheid government in South Africa was one of the principles that motivated the establishment of the OAU.⁷⁵ The creation of the Organisation of African and Malagasy States was suggested at the 1961 pan-African Conference in Monrovia, and the OAU was subsequently adopted in 1963.⁷⁶ African nations now had a united front to discuss regional concerns and work with global groups thanks to the formation of the OAU. Primarily, although limited, it offered a forum for regional discourse and consensus-building around the human rights framework.

⁷³ Murray R 2004. *Human Rights in Africa: From OAU to AU*. Cambridge University Press, 2. These conferences also condemned human rights violations within the continent.

⁷⁴ Nkrumah K 1957. *Ghana's Policy at Home and Abroad: Text of Speech Given in the Ghana Parliament, 29 August 1957, by Kwame Nkrumah, Prime Minister*. Information Office, Embassy of Ghana; See also Independence Speech – Kwame Nkrumah 6 March 1957, Accra, Ghana. Available at <https://panafricanquotes.wordpress.com/speeches/independence-speech-kwame-nkrumah-march-6-1957-accra-ghana/> (accessed 11 February 2024).

⁷⁵ Kannyo E 1980. *Human Rights in Africa: Problems and Prospects: A Report Prepared for the International League for Human Rights*. International League for Human Rights, 15.

⁷⁶ The Monrovia Group (8th – 12th May 1961) was composed of Liberia, Ivory Coast (now Côte d'Ivoire), Cameroon, Senegal, Malagasy Republic (now Madagascar), Togo, Dahomey (now Benin), Chad, Niger Upper Volta (now Burkina Faso), Congo Brazzaville, Central Africa Republic, Gabon, Ethiopia and Libya called for a market-driven development economy. Available at [https://oau60.au.int/en/pan-africanist-movement-and-road-liberation#:~:text=The%20Monrovia%20group%20\(8th%20%2D12th,called%20for%20a%20market%2Ddriven](https://oau60.au.int/en/pan-africanist-movement-and-road-liberation#:~:text=The%20Monrovia%20group%20(8th%20%2D12th,called%20for%20a%20market%2Ddriven)

(accessed 12 February 2024); Bowen JS 1994. 'Power and Authority in the African Context: Why Somalia did not have to Starve – The Organisation of African Unity (OAU) as an Example of the Constitutive Process.' *National Black Law Journal* 14: 93-125, 96-98.

The OAU was founded on 25 May 1963 in Addis Ababa, Ethiopia by the 32 independent African republics at that time. Eventually, another 21 countries joined, making a total of 53 by the time the AU was established in 2002.⁷⁷ South Sudan became the 54th member state of the AU on 9 July 2011.⁷⁸ The OAU's primary goals as outlined in the OAU Charter, included fostering the unity and solidarity of African nations, coordinating and stepping up cooperation to improve the lives of the African people, protecting member states' sovereignty and territorial integrity, ending colonialism and apartheid on the continent, fostering international cooperation within the framework of the UN, and harmonising members' political, diplomatic, economic, educational, cultural, health, welfare, scientific, technical, and defence policies.⁷⁹ With the founding of the OAU, this framework was established to safeguard and promote the protection of human rights across the continent, especially, considering the massive violations that happened for several decades during the colonial era. Nevertheless, the OAU Charter's sole reference to human rights is in relation to the organisation's goal of upholding the UDHR.⁸⁰ Depending on how the OAU pursues its goals, it would be up to them to decide if merely mentioning the UDHR was sufficient to ensure that human rights protection in the newly formed African nations.

⁷⁷ Charter of the OAU, adopted 25 May 1963, 47 UNTS 39; 2 ILM (1963) 766. 22 of 27 independent African states took part in the 1961 conference. It is important to note that many African states regained their independence in the 1960s, while others only gained their independence in the 1970s and even the 1990s. For example, South Africa in 1994, Zimbabwe in 1980, Guinea-Bissau in 1974, Eritrea in 1993 and Angola in 1975.

⁷⁸ See African Union Press Release N 79/ 2011 (Welcomes South Sudan as the 54th Member State of the Union) Available at <https://au.int/en/pressreleases/20110727-1> (accessed 12 February 2024).

⁷⁹ Edo VO & Olanrewaju MA. 2012. 'An Assessment of the Transformation of the Organization of African Unity (OAU) to the African Union (AU), 1963-2007.' *Journal of the Historical Society of Nigeria* 41-69; United States Agency for International Development 2004. The Organization of African Unity and the African Union. Available at <https://www.usaid.gov/african-union/history> (accessed 11 February 2024).

⁸⁰ Art II(1)(e) of the OAU Charter seeks '[t]o promote international cooperation, having due regard to the Charter of the United Nations and the Universal Declaration of Human Rights.'

Young-Anawaty⁸¹ and Mangu⁸² contend that the OAU gave little thought to safeguarding human rights. This is because the OAU's initial emphasis on human rights was largely confined to advocating for the exercise of the right to self-determination by colonised African nations and supporting the struggle against apartheid in South Africa.⁸³

It is important to emphasise that supporting liberation movements for which the organisation granted associate membership and observer status was one of the OAU's greatest accomplishments.⁸⁴ The OAU's most successful endeavour was likely to 'eradicate all forms of colonialism from Africa'⁸⁵ as stated in Article II (1)(d) of the organisation's Charter, which helped the colonised territories regain their territorial integrity.⁸⁶ The OAU also succeeded in promoting the growth of regional economic communities, including the South African Development Coordinating Commission (SADCC) now (SADC),⁸⁷ the North Africa-Greater Area Free Trade Area,⁸⁸ the Central

⁸¹ Young-Anawaty A 1980. 'Human Rights and the ACP-EEC Lomé II Convention: Business as usual at the EEC.' *New York University Journal of International Law and Politics* 13, 63.

⁸² André M 2002. *The Road to Constitutionalism and Democracy in Post-colonial Africa. The Case of Democratic Republic of Congo* (Doctoral Thesis, University of South Africa), 262.

⁸³ Bowen 1994: 96-98.

⁸⁴ Munya PM 1998. 'The Organization of African Unity and its Role in Regional Conflict Resolution and Dispute Settlement: A Critical Evaluation.' *BC Third World Law Journal* 19: 537-592, 544.

⁸⁵ Art II (1)(d) of OAU Charter seek '[t]o eradicate all forms of colonialism from Africa.'

⁸⁶ Sterio M 2018. *Secession in International Law*. Edward Elgar Publishing, 9-28; See also Zacher MW 2001. 'The Territorial Integrity Norm: International Boundaries and the Use of Force.' *International Organization* 55(2): 215-250, 230.

⁸⁷ The predecessor of the Southern African Development Community (SADC) was the Southern African Development Co-ordination Conference (SADCC), established in 1980 in Lusaka, Zambia. The SADC Treaty was signed to establish SADC as the successor to the Southern African Coordinating Conference (SADCC). This Treaty sets out the main objectives of SADC. Available at <https://www.sadc.int/pages/history-and-treaty> (accessed 16 February 2024).

⁸⁸ Fagbayibo B 2021. 'The African Continental Free Trade Area (AfCFTA) and the Imperative of Democratic Legitimacy: An Analysis.' In *Nigerian Yearbook of International Law 2018/2019*, Springer International Publishing: Cham, 393-410.

Africa-Economic Community of the Great Lakes Countries (ECCAS),⁸⁹ and the Economic Community of West African States (ECOWAS).⁹⁰

As previously mentioned, the OAU Charter of 1963 did not list human rights as one of the organisation's objectives. It would only be in 1979 that a meeting of experts was convened by the OAU in Dakar, Senegal to prepare a preliminary draft of a human rights charter for Africa.⁹¹ Many explanations have been put out explaining why, in the late 1970s and early 1980s, the OAU modified its stance and accorded the notion of human rights the importance provided by the Charter. There were several of these explanations at the time, such as the increased focus on human rights internationally (as seen in US President Carter's foreign policy), the use of the concept of human rights in international organisations like the UN and the OAU to denounce South Africa's apartheid regime, and disgust at the human rights abuses in some recently independent African nations, such as Uganda, the Central African Republic, and Equatorial Guinea.⁹² Notwithstanding these endeavours, the OAU's protection and implementation of human rights were insufficient. Thus, when African nations started the process of renaming the OAU to AU, they provided Africa with another chance to define of its stance on human rights and address the criticisms levelled against the organisation.⁹³

⁸⁹ The Economic Community of Central African States (ECCAS) was established on 18 October 1983 by the signing in Libreville of its Constitutive Treaty, which was revised and adopted on 18 December 2019 and entered into force on 28 December 2019. August 2020. Available at <https://ceeac-eccas.org/en/2023/05/28/eccas-in-brief/> (accessed 16 February 2024).

⁹⁰ The Heads of State and Government of fifteen West African Countries established the Economic Community of West African States (ECOWAS) when they signed the ECOWAS Treaty on the 28 May 1975 in Lagos, Nigeria. See <https://www.ecowas.int/about-ecowas/> (accessed 16 February 2024).

⁹¹ Gittleman R 1981. 'The African Charter on Human and Peoples' Rights: A Legal Analysis.' *Virginia Journal of International Law* 22: 667, 668.

⁹² Mbaku JM 2019. 'Protecting Human Rights in African Countries: International Law, Domestic Constitutional Interpretation, the Responsibility to Protect, and Presidential Immunities.' *South Carolina Journal of International Law and Business* 16: 1-216, 25-26.

⁹³ Mattheis F, Deleglise D & Staeger U 2023. 'African Union: The African political integration process and its impact on EU-AU relations in the field of foreign and security policy.' *Policy Department for External Relations*, 1-70; Kindiki K 2003. 'The Normative and Institutional Framework of the African Union Relating

In the 1990s, African leaders discussed whether the OAU's structures needed to be changed to meet the demands of a changing world. Before the AU was formally launched in 2002,⁹⁴ there were four summits, namely the Sirte Summit (1999),⁹⁵ which adopted the Sirte Declaration calling for the establishment of the AU, the Lomé Summit (2000),⁹⁶ which adopted the AU Constitutive Act, the Lusaka Summit (2001),⁹⁷ which drew the road map for implementation of the AU and the Durban Summit (2002),⁹⁸ which launched the AU and convened its first Assembly of Heads of State and Government.⁹⁹ The Sirte Declaration, which called for the creation of the AU was released in 1999 by the OAU Heads of State and Government. By creating an organisation to hasten Africa's integration process, assist African nations in becoming more powerful on the international arena, and with a mandate to address the myriad social, economic, and political challenges confronting the continent, the AU sought to build upon and expand the foundational work of the OAU.

to the Protection of Human Rights and the Maintenance of International Peace and Security: A Critical Appraisal.' *African Human Rights Law Journal* 3(1): 97-117, 99.

⁹⁴ The AU was founded on 26 May 2001. It currently has 55 Member States which represent all the countries on the African continent. South Sudan joined the African Union in 2011, while Morocco re-joined in January 2017 after 33 years of withdrawal from the regional organization due to the regional organization's recognition of Western Sahara.

⁹⁵ Sirte Declaration 1999. Available at <https://www.tralac.org/documents/resources/african-union/4434-au-sirte-declaration-1999/file.html> (accessed 19 February 2024).

⁹⁶ Lomé Declaration 2000 (AHG/Decl.2 (XXXVI)). Available at <https://www.peaceau.org/uploads/ahg-decl-2-xxxvi-e.pdf> (accessed 19 February 2024).

⁹⁷ Lusaka summit 2001 (AHG/Dec. 1 – 11 (XXXVII)). Available at [https://archives.au.int/bitstream/handle/123456789/492/2001%20AHG%20Dec%20160-170%20\(XXXVII\)%20_E.pdf?sequence=1](https://archives.au.int/bitstream/handle/123456789/492/2001%20AHG%20Dec%20160-170%20(XXXVII)%20_E.pdf?sequence=1) (accessed 19 February 2024).

⁹⁸ Assembly of the African Union First Ordinary Session 9 – 10 July 2002 Durban, South Africa (ASS/AU/Dec. 1-8 (I)). Available at https://au.int/sites/default/files/decisions/9549-assembly_en_9_10_july_2002_assembly_heads_state_government_first_ordinary_session_0.pdf (accessed 19 February 2024).

⁹⁹ African Union, About the African Union. Available at [https://au.int/en/overview#:~:text=The%20African%20Union%20\(AU\)%20is,OAU%2C%201963%2D1999](https://au.int/en/overview#:~:text=The%20African%20Union%20(AU)%20is,OAU%2C%201963%2D1999) (accessed 11 February 2024).

The Durban summit of 2002 underscored South Africa's commitment to the AU's goals and its leadership role in the continent's political landscape. Many of the OAU structures were simply incorporated into the AU to ensure continuity. The AU's formation also demonstrated an effort to reframe Africa's goal of advancing the adoption of international human rights law concepts. The key reason is that the OAU Charter did not adequately recognise human rights as one of its principles or objectives. This may have contributed to the poor human rights situation in many OAU member States.¹⁰⁰ Similar to this, AU policies are influenced by the foundational commitments and strategic frameworks established by its predecessor, the OAU. The transition from the OAU to the AU in 2001 marked a significant shift in the approach to African unity and development, but many core principles and strategic goals from the OAU era continue to shape AU policies. The AU Constitutive Act and protocols created a substantial number of new organisations both at the level of major organs and through a variety of new technical and subsidiary committees.¹⁰¹ Since 2002, a lot of these have changed, and several are currently being worked on. It is important to note that the AU, the continental body in charge of advancing development, security, and peace throughout Africa, has taken measures and steps to address the right to development.¹⁰² For example, the AU's Agenda 2063 provides a strategic framework for the continent's socio-economic transformation by 2063, with a focus on inclusive and sustainable development. If fully implemented, Agenda 2063 would significantly advance the realisation of the right to development as enshrined in Article 22 of the African Charter.

¹⁰⁰ Nmehielle VO 2004. 'Development of the African Human Rights System in the Last Decade.' *Human Rights Brief* 11(3): 6-11, 6.

¹⁰¹ The Constitutive Act of the African Union 2000. 'Promoting Africa's growth and economic development by championing citizen inclusion and increased cooperation and integration of African states.' Available at https://au.int/sites/default/files/pages/34873-file-constitutiveact_en.pdf (accessed 19 February 2024).

¹⁰² Sellström AM 2013. 'The OAU/AU and an Africa at Peace with Itself.' *Policy and Practice Brief*. Available at <https://www.accord.org.za/publication/oau-au-africa-peace-english/> (accessed 12 February 2024).

4.2.2.2 African Charter on Human and Peoples' Rights

The promotion and protection of human rights in Africa are anchored in the African Charter, which is examined in detail in Section 4.3. The African Charter was adopted by the Assembly of Heads of State and Government of the OAU on 27 June 1981 and came into force in 1986.¹⁰³ The African Charter is the principal human rights document in Africa, its purpose being to uphold and defend the extensive range of rights encompassing both individual and collective rights enshrined therein.¹⁰⁴ Unlike the preambles of the other regional treaties for the protection of human rights, the African Charter has a different preamble. It demonstrates that the African Charter drew its inspiration from the OAU Charter, which stipulates that 'freedom, equality, justice and dignity are essential objectives for the achievement of the legitimate aspirations of the African peoples'.¹⁰⁵ The African Charter encompasses three generations of rights, including economic, social, and cultural rights, civil and political rights, and solidarity or peoples' rights including the right to development which is the subject matter for this study.¹⁰⁶ The interdependence of the three generation of rights is mentioned in the preamble that:

[I]t is henceforth essential to pay particular attention to the rights to development and that civil and political rights cannot be dissociated from economic, cultural, and social 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.¹⁰⁷

¹⁰³ The African Charter.

¹⁰⁴ Obodo CA 2019. *Realising the Effective Enforcement of Civil and Political Rights in Africa: An Analysis of the African Charter on Human and Peoples' Rights* (Doctoral Dissertation).

¹⁰⁵ The African Charter's Preamble states that '[c]onsidering the Charter of the Organization of African Unity, which stipulates that "freedom, equality, justice and dignity are essential objectives for the achievement of the legitimate aspirations of the African peoples."; See also Gittleman 153; Umozurike 909.

¹⁰⁶ Shepherd GW 1985. 'The Tributary State and "Peoples' Rights" in Africa: The Banjul Charter and Self-Reliance.' *Africa Today* 32(1/2): 37-50, 44-45.

¹⁰⁷ The African Charter's Preamble states that '[c]onsidering that the enjoyment of rights and freedoms also implies the performance of duties on the part of everyone; Convinced that it is henceforth essential to pay a particular attention to the right to development and that civil and political rights cannot be dissociated from

The protection of peoples' rights in the African Charter (I address the question of peoples in section 4.3.1) is of immense importance in the sense that it incorporates the *Ubuntu* philosophy discussed earlier. The protection of peoples' rights is an important component of the African understanding of human rights, as evidenced by their inclusion in the African Charter. For example, African customary law notes that an individual's ability to exercise their rights is typically restricted by the group and occurs within the framework of the group. For example, the principle of non-discrimination against individuals in Article 2,¹⁰⁸ is extended by Article 19 to 'all peoples' who are also supposed to enjoy the same rights and should not be dominated by any other people.¹⁰⁹ Article 20 reinforces this in terms of conferring on 'all peoples shall have the right to existence... [as well as] the unquestionable and unalienable right to self-determination.'¹¹⁰ This involves the free determination of their political status and the pursuit of 'their economic and social development according to the policy they have freely chosen'.¹¹¹ The African Charter has been ratified by fifty-four (54) AU member states. The latest AU member state to become a party to the African Charter is the Republic of South Sudan, having ratified the Charter on 23 October 2013.¹¹² South Africa ratified the African Charter on 7 January 1996. This ratification came shortly after the end of apartheid and the establishment of a democratic government under Nelson Mandela, reflecting South Africa's commitment to human rights

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.'

¹⁰⁸ Art 2 states that '[e]very individual shall be entitled to the enjoyment of the rights and freedoms recognized and guaranteed in the present Charter without distinction of any kind such as race, ethnic group, color, sex, language, religion, political or any other opinion, national and social origin, fortune, birth or other status.'

¹⁰⁹ It is provided in Art 19 that '[a]ll peoples shall be equal; they shall enjoy the same respect and shall have the same rights. Nothing shall justify the domination of a people by another.'

¹¹⁰ Art 20(1) provide that '[a]ll peoples shall have the right to existence. They shall have the unquestionable and inalienable right to self-determination. They shall freely determine their political status and shall pursue their economic and social development according to the policy they have freely chosen.'

¹¹¹ See above.

¹¹² African Charter's State Parties to the African Charter. Available at <https://achpr.au.int/en/states> (accessed 14 February 2024).

(including the right to development) and its alignment with regional standards for the protection of human rights and freedoms.¹¹³ By ratifying the African Charter, South Africa assumes legal obligations to respect, protect, and fulfil the rights and freedoms articulated in the Charter. This includes civil and political rights as well as economic, social, and cultural rights and right to development as provided in Article 22 of the African Charter.

The African Charter provides in Article 1 that everyone (including South Africa) must play their part in ensuring the realisation and enjoyment of the rights and freedoms, including the right to development enshrined therein. It further emphasises the importance to give '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'.¹¹⁴ Article 1 of the African Charter requires all AU member states, South Africa inclusive, 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.'¹¹⁵

The supervisory bodies of the African Charter currently in existence are the African Commission on Human and Peoples' Rights (African Commission) as well as The African Court on Human and Peoples' Rights (The African Court). The African Commission was constituted and met for the first time in 1987¹¹⁶ and adopted its own Rules of Procedure

¹¹³ Government of South Africa. Department of Justice. Available at <https://www.justice.gov.za/policy/african%20charter/africancharter.htm#:~:text=South%20Africa%20acceded%20to%20the%20African%20Charter%20on%209%20July%201996>. (accessed 28 July 2024).

¹¹⁴ The African Charter's Preamble provide that it is 'essential to pay a 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.'

¹¹⁵ Art 1 provide that '[t]he 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.'

¹¹⁶ The African Commission came into existence with the coming into force on 21 October 1986, of the African Charter (adopted by the OAU on 27 June 1981). Although its authority rests on its own treaty, the African Charter, the Commission reports to the Assembly of Heads of State and Government of the African Union. See generally Welch CE 1991. 'The Organisation of African Unity and the Promotion of Human

in 1988 (amended in 1995) and Guidelines for State Reporting (amended in 1998).¹¹⁷ In addition, the Protocol to the African Charter on Human and Peoples' Rights on the Establishment of the African Court on Human and Peoples' Rights (African Human Rights Court Protocol) was adopted in 1998. The Protocol entered into force 25 January 2004 after receiving the necessary fifteen ratifications.¹¹⁸ Also, a Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa was adopted at the AU Summit in Maputo in July 2003.¹¹⁹

Unlike the OAU, the AU has by adopting ancillary human rights instruments and strengthening pre-existing institutions, significantly enhanced the human rights protection system in Africa and established a conducive and enabling environment for a vigorous pursuit of human rights promotion and protection, including the right to development. These mechanisms include the Pan-African Parliament (PAP), the Economic, Social and Cultural Council (ECOSOCC),¹²⁰ among others. The AU has further ensured that human

Rights.' *The Journal of Modern African Studies* 29(4): 535-555; Odinkalu AC 1993. 'Proposals for Review of the Rules of Procedure of the African Commission of Human and Peoples' Rights.' *Human Rights Quarterly* 15(3): 533-548; Welch Jr, CE 1992. 'The African Commission on Human and Peoples' Rights: A Five-Year Report and Assessment.' *Human Rights Quarterly* 14(1): 43-61.

¹¹⁷ The African Commission adopted its first Rules of Procedure in 1988, during its 2nd Ordinary Session held in Dakar (Senegal) from 2 to 13 February 1988. The Rules were amended revised during its 18th Ordinary Session held in Praia (Cape-Verde) from 2 to 11 October 1995. With the advent of the African Court on Human and Peoples' Rights, the African Commission developed the 2010 Rules of Procedure. These Rules were approved by the African Commission on Human and Peoples' Rights during its 47th Ordinary Session held in Banjul (The Gambia) from 12 to 26 May 2010. Available at <https://achpr.au.int/en/rules-procedure> (accessed 20 February 2024).

¹¹⁸ The Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights (1998/2004) (Adopted in Ouagadougou, Burkina Faso, on 10 June 1998 and entered into force on 25 January 2004).

¹¹⁹ The Protocol to the African Charter on Human and People's Rights on the Rights of Women in Africa (Adopted in Maputo in July 2003 and entered into Force 25th November 2005).

¹²⁰ The Economic, Social and Cultural Council (ECOSOCC) was established in July 2004 as an advisory organ composed of different social and professional groups of AU Member States. The purpose of ECOSOCC is to provide an opportunity for African Civil Society Organisations (CSOs) to play an active role

rights encompassing the right to development, are systematically mainstreamed across all its organs, activities, and programmes.¹²¹ In addition, the African Commission, the African Court, and the African Committee of Experts are entrusted with the responsibility of monitoring states' compliance with human rights standards and adjudicating cases involving alleged human rights violations.¹²²

4.3 SOURCES ON THE RIGHT TO DEVELOPMENT UNDER THE AFRICAN HUMAN RIGHTS SYSTEM

In the African context, the right to development is closely tied to the continent's history of colonialism, exploitation, and underdevelopment. African nations have faced significant challenges in achieving equitable and sustainable development, including poverty, conflicts, disease, and inadequate access to basic services.¹²³ When implemented effectively, the right to development is seen as a means to address these challenges and to promote human dignity, social justice, and economic progress on the continent,¹²⁴ including the fulfilment of human rights in their entirety.

The African human rights architecture comprises three tiers of protective mechanisms, domestic, sub-regional, and regional. While these systems operate with a degree of autonomy, they are nonetheless interconnected and mutually reinforcing.¹²⁵ As noted in section 4.2.2.2, the African human rights system was created with the adoption of the African Charter in 1981 and the establishment of the African Commission with mandate

in contributing to the AU's principles, policies and programmes. Available at <https://au.int/en/about/ecosocc> (accessed 20 February 2024).

¹²¹ Gawanas 2009: 140.

¹²² Viljoen F & Louw L 2007. 'State Compliance with the Recommendations of the African Commission on Human and Peoples' Rights, 1994-2004.' *American Journal of International Law* 101(1): 1-34; Magashi, SB 2016. *The Human Right to Development in Nigeria* (Doctoral Dissertation, Stellenbosch University).

¹²³ Kutor SK 2014. 'Development and Underdevelopment of African Continent: The Blame Game and the Way Forward.' *Research on Humanities and Social Sciences* 4(7): 14-21, 15.

¹²⁴ Piron LH 2002. 'The Right to Development: A Review of the Current State of the Debate for the Department for International Development.' 1-44, 10.

¹²⁵ Viljoen 2009: 8-13.

to promote and protect human rights. Since then, this system has grown to include the Protocol on the Rights of Women in Africa and the Charter on the Rights and Welfare of the Child, the African Youth Charter and the African Charter on Democracy, Elections and Governance in Africa which all combined contains legally binding provisions on the right to development.¹²⁶ South Africa is party to these instruments and they have influenced South Africa's human rights policies as well as its socio-economic development strategy. The emphasis on development has informed South Africa's domestic policies, particularly the National Development Plan, which focusses on poverty reduction, economic growth, and social justice.

4.3.1 African Charter on Human and Peoples' Rights

The African Charter serves as the most significant human rights treaty in Africa. It has been ratified by 54 AU member states,¹²⁷ including South Africa.¹²⁸ Ratification also implies direct implementation and enforcement of the African Charter in monist member states with the relevant application as set out in Chapter 3 and further discussed in Chapter 5. The implication of the extensive ratification also suggests unambiguously that the right to development which is legally binding,¹²⁹ enjoys significant recognition within these legal systems, thereby forming part of their *corpus juris*.¹³⁰ Few African countries, including South Africa, provide for developmental rights, especially economic, social and cultural rights in their Constitutions.¹³¹ The right to development is enshrined in the

¹²⁶ Art 22 of the African Charter states that '[a]ll peoples shall have the right to their economic, social and cultural development with due regard to their freedom and identity and in equal enjoyment of the common heritage of mankind'.

¹²⁷ As of 2024, 54 AU member states have ratified the African Charter.

¹²⁸ South Africa signed and ratified the African Charter on Human and Peoples' Rights on 9 July 1996.

¹²⁹ See Ngang CC 2021. *The Right to Development in Africa*. Brill: Leiden/Boston.

¹³⁰ Oduor M 2015. 'The Status of International Law in Kenya'. *Africa Nazarene University Law Journal* 2(2): 97-125, 119-120.

¹³¹ The right to development is implicit in the South African Constitution through the protection of socio-economic rights, which the government according to Sect 7(2) must respect, protect, promote and fulfil as a matter of urgency.

constitutions of few African countries, including Ethiopia,¹³² Malawi,¹³³ Cameroon¹³⁴ the Democratic Republic of Congo¹³⁵ and Uganda¹³⁶ among others. The African Charter firmly anchors the right to development as a legally binding human right. This position is reinforced through the collective import of Articles 19 to 24, which together substantiate this normative claim. The provisions encompassed within these articles include, among

¹³² The right to development is provided in Art 43 of the Ethiopian Constitution 1994 as follows:

'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 fulfilment of their basic needs.'

¹³³ Sec 30 of the Malawi Constitution 1994 provides: '(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.'

¹³⁴ The Preamble to the Constitution of Cameroon, 1996 provides in Para 3 that '[r]esolved to harness our natural resources in order to ensure the well-being of every citizen without discrimination, by raising living standards, proclaim our right to development as well as our determination to devote all our efforts to that end and declare our readiness to co-operate with all States desirous of participating in this national endeavour with due respect for our sovereignty and the independence of the Cameroonian State.'

¹³⁵ Constitution of the Democratic Republic of Congo, 2005 Art 58.

¹³⁶ Constitution of Uganda, 1995 Art IX provide for the 'right to development [i]n order to facilitate rapid and equitable development, the State shall encourage private initiative and self-reliance.'

others, the peoples' right to equality,¹³⁷ to existence and self-determination,¹³⁸ to dispose freely of their wealth and natural resources,¹³⁹ to economic, social and cultural development,¹⁴⁰ national and international security¹⁴¹ and to a general satisfactory environment.¹⁴² Taken collectively with other civil, political, socio-economic, and cultural rights, these provisions embody and give concrete expression to various dimensions of the right to development. Kamga stresses that Article 22 underscores that the right to development is made of economic, social and cultural rights as well as freedoms (civil and political rights),¹⁴³ highlighting the multifaceted and collective nature of the right.¹⁴⁴ Echoing Kamga, Xanthaki asserts that the African Charter presents the right to development as a collective and peoples' rights.¹⁴⁵ Nevertheless, the term '*peoples*' remains without a precise definition, a deliberate omission intended to circumvent

¹³⁷ Art 19 provides that '[a]ll peoples shall be equal; they shall enjoy the same respect and shall have the same rights. Nothing shall justify the domination of a people by another.'

¹³⁸ Art 20(1) provide that '[a]ll peoples shall have the right to existence. They shall have the unquestionable and inalienable right to self- determination. They shall freely determine their political status and shall pursue their economic and social development according to the policy they have freely chosen.'

¹³⁹ Art 21(1) states that '[a]ll peoples shall freely dispose of their wealth and natural resources. This right shall be exercised in the exclusive interest of the people. In no case shall a people be deprived of it.'

¹⁴⁰ Art 22(1) provide that '[a]ll 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.'

¹⁴¹ Art 23(1) provide that '[a]ll peoples shall have the right to national and international peace and security. The principles of solidarity and friendly relations implicitly affirmed by the Charter of the United Nations and reaffirmed by that of the Organization of African Unity shall govern relations between States.'

¹⁴² In Art 24 the African Charter provide that '[a]ll peoples shall have the right to a general satisfactory environment favorable to their development.'

¹⁴³ The right to development in Art 22 is made up of '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.'

¹⁴⁴ Kamga 2011: 195; Kamga SD 2019. 'A Call for a "Right to Development"-informed Pan-Africanism in the Twenty-First Century.' *African Human Rights Law Journal* 19(1): 418-444, 430; Haque ME 2017. 'Multifaceted Dimensions of Human Rights.' *Dhaka University Studies Part-F* 28, 21-34.

¹⁴⁵ Xanthaki A 2017. 'Collective Rights: The Case of Indigenous Peoples.' In *Revival: Human Rights in Philosophy and Practice (2001)*, 303-315, 304-305.

potential controversies; attempts have only been made to give meaning to it depending on circumstances.¹⁴⁶ Kiwanuka refers to the concept as 'commonality of interests, group identity, distinctiveness and a territorial link'.¹⁴⁷ 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'.¹⁴⁸ For Kamga,

The concept of people [is] grounded in the UN Charter and in the African philosophy claiming that a person is not perceived as an isolated human being, but as part of a community, as 'an integral member of a group animated by a spirit of solidarity', and as a result individual rights could be clarified and validated only by the rights of the community.¹⁴⁹

By this definition, groups that share unique characteristics within a sovereign nation may be considered a 'people' by the African Commission, which has recognised the Endorois,¹⁵⁰ the Ogoni,¹⁵¹ and the Southern Cameroons¹⁵² as such. The African Court has also recognised the Ogiek as a people in the Ogiek Community case.¹⁵³ This implies that the concept is based on a people identifying themselves as a people. Saying that the right to development is a people's right does not negate the fact that it is also an individual

¹⁴⁶ Kamga 2011:196.

¹⁴⁷ Kiwanuka RN 1988. 'The Meaning of "People" in the African Charter on Human and Peoples' Rights.' *American Journal of International Law* 82(1): 80-101, 87-88.

¹⁴⁸ McCorquodale R 1994. 'Self-Determination: A Human Rights Approach.' *International and Comparative Law Quarterly* 43(4): 857-885, 866.

¹⁴⁹ Kamga 2011: 196.

¹⁵⁰ *Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council v Kenya* Comm No 276 / 2003, Para 145-157.

¹⁵¹ *Social and Economic Rights Action Centre (SERAC) and Another v Nigeria* (2001) AHRLR 60 (ACHPR 2001).

¹⁵² *Kevin Mgwanga Gumne and Others v Cameroon* (2009) AHRLR 9.

¹⁵³ Ndahinda FM 2016. 'Peoples' Rights, Indigenous Rights and Interpretative Ambiguities in Decisions of the African Commission on Human and Peoples' Rights.' *African Human Rights Law Journal* 16(1): 29-57, 43.

right, even though Kamga concedes that the idea is not entirely obvious.¹⁵⁴ M'baye points out that 'development is a right for all [meaning peoples and individuals]'.¹⁵⁵ He points out that associating the right to development with collective rights is a 'hasty conclusion' which he opposes.¹⁵⁶ According to Ougergouz, the right to development is a human and a right of peoples, an individual and collective right.¹⁵⁷ The African Commission views the right to development both as a collective as well as an individual right. It maintains that African nations adopted the African Charter to safeguard African peoples' human and peoples' rights from both external and internal abuse.¹⁵⁸

It is crucial to consider the nature of peoples' as right holders from both internal and external viewpoints while discussing the right to development. The government, acting as the peoples' representative, is the only means of achieving the right to development externally.¹⁵⁹ International co-operation is reflected in this aspect of the right. Helping individuals without going through the government will be nearly impossible for anyone, whether they are an individual, a group, or an organisation. As a result, the government

¹⁵⁴ Kamga 2011: 196.

¹⁵⁵ M'baye 1972: 515.

¹⁵⁶ M'baye K 1884. 'Le Droit au Développement en Droit International.' In Makarczk J (ed) *Essays in International Law, in Honour of Judge Manfred Lachs*, 173.

¹⁵⁷ Ougergouz F 2003. *The African Charter of Human and Peoples' Rights: A Comprehensive Agenda for Human Dignity and Sustainable Democracy in Africa*. Martinus Nijhoff Publishers: Dordrecht, 299; Rosas A 2001. 'The Right to Development.' In *Economic, Social and Cultural Rights*. Brill Nijhoff, 119-130; Ugochukwu B, Badaru O & Okafor O 2012. 'Group Rights under the African Charter on Human and Peoples' Rights: Concept, Praxis and Prospects.' In *The African Regional Human Rights System*. Brill Nijhoff, 101-117.

¹⁵⁸ Nwobike JC 2005. 'The African Commission on Human and Peoples' Rights and the Demystification of Second and Third Generation rights under the African Charter: Social and Economic Rights Action Centre (SERAC) and the Centre for Economic and Social Rights (CESR) v Nigeria.' *African Journal of Legal Studies* 1(2): 129-146, 142.

¹⁵⁹ Salomon 2007: 115.

should assert its claim to the right to be able to transmit the benefits to the peoples, individually or collectively as stated by Rich¹⁶⁰ and Sengupta.¹⁶¹

At the domestic level, individuals, in their personal capacity, ought to be able to invoke the right to development against the government with respect to obligations that rest primarily upon the government such as the provision of education, healthcare, food, housing, employment, and the equitable distribution of income or in relation to the receipt of development assistance on their behalf.¹⁶² Thus, peoples may be identified as a people for belonging to a local community and so forth as the case may be. Based on the principle of the peoples' right of association,¹⁶³ they ought to be recognised as a group when they wilfully organise themselves for whatever purpose as a group. This would cover vulnerable groups such as women and persons with disability to be able to come together to speak with one voice with respect to their right to development.¹⁶⁴ The government 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.¹⁶⁵ The government is at best a legal trustee or plenipotentiary of its peoples' right to development.¹⁶⁶

¹⁶⁰ Rich 1985: 131.

¹⁶¹ Sengupta 2004: 179.

¹⁶² Meier BM & Fox AM 2008. 'Development as Health: Employing the Collective Right to Development to Achieve the Goals of the Individual Right to Health.' *Human Rights Quarterly* 30: 259-355, 261.

¹⁶³ Art 22 of the African Charter; See also Art 10(1) of the African Charter state that '[e]very individual shall have the right to free association provided that he abides by the law.'

¹⁶⁴ The African Commission, for example, acknowledges in its practice that statements may be submitted to the Commission individually, in groups, or on a representative basis. This could provide a means for a community of like-minded individuals to assert their right to development.

¹⁶⁵ Salomon 2007: 114-116.

¹⁶⁶ M'baye K 1993. 'Introduction to Human and Peoples Rights'. In Bedjaoui, M (ed) *International Law: Achievements and Prospects*, 1041-1049 cited in Salomon 2007:119; See also Obiora LA 1996. 'Beyond the Rhetoric of a Right to Development.' *Law and Policy* 18(2-3): 355-418.

In this sense, the African Charter makes clear provisions that 'States shall have the duty, individually or collectively, to ensure the exercise of the right to development.'¹⁶⁷ Article 1 of the African Charter obligates AU member states (including South Africa) 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'.¹⁶⁸ The responsibilities required of governments, include formulating 'appropriate national development policies that aim at the constant improvement of the well-being of the entire population and of all individuals'.¹⁶⁹ Likewise, governments must do this by creating 'national and international conditions favourable for the realisation of the right to development'.¹⁷⁰ Therefore, all African state governments (including South Africa) bear the obligation of ensuring that human rights, welfare, security and consequently development are achieved. According to the UNDRTD, the duty imposed on governments is a proactive duty, not only to ensure development but also to ensure that they take active steps to pursue and accomplish development.¹⁷¹

Because of South Africa's history, the country has taken a firm commitment in protecting and promoting human rights, not only within the country but also on the continent and globally.¹⁷² As a prominent member state of the AU, South Africa plays a significant role in advocating for human rights principles and promoting compliance with international human rights standards among AU member states. This includes supporting initiatives that address human rights challenges across the continent. According to Melber, this is

¹⁶⁷ Art 22 state that 1. 'All peoples shall have the right to their economic, social and cultural development with due regard to their freedom and identity and in the equal enjoyment of the common heritage of mankind. 2. States shall have the duty, individually or collectively, to ensure the exercise of the right to development.'

¹⁶⁸ Art 1 provide that '[t]he Member States of the Organisation of African Unity, parties to the present Charter shall recognise the rights, duties and freedoms enshrined in the Charter and shall undertake to adopt legislative or other measures to give effect to them.'

¹⁶⁹ Art 2 of the UNDRTD.

¹⁷⁰ Art 8(1) of the UNDRTD.

¹⁷¹ Art 6(3) of the UNDRTD.

¹⁷² Hendricks C & Majozi N 2021. 'South Africa's International Relations: A New Dawn?' *Journal of Asian and African Studies* 56(1): 64-78, 64-66.

confirmed by the central objective of our foreign policy, which aims at creating a better South Africa in a better Africa and a better and safer world.¹⁷³ The commitment under the African Charter underscores its obligation to respect, protect, and fulfil human rights and the right to development for all within its jurisdiction.¹⁷⁴ It includes taking measures to prevent human rights violations, investigating allegations of violations, and providing remedies for victims. The dedication to the promotion of human rights and the right to development is entrenched in the provisions of the Bill of Rights in the Constitution, which inform the ancillary commitment to promoting peace, justice, human rights and the rule of law.¹⁷⁵

4.3.2 Protocol to the African Charter on the Rights of Women in Africa

In addressing one of the shortcomings of the African Charter, which did not expressly cater for women's rights, the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (the Maputo Protocol) was adopted in Maputo, Mozambique on 11 July 2003 and entered into force on 25 November 2005.¹⁷⁶ It protects women's rights in general. Significantly, it also addresses women's right to sustainable development in Article 19, which calls upon states parties to mainstream gender in national development planning.¹⁷⁷ Considering that women suffer more disadvantage in society, their sustainable development is therefore, *conditio sine qua non* to the effective

¹⁷³ Melber H 2014. 'Engagement Matters: South Africa, the United Nations and a Rights-Based Foreign Policy. *South African Journal of International Affairs* 21(1): 1-31, 20-23.

¹⁷⁴ Umozurike UO 2023. *The African Charter on Human and Peoples' Rights*. Brill: Leiden/Boston, 63.

¹⁷⁵ Mubangizi JC 2006. 'Some Reflections on Recent and Current Trends in the Promotion and Protection of Human Rights in Africa: The Pains and the Gains'. *African Human Rights Law Journal* 6(1): 146-165.

¹⁷⁶ African Union, 2003. *Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa*. African Union. Available at <https://au.int/en/treaties/protocol-african-charter-human-and-peoples-rights-rights-women-africa> (accessed 25 February 2024).

¹⁷⁷ Art 19(a) of the Maputo Protocol provide that '[w]omen shall have the right to fully enjoy their right to sustainable development. In this connection, the States Parties shall take all appropriate measures to: introduce the gender perspective in the national development planning procedures.'

realisation of the right to development across the continent.¹⁷⁸ The Maputo Protocol is comprehensive in its protection of women in Africa, evident in its inclusion of civil and political rights, economic, social and cultural rights, group rights and, for the first time in an international treaty, sexual and reproductive rights.¹⁷⁹ It also contains innovative provisions that advance women's rights further than any existing legally binding international treaty. For example, the legal prohibition of female genital mutilation is prescribed as well as the authorisation of abortion in cases of sexual assault, rape, incest, and where the continued pregnancy endangers the mental and physical health of the mother or the life of the mother or the foetus.¹⁸⁰ The Protocol is the first international human rights treaty to explicitly refer to HIV/AIDS and in this case, in the context of sexual and reproductive health rights.¹⁸¹ Besides being a public health concern, HIV/AIDS is importantly also a developmental problem that needs to be redressed if the right to sustainable development for women in Africa is to be achieved.

Article 19 provides that '[w]omen shall have the right to fully enjoy their right to sustainable development' and it places obligations upon governments to advance the empowerment of women by ensuring their unrestricted participation in governance, facilitating their access to credit, and preservation their property rights.¹⁸² The Maputo Protocol further

¹⁷⁸ A 2021 analysis on gender equality reveals that the state of gender equality and women's rights, women and girls are still disproportionately affected by the socioeconomic fallout from the development paradigm, made worse by COVID-19 outbreak. They face higher than average rates of unemployment, disruptions to their education, and an increase in the amount of unpaid work they must perform. For more reading see <https://www.unwomen.org/en/news/stories/2021/10/feature-what-does-gender-equality-look-like-today> (accessed 27 February 2024).

¹⁷⁹ Stefiszyn K & Prezanti A 2009. 'The Impact of the Protocol on the Rights of Women in Africa on Violence Against Women in Six Selected Southern African countries: An Advocacy Tool, 3

¹⁸⁰ Stefiszyn & Prezanti 2009: 28-38.

¹⁸¹ Stefiszyn & Prezanti 2009: 3.

¹⁸² Art 19(b)(c)(d) of the Maputo Protocol seek to 'ensure participation of women at all levels in the conceptualisation, decision-making, implementation and evaluation of development policies and programmes; (c) promote women's access to and control over productive resources such as land and guarantee their right to property; and (d) promote women's access to credit, training, skills development

highlights other issues that have a bearing on the right to development such as discrimination,¹⁸³ dignity,¹⁸⁴ participation in decision-making,¹⁸⁵ education,¹⁸⁶ economic and social welfare,¹⁸⁷ health and reproductive health,¹⁸⁸ food security,¹⁸⁹ adequate housing,¹⁹⁰ healthy and sustainable environment¹⁹¹ and the rights of women with

and extension services at rural and urban levels in order to provide women with a higher quality of life and reduce the level of poverty among women.'

¹⁸³ Art 2(1)(c) the Maputo Protocol provides that 'States Parties shall combat all forms of discrimination against women through appropriate legislative, institutional and other measures; enact and effectively implement appropriate legislative or regulatory measures, including those prohibiting and curbing all forms of discrimination particularly those harmful practices which endanger the health and general well-being of women.'

¹⁸⁴ Art 3(1) the Maputo Protocol provide that 'Every woman shall have the right to dignity inherent in a human being and to the recognition and protection of her human and legal rights.'

¹⁸⁵ Art 9(1)(c) the Maputo Protocol provide that 'States Parties shall take specific positive action to promote participative governance and the equal participation of women in the political life of their countries through affirmative action, enabling national legislation and other measures to ensure that: (c) women are equal partners with men at all levels of development and implementation of State policies and development programmes.'

¹⁸⁶ According to Art 12, women have the right to education and training and the government should 'eliminate all forms of discrimination against women and guarantee equal opportunity and access in the sphere of education and training.'

¹⁸⁷ Art 13 provides for the economic and social welfare rights and state that 'States Parties shall adopt and enforce legislative and other measures to guarantee women equal opportunities in work and career advancement and other economic opportunities.'

¹⁸⁸ Art 14 protects women's health and reproductive health rights and 'States Parties shall ensure that the right to health of women, including sexual and reproductive health is respected and promoted.'

¹⁸⁹ Women have the right to food security in accordance with Art 15 and the 'States Parties shall ensure that women have the right to nutritious and adequate food.'

¹⁹⁰ Art 15 provides that '[w]omen shall have the right to equal access to housing and to acceptable living conditions in a healthy environment. To ensure this right, States Parties shall grant to women, whatever their marital status, access to adequate housing.'

¹⁹¹ According to Art 18(1) '[w]omen shall have the right to live in a healthy and sustainable environment and (2) States Parties shall take all appropriate measures to: (a) ensure greater participation of women in the planning, management and preservation of the environment and the sustainable use of natural resources at all levels.'

disabilities.¹⁹² These rights are important to the right to development especially, when considered in line with Article 8 of the UNDRTD, 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.¹⁹³

The Maputo Protocol acknowledges the interconnectedness of rights, recognising that the enjoyment of one right is dependent on the realisation of other rights. Therefore, by affirming the right to sustainable development for women, the Protocol reinforces the broader framework of human rights and emphasises the importance of holistic approaches to advancing gender equality and women's empowerment in Africa.

South Africa became a constitutional democracy in 1994; founded on the rule of law, the advancement of human rights and a non-racial and non-sexist society.¹⁹⁴ South Africa has accordingly, undertaken focused interventions and initiatives to promote and protect the rights of women in accordance with its international commitments as outlined in the Maputo Protocol. South Africa signed the Protocol on 16 March 2004, ratified it on 17 December 2004 and it entered into force on 25 November 2005.¹⁹⁵ Pursuant to Section 231(4) of the Constitution, an international agreement becomes law in South Africa upon

¹⁹² Art 23 protects rights of women with disabilities and 'ensure the protection of women with disabilities and take specific measures commensurate with their physical, economic and social needs to facilitate their access to employment, professional and vocational training as well as their participation in decision-making.'

¹⁹³ Art 8(1) of the UNDRTD.

¹⁹⁴ Albertyn C 2011. 'Law, Gender and Inequality in South Africa.' *Oxford Development Studies* 39(02): 139-162.

¹⁹⁵ Republic of South Africa combined second periodic report under the African Charter on Human and People's Rights and initial report under the Protocol to the African Charter on the Rights of Women in Africa 2015.

its enactment into national legislation.¹⁹⁶ Although the African Women's Protocol has not been enacted into law as such in South Africa, most of its provisions have already been incorporated into a number of national statutes and legislation. It implies that the Maputo Protocol reinforces South Africa's commitment to gender equality and women's empowerment under international law,¹⁹⁷ which are important components of the right to development. It requires the government to take legislative and other measures to ensure the rights of women are protected and promoted, including the right to sustainable development contained in Article 19 of the Maputo Protocol.

4.3.3 African Charter on the Rights and Welfare of the Child

The African Charter on the Rights and Welfare of the Child (ACRWC) is a regional human rights instrument adopted by the OAU in 1990.¹⁹⁸ It aims to protect and promote the rights of children across the African continent.¹⁹⁹ While the ACRWC primarily focuses on the rights and welfare of children, it also recognises the broader context of development within which these rights must be realised. Article 5 of the ACRWC emphasises the right of the child to life, survival, and development.²⁰⁰ It is a foundational provision in the ACRWC that sets forth the fundamental principles underlying the protection and promotion of children's rights in Africa. One of the key components of Article 5 is the recognition of the right to development. While the term 'right to development' is not explicitly mentioned, the inclusion of development alongside life and survival suggests a broader understanding of children's rights beyond mere existence. This aligns with the

¹⁹⁶ Sect 231(4) of the South African Constitution.

¹⁹⁷ Second South African Periodic Report, Para 29.

¹⁹⁸ African Charter 1990. African Charter on the Rights and Welfare of the Child. *AU Addis Ababa*.

¹⁹⁹ To date 50 AU member states have ratified the African Charter, leaving 5 member states that are yet to ratify it. These are Morocco, Sahrawi Arab Democratic Republic, Somalia, South Sudan and Tunisia. Three (3) member states have entered reservations to some provisions of the Charter namely, Egypt, Mauritania, and Sudan. Available at <https://au.int/en/treaties/african-charter-rights-and-welfare-child> (accessed 27 February 2024).

²⁰⁰ The best interest of every child is clearly stated in Art 5 that '[e]very child has an inherent right to life. This right shall be protected by law'.

principles outlined in the UDHR and other international instruments, which recognise development as a fundamental human right encompassing economic, social, and cultural dimensions. The concept of 'survival and development'²⁰¹ emphasise several key elements of the right to development within the context of children's rights such as access to food, shelter, healthcare, and education. It also reflects a commitment to ensuring that children not only have their immediate needs met but also have opportunities to thrive and contribute to the development and well-being of their societies.

In light of this, Article 5(2) requires the government as a duty bearer, to guarantee the growth and development of every child who is a beneficiary of the right to development. According to Kamga, the government should take the necessary actions in guaranteeing that a child's rights to food, healthcare, and education among others are upheld, because the child's existence and development depends on the fulfilment of these ancillary rights.²⁰²

Article 22 states that the right to economic, social and cultural rights applies to all peoples, including children.²⁰³ South Africa has ratified the African Charter on the Rights and Welfare of the Child.²⁰⁴ The South African government is accordingly, legally bound to uphold and implement the rights enshrined in the Children's Charter. The Children's Charter explicitly recognises the rights of every child to a name and nationality, family care, basic nutrition, education, and the opportunity to develop to their fullest potential.²⁰⁵ It encompasses the right to development as a fundamental aspect of ensuring that children grow up in an environment that supports their physical, mental, and emotional well-being.²⁰⁶ Mbaku posits that international treaties ratified by the South African government become part of domestic law if they are implemented through national

²⁰¹ Art 5 of the ACRWC.

²⁰² Kamga 2011: 202.

²⁰³ Art 22 of the African Charter.

²⁰⁴ South Africa ratified the African Charter on the Rights and Welfare of the Child on 07 January 2000.

²⁰⁵ Art 1-11 of the Children's Charter.

²⁰⁶ Ginsburg KR & Committee on Psychosocial Aspects of Child and Family Health 2007. 'The Importance of Play in Promoting Healthy Child Development and Maintaining Strong Parent-Child Bonds'. *Pediatrics* 119(1): 182-191.

legislation or are otherwise enforceable through the courts.²⁰⁷ The Children's Charter thus, provides a legal foundation for advocating and enforcing children's rights, including their right to development, which the South African government is enjoined to protect within the domestic context.

4.3.4 African Youth Charter

The African Youth Charter (Youth Charter) is a political and legal framework aimed at ensuring youth empowerment and development across Africa at the continental, regional, and national levels.²⁰⁸ It was endorsed by African Heads of State in Banjul in July 2006, following a process that included an initial meeting of the youth and experts in January 2006 to review the first draft and propose amendments. The Youth Charter was eventually adopted on 2 July 2006 and came into effect on 8 August 2009.²⁰⁹ South Africa ratified the African Youth Charter on 28 May 2009 and deposited the instrument of ratification with the African Union Commission on 8 July 2009.²¹⁰ As the 14th country to do so, South Africa committed to formulate policies and programmes that support youth development. By ratifying the Youth Charter, South Africa has committed to supporting its national youth development strategies in accordance with the provisions of the Youth Charter, which imposes legal obligations on state parties to uphold the rights of the youth, and consequently, to incorporate youth development into the broader national development agenda.²¹¹

²⁰⁷ Mbaku 2024: 91-97.

²⁰⁸ African Union 2020. *Continental Framework for Youth, Peace and Security*. Available at https://au.int/sites/default/files/documents/39150-doc-continental_framework_on_youth_peace_and_security_-_english.pdf (accessed 18 November 2024).

²⁰⁹ African Union 2006. African Youth Charter (adopted 02 July 2006 and entered into force on 08 August 2009).

²¹⁰ South Africa ratifies the African Union Youth Charter, 29 Jul 2009. <https://www.gov.za/south-africa-ratifies-african-union-youth-charter> (accessed 18 November 2024).

²¹¹ Makoe M, Tirivanhu P, Alubafi MA, & Mkwana N 2021. National Youth Policy 2020-2030 Draft: A Decade to Accelerate Positive Youth Development Outcomes, 2-34. Available at

Article 10 of the Youth Charter asserts the right of young people to development, emphasising that the youth should have the opportunity to fully realise their potential in all areas of life, including social, economic, political, and cultural spheres.²¹² This right is framed as an integral aspect of human development, which includes access to quality education, health services, and employment opportunities, as well as the provision of an enabling environment for the youth to participate in the development process.²¹³

In South Africa, the right to development as articulated in Article 10 of the Youth Charter intersects with a range of socio-economic issues that have long been entrenched in South African law, particularly post-apartheid. According to Buntu and Lehmann, these issues include, but are not limited to, high levels of unemployment among young people, significant educational disparities, unequal access to healthcare, and social exclusion in marginalised communities.²¹⁴ South Africa, with one of the largest youth populations in Africa, is bound by the Youth Charter to implement policies that can reflect this demographic's development.

As Article 10 emphasises the importance of youth participation in political, economic, and social life. Ntsabane and Ntau argue that the Youth Charter stresses the importance of ensuring their complete and active participation in all decision-making processes within their communities, as this is crucial for the continent to reach its full potential.²¹⁵ South Africa has made strides in encouraging youth participation in governance through

https://www.gov.za/sites/default/files/gcis_document/202103/nationalyouthpolicy.pdf (accessed 21 November 2024).

²¹² Art 10(1) of the African Youth 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 equal enjoyment of the common heritage of mankind.'

²¹³ Art 11(1) of the African Youth Charter state that '[e]very young person shall have the right to participate in all spheres of society.'

²¹⁴ Buntu B & Lehmann S 2015. *Youth Policy Field and Institutional Analyses at Municipal Level in South Africa*. Research Report. July 2015. South African Cities Network in collaboration with German International Cooperation.

²¹⁵ Ntsabane T & Ntau C 2016. 'The African Youth Charter and Youth Participation in Decision Making: Opportunities and Challenges.' *IUP Journal of International Relations* 10(4): 51.

platforms like the National Youth Development Agency (NYDA), yet barriers to full political and civic participation persist, particularly in terms of youth engagement in decision-making processes. Furthermore, youth political disillusionment remains high, and the effectiveness of current mechanisms for engaging youth in meaningful political processes needs to be improved.²¹⁶ Importantly, South Africa is also bound to ensure that the right to development under Article 10 promotes social inclusion, with particular attention to gender equality. Given the widespread incidents of gender-based violence and the disproportionately high levels of poverty among young women, South Africa must address these issues through policies that not only combat violence but also empower young women socially and economically.

It is further provided in Article 10(2) of the Youth Charter that ‘States Parties shall encourage youth organizations to lead youth programmes and to ensure the exercise of the right to development.’²¹⁷ In other words, the South African government is bound to realise the right to development and as such, must provide an enabling environment for youth organisations to advance the goals of youth empowerment and development. This stipulation calls for the active participation of youth-led and youth-focused organisations in the design, implementation, and monitoring of programmes that encourage youth development. Ultimately, the provisions of the Youth Charter represent a recognition of the agency of young people and the importance of youth-led initiatives in achieving the right to development. As noted above, in South Africa where the youth face numerous challenges, enabling youth organisations to take leadership in development programmes is a critical step toward realising their full potential and the right to development.

²¹⁶ Enaifoghe A & Dlamini NP 2021. ‘South African Political Landscape and the Quest for Youth Inclusion: Opportunity for Socio-Political and Economic Development.’ *African Journal of Public Affairs* 12(1): 207-226.

²¹⁷ According to Art 10(1) of the African Youth Charter ‘States Parties shall encourage youth organizations to lead youth programmes and to ensure the exercise of the right to development.’

4.4 ENFORCING THE RIGHT TO DEVELOPMENT IN AFRICA

Enforcing the right to development involves not only legal frameworks and court decisions but also broader societal and economic policies aimed at reducing poverty, inequality, and promoting inclusive development.²¹⁸ The African human rights system, through its institutions and mechanisms, provides a framework for advocating and enforcing the right to development regionally, and importantly at the domestic level. The African human rights system has institutions whose role is to monitor implementation and respect for the human rights contained in various human rights documents. Foremost and most significant in this regard is the African Commission, which was originally established in and alongside the African Charter.²¹⁹

The African Charter's jurisprudence provides legal guidance on the interpretation and enforcement of the right to development. Decisions and opinions rendered by the African Commission offer insights into how states should interpret and apply the right to development within their domestic legal frameworks. For example, in the *Grootboom* case,²²⁰ the Constitutional Court of South Africa, in its judgment, drew upon international human rights law and indirectly, the African Charter.²²¹ Specifically, the Court referred to Article 11(1) of the International Covenant on Economic, Social and Cultural Rights (ICESCR) in interpreting the right to housing and related socio-economic rights in its decisions and recommendations.²²² The international approach to interpreting and applying these rights influenced the court's understanding of South Africa's obligations

²¹⁸ Albertyn 2019: 760-764.

²¹⁹ Onoria H 2003. 'The African Commission on Human and Peoples' Rights and the Exhaustion of Local Remedies under the African Charter.' *African Human Rights Law Journal* 3(1): 1-24.

²²⁰ *Government of the Republic of South Africa and Others v Grootboom* 2001 (1) SA 46(CC), 2000(11) BCLR 1160 (CC).

²²¹ *Grootboom*, Para 26.

²²² Art 11(1) of the ICESCR provide that '[t]he States Parties to the present Covenant recognize the right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing and housing, and to the continuous improvement of living conditions. The States Parties will take appropriate steps to ensure the realization of this right, recognizing to this effect the essential importance of international co-operation based on free consent.'

under the Constitution. By using international and regional human rights principles, especially those stated in the African Charter, the Constitutional Court bolstered its case for a comprehensive interpretation of socio-economic rights contained in South African legislation and thereby, strengthening the legality of the right to development in South Africa.

In addition to the African Commission, the broad AU human rights system subsequently established the African Court for Human and People's Rights.²²³ Its main mandate is to complement the protective mandate of the African Commission.²²⁴ The African Commission has rightly been criticised for being a 'toothless bulldog' or a body lacking 'teeth' due to its incapacity to compel member nations to abide by its decisions, which explains why the African Court was established.²²⁵ The Commission's later activism has however, called into question the accuracy of this description. The African Commission has made an effort to assume more responsibility, as I demonstrate below, and it has rendered some significant decisions that have had a positive effect on the continent's human rights framework specifically, on the right to development.

4.4.1 Jurisprudence of the African Commission

The African Charter established the African Commission on Human and Peoples' Rights. The African Commission was inaugurated on 2 November 1987 in Addis Ababa, Ethiopia. Article 45 of the African Charter sets out the mandate of the African Commission, which includes among others that the '[African] Commission [must] ensure protection of human and peoples' rights through its communication procedure, friendly settlement of disputes,

²²³ The Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights (1998/2004) (Adopted in Ouagadougou, Burkina Faso, on 10 June 1998 and entered into force on 25 January 2004).

²²⁴ Thomas IN 2021. *The Application of the Principle of Complementarity in the Relationship between the African Court and the African Commission under the Regional African Human Rights System* (Doctoral Dissertation, Stellenbosch University) 138.

²²⁵ Ebobrah ST 2011. 'Towards a Positive Application of Complementarity in the African Human Rights System: Issues of Functions and Relations.' *European Journal of International Law*, 22(3): 663-688.

state reporting (including consideration of NGOs' shadow reports), urgent appeals and other activities of special rapporteurs and working groups and missions'.²²⁶ The African Commission is also mandated to interpret the Charter upon request by a state party, organs of the AU or individuals.²²⁷ No organ of the AU has however, referred any case of interpretation of the African Charter to the African Commission. Most of the cases relating to interpretation of the Charter, have been brought to the Commission by nongovernmental (NGOs). The African Commission has also adopted many resolutions expounding upon the provisions of the Charter.²²⁸

One of the tools the African Commission uses to make sure nations abide by the human rights provisions contained in the African Charter is communications (complaints). In line with its authority under Articles 48,²²⁹ 49,²³⁰ and 55²³¹ of the Charter, the African

²²⁶ The mandate of the African Commission is provided in Art 45 1(a) of the African Charter, '[t]o collect documents, undertake studies and research on African problems in the field of human and peoples' rights, organize seminars, symposia and conferences, disseminate information, encourage national and local institutions concerned with human and peoples' rights, and should the case arise, give its views or make recommendations to Governments.

²²⁷ Art 45(3) of the African Charter mandates the African Commission to '[i]nterpret all the provisions of the present Charter at the request of a State party, an institution of the OAU or an African Organization recognized by the OAU.'

²²⁸ See Mandate of the Commission. Available at <https://achpr.au.int/en/about/mandate/> (accessed 21 March 2024).

²²⁹ African Charter's Art 48 provide that '[i]f within three months from the date on which the original communication is received by the State to which it is addressed, the issue is not settled to the satisfaction of the two States involved through bilateral negotiation or by any other peaceful procedure, either State shall have the right to submit the matter to the Commission through the Chairman and shall notify the other States involved.'

²³⁰ Meanwhile Art 49 of the African Charters allows, '[n]otwithstanding the provisions of 47, if a State party to the present Charter considers that another State party has violated the provisions of the Charter, it may refer the matter directly to the Commission by addressing a communication to the Chairman, to the Secretary General of the Organization of African Unity and the State concerned.'

²³¹ Art 55(1)(2) of the African Charter provide that '[b]efore each Session, the Secretary of the Commission shall make a list of the communications other than those of States parties to the present Charter and transmit them to the members of the Commission, who shall indicate which communications should be

Commission may hear complaints on alleged human rights abuses from a nation against another nation (inter-state complaints)²³² or from people and non-governmental organisations against one or more nations (individual complaints). Since its founding in 1987, the African Commission has received many individual communications²³³ and has in accordance, had several occasions to adjudicate on the right to development enshrined in Article 22 of the African Charter. There are several of the African Commission's decisions relating to the right to development, which are discussed in more details in section 4.4.1.1. In this regard, the Commission has approached the right to development from the perspective that it is a collective right, as the African Charter suggests. Communications are brought before the African Commission in accordance with its practices and procedures through representative actions, or what are now referred to as action *popularis* or class actions.²³⁴ This gives certain petitioners' representatives the ability to speak for the entire group, either with or without their knowledge. The African Commission's decisions are not binding, but rather only provide recommendations in line with Article 54 of the African Charter.²³⁵

In this light, the following sub-section discusses the African Commission adjudications over important communications which have direct implications on the right to

considered by the Commission. (2) A communication shall be considered by the Commission if a simple majority of its members so decide.'

²³² It is provided in Art 47 of the African Charter that '[i]f a State party to the present Charter has good reasons to believe that another State party to this Charter has violated the provisions of the Charter, it may draw, by written communication, the attention of that State to the matter. This communication shall also be addressed to the Secretary General of the OAU and to the Chairman of the Commission. Within three months of the receipt of the communication, the State to which the communication is addressed shall give the enquiring State, written explanation or statement elucidating the matter. This should include as much as possible relevant information relating to the laws and rules of procedure applied and applicable, and the redress already given or course of action available.'

²³³ Eno 2002: 63-74.

²³⁴ Aka PC 2017. 'African Commission on Human and Peoples' Rights v Republic of Kenya (Afr. Ct. HPR).' *International Legal Materials* 56(4): 726-764.

²³⁵ Magashi 2016: 132; It is provided in Art 54 of the African Charter that '[t]he Commission shall submit to each ordinary Session of the Assembly of Heads of State and Government a report on its activities'.

development. The first being the one and only inter-state complaint brought before the African Commission, *Democratic Republic of the Congo v Burundi, Rwanda, and Uganda*.²³⁶ *Centre for Minority Rights Development (CEMIRIDE) (on behalf of the Endorois) v Kenya (Endorois case)*²³⁷ and *SERAC v Nigeria (SERAC case)*²³⁸ among others where the African Commission failed to take a strong stance on the right to development.²³⁹

4.4.1.1 DRC v Burundi, Rwanda and Uganda²⁴⁰

In 2004, the African Commission decided on the merits of the one and only inter-country communication in the *Democratic Republic of the Congo (DRC) case*.²⁴¹ The DRC lodged the communication against the Republics of Burundi, Rwanda, and Uganda, alleging that serious human and people's rights violations perpetrated by the respondent states in the eastern provinces of the DRC.²⁴² The DRC alleged violation by the respondent states of the human and peoples' rights guaranteed by the African Charter by committing multiple massacres against the people of the DRC, including attacking the Inga Hydroelectric Dam, disrupting millions of lives and causing the death of patients in hospitals, raping and murdering hundreds of women, establishing concentration camps, deporting people from the DRC, looting resources from the DRC, and also endangering the lives of several endangered species.²⁴³ The alleged violations contravene various provisions of the African Charter, including in particular, Articles 21 and 22 on the right to the ownership of

²³⁶ *Democratic Republic of the Congo v Burundi, Rwanda, and Uganda* Comm 227/99, Annex IV, 20th Annual Activity Report of the African Commission, 111.

²³⁷ *Endorois case*.

²³⁸ *SERAC case*.

²³⁹ Kamga 2011: 217.

²⁴⁰ *DRC case*.

²⁴¹ *DRC case*.

²⁴² Liwanga RC 2015. 'The Meaning of Gross Violation of Human Rights: A Focus on International Tribunals' Decisions over the DRC Conflicts.' *Denver Journal International Law and Policy* 44: 67-81, 69-70.

²⁴³ See <http://hrlibrary.umn.edu/africa/comcases/227-99.html> (accessed 17 March 2024).

natural resources and the right to development respectively.²⁴⁴ Essentially, this means that the Congolese peoples' right to economic, social, and cultural development,²⁴⁵ was infringed by denying them the freedom to dispose of their natural wealth and resources.²⁴⁶ According to the African Commission, the respondents, both individually and collectively, did not fulfil their obligations on the right to development under Article 22 of the African Charter.²⁴⁷

To begin with, the African Commission emphasised the cultural dimension of the right to development by linking it to the traditional practices of the Congolese people. It further reinforced the philosophical premise that African cultural values constitute a *sine qua non* for genuine development.²⁴⁸ Secondly, the African Commission also underlined once more, the connection between the right to development and internal self-determination.²⁴⁹ The Commission held that the fundamental reason behind the infringement of the right to development was the infringement of the freedom to dispose of wealth and natural resources. The African Commission's reading of the right to development and the right to ownership of natural resources illustrates the degree of interdependence among these rights enshrined in the African Charter.²⁵⁰ This 'underscores the interconnectedness of human rights generally and more specifically, shows that the [right to development] is a

²⁴⁴ Kaguongo W 2007. 'Commentary on Communications Decided by the African Commission on Human and Peoples' Rights in 2004.' *Law, Democracy and Development* 11(2): 153-171, 162.

²⁴⁵ Art 22 of the African Charter provides that '[a]ll 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.'

²⁴⁶ Art 21 of the African Charter provide that '[a]ll peoples shall freely dispose of their wealth and natural resources. This right shall be exercised in the exclusive interest of the people. In no case shall a people be deprived of it.'

²⁴⁷ *DRC case*, Para 95; see also Art 22 of the African Charter.

²⁴⁸ Oduwole 2014: 14-15.

²⁴⁹ Uwazuruike A 2020. *Human Rights Under the African Charter*. Springer International Publishing: Cham, 166.

²⁵⁰ Ssenyonjo M 2018. 'Responding to Human Rights Violations in Africa: Assessing the Role of the African Commission and Court on Human and Peoples' Rights (1987–2018).' *International Human Rights Law Review* 7(1): 1-42.

multifaceted human right that should be addressed as such,' as Kamga and Fombad point out.²⁵¹ Thirdly, the decision highlights the co-operation component of the right to development. African countries have an obligation to not only positively support each other's economic development but to also refrain from acting in a way that is contradictory to this goal. Put differently, development is a collaborative endeavour that necessitates joint and multiple contributions from governments for it to be realised. Through their actions, the respondents in the *DRC* case demonstrated that they were not committed to supporting the Congolese people's right to development, but rather actively worked to deny them enjoyment of that right.²⁵²

The African Commission drew inspiration from general principles of international law embodied in the UN Charter and resolutions of the UN General Assembly. The Commission found that by invading and occupying the applicant's territories, the respondent countries violated the right to self-determination of the Congolese people and thus, also posed a threat to national and international peace and security.²⁵³ The Commission concluded that the defendant countries had violated several provisions of the African Charter (including the right to development) and called on them to take measures to comply with their obligations under the UN Charter, the OAU Charter and the African Charter, and hence, ordered to pay appropriate reparations to the victims of the violations.²⁵⁴

²⁵¹ Kamga SAD & Fombad CM 2013. 'A Critical Review of the Jurisprudence of the African Commission on the Right to Development.' *Journal of African Law* 57(2): 196-214, 207.

²⁵² Ndikumana L, Kisangani E, & Kalonda-Kanyama I 2015. 'Conflicts in the Democratic Republic of Congo: Causes, Impact and Implications for the Great Lakes region.' United Nations Economic Commission for Africa, 1-112, 2.

²⁵³ *DRC* case, Para 95.

²⁵⁴ *DRC* case, Para 87.

4.4.1.2 *SERAC v Nigeria (Ogoni case)*²⁵⁵

In this case, the Ogoni people alleged having suffered grave environmental degradation at the hands of the Nigerian government, through its state-owned oil firm, Nigeria National Petroleum Company (NNPC), and a multinational corporation, Shell Petroleum Development Corporation.²⁵⁶ The two main Ogoni sources of income, fishing and farming were rendered unfeasible due to the contamination of the land and water supplies caused by oil exploration.²⁵⁷ In addition, the complainants alleged that the Nigerian government approved of the infractions as it never required the oil corporations to perform social or environmental impact assessments of their operations, even in response to multiple petitions.²⁵⁸

The rights violated include the right not to be discriminated against,²⁵⁹ the right to life,²⁶⁰ property,²⁶¹ health,²⁶² wealth and natural resources²⁶³ and to a general satisfactory environment.²⁶⁴ Among other things, the Ogoni people were not involved in the signing of the agreements between the Nigerian government and Shell Corporation that deprived them of their land and natural resources; they were also not paid a portion of the profits

²⁵⁵ *The Social and Economic Rights Action Centre and the Centre for Economic and Social Rights v Nigeria, African Commission on Human and Peoples' Rights* Comm No 155/96 2001.

²⁵⁶ Marinkas G 2014. 'The Practice of the African Commission on Human and Peoples' Rights concerning the Rights of the Indigenous Peoples, with Special Regard to the Ogoni Case'. *Pro Futuro*, 127; Forlarin S 2007. 'Niger-Delta: Environment, Ogoni Crisis and the State'. *The Constitution* 7(1): 37-61, 40.

²⁵⁷ Nwoko CN 2014. 'Assessing the Socioeconomic Impacts Arising from Oil Pollutions in the Niger Delta Region of Nigeria: Including Proposals for Solution.' Aalto University.

²⁵⁸ Ebeku KS 2003. 'The Right to a Satisfactory Environment and the African Commission: Recent Developments'. *African Human Rights Law Journal* 3(1): 149-166, 156.

²⁵⁹ Art 2 of the African Charter.

²⁶⁰ Art 5 of the African Charter.

²⁶¹ Art 14 of the African Charter.

²⁶² Art 16 of the African Charter.

²⁶³ Art 21 of the African Charter.

²⁶⁴ Art 24 of the African Charter.

from the exploitation of their land and were forcibly removed from their ancestral land.²⁶⁵ Consequently, they asserted their claim to wealth and natural resources.²⁶⁶ The NGOs contested the contracts that the Nigerian government had signed, ignoring the interests of the Ogoni people, for the exploration and mining of oil in Ogoni territory.²⁶⁷ The local community's involvement in the contract-making process, their lack of a profit-sharing share from the sale of their land, and their forced removal from their ancestral lands in order to make way for mining operations were among the interests that were disregarded.

Kamga posits that the African Commission was unable to clarify the content of the right to development in this particular case. Even while it believed that the right to development had been infringed, the Commission's ruling did not find this to be the case.²⁶⁸ In fact, it referred to the violation of the right to development while highlighting the violation of the right to food contained in several violated provisions.²⁶⁹ The Commission held that:

The right to food is implicit in the African Charter, in such provisions as the right to life, the right to health, and the right to economic, social and cultural development. By its violation of these rights, the Nigerian government trampled upon not only the explicitly protected rights, but also upon the right to food implicitly guaranteed.²⁷⁰

According to Kamga, in this case the 'African Commission failed to interpret the law and to define the scope and content of the RTD'.²⁷¹ However, the case reflects the interconnected nature of the human, and peoples' rights contained in the African Charter.

²⁶⁵ Ngang CC 2020. 'Right to Development in Africa and the Common Heritage Entitlement'. *Journal for Juridical Science*, 45(1): 28-50, 36.

²⁶⁶ Forlarin 2007: 38-39; Zabbey N & Olsson G 2017. 'Conflicts—Oil Exploration and Water'. *Global Challenges* 1(5): 1-10.

²⁶⁷ Ebeku 2003: 157.

²⁶⁸ Kamga 2011: 238.

²⁶⁹ *Ogoni* case, Para 64.

²⁷⁰ *Ogoni* case, Para 64.

²⁷¹ Kamga 2011: 237.

4.4.1.3 Centre for Minority Rights International and Another v Kenya (Endorois case)²⁷²

In this case, the African Commission offered greater elucidation of the right to development. Its decision obliges governments not only to pursue the realisation of this right through the formulation of policies and programmes aimed at enhancing the well-being of their populations, but also to establish minimum standards designed to ensure that, in advancing the right to development, the other rights of the intended beneficiaries are duly safeguarded.²⁷³ To make room for the establishment of a national park, the Endorois, a pastoralist community that lives a semi-nomadic lifestyle, were forced off their ancestral land around Lake Bogoria in Kenya's Rift Valley during the 1970s. In 2003, the Minority Rights Group International helped the Endorois file a case with the African Commission after futile attempts to settle the matter at the national level.²⁷⁴ The applicants alleged the absence of consultation or recompense for the forcible relocation, as well as the lack of safeguards for the Endorois' customary lifestyle.²⁷⁵ Additionally, it asserted that the Endorois were deprived of their rights to property, non-discrimination, development, and access to domestic natural resources.²⁷⁶ 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'.²⁷⁷ 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

²⁷² *Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council v Kenya* Comm No 276/2003.

²⁷³ Abioye F 2018. 'Understanding the Rule of Law in Africa through the Lens of the African Commission on Human and Peoples' Rights Interpretation on the Right to Development in Africa.' *Verfassung und Recht in Übersee/Law and Politics in Africa, Asia and Latin America* 51(2): 269-287.

²⁷⁴ Oei 2010: 58-62.

²⁷⁵ *Ogoni case*, Para 1; Murphy J 2012. 'Extending Indigenous Rights by Way of the African Charter.' *Pace International Law Review* 151: 151-189.

²⁷⁶ *Endorois case*, Para 1; See also Ngang CC & Kanga SAD (eds) 2022. *Natural Resource Sovereignty and the Right to Development in Africa*. Routledge: London.

²⁷⁷ *Endorois case*, Para 16.

medicine are all situated around the shores of Lake Bogoria'.²⁷⁸ It was alleged that the Kenyan government violated the African Charter, the national Constitution, and applicable principles of international law by forcibly displacing the Endorois community from their ancestral lands without conducting proper prior consultations or providing adequate and effective compensation.²⁷⁹ The government, acting through the Kenya Wildlife Service (the respondent in the case), merely informed certain Endorois elders after the area had been designated as a game reserve—that the community would be compensated with fertile land, would receive 25% of the tourist revenue generated by the reserve, and that 85% of the employment opportunities created would be allocated to them.²⁸⁰ Moreover, the government promised to construct cattle dips and fresh-water dams for the community.²⁸¹ None of these guarantees were ever fulfilled.

The Kenyan government disagreed with the complainants in different respects. Firstly, the government argued that the Endorois' claim of lack of participation was untrue in that a Country Council, where all decisions are pondered, duly embodied them.²⁸² The Council itself evolved through a partaking model of free and fair election.²⁸³ The respondent state added that to ensure that the right to development of the Endorois people is realised, they pursued determined programmes in the areas of education, agriculture, and rural poverty reduction strategies.²⁸⁴ They observed that the action only intended to portray the Kenyan government 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.²⁸⁵

²⁷⁸ *Endorois case*, Para 16.

²⁷⁹ *Endorois case*, Para 2.

²⁸⁰ *Endorois case*, Para 7; See also Gilbert J 2017. 'Litigating Indigenous Peoples' Rights in Africa: Potentials, Challenges and Limitations.' *International and Comparative Law Quarterly* 66(3): 657-686, 661.

²⁸¹ See above.

²⁸² *Endorois case*, Para 276.

²⁸³ *Endorois case*, Para 269 and 276.

²⁸⁴ *Endorois case*, Para 271.

²⁸⁵ *Endorois case*, Para 273 and 274.

In determining on the matter, the African Commission advanced the key details of the right to development, noting that the right consists of both constitutive and instrumental elements, each of which must be realised simultaneously.²⁸⁶ Violation of either of the rudiments 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’.²⁸⁷ In calling on the government to ensure an ‘active, free and meaningful participation in development’,²⁸⁸ the UN Independent Expert on the Right to Development stated that every effort must be made to realise ‘equitable, non-discriminatory, participatory, accountable, and transparency with equity and choice as important, overarching themes’.²⁸⁹ The African Commission reaffirmed this position by emphasising the importance of the three pillars of the right to development as emphasised in this decision, freedom of choice,²⁹⁰ effective participation and the right to enjoy wealth and natural resources.²⁹¹ For example, individuals and peoples should have the right to decide where to live. The government must not arbitrarily trample upon this right of choice. Thus, ‘[f]reedom of choice must be present as a part of the right to development’.²⁹² On meaningful 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

²⁸⁶ *Endorois case*, Para 277; Lynch G 2012. ‘Becoming Indigenous in the Pursuit of Justice: The African Commission on Human and Peoples’ Rights and the Endorois.’ *African Affairs* 111(442): 24-45.

²⁸⁷ *Endorois case*, Para 277.

²⁸⁸ Art 2(3) of the UNDRD provide that ‘States have the right and the duty 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’.

²⁸⁹ *Endorois case*, Para 277.

²⁹⁰ The African Commission underlined freedom of choice as a core element of the right to development as highlighted by Sengupta the Independent Expert on the right to development. See Sengupta A 2001. ‘Right to Development as a Human Right’. *Economic and Political Weekly*, 2527-2536.

²⁹¹ Art 21 of the African Charter.

²⁹² *Endorois case*, Para 278.

customs and traditions.’²⁹³ The African 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 consultations.²⁹⁴ For there to be effective participation, consultations must be in good faith, through culturally fitting procedures. This means, the government still needs to effectively engage the public in relation to their rights because simple consultation is insufficient. The people’s ‘free, prior, and informed consent, according to their customs and traditions’,²⁹⁵ is required in addition to consultation. This increases the bar for what the government normally must achieve, particularly when acquiring land for public use. Because the government did not allow the Endorois peoples to participate effectively in this matter, what it did was insufficient.²⁹⁶

The significance of the right to development has been repositioned by this decision, earning it the moniker ‘historic’. It has been successful in making governments realise that they must fit round pegs into round holes.²⁹⁷ Stated differently, peoples possess the entitlement to engage in their own development free from coercion. In addition to urging nations to implement policies and initiatives that advance peoples’ rights to realise the right to development, the African Commission’s ruling establishes the minimal requirements to guarantee that other beneficiaries’ rights are not infringed upon in the course of pursuing this goal. According to Murphy, the decision ‘exemplifies a pinnacle of legal recognition for indigenous peoples and a decisive rejection of the kind of law-making that once soiled their rights.’²⁹⁸ According to Kamga, the decision further exemplifies the nature of the right to development as both an interconnected right and a right belonging to peoples.²⁹⁹ According to Human Rights Watch, the *Endorois* decision is the ‘first of its

²⁹³ *Endorois* case, Para 291.

²⁹⁴ *Endorois* case, Para 292.

²⁹⁵ *Endorois* case, Para 291.

²⁹⁶ Magashi 2016: 143.

²⁹⁷ Magashi 2016: 144.

²⁹⁸ Murphy 2012: 189; see also Kamga 2011: 235; Sengupta, A 2008. ‘The Political Economy of Legal Empowerment of the Poor.’ In Banik D (ed) *Rights and Legal Empowerment in Eradicating Poverty* (2008), 31, 31.

²⁹⁹ Kamga 2011: 235-237; Kamga & Fombad 2013: 212.

kind' where any international tribunal has found a violation of the right to development.³⁰⁰ Thus, the decision 'can help many others across Africa who have been forced from their homes.'³⁰¹

In support of the African Commission's decision, UNESCO's 2012 letter addressing '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',³⁰² argued that the Endorois were entitled to enjoy the fruits of the African Commission's decision. UNESCO further stressed that:

This violation is intensified and continued by the fact that to date, 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 decision and in violation of the Endorois' right to development under Art 22.³⁰³

The *Endorois* decision underlines the holistic character of the right to development, which encompasses elements of non-discrimination, participation, accountability and transparency, equity and choices.³⁰⁴ The Commission's ruling is important as it calls upon state parties to the African Charter to respect human rights in general, and 'spells the beginning of a brighter future'.³⁰⁵ The African Commission made a series of wide-reaching

³⁰⁰ Human Rights Watch 2010. 'Kenya: Landmark Ruling on Indigenous Land Rights People.' Available at <https://www.hrw.org/news/2010/02/04/kenya-landmark-ruling-indigenous-land-rights> (accessed 04 April 2024).

³⁰¹ See above.

³⁰² Letter to UNESCO 2013. UNESCO World Heritage Designation of Lake Bogoria, 'Kenya Lake System in the Great Rift Valley.' Available at <https://whc.unesco.org/en/list/1060/> (accessed 04 April 2024).

³⁰³ See above.

³⁰⁴ *Endorois* case, Para 277.

³⁰⁵ Human Rights Group 2010. 'Landmark Ruling Provides Major Victory to Kenya's Indigenous Endorois.' Available at <https://minorityrights.org/landmark-ruling-provides-major-victory-to-kenyas-indigenous-endorois/#:~:text=In%20a%20landmark%20decision%20adopted,from%20their%20ancestral%20lands%20illegal.> (accessed 04 April 2024).

recommendations for the Kenyan government to follow. Although this decision received accolades globally, its implementation by the Kenyan government is yet to be actualised.³⁰⁶ For Magashi, the non-implementation of the decision is one of the main obstacles to the realisation of human rights, particularly the right to development in Africa.³⁰⁷

4.4.2 African Court on Human and Peoples' Rights

The African Court on Human and Peoples' Rights (the African Court) is a continental court established by AU member states to ensure the protection of human and peoples' rights, including the right to development in Africa. It complements the functions of the African Commission on Human and Peoples' Rights.³⁰⁸ The African Court was established pursuant to Article 1 of the Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights,³⁰⁹ adopted by member states of the then OAU in Ouagadougou, Burkina Faso, in June 1998.³¹⁰ The Protocol entered into force on 25 January 2004. To date, 34 member states have ratified the Protocol establishing the Court. Currently, only 8 of the 34 countries have filed the requisite declaration under Article 34(6)³¹¹ of the Protocol, accepting the competence of

³⁰⁶ Esperança 2015: 82.

³⁰⁷ Magashi 2016: 144.

³⁰⁸ On relationship between the African Commission and African Court, Art 2 of the Protocol to the African Charter on the Establishment of the African Court on Human and Peoples Rights provide that 'bearing in mind the provisions of this Protocol, complement the protective mandate of the African Commission conferred upon it by the African Charter.'

³⁰⁹ On the establishment of the African Court, Art 1 of the Protocol to the African Charter on the Establishment of the African Court of Human and Peoples Rights provides that '[t]here shall be established within the Organisation of African Unity an African Court, the organisation, jurisdiction and functioning of which be governed by the present Protocol.'

³¹⁰ The Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights (1998/2004) (Adopted in Ouagadougou, Burkina Faso, on 10 June 1998 and entered into force on 25 January 2004).

³¹¹ On Ratification Art 34(6) of the Protocol to the African Charter on the Establishment of the African Court of Human and Peoples Rights provide that 'at the time of ratification of this Protocol or any time thereafter,

the Court to consider applications filed by individuals and NGOs.³¹² Unlike the African Commission, individuals and NGOs are not entitled to file cases to the African Court if the home state has not made the Article 34(6) declaration. On the other hand, the African Court may allow peoples and NGOs with observer status before the African Commission to directly bring matters before the Court.³¹³ But this is only possible if the state party in question had at the moment the Protocol was ratified, or at any later point in time, declared acceptance of the African Court's competence to entertain communications from individuals and NGOs.³¹⁴ Hailing the establishment of the African Court, Mutua notes that the Court

is a potentially significant development in the protection of rights on a continent that has been plagued with serious human rights violations since colonial rule. The problems of the African human rights system, including the normative weaknesses in the African Charter and the general impotence of its implementing body, the African Commission, may now be addressed effectively and resolved by the establishment of this new adjudicatory body.³¹⁵

Uwazuruike states that Article 27 of the Protocol gives the African Court the authority to issue appropriate rulings to address human and peoples' rights breaches, including the

the State shall make a declaration accepting the competence of the Court to receive case under Art 5(3) of this Protocol. The Court shall not receive petition under Art 5(3) involving State Party which has not made such a declaration.'

³¹² Under Art 3 of the Protocol, the African Court has jurisdiction to deal with all cases and disputes submitted to it regarding the interpretation and application of the Charter, the Protocol and any other relevant human rights instrument ratified by the concerned States. The Court can only deal with cases submitted against Countries that have ratified the Protocol and deposited the Art 34(6) Declaration in cases involving individuals and non-governmental organisations. The case must involve allegations of human rights, and those alleged violations must have taken place in the State concerned after it ratified the Protocol, unless the alleged violations are on-going.

³¹³ Ssenyonjo 2018: 17.

³¹⁴ Uwazuruike 2020: 175.

³¹⁵ Mutua M 1999. 'The African Human Rights Court: A Two-legged Stool?' *Human Rights Quarterly* 342-363.

provision of just compensation or reparations.³¹⁶ While Article 30³¹⁷ requires state parties to the Protocol to guarantee implementation of the judgement and to comply with it within the time frame set by the African Court in any matter in which they are parties.³¹⁸ It is nevertheless clear that states are crucial to the functioning of the African human rights system. However, many of the decisions of the African Commission and the judgments of the African Court have not been complied with by the respondent states, even in light of the African Court's commendable addition. In contrast to the 'recommendations' issued by the African Commission, the African Court's rulings and judgments are final and have binding effect on governments.³¹⁹

In its jurisprudence, the African Court has addressed the right to development in the *Ogiek Community* case.³²⁰ The case dealt with allegations of violations of the Ogiek peoples'

³¹⁶ Art 27 of the Protocol Establishing the African Court also envisages the possibility where 'in cases of extreme gravity and urgency', the Court may adopt provisional measures to 'avoid irreparable harm to persons'.

³¹⁷ Art 30 of the Protocol Establishing the African Court contains requirements for entities eligible to submit cases to the African Court.

³¹⁸ Uwazuruike 2020: 175.

³¹⁹ Uwazuruike 2020: 175.

³²⁰ *African Commission on Human and Peoples' Rights v Kenya* Application 006/2012: (2017).

rights to life,³²¹ property,³²² natural resources,³²³ development,³²⁴ religion,³²⁵ culture³²⁶ and non-discrimination³²⁷ under the African Charter.³²⁸ As with the *Endorois* case, the African Court dealt with a similar set of facts in its decision in the *Ogiek Community* case, which related to the eviction of the Ogiek community from the Mau Forest in Kenya, on the basis that it constituted a reserved water catchment zone on government land.³²⁹ The case was lodged in 2009 by the Peoples' Development Programme and Centre for Minority Rights Development on behalf of the Ogiek community before the African Commission against the Kenyan government. In 2012, the African Commission referred the case to the African Court as it demonstrated serious and mass human rights violations. They requested the African Court to order the rescission of all titles and concessions on the land, and its restitution to the Ogiek peoples to use the land as they

³²¹ Art 4 of the African Charter provide that '[h]uman beings are inviolable. Every human being shall be entitled to respect for his life and the integrity of his person. No one may be arbitrarily deprived of this right.'

³²² Art 14 of the African Charter guarantees that '[t]he right to property shall be guaranteed. It may only be encroached upon in the interest of public need or in the general interest of the community and in accordance with the provisions of appropriate laws.'

³²³ In Art 21 the African Charter states that '[a]ll peoples shall freely dispose of their wealth and natural resources. This right shall be exercised in the exclusive interest of the people. In no case shall a people be deprived of it.'

³²⁴ Art 22 of the African Charter provides that '[a]ll 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.'

³²⁵ Art 8 of the African Charter provides for '[f]reedom of conscience, the profession and free practice of religion shall be guaranteed. No one may, subject to law and order, be submitted to measures restricting the exercise of these freedoms.'

³²⁶ Art 17(1)(2)(3) the African Charter provides that 1. 'Every individual shall have the right to education. 2. Every individual may freely take part in cultural life of his community. 3. The promotion and protection of morals and traditional values recognized by the community shall be the duty of the State.'

³²⁷ In Art 2 of the African Charter, '[e]very individual shall be entitled to the enjoyment of the rights and freedoms recognized and guaranteed in the present Charter without distinction of any kind such as race, ethnic group, colour, sex, language, religion, political or any other opinion, national and social origin, fortune, birth or other status.'

³²⁸ *Ogiek Community* case, Para 10.

³²⁹ *Ogiek Community* case, Para 8.

deem fit, along with compensation for damages and the establishment of a community development fund in favour of the Ogiek peoples.³³⁰ They further requested legislative recognition of the right of the Ogiek peoples to be effectively consulted and to withhold consent with regards to development, conservation or investment projects on their ancestral land.³³¹ The applicants argued that the government had violated the right to development by not allowing the Ogiek people to determine their own development priorities and strategies, to be actively involved in their implementation and to administer it through their own institutions.³³² The Court held that:

The Respondent has violated the Ogieks' right to development by evicting them from their ancestral land in the Mau Forest and by failing to consult with and/or seek the consent of the Ogiek Community in relation to the development of their shared cultural, economic and social life within the Mau Forest.³³³

The Kenyan government on the other hand, contended that the applicants had not shown 'how it has failed in undertaking development initiatives to the benefit of the Ogiek' or how they had been discriminated against or excluded from projects.³³⁴ In May 2017, the African Court delivered its landmark judgment in the case. The Court found the Kenyan government in violation of seven provisions of the African Charter, with the violations amounting to a persistent denial of the Ogiek's land rights and their religious and cultural and hunter-gathering practices.³³⁵ The African Court held that the Kenyan government should not have expelled the Ogiek from their ancestral land against their will and should

³³⁰ *Ogiek Community case*, Para 219.

³³¹ *Ogiek Community case*, Para 43.

³³² *Ogiek Community case*, Para 209.

³³³ *Ogiek Community case*, Para 202.

³³⁴ *Ogiek Community case*, Para 205.

³³⁵ In May 2017, the Committee on the Elimination of All Forms of Racial Discrimination noted its concern in response to reports of ongoing forced evictions that were brought to its attention. The Kenyan government has also announced its plans for the Mau Forest Complex, which would soon become government land and its inhabitants relocated. MRG issued a firm statement at the March 2016 session of the United Nations Human Rights Council on this.

not have deprived them of disposing of the food produced from the land.³³⁶ In doing so, the Court held that the Kenyan government violated their right to land and their right to dispose of the wealth and natural resources.³³⁷ The judges recognised that the evictions made it impossible for the Ogiek to continue their religious practices, which are all linked to the religious sites in the Mau Forest, and it greatly affected their ability to continue their traditions. On top of that, the Kenyan government had not recognised the Ogiek as an indigenous community whereas, they recognised other distinct communities such as the Maasai, and they had denied them special protection available to these other communities.³³⁸ The Kenyan government had therefore, discriminated against the Ogiek and denied their right to freely exercise their religion and culture.

The African Court in making its determination on the right to development, relied on the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP),³³⁹ rather than the jurisprudence of the African Commission in a deviation from its usual practice.³⁴⁰ The Court pointed out that Article 22 of the African Charter should be read in conjunction with Article 23 of the UNDRIP, which 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

³³⁶ In Para 201 of the *Ogiek Community* case, the African Court held ‘that the latter has also violated Article 21 of the Charter since the Ogiek have been deprived of the right to enjoy and freely dispose of the abundance of food produced by their ancestral lands.’

³³⁷ *Ogiek Community* case, Para 200.

³³⁸ *Ogiek Community* case, Para 110.

³³⁹ The United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) was adopted by the General Assembly on 13 September 2007. Available at <https://www.un.org/development/desa/indigenouspeoples/news/2021/09/adoption-of-the-united-nations-declaration-on-the-rights-of-indigenous-peoples-14-years-later/> (accessed 29 March 2024).

³⁴⁰ Boshoff E 2022. ‘Rethinking the Premises underlying the Right to Development in African Human Rights Jurisprudence.’ *Review of European, Comparative and International Environmental Law* 31(1): 27-37, 31.

and social programmes affecting them and, as far as possible, to administer such programmes through their own institutions.³⁴¹

The African Court further recalled that:

The Ogiek have been continuously evicted from the Mau Forest by the Respondent, without being effectively consulted. The evictions have adversely impacted on their economic, social and cultural development. They have also not been actively involved in developing and determining health, housing and other economic and social programmes affecting them.³⁴²

The African Court arrived at the same conclusion as the African Commission in the *Endorois* case, namely, that consultation and participation are core components of the right to development, which the Kenyan government was found to have violated.³⁴³

On June 2022, the African Court further ordered the Kenya government to pay compensation to the Ogiek for the material and moral prejudice they suffered, as well as to take all necessary measures, legislative and otherwise, to identify, delimit and title Ogiek ancestral land and to grant them collective title to such land.³⁴⁴ Where concessions or leases have already been granted over parts of this land, the African Court ordered the Kenyan government to commence consultation between the Ogiek and the other concerned parties to reach an agreement on returning such land or continuing their operations by way of lease or royalty and benefit sharing with the Ogiek.³⁴⁵ The African Court also ordered the Kenyan government to guarantee full recognition of the Ogiek as

³⁴¹ Art 23 of the UNDRIP; *Ogiek* case, Para 209.

³⁴² *Ogiek* case, Para 210; According to Ngang the role of the government as defined in Art 21(4) of the African Charter enjoins state parties to individually and collectively exercise the right to the free disposal of their wealth and natural resources with a view to strengthening African unity and solidarity. Art 22(2) further mandates state parties to take concrete measures individually and collectively, in order to ensure that the right to development is achieved. 'These guarantees create a fiduciary relationship between states and the peoples of Africa, which needs to be given proper legal reasoning.' Ngang 2020:34.

³⁴³ *Ogiek Community* case, Para 211.

³⁴⁴ *African Commission on Human and Peoples' Rights v Kenya (Ogiek Community)* Judgment on Reparations (2022), Para 26.

³⁴⁵ *Ogiek Community* Judgment on Reparations, Para 47.

an indigenous people of Kenya and to take all measures to protect their rights, ensure that they are effectively consulted with respect to all development, conservation or investment projects on the land.³⁴⁶ In enforcing the decisions of the African Court, Ngang asserts that the legally binding decision from the African Court not only requires the Kenyan government to enforce it, but reaffirms that the government's development prerogatives cannot be substituted for or subsumed with the right of African peoples to own and control the natural resources within any given community and as a means of achieving socio-economic and cultural development.³⁴⁷

4.5 CONCLUSION

In this chapter, I have discussed the right to development under the African human rights system. I stress that human rights and the right to development existed in African societies before the formal recognition of human rights putting in place of the relevant institutions that currently make up the African human rights system. I contend that the scope of the right to development has evolved over the years under the African human rights system and has found sources from various legal instruments. It is significant to remember that the legal status of the right to development is much clearer in Africa because the right is recognised by the African system as an enforceable right under international human rights law, because it is expressly enshrined in Article 22 of the African Charter.

The African Commission's decisions in cases like the interstate *DRC v Rwanda and others* case, the *Ogoni* case, the *Endorois* case adjudicated by the African Commission, as well as the *Ogiek Community* case adjudicated by the African Court have all addressed the right to development. The African Commission noted in the *Endorois* case that the right to development is a multifaceted human right that includes aspects of equity, choice, accountability, and transparency, as well as non-discrimination. This was reaffirmed by the African Court in the *Ogiek Community* case. The next Chapter explores the right under the South African legal system.

³⁴⁶ *Ogiek Community* Judgment on Reparations, Para 37 and 39.

³⁴⁷ Ngang 2020: 40.

CHAPTER 5

THE RIGHT TO DEVELOPMENT IN THE SOUTH AFRICAN CONSTITUTIONAL FRAMEWORK

5.1 INTRODUCTION

I have stated in Chapters 3 and 4 that the right to development is essentially an international and national obligation that governments, are responsible for implementing individually and collectively. The national legal systems, therefore, determine the nature, scope, and mode of its application. This brings up significant questions concerning how domestic and international laws interact. In general, Chapters 3 and 4 looked at this relationship. Therefore, this chapter examines the fifth secondary research question formulated as follows: What is the legal status and how to ensure the realisation of the right to development in the South African legal and institutional framework?

South Africa's history and legal system have evolved over time, with the Cape becoming a British colony in 1806¹ and later merged into the independent Union of South Africa in 1910.² The King of England served as the symbolic head of government until 1948 when apartheid became the brutal and radical political ideology.³ During the colonial and apartheid eras, South Africa's legal system lacked respect for human rights and the right development as essential components of the nation's progress, leading to intolerance, brutality, and disregard for human life. This system represents the greatest injustice in human history, characterised by racism, inequality, and violence. It is difficult to imagine

¹ The four colonies were the Cape of Good Hope, Natal, the Orange River Colony and Transvaal.

² Magubane B 1996. *The Making of a Racist State: British Imperialism and the Union of South Africa, 1875-1910*. Africa World Press.

³ De Smith SA 1961. 'The Commonwealth and South Africa.' *University of Malaya Law Review* 3: 167-190.

South Africa's history without colonisation, which involved extensive colonial invasion, and apartheid, which led to the methodical killing of defenceless black people.⁴

The history of colonisation and apartheid in South Africa reveals a complex relationship between human rights and settler colonialism. Dutch immigrants arrived in the 17th century, while British colonisation began in the 19th century.⁵ The colonies that were established and eventually came to be ruled by European settlers are constitutionally preserved in contemporary South Africa, and their descendants continue to be integral to its social and economic fabric.⁶ Looking at the current legal system and the influence of colonialism and apartheid, the main changes in the legal system came about as a result of its interaction with English law and Roman Dutch law.

It is against this background that the analysis presented in this chapter establishes specifically how the South African legal system attempts to put up 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 which has to do with analysing the legality of the right to development in South Africa through statutory means and the creation of pertinent 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 South African legal system.

In response to this overarching question, in section 5.2, I analyse the history of human rights violations in South Africa by examining the impact of colonialism in subsection 5.2.1 and apartheid legislation in subsection 5.2.2. In section 5.3, I investigate the response to and rejection of apartheid supremacy. Followed by section 5.4 which offers analysis on South Africa's legal system under a democratic constitution, followed by subsection 5.4.1, which explores international law and its significance to South African domestic law. The South African position under international law is expanded in 5.4.1.1, which demonstrates South Africa's commitments under international treaties and conventions. Subsection

⁴ I use the concept black to denote all the peoples of South Africa other than those falling into the white group. In this case, Black includes the coloured and Indian peoples of South Africa.

⁵ Sartre JP 2001. 'Colonialism is a System.' *Interventions* 3(1): 127-140.

⁶ Giliomee & Mbenga 2007: 71.

5.4.1.2 discusses customary international law, whereas subsection 5.4.1.3 discusses the African Charter's influence on the South African legal system. In section 5.5, I look at the right to development under the South African Constitution. In subsection 5.5.1, I discuss the constitutional provisions while in subsection 5.5.2, I look at the right to development under domestic legislation and policies, such as the Promotion of Administrative Justice Act (PAJA) in subsection 5.5.2.1 and the NDP in subsection 5.5.2.2. Finally, in subsection 5.5.3, I explore the justiciability of socio-economic rights that are important for the realisation of the right to development. The *Grootboom* case is discussed in subsection 5.5.3.1 and the *Treatment Action Campaign* cases in subsection 5.5.3.2. I chose these two cases from a pool of many cases on socio-economic rights that have a bearing on the right to development.⁷ The *Grootboom* and *TAC* cases are significant in South African jurisprudence and have significantly shaped the interpretation, enforcement, and understanding of socio-economic rights in South Africa. Importantly, they emphasised the justiciability of socio-economic rights, the government's positive obligations, and the need for transformative measures to address historical injustices and inequalities in South Africa. They remain essential references in discussions about constitutional rights, social justice, and the rule of law in South Africa.

5.2 HISTORY OF HUMAN RIGHTS VIOLATIONS IN SOUTH AFRICA

What follows in this section is an understanding of the impact of colonialism and the apartheid legal system on the lives of the oppressed and the deprivation of their human rights and the right to development, which is under consideration in this study. I examine the struggles against human rights violations under the yoke of colonial rule and the unjust apartheid system. There is no attempt to analyse or characterise political systems other than as they affect the legal system and human rights, especially the right to development. The purpose is to lay the foundation upon which the rest of the chapter is constructed. This section of the chapter has relied on academic literature to demonstrate the impact

⁷ *Occupiers of 51 Olivia Rd v City of Johannesburg* 2008 (3) SA 208 (CC); *Residents of Joe Slovo Community, Western Cape v Thubelisha Homes* 2010 (3) SA 454 (CC); *Abahlali baseMjondolo Movement SA v Premier of Province of Kwazulu-Natal* 2010 (2) BCLR 99 (CC).

of colonialism in South Africa and the resultant violation of human rights and more so, the right to development. This section highlights how colonialism has resulted in economic instability, ethnic rivalries, and—above all—violations of human rights and the right to development.⁸ It shows that the impact of colonialism in South Africa has been profound and enduring, shaping the socio-economic and political landscape in significant ways.

5.2.1 Impact of colonialism in South Africa

Colonialism ordinarily involved the dispossession of African peoples of their ancestral lands, which were transformed into European colonies where European settlers lived while maintaining political allegiance to their countries of origin. The process was achieved through domination, which involved the subjugation of one people by another.⁹ According to Horvath, the concepts of dominance and power are intertwined.¹⁰ Thus, dominance, exploitation, and power are associated with colonialism. Besides the general understanding of colonialism, settler colonialism is a particular type of colonialism in which immigrants establish permanent residence on indigenous land and gain authority over it, frequently leading to the uprooting, enslavement, and marginalisation of indigenous peoples.¹¹

According to Loomba, colonialism did not follow the same pattern throughout the world; but it confined the 'original inhabitant and the newcomers into most complex and traumatic relationship in human history.'¹² It implies that colonialism restricts the original citizen and forged complicated relationships that have never been seen before. Kohn describes colonialism as 'practice of domination, which involves the subjugation of

⁸ Ocheni S & Nwankwo BC 2012. 'Analysis of Colonialism and its Impact in Africa.' *Cross-cultural Communication*, 8(3): 46-54, 51.

⁹ Kohn M & Reddy K 2006. 'Colonialism.' *Stanford Encyclopaedia of Philosophy*. Available at <https://plato.stanford.edu/index.html>. (accessed 18 May 2024).

¹⁰ Horvath RJ 1972. 'A Definition of Colonialism.' *Current Anthropology* 13(1): 45-57, 46.

¹¹ Ross R 2016. 'Settler Colonialism in South Africa, 1652–1899.' In *The Routledge Handbook of the History of Settler Colonialism*, 209-222.

¹² Loomba A 2002. *Colonialism/Postcolonialism*. Routledge, 7.

one people to another.¹³ Ocheni and Nwankwo concur that colonialism is the direct and total hegemony of one nation over another based on the possession of state authority by a foreign power.¹⁴ Sartre further argues that colonialism represented a deliberate and systematic form of exploitation.¹⁵ In fact, some scholars contend that colonialism is an outward manifestation of imperialism. Although it is a common conception that all imperialism is colonialism, not all colonialism is imperialism.¹⁶

For thousands of years, the San and Khoikhoi people were the first inhabitants in South Africa and both tribes made South Africa their home.¹⁷ These were the first native people which Giliomee and Mbenga argue, had the first encounter with Europeans.¹⁸ European colonisation of South Africa began during the era of exploration, when the Portuguese explorer, Henry the Navigator sought out new trade routes on the southern coast of India. Because of the Ottoman Empire's authority, they were unable to access new markets in the east.¹⁹ For this reason, in 1488, the Portuguese reached the southern portion of Africa

¹³ Kohn M 2012. 'Colonialism.' *Stanford Encyclopaedia of Philosophy*. Available at <http://plato.stanford.edu/entries/colonialism/> (accessed 18 May 2024).

¹⁴ This means colonialism strived through practices of domination and dispossession of land, customs and traditional history This takes places in two folds, (1) through political domination and (2) exploitation of the colonised country; Ocheni 2012:46.

¹⁵ Sartre 2001: 127; Ypi L 2013. 'What's Wrong with Colonialism.' *Philosophy and Public Affairs*, 41(2): 158-191, 162.

¹⁶ Lenin defines imperialism as a global system of capitalist exploitation and extraction rather than a specific metropole's domination of its colonies. Many African and Asian leaders adopt this new definition of imperialism and recast their own fight for national independence as *anticolonialism*, inside a larger international anti-imperialist struggle, for further reading see Lenin V 1917. *Imperialism: The Last Stage of Capitalism*. London: Communist Party of Great Britain; (published in English in 1926); Ocheni 2012:46.

¹⁷ Adhikari M 2010. 'A Total Extinction Confidently Hoped For: The Destruction of Cape San Society under Dutch Colonial Rule, 1700-1795.' *Journal of Genocide Research* 12(1&2): 19-44, 21; Meyer A 2012. 'Suid-Afrika se Oerverlede.' In: Pretorius F (ed) *Geskiedenis van Suid-Afrika: Van voortye tot vandag.* 17–36, 30.

¹⁸ Giliomee & Mbenga 2007: 19.

¹⁹ Dimkpa P 2015. 'Colonialism, Independence and Underdevelopment in Africa: The Pre-eminence and Blame Game.' *Centre for African Studies – University of Dalarna*, 1-25, 11; European and African

and named the newly discovered territory the 'Cape of Good Hope' which now is Cape Town.²⁰

In 1652, European powers arrived in the southern hemisphere through the Dutch trade company, Vereenigde Oostindische Compagnie (VOC), and eventually the British Empire, marking the beginning of colonialism.²¹ The Afrikaners, a new group, settled on fertile land and resources.²² The arrival of European settlers led to forced work and slavery, robbed the indigenous Khoikhoi pastoralists of their ancestral lands.²³ Because of the European skewed governance, from the foundation of Cape Town in 1652 until 1814, the Dutch entered into conflicts with the native San population. Because of land expropriation, massacres, forced labour, and cultural oppression that came with colonial control, San society in the Cape Colony was virtually destroyed during the eighteenth and nineteenth centuries.²⁴ The atrocities persisted until the end of the apartheid era in 1994. Many white South Africans maintained their property rights during this period, but black

interaction from the 15th through the 18th century Available at <https://www.britannica.com/place/Southern-Africa/European-and-African-interaction-in-the-19th-century> (accessed 14 May 2024).

²⁰ While most of the colonial 'scramble for Africa' took place in the nineteenth century, European domination of South Africa began almost two centuries earlier. Cape Town was initially settled by the Dutch East India Company to resupply ships heading to and from Dutch colonies in Indonesia for further reading see Suveren D 2017. 'The Colonization of South Africa and the British Impacts on Development, 6; O'Neil PH and Fields K 2015. *Cases in Comparative Politics*. WW Norton and Company, 678–679.

²¹ Mitchell LJ 2007. 'This is the Mark of the Widow: Domesticity and Frontier Conquest in Colonial South Africa', *Frontiers* 28(1&2): 47–76, 49.

²² Beck RB 2013. *The History of South Africa*. Bloomsbury Publishing USA, 15; Fairweather JG 2006. *A Common Hunger: Land Rights in Canada and South Africa*. University of Calgary Press, 284.

²³ Piotrowski A 2019. 'Colonialism, Apartheid, and Democracy: South Africa's Historical Implications on the Land Reform Debate.' *Journal of Interdisciplinary Undergraduate Research* 11(1): 4, 53-71, 56-57; Beck RB 2013:15; Giliomee & Mbenga 2007:6.

²⁴ With colonialism, which began in South Africa in 1652, came the slavery and forced labour model. This was the original model of colonialism brought by the Dutch in 1652, and subsequently exported from the Western Cape to the Afrikaner Republics of the Orange Free State and the Zuid-Afrikaansche Republiek. Many South Africans are the descendants of slaves brought to the Cape Colony from 1653 until 1822; Adhikari M 2010. 'A Total Extinction Confidently Hoped For: The Destruction of Cape San Society under Dutch Colonial Rule, 1700–1795.' *Journal of Genocide Research*, 12(1-2): 19-44.

South Africans were relegated to smaller, disproportionately sized plots of land.²⁵ Ashukem and Ngang strengthens this argument by illustrating that persistent displacement of local communities from their lands is adversative to the ability to develop socially, economically and culturally, with simultaneous negative implications on development prospects for subsequent generations.²⁶ Ramutsindela argues that South Africa's land policies were influenced by racism, labour needs, political geography, and deal-making.²⁷ European monopoly of raw minerals led to racial control over natives, influencing property ownership and land allocation.

In order to maintain control over the colonies in South Africa, the European colonists adopted a set of legislations, one of which was the Union of South Africa Act.²⁸ In 1910, the Union of South Africa adopted its first Constitution.²⁹ This gave rights to the white minority but took away the right to vote from the majority of black South Africans.³⁰ Racial discrimination received an official sanction; the racial policies were prompted by the European settlers' fears of competition from the blacks and the growth of black class consciousness. This was the formal start of the nightmare for the vast majority of black

²⁵ Viljoen R 2001. 'Aboriginal Khoikhoi Servants and their Masters in Colonial Swellendam, South Africa, 1745–1795', *Agricultural History* 75(1): 28–51.

²⁶ Ashukem & Ngang 2022: 404-405.

²⁷ McCusker, Moseley & Ramutsindela 2015:14; Beck 2013:15; Ntsebeza L 2005. 'Democracy Compromised: Chiefs and the Politics of the Land in South Africa.' In: *Democracy Compromised*. Brill, 14.

²⁸ The South Africa Act 1909 was an act of the Parliament of the United Kingdom that created the Union of South Africa out of the former Cape, Natal, Orange River, and Transvaal colonies.

²⁹ The delegates drew up a constitution that would, subject to some amendments by the British government, become the South Africa Act, which was South Africa's constitution between 1910 and 1961, when the country became a republic under the Constitution of 1961.

³⁰ In 1902, the Treaty of Vereeniging – signed by Boer and British leaders – ends the Anglo-Boer War, which began in 1899. This is followed in 1908 by a national convention that represents the exclusive interests of whites and which negotiates South Africa's first constitution. This, the South Africa Act, is passed by the British House of Commons, despite petitions and protests from the African majority. The inauguration of the Union of South Africa follows soon afterwards, on 31 May 1910, and marks the disenfranchisement of black people.

South Africans. The Native Labour Act³¹ was created in 1911 to bind African labourers to labour contracts that they could not terminate.

One of the earliest pieces of segregationist legislation passed by the first all-white Parliament of the still-developing Union of South Africa, is the Natives Land Act of 1913,³² a monumental piece of legislation that is now polarising South Africa's land reform debate. The Act significantly curtailed the land rights of black people and led to noticeable inequality in land ownership among the black people. According to Walker the Act served as the foundation for the twentieth-century separation of South Africa into affluent white landowners and native communities living in poverty.³³ On their part, Modise and Mtshiselwa opine that the Act not only deprived black people of their birth right to land but rather, also engineered the poverty that is still prevalent in the country to this day.³⁴ The Act reached its centennial in 2013, at which time the South African government posted on their website that the Natives Land Act of 1913, 'opened the door for white ownership of 87 percent of land, leaving black people to scramble for what was left.'³⁵ As stated in *Land Divided, Land Restored*, the Natives Land Act of 1913 is:

³¹ Native Labour Regulation Act, 1911; In the same year, black people were denied of having membership at the church. This was realised thanks to Dutch Reformed Act of 1911, see Dutch Reformed Churches Union Act No 23 of 1911.

³² Historically the land question dates back to the colonial era, sanctioned by the European 'scramble for Africa' adopted at the Berlin Conference of 1885, the Native Land Act was just a formality. The Act became law on 19 June 1913 limiting African land ownership to 7 percent and later 13 percent through the 1936 Native Trust and Land Act of South Africa. The Act restricted black people from buying or occupying land except as employees of a white master. It opened the door for white ownership of 87 percent of land, leaving black people to scramble for what was left.

³³ Walker C 2017. 'The Land Question in South Africa: 1913 and Beyond.' In *Oxford Research Encyclopedia of African History*, 2.

³⁴ Modise L & Mtshiselwa N 2013. 'The Natives Land Act of 1913 Engineered the Poverty of Black South Africans: A Historico-Ecclesiastical Perspective.' *Studia Historiae Ecclesiasticae* 39(2): 359-378, 359.

³⁵ Walker 2017: 2.

the fundamental cause of land dispossession in South Africa.... At the stroke of a pen, the majority of the population were cruelly robbed of their land, the source of their food and the site of their families' homes for generations. Thousands were evicted and many died.³⁶

The ultimate measure deprived black people of their birth right in their own country by 'restricting African land purchases, leases, and any other such arrangements outside of land specifically reserved for Africans.'³⁷ Due to the forcible occupation of their land during the colonial era, local and indigenous groups in South Africa and other African countries that accommodated a large population of white settlers continue to be dispossessed of their land.³⁸ After the dissolution of the Union of South Africa and the establishment of the Republic of South Africa in 1961, apartheid policies were further entrenched, leading to extreme racism and segregation.³⁹ Afrikaner nationalists erased inconsistencies and promoted complete segregation, excluding the majority black people.

5.2.2 Legislation under apartheid

Apartheid, a political and legal system established in South Africa by the minority white Nationalist Party to maintain white supremacy, has been an issue, with significant human rights implications since its beginning in 1948.⁴⁰ After the victory of the Nationalist Party and the formal establishment of the apartheid political system, race became the

³⁶ Cousins B & Walker C (eds) 2015. *Land Divided, Land Restored: Land Reform in South Africa for the 21st Century*. Jacana, 24.

³⁷ Moseley & Ramutsindela 2015: 49.

³⁸ de Man A & Ngang CC 2021. 'Colonial Extraction of Natural Resources and the Impact on the Right to Development in Africa.' In Ngang CC & Kanga SD (eds) *Natural Resource Sovereignty and the Right to Development in Africa*, Routledge: London/New York, 104-120,109. Also, it is at this time, white colonialists took control of skilled mining practice. Africans were restricted from skilled spectrum and were only allowed to semi-skilled or unskilled labour in the mines. The Mines and Workers Act of 1912 guaranteed the limitation of job opportunities in South Africa.

³⁹ Moseley & Ramutsindela 2015: 57.

⁴⁰ Mosala SJ, Bain EG & Venter JCM 2019. 'The National Democratic Revolution (NDR) in South Africa: An Ideological Journey.' *Koers: Bulletin for Christian Scholarship* 84(1): 1-16.

overarching issue in South Africa.⁴¹ Apartheid was influenced by theological conceptions⁴² and Nazi philosophy.⁴³ It viewed white and black South Africans as distinct, with white culture influencing black identity.⁴⁴ Interestingly, the apartheid system was established at the same time with the adoption of the UDHR.⁴⁵

Apartheid, properly translated as 'apartness/separateness,'⁴⁶ was developed and built in direct opposition to the principles underpinning the UDHR and was declared a crime against humanity by the United Nations in 1976.⁴⁷ The system violated the most

⁴¹ After its victory the National Party rapidly consolidated its control over the state and in subsequent years won a series of elections with increased majorities. Parliament removed coloured voters from the common voters' rolls in 1956. By 1969 the electorate was exclusively white: Indians never had any parliamentary representation, and the seats for white representatives of Blacks and Coloureds had been completely abolished.

⁴² In response to Christianisation of South Africa, Sindane opines in his PhD thesis that '[i]n the name of God, missionaries actively worked towards the destruction of pre-colonial societies and their replacement by new Christian societies in the image of Europe. To find acceptance into the new colonial polity, colonised and conquered people were compelled to jettison their pre-colonial selves and embrace Eurocentric subjectivity, thus doing away with epistemic systems such as reverence/deference to Abezimu/Badimo.'

⁴³ Bouwer W 2021. 'National Socialism and Nazism in South Africa: The Case of LT Weichardt and his Greyshirt Movements', 1933-1946.

⁴⁴ Mlambo N 2024. 'Chapter the Role of Black Theology in Liberating Black Theology: *Emerging South African Voices*, 60.

⁴⁵ Glendon 1998: 1153-1190.

⁴⁶ Apartheid, in its original context, was founded on the dominance of one minority (Whites) over an indigenous majority (Blacks). It is a racial philosophy with roots in South Africa. Apartheid is commonly understood as a social and political regime of segregation and discrimination against a majority, for further reading see Ellis D 2019. 'Apartheid.' *Israel Studies* 24(2), 63-71, 63; Mhlauli MB, Salani E & Mokotedi R 2015. 'Understanding Apartheid in South Africa through the Racial Contract.' *International Journal of Asian Social Science* 5(4): 203-219.

⁴⁷ The 1973 United Nations International Convention on the Suppression and Punishment of the Crime of Apartheid was the first binding international treaty which declared the crime of apartheid and racial segregation under international law. It was adopted by the General Assembly on 30 November 1973 and came into force on 18 July 1976.

fundamental principles of international human rights law⁴⁸ and policy, combining state-sponsored authoritarianism, militarism, racial and gender inequality, and economic exploitation. It was a system in which the minority white population, which accounted for approximately 12% of South Africa's total population, unilaterally determined (and benefited from) the country's wealth and resources.⁴⁹ In this sense, Dugard and Reynolds correctly capture apartheid as:

a loaded term saturated with history and emotion. It conjures up images and memories of discrimination, oppression, and brutality; indulgence, privilege, and pretension; racism, resistance, and, ultimately, emancipation. All of which come to us through the history of apartheid in South Africa.⁵⁰

For it to work, institutions were constructed and maintained by a legal architecture and infrastructure that influenced every social, political, and economic element of daily life. It violated the black population's fundamental human rights and the right to development. Mukaddam posits that the system was established and maintained through racially discriminatory legislation.⁵¹ The apartheid laws effectively consolidated the patterns of economic, political, and social imbalance between white and black South Africans that had existed prior to the legalisation of apartheid in 1948.⁵²

⁴⁸ The principles underpinning human rights are that human rights are universal and inalienable, indivisible, interdependent and interrelated. They are universal because everyone is born with and possesses the same rights, regardless of where they live, their gender or race, or their religious, cultural or ethnic background.

⁴⁹ Marutlulle NK 2022. 'Critical analysis of the role played by apartheid in the present housing delivery challenges encountered in South Africa.' *Africa's Public Service Delivery and Performance Review*, 10(1), 1-12.

⁵⁰ Dugard J & Reynolds J 2013. 'Apartheid, International Law, and the Occupied Palestinian Territory.' *European Journal of International Law* 24(3): 867-913, 867-868.

⁵¹ Mukaddam F 2024. 'South Africa's History of Colonialism and Apartheid.' In Mukaddam F (ed) *Muslim Women between Community and Individual Rights: Legal Pluralism and Marriage in South Africa* Springer Nature Switzerland: Cham, 45-62.

⁵² Mukaddam 2024: 46-60.

As previously established, British colonialism and imperial imperatives laid the stage for dispossession and disenfranchisement of Africa through various laws and policies. In Patterson's account, these laws, including the Land Act of 1913 and the Native Trust and Land Act of 1926, designated only 13% of South Africa's land mass for African occupation and ownership, depriving the majority of South Africans of the right to occupy and own most of the country's land.⁵³ The laws served to meet the needs of various sectors of the economy (particularly mining), which gave way for the exploitation of African labour. By taking land away from the African population and levying a series of taxes on those who owned a few sparse parcels of land, as Ngcukaitobi put it in '*The Land is Ours*', was to ensure a steady supply of labour to South Africa's mines and factories in the urban centres.⁵⁴

Apartheid racist legislations upheld white supremacist values at the expense of black people's human rights and opportunity for the right to development. As an illustration, the Population Registration Act of 1950,⁵⁵ which divided South Africans along racial lines, served as the foundation of apartheid. With racial perks and privileges arranged in a hierarchy, the Population Registration Act permitted racial segregation of the South African population. Erasmus and Ellison provide that the classification was based on appearance, general acceptance, and racial descent.⁵⁶ Other segregationist laws included among others, the Prohibition of Mixed Marriages Act of 1949,⁵⁷ which forbade marriages between white and black people. The Immorality Act of 1950 outlawed sexual

⁵³ Patterson 2003: 13.

⁵⁴ Apartheid's policy of separate development in South Africa, which included constitutional independence and self-determination for various homelands, led to a lack of rights for male African migrant workers, resulting in them living in cities without enforceable legal rights; Ngcukaitobi T 2018. *The Land is Ours: Black Lawyers and the Birth of Constitutionalism in South Africa*. Penguin Random House South Africa.

⁵⁵ Population Registration Act 31 of 1950.

⁵⁶ The racial classification included White, Indian, Coloured (further subdivided into several categories), and African (separated into several different ethnic groups). In disputed cases of racial identity, a race classification board made the final decision. For further reading see Erasmus Y & Ellison GT 2008. 'What can we Learn about the Meaning of Race from the Classification of Population Groups during Apartheid Research in Action.' *South African Journal of Science* 104(11): 450-452.

⁵⁷ Prohibition of Mixed Marriages Act 55 of 1949.

intercourse between whites and black people.⁵⁸ The Group Areas Act of 1950⁵⁹ designated residential areas for the various racial groups as articulated in the Population Registration Act. The Promotion of Self-Government Act of 1959,⁶⁰ provided for division of the 13 percent of South Africa's land mass designated to the black people, into self-governing Bantustans or homelands which perpetuated 'separate development,'⁶¹ many of them not of contiguous land mass but scattered throughout the country.⁶² The Bantu Education Act of 1953⁶³ established an educational system that prepared Africans for an inferior status in South Africa's labour hierarchy.⁶⁴

Not only socio-economic rights and the right development were violated, but also civil and political rights. Because the laws included political laws such as the Suppression of Communism Act of 1950,⁶⁵ the Terrorism Act of 1967⁶⁶ under which Nelson Mandela was regarded as a terrorist,⁶⁷ the Riotous Assemblies and Suppression of Communism Act 15 of 1954,⁶⁸ and the Unlawful Organisations Act of 1960.⁶⁹ The arrest and detention of those

⁵⁸ Immorality Act 21 of 1950.

⁵⁹ Group Areas Act 41 of 1950.

⁶⁰ Promotion of Self-Government Act 46 of 1959.

⁶¹ Twala C & Ndlovu AS 2024. 'Dangling the Land as a Carrot': The Bantustans and the Territorial Extension under the Apartheid Regime in South Africa.' 1-16, 6-10.

⁶² Nyambi O & Makombe R 2019. 'Beyond Seeing QwaQwa, "Homelands", and "Black States": Visual Onomastic Constructions of Bantustans in Apartheid South Africa.' *African Studies Quarterly* 18(4): 1-20, 2. Phillips L 2017. 'History of South Africa's Bantustans.' In *Oxford Research Encyclopedia of African History*; Tsawu S 2022. 'Traditional authorities and co-management of protected areas in South Africa: The case of Dwesa-Cwebe Nature Reserve in the Eastern Cape.

⁶³ Bantu Education Act 47 of 1953.

⁶⁴ Moagi AL & Makgakge D 2023. 'Decolonising the curriculum within Higher Education in South African universities: How #RhodesMustFall had risen?' *Journal of African Education* 4(1): 1.

⁶⁵ Suppression of Communism Act 45 of 1950.

⁶⁶ Terrorism Act 83 of 1967; Dlamuka M 2021. 'Understanding Harry Gwala's Radicalisation, Armed Struggle and Trials, between 1960 and 19801.' *Southern African Humanities* 34(1): 137-174.

⁶⁷ Gupta DK 2020. *Understanding Terrorism and Political Violence: The Life Cycle of Birth, Growth, Transformation, and Demise*. Routledge.

⁶⁸ Riotous Assemblies and Suppression of Communism Act 15 of 1954.

⁶⁹ Unlawful Organisations Act 34 of 1960.

deemed to be political opponents of the apartheid government, with or without a valid warrant, was permitted by all of these laws in one form or another.⁷⁰

The range of apartheid legislation, individually or in combination, resulted in a widespread pattern of human rights violations. In fact, the list of human rights violations committed under apartheid is inexhaustive. In combination, they include violations of the right to human dignity; the right to life, liberty, and security; the right to equality; the right not to be held in slavery and servitude; the right to a fair trial; the right to freedom of movement; the right to asylum and nationality; the right to own property; the right to freedom of association; and the right to marriage and family, as well as a vast range of socio-economic and cultural rights, including the right to development.⁷¹ The idea of the right to development as we know it today was not formalised until later, yet several aspects of the right to development were grossly violated through other rights. The right to development is multifaceted and composite, encompassing economic, social, cultural, political, environmental, global, and legal dimensions. Thus, violation of the enlisted rights under the apartheid system violated the right to development.⁷² For example, apartheid's racially biased development policies largely favoured the white minority, while the black majority endured systematic discrimination and marginalisation. Economic development efforts predominantly benefited the white minority, who wielded disproportionate power and wealth in society. This was accomplished through resource allocation, which harmed the black community. For example, the apartheid government allocated resources

⁷⁰ For the modus operand of a parliamentary supremacy see United Kingdom Parliamentary Privilege First Report. Available at <https://publications.parliament.uk/pa/jt199899/jtselect/jtpriv/43/4306.htm> (accessed 5 June 2024).

⁷¹ The rights that I have mentioned are covered in various international, regional and domestic instruments such as Universal Declaration of Human Rights, International Covenant on Civil and Political Rights, International Covenant on Economic, Social and Cultural Rights, the African Charter on Human and Peoples Rights and South African Constitution among other. See Liebenberg S 2000. 'Human Development and Human Rights: South African Country Study.' *Human Development Report* for further reading.

⁷² Centre for Development and Human Rights, 2004. *The Right to Development: A Primer*. Sage.

unequally, prioritising white communities over black communities in areas such as land, education, healthcare, and infrastructure.⁷³

This demonstrates how the apartheid government actively curtailed black South Africans' access to quality education and skills development. Zungu professes that through the Bantu Education Act, educational opportunities were racially divided, with black students receiving inferior education, limiting their capacity to acquire the skills required for socio-economic advancement.⁷⁴ Moreover, black people faced considerable impediments to economic engagement and entrepreneurship during apartheid. The discriminatory laws and regulations hampered their ability to own land, start enterprises, and obtain credit, limiting economic progress and prolonging cycles of poverty.⁷⁵

5.3 RESPONSE TO, AND REJECTION OF THE APARTHEID SYSTEM

In response to these grave human rights violations, widespread acts of civil disobedience and mass protests were organised in opposition to the oppressive and unjust apartheid regime. Many facets of South African society strongly opposed the apartheid government. Large-scale demonstrations, marches, and acts of civil defiance against apartheid practices were seen during the Defiance Campaign in the 1950s⁷⁶ and the Soweto

⁷³ Kon ZR & Lackan N 2008. 'Ethnic Disparities in Access to Care in Post-apartheid South Africa.' *American Journal of Public Health* 98(12): 2272-2277; Monama SA, Mokoele NJ & Mokgotho KD 2022. 'South African Spatial Planning Fragmentation: Repealing the Apartheid Planning Imprint.' *International Journal of Entrepreneurship* 26: 1-11.

⁷⁴ Zungu BP 2022. 'Socio-Economic and Academic Challenges faced by Black Undergraduate Students from Disadvantaged backgrounds at the Wits School of Education.' *Johannesburg: University of the Witwatersrand*, 118-139.

⁷⁵ Modiri JM 2015. 'Law's Poverty.' *Potchefstroom Electronic Law Journal* 18(2): 223-273, 229; Smith DM 2023. *Living under Apartheid: Aspects of Urbanization and Social Change in South Africa*. Taylor and Francis.

⁷⁶ On 26 June 1952, a campaign to secure the repeal of six unjust laws was launched by a Joint Planning Council, composed of leaders of the African National Congress (ANC), the South African Indian Congress (SAIC), and the Franchise Action Council (FrAC), an ad hoc organization formed to fight against the removal

Uprising in 1976.⁷⁷ The egregious human rights violations suffered by the majority of South Africans, blacks in particular at the hands of the apartheid government led to a systematic campaign by the UN to outlaw the minority white government; and in 1976, with the passage of the Convention on the Suppression and Punishment of the Crime against Humanity, apartheid was declared a 'crime against humanity.'⁷⁸ On Schaack's account, crimes against humanity include 'acts of murder, assault, rape, or unlawful detention.'⁷⁹ Article II of the Convention on the Suppression and Punishment of the Crime against Humanity characterised crime against humanity as 'inhuman acts committed for the purpose of establishing and maintaining domination by one racial group of persons over any other racial group of persons and systematically oppressing them.'⁸⁰ Article II(b) goes further and provide that:

of the Coloured vote. For further reading see Hirson B 1988. 'The Defiance Campaign, 1952: Social Struggle or Party Stratagem. *Searchlight South Africa* 1(1): 70-102.

⁷⁷ The Soweto Uprising took place on 16 June 1976 in Soweto and spread countrywide and profoundly changed the socio-political landscape in South Africa. Events that triggered the uprising can be traced back to policies of the Apartheid government that resulted in the introduction of the Bantu Education Act in 1953. This happened following the banning of major opposition movements in South Africa and the incarceration of Nelson Mandela and other political figures. The police's shooting of hundreds of thousands of peaceful protesting students in 1976 marked a turning point in the country's protest politics regarding the mandatory teaching of Afrikaans, the language of the ruling class. This demonstration, which took place in a vast African township south of Johannesburg expanded throughout the country and started a trend of civil defiance and protest that persisted until Nelson Mandela was freed in 1990. For further reading see Ndlovu SM 2006. 'The Soweto Uprising.' *The Road to Democracy in South Africa* 2: 1970-1980.

⁷⁸ International Convention on the Suppression and Punishment of the Crime of Apartheid adopted 1974 (entered into force in 1976).

⁷⁹ Van Schaack B 1998. 'The Definition of Crimes Against Humanity: Resolving the Incoherence.' *Columbia Journal of Transnational Law* 37: 787-850, 789-795.

⁸⁰ Art II of the Convention provide that policies and practices of racial segregation and discrimination as practised in southern Africa, shall apply to the following inhuman acts committed for the purpose of establishing and maintaining domination by one racial group of persons over any other racial group of persons and systematically oppressing them: (a) Denial to a member or members of a racial group or groups of the right to life and liberty of person (b) Deliberate imposition on a racial group or groups of living conditions calculated to cause it's or their physical destruction in whole or in part.'

Any legislative measures and other measures calculated to prevent a racial group or groups from participation in the political, social, economic and cultural life of the country and the deliberate creation of conditions preventing the full development of such a group or groups, in particular by denying to members of a racial group or groups basic human rights and freedoms, including the right to work, the right to form recognized trade unions, the right to education, the right to leave and to return to their country, the right to a nationality, the right to freedom of movement and residence, the right to freedom of opinion and expression, and the right to freedom of peaceful assembly and association.⁸¹

In concurrence, the International Criminal Court reiterated the UN position when it published the *Elements of Crimes*, and vehemently stated what constitute a crime against humanity in Article 7.⁸² It states that crimes against humanity ‘are among the most serious crimes of concern to the international community as a whole.’⁸³ The UN declaration of apartheid as a crime against humanity played a major role in spearheading the demise of apartheid, and in the process created new norms of international law regarding the eradication of racism and apartheid (strong elements of racism are still prevalent in democratic South Africa).⁸⁴ The UN published many documents on the abolition of

⁸¹ Art II(b) of the Convention on the Suppression and Punishment of the Crime of Apartheid.

⁸² Art 7 of the International Criminal Court.

⁸³ Since Art 7 pertains to international criminal law, its provisions, consistent with Art 22, must be strictly construed, taking into account that crimes against humanity as defined in Art 7 are among the most serious crimes of concern to the international community as a whole, warrant and entail individual criminal responsibility, and require conduct which is impermissible under generally applicable international law, as recognized by the principal legal systems of the world. Available at <https://www.icc-cpi.int/sites/default/files/Publications/Elements-of-Crimes.pdf> (accessed 13 June 2024).

⁸⁴ Modiri posits that ‘racialised capitalism and structural inequality that defined colonialism and apartheid continues to persist in “post”-apartheid South Africa’ Modiri 2015:224; For example, white arrogance manifested itself when the late former apartheid president FW de Klerk denied apartheid was a crime against humanity, in this way he was denying the historical injustice done to black South Africans and therefore perpetuating continua’s racism. Watched at <https://www.youtube.com/watch?v=BmE57LbH3qU> (accessed 13 June 2024).

apartheid since 1946 to the official end of apartheid in 1994⁸⁵ following the Indian government's official complaint to the General Assembly over the plight of Indians in South Africa.

After the first General Assembly resolution was adopted in 1952, annual reports were issued highlighting the apartheid government's persistent violations of international law. Specifically, it was believed that the apartheid government's conduct against its citizens violated international peace and security.⁸⁶ The General Assembly issued a resolution in 1962⁸⁷ and in subsequent years urging all governments to take action against the apartheid regime. Specifically, there was a call for a boycott of the South African government, which included cutting diplomatic ties, barring South African ships from entering ports, refusing to land South African aircrafts, and boycotting the import and sale of South African goods.⁸⁸ The General Assembly declared in 1974⁸⁹ that the South African delegation should not be allowed to participate in General Assembly. By far, the most significant resolution on South Africa was adopted in 1975 by the General Assembly which articulated the illegitimacy of the South African apartheid government and recognised the liberation movements (such as the ANC, PAC and others) as legitimate

⁸⁵ UN General Assembly, Treatment of People of Indian origin in the Union of South Africa, A/RES/719, UN General Assembly, 11 November 1953. Available at <https://www.refworld.org/legal/resolution/unga/1953/en/7539> (accessed 14 June 2024).

⁸⁶ Andrews 2009: 481-491.

⁸⁷ On 6 November 1962, the General Assembly requested member states to take specific measures to bring about the abandonment of apartheid, including breaking of diplomatic, trade and transport relations. It also established a Special Committee to follow developments and report to the General Assembly and the Security Council.

⁸⁸ Stevens S 2016. *Boycotts and Sanctions against South Africa: An International History, 1946-1970*. Columbia University. 176-227.

⁸⁹ In 1974, the General Assembly decided by 98 votes to 23, with 14 abstentions not to accept the credentials of the representatives of South Africa. Similarly, the General Assembly called for the review of the relationship between the United Nations and South Africa in the light of the constant violation by South Africa of the principles of the Charter and the Universal Declaration of Human Rights.

and authentic representatives of the South Africa's population.⁹⁰ The same body also demanded a boycott of South Africa in sports in 1985.⁹¹

According to Zunes, as the UN and the international community worked to undermine the legitimacy of the apartheid regime, the exiled liberation movement and various opposition groups within South Africa such as churches, trade unions, and other civic associations,⁹² launched coordinated efforts to topple the government. In fact, the resistance movement has been called 'possibly the largest grassroots eruption of diverse non-violent strategies in a single struggle in human history.'⁹³ The campaigns, which included both domestic resistance and international solidarity, was mainly effective in focusing its attacks on the weaker areas of the South African state rather than fighting it where it was strongest.

In response, and through a new constitution the apartheid government co-opted unequal rights for Indians and some other people of colour in a tricameral parliament⁹⁴ that was

⁹⁰ General Assembly adopted Resolution 3411 C (XXX) proclaiming 'that the United Nations and the international community have a special responsibility towards the oppressed people of South Africa and their liberation movements, and towards those imprisoned, restricted or exiled for their struggle against apartheid.'

⁹¹ In 1985, calls to boycott South African sport intensified at the International Conference on Sports Boycott against South Africa, UNESCO House, Paris, organised by the Special Committee against Apartheid in cooperation with the Supreme Council on Sports in Africa and the South African Non-Racial Olympic Committee.

⁹² Zunes S 1999. 'The Role of Non-violent Action in the Downfall of Apartheid.' *The Journal of Modern African Studies* 37(1): 137-169, 138-145; Limb P 2008. 'The Anti-Apartheid Movements in Australia and Aotearoa/New Zealand. *The Road to Democracy in South Africa*, 3(Part II), 910-13, 907.

⁹³ Wink IW 1987. *Violence and Nonviolence in South Africa: Jesus' Third Way*. Philadelphia: New Society Publisher, 4.

⁹⁴ Inaugurated to allow for parliamentary participation for Coloureds and Indians in one of three different chambers, a three-tiered assembly was meant to improve and reform the Whites-only representation that was in place during the last ten years of Apartheid. The process represented Indians and Coloureds in an inadequate and racialized manner, and it was intended to dislodge the two groups from an alliance with African nationalists and other anti-Apartheid forces that were demanding authentic democracy and equal rights for all. Nevertheless, this apparent attempt to broaden political representation excluded Black Africans. For a further reading see du Pisanie A & James WG 1987. '*End of a "New Deal": Contradictions of Constitutional Reform*. Lynne Rienner Publishers.

imposed unilaterally by the apartheid government in 1983, which however, excluded black people from the legislative framework.⁹⁵ A state of emergency imposed by the apartheid government in 1985 was extended until 1989. South Africa become practically ungovernable by the early 1990s, with violence becoming a way of life.⁹⁶ The most severe violence took place in the province of KwaZulu-Natal, where fighting between ANC supporters and Inkatha Freedom Party supporters—a political party that had full support from the apartheid government—claimed about ten thousand lives over the course of ten years.⁹⁷

Protests in North America, Europe, Australia, portions of Asia,⁹⁸ and elsewhere intensified, demanding the end of apartheid and the release of Nelson Mandela and other political prisoners. Global anti-apartheid activists and South Africa's political opposition came together as a result of these activities, setting the stage for the ultimate release of Nelson Mandela from prison in 1990⁹⁹ and the release of other prominent political personalities starting in the 1980s. Together, these efforts made it possible for exiles to return to South Africa and for a multiparty negotiation forum to be established to facilitate the country's transition from apartheid to a constitutional democracy.¹⁰⁰ The rejection of apartheid was a long and hard-fought struggle, combining internal resistance, international pressure, legal challenges, and negotiated political transitions. It stands as

⁹⁵ Umoh SU 2023. 'Trade of Proportional Representation and Party Systems in South Africa: South African Parliament.' In *Insights and Explorations in Democracy, Political Unrest, and Propaganda in Elections*, IGI Global, 143-160.

⁹⁶ Nelson Mandela Foundation. Between State Emergency: Photographers in Action 1985-1990. Available at https://www.nelsonmandela.org/uploads/files/NMF_states_emergency.pdf (accessed 17 June 2024).

⁹⁷ MacInnes M 2022. 'Inkatha, Propaganda, and Violence in KwaZulu-Natal in the 1980s and 90s.' *Voces Novae*, 12, 3-7.

⁹⁸ Konieczna A & Skinner R (eds) 2019. *A Global History of Anti-apartheid: 'Forward to Freedom' in South Africa*. Springer.

⁹⁹ Mandela N 2008. *Long Walk to Freedom: The Autobiography of Nelson Mandela*. Hachette UK; Savage K 2000. 'Negotiating the Release of Political Prisoners in South Africa.' *Centre for the Study of Violence and Reconciliation, Northern Ireland Programme, Kennedy School of Government at Harvard*.

¹⁰⁰ Southall R 2022. *Whites and Democracy in South Africa*. African Sun Media.

a significant example of how persistent efforts, both within a country and internationally, can bring about profound social, political and economic change.¹⁰¹

South Africa's transition from apartheid to democracy in 1994 was a watershed moment in history. The new democratic government led by the African National Congress (ANC), began a reconciliation and transformation process aimed at overcoming the legacy of settler colonialism and apartheid. The Truth and Reconciliation Commission, for example, was founded to address historical injustices and encourage healing and reconciliation;¹⁰² whether it achieved its purpose is another matter altogether.

South Africa is addressing issues like land reform, economic justice, and the recognition of indigenous rights to improve human rights and address the legacy of settler colonialism and apartheid. Despite the transition to democracy in the 1990s, apartheid continues to impact socio-economic disparities, despite commitments under the 1996 Constitution¹⁰³ to constitutional supremacy and judicial independence.¹⁰⁴ The Constitution places the Republic's judicial authority in the hands of the courts, which ought to be independent and subject exclusively to the Constitution and the rule of law.¹⁰⁵ While significant strides have been made since the transition to democracy, ongoing challenges underscore the need for continued efforts to address historical injustices, promote equality, and ensure full respect for human rights and the right to development in all aspects of society.

¹⁰¹ Zhenmin L 2020. 'Recovering Better: Economic and Social Challenges and Opportunities. In *Economic and Social Challenges and Opportunities: A Compilation of the United Nations High-level Advisory Board on Economic and Social Affairs*.' Available at https://www.un.org/development/desa/en/wp-content/uploads/2020/07/RECOVER_BETTER_0722-1.pdf, 4 (accessed 17 June 2024).

¹⁰² Thelen D 2002. 'How the Truth and Reconciliation Commission challenges the ways we use history.' *South African Historical Journal*, 47(1), 162-190.

¹⁰³ Constitution of the Republic of South Africa.

¹⁰⁴ Sibanda S 2020. 'When do You Call Time on a Compromise? South Africa's Discourse on Transformation and the Future of Transformative Constitutionalism.' *Law, Democracy and Development* 24(1): 384-412.

¹⁰⁵ Sect 165 of the South African Constitution provide that (1) The judicial authority of the Republic is vested in the courts. (2) The courts are independent and subject only to the Constitution and the law, which they must apply impartially and without fear, favour or prejudice.

5.4 SOUTH AFRICA'S LEGAL SYSTEM UNDER A DEMOCRATIC CONSTITUTION

South Africa's democratic Constitution establishes a legal system that upholds human rights, equality, and the rule of law. It promotes social cohesiveness and seeks to develop a society founded on democratic values and tolerance for diversity. The collapse of apartheid opened the door to political and legal transformation that incorporates human rights and the right to development, which ought to become a key component of government policy as I argue in this thesis. The South African Constitution's recognition of human rights validated five decades of global human rights struggle. A democratic South Africa with the most complete set of human rights policies in its founding documents, the Constitution and Bill of Rights, became the global human rights project's poster child. The Preamble to the Constitution clearly states the human rights values that underpin the democratic endeavour.¹⁰⁶ Not only did rights become widely accepted, but the peaceful transition from authoritarianism to democracy (led by a rights agenda) provided the worldwide human rights movement with a real example of the potential that human rights promised for political transformation. This section examines South Africa's legal system under the democratic dispensation, as well as the relevance of human rights and the legality of the constitutionally implicit right to development.

To begin with, it is worth reiterating that South Africa is a constitutional state with a supreme Constitution and a Bill of Rights.¹⁰⁷ All laws must be consistent with the Constitution. South Africa has a mixed legal system consisting of a hybrid of Roman

¹⁰⁶ The Preamble of the Constitution states that 'the Constitution aims to: heal the divisions of the past and establish a society based on democratic values, social justice and fundamental human rights.'

¹⁰⁷ Hassen E 1998. *The Soul of a Nation: Constitution-making in South Africa*. Oxford University Press: Cape Town.

Dutch civil law,¹⁰⁸ English common law,¹⁰⁹ customary law¹¹⁰ and religious personal law.¹¹¹ The South African Constitution, like in many other constitutional democracies, is the supreme law of the land, prescribing and designing the whole structure of the legal system.¹¹² It applies the constitutionality test to all legal norms, authorities, and institutions. Since 1994, the country has operated under the Constitution's principles of separation of powers,¹¹³ consisting of the legislature, the executive and the judiciary. The Constitution empowers and mandates the three branches of government to entrench the spirit of constitutionalism, the rule of law, and good governance as pillars for the country and the people's overall development.¹¹⁴ These branches of government are

¹⁰⁸ The effect of Roman Dutch civil law and English common law on South Africa reflects the country's history of successive Dutch and English colonial rule. The Roman-Dutch law common law of South Africa is the uncoded law of Holland as it existed when the early Dutch immigrants arrived in the mid-seventeenth century, and many legal theories and the structure of the law in general may be traced back to this civilian heritage.

¹⁰⁹ The English common law influence can be observed most clearly in procedural law, with adversarial trials, extensive case reporting, and adherence to precedents. For further reading see Barratt A, Snyman P & Lutchman S 2002. 'Researching South African Law.' *Law Library Resource Exchange*.

¹¹⁰ Sect 211(3) of the South African Constitution provides that '[t]he courts must apply customary law when that law is applicable, subject to the Constitution and any legislation that specifically deals with customary law.' See also Maimela C 2019. 'The Role and Importance of African Customary Law in the 21st Century South Africa.' *University of Milano-Bicocca School of Law Research Paper*, 19-02.

¹¹¹ Sect 15(3)(a)(I)(II) of the South African Constitution provide the importance of religious and personal law which are also part of the hybrid legal system. Also see Rautenbach C 2010. 'Deep Legal Pluralism in South Africa: Judicial Accommodation of Non-State Law.' *The Journal of Legal Pluralism and Unofficial Law* 42(60): 143-177.

¹¹² Sect 2 of the Constitution provide that '[t]his Constitution is the supreme law of the Republic; law or conduct inconsistent with it is invalid, and the obligations imposed by it must be fulfilled.'

¹¹³ The division of power among the three branches of government is a critical function of a constitution and a hallmark of democracy.

¹¹⁴ Constitutions protect democracy by separating state power into three arms. The legislature (parliament, the provincial legislatures and local councils) makes the laws and monitors the executive; the executive (the president, deputy president and ministers) makes policy, proposes laws and implements laws passed by the legislature; and the judiciary tries cases and administers justice. For detailed information see Munzhedzi, PH 2017. 'The Role of Separation of Powers in ensuring Public Accountability in South Africa:

constitutionally responsible for the creation, implementation, and enforcement of the country's laws, and as such, they are the principal responsibility bearers of South Africa's right to development. It is noteworthy to mention that the judiciary is unique in that it is not elected but rather operates independently. This means that no one can interfere with the functioning of the Constitutional Court (ConCourt) or other courts in the country. Therefore, all human rights, including the right to development, must have a legal basis and exist directly or indirectly through or from the Constitution, since the law is a genuine source of information engrossed by the Constitution.¹¹⁵ This is why all of the country's legal and institutional frameworks must be based on the Constitution.

The South African law is derived from many sources, both internal and external. For example, it consists of common law, legislation or statutes, judicial precedent (court decisions), indigenous laws, customs and legal academic writings.¹¹⁶ The sources of South African law essential for the realisation of the right to development can be grouped into the following categories: statutory laws, domestic indigenous laws and external international laws. Jopek-Bosiacka describes statutory law as laws enacted by a legislative body such as parliament.¹¹⁷ These laws are formally written and codified, meaning they are systematically ordered and organised into legal codes. Moore and Himonga note that domestic indigenous laws refer to all indigenous laws, whether customary or religious, which the South African people have accepted, and which apply to their daily lives.¹¹⁸ Indigenous laws according to Hund, 'represents the practices or customs observed and invested with binding authority by the people whose customary

Policy versus Practice.' *International Conference on Public Administration and Development Alternatives (IPADA)*.

¹¹⁵ Sindane 2023:t133.

¹¹⁶ Davies E 2019. 'Foundations of Law.' *Rhodes University*. Available at https://www.ru.ac.za/media/rhodesuniversity/content/law/documents/FOUNDATIONS_OF_OUTLINE_2019.pdf, 3 (accessed 18 June 2024).

¹¹⁷ Jopek-Bosiacka A 2023. 'Definitions in Law across Legal Cultures and Jurisdictions. *Handbook of Terminology*, 37.

¹¹⁸ Moore E & Himonga C 2018. 'Living Customary Law and Families in South Africa.' *Children, Families and the State* 61-69, 61.

law is under consideration.’¹¹⁹ According to Flaherty, external international laws are a set of norms, agreements, and treaties that govern inter-country relations.¹²⁰ Put together, the internal and external laws are expected to ensure the protection of human rights, including the right to development.

5.4.1 International law and its relevance to South African domestic law

International law plays a significant role in the legal framework of South Africa, influencing both its domestic laws and its international relations. International law is not only relevant but also integral to South African domestic law. It informs the interpretation of legislation, influences the development of common law, and ensures that South Africa complies with its international obligations while also contributing to the international legal framework. This explains why South Africa’s approach to the right to development is shaped by its adherence to international human rights treaties and standards, its constitutional framework, judicial interpretations, and national development policies as discussed in section 5.4.1.1. These key elements collectively demonstrate the country’s commitment to promoting and protecting the right to development both domestically and internationally.

As I illustrated in section 4 of Chapter 3, monism and dualism are the two fundamental theories about the nexus between international and domestic law.¹²¹ In this sub-section,

¹¹⁹ Hund J 1998. ‘Customary Law is What the People Say it is’—HLA Hart’s Contribution to Legal Anthropology. *Archiv für Rechts-und Sozialphilosophie/Archives for Philosophy of Law and Social Philosophy*, 420-433, 429.

¹²⁰ Flaherty MS 2005. ‘External versus Internal in International Law.’ *Fordham International Law Journal*, 29: 447-456, 447.

¹²¹ The nexus between international law and domestic law is complex due to a disagreement among international lawyers over monism or dualism as explained in Chapter 3.4. In summation, Monists believe all law is a single set of rules, absorbing international law into domestic law without adoption. Dualists view international and domestic law as distinct systems, with domestic law taking precedence in domestic disputes. Dualists view international law as separate and separate, avoiding domestic court application until specific adoption. South African Constitution combines monism and dualism, with textbooks covering this topic. See, for example, Dugard J 2000. *International Law: A South African Perspective*. Juta, 43- 44; Harris

having highlighted the nature of the South African legal system above, I proceed to analyse its connection with international law. As I argued in section 4 of Chapter 3, the domestic legal system usually provides how international law applies within it. As a result, understanding the relationship between international law and the South African legal system is significant in determining how the sources of the right to development, as illustrated in Chapters 3 and 4, are relevant to South Africa. Of importance to this discussion is the status of customary international law and treaties within the South African legal system. Thus, it is essential to underscore whether the right to development, as an internationally recognised human right, is incorporated in the South African legal system.

Tladi considers the South African Constitution to be one that promotes international law.¹²² Much has been written regarding the South African courts' propensity to use international legal tools when interpreting and applying South African law. Brierly argues that international law is a set of laws that govern governments' interactions with each other.¹²³ While there is some debate about whether international law is a separate legal system from domestic law, most domestic systems, including South Africa, automatically incorporate it when it is consistent with the Constitution. In this sense, international law influences how domestic law is interpreted by courts. The South African Constitution makes this possible as it provides for the means through which international law may apply in South Africa. Chapter 2 of the Constitution comprises of the Bill of Rights. Section 8(1) provided that '[t]he Bill of Rights applies to all law, and binds the legislature, the executive, the judiciary and all organs of state.'¹²⁴ Equally, the Bill of Rights complies with international norms and standards. This is set out in section 39(1)(b), which declares that

DJ 2004. *Cases and Materials on International Law*, Oxford University Press, 66-72; Wallace R 1997. *International Law: A Student Introduction*. Sweet and Maxwell, 36-37; Shaw MN 2003. *International Law*. Cambridge University Press, 120-123. For a more detailed analysis of the debate, see Aust A 2000. *Modern Treaty Law and Practice*. Cambridge University Press, 146- 161.

¹²² Tladi 2016: 310.

¹²³ Brierly JL 1928. *The Law of Nations: An Introduction to the International Law of Peace*. Clarendon Press.

¹²⁴ Sect 8(1) of the South African Constitution state that '[t]he Bill of Rights applies to all law, and binds the legislature, the executive, the judiciary and all organs of state.'

‘[w]hen interpreting the Bill of Rights, a court, tribunal or forum must consider international law.’¹²⁵ This provision together with section 233 requires a court to give preference to ‘any reasonable interpretation of the legislation that is consistent with international law over any alternative interpretation that is inconsistent with international law.’¹²⁶ It entails that the courts adhere to international norms while also guiding the interpretation of those norms by other international courts and institutions. The source of the law frequently determines how it is integrated into domestic law. It is important to emphasise that international law may include binding and non-binding law.¹²⁷ Both forms may be used in the interpretation process.¹²⁸ Thus, I argue that the right to development, as an internationally recognised human right, is applicable in South African legal system and therefore, must be considered.

Given the significant effect that international human rights law has had on the development of the Bill of Rights, Section 39(1)(b) requires courts to consider international law when interpreting the Bill of Rights.¹²⁹ Although there is little indication of genuine analysis and application of international law, the ConCourt has made several references to international human rights jurisprudence.¹³⁰ In *S v Makwanyane*,¹³¹ the late

¹²⁵ Sect 39(1)(b) of the South African Constitution.

¹²⁶ Sect 233 of the South African Constitution.

¹²⁷ UN Forum on Forests 2004. An Overview of International Law Working Draft. Available at <https://www.un.org/esa/forests/wp-content/uploads/2014/12/background-3.pdf> (accessed 20 June 2024).

¹²⁸ Binding international law is international law ratified and acceded to in terms of Sect 231 of the Constitution. Also see Sect 232 regarding the position of customary international law and Sect 233, which obliges courts to give preference to international law when alternative interpretation outcomes exist.

¹²⁹ In Sect 39 (1) it is provided that ‘[w]hen interpreting the Bill of Rights, a court, tribunal or forum— (a) must promote the values that underlie an open and democratic society based on human dignity, equality and freedom; (b) must consider international law; and (c) may consider foreign law.

¹³⁰ Many of the initial judgments making reference to international law in the interpretation of the Bill of Rights were decided under Sect 35(1) which provide that the ‘rights in the Bill of Rights may be limited by or pursuant to law of general application only to the extent that the limitation is [demonstrably] justifiable in an open and democratic society based on dignity, freedom and equality and limits the right as little as is reasonably possible. For detailed reading see Killander M 2010. *International Law and Domestic Human Rights Litigation in Africa*. PULP: Pretoria.

¹³¹ *S v Makwanyane* 1995(3) SA 391 (CC), 1995 (6) BCLR 665 (CC).

Justice Chaskalson considered the international and foreign authorities to be valuable. He outlined the method that a court ought to take when assessing the meaning of a provision in the Bill of Rights based on international law:

The international and foreign authorities are of value because they analyse arguments for and against the death sentence and show how courts of other jurisdictions have dealt with this vexed issue. For that reason alone[,] they require our attention. They may also have to be considered because of their relevance to section 35(1) of the Constitution.¹³²

Also, in the context of section 35(1)

public international law would include non-binding as well as binding law. They may both be used under the section as tools of interpretation. International agreements and customary international law accordingly provide a framework within which [the Bill of Rights] can be evaluated and understood, and for that purpose decisions of tribunals dealing with comparable instruments, such as the United Nations Committee on Human Rights, the Inter-American Commission on Human Rights, the Inter-American Court of Human Rights, the European Commission on Human Rights and the European Court of Human Rights and in appropriate cases, reports of specialized agencies such as the International Labour Organisation may provide guidance as to the correct interpretation of particular provisions of the Bill of Rights.¹³³

These extracts provide two key guidelines. The first need is to consider international law when interpreting the Bill of Rights, which encompasses both treaty and customary international law. As shown above, such law includes both binding and non-binding international law.¹³⁴ And secondly, where there is a relevant treaty to which there is no commitment yet, the need to consider international law would extend to such a non-binding treaty. It is important to note as such that while courts must consider applicable international law, they are not bound to apply it.¹³⁵ International law is interpretable, and

¹³² *Makwanyane*, Para 34.

¹³³ *Makwanyane*, Paras 34, 35 & 39.

¹³⁴ Hopkins 2001: 26.

¹³⁵ The obligation under Sect 39(1)(b) is not similarly qualified. However, it seems clear that a court is only obliged to consider 'applicable' international law. In *S v Williams* 1995 (3) SA 632 (CC), 1995 (7) BCLR 861 (CC) at Paras 21 and 23 the Court held that 'valuable insights' may be gained from international law, and

courts should consider the varied circumstances of the applicable international law instrument or principle and the Bill of Rights when considering its influence. Justice Yacoob provided greater clarity in *Grootboom*¹³⁶ concerning the use of international law to enhance the court's perspective on the right to housing in Section 26 of the Constitution. He held that:

The relevant international law can be a guide to interpretation but the weight to be attached to any particular principle or rule of international law will vary. However, where the relevant principle of international law binds South Africa, it may be directly applicable.¹³⁷

Justice Yacoob alludes to Section 231 in its entirety, which can only imply that a binding international law norm can be deduced from a treaty signed by Parliament but not adopted into domestic law.¹³⁸ It appears reasonable to conclude here that the preceding interpretation of the significance of international law seeks to distinguish between international law as a tool for constitutional development and international law as directly applicable law. According to this perspective, Strydom and Hopkins conclude that the role of non-binding international law will be confined to advising on the appropriate gloss to apply to a certain provision.¹³⁹

5.4.1.1 Treaties and conventions

Treaties and conventions play a significant role in shaping and promoting the right to development in South Africa by providing frameworks, principles, and standards that ought to guide national policies and practices. Since 1996, South Africa has been committed to the international human rights standards entrenched in the UDHR. South Africa's commitment to the UDHR is evident through its ratification of international human

that FC Sect 35(1) required the Court to 'have regard' to 'international consensus.' Courts are 'not bound to follow it, but neither can they ignore it.'

¹³⁶ *Grootboom* case.

¹³⁷ *Grootboom*, Para 26.

¹³⁸ Sucker F 2013. 'Approval of an International Treaty in Parliament: How does Section 231(2) 'Bind the Republic?' *Constitutional Court Review*, 5(1): 417-434.

¹³⁹ Strydom & Hopkins 2018: 2-4.

rights treaties, incorporation into domestic law, judicial application, policy frameworks, and civil society engagement. These efforts underscore South Africa's dedication to upholding universal human rights principles as outlined in the UDHR.¹⁴⁰ The UDHR outlines fundamental human rights that are universally recognised and forms the basis for many international human rights treaties and conventions. South Africa has ratified several international human rights treaties that are based on the principles of the UDHR, including the ICCPR and the ICESCR. In South Africa, the right to development is primarily anchored in the Constitution and supported by various international treaties and conventions, which the state has ratified.

Glashausser proffers that treaties are fundamentally important international agreements between governments.¹⁴¹ They are binding under international law and establish legal obligations for the parties involved.¹⁴² Treaties, according to Scott and Carr, can be bilateral, in which two governments engage into a treaty to control a specific aspect of their relationship, or multilateral, in which multiple nations enter into a treaty.¹⁴³ Multilateral treaties are typically designed to codify international law pertaining to the subject matter at hand. Yoo establishes that the executive government is normally responsible for negotiating and signing treaties.¹⁴⁴ In many systems, however, the

¹⁴⁰ The UDHR provide that human rights are rights inherent to all human beings, whatever our nationality, place of residence, sex, national or ethnic origin, colour, religion, language, or any other status. Provide that people are all equally entitled to human rights without discrimination. These rights are all interrelated, interdependent and indivisible. Thus, human rights are universal and inalienable; indivisible; interdependent and interrelated. See United Nations General Assembly 1948. Universal Declaration of Human Rights (adopted on 10 December 1948).

¹⁴¹ Glashausser A 2004. 'What We Must Never Forget When it is a Treaty We Are Expounding.' *University of Cincinnati Law Review*, 73: 1243-1305, 1273.

¹⁴² In terms of Art 2(1)(a) of the Vienna Convention on the Law of Treaties (1969), a treaty means 'an international instrument 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.'

¹⁴³ Scott GL & Carr CL 1996. 'Multilateral Treaties and the Formation of Customary International Law.' *Denver Journal of International Law and Policy* 25: 71-94, 71-73.

¹⁴⁴ Yoo 2001: 763.

legislature plays an important role in the treaty-making process. In other cases, treaties are only binding on the government if ratified by the legislature. Furthermore, they frequently become part of domestic law only after the legislature passes a statute integrating the treaty's provisions. Under the previous constitutional regime in South Africa, the executive branch of the government had sole authority to engage into treaties.¹⁴⁵ The legislature had no role in the treaty-making process, and treaties became part of domestic law only after they were integrated into legislation.

Unlike the previous constitutional order, in terms of Section 231 of the post-apartheid South African Constitution, although treaties are still negotiated and signed by the executive, a treaty only becomes binding on the South African government at the international law level if approved by a resolution of both houses of the national legislature.¹⁴⁶ Section 231(2) provides that:

An international agreement binds the Republic only after it has been approved by resolution in both the National Assembly and the National Council of Provinces, unless it is an agreement referred to in subsection (3).¹⁴⁷

According to this section any international agreement that binds South Africa must first be approved by resolution in both houses of Parliament. This ensures that such agreements have undergone democratic scrutiny and approval by the elected representatives of the people. Unlike under the old constitutional order, ratification by Parliament is therefore, a necessary component of the treaty-making process under the current Constitution. Consistent with the dualist approach to the incorporation of treaties,

¹⁴⁵ Sect 6(2)(c) of the South African Constitution.

¹⁴⁶ According to Dugard, the legislature in South Africa employs three principal methods to transform treaties into domestic law — 'in the first instance, the provisions of a treaty may be embodied in the text of an Act of Parliament; secondly, the treaty may be included as a schedule to a statute; thirdly, an enabling Act of Parliament may give the executive the power to bring a treaty into effect in municipal law by means of a proclamation or notice in the Government Gazette.' Mere publication of a treaty for general information does not, according to Dugard, constitute an act of incorporation.

¹⁴⁷ Sect 231 (2) of the South African Constitution.

a further enactment by the national legislature is required to make a treaty part of domestic law. In this sense, Section 231(4) states that:

Any international agreement becomes law in the Republic when it is enacted into law by national legislation; but a self-executing provision of an agreement that has been approved by Parliament is law in the Republic unless it is inconsistent with the Constitution or an Act of Parliament.¹⁴⁸

This section ensures that international agreements that may impact South Africa's legal obligations and rights under international law, undergo parliamentary scrutiny and approval. This process reinforces democratic principles, accountability, and transparency in the country's international relations. Section 231(5) concludes that '[t]he Republic is bound by international agreements which were binding on the Republic when this Constitution took effect.'¹⁴⁹ This is very important because once an international agreement has been approved by both houses of Parliament, it becomes binding on South Africa. This means that the country is obligated to comply with the terms and provisions of the agreement under international law.

South Africa is party to numerous international treaties and conventions covering a wide range of subjects, including human rights, environmental protection, trade, and disarmament among others. The South African government signed most of the international and regional human rights instruments and has since ratified and acceded to the ICCPR, the ICESCR, the CEDAW,¹⁵⁰ the CRC,¹⁵¹ the African Charter, the Protocol to the African Charter on Human and Peoples' Rights on the Establishment of the African Court on Human and Peoples' Rights¹⁵² the African Youth Charter and the Protocol on

¹⁴⁸ Sect 231 (4) of the South African Constitution.

¹⁴⁹ Sect 231(5) of the South African Constitution.

¹⁵⁰ United Nations General Assembly 1979. Convention on the Elimination of All Forms of Discrimination against Women (adopted on 18 December 1979 and entered into force on 3 September 1981).

¹⁵¹ United Nations General Assembly 1989. Convention on the Rights of the Child (adopted on 20 November 1989 and entered into force on 2 September 1990).

¹⁵² African Union 2003. Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (adopted in Maputo, Mozambique on 1 July 2003 and entered into force on 25 November 2005).

the Rights of Women in Africa as well as the Protocol of the Court of Justice and Human Rights¹⁵³ among others, which all enshrine provisions on the right to development. By ratifying and employing these agreements, South Africa has enhanced its legal and policy atmosphere, strengthened accountability mechanisms, and fostered international cooperation which are crucial for advancing socio-economic development and ensuring the realisation of human rights and the right to development for everyone, especially the poor, vulnerable and marginalised.¹⁵⁴

South Africa ratified the ICCPR on 10 March 1998. The ICCPR is one of the most important international human rights treaties that South Africa has committed to upholding, assuring the preservation and promotion of civil and political rights within its jurisdiction. The ICCPR contains all the component rights that make up the right to development comprising of rights such as the rights to life,¹⁵⁵ education,¹⁵⁶ freedom of expression,¹⁵⁷ assembly and association,¹⁵⁸ and due process¹⁵⁹ among many others. These rights are critical for fostering development by guaranteeing political stability, the rule of law, and the preservation of individuals' fundamental freedoms. While the ICCPR does not explicitly mention the right to development, it indirectly promotes it through provisions that protect human rights and encourage political participation. Participation is

¹⁵³ African Union 2004. The Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights (1998/2004) (adopted in Ouagadougou, Burkina Faso, on 10 June 1998 and entered into force on 25 January 2004).

¹⁵⁴ According to the UN Centre for Human Rights, achieving human rights is the ultimate goal of development and that development is the process through which these rights can be achieved. For further reading see United Nations Centre for Human Rights 1995.

¹⁵⁵ Art 6 of the ICCPR states that '[e]very human being has the inherent right to life.'

¹⁵⁶ Art 13 recognises the right to education and the importance of free and compulsory primary education.

¹⁵⁷ It is provided in Art 19 of the ICCPR that '[e]veryone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.'

¹⁵⁸ The right to freedom of assembly and association is contained in Art 21 and 22 of the ICCPR.

¹⁵⁹ The overarching right to a fair and public hearing by a competent, independent and impartial tribunal established by law is encompassed within Art 14(1) of the ICCPR and is expressly applicable to both criminal and non-criminal proceedings.

a key component of the right to development, emphasising the right of individuals and communities to participate in decision-making processes that affect their development.¹⁶⁰ Article 25 of the ICCPR recognises the right of citizens to take part in the conduct of public affairs, directly or through freely chosen representatives. This includes the right to vote and to have access to public service.¹⁶¹ These key elements are essential for fostering a society where economic, social, and cultural rights can be effectively realised. The right to development and the ICCPR shares common principles and objectives in promoting human rights and ensuring the well-being and dignity of individuals and communities.¹⁶² While the ICCPR primarily focuses on civil and political rights, its provisions which are in line with Article 1(1) of the UNDRTD which incorporates political development complement the broader framework of the right to development, which encompasses economic, social, and cultural dimensions of human rights.

Similarly, South Africa ratified the ICESCR on 12 January 2015. As a party to the ICESCR, South Africa has committed to promoting and protecting economic, social, and cultural rights within its jurisdiction in accordance with the provisions of the Covenant. This includes obligations to progressively realise these rights to the maximum extent of available resources, through legislative, administrative, judicial, and other measures. As with the ICCPR, the ICESCR does not explicitly mention the right to development. However, the ICESCR and the right to development are closely interconnected frameworks that influence South Africa's approach to socio-economic rights and development. The ICESCR does include provisions and principles that are closely related to the concept of the right to development, especially in its emphasis on ensuring the full

¹⁶⁰ UNDRTD.

¹⁶¹ In Art 25(b)(c) it is provided (b) To vote and to be elected at genuine periodic elections which shall be by universal and equal suffrage and shall be held by secret ballot, guaranteeing the free expression of the will of the electors; (c) To have access, on general terms of equality, to public service in his country.

¹⁶² While ICCPR emphasises civil and political rights, economic, social, and cultural rights such as the right to an adequate standard of living are indirectly addressed through related provisions, including Art 11 on the right to an adequate standard of living and Art 12 on the right to health. These overlaps with the right to development's understanding of adequate standard of living essential for the realisation of the right to development, encompassing factors such as food, clothing, housing, and healthcare.

realisation of economic, social, and cultural rights for all. Both the right to development and the ICESCR emphasises the right of peoples to freely determine their economic, social, and cultural development.¹⁶³

Both frameworks emphasise the principles of non-discrimination and equality in the enjoyment of rights, ensuring that these rights are accessible to all individuals without discrimination based on race, sex, ethnicity, disability, or other status.¹⁶⁴ This means since the government of South Africa ratified the ICESCR, it committed to the right to development by implementing policies and programmes that gradually improve access to education, healthcare, housing, social security, and other essential services for all citizens, particularly the poor, marginalised and vulnerable. The underlying socioeconomic rights are enshrined in the South African Constitution, which are given in-depth consideration in section 5.5. As stated in section 2.4 of Chapter 3 of this thesis, the UNDRTD is the only declaration that squarely enshrines, in detail, a multifaceted right to development (with elements of ICESCR) at the global level. Fukuda-Parr emphasises this by noting that the document is the only international human rights document that emphasises the need for collective international action to address the human rights implications.¹⁶⁵ Thus, as a ratified treaty, the ICESCR is legally binding on South Africa under international law. This means that the government is obligated to take steps within

¹⁶³ Art 1(2) of the UNDRTD provide that '[t]he human right to development also implies the full realization 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.' Art 1 of the ICESCR states that '[a]ll 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.'

¹⁶⁴ Art 2(2) of the ICESCR state that '[t]he States Parties to the present Covenant undertake to guarantee that the rights enunciated in the present Covenant will be exercised without discrimination of any kind as to race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.' Similar reading is found in art 6 of the UNDRTD that '[a]ll States should co-operate with a view to promoting, encouraging and strengthening universal respect for and observance of all human rights and fundamental freedoms for all without any distinction as to race, sex, language or religion.'

¹⁶⁵ Fukuda-Parr 2012: 840.

its available resources, to progressively realise the rights enshrined in the Covenant thereby realising the right to development in South Africa.

The right to development is a binding international legal norm in South Africa, reflected in international treaties like the UN Charter,¹⁶⁶ the twin Covenants,¹⁶⁷ CEDAW,¹⁶⁸ and CRC.¹⁶⁹ The CEDAW and the CRC address specific obligations for the marginalised and vulnerable, ensuring the realisation of both internal and external dimensions of the right to development.¹⁷⁰ The state parties are obligated to ensure its realisation both externally and internally, reflecting the principle of *pacta sunt servanda*.¹⁷¹ These treaties are all encompassing. South Africa is obligated to fulfil its obligations under international agreements, including the UN Charter, to promote living standards, employment, and economic and social progress and development.¹⁷² As previously established, under the twin international human rights Covenants, South Africa bears an obligation to institute appropriate legal and institutional frameworks to protect life, freedom, and dignity of its citizens.¹⁷³ In fulfilling these obligations, the state is required to take concrete and targeted measures to ensure the realisation of various rights, including the right to gain a livelihood through work, the right to adequate food and freedom from hunger, the right to safe and healthy working conditions, access to social security, adequate housing and clothing, the attainment of the highest possible standard of health, and the right to education.¹⁷⁴

South Africa has, under customary international law, consented to human rights treaties and must observe and adhere to them in good faith. Shaw argues that countries cannot

¹⁶⁶ United Nations Charter (adopted on 26 June 1945 and entered into force on 24 October 1945).

¹⁶⁷ ICCPR and ICESCR.

¹⁶⁸ United Nations Convention on the Elimination of all Forms of Discrimination Against Women (adopted on 18 December 1979 and entered into force on 03 September 1981).

¹⁶⁹ United Nations Convention on the Rights of the Child (adopted on 20 November 1989).

¹⁷⁰ CEDAW Arts 1-10 and CRC Arts 1-20.

¹⁷¹ Lukashak II 1989. 'The Principle *Pacta Sunt Servanda* and the Nature of Obligation Under International Law.' *The American Journal of International Law* 83(3): 513-518.

¹⁷² UN Charter Arts 55 and 56.

¹⁷³ ICCPR Arts 1-12.

¹⁷⁴ ICESCR Arts 1-16.

enter into treaty obligations without a minimum belief in good faith, regardless of domestication.¹⁷⁵

5.4.1.2 Customary international law

The Constitution establishes customary international law as part of South African law. Section 232 of the Constitution clearly recognises customary international law as a source of law in South Africa, alongside legislation and common law. South Africa's legal system heavily relies on customary international law. It influences judicial decision-making, aids in the interpretation of domestic legislation, and promotes the protection of human rights and basic freedoms provided by the Constitution.

I illustrated in section 3 of Chapter 3 that customary international law is a type of international law formed by state custom or practice. It is the common law of the international legal system. A custom will become a norm of customary international law if it is sufficiently prevalent and embraced by governments out of a sense of legal obligation.¹⁷⁶ According to Stępień, there are two elements to customary international law: settled practice (*usus*) and *opinio iuris sive necessitates*.¹⁷⁷ The International Court of Justice stated in the *Columbia v Peru (Asylum)* case that for a practice to become a rule of customary international law, it must be 'constant and uniform'.¹⁷⁸ Such a practice may be evinced in a number of ways: through decisions of national and international courts, diplomatic correspondence, the opinions of state law advisors and resolutions of international organisations like the United Nations.¹⁷⁹ There are several ways to find evidence of such practice, including rulings from domestic and international courts, diplomatic communication, state law adviser views, and resolutions from international bodies like the UN.¹⁸⁰ The establishment of international customary law rules through

¹⁷⁵ Shaw 2017: 904.

¹⁷⁶ Dugard 2000: 26.

¹⁷⁷ Stępień 2018: 94.

¹⁷⁸ *Columbia v Peru* (1950) ICJ Reports 266 (Asylum).

¹⁷⁹ Dugard 2000: 28.

¹⁸⁰ Schwebel 1979: 301-309.

resolutions by the political organs of the United Nations is a contentious practice, particularly with regard to UN resolutions that are non-binding and that fall under the category of mere recommendations. The International Court of Justice in the Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons, explains its treatment of such resolutions as follows:

The Court notes that 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 existence of a rule or the emergence of an *opinio juris*. To establish whether this is true of a given 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.¹⁸¹

In this context, Section 232 establishes that unless it conflicts with the Constitution, customary international law is enforceable in South Africa.¹⁸² In the event of a dispute, domestic law takes precedence. Nonetheless, the application and interpretation of domestic laws continue to be heavily influenced by customary international law, particularly in situations in which there is a lack of express legislation. It is crucial to emphasise that South Africa's jurisdictional norms permit the application of international human rights law without it being incorporated into national legislation. In a number of cases, South African courts have acknowledged and applied customary international law. For example, in *Grootboom*, the South African ConCourt addressed socio-economic rights, particularly the right to adequate housing. While not directly about international customary law, the judgment emphasised the role of international human rights norms and standards in interpreting the South African Constitution.¹⁸³ Also, in the *Joe Slovo* case, which involved evictions and the rights of informal settlers, the ConCourt considered international law principles, including those derived from international customary law, to

¹⁸¹ ICJ Reports 1996: 226.

¹⁸² Sect 232 provide that 'Customary international law is law in the Republic unless it is inconsistent with the Constitution or an Act of Parliament.'

¹⁸³ *Grootboom* case.

develop guidelines on lawful evictions consistent with constitutional and international human rights standards.¹⁸⁴

Through these cases, the South African courts have demonstrated a willingness to consider international customary law as part of the broader legal framework in interpreting constitutional rights, statutory interpretation, and developing common law principles. This reflects the interconnectedness of international law and domestic legal system in addressing human rights, and broader legal principles. In support of this view, Merkouris postulate that in interpreting domestic laws and resolving disputes, courts may make reference to international treaties, customary practices, and principles of international law.¹⁸⁵ When interpreting the Bill of Rights and other constitutional provisions, judges are expressly authorised by the Constitution to take international law into account. Human rights are guaranteed by the Constitution, which also requires the government to respect, protect, promote, and fulfil.¹⁸⁶ In addition, to bring certain international obligations into South African domestic law, the government has passed domestic laws to that effect. For example, South Africa's obligations under international human rights law to prevent discrimination are in line with the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000.¹⁸⁷ Together with customary international law, South Africa acknowledges the customs and laws of indigenous peoples. This acknowledgment preserves the Constitution's guarantees of equality and non-discrimination while honouring the nation's many legal traditions.

Essentially, every international discourse promotes the right to development considering the raging effect of poverty and underdevelopment globally, as I have demonstrated in section 3 of chapter 3 and section 3 of chapter 4. Noting the gaps that exist, I argue that the right to development is a recognised right under customary international applicable in

¹⁸⁴ *Residents of Joe Slovo Community, Western Cape v Thubelisha Homes and Others* 2009 (3) SA 454 (CC).

¹⁸⁵ Merkouris 2017: 129-130.

¹⁸⁶ The Constitution is clear that the state must 'respect, protect, promote and fulfil' all the freedoms contained in the Bill of Rights. Therefore, just as the state has a duty to uphold the right to peaceful protest, it has a responsibility to prevent any attempt to violate any of the other rights in the Constitution.

¹⁸⁷ Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000.

South Africa. The dynamic and elastic nature of customary international law as a norm generating process behoves on South Africa the international obligation under customary international law to ensure its realisation for the benefit of its citizens. As an international actor, South Africa's behaviour regarding the right to development is such that it sees the right as important and worth the status of a binding norm under international law.¹⁸⁸ This is supported by the fact that customary international law is generally a source of law in South Africa pursuant to the doctrine of incorporation, which means that unlike treaties, customary international norms inevitably form part of South Africa's domestic system without the necessity of any further Constitutional ratification procedure or process.

With the exception of a persistent objector, it is binding on both active and passive legislators as a matter of international custom.¹⁸⁹ The right to development has never been opposed by South Africa, not even momentarily or persistently. South Africa recognises the right to development and its efforts to realise it, including through institutional, legal, and policy measures included in its NDP, in pursuit of its international duties. Given the broad international recognition of the right to development, it would seem absurd to deny any international responsibility for the right to development as customary international law. Furthermore, each international human rights standard identifies specific subjects who have duties and beneficiaries who have rights.¹⁹⁰ In the context of right to development, the duty bearers and right holders are known, of course

¹⁸⁸ This is supported by the South African 38th Ordinary Session Periodic Report to the African Commission which recognised the right to development when it stated that: Although the Constitution does not provide for the right to development, this right is implied since the Constitution provides social, economic and cultural rights, including political rights, which are features of the right to development defined in Article 1 of the UN Declaration as comprehensive economic, social, cultural and political processes which aim at the constant improvement of the well-being of the entire population and of all individuals, in which human rights and fundamental freedoms can be realized; See First Periodic Report of South Africa to the African Commission, Para 325.

¹⁸⁹ Yeini SA 2021. 'The Persistent Objector Doctrine: Identifying Contradictions.' *Chicago Journal of International Law*, 22, 581; See also Rudman A 2019. 'The Value of the Persistent Objector Doctrine in International Human Rights Law.' *Potchefstroom Electronic Law Journal* 22(1).

¹⁹⁰ Wiel P 1983. 'Towards Relative Normativity in International Law.' *American Journal of International Law* 77: 413.

with some little uncertainty about the place and status of non-state actors. Despite, there are recognisable duty bearers and right holders and the jurisprudence is still growing.¹⁹¹ The main challenge to the above argument is the uncertainty of the content of the right to development because a 'norm can only be deemed to exist if at least its main features are discernible.'¹⁹² The specifics of this uncertainty are enumerate by Bunn, and they include among others, ambiguity of the right, the vagueness in the identity of the rights holders and duty bearers, the uncertainty over the nature of individual or collective responsibility, and the argument that the right is not justiciable or enforceable.¹⁹³ For Marks, the key challenge for implementing the right to development is for all states to recognise the indivisibility and interdependence of all aspects, as outlined in Article 9¹⁹⁴ of the UNDRTD.¹⁹⁵ Nevertheless, given the broad character of the right to development as an all-encompassing right with some clearly specified requirements as mentioned previously, this is insufficient to strip it of the category of customary international law. Furthermore, as indicated in the previous chapters, other international human rights treaties, doctrines, and jurisprudence all subtly reinforce the right to development.

5.4.1.3 African Charter on Human and Peoples' Rights

As indicated in section 3.1 of Chapter 2, the definition of the right to development is still being debated on a global scale. On M'baye's account development has a human dimension that can be 'moral, spiritual, and [even] material',¹⁹⁶ and it is also an inalienable right that must be enjoyed by all. This implies a legal obligation and a mutual right to

¹⁹¹ Igbiniedion 2019: 408.

¹⁹² Rudolf 2008: 105.

¹⁹³ Bunn 2000: 1433.

¹⁹⁴ Art 9(1)(2) of the UNDRTD provide that the Declaration of the right to development is indivisible and interdependent, ensuring it does not contradict the United Nations' purposes or suggest any state, group, or person has a right to violate the rights outlined in the Universal Declaration of Human Rights and International Covenants on Human Rights.

¹⁹⁵ Marks & Malhotra 2000: 1437.

¹⁹⁶ M'baye 1972: 347.

moral, spiritual, and material development. The Arab Charter on Human Rights¹⁹⁷ and the African Charter are the first human right treaties that have codified the right to development into a legal norm and given it justiciable and legally binding status. Article 22 of the African Charter recognises the right of all peoples to their economic, social, and cultural development.¹⁹⁸ As earlier indicated in section 2.2.2 of Chapter 4, South Africa is a state party to the African Charter, haven ratified the Charter in 1996 and as such, obligated to uphold and protect the rights and freedoms outlined therein.

I submit that the African Charter functions directly in South Africa as an enforceable law under Section 231(5)¹⁹⁹ and as customary international law under Section 232.²⁰⁰ According to Adigun, the African Charter, as a considered law, is inferior to the Constitution and maintains a co-ordinate position with other laws implementing human rights treaties, as well as higher status than other laws implementing other treaties and ordinary laws.²⁰¹ As customary international law, the African Charter ranks lower than the Constitution and statutes but higher than common law. South Africa's commitment to international human rights instruments, including the African Charter, ought to influence its domestic policies and legal framework regarding development. Thus, the African Charter operates simultaneously as a considered law and as customary international law. As a result, it may be concluded that the African Charter holds the status of legislation within South Africa, and thus, South African courts are obliged to apply its provisions when relevant.

¹⁹⁷ The Arab Charter on Human Rights (adopted on 22 May 2004 and entered into force on 15 March 2008.

¹⁹⁸ Art 22 of the African Charter provide that '[a]ll 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.'

¹⁹⁹ Sect 231(5) provide that 'the Republic is bound by international agreements which were binding on the Republic when this Constitution took effect.'

²⁰⁰ Sect 232 determines that 'customary international law is law in South Africa unless it is inconsistent with the Constitution or an act of Parliament.'

²⁰¹ Adigun 2023: 113.

The African Charter, a subsidiary to the South African Constitution imposes obligations on state parties regarding the right to development.²⁰² In addition to the text and jurisprudence of the African Commission,²⁰³ the Preamble to the African Charter requires South Africa to ensure economic, social, and cultural development for its citizens. The African Charter also requires state parties to adopt legislative measures to implement these rights.²⁰⁴ This is a key commitment that is reinforced by the South African Constitution, which mandates that laws enacted by it be carried out for the benefit of the country.²⁰⁵ Thus, legislation must be specifically tailored to enable proper resource management, active citizen participation, transparency, and accountability. These are some of the fundamental components of the right to development. It is not enough to simply construct the desired framework; it must also exhibit a consistent degree of dedication to preserving such an environment. As a result, it is also responsible for ensuring that the benefits of development are distributed evenly among all peoples who are entitled to such rights.²⁰⁶ Aside from the broad right to development requirements outlined above, South Africa has special treaty commitments to its people under the African Charter. This commitment is reflected in Article 1, which states that '[t]he Member States of the Organisation of African Unity, parties to the present Charter shall recognise the rights, duties and freedoms enshrined in the Charter and shall undertake to adopt legislative or other measures to give effect to them'.²⁰⁷ South Africa has a responsibilities under the African Charter to incorporate the right to development into national legislation, as indicated. It is, however, worth noting that South Africa's commitments under the Constitution and treaty instruments like the ICCPR and the ICESCR are fundamentally

²⁰² Ssenyonjo 2011: 29-53.

²⁰³ African Commission on Human and Peoples' Rights. *Bakweri Land Claims Committee v Cameroon*, Comm No. 260/2002, *African Human Rights Law Reports* (2004) 43

²⁰⁴ Okafor 2008: 60.

²⁰⁵ Sect 2 of the South African Constitution provide that '[t]his Constitution is the supreme law of the Republic; law or conduct inconsistent with it is invalid, and the obligations imposed by it must be fulfilled.'

²⁰⁶ Okafor 2008: 60.

²⁰⁷ Art 1 of the African Charter.

individualistic in nature whereas, the formulation of the right to development in the African Charter is more focused on peoples rather than on individuals.²⁰⁸

Importantly, one of my main arguments (which I expand on below) is that the right to development is justiciable and enforceable in South Africa. The African Charter does not only create external duties as a result of South Africa's commitment under the Charter, which is supported by the norm of good faith in international law but also that the Charter strengthens South Africa's international resolve to ensure the proper implementation of all of the rights enshrined therein.

5.5 RIGHT TO DEVELOPMENT UNDER THE SOUTH AFRICAN CONSTITUTION

As previously emphasised, the core principles of the UDHR are effectively incorporated into the South African Constitution, which enshrines and guarantees all universally recognised human rights and fundamental freedoms.²⁰⁹ International and regional human rights law greatly influence the importance and justiciability of human rights in South Africa. I advance the argument that while the right to development is not explicitly enshrined in the South African Constitution, as an all-encompassing right, it finds expression through amalgamation of the civil and political as well as the socio-economic rights in the Constitution and the several other provisions that support the principles underlying development. According to Gutto, calls for public participation in state affairs, references to sustainable development, and the right to self-determination should be seen as implicit inclusion of the right to development in the Constitution.²¹⁰ By this, Gutto reiterates the argument that the right to development is embodied in the entirety of the Constitution, which is a developmental document in and of itself.²¹¹ Gutto further states that 'the national development strategies and objectives point to a model of a developmental state regime that sits comfortably with its right to development'.²¹² As

²⁰⁸ Okafor 2008: 60.

²⁰⁹ Sect 7(1) of the South African Constitution.

²¹⁰ Gutto 2006: 113.

²¹¹ Gutto 2006: 109.

²¹² Gutto 2006: 113.

previously stated, South Africa has ratified a range of international and regional legal instruments that enshrine the right to development, which Gutto believes is additional proof of the right's implicit inclusion in the Constitution.

In the proceeding section, I examine the right to development under the South African Constitution, domestic legislation and policies, and jurisprudence to demonstrate the right's justiciability and enforceability in South Africa.

5.5.1 Constitutional provisions and the right to development

To begin with, the Preamble to the South African Constitution provides a comprehensive framework and a fundamental viewpoint on the nation's dedication to realising the right to development. The Preamble states that:

We, the people of South Africa, Recognise the injustices of our past; Honour those who suffered for justice and freedom in our land;

Respect those who have worked to build and develop our country; and

Believe that South Africa belongs to all who live in it, united in our diversity....

Build a united and democratic South Africa able to take its rightful place as a sovereign state in the family of nations.²¹³

The Preamble begins by acknowledging the injustices of the past (caused by colonialism and apartheid) and seeks to heal the divisions caused by systemic discrimination and oppression. Addressing the historical injustices is crucial for achieving development that is equitable and inclusive. It goes on to affirm the unity of the people of South Africa and recognising their diversity. This sets the stage for inclusive development that respects and promotes the rights and identities of all citizens, irrespective of race, gender, religion, or other characteristics. It aims to improve the quality of life of all citizens and free the potential of each person. This aligns with the right to development, which emphasises not

²¹³ Preamble to the South African Constitution.

only economic advancement but also social, cultural, and political empowerment of individuals and communities.²¹⁴

The Preamble further states that South Africa is founded on the values of human dignity, the achievement of equality, and the advancement of human rights and freedoms. These, for Acharya, are fundamental values of the right to development as recognised internationally, because development must prioritise improving the well-being and dignity of peoples.²¹⁵ This includes the participation of all stakeholders in the decision-making processes that affect their lives, ensuring that development policies are responsive to the needs and aspirations of the people. In connection, the Preamble to the UNDRTD states that development is a multifaceted process aimed at improving the well-being of the entire population through active participation and fair distribution of the benefits thereof.²¹⁶ The Preamble to the South African Constitution converges with the right to development on fundamental principles and values related to human rights, equality, inclusivity, and the promotion of holistic development. Together, they provide a robust framework for understanding and promoting the right to development in South Africa.

The Bill of Rights contained in Chapter 2 of the Constitution contains provisions that are foundational to the right to development, notwithstanding that the Constitution does not explicitly mention the right to development as a standalone right. It is provided in Section 7(1) that:

This Bill of Rights is a cornerstone of democracy in South Africa. It enshrines the rights of all people in our country and affirms the democratic values of human dignity, equality and freedom.²¹⁷

This section sets the context for understanding how the rights enshrined in the Bill of Rights contribute to the overall development and well-being of individuals and communities in South Africa. Its reference to ‘democracy’ demonstrates not just political participation but also the social, economic, and cultural dimensions that are integral to

²¹⁴ Kirchmeier 2006: 9-10.

²¹⁵ Acharya 2013: 348-349.

²¹⁶ Para 2 of the UNDRTD Preamble.

²¹⁷ Sect 7(1) of the South African Constitution.

development. The section provides the overarching principles and values that guide the interpretation and implementation of the rights enshrined in the Constitution. The right to development, therefore, can be understood within this broader framework of democracy, human dignity, equality, and freedom, ensuring that development in South Africa is inclusive, sustainable, and beneficial to all its people. For its application, Section 8(1) provides that ‘The Bill of Rights applies to all law, and binds the legislature, the executive, the judiciary and all organs of state.’²¹⁸

This section plays a significant role in the interpretation and application of rights within the South African legal framework, including those that contribute to the right to development. It ensures that the rights enshrined in the Bill of Rights, including those relevant to development, apply to all laws and actions of the state. It means that any legislative, executive, or judicial action must conform to the rights protected in the Constitution, fostering an environment where development initiatives are aligned with human rights principles. Most importantly, this section binds not only the legislature, executive, and judiciary but also all organs of state. This includes government departments, agencies, and entities responsible for implementing policies and programmes related to development. It ensures that these entities uphold and respect the rights that contribute to development, such as the right to housing, education, and healthcare among many others.²¹⁹ By binding all organs of state to the Bill of Rights, this section reinforces the principles of equality, dignity, freedom, and justice which underpin the right to development, thereby fostering a conducive environment for inclusive and sustainable development in South Africa. In the context of the right to development, it requires that laws and policies be interpreted and implemented in a way that enhances the well-being and opportunities of individuals and communities, particularly the poor, marginalised and vulnerable.

²¹⁸ Sect 8(1) of the South African Constitution.

²¹⁹ Sect 239 of the South African Constitution.

Similarly, Sections 9²²⁰ and 10²²¹ promote inclusive development by ensuring that all individuals and groups, regardless of their background or circumstances, are included in developmental efforts. This is crucial for addressing historical inequalities and in promoting social cohesion. As stated above; by protecting equality and human dignity, these sections empower individuals to actively participate in and contribute to development processes. Empowered people are more likely to take advantage of opportunities for education, employment, and community involvement, thereby advancing sustainable development. The right to development encompasses economic, social, cultural, and political progress that enhances the well-being and capabilities of peoples, which ultimately contributes to human flourishing. Together, these provisions contribute to a legal framework that supports efforts to promote the right development and improve the quality of the people.

Sections 26²²² and 27²²³ provide important socio-economic rights which closely intersect with the right to development. It is important to give context to their inclusion in the South African Constitution. South Africa's history is marked by denial of social goods, inadequate economic resources, and human rights violations. This has led to widespread poverty due to an unfair economic and political system. The inclusion of these rights in the Constitution was to help reduce inequality and balance the socio-economic status.²²⁴ Their inclusion was fundamental because they gave people access to certain basic things²²⁵ (resources, opportunities and services) needed to lead a dignified life such as food, shelter, healthcare, and social security among others. For Okeke, Sections 26 and 27 are considered the most significant provisions on socio-economic rights in the South African Bill of Rights, as they aim to improve the quality of life of the people and free their

²²⁰ Sect 9 of the South African Constitution provide for the right to equality.

²²¹ Sect 10 of the South African Constitution provide for the right to human dignity.

²²² Sect 26 of the South African Constitution provide for the right to adequate housing.

²²³ Sect 27 of the South African Constitution provide for the right to healthcare, food, water and social security.

²²⁴ Okeke 2023: 99.

²²⁵ To be specific, black people were deprived during apartheid.

potentials.²²⁶ Socio-economic rights can be enforced in South African courts and most cases involving these rights are based on these Sections, particularly in the Constitutional Court (which I expand on it in subsection 5.5.3 below). As vital as these rights are in South Africa, Kamga contends that their protection is complicated by the fact that socio-economic rights are subject to progressive realisation, or the need that the government only act based on the availability of financial means.²²⁷ This condition allows the government to defend its incapacity or unwillingness to implement socio-economic rights and protect the right to development. Mainly because of this, Ngang proffers that despite South Africa's well-known lead in the world for upholding socio-economic rights, not much has been done to improve the standard of living for those who are the victims of socio-economic deprivation.²²⁸ Thus, Marks and Andreassen argue that the concept of 'progressive realisation' does not give the government a free pass to neglect the protection of socio-economic rights.²²⁹

Nonetheless, Kamga maintains that although the Constitution does not mention the right to development as a human right, it protects socio-economic rights, which are the correlative rights to the right to development.²³⁰ Thus, I reiterate the argument by Gutto²³¹ together with Kamga²³² and Ngang²³³ that the right to development has legal status in South Africa. The Constitution, as a legal framework that enshrines socio-economic rights, further reinforces this perspective. Former Chief Justice of South Africa, Pius Langa, underlined this point by affirming that genuine national development cannot be achieved unless socio-economic rights are effectively realised..²³⁴ Again, although no

²²⁶ Okeke 2023: 99.

²²⁷ Kamga 2011: 213.

²²⁸ Ngang 2014: 655.

²²⁹ Andreassen BA & Marks SP (eds) 2006. *Development as a Human Right: Legal, Political, and Economic Dimensions*.

²³⁰ Kamga 2011: 210.

²³¹ Gutto 2006: 109-118.

²³² Kamga 2011: 210.

²³³ Ngang 2019: 26.

²³⁴ Langa 2006.

institution is specifically mandated to address the right to development directly, the protection and enforcement of socio-economic rights being consistent with the right to development serve to complement its realisation, thereby playing a central role in enhancing the quality of life and overall living conditions of the people of South Africa. According to Sengupta, developing nations bear the primary responsibility for implementing programmes aimed at fulfilling the right to development, encompassing all essential public policies and related activities..²³⁵ In effect, the South African Constitution has succeeded in giving concrete expression to constitutionally guaranteed rights, including the right to development.

This commitment is not only shown through promulgation of rights, but South Africa also embraces the principle of self-determination as contained in Section 235²³⁶ of the Constitution. The concept of self-determination and its relationship to the right to development is significant, especially considering the country's historical context and its constitutional framework. Reading this section together with Section 31²³⁷ recognises and respect the rights of diverse cultural, religious, and linguistic communities promotes both self-determination and the right to development within the framework of a multicultural society. Acknowledging the right to self-determination is in line with Article 20 of the African Charter,²³⁸ read together with Article 1 of the UNDRTD which states that '[t]he human right to development also implies the full realization of the right of peoples to self-determination, which includes, subject to the relevant provisions of both International Covenants on Human Rights...'²³⁹

Nevertheless, the proclamation of abundant pieces of legislation and policies supporting democracy show the South African commitment to realising the right to development. National policies should promote human rights and address social injustices. According

²³⁵ Sengupta 2017.

²³⁶ Sect 235 of the South Africa Constitution.

²³⁷ Sect 31 of the South African Constitution provide for the right to cultural, religious, and linguistic communities.

²³⁸ Art 20 of African Charter states that '[a]ll peoples shall have the right to existence. They shall have the unquestionable and inalienable right to self-determination.'

²³⁹ See Art 1 of the UNDRTD.

to Marks, many nations, particularly in Africa, struggle with population well-being due to unjust global economic structures. Genuine development agendas, including trade and investment can help overcome disadvantages and maximise resources.²⁴⁰

5.5.2 Domestic legislation and policies

Although the right to development is not explicitly defined in a single piece of legislation in South Africa, it is embedded in the country's constitutional framework and supported by a comprehensive array of laws and policies that have been alluded to, which promote socio-economic rights, sustainable development, and inclusive growth. These legal measures collectively contribute to advancing the right to development by addressing historical injustices, promoting equitable access to resources, and fostering a conducive environment for socio-economic progress and human dignity. As illustrated in section 5.5.1 above, the South African Constitution contains a broad range of constitutionally guaranteed rights, which together amount to the right to development. Through the creation of several key pieces of legislation and policies behind democracy such as the Housing Consumer Protection Measures Act 95 of 1998,²⁴¹ the Rental Housing Act 50 of 1999,²⁴² Spatial Planning and Land Use Management Act 16 of 2013,²⁴³ the Children's Act 38 of 2005,²⁴⁴ the Public Service Act 103 of 1994,²⁴⁵ the National Health Act 61 of 2003,²⁴⁶ the Community Development Act 3 of 1966,²⁴⁷ the Reconstruction and Development Programme Act 79 of 1998,²⁴⁸ the Employment Equity Act 55 of 1998²⁴⁹

²⁴⁰ Marks & Malhotra 2000: 1437.

²⁴¹ Housing Consumers Protection Measures Act 95 of 1998.

²⁴² Rental Housing Act 50 of 1999.

²⁴³ Spatial Planning and Land Use Management Act 16 of 2013.

²⁴⁴ Children's Act 38 of 2005.

²⁴⁵ The Public Service Act 103 of 1994.

²⁴⁶ National Health Act 61 of 2003.

²⁴⁷ Community Development Act 3 of 1966.

²⁴⁸ The Reconstruction and Development Programme Fund Act 79 of 1998.

²⁴⁹ Employment Equity Act 55 of 1998.

and Labour Relations Act 66 of 1995,²⁵⁰ the South African government has demonstrated commitment to realising the right to development.

For the purpose of this thesis, I mainly focus on the Promotion of Administrative Justice Act 3 of 2000, the Public Finance Management Act, the Local Government Municipal System Act of 2008, and the National Environmental Management Act (NEMA) as examples of legislation that indirectly support the right to development. I also examine two important policy instruments, namely the Broad-Based Black Economic Empowerment and NDP. The NDP is a key policy document that outlines South Africa's long-term vision and goals for development. It provides a framework for achieving socio-economic rights and addresses issues such as poverty alleviation, infrastructure development, and economic growth.

5.5.2.1 Legislation

5.5.2.1.1 Promotion of Administrative Justice Act 3 of 2000 (PAJA)

Implementation of the right to development in South Africa requires a robust administrative action which the PAJA fulfils. It is noteworthy to mention that the PAJA itself does not explicitly create or define the right to development. Its procedural fairness principles and mechanisms for reviewing administrative actions play a crucial role in protecting and promoting socio-economic rights, including aspects of development, within the framework of South African law. Therefore, the PAJA contributes indirectly to ensuring that administrative decisions support rather than undermine realisation of the right to development as enshrined in the South African Constitution and international human rights law.

The PAJA is an important piece of South African legislation, and the cornerstone of administration law in South Africa. This important legislation gives effect to the measures

²⁵⁰ Labour Relations Act 66 of 1995.

contemplated in Section 33²⁵¹ of the Constitution. The PAJA aims to ensure that administrative actions are lawful, reasonable, and procedurally fair.²⁵² It mandates that administrative decisions must be procedurally fair in terms of Section 3(1), which provides that an administrative action which materially and adversely affects the rights or legitimate expectations of any person must be procedurally fair.²⁵³ Section 3(2)(a) of the PAJA, which provides for a fair administrative procedure depends on the circumstances of each case.²⁵⁴ It means that individuals affected by administrative actions have the right to be heard, to receive reasons for decisions, and to challenge decisions through review processes. These procedural rights are essential in the context of socio-economic rights, including the right to development, as they ensure that administrative actions do not arbitrarily hinder or prevent individuals from accessing resources necessary for development.

The provisions of the PAJA on fair and reasonable administrative actions can be invoked when individuals or communities are affected by decisions related to these rights. For example, if a government decision impacts housing developments or access to healthcare services, affected parties can challenge such decisions under the PAJA to ensure they meet legal and procedural standards. The PAJA's requirement for reasonableness and lawful administrative action ensures that decisions affecting development initiatives are made with consideration of broader public interest and in accordance with legal principles.²⁵⁵ Hoexter states that the PAJA provides for judicial review of administrative actions, allowing the courts to scrutinise decisions for compliance with legal requirements.²⁵⁶ This mechanism can be utilised to safeguard the right to

²⁵¹ The protection of a just administrative action is enshrined under Sect 33 of the South African Constitution.

²⁵² The PAJA Mainstreaming Guide for Organs of State 2015. Available at (www.justice.gov.za) (accessed 25 June 2024).

²⁵³ Sect 3(1) of the South African Constitution.

²⁵⁴ Sect 3(2)(a) of the South African Constitution.

²⁵⁵ Pfaff R & Schneider H 2001. 'The Promotion of Administrative Justice Act from a German Perspective.' *South African Journal on Human Rights*, 17(1): 59-86.

²⁵⁶ Hoexter 2012: 103.

development by holding public authorities accountable for decisions that may adversely affect socio-economic rights. Currie and De Waal emphasise the need to consider the definition of ‘administrative action’, which is confined to ‘decisions’.²⁵⁷ They also note that the definition of ‘decision’ must be read alongside ‘empowering provision’ and ‘failure’, as ‘decision’ includes failure to take a decision. Baxter argues for a participatory, responsive, accountable, affordable, and efficient administrative decision-making system in South Africa, ensuring equal rights for all citizens, regardless of poverty or disadvantaged status, despite limited resources.²⁵⁸ This is further provided in Article 8(2) of the DRTD that ‘States should encourage popular participation in all spheres as an important factor in development and in the full realization of all human rights.’²⁵⁹

5.5.2.1.2 Public Finance Management Act 1 of 1999 as amended (PFMA)

The PFMA is an important piece of legislation in South Africa that regulates financial management within the public sector. The fundamental goal is to provide transparency, accountability, and effective financial management in the use of public funds and resources.²⁶⁰ While the PFMA emphasises on fiscal discipline and governance within government institutions, its implications for the right to development can be understood by considering a variety of essential factors such as resource allocation, influence on service delivery, accountability, and oversight. The PFMA regulates how public funds are allocated and managed. Effective allocation of resources is crucial for development initiatives such as infrastructure projects, social welfare programmes, and education among many others. This is in line with the UNDRTD which provides that:

²⁵⁷ Currie I & De Waal J 2005. *The Bill of Rights Handbook*. Juta & Company Ltd, 650-667.

²⁵⁸ Baxter 1993: 176; It is provided in Art 8(1) of the UNDRTD.

²⁵⁹ Art 8(2) of the UNDRTD.

²⁶⁰ The Public Finance Management Act (PFMA) and the role of Parliament in the Oversight of the Budget 2021. Available at www.parliament.gov.za/storage/app/media/1_Stock/Events_Institutional/2021/28-04-2021_NCOP_Budget_and_Fiscal_Oversight_Workshop/session4/The_PFMA_and_the_role_of_Parliament_in_budget_oversight_Treasury.pdf (accessed 25 June 2024).

States have the right and the duty 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.²⁶¹

In response to this duty, the PFMA promotes efficiency and effectiveness in the use of public resources. This is important because development requires effective implementation of policies and programmes aimed at improving living standards, reducing poverty, and addressing inequalities.²⁶² The PFMA's provisions for financial discipline and performance monitoring help ensure that government expenditures contribute effectively to these development objectives. In other words, while the PFMA focuses on financial management and governance within the public sector, it indirectly contributes to creating conditions favourable for development by ensuring that public funds are managed efficiently, transparently, and accountably. This, in turn, supports the implementation of policies and programmes aimed at promoting socio-economic development and improving quality of life for all citizens as underscored in the Preamble to the South Africa Constitution.

Effective financial management under the PFMA directly impacts service delivery in areas such as healthcare, education, housing, and infrastructure. Read together with the Public Service Act of 1994,²⁶³ access to quality services is fundamental to development, and the PFMA's requirements for financial prudence and transparency contribute to enhancing service delivery outcomes. The latter sets out principles of service delivery that should be aligned with development objectives, ensuring that services are accessible, equitable, and of high quality. The emphasise on equitable access to public services, ensuring that all citizens, regardless of background or location, have equal opportunities to benefit from government programmes is of paramount importance. This aligns with the principle of non-discrimination under the right to development. By means of guaranteeing transparent

²⁶¹ Art 2(3) of the UNDRTD.

²⁶² Singh PK & Chudasama H 2020. 'Evaluating Poverty Alleviation Strategies in a Developing Country. *PLoS One* 15(1): 1-23.

²⁶³ The Public Service Act 103 of 1994.

and accountable financial management, the PFMA aims to optimise resource allocation in ways that support broader socio-economic development goals. In line with Article 6(3) 'States should take steps to eliminate obstacles to development resulting from failure to observe civil and political rights, as well as economic social and cultural rights.'²⁶⁴

The PFMA establishes mechanisms for accountability and oversight, including reporting requirements and auditing procedures.²⁶⁵ These mechanisms are essential for holding government officials and entities accountable for their management of public finances. The accountability measures are provided in Section 26 which deals with financial misconduct and irregular expenditure within government departments and institutions.²⁶⁶ Specifically, it requires accounting officers and authorities to take steps to prevent irregular expenditure, investigate such expenditure when it occurs, and take disciplinary action against officials responsible for financial misconduct.²⁶⁷ Section 27(4) of the PFMA mandates the National Treasury to promote transparency and effective public sector revenue, expenditure, assets, and liabilities management, enforcing compliance by all government institutions.²⁶⁸ In practice, this means government institutions are expected to use public resources efficiently and effectively to advance the well-being and development of citizens, in accordance with both domestic legislation and international human rights standards.²⁶⁹ For this to take shape Section 65(1) requires that 'the Minister

²⁶⁴ Art 6(3) of the UNDRTD.

²⁶⁵ Sect 40(1)(b) and 55(1)(b) of PFMA mandate that accounting officers and authorities prepare and submit financial statements and annual reports to the relevant treasury and the Auditor-General.

²⁶⁶ Sect 26 of PFMA provide that 'Parliament and each provincial legislation must appropriate money for each financial year for the requirements of the state and province, respectively.'

²⁶⁷ Sect 26 of PFMA.

²⁶⁸ Sect 27(4) of PFMA provide that '[w]hen the annual budget is introduced in the National Assembly, the accounting officer for each department must submit to Parliament measurable objectives for each main division within the department's vote. The relevant treasury may co-ordinate these submissions and consolidate them in one document.'

²⁶⁹ Hamm BI 2001. 'A Human Rights Approach to Development.' *Human Rights Quarterly* 23(4): 1005-1031.

responsible for a department must table the annual report in the relevant legislature within one month after the Minister received the annual report.²⁷⁰

As noted earlier, the PFMA does not explicitly guarantee or define the right to development. However, its promotion of good governance, accountability, and effective resource management lays the groundwork for achieving development goals. This corroborates with Ngang's 'right to development governance' model, which is envisaged to promote participation, sustainable resource management, and the propagation of African identity and value systems, ensuring accountability and equitable redistribution.²⁷¹ Thus, PFMA contributes to creating conditions that allow for realisation of the right to development in South Africa.

5.5.2.1.3 Local Government Municipal System Act 32 of 2008

The South African government has a constitutional mandate to provide services to its citizens and uphold human rights and fundamental freedoms. Section 152²⁷² of the Constitution requires local governments, which are closest to citizens and serve as a link between the government and the citizens, to assure the long-term supply of services to communities. For this to happen, the national and provincial governments must be active participants and create favourable conditions for effective service delivery in accordance with Section 151²⁷³ of the Constitution. To this effect, the Municipal Systems Act was enacted to govern the functioning and operations of local government. It sets out the framework within which municipalities operate and outlines their responsibilities, powers, and duties. Close to the right to development, the Municipality Systems Act also establishes mechanisms for public participation in decision-making processes, ensuring that local communities have a voice in municipal affairs. Sections 16-22 of the Municipality Systems Act are entirely devoted to community participation. Section 16 encourages the

²⁷⁰ Sect 65(1) of PFMA.

²⁷¹ Ngang 2018: 9.

²⁷² Sect 152 of the South African Constitution provide for objects of local government.

²⁷³ Sect 151 of the South Africa Constitution sets out status of municipalities.

‘development of [a] culture of community participation.’²⁷⁴ While Sections 17 and 18 set out ‘mechanisms, processes and procedures for community participation’,²⁷⁵ including ‘communication of information concerning community participation.’²⁷⁶ Piovesan proffers that the right to development encourages active, free and meaningful participation in development processes.²⁷⁷ This is corroborated by Marks, who unequivocally states that the right to development is a comprehensive, human-centred approach to development.²⁷⁸ He defines development as a holistic process aimed at improving the well-being of the entire population and all individuals through active, free, and meaningful involvement, as well as the equitable distribution of the resulting benefits. It is provided in Article 2 of the UNDRTD that ‘[t]he human person is the central subject of development and should be the active participant and beneficiary of the right to development.’²⁷⁹ The Municipality Systems Act enables the active participation element envisaged by the right to development. The Municipal Systems Act further supports the realisation of the right to development by providing a legal framework for participatory governance, effective service delivery, local economic development, accountability, transparency, and capacity building within municipalities. By implementing the provisions of this Act, municipalities contribute to creating an environment where individuals and communities can actively participate in and benefit from socio-economic development processes, thereby promoting human rights and improving quality of life at the local level.

²⁷⁴ Sect 16 of the Municipality Systems Act encourages the ‘development of culture of community participation.’

²⁷⁵ Sect 17 of the Municipality Systems Act sets out ‘mechanisms, processes and procedures for community participation.’

²⁷⁶ Sect 18 of the Municipality Systems Act makes reference to ‘communication of information concerning community participation.’

²⁷⁷ Piovesan 2013: 105-107.

²⁷⁸ Marks 2011: 2.

²⁷⁹ Art 2 of the UNDRTD.

5.5.2.1.4 National Environmental Management Act 107 of 1998 (NEMA)

Human development and the environment are interconnected and interdependent, and without favourable conditions essential for progress, human development is not possible. The African Charter embraces the interconnectedness of human rights, development, and environmental sustainability. It promotes solidarity among African states and communities to address environmental challenges collectively.²⁸⁰ Savić points out that the use of technology and scientific advancements have enabled people to modify and utilise these conditions for human development essential for the realisation of the right to development.²⁸¹ In other words, balancing human development and nature conservation for future generations is important for sustaining both the well-being and the health of nature. Integrating environmental sustainability principles into development practices and policies can ensure that future generations inherit a rich, functioning, and sustainable resourceful environment while still enjoying the benefits of human progress and development. SDG 15 encourages the sustainable use of natural resources, and the protection of ecosystems that are essential for human well-being and for supporting life on Earth.²⁸² It further requires concerted efforts from governments, businesses, civil society, and individuals worldwide to promote sustainable practices and policies that safeguard the environment for current and future generations.²⁸³

In South Africa, the right to the environment is enshrined in Section 24 of the Constitution, which provides that:

Everyone has the right— (a) to an environment that is not harmful to their health or wellbeing; and (b) to have the environment protected, for the benefit of present and future

²⁸⁰ The African Charter.

²⁸¹ Savić 2020: 319-330.

²⁸² SDG 15 on life and land encourage to 'protect, restore and promote sustainable use of terrestrial ecosystems, sustainably manage forests, combat desertification, and halt and reverse land degradation and halt biodiversity loss.'

²⁸³ United Nations Report 2017. Work of the Statistical Commission pertaining to the 2030 Agenda for Sustainable Development. Resolution adopted by the General Assembly on 6 July 2017 Available at https://ggim.un.org/documents/a_res_71_313.pdf (accessed 26 June 2024).

generations, through reasonable legislative and other measures that— (i) prevent pollution and ecological degradation; (ii) promote conservation; and (iii) secure ecologically sustainable development and use of natural resources while promoting justifiable economic and social development.²⁸⁴

In the quest to ensure environmental sustainability as mandated by the Constitution the South African government enacted the National Environmental Management Act 107 of 1998 (NEMA).²⁸⁵ The NEMA is a comprehensive environmental legislation that provides the framework for managing and protecting the environment, integrating environmental considerations into development planning, and promoting sustainable development.²⁸⁶ Importantly, it integrates environmental considerations into planning and decision-making processes, promoting environmental conservation, and ensuring compliance with environmental standards and regulations. Section 2 deals with principles that underpin development. It includes principles such as sustainable development, integrated environmental management, environmental justice, and the precautionary principle. These principles underpin the entire Act and influence how development activities are regulated.²⁸⁷ Under Section 24 of the NEMA, environmental impact assessments are required for certain activities that may have significant environmental impacts.²⁸⁸ It assesses potential environmental effects, consider alternatives, and propose measures to mitigate adverse impacts before development activities are approved. This process aims to balance development needs with environmental protection, thereby safeguarding the right to a healthy environment for present and future generations. Section 24(a) recognises the right of all individuals to an environment that is not harmful to their health or well-being.²⁸⁹ This aligns with broader human rights principles, including the right to

²⁸⁴ Sect 24 of the South African Constitution.

²⁸⁵ NEMA) has been amended several times to strengthen environmental governance, compliance, and enforcement in South Africa. Key changes include streamlining environmental impact assessment processes, enhancing the role and powers of environmental inspectors, and introducing stricter penalties for non-compliance.

²⁸⁶ Sect 2 of NEMA.

²⁸⁷ Sect 2 of NEMA.

²⁸⁸ Sect 24 of NEMA.

²⁸⁹ Sect 24(a) of NEMA.

development, which encompasses the right of individuals and communities to participate in, contribute to, and benefit from sustainable development. In addition, Section 33 establishes the Environmental Management Inspectorate, which is responsible for monitoring and enforcing compliance with environmental laws and regulations. Inspectors have powers to investigate and take enforcement actions against non-compliance.²⁹⁰ In addition, Section 240 requires that environmental considerations be integrated into planning and decision-making processes at all levels. It encourages a holistic approach to managing and mitigating environmental impacts associated with development activities.²⁹¹ Compliance with these provisions is essential for achieving sustainable development outcomes and maintaining environmental integrity.

Article 2 of the UNDRTD supports sustainable development by emphasising that development must be comprehensive and sustainable.²⁹² It is also acknowledged in Article 8 of the UNDRTD that development activities should be conducted in a manner that respects and protects the environment.²⁹³ This implies that development should meet the needs of the present without compromising the ability of future generations to meet their own needs, thereby integrating environmental, economic, and social dimensions. Article 8 of the UNDRTD read together Article 16²⁹⁴ Article 24²⁹⁵ of the African Charter, which although primarily focuses on economic, social, and cultural rights, implicitly supports the idea that environmental degradation can undermine human health and development, and hence also reinforcing the need for a healthy environment as part of the right to development. Importantly, Article 21(1)²⁹⁶ of the African Charter acknowledges the right of peoples to freely dispose of their wealth and natural resources in the interest of their development. This includes using the resources sustainably to ensure environmental integrity for future generations.

²⁹⁰ Sect 33 of NEMA.

²⁹¹ Sect 240 of NEMA.

²⁹² Art 2 of the UNDRTD.

²⁹³ Art 8 of the UNDRTD.

²⁹⁴ Art 16 of the African Charter.

²⁹⁵ Art 24 of the African Charter.

²⁹⁶ Art 21(1) of the African Charter.

While the NEMA does not explicitly make reference to the right to development, it underscores the importance of achieving development that is inclusive, equitable, and sustainable, and ensuring environmental protection and human well-being in the advancement of sustainable human development.

5.5.2.2 Policies

The South African government has established many developmental policies with linkage to the right to development. Closely linked to the right to development and the empowerment of the previously disadvantaged people of South Africa is the Broad-Based Black Economic Empowerment (BBBEE) initiative and the NDP which are discussed below.

5.5.2.2.1 BBBEE

When the ANC came to power in 1994, the new government's priorities included redressing apartheid's legacy of economic exclusion. Under apartheid, legislation and practice had restricted the access of non-Whites to job opportunities, capital, business and property ownership, and other forms of economic advancement, leaving vast racial inequalities in wealth and income.²⁹⁷ The South African Constitution provides for the right to equality and guarantees the formal element of equality by creating a basis for equal treatment.²⁹⁸ Despite the right to equality, not all people in South Africa are born to equal circumstances. Patel and Graham note that the history of South Africa has resulted in an economic and opportunity disparities based on race, resulting in many black South

²⁹⁷ Shai L, Molefinyana C & Quinot G 2019. 'Public Procurement in the Context of Broad-Based Black Economic Empowerment (BBBEE) in South Africa—Lessons Learned for Sustainable Public Procurement. *Sustainability* 11(24): 1-27.

²⁹⁸ Sect 9 of the South African Constitution guarantees equality before the law and freedom from discrimination to the people of South Africa. It prohibits both discrimination by the government and discrimination by private persons; however, it also allows for affirmative action to be taken to redress past unfair discrimination.

Africans not enjoying the same opportunities and therefore, substantively unequal to other South Africans.²⁹⁹ Thus, in response to the historical injustices created by the apartheid system, the BBBEE initiative was established in 2003.

The BBBEE initiative is a government policy to advance economic transformation and enhance the economic participation of black people in the South African economy. It is envisaged to promote black economic participation by providing preferential treatment in government procurement processes for businesses contributing to black economic empowerment through factors like black ownership, hiring, and supplier contracts.³⁰⁰ According to Horwitz and Jain, the overarching goal of BBBEE is not only to promote economic inclusion but also to foster sustainable development and growth in South Africa by addressing historical disadvantages and promoting a more equitable distribution of wealth and resources.³⁰¹ It is seen as a crucial tool for achieving social cohesion and long-term economic stability in the country. However, BBBEE has faced criticism on several fronts, despite its intended goals of redressing historical inequalities and promoting economic inclusion. BBBEE's initial focus on equity transfer through business transactions led to a narrow definition of empowerment, neglecting to mandate industry and value chain initiatives.³⁰² This needed a shift to a broader definition of empowerment aimed to facilitate the re-entry of historically marginalised communities into the mainstream economy, including black individuals, investors, employees, management, suppliers, and communities.³⁰³ The intent was to extend benefits to those who may not have the means or resources to acquire an equity stake or be appointed to a management

²⁹⁹ Patel L & Graham L 2012. 'How Broad-Based is Broad-Based Black Economic Empowerment?' *Development Southern Africa* 29(2): 193-207.

³⁰⁰ Kilambo SR 2016. 'Black economic empowerment and changes in ownership and control in South Africa's mining industry.'

³⁰¹ Horwitz FM & Jain H 2011. An Assessment of Employment Equity and Broad Based Black Economic Empowerment Developments in South Africa. *Equality, Diversity and Inclusion: An International Journal* 30(4), 297-317.

³⁰² Department of Trade and Industry. *Amended Broad-Based Black Economic Codes of Good Practice 2012*; Department of Trade and Industry: Pretoria, South Africa.

³⁰³ Department of Trade and Industry 2005. *The Codes of Good Practice on Broad-Based Black Economic Empowerment*; Department of Trade and Industry: Pretoria, South Africa.

position. Due to its slow social progress, this led to more criticism that BBEE is a tool used to make politicians and the politically connected rich.³⁰⁴ This critique has led to accusations of elite capture and perpetuating inequality within the black population.³⁰⁵ Despite these criticisms, BBEE remains a critical policy tool in South Africa which, with proper implementation and oversight, can contribute positively to long-term sustainable development and social cohesion in the country.³⁰⁶

The BBEE can be viewed through the lens of the right to development, although it is not explicitly framed as such in its policy formulation. The right to development embodies the human rights principles of equality, non-discrimination and participation. On equity, the UNDRTD highlights the importance of the 'fair distribution of the benefits' of development³⁰⁷ while on non-discrimination, it allows no 'distinction as to race, sex, language or religion.'³⁰⁸ By promoting economic participation and empowerment, both the BBEE and the right to development intends to achieve greater equity and reduce discriminatory practices in economic opportunities.

Similarly, it is stated in the UNDRTD that governments should promote popular participation in all spheres for development and the realisation of human rights, considering all aspects of the indivisible and interdependent right to development in the context of the whole.³⁰⁹ As stated in Article 2(1) of the UNDRTD, the human person is the central subject of development and must be an active participant in all development processes.³¹⁰ As with the right to development, Mudau states that the BBEE encourages people, black South Africans in particular, to actively participate in the economy through

³⁰⁴ B-BBEE Commission 2019. National Status and Trends on Black Economic Empowerment Report.

³⁰⁵ Breakfast NBBNB & Madumi P 2020. 'Social and political capital: crony capitalism in post-apartheid South Africa.' *Journal of Nation-Building and Policy Studies*, 2020(si1), 7.

³⁰⁶ Juggernath 2019: 36; Musabayana GT & Mutambara E 2022. 'The Implementation of the Broad-Based Black Economic Empowerment (B-BBEE) Policy in South Africa: A Myth or a Reality in SMEs?' *Australasian Accounting, Business and Finance Journal* 16(1): 73-84.

³⁰⁷ Art 2 of the UNDRTD.

³⁰⁸ Art 6 of the UNDRTD.

³⁰⁹ Preamble of the UNDRTD.

³¹⁰ Art 2(1) of the UNDRTD.

ownership, skill development programmes, and preferential procurement policies, with the goal of promoting overall economic development and social cohesion.³¹¹

5.5.2.2.2 National Development Plan

The right to development is closely linked to South Africa's National Development Plan (NDP), which serves as a blueprint for addressing socio-economic challenges and promoting inclusive growth. The NDP is an all-encompassing developmental policy document created by the South African government. It was written in August 2011 by the National Planning Commission, a special ministerial body established in 2009 by former President Jacob Zuma. The plan seeks to unite South Africans in a common programme to eliminate poverty and reduce inequality, encourage citizen participation, strengthen democracy, promote economic growth, focus on key capabilities like skills, infrastructure, and social security, and build a capable, developmental state³¹² with strong leadership by 2030.³¹³ The NDP provides a policy framework emphasising the importance of partnerships between government, civil society, and the private sector. The NDP advocates for integrated planning and implementation across all spheres of government.³¹⁴ The NDP is designed to work in harmony with the Constitution, reinforcing its principles while addressing the needs and aspirations of South Africa's diverse population. The South African Constitution which embraces the right to development puts emphasis on values such as democracy, equality, and human dignity. Gumede proffers that the NDP reflects these values by prioritising inclusive economic growth, social justice, and improving the quality of life for all South Africans.³¹⁵

In the context of the right to development, the NDP seeks to uphold the right to development by focusing on inclusive economic growth, job creation, equitable access to

³¹¹ Mudau D 2022. *The Influence of Broad-Based Black Economic Empowerment Policies on Organisational Effectiveness: A Case of South African Companies* (Doctoral Dissertation), 191.

³¹² Teffo 2020.

³¹³ National Planning Commission 2011. National Development Plan Vision 2030.

³¹⁴ NDP 2011: 49.

³¹⁵ Gumede 2018: 187.

quality education and healthcare, and building a capable and developmental state as provided in Chapters 3-13 of the NDP. Through prioritising these areas, the plan aims to empower individuals and communities to actively participate in and benefit from the country's development process, thereby fulfilling their right to development. As mentioned earlier, the Constitution of South Africa, particularly in Sections 26 and 27, guarantees various socio-economic rights such as housing, healthcare, education, and social security. The NDP aims to realise these rights by addressing poverty, inequality, and unemployment. The NDP notes the intent to deal with inequality by ensuring that skilled, technical, professional, and managerial posts better reflect the country's racial, gender and disability makeup and that ownership of assets is broadened to historically disadvantaged groups.³¹⁶ This also aligns with the literature that notes that improving access to and the quality of education and skills development contributes to reducing inequality, as well as enabling access to ownership of land.³¹⁷

Concerning unemployment, the framework developed in Chapters 3 and 4 identifies the relevant themes to the jobs and economic inclusion, including structural transformation, small business development, job creation and financial inclusion and inequality reduction. To this effect, the NDP provides that:

South Africa must develop the abilities of its workforce on a broad scale. This includes investing in skills and human development and creating a stable and constructive environment for bargaining and labour relations. This must support both investment and human rights.³¹⁸

Unemployment undermines individuals' ability to enjoy socio-economic rights and contributes to social and economic inequality. The NDP views employment as the most effective social protection measure, particularly given the high levels of unemployment in the country, which hinders poverty alleviation. Thus, effective development policies such

³¹⁶ NDP 2011: 261-294.

³¹⁷ Carter PL & Reardon SF 2014. *Inequality Matters*. New York, NY: William T. Grant Foundation.

³¹⁸ National Planning Commission 2012. Your Guide to the National Development Plan 2030. Available at <https://www.nationalplanningcommission.org.za/assets/Documents/ndp-2030-our-future-make-it-work.pdf>, 22 (accessed 25 June 2024).

as the NDP include measures to create jobs and provide opportunities for all. By ensuring support for investment and human rights, the NDP aligns with international standards on the right to development. It reflects a commitment to inclusive, equitable development that seeks to improve living standards and economic opportunities for everyone. The UNDRTD highlights the responsibility of both national governments and the international community to create favourable conditions for development. This includes ensuring that development policies and strategies are inclusive and participatory.³¹⁹ The NDP fulfils this role by its focus on inclusive growth, investing in education and vocational training, the NDP supports the right to development by equipping individuals with the skills needed to participate in the economy. Equal access to quality education and skills training are critical for reducing poverty and inequality levels. Where necessary, financial support must be provided to those who are financially excluded.³²⁰

Chapter 14 of the NDP notes that transparency is important for public accountability; this relies on enabling access to information which is an important aspect of the right to development. It suggests that more 'open data' be made available – that is data that does not require a formal request for its release.³²¹ It notes in Chapter 15 that active citizenry is key to building a transformed and united country and recommends that the state engages with citizens in their own forums, rather than expecting citizens to engage through government platforms.³²² This would support two-way information gathering and sharing. In other words, the calls for public engagement are collaborative between government, civil society, the private sector, and other stakeholders to ensure coordinated efforts and accountability. Through rigorous monitoring and evaluation mechanisms, the NDP aims to measure the impact of policies and interventions on socio-economic outcomes, including realisation of the right to development. The NDP emphasises the importance of upholding the 1997 Batho Pele principles, which state that

³¹⁹ NDP 2011: 92.

³²⁰ Sorensen P 2015. 'Can the Mining Industry in South Africa Kick-Start a Second Development Phase to Alleviate Poverty and Inequality?' *International Journal of Environmental Studies* 72(6): 921-947; Ali and Zhuang 2007: 97.

³²¹ NDP 2011: 401-410.

³²² NDP 2011: 411-429.

government should communicate with the public and understand their expectations and that citizens should be fully aware of their rights and the services they should expect from government.³²³ The goal of the principles was to encourage transparency and accountability and improve service delivery. This is in line with the right to development emphasis on openness and accessibility to information related to development processes. It ensures that development processes are open, fair, and responsive to the needs and rights of everyone, thereby enhancing the effectiveness and legitimacy of development efforts.

5.5.3 Jurisprudence on socio-economic rights, relevant to the right to development

South African courts have interpreted the socio-economic rights enshrined in the Constitution in ways that reflect the principles underlying the right to development. For instance, the ConCourt has affirmed that socio-economic rights are enforceable, though the court often apply a reasonableness standard, balancing the state's available resources against the immediate needs of individuals. The court has acknowledged that while the government must take reasonable steps to fulfil these rights, the complexity of developmental challenges means that some level of discretion is afforded to the government in deciding how to best meet these obligations. In this subsection, I consider the *Government of the Republic of South Africa and Others v Grootboom and Others* case³²⁴ and *Minister of Health and Others v Treatment Action Campaign*,³²⁵ which both show the importance of socio-economic rights in the realisation of the right to development in South Africa. I intentionally chose these two cases from a large pool of socio-economic rights cases with implications on the right to development. The *Grootboom* and *TAC* cases are noteworthy in South African jurisprudence because they

³²³ Jarbandhan DB 2022. 'The Professionalisation of the South African Public Sector: Challenges and Opportunities.' *Administratio Publica*, 30(4), 24-51.

³²⁴ *Grootboom* case.

³²⁵ *Minister of Health and Others v Treatment Action Campaign and Others* (TAC case) (No 2) 2002 5 SA 721(CC).

influenced the understanding and implementation of socio-economic rights. They clarified their justiciability, government duty, and transformative actions to rectify historical injustices and inequality.

5.5.3.1 Grootboom case

The significance of considering human rights in development processes can be drawn from the *Grootboom* case.³²⁶ The case was brought to the ConCourt by Mrs Irene Grootboom and other applicants whose claim was on the constitutional right of access to adequate housing.³²⁷ As a consequence of the adverse living conditions in which they were living, 390 adults and 510 children were forced to move from their informal settlement onto privately-owned land. They were then forcibly removed from the privately-owned land and their shacks (homes) destroyed.³²⁸ This happened against the backdrop of the government's housing programme that ignored the predicaments of the most vulnerable sections of the South African society.³²⁹ The applicants first approached the High Court to challenge the government's failure to take into consideration their housing plight. They sought an order from the court for the government to provide them with temporary shelter or housing until they were able to find permanent accommodation.³³⁰

The applicants based their arguments on the provisions of the Constitution, specifically those in Section 26(1) 'the right to access to adequate housing' and on the right of children to shelter as contained in Section 28(1)(c).³³¹ The Western Cape High Court found that

³²⁶ *Grootboom* case.

³²⁷ Sect 26(1) of the Constitution of the Republic of South Africa 1996, states that '[t]he state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of this right.'

³²⁸ *Grootboom*, Para 2; Sachs A 2003. 'The Judicial Enforcement of Socio-economic Rights': The *Grootboom* Case.' *Current Legal Problems* 56(1): 579, 579.

³²⁹ De Vos 2001: 258-260.

³³⁰ See the judgment of Davis with Comrie J concurring, in *Grootboom v Oostenberg Municipality and Others* 2000 (3) BCLR 277 (C); *Grootboom*, Para 4.

³³¹ Sect 26(1) of the South African Constitution; Sect 28(1)(c) of the South African Constitution states that '[e]very child has the right to basic nutrition, shelter, basic health care services and social services'.

only the children's right to shelter was violated and not the right of access to adequate housing. On appeal, the ConCourt found that the government's housing programme did not comply with the obligation to take reasonable steps as stipulated in Section 26(2) of the South African Constitution.³³² The ConCourt held that

[s]ocio-economic rights are expressly included in the Bill of Rights; they cannot be said to exist on paper only. Section 7(2) of the Constitution requires the state 'to respect, protect, promote and fulfil the rights in the Bills of Rights and the courts are constitutionally bound to ensure that they are protected and fulfilled.'³³³

The ConCourt further held that:

[t]here can be no doubt that human dignity, freedom and equality; the foundational values of our society are denied to those who have no food, clothing or shelter. Affording socioeconomic rights to all people therefore enables them to enjoy the other rights enshrined in chapter 2 [the Bill of Rights]. The realisation of these rights is also key to the advancement of race and gender equality and the evolution of a society in which men and women are equally able to achieve their full potential.³³⁴

Here the ConCourt's decision reinforced the notion that socio-economic rights, like the right to adequate housing, are justiciable and enforceable, meaning individuals can seek legal redress if their constitutionally guaranteed rights are not met. It declared that the government had breached its responsibility in failing to make provision in the housing policy for basic shelter to the most disadvantaged.³³⁵ The Court made it clear that the right of access to adequate housing included the right of access to land for those who could not afford to pay for it.³³⁶ Moreover, it observed that Section 26(1) required

³³² Khoza B 2007: 31; Sect 26(2) of the South African Constitution.

³³³ *Grootboom*, Para 20.

³³⁴ *Grootboom*, Para 23.

³³⁵ Darrow & Tomas 2005: 523; Sect 26(1) of the South African Constitution state that the South African Constitution guarantees the right to have access to adequate housing. The subsequent paragraph dealing with the state's obligation in that regard requires the state to take 'reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of this right.'

³³⁶ Seleane 2003: 137.

government planning that was flexible enough to adapt to changing social conditions.³³⁷ Even within its limited resources, the government's failure to make provision for the minimal shelter needs of people in certain areas was not reasonable and did not comply with the government's constitutional obligations.³³⁸ The government was obliged to devise and implement within its available resources a comprehensive and coordinated programme to progressively realise the said right. The *Grootboom* case shows the importance of socio-economic rights in general and the right of access to housing in particular, in the realisation of the right to development in South Africa.

The decision in the *Grootboom* case confirms the significance of the contextual and normative framework of human rights to transform a society where people can be able to live in dignity and free from poverty, disease, and hunger. The judgement confirms that the full transformative power of rights can only be realised when they are interpreted in the specific development context (social or economic) prevalent in society to better the living conditions of the poor and the marginalised.³³⁹ This landmark case specifically, dealt with whether the government's housing policies and programmes were sufficient to meet the needs of those in dire housing situations. It set a precedent in South African law for the enforcement of socio-economic rights and the government's obligations to its citizens. The decision has influenced international human rights jurisprudence by demonstrating how domestic courts can enforce socio-economic rights and hold governments accountable. This aligns with the broader principles of the right to development, which advocates for equitable and inclusive development. It underscored the need for comprehensive and inclusive development policies that address the needs

³³⁷ According to the ConCourt, the use of the term 'access to' in Sect 26(1) 'recognises that housing entails more than bricks and mortar. It requires available land, appropriate services such as the provision of water and the removal of sewage and the financing of all of these, including the building of the house itself. For a person to have access to adequate housing all of these conditions need to be met: there must be land, there must be services, and there must be a dwelling. Access to land for housing is, therefore included in the right of access to adequate housing in Sect 26'. (*Grootboom*: Para 35–36); Pillay 2007: 551.

³³⁸ Darrow & Tomas 2005: 524.

³³⁹ De Vos 2001: 268.

of the poor and the marginalised, thereby reinforcing the broader principles of human rights and development.

It is worth noting that although the *Grootboom* case has been significant in advancing the application and justiciability of socio-economic rights in South Africa, it has also attracted criticism for failing to deliver tangible, life-changing outcomes for those directly affected.³⁴⁰ While the ConCourt recognised the government's duty to adopt reasonable measures to realise the right to housing, it stopped short of mandating immediate relief for Ms. Grootboom and her community, many of whom remained in precarious living conditions long after the judgment. This has led scholars to question the practical value of such rights when their enforcement prioritises abstract policy frameworks over the urgent needs of real people.³⁴¹ The judgment's focus on programmatic reasonableness rather than concrete entitlements is seen to dilute the transformative promise of socio-economic rights, including the right to development. Tragically, Ms. Grootboom herself died still living in a shack, her story a stark reminder of the disconnect that can exist between constitutional ideals and the lived realities of those most in need of justice.

The *Grootboom* case is important in understanding the intersection of socio-economic rights and development. It reinforces the idea that the right to development includes not only the progressive realisation of socio-economic rights but also the immediate provision of essential needs for the most vulnerable.

5.3.3.2 Treatment Action Campaign case

In July 2002, the ConCourt again acknowledged the importance of human rights standards that are at the heart of human development. The ConCourt, in the *Minister of Health v Treatment Action Campaign (TAC)* case,³⁴² demonstrated vividly, how the

³⁴⁰ Pillay K 2002. 'Implementation of Grootboom: Implications for the enforcement of socio-economic rights.' *Law, Democracy & Development*, 6(2), pp.255-277.

³⁴¹ De Vos P 2001. 'Substantive equality after Grootboom: The emergence of social and economic context as a guiding value in equality jurisprudence.' *Acta Juridica*, 52.

³⁴² TAC case.

constitutionally guaranteed right of access to healthcare could, within the appropriate limits of its justifiability, have a constructive impact on development policy debates to the benefit of large numbers of people.³⁴³ The *TAC* case confronted the inadequate nature of government measures in preventing mother-to-child transmission of HIV on two grounds. The *TAC* case was rooted in the broader right to health, which is essential to the right to development. The organisation, TAC argued that failing to provide ARV drugs to prevent mother-to-child transmission of HIV was a violation of the socio-economic rights to healthcare guarantee under Section 27 of the South Africa Constitution of 1996. The applicants offered the following arguments:

- (1) The government unreasonably prohibited administering the antiretroviral drug, Nevirapine, at public hospitals and clinics, except for a limited number of pilot sites; (2) The Government had not produced and implemented a comprehensive national programme for the prevention of MTCT of HIV.³⁴⁴

In response, the High Court and the ConCourt applied the reasonableness test developed in the *Grootboom* case.³⁴⁵ The court decided that the government's programme did not comply with the right of access to health care services and the duty to take reasonable measures as required in Section 27(2) of the Constitution.³⁴⁶ The ConCourt additionally developed a new element of the reasonableness test. It held that '[t]he Government must be transparent and allow for the participation of several stakeholders in the implementation of the programme.'³⁴⁷ The ConCourt further observed that any national programme for the realisation of socio-economic rights must be balanced and flexible.³⁴⁸

³⁴³ It is provided in Sect 27(1) of the South African Constitution that everyone the right of access to health care services (including reproductive health care, sufficient food and water, and social security, including, if persons are unable to support themselves and their dependents, appropriate social assistance).

³⁴⁴ *TAC*, Para 58; Khoza 2007: 32.

³⁴⁵ Mbazira C 2011. 'Grootboom: A Paradigm of Individual Remedies Versus Reasonable Programmes.' *Southern African Public Law* 26(1): 60-80.

³⁴⁶ Sect 27(2) of the South African Constitution; Khoza 2007:32.

³⁴⁷ *TAC*, Para 100.

³⁴⁸ Liebenberg S 2005. 'The Value of Human Dignity in Interpreting Socio-Economic Rights.' *South African Journal on Human Rights* 21(1): 1-31.

If not, it would profoundly affect the ability to enjoy the human rights to which people are entitled.³⁴⁹

The *TAC* case exemplifies how the right to development, which encompasses the right to access essential services like healthcare, is interlinked with other human rights.³⁵⁰ In Kirchmeier's account, the right to development is broadly understood as the right of individuals and communities to enjoy a standard of living that includes adequate health, education, and economic opportunities.³⁵¹ By upholding the right to health in this instance, the ConCourt effectively supported the broader right to development, as access to vital healthcare services is critical for individual and community development and well-being.

To enforce these rights, the following Chapter examines the South African government obligations on the right to development. It argues that the South African government has sufficient institutional capacity, ranging from the constitutionally established institutions such as the SAHRC, the Public Protector and the Auditor General. The institutions promote in one form or another respect for human rights, the protection, development, and attainment of human rights, and ensure effective monitoring and assessment of the observance of human rights, including the right to development.

³⁴⁹ *TAC*, Para 68-78; Darrow & Tomas 2005: 527.

³⁵⁰ Meier BM & Fox AM 2008. 'Development as Health: Employing the Collective Right to Development to Achieve the Goals of the Individual Right to Health. *Human Rights Quarterly* 30(2): 259-355.

³⁵¹ Kirchmeier 2006: 11.

5.6 CONCLUSION

In this Chapter, I have examined both the legal status and the extent of realisation of the right to development in the South African legal and institutional frameworks. The Chapter began by highlighting the historical human rights violations under colonialism and the oppressive apartheid system. These two systems had no regard for human rights, particularly the rights of black people who had been dispossessed of their lands. I also explained how local and international actors responded to the unjust regime, shaping the current human rights protection in South Africa. I emphasise that the right to development, as a multifaceted right, is entrenched in the South African legal system. I argue that, while the South African Constitution does not directly mention the right to development, as an all-encompassing right, the protection of socio-economic rights connects to it.

Furthermore, I have demonstrated that the right to development is implicitly embedded in numerous pieces of legislation, including the PAJA, PFMA, NEMA, and the Municipality Systems Act among others. In addition, I have established that the right to development is embedded in major developmental policies such as the BBBEE initiative and the NDP. The justiciability of the right to development was implicitly established in the ConCourt decisions in the *Grootboom* and *TAC* cases. I intentionally chose these two cases from a large pool of socio-economic rights cases with implications on the right to development. The *Grootboom* and *TAC* cases were intentionally selected to demonstrate the influence they have in South African jurisprudence especially, clarifying the justiciability of socio-economic rights, government duty, and transformative actions to rectify historical injustices and inequality under the South African Constitution. They demonstrate how the courts have been able to compel the government to fulfil its obligations towards marginalised communities. As they emphasise that the government must take reasonable measures within its available resources to progressively realise socio-economic rights. The cases illustrate that while immediate fulfilment of all rights might not be possible, there must be a clear plan and effort to address the needs of the most disadvantaged.

Given that the right to development is implicitly protected in the South African constitutional order, the next Chapter examines the South African government's obligations in realising the right to development.

CHAPTER 6

SOUTH AFRICAN GOVERNMENT'S OBLIGATIONS IN REALISING THE RIGHT TO DEVELOPMENT

6.1 INTRODUCTION

The obligation of governments to respect and uphold human rights and fundamental freedoms is a cornerstone of contemporary legal and normative frameworks. This principle is deeply embedded in various cultural and religious traditions globally and has been articulated through numerous international legal instruments. A seminal moment in this evolution occurred in 1948 when the UDHR,¹ which asserts that recognition of the inherent dignity and equal rights of all individuals is essential for fostering freedom, justice, and peace internationally.²

The right to development emerged as a significant aspect of the human rights discourse, particularly following its incorporation into the African Charter. It gained further recognition with the adoption of the UNDRTD, which, despite some dissent, has increasingly garnered support from the international community. The UN's commitment in promoting the right to development culminated in its unanimous endorsement in the 1993 Vienna Declaration,³ marking a fundamental shift towards a more concrete and actionable framework for the right to development. This framework has been supported by various UN agencies and international financial institutions, emphasising the collaborative efforts required to realise this right. Alongside other international human rights instruments, the African Charter imposes specific obligations on member states to respect, protect, and fulfil human rights, including the right to development, thereby reinforcing the essential role of state accountability in promoting development.

¹ UDHR.

² Preamble to the UDHR.

³ Vienna Declaration.

The same is observable in the South African Constitution, which obligates the government to respect, protect, promote, and fulfil the broad range of rights enshrined therein,⁴ delineating them into perfect and imperfect obligations as articulated by legal scholars.⁵ Perfect obligations, which require immediate compliance and enforceable through judicial mechanisms, contrast with imperfect obligations that demand ongoing efforts and progressive realisation. This distinction is crucial for understanding the complexities involved in the implementation and enforcement of human rights in South Africa. It reflects the challenges of achieving comprehensive socio-economic and cultural as well as political development while safeguarding fundamental freedoms.

To effectively balance these obligations, a robust legal framework, effective policy measures, and continuous monitoring are essential. This chapter explores the specific obligations of the South African government concerning the right to development. It assesses the interplay between legal mandates and practical implementation in the pursuit of equitable socio-economic development, emphasising the challenges and opportunities that arise in this critical area of human rights. Through this examination, the chapter elucidates on how South Africa can navigate its commitments while fostering inclusive development for all its citizens.

The Chapter is structured to provide a comprehensive examination of South Africa's obligations on the right to development. To this effect, in Section 6.2, I analyse South Africa's international obligations related to this right, with a focus on relevant international human rights instruments in subsection 6.2.1. In subsection 6.2.2, I explore the role that South Africa plays in ensuring adherence to human rights at the international level. Given that the right to development is legally binding under the African Charter, Section 6.3 delves into South Africa's regional obligations in relation to the African Charter and ancillary African human rights instruments that equally enshrine the right to development. Finally, in Section 6.4, I investigate South Africa's domestic obligations on the right to development. This section is further divided into subsection 6.4.1, which addresses constitutional obligations, and subsection 6.4.2, which focuses on institutional obligations.

⁴ Constitution of the Republic of South Africa 1996.

⁵ Marks 2005: 23-60.

Through this structured approach, the Chapter elucidates the multifaceted obligations that South Africa bears in promoting realisation of the right to development.

6.2 SOUTH AFRICA'S INTERNATIONAL OBLIGATIONS

Every individual in South Africa possesses a set of fundamental human rights in accordance with international law, irrespective of race, religion, nationality, membership in social groups, or political beliefs among others. Through ratifying the treaties that enshrine these rights, South Africa commits to adhere to the international legal framework that binds all UN member states to various human rights obligations, including obligations on the right to development. The government's international obligations on the right to development are delineated by its engagements under diverse international and regional human rights instruments. Governments bear obligations mandated by international human rights law, which is firmly rooted in the concept of human dignity inherent in every individual, regardless of external influences.⁶ The principle finds expression in the UDHR, a cornerstone of international human rights law, which asserts the entitlement of 'everyone' to the rights enumerated therein. The UDHR proclaims a broad spectrum of human rights, encompassing civil and political as well as economic, social, and cultural rights, as a 'common standard of achievement' for all peoples and nations.⁷ Importantly, Ssenyonjo asserts that these rights have been fortified at the international level through the establishment of legally binding treaties.⁸

6.2.1 International conventions and declarations

Over the course of history, numerous governments and international organisations have dedicated substantial efforts towards the establishment and enforcement of international

⁶ United Nations 1948. 'The Foundation of International Human Rights Law.' Available at <https://www.un.org/en/about-us/udhr/foundation-of-international-human-rights-law> (accessed 13 September 2024).

⁷ Preamble to the UDHR.

⁸ Ssenyonjo 2011: 969-1012.

treaties aimed at protecting human rights and fundamental freedoms. According to Kedzia, these treaties are created with the purpose of establishing normative standards and operational mechanisms to protect and promote human rights on a global scale.⁹ Central to these efforts is the UN, which has adopted six foundational international human rights treaties recognised for their role in enhancing human rights practices worldwide.¹⁰ The first among these treaties is the ICCPR,¹¹ which articulates such rights as freedom of expression, freedom of assembly, and fair trial procedures among others. Complementing the ICCPR is the ICESCR,¹² which focuses on rights pertaining to work, education, healthcare, and adequate standards of living. The International Convention on the Elimination of All Forms of Racial Discrimination (CERD) addresses racial equality and the eradication of discriminatory practices.¹³ Furthermore, the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW)¹⁴ is pivotal in promoting gender equality and protecting women's rights, while the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT) seeks to prevent torture and inhumane treatment globally.¹⁵ Lastly, the CRC outlines the specific rights that are guaranteed to children, encompassing protection, education, and healthcare among others.¹⁶ Monitoring the implementation of these treaties falls under the purview of various UN committees, each dedicated to a specific treaty. For example, the Human Rights Committee oversees compliance with the ICCPR,¹⁷ the Committee on

⁹ Kedzia 2017: 4-10.

¹⁰ Simmons B 2010. 'Treaty Compliance and Violation. *Annual Review of Political Science* 13(1): 273-296.

¹¹ ICCPR.

¹² ICESCR.

¹³ United Nations General Assembly 1965. International Convention on the Elimination of All Forms of Racial Discrimination (adopted 21 December 1965 and entered into force 4 January 1969)

¹⁴ UN General Assembly 1979. Convention on the Elimination of All Forms of Discrimination Against Women (adopted on 18 December 1979 and entered into force on 3 September 1981).

¹⁵ United Nations General Assembly 1984. Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (adopted 10 December 1984 and entered into force on 26 June 1987).

¹⁶ CRC.

¹⁷ The Human Rights Committee, comprised of 18 Independent Experts, oversees the implementation of states parties' obligations under the ICCPR.

Economic, Social and Cultural Rights monitors the ICESCR,¹⁸ and the Committee on the Elimination of Discrimination against Women focuses on the CEDAW.¹⁹ Pillay assert that these committees undertake critical functions such as reviewing reports submitted by state parties, addressing individual complaints on rights violations, and issuing recommendations aimed at improving human rights practices at both the national and international levels.²⁰

Mégret submits that all the international human rights treaties impose obligations on state parties to respect, protect, and fulfil human rights.²¹ This mandate is emphasised by Fukuda-Parr, who asserts that under international human rights law, governments are duty-bound to respect, promote, protect, and fulfil human rights.²² For example, Article 2(1) of the ICCPR stipulates that '[e]ach State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognised in the present Covenant.'²³ Similarly, the Preamble to the ICESCR highlights that states are obligated under the UN Charter to promote universal respect for and observance of human rights and freedoms.²⁴ As a state party to the ICESCR, South Africa assumes multifaceted obligations because by ratification, state parties commit to respecting, protecting, and fulfilling the rights articulated in the Covenant, which includes

¹⁸ United Nations Committee on Economic, Social and Cultural Rights. Available at <https://www.ohchr.org/en/treaty-bodies/cescr> (accessed 13 September 2024).

¹⁹ United Nations Committee on the Elimination of Discrimination against Women. Available at <https://www.ohchr.org/en/treaty-bodies/cedaw> (accessed 13 September 2024).

²⁰ Pillay 2012.

²¹ Mégret 2010: 31.

²² Fukuda-Parr 2013: 167-170.

²³ Art 2 of the ICCPR provide that '[e]ach State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.'

²⁴ Preamble to the ICESCR, Para 4.

obligations to progressively achieve the realisation of the economic, social, and cultural rights enshrined therein.²⁵

Qerimi posits that the right to development is intricately linked to the economic, social and cultural rights enshrined in the ICESCR.²⁶ Through linking the right to development with the rights enshrined in the ICESCR, Qerimi emphasises the importance of a holistic approach to human rights that integrates various dimensions of well-being, ensuring that development efforts contribute to the realisation of fundamental human rights for all individuals.²⁷ The principle of progressive realisation requires the South African government to continuously strive towards achieving full realisation of ICESCR rights within its available resources. However, Chenwi raises a critical point regarding the reliance on resource availability, questioning the extent of obligation or expectation for immediate implementation.²⁸ Chenwi's observation underlines the inherent tension between the ideal of immediate implementation of socio-economic rights and the practical constraints imposed by resource availability.²⁹ Achieving a balanced approach necessitates a nuanced consideration of both the government's obligations under international treaties and the practical challenges it confronts.

According to Simmons, human rights treaties have significantly enhanced the protection of human rights globally.³⁰ The act of ratifying the international treaties facilitates advocacy for reforms within the domestic political arena.³¹ The treaties establish mechanisms for monitoring and reporting on human rights practices and provide avenues for individuals and groups to seek redress when their rights are violated. Simmons observes that the existence of human rights treaties has contributed to heightened

²⁵ Art 3 of the ICESCR state that the 'States Parties to the present Covenant undertake to ensure the equal right of men and women to the enjoyment of all economic, social and cultural rights set forth in the present Covenant.'

²⁶ Qerimi 2007: 1-34.

²⁷ Qerimi 2007: 24.

²⁸ Chenwi 2013: 744.

²⁹ Chenwi 2013: 744.

³⁰ Simmons 2010.

³¹ Simmons 2009.

awareness, fostered dialogue, and overall, improved the global framework for human rights protection.³² For example, Hill argues that the ratification of the CEDAW has yielded positive outcomes by advancing women's political, economic, and social rights.³³ This includes ensuring women's implicit right to development as articulated in Article 2 of the CEDAW.³⁴ Furthermore, Articles 1(1) of both the ICCPR and the ICESCR affirm that '[a]ll 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.'³⁵ These provisions highlight the interconnectedness of development and human rights, which translate to an implicit reading of the right to development therein

Additionally, while the UNDRTD is not a legally binding instrument, it imposes obligations on member states to respect, protect, and fulfil the right to development. Scholz elucidates that the UNDRTD outlines specific requirements for member states, emphasising joint obligations to promote development that upholds human rights and fundamental freedoms.³⁶ For example, governments are urged to implement proactive measures to ensure the full realisation of all human rights, encompassing economic, social, cultural as well as civil, and political rights for all individuals and peoples.³⁷

³² Simmons 2010.

³³ Hill Jr 2010: 1161; Phara 3 of CEDAW Preamble notes that the 'States Parties to the International Covenants on Human Rights have the obligation to ensure the equal rights of men and women to enjoy all economic, social, cultural, civil and political rights.'

³⁴ It is provided in Art 2 of CEDAW that 'States Parties shall take in all fields, in particular in the political, social, economic and cultural fields, all appropriate measures, including legislation, to ensure the full development and advancement of women, for the purpose of guaranteeing them the exercise and enjoyment of human rights and fundamental freedoms on a basis of equality with men'.

³⁵ Art 1(1) of the ICCPR and ICESCR.

³⁶ Scholz I 2020. 'Reflecting on the Right to Development from the Perspective of Global Environmental change and the 2030 Agenda for Sustainable Development.' *Sustainable Development Goals and Human Rights* 191-205, 199-200.

³⁷ Art 1(1) of the UNDRTD states that '[t]he right to development is 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.'

Moreover, member states are encouraged to enhance international cooperation and solidarity through bilateral and multilateral channels to support the right to development.³⁸ Article 3 of the UNDRTD underlines the duty bearers of the right to development. It provides that:

1. States have the primary responsibility for the creation of national and international conditions favourable to the realization of the right to development.³⁹
2. The realization of the right to development requires full respect for the principles of international law concerning friendly relations and co-operation among States in accordance with the Charter of the United Nations.⁴⁰
3. States have the duty to co-operate with each other in ensuring development and eliminating obstacles to development. States should realize their rights and fulfil their duties in such a manner as to promote a new international economic order based on sovereign equality, interdependence, mutual interest and cooperation among all States, as well as to encourage the observance and realization of human rights.⁴¹

Furthermore, Article 8 of the UNDRTD provides that:

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.⁴²

³⁸ It is provided in Art 3(3) of the UNDRTD that 'States have the duty to co-operate with each other in ensuring development and eliminating obstacles to development. States should realize their rights and fulfil their duties in such a manner as to promote a new international economic order based on sovereign equality, interdependence, mutual interest and co-operation among all States, as well as to encourage the observance and realization of human rights.'

³⁹ Art 3(1) of the UNDRTD.

⁴⁰ Art 3(2) of the UNDRTD.

⁴¹ Art 3(3) of the UNDRTD.

⁴² Art 8(1) of the UNDRTD.

2. States should encourage popular participation in all spheres as an important factor in development and in the full realization of all human rights.⁴³

Aligned with the UNDRTD, it is noteworthy to emphasise that although the UNDRTD lacks legally binding force, a Draft International Covenant on the Right to Development has been formulated and submitted to the UN General Assembly for deliberation and potential adoption.⁴⁴ South Africa, in conjunction with other nations of the G77 (currently comprising of 134 developing countries) at the UN General Assembly, has played a prominent role in promoting the drafting of the International Covenant on the Right to Development. Article 4(1) of the Draft International Covenant affirms the inherent entitlement of every individual and all peoples to development. This encompasses the rights to engage in, contribute to, and benefit from civil, cultural, economic, environmental, political, and social advancement, which are indivisible from and interdependent with all other human rights and fundamental freedoms.⁴⁵ In defining the right to development, the Draft Covenant imposes obligations on state parties as articulated in Article 8(1) to uphold, protect, and fulfil the right to development for all individuals, without discrimination based on race, colour, sex, language, religion or belief, political or other opinion, national or social origin, property, disability, birth, age, or any other status, consistent with the commitments outlined in the covenant.⁴⁶ The initiative represents a significant stride

⁴³ Art 8(2) of the UNDRTD.

⁴⁴ Draft International Covenant on the Right to Development. Available at <https://www.ohchr.org/en/news/2023/09/intergovernmental-working-group-right-development-presents-human-rights-council-draft> and <https://digitallibrary.un.org/record/4018149?ln=en&v=pdf> (accessed 30 September 2024).

⁴⁵ Art 4(1) of the Draft International Covenant on the Right to Development state that '[e]very individual and all peoples have the inalienable right to development, by virtue of which they are entitled to participate in, contribute to and enjoy civil, cultural, economic, environmental, political and social development that is indivisible from and interdependent and interrelated with all other human rights and fundamental freedoms.'

⁴⁶ Art 8(1) of the Draft International Covenant on the Right to Development provide that 'States Parties shall respect, protect and fulfil the right to development for all, without discrimination of any kind on the basis of race, colour, sex, language, religion [or belief], political or other opinion, national, ethnic or social origin, property, disability, birth, age or other status, in accordance with obligations set forth in the present Covenant.'

towards formalising and strengthening international commitments on the right to development, with the overarching goal of integrating developmental imperatives on a global scale.

According to Ibhawoh, realisation of the right to development hinges on the commitment of governments, who serve as primary duty bearers.⁴⁷ Governments are tasked with providing for the specific right to development and creating an enabling environment wherein all human rights and fundamental freedoms can be enjoyed within their jurisdictions. These obligations derive from various sources of international law, including international treaty law, customary international law, soft law,⁴⁸ and decisions of international tribunals that interpret these obligations.⁴⁹ Customary international law, as discussed in section 3 of Chapter 3, is grounded in the consistent and widespread practice of states, accompanied by a belief (*opinio juris*) in the legal obligation of such practices. Numerous human rights norms, such as the prohibition of torture and the principle of non-discrimination, have attained customary international law status, obligating all states irrespective of their treaty commitments.⁵⁰ As outlined in section 5 of Chapter 2, the right to development is a comprehensive right that encompasses all other human rights, including economic, social and cultural, civil and political rights⁵¹ and other collective rights like the right to self-determination, the rights to permanent sovereignty over natural resources, the right to a clean and healthy environment and the right to peace and security among others. Effectively fulfilling these rights equates to implementing the internal dimension of the right to development.

⁴⁷ Ibhawoh 2011: 96-97.

⁴⁸ Soft law is defined as non-binding agreements, recommendations, statements, and resolutions that impact state behaviour and international standards. Although they are not legally binding, soft law instruments such as the Universal Declaration of Human Rights and several United Nations resolutions shape human rights norms. For further reading see Scholz 2020: 194.

⁴⁹ Interpretations of human rights obligations by international courts and tribunals help clarify and elaborate on treaty provisions and customary international law.

⁵⁰ Baker 2010: 176-177.

⁵¹ Sengupta A 2002. 'On the Theory and Practice of the Right to Development.' *Human Rights Quarterly*, 24, 837–889; Sengupta, Eide, Marks and Andreassen 2003: 1-3.

6.2.2 South Africa's role

Cornwall and Nyamu-Musembi argue that South Africa has an important obligation to adopt specific measures to fulfil its international obligations regarding the right to development, as outlined in various human rights instruments.⁵² The right to development encompasses not only economic growth but also the enhancement of individual and collective well-being, emphasising participation, equality, and sustainability. In this context, this involves implementing policies that address historical injustices, such as land redistribution, access to quality education, and healthcare. The authors highlight that the government must prioritise marginalised communities to ensure equitable access to resources and opportunities.⁵³ Furthermore, they suggest that South Africa should engage in international cooperation to share best practices and resources, fostering a global environment conducive to development.⁵⁴ Through actively pursuing these measures, South Africa can better align its domestic policies with its international commitments, ultimately enhancing its citizens' quality of life and promoting social and economic justice.⁵⁵

Kumar observes that 'an improvement in realisation of the right to development means that at least some rights should improve while no rights are violated.'⁵⁶ In other words, Kumar's observation accentuates the importance of a balanced and integrated approach to the right to development, ensuring that progress in some areas of rights does not result in setbacks or violations in others. As a result, this is a broad responsibility that extends throughout the legal and human rights systems. Therefore, under international human rights law, the three types of obligations to respect, protect, and fulfil apply to all human rights and can exist concurrently as obligations of action and results.⁵⁷ Because the right

⁵² Cornwall A & Nyamu-Musembi C 2004. 'Putting the 'Rights-Based Approach' to Development into Perspective. *Third world quarterly* 25(8): 1415-1437.

⁵³ Gathii 2009: 143.

⁵⁴ Art 8(1) of the UNDRTD.

⁵⁵ Rugunjah 2020: 100-118.

⁵⁶ Kumar 2003: 4; See also Leckie 1998: 92.

⁵⁷ Leckie 1998: 92; See also Marks 2008: 106.

to development is a component of established human rights, all global actors and other duty bearers are obligated to ensure its implementation.⁵⁸ This implies that the right to development, as part of the established human rights framework, places an obligation on all global actors, ranging from governments, international organisations, the private sector, and civil society in ensuring its implementation.⁵⁹ The collective responsibility is crucial for creating a fair and equitable global environment where development efforts respect and enhance human rights for all.

In South Africa, Arendse notes that the obligation to respect enjoins the government to refrain from interfering with or preventing the continuous enjoyment of amenities required for personal development.⁶⁰ The government for example, must not suspend free education or cut off social welfare programmes like social security, petroleum, and agricultural subsidies.⁶¹ It must also not confiscate lands or other properties without compelling arguments or reasonable compensation.⁶² Similarly, the South African government must avoid enacting legislation or policies that may have a negative impact on the livelihoods of disadvantaged people who rely on subsistence farming, such as local farmers, fishers, and pastoralists.⁶³ In other words, the government must not prevent the continuous enjoyment of basic necessities like food, water, power and in general, all services that have a direct impact on development.⁶⁴ It also means that when engaging to bilateral or multilateral trade agreements, the South African government must consider its people's cultural, scientific, technological, and agricultural demands, as well as the

⁵⁸ Gready 2008: 735-747.

⁵⁹ Ibhawoh 2011: 90-91.

⁶⁰ Arendse 2011: 103-108.

⁶¹ Arendse 2011: 103-108.

⁶² *Centre for Minority Rights Development (Kenya) and Minority Rights Group International on Behalf of Endorois Welfare Council v Kenya* Comm No 276/2003, Para 144-162

⁶³ Shackleton and Shackleton 2012: 275-286.

⁶⁴ Hardberger A 2005. 'Life, Liberty, and the Pursuit of Water: Evaluating Water as a Human Right and the Duties and Obligations it Creates. *Northwestern Journal of Human Rights* 4: 331-362.

environmental problems that accompany them.⁶⁵ Denying anyone access to subsistence would imply violating their right to personal development, and thus, the right to life.⁶⁶

Additionally, the obligation to protect obligates the South African government to protect its citizens' economic, social, cultural, civil, and political rights against third-party intervention, as well as their security, safety, and well-being.⁶⁷ It means that constitutional or legislative measures are required to establish good governance and eliminate or control negative socio-economic phenomena such as land grabbing,⁶⁸ water grabbing, pollution, and other forms of environmental degradation, particularly by private enterprises or multinational corporations.⁶⁹ Hence there is a need for proper and effective regulation. Similarly, the right to free and informed consent must be maintained.⁷⁰ Lastly, Ziegler states that the obligation to fulfil imposes three types of tasks on the duty bearer namely, to facilitate, promote, and provide.⁷¹ Accordingly, the commitment to fulfil (facilitate) compels the South African government to actively strengthen citizens' access and use of resources to improve their livelihoods and ensure their safety and security. The commitment to fulfil (promote) compels the South African government to consider the right to development when formulating public policy and decision making. The obligation to fulfil (provide) compels the South African government to directly offer services or supplies to everyone and to all peoples who are unable to enjoy or get them due to circumstances beyond their control, such as natural disasters.⁷² Ziegler's framework of facilitation, promotion, and provision provides a comprehensive approach to understanding the obligations of duty bearers in realising human rights, including the right

⁶⁵ Ziegler 2008: 8-9.

⁶⁶ Sollner 2007: 396-39.

⁶⁷ Chirwa DM & Chenwi L 2016. *The Protection of Economic, Social and Cultural Rights in Africa: International, Regional and National Perspectives*. Cambridge University Press.

⁶⁸ Ashukem & Ngang 2022: 405-407.

⁶⁹ Ziegler 2004: 13-15; Ziegler 2009: 28.

⁷⁰ ICESCR, General Comment 12, 18.

⁷¹ Ziegler 2019: 9; Ziegler 2008:15.

⁷² Ziegler 2019: 15.

to development.⁷³ Each of these mandatory tasks plays a critical role in ensuring that rights are not only recognised but also, effectively enjoyed by all.

Rudolf adds that there are three other related obligations, namely to establish an institutional framework conducive for the realisation of the right to development, to act in accordance with the principles of the right to development as enshrined in international human rights instruments, and to achieve the results defined by the right.⁷⁴ Allen asserts that the establishment of an institutional framework represents the idea of sovereign equality and the government's responsibility to provide an effective governance environment in which all rights can thrive unhindered.⁷⁵ Engagement in conduct aligned with right to development principles is both a negative and positive requirement that reflects national and international commitments.⁷⁶ The combination of the two should result in enhanced human welfare and development in South Africa. The obligations highlighted above are interestingly, complimentary to the general character of the duties of states under economic, social, and cultural rights and thus, vital for achieving the right to development.⁷⁷

South Africa also has a broad international obligation to co-operate with other global actors to create an enabling environment for the realisation of the right to development. Like other developing countries, South Africa has championed and promoted the concept of development as a human right through promulgating both civil and political and socio-economic and cultural rights as well as other collective rights. Every government is expected to co-operate in conformity with the UN Charter and by respecting the principles

⁷³ Ziegler 2019: 15.

⁷⁴ Rudolf 2008: 106.

⁷⁵ Allen N 2012. 'Individual Freedom and Institutional Frameworks in Development. *Cambridge Journal of Education* 42(3): 425-440.

⁷⁶ Lubo 2014: 42.

⁷⁷ 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.

of international law governing friendly relations.⁷⁸ It entails respecting all human rights and encouraging sovereign equality, interdependence, and mutual co-operation in order to remove barriers to development, devise international development policies,⁷⁹ and work towards building and sustaining international peace and security.⁸⁰ Amazingly, this type of right to development duty is anchored in the UN's goals and core values, as enshrined in the UN Charter.⁸¹ It suggests that international co-operation is essential for any meaningful implementation of the right to development, rather than being unique to it. In fact, this has been regarded as the fulfilment of basic human rights as part of the development process.⁸²

Salama does not believe that the right to development is '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.'⁸³ It is not 'an act of charity, or wishful thinking,' but rather a true commitment to social justice and human development.⁸⁴ This is not to say that the right is not biased towards 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.⁸⁵

⁷⁸ United Nations 1945. *United Nations Charter* adopted on 26 June 1945 and entered into force on 24 October 1945), Arts 55 and 56; Art 3(2) of the UNDRTD.

⁷⁹ Art 4(1) of the UNDRTD.

⁸⁰ Art 7 of the UNDRTD; Mthembu-Salter G 2021. 'Peace and Security in Africa: The Case for South African Leadership.' *Journal of Conflict Resolution* 65(4): 713-731.

⁸¹ UN Charter.

⁸² Arts 2000: 51-88

⁸³ Salama 2008: 122.

⁸⁴ Salama 2008: 122.

⁸⁵ 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.

It is important to recognise that the right to development is intended to support the interests of developing countries by advocating for their economic and social progress. However, there can be biases in how development or policies are applied, sometimes favouring certain countries or regions over others, or prioritising economic growth over social equity. In essence, this implies that while the right to development aims to support developing countries, the way it is realised in practice can be subject to various biases and challenges (such as selective resource allocation). It is a complex issue that often requires careful consideration of both the intentions and the practical outcomes of development policies.

Implementation of the human rights obligations involves both international and national dimensions, and states have responsibilities at both levels. This dual-level framework ensures that human rights are respected, protected, and fulfilled in a comprehensive manner.⁸⁶ This view reflects the key implementation provisions 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.⁸⁷

This implies that implementing human rights obligations at both the international and national levels increasingly, requires international co-operation, especially in the context of economic globalisation. The impacts of globalisation and the principles of the Washington Consensus play a significant role in shaping this dynamic.⁸⁸ The Washington Consensus represents a set of economic policy recommendations that emerged in the late 20th century, advocating for market-oriented reforms such as trade liberalisation,

⁸⁶ Leckie 1998: 90-123.

⁸⁷ Art 2(1) of the ICESCR.

⁸⁸ Williamson J 1990. Latin American Adjustment: How Much Has Happened? *Institute for International Economics*.

deregulation, privatisation, and fiscal austerity.⁸⁹ Implementing human rights obligations in the context of economic globalisation and the Washington Consensus requires robust international cooperation. States and global actors must work together in aligning economic policies with human rights goals, address the challenges posed by globalisation, and ensure that development benefits are equitably distributed. This collaborative approach is essential for achieving sustainable development and in respecting human rights in an increasingly interconnected world.

The dire conditions of poverty and malnutrition in poorer countries have indeed been a major driving force behind the push for a shared international responsibility to realise the right to development.⁹⁰ Salomon argues that the incidents of poverty cannot be divorced from the global inequity that ‘produces and perpetuates it’, thereby putting poor countries at a disadvantage.⁹¹ The UNDRTD emerged to provide legitimacy to this viewpoint. The UNDRTD’s principal aim is to restructure the inequitable international economic order and provide equal opportunities to enable poor countries eradicate poverty, malnutrition, and starvation among other challenges.⁹² By advocating for systemic changes, international co-operation, and equitable resource distribution, the UNDRTD seeks to create a more just and supportive global environment for development. Addressing these complex issues requires consistent commitment and collaboration among all global actors in ensuring that the right to development is realised effectively and inclusively. The current structural organisation of the international economic system limits these states’ ability to establish and carry out their internal human rights duties.

The UNDRTD takes a unique and different duty-based approach that is concerned ‘not with a state’s duties to its own nationals, but with its duties to individuals in distant locations.’⁹³ The concept of the right to development as a secondary external requirement has been strongly challenged due to the ‘gross inequality that characterises world

⁸⁹ Williamson 1990.

⁹⁰ Salomon 2008: 17.

⁹¹ Salomon 2008: 17.

⁹² Akintoye and Joshua 2019: 93-121.

⁹³ Salomon 2008: 24.

poverty, the power differentials that accompany it, and the reality of global economic interdependence.⁹⁴ Baxi proffers the argument that while the UNDRTD is not a legally binding instrument, its normative worth is significant.⁹⁵ Kamga notes that the UNDRTD has been influential in shaping international norms, guiding policies, and enhancing advocacy efforts.⁹⁶ Its principles continue to inform and inspire efforts to promote human rights and development, highlighting its significance as a foundational document in the global human rights and development discourse.

Alston additionally, emphasises the importance of establishing a clear distinction between domestic and international efforts to realise the right to development.⁹⁷ By establishing these boundaries and fostering collaboration, both national and international actors can work more effectively to achieve the right to development, and in so doing, address global challenges and promote equitable and sustainable development. This is to illustrate that each of the divides must know and act within its set boundaries without dispensing with the need of cooperating with one another.⁹⁸ In this regard therefore, participation becomes a central element.⁹⁹ Salomon maintains that the right to development is still the most frequently referenced right in all international discourses, conferences, declarations, summits, and the General Assembly and Commission on Human Rights' yearly resolutions.¹⁰⁰ It is worth also reiterating that a rights-based approach to development has

⁹⁴ Salomon 2008: 21.

⁹⁵ Baxi 2008: 47.

⁹⁶ Kamga 2011: 151.

⁹⁷ Alston P 2005. 'Ships Passing in the Night: The Current State of the Human Rights and Development Debate Seen Through the Lens of the Millennium Development Goals.' *Human Rights Quarterly* 27(3): 755-829.

⁹⁸ Report of the Secretary-General 1979. '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.' UN Doc E/CN.4/1334 (2 January 1979) UN doc. E/CN. 4/1334 Paras 34 and 37

⁹⁹ See above, Para 252.

¹⁰⁰ Marks 2011: 5.

become a fixture in the agenda of UN agencies, particularly human rights bodies and global development partners.¹⁰¹

6.3 SOUTH AFRICA'S REGIONAL OBLIGATIONS

As stated above, South Africa's commitment to the promotion and protection of human rights is deeply rooted in its constitutional framework, which enshrines a comprehensive Bill of Rights. According to Matshego, the government actively engages with the African Commission in advocating for the enforcement of human rights standards throughout the continent.¹⁰² Adding to that, Mokhantso asserts that through diplomatic initiatives and participation in regional forums, South Africa has consistently emphasised the importance of fundamental rights such as freedom of expression, freedom of assembly, and the rights of marginalised groups, which encompass the right to development.¹⁰³ Since its inception in 1948, the UDHR has served as a cornerstone for the expansion and delineation of human rights and fundamental freedoms globally. These values have further been elaborated upon and given legal form through treaties, declarations, and decisions by UN and regional bodies, including the AU. The active involvement of formerly colonised nations like South Africa, has been instrumental in broadening and deepening the global comprehension of human rights especially, in ensuring their universal applicability in diverse political, cultural and socio-economic contexts.

A pivotal advancement in the African context occurred with the adoption of the African Charter in 1981 by the OAU, now known as the AU. The African Charter represents a foundational achievement in the advocacy and protection of human rights across the African continent. Since its adoption, there have been significant strides and achievements relating to implementation of the provisions contained in the Charter.¹⁰⁴

¹⁰¹ Hamm 2001: 1005-1008.

¹⁰² Matshego N 2018. 'The African Charter on Human and Peoples' Rights: South Africa's Commitment and Challenges.' *Journal of African Law* 62(2): 203-220.

¹⁰³ Mokhantso I 2019. 'Human Rights Advocacy in Africa: The Role of South Africa.' *Journal of African Studies* 45(2): 89-106.

¹⁰⁴ Gawanas 2009: 136-140.

Notably, new standards have been established, particularly concerning economic, social, and cultural rights, as well as the rights of women and children. The establishment of the African Court on Human and Peoples' Rights further underscores the commitment to effectively enforce the provisions of the African Charter. The AU, which succeeded the OAU in 2000, has reaffirmed its dedication to promoting and protecting human rights, including the right to development throughout the continent. Presently, 54 out of the 55 AU member states have ratified the African Charter and therefore, formally pledged to uphold all the human and peoples' rights provisions enshrined therein, marking a collective commitment to advancing human rights standards and ensuring their application throughout the continent.

The African Charter adopts a holistic approach to human rights, encompassing both the individual and collective dimensions. Keetharuth emphasises that it not only recognises civil and political rights but also economic, social, and cultural rights.¹⁰⁵ Notably distinct from other human rights instruments, the African Charter places significant emphasis on collective or group rights.¹⁰⁶ For example, it acknowledges the rights of peoples to self-determination and development, which reflects the historical and political context of Africa's struggle for independence and post-colonial challenges.¹⁰⁷ An illustrative case is the situation of the *Ogoni* people in Nigeria, which highlights how the African Commission addresses human rights violations concerning environmental and indigenous rights.¹⁰⁸ The African Commission has asserted that all rights articulated in the African Charter are enforceable, demonstrating its commitment to ensuring effective implementation of human rights protections.¹⁰⁹ Under the African human rights system, Murray and Long

¹⁰⁵ Keetharuth 2009: 166.

¹⁰⁶ Keetharuth 2009: 166.

¹⁰⁷ Para 3 of the Preamble of the African Charter reaffirm 'the pledge they solemnly made in Article 2 of the said Charter to eradicate all forms of colonialism from Africa, to coordinate and intensify their cooperation and efforts to achieve a better life for the peoples of Africa and to promote international cooperation having due regard to the Charter of the United Nations and the Universal Declaration of Human Rights.'

¹⁰⁸ See *Ogoni* case

¹⁰⁹ *Social and Economic Rights Action Centre (SERAC) and Another v Nigeria* (2001) AHRLR 60 (ACHPR 2001).

highlight the fact that the African Commission reviews state reports as part of its mandate.¹¹⁰ Quashigah asserts that the African Commission's mission relies heavily on the state reporting processes.¹¹¹ This includes the authority to monitor governments' human rights compliance with treaties¹¹² as outlined in Articles 62 of the African Charter¹¹³ and 26(1) of the Protocol on the Rights of Women in Africa.¹¹⁴ The African Commission has outlined three benefits of the state reporting process.¹¹⁵ First, state reports assist in monitoring the implementation and a state's human rights compliance with a treaty, for example, to monitor the realisation of the African Charter and its Protocols.¹¹⁶ Second, state reports are valuable tools in identifying implementation gaps and areas of non-compliance. Third, state reports are beneficial in detecting and sharing best practices between and among states. This implies that the African Commission's reliance on state reporting processes is a fundamental aspect of its mission to promote and protect human rights across Africa.¹¹⁷ The effectiveness of this mechanism depends on the commitment of both the African Commission and the state parties to engage transparently and to act upon the recommendations provided. However, this has been a difficult process to achieve due to state's lack of co-operation.¹¹⁸

When a state ratifies a treaty, it undertakes a legally binding commitment to uphold the provisions of the treaty and assumes corresponding responsibilities under international law. This principle is foundational in international legal frameworks in ensuring that states are held accountable for honouring their treaty obligations. According to Maluwa, all member states of the AU have ratified the African Charter and thereby, obligating

¹¹⁰ Murray RH and Long D 2015. *The Implementation of the Findings of the African Commission on Human and Peoples' Rights*. Cambridge University Press.

¹¹¹ Quashigah 2002: 265.

¹¹² Johnson 2021; 181.

¹¹³ Art 62 of the African Charter.

¹¹⁴ Art 26(1) of the African Women's Protocol.

¹¹⁵ The African Commission on Human and Peoples Rights.

¹¹⁶ Johnson 2021: 183-184.

¹¹⁷ Johnson 2021: 183-184.

¹¹⁸ Quashigah 2002: 261.

themselves to faithfully respect, protect, and fulfil all the human rights obligations articulated in the Charter.¹¹⁹ Importantly, South Africa is a reliable supporter of the AU and its mechanisms. The government actively participates in AU initiatives aimed at enhancing regional integration and cooperation, based on the recognition that the effectiveness of the African Charter depends on strong institutional frameworks.¹²⁰ Kälin highlights that by contributing to the AU's efforts, South Africa seeks to strengthen the enforcement of human rights standards and promote collective action against violations.¹²¹

The African Charter comprehensively aligns with numerous human rights and fundamental freedoms delineated in international treaties adopted by the UN. It consolidates a wide array of civil, political, economic, social, and cultural rights into a single legal document. As noted by Kamga, the right to development coexists harmoniously with civil, political, and socio-economic rights, all of which carry legal obligations.¹²² From this perspective, it is valid to assert that the right to development finds its basis in the ICESCR and the ICCPR. Therefore, while the right to development is not explicitly enumerated in the ICESCR or ICCPR, it can be interpreted as a foundational principle that underpins the realisation of both civil and political rights, as well as socio-economic rights. This interpretation underscores the interconnectedness of human rights principles under international law.

One of the distinctive features of the African Charter is its recognition of collective rights, particularly the right to development,¹²³ the right of all peoples to self-determination,¹²⁴

¹¹⁹ Maluwa 2012: 643-644.

¹²⁰ Afolabi 2018: 145-162.

¹²¹ Kälin 2020: 23-45.

¹²² Kamga 2011: 160.

¹²³ Art 22(1) of the African Charter state that '[a]ll 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.'

¹²⁴ Art 20(1) of the African Charter provide that '[a]ll peoples shall have the right to existence. They shall have the unquestionable and inalienable right to self-determination. They shall freely determine their

the right of peoples to freely dispose of their natural wealth and resources,¹²⁵ right to peace and security¹²⁶ and right to a generally satisfactory environment.¹²⁷ This is further reinforced by several other legally binding instruments within the African human rights system. For example, Article 10 of the African Youth Charter underscores the right to development,¹²⁸ while Article 19 of the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa articulates similar commitments.¹²⁹ Additionally, Article 5 of the African Charter on the Rights and Welfare of the Child¹³⁰ and Article 3(2) of the African Convention on the Conservation of Nature and Natural Resources—of which South Africa is a party—also emphasise the importance of the right to development.¹³¹ The African Convention on the Conservation of Nature and Natural Resources highlights the necessity of reconciling environmental conservation with sustainable development, asserting that the management of natural resources must promote both ecological integrity and economic advancement for current and future generations.¹³² This dual focus on ecological health and economic development is

political status and shall pursue their economic and social development according to the policy they have freely chosen.'

¹²⁵ Art 21(1) of the African Charter state that '[a]ll peoples shall freely dispose of their wealth and natural resources. This right shall be exercised in the exclusive interest of the people. In no case shall a people be deprived of it.'

¹²⁶ Art 23 of the African Charter.

¹²⁷ Art 24 of the African Charter.

¹²⁸ Art 10 of the African Youth Charter state 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.'

¹²⁹ Art 19 of the Maputo Protocol state that '[w]omen shall have the right to fully enjoy their right to sustainable development.'

¹³⁰ Art 5 of the ACRWC explicitly recognizes the right of every child to 'survival and development.' This includes the right to access essential services such as education, health care, and adequate living standards, which are fundamental to the child's overall development.

¹³¹ African Convention on the Conservation of Nature and Natural Resources (adopted 15 September 1968 and entered into force on 16 June 1969).

¹³² Art 3(2) of the African Convention on the Conservation of Nature and Natural Resources.

essential to the broader understanding and implementation of the right to development within the African context, including in South Africa.

It is important to note that South Africa has ratified all the above-mentioned African instruments, which includes the obligation to uphold the right to development.¹³³ This ratification signifies a commitment by the South African government to align its domestic laws and policies with the principles outlined in these instruments. Maluwa assert that the ratification also means that South Africa is accountable to the AU and its mechanisms for monitoring compliance.¹³⁴ For Dinokopila, it entails not only implementing policies that foster development but also reporting on progress and challenges.¹³⁵ Failure to fulfil these obligations can lead to scrutiny and pressure from regional bodies, civil society, and international organisations. Thus, while South Africa has a framework in place to support the right to development, the effectiveness of these measures is critical for meeting its obligations under the African human rights instruments.

Read in conjunction with Article 22(2) of the African Charter, which states that 'States shall have the duty, individually or collectively, to ensure the exercise of the right to development',¹³⁶ it is evident that upon ratifying the African Charter and ancillary regional human rights treaties, state parties undertake the dual commitments to uphold and protect the human rights enshrined therein at the domestic level. The dual obligation establishes a legal framework that binds state parties to adhere to the standards set forth in the African Charter and the ancillary treaties.¹³⁷ The African Charter explicitly delineates the obligations imposed on state parties, including South Africa regarding realisation of the right to development. In accordance with international law, state parties are required to comply with their international human rights obligations. For example, Article 22(2) of the African Charter mandate state governments with the obligation to individually and

¹³³ Department of Justice. Available at <https://www.justice.gov.za/policy/african%20charter/afr-charter03.html> (accessed 30 September 2024).

¹³⁴ Maluwa 2012: 643-644.

¹³⁵ Dinokopila 2015: 468.

¹³⁶ Art 22(2) of the African Charter.

¹³⁷ Ssenyonjo 2012: 29-53.

collectively ensure the exercise and enjoyment of the right to development.¹³⁸ Article 4(1) of the UNDRTD reinforces this duty, stipulating that states must take steps, both individually and collectively, to formulate international development policies that facilitate the full realisation of the right to development.¹³⁹ These provisions highlight a coherent legal framework wherein South Africa among other state parties are expected to not only recognise but to also actively promote and protect the right to development, ensuring its full realisation especially at the national level.

Vandenhoe and Gready argue that by emphasising the proactive role of states in formulating development policies that ensure the full realisation of human rights, the African Charter reflects a comprehensive approach to development wherein policymaking is intrinsically linked to the fulfilment of human rights.¹⁴⁰ This view highlights the necessity for the South African government to actively engage in creating frameworks that promote both development and human rights. However, despite the African Charter's universal affirmation of the obligation of governments to protect human rights, violations continue to occur. In South Africa, the violations are prevalent in legislation, policies and governmental actions that deny and leave the majority of the population dispossessed of entitlement to guaranteed human rights and equitable access to the opportunities for development. In many instances, governments justify these violations by invoking reasons such as national security, sovereignty, public order or resource availability constraints. Such justifications often undermine the principles enshrined in the African Charter, revealing a tension between state interests and the imperative to uphold human rights. This ongoing challenge highlights the need for rigorous accountability mechanisms to ensure that development policies do not compromise human rights obligations, thereby fostering a more genuine commitment to development and the protection of fundamental rights.¹⁴¹

¹³⁸ Art 22(2) of the African Charter.

¹³⁹ Art 4(1) of the UNDRTD.

¹⁴⁰ Vandenhoe & Gready 2014: 296-297.

¹⁴¹ Nxumalo K 2019. 'Accountability and Justice in South Africa: Challenges and Prospects.' *South African Journal of Human Rights* 35(2): 245-266.

It is important to emphasise that under the African Charter; states bear several critical duties. Primarily, each state is required to recognise the rights, duties, and freedoms enshrined in the African Charter and to adopt legislative or other measures to effectively implement them.¹⁴² However, in practice, many states that have ratified the African Charter have not fulfilled this obligation. For example, South Africa has made strides through its Constitution, which enshrines socio-economic rights, and various legislative frameworks aimed at promoting development, such as the NDP.¹⁴³ However, Saka posit that challenges persist, including high levels of inequality, unemployment, and inadequate service delivery, which hinder the realisation of development for all citizens.¹⁴⁴ While South Africa has established institutions and policies to support development, the effectiveness of these measures is often undermined by socio-economic disparities and governance issues,¹⁴⁵ suggesting a gap between legislative intent and actual outcomes in enforcing the right to development.

All AU member states are expected to promote the rights outlined in the African Charter and ensure their realisation for example, through education and public awareness initiatives among several other measures. State parties must for instance, also guarantee the independence of the judiciary and facilitate the establishment of national human rights institutions to monitor implementation of the rights enshrined in the Charter. Articles 27 to 29 of the African Charter emphasise a balanced approach to rights and responsibilities, ensuring that individual freedoms are exercised in a manner that respects the rights of others and contributes to the welfare of the community and the state.¹⁴⁶ This holistic

¹⁴² Art 1 of the African Charter.

¹⁴³ Khambule 2021: 507-523.

¹⁴⁴ Saka 2024: 201-231; Francis & Webster 2019: 790.

¹⁴⁵ Francis & Webster 2019: 790-791.

¹⁴⁶ Art 27(1) of the African Charter state that '[e]very individual shall have duties towards his family and society, the State and other legally recognised communities and the international community'; Art 28 of the African Charter provide that '[e]very individual shall have the duty to respect and consider his fellow beings without discrimination, and to maintain relations aimed at promoting, safeguarding and reinforcing mutual respect and tolerance.' And Art 29(1) of the African Charter state that '[t]he individual shall also have the duty: 1. To preserve the harmonious development of the family and to work for the cohesion and respect of the family; to respect his parents at all times, to maintain them in case of need.

framework integrates the notion of duties into the human rights paradigm, illustrating the interconnectedness of rights and collective responsibilities. By doing so, it encourages a more comprehensive understanding of human rights that encompass both personal freedoms and the obligations individuals owe to society.

The Preamble to the African Charter, alongside the jurisprudence of the African Commission,¹⁴⁷ emphasise South Africa's obligation to create an environment conducive to the realisation of the right to development.¹⁴⁸ The obligation spans economic, social, and cultural dimensions, necessitating implementation of laws and policies that comprehensively support and protect the right to development. The Preamble encapsulates the foundational principles and goals of the African Charter, which highlights the imperative for the protection and promotion of human rights and development by member states. Read in conjunction with Article 1¹⁴⁹ of the African Charter, which mandates state parties to adopt legislative and other measures to give effect to the rights and duties outlined in the African Charter.¹⁵⁰ By fulfilling these obligations, South Africa not only complies with its commitments under the African Charter but also contributes to the broader objectives of human rights protection and development across the African continent. This alignment reinforces the importance of collective efforts in advancing human rights and sustainable development across the continent.

Firstly, the duty to enact laws to establish an environment in which people can realise their right to development. In South Africa, the duty to enact laws to create an environment conducive for the realisation of the right to development is indeed a fundamental obligation. Stevens and Ntlama posit that this obligation is rooted in the government's

¹⁴⁷ African Commission on Human and Peoples' Rights. *Bakweri Land Claims Committee v Cameroon*, Communication No 260/2002, *African Human Rights Law Reports* (2004) 43, Para, 54.

¹⁴⁸ The Preamble of the UNDRTD state that 'the creation of conditions favourable to the development of people and individuals is the primary responsibility of their states'.

¹⁴⁹ Art 1 of the African Charter states that '[t]he Member States of the Organization of African Unity (OAU) parties to the present Charter shall recognize the rights, duties, and freedoms enshrined in this Charter and shall undertake to adopt legislative or other measures to give effect to them.'

¹⁵⁰ Okafor 2008: 60.

constitutional framework, which mandates that laws and policies must align with the principles enshrined in the Constitution.¹⁵¹ On his part, Albertyn proffers that the South African Constitution emphasises the need for laws that promote justice, equity, and the protection of human rights, including the right to development.¹⁵² Aligning legislative efforts with these constitutional principles, requires the government to create an environment where all individuals can have their development needs met and can fully realise their potential. The laws must, therefore, be designed to ensure proper resource management, active citizen participation, transparency and accountability.

Secondly, South Africa has a duty under the African Charter 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 must demonstrate a sustained level of commitment to maintaining the enabling environment. Thus, the South African government equally has the duty to ensure that the benefits of development are equitably shared among all the peoples entitled to such right.¹⁵³ This implies that South Africa's duty under the African Charter encompasses not only the establishment of a supportive legal environment for the right to development but also the maintenance of that environment through sustained commitment and effective management. Ensuring that the benefits of development are equitably shared among all the peoples of South Africa is a crucial aspect of fulfilling this duty, requiring ongoing efforts to address inequalities and meaningfully involve communities in the development process.

Thirdly, apart from the general right to development related obligations enumerated above, South Africa has specific treaty obligations to its people under the African Charter. The African Charter frames the right to development in a manner that emphasises collective rather than individual rights.¹⁵⁴ Kiwanuka proffers that this approach reflects the

¹⁵¹ Stevens & Ntlama 2016: 57-60.

¹⁵² Albertyn 2019: 753.

¹⁵³ Okafor 2008: 60.

¹⁵⁴ Du Plessis IMM 2007. 'Development and the Right to Development: A Global challenge.' *Politeia*, 26(3): 211-228.

African Charter's broader focus on the rights and well-being of peoples and communities rather than solely on individuals.¹⁵⁵ In other words, the African Charter places a distinct emphasis on the collective, people-centred nature of the right to development, in line with the UNDRTD which frames the right to development as both an individual right and a collective right which contrasts with more individual-focused human rights frameworks such as the CRC, and other international treaties. For Settles, such an emphasis is influenced by the historical and socio-political context of Africa, including the legacy of colonialism, struggles for self-determination, and the quest for socio-economic justice.¹⁵⁶ The integration of the concept of self-determination into the right to development is an historical principle, which was central in the decolonisation process, and accentuates the importance of enabling peoples to determine their own development paths and to control their resources and destinies. Thus, the right to development under the African Charter is understood as a means to achieve collective progress and equally address systemic inequalities affecting entire communities or nations.

I argue that development is fundamentally centred on the enhancement of the human person, both in terms of personal and collective well-being, and that it possesses a crucial human rights dimension essential for understanding development within human rights frameworks.¹⁵⁷ Development should focus on elevating human potential and dignity, encompassing not only economic growth but also advancements in health, education, and social conditions.¹⁵⁸ This comprehensive approach reflects a dual emphasis on both individual and collective improvement. The assertion that development encompasses a human rights dimension is grounded in the recognition that development is vital for the realisation of human rights. The African Charter explicitly acknowledges that development

¹⁵⁵ Kiwanuka RN 1988. The Meaning of "People" in the African Charter on Human and Peoples' Rights. *American Journal of International Law* 82(1): 80-101.

¹⁵⁶ Settles JD 1996. The Impact of Colonialism on African Economic Development.' *Chancellor's Honors Program Projects*. Available at https://trace.tennessee.edu/cgi/viewcontent.cgi?article=1182&context=utk_chanhonoproj (accessed 01 October 2024).

¹⁵⁷ Sen 200.

¹⁵⁸ Riedel & Giacca 2010: 1-25.

transcends mere economic or political processes and is, in fact, a fundamental human right.

Since ratifying the African Charter, South Africa has committed to development that includes not only economic growth but also social, cultural, and environmental components.¹⁵⁹ This perspective is consistent with the government's obligations to ensure that all citizens can participate in and benefit from development activities. In practice, this means that South Africa must implement policies that address systemic inequalities and promote development. The government is tasked with creating an environment where marginalised communities have access to resources, such as education, and healthcare, reflecting the African Charter's emphasis on development as an all-inclusive human right. Thus, I argue that the right to development serves as an umbrella right, capable of enhancing the intrinsic value of human life.

6.4 SOUTH AFRICA'S DOMESTIC OBLIGATIONS ON THE RIGHT TO DEVELOPMENT

As shown in section 5 of Chapter 5, a close reading of the South African Constitution reveals several ways in which it implicitly supports the right to development through its various guarantees and principles. It is worth noting that beyond South Africa, the government emphasises the realisation of socio-economic rights as outlined in the African Charter. As Du Plessis posits, the government engages in regional programmes in addressing poverty, health disparities, and access to education.¹⁶⁰ Through advocating for sustainable development and economic impartiality, South Africa associates its domestic policies with the broader objectives of the African Charter, thus contributing to the realisation of the rights of all African peoples, including the rights to development.¹⁶¹ Scholars like Gutto argue that South Africa has taken on regional and international obligations regarding the right to development.¹⁶² As illustrated above, the right to

¹⁵⁹ Agbakwa 2002: 185-188.

¹⁶⁰ Du Plessis 2017: 65-84.

¹⁶¹ Moyo 2022: 34-50.

¹⁶² Gutto 2006: 109-118.

development is broadly recognised in various international instruments, which outline that development is a comprehensive economic, social, cultural, and political process aimed at improving the well-being of people.¹⁶³ South Africa, as a member of the international community and a signatory to various international human rights treaties, has committed to advancing the right to development both nationally and in its regional and global interactions.¹⁶⁴ This includes initiatives to promote sustainable development, eradicate poverty, and provide equitable access to resources and opportunities while adhering to broader human rights and development goals. By participating in the AU and international initiatives, South Africa contributes to and is held accountable for progress in implementing the right to development, demonstrating its commitment to these principles on a regional and international scale.

6.4.1 South Africa's constitutional obligations

The South African Constitution guarantees and protects the majority of internationally recognised human rights, which oblige the government to 'respect, protect, promote, and fulfil the rights in the Bill of Rights.'¹⁶⁵ The South African Bill of Rights is regarded as binding on 'the legislature, the executive, the judiciary, and all organs of the state,' and it applies to all laws.¹⁶⁶ Empowered by Sections 34 and 38 of the South African Constitution, the judiciary has been pivotal in the interpretation and enforcement of socio-economic rights and the corresponding obligations. These sections endow the courts with significant authority to address and adjudicate matters relating to the protection and the realisation of these rights, thereby reinforcing the underlying principles of justice and accountability. The Constitutional Court (ConCourt) has issued significant rulings concerning the application of socio-economic rights, which have a profound impact on the realisation of the right to development in South Africa.¹⁶⁷ The judgments have played a major role in

¹⁶³ Art 1 of the UNDRTD; Ibhawoh 2011: 82.

¹⁶⁴ Hendricks and Majozi 2021: 64-78.

¹⁶⁵ Sect 7(2) of the South African Constitution.

¹⁶⁶ Sect 8(1) of the South African Constitution.

¹⁶⁷ *Government of the Republic of South Africa v Grootboom*, 2000 (1) SA 46 (CC).

shaping the implementation and enforcement of socio-economic rights, thereby advancing the broader goal of the right development within the country.

According to Ngang, socio-economic rights, which encompass the right to development, are regarded as legal obligations that the South African government is mandated to fulfil.¹⁶⁸ In South Africa, these rights are fundamental to the rule of law and are explicitly enshrined in the Constitution. As principal duty-bearer, the government of South Africa holds specific obligations in ensuring that the rights enshrined in the Constitution are respected, protected, and progressively realised. Ngang explains that socio-economic rights, including the right to development, are not merely aspirational but legally enforceable obligations that demand active and ongoing government commitment and action.¹⁶⁹ In other words, the government should not at any given time, compromise the rights of the people or render the difficult to achieve. It is provided in Section 7(2) of the Constitution that '[t]he State must respect, protect, promote and fulfil the rights in the Bill of Rights.'¹⁷⁰ These obligations not only prevent the government from interfering with the enjoyment of individual and collective rights but also compel it to take proactive measures to ensure that the rights are progressively achieve. This is particularly important for the right to development, which encompasses a broad range of socio-economic and cultural rights aimed at improving the quality of life, necessitating the government to take the requisite measures in ensuring their realisation.¹⁷¹

Concerning the obligation to respect, the government must not arbitrarily deprive or deny access to socio-economic rights. These rights are essential for well-being and development. They encompass rights such as the right to education, access to healthcare, water, housing, and a decent standard of living among others. When the government acts arbitrarily either by denying or restricting these rights, they basically undermine opportunities for development and well-being. This can lead to widespread social and economic disparities, affecting peoples' quality of life and hindering overall

¹⁶⁸ Ngang 2014: 662.

¹⁶⁹ Ngang 2014: 662.

¹⁷⁰ Sect 27(2) of the South African Constitution.

¹⁷¹ Khoza 2007: 35.

societal progress. Rona and Aarons correctly stress that the obligation to respect human rights requires the government to refrain from actions that interfere with the enjoyment of those rights by individuals and groups.¹⁷² This obligation is a fundamental aspect of the government's duty under international human rights law and domestic constitutions like South Africa's. It requires the government to avoid actions that interfere with the enjoyment of rights. This principle is enforced through a combination of international standards, national legal frameworks, and judicial oversight. Courts play a critical role in interpreting and ensuring compliance with this obligation to address violations and promote human rights. For example, the ConCourt held in the *Grootboom* case that the government neglected its duty to respect the rights of the occupiers of privately-owned land.¹⁷³ Occupiers were evicted from their homes earlier than the date ordered by the court and under circumstances that saw settlers' homes destroyed.

Regarding the obligation to protect, the government must draft and implement legislation that prevent people or organisations such as banks, insurance companies, employers, and landlords from violating socio-economic rights. The obligation to protect in the context of the right to development involves ensuring that the government not only respect the right by not interfering with it, but also take proactive steps and measures to prevent others from infringing on the enjoyment of the right. For example, the government is enjoined to protect the right to food by passing and enforcing laws that prevent individuals and companies from violating the right. The government must also enforce the relevant legislation by establishing mechanisms to investigate and provide effective remedies in the instance where the guaranteed rights are violated.¹⁷⁴

Similarly, the government has a duty to promote as a means of ensuring increased awareness of socio-economic rights. It includes educating people about policies and programmes that may help in having access to their socio-economic benefits. For example, the government may use media outlets to inform people about their rights and about how and where to go to claim them. As such, the obligation to promote compels

¹⁷² Rona & Aarons 2015: 506.

¹⁷³ *Grootboom* case.

¹⁷⁴ Welch 2005: 62; Landman 2004: 906.

the government to create a conducive environment that enables right holders to claim and exercise their rights. This is only achievable when the government creates sufficient awareness on human rights by educating the public about their rights and about how to seek redress when there has been a violation of the rights.¹⁷⁵ Attention should be drawn to an over-dependence on the law, as the option of engaging in legal processes to claim rights can be lengthy, expensive, and often not accessible to those most in need.¹⁷⁶

The duty to fulfil means that the government must take steps to assist people without housing, health care, food, water, and social security or to have access to these rights. The full realisation of human rights in South Africa cannot be achieved overnight because of the large backlogs inherited from apartheid and due to current poverty levels. The Constitution recognises that to fully achieve socio-economic rights is a long-term process, which can only be attained progressively and within available resources.¹⁷⁷ Sections 26 and 27 describe the duty of the government to fulfil socio-economic rights, necessitating that 'The State must take reasonable legislative and other measures within its available resources, to achieve the progressive realisation of each of these rights.'¹⁷⁸ Taking measures within available resources acknowledges that resources are not limitless and that the government must do only as much as it is possible with the resources available.¹⁷⁹

The wording in the South African Constitution is very similar to the wording in Article 2 of the ICESCR, which sets out the duties of state parties to the Covenant. The ConCourt has developed guidelines that can assist in understanding what is meant by the duty to 'take reasonable measures', which includes the obligation of the government to involve the public in developing critical social policies or legislation.¹⁸⁰

Sections 26(2) and 27(2), the government is mandated to take legislative and other measures to ensure that the entitlements imposed by the rights are progressively

¹⁷⁵ Mubangizi 2004: 62-87.

¹⁷⁶ Ebi 2016: 123.

¹⁷⁷ Kende 2003: 139.

¹⁷⁸ Sect 27(2) of the South Africa Constitution.

¹⁷⁹ De Vos et al 2015: 684.

¹⁸⁰ Khoza 2007: 37.

realised.¹⁸¹ The government thus, holds the primary mandate to engage in policy formulation and decision-making regarding the progressive realisation of the rights enshrined in the South African Constitution. The government is, accordingly, obligated to provide coherent and flexible plans and measures to make those rights achievable. The plans must include concrete targets and goals that are linked to specific timeframes. Doing so, allows the government the opportunity to plan and monitor its own progress. In addition, proper planning helps human rights organisations and institutions such as the SAHRC, NGOs, and the general public to monitor and hold the government accountable to its commitment to ensure the realisation of socio-economic rights.¹⁸² However, Ngang poses a pertinent question about what would happen when the government fails to live up to expectations in response to the constitutional duty to enforce the socio-economic rights, but instead uses its powers to subjugate the people.¹⁸³

The Constitution contains all the answers. Section 8(1) orders the judiciary to ensure that the rights contained in the Constitution are fulfilled.¹⁸⁴ In addition, all the branches of government are bound by the Bill of Rights to fulfil all the human rights enshrined therein. Section 34¹⁸⁵ guarantees to everyone access to the courts and hence, to effective remedy.¹⁸⁶ This is applicable where individuals, groups, or the community feel that their rights are violated or not met. In practical terms, if a community faces systemic issues such as inadequate access to education or healthcare due to neglect by authorities or discriminatory practices by organisations, Section 34 allows them such access to the courts to seek appropriate redress. Section 38¹⁸⁷ also allocates extensive remedial

¹⁸¹ Sect 26(2) and 27(2) of the South African Constitution.

¹⁸² Khoza 2007: 40.

¹⁸³ Ngang 2014: 662.

¹⁸⁴ Sect 8(1) of the South Africa Constitution.

¹⁸⁵ Sect 34 of the South African Constitution.

¹⁸⁶ Sect 34 of the South African Constitution states that '[e]veryone has the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court or, where appropriate, another independent and impartial tribunal or forum'.

¹⁸⁷ Sect 38 of the Constitution states that '[a]nyone listed in this section has the right to approach a competent court, alleging that a right in the Bill of Rights has been infringed or threatened, and the court may grant appropriate relief, including a declaration of rights.'

powers to the courts to provide appropriate relief when an infringement or threatened violation of a right is established.¹⁸⁸ The courts are, accordingly, equipped to intervene in enforcing compliance with socio-economic rights, and in ensuring that development processes are inclusive and equitable. For example, if a community is denied access to clean water due to discriminatory policies or practices by local authorities or private entities, Section 38 enables them to challenge these violations in court. The court can then mandate the responsible parties to take corrective actions, thereby upholding the community's right to development.

6.4.2 Institutional obligations

South Africa's institutional obligations regarding human rights and the right to development are underpinned by a comprehensive constitutional and legal framework. Section 181 of the South African Constitution titled, 'State Institutions Supporting Constitutional Democracy' establishes several independent bodies to help enforce human rights.¹⁸⁹ De Vos points out that the Chapter 9 Institutions have been described as 'watchdog'¹⁹⁰ entities with a mandate to keep government in check for the purpose of transforming South African society. While the Chapter 9 Institutions possess significant investigatory powers and can make recommendations for remedial action, they do not have the authority to enforce disciplinary measures against government directly.¹⁹¹ They are focused on identifying instances of misconduct, irregularities, or failures in governance and administration.¹⁹² Through their investigations and reports, they serve as a bridge between government and citizens, ensuring that grievances are addressed, and that accountability is upheld.¹⁹³ Key among these are the SAHRC, the Office of the Public Protector and the Auditor-General. While organs of state such as the Department of

¹⁸⁸ Ngang 2014: 663.

¹⁸⁹ Sect 181 of the South African Constitution; Matlosa 2016: 194-209.

¹⁹⁰ De Vos 2013: 161.

¹⁹¹ Fombad 2016: 14.

¹⁹² De Vos 2013: 173.

¹⁹³ Murray 2006: 1-26.

Justice and Constitutional Development hold obligations to protect human rights, I have chosen to focus on the three Chapter 9 Institutions mentioned above on the basis of their constitutional mandates to uphold and protect human rights in South Africa. These strategic institutions are specifically designed to address human rights issues, and by inference support the right to development.

6.4.2.1 South African Human Rights Commission

The SAHRC is an important institution established under Chapter 9 of the South African Constitution,¹⁹⁴ with the primary mandate of promoting and protecting human rights in the country. In addition to its protective role, the SAHRC is instrumental in cultivating a culture of human rights awareness and education, thereby reinforcing democratic principles throughout South Africa.¹⁹⁵ As outlined in Section 184 of the Constitution, the SAHRC is charged with promoting respect for human rights and monitoring their observance across the country.¹⁹⁶ The specific functions of the SAHRC are delineated in Section 184(1), which includes conducting public awareness campaigns to promote human rights and providing recommendations for the effective implementation of human rights standards.¹⁹⁷ According to its 2020 report, the SAHRC also holds the responsibility of monitoring compliance with international human rights obligations, as stipulated in various treaties and covenants, including the ICCPR and the ICESCR, which South Africa is a signatory to.¹⁹⁸

As stipulated in Section 184(2) of the Constitution, the SAHRC possesses the powers necessary to fulfil its mandate as regulated by national legislation.¹⁹⁹ This includes the authority to conduct investigations into allegations of human rights violations. According to Friedman, the investigative power is crucial for fostering public trust in institutions and

¹⁹⁴ Chapter 9 of the South African Constitution.

¹⁹⁵ South African Human Rights Commission, 2020.

¹⁹⁶ Sect 184 of the South African Constitution.

¹⁹⁷ Sect 184(1) of the South African Constitution.

¹⁹⁸ United Nations 2020. *Universal Periodic Review: South Africa*.

¹⁹⁹ South African Human Rights Commission Act 40 of 2013; Sect 184(2) of the South African Constitution.

promoting a culture of accountability.²⁰⁰ Furthermore, the SAHRC is empowered to take steps to secure appropriate redress for human rights violations, emphasising its commitment to remedial justice. This function not only addresses individual grievances but also serves a broader purpose by deterring future violations and reinforcing the rule of law in the country.²⁰¹ It is important to emphasise that the SAHRC's mandate also encompasses ensuring realisation of the right to development. Through initiatives such as awareness-raising, monitoring, investigations, stakeholder engagement, and advocacy, the SAHRC should play a role in ensuring that development is recognised as a fundamental human right for all South Africans, particularly, for marginalised and vulnerable communities.²⁰²

In addition to its constitutional mandate, the SAHRC operates under various legislative frameworks, including the Human Rights Commission Act of 1994, which outlines its operational procedures and the scope of its powers. This legislation supports and regulates the SAHRC's work in addressing systemic issues of discrimination and inequality and therefore, has a positive bearing in the realisation of the right to development. For instance, by investigating complaints on systemic issues, the SAHRC has the potential to identify barriers to access to opportunities for development for disadvantaged and marginalised communities. This facilitates targeted interventions that aim to improve access to economic, social, and cultural resources necessary for development.

The SAHRC operates within a robust constitutional and legislative framework, which underpins its various specialised units. Among these units, two significant entities are the Commission for the Promotion and Protection of the Rights of Cultural, Religious, and Linguistic Communities (CRL Rights Commission) and the Commission for Gender Equality (CGE). These commissions address specific rights and issues pertinent to disadvantaged and marginalised groups, thereby enhancing the SAHRC's overall efficacy

²⁰⁰ Friedman S 2020. The Role of Human Rights Institutions in South Africa. In Human Rights and the South African Constitution.

²⁰¹ South African Human Rights Commission 2023. Annual Report 2022/2023.

²⁰² Liebenberg and Slade 2023: 296-314.

in promoting human rights, including the right to development.²⁰³ The CRL Rights Commission, which is established in terms of Section 185 of the Constitution is dedicated to protecting the rights of diverse cultural, religious, and linguistic communities.²⁰⁴ Its mandate is to ensure that these communities' unique identities and practices are respected and protected. The CRL Rights Commission advocates for the rights of communities to engage in their cultural, religious, and linguistic traditions without discrimination, promoting policies that foster cultural diversity and inclusion.²⁰⁵ Similar to the work of the CGE, the CRL Rights Commission conducts research aimed at understanding the challenges encountered by marginalised communities. Additionally, it engages in educational initiatives to raise awareness regarding the significance of cultural rights and diversity. As previously discussed, the right to development, as it is acknowledged in various international instruments, stresses the importance of participation, equity, and sustainability. The CRL Rights Commission's efforts resonate with this principle by ensuring that the voices and rights of diverse communities are integral components of national development strategies. By protecting cultural diversity and advocating for social justice, the CRL Rights Commission contributes to a comprehensive approach to development that acknowledges the unique needs and aspirations of different groups, in accordance with the tenets (such as participation) of the right to development.

On the other hand, the CGE established under Section 187 is specifically, tasked with the promotion of gender equality and protection of the rights of individuals across all gender identities.²⁰⁶ It undertakes campaigns to raise awareness about gender-based discrimination and violence, while also educating the public on critical issues such as women's rights and gender equality. These efforts are aimed at transforming societal attitudes and norms. By advocating for gender equality, the CGE plays a vital role in ensuring that women and other marginalised groups have equitable access to

²⁰³ South African Human Rights Commission 2020. *Annual Report*.

²⁰⁴ Sect 185 of the South African Constitution.

²⁰⁵ Commission for the Promotion and Protection of the Rights of Cultural, Religious, and Linguistic Communities 2023. *Annual Report 2022/2023*.

²⁰⁶ Sect 187 of the South African Constitution.

opportunities in the economic, social, cultural and political spheres of society.²⁰⁷ In relation to the right to development, the CGE contributes to fostering a more equitable society, wherein all individuals can actively engage in and benefit from developmental initiatives.²⁰⁸ The integration of gender equality and development is essential for constructing a sustainable and inclusive future for all South Africans.²⁰⁹

It is worth noting that the SAHRC encounters several challenges, including limited resources, insufficient public awareness of its functions, and a need for enhanced collaboration with civil society organisations.²¹⁰ Nevertheless, there are significant opportunities for the SAHRC to strengthen its impact through strategic partnerships, community engagement, and the effective use of technology to promote human rights education. By addressing these challenges and capitalising on available opportunities, the SAHRC can enhance its capacity to fulfil its mandate and promote a culture of human rights, including in particular realisation of the right to development in South Africa.²¹¹

6.4.2.2 Office of the Public Protector and the Auditor-General

The Office of the Public Protector plays a pivotal role in safeguarding human rights in South Africa by addressing instances of maladministration and the abuse of power within governmental structures.²¹² Similar to the SAHRC, the Public Protector is empowered by Section 182 of the South African Constitution to investigate public complaints regarding

²⁰⁷ Commission for Gender Equality 2023. *Annual Report 2022/2023*.

²⁰⁸ United Nations 2011. *The Human Rights Education and Training: A Handbook for Implementing the UN Declaration on Human Rights Education and Training*.

²⁰⁹ Commission for Gender Equality 2019. *Strategic Plan 2019-2024*.

²¹⁰ Tshiyombo 2020: 207-224.

²¹¹ South African Human Rights Commission 2023. *Annual Report 2022/2023*.

²¹² The Public Protector is an independent institution established in terms of section 181 of the Constitution, with a mandate to support and strengthen constitutional democracy. The Public Protector must be accessible to all persons and communities. Anyone can submit a complaint to the Public Protector. Available at <https://www.pprotect.org/?q=content/our-mandate> (accessed 23 September 2024).

improper conduct by state institutions or officials.²¹³ This mandate encompasses violations of fundamental human rights enshrined in the Constitution, including the rights to dignity, equality, and access to essential services, which encompass the right to development.

Former Public Protector, Thuli Madonsela noted that the establishment of this office was intended to ensure accountability and transparency in public administration, thereby promoting good governance and defending individuals' rights against administrative injustices.²¹⁴ She emphasised that the office's functions transcend mere oversight; it actively safeguards the rights of individuals against administrative wrongs, including infringements on constitutional rights such as dignity, equality, access to basic services, and fair administrative action.²¹⁵ Through impartial investigations and recommendations for remedial actions, the Public Protector's office seeks to rectify injustices, promote fairness, and restore public trust in governmental institutions.

Raphasha posits that transparency in governmental processes is crucial for democratic accountability.²¹⁶ By illuminating irregularities and failures in governance, the investigations conducted by the Public Protector contribute to systemic enhancements in public service delivery and policy implementation.²¹⁷ It in turn, elevates the quality of democratic governance and nurtures a culture of ethical leadership responsive to the needs of citizens. Importantly, Mbiada asserts that the Public Protector functions as a vital mechanism for the promotion of socio-economic rights, including the rights to education, healthcare, housing, and a clean environment.²¹⁸ By effectively fulfilling this role, the Public Protector significantly advances social justice and enhances the collective

²¹³ Under Sect 182(1) of the South African Constitution 'the Public Protector has the power, as regulated by national legislation (a) to investigate any conduct in state affairs, or in the public administration in any sphere of government, that is alleged or suspected to be improper or to result in any impropriety or prejudice; (b) to report on that conduct; and (c) to take appropriate remedial action.'

²¹⁴ Madonsela 2012: 4-15.

²¹⁵ Madonsela 2012: 4-15.

²¹⁶ Raphasha 2019.

²¹⁷ Nirmala 2024: 120-141.

²¹⁸ Mbiada 2017.

quality of life within society. Through its investigations and reports, the office fosters systemic improvements in service delivery and policy execution, striving to achieve equitable development and improve the quality of life for all South Africans.²¹⁹

To ensure accountability and transparency over public funds, Section 188 of the South African Constitution mandates the Auditor-General to ‘audit and report on the accounts, financial statements and financial management of a. all national and provincial state departments and administrations; b. all municipalities; and c. any other institution or accounting entity.’²²⁰ This is an important role in the protection of human rights, particularly the right to development, through its mandate of ensuring accountability and transparency in public financial management. By conducting independent audits of government departments and entities, the Auditor-General assesses the effective allocation and utilisation of public resources, which is fundamental to upholding citizens’ rights.²²¹ It is worth reiterating that the right to development as recognised in various international human rights instruments, encompasses the notion that every individuals and all peoples should have the opportunity to participate in and benefit from economic, social, and cultural development.²²² The Auditor-General’s work contributes to this right by providing insights into how effectively public funds are utilised to promote development initiatives and social welfare programmes.²²³

Latchu and Singh observe that through comprehensive audits, the Auditor-General identifies inefficiencies, misallocations, and instances of corruption that may hinder progress toward achieving developmental goals.²²⁴ According to Berthin, the audits serve not only as a mechanism for accountability but also as a tool for informing policy decisions

²¹⁹ Masipa 2018: 3-4.

²²⁰ Sect 188(1)(a)(b)(c) of the South African Constitution.

²²¹ Sect 188(2)(a)(b) of the South African Constitution.

²²² Art 22(1) of the African Charter.

²²³ Hoque Z & Thiagarajah T 2015. ‘Public Accountability: The Role of the Auditor-General in Legislative Oversight. *Making Governments Accountable*, 3-23.

²²⁴ Latchu & Singh 2022: 466-467.

and improving service delivery.²²⁵ Mathiba and Lefenya stress that by highlighting areas of concern, the Auditor-General facilitates corrective measures that can enhance governmental responsiveness to the needs of citizens, thereby promoting equitable development.²²⁶ For Dhansay, the findings and recommendations issued by the Auditor-General can drive systemic improvements in governance.²²⁷ It implies that public funds can be directed towards programmes that enhance human rights like the rights to education, healthcare, and infrastructure, implying that the office of the Auditor-General supports the realisation of socio-economic rights for all South Africans.

Put together, these institutions possess the capacity to hold the government, private sector, civil society organisations, and individuals accountable for violations of human rights, including the right to development in South Africa. Their constitutional grounding enables them to operate within a legal framework that is supported by recognition of the Constitution as the supreme law. This authority not only reinforces their role in respecting, protecting and enforcing human rights but also ensures that mechanisms are in place for redress and accountability, contributing to the overall protection and promotion of human rights in South Africa.

²²⁵ Berthin G 2012. 2011. 'A Practical Guide to Social Audit as a Participatory Tool to Strengthen Democratic Governance, Transparency, and Accountability.' Available at <https://www.undp-aci.org/publications/ac/books/practicalguide-socialaudit-e.pdf> (accessed 23 September 2024).

²²⁶ Mathiba & Lefenya 2019: 532-545.

²²⁷ Dhansay A 2019. 'An Investigation into the Powers of the Auditor-General SA and its Ability to Strengthen the Quality of Democracy in South Africa.' 10. Available at <https://open.uct.ac.za/server/api/core/bitstreams/7a9e3931-91d3-4a3f-b812-5ae110ec9a54/content> (accessed 24 September 2024).

6.5 CONCLUSION

I have shed light in this chapter to the fact that the obligations of the South African government concerning the right to development are multifaceted, encompassing a range of international, regional, and domestic commitments. At the international level, South Africa has ratified key human rights treaties, including the ICESCR and the ICCPR, which collectively feature human rights as integral to development. The UNDRTD and the Draft International Covenant on the Right to Development further elaborate on these principles, affirming that development is a fundamental human right that must fully be realised for every individual and all peoples. Regionally, South Africa's obligations under the African Charter and other relevant human rights instruments reinforce its commitment to uphold the right to development especially, because of its legally binding status within the African human rights system.

The African human rights instruments that enshrine the right to development establish a framework that mandates state parties to respect, protect, and fulfil human rights, and thus, promote a holistic rights-based approach to development across the continent. At the domestic level, the South African Constitution envisages strong protections for human rights, and thus, establishes a legal foundation that obligates the government to ensure the realisation of the right to development. Important institutions, such as the SAHRC, the Public Protector, and the Office of the Auditor-General play a significant role in monitoring compliance, investigating violations, and promoting accountability. These institutions are constitutionally empowered to hold the government and other stakeholders accountable, thus reinforcing the supremacy of the Constitution and the rule of law.

This concluding chapter that follows encapsulates the key findings, recommendations, and suggestions for future research relating to the right to development in South Africa.

CHAPTER 7

CONCLUSION AND RECOMMENDATIONS

7.1 OVERVIEW

This doctoral thesis has analysed the legality of the right to development in the South African legal and institutional framework, with particular emphasis on its status, enforceability, and the obligations of the South African government. It is against this background that this Chapter provides a summary of the preceding chapters, highlights key findings, offers recommendations, and suggests opportunities for future research.

7.2 SUMMARY OF THE CHAPTERS

The first Chapter provides a comprehensive introduction to the thesis, establishing the foundational context for the arguments advanced. It highlights the fact that the South African Constitution enshrines a robust Bill of Rights, which embodies the principles of equality, dignity, and freedom that are inherent to the right to development. It demonstrates that the explicit recognition and operationalisation of the right to development in South Africa, however, remains contentious and inadequately addressed within the legal and institutional framework. The apparent gap raised important questions that guided the research that produced this doctoral thesis, which is focused on the legal status of the right to development in South Africa and its implications for marginalised and vulnerable people, who continue to encounter systemic barriers that hinder their full potential and participation in societal progress. In other words, the lack of a clear legal and institutional framework for the right to development presents significant challenges to its realisation in South Africa.

The second Chapter examines the historical context surrounding human rights and development, in the main, tracing the evolution of the right to development globally. The Chapter canvassed various historical development theories, highlighting their influence on contemporary understandings of development and human rights. The exploration

includes an analysis of relevant human rights instruments that have shaped the discourse on development, illustrating how these frameworks have been historically entangled. The Chapter further integrated interdisciplinary theories from both law and social sciences, demonstrating that the right to development cannot be understood in isolation but rather as part of a broader socio-legal framework. By contextualising the right to development within historical and theoretical frameworks, the chapter lays the foundation for understanding its significance and the challenges it faces. It presents the need for an urgent holistic approach that recognises the interconnectedness of human rights and development, emphasising the importance of integrating diverse perspectives in addressing the complexities necessary for advancing the right to development.

The third Chapter situates the right to development within the context of international human rights law, providing a detailed examination of its legal status at the international level. It articulates how the right to development is recognised in prominent international human rights instruments, including the International Bill of Rights, and discuss its implications for global governance and accountability. The Chapter further explores the enforceability of the right to development, assessing the mechanisms available for its implementation and the challenges that arise in practice. By so doing, the chapter connects the international legal status to its relevance in the South African context, shedding light on how global norms inform local interpretations and applications of the right to development. This analysis showed the importance of aligning domestic legal frameworks with international standards in enhancing the right to development for marginalised communities in South Africa. Through this examination, the chapter emphasises the necessity of integrating international human rights law into national policies to promote realisation of the right to development.

The fourth Chapter locates the right to development under the African human rights system, emphasising its legal standing and significance. It asserts that the right to development is legally binding under the African Charter and ancillary treaty instruments that establish a framework of rights and obligations, which states parties are obligated to respect, protect and fulfil. The Chapter underscores the norms incorporated in the African Charter that underpin the right to development, highlighting how these norms contribute

to a cohesive understanding of development as a fundamental human right. It additionally analyses the evolution of the right to development through the jurisprudence of the African Commission and the African Court, illustrating how regional interpretations and rulings have reinforced the importance of the right to development in Africa. This includes the enforceability of the right to development, assessing the mechanisms through which it can be realised and the obligations of states parties, including South Africa that has ratified the African Charter and is therefore, obligated to give effect to all the rights enshrined therein. By situating South Africa's obligations within the African human rights system, the chapter stresses the need for alignment between national policies and continental commitments in effectively promoting the right to development at the domestic level. The analysis in this chapter reveals the critical role that the African human rights instruments can play in improving development in the quest to achieve the 2063 African agenda for development and in addressing systemic inequalities across the continent.

The fifth Chapter investigates the legal status of the right to development in the South African legal and institutional framework. It advances the argument that although the right to development is not explicitly enshrined in the South African Constitution or other legislation, it is implicit through the protection of socio-economic and cultural rights. The argument resulted in the exploration of the South African legal system with respect to how the right to development is embedded in this system, and hence the need for its implementation and enforcement. The evolution of relevant jurisprudence was also discussed in relation to the right to development.

The sixth Chapter delineates the right to development obligations that South Africa is bound to adhere to and comply with under international law, including the UNDRTD. This seminal document emphasises the collective right of individuals and of peoples to participate in, contribute to, and enjoy economic, social, cultural, and political development. Furthermore, legally binding regional instruments like the African Charter among others, strengthen these obligations by enjoining states parties – South Africa inclusive – to undertake domestic legislative and other measures to ensure implementation and enforcement of the right to development enshrined in those instruments. At the domestic level, the South African Constitution enshrines a broad

range of rights that are essential for development, such as the right to equality, education, water, shelter, and healthcare among others. These constitutional protections and obligations provide a solid framework for the government to implement the right to development. The relevant case law examined in the chapter emphasise the judiciary's role in interpreting and enforcing these rights, thereby holding the government accountable.

The seventh Chapter summarised the findings of the thesis, draws conclusions based on the research conducted, and proffer recommendations for further action and research in the area of the right to development.

7.3 KEY FINDINGS

7.3.1 On international acceptance

It is worth reiterating that the concept of the right to development emerged prominently in the 1970s, culminating in the adoption of the UNDRTD in 1986. The Declaration articulates the notion that development is a comprehensive process, central to the full realisation of all human rights. As demonstrated in section 5 of Chapter 2, the findings from the research that culminate into this thesis reveal that while the right to development has been endorsed by numerous international bodies, its application remains inconsistent and subject to differing interpretations. As discussed in section 2 of chapter 3, an examination of important international treaties reveals a growing integration of the right to development into various human rights frameworks. Instruments such as the ICESCR and regional human rights instruments such as the African Charter and the Arab Charter increasingly reflect the legal nature of the right to development.

As indicated in section 5 of Chapter 3, the legal status of the right to development at the international level remains ambiguous, leading to debates regarding its enforceability and the obligations of states. In other words, the right to development encounters significant challenges due to its non-binding legal status at the international level. Although the concept is widely recognised and supported in various declarations and resolutions, its implementation is obstructed by several factors. A primary issue is the reluctance of

governments to commit to enforceable obligations under international law concerning the right to development. Existing development mechanisms often prioritise economic growth and poverty reduction, failing to adequately address the broader range of rights encompassed by the right to development, including cultural, social, and political rights. It is important to highlight that the standing of the right to development at the international level will improve greatly with the submission of the Draft International Covenant on the Right to Development to the UN General Assembly for debate and possible adoption. For this to be possible, South Africa is one of the 29 countries that voted for the right to development at the UN Human Rights Council on 12 October 2023.¹

7.3.2 On the African human rights system

As highlighted in section 3 of Chapter 4, this thesis finds that the African Charter is the only human rights instrument that explicitly recognises the right to development as a collective right of peoples, emphasising the importance of solidarity and self-determination. Article 22 of the Charter states that '[a]ll 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.' This provision underlines the importance of development as a fundamental human right, acknowledging that individuals and communities must have the opportunity to participate in and benefit from development processes. The African Charter basically situates development within the context of human rights and dignity. As shown in section 3.1 of Chapter 4, an important aspect under the African human rights system is the emphasises to address the rights of marginalised and vulnerable groups, including women, children, and indigenous peoples among others. The right to development is framed in this context as essential for empowering these groups and ensuring equitable access to the resources and the opportunities for development. The findings suggest that regional mechanisms like the AU, play an essential role in promoting and facilitating implementation of the right

¹ See UN Human Rights Council Resolution. Available at <https://www.ohchr.org/en/news/2023/10/human-rights-council-adopts-five-resolutions-submits-general-assembly-draft> (accessed 12 October 2024).

to development. Conversely, in other regions like Europe and North America, the right to development is less explicitly embraced, often overshadowed by individual rights.

In response to human rights violations across the African continent, as discussed in section 4 of Chapter 4, the African Commission and the African Court have, through developing a robust jurisprudence, played an important role in promoting and protecting the right to development as a legally enforceable human right. Through resolutions, thematic reports, and guidelines, and through adjudication, the African Commission advances the discourse on development as a human right. Despite the normative recognition of the right to development within the African human rights system, challenges such as poverty, political instability, and inadequate governance hinder its realisation across the continent, necessitating stronger accountability mechanisms and effective governance in addressing these barriers.

7.3.3 On the South African Constitution and institutional framework

As explored in section 5 of Chapter 5, the research affirmed that the South African Constitution does not explicitly mention the right to development, but it incorporates related socio-economic rights, such as the rights to healthcare, water, shelter, education, and an adequate standard of living, which are read to imply the existence of the right to development within the domestic legal framework. This framework supports the realisation of development as a fundamental aspect of human dignity. For example, Section 9 of the Constitution guarantees the right to equality and non-discrimination, crucial for ensuring that all individuals can participate in and benefit from development processes. Section 27 affirms the state's responsibility to provide access to essential services, which is integral to development. While Section 28 protects the rights of children, emphasising the importance of nurturing future generations through development. The findings suggest that the constitutional emphasis on socio-economic rights creates a legal framework conducive for the realisation of the right to development. Consequently, South African courts have increasingly interpreted socio-economic rights in a manner that aligns with the principles of development, emphasising the state's obligation to take reasonable measures to progressively realise these rights. This

interpretation indirectly, enhances the domestic normative status of the right to development.

As examined in sections 5.2.1 and 5.2.2 of Chapter 5, South Africa has in addition, enacted various laws and policies that align with the principles of the right to development. The findings highlight key pieces of legislation, including the Broad-Based Black Economic Empowerment Act and the National Development Plan among others. These strategies are important in the quest to eliminate poverty and reduce inequality, serving as a roadmap for development. The findings in sections 4.1 and 4.2 of Chapter 6 and 6 reveals that the South African government has capacity to advance the right to development through various institutions such as the SAHRC as well as the offices of the Public Protector and the Auditor-General. In their varying mandates, these institutions directly and indirectly monitor and investigate human rights violations, including those related to socio-economic rights and hence also the right to development. It is important to stress that while these institutions play an instrumental role, their effectiveness is often hampered by resource constraints, bureaucratic inefficiencies, and lack of coordination.

Despite the constitutional and legislative frameworks in place, several challenges impede the realisation of the right to development in South Africa, including high levels of inequality and poverty, undermining efforts to achieve development. The findings indicate that socio-economic disparities continue to disproportionately affect marginalised communities. Also, the apparent lack of political will significantly impedes realisation of the right to development because development priorities varies, impacting the implementation of policies and programmes.

7.3.4 On the role of the government and non-state actors

As a signatory to various international human rights treaties, including the ICESCR and the African Charter, South Africa is under binding legal obligations to respect, protect, and fulfil the right to development as explained in section 3 of Chapter 6. It entails integrating these obligations into national laws and policies. This includes creating an enabling environment for development, ensuring equitable access to resources, and

addressing structural inequalities that hinder development efforts. The obligation for upholding the right to development lies not only with the government but also with non-state actors, including international organisations and corporations, highlighting the multi-faceted nature of human rights and development.

The findings further reveal that non-state actors, including civil society organisations (CSOs), non-governmental organisations (NGOs), and community-based organisations complement government efforts in terms of advocating for marginalised communities, raising awareness, and holding the government to legitimate accountability. Grassroots mobilisation and strategic litigation by these organisations have been instrumental in reinforcing the government's right to development obligations under international human rights law. Collaborative initiatives between the government and non-state actors have led to successful programmes in areas like education and healthcare, highlighting the importance of multi-stakeholder approaches. For the right to development to be fully realised, continued collaboration and a focus on inclusive, and equitable policies are essential.

It is important to stress that the government's reliance on foreign aid and investment has created dependency, complicating its ability to uphold the right to development independently. The findings reveal that to enhance the South African government's ability to uphold the right to development independently, the government ought to seek to diversify its funding sources by promoting domestic resource mobilisation, including through taxation and community investments. This approach can reduce reliance on foreign aid and promote self-sufficiency. Investing in the capacity of local institutions and empowering communities to take charge of their development can foster resilience. This includes providing training and resources in enabling local actors to engage effectively in development planning and implementation.

7.4 RECOMMENDATIONS

7.4.1 For domesticating the right to development in South Africa

To fully realise the right to development in South Africa, the explicit recognition of this right within the Constitution is of paramount importance. While South Africa's Constitution enshrines a range of socio-economic rights, it lacks an explicit provision on the right to development, which hinders implementation and enforcement. Amending the Constitution to include this right would not only provide a clear legal foundation but also elevate its status within the framework of human rights protections. Explicit constitutional recognition would serve several critical functions. Firstly, it would enhance the accountability of the government by obligating government institutions to prioritise development initiatives that promote social and economic equity. Such a legal mandate could catalyse the formulation and execution of policies that are specifically geared towards the realisation of development goals, thereby addressing the historical injustices and inequalities that persist in post-apartheid South Africa.

Furthermore, constitutional recognition of the right to development would empower civil society and non-state actors by providing them with a robust legal framework to advocate for development-related claims. This could facilitate strategic litigation aimed at enforcing the right to development, in so doing fostering a more participatory approach to governance. The judiciary would be better positioned to interpret and uphold the right to development, ensuring that governmental actions align with the principles of equity and sustainability. Additionally, an explicit constitutional provision would align South Africa with international human rights norms and frameworks that recognise the right to development, such as the UNDRTD. This alignment would not only enhance South Africa's standing in the global arena but also enhance the framework for international cooperation on the right to development.

7.4.2 For judicial and extra-judicial recognition

Based on the analysis undertaken in this thesis, it is recommended that South Africa pursue both judicial and extra-judicial avenues in strengthening the recognition and implementation of the right to development. Judicially, the courts should adopt a transformative and purposive interpretation of the Constitution that recognises the right to development as implicit within existing socio-economic and equality rights. Strategic litigation should be encouraged to test and establish precedent on the justiciability of this right, while judicial officers should receive ongoing training on its scope and relevance within both domestic and international legal frameworks.

Extra-judicially, Parliament should consider enacting legislation that expressly codifies the right to development, assigning clear obligations to state actors and incorporating mechanisms for accountability and public participation. Furthermore, the right to development should be mainstreamed into national development strategies and policy frameworks, including those related to poverty alleviation, land reform, and climate justice. Civil society organisations should be empowered to engage in advocacy, oversight, and education around this right, while national human rights institutions such as the SAHRC should integrate it into their mandates and reporting duties. These measures are essential for translating the constitutional promise of transformation into tangible, rights-based development outcomes.

7.4.3 For policy alignment

To advance the meaningful realisation of the right to development in South Africa, it is important that policy frameworks across all levels of government be systematically reviewed and aligned with a rights-based and inclusive approach to development. This entails embedding the normative principles of the right to development such as equity, participation, accountability, and sustainability into the formulation and implementation of policies relating to housing, health, education, land reform, economic growth, and climate resilience. Such alignment should ensure that development is not only pursued as an economic objective but recognised as a fundamental human right, particularly for

historically marginalised communities. Importantly, coherence must be established between South Africa's international human rights commitments and its domestic strategies, including the NDP, by positioning development as both a legal entitlement and a societal imperative. Strengthening interdepartmental and intergovernmental coordination will be critical to overcoming policy silos and promoting a more integrated, people-centred model of governance. In this way, the government can give concrete expression to its constitutional mandate to transform society, address structural inequalities, and ensure that development outcomes are just, inclusive, and enduring.

7.4.4 For enhancing inter-institutional collaboration and partnerships between government, civil society and international organisations

Enhancing inter-institutional collaboration is critical for improving coordination among various government departments and agencies, leading to more integrated and effective development strategies. Currently, the fragmentation of efforts across different levels of government often results in overlapping initiatives, inefficiencies, and gaps in service delivery. By advancing collaboration, South Africa can create a more cohesive approach to development that aligns resources, expertise, and objectives. In the main, effective inter-agency collaboration allows for the pooling of knowledge and skills, enabling departments to address complex socio-economic challenges more holistically. For example, when healthcare, education, and social welfare agencies work together, they can develop comprehensive strategies that tackle the interrelated issues of poverty, access to healthcare, and free educational attainment. This holistic approach not only maximises resource utilisation but also ensures that interventions are more relevant and impactful.

Moreover, enhanced collaboration can facilitate better data sharing and analysis among agencies, leading to informed decision-making. A unified database that incorporates insights from multiple departments can help identify priority areas, monitor progress, and evaluate the effectiveness of development programmes. This evidence-based approach ensures that policies are responsive to the actual needs of communities and can be adjusted as circumstances evolve. To achieve this level of collaboration, it is central to

establish formal mechanisms for coordination, such as inter-departmental task forces or committees focused on specific development goals. Furthermore, involving non-state actors in these processes can enhance perspectives and drive innovation, ensuring that development strategies are inclusive and grounded in community realities.

Furthermore, strategic and sustained partnerships ought to be cultivated between government, civil society, and international organisations. Such partnerships are critical for leveraging complementary strengths, encouraging innovation, and ensuring that development efforts are inclusive, participatory, and grounded in local realities. Government institutions, while bearing the primary responsibility for development, can benefit significantly from the technical expertise, community-level insights, and advocacy capacities of civil society organisations, as well as the financial resources, policy guidance, and global best practices offered by international partners. Working collaboratively, these actors can co-design and implement development programmes that are more responsive to the needs of historically marginalised communities.

To this end, formal and informal mechanisms should be established to facilitate dialogue, coordination, and joint planning among stakeholders. This may include multi-stakeholder forums, collaborative policy platforms, and partnership frameworks associated with national development priorities and international human rights standards. Clear roles, mutual accountability, and regular communication are important to maintaining trust and ensuring effective collaboration. Furthermore, government should create enabling conditions for civil society engagement, including legal and financial support, as well as institutional spaces for participation in policy formulation and monitoring. International organisations, in turn, should associate their support with locally defined priorities, while reinforcing government and civil society capacities rather than substituting them. Strengthened partnerships across these sectors can significantly enhance the legitimacy, reach, and impact of development programmes, ultimately contributing to a more equitable, inclusive, and rights-based development trajectory for South Africa.

7.4.5 For promoting participatory right to development governance

Promoting participatory governance in the context of the right to development is significant for ensuring that development programmes are truly responsive to the needs of all citizens. Inclusive governance structures that facilitate community participation in decision-making processes empower individuals and marginalised people, allowing their voices to be heard and their concerns addressed. This approach guarantees a sense of ownership and accountability, as communities become active participants in shaping policies that directly affect their lives. Through mechanisms such as public consultations, participatory budgeting, and community forums, government can create pathways for citizens to engage meaningfully in the development process. These platforms not only enhance transparency but also enable local knowledge and experiences to inform policy decisions. When citizens are involved in identifying priorities and in co-designing solutions, development programmes are more likely to reflect the actual needs and aspirations of communities, leading to more effective and sustainable outcomes, and hence, facilitate realisation of the right to development.

Furthermore, participatory governance can help bridge the gap between government and society, fostering trust and collaboration. When citizens feel that their input is valued and leads to tangible changes, it enhances social cohesion and strengthens democratic processes. This engagement is particularly important in diverse societies like South Africa, where historical inequalities sustain the marginalisation of previously disadvantaged groups, particularly the black segment of the population. Making sure that all voices are represented, including those of women, youth, and marginalised communities, participatory governance contributes to a more equitable distribution of resources and opportunities for development. This adaptive approach not only improves programme effectiveness but also builds community resilience, as citizens become more adept at articulating their needs and advocating for their rights.

7.4.6 For promoting education and awareness

The right to development is not being promoted enough and thus, it is less known in many communities. Promoting education and awareness on the right to development is essential for empowering stakeholders and in encouraging a deeper understanding of its implications for human rights and overall development. Programmes aimed at educating diverse groups, ranging from policymakers and government officials to civil society organisations and community members, can significantly enhance the effectiveness of development efforts. Educational programmes can provide stakeholders with a comprehensive understanding of the right to development, emphasising its significance as a fundamental human right that intertwines social, economic, and cultural dimensions. Clarifying how the right to development relates to other human rights such as the right to education, healthcare, and an adequate standard of living, these initiatives can highlight the interconnectedness of various rights and the importance of integrated approaches to development.

Public workshops, seminars, and training sessions can be designed to engage participants in discussions about the practical implications of the right in their specific contexts. This participatory approach not only enhances understanding but also encourages critical thinking about the challenges and opportunities related to the right to development. By involving local communities in these initiatives, stakeholders can share their experiences, which helps in grounding theoretical discussions to real-world circumstances. Additionally, awareness campaigns leveraging various media platforms—such as social media, community radios, and local events—can reach broader audiences, increasing public knowledge about the right to development. These campaigns can focus on success stories of development initiatives that have effectively integrated the right to development, demonstrating its potential impact. Moreover, educational initiatives should emphasise the role of civil society in monitoring and advocating for the right to development. Equipping stakeholders with the tools and knowledge necessary for holding government accountable can lead to more robust advocacy efforts and greater public demand for realisation of the right development.

7.5 SUGGESTIONS FOR FUTURE RESEARCH

Future research on the right to development in South Africa and its potential to address structural inequality, poverty, and unemployment presents an important avenue for scholarly inquiry. Given the significant socio-economic challenges facing South Africa, including persistent inequalities and high unemployment rates, understanding how the right to development can be operationalised in the legal and institutional framework is of paramount importance. This research could focus on several key areas, including comparative analyses with countries like China, which has effectively leveraged the right to development in driving development to the level that the country has attained.²

A comparative analysis with China could yield valuable insights into how the right to development could effectively be implemented in tackling poverty and inequality. China's rapid economic growth over the past few decades has been attributed, in part, to its focus on development as a fundamental right.³ Researchers could benefit from examining specific policies and strategies employed by the Chinese government that prioritise inclusive growth, such as rural development programmes, investment in education, and infrastructure development. These initiatives illustrate how a robust commitment to the right to development can lead to significant reductions in poverty and structural inequalities.

Research should also focus on the role of non-state actors, including civil society organisations and grassroots movements in advocating for the right to development. By examining their strategies and successes, scholars can gain insights into how these groups can influence policy making and drive community engagement. This area of study

² Republic of China White Paper 2016. 'The Right to Development: China's Philosophy, Practice and Contribution.' Available at http://english.www.gov.cn/archive/white_paper/2016/12/01/content_281475505407672.htm (accessed 12 October 2024); Wang G 2024. 'Neo-Daoism on Developing the Right to Development.' *Journal of International and Comparative Law*. Available at <https://www.yjil.yale.edu/the-right-to-development/> (accessed 12 October 2024).

³ China's White Paper 2016.

is particularly relevant in South Africa, where historical inequalities have often marginalised certain voices.

Another important aspect of future research could involve conducting community impact assessments of development initiatives that incorporate the right to development. Through documenting case studies from South African communities, researchers can analyse the effectiveness of these initiatives in addressing local needs and contributing to economic empowerment. This grassroots perspective is essential for understanding the real-world implications of the right to development and its potential to advance sustainable socio-economic development.

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