

The potential effect of the economic partnership agreements between EU and Africa on article 22 of the African Charter

Alex C Ekeke

LLM

Doctoral Candidate at the Centre for Human Rights, University of Pretoria

OPSOMMING

Die potensiele uitwerking van die ekonomiese vennootskapsooreenkomste tussen die EU en Afrika op artikel 22 van die Afrika Handves

Onder die Afrika menseregtebestel is die reg op ontwikkeling bindend. Artikel 22 van die Afrika Handves oor Mense- en Volkeregte (Afrika handves) dring die plig om 'die uitoefening van die reg op ontwikkeling te verseker' op aan die Afrika state. Tog bly Afrika in werklikheid onderontwikkeld. Tot op hede het die meeste Afrika-lande ooreenkomste gesluit rakende 'n ekonomiese samewerkingsooreenkomste (EPA) met die Europese Unie (EU), terwyl ander nog in 'n onderhandelingsfase is. Hierdie artikel ondersoek die potensiele uitwerking van die EPA's tussen Afrika en die EU ten opsigte van die beskerming van menseregte en, in besonder, die verwesenliking van die reg op ontwikkeling in Afrika. Hierdie artikel poog om te bewys dat die bepalinge van artikel 36(1) van die Cotonou Ooreenkomste, wat van Afrika state vereis om 'n vryhandelgebied met die EU te vestig en, sodoende, hulle plaaslike markte te open vir die invoer van meeste van hulle produkte vanaf die EU, die mense van Afrika van hulle reg op ontwikkeling sal ontnem.

1 Introduction

EPA between the EU and ACP countries was once celebrated as a mechanism for development and economic growth and was expected to reduce the poverty level in Africa.¹ However, the recent negotiations have raised concerns about the effect of the EPA on development in Africa.² Many African countries are not satisfied with the present negotiations, and few of them have signed an EPA.³ The dominant concern of the African countries is dual: one of the concerns is that the EPA sustains exporting raw materials from the African states while it allows high-value-added goods from EU to freely access the African markets. This will subdue the capacity of the African states from developing their indigenous value-adding processing industries. The

- 1 Patel 'Economic Partnership Agreements between the EU and African countries: Potential development implications for Ghana' (2007) available at: www.realizingrights.org (last accessed 2014-06-14).
- 2 Economic Partnership Agreements – still pushing the wrong deal for Africa? (2012) www.stopepa.de/img/epas_Briefing.pdf (accessed 2014-06-01).
- 3 *Ibid.*

second concern is that the elimination of tariffs on these high-value-added goods from the EU will deny the African states much-needed revenue for government expenditure on developmental projects such as health, education and infrastructure.⁴

The present EPA has instigated different reactions, while there are those who believe strongly that the present EPA could provide solutions to Africa's development problems,⁵ there are EPA sceptics who think that the present EPA cannot lead Africa on its path to development and therefore must be rejected by Africa.⁶

2 The Concept and Meaning of Development

The meaning of development has been contentious, unsteady, and complex, over the years.⁷ The variety of different conceptualisation of development has resulted in a significant confusion of the concept. One common point of convergence in most of the concepts is that development includes a change in most facets of the human existence. In Chambers opinion, the 'underlying meaning of development has been good change',⁸ his idea of 'good change' provides a simple definition of development, even though his notion raises some queries on what is 'good' and the type of 'change' that is desirable and if 'bad change' could as well be regarded as a type of development. According to Kanbur,⁹ there is no unanimous answer to what could be regarded as 'good change'. What could be accepted as 'good change' in one society may not be acceptable in another.

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- 4 Brown 'Economic Partnership Agreements' (2012) 8 & 9. *Advocate for International Development Lawyers Eradicating Poverty* <http://a4id.org/sites/default/files/user/Economic%20Partnership%20Agreements.pdf> (accessed 2014-06-29).
 - 5 See generally, European Commission 'How economic partnership agreements benefit both consumers and producers in Europe and developing countries' http://trade.ec.europa.eu/doclib/docs/2013/april/tradoc_151010.pdf (accessed 2015-08-14).
 - 6 See generally, Busse & Grobmann 'Assessing the Impact of ACP/EU Economic Partnership Agreement on West African Countries' (2004), *HWWA DISCUSSION PAPER 294 Hamburgisches Welt-Wirtschafts-Archiv (HWWA) Hamburg Institute of International Economics 2004*; Karingi *et al*; 'Economic and Welfare Impacts of the EU-Africa Economic Partnership Agreements' (2005) *African Trade Policy Centre Work in Progress* No. 10 and Keck & Piermartini 'The Economic Impact of EPAs in SADC Countries' (2005) Staff Working Paper ERSD-2005-04 World Trade Organization Economic Research and Statistics Division http://econpapers.repec.org/paper/lesswpaper/id_3a2.htm (accessed 2014-12-21).
 - 7 Thomas 'The Study of Development' (2004) Paper prepared for Development Studies Association Annual Conference, Church House, London. See also http://www.sagepub.com/upm-data/18296_5070_Sumner_Ch01.pdf (accessed 2015-05-10).
 - 8 Chambers 'Ideas for Development' (2004) IDS Working Paper 238. Sussex: IDS iii at 2-3.
 - 9 Kanbur 'What's Social Policy got to do with Economic Growth?' (2006) <http://www.arts.cornell.edu/poverty/kanbur/> (accessed 2005-08-01) 5.

Development was first conceptualised as a progression of 'structural societal change',¹⁰ it is mostly linked to capitalism, industrialisation and modernisation. This notion has a historical and long-term perspective and involves changes in the socio-economic structures, comprising of ownership and the institutional structure. These changes ensue over the time; nations go through changes that may relate to economic growth as well as societal change which are normally acknowledged as development.

Development has also been viewed to be about people¹¹ instead of focusing on the amassing of capital as the core influence motivating economic growth, and consequently, development. Amartya Sen, the Nobel-prize winning economist changed the general view about the meaning of development in his book 'Development as Freedom'. Sen's view is that development should be measured, not just by the increase in people's income, but by its effect on people, in terms of their capabilities, choices and freedoms.¹²

In its first Human Development Report, United Nations Development Programme (UNDP) started promoting a different idea of development.¹³ They conclude that development is not absolutely knotted either to economic development or human development, but instead, economic development and human development are interconnected, and both must be present to steer development.

Although Article 22 of the African Charter did not clearly define development, it overtly separates into elements its notion of development into economic, social and cultural elements. However, the Declaration on the Right to Development (DRTD) defines development in paragraph two of its preamble as:

A comprehensive economic, social, cultural and political process, which aims at the constant improvement of the well-being of the entire population and of all individuals on the basis of their active, free and meaningful participation in development and in the fair distribution of benefits resulting therefrom.

The DRTD view's development as a continuing process of achieving economic security for the people and this most involve the unrestricted contribution of the people. Thus the DRTD perceive development to be generally about people and the individual. It means access to jobs, right skills for the labour market, good healthcare, and a decent standard of living among others.

10 Thomas (2004) at 7.

11 Jonsson 'Human rights approach to development program' (2003) http://www.unicef.org/rightsresults/files/HRBDP_Urban_Jonsson_April_2003.pdf (accessed 2015-05-10).

12 See generally A Sen *Development as Freedom* (1999) Oxford University Press.

13 UNDP, *Human Development Report* (1990) Oxford Univ. Press.

3 The Right To Development

The RTD is an inalienable right to participate in a process in which all human rights and fundamental freedoms can be realised, which would lead to ‘the constant improvement of the well-being of the entire population and of all individuals, on the basis of their active ... participation in development and ... distribution of benefits resulting therefrom.’¹⁴ Article 1 DRTD stresses the fact that both the human person and all peoples are entitled to the RTD. However, Article 2(1) DRTD emphatically states that ‘the human person is the central subject of development and should be the active participant and beneficiary of the right to development.’ Although peoples or group of persons are entitled to some rights, for example, full authority over the natural resources within its territory, the human person is the active participant and beneficiary of the RTD.¹⁵ The DRTD situates the human person as the epicentre and focus of development.¹⁶

The realisation of the RTD cannot be set as grounds for the violation of any of the human rights, failing to protect human rights constitutes an impediment to the RTD.¹⁷ The process of development should encompass all human rights and fundamental freedoms, and assist in the realisation of human rights for everyone. The DRTD acknowledges in Article 6(2) that human rights are indivisible and interdependent. This requires that economic, social and cultural rights, as well as civil and political rights should be given equal attention and that all human rights must be attended to in an integrated manner, and not in the realisation of separate individual human rights.¹⁸

In Article 8(1), States and the international community are required to formulate appropriate development policies. Since the human person is the central subject of development, the processes by which such policies are formulated must be participatory. Although all human rights and freedoms are integrated into the RTD, the right to participate is unmistakably indicated in Article 1(1) thus: ‘every human person and

14 Declaration on the Right to Development, Article 2(3). Article 8 further explains this point by 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.’

15 Piron ‘The Right to Development A Review of the Current State of the Debate for the Department for International Development’ (2002) Right to Development Report <http://www.odi.org/sites/odi.org.uk/files/odi-assets/publications-opinion-files/2317.pdf> 10.

16 Declaration on the Right to Development, Article 2(1).

17 *Ibid* at Article 6(2).

18 Piron (2002) at 10.

peoples are entitled to participate.' Participation is the foundation of the RTD; it guarantees that no one is left out of the process of development.

International cooperation¹⁹ and assistance both in technical and financial capacities have an important role to play in the quest to realise RTD. The realisation of the RTD involves not only applicable domestic policies but also appropriate international conditions for development, with appropriate international policies and cooperation.

The DRTD requires that 'States have the duty to take steps, individually and collectively, to formulate international development policies with a view to facilitating the full realization of the right to development.'²⁰ International cooperation also involves 'eliminating obstacles to development.'²¹

Although, in 1986 when the DRTD was adopted, a consensus was not reached.²² However, as time goes by, scepticism about RTD changed. At the 1993 Vienna World Conference on Human Rights, consensus was reached. At that conference, RTD was described as an 'integral part of fundamental Human Rights.'²³ From then on RTD has been referenced in major United Nations (UN) documents, such as the Millennium Declaration,²⁴ where it states that 'we are committed to make the Right to Development a reality for everyone and to freeing the entire human race from want.' Likewise, the Rio + 20 Outcomes Document in 2012 reiterates the significance of 'freedom, peace and security, respect for all human rights, including the right to development.'²⁵

RTD is recognised in Article 23 of the UN Declaration on the Right of Indigenous peoples where it said that the 'Indigenous peoples have the right to determine and develop priorities and strategies for exercising their right to development'. In 1998 the United Nations (UN) Open Ended Working Group on RTD was established by the Commission on Human Rights (now Human Rights Council) in its resolution 1998/72, and by the Economic and Social Council (ECOSOC), in its decision 1998/269, with the mandate to oversee progress achieved in implementing the RTD, to appraise reports presented by States and other stakeholders on the

19 International cooperation involves a group of actions and/or resources exchange of technical, financial and/or human resources nature from different countries, voluntarily and according to their own interests and strategies for the purpose of promoting anything that can lead to development. See HR Vazquez 'International Cooperation for Development: A Latin American Perspective' <http://www.southsouth.info/profiles/blogs/international-cooperation-for> (accessed 2016-02-07).

20 Declaration on the Right to Development, Article 4(1).

21 Declaration on the Right to Development, Article 3(3).

22 Kirchmeier F 'The Right to Development where do we stand? state of the debate on the Right to Development' (2006) <http://www.fes-globalization.org/publicationsGeneva/FESOccPapers23.pdf> (accessed 2014-06-25).

23 Vienna Declaration (A/conf.157/23).

24 Millennium Declaration (A/RES/55/2), par 11.

25 See http://www.uncsd2012.org/content/documents/774futurewewant_english.pdf para 8 (accessed 2015-08-08).

correlation between their activities and the RTD and to 'present for the consideration of the Commission on Human Rights a sessional report on its deliberations.'²⁶

To assist the Working Group in the implementation of RTD, an independent expert was appointed in 1999 by the Chair of the Commission on Human Rights in the person of Arjun Sengupta. The Independent Expert conducted a study (1999-2004) on the state of progress in the implementation of the RTD. To also assist the Working Group is the High-level Task Force on the Implementation of the Right to Development which was established by the Commission on Human Rights, in its resolution 2004/7, and the Economic and Social Council, by its decision 2004/249 composed of five experts (2004-2010) to provide the needed expertise to the Working Group to enable it to provide proper recommendations.²⁷

The RTD is regarded as a 'soft law', commonly accepted by the international community but not quite legally binding.²⁸ However, the legality of the RTD can be established from other binding treaties. The content of RTD can be found in the Covenant on Civil and Political Rights (CCPR) and Covenant on Economic, Social and Cultural Rights (CESCR).²⁹ The rights to education, life, work, health, self-determination, food, housing, liberty, security which constitute part of the RTD are also found in the two covenants.

Although RTD is considered as a 'soft law' by the international community, it is legally binding on the African States through the provision of Article 22 of the African Charter.

4 Rights to Development Obligations of the African States

Under the African human rights system, RTD is legally binding on all state parties. Article 22 of the African Charter on Human and Peoples' Rights provides thus:

26 See The Intergovernmental Working Group on the Right to Development available at <http://www.ohchr.org/EN/Issues/Development/Pages/WGRightToDevelopment.aspx> (accessed 2015-12-20).

27 See High-Level Task Force on the implementation of the right to development available at <http://www.ohchr.org/EN/Issues/Development/Pages/HighLevelTaskForce.aspx> (last accessed 2015-12-20).

28 Kirchmeier (2006) at 11.

29 Articles 1-15 of the ICESCR touches on some elements of RTD, especially article 11 on the right to an adequate living standard. ICCPR also guarantees, in articles 22, 23 some freedoms as well as the protection of the right to marry and equality in the union, substances that touch on development.

- 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.

Paragraph one of Article 22 highlights the multidimensional nature of RTD; it accentuates that RTD consists of economic, social and cultural development. Although it did not mention civil and political rights, it did mention freedom which is a component of civil and political rights. Additionally, paragraph 7 of the preamble to the African Charter shows that Article 22 could not have neglected civil and political rights, it states:

Convinced that it is henceforth essential to pay particular attention to the right to development and that civil and political rights cannot be dissociated from economic, social and cultural rights in their conception as well as universality and that the satisfaction of economic, social and cultural rights is a guarantee for the enjoyment of civil and political rights.

Article 22(1) also presents the RTD as peoples' rights, however, it does not repudiate the point that the RTD is also an individual right. Regarding this Ougergouz opines that the RTD certainly consist an individual element and that the view of RTD in the Charter has the eventual objective of the complete development of the individual, individual rights and peoples' rights endeavour to achieve the same goal.³⁰ There is also, evidence in the Charter to show that the RTD enshrined in the Charter has an individual dimension. For example, Article 2 assures every individual the enjoyment of the rights and freedoms recognised and guaranteed in it including the RTD.

The African Commission (the Commission) has made pronouncements on the RTD. The case of *Centre for Minority Rights Development (on behalf of the Endorois) v Kenya*,³¹ is perhaps the most authoritative decision on RTD by the Commission. The Endorois community brought a claim against the Kenyan government who failed to include them in the process of the development. The Complainants in this case (the Endorois community) sought a declaration that the Kenyan government is in violation of, among others, Article 22 of the African Charter which guarantees the RTD.³² They allege that the Kenyan government violated these rights by forcibly removing them from 'their ancestral lands around the Lake Bogoria area of the Baringo and Koibatek Administrative Districts, as well as in the Nakuru and Laikipia

30 Ougergouz 'African Charter on human and peoples' rights - A comprehensive agenda for human dignity and sustainable democracy in Africa' (2003 The Hague/ London/New York: Martinus Nijhoff) at 306.

31 Communication 276/2003 available at http://www.achpr.org/files/sessions/46th/comunications/276.03/achpr46_276_03_eng.pdf (last accessed 2016-09-02).

32 *Ibid* par 22.

Administrative Districts within the Rift Valley Province,' without consulting and adequately compensating them.³³

The Complainants states that the almost sixty thousand people of the Endorois community have lived in the Lake Bogoria area for centuries. They assert that before they were dispossessed of their land in 1973 'through the creation of the Lake Hannington Game Reserve, and a subsequent re-gazetting of the Lake Bogoria Game Reserve in 1978' by the Kenyan government, 'the Endorois had established, and, for centuries, practiced a sustainable way of life which was inextricably linked to their ancestral land.'³⁴

The commission is of the opinion that:

The right to development is a two-pronged test, that it is both constitutive and instrumental, or useful as both a means and an end. A violation of either the procedural or substantive element constitutes a violation of the right to development. Fulfilling only one of the two prongs will not satisfy the right to development. The African Commission notes the Complainants' arguments that recognising the right to development requires fulfilling five main criteria: it must be equitable, non-discriminatory, participatory, accountable, and transparent, with equity and choice as important, over-arching themes in the right to development.³⁵

Concerning the RTD, the commission notes the report of the UN Independent Expert who said that:

Development is not simply the state, providing, for example, housing for particular individuals or peoples; development is instead about providing people with the ability to choose where to live. He states ... the state or any other authority cannot decide arbitrarily where an individual should live just because the supplies of such housing are made available.³⁶

The Commission also notes that freedom of choice is a criterion necessary for the fulfilment of RTD and is of the view that 'the Respondent State bears the burden for creating conditions favourable to a people's development.' The Commission ruled that the Endorois people have been denied their rights guaranteed under Article 22 of the African Charter.³⁷

4.1 The right holders envisaged under Article 22

The right holders envisioned under the DRTD are individuals as well as peoples. This is made clear in its definition of RTD as 'an inalienable human right by virtue of which every human person and all peoples are entitled to participate in ...' From the formulation of the definition of the RTD, the drafters of the Declaration envisaged the RTD holders to be

33 *Ibid* par 2.

34 *Ibid* par 3.

35 *Ibid* par 277.

36 *Ibid* par 278.

37 *Ibid* par 278 and 298.

individuals and peoples. Likewise, in the definition of development by the DRTD, it recognised that 'development is a comprehensive economic, social, cultural and political process, which aims at the constant improvement of the well-being of the entire population and of all individuals ...' The individual as right holder is further strengthened by the provisions of Article 2(1) of the DRTD which describes the individual as 'the central subject of development' and who 'should be the active participant and beneficiary of the right to development.'

Under the provisions of Article 22, the RTD should be enjoyed by all peoples, as alluded earlier, it does not repudiate the point that the RTD is also an individual right. The individuals and peoples are therefore the right holders. However, the word 'peoples' is not defined under Article 22 or anywhere in the African Charter. There are contentions as to whether the term peoples embrace ethnic groups and minorities or whether it refers solely to the States as the representatives of the whole inhabitants of their nations.³⁸ This contention has been settled by the Commission in some of its cases, for example, in *Katangese Peoples' Congress v Zaire*³⁹ the ethnic group of the Katangese people, brought a claim of the denial of self-determination guaranteed under Article 20(1) of the African Charter. Although, the Commission declared that the claims lack merit and there was no evidence of violation of the rights guaranteed under Article 20 (1) of the African Charter, neither Zaire nor the Commission objected to the admissibility of this claim on the basis that it did not satisfy the meaning of peoples under Article 20 (1) of the African Charter. Likewise, in *SERAC v Nigeria*,⁴⁰ the Commission recognised the people of Ogoni – an ethnic and minority group – as peoples within the meaning of Article 21 of the African Charter which states that 'all peoples shall freely dispose of their wealth and natural resources'. The Commission found that Nigeria did violate the Ogoni people's rights guaranteed under Article 21. The Commission's decisions on the above cases can logically be applied to the meaning of peoples under Article 22.

States are not declared clearly as the RTD holders by the DRTD. However, Article 2(3)⁴¹ has been interpreted as introducing the view that States are beneficiaries. For example, Sengupta argues that Article 2(3) implies that 'if States acting on their own are unable to formulate and execute those policies ... they have the right to claim cooperation and

38 See Kiwanuka 'The Meaning of 'People' in the African Charter on Human and Peoples' Rights' (1988) *American Journal of International Law*, vol. 82 at 84; A Ankumah, *The African Commission on Human and Peoples' Rights: Practice and Procedures* (1996) The Hague: Martius Nijhoff) at 167 and Ougergouz (2003) at 320.

39 (2000) AHRLR 72 (ACHPR 1995).

40 (2001) AHRLR 60 (ACHPR 2001)

41 Which states 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.'

help from other States.⁴² This interpretation implies that States can claim RTD against other States. This view is against the general notion that the duty to ensure human rights is held by the states towards their own peoples. The DRTD is not asking States to claim RTD from another State but rather that States should take collective actions. Collective action is taken by the international community. The international community refers to all countries when they come together to act as a group such as the UN, EU or the AU.

4.2 The duty bearers envisioned under Article 22

Article 22 clearly imposes the duty to ensure the enjoyment of RTD on state parties to the Charter. It also urges the African states to act 'collectively' to ensure the realisation of RTD; this implies that the state parties also have the obligation to act through international co-operation to ensure the enjoyment of the RTD of its citizen.

There have been arguments that similar lawful obligations should be imposed on such bodies as the transnational corporations (TNCs); the powerful industrialised nations and their development organisations; the international financial institutions - IMF and the World Bank.⁴³ Regarding this, it will not be practicable for any African people to allege violations of her RTD under Article 22 by any of the above-mentioned bodies since they are not parties to the African Charter. Moreover, the Vienna Convention on the Law of Treaties in Article 26 entreats state parties to respect the *pacta sunt servanda*; this means that only parties to a treaty are bound by it. Moreover, some cases decided by the Commission also point to this fact, for example, in the case of *SERAC v Nigeria*,⁴⁴ mentioned earlier, the Commission could not find Shell Petroleum Development Corporation (SPDC) – a TNC - guilty of violating the RTD of the Ogoni people, despite that the Commission find the TNC to be profoundly involved in denying the RTD of the Ogoni people. The Commission considered Nigeria's obligations as a State party to the African Charter, and violations of human rights by Nigeria as a result of the government's failure to apply the necessary amount of due diligence concerning the conduct of the TNC.

Article 22(2) also imposes a duty on the international community; it urges States to take collective action to ensure the exercise of the RTD. Although the Article 22 did not categorically state how the international cooperation can be achieved, it obviously is not asking States to claim RTD from another State but rather that States should take collective actions. Collective action is taken by the international community. The

42 Sengupta 'On the Theory and Practice of the Right to Development' (2002) *Human Rights Quarterly* vol. 24 853.

43 Okafor 'Righting the Right to Development: A Socio-Legal Analysis of Article 22 of the African Charter on Human and Peoples' Rights' in SP Marks (ed) *Implementing the Right to Development The Role of International Law* (2008 Friedrich-Ebert-Stiftung) at 59.

44 (2001) AHRLR 60 (ACHPR 2001).

international community refers to all countries when they come together to act as a group.⁴⁵

States can also collectively act or cooperate under regional groups, for example, the Assembly of the African Union, which is a medium where the Heads of States of all the AU member States meet, deliberate and take decisions on issues contained in the Constitutive Act of the African Union.⁴⁶ Another example is the European Council which also is a medium that brings together the European Union's Heads of State to act together to provide general political directions and priorities to the EU; it represents the uppermost level of cooperation among EU countries.⁴⁷ States can also act collectively under the United Nations General Assembly, which is a medium for decision making where the entire 193 member States hold multilateral discussion and democratically take decisions on a range of international issues, including international political cooperation, threats to peace and economic development, as well as the huge range of social, humanitarian and cultural issues covered by the UN Charter.

However, the duty of acting collectively can only take place within the African States who are parties to the Charter as they are bound by its provisions. Acting collectively may not be achieved between the African States and the EU or UN as they are not bound by the provisions of the Charter. Nevertheless, that is not to say that the EU or UN cannot voluntarily cooperate with the African States in order to ensure RTD.

4.3 Types of obligation envisaged by Article 22

In human rights laws, obligations can be 'positive' which involve the performance of a necessary action in order to protect human rights or 'negative' which includes abstinence from the commission of a prohibited act to protect human rights.⁴⁸ The types of obligations have been further categorised into the obligations to respect, protect and fulfil.⁴⁹

4.3.1 *The obligation to respect*

This category of obligation suggests that states should desist from engaging in any act (this includes going into any kind of [trade]

45 Rocard 'What Is the International Community?' <https://www.project-syndicate.org/commentary/defining-the-international-community-s-role-and-responsibility-by-michel-rocard> (accessed 2016-03-01).

46 Heyns and Killander 'Compendium of key human rights documents of the African Union' (2013) PULP.

47 The European Council <http://www.consilium.europa.eu/en/european-council/> (accessed 2016-03-01).

48 Bulto '*The extraterritorial application of the human rights to water in Africa*' (2014 *Cambridge*) at 85.

49 De Schutter *et al* 'Commentary to the Maastricht Principles on Extraterritorial Obligations of States in the Area of Economic, Social and Cultural Rights' (2012) *Human Rights Quarterly* 34 at 1090.

agreement with any institution or body) that will obstruct the enjoyment of the RTD of individuals and peoples.⁵⁰ The obligation to respect human rights, according to Bartels, is the minimum human rights obligation,⁵¹ which includes what is fundamentally a negative obligation on the state not to engage in whatever thing that will directly or indirectly impede the enjoyment of the human rights in question.⁵² In the *SERAC* case, the Commission found that the obligation to respect the rights protected in the African Charter requires that states should not allow any practice or policy that will impede the enjoyment of human rights of the individual or peoples.⁵³

4.3.2 The obligation to protect

RTD can be violated by third parties (non-state actors such as TNCs); the obligation to protect is a positive obligation that requires the states to take necessary action in the form of regulations to prevent the violation⁵⁴ of RTD by non-state actors. According to the Commission in the *SERAC* case, to protect human rights, a state needs to enact laws to make sure that right holders are protected from the interference of third parties.⁵⁵

4.3.3 The obligation to fulfil

The obligation to fulfil requires that states should provide basic needs, for example, jobs and other resources and means of realising RTD where the people lack the resources and means of achieving RTD. According to Bulto,⁵⁶ the obligation to fulfil is owed to peoples who for any reason do not have the resources and means to enjoy their human rights, in other words, their RTD. Succinctly put, the state parties are obligated to provide the minimum resources and means of enjoying RTD by the peoples.

5 The EPA

EPAs between the EU and ACP countries started in February 1975 when the first Lomé Convention (Lomé I) came into force.⁵⁷ Lomé I was followed by the II, III and IV Lomé Conventions, and they entered into

50 Bulto (2014) at 85.

51 Bartels 'A model Human Rights clause for the EU's International trade agreements' (2014) *German Institute for Human Rights* <http://ssrn.com/abstract=2405852> (accessed 2016-03-01) at 17.

52 Bulto (2014) at 85.

53 *SERAC v Nigeria* (2001).

54 Bartels (2014) at 17.

55 *SERAC v Nigeria* (2001).

56 Bulto (2014) at 96.

57 Although, cooperation between the European Union (at that time European Community) and Africa, the Caribbean and the Pacific countries (then not yet ACP Group) started in 1957 with the signing of the Treaty of Rome, which gives commercial advantages and financial aid to African the Caribbean and the Pacific countries. The Treaty provided for the creation of European Development Funds (EDFs), aimed at giving technical and

force in 1980, 1985, 1990, respectively. The Lomé Conventions lasted from 1975 – 2000.⁵⁸ From 2000, the EPAs between the EU and ACP countries continued, but now under the name, Cotonou Convention. The Lomé Conventions covered trade, industrial, financial and technical cooperation. According to some observers, Lomé Conventions ‘remained the most far-reaching, elaborate, and complex North-South contractual agreement among its contemporaries’.⁵⁹

An important feature of the Lomé Conventions is the non-reciprocal preferences given to the ACP countries for most of their exports to the then European Economic Community (EEC). This means that ACP countries may impose duties on EU goods coming into ACP countries without EU doing the same on more than 90 percent of goods from ACP countries entering the EU. ACP countries thus have considerable advantages in trading with the EU. Another feature of the Lomé Conventions is the creation of the European Development Fund (EDF) which provides economic assistance to the ACP countries. The EDF manages and disburses funds based on ‘need’, determined by, per capita income and other criteria.⁶⁰ The Conventions also provided two insurance schemes, namely, the stabilisation of exports (STABEX) in Lomé I and the system of minerals (SYSMIN) in Lomé II, for ACP countries that depend on agricultural and mineral exports. The two insurance schemes were aimed at alleviating the impacts of shortfalls from revenues on agricultural and mineral exports.⁶¹

The Lomé convention introduced ‘respect for human rights, democratic principles and the rule of law’ for the first time in the revised Lomé IV in 1995 as essential elements of the Convention.⁶² It also provided the non-execution clause in Article 366a which provides that a party can invite another party for discussions if that party thinks that there has been a breach in the fulfillment of the essential elements contained in Article 5, ‘with a view to assessing the situation in detail and, if necessary, remedying it’. It further provides that where the discussions fail, the party who initiated the discussions may take necessary steps, ‘including, where necessary, the partial or full

57 financial aid to African countries still colonised at that time. See http://ec.europa.eu/europeaid/where/acp/overview/lome-convention/index_en.htm (accessed 2014-06-05).

58 Laaksonen, Maki-Franti & Virolainen ‘Lome Convention, Agriculture and Trade Relations between the EU and the ACP countries in 1975-2000’ Trade AG working paper 06/20 <http://ageconsearch.umn.edu/bitstream/18853/1/wp060020.pdf> (accessed 2014-06-05).

59 Faber G ‘The Lomé Conventions and the causes of economic growth’ 5th SUSTRA Workshop on European Governance and European Opinions on Trade and Sustainable Development, IFRI, Paris June 3 and 4, 2004 http://www.agromontpellier.fr/sustra/research_themes/ue_governance/papers/Faber.pdf (accessed 2014-08-20); see also Anne-Marie Mouradian ‘The Lomé Convention under threat’ <http://mondediplo.com/1998/06/08lome> (accessed 2014-08-20).

60 *Id* at 2.

61 *Ibid*.

62 Lome Convention IV revised (1995) Article 5.

suspension of the application of this Convention to the Party concerned'.⁶³ The non-execution clause was put into practice when the democratic principles were obliterated in the Niger Republic by a coup d'état in 1996. The EU suspended financial cooperation for six months after which they returned to constitutional order.⁶⁴

The EU has also engaged other schemes to provide preferential access for the ACP to the EU market for the economic growth of the poorest countries, for example, the General System of Preferences (GSP), General System of Preferences + (GSP +) and the Everything But Arms (EBA).

The GSP scheme has been applied by the EU since 1971 and has been revised from time to time to mirror progressions in global trade. The current changes were made on 31 October 2012 and took effect on 1 January 2014.⁶⁵ The GSP is a unilateral measure by the EU aimed at assisting the developing countries to integrate into international markets by reducing duties on their exports to the EU market. This measure does not require reciprocity by the developing countries.⁶⁶

The GSP + is a part of the reviewed GSP that provides additional trade incentives to developing countries already profiting from GSP and who ratify and shows a sincere commitment to implementing 'core international conventions on human and labour rights, sustainable development and good governance'. The GSP + provides a strong motivation for the developing countries to protect core labour rights and good governance that enters into force on 1st January 2014. It offers additional tariff reductions or full removal of tariffs for basically the same product categories covered by the GSP.⁶⁷

EBA is also part of the EU's GSP initiated to grant duty-free and quota-free to the Least Developed Countries (LCD) on all their exports into the EU except arms. The EBA initiative came into force on 5 March 2001.⁶⁸

The Lomé Convention was a mechanism for development in Africa; it influenced virtually every single facet of economic life and has been one of the sources for providing jobs in Africa and an improved standard of

63 Id Article 366a (3).

64 Cuyckens 'Human Rights Clauses in Agreements between the community and third countries the case of the Cotonou Agreement' (2010) Institute for international law working paper no. 147 at 68.

65 European Commission 'Revised EU trade scheme to help developing countries applies on 1 January 2014' http://europa.eu/rapid/press-release_MEMO-13-1187_en.htm (accessed 2014-08-27).

66 *Ibid.*

67 European Commission '10 countries to benefit from EU preferential trade scheme GSP+ as of 1 January 2014' <http://trade.ec.europa.eu/doclib/press/index.cfm?id=1006> (accessed 2014-08-27).

68 European Commission 'Everything But Arms (EBA) – Who benefits?' http://trade.ec.europa.eu/doclib/docs/2013/april/tradoc_150983.pdf (accessed 2014-08-27).

living even to the very low level of its people,⁶⁹ ultimately, providing a means of attaining the RTD of the African people.

In 1995, the United States (US) government (including other developing countries from Asia and South America who are not members of the ACP) petitioned the World Trade Organization (WTO) to investigate if the Lomé conventions had gone contrary to WTO rules. The WTO, in 1996 ruled that the Lomé conventions had indeed violated WTO regulations.⁷⁰ The violation is as a result of the EU's exemption of exports from the ACP countries from tariffs while exports from other countries that are not ACP members but are WTO members were subjected to the tariffs. WTO rules GATT (Article XXIV) permits this type of discrimination when the parties enter a Free Trade Agreement (FTA), or under a GSP arrangement.⁷¹ This means that the trade cooperation between the ACP and EU must be reciprocal. A new EPA has to be designed to be compatible with WTO rules. The Lomé conventions were replaced with the Cotonou Agreements (the Agreement) in February 2000 when it came into effect. The Agreement will establish EPAs between the EU and the ACP countries, making it possible to have a fresh trading system founded on reciprocal preferences. On this basis, in 2001 the WTO granted a waiver to the EU to carry on providing unilateral preferences to the ACP countries up to January 2008.⁷² When it became obvious that the EU and all APC regions may not come to an agreement on full EPAs by the end of 2007, the EU and the ACP countries began negotiating an Interim EPA in 2002 which concluded in 2007.⁷³

The fundamental objective of the Agreement is poverty reduction.⁷⁴ This objective 'shall inform all development strategies and shall be tackled through an integrated approach taking account at the same time of the political, economic, social, cultural and environmental aspects of

69 Friedrich Ebert Stiftung 'Impact of the Lome Convention' <http://library.fes.de/fulltext/iez/01113004.htm> (accessed 2014-07-02).

70 The Cotonou Agreement selected issues, effects and implications for Caribbean economies www.cepal.org/publicaciones/xml/1/23581/L.66.pdf (accessed 2014-06-02).

71 See http://www.eac.int/trade/index.php?option=com_content&id=121&Itemid=105 (accessed 2014-06-20).

72 Fontagne *et al*; 'An Impact Study of the Eu-Acp Economic Partnership Agreements (EPAs) in the Six ACP Regions' (2008) Commission of the European Union – Directorate General for Trade <http://ssrn.com/abstract=1194965> (accessed 2015-01-15).

73 Bilal & Stevens 'The Interim Economic Partnership Agreements between the EU and African States' (2009) *Policy management report 17 European Center for Development Policy Management available at: http://ecdpm.org/wp-content/uploads/2013/11/PMR-17-Interim-Economic-Partnership-Agreement-Between-EU-Africa-2009.pdf* (accessed 2015-01-15) at 15. See also Karingi & Deotti 'Interim Economic Partnership Agreements Point to the Classic Regional Trade Agreement after all: Should African Countries really be worried?' (2009) *African Trade Policy Center Work in Progress No. 75 Economic Commission for Africa 13* <http://www.uneca.org/sites/default/files/publications/75.pdf> (accessed 2015-01-15).

74 Article 1 of the Cotonou Agreement revised 2010.

development'.⁷⁵ The Agreement ensures ownership; the ACP States have control over the development policies for their economies and people.⁷⁶ Conceivably, the most far-reaching change introduced by the Agreement is the removal of the 'non-reciprocal trade preferences' granted under the Lome Conventions. Article 36 of the Cotonou Agreement requires that the parties to the agreement should conclude a new WTO-compatible EPA, 'removing progressively barriers to trade between them and enhancing cooperation in all areas relevant to trade'. This will include establishing Free Trade Agreements (FTA) between the EU and the African regional economic communities. The Agreement provides for a special fund for the ACP countries every five years, known as the European Development Fund (EDF) which provides resources for the development cooperation.⁷⁷ The EDF is funded by the EU member States every five years; it is managed by a specific committee with its own financial rules.⁷⁸ We are currently in the 11th EDF, which runs between 2014 and 2020, with funds amounting to €30.5 billion.⁷⁹ It should be noted that the Agreement provides for the establishment of the EPA that will last for 20 years, starting from 1 March 2000 and can be reviewed every five years.⁸⁰

The Agreement contains human rights clause (essential elements)⁸¹ under Article 9(1), 9(2), 9(3) and 9(4) which recognises the human person as the centre for which development will be directed, this involves 'respect for and promotion of all human rights and fundamental freedoms, including respect for fundamental social rights, democracy based on the rule of law and transparent and accountable governance'.⁸² While referring to their international obligations and commitments regarding respect for human rights, the parties acknowledged the relatedness, indivisibility and universality of human rights and 'undertake to promote and protect all fundamental freedoms and human rights, be they civil and political, or economic, social and cultural'.⁸³

Article 9 aimed at ensuring that the human rights obligations that have been in existence should be respected by the parties, referring particularly to economic and social rights as well as civil and political rights. Article 9 also introduced another concept – 'fundamental elements', and considered Good Governance as a fundamental element

75 *Ibid.*

76 Article 2 of the Cotonou Agreement revised 2010.

77 Financial Protocol, Annex I of the Cotonou Agreement revised 2010, par. 2.

78 See European Development Fund (EDF) <http://eurlex.europa.eu/legal-content/EN/TXT/?uri=URISERV:r12102> (accessed 2015-10-02).

79 *Ibid.*

80 Article 95 of the Cotonou Agreement revised 2010.

81 A lot of bilateral treaties with the EU contain human rights clauses, usually under the part titled 'essential Elements' and that the agreement may be suspended if that essential element is violated in the non-execution clause. For example Art. 2 of the EU–Iraq Partnership and Cooperation Agreement.

82 Article 9(1) of the Cotonou agreement revised 2010.

83 Article 9(2) of the Cotonou agreement revised 2010.

of the agreement which ‘underpins the ACP-EU Partnership’.⁸⁴ It is not quite clear what is the difference, but according to Cuyckens, it is believed it could be a way of finding the middle ground due to the fact that the ACP countries could not accept good governance as part of the essential elements of the agreement. However, in practice, apart from the expressions there is no other difference.⁸⁵

The Cotonou Partnership Agreement contains a non-execution clause under Article 96. It laid down procedures that will be activated when a party contemplates that another party has failed to comply with the essential elements of the agreement.⁸⁶ The parties must explore every likely option for discussion under Article 8,⁸⁷ ‘except in cases of special urgency, prior to the commencement of the consultations’.⁸⁸ If after dialogue a party thinks that the other party did not accomplish an obligation in the essential element clause, ‘it shall invite the other party to hold consultations that focus on the measures taken or to be taken by the party concerned to remedy the situation’. If the consultations fail or are refused or in a situation of ‘special urgency, appropriate measures may be taken ... appropriate measures referred to in this Article are measures taken in accordance with international law, and proportional to the violation’.⁸⁹ What constitutes ‘appropriate measures’ is not spelt out in the Agreement but the measure should not subject the people to undue hardship, for that reason, a party can suspend aid to the government while aids, to NGOs as well as humanitarian aids, can remain and the measures revoked as soon as the violation of the essential element ceases.⁹⁰ It should be noted that the Cotonou Agreement recommends that suspension should be a last resort,⁹¹

6 Concerns for the EPA

African states have expressed concern as to the potential effects of the EPA. At the Lisbon summit, held in Portugal in December 2007, the African Heads of State and Government reiterated that ‘EPAs should be able to bring about development in Africa as well as strengthen regional integration initiatives; so far the agreements have not achieved this’.⁹² In a Conference of Ministers of Trade, in Kigali in November 2010, the African Union issued a declaration regarding EPA negotiations, calling on

84 Article 9(3) of the Cotonou agreement revised 2010.

85 Cuyckens (2010) at 36.

86 In which, Article 9 stated are human rights, democratic principles and the rule of law.

87 The condition for having a dialogue among the parties was in the Cotonou Agreement that came into force in 2000, however, the connection between Article 96 and Article 8 was further strengthened in the 2005 and 2010 reviewed Cotonou Agreement.

88 Article 96(1)(b) of the Cotonou agreement revised 2010.

89 Article 96(1)(c) of the Cotonou agreement revised 2010.

90 Article 96(1)(a) of the Cotonou agreement revised 2010.

91 Article 96(1)(c) of the Cotonou agreement revised 2010.

92 Brown (2012).

the EU to provide more funds to address EPA related loss of revenue and capacity building.⁹³

Representatives of African countries have over and over again stated that the current EPA pact is not in the development interest of the African peoples. Dr James Ndahiro, Rwanda's representative to the East African Legislature, said: 'we are concerned that the outstanding issues, if not resolved and if included in the EPA framework, will bind the EAC to poor trading terms'.⁹⁴ According to Professor Chukwuma Soludo, former governor of the Central Bank of Nigeria, 'despite ... the reported public protests in 20 countries against the raw deal, it seems all but certain to be rammed through'. He further said that: 'in private whisperings, not many Africans or policymakers are happy with the deal, but there is a certain sense of helplessness'.⁹⁵ In the opinion of Onkundi Mwencha, the Deputy Chairperson of the African Union (AU) Commission, 'our advantage is regional integration', he maintained that EPA cannot help us to integrate our markets, rather it will stall us, and 'I don't think the EPA is a priority for Africa'.⁹⁶

Busse and Grobmann⁹⁷ state that ACP nations that are parties to the EPAs are obligated to establish an FTA with the EU. If this is achieved the result will be that they would have to expose their local markets to virtually all goods from the EU, free of tariffs within a period of twelve years. They further state that in addition to the bearing on 'trade flows', the result of tariff removal will be a drop in import levies and, later, the whole government income. Likewise, Karingi *et al*⁹⁸ looked at the economic and social bearings of the trade liberalisation features of the anticipated EPAs between the EU and African countries. They provide an appraisal of the probable consequences of EPAs creating FTA between the EU and the various African Regional Economic Communities. They addressed questions such as 'how will an EPA that includes reciprocal market access agreements between the EU and Africa impact on African countries' GDPs, levels of employment and other macroeconomic aggregates?' and 'What sectors in Africa are most likely to lose and what sectors gain with EPAs?'. They conclude that complete reciprocity could be very expensive for Africa. A similar study was made by Keck and Piermartini; they analyse the impact of the creation of an FTA between the EU and the Southern African Development Community (SADC). They explore many issues, particularly the following two essential subjects: First, they evaluate the effects of an FTA between the EU and SADC countries on SADC members including under a full liberalisation and partial exclusions in agriculture. Moreover, secondly, they examine whether SADC countries should concurrently go on with further intra-SADC liberalisation. Their analysis not only pays attention to the

93 *Ibid* 8 & 9.

94 Economic Partnership Agreements (2012) at 2.

95 *Ibid*.

96 *Ibid*.

97 Busse & Grobmann (2004).

98 Karingi (2005) 6.

consequences in terms of well-being and real GDP growth, but also emphasise redistribution effects and cost of adjustments. The study looks at resource reallocation across sectors, differences in the wage of factors of production and variations in trade patterns. They find that major growth impacts should not be expected from liberalisation between the EU and SADC. Zouhoun-Bi and Nielsen⁹⁹ also evaluate the fiscal revenue effects of a potential EPA between ECOWAS and the EU. Zouhoun-Bi and Nielsen carried out an empirical analysis study which shows that the effect of executing EPA on fiscal revenue for certain ECOWAS states will be substantial. They find that goods imported from the EU will rise by almost 10.5 percent in Senegal to 11.5 percent in Nigeria if free trade is implemented. In case of total government income, they find that income loss would be biggest in Cape Verde at about 15.8 percent and Senegal at about 10.4 percent, this is because these countries import largely from the EU and depend highly on income generated from tariffs on importation. Other states that could also be considerably affected include Ghana, whose government income is likely to drop by 7.1 percent and Nigeria who will lose an estimated amount of only 2.4 percent of government income. As regards GDP, they find that tariff income losses sum up to '1.0 percent of GDP in Nigeria, 1.7 percent in Ghana, 2.0 percent in Senegal and 3.6 percent in Cape Verde'.

These concerns arise because the EPA is not addressing the major challenges facing the African peoples. Many African peoples face high unemployment as a result of weak productive capacity and food insecurity because of lack of growth in the area of agricultural production and infrastructure. Benjamin W. Mkapa the former president of Tanzania points out that:¹⁰⁰

We cannot continue to export a narrow range of largely primary products and import a broad range of finished goods on our way to development. The hard work of industrialization and food production must be done.

According to the Human Development Index of the United Nations Development Program (UNDP), the EU is one of the richest regions with a very high level of human development.¹⁰¹ The African countries have a much lower level of development and weaker economies than the EU. The EPA threatens the African countries' development and the RTD of its people because of the difference of the level of economic development between EU and African states. Certainly, such weak economies in most African countries face serious competition from the industrialised EU. If these weak economies that are already incapacitated by poverty collapse

99 Zouhoun-Bi & Nielsen 'The Economic Community of West African States Fiscal Revenue Implications of the Prospective Economic Partnership Agreement with the European Union' (2007) World Bank Policy Research Working Paper 4266, June 2007.

100 Ibid.

101 Position paper International Federation for Human Rights (2007) at 4 & 5.

and their per capita incomes further decrease, it will threaten the RTD of millions in the continent of Africa.¹⁰² In addition, there are no sufficient protections for workers who are affected by restructuring, and in case of inactivity, there is no established social security system.¹⁰³

Some African countries may reform their tax regimes to compensate for the loss of customs duties, and may heavily tax domestic actors (VAT, income tax or corporate tax) to recover the lost import tax revenue. This will have grave consequences on companies' competitiveness and people's purchasing power. This, in addition to the decrease of customs revenues in the after effects of market liberalisation will lead to a tremendous fall in the African countries' budgets.¹⁰⁴ This may severely reduce their ability to finance public policies such as education, health and housing due to decreasing incomes and thus infringe upon the peoples' RTD, guaranteed by article 22 of the African Charter.

As alluded earlier, RTD is binding under the African human rights system, and the state parties have the obligation to ensure the enjoyment of RTD to their citizens as well as desist from any action that will impede the enjoyment of RTD, this includes abstaining from entering into trade agreements that will impede the realisation of RTD. African countries must let their negotiating partners be aware of their RTD obligations to their citizens, and this fact must be on the negotiating table.

7 Conclusion

Article 22 of the African Charter provides a normative force for the RTD under the African human rights system. RTD is a process of development that will result to the realisation of all human rights, a process that must be carried out in a way identified as rights-based, in compliance with the international human rights standards; it is a process that is participatory, nondiscriminatory, equitable, accountable and transparent. Paragraph one of Article 22 of the African Charter points to the multidimensional nature of the RTD; it highlights that RTD comprises of economic, social and cultural development. Article 22 evidently foists the duty to ensure the enjoyment of RTD in African States. African States also have the duty to act through international cooperation to ensure the enjoyment of the RTD by its people. This duty includes restraining from entering into trade agreements that will impede the enjoyment of the RTD by its people.

Presently, most African countries have concluded negotiation on an EPA with the EU while others are still in negotiation. The trade agreement is a source of great concern to most Africans. As mentioned in the introductory section above, one of the concerns is that the EPA sustains exporting raw materials from the African states while it allows high-value-added goods from EU to freely access the African markets. This will

102 *Ibid.*

103 *Ibid.*

104 *Ibid.*

subdue the capacity of the African states from developing their indigenous value-adding processing industries. The second concern is that the elimination of tariffs on these high-value-added goods from the EU will deny the African states much-needed revenue for government expenditure on developmental projects such as health, education and infrastructure. The EPA has a potentially devastating effect on the enjoyment of RTD in Africa; this must be at the back of the minds of the African states as they negotiate the EPAs or revise the EPA at the expiration of the five-year tenure. They should also remember that they have an obligation to respect the RTD of the African peoples and cannot enter into a trade agreement that could obliterate this obligation. The fact that they have a binding obligation to respect, protect and fulfil RTD must be part of the negotiation.