

## Finding value for the right to development in international law

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### Summary

*This article explores the value of the right to development declared by the United Nations General Assembly in 1986 in the context of challenges of underdevelopment in sub-Saharan Africa. Declared over 30 years ago, the right to development remains a paper tiger because of its legal unenforceability. Difficulties associated with enforceability are exacerbated by the failure of the Declaration's sponsors to clearly identify the duty bearers relative to the right. The article argues that the juridical status of the right ignores the mutuality between right and duty in human rights discourse and deceives developing states into believing or expecting that developed states would provide the means and resources to develop developing states. It further argues that such disconnect between right and duty is detrimental to attempts at enforcement, especially where the parties involved are sovereign states that act at the international plane principally by consent or consensus. The detachment of the legally enforceable duty from the right weakens the force of international law and, regrettably, validates the Austinian view on international law as international positive morality. Such a scenario not only has undermined the capacity of developing states to take the destiny of their development into their own hands and look within for economic salvation, but also triggered a situation where public officials in these states engage in maladministration and complacent plunder of the common wealth of their countries. Therefore, the current architecture of the right to development needs to be reconstructed so that some uncertain parts of the obligation therein can be weeded out in order to allow for the enforceability of the right. This measure is expected to infuse some sanity into the human rights discourse and more responsible conduct in developing states.*

**Key words:** *right to development; duty bearers; human rights; international law; plunder of the common wealth*

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## 1 Introduction

Development comprises any form of advancement or progress either at the national or international level. The principle of the sovereign equality of states<sup>1</sup> suggests that each state has the capacity to determine its roadmap to development. However, because such a principle is merely a juristic supposition, in reality developmental capacity differs from state to state.<sup>2</sup> Thus, there are state actors that find it extremely difficult to develop because their ability alone is inadequate. It is against this background that the right to development is to be appreciated. This right was first legally recognised by the African Charter on Human and Peoples' Rights (African Charter).<sup>3</sup> Since the Charter entered into force the African Commission on Human and Peoples' Rights (African Commission) has been mandated to examine the nature of development in intra- and inter-state disputes in Africa.<sup>4</sup>

In contrast, the right to development was declared by the United Nations General Assembly (UNGA) Resolution on the Declaration on the Right to Development (RTD Declaration) of 1986.<sup>5</sup> Unlike the African Charter, the RTD Declaration is applicable to members of the UN (including African states). Different to the African Charter, which is legally enforceable, the RTD Declaration is not. Because the main focus of the article is on the UNGA-declared right to development involving developed and developing states, the African Charter provision on development falls outside the scope of the article.

The RTD Declaration creates the legal capacity in the state through the right to development to develop or to be developed. Although the former does not evoke controversy, the latter does. In the case of the former, the right to development empowers states to develop as they desire.<sup>6</sup> However, in respect of the latter it creates the legal norm that enables developing states to claim the dividends of development from developed states.<sup>7</sup> In this regard, developing states cite the grant of foreign aid by developed states to them as evidencing their right to development.<sup>8</sup> However, developed states, upon whom such a

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1 Art 2(1) UN Charter 1945.

2 This reflects in art 2(1) of the International Covenant on Economic, Social and Cultural Rights (ICESCR) which permits state parties to develop relative to the quantum of their resources.

3 The African Charter was adopted on 27 June 1981 and entered into force on 21 October 1986; (1982) ILM 58.

4 See part 2 below.

5 See A/RES/41/128 (4 December 1986).

6 See, eg art 2(3) RTD Declaration.

7 Art 4(2) RTD Declaration.

8 MA Tadeg 'Reflections on the right to development: Challenges and prospects' (2010) 10 *African Human Rights Law Journal* 340 (stating that developing countries pinpoint slavery, colonialism and the neo-colonial socio-economic hegemony of the north as justifications for their legal right to seek development assistance from developed countries).

burden to develop developing states has been laid, have rejected this.<sup>9</sup> They argue that they offer foreign aid gratuitously and voluntarily to developing states in the course of inter-state relations for reasons that do not include or contemplate the fulfilment of any legal duty.

From the two diametrically opposed positions, there is no argument that nothing is ordinarily wrong with the right to development, but there are matters arising out of the steps taken by the RTD Declaration to concretise or legalise the right to development. Incidentally, such steps are more important than the right itself because the right to development is but an empty shell in the absence of its firm concretisation in, for example, legislation.

This article examines the value of the right to development amidst challenges of underdevelopment in sub-Saharan Africa. The right to development, which was declared by the UNGA 33 years ago, remains illusive by reason of its indeterminacy, uncertainty or unenforceability. In order to overcome these defects, the article advocates the deconstruction of the right to development, especially those aspects relating to the duty of developed states to develop developing states. Part 1 introduces the article, while part 2 considers the subject of development. Part 3 examines the ingredients of the right to development. In part 4 the article argues for the deconstruction of the right and part 5 concludes the discussion.

## 2 Development

There are controversies surrounding the meaning of 'development'. Consequently, the meaning associated with the term is bound to reflect the ideological orientation of the researcher. Such orientation includes historical, sociological, political and economic perspectives on development. However, within the context of the right to development there appears to be the consensus that development is connected to the liberty of the individual. Thus, Sen defines development as a process of expanding the real freedoms that people enjoy.<sup>10</sup> It is upon the basis of such freedom that people make rational choices relative to their preferences, peculiarities and prejudices. Similarly, Seers perceives development as the reduction of poverty, unemployment and inequality from high levels to

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9 Tadeo (n 8) 339 (observing that developed countries deny the right to development as creating any legal obligation on their part to economically or technically assist developing countries).

10 A Sen *Development as freedom* (1999) 1; see also K Iqbal 'The Declaration on the Right to Development and implementation' (2007) 1 *Political Perspectives* 10. For a critique of Sen, see B Tungodden 'A balanced view of development as freedom' 6 July 2001 <https://www.cmi.no/publications/file/953-a-balanced-view-of-development-as-freedom.pdf> (accessed 10 May 2018).

controllable heights.<sup>11</sup> Therefore, while a country that is able to minimise or control the enumerated economic indices is regarded as 'developed', another that falls short of such capacity is termed 'underdeveloped'. Furthermore, Todaro and Ajagun expand the meaning of development by characterising it as the re-organisation and re-orientation of the entire economic, social, political, cultural and religious systems with the aim of making life more meaningful.<sup>12</sup>

The importance of the economy in realising development cannot be over-emphasised. Marx makes this clear when he argues that the superstructure reflects the substructure, that is, the economic base.<sup>13</sup> However, because human freedom is the nucleus or nerve centre of development, there is less emphasis on national economic growth and more interest in the economic development of the individual. Economic growth, which is the ability of an economy to produce goods and services, measures<sup>14</sup> national income and output in terms of gross national product (GNP)<sup>15</sup> or growth per capita income.<sup>16</sup> Sen regards as narrow-minded the identification of development with the growth of GNP or rise in personal incomes, industrialisation, technological advancement or social modernisation.<sup>17</sup> This view is in harmony with that of Seers, who prefers individual economic development – gauged by reference to the economic indices of poverty, unemployment and inequality – rather than the index of per capita income.<sup>18</sup> Therefore, development is measured in terms of its social impact, that is, the extent to which it is people-oriented or improves the quality of lives of people. It is from such orientation that human development is derived.

Human development is an improvement in the fortunes of men or women to boost their capacity to overcome the inadequacies of their environment. Human development not only concerns meeting the bare, basic or existential exigencies of individuals, as contained in Maslow's hierarchy of needs (food, clothing and shelter). Rather, it is placing humans in a material condition where they could live a life of fulfilment and satisfaction. It is in this context that both Sen and Seers agree that the purpose of human development is to reduce poverty,

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11 D Seers 'The meaning of development' <https://www.ids.ac.uk/files/dmfile/themeaningofdevelopment.pdf> (accessed 10 May 2018).

12 BA Adah & UD Abasilim 'Development and its challenges in Nigeria: A theoretical discourse' (2015) 6 *Mediterranean Journal of Social Sciences* 276.

13 JM Elegido *Jurisprudence* (2000) 70-72.

14 J Soares Jr & RH Quintella 'Development: An analysis of concepts, measurement and indicators' (2008) *Brazilian Administration Review* 104.

15 Iqbal (n 10) 10.

16 SK Kutor 'Development and underdevelopment of the African continent: The blame game and the way forward' (2014) 4 *Research on Humanities and Social Sciences* 15.

17 Sen (n 10) 1.

18 Seers (n 11) 5.

inequality, unemployment and deprivation, and to broaden choice.<sup>19</sup> According to the United Nations Development Programme (UNDP), such an approach focuses on people, their opportunities and choices. The UNDP demonstrates this through its annual Human Development Reports.<sup>20</sup> One of the indices upon which the Human Development Report is based is the Human Development Index, which is a summarised measure of average achievement in key dimensions in human development: a long and healthy life, knowledge, and a decent standard of living.<sup>21</sup> For analytical purposes the Human Development Report classifies countries into four levels of development: very high human development; high human development; medium human development; and low human development. Unfortunately, in the Human Development Index reports from 1990 to 2015 many sub-Saharan African countries have consistently been categorised as low human development countries.<sup>22</sup> Such dismal record persists to date.

The statistics of the UNDP harmonise with the sociological experience of sub-Saharan Africa. The economies of most of the countries in this group are in a very bad shape, poorly managed, and the people live in abject poverty and material deprivation. The continent thirsts for economic development that would financially empower the citizens to take care of their needs with relative ease. Signé states that notwithstanding Africa's robust economic growth from 2000 to 2015, the absolute number of the poor has increased on the continent. According to Signé the World Bank estimates that Africa had at least 50 million more poor people in 2013 compared to 1990.<sup>23</sup> On his part, Heidhues laments that despite the fact that a number of sub-Saharan African countries had relatively favourable development prospects and income levels compared to those in Southeast Asian countries upon attainment of statehood, most Asian states have surpassed African states in terms of development and income levels.<sup>24</sup>

The international community has been concerned about the abject poverty on the continent. Specifically, developed states have

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19 W Nafziger 'From Seers to Sen: The meaning of economic development' 2 <http://www.rrojasdatabank.info/widerconf/Nafziger.pdf> (accessed 8 June 2018).

20 UNDP 'Human Development Reports' <http://hdr.undp.org/en/humandev> (accessed 15 December 2018).

21 UNDP 'HDR' <http://hdr.undp.org/en/content/human-development-index-hdi> (accessed 10 June 2018). In its 1991 report the HDR improved upon these three variables. See UNDP 'HDR 1991' [http://hdr.undp.org/sites/default/files/reports/220/hdr\\_1991\\_en\\_complete\\_nostats.pdf](http://hdr.undp.org/sites/default/files/reports/220/hdr_1991_en_complete_nostats.pdf) (accessed 11 June 2018).

22 UNDP *HDR 2016: Human development for everyone* (2016) 202-205.

23 L Signé 'Why has Africa's fast economic growth left more poor people behind and how do we fix it?' Foresight Africa 2018 Report (Africa Growth Initiative at Brookings) 11 January 2018 Cap 3 44, [https://www.brookings.edu/wp-content/uploads/2018/01/foresight-2018\\_chapter-3\\_web\\_final1.pdf](https://www.brookings.edu/wp-content/uploads/2018/01/foresight-2018_chapter-3_web_final1.pdf) (accessed 13 June 2018).

24 F Heidhues 'Why is development in sub-Saharan Africa so difficult: Challenges and lessons learned' (2009) 3 *Review of Business and Economic Literature* 398.

committed themselves to foreign aid for the benefit of Africa. Foreign aid is a generic name for all types of assistance that a country derives from other countries or multilateral agencies and financial institutions to fill noticeable gaps, especially in production, savings and investments.<sup>25</sup> It may be packaged as grants, loans, foreign direct investment, overseas development assistance, debt forgiveness, joint ventures and technical assistance.<sup>26</sup> Mosley defines aid as money transferred on concessional terms by the governments of rich countries to the governments of poor countries.<sup>27</sup> The necessity for foreign aid is grounded in the incapacity of the recipient state to internally generate the necessary capital to fund critical sectors of its economy. Many developing states find themselves in this situation. Consequently, developed states for decades have been funnelling aid to these developing states. Since the independence of most African states in the 1960s economists and development experts have argued that more aid means more capacity of the government to deliver the goods. Thus, by 2000 (that is, for the previous 40 years) an amount in excess of \$568 billion has been spent by developed states as aid in Africa.<sup>28</sup> In his conviction of the utility of further aid to Africa, former British Prime Minister Tony Blair described the African continent as a 'scar on our consciences',<sup>29</sup> and at the World Economic Forum in Davos in January 2005 he called for 'a big, big push forward' in Africa to end poverty, financed by an increase in foreign aid.<sup>30</sup> Ultimately, in July 2005 the G-8 agreed to double foreign aid to Africa, from \$25 billion to \$50 billion annually.<sup>31</sup>

Moreover, in 2000 the UNGA declared the Millennium Development Goals (MDGs), which set some goals including the goal to halve poverty by 2015.<sup>32</sup> At the expiration of the period over 150 world leaders under the auspices of the UNGA adopted another set of goals named the Sustainable Development Goals (SDGs),<sup>33</sup> which set

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25 JS Omotola & H Saliub 'Foreign aid, debt relief and Africa's development: Problems and prospects' (2009) 16 *South African Journal of International Affairs* 88.

26 As above.

27 M Ali & A Zeb 'Foreign aid: Origin, evolution and its effectiveness in poverty alleviation' (2016) 11 *The Dialogue* 108.

28 W Easterly 'Can foreign aid save Africa?' December 2005 3, <https://www.csbsju.edu/Documents/Clemens%20Lecture/Clemens2005.pdf> (accessed 14 March 2019).

29 'Blair promises to stand by Africa' *BBC News* London 2 October 2001, <http://news.bbc.co.uk/2/hi/africa/1575428.stm> (accessed 9 November 2018).

30 As above.

31 As above.

32 UN 'United Nations Millennium Declaration (55/2)' <http://www.un.org/millennium/declaration/ares552e.htm> (accessed 15 June 2018).

33 Adopted on 25 September 2015 at the United Nations Sustainable Development Summit; see UNDP 'World leaders adopt Sustainable Goals' 25 September 2015, <http://www.undp.org/content/undp/en/home/presscenter/pressreleases/2015/09/24/undp-welcomes-adoption-of-sustainable-development-goals-by-world-leaders.html> (accessed 12 July 2018).

some goals connected with goals in the MDGs to be delivered at the latest by 2030.<sup>34</sup>

Global efforts have been somewhat replicated at the continental level. The Heads of State and Government of the African Union (AU) in 2001 adopted and in 2002 ratified the development model known as the New Partnership for Africa's Development (NEPAD). NEPAD is the pan-African strategic framework for the socio-economic development of the continent. Its principal objectives include eradicating poverty; placing African countries (both individually and collectively) on a path of sustainable growth and development; halting the marginalisation of Africa in the globalisation process; accelerating the empowerment of women; and fully integrating Africa into the global economy.<sup>35</sup>

What all these efforts demonstrate is that humans are the centre piece of development and a state can be said to be genuinely developed only when its citizens, or at least most of them, have been raised above poverty. However, much poverty remains in Africa, a circumstance that has prompted concerted efforts by the international community to increase financial aid to the continent. Against this background, the article proceeds to the next section to examine the right to development.

### 3 Right to development

The entry into legal discourse of the right to development is attributed to Senegalese jurist Kéba M'baye who, while presenting a paper at the International Institute of Human Rights in Strasbourg in 1972, initiated the idea of such a right.<sup>36</sup> Although such initiation could best be described in the language of Hume as dressing an 'ought' proposition in the garment of an 'is' proposition,<sup>37</sup> M'baye's academic declaration was seminal as it raised the tempo of the debate on the suitability of the right. Ultimately, nine years later the Organisation of African Unity (now the AU) legally recognised the right to development through the African Charter in 1981,<sup>38</sup> and five years later the UNGA adopted the RTD Declaration.<sup>39</sup> It is worth

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34 UN Sustainable Development Goals <https://www.un.org/sustainabledevelopment/sustainable-development-goals/> (accessed 15 June 2018).

35 See African Union 'New Partnership for Africa's Development (NEPAD)' <https://au.int/en/organs/nepad> (accessed 27 December 2018).

36 I Bunn 'The right to development: Implications for international economic law' (2000) 15 *American University International Law Review* 1433. See, however, OC Okafor 'A regional perspective: Article 22 of the African Charter on Human and Peoples' Rights' in UN Human Rights (ed) *Realising the right to development: Essays in commemoration of 25 years of the United Nations Declaration on the Right to Development* (2013) 374.

37 B Bix *Jurisprudence: Theory and context* (2004) 56.

38 African Charter (n 3).

39 See UNGA Resolution (n 5).

noting that whereas the African Charter is an international instrument legally binding on African states, the RTD Declaration, as the name implies, is a global declaration short of firm legal obligation. Nevertheless, the Declaration was a significant demonstration of the UNGA's high regard for the right to development.

At the UN, the RTD Declaration was sponsored by developing states and supported by Eastern Europe which used their numerical strength to vote, by a recorded vote of 146 in favour, one against (United States) and eight abstentions (Denmark, Finland, the Federal Republic of Germany, Iceland, Israel, Japan, Sweden and the United Kingdom).<sup>40</sup> Beyond the reference to M'baye in connection with the recognition of the right to development, Iqbal traces the roots of the right to development from the decolonisation era of the 1960s through the UNGA Declaration and Programme of Action on the Establishment of the New International Economic Order (NIEO) 1974<sup>41</sup> to the adoption of the Charter of Economic Rights and Duties of States 1974.<sup>42</sup> As Marks puts it:<sup>43</sup>

It emerged from the legitimate preoccupation of newly independent countries with problems of development and the dominance of east-west issues on the agenda of the Commission on Human Rights, marginalizing the concerns of the political South, except for racial discrimination, apartheid, and foreign occupation, which did receive special consideration.

The preambular provisions of the RTD Declaration largely attest to this history. These provisions proceed from the platform of recognising development 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. Thereafter, the provisions make specific reference to the Universal Declaration of Human Rights (Universal Declaration); the International Covenant on Economic, Social and Cultural Rights (ICESCR); and the International Covenant on Civil and Political Rights (ICCPR), instruments concerning the right of peoples to self-determination, state obligations towards the observance of human rights and the NIEO.

While article 1 of the RTD Declaration declares the right to development to be an inalienable human right implying individual participation in the developmental process and the full realisation of the right of peoples to self-determination, article 2 emphasises the

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40 S Marks & R Malhotra 'The future of the right to development' 3, <https://cdn1.sph.harvard.edu/wp-content/uploads/sites/134/2017/07/Marks-Malhotra-The-Future-of-the-Right-to-Development-2017.pdf> (accessed 20 November 2018).

41 GA Res 3201 (S-VI), UN GAOR 6th Special Sess, Agenda Item 6 2229th Plen Mtg 1, UN Doc A/RES/1302 (S-VI) (1974).

42 GA Res 3281 (XXIX) (12 December 1974). See Iqbal (n 10) 4-5.

43 S Marks 'The human right to development: Between rhetoric and reality' (2004) 17 *Harvard Human Rights Journal* 141.

human person as the central subject of development and the active participant in and beneficiary of the right. In the family of human rights, there are several generations of rights including first generation rights,<sup>44</sup> second generation rights,<sup>45</sup> third generation rights and the rest.<sup>46</sup> The right to development belongs to the third generation rights, which are solidarity, peoples', group or societal rights, including the rights to self-determination, the environment, humanitarian assistance, peace, communication, and common heritage.<sup>47</sup>

### 3.1 Right to development advocacy

Perhaps because of the history behind its coming into being, the right to development has generated much controversy that has pitted proponents against opponents along the north-south divide. Developing states and scholars sympathetic to the cause see the right to development as the mother of all rights. According to Bedjaoui the right to development is a core right from which all other rights derive,<sup>48</sup> and flows from and has the same nature as the right to self-determination.<sup>49</sup> Also, ICESCR obligates states to cooperate for the development of all countries.<sup>50</sup> Moreover, and quite empirically, an overwhelming number of states support the right to development.<sup>51</sup> In article 22 the African Charter obligates state parties to protect the right to development. Notably, Africa is the only continent that has transformed the right to development from moral rhetoric to legal obligation. According to Okafor '[t]he existence of article 22 of the African Charter is proof positive that this right transcends the realm of soft international human rights law'.<sup>52</sup> The legal obligation the article imposes on African states has generated rich and robust jurisprudence on the right to development. As at December 2018 the African Commission has handled seven complaints on the right to development.<sup>53</sup> In the process of doing so, the Commission has expounded and ruled on the legitimacy or propriety of claims and

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44 ICCPR 1966.

45 ICESCR 1966 (n 2).

46 Such as the rights of women and children and animal rights; see A Oyeboode *International law and politics: An African perspective* (2003) 197-200.

47 Marks (n 43) 138; AV Cornescu 'The generations of human's rights' 5-6, [https://www.law.muni.cz/sborniky/dny\\_prava\\_2009/files/prispevky/tvorba\\_prava/Cornescu\\_Adrian\\_Vasile.pdf](https://www.law.muni.cz/sborniky/dny_prava_2009/files/prispevky/tvorba_prava/Cornescu_Adrian_Vasile.pdf) (accessed 7 October 2018).

48 Bunn (n 36) 1435.

49 B Ibhawoh 'The right to development: The politics and polemics of powers and resistance' (2011) 33 *Human Rights Quarterly* 91.

50 See eg art 1(2) ICESCR.

51 Marks & Malhotra (n 40).

52 Okafor (n 36) 374; see also K Arts & A Tamo 'The right to development in international law: New momentum thirty years down the line?' (2016) 63 *Netherlands International Law Review* 226.

53 *Centre for Minority Rights Development & Others v Kenya* (2009) AHRLR 75 (ACHPR 2009); *Sudan Human Rights Organisation & Another v Sudan* (2009) AHRLR 153 (ACHPR 2009); *Socio-Economic Rights and Accountability Project v Nigeria* (2008)

counter-claims on the right to development. For example, in the *Endorois* case<sup>54</sup> the African Commission held 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.<sup>55</sup>

The African Commission has also had occasion to make important pronouncements on the article in other cases, including the case of *Democratic Republic of Congo v Burundi, Rwanda and Uganda*.<sup>56</sup>

### 3.2 Hostility towards the right to development

However, antagonists (comprising most developed states and intellectuals from these states) harbour a deep-rooted aversion to the concept of the right to development. Ibhawoh succinctly captures such perspectives as follows:<sup>57</sup>

In the discussions leading up to the adoption of the DRD, the debate focused mainly on whether the right to development is merely a moral and hortatory claim, or a legal or quasi-legal claim. Questions were raised about the foundational basis of the right, its legitimacy, justiciability, and coherence. The United States, joined by several other Western countries, objected to several perceived defects of the notion of a right to development relating to its failure to give due attention to economic liberties and entrepreneurship, its relation to questionable economic and social rights, and its conceptual confusion and conflicts of jurisdiction with trade and other international issues.

Thus, the principal ground upon which such antagonism towards the right to development is based is its legal imprecision or uncertainty. Bunn enumerates the particulars of such uncertainty to include the ambiguity of the right, the vagueness of the identity of the rights holders and duty bearers, the uncertainty over the nature of individual or collective responsibility, and the non-justiciability or non-enforcement of the right.<sup>58</sup> In this part I discuss these objections

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AHRLR 108 (ACHPR 2008); *Bakweri Land Claims Committee v Cameroon* (2004) AHRLR 43 (ACHPR 2004); *Democratic Republic of Congo v Burundi, Rwanda and Uganda* (2004) AHRLR 19 (ACHPR 2004); *Association pour la Sauvegarde de la Paix au Burundi v Kenya, Rwanda, Tanzania, Uganda, Zaire and Zambia* (2003) AHRLR 111 (ACHPR 2003); *Peter Odiwuor Ngoge & 3 Others v The Republic of Kenya* Communication 524/15. See African Commission 'Decisions on Communications' <http://www.achpr.org/communications/decisions/?a=878> (accessed 12 June 2019).

54 *Centre for Minority Rights Development & Others v Kenya* (2009) AHRLR 75 (ACHPR 2009) (*Endorois* case).

55 *Endorois* case (n 54) para 277.

56 (2004) AHRLR 19 (ACHPR 2004).

57 Ibhawoh (n 49) 87.

58 Bunn (n 36) 1435; M Miyawa 'The international dimension of the right to development: Where is the gapping crack of accountability for non-state actors' (2016) 3 *The Transnational Human Rights Review* 41.

except for that on non-justiciability, which is reserved for discussion in part 4.

As far as the ambiguity of the right is concerned, Vandenberghe explains that the right to development has been controversial among states and scholars due to its lack of conceptual clarity. He further claims that the enduring failure of states to agree on a common conceptual framework to develop the right to development has greatly affected the normative validity of the right.<sup>59</sup> Similarly, Cathy criticises the various formulations of the rights of people (including the right to development) to pursue their economic development as a virtually obsessive repetition of the right of economic self-determination.<sup>60</sup> He further states that the claim that states make to a right to economic self-determination primarily serves as an ideological representation, reducing basic concepts to pure ideology. He concludes that such reduction is an indication of a crisis in legal theory. In relation to the vagueness of the right holders and duty bearers, Ghai castigates the right to development for a lack of clarity on the identity of those who are to enjoy the benefit and those to suffer the duty associated with the right.<sup>61</sup> As articulated by Iqbal:<sup>62</sup>

The language of the Declaration is vague, imprecise and unclear in some respects. First, it is not clear whether the individual is the subject or the beneficiary of the RTD ... 'The individual as a subject' and as a 'beneficiary' creates sufficient jurisprudential confusion and vagueness.

### 3.3 Critique of the right to development

Vagueness indeed is evident in some of the provisions of the RTD Declaration. Article 2(3) provides for the right and duty of states to formulate appropriate national development policies that aim at the constant improvement of the well-being of the entire population and of all individuals. This provision may be interpreted as a restatement of the obligation of the territorial state to formulate such policies for the well-being of its citizens or persons living within its territory. However, the reference to 'entire population and of all individuals' is ambiguous. The phrase could be interpreted as the citizens or persons within the state's territory or as persons living anywhere in the world. Based on the principle of territoriality<sup>63</sup> and the need for certainty, the former is preferable to the latter.

59 A Vandenberghe 'The right to development in international human rights law: A call for its dissolution' (2013) 31 *Netherlands Quarterly of Human Rights* 188.

60 A Cathy 'From the right to economic self-determination to the right to development: A crisis in legal theory' (1984) 3 *Third World Legal Studies* 73.

61 Bunn (n 36) 1435; Miyawa (n 58) 41 notes that Ghai has toned down in view of subsequent development.

62 Iqbal (n 10) 12-14.

63 A Aust *Handbook of international law* (2010) 43.

Article 3(1) provides that states have the primary responsibility for the creation of national and international conditions favourable to the realisation of the right to development.<sup>64</sup> Here it is supposed that each state, based on its own peculiar economic model or ideology, will create such conditions favourable to the economic fortunes of its citizens. Could it also mean that each state is duty bound to do so in order to enhance the development of persons outside its jurisdictional radar? More specifically, is the developed state required to develop the developing state? Salomon appears to answer this in the affirmative.<sup>65</sup> Nevertheless, such requirement imposed on a developed state to project its developmental tentacles beyond its borders is too general and reinforces the vagueness of the right to development.

Furthermore, article 3(3) of the RTD Declaration obligates states to co-operate with each other in ensuring development and eliminating obstacles to development.<sup>66</sup> This article complements article 3(1). Although the duty to cooperate for international development is a long-standing element of international law,<sup>67</sup> Salomon notes that 'these external obligations challenge the classical assumption of international human rights law which is rooted in the protection of individuals against abuse by their own state'.<sup>68</sup> Moreover, the obligation implied in inter-state cooperation is not clear. For example, what conduct may qualify as enhancing development or eliminating obstacles? In view of the primary duty of the state to promote its interests even in inter-state intercourse, how does one state shoulder the task of developing persons or entities abroad where doing so conflicts with its national interests?<sup>69</sup> It is highly doubtful that the state has the legal responsibility to promote the right to development of the citizens of foreign countries. All these buttress the ambivalence of the right. Similarly, article 3(3) further enjoins states to fulfil their

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64 See Miyawa (n 58) 52 (criticising the neglect of the non-state actor in the scheme of allocating responsibilities).

65 ME Salomon 'Legal cosmopolitanism and the normative contribution of the right to development' (2008) 5, <http://www.lse.ac.uk/law/working-paper-series/2007-08/WPS2008-16-Salomon.pdf> (accessed 15 March 2019) (attributing such perspective to (a) the impact on human rights of powerful actors external to the developing state advancing rules governing world markets that are widely criticised for being inequitable; (b) the pervasive influence of international economic organisations that continue to espouse neoliberalism (or its more recent variant); and (c) the corresponding reduction in domestic autonomy that limits the ability of states – particularly poor and less influential states – to decide independently their own economic and social policies).

66 O Olusegun & O Ajjigboye 'Realising the right to development in Nigeria: An examination of legal barriers and challenges' (2015) 6 *Afe Babalola University Journal of Sustainable Development and Policy* 152.

67 Arts & Tamo (n 52) 239-242; see also Salomon (n 65) 4-5.

68 See Salomon (n 65) 6.

69 It is trite that every sovereign state has the duty to promote or protect its national interest even when it conflicts with that of another state. It is only when the advancement of such interest is contrary to its international obligation that the state is expected to abandon such interest.

duties in such a manner as to promote a new international economic order (NIEO). Significantly, developed states have ceaselessly voiced their opposition to the NIEO and its being smuggled through the back door into the RTD Declaration further revives or strengthens the hostility of the developed states towards the right to development.<sup>70</sup>

Building on article 4(1), which commits states to the formulation of international development policies for facilitating the full realisation of the right, article 4(2) makes provision for sustained action to promote the more rapid development of developing countries. Article 4(2) undoubtedly makes it clear that the duty bearers are the developed states while the rights holders are the developing states. However, because responsibility is basically territorial, developed states have never missed an opportunity to reject the possibility, however remote, of making them responsible for the development of other sovereign states or persons who live therein.<sup>71</sup>

Obviously, the discordant tunes from both sides of the divide on this matter testify to the ambiguity of the right to development. However, the argument of Salomon is interesting as it strikes at the root of the opposition of developed states to the assumption or imposition of such responsibility. According to Salomon, in contrast to the position of developed states, the right to development is concerned with a structural disadvantage that engenders the poverty afflicting half the global population and that, therefore, it is not preoccupied with the state's duties to its nationals, but with its duties to people in far off places or foreign jurisdictions.<sup>72</sup> Nevertheless, it remains to be seen how this perspective can be translated into the state practice of developed states. In reflection of the uncertainty surrounding the right to development, Cathy describes the right as corresponding more to the affirmation of a principle than to the recognition of a 'true subjective' right,<sup>73</sup> a perspective equally echoed

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70 See Marks (n 43) 143 (stating that the United States government, under the Reagan administration, had clarified that the RTD Declaration should not be used as a means of resuscitating the NIEO in as much as it vowed that the United States would not allow the Declaration to create any entitlement to a transfer of resources or permit aid, being a matter of sovereign decision of donor countries, to be subject to binding rules under the guise of advancing every human being's right to development).

71 See F Kirchmeier 'The right to development: Where do we stand?' (2006) Friedrich Ebert Stiftung Occasional Paper 23 12 (stating that the biggest fear of developed countries is that the right to development could be seen as a 'right to everything' and therefore allow states or individuals from any state to sue rich nations for the fulfilment of what is perceived to be necessary for their enjoyment of the right to development).

72 Salomon (n 65) 11 12.

73 Cathy (n 60) 75; see also S Jha 'A critique of right to development' (2012) 1 *Journal of Politics and Governance* 21 (noting that one of the major criticisms of the RTD Declaration is the imperfect nature of obligations and the articles of the Declaration being at best a few policy commitments and not justifiable entitlements of the peoples of the world).

in Brownlie's view that 'the right constitutes a general affirmation of a need for a programme of international economic justice'.<sup>74</sup>

It is in view of the uncertainty that has dogged the right to development that the UN has been making frantic efforts to develop modalities thereof.<sup>75</sup> Instructively, the right to development for the past 33 years has remained at the realm of rhetoric,<sup>76</sup> a development that has prompted Vandenbogaerde to call for its dissolution.<sup>77</sup> Arguing along this line, this article advocates the deconstruction of the edifice of the right to development as presently constituted but for reasons different from those presented by Vandenbogaerde. While Vandenbogaerde argues that the current human rights mechanisms already cater for the right to development, the article anchors its advocacy on factors indigenous to developing states, an aspect to which the discussion now turns.

## 4 Deconstructing the right to development

Against the background of the many loose ends of the right to development, this part advocates the deconstruction of the right with the aim of weeding off some parts of the whole of the right. Specifically, the part does this by reconsidering the legality or legitimacy of the right, the abuses associated with the foreign aid regime, and the negative impact of the supposed entitlement to development funded by developed states on Africans' belief or confidence in their capacity to self-develop without necessarily looking beyond their territorial borders for economic salvation.

### 4.1 Legal status of the right to development

There are rights and there are rights. The history of the oppression of humanity and state repression of dissenting voices across ages probably justifies the increasing enlargement of the family or generation of human rights.<sup>78</sup> The distinction between *lex lata* (the law as it is) and *lex feranda* (the law as it ought to be) specifically speaks to the enforceability of rights. The legal indeterminacy or uncertainty of the right to development makes its unenforceability obvious. In their desire to ward off a violation of or interference with our interests, legal analysts usually invoke the language of rights without necessarily caring about their enforceability. However, enforcement matters especially where the violator or trespasser is unwilling to make amends as and when due. In a bid to confine a right to the realm of enforceability, Hohfeld proposes a thesis to the

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74 Quoted in Salomon (n 65) 4.

75 Vandenbogaerde (n 59) 190-192.

76 See Marks (n 43) 137.

77 Vandenbogaerde (n 59) 187.

78 See Oyeboode (n 46) 197-200.

effect that to every right there is a correlative duty.<sup>79</sup> In other words, where the right holder claims a right, there must be a duty bearer against whom such right is claimed. The utility of this assertion is that the victim of the right violation should be able to claim compensation against a specific, identifiable person, entity or institution. Otherwise the victim's remedy will be in abeyance and such outcome may bring the legal rule authorising such remedy into disrepute.<sup>80</sup> Such detachment of legally enforceable duty from right weakens the force of international law and regrettably validates the Austinian view on international law as international positive morality.

The RTD Declaration unambiguously identifies developing states as rights holders. Conversely, it imposes the correlative duty of realising the right on developing states and their citizens, and on developed states. Although matters have arisen as to the nature of the obligation so imposed on the trinity, the focus of our analysis – which is the duty imposed on developed states – raises many issues, including the scope of such obligation and the propriety of imposing an obligation on a sovereign state for the benefit of another sovereign state.

The imposition of a right to development-related obligation on one sovereign state for the sake of another sovereign state is problematic. This is particularly so where developed states have used the opportunity provided by every forum to reject such obligation purportedly owed to developing states.<sup>81</sup> Of course, there are several moral bases upon which such obligation could be justified, including the responsibility of developed states for colonising developing states and the inequity in the international economic order that has simultaneously made developing states poor and developed states rich.<sup>82</sup> Nevertheless, the legitimacy of contemporary international law rests principally on the consent or consensus of its subjects.<sup>83</sup> Therefore, a right claimed by developing states but which the mainstream developed states have perpetually or persistently objected to would be difficult to enforce.<sup>84</sup>

The obligation under the right to development undoubtedly may manifest in a developed state granting financial aid to a developing state. However, such obligation is rather ambiguous. For example, in what quantity or quality will such aid appear in order to satisfy the intentment of the right to development? Is it sufficient for a developed state to provide financial assistance to a developing state even when such grant is actuated less by the genuine need of the recipient state but more by the donor's interests, for instance, that of using the aid as bait to recruit the recipient state as a partner-in-

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79 See Bix (n 37) 128.

80 See H Kelsen *General theory of law and state* (2006) 118-9.

81 See Kirchmeier (n 71).

82 Salomon (n 65) 5; W Rodney *How Europe underdeveloped Africa* (1986).

83 M Shaw *International law* (2005) 10.

84 A Cassese *International law* (2005) 162-163.

progress in the battle against terrorism?<sup>85</sup> It is worth noting that aid given under this context may not generate growth or support people's welfare. In fact, it may even be a lifeline for an inept, corrupt or repressive government as was the case during the Cold War when donor states and multilateral financial institutions made aid available to many developing states (ruled by dictators) even when they knew that the resources were finding their way to the private Swiss bank accounts of ruling families and their accomplices.<sup>86</sup>

Obviously, from the analysis above the right cannot be justiciable or enforceable because there is no foundation therefor. In a situation where there is such ideological disagreement on the status of the right to development, it is not surprising that the right remains in limbo notwithstanding the fact that it is gradually ageing.

#### 4.2 Abuses of foreign aid

Aid is an alternative source of funding for possibly alleviating the economic misery of recipient states that are in dire need of the capital to finance developmental projects and welfare programmes. African countries have received more than \$568 billion in foreign aid.<sup>87</sup> Unfortunately, the output has failed to reflect the input as an overwhelming number of scholars have demonstrated that aid hurts more than it helps.<sup>88</sup> For example, Akonor argues that foreign aid has failed to lift Africa out of its economic mess despite the continent's receipt of approximately \$600 billion since the 1960s.<sup>89</sup> This is buttressed by the fact that at the time the amount of aid rose, Africa's growth rate concurrently fell.<sup>90</sup> On his part Deaton emphasises the negative impact of aid on development even in places beyond Africa. According to Deaton:<sup>91</sup>

85 See eg T Cassidy 'How foreign aid affects terrorism: Studying the channel of social spending' (2010) 19 *Issues in Political Economy* 69 (quoting the US Office of Management and Budget's 2004 overview of international assistance programmes, to the effect that the US will provide extensive assistance to states on the front lines of the anti-terror struggle, both in terms of financial assistance and training and support for allied governments, including Afghanistan, Colombia, Jordan, Pakistan and Turkey).

86 P Glynn et al 'The globalisation of corruption' in KA Elliot (ed) *Corruption and the global economy* (1997)10-11.

87 Easterly (n 28) 3.

88 See eg G Mhaka 'Foreign aid hinders development in Africa' 23 October 2013, <http://www.chronicle.co.zw/foreign-aid-hinders-development-in-africa/> (accessed 20 July 2018).

89 K Akonor 'Foreign aid to Africa: A hollow hope?' (2008) 40 *International Law and Politics* 1074; T Ayodele et al 'Perspectives on aid: Foreign assistance will not pull Africa out of poverty' (2005) *African Cato Institute Economic Development Bulletin* 1, <https://object.cato.org/pubs/edb/edb2.pdf> (accessed 16 August 2018).

90 A Swanson 'Why trying to help poor countries might actually hurt them' 13 October 2015, [https://www.washingtonpost.com/news/wonk/wp/2015/10/13/why-trying-to-help-poor-countries-might-actually-hurt-them/?noredirect=on&utm\\_term=.622109549005](https://www.washingtonpost.com/news/wonk/wp/2015/10/13/why-trying-to-help-poor-countries-might-actually-hurt-them/?noredirect=on&utm_term=.622109549005) (accessed 13 October 2018).

91 As above.

[M]any economists were noticing that an influx of foreign aid did not seem to produce economic growth in countries around the world. Rather, lots of foreign aid flowing into a country tended to be correlated with lower economic growth.

Yet, in the midst of all these controversies many African states appear to be precariously dependent on foreign aid.<sup>92</sup>

Similarly, aid fosters corruption in Africa. Corruption, which is the abuse of public power for private ends,<sup>93</sup> arguably is the most intractable problem on the continent. The conduct is notorious for having undermined the development potential of Africa by serving as a vessel for secreting the resources of the continent into the estates and bank accounts of private persons located within and outside Africa.<sup>94</sup> It is worth recalling that many African states are endemically corrupt and much of the resources involved are sourced from natural resources such as oil, gas and minerals.<sup>95</sup> Unfortunately, the legal systems of many African states are unable to bring offenders to justice either through effective prosecution or disgorgement or restitution of the ensuing unjust enrichment.<sup>96</sup>

There is a direct or proportionate nexus between aid and corruption: the higher the aid the more the rate of corruption.<sup>97</sup> Where aid is offered by one government to another, sovereignty is implicated. Although donors usually couple their grants with some form of conditionality, a level of discretion is given to the recipient government, in its sovereign capacity, to execute the projects to

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92 Brautigam & Knack define aid dependency as 'a situation in which the government is unable to perform many of the core functions of governments, such as the maintenance of existing infrastructures or the delivery of basic public services, without foreign aid funding and expertise'; see Omotola & Saliub (n 25) 90.

93 PJ Henning 'Public corruption: A comparative analysis of international corruption conventions and United States law' (2001) 18 *Arizona Journal of International and Comparative Law* 802-803.

94 N Kofele-Kale *International law of responsibility for economic crimes: Holding heads of state and other high-ranking state officials individually liable for acts of fraudulent enrichment* (1995) 171.

95 Studies have shown that the more naturally endowed a country is, the higher the extent of corruption therein. See eg J V Zhan 'Natural resources and corruption: Empirical evidence from China' <http://unpan1.un.org/intradoc/groups/public/documents/apcity/unpan047842.pdf> (accessed 10 October 2018).

96 SA Igbinedion 'A critical appraisal of the mechanism for prosecuting grand corruption offenders under the United Nations Convention against Corruption of 2003' (2009) 6 *Manchester Journal of International Economic Law* 56.

97 See eg M Sundsten 'Foreign aid and corruption: Ethical aspects of foreign aid' (2016) 18-19, cap III, <https://www.diva-portal.org/smash/get/diva2:937768/FULLTEXT01.pdf> (accessed 12 June 2019). See also U Efobi et al 'Foreign aid and corruption: Clarifying murky empirical conclusions' 2014, Working Paper, <http://hdl.handle.net/10419/123633> (accessed 12 June 2019) (arguing that aid aimed at social infrastructure and debt relief fuels corruption whereas aid targeted at the development of economic infrastructure, multi-sector and programme assistance reduces it).

which the grant relates.<sup>98</sup> From the profile of Africa as an intractably corrupt continent, the funds in the hands of the recipient state or government would be susceptible to manipulation, wasteful expenditure and outright corruption. Such money suffers the same fate as revenue internally generated from natural resources. Aid money is seen as a windfall or manna sent from heaven because it is appropriated and spent with little or no accountability and can even be misappropriated by the corrupt elites in government.<sup>99</sup> For example, of the \$22 million that the International Monetary Fund (IMF) loaned to Haiti, Jean-Claude Duvalier privatised or pocketed \$20 million.<sup>100</sup> Consequently, aid encourages unproductive and wasteful expenditure, and strengthens the government and not the institutions of the state. Therefore, aid has come to be understood as a source of corruption in Africa and, therefore, compounds the already serious problem of transparency and accountability on the continent.<sup>101</sup>

Moreover, although the genuine intention and the humaneness of those who advocate more aid for Africa may be undoubted, the intention or motives of state donors are questionable. Research indicates that aid grant is actuated not necessarily by the need or the economic exigency of the beneficiary but by the political or economic preference, inclination or expediency of the donor.<sup>102</sup> Citing other researchers, Tavares notes that aid is uncorrelated with the recipient country's growth, poverty incidence or development drive. For example, Deaton notes that the United States gives aid "for "us", not for "them" – to support our strategic allies, our commercial interests

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98 Within the context of repatriating plundered assets to original state owners, this much was emphasised in the tripartite Memorandum of Understanding between Nigeria, Switzerland and the World Bank regarding the repatriation of \$322,5 million recovered Abacha loot to Nigeria: Global Forum on Asset Recovery 'Summary of discussions' (2017) 3, [https://star.worldbank.org/sites/star/files/final\\_gfar\\_post\\_session\\_report\\_for\\_posting.pdf](https://star.worldbank.org/sites/star/files/final_gfar_post_session_report_for_posting.pdf) (accessed 29 November 2018).

99 *The Encyclopaedia of World Problems and Human Potential* 'Corruption and mismanagement of foreign aid' (2018) <http://encyclopedia.uia.org/en/problem/137140> (accessed 12 June 2019) (observing that much of the aid to Romania in the early 1990s, intended for orphans and institutionalised inmates of psychiatric homes, allegedly was diverted into the hands of corrupt officials and intermediaries who sold it at a profit on the black market, notably in neighbouring countries). See also A Grech 'The role of aid theft in Africa: A development question' 15 April 2017, <http://www.developmentinaction.org/the-role-of-aid-theft-in-africa-a-development-question/> (accessed 12 June 2019) (referring to the October 1998 edition of Financial as asserting that 'half the \$500 million which the World Bank gave the country *Russia* to restructure its coal industry has gone missing – even as coal miners sat outside the main government offices in protest against months without wages'.

100 K Hinterseer *The political economy of money laundering in a comparative legal context* (2002) 63-64.

101 See eg Sundsten (n 97); MV Ndinda 'Governance and foreign assistance in Africa: A case study of Kenya' October 2016, [http://erepository.uonbi.ac.ke/bitstream/handle/11295/99849/Muli\\_Governance%20and%20foreign%20assistance%20in%20Africa.pdf?sequence=1&isAllowed=y](http://erepository.uonbi.ac.ke/bitstream/handle/11295/99849/Muli_Governance%20and%20foreign%20assistance%20in%20Africa.pdf?sequence=1&isAllowed=y) (accessed 9 December 2018).

102 J Tavares 'Does foreign aid corrupt?' (2003) 79 *Economics Letters* 100.

or our moral or political beliefs, rather than the interests of the local people'.<sup>103</sup> Similarly, Akonor observes that the primary true objective cited for African aid is to reduce poverty in order to provide a bulwark against terrorism.<sup>104</sup> It is also in this context that the attempt by the West to influence African culture, and perhaps to advance minority rights, with aid can be understood. For instance, at a time when Nigeria was on the verge of enacting legislation prohibiting same-sex marriage or union,<sup>105</sup> the United States, the United Kingdom and some international agencies issued a veiled threat to withhold aid from countries that were prohibiting this act.<sup>106</sup>

Therefore, the recipient is used as an instrument, or a means to the end of satisfying the whim of the donor. From the perspective of justice this outcome can be problematic. Although aid is ordinarily a benefit, penological theories may be invoked to explain the burden in using aid as an instrument. In the theories, the purposes of punishment include retribution and deterrence.<sup>107</sup> While retribution is deontological, that is, as an end in itself (focusing on the turpitude of the offender's conduct), deterrence is consequentialist, that is, looking at the consequences the punishment of one will have on another.<sup>108</sup> Penalisation based on deterring others triggers opposition. This is because the penalty is imposed on the offender for the sake of deterring a prospective offender from acting similarly. Foreign aid becomes a burden to the beneficiary where the donor offers it not as an end in itself or to genuinely meet the developmental challenges of the beneficiary but for the donor's end of protecting its peculiar interest or carving a sphere of influence for itself. We can legitimately use this penological argument as a weapon against foreign aid. In granting aid to recipients, many of the donors package the aid under the impression that it is meant to alleviate the poverty or parlous condition of the recipient state whereas ultimately they are satisfying their whim and caprice. Giving aid to Africa is not an end in itself – an end to African growth – but a means to the end of fulfilling the narrow interests of aid donors. In other words, aid has become a channel through which donors put up the facade of altruistically or

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103 Swanson (n 90).

104 Akonor (n 89) 1073.

105 Nonetheless, Nigeria enacted the Same-Sex Marriage (Prohibition) Act 2014. Although this article does not address the controversial subject of homosexuality, the Nigerian rejection of same-sex marriage – which is rooted in its African cultural understanding of marriage being between a man and a woman – remains the dominant position in most African countries with the exception of a few countries.

106 See eg 'Obama fights Nigerian anti-gay Bill, threatens to cut off aid' 9 December 2011, <https://www.forbes.com/sites/mfonobongnsehe/2011/12/09/obama-fights-nigerian-anti-gay-bill-threatens-to-cut-off-aid/#235c1e6f4f7b> (accessed 12 September 2018); 'Countries that ban homosexuality risk losing aid, warns David Cameron' 30 October 2011 <https://www.theguardian.com/politics/2011/oct/30/ban-homosexuality-lose-aid-cameron> (accessed 12 September 2018).

107 JB Mitchell 'Crimes of misery and theories of punishment' (2012) 15:4 *New Criminal Law Review* 474.

108 Bix (n 37) 119.

humanitarianly helping Africa out of their economic woods, while their real or substantive aim is to promote their national or strategic interests. Africa is being used as a tool to achieve a desired end. It is high time the practice was halted of enabling donors to make vast amounts of capital out of the misfortunes of Africa with an aid regime that does not necessarily address the peculiar needs of the recipients.

### 4.3 Lethargy

The result of the influx of foreign aid is that Africa tends to overly depend on it. Aid has been used to spoon-feed African states to such an extent that it has taught the continent nothing but the shape of the spoon. Aid dependency has lulled the continent into the lethargy of believing that there can be no life outside of aid even when it is common knowledge that the aid regime is merely palliative and not programmed to bring lasting economic freedom.<sup>109</sup> Consequently, to paraphrase Tony Blair, African aid dependency has indeed made the continent the scar on the consciences of the world<sup>110</sup> and a laughing stock in the comity of nations.

Because aid is sourced externally, it is perceived as 'free' money which is not as amenable to accountability and prudent spending as funds generated locally. In the absence of such incentive to account or spend wisely, aid (as well as domestically-generated national patrimony) becomes vulnerable to massive looting. Indeed, many African rulers are notorious for having embarked on the complacent plunder of such resources<sup>111</sup> for personal and familial benefits. Consequently, governments become somewhat disconnected or distanced from the people. In other words, reliance on aid has rendered governments less accountable and prone to indulging in wasteful expenditure, leading to a weakened relationship between the government and the people.<sup>112</sup>

It should be noted that all these traces of bad governance occur simultaneously with the failure of the government to provide the basic infrastructure needed to meet the existential exigencies of the citizens and the nation. The availability of foreign aid has made African rulers lazy in responding to the critical needs of citizens. For instance, when natural or human-induced disaster strikes on the continent, against which no contingency has been made,<sup>113</sup> African rulers respond

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109 D Moyo 'Why foreign aid is hurting Africa' *Africa News* 21 March 2009, <https://pols306.files.wordpress.com/2011/08/moyo-on-aid-in-africa-wsj.pdf> (accessed 9 December 2018).

110 *BBC News* (n 29).

111 See G Kreijen *State failure, sovereignty and effectiveness* (2004) 30.

112 See M Murshed & MM Khanaum 'Impact of foreign aid in the economic development of recipient country' (2012/2013) 2 *Journal of the Bangladesh Association of Young Researchers* 36; Swanson (n 88).

113 In the event of any natural disaster, African states' low capacity to respond effectively is glaring, and they make up for this by rapidly requesting external help or support; see eg GFDD 'Report on the status of disaster risk reduction in sub-Saharan Africa' November 2010 v.

feebly and then surrender to the fate of self-pity and console themselves with tales of the evils of slave trade or colonisation perpetrated by the West.<sup>114</sup>

Furthermore, with the free flow of foreign aid, African rulers have become unimaginative about turning their economies around despite all the sound and fury they frequently make about diversifying them in order to overcome the instability from fluctuation in world market prices.<sup>115</sup> They have lost their sense of creativity or initiative to think or work around the economic predicament of their countries. Therefore, foreign aid has engendered or generated in developing states the lethargy that has triggered their lack of confidence in themselves and their belief in their internal capacity to develop without necessarily being aided by developed states.<sup>116</sup>

In many African countries governments usually shy away from introducing tax regimes because tax payers would become more critical of their conduct. However, without foreign aid the government will have no choice but to impose taxes or more taxes to fund development. This will exact a huge price from the government. It cannot fiddle with tax payers' money, at least not for too long as tax payers will be more sensitive to and demand transparency and accountability. Ultimately, this will reduce the complacency of the ruling class and empower the people to not only have a say but also to have a way in the conduct of governance. Put differently, such relationship will generate respect for the rule of law, transparency and accountability. This development will signal the advent of home-grown developmental approaches that can genuinely be implemented with the cooperation of the rulers and the citizens.

The argument of this article is that the right to development is good on paper but poor in practice. It is beautifully packaged to lift the burden of poverty and lack from the shoulders of most, if not all, the peoples of the world. However, such communitarian zeal cannot be transformed into reality because the critical actors (the West and China) have vehemently rejected the burden associated with the right to development. Therefore, the article advocates the deconstruction of the right to development with a view to expunging the uncertain

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114 JA Alemazung 'Post-colonial colonialism: An analysis of international factors and actors marring African socio-economic and political development' (2010) 3 *The Journal of Pan-African Studies* 62. However, the former President of the US, Barack Obama, admonished African leaders against blaming their colonial history for their economic woes: 'Africa should stop blaming history for its economic problems'— is Obama right?' <https://www.theguardian.com/world/2014/jul/30/sp-obama-africa-colonial-excuses-poll> (accessed 30 November 2018).

115 S Hove, 'Why Africa must shift from dependence to diversification, now' 15 December 2017, <http://quantumglobalgroup.com/africa-must-shift-dependence-diversification-now/> (accessed 1 December 2018).

116 FW Immanuel 'Are Western aids to Africa the solution to the embattled continental economy' July 2011, <http://www.culturaldiplomacy.org/academy/content/pdf/participant-papers/africa/Fillemon-Wise-Immanuel-Are-Western-Aids-To-Africa-The-Solution-To-The-Embattled-Continental-Economy.pdf> (accessed 15 September 2018).

element in the right (the legal obligation imposed on unwilling developed states to finance the development of developing states).

In order to support this argument, this part considered the importance of the mutuality of right and duty in legal obligation, the harmful effects of the aid regime (including the lethargy it has generated in the creative spirit of the African) and advocacy for the rejection of foreign aid. The article takes the position that such deconstruction and the attendant elimination of the uncertain legal obligation will clearly and unambiguously establish the territorial state as the power with the legal obligation to create the enabling environment for human and national development. This may erase from the minds of the rulers and the ruled alike that development must be externally imposed rather than being home-grown. It will create an avenue for the ruled to own the development processes of their countries and to demand greater transparency and accountability from their rulers. These steps will make governments realise that they need to pander to the whims and fancies of their people and to eliminate governmental misconduct if they are to survive. However, that this measure frees developed states of any responsibility for developing states does not mean that developed states will no longer participate in inter-state cooperation for development. Rather, it will rest the anxiety of developed states about the right to development and even encourage them to genuinely and freely extend assistance (even much more than they have been doing) to developing states. We would probably then succeed in not making the right to development a sedative or an ideological construct that is high on promise but low on fulfilment.

## 5 Conclusion

This article sought to find value for the right to development because it has been unable to deliver on its promises to the beneficiaries. Notwithstanding the fact that the right was declared over 30 years ago, it still is at its infancy and in search or need of further development amidst underdevelopment challenges in African states. The article considered development from the perspectives of the state and the individual and closely examined the latter. In doing so it singled out human development for discussion since the human being is the nucleus of the discussion on the right to development. The article noted that relevant developmental indices demonstrate that African states are extremely poor in human development. It is in view of this poverty that developed states have sought to intervene through the mechanism of foreign aid.

The right to development is indeterminate or uncertain. Specifically, the right is more apparent than real as it fails to pay due regard to the Hohfeldian scheme of a right being coupled with a correlative duty, as demonstrated by the divergence on the right between developing and developed states. The right to development

was conceived in controversy and brought to life in controversy. But having come this far, it is time to make the right less controversial and to lay to rest all anxieties associated with it. Consequently, the article made a case for the deconstruction of the right to development with the aim of expunging some parts of its whole, including its aspirational or programmatic aspects, the legal obligation placed on developed countries to generally develop, and specifically provide foreign aid and other forms of assistance to developing states. It is in such deconstruction that the real value of the right to development is demonstrable.

In its deconstructed state the right to development is capable of jolting African states from the lethargy or slumber of falsely believing that developed states owe African states the legal duty to develop them and, specifically, that foreign aid is the magic wand to transform their economies. More importantly, the drying up of the well of handouts from the West as a result of the re-branding of the right to development has the potential to galvanise African elites to the realisation that African development must be home-grown and not manufactured in any of the capital cities of the world.

Finally, it is hoped that Africans (including the rulers and the ruled) will see an opportunity for greater African human development in the regime of the refurbished right to development and to take the destiny of the continent in their own hands.