

A regional perspective: article 22 of the African Charter on Human and Peoples' Rights

Obiora Chinedu Okafor*

The issue central to each of these [developing] countries, and dominant in their posture towards the industrialized nations, is development ... It is the most critical of the myriad mix of fibres that form the fabric of international relations. Unless wise policies replace the often short-sighted activities that are now all too often evident in countries both North and South, humankind faces an increasingly bleak future. The preferred policy mix, unquestionably, *must include an element of law*.

Ivan Leigh Head¹

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.

Article 22 of the African Charter of
Human and Peoples' Rights²

I. Introduction

This chapter is framed by three principal objectives. The first is to analyse (from a globally contextu-

tized sociolegal perspective) the normative properties, strengths and weaknesses of article 22 of the African Charter of Human and Peoples' Rights, one of the precious few hard law guarantees of a right to development that currently exist in the realm of international human rights. The second major objective of the chapter is to tease out and articulate what, if anything at all, can be learned from an understanding of this region-specific provision by those who have been tasked with imagining what a possible global treaty on the right to development might look like. Entailed by these first two goals of this chapter is an attempt at the "implementation" of the right to development as it is articulated under article 22; an attempt to develop ways of making the right to development "right", not just by strengthening its capacity to function as a legal norm, but also by enhancing its capacity to contribute to "good" development praxis.

The partial "from-Africa-toward-the-globe" gaze of this analysis is only fitting given the highly significant African roots of the specific version of the idea of the right to development that has become ascendant.³ As is now fairly well known, the con-

* Professor of International Law, Osgoode Hall Law School, York University, Toronto, Canada.

¹ Ivan Head, "The contribution of international law to development", *Canadian Yearbook of International Law*, vol. 25 (1987), p. 30. Emphasis added.

² See also article 19 of the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa, which provides for a right of African women to "sustainable development" (art. 19). In a similar vein, article 20 of the Lomé IV Convention of 1989 does provide for a limited right to development, but that document is not an international human rights treaty. Editor's note: the so-called "Lomé IV" agreements between the African, Caribbean and Pacific States and the European Union, were superseded by the Cotonou Agreement of 2000; see chapter 19 of the present publication.

³ Fatsah Ouguergouz, *The African Charter on Human and Peoples' Rights: A Comprehensive Agenda for Human Dignity and Sustainable Democracy in Africa* (Martinus Nijhoff, 2003), pp. 298-299. See also T. Akinola Aguda, "Human rights and the right to development in Africa", Lecture Series No. 55 (Nigerian Institute of International Affairs, 1989); Joseph Oloka-Onyango, "Human rights and sustainable development in contemporary Africa: a new dawn, or retreating horizons?", *Buffalo Human Rights Law Review*, vol. 6 (2000), p. 59; and the Declaration on the Right to Development.

cept of the right to development is thought to be originally African, as it was first stated as such by Doudou Thiam, Minister of Foreign Affairs of Senegal, in Algiers in 1967. The then minister referred to the right to development as a right that must be proclaimed "loud and clear for the Nations of the Third World".⁴ The topic began to attract interest after Kéba M'Baye, Chief Justice of the Supreme Court of Senegal, lectured on the topic at the International Institute of Human Rights in Strasbourg, France, in 1972. Justice M'Baye, argued that "in the name of justice and peace, it is necessary to double efforts to re-encounter the true foundations and sources of the inalienable right that every human being has—and that all human beings collectively have—to live and to live better, that is, to equally benefit from the goods and services produced by the international or national community they belong to".⁵ In this connection, it is also worth noting the contribution of the Algerian scholar Mohammed Bedjaoui on the international dimension of the right to development, declaring the real obligation of the advanced countries for the development of the less economically advanced ones within the framework of a new international law. It is also worth noting the concomitant call for an international social law that acknowledges the proletarian position of some nations within the international community.⁶

This germinal African contribution to what Upendra Baxi has referred to as "the development of the right to development"⁷ is traceable in part to the historical experience of exploitation and underdevelopment that has been widely and intensely experienced by Africans, and to the conviction among not a few African legal thinkers and political leaders (reflected even in global documents) that international law must play an important role in the struggle to ameliorate those circumstances.⁸

The widespread affirmation of the right to development among African thinkers and leaders did not,

however, mean that the kind of effusive enthusiasm for the recognition of a right to development that was expressed by prominent Africans such as Mohammed Bedjaoui was warmly received in all circles.⁹ As Baxi has noted, positive responses to the recognition of this right, such as Judge Bedjaoui's famous valorization of the right as "the alpha and omega of human rights",¹⁰ have frequently been met with deep scepticism among scholars like Yash Ghai, who view any attempt to recognize or protect the right to development as diversionary and as capable of providing increasing resources and support for State manipulation and repression of civil society.¹¹

In any case, ever since the conclusion of the World Conference on Human Rights, held in Vienna in 2003, it has been clear to the discerning observer that, even on the global plane, what Baxi has referred to as the "jurispotency" of the right to development can no longer be in doubt. Part I, paragraph 10, of the Vienna Declaration and Programme of Action (which was adopted by 171 countries, including the United States of America and every Western State) declared quite clearly that the right to development is a universal and inalienable right and an integral part of the corpus of fundamental human rights.¹² What is more, the existence of article 22 of the African Charter is proof positive that this right transcends the realm of soft international human rights law, albeit only at a regional, African level. As interesting in this connection is the fact that, whatever its formal legal status, the right to development has certainly exhibited what I have long referred to elsewhere as the tripartite properties of law generation (helping to catalyse new norms); law regulation (shaping the meaning and limits of already existing and new norms); and law (de)legitimation (helping render existing or proposed norms untenable in the popular and/or State consciousness).

Nevertheless, the fact remains that despite the important—if admittedly limited—value that hard law norms can add to the development struggle, no global treaty exists as yet to frame and regulate, as much as is possible, the relations in this regard between the States of the North (who by and large control the means of development) and the States of the South (who by and large require the infusion of

⁴ Ouguergouz, *The African Charter*, p. 298.

⁵ Kéba M'Baye, "Le droit au développement en droit international", in *Études de droit international en l'honneur du juge Manfred Lachs*, Jerzy Makarczyk, ed. (Martinus Nijhoff, 1983), p. 165, non-official translation. Justice M'Baye made reference here to J.M. Domenach, *Aide au développement, obligation morale?*, and Roger Garaudy on the definition of community in Islam.

⁶ Mohammed Bedjaoui, "The right to development", in *International Law: Achievements and Prospects*, Mohammed Bedjaoui, ed. (Dordrecht, Martinus Nijhoff and UNESCO, 1991), p. 1178.

⁷ Upendra Baxi, "The development of the right to development", in *Human Rights in a Post Human World: Critical Essays* (Oxford University Press, 2007), p. 124.

⁸ "An agenda for development: report of the Secretary-General" (A/48/935), para. 3, and Anselm Chidi Odinkalu, "Analysis of paralysis or paralysis by analysis? implementing economic, social, and cultural rights under the African Charter on Human and Peoples' Rights", *Human Rights Quarterly*, vol. 23, No. 2 (May 2001), p. 347.

⁹ Bedjaoui, "The Right to Development", pp. 1177 and 1182.

¹⁰ Ibid. See also Baxi, "The development of the right to development", p. 124.

¹¹ Yash Ghai, "Whose human right to development?", Human Rights Unit occasional paper (Commonwealth Secretariat, 1989).

¹² Obiora Chinedu Okafor, "The status and effect of the right to development in contemporary international law: towards a South-North 'entente'", *African Journal of International and Comparative Law*, vol. 7 (1995), p. 878.

those resources). It is against this background, i.e., within the context of the existence of a normative gap, that this globally contextualized analysis of article 22 of the African Charter (a region-specific treaty), and of the lessons for global norm-making that might be learned from its particular normative character, makes sense.

In order to accomplish its two major objectives, this chapter is organized into six main sections (this introduction included). In section II, I will attempt—as much as is possible—to tease out and develop the nature of the concept of development that animates article 22. This exercise of necessity draws from the surrounding international discourse on the concept of development. Section III is devoted to understanding the identity and nature of the rights holders; the “peoples” upon whom the right to development has been explicitly conferred by article 22. In section IV, I consider the question of the identity and nature of the duty bearers; those actors on whose shoulders article 22 has rested the weighty responsibility of ensuring that all peoples enjoy their right to development. Section V focuses on the nature of the legal obligation that these duty bearers must bear under article 22. For example, is this duty to be discharged immediately or is its discharge to be progressive? Section VI concludes the chapter, and proposes an African Charter-informed sociolegal agenda that might help frame the character of a possible global treaty on the right to development.

II. The concept of development in article 22

Despite the fact that the character of the particular conception or model of development that is adopted (neoliberal or social democratic) is key to the success or failure of the effort to secure the enjoyment of the right to development,¹³ article 22 and the other documents that recognize and articulate that right are hardly clear as to the identity of their preferred development conceptions or models.¹⁴

However, certain conceptual guideposts are available to inform our understanding of the meaning of development. These are so relatively well established as not to require lengthy discussion in this short chapter. They are that development should no longer be conceived solely in terms of economic growth;¹⁵

that development at its core involves the fostering of equity within and among States;¹⁶ that gender interests must be “mainstreamed” into the development design and practice;¹⁷ that participatory development is to be much favoured over the top-down model;¹⁸ and that a rights-based approach is useful.¹⁹ In addition, article 22 explicitly disaggregates its concept of development into economic, social and cultural components.

Given the above *tour d'horizon*, which identified the key cornerstones that seek to demarcate and distinguish “good” from “bad” development praxis, what then might one offer as a working definition of the concept of development as a widely accepted and proper understanding of that term? In my own view, the United Nations Development Programme (UNDP) has quite correctly conceived of development in terms of “human development”. It has in turn viewed the concept of human development itself as denoting the creation of “an environment in which people can develop their full potential and lead productive, creative lives in accord with their needs and interests”.²⁰ If this is what development means, or ought to mean, in our time, then the right to development should in turn mean the right to that kind of development; the right to the creation of the stated type of environment. To build upon the work of Arjun Sengupta, this can be viewed as encompassing three main aspects: the right to the means of creating that environment; the right to a process of creating that environment; and the right to the benefits that flow from the creation of such an environment.²¹

The foregoing analysis begs the question whether this is the particular conception of development (suitably limited by the so-called development “dos and don’ts”) that has found expression in article 22. The jurisprudence of the African Commission has gradually evolved over time and does currently offer considerable insight into the character of the conception

¹³ See, for example, World Bank, *World Development Report 2005: A Better Investment Climate for Everyone* (New York and Washington, Oxford University Press, 2005), p. 7 and Simeon Ilesanmi, “Leave no poor behind: globalization and the imperative of socio-economic and development rights from an African perspective”, *Journal of Religious Ethics*, vol. 32, No. 1 (2004), p. 72.

¹⁷ Nsongurua Udombana, “The third world and the right to development: an agenda for the next millennium”, *Human Rights Quarterly*, vol. 22, No. 3 (August 2000), p. 767, and Banda, *Woman, Law and Human Rights*, pp. 265 and 269-285.

¹⁸ A/48/935, para. 220.

¹⁹ Kofi Quashigah, “Human rights and African economic integration”, *Proceedings of the African Society of International and Comparative Law*, vol. 8 (1996), p. 218. See also Andrea Cornwall and Celestine Nyamu-Musembi, “Putting the ‘rights-based approach’ to development in perspective”, *Third World Quarterly*, vol. 25, No. 8 (2004), p. 1415.

²⁰ See <http://hdr.undp.org/en/humandev/>.

²¹ Arjun Sengupta, “The human right to development”, *Oxford Development Studies*, vol. 32, Issue 2 (2004), pp. 183 and 192.

¹³ Fareda Banda, *Women, Law and Human Rights: An African Perspective* (Oxford, Hart, 2005), pp. 263-264.

¹⁴ Ouguerouz, *The African Charter*, p. 307.

¹⁵ Banda, *Woman, Law and Human Rights*, p. 264, and Aguda, “Human Rights” p. 19.

of development that animates article 22. On the one hand, in the *Bakweri Land Claims* case, possibly the first case where the African Commission was seized with a communication that was explicitly grounded in article 22, the complainants framed their main grievance, namely the concentration of their historic lands in non-native hands, in terms of the violation of their right to development under article 22.²² As the matter did not get past the admissibility stage, the Commission did not get a chance to pronounce on this issue.

The opportunity to make such a pronouncement nevertheless materialized when the Commission considered the case of *Kevin Mgwanga Gumne, et al. v. Cameroon*,²³ which is also known as the "Southern Cameroon" case. The complainants alleged economic marginalization by the Government of Cameroon as well as denial of economic infrastructure. They contended that their lack of infrastructure, and in particular the relocation of an important sea port from their region, constituted a violation of their right to development under article 22 of the African Charter. The Commission's decision places considerable value on the discretion of States parties to decide on how scarce economic resources are to be allocated. It held that the respondent State was "under obligation to invest its resources in the best way possible to attain the progressive realization of the right to development ..."²⁴ While agreeing that "this may not reach all parts of its territory to the satisfaction of all individuals and peoples, hence generating grievances",²⁵ yet that alone, in the Commission's judgement, could not be a basis to find a violation of article 22. It could be seen that not only did this decision prioritize political discretion; it also consigned the right to development to the conundrum of "progressive realization", a limitation more popular with the better-established kinds of economic, social and cultural rights.

But the Commission rendered what would perhaps be its most authoritative decision on article 22 in the case *Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of the Endorois Welfare Council v. The Republic of Kenya*, otherwise known as the *Endorois* case.²⁶ This is also the first complaint of its kind in which

²² African Commission on Human and Peoples' Rights, *Bakweri Land Claims Committee v. Cameroon*, communication No. 260/2002, *African Human Rights Law Reports* (2004), p. 43.

²³ African Commission on Human and Peoples' Rights, communication No. 266/2003, available at <http://caselaw.ihrda.org/doc/266.03/view/>.

²⁴ *Ibid.*, para. 206.

²⁵ *Ibid.*

²⁶ African Commission on Human and Peoples' Rights, communication No. 276/2003, available at <http://caselaw.ihrda.org/doc/276.03/view/>.

the Commission found a violation of article 22. The main grievance of the Endorois community was that the Government of Kenya had failed to adequately involve them in the development process. Specifically, they claimed that they were neither consulted before a major developmental project that impacted their lifestyle was embarked upon nor were they compensated for its adverse consequences on that lifestyle. The project in question was the conversion into governmental game reserves of the lands around Lake Bogoria on which the pastoral Endorois community grazed livestock as well as performed religious ceremonies.

The Commission, in broad terms, placed the burden of "creating conditions favourable to a people's development"²⁷ on the Government. It held that it was not the responsibility of the Endorois community to find alternative places to graze their cattle or partake in religious ceremonies. Continuing, it held:

The Respondent State [Kenya] ... is obligated to ensure that the Endorois are not left out of the development process or [its] benefits. The African Commission agrees that the failure to provide adequate compensation and benefits, or provide suitable land for grazing indicates that the Respondent State did not adequately provide for the Endorois in the development process. *It finds against the Respondent State that the Endorois community has suffered a violation of Article 22 of the Charter.*²⁸

There is much to commend in the position of the Commission in this case. In addition to its satisfactory decision on behalf of the Endorois community, the Commission quite significantly developed what it describes as a two-part test for the right to development. It held that the right enshrined in article 22 of the African Charter "is both *constitutive* and *instrumental*, or useful as both a means and an end".²⁹ According to the Commission:

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 recognizing 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.³⁰

Yet this decision did not quite answer all the questions regarding the proper dimensions of the right to development under the African Charter. One such question that stands out in the estimation of some schol-

²⁷ *Ibid.*, para. 298.

²⁸ *Ibid.* (Commission's emphasis).

²⁹ *Ibid.*, para. 277 (Commission's emphases).

³⁰ *Ibid.* Editor's note: for further discussion on this case, see chapter 12 of the present publication.

ars is that the African Commission did not "outline the contours of a development process ... which runs counter to the state's aspirations of modernization and economic development".³¹ The authors argue, however, that the Endorois community's insistence on the procedural rights of participation and consultation, as well as their emphasis on equity, is intended to provide space for such a developmental paradigm.³²

As important in this regard is the treatment that the Commission had earlier given to the *Ogoni* case, which emanated from Nigeria.³³ Although this particular communication did not explicitly allege any violation of article 22, the Commission, while finding that conduct of the Government of Nigeria towards the Ogoni people of the Niger Delta had violated articles 16 (right to health) and 24 (right to environment) of the African Charter, declared that:

Undoubtedly and admittedly, the government of Nigeria, through the [Nigerian National Petroleum Company], has the right to produce oil [Nigeria's principal developmental resource], the income from which will be used to fulfil the economic and social rights of Nigerians. But the care that should have been taken ... which would have protected the rights of the victims of the violations complained of was not taken.³⁴

This quotation suggests a reading of the relevant provisions that subscribes to a rights-based and rights-framed model of development, one in which the goal of development activities is imagined, at least in part, as the fulfilment of the economic and social rights of a people. It also suggests that the Commission is of the view that the people of Nigeria as a whole (through their Government) must have a right to the means, processes and outcomes of development. In another part of the decision, in which it found that the Nigeria had violated article 21 of the African Charter (the right of all peoples to freely dispose of their wealth and natural resources in their own interest), the Commission explicitly adopted the language of the complainant in chiding Nigeria's development praxis and condemning the fact that the Government "did not involve the Ogoni communities in the decisions that affected the development of Ogoniland".³⁵ Further down in its decision, the Commission argued that article 21 was designed to ensure "cooperative economic develop-

ment" in Africa.³⁶ This was a clear endorsement of the participatory development imperative. If the African Commission could endorse that imperative in relation to article 21, there is no reason to suppose that it will not do the same in regard to article 22. Such holistic ways of reading the African Charter and the Commission's interpretations of that document are appropriate since, as Chidi Odinkalu has noted, one must take account of the interconnectedness and seamlessness of the rights contained in the African Charter.³⁷ Thus, although the above insights are gleaned from reading a case in which the list of provisions that were explicitly interpreted did not include article 22, the insights into the concept of development that were thereby gleaned are nevertheless useful as a reflection of the thinking of the African Commission on the very same kinds of concepts that also animate article 22.

Furthermore, although not an authoritative source of African Charter meaning, the view of Professor Oji Umozurike, a one-time chair and member of the African Commission and an eminent human rights scholar, is persuasive as to the conception of development that animates article 22. After all, does not international law recognize the opinions of the most highly qualified jurists as a source of legal meaning? Umozurike seems to think that the "participatory development" and "equitable distribution" imperatives that are required by the Declaration on the Right to Development form part of the "right" conception of the developmental right. As such, it is not far-fetched to infer that article 22 may be viewed in this way by at least some members of the African Commission. In any case, the discussion in the immediately preceding paragraph corroborates Umozurike's views, at least with regard to the African Commission's subscription to the participatory development imperative.

On the whole, therefore, given the nature of the emergent international consensus on the "dos and don'ts" of development praxis and the evidence canvassed above with regard to the specific case decided by the African Commission under the African Charter, it seems fairly clear that, while much remains obscure as to the nature of the concept of development in article 22 and no detailed developmental programme can be deciphered from a reading of that provision, certain cornerstones have been laid that reveal its likely broad characteristics. Thus, any conception of development under article 22 must, at a minimum: (a) frame the process and goals of development as constituted in part by the enjoyment of peace; (b) envision

³¹ A. Korir Sing' Oei and Jared Shepherd, "'In land we trust': the Endorois' communication and the quest for indigenous peoples' rights in Africa", *Buffalo Human Rights Law Review*, vol. 16 (2010), p. 81.

³² *Ibid.*

³³ African Commission on Human and Peoples' Rights. *Social and Economic Rights Action Center and Center for Economic and Social Rights v. Nigeria*, communication No. 155/1996, available at <http://caselaw.ihrd.org/doc/155.96/view>.

³⁴ *Ibid.*, para. 54.

³⁵ *Ibid.*, para. 55.

³⁶ *Ibid.*, para. 56

³⁷ Odinkalu, "Analysis of paralysis" (see footnote 8), p. 341.

the process and ends of development in part through a human rights optic; (c) view the gender, ethnic and other such inequities that exist in the distribution of developmental benefits as a lack of development; (d) imagine the people's participation in their own development as an irreducible minimum; and (e) imagine the right to development as inclusive of the rights to the means, processes and outcomes of development. Perhaps any anticipated global treaty on the right to development ought to take a cue from this list.

III. Who are the right holders contemplated by article 22?

According to article 22, the right to development is to be claimed and enjoyed by "all peoples". Under that provision, therefore, "peoples" are the relevant right holders. Yet, although the term "peoples" appears as well in a number of other provisions of the African Charter, it is nowhere defined in that treaty. As Richard Kiwanuka's influential work on this issue has taught us, this definitional gap was the product of a deliberate and calculated attempt by the drafters of the African Charter to avoid what they saw as a difficult discussion over the precise meaning of that term.³⁸

It is little wonder then that there remains significant division, even today, as to the meaning of the extant term among the most prominent commentators on article 22 (or similar provisions). One important scholarly debate concerns whether or not the term "peoples" includes individual citizens of a given State; whether an individual could claim a right to development under article 22. Certainly, ambiguity does exist on the international plane regarding this question.³⁹ Indeed, the Declaration on the Right to Development does state that the right to development is both an individual human right and a right of peoples.⁴⁰ Yet, as Ouguergouz has recognized, given the guarantees of economic and social rights that are now present in all the main regional and global human rights regimes, viewed strictly as an individual right, the right to development does not add a great deal to

the concept of human rights. Although its benefits can of course be enjoyed individually, the developmental right tends to make more practical sense as a collectively claimed right.⁴¹ In any event, the ambiguity that exists at the international level is not reproduced at the African level. Article 22 is crystal clear in its identification of "peoples" (as opposed to individuals) as the subjects/holders of the right to development that it guarantees. But this does not mean that the meaning of the concept of "peoples" in article 22 is as clearly stated.

As such, a related and increasingly important debate is whether or not the term "peoples" includes sub-State groups (such as so-called ethnic groups and national/regional minorities) or enures exclusively to States as the representatives of the entire populations of their countries. Just as there is little doubt today that sub-State groups, such as ethnic minorities, can hold rights under international law,⁴² as we shall see later on in this section, the African Commission has declared as well that these groups are among the rights holders envisaged by article 22. This appears to lay to rest the previous debate around this question. On one side of this now *ancien* debate is Judge Ouguergouz, who has concluded that "the 'people-state' [that is, the entire population of a State], like the 'people-ethnic group' are the subjects of the right to development, but to varying degrees".⁴³ This view is supported by Wolfgang Benedek's declaration that the concept of "people" in the African Charter is broad enough to include ethnic groups and minorities,⁴⁴ and by Evelyn Ankumah's conclusion that the chances of success of a right to development claim can be strengthened if the group concerned can show that it is a minority or oppressed group which is experiencing discrimination.⁴⁵ On the other side of the conceptual fence sits Kiwanuka who, while conceding that the term "peoples" (as used in the African Charter) could under certain circumstances include sub-State groups,⁴⁶ argues nevertheless that we must "equate 'peoples' with the state where the right to development [under article 22] is concerned" since in his view "an entity less than the state cannot effectively contest the right to development in the international arena".⁴⁷ Joseph Oloka-Onyango is of the view that this is the

³⁸ Richard Kiwanuka, "The meaning of 'people' in the African Charter on Human and Peoples' Rights", *American Journal of International Law*, vol. 82 (1988), p. 82. The African Commission restated the difficulty in defining the term "peoples" in the *Endorois* case when it found that "[t]he relationships between indigenous peoples and dominant or mainstream groups in society vary from country to country. The same is true of the concept of 'peoples'. The African Commission is thus aware of the political connotation that these concepts carry. Those controversies led the drafters of the African Charter to deliberately refrain from proposing any definitions for the notion of 'people(s)' (Endorois case, para. 147).

³⁹ Ouguergouz, *The African Charter* (see footnote 3), pp. 299-300.

⁴⁰ Art. 1. See also Ouguergouz, *The African Charter* (footnote 3), p. 301.

⁴¹ Sengupta, "The human right to development" (see footnote 21), p. 191.

⁴² Kiwanuka, "The meaning of 'people'", p. 84.

⁴³ Ouguergouz, *The African Charter* (see footnote 3), p. 320.

⁴⁴ W. Benedek, *Human Rights in a Multi-Cultural Perspective: The African Charter and the Human Right to Development*, cited in Ouguergouz, *The African Charter* (see footnote 3), p. 320.

⁴⁵ Evelyn A. Ankumah, *The African Commission on Human and Peoples' Rights: Practice and Procedures* (The Hague, Martinus Nijhoff, 1996), p. 167.

⁴⁶ Kiwanuka, "The meaning of 'people'" (see footnote 38), pp. 8-95.

⁴⁷ Ibid., p. 96.

very sense in which the term was understood by African leaders at the time of the adoption of the African Charter.⁴⁸ Given that almost every expert would agree that the human person is the central subject of development,⁴⁹ seen in their best light, the arguments put forward by scholars like Kiwanuka ought to be viewed as suggesting that the right to development under article 22 should be conceived of as the right of the entire population of the relevant State.⁵⁰ As such, Sengupta is right to suggest that when States claim that right, that claim can at best be on behalf of their entire population, and not in favour of the State *qua* State.⁵¹

What is more, at a minimum, Kiwanuka's argument that sub-State groups cannot effectively contest the right to development in the international arena incorrectly assumes that the international arena is the sole site of struggle for the realization of the right to development, thus discounting the domestic dimension of the right—a dimension that must in fact loom large in the context of a regional treaty such as the African Charter (which does not admit of the participation of any of the rich industrialized States against which the right to development can be claimed by African States). Within the domestic arena, there is no reason why a sub-State group, as a "people", cannot effectively contest the right to development against their own State. Have not peoples like the Ogoni of Nigeria or the Bakweri of Cameroon famously launched such claims?

In any case, as was suggested earlier, this debate is now somewhat passé. In my view, the African Commission—a pre-eminent interpretive agency in the present connection—has all but settled the debate. The Commission does in fact treat sub-State groups, especially ethnic groups, as the subjects of the peoples' rights that are protected in the African Charter. In the *Bakweri Land Claims Committee* case, although the matter ended at the admissibility stage because the complainants (a minority people within Cameroon) had not first exhausted domestic remedies before approaching the African Commission, the Commission did impliedly treat the Bakweri as a "people" under the African Charter. What is more, neither Cameroon nor the Commission raised the possible objection to the admissibility of this communication on the ground that it was not brought on behalf of "a people" within the meaning of article 22 of the African Charter, and that it was as such "incompati-

ble" with that treaty. Since a matter that is grounded in article 22 can only be brought to the Commission by "peoples", the failure to dismiss the communication on that basis is at least implied evidence that this was not a significant concern to either the opposing party (which had a huge incentive to make all plausible arguments to secure the dismissal of the communication) or the African Commission. Furthermore, in the so-called *Ogoni* case, the African Commission found that Nigeria had violated the rights of the Ogoni people under a "sister" provision, the guarantee in article 21 that "all peoples shall freely dispose of their wealth and natural resources".⁵² Clearly, the Ogoni, who are an "ethnic" minority group within Nigeria, were viewed by the Commission as a "people" within the meaning of article 21. Logic alone suggests that, had the Commission not viewed the Ogoni in this way, it could not have possibly come to the conclusion that their rights under article 21 had been violated by Nigeria. They would simply have had no rights under that provision! In any case, the Commission did make bold to make explicit reference in the concluding portions of its decision to "the Ogoni people" and "the situation of the people of Ogoniland".⁵³ All this will, of course, not be surprising to a keen student of that body's jurisprudence, given the Commission's earlier decisions in the now celebrated *Katanga* case,⁵⁴ as well as in the so-called *Mauritania* case.⁵⁵ In the earlier case, the African Commission clearly treated the people of Katanga Province (a sub-State group) in the former Zaire as a people within the meaning of at least one other provision of the African Charter.⁵⁶ In the latter matter, it had no difficulty in treating the ethnic black population of Mauritania as a people within the meaning of another provision of the same treaty.⁵⁷ The logic of these decisions is applicable by analogy to article 22.

And if any doubt still remains, suffice it to point out that the Commission's decision in the *Endorois* case was even more pointed in addressing the principal aspects of the debate, particularly in relation to article 22. Here, the Commission reiterated its inclination towards a normative view of the African

⁵² *Ogoni* case (see footnote 33), paras. 55 and 58.

⁵³ *Ibid.*, paras. 62 and 69.

⁵⁴ African Commission on Human and Peoples' Rights. *Katangese Peoples' Congress v. Zaire*, communication No. 75/1992, available at www.achpr.org/english/Decison_Communication/DRC/Comm.%2075-92.pdf.

⁵⁵ African Commission on Human and Peoples' Rights. *Malawi African Association v. Mauritania*, communication No. 54/1991, available at www.achpr.org/english/activity_reports/activity13_en.pdf.

⁵⁶ Obiora Chinedu Okafor, "Entitlement, process, and legitimacy in the emerging international law of secession", *International Journal on Minority and Group Rights*, vol. 9 (2001), p. 41.

⁵⁷ Odinkalu, "Analysis of paralysis" (see footnote 8), p. 346.

⁴⁸ Oloka-Onyango, "Human rights and sustainable development" (see footnote 3), pp. 59-60.

⁴⁹ Ouguerouz, *The African Charter* (see footnote 3), p. 302.

⁵⁰ Udombana, "The third world" (see footnote 17), pp. 768-770.

⁵¹ Sengupta, "The human right to development" (see footnote 21), p. 191.

Charter as "an innovative and unique human rights document compared to other regional human rights instruments, in placing special emphasis on the rights of 'peoples'".⁵⁸ It also rendered the guarantees of article 22 claimable by sub-State entities like the Endorois community when it held:

The African Commission, nevertheless, notes that while the terms "peoples" and "indigenous community" arouse emotive debates, some marginalized and vulnerable groups in Africa are suffering from particular problems. It is aware that many of these groups have not been accommodated by dominating development paradigms and in many cases they are being victimized by mainstream development policies and thinking and their basic human rights violated. The African Commission is also aware that indigenous peoples have, due to past and ongoing processes, become marginalized in their own country and they need recognition and protection of their basic human rights and fundamental freedoms.⁵⁹

Thus, not only is the African Commission's interpretation of the term "peoples" within articles 21, 22 and other similar provisions (as admitting of claims made by sub-State groups) legally sound, it is also sociologically and politically appropriate. This is so because, as suggested in the *Endorois* case and as Odinkalu has correctly pointed out, "in most African countries where the state is nowhere near as strong as it is in Europe and North America, the community often insures the individual against the excesses of unaccountable state power".⁶⁰ Such communities include the very kinds of sub-State groups that have been of concern in this chapter. As such, these sub-State groups are, at a minimum, as effective as the relevant States as the mechanisms for the economic and social development of the populations that constitute them. As witness the *Ogoni*, *Bakweri Land Claims* and *Endorois* cases, these sub-State groups are often forced by circumstances to struggle against their own States for the development of their communities. Thus, to deny these sub-State groups the normative resource provided by article 22 may, in many cases, amount to seriously impairing rather than advancing the development of their populations.

IV. Who are the duty bearers envisaged by article 22?

Following Judge Ouguergouz's work, and the basic tenets of *pacta sunt servanda*, I am of the view that article 22 of the African Charter ought to be read to impose the primary duty to ensure the exercise of the right to development on African States, the only

States that are parties to that treaty.⁶¹ Every African State therefore does have the primary duty to ensure the realization of the right to development of all the peoples within its territory. The African Commission said as much in the *Endorois* case when holding that States parties shoulder the "burden for creating conditions favourable to a people's development".⁶² These same African States also bear the primary obligation of intervening internationally on behalf of all of their peoples in order to ensure their enjoyment of the right to development. These points are hardly controversial.

Much more controversial are arguments that posit that similar legal obligations are borne by, or ought to be imposed upon, such entities as the federating units within a federal State (such as Nigeria); the rich industrialized States and their development aid agencies; the United Nations; the international financial institutions (such as the International Monetary Fund and the World Bank); the World Trade Organization; transnational corporations (TNCs), and even international creditors (such as the members of the so-called Paris Club).

With regard to the legal position under the African Charter, as the *Ogoni* case demonstrates fairly clearly, it is of course not technically viable for any African people to bring a claim alleging the violation by any of the above-mentioned actors of its right to development under article 22 (or, for that matter, under any other provision of the African Charter), since none of those actors is a party to the African Charter. In the *Ogoni* case, the African Commission was technically unable to focus its formal attribution of fault in its decision on the Shell Petroleum Development Corporation, despite the very serious infractions by that TNC of the African Charter that had been alleged by the complainants and explicitly admitted by the new democratic Government of Nigeria.⁶³ And despite the Commission's firm finding that this TNC was heavily implicated in the violations of the rights of the Ogoni people, it was forced by the controlling technical legal logic to limit itself to the next best thing: holding the Nigerian State exclusively responsible for the combined actions of Nigeria and Shell, on the basis that Nigeria had an international legal responsibility to control the pernicious activities of private entities operating on its territory which are likely to seriously violate the rights of its citizens.⁶⁴ Although the Commission's reasoning is understandable, the

⁵⁸ *Endorois* case (see footnote 26), para. 149.

⁵⁹ *Ibid.*, para. 148.

⁶⁰ Odinkalu, "Analysis of paralysis" (see footnote 8), p. 344.

⁶¹ *Ibid.*, pp. 308-320.

⁶² *Endorois* case (see footnote 26), para. 298.

⁶³ *Ogoni* case (see footnote 33), para. 42.

⁶⁴ *Ibid.*, paras. 57-58.

rather tortured nature of this sort of logic is all too evident.

Nevertheless, it is useful to consider, albeit briefly, whether the prevailing situation ought to be changed. Ought the rich industrialized States and their development aid agencies, the United Nations and the other non-State actors listed above bear legally enforceable development duties under provisions like article 22, or under a possible global treaty on the right to development? As to the possibility of the federating units within a federal State being construed as bearers of legal duties under article 22, or under any other similar legal provision, the experiences of the various Niger Delta peoples of Nigeria between 1999 and 2007 are instructive. During this period, the relatively well-endowed democratically elected governments of their own federating units did precious little to advance the right to development of their peoples while relentlessly blaming the federal Government for not improving the living standards of these same peoples. This suggests that such federating units ought to bear international legal obligations under provisions like article 22. After all, are not many of the Niger Delta federating units thought to be richer and much better economically endowed than many of the African countries which are parties to the African Charter? Yet, as these federating units are not parties to the African Charter and similar texts, and are in general not viewed as subjects of international law, it is difficult to see how this can be achieved in legal practice without a fundamental reconception of the norms of treaty-making and -implementation.

Regarding the question of the United Nations as a duty bearer of the developmental right, the United Nations report "An agenda for development" states that 'while national Governments bear the major responsibility for development, the United Nations has been entrusted with important mandates for assisting in this task' (A/48/945, paras. 12 and 139). Given how implicated the United Nations is in development praxis in Africa, ought that august organization be allowed to continue to exercise as much power as it does in Africa with little autonomously African hard legal regulation? Should the article 22 legal obligations be imposed on the United Nations by, for instance, inviting it to accede to the African Charter, or through the conclusion of a new protocol to that treaty? Article 1 of the African Charter seems to preclude this possibility, since it clearly states that it is the member States of the African Union that shall recognize the rights and duties enshrined in the treaty. Can

this problem be addressed through the conclusion of a new global treaty on the right to development to which the United Nations shall subscribe in its own right, or which shall impose specific developmental obligations on the United Nations?

The other international actors listed above (such as the rich industrialized States and their development aid agencies,⁶⁵ the international financial institutions,⁶⁶ the World Trade Organization,⁶⁷ transnational corporations,⁶⁸ and even international creditors such as the so-called Paris Club)⁶⁹ are in a similar situation: they all tend to exercise enormous power with respect to the living developmental praxis of virtually every African country, without being constrained nearly enough by a corresponding degree of autonomously African hard legal regulation. None of them is a party to, or can possibly be held accountable under, the African Charter, at least not as that treaty is presently constituted. Whether or not this situation can in fact be remedied by the adoption of a new global treaty on the right to development is another question.

V. What manner of legal obligation is imposed by article 22?

Under article 1 of the African Charter, States assume the obligation to "adopt legislative or other measures to give effect" to the rights protected under that treaty. Read in consonance with the working definition of the conception of "development" adopted earlier in this chapter, States are therefore required to enact laws that support the creation of an environment in which people can develop their full potential and lead productive, creative lives in accordance with their needs and interests. Such laws must advance the ability of the relevant State properly to acquire and manage the means (resources) through which that environment can be created, support the process of creating that environment and help ensure the equitable enjoyment of the benefits that flow from that environment. One good example of a law that would accomplish most of these goals would be one

⁶⁵ See Cornwall and Nyamu-Musembi, "Putting the 'rights-based approach' to development in perspective" (footnote 19), p. 1433 (pointing out that despite their increasing use of rights-based development language, these largely Western donor agencies do not intend to be bound by any rights held by people in Africa and the rest of the South).

⁶⁶ See C. Weaver and S. Park, "The role of the World Bank in poverty alleviation and human development in the twenty-first century: an introduction", *Global Governance*, vol. 13, No. 4 (2007), pp. 461-462.

⁶⁷ A/48/935, para. 54 (arguing that difficult access to the world trading system is an enormous obstacle to development).

⁶⁸ Baxi, "The development of the right to development" (see footnote 7), p. 129 and pp. 141-142.

⁶⁹ A/48/935, para. 61.

that promoted greater public participation in the budgeting and revenue allocation process. Whatever "other measures" States take to ensure the enjoyment of the right to development by their peoples must also perform these same functions. These other measures could include the creation of dedicated poverty alleviation agencies, such as Nigeria's National Poverty Elimination Programme, or the establishment of special commissions which focus on the development of a historically disadvantaged group or on the "righting" of some development inequity or the other, such as Nigeria's Niger Delta Development Commission.

In addition to the above, the African Commission in the *Endorois* case developed the standard by which a State's fulfilment of its obligations under article 22 could be judged. In the first instance, the Commission accepted the recommendation of the United Nations Independent Expert on the right to development that "development is not simply the state of providing, for example, housing for particular individuals or peoples; development is instead about providing people with the ability to choose where to live".⁷⁰ Thereafter, the Commission identified other specific contents of the right to include consultation in development planning where such consultation must be conducted for the community concerned not by illiterates but by those with the ability to "understand documents produced"⁷¹ by the State involved. Where the community in question has been moved from its land, the members should be adequately compensated as well as share the benefits of the development activity.

Equally important is the avoidance in the African Charter (save with respect to its provision on the right to health) of what Odinkalu has accurately referred to as "the incremental language of progressive realization".⁷² As such, all of the rights protected by that treaty, including the right to development under article 22, are immediately applicable. This is a significant departure from the tendency to constrain human rights provisions of a deeply economic and social character by attaching to them the requirement that they be realized progressively. It also poses a serious challenge to most African States to find ways of fulfilling their obligations under provisions like article 22 in circumstances of generally severe resource scarcity. After all, the fulfilment of the guarantee in article 22 of the right to development of all peoples in Africa will more often than not require the deployment of significant socioeconomic resources. And, in any case, cer-

tain elements of the right may be immediately applicable, even if not all of them are. For example, the consultation and participation of peoples in the decision-making process can be immediately applicable, even when the equitable distribution of resources or investments may not be. But what does it really mean to ask a poor country in Africa (or elsewhere) to realize the right to development of all its peoples immediately (rather than progressively)? Surely, even under the best circumstances, it will take some time (not to mention far less short-sightedness) for the domestic and international obstacles that militate against the proper acquisition and management of the means of development by such a country to be surmounted, as it will take time for the process of creating the appropriate environment to unfold to a significant extent and for the effort to ensure the equitable enjoyment of the benefits that flow from development to bear significant fruit. Development is, of course, not a one-time event and cannot simply happen. Thus, the "immediate application" requirement in the African Charter is based on an understanding of the actual, concrete developmental obligation as somewhat protean, varying across space and time and dependent on the extent of available resources in a particular country at any specific historical moment. And so, when once a State is shown to have done all it possibly could within its means to advance the right to development of all its peoples, then that State cannot possibly be viewed as in violation of its obligation under article 22, whether or not significant poverty remains among its people.

When the immediate applicability of the right to development in article 22 is understood in this way, the lack of a general derogation clause in the African Charter becomes far less worrying. Further, the African Commission's interpretation of the absence of this clause to mean that attempts to limit any of the rights guaranteed in the Charter cannot be justified by emergencies or special circumstances enhances this position. Given the harsh economic circumstances that confront far too many States in Africa, it would seem realistic and practical to read into that provision the "available resources" limitation, without making special economic circumstances a grounds for derogating from article 22.

To conclude this part of the chapter, it must be pointed out that, contrary to the impression that might have been created by the focus in the earlier parts of this section on the availability of the resources that must drive the development engine, the exercise of the right to development as guaranteed by article 22

⁷⁰ *Endorois* case (see footnote 26), para. 278.

⁷¹ *Ibid.*, para. 292.

⁷² Odinkalu, "Analysis of paralysis" (see footnote 8), p. 349.

need not always entail the infusion of resources (i.e., positive obligations). The obligation to ensure the exercise of this right does encompass negative obligations. Writing in another context, Odinkalu has offered a very good example of the kind of negative obligations that are encompassed by this developmental obligation, namely, the implied duty not to subject a poor people to forced evictions from their farmlands or settlements in order to redevelop those lands as up-market enclaves or oil refineries while denying the relevant people an alternative settlement or farmland, or adequate compensation in order to facilitate their resettlement. As Paul Ocheje has shown, this kind of forced displacement is far too common in Africa, as elsewhere.⁷³ Yet, any reasonable interpretation of article 22 must lead to a requirement that the existing state of development attainment of any poor or disadvantaged people be protected, and that what these poor people already have ought not to be taken away from them without adequate compensation.

VI. Conclusion

This chapter set out to do two main things: to analyse (from a globally contextualized sociolegal perspective) the normative strengths and weaknesses of the guarantee of the right to development under article 22 of the African Charter on Human and Peoples' Rights and to consider its global potential or generalizability. In section II, the character of the concept of development that animates article 22 was teased out. This exercise drew deeply from the surrounding global discourse on the concept of development. Development was understood in human development terms: as the creation of an environment in which people can develop their full potential and lead productive and creative lives, and as framed by key cornerstone imperatives such as participation, gender and ethnic equity, the existence of peace and a rights-based approach. In section III, it was argued that, although it is not clearly defined in the African Charter, the term "peoples" on whom the right to development is explicitly conferred by article 22 must be read to include sub-State groups. In section IV, the argument was made that, while African States are clearly the primary bearers of the legal obligation to ensure the exercise of the right to development under article 22, the current situation, which does not admit of the possibility of holding other key development actors legally accountable for their activities in Africa,

is problematic. Section V pointed out that States are required by the African Charter (a) to bear immediately applicable rather than progressively realized development duties that cannot be derogated from in an emergency; (b) to take legislative and other measures to ensure the exercise of the right to development; and (c) to bear positive as well as negative developmental duties. It was also argued that given the harsh economic circumstances that currently confront most African States, the obligations that they assume under article 22 must—as immediately applicable as they still are—be read as only requiring each African State to implement article 22 to the extent of its available resources.

In this concluding section, I want to propose—albeit rather briefly—a sociolegal agenda derived from the foregoing analysis of article 22 that might help frame the character of any proposed global treaty on the right to development. First and foremost, any such treaty must be as clear as any treaty can possibly be as to how the basic concepts that must ground its normative content are to be understood. It must therefore define as clearly as possible the rights holders and duty bearers of the right to development that it guarantees. In my view, and for the reasons already offered, such rights holders must, at the very least, include sub-State groups (such as the Ogoni, Native Americans or black Mauritians). As has also been argued, the bearers of the developmental obligations under such a treaty must also go well beyond developing countries to include some of the federating units within federal States (especially in Africa), the rich industrialized States, the United Nations, the international financial institutions, transnational corporations and all the other powerful actors who, for good or for ill, exert a highly significant effect on the state of development of the countries of the geopolitical South.

In accordance with this necessity for much greater conceptual clarity, I am of the view that while any such treaty cannot possibly specify with much precision and for all time the concept and model of development that animates its normative content and programmatic ambition, it will still be short on clarity and on the "specification of policy and programmatic ways and means" of achieving its objectives if it uncritically mirrors the gaps in these respects in texts such as the African Charter and the Declaration on the Right to Development.⁷⁴ For one thing, the possible treaty can definitely help ensure a

⁷³ Paul Ocheje, "'In the public interest': forced evictions, land rights and human development in Africa", *Journal of African Law*, vol. 51, Issue 2 (October 2007) pp. 191-192.

⁷⁴ Baxi, "The development of the right to development" (see footnote 7), p. 149.

minimum content of good development praxis by laying down key cornerstones that will guide understandings of its conception of development. Specifically, such a treaty must reflect the economic, social and cultural dimensions of development; understand development in human development terms; treat the ethnic, gender, environmental and other equity dimensions of development as key; recognize the participatory development imperative (especially the necessity of allowing the peoples most affected by development to participate far more meaningfully in the determination of the very conception or model of development that will affect their lives, and not merely in the process of development); understand development as, at the very least, a collective human right (bearing in mind the limits of "rights talk"); factor in the relationships between the creation of peace and development; and imagine the right to development as inclusive of the rights to the means, processes and benefits of development. This will not of course dispose of the ideological divisions that exist over the best processes and goals of development, but will at least limit and reduce the zone of disagreement.

This question of (largely) North-South ideological difference brings to mind the fact that, as imperative as the utilization of human rights norms of a legal nature seems to be in the struggle to improve the lives of poor people in the third world and elsewhere through the application of more enlightened development praxis, the mere deployment of human rights law norms does not really address one of the most important global obstacles to the attainment of this goal in our own time: the ascendancy of a dominant socio-economic ideology that has dealt most inadequately with the developmental yearnings of the world's poor. This is why, as Baxi has noted, any effort to affirm or

advance the right to development too often "presents an irritating moral nuisance" to ascendant global neoliberalism.⁷⁵ This is the chief reason why even a well-crafted treaty or other document on the right to development may yet be stillborn.

Although other scholars and States have also made invaluable contributions to the "universalization" in our time of the right to development, including through the adoption of the 1986 Declaration and the current efforts at the United Nations to adopt a binding instrument at the international level, the avatar-like character of the African Charter and of the relevant jurisprudence of the African Commission, coupled with the pioneering efforts of African scholars such as Kéba M'Baye, Mohammed Bedjaoui and Georges Abi-Saab⁷⁶ and complemented by the politico-legal strivings of many African States have in these cases made the critical difference. The official records of the Third Committee of the General Assembly, where the draft of the Declaration was discussed, reveal the permanent voice and vote of the African States in favour of the Declaration.⁷⁷ Without their innovation, commitment and persistence, article 22 of the African Charter would likely not have emerged in its present pioneering form, and the jurisprudence of the African Commission on the right to development would likely not have become as rich and cutting edge as it currently is. Agency, indeed African agency, made the difference in the past, and may do the same in future.

This is one good reason why hope must spring eternal.

⁷⁵ Ibid., pp. 129-130.

⁷⁶ Georges Abi-Saab, "The legal formulation of a right to development", in *The Right to Development at the International Level*, René-Jean Dupuy, ed. (The Hague Academy of International Law, 1980), pp. 159-182.

⁷⁷ See A/C.3/41/SR.61 and A/41/925 and Corr.1.