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A Legal Appraisal of the Right to Development

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i) Dedication

" Success does not roll in on the wheels of inevitability ... it comes from the tireless, dedicated and indefatigable efforts of individual men and women" Dr. Martin Luther King Jr.

This piece of work is dedicated to my family; to Dad and Mum who brought me up and taught me that it was okay to dream, and to aspire to be a great person, that the greatest tragedy that can befall a man is not to have dreamt and failed to achieve those dreams, rather not to have dreamt at all. Thanks to my brother George, sister Christine, Cecilia, Raphael and Sarah who stayed close to this dream and in their own quite way lived this dream with me. Thanks you far putting up with all the trying times along the way, especially Cecilia who played mum, while mama has been away.

To Dan Harrison Odhiambo with whom we shared this dream more than ten years back and tried valiantly to achieve it. To Dickison Oluoch Kanindo, who never lived to see his part of the dream to the end; I share the moment with him... God Rest your soul in eternal peace. My special gratitude to Hannington Ouko with whom we fought many academic battles in spite of the, seemingly, insurmountable odds.

To my mentor, the late Dr. Martin Luther king Jr. who taught me that
" the darkest hour of the night comes just before dawn..." and that " only when it is dark enough can you see the stars"
And to my inspiration and role model Patrick Lumumba Otieno (PLO) for showing me what it takes to be a good lawyer (Advocates) and an inspiring teacher of the law (both of which roles, I aspire to excel in) Finally, I Dedicate, to all friends and family the words of a former British wartime premier Sir Winston Churchil, " Don't give up, don't give up, don't you ever give up."

ii) Acknowledgements

This work would not have been possible without the constant counsel of my supervisor Shem Ongondo who patiently put in his time and helped shape some of my foggy academic/intellectual reflections into this constructive piece.

It would also not be possible to forget the indefatigable efforts put by Scholar Musyimi and Alphonse Kioko who typed and help proof read this work.

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v) LIST OF ABBREVIATIONS

ACHPR – African Charter for Human and Peoples Rights

AMF – African Monetary Fund

DOJ – Denial Of Justice

ECHR – European Convention for the Protection of Human Rights

ECOSOC – United Nations Economic and Social Council

ELR – Exhaustion of Local Remedies

ESAF – Enhanced Structural Adjustment Facility

EU – European Union

EVU – Independent Evaluation Unit

FAO – Food and Agricultural Organisation

GATT – General Agreement for Trade and Tariffs

HOL – House Of Lords

IACHR – Inter-American Commission on Human Rights

ICCPR – International Covenant on Civil and Political Rights

ICESCR – International Covenant for Economic Social and Cultural Rights.

ICJ – International Court of Justice

IHR – International Human Rights

ILC – International Law Commission

ILO – International Labour Organization

ILR – International Law Review

IMF – International Monetary Fund

MFN – Most Favored Nation (Trading Status)

MSIJ – Minimum Standards of International Justice

NTP – National Treatment Principle

SAPS – Structural Adjustment Programs

UDHR – Universal Declaration Of Human Rights

UNCTAD – United Nations Conference on Trade and Development

WHO – World Health Organization

WTO – World Trade Organization

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Chapter Four

A LEGAL APPRAISAL OF THE RIGHT TO DEVELOPMENT

1.0 INTRODUCTION

International Human Rights constitutes one of the most controversial and fast developing areas of International Law. As it develops it has become necessary to constantly measure or scrutinize the performance of individual member states of the United Nations to ensure that their activities are brought into greater currency with the entire gamut of International Human Rights and Humanitarian Rights Law.

Whereas, the first and the second generation rights (Civil and Political, as well as the Economic, Social and Cultural Rights) have attracted International attention. The third generation of rights, the so-called collective rights to development, self-determination, peace, security e.t.c. have tended to take back the seats.

The dissertation focuses on the evolution and growth of the Right to Development and makes a deliberate attempt to link it with International Human Rights. It sets out to establish the idea of indivisibility and interdependence of Human Rights (see Declaration on the Right to Development) which principle, asserts that the Right to Development can only be fully realized where there is respect for other human rights.

Conversely the respect of other human rights cannot narrowly be construed to exclude peoples right to development or put another way, the right of peoples to freely determine their economic affairs.

The right to development and the right to self-determination, to which it is contiguous, are inseparable. To deny either is to take away a peoples right to determine their own destiny.

Thirdly this dissertation (having established that there exists a legal right to development) will seek to examine the obligations if any, on International Economic Institutions on protection of Human Rights and Fundamental Freedoms. In particular it will inquire in to the activities IMF, World Bank and World Trade Organization in so far as they impact on the Right to Development.

Lastly we will examine the response of third world countries to policies and activities of these International Institutions and their attempt to create a new International Economic order.

2.0 STATEMENT OF THE PROBLEM

This dissertation seeks to frame the following questions for examination consideration.

2.1 Is the right to development a legal right under International Law?

2.2 Are there adequate International and regional mechanisms for the protection of this right?

2.3 Are International Institutions under any obligation to ensure the protection of Human Rights and Fundamental Freedoms?.

2.4 How do their activities impact on human rights especially the right to development?

2.5 What has been the response of member states especially third world Countries on the activities of these institutions, and which impact

Negatively on human rights.

3.0 Statement of Objectives

3.1 To examine the development of International Human Rights.

3.2 To consider legal aspects of the right to development and

3.3 To establish any international legal obligation upon international economic institution (IMF, World Bank and WTO) in the protection of human rights.

3.4 To evaluate the attempts by third world countries to remedy the inequality that has resulted from policies and activities of these institutions.

4.0 Justification of Study

International Economic institutions, whether they be financial or trade institutions, formulate policies and carry out activities that have far reaching implications on recipients or member states. In spite of the development of human rights (through well over half a century), little has been done to link these activities with the protection of human rights and fundamental freedoms.

The Rights to Development, Self Determination, and other group rights, are among the Human rights areas that are directly affected by policies of these organizations, yet few writers have ventured to write in this area.

More importantly little attempts at codification of international law obligations have been made in form of hard law treaty making. The result is that IMF and World Bank, as well as the world trade organization, view protection of human rights as being outside the ambit of their activities and obligations.

This dissertation examines a number of UN-resolutions, the declaration of the Right to Development together with other general human rights treaties in an attempt to create a link between the activities of these institutions and protection of human rights.

Lastly, several attempts and initiatives have been undertaken by third world countries to remedy the inequality in the international economic order and which are germaine from the activities of these institutions. These institutions deserve collective examination as well as recommendation(s) on how to realize them.

5.0 Hypothesis of Study

This study is predicated upon the following assumptions;

5.1 The right to development is a legal justicieable right under international law.

5.2 There are no adequate international instruments / mechanisms for safeguarding the right to development.

5.3 International economic / trade institutions have / are under an obligation to ensure the protection of human rights.

5.4 The activities and policies of international economic institutions impact negatively on third world countries and precludes their right to development.

6.0 Theoretical Framework

This study will rely on the following theoretical framework.

6.1 Indivisibility and interdependence of human rights.

6.2 The new international Economic Order

6.3 Special and differential treatment principle

7.0 Chapter Analysis;

7.1 Chapter one

7.1.1 Chapter one is a general and historical overview of the key developments in international human rights.

7.1.2 This chapter traces some of the key events origins and features of human rights.

7.1.3 It examines international as well as regional protection of human rights.

7.2 Chapter two

7.2.1 Chapter two is an examination of the right to development and the right to self-determination to which it is contiguous.

7.2.2 It examines the provisions of the UN Charter and other instruments as well as Un resolutions on the right to self-determination.

7.2.3 It also undertakes an evaluation of the Declaration on the Right to Development examining some of it's key features.

7.3 Chapter three

7.3.1 Chapter three examines the role of International Economic/ Trade Institutions in the protection of the Right to Development.

7.3.2 It seeks to evaluate the response by third world countries to the activities of these institutions and the need for a new International Economic Order.

7.4 Conclusion and Recommendations

1.0. INTRODUCTION

There can be no gain saying the fact that, it is in the United Nations Charter that the notion of Human Rights found its first tangible expression. It is here that we first come across the repeated use of the phrases Human Rights and Fundamental Freedoms.

Inspired by the tragic events of the two world wars, the founding fathers and architects of the United Nations Charter were determined that "respect for Human Rights would be one of the cornerstones of the world they intended to create."

Although the concept of Human Rights and fundamental freedoms is referred to seven times in the United Nations Charter there was no time at the San Francisco Conference in 1945 to articulate what precisely constituted these Rights and Freedoms.

The 51 states, which negotiated this Charter, instead included in the Charter a "Declaration on the Essential Rights of Man"[1] and determined that the task of articulating such rights and Freedoms would be undertaken at a subsequent forum.

This task was accordingly heralded by a regime of Law referred to as *soft law* and in the preamble to the Universal Declaration of Human Rights",[2] in 1948 it asserts that;

[1] "Declaration on the Essential Rights of Man"
[2] Universal Declaration of Human Rights.

"Recognition of the inherent dignity, equal and in a alienable rights of all members of the human family is the foundation of freedom, justice and peace in the world."

The UDHR was followed by the adoption in 1966 of the two protocols (hard law treaties) namely the International Covenant for Civil and Political Rights[3] and the Covenant for Economic Social and Cultural Rights."[4]

While the UDHR represented a common standard of achievement for all people and all nations in respect of these rights and freedoms, the two protocols made more specific obligations upon member states in the form of hard law treaty obligations. Whereas the UDHR was a declaration representing mere aspirations and principles, the 1966 protocols represented a binding set of rules and obligations.

This dissertation aims at tracing the historical developments of Human Rights, and evaluating some of the key events that inform Human Rights to date. In particular it seeks to examine the Rights to Development and the Right to Self Determination to which it is contiguous. The two regimes of International Human Rights will be examined against the background of obligations, if any, imposed by International law, upon International Financial and Economic/Trade Institutions.

Secondly, we shall endeavour in this paper to examine how the activities and policies of these institutions have impacted upon International Human Rights and in particular the Rights to Development.

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[3] International Covenant for Civil and Political Rights

[4] International Covent for Economic Social and Cultural Rights.

Some of these emerging trends constitute the third phase of International human rights development following the adoption of the generalized human rights instrument namely the UDHR and the more specific 1966 protocols which give rise to legal obligations.

These two regimes of Human Rights have been more specific, more specialized and include inter' alia new areas such as the rights of women, children, minorities, right to development, right to self determination, Refugee rights, stateless persons, and physical protection for individuals from crimes of genocide.

Lastly, this dissertation will undertake an analysis of the Declaration on The Right to Development and the Obligation its provisions give rise to (as against International Institutions). Against this background we will also examine the Legal status of these institutions (Particularly the IMF And World Bank) and enquire into whether the Declaration gives rise to any obligations binding upon these two institutions, as wells as the World Trade Organization (WTO).

In so doing we realize that International and multinational organizations formulate policies and undertake activities which have yet to be brought within the ambit of International Human Rights. Their activities impact heavily and sometimes negatively on the right to development especially in third World countries.

CHAPTER ONE

1.1 DEFINITION OF HUMAN RIGHTS

"When, in the last phase of the 20th century, people spoke of human rights, the rights of man or ***les droits de I'homme***, they really meant those rights drawing their formulation from the last decades of the 18th century and the American Revolutions."[5]

The idea of inalienable human rights is much older. Poets, philosophers and politicians' knew it in antiquity. When in Sophocles' Antigone says to King Creon *"But all your strength is weakness itself against the Immortal Unrecorded laws of God*, "She was invoking the higher law, the law of nature, the natural rights of man".

Human rights have been defined variously over the years, as natural rights,[6] the rights of man, fundamental rights and freedoms. Francisca Sourez defines it as "a kind of moral power which every man has, either over his property or with respect to that which is due to him."[7]

Maurice Cranson is even more assertive in his description of human rights; he says a human right is *"A universal moral right, something which all men everywhere, at all times ought to have, something of which no one may be*

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[5] Cramson M. " What are Human Rights" London Press (1980) P. 26
[6] Paine T. **Rights of Man** Pelican Books (1989)
[7] Finnis J, "Natural Law and Natural Rights", Oxford Press, 1980 pp. 206 -7

deprived without a grave affront to justice. Something owing to every human being because he is human".[8]

According to lovis Henken, "to call them human suggests that they are universal, they are due to every human being in every human society. They do not differ within geography, history, culture, ideology, political or economic system or state of development. To call them rights [he says] implies they can be claimed as of right, not merely appeals to grace or charity or brotherhood or love, they do not need to be earned or deserved.[9]

Lovis' definition would seem to suggest that for rights to be so considered, they must be justiceable, *"ex debito justiciae;* – Accordingly, rights which cannot be realized are not properly so called human rights or rights"

It is manifestly clear from the foregoing that Human Rights are an expression of the inherent dignity and worth of every human being. To deny them is to deny man's very existence and humanity. Judge Tanaka in the **South West Africa cases**[10] is even more poignantly exquisite in his assertion when he says; " A state or states are not capable of creating human rights by law or by convention: they can only confirm their existence and give them protection ... Human Rights have always existed with human beings. They existed independently of and before the state; an alien and even stateless person must not be deprived of them".

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[8] Cranson M. "**What are Human Rights**?" (London, Press, (1980)) pp 5

[9] Hen kin, L "Rights Here and There" 81, Columbia Law Review 1582, 1592 (1981)

[10] ICJ Reports, 1962 p. 319.

Professor Dworkin[11] while recognizing the existence of special circumstances giving rise to the limitation or derogation of such rights is nevertheless emphatic that it is wrong to deny these rights in the absence of proper justification.

The philosophical grounding of human rights presupposes that man has a certain worth, dignity and freedom, which operates to prevent any tragression against individual rights. The dichotomy as to what society is or is not permitted to do in respect of individual members is what is generally called Human rights.

Human Rights have also been viewed as those basic concepts which man has used in various stages of development to enhance his freedom, as well as economic social justice in society. Louis Henkin, asserts that "Human Rights are not mere aspirations, or assertations of good ... or that the benefits indicated are desirable or necessary."[12] Accordingly, once society reorganizes the existence of person's rights, it affirms, legitimates and justifies its entitlement by incorporating them into its system of values or laws.

Similarly, the realization that Human Rights may be infringed upon calls for institutional mechanisms and procedures to safeguard against their violation. Nowhere has these been deemed more apparent than with the emergence, growing currency and influence of International financial and trade

[11] Dworkin, R. "Taking Rights Seriously" London, 1977 pp. 188
[12] Lovis Henkin, "**The Age of Rights**". Columbia University Press New York, 1990

institutions such as the IMF, and World Bank, and the World Trade organization (WTO)

1.2 HISTORICAL ORIGINS AND DEVELOPMENT OF HUMAN RIGHTS

Although it is in the UN-Charter that we first find, the repeated reference to the concept of Human Rights, its origins and development pre-date the 1945 San-Francisco Conference.

The first codifications [if not of the rights of all men, then at least of the nobles of the land,] began to emerge between princes and feudal assemblies. One of the earliest of these came in 1188, when the courts, the feudal assembly of the kingdom of Leon received from King Alfonso the his confirmation of a series of rights. These rights included the rights to inviolability of life, honour home and property.

In the Golden Bull of King Andrew II of Hungary (1222) the king guaranteed among others things, that no nobles would be arrested or ruined without first being convicted in conformity with judicial procedure.

By far the most famous and influential commitment to Human Rights was the English Margna Carta accepted by King John in the year 1215. One of its famous provisions clause 39 states

"no freeman shall be taken or imprisoned ... or exiled or in any way destroyed.... except by the lawful judgment of his peers or the laws of the land" in most modern constitutions this guarantee has been translated into the right to life; that no person may loose his life except in execution of a

lawful sentence. [This guarantee is further fortified by the provisions for secure protection of the law] fair trial etc[13]

In the 17th Century the Rights of Englishmen were successfully fought for with the focus being the English Petition of Rights in (1628) and the English Bill of Rights (1689).

The American Declaration of Independence in (1776), the Virginia Declaration of Rights and American Bill of Rights in (1791) carried the ideas of the Magna Carta and earlier English Documents.

The French Enlightenment philosophers, to a large extent, influenced the American Revolutions, these revolutions in turn inspired the French revolution of (1789) which culminated into the French Declaration on the Rights of Man and the Citizen (1789).

The Russian Revolution of 1917, though inspired by the American and French Revolutions gave these pronouncements a fundamentally different approach. It lay emphasis on economic and social rights in addition to the traditional civil and political rights.

1.3. Beginnings of International concern for Human Rights.

In the period intervening the San Francisca Conference in 1945 a number of notable events occurred in respect to Human Rights and which culminated into the adoption of the UN-Charter. These events are a significant forerunners/backgrounds to the international concern for the protection of

[13] See "**The Kenyan Constitution**", 1981 Chap V Section 71 & 77

human rights and fundamental freedoms; they include the following events and concepts;

a) The doctrine of denial of justice
b) Minimum standards of International justice and state responsibility
c) Exhaustion of Local Remedies rule
d) The Humanitarian laws of war –
e) The treaty of Versailles – Establishing the ILO

1.3.1. Denial of Justice. (D.O.J)

The Doctrine of Denial of justice was developed to protect the interests of aliens (doing business or residing abroad) who suffered injures to their person or damage to their property and who were denied remedies within that country. The doctrine of DOJ embraces the whole field of state responsibility and was applied to all types of wrongful acts on the part of the state towards aliens. In its narrowest sense DOJ is limited to refusal of a state to grant an alien access to its courts.

In an intermediate sense the doctrine of DOJ was used to imply improper administration of civil and criminal justice as regards aliens. This embraced the entire spectrum of a fair trial, inadequate procedures, unjust decisions, and delay in dispensation of justice. The intermediate view of DOJ includes both procedural and substantive denial of justice. A distinction between the two is drawn in the **Cotes–worth and Powell case**[14] where it was established that "unjust decisions" of local courts constituted substantive denial justice.

[14] Cotes worth and power case ICJ (1965)

1.3.2. Minimum Standards of International Justice (M.S.I.J)

This was developed in response to instances of gross denial of justice in respect of aliens. It is noteworthy that at this stage denial of justice was being used in place of or as a synonym to Human Rights violations. Accordingly, states were compelled to ensue that they did not cause the aliens to suffer from any alleged denial of justice (human rights).

The idea of Minimum Standards of International Justice (M.S.I.J) is predicated upon the idea that sovereign states have a right to treat its nationals as they deem fit, but have an obligation to extend differential (if not better) treatment to aliens. It is noteworthy that the idea of MSIJ was advanced by the west, (France, UK, USA etc) and vigorously opposed by developing countries. Attempts were made by Harvard University in the early sixties to codify this traditional law of State Responsibility.

1.3.3. The Calvo Doctrine

The Calvo Doctrine was developed by Latin American countries in response to the preferential/differential treatment approach advanced by the M.S.I.J. The (then) Argentinean Foreign Minister – Carlos Calvo – Strenuously objected to the idea of being compelled to observe MSIJ and instead advocated "***The equality of treatment***" doctrine. Calvo's argument was that M.SIJ and the preferential treatment amounted to assigning to the aliens a special regime in the country thus creating a state within state".

Aliens, he said, had to accept all conditions in the country in which they lived (like all other citizens) and could not complain about such treatmen just as they could not complain about the whether.

The significance of the doctrines' of DOJ and MSIJ as well as State Responsibility is that, although they were developed to protect aliens abroad they evolved into a universal concept upon which claims for human rights violations were later to be fashioned.

It would appear from these developments that the two doctrines no longer had any *"raison d'etre,"* however Dr. Amadror proposed a synthesis of the two principles dealing with the treatment of aliens. He suggested both a minimum and maximum standards in internationally recognizes Human Rights According to Dr. Amoudor's proposal a state was under duty to ensure to aliens the enjoyment of the same Civil Rights and to make available to them the same individual guarantees as are enjoyed by its own nationals. These rights and guarantees shall, in any case, in any case not be less than the "fundamental human rights, recognized and defined in contemporary international instruments.

In other words Dr. Amador sets out the rights defined in international instruments as the very lowest minimum standard while the treatment of nationals was to form the higher standard of achievement. State responsibility for violation of aliens' rights would accordingly be invoked should the standards of treatment fall below international prescriptions.

At this point in the development of International Human Right and State Responsibility, states were already being held accountable for violation of Human rights and fundamental freedoms (enshrined in the 1948 UDHR) of their citizenry or foreign nationals.

Dr. Amador's system thus marks the culmination of the origins of international human rights and paves the way for the latter trends emerging from the new development in International Human Rights.

1.3.4. Exhaustion of Local Remedies

The ELR Rule provides that a state against whom a claim is made by an alien or on his behalf by a foreign state [his State of Nationality] reserves the right to oppose such claim if that alien has not exhausted local remedies available. This rule must be read together with the Calvo doctrine as an attempt to temper the developed countries requirements for MSIJ and differential treatment.

This rule is a favorable preliminary objection by respondent states and gives rise to demand by respondent state that local remedies under municipal law be taken advantage of before resort can be had to International tribunals. This rule has the rational of giving the forum state the opportunity to claim justice through its municipal/domestic courts before being subjected to dispute settlement the charisma under International law. It is also recognition of the sovereignty and jurisdiction of the forum state as competent to deal with the claims through its judicial organs.

The requirement to ELR was cited in the **Interhadel case**[15] with approval of the European court that "before resort may be had to International Court. It is considered necessary that the state [where the violation occurred] should

[15] **Interhandled case**, ICJ Reports, 1959,pp 26-7; ILR, pp. 475, 490

have an opportunity within the framework of its domestic legal system to remedy it".

It has been argued however that E.L.R rule will not apply where.

i) There are no Local remedies to exhaust

ii) Remedies are ineffective or incapable of granting the claimant a satisfactory relief.

iii) The superior court has no jurisdiction to try, vary or overturn decisions of a lower court

iv) The domestic tribunal is merely investigatory (the ELR will not apply).

v) There is a defect in administration of justice.

In the Ambathelos Arbitration case (Greek v UK)[16] It was held that for ELR to be effective the entire system of legal remedies must be put to test. The claims by Greece against contracts signed by Ambatielos was rejected specifically because remedies under English courts had not been exhausted. The aliens had not appealed to the House of lords against the court of Appeal decision.

In the **lawless case**[17] the European court of Human rights held that the court of appeal did not offer any prospects of reasonable success for the purposes of ELR. In the **De:Becker case**[18] it was held that only effective remedies need to be exhausted especially where the court has no jurisdiction to vary

[16] **Ambathelos Arbitration case** (Greek v. U.K) ICJ
[17] **Lawless Case**
[18] **De:Becker: Applic. V Belgium** No. 214/56. pp. 486 - 91

the decision. The claimant was under no obligation to exhaust these remedies.

1.3.5. Other Significant Developments

The treaty of Versailles and other peace treaties, which effectively ended World War I, also established the International Labour organization (ILO). "Although the ILO has specialized work .. it has over the years given practical expression to the promotion of human rights"[19] it has done so through international action, not only in fields traditionally associated with Labour laws, industrial health, safety, welfare, working hours, leave, wages etc) but also in matters of human rights. These areas include, forced Labour, elimination of discrimination in employment, freedom of association and so forth. The ILO is now a specialized agency of the United Nations.

1.3.6. Development of International Humanitarian Right Laws

In the immediate aftermath of the two world wars the Geneva Conventions adopted four protocols additional to the convention.[20] The 1949 Geneva Protocols relating to **The Protection of Victims of International Armed Conflict** (Protocol I) and **The Protection of Victims of International Non Armed Conflict** (protocol II)[21] These Protocols are particularly significant to the development of the regime of rights referred to as International Humanitarian law (relating to rules of Armed and non armed conflict/war)

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[19] Lan Brownline: **Principles of International law** Oxford Press 1998, pp. 572.

[20] 1949, Protocols, Additional to the Geneva Conventions (12 August 1949, Relating to **The Protection Victims of International Armed conflict** (Protocol 9) and protocol II International non armed conflict of 8th June 1977.

[21] Supra note 20

Also adopted was the Convention for the Amelioration of Conditions of the Wounded in Times of War,[22] which created the international Red Cross, enabled development of laws of humanitarian's intervention and humanitarian assistance.

1.4 THEORIES AND IDEOLOGICAL APPROACHES TO HUMAN RIGHTS

1.4.1. The East West ideological Divide on Human Rights

The regime(s) of human rights have traditionally been divided into.

i) First generation Rights – The civil and political Rights

ii) Second Generation – Economic, social and cultural rights

iii) Third Generation – Group rights.

After the Second world war and creation of the socialist states the above two rival philosophies competed for adoption by the United Nations. On the one hand was essentially the western view that what individual needed to be guaranteed, was freedom to carry out his civil and political life as he wished without state interference. The socialist view by contrast was the presupposition that freedom from hunger and deprivation (the economic, social and cultural rights) were the basic rights. It is against this background that the United Nations chose to adopt both protocols, the ICCPR and ICESCR.

[22] Ibid

The African Charter[23] however presents a synthesis of these two ideological views, it adopts what has been referred to as third generation rights, and amalgamates them with the First and Second generation rights. The third generations of rights are group rights, and include the right(s) to development, self-determination, peace and minority rights. This Third regime of rights under the African Charter further includes another unique attribute of duties and obligations on the individual.[24]

There are two interesting points to note about the First and Second generation of rights; Originally it was thought that the crucial distinction between the First and Second generation of rights was that all the state needed to do in respect of the civil and political rights, was to refrain from interference, and in respect of the social and economic rights what it needed to do was to actively provide these rights. In reality, jurists now agree, that the state is required to take steps to safeguard and guarantee both.

Secondly, it has been assumed that civil and political rights were primarily held by individuals while the social and economic rights were to be guaranteed to groups. In both cases it has been argued that neither of them can be held on enjoyed in isolation. It is against this background that we now undertake an exposé of the theories informing Human Rights

1.4.2. Natural Law School

The history and development of human rights is very closely associated with the natural law theories.The Greek Philosophers postulated the existence of

[23] African Charter for Human and Peoples Rights
[24] Ibid

certain fundamental principles of justice based on the theory of natural law – they emphasized reason as emanating from man, a creature of a universal God. The origins and nature of human rights are thus traceable (by some philosophers) by reference to God and the nature of man. According to Thomas Hobbes, mans basic needs or instinct was self preservation, this is because man's life is "nasty, brutish and short."[25]

Another thinker John Locke envisaged that "man in his original state of nature lived in freedom and sought his own good as well as the good of others … mans main task became protecting his life liberty and property.[26]

Immanuel Kant on the other hand argued that human rights emanate from "the very nature of man. They came before the state and are not dependent on any act on the part of the state." Judge Tanaka in the **South West Africa cases** adopted the above position.[27]

John Lock pursued the notion that "natural rights were interpreted in terms of a social contract where man yields some of his rights to the sovereign"[28] This enables the sovereign to preserve order and enforce laws of nature. He however retained residuary rights to question the exercise of this privilege by the sovereign. This became known as the idea of popular sovereignty in which the actual sovereigns were the people in the collectivity.

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[25] Hobbes T. **Levithian** (Oxford, Blackwell 1957(ch. 21.
[26] Lock J. **The Second Treatise Of Government** oxford, Blockwell 1966)
[27] op cit no. 5
[28] Locke J. '**An Essay Concerning The True Original Extent And End Of Civil Government**, London, oup, 1960

Natural law has been criticized for being based on some immutable unverifiable principles incapable of scientific or empirical proof. This criticism led to rise of Legal positivism, or positivism.

1.4.3. Positive law school

The proponents of positivism who include John Austin, Hans Kelsen and Jeremy Bentham argue that law is a command from the sovereign backed by some form of sanction. On the same token positivists have maintained that natural law is not law[29] properly speaking because it has no determinate superior or sovereign.

Positivists believe that "the will and action of the state is the direct source of human rights. Accordingly the human rights embodied in natural law are neither laws nor rights" [30] [perhaps just mere moral aspiration]

Betham is even more direct in his rejection of natural law, he says that" a right is a child of the law.... real rights come from true law but from imaginary laws only comes imaginary rights.[31]

In the **South West African cases** judicial recognition was given to this positivist position by rejecting view the view that "humanitarian considerations are sufficient in themselves to give rise to legal rights and obligations ... for such rights to exist they must be clearly vested on those

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[29] Bethan J. **Anarchial Fallaces** (quoted by Ezegio for op. cit (pp11)
[30] Szabo .. I., "**Theoretical foundations of human Rights**" pg. 11 in Eide and schoe, internation Protection of Human Rights 1968 p. 137.
[31] Supra Note 29

who claim them, by some text or instrument or rule of law". [32] Positivist critics have responded by stating that human rights are not so perceived because of some legal stipulation or legal instrument/treaty or convention. Positivism is only instrumental, they say, in so far as it helps identify the precise rights to be protected.

1.4.4. Marxist/ Socialist Theory

The socialist theory of rights is predicated upon the principle of "a classless society as the ultimate Good of man, accordingly they have rejected the argument that the rights of man spring from his nature.[33] Marxist theory emphasizes the socio-economic conditions prevailing in a given society as the force creating or shaping human right.

Marxist postulates advance the thesis that citizens have rights depending on their class and position in society. The socialist school unlike positivists and naturalist, subscribed to social and economic rights as opposed to Civil and Political Rights. The enjoyment of civil and political rights, they say depends on the Economic and Social Rights.[34]

The people, it is said, cannot be truly liberated if they cannot obtain adequate food, clothing and shelter. According to the Marxist theory, true liberation lay in liberation from capitalist domination and elimination of exploitation of workers. True freedom can only be manifested in the absence of all sorts

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[32] I CJ Reports, 1966 E pp 248
[33] FIV 27KM (ch 2)
[34] Supra note 22 at pp. 162

of exploitation. The leading Marxists thinkers were, Karl Max, Fredrick Engles, Hegel and Joseph Stalin.

1.4.5. The Historical and Sociological Approach

The history of mans struggle to create a free and just society, limited government and political powers, is very closely associated with history of human rights. The Historical School associates human rights to the society and its institutions. When a society recognizes that a person has a right, it affirms, legitimates and justifies the entitlement and incorporates or establishes it in the society's system of values. This inclusion or accommodation of rights enables human rights to compete in the hierarchy of societal norms, or values.

Once Human rights, become part of society's' norms, impose an obligation upon society to satisfy those claims. It must develop institutions, mobilize procedures and resources to meet these claims.

1.5. Development of International Concern for Human Rights

The immediate origin of international concern for human rights began in ernest in the post second world war period. The combined effect of the two world wars was such as to shock the world into the realization that respect for human rights and fundamental freedom would have to be the foundation of the new world which the League of Nations wanted to create.[35]

[35] Mbaya W. Fundamental Rights and Freedoms, LLM Thesis, 1993.

1.5.1 The Universal Declaration of Human Rights[36]

The Universal Declaration of Human Rights was adopted by the United Nations General Assembly through resolution 217 A (iii) of December 1948. It was proclaimed a common standard of achievement for all People and all Nations.

This Declaration, (though not an international treaty giving rise to binding obligations upon member states) has nevertheless been looked upto as the benchmark upon which the protection of human rights is gauged. It has been described as the first occasion on which the organized community of nations made a common declaration on human rights and fundamental freedoms. It is a document which millions of people, men, women and children all over the world were to turn to for help, guidance and inspiration.

In the **Corfu channel case**[37] it was held that "provisions of the **UDHR**[38] [though not a legally binding instrument] constitute general principles of law" The Declaration has also been invoked as an aid to interpretation of the **European Convention for the Protection of Human Rights and Fundamental Freedom**[39] as was the case in the **Golder case.**[40] The ICJ has similarly used the **UDHR** as an aid for interpretation in the case concerning **The United Nations Diplomatic and consular staff in Tehran**[41] where the issue before the ICJ was the detention of hostages in condition of hardships.

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[36] Ibid out op 36
[37] ICJ Reports (1949) 4 at 22
[38] **Universal Declaration of Human Rights,** (1948), UN Dos. A/27
[39] ECHR, ETS No 5
[40] ICJ Reports (1980) 3 at 42 (Para 91)
[41] ICJ Reports (1980) 3 at 42 (Para 91)

Article 1 of **UDHR** which is based on natural law principles declares "*all human beings are born free, equal in dignity and rights.. that they are endowed with reason and conscience ...*"[42] In adopting this natural law position the UDHR reiterates the rights to freedom, liberty and equality as man's birth right and the foundation of all other freedoms. Article 3 on the other hand sets out the cornerstones of the Declaration; the rights to life, liberty and security of persons. This Article sets the tone for Article 4 –21 which catalogue what are the civil and political rights and include inter' alia freedom from slavery, torture, cruel and inhuman treatment, arbitrary arrest, non interference with privacy and family, right to found a family freedom of thought, conscience religion, expression and assembly.

Article 22 sets the pace for realization of the **Socio – Economic and Cultural Rights** by guaranteeing these set of rights, which are "indispensable for the dignity, and free development of the human personality."[43]

What flows from article 23 – 27 have been referred to as Second generation of rights; they are inter' alia the right to social security, work, equal pay, rest and leisure, healthcare and education.

Article 29 and 30 create, at once, duties and responsibilities upon the individual. It circumscribes the rights of the individual in so far as

i) It affects the enjoyment of the rights of others

ii) Other limitations that may be imposed by the law.

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[42] The **Universal Declaration of Human Rights** (1948) UN Doc. A/217

[43] Ibid, Article 22

The Universal Declaration represents the soft law aspect of international human rights development. This paves the way for the two protocols representing hard law international human rights treaties; [The two 1966 protocols; the International Covenant on Civil and Political Rights and the International Covenant on Economic Social and Cultural Rights.]

1.5.2 Charter of the United Nations

It has already been pointed out in this chapter that even though the United Nations Charter[44] only makes seven ambiguous references to Human Rights and fundamental freedoms, these references form the basic principles upon which the "Declaration on the Essential Rights of Man" are founded.

We have also mentioned that there was no time at the San Francisca conference in 1945 to specifically articulate these rights. This task was later to be undertaken by the commission on human rights established under article 8 of the **UN Charter**[45] and which began work in 1946. This commission later submitted its recommendations to the Economic and Social Council.

In its recommendations it suggests two documents one inform of a Declaration (later) adopted via resolution 217 A (iii) by the UN General Assembly [as the Universal Declaration of Human Rights[46]] and the other in form of specifically defined rights [in form of the two 1966 Covenants ICCPR and ICESCR].[47]

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[44] Charter of the United Nations (1945), 892 UNTS, P. 119
[45] Ibid
[46] Supra Note 38
[47] ICCPR...see also ICESCR.

The preamble to the United Nation Charter makes a very powerful reference to the effects of the two world wars and sets out, as its basic aim " to save succeeding generations from the scourge of war, which twice has brought untold sorrow to mankind".[48]

The Charter makes seven references to human rights and fundamental freedoms, which we shall presently consider.

The preamble "reaffirms faith in fundamental human rights, in equal rights of men and women. **Article 1(3)** "defines the United Nations objectives to include co-operation in promoting and encouraging respect for human rights and fundamental freedoms without distinction as to race, sex, religion" e.t.c.[49]

In **Article 13(1) 6** functions of the United Nations General Assembly are defined to include "promoting international co-operation ... in the realization of human rights and fundamental freedoms for all ..."[50]

The other reference to human rights is found in **Article 55** dealing with International Economic and social co-operation, here respect for the principles of equal rights, universal respect for the observance of human rights and fundamental freedoms for all, is considered necessary for the creation of peace, stability and friendly relations.

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[48] Supra Note 45
[49] Lan Brown line, **Principles of Public International Law** 5th Ed. Oxford Press, 1998.
[50] Supra note 45

Chapter X deals with the Economic and Social council and in **Article 62** the Council may make recommendations for the "purpose of promoting respect for and observation of human rights and fundamental freedoms for all" The commission may also under **Article 68** establish or set up commissions in "economic and social fields for the promotion of human rights ..."

Lastly, **Chapter XII** establishing the International Trusteeship system provides as one of its basic objective in **Article 76** the need "to encourage respect for human rights and fundamental freedoms..."

It is arguable whether states may be called upon (in the absence of any other specific treaty obligation) "to account for any alleged infringement of the generalized provisions of the United Nation Charter ... there, however, exists a duty to account where a substantial infringement of its provisions occur affecting a class of persons and revealing a pattern of activity against the perpetrator"[51]

In the **Advisory Opinion on Namibia** [52] article 5 of the Charter was interpreted as creating an obligation upon member states, this is an indication that the notion that the Charter creates no legally binding obligations upon states, may in some instances be unfounded.

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[51] Supra Note 45
Op. cit Browline pp. 514
[52] ICJ Reports (1971) pp. 56-7

1.5.3. The International Covenant on Civil and Political Rights. (ICCPR)

The ICCPR referred to buy jurists as first generation regime of rights [the civil and political rights] "is more specific in its delineation of rights, stronger in its statements of obligation to respect the rights specified there under and better equipped with means of review and supervision "[53] The 1966 covenants set out to "recognize that these rights derive from the inherent dignity of the human person."[54]

Article 4 of ICCPR gives states the authority to derogate from provisions of the covenant in "public emergencies which threaten the life of the nation and its existence, provided such measures are not inconsistent with other international law obligations"[55]

Article 6 onwards guarantees the right to life, freedom from torture and inhuman treatment, slavery, forced Labour, freedom movement, conscience and religion freedom of thought and expression, assembly, right to fair tria etc. It is a reflection of the provisions of the UNDH (Articles 3 – 21)
Article 2(2) enjoins state parties to take necessary steps in accordance with its constitutional process ... to adopt such legislative or other measures ... to give effect to the rights recognized in the present covenant."[56]

[53] See Brownline pp. 577
[54] Ibid
[55] International Covenant on civil and Political Rights (1966) 5
[56] ICCPR, Supra note 15, article 2(2)

There is an obligation on member states to ensure that persons whose rights are infringed shall have an adequate remedy even if the infringement in question has been perpetrated by a state official.[57]

It is noteworthy that the ICCPR has a complaints procedure through which complaints may be brought for non-compliance. This provision is however subject to the exhaustion of local remedies. This procedure is coupled with the optional protocol[58] to the ICCPR, which allows individual complaints through the commission on Human Rights.

A state accused of violations is required to submit a written explanation or statement clarifying the matter and the remedy it proposes to undertake. The committee then forwards its views to the state and the individual. The procedures are confidential and "no public determination of the issue on a judicial or quasi judicial basis is made."[59]

The ICCPR and ICESCR mark the interface between the soft law provisions of the UN Charter and UNDHR and the dawn of a new regime of "hard law" treaties, which are considered more specific and specialized in particular areas of human rights.

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[57] ICCPR supra note 16 Article 2(3)a

[58] Optional Protocol to the ICCPR, 999 UNTS 171, 61. ILM

[59] Brownline op cit pp. 577., see however 383 (1967) the European convention for protection of human rights and fundamental freedoms, (1950) ETS no. 5

1.5.4. The International Covenant on Economic, Social and Cultural Rights.

The ICESCR[60] marks the second generation of human rights found under Articles 22 to 27 of the **UDHR**. These second generation of rights are phrased in terms of rights rather than freedoms. As opposed to the civil and political rights (in which the state was erstwhile only required to refrain from interference) the social and economic rights require that the state takes a positive step to provide or guarantee them. They are referred to as collective or group rights by virtue of the fact that they accrue to human being in there collectivity. These regimes of rights under ICESCR include the right to social security, work, equal pay rest, leisure, healthcare, education and participation in the cultural life of the community.[61] Like the ICCPR, Article 4 of ICESCR reiterates that these rights may be derogated from, but only in so far as is determined by law. Article 5 further states that 'no restriction upon or derogation from any of the fundamental rights existing by virtue of law, convention or custom, will be permitted on the pretext that the present convention does not recognize such rights."

The ICESCR has been criticized for not phrasing these rights in absolute terms. Critics have argued that the terms "*undertakes to ensure*, or *recognizes, or undertake to respect*." do not form a firm basis upon which individuals may claim these rights in the event of breach. In other words they are not justiceable rights giving rise to legal obligations. State practice

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[60] International covenant on Economic, social and cultural rights, 16, 1966, 993 UNTS 3.

[61] ICESCR, Supra, article 6 - 15

reveals that member states have responded to these "obligations" only in so far as their circumstances, economic or otherwise have permitted.

1.6. Regional Instruments on Protection of Human Rights

It is imperative that we consider briefly the following regional instrument on human rights in so far as they contribute to the entire gamut o International Human Rights Development

i) The European Convention for the Protection of Human Rights an Fundamental Freedoms.

ii) The American Convention on Human Rights

iii) The African Charter on Human and People's Rights.

1.6.1. The European Convention for the Protection of Human Right and Fundamental Freedoms

The **European Convention**[62] was created, after its adoption by the Counc of Europe in 1950. Its creation was inspired by the Charter of the Unite Nations and the UDHR in the International protection of human rights an fundamental freedoms. This convention, which has five additiona protocols, represents the most elaborate regional protection of human right yet.

One distinctive feature of the European convention was the creatio alongside it of a court of human rights. This enabled it to develop what i now considered the largest body of law, judicial and arbitral decisions, o the protection of human a rights, and fundamental freedom.

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[62] European Convention For the Protection of Human Rights and Fundamental Freedoms, (1950) ETS, no. 5.

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The European court however like all other regional courts after it, is limited, in terms of jurisdiction, to those states which accept its jurisdiction. It is noteworthy though that eleven states have, thus far, accepted its compulsory jurisdiction.

Article 19 of the convention establishes a human rights commission and the human rights court to which "any party may refer alleged breaches of the provisions of the convention."[63]

The commission "may receive petitions from any persons or individuals, non-governmental organizations, or groups of individuals claiming to be victims"[64] however article 25(1) of the convention requires the "high contracting party against whom the complaints is lodged, to declare that it recognizes the "competence of the commission to receive such petitions."

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[63] Malcom shaw, "International Law, 4th Ed, Cambridge 1997, pp. 211; see also Browline, pp. 57

[64] Brownline, Ibid at pp. 579

The second limitation of the convention is found in Article 26, which requires that local remedies be exhausted before the commission may deal with the matter. This requirement for **ELR** is further complicated by requirements that such complaints be lodged within six months of the final decisions; this operates as a statute of limitation and may act as a bar to certain human rights violation. The ELR rule has been regarded by some as a useful safeguards and is adopted by the African Charter and the American Convention on Human Rights.

1.6.2. The American Convention on Human Rights (IACHR)

The American Convention on Human Rights[65] was adopted in 1969 and is responsible for the establishment of the **Inter American Commission on Human Rights.** The **IACHR** together with the Inter American Court on Human Rights are organs of the American Convention.

The **IACHR** "was created in 1960 as an organ of the organization of American states, with the principle aim of promoting respect for human rights".[66]

Article 44 of the commission provides for jurisdiction to hear complaints against parties by individual petitions provided a declaration is made in terms of Article 45 recognizing the competence of the court.

The American Convention, which draws heavily from the European Convention, has a membership of twenty-five states (25) and only American states have a right to be parties. The convention is inspired o

[65] American Convention on Human Rights, (1969) ILM, p.673
[66] Brownline, op cit at 580

predicated upon the "American Declaration of the Right and Duties of Man."

1.6.3. The African Charter on Human and Peoples Rights (ACHPR)

Unlike other international and regional instruments the **African Charter**[67] also referred to as the **Banjul Charter**, lays emphasis on the state in protection of human rights. The Charter advances a *third generation* of human rights which is a mixture of the civil and political, the economic social and cultural as well as a unique group of rights; the development and self Determination; rights of children, women and the family as a whole.

However the most unique attribute of the Banjul Charter is its insistence upon duties and obligations on the individual. In this regard it departs from other international instruments whose obligations rests purely on the state to either, refrain from interference or provide and guarantee (in the case of second generation rights) the protection of human rights.

The ACHPR was adopted by the organization of African unity on 17th June 1981 and entered into force on 21st October 1986.

In terms of outfit, it borrows heavily from the European Convention, however in respect to enforcement mechanism, it must be noted that, the African Charter does not provide for, a court of human rights. It instead adopted a conciliatory approach towards settling of cases of human rights

[67] The African Charter for Human and Peoples Rights

violations. It has been argued in this regard (rightly or wrongly) that the western style of dispute settlement or adversarial court system is against the African style or system of values.

An amendment to the African Charter has however been made to establish an African Court for human rights, this has received three signatures thus far and requires 15 to enter into force.

CHAPTER TWO

THE RIGHT TO SELF-DETERMINATION AND DEVELOPMENT

2.0. Introduction.

The essence of this chapter is to draw attention to the right to self-determination and the right to development to which it is contiguous. This analysis is a useful precursor to the examination of the role of International Institutions in the protection of human rights [in the world economic and trade order] and which will be considered in chapter three

2.1. The Right to Self Determination

The development of the right to self-determination began in early 1950's and 1960's at the behest of socialist countries and with the support of developing countries, which had already achieved independence. It was then that the principle of self-determination was first invoked to legitimize the termination of colonial rule.

The right to self-determination has always been a controversial principle especially as a legal justiceable right. Its early development has been more of a political rather than legal principle. In 1919 this principle found expression in the Peace Treaty and subsequently in 1941 in the Atlantic

Charter. A similar recognition can subsequently to be found in the 1943 **Cairo Declaration.**

However the most eloquent expression, yet, of self-determination is found in the Charter of the United Nations. Article 1(2) provides that "peace and friendly relations among nations should be based on respect for the principle of equal rights and self-determination.[68] There is no positive indication from the provisions of Article 1(2) that this right gives rise to a legally justice able right. This chapter seeks to trace the development of the Right of self-determination as a legal right both in its external and internal expression. An attempt will be made to draw a close parallel between this right and the right to Development. We will also evaluate some of the emerging trends in self-determination as a human rights principle available to 'peoples' in the post-colonial era.

No evidence exists, in the period intervening 1920 and 1945 that self-determination had evolved into anything more than an expression of the political will of different nations. Accordingly, it may be argued that the UN-Charter provisions on self-determination are not a codification of pre-existing customary international law. It's development into a legal right must therefore be regarded as having evolved through state practice and the scores of United Nations Resolutions.

The wording of Article 1(2) of the Charter by espousing, "respect for the principles of equal rights and self determination" ostensibly creates no mandatory obligation upon member states. The absence of customary

international law in this area has been used to justify this position. Writers on self-determination have therefore turned to the UN resolutions and state practice for an insight into the evolution of this controversial principle.

2.2. Defining Self Determination

Dr. Rosalyn Higgins defines self determination as "the right of the majority within an accepted political unit to exercise power..."[69] This definition, by placing a higher premium on right of the majority, seems to be oblivious of the right of minority groups, (ethnic, religious or linguistic) to exercises the right to self determination.

The African Charter article 2(1) however asserts that "all people shall have the unquestionable and inalienable right to self determination..."[70] Article 20 (2) qualifies the term 'all peoples" by an express reference to "colonized people" having the right to free themselves from the bonds of domination. Article 19 is even more emphatic in its affirmation that "all peoples are equal, have equal rights and that nothing justifies the domination of a people by another."[71] It emerges that a definition of self-determination inevitably involves, the unenviable task of defining who constitutes "a people".

A positivist's interpretation of Article 1(2) of the Charter of the United Nations[72] indicates that the right to self-determination was contemplated to be in reference to people under colonial domination and foreign occupation.

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[68] Charter of the United Nations (1945), 8892 UNTS, P.119
[69] Dr. Rosalyn Higgins " International Law" (1985) London P.218
[70] African Charter for Human and Peoples Rights
[71] Ibid, Article 19
[72] Charter of the United Nations

This presupposition is backed by the historical context and period within which the founding fathers wrote the Charter of the UN. It has been argued in both contexts that the UN-charter and the African Charter's" reference to people, put in historic context, did not put into contemplation the rights of minorities, ethnic, religious or linguistic; 'a people' was regarded simply as a group of people forming " a nation state.

Accordingly, we would submit, that had the architects of the UN-Charter and the African Charter for Human and Peoples Rights intended the right to self determination to accrue to such minorities, nothing would have been easier than for them to say so.

However as we will discover in the latter development of this right [especially post independence], it became inevitable to look beyond the collective right of the so-called "people", to the protection of group rights as well. This however has been as controversial as the right to self-determination itself.

The right to self determination has also been conceived as consisting of "the rights of a community which has a distinctive character and a desire to have this character reflected in the institutions of government under which it lives[73]

[73] Ibid

Dr. Sornaragah suggests that the right to self determination arises out of circumstances of oppression and is therefore synonymous with human rights."[74] This position is supported by the sentiments of judge Ammoun who in the **Namibia Case** suggests that "the right to equality is a primordial right which cannot be alienated, this freedom is exercisable on an international plane by 'people "in search for their self determination."[75]

Summary

The right to self-determination necessarily reflects its own developments in various epochs of history and the historical context in which jurists have sought to define and delimit its scope and application. It includes, generally speaking, the legitimate rights of people within a defined territory or political unit. The people's aspirations include the right to equality as between themselves on the one hand and between them and other sovereign entities on the other. As will become apparent later in this chapter the right to self-determination is divided into two; external and internal self-determination.

2.3. Characteristics of Self-Determination.

i) A people acceding to independence where that status is denied by colonial domination,

ii) A people dissolving political ties with their own internal sovereign to form their own state

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[74] Dr. Sornaragah paper presented at a Human Rights Conference, Dakar 1976

[75] Namibia case ICJ Reports, (1975) pp. 16

iii) A peoples' right to associate or merge with another sovereign state or entity.

iv) A peoples' right to replace racial domination with a representative government (where i to iii above is not desirable.)

The right to self-determination will arise anytime where racial, colonial, foreign, or military occupation or domination precludes the exercise of free will, choice and expression of "the people".

2.4. The legal status of Self-Determination

Crawford James' assertion that "*the appeal to the right to self determination is precisely that an appeal to a right*,"[76] strikes the key note and principle dilemma pitting on the one hand jurists who have argued that self determination amounts to little more than a political principle in independent states, and those postulates advancing the view that this right survives independence claims by colonial states.

Crawford advances the view that "a right has no meaning, unless, first of all we can determine the bearers of the right and the persons who are obliged to respect it. Secondly unless we can give the right some content.[77] James Crawford while recognizing the difficulty of classifying self-determination as a purely legal principle concedes the fact that, though self-determination does not give rise to real rights, it nevertheless is not entirely "non justiciable".

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[76] Crawford James (2001) **The Development of the Right to self Determination**. In Philip Alston, Peoples Rights, UK, Oxford Press (2001)

Self-Determination, Crawford posits, amounts to soft law which may have a directive function, in so far as it influences legal discourse, but is nevertheless not binding. He considers the principles of self-determination a legal value rather than a legal norm. Self-determination cannot, properly so called, be categorized as ***lex lata*** (settled law).

We submit that even though self determination (as conceived in the charter of the Untied Nations and the International Covenant for Civil and Political Rights)[78] may arguably form the basis of what constitutes ***lex lata***, the provisions in many ways give rise to a paradox ***lex lata***, ***lex obscura***, or put another way, the seemingly settled law, is itself riddled with a great deal of obscurity and uncertainty; it is a right that is in constant flux and highly transient.

2.5. The problem of justiciability

One of the abiding questions that constantly besets the legal status of the principle of self determination is that "the notion is so radically indeterminate and in constant flux.[79] The International Law Commission is itself responsible for the emerging jurisprudence on self-determination as a legal justiceable right. This, it has done, by making constant appeal or references to self-determination in numerous judicial and arbitral decisions.

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[77] Ibid
[78] International **Covenant for Civil and Political Rights** (1976) 6, ILM
[79] Jenning "**The Approach to Self Government** (1956) P. at. 56.

In the **South West African cases**[80] the ICJ invoked the principle of self determination as a matter of public interest and as a principle of ***erga omnis*** character. The court revoked South Africa's authority over the mandate for south west Africa. In so doing the court cited the **Namibia Opinion (case)**[81] arguing that "there was a decisive move in the period intervening 1961 to 1971 in favour of treating self determination as part of international law."

The other mediums responsible for the development of self-determination as a legal justiceable right are the United Nations General Assembly resolution. Accordingly, it is imperative that we turn to them for guidance because they have, to a very large extent helped shape state practice in the years intervening 1961 and 1971.

2.6. UN- General Assembly Resolutions.

The United Nations resolutions on self-determination specifically fall within the general category of recommendations. Article 10 of the **UN Charter** [82] provides that "the UN-general Assembly is empowered to make recommendation to members of the UN and the security councils on any question." Seen in this light, the above provisions the UN resolutions, cannot perse constitute the basis of a legal right or claim, itself creating or giving rise to obligations upon member states.

However, the fact that resolutions, especially those of the security council, carry a very powerful, persuasive force coupled with the fact that these

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[80] ICJ Reports (1962) 128

[81] ICJ Reports (1971) 12 see also, Crawford James, "**The Rights to self Determination International law**, in Phillip Alston "**Peoples Right** (2001) Oxford press.

[82] Supra note 4, Article 10

resolutions form the basis upon which the International law Commission (ILC) codifies international law, means that resolutions occupy a very special and strategic position in terms of influencing future trends in International law.

Article 13(1) seems to confirm this notion in its provision that "the general assembly shall initiate studies and make recommendations for the purpose of promoting international co-operation in the political field and encouraging the progressive development of International law and its codification."[83]
It is instructive that in the hierarchy of the so-called "*soft law,*" resolutions, rank highest (or ahead of declarations which tend to be more generalized). They are a final stage before the making of "hard law" treaties. It is in this regard that "UN resolutions under the UN-system have acquired a coercive force or nature..." Accordingly resolutions irrespective of their (initial) recommendatory nature, coupled with state practice, from part of the corpus of customary International law. It is against this background and in view of the preponderance of authority in support, that resolutions and recommendations are regarded as being of a quasi-legal nature.

Judge Ammoun in **The Namibia case**[84] asserts that self-determination like "... pacts, declarations, and resolutions taken as a whole epitomize the unanimity of states in favour of the imperative rights of peoples to self determination.... there is, not one state which has not [at least once] appended its signature to one or other of these texts or which has not supported it by its vote."

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[83] Ibid, Article 13 (1)
[84] Supra note 15

A further indication that self-determination is now considered a legal right is found in comments by the rapportuer to the UN committee on the 1971 **Declaration on Friendly Relations Between States.**[85] Where the rappotuer said "Nearly all representatives who participated in the debate emphasized that the principle of self determination was no longer to be considered a mere moral or political postulate, it was rather a settle principle of modern international law. It has been suggested that self determination is now a norm of jus cogens".[86]

2.6.1. UN-Resolution 1514 (xv) On Granting of Independence to Colonial Countries and Peoples[87]

This was the first of the UN-resolutions to be adopted in relation to the right to self-determination. The resolution brought out the following salient issues.

i) All peoples subject to colonial rule have a right to self-determination and are free to determine their political social and economic status.

ii) The right relates to external self-determination that is the right of a people to choose the International status of their people and territory where they live.

iii) The right belongs to the people as a whole; if the population of a colonial territory is divided into ethnic groups or nations, they are not at liberty to choose for themselves their external status.

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[85] Declaration **Concerning Friendly Relations Between States**, UN. Res. 2625 (XXV), 24th October 1970.
[86] Ian Brownline; **Principles of Public International Law,** (5th Ed) 1998 Oxford.
[87] General Assembly Res. 1514, Dec 14th (1960), UN year Book, 1960 49 ff.

iv) Paragraph 6 states that "any attempt at the partial or total disruption of the national unity and territorial integrity of a country is incompatible with the purposes and principles of the Charter of the United Nations.

2.6.2. UN-Resolution 2625 - Declaration on Friendly Relations[88]

This resolution asserts the rights of racial or religions minorities to self-determination but makes no indication as to whether this right extends to external self-determination as well. By placing the requirements not to impair the territorial integrity of the state, it may be argued that the 1970 resolution invariably precludes external self-determination or cessation.

The provisions of the 1970 declaration however contains a saving clause, which admits, albeit impliedly, to the possibility for impairment of a state where "*a state does not conduct itself in accordance with the principles of equal rights and self determination of a people*".[89] Accordingly, it has been argued that the saving clause makes an allowance for cessation or external self-determination. This implicit authorization must however be conservatively construed within certain specific circumstances.

i) Where a state persistently refuses to grant participatory rights to religious or racial groups

ii) Where a state grossly and systematically tramples upon their fundamental rights and

iii) where there is no possibility of a peaceful settlement within the established structures.

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[88] General Assembly Res 2625, (1970)
[89] Ibid

2.7. Hard Law Treaties On Self Determination (The 1966 Covenants)

Moving away from the UN-Charter and resolutions constituting *soft law*, it is imperative that we briefly consider the 1966 protocols in so far as they help shape the principle of self-determination. The two protocols mark a departure from the "soft law" approach of the UN to a regime of "*hard law* treaty making which properly speaking, create binding obligations upon member states.

2.7.1. The International Covenant on Civil and Political Rights.

Article 1(1) provides that "all people have the right to self determination by virtue of that right they freely determine their political status and freely peruse their economic, social and cultural development."[90]

Article 1(3) "the states parties to the present covenant including those having responsibility for the administration of non self governing and trust territories, shall promote the realization of the right of self determination and shall respect that right, in conformity with the provisions of the charter of the united nations"

The ICCPR makes the following specific provisions with respect to the right to self-determination:

i) Adherence to and safeguarding of the freedoms in the covenant

ii) right to take part in the conduct of public affairs

iii) right to vote and be voted for

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[90] International Covenant on Civil and Political Rights, (1976), 6 ILM p. 368See also the International Covenant for Economic Social and Cultural Rights (Article 1) Dec 16th (1966), 993 UNTS 3

2.7.2. The International Covenant On Economic Social and Cultural Rights [91] at Article 1(2) makes similar provisions and jointly read with the ICCPR form the backbone of the Right to Self Determination as a legal Right giving rise to obligations enforceable against states.

2.8. Internal Self Determination

Whereas the architects of the UN Charter and the two Covenants envisioned it as a legal right, it has long been settled that this was in light of countries under colonial domination and foreign military occupation. This right, the right to external (we might add) self determination is extinguished upon attainment of independence or the exercise of choice through a plebiscite to unite with another state or split into separate states

It has been argued that by voting overwhelmingly to remain united under the republic of Canada, the Quebecois exercised, through a plebiscite, their right to Self-Determination. This case raises pertinent issues regarding internal self-determination, which we will return to presently. First it will suffice to underscore two issues; in a properly constituted Nation state the right to Self-Determination is not a legal justice able right. Secondly, that the provisions of certain guarantees (liberties and freedoms) i.e. right to elect a representative government through frequent elections, free will to develop their cultural, social and religious beliefs, meets the demands of internal self determination.

[91] The International Covenant for Economic Social and Cultural Rights, Dec 1966,993, U.N.T.S 3

In the **Aaland Island Case** [92] the issue before the commission of jurists (of the League of Nations) was "Whether inhabitants of the island situated in the Baltic Sea (off the Swedish Coast.) Were free to secede from Finland and join the kingdom of Sweden. Finland vigorously contested this claim asserting that this was a matter within the domestic jurisdiction of Finland. It was held that the matter was within the jurisdiction of the League of nations, not because of any alleged right to self determination, but rather because Finland, at the time, was in flux and was not a definitely constituted state. The Jurist ruled that the Islanders should remain within Finland's jurisdiction but that Finland increases guarantees granted to the islanders.

The right to internal self-determination in modern jurisprudence has been associated with **popular governance and representative government**. "The peoples in exercise of this right are entitled to have an elective government; freedom of choice and expression. It has been held that the right to internal self-determination is not a one-stop shop. Unlike external self-Determination, (which once exercised is extinguished) entails legitimate lively dissent and testing the popular sovereignty of its government at the ballot box with frequent regularity.[93]

Thirdly, that the provision of these rights are, in the absence of adverse extenuating circumstances, within the domestic jurisdiction. In the **Canadian Quebecois case**, where more guarantees were given to Quebec through the Meech Lake Accord, (To have more budgetary freedom, right

[92] Aaland Island Case (Finland V. Sweden) ICJ (1920)
[93] Antonia cases "**The Self Determination of Peoples**" A legal Re-appraisal" London 1995, Cambridge press.

to participate in the appointment of judges of the Supreme Court, eloquently demonstrates this point.

We can now begin to see that a clear dichotomy exists under international law between internal and external self-Determination. Internal self-determination is a matter within a states' domestic jurisdiction. It is co-evil with a people rights to popular governance representative government and freedom of expression, association etc.

It will be evident in subsequent cases that "Only when a state is in manifest violation of the peoples freedoms, or oppresses its minority or other groups, or proves utterly powerless to implement safeguards of protecting them, can a claim to internal self determination be legitimately invoked as a legal right. **The above case should be distinguished from other judicial and arbitral decisions where self-determination has been in question.**

In the **Gibraltar Case (Spain and United Kingdom)**[94] the concern was over the Rock and Harbor of Gibraltar ceded by Spain to Great Britain under Article (x) of the Treaty of Utrecht in 1713, contingent upon Spain's right to oppose any attempt to alienate or cede it. The Gibraltar case raises two important issues of significance; first that self determination as a legal right exists in respect of people under colonial domination and is therefore extinguished upon independence. Secondly, that the territorial integrity of a state is inviolable even in the pursuit of external self-determination.

[94] Gibraltar Case (Spain and United Kingdom)

The UN General assembly in its Resolution 2353 cited resolution 1514 on inviolability of sovereignty, in favour of Spain.

In the **Western Sahara case (Morocco V Mauritania)** [95] a distinction was drawn that the right to self-determination can be invoked in light of foreign occupation. Morocco and Mauritania had occupied Western Sahara soon after Spain had ceded it as a colonial territory. The parallels from colonialism and the absence of a properly constituted state is of particular relevance to the understanding of the scope of the right.

The **Ethiopia and Eritrea Case;** It has been argued in favour of Ethiopia, that the Eritrea's right to self-determination was extinguished in 1952 when the Eritrean Assembly voted in favour of union with Ethiopia. Resolution 2625 on the **Declaration of Friendly Relations** backs Ethiopia's claim that any attempt to assert self determination after 1952 would go against the inviolability in Ethiopia's territorial integrity.

The East Timor Case (Portugal V Indonesia)[96] reveals a striking similarity to the Ethiopian case. It involves an agreement between Australia and Indonesian to undertake exploration of East Timor's continental shelf; an area between East Timor and Australia. The ICJ in its advisory opinion rejected the argument that the East Timorese had extinguished their right to self-determination by choosing to join Indonesia. This however can be distinguished from the above case in view of East Timor's non-attainment of independence, at the time. It will suffice to say, that now that the East

[95] Western Sahara case (Morocco V Mauritania) 1978 ICJ
[96] The East Timor Case (Portugal V Indonesia) 1991

Timor has attained independence the right to external self-determination, as that of the entire population of the Republic Kenya, has been extinguished. What remains, it is submitted, is a right to internal self-determination attainable through representative government, free participation through frequent elections and the right of groups to freely develop their social economic and cultural development. The expression of which are all purely within domestic jurisdiction.

The Palestinian Quest To Self Determination; The Palestinian state was definitely constituted in the Hashimite Kingdom of Jordan (thus extinguishing that right to Self-Determination). Allowing their claim to self-determination would amount to creation of a second Palestinian state, it has been claimed. The Palestinian territories were occupied by Israel since 1967. The observer status in the UN General Assembly, granted to PLO is however indicative of the UN'S support for the vision of a Palestinian State. In other words [within the meaning of the Western Sahara and Eastern .... case] to the international community, Palestine will extinguish its right to Self-Determination upon the creation of a properly constituted Palestinian state;

The Helsinki Declaration of 1975, has similarly expressed disquiet at the disruptive impact of the principle of self determinate on territorial integrity. This declaration reaffirms the position that Self-determination and its contiguous rights to development must be exercised with due regard to the integrity of the state.

Article 21 of the Algiers Declaration on the Rights of the People's and States provides that "the rights of minorities must be excised with full respect for the legitimate interests of the community as a whole and cannot be permitted if it will impair the territorial integrity and political unity of the state.

2.8.1 Summary.

This dissertation is not intended to be an exhaustive evaluation of the right to self-determination, but a useful bridge towards the examination of the right to development, to which it is contiguous. It also forms a useful backdrop against which we may understand the violation of human rights especially the right to development by international Institutions within the world economic order.

It follows that if a people have a right to decide their political, social and economic status (as part of self determination) then they have an equal right to use and disposed of natural resources, which right includes the right to development.

The second part of this chapter looks at the right to development as a precursor to chapter three which will look at globalization and global institutions as they impact on human rights especially the right to development.

2.9. THE RIGHT TO DEVELOPMENT

"The emergence of numerically dominant groups in the developing countries on the International arena (as a result of decolonization) led to the elevation of economic development issues to the top of the international agenda, in various for a in the period intervening 1960's and 1970.[97]

After the attainment of independence many former colonies became disillusioned with the international order and the various international economic and development organizations. Most of the states who joined the IMF and World Bank in the period after decolonization soon became dissatisfied with prescriptions of the Bretton Wood Institutions. This disappointment was even more apparent in light of the benefits of the General Agreement for Trade and Tariffs (GATT), which gave rise to the World Trade Organization.

The United Nations Charter, Article 6.(2) parag.25 empowers the Economic and Social Council (ECOSOC) to make recommendations to the general assembly,[98] This was an attempt to forge a link between human rights and development Through this UN initiative ECOSOC could enter into agreements with any agencies in the realization of UN-objectives. Through ECOSOC arose the United Nations conference on Trade and Development (UNCTAD). Mr. Danzie commenting on the UNCTAD forum argued that

[97] Alston, "Revitalizing UN Work on Human Rights and Development", 18 Melbourne University law Review (1991) 216, at 218

[98] Charter of the United Nations, supra note 34

"it was essential, from UNCTAD point of view, to maintain a holistic perspective on development and integrate non-economic factors in an operational way into development process and the development dialogue. Human rights were of course among these non-economic factors".[99]

The main concern of UNCTAD, which essentially was a response by developing countries, to the imbalance in international economic order, was that it was not enough to receive special and so called "differential treatment" or centralized system of preference. They called instead for a rethinking of the entire international economical order.

Accordingly, the **Charter on Rights and Duties of States**[100] was adopted in 1974. Was a initiative on taken through UNCTAD, to renegotiate changes in the systems and rules relating to commodities, trade, shipping, money finance and debt.

Other UN-Agencies, such as the International Labour Organization (ILO), the Food and Agricultural Organization (FAO), World Health Organization (WHO), began to convine conferences to address these issues. Notably the main culprits behind the alleged imbalance in development were the World Bank, and the International Monetary Fund.

The other notable development was a realization that the "there was little sense in *recognizing self-determination* as a superior and inviolable

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[99] I Beldjaoui "The Right to Development,. In M. Bedjaoui (ed), International Law; Achievements and prospects (19910 1177 at 1184

[100] General Assembly Resolution 3201 (S.V.1) 1st May 1974

principle, if one did not recognize, at the same time, *a right to development* for the peoples that have achieved it. This right to development can only be an inherent and in built right forming an inseparable part of the Right to Self-Determination.[101]

It is against this background, of a changing and contested international political order that the notion of a right to development emerged. The concerns of de-colonized states were translated into demands for greater recognition of economic, social and cultural rights. There was also a recognition that neo - colonialism was a gross violation of international and human rights. The view has also been advanced that the colonial legacy was never totally erased and is partly responsible for the imbalance in international economic law.

2.9.1. Emergence of the Right to Development.

The right to development was first recognized by the UN commission on human rights in 1977[102] through **UN-Resolution** 4[103] the **Commission** begun paying special attention to obstacles hindering full realization of the right to development, particularly in developing countries. It recognized the right to development as a human right and linked the right to development with other community rights. **UN Resolution 36**[104] established working groups to organize global consultation on the realization of the right to development.

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[101] Bedjaoui, **The Right to Development**, in M. Bedjaoui (ed) international Law: Achievement and prospects (1991) 1177, at 1184

[102] Anne Oxford, "**Globalization and the Rights to Development** p. 130

[103] Un Commission on Human Rights, Commission resolution (XXXIII) of 21 Feb. 1977

[104] Commission Resolution 36 (XXXVIII) March (1981) See also res. 1989/46 of 6th March.

The right to development was given further recognition in built the **Africa Charter on Human and People's Rights.**[105] Article 22 of this **Banjul Charter** provide that "*all people 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.*" It imposes upon the state the duty, individually and collectively the obligation to ensure the exercise of the right to development.

Article 21(4) reaffirms the collective nature of this right and states that "*states parties shall individually and collectively exercise the right to free disposal of their wealth and natural resources*", while article 22(2) makes it the exclusive right of the state to determine the collective realization of this right.

It is instructive that the state occupies a unique place both as holder of this right and executor. **UN. Resolution 1803**[106] declares "the right of peoples and nations to permanent sovereignty over natural wealth, which must be exercised in the interest of their national development and well being." The position taken by UN-resolution 1803, seems to advance the view held by the **Declaration on the Right to Development**[107], which, though makes the state the holder of the rights, without equivocation states that the individual is "the central subject of the right to development."[108] **Resolution 1803** puts

[105] Concluded in Banjul, 26th June 1981, OAU Doc CAB/LEG/67/3 Rev 5
[106] GA Res 1803, Adopted 16th Dec 1962 UN. GAOR
[107] Infra
[108] Declaration on the Right to Development, adopted by GA res. 41/128 of 6th Dec 1986

public interest and conditions of the peoples and nations' a paramount pre-condition to the exploration and disposition of such resources.[109]

A further recognition of the central place occupied by the state as a right 'holder' [not owner] of right to development is manifested in the **Charter for Economic Rights and Duties of States**[110] which provides that "*every state has and shall freely exercise full permanent sovereignty, including possession, use and disposal over all its wealth, natural resources and economic activities.*"

Article 21(20) of the Charter states that "*each state has a right to regulate and exercise authority over foreign investment within its national jurisdiction in accordance with its laws and regulations and in conformity with its national objectives and priorities.*"

Article 2(3) gives the state powers to regulate and supervise the activities of transnational corporations.

A positivist interpretation of UN Resolution 1803, the Declaration on the Right to Development and the Charter on Rights and Duties of States reveals four salient points against which the right to development must be regarded;

i) the states permanent sovereignty over its natural resources
ii) the discretionary powers of the state in appropriation of these resources
iii) the non-violation of international treaties that obligate the state to promote economic co-operation and foreign investment.

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[109] Supra note 36
[110] GA Res 3281 (XXIX) of Dec 12, 1974.

iv) The UN – Charter and other International Law provisions regarding the peoples right to self determination

The third point raises some conflict given the states role of supervising and regulating the activities of transitional organizations (as provided under the Charter on Economic Rights) and secondly ensuring that any policies on investment take into consideration the interest of the peoples and of the nation. The question is in event of such conflict, which takes precedent the obligations to safeguard the interest of the people or International obligations (towards international treaties and organizations)

The third forum worthy of note was **the 1993 Vienna Conference on Human Rights**[111], which reaffirmed the right to development as a universal and inalienable right and an integral part of fundamental human rights.

2.9.2. Provisions of the Declaration on the Right to Development

Article 1(1) of the Rio Declaration on the Right to Development declares that the right to development is an inalienable human right by virtue of which every human person and all peoples are entitled to participate in, contribute to, and enjoy, economic, social cultural and political development, in which all human rights and fundamental freedoms can be fully realized."

This provision reveals two important issues first; that it is against the background of respect for human right and fundamental freedoms that the right to development can fully be realized or enjoyed. Secondly that through

[111] Article 10, Vienna Declaration and program of Action adopted by UN-World conference on Human Rights, 20th June 1993 UN,

participation, the individual is able to access this right rather than being a mere recipient of the right. **The concept of participation** forms one of the main pillars of the right to development.[112]

The third pillar of the right to development is **the principle of indivisibility and interdependence.** The full realization of the right to self-determination is contingent upon realization of the right to development. Anne Orford remarks "*there is no sense in recognizing the right to self determination as a superior and inviolable principle if one does not recognize at the same time a right to development.*[113] This indivisibility principle includes the respect for relevant provisions of international covenants on human rights.

The fourth pillar of this declaration is its emphasis on the "**individual as the central subject of the right to development**"[114] the individual should be both an active participant and beneficiary of this right. The presupposition that the state cannot be the recipient of a right, rather only the holder of such a rights can neither be overemphasized nor gainsaid. It is worth noting, however, that the individual can only realize this right as part of a larger community of people constituting a nation state: This draws a very clear paralleled between the realization of this right and the right to self, determination. Unlike the latter however the right is never extinguished (refer to external self determination)

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[112] Supra Note 108
[113] Ibid At Article 1
[114] Supra note 36, Article 2.

2.9.3. Key features of the Right to Development

2.9.3.1. Definition(s) of the Right to Development

"The Declaration supports a fairly flexible and people centered approach to what is meant by development[115] According to Charlesworth "while the formulation of the right to development does not rest on a simple economic model of redress, economic inequality is at the very heart of it."[116]

Development has also been used to mean industrialization and westernization. According to the Declaration, the rights for development includes the right to participate in determining the model of development, control over the process of development, and equitable access to enjoyment of the benefits of development.[117]

The preamble recognizes that development is a comprehensive economic, social, cultural and political process, which involves the constant improvement of the well being of the entire population. These approaches to development inevitably includes the role of international economic institutions in the new global world economic order.

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[115] Anne Oxford Globalization and the Right to Development in Phillip Altan "peoples" right 2001, Oxford press US.

[116] Charlesworth, "The Public Private Distinction And The Right To Development In International Law" 12 Australian and the right to development in international law 12 Australian year book of international law (1992) 190 at 196-7.

[117] Anne Oxford, op, cit pp. 144

2.9.3.2. Summary of the Right to Development.

3.51. The right to development is the right of individuals, and groups to continuous economic, social, cultural and political advancement, in which all human rights and fundamental freedoms are fully realized.

3.52. The right to development includes the right to participate in all aspects of development and stages of decisions making process.

3.53. It involves equal opportunity and access to resources, the right to fair distribution of benefits of development

3.54. It involves the respect of civil and political, economic and cultural rights this is the idea of indivisibility and interdependence of human right.

3.55. It includes the right to an internationally conducive environment in which all these rights can be fully realized.

2.9.4. The Subjects of the Right to Development

As in the case of self-determination, the question arises, to whom does the right to development attach? Donnely has argued that, "although the right holder is a physical person/individual, an institutional person must exercise the right[118] in case of a right held by a people, or by society as a whole the most plausible person to exercise the right is the state. Bedjaoui maintains, however that the above position "sets a dangerous precedent"[119] as the state may (in exercising this right on behalf of the people) at the same time infringe upon other rights. This has been referred to as *privileging of development over Human Rights.*

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[118] Donnely "In search of the Unicorn **The Jurisprudence and politics of the Right to Development**, 15, California western intentional law (1985) 473, at 475

[119] Of the **Right to Development** (ed) International Law; Achievements and prospects (1995) 1177.

It is in light of this that Ghai argues against "an attempt to establish the primacy of economic development over human rights".[120] Ghai however concedes that in order to achieve economic development there may be a need for restriction of Human rights "both to provide a secure political framework in which it is to be pursued and to remove obstacles in its way.[121]

The formulation, though, of the 1986 Declaration on the Right to Development shows that it is a right that must accrue not only to the community but also to the individual human person.[122] Article 2(10)of the declaration provides that the human person is the central subject of the right to development and should be the active participant and beneficiary . This position has subsequently been re-affirmed at the **World Conference on Human Rights in Vienna.** Article 2(3) of the Vienna Declaration vested the state with the authority to formulate appropriate national development policies aimed at the constant improvement of the well being of the entire population.[123] The state is the medium through which the right of the individuals are effectively asserted as against the international community"[124] He goes on to say that the right to development is not a right of states except where those states are asserting as against the international community their right to develop human rights based development polices in the interest of their people.

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[120] Ghai Y.P **Human Right to Development**, 15, California Western International law (1985) 473, at 475
[121] Ibid
[122] See Article 2 of the Declaration
[123] Vienna Declaration, Article 10
[124] Philip Alston, **Garfield the Eat**, at op 512

In contra - distinction, Donnelly argues "human rights should derive form the idea of innate personal dignity rather than from notions of solidarity or community"[125] He further suggests that membership of a community or group is not necessarily an aspect of being human and that this collective human right are not logically possible.

This individualistic approach to human rights has been criticized by jurists as not being productive, as individuals inevitably form part of a community of other persons (here members of a group or community suffer disadvantage, oppression or exploitation as a result of membership of that group or community). The case is even stronger for the proposition that "such group members should be able to exercise collective rights against more powerful groups or communities responsible for exploitation or domination."[126]

2.9.5. Participation in Development as a Human Right

The third feature of the right to development relates to participation in development as a human right. **Article 11** declares that " .....every human person and all peoples are entitled to participate in contribute to and enjoy economic, social and cultural and political development".[127]

The Declaration on the Right to Development in Article 2(3) stresses that for such a right to be enjoyed by individuals; it must be on the basis of a free active and meaningful participation in and enjoyment of the benefits of development. Article 8 further specifies participation to include equality of

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[125] Ibid, pp. 56

[126] N. Lacey, **Unspeakable Subjects**: Feminist's Essays on Legal and Social Theory (19980 at 34 – 35.

[127] Supra note 36, Article 1

opportunities for all in their access to income. "all should have a an active role in the development process."[128]

It has been argued that by participation is meant people having control over the direction of the development process rather than simply being consulted about projects or policies that have already been decided upon."[129] According to Bedjaoui the right to development incorporates the notion of economic and social self-determination and by extension springs out of the larger right to self-determination.[130]

Participation by the people involves the right of a people to choose freely its economic and social system without outside interference. Participation is the right of people to determine, with equal freedom, its own model of development.

2.9.6. Equal opportunities and access to benefits

Article of the Declaration reveals the fourth pillar of the right to development, that is *equal opportunities in accessing benefits*. In particular it says women should be enabled to play a more active process.

Article 11 of the Vienna Declaration extends the notion of equitable access to benefits of development to include the idea of *intergenerational equity.*

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[128] Gither "**Participation and Accountability**": Two Aspects of the internal and international Dimensions of the right to development.

[129] Human Rights Council of Australia Inc. **The Rights way to Development**: A Human Rights Approach to development Assistance (19950 118-21

[130] Bedjaoui, Supra note 28

2.9.7. The link between the Right to Development and other Rights

The idea that the right to development should be privileged over human rights goes against the spirit of the Declaration of the Right to Development. This idea of "privileging' has given rise (in response) to the notion of indivisibility of human rights. Article 1 of the Declaration provides that "the right to development involves the realization of human rights and fundamental freedoms. It also implies the full realization of the right of peoples to Self-Determination. This principle of indivisibility is captured under Article 9(2) which declares that the provisions of this Declaration may not be construed to give rise to violation of provisions of the **UDHR** or the two 1966 Covenants.

Article 10 of the Vienna Declaration makes similar provisions that "the lack of development may not be invoked to justify the abridgement of internationally recognized rights."[131] This would seem to suggest that the right to development is not on absolute right, it s exercisable contingent upon respect for other international law and Human Rights obligation.

2.9.8. Enforcement of the Right to Development

This is the sixth pillar of the Right to Development and may be framed in form of the question "*against whom is the right to development enforceable or exercisable.*"

International human rights law system developed after 1945 treats the State as the principal threat to the freedom of the individual, human dignity and well-being.

The **International Covenant on Civil and Political Rights** as well as the **International Covenant on Economic Social and Cultural Rights** were primarily aimed at restraining the ability of the state to infringe upon the liberty of citizens, secondly to guarantee their individuals participation in government.

The Declaration, curiously makes the State the right holder, but sets out to impose an obligation upon the state to "create national and international conditions favorable for the realization of the right to development.' Article 2(3) requires the state put in place necessary measures to ensure the constant improvement and well being of the people."[132]

Donnelly has argued that "human Rights are essentially instruments to protect the individual against the state or to assure that the state guarantees to each individual certain minimum goods, services and impunities"[133] Any shift of focus from the state as the culprit against whom rights are held, he says is an attempt to avoid State Responsibility for Human Rights violations. Ghai argues that this shift of focus is an attempt to provide an alternative framework for the International Discourse on Human Rights.[134]

The role of international organizations/Instructions (which we shall return to presently in the next chapter) is not explicitly provided for in the Declaration. It can however be inferred; the provisions of Article 4(1) for

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[131] Supra note 49, Article 10.
[132] supra note 91,article 2(3)
[133] Donnely, Supra note 44
[134] Ghai Y. P, "**Human Rights and Governance**": The Asia Debate, 15 Australia year book of international low (1994)

instance would seem to suggest that the State may, in formulating International development policies, forge linkages with international institutions, which in return would bear some responsibility on realization of the Right to Development. Indeed as a result of concerns raised by third world countries at the UN-Conference on Trade and Development (UNCTAD), multi-national corporations were put under an obligation not only to return back proceeds of their profits to develop the third world, but also to transfer technology to forster development in the third world. Article 4 (2) encourages international co-operation to foster economic development in the third world countries.

2.9.9. Legal aspects of the Right to Development

Whereas there exist consensus on the idea that states cannot, properly speaking, be the beneficiaries of the Right to Development. (much less subjects of a Human Right), and whereas Article 2 of the Declaration, expressly provides that "the human person is the central subject of development as well as an active participant, considerable difficulty exists in so for as discerning "the exact content of an implementable individual or collective right to development is concerned.

The term "People" equally encounters similar difficulties in so far as the right is concern. While this term is clearly defined in respect to the right to self-determination, it is not quite apparent in so far as defining the collective beneficiaries of the Right to Development is concern. It is generally felt that the term should encompass groups within the state such as indigenous people and minorities.

In terms of implementation, discussion at the global consultation revealed that the 1986 Declaration lacked specific mechanism for implementation and enforcement. Accordingly, the usefulness, from a legal point of view, of the Right to Development still remains an open question and very much the subject of great controversy.

The Declaration on the right to development, it was observed, requires that International peace and security be an essential element for realization of the right to Development and that the elimination of massive and flagrant violation of Human Rights is a prerequisite to development. The provision has a sound legal basis, grounded on illegal acts considered international crimes, they include, genocide, racism, colonialism, denial of right to Self Determination, all of which are protected through international instruments and municipal legislation.

4.2. Summary

It was suggested (at the global consultation on the Right to Development) that an elaborate and binding international convention on the Right to Development was necessary. The adoption of such an instrument, it was suggested should have a stringent enforcement mechanism able to evaluate the minimum levels of development against which a state can be adjudged to be in conformity or in violation.

CHAPTER 3

GLOBOLIZATION AND THE RIGHT TO DEVELOPMENT

3.0. Introduction

Protest about the impact of the World Trade Organization (WTO), the controversy surrounding the negotiation of the multilateral agreements, the activities of the International Monetary Fund (IMF) and World Bank as well as the emergence, in many states, of economic nationalism and protectionism have all contributed to putting globalization on trial[135].

The increased importance of the International Monetary Fund and the World Bank on social, economic and political development within debtor countries has given rise to the concern that the policies of these institutions have social economic costs that impact negatively on issues of human rights concern.
Skogly asserts that, "International organizations with international legal personality, established through multilateral agreements, subject to rules of interpretation of treaties, have certain rights and obligations arising from their operations and activities[136].

This chapter is an examination of the extent to which these obligations extend to International Human Rights and the possible impact this has on economic globalization in general, and in particular the right to development. In so doing we will seek to examine the role of the World

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[135] Anne Oxford, "**The Right to Development**" in Philip Alston, Peoples Rights, (2001) Oxford press USA.

[136] Skogly S.I, "**The Human Rights Obligations of the World Bank and IMF**", PP3.

Bank, International Monetary Fund and the World Trade Oganisation in protection of Right to Development.

The sticking point of this exposé is the assumption (rightly or wrongly) that as financial institutions the IMF and the World Bank and WTO belong to the sphere of International Economic and trade Law, which is seen to be relatively different from public International Law from which International Human Rights are germaine[137]

It has been argued by various jurists, that the activities of transnational corporations and International organizations/institutions must be placed at the centre of the campaign to promote and protect human rights, especially the right to development.

The right to development has become increasingly important to the United Nations Human Rights agenda. This increasing importance has however not been fully embraced by International Economic Institutions. At the bottom of this impasse is the question whether the policies of these institutions or their activities are informed by human rights concerns. Put another way, do International Human Rights concerns inform the policies and activities of these institutions.

Orford argues "while the Right to Development has become a part of the human rights agenda of the UN, it is far from central to the agenda of the World Bank, IMF or even WTO.[138]

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[137] Ibid, Skogly pp.4

[138] A Oxford "**Globalization and the Right to Development"** in Philip Alston Peoples Rights(2001)Oxford Press

The role and activities of these institutions is viewed against the proposition that human beings and communities have the right to participate in and thus control the direction of development[139]

It is generally agreed that these institutions are principally accountable for the human rights violations that result from economic globalization. These institutions (in particular the IMF and World Bank) are the key agents of economic restructuring in the post cold war era. The IMF for instance has been described regularly in the context of the Asian financial crisis as "a benevolent doctor administering bitter medicine to the people of Asia in order to heal their weak or sick economies".[140]

The WTO on the other hand has been presented as an agent of freedom in the form of free market, guaranteeing such positive norms as non-discrimination and equality of treatment principles. The World Trade Organization ostensibly guarantees growth, competition and higher living standards. But as will be able see later in this chapter, the so called free trade theory, liberalization and the non-discrimination and equality among WTO member States.

The accuracy or otherwise of the statement above statements not withstanding, it is imperative (given the wide range of activities that they undertake and their potential impact on individual persons and communities)

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[139] See the "**Declaration on the Right to Development"** Article 2 and 8, adopted by the GA, res. 41/128 4 Dec. 1986

[140] Supra note 4. at pp. 149

that a link is made between their activities and the potential human rights implications thereof.

3.1. A Historical Background of The IMF and World Bank

The IMF and the World Bank were established at the Bretton Woods conference in the United States in July 1944. The World Bank was given the task of assisting in the reconstruction of a war torn Europe, otherwise referred to as the **Marshall plan for Europe.** It was subsequently to encourage development of productive facilities and resources in the less developed countries"[141].

The IMF aimed at promotion of International Monetary co-operation through a permanent institution. This institution was to provide machinery for consultation and collaboration on International monetary problems.
While the World Bank supported the projects in various countries that promoted infrastructure development and improvement of production facilities, the IMF assisted in solving balance of payment problems.

The two institutions were given two district mandates, the World Bank was to assist in the reconstruction of was- torn Europe. The IMF was itself established to promote international monetary co-operation through a permanent institution that provided for consultation and collaboration on international monetary problems.

[141] World Bank Articles of Agreement, Art. 1. (i) S. 1

The IMF assisted in solving balance of payment problems based on a par value system of international currency exchange rates. The Bank financed its loans, credits and guarantees largely by raising money on the private resources deposited by the members.

After the implementation of the marshall plan for Europe the two institutions had to turn from its purely development and reconstruction agenda to something else. The solution presented itself in the 1950s and 60's during the process of decolonization which ensured large number of countries in Asia and Africa gained independence. This was a period of growth in industrialized countries and sources of financing for newly independent countries was plentiful.

Two major events changed the relative importance of the two institutions from what it had been in the 1950's and 1960's. First the par value system broke down and the US suspended the convertibility of officially held dollar balances into gold. Secondly the oil crises of 1973 represented a two-fold effect. The results of the these events had a two fold effect, first due to the collapse of the par value system, the IMF had to deal with a more complex set if variables with regard to members financed and monetary policies; more factors had impacted on the balance of payments situation.

Secondly the indirect result of the sharp rise in the oil prices was the creation of the so called debt crisis; in the early 80's it became apparent that the heavy lending to developing countries in of the 1970's created a debt repayment burden which most countries found difficult to honour.

The IMF and World bank's importance increased due to lack of available private funding for these struggling countries. Thirdly, the end of the cold war and the changes in Eastern European countries, as well as the emergence of new republics in former Soviet Union helped change the fortunes of these two institutions. This resulted in new membership for these institutions, an end to east/west rivalry and a relatively clear international consensus on the desirability of market led economies.

It has been argued that the breakdown of the Bretton Woods fixed exchange rate system in 1973 and the oil crisis, gave rise to the relative importance of these institutions.[142] This situation and phase in history (described as the debt crisis), made it increasingly difficult to access or obtain funds from the IMF and World Bank.

Other developments giving rise to the growth of these institutions were the lack of private sources of lending and the IMF subsequently evolving into a clearinghouse for other sources of funding.

Equally pivotal to the development of these institutions was the corresponding high premium placed on the IMF and World Banks' seal of approval on the economic and fiscal policies of countries seeking funding from other sources[143].

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[142] Brandhow, 1966 at pp. 69.

[143] Sigrum I. Skogly, "**The Human Rights Obligations of the World Bank and IMF**", Carendish Publishers, London 2001.

3.1.1. The legal status of the IMF and World Bank Articles of Agreement

"The Article of Agreement of both institutions were drafted at an intergovernmental conference in Bretton woods in 1944, adopted by the conference and opened for signature.[144] These Article were drafted and adopted in a manner common for the conclusion of international treaties governed by international law.[145]

The Articles of Agreement serve two purposes; first they serve as the international treaties establishing the originations, describing the rights and obligations of the states that decide to become members through ratification of the instruments.

Secondly they serve, as the constitution of the two institutions, giving the purposes and principles that shall guide the organization and its bodies in their daily operations. It also defines the relationship between the articles of agreement and the United Nations system.

3.1.2 The Relationship Between The Articles of Agreement and The United Nations System.

Both the IMF and World Bank "**Relationship Agreement**" are specialized ginces of the UN . this status was obtained through an agreement entered into with the economic and social council of the UN in accordance with Articles 63 and 57 of the UN Charter.[146]

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[144] Supra Note 135 at P. 26
[145] See The Vienna Convention on the Law Treaties, 1969 Article 2
[146] United Nations Charter, Article 57 and 63

The UN, IMF and World Bank Relationship Agreement[147] are subject to approval by the General Assembly and are seen as international treaties, they international documents, the application of which are subject to principles of international law of treaties.[148] The existence of the Relationship Agreement has a legal significance and may have a direct influence on the way in which human rights came into play in terms of the policies of the World Bank and the IMF.

3.1.3 The World Bank, IMF and their Relation to Human Rights Generally.

There is no specific reference, in the Article of Agreement on either Human Rights or the obligations thereof. It is therefore difficult to make any direct human rights links in the purposes of these institutions. This does not mean however, that these institutions are precluded by their articles of Agreement, from taking into account human rights issues into account in so far as their activities and policies are concerned.

As subjected of international law and specialized agencies of the United Nations, the two Institutions are bound by general international law, and are thus obliged to take human rights into account.

The other significant activity marking the central importance of these institutions (to the member countries ability to develop economically) has been it's insistence in the structural adjustment programs (SAP's) otherwise referred to as conditionalities. SAP-related lendings require that in order to receive funding certain conditions relating to how the economy operates

[147] The Relationship Agreement Between the UN and The International Bank for Reconstruction and Development, 15th Nov. 1948

must be met.[149] These conditions which are primarily of an economic nature, include demands for privatization, abolition of subsides, devaluation of over-valued currencies, price deregulation and liberalization of investment markets.

SAP's have been defined in a World Bank report as "a process whereby the national economy is opened up by means of the depreciation of the real exchange rate. This is accomplished through a combination of demand side and supply side policies, with or without a national devaluation"[150] The above definition of SAP's has been qualified further by Skogly to include two facililties "the Structural Adjustment Facility (SAF) in March 1986 and the Enhanced structural Adjustment Facility (ESAF), in December 1987.[151] While the IMF aims at short-term balance of payment improvement, the World Bank aims at longer-term development results, which causes them to focus on expansionary measures. SAP's have been criticized for its poor success rate and an over reliance on marketization policy.

In addition to the above measures, political measures have also been introduced, they relate to governance especially to accountability, predictability and transparency.[152]

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[148] Ibid Article 63.
[149] Denters, 1966, pp. 160
[150] Demery, Ferroni, et, al, 1993.
[151] Landell, Mills, 1992, P1.
[152] Ibid, at pp. 104 – 106.

3.2. The IMF, World Bank Specific Human Rights Concerns

It is in light of these institutions centrality to the economic survival of member states that human rights concerns have increasingly been linked to their activities and policies."[153] The legal counsel to the World Bank, Mr. Ibrahim Shihata, has stated that the Bank has a role and indeed does promote human rights through its activities. The World Bank he says "has joined hands with international agencies in the alleviation of poverty, in combating disease malnutrition illiteracy and the preservation of the environment."[154]

This affirmation notwithstanding the bank, it should be noted, has never undertaken a systematic human rights evaluation of any of its programs. Even though it has undertaken to promote economic and social rights, it has never really acknowledged any obligations on its part towards respect, protection and promotion of human rights.

In its booklet **Development and Human Rights** published to mark the 50th anniversary of the **Universal Declaration of Human Rights**, the World Bank asserted that it has always taken measures to ensure that Human Rights are fully respected in connection with the projects it supports.[155]
This in our opinion remains and supported by any of its activities and given that it continues to deny any obligations to respect this rights on its parts any Unlike the world Bank, the IMF has been adamant that human rights is a subject area completely outside the scope of the Funds activities and one which remains the responsibility of individual governments.

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[153] Skegly, "**The position of the world bank and IMF in the Human Rights Field**" in R. Hanksi and M. Suksi (eds) "**An introduction to the international protection of Human Rights"** (1977) 193, at 194.
[154] Shihata, 1991, pp 133
[155] World Bank Report, "Development and Human Rights." 1998.

The International Monetary Fund, while conceding the possibility of infringement of human rights (As a results of its policies like the SAPS) nevertheless puts full responsibility for this upon individual states. In contrasts to the World Bank the IMF has completely refused to undertake any human rights activities nor use human rights language in its policies or reports at all.

3.3. *International legal Personality of the World Bank and IMF*

Neither the World Bank nor the IMF has been granted explicit international legal personality "this however does not mean that these institutions in practice do not posses such status or personality.[156]

In the **Reparations for Injuries case**[157] the court held that "the organization was intended to exercise and enjoy, (and is in fact exercising and enjoying) functions and rights which can only be explained on the basis of the possession of a large measure of international personality and the capacity to operate upon an International plane".

This case espouses the view that the World Bank is the supreme type of International organization and could not effectively carry out the intention of its founders if it was devoid of international legal personality.[158]

In the **International Tin Council case**[159] the H.O.L held that in spite of a lack of express recognition by way of treaty establishing the organization,

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[156] Bronches, 1995 pp. 19
[157] ICJ Reports pp. 179
[158] Ibid at pp. 181.
[159] H.O.L, 26th Oct. 1989

there existed a separate international personality in the World Bank and I separate from its membership.

It is clear from the foregoing that institutions of IMF the and World Bar stature posses the international legal personality or status to enable safely assume that International Human Rights obligations apply to t activities.

3.4. Objectives of IMF and World Banks'

3.4.1. The activities/ objectives of World Bank include the following;[160]

(i) To assist in the reconstruction and development of territorie members by facilitating the investment of capital for produc purposes including the restoration of economics destroyed disrupted by war.

(ii) To promote private foreign investment

(iii) To promote long ranged balanced growth of international trade the maintenance of equilibrium balance of payments.

(iv) To arrange the loans made or guaranteed by it in relatio international loans accessed through other channels.

(v) To conduct its operation with due regard to the effect International investment on business conditions in the territorie members.

[160] World Bank Articles of Agreement – Article 1.

3.4.2. The Functions of IMF[161]

(i) To promote international monetary co-operation through a permanent institution which provides the machinery for consultation and collaboration on International monetary problems.

(ii) To facilitate expansion and balanced growth of international trade.

(iii) To assist in the establishment of a multilateral system of payments between members and in the elimination of foreign exchange restrictions.

(iv) To promote exchange stability.

(v) To give confidence to members of making the general resources of the fund temporarily available to them under adequate safeguards.

(vi) To shorten the duration and lessen the degree of disequilibrum in the international balance of payments of members.

The activities of both institutions as evident from the above reveal quite clearly that the founders of these institutions did not contemplate there involvement in any human rights activities their activities appear to purely economic and monetary with no human rights obligations watching. Yet it is quite apparent that that their policies impact (sometimes negatively) of recipients especially 3rd world countries.

It is in light of these that we now embark on the role of international institutions in the protection of the Right to Development.

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[161] IMF, Articles of Agreement, Article 1.

3.5. International Institutions and the Declaration Right to Development

The Declaration on the Right to Development adopted by the General Assembly in 1986 did not carry any direct legal obligations upon member states of the United Nations much less International Institutions/Organizations. This is because unlike hard law treaties Declarations are not of a binding nature.

The fact, however, that the Declaration mastered a high level of acceptance among United Nations member states, with only eight abstentions and one negative vote (form the USA) puts the Declaration on a very high moral pedestal.

Development, the Declaration asserts, can only be fully realized with the enjoyment of all human rights and fundamental freedoms. It defines development as "the fulfillment, in any society of the civil, political economic, social and cultural rights, as codified through the UN – Charter and the International bill of Human Rights".[162]

Ouguergouz has argued that the Declarations adds **little more than** the rights contained in the two 1966 Civil and Political, as the well as economic Social and cultural rights, Covenants. It however represents a synthesis of rights, which adds dynamism and validity to already existing rights.[163] In other word the Declaration adds no new rights but may add new ***deleg ferenda*** obligations upon the international community.

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[162] Supra note 2 at pp. 149

Article 4 of the Declaration proclaims that states have the duty individual and collectively to formulate development policies with a view to facilitatin the full realization of the right to development.[164]

Reaffirming the proposition in Article 4 Skogly asserts, "One of the mo powerful formulations of development policies occurs through th collectivity of states when meeting as the World Bank and IMF."[165]

3.5.1 The IMF and World Bank on the Right to Development

The IMF and the World Bank operated (at the turn of the century) in manner very different from that, which was first envisioned. The IMF, no influences government policies through the imposition of conditions access to credit and loans.[166] The IMF imposes economic targets a structural reform conditions on the use of IMF resource. Accordingl World Bank will not lend to a country in breach of IMF sanctions.

Secondly, no country can receive loans form the World Bank without fi being a member of the international monetary funds and subjecting itself IMF conditions. The conditions, imposed in the 1980's require countries adopt policies of investment deregulation, privatization, cuts in governme spending, especially on health and education, Labour market deregulatio

[163] Ouguergouz, 1993, pp. 193
[164] Supra note 5, article 4
[165] Skogly, supra note 9 at pp. 141
[166] J. Williamson (ed) IMF conditionality (1983)

lowering minimum wages and a focus on production of goods for export rather than domestic consumption.[167]

These conditions impact on development of states and their ability to determine or formulate freely their economic policies. The most notable conditions in terms of negative development implications are the swift dismantling of protectionist trade barriers, (this opens up the domestic market to foreign products which may be subsidized by developed countries thus unfairly disadvantaging local producers). According to Gowan, the requirement to cut government spending, privatization of strategic government parastatals impact negatively on the states ability to achieve economic development.[168] This has been witnessed in developing countries for instant Kenya. The attempted of sale of strategic parastatals such as Telecom Kenya and Re-insurance Corporation may be cited as classic examples of potential for negative impact.

The second way in which IMF conditions impact on development is that investors place a very high premium on IMFs' seal of approval. In other words the creditworthiness of a country goes hand in hand with its ability to attract private capital as well as foreign investment.[169]

The International Monetary Fund therefore plays a significant role in arranging private banks to take part in coordinated lending packages. This practice has created the impression among private Banks that "a lending

[167] S. George and Sabelli', "Faith and Credit: The World Banks Secular Empire (1994) pp. 11.
[168] Gowan, Neo – Liberal Theory and practice for Eastern Europe, 213, New left Revient (1995) 3
[169] Tyson et.al "Conditionality and Adjustment in Hungary and Yugoslavia", 1996.

package that includes the imposition of IMF conditionalities will guarantee better and more stable economic policies in the debtor country."[170] This assumption is in our view responsible for the denial of member state of the right to freely access financial packages and therefore be able to determine their own economic policies. In other words it precludes or negates their right to development.

These conditions, it has also been argued, are an excuse to impose foreign policies favorable to foreign multi-national co-operations. This has taken away the power of member states to make decisions or determine the suitability of such policies. Article 1 of the Declaration specifically forbids this, it states *that "every human person and all peoples, have a right to participate in, contribute to and enjoy economics cultural and political development..."*[171]

Anne Orford has argued that the IMF conditions rob the people of a state the right to choose freely forms of economic or social arrangements that differ from models preferred by IMF and the World Bank.[172] The lack of accountability of these institutions has further aggravated this situation, though it has been argued in favour of both the World Bank and IMF that they are institutions owned and controlled by it's member states intern of monetary and financial obligation. But the recipients instill necessary with no apparent link or ties human rights obligations.

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[170] W.R Cline, **"International Debt Re-Examined** (1995) pp. 206, see also M. Milivojevic, "the Debt **Rescheduling Process** (1985),pp. 43-5

[171] Supra note 5 Article 1

[172] Anne Orford, Supra n. 4 art pp. 152

In response to persistent complaints about the effects of it's policies, the IMF established an independent evaluation unit (EVU) to conduct an objective independent evaluation. The findings of this unit however fell short of asserting that there are human rights implications which arise from it's activities and policies. It argued that human rights were not within it's mandate nor that of IMF.

It is now generally accepted that whichever model of economic policy the IMF and World Bank pursue or prescribe, it will inevitably give rise to potential human rights implications, especially the right to development. This can be implied from its Articles of agreement and its International legal personality.

The model that the IMF has prescribed pursues a narrow premise based on privileging economic theory over commitment to ensuring that people have access to food, health, education, social security or employment[173].

In particular polices requiring structural adjustments or cutting of public expenditure on health and education, market deregulation and privatization have led to increased income disparity and marginalization of the poor and rural populations in many countries.[174]

According to Anne Oxford, the effect of IMF and World Bank policies is to strip the State of most of it's functions except maintaining law and order.

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[173] Ibid, pp. 153

[174] Sadasivam, "**The impact of structural Adjustment on Women**: **A governance and Human Rights Agenda,**' 19 Human Rights Quarterly (1997) 639 **See. Also** "The realization of Economic, social and cultural rights final report by Danilo Turk, special rapptueur Un. Human **Rights Commission** UN Doc

The imposition of SAP's and 'shock therapy" programs has facilitated an environment in which "abuses of human rights such as the right to life and freedom from torture are very likely to occur"[175]

In such situations in which the state appears to address more of the interest of International economic institutions and corporate investors, the insecurity vulnerability and frustration of people increases. The result of such frustrations, argues Orford is to augment political instability, violent protests, attempt at cessation and increased nationalism[176].

The World Bank and IMF policies, it can be argued also violate another cardinal principle of the right to development, which requires a guarantee of equitable and fair access to benefits of development[177].

In it's 1999 report the World Bank adopted the language of participation and accessing the government closer to the people[178]. This report however made no mention of peoples right to determine their political or economic systems, nor their right to reject the World Bank model of development. This report, though ostensibly intended to portray the contrary, clearly shows that the World Bank continues to prescribe a model of development, which communities and individuals have no real capacity to participate in or control.

Article 2(3) as read together with article 3 of the Declaration reveals another distinct feature of the right to development, namely the States' role in

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[175] Anne Oxford Supra note 4. at pp. 155
[176] Ibid
[177] Supra note 5, Article 9
[178] World Bank World Development report, 1999

"creation of conditions, national and international, for the realization of the right to development"[179]. These provisions imply an obligation upon states, acting through international institutions to show awareness of requirements on their part (through their activities and policies) to protect and respect human rights and in particular the right to development. Interestingly, the World Bank has never really accepted that it has any legal obligations to promote human rights nor does it have any human rights policy. Skogly adds that the World Bank has apparently not even undertaken a systematic human rights evaluation of any of it's programs[180].

In light of this, one may safely assume that the IMF and World Bank continue to treat human rights and human rights protection as being outside the ambit of it's agenda/concern, or not being within it's legitimate business. Even when reviewing or considering it's own policies, it has continually treated human rights as a matter for the domestic concern and outside of it's mandate. This is ironic given the fact that it's policies and conditions impose stringent economic standards upon recipient of it's financial packages, and also owing to the end result of non-compliance with such condition upon third world countries.

Even though the IMF and World Bank have attempted to bridge this gap or disparity, it is difficult to see any realization on their part of a clear or actual link between it's activities and their implications on human rights and development. The UN secretary General in his report submitted on the

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[179] Supra Note

[180] Skogly, "**The position of the World Bank and IMF in the Human Rights Field**; in R. Hanski and M. Suksi (ed) An introduction to the international protection of Human Rights." (1997) 193, at 194.

question of Realization of the rights to development[181] failed to find or establish a link between human rights and activities of these institutions.

3.5.2. Redress Under the Articles of Agreement and the UN-System

Justiciability is a necessary element of the efficient application of the right to bring action against the institutions for violation human rights. Thus whether or not a victim of a violation of a human rights arising from an obligation of the World Bank and IMF is able to bring legal action against the institution is neither a test for the existence of the right/obligation nor a test that may establish or disprove the rights.

The instruments establishing these institutions provide that any party to the convention may bring a claim against another party to the convention that has allegedly breached convention obligations. This is important to the procedures that could be established to deal with breaches of human rights obligations by the IMF and the World Bank.

The Article of Agreement of the two institutions do not set up a dispute settlement mechanism / structure as such. Article XXIX of the Articles of Agreement of the IMF establish the role of the Executive Board. In case of disagreement the Fund and any members may refer to it any matters for interpretation. There is also provision for arbitration and a final appeal to the Executive Directors where there is dissatisfaction with the Executive Board decision.

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[181] Report of the UN secretary General "**Realization of the Right to Development**", 1997/72, 16th Feb, 1998, E/CN. 4/1998/29. Para 39

As with most other international organization the IMF and World Bank enjoy immunity from domestic jurisdiction in the country in which they operate. This is an acceptable rule of customary international law and which is codified in article vii of IMF and article ix of World Bank Agreements. Accordingly my dispute between them and a member state within municipal sphere must be referred to the ICJ. Article 34 of the International Court of Justice provides that only states may be parties in cases before the ICJ. The state however must have a sufficient legal interest in the matter. There is no requirement that individuals must be citizens of states who bring up the case on their behalf. Any state party to the convention many bring a claim against another for alleged breach of the convention obligations.

Article VII of the Articles of Agreement of the World Bank Confirms the full juridical personality of the Bank. This Article provides that No action shall, however be brought by members or person acting for or deriving claims from members. The property and assets of the Bank shall, wheresover located and by whosoever held be immune from all forms of seizure, attachment, execution before the delivery of final judgment against the Bank etc. This immunity extends to officers and employees and includes privileges and immunities for taxation.

The search for redress by persons or nations affected by breaches of human rights obligation, (of the World Bank and IMF) have been particularly dicey First any creation would be prohibitively expensive, Secondly, the articles of Agreement are so restrictive in terms of jurisdictional immunity that it is no easy to subject these institutions to a judicial process within national courts Where cases have been brought concerning IMF and World Bank condition

it has been between the government and private parties. Like State parties under international law, the IMF and World Bank activities and the acts of its officials are immune from municipal jurisdiction. The question arises whether actions which go beyond their legitimate activities and which therefore are not covered by these immunities which can be tried before municipal courts of other countries. In recent case, the UK House of Lords held in the **August Pinochet case** (House of Lords 1st hearing 25 November) that there are certain acts that are not covered by 1998 State or Sovereign Immunities Act due to the nature of the acts being beyond legitimate state action.

3.6. The World Trade Organization and GATT on the Right to Development

Criticism of potential human rights impacts arising from trade and financial/investment liberalization pursued by the WTO began to surface in the aftermath of the Urguay round of GATT negotiation[182]

"In the Economic world managerial skill and economic efficiency would be the essential market forces driving International economics. Instead governments have introduced a variety of impediments to the free flow of cross-border commerce. The tariff has become the primary international trade barrier. When a government so taxes a foreign made commodity, its tariff increases the cost of doing business in that particular market."[183]

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[182] **The Final Act** Embodying the Results of the Uruguay Round of Multi-lateral Trade negotiations, Ratified at Marrakesh (ratified by 120 countries on 5th April 1994.

[183] Wilhan R. Slomanson "**Fundamental Perspectives on International law**", 3rd (ed). (2000), London

These words perfectly describe what has emerged from what used to be the General Agreement for Trade and Tariffs, GATT 1947. The original GATT operated for 50 years and was later transformed into what is now the World Trade Organization (WTO). Questions have arisen as to whether the creation of these International Trade and Economic Institutions, represent a safe avenue through which member states can achieve development.

Do the rules of International Economic law which drive the WTO encourage or preclude member States' need for development. This section deals, albeit briefly, with the policies of WTO / GATT system and how they have impacted especially on third World countries. We will also consider the 3rd world countries response to the WTO policies – principles and their call for a new International economic order

3.6.1. History of GATT/WTO

In 1944 when World War II was about to end the United States floated the idea of setting up institutions to regulate a post world war II era. At the Bretton woods conference in 1937 it was proposed that the following institutions be created:

i) **IMF**; to regulate international financial affairs

ii) **World Bank**; to regulate the reconstruction of Europe and

iii) **ITO** (The International Trade Organization) to regulate trade in tangible goods across national frontiers.

The then US President Harry Truman presented the ITO Charter (prepared by a committee at the Havana conference in 1945) to the US congress which rejected it. The US congress argued that it was a leading military and

economic power and was not ready to cede economic power and take command / instruction from an organization such as ITO. The US congress argued that it had already surrendered political power to the Untied Nations. As a result of this rejection by US 42 Nations met in 1947 and resolved to implement/ apply, amongst themselves, that part of the ITO Sharter, which was titled "**The General Agreement on Trade and Tariffs** (GATT). These 22 countries signed a "**Protocol of Provisional Application**" of GATT (PPA) amongst themselves. This protocol was the basis upon which GATT operated for almost 50 years.

The objectives of GATT was to liberalize trade by compelling countries to refrain from measures which amounted to distortion of trade (Trade distorting measures) GATT was to come up with rules and principles which would gradually reduce the measures and liberalize trade. GATT, identifies tariffs, quotas, internal taxes, discrimination of imports dumping subsides state trading enterprises as trade distorting measures.

In term of its structure and set up, GATT, as it then was, was not as creation of any instruments. Thus, when we talk of GATT we refer to the organization that operated through three documents / instruments

i) The Protocol of Provincial Application
ii) The General Agreement on Trade and Tariffs, or that part of ITO signed by 42 countries to apply amongst themselves.
iii) Protocols of accession, signed by countries which joined GATT later.
iv) It also operated through national schedule of commitments, which were tariff bindings where contracting parties bound themselves t

certain tariff quotes, undertook not to increase tarrifs (unless through negotiation) and to reduce them in the long run. In the NSC contracting parties listed all possible tradable goods and percentage of quotes to be imposed on each.

GATT itself had no member countries; the countries joining it were referred to as "contracting parties". All contracting parties had to sign the national schedule of commitment, a document which indicated inter alia their willingness to abide by the national treatment principle and the most favoured nation trading status, which are equality and non discrimination principles. The World Trade Organization which succeeded GATT arose out of the need to have a legal foundation or structure or institution which GATT lacked. (GATT was, itself not a legal creation) The creation of a legal framework became the basis for multi-lateral trade and precluded the GATT system where all contracting parties negotiated separately, WTO Agreement acted as a treaty to instill a certain modicum of discipline among member states in the conduct of trade.

The GATT system rigidity in terms of changing and amending rules, witnessed through the long drawn rounds of trade negotiations also contributed to creation of WTO. There was equally no established dispute settlement mechanism, which led to a practice called forum shopping, where contracting parties pursuant to their right to have a pace, chose where there dispute was to be settled.

The WTO system, which was established to address these shortcomings was made up of several instruments. The WTO Charter, which operated as the treaty creating obligations upon member states. The Charter in turn had

four Annexure constituting the WTO Agreement. Annex 1 contained the revised 1994 GATT Agreement, which became the WTO Agreement. There were twelve other agreements; the Trade Related Aspects of intellectual property, (Trips) Trade Related Investment Measures, The Antic Dumping Code etc.

The WTO adopted the governing structure of GATT and was guided by its decisions, procedures and customary practice. GATT Secretariat was the WTO secretarial. Organs of the WTO include the Ministerial Council, The General Council, and Council for Trade in Goods, Trade in services and Trade in Intellectual Property.

The need to create WTO has been justified on grounds that GATT lacked a legal framework of operation and therefore the need arose to have a treaty creating WTO.

It has been argued by some, however, that the creation of WTO was orchestrated by the US, which felt left out of GATT. The US felt the need to join GATT, transform and control world trade. The US apparently wanted a trade the organization it could control and it felt that ITO from which GATT was germane would amount to a surrender of it's an economic power.

Secondly, it became apparent in the 1980's that "a big aspect of trade was in the field of intellectual property, services and investment and were operating outside international trade. "Slomason argues "the1994 WTO agreement which was adopted by 124 countries (including the European community)

was, arguably, the most important, world wide agreement since the UN Charter in 1945."

GATT was established with the principal objectives of "Liberalizing trade. GATT/ WTO intended to achieve by constraining governments from imposing a variety of measures, which distort trade. " It identified such measures as tariffs, quotas, internal taxes, discrimination of imports, subsides, dumping practice, and states trading enterprises. GATT was to formulate strategies and rule or principles that would gradually preclude this trade distorting measures and liberalize trade.

3.6.2. Principles of International Economic Law

Before embarking on how the GATT / WTO system or politics have impacted on Third world countries' right to development, it is mandatory that we have a clear understanding of the two principles underlying the entire international economic law. The two principles, MFN and NTP inform the WTO/GATT system and forms a big part of the third worlds complaint that WTO system precludes their right to development. We will also examine one of the theories of international economic law as it impacts on development.

3.6.2.1. The Most Favoured Nation Trading Status

The GATT / WTO system is based on unconditional MFN, which forms the cornerstone of international trade law. Unconditional MFN as opposed to conditional MFN requires that when a contracting party "A" grants a privilege to country "C" while owing MFN to B then it must extend an

equivalent privilege to "B". The difference with conditional MFN is tha here A is owed nothing in return for extending such privilege.

It has been argued that MFN represents the only way to realize the ideal o sovereign equality. From a trade policy part of commitment to MF protects the value of bilateral concessions and spreads security by makin MFN the basis for a multi-lateral trading system.

The unconditional MFN is a principle of non-discrimination and require that a country refrains from discriminating products from other countrie In so doing MFN espouses a free trade/liberalization theory or system o trade. Article I of the 1947 **GATT Agreement** [184] requires all signator states to observe the unconditional MFN obligation. It says that the MF obligation is the central duty of the member states.' MFN prevent discrimination of similar products from different exporting countries withi a national economy. Article 24 (xxiv) of GATT /WTO however provides a exception to observation of MFN where trading groups/countries belong to custom union, free trade area or countries with an interim agreement to on of the above. It is an equality, non-discrimination principle applicable t countries and their products or same products from different exportin countries.

3.6.2.2. The National Treatment Principle (NTP)

Whereas the MFN protects discrimination between same products or fro different exporting countries on the domestic market, NTP on the other han

[184] GATT 1947 Agreement Article I

prevents discrimination as between domestically produced goods and similar imported goods. In other words it precludes discrimination on like products.

Article II of GATT/ WTO[185], which establishes these regulations, provides that tarrifs, should not be applied so as to afford protection to domestic products at the expense of like products from abroad. This principle of non-discrimination of domestic goods against imported goods has in practice been violated with respect to the following requirements by developed countries

i) Performance requirements
ii) Product standards (Packaging)
iii) Labeling requirements
iv) Advertising restrictions
v) Government procurement

These requirements by the west operate as disguised discrimination and effectively lock out developing countries from certain markets. This is a violation of GATT / WTO principles/policies and exposes WTO as an organization that espouses in equality and perpetuates the relative lack of development among third world countries.

3.6.2.3. The Effect of Free Trade Theory on Development

Although this exposé is not intended to be an exhaustive analysis of international economic law, (much less the Trade theories) we will nevertheless consider the free trade theory to the extent that it impacts on the

[185] Ibid, Article II WTO/WTO

right to development. The free trade theory, also referred to as the liberal trade theory, ostensibly promotes a mutually profitable division of Labour, which enhances potential of real national production of all parties. This theory requires that countries remove all barriers to trade and is meant to facilitate factors of production as well as goods moving freely across national frontiers.

It has been argued that once there is liberalized trade, producers will only produce products on demand and such products only sold where there is demand. This theory is predicated upon the principle of supply and demand. The free trade theory has however been criticized for encouraging developing counties to open their market with the effect that they end up relying on imported products which increases employment in the exporting country while creating unemployment in the in the importing country. The corresponding effect on the importing country is to retard development by killing local industry and perpetuates unemployment.

3.7. Rules developed by WTO to regulate International Trade

WTO and GATT have developed certain rules, which govern the conduct of trade;

3.7.1. Tariffs;

Tariffs are duty imposed on imported goods and which have the effect of increasing prices of imported goods. In so doing this gives the domestic product and producers an advantage over imported goods and is considered. a trade distorting measure. Article II of GATT and WTO make specific provisions on tariffs, which require that certain conditions under the national

schedule of commitment be fulfilled. Article 19 of GATT/ WTO howev permits imposition of tariffs where increased import will cause injury domestic industry.

3.7.2. Dumping

"This is the practice of temporarily selling imported products at a pri below the cost of production in a particular market."[186] It is considered predatory tool for eliminating local competition. The practice [by mul nationals who can afford to sell below cost price] has been to significant increase prices once they ultimately recoup losses and after getting rid of a competition.

Article VI of GATT[187] is considered the Anti Dumping Agreement. Th Code does not prohibit dumping as such, it merely permits the affect country to impose on "*anti dumping duty*" to offset the effect of dumping[18 This is referred to as a "*countervailing duty*."

Under the 1994 " Anti Dumping Agreement", [included in annex 1 GATT/WTO Agreement], a complaining country had to fulfill certa conditions before it could levy a counter veiling duty.

i) Material injury and

ii) Establish dumping in the technical sense.

Injury must be of a material nature. Injury of a material nature can established where there is a 'significant idling' of productive facilities as result of increased imports. Other indicators of material injury inclu

[186] William R.S, "**Fundamental perspectives on international law**" (1983) Pg. 579
[187] GATT, Article 6, 1994

increased unemployment or under employment. Injury of a material nature also occurs where a significant number of domestic firms are unable to reasonable profits, also where there is by excess stocks. Lastly inability of firms'/enterprises to create or generate capital to invest in research.

3.7.3. Disguised discrimination Precludes Development

The GATT/WTO system and the MFN/NTP principle ostensibly espouse the principle of equality and non-discrimination. There are however certain practices which, on the face of it appear innocent but in practice turn out to be discriminatory. It is noteworthy that just like in dumping, WTO/GATT do not per see prohibit discrimination. To the extend that these practices shut out third world countries from accessing markets in the west, the WTO system/policies may be said to be a hindrance to development.

Disguised discrimination refers to a phenomenon where a given rule is applied uniformly (as required by the NTP /MFN principle) and is on the face of it innocent. However when applied such a rule gives rise to discrimination of a disguised nature. Some of these practices / rules outlined above have the following discriminatory effect;

3.7.3.1. Performance / Technical Requirements (Discrimination)

A technical requirement has been imposed, for instance, that planes flying over Europe maintain a certain percentage of waste emission. This requirement is on the face of it innocent. When implemented however it has the effect of shutting out certain countries which cannot meet the standards

[188] Ibid,

from these markets. This violates GATT/WTO principles of non-discrimination.

This requirement in Europe demands that planes flying over Europe keep CFC emissions to 0.05%. The effect is that developing countries which find the airbus more economical and affordable are forced to purchase the 700 series gets in order to over fly Europe.

Other examples of technical requirements, which appear on the face of it innocent, include fishing net landing bay requirements which have effectively precluded other countries from fishing in certain waters. These countries lack the financial and technical ability to fish in these waters given such stringent conditions.

3.7.3.2. Labeling requirements (Discrimination)

This is a requirement that the origin of products be labeled. On the face of it this rule is innocent but once these products enter the market, the ones with labels from the third world are disadvantaged. As a example a watch labeled Swiss made would certainly fetch a higher value than a Kenyan made one in the International Market. This rule is prima facie innocent, in practice however it discriminates products by origin and name of manufacturer. In view of the fact that it mostly affects third world products, it may be said that the rule discriminates upon them and precludes their ability to compete effectively.

3.7.3.3. Packaging Requirements (discrimination).

This is a Requirement that products be removed from the farm to the shelf. It affects products in the Horticultural and meat industries. In Horticulture exporters of flowers must have the financial ability to ensure that flowers are frozen using preservatives and transported in refrigerated containers in order to reach the market before the flowers bud opens. This rule requires a country to have financial and technical ability. Similarly the WTO requirements insist that for meat to enter certain markets they must be tinned. This is a requirement that is expensive and may shut out producers and products from certain origins.

3.7.3.4. Advertising Requirement.

This is a requirement that all products making entry into foreign markets be advertised. Because the costs of so doing are colossal only multi-national companies can afford it. This therefore gives unfair competition to relatively smaller companies especially from developed countries. This rule like the ones, above is innocent on the face of it but in practice discriminates other therefore violates the WTO/GATT Agreement on non-discrimination.

3.8. Developing Countries and the WTO/GATT Policies

Developing countries have over the 50 years history of GATT raised concern that the system does not provide a level playing field. Its principal case has been against the MFN, NTP principles, which underlie International Economic Law and inform the WTO/GATT system. These principles in practice operate to perpetuate inequality between developing and developed

countries. The argument has been advanced that **the equality of unequal perpetuates inequality and preludes their development.** Thus speaking developing countries have demanded that NTP and MFN (equality and non-discrimination principles) should not be strictly applied. GATT part IV and the developed countries have provided for Generalized System of Preferences in which preferential treatment in terms of trade is extended to third world countries' products from their countries. Products from either attract low or no tariffs at all.

It has also been argued that both the negotiating process as well as the Dispute settlement mechanisms, through which inequality may be redressed, are both long drawn and expensive. Thus developing countries have not been able to take advantage of such processes to redress the lack of a level playing field in International trade.

3.8.1. WTO/GATT Response

In response to these concerns the General Agreement was amended to include what is now GATT part IV. This inclusion was intended to benefit developing countries and made the following provisions:-

1.Special and differential treatment (system of GSP)

This involves developing countries allowing deviation or an exception to the equality principle of MFN/NTP. An example of this GSP concession can be seen in Kenyan coffee and tea attracting no duty into the EU markets while other products attract only 5% duty.

2. Developed countries are required to refrain from introducing or increasing incidence of custom duties or non-tariff import barriers on products that are of interest to developing countries.

3.A requirement that developed countries cease or refrain from

Imposing new fiscal measures that hamper the growth of consumption of primary products from developing countries.

4.Developed countries under GATT part IV are permitted to deviate

from the MFN,NTP principles of equality and non- discrimination and apply special differential treatment to developing countries.

5.Developed countries are allowed to discriminate other

developed countries and to lower tariffs or give preferential custom duty, free entry of products from developing countries.

3.8.2. The Need for a New International Economic Order

Despite the introduction of part IV GATT, developing countries have continued to assert that the GATT and WTO system is unfair to them. GATT part IV, they have argued, does not address their real concerns. It is for this reason that they have made representation for a **new International Economic order** which imposes obligations on developed countries. This new order should include a fundamental change of the principles underlying International Economic Law. They have further put up a case for the inclusion of multi-national corporations in the observance of these obligations.

These concerns, requiring a re-ordering of the entire gamut of International Economic Law, crystallized into the United Nations Conference on Trade and Development (UNCTAD). UNCTAD was first convened in 1964 and

became a permanent organ of the United Nations General Assembly. UNCTAD creation is germaine from the feeling by developing countries that GATT/WTO and Bretton Woods Institutions (IMF and World Bank) as well as the WTO were non-responsive to their development needs.

It is note worthy that the **Declaration on the Right to Development** [189] makes a provision that peoples/communities have a right to participate in all aspects of development and stages of decision making[190].

Developing countries were of the view that the WTO/GATT negotiating process rounds as well as dispute settlement system negated this right.

They seemed to argue as well that the WTO, GATT system violated Article 3 of the Declaration, which gives the states *"the primary responsibility for the creation of national and International conditions favorable to the realization of the Right to Development"*. The WTO/GATT system and policies takes away the power of developing countries to determine the realization of this right through policies and principles that create inequality and preclude their ability to develop.

Developing countries have therefore become objects rather than participants in International trade, which further violates another cardinal principle of the Right to Development. Article 2 provides that "the human person is the central subject of the right to development and should be an active participant (not an object) and beneficiary of the Right to Development"[191] WTO,/GATT policies have made developed countries (and the financial,

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[189] Infra note 91

[190] Declaration on the Right to Development, Article 4

[191] Ibid, Article 2

economic interests/benefits of multi-national corporation) the central subject of their trade and development policies.

It is in light of this that the UNCTAD forum came up with the **Charter for Economic Rights and Duties of States**[192] as well as a conduct on multi-national corporations. The Charter imposed on developed countries an obligation to contribute at least1 % of their GDP to developing countries. There was also a code on transfer of technology to assist developing countries to foster development. There was a requirement on multi-national corporations to plough back part of their profits to developing countries. Predictably the US and the West rejected these proposals and refused to be a signatory to the Charter. Accordingly, the quest by developing countries for a **New International Economic order** remains an elusive dream.

[192] Supra Note

Chapter 4

4.0. Conclusion and Recommendations

4.1. Summary

This dissertation set out to establish that international institutions (IMF World Bank and WTO) formulate policies and undertake activities whic impact, sometimes negatively on individual human rights. These activitie however are yet to be brought within the ambit of international huma rights.

We also set out to establish that a denial of peoples right amounts to a denia of their right to self-determination. This underscores the principle o indivisibility and interdependence of human rights, which falls under Articl 6(2) of the Declaration on the Right to Development.

It will also be reaffirmed in this study that "there is little need in recognizin the right to self determination as a superior inviolable right if one does not a the same time recognize the right to development for the people that hav achieved it."

In terms of the holder of the Right to Development; Un Resolution 180 asserts the states right to Permanent Sovereignty over Natural Resources i within its jurisdiction respect to explanation and exploration. Thi resolution makes the state the right holder but not the owner of the right t

development. This position has been re-affirmed in the Declaration on the Right to Development.

This is similarly stated under article 21 (2) of the **Charter of Economic Rights and Duties of States**. The state, it would seem, has the authority to preserve this right, to create national and international conditions favorable for the realization of the right to development. Article 2(3) of the Declaration enjoins the state to regulate and formulate policies in improving the well being of the entire population.

Both the Declaration and the Charter on Economic Rights and Duties of States, take different positions from that of the ICCPR and ICESCR which consider the state (not the Right holder) but the person against whom those regime of rights are to be claimed. Indeed ICCPR and ICESCR considered the state the principle culprit in violation of individual rights. The two protocols primarily focused on restraining the ability of the state to infringe upon the liberty of citizens. Secondly the State has to guarantee their protection. These were the first and second-generation rights.

In the third generation of rights (though it is considered that an unfettered vesting of this right upon the state could lead to abuse or gross violation), the state was nevertheless made the right holder.

The third phase of this study set out to examine the role of international institutions in the protection or non-violation of international human rights. The architects of international treaties and articles of agreement establishing these institutions never explicitly contemplated any legal human rights obligations enforceable under international law.

This obligation has however been implied; especially in article 4(1) of th Declaration on the Right to Development. The state under this provision may formulate international development policies, forge linkages wit international institutions which in turn bear some responsibility in realizatio of the right to development. Indeed at the UN Conference on Trade an Development (UNCTAD) these organizations were put under on obligatio not only to plough back proceeds of their profits to developing countrie they were also required to facilitate transfers of technology, foste development (see the Charter for Economic Rights and the Code on Mult National Corporation and code on transfer of technology.

We have also examined provisions of the Declaration on the Right t Development, which revealed four important issues constituting the mai pillars of the Declaration;

(i) The right to development is the right of individuals to continuou economic, social cultural and political development.

(ii) It includes the right to participate in all aspects of development an decisions making.

(iii) It involves equal opportunity and access to resources, the right t fair distribution of benefits of development.

(iv) The individual is the central subject of the right to development.

It is submitted that the policies of WTO to the extent that they perpetua inequality preclude the realization of fair distribution and equal access t benefit of development. This submission in not only germaine from th concerns of third world countries culminating into the UN—conference o Trade and Development. It also emanates from the provisions of th

Declaration whose obligations are outlined at i-iv above, place a moral, not legal obligation on WTO. Fair distribution are precluded to the exte that its rules and principles espouse disgusted discrimination whose effe is to lockout third world countries from certain international markets.

Similarly, by enforcing stringent monetary conditions and prescribi models of development (to recipients) the IMF and World Bank, de member countries the right to participate in decision making and choosi the model of economic development favorable or suitable to their needs.

The policies of international institutions must put into consideration t implication of their activities not only to member states but mo importantly to the individual, this is in view of the fact that the individual the central subject of the right to development

Philip Alston in his book "Garfield" reaffirms this position that "The state merely the medium through which the right of the individual Development] is effectively asserted, that the right to development is not t right of states except where states claim it in the interest of their people".

It is therefore in the individual that the social effects, economic implicatio and political implications (of IMF, World Bank and WTO policie and their activities,) finally narrow down to pounds shillings and pence.

It behooves these institutions to evaluate or examine their activities a policies with a view to establishing their possible and actual implication individuals human rights. Yet IMF and World Bank continue to treat t

4.2.2 The Article of Agreement of IMF, World Bank and WTO should be revised to include these duties and obligations. Presently the Articles creating these institutions have adopted such language as "to assist, to promote, to facilitate, to give confidence to. etc. all of which provisions give rise to no obligations at all. The Provisions of these articles would seem to privilege economic and monetary considerations over human rights.

4.2.3 In the area of international trade, there is need for a new international economic order. These concerns originate from the policies of WTO and which complaints are originated from the third world and culminated into the UN Conference on Trade and Development. This gave rise to the Charter of Economic Rights and Duties of States and a Code on Transfer of Technology. It also heralded third world countries concern about the unfair policies of these institutions. It created obligations and called for respect for and promotion of developing countries.

The US has since refused to sign the Charter, and or event to recognize the two codes on Conducts of multinationals and transfers of technology. There is need to create universal recognition for this Charter and prevail upon the U.S to sign it.

4.2.4 Third world countries must make concerted efforts, both regional and international, to realize efforts made at the UNCTAD forum. In this regard three initiatives (which are still very much in moot form) and originating from Africa are worthy of note.

(i) The African Monetary Fund (AMF) Proposal

(ii) The New partnership for Africa in Development (NEPAD)

(iii) The African Union

4.2.4.1 African Monetary Fund (AMF)

"Due to the difficulties of meeting the stringent conditions of the World Bank and IMF most African, indeed third world states have been unable to get either short term IMF financing or the World Bank long term funding." These conditions (namely currency devaluation, reduction of the interest rates and devaluation, civil service, trade regime reforms and privatization, to which has been added good governance, has necessitated as Jimnah Mbaru asserts, re-thinking of Africa's dependence on IMF and World Bank for both balance of facilities or World Bank long term project funding[193] He suggests the creation of an African Monetary Fund (AMF) with funding from member states, with additional funding from deposits from national reserves from rich second and third world like Libya, Saudi Arabia, Botswana and South Africa. Other partners including international Institutions wishing to contribute would also be welcome to do so. This proposition however is curious given the fact that these institutions' policies are the very reason why the third world has come up with these complaints.

He suggests that AMF would be accessible to respond quickly to impending crisis in African Countries. Such crisis which have worsened due to slow response by IMF include the onslaught on the South African Rand crisis and the delay in responding to the crisis on the Argentinan ' Peso'. This

[193] Mr. Jimnah Mbaru – Former chair (nation, Friday Sep. 20, 2002.

proposition would also stabilize African currencies presently vulnerable to IMF exchange devaluation policies.

Mbaru makes a rather interesting proposition that creation of an AMF would lead to competition between IMF and other lending institutions with competitive terms of lending and other support service.

The second interesting point to note is that by seeking to be the collective voice of Africa in IMF and World Bank, AMF would leave Africa in a better bargaining power/position. AMF perhaps would seek to be the G-9th partner of IMF/WB.

Lastly he notes that an AMF would actually facilitate the perception of ownership of various policies and reforms (Consistent with Article 2(3) of the Declarations on the Right to Development.) and which is essential to transforming Africa from a poor continent to one which is vibrant and wealthy.

4.2.4.2 New partnership for African Development (NEPAD)

Nepad is an initiative of African leaders, aimed at getting Africa out of poverty and place it on a path of growth and development.[194] It was established to enable African countries participate actively in the world economy and body politics. Its roots are traceable to the South African President Thabo Mbeki and the Senegalese President Abdoulaye Wade.

[194] Nepad Document, October 2001)

Prior to drafting Nepad Mbeki came up with Map,(Millennium Partnership for African Recovery Program). These bold initiative is in response to the inequality and unfair policies in the International Economic Order. It is however, threatened with failure by the civil society, trade unions gender activist) etc who claim not to have been consulted in its formative stages.
This is a serious oversight. Andrew Kailembo (the Secretary General. Of the international Confederation of Free Trade Unions) says "Failure to pull along the socio economic actors for realization of these goals is fatal. He adds that the right to be part of the economic decision making is important to the success of this initiative." Indeed this echoes the provisions of article 2 of the Declaration on the Right to Development, which makes the individual the central subject of the Right to Development.

It is in light of this that it is suggested that a comprehensive development of principles fostering the ideal of national ownership be adopted. This should embrace article 2(1), which calls for a participatory process, a holistic approach of all stakeholders and partners.

One of the criticisms of Nepad is that it does not embrace the principle of indivisibility and interdependence of human rights (Art. 6(2), which calls for respect for and protection of other rights in order to fully realize the right to development.

Nepad also needs to embrace regional co-operation and integration. This would seem to take a step further the requirements of Article 3(2) which embraces the principles of International Law Concerning Friendly Relations and co-op among states." The realization of regional integration may

perhaps have inspired the proposal to have an African Union. A Union of African States (such as was proposed at the last organization of African unity meeting) would place the Nepad initiative on a very high pedestal and on a better position to forge linkages with the rest of the international community and institutions such as IMF and World Bank.

At the recent 2002 Nepad conference the following recommendations were made (which if implemented would go a long way in realization of the right to development)

i) Demand for democratization and accountability of global institutions (WTO, IMF and World Bank)
ii) Trade unions to take an active role in influencing national, regional and international policies to create a more balanced approach to sustainable development.
iii) Establish ownership of Nepad through inculcating ownership and participation from the grass roots.
iv) Call for cancellation of Africa's debt burden.
v) Nepad to embrace the indivisibility and interdependence principle of Human Rights, in this regard Nepad should include issues such as abolition of child Labour, environment, HIV/AIDs policies, and land reforms.
vi) Nepad to include the social dimensions of its proposals aimed at poverty alleviation reduction.
vii) Encourage sharing of information and strategies between member states implementing Nepad policies.

We submit that though this initiative is noble, the approach may be flaw
First the exclusionary approach by its architects, which precludes the n
for ownership and participation. Secondly the funding of Nepad ray
certain question. The founders sought funding from the G – 8 (during its
meeting in Canada). This negates the likehood of benefiting from any of
gains Nepad seeks to garner by making an independent break from I
policies. Nepad promised that in return for more funding and d
cancellation, it would create greater accountability and democratizati
These pre-conditions would seem to amount to the same I
conditionalities which Nepad and other initiatives before it sought to avoid

Perhaps the suggestion by Jimnah Mbaru that an African Monetary Fun
(AMF) be established is the way forward, with funding from member st
and reserve funds from rich African and other second world countries. A
should then seek membership into IMF and G-8 (perhaps as G-9) and b
contributing member and major shareholder with voting power and abilit
influence policy.

Such an arrangement, Mbaru argues, could create competition betw
international lending institutions, the end in view being, better, flexi
user-friendly conditions (not the take it or leave it policies of IMF).