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A LONGER AFRICAN HISTORY: RE-POLITICISING THE RIGHT TO DEVELOPMENT

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1 Introduction

The concept of the right to development is of African origin.¹

‘The “right to development” is considered a specifically African contribution to the international human rights discourse.’² Kéba M’Baye, one of the early giants of African international law during the independence struggles, is considered the father of the right to development,³ as well as the father of the African Charter on Human and Peoples’ Rights (African Charter).⁴ Yet, in today’s discussions at the United Nations (UN) on the right to development, this intellectual history is often glazed over with little to no recognition of the contribution of African thinkers, such as M’Baye and others.⁵ The purpose of this contribution is to bring to the fore the history of the right to development, drawing the politics of its origins further back, in order to re-politicise the right today.

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1 F Ougergouz *The African Charter on Human and Peoples’ Rights: A comprehensive agenda for human dignity and sustainable democracy in Africa* (2003) 298.

2 IG Shivji *The concept of human rights in Africa* (1989) 29.

3 RL Barsh ‘The right to development as a human right: Results of the global consultation’ (1991) 13 *Human Rights Quarterly* 322.

4 1981, OAU CAB/LEG/67/3 rev. 5, 21 ILM 58 (1982). For a contribution of M’Baye, see MA Plagis & L Riemer ‘From context to content of human rights: The drafting history of the ACHPR and the enigma of article 7’ (2020) 23 *Journal of the History of International Law/Revue d’histoire du droit international*.

5 M’Baye was one of a number of key actors working on the right to development; see, eg, N Rubner ‘An historical investigation of the origins of the African Charter on Human and Peoples’ Rights’ PhD thesis, Cambridge University, 2008 699-714 (on file with author).

'Development' can mean different things to different people(s), in different times and places.⁶ Between 1979 and 1981 the meaning of the right to development in the context of the Organisation of African Unity (OAU) was codified in article 22 of the African Charter. The article, as it stands today, is divided into two sections; the first paragraph protects the rights of individuals and peoples, providing that '[a]ll peoples shall have the right to their economic, social and cultural development with due regard to their freedom and identity and in the equal enjoyment of the common heritage of mankind.' The second paragraph places an obligation on states and the wider international community, stating that '[s]tates shall have the duty, individually or collectively, to ensure the exercise of the right to development', thus giving article 22 an inbuilt duality. The article was drafted at a time when many sub-Saharan African states found themselves in economic decline,⁷ and ideological tensions were running high between the classic distinction of civil and political rights, on the one hand, and economic, social and cultural rights, on the other.⁸ What emerged from this context was a right that focussed on *both* economic equity at the inter-state level, as well as individual and community rights that transversed the ideological divide between the 'generations'⁹ of human rights. As a result, the right to development has a distinct character that is unique to the African human rights system.

The mark of M'Baye on the right to development is unmistakable. Nonetheless, the aim of this chapter is to also highlight the embeddedness of the right to development in a longer history of Africa's (and Africans') involvement in the creation of international law at multiple levels.¹⁰ The aim is to demonstrate the influence of African legal and political thought in shaping international human rights law, then and now. In doing so, the chapter makes three assertions. First, it is suggested that while the roots of the link between development and human rights as a legal concept are clearly African, their point of origin is perhaps older than some initially anticipated. Second, the chapter cautions against the potential erasure of

6 Eg, Treblicock and Prado provided an extensive overview of the literature on development and particular goals: development as economic growth, as lack of poverty, as freedom, as sustainability, or as quality of life. MJ Treblicock & MM Prado *Advanced introduction to law and development* (2014) 3-16.

7 PM Lewis 'Economic reform and political transition in Africa: The quest for a politics of development' (1996) 49 *World Politics* at 92.

8 F Viljoen *International human rights law in Africa* (2013) 214; HB Jallow *The law of the African (Banjul) Charter on Human and Peoples' Rights (1988-2006)* (2007) 27-35.

9 Donnelly identifies the right to development as a 'third generation' right. J Donnelly 'The "right to development": How not to link human rights and development' in CE Welch & RI Meltzer (eds) *Human rights and development in Africa* (1984) 263.

10 For a more extensive history of the right to development, see Rubner (n 5) 699-714.

the 'Africanness' of the right to development in its universalisation. As the right to development has re-emerged at the UN level, its socio-political underpinnings that challenged conventional power in international law, which often excluded Africans and peoples of African descent, are in danger of being erased. Third, I argue, therefore, that by going back to the origin story of the right to development in the struggles against colonialism and apartheid, and calls for a new international economic order (NIEO), the new cadre of African international law jurists can challenge their own preconceptions of the boundaries of international law by reflecting on the creativity and ingenuity in the process of resistance of previous generations of African international lawyers.

The chapter maps out the course of 'the right to development' from the first Pan-African Conference in 1900 to the latest iteration of the aspirations of the UN to adopt a right to development. While this might appear to imply a teleological approach,¹¹ the narrative here is not to claim a linear progression of a new human right from 1900 onwards. Thus, although Orford's approach to anachronism¹² is used to a certain extent, the chapter asserts that the story of the right to development is complex. As has been explained elsewhere, the right to development was at times contested and there were multiple motives for its adoption in the African Charter.¹³ There are also potential disjunctures between what was codified, and the breadth of what has since been interpreted. In addition, the UN proposal for a right to development in certain respects is a step back to a more limited vision of what should be included in such a right, and lacks the more radical underpinnings of its origins. Hence, an approach to history that focusses on a 'narrative of progress'¹⁴ would be misleading in this case.

This contribution also deviates from other narratives that distinguish between nation building and the human rights project.¹⁵ The dismissal of the connections between self-determination, nation building, and

11 On how to disrupt such an approach in histories of international law, see M Arvidsson & M Bak McKenna 'The turn to history in international law and the sources doctrine: Critical approaches and methodological imaginaries' (2020) 33 *Leiden Journal of International Law* 1.

12 See A Orford 'On international legal method' (2013) 1 *London Review of International Law* 166.

13 Plagis & Riemer (n 4); Rubner (n 5).

14 Critiqued in Arvidsson & Bak McKenna (n 11) 41.

15 Unlike Moyn who asserts that the right to self-determination is merely an expression of nationalism, Anghie has argued that states consented to their sovereignty being impinged. A Anghie 'Whose utopia? Human rights, development, and the Third World' (2013) 22 *Qui Parle* 63.

individual rights misses two important points in relation to the right to development: First, the duality of the right to development, which is both an individual right and a right among states, was part of a nationalist agenda.¹⁶ Therefore, it is an expression of nationalism, but its recognition of individual rights is also part of the ‘ongoing revolution’ of the human rights project.¹⁷ Second, the centrality of sovereignty was explicit during the drafting process of the African Charter.¹⁸ To a large extent, the experiences of Africans with the international slave trade, colonisation, and post-colonial economic subjugation¹⁹ meant that self-determination and, by extension, sovereignty were core features of the concept of the right to development.²⁰ This is also evident when engaging the longer history of the pan-African movement. Therefore, the distinction between decolonisation, sovereignty, and self-determination as part of a nation-building project, on the one hand, and the inclusion of the right to development as part of the human rights project, on the other, misses the ‘complex interconnections and continuities’²¹ between the concepts and their histories. ‘The idea of pan-Africanism signalled that it was time to claim the [right to development] in Africa’,²² and the inclusion of this right was also integral to the push for African states’ independence. Thus, instead of tracing the imperialist ideology and Eurocentric universalism of international law in today’s world,²³ this chapter traces how past struggles against those systems are now being erased in the process of universalisation.

The chapter is divided into four parts. Part 2 starts by providing a longer view of history and delves into the early history of the pan-Africanist movement. It highlights the calls for a combination of rights that helped

16 See, eg, Rubner’s explanation of the use of human rights discourse by African leaders in relation to (former) colonial powers. Rubner (n 5) 711-713.

17 Anghie (n 15) 70.

18 The centrality of sovereignty was one of the four major factors to have influenced the drafting of the African Charter; see Plagis & Riemer (n 4). The centrality of sovereignty has also been discussed by others, although asserting that sovereignty took precedence over human rights in the negotiations on the African Charter; see S Moyn *The last utopia: Human rights in history* (2012) 84-119; Jallow (n 9) 22. This distinction has been disputed elsewhere; see B Ibhawoh ‘Testing the Atlantic Charter: Linking anticolonialism, self-determination and universal human rights’ (2014) 18 *The International Journal of Human Rights* 3-6.

19 For an overview, see ch 1.2 of SD Kamga *The right to development in the African human rights system* (2018).

20 Kamga (n 19) ch 1.2.

21 Anghie (n 15) 71.

22 Kamga (n 21) ch 1.2.2.

23 Arvidsson & Bak McKenna (n 11) 52.

form the underlying notions of the right to development in article 22. The analysis demonstrates the connections between the rights invoked by the pan-Africanist movement, and those included in the African Charter almost 70 years later. Part 3 then turns to a brief overview of how the right to development has been interpreted in the African human rights system. It delves into the drafting of the African Charter, what makes the right to development ‘uniquely’ African, and how the right has been interpreted to date. Part 4 connects the stories of the creation of the right to development at the UN with African scholars and the work that was taking place on the continent. It explores the usefulness of re-engaging with the political underpinnings of the right to development. The fourth part emphasises the importance of this long durée perspective of the pan-Africanist movements in the beginning of the twentieth century, to the African Charter, and current developments, to better situate the contribution of African voices to international law. The purpose of this mapping and re-politicising exercise is to highlight the moments in history when the concept was introduced, the actors and politics that supported the emergence of the right to development, and how these histories can be useful to the new cadre of African international lawyers today in terms of challenging the boundaries of international (human rights) law.

2 A longer (pan-)Africanist perspective

Some authors place the origin of the right to development in the 1967 Algiers Economic Conference of the Group of 77.²⁴ Others place its origins in 1972 with the publication of *Le Droit du Développement comme un Droit de l’Homme* authored by M’Baye.²⁵ For example, Ouguergouz and Murray both place the origins of the right to development in the late 1970s,²⁶ and firmly within the narratives of post-colonial struggles, control over natural resources, and agitation for a NIEO.²⁷ Rubner discusses the political history of the right to development and places emphasis on inter-state claims, and the calls for a NIEO,²⁸ among other things. Senghor and M’Baye, both influential voices during the drafting of the African Charter, exemplified this in their speeches at the time of its drafting. For example,

24 Ouguergouz (n 1) 298.

25 K M’Baye ‘Le droit au développement comme un droit de l’homme’ (1972) 5 *Revue des Droits de l’Homme*.

26 Ouguergouz (n 1); R Murray *The African Charter on Human and Peoples’ Rights: A commentary* (2019).

27 Murray (n 26) 521.

28 Rubner explains the processes between M’Baye and others at the UN, which demonstrates how circular some of the process were, and how many of the figures, including M’Baye, were integral at different points and kept re-emerging. Rubner (n 5) 701-703.

Senghor explained the right to development as follows in his speech in Dakar in 1979:²⁹

We wanted to lay emphasis on the right to development and other rights which need the solidarity of our states to be fully met: the right to peace and security, the right to a healthy environment, the right to participate in the equitable share of the common heritage of mankind, the right to enjoy a fair international economic order and, finally, the right to natural wealth and resources.

Umzurike summarises the position of M'Baye at another meeting in 1972 as follows: 'All rights are intertwined with the right of existence, with a progressively higher standard of living, and therefore with development.'³⁰ M'Baye has also been credited with the inclusion of the right to development in the 1977 UN Commission on Human Rights Resolution 4(XXXIII), when he presided over the thirty-third session of the UN Commission on Human Rights.³¹ The UN subsequently adopted the Declaration on the Right to Development (UNDRTD) in 1986.³²

Pointing to the first mentions of the right to development helps to identify the moment such a right was perceived as necessary, and formulated as such. Yet, a broader and longer history is required to understand the political and ideological struggles that lay at the centre of why and from where this necessity arose. By addressing the right to development through its political origins, this chapter draws the line of influence further back to the first Pan-African Congresses (PACs), with their origins as early as 1900.³³ More specifically, I argue that the right to development is intimately connected to the calls by lawyers, scholars, political activists, and others from Africa and those of African origin centred on human dignity, self-determination, and authority over natural

29 Address delivered by Léopold Sédar Senghor, President of the Republic of Senegal, address delivered at the opening of the Meeting of African Experts preparing the draft African Charter in Dakar, Senegal, 28 November to 8 December 1979. Reprinted in IG Shivji *The concept of human rights in Africa* (1989) 121, reproduced in CH Heyns (ed) *Human rights law in Africa* (1999) 79.

30 UO Umzurike 'The African Charter on Human and Peoples' Rights' (1983) 77 *American Journal of International Law* 906. The address was given at the Institute of International Law of Human Rights in Strasbourg.

31 Shivji (n 2) 29.

32 UN Doc. A/RES/41/128, adopted on 4 December 1986.

33 This is not to claim a starting point for pan-Africanism, nor to suggest that it is limited to these congresses. However, for the purposes of this chapter, the focus will be on the formal processes that took place between 1900 and 1945. For a fuller history of some of the earlier thinkers, such as James Horton, see H Adi & M Sherwood *Pan-African history: Political figures from Africa and the diaspora since 1787* (2003).

resources in the early twentieth century as a counter to colonialism. This conceptualisation of the political ideas underlying the right to development not only endured the test of time, as reflected in the drafting process of the African Charter, but it also became the mainstay of how the right to development has been codified in the African Charter. In other words, the chapter extends the line of history further back. That is not to say that pan-Africanism necessarily was the 'origin' of the right to development. In that sense the scholars above rightly point to the term being coined in the 1970s.³⁴ Instead, this look further towards the past is used to highlight the struggles engrained in the conceptualisations of the right to development, of which pan-Africanism is one expression. In doing so, the political struggle for a variety of rights, and their protagonists, are brought to the fore. This, in turn, helps to demonstrate how those struggles are connected to the OAU and, by extension, the African Charter.

2.1 Why a longer history?

The move to look to the PACs might appear rather anachronistic: that calls related to sovereignty, human dignity, equality and intra-African relations are plucked from their historical context, and that present-day questions are used to distort the interpretation of these 'past events, texts or concepts'.³⁵ However, as Orford has argued, why should concepts from the past not 'be recovered to do new work in the present',³⁶ especially in the context of international law, where the 'transmission of concepts, languages and norms across time and space' is an integral part of understanding present obligations.³⁷ In addition, as Moyn advocates, human rights can be viewed 'as a powerful transnational idea and movement'.³⁸ Taken at face value, the PACs, the OAU and, subsequently, the AU and its institutions, are transnational initiatives that have promoted certain norms across time as part of a larger movement for decolonisation, among other aims.

It would, therefore, also be somewhat misleading to see the developments at the PACs as completely separate from the developments surrounding the OAU and the creation of the African Charter. For example, although the early PACs were dominated by those of African

34 It is also not a historical accounting of the political processes, as has been done elsewhere for the African Charter. For the right to development, see in particular Rubner (n 5) 699-707.

35 Orford summarising Skinner's perspective. See Orford (n 12) 171.

36 Orford (n 12) 174.

37 Orford (n 12) 175.

38 Moyn (n 18) 7.

origin in the diaspora,³⁹ there are overlaps with those who attended the later meetings and the founding of the OAU. This was coupled with a shift in focus between the earlier pan-Africanist movements pre-1945 and those that came after, namely, the switch between a focus on relations with colonialism, to a focus on continental unity necessary for liberation.⁴⁰ It was this vision of unity – promoted by Francis Nwia Kofi Kwame Nkrumah, a vision shared by Sékou Touré, Ahmed Ben Bella, and Julius Nyerere, among others⁴¹ – that was seen as contributing to the founding of the OAU.⁴² Figures such as Nkrumah were both some of the most prominent pan-Africanists in promoting the OAU, and organisers of the 1945 Manchester PAC.⁴³ During the post-World War II era many parallel initiatives were also taking place among key players such as M'Baye, Karel Vasak, Senghor and others, at both the African and UN levels to promote the right to development.⁴⁴ Therefore, the contexts are connected. That is not to say that there is a direct line of progress from the first PAC to the African Charter to the UN. However, the thinking and concerns underlying what were seen as priorities in different times and different places are connected through the actors and communities of pan-Africanist thinkers that transverse those times and places.

More generally, the contested relationship between African states – or other post-colonial states for that matter – and international law has been explored by numerous authors.⁴⁵ Although the PACs preceded the independence of many African states from colonial rule, the struggles that informed the types of calls for rights during the later PACs were related to the need for independence and self-determination. In addition, once independence was gained by most African states, the struggles against neo-colonialism and apartheid were still very much on the agenda. It was also this focus on self-determination and sovereignty, and the push for an

39 Adi & Sherwood (n 33) ix.

40 As above.

41 This list exclusively contains the names of men who later became the leaders of their respective states. However, women were also active in the pan-Africanist movement and the PACs, whose history often is less visible. See, eg, ZM Roy-Campbell 'Pan-African women organising for the future: The formation of the Pan African Women's Liberation Organisation and beyond' (1996) 1 *African Journal of Political Science / Revue Africaine de Science Politique* 45.

42 Adi & Sherwood (n 33) ix.

43 Adi and Sherwood (n 33) 143.

44 For more details on parallel initiatives, see Plagis & Riemer (n 4).

45 Often categorised as TWAIL, see, eg, M Mutua 'What Is TWAIL?' (2000) *ASIL Proceedings*; JT Gathii 'The promise of international law: A Third World view' (2020) Grotius Lecture presented at the 2020 Virtual Annual Meeting of the American Society of International Law, 25 June 2020.

African human rights instrument, that helped shape the content of the African Charter,⁴⁶ and the inclusion of the right to development.

2.2 Pan-Africanism and (human) rights⁴⁷

There were six PACs throughout the first half of the twentieth century that discussed colonialism and the need for the political liberation of Africa.⁴⁸ Yusuf traces the start of the human rights and self-governance narratives in the pan-Africanist movement to the second PAC⁴⁹ held in Paris in 1919.⁵⁰ This notwithstanding, the product of the first PAC held in London in 1900 – the Address to the Nations of the World (Address)⁵¹ – also mentions the needs for certain ‘rights’. For example, the Address spoke of the need for opportunities for ‘education and self-development’ of Africans and those of African descent, and how this would contribute to the hastening of human progress at large.⁵² The Address placed strong emphasis on the consequences of the exploitation of African peoples and their resources by colonial powers, and argued for the need for self-governance.⁵³ These calls for individual rights and the need for independence reflect the duality of the right to development as codified in the African Charter.

The focus of the second PAC held in Paris was slightly different from the first conference.⁵⁴ In the context of colonisation and the end of World War I, the focus of the second PAC was on ‘the rights of peoples living

46 Plagis & Riemer (n 4).

47 The title of this part is a play on Yusuf’s book based on a series of lectures he gave at The Hague Academy of International Law; AA Yusuf *Pan-Africanism and international law* (2015).

48 For an overview, see S Adejumo ‘The Pan-African Congresses, 1900-1945’ 30 July 2008, <https://www.blackpast.org/global-african-history/perspectives-global-african-history/pan-african-congresses-1900-1945/> (accessed 25 February 2021).

49 Some claim that the 1919 conference was at the first Pan-African Congress. See, eg, the BBC, <http://www.bbc.co.uk/worldservice/africa/features/storyofafrica/13chapter5.shtml> (accessed 17 January 2020). However, others agree with Yusuf’s classification of it being the second. See, eg, CG Contee ‘Du Bois, the NAACP, and the Pan-African African Congress of 1919’ (1972) 57 *The Journal of Negro History*; JR Hooker ‘The Pan-African Conference 1900’ (1974) 46 *Transition*.

50 Yusuf (n 47) 21.

51 1900 Pan-African Conference Resolution, Address to the Nations of the World by the Pan African Conference in London, 1900, <http://www.houseofknowledge.org.uk/site/documents/neoGarveyismCorner/1900%20Conference%20resolution.pdf> (accessed 17 January 2020), reprinted from A Langley *Ideologies of liberation in black Africa* (1979) 738-739.

52 Pan-African Conference Resolution (n 51).

53 As above.

54 Yusuf (n 47) 21.

on the continent' and their 'international protection'.⁵⁵ Central to this call for rights for Africans were the concepts of human dignity and self-determination.⁵⁶ Furthermore, the 1919 Resolution adopted at the second PAC called for an overseeing body that would ensure the application of laws relating to political, social, and economic welfare.⁵⁷ The 1919 Resolution also contained a duality of rights. Part of the Resolution focused on land and natural resources, and the need to invest the capital generated from natural wealth of the state.⁵⁸ The other part highlighted the importance of the social needs of the people, with a focus on issues such as labour rights, education, and public health, as well as the political rights of Africans.⁵⁹ Lastly, the 1919 Resolution also called for the League of Nations, the predecessor of the UN, to help facilitate and safeguard the mission of 'the development of these peoples'.⁶⁰

2.3 Pan-Africanism, the OAU and the African Charter

Although most of the PACs took place long before the OAU was established⁶¹ – let alone the drafting of the African Charter took place – the underlying sentiments and the struggles for which they were employed are closely connected. This is not to claim some kind of genealogy of 'the right to development' from 1900 to the start of its codification in 1979. Among other reasons, the PACs, and the documents produced during them, pre-date the first mention of the right to development in the literature by a couple of decades, rendering such an exercise unfeasible. Instead, the aim here is to demonstrate how political struggles for the recognition of certain rights that were ignored or withheld from certain peoples and places in international law produced concepts that formed the foundations of what the right to development aims to encapsulate.

55 Yusuf (n 47) 22. Resolutions passed at the 1919 Pan-African Congress, 19-21 February 1919, full resolution available at <https://www.international.ucla.edu/asc/mgpp/sample09> (accessed 17 January 2020).

56 Yusuf (n 47) 22.

57 Resolutions passed at the 1919 Pan-African Congress, 19-21 February 1919; full resolution available at <https://www.international.ucla.edu/asc/mgpp/sample09> (accessed 17 January 2020). It is also interesting to note that this is perhaps the earliest call for an African Commission on Human and Peoples' Rights. One of the earliest calls is often viewed as emerging from the Seminar on the Establishment of Regional Commission on Human Rights with Special Reference to Africa (UN Proposal) in September 1969.

58 Resolutions passed at the 1919 Pan-African Congress (n 57).

59 As above.

60 As above.

61 Depending on how they are counted, there were between five and six PACs between 1900/1919 and 1945. Latter PACs were organised in Dar es Salam (1974), Kampala (1994) and Johannesburg (2014).

Therefore, while neither the first nor the second PACs explicitly mention 'the right to development', it is clear that many of the ideas that underpin the conception of the right to development in the African Charter had already emerged in these fora, especially with regard to what later became the structure of article 22.

For example, the OAU was established in May 1963 with numerous aims connected to promoting independence, sovereignty, development, and the 'advancement of our peoples'.⁶² Specifically, the Preamble to the OAU Charter emphasises that member states:

Conscious of [their] responsibility to harness the natural and human resources of our continent for the total advancement of our peoples in all spheres of human endeavour ... dedicated to the general progress of Africa ... [and] desirous that all African states should henceforth unite so that the welfare and wellbeing of their peoples can be assured.

The articulation of these aims echo some of calls made by the PACs, including human dignity, self-determination, equality, and a focus on intra-African relations,⁶³ all of which have found themselves repeated over time in various contexts.

In his background paper during the Dakar Seminar organised by the International Commission of Jurists and the *Association Sénégalaise d'Études et de Recherches Juridiques* in 1978, M'Baye acknowledged that Africans were working not only towards the right to development in the African context, but also at the international level.⁶⁴ It has been argued that the OAU was not particularly concerned with the idea of human rights as such in the 1960s,⁶⁵ instead focusing on dismantling colonialism and apartheid,⁶⁶ and promoting their economic development.⁶⁷ It was only when the OAU became the AU in 2002 that an explicit shift in the narrative took place that put 'peace and security as well as rule of law, good governance, human rights and democracy' on the political agenda at the

62 Preamble, Organisation of African Unity Charter, Addis Ababa, 25 May 1963.

63 For a brief overview, see Yusuf (n 47) 15-19.

64 K M'Baye 'United Nations seminar on the establishment of regional commissions on human rights with special reference to Africa' (1979) Background paper, ST/HR/Liberia/1979/BP.2.

65 Rubner (n 5) 4.

66 AA Yusuf & F Ouguergouz 'Introduction' in AA Yusuf & F Ouguergouz (eds) *The African Union: Legal and institutional framework. A manual on the Pan-African Organisation* (2012) 1.

67 M'Baye (n 64); see also Rubner (n 11) on the emphasis on the NIEO.

continental level.⁶⁸ However, to claim that a focus on self-determination and advancement of African peoples in light of the struggles against colonialism and apartheid completely excluded ideas of (human) rights would be too cynical. Instead, as argued here, a distinction between outward facing rights and inward facing rights would be more apt: The pan-Africanist thinkers of the PACs and those that established the OAU were more concerned with enforcing the rights of newly-founded states (and their citizens) against outside powers, rather than concerned with the internal relationship between people(s) and their states. Yet, elements of inward facing rights of individuals and communities emerged both with the PACs and in the articulation of article 22 in the African Charter. The latter is a unique example of a right in which an external and internal articulation of rights – referred to here as its duality – was consolidated into a single article in contemporary human rights law.

3 The right to development and African specificities

The African approach to the right to development was codified in the African Charter in 1981. The inclusion of the right to development was one of the reasons why the Charter was considered unique,⁶⁹ in comparison to existing human rights instruments. M'Baye did not define development in any particular way.⁷⁰ He argued generally 'that development is a metamorphosis of structures involving "a range of changes in mental and intellectual patterns that favour the rise of growth"'.⁷¹ Essentially, as Shivji summarises, M'Baye viewed 'development as a comprehensive integrated process including, but not confined to, economic development'.⁷² It is important to note in this regard that M'Baye was natural law inclined, and rather modestly never claimed originality when it came to the right to development,⁷³ rather indicating that the right to development 'descended from the "sphere of morals to the that of law"'.⁷⁴

3.1 Drafting of the African Charter

A close reading of the documents produced at the various meetings that led up to the adoption of the African Charter reveals two important

68 Yusuf & Ouguergouz (n 66) 1.

69 Umozurike (n 30) 910.

70 Shivji (n 2) 29. M'Baye himself has published widely on the topic; see, eg, one of his most famous works on the matter: M'Baye (n 25).

71 Shivji (n 2) 29.

72 Shivji (n 2).

73 Rubner (n 5) 700-701.

74 Shivji (n 2) 31.

factors regarding the right to development: first, the synthesis of the desire for the inclusion of economic, social, and cultural rights, the need for equitable sharing in natural resources, and the necessity of independence and self-determination;⁷⁵ second, an entanglement of the efforts made by the UN, OAU, and other organisations to have an African human rights instrument, exemplified by the mix of meetings that took place around the same time.⁷⁶

In the run-up to the adoption of the African Charter, several OAU and UN meetings – and the resulting resolutions – were held in quick succession. There were many overlaps in terms of the participants at the meetings, including M'Baye himself. For example, the African Charter was not the only document to include a right to development. The UNDRTD was adopted in 1986, the result of a 14-year 'struggle', which included various meetings organised – among others – by the International Commission of Jurists, of which M'Baye was the president at the time.⁷⁷ Nonetheless, there is a distinction between when the African Charter was actually drafted, and the longer process of discussing human rights in Africa.⁷⁸ For a hard law rule on the right to development, the African Charter is the most relevant document. The commitment to draft an African Charter was made in Decision 115 (XVI) by the OAU Heads of State and Government in 1979,⁷⁹ with the African Charter adopted in 1981. Even though the right to development was discussed and mentioned in meetings and resolutions held before 1979, these discussions did not directly lead to any legally-binding documents.⁸⁰

The first draft of the African Charter,⁸¹ commonly referred to as the M'Baye Draft, ironically did not include an explicit right to development,⁸² perhaps because it drew heavily on other international instruments⁸³ – which do not provide an equivalent right. The right to development only emerged after the second draft, the Dakar Draft,⁸⁴ which was adopted after

75 See, eg, Umozurike (n 30) 907.

76 Plagis & Riemer (n 4).

77 International Commission of Jurists 'The Review, special edition No 57' (1996) 32.

78 See Plagis & Riemer (n 4).

79 OAU AHG/Dec 115 (XVI) Rev 1 1979.

80 For a longer discussion, see Plagis & Riemer (n 4).

81 OAU CAB/LEG/67/1.

82 The word 'development' is mentioned in, eg, art 2, which is the same as Common Art 1 of ICCPR and ICESCR. However, this does not necessarily reflect the same breadth of meaning of the right to development in the final draft of the African Charter.

83 Plagis & Riemer (n 4) 22.

84 OAU CAB/LEG/67/3/Rev. 1.

the Dakar Meeting of Experts in late 1979. It is unclear why M'Baye did not include the right to development in his initial draft of the Charter, although it should be noted that M'Baye was also one of the experts at the Dakar Meeting. The discussions during the Dakar Meeting emphasised the need not to adopt a carbon copy of other international human rights instruments, as these 'did not focus on African concerns or traditional values'.⁸⁵ Unfortunately, there are few to no records available on what happened during the Dakar Meeting itself to indicate who initiated the right to development being included in article 22.⁸⁶ Therefore, while some argue that '[w]ith hindsight, it is apparent that the African Charter clearly distanced itself from the approach enshrined at the universal level',⁸⁷ this is only part of the story when it comes to the right to development.

The fact that M'Baye was often an influential author in both the OAU and UN fora further indicates that, in the case of the right to development, rather than African approaches diverging from universalist approaches, African approaches were setting the course at both the OAU and the UN level. Thus, the African approaches that emerged during this era were simultaneously particular and universalist. The outcome, however, was that while the right to development was enshrined in article 22 of the African Charter in 1981,⁸⁸ four decades later a legally-binding right to development at the UN level is yet to be adopted.

3.2 African specificities

M'Baye cautioned against promoting social and economic development without due regard for human rights. For him, 'development includes human rights; in other words, there can be no development without respect for human rights',⁸⁹ drawing on the 1961 Law of Lagos on 'the full development of the human person in all countries'.⁹⁰ Generally, M'Baye argued that the *status quo* of promoting 'development' as economic growth that did not respect the rights of the people was unacceptable and against his more comprehensive notion of development, which was

85 Jallow (n 8) 31.

86 Information on the *travaux préparatoires* is limited when it comes to the African Charter; see F Viljoen 'The African Charter on Human and Peoples' Rights: The *travaux préparatoires* in the light of subsequent practice' (2004) 25 *Human Rights Law Journal* 313, 315, 325.

87 Ougergouz (n 1) 304.

88 Also see arts 20, 21 and 24 African Charter.

89 M'Baye (n 64) 6.

90 M'Baye (n 64) 7.

centred in human rights.⁹¹ However, he also pointed out that the notion of development relates to the collective, while human rights operate in the realm of the individual,⁹² acknowledging the duality in the protections of what was to be included in the African Charter. His views were summed up as follows during his interventions at the Dakar Seminar:⁹³

They no longer considered it acceptable to justify systematic violations of human rights by the need for economic and social development but expressed the view that the road to economic growth and progress should not bypass human rights. On the contrary, at the beginning and at the end of all development, as [President Léopold Sédar Senghor] said, 'there is man'. There is man, with his needs, his fundamental rights and his freedoms, whether it is a question of civil and political or social, economic and cultural rights.

M'Baye's emphasis on the balancing of human rights and economic and social development is reflected in the drafting of the African Charter. Both M'Baye's statement and the African Charter focus on the need for an African instrument and an African conception of human rights that addressed the needs of the time. These needs were defined as 'development, decolonisation, the elimination of racial discrimination and the duties of the individual *vis-à-vis* the community'.⁹⁴ Taking cognisance of these African priorities at the time, the Charter recognises that the aim is to work towards 'continually improving the conditions of life. That, ultimately, is what the various civil and political, economic, social and cultural rights amount to; the final aim is development.'⁹⁵

3.3 Subsequent interpretations

Within the African human rights system, the right to development has been interpreted broadly⁹⁶ by both the African Court on Human and Peoples' Rights (African Court) and the African Commission on Human and Peoples' Rights (African Commission). This part highlights key elements of decisions of the African Commission and Court.⁹⁷ That is not

91 M'Baye (n 64) 5-7.

92 M'Baye (n 25) 505. Original: 'Il l'est aussi, parce que «développement» se réfère au groupe, à une société donnée: région, Etat, ensemble d'Etats; il concerne donc la collectivité, alors que les droits de l'homme s'analysent généralement comme les droits ou le droit d'un homme isolé ; ils concernent donc au premier chef l'individu.'

93 M'Baye (n 64) 7.

94 M'Baye (n 64)14.

95 M'Baye (n 64) 15.

96 Murray (n 26) 528.

97 For a comprehensive overview of all the case law, see Murray (n 26) 497-557;

to say that this forms part of a teleology of the progressive broadening of the right over the decades. Rather, it demonstrates the extent to which the right to development has been interpreted, without implying intent on the part of the original drafters.⁹⁸

Before engaging specific decisions, three broad points should be made about the interpretation of the right to development. First, the African Commission has stated that the right to development has ‘two prongs’ with both a constitutive and instrumental element.⁹⁹ In other words, it is ‘useful as both a means and an end’, with an obligation on states to comply with both elements, as a ‘violation of either will violate article 22’.¹⁰⁰ This interpretation to embody broad aims¹⁰¹ is different from the duality of the right to development discussed above. These broad aims relate to the inward facing rights between the individual/community and the state, and even among African states, but not outward facing inter-state solidarity rights.

Second, while the cases discussed in this part focus mainly on article 22 of the African Charter, it is important to note that articles 20, 21 and 24 also relate to the right to development, and should be read together with article 22. These include the right to self-determination¹⁰² that encompasses a NIEO,¹⁰³ the right of peoples to ‘pursue their social and economic development’, and the governance of natural resources.¹⁰⁴ Article 24 covers protection of the environment, which includes climate change and indigenous peoples’ rights.¹⁰⁵ The interconnected nature of articles 20, 21, 22, and 24 is further reinforced by the decisions of the African Commission and case law of the African Court. As Umzurike put it: ‘The Charter recognises the right to development as belonging to

SAD Kanga & CM Fombad ‘A critical review of the jurisprudence of the African Commission on the right to development’ (2013) 57 *Journal of African Law* 196.

98 The drafting of the African Charter included a more complex series of political processes and agendas; see, eg, Rubner (n 5).

99 *Centre for Minority Rights Development & Others v Kenya* (2009) AHRLR 75 (ACHPR 2009) para 277.

100 Murray (n 26) 529.

101 OC Okafor “‘Righting’ the right to development: A socio-legal analysis of article 22 of the African Charter on Human and Peoples’ Rights’ in SP Marks (ed) *Implementing the right to development: the role of international law* (2008) 54.

102 In arts 20 & 21, Murray (n 26) 497 508.

103 Murray (n 26) 497.

104 Murray (n 26) 498. Also see Resolution on a Human Rights-Based Approach to Natural Resources Governance, ACHPR/Res.224, 2 May 2012.

105 Murray (n 26) 528-534.

all peoples and encompassing economic, social, and cultural aspects.¹⁰⁶ Therefore, while article 22 is often used as a shorthand for the right to development, in part because of its title, the right to development in the African Charter is best understood as a package of mutually-reinforcing rights.

Third, the fact that the right to development has been the subject of decisions by both the African Commission and African Court should not be underestimated. In 1983 Umozurike and others were less than optimistic about the justiciability of the right to development. In particular, the distinction was made between the negative duties of states ‘not to impede’ development, and ‘the positive duty to aid such development’.¹⁰⁷ According to Umozurike, the ‘higher level of commitment’ required for positive duties to aid development rested ‘on nonlegal considerations’.¹⁰⁸ Umozurike rightly alluded to the political nature of the NIEO element of the right to development, making it ostensibly inadequate for implementation at the international level. Although the full extent of the inter-state obligations has not been realised, one of the few examples of a break with the general practice of African states not bringing inter-state claims is exemplified by the communication of *Democratic Republic of the Congo v Burundi, Rwanda and Uganda (DRC decision)*.¹⁰⁹ In that decision, the right to development was interpreted along the individual and community rights axis, and the inter-state solidarity axis in a more limited way. In other words, the clear codification of the right to development in the African Charter as a justiciable right for individuals, communities, and states has allowed for the anticipated political limitations to be overcome in the African context. The result has been a small but rich body of work from the African Commission, and emerging jurisprudence from the younger African Court.

At the inter-state level, in the *DRC* decision of 2003 the African Commission found that the ‘indiscriminate dumping of and[/]or mass burial of victims’ was a violation of their right to cultural development protected under article 22.¹¹⁰ In addition, the ‘deprivation of the right of the peoples of the [DRC...] to freely dispose of their wealth and natural resources’ violated ‘their right to their economic, social and cultural development and of the general duty of states to individually or

106 Umozurike (n 30) 906.

107 Umozurike (n 30) 907.

108 As above.

109 *Democratic Republic of the Congo v Burundi, Rwanda and Uganda* (2004) AHRLR 19 (ACHPR 2004).

110 *Democratic Republic of Congo v Burundi* (n 109) para 87.

collectively ensure the exercise of the right to development'.¹¹¹ In another case, Tanzania argued in favour of an embargo against Burundi, stating that it was 'difficult to conceive that it is possible to enjoy economic and socio-cultural rights without enjoying the fundamental rights, which are the political rights that condition the others'.¹¹² The *DRC* decision is unique for multiple reasons, but primarily for placing emphasis on the collective duty of states and highlighting the false dichotomy between individual rights, on the one hand, and the rights of states, on the other, when it comes to the right to development. In addition, these decisions were an early indication of the broadness of the African Commission's approach to article 22, as well as the somewhat surprising turn of African states towards emphasising the civil and political rights required for development.

At the individual and non-governmental organisation (NGO) communication level, the general theme of discrimination of communities or peoples by the state has dominated much of the work of the African Commission with regard to article 22. For example, in 2009 in *Sudan Human Rights Organisation & Another v Sudan* the Commission considered the meaning of peoples in the context of the right to development.¹¹³ In the end, the Commission held that Sudan should 'rehabilitate economic and social infrastructure, such as education, health, water, and agricultural services, in the Darfur provinces in order to provide conditions for return in safety and dignity for the [internally-displaced persons] and refugees'.¹¹⁴ In the same year, in *Centre for Minority Rights Development & Others v Kenya*, the communication concerned the consequences of the displacement of the indigenous Endorois community from their ancestral lands.¹¹⁵ In terms of the right to development, the central plea was that the creation of a game reserve on the lands of the Endorois without their involvement in the development process violated article 22.¹¹⁶ The African Commission summarised its position in *Endorois* in another decision, stating that '[t]he failure of the respondent state to involve the Endorois populations ... in the design of reserve settlement projects as well as in the enjoyment of income

111 *Democratic Republic of Congo v Burundi* (n 109) para 95.

112 *Association pour la Sauvegarde de la Paix au Burundi v Kenya, Uganda, Rwanda, Tanzania, Zaire and Zambia* (2003) AHRLR 111 (ACHPR 2003) para 25. Unlike the *DRC* case, this was not an inter-state case.

113 *Sudan Human Rights Organisation & Another v Sudan* (2009) AHRLR 153 (ACHPR 2009) paras 217-223.

114 *COHRE v Sudan* (n 113) para 229.

115 *Centre for Minority Rights Development* (n 99) para 1. For an analysis of the case, see SAD Kanga 'The right to development in the African human rights system: The *Endorois* case' (2011) 2 *De Jure* 381.

116 *Centre for Minority Rights Development* (n 99) para 269.

accruing to their exploitation is a violation of article 22 of the Charter'.¹¹⁷ The African Commission also drew upon the UNDRTD and the use of 'active, free and meaningful participation in development'.¹¹⁸ In so doing, the African Commission reaffirmed that the right to development is 'closely allied' with the issue of participation,¹¹⁹ the importance of benefit sharing,¹²⁰ and free, prior, and informed consent, especially of indigenous communities.¹²¹

In more recent communications, the African Commission has also looked to the past for inspiration and made reference to M'Baye's work as part of the 'doctrine on the right to development'.¹²² For example, in 2016 the *Open Society Justice Initiative v Côte d'Ivoire* decision concerned the emergence of discriminatory laws in Côte d'Ivoire. The African Commission found that the right to development was 'an inalienable, individual or collective right, to participate in all forms of development, through the full realisation of all fundamental rights, and to enjoy them without unjustifiable restrictions'.¹²³ The African Commission also linked article 22 with article 24 through the addition of the 'obligation to at least create the opportunities and environment conducive to the enjoyment of the [right to development]'.¹²⁴ Ultimately, the denial of a number of rights, including the denial of nationality to the Dioulas, was considered a violation of article 22.¹²⁵

In 2012, in another case involving Kenya the African Court also engaged on the issue of indigenous peoples' rights in relation to article 22 of the Charter. In *African Commission on Human and Peoples' Rights v Kenya* the Court found that Kenya had violated the Ogieks' right to development as they were 'continuously evicted ... without being effectively consulted', and that these evictions had adverse impacts on the Ogieks' economic,

117 Citing *Centre for Minority Rights Development* (n 99) paras 269-298 in *Open Society Justice Initiative v Côte d'Ivoire* Communication 318/06, African Commission on Human and Peoples' Rights, 27 May 2016, para 182.

118 *Centre for Minority Rights Development* (n 99) para 283.

119 *Centre for Minority Rights Development* (n 99) para 289.

120 *Centre for Minority Rights Development* (n 99) para 294.

121 *Centre for Minority Rights Development* (n 99) paras 289-297.

122 *Open Society Justice Initiative* (n 117) para 183.

123 As above.

124 As above.

125 *Open Society Justice Initiative* (n 117) paras 185-186.

social, and cultural development.¹²⁶ In addition, the Ogieks had ‘not been actively involved in developing and determining health, housing and other economic and social programmes affecting them.’¹²⁷ In general, the African Commission has recognised the impediments member states faced in achieving the right to development due to the scarcity of resources.¹²⁸ However, it has also developed a clear line that discriminatory practices, or those that do not take due regard of free, prior and informed consent, will not pass the test of the right to development.¹²⁹

While the pan-Africanism of the PACs initially was more outward facing towards the West, the decisions of the African Commission and Court highlight internal issues within and among African states. This is a logical move in terms of the jurisdiction of these institutions and the African Charter, the success of the decolonisation movement in Africa¹³⁰ and the question of gaining rights no longer being centred in the fight against colonialism and against outside powers. Nonetheless, the linkages should also not be dismissed in relation to the effects of colonialism on territorial boundaries and community formation.¹³¹

4 Re-politicising the right to development?

Almost 50 years since pan-Africanists pushed for the ‘right to development’ on the world stage, and more than a century since early pan-Africanism called for the ideas and norms that underly it, the only international law that codifies the right to development is the African Charter. As new efforts to replace soft law mechanisms with a hard law right to development at the UN level gain momentum,¹³² it becomes ever more important to revisit the origins of the right to development. It is imperative to draw

126 *African Commission on Human and Peoples’ Rights v Kenya* Application 6/2012, African Court on Human and Peoples’ Rights, 26 May 2017 para 210.

127 As above.

128 *Gunme & Others v Cameroon* (2009) AHRLR 9 (ACHPR 2009) para 206. See the criticism of this progressive realisation approach in Kamba & Fombad (n 99) 212.

129 See *Centre for Minority Rights Development* (n 115); *African Commission on Human and Peoples’ Rights v Kenya* (n 126).

130 Remaining colonies notwithstanding, such as the Chagos Islands.

131 For an overview of some of these intricacies, see EN Amadife & JW Warhola ‘Africa’s political boundaries: Colonial cartography, the OAU, and the advisability of ethno-national adjustment’ (1993) 6 *International Journal of Politics, Culture and Society* 533.

132 For an overview, see K Arts & A Tamo ‘The right to development in international law: New momentum thirty years down the line?’ (2016) 63 *Netherlands International Law Review* 221. More recently, eg, the UN Expert Mechanism on the right to development adopted its first report (A/HRC/45/29) on 21 July 2020. See the priorities of the Working Group in para 19.

on the longer history from which it originated, and to keep emphasising the underlying political agendas that made the right necessary in the first place. This is especially important as, despite this ‘new momentum ... [d]eep substantive and political divisions about the exact content and implications of the [right to development] prevail between – and within – the North and the South’.¹³³

The meaning of the right to development in the African context, and its meaning in the African Charter, were elaborated on by M’Baye, and subsequently by the African Commission and African Court. However, the notion of ‘development’ at the international level more generally has not always reflected the same ideas.¹³⁴ Much has been said on the different methods of measuring development, and the various aims that development projects and theories may have.¹³⁵ The origins, however, of these discussions lie in different fields, and for the most part in development economics. Within the sphere of African international law, the focus on the duality of the economic development of states and individual and community rights was already prevalent in the 1970s and during the drafting of the African Charter.

With new developments at the UN aiming to adopt a right to development, the potential erasure of the voices of the (pan-)Africans who helped shape it has arisen. This part provides a brief overview of the efforts at the UN to adopt such a right at the international level. In doing so it highlights the danger of the loss of the political and ideological struggles that helped shape the right to development.

4.1 The United Nations and the right to development

Those less familiar with the African Charter, or other documents emanating from the OAU or the AU, would be forgiven to think that the current push for the right to development at the UN is novel.¹³⁶ For example, in a summary report by the UN Secretary-General on the origins of the right to development, Africa and the African Charter are

133 Arts & Tamo (n 132) 221.

134 For a brief overview of how development has been defined in different eras by different disciplines, see Treblicock & Prado (n 6) 3-16. For discussions on the developmental state in Africa, see T Mkandawire ‘Thinking about developmental states in Africa’ (2001) 25 *Cambridge Journal of Economics* 289-313; V Gumede ‘Rethinking and reclaiming development in Africa’ in B Mpofu & SJ Ndlovu-Gatsheni (eds) *Rethinking and unthinking development: Perspectives on inequality and poverty in South Africa and Zimbabwe* (2019) 51.

135 Treblicock & Prado (n 6).

136 If one were to dismiss the 1986 UNDRTD as it is not legally binding.

not mentioned once, and the contribution of M'Baye is relegated to two footnotes.¹³⁷ As a result, the African origins, and the political struggles that underly the *raison d'être* of the right to development in the African human rights system, appear to be somewhat blurred, if not lost, in more recent discussions at the UN level.¹³⁸

Before the current push, the right to development was acknowledged by the UN in the UNDRTD,¹³⁹ adopted in 1986, which clearly links the concept of development to the concept of human rights.¹⁴⁰ It was also M'Baye who was credited with its introduction.¹⁴¹ However, the legal status of the right to development remains precarious in the UN system.¹⁴² It also misses an essential component in that it does not include burden sharing, or solidarity, among states. The adoption of the UNDRTD was considered another expression of the ideological battles between the Global South and Global North, which were also embodied in other international struggles, such as that over the NIEO.¹⁴³

Although the idea of human rights and development has been further mainstreamed at the international level since the 1980s,¹⁴⁴ the focus has remained on the classic human rights paradigm between the individual and the state. Examples include the adoption of the UN Global Consultation on the Right to Development as a Human Right in 1989,¹⁴⁵ UN Millennium Development Goals (MDGs) in 2000, and the Sustainable Development

137 Office of the High Commissioner for Human Rights (OHCHR) 'Chapter 1: The emergence of the right to development' in *Realising the right to development*: eBook (2013), <https://www.ohchr.org/EN/Issues/Development/Pages/RTDBook.aspx> (accessed 27 February 2021).

138 As above. One exception is the publication of the condensed version of the report commissioned by Van Boven in 1977. See address by T van Boven, Director of the Division of Human Rights and Representative of the Secretary-General, Monrovia Proposal for Setting-up an African Commission on Human Rights, UNGA A/34/359/Add. 1 (5 November 1979). It should be noted that M'Baye was instrumental in the early UN and UNESCO efforts on recognising the right to development; see Rubner (n 5) 701-703.

139 For more details on its adoption, see fn 1024 in Ouguergouz (n 1) 301.

140 Preamble, Declaration on the Right to Development 'Confirming that the right to development is an inalienable human right and that equality of opportunity for development is a prerogative both of nations and of individuals who make up nations'.

141 Rubner (n 5) 702-705.

142 Barsh (n 3) 322.

143 As above.

144 Eg, the adoption of the UN Millennium Development Goals (MDGs) in 2000, and the Sustainable Development Goals (SDGs) in 2015.

145 For more details on the meeting, see Barsh (n 3). Also see United Nations Economic and Social Council, UN Doc. E/CN.4/1990/9/Rev.1 (1990).

Goals (SDGs) in 2015. In addition, while the political will to establish a hard law right to development remains in some corners, the legal status of this right outside the African human rights system remains soft law in nature at best. Therefore, although the MDGs and SDGs re-emphasise the importance of the right to development and make clear connections between the need for development and the human rights regime, such as AU Agenda 2063,¹⁴⁶ they lack the political commitment of a binding legal treaty.

The global discussion on what constitutes the right to development, however, goes further back to the 1970s when the UN Commission on Human Rights was drafting the UNDRTD. The draft working papers reveal that there was much discussion on what the final document should state, as Shivji summarises:¹⁴⁷

While the Cuban Draft retained some of the political foundations of the M'Baye proposal and defined the right to development as 'an inalienable collective right belonging to all people', the draft of the government experts from the 'Group of 77' defined the 'right to development' as a human right which applies to 'individuals, groups, peoples and states' and 'applicable at the local, national, regional and global level' with even greater emphasis on states.

The UN Division for Human Rights (the office now known as the UN High Commissioner for Human Rights) also prepared a study on the connections between the right to development and the broader claim making in relation to the international community, which was tied into the calls for a NIEO.¹⁴⁸ The International Commission of Jurists, which helped facilitate a number of meetings on the issue, went on to summarise the findings in three draft articles. Articles 1 and 2 emphasised the rights of individuals and communities, while article 3 was concerned with the applicability of the right at all levels, from the community, local and national, to the regional and global levels.¹⁴⁹

Although the two constituted separate processes, there was a significant overlap between the language at UN and OAU meetings. For example, in

146 African Union Commission, Agenda 2063: The Africa We Want, September 2015.

147 Shivji (n 2) 31-32.

148 Address by T van Boven (n 138). With a subsequent report entitled 'The international dimensions of the right to development as a human right in relation with other human rights based on international co-operation, including the right to peace, taking into account the requirements of the new international economic order, and the fundamental human needs'.

149 Shivji (n 2) 32.

1979 two parallel meetings were organised less than three months apart: the Monrovia Seminar by the UN, and the Dakar Meeting by the OAU. At the Monrovia Seminar, Theo Van Boven addressed the connections made between development and ‘the [NIEO] for the realisation of human rights’.¹⁵⁰ At the OAU Dakar Meeting of Experts, Senghor, then President of the Republic of Senegal, championed the right to development in his address to the experts embarking on the project of drafting the African Charter. He emphasised the integrated nature of the right, and how it went beyond mere economic growth ‘at all costs’.¹⁵¹ He proposed Michael Adisesish’s definition highlighting human rights: “‘a form of humanism; a moral and spiritual fact, both material and practical; an expression of man as a whole meeting his material needs (food, clothes, shelter) as well as his moral requirements (peace, compassion, freedom, charity)...”. In this conception, development, the right of peoples, respects man and his freedoms’.¹⁵²

The fact that the addresses by Van Boven and Senghor both included the right to development is no accident. It was M’Baye who prepared draft papers that formed the foundation of the work at both the Monrovia Seminar and the Dakar Meeting of Experts, and also further demonstrates the influence of Africans in UN processes.

The linkages between the African protagonists of the right to development and the international sphere are clear. Without M’Baye, the right to development would look very different, not just within the African human rights system, but also at the UN level. Without political leaders such as Senghor championing the African Charter and the framing of rights in it, it might not have been adopted. The right to development, as M’Baye envisioned it, was not just a stance on human rights, it was intimately connected with histories of colonialism and oppression. M’Baye connected the right to development to the individual and the collective, to the state and the international community, to the political and the economic, and not just the legal. For him, the right to development was not only about individual rights, it was also about rebalancing distortions

150 Van Boven (n 138).

151 LS Senghor address delivered at the opening of the Meeting of African Experts preparing the draft African Charter in Dakar, Senegal, 28 November to 8 December 1979. Reprinted in IG Shivji *The concept of human rights in Africa* (1989) 121, as cited in Murray (n 26) 529. Also available in Heyns (n 29) 78-80.

152 Murray (n 26) 529.

in north-south relations.¹⁵³ At its very core, the right to development was about solidarity among peoples and states.¹⁵⁴

Although not always explicitly recognised at the UN level, these ideas are still very much alive in the AU context. The need for an inclusive and holistic right to development was reiterated in the AU Agenda 2063. The first goal of the Agenda is ‘a prosperous Africa based on inclusive growth and sustainable development’,¹⁵⁵ the opening paragraphs pay homage to the origins of Pan-Africanism, and the closing paragraphs of the Agenda speak to ‘the right to development and equity’.¹⁵⁶

4.2 Re-centring the African legacy

The contributions of African voices to the development of international law, especially human rights law, have not always gained the prominent position they should be afforded.¹⁵⁷ The right to development demonstrates an important part of why this might have happened, and still happens: When the African Charter was originally adopted, it was met with much scepticism.¹⁵⁸ The critiques of the time have subsequently proven to be somewhat overblown, especially regarding the unjusticiable nature of certain rights. The right to development has left its mark on the human rights jurisprudence of the African human rights system, proving that the vision of African jurists, such as M’Baye, was not international law pipe dreams at the regional level. The right to development, therefore, is one of the areas of international law in which Africa and Africans have clearly led the way and laid a strong ideological foundation of solidarity at the ‘global, regional and national levels’ on which to build.¹⁵⁹

However, while a number of the newer documents at the UN level acknowledge the importance of recognising ‘colonialism, neocolonialism, apartheid, all forms of racism and racial discrimination, foreign domination and occupation, aggression and threats against national sovereignty, national unity and territorial integrity and threats of war’ as

153 Shivji (n 2) 29-31.

154 Shivji (n 2) 31.

155 African Union Commission (n 146) para 8.

156 Africa Union Commission (n 146) paras 1, 2, 4 & 76.

157 Gathii laments the exclusion, even today, of the work produced by Africa’s international courts. See Gathii (n 45).

158 See, eg, the issue of clawback clauses; L Mapuva ‘Negating the promotion of human rights through “claw-back” clauses in the African Charter on Human and Peoples’ Rights’ (2016) 51 *International Affairs and Global Strategy* 1.

159 A/HRC/45/29 (n 132) para 25.

impediments to development,¹⁶⁰ the origins of these discussions are often lost.¹⁶¹ It is not just that these form impediments, it is that the struggles against them in Africa and beyond helped the emergence and necessity of a right to development in the first place. In the (further) universalisation of the right to development, these political origins of the right to development are at risk of being lost.

The re-politicisation of the right to development serves an important function, as it is by exploring and re-centring these underpinnings that its origins become clear, and the contribution of Africans to international law are highlighted. Tracing the history of the right to development further back is not merely an exercise in what can be imagined,¹⁶² but also concerns what was actually achieved by previous generations. In that sense, the re-politisation also serves another function. It helps to highlight the work that still needs to be done when making the translation from the African back to the international context in terms of the right to development. Like previous generations, African jurists and scholars today face many challenges. With neo-colonialism, the lack of solidarity, and persistent inequity at the international level still present, the full extent of the right to development has yet to be realised. Although it is unlikely to be the 'answer' to the world's lack of equity, the right to development does serve as a frame of reference for thinking about the world and rights differently. How can political struggles inform the types of rights perceive as necessary to achieve human dignity? What might have been radical at the time is now mainstreamed within the African human rights system, and the UN seeks to do the same in a more limited way. For newer generations of African jurists, activists, and politicians, the challenge lies in the fact that the problems faced within and across states have not remained static, but have shifted and morphed. Thus, these issues require continued ingenuity and thinking about how to connect current struggles in the pursuit of human dignity to the rights regime so that it serves the needs of the moment.

This accounting might appear pessimistic. Yet it is intended as being hopeful: The right to development overcame narrower ideas of what can constitute human rights, and was a tool of previous generations of African international law jurists, activists, and politicians of the twentieth century to fight back against an exclusionary international legal order.

160 A/HRC/45/29 (n 132) para 24.

161 As with a number of other UN documents, the eBook's first chapter on the emergence of the right to development (n 137) does not mention 'Africa', 'M'Baye', or the 'African Charter'.

162 Arvidsson & Bak McKenna (n 11) 54.

Focusing on their contributions to international law, and the need for a more inclusive regime, is a call that still rings true today.¹⁶³ It is also a call to the current generation of African jurists to seek out these histories, and to draw inspiration from a wider range of sources, even if it challenges the *status quo*.¹⁶⁴

5 Conclusion

The African conception of the right to development is entwined in ideals of human dignity, sovereignty, self-determination, and human rights, especially economic, social, and cultural rights. While its modern history can be traced to the late 1970s and early 1980s, this chapter demonstrated how earlier struggles place its origins at the start of the twentieth century when there was a push, internationally, for the dignity and political emancipation of African peoples and people of African descent. This legacy helps us understand the complex nature of the right to development in the African Charter and how it goes beyond other international legal documents. This history is important for current discussions around development where the rights of individuals are often pitted against the right of the state to develop as a whole. This dichotomy between individual rights and state-based rights, especially in the context of large-scale development projects, is evident in the case law of the African Commission and African Court. The tensions felt today are a reflection of a longer history in which people struggled for control over their civil and political as well as their economic, social, and cultural rights. The right to development in the African Charter is an individual right, a group right, *and* a right among states. It is part of solidarity among people(s) and among states. Despite this broad scope of protection, it has served a useful function in the African human rights system by providing relief to those who would have been left behind by a narrower concept of economic development.

By mapping the right to right to development in the African and pan-Africanist contexts, this chapter has illustrated the interconnectedness between processes at the international and the regional levels, and the underlying political aspirations of African jurists and politicians. This was done on two levels. First, by going back to declarations of the early PACs, the chapter has demonstrated the origins of the ideas that potentially influenced the conceptualisation of development as a human right that emerged within the OAU. Tracing the right to development to some of the earlier struggles against colonialism, as well as the post-colonial

163 Gathii (n 45).

164 Arvidsson & Bak McKenna (n 11).

experiences of African states, helps shed light on the shared politics of the need for a collective right and the duality in which that should and could be conceived. Second, this contribution illustrated that the people leading these initiatives carried out overlapping functions in different fora. M'Baye was the father of the right to development in both the UN and the African Charter, although the latter remains the only hard law document protecting the right to development. Members of the earlier PACs were also influential actors in later OAU processes as political leaders. In this way, the stories of the international and the regional are not disjointed; to the contrary, they are intimately connected. Therefore, mapping the emergence of the right to development is also important for highlighting the protagonists of the story: the African scholars, leaders and institutions that pushed for a right as a response to a history of exclusion.

Finally, the use of international law as a tool to correct past injustices in the context of the right to development serves another purpose. While the international community is still contemplating how to formulate a hard law commitment, the African human rights system has included the right for 40 years and has an expanding body of case law relating to it. Therefore, the history of the emergence of the right to development is not only significant for its distinctly African origin, but also an important reminder of how international law was and is used by Africans to achieve their political ends, even when 'international law' was not yet ready for such an evolution, and, in some ways, international law still is not ready. By revisiting how African jurists mobilised international law as a tool for their struggles for dignity, sovereignty, independence, and autonomy over natural resources in the twentieth century, it demonstrates how international law can be a powerful (ideological) tool, depending on who defines and wields it.