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Rethinking the premises underlying the right to development in African human rights jurisprudence

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Abstract

The current rate of planetary destruction, which is grounded in an understanding of development as economic growth based on environmental exploitation, has catastrophic consequences for organized human existence. The African human rights system, through the African Charter on Human and Peoples' Rights (the African Charter), is one of the few international legal systems which provides for an enforceable right to development and to a healthy environment. This article argues that the dichotomy set up between the right to development and the right to a healthy environment is ultimately false, because an understanding of development which does not take account of the environmental aspects is untenable in the long run. It is argued that the African Charter and its interpretation by the African Commission and the African Court have resulted in the establishment of important principles towards a revised understanding of development, not based on economic considerations, but rather as human well-being (physical, mental, emotional and social considerations) within a healthy environment. It is further argued that important principles in African environmental ethics should be recognized in interpreting the right to development, which require that development takes place with the necessary regard and reverence for the environment.

1 | INTRODUCTION

A pervasive view of development is that it entails the limitless use and consumption of natural resources to create economic wealth. The United Nations (UN), for example, bases its distinction between developed and developing countries on 'basic economic country conditions'.[1] They use considerations including 'per capita GNI [gross national income], a human assets index and an economic vulnerability index' to determine its list of least developed countries. In this paradigm, the right to development would be understood as a right to economic growth and materialistic wealth, with the resultant increased extraction and destruction of natural resources, and air, water and ground pollution. Clearly in such a case, the right to development and the right to environmental protection would be in conflict with one another. In terms of this approach to development which forefronts economic growth, the priority aim is to 'catch up' economically with more advanced economies. Only once high levels of development are reached would it be important to start protecting the environment and repairing environmental damage resulting from such development, because then such states would be able to 'afford' to allocate resources to environmental sustainability.[2]

[1] 'Country Classification' in UN, 'World Economic Situation and Prospects' (UN 2014) <https://www.un.org/en/development/desa/policy/wesp/wesp_current/2014wesp_country_classification.pdf>.

[2] See, for example, the Chinese model of development, also known as '*zhong guo mo shi*'; H Li, 'The Chinese Model of Development and Its Implications' (2015) 2 World Journal of Social Science Research 128.

At first glance, a simple solution to the tension between the rights lies in the way in which the right to environment is phrased in the African Charter. In the African Charter, this is a right, not to a pristine environment, but rather a right to a 'generally satisfactory' environment 'favourable to their development'.[3] This interpretation would thus allow for many development projects which cause pollution, as long as they do not substantively affect human well-being.[4] This is a highly anthropocentric and utilitarian view of the environment as something which is available in the first place for maximum human exploitation. However, the current rate of planetary destruction, which is grounded in this understanding of development, is causing long-term, potentially irreparable harm to the environment which, some argue, will lead to the collapse of organized human existence.[5]

It had therefore become necessary for policymakers, judges and academics to rethink the way in which they understand of the concept, practice and law related to development. Sustainable development emerged during the final decades of the 20th century as a result of the realization that the exploitative mode of development which had been followed since the Industrial Revolution had become untenable, unsustainable and unfit for a world with limited resources.[6] Sustainable development in this context is taken to mean economic development which is sustainable from a social as well as an environmental perspective.[7] This conception moves the focus away from the purely economic and wealth dimensions of development. However, most conceptions of sustainable development maintain some of the basic tenets of the wealth model of development in that the environment is still exploited, only over a longer timeframe, and the untenable aim of unlimited economic growth is still core to its understanding of development.[8] The African human rights system, through the African Charter, is one of the few international legal systems which provides for an enforceable right to development[9] and to a healthy environment and may be applied in a way to offer an alternative to this paradigm.

This article argues that the dichotomy set up between the right to development and the right to a healthy environment is ultimately false, because an understanding of development which does not take account of the environmental aspects is untenable in the long run. It is argued that the African Charter and its interpretation by the African Commission and the African Court have resulted in the establishment of important principles towards a revised understanding of development, not based on economic considerations, but rather as human well-being (physical, mental, emotional and social considerations) within a healthy environment. It is further argued that important principles in African environmental ethics should be recognized in interpreting the right to development, which require that development takes place with the necessary regard and reverence for the environment.

Section 2 engages with the provisions of the African Charter protecting the rights to development and environment, the interpretation of these rights by the African Commission on Human and Peoples' Rights, the African Court on Human and Peoples' Rights and subregional bodies, in their jurisprudence. This section aims to identify the premises concerning the relationship between the right to development and the right to a healthy environment which underlay the ways in which these rights have been interpreted, to see (i) the conception of sustainable development which has been supported within legal systems in Africa and (ii) whether there is something which can be learned from the African systems about a revised understanding of development which is in harmony with an ecologically sustainable environment.

Sections 3 and 4 build on indigenous African conceptions of 'the good life',[10] along with some practical current examples from the African continent, to argue for a radical rethinking of the right to development, not just as economic development with aspects of social and environmental protection, but as meaningful human existence embedded in environmental flourishing. The article concludes with a call for a revised legal understanding of the right to development, and an assessment of how such an adapted understanding might impact the duties of African States as well as cases before the African human rights system in future.

2 | PREMISES UNDERLYING THE CONCEPTION OF DEVELOPMENT IN THE AFRICAN REGIONAL HUMAN RIGHTS SYSTEM

The aim of this section is twofold. The first is a doctrinal analysis to understand how (sustainable) development has been understood in the African human rights system, both in the text of the core instrument, the African Charter, and also through judicial interpretation. The second aim is to undertake a more critical assessment of the

[3]Organization of African Unity (OAU), African Charter on Human and Peoples' Rights (adopted 27 June 1981, entered into force 21 October 1986) 1520 UNTS 217 (African Charter) art 24.

[4]African Commission on Human and Peoples' Rights (ACHPR), 'State Reporting Guidelines and Principles on Articles 21 and 24 of the African Charter related to Extractive Industries, Environment and Human Rights' (2019) 28.

[5]According to philosopher Noam Chomsky, 'we are destroying the environment for organized human life'. See <https://www.youtube.com/watch?v=F8v_-uagsrY%26list=PL0F1F946BD995C654%26index=141>.

[6]World Commission on Environment and Development (WCED), *Our Common Future* (Oxford University Press 1987); Rio Declaration on Environment and Development in UNGA 'Report of the United Nations Conference on Environment and Development' UN Doc A/CONF.151/26 (vol I) (12 August 1992).

[7]The so-called 'triple bottom line' of sustainable development. See WCED (n 6).

[8]See for example the criticism of the UN Sustainable Development Goals based on 'the focus on economic growth and consumption as a means for development' offered by V Spaiser et al, 'The Sustainable Development Oxymoron: Quantifying and Modelling the Incompatibility of Sustainable Development Goals' (2017) 24 International Journal of Sustainable Development & World Ecology 457, 457; see also the core place of economic growth and exploitation of natural resources in the African Union 'Agenda 2063: The Africa we Want – Popular version' (2015) 15.

[9]While the right to development has been conceived as both a human right and a right of States, the latter of which plays out at the international level and requires a rethinking of international cooperation and the global economic order, this article will focus mainly on the right to development as a right that people can claim against their own State. See, for example, UNGA 'Declaration on the Right to Development' UN Doc A/RES/41/128 (4 December 1986) arts 3–4; M Kanade 'The Right to Development and the 2030 Agenda for Sustainable Development' E-Learning Module on Operationalizing the Right to Development in Implementing the Sustainable Development Goals (2020) <https://hrc.upeace.org/wp-content/uploads/2020/08/Chapter-3-Mihir-Kanade-RtD-and-the-SDGs.pdf>.

[10]The good life is a philosophical concept of the life one aspires to live. While the concept has its origins in the work of the Greek philosophers, other cultures also have similar conceptions such as *buen vivir* as based on indigenous traditions and values, inscribed in the constitutions of Ecuador and Bolivia, and the philosophy of *ubuntu* in Southern Africa.

contribution of the African human rights system towards understanding development not only as economic and social development, but development in which environmental sustainability is central. This section is divided into three parts, dealing with development and environmental rights from the perspective of the provisions of the African Charter itself, the interpretation of these rights by regional human rights bodies (the African Commission and African Court) and finally the interpretations by two of the continental subregional courts in West and East Africa respectively.

2.1 | Close reading of Articles 22 and 24

Article 22 of the African Charter articulates the right to development as follows:

1. All peoples shall have the right to their economic, social and cultural development with due regard to their freedom and identity and in equal enjoyment of the common heritage of mankind.
2. States shall have the duty, individually and collectively, to ensure the exercise of the right to development.[11]

Article 24 of the African Charter provides as follows: 'All peoples shall have the right to a general satisfactory environment favourable to their development'.[12] On a first reading of the provisions of Article 22, while providing for the economic and social aspects of development, it does not require the exercise of this right in an environmentally sustainable way. However, in digging a bit deeper, there are several arguments for such an interpretation.

In the first place, the common heritage of mankind principle has been interpreted to include 'the common interest which men of all nations share in protecting the environment and preserving the welfare of mankind'.[13] In this sense then, it acknowledges the limited environmental resources which have to be shared by all people. Furthermore, the notion of 'heritage' implies concern also for the environmental resource needs of future generations. The reference to common heritage of mankind therefore underwrites at least a basic conception of sustainable development as described above. Furthermore, the social aspect of the right to development includes the right to health. Human health in turn relies on a healthy environment.[14] In addition, conscious of the interrelated and interdependent nature of human rights, the right to development should be read together with Article 24 of the African Charter which protects the right of all peoples to 'a general satisfactory environment favourable to their development'. This brings in an explicit requirement for development that does not infringe the 'general satisfactory environment' of people—again underscoring at least a basic conception of sustainable development. These points are important, in that they support an interpretation of the right to development within the context of the African Charter as not only economic and human development, but development which should at least take account of environmental protection.

In support of this view, the African Commission in its State Reporting Guidelines and Principles on Articles 21 and 24 of the Africa Charter, stated in relation to Article 24 that:

> With regard to the requirement of being favourable to their development, this entails that the environment should be used in a sustainable manner, which fulfills the needs of the present generation, without compromising the ability of future generations to meet their own needs.[15]

This interpretation of the right to a general satisfactory environment is in line with a broad sustainable development approach where the environment may be used and exploited, but in such a way that it is not destroyed or exhausted. However, the wording of Article 24 could in fact be interpreted to go further than that, in that it inextricably links the possibility of development with a healthy environment. By referring to an environment 'favourable to their development', the Charter is acknowledging that without sufficient environmental protection, development cannot take place. Clearly then, in the text of the African Charter, the rights to development and environment are not in opposition. While, as in the case of the State Reporting Guidelines this is interpreted as economic development with environmental aspects, it is argued that the text could also support a more holistic reading of sustainable development as human existence embedded in an environment which is itself healthy and thriving (environmental well-being). The following sections consider the way in which the African Commission, the African Court and subregional courts have interpreted these rights in their case law and whether the rights to development and environment have been applied to their full potential.

2.2 | Jurisprudence of the African regional bodies

In one of its few inter-State communications, the African Commission found Burundi, Rwanda and Uganda in violation of the right to development on the basis of a violation by these States of the right of the Democratic Republic of the Congo (DRC) to 'freely dispose of their wealth and natural resources' (a separate right protected under Article 21 of the African Charter).[16] As rightly pointed out by Kamga and Fombad, this 'underscores the interconnectedness of human rights generally and more specifically shows that the [right to development]

[11] African Charter (n 3) art 22.
[12] ibid art 24.
[13] RP Arnold, 'The Common Heritage of Mankind as a Legal Concept' (1975) 9 The International Lawyer 153, 158.
[14] ACHPR, *Communication 155/96: Social and Economic Rights Action Center (SERAC) and Center for Economic and Social Rights (CESR) v Nigeria* (2001) (*Ogoniland*) para 51.
[15] ACHPR (n 4) 28.
[16] ACHPR, *Communication 227/99*, *Democratic Republic of Congo v Burundi, Rwanda, Uganda* (2003), para 95.
[17] SAD Kamga and CM Fombad, 'A Critical Review of the Jurisprudence of the African Commission on the Right to Development' (2013) 57 Journal of African Law 196, 207.

is a multifaceted human right that should be addressed as such'.[17] The right to decide what happens with natural resources may in addition serve to either strengthen or weaken ecological sustainability as a component of development. It may weaken the ecological component, in that it speaks of the 'disposal' of 'natural resources'. This not only implies that the natural environment can be reduced to 'resources', but further that the natural endowments of a people are their property, to be used (or disposed of) by the people as they wish. This then places no limitations on what people may decide to do with their natural heritage, including destroying it. On the other hand, placing the decision-making power in the hands of the people, rather than politicians with short-term political goals or foreign powers, may lead to a more sober and judicious dealing with the natural resources that people and their children will continue to rely on directly and therefore strengthen ecological sustainability. As shown by experience, while the benefit of environmental exploitation usually does not accrue to communities on whose land it is, the negative consequences to health and other areas of well-being usually does accrue to them. Therefore, both because people experience the negative consequences of environmental degradation directly and also because of considerations regarding the interests of their children (an intergenerational consideration), placing the right to dispose of resources directly in the hands of the people may lead to better protection of the environment and greater concern for environmental destruction as part of development processes.

One of the first and significant case of the African Commission on the right to development was the *Endorois* case in which the complainants argued that the pastoralist Endorois peoples were removed from their land by the Kenyan government without adequate consultation or compensation.[18] The complainants argued that they had used the land sustainably for centuries before they were removed by the government which wanted to establish a game reserve and allowed mining on the land without consulting the Endorois. In relation to the close relationship with the land, which is considered to be sacred,[19] the complainants indicated that 'the Endorois believe that the spirits of all Endorois, no matter where they are buried, live on in the Lake' and further that 'the Monchongoi forest is considered the birthplace of the Endorois'.[20] In their prayers, the complainants requested return of their land, as well as compensation.[21] In relation to the right to development, the complainants argued, similarly to Amartya Sen,[22] that 'development should be understood as an increase in peoples' well-being, as measured by capacities and choices available'.[23] They argued that the Endorois had not been effectively consulted and were not provided with an opportunity for meaningful participation, nor were they included in sharing in the benefits of the development.

The Government of Kenya argued that the community should 'contribute to the well-being of society at large and not only … care selfishly for one's own community at the risk of others'.[24] They further provided evidence of measures that had been taken to ensure universal free basic education and agricultural recovery, 'which is aimed at increasing the household incomes of the rural poor, including the Endorois' and stated that the income from the game reserve is used to fund development projects in the community.[25]

The Commission in coming to its determination held that the right to development has both a procedural and a substantive element and agreed with Arjun Sengupta, UN Independent Expert on the right to development at that time, that '[f]reedom of choice must be present as a part of the right to development'.[26] The Commission concluded that 'community members were informed of the impending project as a *fait accompli*, and not given an opportunity to shape the policies or their role in the Game Reserve'.[27] The Commission further concluded that the Endorois believed that the game reserve and their pastoralist lifestyle were not mutually exclusive.[28] In effect, this would mean that had the Endorois been given a choice in their form of development, they would in all likelihood have embraced a symbiotic approach where the income from the game reserve would have supplemented their pastoralist lifestyle and they would have said no to the mining activities which impact negatively on the environment which they hold as sacred.

It is interesting that the Commission found a violation of the right to development, despite the two arguments of the State that (i) the projects contributed to national development and (ii) the community was receiving development benefits from the projects. The decision of the Commission is ultimately based on participation of the people in decisions affecting their development. Nevertheless, while the decision holds freedom of choice to be central to development, it does not go so far as to actually allow free choice to the community in determining their own form of development. This is clear from the Commission's recommendations. Free choice to determine their own development would have required that existing economic activities which go contrary to the wishes of the Endorois should cease. However, the recommendations require only that the Endorois be paid royalties, and so share in the benefit, on the basis that the state did not adequately consult them.[29] There seems, therefore, to be a weighing up exercise between the developmental and environmental concerns locally, and the national level development needs. While the Commission thus finds a violation of the local level rights, the remedy provided is not full restitution and restoration, but rather only a 'fair

[18]ACHPR, *Communication 276: Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council v Kenya* (2003) (*Endorois*) para 1.
[19]ibid para 16.
[20]ibid para 6.
[21]ibid para 22.
[22]See A Sen, *Development as Freedom* (Anchor Books 2000).
[23]*Endorois* (n 18) para 129.
[24]ibid para 270.
[25]ibid paras 271, 274.
[26]ibid para 151.
[27]ibid para 281.
[28]ibid para 282.
[29]The Commission recommended that the State return the ancestral land, ensure unrestricted access of the Endorois to the Lake Bogoria, pay compensation to the community and pay royalties for existing economic activities; see 'Recommendations of the African Commission' in ibid.
[30]The Commission justifies this approach through citing the Economic Commission for Africa 'African Charter on Popular Participation in Development and Transformation' (1990), which stresses the importance of 'benefit sharing'; ibid para 295.

share' of the benefits from the development which has already taken place.[30]

Related to this, the Commission also did not make any provision for ending mining activities and restoring the despoiled environment. The Commission in its consideration of the right to development did not consider the submissions of the complainants regarding the sacredness of the lake and forest, and thus did not make any determination that any development that takes place should refrain from impacting negatively on these areas. The understanding of development by the Commission in this case does not have an explicit environmental component, although it does imply that challenges such as pollution would have been sufficiently addressed if the free, prior and informed consent of the community had been sought.[31] Surprisingly, the complainants had not sought to prove that their right to environment had been violated, which may explain why the Commission did not further engage with this issue.

The African Court dealt with a similar set of facts in its decision in the *Ogiek* case, which related to the eviction of the Ogiek community from the Mau forest in Kenya, on the basis that it constituted a reserved water catchment zone and government land.[32] The applicants clearly made a case for sustainable livelihood within the forest, in harmony with the environment and contended that

> … the occupation of the Mau Forest through time immemorial by the Ogiek people and their use of the various natural resources therein, including the flora and fauna, such as honey, plants, trees and wild game of the Mau Forest, for food, clothing, medicines, shelter and other needs, was sustainable and did not lead to the rampant destruction or deforestation of the Mau Forest.[33]

Likely learning from the *Endorois* case, the Applicants in the *Ogiek* case requested the Court to order the recission of all titles and concessions on the land, and its restitution to the Ogiek to use as they deem fit, along with compensation for damages and the establishment of a community development fund in favour of the Ogiek.[34] They further requested legislative recognition of the right of the Ogiek to be effectively consulted and to withhold consent 'with regards to development, conservation or investment projects on Ogiek ancestral land'.[35] The applicants contended that the State had violated the right to development through not allowing the Ogiek to determine their own development priorities and strategies, to be actively involved in their implementation and to administer it through their own institutions.[36] The State on the other hand contended that the Applicants had not shown 'how it has failed in undertaking development initiatives to the benefit of the Ogieks' or how they had been discriminated against or excluded from projects.

The Court in making its determination on the right to development relied on the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP), rather than the jurisprudence of the Commission in the cases discussed above, in a deviation from its usual practice. The Court referred to Article 23 of the UNDRIP which holds that '[i]ndigenous peoples have the right to determine and develop priorities and strategies for exercising their right to development' and consequently found that the Ogiek were not sufficiently consulted or involved in developing programmes affecting them, and thus that Article 22 of the African Charter had been violated. The Court reserved the right to receive submissions and make a separate determination on reparations, which has not yet been concluded at the time of writing.

This superficial consideration of the right to development without delving into the established principles in the African human rights system is disappointing. Nevertheless, the Court came to substantively the same conclusion as the Commission in the *Endorois* case, namely, that consultation and participation are core components of the right to development. The right to participation and consultation is also an established procedural element of the right to a healthy environment.[37] Interestingly, both the Court and the Commission decisions, while not directly engaging the environmental degradation concerns, imply in their decisions that compliance with the duty by the State to consult and allow effective participation would prevent the negative social and environmental implications which result from violations of the right to development. This again shows that the rights to development and a healthy environment are not contradictory and that usually both rights are served if the procedural rights of affected (indigenous) people are respected.

Thus, while the right to development is not explicitly construed as a right to sustainable development, there is an assumption, at least in cases related to indigenous communities,[38] that fulfilling the elements of the right to development would result in sustainable development. Unfortunately, this conclusion is weakened in that the Court does not explicitly conclude that the right to development includes the right to say no to development which goes against the views of affected people, but merely that such affected people must be consulted. As also held by the Commission in the *Endorois* case, affected people have a right to contribute to shaping the form of development, but that does not mean they can direct the course completely.

One of the most ground-breaking and famous cases of the Commission is the *Ogoniland* case, which related to the destruction caused by oil companies, with the support of the Nigerian government, of the

[31] ibid para 293.
[32] ACtHPR, *Application 006/2012: African Commission on Human and Peoples' Rights v Kenya* (2017) (*Ogiek*) para 3.
[33] ibid para 43.
[34] ibid.
[35] ibid.
[36] ibid para 202.
[37] See, e.g., ACHPR (n 4) 17; 'Framework Principles on Human Rights and the Environment' in Human Rights Council 'Report of the Special Rapporteur on the Issue of Human Rights Obligations Relating to the Enjoyment of a Safe, Clean, Healthy and Sustainable Environment' UN Doc A/HRC/37/59 (24 January 2018).
[38] There is a danger that, because the environmental component is only implied rather than explicitly stated, that where *other* victims are concerned who may not have the same close connection to the environment that indigenous communities have, the environmental protection component might fall away, as development would in the first place take account of the form of development that the people deem fit.
[39] *Ogoniland* (n 14) para 1.

environment and harm to the well-being of the people in the Niger Delta.[39] This case is different from the other two in at least two respects, the first of which is that the complainants, while alleging that 'Ogoni communities have not been involved in the decisions affecting the development of Ogoniland', did not argue that there was a violation of Article 22, rather relying on the related rights in Articles 21 and 24. Second, whereas in the former two cases the government had as a main aim the protection of the area (although in practice degradation and pollution did take place), in the *Ogoniland* case, the government wanted to exploit the oil resources for the economic benefit of the country. In the words of the Commission: 'undoubtedly and admittedly, the Government of Nigeria, through [the Nigerian National Petroleum Corporation (NNPC)] has the right to produce oil, the income from which will be used to fulfil the economic and social rights of Nigerians'.[40] This could be considered from a narrow perspective to bring the right to development of the country as a whole in conflict with the right to a healthy environment of the affected community. This may be one reason why the complainants decided not to argue that the victims' right to development had been violated, rather focusing their arguments on the violation of the right to a satisfactory environment.[41]

The Commission in its determination on a violation of Article 24 aligned itself with Alexandre Kiss, when he states that 'an environment degraded by pollution and defaced by the destruction of all beauty and variety is … contrary to satisfactory living conditions and … development'.[42] The Commission determined that the right to a healthy environment 'requires the state to take reasonable and other measures to prevent pollution and ecological degradation, to promote conservation, and to secure an ecologically sustainable development and use of natural resources'.[43] This expression is a clear confirmation that the Commission not only supports the principles of sustainable development as it relates to sustainable use and preserving enough of the environment for future generations to benefit from it, but also in conserving and protecting the environment from ecological degradation. While this approach does not go so far as to be an ecocentric approach, it does support a broader conception of sustainable development where human well-being is embedded in, and relies on, environmental health.

The Commission in the *Ogoniland* decision set out the duties on States in relation to the rights to development and environment. In this case, the State has a role in development projects, including by

> … ordering or at least permitting independent scientific monitoring of threatened environments, requiring and publicising environmental and social impact studies prior to any major industrial development, … and providing meaningful opportunities for individuals to be heard and to participate in the development decisions affecting their communities.[44]

Clearly, while the theme of participation and consultation as a core element of development is maintained, in the sustainable development approach of the Commission adopted in the *Ogoniland* case, the State must in addition take measures before and during any development projects to ensure the protection of the environment. In doing so, it goes much further than the *Endorois* case, which in effect left the form of development up to the community. By doing so, the Commission in the *Ogoniland* decision very clearly delineated, first, that there are environmental limits to development projects, and, second, identified further procedural elements for ensuring that environmental boundaries are not overstepped. The Commission proceeds to also derive a right to food from the reading together of Articles 4, 16 and 22 of the African Charter, but curiously then does not find Article 22 as one of the rights that were violated.[45]

The Commission in the *Ogoniland* case makes very strong statements about the nature of the right to a healthy environment and what it implies for development. Nevertheless, when it comes to the application of the case at hand, the outcome is somewhat weakened. The Commission does not challenge the government's right to exploit the oil resources in Ogoniland, irrespective of the wish of the affected people. It 'merely' provides for a right to participate in, and benefit from, the development and provides for safeguards to monitor and to the extent possible, clean up environmental degradation. There is thus no room for consideration of the possible alternative forms of development which may be preferred by the communities. Thus, while the Commission is progressive in interpreting the environmental boundaries to development in theory and is on par with previous cases in recognizing the procedural rights to participation and consultation, in practice participation is limited as the government maintains ultimate control over determining the kind of development to be followed.

One case in which the Commission did not find a violation of the right to development, but nonetheless made important observations about what the right entails is the *Gumne* case.[46] The first point elucidated by the Commission in this case is the need for equitable sharing of resources as an element of the right to development, whereby a government has a duty to ensure that all regions have access to an equitable share of the resources of the State. Second, the Commission confirmed that the right to development, in a similar way to socioeconomic rights, is subject to progressive realization.[47]

[40]ibid para 54.

[41]Nevertheless, the Commission according to its mandate has the possibility to find a violation of any human right protected in the African Charter, even where such a violation was not alleged by the complainant, as was here the case in relation to the right to development. Kamga and Fombad (n 17) 213, in this regard conclude that 'the commission then missed a golden opportunity to provide a dynamic reading of the law to protect the [right to development]'.

[42]A Kiss, 'Concept and Possible Implications of the Right to Environment' in KE Mahoney and P Mahoney (eds), *Human Rights in the Twenty-First Century: A Global Challenge* (Nijhoff 1993) 551, 553, quoted in *Ogoniland* (n 14) para 51.

[43]ibid para 52.

[44]ibid para 53.

[45]ibid para 64 and the 'Holding'.

[46]ACHPR, *Communication 266/2003: Kevin Mgwanga Gumne* et al *v Cameroon* (*Gumne*).

[47]ibid para 206.

2.3 | Jurisprudence of the African subregional bodies

Interesting developments regarding the relationship between the right to development and right to environment also took place at the subregional level. *SERAP v Nigeria* before the Economic Community of West African States (ECOWAS) Court of Justice, related to the same facts as set out above in relation to the oil pollution of the Niger Delta. The complainants alleged violations of the 'rights to health, adequate standard of living and rights to economic and social development'.[48] In this case, the Court concretized the reliance or embeddedness of human well-being in environmental health, in concurring with the International Court of Justice that the environment 'is not an abstraction but represents the living space, the quality of life and the very health of human beings, including generations unborn'.[49] While the complainants purported the violation of a range of peoples' rights under the African Charter, including Articles 21, 22 and 24, the Court found a violation only in relation to Articles 1 and 24 of the Charter.[50] The Court did not provide specific reasons for dismissing the claims of violations of the other rights, including the rights to health and development, and the right to dispose of resources. However, in relation to development, the Court noted that the measures adopted by Nigeria to 'ensure balanced development in the region' included 'the allocation to the region, 13% of resources produced there, to be used for its development'.[51] The Court appears satisfied that by allocating money from natural resource exploitation in the region for development in the region, the State had dispensed with its obligations in relation to development. This is unfortunate in that the procedural elements of choice and participation in their development by affected people had not been met. The Court additionally did not fully recognize the extent to which environmental degradation negatively affects development choices of affected people, even if they are financially compensated.

Another subregional case, which reached ground-breaking conclusions on the right to development in relation to the environment, is *ANAW v the Attorney General of the United Republic of Tanzania*.[52] This case before the East African Court of Justice dealt with a mega-development project by the government of Tanzania, to build a road through the Serengeti National Park.[53] The complainants objected to this project based on the extensive and irreversible environmental and ecological degradation.[54] The State on the other hand argued that it had 'decided to upgrade the road in order to stimulate the socio-economic growth of over two million of its citizens and reduce the prevailing costs of transport'.[55] This can be seen as a clear case where developmental and environmental interests appear to be in opposition. Yet in its decision, the Court recognized its own duty to 'stop future degradation without taking away the Respondent's mandate towards economic development of its people'.[56] The Court in its determination noted that 'the environment, once damaged is rarely ever repaired' and that the 'common thread' throughout the decision had to be the potential for irreparable damage to the environment.[57] The Court therefore only recognized a right for the State 'to undertake such other programmes or initiate policies in the future which would *not* have a negative impact on the environment and ecosystem in the Serengeti National Park'.[58] This is therefore an important decision, in that in weighing up the short term economic benefit against the long-term negative environmental consequences of the road, it found that the right to development is constrained to development which does not irreparably harm the environment. This decision also recognized the possibility of finding alternatives to destructive development projects, in this case the possibility of having the road go around the sensitive protected national park, rather than through it. It also supports the principles already established in the *Ogoniland* decision by the African Commission, that environmental considerations can and should be able to place hard restrictions on the kinds of development projects which can be undertaken – in effect, a right to sustainable development.

The discussion so far suggests that the right to development and the right to a satisfactory environment as interpreted within the African human rights system are not in contradiction. Furthermore, participation and effective consultation of affected people in development decisions have the potential in many cases to ensure that such decisions do not lead to environmental degradation. The government nonetheless also has an important role in ensuring, on the basis of scientific monitoring and impact studies, that development projects do not lead to environmental degradation. The next section draws together the main arguments in favour of a conception of the right to development as a right to ecologically sustainable development.

3 | RIGHT TO DEVELOPMENT AS A RIGHT TO HUMAN AND ENVIRONMENTAL WELBEING

The view that the right to development as formulated in the African Charter is not necessarily in opposition to the right to a healthy environment is in principle supported by the jurisprudence of the African human rights bodies. These bodies recognize environmental considerations as a legitimate limitation on development projects, and impose a duty on States to ensure environmental restoration where development has resulted in environmental degradation. The point about environmental concerns being a legitimate limitation on development is illustrated effectively in the *ANAW* case, where environmental considerations based explicitly on sustainable development principles trumped the State's economic development objectives. However, in

[48] *SERAP v Nigeria*, Judgment, ECW/CCJ/APP/08/09, para 4.
[49] *Legality of the Use by a State of Nuclear Weapons in Armed Conflict* (Advisory Opinion) [1996] ICJ Rep 66 para 28, quoted in *SERAP v Nigeria* (n 48) para 100.
[50] *SERAP v Nigeria* (n 48) para 120.
[51] ibid paras 102–103.
[52] *African Network for Animal Welfare (ANAW) v The Attorney General of the United Republic of Tanzania*, Ref. No. 9 of 2010, Judgment, East African Court of Justice (2014) (*ANAW*).
[53] ibid para 4.
[54] ibid para 11.
[55] ibid para 22.
[56] ibid para 82.
[57] ibid para 85.
[58] ibid para 86 (emphasis added).

other case law, the environmental limitations on the right to environment is less explicit. This may be because the *ANAW* case was brought before the State had started to implement the development project. Conversely, in the *Endorois* and *Ogoniland* cases, the States' development aims were not questioned at all, and apart from environmental clean-up, the projects are allowed to continue—with the communities sharing in the benefits, rather than being able to shape the development policies.

While the right to development as interpreted by the African human rights bodies goes well beyond the narrow view of development as economic wealth accumulation, it remains overwhelmingly anthropocentric. Where there is reference to the environment in the context of development, this is in most instances as 'resources' to be used and disposed of to ensure development, even if they should also be protected. However, this dichotomy which is set up between the right to development and the right to a healthy environment is ultimately false, because without the environment, human civilization and well-being become untenable in the long run. An important scientific approach which supports this view is the planetary boundaries model. First defined by Johan Rockström leading a group of environmental scientists in 2009, the nine planetary boundaries offer a framework of Earth systems that provide a '"safe operating space" for humanity', beyond which there is a high risk of planetary instability and where the 'harmonious Holocene-like state for human development significantly diminishes'.[59] Raworth notes in particular that of the nine planetary boundaries, four (biodiversity loss, land conversion, climate change and nitrogen and phosphorus loading) have already been dramatically overshot, with insufficient data to measure the almost certain surplus of air and chemical pollution.[60] There is thus an urgent need for identifying different ways of conceiving of development within the limits of planetary boundaries.

In some instances, the existing jurisprudence does go beyond this narrow approach, notably in the *Ogoniland* and *ANAW* cases, where the Commission and Court were willing and able to conceive of the environment not only in terms of its 'functional value', but also its 'intrinsic value'.[61] Where there is such a balance being struck, this is done 'with an emphasis on the human element (human health and well-being); intergenerational protection in the spirit of sustainability; and maintenance of a balance between resource use to the benefit of human development and resource protection to ensure sustainable development'.[62] Ultimately, the judicial bodies all aim at striking a balance between the need for development on the continent to allow better quality of life for all, and the needs of local communities and future generations to effective protection of the environment against irreparable damage, and restoration of degraded environments. Through this, there are possibilities arising from the jurisprudence for expanding the understanding of development to include well-being not only of people, but the health of the ecosystems and the natural environment within which we as humans are embedded. The *SERAP* case, for example, as discussed above, recognized this embeddedness of human existence within a living and interconnected environment.

The first such opportunity is the potential of the right to a healthy environment conducive to development which has been interpreted quite broadly in the *Ogoniland* case as including a duty to 'prevent pollution and ecological degradation, to promote conservation, and to secure an ecologically sustainable development'.[63] This provides the legal grounding for contesting development projects which impact substantively on the environment and which are not undertaken in a sustainable manner. This potential was illustrated in the *ANAW* case, where a mega-development project was banned from proceeding in its current format. This remains significant even if in both cases the environmental right was limited again in the remedies provided, in the *Ogoniland* case by not problematizing the oil extraction itself, and in the *ANAW* case by stating that future projects which do not have serious environmental impacts may be allowed to proceed.

The second opportunity which exists for the redefinition of the right to development as a right to sustainable development, is that illustrated by the submissions of the Endorois and Ogiek peoples in the cases discussed above of their close personal relationship with their environment as a sacred place with which they must live in harmony. This clearly shows that a conception of development as human and environmental flourishing is not a foreign idea to the African continent. While the claimants are indigenous peoples, who can be said to have a particularly close relationship with the land on which they depend for their livelihood and socio-cultural existence, as discussed in the next section, a predominantly utilitarian view of the environment is countered by African environmental relational ethics as well.[64]

4 | PRINCIPLES OF AFRICAN ENVIRONMENTAL ETHICS

Behrens argues that the concept of *ubuntu*, an African worldview prominent in Southern Africa but also reflected in similar understandings across the continent that 'one can become a complete, authentic, or virtuous person only through and in relationships with other people' is able to support relationships beyond human relationships.[65]

[59]RE Kim and LJ Kotzé, 'Planetary Boundaries at the Intersection of Earth System Law, Science and Governance: A State-of-the-Art Review' (2021) 30 Review of European, Comparative and International Environmental Law 3, 4.

[60]W Steffen et al, 'Planetary Boundaries: Guiding Human Development on a Changing Planet' (2015) 347 Science 736, provides the scientific basis for this claim in K Raworth, *Doughnut Aconomics: Seven Ways to Think like a 21st-Century Economist* (Random House 2017). The other planetary boundaries which are not yet overshot are freshwater withdrawals, ocean acidification and ozone layer depletion (the latter of which has experienced an improvement in recent years).

[61]LJ Kotzé and E Grant 'Environmental Rights in the Global South' in P Cullet and S Koonan (eds), *Research Handbook on Law, Environment and the Global South* (Edward Elgar 2019) 86, 97.

[62]ibid 94, stated in relation to South African law, but also broadly applicable to the regional jurisprudence discussed.

[63]*Ogoniland* (n 14) para 52.

[64]Africa is a large continent with many different cultures and moral systems, but this assessment draws on the broad, largely common principles. K Behrens, 'Exploring African Holism with Respect to the Environment' (2010) 19 Environmental Values 465, 468.

[65]ibid 468; SAD Kamga, 'Realizing the Right to Development: Some Reflections' (2018) 16 History Compass e12460, 5, also argues that 'African countries should also be allowed to rely on their humanitarian philosophy known as Ubuntu' to give effect to the right to development.

Because in African thought all things are interconnected, 'human wellbeing is indispensable from our dependence on and interdependence with all that exists, and particularly with the immediate environment on which all humanity depends'.[66] However, Behrens rightly acknowledges that this interpretation of *ubuntu* may still be an anthropocentric view in that human existence and well-being may be threatened if environmental balances are upset. Nevertheless, African thought in addition to acknowledging our reliance on the land, also incorporates a sense of respect for nature, in a way which extends the value of the environment beyond its instrumental value.[67] In this regard Behrens refers, among others, to the worldview of the Oromo people in Ethiopia, who 'do not simply consider justice, integrity and respect as human virtues applicable to human beings, but they extend them to non-human species and mother Earth'.[68]

There are many further examples on the continent of environmental ethics based on a close relationship with the environment, particularly sacred spaces.[69] Bernard, for example, refers to the association of Bantu-speaking groups in Southern Africa of water sources and riparian zones with water spirits, and the negative impact of 'environmental degradation, mainly by agroforestry and dam-building programs' on these sacred spaces.[70] Similarly, from West Africa, Eneji and colleagues pointed to the role of indigenous religion in Nigeria, noting in particular that 'protection of the abodes of the gods from entrance, utilization and exploitation overtly or covertly encourages conservation and management of natural resources' in the Cross River state of Nigeria.[71] In East Africa, Shisia and others found that 'the Luo people of Ramogi Hill believe that the earth is a self-regulating complex super organism, the ecosystem processes are linked and humans are part of the system and so humans do not exist in isolation'.[72]

The case law discussed above, including the case of the indigenous Ogiek people of Kenya, who argued before the African Court for sustainable use of their forest areas through traditional lifestyles in harmony with the environment, is an example of how development can be operationalized without resorting to destructive extractivism. Another example is that of the Xolobeni community in South Africa, who opted for sustainable tourism as a culturally appropriate and environmentally acceptable form of development in a ground-breaking case before the Constitutional Court of South Africa.[73] In this case, the community argued for development of the region based on 'tourism and eco-tourism which are contingent upon the preservation of the area's natural beauty and ecological diversity', rather than allowing an Australian company to mine titanium-rich sand in the area.[74] The Constitutional Court inter alia referred to the *Endorois* and *Ogiek* cases in relation to the right to be consulted.[75] The Court concluded that 'the applicants in this matter therefore has the right to decide what happens with their land' and that no development can be undertaken without their 'full and informed consent'.[76]

African ethics is important to informing a reconceptualized understanding of the right to development for a number of reasons. In the first place, by emphasizing the importance of respect for the natural environment as a 'person' or 'being' under the *ubuntu* and Oromo understandings, or as a sacred home of spirits, ancestors or the gods, Western-inspired notions of the natural environment as owned and controlled by humans are turned on their head, and with it conceptions of what it means to 'develop'. Clearly, incorporating some of the principles from African environmental ethics would result in a more ecocentric approach, which would necessarily place limits on the meanings, forms and means of development which are acceptable. Second, in many ways these ancient ideas are more in tune with our most recent understandings of earth system science and complex systems than the exploitative approach of the age of industrialization. This is illustrated by the similar conception of the environment as a complex, interconnected system which we find in both the Luo worldview and in the planetary boundaries model. These strong connections between the past and the future mean that we have to take seriously the inspiration which may be drawn from pre-industrial views on the relationship between humans and nature and what constitutes a good life.

As is clear from this section, a conception of development as human and environmental flourishing is not a foreign idea on the African continent and is in fact strongly supported by African worldviews, ethics and religions. Kamga supports the approach of relying on indigenous knowledge systems in interpreting and understanding of human rights, by stating that 'whenever indigenous knowledge systems can be relied on to supplement legalism to give effect to human rights and the RTD in particular, local communities should be allowed to rely on this knowledge', because of the role of accepted standards in legitimizing human rights policies.[77] While more work needs to be done on how to internalize principles of African environmental ethic in law for the 21st century, some preliminary thoughts are offered in the conclusion.

[66]MF Moruve, 'An African Commitment to Ecological Conservation: The Shona Concepts of *Ukama* and *Ubuntu*' (2004) *Mankind Quarterly* 195, 195–196, quoted in Behrens (n 64) 469.
[67]Behrens (n 64) 470–471.
[68]W Kelbessa, 'The Rehabilitation of Indigenous Environmental Ethics in Africa' (2005) 53 Diogenes 17, 24, quoted in Behrens (n 64) 471.
[69]See, e.g., T Joffroy (ed), *Traditional Conservation Practices in Africa* (International Centre for the Study of the Preservation and Restoration of Cultural Property 2005), for a range of examples from across the continent.
[70]PS Bernard, 'Ecological Implications of Water Spirit Beliefs in Southern Africa: The Need to Protect Knowledge, Nature, and Resource Rights' (2003) USDA Forest Service Proceedings 148, 148.
[71]CVO Eneji et al, 'Traditional African Religion in Natural Resources Conservation and Management in Cross River State, Nigeria' (2012) 2 Environment and Natural Resources Research 45, 45.
[72]EW Shisia et al, 'Linkages Between Sustainable Biodiversity and Cultural Values: A Case Study of Ramogi Hill Forest and Its Environment' (2018) 9 Journal of Economics and Sustainable Development 82, 82.
[73]*Baleni and Others v Minister of Mineral Resources and Others*, 2019 (2) SA 453 (GP) (22 November 2018).
[74]ibid para 12.
[75]ibid para 82.
[76]ibid paras 83–84.
[77]Kamga (n 65) 5.

5 | CONCLUSION

This article has argued that the dichotomy which is set up between the right to development and the right to a healthy environment is ultimately false, because of the central role of environmental health in human well-being and the possibility of development. It has been argued that the African Charter and its interpretation by the African Commission and African Court has resulted in some important principles towards a revised understanding of development, not as wealth-based, but rather as centred on human well-being situated within a healthy and satisfactory environment. It has also argued that there are important elements of African environmental ethics which should be recognized in interpreting the right to development, and which not only support a human-based approach to development but also requires that development takes place with the necessary regard and reverence for the environment, not just as a source of wealth, but as a living system worthy of respect.

Now, two questions remain, namely, what does this mean in terms of the duties of African States in fulfilling the right to development, and how would the reconceived view of development impact on future cases before the African human rights system?

The duties on States in fulfilling the right to a general satisfactory environment as expounded in the *Ogoniland* case already provide a good indication of the kinds of duties that would result from a holistic understanding of the right to development. Therefore, States would have a duty to conceive of development projects which do not permanently damage the environment, whether this is through excessive contributions to greenhouse gasses, through the destruction of critical biodiversity or any other way. States would have a duty to take full account of the views of the affected communities, through allowing for effective consultation and participation of all affected people. However, even if a development project is favoured by the affected community, the State has an additional duty of ensuring that development operations that are destructive to the environment are not permitted. States would therefore in preparation for all development projects have to undertake extensive environmental impact assessments to ensure that the project will not unduly impact on the environment, ensure continuous monitoring while the project is ongoing and rehabilitate the environment after the project is completed.[78] While these are principles that the Commission has highlighted in relation to the right to a general satisfactory environment, they would equally apply to the revised conception of development. The State would also have to set aside land areas where no development projects are undertaken, for purposes of conservation of the environment. Furthermore, States have a duty to adopt overall development policies which are aimed at holistic sustainable development, as part of their duty to fulfil the right to development.

In terms of the *Gumne* case, referenced above, the State has a duty to progressively realize the right to development.[79] Taken from the perspective of holistic development, this would not only mean that the State should progressively ensure the financing of development projects in different parts of its territory, but also that it should progressively ensure the replacement of environmentally destructive projects with projects which are long-term environmentally sustainable and which do not infringe on the environmental rights of its people.[80] Furthermore, even where a violation of a right has not been averred by a complainant before the African Commission, the Commission is able to consider the facts and make a finding of a violation. This is a power which the Commission should more consistently apply in linking the rights to development and environment. Another way in which the Commission and the Court can respond in realizing a more holistic view in relation to the right to a healthy environment is through the kind of remedies that are recommended or ordered. As was seen above, for example in the *Ogoniland* and *Endorois* cases, while the right to participation in development was recognized, in practice, affected communities were not able to request that environmentally destructive projects be halted and restoration of the environment undertaken. Therefore, judicial and quasi-judicial bodies should offer stronger remedies, which not only provide for consultation of affected people or that they benefit from the revenue of ongoing development projects, but rather that such projects be stopped and an inclusive process is followed to identify environmentally sustainable development projects.

It goes without saying that the way in which the right to development is interpreted would depend on the context and the specificities of the case. However, the principles that the African States in implementing the right to development, and the African human rights bodies in interpreting the right to development should uphold, would include: respect for the natural environment in line with indigenous environmental ethics; a recognition of the long-term negative implications for human well-being of environmentally destructive projects, which necessitate an expanded definition of the right to development as encompassing both human well-being as well as environmental sustainability and protection; the interrelated nature of all the peoples' rights protected in the African Charter and in particular the right to development and the right to environment; and the progressive phasing out of environmentally destructive development models, projects and policies in favour of environmentally and socially sustainable development.

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[78]This view was confirmed in the ACHPR Guidelines and Principles; see ACHPR (n 4) 27.

[79]*Gumne* (n 46) para 206.

[80]See, e.g., *ANAW* (n 52) para 86, where the East African Court of Justice decided that Tanzania may not build a road through the Serengeti park, but could only undertake projects which are not environmentally destructive, for example by building *around* this ecologically sensitive area.

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