

The enforcement of socio-economic rights in the African human rights system: Drawing inspiration from the International Covenant on Economic, Social and Cultural Rights and South Africa's evolving jurisprudence

Submitted in partial fulfillment of the requirements of the LLM (Human Rights and Democratisation in Africa) of the University of Pretoria

By

Christopher Mbazira

Student No. 2374521

Prepared under the supervision of Professor Sandra Liebenberg at the Faculty of Law, University of the Western Cape, South Africa

31 October 2003

CONTENTS

TITLE PAGE	i
TABLE OF CONTENTS	ii
LIST OF ABBREVIATIONS	iv
ACKNOWLEDGEMENTS	v
DEDICATION	vi

1 Introduction

1.1 Background	1
1.2 Research problem	4
1.3 Methodology	5
1.4 Limitation and scope	5
1.5 Literature survey	5

2 An overview of the provisions protecting socio-economic rights at the international, regional, and South African domestic levels

2.1 The justiciability debate	8
2.2 The rights in the ICESCR	10
2.3 The rights in the African Charter	11
2.4 The rights in the South African Constitution	13
I. Rights without internal limitations	13
II. Rights in respect of which the positive obligations imposed on the state are expressly limited	13
III. Rights which expressly prohibit certain legislation	13

3 The challenges to the interpretation of socio-economic rights provisions

3.1 The nature of the obligations of the states	15
3.1.1 Taking steps by appropriate means to realise socio-economic rights	18
3.1.2 To achieve 'Progressive realisation'	21
3.1.3 Reading the 'core minimum obligation'	22
3.1.4 Rejection of the concept of 'core minimum obligation' in South Africa	24
3.1.5 Realisation 'within available resources'	26
3.2 The Scope of application	29

3.3	The protection mechanisms and remedies	35
4	Inspiration for the forthcoming African Court on Human and Peoples Rights	
4.1	Introduction to the Court	38
4.2	The jurisdiction of the Court	39
4.3	<i>Locus standi</i>	39
4.3.1	The South African Constitution as a source of inspiration	41
4.4	Remedies and their enforcement	42
4.4.1	Drawing from South Africa's experience	43
4.5	Confronting the normative challenges	45
4.6	Confronting the 'separation of powers' debate	47
5	Conclusion and recommendations	49
5.1	A summary of the areas of inspiration	50
5.1.1	Defining the obligations of states in a practical manner	50
5.1.2	Scope of application of the rights	50
5.1.3	Appropriate remedies effectively enforcement	51
	Bibliography	53
	ANNEX 1	61
	ANNEX 2	66

LIST OF ABBREVIATIONS

AU	African Union
CEDAW	Convention on the Elimination of All forms of Discrimination Against Women
CERD	Convention on the Elimination of All forms of Racial Discrimination
CPMWF	International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families
CRC	Convention on the Rights of the Child
ECOSOC	Economic and Social Council
GNP	Gross National Product
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
NGO	Non-governmental organisation
OAU	Organisation of African Unity
SERAC	Social and Economic Rights Action Centre
TAC	Treatment Action Campaign
TNC	Trans-national corporation
UDHR	Universal Declaration of Human Rights
UN	United Nations
WTO	World Trade Organisation
WIPO	World Intellectual Property Organisation

ACKNOWLEDGEMENTS

I would like to express my gratitude to the Center for Human Rights, University of Pretoria for giving me the opportunity to undertake this LLM study which has opened me to the real problems of the African Continent. The same goes to the Community Law Centre, University of the Western Cape and the entire staff for their support. Special thanks go to Jill Classen the librarian who would always go out of her way to ensure that I had all the research materials I needed.

I am greatly indebted to my supervisor Prof Sandra Liebenberg without whose critical supervision this research would not have taken the form it did. Gratitude also goes to my colleagues with whom we did our second semester at UWC. Priscilla, Rose, Benson and Epy you provided me with a family where there would have been none. This is not to forget Trudy Fortuin who attended to all our needs with motherly compassion.

Special appreciation goes to my family for their support and assistance. I cannot forget the tears of my wife Enid when a boarding call was made for passengers travelling to Johannesburg; I thank you for your endurance and understanding to let me undertake this course. Mention is made of my father Nathan Kiwanuka and my late uncle Joseph Mwandha without whose love and contribution I would not have attained my current level of education.

To all friends, colleagues and relatives not mentioned due to constrained space I am grateful.

DEDICATION

This work is dedicated to my wife Enid who is expecting our first baby

1. Background

The need to protect human dignity, freedom and equality paved the way for the development of the concept of human rights, from an idealistic assertion of vague principles, to the adoption of the comprehensive international normative system now in existence.¹ This includes economic, social and cultural rights with traces in Germany during Bismarck's reign in the 19th Century² and the Russian Revolution in the 20th Century.³ With the adoption of the Universal Declaration of Human Rights (UDHR)⁴ they became universally accepted. In 1966 two covenants were adopted: the International Covenant on Civil and Political Rights (ICCPR),⁵ and the International Covenant on Economic, Social and Cultural Rights (ICESCR),⁶ the former being dedicated to civil and political rights, and the latter to economic, social and cultural rights.

However economic, social and cultural rights have received less attention than civil and political rights.⁷ Their character as rights or their capacity to create obligations binding on states in international law has been denied.⁸ The realisation of these rights has encountered a number of challenges. These include: defining their content, the nature of the obligations that attach to them, enforcement mechanisms, and the lack of effective and enforceable remedies.

At the African level the African Charter on Human and Peoples' Rights (the Charter)⁹ is the principal instrument protecting human rights. The Charter recognises the indivisibility and interrelatedness of both civil and political rights and economic, social and cultural rights. It is recognised that civil and political rights cannot be disassociated from

¹ Eide in Eide, et al (eds) (2001) 12.

² Eide as above 13.

³ Sachs (2003).

⁴ Adopted by the United Nations General Assembly on 10 December 1948.

⁵ Adopted by UN General Assembly Resolution 2200A (XXI) of the 10 December 1966 (entered into force 23 March 1976).

⁶ As above (entered into force 3 January 1976).

⁷ Oloka-Onyango (1995) 26 *California Western International Law Journal*.

⁸ Odinkalu (2001) 23 *Human Rights Quarterly* 331.

⁹ African Charter on Human and Peoples' Rights, adopted by the Eighteenth Assembly of Heads of State and Government of the Organisation of African Unity (OAU), Nairobi July 1989 *Documents of the Organisation of African Unity*, p. 109 (entered into force 21 October 1986).

economic, social and cultural rights in their conception as well as universality. That the satisfaction of economic, social and cultural rights is a guarantee for the enjoyment of civil and political rights.¹⁰ However this author expresses the view that civil and political rights and economic, social and cultural rights cannot do without each other. They live a symbiotic relationship which requires dependence on each other. It is therefore not entirely true that the satisfaction of economic, social and cultural rights will automatically lead to the realisation of civil rights.

But even with such recognition the realisation of these rights on the continent remains a remote possibility.¹¹ A number of factors account for this. This includes issues of justiciability, political conflicts and war, lack of political will and the weaknesses of the enforcement mechanism. According to Oloka-Onyango¹² civil society organisations have devoted most of their energies to addressing the violation of civil and political rights at the expense of economic, social and cultural rights. This is in addition to the weak enforcement mechanism as entrenched in the Charter.¹³

The African Commission on Human and Peoples' Rights (the Commission), the body charged with monitoring the implementation of the African Charter, has been described as 'the missing link' in the enforcement of economic, social and cultural rights.¹⁴ This has been because of the Commission's lack of sufficient resources, absence of an effective enforcement mechanism, confidentiality of its proceedings and the lack of political will to strengthen it. However its recent decision in *Social and Economic Rights Action Center & another v Nigeria (SERAC case)*¹⁵ establishes strong precedent for the enforcement of socio-economic rights within the international community.¹⁶ The decision demonstrates how international instruments can be more creatively interpreted in order to further break down the barriers between the different categories of rights and obstacles of holding the state responsible for the violations of human rights by actors other than the state.¹⁷ The

¹⁰ Preamble para 8 African Charter.

¹¹ Agbakwa (2002) 5 *Yale Human Rights and Development Law Journal* 178 – 179.

¹² Oloka-Onyango (2003) *American University International Law Review*, 852-911.

¹³ Chirwa 2002 3(2) *ESR Review* 19 5.

¹⁴ Oloka-Onyango (n 12 above).

¹⁵ Communication 155/96.

¹⁶ Chirwa (n 13 above) 25.

¹⁷ See Oloka-Onyango (n 12 above).

Commission however failed to place its findings within the African context by reference to relevant African sources. It also failed to define the rights within the concepts of 'progressive realisation' and 'within the available resources' as defined by international human rights law and in the South African Constitution.

The Commission is now to be complemented by the African Court on Human and Peoples Rights (the African Court).¹⁸ But unless the African Court surmounts the Commission's weaknesses and seeks inspiration from the interpretations of the ICESCR then the status quo will be maintained. Issues of standing by victims of human rights violations, defining the obligations of states in a practical manner, the enforcement of judgments and effectiveness of remedies, remain challenges to the Court.

South Africa committed itself to the protection of social-economic rights even when it has not ratified the ICESCR. Its Constitution provides for these rights almost in the same manner as the ICESCR. As will be seen in this paper, South African has gone over some of the hurdles that impinge on the enforcement of socio-economic rights in Africa. Issues such as the nature of the states obligations, justiciability of the rights, the inadequacy of resources and the nature of the state's obligations, remedies and their enforcement have been dealt with extensively.

It is submitted that South Africa presents the Commission and Court with inspiration to draw from on how social-economic rights can be protected. Issues of *locus*, defining the states obligations, effective remedies and their enforcement can be drawn from. However it is impossible to transpose a domestic system directly into the regional system. It is also submitted that South Africa's Constitution and jurisprudence is not without criticisms as assessed against the backdrop of international human rights law. In this respect the United Nations Committee on Economic, Social and Cultural Rights (the Committee) offers immense inspiration. Through its practice of giving normative content to the rights in the ICESCR the Committee has given extensive definition to some of the rights in the ICESCR and the obligations that attach to them. The obligation of the states

¹⁸ Protocol to the African Charter on the Establishment of the African Court on Human and Peoples Rights by the Thirty Fourth ordinary session of the OAU Heads of States and Government July 1998, OAU Doc OAU/LEG/EXP/ACHPR/PROT (III).

to take steps to the maximum of the available resources to achieve progressively the full realisation of the rights in the Covenant has been the subject of extensive elaboration by the Committee. In addition to this the Committee has read into the ICESCR a very important concept, the principle of 'core minimum obligations'. This concept sets the benchmark in determining whether the state has discharged its obligations at the minimum level. The Commission and Court should take advantage of the provisions of the Charter which allow for inspiration from other instruments. The Charter obliges the Commission, and the Court, to draw inspiration from international law and human and peoples' rights, including the UDHR and other instruments adopted by the United Nations and African Countries in the area of human rights.¹⁹ This is in addition to taking into consideration other instruments laying down rules expressly recognized by the States.²⁰ This paper sets out to show that the African system can draw inspiration from South Africa and the Committee in order to surmount the challenges affecting the realisation of the rights.

The paper is divided into five parts: The first part outlines the normative framework of protection of economic, social and cultural rights within the ICESCR, the African Charter and South African Constitution. The second part explores the challenges hampering the effective realisation of these rights followed by an analysis of the African Court and the lessons it may draw not only from the Committee and South Africa's Constitution but from the African Commission as well. The fourth part looks at the forth-coming African Court and its challenges, pointing aspects on which it may seek inspiration. This will be followed by a conclusion and recommendations.

1.2 Research problem

In Africa despite the express recognition of socio-economic rights in the Charter and the ratification by most of the African Countries of the ICESCR and other instruments, these rights remain distant from Africa the majority of whose people live in poverty, disease and ignorance, lack housing and food among other basic needs. The realisation of socio-economic rights presents a number of challenges which include: their justiciability, their normative nature and the obligations attaching to them, the scope of enforcement and the ineffective remedies. The enforcement of the Charter falls on the Commission

¹⁹ Art. 60.

²⁰ Art. 61.

and the forth-coming African Court. The Committee and South Africa 's evolving jurisprudence despite some criticisms, presents the Commission and the African Court with experiences to draw from to ensure effective protection of these rights within Africa. This is despite the impossibility to transpose South Africa's experience into the regional human rights systems and the Committee's lack of a mandate to receive and adjudicate over complaints remains a fatal weakness.

1.3 Methodology

This research shall be library based were the available literature on the subject shall be made use of. Hard sources and electronic sources accessed on the Internet shall be utilised. Reliance will be made on information relating to some African countries as may be accessed on the Internet.

1.4 Limitation and scope

Though focuses is on the African continent this is in the context of Africa's international human rights obligations. The paper focus on the challenges to the enforcement of socio-economic rights in Africa and the inspiration that the African system can draw from the Committee in order to surmount some of the challenges. Focus is also had on South Africa's Constitution and its evolving jurisprudence as a possible source of inspiration.

1.5 Literature survey

Though most of the literature on human rights is dedicated to civil and political rights recently the recognition of economic, social and cultural rights has generated some literature in Africa. Odinkalu²¹ discusses the nature of the obligations of the state in respect of economic, social and cultural rights under the Charter. The article discusses the normative nature of the rights as protected by the Charter. Oloka-Onyango²² highlights the impact of the international financial and development institutions on the realisation of economic, social and cultural rights in Africa. His approach of placing socio-economic rights realisation in Africa in a broader perspective of global trends gives useful information in devising a holistic implementation of socio-economic rights.

²¹ Odinkalu (n 8 above).

²² Oloka-Onyango (n 7 above).

In another paper Oloka-Onyango²³ analyses the efficacy of international mechanisms in protecting the rights of the marginalised and indigenous people in this era of globalisation and non-state actors. Particular focus is had on the Commission in the context of the *SERAC* case. Agbakwa²⁴ examines some of the factors inhibiting the effective realisation of these rights in Africa. Among others he argues that the greatest benefit of ensuring enforcement of the rights is the assurance of an effective mechanism for adjudicating violations or threatened violations to avoid resort to extra-legal means. Pierre de Vos²⁵ analyses the scope and nature of the socio-economic rights provisions in the Charter, the functions of the Commission highlighting its strong and weak points, and the forthcoming African Court in addition to the nature of the state obligations. According to him the Commission has made good use of the international law and the work of the Committee and is well placed to develop unique yet internationally attuned jurisprudence.

There is abundant literature on the nature of the socio-economic rights provisions in the South African Constitution and the jurisprudence of the Constitutional Court. Liebenberg²⁶ in a chronological manner analyses the nature of the socio-economic rights in the Final Constitution, the nature of the obligations that attach to them and how they should be interpreted, the bearers of the rights and the scope of application of the Bill of Rights. She argues that the Constitution establishes 'core minimum obligations' for the state in respect of some of the rights. The concepts 'progressive realisation' and 'within available resources' are given extensive interpretation. Liebenberg in another paper²⁷ gives a critical analysis of all the important decisions that have come out of the Constitutional Court. This is done against the backdrop of international human rights law. In particular against the ICESCR and the General Comments of the Committee. Other writers include: Roux,²⁸ Blitchitz,²⁹ Pierre de Vos,³⁰ and Trengrove.³¹

²³ Oloka-Onyango (n 12 above).

²⁴ Agbakwa (n 11 above).

²⁵ De Vos, Pierre de Vos 'A new beginning? The enforcement of social, economic and cultural rights under the African Charter on Human and Peoples Rights' Paper presented at the *University of the Western Cape AIX-University colloquium on economic, social and cultural rights in Europe and South Africa 13 – 15 August 2003* (unpublished on file with author).

²⁶ Liebenberg in M Chaskalson (1999) 41–34 to 41– 56.

²⁷ Liebenberg 2002 (2) 6 *Law Democracy and Development* 159 – 191.

²⁸ Roux (2003) 10 *Democratization*

CHAPTER TWO

2 An overview of the provisions protecting socio-economic rights at the international, regional, and South African domestic levels

The first most important instrument to proclaim the protection of socio-economic rights was the UDHR. However this declaration is not a treaty and was understood not to be imposing binding legal obligations.³² This called for the promulgation of binding treaties which in 1966 led to the adoption of the ICCPR incorporating civil and political rights, and the ICESCR incorporating economic, social and cultural rights. In addition, these rights have been protected in other universal instruments which include: the Convention on the Rights of the Child (CRC),³³ the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW),³⁴ the Convention on the Elimination of All Forms of Racial Discrimination (CERD),³⁵ and the Convention on the Protection of the Rights of All Migrant Workers and Members of their Families (CPMWF).³⁶ Despite all this protection the justiciability of these rights has for a long been denied. This is not only at the international but domestic level as well and debate has been generated around this area.

²⁹ Bilchitz (2003) 19 *South African Journal on Human Rights* 1.

³⁰ De Vos 1996 Constitution' 1997 (13) *South African Journal on Human Rights* 67

³¹ Trengove (1999) 1 No. 4 ESR Review 8 – 11 9.

³² Apparently UDHR is believed to have acquired the status of customary international law thereby establishing principles that are binding on all subjects of international law. Some authors have expressed the opinion that not all the provisions have acquired this status. There is however no agreement on what those instruments are. See Steiner et al (2000) 227 – 231.

³³ Adopted and opened for signature, ratification and accession by General Assembly Resolution 44/25 of 20 November 1990 (entered into force 2 September 1990).

³⁴ Adopted and opened for signature, ratification and accession by General Assembly Resolution 34/180 of 18 December 1979 (entered into force 3 September 1981).

³⁵ Adopted and opened for signature and ratification by General Assembly resolution 2106 (XX) Of 21 December 1965 (entered into force 4 January 1969).

³⁶ Adopted and opened by signature, ratification and accession by General Assembly Resolution 45/158 of 18 December 1990 (entered into force 1 July 2003).

2.1 The justiciability debate

At the adoption of ICSECR different from the ICCPR, it was argued that civil and political rights were 'absolute' and 'immediate', but socio-economic rights were 'programmatic', to be realised gradually and were therefore not 'justiciable' and could not be enforced by the courts.³⁷ That socio-economic rights required spending by the state as compared to the civil and political rights. But later it was discovered that the above arguments had been overstated. All the rights are now believed to be interrelated and interdependent.³⁸ The understanding that civil and political rights did not involve cost implications was misplaced; rights such as fair trial and right to vote have cost implications, as do other rights.³⁹ It is clear that development cannot be achieved unless a holistic approach to the realisation of human rights is taken. In this context new approaches have emerged, stressing equitable, people-centred development, combined with a respect for human beings and a demand for social and economic equity.⁴⁰

At the drafting of the South African Final Constitution there was contention as to whether social-economic rights should be included as justiciable rights. In *Re Certification of the Constitution of the Republic of South Africa 1996*⁴¹ it was argued that socio-economic rights were not universally accepted fundamental rights.⁴² Secondly, that their inclusion was inconsistent with the principle of separation of powers because the judiciary would interfere in the terrain of the legislature and executive. That this would result in the courts dictating to the government how the budget should be allocated.⁴³ Thirdly it was argued that the enforcement of socio-economic rights had budgetary implications which

³⁷ Eide (n 1 above) 10.

³⁸ As early as 1968, the Proclamation of Tehran, 1968, Final Act of the International Conference on Human Rights, Tehran, UN Doc A/CONF 32/41. See also The Vienna Declaration and Programme of Action, adopted by the World Conference on Human Rights June 1993, UN Doc A/Conf 157/23, para 5 sourced at [http://www.unhcr.ch/huridocda.nsf/\(symbol\)A.CONF.157.23.En?OpenDocument](http://www.unhcr.ch/huridocda.nsf/(symbol)A.CONF.157.23.En?OpenDocument) last visited on 8 September 2003

³⁹ Scheinin in Eide et al (n 1 above), see also *Re Certification of the Constitution of the Republic South Africa under judgment 1996*, below.

⁴⁰ Du Plessis 31(2) 2001 *Africanus* 62.

⁴¹ 1996(10) BCLR 1253 (CC).

⁴² As above para 76.

⁴³ As above para 77.

the courts were not positioned to handle.⁴⁴ Dismissing these arguments the court held that to some extent socio-economic rights are justiciable.⁴⁵ It held further that the Interim Constitution permitted the supplementation of fundamental rights with other rights not universally accepted. The court also said that it was not true that only socio-economic rights had budgetary implications. Even civil and political rights had such implications and yet this did not stop the courts from enforcing them.⁴⁶ That at the very minimum these rights can be negatively protected from improper invasion.⁴⁷ The Court said that:

It is true that the inclusion of socio-economic rights may result into courts making orders which have direct implications for budgetary matters. However, when a court enforces civil and political rights ... the order it makes will often have such implications .. [i]n our view it cannot be said that by including socio-economic rights within a bill of rights, a task is conferred upon the courts so different from that ordinarily conferred upon them by the bill of rights that it results in the breach of separation of power.⁴⁸

Some of the arguments re-surfaced in *Minister of Health & others v Treatment Action Campaign & ors (1)* (TAC case)⁴⁹. It was argued that the Court did not have powers to make orders that would require the executive to pursue a particular policy. This argument was based on the reasoning that under the separation of powers doctrine the making of policy is a prerogative of the executive and not the court.⁵⁰ The court held that the primary duty of the courts is to the Constitution and law, which they must apply impartially and without fear, favour or prejudice. That the Constitution requires the State to 'respect', 'protect', 'promote' and 'fulfil' the rights in the Bill of Rights. Where the State policy is challenged as inconsistent with the Constitution, courts have to consider whether in formulating and implementing such policy the state has given effect to its constitutional obligations.⁵¹ That the Court has to decide whether the state has taken

⁴⁴ As above para 78.

⁴⁵ As above .

⁴⁶ Para 75 (n 41 above).

⁴⁷ As above.

⁴⁸ As above.

⁴⁹ 2002 (10) BCLR 1033.

⁵⁰ As above paras 97 and 98.

⁵¹ As above para 99.

reasonable measures to realise the rights.⁵² This test is the subject of extensive discussion later in the paper.

It will transpire that at the international level the Committee has recognised the justiciability of these rights. Though it lacks a mandate to enforce these rights judicially there are moves towards this direction. The Committee has also through its General Comments and State reporting mechanism given normative content to these rights and obliged states to adhere to their obligations.

2.2 The rights in the ICESCR

The ICESCR provides for the protection of a wide range of economic, social and cultural rights. These include: the right of self-determination,⁵³ right to work,⁵⁴ right to social security,⁵⁵ family rights and protection of the family,⁵⁶ the right of everyone to an adequate standard of living;⁵⁷ which incorporates the right to food, clothing and housing, right to health,⁵⁸ right to education,⁵⁹ and the right to take part in one's culture.⁶⁰ The development of these rights has however lagged behind.⁶¹ Like all other human rights instruments the ICESCR lacks clarity as to their normative implications.⁶² This has been aggravated by the lack of a complaints mechanism under the ICESCR. To cure this defect the practice of giving authoritative interpretation to the provisions of ICESCR has been adopted. This includes the Limburg Principles on the Implementation of the International Covenant on Economic, Social and Cultural Rights (Limburg Principles),⁶³ as elaborated by the Maastricht Guidelines on Violations of Economic, Social and

⁵² *Government of the Republic of South Africa & others v Grootboom & others* 2000 (11) BCLR 1169 (CC) (*Grootboom case*) para 33.

⁵³ Art 1.

⁵⁴ Art 6.

⁵⁵ Art 9.

⁵⁶ Art 10.

⁵⁷ Art 11.

⁵⁸ Art 12.

⁵⁹ Art 13

⁶⁰ Art 15.

⁶¹ Schenin (n 39 above) 30.

⁶² See Schenin (n 39 above), 31.

⁶³ Limburg Principles on the Implementation of the International Covenant on Economic, Social and Cultural Rights, UN doc E/CN.4?1987/17; annex to 1987 (9) *Human Rights Quarterly* 122 – 235.

Cultural Rights (Maastricht Principles).⁶⁴ Though these principles may not have legal basis they have been accepted as authoritative interpretations of the ICESCR. This is because of the fact that they are interpretations of international experts in the field of international law and human rights. But what has received the most profound attention are the General Comments of the Committee. Some of the Comments adopted so far include: article 22 – international technical assistance measures,⁶⁵ article 2 – the nature of the obligations of the States parties,⁶⁶ article 11(1) - the right to adequate housing,⁶⁷ article 11 - right to adequate food,⁶⁸ article 13 - the right to education⁶⁹ and article 12 - right to health,⁷⁰ The aim of these General Comments is not merely to provide the Committee with tools for evaluation, but to assist states (and other bodies) in the promotion and implementation of the rights.⁷¹ In addition to this the Committee has intensified its monitoring duty through its concluding observations adopted at the conclusion of the consideration of every state report.⁷² By the ICESCR States Parties are obliged to submit reports on the measures they have adopted and the progressive made in achieving the observance of the rights in the Covenant.⁷³ The Committee's observations are intended to give a comprehensive and independent assessment of the state's compliance with its obligations under the Covenant.

2.3 The rights in the African Charter

At the regional level the most important instrument protecting human rights, including economic, social and cultural rights, is the Charter. As mentioned earlier, the Charter does not draw a distinction between civil and political rights, and economic, social and cultural rights, but treats them as interrelated, interdependent and indivisible.⁷⁴ However some authors have argued that in the Charter civil and political rights are subject to

⁶⁴ Annexed to Human Rights Quarterly, Vol. 20 (1998) 691 – 705.

⁶⁵ General Comment No. 2 (Fourth session, 1990) UN doc. E/1990/23.

⁶⁶ General Comment No. 3 (Fifth session, 1990) UN doc.E/1991/23.

⁶⁷ General Comment No. 4 (Sixth session, 1991) UN doc E/1992/23.

⁶⁸ General Comment No. 12 (Twentieth session, 1999) UN doc. E/2000/22

⁶⁹ General Comment No. 13 (Twenty-first session, 1999) UN doc. E/2000/22

⁷⁰ General Comment No. 14 (Twenty-second session, 2000) UN doc. E/C.12/2000/4.

⁷¹ Craven in Eide et al (n 1 above) 467.

⁷² Arambulo (1999) 42 – 43.

⁷³ See art 16 of ICESCR

⁷⁴ See n 10 above.

economic, social and cultural rights.⁷⁵ This is based on the existence of 'claw-back' clauses which subject civil and political rights to municipal law. Fortunately however this is not the approach that the African Commission has taken.⁷⁶

The Charter incorporates a wide range of economic, social and cultural rights. These include: the right to property;⁷⁷ right to work under favourable conditions and equal pay for equal work;⁷⁸ right to health;⁷⁹ right to education;⁸⁰ family rights;⁸¹ and the right to self-determination.⁸² In addition to the above, in a revolutionary manner, the Charter incorporates what has been described as 'solidarity' or 'third generation' rights.⁸³ These include: right of equal access to the public service;⁸⁴ right to freely dispose of wealth and natural resources;⁸⁵ right to economic, social and cultural development;⁸⁶ right to peace;⁸⁷ and right to a satisfactory environment.⁸⁸ As a monitoring body the Charter establishes the Commission.⁸⁹ The Commission's broad mandate is to promote human and peoples' rights under the Charter. In the exercise of this mandate the Commission has powers to receive and adjudicate over state and individual communications.⁹⁰

⁷⁵ Amoako (2000) 40.

⁷⁶ In Communication 101/93, *Constitutional Rights Project v Nigeria* 31 October 1998 the Commission said that the claw back clauses have to be interpreted within the standards of international human rights law. This rules out any provision of domestic law that unreasonably limits any rights.

⁷⁷ Art 14.

⁷⁸ Art 15.

⁷⁹ Art 16.

⁸⁰ Art 17.

⁸¹ Art 18.

⁸² Art 20.

⁸³ See Weston (2003).

⁸⁴ Art 13(2) and (3).

⁸⁵ Art 21.

⁸⁶ Art 22.

⁸⁷ Art 23.

⁸⁸ Art 24.

⁸⁹ Art 30.

⁹⁰ Arts 47 and 55 respectively.

2.4 The rights in the South African Constitution

After certification the Final Constitution incorporated a wide range of socio-economic rights. Liebenberg⁹¹ has classified these rights into three categories as follows:

I. Rights without internal limitations

These include the right of every child to 'basic nutrition, shelter, basic health care services and social services'⁹² and 'to be protected from maltreatment, neglect, abuse or degradation';⁹³ the right to basic education, including adult basic education';⁹⁴ and the right of detained persons to 'conditions of detention that are consistent with human dignity, including at least exercise and provision at the state expense, of adequate accommodation, nutrition, reading material and medical treatment'.⁹⁵

II. Rights in respect of which the positive obligations imposed on the state are expressly limited

These are rights to have access to, 'adequate housing',⁹⁶ 'health care services, including reproductive health care',⁹⁷ 'sufficient food and water', and 'social security',⁹⁸ including, if they are unable to support themselves and their dependants, appropriate social assistance'.⁹⁹ These rights are limited by the fact that the state is required to take only 'reasonable legislative and other measures, within its available resources, to achieve progressive realisation' of each of those rights.¹⁰⁰

III. Rights which expressly prohibit certain legislation or conduct

These include the prohibition on evictions and demolitions without a court order made after considering all the relevant circumstances, and prohibition of arbitrary evictions,¹⁰¹

⁹¹ Liebenberg (n 26 above) 41 – 34.

⁹² Sec 28(1) (c).

⁹³ Sec 28(1)(d).

⁹⁴ Sec 29(1)(a).

⁹⁵ Sec 35(2) (e).

⁹⁶ Sec 26(1).

⁹⁷ Sec 27(1) (a).

⁹⁸ Sec 27(1) (b).

⁹⁹ Sec 27(1) (c).

¹⁰⁰ See sec 25(8), 26(2), and 27(2).

¹⁰¹ Sec 26(3).

the prohibition on refusal of emergency medical treatment;¹⁰² and prohibition of activities that have harmful consequences for health and well being.¹⁰³

¹⁰² Sec 27(3).

¹⁰³ Sec 24.

CHAPTER THREE

3 The challenges to the interpretation and enforcement of socio-economic rights

3.1 The nature of the obligations of the states

The obligations imposed on the states by the ICESCR are at three levels: the primary level, the secondary level and the tertiary level.¹⁰⁴ At the primary level the states are under duty to 'respect', to 'protect' at the secondary level, and to 'fulfil' at the tertiary level.¹⁰⁵ These levels give rise to both 'negative' and 'positive' obligations. The duty to respect entails a negative obligation not to interfere with the resources owned by the individual, his or her freedom to find a job and the freedom to take necessary action and use the resources to satisfy his or her needs.¹⁰⁶ This means that the state should refrain from any interferences that obstruct the enjoyment of the rights. At the secondary level the state has to protect the freedom of action and use of resources against more assertive or powerful economic interests.¹⁰⁷ The tertiary level obliges the state to 'promote' and 'fulfil' the rights. This is a more positive obligation compared to the previous two because it requires the state to take positive steps to ensure that the rights are enjoyed. This may include for instance establishment of schools and hospitals to realise the rights to education and health respectively.

However article 2(1) is the linchpin of the ICESCR.¹⁰⁸ It requires states to take steps to the maximum of their resources, with a view to achieving progressively the full realisation of the rights in the Covenant. This provision has been given extensive interpretation by the Committee in its General Comment No. 3.¹⁰⁹ The Committee has given content to the words 'within available resources', 'progressive realisation', and has read the 'core minimum obligation' into the Covenant. However the translation of these obligations into the African human rights system poses challenges. Unlike the ICESCR

¹⁰⁴ See Eide (n 1 above), see also Para 6 Part II Maastricht Guidelines (n 63 above).

¹⁰⁵ As above.

¹⁰⁶ Eide as above 23.

¹⁰⁷ Eide as above 24.

¹⁰⁸ Craven (1995) 106.

¹⁰⁹ General Comment No. 3 (n 66 above).

the rights in the Charter are not subject to 'progressive realisation' and 'within available resources'. Article 1 which defines the obligations of states provides that:

The Member States of the Organisation of African Unity, parties to the present Charter shall recognise the rights, duties and freedoms enshrined in the Charter and shall undertake to adopt legislative or other measures to give effect to them

The Commission has said that the rights and obligations in the Charter are immediate and have to be implemented instantly despite the hostile economic conditions.¹¹⁰

The absence of limitations is the result of a deliberate choice by the framers of the Charter not to single out social-economic rights for special treatment because of their adherence to the idea that all rights are interdependent and indivisible, and should be understood in the context of the document as a whole.¹¹¹ But it has been argued that the interpretation of the Charter should take account of other relevant international instruments and how they have been interpreted.¹¹² There is no doubt that the realisation of civil and political rights and socio-economic rights require resources. But there is no doubt also that the resource implications of the realisation of economic and social rights are more explicit especially at the tertiary level. Effecting the positive obligations inherent in socio-economic rights requires not only resources but administrative infrastructure as well. This calls for a great deal of planning, consideration of priorities; setting goals and strategies, among others. Ignoring the issue of time and resources may force states that do not have the resources to realise the rights to lose the morale to make plans for future realisation and may precipitate the feeling that these rights are for the 'rich' western states.

¹¹⁰ Presentation of the Third Activity Report of the African Commission by the Chairman U Umozurike, to the 26th Session of Heads of State and Government of the Organisation of African Unity, 9 – 11 July 1990, accessed at <http://www.achpr.org/html/africancommissiononhuman.html> last visited on 3 September 2003.

¹¹¹ De Vos (n 25 above)10.

¹¹² De Vos as above.

The practical implementation of the Charter would have been made more practical if the drafters had subjected the rights to the conditions above. One would understand the frequent excuse by states that they lack resources. But the Committee has observed that whereas countries may have resource constraints various obligations are immediate. These include the undertaking to guarantee that the rights will be enjoyed without discrimination.¹¹³ The obligations as interpreted by the Committee are dealt with later.

In the *SERAC* case¹¹⁴ the Commission while defining the nature of the obligations that attach to the right to a general satisfactory environment under the African Charter stated that:

It requires the State *to take reasonable and other measures* to prevent pollution and degradation, to promote conservation, and to secure an ecologically sustainable development and use of natural resources.¹¹⁵ (emphasis added).

It is not clear what the Commission meant by ‘reasonable and other measures’. One would find it hard to resist the temptation to conclude that this implies the scrutiny of all prevailing circumstances, including the available resources, to determine whether there has been a violation. But in the context of the whole decision this conclusion may not be accurate. Even if this is what the Commission meant, without laying down the test of reasonableness in the context of the Charter it would be hard to determine whether there is a breach.

It has been stated that in operationalising social-economic rights in the Charter, it is important for the African Commission to take due notice of the fact that the ICESCR has been ratified by forty-three of the fifty-three states parties to the Charter. This has been interpreted to mean that most African States prefer the ‘progressive realisation’ standard to the more immediate obligations.¹¹⁶ The Commission and the Court should not be oblivious to this fact. Since almost all the rights in the Charter are protected in the

¹¹³ General Comment No. 3 (n 66 above) Para 1.

¹¹⁴ *Serac* (n 15 above).

¹¹⁵ Para 52 (n 15 above).

¹¹⁶ Odinkalu (n 8 above) 353.

ICESCR the Commission should seek inspiration from the interpenetrations by the Committee.

Under the South African Constitution the state is obliged to ‘respect’, ‘protect’, ‘promote’ and ‘fulfil’ the rights in the Bill of Rights.¹¹⁷ But as already stated, with respect to certain categories of rights, ‘the state is obliged to take reasonable legislative and other measures, within its available resources to achieve progressively the realisation’¹¹⁸ of those rights. The following issues arise from such provisions: (a) what are ‘reasonable legislative and other measures’?, (b) what does ‘within available resources’ mean? (c) what is meant by ‘progressive realisation, and (d) does the concept core minimum obligation feature.

3.1.1 Taking steps by appropriate means to realise socio-economic rights

This phrase is derived from article 2 of ICESCR; ‘[e]ach State Party ... undertakes to take steps ... by all appropriate means, including particularly the adoption of legislative measures’ to realise the rights in the Covenant.¹¹⁹ The Committee has given this phrase extensive interpretation in its General Comment No. 3.¹²⁰ The Committee has said that despite the existence of the condition of progressive realisation and availability of resources; the states are obliged to take steps to realise the rights within a reasonably short time after the Covenant entered into force.¹²¹ That such steps should be deliberate, concrete, and directed as clearly as possible towards meeting the obligations in the Covenant.¹²² The Committee has said that in many instances legislation is highly desirable and in some cases may even be indispensable. But that legislation is not mandatory and in some cases may not be sufficient to fulfil the obligations, which calls for ‘other measures’.¹²³ Taking ‘other measures’ means that the State must adopt ‘administrative, economic, social and educational measures’.¹²⁴

¹¹⁷ Sec 8(2).

¹¹⁸ See above (n 100).

¹¹⁹ It does not take a sharp eye to notice that this phrase, unlike the South African, omits the use of the word ‘reasonable’.

¹²⁰ Above (n 66)

¹²¹ As above para 2.

¹²² As above.

¹²³ De Vos (n 30 above) 95.

¹²⁴ Limburg Principles (n 63 above) para 17.

In the South African Constitution phrase that the state is obliged 'to take reasonable legislative and other measures' to realise the rights was construed by the Constitutional Court in the *Government of the Republic of South Africa & others v Grootboom & others* (Grootboom case).¹²⁵ In this case the applicants had been evicted by court order from a piece of land on which they had squatted and built temporary shelters in the form of shacks. Desperately they moved on to a sports field and erected temporary shelters and then brought a case in the High Court for an order requiring the state to provide them with housing. The application sought to enforce against the respondents the right to housing,¹²⁶ and what they called the children's 'unqualified right to shelter' under section 28(1) (c).

One of the issues was whether the state had taken 'reasonable legislative and other measures' to realise the right of access to housing. It was held that what constitutes reasonable legislative and other measures must be determined in light of the fact that the Constitution creates different spheres of government: national, provincial and local. That a reasonable programme must clearly allocate responsibilities and tasks to the different spheres of government and ensure that the appropriate financial and human resources are available.¹²⁷ The State was held to be under duty to devise a comprehensive, well-coordinated and workable plan of action to meet its obligations.¹²⁸ But that this alone is not enough; '[a]n otherwise reasonable programme that is not implemented reasonably will not constitute compliance with the State's obligations'.¹²⁹ The programme must be balanced and flexible; it must take care of the short term, medium term and long-term needs. It must include a component that responds to urgent needs of those in desperate situations.¹³⁰ Those in desperate need should not be

¹²⁵ 2000 (11) BCLR
1169 (CC).

¹²⁶ Sec 26 1996 Constitution Act 108 of 1996.

¹²⁷ Para 39.

¹²⁸ Para 38

¹²⁹ Para 42.

¹³⁰ Para 43, that the programme must also respond to the urgent needs of those in desperate need, see para 68.

ignored in the interest of an overall programme focused on medium and long-term objectives.¹³¹

The reasoning above was applied to the *TAC* case. The case arose out of a government policy of providing nevirapine, a drug that at the time was believed to reduce the risk of transmitting HIV/AIDS from mother to child during childbirth. The provision of the drug was to take place at restricted health centers that had been designated as research sites. This policy was challenged as unreasonable and violating the right of access to health care services under section 27(1) and the rights of newborn children to basic health care under section 28(1)(c). The Court found that the restriction of the drug to research sites was unreasonable. This is because it failed to address the needs of mothers and their newborns who did not have access to those sites.¹³²

However one criticism is that the reasonableness test has been directed towards assessing the reasonableness of programmes without giving substantive content to the rights in the Constitution. Bilchitz¹³³ commenting on the *TAC* case says that:

Indeed the judgment is notable for the virtual absence of any analysis of what the right to have access to health care services involves. What are the services to which one is entitled to claim access? Do these services involve preventative medicine, such as immunization, or treatment for existing diseases, or both? Does the right entitle one to primary, secondary or tertiary health care services, or all of these?

It is therefore necessary that the test commences with a normative definition of the rights as entrenched in the Constitution. It is in addition to this that the reasonableness of compliance can be assessed correctly.

¹³¹ Para 66.

¹³² *TAC* case (n 49 above) para 67.

¹³³ Bilchitz (n 29 above) 6.

3.1.2 To achieve 'Progressive realisation'

According to the Limburg Principles¹³⁴ the obligation 'to achieve progressively the full realisation of the rights' requires States Parties to move as expeditiously as possible towards the realisation of the rights. But under no circumstances shall this be interpreted as implying for states the right to defer indefinitely efforts to ensure full realisation of the rights. States have to begin to take steps immediately to fulfil their obligations. The Committee has added that '[t]he concept constitutes recognition of the fact that the realisation of the rights will generally not be achieved in a short time.'¹³⁵ But realisation over time does not mean depriving the obligations of all meaningful content.¹³⁶ Without expressly stating that retrogressive measures amount to a violation, the Committee has stated that deliberate retrogressive measures need the most careful consideration and would need to be fully justified by reference to the totality of the rights to be provided for.¹³⁷ The last provision of the Committee appears to be a bit vague and vulnerable to 'justifiable abuse'. For instance a state may argue that the retrogressive measures were intended to cut down employment benefits to increase generally the salary of those in employment. This would however amount to violations of the rights conferred an individual to social assistance which is not subject to utilitarianism.¹³⁸ It is clear that unless this later provision is clarified it is susceptible to abuse.

In South Africa, the court in the *Grootboom* case¹³⁹ adopted the Committee's interpretation of the phrase. It said that the phrase was made in contemplation of the fact that the rights could not be realised immediately.¹⁴⁰ That '[i]t means that accessibility should be progressively facilitated: legal, administrative, operational and financial hurdles should be examined, and where possible lowered overtime.'¹⁴¹ According to Liebenberg:

¹³⁴ Limburg Principles (n 63 above) para 21.

¹³⁵ General Comment No. 3 (n 66 above) para 91.

¹³⁶ As above.

¹³⁷ As above.

¹³⁸ Craven (n 108 above) 132.

¹³⁹ As above (n 52).

¹⁴⁰ As above para 45.

¹⁴¹ As above.

'Progressive realisation' is thus both a sword and shield: it imposes an obligation on the state to take steps towards the Constitutional goal of effectively meeting the basic needs of all in our society. These steps must be 'deliberate, concrete and targeted', allowing the state to show measurable progress in meeting this goal. Moreover 'progressive realisation' acts as a brake on measures that reduce access to socio-economic rights. At the same time it allows the state a degree of temporal latitude in the achievement of this goal.¹⁴²

The court's interpretation lacks a qualitative interpretation of the phrase. The proper interpretation would be that 'not only a greater number of people have access to housing, but also that there are progressive improvements in the standard of housing'.¹⁴³

3.1.3 Reading the 'core minimum obligation'

The Committee is of the view that each of the rights in the ICESCR establishes a core minimum obligation; incumbent on the states to ensure satisfaction of that right at the very least minimum.¹⁴⁴ The Committee has stated that:

[F]or example, a State party in which any significant number of individuals is deprived of essential foodstuffs, of primary health care, of basic shelter and housing, or of the most basic forms of education is, *prima facie*, failing to discharge its obligations under the Covenant. If the covenant were to be read in such a way as not to establish such minimum core, it would be largely deprived of its *raison d'être*.¹⁴⁵

The Committee takes cognisance of the fact that resources are a necessary condition for the realisation of the rights. But in order for a State Party to be able to attribute its failure to resources it must demonstrate that every effort has been made to use all resources that are at its disposal in an effort to satisfy, as a matter of priority, those minimum obligations.¹⁴⁶ But even where resources are demonstrably inadequate, the obligation

¹⁴² Liebenberg 2001 (17) *South African Journal on Human Rights* 233 – 257 253

¹⁴³ Liebenberg (n 27 above) 172, she however adds that the court 's endorsement of the ICSECR' s views on 'retrogressive measures' will prove significant.

¹⁴⁴ General Comment 3 (n 66) Para 10.

¹⁴⁵ As above.

¹⁴⁶ As above

remains for the state to strive to ensure the possible enjoyment of the rights under the prevailing circumstances.¹⁴⁷

According to Craven,¹⁴⁸ the minimum threshold approach does not entail the division of the rights according to their priority, rather each right should be realised to the extent that provides for the basic needs of every member of society. Through its General Comments the Committee has indirectly tried to define the core minimum obligations that attaches to some of the rights in the ICESCR.¹⁴⁹ A good example is the General Comment on the right to health.¹⁵⁰ That the right to health must be understood as a right to enjoy a variety of facilities, goods, services and conditions necessary for the full realisation of the highest attainable health.¹⁵¹ Further that a state is under duty to ensure provision of health care, including immunisation, and ensuring 'equal access to determinants of health such as safe food and potable drinking water, basic sanitation and adequate housing and living conditions'.¹⁵²

One question however is whether the core minimum obligation is at the international or domestic level. There are moves to define the obligations at the international level.¹⁵³ This however is problematic because though the needs of persons such as food, clothing and shelter are universal; societies differ in their specific needs and the nature of such needs. For instance what may be considered adequate in one society may be inadequate in another. The Committee is also clear in its comment that the definition of this obligation among others is dependent on available resources.¹⁵⁴ Blichitz argues that the minimum core approach is recognition that 'it is simply unacceptable for any human being to live without sufficient resources to maintain their survival'.¹⁵⁵ It should be noted however that survival means differ from society to society.

¹⁴⁷ As above para 11.

¹⁴⁸ Craven (n 108 above) 140.

¹⁴⁹ See General Comments so far done (n 65 – 70).

¹⁵⁰ General Comment No. 14 (n 70 above).

¹⁵¹ As above para 9.

¹⁵² As above para 36.

¹⁵³ Tomasevski Eide et al (n 1 above).

¹⁵⁴ As above n 66 para 10.

¹⁵⁵ Blichitz (n 29 above) 15.

One of the dangers that has been cited as being inherent in the principle of core minimum obligation is the fact that states may not progress further than the established threshold. This hampers the improvement of people's standards of living since their needs change with time. Some authors have expressed the view that developing countries cannot meet their core minimum obligations because they lack resources. But this view is blind to the fact that the realisation of socio-economic rights is a matter of political will rather than resources because in Africa even the available resources have not been utilised equitably. In addition the states are bound by the principle of 'progressive realisation' which requires the progressive improvement of the rights.

The Commission has not had a concrete opportunity to apply this concept. In implying in the Charter the right to housing in the *SERAC* case, the Commission said that:

At the very minimum, the right to shelter obliges ... the government not to destroy the housing of its citizens and not to obstruct efforts by individuals or communities to rebuild lost homes. The states obligation to respect housing rights requires it ... to abstain from carrying out, sponsoring or tolerating any practice, policy or legal measure violating the integrity of an individual ...¹⁵⁶ (emphasis added)

However this cannot be said to amount to core minimum in the positive sense. As seen earlier minimum core would also include the positive duty and not merely a negative violation as the Commission put it. The Commission has also made reference to General Comment 4 of the Committee meaning that it is also prepared to seek inspiration from General Comment No.3. However, as will appear later, the setting of a threshold across the board creates a number of difficulties due to the institutional incapacities of the tribunal. It is for this reason that South Africa has not applied the principle.

3.1.4 Rejection of the concept of 'core minimum obligation' in South Africa

As early as 1998 it had been argued that considering sections 26 and 27 the state must ensure that groups in especially vulnerable and disadvantaged circumstances have access to a basic level of socio-economic rights.¹⁵⁷ That this is the basic subsistence of the rights which represents the starting point for subsequent efforts progressively to

¹⁵⁶ SERAC (n 15 above) para 61.

¹⁵⁷ Liebenberg (n 26 above) 41-43.

improve the level of enjoyment of the rights. Unfortunately this is not the interpretation of the Constitutional Court has taken. In the *Grootboom* case after referring to the opinion of the Committee on the existence of a core minimum obligation, the Court said that the Committee had developed this concept after so many years of considering the reports of states. That it is from these reports that the Committee obtained the necessary information to formulate the concept after considering the levels of state compliance.¹⁵⁸ The court said that unlike the Committee it lacked such information. That it was not possible to determine the minimum threshold without first identifying the needs and opportunities for the enjoyment of such right.¹⁵⁹ That for the right in issue, different classes of people had different needs, which makes it difficult for the court to define a threshold.

The court was presented, the second time, with the challenge to define the core minimum obligation in relation to the right to health care in the *TAC* case¹⁶⁰. The court relying on *Grootboom*, for the second time, refused to read such an obligation in the Constitution.¹⁶¹ The court said that it is not institutionally equipped to make the wide-ranging factual and political enquiries necessary for determining what the minimum-core standards are.¹⁶²

The court has come under criticism for this course of action. It has been stated that, contrary to the opinion of court, the concept does not require the court 'to define in abstract the precise basket of goods and services that must be provided'.¹⁶³ Instead the court could define the principles underlying the concept of minimum core obligations and apply these contextually on a case-by-case basis.¹⁶⁴ The decision of the court does not go far enough in constraining the state from expending scarce resources on relatively privileged groups for whom such assistance is an added benefit rather than a pressing need.¹⁶⁵ This would be avoided and priority shifted to the under privileged and those in

¹⁵⁸ As above (n 52) paras 31 and 32.

¹⁵⁹ As above.

¹⁶⁰ (n 49 above).

¹⁶¹ See paras 26 – 39 as above.

¹⁶² As above para 37.

¹⁶³ Liebenberg (n 27 above) 173 page

¹⁶⁴ Liebenberg as above

¹⁶⁵ Roux (2002) 12 *Constitutional Forum* 41 45.

need who would be entitled to a core minimum. But some authors argue that had the court made an attempt to define the minimum core obligation it would have put it into direct confrontation with political branches. This is because it would substitute its views on prioritisation to those of the state.¹⁶⁶ This however is not correct because the Court would be discharging its constitutional obligation to enforce the Constitution. In addition it would not be for the Court to decide on budget allocations.

The Court appears to substitute the test of reasonableness by requiring that those in desperate need be taken care of for the core minimum concept. But as stated above, in using the test of reasonability the court has missed out the necessary requirement of giving the rights content before determining whether the state has acted reasonably.¹⁶⁷ It would be hard to determine in a normative nature what the people are entitled to.

3.1.5 Realisation ‘within available resources’

According to Craven¹⁶⁸ the fact that the implementation of the rights was considered to be contingent upon economic resources did not, in the drafters’ eyes, constitute an excuse for the states to delay in the realisation of these rights. It was merely recognition of the fact that many states did not have sufficient resources to undertake the large-scale action required by the Covenant immediately. The Committee has said that in assessing whether a state has discharged its obligations consideration has to be had to the resource constraints of the country concerned. But for a state to be able to attribute its failure to a lack of available resources it must demonstrate that every effort has been made to use all resources at its disposal to meet its core minimum obligations¹⁶⁹. Even where the resources are inadequate the obligation to ensure realisation of the rights still stands.¹⁷⁰ This interpretation is borne out of the foresight of the misinterpretation which states would attach to the provision. The realisation of socio-economic rights has always been a question of political will rather than a question of resources. But even without resources the state is under duty to devise means of getting resources, which include

¹⁶⁶ Roux (n 28 above) 8.

¹⁶⁷ Bilchitz (n 29 above) 9.

¹⁶⁸ Craven (n 108 above) 136.

¹⁶⁹ General Comment No. 3 (n 66 above) para 10.

¹⁷⁰ Paras 10 and 11 of General Comment No. 3 (n 66 above).

resources from international sources.¹⁷¹ Such country is at liberty to exploit the provisions of article 22 to get resources through international co-operation. This is in addition to ensuring equitable distribution of the existing resources.

However the challenge that appears to stand out most to the Committee is the question of determining the benchmark for each country taking into account the available resources. The Committee has gone over this by considering the proportion of the Gross National Product (GNP) committed to social services.¹⁷² The state report guidelines require states to indicate the per capita GNP for the poorest 40 per cent of the population.¹⁷³ This approach may however fail to ascertain how much of the resources have reached the disadvantaged, and whether this has been done equitably. There is need for a more holistic set of indicators that may be used by the Committee. Whereas the Committee has developed some indicators these are defective in a number of respects. The indicators are more implicit rather than explicit.¹⁷⁴ There is need to have more explicit indicators which among others measure the level of distribution of the resources and whether this is done equitably. The Committee should however be commended for a number of its General Comments as indicated above,¹⁷⁵ which have operationalised the rights in the Covenant and which it uses to assess compliance.

In South Africa, the construction of this phrase was first brought in issue in *Soobramoney v Minister of Health, Kwazulu-Natal*.¹⁷⁶ The applicant suffered from a chronic renal failure and his life could only be prolonged by regular renal dialysis but which was denied by the hospital. The applicant sued basing his case on section 27(3) and section 11, which provide respectively as follows: 'No one may be refused emergency medical treatment' and 'Everyone has the right to life'. The respondents

¹⁷¹ Para 26 of Part II of Limburg Principles provides, 'Its available resources' refers to both the resources within a State and those available from the International community through international co-operations and assistance.

¹⁷² Eide in Eide et al (n 1 above) 545.

¹⁷³ Revised General guidelines regarding the form and contents of reports to be submitted by states parties under articles 16 and 17 of the International Covenant on Economic, Social and Cultural Rights: 17/06/91. E/C.12/1991/1, guideline for art 11.

¹⁷⁴ As above

¹⁷⁵ See n 66 – 70 above.

¹⁷⁶ 1997 (12) BCLR 1696 (CC).

argued that their capacity to provide the applicant and other patients in his position with dialysis treatment was constrained by resources. The respondents had only a few machines which could not serve all the patients. They had decided to admit only those patients who had chances of being cured and not patients like the applicant whose situation was irreversible.

The court observed that sections 26 and 27 in regard to access to housing, healthcare, food, water and social security are dependent upon resources available for such purpose, and the rights are themselves limited by the lack of resources.¹⁷⁷ It was held that the case did not fall within the provisions of section 27(3). This was because the applicant's condition was not an emergency which called for immediate remedial treatment; instead it was an ongoing state of affairs resulting from deterioration of the renal function which was incurable.¹⁷⁸ Court found that by managing the inadequate resources the way the hospital did, treating only those patients with a prospect of cure, more patients would benefit, but less would if patients like the applicant got treatment.¹⁷⁹ In coming to this conclusion the Court applied the rationality test. It considered whether in making its decision the hospital has acted rationally. That '[a] court will be slow to interfere with rational decisions taken in good faith by the political organs ... whose responsibility is to deal with such matters'.¹⁸⁰ The intervention would only occur where the decision is irrational. The Court did not however give adequate guidance on the test of the standard of 'irrationality' to be applied and the nature of the circumstances in which the Court would be prepared to intervene.¹⁸¹ In *Grootboom* the court said that the content of the obligations in relation to the rate at which the measures employed to achieve the result are governed by the available resources.¹⁸²

These decisions have not gone without criticism. The first point of criticism emanates from the court's construction of section 27(3). Whereas the restriction of the section to genuine medical emergencies is understandable, the construction of the provision from

¹⁷⁷ As above para 11.

¹⁷⁸ As above para 21.

¹⁷⁹ As above para 25.

¹⁸⁰ As above para 29.

¹⁸¹ Liebenberg (n 27 above) 167.

¹⁸² *Grootboom* (n 52 above) para 46

the angle of a negative obligation confines it to existing services and facilities providing emergency medical treatment.¹⁸³ The court did not elaborate on the obligation inherent in the provision for the state to take positive steps to improve the existing facilities, to put in place more facilities and to ensure their extension to all persons without discrimination. Though the facts of the case did not call for such interpretation the court should have seized the opportunity for such elaboration. The court has also been criticised for failing to consider the real issue which was whether sufficient funds had been allocated to the provision of dialysis treatment. This author is of the opinion that though it would not have been for the Court to make orders with budgetary allocations, it would have directed that the available resources be applied equally to all patients including the applicant. As stated by Liebenberg it is disappointing that the Court failed to give a clear indication as to how it would assess the availability of resources. Would it accept without question the budget allocations by the three spheres of government, or will these also be subject to review for 'reasonableness'? what about macro-economic policies that determine the availability of resources for social spending.¹⁸⁴ Should the state be allowed to determine the extent of its obligations by reference to macro-economic policies then the rights would be denied meaning.¹⁸⁵

3.2 The Scope of application

The ICESCR like other treaties binds only states as the subjects of international law.¹⁸⁶ The obligation to ensure the enjoyment of the rights in the treaty falls on the states parties who are required to take all appropriate measures to discharge their obligations.¹⁸⁷ The obligations and rights in the treaty are of a vertical nature. But while

¹⁸³ Liebenberg (n 27 above) 165. Liebenberg makes reference to the India Supreme Court case which the court refused to follow, *Paschim Banga khet Mazdoor Samity and ors v State of West Bengal and anor* (1996) AIR SC 2426. In that case the right to emergency medical care was derived from the right to life the court also focused on the positive measures that must be taken to ensure that proper facilities are in place for emergency medical treatment.

¹⁸⁴ Liebenberg (n 142 above) 225.

¹⁸⁵ As above.

¹⁸⁶ See generally Oloka-Onyango and Udagama 'Globalization and its impact on the full enjoyment of human rights' Preliminary report to the UN Sub-commission on the Protection and Promotion of Human Rights accessible at <<http://www.globalpolicy.org/socecon/un/wtonite.htm>> (last visited on 1 September 2003).

¹⁸⁷ Art 2.

the primary focus of accountability is on the state, globalisation has brought to the fore the lack of accountability of non-state actors for human rights violations.¹⁸⁸ Most prominent of these are Trans-national Corporations (TNCs) whose activities have had adverse effects on the realisation of social-economic rights. By the very nature of their activities, TNCs, alone or in association with governmental and other actors, have impacted pervasively on economic and social rights.¹⁸⁹ While many human rights violations committed by TNCs can be looked at through the prism of state responsibility, there are gaps when issues of relative power and economic necessity are brought into the picture.¹⁹⁰ It has been argued, and rightly so, that the traditional view of human rights law, where only states are responsible, is no longer valid. In practice it is impossible to differentiate the private from the public sphere and even if this can be done, it leaves a lacuna in the protection of human rights.¹⁹¹

The lacuna in international law has prompted victims to seek redress in domestic courts of countries that hold such corporations liable in delict law. Cases have been instituted in the United States and the United Kingdom against TNCs for violations of human rights committed outside these jurisdictions. This has however not solved the problem.¹⁹² The need to streamline human rights in trade laws is becoming more apparent than ever before. This would force countries to adopt legal trade regimes that take account of this problem. There is also the need to put pressure on the TNCs to take responsibility to contribute towards the promotion of human rights.¹⁹³

¹⁸⁸ Oloka-Onyango (n 12 above).

¹⁸⁹ Scott in Eide et al (n 1 above) 564.

¹⁹⁰ Oloka-Onyango (n 12 above).

¹⁹¹ Clapham (1993) as quoted by Murray (2000), 39.

¹⁹² One of the most common case in this respect is the *Bhopal* case, *In re. Union Carbide Corporation Gas Plant Disaster at Bhopal, India, in December 1984*, F. Supp. 854 were a case brought by India in the United States against a parent company of a subsidiary whose plant had malfunctioned and clouds of toxic case released and killing several was dismissed. The American Judge was of the view that the appropriate forum were the India courts and not the American courts. That it was in India's interest to have such case adjudicated upon in India. See C Scott 'Multinational enterprises and emergent jurisprudence on violations of economic, social and cultural rights' in A Eide et al (n 1 above) 563 – 595.

¹⁹³ Amnesty International has developed a set of human rights principles to assist companies in developing their roles in situations of human rights violations. See *Amnesty international Rights Principles for Companies* January 1998, AI Index: ACT 70/01/98, sourced at

The United Nations Sub-Commission on the Promotion and Protection of Human Rights (the Sub-Commission) has come up with a set of norms on the responsibilities of transnational corporations and other business enterprises with regard to human rights (the norms).¹⁹⁴ The Sub-Commission takes cognisance of the fact that states have the primary responsibility to promote, secure the fulfilment and protection of human rights and freedoms. But it also takes cognisance of the fact that TNCs and other business enterprises as organs of society, are also responsible for promoting and securing the human rights set forth in the Universal Declaration of Human Rights.¹⁹⁵ In addition to obligating the states to ensure that TNCs and other business enterprises respect human rights, it obligates the TNCs and other enterprises to respect human rights in the following words:

Within their respective spheres of activity and influence, transnational corporations and other business enterprises have the obligation to promote, secure fulfilment of, respect, ensure respect of and protect human rights recognised in international as well national law, including the rights and interests of indigenous peoples and other vulnerable groups.¹⁹⁶

The norms impose a number of obligations on these enterprises which includes: ensuring equal opportunity and non-discrimination,¹⁹⁷ respecting the rights of workers,¹⁹⁸ consumer protection,¹⁹⁹ and obligations with regard to the environment.²⁰⁰ It should be noted however that these norms do not have the force of law and as such are not binding either on the states or the enterprises. Despite this however, they can be treated as source of 'soft law' in addition to being used as a tool of 'mobilisation of shame' against business enterprises to force them into compliance.

<<http://web.amnesty.org/library/Index/engACT700011998>> (last visited 30 August 2003).

¹⁹⁴ Norms on responsibilities of transnational corporations and other business enterprises with regard to human rights, adopted by the Sub-Commission at its 22nd meeting, on 13 August 2003 document E/CN.4/2003/12/Rev.2

¹⁹⁵ Preamble (as above) para 3.

¹⁹⁶ Part A 1 (n 194 above).

¹⁹⁷ Part B as above.

¹⁹⁸ Part D as above.

¹⁹⁹ Part F as above.

²⁰⁰ Part G as above.

In Africa, the Charter like the ICESCR binds only states parties . A number of TNCs have invested heavily in African countries and have immense powers to the extent of influencing policies. These corporations have undermined the environment, labour standards, destroyed cultural heritages, caused health hazards and established monopolies through patents, and as the suppliers of certain essential goods and services.²⁰¹ Unfortunately these corporation or even private individuals' cannot be brought to account for violations that may occur. It is the states that should be brought to account for such violations because once in their jurisdictions, states have the power by law to regulate the actions of these companies. In the *SERAC case* the Commission, relying on jurisprudence from the Inter-American Court of Human Rights,²⁰² and the European Court of Human Rights,²⁰³ said that:

Governments have a duty to protect their citizens, not only through appropriate legislation and effective enforcement but also by protecting them from damaging acts that may be perpetrated by private parties ... [W]hen a State allows a private person or groups to act freely and with impunity to the detriment of the rights recognised, it would be in clear violation of its obligations to protect the human rights of its citizens.²⁰⁴

According to De Vos this means that the African Charter has an indirect horizontal application in that it places a duty on the state to ensure that private individuals and institutions do not interfere with the rights at hand.²⁰⁵ This however may not solve the problem. Some TNCs operating in Africa have great influence; they control the national economies, are the largest tax payers, and some have budgets bigger than the entire national budgets of their host countries.²⁰⁶ As already stated the respect of human rights should bind TNCs in the regime of international trade law. Organisations such as the World Trade Organisation (WTO) and the World Intellectual Property Organisation

²⁰¹ See Oloka-Onyango and Udagama (n 186 above).

²⁰² Case of *Velasquez Rodriguez v. Honduras*, Judgment of 19 July 1998 series C, No. 4

²⁰³ The case *X and Y v. Netherlands*, 91 ECHR (1985) (Ser A) 32.

²⁰⁴ Para 57.

²⁰⁵ Pieter de Vos (n 25 above) 22 – 23.

²⁰⁶ In 1999 a consortium of oil Companies included Shell, Exxon and Elf planned to build a pipe line across Cameroon and Chad at a cost of US \$ 3.5 billion which was twenty times the budget of Chad, see A. West 'Shell makes pact with the devil' at <<http://www.lclark.edu/lotl/volume5issue2/nigeria.html>> (accessed at 22 September 2003)

(WIPO) should embrace a human rights approach to trade law and rules in a holistic manner. By these arrangements states should be required to put in place mechanisms and laws to ensure that private actors especially TNCs comply with human rights standards. Failure to do so would lead to a penalty on the state concerned. Penalties would include suspension or withdrawal of certain trade privileges. Measures taken by the states would include constitutional provisions that provide for horizontal application of the rights.

Section 8(2) of the South African Constitution provides that ‘a provision of the Bill of Rights binds a natural or juristic person if, and to the extent that, it is applicable, taking into account the nature of the right and the nature of the obligations imposed by the right’. The specific import of this provision has been the subject of detailed discussion.²⁰⁷ Whereas it is appreciated that it may be difficult to subject private actors to international human rights law this does not mean that domestic law does not bind them. However it has been argued in some circles that horizontal application may not apply in the case of socio-economic rights. Cheadle and Dennis have argued that:

An analysis in terms of these rights are not rights that are infringed by private persons. They are rights that flow from a social democratic vision of the role of the state – that the state should provide basic facilities and services ... [g]iven the potential onerous nature of such a duty on private persons the likely outcome of the analysis must be that these rights are not suitable for horizontal application.²⁰⁸

This reasoning ignores the different levels of the obligations that attach to these rights. Private persons are under duty not to interfere with the enjoyment of the rights just as is the state. This is in addition to refraining from all conduct that may harm the environment and health for example. There has been considerable debate as to whether the Bill of Rights applies directly or indirectly to private persons. Only months before the 1996 came into force, the Constitutional Court judged that the Interim Constitution applied only indirectly to private relations. This was in *Du Plessis v De Klerk*²⁰⁹ where it was held that

²⁰⁷ See De Waal et al (2001) 55 – 57, see also, Chirwa 2003 *Mediterranean Journal of Human Rights* 29 – 68.

²⁰⁸ Cheadle et al (1997) 13 *South African Journal on Human Rights* 59 – 60.

²⁰⁹ 1996 (3) SA 850 (CC).

private disputes could only be taken to court on causes of action already contained in private law. Once this has been done the parties would expect the court to apply the principles consistently with the Constitution.²¹⁰ But even with the 1996 Constitution it is still argued that the Bill of Rights still applies indirectly.²¹¹ According to Van der Walt²¹² this conclusion is supported by the Court's rejection to award damages in *Fose v Minister of Safety and Security*²¹³ (*Fose case*) on the ground that they were obtainable in delict law. He states that:

[T]he distinction between direct and indirect horizontal application ... [is] a choice between two vocabularies, one which does not shy away from directly invoking constitutional principles within the context of the common law, and one that prefers to let common-law principles themselves perform the required mediation between existing law and the constitutional challenges to such law. The latter option is to be preferred, provided the difference between common law and constitutional law that it invokes remains a creative difference or tension, a difference that in fact actuates the constitutional challenge to common law.²¹⁴

The *Du Plessis* case has been upheld even under the current constitution. In *Khumalo and others v Holomisa*²¹⁵ the Constitutional Court held that once it had been established that a natural person is bound by the Bill of Rights, section 8(3) then provides that a court must apply and if necessary develop the common law to the extent that legislation does not give effect to the right.²¹⁶ But whether direct or indirect a strong case for horizontal application is still made. This however can only be achieved in the presence of a strong protection mechanism and appropriate remedies.

²¹⁰ As above para 38.

²¹¹ Sprigman et al (1999) 15 *South African Journal on Human Rights* 25.

²¹² Van de Walt (2001) 17 (3) *South African Journal on Human Rights* 351.

²¹³ 1997 (3) SA 786 (CC).

²¹⁴ As above 355.

²¹⁵ 2002 (8) BCLR 771 (CC).

²¹⁶ AS above para 31.

3.3 The protection mechanisms and remedies

Unlike other monitoring bodies the Committee is not entrenched in the treaty but is instead established by resolution of the UN Economic and Social Council (ECOSOC).²¹⁷ But perhaps the most important setback is the lack of a mandate to entertain and determine complaints of violations of the treaty against states parties. By this mandate, other implementation bodies for example under the ICCPR,²¹⁸ the CERD and the Convention against Torture and other Cruel, Inhuman or Degrading Punishment or Treatment,²¹⁹ have powers to hear individual and state complaints of violations of the obligations under the treaty in a quasi-judicial manner. This has generated sizable jurisprudence which has contributed greatly to the development of the normative nature of the treaties and provided remedies to the complainants.

The omission of this mandate was a result of the misconception that economic, social and cultural rights were non-justiciable and would be implemented by co-operation and facilitation.²²⁰ But this has since changed, an exclusive emphasis upon co-operative, or facilitative forms of implementation no longer serve the purpose.²²¹ Greater emphasis is now being put upon implementation that allows for some form of 'quasi-judicial' review of individual and group complaints.²²² For this purpose the Committee has, on the basis of a report submitted by Alston,²²³ commenced work on a draft Optional Protocol among others to allow for individual complaints. After a number of consultations the UN Commission on Human Rights decided to appoint an independent expert to prepare a report on the issue.²²⁴ The expert's mandate was later renewed and broadened to include the justiciability of the rights and the benefits that a complainant's mechanism

²¹⁷ ECOSOC Resolution 1985/17, 28 May 1985.

²¹⁸ As established by article 28 of ICCPR and empowered to receive individual complaints by the Optional Protocol to the ICCPR adopted by the same resolution and on the same day as ICCPR, (n 5 above).

²¹⁹ Adopted by the UN General Assembly Resolution 39/46 of 10 December 1984. See also Alfred de Zayas in Alfredsson et al (eds) (2001) 67 – 121.

²²⁰ See Arambulo (n 72 above) 58 – 169 on the arguments for and against the adoption of an individual complaint procedure.

²²¹ Craven (n 108 above) 459.

²²² As above

²²³ See Alston in Coomans et al (eds) (1995).

²²⁴ Resolution 2001/30.

would bring.²²⁵ The Sub-Commission has now recommended that the open-ended working group draft the substantive contents of the protocol.²²⁶

The African Commission unlike the Committee has the power to receive and consider communications alleging the violations of the rights by state party. Despite the lack of consensus on the question whether the Commission has judicial powers and, if so, what these are, it has gone ahead to entertain communications and consider them judiciously.²²⁷ The Commission's decision in the *SERAC* case has demystified the status of socio-economic rights in the Charter and has demonstrated the Commission's preparedness to give effect to these rights. The Commission, in a progressive manner, implied into the Charter the existence of the rights to food and shelter, rights that are not expressly included in the Charter.²²⁸ The implications of this decision have been discussed above.²²⁹

The principles on standing are quite progressive. In addition to the individual victims, other persons, including Non Governmental Organisations (NGOs), are authorised to bring action on behalf of the individual victims.²³⁰ The complainant need not be the victim or have interest in the matter.²³¹ In fact except for a few, all the communications have been brought on behalf of victims by NGOs.²³² This is because in Africa without the support of the NGOs victims lack the resources and expertise to bring communications to the Commission.²³³

But one hindrance that overshadows the work of the Commission is the lack of appropriate remedies and an effective enforcement mechanism. The Charter does not

²²⁵ Resolution 2002/24.

²²⁶ Resolution 2002/14.

²²⁷ The Commission considers communication in accordance with article 56 and its rules of procedure.

²²⁸ This was based on art 4 – right to life, art 16 – right to health and art 22 right to development.

²²⁹ See above n 16 and 147.

²³⁰ See Motala in Evans et al (eds) (2002) 257.

²³¹ See Umozurike (1997), 81.

²³² See Motala (n 230) 178.

²³³ See 'Resolution on the co-operation between the African Commission on Human and Peoples' Rights and NGOs having observer status with the Commission' in Heyns (ed) (1999), 215.

stipulate the nature of the remedies that the Commission may grant. In fact the Commission does not make legal decisions; rather it makes recommendations, the binding effect of which is doubtful.²³⁴ All that the Commission is supposed to do after its deliberations is to transmit a report to the OAU Assembly of Heads of State and Government,²³⁵ now the Assembly of Heads of State and Government of the African Union (AU).²³⁶ In addition there does not appear to be any follow up by the Commission on its decisions²³⁷ which has left most of its decisions without effect. However in the *SERAC* case the Commission gave more robust recommendations. It appealed to the state to stop the attacks, ensure adequate compensation²³⁸ and appropriate environmental and social impact assessments. The state was also asked to report back on some of the measures it had taken after the case. But none of these recommendations has been enforced. The enforcement of the Commission's recommendations in the past was overshadowed by the confidentiality principle. Article 59(1) of the Charter provides that all measures taken within the provisions of the present Charter shall remain confidential until such time as the Assembly of Heads of State and Government shall otherwise declare. In the first seven years of its existence, the Commission interpreted this article to mean that it could neither mention the cases, the countries complained against, nor the stage reached in individual cases.²³⁹ This author agrees with Nameheille in his statement that a human rights mechanism that takes away the freedom to make its activities public is likely to be of no effect.²⁴⁰

²³⁴ Orlu (2001) 236.

²³⁵ African Charter, arts 52 and 59

²³⁶ See articles 5 and 6 of the Constitutive Act of the African Union adopted at Lome, Togo 11 July 2002, sourced at <http://www.au2002.gov.za/docs/key_oau_act.htm> lasted visited on 25 August 2003.

²³⁷ Murray 2001(1) *African Human Rights Law Journal* 1, 9.

²³⁸ No indication was however given as to what would be adequate compensation.

²³⁹ See Orlu (n 234 above) 239 – 240.

²⁴⁰ Orlu (n 234 above), the Commission has however in the last few years responded to these criticisms and though yet no so open at least information on the parties and the nature of the complaint will be made public even before deliberation and makes known to the parties its decision before reporting to the Committee, see Erika de Wet in Gudumudur et al (eds) (2001) 713 – 729 722.

CHAPTER FOUR

4 Inspiration for the forthcoming African Court on Human and Peoples Rights

4.1 Introduction to the Court

At the adoption of the African Charter a court was not included as one of the enforcement mechanisms. It has been argued that the Commission was considered to be the most appropriate because of its non-confrontational nature which reflected African traditions of reconciliation rather than confrontation.²⁴¹ But some years down the road, it was discovered that this was not advancing human rights as expected. In July 1998 the Protocol to the African Charter on the Establishment of the African Court on Human and Peoples Rights (the Protocol)²⁴² was adopted. The court has however not yet been established because for the Protocol to come into force it requires fifteen ratifications,²⁴³ but five years after its adoption it has not received the requisite ratifications.²⁴⁴ Reading the Protocol one notices that the court will advance the realisation of economic and social rights in a number of ways.

By establishing such a court victims of violations of all rights, including socio-economic rights, will have an avenue through which to seek redress. As will be seen below the states have undertaken to be bound by the judgements of the Court. But it is noticeable that a number of hindrances stand out against this court. It is not very clear which instrument are within the Court's range of enforcement. They appear to include instruments other than the regional one.

²⁴¹ M'Baye in M'Baye (1985), 27 as quoted Harrington in Evans et al (n 228 above) 305, 306.

²⁴² As above n 19.

²⁴³ Art 34(3).

²⁴⁴ As by 19 August 2003 the following countries had ratified the Protocol: Algeria, Burkina Faso, Burundi, Cote d' Ivoire, Gambia, Mali, Mauritius, Rwanda, Senegal, South Africa, Togo and Uganda.

4.2 The jurisdiction of the Court

Article 3(1) of the Protocol provides that the jurisdiction of the Court shall extend to all disputes submitted to it concerning the interpretation and application of the Charter, the Protocol and any other human rights instruments ratified by the States concerned. From this provision, the Court has very wide powers to enforce not only the African Charter but also other human rights treaties. Whereas this appears to be progressive it has its disadvantages. The Charter as a treaty itself is not well developed and needs development through jurisprudence of the Court. Application of other well-developed instruments may overshadow this possibility. There is need to develop the Charter consistently with other universal instruments but while at the same time paying attention to its relative peculiarities. Secondly, the other treaties have their enforcement mechanisms; the Court runs the risk of giving opinions that contradict those of for instance the UN treaty bodies.²⁴⁵ But if the Court demonstrates willingness to be bound by the interpretations of those bodies then this may be avoided. This will include among others the General Comments of the Committee. As demonstrated above these are an indispensable source of inspiration to the enforcement of socio-economic rights.

4.3 *Locus standi*

It should be noted that the majority of the Africans live in poverty, are ignorant and lack developed communication. Any system of protection should take account of this and make its *locus standi* as broad as possible. The *locus standi* before the African Court extends to the Commission; the States Parties; and African Intergovernmental Organisations.²⁴⁶ The subsequent provisions however curtail the standing of individuals and NGOs. Article 5(3) provides that the Court may entitle relevant NGOs with observer status before the Commission, and individuals to institute cases directly before it, in accordance with article 34(6) of the Protocol. Article 34(6) provides that at the time of ratification of the Protocol or any time thereafter, the state shall make a declaration accepting the competence of the Court to receive cases under article 5(3). Without such declaration the Court shall not have jurisdiction to receive a petition against a state which has not made such declaration. The effect of this provision is that the Court shall not receive petitions from either the individuals, or their representatives, who allege that

²⁴⁵ Murray (2002) 318.

²⁴⁶ Art 5(1).

their economic, social or cultural rights have been violated unless the state has accepted such petitions.

The only option for such individuals is to go through the Commission because cases brought by the Commission do not require a declaration from the State. The role of the Commission in this respect however remains unclear. Whereas the Court is instituted to 'complement the protective mandate of the African Commission',²⁴⁷ the relationship of the two institutions remains unclear. Whether the Commission is to forward to the Court cases it has adjudicated upon and made a finding or not is not clear. It has been suggested that since the court is intended to complement the Commission then the court would not admit a case which has not been adjudicated upon by the Commission.²⁴⁸ This would be equivalent to the relationship between the Inter-American Commission and the Inter-American Court. This may have the effect of allowing the Court to deal with cases that the Commission has considered which may decrease its workload. But at the same time it may be counter-productive. The lesson the Inter-American system provides is that the Court for over ten years did not receive any contentious cases because the Commission in the grip of jealous territorialism refused to forward cases to the Court.²⁴⁹ To avoid this, the rules of procedure should be worked out carefully.

The Protocol also provides that the Court shall rule on the admissibility of cases taking into account the provisions of article 56 of the Charter.²⁵⁰ Article 56 provides that a communication shall only be considered if it complies to the following: bears the name of the author, is compatible with the Charter of the OAU or with the African Charter, is not written in disparaging or insulting language, is not exclusively based on media reports, is sent after exhausting local remedies unless they do not exist or are unduly prolonged, is submitted within reasonable time, and does not deal with a case that has been settled by the states in accordance with Charter of the United Nations. The requirement that has been the subject of extensive consideration before the Commission is the exhaustion of local remedies.²⁵¹

²⁴⁷ Protocol art 2.

²⁴⁸ Badawi (2002) 2 *African Human Rights Law Journal* 253, 254.

²⁴⁹ Harrington (n 241 above) 317.

²⁵⁰ Protocol art 6(2).

²⁵¹ For extensive discussion of this and other admissibility requirements see Viljoen in Evans et al (n

4.3.1 The South African Constitution as a source of inspiration

Section 38 of the South African Constitution allows the following persons to approach the court to enforce the Bill of Rights: (a) anyone acting in their own interest, (b) anyone acting on behalf of another person who cannot act in their name, (c) anyone acting as a member of, or in the interest of a group or class of persons, (d) anyone acting in the public interest, and (e) an association acting in the interest of its members. This gives *locus standi* an understanding far broader than its traditional understanding. This is because the effective enforcement of rights requires a broader approach to standing.²⁵² Chaskalson P in *Ferreira v Levin* NO²⁵³ explained that:

[I]t is my view that we should rather adopt a broader approach to standing. This would be consistent with the mandate given to this court to uphold the Constitution and would serve to ensure that constitutional rights enjoy the full measure of protection to which they are entitled.²⁵⁴

This is important to socio-economic rights because it allows a wide range of victims to have their rights enforced. This is more so where such victims are poor, ignorant and lack capacity to enforce their rights. It also has the advantage of encouraging public interest litigation with the effect of conferring benefits to a wide class of people. In *Ngxuza and others v Permanent Secretary, Department of Welfare, Eastern Cape*²⁵⁵ the applicants' disability grants had been suspended without due process of law. They brought action on their behalf and on behalf of others in a similar position who numbered over 100,000. Relying on section 28 the Court rejected the objection that the applicants did not have standing. The court said that the practical difficulties associated with representative and class actions could not justify denial of such action when the Constitution made specific provision for it. That a flexible and generous approach was called for to make it easier for disadvantaged and poor people to approach the court on public issues and to ensure that the public administration adhered to the fundamental constitutional principle of legality in the exercise of public power.²⁵⁶

230 above) 61 – 99.

²⁵² De Waal et al (n 207 above) 82.

²⁵³ 1996 (1) SA 984 (CC).

²⁵⁴ As above para 165.

²⁵⁵ 2001(2) SA 609 (E).

²⁵⁶ As above 623B – C and 629 E/F – G.

As seen above standing before the African Court is not defined with clarity. One cannot resist the temptation to conclude that the Protocol needs amendment in this respect. The effect of the amendment would be to broaden standing and allow for class and group action. It is in this respect that the South Africa may be used as a source of inspiration. This however has the effect of discouraging countries from ratifying the Protocol. Though not a purely judicious body, the African Commission 's broad understanding of *locus* is commendable. In fact the Commission has allowed Communications even when they are not filed by the victims of the alleged violations²⁵⁷

4.4 Remedies and their enforcement

Article 27(1) of the Protocol provides that if the Court finds that there has been a violation of a human or peoples' right it shall make appropriate orders to remedy the situation, including payment of damages. It is further stated that the States Parties undertake to comply with the judgements of the Court and guarantee their execution.²⁵⁸ This is a positive step because it is broader than all current mandates including that of the Commission. It is hoped that the Court will use this mandate to its maximum.²⁵⁹

In addition to the above the judgments are to be communicated to the Council of Ministers of the African Union who shall monitor their implementation on behalf of the Assembly.²⁶⁰ Whereas this appears to be positive, in practice the execution of these judgments, will be dependent on political will which has always been low in Africa.²⁶¹ However the difficulties presented for an international tribunal in devising appropriate and enforceable remedies should be appreciated. Such a tribunal lacks the jurisdictional advantage and enforcement mechanisms enjoyed by domestic tribunals. But this does not mean that the international tribunal cannot draw from the experiences of domestic courts in devising remedies, which if enforced, would provide appropriate relief to the victims of human rights violation. It is for this reason that the South African experience becomes relevant.

²⁵⁷ See Vijoer (n 251 above) 75.

²⁵⁸ Protocol art 30

²⁵⁹ Murray (2002) 2 *African Human Rights Law Journal* 195, 215.

²⁶⁰ Protocol art 29(2).

²⁶¹ In Europe for example compliance has been positive. Legislation has been changed, reversal of case law and agreements to pay compensation made. See Murray (n 259 above) 217.

4.4.1 Drawing from South Africa' s experience

The duty to interpret and enforce the rights in the Constitution is entrusted to the Courts with powers to grant appropriate relief.²⁶² The courts also have powers to declare any law or conduct that is inconsistent with the Constitution invalid to the extent of the inconsistency.²⁶³ The Court may also make any order limiting the retrospective effect of the declaration of inconsistency, or suspending the declaration of invalidity for any period and on any conditions to allow the competent authority to correct the defect.²⁶⁴ In the *Foss* case²⁶⁵ the Constitutional Court stated that:

It is left to the courts to decide what would be appropriate relief in any particular case ... Appropriate relief will in essence be relief that is required to protect and enforce the Constitution. Depending on the circumstances of each particular case the relief may be a declaration of rights, an interdict, a mandamus or such other relief as may be required to ensure that the rights enshrined in the Constitution are protected and enforced. If it is necessary to do so, the courts may even have to fashion new remedies to secure the protection of these all important rights.²⁶⁶

Indeed the court has followed this approach to devise what it considers appropriate remedies. The most dramatic remedy has been the exercise of supervisory jurisdiction. This requires the Court to involve itself in the specifics of the remedial action to be taken and also in ongoing supervision of its implementation.²⁶⁷ In *Pretoria City Council v Walker*²⁶⁸ the court said that:

[T]he respondent could, for instance, have applied to an appropriate court for a declaration of rights or a mandamus in order to vindicate the breach of his s 8 right. By means of such order the council could have been compelled to take appropriate steps as soon as possible to eliminate the unfair differentiation and to report back to Court in

²⁶² Constitution sec 28.

²⁶³ Constitution sec 172(1) (a).

²⁶⁴ Constitution sect 172(1) (b) (i) and (ii).

²⁶⁵ 1997 (3) SA 786 (CC).

²⁶⁶ As above para 19.

²⁶⁷ Trengove (n 31 above).

²⁶⁸ 1998 (3) BCLR 257 (CC).

question. The Court would have then been in a position to give further ancillary orders or directions as might have been necessary to ensure proper execution of its orders.²⁶⁹

In *August and another v The Electoral Commission and others*²⁷⁰ the Court acknowledged that it did not have the expertise to decide the most appropriate arrangements that the respondents would adopt to ensure that a certain class of prisoners exercise their right to vote. It nevertheless stated that there was need for certainty as to what those arrangements should be. The respondents were ordered to 'furnish an affidavit setting out the manner in which the order will be complied with, and to serve a copy ... on the [applicants]'²⁷¹ it ordered further that the affidavit be filed with the Registrar and would form part of the public record for any member of the public to inspect.²⁷² In the *TAC* case though the Court did not make a supervisory order it insisted that it had a right to 'ensure that effective relief is granted' and to 'exercise supervisory jurisdiction'.²⁷³ The Court did not make the order because it was convinced the government had showed commitment and relaxed its policy after the proceedings commenced.²⁷⁴ It has been argued however that given the life and death nature of the human rights issues and history of government's conduct in the case, a supervisory order was both justified and necessary. That such order would have made it easier to monitor and oversee compliance.²⁷⁵

Though it may on the face of it appear hard for a tribunal like the African Court to make such an order this is not so. Since the Court is to transmit its judgments to the AU Assembly of Heads of State and Government for execution it can include an order that the State reports to the AU on such steps as will have been taken to enforce the judgment. When the AU receives such report it can transmit it to the Court for advice on the orders that should follow next.

²⁶⁹ As above para 6.

²⁷⁰ 1999 (4) BCLR 363, see also Tembeka (2002) 18 (4) *South African Journal on Human Rights* 590 – 613.

²⁷¹ As above para 39.

²⁷² As above

²⁷³ *Tac* (n 49 above) para 106.

²⁷⁴ As above para 118.

²⁷⁵ Heywood (2003) 19 *South African Journal On Human Rights* 312.

Though there is nothing in the South African Constitution that stops the Court from awarding constitutional and punitive damages the Court has been very slow to do this.²⁷⁶ However the need to develop this remedy is now apparent. There are certain situations where a declaration of invalidity or an interdict makes little sense and an award of damages is the only form of relief that will vindicate the fundamental right and deter future infringements.²⁷⁷ On punitive damages the Court in the *Fose* case said that in a country with scarce resources it was inappropriate to use them to pay damages to plaintiffs already compensated by delictual damages. That such funds would be employed in a structural and systematic manner to substantially reduce the causes of infringement.²⁷⁸

The African Court should appreciate the fact that victims of human rights violations in most cases suffer damages. It is only by an award of damages that the breach can be remedied. Victims are entitled to meaningful damages not only to programmes, as has been the case in South Africa though this may benefit them in the long run. The Court should not only award damages but specify the quantum as well. This however would require the Court to have enough information for this purpose. The Commission in *SERAC* appealed to the state to pay adequate compensation to the victims. It did not however quantify the damages and this was only an appeal and not an order binding the state.

4.5 Confronting the normative challenges

Like the Commission the African Court is confronted with the challenge of defining the obligations of the states parties as enshrined in the Charter and other human rights instruments. This is in addition to the challenge of defining the normative content of the rights themselves. One important factor that is likely to compound this problem is the seemingly very wide jurisdiction of the Court. The Court has jurisdiction to enforce not only the Charter and Protocol but also 'any other human rights instruments ratified by the

²⁷⁶ See *Fose* case (n 213 above).

²⁷⁷ De Waal et al (n 207 above) 188.

²⁷⁸ *Fose* case (n 213 above) para 72.
see Trengrove (n 31 above) 8.

States concerned'.²⁷⁹ In exercising this jurisdiction the Court must define the obligations of the state and give normative content to the rights in a practical manner.

As indicated, the Committee and the South African Constitutional Court have to some extent surmounted this challenge. The Committee has given extensive definition of the nature of the obligations of the states parties under the ICESCR.²⁸⁰ As discussed above, the realisation of socio-economic rights is hampered by a number of practical problems. Issues of resources, planning, setting priorities and ensuring realisation of the rights in a balanced and equitable manner stand out. The South African Constitutional Court and the Committee have gone over some of these obstacles skillfully. The lack of sufficient resources has been interpreted not to mean suspension of the states obligations. Even where the resources are inadequate the obligation to ensure realisation of the rights still holds and the state must demonstrate that it has used all the resources at its disposal.²⁸¹ In times of severe resources the vulnerable members of society should be protected by adoption of low cost programmes.²⁸² The Committee has said that 'progressive realisation' does not mean that the states have the right to defer indefinitely efforts to ensure full realisation. The concept constitutes recognition of the fact that the realisation of the rights will generally not be achieved in a short time.²⁸³

Though the South African construction of the state obligations has encountered some criticisms it is instructive. The Constitutional Court has said that the phrase progressive realisation 'means that accessibility should be progressively facilitated: legal, administrative, operational and financial hurdles should be examined, and where possible lowered overtime'.²⁸⁴ A programme intended to realise the rights should be comprehensive and as already stated should not sacrifice the needs of those in desperate need in favour of long and medium term objectives.²⁸⁵

²⁷⁹ Art 3(1) of the Protocol.

²⁸⁰ General Comment No. 3 (n 66 above).

²⁸¹ As above para 11.

²⁸² As above Para 12.

²⁸³ As above Para 9.

²⁸⁴ *Grootboom* (n 52 above).

²⁸⁵ See (n 130 above).

4.6 Confronting the 'separation of powers' debate

Theoretically an international tribunal may not be concerned with issues of separation of powers. This is because it is not part of the internal organs of the state. In practice however this doctrine may impact on the effectiveness of such tribunal. This is because its decisions are to be enforced in the domestic arena and may be received with the same skepticism as the decisions of the domestic courts. This is also because the enforcement of socio-economic rights has a direct impact on the fiscal policies of states. The African Court may lack the jurisdictional advantages of domestic courts such as the South African Court. This however does not mean that such domestic court may not offer some lessons for the African Court. As already seen the South African Court has on a number of occasions been confronted with the separation of powers dilemma.²⁸⁶ But the manner in which the Court has confronted it is an indispensable source of inspiration.

The South African Court has based the exercise of its powers on the Constitution, insisting that constitutionally its endowed with the power to enforce all the provisions of the Constitution including socio-economic rights provisions.²⁸⁷ The African Court's jurisdiction derives from the Protocol. This means that should the powers of the Court be doubted then it has the Protocol to fall back to and assert its authority. However the most challenging issue arises from the kind of decisions and orders that the court is going to make. The South African Court has successfully maneuvered its way out of this situation. For instance in the *Grootboom* case while ruling that the government's housing policy was unreasonable, the Court avoided language that would mean that it had replaced its opinions for those of the state. According to Roux at first brush, this decision appears to be a slap in the face of a government that has made great strides to address the apartheid housing-backlog. But closer examination reveals a diplomatically worded and respectful message to the political branches, generally endorsing their efforts even as fault is found with the housing programme.²⁸⁸ The same can be said of the *TAC* case. Though the court appeared to be making orders that would directly impact on the government's fiscal policy it did this in a diplomatic manner. On most occasions in

²⁸⁶ See above (n 41 – 45).

²⁸⁷ See above (n 50).

²⁸⁸ See Roux (n 28 above) 6.

hearing cases the court has made attempts to dialogue with, rather than confront the government. The African Court should emulate this to avoid confrontation.

CHAPTER FIVE

5. Conclusion and recommendations

For so many decades economic, social and cultural rights have been relegated to the status of secondary rights and perceived as unjusticiable. However it has now been realised that just like the civil and political rights, these rights are justiciable. Civil and political rights and economic, social and cultural are interrelated, interdependent and indivisible. But despite such formal recognition these rights are yet to become a reality. Their enforcement has encountered a number of challenges. These include: defining the obligations of the states in a practical and realistic manner, application and scope of the normative instruments of protection, weak protection mechanisms, and inappropriate and inefficient remedies.

The Africa Charter in addition to the civil and political rights protects a wide range of economic, social and cultural rights. But in spite of this the majority of the people in Africa live in poverty, disease and ignorance and lack the basic necessities of life such as water, food, housing, clothing and health care. The Commission with both a promotional and a protective mandate is showing increased commitment to the enforcement of these rights.²⁸⁹ The Commission's mandate will soon be complemented by the forthcoming African Court. But unless the Commission and the Court surmount the challenges above the enforcement of the socio-economic rights will remain distant. The nature of the obligations in the Charter are not subject to 'progressive realisation' and 'within available resources'. This presents practical difficulties. The realisation of these rights requires a great deal of resources and planning. Unless the obligations are subject to 'progressive realisation' and 'available resources' practical difficulties of enforcement are likely to occur. The absence of effective remedies and an efficient enforcement mechanism has in most cases left victims of human rights without any form of relief.

The Committee and the South African Courts have successfully confronted some of the challenges and present a source of inspiration. The Committee has not only defined the

²⁸⁹ As demonstrated in the *SERAC* case.

obligations of the states in a practical and realistic manner but has also given substantive content to most of the rights. The South African Constitution has included socio-economic rights as justiciable rights. This has been strengthened by entrenchment of an independent and proactive judiciary with powers to grant and enforce appropriate remedies. The following section tries to summarise in a precise manner the areas that may offer inspiration to the African Commission and Court from the Committee and South Africa's jurisprudence.

5.1 A summary of the areas of inspiration

5.1.1 Defining the obligations of states in a practical manner

The ICESCR was drafted with the understanding that the realisation of socio-economic rights especially at the secondary and tertiary level requires a great deal of time and resources. This is the reason the obligations of the states parties were subject to 'progressive realisation' and 'available resources'. The Committee has operationalised these phrases through its General Comment.²⁹⁰ But realising that these phrases may be susceptible to abuse, the Committee has skilfully read into the Covenant the concept of 'core minimum obligation'. The obligations in the African Charter are immediate and not subject to restrictions which has made their realisation impracticable. Even with South Africa's rejection of the concept it has also made significant strides towards operationalising the socio-economic rights in the Constitution. The rights have been subjected to 'progressive realisation', 'available resources' and the requirement that the State takes 'reasonable legislative and other measures' to realise them. It is therefore left for the African Commission and African Court to make use of these developments.

5.1.2 Scope of application of the rights

The absence of horizontal application of the ICESCR and the problems of its application at the international scene still presents challenges. The same difficulty should be appreciated at the African regional level. The African Commission should however be commended for the position that was taken in the *SERAC* case. The Commission emphasised the fact that the obligation to ensure that non-state actors do not violate

²⁹⁰ General Comment No. 3 (n 66 above).

human rights fell on the State.²⁹¹ The Commission and the Court should encourage states to entrench provisions in their Constitution similar to that in the South African Constitution which makes the Bill of Rights horizontally applicable in addition to its vertical application.²⁹² There has been debate as to whether socio-economic rights can be enforced horizontally. However as observed above this is possible for instance at the primary level. TNCs that have been responsible for the massive violation of human rights may be brought to account at the domestic level and even forced to pay damages. This will be complementary to the efforts at the international level to establish a code of human rights norms for TNCs and other business enterprises.²⁹³

5.1.3 Appropriate remedies effectively enforcement

The absence of appropriate remedies effectively enforced stands out as one of the challenges. At the international level the absence of an enforcement machinery has made the enforcement of international law illusory. The Committee for instance has not been able to provide any remedies. This is because it lacks a mandate to receive and adjudicate over individual complaints. But even with the current moves to give it such mandate, it will not be easy for the Committee to enforce its remedies. International tribunals lack the jurisdictional advantage of the domestic tribunals. But the African Court should take advantage of its concrete powers as entrenched in the Protocol. The Court should devise appropriate remedies that will vindicate the victims of human rights violations. The Court should learn from the South African Constitutional Court in this respect. The Constitutional Court has used the term appropriate relief very flexibly and innovatively devised remedies such as the supervisory interdict.²⁹⁴ But in addition to this, the African Court should award damages which the South African Court has not done. Perhaps the South African Court has not done this because at the domestic level litigants are able to obtain delictual damages which is not possible at the international or regional level.

It should be noted however that the success of these remedies is dependent not only on the political will of the African Union, which is the enforcement body, but also on the

²⁹¹ See n 204 above.

²⁹² Sec 8(2).

²⁹³ See above (n 194).

²⁹⁴ See above (n 265).

political will of the states to abide by the judgments of the court. The absence of this political will both at the domestic and regional level represents a lacking ingredient in the struggle to realise human rights in Africa.²⁹⁵

Word count: 17,850 including footnotes

²⁹⁵ Odinkalu 2003 (47) 1 *Journal of African Law* 1 – 37.

BIBLIOGRAPHY

a. Books

Alston P (2000) 'International human rights in context, law, politics and morals' *Oxford University Press*

Amoako Baah R (2000) 'Human rights in Africa: The conflict of implementation' *University Press of America*

Ankumah EA (1996) 'The African Commission on Human and Peoples' Rights: Practice and Procedure' *Kluwer Law International*

Arambulo K (1999) 'Strengthening the supervision of the International Covenant on Economic, Social and Cultural Rights: Theoretical and procedural aspects' *Oxford University Press*

Coomans F and Fried van Hoof (eds) (1995) 'The right to complain about economic, social and cultural rights' *SIM Utrecht*

Craven M (1995) 'The International Covenant on Economic, Social and Cultural Rights. A perspective on its development' *Clarendon Press*

De Waal J, Currie I and Erasmus G (2001) 'The Bill of Rights Handbook' *Juta and company*

Eide A, C Krause and A Rosas (eds) (2001) *Economics, social and cultural rights: A textbook* *Martinus Nijhoff Publishers*

Evans M and R Murray (eds) (2002) 'The African Charter on Human and Peoples' Rights: The system in practice, 1986 – 2000' *Cambridge University Press*

Gudumudur A, Grimheden J, Bertram G and Alfred de Zayas (eds) (2001) *International Human Rights monitoring mechanisms: Essays in honour of Jakob Th. Moller* *Martinus Nijhoff Publishers*

Heyns C (ed) (1999) 'Human Rights Law in Africa Series' *Kluwer Law International*

K M'Baye (1985) *The African Charter on Human and Peoples Rights: A legal analysis*

Murray R (2000) 'The African Commission on Human and Peoples' Rights and international law' *Hart*

Steiner H and Alston P (2000) 'International human rights in context' *Oxford University Press*

Umozurike O U (1997) 'The African Charter on Human and Peoples Rights' *Martinus Nijhoff*

Orlu V O (2001) 'The African human rights system: Its laws, practice, and institutions'
Martinus Nijhoff

b. Chapters in books

Alston P 'Draft Optional Protocol Providing for Consideration of Communications, E/C.12/1994/12, report submitted to the Committee on Economic, Social and Cultural Rights' in F Coomans and Fried van Hoof (eds) (1995) *The right to complain about economic, social and cultural rights*

De Zayas A 'The examination of individual complaints by the United Nations Human Rights Committee under the Optional Protocol to the International Covenant on Civil and Political Rights' in Gudumudur A, Grimheden J, Bertram G and Alfred de Zayas (eds) (2001) *International Human Rights monitoring mechanisms: Essays in honour of Jakob Th. Moller*

Erika de Wet 'The protection mechanism under the African Charter and the Protocol on the African Court of Human and Peoples' Rights' in A Gudumudur, Grimheden J, Bertram G and Alfred de Zayas (eds) (2001) *International Human Rights monitoring mechanisms: Essays in honour of Jakob Th. Moller*

M'Baye K 'Introduction to the African Charter on Human and Peoples' Rights, in K M'Baye (1985) *The African Charter on Human and Peoples Rights: A legal analysis*

Motala A 'Non-governmental organisations in the African System' in Evans M and R Murray (eds) (2002) *The African Charter on Human and Peoples' Rights: The system in practice, 1986 – 2000* 246 – 279

Viljoen F 'Admissibility under the African Charter' in Evans M and R Murray (eds) (2002) *The African Charter on Human and Peoples' Rights: The system in practice, 1986 – 2000* 61 – 99

c. Articles in journals and periodicals

Agbakwa SC 'Reclaiming humanity: Economic, social and cultural rights as the cornerstone of African human rights' (2002) 5 *Yale Human Rights and Development Law Journal* 177

Agbakwa SC 'A path least taken: Economic and social rights and the prospects of conflict prevention and peace building in Africa' (2003) 47 *Journal of African Law* 38

Badawi I A 'The future relationship between the African Court and the African Commission' (2002) 2 *African Human Rights Law Journal* 253.

Benedek W, 'The African Charter and Commission on Human and Peoples' Rights: How to make it more effective', (1993) *N. QTLY Hum. RTS.* 25

Bilchitz D 'Towards a reasonable approach to the minimum core: laying the foundations for future socio-economic rights jurisprudence' (2003) 19 (1) *South African Journal on Human Rights* 1 – 26

Cheadle and D Davis 'The application of the 1996 Constitution in the private sphere' (1997) 13 *South African Journal on Human Rights* 44 – 66

Chirwa 'Obligations of non-state actors in relation to economic, social and cultural rights under the South African Constitution' 2003 *Mediterranean Journal of Human Rights* 29 – 68

Chirwa DM 'Toward revitalising economic, social and cultural rights in Africa: Social and Economic Rights Action Centre (SERAC) and the Centre for Economic and Social Rights v Nigeria' 2002 3(2) *ESR Review* 19

Chirwa DM 'The Merits and Demerits of the African Charter on the Rights and Welfare of the Child' 2002 (10) *International Journal of Children's Rights*, 157

Du Plessis 'Socioeconomic and political development and human rights' 31(2) 2001 *Africanus* 61 – 77 62

Gutto S 'Beyond justiciability: Challenges of implementing/enforcing socio-economic rights in South Africa' (1998) *Buffalo Human Rights Law Review*

Heywood M 'Preventing mother –to-child HIV transmission in South Africa: Background, strategies and outcomes of the Treatment Action Campaign Case Against the Minister of Health' (2003) 19 *South African Journal on Human Rights* 278 - 315

Liebenberg S 'The protection of economic and social rights in domestic legal systems' in A Eide, C Krause and A Rosas (eds) *Economics, social and cultural rights: A textbook* (2001) 55

Liebenberg S 'Socio-economic rights' in M Chaskalson et al *Constitutional law of South Africa* (1999) 41-1 to 41 – 55.

Liebenberg 'The right to socio assistance: The implications of *Grootboom* for policy reform in South Africa' 2001 (17) *South African Journal on Human Rights* 233 – 257

Liebenberg S 'South Africa's evolving jurisprudence on socio-economic rights: An effective tool to challenging poverty? 2002 (2) 6 *Law and Democracy* 159 – 191

Lloyd A "Evolution of the African Charter on the Rights and Welfare of the Child and the African Committee of Experts: Raising the gauntlet" 2002 (10) *International Journal of Children's Rights*, 179

Motala A 'Non-governmental organizations in the African system' in M Evans and R Murray (eds) 'The African Charter on Human and Peoples' Rights: The system in practice, 1986 – 2000 246

Murray R 'A comparison between the African and European Courts of Human Rights' (2002) 2 *African Human Rights Law Journal* 195.

Murray R 'The African Charter on Human and Peoples' Rights 1987 – 2002: An overview of its progress and problems' 2001(1) *African Charter Human Rights Law Journal* 1

Odinkalu CA 'Analysis of paralysis or paralysis by analysis? Implementing economic, social and cultural rights under the African Charter on Human and Peoples' Rights' (2001) *Human Rights Quarterly* 327

Odinkalu CA 'Back to the future: The imperative of prioritizing for the protection of human rights in Africa' 2003 (47) 1 *Journal of African Law* 1 – 37

Oloka-Onyango J 'Beyond the rhetoric; Reinvigorating the struggle for economic and cultural rights in Africa' (1995) 26(1) *California Western International Law Journal* 1

Oloka-Onyango J 'Reinforcing marginalized rights in the age of globalization: International mechanisms, non-state actors and the struggle for peoples' rights in Africa' (2003) *American University International Law Review*, 852.

Oladejo O "Protecting Children's' Rights in Africa: A critique of the African Charter on the Rights and Welfare of the Child" 2002 (10) *International Journal of Children's Rights* 127

P De Vos 'Pious wishes or directly enforceable human rights? Social and economic rights in South Africa's 1996 Constitution' 1997 (13) *South African Journal on Human Rights* 67

Roederer J 'Post-matrix legal reasoning: Horizontality and the rule of values in South African Law' (2003) 19 (1) *South African Journal on Human Rights* 57 – 81

Roux T 'Understanding Grootboom – A response to Cass R. Sunstein' (2002) 12 *Constitutional Forum* 41

Roux T 'Legitimizing transformation: Political resource allocation in South Africa Constitutional' Court (2003) 10 *Democratization* (forthcoming)

Sprigman C and Osborne M 'Du Plessis is not dead: South Africa's 1996 Constitution' (1999) 15 *South African Journal on Human Rights* 25.

Tembeka N 'The evolution of standing rules in South Africa and their significance in promoting social justice' (2002) 18 *South African Journal on Human Rights* 590 – 613

Van Bueren, G. 'Alleviating poverty through the Constitutional Court' (1999) 15 *South African Journal on Human Rights* 52

Van de Walt J 'Progressive indirect horizontal application of the Bill of Rights: Towards a co-operative relation between common-law and constitutional jurisprudence' (2001) 17 *South African Journal on Human Rights* 341 – 363

d. Unpublished papers

Pierre de Vos 'A new beginning? The enforcement of social, economic and cultural rights under the African Charter on Human and Peoples Rights' Paper presented at the *University of the Western Cape AIX-University colloquium on economic, social and*

cultural rights in Europe and South Africa 13 – 15 August 2003 (unpublished on file with author)

Sachs A, 'The judicial enforcement of socio-economic rights: The Grootboom case' Transcript of lecture presented at the Law Faculty of the University College of London on 6 March 2003, (unpublished on file with author)

e. Internet sources

B Weston 'The content of human rights: Three 'generations' of rights' Encyclopedia Britannica: Human Rights, Center for Human, The University of Iowa at <<http://www.uichf.org/features/eb/weston4.shtml>> last visited 24 August 2003

Oloka-Onyango and Udagama 'Globalization and its impact on the full enjoyment of human rights' Preliminary report to the UN Sub-commission on the Protection and Promotion of Human Rights accessible at <<http://www.globalpolicy.org/soecon/un/wtonite.htm>> last visited on 1 September 2003

Amnesty international Rights Principles for Companies January 1998, AI Index: ACT 70/01/98; sourced at <<http://web.amnesty.org/library/Index/engACT700011998>> last visited 30 August 2003

Presentation of the Third Activity Report of the African Commission by the Chairman U Umzurike, to the 26th Session of Heads of State and Government of the Organisation of African Unity, 9 – 11 July 1990, accessed at <<http://www.achpr.org/html/africancommissiononhuman.html>> last visited on 3 September 2003

f. International instruments and documents

Universal Declaration of Human Rights 1948, adopted by the United Nations General Assembly on 10 December 1948

Convention on Elimination of All forms of Racial Discrimination adopted and opened for signature and ratification by General Assembly resolution 2106 (XX) Of 21 December 1965

International Covenant on Civil and Political Rights 1966, adopted by United Nations General Assembly Resolution 2200A (XXI) of the 10 December 1966

International Covenant on Economic, Social and Cultural Rights 1966, adopted by United Nations General Assembly Resolution 2200A (XXI) of the 10 December 1966

Convention of the Elimination of All forms of Discrimination Against Women adopted and opened for signature, ratification and accession by General Assembly Resolution 34/180 of 18 December 1979

Convention against Torture and other Cruel, Inhuman or Degrading Punishment or Treatment adopted by the UN General Assembly Resolution 39/46 of 10 December 1984

Convention on the Rights of the Child, adopted and opened for signature, ratification and accession by General Assembly Resolution 44/25 of 20 November 1990

Convention on the Protection of All Migrant Workers and Members of their Families adopted and opened by signature, ratification and accession by General Assembly Resolution 45/158 of 18 December 1990.

Proclamation of Tehran, 1968, Final Act of the International conference on Human Rights, Tehran, UN Doc A/CONF 32/41

The Vienna Declaration and Programme of Action, adopted by the World Conference on Human Rights June 1993, UN Doc A/Conf 157/23

Limburg Principles on the Implementation of the International Covenant on Economic, Social and Cultural Rights, UN doc E/CN.4? 1987/17; annex to 1987 (9) *Human Rights Quarterly* 122 – 235

General Comment No. 3 (Fifth session, 1990) [Report of the Committee on Economic, Social and Cultural Rights, UN doc. E/1991/23, 83 – 87], *The Nature of the States parties obligations (art. 2, para. 1 of the Covenant)*

General Comment No. 4 (Sixth Session 1991) [Report of the Committee on Economic Social and Cultural Rights, UN doc E/1992/23, pp 114-120], *The right to adequate housing (art. 11(1) of the Covenant)*

General Comment 7 (Sixteenth Session, 1997) [Report of the Committee on Economic Social and Cultural Rights, UN doc E/1998/22, pp 113-118], *The Right to adequate housing (article 11, paragraph. 1 of the Covenant): forced evictions*

General Comment No. 12 (Twentieth session, 1999) [Report of the Committee on Economic Social and Cultural Rights, UN doc E/2000/22, pp 102-110], *The right to adequate food (art. 11 of the Covenant)*

General Comment No. 13 (Twenty-first session, 1999) [Report of the Committee on Economic Social and Cultural Rights, UN doc E/2000/22, pp 111-127], *The right to education (art 13 of the Covenant)*

General Comment No. 14 (Twenty- second session, 2000) [Report of the Committee on Economic Social and Cultural Rights, UN doc E/C.12/2000/4], *The right to the highest attainable standard of health (art. 12 of the Covenant)*

Norms on responsibilities of transnational corporations and other business enterprises with regard to human rights, adopted by the Sub-Commission at its 22nd meeting, on 13 August 2003 document E/CN.4/2003/12/Rev.2

Revised General guidelines regarding the form and contents of reports to be submitted by states parties under articles 16 and 17 of the International Covenant on Economic, Social and Cultural Rights: 17/06/91. E/C.12/1991/1, guideline for art 11

g. Regional instruments and documents

African Charter on Human and Peoples' Rights, adopted by the Eighteenth Assembly of Heads of State and Government of the Organisation of African Unity (OAU), Nairobi July 1989 Documents of the Organisation of African Unity, p. 109 (entered into force 21 October 1986)

Protocol to the African Charter on the Establishment of the African Court on Human and peoples Rights by the Thirty Fourth ordinary session of the OAU Heads of States and Government July 1998, OAU Doc OAU/LEG/EXP/ACHPR/PROT (III).

Resolution of the African Commission on Human and Peoples' Rights on the co-operation between the Commission and NGOs having observer status with the Commission' in C. Heyns (ed) Human Rights Law in Africa Series (1999), 215

Constitutive Act of the African Union, adopted at Lome, Togo 11 July 2002

h. Constitutions

The Constitution of the Republic of South Africa, 1996 as adopted on 8 May 1996, Act 108 of 1996

i. Cases and decisions

Decisions of the African Commission on Human and Peoples' Rights

Social and Economic Rights Action Center & another v Nigeria Communication 155/96

Constitutional Rights Project v Nigeria Communication 101/93

Inter-American Court of Human Rights

Velasquez Rodriguez v. Honduras, Judgment of 19 July 1998 series C, No. 4

The European Court of Human Rights

X and Y v. Netherlands, 91 ECHR (1985) (Ser A) 32

Constitutional Court of South Africa

In Re Certification of the Constitution of the Republic of South Africa 1996, 1996(10) BCLR 1253(CC)

Ferreira v Levin NO 1996 (1) SA 984 (CC)

Du Plessis v De Klerk 1996 (3) SA 850 (CC)

Soobramoney v Minister of Health, Kwazulu-Natal 1997 (12) BCLR 1696 (CC)

Fose v Minister of Safety and Security 1997 (3) SA 786 (CC)

Pretoria City Council v Walker 1998 (3) BCLR 257 (CC)

August and another v The Electoral Commission and others 1999 (4) BCLR 363

Government of the Republic of South Africa & ors v Grootboom & ors, 2000 (11) BCLR 1169 (CC)

Ngxuza and others v Permanent Secretary, Department of Welfare, Eastern Cape 2001(2) SA 609 (E)

Minister of Health & ors v Treatment Action Campaign & ors (1) 2002 (10) BCLR 1033

Khumalo and others v Holomisa 2002 (8) BCLR 771 (CC)

Supreme Court of India

Paschim Banga khet Mazdoor Samity and ors v State of West Bengal and another (1996) AIR SC 2426

ANNEX I

Committee on Economic, Social and Cultural Rights, General Comment 3, the nature of States parties obligations (Art. 2, para.1 of the Covenant) (Fifth session, 1990), Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, U.N. Doc. HRI\GEN\1\Rev.1 at 45 (1994).

1. Article 2 is of particular importance to a full understanding of the Covenant and must be seen as having a dynamic relationship with all of the other provisions of the Covenant. It describes the nature of the general legal obligations undertaken by States parties to the Covenant. Those obligations include both what may be termed (following the work of the International Law Commission) obligations of conduct and obligations of result. While great emphasis has sometimes been placed on the difference between the formulations used in this provision and that contained in the equivalent article 2 of the International Covenant on Civil and Political Rights, it is not always recognized that there are also significant similarities. In particular, while the Covenant provides for progressive realization and acknowledges the constraints due to the limits of available resources, it also imposes various obligations which are of immediate effect. Of these, two are of particular importance in understanding the precise nature of States parties obligations. One of these, which is dealt with in a separate General Comment, and which is to be considered by the Committee at its sixth session, is the "undertaking to guarantee" that relevant rights "will be exercised without discrimination ...".

2. The other is the undertaking in article 2 (1) "to take steps", which in itself, is not qualified or limited by other considerations. The full meaning of the phrase can also be gauged by noting some of the different language versions. In English the undertaking is "to take steps", in French it is "to act" ("s'engage ... agir") and in Spanish it is "to adopt measures" ("a adoptar medidas"). Thus while the full realization of the relevant rights may be achieved progressively, steps towards that goal must be taken within a reasonably short time after the Covenant's entry into force for the States concerned. Such steps should be deliberate, concrete and targeted as clearly as possible towards meeting the obligations recognized in the Covenant.

3. The means which should be used in order to satisfy the obligation to take steps are stated in article 2 (1) to be "all appropriate means, including particularly the adoption of legislative measures". The Committee recognizes that in many instances legislation is highly desirable and in some cases may even be indispensable. For example, it may be difficult to combat discrimination effectively in the absence of a sound legislative foundation for the necessary measures. In fields such as health, the protection of children and mothers, and education, as well as in respect of the matters dealt with in articles 6 to 9, legislation may also be an indispensable element for many purposes.

4. The Committee notes that States parties have generally been conscientious in detailing at least some of the legislative measures that they have taken in this regard. It wishes to emphasize, however, that the adoption of legislative measures, as specifically foreseen by the Covenant, is by no means exhaustive of the obligations of States parties. Rather, the

phrase "by all appropriate means" must be given its full and natural meaning. While each State party must decide for itself which means are the most appropriate under the circumstances with respect to each of the rights, the "appropriateness" of the means chosen will not always be self-evident. It is therefore desirable that States parties' reports should indicate not only the measures that have been taken but also the basis on which they are considered to be the most "appropriate" under the circumstances. However, the ultimate determination as to whether all appropriate measures have been taken remains one for the Committee to make.

5. Among the measures, which might be considered appropriate, in addition to legislation, is the provision of judicial remedies with respect to rights which may, in accordance with the national legal system, be considered justiciable. The Committee notes, for example, that the enjoyment of the rights recognized, without discrimination, will often be appropriately promoted, in part, through the provision of judicial or other effective remedies. Indeed, those States parties which are also parties to the International Covenant on Civil and Political Rights are already obligated (by virtue of arts. 2 (paras. 1 and 3), 3 and 26) of that Covenant to ensure that any person whose rights or freedoms (including the right to equality and non-discrimination) recognized in that Covenant are violated, "shall have an effective remedy" (art. 2 (3) (a)). In addition, there are a number of other provisions in the International Covenant on Economic, Social and Cultural Rights, including articles 3, 7 (a) (i), 8, 10 (3), 13 (2) (a), (3) and (4) and 15 (3) which would seem to be capable of immediate application by judicial and other organs in many national legal systems. Any suggestion that the provisions indicated are inherently non-self-executing would seem to be difficult to sustain.

6. Where specific policies aimed directly at the realization of the rights recognized in the Covenant have been adopted in legislative form, the Committee would wish to be informed, *inter alia*, as to whether such laws create any right of action on behalf of individuals or groups who feel that their rights are not being fully realized. In cases where constitutional recognition has been accorded to specific economic, social and cultural rights, or where the provisions of the Covenant have been incorporated directly into national law, the Committee would wish to receive information as to the extent to which these rights are considered to be justiciable (i.e. able to be invoked before the courts). The Committee would also wish to receive specific information as to any instances in which existing constitutional provisions relating to economic, social and cultural rights have been weakened or significantly changed.

7. Other measures which may also be considered "appropriate" for the purposes of article 2 (1) include, but are not limited to, administrative, financial, educational and social measures.

8. The Committee notes that the undertaking "to take steps ... by all appropriate means including particularly the adoption of legislative measures" neither requires nor precludes any particular form of government or economic system being used as the vehicle for the steps in question, provided only that it is democratic and that all human rights are thereby respected. Thus, in terms of political and economic systems the Covenant is neutral and

its principles cannot accurately be described as being predicated exclusively upon the need for, or the desirability of a socialist or a capitalist system, or a mixed, centrally planned, or *laissez-faire* economy, or upon any other particular approach. In this regard, the Committee reaffirms that the rights recognized in the Covenant are susceptible of realization within the context of a wide variety of economic and political systems, provided only that the interdependence and indivisibility of the two sets of human rights, as affirmed *inter alia* in the preamble to the Covenant, is recognized and reflected in the system in question. The Committee also notes the relevance in this regard of other human rights and in particular the right to development.

9. The principal obligation of result reflected in article 2 (1) is to take steps "with a view to achieving progressively the full realization of the rights recognized" in the Covenant. The term "progressive realization" is often used to describe the intent of this phrase. The concept of progressive realization constitutes a recognition of the fact that full realization of all economic, social and cultural rights will generally not be able to be achieved in a short period of time. In this sense the obligation differs significantly from that contained in article 2 of the International Covenant on Civil and Political Rights which embodies an immediate obligation to respect and ensure all of the relevant rights. Nevertheless, the fact that realization over time, or in other words progressively, is foreseen under the Covenant should not be misinterpreted as depriving the obligation of all meaningful content. It is on the one hand a necessary flexibility device, reflecting the realities of the real world and the difficulties involved for any country in ensuring full realization of economic, social and cultural rights. On the other hand, the phrase must be read in the light of the overall objective, indeed the *raison d'être*, of the Covenant which is to establish clear obligations for States parties in respect of the full realization of the rights in question. It thus imposes an obligation to move as expeditiously and effectively as possible towards that goal. Moreover, any deliberately retrogressive measures in that regard would require the most careful consideration and would need to be fully justified by reference to the totality of the rights provided for in the Covenant and in the context of the full use of the maximum available resources.

10. On the basis of the extensive experience gained by the Committee, as well as by the body that preceded it, over a period of more than a decade of examining States parties' reports the Committee is of the view that a minimum core obligation to ensure the satisfaction of, at the very least, minimum essential levels of each of the rights is incumbent upon every State party. Thus, for example, a State party in which any significant number of individuals is deprived of essential foodstuffs, of essential primary health care, of basic shelter and housing, or of the most basic forms of education is, *prima facie*, failing to discharge its obligations under the Covenant. If the Covenant were to be read in such a way as not to establish such a minimum core obligation, it would be largely deprived of its *raison d'être*. By the same token, it must be noted that any assessment as to whether a State has discharged its minimum core obligation must also take account of resource constraints applying within the country concerned. Article 2 (1) obligates each State party to take the necessary steps "to the maximum of its available resources". In order for a State party to be able to attribute its failure to meet at least its minimum core obligations to a lack of available resources it must demonstrate that every

effort has been made to use all resources that are at its disposition in an effort to satisfy, as a matter of priority, those minimum obligations.

11. The Committee wishes to emphasize, however, that even where the available resources are demonstrably inadequate, the obligation remains for a State party to strive to ensure the widest possible enjoyment of the relevant rights under the prevailing circumstances. Moreover, the obligations to monitor the extent of the realization, or more especially of the non-realization, of economic, social and cultural rights, and to devise strategies and programmes for their promotion, are not in any way eliminated as a result of resource constraints. The Committee has already dealt with these issues in its General Comment 1 (1989).

12. Similarly, the Committee underlines the fact that even in times of severe resources constraints whether caused by a process of adjustment, of economic recession, or by other factors the vulnerable members of society can and indeed must be protected by the adoption of relatively low-cost targeted programmes. In support of this approach the Committee takes note of the analysis prepared by UNICEF entitled "Adjustment with a human face: protecting the vulnerable and promoting growth, the analysis by UNDP in its Human Development Report 1990 and the analysis by the World Bank in the World Development Report 1990.

13. A final element of article 2 (1), to which attention must be drawn, is that the undertaking given by all States parties is "to take steps, individually and through international assistance and cooperation, especially economic and technical ...". The Committee notes that the phrase "to the maximum of its available resources" was intended by the drafters of the Covenant to refer to both the resources existing within a State and those available from the international community through international cooperation and assistance. Moreover, the essential role of such cooperation in facilitating the full realization of the relevant rights is further underlined by the specific provisions contained in articles 11, 15, 22 and 23. With respect to article 22 the Committee has already drawn attention, in General Comment 2 (1990), to some of the opportunities and responsibilities that exist in relation to international cooperation. Article 23 also specifically identifies "the furnishing of technical assistance" as well as other activities, as being among the means of "international action for the achievement of the rights recognized ...".

14. The Committee wishes to emphasize that in accordance with Articles 55 and 56 of the Charter of the United Nations, with well-established principles of international law, and with the provisions of the Covenant itself, international cooperation for development and thus for the realization of economic, social and cultural rights is an obligation of all States. It is particularly incumbent upon those States which are in a position to assist others in this regard. The Committee notes in particular the importance of the Declaration on the Right to Development adopted by the General Assembly in its resolution 41/128 of 4 December 1986 and the need for States parties to take full account of all of the principles recognized therein. It emphasizes that, in the absence of an active programme of international assistance and cooperation on the part of all those States that are in a

position to undertake one, the full realization of economic, social and cultural rights will remain an unfulfilled aspiration in many countries. In this respect, the Committee also recalls the terms of its General Comment 2 (1990).

ANNEX II

EXCERPT OF *SERAC* CASE

155/96 The Social and Economic Rights Action Center and the Center for Economic and Social Rights / Nigeria

Summary of Facts:

1. The Communication alleges that the military government of Nigeria has been directly involved in oil production through the State oil company, the Nigerian National Petroleum Company (NNPC), the majority shareholder in a consortium with Shell Petroleum Development Corporation (SPDC), and that these operations have caused environmental degradation and health problems resulting from the contamination of the environment among the Ogoni People.
2. The Communication alleges that the oil consortium has exploited oil reserves in Ogoniland with no regard for the health or environment of the local communities, disposing toxic wastes into the environment and local waterways in violation of applicable international environmental standards. The consortium also neglected and/or failed to maintain its facilities causing numerous avoidable spills in the proximity of villages. The resulting contamination of water, soil and air has had serious short and long-term health impacts, including skin infections, gastrointestinal and respiratory ailments, and increased risk of cancers, and neurological and reproductive problems.
3. The Communication alleges that the Nigerian Government has condoned and facilitated these violations by placing the legal and military powers of the State at the disposal of the oil companies. The Communication contains a memo from the Rivers State Internal Security Task Force, calling for "ruthless military operations".
4. The Communication alleges that the Government has neither monitored operations of the oil companies nor required safety measures that are standard procedure within the industry. The Government has withheld from Ogoni Communities information on the dangers created by oil activities. Ogoni Communities have not been involved in the decisions affecting the development of Ogoniland.
5. The Government has not required oil companies or its own agencies to produce basic health and environmental impact studies regarding hazardous operations and materials relating to oil production, despite the obvious health and environmental crisis in Ogoniland. The government has even refused to permit scientists and environmental organisations from entering Ogoniland to undertake such studies. The government has also ignored the concerns of Ogoni Communities regarding oil

development, and has responded to protests with massive violence and executions of Ogoni leaders.

6. The Communication alleges that the Nigerian government does not require oil companies to consult communities before beginning operations, even if the operations pose direct threats to community or individual lands.
7. The Communication alleges that in the course of the last three years, Nigerian security forces have attacked, burned and destroyed several Ogoni villages and homes under the pretext of dislodging officials and supporters of the Movement of the Survival of Ogoni People (MOSOP). These attacks have come in response to MOSOP's non-violent campaign in opposition to the destruction of their environment by oil companies. Some of the attacks have involved uniformed combined forces of the police, the army, the air force, and the navy, armed with armoured tanks and other sophisticated weapons. In other instances, the attacks have been conducted by unidentified gunmen, mostly at night. The military-type methods and the calibre of weapons used in such attacks strongly suggest the involvement of the Nigerian security forces. The complete failure of the Government of Nigeria to investigate these attacks, let alone punish the perpetrators, further implicates the Nigerian authorities.
8. ...
9. The Communication alleges that the Nigerian government has destroyed and threatened Ogoni food sources through a variety of means. The government has participated in irresponsible oil development that has poisoned much of the soil and water upon which Ogoni farming and fishing depended. In their raids on villages, Nigerian security forces have destroyed crops and killed farm animals. The security forces have created a state of terror and insecurity that has made it impossible for many Ogoni villagers to return to their fields and animals. The destruction of farmlands, rivers, crops and animals has created malnutrition and starvation among certain Ogoni Communities.

Merits

43. The present Communication alleges a concerted violation of a wide range of rights guaranteed under the African Charter for Human and Peoples' Rights. Before we venture into the inquiry whether the Government of Nigeria has violated the said rights as alleged in the Complaint, it would be proper to establish what is generally expected of governments under the Charter and more specifically vis-à-vis the rights themselves.
44. Internationally accepted ideas of the various obligations engendered by human rights indicate that all rights-both civil and political rights and social and economic-generate at

least four levels of duties for a State that undertakes to adhere to a rights regime, namely the duty to respect, protect, promote, and fulfill these rights. These obligations universally apply to all rights and entail a combination of negative and positive duties. As a human rights instrument, the African Charter is not alien to these concepts and the order in which they are dealt with here is chosen as a matter of convenience and in no way should it imply the priority accorded to them. Each layer of obligation is equally relevant to the rights in question.

45. At a primary level, the obligation to **respect** entails that the State should refrain from interfering in the enjoyment of all fundamental rights; it should respect right-holders, their freedoms, autonomy, resources, and liberty of their action. With respect to socio economic rights, this means that the State is obliged to respect the free use of resources owned or at the disposal of the individual alone or in any form of association with others, including the household or the family, for the purpose of rights-related needs. And with regard to a collective group, the resources belonging to it should be respected, as it has to use the same resources to satisfy its needs.
46. At a secondary level, the State is obliged to **protect** right-holders against other subjects by legislation and provision of effective remedies. This obligation requires the State to take measures to protect beneficiaries of the protected rights against political, economic and social interferences. Protection generally entails the creation and maintenance of an atmosphere or framework by an effective interplay of laws and regulations so that individuals will be able to freely realize their rights and freedoms. This is very much intertwined with the tertiary obligation of the State to **promote** the enjoyment of all human rights. The State should make sure that individuals are able to exercise their rights and freedoms, for example, by promoting tolerance, raising awareness, and even building infrastructures.
47. The last layer of obligation requires the State to **fulfill** the rights and freedoms it freely undertook under the various human rights regimes. It is more of a positive expectation on the part of the State to move its machinery towards the actual realisation of the rights. This is also very much intertwined with the duty to promote mentioned in the preceding paragraph. It could consist in the direct provision of basic needs such as food or resources that can be used for food (direct food aid or social security).
48. Thus States are generally burdened with the above set of duties when they commit themselves under human rights instruments. Emphasising the all embracing nature of their obligations, the International Covenant on Economic, Social, and Cultural Rights, for instance, under Article 2(1), stipulates exemplarily that States “*undertake to take steps...by all appropriate means, including particularly the adoption of legislative*

measures.” Depending on the type of rights under consideration, the level of emphasis in the application of these duties varies. But sometimes, the need to meaningfully enjoy some of the rights demands a concerted action from the State in terms of more than one of the said duties. Whether the government of Nigeria has, by its conduct, violated the provisions of the African Charter as claimed by the Complainants is examined here below.

49. In accordance with Articles 60 and 61 of the African Charter, this communication is examined in the light of the provisions of the African Charter and the relevant international and regional human rights instruments and principles. The Commission thanks the two human rights NGOs who brought the matter under its purview: the Social and Economic Rights Action Center (Nigeria) and the Center for Economic and Social Rights (USA). Such is a demonstration of the usefulness to the Commission and individuals of *actio popularis*, which is wisely allowed under the African Charter. It is a matter of regret that the only written response from the government of Nigeria is an admission of the gravamen of the complaints which is contained in a note verbale and which we have reproduced above at paragraph 30. In the circumstances, the Commission is compelled to proceed with the examination of the matter on the basis of the uncontested allegations of the Complainants, which are consequently accepted by the Commission.

50. The Complainants allege that the Nigerian government violated the right to health and the right to clean environment as recognized under Articles 16 and 24 of the African Charter by failing to fulfill the minimum duties required by these rights. This, the Complainants allege, the government has done by -:

- Directly participating in the contamination of air, water and soil and thereby harming the health of the Ogoni population,
- Failing to protect the Ogoni population from the harm caused by the NNPC Shell Consortium but instead using its security forces to facilitate the damage
- Failing to provide or permit studies of potential or actual environmental and health risks caused by the oil operations

Article 16 of the African Charter reads:

“(1) Every individual shall have the right to enjoy the best attainable state of physical and mental health.

(2) States Parties to the present Charter shall take the necessary measures to protect the health of their people and to ensure that they receive medical attention when they are sick.”

Article 24 of the African Charter reads:

"All peoples shall have the right to a general satisfactory environment favourable to their development."

51. These rights recognise the importance of a clean and safe environment that is closely linked to economic and social rights in so far as the environment affects the quality of life and safety of the individual. As has been rightly observed by Alexander Kiss, "an environment degraded by pollution and defaced by the destruction of all beauty and variety is as contrary to satisfactory living conditions and the development as the breakdown of the fundamental ecologic equilibria is harmful to physical and moral health."
52. The right to a general satisfactory environment, as guaranteed under Article 24 of the African Charter or the right to a healthy environment, as it is widely known, therefore imposes clear obligations upon a government. It 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. Article 12 of the International Covenant on Economic, Social and Cultural Rights (ICESCR), to which Nigeria is a party, requires governments to take necessary steps for the improvement of all aspects of environmental and industrial hygiene. The right to enjoy the best attainable state of physical and mental health enunciated in Article 16(1) of the African Charter and the right to a general satisfactory environment favourable to development (Article 16(3)) already noted obligate governments to desist from directly threatening the health and environment of their citizens. The State is under an obligation to respect the just noted rights and this entails largely non-interventionist conduct from the State for example, not from carrying out, sponsoring or tolerating any practice, policy or legal measures violating the integrity of the individual.
53. Government compliance with the spirit of Articles 16 and 24 of the African Charter must also include 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, undertaking appropriate monitoring and providing information to those communities exposed to hazardous materials and activities and providing meaningful opportunities for individuals to be heard and to participate in the development decisions affecting their communities.
54. We now examine the conduct of the government of Nigeria in relation to Articles 16 and 24 of the African Charter. Undoubtedly and admittedly, the government of Nigeria, through NNPC has the right to produce oil, the income from which will be used to fulfill the economic and social rights of Nigerians. But the care that should have been taken as outlined in the preceding paragraph and which would have protected the rights of the victims of the violations complained of was not taken. To exacerbate the situation, the security forces of the government engaged in conduct in violation of the rights of the Ogonis by attacking, burning and destroying several Ogoni villages and homes.

55. The Complainants also allege a violation of Article 21 of the African Charter by the government of Nigeria. The Complainants allege that the Military government of Nigeria was involved in oil production and thus did not monitor or regulate the operations of the oil companies and in so doing paved a way for the Oil Consortiums to exploit oil reserves in Ogoniland. Furthermore, in all their dealings with the Oil Consortiums, the government did not involve the Ogoni Communities in the decisions that affected the development of Ogoniland. The destructive and selfish role-played by oil development in Ogoniland, closely tied with repressive tactics of the Nigerian Government, and the lack of material benefits accruing to the local population, may well be said to constitute a violation of Article 21.

Article 21 provides

1. *All peoples shall freely dispose of their wealth and natural resources. This right shall be exercised in the exclusive interest of the people. In no case shall a people be deprived of it.*
 2. *In case of spoliation the dispossessed people shall have the right to the lawful recovery of its property as well as to an adequate compensation.*
 3. *The free disposal of wealth and natural resources shall be exercised without prejudice to the obligation of promoting international economic co-operation based on mutual respect, equitable exchange and the principles of international law.*
 4. *States parties to the present Charter shall individually and collectively exercise the right to free disposal of their wealth and natural resources with a view to strengthening African unity and solidarity.*
 5. *States Parties to the present Charter shall undertake to eliminate all forms of foreign economic exploitation particularly that practiced by international monopolies so as to enable their peoples to fully benefit from the advantages derived from their national resources.*
56. The origin of this provision may be traced to colonialism, during which the human and material resources of Africa were largely exploited for the benefit of outside powers, creating tragedy for Africans themselves, depriving them of their birthright and alienating them from the land. The aftermath of colonial exploitation has left Africa's precious resources and people still vulnerable to foreign misappropriation. The drafters of the Charter obviously wanted to remind African governments of the continent's painful legacy and restore co-operative economic development to its traditional place at the heart of African Society.
57. Governments have a duty to protect their citizens, not only through appropriate legislation and effective enforcement but also by protecting them from damaging acts that may be perpetrated by private parties (*See Union des Jeunes Avocats /Chad*). This duty calls for positive action on part of governments in fulfilling their obligation under human rights instruments. The practice before other tribunals also enhances this requirement as is evidenced in the case *Velásquez Rodríguez v. Honduras*. In this landmark judgment, the Inter-American Court of Human Rights held that when a State allows private persons or groups to act freely and with impunity to the detriment of the rights recognised, it would be in clear violation of its obligations to protect the human rights of its citizens. Similarly, this obligation of the State is further emphasised in the practice of the European Court of Human Rights, in *X and Y v.*

Netherlands. In that case, the Court pronounced that there was an obligation on authorities to take steps to make sure that the enjoyment of the rights is not interfered with by any other private person.

58. The Commission notes that in the present case, despite its obligation to protect persons against interferences in the enjoyment of their rights, the Government of Nigeria facilitated the destruction of the Ogoniland. Contrary to its Charter obligations and despite such internationally established principles, the Nigerian Government has given the green light to private actors, and the oil Companies in particular, to devastatingly affect the well-being of the Ogonis. By any measure of standards, its practice falls short of the minimum conduct expected of governments, and therefore, is in violation of Article 21 of the African Charter.
59. The Complainants also assert that the Military government of Nigeria massively and systematically violated the right to adequate housing of members of the Ogoni community under Article 14 and implicitly recognised by Articles 16 and 18(1) of the African Charter.

Article 14 of the Charter reads:

"The right to property shall be guaranteed. It may only be encroached upon in the interest of public need or in the general interest of the community and in accordance with the provisions of appropriate laws."

Article 18(1) provides:

"The family shall be the natural unit and basis of society. It shall be protected by the State..."

60. Although the right to housing or shelter is not explicitly provided for under the African Charter, the corollary of the combination of the provisions protecting the right to enjoy the best attainable state of mental and physical health, cited under Article 16 above, the right to property, and the protection accorded to the family forbids the wanton destruction of shelter because when housing is destroyed, property, health, and family life are adversely affected. It is thus noted that the combined effect of Articles 14, 16 and 18(1) reads into the Charter a right to shelter or housing which the Nigerian Government has apparently violated.
61. At a very minimum, the right to shelter obliges the Nigerian government not to destroy the housing of its citizens and not to obstruct efforts by individuals or communities to rebuild lost homes. The State's obligation to respect housing rights requires it, and thereby all of its organs and agents, to abstain from carrying out, sponsoring or tolerating any practice, policy or legal measure violating the integrity of the individual or infringing upon his or her freedom to use those material or other resources available to them in a way they find most appropriate to satisfy individual, family, household or community housing needs. Its obligations to protect obliges it to

prevent the violation of any individual's right to housing by any other individual or non-state actors like landlords, property developers, and land owners, and where such infringements occur, it should act to preclude further deprivations as well as guaranteeing access to legal remedies. The right to shelter even goes further than a roof over one's head. It extends to embody the individual's right to be let alone and to live in peace- whether under a roof or not.

62. The protection of the rights guaranteed in Articles 14, 16 and 18 (1) leads to the same conclusion. As regards the earlier right, and in the case of the Ogoni People, the Government of Nigeria has failed to fulfill these two minimum obligations. The government has destroyed Ogoni houses and villages and then, through its security forces, obstructed, harassed, beaten and, in some cases, shot and killed innocent citizens who have attempted to return to rebuild their ruined homes. These actions constitute massive violations of the right to shelter, in violation of Articles 14, 16, and 18(1) of the African Charter.
63. The particular violation by the Nigerian Government of the right to adequate housing as implicitly protected in the Charter also encompasses the right to protection against forced evictions. The African Commission draws inspiration from the definition of the term "forced evictions" by the Committee on Economic Social and Cultural Rights which defines this term as "the permanent removal against their will of individuals, families and/or communities from the homes and/or which they occupy, without the provision of, and access to, appropriate forms of legal or other protection". Wherever and whenever they occur, forced evictions are extremely traumatic. They cause physical, psychological and emotional distress; they entail losses of means of economic sustenance and increase impoverishment. They can also cause physical injury and in some cases sporadic deaths.... Evictions break up families and increase existing levels of homelessness. In this regard, **General Comment No. 4 (1991)** of the Committee on Economic, Social and Cultural Rights on the right to adequate housing states that "all persons should possess a degree of security of tenure which guarantees legal protection against forced eviction, harassment and other threats" (E/1992/23, annex III. Paragraph 8(a)). The conduct of the Nigerian government clearly demonstrates a violation of this right enjoyed by the Ogonis as a collective right.
64. The Communication argues that the right to food is implicit in the African Charter, in such provisions as the right to life (Art. 4), the right to health (Art. 16) and the right to economic, social and cultural development (Art. 22). By its violation of these rights, the Nigerian Government trampled upon not only the explicitly protected rights but also upon the right to food implicitly guaranteed.
65. The right to food is inseparably linked to the dignity of human beings and is therefore essential for the enjoyment and fulfillment of such other rights as health, education, work and political participation. The African Charter and international law require

and bind Nigeria to protect and improve existing food sources and to ensure access to adequate food for all citizens. Without touching on the duty to improve food production and to guarantee access, the minimum core of the right to food requires that the Nigerian Government should not destroy or contaminate food sources. It should not allow private parties to destroy or contaminate food sources, and prevent peoples' efforts to feed themselves.

66. The government's treatment of the Ogonis has violated all three minimum duties of the right to food. The government has destroyed food sources through its security forces and State Oil Company; has allowed private oil companies to destroy food sources; and, through terror, has created significant obstacles to Ogoni communities trying to feed themselves. The Nigerian government has again fallen short of what is expected of it as under the provisions of the African Charter and international human rights standards, and hence, is in violation of the right to food of the Ogonis.
67. The Complainants also allege that the Nigerian Government has violated Article 4 of the Charter which guarantees the inviolability of human beings and everyone's right to life and integrity of the person respected. Given the wide spread violations perpetrated by the Government of Nigeria and by private actors (be it following its clear blessing or not), the most fundamental of all human rights, the right to life has been violated. The Security forces were given the green light to decisively deal with the Ogonis, which was illustrated by the wide spread terrorisations and killings. The pollution and environmental degradation to a level humanly unacceptable has made it living in the Ogoni land a nightmare. The survival of the Ogonis depended on their land and farms that were destroyed by the direct involvement of the Government. These and similar brutalities not only persecuted individuals in Ogoniland but also the whole of the Ogoni Community as a whole. They affected the life of the Ogoni Society as a whole. The Commission conducted a mission to Nigeria from the 7th – 14th March 1997 and witnessed first hand the deplorable situation in Ogoni land including the environmental degradation.
68. The uniqueness of the African situation and the special qualities of the African Charter on Human and Peoples' Rights imposes upon the African Commission an important task. International law and human rights must be responsive to African circumstances. Clearly, collective rights, environmental rights, and economic and social rights are essential elements of human rights in Africa. The African Commission will apply any of the diverse rights contained in the African Charter. It welcomes this opportunity to make clear that there is no right in the African Charter that cannot be made effective. As indicated in the preceding paragraphs, however, the

Nigerian Government did not live up to the minimum expectations of the African Charter.

69. The Commission does not wish to fault governments that are labouring under difficult circumstances to improve the lives of their people. The situation of the people of Ogoniland, however, requires, in the view of the Commission, a reconsideration of the Government's attitude to the allegations contained in the instant communication. The intervention of multinational corporations may be a potentially positive force for development if the State and the people concerned are ever mindful of the common good and the sacred rights of individuals and communities. The Commission however takes note of the efforts of the present civilian administration to redress the atrocities that were committed by the previous military administration as illustrated in the Note Verbale referred to in paragraph 30 of this decision.

For the above reasons, the Commission,

Finds the Federal Republic of Nigeria in violation of Articles 2, 4, 14, 16, 18(1), 21 and 24 of the African Charter on Human and Peoples' Rights;

Appeals to the government of the Federal Republic of Nigeria to ensure protection of the environment, health and livelihood of the people of Ogoniland by:

- Stopping all attacks on Ogoni communities and leaders by the Rivers State Internal Securities Task Force and permitting citizens and independent investigators free access to the territory;
- Conducting an investigation into the human rights violations described above and prosecuting officials of the security forces, NNPC and relevant agencies involved in human rights violations;
- Ensuring adequate compensation to victims of the human rights violations, including relief and resettlement assistance to victims of government sponsored raids, and undertaking a comprehensive cleanup of lands and rivers damaged by oil operations;
- Ensuring that appropriate environmental and social impact assessments are prepared for any future oil development and that the safe operation of any further oil development is guaranteed through effective and independent oversight bodies for the petroleum industry; and
- Providing information on health and environmental risks and meaningful access to regulatory and decision-making bodies to communities likely to be affected by oil operations.

Urges the government of the Federal Republic of Nigeria to keep the African Commission informed of the out come of the work of -:

- The Federal Ministry of Environment which was established to address environmental and environment related issues prevalent in Nigeria, and as a matter of priority, in the Niger Delta area including the Ogoni land;
- The Niger Delta Development Commission (NDDC) enacted into law to address the environmental and other social related problems in the Niger Delta area and other oil producing areas of Nigeria; and
- The Judicial Commission of Inquiry inaugurated to investigate the issues of human rights violations.

Done at the 30th Ordinary Session, held in Banjul, The Gambia from 13th to 27th October 2001
