

ANALYSING THE ECONOMIC, SOCIAL AND CULTURAL RIGHTS JURISPRUDENCE OF THE AFRICAN COMMISSION: 30 YEARS SINCE THE ADOPTION OF THE AFRICAN CHARTER

MANISULI SSENYONJO*

Abstract

The African Commission on Human and Peoples' Rights (the Commission), established by the African Charter on Human and Peoples' Rights (African Charter), is a quasi-judicial regional body charged with the functions of promoting and protecting human rights in Africa, including economic, social and cultural (ESC) rights. The Commission was the third regional human rights body after the European and American regional bodies. It is empowered to 'interpret' Africa's key regional human rights treaty, the African Charter adopted in 1981. Although the African Charter protects ESC rights alongside other rights, the African Commission noted in its Resolution on ESC Rights in Africa, ACHPR /Res.73(XXXVI)04 (2004), that 'despite the consensus on the indivisibility of human rights, economic, social and cultural rights remain marginalised in their implementation' in Africa. The Commission observed that there is inadequate recognition by African States of this category of rights that results in the continued marginalisation of these rights, which 'excludes the majority of Africans from the full enjoyment of human rights'. Not surprisingly, the Commission has found several States in violations of ESC rights. One contributory cause for the continued marginalisation of this category of rights in Africa can be attributed to the lack of awareness of the Commission's jurisprudence on these rights. This article reviews selected key aspects in the Commission's jurisprudence on ESC rights since the Commission was inaugurated in 1987 focusing on the normative content; State obligations and obligations of non-State Actors; remedies and limitations to and derogations from ESC rights.

* Senior Lecturer in Law, Brunel Law School, Brunel University, London. All internet sources were last visited on 19 July 2011.

1. INTRODUCTION

27 June 2011 marked the 30th anniversary of the adoption of the African Charter on Human and Peoples' Rights (African Charter or ACHPR).¹ The African Charter is widely known as the first international human rights treaty to protect the three 'generations' of human rights, including civil and political rights; economic, social, and cultural (ESC) rights; and group and peoples' rights, in a single instrument, without drawing any distinction between the justiciability or implementation of the three 'generations' of rights. Despite this achievement, only a modest number of ESC rights were explicitly included in the African Charter due to a 'minimalist' approach adopted during its drafting, which, at the time, was in line with the notion 'to spare [...] young states too many but important obligations'.² Thus, the African Charter only explicitly recognises the following individual ESC rights: the right to property (Article 14); the right to work under equitable and satisfactory conditions (Article 15); the right to enjoy the best attainable state of physical and mental health (Article 16); the right to education (Article 17(1)); and, the protection of the family and cultural rights (Articles 17(2) and (3), 18(1) and (2) and 61). The Charter also protects some group rights in Articles 19–24, including the rights to self-determination, free disposal of wealth and natural resources, economic, social and cultural development, national and international peace and security, and a general satisfactory environment. Most of these rights may be seen, at least in part, as collective ESC rights.

Among the individual ESC rights, which are fundamental for human survival and for living a life of dignity, explicitly protected in the International Covenant on Economic, Social and Cultural Rights (ICESCR),³ but not explicitly included in the African Charter are the right to an adequate standard of living, including adequate food, clothing and housing; social security; and the right to the continuous improvement of living conditions. Further the rights to rest, leisure, reasonable limitation of working hours, periodic holidays with pay, remuneration for public holidays and the right to form and join trade unions are not explicitly protected.⁴ The rights to water and sanitation are also not explicitly protected in the Charter. Relatively more detailed ESC rights are protected in later African human rights treaties protecting specific more vulnerable groups – children, women, the youth and internally displaced

¹ OAU Doc. CAB/LEG/67/3 rev. 5, 21 ILM 58 (1982), ratified by 53 Member States of the African Union. For a discussion see generally Evans, M.D. and Murray, R. (eds), *The African Charter on Human and Peoples' Rights: The System in Practice, 1986–2006*, Cambridge University Press, Cambridge, 2nd ed, 2008; and Ougergouz, F., *The African Charter on Human and Peoples' Rights: A Comprehensive Agenda for Human for Human Dignity and Sustainable Development in Africa*, Kluwer Law International, The Hague, 2003.

² See Rapporteur's Report on the Draft ACHPR, OAU Doc CAB/LEG/67/Draft Rapt. (II) Rev.4, para. 13; Viljoen, F., *International Human Rights Law in Africa*, OUP, Oxford, 2007, p. 238.

³ 993 UNTS 3, entered into force 3 January 1976, Articles 6–15. The vast majority of African UN Member States (48 States) have ratified the ICESCR.

⁴ *Idem*.

persons – in particular the African Charter on the Rights and Welfare of the Child;⁵ the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (African Women's Protocol);⁶ the African Youth Charter;⁷ and the African Union (AU) Convention for the Protection and Assistance of Internally Displaced Persons.⁸

Thus, so far, in its growing 'case law' the African Commission on Human and Peoples' Rights (African Commission) has most frequently dealt with civil and political rights such as the right to fair trial, freedom of speech and freedom from torture, inhuman and degrading treatment.⁹ This is partly because most communications brought before the Commission by civil society actors, such as NGOs, have mostly raised issues relating to civil and political rights. Only a few ESC rights cases have been brought before the Commission. This is despite the fact that many individuals and more vulnerable groups in Sub-Saharan Africa, particularly the inhabitants of rural and deprived urban areas; landless persons; women; children; households headed by women; families living with HIV/AIDS; persons with disabilities; refugees and internally displaced persons, still live in (extreme) poverty.¹⁰ This leads to wide spread denials and violations of ESC rights. For example in 2009 in the Democratic Republic of Congo (DRC) 75 percent of the population lived in extreme poverty, 83 percent of the population had no access to safe drinking water, while 70 percent had

⁵ OAU Doc. CAB/LEG/24.9/49 (1990), entered into force 29 November 1999. See, for example, Articles 11 (right to education); 12 (leisure, recreation and cultural activities); 14 (right to health); 15 (protection against child labour); 18 (protection of the family); and 21 (protection from harmful social and cultural practices).

⁶ Adopted by the 2nd Ordinary Session of the African Union Assembly, Maputo, 11 July 2003, entered into force 25 November 2005, *available at*: www.achpr.org/english/_info/women_en.html. The Protocol protects ESC rights in Articles 12 (education and training); 13 (economic and social welfare rights); 14 (health and reproductive rights); 15 (food security); 16 (adequate housing); and 17 (positive cultural context). The Protocol provides for special protection for elderly women, women with disabilities and women in distress in Articles 22–24.

⁷ Adopted by the African Union Assembly in July 2006, *available at*: www.africa-union.org/root/ua/conferences/mai/hrst/charter%20english.pdf. The Charter protects several rights including property (Article 9); education (Article 13); freedom from poverty (Article 14); employment (Article 15); health (Article 16) and culture (Articles 20 and 25).

⁸ Adopted by the Special Summit of the Union held in Kampala, 23 October 2009, *available at*: [www.au.int/en/sites/default/files/AFRICAN_UNION_CONVENTION_FOR_THE_PROTECTION_AND_ASSISTANCE_OF_INTERNALLY_DISPLACED_PERSONS_IN_AFRICA_\(KAMPALA_CONVENTION\).pdf](http://www.au.int/en/sites/default/files/AFRICAN_UNION_CONVENTION_FOR_THE_PROTECTION_AND_ASSISTANCE_OF_INTERNALLY_DISPLACED_PERSONS_IN_AFRICA_(KAMPALA_CONVENTION).pdf). Under Article 3(b) States undertake to: 'Prevent political, social, cultural and economic exclusion and marginalisation, that are likely to cause displacement of populations or persons by virtue of their social identity, religion or political opinion'.

⁹ By November 2010 the Commission had published around 150 decisions of which slightly less than half were inadmissibility decisions. Decisions of the African Commission are reported in the *Activity Reports of the African Commission for Human and Peoples' Rights*, *available at*: www.interights.org/ACHPR_reports/index.htm.

¹⁰ See UNDP, *Human Development Report 2010: The Real Wealth of Nations: Pathways to Human Development* (New York, UNDP, 2010) pp. 86, 97–98.

no access to hygienic sanitation facilities and only 1 percent of the population had access to electricity.¹¹

While life expectancy at birth in the year 2010 in some non-African States (such as Norway, Australia, Canada, Sweden, Japan, Switzerland, France, Iceland and Spain) was over 80 years, in several States that are party to the African Charter (such as Angola, Central African Republic, Chad, DRC, Guinea-Bissau, Lesotho, Mali, Nigeria, Sierra Leone, and Zimbabwe) it was below 50 years.¹² Fifty percent of the 536,000 women who die every year due to complications during pregnancy, childbirth or the six weeks following delivery occur in Sub-Saharan Africa, with unsafe abortion as one of the major causes.¹³ Despite this poor state of ESC rights in Africa, the African Commission has given prominence to civil and political rights as evident in the Commission's promotional activities. For example, in two general resolutions about the 'human rights situation in Africa' adopted in 1994 and 1999 the Commission expressed concern mainly on 'civil and political' rights.¹⁴ The Commission's recent (March 2011) resolutions on the 'human rights situation' in North Africa in particular in Algeria,¹⁵ Libyan Arab Jamahiliya,¹⁶ and Tunisia¹⁷ do not refer specifically to respect for ESC rights. Nonetheless, the Commission has developed some useful jurisprudence on ESC rights in the thirty years of the Charter African Charter (1981–2011) and 25 years since the African Charter entered into force on 21 October 1986.

This article reviews the evolution and impact of the African Commission's jurisprudence on ESC rights under the African Charter. The article adopts the following structure. Section 2 provides an overview of ESC rights explicitly protected in the African Charter and the interpretation of these rights by the African Commission. It also considers the impact of the Commission's jurisprudence. Section 3 considers the African Commission's emerging jurisprudence on State obligations with respect to ESC right and also considers the Commission's approach to the non-State actor obligations under the African Charter. Section 4 makes several concluding observations.

¹¹ CESCR, *Concluding Observations: Democratic Republic of Congo*, UN Doc. E/C.12/COD/CO/4 (16 December 2009), para. 29.

¹² UNDP, *op.cit.* note 10, pp. 143–146.

¹³ United Nations, *The Millennium Development Goals Report 2009*, New York, United Nations, 2009, p. 26.

¹⁴ See Resolution on the situation of Human Rights in Africa, ACHPR /Res.14(XVI)94, (1994); Resolution on the Human Rights situation in Africa, ACHPR /Res.40(XXVI)99, (1999). However, the 1994 Resolution acknowledged that 'the human rights situation in many African countries is characterised by the violations of economic, social, cultural, civil and political rights' and called upon 'all African Governments to adopt legislative and other measures to protect vulnerable groups of society, in particular women and children, against the consequences of the persistent economic crisis in Africa'.

¹⁵ ACHPR/Res.180(Ext.OS/IX)2011 (1 March 2011).

¹⁶ ACHPR/Res.181(Ext.OS/IX)2011 (1 March 2011).

¹⁷ ACHPR/Res.178(Ext.OS/IX)2011 (1 March 2011).

2. CLARIFYING THE NORMATIVE CONTENT OF ESC RIGHTS UNDER THE AFRICAN CHARTER

This section begins by making a brief consideration of the provisions of the African Charter protecting ESC rights. It is observed that these provisions are broadly framed and require innovative interpretation to enable State Parties to the African Charter to implement ESC rights. The section then considers the jurisprudence of the African Commission on ESC rights developed before 2001. It is observed that the Commission's jurisprudence before 2001, as reflected in its decisions, despite finding violations of ESC rights, generally tends to be very fact specific. The Commission thereby failed to develop the normative content of ESC rights under the African Charter. This was due to the failure of the African Commission to give due attention to the interpretation of the relevant provisions protecting ESC rights. The section ends by examining the Commission's jurisprudence from 2001 up to 2010 noting that the Commission has increasingly paid attention to developing the general normative content of ESC rights under the African Charter mainly through the use of international human rights law. However, more consistency is still required.

2.1. OVERVIEW OF ESC RIGHTS EXPLICITLY PROTECTED IN THE AFRICAN CHARTER: THE VAGUE FORMULATION OF ESC RIGHTS

Although the African Charter protects ESC rights, it does so in very general and extremely vague terms. For example, regarding the right to property, Article 14 provides that '[t]he 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'. Apart from the fact that the content of the right to property and its beneficiaries are not defined in Article 14, the permissible restrictions – references to 'public need' or the 'general interest of the community' – are broadly framed. There is no explicit mention of 'prompt, effective and adequate compensation' prior to the compulsory deprivation of property.

Similarly, in protecting the right to work Article 15 simply provides: 'Every individual shall have the right to work under equitable and satisfactory conditions, and shall receive equal pay for equal work'. It does not define the content of 'equitable and satisfactory conditions'. Does this include, for example, the rights to rest, leisure, reasonable limitation of working hours, periodic holidays with pay, remuneration for public holidays and the right to form and join trade unions including the right to strike?

Article 16, which protects the right to health, reads: 'Every individual shall have the right to enjoy the best attainable state of physical and mental health'. It then obliges State Parties to take the 'necessary measures' to protect the health of their

people and to ensure that they receive medical attention when they are sick. Clearly, Article 16 neither defines the content of the right to the 'best attainable state of physical and mental health' nor does it indicate the specific measures States are required to undertake to implement this right.

Article 17(1), which protects the right to education, only provides: 'Every individual shall have the right to education'. Unlike Article 13 of the ICESCR, which elaborates on the content of the right to education, the content of the right to education in the African Charter that 'every individual' is entitled to enjoy was not defined at all. The general character of this provision leaves more questions than answers. Does Article 17 guarantee access to pre-school education, the right to free and compulsory primary education to all, a right to have secondary education generally available and accessible to all and a right to the accessibility of higher education on the basis of capacity? The objectives of education are also not stated. Clearly then, such a general formulation of the right to education requires interpretation by the Commission (and the African Court) to enable States to give effect to their obligations.

With respect to cultural rights Articles 17(2) of the African Charter provides that: 'Every individual may freely, take part in the cultural life of his community'. The scope of 'cultural life' that 'every individual' may make a choice to take part in is not defined. In sum, all the above provisions on ESC rights lack specificity and require innovative interpretation in the light of present-day conditions to enable State Parties to understand their obligations under the African Charter. Creativity and dynamism in the Commission's interpretation of the African Charter giving meaning to ESC rights are essential if States are to give effect to the object and purpose of the African Charter, which is to 'promote and protect human and peoples' rights and freedoms' effectively in Africa.¹⁸ This creative interpretation would contribute considerably to the clarification and development of ESC rights. In turn this would enable States Parties to implement the relevant ESC rights. Indeed the broad and vague wording was designed to permit a degree of 'flexibility' in the application and subsequent interpretation of the African Charter by the competent bodies.¹⁹

2.2. THE INTERPRETATION OF ESC RIGHTS BY THE AFRICAN COMMISSION

The African Commission met for the first inaugural session on 2 November 1987. The Commission did not have a permanent Secretariat after its inauguration and only became fully functional in June 1989. It comprises 11 commissioners, elected by the Assembly of Heads of State and Government for six-year terms and serving in

¹⁸ African Charter, *supra* note 1, preamble, para. 11.

¹⁹ See Report of the Rapporteur, OAU Ministerial Meeting on the Draft African Charter on Human and Peoples' Rights, Banjul, The Gambia, 9–15 June 1980, OAU Doc. CAB/LEG/67/3/Draft RPT.rpt (II), para. 13.

their personal capacity.²⁰ The Commission, as a part-time body, meets for two annual sessions of fifteen days each, in addition to which extraordinary sessions may be held. The specific functions of the Commission are to promote human and peoples' rights; to ensure the protection of human and peoples' rights; and to provide authoritative interpretation of the African Charter and its Protocol on the Rights of Women.²¹

There are two main ways through which the Commission can directly develop the normative content of ESC rights under the African Charter. The first method is for the Commission to provide an interpretation of the African Charter clarifying the scope of ESC rights in accordance with Article 45(3) of the African Charter. This Article states that one of the functions of the Commission is to interpret all the provisions of the Charter at the request of a State Party, an institution of the African Union (AU) or an African organisation recognised by the AU. Although, as noted above, most of the provisions of the African Charter protecting ESC rights are stated in very general terms, no State Party to the Charter, AU institution or an African organisation recognised by the AU has (as of 27 June 2011) ever requested the Commission to interpret any of the Charter's provisions on ESC rights.²² This is not surprising given the lack of interest in implementing ESC rights by many African States. For example, in spite of the significant economic growth and huge natural wealth in some African States and the international development aid that has been provided, the amount of resources allocated to social services and public infrastructure is far from adequate.²³ Arguably, in interpreting the Charter the Commission may on its own motion make resolutions, statements, general comments, concluding observations on State Party reports, principles or guidelines clarifying the content of the rights protected in the Charter.²⁴

²⁰ African Charter, *supra* note 1, Articles 31–34.

²¹ *Ibidem*, Article 45; African Women's Protocol, *supra* note 6, Articles 26(1) and 32.

²² At the time of writing this competence had been used only on one occasion resulting into an Advisory Opinion which concluded that the draft of the UN Declaration on the Rights of Indigenous Peoples, GA Res. 61/295, UN Doc. A/RES/47/1 (2007), was compatible with the African Charter. See Advisory opinion of the African Commission on Human and Peoples' Rights on the United Nations Declaration on the Rights of Indigenous Peoples, adopted by the African Commission at its 41st ordinary session, Accra, Ghana, May 2007, *available at*: www.achpr.org/english/Special%20Mechanisms/Indigenous/Advisory%20opinion_eng.pdf.

²³ See, for example, Concluding Observations of the Committee on Economic, Social and Cultural Rights for *Angola*, UN Doc. E/C.12/AGO/C/O/3/CRP.1 (18 November 2008), para. 26; *Democratic Republic of Congo*, UN Doc. E/C.12/COD/CO/4 (16 December 2009), para 16; *Chad*, UN Doc. E/C.12/TCD/CO/3UN Doc. (16 December 2009), para. 23.

²⁴ See e.g. Resolution on Economic, Social And Cultural Rights in Africa, ACHPR/Res.73(XXXVI)04, (2004); Guidelines for National Periodic Reports, in *Second Annual Activity Report of the African Commission on Human and Peoples Rights 1988–1989*, ACHPR/RPT/2nd, Annex XII; Draft Principles and Guidelines on Economic, Social and Cultural Rights in the African Charter on Human and Peoples' Rights (Draft Principles and Guidelines), adopted by the African Commission at the 48th session, in November 2010, *available at*: www.achpr.org/english/other/Draft_guideline_ESCR/Draft_Pcpl%20&%20Guidelines.pdf.

The second method is for the Commission to clarify the normative content of ESC rights through the consideration of complaints ('communications'). Complaints alleging human rights violations may be submitted to the Commission from States and non-State actors (NSAs) including individuals and non-government organisations (NGOs) without States having made a separate declaration to this effect.²⁵ Complainants are not required to be victims or to show that they act with the explicit consent of victims.²⁶ Complainants are also allowed to bring an *actio popularis* (a complaint in the public interest).²⁷ However, inter-State communications are less effective because States have not alleged violations under other human rights treaties providing for inter-State complaints.²⁸ This practice of not using the available inter-State complaints indicates that States are generally reluctant to submit communications alleging violations in other States even in cases of massive violations of ESC rights. This is possibly because of the perception that claiming violations in other States is an 'unfriendly act' in international relations and constitutes interference in the 'domestic affairs' of other States. States are also well aware that they generally lack a clean human rights record and as such they should not question another State's human rights compliance. Accordingly, inter-State communications within the African regional human rights system have been rarely used.²⁹ Thus,

²⁵ African Charter, *supra* note 1, Articles 47–55. A separate declaration is required accepting individual and NGO applications before the African Court on Human and Peoples' Rights and the African Court of Justice and Human Rights. See Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights, 9 June 1998, OAU Doc. OAU/LEG/EXP/AFCHPR/PROT (III), Articles 34(6) and 5(3); *In the Matter of Michelot Yagombaye vs The Republic of Senegal*, Application No. 001/2008 (15 December 2009); Protocol on the Statute of the African Court of Justice and Human Rights, 1 July 2008, available at: www.africa-union.org/root/au/documents/treaties/text/Protocol%20on%20the%20Merged%20Court%20-%20EN.pdf, Article 8(3).

²⁶ African Charter, *supra* note 1, Article 56(1) requires communications to 'indicate their authors' without requiring that the authors have to be the victims or act on behalf of the victims.

²⁷ Communication 155/96, *infra* note 63, para. 49. The Commission thanked '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'.

²⁸ See e.g. the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, GA res. 39/46, UN Doc. A/39/51 (1984), entered into force 26 June 1987, Article 21; International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, GA res. 45/158, UN Doc. A/45/49 (1990), entered into force 1 July 2003, Article 74; International Convention on the Elimination of All Forms of Racial Discrimination, GA res. 2106 (XX), UN Doc. A/6014 (1966), entered into force 4 January 1969, Articles 11–13; and International Covenant on Civil and Political Rights, GA res. 2200A (XXI), UN Doc. A/6316 (1966), entered into force 23 March 1976, Articles 41–43.

²⁹ To date the only inter-State communication before the Commission is *Democratic Republic of Congo vs Burundi, Rwanda and Uganda*, Communication No. 227/99 (2003), 20th Activity Report. The other complaint brought by a State was filed by Libya against the US for stationing troops in Zaire and Chad. It was dismissed without recording it because the US was not a State Party to the African Charter.

most communications before the Commission claiming violations of ESC rights, and indeed all other human rights, have been submitted by NSAs – individuals and non-governmental organisations (NGOs).³⁰ The increasing role of NGOs in the African human rights system can be discerned from the increasing number of NGOs with Observer Status before the African Commission.³¹ The most important communications on ESC rights are briefly reviewed below with a view to identifying the approach of the Commission to ESC rights and the impact of the Commission's approach to the protection of ESC rights in Africa.

2.2.1. Pre-2001 Decisions

The Commission started to make public its decisions on communications brought before it in 1994. In jurisprudential terms, decisions of the African Commission on ESC rights made before 2001 did not adequately develop the normative content of ESC rights protected under the African Charter. This failure to develop norms also generally applied to the civil and political rights jurisprudence of the Commission pre-2001. The Commission's decisions generally failed to delineate the freedoms and entitlements arising from specific rights protected in the African Charter. The approach of the Commission to ESC rights cases before 2001 can be observed from the cases summarized below which dealt with some aspects of the rights to property, health, education and work. The cases considered below provide a sample of the Commission's approach to cases involving claims of violations of ESC rights.

2.2.1.1. Right to Property

In several communications the Commission has found a violation of the right to property under Article 14 without indicating the scope of this right. For example, in *John K. Modise vs Botswana* the complainant had been deported four times from Botswana. He claimed a violation of the right to property under Article 14 alleging to have suffered heavy financial losses, since the government of Botswana confiscated his belongings and property.³² The government of Botswana did not refute this allegation. In these circumstances, the Commission found 'the above action of the government of Botswana an encroachment of the Complainant's right to property guaranteed under Article 14 of the Charter'.³³ There was no attempt to clarify the normative content of the right to property.

³⁰ See *Activity Reports of the African Commission for Human and Peoples' Rights*, supra note 9.

³¹ See Final Communiqué of the 48th Ordinary Session of the African Commission on Human and Peoples' Rights Held in Banjul, The Gambia from 10 to 24 November 2010, para. 41, noting that by November 2010 the total number of NGOs with Observer Status before the African Commission was four hundred and eighteen (418).

³² Communication No. 97/93 (2000), 14th Activity Report.

³³ *Idem*, para. 94.

Indeed, only some examples of the right to property can be derived from the Commission's case law. In *Malawi African Association and Others vs Mauritania*, land was considered 'property' for the purposes of Article 14 of the Charter.³⁴ Although in later cases, the Commission stated that the 'right to property necessarily includes a right to have access to property of one's own and the right not for one's property to be removed',³⁵ invaded or encroached upon.³⁶ This inclusive (non-exhaustive) statement of the right to property was broadly framed. In any case, it failed to define what is meant by 'property'. The precise scope of the right to property remained unclear. In particular it was uncertain whether the right to property entailed a right of everyone to own private property or was it limited to the protection from arbitrary deprivation of private property. Even in its more recent decisions on the right to property, the commission did not examine the normative content of the right to property.³⁷

2.2.1.2. Rights to Health and Education

With respect to health and education, in *Free Legal Assistance Group, Lawyers' Committee for Human Rights, Union Interafricaine des Droits de l'Homme, Les Témoins de Jehovah vs Zaïre* it was alleged, *inter alia*, that the mismanagement of public finances, the failure of the Government to provide basic services, the shortage of medicines, and the closure of universities and secondary schools for two years was a violation of the African Charter.³⁸ The Commission simply stated as follows:

47. Article 16 of the African Charter states that every individual shall have the right to enjoy the best attainable state of physical and mental health, and that States Parties should take the necessary measures to protect the health of their people. The failure of the Government to *provide* basic services such as safe drinking water and electricity and the shortage of medicine as alleged in communication 100/93 constitutes a violation of Article 16 (emphasis added).

³⁴ Communications Nos. 54/91, 61/91, 98/93, 164/97 à 196/97 and 210/98 (2000), 13th Activity Report, para. 128, stating: 'The confiscation and looting of the property of black Mauritians and the expropriation or destruction of their land and houses before forcing them to go abroad constitute a violation of the right to property as guaranteed in article 14'.

³⁵ *Media Rights Agenda and Others vs Nigeria*, Communication Nos. 105/93, 128/94, 130/94 and 152/96 (1998), 12th Activity Report, para. 77 (emphasis added).

³⁶ *Constitutional Rights Project, Civil Liberties Organisation and Media Rights Agenda vs Nigeria*, Communication Nos. 140/94, 141/94, 145/95 (1999), 13th Activity Report, para. 55.

³⁷ See *Zimbabwe Lawyers for Human Rights & Associated Newspapers of Zimbabwe vs Republic of Zimbabwe*, Communication No. 284/2003 (2009), 26th Activity Report, Annex 3, para. 179. The Commission simply stated that 'The confiscation of the Complainants' equipment and depriving them of a source of income and livelihood is also a violation of their right to property guaranteed under Article 14' without articulating the normative content of the right to property. See also *Association of Victims of Post Electoral Violence & Interights vs Cameroon*, Communication No. 272/2003, 27th Activity Report, Annex 3, paras. 33–36.

³⁸ *Communications Nos. 25/89, 47/90, 56/91, 100/93 (1996)*, 9th Activity Report. This decision was taken at the 18th Ordinary Session, Praia, Cape Verde, October 1995.

48. Article 17 of the Charter guarantees the right to education. The closures of universities and secondary schools as described in communication 100/93 constitutes a violation of Article 17.

The Commission then held, without legal reasoning, that the facts constituted ‘serious and massive violations’ of several provisions in the African Charter, including Article 16 and 17. While these findings were commendable in so far as they applied the notion of ‘serious’ violations to ESC rights, which has been traditionally used with respect to civil and political rights, it can be noted that the Commission merely restated the relevant provisions of the African Charter, Articles 16 and 17. These Articles do not provide details as to the content of the rights to education and health. It would have been preferred to first identify the normative content of such very general provisions before concluding that these provisions had been violated. However, the Commission did not interpret these provisions. Thus apart from stating that the acts/omissions stated above constituted violations of the rights to health and education, the normative content of the rights to health and education under Articles 16 and 17 remained unclear.

Later decisions made in the period 1997–2000 such as *Union Inter Africaine des Droits de l’Homme, Federation Internationale des Liges des Droits de l’Homme and Others vs Angola*;³⁹ *International Pen, Constitutional Rights Project, Interights on behalf of Ken Saro-Wiwa Jr. and Civil Liberties Organisation vs Nigeria*;⁴⁰ and *Malawi African Association and Others vs Mauritania*;⁴¹ did little to address the normative content of the relevant provisions on ESC rights in the African Charter.

For example the decision in *International Pen and Others vs Nigeria* found a violation of the right to health under Article 16 of the African Charter without identifying the content of the right. In this case it was alleged that Mr. Ken Saro-Wiwa, a writer, Ogoni activist and president of the Movement for the Survival of the Ogoni People, was arrested in 1994 and was severely beaten during the first days of his detention and was held for several days in leg irons and handcuffs. He was also denied access to hospital treatment and the medicine he needed to control his blood pressure. He was held in very poor conditions. In these circumstances, the Commission found that:

The responsibility of the government is heightened in cases where an individual is in its custody and therefore someone whose integrity and well-being is completely dependent on the actions of the authorities. The state has a direct responsibility in this case. Despite requests for hospital treatment made by a qualified prison doctor, these were denied to Ken

³⁹ *Communication No. 159/96 (1997)*, 11th Activity Report. *Taken at the 22nd Ordinary Session, Banjul (Gambia), on 11 November 1997.*

⁴⁰ *Communication Nos. 137/94, 139/94, 154/96 and 161/97 (1998)*, 12th Activity Report. *Done at Banjul, 31st October 1998.*

⁴¹ *Communication Nos. 54/91, 61/91, 98/93, 164/97, 196/97 and 210/98 (2000)*, 13th Activity Report. *Done at Algiers, 11 May 2000.*

Saro-Wiwa, causing his health to suffer to the point where his life was endangered. The government has not denied this allegation in any way. This is a violation of Article 16.⁴²

While it is clear from the foregoing that the denial of prisoners (who are vulnerable or marginalised section of the population) access to hospital treatment or access to doctors while one's health is deteriorating is a violation of the right to health under Article 16 of the African Charter, the nature and scope of prisoners' right to health was not clearly discerned.⁴³

In *Malawi African Association and Others vs Mauritania* the African Commission had another opportunity to clarify the scope of prisoners' right to health but did not do so. In this case, the government detained members of black ethnic groups in Mauritania after the government was criticised by members of the black ethnic groups for marginalising black Mauritians. Prisoners were detained in the worst conditions. They only received a small amount of rice per day, without any meat or salt. Some of them had to eat leaves and grass. The prisoners were forced to carry out very hard labour day and night, and they were chained up in pairs in windowless cells. They only received one set of clothes and lived in very bad conditions of hygiene. They were regularly beaten by their guards and kept in overcrowded cells. They slept on the floor without any blankets, even during the cold season. The cells were infested with lice, bedbugs and cockroaches, and nothing was done to ensure hygiene and provision of health care. As a result some had died in detention. In finding a violation of Article 16 on the basis of the facts above, the Commission stated:

The State's responsibility in the event of detention is even more evident to the extent that detention centres are of its exclusive preserve, hence the physical integrity and welfare of detainees is the responsibility of the competent public authorities. Some prisoners died as a result of the lack of medical attention. The general state of health of the prisoners deteriorated due to the lack of sufficient food; they had neither blankets nor adequate hygiene. The Mauritanian State is directly responsible for this state of affairs and the government has not denied these facts. Consequently, the Commission considers that there was violation of article 16.⁴⁴

Thus, a violation of the right to health was established on the facts based on State responsibility for detention centres without defining the content of the right to health of prisoners. Therefore the scope of the prisoner's right to health under the African

⁴² *Communication Nos. 137/94, 139/94, 154/96 and 161/97 (1998)*, 12th Activity Report, para 114. See also *Media Rights Agenda, Constitutional Rights Project vs Nigeria, Communication Nos. 105/93, 128/94, 130/94, 152/96, 12th Activity Report*, para. 88.

⁴³ For a discussion of prisoner's right to health see Lines, R., 'The Right to Health of Prisoners in International Human Rights Law', *International Journal of Prisoner Health*, Vol. 4, No. 1, 2008, pp. 3–53.

⁴⁴ *Communication Nos. 54/91, 61/91, 98/93, 164/97, 196/97 and 210/98 (2000)*, 13th Activity Report, para. 122.

Charter remains unclear. This is despite the fact that prisoners in some African States still face several difficulties, impacting negatively on their right to health, including overcrowding, poor hygienic and sanitary conditions, lack of sleeping space, food and water, the absence of adequate health care, including for pregnant women and HIV/AIDS and tuberculosis patients, as well as the absence of specialized facilities for prisoners and detainees with disabilities.⁴⁵

2.2.1.3. Mass Expulsion of Non-nationals and ESC Rights

In *Union Inter Africaine des Droits de l'Homme* case it was alleged that the Angolan government rounded up and expelled West African nationals (Senegalese, Malian, Gambian, Mauritanian and others) on its territory between April and September 1996. Those affected lost their belongings. The Commission observed that: 'Mass expulsions of any category of persons, whether on the basis of nationality, religion, ethnic, racial or other considerations "constitute a special violation of human rights"'.⁴⁶ It was further noted that:

This type of deportations [sic] calls into question a whole series of rights recognised and guaranteed in the Charter; such as the right to property (article 14), the right to work (article 15), the right to education (article 17 paragraph 1) and results in the violation by the State of its obligations under article 18 paragraph 1 which stipulates that "the family shall be the natural unit and basis of society".⁴⁷

However, the Commission did not indicate the content of the rights to property, work and education and how such rights were called into question. It concluded that the deportation of the West African nationals from Angola constituted a violation of articles 2 (non-discrimination), 14 (right to property) and 18 (protection of the family) of the African Charter without interpreting the normative content of these rights.⁴⁸ It also remained unclear why there was no finding that the other ESC rights explicitly protected in the Charter, in particular the rights to work and education, were also violated yet in another case the Commission stated that: 'By forcibly expelling the two victims from Zambia, the State has *violated* their right to enjoyment of *all the rights* enshrined in the African Charter'.⁴⁹ In short, beyond the fact that mass expulsion

⁴⁵ See e.g. Committee against Torture, *Concluding Observations: Ethiopia*, UN Doc. CAT/C/ETH/CO/1 (November 2010), para. 26.

⁴⁶ *Communication No. 159/96 (1997)*, 11th Activity Report, para. 16.

⁴⁷ *Ibidem*, para. 17.

⁴⁸ In addition the Commission found violations of Article 7 (1)(a), and Article 12 (4) and (5). Article 7(1) (a) deals with the right to an appeal to competent national organs, while Article 12(4) provides that 'A non-national legally admitted in a territory of a State Party to the present Charter, may only be expelled from it by virtue of a decision taken in accordance with the law'. Article 12(5) prohibits mass expulsion of non-nationals.

⁴⁹ *Amnesty International vs Zambia*, Communication No. 212/98 (1999), 12th Activity Report, para. 52 (emphasis added).

of non-nationals is discriminatory on the basis of origin, the decision is of limited jurisprudential value to the normative content of the relevant ESC rights under the African Charter.

2.2.1.4. Right to Work

In *Annette Pagnouille (on behalf of Abdoulaye Mazou) vs Cameroon*,⁵⁰ the complainant, Mr. Mazou was a magistrate who was sentenced to 5 years imprisonment by a military tribunal without trial, without witnesses, and without a right to defend himself for hiding his brother who was later sentenced to death for an attempted coup d'état. After his release he was not reinstated in his former professional capacity as a magistrate even after the government granted amnesty to all persons sentenced to a punishment of imprisonment and/or fine. The Commission found that by not reinstating Mr. Mazou in his former position after the Amnesty Law, the government violated his right to work under Article 15 of the African Charter, because it has prevented Mr. Mazou to work in his capacity of a magistrate 'even though others who have been condemned under similar conditions have been reinstated' (para. 29). While the Commission's decision could be understood to imply that Article 16 protects the right not to be deprived of employment unfairly or in a discriminatory manner, it is silent on the normative content of the right to work. Does the right to work include an absolute and unconditional right to obtain employment or is it limited to the right of every human being to decide freely to accept or choose work?

2.2.1.5. Impact of the Commission's Pre-2001 ESC Rights Jurisprudence

The impact of the African Commission's pre-2001 jurisprudence on ESC rights was to establish that ESC rights are justiciable, in the sense that individuals and groups who claim to be victims of violations of these rights can file complaints before an impartial (quasi)-judicial body and request adequate remedies or redress if a violation has occurred or is likely to occur. The Commission clearly demonstrated that State compliance with human rights obligations relating to ESC rights (e.g. property, health, education, work) under the African Charter are subject to (quasi)-judicial review. By finding specific violations of ESC rights the Commission demonstrated that the African Charter requires African States to comply with their obligations to respect, protect and fulfil ESC rights at a domestic level in the same way as they are required in the case of civil and political rights. In this respect, the Commission's jurisprudence reinforced the principle of the interdependence of all human rights.

The impact of the African Charter and the Commission's jurisprudence on ESC rights at the domestic level may be seen from the fact that some aspects of ESC rights were protected within African national written constitutions before 2001. For

⁵⁰ Communication No. 39/90 (1997), 10th Activity Report.

example rights relating to property were protected in all 53 African constitutions; 46 constitutions protected the rights related to work; 29 constitutions recognised explicitly the right to freedom from slavery and forced labour; 45 constitutions protected the right to education; 41 constitutions recognised a right to culture; 39 constitutions recognised the right to health in various formulations; 29 constitutions recognised the right to social security; 12 constitutions recognised the right to housing and shelter; 8 constitutions protected the right to food and nutrition; and 6 constitutions recognised the right to ('clean and safe' or 'sufficient') water.⁵¹

While in some pre-2001 African constitutions (e.g. South Africa 1996) ESC rights were protected in the justiciable bill of rights, some constitutions (Lesotho 1993, Nigeria 1999, Sierra Leone 1991, and Sudan 1998) recognised ESC rights only as directive principles of State policy perceived as non-justiciable. In some constitutions (Eritrea 1997, Ethiopia 1995, The Gambia 1996, Ghana 1992, Guinea-Bissau 1984, Liberia 1986, Malawi 1994, Namibia 1990, Tanzania 1977, Uganda 1995, and Zambia 1991) some ESC rights were recognised in the bill of rights while others were only recognised as principles of State policy. The recognition of ESC rights in national constitutions provides a useful starting point to hold States accountable at the domestic level.

However, it should be noted that the Commission's pre-2001 jurisprudence shows that the African Commission found violations of specific ESC rights such as the rights to property, education, health and work but paid little attention to developing the normative content of the relevant rights. None of the pre-2001 decisions drew inspiration from international human rights law in order to interpret and develop the content of the African Charter's general provisions on ESC rights. This is despite the fact that Article 60 of the African Charter expressly provides that '[t]he Commission shall draw inspiration from international law on human and peoples' rights', particularly from the provisions of various African instruments on human and peoples' rights, the United Nations (UN) Charter, the Constitutive Act of the African Union (formerly the Charter of the Organisation of African Unity), the Universal Declaration of Human Rights, other instruments adopted by the UN and by African countries in the field of human and peoples' rights, as well as from the provisions of various instruments adopted within the UN specialised agencies of which the parties to the African Charter are members. The failure to develop the normative content of ESC rights meant the content of such rights remained vague. This led to the perception that ESC rights were mere principles and values, rather than human rights, and that most of these rights were not justiciable. Domestic courts did not rely on the Commission's jurisprudence.

⁵¹ See Heyns, C. and Kaguongo, W., 'Constitutional Human Rights Law in Africa', *South African Journal on Human Rights*, Vol. 22, No. 4, 2006, pp. 673–717.

2.2.1.6. Why Did the Commission Refrain from Developing the Normative Content of ESC Rights in its Pre-2001 Decisions?

Several reasons can be advanced to explain the Commission's approach to ESC rights before 2001. First, when the Commission commenced its work it had several limitations impacting on the quality of its decisions including those on ESC rights. Such limitations included the lack of expertise on the part of the Commission in dealing with cases involving violations of ESC rights, the lack of legal officers with expertise on ESC rights and the Commission's initial reluctance to pay greater attention to ESC rights.⁵² Even before the Commission was inaugurated, Prof. Umozurike, who later became the Commission's Chairperson, stated that 'it seems likely that the Commission will be more concerned with civil and political rights' noting that 'should it venture into economic and social ones, it would find too many problems in too many countries to cope with'.⁵³ Thus, developing jurisprudence on ESC rights and their enforcement was not a priority. This occurred within a broader context in which ESC rights tended to be marginalized as human rights in international human rights law and practice.

Second, the Commission also generally avoided dealing in-depth with the few cases before it (whether on issues relating to civil and political rights or ESC rights) because of the dominant perception, at the time, that: 'the main goal of the Commission's procedure is to initiate a positive dialogue, resulting into an amicable resolutions between the complainant and the state concerned'.⁵⁴ If the Commission's main goal was to initiate a 'positive dialogue', developing the normative content of rights through detailed (quasi)-judicial decisions was not considered as necessary to achieve the Commission's perceived main goal.

Third, civil society actors including individuals and NGOs did not bring several communications before the Commission alleging ESC rights violations. Even in the few cases brought before the Commission, submissions were not comprehensive. For example there were no communications alleging violations of the rights to adequate food, adequate housing, and social security.

Finally, the African Commission did not feel at ease in developing rights where there was little concrete international jurisprudence.⁵⁵ In fact, the UN system,

⁵² See Umozurike, U.O., 'The Protection of Human Rights under the Banjul (African) Charter on Human and Peoples' Rights', *African Journal of International Law*, Vol. 1, No. 1 1988, pp. 65–83, at p. 81; Umozurike, U.O., 'The African Charter on Human and Peoples' Rights: Suggestions for More Effectiveness', *Annual Survey of International & Comparative Law*, Vol. 13, 2007, pp. 179–190, at p. 185.

⁵³ Umozurike, U.O., 'The African Charter on Human and Peoples' Rights', *American Journal of International Law*, Vol. 77, No. 4, 1983, pp. 902–912, at p. 911.

⁵⁴ See *Free Legal Assistance Group, Lawyers' Committee for Human Rights, Union Interafricaine des Droits de l'Homme, Les Témoins de Jehovah vs Zaire [DRC]*, Communications Nos. 25/89, 47/90, 56/91, 100/93(1996), 9th Activity Report, para 39.

⁵⁵ See Report of the African Commission's Working Group of Experts on Indigenous Populations/Communities, (ACHPR/IWGIA, 2005).

particularly the UN Committee of Economic, Social and Cultural Rights (CESCR), in the 1990s was just developing the normative content of ESC rights and the nature of State obligations.⁵⁶ Expert guidelines on violations of ESC rights were only made in 1997.⁵⁷ These had not been applied in specific cases at either national or international levels.

2.2.2. *Decisions from 2001*

It is important to note that most decisions of the Commission on ESC rights decided on the merits from 2001 have relied increasingly on international human rights law to develop the normative content of some ESC rights under the African Charter. The decisions became longer with more elaborate reasoning. Some illustrative examples are considered below.

2.2.2.1. The Right to Property

After 2001, the Commission has interpreted the scope of the right to property in the African Charter by stating that it encompasses two main principles.⁵⁸ The first principle, which is of a general nature, provides for the principle of ownership and peaceful enjoyment of property.⁵⁹ The role of the State is to *respect* and *protect* this right against any form of encroachment, and to regulate the exercise of this right in order for it to be accessible to everyone, taking public interest into due consideration.⁶⁰ The second principle provides for the possibility, and conditions of deprivation of the right to property.⁶¹ Article 14 of the Charter recognises that States are in certain circumstances entitled, among other things, to control the use of property in accordance with the ‘public or general interest’, by enforcing such laws as they deem necessary for the purpose.⁶² The confiscation of private property without a showing of a public or general interest of the community would be arbitrary and in violation of Article 14.

⁵⁶ The CESCR clarified the scope of several substantive rights such as the right to adequate housing, the right to adequate food and the right to education in the 1990s. See CESCR, *General Comments* 4, 7, 12 and 13.

⁵⁷ See Maastricht Guidelines on Violations of Economic, Social and Cultural Rights, Maastricht, 22–26 January 1997, *Human Rights Quarterly*, Vol. 20 No. 3, 1998, pp. 691–704.

⁵⁸ See *Interights, Institute for Human Rights and Development in Africa, and Association Mauritanienne des Droits de l’Homme vs Islamic Republic of Mauritania*, Communication 373/2009 (formerly 242/2001), (2010), 28th Activity Report, para. 44.

⁵⁹ *Idem*.

⁶⁰ *Ibidem*, para. 43.

⁶¹ *Ibidem*, para. 44.

⁶² *Idem*.

2.2.2.2. The Right to Health and the Right to a Clean Environment

In *The Social and Economic Rights Action Center and the Center for Economic and Social Rights vs Nigeria*⁶³ (SERAC case) the complainants alleged that the Nigerian government violated the right to health and the right to a clean environment as recognized under Articles 16 and 24 of the African Charter by failing to fulfil the minimum duties required by these rights.⁶⁴ This, the Complainants alleged, the government did by: (i) directly participating in the contamination of air, water and soil and thereby harming the health of the Ogoni population; (ii) failing to protect the Ogoni population from the harm caused by the Nigerian National Petroleum Company (NNPC) in a consortium with Shell Petroleum Development Corporation (SPDC) but instead using its security forces to facilitate the damage; and (iii) failing to provide or permit studies of potential or actual environmental and health risks caused by the oil operations. Unlike in the previous cases, the Commission commented on the normative content of the right to a healthy environment under Articles 16 and 24 by stating as follows:

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

⁶³ *Communication 155/96, (2001), 15th Activity Report, Annex V. Done at the 30th Ordinary Session, held in Banjul, The Gambia from 13–27 October 2001. For a comment on this case see Shelton, D., 'Decision Regarding Communication 155/96: Social and Economic Rights Action Center and the Center for Economic and Social Rights v Nigeria', *American Journal of International Law*, Vol. 96, No. 4, 2002, pp. 937–941.*

⁶⁴ Article 24 of the African Charter reads: 'All peoples shall have the right to a general satisfactory environment favourable to their development'.

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.

Applying the above standards to the facts of the case, the Commission concluded that although Nigeria had the right to produce oil, it had not protected the rights of the Ogoni under Article 16 and 24. Thus, the Commission read the rights to health and to a clean environment together.

In a decision adopted in 2009, the *Centre on Housing Rights and Evictions vs The Sudan*,⁶⁵ (COHRE case) the Commission further elaborated on the scope of the right to health under Article 16 by relying on the interpretation of the right to health in international law. In this communication, the complainants alleged gross, massive and systematic violations of human rights by the Republic of Sudan (involving destruction of homes, livestock and farms as well as the poisoning of water sources) against the indigenous Black African tribes in the Darfur region of Western Sudan, in particular, members of the Fur, Marsalit and Zaghawa tribes. It was claimed that the Republic of Sudan was complicit in looting and destroying foodstuffs, crops and livestock as well as poisoning wells and denying access to water sources in the Darfur region in violation of Article 16. The Commission gave the right to health meaningful content by relying on the normative definition of the right to health as spelt out by the UN Committee on Economic, Social and Cultural Rights in General Comment No. 14 on the ‘The right to the highest attainable standard of health’.⁶⁶ The Commission stated that:

209. In its General Comment No. 14 on the right to health adopted in 2000, the UN Committee on Economic, Social and Cultural Rights sets out that, ‘the right to health extends not only to timely and appropriate health care but also to the underlying determinants of health, such as, access to safe and portable water, an adequate supply of safe food, nutrition, and housing [...]’. In terms of the General Comment, the right to health contains four elements: availability, accessibility, acceptability and quality, and impose three types of obligations on States – to respect, fulfil and protect the right. In terms of the duty to protect, the State must ensure that third parties (non-state actors) do not infringe upon the enjoyment of the right to health.

210. Violations of the right to health can occur through the direct action of States or other entities insufficiently regulated by States. According to General Comment 14, ‘states should also refrain from unlawfully polluting air, water and soil, [...] during armed conflicts in violation of international humanitarian law [...]’. States should also ensure that third parties

⁶⁵ Communication Nos. 279/03 & 296/05 (2009), 28th Activity Report. Adopted during the 45th Ordinary Session, held between 13–27 May 2009, Banjul, The Gambia. The decision was not made public until July 2010.

⁶⁶ UN Doc. E/C.12/2000/4, (11 August 2000).

do not limit people's access to health-related information and services, and the failure to enact or enforce laws to prevent the pollution of water [...] [violates the right to health].

Applying this understanding of the right to health – as extending to healthcare and the underlying determinants of health – to the facts, the Commission found that 'the destruction of homes, livestock and farms as well as the poisoning of water sources, such as wells exposed the victims to serious health risks and amounts to a violation of Article 16 of the Charter'.⁶⁷ It is likely that in appropriate communications in the future the Commission will continue to rely on the General Comments of the UN Committee on Economic, Social and Cultural Rights to interpret ESC rights under the Charter as it did in the *Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council vs Kenya*,⁶⁸ *SERAC* and *COHRE* cases.

2.2.2.3. Examples of Implied Rights: Housing, Food, Social Security, Water and Sanitation

In the *SERAC* Case the Commission further innovatively interpreted the Charter through implying other rights not expressly protected in the Charter. This was done by reading into the Charter the rights to adequate housing and food. The Commission stated that 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 (Article 16), the right to property (Article 14), and the protection accorded to the family (Article 18(1)) forbids the wanton destruction of shelter because when housing is destroyed, property, health, and family life are adversely affected.⁶⁹ It concluded that the 'combined effect of Articles 14, 16 and 18(1) reads into the Charter a right to shelter or housing'.⁷⁰ This entails the obligation to refrain from, and protect against, forced evictions from home(s) and land; and ensuring access to adequate housing which includes access to safe drinking water, energy for cooking, heating, cooling and lighting, sanitation and washing facilities, means of food storage, refuse disposal, site drainage and emergency services.⁷¹

With respect to the right to food, it was argued that it is implicit in the African Charter, in such provisions as the right to life (Article 4), the right to health (Article 16) and the right to economic, social and cultural development (Article 22).

⁶⁷ Communication Nos. 279/03 & 296/05, *supra* note 65, para. 212.

⁶⁸ Communication No. 276/2003, (2009), 27th Activity Report, para. 200 citing with approval *General Comment No. 4: The Right to Adequate Housing*, UN Doc. E/1992/23, annex III at 114 (1991), para. 18; and *General Comment No. 7: Forced Evictions and the Right to Adequate Housing*, U.N. Doc. E/1998/22, annex IV at 113 (1998), para. 14.

⁶⁹ *Communication 155/96*, *supra* note 63, para. 60.

⁷⁰ *Ibidem*.

⁷¹ Draft Principles and Guidelines, *supra*. note 24, para. 64.

The Commission accepted that the right to food is inseparably linked to the dignity of human beings and is therefore essential for the enjoyment and fulfilment of such other rights as health, education, work and political participation.⁷² It then stated that 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'.⁷³ The right to food entails a State obligation to ensure that individuals including members of vulnerable and disadvantaged groups in a State's jurisdiction are free from hunger and are ensured food security and sufficient, accessible and quality food culturally acceptable.⁷⁴ By its violation of the rights protected in Articles 4, 14, 16, and 18(1) of the African Charter, the Commission found that the Nigerian government trampled upon not only the rights explicitly protected but also upon the rights to adequate housing and food implicitly guaranteed.

Other ESC rights implied in the African Charter include the rights to social security, water and sanitation.⁷⁵ The right to social security is derived from a joint reading of Articles 4, 5, 6, 15, 16, and 18 of the African Charter that protect the rights to life, dignity, liberty, work, health, protection of the family, the aged and persons with disabilities. The right to water and sanitation is derived from the joint reading of Articles 4, 5, 15, 16, 22, and 24 protecting the rights to life, dignity, work, health, economic, social and cultural development and the right to a satisfactory environment.

It should be noted that the Commission might be criticised for creating additional rights in the Charter which States never consented to (and thus compromise legal certainty or rule of law). However, it is in line with the Commission's Reporting Guidelines which require States to report on rights not explicitly protected in the Charter (e.g. the right to an adequate standard of living;⁷⁶ the right to social security;⁷⁷ and rights to rest, leisure, limitation of working hours, and holiday with pay, and trade union rights⁷⁸). Moreover, these rights are protected in other international human rights treaties such as the ICESCR to which the vast majority of African States are parties without reservations. The rights to adequate food and housing are also protected in other African human rights instruments.⁷⁹ This approach of implying rights in the African Charter found support in the Statement on Social, Economic and Cultural Rights in Africa, adopted on 17 September 2004, in Pretoria, South Africa.⁸⁰

⁷² *Ibidem*, para. 65.

⁷³ *Idem*.

⁷⁴ Draft Principles and Guidelines, *supra* note 24, para. 70.

⁷⁵ *Ibidem*, paras. 65–67, 71–75.

⁷⁶ Guidelines for National Periodic Reports, *supra* note 24, paras II.A.31–34.

⁷⁷ *Ibidem*, para. II.18.

⁷⁸ *Ibidem*, paras. 9, 10, and 17.

⁷⁹ See e.g. Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa, *supra* note 6, Articles 15 and 16.

⁸⁰ For the text see *African Human Rights Law Journal*, Vol. 5, No. 1, 2005, pp. 182–193. See also Khoza, S., 'Promoting Economic, Social and Cultural Rights in Africa: The African Commission Hold a

This Statement which has since been adopted by the Commission,⁸¹ asserts that the ESC rights ‘explicitly provided for under the African Charter, read together with other rights in the Charter, such as the right to life and respect for inherent human dignity, imply the recognition of other economic and social rights, including the right to shelter, the right to basic nutrition and the right to social security’.⁸² The effect of this interpretation is to read into the African Charter all ESC rights not stated in the Charter. In the *COHRE* case the Commission reaffirmed that Article 16 of the African Charter protects implicitly the rights to adequate food and housing, including the prohibition on forced evictions, and also guarantees the right to water. All these are underlying determinants of health. No State has challenged ‘implied’ rights in the Charter suggesting that the Commission’s approach reflects a contemporary reading of the African Charter which is consistent with international human rights law.

2.2.2.4. The Right to Education

The Commission decisions to-date have not addressed to scope of the right to education under Article 17(1) of the African Charter. For example in *Kevin Mgwanga Gumne et al vs Cameroon* the complainants alleged that Cameroon violated Article 17 of the Charter, because it was destroying education in the Southern Cameroons by underfunding and understaffing primary education.⁸³ It was also alleged that Cameroon imposed inappropriate reform of secondary and technical education. It was further alleged that the State discriminates Southern Cameroonians in the admission into the *Polytechnique* in Yaoundé, and refused to grant authorisation for registration of the Bamenda University of Science and Technology, thereby violating Article 17 on the right to education. The African Commission found that there was no violation of the right to education under Article 17(1) of the African Charter, without elaborating on the content of this right, because the ‘Complainants did not substantiate the allegations’.⁸⁴ This was a missed opportunity to clarify the scope of the right to education under the African Charter.

However, the scope of the right to education under Article 17 of the African Charter was clarified by the African Commission in its Draft Principles and Guidelines on Economic, Social and Cultural Rights in the African Charter.⁸⁵ The Commission indicated that the right to education includes the right of all children to free and compulsory primary education; to make secondary (including technical

Seminar in Pretoria’, *African Human Rights Law Journal*, Vol. 4, No. 2, 2004, pp. 334–343.

⁸¹ Resolution on Economic, Social And Cultural Rights in Africa, ACHPR /Res.73(XXXVI)04 (2004).

⁸² Statement on Social, Economic and Cultural Rights in Africa, *supra* note 80, para. 10. See also Draft Principles and Guidelines on Economic, Social and Cultural Rights, *supra* note 24, paras. 64–75 (implying rights to housing, social security, food, water and sanitation in the African Charter).

⁸³ Communication 266/2003, (2009), 26th Activity Report, Annex IV, para. 145.

⁸⁴ *Ibidem*, para. 149.

⁸⁵ Draft Principles and Guidelines, *supra*. note 24, para. 57.

and vocational) education available and accessible to all; to make higher and tertiary education equally accessible to all, on the basis of capacity; to ensure accessible and affordable adult education; the prohibition on the use of corporal punishment; to ensure that all educational programmes are of a high quality and appropriate to the needs of society; and to ensure academic freedom in all schools and institutions of higher learning.⁸⁶

2.2.2.5. The Right to Cultural Life

With respect to the right to the right to cultural life under Article 17(2), the African Commission has understood culture to include ‘cultural diversity’ by stating that:

[...] Article 17 of the Charter is of a dual dimension in both its individual and collective nature, protecting, on the one hand, individuals’ participation in the cultural life of their community and, on the other hand, obliging the state to promote and protect traditional values recognised by a community. It thus understands culture to mean that complex whole which includes a spiritual and physical association with one’s ancestral land, knowledge, belief, art, law, morals, customs, and any other capabilities and habits acquired by humankind as a member of society – the sum total of the material and spiritual activities and products of a given social group that distinguish it from other similar groups. It has also understood cultural identity to encompass a group’s religion, language, and other defining characteristics.⁸⁷

If Article 17(2) of the African Charter is interpreted in light of Article 15 of the ICESCR, ‘cultural life’ should be interpreted as encompassing, *inter alia*, ways of life, language, oral and written literature, music and song, non-verbal communication, religion or belief systems, rites and ceremonies, sport and games, methods of production or technology, natural and man-made environments, food, clothing and shelter and the arts, customs and traditions through which individuals, groups of individuals and communities express their humanity and the meaning they give to their existence, and build their world view representing their encounter with the external forces affecting their lives.⁸⁸ Although the right to take part in cultural life of the community includes ‘the inalienable right [of any people] to organise its cultural life in full harmony with its political, economic, social, philosophical and spiritual ideas’,⁸⁹ cultural practices must be consistent with international norms on human and peoples’ rights.⁹⁰ Thus, participation in cultural life under Article 17(2) of the

⁸⁶ *Ibidem*.

⁸⁷ Communication No. 276/2003, *supra*. note 70, para. 241.

⁸⁸ Committee on Economic, Social and Cultural Rights, *General Comment No. 21: Right of Everyone to Take Part in Cultural Life*, UN Doc. E/C.12/GC/21 (21 December 2009), para 13.

⁸⁹ See Cultural Charter for Africa, adopted 15 July 1976, entered into force 19 September 1990, preamble.

⁹⁰ See African Charter, *supra*. note 1, Articles 60 and 61.

African Charter cannot be invoked to infringe upon human rights guaranteed by international law, or to limit their scope. By implication States are obliged to eradicate all forms of harmful cultural practices such as female genital mutilation which violate human rights.⁹¹

Thus, States have the duty to tolerate cultural diversity or multiculturalism and to introduce measures that protect identity groups different from those of the majority/ dominant group in accordance with international human rights law. The Commission has thus interpreted Article 17(2) as requiring governments to take measures 'aimed at the conservation, development and diffusion of culture', such as promoting 'cultural identity as a factor of mutual appreciation among individuals, groups, nations and regions; [...] promoting awareness and enjoyment of cultural heritage of national ethnic groups and minorities and of indigenous sectors of the population'.⁹²

2.2.2.6. Impact of the Commission's Post-2001 ESC Rights Jurisprudence

The Commission's jurisprudence on most ESC rights from 2001 has generally been helpful in developing the normative content of these rights and in clarifying the nature of State obligations, remedies for violations of ESC rights and limitations to and derogations from ESC rights under the African Charter (as shown in sections 3 and 4 below). As the examples considered above demonstrate, the Commission has been able to develop the normative content of some ESC rights in its decisions on merits concerning some ESC rights e.g. the right to property, health and participation in cultural life. In addition, as noted above, the Commission's jurisprudence has led to reading 'new' ESC rights into the Charter in particular the rights to adequate food and housing, rights that were not explicitly included in the text of the African Charter. As a result of these developments the Commission has been able to develop principles and guidelines on ESC rights consolidating the normative standards on ESC rights.

The jurisprudence of the African Commission on ESC rights has also had an impact at the sub-regional level in Africa as reflected in the decisions of African sub-regional institutions giving prominence to the justiciability of ESC rights. For example, in the *Socio-Economic Rights and Accountability Project (SERAP) vs Federal Republic of Nigeria and Universal Basic Education Commission*,⁹³ the plaintiff claimed before the Economic Community of West African States Community Court of Justice (ECOWAS Court) a violation of the right to education under Article 17 of the African Charter due to alleged lack of adequate implementation of Nigeria's Compulsory and Basic Education Act 2004 and the Child's Rights Act, 2004. The ECOWAS Court considered whether it had the jurisdiction to adjudicate a claim involving an alleged violation of the right to education under Article 17 of the African Charter. Relying on Article

⁹¹ Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa, *supra* note 6, Article 5.

⁹² Guidelines for National Periodic Reports, *supra* note 24.

⁹³ Suit No. ECW/CCJ/APP/0808 (27 October 2009).

9(4) of the Supplementary Protocol to the Treaty establishing the ECOWAS Court⁹⁴ and Article 4(g) of the Revised Treaty of ECOWAS,⁹⁵ the Court held that ‘it is well established that the rights guaranteed by the African Charter on Human and Peoples’ Rights are justiciable before this Court’.⁹⁶ The Court dismissed the government’s contention that education is ‘a mere directive policy of the government and not a legal entitlement of the citizens’, concluding that the contention of the government that ‘the right to education is not justiciable as it falls within the directive principles of state policy cannot hold’.⁹⁷ The decision is in line with the jurisprudence of the African Commission which establishes that all rights under the African Charter including ESC rights are justiciable.

The ECOWAS Court has also relied on the jurisprudence of the African Commission to allow public interest litigation which enables NGOs to file complaints against human rights violations, including ESC rights violations, before the ECOWAS Court. This has been done without the need for any specific mandate from the people affected. For example, in *The Registered Trustees of the Socio-Economic Rights & Accountability Project (SERAP) vs President of the Federal Republic of Nigeria & Ors*,⁹⁸ the ECOWAS Court relied on the decision of the African Commission in *SERAC vs Nigeria*⁹⁹ and stated:

Taking into account the need to reinforce the access to justice for the protection of human and people rights in the African context, the Court holds that an NGO duly constituted according to national law of any ECOWAS Member State, and enjoying observer status before ECOWAS institutions, can file complaints against human rights violation in case that the victim is not just a single individual, but a large group of individuals or even entire communities.¹⁰⁰

At a domestic level, several African States increasingly protect ESC rights either in ordinary legislation or in national constitutions.¹⁰¹ For example, Nigeria has given effect to the domestication of the African Charter by virtue of the African Charter on Human and Peoples’ Rights (Ratification and Enforcement) Act,¹⁰² which empowers the Nigerian courts to enforce or give remedies under the provision of the African

⁹⁴ Article 9(4) of the Supplementary Protocol grants the Court jurisdiction to determine cases of violations of human rights in Member States of ECOWAS.

⁹⁵ Revised Treaty of ECOWAS, available at: www.comm.ecowas.int/sec/index.php?id=treaty&lang=en. Article 4(g) of the Revised Treaty of ECOWAS affirms and declares the adherence of ECOWAS Member States to the ‘recognition, promotion and protection of human and peoples’ rights in accordance with the provisions of the African Charter on Human and Peoples’ Rights’.

⁹⁶ Suit No. ECW/CCJ/APP/0808, *supra* note 93, para. 20.

⁹⁷ *Ibidem*.

⁹⁸ Suit No. ECW/CCJ/APP/08/09 (20 December 2010).

⁹⁹ Communication 155/96, *supra*. note 63, para. 49.

¹⁰⁰ *Idem*, para. 61.

¹⁰¹ Viljoen, *op.cit.* note 2, 568–585.

¹⁰² Chapter 10, Laws of the Federation of Nigeria 1990.

Charter. In States which protect ESC rights in national constitutions ESC rights are protected either as directive principles of State policy and/or as part of the Bill of Rights. Recent constitutions in Africa protect justiciable ESC rights demonstrating the trend towards more recognition of the priority to be accorded to these rights. For example, the Constitution of the Republic of Angola 2010 protects several ESC rights in the justiciable Bill of Rights including the rights to work (Article 76), health and social protection (Article 77), education and culture (Article 79), and the right to housing (Article 85).

In a similar manner the Constitution of Kenya 2010 protects a wide range of ESC rights in Article 43 as follows:

- (1) Every person has the right –
 - (a) to the highest attainable standard of health, which includes the right to health care services, including reproductive health care;
 - (b) to accessible and adequate housing, and to reasonable standards of sanitation;
 - (c) to be free from hunger, and to have adequate food of acceptable quality;
 - (d) to clean and safe water in adequate quantities;
 - (e) to social security; and
 - (f) to education.
- (2) A person shall not be denied emergency medical treatment.
- (3) The State shall provide appropriate social security to persons who are unable to support themselves and their dependants.

Likewise the Transitional Constitution of the Republic of South Sudan, 2011 protects in the Bill of Rights the right to property (Article 28), education (Article 29), healthcare (Article 31) and housing (Article 34). Article 9(2) states that: ‘The rights and freedoms of individuals and groups enshrined in this Bill shall be respected, upheld and promoted by all organs and agencies of Government and by all persons’.

The South African Constitution is also very well known for its protection of ESC rights as justiciable rights.¹⁰³ It requires the State to take ‘reasonable’ legislative and other measures to achieve the ‘progressive realisation’ of several ESC rights ‘within available resources’. This standard of ‘reasonable’ measures has been elaborated upon by the South African Constitutional Court in key ESC rights cases.¹⁰⁴ At least in part, all the above developments are an attempt to give effect to at a domestic level to the

¹⁰³ See Constitution of South Africa 1996, Sections 24–29 protecting healthy environment, land and natural resources, housing, healthcare, food, water, social security, and education.

¹⁰⁴ See e.g. *Soobramoney vs Minister of Health (Kwazulu-Natal)* (CCT32/97); 1998 (1) SA 765 (CC) (27 November 1997); *Government of the Republic of South Africa and Others vs Grootboom and Others* (CCT11/00) 2001 (1) SA 46 (4 October 2000); *Minister of Health and Others vs Treatment Action Campaign and Others* (No 1) (CCT9/02) 2002 (5) SA 703 (5 July 2002); *Khosa and Others vs Minister of Social Development and Others, Mahlaule and Another vs Minister of Social Development* (CCT 13/03, CCT 12/03) 2004 (6) SA 505 (CC) (4 March 2004); *Mazibuko and Others vs City of Johannesburg and Others* (CCT 39/09) 2010 (4) SA 1 (CC) (8 October 2009).

protection of ESC rights under the African Charter, as elaborated by the African Commission.

2.2.2.7. Why Has the Commission Developed its Approach to the Normative Content of ESC Rights in its Decisions from 2001?

There are several reasons for the change in the Commission's approach to ESC rights communications. First, the approach of the Commission has been influenced by developments in the international discourse on ESC rights including the trend towards increasing justiciability of ESC rights. Since 1999 the CDESCR has, through several General Comments, developed the normative content of ESC rights and the corresponding State obligations, including the right to adequate food, education, health, water, work and social security. Some of these rights have also been the subject of adjudication before domestic jurisdictions. Thus, the Commission has benefitted from these developments in the clarification of normative international standards as reflected in its increased use of international human rights law to interpret the general provisions of the African Charter. The approach of the Commission is in line with the developments towards increased justiciability of ESC rights at both the international and domestic levels. To be sure, the emerging consensus that the idea that ESC rights, as a whole category, are not fit for (quasi)judicial adjudication is 'seriously misguided'.¹⁰⁵

Second, a more detailed approach to ESC rights may be attributed to several other factors with a direct impact on the Commission's work including 'Commissioners who were prepared to articulate reasons more clearly, by better secretarial support,¹⁰⁶ and through improved contribution of pleadings by the parties' as well as the greater and increasingly critical engagement of States.¹⁰⁷ Furthermore, NGOs with a focus on ESC rights have been essential in bringing ESC rights cases before the Commission and further improving the quality of legal arguments before the Commission in favour of ESC rights. Such NGOs include the Social and Economic Rights Action Center (SERAC),¹⁰⁸ the Center for Economic and Social Rights and the Socio-Economic Rights and Accountability Project.¹⁰⁹

¹⁰⁵ See e.g. International Commission of Jurists, *Courts and the Legal Enforcement of Economic, Social and Cultural Rights*, Geneva, International Commission of Jurists, 2008, 103. See also Ssenyonjo, M., 'Reflections on State Obligations with Respect to Economic, Social and Cultural Rights in International Human Rights Law', *The International Journal of Human Rights*, Vol. 15, No.6, 2011, pp. 969–1012.

¹⁰⁶ At the time of writing a small full-time secretariat but inadequately resourced, based in Banjul, the Gambia, and headed by a Secretary, provides continuity and administrative support to the Commission. It does the necessary legal research and prepares draft decisions for the commissioners.

¹⁰⁷ Viljoen, *op.cit.* note 2, 354.

¹⁰⁸ See e.g. *Social and Economic Rights Action Center (SERAC) vs Nigeria*, Communication 370/09.

¹⁰⁹ See e.g. *Socio-Economic Rights and Accountability Project vs Libya*, Communication 378/09; *Socio-Economic Rights and Accountability Project (SERAP) vs the Federal Republic of Nigeria*,

Finally, the adoption of the AU Constitutive Act on 11 July 2000, which replaced the 1963 Charter of the Organisation of African Unity (OAU Charter),¹¹⁰ placed more emphasis on the promotion and protection of human rights in accordance with the African Charter and other relevant human rights instruments.¹¹¹ This includes the promotion and protection of ESC rights. The Commission has therefore given more focus to ESC rights since its 36th Ordinary Session held from 23 November to 7 December 2004 in Dakar, Senegal, when the Commission adopted Resolution 73 specifically on 'Economic, Social and Cultural Rights in Africa'.¹¹² One of the decisions coming from Resolution 73 was the establishment of a Working Group composed of members of the African Commission and NGOs with a mandate to develop and propose to the African Commission 'draft principles and guidelines on economic, social and cultural rights'. The Working Group developed two documents: (1) a compilation of Principles and Guidelines on Economic, Social and Cultural Rights and (2) a compilation of Reporting Guidelines on Economic, Social and Cultural Rights in Africa adopted by the Commission with amendments in November 2010.¹¹³ These Guidelines consolidate the jurisprudence of the African Commission on ESC rights and would guide States in complying with their reporting obligations on ESC rights under the African Charter.

3. STATE AND NON-STATE ACTOR OBLIGATIONS UNDER THE AFRICAN CHARTER

The purpose of this section is two-fold. It reviews the African Commission's emerging jurisprudence on State obligations with respect to ESC rights. It also considers the Commission's approach to the question of whether NSAs (non-parties to the African Charter) have any human rights obligations under the African Charter, and in particular to respect ESC rights.

3.1. CLARIFYING STATE OBLIGATIONS

There are four aspects of State obligations considered below. First consideration is made of the tripartite typology of State obligations under 'respect, protect and fulfil'

Communication 338/07. The Case was declared admissible by the Economic Community of West African States (ECOWAS) Court of Justice in *Socio-Economic Rights and Accountability Project (SERAP) vs Federal Republic of Nigeria and Universal Basic Education Commission*, No. ECW/CCJ/APP/0808.

¹¹⁰ 479 UNTS 39, entered into force 13 September 1963.

¹¹¹ See the Constitutive Act of the African Union, CAD/LEG/23.15, entered into force 26 May 2001, preamble, Article 3(e) and (h), Article 4 (g)-(p).

¹¹² ACHPR/Res.73(XXXVI)04, (2004).

¹¹³ See Report of the 48th Ordinary Session of the African Commission on Human and Peoples' Rights (10–24 November 2010, Banjul, The Gambia), para. 244.

as applied by the African Commission. Second, the notion of ‘progressive realisation’ of ESC rights subject to available resources is considered in the context of the African Charter. Third, the obligation to eliminate discrimination is outlined. Finally, the extraterritorial application of the African Charter is considered.

3.1.1. *Respect, Protect and Fulfil*

The general obligation of State Parties to the African Charter as stated in Article 1 of the Charter is to ‘recognise the rights, duties and freedoms’ enshrined in the Charter and to ‘undertake to adopt legislative or other measures to give effect to them’. This is not explicitly subjected to progressive realisation. Thus, State Parties are obliged to ‘recognise’ immediately ESC rights by adopting legislative or other (non-legislative) measures to produce the result of preventing all violations of the African Charter. This obligation was clarified by the African Commission in *The Social and Economic Rights Action Center and the Center for Economic and Social Rights vs Nigeria*.¹¹⁴ In this case, which dealt with gross human rights violations (by Shell, acting in collaboration with the government of Nigeria) in the oil-rich Ogoniland region of Nigeria, the African Commission stated 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 fulfil’ these rights.¹¹⁵ This typology of State obligations has been explained by the Commission as follows:

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. At a secondary level, the State is required to ensure others also respect their rights. This is what is called the State’s obligation 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 of 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. The last layer of obligation requires the

¹¹⁴ *Communication 155/96*, *supra* note 63.

¹¹⁵ *Ibidem*, paras. 44–47. However, this analysis is not always applied consistently by the Commission. For example, in the *COHRE* case, *supra* note 65, para. 191, the Commission stated the ‘State has an obligation under Article 14 of the African Charter not only to *respect* the “right to property”, but also to *protect* that right’. No reference was made to the State obligation to *promote* and to *fulfil* the right to property. The obligation to *promote* was only made with reference to ‘cultural rights’ in para. 248.

State to *fulfil* 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.¹¹⁶

The Commission found that the killing and destruction by government forces and agents of the State-controlled oil company violated Nigeria's duty to 'respect' the right to life and dignity, the right to health, property, and the 'implied' rights to shelter and food, as well as the right to economic, social, and cultural development of the Ogonis. Thus, all substantive ESC rights (explicitly and implicitly) protected under the Charter entail the above duties on the State subject to available resources.

3.1.2. *Progressive Realisation*

Although the African Charter does not explicitly subject State obligations under the Charter to the notion of 'progressive realisation' subject to 'available resources', the Commission read this into Article 16 of the Charter in *Purohit and Moore vs The Gambia (Purohit case)*.¹¹⁷ In this communication, while interpreting State obligations with respect to the right to health under Article 16 of the African Charter, the African Commission recognised that 'African countries are generally faced with the problem of poverty which renders them incapable to provide the necessary amenities, infrastructure and resources that facilitate the full enjoyment of this right'.¹¹⁸ Accordingly, the Commission held that State Parties to the African Charter have to take 'concrete and targeted steps', while taking full advantage of their *available resources*, to 'ensure' that the right to health is fully realised in all aspects without discrimination of any kind.¹¹⁹ This confirms the view of the UN Committee on Economic, Social and Cultural Rights expressed in several General Comments.¹²⁰ Since the African Charter does not explicitly make the 'fulfilment' of its rights dependent on 'available resources', it may be questioned whether the reference to available resources in the *Purohit* case was influenced by the specific wording of Article 16 (which provides for the 'best attainable' state of health and 'necessary measures') or whether it applies generally to all other rights. While this is not clear from the Commission's decision, it has been argued that the reference to available resources was not a general statement about the duty to 'fulfil' rights and should therefore not, on the basis of this decision, be applied to the 'unqualified' right to education.¹²¹

¹¹⁶ *Zimbabwe Human Rights NGO Forum vs Zimbabwe*, Communication 245/2002, Annex III, (2006), 21st Activity Report at 54, para. 152.

¹¹⁷ Communication No. 241/2001, (2003), 16th Activity Report, Annex VII.

¹¹⁸ *Ibidem*, para. 84.

¹¹⁹ *Idem*.

¹²⁰ See CESCR, *General Comments*, available at: www2.ohchr.org/english/bodies/cescr/comments.htm.

¹²¹ Viljoen, *supra* note 2, 240. Article 17(1) of the African Charter simply states: 'Every individual shall have the right to education'.

However, in practice it remains a fact that the problem of poverty renders African countries incapable of not only providing the necessary amenities, infrastructure and resources that facilitate the full enjoyment of the right to health, but also other rights including ESC rights (such as education, adequate housing, and social security) as well as civil and political rights (such as the provision of adequate legal aid, establishing sufficient courts, re-education of police, training of lawyers and judges essential for a fair trial). Thus, the progressive realisation of all human rights subject to available resources is inevitable for many African States. In this respect Article 13(3)(a) and (b) of the African Children's Charter while obliging States to 'provide free and compulsory basic education', requires States to merely 'encourage the development of secondary education in its different forms and to *progressively* make it free and accessible to all' (emphasis added). The Commission's guidelines on State reports have also taken a realistic approach indicating that ESC rights have to be realised 'progressively'. For example, States are required to report about measures 'for the *progressive* implementation of the principle of compulsory education free of charge'¹²² and on how social security benefits are extended to 'further groups of the population'.¹²³

Progressive realisation is necessarily linked to the available resources for State parties to the African Charter, which 'are developing countries with scarce resources'.¹²⁴ Thus, a State Party to the African Charter is only under 'obligation to invest its resources in the best way possible to attain the progressive realisation of [...] economic, social and cultural rights'.¹²⁵ It follows that a State is not required to do more than what its available resources permit. Of course, a State would be required to develop existing resources and to use available resources in the 'best way possible' (i.e. to the maximum) to enhance the realisation of ESC rights.¹²⁶

3.1.3. *Elimination of Discrimination*

State Parties to the African Charter have a general obligation to eliminate discrimination, formally (in law) and substantively (in practice) since non-discrimination is a 'fundamental principle' in international human rights law essential to the exercise and enjoyment of all human rights including ESC rights.¹²⁷ In this regard, Article 2 of the African Charter emphatically stipulates that:

¹²² Guidelines for National Periodic Reports, *supra* note 14, para II.B.58 (emphasis added).

¹²³ *Ibidem*, para. II.19.

¹²⁴ *Kevin Mgwanga Gumne et al vs Cameroon*, Communication 266/2003, (2009), 26th Activity Report, Annex IV, para. 206.

¹²⁵ *Idem*.

¹²⁶ *Idem*.

¹²⁷ *Kenneth Good vs Republic of Botswana*, Communication 313/05, (2010), 28th Activity Report, Annex IV, para 218.

Every individual shall be entitled to the enjoyment of the rights and freedoms recognised and guaranteed in the present Charter without distinction of any kind such as race, ethnic group, colour, sex, language, religion, political or any other opinion, national and social origin, fortune, birth or other status.

Relying on comparative human rights law, the Commission has stated that a violation of the principle of non-discrimination arises if equal cases are treated in a different manner; and such a difference in treatment does not have an objective and reasonable justification; and if there is no proportionality between the aim sought and the means employed.¹²⁸ The Commission has further stated that to determine whether one has been the victim of discrimination or not, the allegation has to be weighed against the three tests set above:

Was there equal treatment? If not, was the differential treatment justifiable? Was the aim of the difference in treatment proportionate to the aim sought and means employed? These three benchmarks are cumulative requirements and hence the non-compliance with any of the three requirements makes a treatment discriminatory.¹²⁹

It can be discerned from the Commission's jurisprudence that State Parties to the African Charter have a general obligation not only to refrain from discrimination on the prohibited grounds¹³⁰ but also to take temporary special measures in favour of marginalised groups, which suffer historical or persistent prejudice in order to attenuate or suppress conditions that perpetuate discrimination.¹³¹ As the Commission has clearly stated, 'in certain cases, positive discrimination or affirmative action helps to redress imbalance'.¹³²

It is to be noted that discrimination constitutes any distinction, exclusion, restriction or preference or other differential treatment that is directly or indirectly based on the prohibited grounds of discrimination and which has the intention or effect of nullifying or impairing the recognition, enjoyment or exercise by everyone, on an equal footing, of all the rights and freedoms protected in the African Charter.¹³³

¹²⁸ *Ibidem*, para. 219, citing *Marckx vs Belgium* (6833/74) [1979] ECHR 2 (13 June 1979); *Proposed Amendments to the Naturalization Provisions of the Constitution of Costa Rica*, Advisory Opinion Oc-4/84, January 19, 1984, Inter-Am. Ct. H.R. (Ser. A) No. 4 (1984) para. 57; Human Rights Committee, *General Comment No. 18: Non-Discrimination*, UN Doc. HRI/GEN/1/Rev.1 at 26 (1994), para. 13.

¹²⁹ *Kenneth Good vs Botswana*, *supra* note 127, para. 222.

¹³⁰ See e.g. *Communication No. 159/96*, *supra* note 39.

¹³¹ Communication No. 276/2003, *supra* note 68, para. 196. Article 18(4) of the African Charter specifically states: 'The aged and the disabled shall also have the right to special measures of protection in keeping with their physical or moral needs'.

¹³² Communication No. 276/2003, *supra* note 68, para. 196.

¹³³ Communication No. 245/2002, *supra* note 116, para. 170. For similar definitions see International Convention on the Elimination of All Forms of Racial Discrimination (ICERD), 660 UNTS 195, entered into force 4 January 1969, Article 1; Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), UN Doc. A/34/46, entered into force 3 September 1981,

It is not limited to the specific grounds listed above in Article 2 but also includes another general ground – ‘other status’ – given that the ‘nature of discrimination varies according to context and evolves over time’.¹³⁴ Thus, the Commission has accepted that ‘other status’ includes ‘disability, age or sexual orientation’,¹³⁵ grounds of discrimination not explicitly mentioned in Article 2. There seems to be no good reason why ‘other status’ should also not include grounds such as marital and family status, gender identity, health status, place of residence, economic and social situation.

3.1.4. *Extraterritorial Obligations*

Although the realisation of ESC rights under the African Charter essentially has a State territorial scope, it is important to note that State obligations under the African Charter may have extraterritorial application. This is because unilateral or joint acts or omissions of States increasingly have effects, positively or negatively, on the progressive realisation of ESC rights in other States. Despite this reality, the African Commission (just like other international bodies monitoring ESC Rights e.g. the Committee on Economic, Social and Cultural Rights)¹³⁶ has never clarified the notion of extraterritorial scope of State Party obligations under the African Charter. When, for example, would a State have a duty to a person in another State to take positive actions to fulfil his or her rights? And when could that person’s ESC rights violations be held to come within the responsibility of another State?

When States impose measures (such as economic sanctions) on another State which inhibit the ability of the targeted State to meet its human rights obligations, it is incumbent on such States to *respect* ESC rights of vulnerable groups in the affected State.¹³⁷ In this respect the African Commission has accepted that even when States acting collectively impose sanctions/embargoes on another State for legitimate reasons (e.g. to address a threat to regional or international peace, stability and security) such sanctions/embargoes must not be ‘excessive and disproportionate’, ‘indiscriminate’ or

Article 1; and International Convention on the Protection and Promotion of the Rights and Dignity of Persons with Disabilities, UN Doc. A/61/49 (2006), *entered into force* 3 May 2008, Article 2. See also the Human Rights Committee, *General Comment No. 18*, paras. 6 and 7; and the Committee on Economic, Social and Cultural Rights, *General Comment No. 20*, para. 7.

¹³⁴ Committee on Economic, Social and Cultural Rights, *General Comment No. 20*, para. 27.

¹³⁵ Communication 245/2002, *supra* note 116, para. 169. However, the Commission refused to grant observer status to the Coalition of African Lesbians allegedly ‘because the activities of the said Organisation do not promote and protect any of the rights enshrined in the African Charter’. See 28th Activity Report, para. 33.

¹³⁶ See Coomans, F., ‘The Extraterritorial Scope of the International Covenant on Economic, Social and Cultural Rights in the Work of the United Nations Committee on Economic, Social and Cultural Rights’ *Human Rights Law Review*, Vol. 11 No. 1, 2011, pp. 1–35.

¹³⁷ CESCR, *General Comment 8: The Relationship between Economic Sanctions and Respect for Economic, Social and Cultural Rights*, UN Doc. E/C.12/1997/8 (1997), para. 8.

‘seek to achieve ends beyond the legitimate purpose’.¹³⁸ As the African Commission has observed:

Sanctions therefore cannot be open-ended, the effects thereof must be carefully monitored, measures must be adopted to meet the basic needs of the most vulnerable populations or they must be targeted at the main perpetrators or authors of the nuisance complained of.¹³⁹

The above makes sense since clearly the inhabitants of a given State do not forfeit their basic ESC rights by virtue of any determination that their leaders have violated norms relating to international peace and security. Therefore every State Party to the African Charter has to undertake an impact assessment to determine the possible consequences of its policies such as foreign trade policies and agreements on the enjoyment of ESC rights in the affected States.

3.2. TOWARDS OBLIGATIONS FOR NON-STATE ACTORS

Human rights violations could emanate from the State or from non-State actors (NSAs). In the absence of the imposition of direct human rights obligations on NSAs for human rights violations in the African Charter, the African Commission has emphasised the State duty to ‘protect’ against human rights violations by NSAs.¹⁴⁰ The Commission has taken a broad definition of NSAs as including ‘individuals, organisations, institutions and other bodies acting outside the State and its organs’.¹⁴¹ According to the Commission NSAs:

are not limited to individuals since some perpetrators of human rights abuses are organisations, corporations or other structures of business and finance, as the research on the human rights impacts of oil production or the development of power facilities demonstrates.¹⁴²

The Commission has recognised the fact that ‘States as well as non-state actors, have been known to *violate* the right to life’.¹⁴³ Such violations are certainly not restricted to the right to life but extend to other human rights. For example, discrimination is frequently encountered from individuals and entities in the private sphere such

¹³⁸ *Association Pour la Sauvegarde de la Paix au Burundi vs Tanzania, Kenya, Uganda, Rwanda, Zaire and Zambia*, Communication No. 157/96 (2003), 17th Activity Report, para. 75.

¹³⁹ *Idem*.

¹⁴⁰ *Commission Nationale des Droits de l’Homme et des Libertés vs Chad*, Communication 74/92 (1995), 9th Activity Report; *Association of Victims of Post Electoral Violence & Interights vs Cameroon*, Communication 272/2003, 27th Activity Report, Annex 3.

¹⁴¹ *Zimbabwe Human Rights NGO Forum vs Zimbabwe*, *supra* note 116, para. 136.

¹⁴² *Ibidem*.

¹⁴³ Communication Nos. 279/03 & 296/05, *supra* note 67, para. 148.

as in families, workplaces, and other sectors of society. NSAs in the private housing sector (e.g. private landlords and private credit providers) may directly or indirectly deny access to housing or mortgages on the basis of ethnicity, marital status, disability or other status while some families may refuse to send female children to school or higher education.¹⁴⁴

Accordingly, every State Party to the African Charter is obliged to protect persons ‘within its jurisdiction’ from human rights violations by NSAs.¹⁴⁵ The reference to ‘*jurisdiction*’ is significant because it extends State obligations to protect against human rights violations by NSAs both to territories over which a State Party has sovereignty and to those over which that state exercises territorial jurisdiction. Thus, State responsibility under the African Charter can, for example, be incurred by a State’s omissions to regulate the conduct of NSAs which lead to human rights violations outside a State’s territory. This implies that a State can be found to be in violation of its obligations under the African Charter for actions taken by it extraterritorially, in relation to anyone within the power, effective control or authority of that State, as well as within an area over which that State exercises effective overall control.

This recognition is crucial because it raises the question of how NSAs should be held accountable for direct violations of human rights treaties. The approach of the Commission has been to attribute responsibility for human rights violations by NSAs to the State. For example, in *Zimbabwe Human Rights NGO Forum vs Zimbabwe*¹⁴⁶ the Commission noted that an act by a private individual (or non-State actor) and therefore not directly imputable to a State, can generate responsibility of the State, not because of the act itself, but because of the lack of ‘due diligence’ on the part of the State to prevent the violation or for not taking the necessary steps to provide the victims with reparation. The Commission explained that under the ‘due diligence’ obligation, ‘States must prevent, investigate and punish acts which impair any of the rights recognised under international human rights law’.¹⁴⁷ The Commission concluded that what would otherwise be wholly private conduct is transformed into a constructive act of State, ‘because of the lack of due diligence to prevent the violation or respond to it as required by the [African Charter]’.¹⁴⁸ It asserted that a failure to exercise ‘due diligence’ to prevent or remedy violation, or a failure to apprehend the individuals committing human rights violations gives rise to State responsibility even if committed by private individuals.¹⁴⁹

Similarly, in the *Centre on Housing Rights and Evictions vs The Sudan*,¹⁵⁰ the Commission stated that it agreed with the UN Committee Against Torture in *Hijrizi*

¹⁴⁴ CESCR, *General Comment No. 20*, para. 11.

¹⁴⁵ Communication Nos. 279/03 & 296/05, *supra* note 67, para. 148.

¹⁴⁶ Communication 245/2002, *supra* note 116, para. 143.

¹⁴⁷ *Ibidem*, para. 145.

¹⁴⁸ *Ibidem*, para. 144.

¹⁴⁹ *Ibidem*, para. 145.

¹⁵⁰ Communication Nos. 279/03 & 296/05, (2009), *supra* note 65.

vs *Yugoslavia* that forced evictions and destruction of housing carried out by NSAs amount to cruel, inhuman and degrading treatment or punishment, if the State fails to protect the victims from such a violation of their human rights.¹⁵¹ Relying on the UN Principles on Housing and Property Restitution for Refugees and Displaced Persons (Pinheiro Principles),¹⁵² the Commission confirmed that ‘States shall take steps to ensure that no one is subjected to displacement by either State or non State actors’.¹⁵³

Recent human rights treaties in Africa have taken into account the Commission’s jurisprudence on the State responsibility to ‘ensure’ accountability of NSAs. For example, Article 3 of the AU Convention for the Protection and Assistance of Internally Displaced Persons (IDPs) obliges States to:

- a. Ensure individual responsibility for acts of arbitrary displacement, in accordance with applicable domestic and international criminal law;
- b. Ensure the accountability of non-State actors concerned, including multinational companies and private military or security companies, for acts of arbitrary displacement or complicity in such acts;
- c. Ensure the accountability of non-State actors involved in the exploration and exploitation of economic and natural resources leading to displacement.

States may discharge the above obligation by enacting legislation to apply human rights obligations against NSAs so that suits can be brought directly against such actors in national courts. For example, the ancient US statute, the Alien Tort Claims Act 1789 (ATCA), which confers upon US federal district courts original jurisdiction over ‘any civil action by an alien for a tort only, committed in violation of the law of nations’ wherever it may have taken place, has led to some significant litigation.¹⁵⁴ In one case against Shell for complicity in human rights violations in Nigeria, Shell settled the case for a sum of US\$ 15.5 million in 2009.¹⁵⁵ However, it should be noted the emphasis on State obligations to ensure the accountability of NSAs is inadequate in the era of globalisation because of three main reasons.

First, NSAs (in particular multinational companies, many of which have multimillion projects) in the era of globalisation operate from multiple jurisdictions, which will not always ensure that they are held accountable for human rights violations. Indeed, developing States in Africa competing for foreign direct investment have shown limited inclination to develop accountability for corporate abuses of ESC rights. Second, the privatisation of sectors such as health, education, prisons and the

¹⁵¹ Communication No. 161/2000, UN Doc. CAT/C/29/D/161/2000 (2 December 2002); COHRE case, *supra* note 66, para. 159.

¹⁵² UN Doc. E/CN.4/Sub.2/2005/17 (28 June 2005), Annex, para. 5.4.

¹⁵³ COHRE case, (2009), *supra* note 65, para. 203.

¹⁵⁴ 28 USC 1350.

¹⁵⁵ See Pilkington, E., ‘Shell Pays Out \$15.5m over Saro-Wiwa Killing’, *The Guardian*, 9 June 2009, available at: www.guardian.co.uk/world/2009/jun/08/nigeria-usa.

supply of water, gas and electricity place more public or governmental functions into the hands of NSAs in a large number of countries. This has increased the potential of NSAs to violate human rights especially of vulnerable groups such as poor women as long as governments do not hold them accountable.¹⁵⁶ Third, Africa has experienced a growth in the number and proportion of internal armed conflicts and, in some cases, some organised armed groups control or aspire to control territory and the populations therein.

In the above context, while the State-based approach is commendable in reaffirming the State obligation to protect against human rights violations by NSAs against vulnerable groups such as IDPs, its effectiveness depends on the ability of a particular State to hold NSAs responsible for human rights violations at a domestic level. However, this is not always possible such as in situations of internal armed conflicts leading to the fragmentation of States as NSAs take control of territory and populations. For example, the Transitional Federal Government of Somalia is currently unable, on its own, to ensure accountability for human rights abuses against civilians (including indiscriminate attacks against civilians leading to significant displacement of the population) by non-State armed opposition groups, principally Al-Shabaab and Hizbul Islam, without the international concerted efforts to tackle decades of impunity in Somalia.¹⁵⁷

Where a State is unable to hold NSAs responsible for human rights violations, it is not only desirable but also essential to hold such actors directly responsible for violations of the African Charter. This can be realised by imposing direct legal obligations on NSAs to complement existing State obligations by way of a Protocol to the African Charter. Under the Protocol NSAs in Africa should increasingly support and respect human rights and make sure that they are not complicit in human rights abuses. It is likely that such a protocol will be ratified by NSAs to protect reputation, gain international legitimacy, enhance attractiveness to employees, and reduce risk of disruption through protests. In this context, it might be possible to bring actions directly against the relevant NSAs and seek appropriate remedies directly against these actors. While individuals and small businesses would still be excluded, it is still possible to hold individuals, even when acting as part of the organs of the State, independently responsible for certain actions such as international crimes (e.g. war crimes, crimes against humanity and genocide) amounting to serious violations of the African Charter. This could be done by empowering the African Court with jurisdiction to

¹⁵⁶ See e.g. Brown, R., 'Unequal Burden: Water Privatisation and Women's Human Rights in Tanzania', *Gender and Development*, Vol. 18, No. 1, 2010, pp. 59–67.

¹⁵⁷ See Bari, S., *Report of the Independent Expert on the Situation of Human Rights in Somalia*, A/HRC/13/65 (23 March 2010), para. 105; Kelly, K., 'Al-Shabaab a Threat to East African Countries', *The East African*, 17 September 2010.

prosecute international crimes in Africa which would be complementary to national jurisdictions.¹⁵⁸

4. CONCLUSION

Despite the initial reluctance to develop the normative content of ESC rights under the African Charter and the corresponding human rights obligations for States and NSAs, by and large, the jurisprudence of the African Commission since 2001 has displayed advances in the field of ESC rights. Although long delays have generally continued to characterise the Commission's complaints' procedure, the Commission has made a generous and progressive interpretation of the African Charter which confirms that ESC rights are justiciable, subject only to restricted limitations. In the words of the Commission: 'any limitations on rights must be proportionate to a legitimate need, and should be the least restrictive measures possible'.¹⁵⁹ According to the Commission, Article 27(2) of the African Charter provides the only 'legitimate reasons' for the general limitation of the rights and freedoms under the Charter.¹⁶⁰ The Commission has also held that the rights protected under the African Charter including ESC rights are non-derogable during emergencies or special circumstances.¹⁶¹

The Commission has read into the Charter some important ESC rights in particular the rights to adequate housing, food, social security, water and sanitation; and adopted the Pretoria Statement on Social, Economic and Cultural Rights in Africa in 2004 and the Draft Principles and Guidelines on ESC Rights in 2010 elaborating the substantive provisions of the Charter on ESC rights. In this process the Commission has expanded the scope of ESC rights under the African Charter. However, the current discrepancy between the explicit wording of the Charter and its interpretation by the Commission leaves the Charter exposed as an 'outdated document in need of revision to ensure that it actually says, loud and clear, what it has been interpreted by the Commission to say'.¹⁶²

¹⁵⁸ See AU Assembly's Decision on the Meeting of African States Parties to the Rome Statute of the International Criminal Court (ICC), Assembly/AU/13(XIII), 13th Ordinary Session, 1–3 July 2009, Sirte, Great Socialist People's Libyan Arab Jamahiriya, para. 5.

¹⁵⁹ *COHRE Case*, *supra* note 65, para. 214.

¹⁶⁰ Communication Nos. 279/03 & 296/05, (2009), *supra* note 65, para.165. Article 27(2) provides that the rights and freedoms of each individual 'shall be exercised with due regard to the rights of others, collective security, morality and common interest'.

¹⁶¹ See e.g. *Commission Nationale des Droits de l'Homme et des Libertés vs Chad*, Communication No. 74/92, (1995), 9th Activity Report, para. 21; *Malawi African Association and Others vs Mauritania*, Communication Nos. 54/91, 61/91, 98/93, 164/97–196/97 and 210/98, (2000), 13th Activity Report, Annex V, para. 84; and *Centre on Housing Rights and Evictions vs The Sudan*, Communication Nos. 279/03 & 296/05, *supra* note 65, paras. 165 and 167.

¹⁶² See Heyns, C., 'The African Regional Human Rights System: The African Charter', *Penn State Law Review*, Vol. 108, No. 3, 2003–2004, pp. 679–702, at p. 691.

The Commission has found violations of ESC rights in almost all admissible cases. Its decisions have evolved from less detailed decisions finding violations without elaborating on the normative content of ESC rights into fully reasoned decisions drawing on international human rights jurisprudence. Increasingly, the Commission has made detailed ‘recommendations’ as remedies for victims of ESC rights violations directed at States found in violation of ESC rights.¹⁶³ Its recent practice further requires States to report on the implementation of its ‘recommendations’ within a defined period of time. This is included in the Commission’s Activity Reports. This development is a significant step forward towards a more effective mechanism for the adjudication of ESC rights violations. It is hoped that the African Court would complement the Commission’s protective mandate in the future to develop a coherent body of ESC rights jurisprudence in Africa. The potential benefit of the supplementary role of the African Court was demonstrated in March 2011 when the Court, responding to a referral by the Commission, ordered provisional measures against Libya.¹⁶⁴

The Commission’s jurisprudence emphasises that ESC rights are indivisible, interdependent and interrelated with other human rights. As the Commission stated ‘there is no right in the African Charter that cannot be made effective’.¹⁶⁵ In this respect, the Commission has lived up to the expectation of the African Charter which, in the Commission’s own words:

[...] departs from the narrow formulations of other regional and universal human rights instruments by weaving a tapestry which includes the three “generations” of rights: civil and political rights; economic, social, and cultural rights; and group and peoples’ rights.¹⁶⁶

This provides a potential legal vehicle to challenge policies contributing to human rights violations in Africa, such as poverty and inappropriate resources allocation. The real challenge remains how to implement ESC rights. It is now up to NGOs, National Human Rights Institutions, activists, lawyers, universities and other members of civil society to support the Commission’s jurisprudence on ESC rights and further explore coherent and strategic ways and means in which ESC rights may become a reality in the lives of individuals and groups in order ‘to achieve a better life for the peoples of Africa’.¹⁶⁷ This may be achieved through, *inter alia*,¹⁶⁷ coordinated efforts to enhance the interaction among all the actors concerned, including the various components of civil society by increasing public awareness of ESC rights, advocating for legislative reform, increased budgetary allocation to ESC rights and the effective use of available

¹⁶³ See e.g. Communication Nos. 279/03 & 296/05, *supra* note 65, para. 229.

¹⁶⁴ See *African Commission on Human and Peoples’ Rights vs Great Socialist People’s Libyan Arab Jamahiliya*, Application No. 004/2011, available at: www.african-court.org/fileadmin/documents/Court/Cases/Order_for_Provisinal_Measures_against_Libya.PDF.

¹⁶⁵ Communication 155/96, *supra* note 63, para. 68.

¹⁶⁶ *COHRE Case*, *supra* note 65, at para. 149. See also the African Charter, *supra* note 1, Preamble, para. 7.

¹⁶⁷ African Charter, *supra* note 1, Preamble.

resources, as well as increased litigation of strategic ESC rights cases at national and international levels.

It is clear from the Commission's decisions that States are obliged to 'respect, protect, promote and fulfil' *all* ESC rights explicitly protected in the Charter and those implied in the Charter. It can also be arguably stated that the State obligation to 'fulfil' ESC rights under the Charter is subject to 'available resources' (within a State and from international assistance/cooperation) given that many African States are generally faced with the problem of poverty. In order to implement State obligations as developed in the Commission's jurisprudence under the African Charter ESC rights should not be relegated to non-justiciable directive principles of State policy in the domestic law of all African States parties to the African Charter.

Given that the African Charter complements human rights protection at the domestic level where the rights protected in the Charter should be realised, African States should ensure that the ESC rights protected in the African Charter are given full legal effect in domestic law, that the Charter rights are made justiciable, and that effective remedies (e.g. compensation, reparation, restitution, rehabilitation, guarantees of non-repetition, and public apologies) are available for victims of all violations of ESC rights at the domestic level. In this respect, it is essential to adopt domestic legislation to give ESC rights the same level of protection given to civil and political rights since this is indispensable in complying with State obligations under Articles 1 and 2 of the African Charter.¹⁶⁸ The direct incorporation of international human rights treaties into domestic law would enhance the legal protection of human rights. The Transitional Constitution of the Republic of South Sudan, 2011 provides a recent good example. Its Article 9(3) provides that: 'All rights and freedoms enshrined in international human rights treaties, covenants and instruments ratified or acceded to by the Republic of South Sudan shall be an integral part of this Bill [of Rights]'.

¹⁶⁸ See e.g. African Charter on Human and Peoples' Rights (Ratification and Enforcement) Act, Chapter A9, Laws of the Federation of Nigeria, 2004. Section 1 of this Act provides that the provisions of the African Charter shall 'have force of law in Nigeria and shall be given full recognition and effect and be applied by all authorities and persons exercising legislative, executive or judicial powers in Nigeria'. See also *Socio-Economic Rights and Accountability Project vs Nigeria*, Communication 300/2005, paras. 65–69, (2008), 25th Activity Report.