

# A new beginning? The enforcement of social, economic and cultural rights under the African Charter on Human and Peoples' Rights

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## 1 INTRODUCTION

The African Charter on Human and Peoples' Rights (the Charter) is a unique document. It has been subjected to much criticism for the vague language in which the various rights have been couched, the over-broad claw-back clauses, the inclusion of non-traditional peoples' rights and for the weak, politically controlled mechanisms provided for its enforcement. Yet, I believe the Charter can be viewed as a new kind of international human rights treaty, a treaty that requires the development of a more nuanced and theoretically consistent understanding of the nature and scope of the human rights obligations contained in it. At the heart of this unique document is an endorsement of the idea of the interdependence and indivisibility of the various kinds of rights, which are traditionally classified into discrete groups and viewed as having their own character and enforcement potential. In this article I focus on one such group – social and economic rights – but in a way that rejects the traditional distinction between the various kinds of rights and embraces an understanding of the rights in the Charter as being truly interdependent and indivisible. I argue that the Charter is unique amongst regional human rights instruments in that it makes no distinction between various kinds of rights, and that the scope and content of these rights should therefore be interpreted in a way that makes sense for all the rights contained in the document. Although I therefore focus on social and economic rights, I do so with reference to all rights contained in the Charter.

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## 2 THE AFRICAN CHARTER ON HUMAN AND PEOPLES' RIGHTS

### 2.1 Historical context

The Assembly of Heads of State of the Organisation of African Unity (OAU) – the predecessor to the African Union – finally adopted the Charter in Nairobi, Kenya, in 1981 after a long and arduous process which began in 1961 when more than 200 lawyers, judges and academics, gathered under the auspices of the International Commission of Jurists, first called for the establishment of an African human rights treaty.<sup>1</sup> But it took some concerted pressure from the UN<sup>2</sup> to get the Heads of State moving, as many of them viewed the proposed human rights treaty for Africa with suspicion and suspected that it would constitute an attack on the sovereignty of their respective states.<sup>3</sup> By 1979 the work of the UN started paying off, when the Assembly of Heads of State of the OAU set up a working group chaired by Justice EK Wiredu of Ghana to make further proposals for the establishment of an African human rights charter and

1 African Charter on Human and Peoples' Rights, adopted 27 June 1981, O.A.U. Doc CAB/LEG/67 Rev. 5 (entered into force 21 Oct 1986). For a general overview of the history of the African Charter see generally Chidi Anselm Odinkalu "The Individual Complaints Procedure of the African Commission on Human and Peoples' Rights: A Preliminary Assessment" vol 8 (1998) *Transnational Law and Contemporary Problems* 359–363; Nsongurua J Udonibana "Towards the African Court on Human and Peoples' Rights: Better late than never" vol 3 (2000) *Yale Human Rights and Development Law Journal* 45–58; Richard Gittleman "The African Charter on Human and Peoples' Rights: A Legal Analysis" vol 22 (1981) *Virginia Journal of International Law* 667; and J Oloka-Onyango "Human Rights and Sustainable Development in Contemporary Africa: A new Dawn, or Retreating Horizons" vol 6 (2000) *Buffalo Human Rights Law Review* 39.

At the end of the Lagos conference the participants adopted a significant document – the Law of Lagos – which can be described as the seed from which the African Charter later grew. This document declared: "[I]n order to give full effect to the Universal Declaration of Human Rights of 1948, this Conference invites the African Governments to study the possibility of adopting an African Convention of Human Rights in such a manner that the Conclusions of this Conference will be safeguarded by the creation of a court of appropriate jurisdiction and that recourse thereto be made available for all persons under the jurisdiction of the signatory States."

See Law of Lagos, Jan 7 1961 par 4, reprinted in vol 3 (1961) *Journal of the International Commission of Jurists* 9 par 4.

2 In 1977, after the adoption of the International Covenants, the UN General Assembly appealed to States in areas where regional arrangements in the field of human rights did not yet exist to consider agreements with a view to the establishment within their respective regions of suitable regional machinery for the promotion and protection of human rights. See G.A. Res. 32/127, U.N. GAOR, 32nd Sess., Supp. No. 45, at 149, U.N. Doc. A/32/45 (1977). In September 1979, the UN once again convened a conference, this time in Monrovia, to address the issue of human rights protections with special reference to Africa. The conference produced the "Monrovia Proposals for Setting-up of an African Commission on Human Rights". See UN Seminar on the Establishment of Regional Commissions on Human Rights with Special Reference to Africa, U.N. Doc. ST/HR/SER.A/4 (1979). Both the draft and final Monrovia Proposals are reprinted in BG Ramcharan "The *Travaux Préparatoires* of the African Commission on Human Rights" vol 13 (1992) *Human Rights Law Journal* 307–310–314 annexes II–III. See generally Udonibana, *supra* note 1 at 59.

3 Tunguru Huaraka "Implementation Mechanism in the African Charter on Human and Peoples' Rights" in *The African Charter on Human and Peoples' Rights: Development, Context, Significance* 70–72 (African Law Association (ed) 1991).

commission. The Wiredu proposals formed the basis of the draft charter prepared by the Keba M'baya Committee at the request of the OAU Secretary-General and discussed at three OAU ministerial conferences, in Dakar in 1979 and in Banjul in 1980 and 1981.<sup>4</sup> The OAU finally adopted the Charter in 1981, achieving a milestone in the evolution of human rights protection at the regional level in Africa. The document to a large degree reflects the political reality of Africa as it existed in 1981 and thus differs markedly from the universal human rights documents as well as from the other regional human rights treaties. Steiner and Alston described the Charter thus as “[t]he newest, the least developed or effective, the most distinctive and the most controversial of the regional human rights regimes”.<sup>5</sup>

The Charter came into force on 21 October 21 1986, providing for “human and peoples’ rights” to which the OAU member states party to the Charter undertake to recognise and give effect. The OAU has since been replaced by the African Union and the latter is now for all intents and purposes the guardian of the Charter. Only Eritrea<sup>6</sup> of the current member states of the African Union has yet to ratify the African Charter. Morocco pulled out of the OAU in 1984 when the organisation recognised the Sahrawi Arab Democratic Republic<sup>7</sup> and, as such, is ineligible to ratify the Charter, to which only member states of the now African Union can be party.<sup>8</sup>

## 2.2 Structure and content of the African Charter

### 2.2.1 Background

The Charter came into existence in the aftermath of the devastating colonial period at a time when most African states had gained their independence from their previous colonisers.<sup>9</sup> The colonial period was characterised by a complete negation of respect for human rights and often required the promulgation of draconian “security” laws, outlawing free speech and free political association and sanctioning detention without trial and harsh penalties for any form of political protest.<sup>10</sup> Colonial occupiers

4 Udombana, *supra* note 1 at 59.

5 Henry J Steiner & Philip Alston *International Human Rights in Context* (1996) 689.

6 Ethiopia is the most recent country to ratify the Charter. It did so in June 1998.

7 The Saharawi Arab Democratic Republic (SADR) is the official name of the territory otherwise known as Western Sahara. It was admitted into the OAU in February 1982 after being recognised by 26 member states of the Organisation, a majority of the then total membership of 50. As a result, Morocco, which claimed sovereignty over the Western Sahara, decided to withdraw from the OAU, effective November 1985. For a summary of the current status of the SADR, see “Desert Diplomacy” vol 39 (1998) *African Confidential* 4, 4-5.

8 Charter *supra* note 1 art 1. See generally Chidi Anselm Odinkalu “The individual complaints procedures of the African Commission on Human and Peoples’ Rights: A preliminary assessment” vol 8 (1998) *Transnational law and Contemporary Problems* 359 362 363.

9 By 1981 only South Africa, Namibia and Western Sahara had not obtained their independence.

10 Oloka-Onyangu *supra* note 1 at 47.

often justified their occupations in altruistic, moralistic and religious terms, but today it is well recognised that colonialism was primarily concerned with economic exploitation of the territories under control of the various colonial powers.<sup>11</sup> Because the system was ultimately aimed at the economic exploitation of the colonies, it had little time for the recognition and protection of rights that would threaten or undermine its primary economic objective. Thus, far more money was spent on the social control of indigenous populations (through spending on the police, the armed forces and prison services) than on social service in any colony on the continent. This resulted in an apartheid-like system based primarily on race but reinforced by class, that resulted in highly stratified social formations and critically impacted the ethnic frameworks of the colonised territories.<sup>12</sup> As Jalali and Lipset have pointed out, “[o]ver time such (colonial) policies created widespread economic and social disparities between ethnic groups. Certain ethnic groups were selected as collaborators or channels for the transmission of government patronage”.<sup>13</sup> Many such disparities have persisted into the post-colonial era, and this situation has often bedevilled the governance of independent countries.<sup>14</sup> It must also be remembered that at the time the Charter was drafted, most members of the OAU were still very much concerned with the right to self-determination. Many states had only recently thrown off the yoke of colonial oppression and were eager to protect the developing and fragile foundations of their own states. Many of the states – whose leaders were mostly less than enthusiastic about democratic practices now pressed on them by colonial masters who themselves never adhered to them – also showed an unhealthy preoccupation with their own sovereignty and saw this as justification for a strict enforcement of the principle of non-interference in the internal affairs of other states.<sup>15</sup>

Given this context it is not surprising that the Charter purports to represent a distinctly African conception of human rights, while at the same time drawing inspiration from the Universal Declaration of Human Rights and other international human rights treaties.<sup>16</sup> But the Charter differs

11 See Theophilus Maranga “The Colonial Legacy and the African Common Market: Problems and Challenges Facing the African Economic Community” vol 10 (1993) *Harvard Blackletter Journal* 105.

12 Oloka-Onyanga *supra* note 1 at 46. For an analysis of how racial and economic considerations designed by colonial powers affected conceptions of inclusion and exclusion, see Mahmood Mamdani *Citizen and Subject: Contemporary Africa and the Legacy of Late Colonialism* (1996) 285-286.

13 Rita Jalali & Seymour Martin Lipset “Racial and Ethnic Conflicts: A Global Perspective” in Michael W Hughey (ed) *New Tribalisms: The Resurgence of Race and Ethnicity* (1998) 321.

14 Oloka-Onyanga *supra* note 1 at 47.

15 See Solomon Gones *Sensitivity to the Principle of Non-interference in the Internal Affairs of States: A Political Imperative* (17-19 Feb 1993) (paper presented at the International Negotiation Network (INN) Consultation held at the Carter Centre, Emory University), quoted by Oloka-Onyanga *supra* note 1 at 47 note 29.

16 See Bertrand G Ramcharan “The Universality of Human Rights” vol 53 (1994) *The Review* 105-112. See also *African Charter on Human and Peoples’ Rights*, adopted 26 June 1981, O.A.U. Doc. CAB/LEG/67/3, Rev. 5 (entered into force 12 Oct 1986), reprinted in 21 *ILM*. (1982) 58.

sharply from other regional human rights treaties. This becomes clear from perusing its preamble, which endorses the right to development, the duty to achieve the total liberation of Africa from colonial domination and the need for citizens to carry out their duties. It is also reflected in its endorsement of rights not only for “humans” but also for “peoples”<sup>17</sup> and through its constant references to the phenomenon of African civilisation. Thus, the fifth paragraph of the Charter’s preamble stipulates as follows:

Taking into consideration the virtues of their historical tradition and the values of African civilization which should inspire and characterize their reflection on the concept of human and peoples’ rights.

The Charter also emphasises the family, the community, and the state, and endorses the concept of self-determination.<sup>18</sup> The Charter furthermore protects economic, social and cultural rights in addition to civil and political rights.<sup>19</sup> It thus marks some conceptual distance from its international precursors.<sup>20</sup> The Charter is definitely an instrument that is married to the socio-cultural context in which it was given birth.<sup>21</sup>

These distinguishing characteristics stem from the drafters’ intention that the Charter reflect and emphasise the influence of African traditions – to take “as a pattern, the African philosophy of law” and to be designed to “meet the needs of Africa”.<sup>22</sup> As was declared at one of the final drafting meetings: “As Africans, we shall neither copy, nor strive for originality, for the sake of originality. We must show imagination and effectiveness. We could get inspiration from our beautiful and positive traditions. Therefore, you must keep constantly in mind our values of civilisation and the real needs of Africa.”<sup>23</sup>

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- 17 For a detailed discussion of the various meanings of the term “peoples” as used in the Charter, see generally Richard Kiwanuka “The Meaning of ‘People’ in the African Charter on Human and Peoples’ Rights” 82 *Am J Int L* (1988) 80.
  - 18 Preambular par 7 of the Charter stipulates that: “Considering that the enjoyment of rights and freedoms also implies the performance of duties on the part of everyone.” A recent study on the phenomenon of duties in international human rights law pointed out that the Charter contains a total of 3 articles and 11 paragraphs devoted to the issue of individual duties. See Daniel Petrasek *International Council on Human Rights Policy, Taking Duties Seriously: Individual Duties in International Law (A Commentary)* (1999) 33.
  - 19 See generally Obina Okere “The Protection of Human Rights in Africa and the African Charter on Human and Peoples’ Rights: Comparative Analysis with the European and American Systems” vol 6 (1984) *Human Rights Quarterly* 141; Weston *et al* “Regional Human Rights Regimes: A Comparison and Appraisal” vol 20 (1987) *Vanderbilt Journal of Transnational Law* L 585.
  - 20 For a comparative analysis with other regional instruments, see Obinna Okere: *supra* note 19 at 141.
  - 21 See Mohamed Komeja “The African System of Human and Peoples’ Rights: An Annotated Bibliography” vol 3 (1996) *East African Journal of Peace and Human Rights* 262-263-265, quoted in Oloka-Onyangu *supra* note 1 at 49 note 41.
  - 22 Meeting of Experts for the Preparation of the Draft African Charter on Human and Peoples’ Rights at 1 OAU Doc. CAB/LEG/67/3/Rev, quoted by Udombana *supra* note 1 at 60 note 80.
  - 23 *Ibid* at 5 (quoting address by former President Senghor of Senegal to the meeting of African experts preparing the preliminary draft of the Charter on 28 Nov 1979). The full address is reproduced in P Kunig *et al* *Regional Protection of Human Rights by International Law: The Emerging African System* (1985) 121.

### 2.2.2 *The provisions of the African Charter*

The African Charter is usually divided into five distinct parts: the provisions on civil and political rights; those on economic, social and cultural rights; the group or collective rights; the provisions which elaborate the duties in the Charter; and those governing the enforcement mechanisms in the instrument.<sup>24</sup> The Charter includes several of the traditional civil and political rights to be found in the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights (ICCPR), including the right to non-discrimination (article 2), equality before the law (article 3), the right to life (article 4) and the inherence of human dignity (article 5). There are some notable omissions from the Charter though.<sup>25</sup> However, the most problematic aspect of these civil and political rights is the inclusion of so called claw-back clauses, phrases that could effectively remove (or at a minimum severely curtail) the right ostensibly guaranteed. In each of the provisions referred to above, clauses such as "except for reasons and conditions previously laid down by law",<sup>26</sup> "subject to law and order",<sup>27</sup> and "provided he abides by the law"<sup>28</sup> abound. Although the grant of the right is supposed to be paramount, the claw-back clause may have the effect of taking away the right that is granted. This is especially a problem because in many African states one still find laws from the colonial era and laws promulgated after independence that violate some of the most fundamental human rights.<sup>29</sup>

In response to the colonial period, the Charter also addresses the social and economic deprivation of the region by including a set of economic, social and cultural rights in articles 14 to 18.<sup>30</sup> These rights will be discussed in more detail below.<sup>31</sup>

24 See generally Evelyn A Ankumah *The African Commission on Human and Peoples' Rights: practice and procedures* (1996). As I have stated in the introduction, I believe the Charter can be read in a way that de-emphasises the differences between the various groups of rights traditionally viewed as having distinct character and enforcement potential. Although Ankumah and others still make this distinction and although it is helpful to analyse the various rights in this traditional way, I do not endorse a strict distinction between the various kinds of rights.

25 As Oloka-Onyanga points out, striking omissions from the Charter include the prohibition against being subjected, without free consent, to medical or scientific experimentation, protected in art 7 of the ICCPR. The Charter also lacks more elaborate guarantees against arbitrary detention. Similarly, although the right to a fair trial is covered by art 7 of the Charter, it does not speak about trial *in absentia*, the issue of legal aid or the right to an interpreter. Also omitted are compensation for the miscarriage of justice and protection against double jeopardy, all of which are covered by art 14 of the ICCPR. See Oloka-Onyanga *supra* note 1 at 54.

26 Art 6.

27 Art 8.

28 Art 9.

29 See Oloka-Onyanga *supra* note 1 at 54.

30 UO Umozurike "The Present State of Human Rights in Africa" vol 1 (1986) *Calabar Law Journal* 62-81. Umozurike points out that these rights were included "as a component for redressing the colonial heritage typified by governments for and by the minority against the majority".

31 See text accompanying notes 39-55.

The Charter is unique among international human rights treaties in its protection not only of individualistic human rights, but also of group rights.<sup>32</sup> Articles 19 through 24 include the rights to self-determination, to the equality of peoples and the non-domination of one people by another, and the right to dispose of natural wealth and resources in the interest of the people.<sup>33</sup> Other provisions include the right to recover dispossessed property, the right to adequate compensation, to cultural development, to international peace and security, and to a general environment favourable to development. The Charter was the first international instrument to lay down these rights in a way that approximates legally binding provisions.<sup>34</sup>

The Charter is also unique in that it contains a set of individual duties, endorsing the principle that when rights are claimed they also impose duties on those who wish to claim them. Although the Universal Declaration, ICCPR and ICESCR contain reference to the duties individuals owe to society, none of them are as extensive as the Charter's elaboration.<sup>35</sup> The duties listed extend from the harmonious development of the family<sup>36</sup> to the promotion and achievement of African unity.<sup>37</sup> Most commentary about these duties has considered them to be too onerous and capable of being used by states to effectively trump the individual rights guaranteed.<sup>38</sup> While there has been little action undertaken to test this aspect of the Charter, it is quite clear that the concept of duties is not necessarily antithetical to the respect of human rights. What is clear is that the overall observation and protection of individual rights is not undermined by an undue emphasis on duties. This is especially true of the aspect of the Charter dealing with economic, social and cultural rights and their connection to the pursuit of sustainable human development.

32 The word "peoples" is used in 8 of the 10 preambular paragraphs of the Banjul Charter. When drafting the Charter at the 1979 OAU summit conference in Monrovia, some states, especially Guinea Republic and Madagascar, had insisted that the proposed Charter include peoples' rights. See OAU Doc. Dec.415 (XVI) Rev. 1 (1979). Cf UN Charter arts 1 & 55; ICESCR *supra* note 21 art 1; ICCPR *supra* note 20 art 1.

33 These are generally said to be so called "third generation" rights. These rights and the rights of peoples have received increasing rhetorical affirmation at the international level. See, eg. Permanent Sovereignty over Natural Resources, G.A. Res. 1803 (XVII), 17 U.N. GAOR Supp. No. 17 at 15 U.N. Doc. A/5217 (1962); Declaration on Social Progress and Development, G.A. Res. 2542 (XXIV), 24 U.N. GAOR Supp. No. 30 at 49 U.N. Doc. A/7630 (1969); Declaration on the Right to Development, G.A. Res. 41/128, annex. 41 U.N. GAOR Supp. No. 53 at 186 U.N. Doc. A/41/53 (1986); Draft Declaration of Principles on Human Rights and the Environment (1994), available at <http://www1.umn.edu/humanrts/instree/1994-dec.htm>. See also Udombana *supra* note 1 at 61.

34 See Inger Oslerdahl "The Jurisdiction *Ratione Materiae* of the African Court of Human and Peoples' Rights: A Comparative Critique" vol 7 (1998) *Review of the African Commission of Human and Peoples' Rights* 149. See also Oloko-Onyanga *supra* note 1 at 56.

35 While neither the European nor American human rights conventions include duties under its protective mandate, a long set of duties are provided for in the American Declaration on the Rights and Duties of Man, a non-binding instrument in the Inter-American human rights system. See American Declaration of the Rights and Duties of Man, OAS Res. XXX (1948), reprinted in Basic Documents Pertaining to Human Rights in the Inter-American System, OEA/Ser.L.VIII.82 doc.6 Rev.1 (1992) 17.

36 Art 29(1).

37 Art 29(9).

38 Tokunbo Ige *The African Charter on Human and Peoples' Rights* (1998), unpublished manuscript quoted by Oloko-Onyanga *supra* note 1 at 56 note 65.

### 2.2.3 Social and economic rights in the African Charter

The Charter contains set of economic, social and cultural rights. These rights are not contained in a separate section of the Charter or designated as directive principles and thus – much like the Bill of Rights in the South African Constitution – they articulate a truly indivisible and interdependent normative framework, addressing all rights equally in the same coherent text.<sup>39</sup>

The Charter recognises a set of rights that might have some bearing on the protection of economic, social and cultural rights and that is absent from other international human rights documents.<sup>40</sup> These rights, found in articles 13 and 14 of the Charter, include the right to participate in the government of one's country, the right of access to the public services of one's country and the right of access to public property and services. The thrust of this right is an insistence of equal access to the public services of one's country.<sup>41</sup> Article 14 guarantees the right to property, but qualifies this right by sanctioning the limitation of this right in the interest of public need or in the general interest of the community.<sup>42</sup>

The classical social and economic rights contained in the Charter include the right to work under equitable and satisfactory conditions, and to equal pay for equal work.<sup>43</sup> The Charter also guarantees the right to health, stating that every individual has the right to enjoy the best attainable state of physical and mental health and obliging states to "take the necessary measures to protect the health of their people and to ensure that they receive medical attention when they are sick".<sup>44</sup> Article 17 of the Charter guarantees every person's right to education as well as the right to take part in the cultural life of his or her community, while placing a duty on the state to promote and protect "moral and traditional values recognized

39 Odinkalu *supra* note 1 at 340.

40 See generally Yemi Akinseye-George "New Trends in African Human Rights Law: Prospects of an African Court of Human Rights" vol 10 (2001–2002) *University of Miami International and Comparative Law Review* 159–163–164.

41 Art 13 states:

- (1) Every citizen shall have the right to participate freely in the government of his country, either directly or through freely chosen representatives in accordance with the provisions of the law.
- (2) Every citizen shall have the right of equal access to the public services of his country.
- (3) Every individual shall have the right of access to public property and services in strict equality of all persons before the law."

42 Art 14 states: "The right to property shall be guaranteed. It may 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 law."

43 Art 15 states: "Every individual shall have the right to work under equitable and satisfactory conditions, and shall receive equal pay for equal work."

44 Art 16 states:

- (1) Every individual shall have the right to enjoy the best attainable state of physical and mental health.
- (2) States parties to the present Charter shall take the necessary measures to protect the health of their people and to ensure that they receive medical attention when they are sick."



by the community".<sup>45</sup> The Charter has been criticised for the absence of any express guarantees of the rights of social security, food, an adequate standard of living or housing and prohibition on forced labour.<sup>46</sup> Article 18 of the Charter places a duty on the state to assist the family – deemed to be the natural unit and basis of society – and to eliminate discrimination against women. It also guarantees for the disabled and the aged the right to have special measures of protection in keeping with their needs.<sup>47</sup>

In recognition of the peculiar history of African states which were arbitrarily constructed by European powers in Berlin in 1885,<sup>48</sup> the Charter includes a set of collective rights protecting the rights of "peoples".<sup>49</sup> The Charter thus guarantees equality for all peoples,<sup>50</sup> the right of peoples to existence and self-determination<sup>51</sup> and the sovereignty of peoples over their natural resources.<sup>52</sup> Article 22 of the Charter guarantees the right of

45 Art 17 states:

"(1) Every individual shall have the right to education.

(2) Every individual may freely take part in the cultural life of his community.

(3) The promotion and protection of morals and traditional values recognized by the community shall be the duty of the State."

46 Joe Oloka-Onyango "Beyond the Rhetoric: Reinvigorating the Struggle for Economic and Social Rights in Africa" vol 26 (1995) *California Women's International Law Journal* 1 50.

47 Art 18 states:

"(1) The family shall be the natural unit and basis of society. It shall be protected by the State which shall take care of its physical health and moral.

(2) The State shall have the duty to assist the family which is the custodian of morals and traditional values recognized by the community.

(3) The State shall ensure the elimination of every discrimination against women and also ensure the protection of the rights of the woman and the child as stipulated in international declarations and conventions.

(4) The aged and the disabled shall also have the right to special measures of protection in keeping with their physical or moral needs."

48 See generally Thomas Pakenham *The Scramble for Africa* (1991).

49 See Odinkalu *supra* note 1 at 344. Peter Juviler draws a distinction between collective rights and group rights and asserts that "[u]nlike individual (including group) and solidarity rights, collective rights are claims based not on shared human traits but on cultural distinctiveness and membership in a community defined by its distinctiveness". See Peter Juviler "Are Collective Rights Anti-Human? Theories on Self-Determination and Practice in Soviet Successor States" vol 11 (1993) *Netherlands Human Rights Quarterly* 269.

50 Art 19 states: "All peoples shall be equal; they shall enjoy the same respect and shall have the same rights. Nothing shall justify the domination of a people by another."

51 Art 20 states:

"(1) All peoples shall have the right to existence. They shall have the unquestionable and inalienable right to self-determination. They shall freely determine their political status and shall pursue their economic and social development according to the policy they have freely chosen.

(2) Colonized or oppressed peoples shall have the right to free themselves from the bonds of domination by resorting to any means recognized by the international community.

(3) All peoples shall have the right to the assistance of the States parties to the present Charter in their liberation struggle against foreign domination, be it political, economic or cultural."

52 Art 21 states:

1 All peoples shall freely dispose of their wealth and natural resources. This right shall be exercised in the exclusive interest of the people. In no case shall a people be deprived of it.

[continued on next page]

peoples "to their economic, social, and cultural development with due regard to their freedom and identity and in equal enjoyment of the common heritage of mankind" and places an obligation on all state parties "individually and collectively, to ensure the exercise of the right to development".<sup>53</sup> The Charter also guarantees the right to international peace and security,<sup>54</sup> as well as the right of peoples to a general satisfactory environment favourable to their development.<sup>55</sup>

It is significant that these rights do not contain explicit and well-defined internal limitations that expressly limit the duty of the state to give effect to them progressively, in a reasonable manner, and as much as resources are available for the task. While the realisation of social and economic rights contained in the ICESCR and in the South African Constitution is made subject to resource constraints, the text of the Charter places no such limits on the duty of the contracting states. The absence of such limitation clauses is obviously the result of a deliberate choice by the framers of the Charter not to single out social and economic rights for special treatment because of their adherence to the idea that all rights are interdependent and indivisible and should be understood in the context of the document as a whole. This is a significant textual pointer that could influence the way in which the nature and scope of the rights are interpreted by those bodies called upon to do so.

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2. In case of spoliation the dispossessed people shall have the right to the lawful recovery of its property as well as to an adequate compensation.
  3. The free disposal of wealth and natural resources shall be exercised without prejudice to the obligation of promoting international economic cooperation based on mutual respect, equitable exchange and the principles of international law.
  4. States parties to the present Charter shall individually and collectively exercise the right to free disposal of their wealth and natural resources with a view to strengthening African unity and solidarity.
  5. States parties to the present Charter shall undertake to eliminate all forms of foreign economic exploitation particularly that practiced by international monopolies so as to enable their peoples to fully benefit from the advantages derived from their national resources.

53 Art 22 states:

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

54 Art 23 states:

1. All peoples shall have the right to national and international peace and security. The principles of solidarity and friendly relations implicitly affirmed by the Charter of the United Nations and reaffirmed by that of the Organization of African Unity shall govern relations between States.
2. For the purpose of strengthening peace, solidarity and friendly relations, States parties to the present Charter shall ensure that: (a) any individual enjoying the right of asylum under 12 of the present Charter shall not engage in subversive activities against his country of origin or any other State party to the present Charter; (b) their territories shall not be used as bases for subversive

55 Art 24 states: All peoples shall have the right to a general satisfactory environment favorable to their development.

### 2.2.4 *The African Commission on Human and Peoples' Rights*

When the Charter was drafted, the African Commission on Human and Peoples' Rights (ACHPR) was created as the most important mechanism for the promotion and enforcement of the rights contained in the Charter.<sup>56</sup> The primary goals of the ACHPR are to promote and protect human rights and to interpret the Charter for states, the AU and organisations recognised by the AU.<sup>57</sup> At present, the central functions of the ACHPR are to collect and disseminate information regarding human rights in Africa and to consider reports issued by member states and recognised NGOs. The ACHPR also investigates reports of widespread or systematic human rights abuses and reviews complaints submitted by states and non-state parties.<sup>58</sup> The ACHPR, headquartered in Banjul, The Gambia, holds two ordinary sessions a year, usually in October and April, and may hold extraordinary sessions as needed. ACHPR sessions are usually attended by member states, national liberation movements, special institutions and NGOs with observer status. The agenda of each session addresses periodic state reports mandated by the ACHPR as well as complaints, which are usually brought by NGOs.

The ACHPR is composed of 11 members serving six-year terms. The members were previously elected by the Assembly of Heads of State and Government (Assembly), which was charged by the OAU with setting policy for the ACHPR. The Assembly will be replaced by a similar body under the African Union. States may notify the ACHPR of violations of the Charter by other states. Typically one state will notify another of a violation, after which either will have up to three months to notify the Commission for consideration. If a complaint is submitted to the ACHPR by a non-state party regarding an alleged violation committed by a state, it will be considered only at the request of a majority of the members. In addition, the ACHPR will review a complaint only if local remedies have been exhausted, or if it involves a case that has been unduly delayed in domestic

56 On the African Commission on Human and Peoples' Rights see generally Udeme Essien "The African Commission on Human and Peoples' Rights: Eleven years after" vol 6 (2000) *Buffalo Human Rights Law Review* 93; Vincent O Orlu Nmechielle "Towards an African Court on Human Rights: Structuring the Court" vol 6 (2000) *Annual Survey of International and Comparative Law* 27 29-34; Oloka-Onyango *supra* note 1 at 69-72; Udombana *supra* note 1 at 64-73; Yemi Akinseye-George "New Trends in African Human Rights Law: Prospects of an African Court of Human Rights" vol 10 (2001-2002) *University of Miami International and Comparative Law Review* 159 165-168; and David Baluarte & Jamal Jafari "News from the regional human rights systems" vol 10 (2003) *Human Rights* 34.

57 Art 45 states that the Commission has the duty to promote human and peoples' rights (art 45(1)); to ensure the protection of human and peoples' rights under the conditions laid down by the Charter (art 45(2)); to interpret all the provisions of the Charter at the request of a state party, an institution of the OAU or an African Organisation recognised by the OAU (art 45(3)); and to perform any other tasks which may be entrusted to it by the Assembly of Heads of State and Government (art 45(4)). In the performance of these functions, the Commission "may resort to any appropriate method of investigation; it may hear from the Secretary General of the Organisation of African Unity or any other person capable of enlightening it" (art 46). See generally Essien *supra* note 56 at 95.

58 See Baluarte *et al supra* note 56 at 37.

courts. Formerly, if a matter was taken under advisement, the ACHPR would submit its recommendations to the Assembly for action. The ACHPR is primarily concerned with upholding the principles of the Charter, although other international standards of human rights guide its operations. According to article 60 of the Charter, the ACHPR must draw inspiration from:

international law on human and peoples' rights, particularly from the provisions of various African instruments on human and people's rights, the Charter of the United Nations, the Charter of the Organisation of African Unity, the Universal Declaration of Human Rights, other instruments adopted by the United Nations and by African countries in the field of human and peoples' rights as well as from the provisions of various instruments adopted within the Specialized Agencies of the United Nations of which the parties to the present Charter are members.

This provision ensures that the interpretation of the various provisions of the Charter is firmly placed within the context of international human rights law. The provisions should therefore not be understood in isolation, but must be understood as forming part of a larger tradition of human rights protection as espoused by all the relevant international and regional human rights instruments. Any understanding of the nature and scope of the obligations engendered by the provisions of the Charter should therefore not only take cognisance of the text of the Charter, but also the texts of other relevant human rights instruments and their interpretation by the bodies legally entitled to interpret them.

During its early years, the ACHPR did not make full use of the individual complaints procedure and was criticised for its lack of will in dealing with complaints. Over the past several years the ACHPR has taken on a more active approach and has delivered some interesting and groundbreaking opinions in dealing with individual complaints before it, often making use of the international jurisprudence on human rights built up over the past 30 years. The ACHPR has thus begun to build up a jurisprudence regarding the interpretation of the various provisions of the Charter. When interpreting the social and economic rights provisions of the Charter, the interpretation given to them by the Commission will be of paramount importance.

### 2.2.5 *The proposed African Court of Human and Peoples' Rights*

The establishment of an African Court on Human and Peoples' Rights is a landmark development in the field of international human rights law.<sup>59</sup> On 9 June 1998, in Ouagadougou, Burkina Faso, the Assembly of Heads of State and Government of the OAU adopted a Protocol to the African Charter on Human and Peoples' Rights.<sup>60</sup> This Protocol, which was signed

59 Udombana *supra* note 1 at 45.

60 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) [hereinafter Protocol]. The text was adopted unmodified from the Draft Protocol reprinted in vol (1997) *African Journal on International and Comparative Law* 953.

by 30 of the 52 member states of the then OAU on the same day,<sup>61</sup> establishes an African Court on Human and Peoples' Rights to supplement the existing protections afforded by the African Commission on Human and Peoples' Rights. The Court will come into existence with the ratification of the protocol by at least 15 of the members of the African Union.<sup>62</sup> By September 2003, 12 countries had ratified the protocol.<sup>63</sup> While many of the Protocol's provisions are similar to the statutes of both the European and Inter-American Court of Human Rights, several unique features distinguish the African Court.<sup>64</sup>

The Protocol vests the Court with a broad mandate and provides for automatic jurisdiction upon ratification.<sup>65</sup> It does not require the deposit of an additional declaration for the Court to entertain petitions filed by the Commission, another State Party or an African Inter-Governmental Organisation.<sup>66</sup> Like the other regional human rights courts, the African Court is authorised both to consider disputes between individuals and state parties and to issue general interpretive opinions regarding subjects that are not the subject of individual complaints brought to the Court. Article 5 of the Protocol is particularly important as it defines who may bring a case before the Court. Subsection 5(1) entitles four categories of claimants to access the Court directly: the Commission; a state party that has lodged a complaint to the Commission; a state party against which a complaint has been lodged; and a state party whose citizen is a victim of a human rights violation. For these actors access to the Court is automatic upon a

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61 The 30 states are Benin, Botswana, Burkina Faso, Burundi, Federal Islamic Republic of Comoros, Republic of Congo, Côte d'Ivoire, Federal Democratic Republic of Ethiopia, Equatorial Guinea, Gabon, Gambia, Ghana, Guinea-Bissau, Liberia and Great Socialist People's Libyan Arab Jamahiriya, Malawi, Mali, Mauritius, Namibia, Rwanda, Senegal, Seychelles, Sierra Leone, South Africa, Sudan, United Republic of Tanzania, Togo, Tunisia, Zambia and Zimbabwe. See Nsongurua J Udombana "Towards an African Court on Human and Peoples' Rights: Better late than never" vol 3 (2000) *Yale Human Rights and Development Law Journal* 45-46.

62 See Protocol *supra* note 61, art 34(3). This is an improvement in light of the 26 ratifications required for the Banjul Charter to enter into force. It is higher, however, than the 11 ratifications required under the Cape Town Draft.

63 These countries are Burkina Faso, Gambia, Mali, Senegal, South Africa and Uganda.

64 The Protocol contains other provisions, including those related to vacancies (art 20), presidency of the Court (art 21), registry of the Court (art 24) and seat of the Court (art 25). Space will not allow for detailed consideration of these important provisions aimed at enhancing the effectiveness of the Court. See Udombana *supra* note 1 at 82.

65 See Protocol *supra* note 1, art 34(3).

66 An important exception to this general rule discussed in more detail below, however, relates to individuals and NGOs. Under art 34(6), the Commission does not have jurisdiction to entertain cases filed by individuals and NGOs *unless* the target state has made an explicit declaration to that effect and has deposited its declaration with the AU Secretariat. See art 34(6) which states:

"At the time of the ratification of this Protocol or any time thereafter, the State shall make a declaration accepting the competence of the Court to receive cases under art 5(3) of this Protocol. The Court shall not receive any petition under art 5(3) involving a State Party which has not made such a declaration."

Art 5(3) states: "The Court may entitle relevant Non Governmental Organizations (NGOs) with observer status before the Commission, and individuals to institute cases directly before it, in accordance with art 34(6) of this Protocol."

state's ratification of the Protocol.<sup>67</sup> But article 5(1) also provides access to individuals and "[r]elevant NGOs with observer status before the Commission" subject to optional jurisdiction agreed to by the relevant state under article 34(6).<sup>68</sup> The discretion to allow direct access to the Court by individuals and NGOs lies jointly with the Court and the state which is being taken to Court. On the one hand, it appears that the Court has discretion to grant or deny individual and NGO access at will.<sup>69</sup> On the other, in order for a willing Court to hear a case filed by an individual or NGO, the state must have made an express declaration accepting the Court's jurisdiction to hear such cases.

Article 5(1) read with article 34(6) represents a compromise to facilitate the adoption of the Protocol. The question of whether non-state entities, such as NGOs and individuals, should be allowed direct access to the Court was extremely controversial throughout the drafting of the protocol. According to Ambassador Badawi, who was a member of the African Commission and its former chair, "[t]he question of allowing NGOs and individuals to submit cases to the Court was one of the most complicated issues during the consideration of the Draft Protocol".<sup>70</sup> This is because there is a far greater possibility that individual and NGO-related complaints would reach the Court and would embarrass a government, than the other kinds of complaints envisaged in article 5. Many states, anxious to preserve their sovereignty and fearful of embarrassment by adverse judgments of the Court, would not have contemplated ratifying the Optional Protocol if this meant that they had to sign onto individual and NGO-related complaints.

Despite this drawback, the Protocol contains some innovative aspects. There are, for example, significant innovations in regard to the subject matter jurisdiction of the African Court. The Court's jurisdiction extends "to all cases and disputes submitted to it concerning the interpretation and application of the Charter, this Protocol and *any other relevant Human Rights instrument ratified by the States concerned*".<sup>71</sup> Article 7 further provides that "the Court *shall apply* the provisions of the Charter *and any other human rights instruments ratified by the States concerned*".<sup>72</sup> These provisions are quite radical in their implication and go much further than articles 60 and 61 of the African Charter, which merely allow the Commission to "draw inspiration" from comparative and international human rights law when interpreting the provisions of the Charter, but make clear

67 See *ibid* art 5(2).

68 *Ibid* note 66.

69 See *ibid* art 5(3) (providing that the "Court may entitle relevant Non-Governmental Organizations (NGOs) with observer status before the [African] Commission, and individuals to institute cases directly before it" (my italics)).

70 See Ibrahim Ali Badawi El-Sheikh "Draft Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples Rights: Introductory En" vol 9 (1997) *African Journal on International and Comparative Law* 943 at 947.

71 Protocol *supra* note 1, art 3 (my italics).

72 *Ibid*. Art 7 (my italics).

that all cases must be decided with reference to the Charter. These provisions are a departure from traditional international human rights practice, as the European and Inter-American Courts direct subject-matter jurisdiction is limited to the Conventions under which they were created. The Optional Protocol, however, provides for the African Human Rights Court to exercise direct jurisdiction over all human rights instruments "ratified by the State concerned". This means that the Court will have jurisdiction to enforce the provisions of all regional, sub-regional, bilateral, multilateral and international treaties, including treaties which contain their own enforcement mechanisms. It has been pointed out that the Inter-American Court has held in an advisory opinion that with reference to the term "other treaties" as used in a jurisdictional clause of the American Convention, the treaty need not be concerned solely or even primarily with human rights and need not be regional in character nor adopted under the auspices of the regional political organ, the OAS. While excluding treaties that may not be ratified by states in the region, the Court held that its jurisdiction under the clause in question extended to all treaties dealing with the protection of human rights of the persons in the region.<sup>73</sup> It is not clear how the Court will apply this provision, but in principle, article 7 could therefore be used to expand the scope and content of the social and economic rights beyond the text of the social and economic rights contained in the Charter. For example, the right to housing, not explicitly protected in the Banjul Charter, could be invoked in cases where the Court has to consider a case on housing rights against a state which has signed and ratified the ICESCR. Thus, an individual or NGO in a state that has ratified the ICESCR would have standing in the African Court to seek an effective remedy against housing rights violations committed by that state in violation of the ICESCR.<sup>74</sup> If the Court gives effect to this provision in its totality, it will mean that will be empowered to go much further than the African Commission, which has recently interpreted social and economic rights broadly with reference to the totality of rights in the Charter. The subject-matter jurisdiction provisions of the Protocol are therefore revolutionary in expanding the protections afforded by regional human rights courts.

### 3 THE SCOPE AND CONTENT OF SOCIAL AND ECONOMIC RIGHTS IN THE AFRICAN CHARTER

#### 3.1 Basic principles

The Charter is generally viewed as creating relatively weak obligations for state parties who sign and ratify it. Much of the commentary – including

73 See also Udombana *supra* note 1 at 90. See also Inter-Am. Ct. H.R. "Other Treaties" Subject to the Advisory Jurisdiction of the Court Art 64 American Convention on Human Rights" Advisory Opinion OC-1/82, 24 Sept 1982, Ser. A, No. 1, pars 34–38.

74 Housing rights are protected in the ICESCR. See ICESCR *supra* note 21, art 11 ("The States Parties to the present Covenant recognize the right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing and housing...").

the commentary and opinions of the African Commission on Human Rights – relating to the interpretation and enforcement of the Charter have been directed at providing more restrictive readings of the various provisions of the Charter to bolster the scope and content of the state obligations. Most notably, many of the provisions in the Charter contain claw-back clauses, which permit, in normal circumstances, breach of an obligation for a specified number of reasons.<sup>75</sup> The Charter is unique, however, in that the economic, social and cultural rights contained in the Charter are free of both claw-back clauses and limitations.<sup>76</sup> The Charter also does not contain a derogation clause and the African Commission has held this to mean that “limitations on rights and freedoms enshrined in the Charter cannot be justified by emergencies or special circumstances”.<sup>77</sup> Moreover, the Charter does not provide for the “progressive realisation” of social and economic rights and therefore does not limit the state obligations with reference to incremental steps to be taken by the state.<sup>78</sup> Unlike the ICESCR, for example, the Charter makes clear that the obligations that state parties assume with respect to these rights are of immediate application. As Odinkalu points out “[e]conomic, social, and cultural rights are placed on the same footing as all other rights in the Charter”.<sup>79</sup> This view seems to be endorsed by the African Commission on Human and Peoples’ Rights. Early opinions by the Commission already noted that all the rights in the Charter “should be implemented now . . . It is a task that must be carried out by every ratifying State”.<sup>80</sup> Other members of the Commission

75 See Rosalyn Higgins “Derogations under Human Rights Treaties” vol 48 (1978) *British International Lawyer* 281.

76 Odinkalu *supra* note 1 at 348. The jurisprudence of the African Commission generally strives to mitigate and severely limit the adverse consequences of the claw-back clauses in the Charter. In Communication 101/93, *Civil Liberties Organization (in respect of the Nigerian Bar Association) v. Nigeria*, the Commission held that the claw-back clause in art 10 of the Charter (dealing with freedom of association), did not permit national authorities to limit the exercise of the rights granted by the Charter. See Communication 101/93, *Civil Liberties Organization (in respect of the Nigerian Bar Association) v. Nigeria*, in Eighth Annual Activity Report of the African Commission on Human and Peoples’ Rights 1994-1995, issued at Eighteenth Ordinary Session, 2-11 October 1995, ACHPR/AHG/201 (XXXI) 22 (1995). More importantly, the Commission has recently argued that in order to pass muster, the limitation of the Charter rights by national law must be compatible with international law, arguing that “to allow national law to have precedence over the international law of the Charter would defeat the purpose of the rights and freedoms enshrined in the Charter”. See Communications 105/93 *Media Rights Agenda & Constitutional Rights Project v Nigeria*, in its Twelfth Activity Report par 63.

77 *Media Rights Agenda & Constitutional Rights Project v Nigeria* par 64.

78 Art 16(2) does provide for state parties to take “necessary measures” to protect the health of their people. Some commentators have interpreted this to mean that art 16 provides for the incremental language associated with social and economic rights obligations found in other international human rights law treaties such as the CESCR. See Odinkalu *supra* note 1 at 349. But art 16(2) does not refer to the progressive realisation of the right to health and places a duty on the state to take the necessary measures to protect the health of its people without limiting this duty with reference to available resources or progressive realisation.

79 Odinkalu *supra* note 1 at 349.

80 Presentation of the Third Activity Report by the Chairman of the Commission, Prof UM Umozurike, to the 26th Session of the Assembly of the Heads of State and Government of the Organisation of African Unity, 9-11 July 1990, accessed at <http://www.achpr.org/html/africancommissiononhuman.html>.



have echoed this interpretation at different times as the authoritative interpretation of the nature of the obligation regarding economic, social and cultural rights under the Charter.<sup>81</sup>

This interpretation is in line with the idea that the rights in the African Charter are interdependent and indivisible. This view, in turn, dovetails with the general consensus which emerged *after* the adoption of the Charter. In the 1993 Vienna Declaration,<sup>82</sup> the consensus opinion recognised the futility inherent in entrenching civil and political rights without the corresponding protection of economic, social and cultural rights.<sup>83</sup> This

81 See generally Odinkalu *supra* note 1 at 350 note 147.

82 Vienna Declaration and Programme of Action *supra* note 2; see also Shadrack Gutto "Beyond Justiciability: Challenges of Implementing/Enforcing Socio-Economic Rights in South Africa" vol 4 (1998) *Buffalo Human Rights Law Review* 79, 86-88 (discussing the Vienna Human Rights Conference and its outcome). See also Proclamation of Tehran, Final Act of the International Conference on Human Rights, 13 May 1968, art 13, U.N. Doc. A/CONF.32/41 (1968), reprinted in UN Human Rights: A Compilation of International Instruments vol 1 (2nd part) at 51-54, U.N. Doc. ST/HR/1/Rev.5 (1994); Vienna Declaration and Programme of Action, June 25, 1993, U.N. World Conference on Human Rights in Vienna, U.N. Doc. A/CONF.157/24 (1993), reprinted in 32 I.L.M. 1661 (1993); see also The Limburg Principles on the Implementation of the International Covenant on Economic, Social and Cultural Rights, 8 Jan 1987, prints 2-3, U.N. ESCOR, Commission on Human Rights, 43d Sess., Agenda Item 8, U.N. Doc. E/CN.4/1987/17/Annex (1987), reprinted in 9 *Human Rights Quarterly* 122, 123 (1987) (underscoring the indispensability of indivisibility and interdependence); Maastricht Guidelines on Violations of Economic, Social and Cultural Rights, guideline 4, reprinted in vol 20 (1998) *Human Rights Quarterly* 691 (re-emphasising equality, interdependence and indivisibility of all human rights). On interdependence generally, see Craig Scott "The Interdependence and Permeability of Human Rights Norms: Towards a Partial Fusion of the International Covenants on Human Rights" vol 27 (1989) *Osgoode Hall Law Journal* 769.

83 The SA Constitutional Court has long since endorsed the principle that the rights in the Bill of Rights are interdependent and indivisible. This came as no surprise as it seems obvious from the structure of the Bill of Rights, which does not, in any formal way, distinguish between rights traditionally seen as civil and political rights, and rights traditionally seen as social and economic in nature. In this view, there is no *conceptual* difference between civil and political rights and economic and social rights. A distinction between the former and the latter is usually based on the nature of the interests they aim to protect. All rights are aimed at guaranteeing each individual the freedom to live his or her life with dignity and respect. Civil and political rights are mostly concerned with guaranteeing an individual the autonomy to freely pursue personal and political choices without interference from the state or other powerful parties. Social and economic rights are mostly concerned with guaranteeing everyone an autonomous space within which the individual may pursue his or her social and economic well being and, with appropriate assistance from the state, live a life free from economic and social want. However, it is not possible to make an absolute and definitive distinction between the rights by referring to the interest they aim to protect. Civil and political rights will often operate to protect economic and social interests while social and economic rights will often operate to protect interests related to the personal and political choices of an individual. The different rights also operate in support of each other, since the realisation of one right might be dependent on the realisation of another. Starving people may find it difficult to exercise their freedom of speech, while a restriction on freedom of speech may make it difficult for individuals to enforce their right of access to housing. See P de Vos "Pious wishes or directly enforceable human rights?: Social and economic rights in South Africa's 1996 Constitution" vol 13 (1997) *SAJHR* 67 70-71. The approach of indivisibility is reflected in the documentation of the Technical Committee of experts to the constitutional committee (Theme Committee 4 of the Constitutional Assembly), most notably in an undated memorandum "Supplementary Memorandum on Bill of Rights and Party Submissions" drawn up by the Technical Committee after

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consensus emerged despite earlier conflicts which resulted from ideological differences between East and West which then dominated international relations. Unlike the international system, the African Charter chose to deal with all rights in one signal body. The African Commission has also reiterated that the Charter is unique and must be interpreted in the light of the uniqueness of its text.

The uniqueness of the African situation and the special qualities of the African Charter on Human and Peoples' Rights imposes upon the African Commission an important task. International law and human rights must be responsive to African circumstances. Clearly, collective rights, environmental rights, and economic and social rights are essential elements of human rights in Africa. The African Commission will apply any of the diverse rights contained in the African Charter. It welcomes this opportunity to make clear that there is no right in the African Charter that cannot be made effective.<sup>84</sup>

The interpretation of the Charter is also made easier by a provision in the Charter dealing with its interpretation by the African Commission and by a provision in the draft protocol establishing the African Court on Human and Peoples' Rights. As I have pointed out above, article 60 of the Charter instructs the African Commission to "draw inspiration" from international law on human and peoples' rights, including the various international treaties adopted by African countries, while the draft protocol instructs the court to apply the Charter and all other relevant human rights documents ratified by the states concerned. This means that when interpreting the social and economic provisions of the Charter it will often be possible to have regard to the interpretation of other human rights treaties dealing with social and economic rights. The General Comments of the UN Committee on Economic, Social and Cultural Rights dealing with the interpretation of the ICESCR, will be particularly helpful. At the same time, the text of the Charter is unique and the African Commission has demonstrated that it will borrow from international jurisprudence, while at the same time adopting a uniquely African perspective.

publication of the first working draft of the Constitution in October 1995. In the course of objecting to a request by the Theme Committee to group social and economic rights together in a separate section of the Bill of Rights, the technical experts argue that grouping these rights together will devalue them and will make them seem "like some special species of rights". See also Memorandum of Panel of Constitutional Experts, "The Meaning of 'Progressive' (section 25 and 26)", dated 6 February 1996, where the "interrelationship and indivisibility" of the different kinds of rights are accepted. (On interdependence, see Craig Scott "The interdependence and permeability of human rights norms: Towards a partial fusion of the international Covenants on human rights" vol 27 (1989) *Osgoode Hall Law Journal* 769-878; Economic and Social Council of UN, "Limburg Principles on the Implementation of the International Covenant on Economic, Social and Cultural Rights" E/CN.4/1987/17, at par 2 and 3; *The Maastricht guidelines on violations of economic, social and cultural rights* par 6, published in vol 20 (1998) *Human Rights Quarterly* 691 par 4.) In *Minerva Mills v Union of India* 1980 S.C. 1789 (pars 111-112 per Bhagwati J) the Indian Supreme Court also endorsed this view when it found that both the Fundamental (civil) Rights contained in Part III of the Indian constitution and the Directive Principles of state policy found in Part IV are based on human rights, and that the latter is in no way inferior to the former.

84 *Nigeria case supra* note 77 at par 68.

### 3.2 The duties imposed by social and economic rights in the African Charter

The African Commission has accepted the view endorsed by the Committee on Economic, Social and Cultural Rights, that social and economic rights (like all other human rights) engender at least four levels of duties for a state that undertakes to adhere to a rights regime.<sup>85</sup> These duties include the duty to *respect, protect, promote* and *fulfil* the rights in a human rights treaty. These obligations universally apply to all rights and entail a combination of negative and positive duties, and each layer of obligation is equally relevant to the rights in question.<sup>86</sup> Although there are therefore different levels of obligations, one level is not more important than another, because all rights are interdependent and indivisible and engender various kinds of obligations.

At a primary level, the Charter places a negative duty on the state to *respect* the rights contained in it and this entails that the state should refrain from interfering in the enjoyment of all fundamental rights. According to the Commission, this means that a state "should respect right-holders, their freedoms, autonomy, resources, and liberty of their action".<sup>87</sup> Regarding socio-economic rights, this means that the "State is obliged to respect the free use of resources owned or at the disposal of the individual alone or in any form of association with others, including the household or the family, for the purpose of rights-related needs".<sup>88</sup> Any action by the State that takes away existing access to enjoyment of social and economic rights or makes it more difficult for an individual to enjoy their existing social and economic well-being, would thus potentially result in an infringement of this right. The Commission also stressed that due to the inclusion of collective rights, this level of obligation requires that the resources belonging to the collective should be respected, as it has to use the same resources to satisfy its needs.

85 See generally Henry Shue *Basic Rights: Subsistence, Affluence and U.S. Foreign Policy* (1980) 5. See Committee on Economic, Social and Cultural Rights, General Comment 3 "The nature of States parties obligations (art 2.1)" 14/12/90, fifth session par 9, using the terminology that states had to "respect and ensure" the realisation of social and economic rights. Other international law documents dealing with this matter include *Limburg Principles on the Implementation of the International Covenant on Economic, Social and Cultural Rights*, accessed at <http://www.law.uu.nl/english/sim/instr/limburg.asp> and the *Maastricht Guidelines on Violations of Economic, Social and Cultural Rights, Maastricht 22-26 January 1997*, accessed at <http://www1.umn.edu/humanrts/mstree/maastrichtguidelines.html>.

86 See *Social and Economic Rights Action Center and the Center for Economic and Social Rights v Nigeria Communication 155/96 ACHPR/COMM/A044/1* 27 May 2002 par 44. See generally Asbjørn Eide "Economic, Social and Cultural Rights As Human Rights" in Asbjørn Eide, Catarina Krause and Allan Rosas (eds) *Economic, Social, and Cultural Right: A Textbook* (1995) 21-40.

87 Krzysztof Drzewicki "Internationalization of Human Rights and Their Juridization" in Rajja Hanski and Markku Suksi (eds) *An Introduction to the International Protection of Human Rights: A Textbook* 2 ed (rev) (1999) 51.

88 *Nigeria case supra* note 77 at par 45.

Apart from this negative obligation, the state also engenders at least three levels of positive obligations. The first of these entails a duty on the state to *protect* right-holders against other subjects by legislation and by the provision of effective remedies.<sup>89</sup> This obligation requires the state to take measures to protect beneficiaries of the protected rights against political, economic and social interferences. The Commission has stressed that this protection generally entails the creation and maintenance of an atmosphere or framework by an effective interplay of laws and regulations so that individuals will be able to freely realise their rights and freedoms.<sup>90</sup>

This first positive obligation is intertwined with the second positive obligation of the state to *promote* the enjoyment of all human rights. The Commission has explained that this means that the state has a duty to make sure that individuals are able to exercise their rights and freedoms, for example, by promoting tolerance, raising awareness, and even building infrastructures.<sup>91</sup>

Finally, the state is required to *fulfil* the rights and freedoms it freely undertook under the various human rights regimes. According to the Commission, this obligation "is more of a positive expectation on the part of the State to move its machinery towards the actual realisation of the rights. This obligation is linked to the duty to promote social and economic rights mentioned above. It could consist in the direct provision of basic needs such as food or resources that can be used for food (direct food aid or social security)".<sup>92</sup>

These obligations as set out above are in line with the interpretation provided by the Committee on Economic, Social and Cultural Rights in their various general comments, and especially in General Comment 3.<sup>93</sup> There is, however, a difference between the UN Committee's understanding of the obligations engendered by the ICESCR and the African Commission's view of the obligations engendered by the Charter, in that the latter document does not contain a limitation clause similar to the one

89 Drzewicki *supra* note 87 at 31.

90 *Nigeria case supra* note 77 at par 46.

91 *Ibid* par 46.

92 *Nigeria case supra* note 77. See Eide in Eide, Krause and Rosas *op cit* note 87 at 38.

93 See UN Committee on Economic, Social and Cultural Rights General Comment 3. See also General Comment 4: The right to adequate housing (Art 11.1, Sixth session, 1991); General Comment 5: Persons with disabilities (Eleventh session, 1994); General Comment 6: The economic, social and cultural rights of older persons (Thirteenth session, 1995); General Comment 7: The right to adequate housing: forced evictions (Art 11.1, Sixteenth session, 1997); General Comment 8: The relationship between economic sanctions and respect for economic, social and cultural rights (Seventeenth session, 1997); General Comment 9: The domestic application of the Covenant (Nineteenth session, 1998); General Comment 10: The role of national human rights institutions in the protection of economic, social and cultural rights (Nineteenth session, 1998); General Comment 11: Plans of action for primary education (Art 14, Twentieth session, 1999); General Comment 12: The right to adequate food (Art 11, Twentieth session, 1999); General Comment 13: The right to education (Art 13, Twenty-first session, 1999); and General Comment 14: The right to the highest attainable standard of health (Art 12, Twenty-second session, 2000).

contained in section 2(1) of the ICESCR. The African Commission is not bound by the kind of language used in section 2(1) and there is therefore no explicit limit placed on the set of duties by the state to respect, protect, promote and fulfil the rights in the Charter, and thus no explicit instruction that the state's duties are subject to available resources or should be achieved progressively. But given the fact that article 60 of the Charter and article 7 of the draft protocol explicitly place the interpretation of the Charter in the context of international human rights jurisprudence, it is clear that any interpretation of the social and economic rights cannot ignore the fact that *some* form of limitation is implied. Thus the African Commission has stated that:

Emphasising the all embracing nature of their obligations, the International Covenant on Economic, Social, and Cultural Rights, for instance, under Article 2(1), stipulates exemplarily that States '*undertake to take steps . . . by all appropriate means, including particularly the adoption of legislative measures.*' Depending on the type of rights under consideration, the level of emphasis in the application of these duties varies. But sometimes, the need to meaningfully enjoy some of the rights demands a concerted action from the State in terms of more than one of the said duties.<sup>94</sup>

But the Commission does not say under which circumstances it would require immediate action from the state. This is the crux of the problem surrounding the interpretation of the social and economic rights and, in fact, all other rights in the Charter: to what extent can and should these rights be enforced immediately? The African Commission, when required to deal with the question of whether the Nigerian government had violated the right to health<sup>95</sup> and the right to a satisfactory environment,<sup>96</sup> confirmed that social and economic rights place clear obligations on the state and engender both positive and negative obligations.<sup>97</sup> The negative aspect of these rights places an obligation on the state to respect the 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".<sup>98</sup>

The more difficult question, however, is to determine to what extent the state has an obligation to act immediately to ensure the positive realisation of the right(s) in question. The Commission confirmed that in the context of articles 16 and 24, these rights impose "clear obligations upon the government" and that the state therefore has a duty "to take reasonable and other measures (sic) to prevent pollution and ecological degradation, to promote conservation, and to secure an ecologically sustainable development and use of natural resources".<sup>99</sup> It furthermore argued that:

94 *Nigeria case supra* note 77 at par 48.

95 Art 16.

96 Art 24.

97 *Nigeria case supra* note 77 at par 52.

98 See *Nigeria case supra* par 52, referring to Scott Leckie "The Right to Housing" in Eide, Krause and Rosas (eds) *Economic, social and cultural rights*, Martinus Nijhoff Publishers 1995.

99 *Nigeria case supra* note 77 at par 52.

Government compliance with the spirit of Articles 16 and 24 of the African Charter must also include ordering or at least permitting independent scientific monitoring of threatened environments, requiring and publicising environmental and social impact studies prior to any major industrial development, undertaking appropriate monitoring and providing information to those communities exposed to hazardous materials and activities and providing meaningful opportunities for individuals to be heard and to participate in the development decisions affecting their communities.<sup>100</sup>

The gist of this argument seems to be that the government is required to act reasonably. This is, in fact, very similar to the standard adopted by the South African Constitution in its social and economic rights litigation when interpreting and applying the South African Bill of Rights. The South African Constitutional Court has argued that steps will be reasonable where they are based on coherent and comprehensive policies and programmes that are reasonable both in their conception and implementation.<sup>101</sup> A reasonable plan might include the adoption of legislation invariably supported by appropriate, well-directed policies and programmes implemented by the executive. Such programmes must be capable of facilitating the realisation of the right and must be reasonable both in their conception and their implementation. The programmes must be "balanced and flexible". One that "excludes a significant segment of society cannot be said to be reasonable".<sup>102</sup> To be reasonable, measures cannot leave out of account the degree and the extent of the denial of the right they endeavour to realise. Those whose needs are the most urgent and whose ability to enjoy all rights are most in peril, must not be ignored by the measures aimed at achieving the realisation of the goal. Where measures, though statistically successful, fail to respond to those most desperate, they may not pass the test of reasonableness.<sup>103</sup>

The African Commission has also reiterated on several occasions that the state has a duty to protect citizens "from damaging acts perpetrated by private parties".<sup>104</sup> This duty stems from its obligation to protect the existing rights holders against interference from others. The state therefore has to take steps to make sure that the enjoyment of rights is not interfered with by any other private person. This means that the Charter has an indirect horizontal application, in that it places a duty on the state to ensure that private individuals and institutions do not interfere with the rights at hand.

Potentially one of the most innovative aspects of the Commission's interpretation of the Charter, is the way in which it has applied the idea that

<sup>100</sup> *Nigeria case supra* note 77 at par 53.

<sup>101</sup> *Grootboom case supra* note 24 at par 42.

<sup>102</sup> *Ibid* par 43; *Treatment Action Campaign and Others v Minister of Health and Others* 2002 (4) BCLR 356 (T) (*TAC supra* note 23 at par 68.

<sup>103</sup> *Government of the Republic of South Africa and Others v Grootboom and Others* 2000 (11) BCLR 1169 (CC) *supra* note 24 at par 44; and *TAC supra* note 23 at par 68.

<sup>104</sup> *Nigeria case supra* note: 77 at par 57. See also *Union des Jeunes Avocats v Chad Communication* 74/92. The Commission also referred to the judgment of the Inter-American Court on Human Rights in *Velásquez Rodríguez v Honduras* judgment of 19 July 1988. Series C No 4.

the rights in the Charter should be seen as interdependent and indivisible, and has thus “read in” rights into the Charter that are not explicitly included in the text of the Charter. Thus the Commission has interpreted article 14 (the right to property) to be read in combination with article 16 (the right to health) and article 18(1) (the right of the family to be protected by the state) as to protect the right to shelter or housing which is not explicitly protected in the Charter.<sup>105</sup> In *Social and Economic Rights Action Centre v Nigeria* the Commission found that this right to shelter obliges the Nigerian government – at a minimum – not to destroy the housing of its citizens and not to obstruct efforts by individuals or communities to rebuild lost homes. The state’s obligation to respect housing rights requires it, and thereby all of its organs and agents, to abstain from carrying out, sponsoring or tolerating any practice, policy or legal measure violating the integrity of the individual or infringing upon his or her freedom to use those materials or other resources available to him or her in a way that is most appropriate to satisfy individual, family, household or community housing needs.<sup>106</sup> Its obligations to protect obliges it to prevent the violation of any individual’s right to housing by any other individual or non-state actors like landlords, property developers, and land owners and, where such infringements occur, it should act to preclude further deprivations as well as guaranteeing access to legal remedies.<sup>107</sup> The right to shelter goes further than a roof over one’s head. It extends to embody the individual’s right to be left alone and to live in peace – whether under a roof or not.<sup>108</sup> The particular violation by the Nigerian government of the right to adequate housing as implicitly protected in the Charter also encompasses the right to protection against forced evictions. The African Commission draws inspiration from the definition of the term “forced evictions” by the Committee on Economic Social and Cultural Rights, which defines this term as “the permanent removal against their will of individuals, families and/or communities from the homes and/or which they occupy, without the provision of, and access to, appropriate forms of legal or other protection”.<sup>109</sup> Wherever and whenever they occur, forced evictions are extremely traumatic. They cause physical, psychological and emotional distress; they entail losses of means of economic sustenance and increase impoverishment. They can also cause physical injury and in some cases sporadic deaths. Evictions break up families and increase existing levels of homelessness.<sup>110</sup> In this regard, General Comment 4 (1991) of the Committee on Economic, Social and Cultural Rights on the right to adequate housing states that “all persons should possess a degree of security of tenure which guarantees legal protection against forced eviction, harassment and other threats”.<sup>111</sup>

105 *Nigeria case supra* note 77 at par 60.

106 See Leckie *supra* note 99 at 107. This is in line with the requirements of the UN Committee on Economic, Social and Cultural Rights General Comment 4 and especially General Comment 7, which prohibits forced evictions.

107 Leckie *op cit* 113–114.

108 *Nigeria case supra* note 77 at par 61.

109 See General Comment 7 (1997) on the right to adequate housing (Art 11.1): Forced Evictions.

110 Leckie *op cit* 113.

111 E/1992/23, annex III, par 8(a).

The Commission used the same method to “discover” a right to food in the Charter which is not explicitly included in the Charter. The Commission endorsed the arguments put forward by applicants that the right to food is implicit in the Charter, in such provisions as the right to life,<sup>112</sup> the right to health,<sup>113</sup> and the right to economic, social and cultural development.<sup>114</sup> The right to food is implicitly protected in the Charter because it 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”.<sup>115</sup> The minimum core of this right to food requires that states should not destroy or contaminate food sources. The state should not allow private parties to destroy or contaminate food sources or prevent peoples’ efforts to feed themselves.<sup>116</sup>

#### 4 CONCLUSION

The African Commission has now taken the first bold steps in the interpretation of the social and economic rights provisions in the African Charter. It has employed some innovative methods to flesh out the obligations engendered by social and economic rights in the Charter and to find protection for social and economic rights not explicitly included in the text of the Charter. It has made good use of international human rights norms and the work of the Committee on Economic, Social and Cultural Rights, and is well placed to develop a unique yet internationally-attuned jurisprudence on the enforcement of social and economic rights.

112 Art 4.

113 Art 16.

114 Art 22.

115 *Nigeria case supra* note 77 at par 64.

116 *Ibid* par 65.