
Mini-thesis submitted in fulfilment of the requirements for the LLM degree in the Faculty of Law, University of the Western Cape

By

TSHIMPAKA KASONGO

3281259

Supervisor: DR. EBENEZER DUROJAYE

14 October 2014
DECLARATION

I declare that ‘The implementation of socio-economic rights provisions of the African Charter on Human and Peoples’ Rights at the national level: A case study of Democratic Republic of Congo (DRC)’ is my work and has not been submitted for any degree or examination in any other university or academic institution. All sources and materials used are duly acknowledged and are properly referenced.

Tshimpaka Kasongo

Signed……………………………..

Date……………………………..
DEDICATION

This Mini-thesis is dedicated to my lovely family, especially to my parents Tshimpaka Jean-Mari and Kasongo Lea Wivine. May this achievement be a reflection of their pride in raising me and providing me with an education of the highest quality.

This study is also for my son Tshimpaka Daniel, great and beloved brothers, cousins, nephews, and nieces. I am confident that you will bring a valuable contribution in the world. May this research inspire you to achieve greater things in future.

To all who suffer from violations of their socio-economic rights in Africa, in general and in DRC in particular, may this study be an awakening of the human conscience to equip, protect, and defend you.
ACKNOWLEDGEMENTS

I would like to express my sincere thanks to the following persons for their invaluable assistance in bringing this work to completion. First, to Whom is above all things, Almighty God, to Whom I dedicate my life, and who has power over everything in heaven and on earth. His Name be praised.

I would like to express my heartfelt thanks to Dr. Ebenezer Durojaye, my supervisor; especially for his incisive and motivating guidance and tireless support throughout the time of writing this mini-thesis. Without your constructive criticism, it would not have been possible to complete this work. Thank you so much.

To the couple, Mr. and Mrs. Thabo Khojane, through building of their lovely house, the Residence “Koeneng” in Bishopscourt, studies have been possible in this country. Thank very much for the job which has financed our master programme.

To my brother-in-law, Mr. Kapita Adelard, sister Mrs. Musebe Bibi, cousin Mr. Takombe Ody and friends, Mr. Musema Jean-Paul, Mr. Tutu Mathias, Mr. Intara Marc, Mrs. Tankama Mireille, thank you for your support and encouragement.

To my editor, Professor Leeman, who has agreed to edit my mini-thesis in spite of his many responsibilities. Thanks for your remarkable and valuable work.

To the administrative staff of the Law Faculty of the University of the Western Cape, thanks for the assistance.
KEYWORDS

African Charter on Human and Peoples’ Rights
Constitution of DRC
Democratic Republic of Congo
Economic, social and cultural rights
Implementation
Justiciability
National/domestic level
Protection
Realisation
Socio-economic rights provisions
Violation
ABSTRACT

This mini-thesis examines the issue of the implementation of the socio-economic rights provisions of the African Charter on Human and Peoples’ Rights (ACHPR) at the national level, in a case study of Democratic Republic of Congo (DRC). These rights which comprise the right to property, the right to work, the right to health, the right to education and the protection of the family and cultural rights in Articles 14 to 18 of the ACHPR are provided for and guaranteed in the DRC Constitution of 18 February 2006 in Articles 34 to 48 and, accordingly, are legally enforceable under the Constitution. This study was motivated by the fact that despite the enforceability of these rights under the DRC Constitution, the real situation in the DRC remains worrying in that the economic, social and cultural rights (ESCR) of the ACHPR are violated from day to day by the government. The majority of Congolese live in poverty, disease and ignorance; they lack jobs, food and other basic necessities, such as, water and electricity, in spite of DRC’s abundant natural resources (such as, oil and gas); minerals (such as cobalt, vanadium, manganese, phosphate, and bauxite); iron ore; and precious tropical rain forests. This situation is due to certain reasons, including: bad governance; mismanagement of public finances by political authorities at the expense of the majority; lack or weakness of the institutions or organs of implementation; and the ignorance of the Congolese people about their socio-economic rights even if they are massively violated by their government. Consequently, the marginalisation of socio-economic rights which results in their non-protection and non-realisation in DRC leads to a low expectation of the State and Government by the people, corruption, exclusion, racism, xenophobia, inequality, diseases, poverty, a feeling of betrayal of the people, a crisis of state and governmental legitimacy, popular insurrections and civil war in the country. To prevent the above consequences requires the DRC State to comply with Article 1 of the ACHPR which declares that the Member States of the Organization of African Unity that are parties to the ACHPR shall recognise the rights, duties and freedoms enshrined in it and shall undertake to adopt legislative or other measures to give effect to them. In addition, as the ACHPR complements human rights protection at the domestic level where the rights protected in the Charter should be realised, it is important for DRC to ensure that the ESCR of the ACHPR
protected in its Constitution are given full legal effect under domestic law, such that the Charter’s rights are made justiciable.
<table>
<thead>
<tr>
<th>Abbreviation</th>
<th>Full Form</th>
</tr>
</thead>
<tbody>
<tr>
<td>ACHPR</td>
<td>African Charter on Human and People’s Rights</td>
</tr>
<tr>
<td>AHSG</td>
<td>Assembly of Heads of State and Government</td>
</tr>
<tr>
<td>AU</td>
<td>African Union</td>
</tr>
<tr>
<td>ARV</td>
<td>Antiretroviral</td>
</tr>
<tr>
<td>CEDAW</td>
<td>Convention on Elimination of All Forms of Discrimination Against Women</td>
</tr>
<tr>
<td>CESR</td>
<td>Committee on Economic, Social and Cultural Rights</td>
</tr>
<tr>
<td>CPR</td>
<td>Civil and Political Rights</td>
</tr>
<tr>
<td>CRC</td>
<td>Convention on the Rights of the Child</td>
</tr>
<tr>
<td>DRC</td>
<td>Democratic Republic of Congo</td>
</tr>
<tr>
<td>DRD</td>
<td>Declaration on the Right to Development</td>
</tr>
<tr>
<td>DFID</td>
<td>Department for International Development</td>
</tr>
<tr>
<td>DGDA</td>
<td>The customs authority (Direction Generale des Douanes et Acquises)</td>
</tr>
<tr>
<td>DGI</td>
<td>Tax authority (Direction Generale d’ Impots)</td>
</tr>
<tr>
<td>DGRAD</td>
<td>General Direction of Administrative Incomes (Direction Generale des Recettes Administratives, Judiciaires, Domaniales et de Participations)</td>
</tr>
<tr>
<td>DSPD</td>
<td>Declaration on Social Progress and Development</td>
</tr>
<tr>
<td>ESCR/ESC Rights</td>
<td>Economic, Social and Cultural Rights</td>
</tr>
<tr>
<td>ECHPR</td>
<td>European Commission on Human and People’s Rights</td>
</tr>
<tr>
<td>FC</td>
<td>Congolese francs (Francs Congolais)</td>
</tr>
<tr>
<td>Acronym</td>
<td>Description</td>
</tr>
<tr>
<td>--------------</td>
<td>-----------------------------------------------------------------------------</td>
</tr>
<tr>
<td>ICERD/CERD</td>
<td>International Convention on the Elimination of All Forms of Racial Discrimination</td>
</tr>
<tr>
<td>ICESCR</td>
<td>International Covenant on Economic, Social and Cultural Rights</td>
</tr>
<tr>
<td>ICRMW</td>
<td>International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families</td>
</tr>
<tr>
<td>INSS</td>
<td>National Institute of Social Security (Institut National de Securite Sociale)</td>
</tr>
<tr>
<td>IPR</td>
<td>Intellectual property rights</td>
</tr>
<tr>
<td>GC</td>
<td>General Comment</td>
</tr>
<tr>
<td>HIV/AIDS</td>
<td>Human Immunodeficiency Virus/Acquired Immune Deficiency Syndrome</td>
</tr>
<tr>
<td>NHRIs</td>
<td>National Human Rights Institutions</td>
</tr>
<tr>
<td>NGOs</td>
<td>Non-Government Organisations</td>
</tr>
<tr>
<td>NSAs</td>
<td>Non-State Actors</td>
</tr>
<tr>
<td>OAU</td>
<td>Organisation of African Unity</td>
</tr>
<tr>
<td>ONDHR</td>
<td>National Observatory of Human Rights (Office National des Droits de l'Homme)</td>
</tr>
<tr>
<td>RAPDA</td>
<td>African Network for the Right to Food (Réseau Africain Pour le Droit a l’Alimentation)</td>
</tr>
<tr>
<td>REGIDESO</td>
<td>Agency for Water Production and Distribution (Régie de Distribution des Eaux)</td>
</tr>
<tr>
<td>SERAC</td>
<td>Social and Economic Rights Action Centre</td>
</tr>
<tr>
<td>SNEL</td>
<td>National Electricity Company (Société Nationale d’Électricité)</td>
</tr>
<tr>
<td>UDHR</td>
<td>Universal Declaration of Human Rights</td>
</tr>
<tr>
<td>UN</td>
<td>United Nations</td>
</tr>
</tbody>
</table>
UNDP                         United Nations Development Program

UNESCO                    United Nations Educational, Scientific and Cultural Organization

                  Children's Emergency Fund)

WHO                           World Health Organisation
# TABLE OF CONTENTS

<table>
<thead>
<tr>
<th>Section</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>TITLE PAGE</td>
<td>i</td>
</tr>
<tr>
<td>DECLARATION</td>
<td>ii</td>
</tr>
<tr>
<td>DEDICATION</td>
<td>iii</td>
</tr>
<tr>
<td>ACKNOWLEDGEMENTS</td>
<td>iv</td>
</tr>
<tr>
<td>KEYWORDS</td>
<td>v</td>
</tr>
<tr>
<td>ABSTRACT</td>
<td>vi</td>
</tr>
<tr>
<td>ABBREVIATIONS AND ACRONYMS</td>
<td>viii</td>
</tr>
<tr>
<td>TABLE OF CONTENTS</td>
<td>xi</td>
</tr>
</tbody>
</table>

## CHAPTER ONE:

### INTRODUCTION

1.1 Background ................................................................. 1  
1.2 Problem statement ....................................................... 6  
1.3 Literature review ......................................................... 6  
1.4 Objectives of study ....................................................... 8  
1.5 Research questions ....................................................... 8  
1.6 Significance of the study .............................................. 8  
1.7 Research methodology .................................................... 9  
1.8 Limitations of the study .............................................. 9  
1.9 Overview of chapters .................................................... 9
CHAPTER TWO:

NATURE OF ECONOMIC, SOCIAL AND CULTURAL RIGHTS

2.1 Conceptual clarification, aim and origins of socio-economic rights

2.2 The normative framework of economic, social and cultural rights

2.2.1 The indivisibility and interdependence of human rights

2.2.2 International Covenant on Economic, Social and Cultural Rights

2.2.3 Justiciability of economic, social and cultural rights

2.2.4 Interpretations provided by the Committee on ESCR in its various General Comments

2.3 The African Charter and Economic, Social and Cultural Rights

2.3.1 Clarifying the normative content of ESCR under the ACHPR

2.3.1.1 Overview of ESCR explicitly protected in the ACHPR: the vague formulation of ESCR

2.3.1.2 The interpretation of the ESCR of the ACHPR by the African Commission

2.4 Conclusion

CHAPTER THREE:

IMPLEMENTATION OF THE SOCIO-ECONOMIC RIGHTS PROVISIONS OF THE ACHPR IN DRC

3.1 The economic, social and cultural rights in DRC’s Constitution

3.2 Analysis of the real situation of ESCR of the ACHPR contained in the DRC Constitution in DRC

3.2.1 The right to property
3.2.2 The right to work and social security.................................................................36
3.2.3 The right to health............................................................................................38
3.2.4 The right to education......................................................................................39
3.2.5 The right to protection of family and cultural rights.......................................41
3.2.6 The right to decent housing............................................................................42
3.2.7 The right to water, sanitation and electricity..................................................43
3.2.8 The right to food..............................................................................................45
3.3 Factors that impede or enhance the realisation of ESCR of the ACHPR in DRC..................................................................................................................46
3.3.1 Factors that impede or enhance the realisation of ESCR of the ACHPR in DRC at the national level.........................................................................................46
3.3.1.1 Bad governance............................................................................................46
3.3.1.2 Mismanagement of public finances.............................................................47
3.3.1.3 Lack or weak institutional structures for the implementation or verification of ESCR..................................................................................................................49
3.3.1.4 Ignorance of the Congolese people of their socio-economic rights.............50
3.3.1.5 Character of non-justiciability of ESCR before the Congolese courts...........51
3.3.2 Factors that impede or enhance the realisation of ESCR of the ACHPR in DRC at the regional level.........................................................................................52
3.3.2.1 Interpretation of ESCR provisions of the ACHPR (formulation vague in terms of content and scope)..................................................................53
3.3.2.2 Lack of effective enforcement and promotion of ESCR (the virtual inaction of the African Commission)..................................................................54
3.3.2.3 The absence of an expeditious and effective individual complaints procedure before the Commission........................................................................................................57

3.3.2.4 The ineffectiveness of the proposed African Court of Human and Peoples Rights….58

3.3.2.5 International apathy and hostility........................................................................59

3. 4 Consequences of continued marginalisation of the ESCR of the ACHPR……………59

3.5 Conclusion..................................................................................................................61

CHAPTER FOUR:

NATURE OF THE OBLIGATIONS OF DRC IN RELATION TO THE ECONOMIC, SOCIAL AND CULTURAL RIGHTS GUARANTEED AND PROTECTED IN ITS CONSTITUTION AND THE ACHPR.................................................................63

4.1 Introduction..................................................................................................................63

4.2 General obligations of DRC in relation to ESCR guaranteed and protected in the ACHPR.................................................................64

4.2.1 Obligation to take measures to ensure enjoyment of ESCR.....................................64

4.2.2 Obligations to respect, protect, promote and fulfil..................................................66

4.2.3 Resources and progressive realisation.......................................................................68

4.2.4 Immediate obligations regarding the implementation of ESCR................................69

4.3 Other key obligations..................................................................................................73

4.3.1 Equality..................................................................................................................73

4.3.2 International co-operation.......................................................................................73

4.3.3 Right to self-determination of peoples....................................................................74

4.3.4 Engaging with and respecting the rights of civil society..........................................75
4.3.5 National human rights institutions ................................................................. 76
4.3.6 State Party reporting ....................................................................................... 76
4.4 Policies and programmes of the DRC Government in relation to ESCR with regard to its international obligations ................................................................. 76
4.5 Justiciability as a necessary element for effective protection and realisation of ESCR at the DRC national level: Drawing lessons from South Africa’s experience ............... 85
4.6 Conclusion ........................................................................................................... 88

CHAPTER FIVE:

CONCLUSION AND RECOMMENDATIONS .............................................................. 90

5.1 Conclusion ........................................................................................................... 90
5.2 Recommendations ............................................................................................. 92

5.2.1 To the DRC Government ................................................................................ 92

5.2.1.1 Good governance ....................................................................................... 92
5.2.1.2 Good management of public finances ....................................................... 93
5.2.1.3 Complying with the imposed general and specific obligations generated by the ESCR of the ACHPR through the Guidelines and Principles on the implementation of ESCR ......................................................................................... 93
5.2.1.4 Sensitising and vulgarising international conventions and national laws on socio-economic rights in DRC ................................................................. 94
5.2.1.5 Educating the Congolese people about their ESCR, and the role of the NHRI .......... 94
5.2.1.6 Enacting legislation, legal or judiciary mechanisms and procedures that allow the Congolese people to sue the DRC State in case of violation of their ESCR ................................................................. 94
5.2.1.7 Making socio-economic rights of the ACHPR justiciable before the Congolese courts…………………………………………………………………………………..94

5.2.2 To the international/regional community…………………………………………………………..95

5.2.2.1 Making clear the content and scope of the ESCR of the ACHPR through the African Commission………………………………………………………………………………………………………………95

5.2.2.2 Making effective enforcement and promotion of ESCR (action of African Commission)………………………………………………………………………………………………………………95

5.2.2.3 Existence of an expeditious and effective individual complaints procedure before the African Commission which will enhance the development of appropriate jurisprudence on human rights in general and economic, social and cultural rights in particular…………………………………………………………………………………………………………………………………………………………95

5.2.2.4 Effectiveness of the proposed African Court of Human and Peoples Rights………………96

5.2.2.5 Regard and vigilance of the international community with respect to the enforceability of ESCR in DRC………………………………………………………………………………………………………………………………………………..96

BIBLIOGRAPHY……………………………………………………………………………………………………97
CHAPTER ONE:
INTRODUCTION

1.1 Background

The implementation of the socio-economic rights provisions of the African Charter on Human and Peoples Rights (ACHPR) is a problematic issue in Africa in general, and in Democratic Republic of Congo (DRC) in particular, given that these rights remain marginalised in their implementation and are violated. This has been confirmed by the Resolutions on the ACHPR of the African Commission.

However, lack of access to basic social services, including education and health, coupled with hunger, malnutrition and infant mortality are more acute in most countries of Africa than the rest of the world. Poverty and deprivation are a challenge to human rights, even though Africa is recognised as the richest continent in terms of natural resource endowment.

DRC is one of the African countries where evidence indicated the existence of a series of serious violations of human and peoples’ rights, including socio-economic rights, though protected under the ACHPR. The latter only explicitly recognises the following individual economic,

---

1 For the sake of convenience, this study will make use of the term “socio-economic rights” to refer to economic, social and cultural rights. Such usage should not be interpreted as denying the importance of cultural rights in this discourse. See Cole J ‘Your social and economic rights’ 1996 10.


3 Building on Limburg’s principles, the Maastricht Guidelines affirms that “As in the case of civil and political rights, the failure by a State party to comply with a treaty obligation concerning economic, social and cultural rights is, under international law, a violation of that treaty. See Chapman A & Russell S (eds) Core Obligations: Building a Framework for Economic, Social and Cultural Rights (2002) 7.


social and cultural rights (ESCR): the right to property (Art.14); the right to work under equitable and satisfactory conditions (Art.15); the right to enjoy the best attainable state of physical and mental health (Art.16); the right to education (Art.17(1)); and, the protection of the family and cultural rights (Arts.17(2) and (3), 18(1) and (2) and 61).  

The Charter has been criticised for the absence of any express guarantees of the rights of social security, food, adequate standard of living or housing and prohibition of forced labour. Those prominent socio-economic rights are not mentioned by name.  

It has also been noted that most of the provisions of the African Charter protecting ESCR are stated in very general terms. No State Party to the Charter, African Union (AU) institution or an African organization recognised by the AU has (as of 27 June 2011) ever requested the Commission to interpret any of the Charter’s provisions on ESCR. This is not surprising given the lack of interest in implementing ESCR by many African States.  

However, in 2001, in **SERAC & CESR v Nigeria**, the African Commission interpreted the right to housing or shelter and the right to food, both not explicitly provided for, nor protected under the African Charter.  

Regarding the right to housing or shelter (Arts. 14, 16 and 18(1)), the Commission held that, although not being explicitly provided for under the African Charter, housing rights are protected through the combination of provisions protecting the right to property (Art.14), the right to enjoy the best attainable standard of mental and physical health (Art.16), and the protection accorded to the family (Art.18 (1)).  

The right to food (Arts. 4, 16 and 22), although not expressly protected

---


under the African Charter, is inherent in the Charter’s protection of the rights to life, to health and to economic, social and cultural development.\textsuperscript{12}

In addition, while the African Charter does not directly protect the right to water and sanitation (Arts. 4, 5, 15, 16, 22 and 24), it is implied in the protection of a number of rights, including but not, limited to the rights to life, dignity, work, food, health, economic, social and cultural development, and a satisfactory environment.\textsuperscript{13}

In the context of DRC, socio-economic rights are provided for and guaranteed in the Constitution as the logical consequence of the country’s adherence to the Universal Declaration on Human Rights (UDHR)\textsuperscript{14}, and the ratification of the International Covenant on Economic, Social and Cultural Rights (ICESCR)\textsuperscript{15} at the international level as a member of the United Nations (UN). The country is also party to the ACHPR at the regional level as a member of the African Union (AU).

The DRC Constitution provides for and guarantees the following ESCR: the right to property (Art. 34); the right to private initiative (Art. 35); the right to work and to social security (Art. 36); the right to protection of the family (Art. 40); the right to education (Art. 43); the right to culture, freedom of intellectual and artistic creation and that of scientific and technological research (Art. 46); the right to health and to food security (Art. 47); and the right to decent housing, of access to drinking water and to electricity (Art. 48).\textsuperscript{16}


\textsuperscript{14}Universal Declaration on Human Rights adopted by the UN General Assembly on 10 December 1948.


\textsuperscript{16}Articles 34-48 of the DRC Constitution of 18 February 2006.
Therefore, ESCR are legally enforceable under the DRC Constitution due to the fact that the African Charter which provides for them forms part of DRC law as a ratified\textsuperscript{17} treaty. Surprisingly, nowadays the real situation of the DRC remains worrying as the ESCR of the ACHPR are violated by the government in most cases.

The violations of ESCR had already been demonstrated through the case of \textit{Free Legal Assistance Group, Lawyers’ Committee for Human Rights, Union Interafrique des Droits de l’Homme, Les Témoins de Jehovah vs Zaire} in which 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 were a violations of the African Charter.\textsuperscript{18} There had been, in this case, violations of the rights to health (Art.16) and education (Art.17) of the ACHPR which had been proved through the procedure of the Communication no. 25/89, 56/91, 100/93 (1995) brought before the African Commission.\textsuperscript{19}

Yet, at the domestic level, there are no instances where courts in DRC have made any pronouncement on socio-economic rights. Today, more than 30 years after the adoption of the ACHPR, the DRC state has neither enacted any legislation, nor provided any legal nor judiciary mechanisms and procedures allowing the Congolese people to sue it in case of violation of their ESCR.\textsuperscript{20} The real situation in the DRC remains disturbing in that the ESCR of the ACHPR are violated by the government in most cases.

In the same vein, unemployment is acute in DRC; access to work under equitable and satisfactory conditions is a challenge.\textsuperscript{21} Access to work has become an exception and

\textsuperscript{17} DRC has ratified the ACHPR on 20/07/1987. See Table 5.1 Chart of Ratifications of AU Human Rights-related Treaties (as at 31 July 2011) in Viljoen F \textit{International Human Rights Law in Africa} 2ed (2012) 285.


\textsuperscript{21} Mayimona N M ‘Quel bilan dresser de l’effectivite et de la justiciabilite des Droits economiques,sociaux et culturels en DRC au regard de la Declaration Universelle des Droits de l’homme et de la Charte Africaine des
unemployment the rule. The state of social security is precarious because there is irregularity of payment of pensions of the retired by the National Institute of Social Security. A large portion of the population has no access to hygienic sanitation facilities.

Primary education is compulsory and free according to the Constitution, but there is no public primary school where the education is free. The majority of people in the country do not benefit from drinking water and electricity. In areas where there is water and electricity, the provision thereof is generally irregular and the quality of drinking water less trustworthy.

Thus, so far, it has mostly been a case of the inaction of ESCR rather than ESCR in action, in Africa in general, and DRC in particular. This was proved by the 2005 National Development Report published by the United Nations Development Program (UNDP) which showed that most of the States at the bottom of the table on issues relevant to ESCR are African States and parties to the ACHPR, to which DRC is also party.

---


1.2 Problem statement

The implementation of the socio-economic rights provisions of the ACHPR remains a challenge for the DRC government. The ESCR are provided for and guaranteed in the DRC Constitution but there are challenges, including: bad governance; mismanagement of public finances by political authorities at the expense of the majority; lack or weakness of the institutions or organs of implementation; and ignorance of the Congolese people about their socio-economic rights even if they are massively violated by their government.

In light of the above problems, there is a dire need for the DRC government to fulfil its obligations of achieving socio-economic rights by intervening actively through its constitutional duties to implement them for the benefit of people living in DRC. Alston and Quinn observed: these rights may not be realised without intervention on the part of government.

As the African Charter complements human rights protection at the domestic level where the rights protected in the Charter should be realised, the DRC should ensure that the ESCR protected in its Constitution and the African Charter are given full legal effect in domestic law, such that the Charter’s 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 ESCR at the domestic level.

1.3 Literature review

Many studies have been conducted with regard to the implementation of the ESCR of the ACHPR in Africa and the nature of the obligations that engenders. Among the studies is the contribution made by Sibonile Khoza. His contribution in this regard is very significant,

29 Articles 34-48 of the DRC Constitution of 18 February 2006.


particularly as he has shown how to effectively implement the ESCR under the ACHPR following the core content and the recommendations of the Pretoria Seminar. His contribution can be differentiated from this study by the fact that it aims at the implementation of the ESCR provisions under the ACHPR purely in the African context in general, and does not focus on DRC in particular.

Another valuable contribution was made by Baderin & McCorquodale\textsuperscript{33}, who discussed the assessment of the implementation of the ESCR under the African Human Rights system through a critical evaluation of the activities of the African Commission. Nevertheless, their work is concentrated on the assessment of the implementation of the ESCR of the ACHPR in Africa in general, and does not focus on a particular country.

Similarly, Pierre de Vos\textsuperscript{34} has made a valuable contribution on the ESCR guaranteed under the ACHPR by analysing the scope and nature of the ESCR provisions in the Charter, highlighting the strong and weak points of the functions of the Commission and the forthcoming African Court, in addition to the nature of the State’s obligation. His work is different from this study in that it does not analyse the scope and the nature of the obligations engendered by the ESCR provisions of the ACHPR as they are implemented in the context of DRC.

Furthermore, Manisuli Ssenyonjo\textsuperscript{35} made a valuable contribution with regard to the African Charter which complements the human rights protection at the domestic level where the rights protected in the Charter should be realised. He cautions that African States should ensure that the ESCR are protected within the African Charter set-ups and be given full legal effect in domestic law, and that the Charter rights are made justiciable. He proposes that effective remedies (e.g. compensation, reparation, restitution, rehabilitation, guarantees of non-repetition, and public apologies) be made available to victims of all violations of ESCR at the domestic level.

\begin{flushright}
\end{flushright}

\begin{flushright}
\textsuperscript{34} De Vos P ‘A new beginning? The enforcement of social, economic and cultural rights under the African Charter on Human and Peoples Rights’. Paper presented at the University of the Western Cape AIX-University colloquium on economic, social and cultural rights in Europe and South Africa 13 – 15 August 2003 (unpublished on file with author).
\end{flushright}

\begin{flushright}
\end{flushright}
Nevertheless, his work addresses all the above-mentioned recommendations in relation to the African States in general, rather than to DRC in particular.

This research focuses on the implementation of the ESCR of the ACHPR in Africa, with particular reference to DRC, by strengthening justiciability (reasonableness review) as a necessary element for the protection and full realisation of the ESCR under the ACHPR at the Congolese national level.

1.4 Objectives of study

The objectives of the proposed study are to:

1. Analyse the nature of the ESCR provisions enshrined in the Constitution of DRC and the ACHPR with a view to ensuring their effective protection and implementation in DRC;

2. Analyse the factors that impede or enhance the realisation of the ESCR of the ACHPR in DRC with prospects for their effective protection and implementation in DRC;

3. Assess the nature of DRC’s obligations in implementing the ESCR enshrined in its Constitution and the ACHPR.

1.5 Research questions

The study seeks to address the following research questions:

1. To what extent are the socio-economic rights provisions of the ACHPR protected and enforced under the DRC Constitution?

2. What are the factors that impede or enhance the realisation of the ESCR of the ACHPR in DRC?

3. What are the obligations of the DRC, as an African State under the ACHPR, in ensuring ESCR in DRC?

1.6 Significance of the study

The study intends to contribute to the academic discourse on the implementation of the ESCR under the ACHPR especially from a practical point of view. It is a significant step in analysing the role and obligations of African States in general, and DRC in particular, for effective
implementation of ESCR in Africa. Furthermore, it sheds light on the policies and engagement between civil society and government toward the promotion of ESCR. In addition, the study will inspire further research in the field.

1.7 Research methodology

The methodology of this study is mostly desk research involving secondary data collection from library and published sources. The sources that will be utilised are: international instruments, domestic constitutions and legislation, case law, soft-law books, journals, newspapers, articles and internet sources. The study will critically analyse and interpret information collected from extant researches in the field in order to respond adequately to the implementation of the socio-economic rights provisions of the ACHPR in Africa, with a particular focus on DRC.

1.8 Limitations of the study

Conducting a study related to DRC from South Africa is a challenge because most of the information is in DRC which researchers cannot access owing to distance. The content of the dissertation will thus be limited to specific sources of information compiled through desk or library research on the situation of the implementation of the socio-economic rights provisions of the ACHPR in Africa, with a particular focus on DRC.

1.9 Overview of chapters

In addition to the present chapter, the structure of this research is presented as follows:

Chapter Two: deals with the nature of socio-economic rights with a view to ensuring their effective protection and implementation in DRC;

Chapter Three: discusses the implementation of the ESCR provisions of the ACHPR in DRC, together with the prospects for their effective protection and realisation in DRC;

Chapter Four: discusses the nature of the obligations of DRC in relation to the ESCR guaranteed in the Constitution and the ACHPR in implementing the ESCR enshrined in its Constitution and the ACHPR;
Chapter Five: provides conclusions and recommendations on how the implementation of the ESCR of the ACHPR in DRC can be enhanced.
CHAPTER TWO:

NATURE OF ECONOMIC, SOCIAL AND CULTURAL RIGHTS

2.1 Conceptual clarification, aim and origins of socio-economic rights

An attempt at conceptualising socio-economic rights is constrained by the conflation of the “social”, “economic” and “cultural” elements. Sometimes the “social” and “economic” are kept separate, and sometimes combined as “socio-economic”. Mostly, “cultural” is tagged on, without paying much attention to its peculiarities.\(^{36}\)

“Social rights” have been defined as rights “with regard to relationships in society”, such as, the right to family, to special protection for children and the elderly, and to form trade unions. “Economic rights” are defined as rights\(^ {37}\) “whose purpose is to assure that human beings have the ability to obtain and maintain a minimum decent standard of living consistent with human dignity”.\(^ {38}\) “Cultural rights” comprise an aspect of human rights in that they are universal in character and guarantee all persons the right to access their culture.\(^ {39}\) They can be an overlapping category of human rights that have a link with culture, which can be described as the ‘broard’\(^ {40}\) group of cultural rights.\(^ {41}\)

‘Socio-economic rights’\(^ {42}\) are those rights that give people access to certain basic needs (resources, opportunities and services) necessary for human beings to lead a dignified life.\(^ {43}\)

---


\(^ {37}\) Examples are the rights to food, health care, work, social security and to form trade unions. See Donders Y & Volodin V (eds) Human Rights in Education, Science and Culture Legal Developments and Challenges (2007) 54.


\(^ {40}\) This board group refers, in particular, to the rights of self-determination, to freedom of religion, freedom of expression, freedom of association, and to education. See Donders Y M Towards a Right to Cultural Identity? (2002) 3.


\(^ {42}\) ‘Socio-economic rights’ include health rights, the rights to housing, food, water, education and an adequate standard of living, as well as social security rights and the right to work. See Nolan A Children’s Socio-Economic Rights, Democracy and the Courts (2011) 21.
Otherwise, they are those rights that deal with minimum conditions for welfare and wellbeing.\textsuperscript{44} These rights are the human rights especially for disadvantaged people in any country. They are particular groups of basic human rights that are created to address social and economic injustices in any society.\textsuperscript{45}

However, they are important tools for these groups, who are often most affected by poverty\textsuperscript{46} and who experience a number of barriers that block their access to resources, opportunities and services in society.\textsuperscript{47} Although historically these rights have received less attention than civil and political rights, they are now being focused on increasingly.\textsuperscript{48} Vulnerable groups often experience social exclusion and unfair discrimination because of a number of overlapping grounds or reasons.\textsuperscript{49}

In the context of their origins, those rights have drawn strength from the views expressed in different religious traditions to care for those in need and for those who cannot look after themselves.\textsuperscript{50} The sources of socio-economic rights in international law can be found in numerous declarations\textsuperscript{51} and conventions\textsuperscript{52}. Economic, social and cultural rights are fully recognised in international human rights law.\textsuperscript{53}


\textsuperscript{44} Nolan A \textit{Children’s Socio-Economic Rights, Democracy and the Courts} (2011) 21.


\textsuperscript{46} Some issues relating to poverty include the growing inequalities in income distribution; the exclusion of certain groups from benefits; barriers to access to justice to enforce socio-economic rights; and the problem of discrimination. In its concluding observations, the UN Committee on Economic, Social and Cultural Rights noted that there are “unacceptable levels of poverty, among certain segments of the population…with a significant widening gap between rich and poor as a result.” See Burchill R et al \textit{Economic, Social and Cultural Rights: Their implementation in United Kingdom Law} (1999) XIV.


\textsuperscript{51} The UDHR is the initial foundation of socioeconomic rights. See Eide A et al \textit{Economic, social and cultural rights A textbook} 2 rev. ed (2001) 17.
2.2 The normative framework of economic, social and cultural rights

International human rights law recognises economic, social and cultural rights as an integral part of the human rights framework. The key international texts that explicitly refer to economic, social and cultural rights are: Universal Declaration of Human Rights 1948 (Arts. 22-8); International Convention on the Elimination of All Forms of Racial Discrimination 1965 (Art. 5); International Covenant on Economic, Social and Cultural Rights 1966 (Arts. 1,3,6-15); Declaration on Social Progress and Development 1969; Convention on the Elimination of All Forms of Discrimination against Women 1979 (Art. 1); Declaration on the Right to Development 1986; Convention on the Rights of the Child 1989; and International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families 1990. Of all the above-mentioned international texts, the most comprehensive is the ICESCR, constituting a more elaborate framework for ESCR.


Economic, social and cultural rights are also widely recognised in domestic legal systems, although not to the same extent as civil and political rights. In Africa, a few national constitutions, such as, those of South Africa, Kenya and Zimbabwe, expressly provide for

52 The ICESCR constitutes a more elaborate framework for these rights. Socio-economic rights are also contained in numerous other instruments, some adopted by the UN General Assembly, some by specialised agencies, and some by regional organisations. See Eide A et al Economic, social and cultural rights A textbook 2 rev. ed (2001) 17.


socio-economic rights with judicial enforcement.\textsuperscript{62} Besides Africa, the protection and promotion of socio-economic rights are included as general state duties within the legal and policy spheres in many other national constitutions, including those of India, the Netherlands and Mexico.\textsuperscript{63} Virtually all states have domestic statutes of one form or another that incorporate elements of economic, social and cultural rights. The legal status of these rights cannot be overlooked. Although few domestic legal systems incorporate all elements of every economic, social and cultural right, the majority of states have ratified international treaties that recognize these rights and have adopted national and local laws to give effect to them.\textsuperscript{64}

2.2.1 The indivisibility and interdependence of human rights

Civil and political rights and economic, social and cultural rights are not fundamentally different from one another, either in law or in practice.\textsuperscript{65} The official position within the United Nations is that economic, social and cultural rights and civil and political rights are interdependent and indivisible. This means that one set of rights does not have priority over the other and one set of rights cannot be enjoyed in a meaningful way if the other set of rights is also not enjoyed. For example, the right to vote and participate in public affairs will be weakened if an individual is denied food and water or deprived of the right to an education. The right to freedom from

\textsuperscript{58} The Constitution of a country is generally considered to be its supreme law. The entrenchment of a Chapter or Bill of Fundamental Rights in a constitution is particularly relevant for human rights protection. Civil and political rights have extensive protection through their inclusion as justiciable rights in constitutions of various countries. See Eide A et al \textit{Economic, social and cultural rights A textbook 2rev.ed} (2001) 56.

\textsuperscript{59} The 1996 South African Constitution.

\textsuperscript{60} The 2010 Kenyan Constitution.

\textsuperscript{61} The 2013 Zimbabwean Constitution.


inhuman and degrading treatment will be compromised by a lack of adequate housing and access to health care.\textsuperscript{66} In this regard, the international community must treat human rights globally in a fair and equal manner on the same footing and with the same emphasis.\textsuperscript{67}

2.2.2 International Covenant on Economic, Social and Cultural Rights

The ICESCR is one of the two human rights treaties that converted the ideals elaborated in the Universal Declaration into binding state obligations,\textsuperscript{68} constituting the most important international treaty for the codification of the “second generation of human rights”,\textsuperscript{69} and therefore remains the foundational treaty on economic, social and cultural rights. It recognizes the rights to: self-determination (Art. 1); equality for men and women (Art. 3); work and favourable conditions of work (Arts. 6 and 7); form and join trade unions (Art. 8); social security (Art. 9); protection of the family, mothers and children (Art. 10); an adequate standard of living, including adequate food, clothing and housing (Art. 11); the highest attainable level of health and health care (Art. 12); education (Art. 13); free and compulsory primary education (Art. 14); take part in cultural life; are benefit from scientific progress; and benefit from the protection of scientific, literary or artistic production of which one is the author (Art. 15).\textsuperscript{70} This group of rights is considered to be essentially humanitarian and aimed at providing human beings with a right to those basic subsistence needs that make life livable in dignity.\textsuperscript{71}

With over 150 States having so far ratified the ICESCR, which represent more than three-quarters of the members of the United Nations (UN), and from across all regions and political and economic systems of the world, there can be no doubt that it is accepted as an important


\textsuperscript{68} Viljoen F International Human Rights Law in Africa 2ed (2012) 114.

\textsuperscript{69} Nowak M Introduction to International Human Rights Regime (2003) 81.


States had become parties to the Covenant and voluntarily undertaken to implement and give effect to the norms and provisions it establishes. The UN Committee on ESCR monitors States’ compliance with their obligations under the Covenant. It has issued numerous Concluding Observations on the periodic reports submitted by States on their implementation of the Covenant. Moreover, it has adopted a series of General Comments on the interpretation and application of various provisions of the Covenant.

In 1993, the World Conference on Human Rights recommended the elaboration and adoption of an Optional Protocol to the Covenant that would grant individuals and groups the right to submit communications (complaints) concerning non-compliance with the Covenant.

2.2.3 Justiciability of economic, social and cultural rights

Many concerns about the justiciability of ESCR are based on inaccurate characterisations of ESCR and their CPR counterparts. Claims about the different nature of ESCR and CPR, respectively, include: the negative/positive nature of CPR and ESCR in terms of the duties they impose on states; the notion that, as rights to resources, ESCR may not be practicable where such resources are scarce, while CPR are always practicable or realisable; the belief that the obligations imposed by ESCR are vague and indeterminate in contrast to more precise CPR, and the idea that the obligation to fulfil or progressively realise ESCR involves the courts in reviewing state inaction while CPR involve review of state action.


ESCR have traditionally been considered as lacking justiciability, a quality which CPR are deemed to possess. In this respect, they are therefore not capable of being invoked in courts of law and applied by judges because of their very nature.

The aforementioned view is disproved by the growing body of jurisprudence relating to such rights at the international, regional and national levels. Socio-economic rights have been litigated directly and indirectly before regional bodies, including the African Commission on Human Rights, the Inter-American regional human rights bodies, the European Committee of
Social Rights, and the European Court of Human Rights. In light of this jurisprudence, it cannot be said that socio-economic rights are, by their very nature, incapable of being the subject of judicial determination or enforcement.

In the same vein, the UN Committee on ESCR stresses that ESCR are justiciable. In this regard, the justiciability of ESCR is therefore meaningful and stands as a response to the prevailing situation of dire poverty and exploitation by governing elites.

Therefore, the necessity that once international human rights conventions, including regional ones, have been ratified by the state and acquired formal validity in the domestic system following their publication, they must necessarily be applied by the courts. Application of

---

83 The *Social and Economic Rights Action Center and the Center for Economic and Social Rights vs Nigeria* (SERAC case) is one of cases litigated before the African Commission. In this case, the complainants alleged in Communication 155/96, (2001) that the Nigerian government violated the right to health and the right to a clean environment as recognized under Arts. 16 and 24 of the African Charter by failing to fulfil the minimum duties required by these rights. The African Commission concluded that although Nigeria had the right to produce oil, it had not protected the rights of the ogoni under Arts. 16 and 24, which were therefore violated. In addition, the Commission elaborated to adjudicate complaints of violations of ESCR in the Charter, affirming that “international law and human rights must be responsive to African circumstances.” See Gauri V & Brinks DM (eds) *Courting Social Justice Judicial Enforcement of Social and Economic Rights in the Developing world* (2008) 195.

84 In *Cortez v El Salvador*, Jorge Odir Miranda Cortez and 26 other HIV-infected petitioners submitted a claim to the Inter-American Commission alleging that the refusal of El Salvador to provide triple therapy medication to them constitutes a violation of numerous convention provisions as well as Article 10 of the Protocol of San Salvador. The petitioners alleged that they had not received the necessary medication due to the refusal of the Salvadoran government. The Commission observed that it “can consider” the Protocol of San Salvador “in the interpretation of other applicable provisions” (para.36). See Viljoen F *The Justiciability of socio-economic rights: Experiences and problems* in Donders Y & Volodin V (eds) *Human Rights in Education, Science and Culture Legal Developments and Challenges* (2007) 79.

85 For example, in the well known case of *Young, James and Webster v UK ECtHRR* A 44(1981), the applicants were dismissed because they refused to join, for reasons of conscience, one of three trade unions which British Rail employees were required to join under an arrangement introduced after the three applicants had become British Rail employees. The European Court held that this post-entry arrangement and dismissal, which was lawful under British law, infringed the applicants’ “freedom not to join a trade union under Article 11 of the European Convention on Human Rights. This Article protects the right to ‘freedom of association with others, including the right to join and form trade unions for the protection of his interests. See Burchill R et al *Economic, Social and Cultural Rights: Their implementation in United Kingdom Law* (1999) 15.


human rights, including ESCR, by the courts should respect the separation of powers due to the fact that trying on their part to secure State guarantees for social welfare rights may engage them in policy decision-making, trespassing in that manner on the executive’s territory. However, practice has proven that not all types of socio-economic rights adjudication threaten the separation of powers.\textsuperscript{90} Conferring courts with the authority to adjudicate ESCR does not mean that they assume the function of designing social programs. Enabling courts to adjudicate ESCR simply means that courts can hear and adjudicate claims involving alleged rights violations.\textsuperscript{91} Where courts (judges) feel that they lack the necessary competence or information in a particular case, there are a variety of means by which they can access additional expertise or information, or rely on the government to fashion the appropriate remedy.\textsuperscript{92} They are neither politicians nor expert civil servants who lead economic policy or design governmental programs, without abdicating their responsibility to uphold rights.\textsuperscript{93} Under the doctrine of the separation of powers, it is the job of courts, not legislatures, to consider allegations of rights violations and to determine whether a right has been infringed. Arguably, leaving the legislature to ensure its own compliance with social and economic rights would amount to a violation of the doctrine of separation of powers.\textsuperscript{94}

### 2.2.4 Interpretations provided by the Committee on ESCR in its various General Comments

The Committee on ESCR adopts General Comments (GC) to provide guidance on the interpretation and application of the provisions of the Covenant. Its comments give further substance to the norms and provisions found in the Covenant. These General Comments and

---


those adopted by other human rights bodies are valuable statements, outlining the content, intent and legal meaning of the subjects they address.\textsuperscript{95}

However, although the Committee on ESCR has adopted several General Comments\textsuperscript{96}, the emphasis will only be placed on General Comments No 3, 14, 18 and 20 in this section. Regarding GC 3, Article 2 of the ICESCR is of particular importance to a full understanding of the Covenant and must be seen as having a dynamic relationship with all of the other provisions of the Covenant. It describes the nature of the general legal obligations undertaken by States Parties to the Covenant. Those obligations include both what may be termed (following the work of the International Law Commission) obligations of conduct and obligations of result. It also imposes various obligations which are of immediate effect.\textsuperscript{97} GC 14 deals with the right to the highest attainable standard of health provided for by Article 12 of the ICESCR due to the fact that health is a fundamental human right indispensable for the exercise of other human rights. The realisation of this right may be pursued through numerous, complementary approaches, such

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{96} General Comment No. 1: \textit{Reporting by States parties} (1989); General Comment No. 2: \textit{International technical assistance measures} (Art. 22 ) (1990); General Comment No. 3: \textit{The nature of States parties’ obligations} (Art. 2, para.1 ) (1990); General Comment No. 4: \textit{The right to adequate housing} (Art.11, para.1 ) (1991); General Comment No. 5: \textit{Persons with disabilities} (1994); General Comment No. 6: \textit{The economic, social and cultural rights of older persons} (1995); General Comment No. 7: \textit{The right to adequate housing} (Art.11, para.1 ): forced evictions (1997); General Comment No. 8: \textit{The relationship between economic sanctions and respect for economic, social and cultural rights} (1997); General Comment No. 9: \textit{The domestic application of the Covenant} (1998); General Comment No. 10: \textit{The role of national human rights institutions in the protection of economic, social and cultural rights} (1998); General Comment No. 11: \textit{Plans of action for primary education} (Art.14 ) (1999); General Comment No. 12: \textit{The right to adequate food} (Art.11 ) (1999); General Comment No. 13: \textit{The right to education} (Art.13) (1999); General Comment No. 14: \textit{The right to the highest attainable standard of health} (Art.12 ) (2000); General Comment No.15: \textit{The right to water} (2002). General Comment No 16: \textit{the equal right of men and women to the enjoyment of all economic, social and cultural rights} (Art. 3) (2005); General Comment No 17: \textit{The right of everyone to benefit from the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he or she is the author} (Art.15,para.1 (c ) ) (2006), General Comment No 18: \textit{the equal right of men and women to the enjoyment of all economic, social and cultural rights}(Art.6) (2006); General Comment No 19: \textit{The right to social security} (Art. 9)(2008); General Comment No 20: \textit{Non-Discrimination in Economic, Social and Cultural Rights} (Art. 2, para. 2 ) (2009); General Comment 21: \textit{Right of everyone to take part in cultural life} (Art. 15, para. 1 (a) of ICESCR ) (2009) available at http://www1.umn.edu/humanrts/gencomm/econ.htm (accessed 7 June 2014).
\item \textsuperscript{97} Craven M \textit{The International Covenant on Economic, Social and Cultural Rights A Perspective on its Development} (1995) Appendix.
\end{itemize}
\end{footnotesize}
as, the formulation of health policies, or the implementation of health programmes developed by
the World Health Organization (WHO), or the adoption of specific legal instruments.\textsuperscript{98}

Contrary to the previous General Comments, GC 18 deals with the right to work contained in
Article 6 of the ICESCR. The latter proclaims the right to work in a general sense and explicitly
develops the individual dimension of the right to work through the recognition in Article 7 of the
right of everyone to the enjoyment of just and favorable conditions of work, in particular the
right to safe working conditions. The collective dimension of the right to work is addressed in
Article 8, which enunciates the right of everyone to form trade unions and join the trade union of
his/her choice, as well as the right of trade unions to function freely.\textsuperscript{99} GC 20 focuses on States
Parties’ obligations under Article 2(2) of the ICESCR requiring States Parties to guarantee non-
discrimination in the exercise of each of the ESCR enshrined in the Covenant, and can only be
applied in conjunction with these rights.\textsuperscript{100}

\section*{2.3 The African Charter and Economic, Social and Cultural Rights}

The African Charter on Human and People’s Rights (ACHPR or the Charter, also known as the
Banjul Charter) was adopted in 1981,\textsuperscript{101} and came into force in 1986, and is the main human
rights treaty of the AU system.\textsuperscript{102} The ACHPR is an international human rights instrument that is
intended to promote and protect human rights and basic freedoms on the African continent.\textsuperscript{103} It
emerged under the aegis of the Organisation of African Unity (replaced by the African Union)
which, at its 1979 Assembly of Heads of State and Government, adopted a resolution calling for
the creation of a committee of experts to draft a continent wide human rights instrument, similar


\textsuperscript{99} General comment No 18: \textit{the equal right of men and women to the enjoyment of all economic, social and cultural

\textsuperscript{100} General comment No 20: \textit{Non-Discrimination in Economic, Social and Cultural Rights} (Art. 2, para. 2 ) (2009)
available at \url{http://www1.umn.edu/humanrts/gencomm/econ.htm} (accessed 7 June 2014).


\textsuperscript{103} Hanski R & Suksi M \textit{An Introduction to the International Protection of Human Rights A Textbook} 2 rev.ed
to those that already existed in Europe (European Convention on Human Rights) and the Americas (American Convention on Human Rights).\textsuperscript{104} It has now been ratified by almost all African States, except South Sudan, and is unique regional human rights system.\textsuperscript{105}

An essential feature of the ACHPR is that, unlike the two UN Covenants\textsuperscript{106}, the European Convention on Human Rights (ECHPR)\textsuperscript{107} and the American Convention on Human Rights (ACHR)\textsuperscript{108}, it provides for ESCR and CPR in a single instrument without distinction.\textsuperscript{109} In addition to rights it emphasises individual and state duties in considerable detail and enforcement of the Charter rights is informed by a philosophy of negation and conciliation rather than the adversarial approach associated with adjudicatory mechanisms.\textsuperscript{110} The ACHPR guarantees a broad range of socio-economic rights. These include: the right to property (Art.14); the right to work under equitable and satisfactory conditions (Art.15); the right to enjoy the best attainable state of physical and mental health (Art.16); the right to education (Art.17.1); and, the protection of the family and cultural rights (Art.17.2 & 3), (Art.18.1.2 & 61).\textsuperscript{111} The above rights are recognised as individual rights. In addition they are less detailed and are therefore vague than those of the ICESCR. For instance, in protecting the right to work, Article 15 simply provides: ‘every individual shall have the right to work under equitable and satisfactory conditions, and


\textsuperscript{106}Under the UN system, economic, social and cultural rights (ESCRights) are provided for separately in the International Covenant on Economic, Social and Cultural Rights (ICESCR), while civil and political rights (CP Rights) are provided for in the International Covenant on Civil and Political Rights (ICCPR). See Baderin M A & McCorquodale R Economic and Cultural Rights in Action (2007) 140.

\textsuperscript{107}Under the European system, the European Convention on the Protection of Human Rights and Fundamental Freedoms (1950) provides mainly for CP rights, while ESC Rights are provided for under the European Social Charter later adopted in 1961. See Baderin M A & McCorquodale R Economic and Cultural Rights in Action (2007) 140.


\textsuperscript{111}Articles 14-18 of the ACHPR.
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?112

The Charter also contains and protects some group rights in Articles 20–24, 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, in part, as collective ESCR.113 The most important omissions in the ACHPR are the right to social security, the right to an adequate standard of living, including ‘adequate food, clothing and housing, and the right to the continuous improvement of living conditions’.114 These rights are not therefore mentioned by name.115

It should be noted that the ACHPR’s ESCR provisions mirror those of the ICESCR. Some of them have also been drafted along the same lines as the ICESCR (Articles 1, 6-15),116 as cited earlier in this chapter, especially in the section relating to the ICESCR. The rights to housing and to food which are not explicitly provided for in the Charter had also been included as “implicit” in it, through a decision by the African Commission on Human and Peoples’ Rights, SERAC v Nigeria (2001), particularly in light of its provisions on the right to life (Art. 4), the right to health (Art. 16) and the right to development (Art. 22).117 Nevertheless, there are significant differences between the ACHPR and the ICESCR. While the ICESCR requires “progressive


realisation” of socio-economic rights subject “to the maximum of the available resources”, the ACHPR does not. Nevertheless, the Commission read it into Article 16 of the Charter in *Purohit and Moore v The Gambia*. In this case, 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’. 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.

### 2.3.1 Clarifying the normative content of ESCR under the ACHPR

It is observed that the Commission’s jurisprudence before 2001, as reflected in its decisions, despite finding violations of ESCR, generally tends to be very fact specific. The Commission thereby failed to develop the normative content of ESCR 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 ESCR.

Although it is not on record that any state, organization, or institution has requested the interpretation of the scope of the ESCR provided under the ACHPR, the latter, which are broadly framed, require innovative interpretation to enable State Parties to the African Charter to implement ESCR.

---


2.3.1.1 Overview of ESCR explicitly protected in the ACHPR: the vague formulation of ESCR

Although the African Charter protects ESCR, it does so in very general and extremely vague terms.\textsuperscript{123} The ESCR included in the ACHPR have not been given a clear normative content.\textsuperscript{124} For example, regarding the right to property, Article 14 provides that ‘the right to property shall be guaranteed. It may only be encroached upon in the interest of public need or in the general interest of the community and in accordance with the provisions of appropriate laws’. 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.\textsuperscript{125} Similarly, in protecting the right to work, Article 15 simply provides that ‘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?\textsuperscript{126} Article 16 entitles individuals to enjoy “the best attainable state of physical and mental health” without prescribing the standard of health or defining what is meant by “the best attainable state”.\textsuperscript{127} Article 17(1), which protects the right to education, only provides:

\begin{enumerate}
\end{enumerate}
‘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. With respect to cultural rights, Article 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 ESCR 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.\textsuperscript{128}

2.3.1.2 The interpretation of the ESCR of the ACHPR by the African Commission

Most of the provisions of the African Charter protecting ESCR 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 ESCR.\textsuperscript{129} This is not surprising given the lack of interest in implementing ESC rights by many African States.\textsuperscript{130}

There are two main ways through which the Commission can directly develop the normative content of ESCR under the African Charter. The first method is for the Commission to provide an interpretation of the African Charter clarifying the scope of ESCR in accordance with Article 45(3)\textsuperscript{131} of the African Charter.


The second method is for the Commission to clarify the normative content of ESCR 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. Complainants are not required to be victims or to show that they act with the explicit consent of victims. Complainants are also allowed to bring an actio popularis (a complaint in the public interest).  

However, the Commission has had an opportunity to consider allegations of violations of each of the other ESCR guaranteed under the ACHPR in different non-state Communications brought before it, as analysed below. In several Communications the Commission has found violations of different ESCR of the ACHPR without indicating their scope which remained most times unclear. For example, John K. Modise vs Botswana and Malawi African Association and Others vs Mauritania, are both cases in relation to the right to property. Annette Pagnoulle (on behalf of Abdoulaye Mazou) vs Cameroon, is a Communication regarding the right to work.

---

131 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. See African Charter, Article 45.


134 In this Communication no 97/93(2000), 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 loses, since the government of Botswana confiscated his belongings and property. 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’. There was no attempt to clarify the normative content of the right to property. See Baderin M A & McCorquodale R Economic and Cultural Rights in Action (2007) 150-1.

135 In this Communication no 54/91, 61/91, 98/93,164/97,196/97,210/98(2000), the land was considered ‘property’ for the purposes of Article 14 of the Charter. 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’, invaded or encroached upon. 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. See Ssenyonjo M Analyzing the Economic, Social and Culture Rights
With respect to health and education rights, there is the case Free Legal Assistance Group, Lawyers’ Committee for Human Rights, Union Interafricaine des Droits de l’Homme, Les Témoins de Jehovah vs Zaire. There are later decisions during the period 1997–2000, such as, cases Union Inter Africaine des Droits de l’Homme, Federation Internationale des Ligues des Droits de l’Homme and Others vs Angola; in relation to right to the protection of the family, International Pen, Constitutional Rights Project, Interights on behalf of Ken Saro-Wiwa Jr. and Civil Liberties Organisation vs Nigeria; and Malawi African Association and Others vs Mauritania; all of them in relation to right to right to health contained in the African Charter.

---

136 In this Communication no.39/90 (1997), 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 prevented Mr. Mazou to work in his capacity as 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? See Baderin M A & McCorquodale R Economic and Cultural Rights in Action (2007) 153-4.

137 In this Communication no 25/89, 47/90, 56/91,100/93(1995), 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 were violations of the rights to health (Art.16) and education (Art.17) of the African Charter. 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. The latter 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 they had been violated. However, the Commission did not interpret these provisions. Thus Articles 16 and 17 remained unclear. See Ssenyonjo M Analyzing the Economic, Social and Culture Rights Jurisprudence of the African Commission: 30 Years since the Adoption of the African Charter (2011) 367-8 available at http://www.corteidh.or.cr/tablas/r26994.pdf (accessed 6 June 2014).

138 Communication No. 159/96 (1997) in which it was alleged that there had been the illegal expulsion of some West African nationals from Angola. The Communication held that the state violated ‘its obligations under the Article 18(1)...By adopting the victims, thus separating some of them from their families, the Defendant state has violated and violates the letter of this text. See Baderin M A & McCorquodale R Economic and Cultural Rights in Action (2007) 159.

139 Communication Nos. 137/94, 139/94, 154/96 and 161/97 (1998). In this case, the African Commission decision found a violation of the right to health under Article 16 of the African Charter without identifying the content of the right. 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, severely beaten during the first days of his detention, and
Arguably, in interpreting the Charter, the Commission may on its own motion make use of resolutions, statements, General Comments, and Concluding Observations on State Party reports, principles or guidelines clarifying the content of the rights protected in the Charter. Referring to statements as one of the modes of interpretation of the ESCR provisions of the ACHPR, it is clear that the Pretoria Statement is also significant in relation to the Commission’s interpretative mandate under the Charter. By the adoption of the Pretoria Statement, the Commission has accepted the Statement’s interpretations, which greatly broaden the scope, and bridge the gap in the vagueness, of the rights to property, work, health, education, and culture guaranteed under the Charter. These rights explicitly provided for under the ACHPR, read together with other rights in the Charter, such as, the right to life and respect for inherent human dignity, imply the

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 wellbeing are 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 Saro-Wiwa, causing his health to suffer to the point where his life was endangered. The government had not denied this allegation in any way. This is a violation of Article 16. While it is clear from the foregoing that the denial to prisoners (who are a vulnerable or marginalised section of the population) access to hospital treatment or access to doctors while their 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. See Ssenyonjo M Analyzing the Economic, Social and Culture Rights Jurisprudence of the African Commission: 30 Years since the Adoption of the African Charter (2011) 368-9 available at http://www.corteidh.or.cr/tablas/r26994.pdf (accessed 6 June 2014).

In Communication Nos. 54/91, 61/91, 98/93, 164/97, 196/97 and 210/98 (2000), 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. 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 its exclusive preserve, hence the physical integrity and welfare of detainees are 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 a violation of Article 16. 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 a prisoner’s right to health under the African Charter remains unclear. See Baderin M A & McCorquodale R Economic and Cultural Rights in Action (2007) 155.

recognition of the other economic and social rights, including the right to shelter, the right to basic nutrition and the right to social security.\textsuperscript{142}

\section*{2.4 Conclusion}

Constituting the rights dealing with minimum conditions for welfare and wellbeing,\textsuperscript{143} socio-economic rights are meaningful due to the fact that they are particular groups of basic human rights created to address social and economic injustices in any society.\textsuperscript{144} Human rights, including CPR and ESCR, are indivisible and interdependent.\textsuperscript{145} The latter are fully recognised throughout International Human Rights Law, including in the International Covenant on Economic, Social and Cultural Rights, the Convention on the Rights of the Child, the International Convention on the Elimination of all Forms of Racial Discrimination, and the Convention on the Elimination of all Forms of Discrimination against Women, and to some extent in most domestic legal systems.

Of all the above-mentioned international human rights laws the most comprehensive is the ICESCR,\textsuperscript{146} which constitutes a more elaborate framework for ESCR at international level. At regional level the ACHPR (which refers to ESCR) is the main African human rights instrument upon which this study is premised. The ACHPR, whose ESCR provisions mirror the ICESCR, is unique in that it provides for ESCR and CPR in a single instrument without distinction. Scholars have criticised the ACHPR, arguing that its ESCR provisions lack specificity, character that requires innovative interpretation in the present-day conditions enabling States Parties to understand their obligations under it,\textsuperscript{147} prospects of the effective protection and realisation of

\begin{footnotesize}
\begin{enumerate}
\item Cole J ‘Your Social and economic rights’ 1996 10.
\end{enumerate}
\end{footnotesize}
ESCR. There is growing international acceptance of the justiciability of ESCR, including effective remedies, evident in the frequent consideration of issues involving ESCR, at international, regional and national levels,\textsuperscript{148} of which some selected jurisprudence already cited in this study is proof.

CHAPTER THREE:

IMPLEMENTATION OF THE SOCIO-ECONOMIC RIGHTS PROVISIONS OF THE ACHPR IN DRC

3.1 The economic, social and cultural rights in DRC’s Constitution

Once international human rights conventions, including regional human rights conventions, have been ratified by the State and have acquired formal validity in the domestic system following their publication, they are included in the domestic system either by the way of the constitution or positive law of a particular country. By way of the constitution, human rights, including ESCR become not only part of a Bill of Rights or Chapter on Fundamental Rights but also theoretically justiciable,\(^{149}\) and enforceable. Therefore, the ACHPR which provides for ESCR forms part of DRC law as a ratified\(^ {150}\) treaty. Today, more than 30 years after the adoption of the ACHPR, the DRC\(^ {151}\) State has never enacted any legislation, nor any legal or judiciary mechanisms and procedures allowing the Congolese people to sue it in case of violation of its ESCR at the national level.\(^ {152}\)

Consequently, DRC remains a country in which the judiciary is reluctant to adjudicate alleged violations of ESCR on the grounds that such issues fall within the power of the Executive, Such


a reduced role for the judiciary in respect of societal problems appears not only increasingly anachronistic but particularly difficult to sustain in law.  

ESCR recognised and protected by the ACHPR at the African regional level are also enshrined in the Constitution of DRC as a logical consequence of its ratification by DRC as a member State of the AU. The 18 February 2006 Congolese Constitution is the fundamental, supreme law of DRC. It provides for both institutional law and human rights law.

Drawing on the ACHPR, which the DRC ratified on 20 July 1987, the Constitution protects the three generations of human rights (civil and political; social, economic and cultural; and peoples’) and imposes individual duties on citizens. All of them are enshrined in the DRC Constitution, especially in Title 2 Human Rights, Fundamental Liberties and the Duties of the Citizen and the State. CP rights are contained in Chapter 1 Civil and Political Rights, in Articles 11 to 33; ESC rights in Chapter 2 Economic, Social and Cultural Rights, in Articles 34 to 49; and peoples’ rights in Chapter 3 Collective Rights, from Articles 50 to 61.

However, the individual socio-economic rights of the ACHPR provided for and guaranteed in the Constitution of DRC are the following: the right to property (Art.34); the right to private initiative (Art.35); the right to work and to social security (Art.36); the right to protection of the family (Art.40); the right to education (Art.43); the right to culture, freedom of intellectual and artistic creation and that of scientific and technological research (Art.46); the right to health and to food security (Art.47); the right to decent housing; and the right of access to drinking water

---


156 Constitution of DRC of 18 February 2006.
and to electricity (Art.48).\(^{157}\) The law establishes the conditions for the exercise of these rights.\(^{158}\)

As noted earlier in this study, ESCR are therefore legally enforceable under the DRC Constitution. Surprisingly, nowadays the real situation in the DRC remains ‘disturbing’ since the ESCR of the ACHPR are violated by the government most times. This has been confirmed by Scott Campbell, the High Commissioner of the United Nations in charge of Human Rights in DRC, who, during the 65\(^{th}\) international day of human rights on 10 December 2013, declared that:

Socioeconomic rights are violated from day to day in DRC. There is a problem on national territory of non-respect of these rights: the right to food, right to work, right to health and right to education. These rights are violated every day more than violences which are being committed in eastern DRC.\(^{159}\)

### 3.2 Analysis of the real situation of ESCR of the ACHPR contained in the DRC Constitution in DRC

The real situation of socio-economic rights of the ACHPR guaranteed in the DRC Constitution of 18 February 2006 is presented as bellow.

#### 3.2.1 The right to property

The Constitution of DRC guarantees the right of individuals to private ownership\(^{160}\) of property.\(^{161}\) It also encourages and presides over the security of foreign investment. Despite the Constitution, protection of property rights remains weak, though attempts have been made to

---

\(^{157}\) Articles 34,35,36,40,43,46,47,48 of DRC Constitution of 18 February 2006.

\(^{158}\) Constitution of DRC of 18 February 2006.


\(^{160}\) In DRC, ownership interest in movable properties (e.g. equipment, vehicles, etc.) is secured and registered through the Ministry of the Interior’s Office of the Notary. Real estate property (e.g. buildings and land) is secured and registered at the Ministry of Land’s Office of the Mortgage Registrar. Available at [https://www.wikileaks.org/plusd/cables/09KINSHASA45_a.html](https://www.wikileaks.org/plusd/cables/09KINSHASA45_a.html) (accessed 12 May 2014).

\(^{161}\) Article 34 of the DRC Constitution of 18 February 2006.
enforce existing legal provisions and improve the current dysfunctional public administration and judicial system. Some senior level officials are making efforts to restore and improve the legal and administrative frameworks, but the challenge remains to implement these changes at a practical level.\textsuperscript{162} The pygmy communities were faced with problems relating to this right. Now that land is privately owned, based on land titles, the pygmies, who formerly owned land collectively, are left without land.\textsuperscript{163}

Regarding intellectual property, DRC continues to undertake efforts to improve legislation with regard to intellectual property rights (IPR) and build capacity to improve their implementation and enforcement. In principle, IPR are legally protected in DRC, but enforcement of IPR regulations is virtually non-existent. The DRC’s\textsuperscript{164} legal system and public administration do not have the capacity to enforce intellectual property regulations.\textsuperscript{165}

The DRC’s Constitution not only protects private ownership without discrimination between foreign and domestic investors, but also protects investments against take-over.\textsuperscript{166} Regrettably, this right continues to remain violated by the DRC government, when taking into account the example of the expropriation of the Kolwezi Tailings copper project by the DRC government and the fact that the government shut down First Quantum’s Kolwezi mine after claiming that the Vancouver based junior copper miner violated parts of its contract. In addition, the police sealed off the US$765 million project, which was still under construction.\textsuperscript{167}

\textsuperscript{162} Investment Climate Statement Bureau of Economic and Business Affairs April 2013 Report(DRC) available at \url{http://www.state.gov/e/eb/rls/othr/ics/2013/204623.htm} (accessed 7 April 2014).


\textsuperscript{164} The country is a signatory to a number of international agreements with organizations such as the World Intellectual Property Organization (WIPO), and the Paris Convention for the Protection of Intellectual Properties, which protects trademarks and patents. The DRC is also a member of the Berne Convention that protects copyrights, artistic works, and literary rights. The maximum protection that these conventions provide is 20 years for patents and 20 years, renewable, for trademarks, beginning from the date of registration. Available at \url{http://www.state.gov/e/eb/rls/othr/ics/2013/204623.htm} (accessed 7 April 2014).

\textsuperscript{165} Investment Climate Statement Bureau of Economic and Business Affairs(DRC) April 2013 Report available at \url{http://www.state.gov/e/eb/rls/othr/ics/2013/204623.htm} (accessed 7 April 2014).

\textsuperscript{166} Right to Private Ownership and Establishment in DRC available at \url{http://www.state.gov/e/eb/rls/othr/ics/2013/204623.htm} (accessed 20 February 2015).
3.2.2 The right to work and social security

DRC is among the countries around the world where the unemployment rate is higher concerning the right to work, the guarantee against jobless and the right to social security. Different governments succeed each other but do not present concrete mechanisms to combat the unemployment situation in the country.

Every year graduates from institutions (schools) of public or private education move into the labour market with various qualifications. Regrettably, many graduates remain unemployed and as a result are unable to use their knowledge for the benefit of society.

A lot of young people do not work, which results in the rate of unemployment of young people being 32.23%. The latter is substantially more than the national average of 18%. In the great towns, like Kinshasa and Lubumbashi, the past years have witnessed a proliferation of guarding and security companies.

---

167 G8 leaders take DRC to task over First Quantum Minerals expropriation available at http://www.mineweb.com/archive/g8-leaders-take-drc-to-task-over-first-quantum-minerals-expropriation/ (accessed 20 February 2015).

168 Employment is regulated in DRC by the Law-framework no.15/2002 relating to work code.


172 Kinshasa is the capital and the largest city of the DRC (province of Kinshasa.). It is located on the Congo River. It is the political capital and seat of Republic Institutions in DRC.

173 Lubumbashi is situated in the southeastern part of DRC (province of Katanga). It is the second largest city in the country, second only to the nation's capital Kinshasa.

174 The important guarding and security companies in Kinshasa are Magenia, Mamba, Securito, Security, Delta, GSA, Likonzi, New Escokin, Simba, ASA…
Unfortunately, security companies pay wretched wages and in some cases employees work without any employment agreement/contract.\(^\text{175}\) The monthly salary hovers around FC45000 (or US$50) to FC90000 (or US$100). Some companies prefer to employ hear without any employment agreement. The employment market is unsafe. For instance, Madame Rose L. worked three years as a daily worker without a work agreement for the national electricity company (SNEL)\(^\text{176}\). Mr. Elias worked for the security company ASA. On 18 August 2012, he did not receive his wages for the month of July. He took ill but did not get any money for medical care.\(^\text{177}\)

Access to work under equitable and satisfactory conditions is guaranteed in the UDHR,\(^\text{178}\) ICESCR,\(^\text{179}\) ACHPR,\(^\text{180}\) and even the Constitution.\(^\text{181}\) However, realization of this right is a challenge in most cases. Supporting this viewpoint, Law no.08/040 of 30 April 2008 (on determination of the guaranteed minimum wage; the minimum family grants; and against value of housing) may be taken as an instance. However, in Appendix 2 of the above-mentioned Law, the guaranteed minimum wage applicable as from 1 January 2009 for an ordinary manoeuver is determined as FC 1680(or US$ 2) per day, and the family grants for every child as FC 168(or US$ 21 cents)per day.\(^\text{182}\)

---


\(^\text{176}\) Societe Nationale d'Électricité (SNEL) is the national electricity company of DRC.


\(^\text{178}\) Article 23 of the UDHR.

\(^\text{179}\) Article 7 of the ICESCR. In a broad sense, the right to just and favourable conditions of work in this article 7 is an essential corollary of the right to work (found in article 6), See Craven M The International Covenant on Economic, Social and Cultural Rights A Perspective on its Development (1995) 226.

\(^\text{180}\) Article 15 of the ACHPR.

\(^\text{181}\) Article 36 of the DRC Constitution of 18 February 2006.

A worker with one child who works 26 days earns FC48048 or US$60 (1680+168 x 26 days) as a monthly salary to provide an adequate standard of living or housing, accommodated ordinary manoeuver carried by the company and for support of the family. A 50 Kg bag of maize (corn flour), the basic food of the majority of the Congolese population, costs itself already more than FC 20000 (more than US$ 25). Taking into account the actual economic conditions of DRC, the monthly wage as described above cannot allow a family to maintain a safe, decent standard of living.183

The situation of a civil servant in public administration or member of the police or army is precarious in terms of treatment or pay. The latter is not only inadequate but also irregular. Social security and the insignificance and irregularity of the payment of pensions of the retreat by the National Institute of Social Security (INSS)184 to people who have spent the greater part of their lives in working and hoping to accommodate funds for covering their old age, are a challenge.185

3.2.3 The right to health

In DRC 70% of the population have no access to hygienic sanitation facilities.186 Medical facilities are now severely limited and medical materials are in short supply. An adequate supply of prescription or over-the-counter drugs in local stores or pharmacies is also generally not available. Payment for any medical services is expected in cash, in advance of treatment.187


184 Institut National de Securite Nationale (The National Institute of Social Security) is unique in DRC for taking care of social security.


The inaccessibility of medical care of quality, and the quality of services and medical care given to the sick members of the population with respect to primary, secondary and tertiary care are quite a challenge. Moreover, health infrastructures are dilapidated and technological equipment out of date, medical professionals are demotivated, not stabilised and not creating loyalty, and, lastly, them are the delivered medicines are often of bad quality (a lot of wrong products).\textsuperscript{188}

As a result, every hour two women die in childbirth, with 17\% of these maternal deaths being adolescents. Every hour 29 children under one year of age die, with 46\% of those infants being newborns.\textsuperscript{189} The number of HIV-positive people is currently estimated at more than one million and there are more than 1 million AIDS orphans.\textsuperscript{190} Only 44,000 people are currently receiving treatment, translating into a 15\% antiretroviral (ARV) coverage rate, one of the lowest in the world.\textsuperscript{191}

\subsection*{3.2.4 The right to education}

Primary education is compulsory and free according to the DRC Constitution,\textsuperscript{192} but currently there are no public primary schools where tuition is freely given. The schools later turn to students’ (pupils’) parents, who pay the study fees of their children as well as pay the salaries of the teachers – through a system commonly referred to as punctual intervention fees.\textsuperscript{193}

\begin{thebibliography}{99}
\bibitem{188} Risterucci M & Bouty C \textit{L'accès aux soins de santé dans le pays du Nord et sud, le cas des médicaments : amorce de réflexion concernant l’accès aux antirétroviraux au Bénin et l’accès aux antituberculeux en Nouvelle-Calédonie} (These soutenue publiquement à la Faculté de Pharmacie le 10 mai 2010, version 13 May 2011) available at www.dumas.ccsd.cnrs.fr/docs/00/.../TP10_7015_risterucci_et_bouty_0_D_.pdf... (accessed 7 April 2013).
\bibitem{192} Article 43 of the DRC Constitution of 18 February 2006.
\bibitem{193} Mayimona N M ‘Quel bilan dresser de l’effectivité et de la justiciabilité des Droits économiques,sociaux et culturels en DRC au regard de la Déclaration Universelle Des Droits de l’homme et de la Charte Africaine des
A study conducted by the Higher Institute of Population Sciences at the University of Ouagadougou, Burkina Faso, on behalf of the Ministry of Primary, Secondary and Vocational Education, and funded by UNICEF and the Department for International Development (DfID) of the United Kingdom of Great Britain and Northern Ireland in 2013 had indicated that nearly 7.4 million children aged 5–17 are currently not in school in DRC. Girls account for more than half of those who are not enrolled, just fewer than 3.9 million. This figure is even greater, when secondary school rates are taken into account. The study also found that the number of children who are not in school is three times higher in rural areas than in urban areas.\textsuperscript{194}

It is noted that according to the last census by the Congolese non-government organisation “REEJER” in Kinshasa, there are about 20000 children in the streets of Kinshasa. Different reasons push those children to desert or flee their respective family homes. Amongst these is the non-payment of school fees by their parents.\textsuperscript{195} The cases of Serge Kasanda and Glodi may serve as instances.

Serge Kasanda (13 years old) studied until grade four primary; he was kicked out of the school system owing to non-payment of tuition fees by his parents. For the past three years Glodi (13 years old) has spent time in the streets, but his only wish is to return to school. The rate of increase of the number of children on Kinshasa streets from day to day make them “family fathers” on streets. There is a manifest lack of political will on the part of the authorities of the country to solving the issue. Thus, since the Congolese State has failed to provide compulsory and free education for children, churches\textsuperscript{196}, and non-government organisations are trying to the best of their best ability to alleviate the situation.\textsuperscript{197}


\textsuperscript{196} Lutemo Primary school in the province of Maniema in DRC is a public school managed by the church of grace in Congo. Radio Okapi available at \url{http://radiookapi.net/actualite/2014/04/12/maniema-lecole-primaire-lutemo-manne-presque-de-tout/#more-177556} (accessed 13 April 2014).
3.2.5 The right to protection of family and cultural rights

Despite the importance of the family, families have not been able to benefit from constitutional protection. Since 1987, armed conflict has devastated large swathes of families in DRC. The situation is fluid and, while exact numbers are disputed, it is clear that hundreds of thousands of people have lost their lives, and many survivors have fled their homes to other provinces or to neighbouring countries.

Civilians in many parts of the eastern provinces in particular face constant threats of forceful displacement, sexual violence, abduction and extortion. They are regularly terrorised, not only by rebel militia groups, but often by the police and armed forces that are mandated to protect them. The conflict continues to stifle the country’s development, particularly standards of education and health, the development of strong civil society groups, and gender equality. The average life expectancy is 48 years for women and only 46 for men, and has barely changed since 1990.

Cultural rights are mostly violated with regard to rural and nomad populations, although UNESCO had paid particular attention to the prevention of discrimination against persons belonging to disadvantaged and vulnerable groups, especially in this sphere of culture. Nomadism constitutes a barrier to accessing cultural rights, which are expressly guaranteed; there is lack of competent institutions to strengthen the cultural rights and practices of nomad peoples.


198 Article 40 of the DRC Constitution of 18 February 2006.


201 Referring specially to indigenous peoples (pygmies).


Recent massive breaches of human rights have often been motivated by cultural considerations. In light of this, DRC is one of the countries within which these violations include illegal confinement, persecution or assassination of artists, journalists, teachers, scholars and members of religious and minority ethnic groups; intentional destruction of immovable cultural heritage and deprivation or destruction of the movable cultural heritage; restriction of speech or cultural expression; and many acts that curtail cultural diversity and freedom of expression.\textsuperscript{205}

3.2.6 The right to decent housing

Although the right to decent housing is recognised and protected under the DRC Constitution,\textsuperscript{206} the precarious nature of work and the under paid wages that most Congolese workers earn each month do not enable them to have decent housing. Access to decent housing is a challenge in the country. For instance, in the town of Kolwezi some workers are paid less than US$100 per month, live in certain areas in houses without electricity and drinking water on a plot of land, and have to pay from US$40 to US$50 per month for the accommodation.\textsuperscript{207}

Any housing initiative is an individual decision, since, there is no organised society for building houses in DRC. As a consequence, illegal buildings, which do not comply with safety and security rules, have sprung up.\textsuperscript{208}

In the provinces of Katanga and Kasai Oriental, there is a great portion (88\%) of unsatisfied households due to housing conditions. These provinces are followed by those of Equateur, Bandundu and Bas-Congo where, an average, 71\% of households do not benefit from decent

\begin{footnotes}
\item 204 Observatoire de la diversité et des droits culturels ( Rapport ) . Violations: Observations par pays sur les violations et les bonnes pratiques concernant la diversité et les droits culturels (2005) 54.
\item 205 UNESCO Cultural rights and Wrongs A collection of essays in commemoration of the 50th anniversary of the Universal Declaration of Human Rights (1998) 160.
\item 206 Article 48 of the DRC Constitution of 18 February 2006.
\end{footnotes}
Concerning Kinshasa\textsuperscript{210}, there is insufficient quality housing for the disadvantaged ones of the population. There is only an embryonic regulation on the subject of housing. The property owners illegally set prices higher for houses and apartments.\textsuperscript{211}

### 3.2.7 The right to water, sanitation and electricity

The water and sanitation sector in DRC suffered a great setback during the country’s long political crisis through the 1990s and early 2000s. Since then, the sector has started to recover, albeit slowly. Basic water supply and sanitation needs are still immense. Today, an estimated 50 million Congolese (which is 75\% of the population) do not have access to safe water\textsuperscript{212}, and approximately 80-90 \% do not have access to improved sanitation.\textsuperscript{213}

DRC is recognised as the most water-rich country in Africa\textsuperscript{214}. Although it possess abundant resources, such as drinking water, access to safe water is a challenge that the government\textsuperscript{215} has to address. At the national level 26\% of the population has access to drinking water. However, there is a disparity between urban and rural areas. In this regard, 38\% of Congolese have access

\begin{itemize}
\item \textsuperscript{211} Kafui S H A ‘Kaléidoscope sur les Droits socio-économiques en République Démocratique du Congo’ 2012 16 available at www.ziviler-friedensdienst.org/.../zfkd-kaleidoscope-su... (accessed 12 April 2014).
\item \textsuperscript{212} This has been confirmed by One local, named Romuald Onanga, who gets his water from those streams said, "We've become used to drinking spring water because it is natural. It is not often associated with chemicals" (IRIN News). See Shore R ‘Crisis Spotlight, Water in Crisis - Democratic Republic of Congo’ available at http://thewaterproject.org/water-in-crisis-congo (accessed 18 April 2014).
\item \textsuperscript{215} The current Government of DRC is led by the Prime Minister Matata Ponyo since 28 April 2012 according to the Ordnance-Law no.12/0041, 2 due to the resignation of Government-Muzito III on 6 April 2012.
\end{itemize}
to drinking water in urban areas against 17% in the rural areas.\textsuperscript{216} The majority of people in the country do not benefit from drinking water,\textsuperscript{217} nor electricity.\textsuperscript{218} In areas where there are water and electricity, the supply is generally, irregular and the quality of the drinking water less trustworthy. Moreover, in certain areas, electrical installations are more like monuments for public places, without any usefulness, like the installations of REGIDESO\textsuperscript{219} on certain properties (slots of land).\textsuperscript{220}

According to the report of a management commission on the project relating to the electricity sector, examined by the DRC Senate on 30 October 2013, only 9\% of the population have access to electricity in DRC. In addition, the Congolese senators noted that as regards of the population about nine millions in Kinshasa, the DRC capital, only 44\% benefit from electricity, which is one of the major and essential factors for economic, cultural and technological development.\textsuperscript{221}


\textsuperscript{218} Amongst causes behind this situation mainly lies the existence of a legal framework which is unattractive and inadequate to current environment. The legal framework that currently governs the electricity sector in the DRC is essentially composed of antiquated, disparate, out-dated and unsuitable legal instruments as compared to the evolution of the sector. See Mukendi W E & Tshimanga M E ‘ Significant changes currently taking place in electrical power law in the DRC’ 2013 available at http://www.lexology.com/library/detail.aspx?g=faf8f72a-9709-420d-bad4-04fb41b80244 (accessed 13 April 2014).

\textsuperscript{219} REGIDESO being the only public organism which has the monopole of treatment and distribution of water in DRC.


\textsuperscript{221} Radio Okapi available at http://radiookapi.net/actualite/2013/10/31/rdc-9-seulement-de-la-population-a-acces-electricite/ (accessed 5 November 2013).
3.2.8 The right to food

In DRC, there is no legal guarantee of human rights norms concerning the right to food. This right is not enshrined in the Constitution. Also, surprisingly, there exists no national regulation in relation to the right to food.\textsuperscript{222}

The food situation is precarious; about 16 million people, or 33\% of the population, are facing serious deficiencies in food needs because of prolonged displacements due to war, isolation, lack of prospects in the employment market, breaking of supply chains, and inflation.\textsuperscript{223}

In Kinshasa for instance, 3/4 of the inhabitants live from day to day: they cannot arrange for stocks of food nor do they have money for providing food. The food security situation is also precarious in the following provinces: South Kivu where 66\% of households are without any food reserves; the position id better in Maniema (47\%); Equateur (37\%); Kasai Oriental (36\%), Katanga (35\%) and Bandundu (35\%).\textsuperscript{224}

The Congolese population does not eat well and their food intake is not balanced. According to UNICEF, 27\% of households eat once per day and 59\% twice. The majority of the population, 86\%, eats less than three times. Also, certain households organise meals once or twice per week only. This situation is worrying in the province of Kinshasa.\textsuperscript{225}

Note that all the abovementioned ESCR are therefore not protected and realised in accordance with Article 1 of the African Charter which defines the obligations of States, providing that:

\begin{quote}
The member States of the Organisation of African Unity, parties to the present Charter shall recognise the rights, duties and freedoms enshrined in the Charter and shall undertake to adopt legislative or other measures to give effect to them.\textsuperscript{226}
\end{quote}

\begin{footnotes}
\textsuperscript{222}RAPDA, the right to food, Rapport d’état des lieux de la RDC sur le droit a l’alimentation, realise par la coalition Nationale RAPDA-DRC 2009 11-12 available at \url{www.rtfn-watch.org/uploads/.../} (accessed 13 April 2014).

\textsuperscript{223}RAPDA, the right to food, Rapport d’état des lieux de la RDC sur le droit a l’alimentation, realise par la coalition Nationale RAPDA-DRC 2009 11 available at \url{www.rtfn-watch.org/uploads/.../} (accessed 13 April 2014).

\textsuperscript{224}RAPDA, the right to food, Rapport détat des lieux de la RDC sur le droit a l’alimentation, realise par la coalition Nationale RAPDA-DRC 2009 11 available at \url{www.rtfn-watch.org/uploads/.../} (accessed 13 April 2014).

\textsuperscript{225}RAPDA, the right to food, Rapport d’état des lieux de la RDC sur le droit a l’alimentation, realise par la coalition Nationale RAPDA-DRC 2009 11 available at \url{www.rtfn-watch.org/uploads/.../} (accessed 13 April 2014).
\end{footnotes}
3.3 **Factors that impede or enhance the realisation of ESCR of the ACHPR in DRC**

The factors that impede or enhance the realisation of ESCR of the ACHPR in DRC may be identified at national and regional levels.

3.3.1 **Factors that impede or enhance the realisation of ESCR of the ACHPR in DRC at the national level**

At the domestic level, some factors that constitute barriers to the protection and realisation of ESCR in DRC, include, among others, bad governance, mismanagement of public finances, inadequate/ or weak institutional structures for implementation or verification of ESCR, ignorance of the Congolese people about their ESCR, and the non justiciability of ESCR before the Congolese courts.

3.3.1.1 **Bad governance**

DRC is a country characterised by bad governance, one of the challenges that it continues to face. It has never developed any credible system of governance. Although having celebrated its 50th anniversary of independence on 30 June 2010, the State’s authority is still weak.

Bad governance is one of the factors that impede the protection and realisation of ESCR in DRC. This is manifest in the non-improvement of administrative performance and public institutions; non-improvement in the supply of public services; non-reinforcement of the Congolese population in the political system; non-promotion of dialogue interfaces; non-reddition of the management of public finances between public institutions and the population; non-transparency; corruption; non-respect of human rights; impunity; non-participation of people with regards to

---


the country’s development; and absence of foreseeability. These factors are seen as major factors that have undermined the country’s growth and development – perpetuating its cycle of poverty and conflict.

The truism that the destiny of a people is tied to the quality of its leadership, is noteworthy in this context. Colonialism left Africa, in general, and DRC, in particular, socio-economically battered. However, the ineptitude and corruption of certain past and present African leaders, including those of DRC, have worsened the socio-economic woes of the continent. As George Kent argues:

Some African states have had corrupt governments that exploited their own people as viciously as any outsiders have ever done.

3.3.1.2 Mismanagement of public finances

Mismanagement of public finances in DRC has earlier been demonstrated through the case of Free Legal Assistance Group, Lawyers’ Committee for Human Rights, Union Interafricaine des Droits de l’Homme, Les Témoins de Jehovah vs Zaire, because the government had failed to provide the populace with basic services, such as safe water, electricity and medicines in the hospitals. This case had been brought before the African Commission through Communication no. 25/89, 56/91, 100/93 (1995).

In recent times, the performance framework for the management of public finances has been put in place since 2001 by the international community and implemented in 200 countries around the world, including DRC. However, the experience of DRC shows that it has been categorised as a red zone regarding the management of public finances. The first assessment of the performance framework for the management of public finances in DRC in 2008 indicated that DRC is among the countries that were marked D (bad) measured against certain indicators, as Sissoko Fili,

---

231 PNUD, RDC ‘Consolidation des appuis nécessaires à l’émergence d’une bonne gouvernance en RDC’ Note d’Orientation 2005 26.


specialist in public finances issues of the World Bank, had declared at a seminar held on 29 March 2012 in Kinshasa organized by the orientation committee for finance reform. In addition, he had said that the DRC allocates less resources to priority sectors other than health and education, which perhaps explains the grave budget deficits.235

Poor mobilisation of public resources (finances) due to customs fraud is caused by corruption. Currently, the situation in DRC with regard to public finance does not promote improvement of the tax system which is required to implement structures towards realisation of ESCR for the Congolese.236

The few funds collected by the public generators of funds such as, the DGI, DGDA,DGRAD and other public companies and administrations,237 are subject to embezzlement by not only those managing these companies but also by political authorities of the country due to selfish interests. Furthermore, sometimes the funds collected are directed towards sectors that are non-productive.238

Resources that should have been utilised to provide basic facilities are often filched and transferred into private Western bank accounts of high-ranking leaders and officials. Less directly, corrupt leaders steal by rejecting policies that would spur growth and development and


237 The primary DRC agencies that collect taxes on imports include the following: the customs authority (DGDA), tax authority (DGI), General Direction of Administrative Incomes, Industrial Promotion Fund, Office of Maritime Freight Management, National Office of Transportation, and the Import-Export Control Agency (OCC) available at www.ustr.gov/.../Democratic%20Republic%20of%20the%20Congo_0.p... (accessed 19 April 2014).

238 For example, the former President of Zaire (now the Democratic Republic of Congo), Mobutu Sese Seko, is believed to have amassed a fortune far in excess of his country’s national debt, impinging upon the people of Zaire’s economic and social rights to adequate health care, sufficient food and appropriate shelter. This has been the trend in most African countries, where resources that could have been used to achieve socio-economic rights, are siphoned into individual pockets and smuggled into offshore bank accounts. See Mbazira C ‘A path to realising economic, social and cultural rights in Africa? A critique of the New Partnership for Africa’s Development’ (2004) 4 African Human Rights Law Journal 45.

promote ESCR, in favor of policies that bring greater profits their way through businesses, investments, or unscrupulous cohorts.\textsuperscript{240}

The interests of the people are only pursued to the extent that they coincide with the selfish interests of those in power. Many African States, including DRC, like other developing countries, are overburdened with heavy debts. Debt burdens are major obstacles to meaningful economic development in those States and contribute to non-enforcement of ESCR.\textsuperscript{241}

3.3.1.3 Lack or weak institutional structures for the implementation or verification of ESCR

Law 04/20 of July 2004 established the National Office for Human Rights (Office National des Droits de l’Homme-ONDH) as an independent and autonomous body with judicial personality. However, the institution became defunct in 2006. During its short existence the institution was largely weak and ineffective,\textsuperscript{242} contrary the reason behind its establishment, namely, to tackle impunity.\textsuperscript{243} According to the 2006 Global Integrity Report, the National Office for Human Rights remained a timid organ and inactive against the massive human rights violations during the transition period,\textsuperscript{244} while being a national human rights institution (NHRI), an administrative body set up to protect or monitor human rights in the country.\textsuperscript{245} Political interference could be seen in almost all of its work and it was accused of being biased towards the government.

\begin{flushright}


\end{flushright}
Periodic reports of the agency mainly documented human rights abuses rather than action taken against such abuses by the agency.\textsuperscript{246}

3.3.1.4 Ignorance of the Congolese people of their socio-economic rights

A national human rights institution (NHRI)\textsuperscript{247}, whose responsibilities include assisting with the education of public opinion towards awareness of, and respect for, human rights,\textsuperscript{248} has actually been non-existent in DRC since 2006.\textsuperscript{249} The socio-economic rights of the majority of Africans, including the Congolese people, are most times violated owing to illiteracy and ignorance\textsuperscript{250} of these rights amongst the people.

The level of education of the majority of Congolese is low,\textsuperscript{251} while the UDHR and the Covenants\textsuperscript{252} placed education at the center of human rights activities.\textsuperscript{253} This makes the promotion of human rights a mammoth task.\textsuperscript{254} Even if the rights are violated, the Congolese are

\begin{itemize}
  \item \textsuperscript{245} Ssenyonjo M Economic, Social and Cultural Rights in International Law (2009) 190.
  \item \textsuperscript{247} National human rights institution (NHRI) in UN parlance is broadly defined as “a body which is established by a government under the Constitution, or by law or decree, the functions of which are specifically designed in terms of the promotion and promotion of human rights”. See Goodman R & Pegram T (eds) Human Rights, State Compliance, and Social Change Assessing national Human Rights Institutions(2012) 1.
  \item \textsuperscript{248} Ramcharan B The Quest for Protection A human rights Journey at the United Nations (2004) 97.
  \item \textsuperscript{251} Maïna P C ‘ Human Rights Commissions in Africa- Lessons and challenges’ in Bosl A & Diescho J Human Rights in Africa Legal Perspectives on their Protection and Promotion (2009) 369.
  \item \textsuperscript{252} The ICESCR, created as one of the central pillars of the international human right system as developed by the United Nations after 1945. As such, it stands alongside its sister covenant, the ICCPR and the UDHR which together form the International Bill of Human Rights. See Craven M ‘The International Covenant on Economic, Social and Cultural Rights’ in Hanski R & Suksi M An Introduction to the International Protection of human Rights A Textbook 2rev.ed (2004) 101.
  \item \textsuperscript{253} Horn N ‘Human rights education in Africa’ in Bosl A & Diescho J Human Rights in Africa Legal Perspectives on their Protection and Promotion (2009) 53.
\end{itemize}
unable to revolt and claim their rights. Consequently, the exercise and enjoyment of these rights remain for most of them a distant dream, as declared by Mr Titinga Frederic PACERE, an independent expert on the human rights situation in DRC, at the General Assembly, in the Human Rights Council, on 29 February 2008.

3.3.1.5 Character of non-justiciability of ESCR before the Congolese courts

The judiciary has an important role to play where there exists a sufficient gross failure to uphold basic socio-economic rights. Thus, the tribunals and courts are the mechanisms for the protection of human rights, including ESCR. The latter, in this way, therefore become justiciable. When reading all the Congolese legislation regarding the competencies of tribunals and courts of DRC, nowhere does it explicitly indicate their role concerning rights and liberties. Also, the embryonic judicial system is weak in structure and capacity.


258 A right is said to be justiciable when a judge can apply it in a specific case, and when this application can result in the further determination of this right’s meaning. See Arambulo K Strengthening the supervision of the International Covenant on Economic, Social and Cultural Rights Theoretical and Procedural Aspects (1999) 55.

259 When reading all the Congolese legislation regarding the competencies recognised to tribunals and courts of DRC, nowhere it is expressly indicated their role concerning rights and liberties. While many examples demonstrate that justice is closely related to poverty eradication and human development. As UNDP states, “There are strong links between establishing democratic governance, reducing poverty and securing access to justice. Access to justice is also closely linked to poverty reduction since being poor and marginalized means being deprived of choices, opportunities, access to basic resources and a voice in decision-making. Lack of access to justice limits the effectiveness of poverty reduction and democratic governance programmes by limiting participation, transparency and accountability”. See The obstacles people living in extreme poverty available at www.asf.be/.../ASF_GEN_Extreme-Poverty_Briefing_ASF_FINAL_Vers... (accessed 18 May 2014)


Furthermore, there is a great difference between CPR and ESCR. The CPR benefit from several judiciary and legal mechanisms that exist for their protection and defence in case of violation, while the ESCR, in the case of DRC, do not benefit from these mechanisms.\textsuperscript{262}

Nevertheless, at the domestic level, the socio-economic rights are not justiciable as there are no instances where courts in DRC have made any pronouncement on them. Nowadays, more than 30 years after the adoption of the ACHPR,\textsuperscript{263} and 27 years since it became part of DRC law by ratification\textsuperscript{264}, the DRC State has never enacted any legislation, legal or judicial mechanisms and procedures allowing the Congolese people to sue it in case of violation of their ESCR.\textsuperscript{265}

\section*{3.3.2 Factors that impede or enhance the realisation of ESCR of the ACHPR in DRC at the regional level}

Apart from the abovementioned factors, other factors at the regional level may contribute to the non-protection and realisation of ESCR at the regional level of DRC, namely: interpretation of ESCR provisions of the ACHPR (formulation vague in terms of content and scope); lack of effective enforcement and promotion of ESCR (the virtual inaction of the African Commission); the absence of an expeditious and effective individual complaints procedure before the Commission, the ineffectiveness of the proposed African Court of Human and People’s Rights; and international apathy and hostility.


\textsuperscript{264} DRC has ratified the ACHPR on 20/07/1987. See Table 5.1 Chart of Ratifications of AU Human Rights-related Treaties (as at 31 July 2011) in Viljoen F \textit{International Human Rights Law in Africa} 2ed (2012) 285.

3.3.2.1 Interpretation of ESCR provisions of the ACHPR (formulation vague in terms of content and scope)

The normative inadequacies of the African Charter, particularly the provisions on ESCR, are wellknown. One serious obstacle to the enforcement of the Charter’s provisions on ESCR is their lack of conceptual clarity. The Charter’s failure to define ESCR adequately is not unique among international instruments. Nonetheless, the vagueness of the ESCR makes enforcement quite difficult, even if being protected by the African Charter.

The Charter’s provision on the right to health is typical. It entitles individuals to enjoy “the best attainable state of physical and mental health” without prescribing the standard of health or defining what is meant by “the best attainable state”. Given this ambiguity, the Charter’s right to health depends on how a State construes it. A reasonable interpretation is that it imposes an unlimited obligation to provide free medical services, which leads to the frustrating conclusion that:

Even if governments employ the services of modern doctors as well as traditional healers, it seems quite impossible for them to carry out the obligation.

The provision’s ambiguity allows States to avoid this interpretation. For both the individual and the state, the provision provides little guidance as to the State’s obligation and the individual’s


appropriate expectations. As with its correlate in the ICESCR, the Charter’s right to health needs to be better defined.\textsuperscript{269}

3.3.2.2 Lack of effective enforcement and promotion of ESCR (the virtual inaction of the African Commission)

Although the African Commission on Human and Peoples’ Rights is the principal body mandated to monitor the implementation of the African Charter by States Parties, it has failed to concretely engage the continent's important human rights problems and address Africa's pervasive ESCR violations. The virtual inaction of the Commission in the promotion and protection of ESCR has been linked to the spatial presence of actors in that field of focus. In March 1997, for example, the Commission's Secretary noted that Communications on ESCR represent less than one per cent of the total Communications so far received by the Commission.\textsuperscript{270} However, since 2000 things have changed: there have been many SER cases decided by the Commission including \textit{SERAC}\textsuperscript{271}, \textit{Purohit}\textsuperscript{272}, \textit{Endorois}\textsuperscript{273}, \textit{Sudan}\textsuperscript{274}, and others. In addition, the Commission has developed Principles and Guidelines on the Implementation of Socio-economic Rights.\textsuperscript{275}


\textsuperscript{271} Social and Economic Rights Action Centre (SERAC) and Another v Nigeria (2001) AHRLR 60 (ACHPR 2001) Communication 155/96. This is a communication alleging violation of the right to property (Art.14), the right to health(Art.16), the right of protection of family 18(1), the right of peoples to freely dispose of their wealth and natural resources(Art.21) and the right of peoples to a general satisfactory environment favourable to their development (Art.24) of the ACHPR available at http://www.chr.up.ac.za/index.php/browse-by-subject/410-nigeria-social-and-economic-rights-action-centre-serac-and-another-v-ni (accessed 2 July 2014).

\textsuperscript{272} Purohit and Moore v. The Gambia. Cited as: Communication No. 241/2001, Sixteenth Activity report 2002-2003, Annex VII. This is a communication alleging violation of the right to best attainable state of physical and mental health (Article 16(1) African Charter) and the right of the disabled to special measures (Article 18(4) African Charter); limitations on rights under Charter; positive obligations available at http://www.escr-net.org/docs/i/401249 (accessed 2 July 2014).

\textsuperscript{273} Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council v Kenya : Communication 276 / 2003 –This is a commission alleging violation of the right to property(Art.14),the right to education(Art.17),the right of peoples to freely dispose of their wealth and natural resources(Art.21) and the right of peoples 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 (Art.22) of the
Moreover, human rights organisations and other actors have yet to optimise the important advantages of sharing their insights and experiences in order to formulate common perspectives and goals which could shape the Commission’s understanding and agenda setting on this subject. Consequently, ESCR issues have been deferred on the Commission's agenda, thereby augmenting States Parties' indifference to their aggregate Charter obligations and fostering a culture of disrespect of human rights, including ESCR.

It is noted that the Commission is often regarded as impotent owing to serious and systemic abuses of human rights, including ESCR. Whatever power exists to implement the Commission’s findings seems to be vested in the OAU’s Assembly of Heads of States, which, as a political body, should not be trusted to put human rights above State interests. Regrettably, the clawback clauses of the ACHPR severely limit supposedly protected rights by granting governments the power to infringe them.

In reference to the above situation, a number of factors have been identified as contributing to the ineffectiveness of the African Commission in exercising its mandate. The Commission had neither the authority nor the power when African States were tardy at best, and friendly


274 Centre on Housing Rights and Evictions vs The Sudan: Communication Nos. 279/03 & 296/05, (2009), supra note 65. This is a communication alleging violation of massive and systemic violations of their human rights, including economic, social and cultural rights in the context of forced displacement experienced by the indigenous groups in the Darfur region of Sudan. See Ssenyonjo M Analyzing the Economic, Social and Culture Rights Jurisprudence of the African commission: 30 Years since the Adoption of the African Charter (2011) 392 available at http://www.corteidh.or.cr/tablas/r26994.pdf (accessed 3 July 2014).


negligent, in submitting reports (late or missing) to the Commission about how they were applying the Charter.\textsuperscript{280} Since 1995, at least 31 of the African States have not bothered to honour their reporting obligations and in the case of those who have responded, reports have been submitted long after they were due.\textsuperscript{281} When the Commission raised questions about the reports that were submitted, States tended toward silence.\textsuperscript{282} Likewise, when private Communications were submitted to the Commission claiming a violation of the Charter, States tended to disregard the entire process of inquiry and friendly settlement that the Commission was trying to conduct.\textsuperscript{283}

In addition, doubts have been expressed about the independence and impartiality of the members of the African Commission.\textsuperscript{284} The independence and the impartiality of this Commission are suspect and its powers are in any case somewhat limited in terms of the Charter.\textsuperscript{285} Since its commencement, a sizeable number of commissioners have simultaneously held posts in the public service of their countries, either as attorneys-general, cabinet ministers or ambassadors.\textsuperscript{286} The Commission operates completely under the political influence of Member States, and suffers from the principle of confidentiality.\textsuperscript{287} The imposition of confidentiality made the Commission’s promotion and protection work exceedingly difficult.\textsuperscript{288}


\textsuperscript{282} Forsythe D.P Human Rights in International Relations 2ed (2006) 147.

\textsuperscript{283} Forsythe D.P Human Rights in International Relations 2ed (2006) 147.


The ability to enforce such rights and for them to be protected is still dependent on the will of the States to co-operate and to guarantee the rights, which few may be prepared, or indeed able, to do. The main responsibility, thus, still seems to fall on the States to ensure the rights are protected in the first place. Furthermore, neither the preventive nor response powers of the Commission are strong.289

This intended the Commission to be and to function. Thus, any human rights, including ESCR, violations which governments wish to hide remain hidden from the public, including human rights watches, non-government organisation activists, academicians and other interested bodies who are denied access to the Commission’s deliberations.290 This appears to have compromised their independence and stopped them from condemning their governments.291

All socio-economic rights decisions made by the African Commission during the redundancy stage are inadequate in normative terms. In these decisions, there is no effort on the part of the Commission to draw from international human rights law in the area of socio-economic rights. Most decisions just declare that the State has violated rights without elaborating the normative basis of the right.292

3.3.2.3 The absence of an expeditious and effective individual complaints procedure before the Commission

Although any individual (victim(s) or anyone on their behalf) or NGO may bring a Communication before the African Commission, the African Charter is silent on the issue of


standing and the rules of procedure of the African Commission do not provide for a victim requirement.  

This absence of an expeditious and effective individual complaints procedure before the African Commission has impeded the development of appropriate jurisprudence on human rights in general and economic, social and cultural rights in particular.

3.3.2.4 The ineffectiveness of the proposed African Court of Human and Peoples Rights

The African Court of Human and Peoples’ Rights is in operation since 2006. Though its decisions are binding, the most outstanding challenge at the African Court is overcoming the problem of non-enforcement of the judgments of the Court. To date, twenty seven States have ratified the Protocol to the African Charter establishing the African Court, but only five countries, namely Burkina Faso, Ghana, Malawi, Mali and Tanzania, have made a special declaration under Article 34.6 of the Protocol which allows individuals and NGOs to appeal directly to the Court. Senegal was the first African country to ratify the Protocol establishing the Court. Thus, it has been required to guarantee individuals and NGOs access to the African Court. The effectiveness of the Court is thus frequently called into question by the very low number of States allowing citizens to directly appeal to it.

---


3.3.2.5 International apathy and hostility

The indifference and hostility of the international community towards enforceable ESCR constitute one of the greatest impediments to the enforcement and realisation of ESCR in Africa, in general, and in DRC in particular. The most notable monument to this attitude is the fact that the UDHR had to be translated into two covenants instead of one. Although lip service was paid to the notion of ESCR during much of the Cold War, indifference and apathy towards enforceable ESCR grew increasingly in the later years of the Cold War and especially since the end of the Cold War.298

The end of the Cold War deprived ESCR of the support of a superpower, the Soviet Union, on the international stage. The demise of the Soviet Union was taken as the defeat of an ideology that emphasises ESCR and a victory for liberal ideology.299 Over the past few years, some Western States, particularly the United States, have undermined the efforts of certain developing countries to obtain cheaper generic drugs by threatening trade sanctions, notwithstanding that “drug costs account for up to 60 percent of health care budgets in poor countries”.300

3.4 Consequences of continued marginalisation of the ESCR of the ACHPR

Certain implications are conspicuously discernible from the continued marginalisation of the enforcement of ESCR. As Henry Shue observed:

To enjoy something only at the discretion of someone else, especially someone powerful enough to deprive you of it at will, is precisely not to enjoy a right to it.301


The notion of a non-enforceable right is nothing but a negation of the very concept of right. Continued marginalisation of the enforcement of ESCR dresses these rights in the garb of mere luxuries. This deception is emblematic and symptomatic of the continued oppression, and relegation to second-class citizens, of those most dependent on such rights for basic survival.\textsuperscript{302} For a region that has staked its integrity on the adoption of a document that gives equal prominence to all aspects of human rights, maintaining a contradictory posture at the domestic level is an exercise in self-ridicule. It also casts the Charter in a bad light for proclaiming what cannot be guaranteed.\textsuperscript{303}

The fact that the so-called second and third generations of rights are not taken seriously by the DRC government and that the most recent ones depict a close connection to its inability to provide for the socio-economic welfare of its people,\textsuperscript{304} result in continued marginalisation of ESCR and, accordingly, their violations, which are at the core of every conflict that Africa in general and DRC in particular has witnessed, not only as a contributor to the causality factors but also the major casualty.\textsuperscript{305}

Because the DRC government is increasingly expected to meet the basic needs of the citizens, there is a growing tendency to demand results in militant terms, particularly in the absence of a proper forum to compel governmental action. As Callisto Madavo, World Bank Vice President for the Africa region, observed: Africa’s war, including the DRC, are not driven…by ethnic differences. As elsewhere, they reflect poverty, lack of jobs and education, rich natural resources that tempt and sustain rebels and [ineffective and insensitive] political system…\textsuperscript{306}


\textsuperscript{305} Juma L Human Rights in Africa and Conflicts transformation in Africa (2013) 125.

The marginalisation of SERs causes consequences, including: HIV and AIDS, diseases, poverty, exclusion, racism, xenophobia, inequality, corruption, conflicts, bad governance, and violence against women and children.\textsuperscript{307} This continued marginalisation of ESCR also deepens the collective feeling of betrayal of the people.\textsuperscript{308}

As long as these challenges affect the Congolese people’s everyday lives, the problems of sustaining democracy and development and the protection and promotion of human rights, including ESCR, will continue to haunt the country. For example the poverty is defined by Oxfam as:

…a symptom of deeply rooted inequalities and unequal power relations, institutionalized through policies and practices at all levels of state, society, and household.\textsuperscript{309}

In such situations, the existing government is perceived as having outlived its usefulness as a result of the deterioration of the basic socio-economic rights of the people.\textsuperscript{310}

3.5 Conclusion

The socio-economic rights provisions enshrined in the DRC Constitution, especially in Title 2 Human Rights, Fundamental Liberties and the Duties of Citizen and the State, and Chapter 2 Economic, Social and Cultural Rights, in Articles 34 to 49, are consequences of adherence to declarations and ratification by the DRC government of certain international human rights instruments, such as, conventions, treaties, amongst others, the ACHPR at regional level.

Through the analysis of the real situation of those rights in DRC, it has mostly been a case of the inaction of ESCR rather than ESCR in action. The latter are not protected and realised and accordingly, are marginalised and violated from day to day. The Government is therefore unable


\textsuperscript{309} Green D \textit{From poverty to power: How active citizens and effective states can change the world} (2008) 27.

to bring a solution to the expectations of its population in reducing or bringing an end to poverty leading to dignified human life.

However, a number of factors at the national level as well as at the regional level constitute barriers to their protection and realisation in DRC. At the national level, the barriers include, amongst others: bad governance, mismanagement of public finances, weak institutions or organs for implementation or verification of ESCR, ignorance of the Congolese about their socio-economic rights, and character of non-justiciability of ESCR before the Congolese courts.

At the regional level, the barriers include: interpretation of ESCR provisions of the ACHPR whose formulation is vague in terms of content and scope, lack of effective enforcement and promotion of ESCR (the virtual inaction of the African Commission), the absence of an expeditious and effective individual complaints procedure before the Commission, the ineffectiveness of the proposed African Court of Human and People’s Rights, international apathy and hostility.

Consequent to the marginalisation of socio-economic rights which results in their non-protection, non-realisation in DRC leads to minimum expectations of the State and government from the people, in respect of corruption, exclusion, racism, xenophobia, inequality, diseases, poverty, feeling of betrayal of the people, crisis of State and governmental legitimacy, and popular insurrections and civil war in the country.311

The aforementioned factors at national level as well as at international level may contribute to the protection and realisation of socio-economic rights of the ACHPR in DRC if only they are taken into account. These provisions would not only address social and economic injustices in Congolese society but also improve the social and economic conditions of most Congolese living in abject poverty.

CHAPTER FOUR:

NATURE OF THE OBLIGATIONS OF DRC IN RELATION TO THE ECONOMIC, SOCIAL AND CULTURAL RIGHTS GUARANTEED AND PROTECTED IN ITS CONSTITUTION AND THE ACHPR

4.1 Introduction

Having ratified and acceded to the ACHPR, the DRC\(^{312}\) had been bound by a range of obligations relating to ESCR generated by the aforementioned treaty. In addition, the African Commission has said that the rights and obligations in the Charter are immediate and have to be implemented instantly despite hostile economic conditions.\(^{313}\) As regards the real situation of the ESCR of the ACHPR contained in the DRC Constitution, most of them are not implemented and, accordingly, violated by the government in most cases. For instance, the majority of Congolese live in poverty, disease and ignorance; they lack jobs, food and other basic necessities, such as water.\(^{314}\) This is due to certain reasons or factors at the national level as well as regional level constituting barriers to their protection and realisation, as discussed in the previous chapter. Therefore, to redress the aforementioned situation, the Congolese State is not only obliged to refrain from acts that defeat the object and purpose of the Treaty,\(^{315}\) but also to scrupulously respect its international obligations as discussed below.

---


4.2 General obligations of DRC in relation to ESCR guaranteed and protected in the ACHPR

4.2.1 Obligation to take measures to ensure enjoyment of ESCR

Article 1 of the African Charter which defines the obligations of States provides:

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

Such measures include providing for the protection and realisation of ESCR through constitutional rights and institutions, legislative, policy and budgetary measures, educational and public awareness measures and administrative action as well as ensuring appropriate administrative and judicial remedies for the violation of these rights.

The DRC is under a general obligation in respect of all the ESCR in the African Charter to ensure that at least the following key elements of the rights are guaranteed:

*The availability* of the rights which requires DRC to ensure that the necessary goods and services and institutional arrangements needed to enjoy a right are practically available to an individual


318 The first para. 11(c) (iii) of the Declaration of the Pretoria Seminar on Economic, Social and Cultural Rights in Africa (hereinafter the “Pretoria Declaration”), as adopted by Res.73(XXXVI) 04 of the African Commission on Human and Peoples’ Rights: Resolution On Economic, Social And Cultural Rights In Africa.

319 For example, legislation to ensure the protection of health, housing, education, food and social security rights on a comprehensive and co-ordinated basis, and to prevent any form of discrimination in the enjoyment of the various rights. See the Pretoria Declaration, para. 11(c)(ii).

320 Art. 25 of the ACHPR.

321 Art. 26 of the ACHPR.

322 The UN Committee on Economic, Social and Cultural Rights (hereinafter the “UN CESCER”), General Comment 3: The nature of States parties obligations (Art. 2, para.1 of the ICESCR) (Fifth session, 1990), para. 7.
regardless of how this is achieved.\textsuperscript{323} For example, with regards to the right to water: the water supply for each person must be sufficient and continuous for personal and domestic uses.\textsuperscript{324}

The adequacy of the benefits provided in terms of the rights: this requires that the goods and services provided to the individual are sufficient to meet all the requirements of the rights protected. For example, with regards to the right to food: the food must at a minimum be of quantity and quality sufficient to satisfy the dietary needs of individuals and free of harmful substances.\textsuperscript{325}

The physical and economic accessibility/ or affordability of the rights to all, particularly vulnerable and disadvantaged groups. For example, with regards to the right to health: DRC should ensure that health facilities are accessible to people with disabilities (physical accessibility). In terms of the right to education: DRC should ensure that secondary and tertiary education are affordable (economic accessibility).\textsuperscript{326}

The acceptability of provision of the rights requires that the ESCR should be provided in a manner which respects societal and cultural norms that are consistent with African and international human rights law.\textsuperscript{327}


\textsuperscript{324} UN CESCR, General Comment 15: The right to water (Arts. 11-12 of the ICESCR) UN doc. E/C.12/2002/11, para. 12(a).

\textsuperscript{325} See, for example, UN CESCR, General Comment 12: The right to adequate food (Art. 11 of the ICESCR) UN doc. E/C.12/1999/5.


For example: this includes the requirement that provision of housing, particularly regarding construction and the building materials used, should be culturally appropriate\(^\text{328}\), for example, for minorities and indigenous peoples.

### 4.2.2 Obligations to respect, protect, promote and fulfil

All human rights, including ESCR, impose a combination of negative and positive duties on DRC.\(^\text{329}\) A useful framework for understanding the nature of the duties imposed by ESCR is the duty “to respect, protect, promote and fulfil” these rights.\(^\text{330}\)

**Obligation to respect**

This obligation requires DRC, at a primary level, to refrain from interfering directly or indirectly with the enjoyment of all human rights, including ESCR, and the freedom of the individual to use material resources—alone or in association with others—to satisfy basic needs or enjoy the right in question.\(^\text{331}\) DRC has to comply with this obligation to not run the risk of pursuing for acting in any way to encroach upon recognised rights and freedoms, such as, in the case of *Free Legal Assistance Group, Lawyers’ Committee for Human Rights, Union Interafricaine des Droits de l’Homme, Les Témoins de Jehovah vs Zaire*. In this regard, the failure of the Government to provide basic services, the shortage of medicines, and the closure of universities and secondary schools for two years were violations and, accordingly, result in non-satisfaction

---

\(^\text{328}\) UN CESCR, General Comment 4: *The right to adequate housing* (Art. 11(1) of the ICESCR) (Sixth session, 1991), para. 8(g).


or enjoyment of the rights to health (Art.16) and education (Art.17) of the ACHPR by the Zairian people.332

**Obligation to protect**

The obligation to protect requires DRC to take measures that prevent NSAs (third parties or private parties) including individuals, groups, corporations and other entities as well as agents acting under their authority from interfering in any way with ESCR.333 Referring to violations of the rights to health and education in the above-mentioned case, 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 Zaire 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).

48. Article 17 of the Charter guarantees the right to education. The closures of universities and secondary schools as described in communication 100/93 constitute a violation of Article 17.334

**Obligation to promote**

As ESCR are not promoted in DRC by the Government in order to enhance people’s awareness of their rights and the means of any kind for realising them,335 DRC is required to adopt measures to enhance people’s awareness of their ESCR, and to provide accessible information relating to the programmes and institutions adopted to realise them.336 In this regard, the African Charter explicitly places an obligation on DRC “to promote and ensure through teaching, education and publication, the respect of the rights and freedoms contained in the present Charter

---


and to see to it that these freedoms and rights as well as corresponding obligations and duties are understood”.

**Obligation to fulfil**

DRC must take the necessary steps and actions to comply with the obligation to fulfil. Such measures include providing for the protection and realisation of ESCR through constitutional rights and institutions, legislative, policy and budgetary measures, educational and public awareness measures and administrative action as well as by ensuring appropriate administrative and judicial remedies for the violation of these rights. The above-mentioned measures have to be taken in order to ensure the satisfaction of the needs of the individual that cannot be secured by the personal efforts of that individual. Non-compliance of DRC with this obligation would result in failure of its duties under the ACHPR such as in the case Free Legal Assistance Group and others vs Zaire. In this case, Zaire had surely omitted to take the necessary measures to ensure the satisfaction of the needs of the individuals (Zairian people) in realising the rights to health and education respectively protected by Articles 16 and 17 of the ACHPR.

**4.2.3 Resources and progressive realisation**

The obligation to progressively and constantly move towards the full realisation of ESCR, within the resources available to DRC, including regional and international aid, is referred to as progressive realisation. Most times these available resources are the fruit of taxation.

---

337 Art.25 of the ACHPR.

338 The UN CESCR, General Comment 3: The nature of States parties obligations (Art. 2, para.1 of the ICESCR) (Fifth session, 1990), para. 7.


341 It is open to States to implement the rights in a progressive manner, they must take immediate steps to that end and do so to the ‘maximum of available resources’. It is not open to states to delay indefinitely the implementation of the rights, or to use resource constraints as an excuse for doing nothing. See Hanski R & Suksi M An Introduction to the International Protection of Human Rights A Textbook 2rev.ed (2004) 108.
funds collected from taxation are allocated to ESCR issues in providing for and improving basic facilities for citizens such as, electricity, water, building of schools, hospitals, etc. Generally, the realisation of ESCR in DRC, at a minimum level, remains poor.\footnote{Mbazira C ‘ A path to realising ESCR in Africa ?...35 available at www.ahrlj.up.ac.za/ahrlj_vo14_no1_2004_christopher_mbazira.pdf (accessed 18 May 2014).} Where regional/international aid is provided to a State, as seen from the CESCR’s Concluding Observation on the combined second to fourth periodic reports of DRC, a sustainable institutional framework on the use of such aid must be adopted.\footnote{CESCR, Concluding Observations on the Combined Second to Fourth Periodic Reports of the Democratic Republic of the Congo, UN doc. E/C.12/COD/CO/4, 16 December 2009, paras 16 & 29.}

The African Charter does not explicitly refer to the principle of progressive realisation. This concept is widely accepted in the interpretation of ESCR and has been implied in the Charter in accordance with Articles 61 and 62 of the African Charter. The concept of progressive realisation means that DRC must implement a reasonable and measurable plan, including setting achievable benchmarks and timeframes, for the enjoyment over time of ESCR within the resources available to it.\footnote{The Declaration of the Pretoria Seminar on Economic, Social and Cultural Rights in Africa, para. 11(c)(iv)(hereinafter the “Pretoria Declaration”) as adopted by Res.73(XXXVI)04 of the African Commission on Human and Peoples ‘Rights.Resolution on Economic, Social and Cultural Rights in Africa.}

\[4.2.4 \textbf{Immediate obligations regarding the implementation of ESCR}\]

Despite the obligation to progressively realise ESCR, some of the obligations imposed on DRC as a party to the African Charter are immediate upon ratification of the Charter. These obligations include, but are not limited to, the obligation to take steps, the prohibition of retrogressive steps, minimum core obligations and the obligation to prevent discrimination in the enjoyment of ESCR.\footnote{African Commission, Draft Principles and Guidelines on the Implementation of Economic, Social and Cultural Rights in the African Charter on Human and Peoples' Rights available at www.achpr.org/...economic-social-cultural/achpr_instr_guide_draft_esc... (accessed 17 May 2014).}
Minimum core obligations

DRC as a State Party has an obligation to ensure the satisfaction of, at the very least, the minimum essential levels of each of the ESCR contained in the African Charter. The minimum core obligation is the obligation of DRC to ensure that no significant number of individuals is deprived of the essential elements of a particular right, such as, ensuring that all children enjoy their right to free and compulsory primary education. The notion of minimum core obligation is sometimes subject to controversy since it is difficult in some cases to ascertain what constitutes the minimum core of a right, such as, the rights to property and culture, respectively contained in Articles 14 and 17(2) and (3) of the ACHPR.

Obligation to take steps

DRC Party has immediate obligations to take steps, in accordance with a measurable national plan of action, towards the realisation of the protected ESCR. The measures adopted should be deliberate, concrete and targeted as clearly as possible towards ensuring enjoyment of the rights protected in the African Charter. Therefore, DRC as a State Party is obliged to take legislative measures for the protection of ESCR, by enacting legislation, such as, the Law relating to a system of social protection, and the Law-frame on primary and secondary teaching as planned in the DRC Government Action Programme 2012-2016.

347 UN CESCR, General comment 3: The nature of States parties obligations (Art. 2, para.1 of the ICESCR) (Fifth session, 1990). See also: The Maastricht Guidelines, para. 9; the Pretoria Declaration, para. 2; AHO/Res.236 (XXXI) Annex 1995 – Relaunching Africa’s Economic and Social Development: The Cairo Agenda For Action (hereinafter, the “Cairo Agenda for Action”), which reads: “Member States should give priority in their development programmes to the basic needs of the people by developing appropriate infrastructure (such as rural roads, potable water supply …), meeting basic food requirements, providing primary health services, education and skills and generating productive and remunerative employment opportunities as a means of eradicating poverty.”

348 UN CESCR, General Comment 3: The nature of States parties obligations (Art. 2, para.1 of the ICESCR) (Fifth session, 1990), para. 10.

349 The Reporting Guidelines, Part II, para. 48.

350 UN CESCR, General Comment 3: The nature of States parties obligations (Art. 2, para.1 of the ICESCR) (Fifth session, 1990), para. 11.

Non-discrimination

Article 2 of the African Charter prohibits any discrimination in the enjoyment of the protected rights on the following non-exhaustive grounds including race, ethnic group, colour, sex/gender, language, religion, political or any other opinion, national and social origin, economic status and birth. In this regard, the African Commission, through the case Purohit and Moore v The Gambia\(^{352}\) in relation to the right to health, had explained the meaning of discrimination and equality before the law, in that the right to health facilities, and access to goods and services had to be guaranteed to all without discrimination of any kind.\(^{353}\)

As inequality and marginalisation are acute in many social life sectors in terms of access to ESCR in DRC,\(^{354}\) the Congolese State has a duty to prevent and prohibit any discrimination against individuals in their access to or enjoyment of ESCR on any of the prohibited grounds which is a violation of the African Charter.\(^{355}\)

Presumption against retrogressive measures

The DRC has an obligation to avoid taking measures that reduce the enjoyment of ESCR by individuals or peoples which are prima facie in violation of the African Charter. Any such measures must be justified in the light of the totality of the rights provided for in the African Charter and in the context of the full use of the maximum available resources.\(^{356}\) In this context available resources refers to both the DRC’s own resources and international assistance and cooperation.\(^{357}\)

---


354 Gender inequality and social institutions in the DRC available at www.peacewomen.org/.../hrinst_genderinequalityinthedrc_wilpf_decem (accessed 11 August 2014).


356 UN CESCR, General Comment 3: The nature of States parties obligations (Art. 2, para.1 of the ICESCR) (Fifth session, 1990), para. 9; General Comment 14: The right to the highest attainable standard of health (Art. 12 of the ICESCR) UN doc. E/C.12/2000/4 , para. 19, the Limburg Principles, para. 72; The Maastricht Guidelines, para. 14(e).
**Effective domestic remedies**

As there are no instances where courts in DRC have made any pronouncement on ESCR in cases at domestic level due to the fact that DRC has never enacted any legislation, legal or judiciary mechanisms and procedures, these must be put in place in order not only to allow affected individuals and peoples (Congolese people) to sue the Government in case of violation of its ESCR, but also to make ESCR effective under national the legal system. Thus, DRC must ensure that persons within its jurisdiction, particularly members of vulnerable and disadvantaged groups, enjoy effective access to quality legal services.

**Designing and implementing a national policy**

In DRC, national plans and policies are most times not periodically reviewed and, accordingly, not implemented owing to the general bad governance of the country.

For each protected right, national plans and policies should be devised and periodically reviewed, on the basis of a participatory and transparent process. In this regard, DRC should ensure, through political and financial support, the greater effective participation of the

---


359 In 1989, the Commission adopted the Resolution on the Integration of the Provisions of the African Charter on Human and Peoples” Rights into National Laws of States, which stressed the importance of the integration of the provision of the African Charter into the national laws of states, and recommended member states to introduce articles 1 to 29 “in their constitutions, law and regulations and other acts relating to human rights.”

360 The Commission has observed that access to legal services is a critical aspect of the effective protection of economic, social and cultural rights - see in this regard: Purohit and Moore v. the Gambia, Com. No. 241 (2001), paras. 34 - 38, 54; Protocol on the Rights of Women, Art. 9. Appropriate legal assistance and legal aid for vulnerable groups should be made available in all African countries in cases involving violations of economic, social and cultural rights. See African Commission on Human and Peoples’ Rights, Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa, section H.


population in all phases of policy and programme design, implementation, monitoring and review.\textsuperscript{363}

\textbf{4.3 Other key obligations}

\textbf{4.3.1 Equality}

Studies and investigations show that inequality is existing in several domains of national life regarding equal access to and enjoyment of ESCR in DRC.\textsuperscript{364} Therefore, to redress this situation, guarantees of equality and non-discrimination should be interpreted, to the greatest extent possible, in ways which facilitate the full protection of ESCR.\textsuperscript{365} In ensuring effective equality in the enjoyment of ESCR, DRC must pay particular attention to members of vulnerable and disadvantaged groups.\textsuperscript{366} To ensure realisation of equal access to ESCR, DRC should ensure the provision of basic social services (such as, water, electricity, education and health care) and equitable access to resources (such as, land and credit) to members of vulnerable and disadvantaged groups.\textsuperscript{367}

\textbf{4.3.2 International Co-operation}

As poor mobilisation of public ordinary resources due to customs fraud is obvious in DRC, resort to international aid/assistance constitutes the public extraordinary resources of the State.\textsuperscript{368} To do

\begin{itemize}
  \item Limburg Principles, para. 11.
  \item Gender inequality and social institutions in the DRC available at www.peacewomen.org/.../hrinst_genderinequalityinthedrc-wilpf_decem (accessed 11 August 2014).
  \item The Pretoria Declaration, para. 11(c)(xi). See also: UN CESCR General Comment 16: the equal right of men and women to the enjoyment of all economic, social and cultural rights (Art. 3 of the ICESCR) (11 August 2005), para. 15. Special measures include, for example, employment equity programmes and legislation that aims to increase representation by vulnerable and disadvantaged groups in the workforce or special educational bursary programmes reserved for girls or members of groups who have been victims of previous racial and other forms of discrimination.
\end{itemize}
so, DRC has the obligation to engage in international co-operation\textsuperscript{369} for the realisation of ESCR and must prioritise the allocation of such assistance towards the realisation of these rights.\textsuperscript{370} It is particularly incumbent upon developed countries, as well as others which are in a position to assist, to do so.\textsuperscript{371} DRC must avoid entering into all forms of agreements which undermine the enjoyment of ESCR by individuals and/or peoples within their jurisdiction.\textsuperscript{372}

\textbf{4.3.3 Right to self-determination of peoples}

The right to self-determination as guaranteed under Article 20 (1) the African Charter is exercised within the inviolable national borders of DRC by taking due account of the sovereignty of the State.\textsuperscript{373} In addition, in terms of \textit{Katangese Peoples’ Congress v Zaire},\textsuperscript{374} the African Commission believes that self-determination may be exercised in any of the following ways: independence, self-governance, federalism, confederalism, unitarism or any other form of relations that accords with the wishes of the people but is fully cognizant of other principles.

\begin{footnotesize}
\begin{enumerate}
\item\textsuperscript{368} Lambert T \textit{Controle Fiscal, Droit et Pratique}, in TSHIMPAKA K \textit{‘L’Assainissement des Finances Publiques en Republique Democratique du Congo: Analyse, Critique et Perspectives d’Avenir’} 2007 40,\textit{Memoire}, Faculte de Droit, Universite de Kinshasa.
\item\textsuperscript{369} The DRC, a member of the community of states, is dependent on international cooperation to cope with problems that go beyond national borders. The need for international co-operation as key principle of present-day life comes very much to the fore in the era of globalisation in which we live. The process of globalisation is crucial for a proper understanding of the extraterritorial dimensions of the realisation of esc rights. See Coomans F \& Kamminga MT (eds) \textit{Extraterritorial Application of Human Rights Treaties} (2004) 183.
\item\textsuperscript{372} The Pretoria Declaration, para. 11(c)(xii).
\item\textsuperscript{374} Katangese Peoples’ Congress v Zaire (2000)AHRLR 72 (ACHPR 1995) is a case brought before the African Commission(Eighth Annual Activity Report 1994-1995) by the president of the Katangese Peoples’ Congress through the communication 75/92 to recognize, among other things, the independence of Katanga by virtue of Article 20(1) of the African Charter. This request therefore had no merit under the African charter. It is important to note the distinction that the Commission envisaged in its decision between Katanga and the state of Zaire. See Dersso S.A ‘Peoples’ Rights under the African Charter on Human and Peoples’ Rights: Much ado about nothing?’ available at \textit{www.docstoc.com/.../I-Peoples-Rights-under-the-African-Charter-on-Hu} (accessed 10 August 2014).
\end{enumerate}
\end{footnotesize}
such as, sovereignty and territorial integrity.\textsuperscript{375} This right in its application to peoples, including indigenous populations/communities, encompasses ESCR, including (but not limited to) the right to recognition of their structures and traditional ways of living as well as the freedom to preserve and promote their cultures.\textsuperscript{376} The enjoyment of these rights by individuals obliges DRC to promote the abolition of, or amend, cultural norms that result in discrimination or violation.\textsuperscript{377}

4.3.4 Engaging with and respecting the rights of civil society

DRC is a State Party which does not engage with and respect the rights of civil society while it has a key role to play in the implementation of ESCR in the country.\textsuperscript{378} To this end, DRC should actively engage with civil society in the realisation of these rights. DRC should also respect and protect the rights of civil society actors and human rights defenders. In turn, civil society organisations should prioritise the monitoring and enforcement of ESCR in their advocacy work.\textsuperscript{379}

4.3.5 National human rights institutions

Actually, at present no National Human Rights Institution (NHRI) exists in DRC as it became defunct in 2006.\textsuperscript{380} In this regard, recognising that NRHIs play a significant role in the promotion and protection of ESCR, DRC should effectively establish a NHRI which meets the standards set by the Paris Principles Relating to the Status of National Institutions.\textsuperscript{381} In addition to active


\textsuperscript{379} See generally the Pretoria Declaration.

promotion and enforcement of ESCR, the NHRI should be involved in the development and monitoring of implementation policies, including the setting of national benchmarks and indicators.\textsuperscript{382}

\textbf{4.3.6 State Party reporting}

DRC is one of the African States which do not honour their reporting obligations vis-à-vis the African Commission on realisation of human rights in general and ESCR in particular.\textsuperscript{383} Thus, to redress this situation, DRC as a Party to the African Charter has to undertake to file periodic reports to the African Commission on the steps taken to realise all the rights protected in the Charter, including ESCR.\textsuperscript{384} The Commission urges the DRC, by utilising both the Charter principles and guidelines on State Party reporting, to periodically report on steps taken to realise all the ESCR (explicitly and implicitly) guaranteed under the Charter and included in these principles and guidelines.\textsuperscript{385}

\textbf{4.4 Policies and programmes of the DRC Government in relation to ESCR with regard to its international obligations}

The DRC Government had instituted an action programme, for the period 2012-2016, aimed at poverty reduction and improvement in the living conditions of citizens of DRC.\textsuperscript{386} This intervention encapsulated national plans, policies and systems in relation to ESCR, albeit not clearly defined. These are observable through the following targetted rights:

382 UN CESCR, General Comment 10: The role of national human rights institutions in the protection of economic, social and cultural rights, UN doc. E/C.12/1998/25, para. 3, which lists a number of activities that can be undertaken by NHRI.  
**Right to work**

The DRC Government, through this programme, provided for the creation of employment through a national fund for employment that will cater for workers in both the public and private sectors. The Government put in place appropriate political measures to absorb (young) unemployed persons and alleviate poverty. In realising these objectives, the program provides for creation of job opportunities, through innovative initiatives (e.g. agriculture, workers cooperative, micro-credits...) for idle young people, the poor and villagers. It also reinforces incubation centres in order to facilitate employment creation by training low-skilled private operators. This programme/ or policy is not in line with DRC’s international obligations and lacks in-depth consistency as it excludes other important policies ,such as, taking appropriate steps to realise the right of everyone to gain their living by work which they freely choose and accept. Such steps include, for example, technical and vocational guidance and training programmes; promoting a social environment that is conducive to business creation, opportunities for self-employment, entrepreneurship, and the development of cooperatives; ensuring that educational systems prepare young people with the skills necessary to obtain initial employment; ensuring the right of everyone to equitable and satisfactory conditions of work, including, for instance, safe and hygienic working conditions; etc.

**Right to health**

Some of the policies and programmes adopted by the DRC Government to realise this right by ensuring that the population, especially vulnerable groups, have access to primary, quality health care and at affordable prices; combatting serious diseases; and developing progressively the health centres for increasing access of the population to quality health care. The specific


\[388\]  The Reporting Guidelines, Part II, para. 4(b).

\[389\]  The Pretoria Declaration, para. 6.


\[391\]  UN CESCR, General Comment 14: The right to the highest attainable standard of health (Art. 12 of the ICESCR) UN doc. E/C.12/2000/4 , para. 15.
objectives of the programme in this sector is to fight against the resistance of certain diseases, such as, malaria, diarrhoea, breathing infections, tuberculosis, etc.; HIV/AIDS; improving maternal and infant health; improving efficiency of the health system; building modern infrastructures; and providing essential medicines. To comply with its international obligations under international law for realising ESCR, DRC should elaborate on these policies and include other policies and programmes, such as, setting a target of allocating at least 15% of its annual budget to the improvement of the health sector; ensuring that plans aim to ensure access for all to adequate medical care and treatment in the event of sickness or accident; ensuring that national plans and policies are designed to ensure that health systems are able to deal with an individual’s health holistically by addressing all aspects that may affect his/her health; etc.

**Right to education**

The main objective of the DRC government program on education is to contribute to economic growth and poverty alleviation through provision of inclusive and quality primary, secondary and technical/ vocational teaching systems that will offer the same opportunities to young girls and boys. However, this programme also lacks in-depth consistency and therefore is not in line with DRC obligations under International Law owing to the fact that some policies are omitted – for instance, those policies that develop a system at all levels that ensures that education is physically and economically accessible to everyone (including the provision of finance, the

---


393 Framework Plan of Action for the Implementation of the Abuja Declaration on the Control of HIV/AIDS, Tuberculosis, and other related Infectious Diseases in Africa, AHG/228 (XXXVII).

394 The Reporting Guidelines, Part II, para. 36(e).


397 The Pretoria Declaration, para. 8.
building of schools and the provision of educational materials);\textsuperscript{398} establishing an adequate scholarship and/or fellowship system;\textsuperscript{399} ensuring continued education for teachers and instructors including education on human rights;\textsuperscript{400} ensuring that secondary education is made generally available and accessible to all by all appropriate means, and in particular by the progressive introduction of free education;\textsuperscript{401} ensuring that higher education is made generally available and accessible to all, on the basis of capacity, by all appropriate means, and in particular by the progressive introduction of free education;\textsuperscript{402} etc.

Right to culture

The program designed for this seeks to promote sports, leisure and culture by building modern sport centres, creation of specialised schools for sports in all areas, construction of specialised leisure public spaces, and modern national libraries. The appropriate mechanisms are to be set up to encourage sports in primary and secondary schools, at Congolese universities, and for awarding the youth who will excel in different sporting activities. A specific law should be enacted before 2012 concerning culture with the participation of painters, musicians, sculptors, etc. in order to protect intellectual works.\textsuperscript{403} These policies and programmes are not congruent with DRC international obligations under International Law. Some of the elements omitted include strategies that ensure participation at all levels in the determination of cultural policies and in cultural and artistic activities;\textsuperscript{404} implement measures for safeguarding, protecting and building awareness of tangible and intangible cultural heritage, including traditional knowledge systems;\textsuperscript{405} ensure recognition of and respect for the diverse cultures existing in Africa;\textsuperscript{406} and

\textsuperscript{398} The Reporting Guidelines, Part II, para. 52.
\textsuperscript{399} The Reporting Guidelines, Part II, para. 53.
\textsuperscript{400} The Pretoria Declaration, para. 8.
\textsuperscript{401} UN CESCR, General Comment 13: The right to education (Art. 13 of the ICESCR), para 13.
\textsuperscript{402} UN CESCR, General Comment 13: The right to education (Art. 13 of the ICESCR), para. 18, 19 and 20.
\textsuperscript{403} Face aux Députés ce lundi, Voici le Programme du Gouvernement Matata ! Kinshasa, le 07/05/2012 available at \url{http://www.laprosperiteonline.net/show.php?id=10664&rubrique=La%20Une} (accessed 4 August 2014).
\textsuperscript{404} The Pretoria Declaration, para. 9.
\textsuperscript{405} The Pretoria Declaration, para. 9.
implement policies generally aimed at the conservation, development and diffusion of culture and the promotion of cultural identity.  

Right to housing

The objective of the program in this sector is to increase the access rate of the population to decent housing; improve land management in order to reduce shanty towns; modernise certain areas; and make villages economically viable. In this regard, the actions should have the following aims:

a) at land level: clean up the area through reform of land law; demolition of old/ or deteriorated buildings; modernisation and securisation of property; and responsibilisation of curator in charge of lands titles (property) for all reprehensible deed for exercising their responsibilities; proceed with amalgamation of villages, first on a voluntary basis (others will follow later if the experience is a success), in order to render them economically viable. This amalgamation would allow the optimisation of the use of collective goods supplied by the State (schools, hospitals, administration…);  

b) at urbanism and housing levels: proceed with creating an inventory and the securisation of property heritage of private estate of state in order to rehabilitate, modernise and render it viable; provide the country with a general arrangement of the territory and particular plans of each province and great towns; encourage private initiatives and public/private partnership in the building of housing and building at least 30000 social houses between 2011-2016; make a feasibility survey in order to proceed with the creation of a housing bank and finalise the law on lease credit; and define an absorption policy for accord shanty town and healthy housing.

The abovementioned policies and programmes are not in line with DRC obligations under

---

406 The Pretoria Declaration, para. 9.


International Law in that some important policies are lacking, such as, carrying out comprehensive reviews of relevant national legislations and policies with a view to ensuring their conformity with international human rights provisions;\footnote{410} implementing housing programmes, including subsidies and tax incentives, to expand housing construction to meet the needs of all categories of the population, particularly low income families;\footnote{411} prioritising in national plans and policies the provision of shelter for all persons in desperate need of emergency housing;\footnote{412} etc.

**Right to social security**

The objective of the program is to reinforce the social security and retreat system in order to guarantee the best social cover for retired persons and others whose rights are guaranteed. Thus, this program provides for: institute co-management systems with social partners (employees, employers and State) in order to improve transparency and efficiency in management; increase deduction rate which should evolve from 7\% actually to 12,5\% before 2016; create medical insurance by a mutualisation system of risk in order to assure access to health care to the public; organise general states of employment and social security; and affect deducted funds towards property by applying building system by serial owing to pre-financing by banks for first objective of 10000 average villas.\footnote{413} These policies are not in accord with international human rights standards and accordingly, DRC should take effective measures to fully realise the right of all persons to social security, including social insurance;\footnote{414} ensure that a system, whether composed of a single or variety of schemes, is available and in place to ensure that benefits are provided for the relevant social risks and contingencies;\footnote{415} ensure that the social security system


\footnote{411} The Reporting Guidelines, Part II para. 34(b).

\footnote{412} Government of Republic of South Africa and Ors v. Grootboom and Ors 2000 (11) BCLR 1169 (CC).

\footnote{413} Face aux Députés ce lundi,Voici le Programme du Gouvernement Matata ! Kinshasa, le 07/05/2012 available at http://www.laprosperiteonline.net/show.php?id=10664&rubrique=La%20Une (accessed 4 August 2014).

\footnote{414} UN CESCR, General Comment 19: The right to social security (Art. 9 of the ICESCR), UN doc. E/C.12/GC/19 , para 4.
provides for the following nine principal branches of social security: health care, sickness, old age, unemployment, employment injury, family and child support, maternity, disability; Survivors and orphans: States should guarantee to widows and orphans adequate benefits and assistance under social security schemes, including ensuring that they are entitled to inherit property from their husbands, parents or other relatives; ensure that qualifying conditions for benefits are reasonable, proportionate and transparent; and ensure that where a social security scheme requires contributions, these are stipulated in advance.

Right to food

The programme aims to restore food security around the country. Some strategies in agricultural and rural policies had been set up to reach this goal. The restoration of food security around the country touches on sensitisation, production, evacuation, stocking, transformation and commercialisation of food producing products. The programme targets a sub-sector of agriculture (vegetable production) to intensify food production in order to realise self-sufficiency regarding basic foodstuffs before 2015. This will also concern reinforcing the programme of agricultural mechanisation, improving the infrastructures for agronomic researche, availability of agricultural inputs to farmers and the promotion of appropriate post harvesting technology; re-energise agriculture on a firm foundation, through mobilisation and framing rural populations in order to realise the objective of an area of 1 ha per household; promote professionalisation of agricultural actors (incubators); of idle youth ,retired and mobilised in agricultural production in order to proceed with self-taking care. The aforementioned policies and programmes do not

UN CESCR, General Comment 19: The right to social security (Art. 9 of the ICESCR), UN doc. E/C.12/GC/19 , para 11.

UN CESCR, General Comment 19: The right to social security (Art. 9 of the ICESCR), UN doc. E/C.12/GC/19, para 12-20.


UN CESCR, General Comment 19: The right to social security (Art. 9 of the ICESCR), UN doc. E/C.12/GC/19, para. 24.

UN CESCR, General Comment 19: The right to social security (Art. 9 of the ICESCR), UN doc. E/C.12/GC/19 , para. 25.

comply with the DRC international obligations under International Law and the DRC Government should consequently elaborate more by adding other policies, such as, developing national plans and policies to ensure food security, \(^{421}\) which includes constantly accessible and quality food that meets the requirements of nutrition and cultural acceptability; \(^{422}\) addressing critical issues and measures with regard to all aspects of the food system, including the production, processing, distribution, marketing and consumption of safe food, as well as parallel measures in the fields of nutrition, health, education, employment and social security; \(^{423}\) care should be taken to ensure the most sustainable management and use of natural and other resources for food at the national, regional, local and household levels; \(^{424}\) ensure that all persons are able to feed themselves directly through environmentally, economically and socially sustainable methods from productive land or other natural resources, or from well-functioning distribution, processing and market systems that can move food from the site of production to where it is needed in accordance with demand; \(^{425}\) etc.

**Right to water**

The DRC government in its action programme had formulated policies to supply quality drinking water in urban and rural areas, which should be available and permanent. Taking into account the challenge that it is facing with respect to improving the quality of drinking water in the country, specific actions had been undertaken for reaching these objectives. The aim is to increase public investment in the sector to about 2% of gross domestic product (GDP) from year 2013 to 2016; reinforcing the capacities of catching, treatment, stocking and distributing of Regideso water by

---

421 UN CESCR, General Comment 12: *The right to adequate food* (Art. 11 of the ICESCR) UN doc. E/C.12/1999/5, para.15.


423 See generally the Food and Agriculture Organisation *Voluntary Guidelines to support the progressive realization of the right to adequate food in the context of national food security* (2005) (hereinafter, the “FAO Voluntary Guidelines”) available at [http://www.fao.org/docrep/meeting/009/v9825e/v9825e00.htm](http://www.fao.org/docrep/meeting/009/v9825e/v9825e00.htm) (accessed 14 August 2014).

424 UN CESCR, General Comment 12: *The right to adequate food* (Art. 11 of the ICESCR) UN doc. E/C.12/1999/5, para. 25.

425 UN CESCR, General Comment 12: *The right to adequate food* (Art. 11 of the ICESCR) UN doc. E/C.12/1999/5, especially para.12.
rehabilitation of existing installations and other constructions, notably: the Tshikapa centre (50,000 m3/day), Lisala centre (5,000 m3/day), Kasangulu centre (1,500 m3/day), etc.; improving the governance of the sector, by finalizing a Water Code which should include the aspects of protection and integrated management of water resources and the definition of private operators’ role; proceeding with payment of the water bills of official instances by the State (about 40% of business numeral), in order to increase the intervention capacity of Regideso; pursuing and intensifying the unity establishment of water drilling, especially in rural areas; encouraging the transfer in rural areas, in view of decentralisation policies and rural development, to independent systems of community management of water, such as, NGOs, associations of civil society and basic communities. These actions are not in accord with international human rights standards and accordingly, DRC should elaborate more by adding other policies, such as, taking appropriate measures for the national management of water resources and the preservation of water against pollution; promoting sustainable use of water resources; ensuring that there is appropriate education concerning the hygienic use of water, protection of water sources and methods to minimise water wastage; formulate and implement national water and sanitation strategies and plans of action that should respect, inter alia, the principles of non-discrimination and ensure the right of everyone to participate in decision-making affecting their right to water and sanitation; etc.


427 The Cairo Agenda For Action, which reads: “Member States should give priority in their development programmes to the basic needs of the people by developing appropriate infrastructure (such as rural roads, potable water supply …), meeting basic food requirements, providing primary health services, education and skills and generating productive and remunerative employment opportunities as a means of eradicating poverty.”, para. 12(iv).

428 FAO Voluntary Guidelines, para. 8.11. Organisation of African Unity, The African Convention on the Conservation of Nature and Natural Resources (Revised Version 2003) includes in Art. 5: “The Parties shall establish and implement policies for the planning, conservation, management, utilization and development of underground and surface water, as well as the harvesting and use of rain water, and shall endeavour to guarantee for their populations a sufficient and continuous supply of suitable water, …”

429 UN CESCR, General Comment 15: The right to water (Arts. 11-12 of the ICESCR) UN doc. E/C.12/2002/11, p., para. 25.

430 UN CESCR, General Comment 15: The right to water (Arts. 11-12 of the ICESCR) UN doc. E/C.12/2002/11, p., para. 48. See also: Guidelines for the realization of the right to drinking water and sanitation, above n.374, para.
4.5 Justiciability as a necessary element for effective protection and realisation of ESCR at the DRC national level: Drawing lessons from South Africa’s experience

The necessity for the justiciability of the ESCR of the ACHPR enshrined in the DRC Constitution at the national level is meaningful in that: first, the judiciary plays an important role where there exists a sufficiently gross failure to uphold basic socio-economic rights: when the other two branches of government have comprehensively failed to fulfil their responsibilities, then ‘the least dangerous branch’ has a duty to intervene. Secondly, it plays an essential role in promoting the protection of ESCR, a role that is particularly important for the most vulnerable groups in society. It provides an avenue for the poor and vulnerable to have their voices heard. Domestic courts are potentially highly effective in safeguarding human rights, including ESCR. Finally, it is a useful tool for assessing the implementation or lack of implementation of ESCR at the domestic level. It serves a crucial accountability function. The governmental authorities are therefore forced to justify their policies as they are drafted, implemented and reviewed.

However, the justiciability shall be regarded as contingent, meritable, on the judiciary, but also on the nature of the State obligations arising from the specific rights that are at stake. The obligations of States, on which justiciability is dependent, in respect of all rights are at three

---

8.1. See also the African Union Assembly, Sharm-el-Sheikh Commitments for Accelerating the Achievement of Water and Sanitation Goals in Africa”, 1 July 2008, promoting public participation in water and sanitation activities, para. (1).


levels: “respect”, “protect”, and “fulfil”. The latter shall effectively be followed and applied due to their imperative character.

In light of the above assertion, all of the obligations imposed by the ESCR have been found to be justiciable and the DRC courts have to enforce both the positive and the negative aspects of the different duties. To do so, DRC shall be inspired by South Africa’s experience as an African country and party to the ACHPR where socio-economic rights are justiciable, due to the fact that the formal recognition of ESCR in the Constitution does not automatically guarantee their practical and effective protection, such as in the case of DRC. The most far-reaching constitutional provisions relating to ESCR may amount to no more than paper promises.

South Africa is an exemplary case in Africa in making ESCR justiciable for their protection and realisation at the national level. The South African courts have accordingly been at the forefront, providing that these rights are subject to judicial review. The jurisprudence of the South African Constitutional Court on socio-economic rights provides rich comparative insights into judicial methodology and interpretation. Cognisant of its historic and constitutional role, the South African Constitutional Court has long transcended the usual objections of enforceability and lack of government resources to adjudicate cases involving governmental distributive programs that impact on socio-economic rights.


Exemplar cases, such as, *Republic of South Africa v. Grootboom*\(^{441}\), *Minister of Health v. Treatment Action Campaign*,\(^ {442}\) and *Soobramoney v. Minister of Health*,\(^ {443}\) among others, show that socio-economic rights and governmental duties can indeed be calibrated in modern constitutional adjudication.\(^ {444}\)

Drawing from comparative South African scholarship, the adoption and practice of the triangulated theory (“Purpose-Role-Norm”) is significant to inspire DRC in making the socio-economic rights enshrined in its Constitution of 18 February 2006 justiciable before the courts. First, the DRC courts could look to the purpose of the justiciability constraint, and whether maintaining the traditionally high justiciability threshold set by *Baker v. Carr*\(^ {445}\) is consistent with this purpose.\(^ {446}\)  Secondly, the DRC courts should also look to their constitutional role, and whether, under their expanded judicial review and rule making powers, they may adjudicate the case or controversy involving socio-economic rights. This analytical prong should be examined

\(^{441}\) *Republic of South Africa v. Grootboom*, 2001 (1) SA 46 (CC) (S. Afr.) is a case in which the Constitutional Court found violation of the right to housing for families who were living in deplorable conditions with barest of shelter. See Church J et al *Human Rights from a Comparative and International Law Perspective* (2007) 289.

\(^{442}\) *Minister of Health v. Treatment Action Campaign*, 2002 (5) SA 721 (CC) (S.Afr.). TAC is a case where the Constitutional Court ordered that anti-retroviral medication be made available to pregnant mothers shows that it is possible to grapple with challenges of justiciability and develop sound jurisprudence in accordance with well-established principle of judicial interpretation. See Gauri V & Brinks D M (eds) *Courting Social Justice Judicial Enforcement of Social and Economic Rights in the Developing world* (2008) 54-5.


\(^{445}\) *Baker v. Carr*, 369 U.S. 186 (1962), was a landmark United States Supreme Court case that retreated from the Court’s political question doctrine, deciding that redistricting (attempts to change the way voting districts are delineated) issues present justiciable questions, thus enabling federal courts to intervene in and to decide redistricting cases. The defendants unsuccessfully argued that redistricting of legislative districts is a “political question”, and hence not a question that may be resolved by federal courts. Available at www.infoplease.com/us/supreme-court/cases/ar02.html (accessed 12 July 2014).

in tandem with the third aspect of this theory, which is to look at the norm as constitutionally formulated.  

4.6 Conclusion

In terms of Article 1 of the ACHPR, DRC as a Member State of the AU, and Party to the present Charter, shall recognise the rights, duties and freedoms enshrined in the Charter and shall undertake to adopt legislative or other measures to give effect to them. Such measures include providing for the protection and realisation of ESCR through constitutional rights and institutions, legislative, policy and budgetary measures, educational and public awareness measures and administrative action, as well as ensuring appropriate administrative and judicial remedies for the violation of these rights.

The ESCR of the ACHPR are also enshrined in the DRC Constitution, as the logical consequence of their ratification by the DRC as Member of the AU, and Party to the ACHPR, at regional level. From those rights, some general obligations are generated and are therefore imposed on the African States, one of which is DRC: obligation to take measures to ensure enjoyment of ESCR; obligations to respect, protect, promote and fulfil; resources and progressive realisation; immediate obligations regarding the implementation of ESCR; presumption against retrogressive measures; and effective domestic remedies.

Other key obligations, include: the guarantee of equality and non-discrimination, international co-operation between countries, the guarantee of the right to self-determination of peoples, active engagement with civil society, effective establishment of a national human rights institution, and the undertaking to file period reports to the African Commission on the steps taken for the protection and realisation of ESCR. Specific obligations generated from the ESCR of the


448 Articles 34-48 of the DRC Constitution of 18 February 2006.

ACHPR entrenched in the DRC Constitution should be read in the light of the general obligations of States in relation to those rights.\textsuperscript{451}

As the African Charter complements human rights protection at the domestic level where the rights protected in the Charter should be realised, the DRC should ensure that the ESCR of the ACHPR protected in its Constitution are given full legal effect in domestic law, such that the Charter’s 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 ESCR at the domestic level.\textsuperscript{452}


CHAPTER FIVE:
CONCLUSION AND RECOMMENDATIONS

5.1 Conclusion

The realisation of socio-economic rights in DRC, even at a minimum level, remains poor.\textsuperscript{453} Although DRC is a rich country which is endowed with abundant natural resources (such as, oil and gas); minerals (such as, cobalt, vanadium, manganese, phosphate, and bauxite); iron ore; and precious tropical rain forests,\textsuperscript{454} the majority of Congolese live in poverty, disease and ignorance; they lack jobs, food and other basic necessities, such as water.\textsuperscript{455} DRC as an African State and member of the AU, had ratified the ACHPR (the foundational normative instrument for the protection and promotion of human rights in Africa) containing CPR, on the one hand, and ESCR, on the other hand.\textsuperscript{456} It had consequently incorporated them into its Constitution of 18 February 2006, which made them legally enforceable under the Constitution. Interestingly, the implementation of ESCR, contrary to CPR, is problematic in DRC given that those rights remain marginalised and, accordingly, are violated most times,\textsuperscript{457} especially in terms of providing for ESCR in domestic legal documents. Experience has


\textsuperscript{454} Viljoen F International Human Rights Law in Africa 2ed (2012) 545 & 544.


\textsuperscript{457} The violations of ESCR had already been demonstrated through the case of Free Legal Assistance Group, Lawyers’ Committee for Human Rights, Union Interafrique des Droits de l’Homme, Les Témoins de Jehovah vs Zaire. See Baderin M A & McCorquodale R Economic, Social and Cultural Rights in Action (2007) 154,157. Also Scott Campbell, the High Commissioner of United Nations in charge of Human Rights in DRC, at the occasion celebrating the 65th international day of human rights on 10 December 2013, had made a declaration according to which “socioeconomic rights are violated from day to day in DRC. These rights are violated every day more than violations which are being committed in eastern DRC.” See Radio Okapi available at http://radiookapi.net/actualite/2013/12/10/scott-campbell-les-droits-sociaux-economiques-sont-violes-tous-les-jours-en-rdc/ (accessed 17 March 2014).

90
indicated that it is easier to provide for human rights, including ESCR, than it is to implement them.\textsuperscript{458} Even though the ESCR of the ACHPR are provided for in the DRC Constitution, their implementation in DRC remains a challenge. The real situation of these rights is disturbing because they are violated in most cases by governments.\textsuperscript{459} This situation is due to certain reasons or factors at the national and regional levels that constitute barriers to their protection and realisation. At the national level: factors include: bad governance, mismanagement of public finances, lack of or weak institutions or organs of implementation, verification of ESCR, ignorance of the Congolese people about their socio-economic rights, and non-justiciability of ESCR before the Congolese courts; and these pose barriers. Whereas at the regional level: the interpretation of the ESCR provisions of the ACHPR whose formulation is vague regarding content and scope, lack of effective enforcement and promotion of ESCR (the virtual inaction of the African Commission), the absence of an expeditious and effective individual complaints procedure before the Commission, the ineffectiveness of the proposed African Court of Human and Peoples Rights, and international apathy and hostility; are all problematic.

Consequently, the marginalisation of socio-economic rights which results in their non-protection, and non-realisation in DRC, leads to: low expectation of the State and Government by the people, corruption, exclusion, racism, xenophobia, inequality, diseases, poverty, feeling of betrayal of the people, crisis of State and governmental legitimacy, and popular insurrections and civil war in the country.\textsuperscript{460}

To prevent the above consequences requires DRC to comply with Article 1 of the ACHPR\textsuperscript{461}. With regard to all the human rights of the ACHPR, including ESCR, enshrined in the


\textsuperscript{459} Scott Campbell, the High Commissioner of United Nations in charge of Human Rights in DRC, at the occasion celebrating the 65th international day of human rights on 10 December 2013,had made a declaration according to which “socioeconomic rights are violated from day to day in DRC” See Radio Okapi available at http://radiookapi.net/actualite/2013/12/10/scott-campbell-les-droits-sociaux-economiques-sont-violes-tous-les-jours-en-rdc/ (accessed 17 March 2014).


\textsuperscript{461} Article 1 of the ACHPR declares that the Member States of the Organization of African Unity parties to the present Charter shall recognize the rights, duties and freedoms enshrined in this Charter and shall undertake to adopt legislative or other measures to give effect to them.
DRC Constitution, general obligations are generated and are therefore imposed on the African States, including the DRC. The general obligations include: obligation to take measures to ensure enjoyment of ESCR; obligations to respect, protect, promote and fulfil; resources and progressive realisation; immediate obligations regarding the implementation of ESCR; presumption against retrogressive measures; and effective domestic remedies. Other key obligations are: guarantee of equality and non-discrimination; international co-operation between countries; guarantee of the right to self-determination of peoples; active engagement with civil society; effective establishment of a national human rights institution; and undertaking to file period reports with the African Commission; and are the steps taken for the protection and realisation of ESCR.\textsuperscript{462}

Since the African Charter complements human rights protection at the domestic level where the rights protected in the Charter should be realised, it is important for DRC to ensure that the ESCR of the ACHPR protected in its Constitution are given full legal effect under domestic law, such that the Charter’s rights are made justiciable.\textsuperscript{463}

5.2 Recommendations

5.2.1 To the DRC Government

5.2.1.1 Good governance

Good governance for the DRC government implies accountability, transparency, combating corruption, legal and judiciary reforms,\textsuperscript{464} participation of all citizens with regards to the development of the country, improvement of administrative performance and public institutions,


improvement of the provision of public services, and respect for the rule of law and human rights.\textsuperscript{465}

5.2.1.2 Good management of public finances

Strong mobilisation of public resources (finances) by public service fund generators, such as, the DGI, DGDA, DGRAD and other public companies and administrations. The funds collected should be utilised to provide basic facilities to citizens and directed towards productive sectors, thereby making more financial resources available to realise the ESCR. Moreover, the collected funds should not be subject to embezzlement by not only those managing these companies, but also the political authorities of the country for their personal gain. The DRC should also avoid heavy debts. Debt burdens are major obstacles to meaningful economic development in DRC and contribute to non-enforcement of ESCR.\textsuperscript{466}

5.2.1.3 Complying with the imposed general and specific obligations generated by the ESCR of the ACHPR through the Guidelines and Principles on the implementation of ESCR.

The DRC Government shall effectively comply with the general obligations imposed by the ACHPR, including: obligation to take measures to ensure enjoyment of ESCR; obligation to respect, protect, promote and fulfil resources and progressive realisation; immediate obligations regarding the implementation of ESCR; presumption against retrogressive measures; and effective domestic remedies. Other key obligations include: guarantee of equality and non-discrimination, international co-operation between countries, guarantee of the right to self-determination of peoples, active engagement with civil society, effective establishment of a NHRI; and undertaking to file period reports with the African Commission on the steps taken for the protection and realisation of ESCR.\textsuperscript{467}

\textsuperscript{465} Nowak M Introduction to International Human Rights Regime (2003)47.

\textsuperscript{466} Bakandeja wa Mpungu G Droit des Finances Publiques. Moyens d’action et Plan financier de l’État (1997).

5.2.1.4 Sensitising and vulgarising international conventions and national laws on socio-economic rights in DRC.

International (regional) as well as national instruments in relation to ESCR, such as, the UDHR 1948 (Articles 22-8); ICERD 1965 (Article 5); ICESCR 1966 (Articles 1,3,6-15); DSPD 1969; CEDAW 1979 (Article 1); DRD 1986; CRC 1989; ICRMW 1990; ACHPR 1981, DRC Constitution 2006 (especially the provisions referring to ESCR, Articles 34-48) etc. shall be vulgarized in order to sensitize the Congolese people about their socio-economic rights.

5.2.1.5 Educating the Congolese people about their ESCR, and the role of the NHRI

Once instituted, the NHRI should give particular attention to the education of the majority of the Congolese people, especially with respect to its role in assisting in the education of public opinions towards, and awareness of, a respect for human rights, including socio-economic rights.

5.2.1.6 Enacting legislation, legal or judiciary mechanisms and procedures that allow the Congolese people to sue the DRC State in case of violation of their ESCR.

Since no legislation, legal or judiciary mechanisms and procedures to remedy ESCR violations exist in DRC, their elaboration by its Parliament (National Assembly and Senate) will be very significant for contributing to the protection and realisation of ESCR in DRC.

5.2.1.7 Making socio-economic rights of the ACHPR justiciable before the Congolese courts

As the African Charter complements human rights protection at the domestic level where the rights protected in the Charter should be realised, DRC should ensure that the ESCR of the ACHPR protected in its Constitution are given full legal effect in domestic law, such that the Charter’s 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 ESCR at the domestic level.469

5.2.2 To the international/regional community

5.2.2.1 Making clear the content and scope of the ESCR of the ACHPR through the African Commission

The African Commission should of its own accord make resolutions, statements, general comments, concluding observations on State Party reports, and principles or guidelines clarifying the content of the rights protected in the Charter.470

5.2.2.2 Making effective enforcement and promotion of ESCR (action of African Commission)

Being the principal body mandated to monitor the implementation of the African Charter in Africa, the African Commission should be active in the promotion and protection of human rights, including ESCR. The Commission should be potent in the face of serious and systemic abuses of human rights, including ESCR. Whatever power exists to implement the Commission’s findings, seems to be vested in the OAU’s Assembly. Hence, human rights, including ESCR, should be a State’s top priority. The Commission members should be independent and impartial and should observe the principle of confidentiality.471

5.2.2.3 Existence of an expeditious and effective individual complaints procedure before the African Commission which will enhance the development of appropriate jurisprudence on human rights in general and economic, social and cultural rights in particular.


471 Functions of the African Commission. See Articles 45-9 of the ACHPR.
5.2.2.4 Effectiveness of the proposed African court of Human and Peoples Rights

The African Court judgments shall be effectively applied. This will ensure the effectiveness of the Court which is frequently called into question by the few States that allow citizens to directly appeal to it.

5.2.2.5 Regard and vigilance of the international community with respect to the enforceability of ESCR in DRC.

The pressure on the efforts of the international community (States, NGOs, and civil society) in relation to the protection and realisation of CPR shall also be made with regard to enforceability of ESCR in DRC.472

Word count: 35,890 including footnotes

---

BIBLIOGRAPHY

1. Books


Bosl A & Diescho J *Human Rights in Africa Legal Perspectives on their Protection and Promotion* (2009), Konrad-Adeneauer-Stiftung/Publisher Macmillan Education Namibia


Green D *From poverty to power: How active citizens and effective states can change the world* (2008)


\textbf{2. Chapters in books}


Horn N ‘Human Rights education in Africa’ in Bosl A & Diescho J \textit{Human Rights in Africa Legal Perspectives on their Protection and Promotion} (2009), Konrad-Adenaueur-Stiftung/Publisher Macmillan Education Namibia.

Keetharuth S B ‘Major African legal instruments’ in Bosl A & Diescho J \textit{Human Rights in Africa Legal Perspectives on their Protection and Promotion} (2009), Konrad-Adenaueur-Stiftung/Publisher Macmillan Education Namibia.


Maina P C ‘Human Rights Commissions in Africa- Lessons and challenges’ in Bosl A & Diescho J \textit{Human Rights in Africa Legal Perspectives on their Protection and}
Promotion (2009), Konrad-Adenaueur-Stiftung/Publisher Macmillan Education Namibia.


3. Journal articles and contributions


PNUD, RDC ‘Consolidation des appuis necessaires a lémergence d’une bonne gouvernance en RDC’ 2005 Note d’orientation.


4. International reports and documents


Human Rights Council, Report of the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health, Paul Hunt (31 January 2008) UN doc. A/HRC/7/11 (the “Special Rapporteur Health Report 2008”), para. 38;

National Development Report (2005) published by the United Nations Development Program (UNDP);

Observatoire de la diversité et des droits culturels (Rapport), Violations: Observations par pays sur les violations et les bonnes pratiques concernant la diversité et les droits culturels (2005);

Rapport national des progres des OMD, “la pauvrete 2015” 50 ans DRC, PNUD 2010;


5. General Comments, General Recommendations and Concluding observations

UN CESCR, General Comment No. 1: Reporting by States parties (Third Session, 1989), UN. Doc. E/1989/22;

UN CESCR, General Comment No. 2: International technical assistance measures (Art. 22 of the ICESCR) (Fourth Session, 1990), UN. Doc. E/1990/23, annex III at 86(1990);
UN CESCR, General Comment No. 3: *The nature of States parties’ obligations* (Art. 2, para.1 of the ICESCR) (Fifth session, 1990), UN. Doc. E/1991/23, annex III at 86 (1990);

UN CESCR, General Comment No. 4: *The right to adequate housing* (Art.11, para.1 of the ICESCR) (Sixth session, 1991) UN. Doc. E/1992/23, annex III at 114 (1991);

UN CESCR, General Comment No. 5: *Persons with disabilities* (Eleventh session, 1994), UN. Doc. E/1995/22 at 19(1995);

UN CESCR, General Comment No. 6: *The economic, social and cultural rights of older persons* (Thirteenth session, 1995), UN. Doc.E/1996/22 at 20 (1996);

UN CESCR, General Comment No. 7: *The right to adequate housing* (Art.11, para.1 of the ICESCR): forced evictions (Sixteenth Session, 1997) UN.Doc. E/1998/22, annex IV at 113(1998);

UN CESCR, General Comment No. 8: *The relationship between economic sanctions and respect for economic, social and cultural rights* (Seventeenth session, 1997), UN Doc.E/C.12/1997/8 (1997);


UN CESCR, General Comment No. 10: *The role of national human rights institutions in the protection of economic, social and cultural rights* (Nineteenth, 1998) UN. Doc. E/C.12/1999/22 at 18 (1998);

UN CESCR, General Comment No. 11: *Plans of action for primary education* (Art.14 of the ICESCR) (Twentieth, 1999), UN Doc. E/C.12/1999/4 (1999);

UN CESCR, General Comment No. 12: *The right to adequate food* (Art.11 of the ICESCR) (Twentieth session, 1999), U.N. Doc. E/C.12/1999/5 (1999);

UN CESCR, General Comment No. 13: *The right to education* (Art.13 of the ICESCR) (Twenty-first session, 1999), UN Doc E/C.12/1999/10 (1999);
UN CESCR, General Comment No. 14: *The right to the highest attainable standard of health* (Art.12 of the ICESCR) (Twenty- second session, 2000), UN. Doc. E/C.12/2000/4 (2000);

UN CESCR, General Comment No.15: *The right to water* (Arts. 11-12 of the ICESCR) (Twenty- ninth session, 2003), UN. Doc. E/C.12/2002/11 (2003);

UN CESCR, General comment No 16: *the equal right of men and women to the enjoyment of all economic, social and cultural rights* (Art. 3 of the ICESCR) (Thirty-fourth session, 2005), UN. Doc.E/C.12/2005/3 (2005);

UN CESCR, General comment No 17: *The right of everyone to benefit from the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he or she is the author* (Art.15,para.1 (c ) of the ICESCR ),UN. Doc.E/C.12/GC/17 (2006);

UN CESCR, General comment No 18: *the equal right of men and women to the enjoyment of all economic, social and cultural rights* (Art.6 of the ICESCR) (Thirty-fifth, 2006), UN. Doc. E/C.12/GC/18 (2006);

UN CESCR, General comment No 19: *The right to social security* (Art. 9 of the ICESCR) (Thirty-ninth session, 2007), UN. Doc. E/C.12/GC/19 (2008);


UN CESCR, General comment No 21: *Right of everyone to take part in cultural life* (Art. 15, para. 1 (a) of the ICESCR), UN. Doc.E/C.12/GC/21 (2009);


6. Internet sources


Gender inequality and social institutions in the DRC available at www.peacewomen.org/.../hrinst_genderinequalityinthedrc_wilpf_decem (accessed 11 August 2014).


Intellectual property Rights in DRC available at www.ustr.gov/.../Democratic%20Republic%20of%20the%20Congo_0.p... (accessed 19 April 2014).

Intervention orale de l’Observatoire pour la protection des défenseurs des droits de l’Homme ‘Intervention de la FIDH et l’OMCT sur la situation des défenseurs des droits de


Lutemo Primary school in the province of Maniema in DRC is a public school managed by the church of grace in Congo. Radio Okapi available at http://radiookapi.net/actualite/2014/04/12/maniema-lecole primaire-lutemo-manque-presque-de-tout/#more-177556 (accessed 13 April 2014).

Ownership interest in DRC in movable properties (e.g. equipment, vehicles, etc.) is secured and registered through the Ministry of the Interior’s Office of the Notary. Real estate property (e.g. buildings and land) is secured and registered at the Ministry of Land’s Office of the Mortgage Registrar. Available at https://www.wikileaks.org/plusd/cables/09KINSHASA45_a.html (accessed 12 May 2014).


Presentation of the Third Activity Report of the African Commission by the Chairman U Umozurike, to the 26th Session of Heads of State and Government of the Organisation of African Unity, 9 – 11 July 1990 available at


Presentation of the Third Activity Report of the African Commission by the Chairman U Umozurike, to the 26th Session of Heads of State and Government of the Organisation of African Unity, 9 – 11 July 1990 available at


Risterucci M & Bouy C Lácces aux soins de sante dans le pays du Nord et sud, le cas des médicaments : amorce de réflexion concernant l’accès aux antirétroviraux au Bénin et l’accès aux antituberculeux en Nouvelle-Calédonie (These soutene publiquement a la


The DRC is member of the Berne Convention that protects copyrights, artistic works, and literary rights. The maximum protection that these conventions provide is 20 years for patents and 20 years, renewable, for trademarks, beginning from the date of registration. Available at http://www.state.gov/e/eb/rls/othr/ics/2013/204623.htm (accessed 7 April 2014).


The obstacles people living in extreme poverty available at www.asf.be/ASF_GEN_Extreme-Poverty_BriefingASF_FINAL_Vers... (accessed 18 May 2014).

The primary DRC agencies that collect taxes on imports include the following: the customs authority (DGDA), tax authority (DGI), General Direction of Administrative Incomes, Industrial Promotion Fund, Office of Maritime Freight Management, National Office of Transportation, and the Import-Export Control Agency (OCC) available at www.ustr.gov/Democratic%20Republic%20of%20The%20Congo_0.p... (accessed 19 April 2014).


7. Unpublished paper


8. Legislations

DRC Constitution of 18 February 2006;

Law 04/20 of July 2004 establishing the National Observatory of Human Rights (Office National des Droits de l'Homme-ONDH) in DRC;

Law no.08/040 of 30 April 2008 on determination of the guaranteed minimum wage, the minimum familial grants and against value of housing;

Law-framework no.15/2002 relating to work code;

Ordnance-Law no.12/0041 of 2012 instituting the Government of the Prime Minister Matata Ponyo.
9. Case-Law

African Commission on Human and Peoples’ Rights

Annette Pagnoulle (on behalf of Abdoulaye Mazou) vs Cameroon, Comm. no.39/90 (1997);

Burkina Faso / Norbert Zongo Case;

Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council v Kenya: Communication 276 / 2003;

Centre on Housing Rights and Evictions vs The Sudan: Communication Nos. 279/03 & 296/05, (2009), supra note 65;

Free Legal Assistance Group and Others v. Zaire, Comm. No. 25/89, 47/90, 56/91, 100/93;


John K. Modise vs Botswana, Comm. no 97/93(2000);

Katangese Peoples’ Congress v Zaire (2000) AHRLR 72 (ACHPR 1995);

Malawi African Association and Others vs Mauritania, Comm. no54/91, 61/91, 98/93,164/97,196/97,210/98(2000);

Purohit and Moore vs The Gambia, Comm. no. 241/2001 (2003);


Constitutional Court of South Africa

Gov’t of the Republic of S. Afr. v Grootboom & Others 2001 (1) SA 46 (CC);

Lindiwe Mazibuko and Others v The City of Johannesburg and Others, Case CCT 39/09 [2009] ZACC 28(8 Oct 2009);
Minister of Health v. Treatment Action Campaign, 2002 (5) SA 721 (CC) (S.Afr.);

President of the Republic of South Africa v. Modderklip Boerdery 2005 (5) SA 3 (CC);

Sooobramoney v Minister of Health, KwaZulu-Natal 1998 (1) SA 765 (CC).

European Court of Human Rights

Young, James and Webster v UK ECtHRR A 44(1981).

Inter-American Court of Human Rights


United States Supreme Court


10. International instruments and documents

International Covenant on Civil and Politics ‘Rights, adopted by UN General Assembly Resolution 2200A (XXI) of 16 December 1966 at New York, came into force on 23 March 1976;


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

11. Regional instruments, Resolutions and documents


ACHPR/Res.73 (XXXVI) 04 (2004): Resolution on Economic, Social and Cultural Rights in Africa (2004);


Framework Plan of Action for the Implementation of the Abuja Declaration on the Control of HIV/AIDS, Tuberculosis, and other related Infectious Diseases in Africa (2001), AHG/228 (XXXVII);

Organisation of African Unity, the African Convention on the Conservation of Nature and Natural Resources (Revised Version 2003);

The African Union Assembly, Sharm-el-Sheikh Commitments for Accelerating the Achievement of Water and Sanitation Goals in Africa”, 1 July 2008, promoting public participation in water and sanitation activities, para. (l);