

**The Implementation of the 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)**

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



By

UNIVERSITY of the
WESTERN CAPE

TSHIMPAKA KASONGO

3281259

Supervisor: DR. EBENEZER DUROJAYE

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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.



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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.

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KEYWORDS

African Charter on Human and Peoples' Rights

Constitution of DRC

Democratic Republic of Congo

Economic, social and cultural rights

Implementation

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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.



ABBREVIATIONS AND ACRONYMS

ACHPR	African Charter on Human and People's Rights
AHSG	Assembly of Heads of State and Government
AU	African Union
ARV	Antiretroviral
CEDAW	Convention on Elimination of All Forms of Discrimination Against Women
CESR	Committee on Economic, Social and Cultural Rights
CPR	Civil and Political Rights
CRC	Convention on the Rights of the Child
DRC	Democratic Republic of Congo
DRD	Declaration on the Right to Development
DFID	Department for International Development
DGDA	The customs authority (Direction Generale des Douanes et Acquises)
DGI	Tax authority (Direction Generale d' Impots)
DGRAD	General Direction of Administrative Incomes (Direction Generale des Recettes Administratives, Judiciaires, Domaniales et de Participations)
DSPD	Declaration on Social Progress and Development
ESCR/ESC Rights	Economic, Social and Cultural Rights
ECHPR	European Commission on Human and People's Rights
FC	Congolese francs (Francs Congolais)

ICERD/CERD	International Convention on the Elimination of All Forms of Racial Discrimination
ICESCR	International Covenant on Economic, Social and Cultural Rights
ICRMW	International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families
INSS	National Institute of Social Security (Institut National de Securite Sociale)
IPR	Intellectual property rights
GC	General Comment
HIV/AIDS	Human Immunodeficiency Virus/Acquired Immune Deficiency Syndrome
NHRIs	National Human Rights Institutions
NGOs	Non-Government Organisations
NSAs	Non-State Actors
OAU	Organisation of African Unity
ONDH	National Observatory of Human Rights (Office National des Droits de l'Homme)
RAPDA	African Network for the Right to Food (Réseau Africain Pour le Droit a l'Alimentation)
REGIDESO	Agency for Water Production and Distribution (Régie de Distribution des Eaux)
SERAC	Social and Economic Rights Action Centre
SNEL	National Electricity Company (Société Nationale d'Électricité)
UDHR	Universal Declaration of Human Rights
UN	United Nations

UNDP	United Nations Development Program
UNESCO	United Nations Educational, Scientific and Cultural Organization
UNICEF	United Nations Children's Fund (formerly United Nations International Children's Emergency Fund)
WHO	World Health Organisation



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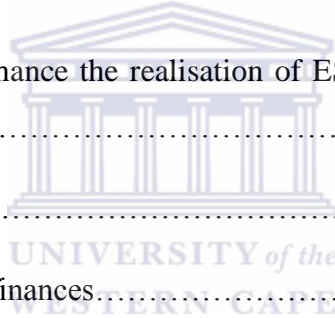
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CHAPTER ONE:

INTRODUCTION

1.1 Background

The implementation of the socio-economic rights¹ provisions of the African Charter on Human and Peoples Rights (ACHPR)² 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 violated³. This has been confirmed by the Resolutions⁴ 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.⁵

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.⁶ 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.

² Adopted by the Assembly of Heads of State and Government of the Organisation of African Unity (OAU) 27 June 1981 and entered into force 21 Oct. 1986.

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.

⁴ The Resolutions, ACHPR/Res.73 (XXXVI) 04 (2004) and ACHPR/Res.14 (XVI) 94 (1994). See respectively Ssenyonjo M *Analyzing the Economic, Social and Culture Rights Jurisprudence of the African Commission: 30 Years since the Adoption of the African Charter* (2011) 358 available at <http://www.corteidh.or.cr/tablas/r26994.pdf> (accessed 29 October 2013) and Baderin M A & McCorquodale R *Economic, Social and Cultural Rights in Action* (2007) 146.

⁵ Wohlgenuth L & Sall E *Human Rights Regionalism and the Dilemmas of Democracy in Africa* (2006) 44.

⁶ Van der Linde M & Louw L 'Considering the interpretation and implementation of the Article 24 of the ACHPR in light of the SERAC Communication' 2003 *African Human Rights Law Journal* 181 available at www.repository.up.ac.za/bitstream/handle/.../van%20der%20linde_m_l.pdf (accessed 20 November 2013).

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).⁷

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.⁸

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.⁹

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.¹⁰

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)).¹¹ The right to food (Arts. 4, 16 and 22), although not expressly protected

⁷Articles 14-18 of the African Charter on Human and People's Rights.

⁸Heyns C 'The African Regional Human Rights system: The African Charter' (2004)5 *108 Pennst.L.Rev.*679.

⁹Ssenyonjo M *Analyzing the Economic, Social and Culture Rights Jurisprudence of the African Commission: 30 Years since the Adoption of the African Charter* (2011) 364 available at <http://www.corteidh.or.cr/tablas/r26994.pdf>(accessed 29 October 2013).

¹⁰ *SERAC & CESR v. Nigeria*. See African Commission 'The Principles and Guidelines on the implementation of ESCR in the ACHPR' 2011 25-6,31,33 available at www.peopletoparliament.org.za/.../African_Commission_ESCR_Guidelines (accessed 24 January 2014).

¹¹ African Commission, *SERAC & CESR v. Nigeria*, Com. No. 155/96 (2001), para. 60; ICESCR, art. 11(1).See African Commission 'The Principles and Guidelines on the implementation of ESCR in the ACHPR' 2011 25-6

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.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.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)¹⁴, and the ratification of the International Covenant on Economic, Social and Cultural Rights (ICESCR)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).¹⁶

available at [www.peopletoparliament.org.za/.../African Commission ESCR Guidelines](http://www.peopletoparliament.org.za/.../African_Commission_ESCR_Guidelines)(accessed 24 January 2014).

¹²*SERAC & CESR v. Nigeria*, above n.11, para. 64. See African Commission 'The Principles and Guidelines on the implementation of ESCR in the ACHPR' 2011 31 available at [www.peopletoparliament.org.za/.../African Commission ESCR Guidelines](http://www.peopletoparliament.org.za/.../African_Commission_ESCR_Guidelines) (accessed 24 January 2014).

¹³*SERAC & CESR v. Nigeria*, above n.11. See African Commission 'The Principles and Guidelines on the implementation of ESCR in the ACHPR' 2011 33 available at [www.peopletoparliament.org.za/.../African Commission ESCR Guidelines](http://www.peopletoparliament.org.za/.../African_Commission_ESCR_Guidelines) (accessed 24 January 2014).

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

¹⁵ International Covenant on Economic, Social and Cultural Rights adopted by UN General Assembly Resolution 2200A (XXI) of the 10 December 1966(entered into force 3 January 1976).

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 ratified¹⁷ 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 *Free Legal Assistance Group, Lawyers' Committee for Human Rights, Union Interafricaine 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.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.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.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.²¹ Access to work has become an exception and

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 *International Human Rights Law in Africa* 2ed (2012) 285.

¹⁸ 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 available at <http://www.corteidh.or.cr/tablas/r26994.pdf> (accessed 7 August 2013).

¹⁹ Baderin M A & McCorquodale R *Economic, Social and Cultural Rights in Action* (2007) 154,157.

²⁰ Mayimona N M 'Quel bilan dresser de l'effectivite et de la justiciabilite des Droits économiques, sociaux et culturels en DRC au regard de la Declaration Universelle des Droits de l'homme et de la Charte Africaine des Droits de l'homme et des peuples' 2009 7 available at <http://www.congoforum.be/upldocs/Nzati.pdf> (accessed 12 August 2013).

²¹ Mayimona N M 'Quel bilan dresser de l'effectivite et de la justiciabilite des Droits économiques, 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.²² 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.²³ A large portion of the population has no access to hygienic sanitation facilities.²⁴

Primary education is compulsory and free according to the Constitution, but there is no public primary school where the education is free.²⁵ The majority of people in the country do not benefit from drinking water and electricity.²⁶ In areas where there is water and electricity, the provision thereof is generally irregular and the quality of drinking water less trustworthy.²⁷

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,²⁸ to which DRC is also party.

Droits de l'homme et des peuples'2009 4 available at <http://www.congoforum.be/upldocs/Nzati.pdf> (accessed 12 August 2013).

²²Kafui S H A 'Kaléidoscope sur les Droits socio-économiques en République Démocratique du Congo' 2012 23 available at www.ziviler-friedensdienst.org/.../zfd-kaleidoscope-su... (accessed 27 February 2014).

²³Mayimona N M 'Quel bilan dresser de l'effectivite et de la justiciabilite des Droits économiques,sociaux et culturels en DRC au regard de la Declaration Universelle des Droits de l'homme et de la Charte Africaine des Droits de l'homme et des peuples'2009 5 available at <http://www.congoforum.be/upldocs/Nzati.pdf> (accessed 12 August 2013).

²⁴CESCR, Concluding Observations: Democratic Republic of Congo, UN Doc. E/C.12/CoD/Co/4 (16 December 2009), para. 29.

²⁵Mayimona N M 'Quel bilan dresser de l'effectivite et de la justiciabilite des Droits économiques,sociaux et culturels en DRC au regard de la Declaration Universelle des Droits de l'homme et de la Charte Africaine des Droits de l'homme et des peuples'2009 5 available at <http://www.congoforum.be/upldocs/Nzati.pdf>(accessed 12 August 2013).

²⁶ Radio Okapi available at <http://radiookapi.net/actualite/2013/10/31/rdc-9-seulement-de-la-population-a-access-lelectricite/>(accessed 5 November 2013).

²⁷Mayimona N M 'Quel bilan dresser de l'effectivite et de la justiciabilite des Droits économiques,sociaux et culturels en DRC au regard de la Declaration Universelle des Droits de l'homme et de la Charte Africaine des Droits de l'homme et des peuples'2009 5 available at <http://www.congoforum.be/upldocs/Nzati.pdf> (accessed 12 August 2013).

²⁸ Baderin M A & McCorquodale R *Economic, Social and Cultural Rights in Action* (2007) 144.

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 Constitution²⁹ 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.³⁰

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.³¹

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 Khoza³². His contribution in this regard is very significant,

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

³⁰Salman MA & McInerney-Lankford S *The human right to water* (2004) 2.

³¹Ssenyonjo M *Analyzing the Economic, Social and Culture Rights Jurisprudence of the African commission: 30 Years since the Adoption of the African Charter* (2011) 397 available at <http://www.corteidh.or.cr/tablas/r26994.pdf> (accessed 7 August 2013).

³²Khoza S 'Promoting Economic, Social and Cultural Rights in Africa: The African Commission holds a Seminar in Pretoria' 2004 *African Human Rights Law Journal* available at www.pijipimpact.org/.../PromotingEconomicSocialandCulturalRightsin... (accessed 1 March 2014).

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 & McCorquodale³³, 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 Vos³⁴ 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 Ssenyonjo³⁵ 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.

³³ Baderin M A & McCorquodale R *Economic, Social and Cultural Rights in Action* (2007).

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).

³⁵ Ssenyonjo M *Analyzing the Economic, Social and Culture Rights Jurisprudence of the African Commission: 30 Years since the Adoption of the African Charter* (2011) available at <http://www.corteidh.or.cr/tablas/r26994.pdf> (accessed 7 August 2013).

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 focus 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 rights³⁷ “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 ‘broad’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

³⁶ Conde H V A *Handbook of International Human Rights Terminology* (2004) 241.

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.

³⁸ Conde H V A *Handbook of International Human Rights Terminology* (2004) 55.

³⁹ Barth W K ‘Cultural Rights: A Necessary Corrective to the Nation State’ in Francioni F & Scheinin M (eds) *Cultural Human Rights* (2008) 79.

⁴⁰ This broad 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.

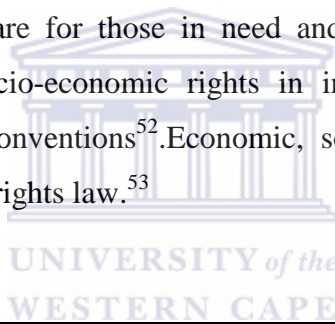
⁴¹ Donders Y M *Towards a Right to Cultural Identity?* (2002) 3.

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.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.⁴⁵

However, they are important tools for these groups, who are often most affected by poverty⁴⁶ and who experience a number of barriers that block their access to resources, opportunities and services in society.⁴⁷ Although historically these rights have received less attention than civil and political rights, they are now being focused on increasingly.⁴⁸ Vulnerable groups often experience social exclusion and unfair discrimination because of a number of overlapping grounds or reasons.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.⁵⁰ The sources of socio-economic rights in international law can be found in numerous declarations⁵¹ and conventions⁵². Economic, social and cultural rights are fully recognised in international human rights law.⁵³



⁴³ Khoza S *Socio Economic Rights in South Africa* 2ed (2006) 20.

⁴⁴ Nolan A *Children's Socio-Economic Rights, Democracy and the Courts* (2011) 21.

⁴⁵ Cole J 'Your Social and economic rights' 1996 10.

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 *Economic, Social and Cultural Rights: Their implementation in United Kingdom Law* (1999) XIV.

⁴⁷ Khoza S *Socio Economic Rights in South Africa* 2ed (2006) 20.

⁴⁸ Eide A et al *Economic, social and cultural rights A textbook* 2rev.ed (2001) 3.

⁴⁹ Khoza S *Socio Economic Rights in South Africa* 2ed (2007) 20.

⁵⁰ Steiner H & Alston P *International Human Rights in context* (2000) 242.

⁵¹ The UDHR is the initial foundation of socioeconomic rights. See Eide A et al *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 1990.⁵⁴ Of all the above-mentioned international texts, the most comprehensive is the ICESCR,⁵⁵ constituting a more elaborate framework for ESCR.⁵⁶

In addition, many regional human rights instruments address economic, social and cultural rights. The notably ones are: African Charter on Human and Peoples' Rights (1981); Additional Protocol in the Area of Economic, Social and Cultural Rights to the American Convention on Human Rights (Protocol of San Salvador) (1988); European Social Charter (revised 1996) and the Additional Protocol thereto.⁵⁷

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 constitutions⁵⁸, such as, those of South Africa⁵⁹, Kenya⁶⁰ and Zimbabwe⁶¹, 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.

⁵³ Eide A et al *Economic, social and cultural rights A textbook* 2 rev. ed (2001) 4.

⁵⁴ Craven M *The International Covenant on Economic, Social and Cultural Rights A Perspective on its Development* (1995) 8-9.

⁵⁵ Joseph S L & McBeth A *Research Handbook on International Human Rights Law* (2010) 36.

⁵⁶ Eide A et al *Economic, social and cultural rights A textbook* 2 rev. ed (2001) 17.

⁵⁷ United Nations, *Economic, Social and Cultural Right Handbook for National Human Rights Institutions* (2005) 3 available at www.ohchr.org/Documents/Publications/training12en.pdf (accessed 5 June 2014).

socio-economic rights with judicial enforcement.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.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.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.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

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 *Economic, social and cultural rights A textbook 2rev.ed* (2001) 56.

⁵⁹ The 1996 South African Constitution.

⁶⁰ The 2010 Kenyan Constitution.

⁶¹ The 2013 Zimbabwean Constitution.

⁶² Zimbabwe adopts a new Constitution “Course on the Enforcement of Socio-Economic Rights in Africa, Towards Carnegie III: Strategies to Overcome Poverty and Inequality” available at blogs.sun.ac.za/seraj/2013/05/28/zim... (accessed 21 February 2015).

⁶³ United Nations, *Economic, Social and Cultural Right Handbook for National Human Rights Institutions* (2005) 3 available at www.ohchr.org/Documents/Publications/training12en.pdf (accessed 5 June 2014).

⁶⁴ United Nations, *Economic, Social and Cultural Right Handbook for National Human Rights Institutions* (2005) 3 available at www.ohchr.org/Documents/Publications/training12en.pdf (accessed 5 June 2014).

⁶⁵ United Nations, *Economic, Social and Cultural Right Handbook for National Human Rights Institutions* (2005) 3 available at www.ohchr.org/Documents/Publications/training12en.pdf (accessed 5 June 2014).

inhuman and degrading treatment will be compromised by a lack of adequate housing and access to health care.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.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,⁶⁸ constituting the most important international treaty for the codification of the “second generation of human rights”,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).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.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

⁶⁶ Tobin J ‘Economic, social and cultural Rights, the Charter of Human Rights and Responsibilities A framework for discussion’ 2010 4 available at www.humanrightscommission.vic.gov.au/...publications/.../1709_79f3d9 (accessed 5 June 2014).

⁶⁷ Nowak M *Introduction to International Human Rights Regime* (2003) 26.

⁶⁸ Viljoen F *International Human Rights Law in Africa* 2ed (2012) 114.

⁶⁹ Nowak M *Introduction to International Human Rights Regime* (2003) 81.

⁷⁰ Craven M *The International Covenant on Economic, Social and Cultural Rights A Perspective on its Development* (1995) Appendix.

⁷¹ Baderin M A & McCorquodale R ‘The international Covenant on Economic, Social and Cultural Rights: forty Years of Development’ in Baderin M A & McCorquodale R *Economic and Cultural Rights in Action* (2007) 9.

frame of reference in human rights.⁷² States had become parties to the Covenant and voluntarily undertaken to implement and give effect to the norms and provisions it establishes.⁷³ 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.⁷⁴

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.⁷⁵

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;⁷⁶ 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.⁷⁷

⁷² Baderin M A & McCorquodale R 'The international Covenant on Economic, Social and Cultural Rights: forty Years of Development' in Baderin M A & Corquodale R *Economic and Cultural Rights in Action* (2007) 5.

⁷³ United Nations, *Economic, Social and Cultural Right Handbook for National Human Rights Institutions* (2005) 5 available at www.ohchr.org/Documents/Publications/training12en.pdf (accessed 5 June 2014).

⁷⁴ United Nations, *Economic, Social and Cultural Right Handbook for National Human Rights Institutions* (2005) 5 available at www.ohchr.org/Documents/Publications/training12en.pdf (accessed 5 June 2014).

⁷⁵ United Nations, *Economic, Social and Cultural Right Handbook for National Human Rights Institutions* (2005) 5 available at www.ohchr.org/Documents/Publications/training12en.pdf (accessed 5 June 2014).

⁷⁶ Nolan A et al 'The justiciability of Social and Economic Rights: An updated Appraisal' 2007 7 available at www.chrgj.org/publications/docs/wp/NolanPorterLangford.pdf (accessed 4 July 2014).

⁷⁷ Nolan A et al 'The justiciability of Social and Economic Rights: An updated Appraisal' 2007 7 available at www.chrgj.org/publications/docs/wp/NolanPorterLangford.pdf (accessed 4 July 2014).

ESCR have traditionally been considered as lacking justiciability, a quality which CPR are deemed to possess.⁷⁸ In this respect, they are therefore not capable of being invoked in courts of law and applied by judges because of their very nature.⁷⁹

The aforementioned view is disproved by the growing body of jurisprudence relating to such rights at the international⁸⁰, regional⁸¹ and national⁸² levels. Socio-economic rights have been litigated directly and indirectly before regional bodies, including the African Commission on Human Rights⁸³, the Inter-American regional human rights bodies,⁸⁴ the European Committee of

⁷⁸ Churchill R R & Khaliq U 'Violations of Economic, Social and Cultural Rights: The Current Use and Future Potential of the European Social Charter' in Baderin M A & McCorquodale R *Economic and Cultural Rights in Action* (2007) 196-7.

⁷⁹ Eide A et al *Economic, social and cultural rights A textbook* 2rev.ed (2001) 29.

⁸⁰ At the global level, the ICESCR is the UN instrument most clearly directed at the subject matter of this study. In their interpretation of other UN human rights treaties, such as, the International Covenant on Civil and Political Rights (ICCPR) and the (Convention on the Elimination of All Forms of Racial Discrimination (CERD), the relevant treaty bodies have also explored the socio-economic potential of these instruments. These treaty experiences, as well as that under the UNESCO complaints system, are briefly surveyed. 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) 83.

⁸¹ 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. See Nolan A *Children's Socio-Economic Rights, Democracy and the Courts* (2011) 30-1.

⁸² In this regard, we refer to South Africa's experience. This country provides an example of explicit constitutional protection of legally enforceable socio-economic rights that cannot be ignored. In contrast to critics' suggestions, it is clear that the judiciary has not treated enforceability as a panacea for finding socio-economic rights violations; the *Soobramoney* case (*Soobramoney v Minister of Health, Kwazulu-Natal* 1998 (1) SA 765 (CC)) indicates that judges are responsible in respecting the boundaries of their role, and are even accused of being over-cautious. An example of positive application of socio-economic rights is the *Grootboom* case (*Gov't of the Republic of S. Afr. v Grootboom & Others* 2001 (1) SA 46 (CC) at 53 (describing the applicants' living conditions as "appalling" and "intolerable") in which a group of applicants, comprised of 390 adults and 510 children, was evicted from a squatter camp in which they had been living in extremely poor conditions." Many had applied for housing, but had been on a waiting list for as long as seven years. The applicants launched an urgent application for adequate and sufficient basic temporary shelter for the group under Section 26 of the Constitution, which provides that everyone has the right to have access to adequate housing. The respondents were ordered by the Court to make a local building available, free of charge, as temporary accommodation pending a further hearing. Other cases in South Africa, such as *President of The Republic of South Africa v. Modderklip Boerdery* in 2005, have had different outcomes, featuring an increased use of structural remedies by the Constitutional Court. Indeed, it is natural for initial teething problems to arise in a radically new area of jurisdiction without national precedent, and for a process of responsive adaptation of the system to occur. See Wiles E 'Aspirational Principles or Enforceable Rights? The Future for Socio-Economic Rights in National Law' 2006 61-3 available at digitalcommons.wcl.american.edu/cgi/viewcontent.cgi?article=1112... (accessed 5 July 2014).

Social Rights, and the European Court of Human Rights⁸⁵. 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.⁸⁶

In the same vein, the UN Committee on ESCR stresses that ESCR are justiciable.⁸⁷ 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.⁸⁸

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.⁸⁹ 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 D M(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. Allegation inadmissible *ratione materiae*, 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.

⁸⁶ Nolan A *Children’s Socio-Economic Rights, Democracy and the Courts* (2011) 30-1.

⁸⁷ United Nations, *Economic, Social and Cultural Rights Handbook for National Human Rights* (2005) 6 available at www.ohchr.org/Documents/Publications/training12en.pdf (accessed 6 June 2014).

⁸⁸ Viljoen F *International Human Rights Law in Africa* 2ed (2012) 214.

⁸⁹ Conforti B & Francioni F(eds) *Enforcing International Human Rights in Domestic Courts* (1997) 7.

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.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.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.⁹² They are neither politicians nor expert civil servants who lead economic policy or design governmental programs, without abdicating their responsibility to uphold rights.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.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

⁹⁰ Trispiotis I 'Socio-Economic Rights: Legally Enforceable or just Aspirational?' 2010 2 available at www.ucl.ac.uk/.../Article_Laws_-_Ilias_Social_equality_Publish_.pdf (accessed 4 July 2014).

⁹¹ Nolan A et al 'The justiciability of Social and Economic Rights: An updated Appraisal' 2007 3 available at www.chrgj.org/publications/docs/wp/NolanPorterLangford.pdf (accessed 4 July 2014).

⁹² Trispiotis I 'Socio-Economic Rights: Legally Enforceable or just Aspirational?' 2010 2 available at www.ucl.ac.uk/.../Article_Laws_-_Ilias_Social_equality_Publish_.pdf (accessed 4 July 2014).

⁹³ Trispiotis I 'Socio-Economic Rights: Legally Enforceable or just Aspirational?' 2010 2 available at www.ucl.ac.uk/.../Article_Laws_-_Ilias_Social_equality_Publish_.pdf (accessed 4 July 2014).

⁹⁴ Just News, Human Rights in Northern Ireland, Protecting socio-economic rights 2006 5 available at www.caj.org.uk/files/2006/01/01/2006jan.pdf (accessed 4 July 2014).

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

However, although the Committee on ESCR has adopted several General Comments⁹⁶, 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.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

⁹⁵United Nations, *Economic, Social and Cultural Rights Handbook for National Human Rights* (2005) 6 available at Institutions www.ohchr.org/Documents/Publications/training12en.pdf (accessed 6 June 2014).

⁹⁶ General Comment No. 1: *Reporting by States parties* (1989); General Comment No. 2: *International technical assistance measures* (Art. 22) (1990); General Comment No. 3: *The nature of States parties' obligations* (Art. 2, para.1) (1990); General Comment No. 4: *The right to adequate housing* (Art.11, para.1) (1991); General Comment No. 5: *Persons with disabilities* (1994); General Comment No. 6: *The economic, social and cultural rights of older persons* (1995); General Comment No. 7: *The right to adequate housing (Art.11, para.1): forced evictions* (1997); General Comment No. 8: *The relationship between economic sanctions and respect for economic, social and cultural rights* (1997); General Comment No. 9: *The domestic application of the Covenant* (1998); General Comment No. 10: *The role of national human rights institutions in the protection of economic, social and cultural rights* (1998); General Comment No. 11: *Plans of action for primary education* (Art.14) (1999); General Comment No. 12: *The right to adequate food* (Art.11) (1999); General Comment No. 13: *The right to education* (Art.13) (1999); General Comment No. 14: *The right to the highest attainable standard of health* (Art.12) (2000); General Comment No.15: *The right to water* (2002). General Comment No 16: *the equal right of men and women to the enjoyment of all economic, social and cultural rights* (Art. 3) (2005); 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)) (2006), General Comment No 18: *the equal right of men and women to the enjoyment of all economic, social and cultural rights*(Art.6) (2006); General Comment No 19: *The right to social security* (Art. 9)(2008); General Comment No 20: *Non-Discrimination in Economic, Social and Cultural Rights* (Art. 2, para. 2) (2009); General Comment 21: *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).

⁹⁷ Craven M *The International Covenant on Economic, Social and Cultural Rights A Perspective on its Development* (1995) Appendix.

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.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.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.¹⁰⁰

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 1981,¹⁰¹ and came into force in 1986, and is the main human rights treaty of the AU system.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.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

⁹⁸ Craven M *The International Covenant on Economic, Social and Cultural Rights A Perspective on its Development* (1995) Appendix.

⁹⁹ General comment No 18: *the equal right of men and women to the enjoyment of all economic, social and cultural rights* (Art.6) (2006) available at <http://www1.umn.edu/humanrts/gencomm/econ.htm> (accessed 7 June 2014).

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

¹⁰¹ Baderin M A & McCorquodale R *Economic and Cultural Rights in Action* (2007) 140.

¹⁰² Van Ert G *International Human Rights Law* (2004) 115.

¹⁰³ Hanski R & Suksi M *An Introduction to the International Protection of Human Rights A Textbook 2 rev.ed* (2004) 387.

to those that already existed in Europe (European Convention on Human Rights) and the Americas (American Convention on Human Rights).¹⁰⁴ It has now been ratified by almost all African States, except South Sudan, and is unique regional human rights system.¹⁰⁵

An essential feature of the ACHPR is that, unlike the two UN Covenants¹⁰⁶, the European Convention on Human Rights (ECHR)¹⁰⁷ and the American Convention on Human Rights (ACHR)¹⁰⁸, it provides for ESCR and CPR in a single instrument without distinction.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 negotiation and conciliation rather than the adversarial approach associated with adjudicatory mechanisms.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).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

¹⁰⁴African Commission, African Charter on Human and Peoples' Rights available at <http://www.achpr.org/instruments/achpr/> (accessed 2 June 2014).

¹⁰⁵ Church J et al *Human Rights from a Comparative and International Law Perspective* (2007) 259.

¹⁰⁶Under 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.

¹⁰⁷Under 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.

¹⁰⁸ Under the Inter-American system, the American Convention on Human Rights (1969) provides for CPR, while ESCR are provide for in a Protocol on Economic, Social and Cultural Rights later adopted in 1988. See Baderin M A & McCorquodale R *Economic and Cultural Rights in Action* (2007) 140.

¹⁰⁹ Baderin M A & McCorquodale R *Economic and Cultural Rights in Action* (2007) 140-1.

¹¹⁰Church J et al *Human Rights from a Comparative and International Law Perspective* (2007) 259.

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

¹¹² Ssenyonjo M *Analyzing the Economic, Social and Culture Rights Jurisprudence of the African Commission: 30 Years since the Adoption of the African Charter* (2011) 362 available at <http://www.corteidh.or.cr/tablas/r26994.pdf> (accessed 6 June 2014).

¹¹³ Viljoen F *International Human Rights Law in Africa* (2012) 214.

¹¹⁴ Viljoen F *International Human Rights Law in Africa* (2012) 215.

¹¹⁵ Heyns C & Steffiszyn K (eds) *Human Rights, Peace and Justice in Africa: A Reader* (2006) 200.

¹¹⁶ Mbazira C 'Enforcing the Economic, social and cultural rights in the ACHPR: Twenty years of Redundancy, Progress and Significant Studies' in Lliopoulos-Strangas J & Roux T (eds) *Perspectives Nationales et Internationales des Droits Sociaux, National and International perspectives on social rights* (2008) 301.

¹¹⁷ Heyns C & Steffiszyn K (eds) *Human Rights, Peace and Justice in Africa: A Reader* (2006) 200.

realisation” of socio-economic rights subject “to the maximum of the available resources”, the ACHPR does not.¹¹⁸ 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.¹¹⁹

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.¹²⁰

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,¹²¹ the latter, which are broadly framed, require innovative interpretation to enable State Parties to the African Charter to implement ESCR.¹²²

¹¹⁸ Mbazira C ‘Enforcing the Economic, social and cultural rights in the ACHPR: Twenty years of Redundancy, Progress and Significant Studies’ in Lliopoulos-Strangas J & Roux T (eds) *Perspectives Nationales et Internationales des Droits Sociaux, National and International perspectives on social rights* (2008) 298.

¹¹⁹ Ssenyonjo M *Analyzing the Economic, Social and Culture Rights Jurisprudence of the African Commission: 30 Years since the Adoption of the African Charter* (2011) 387 available at <http://www.corteidh.or.cr/tablas/r26994.pdf> (accessed 6 June 2013).

¹²⁰ Ssenyonjo M *Analyzing the Economic, Social and Culture Rights Jurisprudence of the African Commission: 30 Years since the Adoption of the African Charter* (2011) 362 available at <http://www.corteidh.or.cr/tablas/r26994.pdf> (accessed 6 June 2014).

¹²¹ Baderin M A & McCorquodale R *Economic and Cultural Rights in Action* (2007) 148.

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.¹²³ The ESCR included in the ACHPR have not been given a clear normative content.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.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?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”.¹²⁷ Article 17(1), which protects the right to education, only provides:

¹²² Ssenyonjo M *Analyzing the Economic, Social and Culture Rights Jurisprudence of the African Commission: 30 Years since the Adoption of the African Charter* (2011) 362 available at <http://www.corteidh.or.cr/tablas/r26994.pdf> (accessed 6 June 2014).

¹²³ Agbakwa S.C ‘Reclaiming Humanity: Economic, Social and Cultural Rights as the cornerstone of the African Human Rights’ in Heynes C & Steliszyn K (eds) *Human Rights, Peace and Justice in Africa. A Reader* (2006) 192.

¹²⁴ Protection of Human Rights in Africa: African Human Rights in a Comparative Perspective available at <http://www.leganet.cd/Doctrine.textes/DroitPublic/DH/ProtectionofHR.Kabange.htm> (accessed 5 June 2014).

¹²⁵ Ssenyonjo M *Analyzing the Economic, Social and Culture Rights Jurisprudence of the African Commission: 30 Years since the Adoption of the African Charter* (2011) 362 available at <http://www.corteidh.or.cr/tablas/r26994.pdf> (accessed 6 June 2014).

¹²⁶ Ssenyonjo M *Analyzing the Economic, Social and Culture Rights Jurisprudence of the African Commission: 30 Years since the Adoption of the African Charter* (2011) 362 available at <http://www.corteidh.or.cr/tablas/r26994.pdf> (accessed 6 June 2014).

‘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.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.¹²⁹ This is not surprising given the lack of interest in implementing ESC rights by many African States.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)¹³¹ of the African Charter.

¹²⁷ Agbakwa S.C ‘Reclaiming Humanity: Economic, Social, and Cultural Rights as the Cornerstone of African Human Rights’ (2002) 192 *Yale Human Rights & Development L.J.* Vol.5 available at www.law.yale.edu/documents/pdf/.../Shedrack_Agbakwa_YHRDLJ.pdf (accessed 19 April 2014).

¹²⁸ Ssenyonjo M *Analyzing the Economic, Social and Culture Rights Jurisprudence of the African Commission: 30 Years since the Adoption of the African Charter* (2011) 363 available at <http://www.corteidh.or.cr/tablas/r26994.pdf> (accessed 6 June 2014).

¹²⁹ Ssenyonjo M *Analyzing the Economic, Social and Culture Rights Jurisprudence of the African Commission: 30 Years since the Adoption of the African Charter* (2011) 364 available at <http://www.corteidh.or.cr/tablas/r26994.pdf> (accessed 6 June 2014).

¹³⁰ Ssenyonjo M *Analyzing the Economic, Social and Culture Rights Jurisprudence of the African Commission: 30 Years since the Adoption of the African Charter* (2011) 364 available at <http://www.corteidh.or.cr/tablas/r26994.pdf> (accessed 6 June 2014).

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).¹³²

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.¹³³ 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*¹³⁴ and *Malawi African Association and Others vs Mauritania*,¹³⁵ are both cases in relation to the right to property. *Annette Pagnouille (on behalf of Abdoulaye Mazou) vs Cameroon*,¹³⁶ 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.

¹³² Ssenyonjo M *Analyzing the Economic, Social and Culture Rights Jurisprudence of the African Commission: 30 Years since the Adoption of the African Charter* (2011) 365 available at <http://www.corteidh.or.cr/tablas/r26994.pdf> (accessed 6 June 2014).

¹³³ Baderin M A & McCorquodale R *Economic and Cultural Rights in Action* (2007)150.

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 losses, 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 Inter africaine des Droits de l'Homme, Les Témoins de Jehovah vs Zaire*.¹³⁷ 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*;¹³⁸ 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*;¹³⁹ and *Malawi African Association and Others vs Mauritania*;¹⁴⁰ all of them in relation to right to health contained in the African Charter.

Jurisprudence of the African Commission: 30 Years since the Adoption of the African Charter (2011) 367 available at <http://www.corteidh.or.cr/tablas/r26994.pdf> (accessed 6 June 2014).

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.¹⁴¹ 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).

¹⁴⁰ 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.

¹⁴¹ Ssenyonjo M *Analyzing the Economic, Social and Culture Rights Jurisprudence of the African Commission: 30 Years since the Adoption of the African Charter* (2011) 364 available at <http://www.corteidh.or.cr/tablas/r26994.pdf> (accessed 6 June 2014).

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

2.4 Conclusion

Constituting the rights dealing with minimum conditions for welfare and wellbeing,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.¹⁴⁴ Human rights, including CPR and ESCR, are indivisible and interdependent.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,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,¹⁴⁷ prospects of the effective protection and realisation of

¹⁴² Baderin M A & McCorquodale R *Economic and Cultural Rights in Action* (2007) 148.

¹⁴³ Nolan A *Children's Socio-Economic Rights, Democracy and the Courts* (2011) 21.

¹⁴⁴ Cole J 'Your Social and economic rights' 1996 10.

¹⁴⁵ Tobin J 'Economic, social and cultural Rights, the Charter of Human Rights and Responsibilities A framework for discussion' 2010 4 available at www.humanrightscommission.vic.gov.au/...publications/.../1709_79f3d9 (accessed on 5 June 2014).

¹⁴⁶ Eide A et al *Economic, social and cultural rights A textbook* 2rev.ed (2001) 17.

¹⁴⁷ Ssenyonjo M *Analyzing the Economic, Social and Culture Rights Jurisprudence of the African Commission: 30 Years since the Adoption of the African Charter* (2011) 363 available at <http://www.corteidh.or.cr/tablas/r26994.pdf> (accessed 6 June 2014).

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,¹⁴⁸ of which some selected jurisprudence already cited in this study is proof.



¹⁴⁸ United Nations, *Economic, Social and Cultural Rights Handbook for National Human Rights* (2005) 93 available at Institutions www.ohchr.org/Documents/Publications/training12en.pdf (accessed 6 June 2014).

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 ratified¹⁵⁰ treaty. Today, more than 30 years after the adoption of the ACHPR, the DRC¹⁵¹ 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

¹⁴⁹ Donders Y & Volodin V (eds) *Human Rights in Education, Science and Culture Legal Developments and Challenges* (2007) 57-8.

¹⁵⁰ 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 *International Human Rights Law in Africa* 2ed (2012) 285.

¹⁵¹ At Congolese domestic level, there are no instances where courts in DRC have made any pronouncement on socioeconomic rights issues. See 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 Droits de l'homme et des peuples' 2009 7 available at <http://www.congoforum.be/upldocs/Nzati.pdf> (accessed 12 August 2013).

¹⁵² 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 Droits de l'homme et des peuples' 2009 7 available at <http://www.congoforum.be/upldocs/Nzati.pdf> (accessed 12 August 2013).

a reduced role for the judiciary in respect of societal problems appears not only increasingly anachronistic but particularly difficult to sustain in law.¹⁵³

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.¹⁵⁴

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.¹⁵⁵ 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 61.¹⁵⁶

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

¹⁵³ Ghai Y& Cottrell J (eds) *Economic, Social & Cultural Rights in Practice The Role of Judges in Implementing Economic, Social & Cultural Rights* (2004) 21.

¹⁵⁴ The Legal System and Research of the Democratic Republic of Congo (DRC): An Overview available at http://www.nyulawglobal.org/globalex/democratic_republic_congo.htm#_Toc182803272 (accessed 2 June 2014).

¹⁵⁵ The Legal System and Research of the Democratic Republic of Congo (DRC): An Overview available at http://www.nyulawglobal.org/globalex/democratic_republic_congo.htm#_Toc182803272 (accessed 2 June 2014).

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 65th 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 ownership¹⁶⁰ 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.

¹⁵⁹ 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).

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 (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.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.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's¹⁶⁴ legal system and public administration do not have the capacity to enforce intellectual property regulations.¹⁶⁵

The DRC's Constitution not only protects private ownership without discrimination between foreign and domestic investors, but also protects investments against take-over.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.¹⁶⁷

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

¹⁶³ Global property Guide available at <http://www.globalpropertyguide.com/Africa/Congo-Dem-Rep> (accessed 5 April 2014).

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 <http://www.state.gov/e/eb/rls/othr/ics/2013/204623.htm> (accessed 7 April 2014).

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

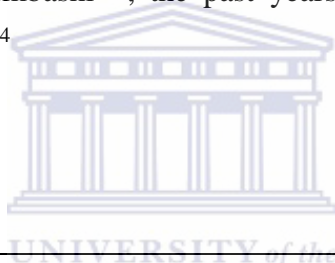
¹⁶⁶ Right to Private Ownership and Establishment in DRC available at <http://www.state.gov/e/eb/rls/othr/ics/2013/204623.htm> (accessed 20 February 2015).

3.2.2 The right to work and social security

DRC¹⁶⁸ 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.¹⁶⁹

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.¹⁷⁰

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%.¹⁷¹ In the great towns, like Kinshasa¹⁷² and Lubumbashi¹⁷³, the past years have witnessed a proliferation of guarding and security companies.¹⁷⁴



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.

¹⁶⁹ 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 Droits de l'homme et des peuples'2009 4 available at <http://www.congoforum.be/upldocs/Nzati.pdf> (accessed 12 August 2013).

¹⁷⁰ 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 Droits de l'homme et des peuples'2009 4 available at <http://www.congoforum.be/upldocs/Nzati.pdf> (accessed 12 August 2013).

¹⁷¹ Rapport national des progres des OMD," la pauvreté 2015" 50 ans DRC, PNUD 2010, 40.

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.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)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.¹⁷⁷

Access to work under equitable and satisfactory conditions is guaranteed in the UDHR,¹⁷⁸ ICESCR,¹⁷⁹ ACHPR,¹⁸⁰ and even the Constitution.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.¹⁸²

¹⁷⁵ Kafui S H A ‘Kaléidoscope sur les Droits socio-économiques en République Démocratique du Congo’ 2012 23 available at www.ziviler-friedensdienst.org/.../zfd-kaleidoscope-su...(accessed 27 February 2014).

¹⁷⁶ Societe Nationale d’Electricite (SNEL) is the national electricity company of DRC.

¹⁷⁷ Kafui S H A ‘Kaléidoscope sur les Droits socio-économiques en République Démocratique du Congo’ 2012 24 available at www.ziviler-friedensdienst.org/.../zfd-kaleidoscope-su...(accessed 27 February 2014).

¹⁷⁸ Article 23 of the UDHR.

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.

¹⁸⁰ Article 15 of the ACHPR.

¹⁸¹ Article 36 of the DRC Constitution of 18 February 2006.

¹⁸² Mayimona N M ‘Quel bilan dresser de l’effectivite et de la justiciabilite des Droits économiques,sociaux et culturels en DRC au regard de la Declaration Universelle des Droits de l’homme et de la Charte Africaine des Droits de l’homme et des peuples’2009 4-5 available at <http://www.congoforum.be/upldocs/Nzati.pdf> (accessed 12 August 2013).

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 manoeuvre 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

¹⁸³ 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 Droits de l'homme et des peuples'2009 4 available at <http://www.congoforum.be/upldocs/Nzati.pdf> (accessed 12 August 2013).

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

¹⁸⁵ 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 Droits de l'homme et des peuples'2009 4 available at <http://www.congoforum.be/upldocs/Nzati.pdf> (accessed 12 August 2013).

¹⁸⁶ CESCR, Concluding Observations: Democratic Republic of Congo, UN Doc. E/C.12/CoD/Co/4 (16 December 2009), para. 29.

¹⁸⁷ Introducing the state of world's midwifery Report 2011 available at <http://www.unfpa.org/sowmy/report/home.htm> (accessed 7 April 2014).

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, the delivered medicines are often of bad quality (a lot of wrong products).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.¹⁸⁹ The number of HIV-positive people is currently estimated at more than one million and there are more than 1 million AIDS orphans.¹⁹⁰ Only 44,000 people are currently receiving treatment, translating into a 15% antiretroviral (ARV) coverage rate, one of the lowest in the world.¹⁹¹

3.2.4 The right to education

Primary education is compulsory and free according to the DRC Constitution,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.¹⁹³

¹⁸⁸ Risterucci M & Bouty C *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_.pd... (accessed 7 April 2013).

¹⁸⁹ New health program in Congo hopes to improve maternal, infant mortality rates, A PC(USA) mission letter from Democratic Republic of Congo July 30, 2013 available at <https://www.pcusa.org/news/2013/7/30/new-health-program-congo-hopes-improve-maternal-in/> (accessed 9 June 2014).

¹⁹⁰ Health care, Fight against HIV/AIDS in DRC 2012 available at <https://www.cordaid.org/en/projects/fight-against-hiv-aids/106365/> (accessed 9 June 2014).

¹⁹¹ HIV/AIDS in Democratic Republic of Congo, MSF XIX International Aids Conference, Washington DC USA 2012 available at <http://aids2012.msf.org/2012/hiv-aids-in-democratic-republic-of-congo/> (accessed 11 June 2014).

¹⁹² Article 43 of the DRC Constitution of 18 February 2006.

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.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.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, churches¹⁹⁶, and non-government organisations are trying to the best of their best ability to alleviate the situation.¹⁹⁷

Droits de l’homme et des peuples’2009 4 available at <http://www.congoforum.be/upldocs/Nzati.pdf> (accessed 12 August 2013).

¹⁹⁴ Cornelia W ‘To school, not to the mines: Investing in primary education in the Democratic Republic of the Congo’ 2013 available at http://www.unicef.org/infobycountry/drcongo_68298.html (accessed 7 April 2014).

¹⁹⁵ Kafui S H A ‘Kaléidoscope sur les Droits socio-économiques en République Démocratique du Congo’ 2012 48 available at www.ziviler-friedensdienst.org/.../zfd-kaleidoscope-su... (accessed 27 February 2014).

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 <http://radiookapi.net/actualite/2014/04/12/maniema-lecole-primaire-lutemo-manque-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.¹⁹⁸ 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.¹⁹⁹

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 1990.²⁰⁰

Cultural rights are mostly violated with regard to rural and nomad populations²⁰¹, although UNESCO²⁰² had paid particular attention to the prevention of discrimination against persons belonging to disadvantaged and vulnerable groups, especially in this sphere of culture.²⁰³ 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.²⁰⁴

¹⁹⁷ Kafui S H A 'Kaléidoscope sur les Droits socio-économiques en République Démocratique du Congo' 2012 48 available at www.ziviler-friedensdienst.org/.../zfd-kaleidoscope-su... (accessed 27 February 2014).

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

¹⁹⁹ Protecting Communities in the DRC, Understanding gender dynamics and empowering women and men 2012 2 available at www.oxfamblogs.org/.../cs-protecting-communities-drc-081012-en.pdf (accessed 5 April 2014).

²⁰⁰ Protecting Communities in the DRC, Understanding gender dynamics and empowering women and men 2012 2 available at www.oxfamblogs.org/.../cs-protecting-communities-drc-081012-en.pdf (accessed 5 April 2014).

²⁰¹ Referring specially to indigenous peoples (pygmies).

²⁰² United Nations Educational Scientific and Cultural Organization: an agency of the United Nations that promotes education and communication and the arts.

²⁰³ UNESCO *Cultural rights and Wrongs* A collection of essays in commemoration of the 50th anniversary of the Universal Declaration of Human Rights (1998) 151.

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.²⁰⁵

3.2.6 The right to decent housing

Although the right to decent housing is recognised and protected under the DRC Constitution,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.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.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

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.

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.

²⁰⁶ Article 48 of the DRC Constitution of 18 February 2006.

²⁰⁷ Mayimona N M 'Quel bilan dresser de l'effectivite et de la justiciabilite des Droits économiques, sociaux et culturels en DRC au regard de la Declaration Universelle des Droits de l'homme et de la Charte Africaine des Droits de l'homme et des peuples' 2009 4 available at <http://www.congoforum.be/upldocs/Nzati.pdf> (accessed 12 August 2013).

²⁰⁸ Kafui S H A 'Kaléidoscope sur les Droits socio-économiques en République Démocratique du Congo' 2012 23 available at www.ziviler-friedensdienst.org/.../zfd-kaleidoscope-su... (accessed 27 February 2014).

housing.²⁰⁹ Concerning Kinshasa²¹⁰, 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.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 water²¹², and approximately 80-90 % do not have access to improved sanitation.²¹³

DRC is recognised as the most water-rich country in Africa²¹⁴. Although it possess abundant resources, such as drinking water, access to safe water is a challenge that the government²¹⁵ 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

²⁰⁹ Document-de-programme-Pays-2008-2009-Republique-Democratique-du-Congo available at unhabitat.org/publications/document-de-programme-pays-2008-2009-republique-democratique-du-congo (accessed 12 April 2014).

²¹⁰ The majority of people in Kinshasa live in city, in houses often without adequate sanitations and sometimes situated on the sites at risk. Still in Kinshasa, there is insufficiency of quality housing for the disadvantaged category of population. See Document-de-programme-Pays-2008-2009-Republique-Democratique-du-Congo available at unhabitat.org/publications/document-de-programme-pays-2008-2009-republique-democratique-du-congo (accessed 12 April 2014).

²¹¹ Kafui S H A 'Kaléidoscope sur les Droits socio-économiques en République Démocratique du Congo' 2012 16 available at www.ziviler-friedensdienst.org/.../zfd-kaleidoscope-su... (accessed 12 April 2014).

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).

²¹³ Water and Sanitation Program 'Water Supply and Sanitation in the Democratic Republic of Congo, Turning Finance into Services for 2015 and Beyond' 2011 2 available at <https://www.wsp.org/sites/wsp.org/files/publications/CSO-DRC-En.pdf> (accessed 6 May 2014).

²¹⁴ Zaragoza M A 'In search of clean water: human rights and the mining industry in Katanga, DRC' 2013 6 Réseau Ressources Naturelles available at www.ipisresearch.be/publications_detail.php?id=434 (accessed 8 May 2014).

²¹⁵ The current Government of DRC is led by the Prime Minister Matata Ponyo since 28 April 2012 according to the Ordinance-Law no.12/0041, 2 due to the resignation of Government-Muzito III on 6 April 2012.

to drinking water in urban areas against 17% in the rural areas.²¹⁶ The majority of people in the country do not benefit from drinking water,²¹⁷ nor electricity.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 REGIDESO²¹⁹ on certain properties (slots of land).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.²²¹



²¹⁶ Kafui S H A ‘Kaléidoscope sur les Droits socio-économiques en République Démocratique du Congo’ 2012 23 available at www.ziviler-friedensdienst.org/.../zfd-kaleidoscope-su... (accessed 27 February 2014).

²¹⁷ Shore R ‘Crisis Spotlight, Water in Crisis - Democratic Republic of Congo’ available at <http://thewaterproject.org/water-in-crisis-congo> (accessed 18 April 2014).

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).

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

²²⁰ Mayimona N M ‘Quel bilan dresser de l’effectivite et de la justiciabilite 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 Droits de l’homme et des peuples’ 2009 5 available at <http://www.congoforum.be/upldocs/Nzati.pdf> (accessed 12 August 2013).

²²¹ Radio Okapi available at <http://radiookapi.net/actualite/2013/10/31/rdc-9-seulement-de-la-population-a-acces-lelectricite/> (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.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.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 is better in Maniema (47%); Equateur (37%); Kasai Oriental (36%), Katanga (35%) and Bandundu (35%).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.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:

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.²²⁶

²²²RAPDA, the right to food, Rapport d'état des lieux de la RDC sur le droit à l'alimentation, réalisé par la coalition Nationale RAPDA-DRC 2009 11-12 available at www.rtfn-watch.org/uploads/.../ (accessed 13 April 2014).

²²³ RAPDA, the right to food, Rapport d'état des lieux de la RDC sur le droit à l'alimentation, réalisé par la coalition Nationale RAPDA-DRC 2009 11 available at www.rtfn-watch.org/uploads/.../ (accessed 13 April 2014).

²²⁴ RAPDA, the right to food, Rapport d'état des lieux de la RDC sur le droit à l'alimentation, réalisé par la coalition Nationale RAPDA-DRC 2009 11 available at www.rtfn-watch.org/uploads/.../ (accessed 13 April 2014).

²²⁵ RAPDA, the right to food, Rapport d'état des lieux de la RDC sur le droit à l'alimentation, réalisé par la coalition Nationale RAPDA-DRC 2009 11 available at www.rtfn-watch.org/uploads/.../ (accessed 13 April 2014).

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,²²⁷ one of the challenges that it continues to face.²²⁸ It has never developed any credible system of governance.²²⁹ Although having celebrated its 50th anniversary of independence on 30 June 2010, the State's authority is still weak.²³⁰

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

²²⁷ Radio Okapi available at <http://radiookapi.net/actualite/2012/03/30/gestion-des-finances-publiques-la-rdc-toujours-dans-la-zone-rouge-selon-la-banque-mondiale/#.U3jNvl4aLIU> (accessed 18 Mai 2014).

²²⁸ Gawanas B 'The African Union: Concepts and Implementation mechanisms relating to Human Rights' in Bosl A & Diescho J *Human Rights in Africa* (2009) 160.

²²⁹ Juma L *Human Rights and Conflict transformation in Africa* (2013) 361.

²³⁰ The DRC is a country characterised by bad governance available at www.usip.org/publications/the-democratic-republic-the-congo (accessed 18 May 2014).

the country's development; and absence of foreseeability.²³¹ These factors are seen as major factors that have undermined the country's growth and development – perpetuating its cycle of poverty and conflict.²³²

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.²³³

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).²³⁴

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.

²³² Baudienville G 'Public financial management reforms in fragile states: the case of Democratic Republic of the Congo' 2012 6 available at <http://www.odi.org.uk/publications/6875-public-financial-management-reforms-fragile-states-democratic-republic-congo> (accessed 22 April 2014).

²³³ Agbakwa S.C 'Reclaiming Humanity: Economic, Social, and Cultural Rights as the Cornerstone of African Human Rights' (2002) 195 *Yale Human Rights & Development L.J.* Vol.5 available at www.law.yale.edu/documents/pdf/.../Shedrack_Agbakwa_YHRDLJ.pdf (accessed 19 April 2014).

²³⁴ Baderin M A & McCorquodale R *Economic, Social and Cultural Rights in Action* (2007) 154.

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 selfish²³⁸ interests. Furthermore, sometimes the funds collected are directed towards sectors that are non-productive.²³⁹

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

²³⁵ Radio Okapi available at <http://radiookapi.net/actualite/2012/03/30/gestion-des-finances-publiques-la-rdc-toujours-dans-la-zone-rouge-selon-la-banque-mondiale/#.U3jNvl4aLIU> (accessed 18 Mai 2014).

²³⁶ Lambert T *Controle Fiscal, Droit et Pratique* (1991) in TSHIMPAKA K 'L' Assainissement des Finances Publiques en Republique Democratique du Congo: Analyse, Critique et Perspectives d'Avenir' 2007 40, *Memoire*, Faculte de Droit, Universite de Kinshasa.

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.

²³⁹ Bakandeja wa Mpungu G *Droit des Finances Publiques. Moyens d'action et Plan financier de l'État* (1997) 66.

promote ESCR, in favor of policies that bring greater profits their way through businesses, investments, or unscrupulous cohorts.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.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,²⁴² contrary the reason behind its establishment, namely, to tackle impunity.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,²⁴⁴ while being a national human rights institution (NHRI), an administrative body set up to protect or monitor human rights in the country.²⁴⁵ Political interference could be seen in almost all of its work and it was accused of being biased towards the government.

²⁴⁰ Agbakwa S.C 'Reclaiming Humanity: Economic, Social, and Cultural Rights as the Cornerstone of African Human Rights' (2002) 195 *Yale Human Rights & Development L.J.* Vol.5 available at www.law.yale.edu/documents/pdf/.../Shedrack_Agbakwa_YHRDLJ.pdf (accessed 19 April 2014).

²⁴¹ Agbakwa S.C 'Reclaiming Humanity: Economic, Social, and Cultural Rights as the Cornerstone of African Human Rights' (2002) 195 *Yale Human Rights & Development L.J.* Vol.5 available at www.law.yale.edu/documents/pdf/.../Shedrack_Agbakwa_YHRDLJ.pdf (accessed 19 April 2014).

²⁴² DRC: National Observatory of Human Rights (defunct) available at <http://www.content.eisa.org.za/old-page/drc-national-observatory-human-rights-defunct> (accessed 19 April 2014).

²⁴³ Juma L *Human Rights and Conflict transformation in Africa* (2013) 360.

²⁴⁴ DRC: National Observatory of Human Rights (defunct) available at <http://www.content.eisa.org.za/old-page/drc-national-observatory-human-rights-defunct> (accessed 19 April 2014).

Periodic reports of the agency mainly documented human rights abuses rather than action taken against such abuses by the agency.²⁴⁶

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

A national human rights institution (NHRI)²⁴⁷, whose responsibilities include assisting with the education of public opinion towards awareness of, and respect for, human rights,²⁴⁸ has actually been non-existent in DRC since 2006.²⁴⁹ The socio-economic rights of the majority of Africans, including the Congolese people, are most times violated owing to illiteracy and ignorance²⁵⁰ of these rights amongst the people.

The level of education of the majority of Congolese is low,²⁵¹ while the UDHR and the Covenants²⁵² placed education at the center of human rights activities.²⁵³ This makes the promotion of human rights a mammoth task.²⁵⁴ Even if the rights are violated, the Congolese are

²⁴⁵ Ssenyonjo M *Economic, Social and Cultural Rights in International Law* (2009) 190.

²⁴⁶ DRC: National Observatory of Human Rights (defunct) available at <http://www.content.eisa.org.za/old-page/drc-national-observatory-human-rights-defunct> (accessed 19 April 2014).

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.

²⁴⁸ Ramcharan B *The Quest for Protection A human rights Journey at the United Nations* (2004) 97.

²⁴⁹ DRC: National Observatory of Human Rights (defunct) available at <http://www.content.eisa.org.za/old-page/drc-national-observatory-human-rights-defunct> (accessed 19 April 2014).

²⁵⁰ Symonides J (ed) *Human Rights: International Protection, Monitoring, Enforcing* (2003) 229.

²⁵¹ Maina 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.

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.

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.

²⁵⁴ Maina 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.

unable to revolt and claim their rights.²⁵⁵ 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 2008.²⁵⁶

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.²⁵⁷ Thus, the tribunals and courts are the mechanisms for the protection of human rights, including ESCR. The latter, in this way, therefore become justiciable²⁵⁸. When reading all the Congolese legislation regarding the competencies of tribunals and courts²⁵⁹ of DRC, nowhere does it explicitly indicate their role concerning rights and liberties.²⁶⁰ Also, the embryonic judicial system is weak in structure and capacity.²⁶¹

²⁵⁵ Kafui S H A 'Kaléidoscope sur les Droits socio-économiques en République Démocratique du Congo' 2012 24 available at www.ziviler-friedensdienst.org/.../zfd-kaleidoscope-su... (accessed 27 February 2014).

²⁵⁶ La question de l'effectivité et de la justiciabilité des Droits sociaux et économiques en RDC available at www.cjrrdc.org/laquestion-de-l-effectivite.ws (accessed 21 April 2014).

²⁵⁷ Lord Lester of Herne Hill QC & O'Connell C 'The Effective Protection of Socio-Economic Rights' in Ghai Y & Cottrell J (eds) *Economic, Social & Cultural Rights in Practice The Role of Judges in Implementing Economic, Social & Cultural Rights* (2004) 21.

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)

²⁶⁰ La question de l'effectivité et de la justiciabilité des Droits sociaux et économiques en RDC available at www.cjrrdc.org/laquestion-de-l-effectivite.ws (accessed 21 April 2014).

²⁶¹ Juma L *Human Rights and Conflict transformation in Africa* (2013) 356.

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.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,²⁶³ and 27 years since it became part of DRC law by ratification²⁶⁴, 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.²⁶⁵

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.

²⁶² 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 Droits de l'homme et des peuples'2009 6 available at <http://www.congoforum.be/upldocs/Nzati.pdf> (accessed 12 August 2013).

²⁶³ 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 Droits de l'homme et des peuples'2009 7 available at <http://www.congoforum.be/upldocs/Nzati.pdf> (accessed 12 August 2013).

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 *International Human Rights Law in Africa* 2ed (2012) 285.

²⁶⁵ 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 Droits de l'homme et des peuples'2009 7 available at <http://www.congoforum.be/upldocs/Nzati.pdf> (accessed 12 August 2013).

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,²⁶⁶ even if being protected by the African Charter.²⁶⁷

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.²⁶⁸

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

²⁶⁶ Agbakwa S.C 'Reclaiming Humanity: Economic, Social, and Cultural Rights as the Cornerstone of African Human Rights' (2002) 192 *Yale Human Rights & Development L.J.* Vol.5 available at www.law.yale.edu/documents/pdf/.../Shedrack_Agbakwa_YHRDLJ.pdf (accessed 19 April 2014).

²⁶⁷ Ssenyonjo M *Analyzing the Economic, Social and Culture Rights Jurisprudence of the African commission: 30 Years since the Adoption of the African Charter* (2011) 362 available at <http://www.corteidh.or.cr/tablas/r26994.pdf> (accessed 3 August 2013).

²⁶⁸ Agbakwa S.C 'Reclaiming Humanity: Economic, Social, and Cultural Rights as the Cornerstone of African Human Rights' (2002) 193 *Yale Human Rights & Development L.J.* Vol.5 available at www.law.yale.edu/documents/pdf/.../Shedrack_Agbakwa_YHRDLJ.pdf (accessed 19 April 2014).

appropriate expectations. As with its correlate in the ICESCR, the Charter's right to health needs to be better defined.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.²⁷⁰ However, since 2000 things have changed: there have been many SER cases decided by the Commission including *SERAC*²⁷¹, *Purohit*,²⁷² *Endorois*,²⁷³ *Sudan*²⁷⁴, and others. In addition, the Commission has developed Principles and Guidelines on the Implementation of Socio-economic Rights.²⁷⁵

²⁶⁹ Agbakwa S.C 'Reclaiming Humanity: Economic, Social, and Cultural Rights as the Cornerstone of African Human Rights' (2002) 193 *Yale Human Rights & Development L.J.* Vol.5 available at www.law.yale.edu/documents/pdf/.../Shedrack_Agbakwa_YHRDLJ.pdf (accessed 19 April 2014).

²⁷⁰ Module 28 The African Commission on Human and Peoples' Rights and ESC Rights, using Module 28 in a training program, Circle of Rights, Economic, Social & Cultural Rights Activism: A training Resource, available at <http://www1.umn.edu/humanrts/edumat/IHRIP/circle/modules/module28.htm> (accessed on 29 April 2013).

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).

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).

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 communication 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,²⁷⁶ including ESCR.

It is noted that the Commission is often regarded as impotent owing to serious and systemic abuses of human rights,²⁷⁷ 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.²⁷⁸

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.²⁷⁹ The Commission had neither the authority nor the power when African States were tardy at best, and friendly

ACHPR available at www.forestpeoples.org/sites/fpp/files/publication/.../endorois-decision.pdf (accessed 2 July 2014).

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).

²⁷⁵ African Commission, Principles and Guidelines on the Implementation of Economic, Social and Cultural Rights in the African Charter on Human and Peoples' Rights available at www.peopletoparliament.org.za/.../socio-economic-rights/...Guidelines... (accessed 2 July 2014).

²⁷⁶ Module 28 The African Commission on Human and Peoples 'Rights and ESC Rights, using Module 28 in a training program, Circle of Rights, Economic, Social & Cultural Rights Activism: A training Resource, available at <http://www1.umn.edu/humanrts/edumat/IHRIP/circle/modules/module28.htm> (accessed on 29 April 2013).

²⁷⁷ Smith R K.M *Textbook on International Human Rights* 5ed (2012) 150.

²⁷⁸ Hanski R & Suksi M (eds) *An Introduction to the International Protection of Human Rights: A Textbook* 2ed (1999) 395.

²⁷⁹ Mbazira C 'Enforcing the Economic, Social and Cultural Rights in the African Charter on Human and Peoples' Rights: Twenty Years of Redundancy, Progress and Significant strides' in Lliopoulos-Strangas J & Roux T (eds) *Perspectives Nationales et Internationales des Droits Sociaux, National and International perspectives on social rights* (2008) 302.

negligent, in submitting reports (late or missing) to the Commission about how they were applying the Charter.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.²⁸¹ When the Commission raised questions about the reports that were submitted, States tended toward silence.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.²⁸³

In addition, doubts have been expressed about the independence and impartiality of the members of the African Commission.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.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.²⁸⁶ The Commission operates completely under the political influence of Member States, and suffers from the principle of confidentiality.²⁸⁷ The imposition of confidentiality made the Commission's promotion and protection work exceedingly difficult.²⁸⁸

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²⁸⁰ Smith R K.M *Textbook on International Human Rights* 5ed (2012) 150.

²⁸¹ Church J et al *Human Rights from a Comparative and International Law Perspective* (2007) 261.

²⁸² Forsythe D.P *Human Rights in International Relations* 2ed (2006) 147.

²⁸³ Forsythe D.P *Human Rights in International Relations* 2ed (2006) 147.

²⁸⁴ Mbazira C 'Enforcing the Economic, Social and Cultural Rights in the African Charter on Human and Peoples' Rights: Twenty Years of Redundancy, Progress and Significant strides' in Lliopoulos-Strangas J & Roux T (eds) *Perspectives Nationales et Internationales des Droits Sociaux, National and International perspectives on social rights* (2008) 302.

²⁸⁵ Church J et al *Human Rights from a Comparative and International Law Perspective* (2007) 260.

²⁸⁶ Mbazira C 'Enforcing the Economic, Social and Cultural Rights in the African Charter on Human and Peoples' Rights: Twenty Years of Redundancy, Progress and Significant strides' in Lliopoulos-Strangas J & Roux T (eds) *Perspectives Nationales et Internationales des Droits Sociaux, National and International perspectives on social rights* (2008) 302.

²⁸⁷ Symonides J (ed) *Human Rights: International Protection, Monitoring, Enforcement* (2003) 228.

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

²⁸⁸ Welch C E 'The African Commission on Human and Peoples' Rights: A Five-Year Report and Assessment' (1992) 43-61, *Human Rights Quarterly*, 14.

²⁸⁹ Church J et al *Human Rights from a Comparative and International Law Perspective* (2007) 260.

²⁹⁰ Symonides J (ed) *Human Rights: International Protection, Monitoring, Enforcement* (2003) 228.

²⁹¹ Mbazira C 'Enforcing the Economic, Social and Cultural Rights in the African Charter on Human and Peoples' Rights: Twenty Years of Redundancy, Progress and Significant strides' in Lliopoulos-Strangas J & Roux T (eds) *Perspectives Nationales et Internationales des Droits Sociaux, National and International perspectives on social rights* (2008) 302.

²⁹² Mbazira C 'Enforcing the Economic, Social and Cultural Rights in the African Charter on Human and Peoples' Rights: Twenty Years of Redundancy, Progress and Significant strides' in Lliopoulos-Strangas J & Roux T (eds) *Perspectives Nationales et Internationales des Droits Sociaux, National and International perspectives on social rights* (2008) 303.

standing and the rules of procedure of the African Commission do not provide for a victim requirement.²⁹³

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.²⁹⁴

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.²⁹⁵ 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.²⁹⁶ 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.²⁹⁷

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²⁹³ African Commission on Human and People's Rights, Celebrating the African Charter at 30: A Guide to the African Human Rights system 2011 24 available at www.achpr.org/files/pages/about/african.../human_rights_guide_en.pdf (accessed 4 July 2014).

²⁹⁴ Module 28 The African Commission on Human and Peoples 'Rights and ESC Rights, using Module 28 in a training program, Circle of Rights, Economic, Social & Cultural Rights Activism: A training Resource, available at <http://www1.umn.edu/humanrts/edumat/IHRIP/circle/modules/module28.htm> (accessed on 29 April 2013).

²⁹⁵ *Burkina Faso / Norbert Zongo Case* : The African Court recognizes the responsibility of the State of Burkina Faso in the denial of justice for the victims available at <http://www.fidh.org/en/africa/burkina-faso/15142-burkina-faso-norbert-zongo-case-the-african-court-recognizes-the> (accessed 21 April 2014).

²⁹⁶ FIDH, African Court on Human and Peoples' Rights , Senegal Must Guarantee Individuals and NGOs Access to the African Court 2012 available at <http://www.fidh.org/en/africa/senegal/Senegal-Must-Guarantee-Individuals> (accessed 3 July 2014).

²⁹⁷ *Burkina Faso / Norbert Zongo Case* : The African Court recognizes the responsibility of the State of Burkina Faso in the denial of justice for the victims available at <http://www.fidh.org/en/africa/burkina-faso/15142-burkina-faso-norbert-zongo-case-the-african-court-recognizes-the> (accessed 21 April 2014).

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

²⁹⁸ Agbakwa S.C ‘Reclaiming Humanity: Economic, Social, and Cultural Rights as the Cornerstone of African Human Rights’ (2002) 200 *Yale Human Rights & Development L.J.* Vol.5 available at www.law.yale.edu/documents/pdf/.../Shedrack_Agbakwa_YHRDLJ.pdf (accessed 19 April 2014).

²⁹⁹ Agbakwa S.C ‘Reclaiming Humanity: Economic, Social, and Cultural Rights as the Cornerstone of African Human Rights’ (2002) 200 *Yale Human Rights & Development L.J.* Vol.5 available at www.law.yale.edu/documents/pdf/.../Shedrack_Agbakwa_YHRDLJ.pdf (accessed 19 April 2014).

³⁰⁰ Agbakwa S.C ‘Reclaiming Humanity: Economic, Social, and Cultural Rights as the Cornerstone of African Human Rights’ (2002) 203 *Yale Human Rights & Development L.J.* Vol.5 available at www.law.yale.edu/documents/pdf/.../Shedrack_Agbakwa_YHRDLJ.pdf (accessed 19 April 2014).

³⁰¹ Agbakwa S.C ‘Reclaiming Humanity: Economic, Social, and Cultural Rights as the Cornerstone of African Human Rights’ (2002) 204 *Yale Human Rights & Development L.J.* Vol.5 available at www.law.yale.edu/documents/pdf/.../Shedrack_Agbakwa_YHRDLJ.pdf (accessed 19 April 2014).

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.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.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,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.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...³⁰⁶

³⁰² Agbakwa S.C 'Reclaiming Humanity: Economic, Social, and Cultural Rights as the Cornerstone of African Human Rights' (2002) 204 *Yale Human Rights & Development L.J.* Vol.5 available at www.law.yale.edu/documents/pdf/.../Shedrack_Agbakwa_YHRDLJ.pdf (accessed 19 April 2014).

³⁰³ Agbakwa S.C 'Reclaiming Humanity: Economic, Social, and Cultural Rights as the Cornerstone of African Human Rights' (2002) 204 *Yale Human Rights & Development L.J.* Vol.5 available at www.law.yale.edu/documents/pdf/.../Shedrack_Agbakwa_YHRDLJ.pdf (accessed 19 April 2014).

³⁰⁴ Juma L *Human Rights in Africa and Conflicts transformation in Africa* (2013) 16-7.

³⁰⁵ Juma L *Human Rights in Africa and Conflicts transformation in Africa* (2013) 125.

³⁰⁶ Agbakwa S.C 'Reclaiming Humanity: Economic, Social and Cultural Rights as the cornerstone of the African Human Rights' in Heynes C & Steliszyn K (eds) *Human Rights, Peace and Justice in Africa. A Reader* (2006) 70.

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.³⁰⁷ This continued marginalisation of ESCR also deepens the collective feeling of betrayal of the people.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.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.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

³⁰⁷ Gawanas B 'The African Union: Concepts and Implementation mechanisms relating to Human Rights' in Bosl A & Diescho J *Human Rights in Africa* (2009) 148.

³⁰⁸ Agbakwa S.C 'Reclaiming Humanity: Economic, Social, and Cultural Rights as the Cornerstone of African Human Rights' (2002) 204 *Yale Human Rights & Development L.J.* Vol.5 available at www.law.yale.edu/documents/pdf/.../Shedrack_Agbakwa_YHRDLJ.pdf (accessed 19 April 2014).

³⁰⁹ Green D *From poverty to power: How active citizens and effective states can change the world* (2008) 27.

³¹⁰ Agbakwa S.C 'Reclaiming Humanity: Economic, Social, and Cultural Rights as the Cornerstone of African Human Rights' (2002) 205 *Yale Human Rights & Development L.J.* Vol.5 available at www.law.yale.edu/documents/pdf/.../Shedrack_Agbakwa_YHRDLJ.pdf (accessed 19 April 2014).

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.

³¹¹ Gawanas B 'The African Union: Concepts and Implementation mechanisms relating to Human Rights' in Bosl A & Diescho J *Human Rights in Africa* (2009) 148.

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 DRC³¹² 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.

³¹² It 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 *International Human Rights Law in Africa* 2ed (2012) 285.

³¹³ Presentation of the Third Activity Report of the African Commission by the Chairman U Umzurike, to the 26th Session of Heads of State and Government of the Organisation of African Unity, 9 – 11 July 1990 available at <http://www.achpr.org/html/africancommissiononhuman.html> (accessed 26 April 2014).

³¹⁴ Mbazira C ‘ A path to realising ESCR in Africa ?...35 available at www.ahrlj.up.ac.za/.../ahrlj_vol4_no1_2004_christopher_mbazira.pdf (accessed 18 May 2014).

³¹⁵ Article 17 of the Vienna Convention on the Law of Treaties, 1969. See also Dugard J *International Law: A South African Perspective* (2001) 330.

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*³¹⁶

Article 1 of the African Charter³¹⁷ 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 rights³¹⁸ and institutions, legislative³¹⁹, policy and budgetary measures, educational and public awareness measures³²⁰ and administrative action as well as ensuring appropriate administrative and judicial remedies³²¹ for the violation of these rights.³²²

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

³¹⁶ A state is under an obligation to take measures to realise the esc rights listed in the ICESCR. See Coomans F ‘Some Remarks on the Extraterritorial Application of the International Covenant on Economic, Social and Cultural Rights’ in Coomans F & Kamminga M T (eds) *Extraterritorial Application of Human Rights Treaties* (2004) 183.

³¹⁷ A fifth characteristic of the AfrCHPR is the unusually specific and broad range of obligations it creates for the states. See Gibran V E *International Human Rights Law* (2004) 116.

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.

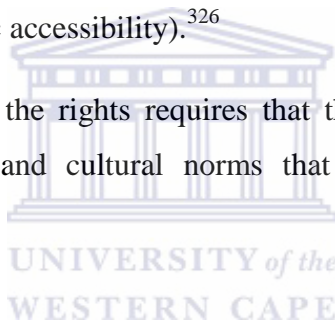
³²² The UN Committee on Economic, Social and Cultural Rights (hereinafter the “UN CESCR”), General Comment 3: *The nature of States parties obligations* (Art. 2, para.1 of the ICESCR) (Fifth session, 1990), para. 7.

regardless of how this is achieved.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.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.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).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.³²⁷



³²³ 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).

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).

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.

³²⁶ 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).

³²⁷ 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).

For example: this includes the requirement that provision of housing, particularly regarding construction and the building materials used, should be culturally appropriate³²⁸, 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.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.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.³³¹ DRC has to comply with this obligation to not run the risk of pursuit 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 a violations and, accordingly, result in non-satisfaction

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

³²⁹ African Commission, *SERAC & CESR v Nigeria*, Com. No. 155/96 (2001), para. 44.

³³⁰ This framework is used by the UN CESCR in analysing the obligations imposed on States Parties by the International Covenant on Economic, Social and Cultural Rights (hereinafter, the “ICESCR”). See, for example, General Comment 12: *The right to adequate food* (Art. 11 of the ICESCR) UN doc. E/C.12/1999/5, para. 15; General Comment 14: *The right to the highest attainable standard of health* (Art. 12 of the ICESCR) UN doc. E/C.12/2000/4, paras. 33-37; General Comment 15: *The right to water* (Arts. 11-12 of the ICESCR) UN doc. E/C.12/2002/11, paras. 21-29. See also The Maastricht Guidelines on Violation of Economic, Social and Cultural Rights (1998) 20 *Human Rights Quarterly*, 691–705 (hereinafter, the “Maastricht Guidelines”), para. 6. The framework was expressly utilised by the Commission in *SERAC & CESR v. Nigeria*, Com. No. 155/96 (2001), para. 44-48.

³³¹ Eide A ‘Economic and Social Rights’ in Symonides J (ed) *Human Rights: Concepts and Standards* (2000) 109–74 at 127.

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

³³² Baderin M A & McCorquodale R *Economic, Social and Cultural Rights in Action* (2007) 154,157.

³³³ Ssenyonjo M *Economic, Social and Cultural Rights in International Law* (2009) 24.

³³⁴ Ssenyonjo M *Analysing 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 7 August 2013).

³³⁵ Symonides J (ed) *Human Rights: International Protection, Monitoring, Enforcing* (2003) 229.

³³⁶ *SERAC & CESR v. Nigeria*, Com. No. 155/96 (2001), para. 46.

and to see to it that these freedoms and rights as well as corresponding obligations and duties are understood".³³⁷

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.³³⁸ 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.³³⁹ 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 realisation³⁴⁰

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.³⁴¹ Most times these available resources are the fruit of taxation.³⁴² The

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.

³³⁹ Craven M *The International Covenant on Economic, Social and Cultural Rights A Perspective on its Development* (1995) 109.

³⁴⁰ Authority for the concept of progressive realisation may be found in: the ICESCR; The Limburg Principles on the Implementation of the International Covenant on Economic, Social and Cultural Rights, UN doc. E/CN.4/1987/17, Annex, paras. 19 and 51; and the Maastricht Guidelines on Violations of Economic, Social and Cultural Rights, para 22.

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.³⁴³ 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.³⁴⁴

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.³⁴⁵

4.2.4 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.³⁴⁶

³⁴² Art. 29(6) of the ACHPR.

³⁴³ Mbazira C ' A path to realising ESCR in Africa ?....³⁵ available at www.ahrlj.up.ac.za/.../ahrlj_vol4_no1_2004_christopher_mbazira.pdf (accessed 18 May 2014).

³⁴⁴ 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.

³⁴⁵ 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.

³⁴⁶ 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.³⁴⁷ 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,³⁴⁸ such as, ensuring that all children enjoy their right to free and compulsory primary education.³⁴⁹ 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.³⁵⁰ Therefore, DRC as a State Party is obliged to take legislative measures for the protection of ESCR,³⁵¹ 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; AHG/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.

³⁵¹ 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).

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 co-operation.³⁵⁷

³⁵² Communication no. 241/2001 (2003).

³⁵³ Baderin M A & McCorquodale R *Economic, Social and Cultural Rights in Action* (2007) 156.

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

³⁵⁵ 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).

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,³⁵⁸ but also to make ESCR effective under national the legal system.³⁵⁹ Thus, DRC must ensure that persons within its jurisdiction, particularly members of vulnerable and disadvantaged groups, enjoy effective access to quality legal services.³⁶⁰

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.³⁶¹

For each protected right, national plans and policies should be devised and periodically reviewed, on the basis of a participatory and transparent process.³⁶² In this regard, DRC should ensure, through political and financial support, the greater effective participation of the

³⁵⁷ 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).

³⁵⁸ 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 Droits de l'homme et des peuples'2009 7 available at <http://www.congoforum.be/upldocs/Nzati.pdf> (accessed 12 August 2013).

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.

³⁶¹ Radio Okapi available at <http://radiookapi.net/actualite/2012/03/30/gestion-des-finances-publiques-la-rdc-toujours-dans-la-zone-rouge-selon-la-banque-mondiale/#.U3jNvl4aLIU> (accessed 18 Mai 2014).

³⁶² 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).

population in all phases of policy and programme design, implementation, monitoring and review.³⁶³

4.3 Other key obligations

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.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.³⁶⁵ In ensuring effective equality in the enjoyment of ESCR, DRC must pay particular attention to members of vulnerable and disadvantaged groups.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.³⁶⁷

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.³⁶⁸ To do

³⁶³ Limburg Principles, para. 11.

³⁶⁴ Gender inequality and social institutions in the DRC available at www.peacewomen.org/.../hrinst_genderinequalityinthedrc_wilpf_decem (accessed 11 August 2014).

³⁶⁵ UN CESCR, General Comment 9: *The domestic application of the Covenant* (3 December 1998) UN doc. E/C.12/1998/24, para. 15.

³⁶⁶ 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).

³⁶⁷ 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.

so, DRC has the obligation to engage in international co-operation³⁶⁹ for the realisation of ESCR and must prioritise the allocation of such assistance towards the realisation of these rights.³⁷⁰ It is particularly incumbent upon developed countries, as well as others which are in a position to assist, to do so.³⁷¹ DRC must avoid entering into all forms of agreements which undermine the enjoyment of ESCR by individuals and/or peoples within their jurisdiction.³⁷²

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.³⁷³ In addition, in terms of *Katangese Peoples' Congress v Zaire*,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,

³⁶⁸ Lambert T *Controle Fiscal, Droit et Pratique*, in TSHIMPAKA K 'L'Assainissement des Finances Publiques en Republique Democratique du Congo: Analyse, Critique et Perspectives d'Avenir' 2007 40, *Memoire*, Faculte de Droit, Universite de Kinshasa.

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) *Extraterritorial Application of Human Rights Treaties* (2004) 183.

³⁷⁰ Gondek M *The Reach of Human Rights in a Globalising World: Extraterritorial Application of Human Rights Treaties* (2009) 18.

³⁷¹ UN CESCR, General Comment 3 : *The nature of States parties obligations* (Art. 2, para.1 of the ICESCR) (Fifth session, 1990) , para. 14; UN CESCR, 'Poverty and the International Covenant on Economic, Social and Cultural Rights' (2001) UN doc. E/C.12/2001/10, para. 16.

³⁷² The Pretoria Declaration, para. 11(c)(xixi).

³⁷³ UN General Assembly, Report of the Human Rights Committee (2000) UN doc. A/55/40 Vol. I 43, concluding observations on Congo, para. 291-292. See also: *Katangese Peoples' Congress v. Zaire*, Com. No. 75/92 (1995) ACHPR decision.

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 www.docstoc.com/.../1-Peoples-Rights-under-the-African-Charter-on-Hu (accessed 10 August 2014).

such as, sovereignty and territorial integrity.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.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.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.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.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 2006.³⁸⁰ In this regard, recognising that NHRIs 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.³⁸¹ In addition to active

³⁷⁵ Dersso SA ‘The jurisprudence of the African Commission on Human and Peoples’ Rights with respect to peoples’ rights’ 2006 365 published in African Human Rights Law Journal available at www.ahrlj.up.ac.za/dersso-s-a (accessed 11 August 2014).

³⁷⁶ UN General Assembly, Report of the Human Rights Committee (1998) UN doc. A/53/40 Vol. I 40, concluding observations on Finland, para. 255.

³⁷⁷ UN General Assembly, Report of the Committee on the Elimination of Racial discrimination (2003) UN doc. A/58/18, concluding observations on Ecuador, para. 59 and 62.

³⁷⁸ 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 l’Homme en Afrique’ 2013, 53ème Session de la CADHP available at <http://www.fidh.org/fr/afrique> (accessed 11 August 2014).

³⁷⁹ See generally the Pretoria Declaration.

³⁸⁰ DRC: National Observatory of Human Rights (defunct) available at <http://www.content.eisa.org.za/old-page/drc-national-observatory-human-rights-defunct> (accessed 19 April 2014).

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.³⁸²

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.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.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.³⁸⁵

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.³⁸⁶ This intervention encapsulated national plans, policies and systems in relation to ESCR, albeit not clearly defined. These are observable through the following targeted rights:

³⁸¹ UN General Assembly, Principles relating to the Status of National Institutions (The Paris Principles) (1994) UN doc. A/RES/48/134.

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 NHRIs.

³⁸³ Church J et al *Human Rights from a Comparative and International Law Perspective* (2007) 261.

³⁸⁴ Nickel J W *Making sense of Human Rights* 2 ed (2007) 19.

³⁸⁵ 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).

³⁸⁶ Face aux Députés ce lundi,Voici le Programme du Gouvernement Matata ! Kinshasa, le 07/05/2012 available at <http://www.laprosperteonline.net/show.php?id=10664&rubrique=La%20Une> (accessed 4 August 2014).

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 co-operative, 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.³⁸⁷ 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; ³⁸⁸promoting a social environment that is conducive to business creation,³⁸⁹ opportunities for self-employment, entrepreneurship, and the development of co-operatives; ensuring that educational systems prepare young people with the skills necessary to obtain initial employment;³⁹⁰ensuring the right of everyone to equitable and satisfactory conditions of work, including, for instance, safe and hygienic working conditions,³⁹¹ 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

³⁸⁷ Face aux Députés ce lundi,Voici le Programme du Gouvernement Matata ! Kinshasa, le 07/05/2012 available at <http://www.laprosperteonline.net/show.php?id=10664&rubrique=La%20Une> (accessed 4 August 2014).

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

³⁸⁹ The Pretoria Declaration, para. 6.

³⁹⁰ UN CESCR, General Comment 18: *the right to work* (2006) UN doc. E/C.12/GC/18 , para. 14.

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.³⁹² 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;³⁹³ ensuring that plans aim to ensure access for all to adequate medical care and treatment in the event of sickness or accident;³⁹⁴ 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;³⁹⁵ 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.³⁹⁶ 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 everyone³⁹⁷ (including the provision of finance, the

³⁹² Face aux Députés ce lundi,Voici le Programme du Gouvernement Matata ! Kinshasa, le 07/05/2012 available at <http://www.laprosperteonline.net/show.php?id=10664&rubrique=La%20Une> (accessed 4 August 2014).

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).

³⁹⁵ World Health Organisation, Everybody's Business: Strengthening Health Systems to Improve Health Outcomes: WHO's Framework for Action (2007) available at http://who.int/healthsystems/strategy/everybodys_business.pdf (accessed 14 August 2014). See also 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 (hereinafter, the "Special Rapporteur Health Report 2008"), para. 38.

³⁹⁶ Face aux Députés ce lundi,Voici le Programme du Gouvernement Matata ! Kinshasa, le 07/05/2012 available at <http://www.laprosperteonline.net/show.php?id=10664&rubrique=La%20Une> (accessed 4 August 2014).

³⁹⁷ The Pretoria Declaration, para. 8.

building of schools and the provision of educational materials);³⁹⁸ establishing an adequate scholarship and/or fellowship system;³⁹⁹ ensuring continued education for teachers and instructors including education on human rights;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;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;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.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;⁴⁰⁴ implement measures for safeguarding, protecting and building awareness of tangible and intangible cultural heritage, including traditional knowledge systems;⁴⁰⁵ ensure recognition of and respect for the diverse cultures existing in Africa;⁴⁰⁶ and

³⁹⁸ The Reporting Guidelines, Part II, para. 52.

³⁹⁹ The Reporting Guidelines, Part II, para. 53.

⁴⁰⁰ The Pretoria Declaration, para. 8.

⁴⁰¹ UN CESCR, General Comment 13: *The right to education* (Art. 13 of the ICESCR), para 13.

⁴⁰² UN CESCR, General Comment 13: *The right to education* (Art. 13 of the ICESCR) , para. 18, 19 and 20.

⁴⁰³ Face aux Députés ce lundi, Voici le Programme du Gouvernement Matata ! Kinshasa, le 07/05/2012 available at <http://www.laprosperteonline.net/show.php?id=10664&rubrique=La%20Une> (accessed 4 August 2014).

⁴⁰⁴ The Pretoria Declaration, para. 9.

⁴⁰⁵ The Pretoria Declaration, para. 9.

implement policies generally aimed at the conservation, development and diffusion of culture and the promotion of cultural identity.⁴⁰⁷

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 responsabilisation 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...);⁴⁰⁸

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.⁴⁰⁹ The abovementioned policies and programmes are not in line with DRC obligations under

⁴⁰⁶ The Pretoria Declaration, para. 9.

⁴⁰⁷ The Reporting Guidelines, Part III para. 14(b)(vii).

⁴⁰⁸ Face aux Députés ce lundi,Voici le Programme du Gouvernement Matata ! Kinshasa, le 07/05/2012 available at <http://www.laprosperteonline.net/show.php?id=10664&rubrique=La%20Une> (accessed 4 August 2014).

⁴⁰⁹ Face aux Députés ce lundi,Voici le Programme du Gouvernement Matata ! Kinshasa, le 07/05/2012 available at <http://www.laprosperteonline.net/show.php?id=10664&rubrique=La%20Une> (accessed 4 August 2014).

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;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;⁴¹¹ prioritising in national plans and policies the provision of shelter for all persons in desperate need of emergency housing;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.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;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;⁴¹⁵ ensure that the social security system

⁴¹⁰ Human Rights Council, Report of the Special Rapporteur on adequate housing as a component of the right to an adequate standard of living, Miloon Kothari (5 February 2007) UN doc. A/HRC/4/18 (hereinafter the “Special Rapporteur Housing Report”). , Annex 1, para. 24.

⁴¹¹ The Reporting Guidelines, Part II para. 34(b).

⁴¹² *Government of Republic of South Africa and Ors v. Grootboom and Ors* 2000 (11) BCLR 1169 (CC).

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

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;⁴¹⁶ 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;⁴¹⁷ ensure that qualifying conditions for benefits are reasonable, proportionate and transparent;⁴¹⁸ and ensure that where a social security scheme requires contributions, these are stipulated in advance.⁴¹⁹

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 research, 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.⁴²⁰ The aforementioned policies and programmes do not

⁴¹⁵ UN CESCR, General Comment 19: *The right to social security* (Art. 9 of the ICESCR), UN doc. E/C.12/GC/19, para 11.

⁴¹⁶ 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.

⁴¹⁷ Protocol on the Rights of Women, Art. 21.

⁴¹⁸ UN CESCR, General Comment 19: *The right to social security* (Art. 9 of the ICESCR), UN doc. E/C.12/GC/19, para. 24.

⁴¹⁹ UN CESCR, General Comment 19: *The right to social security* (Art. 9 of the ICESCR), UN doc. E/C.12/GC/19, para. 25.

⁴²⁰ Face aux Députés ce lundi, Voici le Programme du Gouvernement Matata ! Kinshasa, le 07/05/2012 available at <http://www.laprosperteonline.net/show.php?id=10664&rubrique=La%20Une> (accessed 4 August 2014).

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.

⁴²² Food and Agriculture Organisation *The State of Food Insecurity in the World 2009: Economic crises – impacts and lessons learned* (2009) 8.

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/y9825e/y9825e00.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.⁴²⁶ 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;⁴²⁷ promoting sustainable use of water resources;⁴²⁸ ensuring that there is appropriate education concerning the hygienic use of water, protection of water sources and methods to minimise water wastage;⁴²⁹ 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;⁴³⁰ etc.

⁴²⁶ Face aux Députés ce lundi,Voici le Programme du Gouvernement Matata ! Kinshasa, le 07/05/2012 available at <http://www.laprosperteonline.net/show.php?id=10664&rubrique=La%20Une> (accessed 4 August 2014).

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.⁴³¹ 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.⁴³² It provides an avenue for the poor and vulnerable to have their voices heard.⁴³³ Domestic courts are potentially highly effective in safeguarding human rights, including ESCR.⁴³⁴ 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.⁴³⁵

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. (I).

⁴³¹ Gauri V & Brinks D M (eds) *Courting Social Justice Judicial Enforcement of Social and Economic Rights in the Developing world* (2008) 185.

⁴³² Ghai Y & Cottrell J (eds) *Economic, Social & Cultural Rights in Practice The Role of Judges in Implementing Economic, Social & Cultural Rights* (2004) 21.

⁴³³ Gearty C & Mantouvalou M *Debating Social Rights* (2011) 116.

⁴³⁴ Morawa A H E & Shreuer C 'The role of Domestic Courts in Enforcement of International Human Rights- A view from Austria' in Conforti B & Francioni F(eds) *Enforcing International Human Rights in Domestic Courts*(1997) 175.

⁴³⁵ Hannum H (ed) *Guide to International Human Rights Practice* 3 ed (1999) 21.

levels: “respect”, “protect”, and “fulfil”.⁴³⁶ 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.⁴³⁷ 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 justiciable⁴³⁸, 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.⁴³⁹

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.⁴⁴⁰

⁴³⁶ Donders Y & Volodin V (eds) *Human Rights in Education, Science and Culture Legal Developments and Challenges* (2007) 56.

⁴³⁷ Coomans F ‘Reviewing Implementation of Social and Economic Rights: An Assessment of the “Reasonableness” Test as Developed by the South African Constitutional Court’ 2005 available at www.zaoerv.de/65_2005/65_2005_1_a_167_196.pdf (accessed 10 July 2014).

⁴³⁸ South Africa provides an example of explicit constitutional protection of legally enforceable socio-economic rights that cannot be ignored. Several cases on ESCR have been brought and litigated before the SA Constitutional Court, notably, *Republic of South Africa v. Grootboom*, *Minister of Health v. Treatment Action Campaign (TAC)*, *Soobramoney v. Minister of Health (KwaZulu-Natal)*, *Lindiwe Mazibuko and Others v The City of Johannesburg and Others* and *Others*. See Githii J ‘The Case for Justiciability of Socio-Economic Rights in Kenya: Drawing from the Experience in South Africa, India and The United States’ 2008 73-9 available at www.etd.ceu.hu/2009/githii_john.pdf (accessed 9 July 2014).

⁴³⁹ Eide A et al *Economic, social and cultural rights A textbook* 2rev.ed (2001) 84.

⁴⁴⁰ Desierto D A ‘Justiciability of Socio-Economic Rights: Comparative Powers, Roles, and Practices in the Philippines and South Africa’ 2009 116 available at blog.hawaii.edu/aplpj/files/2011/11/APLPJ_11.1_desierto.pdf (accessed 30 May 2014).

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.

⁴⁴³ *Soobramoney v. Minister of Health*, 1998 (1) SA 765 (CC) (S. Afr.) is a case where the SA Constitutional Court adopted a deferential stance to the executive’s refusal to grant dialysis for a diabetic patient who was chronically ill. See Gauri V & Brinks D M (eds) *Courting Social Justice Judicial Enforcement of Social and Economic Rights in the Developing world* (2008) 54.

⁴⁴⁴ Desierto D A ‘Justiciability of Socio-Economic Rights: Comparative Powers, Roles, and Practices in the Philippines and South Africa’ 2009 116 available at blog.hawaii.edu/aplpj/files/2011/11/APLPJ_11.1_desierto.pdf (accessed 30 May 2014).

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).

⁴⁴⁶ Desierto D A ‘Justiciability of Socio-Economic Rights: Comparative Powers, Roles, and Practices in the Philippines and South Africa’ 2009 116 available at blog.hawaii.edu/aplpj/files/2011/11/APLPJ_11.1_desierto.pdf (accessed 30 May 2014).

in tandem with the third aspect of this theory, which is to look at the norm as constitutionally formulated.⁴⁴⁷

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 Constitution⁴⁴⁸, 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.⁴⁴⁹

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.⁴⁵⁰ Specific obligations generated from the ESCR of the

⁴⁴⁷ Desierto D A 'Justiciability of Socio-Economic Rights: Comparative Powers, Roles, and Practices in the Philippines and South Africa' 2009 116 available at blog.hawaii.edu/aplpj/files/2011/11/APLPJ_11.1_desierto.pdf (accessed 30 May 2014).

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

⁴⁴⁹ 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).

ACHPR entrenched in the DRC Constitution should be read in the light of the general obligations of States in relation to those rights.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.⁴⁵²



⁴⁵⁰ 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).

⁴⁵¹ 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).

⁴⁵² Ssenyonjo M *Analyzing the Economic, Social and Culture Rights Jurisprudence of the African Commission: 30 Years since the Adoption of the African Charter* (2011) 397 available at <http://www.corteidh.or.cr/tablas/r26994.pdf> (accessed 29 October 2013).

CHAPTER FIVE:

CONCLUSION AND RECOMMENDATIONS

5.1 Conclusion

The realisation of socio-economic rights in DRC, even at a minimum level, remains poor.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,⁴⁵⁴ the majority of Congolese live in poverty, disease and ignorance; they lack jobs, food and other basic necessities ,such as water.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.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,⁴⁵⁷ especially in terms of providing for ESCR in domestic legal documents. Experience has

⁴⁵³ Mbazira C ‘ A path to realising ESCR in Africa ?....35 available at www.ahrlj.up.ac.za/.../ahrlj_vol4_no1_2004_christopher_mbazira.pdf (accessed 18 May 2014).

⁴⁵⁴ Viljoen F *International Human Rights Law in Africa* 2ed (2012) 545 & 544.

⁴⁵⁵ Mbazira C ‘ A path to realising ESCR in Africa ?....35 available at www.ahrlj.up.ac.za/.../ahrlj_vol4_no1_2004_christopher_mbazira.pdf (accessed 18 May 2014).

⁴⁵⁶ Keetharuth S B ‘Major African legal instruments’ in Bosl A & Diescho J *Human Rights in Africa Legal Perspectives on their Protection and Promotion* (2009) 166.

⁴⁵⁷ The violations of ESCR had already 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*. 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 violences 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).

indicated that it is easier to provide for human rights, including ESCR, than it is to implement them.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.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.⁴⁶⁰

To prevent the above consequences requires DRC to comply with Article 1 of the ACHPR⁴⁶¹. With regard to all the human rights of the ACHPR, including ESCR, enshrined in the

⁴⁵⁸ Maina 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) 351.

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).

⁴⁶⁰ Gawanas B 'The African Union: Concepts and Implementation mechanisms relating to Human Rights' in Bosl A & Diescho J *Human Rights in Africa* (2009) 148.

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.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.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,⁴⁶⁴ participation of all citizens with regards to the development of the country, improvement of administrative performance and public institutions,

⁴⁶² 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).

⁴⁶³ Ssenyonjo M *Analyzing the Economic, Social and Culture Rights Jurisprudence of the African Commission: 30 Years since the Adoption of the African Charter* (2011) 397 available at <http://www.corteidh.or.cr/tablas/r26994.pdf> (accessed 29 October 2013).

⁴⁶⁴ Heynes C & Steliszyn K (eds) *Human Rights, Peace and Justice in Africa. A Reader* (2006) 141.

improvement of the provision of public services, and respect for the rule of law and human rights.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.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.⁴⁶⁷

⁴⁶⁵ Nowak M *Introduction to International Human Rights Regime* (2003)47.

⁴⁶⁶ Bakandeja wa Mpungu G *Droit des Finances Publiques. Moyens d'action et Plan financier de l'État* (1997).

⁴⁶⁷ 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).

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 sensitise 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.⁴⁶⁸

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,

⁴⁶⁸ Ramcharan B *The Quest for Protection A human rights Journey at the United Nations* (2004) 97.

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.

⁴⁶⁹ Ssenyonjo M *Analyzing the Economic, Social and Culture Rights Jurisprudence of the African Commission: 30 Years since the Adoption of the African Charter* (2011) 397 available at <http://www.corteidh.or.cr/tablas/r26994.pdf> (accessed 29 October 2013).

⁴⁷⁰ Ssenyonjo M *Analyzing the Economic, Social and Culture Rights Jurisprudence of the African Commission: 30 Years since the Adoption of the African Charter* (2011) 364 available at <http://www.corteidh.or.cr/tablas/r26994.pdf> (accessed 6 June 2014).

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



⁴⁷² Agbakwa S.C 'Reclaiming Humanity: Economic, Social, and Cultural Rights as the Cornerstone of African Human Rights' (2002) 202 *Yale Human Rights & Development L.J.* Vol.5 available at www.law.yale.edu/documents/pdf/.../Shedrack_Agbakwa_YHRDLJ.pdf (accessed 19 April 2014).

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