

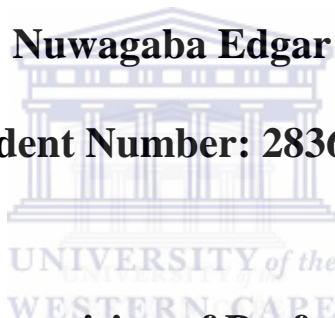
**An Analysis of the Approaches of the African Commission to  
the socio-economic rights provisions of the African Charter:  
A Comparative Analysis with European and inter-American  
regional systems**

A full-thesis submitted in fulfilment of the requirements for the  
Degree of Masters in Development Studies

By

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At the

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## Declaration

By submitting this dissertation electronically, I **Nuwagaba Edgar**, declare that the entirety of the work contained therein, is my own original work, and that I have not previously in its entirety or in part submitted it for obtaining any qualification in any other University. All the sources and materials used have been duly acknowledged and properly referenced.

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DATE: -----

## **Dedication**

I dedicate this dissertation to my loving Mom **Pelagia Peggy Kemitare**. God could not have placed me in better arms. Thank you for your unconditional love and support and for encouraging me throughout this journey. Your wisdom and prayers have always been a source of inspiration throughout my life.

This work is also dedicated to my young sister Sheba Rita Atuhairwe who has always been a source of hope and love.



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## **Key words**

African Commission on Human and Peoples' Rights

African Charter on Human and Peoples' Rights

Socio-economic rights

Challenges

Interpretation



## LIST OF ACRONYMS AND ABBREVIATIONS

AU	-	African Union
CPRs	-	Civil and Political Rights
CRC	-	Convention on the Rights of the Child
CEDAW	-	Convention on the Elimination of All Forms of Racial Discrimination against Women
CERD	-	Convention on the Elimination of Racial Discrimination
CESCRs	-	UN Committee on Economic Social and Cultural Rights
EU	-	European Union
HRC	-	United Nations Human Rights Committee
ICCPRs	-	International Covenant on Civil and Political Rights
ICESCRs	-	International Covenant on Economic, Social and Cultural Rights
NHRC	-	National Human Rights Commission
NGOs	-	Non-governmental organizations
OAU	-	Organization of African Unity
OAS	-	Organization of American States
SERs	-	Socio-economic Rights
SERAC	-	Social and Economic Rights Action Centre
SACC	-	South African Constitutional Court
UDHR	-	Universal Declaration of Human Rights
UN	-	United Nations
UNGA	-	United Nations General Assembly
UNDP	-	United Nations Development Programme

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# CHAPTER ONE

## INTRODUCTION AND BACKGROUND TO THE STUDY

### 1.1 Background to the study:

Although the African Charter on Human and Peoples' rights<sup>1</sup> (African Charter or Charter) provides for a catalogue of socioeconomic rights<sup>2</sup> (SERs), alongside civil and political rights (CPRs) in a single instrument, the realisation of these rights, and the interpretation provided by the African Commission on Human and Peoples' Rights<sup>3</sup> (African Commission or the Commission) has for decades hampered their implementation in several African States. The adoption in 1981 and entry into force of the Charter,<sup>4</sup> under the auspices of the Organization of African Unity (OAU) (now African Union, AU) was recognition of the need to give urgent attention to human rights instruments on the African continent and to provide an institutional oversight for the implementation, promotion and protection of human rights.

Comparatively, the Council of Europe, the Organisation of American States<sup>5</sup> (OAS) and the AU being the principle regional organisations for the European, inter-American and Africa regions respectively, have adopted a range of instruments protecting SERs largely based on the United Nations (UN) human rights model.<sup>6</sup>

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<sup>1</sup> See African Charter on Human and Peoples' Rights Doc OAU/CAB/LEG/67/3/Rev.5, adopted 27 June 1981 entry into force 21 Oct 1986, (1982) 21 *International Legal Materials* 59; Also See, F.Ouguerouz *The African Charter on Human and Peoples' Rights: A Comprehensive Agenda for Human Dignity and Sustainable Development in Africa*, (2003) Kluwer Law International, The Hague.

<sup>2</sup> P O'Connell, 'Vindicating socio-economic rights: International standards and comparative experiences' (2012) 3-6, defines SERs as the rights concerned with the material bases of the well-being of individuals and communities, that is, rights aimed at securing the basic quality of life for a particular society.

<sup>3</sup> See Art.30 of the African Charter on Human and Peoples' Rights (n 1 above).

<sup>4</sup> The African Charter on Human and Peoples' Rights (n 1 above). All member States of the OAU were parties to the Charter.

<sup>5</sup> Charter of the Organization of American States, 119 U.N.T.S. 3, entered into force December 13, 1951; amended by Protocol of Buenos Aires, 721 U.N.T.S. 324, O.A.S. Treaty Series, No. 1-A, entered into force Feb. 27, 1970; OAS is a regional international organization and its membership is open to all American States. See also Scott Davidson, *The Inter-American Court of Human Rights*, 7-12, 1997.

<sup>6</sup> For a comparative discussion between the UDHR, African Charter, the European Convention and the inter-American treaties, See B Obinna Okere, 'The Protection of Human Rights in Africa and the African Charter on Human and Peoples' Rights: Human Rights Quarterly', Vol 6, No 2 141-159.

Unlike international systems, it should be noted that the UN has always encouraged development of regional instruments in the attempt to deal with regional peace, security and other human rights issues which should complement UN mechanisms.<sup>7</sup> This is because regional human rights mechanisms are an essential component in the international protection of human rights including SERs and are thought to be more effective than UN human rights mechanisms because they are able to take better account of peculiar regional and continental conditions.<sup>8</sup>

The full realisation of SERs rights in Africa is imperative in overcoming the challenges of poverty, marginalisation and underdevelopment. This is because these rights among other things provide people especially those living in poverty with access to certain basic needs including resources, opportunities and services that are necessary for them to lead a meaningful life.

Under international human rights law, the need to protect human dignity, freedom, and equality paved way for the development of a regime of human rights from an idealistic assertion of vague principles to the adoption of a comprehensive international normative system now in existence.<sup>9</sup> This includes socioeconomic and cultural rights with traces in Germany during Bismarck's reign in the 19th Century<sup>10</sup> and the Russian Revolution in the 20<sup>th</sup> Century.<sup>11</sup> With the adoption of the 1948 Universal Declaration of Human Rights (UDHR)<sup>12</sup> they became universally accepted. In 1966 two conventions were adopted: the International Covenant on Civil and Political Rights (ICCPRs),<sup>13</sup> and the International Covenant on Economic, Social and Cultural Rights (ICESCRs),<sup>14</sup> the former being dedicated to CPRs and the latter to SERs.

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<sup>7</sup> See B H Weston, R A Lukes, and K M Hnatt, 'Regional Human Rights Regimes: A Comparison and Appraisal' (1987) 20(4) *Vanderbilt Journal of Transnational Law* 585.

<sup>8</sup> See D Shelton, 'The Promise of Regional Human Rights Systems' in Burns H Weston and Stephen P Marks (eds), *The Future of International Human Rights* (1999)351.

<sup>9</sup> Eide in Eide et al (eds) (2001) 12.

<sup>10</sup> Eide in Eide et al (eds) (2001) 13.

<sup>11</sup> See Albie Sachs, 'The judicial enforcement of socio-economic rights' (2003).

<sup>12</sup> See Universal Declaration of Human Rights, adopted by the United Nations General Assembly.GA Res 217 A (III), UN Doc A/810 (10 December 1948)(accessed on 29 May 2014).

<sup>13</sup> See International Covenant on Civil and Political Rights, opened for signature 26 December 1966, 999 UNTS 171, GA Res 2200A (XXI), UN Doc A/6316 (1966)(entered into force on 23 March 1976).

<sup>14</sup> See International Covenant on Economic, Social and Cultural Rights, adopted 16 December 1966; GA Res 2200 (XXI), UN Doc A/6316 (1966) 993 UNTS 3 (entered into force 3 January 1976).



However, since the adoption of the two covenants, SERs have received less legal protection than CPRs<sup>15</sup>. The realization of these rights has encountered multiple challenges such as defining their normative content, the nature of the obligations attached to them, enforcement mechanisms and the lack of effective enforceable remedies. This has been aggravated by the fact that the Charter did not establish a strong institutional framework to enforce the rights it guaranteed contrary to the European Convention on Human Rights (European Convention) and the inter-American Convention on Human Rights (inter-American Convention) who had both a Commission and a Court to safeguard and ensure the protection of the human rights they guaranteed in their instruments. Conversely, the Charter established an African Commission with a broad mandate to promote human and peoples' rights and ensure their protection in Africa.

In the context of Africa, the Charter which entered into force in 1986 is the principle instrument that is intended to promote and protect human rights and basic freedoms including SERs. Significantly, the Charter adopted an integrated approach in its entrenchment of human rights by incorporating all the three dimensions of human rights including the first generation of CPRs also known as libertarian rights, the second generation of SERs referred to as egalitarian rights<sup>16</sup> and the third generation of peoples' rights in a single document unlike the other regional human rights instruments.<sup>17</sup> Hence the Charter recognizes the indivisibility and interconnectedness of both civil, political and SERs. Distinctively, this is spelt out in its preamble which explicitly states that "CPRs cannot be disassociated from SERs in their conception as well as universality."

However even with such recognition, the realization of these rights on the African continent has remained a remote possibility.<sup>18</sup> The obligation by States to implement SERs is subject to the interpretation provided by the African Commission the foremost institutional body authorized with monitoring the implementation of the Charter. This interpretation if not innovatively constructed could be used by States to delay implementation. Therefore clear,

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<sup>15</sup> J Oloka-Onyango 'Beyond the Rhetoric Reinvigorating the struggle for economic and Social Rights in Africa, *California Western International Law Journal*, (1995), 26.

<sup>16</sup> CA Odinkalu, 'Analysis of Paralysis or Paralysis by Analysis?', *Implementing Economic Social and Cultural Rights under the African Charter on Human and Peoples' Rights* (2001) 23 *Human Rights Quarterly* 327, 330.

<sup>17</sup> N Udombana, *Between Promise and Performance: Revisiting States 'Obligations under the African Human Rights Charter*, *Stanford Journal of International Law*, (Winter 2004), p.9.

<sup>18</sup> SC Agbakwa 'Remaining Humanity: Economic Social and Cultural Rights as the cornerstone of African Human Rights' (2002) 5 *Yale Human Rights and Development Law Journal* 178-179.

purposive and innovative interpretation to the realisation of these rights is imperative. It is notable that over three decades now since the adoption of the African Charter, massive violations of SERs still prevail on the continent on a daily basis.

Comparatively, the principal instruments protecting SERs within the European human rights framework are the European Convention for the protection of Human Rights and Fundamental Freedoms (European Convention)<sup>19</sup> and the European Social Charter (Social Charter).<sup>20</sup> While the European Convention primarily protects CPRs, the Social Charter endeavors to safeguard a range of SERs provisions. Although both instruments establish supervisory mechanisms for the rights guaranteed, there are significant distinctions in the implementation and protection of these rights between these two instruments. Whereas the provisions of the European Convention must be accepted and implemented in its totality, the Social Charter permits States to accept its SERs selectively and it uses a complicated system of reporting as a means of supervision instead of the complaints procedure.<sup>21</sup>

Previously, there were perceptions that the impact of the Social Charter in comparison to the European Convention was generally low due to the lack of attention within the European regional system for protecting SERs.<sup>22</sup> However in recent times, the attitude has changed, protocols have been concluded to extend the range of the rights protected and to improve the supervisory mechanisms while further measures are also being contemplated.<sup>23</sup>

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<sup>19</sup> The European Convention for the Protection of Human Rights and Fundamental Freedoms, opened for signature 4 November 1950, 213 UNTS 221 (1950) ETS 5 (entered into force on 3<sup>rd</sup> September 1953), amended by protocol No 13 of 2002, ETS 187 (2002).

<sup>20</sup> European Social Charter, opened for signature 18 October 1961, ETS (1961) (entered into force on 26<sup>th</sup> February 1965), revised by ETS 187 (1996).

<sup>21</sup> See RR Churchill & U Khaliq 'The Collective Complaints System of the European Social Charter: An Effective Mechanism for Ensuring Compliance with Economic and Social Rights?'(2004),15*European Journal of International Law* 417, 419.

<sup>22</sup> JG Merrills, 'Promotion and Protection of Human Rights Within the European Arrangements' in Raija Hanski and Marku Suski (eds) *An Introduction to the International Protection of Human Right: A Textbook* (2nd ed, 1999) 279.

<sup>23</sup> See A W Heringa, 'The European Social Charter: New Initiatives for the improvement of Basic Social Rights Protection Within the Framework of the Council of Europe' in Coomans APM et al (eds).*The increasing Importance of Economic, Social and Cultural rights* (1994)30. Under the additional Protocol No.3 to the European Social Charter, adopted on 9<sup>th</sup> November 1995, there is a collective complaint mechanism that would allow complaints to be submitted by employers' organisations, NGOs and trade unions.

Within the inter-American regional system, the basic instruments protecting human rights are the American Declaration of the Rights and Duties of the Man,<sup>24</sup> the inter-American Convention on Human Rights also known as the Pact of San Jose<sup>25</sup> and importantly, the Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights or Protocol of San Salvador<sup>26</sup> which specifically and explicitly deals with the SERs provisions in the American region. Much as the American Convention concentrates on CPRs paying only minimum attention to the protection of SERs, the supervisory mechanism for SERs in the inter-American regional system was later strengthened through the adoption of the Additional Protocol of San Salvador which delineates elaborate provisions for state reporting as the principle implementation and monitoring mechanism for the rights it entrenched.

It should be mentioned that the positive trend towards an effective institutional protection of SERs in the inter-American regional system is primarily anchored on two bodies notably the inter-American Commission on Human Rights (inter-American Commission) which is the region's key quasi-judicial body and the inter-American Court on Human Rights (inter-American Court) as well as other quasi-ministerial bodies.

A comparative perspective with the European and inter-American regional systems in the interpretation of SERs in Africa is based on the view that the African human rights system is for example seen as the weakest of the three regional systems.<sup>27</sup> To the contrary, the European regional system specifically the European Court of Human Rights provides arguably the world's most advanced international system for the protection of CPRs.<sup>28</sup> Similarly, the inter-American was in existence long before the African Commission and African Court were ever established. Through a comparative analysis, this study will contribute to the appraisal of the African human

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<sup>24</sup> See American Declaration of the Rights and Duties of the Man, OAS Res XXX, adopted by the 9<sup>th</sup> International Conference of American States (1948), reprinted in Basic Documents Pertaining to Human Rights in the Inter American System OEA/Ser. L.V/II.82 doc.6 rev 1 at 17 (1992).

<sup>25</sup> See inter-American Convention on Human Rights opened for signature on 22 November 1969, 1144 UNTS 123, OASTS 36 (1969), OEA/Ser. C/II.5 (entered into force on 18<sup>th</sup> July 1978).

<sup>26</sup> See Additional Protocol of San Salvador opened for signature 17<sup>th</sup> November 1988 OASTS 69 (1988) (entered into force in 1999).

<sup>27</sup> DJ Bederman & C Chernorjalloh, Michelot Yogogombaye vs Senegal, *The American Journal of International Law*, Vol. 104 No. 4 (October 2010), American Society of International Law pg. 620-228 at 623.

<sup>28</sup> LR Helfer: "Redesigning the European Court of Human Rights: Embeddedness as a Deep Structural Principle of the European Human Rights Regime, 2008. *The European Journal of International Law* Vol.19 no. 1, pg.125.

rights system as a vehicle for protecting and enforcing SERs by pointing out the challenges, suggesting possible interpretative approaches and making recommendations that can be translated into workable elucidations to the African Commission in its interpretation and protection of SERs. A comparative analysis will also point out progress made by the Commission in interpreting the SERs provisions of the Charter in contradistinction to the European and inter-American regional mechanisms.

Relying on comparative international law, it is notable that much like the African Charter, the European and inter-American regional systems highly recognize the instruments developed under the international system of human rights law in their interpretation of the rights guaranteed. For example the European Convention on Human Rights explicitly refers to the UDHR.<sup>29</sup> By the same token, the African Charter on Human and Peoples' Rights in its preamble states the relevance of the UDHR.<sup>30</sup> More significantly, the Charter sanctions the Commission to draw inspiration from other international human rights instruments including but not limited to the UDHR, the ICESCRs and other instruments adopted by the UN.<sup>31</sup> On the other hand, the inter-American Convention unequivocally refers to the UDHR.<sup>32</sup>

Through its interpretative role, the African Commission provides an interpretation of the Charter's SERs in two distinctive ways; firstly, by clarifying the scope of SERs in accordance with Article 45(3) of the Charter. Article 45(3) provides 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 AU or an African organization recognized by the AU. It is notable that although most of the provisions of the Charter protecting SERs are construed in very general terms, no State Party to the Charter, AU institution or an African organization recognized by the AU has ever requested the Commission to interpret any of the Charter's provisions on SERs.<sup>33</sup>

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<sup>29</sup> See European Convention, (n 19above) preamble paragraph.

<sup>30</sup> African Charter (n 1above) preamble para 6, which provide that: it is henceforth essential to pay a particular attention to the right to development and that (CPRs) cannot be dissociated from (SERs) in their conception as well as universality and that the satisfaction of (SERs) is a guarantee for the enjoyment of (CPRs).

<sup>31</sup> Art.60 & 61, African Charter (n 1above).

<sup>32</sup> See Inter-American Convention on Human Rights preamble, (n 25above).

<sup>33</sup> Available at: [www.achpr.org/english/Special%20Mechanisms/Indegenous/Advisory%20opinion\\_eng.pdf](http://www.achpr.org/english/Special%20Mechanisms/Indegenous/Advisory%20opinion_eng.pdf) (accessed 29<sup>th</sup> April 2013).

Arguably, this is due to the lack of attention in implementing these rights by several African States. For example, it has been observed that despite the significant economic growth and huge natural wealth in some African states such as Angola, Nigeria, Chad and DRC, and the international aid that has been provided, the amount of resources allocated to social economic amenities and infrastructure is far from adequate.<sup>34</sup> It is noteworthy that in interpreting the Charter's provisions, the Commission may on its own motion and in accordance with its promotional mandate as provided in Article 45 make resolutions, general comments and Concluding Observations on State Party reports, principles or guidelines clarifying the content of SERs protected in the Charter.<sup>35</sup>

Secondly, the Commission must clarify the normative content of SERs by consideration of complaints. Complaints alleging SERs violations may be submitted to the Commission from States including individuals and NGO's with Observer status.<sup>36</sup> Complainants are not required to be victims or to show that they act with the consent of victims.<sup>37</sup> Complainants are also allowed to bring complaints that are in the public's interest.<sup>38</sup> Compared to individual complaints, inter-State communications have been less effective because States have not alleged violations under other human rights treaties providing for inter-State complaints.<sup>39</sup> This reluctance of not using the inter-State complaints indicates that States are hesitant to submit communications alleging violations in other States even in cases of serious violations of SERs. Arguably, this is borne out of the view that claiming violations in other States is an 'unfriendly act' in international relations and constitutes interference in the 'domestic affairs' of other States.

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<sup>34</sup> See for instance Concluding Observations of the Committee on Economic Social and Cultural Rights for *Angola*, UN Doc. E/C.12/AGO/C/O/3/CRP.1 (18 November 2008), para.26; *Democratic Republic of Congo*, UN Doc. E/C.12/COD/CO/4 (16 December 2009), para.16; *Chad*, UN Doc. E/C.12/TCD/CO/3UN Doc. (16 December 2009), para. 23. (Accessed 29 April 2014).

<sup>35</sup> See for instance Resolution on Economic, Social and Cultural Rights in Africa, ACHPR /Res.73 (XXXVI) 04, (2004); Guidelines for National Periodic Reports, in *Second Annual Activity Report of the African Commission on Human and Peoples Rights 1988–1989*.

<sup>36</sup> See *The African Charter on Human and Peoples' Rights: The System in Practice, 1986–2006*, Cambridge University Press, Cambridge, 2<sup>nd</sup> ed, 2008; and F Ouguergouz, *The African Charter on Human and Peoples' Rights: A Comprehensive Agenda for Human Dignity and Sustainable Development in Africa*, Kluwer Law International, The Hague, 2003.(n 1above).

<sup>37</sup> Art.56(1) African Charter.

<sup>38</sup> See Communication 155/96. The Commission thanked 'the two human rights NGOs who brought the matter under its purview: the *Social and Economic Rights Action Center (Nigeria)* and the *Center for Economic and Social Rights (USA)*.

<sup>39</sup> Art. 74 UN International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, GA res. 45/158, UN Doc. A/45/49 (1990), entered into force 1 July 2003.



Further, States are also alert that they lack a clean human rights record and that they should not question another State's human rights compliance. Hence it has been observed that inter-State communications within the African regional human rights system have been barely used.<sup>40</sup> Thus, most communications that have appeared before the Commission claiming violations of SERs and other human rights violations have been submitted by individuals and NGO's.<sup>41</sup> It is important to consider pertinent case law in an attempt to examine the Commission's approach to some of the cases that have appeared before the Commission involving claims of violations of SERs. The analysis of the approach by the Commission in appropriate cases will be examined in detail in Chapter three.

Distinctively, a significant feature of the Charter in comparison to other regional instruments is its entrenchment of both SERs on equal footing with CPRs and group and peoples' rights in one document without categorizing the different dimensions of rights. This is significant in that it recognizes the principle of indivisibility of human rights and the importance of developmental issues that are of pertinence on the African continent. Similarly, the fact that only a modest number of SERs are explicitly included in the Charter should be noted. The SERs engrained in the African Charter are in several ways analogous to those guaranteed in other international treaties such as the ICESCRs and the UDHR and these have practically received the attention of the African Commission.

The Charter contains a wide range of provisions pertaining to SERs. Article 14 provides for the right to property<sup>42</sup>, while Article 15 grants the right to work and obliges States that every individual shall have the right to work under "equitable and satisfactory conditions and shall receive equal pay for equal work."<sup>43</sup> Article 16(1) provides that every individual shall have the "right to enjoy the best attainable state of physical and mental health." Subsection (2) of Article 16 places a duty on the state to take necessary measures to protect the health of their people and to ensure that they receive medical attention when they are sick.<sup>44</sup>

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<sup>40</sup> To date the only inter-State communication before the Commission is *Democratic Republic of Congo vs. Burundi, Rwanda and Uganda*, Communication No. 227/99 (2003), 20<sup>th</sup> Activity Report.

<sup>41</sup> *Activity Reports of the African Commission on Human and Peoples' Rights*.

<sup>42</sup> Art. 14 African Charter, This provision will be examined in Chapter 2 & 3.

<sup>43</sup> Art.15 African Charter, This provision will be examined in Chapter 2 & 3.

<sup>44</sup> Art.16 African Charter, This right will be examined in detail in Chapters 2 & 3.

In elaborating on the essential right to health in the American region, Article XI of the American Declaration of the Rights and Duties of Man defines this right as “the right to the preservation of health through sanitation and social measures such as food, clothing, housing and medical aid” although the provision conditions its implementation on the availability of public and community resources. Similarly, Article 10 of the Additional Protocol of San Salvador sets forth a right to health for all individuals. The the Protocol expresses this right as “the enjoyment of the highest level of physical mental and social wellbeing” and sets out measures to be adopted by Member states to ensure its implementation.

Under the European region, Article 11 of the European Social Charter refers to the right to the protection of health for the attainment of which it stipulates health promotion, education and disease prevention activities. In addition, Article 3 of the Social Charter states that all workers have the right to safe and healthy working conditions. Article 13 of the Social Charter is significant in terms of access to healthcare and services as it guarantees access to social and medical assistance and care to those without adequate resources.

In addition to the above SERs provisions contained under the African Charter, Article 17<sup>45</sup> provides the right to education to every individual. The fundamental right to life is granted by Article 4<sup>46</sup> whereas family rights are contained in Article 18.<sup>47</sup> The Charter provides a right to self-determination accorded in Article 20.<sup>48</sup>

Another distinctive element of the Charter is its entrenchment of a third cluster of rights referred to as third generation rights.<sup>49</sup> These entail the right to self-determination,<sup>50</sup> right to freely dispose of wealth and natural resources,<sup>51</sup> right to economic, social and cultural development,<sup>52</sup> right to peace and security,<sup>53</sup> and the right to a satisfactory environment.<sup>54</sup> As mentioned above, the Charter institutes the Commission<sup>55</sup> to adjudicate matters pertaining to

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<sup>45</sup>Art.17 African Charter, This provision will be is examined in Chapters 2 & 3.

<sup>46</sup> Art.4 African Charter, This provision will be examined in Chapters 2 & 3.

<sup>47</sup> Art.18 African Charter, This provision will be examined in Chapters 2 & 3.

<sup>48</sup> Art.20 African Charter.

<sup>49</sup> See Weston (2003).

<sup>50</sup> Art.20 African Charter.

<sup>51</sup> Art.21 African Charter.

<sup>52</sup> Art.22 African Charter.

<sup>53</sup> Art.23 African Charter.

<sup>54</sup> Art.24 African Charter, This provision will be examined in Chapter 3.

<sup>55</sup> Art.30 African Charter.

violations of the rights guaranteed and to ensure their effective realization. In addition to the Commission's broad mandate to promote and protect human and peoples' rights,<sup>56</sup> the Commission is authorized to interpret the provisions outlined in the Charter and to ensure that member States implement these obligations.

Under international law, the United Nations Committee on Economic, Social and Cultural Rights (CESCRs) the sole supervisory body that monitors the implementation of the SERs contained in the ICESCRs offers vast inspiration. Through its practice of giving normative content to the rights in the ICESCRs, the CESCR has extensively defined some of the provisions entrenched in the ICESCRs and the obligations that attach to them. The ICESCRs explicitly articulates a broad range of SERs including the rights to security, work, housing, health, education and cultural activities. These provisions are subject to the availability of resources and are realised progressively. A comparative interpretation of the concept of progressive realisation subject to available resources will be examined in detail in Chapter two in an attempt to inspect whether the Charter's SERs are subject to the progressive realisation notion as espoused in the international covenant.

In the context of Africa, the Charter has a very expansive approach in respect to the interpretation of its SERs provisions. Commensurate with Articles 60 and 61,<sup>57</sup> the Commission is obliged to draw inspiration from international law in interpreting the provisions of the Charter particularly from the provisions of the UDHR and other instruments adopted by the UN. The Commission has in several instances used these provisions liberally to bring the Charter in conformity with international law including claw-back clauses. In the context of claw-back clauses, the Commission has endorsed the view that provisions in articles that allow rights to be limited "in accordance with law, should be understood to require such limitation to be done in terms of domestic legal provisions that are compatible with international human rights standards."<sup>58</sup> Through this interpretation, the Commission has gone a long way towards seeking inspiration from international law particularly from the provisions on SERs under the ICESCRs.

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<sup>56</sup> Art.47 & 55 African Charter.

<sup>57</sup> Art.60 & 61 African Charter.

<sup>58</sup> The Commission has held, e.g., in Communications 105/93, 128/94, 130/94 and *Media Rights Agenda & Others V Nigeria* paragraph 66: To allow national law to have precedence over the International law of the Charter would defeat the purpose of the Rights and freedoms enshrined in the Charter. International Human Rights standards must



However, despite these mandates, the African Commission has been ineffective in its interpretation and execution of SERs in Africa due to the fact that it suffers from various shortcomings. Since its functioning, the Commission has been faced with innumerable challenges which have fundamentally obstructed its performance. During its formative stage, the Commission encountered a multitude of challenges such as lack of independence of its Commissioners who are governmental employees in their home countries some of them in charge of dealing with human rights violations in their countries,<sup>59</sup> lack of professionalism, the part-time nature of the Commission and the lack of regular attendance by Commissioners to all or part of the sessions,<sup>60</sup> the lack of resources that have severely obstructed the Commission and forced it to rely on international donors rather than on the OAU,<sup>61</sup> and insufficiency of remedies explains why it usually gives imprecise decisions which do not provide any specific guidance to member States on improving their human rights records.

While the Commission has overcome some of these challenges in recent years, it still suffers from structural obstacles which have substantially hindered its ability to function as an effective human rights institution on the continent. These obstacles include its failure to deal effectively with complaints. In this respect, communications are postponed and long delays have characterised the commission's complaints procedure. Secondly, the Commission is still under equipped with its current status, composition and mandate to respond to the multitude of massive human rights violations in Africa. The eleven commissioners are unrealistically tasked with multiple mandates such as the promotion and protection of human rights, to act as Special Rapporteurs, to examine communications and to examine State reports.

Thirdly, the Commission has failed to establish a credible practise of examining State reports. The main challenge here is the lack of a real dialogue between the Commission and the States procedure used and the failure to provide publicly accessible Concluding Observations on the reports. Even if Concluding Observations have recently been adopted on a consistent basis, they are not always made available to the public and are still contained in its Annual Activity

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always prevail over contradicting national Law.Org. of African Unity African Comm'n *Media Rights Agenda & Others v Nigeria*. 12<sup>th</sup> Annual Activity Report.(1998-1999).

<sup>59</sup> See for example, Nmehielle (2001) 172-173.

<sup>60</sup> See, OU Umozurike 'The Complaint Procedures of the African Commission on Human and Peoples' Rights' in Gudmundur et al. (eds.) (2001) 707, 712.

<sup>61</sup> See, African Commission on Human and Peoples' Rights, Fifteenth Annual Activity Report of the African Commission 2001-2002, paras 25-26.

Reports. Fourthly, the lack of dissemination of these reports is another impediment to the effectiveness of the Commission.

Further, absence of a coherent and consistent strategy by the Commission to deal with urgent cases<sup>62</sup> has also hindered the effective implementation and enforcement of SERs. Even if individuals and NGO's with Observer status have largely become the cornerstone of the African Commission, the committed involvement of African NGO's has been lacking. Although there is a sizable representation at the Commission's sessions, only a handful of NGO's actively support the work of the Commission between sessions. In addition, States continue to place obstacles in the way of the Commission and are uncooperative when it comes to the implementation and enforcement of decisions, recommendations or requests for information. Even State attendance at sessions has in recent years gone down.<sup>63</sup> To a very large extent, the Commission has performed its activities in isolation.

It is observed that through its jurisprudence, the Commission has most frequently dealt with CPRs<sup>64</sup> mainly because most communications brought before the Commission by civil society actors have mostly raised issues relating to CPRs. As mentioned above, this is mainly due to the inability on the part of civil society to submit communications pertaining to violations of SERs. Only a few outstanding NGOs such as *SERAC* have submitted communications in respect to violations of SERs. This is despite the fact that several marginalised individuals and vulnerable groups in Africa, primarily the inhabitants of rural and deprived urban areas, women, children, households headed by women, families stigmatised with the HIV pandemic, persons

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<sup>62</sup> Nothing much has transpired since the Commission adopted an Early Intervention Mechanism in Cases of Massive Human Rights Violations at its 24<sup>th</sup> Session, October 1998( Doc/ 05/52(XXIV) until a procedure for dealing with matters of emergency was provided for in its 2010 Rules of Procedure(rr 79, 80).

<sup>63</sup> Support for this suspicion may be found in a perusal of attending states and the number of persons in their delegations. At the height of criticism against Mauritania, this government was consistently represented by a Sizeable high-level delegation; the same applies to states such as Ethiopia, Sudan and Zimbabwe.

<sup>64</sup> Adopted by the Special Summit of the Union held in Kampala, 23 October 2009, *available at*: [www.au.int/en/sites/default/files/African\\_Union\\_Convention\\_for\\_the\\_Protection\\_and\\_Assistance\\_of\\_Internally\\_Displaced\\_Persons\\_in\\_Africa\\_\(Kampala\\_Convention\).pdf](http://www.au.int/en/sites/default/files/African_Union_Convention_for_the_Protection_and_Assistance_of_Internally_Displaced_Persons_in_Africa_(Kampala_Convention).pdf). Under Article 3(b) States undertake to: 'Prevent political, social, cultural and economic exclusion and marginalisation, that are likely to cause displacement of populations or persons by virtue of their social identity, religion or political opinion'.(accessed 15<sup>th</sup> June 2014).

with disabilities, refugees and internally displaced persons, still live in extreme poverty.<sup>65</sup> This leads to wide-spread denials and massive violations of SERs.

## **1.2 Statement of the problem:**

Although the African Commission was established by the Charter twenty eight years ago, it has faced innumerable challenges as illustrated above. Unlike other regional human rights instruments, the Charter is anonymous to many African people. Similarly, the African Commission is unpopular to the majority of human rights promoters, lawyers and activists. The greatest challenge to the African Charter and the Commission's effectiveness is the absence of enforcement of decisions made by the Commission since it has not put in place any procedure to supervise the implementation of its recommendations. As such, States do not feel obligated to abide by the Commission's decisions which they consider to be only recommendations. It is significant that this is one of the main reasons why an African Court on Human and Peoples' Rights was established in the attempt to combat the issue of the Commissions' non-binding recommendations and to complement the Commission's mandate by providing more legally binding decisions. Nevertheless, the African Commission has a responsibility to institute standards and working methodologies to ensure the implementation of its recommendations.

Although the Charter outlines a variety of SERs,<sup>66</sup> there are mitigating factors which have hampered the effective realization of these rights. Obstacles such as the State's failure to report to the Commission, lack of implementation of laws and weak institutions and the lack of political will are among the challenges that adversely affect the Commission in its interpretative role of SERs. Importantly, it is observed that the Commission has addressed many of these challenges relating to SERs in Africa through the *SERAC* case.

Additionally, most African countries have ratified international instruments such as ICESCRs and are also member States to the Charter by ratification. Some countries in Africa such as South Africa have also developed a progressive jurisprudence on SERs and in some of the decisions reference to international law have been made. The existence of various ranges of progressive legislation and National Human Rights Institutions (NHRS) in some African

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<sup>65</sup> See UNDP, *Human Development Report 2010: The Real Wealth of Nations: Pathways to Human Development* (New York, UNDP, 2010) pp. 86, 97–98.

<sup>66</sup> See Arts.14, 15, 16, 17, 18, 20, 21 African Charter.

countries such as South Africa also explains the continent's endeavor to comply with human rights principles in general and the provisions of SERs in particular.

However, there are still a number of challenges with regard to the interpretation of the SERs provisions under the Charter. A case in point pertaining to health and education is the *Free Legal Assistance Group, Lawyers' Committee for Human Rights, Union Interafricaine des Droits de l'Homme, Les Témoins de Jehovah v Zaire* where it was alleged, *inter alia*, that the mishandling of public finances, the government's failure to provide basic necessities, lack of medicines, and closure of universities and schools for two years constituted a violation of the African Charter.<sup>67</sup> It is observed in this case that apart from just pronouncing that the acts indicated above constituted a violation of these rights, the normative content of the rights to health and education under Articles 16 and 17 of the Charter remained imprecise.

Although in some African countries such as South Africa extensive reference to international law has been made, many legal practitioners, human rights activists and lawyers in most African countries are not using these instruments sufficiently to the realization of SERs. This study aims to critically evaluate the approaches of the African Commission in interpreting the SERs under the Charter in an attempt to determine whether or not these approaches have been effective in advancing these rights.

The study aims to comparatively evaluate the jurisprudence of the African Commission and other interpretative guidance notably; resolutions, reports and guidelines made by the Commission with a view to determining whether they are capable of advancing SERs in the region. The study further examines methods such as issuance of resolutions and guidelines by the African Commission.

### **1.3 Research questions:**

This study seeks to address the following key questions:

1. To what extent has the African Commission been effective in its interpretation of SERs provisions in the African Charter?

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<sup>67</sup> *Free Legal Assistance Group, Lawyers' Committee for Human Rights, Union Interafricaine des Droits de l'Homme, Les Témoins de Jehovah v Zaire Communications Nos. 25/89, 47/90, 56/91, 100/93 (1996)*, 9th Activity Report. This decision was taken at the 18th Ordinary Session, Praia, Cape Verde, October 1995.

2. What are the challenges and the obstacles that the African Commission has faced in its interpretative role of the SERs in the Charter and how have these affected the realization of SERs in Africa.
3. How can these challenges possibly be remedied?
4. What lessons can the African Commission learn from the experiences of other regional bodies such as the European and inter-American in the interpretation of SERs?

#### **1.4 Literature Review:**

The African Commission has been subject of several academic writings. In this regard an attempt to review all the available literature on the system is a formidable task which cannot be accomplished in this study. However, reference will be given to this subject on the interpretation of SERs by the African Commission.

Firstly, Odinkalu<sup>68</sup> discusses the nature of the obligations of the state in regard to SERs under the African Charter. This paper focuses on the normative nature of the rights as enunciated in the Charter. By the same token, Oloka Onyango<sup>69</sup> highlights the impact of the international financial and development institutions on the realisation of SERs rights in Africa. His line of argument of placing SERs realisation in Africa in a broader perspective of global trends provides valuable information in devising a holistic implementation and enforcement of SERs.

Gittleman has also made a legal analysis of this instrument. He concluded that the African Charter is as much a political document as it is a legal one. This is why the African Commission was given sufficient flexibility to interpret the Charter in a manner consistent with other international instruments, and that despite the unique concept of peoples' rights and the firm obligation imposed upon individuals by their States.<sup>70</sup>

In elaborating on the performance of the African regional system of human rights, Viljoen contended that its lack of focus with reference to its secrecy especially during its foundational

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<sup>68</sup> See CA Odinkalu 'Analysis of Paralysis or Paralysis by Analysis? Implementing Economic, Social, and Cultural Rights Under the African Charter on Human and Peoples' Rights' (2001) 23 *Human Rights Quarterly* 327 337–39. (n16above).

<sup>69</sup> J Oloka-Onyango (1995), 26 *California Western International Law Journal*. (As above)

<sup>70</sup> R Gittleman 'The African Charter on Human and Peoples' Rights: A Legal Analysis' (1982) 22 *Virginia Journal of International Law* 667 713.

stage,<sup>71</sup> seriously impeded academic analysis especially of the role played by the Commission in its enforcement of rights including SERs.<sup>72</sup> Despite these drawbacks, he notes that a remarkable literature on the effectiveness of the African system, particularly the functioning of the African Commission has been gradually developed. He further supported the Charter's unique procedural flexibility, its acceptance of communications from non-victims<sup>73</sup>

He however criticized the African Commission for applying a strict standard in barring communications. He examined international human rights law in Africa.<sup>74</sup> This comprehensive, analytical overview of human rights in Africa deals with institutions, norms and processes for human rights realization, provided for under the United Nations, the African Union and sub-regional economic communities in Africa. It explored their inter-relationship with the domestic legal systems of African states. Viljoen also analyses the development of the African human rights system since the entry into force of the African Charter on Human and Peoples' Rights. While he provides a general overview on the theme of SERs, he does not engage in a critical comparative analysis of SERs by the Commission in enforcing these rights.

Dugard provides an interpretation of SERs from a perspective of their judicial nature and enforceability in that one of the main reasons that has impeded effective implementation of SERs compared to CPRs is because of the standard of progressive realization to the maximum of its available resources specified in the ICESCRs which differs distinctively from the provisions entrenched in the ICCPRs which urges states immediate implementation.<sup>75</sup> Mubangizi concurs with this line of argument in that the enforcement of SERs is dependent on the availability of resources.<sup>76</sup> However, not all rights enunciated in the ICESCRs are made subject to this standard of enforcement. Hence this perspective fails to appreciate the current trend of the universality

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<sup>71</sup> F Viljoen *The Realisation of Human Rights in Africa through Inter-Governmental Institutions*, Thesis, University of Pretoria, Faculty of Law (1998) 26.

<sup>72</sup> F Viljoen (n 71 above).

<sup>73</sup> F Viljoen 'Admissibility under the African Charter' in M.D. Evans and R.Murray (eds.) *The African Charter on Human and Peoples' Rights: The System in Practice, 1986-2000* (Cambridge: Cambridge University Press, 2002) 61.

<sup>74</sup> F Viljoen, *International Human Rights Law in Africa* (Oxford: Oxford University Press, 2012).

<sup>75</sup> J Dugard *Adjudication of Socio-Economic Rights in South Africa: Progress Made and Challenges Remaining*, University of the Witwatersrand, South Africa, (November 2007), p.4.

<sup>76</sup> J C Mubangizi, —the Constitutional Protection of Socio-Economic Rights in Selected African Countries: A Comparative Evaluation, the Africa Law Institute, African Journal Legal Studies,(2006), (<http://www.africalawinstitute.org/ajls>), last visited June 11, 2012,p.4.



and the holistic aspect of human rights on the one hand and the jurisprudential developments at international regional and national levels that would be applicable for states.

Osterdahl limited her analysis to the procedures of considering individuals communications by the African Commission.<sup>77</sup> While offering some valuable critique on the decisions discussed, Osterdahl did not make recommendations as how to improve the African Commission's work in the consideration of individual complaints.<sup>78</sup> Similarly, in his academic and scholarly contributions, Umozurike also provided important information on and insights into the realities of the African Commission's work. However, he tended to be rather theoretical in his approach.<sup>79</sup>

The study undertaken by Evans and Murray provided a constructive analysis on the Commission's implementation of the Charter and practically evaluated its efficacy. This constructive evaluation study contains contributions of eleven African human rights experts, who avoided taking an adversarial, *exposé* style approach, seeking instead to combat pessimism about the African regional human rights system with informed and critical optimism.<sup>80</sup> The study explores 'Future Trends in Human Rights in Africa' by Naldi.<sup>81</sup> Examining the State reporting mechanism, Evans, Ige and Murray<sup>82</sup> documented the widespread lack of compliance with the Charter's bi-annual State reporting requirements. They suggested greater involvement on the part of the African Commission in obtaining and responding to State reports. Murray<sup>83</sup> made a strong case for the African Commission to step out of its promotional of the OAU solidarity, and take this role as finder of facts more seriously. Heyns<sup>84</sup> and Odinkalu<sup>85</sup> examined the normative

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<sup>77</sup> I Österdahl, *Implementing Human rights in Africa: The African Commission on Human and Peoples' Rights and Individual Communications 2002* (Uppsala: Uppsala University, *Swedish Institute of International Law*).

<sup>78</sup> CA Odinkalu and C Christense 'The African Commission on Human and Peoples' Rights: The Development of its Non-State Communications Procedures' (1998) 20 *Human Rights Quarterly* 235.

<sup>79</sup> See UO Umozurike 'The Complaints Procedures of the African Commission on Human and Peoples rights' (n 60above).

<sup>80</sup> See Evans and Murray, (eds.) (2002).

<sup>81</sup> GJ Naldi., 'Future Trends in Human Rights in Africa: The Increased Role of the OAU' in Evans and Murray (eds.) (2002) 1.

<sup>82</sup> MD Evans, T Ige & R Murray 'The Reporting Mechanism of the African Charter on Human and Peoples' Rights', in Evans and Murray (eds.) (2002) 36.

<sup>83</sup> See R Murray 'Evidence and Fact-finding by the African Commission' in Evans and Murray, (n 80above) 100.

<sup>84</sup> See CH Heyns 'Civil and political rights in the African Charter' in Evans and Murray (eds.) (2002) 137.

<sup>85</sup> CA Odinkalu 'Implementation economic, social and cultural rights under the African Charter on Human and Peoples' Rights' in Evans and Murray (eds.) (2002) 178.

framework that the Charter creates for the treatment of the distinct categories of rights including civil, political and SERs.

In a similar context Nmehielle analysed the African system of human rights, its laws, practices and institutions.<sup>86</sup> He employed a comparative approach and presents a summary of the UN, European and inter-American human rights mechanisms in terms of their impact on the African system. The role of NGO's in Africa is also considered. He concluded by recommending how the system could be reformed. Nmehielle however did not analyse the normative framework of the African Charter. Mainstream analyses of the African regional human rights system would be characterised by a focus on normative, institutional, and jurisprudential developments on the continent, resorting to positive and comparative techniques with other regional mechanisms.

The study advanced by Lindholt explained the high level of ratification of the African Charter with the mere fact that the obligations in this instrument are of such a nature that they do not pose any serious threat to the autonomy of its Member States.<sup>87</sup> Firstly, she notes that because the enforcement mechanism of the African Commission is not very effective,<sup>88</sup> Secondly, because of the large number of claw-back clauses, which significantly reduce the obligations inherent in the provisions,<sup>89</sup> and thirdly, because of the opportunity for using individual duties to neutralize the exercise of rights and freedoms.<sup>90</sup>

In addition to the above studies, Ankumah examined concrete ways in which communications have been considered by the secretariat without considering the potential and possibilities of the African Charter as an instrument for realizing human rights in the continent. She also discussed the African Commission decisions on admissibility and with the merits of many of these communications.<sup>91</sup> She raised the complaints that the African Commission is overly deferential to States, takes too long to process communications and overemphasizes the goal of promoting dialogue instead of deterring human rights abuses.

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<sup>86</sup> Nmehielle (2001).

<sup>87</sup> L Lindholt 'The African Charter: Contextual Universality' in Hastrup K. (ed.) *Human Rights on Common Grounds The Quest for Universality* (The Hague: Kluwer Law International, 2001) 117, 136.

<sup>88</sup> L Lindholt in K Hastrup (n 87above).

<sup>89</sup> L Lindholt in K Hastrup (n 87 above).

<sup>90</sup> L Lindholt in K Hastrup (n 87above).

<sup>91</sup> E Ankumah *The African Commission on Human and Peoples' Rights Practices and Procedures* (The Hague: Martinus Nijhoff Publishers, 1996).



In another comment, Oloka-Onyango<sup>92</sup> analyses the efficacy of international mechanisms in protecting the rights of the marginalised and indigenous people in the era of globalisation and non-state actors. Particular focus is on the Commission in the context of the *SERAC* case. Importantly, Agbakwa<sup>93</sup> examines some of the factors inhibiting the effective realisation of these rights in Africa. Among others, he argues that the greatest benefit of ensuring enforcement of the rights is the assurance of an effective mechanism for adjudicating violations or threatened violations to avoid resort to extra-legal means.

Pierre De Vos<sup>94</sup> critically analyses the scope and nature of the SERs provisions in the Charter, the functions of the Commission highlighting its strong and weak points, and the African Court in addition to the nature of the state obligations. According to him, the Commission has made good use of the international law and the work of the Committee and is well placed to develop unique yet internationally attuned jurisprudence.

In light of the above literature, this study takes a broader and more in-depth approach by cross-examining the approaches adopted by the African Commission in implementing SERs and comparing these approaches with other regional systems in an attempt to assess whether these approaches are consistent with international and regional standards. The study will attempt to fill this lacuna by undertaking a comparative analysis of the interpretative approaches presented by the entrenchment and judicial adjudication of SERs at the international and regional levels as well as in Africa and how these opportunities can be utilised to advance the promotion and protection of SERs on the African Continent. This dissertation therefore attempts to address the shortcomings of the above literature. In addition, the study gives a particular focus on the interpretation of SERs comparatively with other regional mechanisms which helps the research to be able to identify the extent to which these rights have been realised in Africa or not.

### **1.5 Objectives of the study:**

This study has the following objectives: The research focuses on the challenges confronted by the African Commission in its interpretation of the SERs provisions guaranteed in the African

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<sup>92</sup> J Oloka-Onyango (2003) *American University International Law Review*, 852-911.

<sup>93</sup> Agbakwa (2002) *5Yale Human Rights and Development Law Journal* 178 –179.

<sup>94</sup> De Vos, Pierre ‘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.

Charter. It aims to examine the nature and normative content of SERs under the Charter and how the Commission has provided interpretative guidance to these rights in accordance with international and other regional norms and standards for the protection afforded to SERs. The research focuses on the interpretation of substantive SERs provisions, such as the right to health, work and the right to education in order to assess the extent to which international standards for the realization of these rights have been attained.

The study also examines the interpretation of the concept of progressive realization within available resources, the nature of the obligations that attach to these rights and it analyses how the African Commission have interpreted these key concepts in the context of SERs in the Charter as opposed to international and regional law standard interpretation that is provided. The study also seeks to address the obstacles which hinder the effective realization of SERs in Africa and proposes recommendations as to how the Commission can better regulate, interpret and implement protection afforded to SERs in line with internationally accepted standards.

- I. In essence, the study aims to investigate whether the interpretation of the SERs provisions of the African Charter provided by the African Commission is consistent with international human rights law standards.
- II. Also, it seeks to examine the challenges the African Commission encounter with regard to providing interpretative guidance on the SERs provisions of the Charter and how it can combat these challenges.
- III. The study seeks to examine the lessons the African Commission can learn from the experiences of other regional bodies such as the European and inter-American in the interpretation of SERs?

### **1.6 Aims and Significance of the Study:**

The study seeks to evaluate to what extent the SERs in the African Charter have been realized through the interpretation of the African Commission. Although the focus is on the African Charter and the Commission, the important role and contribution of other regional human rights instruments and mechanisms namely the 1961 European Social Charter and the Additional Protocol to the American Convention on Human Rights in the Area of economic social and cultural Rights will be explicitly examined. This study aims at prospectively investigating ways

of improving protection afforded to SERs in the African Charter through the interrogation of common and particular challenges facing its enforcement. It aims at analyzing other aspects that have not been given much attention under the African Charter and the Commission; namely the Challenges. The study seeks to contribute to ensuring a better SERs regime and an effective regional human rights system which upholds the rule of law, human dignity and human rights in the promotion, protection, interpretation and implementation of SERs.

**Significance:**

The study seeks to critically and comparatively identify the challenges and strengths of the African Commission in its interpretation of SERs on the African continent. The research will provide an opportunity for African countries and the African Commission particularly to identify critical areas of intervention for a better protection and realisation of SERs. As this research is of particular pertinence to the current situation in Africa, the lessons drawn will help the Commission in reviewing its mandate for a better protection afforded to SERs in Africa.

**1.7 Research Methodology:**

This research employs secondary methods of data collection. As a secondary source, desktop research has extensively been utilised whereby legal textbooks, legal journal articles, case law and legislation have been reviewed. Additionally various law books, reviews, reports and judgments have been given extensive consideration. A full list of the relevant sources may be found in the bibliography below.

The study intends to be analytical in nature. It is premised on the assumption that institutional arrangements such as the African Commission on Human and Peoples' rights and the African Charter have both regional and national roles to play in such a system. The techniques employed involve legal analysis and comparative approaches with international instruments such as the International Covenant on Economic Social and Cultural rights. The study has adopted different strategies in order to reach the goal of this study. One further strategy was to analyze resourceful relevant literature in the various specialized human rights and SERs centres such as the Community Law Centre at the University of the Western Cape. This resource

centre has provided the author with enormous and relevant raw materials from which this research shall be processed.

### **1.8 Limitation and Scope of the study:**

The African human rights system as we know it has been in existence for over three decades now since the entry into force of the African Charter. The Commission the currently sole supervisory institution on the other hand has existed for twenty-eight years now having inaugurated on 2<sup>nd</sup> November 1987 in Addis Ababa, following the election of its members by the 23<sup>rd</sup> Ordinary Session of the Assembly of Heads of State and Government earlier in July of that year. This study is limited to the institutional and normative developments of SERs within the African Commission from its inception till this year when the study will be finally concluded.

The analysis of the case-law of the African Commission relating to SERs will be carried out. Toward this end, relevant jurisprudence from comparable regional and international human rights fora is examined. The analysis identifies the approaches and practices of the African Commission regarding SERs and postulates possible options in the promotion and protection afforded to these rights that could be applicable in the African regional system.

### **1.9 Chapter Outline**

#### **Chapter One: Introduction**

Chapter one which is the introductory chapter sets out the context of the research question and briefly reviews the methodology used in exploring the research question. It also covers an overview of the existing relevant literature and delineates the limitation of the study. The Chapter also presents the content and background to the study. A brief overview of the other chapters is also spelt out.

#### **Chapter Two: International and Regional Normative Framework on SERs**

After introducing the literature and background in Chapter one, this chapter provides an analysis of the international and regional normative frameworks on SERs. The chapter attempts to put the

discussion in context and with this goal in mind, it highlights the position of Africa regarding the protection afforded to SERs at the regional and international level. Essentially, the nature of the obligation of states that attach to these rights will be explicitly deciphered.

### **Chapter Three: An Analysis of the Approaches of the African Commission to SERs.**

Chapter three which is the kernel of this study explores the approaches of the African Commission in interpreting the SERs provisions guaranteed under the Charter and examines their compatibility with the European and inter-American systems. The interpretation provided to substantive SERs provisions will be examined. Centrally, the Interdependence Approach, Underlying Determinants Approach, the Non-Discrimination Approach and Direct Approaches; to the interpretation and enforcement of SERs will be explored.

### **Chapter Four: Challenges to the interpretation of SERs by the African Commission**

Chapter four undertakes an analysis of the current challenges inhibiting the interpretation and enforcement of SERs by the African Commission. It highlights obstacles that have hindered effective interpretation of SERs in Africa and identifies possible opportunities of overcoming these challenges and improving the system.

### **Chapter Five: Conclusions and Recommendations**

Finally, Chapter five which contains the conclusion and recommendations sums up the findings of this study and proffers a conclusion and possible recommendations. The chapter proposes specific recommendations to be undertaken in order to overcome the challenges and shortcomings identified. In suggesting recommendations, an attempt is made to tailor the recommendations to the findings of this research in order to avoid duplication of recommendations already been suggested by other scholars.

## CHAPTER TWO

# INTERNATIONAL AND REGIONAL NORMATIVE FRAMEWORK ON SOCIO-ECONOMIC RIGHTS

### 2.0. Introduction

This Chapter following the background and literature to the protection of SERs sets out the international and regional normative framework on SERs. Towards this end, it juxtaposes the position and status of Africa regarding the interpretation of SERs with international and regional systems. The Chapter also refers relevant interpretations from European<sup>95</sup> and inter-American practices<sup>96</sup> comparatively to assess the interpretation provided by the African Commission taking the international system<sup>97</sup> into account as a universal norm against which these regional human rights systems are going to be evaluated.

In reflecting on the approach by the African Commission on the nature of obligations of States in comparison to the interpretation provided under the international system, the Chapter explores some prospects to improve its obligations under the Charter. In exploring the above, the Chapter examines the concepts of minimum core obligations,<sup>98</sup> Secondly, consideration is made to the four aspects of State obligations in realising SERs; notably the obligation to respect, obligation to protect, promote and to fulfil,<sup>99</sup> Thirdly, the interpretation given to the concept of progressive realisation is considered,<sup>100</sup> and limitations of rights.<sup>101</sup> The over-arching provision of Equality and Non-discrimination is also examined in this section.<sup>102</sup> In demonstrating these obligations, the Chapter utilises international and regional legal regimes as espoused in the relevant treaties, declarations, documents and court cases.

Although these instruments cut across both CPRs and SERs, my focus shall be on the latter. Finally, the Chapter ends with concluding remarks in as far as the international legal protection of SERs in Africa is concerned. Before analysing the normative content of the SERs

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<sup>95</sup> Section 2.4

<sup>96</sup> Section 2.5

<sup>97</sup> Section 2.0

<sup>98</sup> Section 2.9.1.6

<sup>99</sup> Section 2.9

<sup>100</sup> Section 2.9.1.5

<sup>101</sup> Section 2.9.1.7

<sup>102</sup> Section 2.8.3

engrained in the Charter, below is a brief exposition of some controversies which have obstructed the effective implementation and legal enforcement of SERs for several decades.

## 2.1 The Justiciability Debate

During the drafting of the international bill of human rights,<sup>103</sup> the debate on the enforceability of SERs as justiciable rights was one of the most controversial issues under the United Nations (UN).<sup>104</sup> After much contention between Western and Socialist countries, the outcome by the UN-General Assembly was the bifurcation of the Universal Declaration<sup>105</sup> into the ICCPRs and the ICESCRs. The contention that SERs are different in nature from CPRs was central to the adoption of the two categories of rights to be adopted in two separate instruments.<sup>106</sup> CPRs were considered to be 'absolute' and 'immediate' whereas their counterpart SERs were held to be programmatic and hence only to be realised gradually.

Since then, this division of the two instruments has led to the marginalisation of SERs in comparison to CPRs with a detrimental effect on the overall realisation of human rights.<sup>107</sup> Another problem affecting the protection of SERs has been the slow progress in clarifying the scope and content of these rights and the obligations attached to them. In addition, a third contradistinction is that CPRs have been perceived to incur limited or no resources whereas the realisation of SERs requires a significant amount of resources.<sup>108</sup>

However despite these assumptions that have categorised SERs, there has been increased attention in recent times at the international level that has helped to clarify and define the content

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<sup>103</sup> The original core of UN human rights treaty-making efforts is contained in the three normative international instruments known as the 'International Bill of Human Rights'. These are Universal Declaration of Human Rights (n 12above), the International Covenant on Civil and Political Rights (ICCPRs) (n 13above) and the International Covenant on Economic Social and Cultural Rights (ICESCRs) (n 14above).

<sup>104</sup> C Raj Kumar, 'International Human Rights Perspectives on the Fundamental Right to Education Integration of human rights and Development in the Indian Constitution' (2004)12 *Tulane Journal of International and Comparative Law* 237, 247.

<sup>105</sup> The Universal Declaration of Human Rights (n12above).

<sup>106</sup> International Commission of Jurists (ICJ) Report 'Courts and the legal enforcement of economic, social and cultural rights: Comparative experience of justiciability' (2008) 1, Available at <http://www.icj.org/dwn/database/ESCR.pdf> (Accessed on 3 March 2015).

<sup>107</sup> See S Liebenberg *Socioeconomic rights adjudication under a transformative constitution* (2010) 35-36.

<sup>108</sup> See S Liebenberg (2010) 35-36 (n 107above).



of these rights.<sup>109</sup> Comparatively, a distinctive feature at the adoption of the Charter on the question of justiciability clearly reveals that the Charter ended this debate by its incorporation of a catalogue of SERs on equal footing with CPRs. In the African context, different from other regions, it is notable that this is the most significant contribution of the Charter to the discourse of international law and human rights especially in the realisation of SERs.<sup>110</sup>

Under international human rights law, SERs have now been entrenched in several international and regional human rights instruments, declarations and resolutions. The first most important instrument to proclaim the protection of SERs was the Universal Declaration adopted in 1948.<sup>111</sup> Much like the Charter, the UDHR contains a wide range of civil political and SERs in a single text without separating the two sets of rights. However this declaration was not a treaty and was understood not to be imposing any legal binding obligations.<sup>112</sup> This called for the enactment of two legally binding treaties which led to the adoption of the ICCPRs and the ICESCRs.

Other internationally recognised instruments protecting SERs include the UN Convention on the Rights of the Child (CRC),<sup>113</sup> the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW),<sup>114</sup> the International Convention on the Elimination of All Forms of Racial Discrimination (CERD),<sup>115</sup> and the Convention on the Protection of the

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<sup>109</sup> See Statement to the 1993 Vienna World Conference on Human Rights on behalf of the UN Committee on Economic Social and Cultural Rights (seventh session; E/1993/22-E/C.12/1992/2, annex III), UN Doc A/CONF 157/24 Part 1 ch III. (Accessed on 26 march 2015) which stated that ("All human rights are universal, indivisible and interdependent and interrelated. The international community must treat human rights globally in a fair and equal manner, on the same footing, and with the same emphasis.").

<sup>110</sup> See F Viljoen 'Africa's Contribution to the Development of International Human Rights and Humanitarian Law' *African Human Rights Law Journal* (2001)18 20.

<sup>111</sup> Universal Declaration of Human Rights (n12above). For a detailed description of the drafting process of the UDHR See M A Glendon, *A World Made New: Eleanor Roosevelt and the Universal Declaration of Human Rights* (Random House, 2001).

<sup>112</sup> It is now universally accepted that the UDHR has acquired the status of customary international law establishing legally binding principles across all fields of international law See, Steiner et al (2000) 227–231.

<sup>113</sup> UN Conventional on the Rights of the Child (CRC) Adopted and opened for signature and ratification by the General Assembly Res. 44/25 of 20 November 1989, came into force on 2 September 1990.

<sup>114</sup> UN Convention on the Elimination of all Forms of Discrimination against Women (CEDAW) was adopted and opened for signature and ratification by the GA Res. 34/180 (XXI) of 18 December 1979, and came into force on 3 September 1981.

<sup>115</sup> UN Convention on the Elimination of Racial Discrimination (CERD) was adopted and opened for signature and ratification by General Assembly resolution 2106 (XX) Of 21 December 1965 (entered into force 4 January 1969).



Rights of All Migrant Workers and Members of their Families (CMW).<sup>116</sup> Although these treaties protect a selection of SERs, this discussion shall be limited to the key instrument the ICESCRs while reference to other instruments shall be implicitly undertaken. It should be noted that despite all this protection, the enforcement of SERs rights has for a long time been relegated at the international and regional level.

More recently, the adoption of the Optional Protocol to the ICESCRs on 10 December 2008 which expands the mandate of the CESCRRs to receive and consider individual, group and inter-state communications,<sup>117</sup> is the most latest development in the protection of SERs at the international level as it reaffirms the universality and interdependence of human rights as well as to conduct cases of massive violations of SERs.<sup>118</sup>

The protection and interpretation of SERs is a major concern not only in Africa but also in other developing and even developed countries. This is because these rights provide those living in poverty with certain basic needs that are essential for their survival. Before examining the normative content of SERs, below is a brief analysis of the development of international human rights law in an attempt to shed light on its evolution. It is notable that the instruments highlighted in this section form part of the universal norms against which the regional framework shall be examined.

## **2.2 The Development of International Human Rights Law in Africa: A Historical Context**

In the attempt to overcome the atrocities of World War II and to protect, promote and achieve universal respect for human rights, the world witnessed developments in the international protection of human rights.<sup>119</sup> Pre-World War II, where international law was not violated when States committed violations of human rights to their citizens, new legal institutions aimed at the

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<sup>116</sup> UN Convention on the Protection of all Migrant Workers and Members of their Families (CMW) was adopted and opened by signature, ratification and accession by General Assembly Resolution 45/158 of 18 December 1990 (entered into force 1 July 2003).

<sup>117</sup> See L. Chenwi 'Monitoring the progressive realisation of socio-economic rights: Lessons from the United Nations Committee on Economic, Social and Cultural Rights and the South African Constitutional Court' (2010) 5, available at <http://www.spii.org.za/agentfiles/434/file/Progressive%20realisation%20Research%20paper1.pdf> (Accessed on 18 August 2014).

<sup>118</sup> Optional Protocol to the International Covenant on Economic, Social and Cultural Rights: resolution / adopted by the General Assembly, 5 March 2009, A/RES/63/117, Arts.1, 2, 10, &11 available at <http://www.unhcr.org/refworld/docid/49c226dd0.html> (Accessed 25 August 2014).

<sup>119</sup> See SC Tomuschat, *Human Rights: Between Idealism and Realism* (2003) 22.

universal protection of human rights emerged<sup>120</sup> in the wake of the war in an attempt to counter those violations over their citizens in each nation. These developments evolved at the international<sup>121</sup> regional<sup>122</sup> and national levels.<sup>123</sup> At the international level, the newly established UN which was still trying to cope with the atrocities of two World Wars in particular declared the promotion of human rights as one of its core objectives.<sup>124</sup>

Consequently, development of UN international instruments which emerged under the UN Charter together with African States ratification of these treaties is one of the most fundamental developments towards the realization of SERs in Africa. The UN Charter is an international legally binding treaty establishing mutual obligations for States to act together in the attempt to respect, protect and promote human rights including SERs on a non-discriminatory basis. It should be noted that the UN Charter neither specifies nor defines the human rights that it proposes to protect and promote.<sup>125</sup>

Following the UN Charter, the adoption by the United Nations General Assembly of the UDHR on December 10<sup>th</sup> 1948,<sup>126</sup> in conjunction with the adoption of the ICCPRs<sup>127</sup> and the ICESCRs<sup>128</sup> paved way for the development of an international normative framework for the protection of human dignity, freedom and equality now in existence. It should be mentioned here that the European Convention also came into force during this period.<sup>129</sup> In addition to the above instruments working under the auspices of UN, treaty committees were established as oversight institutional bodies of these treaties<sup>130</sup> in an attempt to safeguard the rights incorporated in the

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<sup>120</sup> SC Tomuschat (n 119above).

<sup>121</sup> For a detailed analysis of the justiciability of SERs both at the national and international level, see M Scheinin 'Justiciability and the indivisibility of human rights' in J Squires, M Langford & B Thiele (eds.), *The road to a remedy: Current issues in the litigation of economic, social and cultural rights* (2005) 17-20.

<sup>122</sup> See M J Squires, M Langford & B Thiele (eds.) (n 121above).

<sup>123</sup> S Liebenberg 'The domestic protection of economic and social rights in domestic legal systems' in A Eide *et al* (eds.) *Economic, social and cultural rights*, 2nd ed, (2001) 55, 57. See also; C Young, *Constituting economic and social rights* (2012) 5-6.

<sup>124</sup> Among other things, the UN Charter was guided by the objective: 'To reaffirm faith in fundamental rights, in the dignity and worth of the human person, in the equal rights of men and women and of nations large and small' (UN Charter, preamble, paragraph 2).

<sup>125</sup> Art. 1 UN Charter UNTS XVI. Available at: <http://www.refworld.org/docid/3ae6b3930.html> (Accessed 9 November 2014).

<sup>126</sup> Universal Declaration (n 12above).

<sup>127</sup> International Covenant on Civil and Political Rights (n 13above).

<sup>128</sup> International Covenant on Economic, Social and Cultural Rights (n 14above).

<sup>129</sup> European Convention on Human Rights (n 19above).

<sup>130</sup> See, e.g. the Human Rights Committee working within ICCPRs.

instruments and to ensure their implementation. Consequently, the UN Human Rights Committee<sup>131</sup> (HRC) was authorized to enforce the implementation of the ICCPRs. Although the ICCPRs protect CPRs, the HRC has found violations of some CPRs in cases on facts revealing violations of SERs. Similarly, the CESCR<sup>132</sup> was empowered to monitor the implementation of the ICESCRs and to provide normative content to the rights guaranteed under the covenant.

As mentioned earlier and in line with these quasi-judicial institutional bodies, the African Commission was authorized to monitor the implementation of the Charter and to ensure that States comply with their obligations. The Commission has handed down a significant number of decisions interpreting SERs and finding States accountable for massive violations of rights under the Charter.<sup>133</sup> It should be noted that the protection and interpretation of SERs in Africa is also influenced by the prevailing circumstances of poverty, illiteracy and hunger that are widespread on the African continent. Without addressing these dire socio-economic ills in Africa, the explicit protection of CPRs would remain a meaningless effort.

Within the inter-American region, two institutional bodies notably the inter-American Commission on Human Rights (inter-American Commission) and the inter-American Court of Human Rights (inter-American Court) were empowered not only to receive complaints within the American region, they have also interpreted Article 29(d)<sup>134</sup> of the Convention which prohibits Court from interpreting any provisions of the American Convention to take account of international instruments in their interpretation of the content and scope of human rights.

At the national level, several national constitutions have emerged containing a wide range of human rights provisions in their Bills of rights.<sup>135</sup> For example several member states to the Charter such as Algeria, South Africa,<sup>136</sup> Kenya, Nigeria, Namibia and Uganda have entrenched a broad range of provisions pertaining to SERs in their national constitutional framework either as justiciable rights in a Bill of rights or as non-justiciable Directive Principles of State Policy

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<sup>131</sup> See <http://www.ohchr.org/EN/HRBodies/CCPR/Pages/CCPRIndex.aspx> (accessed 22nd May 2015).

<sup>132</sup> See <http://www.ohchr.org/en/hrbodies/cescr/pages/cescrindex.aspx> (accessed 22nd May 2015).

<sup>133</sup> See *Social & Economic Rights Action Center & Another v Nigeria* Communication No 155/96 2001–2002 African Annual Activity Report Annex V.

<sup>134</sup> Art.29 inter-American Convention (n 25above).

<sup>135</sup> G de Waal I Currie & G Erasmus, *The Bill of Rights Handbook* (2001) 433 (5th ed 2004).

<sup>136</sup> South African Constitutional Court (SACC) in *re Certification of the Constitution of the Republic of South Africa (First Certification case)* 1996 (10) BCLR 1253 (CC) of 4<sup>th</sup>December 1996 even though this may have direct financial and budgetary implications, Para 78.

(DPSP).<sup>137</sup> While the inclusion of SERs as justiciable rights means that these rights can be invoked both directly and indirectly by litigants, when rights are included in national constitutions as directive principles, they are not justiciable as such but serve as a guide to the executive and legislature in the exercise of its functions.<sup>138</sup>

In the Namibian context, Article 101<sup>139</sup> makes it clear that the principles “shall not of and by themselves be legally enforceable by any court, but shall nevertheless guide the government in making and applying laws to give effect to the fundamental objectives of the said principles”. Article 101 further states that courts are only “entitled to have regard to the said principles in interpreting any laws based on them”. It is notable that despite significant differences in the actual catalogue of rights incorporated in constitutions across several jurisdictions; some peculiar features frequently arise in most constitutions.<sup>140</sup>

At the regional level, regional mechanisms have been established independent from the international system.<sup>141</sup> Three regions in the world namely; Europe, the Americas and Africa have developed their own regional mechanisms. While regional systems add to the international system in several distinctive ways, it is argued that regional mechanisms tend to provide better enforcement potential than their counterpart international mechanisms in that they offer accessible opportunities in which individuals can pursue their cases.<sup>142</sup> By the same token, it is recognised that States are politically inclined to conform to the decisions of regional mechanisms as compared to national mechanisms. In complying with national mechanisms, it has been

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<sup>137</sup> See DM Chirwa ‘An overview of the impact of the International Covenant on Economic, Social and Cultural Rights in Africa (2001) 7-10, available at <http://www.communitylawcentre.org.za/clc-projects/socio-economic-rights> (accessed on 4 June 2015).

<sup>138</sup> See Art.45 of the Irish Constitution, which stipulates that the Directives of Social Policy are intended as general guidelines for the legislature. See also Art.37 of the Indian Constitution of 1949 which calls the directive principles fundamental in the governance of the country and in making laws.

<sup>139</sup> Art.101 of the Constitution of the Republic of Namibia.

<sup>140</sup> N Udombana, Towards the African Court on Human and Peoples Rights: Better Late Than Never, *Yale Human Rights & Development law journal*.L.J.45, (2000).48.

<sup>141</sup> KM Rhona Smith, *International Human Rights* (2002).83

<sup>142</sup> The Inter-American system has now adopted a procedure that accepts online applications. This helps to combat the impact of distance, See Rhona K, M Smith, *International Human Rights* (2003). 85.

observed that national systems tend to function under the political framework of the executive and this salient point makes them vulnerable to coercion by the executive.<sup>143</sup>

In recent times, the international community has attempted to clarify the nature of human rights including SERs. Consequently, a series of UN World Conferences during the early 1990s have helped to create an understanding that human rights and social development are interdependent. As a result, a significant outcome of the UN World Conference on Human Rights held in Vienna on 25<sup>th</sup> June 1993 emphasised that all human rights are ‘universal,’ ‘indivisible,’ ‘interdependent’ and ‘interrelated.’<sup>144</sup> Indeed, international law has increasingly reinforced the view that human rights are interdependent and indivisible and that SERs cannot be divorced from CPRs. Nonetheless, the most fundamental SERs of the four-fifths of humanity that live in dire poverty are disregarded on a daily and massive basis.

While the preambles of the ICESCRs<sup>145</sup> and the ICCPRs<sup>146</sup> recognise this interdependence and interrelatedness of human rights, the Charter underscores the indivisibility of human rights by incorporating a catalogue of SERs alongside CPRs in one single instrument without categorising the relevant rights.

More importantly, it is notable that the General Comments of the CESCRs dealing with the interpretation of the ICESCRs will be particularly instrumental. General Comments are released annually to clarify the scope of the rights guaranteed under the ICESCRs. The purpose of these general comments is to provide authoritative guidance in the interpretation and application of the Covenant.<sup>147</sup> Some of the pertinent general comments adopted by the CESCRs that have helped in clarifying these rights include Article 22 pertaining to international technical assistance measures,<sup>148</sup> Article 2 which delineates the nature of the obligations of the States,<sup>149</sup>

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<sup>143</sup> The cases of the three Peruvian judges who were dismissed from their offices after filing against a law that allowed the president to run for a second consecutive time., See C M Cerna, *The inter-American System for the protection of human rights*, 16 *Florida Journal of International Law* 195, 205 (2004).

<sup>144</sup> Vienna Declaration and Programme of Action, adopted by the World Conference on Human Rights on 24 June 1993, UN Doc. A/Conf. 157/24, Para 1.

<sup>145</sup> ICESCRs (n 14above) preamble.

<sup>146</sup> ICCPRs (n13above) preamble.

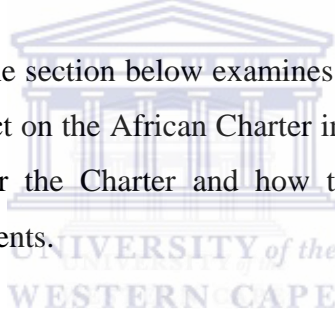
<sup>147</sup> See M Craven, *The International Covenant on Economic Social and Cultural Rights. A perspective on its Development* (1995), Chapter 2.

<sup>148</sup> International technical assistance measures, UN Committee on ESCR General Comment 2. (Fourth session, 1990) UN doc. E/1990/23.

Article 11(1) pertaining to the right to adequate housing,<sup>150</sup> Article 11 relates to the right to adequate food,<sup>151</sup> Article 13 on the right to education<sup>152</sup> and Article 12 deals with the right to health.<sup>153</sup>

To the contrast, a significant development in the African regional system is the adoption of resolutions and general comments. The African Commission has handed down a number of recommendations and resolutions some of which also serve promotional and protective functions.<sup>154</sup> Country and thematic resolutions adopted serve to draw attention to human rights situations in particular States as well as to highlight particular human rights issues affecting the continent.<sup>155</sup> These resolutions have marked a courageous stand on the part of the Commission and a turning point in its institutional relationship with the AU. The interactive dialogue between the Commission and the States pursuant to such resolutions demonstrates that they are an effective means of encouraging States to account for their conduct before the Commission.

Against this background, the section below examines the major international instruments which have had a significant impact on the African Charter in an attempt to provide comparative interpretations of the SERs under the Charter and how the Commission has utilised these provisions in light of these instruments.



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<sup>149</sup> The Nature of States Parties' Obligations, UN Committee on ESCR General Comment 3. (Fifth session, 1990) UN doc.E/1991/23.

<sup>150</sup> The Right to Adequate Housing, UN Committee on ESCR General Comment 4. (Sixth session, 1991) UN doc E/1992/23.

<sup>151</sup> The Right to Adequate Food, UN Committee on ESCR General Comment 12. (Twentieth- session, 1999) UN doc. E/2000/22.

<sup>152</sup> The Right to Education, UN Committee on ESCR General Comment No 13. (Twenty-first session, 1999) UN doc. E/2000/22.

<sup>153</sup> The Right to the Highest Attainable Standard of Health, UN Committee on ESCR General Comment No 14. (Twenty-second session, 2000) UN doc. E/C.12/2000/4.

<sup>154</sup> VO Nmehielle 'A Decade of Human Rights: Development of the African Human Rights System in the Last Decade' (2004) 11 *Human Rights Briefings* 6.

<sup>155</sup> Not all the resolutions passed by the African Commission are country-specific or thematic. See the list of resolutions adopted by the African Commission at its 40th Ordinary Session set out in the 21st Activity Report, para 69, including: Resolution on the Establishment of a Fund to be Financed by Voluntary Contributions for the African Human Rights System; Resolution on the Importance of the Implementation of the Recommendations of the African Commission; Resolution on the Appointment of a Commissioner as a Member of the Working Group on Indigenous Populations/Communities in Africa; Resolution on the Situation of Freedom of Expression in Africa; Resolution on the Adoption of the Lilongwe Declaration on Access to Legal Assistance in the Criminal Justice System; Resolution on the Composition and Operationalisation of the Working Group on the Death Penalty; Resolution on the Human Rights Situation in Darfur; and Resolution on the Situation of Women in the Democratic Republic of Congo.



## 2.3 The Universal Declaration of Human Rights

In contrast to the prevailing circumstances at the time of its adoption, the UDHR was the first international human rights instrument that declared a broad range of SERs alongside CPRs coherently in the same instrument.<sup>156</sup> Building on the principles of the UN Charter, the UDHR provided that the rights contained in this instrument shall be enjoyed by everyone throughout the world. Its preamble recognises the ‘inherent dignity and of the equal and inalienable rights of all members of the human family as the foundation of freedom, justice and peace in the world’.<sup>157</sup> As stated earlier, the UDHR was adopted by the UN in the attempt to confront the atrocities of World War II during the latter half of the 2<sup>nd</sup> century. Consequently, the UDHR was adopted to counter those violations in an attempt to create mutual relationships among the nations and to encourage them to work for peace in the attainment of human dignity, freedom and equality.

The UDHR guarantees several substantive provisions pertaining to SERs. While it grants the fundamental provisions of non-discrimination and equality codified in Article 2, it declared a wide range of protections pertaining to SERs including the right to social security<sup>158</sup>. In elaborating on this right, it is notable that although it has received minimum attention, numerous ILO standards provide an interpretation and definition of the right to social security. This right is essential specifically when a person lacks the necessary means such as property available or is unable to secure a decent standard of living through work due to either unemployment or disability.

Conversely, the European Court of Human Rights (European Court) stressed that the “right to fair trial in the determination of civil rights and obligations encompasses social security benefits set out in national legislation.” Other substantive provisions contained in the UDHR include the right to work provided in Article 23.<sup>159</sup> A similar right in relation to work is Article 8 of the ICESCRs and several ILO conventions which have elaborated on this right. Other SERs provisions considered under the UDHR are the right to property provided in Article 17,<sup>160</sup> the rights to rest and leisure including reasonable limitation of working hours and periodic holidays

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<sup>156</sup> Universal Declaration of Human Rights (1948) (n 12above)

<sup>157</sup> Universal Declaration (n12above) preamble Para 1.

<sup>158</sup> Art. 22 UDHR.

<sup>159</sup> Art.23 UDHR.

<sup>160</sup> Art.17 UDHR.



with pay,<sup>161</sup> and the right to an adequate standard of living including food, housing and medical care.<sup>162</sup>

In light of the right to health, Article 25(1)<sup>163</sup> of the UDHR enunciates that “everyone has the right to a standard of living adequate for health and wellbeing of himself and of his family including food, clothing, housing, and medical care and the necessary social services and security in the advent of unemployment, sickness or disability’. A correlate right to Article 25 is granted in Article 12 of the ICESCRs which guarantees the most authoritative and comprehensive provision on health at the international level.

However the UDHR was a declaration and not a strictly legally binding document,<sup>164</sup> which led to the enactment of two separate but interrelated legally-binding instruments the ICCPRs and ICESCRs. The two covenants came into force almost ten years later on the 3<sup>rd</sup> January 1976 and together with the UDHR are referred to as the international bill of human rights.<sup>165</sup> It is significant that the two normative covenants constitute a comprehensive codification of human rights and fundamental freedoms. Indeed the two international covenants were the first UN human rights treaties of a general nature although they were not the first human rights treaties.

Notably, a unique feature of the UDHR is that since its inception, it has had a significant impact in shaping other treaties protecting human rights including instruments protecting CPRs and SERs at the regional and international level.<sup>166</sup> Similarly, it is noteworthy that although the UDHRs is not a legally binding document, its objectives have been adopted as benchmarks in the development of international human rights law and it is now regarded as customary international law.<sup>167</sup> As mentioned, the provisions of the UDHR have now penetrated regional and domestic

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<sup>161</sup> Art.24 UDHR.

<sup>162</sup> Art.25 UDHR.

<sup>163</sup> Art.25(1) UDHR.

<sup>164</sup> (n12above).

<sup>165</sup> See e.g. M. Baderin and R. Mc Corquodale, ‘The International Covenant on Economic, Social and Cultural Rights: Forty Years of Development’, in M. Baderin and R. McCorquodale (eds), *Economic, Social and Cultural Rights in Action* (Oxford: Oxford University Press, 2007), pp. 4–9, at p. 3.

<sup>166</sup> For a further description of the legal significance and influence of the UDHR at international, regional and national levels, see R E Asher et al, *The United Nations and the Promotion of the General Welfare* (The Brookings Institution, 1957) 674-7; H J Steiner and P Alson, *International Human Rights in Context* (Oxford University Press, 2<sup>nd</sup>ed, 2000) 139.

<sup>167</sup> See, I Brownie *Principles of International Law* 7<sup>th</sup> edn (Oxford: Oxford University Press 2008), p. 559.

law in several countries and have informed the normative content of national legislation in several constitutions.<sup>168</sup>

It is submitted therefore that this instrument is of significant importance and a relevant treaty in providing an understanding and interpretation of the SERs provisions guaranteed under the Charter. It is pertinent to discuss the ICESCRs which comprehensively deals the interpretation and enforcement of SERs at the international level and sets out legally-binding international standards compatible to the realisation of SERs. This is consistent with the salient point that the UDHR is a non-legally binding document hence only imposing ‘soft law’ obligations on States.<sup>169</sup>

## **2.4 The International Covenant on Economic, Social and Cultural Rights**

The ICESCRs is the principle UN international human rights instrument that was adopted in the attempt to convert the non-legally binding provisions of the UDHR into legally-binding State obligations and it specifically and comprehensively addresses the promotion and protection of SERs.<sup>170</sup> The ICESCRs was adopted by the UN General Assembly in 1966 together with its counterpart instrument the ICCPRs.

In addition to its anchoring provisions of Equality and Non-discrimination,<sup>171</sup> contained in Article 2, the ICESCRs provides a wide range of provisions pertaining to SERs such as the right to education, health, the right to adequate food, clothing and housing. Although SERs are protected in several international instruments, the most significant instrument that explains the nature of State obligations and determines how States must comply with the implementation of the rights guaranteed is the ICESCRs. This is contained in Article 2(1)<sup>172</sup> which provides that States have expressly undertaken to be legally bound to take steps to the maximum of their available resources to achieve progressively the full realisation of the rights in the covenant. Article 2(1) of the ICESCRs has been given extensive interpretation by the CESCRs in its General Comment Number. 3 adopted at its fifth session in 1990. The Committee has given

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<sup>168</sup> See Measures taken within the United Nations in the field of Human Rights, UN Doc. A/CONF.32/5, pp 28-30.

<sup>169</sup> See for instance the discussion by E.V.O Dankwa, C Flinterman, and S Leckie, ‘Commentary to the Maastricht Guidelines on Violations of Economic, Social and Cultural Rights’(1998) 20 *HRQ* 705.

<sup>170</sup> International Covenant on Economic Social and Cultural Rights (n 14above).

<sup>171</sup> Art 2(2) IECSCRs.

<sup>172</sup> Art 2(1)ICESCRs.

content to the words ‘within available resources’ and ‘progressive realization’, and has read the ‘core minimum obligation’ into the Covenant contending that Article 2 of the ICESCRs must not detract from the obligation of States to take immediate action in the provision of its rights.<sup>173</sup>

A comparative instrument which guarantees a range of SERs is the CRC.<sup>174</sup> Although the CRC does not qualify its rights to the obligation of progressive realisation, its obligations arise immediately and are qualified by the phrase ‘within their means. This has been interpreted to mean that what is special about SERs is only the availability of means when such are required. The obligations are otherwise as immediate as CPRs.

Similarly, the translation of these obligations in the African system poses challenges. Unlike the ICESCRs, the rights in the Charter are not subject to ‘progressive realization’ and ‘within available resources’. The Commission has illustrated that rights and obligations in the Charter are of immediate effect and must be implemented instantly notwithstanding the hostile economic conditions.<sup>175</sup> It is contended that the absence of limitations was deliberately intended by the drafters of the Charter not to single out SERs because of their adherence to the principle of indivisibility of human rights espoused in the Charter and therefore must be interpreted in the context of the document as a whole.<sup>176</sup> However as noted, it has been argued that the interpretation of the Charter should take account of other relevant international instruments and how they have been interpreted.<sup>177</sup>

The CESCRs offers vast inspiration. Through its practice of giving normative content to the rights in the ICESCRs, the Committee has given extensive definition to some of the rights in the ICESCRs and the obligations that attach to them. The obligation of States to take steps to the maximum of the available resources to achieve progressively the full realization of the rights in the Covenant has been the subject of extensive elaboration by the CECSR. Importantly, the Charter in accordance with Articles 60 and 61 obliges the Commission to draw inspiration from

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<sup>173</sup> The Nature of State Parties Obligations; UN Committee on ESCR General Comment 3, para 2.

<sup>174</sup> UN Conventional on the Rights of the Child (CRC) (n 113above).

<sup>175</sup> <http://www.achpr.org/html/africancommissiononhuman.html> Presentation of the Third Activity Report of the African Commission by the Chairman U Umzurike, to the 26<sup>th</sup> Session of Heads of State and Government of the Organization of African Unity, 9 –11 July 1990, (accessed 30<sup>th</sup> April 2014).

<sup>176</sup> De Vos ‘A new beginning? The enforcement of social, economic and cultural rights under the African Charter on Human and Peoples Rights’ Paper presented at the *University of the Western Cape AIX-University colloquium on economic, social and cultural rights in Europe and South Africa 13–15 August 2003*.

<sup>177</sup> De Vos (2003), (n 176above).

international law including the UDHR and other UN instruments adopted by the UN and other African countries in the discourse of human rights.

In the European regional context, it is notable that in interpreting the obligations of States, the Revised European Social Charter in its preamble obliges State Parties to “accept as an aim of policy to be pursued by all appropriate means both national and international and the attainment of conditions in which the rights and principles may be effectively realized.”<sup>178</sup> It has been argued that in the European context, the obligation to be pursued by all appropriate means has been interpreted to be similar to that of the ICESCRs. However it has been recognized that the requirement is difficult in that it does not explicitly allow for progressive realization or a lack resources.

In the inter-American regional context, Article 26 Chapter three of the American Convention a Chapter that specifically concerns SERs has been interpreted to mean that the obligation does not differ from the ICESCRs and the Court has determined that the economic, social, educational, scientific, and cultural standards set forth in the OAS Charter, as amended by the Protocol of Buenos Aires may be taken to be the SERs covered in the Declaration due to its status as an authoritative interpretation of the references to human rights in the OAS Charter.<sup>179</sup>

From the foregoing, it is evident that while the Charter’s interpretation of the nature of State obligations in the context of progressive realization significantly differs from the ICESCRs, the European and the inter-American interpretations are consistent with the interpretation provided under the ICESCRs. The difference within the European Social Charter and the American Declaration lies in the wording. While the wording of the European and the inter-American differ from the ICESCRs, the two treaties have provided a similar interpretation. The African Charter however differs remarkably.

Conversely, in an attempt to provide normative content to the rights contained in the ICESCRs, the practise of giving normative content to the rights has been adopted notably the Limburg Principles on the Implementation of the International Covenant on Economic, Social and Cultural Rights as elaborated by the Maastricht Guidelines on Violations of Economic,

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<sup>178</sup> The Revised European Social Charter (n 20above) Part 1 Para 1.

<sup>179</sup> Advisory Opinion OC-5/85.

Social and Cultural Rights.<sup>180</sup> While these principles are not legally binding and hence providing ‘soft law’ obligations, they have been accepted as legal interpretations of the Covenant because of the fact that they are interpretations of international experts in the discourse of international human rights law.

It is submitted therefore as evident that the ICESCRs recognises the protection of SERs at the international level and must be used as a comparable instrument containing justiciable universal norms that are applicable in interpreting the provisions of the Charter in the attempt to examine whether the SERs under the Charter are consistent with the interpretation provided under international law. The ICESCRs is the first comprehensive international treaty on SERs with binding legal obligations.

## **2.5. The International Covenant on Civil and Political Rights**

While the ICCPRs is the principle UN instrument protecting CPRs, it is significant that some of the rights that this instrument enshrines have important SERs dimensions and implications. Just like the UDHR and the African Charter, the ICCPRs emphasises the fundamental principles of Equality and Non-discrimination.<sup>181</sup> More importantly, Article 6(1) of the ICCPRs states that ‘every human being has the inherent right to life’.<sup>182</sup> In General Comment Number. 6, the HRC has emphasised that this right must not be restrictively interpreted but “States should adopt positive measures including all possible measures to reduce infant mortality and increase life expectancy especially in adopting measures to eradicate epidemics.”<sup>183</sup>

It should be noted that the HRC has found violations of CPRs in several instances through complaints pertaining SERs. Citing the case of *C v Australia*,<sup>184</sup> the Committee reiterated that the failure to attend to prisoners deteriorating mental health constitutes cruel, inhuman and degrading treatment. In the same vein, another case by the Human Rights

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<sup>180</sup> Limburg Principles on the Implementation of the International Covenant on Economic, Social and Cultural Rights, UN doc E/CN.4/1987/17; annex to 1987 (9) *Human Rights Quarterly* 122–235.

<sup>181</sup> Compare: the ICCPR, Art. 2-3. Similarly, Art 26 of ICCPR reinforces the principle of equality. See Human Rights Committee, General Comment No 28 Para 31 UN Doc HRI/GEN. 1/Rev 6 (2000).

<sup>182</sup> Art 6(1) ICCPRs.

<sup>183</sup> The Right to Life; Human Rights Committee General Comment 6 (Sixteenth session 1982), Para 5.

<sup>184</sup> *C v Australia case*, Communication No 900/1999, CCPR/C/76/D/900/1999.

Committee is the *Lantsova v The Russian Federation*,<sup>185</sup> where the Committee held that the failure to take steps to determine a prisoner's health condition and provide medical care violated his right to health. It follows that while this instrument focuses on CPRs, it can be used as a powerful tool in advancing SERs. It is submitted that this cross-interrelationship of rights not only expands on the judicial recognition and protection SERs, it underpins the indivisibility and interrelatedness of human rights as espoused under the Charter.

## **2.6 Comparison of the Socio-economic Rights Provisions under the African Charter and the International Covenant on Economic, Social and Cultural Rights**

The African Charter is an African regional human rights instrument that is intended to promote, protect and interpret human rights on the African continent including SERs and it binds all African States that are party to it by ratification. The Charter contains a cluster of SERs provisions alongside CPRs. These rights are not isolated in a separate section of the Charter or designed as directive principles of state policy but they articulate an indivisible, interrelated and interconnected normative framework providing for all three dimensions of rights in a single instrument.

Comparatively, the ICESCRs is an international instrument that encapsulates SERs and it binds all States that are party to it including African States. Both instruments the Charter and the ICESCRs provide supervisory monitoring bodies the Commission and the Committee respectively in the interpretation and implementation of SERs. It is pertinent to provide a comparative analysis of the provisions of the Charter and the Covenant in their interpretation of the SERs in an attempt to examine whether the Charter is consistent with international norms. The provisions of the Covenant are universal norms internationally accepted and they provide applicable legal standards alongside which the Charter's provisions on SERs must be evaluated.

Importantly, Article 1 of the Charter obliges states to recognise the rights, obligations and the fundamental freedoms provided in the Charter and to adopt measures for their effective implementation. This provision has been interpreted in the context of the domestication of the

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<sup>185</sup> *Lantsova v. The Russian Federation case*, Communication No 763. CCPR/C/74/D763/1997 (Accessed 15 April 2015).



Charter into national law.<sup>186</sup> In a similar vein and linked with this obligation is the obligation contained in Article 62<sup>187</sup> of the Charter according to which member states are obliged to “submit a report every two years which indicates legal and other measures they have adopted in the implementation of the rights contained in the Charter” including SERs.<sup>188</sup>

Further, Article 2 of the African Charter guarantees the fundamental provision of Non-discrimination to the rights enshrined in the Charter “without differentiation of any kind including race, ethnic group, skin colour, language, and sex, political or other social origin.”<sup>189</sup> Congruently, this provision is codified in the ICESCRs in article 2(2) phrased in similar wording to the Charter and it provides that the rights guaranteed in the covenant must be exercised on a non-discriminatory basis. This key provision is consistent with the Equality and Non-discrimination requirements guaranteed in other regional human rights documents in the European and America regions.<sup>190</sup>

In addition to CPRs, the Charter guarantees economic rights such as the right to property. Article 14<sup>191</sup> of the African Charter provides that “the right to property shall be guaranteed and may only be restricted in the interest of public need or in the general interest of the community”. In so far as the right to property is concerned, it is notable that the ICESCRs explicitly eliminates this provision. In defining the right to property under the Charter, it should be noted that the Charter limits this right by sanctioning the limitation of the right to property in the interest of public need or in the general interest of the community.

In analysing the right to property under the Charter, it is notable that the grounds for expropriation are not elaborated upon. The right to property has been a controversial right. While the ICESCRs excludes a provision on this right under international standards, the UDHR entrenches the right to property in Article 17,<sup>192</sup> as does Protocol 1 to the European Convention on Human Rights and the American Convention. It is notable that during that drafting process of

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<sup>186</sup> See G Naldi, *The Organization of African Unity—An Analysis of its Role*, New York 1989, p. 114. London Mansell; P Kunig, *The Protection of Human Rights by International Law in Africa*, in: *German Yearbook of International Law* 25 (1982), pp. 138 168, 151.

<sup>187</sup> Compare, Art. 62 and Art.1 African Charter.

<sup>188</sup> See Statements pertaining to state reporting methods under the African Commission.

<sup>189</sup> Art 2, African Charter.

<sup>190</sup> Compare: Art.1 American Convention & Art.14, European Convention.

<sup>191</sup> Compare: Art 14, African Charter.

<sup>192</sup> Art. 17 UDHR



the relevant rights, the right to property proved too divisive and it was not possible to incorporate it within the two international covenants.

In a significant debate, developing countries argued against providing absolute guarantees for property rights. They campaigned for a State to be able to nationalise foreign assets and to restrict the rights of foreign nationals. A confirmation of this view is provided in Article 2(3)<sup>193</sup> of the ICESCRs which contends that “developing countries with due regard to human rights and their national economy, may determine to what extent they would guarantee the economic rights recognised in the present covenant to non-nationals”. It has been noted that economic rights such as the right to property serve as a basis for entitlements which can ensure an adequate standard of living while on the other hand it is a basis of independence and therefore of freedom.

Secondly, under international standards, the ICESCRs provides for the right to work in Article 6.<sup>194</sup> A correlate right under the UDHR is Article 23. Article 6 of the ICESCRs stipulates that ‘the right to work includes the right of everyone to have an opportunity to work and gain a living by work which one freely chooses.’ Among regional instruments, this right is guaranteed in the European Social Charter and the Treaty of the European Union. The African Charter is explicit in its provision on the right to work provided in Article 15.<sup>195</sup> Compared to the ICESCRs, Article 15 of the African Charter grants ‘the right to work and obliges states that every individual shall have the right to work under equitable and satisfactory conditions and shall receive equal pay for equal work.’ Within the African context, it is notable that equal pay for equal work is also aimed at ensuring equality for women. Also, it is significant that all rights guaranteed in the Charter are not citizen-related providing for every individual a right to work which is relevant in view of the problem of refugees in several African countries seeking for work<sup>196</sup> in the attempt to meet their socio-economic needs.

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<sup>193</sup> Compare: Art.2(3) ICESCR.

<sup>194</sup> Art 6 African Charter.

<sup>195</sup> Compare; Art 6 ICESCR & Art 15 African Charter.

<sup>196</sup> In accordance with the UNHCR, by July 2006 there were 3.6 million refugees in Africa. Among these refugees there are approximately 180,000 in Ethiopia, Guinea and Uganda, 510,000 in Tanzania, 215,000 in Zambia and 203,000 in Kenya; compare: [www.unhcr.de](http://www.unhcr.de). Not included in these figures are the numerous domestic refugees (1.3 million) who do not enjoy any legal advantage in this connection, however.

In analysing the rights to work in both instruments, it is notable that the right to work under the ICESCRs deals exclusively with access rights and yet persons who do not have access to work are the main concern. Although the ICESCRs entrenches this right, the right to work itself is not comprehensively dealt. Much detail has been elaborated on discriminatory access to work than on the right to work itself. It can be said that although the ICESCRs and the Charter provide for the right of everyone to work, the right to work under the Charter is more explicit and comprehensive than its counterpart right in the ICESCRs.

Comparatively, the European Social Charter provides comprehensive and explicit provisions pertaining to the rights to work. Articles 1, 2, 3, 4, 5, and 6<sup>197</sup> all provide for the right to work or for workers' rights. The Revised Social Charter 1996 further guarantees several provisions relating to work. Notably, Articles 21, 22, 24, 25 all deal with workers' rights. It is notable that contrary to the African regional system, the European Charter is comprehensive and wide-reaching in its protection and enforcement of the right to work.<sup>198</sup>

Under international standards, the essential right to health is provided in the ICESCRs in Article 12.<sup>199</sup> In defining the right to health, Article 12 provides that “the state shall recognise the right of everyone to the highest attainable standard of physical and mental health.” In so far as the right to health is concerned, Article 16(1) of the African Charter mirroring the ICESCRs provides that “every individual shall have the right to enjoy the best attainable state of physical and mental health.” Subsection (2) of Article 16 places a duty on the state to take necessary measures to protect the health of their people and to ensure that they receive medical attention when they are sick. Articles 16(1) and (2) impose obligations on states to provide healthcare to everyone and to ensure that this right is fully realised in and at all times.

In analysing Article 12, the CDESCRs has in its General Comment Number 14 emphasised that the right to health is an inclusive right in that it does not only entirely entail the right to health, it inextricably encompasses the Underlying Determinants of Health such as safe and potable drinking water, adequate sanitation, and adequate supply of food, nutrition and housing,

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<sup>197</sup> Compare; Art.15 African Charter, Art. 1, 2,3,4,5 & 6 European Social Charter.

<sup>198</sup> Compare; Art.15 African Charter, Art. 21, 22, 24, & 25 European Social Charter; Art. 6 ICESCRs.

<sup>199</sup> Art. 12 of the ICESCRs.

access to healthy working and environmental conditions and access to information including information of sexual and reproductive health.

In contrast to the ICESCRs, the African Commission's Guidelines on Economic Social and Cultural Rights mirroring the CESCRC provide these Underlying Determinants of Health in similar phrasing notably, safe and potable drinking water, adequate supply of nutrition and housing and the provision of access to information on sexual and reproductive health as essential tenets in the realisation of the right to health. Although these Guidelines are not binding on State Parties and therefore form part of 'soft law' in ensuring the attainment of this right, it can be said that both instruments the Charter and the ICESCRs have comprehensively and explicitly provided assertive and progressive interpretation to the essential right to health.

To the contrast, Article XI<sup>200</sup> of the American Declaration of the Rights and Duties of the Man establishes the right to the preservation of health through sanitation and social measures such as food, clothing, and housing and medical care although the article conditions its implementation on the availability of public and community resources.<sup>201</sup> Similarly, Article 10<sup>202</sup> of the Protocol of San Salvador sets forth a right to health for all individuals as "the enjoyment of the highest level of physical, mental, and social wellbeing" and sets out measures to be adopted by member States.

In the European context, the European Social Charter defines the right to health as the right to the protection of health for the attainment of which it stipulates health promotion, education, and disease prevention activities. It is submitted that the right to health has been given extensive and comprehensive interpretation under international standards and within the three regional human rights frameworks the African, European and inter-American regional systems.

Similarly, Article 13 of the ICESCRs guarantees the right to education.<sup>203</sup> It is notable that of all the SERs entrenched in the Covenant; the right to education is the most explicit of all the provisions contained in the Covenant. This is because the ICESCRs devotes two Articles, 13 and 14 on this right and comprehensively elaborates on this right. In as far as the right to

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<sup>200</sup> Article XI American Declaration.

<sup>201</sup> Yanomami Tribe Case No 7615 (Brazil) Annual Report, 1984- 1985, 24 -

<sup>202</sup> Art.10 Protocol of San Salvador.

<sup>203</sup> Art.13 of the ICESCRs.

education is concerned; Article 17<sup>204</sup> of the Charter covers a cluster of interrelated rights including the right to education. While the Charter entrenches the essential right to education, the Charter's approach on the content of the right to education that every individual is entitled to is not comprehensively defined. In analysing the right to education in both instruments the Charter and the ICESCRs, it can be concluded that the right to education contained in the ICESCRs is more assertive and comprehensive than its correlate right in the African Charter.

In tackling cultural rights, the Charter stipulates in Article 17 'the right of individuals to participate freely in the cultural life of the community' and imposes an obligation on the State to promote and protect the morals and traditional values recognised by the community. Under Article 27 of the UDHR and Article 15 of the ICESCRs, cultural rights contain the following elements: the right to benefit from the protection of the moral and material interests resulting from any scientific literacy, the right to enjoy the benefits of scientific progress and its applications and the right to take part in cultural life. This right is also closely linked however to other rights such as the right to education UDHR Article 26, Articles 13 and 14 of the ICESCRs, and Articles 28 and 29 of the CRC.<sup>205</sup> Remarkably, this right is also an essential element to economic and social rights. An important aspect of cultural rights is the right to preserve the cultural identity of minority groups ICCPRs, Article 27 and CRC Article 30,<sup>206</sup> which also has implications for civil and political as well as SERs.<sup>207</sup>

A striking component of the Charter is the entrenchment of people's rights. Some of the peoples' rights enunciated in the Charter specifically Articles 21 and 22 are also economic rights. Notably, cultural rights are the rights to education, the right to take part in the cultural life of the community, and the promotion and protection of morals and traditional values by the State.<sup>208</sup> It is clear, however, that the collective rights listed in Articles 20-24 also have important SERs dimensions and implications. Odinkalu contends that these rights are relevant for communities

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<sup>204</sup> Compare: Art. 17 African Charter, Art. 13 and 14 ICESCRs.

<sup>205</sup> Compare: Art 26 UDHR, Art 13 and 14 ICESCR, Art. 28 & 28 CRC.

<sup>206</sup> See also the United Nations Declaration on the Rights of Persons belonging to National or Ethnic, Religious and Linguistic Minorities, General Assembly Resolution 47/135 of 18 December 1992.

<sup>207</sup> See R Stavenhagen, *Cultural Rights: A Social Science Perspective* in Eide A., Krause C., & Rosas.A. eds *Economic Social and Cultural Rights A text book* 2<sup>nd</sup> ed Martinus Nijhoff Dordrecht pg 85-110, 2011.

<sup>208</sup> (n 206above).

such as individual, subsistence farmers and fishermen who seek guarantees of physical and economic security for themselves and their families.<sup>209</sup>

In addition, Article 4<sup>210</sup> of the Charter provides for the right to life. The right to life is a fundamental provision to the full enjoyment of all human rights including CPRs. It is pertinent to note that this right has a significant bearing in the realisation and attainment of the full corpus of human rights guaranteed in both instruments the Covenant and the Charter and in the two regional human rights systems the European and the inter-American regional systems.

In tackling family matters, Articles 18<sup>211</sup> of the Charter accords specific provisions for the protection of women, children and the disabled. Worthy of note is Article 18 (3)<sup>212</sup> which obliges that “the State shall ensure the elimination of every kind of discrimination against women and also ensure the protection of the rights of the woman and the child as stipulated in international declarations and conventions.” It is notable that Article 18 is wide ranging and covers at least four rights. Much as it recognises the family as the natural unit and basis of society, it places a special duty upon the State to take care of the physical health and morals of the family.

In a comparative analysis of the of family as the natural unit, the provisions draw upon international provisions notably Article 16 of the UDHR<sup>213</sup>, Article 23 of the ICCPRs<sup>214</sup> and Article 10 of the ICESCRs<sup>215</sup>. It is notable that these provisions emphasise on what it is already known to be matters of pertinence on the African continent.<sup>216</sup>

In the African context, Bradely and Weisner have contended that the family in its nuclear and extended form is a significant social unit embodying important values.<sup>217</sup> Meillasoux has argued that the elderly generally hold a privileged position and must not only be protected but

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<sup>209</sup> Odinkalu (2001) 346-347

<sup>210</sup> Art. 4 African Charter.

<sup>211</sup> Art. 18 African Charter.

<sup>212</sup> Art. 18(3) African Charter.

<sup>213</sup> Art. 16 UDHR.

<sup>214</sup> Art. 23 ICCPR.

<sup>215</sup> Art.10 ICESCRs.

<sup>216</sup> Compare Art 16 UDHR, Art 23 ICCPRs & Art 10 ICESCRs.

<sup>217</sup> C. Bradley and T.S. Weisner ‘Introduction: Crisis in the African Family’ in T.S Weisner et al. (eds.) AFRICAN FAMILIES AND THE CRISIS OF SOCIAL CHANGE (London: Bergin and Garvey, 1997) xxvi.

should also be respected.<sup>218</sup> It has been recognised that in the event of family disputes, solutions should be sought to protect the unity of the family where possible.<sup>219</sup> On the contrary scholars such as Ankumah have re-affirmed that it is the specific framing of the promotion and preservation of the family as a duty of the individual which raises concern.<sup>220</sup> It is notable that Article 18(3) is a comprehensive clause concerning prohibition of discrimination against women.

Importantly, some of the rights that are enshrined in the ICESCR but not explicitly provided under the Charter include the rights to rest, leisure, reasonable limitation of working hours, periodic holidays with pay, and remuneration (Article 7(d), ICESCRs; trade union rights (Article 8, ICESCRs), the right to social security Article 9, ICESCRs; the right to an adequate standard of living, including adequate food, clothing, housing and continuous improvement of living conditions Article 11, ICESCRs; and the prohibition of forced labour.

In providing an analysis of Article 18 which deals with family matters, it is notable that the African Charter does not mention the essential right to housing as the covenant did in its entrenchment of that right. The African Charter in interpreting the right to housing has creatively through applying the indivisibility approach implied other rights contained in the Charter to include the right to adequate housing and the protection against forced evictions.

According to Baricako,<sup>221</sup>

The omission of the right to social security was not an oversight but rather takes into account the current economic environment in the majority of African States, whose resources could not adequately support a social security system. It is therefore left to the discretion of each State to provide its own social security system.

A salient feature concerning the realisation of SERs in Africa as in several developing countries is that these rights cannot be divorced from the availability of resources. In view of this argument, Scholars such as Baderin have argued that the question of underdevelopment and

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<sup>218</sup> See; C Meillasoux, 'La conquête de l'ânesse' (trans, *the conquest of the older*) in C. Attias-Donfut. and L. Rosenmayr. (eds.) *Vieillesse en Afrique* (Paris: Presses Universitaires de France, 1994)49.

<sup>219</sup> Bradley and Weisner in Weisner (n 216above) (1997).

<sup>220</sup> Ankumah (1996) 171.

<sup>221</sup> G Baricako 'The African Charter and the African Commission on Human and Peoples' Rights: A Mandate to Promote and Protect Economic, Social and Cultural Rights in Africa' in International Commission of Jurists *Report of A Regional Seminar on Economic, Social and Cultural Rights (Banjul, The Gambia, 9-12 March 1998)* (Geneva: International Commission of Jurists, 1999) 45, 51.



inadequate resources creates a paradox for SERs in Africa. Although the realisation of SERs will lead to human, economic and social development in the region, the aforementioned rights cannot be fully realised without economic resources in the first place.<sup>222</sup>

Importantly, Odinkalu remarkably argued that some of the omitted rights ‘are not outside the scope of interpretive possibilities’ open to the African Charter.<sup>223</sup> In a similar vein, Ankumah explained that the right to rest, leisure and limited working, paid holidays are covered by the right to work under equitable and satisfactory conditions, provided for under Article 15 of the African Charter, and the right to assemble could be interpreted as the right to join a trade union.<sup>224</sup> While the Charter provides an interpretation of the right to housing through the indivisibility approach, it can be concluded that the Covenant in Article 11 is more comprehensive and assertive than the similar right under the African Charter.

In interrogating the issue of limitations of rights under the Charter, it is significant that contrary to the Covenant, the Charter does not contain explicit and well defined limitations that expressly limit the duty of the state to give effect to them progressively in a reasonable manner and as much as resources are available to the task. While the SERs contained in the ICESCRs are made subject to resource constraints, the Charter places no such limitation on the duty of the States. In expanding on the issue of limitations of rights under the Charter, a further discussion on limitations will be examined in section 2.8 below.

In light of the above discussion, it is evident that comparatively, some significant distinctions in the interpretation between the ICESCRs and the African Charter indicate weaknesses of the African Charter. Much as the Charter entrenches a broad range of provisions pertaining to SERs, it does not explicitly go quite as far as the ICESCRs in protecting essential provisions such as the right to housing, the right to food and the right to water. In a continent such as Africa with widespread and high levels of poverty, underdevelopment and deaths, these rights are essential not only in improving the general welfare and living standards of people; they

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<sup>222</sup> MA Baderin ‘The African Commission on Human and Peoples’ Rights and the Implementation of Economic, Social, and Cultural Rights in Africa’ in M.A Baderin and McCorquodale R. (eds.) *Economic, Social and Cultural Rights in Action* (Oxford: Oxford University Press, 2007) 139, 142.

<sup>223</sup> Odinkalu (2001) 341

<sup>224</sup> Ankumah (1996),145.



are also fundamental provisions in enhancing the development of the continent and providing a holistic-approach to the realisation of all other human rights.

Similarly, it is notable that while some of the rights entrenched in the Charter mirror the ICESCRs, there are important distinctions; for example there are a number of provisions which are essential in Africa such as the right to development which are not protected in the Covenant although they are recognised by the UN.<sup>225</sup> Additionally, it is noteworthy that provisions such as the right to health contained in the Charter and other international and regional instruments have been given comprehensive interpretation.

From the foregoing discussion, it is comparatively evident that the African Charter does not go quite as far as the ICESCRs and the European Social Charter in explicitly protecting some fundamental SERs such as the rights to housing and the rights to work. However it is further evident that both instruments provide for a wide range of SERs. The difference lies in the interpretations attached to the relevant SERs provisions. As evident from the discussion, it is submitted that these provisions provide protection for SERs both at the international level and in Africa and the African Charter can utilize the interpretations of these instruments in appraising notable weaknesses in the provisions of the Charter so as to improve the normative content of rights under the Charter.

## **2.7. The Recognition of Socio-economic Rights under the European Regional System**

### **2.7.1 The 1961 Original European Social Charter**

Although the European Convention is the main instrument protecting human rights in the European region, this instrument focuses on the protection of CPRs. The European Social Charter (1961) which was revised in 1966 is the principle instrument aimed at the protection of SERs and it was adopted to promote and enhance the social standards within the European region. While its status is that of a Charter and not a treaty, it does guarantee a broad range of SERs that states must implement. The Social Charter came into force in 1999. It engrains an extensive range of SERs provisions provided in the initial 1961 text such as the right to fair

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<sup>225</sup> See United Nations General Assembly Declaration on the Right to Development GA Res 41/128, Annex, 41GAOR Supp (No 53).

working conditions and pay, the right to union membership, the right to work and to professional training, social security rights and family assistance.

More importantly, the Revised Charter (1996) expands on the provisions guaranteed in the original Charter by strengthening on rights pertaining to women equality and it provides additional substantive provisions such as the right to adequate housing. While the original Charter was revised, this section shall focus on the original Charter which guarantees the normative framework on SERs in the Europe.

The Social Charter contains a broad variety of provisions pertaining to SERs, Article 1 provides for the right to work,<sup>226</sup> while Article 2 grants the rights to just conditions of work.<sup>227</sup> The right to healthy working conditions<sup>228</sup> are spelt out in Article 3, whereas Article 4 guarantees the right to remuneration.<sup>229</sup> Furthermore, the right of workers to organize<sup>230</sup> are contained in Article 5 while the right of workers to bargain collectively<sup>231</sup> are guaranteed in Article 6 of the Social Charter. The right of children and young persons to protection<sup>232</sup> are recognised in Article 7 while Article 8 grants the right of unemployed women to protection.<sup>233</sup> Article 11 provides the essential right to health,<sup>234</sup> while the right to social security is provided for under Article 12 of the European Social Charter.<sup>235</sup>

In monitoring compliance to the implementation of SERs provisions under the Charter, State parties are obliged to submit annual reports. In accordance with Article 25<sup>236</sup> of the Social Charter, the Committee of Social Rights which is a Committee of independent experts authorized with monitoring and implementation of member States to the Social Charter examines the annual national reports and adopts conclusions on the reports that States must comply to.

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<sup>226</sup> Art 1 of the European Social Charter.

<sup>227</sup> Art. 2 of the European Social Charter.

<sup>228</sup> Art. 3 of the European Social Charter.

<sup>229</sup> Art. 4 of the European Social Charter.

<sup>230</sup> Art. 5 of the European Social Charter.

<sup>231</sup> Art. 6 of the European Social Charter.

<sup>232</sup> Art.7 of the European Social Charter.

<sup>233</sup> Art. 8 of the European Social Charter

<sup>234</sup> Art.11 of the European Social Charter.

<sup>235</sup> Art.12 of the European Social Charter.

<sup>236</sup> Art.25 of the European Social Charter.

In addition to these duties, the European Committee of Social Rights is empowered to hear individual complaints from states on issues relating to SERs violations. A pertinent case is the *European Roma Rights Centre V. Greece*<sup>237</sup> where the Committee noted that the right to housing permits the exercise of many other rights including both CPRs and SERs. The Committee noted that there was consistent case law on the point that in order to satisfy the right to family life, states must promote the provision of an adequate supply of housing for families.

Several of the SERs enshrined in the Social Charter are guaranteed although in varying proportions in the African Charter, the ICESCRs and the UDHR, including the rights to work, health, social security and the right of workers to organise. However, in terms of its entrenchment of rights, the Charters provisions are heavily reliant to the contents of the UDHR than its counterpart European and inter-American regional human rights systems.<sup>238</sup> The difference lies in the interpretation of the relevant rights by the relevant instruments.

It is submitted therefore that this instrument protects a wide range of SERs provisions including the right of every family, migrant workers and their families, housing rights of elderly persons and it safeguards those under poverty and social exclusion and is therefore an applicable devise in the protection and recognition of SERs within the European region.

### **2.7.2 The European Union Charter of Fundamental Rights**

Worthy of mention is the European Union Charter of Fundamental Rights as one of the core documents in the European regional system that provides normative standards of SERs. Although this document does not include a specific right to housing, Articles 7 and 34(3)<sup>239</sup> have notable inferences to the right to housing. Subsequently, Article 7 declares the right to the respect for the home as one of the fundamental rights to privacy and family life. This right can be interpreted in the widest possible way to encompass a range of issues with important SERs dimensions.

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<sup>237</sup> *European Roma Rights Centre V Greece*, Compliant No 15./2003.

<sup>238</sup> See BO Okere 'The protection of human rights in Africa and the African Charter on Human and Peoples' Rights: Comparative analysis with the European and American systems' (1984) 6 *Human Rights Quarterly* 141-159; P Kunig 'Regional protection of human rights: A comparative introduction' in Cohen *et al* 31-58;

<sup>239</sup> EU Charter of Fundamental Rights adopted by the European Parliament, the European Council and the European Commission in Nice on 7 December 2000,(2000/C 364/01), Articles 7 and 17.

Further, the European Union Charter of Fundamental Rights contains a separate provision on the right to property provided in Article 17(1) that covers the right to possession. More importantly, Article 34(4) which grants the rights to social security and a right to social assistance permits protection for the right to social and housing assistance. It can be concluded that this instrument is an applicable and a valuable avenue for the protection of SERs in the European regional system.

In conclusion, it is submitted that unlike the international system for the protection of SERs, the European human rights normative framework provides a stronger and comprehensive normative framework with explicit and concrete protection for the recognition of specific important provisions such as the right to work and the rights to housing. These rights have important ramifications to the realisation of all SERs as they provide the means for the attainment of other socio-economic necessities. It is noted in this submission that the African and inter-American system can learn from the experiences of the European system in appraising their system following a similar trend as the European system.

## **2.8. The Recognition of Socio-economic Rights under the inter-American regional System**

### **2.8.1 The American Convention on Human Rights (Pact of San Jose)**

Although, the American Convention is the principle instrument protecting CPRs within the American region,<sup>240</sup> Article 26, Chapter III of the Convention specifically relates to SERs. This article underscores the general commitment of states to adopt measures with the view to the full realisation of SERs. Importantly, Article 26 provides that “the States Parties undertake to adopt measures...the full realisation of the rights implicit in the economic, social, educational, scientific, and cultural standards.”<sup>241</sup> This instrument also defines the right to property which the ratifying States have agreed to respect and ensure under Article 21(1).<sup>242</sup>

It should be mentioned that the inter-American Commission the institutional body authorized with implementing the Convention has in several instances found violations of CPRs

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<sup>240</sup> The American Convention on Human Rights was adopted by the Inter-American Specialised Conference on Human Rights on 22<sup>nd</sup> November 1969 at San Jose’ and entered into force on 18<sup>th</sup> July 1978 (n 25above)

<sup>241</sup> Art 26 inter-American Convention.

<sup>242</sup> Art. 21(1) inter-American Convention.

which have important SERs implications. It is submitted that while this instrument focuses CPRs, it can be invoked as an effective device in advancing the protection of SERs.

## **2.8.2. The Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social, and Cultural Rights**

Although SERs were expressly guaranteed under the American Declaration in 1948, these rights were unfortunately excluded in the legally-binding Convention in 1969. However, in interpreting the rights contained in these instruments, the inter-American Commission and the inter-American Court have consistently held that the two instruments must be read together and with that approach, they have sought to judiciary protect the SERs guaranteed in the declaration.

While the American Convention explicitly protects CPRs, the subsequent adoption of the Protocol of San Salvador was specifically aimed to promote, protect, and fulfil the SERs in the inter-American region. Contrary to Article 26 of the American Convention the only convention article which implicitly refers to SERs, the Protocol entrenches a catalogue of provisions pertaining to SERs. The Protocol of San Salvador is the principle treaty in the region intended to promote and protect SERs. The SERs enshrined in the protocol include; Article 10<sup>243</sup> which grants the right to health, Article 11<sup>244</sup> guarantees the right to a healthy environment while the right to food is provided in Article 12.<sup>245</sup> Similarly, Article 13<sup>246</sup> provides the fundamental right to education. Other provisions such the right to work and the right to just and satisfactory conditions of work are contained in articles 6 and 7 respectively.<sup>247</sup>

In addition to the above substantive SERs, the Protocol affords the right to trade unionization contained in Article 9,<sup>248</sup> and cultural rights are provided in Article 14.<sup>249</sup> Much like the African Charter, the Protocol of San Salvador contains rights dealing with the family. In tackling family rights, the protocol guarantees the rights to family including, children, the handicapped and elderly in Articles 15 to 18. It is notable that in implementing the aforementioned provisions contained in the protocol, member states are required to submit

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<sup>243</sup> Art.10 of the Protocol of San Salvador.

<sup>244</sup> Art.11 of the Protocol of San Salvador.

<sup>245</sup> Art.12 of the Protocol of San Salvador.

<sup>246</sup> Art.13 of the Protocol of San Salvador.

<sup>247</sup> Art.6 & 7 of the Protocol of San Salvador.

<sup>248</sup> Art.9 of the Protocol of San Salvador.

<sup>249</sup> Art.14 of the Protocol of San Salvador.

periodic reports on the progressive measures they have taken to ensure the promotion, protection and implementation of the rights contained in this document.<sup>250</sup> These reports are to be transmitted to the Commission and other specialised organizations in the inter-American region. Importantly, much like the African Commission, the American Commission may use these reports to formulate observations and recommendations pertaining to the status of SERs in individual states which are published annually in a specialized report.

In protecting the SERs in the inter-American region, it is notable that the protocol in its preamble underscores the critical need for the implementation of these rights.<sup>251</sup> Indeed the preamble reaffirms the indivisibility of CPRs and SERs and emphasizes the essentiality of SERs in the consolidation of democracy and development in the American region.<sup>252</sup> Conversely, the indivisibility of SERs recognized under the protocol is underscored by the African Charter and the ICESCRs. It is significant that the protocol establishes a state reporting system and the individual petitions system administered by the convention in the protection of these rights.

From the foregoing discussion, it is comparatively evident that the catalogue of rights which the African Charter guarantees differs from its European and inter-American counterparts in several important distinctions. Firstly, it is notable that the Charter guarantees not only rights but it further pronounces duties and enshrines both individual and people's rights. In addition to CPRs,<sup>253</sup> the African Charter entrenches a range of economic and social rights.<sup>254</sup> Furthermore, the Charter permits States to impose more extensive limitations on the exercise of the rights it proclaims than the European and inter-American instruments. The Charter also excludes a derogation clause which raises the question whether all rights engrained in this instrument are derogable. In line with this argument and in contrast with the European and inter-American, it is noteworthy that Article 15 of the European Convention in conjunction with Article 27 of the

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<sup>250</sup> Art.19(1) Protocol of San Salvador. The Commission deliberately incorporated the guidelines for preparation of such reports in its rules of procedure (which can be easily amended), rather than in the Protocol itself. It thereby hoped to avert the experience of ESCR reporting under article 42 of the Convention, which established an inadequate system of protection that has not functioned since the Convention has been in force. See Annual Report of the Inter-American Commission on Human Rights 1985–1986, at 200, OEA/Ser.L/V/II.68 Doc. 8 rev. 1 (1986)

<sup>251</sup> Protocol of San Salvador preamble. Para. 3, 6.

<sup>252</sup> Protocol of San Salvador preamble. Para. 3, 6.

<sup>253</sup> C Heynes, Civil and Political Rights in the African Charter, in "The African Charter on Human and Peoples' Rights, The System in Practice. 1986-2000, at 137 (Malcolm D. Evans & Rachel Murray e ds., 2002) ,

<sup>254</sup> CA Odinkalu, Implementing Economic, Social and Cultural Rights under the African Charter on Human and Peoples 'Rights, in "The African Charter on Human and Peoples' Rights, The System in Practice.1986-2000,at 178 (Malcolm D. Evans & Rachel Murray e ds., 2002),



American Convention specifies that rights may be derogated from in specific times of national emergency such as of war or other public emergencies.

Secondly, the catalogue of rights guaranteed in the Charter was heavily contingent on the rights proclaimed in the Universal Declaration of Human Rights and the twin covenants. More distinctively, Africa's historical traditions and customs are uniquely reflected in some provisions of the Charter specifically those dealing with duties of individuals and family matters.<sup>255</sup> Thirdly, apart from excluding some rights, many of the rights it enumerates are drafted with less judicial precision and permit more restrictions than the two regional instruments.<sup>256</sup> Unlike the European and inter-American systems in dealing with violations of SERs, the African system envisions not only inter-state and individual communication procedures, but also adopts special procedures for situations of gross and systematic violations.

Conversely, the African regional system faces several challenges which have made it lag behind its counterparts the Europe and the Americas. First, the adoption of the African Charter with its African nature<sup>257</sup> has raised debate in international human rights sphere on the universal pluralistic nature of human rights. It has been a question of much contention as to whether the African Charter was meant to pursue a trend towards African culturalism or to reinforce universal human rights norms.<sup>258</sup>

To the contrary, some positions in regional and international human rights instruments conflict with African cultural norms. These contradictions have served as stumbling blocks for the African system to serve as a vehicle for the realization of universal norms. However, as already noted, much like the other regional systems for their protection of human rights, the African system has its own uniqueness, concerns and distinctions which influenced its

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<sup>255</sup> See F Viljoen, *The African Charter on Human and Peoples' Rights: The Travauxprepara-toires in the Light of its Subsequent Practice*, 25 HUM.R TS.L .J.3 13, 319 (2004).

<sup>256</sup> The Charter, in Part II (dealing with duties) merely mentions "collective security" but not "public emergency." See African Charter, Art 27 (2). In view of the difference in character, scope, and circumstances in which limitations and derogations may be imposed, it is untenable to attempt to argue that the many limitation clauses (claw-backs) make a derogation clause unnecessary. See, for example, Article 8 provides that the freedom of conscience and religion may only be limited in the interest of 'law and order'.

<sup>257</sup> In its Preamble, the Charter bases itself on "the virtues of African tradition and the values of African civilization" and that the duty to promote human rights has to take into account "the importance traditionally attached to these rights and freedoms in Africa." See African Charter 14 551-52.

<sup>258</sup> See MW Mutua *The Banjul Charter and the African Cultural Fingerprint: An Evaluation of the Language of Duties*, 35 VA.J. INT'L L. 339 (1995).



innovations. This notwithstanding, like the other regional systems, the African system was inspired by universal norms as demonstrated in the UDHR and other international instruments. The innovative aspects of the Charter merely enhance the human rights body and are not intended to detract from the universal scope. The Charter deferred to the point of universalism in the preamble <sup>259</sup> and in Articles 60 and 61.<sup>260</sup> As will be seen in Chapter three in the appropriate court cases, the Commission has adopted principles established in the case law of other international human rights institutions.

Furthermore, the Charter eliminates a range of rights and does not interdict certain notable violations. For instance, the Charter does not protect the right to privacy, right to respect for private and family life, home, nor does it invoke provisions on forced labour a situation faced by most African States. Also, it should be noted that there is no right to vote and be elected in periodical elections by secret ballot, nor does the Charter encompass democratic concepts such as free and fair elections.<sup>261</sup> This is despite the view that several African States are faced with unfair elections, corrupt and inept leadership and undemocratic tendencies on a daily and massive basis. The right of nationals not to be expelled and the right to fair trial<sup>262</sup> suffer various shortcomings. Importantly, the many claw-back clauses tend to water down the contents of the rights and give wide powers to states to derogate from their human rights obligations.<sup>263</sup>

### **2.8.3 The Elimination of Discrimination**

The fundamental provisions of Equality and Non-discrimination in the enforcement of SERs are of central importance to the realisation of SERs. It should be mentioned that

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<sup>259</sup> One of the objectives of the Charter is to "promote international cooperation having due regard to the United Nations and the UDHR." *See* African Charter, Art. 45(3), at 561. In the Preamble, African states reaffirm "the adherence to the principles of human and people's rights and freedoms contained in the declarations, conventions and other international instruments adopted by the OAU, the Movement for Non-Aligned Countries and the United Nations."

<sup>260</sup> Art. 60

<sup>261</sup> In its 19th session, the Commission adopted a resolution on "electoral process and participatory governance." Applauding elections in Benin, the Sierra Leon, and the Comoros as part of the transition to democratic rule in these countries, the Commission asserted that elections are the only means by which people can elect democratically the government of their choice in conformity with the Charter. It called on governments to take measures to ensure the credibility of electoral processes, and stressed the duty of states to provide the material needs of the electoral supervisory bodies. Ninth Annual Activity Report Annex VII at 9.

<sup>262</sup> The Commission has tried to remedy some of the omissions in its resolution on Right to Recourse Procedure and Fair Trial.

<sup>263</sup> Many of the clauses embody nebulous and open-ended clauses and are not qualified as "necessary in a democratic society" as found in the European and American Conventions. *See* Arts. 8-11 of the European Convention and Arts. 15-16 of the American Convention.

implementation of this right has important implications in the eradication of persistent poverty, discrimination and gross socio-economic inequalities entrenched in several African States. Similar to other regional and universal human rights instruments,<sup>264</sup> member States to the Charter have a special general obligation to discard discrimination, formally and substantively since non-discrimination is a “fundamental principle” in international law essential to the enjoyment of the full corpus of human rights including SERs.<sup>265</sup> This provision is clearly spelt out in Article 2 of the African Charter.<sup>266</sup>

It should be mentioned that most violations of SERs in Africa are directly linked to systematic inequalities and may in several instances be revoked. Hence in instances where States are lacking explicit judicial protections of SERs, the right to Equality and Non-discrimination can be invoked as an applicable tool for marginalised and vulnerable members of society claiming their SERs.<sup>267</sup> Moreover Article 2 of the Charter prohibits individuals from being discriminated against in their enjoyment of civil, political and SERs.<sup>268</sup>

Relying on international human rights law, discrimination has been prohibited on the basis of a wide variety of prohibited grounds in several international instruments. The UDHR in conjunction with the ICCPRs and the ICESCRs explicitly prohibit discrimination on grounds of race, colour, sex, language, and religion, political, national, or other status. The CEDAW and other international instruments seeking to ensure the SERs for women by affirmative action all prohibit discrimination of any kind.

Comparatively, the CERD which requires measures to ensure equality in the civil political as well as socio-economic dimensions and the CRC which addresses the vulnerability of children dealing with their special SERs all provide explicit provisions against discrimination of any kind. The ICCPRs and the ICESCRs include an over-arching provision to ‘ensure’ the equal

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<sup>264</sup> See, for example, UN Human Rights Committee (HRC), CESCR General Comment 18: Non-discrimination (1989), Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, UN Doc. No.HRI/GEN/1/Rev.6 (2003), 146.

<sup>265</sup> *Kenneth Good Vs Republic of Botswana* Communication 313/05, (2010), 28<sup>th</sup> Activity Report, Annex 1V. Para 218.

<sup>266</sup> Art.2 African Charter.

<sup>267</sup> A. Sumner (2012). *The New Face Of Poverty? Changing Patterns of Education, Health and Nutrition in Low and Lower Middle Income Countries by Spatial and Social Characteristics of Households, 1998 vs 2007*, IDS Working paper table reproduced in ODI Post 2015: the road ahead. Institute for Development Studies.

<sup>268</sup> Art.2 African Charter.

right of men and women to the enjoyment' of all rights in their respective covenants. It is important to note that the CESCR in interpreting this provision has stated that “guarantees of Equality and Non-discrimination should be interpreted to the greatest extent possible, in ways which facilitate the full protection and enjoyment of SERs.”<sup>269</sup>

Within regional mechanisms, the inter-American Court's use of the Non-discrimination principle has been used extensively where CPRs violations reveal cases with a SERs dimension. Similarly, the principle of Non-discrimination has also been utilised in the European and universal human rights systems. It should be noted that for two decades, the European Court of Human Rights has consistently and comprehensively referred to the European Convention's Non-discrimination provisions in decisions that have expanded protection for SERs. Significantly, Article 14 of the European Convention provides that:

*“the enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.”*<sup>270</sup>

The European Court has found violations of this Article in a plethora of cases with important SERs ramifications. A pertinent case is the *Abdulaziz, Cabales, and Balkandali v. The United Kingdom*,<sup>271</sup>

Within the American regional system, Article 1 of the American Convention which defines the States' general obligations reads that:

*the States Parties to this Convention undertake to respect the rights and freedoms recognized herein and to ensure to all persons subject to their jurisdiction the free and full exercise of those rights and freedoms, without any discrimination for reasons of race, colour, sex, language, religion, political or other opinion, national or social origin, economic status, birth, or any other social condition.*

Although neither the American Commission or Court have explicitly referred to the Non-discrimination element of Article 1 in finding a violation of SERs, the Court however held in its

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<sup>269</sup> General Comment No. 20.

<sup>270</sup> Art 14 European Convention.

<sup>271</sup> *Abdulaziz, Cabales and Balkandali v. The United Kingdom*, 94 Eur. Ct. H.R. (ser. A) (8985).

Advisory Opinion OC-18,<sup>272</sup> relating to the rights of migrant workers in the Americas that the principles of Non-discrimination prohibited states from denying workers fundamental rights on the basis of their migratory status.<sup>273</sup> The Court further reiterated that “a person’s migratory status cannot constitute justification to deprive him of his rights including those that are labour related.” The Court also went as far as holding the opinion that Non-discrimination and equal protection principles have attained the status of *jus cogens* norm and peremptory norms of international law based on the universal consensus regarding certain elemental values that states cannot legitimately oppose through domestic legislation. Far more importantly, in a plethora of cases within the inter-American and European systems, the Non-discrimination Approach has been widely endorsed in finding violations of SERs as well as CPRs.

From the foregoing, it is evident that the over-arching provisions of Non-discrimination and Equality codified in several international and regional instruments provide legitimate and legal means for holding States accountable for the violation of SERs and therefore this principle can be utilised as an applicable and valuable avenue in advancing a wide range of SERs at the African regional level.

## **2.9. The General Obligations and duties of States to realise Socio-economic Rights under the African Charter:**

This section aims to examine the general legal obligations placed upon the state to realise SERs. Specifically, I shall focus on the three aspects of state obligations in realising SERs notably the obligation to ‘respect’, obligation to ‘protect’, ‘promote’ and the obligation to ‘fulfil.’ Also consideration will be given to the concept of progressive realisation, the minimum core concept and the notion limitations of rights.

It should be mentioned that under international law, the CESCRs in its General Comment Number 12 has confirmed that the obligation to fulfil entails both an obligation to facilitate and to provide.<sup>274</sup> In the African context, the landmark *SERAC* case provided an interpretation of these obligations in greater detail in the context of violations of SERs provisions in the Niger

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<sup>272</sup> OC-i8 Ad.Op., Inter-Am. Ct. H.R. (ser. A) (2003).

<sup>273</sup> OC-i8 Ad (n 272above).

<sup>274</sup> See CESCR, General Comment No 12(1999) Report of the Committee on Economic Social and Cultural Rights UN doc. E/ 2000/ 22 pp 102-110.

Delta. This section will examine these general legal obligations of states in light of the *SERAC case* while reference will be made under international and regional mechanisms.

### **2.9.0 The Obligations to respect, obligation to protect, promote and fulfil SERs**

A significant interpretation to the realisation of the SERs guaranteed in the Charter as with international and regional instruments derives from the general obligations to respect, obligation to protect, promote and to fulfil. In the attempt to implement and clarify SERs, the Commission as well as other commentators, have categorized the fundamental obligations of State Parties as obligations to respect, obligation to protect, promote and to fulfil. In concretising the aforementioned SERs, these obligations were interpreted by the African Commission in the *The Social and Economic Rights Action Center and the Center for Economic and Social Rights vs Nigeria*<sup>275</sup> and they apply to both civil political and SERs.

In identifying these obligations, it was the American Scholar Henry Shue who in 1980 first identified these obligations.<sup>276</sup> Since then, they have been adopted by various commentators and have been followed by the UN in much of its work in the promotion and protection of human rights. Shue asserted that these obligations complement each other in various degrees in the implementation and realisation of almost every human right.<sup>277</sup> The interpretation of state obligations and their interdependence has been endorsed by the CESC Rs and in the Maastricht Guidelines on Violations of Economic, Social and Cultural Rights.<sup>278</sup> Since Shue's discovery of these obligations, other scholars have categorised human rights obligations as involving the duty to respect, promote and to protect and fulfil human rights.<sup>279</sup>

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<sup>275</sup> Communication 155/96, (2001), 15th Activity Report, Annex V. Done at the 30th Ordinary Session, held in Banjul, The Gambia from 13–27 October 2001. For a comment on this case see Shelton, D., 'Decision Regarding Communication 155/96: *Social and Economic Rights Action Center and the Center for Economic and Social Rights v Nigeria*', American Journal of International Law, Vol. 96, No. 4, 2002, pp. 937–941.

<sup>276</sup> See H Shue *Basic Rights: Subsistence, Affluence and US Foreign Policy* (1980).

<sup>277</sup> Cf Shue 'The Interdependence of Duties' 84.

<sup>278</sup> CESC R General Comment 3, Maastricht Guidelines on Violations of Economic, Social and Cultural Rights (reprinted in (1998) 20 *Human Rights Quarterly* 691. Guideline 6.

<sup>279</sup> See A Eide 'The human right to adequate food and freedom from hunger' Final Report prepared by Asbjorn Eide for the UN Sub-Commission on Human Rights, E/CN.4/Sub.2/1987/23, available at <http://www.fao.org/docrep/W9990E/w9990e03.htm> (accessed on 2 June, 2015). See also CESC R General Comment No. 12, Para. 15 A Eide 'Economic, social and cultural rights as human rights' in A Eide, C Krause & A Rosas (eds.) *Economic, social and cultural rights: a textbook* (2001) 22-28.

In the African context, these general obligations were clarified in the *SERAC* case by the African Commission.<sup>280</sup> Citing this case which dealt with massive violations of human rights, the Commission said that both civil, political and SERs engender four aspects of state duties. These include the duty to respect, promote and to fulfil.<sup>281</sup> The interpretation of obligations of states has been explained by the African Commission in the *Zimbabwe Human Rights NGO Forum vs Zimbabwe*, Communication 245/2002, Annex III, (2006), 21st Activity Report.

In a significant interpretation, it is notable that the Commission found that the killing and destruction of property by the government forces and agents and the State-controlled oil company violated Nigeria's duty to respect the right to life and dignity, the rights to health, property and the rights to shelter and food as well as the 'implied' rights to economic social and cultural development'. Significantly, all substantive SERs explicitly and implicitly guaranteed under the Charter entail the above duties on the State subject to available resources. It is pertinent in the subsection below to examine each of these obligations independently in light of the African Commission.

### **2.9.1.1 The Obligation to Respect:**

The Obligation to respect was the first of general State obligations identified in the *SERAC* case by the African Commission. In interpreting the obligation to respect, it is notable that this obligation entails a negative duty on the state not to interfere with the existing enjoyment of all fundamental human rights and basic freedoms including SERs. While this obligation means that the state must abstain from interfering with the rights and freedoms of individuals, it sanctions the state to respect their use of resources either individually or communally.<sup>282</sup> In clarifying the obligation to respect, the African Commission held that

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<sup>280</sup> Communication 155/96, (2001), 15th Activity Report, Annex V. Done at the 30th Ordinary Session, held in Banjul, The Gambia from 13–27 October 2001. For a detailed analysis on this case see D Shelton, 'Decision Regarding Communication 155/96: *Social and Economic Rights Action Center and the Center for Economic and Social Rights v Nigeria*', *American Journal of International Law*, Vol. 96, No. 4, 2002, pp. 937–941.

<sup>281</sup> *SERAC* case (n 280above) Para 44-47. However, this analysis is not always applied consistently by the Commission. For instance in the *COHRE* case, the Commission stated that the 'State has an obligation under Article 14 of the African Charter not only to respect the "right to property", but also to protect that right'. No reference was made to the State obligation to promote and to fulfil the right to property. The obligation to promote was only made with reference to 'cultural rights'.

<sup>282</sup> *SERAC* case (n 280above) Para 45.



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

From the viewpoint of the *SERAC* case, it is notable that the Nigerian government violated this obligation in respect of the Ogoni people.

### **2.9.1.2 The Obligation to Protect:**

The Obligation to protect is the second of the State’s obligations as recognized in the *SERAC* case by the African Commission. This obligation places a positive duty upon the state to implement appropriate measures to protect citizens against socio-economic and political interferences.<sup>283</sup> In interpreting the obligation to protect, the African Commission held that this obligation requires a state to create and maintain an atmosphere that is favourable for the effective harmonisation of laws and regulations so that rights holders are enabled to freely realise their SERs.<sup>284</sup> Comparatively, one of the first decisions under the European Committee of Social Rights, the *International Commission of Jurists (ICJ) v. Portugal* under the collective complaints procedure<sup>285</sup> provides a comparative international example of a quasi-judicial body’s interpretation of the duty to protect.

In the context of Africa, the African Commission emphasised that human rights including SERs are better protected where appropriate laws and administrative policies are supported by equally appropriate government machinery such as the courts, police as well as a system of health, social and educational services.<sup>286</sup> Without the provision of these structures to enable individuals to redress violations, the state fails in its obligation to protect SERs.<sup>287</sup> The inter-American Court of Human Rights in a case concerning disappearances defined the duty to protect<sup>288</sup> “that the State has a duty to take reasonable steps to prevent human rights violations

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<sup>283</sup> *SERAC*, Case (n 280above) Para 46.

<sup>284</sup> *SERAC*, Case (n 280above) Para 46.

<sup>285</sup> European Committee of Social Rights, *International Commission of Jurists (ICJ) v. Portugal*, Complaint N° 1/1998, September 10, 1999.

<sup>286</sup> See Z Stavrinides, Human Rights Obligations under the United Nations Charter, 3 Int'l. J. Hum. Rts. 38, 45-46 (1999).

<sup>287</sup> See *Jawarav.The Gambia*, Comm. Nos. 147/95, 149/96, Para. 74, 1999-2000 Afr. Ann. Act. Rep., Annex V.

<sup>288</sup> *Velazquez-Rodr'guez v Honduras*, Series C, No.4 July 1988) Para 174-5.

and to use the means at its disposal to carry out serious investigations of violations committed within its jurisdiction, to identify those responsible, to impose the appropriate punishment and to ensure the victim adequate compensation.”

### **2.9.1.3 The Obligation to Promote:**

Another state obligation as recognised in the *SERAC* case by the African Commission is the obligation to promote. This obligation imposes a positive duty on the State to ensure that individuals are able to exercise their fundamental rights and basic freedoms. The African Commission noted that as much as the obligation to promote requires the state to implement certain measures aimed at the promotion of tolerance and raising awareness, it further encourages the building of infrastructural amenities such as schools, healthcare centres in the promotion and protection of SERs.<sup>289</sup>

In interpreting the obligation to protect, it is notable that in many of the resolutions and recommendations by the African Commission, the Commission has stressed the importance of the promotional obligation and has urged States to take action accordingly bearing that ignorance is one of the main deterrent factors inhibiting the full realisation of human and peoples' rights in Africa. In its promotional mandate of SERs, the African Commission has in accordance with Article 25<sup>290</sup> recommended the teaching of human rights through the forum of the media as a means of communication and has further encouraged periodic publications on human rights in Africa.<sup>291</sup>

### **2.9.1.4 The Obligation to Fulfil:**

The obligation to fulfil was the last of the general obligations as interpreted by the African Commission in the *SERAC* case. It is notable that the obligation to fulfil requires the state to take all the necessary measures for the realisation of SERs. As with CPRs, SERs require governments to actively participate in fulfilling these rights. In interpreting the obligation to fulfil, it was noted

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<sup>289</sup> *SERAC* case (n 280above) Para 46.

<sup>290</sup> Art.25 African Charter.

<sup>291</sup> Recommendation on Modalities for Promoting Human and Peoples' Rights, in Recommendations and Resolutions Adopted by the African Commission on Human and Peoples' Rights, available at <http://www.achpr.org..> (accessed 27 July 2015).

in the *SERAC* that member states have a general obligation to move their machinery as expeditiously as possible towards the actual realisation of SERs.

For example in fulfilling this obligation, the Commission found that the Charter's guarantee of the right to a healthy environment and general satisfactory environment imposes a number of clear obligations on governments. Since this obligation is a positive expectation on member states, the African Commission noted in the *SERAC* that it requires the government to take reasonable and other measures to prevent pollution, and promote conservation in the fulfilment of the right to health. Compliance with the fulfilment obligation including the requirement to "take the necessary measures to protect the health of their people and to ensure that they receive medical attention when they are sick,"<sup>292</sup> demands that states periodically arrange for independent scientific monitoring of threatened environments. It is notable that governments must undertake environmental and social impact assessments prior to major industrial developments such as the oil industry in the Niger Delta.

In line with the above argument and in commenting on whether there has been improvement on the living conditions of the Ogoni since *SERAC* decision, it is notable that pursuant to a report by the United Nations Environmental Programme (UNEP),<sup>293</sup> it has been noted that oil pollution in Ogoni land is still a major health hazard and still severely affects the environment. Oil spills have also continued to contaminate the vegetation of the Ogoni people and the government has done little to redress the situation. Importantly, the UNEP report on *SERAC* found that oil spills still expose the Ogoni people to high concentrations of hydrocarbons in the air and drinking water<sup>294</sup> thus violating their right to a healthy environment under the Charter. This implies that the government of Nigerian has failed to meet its obligation to fulfil.

In elaborating on these obligations, it is significant that the *SERAC* case clearly extrapolates the scope and interpretation of these obligations within the jurisprudence of the African Commission and provides interpretative guidance in applying these obligations to the rights contained in the Charter including civil, political and SERs. While other decisions by the

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<sup>292</sup>Art.16 African Charter.

<sup>293</sup> See U.N. ENV'T PROGRAMME, ENVIRONMENTAL ASSESSMENT OF OGONILAND 8 (2011) [UNEP REPORT], available at [http://postconflict.unep.ch/publications/OEA/UNEP\\_OEA.pdf](http://postconflict.unep.ch/publications/OEA/UNEP_OEA.pdf).

<sup>294</sup> "Oil pollution in many intertidal creeks has left mangroves denuded of leaves and stems, leaving roots coated in a bitumen-like substance sometimes 1cm or more thick."

Commission have had similar prospects to elaborate on the general obligations, it can be concluded that neither of the decisions which have appeared before the Commission have interpreted these obligations as the *SERAC* case did. Significantly, it is notable that these general obligations apply to CPRs with equal force as SERs.

### **2.9.1.5 Interpreting the Obligation of progressive realisation**

In the attempt to realise the SERs guaranteed under the ICESCRs, the standard of progressive realisation was adopted which recognizes the view that full realisation of SERs cannot be achieved in a short period of time due to financial and other difficulties faced by several developing countries. Significantly, Article 2 of the ICESCRs compels States to ‘take steps’ to the “maximum of its available resources, with a view to achieving progressively the full realisation of the rights in the Covenant.” This provision has been given extensive interpretation by the Committee in its General Comment Number 3.<sup>295</sup>

The CESCR in interpreting progressive realisation has affirmed that States must move as expeditiously and as effectively as possible towards achieving their goal for the full realisation of SERs.<sup>296</sup> For example the progressive provision of free education requires that states should not only prioritise the provision of free primary education but must also take ‘concrete and targeted’ steps towards achieving free education and higher education.<sup>297</sup> Essentially, the CESCR has given content to the words “within available resources” and “progressive realisation” and has read the minimum core obligation into the covenant.

In delineating the standard of ‘progressive realization,’ it is notable that unlike the ICESCRs, the rights in the Charter are not subject to ‘progressive realization’ and ‘within available resources’. Article 1 of the African Charter merely enjoins all State parties to the Charter to adopt legislative and other measures to give effect to the rights contained under the Charter. In interpreting this provision which defines the nature of obligations under the Charter, the Commission has underscored the view that rights and obligations in the Charter are of immediate action and have to be implemented instantly notwithstanding the hostile economic

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<sup>295</sup> <http://www.refworld.org/cgi-bin/tehis/vtx/rwmain?docid=4538838e10> Nature of States Obligations UN General Comment. 3 (accessed 29<sup>th</sup> April 2014).

<sup>296</sup> UN Committee on ESCR; General Comment No. 3 (1990) Para 9.

<sup>297</sup> The Right to Education, UN Committee on CESCR General Comment 13, UN doc E/C12/1999/10 (1990). Para 14.

conditions. Unlike CPRs, SERs are realised overtime and within available resources. The CESCR has acknowledged the fact that the realisation of SERs cannot be achieved in a short duration of time due to financial and other reasons .On the contrary and in responding to the interpretation that the SERs obligations in the Charter are of immediate effect, the endorsement in the *Purohit case*<sup>298</sup> defined the obligations in a realistic manner taking into account resource constraints of African countries. It is notable that the *Purohit case* drifted significantly from the Commission’s earlier interpretation.<sup>299</sup> This case will be discussed in greater detail in Chapter three.

However quite essentially, states should not take retrogressive measures that undermine the protection and promotion of the SERs. The standard of progressive realisation ensures that states must move its machinery as expeditiously as possible towards the full realisation of SERs. Thus states must progress towards the full realisation of the rights irrespective of whether there is an increase in resources or not. However it has been noted that the difference in the availability of resources in various countries poses challenges in the uniform realisation of these rights at the international level.

Importantly, it is notable that the concept of “progressive realisation” cannot be divorced from “available resources” for States to the African Charter which are developing countries with limited resources<sup>300</sup> thus States are only under an obligation to prioritise the resources available to them to attain the progressive realisation of SERs.<sup>301</sup> Thus a State is not required to do more than the available resources at its disposal.

While there is no doubt that the realisation of CPRs and SERs require resources, there is no doubt also that resource implications to the realization of SERs are more explicit at the tertiary level. Effecting positive obligations inherent of SERs not only requires budgetary and other resources, but administrative infrastructure as well.

It should be mentioned that the Commission’s guidelines on Economic Social and Cultural Rights have taken a realistic approach in interpreting the standard of progressive

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<sup>298</sup> *Purohit and others v The Gambia* Communication 241/ 2001,

<sup>299</sup> *Purohit and others v The Gambia* (n 298above) Para 84.

<sup>300</sup> *Kevin Mgwanga Gumne et al vs Cameroon*, Communication 266/2003, (2009), 26th Activity Report, Annex IV, para.206.

<sup>301</sup> *Kevin Mgwanga Gumne et al vs Cameroon* .

realisation contending that SERs have to be realised progressively. On the other hand, the Commission has taken the view that “states are required to report about the progressive measures taken for the principle of compulsory education free of charge<sup>302</sup> and how social security benefits are extended to further groups of the population.”<sup>303</sup>

Scholars such as Odinkalu have noted that in operationalizing SERs, it is important for the Commission to take recognisance of the interpretation of other international instruments such as the ICESCRs.<sup>304</sup> More importantly, other Scholars such as De Vos have concurred with the view that the interpretation of the Charter must take into account of how other international instruments have been interpreted.<sup>305</sup> However it can be concluded that the African Commission has adopted two approaches in interpreting the concept of progressive realisation. Notably, the immediate approach to the interpretation of progressive realisation; Conversely, it is submitted that the Commission is also open to the progressive realisation approach of the Covenant which was relevant as evidenced in the *Purohit* case in paragraph 84.

#### **2.9.1.6 Interpreting the ‘Minimum Core’ Obligation:**

In regard to the concept of minimum core obligations, it is notable that contrary to the interpretation provided by the Charter, the CESCRs adopted the view that “each of the rights in the ICESCRs establishes a core minimum obligation, incumbent on State Parties to ensure satisfaction of that right at the very least minimum.” The Committee has noted that in order to give content to the obligation of progressive realisation, States must provide a minimum core of the rights guaranteed in the covenant. Essentially, minimum core content refers to the minimum standards that a State must comply with in order to meet its obligations pertaining to a specific right. In elaborating on the minimum core, the CESCR has in its General Comment Number 3<sup>306</sup> emphasised that the minimum core provision would entail prioritizing the basic needs of the most vulnerable members of the community.

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<sup>302</sup> Resolution on the situation of Human Rights in Africa, ACHPR /Res.14(XVI)94, (1994); Resolution on the Human Rights situation in Africa, ACHPR /Res.40(XXVI)99, (1999).

<sup>303</sup> See Resolutions (n 301 above).

<sup>304</sup> Odinkalu (2001) 23 *Human Rights Quarterly* 351.

<sup>305</sup> De Vos (2003).

<sup>306</sup> UN Committee of ESCR General Comment No. 3. The Nature of State Parties Obligations.



In the particular context of the right to health, States are obliged to provide a certain minimum level of health care services to all individuals. The CESCR has enunciated minimum core conditions on the right to health. These include the provision of Underlying Determinants of Health such as food supply, proper nutrition and adequate supply of potable and safe drinking water. More importantly, the provision of education concerning prevailing health problems and the methods of preventing and controlling them come out clearly as the minimum core on the right to health.

Although the African Commission has not had a concrete opportunity to apply this concept, in implying the Charter on the right to housing in the *SERAC* case, a case that has direct linkage on the right to health, the Commission said that:

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

This cannot be said to amount to core minimum in the positive sense. Minimum core would also include the positive duty and not merely a negative violation as the Commission put it. The Commission has also made reference to General Comment Number 4<sup>307</sup> of the Committee meaning that it is also prepared to seek inspiration from General Comment Number 3.<sup>308</sup> In providing the minimum essentials of rights, the Commission has noted that the majority of African countries find it difficult to provide even the minimum core of the most basic essentials of healthcare to all individuals due to scarcity of resources. However, resource constraints must be taken into account in assessing whether a state is meeting its minimum core obligations.<sup>309</sup> It can thus be argued that meeting the minimum essential levels of a right is an initial step towards progressive realisation. In adopting the minimum core approach in the inter-American regional context, the inter-American Commission reiterated that,

*the obligation* of member states to observe and defend the human rights of individuals within their jurisdictions, as set forth in both the American Declaration and the American Convention,

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<sup>307</sup> The Right to Adequate Housing, UN Committee on ESCR General Comment 4.

<sup>308</sup> The Nature of State Parties Obligations, UN Committee on ESCR General Comment 3.

<sup>309</sup> (n 307above).

obligates them, regardless of the level of economic development, to guarantee a minimum threshold of these rights.<sup>310</sup>

Similarly, in applying the minimum core concept in its earlier case law, the African Commission highlighted the essential components of the right to healthcare without explicitly referring to them as the minimum core. A case in point is the *Free Legal Assistance Group, Lawyers' Committee for Human Rights, Union Interafricaine des Droits de l'Homme, Les Témoins de Jehovah vs Zaire* where the Commission in its decision held that the 'failure of the government to provide basic services such as safe drinking water and electricity and the shortage of medicine' constituted a violation of the right to health under Article 16 of the Charter.

It is noted that while the decision of the Commission is not based on a clear analysis of the minimum core content of the right to health, the Commission envisions the essential components of rights which mirror the minimum core content as espoused in General Comment Number.14<sup>311</sup> enumerating that access to safe and potable water and the provision of essential drugs entail the minimum core on the right to health in the enforcement of the obligation to fulfil that right.

Although most African States cannot guarantee the highest attainable standard of physical and mental health to their nationals, certain obligations are required of them. The minimum obligations of a state in assuring the right to health are not limited to healthcare. The minimum obligations include the provision of both medical care and other Underlying Determinants of Health such as safe drinking water, sanitation, housing and education. It is submitted therefore that the minimum core approach is a valuable and commendable approach for holding states accountable in cases where they have violated their obligations to realise SERs. The justification for this can be seen from the argument above bearing that the minimum core concept finds its roots in international law and it can be applied both at the regional and national level in realising SERs.

### **2.9.1.7 Limitations on Socio-economic rights obligations under the African Charter:**

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<sup>310</sup> Inter-American Commission on Human Rights *Annual report of the inter-American Commission on Human Rights* (1994) 524.

<sup>311</sup> The Right to the Highest Attainable Standard of Health, UN Committee on ESCR General Comment 14.

In responding to the question of limitations under the African Charter in comparison to international law interpretation, it is notable that under international standards and in cases of national emergencies, States can be permitted to put limitations on SERs in certain emergency situations. An example is when a person or a group of people contract a particular contagious disease and having contact with other persons being otherwise in contravention of the human right to health. Under international law, Article 4 of the ICESCRs provides that “the State may subject such rights only to such limitation as are determined by law in so far as this may be compatible with the nature of this right.”<sup>312</sup>

However contrary to this provision enunciated under the ICESCRs, it is notable that the rights under the African Charter do not contain such a limitation or derogation clause. As much as the realization of the SERs provided under the covenant are made subject to resource constraints, the African Charter places no such limitation on the duty on states in implementing these rights. Accordingly, it is recognised that the exclusion of a limitation clause is a result of a deliberate choice by the drafters of the Charter not to single out SERs for the special treatment because of the commitment to the idea that all charter entrenched rights including SERs are interdependent and interconnected and thus must be interpreted in accordance with the document as a whole.

This is despite the fact that other international human rights instruments contain limitation clauses in the implementation of rights. Hence limitations on human rights and freedoms entrenched in the Charter including civil, political and socio-economic rights cannot be justified by emergencies.

In a significant interpretation, the African Commission provides in Article 27(2)<sup>313</sup> as the general limitations clause and has developed a limitations case law in accordance with this article.<sup>314</sup> Citing the *Media Rights Case*, the Commission has provided that any law limiting Charter rights must be of a general application<sup>315</sup> and must conform to the provisions of the

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<sup>312</sup> Art.4 ICESCRs.

<sup>313</sup> It provides that "[t]he rights and freedoms of each individual shall be exercised with due regard to the rights of others, collective security, morality and common interest".

<sup>314</sup> See *Media Rights Agenda v Nigeria* 2000 AHRLR 200 (ACHPR 1998) (*Media Rights case*) Para 68; *Prince v South Africa* 2004 AHRLR 105 (ACHPR 2004) (*Prince case*) Para 43.

<sup>315</sup> *Media Rights case* (n 314above) Para 71; *Prince case* para 44.

Charter.<sup>316</sup> In interpreting the aspect of limitations under the Charter, the Commission has projected a proportionality test which balances the nature and the extent of the limitation imposed against the legitimate states' interests aimed to be protected by the limitation. While refereeing to the *Media Rights Case*, the Commission has asserted that:

“*The reasons for possible limitation must be founded in a legitimate State interest and the evils of limitation of rights must be strictly proportionate with, and absolutely necessary for, the advantages which are to be obtained. Even more important, a limitation may never have as a consequence that the right itself becomes illusory.*”

In interpreting this affirmation, the Commission is confirming that any use of the limitations clause must be interpreted in conformity with the basic requirements of legality, necessity and the prohibition of arbitrariness.<sup>317</sup> The Commission has stressed that in “undertaking the proportionality analysis, that if there is more than one way of achieving the legitimate state objective; the measure that least limits rights in question must be adopted.”<sup>318</sup> The Commission has elaborated that the burden of proving the legitimacy of the limitation of the right rests on the state and that once the fact of the limitation has been proven, the onus lies on the relevant government to justify the legitimacy of the limitation.<sup>319</sup> The object and purpose of the Charter are to provide protection to individuals and that the limitations clause must be interpreted with this in mind.

## **Conclusion**

In conclusion, this Chapter has comparatively interpreted the provisions of SERs under the African Charter and has spelt out the application of international law in clarifying normative weaknesses in the formulation of SERs provisions under the Charter. The Chapter also presented the general obligations upon the state to realise SERs. It discussed the concepts of minimum core obligations. It examined the obligations of States to respect, the obligation to protect, promote and to fulfil SERs and further examined the concepts of progressive realisation within available

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<sup>316</sup> *Media Rights case* (n 314above) Para 66.

<sup>317</sup> Oguergouz African Charter 430.

<sup>318</sup> *Interights v Mauritania* 2004 AHRLR 87 (ACHPR 2004) Para 82-85.

<sup>319</sup> *Media Rights case* (n314above) Para 73. The Commission states that the Nigerian government had not provided any evidence to justify its limitation of the freedom of expression. See also *Amnesty International v Zambia* 2000 AHRLR 325 (ACHPR 1999) Para 50, where the Commission not only cautioned against a too easy resort to the use of limitation, but also found that the onus is on the State to prove that it is justified in resorting to the use of the limitation clause.

resources and the notion of limitations. In conclusion, it is submitted that there exist general normative standards under international human rights law in realising SERs under the African Charter which can be explicitly and effectively utilised in advancing SERs in the region. The next Chapter examines the Approaches adopted by the African Commission in interpreting the SERs guarantees using the above rights.



## **CHAPTER THREE**

# **APPROACHES OF THE AFRICAN COMMISSION TO THE SOCIO-ECONOMIC RIGHTS PROVISIONS UNDER THE AFRICAN CHARTER: A COMPARATIVE ANALYSIS WITH EUROPEAN AND INTER-AMERICAN SYSTEMS**

### **3.0 Introduction**

This Chapter is aimed at examining the jurisprudence of the African Commission in the context of the approaches developed by the Commission to the SERs provisions of the Charter. It comparatively explores the approaches developed by the Commission to SERs adjudication, and examines their compatibility with the interpretation provided under the European and inter-American Commission and the Court. The Chapter is divided into three interrelated Parts. After setting out a brief overview of the organizational structure, the roles and background of judicial and quasi-judicial organs of the three regional systems in Part 1, Part II explores the principles of treaty interpretation under European and inter-American systems. Thereafter, Part III provides a comparative analysis of approaches that the Commission has adopted to the interpretation of SERs. The Chapter concludes that the Interdependence Approach, Underlying Determinants of a Health Approach, the Direct Approach and Non-discrimination Approaches proposed in this chapter provide viable and applicable approaches to the enforcement, implementation and realization of SERs in the African regional system.

### **3.1 Judicial and Quasi-Judicial institutional mechanisms in the interpretation of Socio-economic rights under Regional Human Rights Systems**

#### **3.1.1 The African Commission on Human and Peoples Rights.**

##### **3.1.1.1 Establishment and the Organizational Structure**

The African Commission was established in accordance with Article 30<sup>320</sup> of the Charter as a quasi-judicial regional body. The mandate of the Commission is to “promote human and

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<sup>320</sup>Art.30 of the African Charter, (n 1above).



peoples' rights on the African continent<sup>321</sup> and to ensure that the rights guaranteed under the Charter are protected. Following in the footsteps of the European and inter-American in their creation of regional human rights institutions, the Commission is the third regional body to be established and is the only quasi-judicial continental institution for the implementation of the African Charter. As one of its principal mandates, the Commission is empowered to provide an interpretation of the provisions of the Charter and to carry out any other duties that might be assigned to it by the AU Assembly.<sup>322</sup>

The interpretation of the Charter and the performance of any other tasks are aimed at complementing the promotional and the protective mandates of the Commission. In addition to providing interpretative opinions, the Commission is authorized to deal with inter-state and individual complaints and to monitor the rights enshrined under the Charter by receiving and examining state reports.<sup>323</sup> Through its promotional role, the Commission discharges its duties by promoting human rights, disseminating information on human rights issues, organizing seminars, carrying out research and studies and encouraging and assisting National Human Rights Commissions.<sup>324</sup> (NHRCs)

The Commission holds two ordinary sessions as required. These sessions are usually attended by Member States, national liberation movements, special institutions and NGOs with Observer status. Notably, one state will notify another of a violation after which either will have up to three months to notify the Commission for consideration. Further, the Commission will review a complaint only if local remedies have been exhausted or if it involves a case that has been unduly delayed in domestic courts.

With regard to complaints,<sup>325</sup> it is notable that the powers of the Commission to deal with inter-state and individual complaints are much more limited than those conferred by the European and inter-American instruments. Arguably, this is partly because its findings with regard to the communications it receives cannot be made public without the consent of the AU's Assembly of Heads of State and Government, (AHSG). The Commission's power to deal with

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<sup>321</sup> Art.45 of the African Charter States the mandate of the African Commission.

<sup>322</sup> Art.45(3) African Charter.

<sup>323</sup> E A Ankumah, *The African Commission on Human and Peoples Rights: Practice and Procedures* (The Hague Martinus Nijhoff Publishers 1996) 25.

<sup>324</sup> N Udombana, *Toward the African Court of Human and People's Rights: Better Late than Never*. 3Yale Human Rights and Development Law Journal 45, 65 (2002).

<sup>325</sup> N Udombana (n 324above).

individual petitions is limited furthermore, to "cases which reveal the existence of a series of serious or massive violations of human and peoples' rights."<sup>326</sup>

On the other hand, the Commission is also empowered to render interpretative opinions. Towards this end, State parties, the AU, and inter-governmental African organizations recognized by the Commission may request advisory opinions from the Commission regarding the interpretation of the Charter.<sup>327</sup> These advisory powers acquire special significance in light of two Charter provisions notably Articles 60 and 61.<sup>328</sup> These radical provisions have provided the Commission with an expansive interpretative tool in ensuring that its interpretations of the Charter are consistent with developments in the field of international human rights law in general. Through its jurisprudence, the Commission has progressively relied on these unique provisions with a view to strengthening the normative content of the African Charter.<sup>329</sup> The Charter's provisions should therefore not be understood in isolation but must be interpreted as forming part of human rights protection as espoused by international and regional human rights instruments. When interpreting the SERs provisions of the Charter, the interpretation given to them by the Commission will be of paramount importance.

### **3.2 Implementation Mechanisms of the Socio-economic Rights under the African Charter**

In responding to the question of whether states have complied with their obligations, it is notable that the Commission fulfills this mandate in a number of several distinctive ways. These include: the State reporting procedures, the complaints procedure and thirdly, through a series of promotional activities.<sup>330</sup> These implementation mechanisms shall be discussed in the section below.

#### **3.2.1 State Periodic Reports**

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<sup>326</sup> Art.58(1) African Charter. It is notable in this case that this language is quite similar to that of ECOSOC Resolution 1503.

<sup>327</sup> R Murray, Report of the 1999 Session of the African Commission on Human and Peoples' Rights, 22 *Human Rights Law Journal* 172 (2001).70 Art. 45.

<sup>328</sup> Art.60 & 61 African Charter.

<sup>329</sup> See African Charter on Human and Peoples' Rights, (n1 above) pmb.; See also F Viljoen, The African Charter on Human and Peoples' Rights: The Travaux Prepara-toires in the Light of Its subsequent Practice, 25 *Human Rights Law Journal*.3 13, 319 (2004).

<sup>330</sup> See IAB El-Sheikh 'Human rights development in Africa' (1992) 2 *Review of the African Commission on Human and Peoples' Rights* 46 52-54.

The African Commission monitors the implementation of the Charter through state periodic reports which are examined during ordinary sessions. In accordance with Article 62, State parties to the Charter are required to submit periodic reports in the attempt to show policy and legislative measures undertaken by States to give effect to the Charter.<sup>331</sup> However, although the state reporting procedure has become the cornerstone of the Commissions' monitoring mechanism,<sup>332</sup> the system has been fraught with several obstacles that have hindered its effective realization. Much like other regional systems, a major impediment that hampers its effectiveness is the ardent failure of member states to submit their state reports on time.<sup>333</sup>

Another significant impediment is that even when States do submit their reports, they barely send competent representatives to present these reports.<sup>334</sup> This scenario coupled with the low level of understanding of SERs has retarded the realization of these rights in Africa. A third obstacle is that the Commission lacks an effective follow-up mechanism of its recommendations as there is no clear definitive procedure to ensure or monitor what the affected state does with the recommendations.<sup>335</sup>

To the contrary, some scholars have noted that the reporting system has more advantages than disadvantages. As one of its advantages, Viljoen and Heyns argued that because the preparation of a State report requires intergovernmental contact between the concerned ministries or departments, it widens the scope of governmental bodies concerned with ways of improving the human rights situation in the country - thus, it reduces the possibility of the embarrassing questioning of government practices in the international arena.<sup>336</sup> In fact African countries experience difficulties in complying with the reporting deadlines, guidelines regarding the quality of reports, and the implementation of the African Commission's findings, as well as

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<sup>331</sup> Art. 62 African Charter.

<sup>332</sup> See IB El-Sheikh 'The African Commission on Human and Peoples' Rights: Prospects and problems' (1989) 7 *Netherlands Quarterly of Human Rights* 272-283.

<sup>333</sup> See [http://www.achpr.org/english/info/statereport\\_considered\\_en.html](http://www.achpr.org/english/info/statereport_considered_en.html) 'Status of submission of state initial/periodic reports to the African Commission on Human and Peoples' Rights' (updated March 2008) May 2015) showing that 12 African states had never submitted any report as of March 2008). The states were Botswana, Equatorial Guinea, Ethiopia, Eritrea, Gabon, Guinea-Bissau, Liberia, Madagascar, Malawi, São Tomé and Príncipe, Sierra Leone and Somalia.

<sup>334</sup> See Viljoen (2007).

<sup>335</sup> See [http://www.africaninstitute.org/html/28th\\_session.html](http://www.africaninstitute.org/html/28th_session.html) 'Final communiqué of the 28th ordinary session of the African Commission on Human and Peoples' Rights' 23 October-6 November 2000, Cotonou, Benin, (accessed 12 May 2015).

<sup>336</sup> Heyns and Viljoen (2002) 246.

those of other international bodies. The reporting process does not always function in the way it was intended. Alston did not miss the point when he observed that:

It is one thing to insist that respect for basic human rights cannot be contingent upon per capita gross national product (GNP), or any other comparable economic indicator; it is quite another to demand that poor countries will be able of willing to devote the same level of resources to reporting and complaints procedures as some developed States with strong internal human rights constituencies.<sup>337</sup>

### **3.2.2 The Individual Complaints Procedure**

As mentioned the African Commission in holding states accountable for violations of SERs is empowered to entertain individual and inter-state complaints. It should be noted that the complaints procedure provides the clearest possibility of holding states accountable to their obligations under the Charter. Importantly, one of the significant contributions of regional human rights systems in protecting human rights is the individual complaints procedure which has fundamentally attempted to address SERs violations at the regional level.

At the international level, no permanent human rights court was created to allow individual complaints against states for violations of human rights. The European regional system was the first to create such a system in allowing for effective individual complaints against states for violations of human rights. Consequently, the Europe regional system was the first to create a Commission and Court that could hear complaints, followed by the Americas and now Africa. The system has become the model of human rights realization in other regional systems.

On the other hand, the inter-American after its inception in 1960 interpreted complaints mechanisms for each individual State, as well as for all of them.<sup>338</sup> This was deemed to include the power to take cognizance of individual petitions and to use them to assess the human rights situation in a particular country, based on the normative standards of the American Declaration. It should be noted that the inter-American system was thus the first to make the complaints procedure mandatory for all member states.

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<sup>337</sup> P Alston 'Beyond Them and Us: Putting Treaty Body Reform into Perspective' in Alston P. and Crawford J. (eds.) *The Future of United Nations Treaty Monitoring* (Cambridge: Cambridge University Press, 2000) 501, 520.

<sup>338</sup> Inter-American Commission on Human Rights, First Report 1960, OAS Doc. OAE/ Ser.L/II.1, Doc. 32 (1961).

In the African context, Article 55<sup>339</sup> of the Charter mandates the commission to receive complaints from individuals and non-governmental organisations other than those of States. This provision authorizes the Commission to consider communications under the Charter admissible only if a simple majority of its members decide. Pursuant to Article 55, it is notable that this mandate has developed into a practice of accepting communications from individuals and (NGOs)<sup>340</sup> hence the Commission can receive individual cases to the extent that they reveal massive violations of human rights.

It is important to note that before the Commission receives the communication, it first considers if the communication meets the admissibility<sup>341</sup> criteria. The requirements for admissibility are spelt out and the Commission then decides the merits of the case but only if a friendly settlement<sup>342</sup> has failed. Hence the practice of the Commission especially in inter-State communications is to reach for a friendly settlement before adjudication. In the context of admissibility requirements, Article 56 of the Charter enumerates those admissibility requirements.<sup>343</sup> Among all the requirements in receiving communications under the African Charter, it should be noted that all the matters have to be in compliance with the salient requirement that local remedies have been exhausted hence the Commission cannot receive the communication if one of the admissibility requirements especially the one of local remedies have not been met.

### **3.3 The inter-American Commission on Human Rights:**

#### **3.3.1 The establishment and organisational structure:**

The inter-American system consists of two institutional bodies, the inter-American Commission and the Court of Human Rights both created by the OAS. The quasi-judicial Commission acts as the first instance for victims of SERs violations. In addition to its mandate of processing

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<sup>339</sup> Art. 55 African Charter.

<sup>340</sup> See C Heyns, *The African Regional Human Rights System: The African Charter*, 108 *Pennsylvania State Law Review*. 679,694,2004.

<sup>341</sup> See CA Odinkalu & C Christensen, *The African Commission on Human and Peoples' Rights: The Development of its Non-state Communication Procedures*, 20 *Human Rights Quarterly*. 235, 294 & n 11;

<sup>342</sup> C A Odinkalu & C Christensen, *The African Commission on Human and People's Rights. The Development of its Non-State Communication Procedures*, 20 *Human Rights Quarterly* 235, 249 (1998).

<sup>343</sup> Art.56 African Charter expounds the following as admissibility requirements; "disclosure of authors' identity, compatibility of the Communication with the provisions of the Charter, use of insulting language against the respondent state, its institutions or the African Union, exclusive reliance on media for the alleged violation, exhaustion of domestic remedies, submission of the communication with a reasonable time after final decision of the domestic organs, and cases not dealt with and settled before."

individual petitions, the Commission undertakes a range of monitoring and promotional activities. To the contrary, the inter-American Court on the other hand, is an exclusively judicial institution that issues binding decisions in cases of SERs violations submitted to it by the Commission. Additionally, the Court issues advisory opinions and grants provisional measures for the protection of individuals in cases of violations of SERs.

The Commission with its headquarters in Washington, D.C is the principle institutional body and it was created by the inter-American Convention in 1960. The Commission is an autonomous organ of the OAS representing all the OAS member states. The mandate of the Commission is “to promote the observance and defense of human rights.”<sup>344</sup> This is spelt out in the OAS Charter and the American Convention while its procedures and organizational guidelines are defined by the Commission’s Statute and Rules of Procedure. In terms of the Commission’s mandate, “human rights” are understood to be the rights enshrined in the American Convention for States Parties, and the rights guaranteed in the American Declaration for non-party states.<sup>345</sup>

Comparatively, the Commission is modeled on that of the European Convention before its Protocol No. 11 entered into force. The Commission created as a quasi-judicial institution promotes human rights through a series of functions that go beyond the adjudication of individual cases. More importantly, the inter-American system is composed of a Court of seven judges who meet two or three times per year for periods of two to three weeks.<sup>346</sup> During these sessions, the members of the Commission review and approve reports relating to cases that have been submitted by individuals or NGOs alleging specific violations of human rights enshrined in the American Convention, the American Declaration, and various other inter-American instruments.<sup>347</sup>

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<sup>344</sup> (“The inter-American Commission on Human Rights is . . . created to promote the observance and defense of human rights.”); Commission Rules of Procedure, 45, art. 1(1) (stating Commission’s principle function is “to promote the observance and defense of human rights”).

<sup>345</sup> Art.1(2) Commission Statute, 88.

<sup>346</sup> Inter-American Commission on Human Rights, The Rules of Procedure of the Inter-American Commission on Human Rights, tit.I, ch. V., Art.14, available at <http://www.cidh.oas.org/basicos/basici6.htm> (updated Oct. 2003) (“The Commission shall hold at least two regular periods of sessions per year for the duration previously determined by it and as many special sessions as it deems necessary.”).

<sup>347</sup> The Commission is empowered to adjudicate cases against any of the OAS member states, including those that have not ratified the American Convention. In the event the state charged has not ratified the Convention, the



Because the Commission established by the Convention retains the powers its predecessor exercised as an OAS Charter organ, all OAS member states have the right to nominate and elect the members of the Commission.<sup>348</sup> It is significant that this dual role of the Commission authorizes it to deal with massive violations of human rights that, though not within its jurisdiction as a Convention organ, it can address as a Charter organ regardless of whether or not the state in question is a party to the Convention. To the contrast, the European Convention applies in principle only to individual human rights violations.

Additionally, the Commission undertakes to resolve structural human rights issues through a number of activities, including observation and reporting on general human rights conditions in states, which may include on-site visits and collaboration with local entities and governmental agencies; the publication of reports on specific human rights issues where appropriate; and the organization of conferences, seminars, and meetings with representatives of governments, NGOs, and other groups.<sup>349</sup>

In addition to the protection mandates mentioned above, the inter-American Commission carries out promotional roles within the American region.<sup>350</sup> In respect to the implementation of policies, it should be noted that the Commission's role in shaping policies and practices of member states is through the issuance of recommendations. However, much like the African commission, the inter-American Commission's resolutions are not binding in the same manner as those of the Court although states do have an obligation to implement the Commission's recommendations.<sup>351</sup> It is notable that States can and often do reject these recommendations by failing to take measures to ensure their implementation.

### **3.4 The European Court of Human Rights**

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Commission applies the human rights principles set forth in the American Declaration of the Rights and Duties of Man, applicable to all member states by virtue of their membership in the OAS.

<sup>348</sup>The Inter-American Commission on Human Rights is thus both an OAS Charter organ and a Convention organ.

<sup>349</sup> As mentioned above, Article 41 of the Convention sets forth the Commission's functions. *See also* Legal Bases and Activities of the IACHR During 2003, Inter-Am. C.H.R., ch. II, OEAI Ser. LIV/II.i;8, doc. 5, and rev. 2, available at <http://www.cidh.org/annualrep/2003eng/chap.2.htm> (accessed 27<sup>th</sup> April 2014) (description of the Commission's legal bases, functions, and powers).

<sup>350</sup> Rhona K.M. Smith *International Human Rights* 122, (2003)

<sup>351</sup> The inter-American Court of Human Rights has observed that, "the report or resolution of the Commission does not have those binding effects. Its intervention is intended to enable it, on the basis of good faith, to obtain the State's cooperation." Ad. Op. OC-s5 , Inter-Am. Ct. H.R. (ser. A) Para. 28(1997).

### **3.4.1 The Establishment and Composition:**

Previously, the composition and structure of the European system of human rights was composed of two institutional bodies notably the European Commission on Human Rights and the Court.<sup>352</sup> However, it should be mentioned that the European Commission was abolished and the European system has now adopted only the European Court.<sup>353</sup> The system has also served as a role model for the two other regional systems. It is important to note that the institutional structure of the European system was changed with the adoption of Protocol No. 11 to the Convention which entered into force in 1998.

This protocol abolished the Commission and gave individuals direct access to the Court.<sup>354</sup> It is remarkable that the Convention thus became the first human rights treaty to give individuals standing to file cases directly with the appropriate tribunal. The Court is also mandated to issue advisory opinions if requested by the Council of Ministers.<sup>355</sup> It is significant that the European Court has become Europe's Constitutional Court in matters of CPRs<sup>356</sup> while at the same time dealing with a range of SERs emanating from violations of CPRs. The Convention itself has acquired the status of domestic law in most of the States and can be invoked as such in their Courts of law.<sup>357</sup>

This section has discussed the judicial and quasi-judicial institutions, their roles and organizational structure of the three regional institutional frameworks and has identified their relevance to the enforcement of SERs. It is submitted that these bodies are authorized to provide an interpretation of the human rights guaranteed in the relevant instruments including SERs and in clarifying their normative content. Therefore the interpretation given by these regional bodies is of great significance to the implementation and enforcement of SERs.

### **3.5 The Interpretation of Socio-economic rights under the European and inter-American systems of human rights**

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<sup>352</sup> C Ovey & C A Robin White, *European Convention on Human Rights*, 396(3<sup>rd</sup> edn.2002).

<sup>353</sup> (n 351 above).

<sup>354</sup> Protocol No.11 to the Convention for the Protection of Human Rights and Fundamental Freedoms Restructuring the Control Machinery Established Thereby, May 1, 1994, 3 ILM 9 43 (1994).

<sup>355</sup> Art.47(1) European Court of Human Rights.

<sup>356</sup> See C Walter, 59 HEIDEL-BERG J. INT'L L. 961 (1999).

<sup>357</sup> J Polakiewicz & V Jacob-Foltzer, *The European Human Rights Convention in Domestic Law: The Impact of Strasbourg Case-Law in States where Direct Effect Is Given to the Convention*, 12 *Human Rights Law Journal*. 65, 125 (1991).

Articles 31(1) of the Vienna Convention on the Law of treaties provides that a;

“*treaty* shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose”

This principle has been interpreted by the International Court of Justice in *Nuclear Test cases*<sup>358</sup> in a threefold context. Firstly, to mean as the foundation of *pacta sunt servanda* it makes it possible to ascertain the legal meaning of states behaviour; Secondly; for determining the extent of the legal obligations assumed by States or other subjects of international law and thirdly; it protects those who with good reason trust the behaviour of other international legal actors.

However under the European regional system, it should be noted that both the European Commission before it was abolished and the European Court have rejected the adoption of a broad interpretation of State sovereignty to the extent that such an approach would conflict with European Human rights convention fundamental purpose in protecting human rights.<sup>359</sup> In a significant case, in *Wemhoff Case*,<sup>360</sup> the European Court specifically opted for "the interpretation that is most appropriate in order to realize the aim and achieve the object of the treaty" rather than "that which would restrict to the greatest possible degree the obligations undertaken by the Parties."<sup>361</sup> Judge Evrigenis, of the European Court concluded that the Court's approach had adopted a teleological approach that sought to "take account of changes in the legal and social situation and in legal and social thinking in Europe."

In a similar vein, it is noteworthy that in both the European and inter-American in the context of interpreting the rights guaranteed in each of the regional systems, the human rights conventions in the inter-America and Europe create institutions and give them a judicial nature and role in interpreting and applying the rules which each of these treaties embodies. It is significant that within these regions, the principle regional systems for the protection and enforcement of human rights including SERs are heavily dependent on the rules set out in the relevant regional conventions which created them. However, guidance as to interpretation is also

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<sup>358</sup> *Nuclear Test cases New Zealand Vs France*

<sup>359</sup> Morrison, "Restrictive Interpretation of Sovereignty-Limiting Treaties: The Practice of the European Human Rights Convention System," 19 Int'l & Comp. L.Q. 361 (1970).

<sup>360</sup> *Wemhoff Case*,

<sup>361</sup> 7-1 Eur. Ct. H.R. (ser. A) (1968).

fundamentally sought from other relevant human rights treaties, including conventions adopted by the International Labour Organization. A distinctive feature in these regional treaties is that both systems in their convention preambles refer to the UDHR and the UN Charter.

Significantly, the European Convention on Human Rights<sup>362</sup> preamble points out that, through the agreement to establish the treaty and its institutions, the “governments of European countries which are like-minded and have a common heritage of political traditions, ideals, freedom and the rule of law” have resolved, “to take the first steps for the collective enforcement of certain of the rights stated in the Universal Declaration. Conversely, within the inter-American regional framework, the American Convention pronounces in its preamble that “the essential human rights of persons are not derived from their link of nationality with a state but rather, are based upon attributes of the human personality.”<sup>363</sup>

In the inter-American system in analysing these provisions, it is notable that these essential objectives entrenched in both regional systems in their preambles articulated above are compatible with international law in the form of a convention complementing protection and interpretation provided under domestic law in both preambles of the American regional states. It is notable that the Convention preamble derives inspiration from the UDHR together with the OAS Charter<sup>364</sup> and the American Declaration of the Rights and Duties of the Man<sup>365</sup> and other international and regional instruments. In the African context, the African Charter mentions the UN Charter and the UDHR in connection with the view by the African States to promote international peace and cooperation. In its preamble, African States emphasise “their adherence to the principles of human and peoples' rights and freedoms contained in the declarations, conventions and other international instruments adopted by the OAU now the AU.

Congruently, the European Court of Human Rights is the principle human rights enforcement mechanism within the European framework. Much as the Convention deals mainly with CPRs, it entrenched its mandate with a partial SERs dimension in Article 26. Although

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<sup>362</sup> European Convention on Human Rights preamble.

<sup>363</sup> Draft Inter American Convention on Protection of Human Rights preamble. OEA/Ser L/V/II 19 Booklet 13 at 1(Issued August 1982).

<sup>364</sup> Charter of the Organisation of American States (n 5above).

<sup>365</sup> American Declaration on Human and Peoples' Rights preamble adopted May 2,1948 by the Ninth International Conference of American States, Bogota, Colombia reprinted in Basic documents Pertaining to the inter-American System, OEA/ser L/V.II.82,doc.6.rev.1 1992 at 17.

SERs are not the primary focus within the context of the European Convention, the Court based in Strasbourg has in several instances dealt with forced eviction cases, discrimination in educational languages and cases dealing with destruction of property. The European Court has also in many instances stressed the positive obligations emanating from rights in the Covenant such as environmental pollutions. Several cases dealing with SERs have appeared before the European Court in its interpretation of the rights contained in the convention. More pertinently, the European Court has always endorsed the view that there is no rigid division between the two categories of rights.<sup>366</sup>

It is submitted therefore that this interpretation has provided the Court the impetus to adjudicating SERs even though it does not primarily focus on these rights. It should be noted that although the Court has adopted this approach in dealing SERs, this must not be interpreted to mean that SERs are inferior to CPRs but must be treated as indivisible and interrelated.

### **3.6 Approaches to the judicial enforcement of Socio-economic rights in the jurisprudence of the African Commission: A Comparative analysis with European and inter-American systems.**

Over the past two and a half decades, the African Commission has handed down a significant number of decisions pertaining to SERs some of which have played a pertinent role in concretizing the normative content of essential SERs such as the right to health, housing or shelter and the right to food. While decisions of the Commission on SERs adjudicated during its foundational years failed to adequately develop the normative content under the Charter, it is comparatively observed that the CPRs jurisprudence pre-2001 also remained underdeveloped. It should be mentioned that unlike decisions dealing SERs after 2001, the Commission's earlier decisions failed to provide interpretative guidance to a range of substantive rights guaranteed in the Charter. Importantly, the approach by the African Commission in dealing with the SERs cases before it can be seen from a range of substantive rights discussed below.

Various approaches have been adopted by the Commission in defining the content of rights guaranteed in the Charter. While approaches adopted in this study are not the only approaches to the interpretation of SERs, this discussion explores the Direct Approach; the

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<sup>366</sup> Council of Europe *Exchanging Views on Poverty in Europe* (1986) Para 35.

Underlying Determinants of Health Approach, the Non-discrimination Approach; and the Interdependence Approach; to the interpretation of SERs by the Commission. The cases considered in the section below enumerate the Commission's application to these approaches to cases involving claims of violations of SERs.

Comparatively, regional and international human rights Courts and quasi-judicial bodies have handed down a plethora of classical decisions enforcing international SERs standards in the context of states which have violated their obligations. This section examines compares and seeks to account for the different approaches adopted by these regional bodies in dealing with SERs in particular cases and discovers whether these approaches have been effective to the realization of SERs.

### **3.6.1 The Jurisprudence of Socio-economic rights under the African Regional System**

#### **3.6.1.1 The Right to Property and the Mass Expulsion of Non-Nationals**

Article 14 of the African Charter provides for the right to property. In defining the content of the right to property under the Charter, the African Commission has handed down a significant number of decisions relating to this right. The decision in *Union Inter Africaine and Others v. Angola*<sup>367</sup> is a pertinent case dealing with the right to property. In this case, the complainants were (non-nationals who were expelled from) West Africans citizens who were rounded off and expelled from Angola in 1996 and they lost all their property in the process of expulsion. In providing an interpretation in this case, the African Commission ruled that there was a violation of Article 14 of the African Charter without engaging into a detailed interpretation of such an essential right, in the following judgment:

The Commission concedes that African States in general and the Republic of Angola in particular are faced with many challenges, mainly economic. In face of such difficulties, States resort to radical measures aimed at protecting their nationals and their economies from non-nationals. Whatever the circumstances may be, however, such measures should not be taken at the detriment of the enjoyment of human rights. Mass expulsion of any category of persons whether on the basis of nationality, religion, ethnic, racial or other considerations constitute a special violation of human rights. This type of deportations calls into

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<sup>367</sup> Communication 159/96, *Union Inter africaine and Others v. Angola* , 11th Annually Activity Report of the African Commission on Human and Peoples' Rights, Para 16.



question a whole series of rights recognized and guaranteed in the Charter; such as the right to property (Article 14).<sup>368</sup>

An important point deduced in this case is that the Commission did not indicate the content of a range of rights notably the right to property, the right to work and the right to education and how such provisions were called into question. The Commission in its decision merely concluded that “the deportation of the West African nationals from Angola constituted a violation of several important rights such as, Articles 2 (non-discrimination),14 (right to property) and 18 (protection of the family) of the African Charter ” without interpreting and defining the normative content of these rights.<sup>369</sup> Significantly, it also remained questionable why other substantive SERs explicitly guaranteed in the African Charter particularly the right to work and the right to education were also violated, yet in another outstanding decision the Commission clearly indicated that ‘the forceful expulsion of the two victims from Zambia amounted to a violation of their rights to enjoyment of *all the rights* entrenched in the Charter’.<sup>370</sup>

It is submitted that although the commission noted a violation of the right to property and other rights such as the right to work, and the right to family as noted above, the normative content of the right to property remained unclear under the Commission. In adopting the Direct Approach to the interpretation of the right to property, this decision did not provide any interpretative guidance; neither did it deliver any jurisprudential guidelines to be followed in similar cases on the content of the right to property apart from just re-stating the fact that the right to property under the Charter had been violated. Hence it can be concluded that the interpretation of the right to property remained imprecise in this case.

A comparative decision dealing with the right to property is the *Modise Vs Botswana* case. Citing this case, the African Commission declared “an encroachment of the complainant’s rights to property guaranteed under Article 14 of the African Charter, where *Modise* had for political reasons, been deprived of his citizenship, deported from Botswana, and his personal

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<sup>368</sup> *Union Interfricaine and Others v. Angola* (n366 above), Paras16-17 & 20.

<sup>369</sup> The Commission further found violations of Art.7 (1) (a), and Art.12 (4) & (5), Art. 7(1) (a) deals with the right to an appeal to competent national organs, while Art.12(4) provides that ‘A non-national legally admitted in a territory of a State Party to the present Charter, may only be expelled from it by virtue of a decision taken in accordance with the law’. Art.12(5) prohibits mass expulsion of non-nationals.

<sup>370</sup> *Amnesty International vs Zambia*, Communication No. 212/98 (1999), 12th Activity Report, Para. 52.

belongings and property impounded by the government”.<sup>371</sup> In a similar interpretation regarding this right, the African Commission reiterated that the right to property had been violated without providing interpretative guidance on the essential right to property.

Other comparative cases under the African Charter regarding the right to property is *Media Rights Agenda and Others v. Nigeria*<sup>372</sup> and *Constitutional Rights Project and Others v. Nigeria*,<sup>373</sup> two cases that also dealt with the right to property. In both these cases, the military regime of that time banned some newspapers, sealed off the newspaper companies’ premises, prevented the proprietors and employees from accessing the premises and confiscated copies of newspapers. In providing an interpretation in these two cases, the African Commission decided that both the sealing of newspaper premises and seizure of copies of newspapers violated the right to property and that the grounds for doing so did not fall within the exception of public need or general interest of the community under Article 14. It is notable that the Commission found a violation of the right to property in this case. However, the Commission did not engage in a detailed interpretation of the normative content of the right to property. It can be concluded that although the Commission adopted a Direct Approach to the interpretation of cases discussed above, the Commission’s decisions on the right to property remained unclear.

### **3.6.1.2 The Right to Property under the inter-American System:**

In a comparative interpretation of the right to property under the inter-American system, it is notable that a comparative case dealing with the right to property by the inter-American Court and Commission is the *Five Pensioners v. Peru*<sup>374</sup> case. It is pertinent in this case, different from the approaches taken by the African Commission in property cases examined above, the inter-American Court took a step further in examining SERs in the context of a petition alleging the violation of CPRs. Citing the *Five Pensioners case*, a group of retirees alleged that Peru had arbitrarily reduced pension payments to pensioners to which they were entitled. Importantly, it is notable that the applicants argued their case on two important grounds: Firstly, that the State’s

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<sup>371</sup> *Modise v. Botswana*, Communication No. 97/93 (2000), 14th Activity Report Para 96.

<sup>372</sup> *Media Rights Agenda and Others Vs Nigeria* Communication Nos. 105 /93, 128/94, 130/94 AND 152/96 (1998), 12 Activity Report.

<sup>373</sup> *Constitutional Rights Project, Civil Liberties Organisation and Media Rights Agenda Vs Nigeria* Communication No s 140/94, 141/94, 145/95, (1999) 13<sup>th</sup> Activity Report.

<sup>374</sup> *“Five Pensioners” v. Peru*, Inter-Am. Ct. H.R. (ser. C) No. 98 (2003).

action constituted a violation of Article 21 of the Convention (right to private property a CPR), and, Secondly, that it constituted a violation of Article 26 of the Convention relating to state obligations to advance SERs.

In an important decision, the Court upheld the Commission's claims based on Article 21 but refused to adjudicate its claims based on Article 26. The Court held the right to social security payments to be a property right and therefore fully protected by the guarantees of Article 21. The Court based this view on “a progressively developing interpretation of international instruments that protect human rights.”<sup>375</sup> The Court's construction of property rights is a pertinent example of how it may expand SERs through an expansive interpretation of substantive CPRs.

In responding to the approach adopted by the inter-American Court in this case, it can be said that the Court adopted the elements approach. The elements approach in protecting SERs has been adopted in the inter-American regional system whereby the Court has construed CPRs to encompass a range SERs. The *Five Pensioners* case is an example of a decision that applied the elements approach in expanding on SERs. The first case to apply this approach by the inter-American Court was the *Baena Ricardo* case discussed further below.

Another comparable decision dealing with the right to property under the inter-American system is the case of the *Ituango Massacres v. Colombia*.<sup>376</sup> In this case which dealt with, displacement, forced evictions and housing destruction in the municipality of Ituango, in (La Granja and El Aro districts) in Colombia by paramilitaries aligned with the Government. It is notable that the inter-American Court of Human Rights in July 2006 found that the forced evictions and destruction of housing violated Article 11 (2) and Article 21 relating to the right to property of the American Convention. Importantly, it should be noted in this case different from the case discussed above that the inter-American Court adopted the Interdependence Approach by reading the right to housing into the right to property.

It can be concluded that a comparative analysis of the cases discussed above dealing with the essential right to property reveal divergent approaches in finding a violation of the right to

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<sup>375</sup> “*Five Pensioners*” v. *Peru* (n 374above).

<sup>376</sup> *Ituango Massacres v. Colombia*, Inter-Am. Ct. H.R (ser. C) No. 148.

property. In the African context, it is submitted that the Commission adopted the Direct Approach in finding a violation of the right to property while the inter-American Court adopted the elements approach and the Interdependence Approach in finding a violation of this right in the cases discussed above. It is notable that both approaches reveal a commendable approach and the African Commission can utilize the inter-American elements approach in future cases for finding a violation of this right where circumstances of such a violation permit.

### **3.6.1.3 The Right to Work under the African Charter:**

In detention disputes which mainly dealt with CPRs issues such as the right against arbitrary detention and the right to personal liberty, the African Commission considered allegations of some SERs such as a violation of the right to work and being in custody in poor hygienic conditions in *Annette Pagnouille (on behalf of Abdoulaye Mazou) v. Cameroon*.<sup>377</sup> In that case, the appellant Mr. Mazou a writer, activist and magistrate was sentenced to five years' imprisonment by a military tribunal in Cameroon in 1984 because he had hidden his brother who was later sentenced to capital punishment for an attempted *coup d'Etat*. The appellant continued to be placed under house arrest, although he served his sentence till 1991, when he benefited from a law of amnesty. In providing an interpretation of the right to work in this case, The African Commission asserted that:

By not reinstating Mr. Mazou in his former position after the Amnesty Law, the government has violated Article 15 of the African Charter because it has prevented Mr. Mazou to work in his capacity of a magistrate even though others who have been condemned under similar conditions have been reinstated.<sup>378</sup>

The African Commission noted two main issues in this case. First, that States have an express obligation not to violate the right through arbitrary dismissals from work, a practice that is widespread in several African countries and the approaches taken by the courts may provide little, if any, redress. Secondly, by requiring the State to reinstate the appellant, the Commission interpreted Article 15 as requiring States to take positive measures to provide employment. These approaches reiterated by the Commission may help to halt widespread unemployment in Africa.

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<sup>377</sup> *Annette Pagnouille (on behalf of Abdoulaye Mazou) v. Cameroon*, Para 29, Communication No. 39/90 (1997), 10th Activity Report.

<sup>378</sup> *Annette Pagnouille (on behalf of Abdoulaye Mazou) v. Cameroon*, (n 377 above) Para 29.

Significantly, it is notable that the *Mazou* case clearly revealed discrimination. However, the African Commission did not address the case with regard to Article 2 of the African Charter although in its reasoning it mentioned that “others who have been condemned under similar conditions have been reinstated”.

It is evident from the Commission that the non-reinstatement of Mr. Mazou was discriminatory, something that the African Charter does not accept. Non-discrimination and Equality are over-arching principles in international law that also encapsulate the right to work. The African Commission would have provided a combined effect of Articles 2 and Article 15 in order to support his reasoning. However, its findings of violations of other specific CPRs as well as SERs such as the right to health demonstrate the Commission’s utilisation of the Interdependence Approach based on rights that are classified as CPRs to reinforce the protection of SERs.

In another decision dealing with the right to work a case concerning exploitation in Mauritania, the African Commission further illustrated the interdependence of the right to dignity provided in Article 5 and the essential right to work guaranteed in Article 15. Citing the *Malawi African Association and Others v. Mauritania*, it was alleged that some political prisoners passed away under custody due to malnutrition and poor medical attention, and that “the cells were infested with lice, bedbugs and cockroaches and nothing was done to improve their hygienic conditions and health care”.<sup>379</sup> The African Commission declared that “the general state of health of the prisoners deteriorated due to the lack of sufficient food; they had neither blankets nor adequate hygiene”. The Commission noted that the Mauritania State was directly accountable for this state of affairs. Consequently, the Commission alleged that Article 16 of the Charter had been violated.

In this case, the interpretation of the Commission indicates that the right to dignity can be utilised in protecting a range of substantive provisions such as the right to work that are not explicitly protected by provisions of Article 15 of the African Charter. Just like the *Sudan Human Rights Organization and Another v Sudan* case discussed further below, it was observed in the Mauritania case that the destruction and expropriation of the houses of Mauritians

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<sup>379</sup> *Annette Pagnoulle*(on behalf of Abdoulaye Mazou) v. *Cameroon*, (n 377 above) Para 29.

constituted a violation of their right to property.<sup>380</sup> Significantly, the Mauritania case reveals the interdependence between the right to property and the right to housing which directly relates to the core violation. In accordance with several decisions that have applied this approach in the inter-American and European Courts, the Commission may invoke the right to property for protection of some provisions such as the right to social security which are not explicitly provided in the Charter.

#### **3.6.1.4 The Non-Discrimination Approach to the interpretation of SERs**

Relying on comparative approaches under regional law, the Non-discrimination Approach to the interpretation of SERs is a valuable basis for extending SERs in circumstances in which these rights would not be the basis of any protection. This approach has been adopted in several cases within the inter-American regional context in the protection of their SERs. The advantage of using the non-discrimination approach is that applicants the Commission or the Court may rely on fundamentally CPRs to expand the protection of SERs. It is important to note that in adopting this approach, applicants must seek out situations that allow for expanding constructions of the principle of non-discrimination. It is pertinent to note that this approach is appropriate in contexts where substantive and procedural gaps exist in the protection of SERs.

#### **3.6.1.5 The Right to Work in the inter-American system:**

A relevant comparative example that adopted the Non-discrimination Approach within the inter-American region is the *Maria Eugenia Morales de Sierra v. Guatemala*,<sup>381</sup> case. Citing this case, the inter-American Commission effectively advanced the SERs of women by applying the principle of Non-discrimination. In that case, the Commission considered provisions of the Guatemalan Civil Code that relate to the roles of men and women within the family. The Commission found that provisions that limited the rights of married women by according their husbands the right to determine whether or not their spouses could work outside the home

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<sup>380</sup> *Malawi African Association and Others Vs. Mauritania*, Communication Nos. 54/91, 61/91, 98/93, 164/97, 196/97 and 210/98 (2000), 13th Activity Report. Done at Algiers, 11 May 2000. Para 128.

<sup>381</sup> *Maria Eugenia Morales de Sierra v. Guatemala*, Case 11.625, Inter-American Commission of Human Rights, Report No. 4/oi, OEA/ser. L./V./II.iii, doc. 20 rev. (2001).



violated Article 17(4) of the Convention (rights of the family) and Article I6(1) of the (CEDAW)<sup>382</sup> under international standards.

Under international human rights law, the inter-American Court's use of the Non-discrimination principle can be deduced in both the European and international human rights contexts. It is notable that for over two decades the European Court has consistently and explicitly referred to the European Convention's non-discrimination provisions in decisions that have ramifications in the protection for SERs such as discriminatory tendencies in education and in evictions. Article 14 of the European Convention reads:

The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, and national or social origin, association with a national minority, property, birth or other status.<sup>383</sup>

In another remarkable decision dealing with the right to work in the inter-American region is the *Ricardo V Panama*.<sup>384</sup> In this case, two hundred and seventy government workers who took part in a labour protest were dismissed under a retroactive law. The workers claimed that their rights to due process of law and to judicial protection had been violated. Despite the Court's contention that the Protocol of San Salvador was not applicable, it nonetheless ruled that the Panama state had violated the principle of non-retroactivity under Article 9, the right to judicial guarantees and the right to judicial protection guaranteed in Article 8(1), 8(2), and 25 respectively and the right to freedom of association provided in Article 16 of the American Convention.

### **3.6.1.6 The Right to Work under the European Human Rights System:**

A comparative case under the European context is a decision by the European Court of human rights that have found violations of Article 14<sup>385</sup> with significant SERs dimensions. Citing the *Abdulaziz, Cabales, and Balkandali v. The United Kingdom case*,<sup>386</sup> the applicants

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<sup>382</sup> This case illustrates the tendency of the Commission to apply norms and standards established in international treaties.

<sup>383</sup> Art.14 of the European Convention.

<sup>384</sup> *Ricardo V Panama* Inter-American Court of Human Rights (2<sup>nd</sup> February 2001) (Series. C) No. 72.

<sup>385</sup> Art.14 of the European Convention (n 383above).

<sup>386</sup> *Abdulaziz, Cabales, and Balkandali v. The United Kingdom* 94, European Court of Human Rights (Series. A) May 28, 1985.

were non-natives but permanent residents of the United Kingdom who questioned distinctions in British immigration law that effectively denied them the right of entry to their male spouses in circumstances in which female spouses would have been granted residence. Each of the applicants lawfully resided in the United Kingdom and had sought permission for her husband to join her in residence. In either case, such permission was denied by the immigration authorities. The applicants argued that the refusal to grant residence to their male spouses in circumstances in which female spouses of male applicants would have been granted constituted a violation of Article 14 of the Convention. The Court upheld their claim.

A critical component in the Court's analysis in this case was the evaluation of economic rights. The United Kingdom argued that it could legitimately distinguish between female and male spouses because the latter were more likely to seek employment than female spouses. The government provided evidence concerning the then-current economic crisis and level of unemployment in the United Kingdom, as well as support for the position that male immigrants were more likely to seek work than female immigrants. While in the *Abdulaziz case*, the Court analysed the issues in the context of family rights in Article 8,<sup>387</sup> and the prohibition of discrimination (Article 14),<sup>388</sup> it is evident that the decision has implications for fundamental economic rights, such as the right to seek employment which will inextricably impact on the realisation of other SERs.

### **3.6.1.7 The Right to Health and the Right to a clean environment under the African system**

#### **3.6.a The Social Economic Rights Action Centre and Another v. Nigeria**

Although the African Commission has handed down a significant number of decisions pertaining to SERs, the decision in *SERAC* is an exceptional case where the Commission was confronted with a range of concerns including the forced eviction and destruction of housing in several Ogoni villages by State security forces working in concert with the State-owned Nigerian National Petroleum Company.<sup>389</sup>

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<sup>387</sup> Art.8 of the European Convention.

<sup>388</sup> Art.14 of the European Convention.

<sup>389</sup> Communication 155/96 (*SERAC*). For a detailed discussion about the general human rights situation in Ogoniland, see Skogly S.I. 'Complexities in Human Rights Protection: Actors and Rights Involved in the Ogoni Conflict in Nigeria' (1997) 15(1) *Netherlands Quarterly of Human Rights* 47-60. Skogly dealt with a number of actors involved

In that case concluded under Article 55, the applicants on behalf of the Ogoni people brought an allegation against the Nigerian government for allowing operations by multinational oil companies without supervising them or taking any required safety measures. The applicants argued that the Nigerian security forces attacked, burned and destroyed several Ogoni villages and homes causing environmental pollution and degradation which impacted negatively on the health of the Ogoni people thus threatening their survival. Consequently, it was observed in this case that the African Commission found the Nigerian government in violation of several human rights including SERs.

In elaborating the rights allegedly violated in accordance with the Charter, the applicants alleged violations of Articles 2 (non-discrimination),<sup>390</sup> 4 (right to life),<sup>391</sup> 14 (right to property),<sup>392</sup> 16 (right to health),<sup>393</sup> 18 (family rights),<sup>394</sup> 21 (right of people to freely dispose of their wealth and natural resources)<sup>395</sup> and 24 (right of people to a satisfactory environment)<sup>396</sup> among other rights. The communication further confirmed that Nigeria's actions of placing its military forces at the disposal of the oil companies perpetuated these violations.

In this case, the applicants fronted the argument that the government of Nigeria failed to investigate these attacks; neither did it take any precautions to punish the perpetrators. Towards this end, it was illustrated that the government failed to exercise due diligence in this regard. Similarly, the Commission observed that the communication lacked information on domestic Court actions to stop the violations despite the view that Nigeria had directly incorporated the Charter into its domestic law thus allowing all the rights provided in this instrument to be invoked in Nigerian Courts. Further, the African Commission noted that the military regime had passed a number of decrees ousting the jurisdiction of the Courts.<sup>397</sup> Consequently, no adequate domestic remedies could be said to exist. Furthermore, the government's failure to respond to the

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in the *SERAC* case, which illustrates that human rights concerns go beyond traditional dichotomy of individual versus State, and indeed enter the realm of private versus public in international law.

<sup>390</sup> Art.2 African Charter.

<sup>391</sup> Art. 4 African Charter.

<sup>392</sup> Art. 14 African Charter.

<sup>393</sup> Art.16 African Charter.

<sup>394</sup> Art.18 African Charter.

<sup>395</sup> Art.21 African Charter.

<sup>396</sup> Art.24 African Charter

<sup>397</sup> *SERAC case* (n 389above) Para 41. Citing Constitution Suspension and Modification Decree 1993 of Nigeria.

communication despite multiple requests by the Commission allowed the case to be considered in context of the allegations.

With regard to admissibility requirements in this case, the Commission illustrated that none of the rationales for requiring exhaustion of local remedies justified finding the case inadmissible. It was noted that since there were no effective domestic remedies, it was useless to afford domestic courts an opportunity to address violations, thereby “avoiding contradictory judgments of law at national and international levels”.<sup>398</sup> Secondly, since international attention to the problems of Ogoni land had given the Nigerian government enough notice over several decades, it was not premature to call the government to account before an international tribunal.<sup>399</sup>

In respect to the merits of the case, the African Commission first interrogated the duties and obligations placed upon the state in realizing human rights. Towards this end, the Commission affirmed the four aspects and duties of state obligations which include the duties to respect, the duty to protect, promote and to full. These four but interrelated obligations have been examined in greater detail in Chapter two above in view of this case.

In examining the issue of non-discrimination in this case, it was confirmed that the actions of the government of Nigeria constituted a violation of Article 2 of the Charter. In this regard, the Commission asserted that “the targeting and wanton violations of the Ogoni people both individually and collectively ran afoul of this provision.”<sup>400</sup>

In elaborating on Article 4 of the Charter, the Commission contended that the widespread violations fronted by both the Nigerian government and private actors violated the fundamental right to life. Towards this end, the Commission commented with much regard that ‘the terrorising and killing of Ogonis, together with the intolerable levels of environmental pollution and degradation that destroyed farmlands and waterways, impacted negatively not only the Ogoni lives, but also their existence.’<sup>401</sup> In this regard scholars such as Nwobike<sup>402</sup> pointed out that:

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<sup>398</sup> *SERAC* case (n 389above) Para 37.

<sup>399</sup> *SERAC* case (n 389above) Para 38.

<sup>400</sup> *SERAC* case (n 389above).

<sup>401</sup> *SERAC* case (n 389above) Para 67.

Findings based on environmental degradation and its threat to, and destruction of Ogoni sources of livelihood was a positive step forward by the African Commission in the purposive interpretation of the right to life. It marked a departure from earlier decisions in which violations of the right to life were based on executions, assassinations, arrests and detentions without trial, torture and other acts that either threatened or actually harmed the individuals concerned. The right to life and respect for the dignity and integrity of all human beings, if expansively interpreted, will give an effective content to all guaranteed rights – economic, civil, political, social and cultural.

In clarifying on whether a group of people within a State may constitute ‘a people’ an issue which has been a topic of much contention at the African regional level, it was observed in this case that the Ogoni were implicitly considered to be such.

In finding a violation of the right to health and the right to a satisfactory environment provided in the Charter, the Commission underscored the view that these important provisions place a special duty upon the state to desist from directly or indirectly threatening the health and environment of rights holders. According to the Commission, the government had not taken the prerogative to protect the inhabitants of Ogoni land against the harmful activities of the oil companies.<sup>403</sup> This constituted to a violation of Articles 16 and 24 of the Charter.

It is notable that the nature of the peoples’ rights to freely dispose of their wealth and natural resources was clearly brought out in this case. In finding a violation of Article 21, the African Commission declared that:

Governments have duty to protect their citizens, not only through appropriate legislation and effective enforcement but also by protecting them from damaging acts that may perpetrated by privates parties... This duty calls for positive action on part of the governments in fulfilling their obligation under human rights instruments.<sup>404</sup> ... The Government of Nigeria facilitated the destruction of the Ogoniland. Contrary to its Charter obligations and despite such internationally established principles, the Nigerian Government has given the green light to private actors, and the oil Companies in particular, to devastating affect the well-being of the Ogonis. ... [T]herefore, is in violation of Article 21 of the African Charter.<sup>405</sup>

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<sup>402</sup> J.C Nwobike ‘The African Commission on Human and Peoples’ Rights and the Demystification of Second and Third Generation Rights under the African Charter: *Social and Economic Rights Action Center (SERAC) and the Center for Economic and Social Rights (CESR) v. Nigeria*’ (2005) 1 (2) *African Journal of Legal Studies* 129, 135.

<sup>403</sup> *SERAC* case (n 389above) Para 53-54.

<sup>404</sup> *SERAC* case (n 389above) Para 56-57.

<sup>405</sup> *SERAC* case (n 389above) Para 58.

In support of its reasoning, the Commission invoked the judgment of the inter-American Court of Human Rights in the *Velásquez Rodríguez* case.<sup>406</sup>

In finding a violation of the essential right to property and the right to family, the Commission through innovative approaches of rights interpretation observed that despite the lack of an explicit recognition of the right to housing or shelter, the corollary of the combined effect of the right to health contained in Article 16, the right to property guaranteed in Article 14 and protection afforded to the family prohibits the wanton destruction of shelter, because when housing is destroyed, property, health and family life are severely disrupted.” In adopting the Interdependence Approach to the protection of SERs not explicitly entrenched under the Charter, the Commission noted in the *SERAC* that the combination of Articles 14, 16 and 18(1) covers the right to shelter or housing which the Nigerian government evidently violated.<sup>407</sup>

Drawing on the minimum core to rights approach, the Commission illustrated that the right to shelter implies an obligation to respect people. As a minimum, this right sanctions the government of Nigeria to abstain from destroying the houses of its citizens and not to interfere with their efforts to reconstruct their homes. Importantly, this right also implies an obligation to protect. This has been interpreted to mean that the government must protect its citizens from interference by non-State actors, such as oil companies and to provide access to legal remedies in the attempt to challenge such interference. In view of the minimum core approach, the Nigerian government violated both these obligations which are qualified as being minimum obligations.<sup>408</sup>

The Commission further reiterated that the right to housing encapsulates a right to be protected against evictions. In that respect, the Commission refers to the CESCRs in its General Comment Number.7<sup>409</sup> Further, the Commission stressed the importance of legal security of

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<sup>406</sup> *Velásquez Rodríguez v. Honduras*, inter-American Court of Human Rights, Judgment of 19 July 1988, Series C, No 4, paras 166, 172. In the opinion of the Inter-American Court, A State violates human rights when it allows private persons or groups to act freely and with impunity to the detriment of the rights recognised by the Convention.

<sup>407</sup> *SERAC* case (n 389above) Para 60.

<sup>408</sup> *SERAC* case (n 389above) Para 60.

<sup>409</sup> General Comment No 7 (1997) on forced evictions, UN Doc. E/1998/22, Annex IV, Para 3.



tenure as an essential guarantee against forced evictions.<sup>410</sup> It follows that the government of Nigeria was in violation of the relevant provisions of the African Charter.<sup>411</sup>

In a similar manner as the right to housing, the right to food is not explicitly guaranteed under the African Charter. In interpreting the right to food, the Commission combined Articles 4, 16 and 22 to encompass the right to food. According to the Commission, the minimum core of this right requires the Nigerian government to comply with three minimum duties notably, the duty to not destroy food resources, Secondly, to prohibit private actors from destroying these sources and thirdly, to abstain from interfering with rights holders' efforts to feed themselves." According to the Commission, the Nigerian government violated all these three minimum duties.<sup>412</sup>

In a conclusive analysis, the Commission found that the government of Nigeria violated Articles 2, 4, 14, 16, 18(1), 21 and 24 of the Charter. It is submitted that in adopting the Interdependence Approach in this case, the Commission touched on a wide spectrum of rights and it interpreted the relevant provisions hence clarifying the vague formulation of rights that punctuated the Charter pre-2001. Through this purposive and innovative approach of interpretation, States were able to identify their obligations in the application of the relevant rights. Similarly, the Interdependence Approach has also been utilised between substantive SERs and CPRs in the attempt to bridge gaps in the protection of SERs.

It should be noted that the Interdependence Approach has been comprehensively and explicitly utilised in contexts where there are substantive and procedural gaps in the protection of SERs. In cases concerning social security, both the European Court and the HRC in applying this approach gave SERs dimensions to the provisions of non-discrimination and a fair trial respectively.<sup>413</sup> The two bodies in a plethora of relevant cases have also consistently applied the interdependence between substantive rights. Under the European context, the case of *Sidabras & Dziautas v Lithuania* is a pertinent example where the European Court provided protection for

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<sup>410</sup> SERAC case (n 389above) Para 60.

<sup>411</sup> SERAC case (n 389above) Para 63.

<sup>412</sup> SERAC case (n 389above) Para 64-66.

<sup>413</sup> For the analysis of relevant cases, see M Scheinin 'Economic and social rights as legal rights' in A Eide *et al* (eds) *Economic, social and cultural rights: A textbook* (2001) 32-38; C Krause & M Scheinin 'The right not to be discriminated against: The case of social security' in T Orlinet *et al* (eds) *The jurisprudence of human rights law: A comparative interpretive approach* (2000) 259-264.

the right to work by applying a combined effect of the right to non-discrimination and the provision of the right to respect for private life and further interpreted the right to life in providing protection for the right to health.<sup>414</sup>

Under international law, the HRC read SERs into the right of members of minorities to enjoy their own culture in community with others.<sup>415</sup> Similarly, in adopting the Interdependence Approach, the inter-American Court of Human Rights through a combined reading of the right to property and the right to judicial protection has affirmed the justiciability of indigenous land and resource rights.<sup>416</sup> Through this approach, the fundamental right to property which serves as both a civil, political and socio-economic right has comprehensively been utilised to cover elements of the right to housing and the right to social security.<sup>417</sup>

In the African context, the approach can be utilised to bridge gaps and strengthen the protection of SERs that are not explicitly protected. Notably, the African Charter enshrines cross-cutting provisions which are not particularly categorised as SERs but can be used for the implementation and enforcement of all the categories of rights entrenched in this instrument. Provisions such the right to non-discrimination and equality contained in Article 2, provisions pertaining to the fundamental right to life and dignity including the right to freedom of movement, equal protection before the law and the right to property and development related provisions which could also be categorised as SERs; these rights provide potential bases for the implementation of SERs even in instances where there is no explicit protection of SERs.<sup>418</sup> Through the Approach of the Indivisibility and Interrelatedness of human rights as espoused in the Charter, the African Commission is unequivocally inclined to see all Charter provisions as an interconnected set of norms and has applied these rights for its Interdependence Approach. The Commission has applied this approach to protect SERs provisions that are not explicitly guaranteed in the Charter.

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<sup>414</sup> *Sidabras & Dziutas v Lithuania* (2004) 42 EHRR 104 paras 50 & 62; *Zdzislaw Niteckiv Poland*, application 65653/01, decision, ECHR (2002) Para 1.

<sup>415</sup> M Scheinin 'The right to enjoy a distinct culture: Indigenous and competing uses of land' in *Orlinet al* 164-168.

<sup>416</sup> *Mayanga (Sumo) Awas Tingni Community V. Nicaragua*, IACHR (2001) Ser C 79 paras 137-139 & 148-155.

<sup>417</sup> *Akdivar & Others v Turkey* application 21893/93, ECHR 1998-II 69 (1998) (finding forced evictions and destruction of housing in violation of the right to property); *Gaygusuz v Austria*, application 17371/90, ECHR 1996-IV 14 (1996) para 41 (social benefits as pecuniary rights covered by the right to property); and *Case of the 'Five Pensioners' v Peru* IACHR (2003) Ser C 98 paras 102, 103 & 121 (finding arbitrary changes in the amount of pensions to be in violation of the right to property).

<sup>418</sup> Arts 2, 3, 4, 5, 7, 12, 13(2) & (3), 14, 19 & 20-22 African Charter.

### 3.6.b The *Purohit* Case:

Another comparative decision worthy of mention concerning the right to health where the African Commission provided a purposive and progressive interpretation of this right is the *Purohit and Moore v. Gambia* case. In this case, one of the applicants Paul Moore was a mental health advocate who was the victim of inhuman treatment of mental health patients in the psychiatric unit of the Royal Victoria Hospital in Gambia. The case was submitted on behalf of mental health patients admitted at the psychiatric unit.

Importantly, it was alleged that the Lunatics Detention Act of 1917 which was the principle document governing mental health patients at the Royal Victoria psychiatric unit in Gambia was outdated and it lacked several provisions including provisions on legal aid, safeguards during diagnosis and compensation in case patient's rights were violated, and several other provisions. Consequently, the applications alleged several violations of their human rights including Articles 2, 3, 5, 7(1) (a), 13(1), 16 and 18(4) of the African Charter.<sup>419</sup>

In a significant interpretation of the violations of all the alleged provisions of the Charter, the Commission gave some significant insights into the development of international human rights law with regard to mental health patients. It concluded that:

The African Commission maintains that mentally disabled persons would like to pursue those hopes, dreams and goals just like any other human being.<sup>420</sup> Like any other human being, mentally disabled persons or persons suffering from mental illness have a right to enjoy a decent life, as normal and full as possible, a right which lies at the heart of the right to human dignity. This should be zealously guarded and forcefully protected by all States party to the African Charter in accordance with the well-established principles that all human beings are born free and equal in dignity and rights.<sup>421</sup>

In adopting the Underlying Determinants of a Health Approach to the interpretation of the essential right to health, the African Commission declared that the enjoyment of this right is vital to all aspects of a person's life and well-being, and is crucial to the realisation of all other

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<sup>419</sup>*Purohit and Moore v. Gambia*, (n 298above) Paras 30-31.

<sup>420</sup> Referring to Art.3 of the Declaration on the Rights of Disabled Persons. UN General Assembly Res. 344 (XXX) of 9 December 1975, provides that 'Disabled persons have the inherent right to respect for their human dignity..., whatever the origin, nature and seriousness of their handicaps and disabilities, have the same fundamental rights as their fellow citizens of the same age, which implies first and foremost the right to enjoy a decent life, as normal and as full as possible'.

<sup>421</sup>*Purohit and Moore Vs. Gambia*, referring to the Universal Declaration, Art 1, Paras 54-57, 61.

rights.<sup>422</sup> Accordingly, the Commission contended that the right to health encompasses ‘the right to health facilities, access to goods and services to be guaranteed to all without discrimination of any kind’.<sup>423</sup> It was illustrated that the mental health patients deserve special treatment because of their vulnerability and by virtue of their disability and that they should be enabled not only to attain, but also to sustain an optimum level of independence and performance.<sup>424</sup>

It should be mentioned that The Underlying Determinants of a Health Approach has been rightfully underscored by some scholars such as Durojaye where he contended that the pronouncement of the indivisibility and interrelatedness of human rights confirmed by the Vienna Declaration made this approach a necessary and applicable approach to the interpretation of the essential right to health.<sup>425</sup> In addition, the African Commission took into consideration the aspect of resources and realities faced by African countries in the effort to implement this right. In this regard, the Commission declared that:

Millions of people in Africa are not enjoying the right to health maximally because African countries are generally faced with problems of poverty which renders them incapable to provide the necessary amenities, infrastructure and resources that facilitate the full enjoyment of this right. Therefore, having regard to this depressing but real state of affairs, the African Commission would like to read into Article 16 the obligation on the part of States party to the African Charter to take concrete and targeted steps, while taking full advantage of its available resources, to ensure that the right to health is fully realised in all its aspects without discrimination of any kind.<sup>426</sup>

A significant feature that can be deduced in this case is that contrary to the interpretation made earlier by the Commission that the SERs obligations in the Charter are of immediate action, the *Purohit case* provided a realistic approach taking into account the impact of resource constraints faced by several African states in implementing SERs. In this regard, some scholars have argued that the *Purohit case* took into account the interpretation provided in international instruments.<sup>427</sup> In view of this argument, Mbazira contended that this case attempted to integrate the African

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<sup>422</sup> *Purohit and Moore vs. Gambia* (n 298above), para 80.

<sup>423</sup> *Purohit and Moore vs. Gambia* (n 298above), para 80.

<sup>424</sup> *Purohit and Moore vs. Gambia* (n 298above), para 81.

<sup>425</sup> E Durojaye *The Approaches of the African Commission to the Right to health under the African Charter,* Community law Centre, University of the Western Cape, *Law, Democracy and Development* p.g 406 (2013).

<sup>426</sup> E Durojaye *The Approaches of the African Commission to the Right to health under the African Charter,* (n 425above),para 100.

<sup>427</sup> C Mbazira, ‘Enforcing the Economic, Social and Cultural Rights in the African Charter on Human and Peoples’ Rights: Twenty Years of Redundancy, Progression and Significant Strides’ (2006) 6 *African Human Rights Law Journal* 333, 347.

regional human rights system with the international system.<sup>428</sup> While the Commission did not invoke the jurisprudence on the right to health under international law,<sup>429</sup> in its earlier case law, the Commission observed that starvation of prisoners and their deprivation of blankets and clothing constituted a violation of Article 16 of the African Charter.<sup>430</sup>

In underscoring the Underlying Determinants of a Health Approach and the Interdependence Approaches under the Charter in the cases dealing with the right to health examined above, it is submitted that the integrated protection of various groups of rights which are distinctively categorised to be indivisible and interrelated provide a valuable legal basis for these approaches in the implementation and enforcement of SERs in Africa.<sup>431</sup> In support of this argument, the *SERAC* and *Purohit Cases* discussed above provides a legal basis of this argument by taking cognisance of the view that ‘all human rights are universal, indivisible, and interdependent and interrelated.’<sup>432</sup> The provision in articles 60 and 61 that the Commission must draw inspiration from international law in conjunction with the provisions in Articles 3 and 7 of the African Court protocol that provide the Court’s with a broader subject matter jurisdiction widen the substantive basis for this approach as they allow for the interdependence of rights.<sup>433</sup>

In a further recent comparative decision by the African Commission dealing the right to health notably, the *Sudan Human Rights Organization and Another v Sudan case*,<sup>434</sup> (*Darfur case*) decided in 2009, the Commission further illustrated the normative content of the right to health under Article 16 by invoking the interpretation of this right under international law. In this case, the applicants submitted that forced evictions and the poisoning of water wells by the Janjaweed people constituted violations of the right to water implicitly guaranteed under Articles 4, 16 and 22 of the Charter.<sup>435</sup> Importantly, it is observed in this case that the Commission gave a

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<sup>428</sup> C Mbazira, ‘The Right to Health and the Nature of Socio-Economic Rights Obligations under the African Charter: *Purohit and others v The Gambia* (n 298 above) Para 6 (2005) (4) *ESR Review* 15.

<sup>429</sup> UN Committee on ESCR, General Comment No. 14, The Right to Health, UN Doc.E/C.12/2000/4, Paras 11-14.

<sup>430</sup> *Malawi African Association and Others vs. Malawi*, Para 12.

<sup>431</sup> African Charter. Preamble, Para 7.

<sup>432</sup> *Purohit and others v The Gambia*. (n 298above) Para 48.

<sup>433</sup> Art. 60 & 61 African Charter; Art. 3 & 7 African Court Protocol.

<sup>434</sup> *Sudan Human Rights Organisation and Another Vs Sudan* (2009) AHRLR 153 (ACHPR 2009) (*Darfur case*) Paras 205, 212, 216 & 223.

<sup>435</sup> *Sudan Human Rights Organisation and Another Vs Sudan* (2009) at Para 209, relying on UN Committee ESCR General Comment No. 14; The Right to the Highest Attainable standard of Health.

progressive interpretation of the right to health by invoking the normative meaning of the right to health as enunciated by the CESCR in its General Comment No.14 dealing with this right.<sup>436</sup>

Remarkably, the approach of the Commission is based on the undertaking that the right to health extends not only to timely and appropriate healthcare but also to the underlying determinants of health' thus it is significant that the Commission underscored the Underlying Determinants of a Health Approach on the basis that water is one of these determinants. The Commission concluded that the right to health has been violated. It is notable in this case that the serious nature and far reaching extent of the violence against African tribes in the Darfur region explains why the Commission did not engage in a detailed exposition of the right to development in the region. However in its finding in 2009, the Commission held that the 'failure of the government to deploy its resources to address the marginalisation in the Darfur which was the main cause of the conflict violated the right to development.'

Comparatively, much like the Ogoni case, the forced evictions of civilian population from their homes and villages in the Darfur and the demolition of their property, water sources, food and livestock by the state constituted cruel and inhuman treatment that threatened the very essence of their existence and dignity.<sup>437</sup> In adopting the Interdependence of substantive rights Approach, the Commission contended that a combined effect of the provisions of the right to property as well as the rights to housing, water and food if taken separately amounts to a violation of the right to dignity and against cruel and inhuman treatment. It is submitted that the Commission adopted two approaches in this case, notably the Underlying Determinants of a Health Approach and the Interdependence Approach.

### **3.7. The Right to Health under the inter-American Human Rights System.**

A further comparable decision by the American Commission on the human right to health is the *Jorge Odir Miranda Cortez .al. El Salvador case*<sup>438</sup>. In this case, the complainants were HIV patients. They alleged that the failure of the government of El Salvador to provide them with the triple therapy medication violated a range of rights including their right to life contained

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<sup>436</sup> UN.CESCRs in its General Comment No.14 UN Doc. E/C.12/2000/4, (accessed 11April 2015).

<sup>437</sup> *Sudan Human Rights Organisation and Another v Sudan* (2009) (n 434above) Paras 155-164 & 168.

<sup>438</sup> *Jorge Odir Miranda Cortez et al v. El Salvador*, Case 12.249, Report No. 29/01, OEA/Ser.L/V/II.111 Doc. 20 rev. at 284 (2000).(Accessed 25 April 2015).



in Article 4, the right to freedom and in human treatment provided in Article 5, the right to equal protection provided in Article 24, the right to judicial protection guaranteed in Article 25 and the right to economic social and cultural right provided in Article 26 of the American Convention on Human Rights. The complainants further indicated that this denial by the state constituted a violation of their right to health contained in Article 10 of the Additional Protocol to the American Convention in the Area of Economic Social and Cultural rights.

The inter-American Commission ruled that the case was admissible in respect to Article 26 of the Convention which obliges States to take the necessary steps to progressively realise the rights implicit in the economic, social and cultural standards guaranteed in the Charter of the OAS. A significant approach that the Commission applied in finding a violation is that the Commission explicitly reasoned that while it was incompetent to determine violations of Article 10 in the context of the right to health of the Protocol of San Salvador, it conceded that it would use this provision and the other SERs provisions of the protocol for interpretative purposes in the attempt to elucidate the guarantees provided under Article 26 of the Convention. This approach permits the Commission to infer this right in a range of instruments under the inter-American system for the protection of human rights.

It is submitted in this segment that the commendable decisions of the inter-American Commission and Court can have a fundamental impact in resolving normative hurdles and providing guidelines even for other regions such as the African region that can be followed in improving the normative content of SERs under the Charter. A critical comparison of these cases provides a clear construction of the normative content of other regions which can be of great benefit to the African regional system.

### **3.8. The Right to Health under the European Human Rights System:**

Another remarkable decision on the right to health in the European regional framework is the *International Federation of Human Rights Leagues (FIDH) v. France*<sup>439</sup> a case that was decided by the European Committee of Social Rights in 2004 in the context of two provisions of the Revised European Social Charter notably Articles 13 and 17. Accordingly, Article 13 of the

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<sup>439</sup> *International Federation of Human Rights Leagues (FIDH) v. France* , Complaint No. 14/ 2003(2003)

Social Charter is a significant provision in terms of access to health care and services as it guarantees access to social and medical assistance and care to those without adequate resources.

Similarly, Article 17 which provides for the “right to children and young persons to social, legal and economic protection” also requires the State to take necessary measures to ensure children’s right to health. In this case, Article 13 and 17 of the European Social Charter was the subject of a 2004 decision of the European Committee of Social Rights. It is notable in this case that the Federation claimed that France had violated Article 13, the right to medical assistance by ending the exemption of illegal immigrants with very low incomes from charges for medical and hospital treatment. The Committee also noted that a 2002 legislative reform restricting access to medical services for children of illegal or undocumented immigrants violated Article 17 of the Social Charter. In this case, such children were forced to wait for three months to qualify for medical assistance and were only afforded assistance in “situations that involved an immediate threat to life”.

It is of importance in this case that the Federation claimed that France had violated the right to medical assistance and argued that these children were lawfully residents because residency permits were not required for those under the age of 16 years of age. Subsequently, the Committee found no violation of Article 13; however since illegal immigrants could access some forms of medical assistance after three months of residence, while all foreign nationals could at any time obtain treatment for “emergencies and life threatening conditions.” This finding was reached despite evidence of significant problems with the implementation of legislation. The Committee found a violation of Article 17 (the right of children to protection), even though children had similar access to health care as adults. The Committee noted that Article 17 was inspired by the CRC, and that it protects the right of children and young persons to care and assistance.<sup>440</sup> This case is significant in that it not only provides an expansive interpretation of the Social Charter with international instruments; it also recognises children’s vulnerability in providing protection for their rights.

### **3.9 The Right to Education under the African Charter:**

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<sup>440</sup> Art.13 is more restrictive in its wording.

The right to education is directly linked to the ability of individuals to realise and exercise their human rights and to be part of society. The right to education demonstrates the interdependence and indivisibility of rights since it serves as both a civil, political and SER. The CESCRs rightly states that regardless of how it is categorised, the denial of the right to education is extremely damaging as it creates substantial obstacles to the ability of individuals to participate in decision-making processes impacting on their daily lives.<sup>441</sup> There is no justification for denying the right to education or applying discriminatory policies in this area. A denial of education will not only have a detrimental impact upon the existence of democracy, if individuals are able to access education, they are also able to be active participants in their own development and to contribute to the development of society.

The Commission addressed the violation of this right in the case of *Free Legal Assistance Group and Others v. Zaïre*.<sup>442</sup> In this case, the complainants alleged that due to the mishandling of public finances, the government had failed to provide basic services, including the fact that the universities and secondary schools had been closed for two years. The African Commission concluded that: ‘the closure of universities and secondary schools constitutes a violation of Article 17’.<sup>443</sup> In this case, Mbazira<sup>444</sup> contended that:

The Commission should have seized the opportunity to elaborate on the right to education, especially considering the fact that Article 17 does not detail the content of this right. This is in comparison to Article 13 of the ICESCR, which details the right as comprising of compulsory and free primary education and access to secondary and higher education.

Importantly, it is notable that the African Commission did not determine whether or not all closure of secondary schools and universities amounted to the violation of Article 17. This is despite the view that, although the right to education as guaranteed in the Charter, the Charter does not contain a limitation clause; when students go on riots or use the university as bases for destabilising institutions of the State, in such instances closure may be justified.

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<sup>441</sup> UN Committee on Economic, Social and Cultural Rights, *Croatia* UN Doc. E/C.21/Add 73, 27th Session, 30 November 2001, Para 35.

<sup>442</sup> *Free Legal Assistance Group and Others v. Zaïre*.

<sup>443</sup> Veriava in Brand and Heyns. (eds.)(2005) 63.

<sup>444</sup> C Mbazira (2006) 345.

A further comparative decision dealing with the right to education under Article 17 is the *Kevin Mgwanga Gumne et al vs Cameroon case*.<sup>445</sup> In this case, the applicants alleged that Cameroon violated Article 17 of the Charter because it was destroying education in Southern Cameroon by providing insufficient funds for primary education.<sup>446</sup> It was also alleged that Cameroon imposed inappropriate reform policies of secondary and technical education. In addition to refusal to provide authorisation for registration of the Bamenda University of Science and Technology, it was observed that the State engaged in discriminatory tendencies against Southern Cameroonians in the admission into the polytechnique Yaoundé, which impacted negatively on the education system in Cameroon and in realising this right.

In interpreting the content of the right to education, the African Commission determined that there was no violation of this right under Article 17(1) without elaborating on its content because the applicants did not substantiate the allegations'.<sup>447</sup> It is observed in this pertinent case that the Commission should have seized this moment in providing meaningful content to the indispensable right to education and to clarify the scope of this right under the Charter.

However, it is significant that although the Commission did not clarify the scope of this right, the content of the right to education was clarified by the Commission's Draft Principles and Guidelines on Economic, Social and Cultural Rights in the African Charter.<sup>448</sup> Under the guidelines, the Commission demonstrated that the right to education extends to the right of all children to free and compulsory primary education; "to make secondary including technical and vocational and higher education to all without discrimination of any kind." It is observed in this case that the Commission applied a Direct Approach in finding a violation of this right since the right to education is explicitly engrained in the Charter.

### **3.9.1 The Right to Education in the inter-American system:**

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<sup>445</sup> Communication 266/2003, (2009), 26<sup>th</sup> Activity Report, Annex IV *Kevin Mgwanga Gumne et al vs Cameroon case*

<sup>446</sup> See Draft Principles and Guidelines on Economic, Social and Cultural Rights, paras.64–75(implying the rights to housing, the right to social security, food, water and sanitation in the African Charter).

<sup>447</sup> Communication 266/2003, (2009), 26<sup>th</sup> Activity Report, Annex IV, Para 145. *Kevin Mgwanga Gumne et al v. Cameroon case*

<sup>448</sup> See African Commission Draft Principles and Guidelines adopted in 2010 and launched in 2011; at para 57. Available at <http://www.escri-net.org/docs/i/1599552> (assessed 17 July 2015).

The inter-American Court has dealt with a plethora of decisions in the context of education. A recent development in the cases dealing with education is the *Dilcia Yean and Violeta Bosica v. Dominican Republic* case.<sup>449</sup> Citing this case, it was noted that the Dominican authorities denied birth certificates to two Dominican-born children of Haitian descent. The refusal of the authorities to provide the children birth certificates had clear implications for the enjoyment of their right to education and other interrelated SERs because without a birth certificate, it is impossible to attend school in the Dominican Republic.

It is observed in this case that the Court found that the Dominican Republic had clearly violated a wide range of rights enshrined in the American Convention on Human Rights including the right to special protection of minor children contained in Article 19,<sup>450</sup> the right to individuals as persons before the law guaranteed in Article 3,<sup>451</sup> the right to nationality accorded in Article 2,<sup>452</sup> and the right to equal protection before the law spelt out in Article 24.<sup>453</sup>

Importantly, the Court continued to invoke the CRC noting that according to the child's right to special protection embodied in Article 19 of the American Convention, interpreted in light of the CRC and the Additional Protocol to the American Convention on Human Rights in the Area of Economic Social and Cultural Rights, in relation to the obligation to ensure progressive development contained in Article 26 of the Convention, the State must provide free primary education to all children in an appropriate environment and in the conditions necessary to ensure their full intellectual development. It is noted that the immediate nature of this case reflects discrimination tendencies prevalent in the context of education cases. This case further brings to light the critical approach of the Non-discrimination principle to the interpretation of SERs which has been explored in cases in the inter-American region. The discussion below provides more light in the European context to cases that have applied this approach to the interpretation of SERs.

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<sup>449</sup> *Dilcia Yean and Violeta Bosica v. Dominican Republic* Case No 12. 12.189, 8 Sept. 2005. For a full text see, [http://www.corteididh.or.cr/seriec\\_130\\_esp.doc](http://www.corteididh.or.cr/seriec_130_esp.doc)

<sup>450</sup> Art.19 American Convention.

<sup>451</sup> Art.3 American Convention.

<sup>452</sup> Art.2 American Convention.

<sup>453</sup> Art.24 American Convention.

### 3.9.2 The Right to Education under the European Human Rights System

In interpreting the indispensable right to education, a comparative decision that was determined by the European Committee of Social Rights which dealt with this right is the *International Association Autism-Europe (IAAE) v. France*.<sup>454</sup> In this case, the applicants alleged that the French Government had made insufficient educational provision for autistic persons, hence violating a range of provisions of the Revised European Social Charter of 1966 including Article 17(1) (the obligation of States Parties to secure the right to education of all children and young persons) and Article 15(1) (the obligation of State parties to ensure the effective exercise by persons with disabilities of their right to independence, social integration and participation in the life of the community by taking the necessary measures to provide such persons with education).

Importantly, the applicants also claimed that France had violated the Non-discrimination principle contained in Article E in the enjoyment of Charter rights. It should be noted that the European Committee of Social Rights illustrated that Article E prohibits both direct and all other forms of discrimination. In a significant decision, the Committee determined that numbers of autistic children enrolled in either general or specialist schools were disproportionately low compared to other children which led to discrimination tendencies of care and support for autistic adults. This amounted to a violation of Articles 15(1) and 17(1) either read alone or together with Article E.

It is submitted from the foregoing consideration of jurisprudential developments in the European regional system that the decisions dealt in this region provide an impetus for the Commission and they can be effectively utilised in advancing the normative content of the Charter where circumstances of such violations permit. As observed earlier in the European system, through its integrative approach, coupled with the Non-discrimination principle would further complement the approaches to the Commission in providing potential claims that can be used in their interpretation of SERs.

Under international law, a plethora of decisions by the HRC have concurred with the approach of the European Court of Human Rights in applying the principle of non-discrimination to SERs even when these are not the subject of protection on their own. Citing the *Zwaan de*

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<sup>454</sup> *International Association Autism-Europe (IAAE) v. France* Case No.13/ 2002,



*Vries v. The Netherlands*, the Human Rights Committee issued a ruling extending the right to non-discrimination to economic rights otherwise clearly beyond the scope of the ICCPRs.<sup>455</sup> In this case, the Committee deliberated on legislation that required married women seeking unemployment compensation to demonstrate that their income had been the primary source of income for their families. Neither married men, nor single men or women were required to make such a showing. In rejecting the burden on married women, the Human Rights Committee resolved that:

*Although Article 26 requires that legislation should prohibit discrimination, it does not of itself contain any obligation with respect to the matters that may be provided for by legislation. Thus it does not, for example, require any State to enact legislation to provide for social security. However, when such legislation is adopted in the exercise of a State's sovereign power, then such legislation must comply with article 26 of the Covenant.*<sup>456</sup>

It is notable that *Zwaan de Vries* case allowed the Human Rights Committee to establish the expansive nature of the principle of non-discrimination in finding violations and interpreting SERs. The Human Rights Committee noted that, “whatever the economic, social, or cultural right, be it social security, in these cases, or any other benefit or any other program that a state may provide, may never be provided on a discriminatory basis under the principles of international human rights law.”

Similarly, in *Lantsova v The Russian Federation*<sup>457</sup> where the Human Rights Committee construed that a prisoner had died owing to overcrowding and other cruel inhuman and degrading conditions in regard to food and hygiene, the Human Rights Committee interpreted Article 6 of ICCPRs on the right to life to incorporate a range of provisions including the right to health and medical assistance. In a consistent manner of rights interpretation, the Human Rights Committee further noted that conditions of detention violated the ICCPRs Article 10 on the right to respect the inherent dignity of prisoners. Comparatively a similar case discussed above under

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<sup>455</sup> *Zwaan-de Vries v. The Netherlands*, U.N. GAOR, Hum. Rts. Comm., U.N. Doc. Supp. No. 40 (A/42/4o), at i60 (1987).

<sup>456</sup> *Zwaan-de Vries v. The Netherlands*, U.N. GAOR, Hum. Rts. Comm., U.N. Doc. Supp. No. 40 (A/42/4o), at i60 (1987), 12.4

<sup>457</sup> *Lantsova v. The Russian Federation* Communication 763/1997 (15 March 2002), UN Doc CCPR/C/74/D/763/1997.

the African Commission the *Mukong v Cameroon case* can be detected where detainee's rights were violated.

It is submitted that the jurisprudence by the Human Rights Committee as illustrated in the cases above can be of great importance and guidance in interpreting the SERs provisions of the Charter and especially in extending the Non-discrimination principle in finding violations of SERs. While the approaches discussed above have been effective means for holding States accountable that have violated their obligations, the African Commission can learn from these approaches in advancing the SERs under the Charter.

### **Conclusion:**

Conclusively, this chapter has explored relevant approaches adopted by the African Commission to the SERs provisions under the Charter. The Chapter confirmed that the Interdependence Approach, Direct Approach, Underlying Determinants of a Health Approach, and Non-Discrimination Approaches which have been extensively applied under European and inter-American regional systems provide valuable approaches to the judicial adjudication of SERs under the Charter. As noted from the cases decided in the discussion above, the pattern of violations and issues on which the Commission has had to adjudicate and pronounce clearly demonstrate that the rights under the Charter are interrelated and indivisible. In the words of the Commission '*there is no right in the Charter that cannot unequivocally be made effective*'.<sup>458</sup> The next Chapter deals the challenges to the interpretation of SERs by the Commission.

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<sup>458</sup>Communication 155/96, 63, Para. 68.

## CHAPTER FOUR

### CHALLENGES TO THE INTERPRETATION AND ENFORCEMENT OF SOCIO-ECONOMIC RIGHTS BY THE AFRICAN COMMISSION

#### 4.0. Introduction:

The previous two Chapters examined the interpretation of SERs under the African Charter. Against this background, this Chapter is aimed at examining the challenges inhibiting the Commission's interpretative mandate. It contends that despite the emphasis on the indivisibility of human rights, interpretation of these provisions has been met with numerous challenges. While some of these challenges were spotlighted in Chapter one, this Chapter deals with recent obstacles that have significantly obstructed the Commission's ability to function as an effective regional human rights institution on the continent.

Hence, this chapter will focus on the following challenges; the non-enforceability of SERs as justiciable rights in several African States,<sup>459</sup> Secondly, the lack of clarity in the normative content of the Charter's provisions on SERs.<sup>460</sup> I then discuss the lack of implementation and enforcement of the Commission's recommendations;<sup>461</sup> financial constraints;<sup>462</sup> and finally, the Commission's reliance on political organs.<sup>463</sup> The Chapter is divided into three sections; after the brief introduction, Section 4.1 which is the kernel of this chapter explores these challenges; Section 4.2 identifies some opportunities for overcoming these challenges while simultaneously postulating ways of improving the Commission's effectiveness in its interpretation and implementation of SERs. The Chapter ends with some concluding remarks.

#### 4.1. The non-enforceability of socio-economic rights as justiciable rights in African States

In 1993, the international community in the Vienna Declaration and Program of Action reinforced the importance of realising both CPRs and SERs by proclaiming their indivisibility

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<sup>459</sup> Section 4.1

<sup>460</sup> Section 4.2

<sup>461</sup> Section 4.3

<sup>462</sup> Section 4.4

<sup>463</sup> Section 4.5

and interrelatedness.<sup>464</sup> Comparatively, it is notable that while the Charter contrary to European and inter-American instruments underscores the universality of human rights,<sup>465</sup> the question of non-judicial enforcement of SERs as justiciable rights in most African countries has led to the marginalisation of these rights which has had a detrimental effect on their effective realisation. While the Charter entrenches a catalogue of justiciable SERs alongside CPRs,<sup>466</sup> most African countries differ significantly in that they do not recognise the justiciability of SERs in their national constitutions and these rights are perceived as non-justiciable hence courts are incapable of judicially enforcing their implementation. This is despite the view that almost all AU member states with exception of Southern Sudan have ratified the Charter.<sup>467</sup>

Subsequently, it is notable that while only a handful African constitutions such as that of South Africa<sup>468</sup> and Kenya;<sup>469</sup> SERs are protected as justiciable in the bill of rights, in several African states including that of Nigeria, Ghana, Namibia, Lesotho and Sierra Leone, the provisions pertaining to SERs have been included in their national constitutions or Bill of rights only as Directive Principles of State Policy (DPSP) hence they are not epitomised as justiciable rights as such but only serve as a guide to the executive or legislature in the exercise of its functions.<sup>470</sup> Another distinction is that the ‘directive principles’ only serve as a guide to the judiciary in the interpretation of the constitution and other laws<sup>471</sup> but are not judicially enforceable. To the contrary and in line with this argument, some scholars have asserted that even though the political role of the judiciary was an uncontroversial issue in light of interpreting

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<sup>464</sup> See Vienna Declaration and Program of Action (n 144above).

<sup>465</sup> African Charter (n 1above) preamble Para 6 which provides that: (i)t is henceforth essential to pay particular attention to the right to development and that (CPRs) cannot be dissociated from [SERs] in their conception as well as universality and that the satisfaction of (SERs) is a guarantee for the enjoyment of (CPRs).

<sup>466</sup> For an elaborate analysis of the justiciability of SERs both at the national and international level, See M Scheinin ‘Justiciability and the indivisibility of human rights’ in J Squires, M Langford & B Thiele (eds.), *The road to a remedy: Current issues in the litigation of economic, social and cultural rights* (2005) 17-20.

<sup>467</sup> (n 1above)The African Charter has been ratified by all members of the AU.

<sup>468</sup> The inclusion of constitutional SERs was confirmed by the South African Constitutional Court (SACC) in *re Certification of the Constitution of the Republic of South Africa (First Certification case)* 1996 (10) BCLR 1253 (CC) of 4 December 1996 even though this may have direct financial and budgetary implications, Para 78.

<sup>469</sup> The three phases leading to the inclusion of SERs in the 2010 Kenyan Constitution are similar to the situation leading to the recognition of SERs in Latin American States’ constitutions. See DM Brinks & W Forbath ‘Commentary - Social and economic rights in Latin America: Constitutional courts and the prospects for pro-poor interventions’ (2010-2011) 89 *Texas Law Review* 1943, at 1948.

<sup>470</sup> (n 138 above).

<sup>471</sup> See for instance Art.45 of the 1937 Irish Constitution, which stipulates that the ‘Directive Principles of Social Policy’ are intended as general guidelines for the legislature.(n 138above).

SERs; and judges possessed the requisite expertise to implement decisions on socio-economic issues, Courts will still focus on CPRs in Africa as SERs are considered as non-justiciable.<sup>472</sup>

Consequently, the non-judicial recognition of SERs and their constitutional inclusion only as 'directive principles' questions their enforceability and creates substantial obstacles for the Commission in providing a holistic interpretation which will enable their effective realisation at the domestic level thus leaving the plight of the poor and the vulnerable members of society unprotected.<sup>473</sup> Much like several African countries, a pertinent example of the constitutional entrenchment of directive principles is the Constitution of Nigeria. In the Nigerian context, a range of SERs are provided in Chapter 11 of the 1999 Constitution of Nigeria entitled as "Fundamental Objectives and directive Principles of State Policy" and hence interpreted as constitutional commitments excluded from judicial enforcement.<sup>474</sup> While the Constitution of Nigeria provides in Section 3 that "it is the duty of and responsibility of all organs of the government to conform to observe and apply these principles," the same document reiterates that Courts have no jurisdiction to inquire whether conduct or legislation conforms with the Directive Principles.

In clarifying the status of the directive principles in *Morebishe v. Lagos State House of Assembly case*,<sup>475</sup> the Lagos State High Court stipulated the non-justiciability of the directive principles but added that they remain pillars of guidance and the focus of attention for all tiers of government. Principally, based on the Nigerian Bill of Rights, and thus indirectly on the European Convention on Human Rights, the constitutions of Lesotho and Sierra Leone do not provide for any justiciable SERs rights but both include non-justiciable DPSP. This is despite the view that the Nigerian state has not only ratified the Charter, it has also domesticated the Charter into its national laws. Hence it is notable that maintaining a contradictory approach in several Africa countries not only contradicts the Charter's, norms, object and purpose, it seriously impedes development.

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<sup>472</sup> F Viljoen "Some Arguments in Favour of and Against an African Court on Human and Peoples' Rights", *The Afric. Society of Inter'l Comp Law Proc* (1998), 10th Ann. Conf. at 40.

<sup>473</sup> See R Kunemann 'A coherent approach to human rights' (1995) *Human Rights Quarterly* 323, at 332, who contends that SERs are the only means of self-defence for millions of impoverished and marginalised individuals and groups all over the world.

<sup>474</sup> See s 6(6)(c) of the Constitution of Nigeria 1999, which provides that all the rights listed in Chapter 2 of the Constitution, shall not be made justiciable.

<sup>475</sup> *Morebishe vs Lagos State House of Assembly, case* [2000] 3 WRN 134, 150. See also, *Archbishop Okogie vs Attorney General of Lagos State* (1981) 2NCLR 350.

Unless the directive principles clearly have constitutional status, domesticated international law such as the Charter in Nigeria and relevant international law may have limited effect on national law. In elaborating on this view, a pertinent example is the *Abacha v Fawehinmi, case*,<sup>476</sup> where the Supreme Court of Nigeria reiterated that “the African Charter having been incorporated into Nigerian Municipal law cannot be preferably treated but should rank at par with other legislation and be subordinated to the Constitution.”

In my opinion, although I concur with the view in the *Abacha* that other legislation including international instruments ratified by Nigeria cannot not be favourably treated since Section 1(3) of the Nigerian Constitution provides that the Constitution of Nigeria is the Supreme law of the land, I assert that Nigeria should not derogate from its obligations to respect, protect, promote and fulfil SERs under the Charter and the ICESCRs. While Nigeria is a member state to the Charter, it has ratified several other international instruments including the ICESCRs which impose obligations on the state for which it must comply.

The provision of progressive realisation in Article 2(1) under the ICESCRs endorses the view that full realisation of SERs cannot be achieved in a short period of time due to financial difficulties faced by several developing countries such as Nigeria hence this provision imposes an obligation on States including Nigeria to ‘move as expeditiously and effectively as possible’ towards achieving the full realisation of SERs.<sup>477</sup> Similarly, the Constitution of the Republic of Namibia as is the case in the Nigeria; its socio-economic provisions are contained in the directive principles of state policy in Chapter eleven of the Constitution entitled ‘Principles of State Policy’<sup>478</sup> and are interpreted as mere policy objectives excluded from judicial enforcement.<sup>479</sup>

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<sup>476</sup> *General San Abacha and ors vs Fawehinmi*, Appeal to Supreme Court, SC 45/1997; ILDC 21 (NG 2000); (2001) AHRLR 172 (NgSC 2000). The Supreme Court held that where there is a conflict between the provisions of the African Charter and the Constitution of Nigeria the latter will take precedence. For an analysis of this Court of Appeal decision, See E Egede “The New Territorial Waters (Amendment) Act 1998 – comments on the impact of international law on Nigerian law” (2000) 12 *African Journal of International and Comparative Law* 84–104.

<sup>477</sup> ‘The Nature of States Parties’ Obligations’; UN Committee on ESCR General Comment No. 3. Para 9. (Accessed 17 August 2015).

<sup>478</sup> See G Carpenter, ‘The Namibian Constitution – *ex Afria Aliquid Novi* After All?’ in Dawid Hercules van Wyk, Marinus Wiechers and Romaine Hill (eds), *Namibia: Constitutional and International Law Issues* (VerLoren van Themaat Centre for Public Law Studies, University of South Africa, Pretoria 1991) 32.

<sup>479</sup> See GJ Naldi, ‘Some Reflections on the Namibian Bill of Rights’ (1994) *African Journal of International and Comparative Law* 45, 46.



Importantly, it is significant that the non-judicial recognition of SERs at the domestic level where these rights are implemented seriously impedes development. It is observed that a State that is not required to account for its socio-economic policies is unlikely to develop a consistent policy that encourages resource investment necessary for sustainable socio-economic development. Moreover, it should be noted that the inclusion of SERs as justiciable rights at the domestic level would play a significant role because it matters less to tell people that their CPRs will be protected if their socio-economic needs are compromised. CPRs such as freedom of expression mean little to millions of Africans deprived of food, shelter, water, and are dying from starvation and disease. In acknowledging this argument, the Constitutional Court of the Swiss Confederation contended that rights to democracy and liberty are meaningless without recognition of rights to a basic minimum level of subsistence and a right to basic necessities.<sup>480</sup>

In a further exceptional decision, the Supreme Court of the Republic of Ireland in *G v. An Bord Urchtala case*,<sup>481</sup> Justice Walsh observed that “the child also has natural rights, the child has the right to be fed and to live, to be reared and educated, to have the opportunity of working and of realising his or her full personality and dignity as a human being. These rights of the child and others which I have not enumerated must equally be protected and vindicated by the state.”<sup>482</sup>

Essentially, opposing arguments have been advanced for the non-enforcement of SERs. Proponents of non-judicial enforcement stress that the recognition of socio-economic claims as judicial rights will enable courts to intervene in the legislative process which will constitute a breach on the separation of powers.<sup>483</sup> To the contrary, those in support of SERs argue that these rights can be well defined to be included in a Bill of rights as has been the case with the rights to

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<sup>480</sup> The Court determined that there was an implied constitutional right to conditions minimales d’existence (a basic minimum level of subsistence). The right was a condition for the exercise of other written constitutional rights (rights to liberty and justice) or was indispensable for a State based on democratic principles and the rule of law, as well as the constitutional principles of human dignity and the right to life. A sufficient societal consensus for such an implication was found, particularly given the constitutional principle of human dignity; see *V v. Einwohnergemeine X und Regierungsrat des Kantons Bern* (BGE/ATF 121 I 367, Federal Court of Switzerland, 27 Oct. 1995). The Constitutional Court of the Federal Republic of Germany has done likewise; see *BverfGE 40, 121 (133)* (Federal Constitutional Court of Germany).

<sup>481</sup> *G v. An Bord Urchtala* (1980) IR 32 (‘G v. ABU’).

<sup>482</sup> (n 481 above) p. 69.

<sup>483</sup> Starck “Europe’s Fundamental Rights in their Newest Garb” 1982 *Human Rights Law Journal* 116.

equal pay for equal work.<sup>484</sup> In support of this later view, the Constitutional Court of South Africa (SACC) commented; *In Re Certification of the Constitution of the Republic of South Africa*,<sup>485</sup> that:

It is true that the inclusion of socio-economic rights may result in Courts making orders which have direct implications for budgetary matters. However, even where a court enforces civil and political rights such as equality, freedom of speech and the right to a fair trial, the order it makes will often have such implications . . . In our view, it cannot be said that by including socio-economic rights within a bill of rights, a task is conferred upon the Courts so different from that ordinarily conferred upon them by a bill of rights that it results in a breach of the separation of powers . . . The fact that socio-economic rights will almost inevitably give rise to [budgetary] implications does not seem to us to be a bar to their justiciability. At the very minimum, socio-economic rights can be negatively protected from improper invasion.

More importantly, the SACC further emphasised in the *South Africa Vs Grootboom* that “socio-economic rights are expressly included in the Bill of Rights; they cannot be said to exist on paper only.., and the courts are constitutionally bound to ensure that they are protected and fulfilled. The question is therefore not whether socio-economic rights are justiciable under our Constitution but how to enforce them in a given case.”<sup>486</sup>

Some scholars such as Basson rightly support this view by stressing that the only real difference between CPRs and SERs is their origin and contend that such categorisation should not be overemphasized. In supporting the essentiality of SERs, Kooijmans emphasised that the protection of SERs is as important for full human development as CPRs<sup>487</sup> while scholars such as Hausermann summarizes the importance of SERs as follows:

*"Insisting that economic, social and cultural rights are of equal importance to the other branches of human rights is not intended to paper over the cracks by ignoring the difficulties which inevitably arise in their full realization . . . But what can be stated is that in deciding these (spending) priorities, international human rights laws require states, both rich and poor, to allocate sufficient funds to ensure that all members of their population live in conditions appropriate to guarantee*

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<sup>484</sup> Eide "Realization of Social and Economic Rights and the Minimum Threshold Approach" 1989 *Human Rights Law Journal* 37.

<sup>485</sup> *In Ex parte Chairperson of the Constitutional Assembly: In re Certification of the Constitution of the Republic of South Africa*, 1996 (4) SA 744 (CC) (1996).

<sup>486</sup> *Government of the Republic of South Africa v Grootboom* 2001 (1) SA 46 (CC). Para 20.

<sup>487</sup> PH Kooijmans "Human rights-Universal Panacea?-Some Reflections on the so-called Human Rights of the Third Generation" 1990 *Netherlands International Law Review* 320.

their health and dignity, before allocating funds to those programmes and projects less immediately concerned with human welfare." <sup>488</sup>

From the foregoing, it is submitted that the non-judicial recognition of SERs in most African states explains why the *SERAC* and *Purohit* cases discussed in Chapter three have had little impact if any, on the realisation of SERs since 2001 when the decision was made. This explains why there has been no improvement on the lives of the Ogoni people and the government of Nigeria has done very little to improve the living conditions of Ogoni community.

#### **4.2 The lack of clarity in the normative content of the Charter's provisions on Socio-economic Rights and their scope of application**

It is imperative on States to ensure implementation of their SERs obligations if the rights guaranteed in the Charter are to realise their full potential. However, one serious impediment to the Charter and the Commission is the lack of conceptual clarity in the Charters provisions on SERs and its scope of application.<sup>489</sup> The Charter has been well known among international instruments for its ardent failure to adequately clarify and define the content of its SERs provisions. The Charter's provisions are not only broadly framed; they are vaguely formulated and hence require innovative and purposive interpretation to enable member States to the Charter to implement them.

Consequently, the vagueness in the formulation of provisions pertaining to SERs together with the Commission's failure to define and clarify these provisions makes enforcement at the domestic level quite difficult.<sup>490</sup> As observed in its case law on SERs pre-2001, despite finding violations in these cases, the Commission generally failed to develop the normative content of its SERs provisions.

A pertinent example of the Charter's provisions is the right to health.<sup>491</sup> Article 16 entitles individuals to "enjoy the best attainable state of physical and mental health without

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<sup>488</sup> "Myth and Realities" in Davies (ed) *Human Rights* (1988) 152.

<sup>489</sup> See MW Mutua The African Charter on Human and Peoples Court; A Two legged stool 21 HUM RTS Q 342 (1999) Makau wa Mutua The African Human Rights System in a Comparative Perspective 3 REV.AFR. COM.

<sup>490</sup> See C A BRIGIT TOEBES, THE RIGHT TO HEALTH AS A HUMAN RIGHT IN INTERNATIONAL LAW (1999).

<sup>491</sup> Art.16 African Charter.

defining the meaning of “standard of health”<sup>492</sup> or clarifying what is meant by the “best attainable state”. Given such a vague formulation of the essential right to health, its provision clearly depends on how a state construes it. Arguably, a reasonable interpretation is that it imposes an unlimited obligation on states to provide free medical services to rights-holders which leads to the conclusion that even if States employ the services of modern medical doctors and technology, it would seem quite impossible for such an obligation to be fulfilled. The ambiguity of such a provision permits states to avoid this interpretation.

For both the state and the individual, the provision fails to delineate the state’s obligation and the individual’s appropriate expectation leading to a violation of the fundamental right to health. It should be noted that the interpretation of the right to health is imperative in that this right not only extends to the Underlying Determinants of Health; it is inextricably linked to other fundamental provisions such as the right to life, food, shelter, dignity and non-discrimination hence the approach given to this right by the Commission is of paramount importance.

Similarly, reduction by government of the entitlements of employers to medical care is different from a violation of the right to health. Much like its counterpart right to health under the ICESCRs, the Charter’s right to health must be clarified.<sup>493</sup> Similarly, in elaborating on the right to work, the phrase “equitable and satisfactory conditions”, as illustrated in the Charter,<sup>494</sup> is “highly subjective” and lacks detailed definition. Commenting on this view, Ouguergouz described the rights provided in the Charter as “imprecise” and that the “the pertinent clauses offer only weak legal protection to the individual.”<sup>495</sup>

Moreover the Charter and Commission might be criticised for its exclusion of a multiplicity of provisions guaranteed in other international instruments that are of relevance to the African continent. For example it excludes a right to respect for private and family life, the right to an adequate standard of living, the right to rest and leisure, right to financial compensation in events of miscarriage of justice, the abolition of the death penalty, nor does it

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<sup>492</sup> UO Umozurike, *The significance of the African Charter on Human and Peoples’ Rights in Perspectives on Human Rights* 48.

<sup>493</sup> See UN Committee on ESCR G.A. Res 2200A(XXI), For an attempt to clarify the scope and implications of the right to health under the ICESCRs, See Toebe (n 489 above).

<sup>494</sup> Art. 15 African Charter.

<sup>495</sup> F Ouguergouz *The African Charter on Human and Peoples’ Rights: A Comprehensive Agenda for Human Dignity and Sustainable Democracy in Africa* (2003) 184 (arguing that “it would have been preferable to define [the phrase] more precisely”).

interdict forced or compulsory labour a situation faced by several African States. Similarly, there is no right to vote and be elected in periodical elections despite several instances of election violence in Africa. However, in line with the argument on the omission on the right to vote, the new Charter on Democracy and Election has so far provided for this gap.<sup>496</sup> It is notable that these rights have serious ramifications for the realisation of SERs in Africa hence their inclusion in the Charter is of significant importance.

The right to social security,<sup>497</sup> limitation of working hours and holiday with pay and trade unions are also excluded. Although the Commission through its reporting guidelines has required States to report on rights not explicitly protected, their explicit exclusion from the Charter in conjunction with entrenchment of SERs only as 'directive principles' in several states, creates substantial obstacles in their implementation. Notably, it is significant that the above mentioned rights are protected in other international human rights covenants such as the ICESCRs to which several African States are members without reservation. Therefore their explicit exclusion is a fundamental weakness to the African regional system. The essential rights to adequate food and shelter are also protected in other African human rights instruments<sup>498</sup> but not explicitly provided under the Charter.

Far more pertinently, the many claw-back clauses tend to water down the contents of the Charter's rights and give enormous powers to States to derogate from their human rights obligations.<sup>499</sup> The claw-back clauses restrict many of the Charters protection to rights as they are limited by domestic laws. Similarly, the claw-back clauses permit national laws to take preference over international law and this in turn undermines the purpose of codifying certain rights in international law. Claw back clauses have placed the Commission in a predicament of

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<sup>496</sup> In its 19th Ordinary Session, the African Commission adopted a resolution on Electoral Process and Participatory Governance. Applauding elections in Benin, the Sierra Leone, and the Comoros as part of the transition to democratic rule in these countries, the Commission asserted that elections are the only means by which people can elect democratically the government of their choice in conformity with the Charter. It called on governments to take measures to ensure the credibility of electoral processes, and stressed the duty of States to provide the material needs of the electoral supervisory bodies. See Ninth Annual Activity Report, Annex VII, 9.

<sup>497</sup> (n 491 above) 11. 18.

<sup>498</sup> See Art.15 &16 protocol to the African Charter on Human and Peoples Rights on the Rights of Women in Africa.

<sup>499</sup> See Arts. 8-11 of the European Convention, & Arts.15-16 of the American Convention. For instance, some rights are to be enjoyed "subject to law and order, "within the law," if one "abides by the law." Some rights may also be restricted for the protection of "national security," "public order," or "public health." It is argued that although some of the phrases used are found in other international instruments, the African Charter "claw-back" regime tends to overemphasize the "exceptions" and gives wide powers to states at the expense of the rule.

deciding what applicable standard should be used in determining what is in accordance with a Members States law.<sup>500</sup> The issue of claw-back clauses is aggravated by the absence of the requirement that the restrictions must be in the interest of national security, public safety or public order. In commenting on claw-back clauses, Umozurike has rightly pointed out that “an attempt to set a standard would have been more helpful.” The Charter also omits a derogation clause.<sup>501</sup>

With regard to the scope of application, the Commission has been obstructed with difficulties in dealing with SERs violations emanating from non-state actors. In Africa, like other developing countries, emergence of international trade and globalisation has attracted Trans National Corporations (TNCs) in international and domestic economies with the TNCs playing a significant role in the process.<sup>502</sup> To the contrary, these TNCs acting independently or in association with governments have the potential to violate human rights.<sup>503</sup> The problem of accountability for their activities is that private actors including TNCs are fundamentally immune to human rights since they are non-signatories to treaties guaranteeing human rights.<sup>504</sup>

In the Africa context, several TNCs have heavily invested in African countries to the extent that these TNCs have immense powers of influencing national policies and the economy. These TNCs run dynamic sectors of many national economies including, pharmaceuticals, telecommunications, information technology, banking and finance, and insurance. Far more pertinently, these TNCs take independent decisions and actions alone or in conjunction with States and international organizations which raise controversial labour, environmental, and justice issues, with serious implications on SERs and the living standards of millions.<sup>505</sup> However, these corporations cannot be directly brought to account for violations of human

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<sup>500</sup> A E Anthony, *Beyond the Paper Tiger: The Challenge of a Human Rights Court in Africa*, Texas International law Journal summer, available at [www.Africancourtcoalition.org/content\\_files](http://www.Africancourtcoalition.org/content_files). *Beyond the Tiger* doc (1997).

<sup>501</sup> See The Charter, in Part II (dealing with duties) merely mentions "collective security" but not "public emergency." See Art.27 (2) African Charter at 558. In view of the difference in character, scope, and circumstances in which limitations and derogations may be imposed, it is untenable to attempt to argue that the many limitation clauses (claw-backs) make a derogation clause unnecessary. For this argument, See, M. Rosa D'Sa, *Human and Peoples' Rights: Distinctive Features of the African Charter*, 29 *Journal of African Law* 72, 75-76 (1985).

<sup>502</sup> See MT Kamminga & S Zia-Zarifi (eds) *Liability of Multinational Corporations under International Law* (2000).

<sup>503</sup> Steiner & Alston (2000) 39.

<sup>504</sup> Jochnick (1999) 21 *Human Rights Quarterly* 58.

<sup>505</sup> See L Reed 'Great Expectations: Where Does the Proliferation of International Dispute Resolution Tribunals Leave International Law?' (2002) 96 *American Society International Law Proceedings* 219 224. See, in general, G Kelley 'Multilateral Investment Treaties: A Balanced Approach to Multilateral Corporations' (2000) 39 *Columbia Journal of Transnational Law* 483. CAT/C/29/161/2000(2002).



rights. It is the host States that should be brought to account for such violations because once in their jurisdictions, states have the legal authority to regulate the actions of these TNCs.

In responding to the issue of non-state actors including TNCs, in the *Centre on Housing Rights and Evictions vs. The Sudan*,<sup>506</sup> the Commission reiterated that it concurred with the decision by the UN Committee Against Torture in *Hijrizi vs Yugoslavia*<sup>507</sup> which held that forced evictions and destruction of housing carried out by non-state actors amount to cruel, inhuman and degrading treatment or punishment, if the State fails to protect the victims from such a violation of their human rights.<sup>508</sup> Relying on the UN Principles on Housing and Property Restitution for Refugees and Displaced Persons,<sup>509</sup> the Commission further confirmed that ‘States shall take steps to ensure that no one is subjected to displacement by either State or non-State actors’.<sup>510</sup> Some Scholars have also contended that the Charter has an indirect horizontal application in that it places a duty on the state to ensure that private individuals or non-state actors and institutions do not interfere with the human rights in a particular state.<sup>511</sup>

However, in reality it has been realised that this has not resolved the issue since most TNCs operating in Africa generate annual wealth that far exceeds most countries Gross Domestic Product (GDP). Most TNCs are more powerful than their host governments and are capable of influencing, destabilizing or even at the minimum, convicting these governments at will.<sup>512</sup> This is despite the view by the international community in the Vienna Declaration and Program of Action which explicitly pronounced that, “while development facilitates the enjoyment of all human rights, the lack of development may not be invoked to justify the

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<sup>506</sup> *Centre on Housing Rights and Evictions v. The Sudan*, Communication Nos. 279/03 & 296/05, (2009).28<sup>th</sup> Annual Activity Report

<sup>507</sup> *Hijrizi vs. Yugoslavia*, CAT/C/29/161/2000(2002)

<sup>508</sup> Communication No. 161/2000, UN Doc. CAT/C/29/D/161/2000 (2 December 2002) & COHRE case, (n 506 above) 66, Para. 159.

<sup>509</sup> UN Principles on Housing and Property Restitution for Refugees and Displaced Persons, UN Doc. E/CN.4/Sub.2/2005/17 (28 June 2005), Para. 5.4.

<sup>510</sup> COHRE case (n 508above) Para 203.

<sup>511</sup> De Vos Pierre ‘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).

<sup>512</sup> In 1999 a consortium of oil Companies included Shell, Exxon and Elf planned to build a pipe line across Cameroon and Chad at a cost of US \$ 3.5 which was twenty times the budget of Chad, see A. West ‘Shell makes pact with the devil’. at <<http://www.lclark.edu/lotl/volume5issue2/nigeria.html>> (accessed on 21 August 2015).

abridgement of internationally recognized human rights”.<sup>513</sup> Quite essentially, it is notable that the issue of TNCs in Africa has created a paradox for the Commission in its interpretative mandate and implementation of SERs. This argument is in view of many Africans who have been forcefully evicted or displaced due to the large-scale development projects such as the oil industry in the Niger Delta, dam buildings and other energy projects in several African states.

Scott has contended that in the absence of meaningful governmental capacity, corporations such as TNCs in Africa could be impleaded under the Charter as *de facto* governing authorities at least in some instances.<sup>514</sup> In the *SERAC* context, the Commission relying on the jurisprudence from the inter-American Court of Human Rights,<sup>515</sup> and the European Court of Human Rights,<sup>516</sup> asserted that:

Governments have a duty to protect their citizens, not only through appropriate legislation and effective enforcement but also by protecting them from damaging acts that may be perpetrated by private parties ... [W]hen a State allows a private person or groups to act freely and with impunity to the detriment of the rights recognised, it would be in clear violation of its obligations to protect the human rights of its citizens.<sup>517</sup>

Comparatively, under the ICESCRs for which several African states are members, the Maastricht Guidelines on Violations on Economic Social and Cultural Rights recognize “the state’s responsibility to ensure that private entities or individuals, including TNCs over which they exercise jurisdiction, do not deprive individuals of their SERs”.<sup>518</sup> In line with the delineation of the state’s duty as the duties to respect, protect, promote and fulfil, this obligation entails a combination of both negative and positive duties of the state. The Maastricht Guidelines further endorse the view of the inter-American Court in *Velasquez Rodriguez* by stating that “states are responsible for violations of economic, social and cultural rights that result from the failure to exercise due diligence in controlling the behaviour of non-state actors”.<sup>519</sup> The CESCRs has affirmed this position in its state reporting procedure thus confirming that the realm

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<sup>513</sup> Vienna Declaration and Program of Action (n 459above).

<sup>514</sup> Scott in Eide “Economic, Social and Cultural Rights as human rights” in Eide et al (eds) (2001) 1, 580.

<sup>515</sup> Case of *Velasquez Rodriguez v. Hondruas*, Judgment of 19 July 1998 series C, No. 4.

<sup>516</sup> The case *X and Y v. Netherlands*, 91 ECHR (1985) (Ser A) 32.

<sup>517</sup> *SERAC Case* (n280 above) Para 57.

<sup>518</sup> The Maastricht Guidelines on Violations of Economic, Social and Cultural Rights, guideline 4, reprinted in (1998) 20 *Human Rights Quarterly* 691. Para 18.

<sup>519</sup> (n 515above).

of state responsibility extends not only to the acts of the state but also to third parties such as TNCs over whom the state should have control.<sup>520</sup>

From the foregoing, it is noted that the issue of TNCs operating in Africa is a major challenge to the enjoyment of SERs due the fact that these corporations are responsible for violating these rights with minimum chances of holding them accountable which has fundamentally obstructed the Commission in providing a holistic interpretation that will hold the TNCs accountable for violations of SERs in instances where they are responsible for massive violations.

### **4.3 Financial Constraints**

Relatively, in comparison to European and inter-American quasi-judicial institutions, the African Commission has existed since its inception with inadequate resources and personnel which have severely hampered its effectiveness. Apart from being under-resourced, the Commission in carrying out its mandate has been faced with a heavy workload combined with lack of human resources and chronic lack of funding.<sup>521</sup> Accordingly, Article 41 of the Charter provides that: “the Secretary General of the (O) AU Commission shall appoint the Secretary of the Commission. “He shall provide the staff and services necessary for the effective discharge of the duties of the Commission and the AU shall bear cost of the staff and services.”<sup>522</sup> However, contrary to this provision, the financial situation of the Commission has remained a serious cause of concern thus impeding on the effective performance of its duties.

In accordance with its mandate, the promotional responsibilities of the Commission include holding of conferences, seminars and symposia on human and people’s rights either alone or in collaboration with other organisations. The Commission may also formulate principles on which African States may legislate. Effective performance of the Commission is dependent on the efficacy of the Secretariat while the Secretariat is dependent on resources made

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<sup>520</sup> Craven (1995) 112.113 citing the UN Committee on ESCRs Concluding Observations in regard to Iran’s initial State Report in 1993 where the Committee stated thus, “While appreciating that fatwahs are issued by the religious authorities and not by State organs *per se*, the question of State responsibility clearly arises in circumstances in which the State does not take whatever measures are available to it to remove clear threats to the rights applicable in Iran in consequence of its ratification of the Covenant”.

<sup>521</sup> N Udombana An African Human Rights Court and an African Union Court: A Needful Duality or a Needless Duplication? (2003). *Brooklyn Journal of International Law*, Vol. 28, No. 3.

<sup>522</sup> Art. 41 African Charter.

available to it by the AU. However, since most African countries are poor, they have not contributed enough funds in facilitating the running of the Commission hence the AU, the parent organisation has consistently and significantly failed to meet its financial obligations.<sup>523</sup> This could have been the reason why Member States opted for part-time Commissioners which has severely affected its efficiency due to unavailability of full time staff.

Consequently, budgetary constraints have oftentimes forced Commissioners to abandon important organisational and promotional activities, such as seminars and visits in State parties.<sup>524</sup> To this end, financial matters have taken up substantial space at the Commissions bi-annual sessions, thus instead of using those limited periods to deliberate on important aspects of its mandate, the Commission spends a huge amount of time discussing strategies for survival.<sup>525</sup> The Office of the United Nations High Commissioner for Human Rights commented with much concern the inconsistency in the African system.<sup>526</sup> With the African Commission meeting only twice a year and the Court sitting only quarterly, this in turn affects the frequency of meetings and inevitably the effective functioning of the African system of human rights.

It should be noted that on several occasions in its annual activity reports, the Commission has pointed to insufficient staffing particularly the lack of legal officers and resources to fund mandate holders activities.<sup>527</sup> While the Commission has attempted to address this challenge by accepting the services of legal officers and volunteers funded outside the AU, much still needs to be accomplished. Until December 2008, the AU provided the Commission with only two legal officers, a Secretary, a finance officer, two drivers, a documentation officer, a security guard and a cleaner. To keep operations at the Secretariat functional at the barest minimum level, the secretariat has been forced to resort to extra-budgetary sources of funding from International Organisations, donor countries and NGOs with Observer status.

Recently, at its 25<sup>th</sup> Anniversary, the Commission further raised the same issue of insufficient staffing specifically the lack of legal officers and resources to fund mandate holders activities. The Chair noted with much concern that she receives no support to carry out her work.

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<sup>523</sup> Ankumah (1996) 28.

<sup>524</sup> Udombana (2002) 140.

<sup>525</sup> Udombana (2002) 140.

<sup>526</sup> Office of the United Nations High Commissioner for Human Rights, UN Doc E/CN.4/1999/93 Para 6.

<sup>527</sup> See for example, Thirteenth Annual Activity Report of the African Commission on Human and Peoples' Rights 1999/2000 (2000) 11.

Some of the international organisations that have financially supported the Commission's promotional activities include the Raoul Wallenberg Institute for Human Rights and Humanitarian Law, Danish Agency for International Development, (DANIDA), Swedish International Development Agency (SIDA), the Lund, and Sweden. Support for conferences also came from the European Union and the UN Council for Human Rights. However, despite this development, inconsistent support from donor organisations has seriously undermined the credibility of the Commission. That is why it was recommended strongly that Member states of the AU must support the Commission morally and financially or else they would be undermining the African Charter and its Commission.<sup>528</sup>

It should be noted that in the attempt to promote human and peoples' rights and ensure their protection in Africa, the current staff strength is clearly inadequate. The Commission considers at minimum fifty communications at each Ordinary Session and a lot of research goes in finalising a communication. Given the workload of the special mechanisms each of them should have a full time legal officer to coordinate their activities. It is apparent that the current staff provided to the Commission by the AU is clearly inadequate to effectively support its very broad mandate. At the same time, it should be noted that the effectiveness of the Secretariat is critical for the success of the Commission in carrying out its mandate.

From the foregoing, it is submitted that the issue of financial constraints has effectively affected the African Commission and thus remained a major factor in undermining the activities of the Commission.

#### **4.4 The lack of implementation and enforcement of the Commission's Recommendations**

Another outstanding challenge faced by the Commission is the lack of implementation of its recommendations. Although through its protective mandate,<sup>529</sup> the Commission considers a multitude of complaints of alleged violations of human rights and issues recommendations<sup>530</sup>

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<sup>528</sup> A Safari (1999) *The Enforcement of Human Rights in Africa with Reference to Tanzania*, 8 *Revision of the African Commission on Human & Peoples' Rights*, at 302-303.

<sup>529</sup> The communications are either from States Arts 47-54 African Charter, or Non-state entities (NGOs, national human rights institutions) or individuals Arts.55-59 African Charter.

<sup>530</sup> See 'Non-Compliance of States Parties to Adopted Recommendations of the African Commission: A Legal Approach' 24th ordinary session, OAU DOC/OS/50b (XXIV), Para 2 (1998), reprinted in R Murray & M Evans (eds) *Documents of the African Commission on Human and Peoples' Rights*, on compliance of state parties to adopted recommendations of the African Commission.

upon finding a violation, the attitude of states <sup>531</sup> has been to out-rightly ignore these recommendations<sup>532</sup> with no consequences.<sup>533</sup> Consequently, victims of SERs often find themselves without any remedy despite resorting to the Commission.<sup>534</sup> Several reasons have been raised for the non-compliance of the Commission's recommendations. Firstly, it has been pointed that the non-binding nature of the recommendations constitutes a significant cause of concern for state's non-compliance,<sup>535</sup> since States do not feel compelled to abide by the Commission's decisions which they consider to be only recommendations. Secondly, contrary to other regional and international human rights instruments, the Commission does not have a follow-up procedure<sup>536</sup> to ensure the implementation of its recommendations, 'although inconsistent follow-up measures in the past have been initiated on few occasions'.<sup>537</sup>

In regard to inter-State communications, it is notable that the Commission shall in accordance with Articles 52 and 53 draw up a report containing facts and findings that it deems useful and hence make recommendations to the AU Assembly. Rule 101 of the rules of procedure provide that 'the report shall concern the decisions and conclusions that the Commission will reach'. Conversely, regarding 'other communications'; in addition to Article 58 of the Charter, Rule 120 of the rules of procedure states that the Commission shall prepare observations on admissible cases and communicate them to the AU Assembly and the relevant State party.

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<sup>531</sup> The few instances of compliance with the African Commission's recommendations would include *Modise v Botswana* (2000) AHRLR 25 (ACHPR 1994) (V Dankwa 'The promotional role of the African Commission on Human and Peoples' Rights' in M Evans & R Murray (eds) *The African Charter on Human and Peoples' Rights: The system in practice, 1986-2000* (2002) 345; Pagnouille (on behalf of Mazou) v Cameroon (2000) AHRLR 57 (ACHPR 1997) (comments made by the state representative of Cameroon during the delivery of its initial state report at the 31st ordinary session of the African Commission on 6 May 2002 in Pretoria, South Africa).

<sup>532</sup> See 'Non-Compliance of States Parties to Adopted Recommendations of the African Commission: A Legal Approach' 24th ordinary session, OAU DOC/OS/50b (XXIV), Para 2 (1998), reprinted in R Murray & M Evans (eds) *Documents of the African Commission on Human and Peoples' Rights, on compliance of state parties to adopted recommendations of the African Commission*:

<sup>533</sup> Instances of states' disregard of the Commission's recommendations resonate in Africa. A typical example of a continued violation of human rights is *Zegveld & Another v Eritrea* (2003) AHRLR 84 (ACHPR 2003), whereby 11 detainees and victims of human rights violations, whom the African Commission had ordered to be released immediately, at its 34th session in November 2003, remain incommunicado.

<sup>534</sup> Non-Compliance of States Parties as above.

<sup>535</sup> F Viljoen, 'A Human Rights Court for Africa, and Africans' (2004) 30 *Brooklyn Journal of International Law* 13

<sup>536</sup> See Rules of Procedure of the Inter-American Commission (2003) Art 46; the UN Human Rights Committee and the UN Committee against Torture (accessed 3 August 2015).

<sup>537</sup> (n 530above)15.



Further, the AU Assembly can then request an in-depth study and a factual report, accompanied by findings and recommendations. In general, such report contains the decisions of the Commission, describing facts, the complaint, the procedure and the law, both related to admissibility and, if relevant, merits, as well as findings and recommendations. The report is included in an annual activity report, and submitted to the AU Assembly in accordance with Article 54 of the Charter. In practice, the Commission submits its report to the AU Executive Council. However, as has been noted above, the question is whether the recommendations made by the Commission become binding. Article 6(2) of the AU Constitutive Act provides that ‘the AU Assembly is the supreme organ of the AU.’ One of the tasks of the AU Assembly is to ‘make, receive, consider and take decisions on reports and recommendations from the other organs of the Union’. However, it is not explicitly mentioned in the AU Constitutive Act that the decisions of the AU Assembly are binding on Member States.

Since the AU Assembly is the supreme organ of the AU, it would mean that its decisions are binding for other AU organs and Member States. In elaborating on this view, Article 23(2) of the AU Constitutive Act provides that:

*Any Member State that fails to comply with the decisions and policies of the Union may be subjected to other sanctions, such as the denial of transport and communications links with other Member States, and other measures of a political and economic nature to be determined by the Assembly.*

Based on the above provisions, it is notable that the decisions by the AU Assembly are to be regarded as decisions of the AU. Since there are sanctions against Member States failing to comply with such decisions, it can be said that such decisions are binding, because it is absurd to sanction Member States for failing to comply with non-binding decisions.

In interrogating the implementation of recommendations under the inter-American system, it is notable that the inter-American Commission has urged member states “to adopt legal mechanisms for the execution of the recommendations of the Commission in the domestic sphere.”<sup>538</sup> While few American states have established special mechanisms to facilitate the implementation of its Commission’s recommendations and Court decisions, initiative has been

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<sup>538</sup> Annual Report, Inter-American Commission of Human Rights ch V11 para 12, OEA/Ser.L/V/11.98 doc.6 rev (1998).

made in implementing these recommendations. While such mechanisms within the inter-American context do not necessarily guarantee effective application of inter-American decisions, such efforts represent an important step towards creating conditions in which such decisions can have practical impact.

Within the African regional system, it is noteworthy that although the decisions of the African Commission on communications lack the formal binding force of a court ruling, Murray contended that they have a persuasive authority akin to the opinions of the UN Human Rights Committee.<sup>539</sup> In a similar vein, Viljoen and Louw revealed that the lack of any effective follow-up system had been a key cause of low compliance with the non-binding recommendations of the Commission.<sup>540</sup>

Nevertheless, the non-binding nature of these recommendations has been a serious deterrent factor and a significant set-back to the Commission's effectiveness in implementing its mandate. It should be noted that this is the very reason why an African Court on Human and people's rights was initiated in an attempt to confront the issue of the non-binding nature of the Commission's recommendations. It is contended that the African Court on Human and People's Rights is empowered to make appropriate orders to remedy violations including payment of fair compensation in instances of extreme gravity and massive violations of SERs and to complement the quasi-judicial Commission's protective mandate in providing more binding decisions that states are obligated to implement. The essentiality of the complementarity role of the African Court was demonstrated in March 2011 when the Court responding to a referral by the Commission ordered provisional measures against Libya.<sup>541</sup>

#### **4.5 Reliance on political organs.**

Finally, the effectiveness of the African Commission has been hampered by the Commission's reliance on political organs. Although the Commission is the oversight institutional body of the Charter, its effectiveness and performance is dependent on the extent to which Member states

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<sup>539</sup> R Murray 'Decisions by the African Commission on Individual Communications under the African Charter on Human and Peoples' Rights' (1997) *International and Comparative Law Quarterly* 412, 248.

<sup>540</sup> F Viljoen and L Louw 'State Compliance with the Recommendations of the African Commission on Human and Peoples' Rights 1994-2004' (2007) 101 (1) *American Journal of International Law* 1-34.

<sup>541</sup> See, African Commission on Human and Peoples' Rights *Vs. Great Socialist People's Libyan Arab Jamahiriya* Application No. 004/2011.

and the AU are willing to cooperate in the promotion and protection of human and peoples' rights on the continent. Subsequently, a notable challenge facing the Commission is that the President of the AU Commission has a very large role to play in its activities. He not only appoints the Secretary of the Commission but is also practically involved with providing the staff, funds, and necessary services for the effective discharge of the Commission's duties.<sup>542</sup> Notably, in accordance with the Commission's Rules of Procedure, almost all duties that facilitate and assist the Commission in the performance of its duties are vested in the President of the AU Commission.

To the contrary, some scholars have expressed serious concern that this is extremely detrimental for a regional institution that is expected to be independent and functioning as a watchdog on State parties on human rights issues.<sup>543</sup> The Commission's dependence on the AU seriously impedes its activities since it is expected to report to the AU sometimes awaiting approval on urgent issues that require resources and hence the Commission lacks the independence of a regional human rights institution. The AU Assembly or its Chairman are empowered to request the Commission to undertake in depth studies of human rights situations amounting to emergencies, serious or massive violations of human and people's rights duly reported to them by the African Commission.<sup>544</sup> Again the Commission has a duty to perform any task, not specified under the Charter, which may be assigned to it by the AU Assembly.<sup>545</sup>

Reliance of the Commission to the AU Assembly of Heads of State and Government took another dimension in view of what was seen as the AU Assembly's political interference in the African Commission's task. This was in light of the Assembly's decision to suspend the publication of the African Commission's 17<sup>th</sup> Activity Report, at its 4<sup>th</sup> Summit in Addis Abba<sup>546</sup> and certain aspects of the 19<sup>th</sup> Activity Report before publication, at the Assembly's 6<sup>th</sup> Summit, January 2006 in Khartoum.<sup>547</sup>

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<sup>542</sup> Art.41 African Charter; See also Rules of Procedure of the African Commission, Rule 22 defining the functions of the OAU now AU Secretary-General.

<sup>543</sup> Udombana (2002) 145.

<sup>544</sup> Art.58 African Charter.

<sup>545</sup> Art.45 (4) African Charter.

<sup>546</sup> Assembly/AU/Dec. 49 (III).

<sup>547</sup> The AU Assembly decided : 'to adopt and authorise, in accordance with Article 59 of the African Charter on Human and Peoples' Rights, the publication of the 19th Activity Report of the African Commission on Human and Peoples' Rights and its annexes, except for those containing the Resolutions on Eritrea, Ethiopia, the Sudan, Uganda

The decision to suspend the publication of the 17<sup>th</sup> Activity Report was taken after the Zimbabwe protested that the report did not incorporate its response to the findings of the Commission on a fact finding mission which was part of the Annual Activity Report's annexes.<sup>548</sup> This was despite the fact that the Commission had solicited time and again the response noted to no avail before its inclusion in the Annual Activity Report.<sup>549</sup> The deletion of certain aspects of the 19<sup>th</sup> Activity Report was at the request of the States mentioned in the resolutions noted above.<sup>550</sup>

This was also despite the fact that the resolutions on the human rights situation of these States like many other resolutions in the activity reports had been adopted by the Commission in accordance with its rules of procedure.<sup>551</sup> In addition, it is questionable if African States will be willing to bring cases against each other judging from the Commission's jurisprudence. Since its inception the Commission has heard only one case brought by a State against another State. That is the case of *Democratic Republic of Congo V Burundi, Rwanda & Uganda*.<sup>552</sup>

From the foregoing discussion, it can be concluded that the AU's interference in the Commission's activities is a major challenge to the Commission in the execution of its duties. This section has examined some of the recent challenges faced by the Commission to the interpretation of SERs under the Charter. However, these challenges are not insurmountable. The next section identifies opportunities in overcoming the challenges discussed above.

#### **4.2.0 Opportunities for Overcoming the Challenges to Socio-economic Rights interpretation by the African Commission**

A comparative perspective of the African Charter with European and inter-American regional instruments reveals that the Charter has contributed immensely to developments in international human rights law in Africa. Since its inception, it has played a significant role in complementing

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and Zimbabwe. It calls upon the African Commission on Human and Peoples' Rights to ensure that in future, it enlists the responses of all States parties to its Resolutions and Decisions before submitting them to the Executive Council and/or the Assembly for consideration; and requests States parties, within three (3) months of the notification by the African Commission on Human and Peoples' Rights, to communicate their responses to Resolutions and Decisions to be submitted to the Executive Council and/or the Assembly...'.<sup>548</sup>

<sup>548</sup> Mukindi in Viljoen (ed.).

<sup>549</sup> Mukindi in Viljoen (ed.).

<sup>550</sup> Mukindi in Viljoen (ed.).

<sup>551</sup> Mukindi in Viljoen (ed.).

<sup>552</sup> Communication 227/99, *Democratic Republic of the Congo v. Burundi, Rwanda and Uganda*.

and reinforcing the international system in the interpretation and enforcement of universal norms at the African regional level while at the same time responding to peculiar socio-economic problems in the region. While the Commission has been obstructed with some challenges as enumerated above, this section provides an exploration of some opportunities for surmounting these obstacles.

In presenting these opportunities, consideration will be made to the following; the domestication of the Charter; inclusion of SERs in the domestic constitutional framework as justiciable rights. Secondly, Normative Institutional and Procedural reforms, Thirdly, Independence of the Commission and finally, increase in the Commission's funding.

#### **4.2.1.0 Domestication of the Charter and the inclusion of Socio-economic Rights in domestic constitutions.**

Domestication of a treaty may distinctively take place in two ways: either directly through incorporation or indirectly through transformation.<sup>553</sup> Viljoen describes incorporation as the wholesale enactment of the provisions of a treaty usually with specific reference to the treaty being incorporated.<sup>554</sup> On the other hand, transformation takes place where a domestic legislation is amended to conform with a treaty usually without any explicit reference to the treaty.<sup>555</sup>

In Africa, direct incorporation of international human rights treaties such as the Charter into the national constitutional framework would significantly enhance the legal protection of SERs at the domestic level where these rights are relegated to non-justiciable. Nigeria is the only Anglo-phone country in Africa to have directly domesticated the African Charter.<sup>556</sup> Significantly, in dualist systems such as the case in Nigeria, international law and domestic laws are considered two separate legal systems. In this system, duly ratified treaties do not become part of the domestic laws until such treaties are domesticated. Nigeria has adopted the dualist approach.<sup>557</sup> In its Section 12 of the Nigerian 1999 Constitution, it provides that:

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<sup>553</sup> J Eluyode "Enforcement of international humanitarian law in Nigeria" (2003) 3 *African Human Rights Law Journal* 266.

<sup>554</sup> F Viljoen . *International human rights law in Africa* (2007) 536.

<sup>555</sup> F Viljoen *International human rights law in Africa* (2007) 536.

<sup>556</sup> (n 555above).

<sup>557</sup> *Abacha v Fawehinm* May [2000] 6 NWLR (Pt 660) 228 SC; *Ibidapo v Lufthansa Airlines* [1997] 4 NWLR (Part 498) 124 at 150.

No treaty between the federation and any other country shall have the force of law except to the extent to which any such treaty has been enacted into law by the National Assembly.

More recently, the Transitional Constitution of the Republic of South Sudan provides a another pertinent example in its Article 9(3) which grants that ‘All rights and freedoms enshrined in international human rights treaties, covenants and instruments ratified or acceded to by the Republic of South Sudan shall be an integral part of this Bill of Rights’. It should be noted that domestication of the Charter into national laws is an initial and a significant step towards justiciability of SERs and would greatly intensify chances for litigation.

On the other hand, in the attempt to implement the Charters’ SERs provisions and its State duties and obligations as developed through the Commission’s jurisprudence, SERs rights should not be relegated to non-justiciable ‘directive principles of State policy’ under domestic law. As Henry Shue comments that, “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.”<sup>558</sup> Arguably, the notion of non-enforceable right is nothing but a denial of the very concept of right.<sup>559</sup> It should be noted that since the Charter complements human rights protection at the domestic or sub-regional level where these rights are realised, the domestication of the Charter in conjunction with inclusion of SERs as justiciable rights in domestic constitutions is an essential step since this is a prerequisite compatible in complying with State obligations in accordance with Articles 1 and 2 of the African Charter.<sup>560</sup> In that way, the challenge of justiciability will be overcome to a very large extent. As discussed earlier, both the South African and the Kenyan Constitutions provide pertinent examples of the inclusion of SERs in a Bill of rights as justiciable. In supporting the inclusion of SERs in the new constitutional order, President Nelson Mandela noted that.

“A simple vote, without food, shelter and health care is to use first generation rights as a smokescreen to obscure the deep underlying forces which dehumanise people. It is to create an

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<sup>558</sup> H Shue, *Basic Rights: Subsistence, Affluence and U.S Foreign policy* 78 (1980).

<sup>559</sup> D Shelton, *Remedies in International Human Rights Law* 37 (1999) (a state that fails to protect fully individuals against human rights violations or that otherwise violates remedial rights commits an independent, further violation of internationally recognised human rights.”

<sup>560</sup> See e.g. *African Charter on Human and Peoples’ Rights (Ratification and Enforcement) Act*, Chapter A9, Laws of the Federation of Nigeria, 2004. Section 1 of this Act provides that the provisions of the African Charter shall ‘have force of law in Nigeria and shall be given full recognition and effect and be applied by all authorities and persons exercising legislative, executive or judicial powers in Nigeria’. See also *Socio-Economic Rights and Accountability Project vs Nigeria*, Communication 300/2005, Paras. 65–69, (2008), 25th Activity Report.



appearance of equality and justice, which by implication socio-economic inequality is entrenched. We do not want freedom without bread, nor do we want bread without freedom. We must provide for all the fundamental rights and freedoms associated with a democratic society.”<sup>561</sup>

Similarly, the SACC has confirmed in the *Grootboom* that these rights can be enforced at the domestic level. More importantly, the example of Nigeria in its domestication of the Charter provides a pertinent example of a state judicially bridging the divide between the two categories of rights and increasing the chances for litigation at national level through the domestication of the Charter. It is desirable that other African countries that have not yet domesticated the Charter should emulate the example of Nigeria.

#### **4.2.1.1 Normative Institutional and Procedural reforms**

Secondly, there is a pressing need for further innovative normative, institutional and procedural reforms to make the African human rights system more effective. Under the European system of human rights, the adoption of additional Protocols contributed fundamentally to its substantive and procedural provisions. In emulating the European approach, the need to adopt additional protocols to complement the Charter is recommendable where certain rights are either implicitly defined or excluded from the Charter. Although the Commission through innovative interpretative approaches has tried to fill the normative gaps on SERs, this is not enough.

In addition to domestication of the Charter, it is suggested that creativity, innovation and purposive interpretation of the Charter giving substantive meaning to fundamental SERs such as the right to health, housing, food is crucial if States are to give effect to the object, purpose and meaning of the Charter which is to promote and protect human and people’s rights effectively on the continent.<sup>562</sup> This purposive, innovative and creative interpretation would clearly delineate State obligations and in turn, States would be obliged to implement their obligations under the Charter. Importantly, the Charter needs revisions in several respects. Provisions that inhibit the publicity of the Commission's work should be revised.

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<sup>561</sup> N.R. Mandela ‘Address: On the occasion of the ANC’s Bill of Rights conference’ in *A Bill of Rights for a Democratic South Africa: Papers and Report of a Conference Convened by the ANC Constitutional Committee, May 1991* (1991) 9 – 14 at 12.

<sup>562</sup> African Charter Preamble Para 11.

As far as claw back clauses and the absence of derogation clauses under the Charter are concerned, the Commission must further tighten its belt and take a bold stance giving strict interpretations to Charter provisions as it did in *Amnesty international (on behalf of Benda and Chinida) v. Zambia*,<sup>563</sup> where it contended that recourse to these claw-back clauses, ‘should not be used as means of giving credence to violations of express provisions of the Charter’.

Importantly, the respect and protection of human rights and fundamental freedoms should bind TNCs in the regime of international trade. African states in conjunction with organisations such as the World Trade Organisation should embrace a human rights approach to trade law in a holistic manner. To this end, states should be required to put in place mechanisms and laws to ensure that private actors especially TNCs comply with human rights standards. Failure to comply should lead to a penalty on the state concerned. In the context of Africa, states must act in due diligence to ensure and protect SERs from private actor violations such as TNCs. Penalties should include suspension or withdrawal of certain trade privileges. Measures taken by the states must include constitutional provisions, legislative, administrative and other measures that provide for the horizontal application of the rights.

There is an urgent need to further restructure and strengthen the Commission’s broad mandate. It should be noted that the division of over 53 African States among eleven commissioners is unrealistic in the face of a huge continent with serious and massive violations of human rights as this result in the ineffective performance of its duties. Since they work on a part-time basis, they are unable to effectively perform their roles. Under the European Commission before Protocol 11, each member-state had a member while the inter-American Commission has seven members excluding promotional activities that are not included in their functions. To this end, the Commission requires more commissioners to deal with tasks at hand. On the other hand, the President of the African Court on Human and Peoples’ rights works full-time and lives at the seat of the court while other judges live where it is convenient. This arrangement should be extended to the Commission.

#### **4.2.1.2 Independence of the Commission**

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<sup>563</sup> Communication 212/98, *Amnesty International v. Zambia, Amnesty international (on behalf of Benda and Chinida) v. Zambia*.

In tackling the issue of the Commission's reliance on political organs, it should be noted that even though the Commission was created by the (O) AU, it is crucial that its mandate be expanded to make it more accountable to the people whose human rights are violated rather than the Assembly of Heads of State and Government. It is noteworthy that the Commission's close relationship with the AU is of paramount importance since the AHSG serves as the closest link to the Commission and is the medium through which the Commission's activities are communicated to the people at the domestic level. However, on the contrary, the Commission must retain its independence from the AHSG the members of which are sometimes the targets of serious violations of human rights. On the other hand, the AU must refrain from imposing sanctions that compromise its effectiveness. The current working relationship between the Commission and AHSG gives powerful states the ability to influence and sometimes silence the findings of the Commission. Independence of the Commission is important if it is to realise its full potential in the interpretation and implementation of human rights.

#### **4.2.1.3 Increase in the Commission's funding**

The Commission's financial dependence on the AU has significantly obstructed its performance. Since its inception, the Commission has undergone serious financial obstacles due to lack of resources and poor funding. Given the Commission's broad mandate, it is imperative that funding must be increased in order to enable the Commission effectively carry out promotional and protective mandates. To this end, the commission should consistently urge member states to abide by their financial obligations notwithstanding their economic circumstances. Notably, it has been observed in several instances that African governments have perpetually abstained from meeting their financial obligations. In order to effectively execute its broad mandate, the Commission must consistently urge member states to comply with their financial obligations; and to urge international human rights institutions and other private sources that are disposed to funding human rights.

#### **Conclusion**

This chapter has illustrated the numerous challenges directly and indirectly confronted by the Commission in the interpretation of SERs and has identified opportunities for surmounting these obstacles. As mentioned, relegation of SERs as directive principles of state policy in several

African States creates substantial obstacles for the Commission in providing a holistic interpretation of these rights. Other obstacles such as the lack of clarity in the normative content of the Charter's provisions on SERs, lack of implementation of the Commission's recommendations, financial constraints, and the Commission's reliance on political organs have fundamentally obstructed the Commission in the interpretation of SERs. However, these challenges are not insurmountable. The Chapter identified opportunities in overcoming these challenges such as; domestication of the African Charter, judicial inclusion of SERs in domestic constitutions. Secondly, the Chapter suggested that there is need for normative, institutional and procedural reforms. Also consideration was given to the need for Independence of the Commission and finally the Chapter argues for increase in the Commission's funding. The next chapter provides a conclusion to this study and proffers some recommendations.



## **CHAPTER FIVE**

### **CONCLUSION AND RECOMMENDATIONS**

#### **5.0 Introduction**

This study set out to investigate among other questions, whether the African Commission has developed principled interpretative approaches to the implementation and enforcement of SERs under the Charter as well as to comparatively examine their compatibility with European and inter-American regional systems. In order to effectively engage these questions, the study interrogated a range of issues including a comparative analysis of the normative content of the Charter's substantive SERs and whether these provisions are consistent with international norms. The study is premised on a comparative literature survey with primary and secondary literature being analysed and findings from them applied towards answering the research questions.

The study sets out to inquire into five main domains guided by the research questions contained in Chapter One and these are: To what extent has the African Commission proved effective in its interpretation of SERs provisions under the Charter and; What are the probable challenges faced by the Commission in its interpretation and implementation of SERs that have impeded their effective realization; How have these challenges affected the implementation and realisation of SERs in Africa; How can these challenges possibly be remedied; What lessons can the African Commission learn from the experiences of other regional bodies such as the European and inter-American in the interpretation of SERs. This chapter provides a summary of these findings and proposes some recommendations based on the findings. Finally, the chapter provides a few concluding remarks.

#### **5.1 Summary and Conclusion**

As the analysis of the relevant SERs cases before the Commission revealed in the discussion above in Chapter Three, this study confirmed that despite initial reluctance to develop the normative content of SERs during its foundational stage, its jurisprudence later demonstrated innovative advances and progress in cases dealing SERs after 2001. Since then, the Commission displayed a transformative and progressive interpretation of SERs which confirms that SERs

under the Charter are not only ‘justiciable’, but all Charter rights are ‘indivisible’ ‘interrelated’ and ‘interdependent’ thus affirming the principle of indivisibility of human rights and confirming that the realisation of CPRs depends on the scrupulous enforcement of SERs. The Commission found violations of SERs rights in almost all admissible cases. The Chapter confirmed that the Commission’s decisions have evolved from less detailed decisions finding violations without clarifying on the normative content of SERs; into fully reasoned decisions invoking international and regional human rights jurisprudence. A case in point is the *SERAC* Case and the *Purohit and Moore v. Gambia* cases in contrast to the *Modise* and *Free legal Assistance Group & Others Vs Zaire* cases.

In adopting the Interdependence Approach which has been effectively utilised in a plethora of cases in the inter-American and European regional systems, the Commission through a range of cases including the outstanding *SERAC* case read into the Charter some essential SERs provisions particularly the rights to adequate housing or shelter, food, social security, water and sanitation and has adopted the Draft Principles and Guidelines on Economic Social and Cultural rights thus further elaborating the substantive SERs provisions of the Charter. Through this development, the Commission has expanded the scope and content of SERs rights under the Charter. However, as illustrated in Chapter Two in a comparative discussion on the normative content of the Charter’s provisions, the ambiguity and vagueness between the explicit wording of the Charter and its interpretation by the Commission requires revision of some essential SERs since most of the provisions of the Charter are imprecise thus impacting negatively on their effective implementation at the domestic level.<sup>564</sup>

In underscoring the Underlying Determinants of a Health Approach in Chapter Three, the Commission declared in the *Purohit and Moore v Gambia* that the enjoyment of this right is not only a necessity to all aspects of person’s life and well-being, but inextricably linked to the realisation of all other rights. As was confirmed in the *Purohit case*, that the integrated protection of different groups of rights which are categorized to be indivisible and interdependent under the Charter provides a basis for the Underlying Determinants and the Interdependence approaches to the interpretation of SERs. Indeed as some scholars contended that the international community

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<sup>564</sup> See C Heyns., ‘The African Regional Human Rights System: The African Charter’, *Penn State Law Review*, Vol. 108, No. 3, 2003–2004, pp. 679–702, at p. 691.



in the Vienna Declaration and Program of Action made this approach a valuable and justiciable approach when it proclaimed that all rights including SERs are indivisible and interrelated.

Chapter Three confirmed that the Non-Discrimination Approach to the interpretation of SERs is a justiciable approach for extending SERs in instances where these rights are not the subject of any protection. This approach was explicitly discussed in several decisions within the inter-American regional context and it provides valuable lessons that can be effectively utilised by the Commission in finding violations of SERs where substantive and procedural gaps exist in the protection of SERs. As was explored in the cases discussed above revealing discriminatory tendencies in education whereby resources in some universities were inappropriately allocated, this approach could be employed as a critical vehicle for forcing change in governmental policies concerning a wide range of SERs. The study comparatively confirmed that; indeed both the Interdependence Approach and Non-discrimination Approaches to the interpretation of SERs have been extensively utilised in all the three regional human rights systems and these approaches are commendable and can be legally utilised. However, despite the application of these approaches to SERs, several challenges exist.

Chapter Four analysed the challenges inhibiting the interpretation of SERs under the Charter. The implementation and realisation of the Charter's SERs in many African countries has been met with different challenges such as; non-enforceability of SERs as justiciable rights in several African countries and lack of clarity in the normative content of the Charter's SERs thus impacting negatively on the realisation of these rights. On this view, despite the Charter's entrenchment of a range of SERs, majority of people in Africa still live in extreme poverty, disease and ignorance and lack the basic necessities to support life such as clean and potable drinking water, food, housing, clothing and healthcare.

The realisation of SERs in Africa is not only mitigated by the Charter's normative framework, other limiting obstacles such as non-enforcement of SERs as justiciable rights have created a paradox for the Commission in providing a holistic interpretation of these rights thus contributing to the lack of implementation of these rights. However, Chapter Four identified some opportunities for surmounting these challenges such as domestication of the Charter. The Chapter fronted the argument that inclusion of SERs in the constitutional framework of African states is essential to the realisation of these rights. It further argued for normative, institutional

and procedural reforms, independence of the Commission and increase in the Commission's funding.

In determining whether states in Africa have obligations under international law for realising SERs, Chapter Two comparatively interpreted the provisions of SERs under the African Charter but also spelt out the relevance of international norms in clarifying notable weaknesses in the formulation of some SERs provisions under the Charter. The Chapter investigated the general obligations upon the State to realise SERs. In providing an understanding of the nature of the general obligations, the chapter undertook a comparative interpretation of the concepts of minimum core obligations, examined the obligations to respect, obligation to protect, promote and fulfil SERs; In examining the obligation of progressive realisation, it was significantly observed that SERs under the Charter are not subject to progressive realisation and within available resources which creates practical difficulties since the realisation of these rights requires a great deal of resources.

Unless the obligations are made subject to progressive realisation and available resources, practical difficulties of enforcement are inevitable. Absence of effective remedies and an efficient enforcement mechanism has in several instances left victims of SERs without any form of remedy. The Commission has also interpreted SERs under the Charter as being subject only to restricted limitations and has endorsed the view that 'any limitations on rights must be proportionate to a legitimate need, and should be the least restrictive measures possible'.<sup>565</sup>

Conclusively, Chapter Two confirmed that there exist general normative standards under international human rights law in realising SERs on the basis of international instruments and declarations such as the ICESCRs and the African Charter. These norms provided the normative calculus for examining the Approaches adopted by the Commission in interpreting the SERs under the Charter which were explored in Chapter Three. Based on the above normative calculus, it was significantly confirmed that there exist normative standards in Africa for holding States accountable for violations of SERs. The Charter imposes both negative and positive obligations on States thus it is upon the states concerned to comply with their obligations in implementing SERs. Importantly, the recent practise of the Commission which requires States to

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<sup>565</sup> *COHRE Case*, para. 214.

report on the implementation of its 'recommendations' within a specific period of time is a significant development towards a more effective mechanism for the adjudication of SERs. In light of the above discussion, the next section proposes specific recommendations to effectively enhance the interpretation and enforcement of SERs in Africa.

## **5.2 Recommendations**

Several recommendations to the interpretation of SERs by the African Commission are proffered in view of the foregoing discussion in this study: Firstly, it is recommended that the Commission adopts the Interdependence-Approach, the Underlying Determinants to a Health-Approach, the Non-Discrimination Approach and the Direct Approaches which have been proposed in this thesis; to the interpretation, implementation and enforcement of SERs in Africa. As has been comparatively explored in a range of outstanding cases, these approaches have the judicial potential to enhance the development of an inclusive and comprehensive human rights regime that recognises the full corpus of human rights. Indeed these approaches have been effectively and widely utilised in all the three regional systems with valuable lessons to learn. As has been demonstrated, both judicial and quasi-judicial institutions have confronted issues and the mentioned approaches have proved commendable for holding states accountable for violations all human rights.

### **5.2.1 The Integrated Approach: Civil and political rights interpretations of SERs Approach**

Secondly and in conjunction with the above approaches, this study further recommends that the Commission adopts the integrated or the elements approach to SERs interpretation and enforcement which was implicitly discussed in this study. Since SERs are relegated to non-justiciable in most African constitutions, as well as largely undermined at the regional level means that there is limited chances for their judicial enforcement as independent rights despite massive violations. In light of this predicament, it is recommended that special attention must be given to the SERs elements of CPRs. This approach also known as the elements approach seeks to enforce SERs through the provisions CPRs which are widely justiciable. In this context, cases that present facts leading to violations of particular SERs will enable the Commission and Courts to consider these elements without the need for an explicit finding with respect to SERs.

Through the integrated approach, SERs could be expressed as underlying elements inherent in CPRs that have been violated. Both the European and inter-American system of human rights have employed this approach in some instances. The European Court of Human Rights offers a perfect example of how judicial institutions can surmount normative hurdles in solving a range of human rights problems. In the absence of judicial adjudication for the SERs provided under the Social Charter, the European Court of Human Rights has sought a dynamic mode of rights interpretation that seeks to encompass the SERs provided in the Social Charter.

A case in point is that the right to health could be reinforced through the right to life or the right to education through the right to freedom of expression. Effective utilisation of this approach will enable the African Commission, African Court of Human Rights, National Human Rights Commissions, and domestic courts to expand, develop and enforce these rights at the domestic and regional level. Similarly, through this approach, judges, lawyers and human rights activists would seize the opportunity to bridge the divide between the two sets of rights.

### **5.2.2 Minimum Core entitlements Approach:**

Lastly, this study recommends that the Commission aggressively and cautiously adopts a minimum core contents to rights approach especially in dealing SERs in Africa. The minimum core entitlements approach seeks for the identification of the most vulnerable and deprived groups or members of society and demands that in the enforcement and implementation of SERs, States must place special consideration as a matter of priority upon assisting the poorest and marginalised members of society. The minimum core entitlements approach finds its roots in international law. In the inter-American regional context, scholars have described the inter-American Commission's attempt to give effect to SERs as the 'minimum threshold approach.' Importantly, within the inter-American regional context, the recognition of such an approach is based on the emphasis of the equal implementation and enforcement of all human rights and it advocates for the minimum level of the enjoyment of the full spectrum of human rights.

In the context of Africa, the African Commission's minimum core approach is in conformity with the CESCRRs. In its General Comment No.3, the Committee fronted the notion of 'minimum core obligation' necessary to ensure satisfaction at the very least minimum essential levels of each of the rights. Using this approach, the Commission in conjunction with

the Court could set up minimum thresholds or core values and obligations for states to realise certain essential SERs. The minimum core approach if effectively utilised could enable the Commission to set up State-specific obligations or thresholds measured by indicators and benchmarks to determine what levels of the “best attainable state of physical and mental health” or what recommendable measures in providing for the health of their people. In this context, what national governments can or cannot afford could be determined with other competing national priorities in accordance with specific States’ limited resources.

### **Concluding Remarks:**

This dissertation has comparatively examined the approaches of the African Commission to the SERs provisions of the African Charter. This analysis exemplified that challenges to the interpretation of SERs abound both at regional and national levels. At the African regional level, these challenges are exacerbated by the non-recognition of SERs as justiciable rights in the constitutional frameworks of African states in conjunction with general neglect towards the protection of human rights by both judicial and quasi-judicial institutions. Relegation of SERs to non-justiciable principles of state policy has been further exacerbated by the lack of clarity in the normative content of the Charters’ SERs coupled with the negative attitude towards SERs in Africa.

However as illustrated in the cases that appeared before the Commission after 2001, the Commission’s approach towards the implementation of SERs is slowly improving. The approaches discussed in the study provide commendable and valuable lessons. It is in this context that this study recommends these approaches to enhance the interpretation, implementation and enforcement of SERs at the African regional level. A combination of legal strategies, social mobilisation, political ownership and civil society may help to enable these approaches realise their full potential in advancing SERs. Though not perfect approaches bearing in mind all the challenges to the enforcement of SERs, it is hoped that the precautions highlighted in this study will go a long way towards providing a platform for providing interpretative strategies and approaches that will help to regulate and enhance the interpretation enforcement and implementation of SERs in Africa.

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