
**THE PROMOTION AND PROTECTION
OF ECONOMIC, SOCIAL AND CULTURAL
RIGHTS AND THE RIGHT TO DEVELOPMENT
UNDER THE AFRICAN REGIONAL HUMAN
RIGHTS SYSTEM**

1 Introduction

The promotion and protection of human rights in Africa is underpinned by the African Charter on Human and Peoples' Rights ("the African Charter" or "Banjul Charter") which was adopted by the Assembly of the Heads of State and Government of the Organisation of African Unity (OAU) on 27 June 1981. Other key instruments under the African human rights system are the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (which was adopted in July 2003 and addresses a variety of civil, political, economic, cultural and social rights) and the African Charter on the Rights and Welfare of the Child (which was adopted in July 1990 and entered into force on 29 November 1999). The former has not yet entered into force (as of August 2005, 12 states had ratified the Protocol which requires 15 ratifications to enter into force) while the latter has its own monitoring body, the Committee on the Rights and Welfare of the Child. Consequently, discussion of these two instruments is outside the scope of this note. The Charter entered into force on 21 October 1986 and had been ratified by 53 member states of the African Union (AU) as of July 2004. The African Union is a regional inter-governmental organisation that replaced the OAU. The Assembly of Heads of State and Government of the OAU adopted the Constitutive Act that established the AU in Lome, Togo, on 11 July 2000. The AU was officially launched in Durban, South Africa, on 10 July 2002.

The African Charter aims to promote and protect a comprehensive list of rights which includes both *individual* and *collective* people's rights. While its regional counterparts – the European Convention for the Protection of Human Rights and Fundamental Freedoms 1950 and the American Convention on Human Rights 1969 - guarantee only civil and political rights, the African Charter covers civil and political rights (the so-called "first generation" rights); economic, social, and cultural rights (the so-called "second generation" rights); and collective rights of peoples (the so-called "third generation" rights). The Charter also innovatively provides for duties of the individual and the state.

This paper discusses the promotion and protection of economic, social and cultural rights under the African Charter. It does this by first outlining the substantive content of the Charter. Secondly, it provides an overview of the supervisory mechanisms established in terms of the Charter. Next, the paper

discusses the methods of promotion and protection of rights under the Charter and the limitations thereto. The paper then presents an overview of the jurisprudence of the African Commission on economic, social and cultural rights. The paper concludes with some comments on the effectiveness of the African human rights system.

2 Standards and supervisory mechanisms

2 1 Standards

2 1 1 Introduction

As stated above, the African Charter seeks to promote and protect a wide range of individual and collective peoples' rights. Unlike the other regional human rights treaties, the Charter guarantees civil and political rights, and socio-economic and collective rights such as the right to development and self-determination. Unusually, the Charter also recognises duties.

2 1 2 Individual rights

The African Charter's section on individual rights commences with a general non-discrimination clause (Art 2), an equal protection clause (Art 3), and a guarantee of the right to life and personal integrity (Art 4). A number of other individual rights including the prohibition on slavery, torture, cruel, inhuman or degrading treatment and punishment (Art 5), and arbitrary arrest and detention (Art 6) are guaranteed. Provision is made for the freedoms of conscience and religion (Art 8); information (Art 9(1)); expression (Art 9(2)); association (Art 10); and assembly (Art 11). Freedom of movement (Art 12(1)) and the right to seek asylum (Art 12(3)) are provided for and the mass expulsion of non-nationals "which is aimed at national, racial, ethnic or religious groups" is prohibited (Art 12(5)).

The Charter guarantees the right to property (Art 14), the right to work (including equal pay for equal work (Art 15)), and the right to enjoy the best attainable state of physical and mental health (Art 16). The right to education is protected with the attendant obligation on the state to promote and protect the "morals and traditional values recognised by the community" (Art 17(1)). The family is declared to be the "natural unit and basis of society" which must be protected and assisted by the state (Art 18(1)). Special protection is provided for in respect of the rights of vulnerable groups such as children, women, the aged and people with disabilities (Art 18(3) and 18(4)).

It is notable that the section on individual rights refers to and incorporates other international human rights instruments. For example, Article 18(3) places an obligation on the state to ensure the elimination of all kinds of discrimination against women and children "as stipulated in international declarations and conventions".

2 1 3 Peoples' rights

Articles 19 to 24 of the Charter provide for peoples' rights including the right to equality of all peoples (Art 19); the unquestionable and inalienable right to self-determination (Art 20); the peoples' sovereignty over their wealth and natural resources (Art 21); the right to economic, social and cultural development (Art 22); the right to national and international peace and security (Art 23); and the right to a generally satisfactory environment favourable to development (Art 24).

2 1 4 Duties

Unlike the other regional human rights treaties, the African Charter recognises both rights and duties. Under the Charter, the individual has "duties towards his family and society, the state and other legally recognised communities and the international community". Consequently, individuals' enjoyment of their rights is limited by their duty to exercise them "with due regard to the rights of others, collective security, morality and common interest" (Art 27(2)). In terms of Article 28, the individual has a duty not to discriminate against others. The individual's duties to the family include respect for parents and caring for them as necessary while duties to the state include the duty to uphold positive African values and unity. Article 29(4) places a duty on the individual to "preserve and strengthen social and national solidarity, particularly when the latter is threatened". It has been argued that this provision seems to give governments the freedom to unduly restrict personal rights by simply claiming that the state's solidarity is threatened (Flinterman and Henderson "The African Charter on Human and Peoples' Rights" in Hanski and Suksi (eds) *An Introduction to the International Protection of Human Rights* (2002) 390).

2 2 Supervisory mechanisms

There are two supervisory mechanisms established in terms of the African Charter: (i) the African Commission on Human and Peoples' Rights, and (ii) the African Court on Human and Peoples' Rights. The latter is a recent addition to the African system of human rights protection.

2 2 1 The African Commission on Human and Peoples' Rights

Article 30 of the Charter establishes an African Commission on Human and Peoples' Rights ("the Commission") to "promote human and peoples' rights and ensure their protection in Africa". The Commission – a *quasi-judicial* body – comprises eleven members selected from "amongst African personalities of the highest reputation, known for their high morality, integrity, impartiality and competence in matters of human and peoples' rights; particular consideration being given to persons having legal

experience". (Art 31. Members of the Commission are elected by the AU Assembly for six-year renewable terms. The Commission's Secretariat is located in Banjul, The Gambia.) The members serve in their personal capacity although many of them come from senior government positions.

In terms of Article 45 of the Charter, the Commission's role includes promotion of the Charter, protection of the rights under the Charter, interpretation of the Charter at the request of states, AU institutions or any other African organisation, and performance of other tasks stipulated by the AU Assembly.

The Charter gives the Commission three main functions: examining reports submitted by the state parties in terms of Article 62, considering communications alleging violations of human rights from both individuals and states (Art 47 and 55), and interpreting provisions of the Charter (Art 45(3)).

2 2 2 The African Court on Human and Peoples' Rights

The African Charter originally did not provide for a court of human rights. In June 1998, a Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights was adopted by the OAU. The Protocol entered into force on 25 January 2004 although the Court is yet to become operational.

The Court is a non-permanent (all judges, with the exception of the President of the Court, will serve on a part-time basis), judicial body composed of eleven judges elected in their individual capacity by the AU Assembly to serve six-year terms which are renewable once only. Judges must be nationals of member states of the AU and jurists of "high moral character and of recognised practical, judicial or academic competence and experience in the field of human and peoples' rights" (Protocol, Art 11). In its composition, the Court must represent the main regions of Africa and their principal legal traditions (Protocol, Art 14(2)). Articles 12(2) and 14(3) of the Protocol contemplate that there will be adequate gender representation on the Court. Article 22 of the Protocol excludes participation in a case by a judge who is a national of a state that is a party to the case.

The Court has both contentious and advisory jurisdiction. Cases against a state can be brought to the Court by the African Commission, state parties and African inter-governmental organisations once that state ratifies the Protocol (Protocol, Art 5(1)). It is notable, however, that individuals and non-governmental organisations (NGOs) can approach the Court only where the state concerned has made a declaration accepting the competence of the Court to receive cases from individuals (Protocol, Art 5(3) and 34(6)).

In terms of its advisory jurisdiction, the Court may give opinions on "any legal matter relating to the Charter or any other relevant human rights instruments" as long as the subject matter of the opinion is not related to a matter being examined by the Commission (Protocol, Art 4(1)). Such advisory opinions may be requested by AU members, any organ of the AU, or an African NGO recognised by the AU.

It is interesting to note that the Court's jurisdiction is not limited to cases or disputes arising out of the Charter but extends to any relevant instruments (including international human rights instruments) ratified by the state party in question. Further, the Court may, in addition to the Charter, invoke as sources of law any relevant human rights instrument to which the state concerned is a party (Protocol, Art 3).

Although formally independent of the Commission, the Court may request the Commission's opinion as to the admissibility of a case brought by an individual or an NGO. The Court may also refer cases to the Commission in circumstances where it is of the view that the matter is best resolved by amicable settlement rather than through adversarial adjudication.

The judgments of the Court are final and no appeal lies therefrom. They are binding on states and their execution will be monitored by the AU Executive Council on behalf of the AU Assembly (Protocol, Art 29(2) and 30). A notable provision of the Protocol is Article 31 which requires the Court to publish in its annual report to the AU a list of states that have not complied with its judgments. Another is Article 9 which allows the Court to attempt friendly settlement of cases pending before it.

In cases of "extreme gravity and urgency", and to avoid "irreparable harm to persons", the Court has the discretion to adopt provisional measures (Protocol, Art 27(2)). Hearings are to be held in public but may be held in camera as provided in the Rules of Procedure. Article 10(2) of the Protocol provides for free legal representation "where the interests of justice so require".

3 Promotion of rights

Promotion is the least controversial approach to human rights as it does not directly call into question the human rights performance of any state. Rather, it involves a range of tasks such as collecting resource materials, disseminating information, organising conferences, and encouraging and supporting national bodies.

Article 25 of the Charter imposes a duty on state parties "to promote and ensure through teaching, education, and publication, the respect of the rights and freedoms contained in the Charter and to see to it that these freedoms and rights as well as corresponding obligations are understood". However, the Charter assigns to the Commission a number of promotional functions. These are similar to the ones referred to above which are also undertaken by other international human rights bodies. The Commission's promotional functions include providing assistance to national legislatures through the formulation of relevant rules and principles to enable states to reform and redraft domestic legislation as required to better protect human rights.

Since October 1991, the Commission has, in addition to its annual reports and other information on the Charter, published a journal – *The African Review of Human Rights*.

It is worthy of note that NGOs have played an increasingly important role in the promotional work of the Commission. They have made a significant contribution to training, research and information dissemination in collaboration with the Commission. Over 30 local (African) and international NGOs have been granted observer status (see Resolution on the Criteria for Granting and Enjoying Observer Status to Non-Governmental Organisations working in the Field of Human Rights with the African Commission on Human and Peoples' Rights adopted by the Commission at its 25th Ordinary Session, 26 April-5 May 1999).

4 Protection of rights

The primary role of protecting the rights under the African Charter has been undertaken by the Commission. However, the recently established African Court is expected to play a significant protective function under the Charter once it becomes operational. As indicated above, the Court will exercise both advisory and contentious jurisdiction. Cases may be submitted to the Court by the Commission, by a state which has lodged a complaint with the Commission, by a state against which the complaint has been lodged, by a state whose national is a victim of a human rights violation, and by an African inter-governmental organisation. The state parties may by separate declaration accept the competence of the Court to receive communications from individuals and NGOs. State parties are obliged to comply with the judgments of the Court and to ensure its execution.

The protective function of the Commission is covered in Articles 46 to 54 of the Charter dealing with complaints or communications. In the discharge of its protective function, the Commission has adopted the three traditional methods of monitoring states' compliance with their obligations under the Charter: state reports, inter-state complaints, and individual, NGO and group complaints.

4 1 State reports

Article 62 of the Charter requires that state parties must submit periodic reports every two years on the legislative and other measures they have taken to give effect to the Charter's provisions. Although the Charter does not specify the organ competent to review these reports, the Commission adopted a resolution at its third session requesting the OAU Assembly to allow it to review state reports. This resolution was approved by the Assembly and since then, state reports are submitted to and reviewed by the Commission.

It is notable that the state reporting mechanism has proved problematic under the African Charter. A number of states have either not submitted their reports or have submitted what can be characterised as shoddy reports indicating a lack of seriousness with respect to their obligations under the Charter (as of July 2004, only 31 state reports had been submitted to the Commission).

It is also notable that the African Commission does not have a monitoring system similar to that of the United Nations Human Rights Committee to ascertain whether its recommendations are being adopted by state parties.

4.2 *Inter-state complaints*

Under the inter-state complaints mechanism, there are two distinct methods of dispute resolution. The first method “negotiation communication” – involves a state party submitting a formal, written complaint to another state party that it has “good reasons to believe” has violated provisions of the Charter. The respondent state must respond within three months. The matter passes to the Commission if there is no response within three months or if either party submits the unsettled matter to the Commission before the expiry of the three-month period. If a response is provided within the three-month period, negotiations ensue and these may continue for years. A “complaint communication” refers the matter directly to the Commission.

Article 52 of the Charter enjoins the Commission to attempt “all appropriate means to reach an amicable solution”, but if no friendly settlement can be arrived at, the Commission must prepare a report stating the facts, its findings, and recommendations, which are then submitted to the AU Assembly and to the state parties concerned. The Charter contains no provisions requiring enforcement of the Commission’s recommendations. Rather, the emphasis is on negotiation and reconciliation in consonance with the African tradition of avoiding adjudication.

4.3 *Individual, NGO and group complaints*

The individual complaints mechanism under Article 55 of the Charter is employed for communications submitted by parties other than states (e.g. private individuals, NGOs, or other groups). Article 55 provides:

“Before each session, the Secretary of the Commission shall make a list of the communications other than those of States Parties to the present Charter.”

The Commission has interpreted this provision as granting it the authority to consider any communication from anyone, including NGOs, as long as the rights contained in the Charter are involved (*Sir Dawda K Jawara v The Gambia*, Communications 147/95 and 146/96).

However, to be considered by the Commission, such communications must be approved by a simple majority of the members of the Commission, as well as fulfil the various admissibility requirements specified in Article 56 of the Charter. The admissibility requirements include the exhaustion of local remedies (unless these would be unduly prolonged) and the requirement that the communication must not be based solely on information “disseminated through the mass media”. Further, a communication must indicate its authors (although anonymity may be requested), must be compatible with the Charter of the OAU or the African Charter on Human

and Peoples' Rights, and may not relate to a matter which has already been settled under the UN Charter, the AU, or the African Charter. It is noteworthy that in order to submit a complaint against a state, the complainant does not need to live in that state.

Where the complaint is admissible, the Commission notifies the complainant and the state concerned. The state has four months to submit an explanation or statement and the complainant may respond thereto. The Commission may review its admissibility decision in the light of new information. Where a violation is found, the Commission has no powers to take action or make recommendations. The matter must be referred to the AU Assembly for a decision. Where the Commission finds a series of serious or massive violations of human and peoples' rights, it must draw the attention of the AU Assembly to the problem and the latter may request the Commission to undertake an in-depth study of the situation and make a factual report together with its findings and recommendations.

There is no provision for enforcement or monitoring of recommendations; publicity is the Commission's only real sanction against human rights violations. It should be noted, however, that all proceedings are *confidential* and only the AU Assembly may take the decision to make public a Commission report. This procedure indicates that there is effectively no remedy for individual violations since the Commission can take no further action once it has considered a case. Even for more systematic violations the Commission is dependent on the decision of the AU Assembly (a political body) as to whether it can make its findings public. This has led to the criticism that:

"The Commission does not, for all practical purposes, have the power to implement the Charter's provisions. That was precisely what the African political leaders of the day wanted the Commission to be – a tool of African governments" (Nanjira "The Protection of Human Rights in Africa: The African Charter on Human and Peoples' Rights" in Symonides (ed) *Human Rights: International Protection, Monitoring and Enforcement* (2003) 227).

The above shortcomings do not, however, necessarily render the procedure an exercise in futility. The Commission may use the opportunity proffered by the confidentiality to persuade states to take action.

5 Special rapporteurs and working groups

In keeping with the practice of international human rights supervisory mechanisms, the African Commission has appointed a number of experts as special rapporteurs and set up working groups to deal with specific human rights issues. These experts, who are usually members of the Commission itself, deal with issues such as prisons and prison conditions in Africa, women's rights, freedom of expression in Africa, the situation of human rights defenders, and extra-judicial, summary or arbitrary executions.

6 Interpretative and other functions

The interpretative function of the Commission is somewhat similar to the authority to give advisory opinions. Any state party to the African Charter, any AU institution, or any African organisation recognised by the AU may request the Commission to interpret the Charter. The Commission is also expected to perform any other tasks assigned to it by the AU Assembly.

It is notable that the court (once in existence) will interpret provisions of the Charter in the context of deciding cases or rendering advisory opinions. Article 3(1) of the Protocol provides:

“The jurisdiction of the Court shall extend to all cases and disputes submitted to it concerning the interpretation and application of the Charter, this Protocol and any other relevant human rights instrument ratified by the states concerned.”

7 The African Commission and Socio-Economic Rights

The African Charter expressly guarantees several economic, social and cultural rights, including the right to work under equitable and satisfactory conditions (Art 15); the right to the best attainable state of physical and mental health (Art 16); the physical health of families together with protections for women, children, the aged and the disabled (Art 18); the right to education (Art 17); freedom to take part in the cultural life of one's community (Art 17(2)); the right of all peoples to their economic, social and cultural development with due regard to their freedom and identity and the equal enjoyment of the common heritage of humankind (Art 22); and the right to a generally satisfactory environment (Art 24).

It is notable, however, that the African Commission does not have an extensive jurisprudence concerning economic, social and cultural rights. Under the African system, complaints alleging violations of economic, social and cultural rights have usually been submitted to the Commission in association with other violations. Nevertheless, the few cases that the Commission has decided concerning economic, social and cultural rights have clearly demonstrated that, contrary to some arguments, these rights are capable of judicial enforcement. What follows is an overview of some of the key decisions of the Commission on economic, social and cultural rights.

7.1 *Right to health*

The African Commission has elaborated on the content of the right to health in Article 16 of the Charter and on the nature of states' obligations arising therefrom. In *Purohit and Moore v The Gambia* (Communication 241/2001 16th Annual Activity Report), the Commission considered the meaning of the right to health under the African Charter, particularly as it relates to mental health care. The Commission emphasised that enjoyment of the right to health is “vital to all aspects of a person's life and well-being and is crucial to

the realisation of all the other fundamental human rights and freedoms". (See also Sepulveda, Van Banning, Gudmundsdottir and Chamoun *Universal and Regional Human Rights Protection: Cases and Commentaries* (2004) 286: "Health is a fundamental human right indispensable for the exercise of other human rights ... The right to health is closely related to and dependent upon the realisation of other human rights ... including the rights to food, housing, work, education, human dignity, life, non-discrimination, equality, the prohibition of torture, privacy, access to information, and the freedoms of association, assembly and movement".) In the Commission's view, the right to health under the African Charter includes the right to health facilities, access to goods and services to be guaranteed to all without discrimination of any kind. The Commission also defined the obligations of state parties with regard to mental health patients. In its estimation, as a consequence of their condition and by virtue of their disabilities, mental health patients should be accorded special treatment which would enable them not only to attain but also sustain their optimum level of independence and performance in keeping with Article 18(4) of the Charter and the standards as set out in the Principles for the Protection of Persons with Mental Illness and Improvement of Health Care. Persons with mental illnesses should never be denied their right to proper health care as this is crucial for their survival and for their assimilation into and acceptance by the wider society.

While it acknowledged the "problem of poverty" which many African countries face and which rendered them incapable of providing the necessary amenities, infrastructure and resources that facilitate the full enjoyment of the right to health, the Commission read into Article 16 an obligation on the part of states party to the Charter to "take concrete and targeted steps, while taking full advantage of their available resources" to ensure that the right to health is fully realised in all its aspects without discrimination of any kind.

In *Media Rights Agenda v Nigeria* ((2000) AHRLR 200 (ACHPR 1998)) and *International Pen (on behalf of Saro-Wiwa) v Nigeria* ((2000) AHRLR 212 (ACHPR 1998)), the Commission stated that the responsibility of the government in regard to Article 16 is heightened in cases where an individual is in the state's custody and is therefore completely dependent on the activities of the authorities for their integrity and well-being (*International Pen (on behalf of Saro-Wiwa) v Nigeria supra*).

It is noteworthy that the African Commission has endorsed the Committee on the Elimination of Discrimination Against Women's definition of the right to health to include socio-economic factors. (In its General Recommendation No. 24, the Committee defined the right to health to include socio-economic factors: "The Committee notes that the full realisation of women's right to health can be achieved only when States parties fulfil their obligations to respect, protect and promote women's fundamental human right to nutritional well-being throughout their life span by means of a food supply that is safe, nutritious and adapted to local conditions".) Thus, in *Free Legal Assistance Group v Zaire* (Communications 25/89, 47/90, 56/91 and

100/93), the Commission found that the failure of a state party to provide basic services necessary for a minimum standard of health such as safe drinking water and electricity, as well as the shortage of medicine, constituted a violation of the right to enjoy the best attainable state of physical and mental health.

7.2 *Rights to education and culture*

The Commission has considered the content and nature of the rights to education and culture. In *Free Legal Assistance Group v Zaire (supra)*, the Commission found that the closure of universities and schools, and non-payment of teachers' salaries, preventing them from providing education and students from attending school, constituted a violation of the right to education.

In *Malawi African Association v Mauritania* ((2000) AHRLR 149 (ACHPR 2000)), the Commission held that language is an integral part of the structure of culture and that it is in fact the "pillar" and means of expression of culture. According to the Commission, the use of language enriches the individual and enables them to participate actively in their community. Consequently, depriving an individual of such participation amounts to depriving them of their identity.

7.3 *Right to a healthy environment*

The African Commission has elaborated on states' obligations as regards the right to a generally satisfactory environment favourable to development (or right to a healthy environment, as it is commonly called) guaranteed in Article 24 of the Charter, holding that the provision imposes clear obligations on the state. (The right to a healthy environment is recognised in Article 12(2)(b) of the International Covenant on Economic, Social and Cultural Rights (ICESCR) (which requires all state parties to improve "all aspects of environmental and industrial hygiene") and in Article 11 of the Protocol of San Salvador to the American Convention on Human Rights 1988.) In *Social and Economic Rights Action Centre (SERAC) v Nigeria* ((2001) AHRLR 60 (ACHPR 2001)), a case which concerned the consequences of environmental degradation in Ogoniland (in the Niger Delta region of Nigeria) caused by Shell Corporation, in collusion with the Nigerian government, the Commission stated that this right requires the state to take reasonable and other measures to prevent pollution and ecological degradation, to promote conservation, and to secure ecologically sustainable development and use of natural resources. (It is notable that the UN Committee on Economic, Social and Cultural Rights has stated in General Comment No 14 that the right to a healthy environment includes, inter alia, preventive measures in respect of occupational accidents and diseases; the obligation to ensure the adequate supply of safe and potable water and basic sanitation; and the prevention and reduction of the population's exposure to harmful substances such as radiation and harmful chemicals or

other detrimental environmental conditions that directly or indirectly impact on human health.)

7.4 *Right to work*

The Commission has not dealt with many cases concerning the right to work. However, in at least two cases that primarily concerned other rights, the Commission found violations of the right to work. In *Pagnouille (on behalf of Mazou) v Cameroon* ((2000) AHRLR 57 (ACHPR 1997)), the Commission found an infringement of the right to work where a political prisoner had not been reinstated in his former governmental position following an amnesty.

In *Malawi African Association v Mauritania (supra)*, which concerned, inter alia, allegations of slavery in Mauritania, the Commission considered, in line with the provisions of Article 23(3) of the Universal Declaration of Human Rights and Article 7 of the ICESCR, that everyone who works has the right to just and favourable remuneration ensuring for themselves and their family an existence worthy of human dignity, and supplemented, if necessary, by "other means of social protection". Consequently, the Commission found a violation of Article 5 of the Charter due to practices analogous to slavery in Mauritania. The Commission further stressed that unremunerated work is "tantamount to a violation of the right to respect for the dignity inherent in the human being".

7.5 *Right to development*

The precise nature and content of the right to development is unclear and there has not been any authoritative pronouncement in relation thereto. In 1986, the UN General Assembly adopted a Declaration on the Right to Development (General Assembly Resolution 41/128 of 4 December 1986). Article 1 of the Declaration states:

"The right to development is an alienable human right by virtue of which every human person and all peoples are entitled to participate in, contribute to, and enjoy economic, social, cultural and political development, in which all human rights and fundamental freedoms can be fully realised".

As a resolution of the General Assembly, however, the Declaration is not legally binding.

The right to development also finds expression in the Vienna Declaration and Programme of Action, adopted by consensus by the World Conference on Human Rights in 1993 where it is reaffirmed as "a universal and inalienable human right and an integral part of human rights" (UN Doc.A/CONF.157/23, Part 1 par 10). The UN Commission on Human Rights has referred to the right to development as an important right "for every human person and all peoples in all countries".

The African Charter is the only legally binding international human rights instrument that guarantees the right to development. (The right is set out in

the United Nations Declaration on the Right to Development adopted by the United Nations in 1986 and was reaffirmed in the Vienna Declaration, both of which are not legally binding.) The right is formulated in Article 22 of the Charter as follows:

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

The African Commission does not appear to have decided any case concerning the right to development. Nevertheless, a number of observations concerning this provision can be made. First, in terms of its formulation, Article 22 of the African Charter is broadly similar to Article 1(1) of the Declaration on the Right to Development which proclaims a right to enjoy “economic, social, cultural and political development, in which all human rights and fundamental freedoms can be fully realised”. However, Article 22 of the Charter does not mention political development separately.

Second, Article 22 identifies “all peoples” as the beneficiaries of the right to development. Conversely, the UN Working Group on the Right to Development of 1993-1995 listed as beneficiaries not only “peoples” but also “individuals” and “groups”.

Third, the Charter provides for the duty of states, “individually or collectively”, to ensure the exercise of the right to development.

Finally, unlike the 1986 UN Declaration (*eg* Art 2(3) of the Declaration refers to the “active, free and meaningful participation in development” of all individuals), the African Charter makes no reference to the notion of participation in the context of the right to development.

7.6 *Implied socio-economic rights*

A number of socio-economic rights (including the right to an adequate standard of living, housing or food) are not expressly guaranteed in the African Charter. Nevertheless, these rights have been implied through innovative interpretation by the Commission of other Charter provisions, notably in *Social and Economic Rights Action Centre (SERAC) v Nigeria* (*supra*), where it found violations of the rights to food and housing, neither of which are expressly provided for in the Charter. The Commission held that the right to housing or shelter is implicitly entrenched in the totality of the right to enjoy the best attainable standard of mental and physical health, the right to property, and the protection of the family. In similar vein, the right to food was implied in the rights to life, health, and economic, social and cultural development.

The Commission stressed that the African Charter, in common with other international human rights standards, imposes four kinds of duties on the state parties, namely the duty to *respect, protect, promote* and *fulfil* human

rights. These obligations apply universally to all rights and entail a combination of positive and negative duties.

The obligation to *respect* entails that the state should refrain from interfering in the enjoyment of all fundamental rights. The obligation to *protect* requires that the state take measures to protect beneficiaries of the protected rights against political, economic and social interferences by third parties. The obligation to *promote* entails that the state should ensure that individuals are able to exercise their rights and freedoms, for instance, by promoting tolerance, raising awareness and building infrastructures. The obligation to *fulfil* requires the state to take measures to ensure, for persons subject to its jurisdiction, opportunities to obtain satisfaction of the basic needs as recognised in human rights instruments.

According to the Commission, the right to shelter obliges the state not to destroy the housing of its citizens or obstruct efforts by individuals or groups to rebuild lost homes. The duty to respect this right also requires that the state and its agents refrain from carrying out, sponsoring or tolerating any practice, policy or legal measure violating the integrity of the individual or infringing upon the freedom of an individual to use available resources to satisfy individual, family, household or community housing needs. The duty to protect includes the prevention of violations of the right by any individual or non-state actor such as landlords, property developers and landowners. The right to food obliges states to protect and improve existing food sources and to ensure access to adequate food for all citizens. As a minimum, the right to food requires that states must refrain from destroying or contaminating food sources or preventing people's efforts to feed themselves.

Endorsing the definition of "forced eviction" given by the UN Committee on Economic, Social and Cultural Rights (CESCR), the Commission held that the right to adequate housing as implicitly protected in the Charter also encompasses the right to protection against forced evictions. (The CESCR has defined "forced eviction" as "the permanent removal against their will of individuals, families and/or communities from their homes and/or which they occupy, without the provision of, and access to, appropriate forms of legal or other protection". See General Comment No. 7 (1997) on the right to adequate housing (Art 11(1)): Forced Evictions.)

7.7 Progressive realisation of economic, social and cultural rights

The obligations imposed by international human rights law are primarily held by states. In terms of Article 2 of the ICESCR, state parties have undertaken legally binding obligations to take steps to the maximum of their available resources to "achieve progressively" the full realisation of the economic and social rights in that Covenant. According to the CESCR, this notion imposes legally binding obligations on states, including the obligation to take steps to continuously improve the conditions and the obligation to refrain from taking deliberately retrogressive measures except under specific circumstances.

(See General Comment No. 3 (1991) of the Committee on Economic, Social and Cultural Rights and Guideline No. 14 of the Maastricht Guidelines on Violations of Economic, Social and Cultural Rights.) In its General Comment No. 3 on the nature of state obligations under Article 2(1), the CESCR has interpreted the term “progressive realisation” to mean an obligation on the part of the state “to move as effectively and expeditiously as possible to securing its ultimate goal”.

Unlike the ICESCR (Art 2) and the Protocol of San Salvador (Art 1), the African Charter does not contain any reference to the notion of “progressive” realisation using “available resources”. Consequently, the African Commission has not had occasion to elaborate on this notion.

As regards the obligations of states in regard to economic and social rights, the Commission has recognised obstacles to the realisation of these rights including the lack of resources. For instance, in *Purohit and Moore v The Gambia (supra)*, the Commission, while acknowledging the “problem of poverty” which rendered African states incapable of providing the necessary amenities, infrastructure and resources that facilitate the full enjoyment of the right to health, stated that Article 16 nevertheless required states party to the Charter to “take concrete and targeted steps”, while taking full advantage of their available resources, to ensure that the right to health is fully realised in all its aspects without discrimination of any kind. The Commission has emphasised that the principle of “non-discrimination” contained in Article 2 is a non-derogable one which is “essential to the spirit of the African Charter”.

It is worthy of note that in interpreting and applying the African Charter, the Commission relies on its own jurisprudence and draws inspiration from appropriate and relevant international and regional human rights instruments, principles and standards (see ACHPR, Art 60 and 61). In this regard, the Commission has referred to the General Comments of the CESCR in a number of its decisions.

7 8 Limitations on the enjoyment of socio-economic rights

It is generally accepted that only a few rights are “absolute”. Consequently, human rights instruments usually provide for limitations or restrictions to the rights they contain. Common grounds for restricting rights include national security, public order, public health, or public morality. However, such restrictions must be used only to establish the proper limits of the protected right and not as a pretext for undermining the right itself or destroying it altogether. Generally, there must be a proportionate relationship between the restriction of the right and the reason for the restriction. In *Media Rights Agenda v Nigeria (supra)*, the African Commission emphasised that restrictions on rights must be “based on legitimate public interests and the inconvenience caused by these restrictions should be strictly proportional and absolutely necessary for the benefits to be realised”. Significantly, a limitation may never have as a consequence that the right itself becomes illusory. (See also *Civil Liberties Organisation (in respect of Bar Association)*)

v Nigeria (2000) AHRLR 186 (ACHPR 1995); *Constitutional Rights Project v Nigeria* (2000) AHRLR 227 (ACHPR 1999); and *Interights v Islamic Republic of Mauritania*, Communication No 242/2001, 17th Annual Activity Report.) This is a general principle that applies to all rights (*Media Rights Agenda v Nigeria supra*).

In a legitimate state of emergency that is publicly declared, some human rights instruments allow a state party unilaterally to derogate temporarily from some of its obligations. (There are derogation clauses in the European Convention on Human Rights (Art 15), American Convention on Human Rights (Art 27), European Social Charter (Art 31); and International Covenant on Civil and Political Rights (Art 15).) Unlike other regional human rights instruments, however, the African Charter does not contain a general derogation clause allowing the state parties to suspend the enjoyment of certain rights during national emergencies. Consequently, limitations on the rights and freedoms enshrined in the Charter cannot be justified by emergencies or special circumstances. According to the Commission, the only legitimate reasons for limitations to the rights and freedoms in the Charter are found in Article 27(2) of the Charter; namely that the rights of the Charter “shall be exercised with due regard to the rights of others, collective security, morality and common interests”.

Although it does provide for derogation clauses, the African Charter contains a number of articles with provisions, referred to as “claw-back” clauses, which limit these rights. An example of an article with a “claw-back” clause is Article 9(2) which states: “Every individual shall have the right to express or disseminate his opinions within the law”. The term “within the law” was initially understood as meaning that no domestic law limiting the right in question could be challenged under the Charter (*Sepulveda et al* 167). However, the Commission clarified the issue in *Civil Liberties Organisation (in respect of Bar Association) v Nigeria (supra)*, where it stated that the term “within the law” must be understood to refer to international law, not national law.

In the *Media Rights* case, the Commission emphasised that a national law that seeks to limit any of the rights in the Charter must comply with international standards. To allow national law to take precedence over the international law of the Charter would defeat the purpose of the rights and freedoms guaranteed in the Charter.

The Commission further stated that governments should avoid restricting rights and exercise special care with regard to those rights protected by constitutional and international human rights law. General restrictions on human rights have the tendency to diminish public confidence in the rule of law and are often counter-productive.

It is notable that the provisions in the Charter concerning economic, social and cultural rights do not contain any “claw-back” clauses. Consequently, the only possible limitations on these rights are to be found in Article 27(2) which applies to all the rights in the Charter.

8 Conclusion

The African Charter is an innovative instrument that provides for a range of rights that extend beyond those guaranteed in other regional human rights treaties. It also recognises duties on the part of the individual and the state. However, the Charter lacks effective human rights protection in several ways. A number of "claw-back" clauses have the potential to severely restrict the rights guaranteed by granting governments the power to infringe them. The system of protection under the Charter also lacks effective enforcement and monitoring mechanisms. Implementation of the Commission's recommendations is left to the AU Assembly, which as a political body can hardly be expected to subordinate state interests to human rights. Nevertheless, in a number of cases, the Commission has found violations of rights guaranteed in the Charter. The Commission has also creatively interpreted the Charter to imply certain socio-economic rights which are not expressly provided for in the Charter.

A notable development in the African human rights system is the recent establishment of the Court on Human and Peoples' Rights to complement the supervisory role of the Commission. Unlike the Commission, however, the court is a judicial body whose decisions will be final, legally binding and cannot be appealed. This development bodes well for more effective enforcement of human and peoples' rights in Africa.

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