

PART III

African Regional and Sub-Regional Protection

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The Protection of Economic, Social and Cultural Rights under the African Charter

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1 Introduction

The African Charter on Human and Peoples' Rights¹ (African Charter) is widely known as the first international human rights treaty to protect the three 'generations' of human rights – civil and political rights; economic, social, and cultural rights; and group and peoples' rights – in a single instrument, without drawing any distinction between them based on their justiciability.² Article 1 of the African Charter provides that states parties to the African Charter 'shall recognize the rights, duties and freedoms' enshrined in the Charter and 'undertake to adopt legislative or other measures to give effect to them'. These provisions apply not only to civil and political rights but also to economic, social and cultural rights. The Preamble to the African Charter expressly proclaims the indivisibility, interdependence and interrelatedness of all rights, by providing that: 'civil and political rights cannot be dissociated from economic, social and cultural rights in their conception as well as universality and that the satisfaction of economic, social and cultural rights is a guarantee for the enjoyment of civil and political rights'. Thus, the African Charter protects all human rights under the same heading of 'human and peoples'

¹ OAU Doc. CAB/LEG/67/3 rev. 5, 21 ILM 58 (1982), ratified by 53 member states of the African Union (AU).

² For a discussion, see generally M. Ssenyonjo (ed.), *The African Regional Human Rights System* (The Hague: Martinus Nijhoff Publishers, 2012); F. Viljoen, *International Human Rights Law in Africa*, 2nd ed. (Oxford: Oxford University Press, 2012); M.D. Evans and R. Murray (eds.), *The African Charter on Human and Peoples' Rights: The System in Practice, 1986–2006*, 2nd ed. (Cambridge: Cambridge University Press, 2008); and F. Ougergouz, *The African Charter on Human and Peoples' Rights: A Comprehensive Agenda for Human Dignity and Sustainable Development in Africa* (The Hague: Kluwer Law International, 2003).

rights' and places legally binding obligations on all states parties to respect, protect and fulfil these rights.³

Despite the apparent strong legal protection economic, social and cultural rights enjoy at the regional level, the state of the realisation of these rights in Africa remains generally poor. Reflecting this reality, in 2014 about 65 percent of states parties to the African Charter were at the bottom end of the United Nations Human Development Index,⁴ which is reserved for states classified as having 'low human development'.⁵

This chapter provides a critical overview of the protection of economic, social and cultural rights in the African regional system, with a view to uncovering the possibilities of using litigation at this level as a means of ensuring that all Africans have improved access to basic necessities of life. Special emphasis will be placed on the provisions of the African Charter as they have been interpreted by its key monitoring body, the African Commission on Human and Peoples' Rights (Commission).

2 The Legal Protection of Economic, Social and Cultural Rights under the African Charter

Although the African Charter proclaims the principle of the indivisibility, interdependence and interrelatedness of all human rights, only a modest number of economic, social and cultural rights were explicitly enshrined in it. This was due to the 'minimalist' approach to the protection of these rights adopted during the drafting of the Charter, which sought 'to

³ See, e.g., *Abdel Hadi, Ali Radi and Others v. Sudan*, Communication No. 368/09, 5 November 2013, para. 92: 'The Commission considers that if a State Party fails to respect, protect, promote or fulfil any of the rights guaranteed in the Charter, this constitutes a violation of Article 1 of African Charter.'

⁴ The Human Development Index is a 'composite index measuring average achievement in three basic dimensions of human development – a long and healthy life, knowledge and a decent standard of living'. See UNDP, *Human Development Report 2014 – Sustaining Human Progress: Reducing Vulnerabilities and Building Resilience* (New York: UNDP, 2014), 163, available at <http://hdr.undp.org/sites/default/files/hdr14-report-en-1.pdf> (accessed 16 March 2015).

⁵ The following African states were classified as having 'low human development': the Democratic Republic of Congo (DRC), Central African Republic (CAR), Chad, Sierra Leone, Eritrea, Burkina Faso, Burundi, Guinea, Mozambique, Guinea-Bissau, Mali, Liberia, Malawi, Ethiopia, Gambia, Côte d'Ivoire, Djibouti, Togo, Sudan, Benin, Uganda, Senegal, Lesotho, Mauritania, Tanzania, Comoros, Zimbabwe, Madagascar, Nigeria, Cameroon, Rwanda, Angola, Swaziland and Kenya. See UNDP, *Human Development Report 2014*, note 4, 160–3, Table 1.

spare . . . young states too many but important obligations'.⁶ Thus, the African Charter only explicitly recognises the following individual economic, social and cultural rights: the right to property (Article 14); the right to work under equitable and satisfactory conditions (Article 15); the right to enjoy the best attainable state of physical and mental health (Article 16); the right to education (Article 17(1)); and the protection of the family and cultural rights (Articles 17[2] and [3], 18[1] and [2] and 61). The Charter also protects some group rights in Articles 19–24, including the rights to self-determination, free disposal of wealth and natural resources, economic, social and cultural development, national and international peace and security, and a general satisfactory environment. Most of these rights may be seen, at least in part, as collective economic, social and cultural rights.⁷

With the exception of the right to property, there are no rights-specific limitations on economic, social and cultural rights in the African Charter. However, it has been widely accepted that all rights in the Charter may be subjected to the general limitations provided for in Article 27(2), which provides that the rights and freedoms of each individual 'shall be exercised with due regard to the rights of others, collective security, morality and common interest'. According to the African Commission, Article 27(2) of the African Charter provides the only 'legitimate reasons' for the general limitation of the rights and freedoms protected under the Charter.⁸ It follows that limitations on economic, social and cultural rights under the African Charter, like limitations on other rights, 'cannot be derived *solely* from the popular will' [italics added]⁹ but must be justified by reference to reasons related to the public interests as specified in Article 27(2). Furthermore, the African Commission's jurisprudence has established that 'limitations must be *strictly proportionate* with and *absolutely necessary* for the advantages which follow' [italics added]¹⁰ or

⁶ See Report of the Rapporteur, OAU Ministerial Meeting on the Draft African Charter on Human and Peoples' Rights, Banjul, The Gambia, 9–15 June 1980, OAU Doc. CAB/LEG/67/Draft Rapt. (II) Rev. 4, para. 13; Viljoen, *International Human Rights Law in Africa*, 215.

⁷ See Chapter 8 in this book.

⁸ *Sudan Human Rights Organisation and Another v. Sudan (Sudan Human Rights Organisation)*, Communication Nos. 279/03 and 296/05, (2009) 28th Activity Report; (2009) AHRLR 153 (ACHPR 2009), para.165.

⁹ *Legal Resources Foundation v. Zambia*, Communication No. 211/98, (2001) 14th Activity Report; (2001) AHRLR 84 (ACHPR 2001), para. 70.

¹⁰ *Constitutional Rights Project and Others v. Nigeria (Constitutional Rights Project)*, Communication Nos. 140/94, 141/94 and 145/95, (1999) 13th Activity Report; (2001) AHRLR 227 (ACHPR 1999), para. 42.

that ‘any limitations on rights must be proportionate to a legitimate need, and should be the least restrictive measures possible’.¹¹

The African Charter does not make provision for derogations. This has been interpreted to mean that ‘the rights and freedoms enshrined in the Charter cannot be justified by emergencies or special circumstances’.¹² Thus, states parties to the African Charter cannot, under any circumstances whatsoever, justify non-compliance with at least the core obligations with respect to economic, social and cultural rights protected under the African Charter even in real public emergencies (i.e., exceptional situations of crisis that affect the whole population and constitute a threat to the organised life of the community of which the state is composed).

Apart from protecting a small number of economic, social and cultural rights, the African Charter protects these rights in general, if not extremely vague, terms. The Charter’s provisions on these rights lack specificity and require innovative interpretation (by the African Commission and African Court on Human and Peoples’ Rights) to enable states parties to understand and implement their obligations accordingly. Innovative interpretation is essential if states are to give effect to the object and purpose of the African Charter, which is to ‘promote and protect human and peoples’ rights and freedoms’ effectively in Africa.¹³ Seen through an optimistic lens, it could be argued that the vague wording allows for a reasonable degree of ‘flexibility’ in the application and interpretation of the African Charter by states and monitoring bodies tasked with enforcing its implementation.¹⁴

Among the key economic, social and cultural rights protected in the International Covenant on Economic, Social and Cultural Rights (ICESCR),¹⁵ but not explicitly included in the African Charter, are the

¹¹ *Centre for Minority Rights Development (Kenya) and Minority Rights Group International (on behalf of Endorois Welfare Council) v. Kenya (Endorois)*, Communication No. 276/2003, (2009) 27th Activity Report; (2009) AHRLR 75 (ACHPR 2009), para. 214.

¹² *Constitutional Rights Project*, note 10, para. 41; *Commission Nationale des Droits de l’Homme et des Libertés v. Chad*, Communication No. 74/92, (1995) 9th Activity Report; (2000) AHRLR 66 (ACHPR 1995), para. 21; *Malawi African Association and Others v. Mauritania*, Communication Nos. 54/91, 61/91, 98/93, 164/97–196/97 and 210/98, (2000) 13th Activity Report, Annex V; (2000) AHRLR 149 (ACHPR 2000), para. 84; and *Sudan Human Rights Organisation*, note 8, paras. 165 and 167.

¹³ Paragraph 11 of the Preamble to the African Charter.

¹⁴ See Report of the Rapporteur, note 6, para. 13.

¹⁵ GA Resolution 2200A (XXI), 21 UNGAOR Supp. (No. 16) at 49, UN Doc. A/6316 (1966), 993 UNTS 3, entered into force 3 January 1976. At the time of writing, 48 African states had ratified the ICESCR.

right to an adequate standard of living, the right to adequate food and clothing, rights to water and sanitation, the right to housing, the right to social security, the right to rest and leisure, and the right to form and join trade unions. This shortcoming has partially been addressed by later African human rights treaties that protect specific vulnerable groups, such as children, women, the youth and internally displaced persons – in particular, the African Charter on the Rights and Welfare of the Child¹⁶ (African Children’s Charter); the Protocol to the African Charter on Human and Peoples’ Rights on the Rights of Women in Africa¹⁷ (African Women’s Protocol); the African Youth Charter;¹⁸ and the Convention for the Protection and Assistance of Internally Displaced Persons.¹⁹

Thus far, the African Commission’s growing body of communications has mostly dealt with civil and political rights, such as the right to a fair trial, freedom of speech, and freedom from torture or cruel, inhuman or degrading treatment or punishment.²⁰ This is partly because most African states were for a long time under dictatorships where violations of civil and political rights were more widely reported and partly because civil society groups who have played a significant role in litigation before

¹⁶ OAU Doc. CAB/LEG/24.9/49 (1990), entered into force 29 November 1999. See, e.g. Article 11 (right to education), Article 12 (leisure, recreation and cultural activities), Article 14 (right to health), Article 15 (protection against child labour), Article 18 (protection of the family), and Article 21 (protection from harmful social and cultural practices).

¹⁷ Adopted by the Second Ordinary Session of the AU Assembly, Maputo, 11 July 2003, entered into force 25 November 2005. The Protocol protects the right to education and training (Article 12), economic and social welfare rights (Article 13), the right to health and reproductive rights (Article 14), the right to food security (Article 14), the right to adequate housing (Article 16), and the right to a positive cultural context (Article 17). In addition, it provides for the special protection of elderly women, women with disabilities and women in distress (Articles 22–24).

¹⁸ Adopted by the AU Assembly in July 2006, entered into force 8 August 2009. The Charter protects several rights, including the right to property (Article 9), the right to education (Article 13), freedom from poverty (Article 14), the right to employment (Article 15), the right to health (Article 16), and the right to participate freely in a culture (Articles 20 and 25).

¹⁹ Adopted by the Special Summit of the AU held in Kampala, 22 October 2009, entered into force 6 December 2012. Article 3(b) requires states to ‘[p]revent 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’.

²⁰ The African Commission issued its first decision on an individual communication in 1994. By 2014 it had published decisions in over 200 communications, of which slightly less than half were declared inadmissible. Decisions of the African Commission are reported in the Activity Reports of the African Commission for Human and Peoples’ Rights, available at www.achpr.org/activity-reports/ (accessed 30 March 2015).

the African Commission have mostly raised issues relating to civil and political rights. This anomaly could also be because these rights were for long not considered justiciable in most African domestic courts, until the mid-1990s when new constitutions were adopted.

This state of affairs has changed remarkably in the last decade, as more and more cases alleging violations of economic, social and cultural rights have been brought before the Commission. This development is welcome. Many individuals and vulnerable groups in sub-Saharan Africa, particularly the inhabitants of rural and deprived urban areas, landless persons, women, children, woman- and child-headed households, persons living with HIV/AIDS, persons with disabilities, refugees and internally displaced persons, still live in (extreme) poverty.²¹ The situation is exacerbated by high levels of corruption and impunity for crimes against humanity, as well as institutional and political crises.²² For example, in 2009, in the Democratic Republic of Congo (DRC), 75 percent of the population lived in extreme poverty, 83 percent of the population had no access to safe drinking water, while 70 percent had no access to hygienic sanitation facilities and only 1 percent of the population had access to electricity.²³ While life expectancy at birth in 2014 in some Western and Asian countries was over 80 years, in many African states (such as Angola, Central African Republic, Chad, Côte d'Ivoire, DRC, Lesotho, Mozambique, and Sierra Leone) life expectancy was below 52 years.²⁴ In 2009, about 50 percent of the 536 000 deaths of women every year due to complications during pregnancy, childbirth or the six weeks following delivery occurred in sub-Saharan Africa.²⁵

²¹ See UNDP, *Human Development Report 2010: The Real Wealth of Nations: Pathways to Human Development* (New York: UNDP, 2010), 86, 97–8. See also 37th Activity Report of the African Commission on Human and Peoples' Rights, para. 45(b)(ii), which recognises that: 'Poverty and unemployment remain major challenges to the effective enjoyment of socio-economic rights, especially by those living below the international poverty threshold'.

²² See, e.g. CESCR, Concluding observations: Chad, UN Doc. E/C.12/TCD/CO/3, 16 December 2009, paras. 7, 11 and 24; CESCR, Concluding observations: The Gambia, UN Doc. E/C.12/GMB/CO/1, 6 March 2015, para. 9; K. Olaniyan, *Corruption and Human Rights Law in Africa* (Oxford: Hart Publishing, 2014).

²³ CESCR, Concluding Observations: Democratic Republic of Congo, UN Doc. E/C.12/COD/CO/4, 16 December 2009, para. 29. By 2012, the poverty level had dropped to 63 per cent. See www.worldbank.org/en/country/drc/overview (accessed 20 November 2015).

²⁴ UNDP, *Human Development Report 2010*, note 21, 160–3.

²⁵ United Nations, *The Millennium Development Goals Report 2009* (New York: United Nations, 2009) 26.

3 Background to the African Commission's Jurisprudence on Economic, Social and Cultural Rights

The African Commission is the oldest human rights monitoring body in Africa. Established by Article 30 of the African Charter, the African Commission has, since 1989, been receiving and determining 'communications' submitted by individuals and non-governmental organisations on alleged violations of human rights. It has, through the years, developed valuable and, in some ways, uniquely African human rights jurisprudence, which has given teeth to the African Charter. The most important communications on economic, social and cultural rights are considered below to demonstrate the contribution the African Commission has made to the justiciability of economic, social and cultural rights in Africa.

In jurisprudential terms, decisions of the African Commission on economic, social and cultural rights made before 2001 found violations of some economic, social and cultural rights without developing the normative content of these rights. The Commission's pre-2001 decisions on civil and political rights were similarly constrained. With respect to economic, social and cultural rights, this shortcoming is understandable, as there was little comparative international and domestic jurisprudence on these rights.²⁶ In fact, within the United Nations system, the UN Committee on Economic, Social and Cultural Rights (CESCR) started developing the normative content of economic, social and cultural rights and state obligations in the 1990s.²⁷ Even so, this was in the context of state reporting as the main means of monitoring the implementation of

²⁶ See Report of the African Commission's Working Group of Experts on Indigenous Populations/Communities, ACHPR/IWGIA, 2005.

²⁷ See, e.g. CESCR, General Comment 3: The nature of states parties' obligations (Fifth session, 1990), UN Doc. E/1991/23, annex III at 86 (1990); General Comment 4: The right to adequate housing (Sixth session, 1991), UN Doc. E/1992/23, annex III at 114 (1991); General Comment 5: Persons with disabilities (Eleventh session, 1994), UN Doc E/1995/22 at 19 (1995); General Comment 6: The economic, social and cultural rights of older persons (Thirteenth session, 1995), UN Doc. E/1996/22 at 20 (1996); General Comment 7: Forced evictions, and the right to adequate housing (Sixteenth session, 1997), UN Doc. E/1998/22, annex IV at 113 (1997); General Comment 8: Relationship between economic sanctions and respect for economic, social and cultural rights (Seventeenth session, 1997), UN Doc. E/C.12/1997/8 (1997); General Comment 11: Plans of action for primary education (Twentieth session, 1999), UN Doc. E/C.12/1999/4 (1999); General Comment 12: Right to adequate food (Twentieth session, 1999), UN Doc. E/C.12/1999/5 (1999); General Comment 13: The right to education (Twenty-first session, 1999), UN Doc. E/C.12/1999/10 (1999); Maastricht Guidelines on Violations of Economic, Social and Cultural Rights, Maastricht, 22–26 January 1997, (1998) 20(3) *Human Rights Quarterly* 691–704.

these rights, and so these guidelines were not developed in or applied to specific cases before national or international courts or human rights monitoring bodies.

Most of the Commission's post-2001 decisions on economic, social and cultural rights have drawn inspiration from the international human rights jurisprudence. These decisions have become noticeably longer and entailed more elaborate reasoning. In 2010, the African Commission adopted its own principles and guidelines elaborating the content of the economic, social and cultural rights protected under the African Charter and the obligations of states parties related to them.²⁸ These principles and guidelines largely draw on the CESCRC's general comments. For example, the Commission has borrowed the CESCRC's definitions of the states' duties to respect, protect, promote and fulfil in developing its own understanding of the obligations that states parties to the African Charter have in relation to these rights.²⁹

Apart from the existence of comparative jurisprudence, the Commission's improved understanding of economic, social and cultural rights may be attributed to several other factors. First, the commissioners are now more prepared to provide clear reasons for their decisions and receive better support from the Commission's secretariat than was the case before.³⁰ Second, non-governmental organisations specialising in economic, social and cultural rights have brought economic, social and cultural rights cases before the Commission with better legally substantiated arguments.³¹ Third, states parties are now engaging with the

²⁸ See Principles and Guidelines on the Implementation of Economic, Social and Cultural Rights in the African Charter on Human and Peoples' Rights (Principles and Guidelines), adopted at the Forty-Seventh Ordinary Session held in Banjul, the Gambia, from 12 to 26 May 2010, and formally launched at the Commission's Fiftieth Ordinary Session held in Banjul, the Gambia, from 24 October to 7 November 2011, available at www.achpr.org/files/instruments/economic-social-cultural/achpr_instr_guide_draft_esc_rights_eng.pdf (accessed 20 November 2015).

²⁹ *Social and Economic Rights Action Centre and Centre for Economic and Social Rights v. Nigeria*, Communication No. 155/96, 15th Annual Activity Report, (2001) AHRLR 60 (ACHPR 2001), paras. 44–47; *Zimbabwe Human Rights NGO Forum v. Zimbabwe*, Communication No. 245/2002, Annex III, (2006) 21st Activity Report; (2006) AHRLR 128 (ACHPR 2006), para. 152.

³⁰ At the time of writing, the Commission's secretariat in Banjul, the Gambia had a small number of full-time staff.

³¹ Such non-governmental organisations have included the Social and Economic Rights Action Centre, the Centre for Economic and Social Rights, the Socio-Economic Rights and Accountability Project, Centre for Minority Rights Development, and the Centre on Housing Rights and Evictions.

Commission more critically and constructively than was the case previously.³²

4 Expressly Recognised Rights and the Commission's Jurisprudence

This section focuses on the analysis of the specific economic, social and cultural rights provisions contained in the African Charter.

4.1 *Right to Property*

The right to property is closely connected to the enjoyment of several rights, including the right to adequate housing. Article 14 provides: 'The right to property shall be guaranteed. It may only be encroached upon in the interest of public need or in the general interest of the community and in accordance with the provisions of appropriate laws.' The term 'property' is not defined.

Unlike Article 1 of Protocol 1 to the European Convention for the Protection of Human Rights and Fundamental Freedoms,³³ which specifies the beneficiaries of the right to property as being both natural and legal persons, Article 14 of the African Charter is silent on the beneficiaries of the right to property. Furthermore, this article permits restrictions on the exercise of this right, provided that those restrictions serve a 'public need' or the 'general interest of the community'. Apart from the fact that these terms are broadly framed, this article does not expressly state that expropriation of property is subject to 'prompt, effective and adequate compensation'.

Some aspects of the right to property have been protected in later African human rights treaties. For example, with respect to women's right to property, the African Women's Protocol obliges states to enact appropriate national legislative measures to guarantee that 'during her marriage, a woman shall have the right to acquire her own property and to administer and manage it freely'.³⁴ It also obliges states to ensure that 'in case of separation, divorce or annulment of marriage, women and men shall have the right to an equitable sharing of the joint property deriving from the marriage'.³⁵ States are further obliged by this Protocol

³² F. Viljoen, *International Human Rights Law in Africa* (Oxford: Oxford University Press, 2007), 354.

³³ 213 UNTS 222, ETS 9, adopted on 20 March 1952, entered into force 18 May 1954.

³⁴ Article 6(j). ³⁵ Article 7(d).

to take all appropriate measures to 'promote women's access to and control over productive resources such as land and guarantee their right to property'.³⁶ A widow is specifically guaranteed the right to 'an equitable share in the inheritance of the property' of her husband, the right to continue to live in the matrimonial house and, in case of remarriage, to 'retain this right if the house belongs to her or she has inherited it'.³⁷ The Protocol also guarantees women and men 'the right to inherit, in equitable shares, their parents' properties'.³⁸

Through its communications, guidelines and principles, the Commission has considered some violations of the right to property, and progressively clarified some aspects of this right and the circumstances in which it may be limited. For example, in *Modise v. Botswana*,³⁹ the complainant had been deported four times from Botswana. He then claimed a violation of his right to property, alleging that the deportations had caused him heavy financial losses and that the government of Botswana had confiscated his property. Botswana did not refute these allegations. In these circumstances, the Commission found Botswana responsible for violating the complainant's right to property.⁴⁰ Although the Commission did not make an attempt to clarify the normative content of the right to property, its finding was consistent with the general principles of international law, which require that non-nationals are protected against arbitrary expropriations and, in case of lawful expropriations, that they are given prompt, adequate and effective compensation for the loss of their property.⁴¹

In *Malawi African Association and Others v. Mauritania*,⁴² land was considered 'property' for the purposes of Article 14 of the Charter. In *Media Rights Agenda and Others v. Nigeria*⁴³ and *Constitutional Rights Project, Civil Liberties Organisation and Media Rights Agenda v. Nigeria*,⁴⁴ the Commission held that the right to property includes a right to have access to one's property and the right not to have one's

³⁶ Article 19(c). ³⁷ Article 21(1). ³⁸ Article 21(2).

³⁹ Communication No. 97/93, (2000) 10th Activity Report; (2000) AHRLR 30 (ACHPR 2000).

⁴⁰ *Ibid*, para. 94.

⁴¹ *James and Others v. United Kingdom*, Application No. 8793/79, 21 February 1986, (1986) 8 EHRR, 123, paras. 61–63.

⁴² Note 12, para. 128.

⁴³ Communication Nos. 105/93, 128/94, 130/94 and 152/96, (1998) 12th Activity Report; (2000) AHRLR 200 (ACHPR 1998), para. 77.

⁴⁴ Communication Nos. 140/94, 141/94, 145/95, (1999) 13th Activity Report; (2000) AHRLR 227 (ACHPR 1999), para. 55.

property removed, invaded or encroached upon. In *Zimbabwe Lawyers for Human Rights & Associated Newspapers of Zimbabwe v. Zimbabwe*,⁴⁵ the Commission held that '[t]he confiscation of the Complainants' equipment and depriving them of a source of income and livelihood [constituted] a violation of their right to property guaranteed under Article 14'.⁴⁶

More recent communications decided by the African Commission provide more details of the scope of the right to property. For example, in *Interights and Others v. Mauritania*,⁴⁷ the Commission held that this right encompasses two main principles. The first principle, which is of a general nature, relates to ownership and peaceful enjoyment of property.⁴⁸ It states that everyone is entitled to peaceful enjoyment of their possessions, including the right to dispose of one's property. The role of the state is to *respect* and *protect* this right against any form of encroachment, and to regulate the exercise of this right in order for it to be accessible to everyone, taking due consideration of the public interest.⁴⁹ The second principle relates to circumstances under which deprivation of the right to property may be permitted.⁵⁰ Article 14 of the Charter recognises that states are entitled in certain circumstances to control the use of property in accordance with the 'public or general interest' by enforcing such laws as they deem 'necessary' for the purpose.⁵¹

Thus, in *Mouvement Ivoirien de Droits de l'Homme (MIDH) [Ivorian Human Rights Movement] v. Côte d'Ivoire*,⁵² it was held that confiscation of private property without showing that it was needed to advance the public or general interest of the community and proving that it was proportionate (i.e. it struck a fair balance between the individual interest and the collective or general interest of the community) amounts to arbitrary deprivation of property and thus a violation of Article 14 of the African Charter. However, the Commission has not yet defined the term 'public or general interest'. Nonetheless, in its Principles and Guidelines, it has stated that that this term encompasses 'legitimate public interest objectives such as economic reform or measures designed

⁴⁵ Communication No. 284/2003, (2009) 26th Activity Report, Annex 3; (2009) AHRLR 235 (ACHPR 2009).

⁴⁶ *Ibid.*, para. 179.

⁴⁷ Communication No. 373/2009 (formerly 242/2001), (2010) 28th Activity Report; (2010) AHRLR 90 (ACHPR 2010), para. 44.

⁴⁸ *Ibid.* ⁴⁹ *Ibid.*, para. 43. ⁵⁰ *Ibid.*, para. 44. ⁵¹ *Ibid.*

⁵² Communication No. 262/02 (2008) 26th Activity Report, paras. 76–78.

to achieve greater social justice'.⁵³ Elsewhere, it has been held the protection of nature and forests,⁵⁴ the protection of natural heritage,⁵⁵ and the protection of the historical and cultural heritage are examples of measures that serve the public interest.

The African Commission's Principles and Guidelines confirm the broad nature of the right to property. They provide:

The right to property is a broad right that includes the protection of the real rights of individuals and peoples in any material thing which can be possessed as well as any right which may be part of a person's patrimony. The concept also includes the protection of a legitimate expectation of the acquisition of property. It encompasses the rights of the individual, group or people to peaceful enjoyment of the property. The right may be limited by the State in a non-arbitrary manner, according to the law and the principle of proportionality.

Protected under this article are rights guaranteed by traditional custom and law to access to, and use of, land and other natural resources held under communal ownership. This places an obligation on State Parties to ensure security of tenure to rural communities, and their members.⁵⁶

Given such broad definition, the right to property under the African Charter arguably protects all manner of things that have economic value including immovable and movable property, intellectual property (such as patents, trademarks, copyrights and internet domain names), possessions such as telecommunications and broadcasting licences, fishing rights and planning permissions, an enforceable judgment or arbitration award and social security benefits, where national law provides for such an entitlement.

According to the Commission, the right to property imposes a wider range of obligations on state parties, including obligations to:

- a. Ensure peaceful enjoyment of property and protection from forced eviction. This obligation implies that the State shall protect the enjoyment [of the right to property] in all its forms, from interference by third parties as well as its own agents.
- b. Define by law the terms and conditions for the acquisition, nationalisation or expropriation of property based on acting in the public interest at all times.

⁵³ Principles and Guidelines, note 28, para. 55(c).

⁵⁴ *Turgut and Others v. Turkey*, (App 1411/03), ECtHR, 8 July 2008.

⁵⁵ *Anonymos Touristiki Etairia Xenodocheia v. Greece*, Application No. 35332/05, ECtHR, 21 February 2008.

⁵⁶ Paras. 53 and 54, note 28.

- c. Ensure that 'public need or in the general interest of the community' as expressed under the Charter serves legitimate public interest objectives such as economic reform or measures designed to achieve greater social justice.
- d. Ensure effective public participation and transparency in any acquisition process.
- e. Ensure that compensation for public acquisition of property fairly balances the rights of the individual and the wider interests of society. In general, compensation should be reasonably related to the market value of the acquired property. However, in certain circumstances public interest may require less than market value compensation or, exceptionally, none at all.
- f. To ensure that members of vulnerable and disadvantaged groups, including indigenous populations/communities who are victims of historical land injustices, have independent access to and use of land and the right to reclaim their ancestral rights, and are adequately compensated for both historical and current destruction or alienation of wealth and resources. This may include land redistribution programmes implemented according to the due process of the law. States should protect traditional land ownership, while ensuring gender equality.
- g. To prevent unfair exploitation of natural resources by both state and non-state national and international actors.
- h. To ensure equitable and non-discriminatory access, acquisition, ownership, inheritance and control of land and housing, especially by women. This includes the obligation to take measures to modify or prohibit harmful social, cultural or other practices that prevent women and other members of vulnerable and disadvantaged groups from enjoying their right to property, particularly in relation to housing and land.⁵⁷

In *Endorois*,⁵⁸ the Commission held that the right to property can be held by a collective, such as an indigenous people. This communication alleged that Kenya, in violation of Article 14 of the African Charter, had forcibly removed the Endorois community⁵⁹ from their ancestral

⁵⁷ See para. 55 of the African Commission's Principles and Guidelines, note 28.

⁵⁸ Note 11.

⁵⁹ The Endorois are a semi-nomadic indigenous community of approximately 60 000 people, who for centuries have earned their livelihoods from herding cattle and goats in the Lake Bogoria area of Kenya's Rift Valley.

lands, without proper, prior consultations or giving them adequate and effective compensation. The Commission found that Kenya had indeed violated this article, noting, *inter alia*, that the state had not only denied the Endorois community all legal rights in their ancestral land, rendering their property rights essentially illusory, but also violated the very essence of the right itself without providing a plausible justification.⁶⁰ This decision is a landmark because the Commission effectively recognised the rights of indigenous peoples, which are not expressly recognised by the African Charter.

4.2 *Rights to Health and Education*

Article 16(1) of the African Charter provides: 'Every individual shall have the right to enjoy the best attainable state of physical and mental health'. Hence, states parties have the duty to take 'necessary measures to protect the health of their people and to ensure that they receive medical attention when they are sick'. Subsequent African human rights instruments, the African Children's Charter⁶¹ and the African Women's Protocol⁶² have bolstered and significantly expanded the protection of this right and of women, including women's sexual and reproductive health. Collectively, these treaties obligate the state to:

- take measures to reduce the infant and child mortality rate;
- ensure the provision of necessary medical assistance and health care, with emphasis on the development of primary health care;
- ensure the provision of adequate nutrition and safe drinking water;
- combat disease and malnutrition through the application of appropriate technology;
- ensure appropriate health care for expectant and nursing mothers; and provide adequate, affordable and accessible health services, including information, education and communication programmes to women, especially those in rural areas;
- develop preventive health care and family life education and provision of service;
- provide protection against harmful social and cultural practices prejudicial to health, including all forms of female genital mutilation; and

⁶⁰ *Endorois*, note 11, paras. 215 and 238. ⁶¹ See Article 14. ⁶² See Article 14.

- promote basic health information, including child health and nutrition, hygiene and environmental sanitation, and the prevention of domestic and other accidents.⁶³

As regards the right to education, Article 17(1) of the African Charter provides: 'Every individual shall have the right to education.' Compared with Article 13 of the ICESCR, Article 17 does not say much about the content of the right to education. Neither does it specify the objectives of education. However, these shortfalls were remedied by the African Children's Charter, which spelt out the content and objectives of the right to education.⁶⁴

As was the case with other rights, the Commission's pre-2001 case law on health and education made findings of violations of both rights without developing the normative content of these rights. For example, in *Free Legal Assistance Group and Others v. Zaire*,⁶⁵ it was alleged Zaire was responsible for the mismanagement of public finances, the failure to provide basic services such as medicines to its population, and the closure of universities and secondary schools for two years. In finding that Zaire had indeed violated the provisions of the African Charter, the Commission simply stated:

Article 16 of the African Charter states that every individual shall have the right to enjoy the best attainable state of physical and mental health, and that States Parties should take the necessary measures to protect the health of their people. The failure of the Government to *provide* [italics added] basic services such as safe drinking water and electricity and the shortage of medicine as alleged in communication 100/93 constitutes a violation of Article 16.

Article 17 of the Charter guarantees the right to education. The closure of universities and secondary schools as described in communication 100/93 constitutes a violation of Article 17.⁶⁶

As is clear from the above, the Commission held, without providing detailed reasons, that the facts constituted 'serious and massive violations' of several provisions in the African Charter, including Articles 16 and 17. It may be inferred from the foregoing that the Commission generally considers retrogressive measures, such as unjustified closure

⁶³ See Articles 5, 14(2) and 18 of the African Women's Protocol and Articles 14(2) and 21 of the African Children's Charter.

⁶⁴ See Article 11.

⁶⁵ Communication Nos. 25/89, 47/90, 56/91 and 100/93, (1996) 9th Annual Report; (2000) AHRLR 74 (ACHPR 1995).

⁶⁶ *Ibid*, paras. 47-48.

of available schools and universities, a violation of the right to education. The Commission has also found 'mass and indiscriminate transfers of civilian population . . . and the general disruption of life and state of war' to constitute a violation of Article 17,⁶⁷ apparently based on the negative effect that the disruption of civilian life has on the right to education. Further, the Commission has found that mass expulsion of non-nationals 'calls into question a whole series of rights', including the right to education.⁶⁸

In *International PEN and Others (on behalf of Saro-Wiwa) v. Nigeria*,⁶⁹ the Commission found a violation of the right to health. In this case, it was alleged that Ken Saro-Wiwa, a writer, Ogoni activist and president of the Movement for the Survival of the Ogoni People, was arrested in 1994, severely beaten during the first days of his detention and chained in leg irons and handcuffs for several days. He was also denied access to a hospital or medicine to control his blood pressure. In finding Nigeria responsible for violating Saro-Wiwa's rights, including the right to health, the Commission said:

The responsibility of the government is heightened in cases where an individual is in its custody and therefore someone whose integrity and well-being is completely dependent on the actions of the authorities. The state has a direct responsibility in this case. Despite requests for hospital treatment made by a qualified prison doctor, these were denied to Ken Saro-Wiwa, causing his health to suffer to the point where his life was endangered. The government has not denied this allegation in any way. This is a violation of Article 16.⁷⁰

The rationale for holding the state to a higher standard in cases of detained persons was explained in *Malawi African Association and Others v. Mauritania* thus:

The State's responsibility in the event of detention is even more evident to the extent that detention centres are of its exclusive preserve, hence the

⁶⁷ *Democratic Republic of Congo v. Burundi, Rwanda and Uganda*, Communication No. 227/99, (2003) 20th Annual Activity Report; (2004) AHRLR 19 (ACHPR 2003), para. 88.

⁶⁸ *Union Inter Africaine des Droits de l'Homme and Others v. Angola*, Communication No. 159/96, (1997) 11th Annual Activity Report; (2000) AHRLR 18 (ACHPR 1997), paras. 16–17.

⁶⁹ Communication Nos. 137/94, 139/94, 154/96 and 161/97, (1998) 12th Activity Report; (2000) AHRLR 212 (ACHPR 1998).

⁷⁰ *Ibid*, para. 114. See also *Media Rights Agenda and Others v. Nigeria*, Communication Nos. 105/93, 128/94, 130/94 15 and 2/96, (1999) 12th Annual Activity Report; (2000) AHRLR 200 (ACHPR 1999), para. 88.

physical integrity and welfare of detainees is the responsibility of the competent public authorities. Some prisoners died as a result of the lack of medical attention. The general state of health of the prisoners deteriorated due to the lack of sufficient food; they had neither blankets nor adequate hygiene. The Mauritanian State is directly responsible for this state of affairs and the government has not denied these facts. Consequently, the Commission considers that there was violation of article 16.⁷¹

Although these communications clearly established that denying prisoners (who are a vulnerable or marginalised group) access to health care constituted a violation of the right to health under Article 16 of the African Charter, the nature and scope of prisoners' right to health were not clearly defined.⁷²

From 2001 onwards, the Commission began to develop the content of this right. In *Purohit and Moore v. The Gambia*,⁷³ the African Commission stated that the right to health includes 'the right to health facilities, access to goods and services to be guaranteed to all without discrimination of any kind'.⁷⁴ Mindful of the high levels of poverty in Africa, it qualified the positive obligations that states have in relation to this right by reading into Article 16 the duty of states to take 'concrete and targeted steps', while taking full advantage of the 'available resources' within the state and other sources to ensure that the right to health is fully realised in all its aspects without discrimination of any kind.⁷⁵

In *Social and Economic Rights Action Centre and the Centre for Economic and Social Rights v. Nigeria*⁷⁶ (SERAC), the complainants alleged that the Nigerian government violated the right to health and the right to a clean environment by failing to fulfil the minimum duties required by these rights. The complainants alleged that the government had (i) directly participated in the contamination of air, water and soil, thereby harming the health of the Ogoni population; (ii) failed to protect the Ogoni population from the harm caused by the Nigerian National Petroleum Company and Shell Petroleum Development Corporation, but instead used its security forces to suppress peaceful demonstrations and protests; and (iii) failed to regulate the oil operations.

⁷¹ Note 12, para. 122.

⁷² For a discussion of prisoners' right to health see R. Lines, 'The right to health of prisoners in international human rights law', (2008) 4(1) *International Journal of Prisoner Health* 3.

⁷³ Communication No. 241/2001, (2003) 16th Annual Activity Report; (2003) AHRLR 96 (ACHPR 2003).

⁷⁴ *Ibid*, para. 80. ⁷⁵ *Ibid*, para. 84.

⁷⁶ Communication No. 155/96, (2001) 15th Activity Report, Annex V; (2001) AHRLR 60 (ACHPR 2001).

Unlike in the previous communications, the Commission commented on the normative content of the right to a healthy environment thus:

The right to a general satisfactory environment, as guaranteed under Article 24 of the African Charter or the right to a healthy environment, as it is widely known, therefore imposes clear obligations upon a government. It requires the State to take reasonable and other measures to prevent pollution and ecological degradation, to promote conservation, and to secure an ecologically sustainable development and use of natural resources. Article 12 of the International Covenant on Economic, Social and Cultural Rights (ICESCR), to which Nigeria is a party, requires governments to take necessary steps for the improvement of all aspects of environmental and industrial hygiene. The right to enjoy the best attainable state of physical and mental health enunciated in Article 16(1) of the African Charter and the right to a general satisfactory environment favourable to development (Article 16(3)) already noted obligate governments to desist from directly threatening the health and environment of their citizens. The State is under an obligation to respect the just noted rights and this entails largely non-interventionist conduct from the State for example, not from carrying out, sponsoring or tolerating any practice, policy or legal measures violating the integrity of the individual.

Government compliance with the spirit of Articles 16 and 24 of the African Charter must also include ordering or at least permitting independent scientific monitoring of threatened environments, requiring and publicising environmental and social impact studies prior to any major industrial development, undertaking appropriate monitoring and providing information to those communities exposed to hazardous materials and activities and providing meaningful opportunities for individuals to be heard and to participate in the development decisions affecting their communities.⁷⁷

Thus, the Commission concluded that, although Nigeria had the right to produce oil, it had to do so without violating the rights of the Ogoni people. By reading the rights to health and to a clean environment together, the Commission was able to find Nigeria responsible for violating both rights. In its recommendations, the Commission appealed to Nigeria to undertake appropriate environmental and social impact assessments for any future oil development and ensure the safe operation of any further oil development through effective and independent oversight bodies for the petroleum industry. It also appealed to Nigeria to provide information on health and environmental risks and meaningful

⁷⁷ *Ibid*, paras. 52–53.

access to regulatory and decision-making bodies to communities likely to be affected by oil operations.

This communication influenced a later judgment of the Economic Community of West African States' Community Court of Justice (ECOWAS Community Court), where Nigeria was also found to have violated the right to a healthy environment under Article 24 of the African Charter.⁷⁸ The Court ordered Nigeria to take all effective measures, within the shortest possible time, to ensure the restoration of the environment of the Niger delta, to prevent environmental degradation, and to hold the perpetrators of the environmental damage accountable.⁷⁹

In *Sudan Human Rights Organisation*,⁸⁰ the Commission developed the right to health further. In this communication, the complainants alleged gross, massive and systematic violations of human rights by Sudan (including the destruction of homes, livestock and farms, and the poisoning of water sources) against the indigenous Black African tribes in the Darfur region of Western Sudan (in particular, members of the Fur, Marsalit and Zaghawa tribes). It was claimed that Sudan was complicit in looting and destroying foodstuffs, crops and livestock, and poisoning wells and denying local people access to water sources in Darfur. Relying on the CESCRC's jurisprudence, the Commission interpreted the right to health thus:

In its General Comment No. 14 on the right to health adopted in 2000, the UN Committee on Economic, Social and Cultural Rights sets out that, 'the right to health extends not only to timely and appropriate health care but also to the underlying determinants of health, such as, access to safe and potable water, an adequate supply of safe food, nutrition, and housing . . .'. In terms of the General Comment, the right to health contains four elements: availability, accessibility, acceptability and quality, and impose three types of obligations on States – to respect, fulfil and protect the right. In terms of the duty to protect, the State must ensure that third parties (non-state actors) do not infringe upon the enjoyment of the right to health.

Violations of the right to health can occur through the direct action of States or other entities insufficiently regulated by States. According to General Comment 14, 'states should also refrain from unlawfully polluting air, water and soil . . . during armed conflicts in violation of international humanitarian law . . . States should also ensure that third parties do not limit people's access to health-related information and services,

⁷⁸ *Registered Trustees of the Socio-economic Rights & Accountability Project (SERAP) v. Federal Republic of Nigeria*, ECW/CCJ/JUD/18/12, 14 December 2012, para. 120.

⁷⁹ *Ibid*, para. 121. ⁸⁰ Note 8.

and the failure to enact or enforce laws to prevent the pollution of water . . . [violates the right to health].⁸¹

Applying this understanding of the right to health, the Commission found that ‘the destruction of homes, livestock and farms as well as the poisoning of water sources, such as wells exposed the victims to serious health risks and amount[ed] to a violation of Article 16 of the Charter’.⁸² In short, African human rights jurisprudence confirms that the right to ‘the best attainable state of physical and mental health’ under Article 16 of the African Charter extends to both the right to health care and the right to the underlying conditions/determinants of health, which include ‘access to safe and potable water and adequate sanitation, an adequate supply of safe food, nutrition and housing, healthy occupational and environmental conditions’.⁸³ Accordingly, the Commission has found that acts such as ‘the besiege and damage of the hydro-dam, stopping of essential services in the hospital, leading to deaths of patients and the general disruption of life’ constituted a violation of the right to the best attainable state of physical and mental health under Article 16.⁸⁴

By 2014 the African Commission had not yet developed the content of the right to education through its communications procedure. In *Gumne and Others v. Cameroon*,⁸⁵ where this right was invoked, no violation was found, because the ‘[c]omplainants did not substantiate the allegations’.⁸⁶

However, the Commission’s Principles and Guidelines⁸⁷ have substantially developed the right to education. For example, they state that the right to education ‘encompasses pre-school, primary, secondary, tertiary, adult education and vocational training’.⁸⁸ According to these Principles and Guidelines, Article 17(1) requires states to ensure that:

- ‘all children enjoy their right to free and compulsory primary education’;
- secondary (including technical and vocational) education is made ‘generally available and accessible to all by all appropriate means, and in particular by the progressive introduction of free education’;

⁸¹ Ibid, paras. 209–212. ⁸² Ibid, para. 212.

⁸³ Principles and Guidelines, note 28, para. 63. This wording was derived from the CESCRC General Comment 14: The right to the highest attainable standard of health (Twenty-second session, 2000), UN Doc. E/C.12/2000/4 (2000), para. 11.

⁸⁴ *Democratic Republic of Congo v. Burundi, Rwanda and Uganda*, note 67, para. 88.

⁸⁵ Communication No. 266/2003, (2009) 26th Activity Report, Annex IV; (2009) AHRLR 9 (ACHPR 2009), para. 145.

⁸⁶ Ibid, para. 149. ⁸⁷ Note 28, paras. 68–71. ⁸⁸ Ibid, para 70.

- higher education is made ‘generally available and accessible to all, on the basis of capacity, by all appropriate means, and in particular by the progressive introduction of free education’;
- vocational training and adult education/literacy is ‘accessible and affordable’;
- all educational programmes are of a ‘high quality and appropriate to the needs of society’.
- the liberty of parents and guardians to establish and choose schools for their children is respected;
- ensure the safety of school children by taking measures to ‘address physical and sexual abuse by other students, teachers, staff or principals’;
- ensure academic freedom and institutional autonomy in all institutions of higher learning; and
- all children, including those belonging to vulnerable and disadvantaged groups (e.g., orphans, pregnant girls, children with disabilities, children with real or perceived HIV/AIDS status, working children, children of migrant workers, and prisoners) enjoy equal access to and progress in the education system.⁸⁹

Curiously, Article 17 of the African Charter has been a subject of litigation before a sub-regional court. In *Registered Trustees of Socio-Economic Rights and Accountability Project (SERAP) v. Federal Republic of Nigeria and Universal Basic Education Commission*,⁹⁰ the plaintiff, a human rights non-governmental organisation claimed before the ECOWAS Community Court that Nigeria’s failure to implement her Compulsory and Basic Education Act of 2004 and the Child’s Rights Act of 2004 constituted a violation of the right to education enshrined in the African Charter. In a preliminary application, the state argued that the ECOWAS Community Court lacked jurisdiction to hear a claim involving an alleged violation of rights protected in the African Charter; that the right to education was not justiciable; and that the applicant (SERAP) had no locus standi to bring the action before the Court since it ‘failed to show that it [had] suffered any damage, loss or personal injury in respect of the acts alleged in the suit’.⁹¹

Relying on Article 9(4) of the Supplementary Protocol to Protocol A/P.I/7/91 on the Community Court of Justice⁹² and Article 4(g) of the

⁸⁹ Ibid, Parts II and III of the Principles and Guidelines.

⁹⁰ Suit No. ECW/CCJ/APP/0808, 27 October 2009. ⁹¹ Ibid. para. 20.

⁹² Protocol No. A/SP.1/01/05, adopted in Accra, Ghana, 19 January 2005. Article 9(4) of this Protocol grants the Court jurisdiction to determine cases alleging violations of human rights against ECOWAS member states.

Revised Treaty of the Economic Community of West African States,⁹³ the Court held that the rights guaranteed by the African Charter are justiciable before the ECOWAS Community Court.⁹⁴ In particular, the Court dismissed the government's contention that education was a mere directive policy of the government that did not grant a legal entitlement to anyone. It held that it had jurisdiction over cases alleging violations of the rights enshrined in the African Charter.⁹⁵

Finally, in holding that SERAP did indeed have standing, the Court cited the doctrine of *actio popularis* that allows any person or entity to challenge a violation of a public right without having to show that the plaintiff was personally affected or had any special interest worthy of protection. Relying on comparative jurisprudence from Bangladesh, India, Ireland, Pakistan, the United Kingdom and the United States and from international law, it held that in 'public interest litigation, the plaintiff need not show that he has suffered any personal injury or has a special interest that needs to be protected to have standing'.⁹⁶ Rather, the Court stated, the plaintiff must establish that 'there is a public right which is worthy of protection which has been allegedly breached and that the matter in question is justiciable'.⁹⁷

This decision is significant because it confirmed the justiciability of all rights protected in the African Charter before the ECOWAS Community Court and because it recognised public interest-based access to the Court by non-governmental organisations and other actors.

On the merits, the Court declared that every Nigerian child was entitled to free basic education and directed that the 'defendant should take the necessary steps to provide the money to cover the shortfall to ensure a smooth implementation of the education programme'.⁹⁸

4.3 *Right to Work*

Article 15 of the African Charter provides: 'Every individual shall have the right to work under equitable and satisfactory conditions, and shall

⁹³ Adopted in Cotonou, Benin, 24 July 1993, 35 ILM 660 (1996). Article 4(g) affirms and declares the adherence of ECOWAS Member States to the 'recognition, promotion and protection of human and peoples' rights in accordance with the provisions of the African Charter on Human and Peoples' Rights'.

⁹⁴ Note 90, para. 19. ⁹⁵ Ibid, para. 13. ⁹⁶ Ibid, para. 33. ⁹⁷ Ibid.

⁹⁸ *Registered Trustees of the Socio-economic Rights & Accountability Project (SERAP) v. The Federal Republic of Nigeria and Another*, ECW/CCJ/APP/12/07, 30 November 2010, para. 28.

receive equal pay for equal work'. Article 16 of the African Children's Charter prohibits child labour and economic exploitation, and requires states, among other things, to adopt minimum wages for admission to every employment. Of the three main African regional human rights treaties, the African Women's Protocol contains the most detailed protection of work-related rights. Article 13 requires states to adopt and enforce legislative and other measures to guarantee women equal opportunities in work and career advancement and other economic opportunities by, among other things, promoting equality of access to employment and equal remuneration for jobs of equal value for women and men; guaranteeing freedom of choice of occupation and transparency in recruitment, promotion and dismissal of women; and combating sexual harassment and exploitation at the workplace and protecting women from such behaviour. These aspects of the right to work are reiterated in the Commission's Principles and Guidelines.⁹⁹

Thus far, the Commission has dealt with many communications alleging violations of the right to work. For example, in *Zimbabwe Lawyers for Human Rights & Associated Newspapers of Zimbabwe v. Republic of Zimbabwe*,¹⁰⁰ the Commission found that the unjustified closure of business premises by state authorities and the prevention of owners and employees from working violated Article 15 of the African Charter. Although no violation of this right was found in *Prince v. South Africa*,¹⁰¹ the Commission observed that the right to work seeks 'to ensure that states respect and protect the right of everyone to have access to the labour market without discrimination'. In *Institute for Human Rights and Development in Africa (IHRDA) v. Angola*,¹⁰² the Commission found that the abrupt expulsion of non-nationals working in Angola without according them due process or access to courts to challenge their expulsion 'severely compromised' their right to continue working in Angola under equitable and satisfactory conditions.¹⁰³

Article 15 has also been interpreted as entailing a positive state obligation to reinstate a person, unfairly deprived of employment, in his or her

⁹⁹ See paras. 58–59.

¹⁰⁰ Communication No. 284/03, (2009) 26th Annual Activity Report; (2009) AHRLR 325 (ACHPR 2009), para. 179.

¹⁰¹ Communication No. 255/2002, (2004) 18th Annual Activity Report; (2004) AHRLR 105 (ACHPR 2004), para. 46.

¹⁰² Communication No. 292/2004, (2008) 24th Annual Activity Report; (2008) AHRLR 43 (ACHPR 2008).

¹⁰³ *Ibid.*, para. 17.

employment. In *Pagnouille (on behalf of Mazou) v. Cameroon*,¹⁰⁴ a military tribunal sentenced Mazou, a magistrate, to five years' imprisonment without according him all his fair trial guarantees, such as allowing him to defend himself and call witnesses. After his release, he was not reinstated as a magistrate even after the government had granted amnesty to all persons sentenced to a prison term or punished by a fine. Apart from finding that Cameroon had violated his right to a fair trial, the Commission found that, by not reinstating Mazou after the amnesty law, the government had violated his right to work.

4.4 Right to Cultural Life

Article 17(2) of the African Charter provides that every individual is free to take part in the cultural life of his or her community. In *Endorois*, the African Commission has interpreted this right broadly thus:

Article 17 of the Charter is of a dual dimension in both its individual and collective nature, protecting, on the one hand, individuals' participation in the cultural life of their community and, on the other hand, obliging the state to promote and protect traditional values recognised by a community. It thus understands culture to mean that complex whole which includes a spiritual and physical association with one's ancestral land, knowledge, belief, art, law, morals, customs, and any other capabilities and habits acquired by humankind as a member of society – the sum total of the material and spiritual activities and products of a given social group that distinguish it from other similar groups. It has also understood cultural identity to encompass a group's religion, language, and other defining characteristics.¹⁰⁵

As can be seen from the dictum above, the Commission has defined culture mainly in its anthropological sense as a way of life. In *Malawi African Association and Others v. Mauritania*, it considered language as 'an integral part of the structure of culture' which enables an individual 'to take an active part in the community and in its activities'.¹⁰⁶

Although the right to take part in the cultural life of one's community includes 'the inalienable right [of any people] to organise its cultural life in full harmony with its political, economic, social, philosophical and

¹⁰⁴ Communication No. 39/90, (1997) 10th Activity Report; (2000) AHRLR 57 (ACHPR 1997).

¹⁰⁵ Note 11, para. 241.

¹⁰⁶ Note 12, para 137. Compare with CESCR General Comment No. 21: Right of everyone to take part in cultural life, UN Doc. E/C.12/GC/21 (21 December 2009), paras. 11 and 13.

spiritual ideas',¹⁰⁷ cultural practices must be consistent with international norms on human and peoples' rights.¹⁰⁸ Thus, the right to participate in cultural life cannot be invoked to infringe upon the rights of others or to limit their scope without justification.¹⁰⁹ This means that there is no right to participate in harmful cultural practices. On the contrary, states are obliged to eliminate harmful cultural practices, such as female genital mutilation, child marriage and the betrothal of girls.¹¹⁰

In order to ensure the realisation of this right, states have a positive duty to promote cultural diversity or multiculturalism and to introduce measures that promote the 'enjoyment of the cultural heritage of national ethnic groups and minorities and indigenous sectors of the population'.¹¹¹ In *Endorois*, the African Commission confirmed the duty of the state implicit in Article 17 of the African Charter to tolerate diversity and protect minorities and other vulnerable groups.¹¹² Accordingly, the Commission accepted that the Endorois community, as an indigenous people, had a right to preserve its identity through identification with ancestral land.¹¹³ Thus, the Commission found that Kenya's actions in restricting access by the Endorois community to their ancestral land denied the very essence of the Endorois right to culture.¹¹⁴ This communication was a major legal victory for indigenous peoples' right to culture in Africa, whose regional treaties do not expressly recognise the rights of indigenous groups.

4.5 *Non-Discrimination in the Enjoyment of Economic, Social and Cultural Rights*

States parties to the African Charter have a general obligation to eliminate discrimination in law and practice in the enjoyment of economic, social and cultural rights. Non-discrimination is a fundamental principle

¹⁰⁷ See Preamble to the Cultural Charter for Africa, adopted 15 July 1976, entered into force 19 September 1990.

¹⁰⁸ See Articles 60 and 61 of the African Charter.

¹⁰⁹ *Prince v. South Africa*, note 101, para 48.

¹¹⁰ See Article 21 of the African Children's Charter and Article 5 of the African Women's Protocol.

¹¹¹ Para. 14(b)(iv) of the Guidelines for National Periodic Reports, 1989, III, adopted at the Fifth Ordinary Session of the African Commission, in April 1989, attached to the Commission's 2nd Annual Activity Report 1988-1989, available at www.achpr.org/files/instruments/guidelines_national_periodic_reports/achpr_guide_periodic_reporting_1989_eng.pdf (accessed 20 January 2015).

¹¹² *Endorois*, note 11, para. 246. ¹¹³ *Ibid*, paras. 115-119, 144-162.

¹¹⁴ *Ibid*, paras. 249-251.

of international human rights law whose respect is essential to the exercise and enjoyment of all human rights, including economic, social and cultural rights. Article 2 of the African Charter specifically stipulates:

Every individual shall be entitled to the enjoyment of the rights and freedoms recognised and guaranteed in the present Charter without distinction of any kind such as race, ethnic group, colour, sex, language, religion, political or any other opinion, national and social origin, fortune, birth or other status.

In *Good v. Botswana*,¹¹⁵ the Commission held that discrimination will be found if equal persons are treated differently and the differential treatment does not have an objective and reasonable justification or is not proportionate to its intended aim and means of achieving that aim.¹¹⁶ The Commission's jurisprudence also establishes that states parties to the African Charter have the duty not only to refrain from discrimination on the prohibited and analogous grounds,¹¹⁷ but also to take temporary special measures in favour of marginalised groups and address the conditions that perpetuate discrimination.¹¹⁸ As the Commission has clearly stated, 'in certain cases, positive discrimination or affirmative action helps to redress imbalance'.¹¹⁹

The Charter's list of grounds on which discrimination is prohibited is not exhaustive. Included in that list is the generic term 'other status', which was intended to serve as a safety net, given that the 'nature of discrimination varies according to context and evolves over time'.¹²⁰ Over the years, the Commission has read into 'other status' disability, age and sexual orientation as grounds on which discrimination will be assumed to be unfair.¹²¹ Other grounds that may fall in this category include marital status, gender, health status and place of residence.¹²²

¹¹⁵ *Good v. Botswana*, Communication No. 313/05, (2010) 28th Activity Report, Annex IV; (2010) AHRLR 43 (ACHPR 2010), para. 218.

¹¹⁶ *Ibid*, para. 219.

¹¹⁷ See e.g. *Union Inter Africaine des Droits de l'Homme and Others v. Angola*, note 68, para. 39.

¹¹⁸ *Endorois*, note 11, para. 196. Article 18(4) of the African Charter specifically states: 'The aged and the disabled shall also have the right to special measures of protection in keeping with their physical or moral needs'.

¹¹⁹ §

¹²⁰ CESCR General Comment No. 20: Non-discrimination in economic, social and cultural rights (Art 2(a) of the ICESCR), UN Doc. E/C.12/GC/20, 2 July 2009, para. 27.

¹²¹ *Zimbabwe Human Rights NGO Forum*, note 29, para. 169.

¹²² See notes 16–19 and the accompanying notes.

The Commission has found mass expulsion of non-nationals to be discriminatory. In *Union Inter Africaine des Droits de l'Homme and Others v. Angola*,¹²³ it was alleged that the Angolan government had rounded up and expelled West African nationals (Senegalese, Malian, Gambian, Mauritanian and others) from its territory between April and September 1996. The Commission held that: 'Mass expulsions of any category of persons, whether on the basis of nationality, religion, ethnic, racial or other considerations "constitute a special violation of human rights"'.¹²⁴ It held further that:

This type of deportations [sic] calls into question a whole series of rights recognised and guaranteed in the Charter; such as the right to property (Article 14), the right to work (Article 15), the right to education (Article 17, paragraph 1) and results in the violation by the State of its obligations under Article 18, paragraph 1 which stipulates that 'the family shall be the natural unit and basis of society'.¹²⁵

This communication provides an example of the Commission's holistic approach to the interpretation and enforcement of human rights, which has enabled it to find certain conduct to constitute a violation of both civil and political rights and economic, social and cultural rights.

5 Implied Economic, Social and Cultural Rights

As noted earlier, despite its attempt to uphold the indivisibility of all rights, the African Charter did not expressly protect many economic, social and cultural rights. However, the Commission has interpreted the Charter innovatively to enforce and protect other rights not expressly protected by the Charter. For example, in *SERAC*,¹²⁶ the plaintiffs argued that Nigeria's military forces, which had been deployed to suppress protests and demonstrations by the Ogoni, destroyed these people's houses, killed their livestock and destroyed their food. Although the rights to housing and food are not expressly recognised by the Charter, the Commission found Nigeria to have violated these rights. It did so by holding that these rights are implicitly recognised by the Charter. According to the Commission, the right to housing or shelter is impliedly recognised by the provisions protecting the right to enjoy the best attainable state of mental and physical health (Article 16), the right to property (Article 14), and the protection accorded to the family (Article 18[1]).¹²⁷ It held

¹²³ Note 68. ¹²⁴ *Ibid*, para. 16. ¹²⁵ *Ibid*, para. 17. ¹²⁶ Note 29.

¹²⁷ *Ibid*, para. 60.

similarly that the right to food was implicitly recognised by the right to life (Article 4), the right to health (Article 16), and the right to economic, social and cultural development (Article 22).

With respect to the right to food, it held that this right was inseparably linked to the dignity of human beings and was therefore essential to the enjoyment and fulfilment of such other rights as health, education, work and political participation.¹²⁸ According to the Commission, this right requires and binds Nigeria 'to protect and improve existing food sources and to ensure access to adequate food for all citizens'.¹²⁹

In *Sudan Human Rights Organisation*,¹³⁰ the Commission implied that the right to housing might be enforced indirectly through the prohibition of torture. In this communication, the Commission agreed with the UN Committee Against Torture's views in *Hijrizi v. Yugoslavia*,¹³¹ where it was held that forced evictions and destruction of housing may amount to cruel, inhuman and degrading treatment or punishment. Relying on the UN Principles on Housing and Property Restitution for Refugees and Displaced Persons¹³² (Pinhero Principles), the Commission confirmed that states have a duty to ensure that 'no one is subjected to displacement by either State or non-State actors'.¹³³

The Commission might be criticised for adding new rights to the Charter without the consent of states parties and creating legal uncertainty. However, the rights that have been implied in the Charter thus far are protected in other African and international human rights treaties, such as the Women's Protocol and ICESCR, which are binding on African states. More importantly, the Protocol to the African Charter on the Establishment of an African Court on Human and Peoples' Rights¹³⁴ empowers the African Court to enforce any relevant human rights treaty ratified by a state party.

A major consequence of the Commission's approach to interpreting the African Charter is that most of the rights that are not expressly recognised by the Charter may be enforced.

¹²⁸ Ibid, para. 65. ¹²⁹ Ibid. ¹³⁰ *Sudan Human Rights Organisation*, note 8.

¹³¹ Communication No. 161/2000, UN Doc. CAT/C/29/D/161/2000 (2 December 2002).

¹³² UN Doc. E/CN.4/Sub.2/2005/17 (28 June 2005), Annex, para. 5.4.

¹³³ *Sudan Human Rights Organisation*, note 8, para 203.

¹³⁴ Adopted in Addis Ababa, Ethiopia, on 10 June 1998, entered into force 25 January 2004. See Articles 3 and 7. See also Article 28(c) of the Protocol on the Statute of the African Court of Justice and Human Rights, adopted by the Eleventh Ordinary Session of the Assembly of the Union, Sharm El-Sheikh, Egypt, 1 July 2008.

6 Conclusion

It is clear from the African Commission's decisions on communications that states parties to the African Charter are obliged to respect, protect, promote and fulfil *all* economic, social and cultural rights explicitly and impliedly protected by it. Despite the initial reluctance to develop the normative content of these rights, by and large the jurisprudence of the African Commission has since 2001 interpreted the African Charter generously and hence managed to address some of the shortcomings of the Charter by expanding the scope of economic, social and cultural rights protected in the African Charter.

Increasingly, the Commission has made detailed 'recommendations' on the measures states found to have violated rights need to take to stop or redress the violation at hand. For example, in *Sudan Human Rights Organisation*,¹³⁵ after finding that Sudan was responsible for violations of not only the economic, social and cultural rights but also other individual rights of the people of Darfur,¹³⁶ the Commission urged Sudan to take 'all necessary and urgent measures' to ensure the protection of victims of human rights violations in the Darfur region, including to:

- a. conduct effective official investigations into the abuses, committed by members of military forces, i.e., ground and air forces, armed groups and the Janjaweed militia for their role in the Darfur;
- b. undertake major reforms of its legislative and judicial framework in order to handle cases of serious and massive human rights violations;
- c. take steps to prosecute those responsible for the human rights violations, including murder, rape, arson and destruction of property;
- d. take measures to ensure that the victims of human rights abuses are given effective remedies, including restitution and compensation;
- e. rehabilitate economic and social infrastructure, such as education, health, water, and agricultural services, in the Darfur provinces in order to provide conditions for return in safety and dignity for the IDPs and Refugees;
- f. establish a National Reconciliation Forum to address the long-term sources of conflict, equitable allocation of national resources to the various provinces, including affirmative action for Darfur, resolve issues of land, grazing and water rights, including destocking of livestock;

¹³⁵ Note 8. ¹³⁶ *Ibid*, para. 224.

- g. desist from adopting amnesty laws for perpetrators of human rights abuses; and
- h. consolidate and finalise pending Peace Agreements.¹³⁷

The Commission's recent practice further requires states to report on the implementation of its 'recommendations' within a defined period of time. Such reports are included in the Commission's annual activity reports. This development is a significant step towards a more effective mechanism for the enforcement of economic, social and cultural rights.

By upholding the justiciability of economic, social and cultural rights and applying these rights in an increasing number of communications, the Commission has bolstered the principle that all rights are indivisible, interdependent and interrelated. It is thus possible in the African regional human rights system for a person to challenge policies that have the effect of exacerbating poverty or marginalising groups of people, or lead to inappropriate allocation of resources or failure to take action to improve access to basic services.

It is now up to states, national human rights institutions, activists, lawyers, universities and civil society to support the Commission's work and jurisprudence on economic, social and cultural rights and to explore new ways and means by which these rights may be realised and implemented for the betterment of the lives of African peoples.¹³⁸ Since most African states 'are developing countries with scarce resources',¹³⁹ they are not obliged to achieve more than what available resources permit. Still, as the African Commission has said, the African Charter requires states to use 'resources in the best way possible to attain the progressive realisation of . . . economic, social and cultural rights'.¹⁴⁰

Given that the regional human rights system is supposed to complement rather than to supplant domestic systems, African states should ensure that the economic, social and cultural rights protected in the African Charter are given full legal effect in domestic law, that the Charter rights are made justiciable, and that effective remedies (e.g. compensation, reparation, restitution, rehabilitation, guarantees of non-repetition and public apologies) are made available to victims of violations of these rights. It is also essential to adopt and implement domestic legislation, national plans, policies and systems to give economic, social and cultural rights the same level of protection given to civil and political rights in practice.

¹³⁷ *Ibid*, para. 229. ¹³⁸ Preamble to the African Charter.

¹³⁹ *Gumne*, note 85, para. 206. ¹⁴⁰ *Ibid*.