

**A teleological approach to the interpretation of socio-economic rights in the
African Charter on Human and Peoples' Rights**

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Declaration

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Summary

Realising socio-economic rights is significant for improving the socio-economic conditions of Africa's people and ensuring that people have access to socio-economic services and a dignified life. The African Charter on Human and Peoples' Rights both explicitly and implicitly protects a wide range of socio-economic rights. Interpreting these socio-economic rights in a manner that guarantees their efficacy and improves peoples' socio-economic conditions is essential on the African Continent. Supervisory organs have, however, been inconsistent in their interpretive approaches to the socio-economic rights in the African Charter.

This dissertation investigates the extent to which the teleological approach to interpretation can assist supervisory organs in interpreting socio-economic rights in a manner that ensures their efficacy. The study identifies the need to advance a coherent methodology for the application of the teleological approach. Thereafter, it develops a methodology that engages a wide range of interpretative tools both within and beyond the African Charter. This methodology can assist supervisory organs to coherently elaborate on the African Charter's object and purpose to generate the meaning, scope, and content of socio-economic rights and their related obligations.

Advancing socio-economic rights in Africa necessitates a model of review grounded in the teleological approach to interpretation. Supervisory organs, in particular the African Commission, have applied various models of review to assess States' compliance with their socio-economic rights obligations. This dissertation develops the reasonableness model of review, which incorporates minimum core standards and proportionality. It is argued that this model can assist supervisory organs in assessing States' compliance with their progressive and immediate socio-economic rights obligations. Furthermore, it can provide a basis for evaluating the justification for limitations imposed by States' on socio-economic rights.

Advancing the teleological approach to interpreting the socio-economic rights in the African Charter can therefore assist supervisory organs to make a meaningful contribution to protecting socio-economic rights on the African Continent.

Opsomming

Die verwesenliking van sosio-ekonomiese regte is belangrik om die sosio-ekonomiese welstand van Afrika se mense te verbeter en persone se toegang tot sosio-ekonomiese dienste en 'n waardige lewe te verseker. Die Afrika Handves vir Menseregte en die Regte van Volkere verleen aan 'n verskeidenheid sosio-ekonomiese regte beide eksplisiete en implisiete beskerming. Dit is noodsaaklik om sosio-ekonomiese regte op 'n wyse te interpreteer wat hul doeltreffendheid waarborg en volkere op die Afrika Vasteland se sosio-ekonomiese omstandighede verbeter. Toesighoudende organe se uitlegsbenaderings ten opsigte van die sosio-ekonomiese regte in die Afrika Handves is egter inkonsekwent.

Hierdie proefskrif ondersoek die mate waartoe die teleologiese uitlegsbenadering toesighoudende organe kan bystaan om sosio-ekonomiese regte, op 'n wyse wat hul doeltreffendheid verseker, te interpreteer. Die studie identifiseer die behoefte om 'n samehangende metodologie vir die toepassing van die teleologiese uitlegsbenadering te bevorder. Vervolgens ontwikkel dit 'n metodologie wat 'n verskeidenheid uitlegsmeganismes binne en verder as die Afrika Handves in beslag neem. Hierdie metodologie kan toesighoudende organe help om die oogmerk en doelwit van die Afrika Handves samehangend uit te brei om sodoende die betekenis, omvang, en inhoud van sosio-ekonomiese regte en hul verwante verpligtinge te ontwikkel.

Die vooruitgang van sosio-ekonomiese regte in Afrika noodsaak 'n hersieningsmodel wat op die teleologiese uitlegsbenadering gegrond is. Toesighoudende organe, veral die Afrika Kommissie, pas verskeie hersieningsmodelle vir die assessering van State se nakoming van hul sosio-ekonomiese regte verpligtinge toe. Hierdie proefskrif ontwikkel die model van redelikheidshersiening, wat minimumkernstandaarde en proporsionaliteit inkorporeer. Dit voer aan dat hierdie model toesighoudende organe in hul assessering van State se nakoming van hul toenemende en onmiddellike sosio-ekonomiese regte verpligtinge kan bystaan. Dit kan ook as 'n evalueringbasis vir die beperkings wat State op sosio-ekonomiese regte oplê dien.

Die bevordering van die teleologiese uitlegsbenadering ten opsigte van die sosio-ekonomiese regte in die Afrika Handves kan dus toesighoudende organe bystaan om 'n betekenisvolle bydrae tot die beskerming van sosio-ekonomiese regte op die Afrika Vasteland te maak.

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Abbreviations

AU	African Union
art	article
arts	articles
CEDAW	Convention on the Elimination of All Forms of Discrimination against Women
CESCR	Committee on Economic, Social and Cultural Rights
CLC	Community Law Centre
CRC	Convention on the Rights of the Child
DPA	Darfur Peace Agreement
ECHR	European Court of Human Rights
ECJ	European Court of Justice
ECSR	European Committee of Social Rights
EU	European Union
FAO	Food and Agriculture Organisation
GA	General Assembly
GDP	Gross Domestic Product
IACHR	Inter-American Commission on Human Rights
IACtHR	Inter-American Court of Human Rights
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
ICJ	International Court of Justice
ICSID	International Centre for Settlement of Investment Disputes
ILC	International Law Commission
ILO	International Labour Organisation
LDA	Lunatic Detention Act
MEM	Justice Equality Movement
MOSOP	Movement of the Survival of Ogoni People
n	footnote
NGOs	Non-Governmental Organisations
NNPC	Nigerian National Petroleum Company
OAU	Organisation of African Unity
OP-ICESCR	Optional Protocol to the International Covenant on Economic, Social and Cultural Rights

para	Paragraph
paras	Paragraphs
PCIJ	Permanent Court of International Justice
SLA	Sudan Liberation Army
SPDC	Shell Petroleum Development Corporation
UDHR	Universal Declaration on Human Rights
UN	United Nations
USA	United States of America
UWC	University of the Western Cape

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Chapter 1

Introduction

1 1 Background

Realising socio-economic rights¹ is significant for improving the living conditions of Africa's people, as these rights help to ensure individuals' access to socio-economic services² and a dignified life.³ Despite their significance, millions of Africans are still denied access to socio-economic rights,⁴ and socio-economic rights violations are a daily concern.⁵ Since independence, there have been frequent and serious incidences of socio-economic rights violations all over the continent.⁶ Africa's colonial and postcolonial legacy continues to manifest in widespread incidences of mass impoverishment, disease, unemployment and under-development, as well as other socio-economic rights violations.⁷ The continent also faces many challenges to the enjoyment of socio-economic rights, such as insufficient access to clean water, food insecurity, inadequate shelter, poor health care,⁸ and inadequate housing.⁹

¹ Socio-economic rights in the African Charter on Human and Peoples' Rights include explicit rights to: property (art 14), work (art 15), health (art 16), education (art 17), family (18), as well as the collective socio-economic rights to freely dispose of wealth (art 21), development (art 22), and a general satisfactory environment (art 24). They also include the implicit rights to social security and adequate standard of living (including food, water and housing) These rights are discussed in chapter five, part 5 5 2. Based on the peculiarity and broad nature of their context and jurisprudence, this dissertation does not discuss the cultural rights recognised in article 17(2) and (3) of the African Charter. This does not mean that this dissertation de-emphasises the importance of this category of rights, but rather these rights will be discussed only to the extent that they shed light to the socio-economic rights. The African Charter on Human and Peoples' Rights (1981) OAU Doc. CAB/LEG/67/3 rev 5, 21 I.L.M 58 (1982) was adopted on 27 June 1981 and entered into force on 21 October 1986.

² MA Baderin "The African Commission on Human and Peoples' Rights and the implementation of economic, social and cultural rights in Africa" in MA Baderin & R Mccorquodale (eds) *Economic, Social and Cultural Rights in Action* (2007) 139 139.

³ M Ssenyonjo "Analysing the economic, social and cultural rights jurisprudence of the African Commission: 30 years since the adoption of the African Charter" (2011) 29 *Netherlands Quarterly of Human Rights* 358 359.

⁴ Baderin "The African Commission on Human and Peoples' Rights" in *Economic, social and cultural rights in action* 144.

⁵ JC Mubangizi "The constitutional protection of socio-economic rights in selected African countries: A comparative evaluation" (2006) 2 *African Journal of Legal Studies* 1 2.

⁶ NJ Udombana "Toward the African Court on Human and Peoples' Rights: Better late than never" (2000) 3 *Yale Human Rights and Development Law Journal* 45 86.

⁷ CA Odinkalu "Implementing economic, social and cultural rights under the African Charter on Human and Peoples' Rights in MD Evans & R Murray (eds) *The African Charter on Human and Peoples' Rights: The System in Practice 1986-2000* (2002) 178 180-181.

⁸ SB Keetharuth "Major African legal instruments" in A Bosl & J Diescho (eds) *Human Rights in Africa: Legal Perspectives in their Protection and Promotion* (2009) 163 180.

In its 2004 Resolution on Economic, Social and Cultural Rights in Africa ('Resolution on SERs'),¹⁰ the African Commission on Human and Peoples' Rights ('African Commission')¹¹ noted that apart from the consensus on the notion of the indivisibility of human rights among African States, socio-economic rights are still marginalised.¹² According to the African Commission, States' failure to adequately realise socio-economic rights sustains their continued violation.¹³ In 2015 the United Nations ('UN')¹⁴ Food and Agriculture Organisation's ('FAO')¹⁵ report on the State of Food Insecurity in the World ('Food Insecurity Report')¹⁶ stated that nearly 220 million people in Sub-Saharan Africa experienced hunger.¹⁷ According to the FAO, this represents the highest degree of food shortage in any region.¹⁸ It also notes that, as a sub-region, East Africa faces an acute hunger problem affecting approximately 124 million people.¹⁹

The realisation of socio-economic rights and human development are directly linked, as these rights enable people to actively engage in various social and economic development activities. Socio-economic rights also assist people in accessing resources and services in support of their economic development.²⁰ States' protection of these rights, through employment opportunities and access to essential socio-economic

⁹ Udombana (2000) *Yale Human Rights and Development Law Journal* 50.

¹⁰ The Resolution on Economic, Social and Cultural Rights in Africa was adopted by the African Commission on Human and Peoples' Rights at its 36th Ordinary Session in Dakar Senegal on 7 December 2004. See The African Commission Resolution on Economic, Social and Cultural Rights in Africa (2004) ACHPR/Res.73 (XXXVI)04.

¹¹ The African Commission was established in terms of article 30 of the African Charter. For a discussion on the African Commission and its mandate regarding the protection and interpretation of socio-economic rights in the African Charter see in chapter four, parts 4 2 - 4 3.

¹² Resolution on SERs para 4.

¹³ Para 5.

¹⁴ The United Nations Organisation was officially recognised and established in San Fransisco on 24 October 1945 with the mandate to keep world peace <<http://www.un.org/en/sections/history-united-nations/>> (accessed 25-03-2017).

¹⁵ FAO was founded on 16th October, 1945 in Quebec, Canada with the purpose of eradicating hunger and malnutrition, as well as effective management of world's food system <<http://www.fao.org/world-food-day/history/en>> (accessed 25-03-2017).

¹⁶ The State of Food Insecurity in the World: Meeting the 2015 International Hunger Targets: Taking Stock of uneven Progress 2015 <<http://www.fao.org/3/a-i4646e.pdf>> (accessed 17-02-2016).

¹⁷ 12.

¹⁸ 12.

¹⁹ 13.

²⁰ S Khoza "The link between development, social and economic rights: Are socio-economic rights development rights?" (2002) *Socio-Economic Rights Project, Community Law Centre ('CLC'), University of the Western Cape ('UWC')* 1 4. A paper presented at the Networking for change conference: Equality and justice – Gains and challenges, (2002) Cape Town, see <aihr-resourcescenter.org/administrator/upload/documents/link.pdf> (accessed 06-05-2017).

services, promotes the involvement of people in economic development.²¹ In its Declaration on the Right to Development ('Declaration on Development')²² the UN requires States to protect socio-economic rights as a means of ensuring human development.²³ According to the Declaration on Development, realising the right to development requires States to ensure equality of access to socio-economic rights, resources, education, health services, food, housing, and employment, as well as the fair distribution of income.²⁴ Conversely, socio-economic rights violations give rise to poor economic development and poverty.²⁵

In Africa, poverty is directly connected to both the enjoyment and violation of socio-economic rights.²⁶ In its 2012 Africa Hunger and Poverty Facts ('Hunger and Poverty Facts')²⁷ FAO demonstrated that poverty is the key source of hunger in Africa, because many people cannot afford to buy food.²⁸ Poverty is prevalent in many African countries and characterised by hunger, inadequate access to safe drinking water, and a general lack of the socio-economic goods needed for improved standards of living and a dignified life.²⁹ A human rights approach to poverty alleviation can assist in improving peoples' socio-economic conditions:

“The human rights approach offers an explicit normative framework - that of international human rights. Underpinned by universally recognised moral values and reinforced by legal obligations, international human rights provide a compelling normative framework for the formulation of national and international policies including poverty reduction strategies. One reason why this framework is compelling in the context of poverty reduction is that the norms and values enshrined in it have the potential to empower the poor.”³⁰

²¹ 4.

²² UN Declaration on the Right to Development 1986 A/RES/41/128 adopted by the UN General Assembly on 4 December 1986.

²³ Art 6(3).

²⁴ Art 8(1).

²⁵ Khoza (2002) Socio-Economic Rights Project, CLC, UWC 4.

²⁶ Baderin “The African Commission on Human and Peoples’ Rights” in *Economic, Social and Cultural Rights* 156.

²⁷ United Nations Food and Agriculture Organisation *Africa hunger and poverty facts* (2012) (http://www.worldhunger.org/articles/Learn_africa_hunger_facts.htm) (accessed 11-08-2013).

²⁸ 2.

²⁹ W Nderitu “The United Nations and the advancement of human rights in Africa” in A Bosl & J Diescho (eds) *Human Rights in Africa: Legal Perspectives in their Protection and Promotion* (2009) 81 82.

³⁰ Principles and Guidelines for a human rights approach to poverty reduction strategies HR/PUB/06/12 paras 16 & 18 see <<http://www..ohchr.org/Documents/Publications/Poverty/Strategiesen.pdf>> (accessed 27-03-2017) .

Foreign investment in Africa is also directly linked to socio-economic rights violations as economic growth is often promoted by large-scale external investments engineered by the World Bank and the International Monetary Fund ('IMF'). Investment by globalised economic sources is predominantly applicable to select projects, such as the construction of dams, roads, and runways or the creation of large-scale commercial farms. As a result, areas such as primary health care, clean drinking water, and basic education are often neglected on the continent.³¹ Due to deregulation, powerful foreign direct investments in Africa also negatively affect individuals' enjoyment of human rights, including socio-economic rights.³² The FAO reports, for instance, that investments have significantly contributed to the growth of Tanzania's average annual Gross Domestic Product ('GDP') since the beginning of the 1990s.³³ Despite this economic growth, people in Tanzania still faced food insecurity.³⁴ Discrepancies between economic growth and food insecurity are attributed to the ineffective regulation of foreign investment.³⁵ The FAO also notes that Tanzania's investment sector requires an improved regulatory framework.³⁶

Moreover, engagements by foreign direct investors have resulted in environmental disasters and violations of the rights to food and an adequate standard of living in States such as Nigeria.³⁷ Scholars have confirmed socio-economic rights violations by investors. In relation to individual's labour rights, Kinley and Tadaki observe that investors have been paying "unfair and inadequate wages", while subjecting workers to poor working conditions and "unreasonable overtime".³⁸ Doyle emphasises foreign investors' systemic violations of the socio-economic rights of indigenous peoples.³⁹ Ssenyonjo argues that the privatisation of sectors relating to health, education, water supply, and electricity encourages many African States to relinquish their obligations regarding the realisation of socio-economic rights to non-state actors. Privatisation

³¹ R McCorquodale & R Fairbrother "Globalisation and human rights" (1999) 21 *Human Rights Quarterly* 735 743.

³² D Kinley & J Tadaki "From talk to walk: The emergence of international human rights responsibilities for corporations at international law" (2004) 44 *Virginia Journal of International Law* 931 933.

³³ FAO 2015 Food Insecurity Report 30.

³⁴ 30.

³⁵ 30.

³⁶ 30.

³⁷ Kinley & Tadaki (2004) *Virginia Journal of International Law* 934.

³⁸ 933-934.

³⁹ CM Doyle "Business and human rights: Indigenous peoples' experiences with access to remedy: An introduction" in CM Doyle (ed) *Indigenous Peoples' Experiences with Access to Remedy: Case Studies from Africa, Asia and Latin America* (2015) 1 1.

raises the possibility of non-state actors violating socio-economic rights, particularly those of women and other vulnerable members of society.⁴⁰ A Report of the Sessional Working Group on the Working Methods and Activities of Transnational Corporations ('Report on Methods of Transnational Corporations') affirms that the operations of foreign investors in developing countries have negatively impacted on the realisation of socio-economic rights.⁴¹

Socio-economic rights violations by both State and non-state actors raise the need for interpreting these rights and their related obligations in a manner that strengthens the legal accountability of these institutions.⁴² Effective protection of socio-economic rights, therefore, depends on the performance of various interpretative approaches by the supervisory organs of the African Charter.⁴³ Odinkalu argues that a coherent approach to the interpretation of socio-economic rights by the supervisory organs of the African Charter can assist States to realise these rights effectively.⁴⁴

Accordingly, this dissertation aims to develop a coherent approach that can effectively assist the African Charter's supervisory organs to interpret socio-economic rights and guarantee their protection.

1 2 Motivation

1 2 1 Using the teleological approach to interpret socio-economic rights in the African Charter

The underlying object and purpose of the African⁴⁵ Charter on Human and Peoples' Rights ('African Charter') is to promote and protect human rights including the socio-economic rights.⁴⁶ Scholars have, however, stressed the continuous violations of these

⁴⁰ M Ssenyonjo "Economic, social and cultural rights in the African Charter" in M Ssenyonjo (ed) *The African Regional Human Rights System: 30 Years after the African Charter on Human and Peoples' Rights* (2012) 55 89.

⁴¹ Report of the Sessional Working Group on the Working Methods and Activities of Transnational Corporations on its Fourth Session, Sub-Commission E/CN.4/Sub.2/2002/13 (2002) para 12.

⁴² C Jochnik "Confronting the impunity of non-state actors: New fields for the promotion of human rights" (1999) 21 *Human Rights Quarterly* 56 61.

⁴³ CA Odinkalu "Analysis of paralysis or paralysis by analysis? Implementing economic, social, and cultural rights under the African Charter on Human and Peoples' Rights" (2001) 23 *Human Rights Quarterly* 327 366.

⁴⁴ 367-369.

⁴⁵ In relation to the interpretation of the socio-economic rights, the term "African" in the African Charter relates to the interpretive tools, such as the notion of African philosophy and the formulation of the rights in the African Charter, which does not establish a dichotomy between civil and political rights and socio-economic rights (unlike treaties such as the ICESCR).

⁴⁶ Preamble to the African Charter para 11.

rights since the adoption of the African Charter.⁴⁷ This curtails the effective protection of human rights as envisioned by the African Charter. Supervisory organs' interpretation of human rights is considered a useful mechanism for guaranteeing the effective protection and enjoyment of these rights.⁴⁸ The underlying motivation of this dissertation is thus to investigate how the teleological approach⁴⁹ can be applied to interpret socio-economic rights in a manner that ensures their effective protection for beneficiaries.

1 2 2 General formulation and omission of certain socio-economic rights provisions in the African Charter

While the African Charter substantially formulates socio-economic rights to property,⁵⁰ work,⁵¹ health,⁵² education,⁵³ family,⁵⁴ freely dispose of wealth,⁵⁵ development,⁵⁶ and a general satisfactory environment,⁵⁷ it critically leaves out the rights to social security and an adequate standard of living (including food, water, and housing).⁵⁸ Omitting these socio-economic rights provisions raises uncertainty regarding their recognition in the African Charter. Moreover, the African Charter leaves out the internal qualifiers of "progressive realisation" and "within available resources" in the

⁴⁷ See Baderin "The African Commission on Human and Peoples' Rights" in *Economic, Social and Cultural Rights* 144; and Mubangizi (2002) *African Journal of Legal Studies* 2.

⁴⁸ L Chenwi "An appraisal of international law mechanisms for litigating socio-economic rights, with a particular focus on the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights and The African Commission and Court" (2011) 3 *Stellenbosch Law Review* 683 684.

⁴⁹ The teleological approach argued for in this dissertation is not unique to the African Charter and its supervisory organs. The other supervisory organs such as the Inter-American Court of Human Rights and the European Court of Human Rights have also been applying this approach. Uniquely, the methodology for the application of the teleological approach developed in this dissertation draws from the interpretive tools such as "African philosophy" and "inter-dependence of the rights" to interpret socio-economic rights in a manner that corresponds with African realities.

⁵⁰ Art 14 of the African Charter. There is a scholarly debate regarding the consideration of the right to property as a socio-economic right. For a discussion of the scholars' arguments against the right to property as a socio-economic right and the counter-arguments that consider this right a socio-economic right, see chapter three, part 3 3 4 1.

⁵¹ Art 15 of the African Charter.

⁵² Art 16.

⁵³ Art 17.

⁵⁴ Art 18.

⁵⁵ Art 21.

⁵⁶ Art 22.

⁵⁷ Art 24.

⁵⁸ These rights are enshrined in arts 9 and 11 of the International Covenant on Economic, Social and Cultural Rights respectively. The International Covenant on Economic, Social and Cultural Rights, was adopted by the UN General Assembly through its resolution 2200A (XXI) of 16 December 1966 and entered into force on 3 January, 1976. See The International Covenant on Economic, Social and Cultural Rights, GA Res 2200A (XXI) 16 December 1966, 993 UNTS 3.

formulated socio-economic rights.⁵⁹ This omission gives rise to uncertainty regarding the precise nature of States' duties. Phrased differently, the question arises whether these rights have immediate effect – which raises numerous practical and resource-based problems – or whether they should be realised progressively.⁶⁰ In addition, the African Charter formulates socio-economic rights broadly, which give rise to uncertainties regarding their definitive scope, content, and concomitant obligations. Accordingly, this dissertation is motivated by the need to investigate the implications of a teleological approach interpretation on the scope and content of socio-economic rights and their concomitant obligations.

1 2 3 Uncertainties regarding the interpretive and remedial mandate of supervisory organs

Two major supervisory organs are tasked with developing the normative scope and content of socio-economic rights through interpretation. While the African Charter establishes the African Commission, the Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights ('African Court Protocol'),⁶¹ establishes the African Court on Human and Peoples' Rights ('African Court').⁶² Both instruments vest in these organs a mandate to interpret the socio-economic rights formulated in the African Charter.⁶³

Article 45(3) grants the African Commission a mandate to interpret the socio-economic rights embedded in the African Charter. Additionally, article 45(1) read in conjunction with article 53 requires the African Commission to make recommendations in the event that it finds a socio-economic rights violation. It is important to note, however, that the legal status of the African Commission's recommendations is

⁵⁹ These internal qualifiers are recognised in art 2(1) of the International Covenant on Economic, Social and Cultural Rights.

⁶⁰ *Purohit and Moore v The Gambia* Communication No 241/2001 (2003) AHRLR 96 (ACHPR 2003) para 84.

⁶¹ The Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights OAU Doc.OAU/LEG/EXP/AFCHPR/PROT (III) was adopted on 9 June 1998 and entered into force on 25 January 2004. A total of 24 States have ratified the African Court Protocol, 25 States have signed but not yet ratified it, and 5 States have neither signed nor ratified the African Court Protocol <www.achpr.org/instruments/Court-establishment/ratifications> (accessed 07-11-2016). See footnote 411 in chapter four for the States that have deposited declaration acknowledging the competence of the African Court over cases submitted by individuals.

⁶² Art 30 of the African Charter establishes the African Commission while art 1 of the African Court Protocol establishes the African Court.

⁶³ Art 45(3) of the African Charter and Art 3 of the African Court Protocol.

uncertain, which, may adversely affect the interpretation of socio-economic rights as States regard the recommendations as non-binding.⁶⁴ The African Charter does not expressly formulate provisions regarding the African Commission's mandate to determine communications submitted in the public interest. The African Charter's formulation of the provision regarding the admissibility of communications is also strict.⁶⁵ This strict formulation raises the argument that complainants of socio-economic rights violations are obliged to fulfil all of the admissibility requirements.⁶⁶ In addition, the African Charter is silent regarding the African Commission's mandate to issue provisional measures, remedies, and follow-up mechanisms to monitor States' compliance with its decisions. Lack of express provisions regarding the identified mandate is problematic, as it raises uncertainties regarding the effective protection of socio-economic rights.

The African Court's mandate to interpret socio-economic rights provisions is grounded in article 3 of the African Court Protocol and elaborated on in Rule 26 of the Rules of Court ('African Court Rules')⁶⁷. This mandate is, however, limited by article 5 of the African Court Protocol when read in conjunction with article 34(6) and Rule 33 of the African Court Rules, as they limit individuals' access to the African Court.⁶⁸ These articles require States to deposit a declaration recognising the competence of the African Court to hear direct individual complaints. Despite these provisions, there are a very low number of declarations made by States under article 34(6).⁶⁹ The limitation may affect the African Court's mandate to interpret the socio-economic rights as individual victims may not be able to access the African Court directly. It should be noted that the

⁶⁴ SA Yeshanew *The Justiciability of Economic, Social and Cultural Rights in the African Regional Human Rights System: Theories, Laws, Practices and Prospects* (2011) 176.

⁶⁵ Art 56 of the African Charter. This article is analysed in depth in chapter four, part 4 3 4.

⁶⁶ See art 56 of the African Charter.

⁶⁷ African Court Rules were adopted in April 2010 after the harmonisation of the Interim Rules of Court and the Commission to replace the Interim Rules of Procedure of 20 June 2008.

⁶⁸ Art 5(3) of the African Court Protocol grants individuals the power to institute cases directly before the African Court in accordance with the provisions of art 34(6). However, art 34(6) limits the African Court's mandate to receive any petition under art 5(3) involving a State Party that has not made a declaration accepting the competence of the African Court to receive cases under art 5(3).

⁶⁹ The States that have deposited the declaration include: Benin, Burkina Faso, Malawi, Mali, Tanzania, Ghana, Rwanda and Cote d'Ivoire <<http://en.african-court.org/index.php/news/press-releases/item/69-benin-makes-the-declaration-to-allow-ngos-and-individuals-to-directly-access-the-african-court-on-human-and-peoples-rights>> (accessed 18-05-2017).

African Court in its first few judgements⁷⁰ has already declared a lack of jurisdiction on cases submitted by individual victims whose States have not deposited a declaration.

Closely linked to the African Court's interpretive mandate is its authority to apply the provisions of the African Charter and other relevant human rights instruments as granted by article 7 of the African Court Protocol.⁷¹ This mandate raises uncertainty as to whether the African Court has the authority to interpret other human rights instruments.⁷² While the African Court Protocol vests the African Court with a mandate to issue provisional measures,⁷³ the legal binding status of such measures is questionable.⁷⁴ Moreover, the provisions regarding the remedial mandate of the African Court are also challenged for being non-elaborate.⁷⁵

This dissertation is thus further motivated by the need for a teleological interpretation to help clarify the interpretative and remedial mandate of the supervisory organs of the African Charter.

1 2 4 Inconsistencies regarding supervisory organs' interpretative approaches

The interpretative approach of the African Charter's supervisory organs when generating the meaning of socio-economic rights is unclear. On different occasions, the African Commission has inconsistently applied the textual, "golden thread",⁷⁶ and the teleological approaches in interpreting the socio-economic rights in the African Charter. This approach has led to some jurisprudential inconsistencies.

For instance, by using the textual approach the African Commission confines itself to the ordinary meaning of provisions, which leads to a narrow interpretation. In contrast,

⁷⁰ Recent decisions of the African Court include: *Urban Mkandawire v The Republic of Malawi* Application No 003/2011 *Abdoulaye Nikiema, Ernest Zongo, Blaise Ilboudo & Burkinabe Human and Peoples' Rights Movement v The Republic of Burkina Faso* Application No 013/2011 and *Rev Christopher R Mtikila v The United Republic of Tanzania* Application No 011/2011 <<http://www.african-court.org/en/index.php/2012-03-04-06-06-00/finalised-cases-closed>> (accessed 07-11-2016).

⁷¹ Art 7 of the African Court Protocol states:

"The Court shall apply the provisions of the Charter and any other relevant human rights instruments ratified by the State concerned."

⁷² See GJ Naldi & K Magliveras "Reinforcing the African system of human rights: The Protocol on the establishment of a regional court of human and peoples' rights" (1998) 16 *Netherlands Quarterly of Human Rights* 431 435.

⁷³ Art 27(2) of the African Court Protocol.

⁷⁴ The mandate of the African Court to issue provisional measures and the legal status of these measures is discussed in chapter four, part 4 4 4.

⁷⁵ Naldi & Magliveras (1998) *Netherlands Quarterly of Human Rights* 450.

⁷⁶ F Viljoen "The African Charter on Human and Peoples' Rights: The *travaux preparatoires* in the light of subsequent practice" (2004) 25 *Human Rights Law Journal* 313 325, where Viljoen defines the "golden thread" as an interpretation of rights that favours the individual and peoples' human rights.

by applying a teleological approach, the African Commission goes beyond the ordinary meaning and inquiries into the object and purpose of provisions as intended by the parties to the African Charter.⁷⁷ This dissertation seeks to address both the appropriate approach to interpretation and the methodology for its application that can assist in developing the scope and content of socio-economic rights. Accordingly, this dissertation is motivated by a recognition for the need to adopt an appropriate approach to interpretation. The dissertation is further motivated by the need to adopt a methodology for the application of such an appropriate interpretative approach in order to achieve the effective interpretation of the socio-economic rights in the African Charter and the obligations they impose.

1 2 5 Inconsistencies regarding models of review

There are inconsistencies regarding the models of review applied by the African Commission to hold States accountable for the socio-economic rights obligations imposed by the African Charter.⁷⁸ These inconsistencies include the use of various concepts such as minimum core obligations (of varying interpretations),⁷⁹ the reasonableness model of review,⁸⁰ and the concept of concrete and targeted steps.⁸¹ The African Commission has failed to apply a uniform model of review that holds States accountable and establishes jurisprudential consistency. This lack of consistency is problematic, as it hinders the establishment of positive duties imposed on States by the socio-economic rights in the African Charter.⁸² This dissertation seeks to develop an appropriate model of review consistent with the teleological approach that can assist the supervisory organs of the African Charter to monitor States' compliance with the obligations imposed by socio-economic rights.

⁷⁷ A Abass *International Law: Text, Cases and Materials* (2012) 102-103.

⁷⁸ Chenwi (2011) *Stellenbosch Law Review* 694.

⁷⁹ *Social and Economic Rights Action Centre (SERAC) v Nigeria* Communication No 156/96, (2001) AHLRLR 60 (ACHPR 2001).

⁸⁰ Para 52. See also *Centre for the Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council v Kenya* Communication No 276/2003 (2009) AHLRLR 75 (ACHPR 2009) para 172.

⁸¹ *Purohit* para 84.

⁸² DM Chirwa "African Regional Human Rights System: The promise of recent jurisprudence on social rights" in M Langford (ed) *Social Rights Jurisprudence: Emerging Trends in International and Comparative Law* (2008) 323 326.

1 3 Scope of dissertation

Although various rights are embedded in the African Charter, this dissertation focuses on socio-economic rights provisions,⁸³ given the controversy surrounding the interpretation of these rights. These rights include explicit socio-economic rights to property,⁸⁴ work,⁸⁵ health,⁸⁶ education,⁸⁷ and family.⁸⁸ In addition, the dissertation extends its scope to include implicit socio-economic rights to social security and an adequate standard of living including food, water, and housing.⁸⁹ The dissertation also considers on the collective socio-economic rights to freely dispose of wealth,⁹⁰ the right to development,⁹¹ and the right to a satisfactory environment.⁹²

Socio-economic rights can be interpreted through both contentious and non-contentious mechanisms. This dissertation does not focus, on the non-contentious mechanisms under the African Charter, such as the State reporting mechanism.⁹³ It only refers to them insofar as they shed light or indicate problems in the interpretation of socio-economic rights through contentious mechanisms. Furthermore, since this dissertation concerns the interpretation of socio-economic rights in the African Charter, it also focuses on the African Charter's supervisory organs which are vested with the mandate to interpret these rights. These supervisory organs are the African Commission and the African Court.⁹⁴ In particular this dissertation focuses on the interpretative and remedial mandate of these organs.

⁸³ Yeshanew *The Justiciability of Economic, Social and Cultural Rights* 2. According to Yeshanew the term of socio-economic rights can also be referred to as the social rights.

⁸⁴ Art 14 of the African Charter.

⁸⁵ Art 15.

⁸⁶ Art 16.

⁸⁷ Art 17.

⁸⁸ Art 18.

⁸⁹ See chapter five, part 5 5 2.

⁹⁰ Art 21 of the African Charter.

⁹¹ Art 22 of the African Charter provides, for instance, that 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. In addition, art 24 provides that all peoples shall have the right to a general satisfactory environment favourable to their development. The African Charter also enshrines the peoples' right to existence in Art 20. This right, however, not analysed in this dissertation will only be referred in so far as it affects the collective socio-economic rights in the African Charter.

⁹² Art 24 of the African Charter.

⁹³ Art 62.

⁹⁴ The African Court was established by the Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights OAU Doc.OAU/LEG/EXP/AFCHPR/PROT (III) which was adopted on 9 June 1998 and entered into force on 25 January 2004. However, the African Court was invalidated by article 1 of the Protocol on the Statute of the African Court of Justice and Human Rights. The Protocol on the Statute of the African Court of Justice and

The scope of this dissertation includes an analysis of supervisory organs' jurisprudence. Due to the fact that, at the date of submitting this dissertation for examination, the African Court has yet to decide on the merits⁹⁵ of a socio-economic rights case, this dissertation focuses mainly on the socio-economic rights jurisprudence developed through the non-state communications of the African Commission.⁹⁶ The dissertation does not, however, analyse State communications as the only State communication decided at the time of writing this dissertation does not deal with socio-economic rights.⁹⁷

The dissertation recognises the significance of other international, regional, sub-regional, and national legal instruments and jurisprudence based on their relevance for the interpretation of the socio-economic rights in the African Charter. The significance is evident in the instruments' similarity regarding the formulation of rights; regional location, reference to international human rights law when conceived, and the use of the teleological approach to interpretation. These legal sources are utilised throughout the dissertation for comparative reasons. The application of these sources seeks to illustrate how the supervisory organs can draw inspiration⁹⁸ from them to further a teleological approach to the interpretation of the socio-economic rights and the development of their substantive content. These sources include the International Covenant on Economic, Social and Cultural Rights ('ICESCR'),⁹⁹ the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa ('Women's Protocol'),¹⁰⁰ and the

Human Rights was adopted on 1 July 2008. It establishes the African Court of Justice and Human Rights in article 2. However, the African Court of Justice and Human Rights is not in operation as the Protocol on the Statute of the African Court of Justice and Human Rights has not yet entered into force. See <<http://www.au.int/web/en/treaties/protocol-statute-African-court-justice-and-human-right>> (accessed 10-05-2017).

⁹⁵ *African Commission on Human and Peoples' Rights v The Republic of Kenya* Application No 006/2012 was decided a few days after the submission of this dissertation for examination. Based on the fact that this case was decided after the cut-off date of analysing the jurisprudence that is 24 May 2017 and after the submission of this dissertation for examination but before the final corrections, the case is briefly discussed in a postscript to the dissertation.

⁹⁶ Non-state communications as used in this dissertation entail individual communications, alleging the violations of the socio-economic rights, covered in articles 55-59 of the African Charter.

⁹⁷ *Democratic Republic of Congo v Burundi, Rwanda and Uganda* Communication No 227/99 (2004) AHRLR 19 (ACHPR 2004).

⁹⁸ Arts 60 and 61 of the African Charter, and art 7 of the African Court Protocol.

⁹⁹ The International Covenant on Economic, Social and Cultural Rights GA Res 2200 (XXI) 16 December 1966, 993 UNTS 3 was adopted by the United Nations General Assembly on 16 December 1966 and entered into force on 3 January, 1976.

¹⁰⁰ The Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa CAB/LEG/66.6 was adopted on 11 July 2003 and entered into force on 25 November 2005.

African Charter on the Rights and the Welfare of the Child ('Children's Charter').¹⁰¹ Other sources include the socio-economic rights jurisprudence of the European Court of Human Rights and the European Committee of Social Rights ('ECSR'), the jurisprudence of the Inter-American Commission on Human Rights ('IACHR') and the Inter-American Court of Human Rights, as well as African national constitutional jurisprudence such as the jurisprudence of the South African Constitutional Court.

1 4 Research question

The overarching research question of this dissertation concerns the nature and implications of the teleological approach to human rights treaty interpretation for the interpretation of the socio-economic rights provisions in the African Charter by its supervisory organs.

1 5 Research aims and hypotheses

This dissertation examines the extent to which the teleological approach can assist supervisory organs to develop an interpretation of socio-economic rights in the African Charter, which is both coherent and gives effect to the object and purpose of the African Charter. The hypothesis underlying this research aim is that a teleological approach to interpretation can assist supervisory organs in interpreting the socio-economic rights in the African Charter.

Based on the elements of the teleological approach to interpretation, chapter two aims to develop an appropriate and coherent methodology for its application. The corresponding hypothesis is that a systematic consideration of the elements of text, historical and philosophical background, international and other legal sources, as well as the principle of effectiveness can guide the development of a teleological approach to interpreting socio-economic rights in the African Charter, and lead to a more coherent and substantive jurisprudence by its supervisory organs.

This dissertation also aims, in pursuance of the teleological approach, to conduct a historical and philosophical analysis of the adoption of the African Charter with a view of examining how it can assist supervisory organs to interpret socio-economic rights. The hypothesis in this regard is that the historical and philosophical background to the

¹⁰¹ The African Charter on the Rights and Welfare of the Child CAB/LEG/24.9/49 (1999) was adopted on 11 July 1990 and entered into force on 29 November 1999.

adoption of the African Charter can provide significant insight into the optimal interpretive approach to the relevant socio-economic rights.

Furthermore, this dissertation seeks to analyse the textual formulation of the socio-economic rights provisions in the African Charter and the interpretive mandate of its supervisory organs. The hypothesis regarding this aim is that the textual formulation of socio-economic rights and the interpretive mandate of the supervisory organs are sufficient for the interpretation of socio-economic rights.

The dissertation also aims, in the respective chapters, to analyse relevant international and other legal sources such as regional, sub-regional, and national laws and jurisprudence relating to the interpretation of socio-economic rights from which supervisory organs can draw inspiration. The purpose of this analysis is to ascertain how these sources can further a teleological interpretation of the socio-economic rights in the African Charter. The hypothesis is that relevant international and other legal sources, relating to the interpretation of the socio-economic rights, can facilitate a teleological interpretation of the socio-economic rights in the African Charter and help to give substance to these rights.

This dissertation also analyses and evaluates the socio-economic rights jurisprudence of the supervisory organs of the African Charter with the aim of identifying its strengths and weaknesses. The corresponding hypothesis is that the supervisory organs' current interpretation of socio-economic rights in the African Charter is inconsistent and does not give full effect to the object and purpose of the African Charter. The dissertation also develops a coherent methodology that can assist the supervisory organs to align their jurisprudence with the teleological approach.

1 6 Methodology

This dissertation employs a legal research methodology, as interpreting the socio-economic rights in the African Charter is a legal matter, which is specifically concerned with assigning appropriate meaning to the socio-economic rights provisions of the African Charter. This dissertation analyses and contextualises the primary and secondary legal sources relevant to the interpretation of socio-economic rights in the African Charter.

1 6 1 the teleological approach to interpretation and a methodology for its application

This dissertation analyses the teleological approach to interpretation and its tenets,¹⁰² as formulated by the Harvard Research in International Law programme and Sir Gerald Fitzmaurice and as codified in the Vienna Convention on the Law of Treaties ('Vienna Convention').¹⁰³ Furthermore, it analyses debates surrounding this approach including the textual theory debate and the intention of the parties' debate.¹⁰⁴ Given the relevance of the teleological approach for interpreting human rights treaties, various scholars have suggested its application for human rights interpretation.¹⁰⁵ Based on the literature survey, however, there is no specific research that has focused on how the teleological approach can be applied to interpret the socio-economic rights in the African Charter. Moreover, there appears to be no research that has developed the methodology for its application in the context of the African Charter's socio-economic rights.

1 6 2 Preparatory work of the African Charter relating to socio-economic rights

This dissertation critically analyses and contextualises both external and internal preparatory work leading to the adoption of the African Charter. Significantly, this preparatory work gives insights into the objectives of the supervisory organs and how they should interpret socio-economic rights. They also establish the values that should be upheld in the realisation and protection of socio-economic rights.

Although the preparatory work provides these fundamental insights, secondary literature shows that supervisory organs have not yet fully explored the potential of this

¹⁰² The main scholarship relied on is the Harvard Draft Convention on the Law of Treaties, as developed by the Harvard Law School between the late 1920s and early 1930s; two articles by Sir Fitzmaurice namely: GG Fitzmaurice "The law and procedure of the International Court of Justice: Treaty interpretation and certain other treaty points" (1951) 28 *British Year Book of International Law* 1 1-2 & GG Fitzmaurice "The law and procedure of the International Court of Justice 1951-4: Treaty interpretation and certain other treaty points" (1957) 33 *British Year Book of International Law* 203 207-209; and the Vienna Convention on Law of Treaties (1969) as adopted on 23 May 1969 and entered into force on 27 January 1980.

¹⁰³ Arts 31-32 of the Vienna Convention on the Law of Treaties.

¹⁰⁴ FG Jacobs "Varieties of approach to treaty interpretation: With special reference to the Draft Convention on the Law of Treaties before the Vienna Conference" (1969) *The International and Comparative Law Quarterly* 318 319. According to Jacobs subjective theory interprets a treaty by focusing mainly on the real intentions of the parties to the treaty at the moment of the adoption of the final text.

¹⁰⁵ See D Rietiker "The principle of "effectiveness" in the recent jurisprudence of the European Court of Human Rights: Its different dimensions and its consistency with public international law – No need for the concept of treaty *sui generis*" (2010) 79 *Nordic Journal of International Law* 245 255, H Senden *Interpretation of fundamental rights in a multilevel legal system: An analysis of the European Court of Human Rights and the Court of Justice of the European Union* (2011) 16; and M Ssenyonjo "Economic, social and cultural rights in the African Charter" in M Ssenyonjo (ed) *The African Regional Human Rights System: 30 Years after the African Charter on Human and Peoples' Rights* (2012) 55 59.

source in developing socio-economic rights jurisprudence. In addition to the preparatory work, this dissertation analyses relevant primary and secondary sources and jurisprudence regarding the significance of the preparatory work of the African Charter. This analysis can assist supervisory organs in understanding the historical context in which socio-economic rights were formulated in the African Charter in order to ascertain their objects and purposes.

1 6 3 Textual formulation of socio-economic rights and other relevant provisions in the African Charter

The dissertation critically analyses the textual formulation of the socio-economic rights articles and other relevant provisions protecting these rights read in conjunction with the operative provisions of the African Charter.¹⁰⁶ Significantly, the analysis demonstrates the implications of the textual formulation for the interpretation of socio-economic rights.

1 6 4 Interpretive mandate of supervisory organs

In this dissertation the interpretative and remedial mandate of the supervisory organs of the African Charter are analysed. The analysis focuses on the establishment of these organs and their jurisdiction regarding admissibility of complaints, provisional measures, status of their findings, remedial powers and enforcement of the remedies. The analysis aims at demonstrating the implications of the interpretative and remedial mandate provisions in the African Charter for the protection of socio-economic rights therein.

1 6 5 African Commission's jurisprudence

The dissertation also examines and evaluates the African Commission's interpretation of the socio-economic rights, focusing on relevant communications. This analysis seeks to illustrate the implications of the jurisprudence for subsequent interpretation by the African Commission and ultimately the African Court.

1 6 6 An appropriate and coherent interpretative methodology for socio-economic rights

This dissertation advances an appropriate and coherent methodology for aligning the supervisory organs' jurisprudence with the teleological approach to interpretation.

¹⁰⁶ This includes art 1 of the African Charter that provides for the obligations imposed by the socio-economic rights. For a discussion of this art see chapter three, parts 3 3 3 – 3 3 3 5.

1 7 Significance of the dissertation

This dissertation is significant as it focuses on developing a methodology for the application of the teleological approach, which can guide the supervisory organs of the African Charter to interpret socio-economic rights in a manner that fosters the African Charter's object and purpose. This teleological methodology encompasses systematic interpretive tools that can enable supervisory organs to develop the normative scope and content of socio-economic rights and their related obligations. Instead of focusing exclusively on the individual socio-economic rights provision of the treaty being interpreted, the teleological methodology combines various interpretive tools, including the treaty as a whole, to generate the meaning of the socio-economic rights provisions being interpreted. Thus, the methodology can help supervisory organs to consistently and coherently develop socio-economic rights jurisprudence. In this way, it can also assist supervisory organs to explore the adequate formulation of the African Charter regarding socio-economic rights' provisions and develop socio-economic rights jurisprudence that advances the object and purpose of the African Charter. Furthermore, this dissertation aims to demonstrate the adequacy of the African Charter in protecting socio-economic rights. The dissertation also develops a model of review to be applied by supervisory organs for monitoring States' compliance with their socio-economic rights obligations.

1 8 Overview of chapters

Chapter 2 analyses the teleological approach to interpretation and its tenets,¹⁰⁷ as well as the debates surrounding this approach. In particular, the chapter examines three major approaches to interpretation, namely the intention of the parties approach, the textual approach, and the teleological approach. The chapter demonstrates that the intention of the parties and the textual approaches are insufficient for the interpretation of socio-economic rights. The chapter demonstrates that the teleological approach to interpretation is the appropriate approach for the interpretation of socio-economic rights. Significantly, the chapter develops the methodology for applying the teleological approach to the interpretation of socio-economic rights that supervisory organs should use. This teleological methodology can assist supervisory organs in generating the

¹⁰⁷ See n 102 in part 1 6 1 above.

meaning of socio-economic rights in light of the object and purpose of the African Charter.

Pursuant to the teleological approach to interpretation, chapter 3 analyses the historical and philosophical background to the adoption of the African Charter, as well as the textual formulation of socio-economic rights and other relevant provisions in the African Charter. The chapter examines various preparatory work of the African Charter, including the external and the internal initiatives to its adoption. Regarding the textual formulation the chapter analyses socio-economic rights provisions and other relevant provisions in the African Charter. The analysis of the textual formulation of socio-economic rights and other relevant provisions attempts to show the interpretive potential found in these provisions of the African Charter, as a whole, and their relevance to the interpretation of socio-economic rights.

Chapter 4 analyses the interpretative mandate of the supervisory organs of the African Charter namely the African Commission and the African Court. Chapter 4 specifically examines significant aspects relating to the interpretive mandate of these supervisory organs. These aspects include the *locus standi* of individuals before the supervisory organs, admissibility requirements and a mandate to issue provisional measures, the nature and legal status of the decisions of the supervisory organs, and a remedial mandate. The analysis assists in identifying the strengths of the interpretation of socio-economic rights by the supervisory organs through these interpretative aspects. In the same spirit of identifying the strengths of the supervisory organs, the chapter also examines the complementarity between these supervisory organs.

Chapter 5 analyses the jurisprudence of the supervisory organs of the African Charter. The chapter attempts to show the strengths and shortfalls of this jurisprudence in relation to the development of the scope and content of socio-economic rights and their related obligations. The chapter demonstrates that supervisory organs have been inconsistent regarding the approach to interpretation they apply in interpreting socio-economic rights. The chapter also shows that these organs' use of the teleological approach to interpretation is inconsistent and inappropriate. The chapter attempts to show that supervisory organs have also been inconsistent regarding the model of review applied to monitor States' compliance with their socio-economic rights obligations.

Chapter 6 develops an appropriate and coherent approach that can assist the supervisory organs to coherently align their jurisprudence with the teleological approach to interpretation and develop the scope and content of socio-economic rights and their

concomitant obligations. The approach is significant for the supervisory organs' future interpretation of socio-economic rights in a manner that fosters the object and purpose of the African Charter regarding these rights. Moreover, as an aspect of the coherent approach, chapter 6 develops the appropriate model of review that can assist these supervisory organs to govern States' compliance with their obligations imposed by socio-economic rights in the African Charter. It is postulated that the model of review developed in this chapter can also significantly help States to efficiently fulfil their obligations regarding realisation of socio-economic rights in the African Charter.

The dissertation includes a postscript that analyses the African Court on Human and Peoples' Rights' first socio-economic judgment on merits. This recent case, *the African Commission on Human and Peoples' Rights v The Republic of Kenya* was decided a few days after the submission of this dissertation for examination but before the final submission. The discussion shows that the African Charter has attempted to broadly interpret the socio-economic rights in this landmark case. However, it implicitly applies both textual approach, and some aspects of the teleological approach to interpretation. Moreover, the application of these aspects is inappropriate.

Chapter 7 concludes the dissertation. The benefits of advancing the teleological methodology developed in this dissertation are summarised and recommendations are made regarding its value for the supervisory organs of the African Charter, Member States of the African Charter, non-state actors, Non-Governmental Organisations ('NGOs'), legal practitioners in the field of African human rights particularly, socio-economic rights, and human rights students.

Chapter 2

The appropriateness and methodology of a teleological approach

2 1 Introduction

The meaningful effect of the socio-economic rights¹ in the African Charter on Human and Peoples' Rights ('African Charter')² depends on their interpretation by the interpretive organs of the African Charter.³ This interpretation should be able to address the socio-economic needs of the African people.⁴ While agreeing with the African Commission on Human and Peoples' Rights ('African Commission') that all human rights in the African Charter can be made effective,⁵ this chapter demonstrates how such efficacy can be achieved in the specific context of rights with a socio-economic character. Viljoen contends that in interpreting human and peoples' rights under the African Charter, the African Commission has applied an inconsistent approach to treaty

¹ The term socio-economic rights has been defined by various authors in different ways. Some define it to encompass three components (namely: economic, social and cultural rights) as reflected in the International Covenant on Economic, Social and Cultural Rights and the African Charter on Human and Peoples' Rights. Other authors have given separate definitions of these three components. See EVO Dankwa "Working paper on article 2(3) of the International Covenant on Economic, Social and Cultural Rights" (1987) 9 *Human Rights Quarterly* 230 239-240; C Scott & P Macklem *Constitutional ropes of sand or justiciable guarantee? Social rights in a new South African Constitution* (1992) 141 *University of Pennsylvania Law Review* 1 9. M Langford "The justiciability of social rights: From practice to theory" in M Langford (ed) *Social Rights Jurisprudence: Emerging Trends in International and Comparative Law* (2008) 3. SA Yeshanew *The Jjusticiability of Economic, Social and Cultural Rights in the African Regional Human Rights: Theories, Laws, Practices and Prospects* (2011) 1-2. For the purpose of this dissertation socio-economic rights are defined as the rights that protect and improve the material living conditions of all human beings in their individual capacity and in groups. They include: the rights to property, work, health, education, family, social security, adequate standard of living including water, food and housing, as well as the rights to freely dispose wealth, development and general satisfactory environment. See chapter three, parts 3 3 4 1 – 3 3 4 8 and chapter five, part 5 5 2.

² African Charter on Human and Peoples' Rights (1981) OAU Doc. CAB/LEG/67/3/rev 5, 21 I.L.M 58 (1982) adopted on 27th June 1981 and entered into force on 21st October 1986. The African Charter has been ratified by 53 out of 54 African States <<http://www.au.int/en/sites/default/files/African%20Charter%20on%20Human%20and%20Peoples%20Rights.pdf>> (accessed 26-06-2014).

³ For the purpose of this dissertation the interpretive organs of the African Charter refer to: The African Commission on Human and Peoples' Rights, the African Court on Human and Peoples' Rights, and the African Court of Justice and Human Rights. It should be noted that the African Court was replaced by article 1 of the Protocol on the Statute of the African Court of Justice and Human Rights, adopted in Sharm el-Sheikh, Egypt, 1 July 2008 which establishes the African Court of Justice under article 2. However, the African Court of Justice is not in operation as the African Court of Justice Protocol has not yet entered into force.

⁴ EA Ankumah *The African Commission on Human and Peoples' Rights: Practice and Procedures* (1996) 111.

⁵ *Social and Economic Rights Action Centre (SERAC) v Nigeria* Communication No 155/96 (2001) AHRLR 60 (ACHPR 2001) para 68.

interpretation.⁶ This has led to socio-economic rights being ineffective in the sense that their scope and content is not transparent or predictable in offering meaningful guidance to beneficiaries and States Parties. Based on Viljoen's observation, this chapter suggests that an appropriate way to achieve the effectiveness of socio-economic rights under the African Charter is by adopting the teleological approach to treaty interpretation and consistently applying it when interpreting these rights.

The chapter applies the model of the teleological approach to treaty interpretation as formulated by the Harvard Research in International Law programme⁷ and Sir Gerald Fitzmaurice,⁸ and codified in the Vienna Convention on the Law of Treaties ('Vienna Convention').⁹ As will be elaborated in this chapter, these sources lay the foundations for the interpretation of a treaty in the light of its object and purpose. An interpretation based on the object and purpose of a treaty strives to reveal the aim of such a treaty in relation to its substantive provisions. In this regard, the object and purpose of the African Charter can help to identify its specific purposes and goals in relation to the socio-economic rights.

Although the main focus of this chapter is to analyse the teleological approach as the lens through which socio-economic rights should be interpreted, an examination of other approaches to treaty interpretation is also important. This analysis can assist in demonstrating the appropriateness of the teleological approach over other approaches to interpreting the socio-economic rights. The following part analyses the major approaches to treaty interpretation.

⁶ F Viljoen *International Human Rights Law in Africa* 2 ed (2012) 323-324.

⁷ The Harvard Research in International Law was a programme of research into international law carried out under the auspices of the Harvard Law School between late 1920s and early 1930s. Through this programme the Harvard Law School developed the Harvard Draft Convention on the Law of Treaties. The Harvard Draft Convention on the Law of Treaties is attached as an appendice in the Report on the Law of Treaties by JL Briery, Special Rapporteur on the Law of Treaties A/CN.4/23 legal.un.org/ilc/documentation/english/a_cn4_23.pdf (accessed 10-05-2017).

⁸ At the time of writing his two articles: GG Fitzmaurice "The law and procedure of the International Court of Justice: Treaty interpretation and certain other Treaty points" (1951) 28 *British Year Book of International Law* 1 1-2 & GG Fitzmaurice "The law and procedure of the International Court of Justice 1951-4: Treaty interpretation and certain other treaty points" (1957) 33 *British Year Book of International Law* 203 207-209, Sir Gerald Fitzmaurice was the United Kingdom Counsel to the International Court of Justice. Through these two articles Fitzmaurice ascertained that there existed three major approaches to treaty interpretation: the intention of the parties, the textual, and the teleological approaches.

⁹ The Vienna Convention on the Law of Treaties 8I.L.M 679 (1969) was adopted on 23 May 1969 and entered into force on 27 January 1980.

2 2 Theoretical approaches to treaty interpretation

The evolution of theoretical approaches to treaty interpretation resulted from debates between two groups of scholars. The first group is represented by scholars who reject the use of systematic approaches to treaty interpretation, while the second argues for the use of systematic approaches to treaty interpretation.¹⁰ Stone argues that treaties can be interpreted without using any systematic approach to treaty interpretation.¹¹ The first group argues that systematic approaches to treaty interpretation render the interpretation process inconsistent,¹² as some of the approaches limit the scope of interpretation, while others broaden it.¹³ As a means to discard the use of systematic approaches to interpretation, Fitzmaurice suggests that the interpretation of a treaty relies on the common sense and intelligence of judges.¹⁴ Scholars, such as Stone, however, who reject the use of systematic approaches to treaty interpretation do not demonstrate which approaches limit or broaden the scope of interpretation. They also did not show the extent to which the various approaches to treaty interpretation are inconsistent. Accordingly, this chapter analyses the approaches to treaty interpretation that limit or broaden the scope of interpretation.

While the first group of scholars denied the utility of interpretational approaches, the second group developed different approaches to treaty interpretation. Grotius¹⁵ and Vattel,¹⁶ for example, developed the ordinary meaning approach, McNair developed the intention of the parties approach¹⁷ and the Harvard Research in International Law programme¹⁸ developed the teleological approach to treaty interpretation.¹⁹ International

¹⁰ IM Sinclair *The Vienna Convention on the Law of Treaties* (1973) 69.

¹¹ J Stone "Fictional elements in treaty interpretation – A study in the international judicial process" (1955) 1 *Sydney Law Review* 344 347.

¹² H Lauterpacht "Restrictive interpretation and the principle of effectiveness in the interpretation of treaties" (1949) 26 *British Year Book of International Law* 48 52.

¹³ 52.

¹⁴ Fitzmaurice (1951) *British Year Book of International Law* 3.

¹⁵ Grotius "On Interpretation" Book II, ch. xiv of *De Jure Belli ac Pacis* as quoted in Lauterpacht (1949) *British Year Book of International Law* 48. H Grotius published a book on the law of war and peace *De jure belli ac pacis* in 1625 which was translated by AC Campbell in 1864. In his work Grotius devoted a chapter on treaty interpretation.

¹⁶ Vattel "The interpretation of treaties" vol. i, ch. xvii of *Le Droit des Gens*, as quoted in Lauterpacht (1949) *British Year Book of International Law* 48. Vattel published various works in the field of international law. His work "The law of nations" he is quoted in R Gardiner *Treaty Interpretation* (2008) 55 where Vattel developed the general maxim on treaty interpretation that, 'it is not permissible to interpret what has no need of interpretation'.

¹⁷ L McNair *The Law of Treaties* (1961) 365.

¹⁸ See footnote 7 above.

tribunals such as the International Court of Justice ('ICJ')²⁰ were, however, inconsistent in their utilisation of these approaches.²¹ Such inconsistencies necessitated the codification of the fixed interpretational approaches to treaty interpretation.²² Fitzmaurice codified the three pertinent approaches to treaty interpretation in 1951, based on his experience as the UK Counsel at the ICJ. These approaches are 'the intention of the parties', 'the textual approach' and 'the teleological approach'.²³ These respective approaches are analysed below.

2 2 1 Intention of the parties approach

The intention of the parties approach posits that a treaty should be interpreted by using the common intention of the parties to the treaty.²⁴ The underlying objective of this approach is to discover what the parties intended with regard to the provisions of the treaty.²⁵ This approach specifically questions: the intention of the parties to a treaty in formulating the provision to be interpreted.²⁶ According to Lauterpacht, the answer to this question may be obtained by exclusively relying on the preparatory work of the treaty in question.²⁷ Hence, this approach emphasises the preparatory work of the treaty in illuminating the meaning of the terms of the treaty concluded by the parties.²⁸

The intention of the parties approach is based on an inadequate hypothesis that the meaning of a treaty can be found exclusively in its preparatory work. While the preparatory work represents an important aspect of treaty interpretation, exclusive dependence on it undermines the significance of the actual terms of the treaty

¹⁹ Art 19(a) of the Draft Convention on the Law of Treaties (1935) 29 AJIL Supp 971, as quoted in FG Jacobs "Varieties of Approach to Treaty Interpretation: With Special Reference to the Draft Convention on the Law of Treaties before the Vienna Diplomatic Conference" (1969) 18 *International and Comparative Law Quarterly* 318 344.

²⁰ The International Court of Justice was established in June 1945 by the Charter of the United Nations, with the mandate to determine legal disputes, in accordance with international law, submitted by States. See The Charter of the United Nations, 24 October 1945, 1 UNTS XVI; and <<http://www.icj-cij.org/court/index.php?p1=1>> (accessed 28-03-2017).

²¹ RP Schaffer "Current trends in treaty interpretation and the South African approach" (1977) *Australian Year Book of International Law* 129 130.

²² 130.

²³ Fitzmaurice (1951) *British Year Book of International Law* 1.

²⁴ M Fitzmaurice "Interpretation of human rights treaties" in D Shelton (ed) *International Human Rights Law* (2013) 739 745.

²⁵ 745.

²⁶ Fitzmaurice (1957) *British Year Book of International Law* 204.

²⁷ This was the proposal prepared by Lauterpacht. See Art 2(2)(a) of the Resolution on the Interpretation of Treaties Adopted by the Institute of International Law (1956). Art 2(2)(a) provides that "[a]mongst the legitimate means of interpretation is [r]ecourse to the preparatory work".

²⁸ Fitzmaurice "Interpretation of human rights treaties" in *International Human Rights Law* 745.

considered in their context. By relying exclusively on the preparatory work, this approach limits the interpretation of a treaty to external factors that existed prior to the adoption of the treaty.

Departing from this approach, I argue below that the intention of the parties can also be found within the treaty.²⁹ As Schaffer observes, the intention of the parties to a treaty should be discerned from the treaty as a whole.³⁰

Moreover, the assumption that treaties are mainly bilateral is another flaw of the 'intention of the parties' approach. Fitzmaurice notes that this approach is more relevant in bilateral treaties than in multilateral treaties.³¹ While bilateral treaties signify treaties that bring together two parties with a definite intention, multilateral treaties are formed by a number of parties with mixed intentions.³² In this regard, it can be difficult to establish the common intention that cuts across many parties to a treaty. Additionally, Lauterpacht observes that, there are scenarios where the provisions of the treaty do not incorporate the common intention of the parties.³³

Reflecting on the non-existence of a common intention, Lauterpacht posited that in situations where parties to a treaty fail to agree on the common meaning of the provisions of the treaty, they formulate those provisions in general terms.³⁴ This argument resonates with the reasoning prevalent during the adoption of the African Charter, namely that the African Charter's provisions were formulated in general terms in order to allow the interpretive organs flexibility in interpretation.³⁵ Based on the fact that some treaty provisions are formulated in general terms, Lauterpacht conceded that in such situations, the teleological approach can be applied to interpret those provisions.³⁶ The teleological approach applies both the intention of the parties as well as other sources relevant in treaty interpretation.³⁷ Recourse to only one set of factors relevant to the treaty concerned, as is advanced by the intention of the parties approach, is insufficient for the effective interpretation of the socio-economic rights in the African Charter.

²⁹ See part 2 3 3 2 below.

³⁰ Schaffer (1977) *Australian Year Book of International Law* 131. See also Lauterpacht (1949) *British Year Book of International Law* 76. See also Lauterpacht (1949) *British Year Book of International Law* 76.

³¹ Fitzmaurice (1951) *British Year Book of International Law* 3.

³² 3.

³³ Lauterpacht (1949) *British Year Book of International Law* 76.

³⁴ 77.

³⁵ Report of the rapporteur on the Dakar draft CAB/LEG/67/Draft Rapt. Rpt(II) Rev.4 para 13. This report is analysed in depth in chapter three, part 3 2 3 7.

³⁶ Lauterpacht (1949) *British Year Book of International Law* 76.

³⁷ The teleological approach to interpretation is discussed in part 2 2 3 below.

Apart from the intention of the parties approach, another approach to treaty interpretation is the textual approach. This approach to interpretation is analysed below.

2 2 2 Textual approach

The textual approach (sometimes referred to as the 'ordinary meaning' approach) is the dominant approach to treaty interpretation.³⁸ The main characteristic of this method lies in the fact that the meaning of the text of a treaty should be derived from the text itself.³⁹ This approach to interpretation posits that external sources of interpretation cannot be applied to give meaning to the text of the treaty.⁴⁰ Furthermore, the textual approach does not allow the use of external sources to fill in the gaps found in the treaty.⁴¹ Thus, the key question that arises is: what does the text in question mean as it appears in the treaty?⁴²

The stance of the textual approach, namely that the words of the text are clear and contain only one true meaning is a theoretical flaw. This is due to the fact that such an assumption does not apply to human rights treaties, which are mainly formulated in general terms. The postulations of Killander, Sinclair, and Anzilotti J are important in justifying this premise. As Killander aptly observes, human rights treaties are not formulated in clear terms to allow the interpretive organs to use only the textual

³⁸ Competence of the General Assembly for the Admission of a State to the United Nations of 3 March 1950, Advisory Opinion, *I.C.J Reports* 1950 para 8:

"The first duty of a tribunal which is called upon to interpret and apply the provisions of a treaty, is to endeavour to give effect to them in their natural and ordinary meaning in the context in which they occur. If the relevant words in their natural and ordinary meaning make sense in their context that is the end of the matter."

Sir Fitzmaurice observes:

"A sounder and more scientific method of approach would seem, while not exactly ignoring the question of intentions, lays the chief emphasis elsewhere, or alternatively attempts to give effect to intentions by methods other than a direct investigation of them as such. To put the matter in epigrammatic form, the question is, on this view, not so much one of what meaning is to be attributed to the text in the light of the intentions of the parties, as of what the intentions of the parties must be presumed to have been in the light of the meaning of the text they drew up. If this were not the case, it would logically involve that, after only a cursory reading of the text, interpretation would begin with an independent investigation, *ab extra*, of the intentions of the parties; and only after these had been ascertained and established would the text be seriously considered, and its meaning and effect finally determined. In actual fact this is never the *modus operandi*. Interpretation starts, as it must, with careful consideration of the text to be interpreted. This is so because the text is the expression of the will and intention of the parties. To elucidate its meaning, therefore, is *ex hypothesi*, to give effect to that will and intention. If the text is not clear, recourse must be had to extraneous sources of interpretation: but the object is still the same - to find out what the text means or must be taken to mean."

See Fitzmaurice (1957) *British Year Book of International Law* 207.

³⁹ Fitzmaurice (1951) *British Year Book of International Law* 7.

⁴⁰ 7.

⁴¹ 7.

⁴² 7.

context.⁴³ It is therefore insufficient to assume that the text of the treaty is clear and contains only one true meaning.⁴⁴ Moreover, Killander notes that it is rare for an interpretive organ to construe the meaning of the text in isolation from the entire treaty.⁴⁵ In a similar vein, Sinclair argues that even in circumstances where the text appears clear on the face of it, its true meaning still requires a thorough investigation into its context in light of the object and purpose it was meant to serve.⁴⁶ As Anzilotti J states in *Interpretation of the Convention of 1919 Concerning the Employment of Women Working during the Night* ('*Women Working during the Night*'),⁴⁷ the text of a treaty cannot be clear in itself until the interpretive organ establishes the object and purpose of that treaty in relation to the text being interpreted. According to him, the clear meaning of the text of a treaty is obtained in the light of the object and purpose of the treaty.⁴⁸

Another questionable assumption of the textual approach is that treaties are self-sufficient. It does not allow recourse to other external sources to give meaning to the treaty. It is on this basis that the textual approach fails to take into account that some treaties do not encompass each and every provision relevant to ascertaining their meaning. As a result, they require recourse to external sources to comprehend their meaning fully. As discussed in chapter three of this dissertation, for example, the African Charter omits a significant number of socio-economic rights in its express formulation.⁴⁹ The textual approach would accordingly not be amenable to reading into the treaty the supplementary rights that are not explicitly mentioned in the text.

Senden argues that the textual approach is inadequate in that it fails to broadly construct the provisions of the text.⁵⁰ The judgement in *Johnston v Ireland* ('*Johnston*')⁵¹ justifies that argument. In this case the first and second applicants alleged that the omission of the right to divorce in the European Convention on Human Rights

⁴³ M Killander "Interpreting regional human rights treaties" (2010) 7 *International Journal on Human Rights* 144 146.

⁴⁴ M Dixon *Textbook on International Law* (2007) 71.

⁴⁵ Killander (2010) *International Journal on Human Rights* 146.

⁴⁶ Sinclair *The Vienna Convention* 72.

⁴⁷ *Interpretation of the Convention of 1919 Concerning the Employment of Women Working During the Night* PCIJ Rep Series A/B No. 50.

⁴⁸ 383.

⁴⁹ See chapter three, part 3 3 4.

⁵⁰ H Senden *Interpretation of Fundamental Rights in a Multilevel Legal System: An Analysis of the European Court of Human Rights and the Court of Justice of the European Union* (2011) 52.

⁵¹ *Johnston and Others v Ireland* (1986) Series A No. 112.

(‘European Convention’)⁵² resulted in the violation of their right to marry, found under article 12.⁵³ The issue before the European Court of Human Rights (‘ECHR’) was thus whether the applicants can derive a right to divorce from the right to marry.⁵⁴ Relying purely on the textual approach, the ECHR held that “the ordinary meaning of the words ‘right to marry’ is clear in the sense that they cover the formation of marital relationships but not their dissolution”.⁵⁵ The ECHR further held that it cannot read into the provisions of article 12 a right that was not expressly formulated by the European Convention.⁵⁶ Fitzmaurice convincingly argues that this reliance on the textual approach by the ECHR is inadequate in the sense that it apparently restricts the broadening of the scope and meaning of the right to marry to include the right to divorce.⁵⁷

In this regard, the textual approach can arguably limit the effective interpretation of the socio-economic rights in the African Charter. Sole recourse to the textual approach may result in interpretive organs being reluctant to read into the African Charter rights which are not explicitly incorporated.⁵⁸ Exclusive reliance on the text of the treaty during the interpretation process thus undermines the potential that can be offered by factors external to a treaty in the interpretation process. It is therefore necessary, when interpreting the socio-economic rights in the African Charter, to consider other external factors in order to broaden the scope and meaning of these rights. Senden correctly contends that in cases where the treaty does not precisely formulate its provisions, recourse to other external factors is required to provide the sufficient meaning of the provisions.⁵⁹ Accordingly, there is a need for an interpretative approach that takes into consideration both the text and certain external factors. This approach is examined in the ensuing part.

⁵² Council of Europe, European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos 11 and 14, 4 November 1950, ETS 5.

⁵³ Article 12 of the European Convention states:

“Men and women of marriageable age have the right to marry and to found family, according to the national laws governing the exercise of this right.”

⁵⁴ Para 51.

⁵⁵ Para 52.

⁵⁶ Para 53.

⁵⁷ Fitzmaurice “Interpretation of human rights treaties” in *International Human Rights Law* 762.

⁵⁸ TO Elias *The Modern Law of Treaties* (1974) 73.

⁵⁹ Senden *Interpretation of Fundamental Rights* 52.

2 2 3 Teleological approach

It is claimed that the teleological approach is influenced by American jurisprudence and practices.⁶⁰ It emerged in international law in 1935 through article 19(a) of the Harvard Draft Convention on the Law of Treaties ('Harvard Draft')⁶¹ formulated by the Harvard Research in International Law programme.⁶² Article 19(a) of the Harvard Draft states:

“A treaty is to be interpreted in the light of the general purpose which it intended to serve. The historical background of the treaty, *travaux préparatoires*, the circumstances of the parties at the time the treaty was entered into, the change in these circumstances sought to be effected, the subsequent conduct of the parties in applying the provisions of the treaty, and the conditions prevailing at the time interpretation is being made, are to be considered in connection with the general purpose which the treaty is intended to serve.”

As this excerpt demonstrates, the Harvard Draft treats the general purpose of a treaty as a focal point in the interpretation of treaties. In this regard, the teleological approach allows the interpretive organs to use various sources from within and outside the treaty in order to ascertain the purpose of the treaty. According to the Harvard Draft, these sources include: the treaty's historical background and its preparatory work; the circumstances at the time of the adoption of the treaty; any change in these circumstances that the parties sought to effect; the subsequent conduct of the parties in applying the provisions of the treaty; and the conditions prevailing at the time the treaty is interpreted.

In spite of the fact that the Harvard Draft highlighted these elements of the teleological approach, it did not elaborate on the scope and content of these elements. It simply listed them.⁶³ Moreover, it relied mainly on the external factors before, during and after the adoption of the treaty. It did not refer to the treaty in question as a source of interpretation. Thus, the Harvard Draft must be supplemented by allowing the application of other factors, specifically pertaining to those internal to the treaty when read as a whole. This development can be effected through the teleological approach as developed by Fitzmaurice and the Vienna Convention. By merging the Harvard Draft's

⁶⁰ Schaffer (1977) *Australian Year Book of International Law* 133.

⁶¹ Art 19 (a) of the Draft Convention on the Law of Treaties (1935) 29 *American Journal of International Law* Supp 971.

⁶² Within the context of this dissertation, the work of the Harvard Research in International Law programme is significant, as it contributed to the process of the codification of the law of treaties and particularly the teleological approach to treaty interpretation.

⁶³ Schaffer (1977) *Australian Year Book of International Law* 129 134.

formulation with Fitzmaurice's and the Vienna Convention's formulation, other elements internal to the treaty can be used as significant elements in the interpretation of the treaty.

In 1951, Fitzmaurice elaborated the teleological approach through his classification of the various approaches to treaty interpretation. According to him, the teleological approach applies mostly to multilateral treaties such as human rights treaties.⁶⁴ Fitzmaurice argues that the primary objective of the teleological approach is to discover the general object and purpose⁶⁵ of the treaty itself and interpret the text of the treaty in the light of such object and purpose.⁶⁶ He also emphasised that the object and purpose of the treaty may be deduced from a treaty's preamble.⁶⁷ Fitzmaurice advanced that the preamble is composed of two characteristics, namely: its interpretive and binding characters. Regarding the interpretive character of the preamble, he observes that the preamble to the treaty enshrines and elaborates its object and purpose.⁶⁸ This inclusion renders it a useful interpretative tool for elaborating the meaning of a treaty's provisions, as well as clarifying the context in which such provisions should be construed.⁶⁹

In relation to the binding character of the preamble, Fitzmaurice argues that when applied as an interpretive aid the preamble becomes binding just like any other treaty provision.⁷⁰ It is for this reason that statements of the parties contained in the preamble to the treaty must be treated as relevant when interpreting the treaty in question.⁷¹ For example, the preamble to the treaty as a source of the object and purpose of a treaty was used by Anzilotti J in the *Women Working during the Night* case.⁷² In his dissenting opinion the judge remarks that in interpreting a provision of a treaty the first thing to address is the object and purpose of such a treaty in relation to the provision being interpreted.⁷³ Referring to part XIII of the Treaty of Versailles ('Versailles Treaty') which applied to the Women Working during the Night Convention, Anzilotti J states that the

⁶⁴ Fitzmaurice (1951) *British Year Book of International Law* 2. See also Fitzmaurice (1957) *British Year Book of International Law* 207.

⁶⁵ J Klabbbers "Some problems regarding the object and purpose of treaties" (1999) 8 *Finnish Year Book of International Law* 138-160 quoted in Yeshanew *The Justiciability of Economic, Social and Cultural Rights* 45. Klabbbers identifies object and purpose of a treaty as a "comprehensive blanket term" referring to the "aims, nature and end" of a treaty and it applies to a treaty "as a whole rather than to its parts or articles."

⁶⁶ Fitzmaurice (1951) *British Year Book of International Law* 1-2.

⁶⁷ 10.

⁶⁸ 25

⁶⁹ 25

⁷⁰ Fitzmaurice (1957) *British Year Book of International Law* 229.

⁷¹ 229.

⁷² *Women Working During the Night* 384-387.

⁷³ 383.

preamble to the Versailles Treaty indicates its object and purpose to improve the working conditions of the working class.⁷⁴ This teleological interpretation enabled women working at night to be included within the scope of article 3 of the Women Working during the Night Convention.

Apart from the preamble, Fitzmaurice briefly discusses the subsequent practice of the parties to a treaty as a source of the object and purpose of a treaty.⁷⁵ According to him, the subsequent conduct of the parties includes the decisions of the interpretive organs,⁷⁶ and the rules of procedure formulated by these interpretive organs to interpret the treaty.⁷⁷ Fitzmaurice emphasises that recourse to such practices during the interpretation process is significant in that it assists in ascertaining the effective meaning of the treaty.⁷⁸

Besides mentioning other elements such as the general theme of the treaty, the circumstances in which it was adopted, and the place of the treaty in international law,⁷⁹ Fitzmaurice failed to elaborate upon these elements.⁸⁰ This chapter seeks to elaborate on two specific elements in order to supplement the teleological approach articulated by the Harvard Draft and Fitzmaurice. The two elements to be analysed are the general theme of a treaty and the circumstances in which it was adopted as illuminated by the role of the preparatory work referred to in the Vienna Convention.⁸¹ Since these elements elaborate on the circumstances in which a treaty was adopted, as well as processes that occurred mainly at the time of preparation and formation of a treaty, they can thus be accommodated in the preparatory work of the treaty. Essentially, preparatory work includes “exchanges among the parties and with the drafting body, treaty drafts, negotiation records, minutes of commission and plenary proceedings, drafters of a treaty worked, if any”.⁸²

⁷⁴ 385.

⁷⁵ Fitzmaurice (1951) *British Year Book of International Law* 9. See also Fitzmaurice (1957) *British Year Book of International Law* 210-211.

⁷⁶ Fitzmaurice (1951) *British Year Book of International Law* 9. See also Fitzmaurice (1957) *British Year Book of International Law* 211.

⁷⁷ Fitzmaurice (1951) *British Year Book of International Law* 9. See also Fitzmaurice (1957) *British Year Book of International Law* 211.

⁷⁸ Fitzmaurice (1951) *British Year Book of International Law* 9. See also Fitzmaurice (1957) *British Year Book of International Law* 211.

⁷⁹ Fitzmaurice (1951) *British Year Book of International Law* 2.

⁸⁰ As was the case with the Harvard Draft.

⁸¹ These two elements are discussed in part 2 3 below.

⁸² Yeshanew *The Justiciability of Economic, Social and Cultural Rights* 52.

Fitzmaurice argues, however, that all the elements of the teleological approach identified above embody the principle of effectiveness.⁸³ In his reasoning, the principle of effectiveness presumes that texts are formulated to fulfil a specific effect. Accordingly, they should be interpreted to make them effective rather than ineffective.⁸⁴ The principle requires the text to be interpreted in light of the declared or apparent object and purpose of the treaty, in a manner that gives such a text its effective meaning consistent with the words used to formulate it and with the other provisions of the treaty.⁸⁵ In order to assign effective meaning to the text, the principle of effectiveness allows the interpretive organs to consider and apply different possibilities of interpretation which will safeguard the effectiveness of the text.⁸⁶ Fitzmaurice provides, however, only a general evaluation of the principle of effectiveness.⁸⁷ He does not elaborate on the various dimensions of this principle that can help generate different interpretive possibilities.

This insufficiency can be supplemented by the work of Rietiker who elaborates on different dimensions of this principle of effectiveness.

In addition to the general dimension of the principle of effectiveness discussed by Fitzmaurice, Rietiker identifies three further dimensions. These dimensions are the substantive, temporal, and systemic dimensions. According to Rietiker, the principle of effectiveness in its substantive dimension requires interpretive organs to interpret the rights enshrined in a treaty broadly.⁸⁸ It also requires the limitations of such rights to be interpreted narrowly.⁸⁹

The implication of the substantive dimension of the principle of effectiveness, particularly for the human rights treaties, is twofold. The first implication was given by Killander, who wrote in the context of the interpretation of regional human rights treaties.⁹⁰ According to Killander, the principle of effectiveness means that the texts of human rights treaties should be interpreted broadly.⁹¹ Craven has elaborated on the

⁸³ Fitzmaurice (1957) *British Year Book of International Law* 203 & 211. The principle of effectiveness is sometimes referred to as *ut res magis valeat quam pereat*.

⁸⁴ Fitzmaurice (1951) *British Year Book of International Law* 8.

⁸⁵ Fitzmaurice (1957) *British Year Book of International Law* 211.

⁸⁶ D Rietiker "The principle of "effectiveness" in the recent jurisprudence of the European Court of Human Rights: Its different dimensions and its consistency with public international law – No need for the concept of treaty *sui generis*" (2010) 79 *Nordic Journal of International Law* 245 256.

⁸⁷ 256. Rietiker calls this general evaluation of the principle of effectiveness as a narrow dimension of this principle.

⁸⁸ 259.

⁸⁹ 259.

⁹⁰ Killander (2010) *International Journal on Human Rights* 147.

⁹¹ 147.

second implication of the principle of effectiveness. He notes that the principle of effectiveness requires the limitations and restrictions to the human rights provisions in the treaty to be interpreted narrowly.⁹²

In its temporal dimension,⁹³ the principle of effectiveness considers a treaty as a living instrument.⁹⁴ This means that a treaty should be interpreted in light of present-day conditions prevalent in society.⁹⁵ As Kanstantsin notes writing on the European Convention, in its temporal dimension the principle of effectiveness “keeps the meaning of the rights both contemporary and effective”.⁹⁶ This is significant, as it promotes an interpretation of the rights that takes into account the living conditions of people at the time of the interpretation of the treaty. In this regard, the interpretive organs can consider the conditions that were not foreseen by the treaty parties at the time of its conception. Accordingly, this interpretation considers both the protection against the violations prevalent at the time of interpretation and at the time of the adoption of a treaty.⁹⁷

This dimension was adopted by the ICJ in *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970) ('Namibia')*.⁹⁸ In clarifying the legal consequences of the continued presence of South Africa in Namibia, even after the termination of South Africa's mandate to administer Namibia in 1966, the ICJ held that the terms the “strenuous conditions of the modern world”, the “well-being and development of such peoples”, and “sacred trust” contained in article 22(1) of the Covenant of the League of Nations⁹⁹ were not static. Rather, they were evolutionary, and the parties must be presumed to have accepted the evolution.¹⁰⁰ The ICJ held that although the right of independence was not envisaged at the time the Covenant of the

⁹² M Craven *The International Covenant on Economic, Social and Cultural Rights: A Perspective on Its Development* (1995) 3.

⁹³ Rietiker (2010) *Nordic Journal of International Law* 261. According to Rietiker temporal dimension is sometimes referred to as “dynamic” or “evolutive” approach.

⁹⁴ 261.

⁹⁵ 261.

⁹⁶ K Dzehtsiarou “European consensus and the evolutive interpretation of the European Convention on Human Rights” (2011) 12 *German Law Journal* 1730 1730.

⁹⁷ Killander (2010) *International Journal on Human Rights* 151.

⁹⁸ *Legal Consequences for States of the continued presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)* Advisory Opinion of 21 July 1971 ICJ Judgment 16.

⁹⁹ The Covenant of the League of Nations 255 CTS 195 was adopted 28 June 1919 and entered into force 10 January 1920.

¹⁰⁰ *Namibia* para 53.

League of Nations was adopted, the “ultimate objective of the sacred trust was the self-determination and independence of the peoples concerned”.¹⁰¹

In the case of *Dispute regarding Navigational and Related Rights (Costa Rica v Nicaragua)* (*Dispute regarding Navigational and Related Rights*),¹⁰² the ICJ elaborated the conditions upon which the temporal dimension may be applied. It held that the temporal dimension can be applied if:

“The parties have used generic terms in a treaty, the parties necessarily having been aware that the meaning of the terms was likely to evolve over time, and where the treaty has been entered into for a very long period or is ‘of continuing duration’.”¹⁰³

As Killander notes, the African Commission has not applied this dimension of the principle of effectiveness in its decisions.¹⁰⁴ Specifically, Ssenyonjo argues that the socio-economic rights in the African Charter require an innovative interpretation that is capable of addressing the relevant socio-economic needs at the time of interpretation.¹⁰⁵ This innovative interpretation is significant as peoples’ socio-economic conditions change with time. Hence, the interpretation of the socio-economic rights should be responsive to these changes. Helmersen confirms the evolving nature of the socio-economic circumstances.¹⁰⁶ According to him, an interpretation that considers the evolving socio-economic conditions renders the rights relevant and effective.¹⁰⁷

The temporal dimension, as elaborated in the ICJ judgments discussed above and Rietiker’s analysis, renders the teleological interpretation significant to this dissertation. The significance is twofold. Firstly, it can help to interpret the socio-economic rights in the African Charter in a manner that is consistent with the prevalent socio-economic conditions at the time of interpretation. This is vital, the socio-economic rights in the African Charter are mainly formulated in general terms.¹⁰⁸ Secondly, it can assist in

¹⁰¹ Para 53.

¹⁰² *Dispute regarding Navigational and Related Rights (Costa Rica v Nicaragua)*, Judgment, ICJ Rep 2009.

¹⁰³ Para 66.

¹⁰⁴ Killander (2010) *International Journal on Human Rights* 149.

¹⁰⁵ M Ssenyonjo “Analysing the economic, social and cultural rights jurisprudence of the African Commission: 30 years since the adoption of the African Charter” (2011) 29 *Netherlands Quarterly of Human Rights* 358 363.

¹⁰⁶ ST Helmersen “Evolutive treaty interpretation: Legality, semantics and distinctions” (2013) 6 *European Journal of Legal Studies* 126 129-130.

¹⁰⁷ 130.

¹⁰⁸ See chapter three, part 3 3.

interpreting the scope and content of the socio-economic rights where the circumstances in which they are applied change over time.

The systemic dimension represents another facet of the principle of effectiveness. This dimension consists of both the internal and external coherence dimensions.¹⁰⁹ According to Rietiker, the internal coherence dimension emphasises a form of interpretation that reads the treaty as a whole in a manner that advances internal consistency and harmony among the various provisions of the treaty.¹¹⁰ In relation to external coherence, the principle of effectiveness focuses on interpreting a treaty through other comparative legal sources. As the ICJ held in the *Namibia* case, a treaty should be interpreted in light of other relevant international legal sources.¹¹¹ As such, interpretive organs should interpret the treaty in light of other relevant international instruments.¹¹² This dimension is significant as it gives the interpretive organs the latitude to interpret the socio-economic rights in the African Charter in a manner that harmonises with the normative provisions in other relevant human rights instruments.

This dissertation thus contends that the application of the teleological approach, in a manner that integrates the dimensions of the principle of effectiveness, can enhance the interpretation of the text of a treaty. Focusing on the object and purpose of the treaty can guarantee the effective interpretation of the text of the treaty.¹¹³ In accordance with Fitzmaurice and Rietiker, this chapter demonstrates below that the principle of effectiveness can be applied in the interpretation of the socio-economic rights in the African Charter.¹¹⁴

The following part explores the place of the teleological approach to treaty interpretation in the Vienna Convention.

2 3 Place of the teleological approach to interpretation in the Vienna Convention

While scholars have developed three distinct approaches to treaty interpretation,¹¹⁵ the Vienna Convention adopts a single authoritative rule of interpretation under articles 31 and 32. There are, however, competing arguments among scholars and institutions regarding the place of the teleological approach in the codified rule of interpretation

¹⁰⁹ Rietiker (2010) *Nordic Journal of International Law* 267-275.

¹¹⁰ 267.

¹¹¹ *Namibia* para 53.

¹¹² Rietiker (2010) *Nordic Journal of International Law* 271.

¹¹³ Killander (2010) *International Journal on Human Rights* 147.

¹¹⁴ See part 2 5 2 4 below.

¹¹⁵ See part 2 2 above.

under the Vienna Convention. For instance, the United Nations Conference on the Law of Treaties ('UN Conference') in its first session declared that, in adopting the Vienna Convention, the International Law Commission ('ILC')¹¹⁶ considered the phrase "object and purpose" in article 31(1) as merely a significant interpretive tool and not as an independent teleological approach.¹¹⁷ According to the UN Conference, the teleological interpretation is not incorporated in article 31(1) of the Vienna Convention because it could distort the interpretation of provisions of the treaty.¹¹⁸ In a similar vein, Gardiner argues that only the textual approach is incorporated as an independent interpretive approach in article 31 of the Vienna Convention, and not the teleological approach.¹¹⁹ According to Gardiner, article 31(1) of the Vienna Convention merely incorporates the teleological element of interpretation as an interpretive means that sheds light on the textual meaning.¹²⁰

The harnessing of the three approaches to interpretation into one general rule of interpretation, which is the codification of these perspectives, raises an important question relevant to this dissertation: Is the teleological approach incorporated in the codified rule of treaty interpretation under the Vienna Convention? In this part, I argue that the codification of approaches to treaty interpretation endorses the teleological approach and establishes it as the primary method of treaty interpretation. The Vienna Convention endorses the teleological approach as developed by the Harvard Research in International Law programme and Fitzmaurice and grants it legitimacy to interpret international treaties.¹²¹ An analysis of articles 31 and 32 of the Vienna Convention supports this argument. Article 31 of the Vienna Convention provides:

- "1. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light to its object and purpose.
2. The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes:
 - (a) any agreement relating to the treaty which was made between all the parties in connection with the conclusion of the treaty;

¹¹⁶ The International Law Commission was established in 1947 by the UN General Assembly, with the mandate to initiate studies and make relevant recommendations regarding the progressive development of international law and its codification <<http://legal.un.org/ilc>> (accessed 28-03-2017).

¹¹⁷ United Nations Conference on the Law of Treaties, First Session, Vienna 26 March-24 May 1968, Official Records 170.

¹¹⁸ 170.

¹¹⁹ R Gardiner *Treaty Interpretation* (2008) 189-190.

¹²⁰ 189-190.

¹²¹ See part 2 3 3 below.

(b) any instrument which was made by one or more parties in connection with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty.

3. There shall be taken into account, together with the context:

(a) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions;

(b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation;

(c) any relevant rules of international law applicable in the relations between the parties.

4. A special meaning shall be given to a term if it is established that the parties so intended.”

Article 32 of the Vienna Convention reads:

“Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of article 31, or to determine the meaning when the interpretation according to article 31:

(a) leaves the meaning ambiguous or obscure; or

(b) leads to a result which is manifestly absurd or unreasonable.”

It is argued that the codification of approaches to treaty interpretation under article 31(1) of the Vienna Convention gives primacy to the textual approach over other approaches. For example, the ILC Commentaries on its draft article 27, (which was later approved as article 31(1) of the Vienna Convention) seem to indicate the primacy of the text as an authentic authority in treaty interpretation.¹²² A number of international tribunals also give primacy to the textual approach over the teleological approach. In *RSM Production Corporation v Grenada* (*'RSM'*), for instance, the International Centre for Settlement of Investment Disputes (*'ICSID'*) held that the Vienna Convention, through its rule of interpretation, considers the teleological approach as a supplementary approach that can only be applied when the textual approach is insufficient.¹²³

In contrast, I argue that article 31(1) requires the interpretation of the text to occur in accordance with the object and purpose of the treaty in question. The effective meaning of the text in dispute cannot be ascertained if the treaty's object and purpose in relation to such text is not considered. From this perspective, article 31(1) does not establish the primacy of the textual approach over the teleological approach. Additionally, article 31(1) does not establish hierarchy among these incorporated elements which would imply the

¹²² ILC (1966) *Yearbook of the International Law Commission* 220 para 11. See also A Orakhelashvili “Restrictive interpretation of human rights treaties in the recent jurisprudence of the European Court of Human Rights” (2003) 14 *European Journal of International Law* 529 533.

¹²³ *RSM Production Corporation v Grenada* ICSID Case No. ARB/05/14 Award 383 (13 March 2009) para 383.

primacy of one element over the other. Instead, article 31(1) demonstrates that the interpretation of a treaty is a single combined process.¹²⁴ In the interpretation process, the text of the treaty and its context, as well as its object and purpose should be examined together.¹²⁵ While the text is considered the logical starting point,¹²⁶ its effective meaning should always be obtained in the context it was formulated and in light of its object and purpose.¹²⁷

Aust rightly argues that the ordinary meaning of the text cannot be ascertained in abstract, but rather through the context of the treaty as well as its object and purpose.¹²⁸ The deliberate combined approach adopted by the Vienna ensures that the object and purpose of a treaty is taken into account whenever a treaty is interpreted.¹²⁹ Commenting particularly on human rights treaties, Scheinin argues that article 31 of the Vienna Convention requires the interpretation of these treaties to be performed in a manner that commits the parties to respecting the object and purpose enshrined therein.¹³⁰ In doing so, this article implies that the interpretation of human rights treaties should give due regard to their object and purpose.

As is the case with the Harvard Draft and Fitzmaurice's formulation, the general rule of interpretation under article 31(1) positions the object and purpose of the treaty as a significant aspect in its interpretation. It requires, rather than permits, recourse to the object and purpose of the treaty as a significant approach in the interpretation of the treaty. It should be noted that the object and purpose of a treaty is the major assumption underlying the teleological approach.¹³¹ The inclusion of the phrase, "object and purpose" under article 31 of the Vienna Convention, therefore, reflects the recognition of the teleological approach to interpretation. As Jacobs notes, the incorporation of the phrase "in the light of its object and purpose" confirms the inclusion of the teleological

¹²⁴ ILC (1966) *Yearbook of the International Law Commission* 219-220 para 8.

¹²⁵ K Mechlem "Treaty bodies and the interpretation of human rights" (2009) 42 *Vanderbilt Journal of Transnational Law* 905 911.

¹²⁶ 911.

¹²⁷ Art 31(1) of the Vienna Convention.

¹²⁸ A Aust *Modern Treaty Law and Practice* (2000) 188.

¹²⁹ Schaffer (1977) *Australian Year Book of International Law* 139.

¹³⁰ M Scheinin "Characteristics of human rights norms" in C Krause and M Scheinin (eds) *International Protection of Human Rights: A Textbook* 2 ed (2012) 19 21.

¹³¹ See part 2 2 3 above.

approach in article 31.¹³² In this regard, treaty interpretation will not be effective if reference to the object and purpose of such a treaty is not made.¹³³

According to the Vienna Convention, the object and purpose should be deduced from the context within which the treaty was adopted.¹³⁴ The context of the treaty includes the text, preamble, subsequent agreements or practices, and the relevant rules of international law.¹³⁵ These are the elements of the teleological approach as developed by the Harvard Research in International Law programme and Fitzmaurice. As such, the inclusion of these elements under article 31 confirms that the teleological approach to treaty interpretation is incorporated in the Vienna Convention. In order to show the link between the teleological approach to treaty interpretation as developed by the Harvard Research in International Law and Fitzmaurice, as well as the elements in the Vienna Convention, there is a need to provide a brief discussion of these elements.

As the ILC observes, the preamble is an integral part of the treaty in the process of treaty interpretation.¹³⁶ The Vienna Convention confirms the interpretive significance of the preamble to the treaty by incorporating it in article 31.¹³⁷ According to Fitzmaurice, the statements enshrined in a treaty's preamble are viable indicators of its object and purpose.¹³⁸ These preambular statements are significant in the sense that they shed light on the manner in which the meaning of the provisions of the treaty should be ascertained.¹³⁹ In addition, Gardiner argues that statements in the preamble disclose the motivations, goals, and objectives of a treaty in relation to its substantive provisions.¹⁴⁰ He further asserts that, by stating the treaty's goals and objectives, the preamble becomes an integral element of the teleological approach to interpretation suitable for the interpretation of the provisions of such treaty.¹⁴¹

In line with the Harvard Draft and Fitzmaurice, the Vienna Convention endorses and elaborates on the element of subsequent conduct of the parties to a treaty. According to the Vienna Convention, the subsequent conduct of the parties may take two forms:

¹³² Jacobs (1969) *International and Comparative Law Quarterly* 337. See also Yeshanew *The Justiciability of Economic, Social and Cultural Rights* 45; and Senden *Interpretation of Fundamental Rights* 55.

¹³³ I Van Damme "Treaty interpretation by the WTO Appellate body" (2010) 21 *European Journal of International Law* 1 8.

¹³⁴ Art 31(1) of the Vienna Convention.

¹³⁵ Art 31(2) – (3) of the Vienna Convention.

¹³⁶ ILC (1966) *Yearbook of the International Law Commission* 221 para 13.

¹³⁷ Art 31(2) of the Vienna Convention.

¹³⁸ Fitzmaurice (1951) *British Year Book of International Law* 10.

¹³⁹ 10.

¹⁴⁰ Gardiner *Treaty Interpretation* 186.

¹⁴¹ 186. See also Senden *Interpretation of Fundamental Rights* 100.

subsequent agreements and practices of the parties.¹⁴² Significantly, the Vienna Convention endorses this element as mandatory in the process of treaty interpretation. Through the formulation of article 31(3)(a) and (b), the Vienna Convention requires interpretive organs to consider the subsequent agreements and practices of the parties as a primary source in establishing the object and purpose of the treaty in the interpretation process. However, neither the Vienna Convention nor the ILC demonstrate how to establish the subsequent agreement and practice of the parties as enshrined in the treaty. For this reason, I draw on the ideas advanced by Fitzmaurice, Roberts, and Killander to illustrate how the subsequent agreements and practices of the parties can be established.

Fitzmaurice notes that the subsequent practices of the parties to a treaty may be found in the rules of procedure and decisions formulated by interpretive organs.¹⁴³ Gardiner elaborates that the decisions of interpretive organs are accepted by the parties as binding.¹⁴⁴ Consecutive decisions by interpretive organs on the same provisions of a treaty establish parties' consistent practice, in that the parties accept to be bound by these findings.¹⁴⁵ In this regard, the consistent practices of the parties establish a means in which interpretation of the treaty can be determined.¹⁴⁶ As a result, the consistent practices form the basis of subsequent practices of the parties.¹⁴⁷

Elaborating further on subsequent practices in the context of human rights treaties, Scheinin argues that the parties' enforcement of the decisions of interpretive organs establishes the subsequent practices of the parties.¹⁴⁸ According to Scheinin, such subsequent practices can be applied in the subsequent interpretation of the human rights treaties. In the same vein, Roberts notes that while a subsequent agreement focuses "on the fact of an agreement between the treaty parties,"¹⁴⁹ "subsequent practice includes executive, legislative and judicial acts."¹⁵⁰ Through the subsequent agreements and practices of the parties, the teleological approach creates space for interpretive organs to apply the attitudes of States to interpret the treaty. These elements

¹⁴² Art 31(3)(a)-(b) of the Vienna Convention.

¹⁴³ Fitzmaurice (1951) *British Year Book of International Law* 9.

¹⁴⁴ Gardiner *Treaty Interpretation* 229.

¹⁴⁵ 229.

¹⁴⁶ 229-230.

¹⁴⁷ 229-230.

¹⁴⁸ Scheinin "Characteristics of human rights norms" in *International Protection of Human Rights* 21.

¹⁴⁹ A Roberts "Power and persuasion in investment treaty interpretation: The dual role of States" (2010)

104 *American Journal of International Law* 179 199.

¹⁵⁰ 200.

allow interpretive organs to apply their precedents to interpret the text in question. As Killander expresses, subsequent agreements and practices provide the interpretive organs with a mandate to rely on their precedents.¹⁵¹

This insight is significant for this dissertation, as it can enrich the jurisprudence of the interpretive organs of the African Charter and States' subsequent practices in protecting socio-economic rights in Africa. It allows the application of decisions of the interpretive organs, as well as States' undertakings such as subsequent treaties and protocols, in the interpretation of socio-economic rights in the African Charter.

The 'relevant rules of international law' is another element of the teleological approach to the interpretation of treaties endorsed by the Vienna Convention. This element is formulated as a primary source that enables the interpretive organs to establish the object and purpose of the treaty in question.¹⁵² The ILC identifies that recourse to the relevant rules of international law in article 31 of the Vienna Convention requires a treaty to be interpreted in light of other international law treaties of a similar nature.¹⁵³ The rules of international law in article 31 encompass both customary and general international law related to the interpreted treaty.¹⁵⁴

Through this formulation, the Vienna Convention develops Fitzmaurice's approach to teleological treaty interpretation. The formulation in article 31 of the Vienna Convention is important, as it enables the socio-economic rights in the African Charter to be interpreted with reference to other relevant international human rights instruments. This is significant as the interpretive organs of the African Charter will be able to clarify the scope and content of these rights in the light of other international instruments. As Yeshanew observes:

“While their special nature should be taken into account, human rights treaties cannot be interpreted in a vacuum and only in their own context. They should be interpreted in the wider context of and in harmony with general international law, of

¹⁵¹ Killander (2010) *International Journal on Human Rights* 149.

¹⁵² Art 31(3)(c) of the Vienna Convention. It should be noted that interpretation of a treaty in the light of other treaties codified in article 31(3)(c) of the Vienna Convention is also referred to as systemic approach to interpretation or systemic integration. See also International Law Commission, 'Fragmentation of international law: Difficulties arising from the diversification and expansion of international law', Report of the Study Group of the International Law Commission, 58th session (2006) A/CN.4/L.682) Chapter F, Systemic integration and Article 31(3)(c) of the Vienna Convention para 413.

¹⁵³ International Law Commission, 'Fragmentation of international law: Difficulties arising from the diversification and expansion of international law', Report of the Study Group of the International Law Commission, 58th session (2006) A/CN.4/L.682) Chapter F, Systemic integration and Article 31(3)(c) of the Vienna Convention paras 410-480.

¹⁵⁴ 461.

which they form part. The requirement of reference to binding rules concerning the subject-matter of a treaty in question is premised on the assumption that parties do not intend to act inconsistently in the various treaties they enter.”¹⁵⁵

As discussed above,¹⁵⁶ recourse to the above sources is to ensure effective interpretation. Unlike Fitzmaurice’s formulation, the interpretive provisions of the Vienna Convention do not explicitly articulate the principle of effectiveness explained above.¹⁵⁷ However, it can be argued that the principle of effectiveness is implicitly incorporated in articles 31 and 32 of the Vienna Convention through the terms, “object and purpose” and the “preamble”, “preparatory work”, “subsequent agreement and practices of the parties” as well as the “rules of international law”. As was elaborated above,¹⁵⁸ the principle of effectiveness requires an interpretation that promotes the achievement of the object and purpose of the particular treaty. The provisions of articles 31 and 32 of the Vienna Convention allow recourse to various sources to establish the object and purpose of the treaty. These sources include: the preamble to the treaty, the subsequent agreements and the subsequent practices of the parties, the relevant rules of international law, and the preparatory work of the treaty. In this regard, these sources can be used in the interpretation process to achieve the object and purpose of the treaty. As Senden notes, the principle of effectiveness focuses on the means according to which the teleological approach is applied.¹⁵⁹ Hence, the omission of the Vienna Convention to refer explicitly to the principle of effectiveness can be cured by reading this principle as a component of the “object and purpose” of the treaty in article 31(1). As the ILC notes in its commentary, the principle of effectiveness is embodied in the provisions of article 27(1) (now article 31(1)) through the phrase “in the light of its object and purpose”. This comment by the ILC is to the effect that the principle of effectiveness is part of the object and purpose of the treaty.¹⁶⁰ The interpretive organs can use the phrase “in the light of object and purpose of the treaty” to broadly encompass the principle of effectiveness and apply it in the interpretation of a treaty.

Another element of the teleological approach endorsed by the Vienna Convention is the preparatory work of the treaty. Unlike the Harvard Research in International Law and Fitzmaurice, the Vienna Convention endorses preparatory work (*travaux préparatoires*)

¹⁵⁵ Yeshanew *The Justiciability of Economic, Social and Cultural Rights* 51.

¹⁵⁶ See part 2 2 3 above.

¹⁵⁷ See part 2 2 3 above.

¹⁵⁸ See part 2 2 3 above.

¹⁵⁹ Senden *Interpretation of Fundamental Rights* 84.

¹⁶⁰ ILC (1966) *Yearbook of the International Law Commission* 219 para 6.

as a supplementary element of treaty interpretation. This notion of regarding preparatory work as a supplementary element implies that the interpretive organs can draw on this element only as a peripheral element of the treaty interpretation.

It is contended that the preparatory work should be treated as a central element in interpreting the African Charter. This understanding is important for interpreting the socio-economic rights in the African Charter, as its preparatory work incorporates significant historical background pertaining to the inclusion of these rights. This historical background is important as it helps to identify the object and purpose of the African Charter. The preparatory work of the African Charter also enshrines and elaborates the object and purpose of the African Charter regarding the socio-economic rights it recognises.¹⁶¹

It should be noted that article 31(1) of the Vienna Convention require the text to be interpreted in light of its object and purpose. It can be argued that this requirement logically allows the consideration of the preparatory work of the African Charter which enshrines its object and purpose. Interpreting the socio-economic provisions in the African Charter, in light of its object and purpose therefore requires considering the preparatory work that embodies the object and purpose relating to these rights as a primary interpretative tool. As Yeshanew rightly observes, in some international treaties, a treaty's preparatory work forms part of the relevant law and it cannot be treated as a supplementary means of interpretation.¹⁶²

Accordingly, this part has established that the Vienna Convention endorses the teleological approach to treaty interpretation in articles 31 and 32. I have also demonstrated that these provisions require the meaning of a treaty's provisions be developed with reference to its object and purposes. This aspect gives the teleological approach a significant place in the Vienna Convention.

However, the formulations by the Harvard Research in International Law programme, Fitzmaurice, and the Vienna Convention only indicate how the object and purpose of the treaty is to be discovered. They do not elaborate on the precise content and scope of this notion. The latter can play a significant role in interpreting the socio-economic rights provisions in the African Charter. In the following part I proceed to analyse the concept of the 'object and purpose' of a treaty in greater depth.

¹⁶¹ See parts 2 5 2 2 below, and chapter three, parts 3 2, 3 2 2 and 3 2 3.

¹⁶² Yeshanew *The Justiciability of Economic, Social and Cultural Rights* 52.

2 3 1 Meaning of the concept 'object and purpose' of a treaty

2 3 1 1 Introduction

The failure to define the object and purpose of a treaty adversely impacts on the interpretation process as it endangers clarity of meaning.¹⁶³ The notion of the object and purpose of a treaty can be a useful element in interpreting many international treaties, including the African Charter.¹⁶⁴ For this reason, analysing the meaning of this concept can guide interpretive organs in identifying the object and purpose of a particular treaty they are required to interpret.

The meaning of the object and purpose of a treaty is surrounded by two key concerns. The first is whether object and purpose is a single concept or two distinct concepts. The second is whether the notion requires a specific definition or a general definition. This part thus seeks to shed light on the nature of the object and purpose of a treaty, and its implications for treaty interpretation.

2 3 1 2 Object and purpose of a treaty: Single or two distinct concepts?

International tribunals and the scholars have been using the term, "object and purpose" either as a single concept or as two distinct concepts. In the *International Status of South-West Africa* ('*South-West Africa*'), for example, the ICJ only used the word "purpose".¹⁶⁵ In the *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide* ('*Reservations to the Genocide Convention*')¹⁶⁶ the ICJ used the phrase "object and purpose" interchangeably. This implies that the ICJ sometimes uses one concept to mean the other or to re-ordering them.¹⁶⁷

Scholars also refer to these concepts interchangeably and inconsistently. For instance, Bernhardt uses "object" and "purpose" interchangeably.¹⁶⁸ Ress uses the

¹⁶³ DS Jonas & TN Saunders "The object and purpose of a treaty: Three interpretive methods" (2010) 43 *Vanderbilt Journal of Transnational Law* 565 569.

¹⁶⁴ 567.

¹⁶⁵ *International Status of South-West Africa* Advisory Opinion of 11 July 1950 ICJ Reports 1950 136.

¹⁶⁶ *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide* ICJ Reports 1951.

¹⁶⁷ The ICJ stated that:

"It is also a generally recognised principle that a multilateral Convention is the result of an agreement freely concluded upon its clauses and that consequently none of the contracting parties is entitled to frustrate or impair, by means of unilateral decisions or particular agreements, the purpose and *raison d'être*' of the Convention."

¹⁶⁸ I Buffard & K Zemanek "The "object and purpose" of a treaty: An enigma?" (1998) 3 *Austrian Review of International and European Law* 311 323.

word, “object” to also include the term, “purpose”,¹⁶⁹ while Jennings considers the object and purpose of a treaty as a single concept.¹⁷⁰ On the other hand, Duguit and Bonnard, Rousseau and Weckel consider the “object and purpose” as two distinct concepts. Weckel, for example, explains the object of a treaty as a goal the parties to a treaty want to achieve. He identifies the purpose of a treaty as the motive to achieve the goal of the treaty. It is therefore significant to ascertain the nature of the phrase, “object and purpose” of the treaty. Senden rightly notes that the clarity of the object and purpose of a treaty can help to establish whether or not the teleological approach is correctly applied in its interpretation.¹⁷¹

While the ICJ and scholars regard the object and purpose of a treaty as different concepts and use them inconsistently, I follow the approach adopted in the Vienna Convention, which treats “object and purpose” as a single discursive concept:-

“A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.”¹⁷²

The term “object and purpose” in the Vienna Convention focuses on an interpretation that attains the general goal of the treaty as a whole, as opposed to the goals of the specific provisions to be interpreted.¹⁷³ Buffard and Zemanek advance that treating the object and purpose of the treaty as a single notion, connects the provisions of the treaty with the general goal of the treaty.¹⁷⁴ The phrase “in the light of its object and purpose” suggests that the Vienna Convention treats the term “object and purpose” as a single concept. Therefore, treating the object and purpose of the treaty as two distinct concepts is inconsistent with the Vienna Convention’s approach. As Jonas and Saunders affirm, the Vienna Convention formulates it as a single concept.¹⁷⁵ Buffard and Zemanek

¹⁶⁹ 323.

¹⁷⁰ RY Jennings “Treaties” in M Bedjaoui (ed) *International Law: Achievements and Prospects* Vol. I, UNESCO, Paris 1991 135 145 quoted in Buffard & Zemanek (1998) *Australian Review of International and European Law* 324. Jennings states that:

“A treaty is an agreed, authoritative text, normally drafted with care in the choice of terms, and it is the resulting text that States elect to accept, or not to accept ... The qualification ‘in good faith’ is the central component of the principle of *pacta sunt servanda*: it comprises and qualifies inter alia the principle of effectiveness – *ut res magis valeat quam pereat*. The ‘terms of the treaty ... in their context’, that is so to say the text, is indeed in primary place, but viewed ‘in the light of’ the object and purpose of the treaty.”

¹⁷¹ Senden *Interpretation of Fundamental Rights* 97.

¹⁷² Art 31(1) of the Vienna Convention.

¹⁷³ Jonas & Saunders (2010) *Vanderbilt Journal of Transnational Law* 579.

¹⁷⁴ Buffard & Zemanek (1998) *Australian Review of International and European Law* 332.

¹⁷⁵ Jonas & Saunders (2010) *Vanderbilt Journal of Transnational Law* 579.

emphasise that the object and purpose of the treaty, as a single concept, underlies the teleological approach to treaty interpretation, in that it regards the object and purpose of the treaty as a whole.¹⁷⁶

Senden identifies three teleological elements that legitimatise the object and purpose of the treaty as a single concept. Firstly, the notion “object and purpose” of the treaty establishes interpretive references to which the interpretive organs should make recourse to, in interpreting all provisions of the treaty.¹⁷⁷ Secondly, the term, “object and purpose” of the treaty, creates space for interpretive organs to clarify to parties that the meaning they assign to the provisions are embedded in the relevant treaty.¹⁷⁸ Thirdly, as a single concept the “object and purpose” helps the interpretive organs to demonstrate that the decisions made were intended by the parties to the relevant treaty.¹⁷⁹ Treating the notion “object and purpose” as two distinct concepts is thus inconsistent with article 31(1) of the Vienna Convention.¹⁸⁰ Since this dissertation argues for the teleological approach as codified in the Vienna Convention, it uses “object and purpose” as a single concept.

2 3 1 3 Does the ‘object and purpose’ require a specific fixed or general meaning?

Another concern is whether the term “object and purpose” requires a specific or general meaning. Scholars adopt different approaches to this question. Buffard and Zemanek, for example, regard the term as a specific fixed concept constituting a collection of only certain provisions of a treaty that can assist in achieving the goals of a treaty.¹⁸¹ This definition treats certain provisions as irrelevant in establishing the object and purpose of a treaty. According to this definition, not all provisions of the treaty are appropriate to establish its object and purpose. This implies that interpretive organs are limited to utilising only some provisions of a treaty to establish its object and purpose.

However, Buffard and Zemanek do not demonstrate how the interpretive organs can identify the relevant provisions and context of a treaty in order to establish its object and purpose. Regarding the object and purpose of a treaty as a fixed concept can have a negative impact in interpreting the socio-economic rights of the African Charter. Limiting

¹⁷⁶ Buffard & Zemanek (1998) *Australian Review of International and European Law* 332.

¹⁷⁷ Senden *Interpretation of Fundamental Rights* 204.

¹⁷⁸ 205.

¹⁷⁹ 205.

¹⁸⁰ U Linderfalk *On the Interpretation of Treaties: The Modern International Law as expressed in the 1969 Vienna Convention on the Law of Treaties* (2007) 209.

¹⁸¹ Buffard & Zemanek (1998) *Australian Review of International and European Law* 343.

the object and purpose to a fixed concept may confine supervisory organs to an interpretation of socio-economic rights that takes into account the circumstances at time the rights were enacted rather than the time of interpretation. The circumstances in which the socio-economic rights are interpreted change. As such, regarding object and purpose as a fixed concept limits the consideration of the context of the socio-economic rights at the time of interpretation. According to Senden, the context in which the provisions of the treaty should be interpreted change over time.¹⁸² In turn, this change of context influences the object and purpose of the treaty.¹⁸³ Treating object and purpose as a fixed concept would thus hinder the interpretation that addresses the conditions prevalent at the time of interpretation.

While Buffard and Zemanek view “object and purpose” as a fixed concept, Linderfalk, as well as Jonas and Saunders, define it in a general form. According to Linderfalk, the concept, “object and purpose” of a treaty means the reasons for the existence of the treaty.¹⁸⁴ He explains further that the object and purpose entails only the reasons that reflect the conditions intended by the parties to a treaty,¹⁸⁵ and that reveal the expectations of the parties to a treaty.¹⁸⁶ According to Linderfalk, the reasons intended by the parties are different from the ones that led to the adoption of the treaty.¹⁸⁷ He identifies the reasons that caused the adoption of a treaty as the “cause for the treaty”.¹⁸⁸ This “cause for the treaty” entails the conditions prevailing before the adoption of the treaty.¹⁸⁹ He argues that the concept, “object and purpose” under article 31(1) of the Vienna Convention does not include the “cause for a treaty”.¹⁹⁰ The ‘cause for the treaty’, as Linderfalk puts it, is covered under article 32 of the Vienna Convention.¹⁹¹

Linderfalk’s definition of the “object and purpose” is general and offers an insufficient understanding of this concept. It limits the meaning of object and purpose only to the provisions of the treaty and the subsequent practices of the parties to a treaty. The appropriate meaning of the object and purpose of a treaty should, however, allow flexibility to invoke different interpretive aids. The reliance only on the provisions of a

¹⁸² Senden *Interpretation of Fundamental Rights* 98-99.

¹⁸³ 98-99.

¹⁸⁴ Linderfalk *On the Interpretation of Treaties* 204.

¹⁸⁵ 205.

¹⁸⁶ 206.

¹⁸⁷ 206.

¹⁸⁸ 206.

¹⁸⁹ 206.

¹⁹⁰ 206-207.

¹⁹¹ 207.

treaty curtails the flexibility inherent in the concept of the object and purpose of a treaty to draw on other elements relevant to the interpretation of a treaty. These other elements include, for example, the preamble to the treaty, the concept of the “interdependence of rights”,¹⁹² and the “preparatory work” of a treaty. As Klabbers observes, the meaning of the term, “object and purpose” should accommodate different elements relevant to the interpretation of the treaty.¹⁹³

Moreover, reliance on only the treaty provisions can diminish the understanding of the object and purpose under the teleological approach. As noted above, the term, “object and purpose” under the teleological approach interprets a treaty as a whole. Discerning the meaning of the object and purpose of a treaty, focusing only on its individual provisions confines the interpretation of the treaty to a textual approach. Klabbers points out that such an approach can limit the stance of the concept the “object and purpose” of a treaty to interpret a treaty as a whole.¹⁹⁴

Linderfalk’s general definition of the “object and purpose” also does not allow scope for a conception of the “object and purpose” through an understanding of the conditions existing at the time of treaty’s, since its scope excludes the preparatory work. As discussed above, the interpretive aids under article 31(1) of the Vienna Convention, which elaborate on the object and purpose, do not replace the preparatory work.¹⁹⁵ According to Yeshanew, article 31(1) of the Vienna Convention should not be interpreted in such a way as to diminish the significance of the preparatory work in establishing the “object and purpose” of a treaty.¹⁹⁶ Instead, the preparatory work of a treaty can be regarded as a significant element of the teleological approach that can assist the interpretive organs in discovering the object and purpose of a treaty. It can be used to establish the goals meant to be achieved by the treaty and the means to do so.¹⁹⁷ Therefore, excluding the preparatory work from the scope of the “object and purpose” can render the interpretation of a treaty ineffective.

¹⁹² Scott defines interdependence of rights in two senses: “organic interdependence” and “related interdependence”. According to Scott, organic interdependence refers to a situation where “one right forms part of another right and may therefore be incorporated into that latter right”. In the related dimension, interdependence of rights means that all rights, civil and political, as well as socio-economic are equally important yet separate. C Scott “The interdependence and permeability of human rights norms: Towards a partial fusion of the International Covenants on Human Rights” (1989) 27 *Osgoode Hall Law Journal* 769 779-783.

¹⁹³ Klabbers (1997) *Finnish Year Book of International Law* 159.

¹⁹⁴ 157.

¹⁹⁵ See part 2 3 above.

¹⁹⁶ Yeshanew *The Justiciability of Economic, Social and Cultural Rights* 52.

¹⁹⁷ 52.

Similar to Linderfalk, Jonas and Saunders proffer a general definition of the object and purpose of a treaty, allowing for flexibility in its meaning. According to Jonas and Saunders, the “object and purpose” means any essential goals of a treaty that can elaborate its effective meaning.¹⁹⁸ Their definition provides scope for the interpretive organs to consider all the potential elements that can explain the goals to be achieved by the treaty.

I argue that the efficacy of treaty interpretation requires the notion, “object and purpose” of a treaty to be defined with this form of flexibility. As Klabbers highlights, the meaning of “object and purpose” should not be limited to a specific fixed meaning,¹⁹⁹ since the content of the treaties change on a regular basis.²⁰⁰ By drawing on Jonas’ and Saunders’ definition, the interpretive organs can apply various elements such as the preparatory work, preamble to the treaty, provisions of the treaty, subsequent agreements and practices of the parties to a treaty, relevant rules of international law, and the principle of effectiveness. Klabbers’ observation reveals that flexibility allows the use of different interpretive aids to achieve an effective meaning of a treaty.²⁰¹

This dissertation adopts the general and flexible definition of “object and purpose” suggested by Jonas and Saunders in the context of elaborating on an interpretive approach to the socio-economic rights in the African Charter. This definition can enable the interpretive organs of the African Charter to flexibly apply the tenets of the teleological approach analysed above to address the socio-economic conditions of African people. This stance aligns with Klabbers’ observation that the flexible meaning of “object and purpose” can help address different needs and circumstances.²⁰²

This part argued that the concept of “object and purpose”, as endorsed in the Vienna Convention, which is central to the teleological approach and best understood as a single concept. Moreover, the “object and purpose” of a treaty should be viewed as a general and flexible concept that includes all the essential goals of a treaty in order to develop its effective meaning. It should be borne in mind, however, that the Vienna Convention applies to all international law treaties with some specific rules and applications in the context of international human rights law treaties.²⁰³ The following

¹⁹⁸ Jonas & Saunders (2010) *Vanderbilt Journal of Transnational Law* 567.

¹⁹⁹ Klabbers (1997) *Finnish Year Book of International Law* 141.

²⁰⁰ C McLachlan “The principle of systemic integration and Article 31-(3)-(c) of the Vienna Convention” (2005) 54 *International and Comparative Law Quarterly* 279 282.

²⁰¹ Klabbers (1997) *Finnish Year Book of International Law* 141.

²⁰² 159.

²⁰³ M Scheinin “Characteristics of human rights norms” in *International Protection of Human Rights* 21.

part seeks to ascertain how the teleological approach endorsed in the Vienna Convention should be applied in the context of international human rights treaties, particularly the African Charter.

2 3 2 Applicability of the teleological approach in the interpretation of human rights treaties

The applicability of the teleological approach, as codified in the Vienna Convention, in the interpretation of human rights has been challenged.²⁰⁴ The challenge centres on two primary arguments. First, there is an argument that the Vienna Convention does not apply to the human rights treaties. For example, Scheinin argues that the Vienna Convention is a State-centred instrument governing only the general international law treaties hence it does not cover human rights treaties.²⁰⁵ Particularly, Yeshanew observes that it is believed the general rule of interpretation in articles 31 and 32 of the Vienna Convention applies only to the general international law treaties.²⁰⁶ This argument implies that the teleological approach covered in the Vienna Convention is not applicable to the interpretation of human rights treaties.

Second, the argument that human rights treaties have special features that require distinct approaches to interpretation - different from that enshrined in the Vienna Convention - is common in international law scholarship. For example, Craven argues that human rights treaties have a distinctive legal character which necessitates distinct approaches to interpretation different from the general rule of interpretation under the Vienna Convention.²⁰⁷

These challenges raise three major questions relevant to this dissertation. The first concerns whether human rights treaties are covered within the scope of treaties contemplated by the interpretation articles of the Vienna Convention. The second question considered in this part is whether human rights treaties possess special features distinct from general international law treaties. Third, if human rights treaties do have special features, whether such features disqualify the application of the teleological approach as found in the Vienna Convention. It is important to address these issues in order to ascertain the legitimacy of the teleological approach in the interpretation of the

²⁰⁴ M Craven "Legal differentiation and the concept of the human rights treaty in international law" (200) 11 *European Journal of International Law* 489 491.

²⁰⁵ Scheinin "Characteristics of human rights norms" in *International Protection of Human Rights* 21.

²⁰⁶ Yeshanew *The Justiciability of Economic, Social and Cultural Rights* 43.

²⁰⁷ Craven (2000) *European Journal of International Law* 491.

socio-economic rights in the African Charter. In the next part, I discuss the applicability of the Vienna Convention to the interpretation of human rights treaties.

2 3 2 1 Are human rights treaties covered by the Vienna Convention?

In order to ascertain whether the human rights treaties are covered by the Vienna Convention, it is important to analyse the scope of the Vienna Convention and the meaning of a treaty as stated in the Vienna Convention. Article 1 of the Vienna Convention outlines the scope of the Vienna Convention by stating that the Vienna Convention is applicable to “treaties between parties”.

The provisions of article 1 of the Vienna Convention imply that the Vienna Convention governs all treaties concluded between States, including human rights treaties. According to McLachlan, the treaties that govern relations between States form part of the general international law in that, regardless of their subject matter, these treaties are limited within the scope of the Vienna Convention.²⁰⁸ In a similar vein, the ILC pinpoints that there is no treaty between States that is excluded from the scope of the Vienna Convention.²⁰⁹ In order to understand the scope of the Vienna Convention, the provisions of article 1 should be read in conjunction with articles 2(1)(a), and 42 of the Vienna Convention. While article 2(1)(a) defines the term, “treaty”, article 42 elaborates the extent to which the Vienna Convention cover treaties. As was emphasised by the ILC, the provisions of articles 1 and 2(1)(a) of the Vienna Conventions should be read together, and that all other provisions of the Vienna Convention, including article 42, elaborate the treaties concluded between States.²¹⁰ Article 2(1)(a) of the Vienna Convention defines the term, “treaty”. This article reads:

“treaty means an international agreement concluded between States in written form and governed by international law, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation.”

These provisions define the term, “treaty” in a general form. They simply define a treaty as an international agreement in a written form concluded between contracting States and governed by international law. The provisions do not distinguish categories of treaties by reference to their specific subject matter.²¹¹ Koskeniemi argues that

²⁰⁸ McLachlan (2005) *International and Comparative Law Quarterly* 279 280.

²⁰⁹ ILC Fragmentation Report para 193.

²¹⁰ ILC (1966) *Yearbook of the International Law Commission* 187 para 1.

²¹¹ Craven (2000) *European Journal of International Law* 494.

particular terms such as human rights are merely labels which express forms of professional specialisation.²¹²

Article 42(1) of the Vienna Convention reads:

“The validity of a treaty or of the consent of a State to be bound by a treaty may be impeached only through the application of the present Convention.”

According to the ILC, article 42 of the Vienna Convention covers important aspects of all treaties including the human rights treaties.²¹³ These aspects include the principles that govern the validity of the treaties, including their establishment.²¹⁴ The Vienna Convention also influences the interpretation of the treaties, in that it provides the interpretive guidance through articles 31 and 32.²¹⁵ The ILC emphasises that the provisions of articles 31 and 32 of the Vienna Convention enshrine the interpretive guidance for all treaties including human rights treaties.²¹⁶ Given that the provisions of articles 31 and 32 of the Vienna Convention do not categorically distinguish treaties on the basis of their subject matter, it can be convincingly argued that the Vienna Convention also applies to human rights treaties.²¹⁷ Since there is no established theoretical foundation which distinguishes human rights treaties from the umbrella of other general treaties,²¹⁸ we can conclude that human rights treaties are accommodated within the definition of a treaty as articulated by the Vienna Convention.²¹⁹

Writing on treaty bodies and their mandate to interpret human rights instruments, Mechlem rightly argues that the interpretive organs are bound to apply the general rule of interpretation under the Vienna Convention.²²⁰ Similarly, Killander argues that the Vienna Convention’s general rule of interpretation applies to human rights treaties in the same manner it applies to customary international law treaties.²²¹ Yeshanew also argues that the Vienna Convention’s general rule of interpretation is not exclusive to general international law treaties, but also applies to human rights treaties.²²²

²¹² ILC Fragmentation Report para 254.

²¹³ Para 194 (1).

²¹⁴ Para 194 (1).

²¹⁵ Para 194 (2) (a)-(b).

²¹⁶ Para 427.

²¹⁷ Rietiker (2010) *Nordic Journal of International Law* 245 247-248.

²¹⁸ Fitzmaurice “Interpretation of human rights treaties” in *International Human Rights Law* 742.

²¹⁹ 739.

²²⁰ Mechlem (2009) *Vanderbilt Journal of International Law* 909.

²²¹ Killander (2010) *International Journal on Human Rights* 145.

²²² Yeshanew *The Justiciability of Economic, Social and Cultural Rights* 43.

These scholarly observations are significant for applying the teleological approach to the interpretation of human rights treaties. These observations imply that the teleological approach enshrined in the interpretive provisions of the Vienna Convention is applicable to human rights treaties. Senden confirms the viability of the teleological approach in articles 31 and 32 of the Vienna Convention in the interpretation of human rights treaties.²²³ Based on the foregoing observations, I maintain that the teleological approach, as enshrined in the Vienna Convention, applies to human rights treaties including the African Charter. This understanding is significant to the interpretation of the socio-economic rights in the African Charter as it allows the interpretive organs to apply the teleological approach formulated in the Vienna Convention.

However, human rights treaties are said to possess certain special features which exclude some rules of international law such as the general rule of interpretation.²²⁴ For example, in the case of *Belilos v Switzerland* ('*Belilos*')²²⁵ the ECHR had to decide on the declaration made by Switzerland that the application of article 6(1) of the European Convention is incompatible with the general international law obligations assumed by Switzerland.²²⁶ The ECHR held Switzerland to be bound by the obligations under the European Convention rather than the obligations under the general international law.²²⁷ The ECHR thus held this declaration by Switzerland to be incompatible with the object and purpose of the European Convention.²²⁸

In a similar vein, in the case of *Loizidou v Turkey* ('*Loizidou*')²²⁹ the ECHR stated that a difference exists between the treaties governing the international court and those governing the ECHR.²³⁰ According to the ECHR the difference between these treaties concerns the subject matter addressed by these treaties.²³¹ The ECHR stated that the complaint before any International Court may fall within the scope of any general international law, but the subject matter of the complaint before the ECHR is exclusively within the scope of the European Convention.²³² It thus held that such a difference in the subject matter between the treaties of the International Court and ECHR allows the

²²³ Senden *Interpretation of Fundamental Rights* 392.

²²⁴ Craven (2000) *European Journal of International Law* 491.

²²⁵ *Belilos v Switzerland* (1988) Series A No. 132.

²²⁶ Para 38.

²²⁷ Para 60.

²²⁸ Para 60.

²²⁹ *Loizidou v Turkey* (1995) Series A No. 310.

²³⁰ Paras 83-85.

²³¹ Paras 83-85.

²³² Paras 83-85.

ECHR to distinguish the European Convention from the general international law.²³³ Based on this distinction the interpretive organs, such as the ECHR and the Inter-American Court of Human Rights ('IACtHR') have been applying different approaches to treaty interpretation.²³⁴ The approaches include: the autonomous and the evolutive interpretations, and the principle of effectiveness.²³⁵ While the principle of effectiveness and the evolutive interpretation have been discussed above,²³⁶ this part briefly elaborates the autonomous interpretation.

The aim of the autonomous interpretation is to achieve the uniform understanding of the treaty applicable to all parties, rather than the meaning accepted by individual States at the domestic level.²³⁷ The autonomous interpretation is significant in that it helps parties to have a common understanding of the provisions of the treaty.²³⁸ Particularly in relation to human rights treaties, the common understanding gained from the autonomous interpretation ensures the effective protection of the rights contained in these treaties.²³⁹ In order to establish the common meaning of the treaty among the parties an inquiry as to the object and purpose of the treaty is required. In the case of *Engel v the Netherlands* ('*Engel*')²⁴⁰ the ECHR held that although the parties have the discretion to interpret the treaty in accordance with their domestic laws, this discretion should be compatible with the object and purpose of the treaty.²⁴¹ This argument, that human rights treaties are immune to the general rule of interpretation, directly affects the application of the teleological approach to the interpretation of human rights treaties. Therefore, an examination that ascertains the applicability of the teleological approach to human rights treaties is required. I turn to this examination in the following part.

2 3 2 2 Do human rights treaties have distinctive features from other international law treaties?

While the preceding part has established that the Vienna Convention defines a treaty in wide terms to cover the human rights treaties it has been argued that the Vienna

²³³ Paras 83-85.

²³⁴ F Vanneste *General International Law before Human Rights Courts: Assessing the Specialty Claims of International Human Rights Law* (2010) 227-334.

²³⁵ 227.

²³⁶ See part 2 2 3 above.

²³⁷ Vanneste *General International Law* 229.

²³⁸ Senden *Interpretation of Fundamental Rights* 86.

²³⁹ 87.

²⁴⁰ *Engel v the Netherlands* (1976) Series A No. 22.

²⁴¹ Para 81.

Convention does not address the peculiarities of these treaties. For example, Rietiker in his work on the principle of effectiveness argues that, with the exception of article 60(5),²⁴² the Vienna Convention does not consider the specificities of the human rights treaties.²⁴³ According to the provisions of article 60 (5) of the Vienna Convention the parties to the “treaties of a humanitarian character” that enumerate “provisions relating to the protection of the human person” are prohibited from suspending or terminating the enforcement of these treaties in their jurisdictions as a result of the breach of the treaty by one of the parties. As Schutter rightly notes, the prohibition in article 60(5) is necessary since in human rights treaties it is the individuals who are the beneficiaries of rights rather than the parties.²⁴⁴ Craven observes that the article is significant in the sense that parties to a human rights treaty are required to ensure the protection of the individuals’ human rights at all times.²⁴⁵ In this part, I argue that the human rights treaties have special features distinct from other international law treaties. Understanding of the special features of the human rights treaties is significant to this dissertation, as they influence the approach to interpretation which the interpretive organs should apply. As Fitzmaurice rightly notes, the special nature of human rights determines how these treaties should be interpreted.²⁴⁶

The major factor in which the special legal character of human rights treaties can be demonstrated is their non-reciprocal nature. This means, each party to a human rights treaty should perform its obligations irrespective of what other parties to a treaty may be doing. In this regard, Fitzmaurice observes that the nature of human rights treaties centres on the absolute performance of States’ obligations, independent of the performance by other contracting States.²⁴⁷ According to Fitzmaurice, non-reciprocity is the most significant legal character which differentiates human rights treaties from other international law treaties.²⁴⁸ It is worth noting that the general international law treaties

²⁴² Art 60(5) of the Vienna Convention reads as follows:

“Paragraphs 1 to 3 do not apply to provisions relating to the protection of the human person contained in treaties of a humanitarian character, in particular to provisions prohibiting and form of reprisal against persons protected by such treaties.”

²⁴³ Rietiker (2010) *Nordic Journal of International Law* 247.

²⁴⁴ O De Schutter “The status of human rights in international law” in *International Protection of Human Rights* 39 54.

²⁴⁵ Craven (2000) *European Journal of International Law* 491.

²⁴⁶ Fitzmaurice “Interpretation of human rights treaties” in *International Human Rights Law* 759.

²⁴⁷ Second Report on the Law of Treaties by GG Fitzmaurice, Special Rapporteur YBILC vol. II (1957) A/CN.4/107 paras 124-126.

²⁴⁸ Fitzmaurice “Interpretation of human rights treaties” in *International Human Rights Law* 743-744.

embrace the reciprocal nature of treaties by maintaining mutual obligations and entitlements among contracting States.²⁴⁹

The non-reciprocal character of human rights treaties explained above is expressed through States' paramount obligation to protect the human rights of individuals.²⁵⁰ Unlike the general international law treaties which safeguard the interests of the States, the object and purpose of human rights treaties is to protect the rights of individuals within the jurisdiction of States. Schutter argues that the non-reciprocity of human rights is objective in nature, in that the parties are placed with the obligations to protect the rights of the individuals.²⁵¹ While rendering its advisory opinion on *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide Convention* ('*Reservations to the Genocide Convention*'),²⁵² the ICJ noted that, in human rights treaties such as the Genocide Convention, States do not have their own interests, but rather have the duty to fulfil the object and purpose embodied in such treaties which is the protection of human rights.²⁵³ In the same vein, the United Nations Human Rights Committee ('Human Rights Committee')²⁵⁴ in its General Comment 24²⁵⁵ noted that the human rights treaties are not concerned with the exchange of mutual obligations among contracting States, but rather with the endowment of individuals with rights.²⁵⁶

²⁴⁹ Scheinin "Characteristics of human rights norms" in *International protection of human rights* 19.

²⁵⁰ 19.

²⁵¹ De Schutter "The status of human rights" in *International protection of human rights* 53.

²⁵² *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide*, Advisory Opinion of 28 May 1951.

²⁵³ Page 12. The ICJ stated that:

"The Convention was manifestly adopted for a purely humanitarian and civilising purpose. It is indeed difficult to imagine a Convention that might have this dual character to a greater degree, since its object on the one hand is to safeguard the very existence of certain human groups and on the other hand to confirm and endorse the most elementary principles of morality. In such Convention the contracting States do not have any interests of their own; they merely have, one and all, a common interest, namely, the accomplishment of those high purposes which are the *raison d'être* of the Convention. Consequently, in a Convention of this type one cannot speak of individual advantages or disadvantages to States, or of the maintenance of a perfect contractual balance between rights and duties. The high ideals which inspired the Convention provide, by virtue of the common will of the parties, the foundation and measure of all its provisions."

²⁵⁴ United Nations Human Rights Committee is a supervisory body comprising of independent experts with a mandate to monitor the implementation of the International Covenant on Civil and Political Rights by its Member States. (<http://www.ohchr.org/EN/HRBodies/CCPR/Pages/CCPRIntro.aspx>) (accessed 29-03-2017).

²⁵⁵ United Nations Human Rights Committee, General Comment 24 General Comment on issues relating to reservation made upon ratification or accession to the Covenant or Optional Protocol thereto, or in relation to declarations under article 41 of the Covenant (1994) UN Doc. CCPR/C/21/Rev.1/Add.6.

²⁵⁶ Para 17. See also *Mapiripan Massacre v Colombia (Merits, Reparations and Costs)* Judgment of September 15, 2005 Series C No. 134 para 104.

Thus the non-reciprocal character of human rights treaties vests States with obligations towards third-party beneficiaries.²⁵⁷ Through this special feature, the approach applied to interpret human rights treaties should ensure the effective safeguarding of the individuals' human rights.²⁵⁸ As the European Court noted in the case of *Rantsev v Cyprus and Russia* ('*Rantsev*'),²⁵⁹ the object and purpose of the European Convention requires its provisions to be construed in a manner that renders the protection envisaged therein practical and effective.²⁶⁰ Based on this perspective, Schutter notes that the non-reciprocal nature of human rights treaties requires the interpretive organs to interpret the human rights in an effective and practical manner.²⁶¹

In this part, I have established that human rights treaties possess peculiar features distinct from other international treaties. In the following part I consider whether these distinctive features require a departure from the teleological approach to treaty interpretation and whether other more appropriate interpretive approaches exist in respect of human rights treaties.

2 3 2 3 Does the special nature of human rights treaties necessitate a departure from the teleological approach?

Although it has been argued that special legal characteristics determine the manner in which human rights treaties should be interpreted,²⁶² this does not necessarily mean that their interpretation should depart from the general rule of interpretation under articles 31 and 32 of the Vienna Convention.²⁶³ As noted above,²⁶⁴ articles 31 and 32 of the Vienna Convention embrace the teleological approach to interpretation. In this part, I argue that since the special legal character of the human rights treaties lies in their underlying object and purpose, the teleological approach that interprets a treaty in the light of its object and purpose becomes the most viable approach to be applied. As Fitzmaurice rightly notes, the special legal character of human rights treaties leads the

²⁵⁷ Scheinin "Characteristics of human rights norms" in *International Protection of Human Rights* 19.

²⁵⁸ Mechlem (2009) *Vanderbilt Journal of Transnational Law* 912.

²⁵⁹ *Rantsev v Cyprus and Russia* App no 25965/04 (ECHR, 10 May 2010).

²⁶⁰ Para 275.

²⁶¹ De Schutter "The status of human rights" in *International Protection of Human Rights* 54-55.

²⁶² Fitzmaurice "Interpretation of human rights treaties" in *International Human Rights Law* 742.

²⁶³ Killander (2010) *International Journal on Human Rights* 146.

²⁶⁴ See part 2 3 above.

interpretive organs to apply the teleological approach of interpretation found in article 31 of the Vienna Convention.²⁶⁵

In particular, the specificity of human rights treaties requires them to be interpreted in a way that effectively protects the human rights of individuals.²⁶⁶ It was observed by the ILC in its commentaries on the draft articles of the Law of Treaties that the principle of effectiveness explained above,²⁶⁷ is embodied in the phrase “object and purpose of the treaty”.²⁶⁸ The inclusion of the principle of effectiveness in the object and purpose of the treaty renders it part of the teleological approach. Senden confirms the principle of effectiveness to be an aspect of the teleological approach.²⁶⁹ Since this principle of effectiveness is embraced in the teleological aspect of object and purpose found in the Vienna Convention, the teleological approach becomes appropriate for the interpretation of human rights treaties. Scheinin confirms the relevance of the teleological approach enshrined in the Vienna Convention in interpreting the human rights treaties.²⁷⁰

In the same vein, Fitzmaurice emphasises that the teleological aspect embodied in the provisions of article 31(1) is the most appropriate approach for the interpretation of the human rights treaties.²⁷¹ Its appropriateness centres on the fact that recourse to the object and purpose of these treaties enables the interpretive organs to ascertain the content and scope of the relevant provisions protecting human rights.²⁷² Through the principle of effectiveness the interpretive organs can render the content and scope of the individuals’ rights practical and effective. This objective interpretation is significant in two respects. Firstly, it guarantees the importance of the individuals’ rights.²⁷³ Secondly, it interprets the treaty as a living instrument.²⁷⁴

Moreover, the provisions of article 31(1) requiring a treaty to be interpreted in the light of its object and purpose are flexible in that they accommodate the application of

²⁶⁵ Fitzmaurice “Interpretation of human rights treaties” in *International Human Rights Law* 760.

²⁶⁶ Craven *The International Covenant on Economic, Social and Cultural Rights* 3.

²⁶⁷ See part 2 2 3 above.

²⁶⁸ ILC (1966) *Yearbook of the International Law Commission* 218-219. The ILC commented that:

‘The Commission however took the view that, in so far as the maxim *ut res magis valeat quam pereat* reflects a true general rule of interpretation, it is embodied in article 27, paragraph 1, which requires that a treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to its terms in the context of the treaty in the light of its object and purpose. When a treaty is open to two interpretations one of which does and the other does not enable the treaty to have appropriate effects, good faith and the object and purpose of the treaty demand that the former interpretation should be adopted.’

²⁶⁹ Senden *Interpretation of Fundamental Rights* 84-85.

²⁷⁰ Scheinin “Characteristics of human rights norms” in *International Protection of Human Rights* 21.

²⁷¹ Fitzmaurice “Interpretation of human rights treaties” in *International Human Rights Law* 751.

²⁷² Orakhelashvili (2003) *European Journal of International Law* 532.

²⁷³ Senden *Interpretation of Fundamental Rights* 73.

²⁷⁴ 73.

objective criteria of interpretation. This flexibility is compatible with the specificity underlying various human rights treaties.²⁷⁵ The objective criteria of interpretation allow the interpretive organs to take into account the real needs of the individuals at the time of the interpretation of the treaty.²⁷⁶ Thus, the interpretation creates space for the interpretive organs to ascertain the object and purpose of the treaty in relation to the rights being interpreted based on the conditions prevalent at the time of interpretation rather than the conditions at the time of the treaty's adoption.²⁷⁷ In this regard, the objective criteria of interpretation allow the interpretation of a treaty as a living instrument. Writing on the European Convention, Dzehtsiarou confirms that this aspect of the objective criteria of interpretation provides the interpretive organs with flexibility to consider the socio-economic circumstances relevant to the interpretation of the individual's rights.²⁷⁸ While this part has demonstrated that the peculiarity of human rights treaties does not discard the application of the teleological approach to interpretation but rather embraces it, the following part analyses the criticisms levelled against this approach.

2 3 3 Criticisms of the teleological approach

2 3 3 1 Does the teleological approach ignore the text and intention of the parties?

Critics of the teleological approach contend that it ignores the text and intention of the parties to a treaty. Fitzmaurice, for instance, contends that in its extreme form, the teleological approach fails to properly regard the intentions of the parties in two respects. On the one hand, the teleological approach interprets a treaty by focusing only on the known or presumed object and purpose of the treaty or the subsequent conduct of the parties.²⁷⁹ On the other hand, it interprets the treaty by considering the emergent purpose²⁸⁰ and overrides the purpose that was intended by the parties at the time of the

²⁷⁵ Orakhelashvili (2003) *European Journal of International Law* 533-534.

²⁷⁶ Senden *Interpretation of Fundamental Rights* 102.

²⁷⁷ 102.

²⁷⁸ K Dzehtsiarou "European consensus and the evolutive interpretation of the European Convention on Human Rights" (2011) 12 *German Law Journal* 1730 1731.

²⁷⁹ Fitzmaurice (1951) *British Year Book of International Law* 4.

²⁸⁰ Fitzmaurice (1951) *British Year Book of International Law* 8. See also Fitzmaurice (1957) *British Year Book of International Law* 208. Fitzmaurice defines emergent purpose to mean an emerging or true purpose different from the original purpose intended by the parties to a treaty. According to Fitzmaurice, with emergent purpose a treaty is interpreted in the light of the purpose of the treaty at the time of interpretation as opposed to the purpose at the time of the adoption of the treaty. Based on the analysis of

adoption of the treaty.²⁸¹ According to Fitzmaurice, the emergent purpose is the aim of the treaty that appears to exist at the time of interpretation.²⁸² Jacobs takes it a step further and argues that, in general, the teleological approach seeks the object and purpose of the treaty without considering both the text itself and the original intention of the parties to a treaty.²⁸³ He argues that since the emergent purpose appears at the time of interpretation it is not identified either from the text or the original intention of the parties.²⁸⁴

It should be noted that the teleological approach interprets a treaty in the light of its object and purpose. As discussed above, the object and purpose can be discovered by having recourse to a wide range of key elements such as the preamble, preparatory work, subsequent practices and subsequent agreements of the States parties, as well as the relevant rules of international law. Reference to textual elements such as the preamble, as analysed in part 2 2 3 as well as the construction of the text of the treaty as a whole, which the teleological approach requires, does not represent a neglect of the text of the treaty. The teleological approach aims at interpreting the preamble and the text in a coherent, integrated manner and in so doing engages with the text appropriately. Thus, instead of ignoring the text, the teleological approach gives the text the intended effective meaning by interpreting it in the light of object and purpose of the treaty as it appears in various provisions thereof. Moreover, the teleological approach, through requiring proper regard of the preparatory work of the treaty, accords due consideration to the intention of the parties to a treaty. It should be noted that the teleological approach applies preparatory work with the aim of identifying the apparent object and purpose of the treaty intended by the parties.²⁸⁵ Since the preparatory work reveals the object and purpose of the treaty as intended by the parties, the teleological interpretation using the preparatory work values the intentions of the parties.

Furthermore, while Fitzmaurice and Jacobs treat the emergent purpose as a purpose which is not found within the text or intention of the parties, it is worth noting that the object and purpose of the treaty can be established through the subsequent practice and

the temporal dimension of the principle of effectiveness enshrined in the teleological approach, this study considers emergent purpose as elaborated by Fitzmaurice to fall within the temporal dimension meaning.

²⁸¹ Fitzmaurice (1951) *British Year Book of International Law* 8. See also Fitzmaurice (1957) *British Year Book of International Law* 208.

²⁸² Fitzmaurice (1951) *British Year Book of International Law* 8. See also Fitzmaurice (1957) *British Year Book of International Law* 208.

²⁸³ Jacobs (1969) *International and Comparative Law Quarterly* 336.

²⁸⁴ 320.

²⁸⁵ Fitzmaurice (1957) *British Year Book of International Law* 209.

agreement of the parties and the relevant rules of international law. These are significant elements for ensuring effective interpretation since the principle of effectiveness embodied within the teleological approach requires the treaty to be interpreted as a living document. In this way, the interpretive organs are able to address the actual circumstances and needs of the people at the time of interpretation of the treaty. Thus, the interpretive organs can apply these elements to identify the object and purpose of the treaty at the time of interpretation rather than confining their focus to the object and purpose existing at the adoption of the treaty.

As Rietiker highlights, interpretation in the light of the object and purpose of the treaty is flexible in that it avails the interpretive organs with wide options to adopt different elements of interpretation.²⁸⁶ According to this understanding, the emergent purpose does not necessarily mean the identification of purposes beyond the scope of the text, but rather ascertaining the object and purpose of the text by reference to subsequent external sources relevant to the treaty.

2 3 3 2 Does the teleological approach cause interpretive organs to usurp States Parties' drafting mandate?

It has been contended that by applying the teleological approach, the interpretive organs usurp the drafting powers of the parties to a treaty.²⁸⁷ For instance, Fitzmaurice argues that by reading into the treaty provisions that are not expressly included therein or expanding the scope and content of the texts and making corrections to the texts, the teleological approach usurps the powers of the parties to amend and make laws.²⁸⁸ In order to ensure that the interpretive organs do not encroach upon the parties' drafting powers, Fitzmaurice argues for a restrictive application of the teleological approach.²⁸⁹ According to him, if the teleological approach is restrained, it demonstrates the principle of effectiveness efficiently.²⁹⁰ In this part, I argue that Fitzmaurice's suggestion can endanger the interpretation of the provisions of the treaties, particularly the socio-economic rights provisions in the African Charter. This is because it does not take into consideration the significant sources that are crucial for the improvement of socio-

²⁸⁶ Rietiker (2010) *Nordic Journal of International Law* 255.

²⁸⁷ Fitzmaurice (1951) *British Year Book of International Law* 2 and 8.

²⁸⁸ Fitzmaurice (1951) *British Year Book of International Law* 8. See also Fitzmaurice (1957) *British Year Book of International Law* 208.

²⁸⁹ Fitzmaurice (1951) *British Year Book of International Law* 8.

²⁹⁰ 8.

economic conditions of the African people. In this way, the interpretive organs can limit a generous construction of the object and purpose of the African Charter.

It is also necessary to point out that the thrust of the principle of effectiveness enshrined in the teleological approach is to ensure that the text of a treaty is interpreted in a way that guarantees the effective meaning of such particular text. The legal basis of the principle of effectiveness is found within the object and purpose of the treaty itself. In this regard, a restrictive interpretation of the individuals' rights in a manner that favours the interests of the States is contrary to this principle of effectiveness. Particularly to the human rights treaties, as was discussed above,²⁹¹ the interpretation that restricts the rights defeats the object and purpose which is to promote and protect human rights. As observed by Rietiker, the adoption of a restrictive interpretation of the individuals' rights curtails the enjoyment of human rights and freedoms.²⁹² For this reason a restrictive interpretation of the scope of human rights provisions is not an effective interpretive aid.²⁹³ The requirement (in the principle of effectiveness) that a treaty is a living instrument demands that it be interpreted in the light of the conditions prevalent at the time of interpretation. In this regard, the teleological approach does not result in the interpretive organs usurping the drafting powers of the parties but rather enables them, (through the principle of effectiveness) to give the treaty a meaning which is consistent with the text interpreted in the light of contemporary circumstances. As Viljoen rightly notes, as living instruments, treaties should be interpreted continuously in the light of the contemporary conditions prevalent in the society.²⁹⁴ In this regard, the interpretive organs are required to interpret the rights of individuals in the light of present socio-economic conditions.²⁹⁵ This aspect of the teleological approach enables the interpretive organs to render the rights of individuals practical and effective in a manner that responds to the individuals' socio-economic changes.²⁹⁶ In addition, Vanneste argues that interpreting a treaty as a living instrument, requires an interpretation that ensures the improvement of individuals' socio-economic conditions.²⁹⁷ Thus, the teleological approach enables the interpretive organs to perform their significant role of effectively assigning meaning to a treaty without usurping the drafting powers of the parties.

²⁹¹ See part 2 3 2 2 above.

²⁹² Rietiker (2010) *Nordic Journal of International Law* 259.

²⁹³ Orakhelashvili (2003) *European Journal of International Law* 530.

²⁹⁴ Viljoen *International Human Rights Law in Africa* 2 ed (2012) 308.

²⁹⁵ Vanneste *General International Law* 243.

²⁹⁶ Dzehtsiarou (2011) *German Law Journal* 1732.

²⁹⁷ Vanneste *General International Law* 255.

This part has assessed various criticisms against the teleological approach. The following part examines why the teleological approach is a particularly appropriate approach for the interpretation of the rights enshrined in the African Charter including the socio-economic rights.

2 4 Appropriateness of the teleological approach for interpreting rights in the African Charter

The African Charter is a law-making instrument in the sense that it focuses on achieving a common goal. According to Senden, the main goal of any law-making treaty of a human rights nature is to protect the individual's rights.²⁹⁸ The parties' object and purpose to protect individuals' rights is non-reciprocal in that they undertake to safeguard the rights of the individuals rather than their own interests. This law-making aspect to protect human rights, both at individual and collective level, is also the core objective of the African Charter. The Preamble to the African Charter confirms the parties' obligation to promote and protect human and peoples' rights.²⁹⁹ The object and purpose to protect individual's rights requires that interpretation of the relevant provisions of the African Charter promotes this common goal. As Senden rightly notes, in the law-making treaties consideration of the object and purpose of the treaty is significant in establishing the meaning and scope of the provisions to be interpreted.³⁰⁰ In this regard, the interpretive organs are required to accord a generous interpretation of the relevant rights in a manner that gives proper effect to parties' obligations rather than given them a narrow or restrictive interpretation. In the case of *Wemhoff v Germany* ('*Wemhoff*')³⁰¹ the ECHR, with regard to article 5 of the European Convention on the right to liberty and security of person, held that:

“Given that it is a law-making treaty, it is also necessary to seek the interpretation that is most appropriate in order to realise the aim and achieve the object of the treaty, not that which would restrict to the greatest possible degree the obligations undertaken by the Parties.”³⁰²

Writing in the context of the European Convention, Rietiker confirms the suitability of the teleological approach in interpreting a law-making treaty of a human rights

²⁹⁸ Senden *Interpretation of Fundamental Rights* 16.

²⁹⁹ The preamble to the African Charter para 11.

³⁰⁰ Senden *Interpretation of Fundamental Rights* 16.

³⁰¹ *Wemhoff v Germany* (1968) Series A No. 7.

³⁰² Para 8. See also *Soering v The United Kingdom* (1989), Series A No. 161 para 87.

character.³⁰³ As was elaborated above,³⁰⁴ the teleological approach that focuses on realising the object and purpose of the treaty becomes an appropriate approach for interpreting the rights enshrined in the African Charter including the socio-economic rights.

As was analysed above,³⁰⁵ through the object and purpose of the treaty the teleological approach interprets a treaty as a whole. It takes into account the preamble to the treaty as well as the systematic construction of the treaty in its entirety.³⁰⁶ This aspect of interpretation is appropriate in that the construction of the socio-economic rights can be done on the basis of various clauses of the preamble and the other provisions of the African Charter.

The African Charter contains various statements in its preamble, as well as certain substantive provisions that can be used as interpretive guidelines. The statements in the preamble that enshrine the interpretive insight include: the parties' commitment to uphold the values of freedom, equality, justice, and dignity,³⁰⁷ the principle of interdependence of rights,³⁰⁸ the notion of African philosophy, the concept of the rights of "peoples", and the performance of duties on the part of everyone.³⁰⁹ The significance of these interpretive elements in the context of interpreting socio-economic rights will be discussed in chapter three of this study. The substantive provisions of the African Charter that provide an interpretive guide include: the operative provisions,³¹⁰ the provisions that strengthen the values stated in the preamble to the African Charter,³¹¹ and the duties provisions.³¹² Other provisions include articles 3, 4 and 5, as well as articles 60 and 61 ('drawing inspiration clauses') of the African Charter. Articles 60 and 61 create space for the interpretive organs to draw inspiration from other relevant laws in interpreting the provisions of the African Charter.

The provisions of human rights treaties are formulated in general terms making it difficult for the interpretive organs to ascertain their scope and content through the

³⁰³ Rietiker (2010) *Nordic Journal of International Law* 255.

³⁰⁴ See part 2 2 3 above.

³⁰⁵ See parts 2 2 3 and 2 3 above.

³⁰⁶ Senden *Interpretation of Fundamental Rights* 57.

³⁰⁷ Preamble to the African Charter para 3.

³⁰⁸ Para 8.

³⁰⁹ Para 7.

³¹⁰ Arts 1-2 of the African Charter.

³¹¹ Arts 3-5.

³¹² Arts 27-29.

textual approach.³¹³ The African Charter is not immune from this general characteristic of the human rights treaties. As will be discussed in chapter three of this study, the African Charter formulates the socio-economic rights in a broad manner. The report of the Rapporteur to the Ministerial Meeting of the Organisation of the African Unity ('Rapporteur's OAU report')³¹⁴ confirms the general nature of the socio-economic rights provisions.³¹⁵ According to the Rapporteur, the human rights provisions were formulated in general terms in order to allow the interpretive organs the flexibility to interpret them by an appropriate approach to interpretation. Regarding the general formulation of the socio-economic rights' provisions in the African Charter, Ssenyonjo suggests that an interpretive approach that takes into account the object and purpose of the treaty is required in the interpretation of these rights.³¹⁶ As elaborated above,³¹⁷ recourse exclusively to the intention of the parties or a narrow textual approach to treaty interpretation is incapable of assigning adequate meaning to the broadly formulated rights provisions.

In *Wemhoff* the ECHR, while deciding on the meaning of article 5(3) of the European Convention, held that the application of the textual approach would lead to an interpretation which was contrary to the object and purpose of the European Convention.³¹⁸ Given the nature of the broad formulation of the rights' provisions in the African Charter, the teleological approach which utilises various interpretive elements and principles is required to ascertain their adequate meaning. Vanneste confirms the relevance of the teleological approach in ascertaining the scope and content of the broadly formulated provisions.³¹⁹ Although the text of the treaty is relevant in the interpretation of human rights provisions, based on their general nature, an approach to treaty interpretation that constructs the meaning of these rights through a number of interpretive tools is required.³²⁰

As will be discussed in chapter three of this dissertation, the African Charter omits a significant number of the socio-economic rights as well as the remedies provisions. As

³¹³ Killander (2010) *International Journal on Human Rights* 146.

³¹⁴ Report of the Rapporteur, OAU Ministerial Meeting on the Draft African Charter on Human and Peoples' Rights, Banjul Gambia, 9-15 June 1980, OAU Doc. CAB/LEG/67/3/Draft RPT.rpt (II).

³¹⁵ Para 13.

³¹⁶ M Ssenyonjo "Economic, social and cultural rights in the African Charter" in M Ssenyonjo (ed) *The African Regional Human Rights System: 30 Years after the African Charter on Human and Peoples' Rights* (2012) 55-59.

³¹⁷ See parts 2.2.1 and 2.2.2 above.

³¹⁸ *Wemhoff* paras 4-5.

³¹⁹ Vanneste *General International Law* 253.

³²⁰ Senden *Interpretation of Fundamental Rights* 52.

was discussed above,³²¹ the intention of the parties and the textual approaches are limited methods to derive rights not expressly included in the treaty. In this regard, an interpretive approach that interprets the provisions of the treaty as a whole is required. The teleological approach engages the provisions of the entire treaty to ascertain the meaning of the interpreted text.³²² As such, the teleological approach allows the interpretive organs to apply the provisions of articles 60 and 61 of the African Charter to read in it the omitted provisions. These articles create space for interpretive organs to draw inspiration from other relevant laws in interpreting the provisions of the African Charter. Interpreting the treaty in the light of other relevant instruments is an aspect of the teleological approach. Thus, this aspect of the teleological approach allows the interpretive organs to read in the African Charter the omitted socio-economic rights as well as the remedies provisions. As Yeshanew notes, the provisions of articles 60 and 61 serve as an interpretive guide of the African Charter.³²³ Chapter three of this dissertation will discuss these provisions.

Having analysed the appropriateness of the teleological approach in interpreting the socio-economic rights in the African Charter, the following part suggests a methodology for the teleological approach to be followed by interpretive organs in interpreting these rights.

2 5 Applying the teleological approach to the interpretation of the African Charter: Methodology

2 5 1 Introduction

The foregoing analysis elaborated the teleological approach to interpretation. In particular, the analysis identified the elements of the teleological approach and the appropriateness of this approach in the interpretative process. This analysis is significant in two respects. Firstly, it elaborates the meaning of the teleological approach and its elements that should be taken into account in the interpretative process. Secondly, it identifies the appropriateness of the teleological approach in the interpretation of the human rights treaties. However, Senden notes the non-existence of a systematic methodology for the application of the teleological approach.³²⁴ Accordingly, a

³²¹ See parts 2 2 1 and 2 2 2 above.

³²² See part 2 2 3 above.

³²³ Yeshanew *The Justiciability of Economic, Social and Cultural Rights* 54.

³²⁴ Senden *Interpretation of Fundamental Rights* 213.

methodology for the application of the teleological approach to be followed by the interpretive organs is required. Thus, this part develops the methodological approach to be applied by the interpretive organs when interpreting the socio-economic rights in the African Charter. The methodology is significant in two ways. Firstly, it can guide the interpretive organs to apply the teleological approach appropriately. Secondly, it can help the interpretive organs to justify their decisions. As Tobin rightly observes, the appropriate application of the interpretive approach renders the interpretative process legitimate.³²⁵ As analysed in the foregoing parts, the teleological approach is enshrined in the interpretive provisions of articles 31 and 32 of the Vienna Convention. Although these provisions do not establish the methodology for application of the teleological approach, they are significant in the sense that they can guide the development of the required methodology.³²⁶

The interpretive provisions of articles 31 and 32 will be engaged in developing the methodology for the application of the teleological approach which is discussed in the following sub-parts. Significantly, as was elaborated above,³²⁷ the Vienna Convention in article 31(1) requires a treaty to be interpreted in the light of its object and purpose. The following part explores this requirement in the context of the African Charter as a vital element for the methodology developed herein.

2 5 2 Interpreting the socio-economic rights in the African Charter in light of its object and purpose

The preceding analysis of the teleological approach demonstrated that the apparent object and purpose of the treaty is the underlying premise of this interpretive approach. The object and purpose of the African Charter is vital in developing the effective meaning, scope and content of socio-economic rights and their related obligations enshrined therein. As Senden notes, the object and purpose of the treaty is significant in developing the meaning of the provisions of the treaty.³²⁸ Furthermore, in the *Rantsev* case, the ECHR held that the specific substantive provisions of the European Convention should not be the exclusive point of reference in the interpretative

³²⁵ J Tobin "Seeking to persuade: A constructive approach to human rights treaty interpretation" (2010) 23 *Harvard Human Rights Journal* 1 3-4.

³²⁶ See also J Tobin "Seeking to persuade: A constructive approach to human rights treaty interpretation" (2010) 23 *Harvard Human Rights Journal* 19.

³²⁷ See part 2 3 above.

³²⁸ Senden *Interpretation of Fundamental Rights* 56-57.

process.³²⁹ According to the ECHR the provisions of the European Convention originate from its object and purpose. Hence, they should be interpreted in the light of the object and purpose of the European Convention.³³⁰ Commenting on *Golder v The United Kingdom* ('*Golder*')³³¹ Fitzmaurice notes that in the interpretative process the establishment of the object and purpose of the treaty is vital in developing the meaning of the provisions being interpreted.³³² In a similar vein, Senden observes that the ECHR interprets the European Convention by ascertaining the object and purpose.³³³ This practice helps to demonstrate that the object and purpose of the treaty is the vital point of reference in the interpretative process. Thus, it can convincingly be argued that in interpreting socio-economic rights the supervisory organs of the African Charter should ascertain the object and purpose of the African Charter relating to these rights.

The significance of ascertaining the object and purpose of the African Charter in interpreting socio-economic rights enshrined therein is threefold. Firstly, it can help the interpretive organs to identify the goals to be achieved, in relation to the substantive and procedural provisions being interpreted. Secondly, it can help the interpretive organs to identify the interpretive aids enshrined in the African Charter as a whole. As Swart correctly argues, the object and purpose of the treaty guides the interpretive organs to interpret the treaty in its entirety.³³⁴ Thirdly, it can assist the interpretive organs to identify appropriate external interpretive aids that can be consulted during the interpretative process. As Senden rightly observes, the interpretive organs establish the interpretive aids to support the interpretation of the treaty through the object and purpose.³³⁵ Thus, referring to the object and purpose of the treaty requires the interpretive organs to take internal and external interpretive aids into account when interpreting such treaty. In the case of *Rantsev* the ECHR held that:

“The court is required to ascertain the ordinary meaning to be given to the words in their context and in the light of the object and purpose of the provision from which they are drawn. The Court must have regard to the fact that the context of the provisions is a treaty for the effective protection of individuals human rights and that the Convention must be read as a whole, and interpreted in such a way as to promote internal consistency and harmony between its various provisions. Account

³²⁹ *Rantsev* para 273.

³³⁰ Para 274.

³³¹ *Golder v The United Kingdom* Application no. 4451/70 ECHR (1975).

³³² Fitzmaurice “Interpretation of human rights” in *International Human Rights Law* 761

³³³ Senden *Interpretation of Fundamental Rights* 197 and 217.

³³⁴ M Swart “Is there a text in this Court? The purposive method of interpretation and the ad hoc tribunals” (2010) 70 *ZaoRV* 767 782.

³³⁵ Senden *Interpretation of Fundamental Rights* 210.

must also be taken of any relevant rules and principles of international law applicable in relations between the Contracting Parties and the Convention should so far as possible be interpreted in harmony with other rules of international law of which it forms part. Finally, the Court emphasises that the object and purpose of the Convention, as an instrument for the protection of individual human beings, requires that its provisions be interpreted and applied so as to make its safeguards practical and effective.³³⁶

However, Jacobs points out the lack of a clear methodology for ascertaining the object and purpose of the treaty in relation to the provisions being interpreted.³³⁷ According to Jacobs, it is uncertain how the interpretive organs should engage the internal and external interpretive aids in interpreting the text of the treaty.³³⁸ The concern by Jacobs indicates the need to develop a clear methodological sequence for ascertaining the object and purpose in relation to the provisions being interpreted. The sequence is significant in that it can help the interpretive organs to interpret the socio-economic provisions in the African Charter in line with its object and purpose. The following parts discuss the suggested sequence.

2 5 2 1 Textual synthesis

The interpretive organs should start with the textual synthesis to identify the object and purpose of the treaty in relation to the provisions being interpreted. Through the textual synthesis the interpretive organs apply the key elements, emerging from the treaty read as a whole, to develop the meaning of the provisions in the treaty. These key elements include: the preamble, the operative provisions, the substantive socio-economic rights provisions, and other related provisions. The interpretive organs are thus required to construe the provisions of the treaty in the light of other key elements found within a treaty.³³⁹ This sequence is justified within the provisions of article 31(1)-(2) of the Vienna Convention. To engage these key elements the interpretive organs should begin with the preamble to the African Charter. It is significant to give prime weight to the preamble to the African Charter as it encompasses the goals to be protected, in relation to the provisions found therein. As Fennelly rightly observes, the preamble to the treaty enshrines the aspirations of the States embedded in the

³³⁶ Rantsev paras 273-275.

³³⁷ Jacobs (1969) *International and Comparative Law Quarterly* 337.

³³⁸ 337.

³³⁹ Tobin (2010) *Harvard Human Rights Journal* 37.

provisions of the treaty.³⁴⁰ In a similar vein, Gittleman argues that the preamble guides the interpretive organs to understand the substantive provisions contained in the African Charter.³⁴¹ Specifically, the preamble to the African Charter articulates the commitment of the States to “promote and protect human and peoples’ rights.”³⁴² Moreover, the preamble to the African Charter contains various clauses that elaborate the goal to promote and protect human and peoples’ rights. For example, the statements in the preamble give the interpretive organs scope to draw on the “values of freedom, equality, justice, and dignity”, the principle of interdependence of human rights, “individual duties”, and adherence to other international treaties of a human rights nature in order to define the object and purpose of the African Charter. Fitzmaurice rightly argues that the preamble to the African Charter provides a wide context of the international treaties to be applied in the interpretative process.³⁴³ The values of freedom, equality, justice, and dignity referred to in the preamble are “essential objectives for the achievement of the legitimate aspirations of the African peoples”.³⁴⁴ This implies that the object and purpose of the African Charter is to ensure that the African people live with freedom, equality, justice, and dignity in order to achieve their socio-economic aspirations. Thus, the interpretation of socio-economic rights in the African Charter should promote these values.

Furthermore, these values are elaborated in the substantive provisions of articles 1 to 5 of the African Charter. Article 1 of the African Charter provides for the general obligations of the parties. Through this article the parties are required to “recognise the rights, duties and freedoms enshrined in the African Charter” and “to adopt legislative or other measures to give effect” to these rights, duties and freedoms. The provisions of article 2 embody the principle of non-discrimination that is relevant in the interpretation of provisions of human rights, including the provisions of socio-economic rights. Article 3 embodies the individual’s right to equality before the law, and the equal protection of the law, while article 4 provides for the right to life and article 5 provides for the right to dignity. As such the interpretive organs are required to engage these provisions in the interpretative process of the African Charter as a whole. These articles are significant in

³⁴⁰ N Fennelly “Legal interpretation at the European Court of Justice” (1996) 20 *Fordham International Law Journal* 656 670.

³⁴¹ R Gittleman “The African Charter on Human and Peoples’ Rights: A legal analysis” (1982) 22 *Virginia Journal of International Law* 667 677.

³⁴² Preamble to the African Charter para 11.

³⁴³ Fitzmaurice “Interpretation of human rights treaties” in *International Human Rights Law* 755.

³⁴⁴ Preamble to the African Charter para 3.

that they strengthen the values stated in the preamble to the African Charter. Commenting on similar provisions in various international treaties, Tobin argues that the interpretation of the treaty as a whole requires the interpretive organs to engage these provisions in the interpretative process.³⁴⁵

Odinkalu rightly notes that the provisions of articles 1 to 5 facilitate the construction of the socio-economic rights.³⁴⁶ The application of these provisions can help the interpretation of the socio-economic rights in three ways. Firstly, it can ensure that States fulfil the obligations vested in them by the socio-economic rights. Secondly, it guarantees the realisation of the socio-economic rights on non-discriminatory, equitable grounds. Bulto confirms the significance of the right to equality in guaranteeing the enjoyment of socio-economic rights on an equitable basis.³⁴⁷ According to Bulto, the right to equality enables the equal distribution of public resources related to socio-economic rights such as health, labour, and educational rights.³⁴⁸ Thirdly, it ensures that the socio-economic rights are realised in a manner that promotes the dignity of the individuals. For example, Heyns observes that the provision of poor quality food, and the denial of access to adequate medical care violate the right to dignity.³⁴⁹ In this regard, these operative provisions lay down the scope and content to be considered in achieving the object and purpose of the African Charter in relation to the socio-economic rights being interpreted.

Furthermore, Bulto identifies two other ways in which these provisions can help the interpretation of the socio-economic rights.³⁵⁰ Firstly, they can be used to identify the implicit socio-economic rights in the African Charter through their socio-economic dimensions. Therefore, these provisions can give effect to the scope of the socio-economic rights in the African Charter.³⁵¹ Secondly, they can be used to further the

³⁴⁵ Tobin (2010) *Harvard Human Rights Journal* 39.

³⁴⁶ CA Odinkalu "Implementing economic, social and cultural rights under the African Charter on Human and Peoples' Rights" in MD Evans & R Murray (eds) *The African Charter on Human and Peoples' Rights: The System in Practice 1986-2000* (2002) 178 188-189.

³⁴⁷ TS Bulto "The utility of cross-cutting rights in enhancing justiciability of socio-economic rights in the African Charter on Human and Peoples' Rights" (2010) 29 *University of Tasmania Law Review* 142 163.

³⁴⁸ 163.

³⁴⁹ C Heyns "Civil and political rights in the African Charter" in MD Evans & R Murray (eds) *The African Charter on Human and Peoples' Rights: The System in Practice 1986-2000* (2002) 137 150.

³⁵⁰ Bulto (2010) *University of Tasmania Law Review* 146.

³⁵¹ 159.

notion of the interdependence of rights. As Viljoen rightly argues, the socio-economic rights are inter-linked to the civil and political rights.³⁵²

Furthermore, the textual synthesis creates room for the interpretive organs to engage other civil and political rights' provisions to give meaning to the socio-economic rights being interpreted. These rights include: the rights to be heard, freedom of conscience, freedom of information, freedom of association, freedom of assembly, freedom of movement and residence, and equal access to public services.³⁵³ Bulto rightly argues that the use of these civil and political rights can help to enrich the scope and content of the socio-economic rights.³⁵⁴ Moreover, the textual synthesis provides the interpretive organs with the scope to engage the duties' provisions to ascertain the object and purpose of the African Charter in relation to socio-economic rights. These provisions include articles 27 to 29 of the African Charter. These provisions provide for the individual's duties to his or her family, "respect his or her fellow beings without discrimination", and "preserve the harmonious development of the family". The interpretive organs can utilise these provisions to interpret the socio-economic rights' obligations of the non-state actors.

As Chirwa rightly notes, the individual's duties provisions in the African Charter are relevant in holding the non-state actors accountable for the violations of human rights.³⁵⁵ Through the textual synthesis the interpretive organs can also employ the provisions of articles 60 and 61 of the African Charter, and article 7 of the African Court Protocol to interpret the socio-economic rights in accordance with the object and purpose of the African Charter. The interpretive aspect of these provisions centres on the fact that they identify other African and international treaties, as well as national legal sources that can be applied to interpret the socio-economic provisions. The legal sources identified in these provisions will be discussed below.³⁵⁶ Moreover, the analysis of these provisions that demonstrate the textual possibilities to interpret the socio-economic rights is the subject of chapter three of this dissertation.

³⁵² F Viljoen "The African Charter on Human and Peoples' Rights: The *travaux preparatoires* in the light of subsequent practice" (2004) 25 *Human Rights Law Journal* 313 320.

³⁵³ Arts 7-13 of the African Charter.

³⁵⁴ Bulto (2010) *University of Tasmania Law Review* 142 158.

³⁵⁵ DM Chirwa "African regional human rights system: The promise of recent jurisprudence on social rights" in M Langford (ed) *Social Rights Jurisprudence: Emerging Trends in International and Comparative Law* (2008) 323 327.

³⁵⁶ See part 2 5 2 3 below.

2 5 2 2 Preparatory work of the African Charter

As previously discussed, the text of the treaty is the starting point of the interpretative process. As such, the interpretive organs should not treat the textual synthesis as an exclusive means of interpretation. At the second stage of the interpretative process the interpretive organs should consider the preparatory work of the treaty. As demonstrated above,³⁵⁷ the Vienna Convention places the preparatory work of a treaty as a supplementary tool of interpretation.³⁵⁸ It therefore allows recourse to the preparatory work of the treaty in limited circumstances such as confirming the meaning from an application of article 31(1) or when the meaning according to article 31(1) leaves the meaning ambiguous or obscure or when the meaning leads to a result which is manifestly absurd or unreasonable.³⁵⁹ However, it was argued above³⁶⁰ that the fact that article 31(1) of the Vienna Convention requires the treaty to be interpreted in light of its object and purpose allows interpretative tools, which elaborate the object and purpose of the treaty, to be considered as primary interpretative sources. Thus, this understanding allows the preparatory work of the African Charter that embodies the object and purpose of the African Charter to be applied as a primary interpretative tool.

There are six reasons to substantiate this consideration. Firstly, the preparatory work can clarify the scope of the object and purpose of the treaty embedded in the socio-economic rights provisions when the textual synthesis is not amenable to give such clarity.³⁶¹

Secondly, the preparatory work can assist the interpretive organs to explain the scope and content of the rights that are formulated in general terms. As Tobin rightly argues, the preparatory work of the treaty clarifies the nature of the substantive rights' formulation.³⁶² In a similar vein, Fachiri had noted earlier on that the preparatory work of the treaty should be applied to solve the ambiguities found in the text of the treaty and explain the object and purpose of the treaty.³⁶³ Klabbers confirms this role of the

³⁵⁷ See part 2 3 above.

³⁵⁸ Art 32 of the Vienna Convention.

³⁵⁹ Art 32(a)-(b) of the Vienna Convention.

³⁶⁰ See part 2 3 above.

³⁶¹ See also H Lauterpacht "Some observations on preparatory work in the interpretation of treaties" (1935) *XLVIII Harvard Law Review* 549 564; Tobin (2010) *Harvard Human Rights Journal* 23-24; Yeshanew *The Justiciability of Economic, Social and Cultural Rights* 52; and Senden *Interpretation of Fundamental Rights* 100.

³⁶² Tobin (2010) *Harvard Human Rights Journal* 24.

³⁶³ AP Fachiri "Interpretation of treaties" (1929) 23 *American Journal of International Law* 745 746.

preparatory work to expound on the meaning of the substantive provisions of the treaty.³⁶⁴

Thirdly, the preparatory work can guide the interpretive organs to fill the gaps of the omitted socio-economic rights in the African Charter. Fourthly, the interpretive organs can use preparatory work to clarify the text of the treaty. Aust confirms this corrective function of the preparatory work of the treaty.³⁶⁵ Fifthly, it can guide the interpretive organs to interpret the provisions related to remedies. Lastly, the preparatory work can assist the interpretive organs to identify other interpretive aids to be applied in the interpretative process. Yeshanew correctly notes that the preparatory work can be used to establish other interpretive sources that can inspire the interpretive organs.³⁶⁶

However, Senden rejects the use of the preparatory work of the treaty to elaborate the object and purpose of the treaties with a human rights nature.³⁶⁷ According to Senden, some of the parties to such treaties did not take part in the preparatory stages.³⁶⁸ Therefore, such parties cannot be obliged to comply with the preparatory work of such treaties.³⁶⁹ This rejection is problematic in that it can cause uncertainty of the methodology for the application of the teleological approach. The uncertainty is based on the fact that the interpretive organs can be required to apply two distinct methodological approaches for interpreting the same treaty. One of the methodological approaches would be for negotiating States,³⁷⁰ and the other for States that did not take part in the negotiations for the adoption of the treaty. According to Merkouris, this methodological distinction can lead to the fragmentation of the treaties.³⁷¹ Merkouris argues further that the application of two distinct sets of interpretive rules to member States of the same treaty contravenes the principle of legal certainty.³⁷²

In support of the application of the preparatory work to the ratifying States, Merkouris identifies three significant considerations that the interpretive organs should take into

³⁶⁴ J Klabbers "International legal histories: The declining importance of *travaux preparatoires* in treaty interpretation?" (2003) *Netherlands International Law Review* 267 281.

³⁶⁵ Aust *Modern Treaty Law* 197.

³⁶⁶ Yeshanew *The Justiciability of Economic, Social and Cultural Rights* 52.

³⁶⁷ Senden *Interpretation of Fundamental Rights* 101.

³⁶⁸ 101.

³⁶⁹ 101.

³⁷⁰ Art 2(1)(e) of the Vienna Convention defines the term 'negotiating state' to mean "a State which took part in the drawing up and adoption of the text of the treaty."

³⁷¹ P Merkouris "'Third party' considerations and 'corrective interpretation' in the interpretative use of *travaux preparatoires*: Is it fahrenheit 451 for preparatory work?" in M Fitzmaurice O Elias & P Merkouris (eds) *Treaty Interpretation and the Vienna Convention on the Law of Treaties 30 Years On* (2010) 75 79.

³⁷² 79.

account. These considerations include the knowledge of the preparatory work by the ratifying States, the number of the States that have ratified the treaty, and the accessibility of the preparatory work to the States.³⁷³ With regard to the knowledge of the preparatory work, Lauterpacht argued earlier on that by signing or ratifying the final draft of the treaty, the parties demonstrate their acceptance to the treaty as it was finalised by the negotiating States. They also demonstrate their willingness for the consideration of the intention of the negotiating States regarding the treaty in interpreting it.³⁷⁴ In a similar vein Shabtai observes that, by accepting the texts of the treaties, States express their knowledge of and consent to the use of the preparatory work of such treaties.³⁷⁵ Drawing on the argument advanced by Lauterpacht and Shabtai, I demonstrate that the States' acceptance of the African Charter, by way of signature and ratification, express their knowledge and acceptance to comply with the overarching object and purpose of the treaty as envisaged by the drafters. These means of States' acceptance of the terms of the treaty are provided for in article 63(1) of the African Charter. According to this article a State's consent can be expressed by way of signature, ratification or adherence.³⁷⁶ Through expression of their commitment to adhere to the terms of the treaty, the States become bound by the whole treaty. As Aust rightly argues, the term "adherence to a treaty" is a general way of demonstrating that a State has consented to be bound by the treaty.³⁷⁷ Articles 12(1)(a),³⁷⁸ 14(1)(a),³⁷⁹ and 16(1)(b)³⁸⁰ of the Vienna Convention, which are also applicable to human rights treaties including the African Charter, confirm the above-mentioned ways as the means to express parties' consent to be bound by the treaty. As such, the States that have consented to be bound by the African Charter either by signature, ratification or

³⁷³ 80-81.

³⁷⁴ Lauterpacht (1935) *Harvard Law Review* 585.

³⁷⁵ Yearbook of the International Law Commission (1966) Vol. 1 Part II: Summary records of the eighteenth session 4 May – 19 July 1966 (A/CN.4/SR.A/1966) at 200 para 34.

³⁷⁶ Art 63(1) of the African Charter.

³⁷⁷ Aust Modern treaty law 91.

³⁷⁸ Art 12(1)(a) of the Vienna Convention provides:

"The consent of a state to be bound by a treaty is expressed by the signature of its representative when: the treaty provides that signature shall have that effect."

³⁷⁹ Art 14(1)(a) of the Vienna Convention reads:

"The consent of a state to be bound by a treaty is expressed by ratification when: the treaty provides for such consent to be expressed by means of ratification."

³⁸⁰ Art 16(1)(b) provides:

"Unless the treaty otherwise provides, instruments of ratification, acceptance, approval or accession establish the consent of a state to be bound by a treaty upon their deposit with the depositary".

adherence,³⁸¹ are required to comply with its apparent object and purpose. Article 18 of the Vienna Convention confirms the requirement for the parties to a treaty to comply with the object and purpose stated in the treaty. The article requires States to refrain from defeating the object and purpose of the treaty.³⁸² According to Aust this requirement applies to both the negotiating States and the States that did not participate in the negotiation process.³⁸³

For these reasons, it can be argued that the interpretive organs can apply the preparatory work as a means to elaborate the object and purpose of the African Charter to both categories of States.³⁸⁴ Significantly, the preparatory work of the African Charter is accessible to all State members. Yeshanew confirms the availability and accessibility of the documents used to adopt the African Charter.³⁸⁵

2 5 2 3 Reference to the relevant international treaties and subsequent agreements and practices of the parties

At the third stage of the interpretative process, the interpretive organs should have recourse to other relevant international treaties, the subsequent agreements and the subsequent conduct of the parties. The significance of applying the relevant international treaties at the third stage of the interpretative process is fourfold. Firstly, they fill in the lacunae in the African Charter which could not be solved by the application of the textual synthesis, and the preparatory work. The ILC notes that reference to other international treaties can be made when the treaty fails to explicitly or implicitly provide for some substantive provisions.³⁸⁶ Tobin confirms this role of international treaties to address the gaps found within a treaty being interpreted.³⁸⁷ Secondly, they help to resolve ambiguities of the textual formulation of the provisions being interpreted. Thirdly, they guarantee international acceptance of the decisions by the interpretive organs. Fourthly,

³⁸¹ As noted in part 2 1 above 53 out of 54 African States have ratified and deposited the instruments of their ratification with the AU Secretary-General who is the depositary in accordance with the provisions of article 63(2) of the African Charter.

³⁸² Art 18 of the Vienna Convention provides:

“A State is obliged to refrain from acts which would defeat the object and purpose of a treaty when: it has signed the treaty or has exchanged instruments constituting the treaty subject to ratification, acceptance or approval, until it shall have made its intention clear not to become a party to the treaty; or it has expressed its consent to be bound by the treaty, pending the entry into force of the treaty and provided that such entry into force is not unduly delayed.”

³⁸³ Aust *Modern Treaty Law* 94.

³⁸⁴ Lauterpacht (1935) *Harvard Law Review* 577.

³⁸⁵ Yeshanew *The Justiciability of Economic, Social and Cultural Rights* 53.

³⁸⁶ ILC Fragmentation Report para 465(a).

³⁸⁷ Tobin (2010) *Harvard Human Rights Journal* 43-44.

they help to achieve external coherence³⁸⁸ so as to achieve maximum harmonisation between the interpretation of socio-economic rights provisions in the African Charter and the interpretation of the socio-economic rights in line with other international and regional treaties recognised by the African States. As Tobin rightly argues, the external coherence requires the decisions of the interpretive organs to be justified by other relevant international treaties.³⁸⁹ Fitzmaurice confirms the requirement to justify the meaning of the treaty with other international instruments.³⁹⁰ Deciding in the European context, the ECHR held in the *Rantsev* case that the meaning assigned to the text of the treaty should be in harmony with other relevant international treaties.³⁹¹ The ILC had explained earlier on that the intention of the parties to a treaty is to ensure that their treaty is not inconsistent with other international instruments.³⁹² In this regard, the international treaties become relevant at the third stage of the interpretative process. This stage of the interpretative process is justified by the provisions of article 31(3)(c) of the Vienna Convention.

Writing in the European context, Senden observes the lack of certainty of the relevant international treaties to be consulted.³⁹³ This observation raises the need to ascertain relevant international instruments to be applied in the interpretation of the African Charter. With regard to the requirement to ascertain the relevant international laws the ILC explained that:

“It is a preliminary step to any act of applying the law that a *prima facie* view of the matter is formed. This includes, among other things, an initial assessment of what might be the applicable rules and principles. The result will be that a number of standards may seem *prima facie* relevant. A choice is needed, and a justification for having recourse to one instead of another.”³⁹⁴

³⁸⁸ The term ‘external coherence’ was used by Rietiker in his work on the principle of effectiveness to mean the interpretation of a treaty in the light of other relevant international sources. See Rietiker (2010) *Nordic Journal of International Law* 271. In this dissertation the term ‘external coherence’ is applied in the context envisaged by Rietiker and expand it to include relevant national legal sources.

³⁸⁹ Tobin (2010) *Harvard Human Rights Journal* 29.

³⁹⁰ Fitzmaurice “Interpretation of human rights treaties” in *International Human Rights Law* 749.

³⁹¹ *Rantsev* para 274.

³⁹² ILC Fragmentation Report para 465(b).

³⁹³ Senden *Interpretation of Fundamental Rights* 67.

³⁹⁴ ILC Fragmentation Report para 36.

Articles 60 and 61 of the African Charter, as well as articles 3 and 7 of the African Court Protocol and article 31 of the African Court of Justice Protocol³⁹⁵ provide for the relevant laws to be applied.

Article 60 of the African Charter reads:

“The Commission shall draw inspiration from international law on human and peoples’ rights, particularly from the provision of various African instruments on human and peoples’ rights, the Charter of the United Nations, the Charter of the Organisation of African Unity, the Universal Declaration of Human Rights, other instruments adopted within the specialised agencies of the United Nations of which the parties to the present Charter are members.”

Article 61 of the African Charter states:

“The Commission shall also take into consideration, as subsidiary measure to determine the principles of law, other general or specialised international conventions laying down rules expressly recognised by member states of the Organisation of African Unity, African practices consistent with international norms on human and peoples’ rights, customs generally accepted as law, general principles of law recognised by African States, as well as legal precedents and doctrines.”

Article 3 of the African Court Protocol is relevant as it confers on the African Court the mandate to interpret and apply the provisions of the African Charter, and any other relevant international instruments.³⁹⁶ While the mandate to interpret gives the African Court the jurisdiction to assign meaning to the provisions of socio-economic rights in these relevant human rights instruments, the mandate to apply gives it the powers to enforce provisions of any relevant human rights instruments. The African Court’s jurisdiction in article 3 relates to article 7 of the African Court Protocol, as they both

³⁹⁵ As it was pointed out in part 2 1 above the African Court of Justice Protocol has not yet entered into force. However, the discussion in this part is relevant in the understanding of art 31 of the African Court of Justice Protocol that provides for the laws that the African Court of Justice should be consulting in the interpretation of the African Charter. Art 31 of the African Court of Justice Protocol reads:

“In carrying out its functions, the Court shall have regard to:

- a) The Constitutive Act;
- b) International treaties, whether general or particular, ratified by the contesting States;
- c) International custom, as evidence of a general practice accepted as law;
- d) The general principles of law recognised universally or by African States;
- e) Subject to the provisions of paragraph 1, of Article 46 of the present Statute, judicial decisions and writings of the most highly qualified publicists of various nations as well as the regulations, directives and decisions of the Union, as subsidiary means for the determination of the rules of law;
- f) Any other law relevant to the determination of the case.”

³⁹⁶ This part briefly explains the relevance of article 3 of the African Court Protocol and the extent to which it relates with article 7 of the African Court Protocol. It should be noted that there has been a scholarly debate regarding the formulation of article 3 of the African Protocol. The debates and a detailed discussion on the implications of the formulation of article 3 for the interpretation of the socio-economic rights is provided for in chapter four, part 4 4 1.

require the African Court to apply as sources of law the African Charter and any other relevant international human rights instrument. In order to establish the scope of the international instruments that the African Court can apply, the provisions of article 3 of the African Court Protocol should be read in conjunction with the provisions of article 7 of the Protocol.

Article 7 of the African Court Protocol reads:

“The Court shall apply the provision of the Charter and any other relevant human rights instruments ratified by the States concerned.”

The foregoing provisions identify the international treaties, African regional, and national legal instruments and jurisprudence recognised by the African States as relevant sources for interpretive purposes. Particularly, article 60 of the African Charter and article 7 of the African Court provide for the primary international sources to be applied. According to article 60 all the international treaties of a human rights nature are relevant for the interpretation of the African Charter. These treaties include the treaties adopted under the auspices of the UN and its agencies, as well as the African regional human rights treaties. Article 7 of the African Court Protocol is general in that it allows the African Court to apply any relevant human rights treaties. According to Harrington, the formulation of article 7 of the African Protocol is narrow in that it does not explicitly mention the international treaties to be applied.³⁹⁷ Harrington argues further that the African Court can resort to the provisions of articles 60 and 61 of the African Charter to broaden the scope of the relevant treaties to be applied. However, the scope of article 60 is limited to the treaties of a human rights nature. As such, article 60 should be read in conjunction with article 31(3)(c) to establish other relevant international treaties to be applied. As Yeshenew rightly observes, the provisions of articles 60 and 61 of the African Charter do not replace the application of article 31 of the Vienna Convention.³⁹⁸ According to the provisions of article 31(3)(c) the interpretive organs are required to take into account “any relevant rules of international law”. However, article 31(3)(c) is not elaborate in that it does not clearly mention the treaties to be consulted. Thus, the provisions of article 31(3)(c) should be read in conjunction with article 38(1)(a) and (b) of

³⁹⁷ J Harrington “The African Court on Human and Peoples’ Rights” in MD Evans & R Murray (eds) *The African Charter on Human and Peoples’ Rights: The System in Practice 1986-2000* (2002) 305 322-323.

³⁹⁸ Yeshenew *The Justiciability of Economic, Social and Cultural Rights* 55.

the Statute of the ICJ ('ICJ Statute')³⁹⁹ that provides for the relevant laws to be applied in the interpretation of the treaties. Scheinin rightly argues that, since the human rights treaties are part of the normative framework of public international law, they should be interpreted in the light of the sources of public international law enumerated in article 38(1)(a)-(d) of the ICJ Statute.⁴⁰⁰ Rietiker confirms the application of these provisions of the ICJ Statute in establishing the relevant international laws referred to in article 31(3)(c) of the Vienna Convention.⁴⁰¹ Article 38(1)(a)-(d) of the ICJ Statute provides:

“The court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply:

- (a) international conventions, whether general or particular establishing rules expressly recognised by the contesting states;
- (b) international custom, as evidence of general practice accepted as law;
- (c) the general principles of law recognised by civilized nations;
- (d) subject to the provisions of article 59, judicial decisions and teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.”

Moreover, the sources of public international law are relevant for the interpretation of the human rights treaties including the African Charter. As defined in the Vienna Convention, a treaty is an agreement between States that is governed by international law.⁴⁰² Through this definition of a treaty the Vienna Convention supports the applicability of the relevant sources of international law to the interpretation of human rights. Fitzmaurice confirms the avenue provided by article 2(1) of the Vienna Convention to apply sources of international public law in the interpretative process.⁴⁰³

Another set of relevant legal sources is provided for in article 61 of the African Charter. These legal sources include the international treaties recognised by the African States, the African practices that are compatible with international human rights standards, the customs recognised as laws, the general principles of law applicable to African States, and the legal precedents. According to Scheinin, the general principles of law recognised by the States include the constitutions of such States. The legal sources in the provisions of article 61 accommodate the subsequent agreements and the subsequent conduct of the parties as relevant elements in the interpretative process.

³⁹⁹ Statute of the ICJ is an integral part of the Charter of the United Nations. The underlying object and purpose of the Statute of the ICJ is to organise the composition and the functions of the ICJ. (<http://www.icj.org/documents/?p1=4&p2=2>) (accessed 31-03-2017).

⁴⁰⁰ Scheinin “Characteristics of human rights norms” in *International Protection of Human Rights* 20.

⁴⁰¹ Rietiker (2010) *Nordic Journal of International Law* 272.

⁴⁰² Art 2(1) of the Vienna Convention.

⁴⁰³ Fitzmaurice “Interpretation of human rights treaties” in *International Human Rights Law* 749.

These include legal sources such as the constitutions of the African States and legal precedents. According to Roberts, these subsequent practices are useful in the sense that they can provide the interpretive organs with an insight on how the treaty should be interpreted.⁴⁰⁴ Arato argues further that the subsequent agreements and practices provide evidence for the interpretation of the treaty desired by the States.⁴⁰⁵

Moreover, as discussed above,⁴⁰⁶ the subsequent agreements and subsequent practices include: interpretive organs' decisions, regulations, rules of procedure and resolutions, as well as the relevant laws and jurisprudence applicable in the African Countries, and decisions of the AU organs. Yeshanew confirms these sources as forming part of the subsequent agreements and subsequent practices of the parties.⁴⁰⁷ The subsequent agreements and the subsequent practices of the parties are important in two respects. Firstly, they help to ascertain the consistency of the interpretive organs' approach in relation to the socio-economic rights being interpreted. As Roberts rightly notes, through the subsequent agreements and the subsequent practices of the parties the interpretive organs establish the common and constant understanding of the terms of the treaty by the parties.⁴⁰⁸ The subsequent agreements and the subsequent practices stand as evidence of the parties' interpretation of the treaty.⁴⁰⁹ Secondly, they demonstrate the States' acceptance to the decisions of the interpretive organs.

However, Senden observes the lack of the order of application of the relevant international instruments by the interpretive organs.⁴¹⁰ According to Senden, each interpretive organ develops its own order of application of these sources.⁴¹¹ Writing on the African Commission, Viljoen argues that in some instances it has been applying only the non-African sources.⁴¹² For this reason an order of application of these sources to be followed by the interpretive organs of the African Charter is required. The suggested order of application considers both primary and subsidiary interpretive legal sources as follows: the interpretive organs should begin with treaties of a human rights nature. In

⁴⁰⁴ A Roberts "The power and persuasion in Investment Treaty interpretation: The dual role of States" (2010) 104 *American Journal of International Law* 179 204.

⁴⁰⁵ J Arato "Subsequent practice and evolutive interpretation: Techniques of treaty interpretation over time and their diverse consequences" (2010) 9 *The Law and Practice of International Courts and Tribunals* 443 458.

⁴⁰⁶ See parts 2.2.3 & 2.3 above.

⁴⁰⁷ Yeshanew *The Justiciability of Economic, Social and Cultural Rights* 46-49

⁴⁰⁸ Roberts (2010) *American Journal of International Law* 200.

⁴⁰⁹ 200.

⁴¹⁰ Senden *Interpretation of Fundamental Rights* 112.

⁴¹¹ 112.

⁴¹² Viljoen *International Human Rights Law* 327.

this category the interpretive organs should start with the African treaties followed by the international human rights treaties. At the second stage of application, recourse should be made to the general international treaties that shed light on the provisions being interpreted. According to Yeshanew, these are non-human rights treaties that are consistent with human rights standards.⁴¹³ The ILC confirms this order of applying the specific treaties first followed by the general treaties at the second stage.⁴¹⁴

The interpretive organs should thereafter apply the African practices consistent with international human rights treaties followed by the international custom recognised as law by the African States. At the fourth stage the interpretive organs should apply the general principles of law recognised as law, and the legal precedents. According to Scheinin, the general principles of law include the domestic laws of the countries.⁴¹⁵ Moreover, the fourth stage creates room for the interpretive organs to apply the subsequent agreements and the subsequent practices of the parties including the legal precedents of the African Charter's interpretive organs. According to Viljoen, the African Commission has not been constantly applying them.⁴¹⁶

2 5 2 4 Principle of effectiveness

The principle of effectiveness as elaborated upon⁴¹⁷ should be integrated throughout the above-mentioned interpretative process. Swart confirms the requirement to engage the principle of effectiveness in the entire interpretative process. This engagement is useful in ensuring that all the interpretive aids referred to by the interpretive organs assist in attaining the practical and effective meaning of the provisions being interpreted. As Fennelly rightly argues, the constant engagement of the principle of effectiveness ensures the effectiveness of the provisions of the treaty.⁴¹⁸ The effectiveness of the provisions implies that the rights are broadly interpreted and their restrictions are interpreted narrowly.

Moreover, the principle of effectiveness ensures consistency and uniformity in the interpretation of the treaty.⁴¹⁹ This principle also guarantees the interpretation of the treaty that addresses the conditions prevalent at the time of interpretation. In this regard,

⁴¹³ Yeshanew *The Justiciability of Economic, Social and Cultural Rights* 57.

⁴¹⁴ ILC Fragmentation Report para 463.

⁴¹⁵ Scheinin "Characteristics of human rights norms" in *International Protection of Human Rights* 20.

⁴¹⁶ Viljoen *International Human Rights Law* 326.

⁴¹⁷ See parts 2 2 3 and 2 3 above.

⁴¹⁸ Fennelly (1996) *Fordham International Law Journal* 674.

⁴¹⁹ 674.

all four dimensions⁴²⁰ of this principle should be engaged in the entire interpretative process. These dimensions include the general, substantive, temporal, and systemic dimensions.

2 6 Conclusion

The main research aims of this chapter were twofold. Firstly, the chapter aimed at demonstrating the appropriateness of the teleological approach in interpreting the socio-economic rights in the African Charter. Secondly, the chapter intended to develop the methodology for application of the teleological approach that should be followed by the interpretive organs of the African Charter when interpreting the socio-economic rights.

With regard to the appropriateness argument, the chapter has identified that the teleological approach is established as the primary method of interpretation in article 31 of the Vienna Convention. This recognition by the Vienna Convention gives the teleological approach the legal basis for interpreting international treaties including the African Charter. Moreover, the appropriateness of the teleological approach centres on its utilisation of the object and purpose of the treaty to interpret treaties. The reference to the object and purpose of the treaty is useful for interpreting treaties whose underlying goal is the protection and promotion of human rights including the socio-economic rights. Through the utilisation of the object and purpose of the treaty, the interpretive organs can engage various internal and external interpretive elements to develop the meaning of the socio-economic rights provisions. The internal interpretive aids consist of the preamble to the African Charter, operative provisions, relevant civil and political rights, individual's duties provisions, and the 'drawing inspiration' clauses. These elements can assist the interpretive organs to construe the meaning of the socio-economic rights in a manner that reads the African Charter as a whole. The external interpretive elements include the preparatory work of the African Charter, relevant international treaties and the subsequent agreements and practices of the African States. Moreover, the use of object and purpose of the treaty enables the interpretive organs to engage the principle of effectiveness in the interpretative process. Through the principle of effectiveness the interpretive organs can engage the identified interpretive elements in a manner that gives effect to the socio-economic rights provisions in the African Charter.

This chapter also demonstrated the lack of methodology for the application of the teleological approach in the interpretation of treaties. In this regard, the chapter

⁴²⁰ See part 2 2 3 above.

developed the methodology for application of the teleological approach to be followed by the interpretive organs of the African Charter. The methodology enables the interpretive organs to know when and how they should engage the interpretive elements of the teleological approach. Significantly, the methodology allows the interpretive organs to begin the interpretative process with the textual synthesis that engages the treaty as a whole. Furthermore, the methodology allows the interpretive organs to engage the historical and philosophical background of the African Charter embedded in its preparatory work, in order to elaborate the object and purpose. It is significant for the interpretive organs to consider other relevant international treaties and the subsequent agreement and practices of the parties at the third stage of the interpretative process. The engagement of these elements can ensure that the meaning of the African Charter is in harmony with other treaties, and the consistency of the decisions of the interpretive organs. Significantly, the interpretive organs should engage the principle of effectiveness in the entire interpretative process. The engagement of this principle can help the interpretive organs to ensure the meaning assigned to the socio-economic rights is practical and effective.

The following chapter will seek to consider how the historical and philosophical background of the African Charter, that is embedded in its preparatory work, sheds light on the socio-economic rights provisions. Moreover, the chapter will seek to demonstrate the interpretive possibilities embedded in the African Charter as a whole, by discussing the relevant provisions of an interpretive character, as well as the provisions related to the interpretative mandate of the interpretive organs

Chapter 3

The history and text of the African Charter

3 1 Introduction

The previous chapter identified the teleological approach as appropriate for interpreting the socio-economic rights in the African Charter.¹ The discussion demonstrated that this approach applies the object and purpose of a treaty to develop the meaning of its provisions.² This approach requires the treaty to be interpreted holistically by engaging all the relevant provisions of the text, as well as the preparatory work, to construe the meaning of the provisions being interpreted.³ In this regard, the analysis in the preceding chapter identified the text, as well as the preparatory work, as significant elements of the treaty.⁴ The preparatory work enshrines the historical and philosophical background of the treaty,⁵ as confirmed by Gardiner and Mortenson.⁶

The methodology for applying the teleological approach, as developed in the previous chapter, demonstrates how the interpretive organs should apply these elements.⁷ This chapter analyses the historical background to the adoption of the African Charter in relation to the socio-economic rights and discusses the textual formulation of socio-economic rights and other relevant provisions, as well as the statements of the preamble. The aim of this analysis is to demonstrate the implications of these elements for the interpretation of the socio-economic rights in the African Charter.

3 2 Preparatory work of the African Charter and its implications for interpreting socio-economic rights

3 2 1 Introduction

The adoption of the African Charter was influenced by initiatives from inside and outside Africa. The external initiatives include the efforts of international institutions, such as the International Commission of Jurists ('International Commission') and the

¹ See chapter two, parts 2 2 3 and 2 4.

² See chapter two, part 2 2 3.

³ See chapter two, parts 2 2 3 and 2 5 2 2.

⁴ See chapter two, parts 2 2 3, 2 5 2 1, and 2 5 2 2.

⁵ See chapter two, part 2 2 3.

⁶ R Gardiner *Treaty Interpretation* (2008) 25; and JD Mortenson "The *travaux of travaux*: Is the Vienna Convention hostile to drafting history?" (2013) 107 *American Journal of International Law* 780-781.

⁷ See chapter two, part 2 5.

United Nations ('UN'),⁸ whereas the anti-colonial struggle and the efforts of the Organisation of African Unity ('OAU') (now the African Union 'AU') represent internal initiatives. This section takes stock of the historical and philosophical background to the adoption of the African Charter contained in its preparatory work and discusses its implications for the interpretation of socio-economic rights provisions.

3 2 2 External historical initiatives

The external efforts to adopt the African Charter started with the work of the International Commission in the early 1960s.⁹ In 1961, the International Commission organised the African Conference on the Rule of Law in Lagos ('Lagos Conference'). The Lagos Conference adopted a Declaration ('Law of Lagos'),¹⁰ which required African leaders to adopt a human rights instrument for Africa. It states

“[t]hat in order to give full effect to the Universal Declaration of Human Rights of 1948, this Conference invites the African Governments to study the possibility of adopting an African Convention of Human Rights in such a manner that the Conclusions of this Conference will be safeguarded by the creation of a court of appropriate jurisdiction and that recourse thereto be made available for all persons under the jurisdiction of the signatory States.”¹¹

The Law of Lagos is significant in two ways. Firstly, it demonstrates the intention of African leaders and scholars to protect human rights (including socio-economic rights) through an African human rights treaty. Although the Law of Lagos does not expressly contain provisions relating to socio-economic rights, its preamble gives insight into the participants' intention to protect such rights. In particular, the Law of Lagos defines “rule of law” as a broad concept, which should be applied to protect both individuals' political rights and the social, economic, educational, and cultural conditions for the achievement of their dignity.¹²

⁸ The organisation of the United Nations ('UN') was officially recognised and established in San Francisco on 24 October 1945, with the mandate to keep world peace, see <http://www.un.org/en/sections/history-united-nations/> (accessed 25-03-2017).

⁹ G Baricako “The African Charter and African Commission on Human and Peoples' Rights” in M Evans & R Murray (eds) *The African Charter on Human and Peoples' Rights: The System in Practice, 1986-2006* 2 ed (2008) 1 1.

¹⁰ African Conference on the Rule of Law, Lagos, Nigeria (3-7 January 1961), A Report on the Proceedings of the Conference (1961) 9 ('Law of Lagos').

¹¹ Law of Lagos para 4.

¹² Preamble to the Law of Lagos.

The Lagos Conference was attended by nearly two hundred legal scholars from twenty-three African countries.¹³ This number is significant, as it provides insight into African leaders' awareness of the protection of human rights, including socio-economic rights. As Rhyne observes, being the heads of important public institutions in their respective governments, the participants of the Lagos Conference had the power to influence African leaders to take action on human rights protection.¹⁴ Two years after the Lagos Conference, African leaders adopted the Charter of the Organisation of African Unity ('OAU Charter').¹⁵

Secondly, the Law of Lagos is significant as it stresses the establishment of an African Court that is accessible to all individuals in Africa. This historical aspect is vital in that it demonstrates African leaders' intention to guarantee a human rights enforcement mechanism that is accessible to every individual.

In 1967, the Conference of the French-speaking African Jurists was held in Dakar under the auspices of the International Commission ('Dakar Conference').¹⁶ This conference adopted the Declaration of Dakar ('Dakar Declaration'), which was significant for the adoption of the African Charter in three respects. Firstly, it stressed the need to adopt an African treaty for the promotion and protection of human rights.¹⁷ Secondly, it required African States to establish the African Commission with a mandate to protect the human rights of individuals in Africa.¹⁸ Thirdly, it enumerated a small number of socio-economic rights to be promoted and protected by the prospective treaty.¹⁹

Concerning the protection of human rights, the Dakar Conference highlighted that States' efforts to construct the political and socio-economic conditions required for development projects can also endanger the enjoyment of individual's rights.²⁰ Accordingly, an equitable balance between the requirements of public well-being and

¹³ The African Conference on the Rule of Law consisted of 294 judges, practicing lawyers, and teachers of law from 23 African nations, as well as 9 countries from other continents.

¹⁴ CH Rhyne "A report on the Lagos Conference" (1961) 47 *American Bar Association Journal* 685 686.

¹⁵ The Organisation of the African Unity ('OAU') was formed by the African Leaders of 32 countries. The Charter of the Organisation of African Unity, 13 September 1963 479 UNTS 39 ('OAU Charter'). The contribution of the OAU Charter to the adoption of the African Charter is discussed in part 3 2 3 2 below.

¹⁶ The Conference of French-speaking African Jurists met in Dakar, Senegal, from 5-9 January 1967 under the auspices of the International Commission of Jurists in collaboration with its French National Section *Libre Justice*, and the *Association Senegalaise d'Etudes et de Recherches Juridiques* 1-17 reprinted in the Bulletin of the International Commission of Jurists No. 29, March 1967.

¹⁷ Art VI(3) of the Dakar Declaration.

¹⁸ Art VI(3).

¹⁹ Arts I-III.

²⁰ Dakar Declaration para 9.

individual's rights is required.²¹ Based on this background, the Dakar Declaration emphasised the protection of the rights to human dignity and non-discrimination of individuals.²² In addition, it stressed the significance of treating civil and political rights, as well as socio-economic rights, on equal footing.²³ Based on these statements, the Dakar Declaration acknowledged a few rights of a socio-economic nature.

Article I(1) of the Dakar Declaration required States to adopt legislative measures that prohibit "oppressive labour contracts", "obstructions placed in the way of a free choice of marital partner", and "any abuse of parental authority, especially by exploiting the work of children".²⁴ The right to work encompassed the right to an adequate standard of living and placed an obligation on every individual to work.²⁵ This right also included a prohibition on forced labour; the State's obligation to create employment opportunities for individuals; freedom of choice of employment; and fair conditions of work.²⁶ Others included the rights to fair remuneration; vocational training;²⁷ and to join a trade union.²⁸ States were urged to ratify the International Labour Conventions, as well as to enact relevant labour legislation.²⁹

These provisions are significant for interpreting the socio-economic rights in the African Charter in three ways. Firstly, the provisions recognised the rights to dignity and non-discrimination, which are relevant in explicating the meaning of socio-economic rights. Secondly, the provisions enumerated some of the important socio-economic rights and their content. Thirdly, they demonstrate States' obligations to protect these rights through legislation. Ouguergouz posits that the inclusion of these rights provisions in the Dakar Declaration sheds light on the scope and content of the rights of individuals in the African Charter.³⁰

In 1971, the United Nations Economic Commission for Africa ('UN Economic Commission') undertook another initiative. The Commission held a Conference of African Jurists on African Legal Process and the Individual in Addis Ababa ('Addis

²¹ Para 9.

²² Para 10.

²³ Para 11.

²⁴ Art I(1) of the Dakar Declaration.

²⁵ Art II(1).

²⁶ Art II(2).

²⁷ Art II(3).

²⁸ Art III(3)-(4).

²⁹ Arts II(4) and III(4) of the Dakar Declaration.

³⁰ F Ouguergouz *The African Charter on Human and Peoples' Rights: A Comprehensive Agenda for Human Dignity and Sustainable Democracy in Africa* (2003) 22.

Ababa Conference’).³¹ This conference recommended that African States adopt an African Convention on Human Rights (‘Convention on Human Rights’).³² According to the Addis Ababa Conference, the Convention on Human Rights was significant for the effective protection of all the rights of individuals.³³

In 1973, the UN commenced an initiative aimed at the adoption of the African Charter. The UN organised a seminar in Dar Es Salaam, Tanzania (‘Dar Es Salaam Seminar’).³⁴ This seminar is significant, as its participants agreed to establish an African human rights treaty.³⁵ The participants also stressed that this proposed African human rights treaty should focus on people’s socio-economic conditions.³⁶ The Dar Es Salaam Seminar is important, as it articulated the intention of African leaders to adopt a treaty that protects rights of a socio-economic character. As Ouguergouz rightly observes, the Dar Es Salaam Seminar expressed African leaders’ concerns about the socio-economic conditions of the continent’s people.³⁷

This preparatory work of the African Charter gives vital insight into African leaders’ emphasis on protecting socio-economic rights. Secondly, it stresses the context within which these rights should be protected, namely in a flexible and evolutive way. This requirement demonstrates African leaders’ intention to protect African people against the past and subsequent violations of their socio-economic rights.

The external initiatives discussed in this part were not directly successful in fostering the adoption of the African Charter, as African leaders did not implement them immediately. Although these initiatives were not directly successful, they were significant in two respects. Firstly, some resolutions made during various conferences elaborated the scope and content of a few socio-economic rights. This elaboration can provide interpretive organs with insight into the meaning and content of the socio-economic rights formulated in the African Charter.

The external preparatory work emphasised the improvement and protection of the socio-economic conditions and welfare of African people. It also emphasised the values

³¹ Conference of African jurists on the African Legal Process and the Individual, Addis Ababa, Ethiopia, 19-23 April 1971, E/CN.14/521 of 5 July 1971.

³² Resolution 3(5)(ii) of the Addis Ababa Conference.

³³ Resolution 3(5).

³⁴ Seminar on the Study of New Ways and Means for Promoting Human Rights with Special Attention to the Problems and Needs of Africa, Dar es Salaam, Tanzania, 23 October-5 November 1973, UN Doc ST/TAO/HR/48, as quoted in BG Ramcharan “Human rights in Africa: Whither now?” (1975) 12 *University of Ghana Law Journal* 88 98.

³⁵ Dar Es Salaam Seminar para 111, as quoted in Ramcharan (1975) *University of Ghana Law Journal* 98.

³⁶ 98.

³⁷ Ouguergouz *The African Charter on Human and Peoples’ Rights* 31.

of freedom, equality, justice, and dignity. The preparatory work also stressed individuals' access to human rights enforcement mechanisms. As such, the interpretation of socio-economic rights by supervisory organs should take into account these values in elaborating the scope and content of socio-economic rights. Furthermore, the interpretation should guarantee individuals complaining of human rights violations access to the supervisory organs for their complaints to be heard and determined.

Secondly, the initiatives outlined above raised awareness among African leaders of the significance of adopting a human rights treaty for Africa.³⁸ As Baricako notes, for instance, the external initiatives helped President Senghor of Senegal to persuade African leaders of the importance of adopting a mechanism for human rights protection.³⁹ This initiative and other factors paved the way for the internal efforts of African leaders to adopt the African Charter. Ouguergouz explains that various efforts within Africa directly necessitated the decision by African leaders to adopt the African Charter.⁴⁰ These internal efforts are discussed in the ensuing section.

3 2 3 Internal historical initiatives

3 2 3 1 Contribution of the anti-colonial struggle

The struggle against colonialism in Africa contributed significantly to the adoption of the African Charter. The movements for decolonisation, particularly through Pan-African Congresses, emphasised the respect and protection of human rights in Africa.⁴¹ As Killander argues, human rights standards were used in Africa to fight colonialism.⁴² This part analyses the contribution of decolonisation movements to the adoption of the African Charter.

The 1919 Pan-African Congress in Paris marked the beginning of African leaders' efforts to protect the human rights of African people, which eventually contributed to the adoption of the African Charter. At this congress, Africans and African-descended

³⁸ In the Decision on Human and Peoples' Rights in Africa AHG/Dec. 115 (XVI) Rev 1, 1979, for instance, African leaders referred to Resolution 24(XXIV) of the United Nations Human Rights Commission on Regional Arrangements for the Promotion and Protection of Human Rights.

³⁹ Baricako "The African Charter and African Commission" in *The African Charter on Human and Peoples' Rights* 5. See also Ouguergouz *The African Charter on Human and Peoples' Rights* 36; and Viljoen *International Human Rights Law* 159.

⁴⁰ Ouguergouz *The African Charter on Human and Peoples' Rights* 37.

⁴¹ M Killander "African human rights law in theory and practice" in S Joseph & A McBeth (eds) *Research Handbook on International Human Rights Law* 389-391, see <<http://ssrn.com/abstract=1438555>> (accessed 03-11-2015). See further Viljoen *International Human Rights Law* 151-156.

⁴² Killander "African human rights law" *Research Handbook on International Human Rights law* 388 389.

activists tried to influence an agenda relating to the political and economic freedom of all African colonies. During the congress, participants from Africa requested changes in colonial policy relating to human rights, including socio-economic rights.

In particular, African participants raised three significant concerns. Firstly, the need for land ownership and equitable economic development in a manner that allows African people to benefit from the sale and extraction of their natural resources. Secondly, provision for educational opportunities in industrial fields and in language programmes, as well as accessible health care, which was considered an effective tool for economic development. Thirdly, they requested the participation of African people in local government, as well as the independence of African colonies.⁴³ These resolutions are significant in that they can give insight into the purpose, scope and content of the substantive provisions of socio-economic rights, particularly peoples' socio-economic rights to development, free disposal of natural resources, and a healthy environment, as adopted in the African Charter.⁴⁴

The second Pan-African Congress was held in three different cities namely, London, Brussels, and Paris.⁴⁵ This congress reiterated the three concerns that were raised at the 1919 Congress and added other concerns. In particular, it emphasised self-determination and the protection of labour rights (especially the elimination of involuntary servitude, inadequate pay, and hard working conditions). The third and fourth Pan-African Congresses took place in 1923 and 1927 respectively,⁴⁶ and reiterated the concerns raised in the previous congresses.

The fifth Pan-African Congress was held in Manchester in October 1945.⁴⁷ It was convened by an influential pan-Africanist, George Padmore, and the President of Ghana, Kwame Nkrumah.⁴⁸ The resolutions of the 1945 Congress emphasised the abolition of discriminatory land laws, as well as forced labour; the inclusion of the right to freedom from poverty; the right of Africans to develop their economic resources without

⁴³ 1919 Pan-African Congress <www.diaspora.northwestern.edu> (accessed 21-10-2015). Pan-African Congress in 1919 www.diaspora.northwestern.edu (accessed 21-10-2015).

⁴⁴ These collective socio-economic rights are discussed in parts 3 3 4 6 to 3 3 4 8 below.

⁴⁵ 1921 Pan-African Congress, see <www.diaspora.northwestern.edu> (accessed 21-10-2015).

⁴⁶ 1923 Pan-African Congress and 1927 Pan-African Congress, see <www.diaspora.northwestern.edu> (accessed 21-10-2015).

⁴⁷ 1945 Pan-African Congress, see <www.aaprp-intl.org> (accessed 03-11-2015).

⁴⁸ The Congress was attended by 90 delegates, among them 26 from Africa, including scholars, intellectuals, and political activists who later became influential leaders in their respective African countries. These African leaders included Jomo Kenyatta, who became the President of Kenya; Hastings Kamuzu Banda, who became the President of Malawi; and Kwame Nkrumah, who became the President of Ghana.

hindrance; the right to freedom of association and assembly; the right to compulsory free education, including free uniforms, meals, books and school equipment; the right to health, including the rights to medical services, equality of access to health and welfare services; and the right to work, including the right to equal pay for equal work.⁴⁹ These resolutions can assist the supervisory organs in developing the scope and content of the socio-economic rights to work, education, health, property, and food.

In 1958, the All African People's Conference was held in Accra and attended by 300 delegates. This conference adopted a Resolution on Imperialism and Colonialism,⁵⁰ which extended fundamental human rights to all men and women in African countries, as well as the rights of African people to the fullest use and protection of their lands.⁵¹ The resolution required independent African States to ensure fundamental human rights were extended within their States to serve as an example to the colonial nations who violated and ignored the rights of African people.⁵²

The discussion in this part demonstrates the influence of the anti-colonial struggle, through the Pan-African Congresses, on the socio-economic rights provisions in the African Charter. In particular, the resolutions passed by the Pan-African Congresses and the All African People's Conference can give insight into the normative scope and content of the socio-economic rights to work, education, health, property, food, as well as the peoples' socio-economic rights to freely dispose of their natural wealth, development, and a satisfactory environment (as enshrined in articles 21, 22, and 24 of the African Charter).⁵³

3 2 3 2 Organisation of African Unity Charter

A few years after the Resolution on Imperialism and Colonialism, and after thirty-two African countries had achieved independence, African leaders⁵⁴ adopted the OAU

⁴⁹ 5th Pan-African Congress Resolutions and Declarations, see <www.13.+5th+PAC++resolutions+and+declarations,+1945.pdf> (accessed 03-11-2015).

⁵⁰ Resolution on Imperialism and Colonialism, Accra, 5-13 December 1958, see <www.v1.sa.history.org> (accessed 21-10-2015).

⁵¹ 5.

⁵² 7.

⁵³ The Pan-African Congresses greatly influenced the inclusion of peoples' rights, as enshrined in arts 19-24 of the African Charter. This dissertation will only analyse arts 21, 22, and 24, as they specifically concern peoples' socio-economic rights. See parts 3 3 4 6 to 3 3 4 8 below. Other provisions regarding peoples' rights will be discussed only to the extent that they are relevant to the socio-economic rights in the African Charter.

⁵⁴ The Organisation of African Unity ('OAU') was formed by the African Leaders of 32 countries.

Charter.⁵⁵ Significantly, the OAU Charter contained provisions relevant to the protection of socio-economic rights. As Killander notes, the instrument fostered some human rights standards that African leaders stood for in their anti-colonial struggles.⁵⁶ Through its preamble, African leaders declared the significance of the values of freedom, equality, justice, and dignity for the realisation of human rights.⁵⁷ Furthermore, African leaders affirmed their adherence to the principles of human rights contained in the UN Charter and the Universal Declaration of Human Rights ('UDHR').⁵⁸ According to African leaders, these principles ensured common cooperation among states.⁵⁹ Moreover they expressed the desire to protect the welfare and well-being of all individuals in Africa.⁶⁰

In addition, African leaders explicitly stated their purpose to achieve a better life for all individuals in Africa.⁶¹ In order to achieve these goals, African leaders agreed to commonly cooperate in various areas related to human rights.⁶² These areas include economic, educational and cultural, as well as health, sanitation, and nutritional cooperation.⁶³ These provisions are significant in that they can provide insight into the purpose, as well as the scope and content, of the substantive provisions of the socio-economic rights adopted in the African Charter. These provisions can help ensure that socio-economic rights are interpreted in a manner that ensures equality in their enjoyment by individuals, as well as the guarantee of an individual's dignity in the protection and enjoyment of such rights. As Ramcharan notes, these provisions are directly related to socio-economic rights.⁶⁴

3 2 3 3 Decision on Human and Peoples' Rights in Africa

The internal processes to adopt the African Charter continued in 1979 with the Summit of the African Leaders in Monrovia ('Monrovia Summit').⁶⁵ During the Monrovia

⁵⁵ The Charter of the Organisation of African Unity ('Charter of the OAU'), entered into force 13 September 1963, 479 UNTS 39.

⁵⁶ Killander "African human rights law" in *Research Handbook on International Human Rights Law* 390-391.

⁵⁷ Preamble to the OAU Charter para 2.

⁵⁸ Preamble para 8.

⁵⁹ Para 8.

⁶⁰ Para 9.

⁶¹ Art II(1)(b).

⁶² Art II(2).

⁶³ Art II(2)(b)-(d).

⁶⁴ BG Ramcharan "Human rights in Africa: Whither now?" (1975) 12 *University of Ghana Law Journal* 88 91.

⁶⁵ Sixteenth Ordinary Session of the OAU Assembly of Heads States and Government, Monrovia Liberia, 16-20 July 1979.

Summit, African leaders declared their commitment to protecting human rights and other principles related to human rights contained in the UN Charter.⁶⁶ These principles include dignity, equality, and justice.⁶⁷ Furthermore, the leaders stressed their goal to protect socio-economic rights on the same level as civil and political rights.⁶⁸ African leaders agreed to give special attention to the socio-economic rights of individuals.⁶⁹ Based on this background, these leaders adopted a resolution ('OAU Resolution')⁷⁰ that initiated the process to draft the African Charter. The OAU Resolution required the OAU Secretary-General to convene "a restricted meeting of highly qualified experts" who could formulate the "preliminary draft" of the African Charter, which establishes supervisory bodies with a mandate to promote and protect human rights at the individual and collective level.

The OAU Resolution is significant for interpreting socio-economic rights in four ways. Firstly, it demonstrates the commitment of African leaders to protect the values of dignity, equality, and justice. Secondly, it shows the significance of socio-economic rights for improving the socio-economic conditions of individuals. Thirdly, the OAU Resolution recognises the principle of the interdependence of rights. Finally, it stresses that the adoption of the African Charter will protect these goals.

Writing on the development of the African Charter, Ouguergouz notes that the OAU Resolution identifies the shared concerns of African leaders to protect human rights, including socio-economic rights.⁷¹ In this regard, the OAU Resolution can give insight into the manner in which the scope and content of socio-economic rights contained in the African Charter should be construed. Baricako confirms the significance of the OAU Resolution in the elaboration of the provisions of the African Charter.⁷²

Following the OAU Resolution, a meeting of experts was convened to draft the African Charter.⁷³ Three documents are significant for this discussion. They include the opening speech by President Senghor;⁷⁴ the Draft African Charter prepared by Keba

⁶⁶ OAU Resolution para 1.

⁶⁷ Para 1.

⁶⁸ Para 4.

⁶⁹ Para 4.

⁷⁰ Decision on Human and Peoples' Rights in Africa, Resolution AHG/Dec 115 (XIV) Rev 1, 1979.

⁷¹ Ouguergouz *The African Charter on Human and Peoples' Rights* 40.

⁷² Baricako "The African Charter and African Commission" in *The African Charter on Human and Peoples' Rights* 5.

⁷³ See part 3 2 3 4 below.

⁷⁴ See part 3 2 3 4 below.

M'Baye to guide the experts;⁷⁵ and the Draft African Charter that was prepared by the experts.⁷⁶

3 2 3 4 Opening speech by President Senghor

In response to the OAU Resolution, the OAU Secretary-General convened the Meeting of Experts in Dakar.⁷⁷ This meeting was opened by the then President of Senegal, His Excellency Leopold Sedar Senghor.⁷⁸ In his speech ('Address by Senghor' or 'Senghor's speech'), President Senghor highlighted the object and purpose of the African Charter to be adopted. According to him, the proposed African Charter should safeguard the values of dignity, equality, freedom, and justice,⁷⁹ taking into account the needs of African people, including their socio-economic needs.⁸⁰

The concern for people's socio-economic needs implies that the proposed African Charter should give effect to the interpretation of the socio-economic rights of the people in Africa. As Odinkalu notes, Senghor's speech highlighted the need for an African Charter that protected socio-economic rights in such a manner that it would improve the socio-economic conditions of African people.⁸¹ This goal should be reflected in the drafting of the relevant socio-economic rights provisions. Moreover, Senghor's speech stressed African leaders' goal of protecting socio-economic rights, both at the individual and collective level.⁸²

President Senghor noted that the recognition of these rights in the African Charter was significant for the socio-economic development of all people in Africa.⁸³ He highlighted that African leaders considered socio-economic rights and civil and political rights as equally important.⁸⁴ Thus, the African Charter should protect these categories

⁷⁵ See part 3 2 3 5 below.

⁷⁶ See part 3 2 3 6 below.

⁷⁷ The Meeting of Experts to Draft the Preliminary Draft of the African Charter was held in Dakar, Senegal, from 28 November to 8 December 1979.

⁷⁸ Address delivered by Leopold Sedar Senghor, President of the Republic of Senegal, OAU Doc CAB/LEG/67/5 ('Address by Senghor').

⁷⁹ Para 3.

⁸⁰ Para 16.

⁸¹ CA Odinkalu "Implementing economic, social and cultural rights under the African Charter on Human and Peoples' Rights in M Evans & R Murray (eds) *The African Charter on Human and Peoples' Rights: The System In Practice 1986-2000* (2002) 178 187. See also Yeshanew *The Justiciability of Economic, Social and Cultural Rights* 111.

⁸² Address by Senghor para 19.

⁸³ Para 19.

⁸⁴ Para 20.

of rights equally.⁸⁵ In relation to the protection of socio-economic rights, Senghor's address emphasised the importance of the right to development, which embraces all rights of a socio-economic character. The full realisation of the right to development should be considered in a manner that improves the socio-economic conditions of individuals.⁸⁶

In his address, President Senghor also urged the experts to take African philosophy⁸⁷ into account when developing the African Charter:

“Room should be made for this African tradition in our Charter on Human and Peoples’ Rights, while bathing in our philosophy, which consists in not alienating the subordination of the individual to the community, in co-existence, in giving everyone a certain number of rights and duties ... In Africa, the individual and his rights are wrapped in the protection the family and other communities ensure everyone.”⁸⁸

These remarks imply that the notion of African philosophy enshrines three significant components. Firstly, the notion of African philosophy considers an individual as part and parcel of the collective community. Secondly, the African philosophy considers an individual as a person with rights, as well as obligations. Thirdly, the enjoyment of an individual's rights is closely linked to the protection offered to him or her by members of the family, as well as by the entire community. As such, Senghor's speech takes into account the fact that both States and non-state actors bear a certain number of obligations towards the realisation of human rights.⁸⁹

President Senghor's emphasis on an individual as a duty bearer is significant for interpreting the socio-economic rights in the African Charter. It takes into consideration the fact that these rights can be violated by both States and non-state actors. As such, it implies that States bear an obligation to protect individuals from violations by non-state actors. It also suggests that States have an obligation to ensure that non-state actors respect individuals' human rights. Moreover, President Senghor stressed the significance of drawing inspiration from other relevant international instruments related to the protection of human rights.⁹⁰

The foregoing discussion demonstrates the significance of President Senghor's speech in relation to socio-economic rights. His address embraces three significant

⁸⁵ Para 20.

⁸⁶ Paras 21-22.

⁸⁷ The notion of African philosophy is analysed in part 3 2 4 2 below.

⁸⁸ Address by Senghor paras 27 and 29.

⁸⁹ Para 24.

⁹⁰ Para 30.

elements relevant for the interpretation of socio-economic rights. Firstly, it emphasises the protection of human rights as the main object and purpose of the African Charter. Secondly, it emphasises the interdependence of rights.⁹¹ Thirdly, it insists on the promotion of African philosophy, as well as the values of dignity, equality, freedom and justice. As Ouguergouz argues, Senghor's speech enshrines the philosophy surrounding the provisions of the African Charter.⁹² Thus, the socio-economic rights in the African Charter should be construed in a manner that embraces these identified elements.

The recommendations in Senghor's speech also influenced the manner in which the African Charter was drafted.⁹³ Thus, Senghor's speech is relevant in that it influenced both the drafting process and the adoption of the African Charter. As Yeshanew rightly notes, Senghor's speech informed the subsequent deliberations in the adoption of the African Charter.⁹⁴

3 2 3 5 M'Baye's Draft of the African Charter on Human and Peoples' Rights

The preliminary draft of the African Charter was prepared by Keba M'Baye ('M'Baye Draft'),⁹⁵ who was the President of the Supreme Court of Senegal. The M'Baye Draft is significant as it was used as a framework for the African Charter.⁹⁶ According to Viljoen,⁹⁷ and Yeshanew,⁹⁸ the M'Baye Draft provided the foundation for deliberations by the experts who drafted the African Charter. The M'Baye Draft incorporated various provisions on socio-economic rights and other related rights.

These provisions were similar⁹⁹ to the provisions of the International Covenant on Economic, Social and Cultural Rights ('ICESCR'),¹⁰⁰ and the American Convention on

⁹¹ The concept of the interdependence of rights is discussed in part 3 3 2 2 below.

⁹² Ouguergouz *The African Charter on Human and Peoples' Rights* 41. See also Baricako "The African Charter and the African Commission" in *The African Charter on Human and Peoples' Rights* 6.

⁹³ 41.

⁹⁴ Yeshanew *The Justiciability of Economic, Social and Cultural Rights* 111.

⁹⁵ M'Baye Draft African Charter on Human and Peoples' Rights, OAU Doc CAB/LEG/67/1 ('M'Baye Draft').

⁹⁶ Introduction to the M'Baye Draft para 1.

⁹⁷ F Viljoen "The African Charter on Human and Peoples' Rights: The *travaux preparatoires* in the light of subsequent practice" (2004) 25 *Human Rights Law Journal* 313 314.

⁹⁸ Yeshanew *The Justiciability of Economic, Social and Cultural Rights* 111.

⁹⁹ Introduction to the M'Baye Draft para 1.

¹⁰⁰ International Covenant on Economic, Social and Cultural Rights, GA Res 2200A (XXI) 16 December 1966, 993 UNTS 3 ('ICESCR') was adopted by the UN General Assembly ('GA') on 16 December 1966 and entered into force on 3 January 1976. The final provisions of the African Charter are, however, quite different from the ICESCR. See part 3 3 below.

Human Rights ('American Convention').¹⁰¹ This reference to the ICESCR is significant as it allows for the interpretive organs to refer to the ICESCR during the interpretative process. As is discussed below,¹⁰² it should be noted that in the end the formulation of the provisions of the African Charter is quite different from the ICESCR. Despite the contrast in formulation between the African Charter and the ICESCR, the teleological approach enables ICESCR provisions to be incorporated into the African Charter through interpretation. Through a teleological approach, supervisory organs can consider other relevant instruments in the interpretation of the provisions of the African Charter. As such, the supervisory organs can use the ICESCR to elaborate the socio-economic rights provisions of the African Charter.

The M'Baye Draft refers to socio-economic rights in three distinct provisions, namely the preambular clauses; the general provisions; and the specific socio-economic rights provisions. Regarding the preambular clauses, the M'Baye Draft identifies two significant elements relevant for interpreting socio-economic rights. Firstly, the preamble identifies the apparent object and purpose, as well as the underlying values, of the African Charter. According to the preamble, African leaders commit to protecting fundamental human rights, including socio-economic rights, and the value of human dignity.¹⁰³ The respect for human dignity and fundamental rights is not restricted to civil and political rights, but extends to socio-economic rights.¹⁰⁴ Therefore, every individual is entitled to the enjoyment of his or her socio-economic rights, as well as the enjoyment of civil and political rights.¹⁰⁵ Secondly, it stated the commitment of African leaders to protecting fundamental rights in accordance with the UN Charter and the UDHR.¹⁰⁶

The second way in which the M'Baye Draft protects socio-economic rights is through general provisions. These general provisions protect socio-economic rights in two respects. On the one hand, the general provisions recognise individuals' socio-economic rights. On the other, they impose obligations on States to protect socio-economic rights. For example, article 1(1) of the M'Baye Draft requires States to respect the rights formulated therein without discrimination. Regarding this obligation, States are required

¹⁰¹ Organisation of American States ('OAS') American Convention on Human Rights, "Pact of San Jose", Costa Rica, 22 November 1969 ('American Convention'). The American Convention was adopted on 22 November 1969 and entered into force on 18 July 1978, see <http://www.oas.org/dil/treaties_b-32_american_convention_on_human_rights_sign.htm> (accessed 03-04-2017).

¹⁰² See part 3.3 below.

¹⁰³ Introduction to the M'Baye Draft para 2.

¹⁰⁴ Para 2.

¹⁰⁵ Para 4.

¹⁰⁶ Para 1.

to adopt “legislative or other measures... to give effect to these rights and freedoms”.¹⁰⁷ Article 2(1) recognises the right to self-determination of the individual’s socio-economic development. In accordance with this right, individuals are allowed to dispose of “their natural wealth and resources” for their socio-economic development.¹⁰⁸ This right is qualified by prohibiting the deprivation of individuals’ own socio-economic means of subsistence.¹⁰⁹ Article 3 requires States to take steps through available resources and progressive realisation to realise individuals’ rights. This article is similar to the provisions of article 2(1) of the ICESCR, which provides for States obligations.¹¹⁰

The third way in which the M’Baye Draft protects socio-economic rights is through the formulation of specific substantive provisions related to these rights. The socio-economic rights in the M’Baye Draft include the right to equal enjoyment of the socio-economic rights to work;¹¹¹ social security;¹¹² an adequate standard of living;¹¹³ health;¹¹⁴ and education.¹¹⁵ These rights in the M’Baye Draft enshrine the legal socio-economic entitlements of individuals, as well as the obligations they impose upon States for their full realisation.

As noted above, the M’Baye Draft was used by experts as a guide to develop the draft African Charter, which is analysed below.

3 2 3 6 Dakar Draft

A group of experts¹¹⁶ under the chairmanship of Keba M’Baye, met in Dakar and prepared the draft African Charter (‘Dakar Draft’).¹¹⁷ The Dakar Draft formulated various socio-economic rights and other provisions relevant to socio-economic rights. According

¹⁰⁷ Art 1(2) of the M’Baye Draft.

¹⁰⁸ Art 2(2).

¹⁰⁹ Art 2(3).

¹¹⁰ Art 2(1) of the ICESCR reads:

“Each State Party to the present Covenant undertakes to take steps, individually and through international assistance and co-operation, especially economic and technical, to the maximum of its available resources with a view to achieving progressively the full realisation of the rights recognised in the present Covenant.”

¹¹¹ Art 6 of the M’Baye Draft.

¹¹² Art 7.

¹¹³ Art 10.

¹¹⁴ Art 11.

¹¹⁵ Art 12.

¹¹⁶ A group of experts was formed by the Secretary-General of the OAU, Edem Kodjo, as directed by the Assembly of Heads of State and Governments in its Decision 115(XIV). The record shows that the group was composed of twenty African experts, presided over by Judge Keba M’Baye. However, the record does not disclose the names of the experts, see <www.achpr.org> (accessed 11-11-2015).

¹¹⁷ Preliminary Draft of the African Charter, prepared during the Dakar Meeting of Experts at the end of 1979, OAU Doc CAB/LEG/67/3/Rev. 1.

to the Dakar Draft, the promotion and protection of human rights should be able to improve peoples' needs, including their socio-economic needs.¹¹⁸ The Dakar Draft recognises the values of freedom, equality, justice, and dignity, as significant for the achievement of peoples' needs.¹¹⁹ It therefore formulated substantive provisions in relation to these values, including provisions on the rights to non-discrimination, equality, life, and dignity.¹²⁰ The Dakar Draft emphasised the improvement of individuals' socio-economic conditions through the protection of socio-economic rights.¹²¹

Socio-economic rights in the Dakar Draft included the rights to property;¹²² work; health; education; family; wealth and natural resources; as well as the right to economic, social and cultural development.¹²³ Unlike the M'Baye Draft, the Dakar Draft formulates socio-economic rights in a general form in that it does not elaborate their normative scope and content. The Dakar Draft also omitted some significant socio-economic rights provisions. These include the right to social security, as well as the right to an adequate standard of living.¹²⁴ According to Viljoen, the general formulation and the omission of some socio-economic rights hinders the development of the normative content of these rights.¹²⁵ However, the Dakar Draft provides the mechanism with which the omitted rights, and the normative content of socio-economic rights, should be developed, as it requires interpretive organs to develop the normative content of these rights through interpretation.¹²⁶

Another significant aspect of the Dakar Draft is the imposition of obligations on States, as well as individuals, to realise some socio-economic rights.¹²⁷ States are generally obliged to "recognise" and "guarantee" human rights and to adopt "legislative and other measures" in order to "give effect" to these rights.¹²⁸ The Dakar Draft recognises an individual's duties towards his or her family, community, other individuals, and the country.¹²⁹ Unlike the M'Baye Draft, the Dakar Draft thus formulates these duties

¹¹⁸ Governing principle of the Dakar Draft.

¹¹⁹ Preamble to the Dakar Draft para 3.

¹²⁰ Arts 2-5 and 19 of the Dakar Draft.

¹²¹ Governing principle of the Dakar Draft para 6. See also, preamble to the Dakar Draft para 6.

¹²² The social dimensions of the right to property are discussed in part 3 5 4 1 below.

¹²³ Arts 14-19 of the Dakar Draft.

¹²⁴ The ICESCR contains these socio-economic rights in articles 9 and 11 respectively.

¹²⁵ Viljoen (2004) *Human Rights Law Journal* 320.

¹²⁶ Dakar Draft paras 2-3.

¹²⁷ Arts 16(2) and 17(2) of the Dakar Draft.

¹²⁸ Art 1 of the Dakar Draft.

¹²⁹ Arts 27-29 of the Dakar Draft.

broadly in a manner that provides for their scope and content. For example, article 27(2) requires individuals to fulfil these duties without discrimination.

The formulation of rights provisions in the Dakar Draft does not distinguish between socio-economic rights and civil and political rights. This formulation is significant in two ways. Firstly, it allows the interpretation of socio-economic rights through the concept of the interdependence of rights.¹³⁰ Secondly, it can assist interpretive organs interpreting socio-economic rights in a manner that recognise various States' obligations. As Viljoen notes, in addition to the obligations to respect and protect as stated in the provisions of the health and education rights, the formulation of the Dakar Draft incorporates the obligation to fulfil by requiring States to ensure and promote these rights.¹³¹

3 2 3 7 Report of the Rapporteur on the Dakar Draft

The Report of the Rapporteur ('Rapporteur's Report')¹³² represents another significant piece of preparatory material for interpreting the socio-economic rights in the African Charter. The significance of the Rapporteur's Report in relation to socio-economic rights provisions is found in the remarks by the Chairman of the Committee of Experts who drafted the Dakar Draft:¹³³

"The relatively simple form in which some articles were drafted so as to enable the future users of the legal instrument to apply and interpret them with some flexibility. It is left to the protection organs of human rights to complete the Charter. The deliberate refusal to indulge in the definition of such notions as 'people' so as not to end up in difficult discussions."¹³⁴

Chairman M'Baye's words are significant as they allow the interpretive organs to flexibly develop the scope and content of the socio-economic rights and their related obligations. As such, in situations where the interpretive organs find that the socio-economic rights provisions are formulated in a general form, they can use various interpretive sources to develop the required meaning of these rights.

The Dakar Draft was submitted to the OAU Ministers of Justice for deliberation. Significantly, the provisions of the Dakar Draft did not undergo any substantial change

¹³⁰ The concept of interdependence of rights is discussed in part 3 3 2 2 below.

¹³¹ Viljoen (2004) *Human Rights Law Journal* 320.

¹³² Rapporteur's Report OAU Doc CAB/LEG/67/Draft Rapt Rpt (II) Rev 4.

¹³³ Para 13.

¹³⁴ Para 13.

during deliberation.¹³⁵ After deliberation, the Dakar Draft was submitted to the Assembly of Heads of State and Governments, which adopted the African Charter on 17 June 1981. While the text of the African Charter is discussed below,¹³⁶ the ensuing part discusses the implications of the preparatory work of the African Charter for interpreting socio-economic rights provisions.

3 2 4 Implications of the preparatory work for interpreting socio-economic rights

3 2 4 1 Promoting and protecting socio-economic rights

An analysis of the preparatory work of the African Charter shows the underlying goals that influenced the adoption of the African Charter. The underlying object that guided initiatives to adopt the African Charter was to ensure the promotion and protection of the human rights of individuals, including socio-economic rights.

The preparatory work's promotion and protection of socio-economic rights was characterised by both explicit and implicit formulations of these rights. Explicit protection is evidenced in the Dakar Declaration, the M'Baye draft, and the Dakar Draft. Implicit protection is evident in the Law of Lagos, the Dar Es Salaam Seminar and Senghor's speech. These two forms of socio-economic rights formulation promoted and protected the right to equality in the enjoyment of socio-economic rights to property; work; social security; family; children's socio-economic rights; and an adequate standard of living, including adequate food, clothing and housing. Other rights include the rights to health; education; socio-economic development; and a healthy environment. The significant action required by interpretive organs is to interpret the socio-economic rights provisions in the African Charter in a manner that guarantees their promotion and protection. The advantage of promoting and protecting socio-economic rights is that it will further the object and purpose of the African Charter and ensure the improvement of the socio-economic conditions of individuals.

3 2 4 2 Promoting the African philosophy and the values of freedom, equality, justice, and dignity

The preparatory work has consistently demonstrated the need to embrace the African philosophy and promote the values of equality, freedom, justice, and dignity. The requirement to promote the African philosophy and these values is evidenced in the

¹³⁵ Yeshanew *The Justiciability of Economic, Social and Cultural Rights* 285.

¹³⁶ See part 3 3 below.

Dakar Declaration, the OAU Resolution, Senghor's speech, the M'Baye Draft, and the Dakar Draft.

There is a scholarly debate concerning the existence of a distinctly African philosophy. Hountondji rejects the existence of an African philosophy on the ground that it is not found in written literature. According to her, the African philosophy is a "set of texts written by Africans and described as philosophical by their authors".¹³⁷ She argues that the lack of literature on an African philosophy "prevents it from integrating itself into a collective theoretical tradition" and from "taking its place in history as a reference point capable of orienting future discussion".¹³⁸ Maurier also denies the existence of an African philosophy on the basis that it does not satisfactorily meet the three criteria required for an existence of a genuine philosophy, namely the reflective, rational, and systematic.¹³⁹ Bodunrin too rejects the existence of an African philosophy on the basis that it is wrong to argue that an African philosophy is centred on the collective nature of the individuals. According to him, since philosophy is studied through examining the thoughts of an individual, the African conception of philosophy based on the collective nature of individuals is based on an incorrect conception.¹⁴⁰ He argues that this view of an African philosophy merely portrays a specific system of thought of a particular African community.¹⁴¹

It is, however, wrong to rely exclusively on the existence of philosophical literature and philosophers as the sole justification for the existence of an African philosophy. As Appiagyei-Atua argues, the denial of the existence of African philosophers implies the denial of the existence of African people who can reflect and conceptualise their experiences.¹⁴² Apart from published literature, philosophical information can also be found through other undocumented sources, such as stories. Wright observes that although the subject of philosophy is established through a systematically identifiable body of literature, as developed by philosophers, this proof can be difficult as there is not any work by individual African philosophers similar to "Aristotle's *Metaphysics*, Hume's

¹³⁷ PJ Hountondji *African Philosophy: Myth and Reality* (1983) 33.

¹³⁸ 106.

¹³⁹ H Maurier "Do we have an African philosophy?" in RA Wright (ed) *African Philosophy: An Introduction* 3 ed (1984) 25 26.

¹⁴⁰ PO Bodunrin "The question of African philosophy" in RA Wright (ed) *African Philosophy: An Introduction* 3 ed (1984) 1 11.

¹⁴¹ 1.

¹⁴² K Appiagyei-Atua "A rights-centred critique of African philosophy in the context of development" (2005) 2 *South African Human Rights Law Journal* 335 346.

Treatise of Human Nature, or Kant's Critique of Pure Reason".¹⁴³ According to Wright, it is genuine to assume that the existence of a particular philosophy largely depends on published literature.¹⁴⁴ However, it is wrong to assume that written literature is an exclusive means to substantiate the existence of philosophy.¹⁴⁵

Wright further argues that African philosophy can be found through stories, oral tradition, and social institutions, as well as the writings of scholars.¹⁴⁶ Writing on *Ubuntu*,¹⁴⁷ as an African philosophical concept,¹⁴⁸ Shutte notes that it was expressed through songs and stories.¹⁴⁹ As such, Wright concludes that an African philosophy exists and that "its tenets may legitimately be found in the types of literature mentioned earlier".¹⁵⁰

Appiagyei-Atua argues that African philosophy can be demonstrated through the cultures, experiences, and mentalities of African people, which shape their societies.¹⁵¹ In a similar vein, Makinde notes that if the scepticism concerning the existence of an African philosophy is based on historical reasons (namely that there have been no renowned African philosophers) then such a doubt is wrong. Makinde also notes that the existence of an African philosophy can be established through common social values in African communities, which lay the foundation for an African philosophy.¹⁵²

The foundation of an African philosophy is the collective way of living in African societies. Mbiti argues that African philosophy is founded in the phrase "I am, because we are; and since we are, therefore I am".¹⁵³ The phrase by Mbiti demonstrates that the African philosophy is built on the collective nature of human beings, rather than on an individual basis. Maurier notes that African philosophy is characterised by the vital relationship that an individual maintains with other members of the community.¹⁵⁴ Similarly, President Senghor acknowledges that the African philosophy considers an

¹⁴³ RA Wright "Investigating African philosophy" in RA Wright (ed) *African Philosophy: An Introduction* 3 ed (1984) 41 50.

¹⁴⁴ 50.

¹⁴⁵ 50.

¹⁴⁶ 51.

¹⁴⁷ The concept of *Ubuntu* is discussed in this part below.

¹⁴⁸ J Broodryk *Ubuntu in South Africa* LLD thesis, University of South Africa (1997), as quoted in JY Mokgoro *Ubuntu and the Law in South Africa*, Paper delivered at Potchefstroom University on 31 October 1997, 2.

¹⁴⁹ A Shutte *Ubuntu: An Ethic for a New South Africa* (2001) 9.

¹⁵⁰ Wright "Investigating African philosophy" in *African Philosophy* 51.

¹⁵¹ Appiagyei-Atua (2005) *South African Human Rights Law Journal* 335 347.

¹⁵² MA Makinde *African Philosophy, Culture, and Traditional Medicine* (1988) 28-29.

¹⁵³ JS Mbiti *African Religions and Philosophy* 2 ed (1990) 106 and 141.

¹⁵⁴ Maurier "Do we have an African philosophy?" in *African Philosophy* 35.

individual as part and parcel of the community in the sense that he and the community are inseparable.¹⁵⁵

The African philosophy accordingly refers to an individual as a person who is responsible to the entire community for the realisation of his or her rights. In this vein, Okere argues that “the African conception of man is not that of an isolated and abstract individual, but an integral member of a group animated by a spirit of solidarity”.¹⁵⁶ As such, the African philosophy is guided by the values of collectiveness, humanism, togetherness, corporation, responsibility, and interdependence. Anyanwu argues that the African philosophy refers to the “fundamental and general principles governing the community of people called Africans”.¹⁵⁷

The community-oriented nature demonstrated by the African philosophy is, however, challenged by scholars. Howard argues that the collective conception of an individual is not the exclusive system in Africa.¹⁵⁸ According to her, African societies are largely divided in classes and status, such as age and sex, free-men and slaves, members and aliens.¹⁵⁹ She further contends that individualism has increased in contemporary African society due to economic difficulties and unemployment.¹⁶⁰ According to her, insistence on the communal-oriented nature of the African philosophy is not feasible.¹⁶¹

The communal oriented nature of an individual in a society is characterised as an African philosophy based on the fact that it was practiced by many pre-colonial African societies. This community-oriented practice enshrined in the African philosophy is identified through different names. Mutua pinpoints that scholars in contemporary Africa society identify the African philosophy as “African personality”; “negritude”; and “*Ujamaa*”

¹⁵⁵ Address by Senghor paras 27-29.

¹⁵⁶ BO Okere “The protection of human rights in Africa and the African Charter on Human and Peoples’ Rights: A comparative analysis with the European and American Systems” (1984) 6 *Human Rights Quarterly* 141 148. See also JAM Cobbah “African values and the human rights debate: An African perspective” (1987) 9 *Human Rights Quarterly* 309 323; and RN Kiwanuka “The Meaning of ‘People’ in the African Charter on Human and Peoples’ Rights” (1988) 82 *American Journal of International Law* 80 82.

¹⁵⁷ KC Anyanwu “The African world-view and theory of knowledge” in EAR Omi & KC Anyanwu (eds) *African Philosophy: An Introduction to the Main Philosophical Trends in Contemporary Africa* (1984) 77 81.

¹⁵⁸ RE Howard “Human rights in Commonwealth Africa” 25, as quoted in IG Shivji *The Concept of Human Rights in Africa* (1989) 12.

¹⁵⁹ RE Howard “Group versus individual identity in the African debate on human rights” in AA An-Na’im & FM Deng (eds) *Human Rights in Africa: Cross-Cultural Perspectives* (1990) 159 163-174.

¹⁶⁰ 165.

¹⁶¹ 165.

(the Kiswahili term for African socialism).¹⁶² Winks terms the African philosophy “African humanism”.¹⁶³ Winks also notes that African humanism was pre-dominant in pre-colonial societies and is similar to Kwame Nkrumah’s modern reformulation of “consciencism”; Kenneth Kaunda’s “humanism”; and Julius Nyerere’s “*Ujamaa*”.¹⁶⁴

These formulations of African philosophy are practiced and expressed in many African countries through various languages. For example, Winks notes that in South Africa it is known as “*Ubuntu*”.¹⁶⁵ *Ubuntu* originates from the Zulu phrase “*Umuntu ngumuntu ngabantu*”, which literally means “a person is a person through other persons”.¹⁶⁶ Langa J notes in *S v Makwanyane* (*‘Makwanyane’*)¹⁶⁷ that:

“Ubuntu emphasises on collective and “interdependence of the members of a community. It recognises a person’s status as a human being, entitled to unconditional respect, dignity, value and acceptance from the members of the community such person happens to be part of. It also entails the converse, however. The person has a corresponding duty to give the same respect, dignity, value and acceptance to each member of that community. More importantly, it regulates the exercise of rights by the emphasis it lays on sharing and co-responsibility and the mutual enjoyment of rights by all.”¹⁶⁸

Broodryk points out the existence and practice of *Ubuntu* in other African languages.¹⁶⁹ According to Mutua, although the names for African philosophies are different, they all represent the “respect for, and protection of, the individual and individuality within the family and the greater socio-political unit”.¹⁷⁰

The concept of an African philosophy has direct implications for the interpretation of both individual and collective socio-economic rights in the African Charter. Cobbah

¹⁶² M Mutua “The Banjul Charter and the African cultural fingerprint: An evaluation of the language of duties” (1995) 35 *Virginia Journal of International Law* 339 352.

¹⁶³ BE Winks “A covenant of compassion: African humanism and the rights of solidarity in the African Charter on Human and Peoples’ Rights” (2011) 11 *African Human Rights Law Journal* 447 456.

¹⁶⁴ 456.

¹⁶⁵ 456.

¹⁶⁶ T Metz “Toward an African moral theory” (2007) 15 *The Journal of Political Philosophy* 321 323. Based on available literature on *Ubuntu*, this dissertation uses the notion of *ubuntu* to elaborate on the notion of African philosophy.

¹⁶⁷ *S v Makwanyane* 1995 3 SA 391 CC.

¹⁶⁸ *S v Makwanyane* 1995 3 SA 391 CC paras 224 and 308. See also JY Mokgoro *Ubuntu and the Law in South Africa* (1997) 2, Paper delivered Potchefstroom University on 31 October 1997.

¹⁶⁹ J Broodryk *Ubuntu: African Life Coping Skills* (2006) 3-4, Paper delivered at the CCEAM Conference in Lefkosia (Nicosia), Cyprus, 12-17 October 2006. According to Broodryk, *Ubuntu* is also known as *Botho* in Sesotho; *Biakoye* in Akan; *Ajobi* in Yoruba; *Numunhu* in Shangaan; *Vhuthu* in Venda; *Bunhu* in Tsonga; *Umntu* in Xhosa; *Hunhu* in Shona; *Utu* or *Ujamaa* in Swahili; *Abantu* in Ugandan languages; and *Menslikgeit* in Cape Afrikaans.

¹⁷⁰ M Mutua “The Banjul Charter and the African cultural fingerprint: An evaluation of the language of duties” (1995) 35 *Virginia Journal of International Law* 339 352.

argues that an African philosophy based on the values of cooperation, collectiveness, obligations, and interdependence is appropriate for developing socio-economic rights seriously.¹⁷¹ Commenting on the relationship between *Ubuntu* and the socio-economic rights enshrined in the Constitution of the Republic of South Africa, 1996 ('South African Constitution'),¹⁷² Metz notes that the inclusion of socio-economic rights in the Constitution relates to the respect for communal nature enshrined in *Ubuntu* in two ways. Firstly, it requires a state to foster a communal relationship between itself and its people, by improving the quality of an individual's socio-economic life through poverty reduction. According to Metz, poverty reduction strengthens togetherness between people and their state. Secondly, it requires a State to foster community among the people themselves by reducing the level of an individual's impoverishment. Metz further notes that the State is required to protect an individual's socio-economic rights in order to enable that individual to commune and engage in joint projects with others. Metz also argues that disregarding socio-economic rights undermines the ability of an individual to commune with others and weakens solidarity among the people.

An individual feels ashamed to commune with others if his or her basic socio-economic needs are not realised, while those of other members of the community are. As such, a State is required to provide individuals with the socio-economic resources that will help them to commune with others in society.¹⁷³ In a similar vein, writing on the link between *Ubuntu* and the socio-economic right to social security, Tshoose posits that *Ubuntu* is relevant to the right to social security, as it advocates for the concepts of "humanness", "justice" and "equality". According to Tshoose, humanness is the basis for the provision of social security.¹⁷⁴

African philosophy is directly linked to the concept of human rights, as understood in the African context. Like an African philosophy that considers an individual as inseparable from his or her community, the African concept of human rights is communal in nature as it considers an individual's rights as being integrally related to the rights of the community. Cobbah argues that an individual's human dignity and rights in Africa are not derived from an individualistic framework but rather from a communal structure.¹⁷⁵

¹⁷¹ Cobbah (1987) *Human Rights Quarterly* 331.

¹⁷² Constitution of the Republic of South Africa, 1996.

¹⁷³ T Metz "Ubuntu as a moral theory and human rights in South Africa" (2005) 2 *African Human Rights Law Journal* 532 550-551.

¹⁷⁴ CI Tshoose "The emerging role of the constitutional value of *Ubuntu* for informal social security in South Africa" (2009) 3 *African Journal of Legal Studies* 12 14-15.

¹⁷⁵ Cobbah (1987) *Human Rights Quarterly* 331.

The conception of an individual who is endowed with rights and bound by obligations towards the community is the essence of the African notion of human rights.¹⁷⁶ This communal nature of rights in Africa was deliberately adopted to ensure equality among groups and classes in matters of justice.¹⁷⁷ The recognition of an individual's rights is subject to his respect and recognition of the rights of others.¹⁷⁸

Ankumah contends that, in African societies, an individual depends on other members of the community (such as the extended family) to enforce his or her rights. This dependence guarantees a form of social security among individuals.¹⁷⁹ As such, the conception of human rights in Africa recognises not only the rights of the individual, but also his obligations towards others. According to Cobbah, this African philosophical context expresses rights and duties through four underlying principles, namely respect, restraint, responsibility, and reciprocity.¹⁸⁰

Philosophers criticise the communal conception of human rights in Africa on three grounds. Firstly, they argue that proponents of the communal nature of rights confuse it with human dignity. According to Howard, the African concept of human rights is actually a mere concept of human dignity, which expresses the moral nature of an individual and his relationship with society.¹⁸¹ Secondly, the African communal nature of human rights is considered a mere mechanism used by African leaders to justify their undemocratic rule. Howard argues that the communal conception of human rights, which denies the existence of economic and political inequalities, is invoked to support African leaders staying in power for a long time.¹⁸² Thirdly, the African communal nature of human rights is subject to objection on the grounds that pre-colonial African societies did not know human rights due to their low level of development. Scholars such as Eze, Howard and Donnelly believe that the existence of human rights in a society largely depends on the level of development of that particular society.

¹⁷⁶ Mutua (1995) *Virginia Journal of International Law* 363.

¹⁷⁷ R Cohen "Endless teardrops: Prolegomena to the study of human rights in Africa" in R Cohen, G Hyden & WP Nagan (eds) *Human Rights and Governance in Africa* (1993) 3 14.

¹⁷⁸ Mbiti *African Religions and Philosophy* 106.

¹⁷⁹ EA Ankumah *The African Commission on Human and Peoples' Rights: Practice and Procedures* (1996) 160.

¹⁸⁰ Cobbah (1987) *Human Rights Quarterly* 321.

¹⁸¹ Howard "Group versus individual identity" in *Human Rights in Africa* 165.

¹⁸² RE Howard "Human rights in Commonwealth Africa" 25, as quoted in IG Shivji *The Concept of Human Rights in Africa* (1989) 12.

Three arguments can be raised in response to these objections.¹⁸³ Firstly, while it is true that the African philosophy is mainly founded on the value of human dignity, it is a mistake to contend that the African philosophy is exclusively a human dignity notion, which is isolated from the recognition and respect for human rights. To the contrary, it can be argued that the African philosophy based on human dignity is the foundation for human rights as understood in the African context. As such, the value of human dignity enshrined in the African philosophy broadly encompasses a recognition and respect for human rights. Writing on the African philosophical concept of *Ubuntu*, Metz argues that:

“One is required to develop one’s humanness by honouring friendly relationships (of identity and solidarity) with others who have dignity by virtue of their inherent capacity to engage in such relationships, and human rights violations are serious degradations of this capacity. This Ubuntu-inspired theory is sufficient to account to many arrays of human rights.”¹⁸⁴

The collective nature of the African philosophy clearly demarcates individuals’ rights and obligations. It is thus not correct to claim that the African philosophy does not reflect the notion of human rights. Mutua argues that the African philosophy developed through a system of rights and obligations structured through political and social organisations, such as gender and age.¹⁸⁵ Moreover, African pre-colonial societies recognised various human rights norms similar to those that are currently recognised as human rights in various human rights instruments. These include the rights to life, personal freedom, and right to property.

In this vein, Fernyhough argues that pre-colonial societies had a respect for the right to life, which was subject to the right to justice. Accordingly, cases regarding the right to life were determined through a judicial process. Moreover, accused persons convicted of murder or manslaughter were allowed a right of appeal from a subordinate court to a higher court.¹⁸⁶

Secondly, it is unjustifiable to contend that under-developed African societies were not aware of human rights norms. Marasinghe argues that African societies recognised

¹⁸³ The discussion regarding democracy falls outside the scope of this dissertation. Accordingly, this dissertation will respond to the second objection only to the extent that it addresses the relationship between African philosophy and socio-economic rights.

¹⁸⁴ Metz (2005) *African Human Rights Law Journal* 547.

¹⁸⁵ Mutua (1995) *Virginia Journal of International Law* J 361. See also RT Nhlapo “International protection of human rights and the family: African variations on a common theme” (1989) 3 *International Journal of Law and the Family* 1 5.

¹⁸⁶ T Fernyhough “Human rights and precolonial Africa” in R Cohen, G Hyden & WP Nagan (eds) *Human Rights and Governance in Africa* (1993) 39 56.

the rights to membership, freedom of thought, speech, belief, and association, as well as the right to property.¹⁸⁷ According to Marasinghe, the right to freedom of association was closely linked to the right to family in that it incorporated the rights to marriage and children.¹⁸⁸ Regarding the right to property, Marasinghe advances that it is a fundamental right of any African society. Marasinghe notes that, in pre-colonial African societies, the right to property was communal in nature¹⁸⁹ in the sense that it largely depended on membership to a family.¹⁹⁰ As such, any disposition of the family property, for example, required the consent of all members of the extended family.¹⁹¹ This consent requirement was significant for all land transactions, such as leasing, mortgaging, as well as the determination of the boundaries.¹⁹² The requirement for consent thus demonstrates that pre-colonial African societies recognised the limits attached to the enjoyment of the right to property.¹⁹³

Thirdly, it is flawed to generally argue that the African philosophy encourages undemocratic rule. The fact that there exist undemocratic leaders in Africa does not necessarily mean that the practice is attributed to the African philosophy. It can be argued that the African philosophy enshrines attributes that embrace democracy and respect for human rights. As demonstrated above,¹⁹⁴ the African philosophy is founded on the principles of humanness; dignity; togetherness; community; and respect for human rights.

The significance of an individual is also seen through his capacity to commune with others. The African philosophy places an individual as the leader of the family or community who should support his family or community. The African philosophy treats all human beings as equal in society. In doing so, it fosters the value of equality. Based on this ground, the African philosophy encourages leaders to practice humanness, respect for human rights, and human dignity. It also encourages individuals in leadership positions to be on good terms with the people they govern. In this regard, it embraces a mutual relationship between the leaders and the other members of the State.

¹⁸⁷ L Marasinghe "Traditional conceptions of human rights in Africa" in CE Welch Jr & RI Meltzer (eds) *Human Rights and Development in Africa* (1984) 32-33.

¹⁸⁸ 33-34.

¹⁸⁹ 41.

¹⁹⁰ 42.

¹⁹¹ 41.

¹⁹² 42.

¹⁹³ 41.

¹⁹⁴ See part 3 2 4 2 above.

Writing on *Ubuntu* as an African leadership philosophy, Ncube argues that as a leadership philosophy *Ubuntu* centres on relationships with others.¹⁹⁵ It also embraces the significance of mutual relationships between leaders and their followers. According to her, this value of togetherness fosters the sanctity of human life to treat all human beings equally. Ncube argues further that *Ubuntu* provides a viable leadership philosophy that helps leaders to balance the past and present by examining immediate and pressing concerns in society, as well as the vision for the future.¹⁹⁶

It is argued that the African philosophy, through its consideration of the past, present, and future by way of the values identified above, allows for undemocratic practices that are not in line with present conditions or principles of democracy. Writing on the African philosophy from the Akan context, Appiagye-Atua argues that the African philosophy does not exclusively confine itself to thoughts of the past. According to Appiagye-Atua, while considering the past, African philosophy identifies and leaves norms that are irrelevant to present circumstances. Moreover, through its various values, African philosophy can consider norms that are relevant for present living conditions.¹⁹⁷

As demonstrated above, there is a close link between African philosophy and the values of freedom, equality, justice, and dignity. African philosophy is founded on the value of dignity, which considers freedom, equality, and justice as part of human dignity. In elaborating on the concept of *Ubuntu* as an African philosophical approach in *Makwanyane*, Langa J¹⁹⁸ and Mokgoro J¹⁹⁹ stated that *Ubuntu* relates to the values of human dignity, freedom, and equality that need to be upheld in society. Similarly, writing on the African philosophical concept of *Ubuntu* as a component of South African legal culture, Keep and Midgley argue that *Ubuntu* is directly linked to the values of human dignity, equality, and the advancement of human rights and freedoms, as well as accountability, responsiveness, and openness.²⁰⁰

Therefore, the interpretation of the socio-economic rights in the African Charter should be able to depict the adherence to and promotion of the African philosophy and its identified values. The significance of promoting these elements is that they can

¹⁹⁵ LB Ncube "Ubuntu: A transformative leadership philosophy" (2010) 4 *Journal of Leadership Studies* 77-78. See also Tshoose (2009) *African Journal of Legal Studies* 14.

¹⁹⁶ LB Ncube "Ubuntu: A transformative leadership philosophy" (2010) 4 *Journal of Leadership Studies* 77-78.

¹⁹⁷ Appiagyei-Atua (2005) *South African Human Rights Law Journal* 347-348.

¹⁹⁸ *Makwanyane* para 224.

¹⁹⁹ Para 308.

²⁰⁰ H Keep & R Midgley "The emerging role of *ubuntu-botho* in developing a consensual South African legal culture" in F Bruinsma & D Nelken (eds) *Explorations in Legal Cultures* (2007) 29-35.

ensure that socio-economic rights are interpreted in a manner that achieves the collective nature of human rights and obligations, as well as the values of equality, dignity, justice, and freedom in the enjoyment of these rights. It is thus imperative for the African Charter's supervisory organs to engage the values of freedom, equality, justice, and dignity in developing the scope and content of socio-economic rights. As Tshoose notes, interpreting fundamental human rights requires considering the values accepted in an open and democratic society.²⁰¹

3 2 4 3 Developing the normative scope and content of socio-economic rights and their related obligations

Elaborating on the substantive provisions of socio-economic rights and their concomitant obligations in preparatory work can provide interpretive organs with valuable guidance to interpret these rights in the African Charter. The formulation of socio-economic rights provisions and other related provisions can assist interpretive organs in interpreting socio-economic rights in a manner that develops their normative content. Significantly, the preparatory work does not distinguish between civil and political rights and socio-economic rights in that these rights are not formulated in distinct categories. Accordingly, the interpretive organs should interpret socio-economic rights in a manner that gives effect to the principle of interdependence of rights.²⁰² The advantage of utilising this principle is that it can ensure internal consistency by considering the treaty as a whole.

The preparatory work can also guide the interpretive organs to develop the normative scope and content of the obligations imposed by socio-economic rights. In particular, the preparatory work establishes the obligations of States and individuals to respect, promote, and protect human rights, including socio-economic rights. Furthermore, according to the preparatory work, States have the obligation to realise these rights progressively and within their maximum available resources.²⁰³ As is demonstrated below,²⁰⁴ the notions of progressive realisation and maximum available resources were not expressly included in the provisions of the African Charter. Scholars have considered the reasons for the omission of these limitation clauses. According to De

²⁰¹ Tshoose (2009) *African Journal of Legal Studies* 18-19.

²⁰² The concept of the interdependence of rights is discussed in part 3 3 2 2 below.

²⁰³ Art 3 of the M'Baye Draft.

²⁰⁴ See part 3 3 3 3 below.

Vos²⁰⁵ and Yeshanew,²⁰⁶ the omission of the limitation clauses was deliberate in order to foster the notion of interdependence of rights in the African Charter.

As argued in chapter two, the teleological approach to interpretation allows the application of the preparatory work in elaborating on the provisions of the African Charter. Accordingly, the supervisory organs can take into account the M'Baye Draft as part of the preparatory work of the African Charter to elaborate the limitation clauses in its provisions.²⁰⁷

3 3 Socio-economic rights in the African Charter: Relevant textual provisions

3 3 1 Introduction

Chapter 2 demonstrated that the teleological approach interprets a treaty as a whole.²⁰⁸ Through this premise, the teleological approach allows interpretive organs to use the provisions within the text of the treaty to generate the meaning of the rights being interpreted. The discussion on the methodology for the application of the teleological approach demonstrated that, in the interpretative process, the interpretive organs are required to begin with the elements emerging from the treaty as a whole.²⁰⁹ Against this background, this section analyses the textual formulation of socio-economic rights and other provisions relevant for their interpretation. This analysis shows the textual interpretive possibilities embedded in various provisions formulated in the African Charter, which can assist interpretive organs in generating the meaning of socio-economic rights.

3 3 2 Preamble to the African Charter

3 3 2 1 African philosophy and the values of freedom, equality, justice, and dignity

In this study, the discussion of the teleological approach and the methodology for its application indicates the significance of the preamble in the interpretative process.²¹⁰ The preamble to the African Charter, in particular, stipulates Member States' commitment to promote the African philosophy. In this regard, the preamble declares

²⁰⁵ P de Vos "A new beginning? The enforcement of social, economic and cultural rights under the African Charter on Human and Peoples' Rights" (2004) 8 *Law, Democracy & Development* 1 10.

²⁰⁶ Yeshanew *The Justiciability of Economic, Social and Cultural Rights* 282.

²⁰⁷ Part 3 3 3 below elaborates another vital mechanism through which these qualifiers can be included in the African Charter.

²⁰⁸ See chapter two, parts 2 2 3, 2 3, 2 4, 2 5, and 2 5 2 1.

²⁰⁹ See chapter two, part 2 5 2 1.

²¹⁰ See chapter two, parts 2 2 3, 2 5, and 2 5 2 1.

States' consideration of the virtues of African historical tradition and values as sources and reflection of the African human rights concept.²¹¹ In relation to the African philosophy, the preamble acknowledges the fact that the enjoyment of the rights in the African Charter implicitly requires the performance of duties by everyone.²¹²

The preamble also enshrines Member States' commitment to promoting the values of freedom, equality, justice, and dignity in the protection of individuals' rights.²¹³ This statement underlines the significant role vested in interpretive organs to promote these values through the interpretation of various rights provisions, including socio-economic rights. Promoting these values in the interpretation of socio-economic rights requires interpretive organs to uphold the object and purpose of the African Charter in relation to these rights. In order to promote these values, the interpretation of socio-economic rights should be carried out in a manner that attains the various goals of these rights, including the improvement of individuals' socio-economic conditions.

Writing on socio-economic rights in the context of the South African Constitution, Liebenberg argues that in order to promote these values interpretive organs should consider the relationship between the purposes of socio-economic rights and these values.²¹⁴ The application of values in the interpretation of socio-economic rights can assist interpretive organs in developing the content of these rights. Alibertyn convincingly argues, while writing on the value of equality in the context of the South African Constitution, that:

“As a value, equality gives substance to the vision of the Constitution ... The fact that there is a relationship between value and right – the value is used to interpret and apply the right – means that the right is infused with the substantive content of the value.”²¹⁵

Accordingly, reference to the African Charter's preamble will assist supervisory organs in interpreting socio-economic rights provisions.

²¹¹ Preamble to the African Charter paras 5-6.

²¹² Para 7.

²¹³ Para 3.

²¹⁴ S Liebenberg *Socio-Economic Rights: Adjudication under a Transformative Constitution* (2010) 48.

²¹⁵ C Alibertyn “Facing the challenge of transformation: Difficulties in the development of an indigenous jurisprudence of equality” (1998) 14 *South African Journal on Human Rights* 248 249.

3 3 2 2 *The interdependence of human rights*

The preamble to the African Charter reiterates the interdependence of human rights.²¹⁶ This concept is demonstrated through States' declaration that "civil and political rights cannot be dissociated from economic, social and cultural rights".²¹⁷ This statement implies that, in interpreting socio-economic rights, interpretive organs should take into account the interrelationship between these two categories of rights.

In his analysis of the interdependence of rights, Scott argues that the concept entails two senses, namely "organic" and "related interdependence".²¹⁸ Organic interdependence entails that one derivative right forms part of another core right.²¹⁹ For example, organic interdependence considers whether the core right to life can be interpreted to include a derivative right to an adequate standard of living.²²⁰ This nature of interpretation means that protecting the right to life directly means the protection of the right to an adequate standard of living.

Regarding related interdependence, Scott argues that this form of interdependence considers rights as distinct, yet dependent on each other.²²¹ Stated differently, related interdependence treats rights as "equally important and complementary, yet separate".²²² This interpretation means that the protection of one right indirectly protects another right.²²³ For example, the civil and political rights to equality²²⁴ and a fair trial²²⁵ in the African Charter may be applied to protect socio-economic rights. In other words, the right to equality guarantees the enforcement of civil and political rights, as well as socio-economic rights.²²⁶ With reference to socio-economic rights in particular, the right to equality may help the equal distribution of public resources for the protection of rights to health, labour, and education, as well as other socio-economic services.²²⁷

²¹⁶ See chapter two, part 2 5 2 1.

²¹⁷ Preamble to the African Charter para 7.

²¹⁸ C Scott "The Interdependence and permeability of human rights norms: Towards a partial fusion of the international covenants on human rights" (1989) 27 *Osgoode Hall Law Journal* 769 779.

²¹⁹ 779.

²²⁰ 780.

²²¹ 782-783.

²²² 783.

²²³ 783.

²²⁴ Art 3 of the African Charter.

²²⁵ Art 7.

²²⁶ TS Bulto "The utility of cross-cutting rights in enhancing justiciability of socio-economic rights in the African Charter on Human and Peoples' Rights" (2010) 29 *University of Tasmania Law Review* 142 163.

²²⁷ 163.

An understanding of the interdependence of rights, as elaborated by Scott, is advantageous in two respects. Firstly, it allows interpretive organs to interpret socio-economic rights holistically in a manner that engages the African Charter as a whole. Secondly, it enables interpretive organs to apply the relevant civil and political rights provisions in the African Charter to develop the meaning of socio-economic rights.

Developing the content of socio-economic rights through civil and political rights provisions may assist in ascertaining the nature and scope of their protection.²²⁸ This means that there is no right in the African Charter that is meaningful in itself. As Liebenberg argues, it is difficult to effectively protect one category of human rights in isolation from another.²²⁹ Thus, applying the concept of the interdependence of rights will enable supervisory organs to interpret socio-economic rights in connection with relevant civil and political rights, as well as the African Charter as a whole.

3 3 3 Operative provisions

3 3 3 1 General obligations of States

The general obligations of states are formulated in article 1 of the African Charter:

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

Article 1 determines the nature of the legal obligations imposed to give effect to all the rights in the African Charter. Its formulation creates two layers of obligations. Firstly, the general obligation to recognise the rights contained in the African Charter and their related obligations and freedoms. Secondly, it establishes States’ obligation to undertake legislative or other measures in order to give effect to these rights and their related obligations. These two obligations are interlinked in the sense that they reinforce each other. This interrelationship means that the full realisation of one obligation is dependent on the enforcement of the other. Therefore, States should enforce both obligations in order to ensure the full protection of all the rights in the African Charter.

The African Commission on Human and Peoples’ Rights (‘African Commission’ or ‘ACHPR’)²³⁰ interpreted the obligation “to recognise” in *Commission Nationale des Droits*

²²⁸ 158.

²²⁹ Liebenberg *Socio-Economic Rights* 51-52.

²³⁰ The African Commission on Human and Peoples’ Rights (‘African Commission’ or ‘ACHPR’) was established by art 30 of the African Charter on Human and Peoples’ Rights (1981) OAU Doc

de l'Homme et des Libertes v Chad ('Chad')²³¹ to mean that States are in breach of this obligation if they fail to undertake measures to give effect to the rights in the African Charter.²³² These obligations denote the fact that States are required to take positive measures to "take steps" and "adopt legislative or other measures". As Liebenberg argues, in international human rights law, the effective realisation of human rights depends on both negative and positive duties.²³³

The formulation of the obligation to recognise in article 1 is mandatory in nature in that States are required to acknowledge all the rights and their concomitant obligations as guaranteed in the African Charter. According to Yeshanew, the nature of the requirement to "recognise" in article 1 is twofold. Firstly, it requires States to acknowledge all the rights in the African Charter as legally binding standards. Secondly, it requires States to adopt measures to give effect to the binding nature of the rights enshrined in the African Charter.²³⁴ Through these requirements, the obligation to recognise reinforces the obligation to adopt legislative or other measures.

The obligation to adopt legislative or other measures imposes on States the duty to realise and protect all the rights in the African Charter, through adequate domestic legislation, in order to ensure the full enjoyment of all rights. The formulation of article 1 allows supervisory organs to interpret this article in a manner that includes a State's obligation to protect socio-economic rights through legislation and other measures.

The UN Committee on Economic Social and Cultural Rights ('CESCR') expresses a similar interpretation in its General Comment on the nature of States Parties obligations ('General Comment 3'),²³⁵ while elaborating on the obligation to adopt legislative measures. General Comment 3 affirms that legislation is crucial in the health and education sectors.²³⁶

The obligation to legislate implies that States are obliged to pass legislation that is consistent with the rights protected in the African Charter. In addition, this obligation

CAB/LEG/67/3 rev 5, 21 I.L.M 58 (1982) ('African Charter'), adopted on 27 June 1981 and entered into force on 21 October 1986. The discussion on the African Commission and its mandate regarding the protection and interpretation of the socio-economic rights in the African Charter is carried out in chapter four, parts 4.2 and 4.3.

²³¹ *Commission Nationale des Droits de l'Homme et des Libertes v Chad* Communication No 74/92 (2000) AHRLR 66 (ACHPR 1995).

²³² Para 20.

²³³ Liebenberg *Socio-Economic Rights* 83.

²³⁴ Yeshanew *The Justiciability of Economic, Social and Cultural Rights* 222.

²³⁵ Committee on Economic, Social and Cultural Rights, General Comment 3: The nature of States parties obligations (art 2, para 1) (1990) UN Doc E/1991/23 ('General Comment 3').

²³⁶ Para 3.

requires States to amend all existing legislation that is inconsistent with the socio-economic rights recognised in the African Charter. In *Lawyers for Human Rights v Swaziland* ('Swaziland'),²³⁷ the African Commission held that a State's failure to take steps to ensure the conformity of its domestic laws with the provisions of the African Charter amounted to a violation of article 1.²³⁸

Additionally, the obligation to legislate indicates that the adopted domestic legislation should be able to guarantee three significant elements of rights. Firstly, domestic laws should guarantee substantive socio-economic rights and their related duties. Secondly, laws should provide for effective enforcement mechanisms and means that can ensure governmental accountability. Thirdly, legislation should provide for effective and adequate redress and remedy for violations of these rights.

The African Commission states in its Principles and Guidelines on the Implementation of Economic, Social and Cultural Rights in the African Charter on Human and Peoples' Rights ('Principles and Guidelines'),²³⁹ that the adoption of legislative or other measures in article 1 of the African Charter requires States to protect socio-economic rights by guaranteeing appropriate administrative, as well as judicial remedies, to redress the violations of such rights.²⁴⁰ A similar statement is found in the CESCR's General Comment on the application of the ICESCR ('General Comment 9').²⁴¹ In General Comment 9, the CESCR states that in order to give effect to their international obligations States are required to amend their domestic laws, as well as provide for effective judicial and administrative remedies for human rights violations.²⁴²

The obligation to legislate requires States to incorporate socio-economic rights in their domestic legal and administrative system that is, in the national legislation and regulations. In its Principles and Guidelines, the African Commission states that the obligation to recognise rights, duties, and freedoms, as well as the obligation to adopt legislative and other measures to give effect to the rights in the African Charter, impose on States an obligation to protect and realise socio-economic rights apart from other

²³⁷ *Lawyers for Human Rights v Swaziland* Communication No 251/02 (2005) AHRLR 66 (ACHPR 2005).

²³⁸ *Swaziland* para 51. See also I Brownlie *Principles of Public International Law* 6 ed (2003) 35.

²³⁹ Principles and Guidelines on the Implementation of Economic, Social and Cultural Rights in the African Charter on Human and Peoples' Rights, as adopted on 24 October 2011 ('Principles and Guidelines').

²⁴⁰ Para 2.

²⁴¹ CESCR General Comment 9: The domestic application of the Covenant (1998) UN DOC E/C.12/1998/24 ('General Comment 9').

²⁴² Para 3.

ordinary legislation in their national constitutions.²⁴³ The approach used to incorporate socio-economic rights into domestic laws should ensure a State's compliance with its obligations in the African Charter, as well as ensure that it is the efficient mechanism for protecting socio-economic rights. As the CESCR states in General Comment 9, any approach of incorporation of the ICESCR applied by a State should take into account two significant criteria. Firstly, it should guarantee the State's fulfilment of its obligations in terms of the ICESCR. Secondly, it should be the most effective approach for protecting human rights in that State.²⁴⁴

3 3 3 2 States' obligations to respect, protect, promote, and fulfil

The formulation of States obligations in article 1 incorporates negative and positive duties. The negative duties require States to desist from interfering with individuals' enjoyment of their rights. The positive duties oblige States to undertake a variety of measures to ensure that individuals enjoy their rights. These duties are incorporated in the obligation to "recognise" and "legislate". States are required to implement the quartet typology of obligations, namely obligations to respect, protect, promote, and fulfil. In *Association of Victims of Post Electoral Violence & INTERIGHTS v Cameroon* ('*Post Electoral Violence*') the African Commission held that:

"Article 1 places the States Parties under the obligation of respecting, protecting, promoting and implementing the rights. The respect for the rights imposes on the State the negative obligation of doing nothing to violate the said rights. The protection targets the positive obligation of the State to guarantee that private individuals do not violate these rights... This Article places on the States Parties the positive obligation of preventing and punishing the violation by private individuals of the rights prescribed by the Charter."²⁴⁵

When elaborating the nature of obligations imposed by socio-economic rights, the African Commission states in its Principles and Guidelines that:

²⁴³ Principles and Guidelines para 2.

²⁴⁴ General Comment 9 para 7.

²⁴⁵ *Association of Victims of Post Electoral Violence & INTERIGHTS v Cameroon* Communication No 272/03 paras 87-90.

“A useful framework for understanding the nature of the duties imposed by economic, social and cultural rights is the duty ‘to respect, protect, promote and fulfil’ these rights.”²⁴⁶

Thus States’ obligations to “recognise” and “legislate” imply that domestic legislation and other measures by States should be able to respect, protect, promote, and fulfil the socio-economic rights of individuals guaranteed in the African Charter.

The concept of the typology of obligation was firstly developed by Shue, who argues that the meaningful realisation of all human rights requires the fulfilment of a spectrum of duties.²⁴⁷ According to Shue, each human right assigns a tripartite typology of duties. These duties include “duties to avoid depriving, duties to protect from deprivation, and duties to aid the deprived”.²⁴⁸ The duty to avoid depriving entails the obligation not to remove an individual from his or her sources of subsistence.²⁴⁹ The nature of this duty requires States to refrain from interfering with the rights of individuals, including socio-economic rights.²⁵⁰ The duty to protect from deprivation incorporates States’ obligation to protect the rights of individuals from interference by third parties.²⁵¹ The duty to aid the deprived enshrines States’ obligation to provide means of subsistence to individuals who cannot provide for themselves.²⁵²

The typology of States’ obligations is further developed by Eide. According to Eide, human rights impose a quartet typology of obligations, namely obligations to respect, protect, facilitate, and fulfil.²⁵³ The obligation to respect requires States to respect the resources of individuals and their autonomy to use them for their well-being.²⁵⁴ Furthermore the obligation to protect, imposes on States the duty to protect individuals’ enjoyment of their resources against interference by third parties.²⁵⁵ Regarding the obligation to facilitate, States are required to avail individuals with opportunities to enjoy

²⁴⁶ Principles and Guidelines para 4 and paras 5-12. See also C Heyns “Civil and political rights in the African Charter” in MD Evans & R Murray (eds) *The African Charter on Human and Peoples’ Rights: The System in Practice 1986-2000* (2002) 137 138.

²⁴⁷ H Shue *Basic Rights: Subsistence, Affluence and US Foreign Policy* (1980) 52.

²⁴⁸ 52.

²⁴⁹ 53.

²⁵⁰ 55.

²⁵¹ 53.

²⁵² 53.

²⁵³ Updated Study on the Right to Food submitted by A Eide in accordance with Sub-Commission Decision 1998/106 E/CN.4/Sub.2/1999/12 paras 52-53.

²⁵⁴ A Eide “Economic, social, and cultural rights” in *Economic, Social and Cultural Rights: A Textbook* 2 ed (2001) 9 23.

²⁵⁵ 24.

their rights.²⁵⁶ The obligation to fulfil requires States to directly provide needy individuals with the necessities of life.²⁵⁷

The formulation of the obligation to undertake measures does not limit States exclusively to legislative measures. States are also required to take other measures. The obligation to adopt other measures is broad and flexible in that it does not define and limit the scope of the term “other measures”. This broad formulation implies that legislative measures are not exclusive measures for the full realisation of human rights.²⁵⁸ This broad and flexible formulation allows States to take into account a variety of necessary measures that can facilitate the enjoyment of the socio-economic rights in the African Charter. These measures include administrative, financial, educational, and social measures. The African Commission states in its Principles and Guidelines that article 1 of the African Charter requires Member States to safeguard socio-economic rights by adopting policy, budgetary, educational, public awareness, and administrative measures.²⁵⁹

As the CESCR notes in General Comment 3, the legislative measures required in article 2(1) of the ICESCR are not exhaustive.²⁶⁰ According to the CESCR, the phrase “all appropriate means” in article 2(1) requires other measures, such as judicial remedies, to be taken.²⁶¹ Other measures may also include administrative, financial, educational, and social measures.²⁶² The CESCR further emphasises in General Comment 9 that judicial remedies are not exclusive. States’ obligations to give effect to the rights in the ICESCR require States to ensure that remedies are accessible, affordable, timely, and effective administrative remedies in addition to legislative and judicial measures.²⁶³

3 3 3 3 Obligations of progressive realisation and within available resources

Unlike the provisions of article 2(1) of the ICESCR, the formulation of article 1 of the African Charter does not expressly include a State’s obligation to realise rights “progressively” and within “available resources”. According to Odinkalu, the omission of

²⁵⁶ MM Sepulveda *The Nature of Obligations under the International Covenant on Economic, Social and Cultural Rights* (2003) 162.

²⁵⁷ Eide “Economic, social and cultural rights” in *Economic, Social and Cultural Rights* 24.

²⁵⁸ Yeshanew *The Justiciability of Economic, Social and Cultural Rights* 222.

²⁵⁹ Principles and Guidelines para 2.

²⁶⁰ General Comment 3 para 4.

²⁶¹ Para 5.

²⁶² Para 7.

²⁶³ General Comment 9 para 9.

these two phrases implies that the socio-economic rights in the African Charter should be realised immediately.²⁶⁴ However, it can be argued that based on the scarcity of resources in many African countries, socio-economic rights need to be realised progressively. Ankumah argues that poor levels of economic development, as well as the uneven allocation of resources, can hinder States from realising these rights immediately.²⁶⁵

The African Commission acknowledges that many African states are faced with economic hardships.²⁶⁶ In *Purohit and Moore v The Gambia* ('Purohit'),²⁶⁷ the African Commission stated that poverty in many African countries hinders the enjoyment of the right to health.²⁶⁸ The African Commission confirmed that resource scarcity and poverty contribute to the failure of African states to effectively realise individuals' rights to health.²⁶⁹

Yeshanew²⁷⁰ pinpoints the concern that framers of the African Charter could adopt the approach of the Convention on the Rights of the Child ('CRC').²⁷¹ The CRC establishes a specific provision regarding socio-economic rights, which incorporates the notions of "progressive realisation" and "within available resources".²⁷² Although concern for the adoption of an explicit provision regarding the obligation of progressive realisation is valid, I argue that the suggestion to adopt a distinct provision can weaken the object and purpose of the African Charter to protect human rights, including socio-economic rights. As mentioned above,²⁷³ the framers of the African Charter did not intend to create a dichotomy between civil and political rights and socio-economic rights. Their intention was to consider these rights on the same footing. As such, an adoption of a specific provision that exclusively qualifies socio-economic rights strengthens the dichotomy of rights and weakens their protection.

²⁶⁴ Odinkalu "Implementing economic, social and cultural rights" in *The African Charter on Human and Peoples' Rights* 196.

²⁶⁵ Ankumah *The African Commission on Human and Peoples' Rights* 144.

²⁶⁶ *Union interafricaine des droits de l'Homme, Federation internationale des ligues des droits de l'Homme, Rencontre africaine des droits de l'Homme, Organisation nationale des droits de l'Homme au Senegal and Association malienne des droits de l'Homme v Angola* Communication No 159/96 para 16.

²⁶⁷ *Purohit and Moore v The Gambia* Communication No 241/2003 (2003) AHRLR 96 (ACHPR 2003).

²⁶⁸ Para 84.

²⁶⁹ *Purohit* para 84. See also *Kevin Mgwanga Gunme v Cameroon* Communication No 266/03 (2009) AHRLR 9 (ACHPR 2009) para 206.

²⁷⁰ Yeshanew *The Justiciability of Economic, Social and Cultural Rights* 282.

²⁷¹ The Convention on the Rights of the Child 28 ILM 1456 (1989) was adopted on 20 November 1989 and entered into force on 2 September 1990.

²⁷² Art 4 of the CRC.

²⁷³ See parts 3 2 3 4 and 3 2 3 6 above.

The concept of progressive realisation is designed to take into consideration the fact that the full realisation of socio-economic rights largely depends on the availability of resources. In elaborating this concept, as used in article 2(1)²⁷⁴ of the ICESCR, the CESCR notes that “progressive realisation” entails the understanding that realising socio-economic rights within a short period of time is impossible.²⁷⁵ While writing on the ICESCR, Alston and Quinn rightly point out that the notion of “progressive realisation” reflects the fact that resources in variables are required to ensure the full realisation of socio-economic rights.²⁷⁶ This notion is significant in explicating the nature of state obligations imposed by socio-economic rights.²⁷⁷

Although the African Charter does not explicitly provide for the concepts of “progressive realisation” and “within maximum available resources”, it does not necessarily mean that these notions are excluded from the African Charter. As Craven observes, all human rights instruments relating to socio-economic rights, including the African Charter, recognise that States must take immediate steps while the full realisation of these rights may be progressive.²⁷⁸

I argue in this part that the notions of “progressive realisation” and “within maximum available resources” are implicitly incorporated in article 1 of the African Charter. “Progressive realisation” and “within maximum available resources” can be derived from the phrase “to adopt other measures”. This phrase allows States to take into account non-legislative measures,²⁷⁹ such as resource consideration, planning, and budgeting to realise the socio-economic rights in the African Charter. According to Yeshanew, “other measures” should be construed in a manner that includes the notions of “progressive realisation” and “within maximum available resources”.²⁸⁰

As discussed above,²⁸¹ article 1 imposes on Member States obligations of both a negative and positive nature. While negative obligations are immediate in nature, positive obligations require a lot of resources and planning. Accordingly, they cannot be realised immediately. As the African Commission states in its Principles and Guidelines:

²⁷⁴ Art 2(1) of the ICESCR is reproduced in part 3 2 3 5 above.

²⁷⁵ General Comment 3 para 9.

²⁷⁶ P Alston & G Quinn “The nature and scope of States Parties’ obligations under the International Covenant on Economic, Social and Cultural Rights” (1987) 9 *Human Rights Quarterly* 156 172.

²⁷⁷ 172.

²⁷⁸ M Craven *The International Covenant on Economic, Social and Cultural Rights: A Perspective on its Development* (1995) 130.

²⁷⁹ The requirement to adopt legislative measures in art 1 is similar in nature to the negative obligation to respect. See *Purohit* para 42.

²⁸⁰ Yeshanew *The Justiciability of Economic, Social and Cultural Rights* 282-283.

²⁸¹ See part 3 3 3 1 above.

“The concept of progressive realisation means that States must implement a reasonable and measurable plan, including set achievable benchmarks and timeframes, for the enjoyment over time of economic, social and cultural rights within the resources available to the state party.”²⁸²

There is a direct link between “progressive realisation” and “available resources”. Underestimating the availability of resources, as a key element to the progressive realisation of rights, can render impossible a State’s realisation of socio-economic rights. Chenwi argues that a State’s progressive realisation of socio-economic rights largely depends on the socio-economic rights recognised by such State and its available resources to realise such rights.²⁸³

Alston and Quinn pinpoint the existence of a perception that “progressive realisation” distinguishes socio-economic rights from civil and political rights in the sense that civil and political rights are realised immediately and do not involve any resources.²⁸⁴ This perception is based on article 2(1) of the ICESCR, which requires socio-economic rights to be realised progressively, while its counterpart the International Covenant on Civil and Political Rights (‘ICCPR’)²⁸⁵ imposes on States an obligation to “respect and ensure” civil and political rights – which means immediate realisation.²⁸⁶

It is wrong to argue that all civil and political rights are immediately realisable without any resource implications. Craven notes that, based on their socio-economic dimensions, it is impossible to realise all civil and political rights within the shortest period of time.²⁸⁷ The ECtHR in *Airey v Ireland* (‘*Airey*’), while deciding on article 6 of the European Convention, held that civil and political rights also have socio-economic implications.²⁸⁸

The full realisation of civil and political rights also requires the deployment of resources. Alston and Quinn argue that realising civil and political rights largely depends

²⁸² Principles and Guidelines para 14.

²⁸³ L Chenwi “Unpacking ‘progressive realisation’, its relation to resources, minimum core and reasonableness, and some methodological considerations for assessing compliance” (2013) *De Jure* 742 743.

²⁸⁴ Alston & Quinn (1987) *Human Rights Quarterly* 172.

²⁸⁵ The International Covenant on Civil and Political Rights, GA Res 2200A (XXI) 16 December 1966, 999 UNTS 171 was adopted on 16 December 1966 and entered into force on 23 March 1976.

²⁸⁶ Art 2(1) of the ICCPR provides:

“Each State Party to the present Covenant undertakes to respect and ensure to all individuals within its territory and subject to its jurisdiction the rights recognised in the present Covenant, without discrimination of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.”

²⁸⁷ Craven *The International Covenant on Economic, Social and Cultural Rights* 130.

²⁸⁸ *Airey v Ireland* Application No 6289/73 Judgment of 9 October 1979.

on the availability of resources, as well as the development of societal structures.²⁸⁹ Moreover Liebenberg argues that the rights to vote, fair trial and equality, for example, have resource and policy implications.²⁹⁰ In a similar vein, Riedel notes that civil and political rights that guarantee the rule of law and protect peaceful demonstrations involve financial resources for their implementation. According to Riedel, the only distinction between these two categories of rights is the amount of resources required rather than the principle.²⁹¹

Scholars raise the concern that the requirement to progressively realise socio-economic rights can cause States to evade their obligations. For example, Craven identifies the concern raised during the drafting of the ICESCR that reliance on “progressive realisation” would create an avenue for States to postpone the realisation of socio-economic rights or dodge the obligations imposed by such rights.²⁹² In a similar vein, Odinkalu argues that the term “progressive realisation” is incomprehensible in that it lacks meaningful normative content and can cause States’ endless postponement to realise individuals’ socio-economic rights.²⁹³

It should be noted that the phrase “progressive realisation” does not deter States from ensuring that socio-economic rights are realised as soon as possible. Craven pinpoints that, regardless of the contingent requirement to realise socio-economic rights progressively, these rights should be implemented in a manner that ensures their expeditious achievement.²⁹⁴ In a similar vein, the African Commission states in its Principles and Guidelines that “progressive realisation” includes both immediate obligations and reasonable and measurable strategies that specify the goals to be achieved and the timeframes for the enjoyment of socio-economic rights.²⁹⁵

It is thus worth noting that “progressive realisation” cannot be used by States to neglect their obligation to fully realise the socio-economic rights in the African Charter in circumstances where resources are available. To the contrary, “progressive realisation” is meant to ensure that States utilise their available resources prudently in a manner that

²⁸⁹ Alston & Quinn (1987) *Human Rights Quarterly* 172.

²⁹⁰ Liebenberg *Socio-Economic Rights* 55.

²⁹¹ E Riedel “Economic, social and cultural rights” in C Krause & M Scheinin (eds) *International Protection of Human Rights: A Textbook* 2 ed (2012) 131 138. See also Liebenberg *Socio-Economic Rights* 191.

²⁹² Craven *The International Covenant on Economic, Social and Cultural Rights* 130-131.

²⁹³ Odinkalu “Implementing Economic, Social and Cultural Rights” in *The African Charter on Human and Peoples’ Rights* 183. See also Alston & Quinn (1987) *Human Rights Quarterly* 172.

²⁹⁴ Craven *The International Covenant on Economic, Social and Cultural Rights* 131. See also General Comment 3 para 9; and The Maastricht Guidelines on Violation of Economic, Social and Cultural Rights adopted in Maastricht, January 1997 para 8.

²⁹⁵ Principles and Guidelines para 14.

would enable the realisation of the socio-economic rights in the African Charter at the earliest possible moment. In *Kevin Mgwanga Gunme v Cameroon* ('*Gunme*'), the African Commission held that Member States to the African Charter are obliged to invest their resources carefully in a manner that guarantees the realisation of the right to development, as well as other socio-economic rights progressively.²⁹⁶

In evaluating a State's obligation to take steps to the maximum of its available resources under the Optional Protocol to the ICESCR ('Optional Protocol'),²⁹⁷ the CESCR states that the "availability of resources" should not be understood as a means to stop the immediacy of a State's obligations to take concrete steps towards the full realisation of socio-economic rights.²⁹⁸ It should also be noted that even socio-economic rights incorporate immediately realisable obligations, such as a State's obligation to respect socio-economic rights, as well as non-discrimination. For example, Yeshanew argues that the right against arbitrary forced eviction, a person's right to his or her own choice of work, and the right to establish and direct educational institutions are immediate in nature.²⁹⁹

3 3 3 4 Non-discrimination

The right to non-discrimination is recognised in article 2 of the African Charter:

"Every individual shall be entitled to the enjoyment of the rights and freedoms 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."

The formulation of article 2 implies that non-discrimination standards are applicable to everyone and are immediately realisable. The right to non-discrimination applies to all rights in the African Charter, including socio-economic rights. The African Commission elaborates in its Principles and Guidelines that article 2 of the African Charter prohibits any form of discrimination regarding the enjoyment of all human rights protected in the

²⁹⁶ *Gunme* para 206.

²⁹⁷ Optional Protocol to the International Covenant on Economic, Social and Cultural Rights was adopted by the United Nations General Assembly through its resolution A/RES/63/117 on 10 December, 2008.

²⁹⁸ An Evaluation of the Obligation to take steps to the "Maximum of Available Resources" under an Optional Protocol to the Covenant UN doc E/C12/2007/1, 10 May 2007, paras 4-5. See also Riedel "Economic, social and cultural rights" in *International Protection of Human Rights* 139; Yeshanew *The Justiciability of Economic, Social and Cultural Rights* 278; and Craven *The International Covenant on Economic, Social and Cultural Rights* 131.

²⁹⁹ Yeshanew *The Justiciability of Economic, Social and Cultural Rights* 278.

African Charter.³⁰⁰ According to the African Commission, discrimination in relation to individuals' socio-economic rights amounts to a violation of the African Charter.³⁰¹

The African Commission defines discrimination to include any "conduct or omission" that nullifies or impairs equality of enjoyment of socio-economic rights by individuals.³⁰² The formulation is broad and prohibits any kind of discrimination, both formal and substantive. These grounds include race, ethnicity, colour, sex, language, religion, political or any other opinion, national and social origin, fortune, and birth.

The explicit formulation of the prohibited grounds of discrimination requires the equal enjoyment of all rights, including socio-economic rights, between men and women, as well as between nationals and non-nationals. The African Commission states in its State Party Reporting Guidelines for Economic, Social and Cultural Rights in the African Charter ('State Reporting Guidelines') that Member States are required to indicate in their reports legislative and other practical measures they have taken to ensure equality of enjoyment of socio-economic rights between men and women, as well as vulnerable and marginalised groups.³⁰³ Moreover, article 2 recognises the right to non-discrimination of every individual in his capacity as an individual and a group. The inclusion of "ethnic group" as a prohibited ground takes into account individuals as a group.³⁰⁴

Unlike the ICESCR, the African Charter expressly includes "fortune" as a prohibited ground of discrimination, which implies the prohibition of discrimination on the basis of individuals' socio-economic status, for example, poverty. Individuals who are too poor to afford socio-economic goods and services, such as health care services and education, should not be denied access to these services on grounds of their poverty. The Principles and Guidelines are silent on the implications of the term "fortune" in article 2 of the African Charter. In its General Comment on non-discrimination ('General Comment 20'),³⁰⁵ the CESCR elaborates on discrimination on the basis of economic and

³⁰⁰ Principles and Guidelines para 19.

³⁰¹ Para 19.

³⁰² Para 19.

³⁰³ State Reporting Guidelines para 6.

³⁰⁴ R Gittleman "The African Charter on Human and Peoples' Rights: A legal analysis" (1982) 22 *Virginia Journal of International Law* 667 683.

³⁰⁵ CESCR General Comment 20: Non-Discrimination in Economic, Social and Cultural Rights (art 2, para 2) (2009) UN Doc. E/C.12/GC/20 ('General Comment 2').

social situation to include the denial of socio-economic goods, such as health care and education, to individuals on the ground of poverty or being homeless.³⁰⁶

The list of prohibited grounds of discrimination is not exhaustive. The formulation does not limit the application of the principle of non-discrimination exclusively to the explicitly mentioned prohibited grounds. Article 2 includes a prohibition against discrimination based on other status. This formulation is broad and flexible as the phrase “other status” implicitly allows the inclusion of other prohibited grounds of discrimination that are not expressly mentioned in article 2, such as age, disability, marital status, family status, legal status, and nationality.

In *Zimbabwe Human Rights NGO Forum v Zimbabwe* (*Zimbabwe Human Rights NGO Forum*),³⁰⁷ the African Commission included sexual orientation as a ground of discrimination. According to the ACHPR, the right to non-discrimination in the African Charter ensures the equal treatment of individuals, regardless of their sexual orientation.³⁰⁸ In its Resolution on Protection against Violence and other Human Rights Violations against Persons on the Basis of their Real or Imputed Sexual Orientation (*Resolution on Sexual Orientation*),³⁰⁹ the African Commission condemns violations of human rights on the basis of sexual orientation and urges States to stop such violations.

In 2015, in relation to sexual orientation, the African Commission granted seven non-governmental organisations (*NGOs*) observer status, including the Coalition of African Lesbians (*CAL*).³¹⁰ The African Union (*AU*) rejected the ACHPR’s decision to grant *CAL* observer status. The *AU* requested the African Commission to consider “fundamental African values, identity and good traditions” and to withdraw the observer status it granted to *CAL*.³¹¹

³⁰⁶ Para 35.

³⁰⁷ *Zimbabwe Human Rights NGO Forum v Zimbabwe* Communication No 245/02 (2006) AHRLR 128 (ACHPR 2006).

³⁰⁸ Para 169.

³⁰⁹ Resolution on Sexual Orientation adopted at the 55th Ordinary Session of the African Commission on Human and Peoples’ Rights held in Luanda, Angola, 28 April-12 May 2014, paras 1-4, see <www.achpr.org/sessions/55th/resolutions/275> (accessed 20-05-2017).

³¹⁰ Thirty-Eighth Activity Report of the African Commission on Human and Peoples’ Rights, AU DOC.EX.CL/921 (XXVII) para 14. The names of these seven *NGOs* are listed in the Final Communiqué of the 56th Ordinary Session of the African Commission on Human and Peoples’ Rights held in Banjul, The Gambia, 21 April-7 May 2015. These *NGOs* are the Legal Assistance Trust (Namibia); Asylum Access (Tanzania); International Lawyers.org (Switzerland); Coalition of African Lesbians (South Africa); Universal Rights Group (Switzerland); and the Pan African Lawyers Union (*PALU*) (Tanzania).

³¹¹ Decision of the African Union Executive Council on the Decision of the Thirty-Eighth Activity of the African Commission on Human and Peoples’ Rights AU DOC.EX.CL/Dec.887 (XXVII) para 7. The focus of this dissertation is to demonstrate that the broad formulation of art 2 of the African Charter creates a

Writing on the notion of sexual orientation, scholars argue for an interpretation of the rights to non-discrimination, equality, and dignity in the African Charter to include sexual orientation. Viljoen and Murray argue that the right to equality in the African Charter includes rights related to sexual orientation.³¹² Viljoen notes that article 2, which prohibits discrimination on grounds of sex or any other status, can be interpreted to include a prohibition against discrimination on the ground of sexual orientation.³¹³ In a similar vein, Rudman argues that the rights to equality, dignity, liberty, freedom of expression, and the implicit right to privacy in the African Charter can be interpreted to include sexual orientation as a ground for discrimination.³¹⁴

The formulation of the principle of non-discrimination in article 2 implies that States are required to protect individuals' access to their enjoyment of socio-economic rights against discriminatory practices by non-state actors. For example, non-state actors (such as employers) may conduct discriminatory practices in different labour circumstances, such as recruitment processes, working conditions, training opportunities, remuneration, promotion, termination, and retirement.³¹⁵ The African Commission held in *Post Electoral Violence* that the obligation to protect "targets the positive obligation of the State to guarantee that private individuals do not violate these rights".³¹⁶

3 3 3 5 Conclusion

This study demonstrates the interpretive potential embedded in the preamble to the African Charter and the operative provisions. The notion of African philosophy and the values of freedom, equality, justice, and dignity, as well as the notion of the interdependence of rights can broadly be applied to enrich the scope and content of the socio-economic rights in the African Charter. Engaging these interpretive tools implies that supervisory organs will develop the scope and content of socio-economic rights that

possibility for the inclusion of different grounds that are not expressly listed in art 2, including sexual orientation as a ground of discrimination. An in-depth discussion of the legality of homosexual practices falls outside the scope of this dissertation.

³¹² R Murray & F Viljoen "Towards non-discrimination on the basis of sexual orientation: The normative basis and procedural possibilities before the African Commission on Human and Peoples' Rights and the African Union" (2007) 29 *Human Rights Quarterly* 86-91.

³¹³ Viljoen *International Human Rights Law* 264-265.

³¹⁴ A Rudman "The protection against discrimination on sexual orientation under the African human rights system" (2015) 15 *African Human Rights Law Journal* 1 14-19.

³¹⁵ Kinley & Tadaki (2004) *Virginia Journal of International Law* 977.

³¹⁶ *Post Electoral Violence* paras 87-90.

guarantee human dignity and equality of opportunity for individuals and peoples. The consideration of an African philosophy in interpreting socio-economic rights will help supervisory organs to garner insights into the scope and content of these rights and particularly those of a collective nature.

The principle of interdependence of rights offers supervisory organs an opportunity to take into account the provisions of socio-economic rights, as well as other provisions in the African Charter, during the interpretive process. In particular, “organic independence” enables supervisory organs to engage the rights to equality,³¹⁷ life,³¹⁸ and dignity³¹⁹ in developing the scope and content of socio-economic rights. Furthermore, the provisions on non-discrimination enable supervisory organs to interpret socio-economic rights in a manner that ensures that their beneficiaries are not discriminated against, either on the explicit or implicit grounds of discrimination. The following part analyses the socio-economic rights provisions.

3 3 4 Socio-economic rights provisions

3 3 4 1 Right to property³²⁰

The African Charter provides for the right to property in article 14:

“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 African Charter formulates the right to property in a general way in two respects. Firstly, it does not explicitly specify the content or the right-holder of the right. Secondly, it requires this right to be guaranteed. This formulation allows for a consideration of an individual’s right to property, as well as the peoples’ right to property. This includes aspects of ownership, possession, usage, and the enjoyment of property. This broad formulation signifies that individuals, both in their individual as well as collective capacities, enjoy the right to property. In its Guidelines and Principles, the African Commission states that the right to property in article 14 of the African Charter is broad in that it protects individual and collective property rights. These property rights include a

³¹⁷ Art 3 of the African Charter.

³¹⁸ Art 4.

³¹⁹ Art 5.

³²⁰ The reasons why this dissertation considers the right to property as a socio-economic right are discussed in this part below.

legitimate expectation of the acquisition of property, peaceful enjoyment of property, and access to as well as use of land and natural resources held under communal ownership under traditional custom and law. According to the African Commission, the protection of property under communal ownership obliges States to guarantee security of tenure to communities and their people.³²¹

The broad formulation of the right to property creates space to incorporate equality of enjoyment of this right between men and women, as well as vulnerable and marginalised individuals. The African Commission elaborates in its Principles and Guidelines that article 2 of the African Charter prohibits any discrimination in the enjoyment of all rights protected in the African Charter.³²² Furthermore the African Commission requires Member States to indicate measures they have taken to guarantee equitable and non-discriminatory access, acquisition, ownership, inheritance, and control of land and housing, especially by women and members of low income groups.³²³ Moreover, the right to property creates space to incorporate States' obligations to respect, protect, promote, and fulfil individuals' rights to property. The African Commission states in its Principles and Guidelines that the specific duties relating to the right to property should be interpreted in light of the general obligations regarding socio-economic rights, as elaborated by the African Commission.³²⁴

The right to property, as formulated in article 14, is not absolute and can be restricted. Two reasons justify the encroachment of this right, namely "interest of public need" and "general interest of the community". The formulation of these grounds is broad as it does not elaborate on their meaning, as well as the meaning of different types of encroachment.³²⁵ The implication of this broad formulation is that it allows a broad interpretation of the legitimate interests of the public and considers the expropriation of property, provided such expropriation is for public interest or the general interest of the community. The reference to the terms "public interest" and "general interest of the public" takes into account peoples' socio-economic interests – that is, individuals' collective socio-economic rights. The African Commission elaborates in its

³²¹ Principles and Guidelines paras 53-54.

³²² Para 19.

³²³ States Reporting Guidelines para 7(v).

³²⁴ Principles and Guidelines para 52.

³²⁵ C Krause "The right to property" in A Eide, C Krause & A Rosas (eds) *Economic, Social and Cultural Rights: A Textbook* 2 ed (2001) 200. See also Ssenyonjo (2011) *Netherlands Quarterly of Human Rights* 358 362.

Principles and Guidelines that “public interest concerns the common well-being or general welfare of the population”.³²⁶

Furthermore, the reference to “public interest” and “general interest of the public” implies the inclusion of States’ commitment to ensuring land reform in a manner that protects equitable access to property. The African Commission states in its Principles and Guidelines that the right to property imposes upon States an obligation to ensure “legitimate public interest objective”, including economic reforms and other measures adopted for promoting and protecting “social justice”.³²⁷

The formulation of the grounds for expropriation is qualified by the requirement to conform to appropriate laws. This formulation denotes that the laws governing the encroachment of the right to property guarantees all the requirements of the protection of this right. Such requirements include payment of compensation and a prohibition against arbitrary encroachment. As Yeshanew observes, in order to be appropriate, the laws “should not be arbitrary” and should take into account the “right to remedy”.³²⁸ In its Principles and Guidelines, the African Commission states that Member States have the obligation to guarantee an individual’s peaceful enjoyment of this right, as well as protection against forced evictions. This obligation implies that Member States shall protect the enjoyment in all its forms, from interference by third parties to its own agents.³²⁹

Scholars have challenged the inclusion of the right to property as a socio-economic right. For example, Oloka-Onyango³³⁰ and Odinkalu³³¹ argue that the right to property is not recognised as a socio-economic right in other international human rights treaties, such as the ICESCR. Oloka-Onyango further argues that the right to property, as a socio-economic right, does not help to improve the socio-economic conditions of African people for two reasons. Firstly, the right to property is individualistic in nature and guarantees individual ownership of land. Secondly, it is controversial regarding the rights of tenure, land reform, and equality in access to land. Accordingly, scholars such as

³²⁶ Principles and Guidelines para 1(h).

³²⁷ Para 55(c).

³²⁸ Yeshanew *The Justiciability of Economic, Social and Cultural Rights* 237.

³²⁹ Principles and Guidelines para 55(a)-(e).

³³⁰ J Oloka-Onyango “Beyond the rhetoric: Reinvigorating the struggle for economic and social rights in Africa” (1995) 26 *California Western International Law Journal* 1 49.

³³¹ Odinkalu “Implementing economic, social and cultural rights” in *The African Charter on Human and Peoples’ Rights* 190.

Umuzorike,³³² Ankumah,³³³ Nmehielle,³³⁴ and Ouguergouz³³⁵ consider the right to property as a civil and political right, rather than a socio-economic right.

However, the right to property can also be classified as a socio-economic right based on the number of social dimensions it possesses. For example, the intimate connection between the land rights of indigenous people and their socio-economic well-being illustrates the socio-economic dimensions of the right to property. According to the African Commission, the right to property protects property rights relating to “access and use of land and other natural resources” held under collective ownership, as recognised by customary law.³³⁶ Cobo points out that for indigenous communities, land is the basis for their existence, such as food production and family life.³³⁷ The connection is based on the fact that their land and natural resources guarantee their socio-economic development and existence.³³⁸ The ACHPR held in the *Centre for the Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council (‘Endorois’)*³³⁹ that the first step to protecting indigenous communities is to acknowledge that the rights, interests, and benefits attached to their traditional land constitute property.³⁴⁰ The African Commission stated that indigenous communities’ rights include assets, such as houses built on their traditional land, livestock, forests, pasture, and grazing land, as well as economic activities such as stock-breeding.³⁴¹

In a similar vein, Yeshanew argues that shelter and other socio-economic needs of indigenous people renders the right to property a socio-economic right.³⁴² Krause argues that the uncertainty of whether the right to property is a civil and political right or a socio-economic right can be resolved by considering the social dimensions of this right.³⁴³

³³² UO Umuzorike *The African Charter on Human and Peoples’ Rights* (1997) 40-41.

³³³ Ankumah *The African Commission on Human and Peoples’ Rights* 142.

³³⁴ VO Nmehielle *The African Human Rights System: Its Laws, Practice, and Institutions* (2001) 119-120.

³³⁵ Ouguergouz *The African Charter on Human and Peoples’ Rights* 152-155.

³³⁶ Principles and Guidelines para 54.

³³⁷ Study of the Problem of Discrimination Against Indigenous Populations, UN Doc E/CN4/Sub2/1983/21/Add4 (1983) para 51.

³³⁸ D Kinley and J Tadaki “From talk to walk: The emergence of human rights responsibilities for corporations at international law” (2004) 44 *Virginia Journal of International Law* 931 990. See also *Mayagna Awas Tingni Community v Nicaragua* para 149.

³³⁹ *Centre for the Minority Rights Development (Kenya) and the Minority Rights Group International on behalf of Endorois Welfare Council v Kenya* Communication No 276/2003 (2009) AHRLR 75 (ACHPR 2009).

³⁴⁰ Para 187.

³⁴¹ Paras 188-189.

³⁴² Yeshanew *The Justiciability of Economic, Social and Cultural Rights* 236.

³⁴³ Krause “The right to property” in *Economic, Social and Cultural Rights* 203.

Based on the foregoing discussion, the formulation of the right to property in the African Charter, interpreted against the background of the prevalence of customary land tenure and the need to promote land reforms in Africa to redress colonial wrongs, justifies it to be considered as a socio-economic right.

3 3 4 2 Right to work

The right to work is contained in article 15 of the African Charter:

“Every individual shall have the right to work under equitable and satisfactory conditions and shall receive pay for equal work.”

Yeshanew argues that this provision protects only the right of employed individuals.³⁴⁴ However, this article recognises the right to work in two respects. Firstly, it recognises the right to work in a general manner in that it entitles every individual to the right to work. This implies that the right is guaranteed on the basis of equality and non-discrimination between men and women and on any prohibited ground of discrimination. The formulation of this right requires equality and satisfactory conditions of work, such as equal opportunities, safe working conditions, and an individual’s choice of work. Secondly, article 15 recognises the right to work in that it formulates the right to receive equal pay for equal work. This formulation allows the inclusion of equality of remuneration for equal work among employed individuals.

According to the African Commission, the right to work in article 15 incorporates the right to equitable and decent work that respects an individual’s basic rights. Moreover this right includes rights regarding conditions of work, safety, and remunerations. The African Commission emphasised further that the right to work does not mean a right to obtain employment, but rather a State’s duty to create a conducive environment for an individual’s employment that takes into account respect for human dignity. The right to work also includes an individual’s right to freely choose work.³⁴⁵

3 3 4 3 Right to health

The right to health is provided for in article 16 of the African Charter:

³⁴⁴ Yeshanew *The Justiciability of Economic, Social and Cultural Rights* 240.

³⁴⁵ Principles and Guidelines paras 57-58.

- “1. Every individual shall have the right to enjoy the best attainable state of physical and mental health.
2. State parties to the present Charter shall take the necessary measures to protect the health of their people and to ensure that they receive medical attention when they are sick.”

The right to health is formulated as a guarantee to every individual in that everyone is entitled to its enjoyment. The formulation recognises the right to enjoyment of both physical and mental health. This right is formulated broadly in that it does not provide for a definition of “health” and it also confers a right upon individuals to “enjoy the best attainable” state of health. This general formulation considers the various circumstances that can play a role in determining the meaning of “health”, as well as the “best attainable” state of health. It allows individuals freedom of choice of medical treatment, sexual and reproductive freedom, and freedom from interference with his or her right to health. It also considers the right to enjoy the underlying determinants of a right to health that furthers the enjoyment of the best attainable state of health.

The African Commission states in its Principles and Guidelines that the right to health is inclusive and is not restricted to health care, but rather extends to the underlying determinants of health.³⁴⁶ These determinants enshrine access to safe and potable water and adequate sanitation, adequate food, nutrition and housing, as well as healthy occupational and environmental conditions.³⁴⁷ Others include health-related education and information on sexual and reproductive health.³⁴⁸ In addition to these elements, the CESCR’s General Comment on the right to the highest standard of health (‘General Comment 14’),³⁴⁹ adds the engagement of people in decision-making in all health-related issues at community, national, and international levels as an underlying determinant of health.³⁵⁰

Furthermore, the formulation of the phrase “best attainable state” takes into consideration both individuals’ and states’ socio-economic conditions, such as financial status, biological conditions, and available resources. As Chirwa³⁵¹ and Yeshanew³⁵²

³⁴⁶ Principles and Guidelines para 61.

³⁴⁷ Para 63.

³⁴⁸ Para 64.

³⁴⁹ CESCR General Comment 14: The right to the Highest Standard of Health (2000) UN Doc E/C12/2000/4 (“General Comment 14”).

³⁵⁰ Para 11.

³⁵¹ DM Chirwa “African regional human rights system: The promise of recent jurisprudence on social rights” in M Langford (ed) *Social Rights Jurisprudence: Emerging Trends in International and Comparative Law* (2008) 323 330.

³⁵² Yeshanew *The Justiciability of Economic, Social and Cultural Rights* 283.

rightly observe, the provisions of article 16(1) (“the individuals’ right to enjoy the best attainable state”) depends on various factors including the individual and State’s socio-economic conditions to realise the right.

Article 16(1) is qualified by article 16(2), which requires States to “take the necessary measures to protect the health of their people” and to ensure that “people receive medical attention” when they are ill. This formulation establishes States’ obligations to protect the right to health through various measures. Moreover, the obligation to ensure individuals who are ill receive medical attention denotes the States’ duty to ensure health facilities and providers are available, and accessible, in a manner that guarantees the enjoyment of the best attainable right to health. It also accommodates the provision of health-related facilities, such as food and water.

3 3 4 4 Right to education

The African Charter formulates the right to education in article 17:

- “1. Every individual shall have the right to education.
2. Every individual may freely take part in the cultural life of his community.
3. The promotion and protection of morals and traditional values recognised by the community shall be the duty of the State.”

Article 17 protects the right of every individual to education. The formulation of the right to education is general in nature in that it does not explicitly state the form of education to be enjoyed. This formulation allows the inclusion of different types and forms of education that can be enjoyed. In its Principles and Guidelines the African Commission elaborates on the right to education to encompass pre-school, primary, secondary, tertiary, and adult education, and vocational training.³⁵³ The broad formulation of the right to education also requires the consideration of the elements relating to availability, accessibility, adaptability, and non-discrimination. The African Commission has stated that the right to education requires States to guarantee children’s access to the right to free and compulsory primary education. States have an obligation to ensure that secondary education is generally available and accessible on the same basis to all. States have to ensure that higher education is generally available and accessible to all on the basis of capacity. Significantly, States should progressively introduce free secondary and higher education to all. Moreover, the African Commission

³⁵³ Principles and Guidelines para 70.

emphasised States' obligations to ensure that education is accessible physically and economically at all levels by providing finance, building schools, and providing educational materials, as well as training for teachers and instructors.³⁵⁴

In relation to the right to education, the African Charter recognises the freedom of every individual to take part in the cultural life of his or her community. This broad formulation of the term "cultural life" denotes the possibility of including cultural educational training and languages, as well as lawful cultural practices compatible with human rights standards. The African Commission elaborates in its Guidelines and Principles that States should ensure that education systems in their jurisdiction preserve and strengthen positive African morals, traditional values, and cultures.³⁵⁵

The right to education in article 17(1) and (2) is qualified by the obligations on States to protect and promote traditional values recognised by the community. Ouguergouz confirms the formulation of these obligations in article 17.³⁵⁶ Through these two obligations, states are obliged to take positive legislative and other measures to ensure this right is protected, respected, promoted, and fulfilled. These measures include the adoption of educational and cultural legislation and cultural policies that respect and uphold the cultural values of the community. Ouguergouz confirms the requirement to develop educational and cultural policies contained in the formulation of article 17(3).³⁵⁷ Moreover, the formulation of article 17(3) protects both the individual in his personal capacity, as well as the individual as a group, by conferring on States the obligation to protect and promote the morals and traditional values of the community, which are consistent with human rights standards. Ouguergouz confirms the intention of article 17(3) to safeguard the individual and the community.³⁵⁸

3 3 4 5 Right to family

The right to family is provided for in article 18 of the African Charter:

"(1) The family shall be the natural unit and basis of society. It shall be protected by the state which shall take care of its physical and moral health.

(2) The state shall have the duty to assist the family which is the custodian of morals and traditional values recognised by the community.

³⁵⁴ Para 71 (a)-(e). See also CESCR General Comment 13: The right to education UN Doc E/C.12/1999/10 ('General Comment 13') para 6(a)-(d).

³⁵⁵ Principles and Guidelines para 71(f)(3).

³⁵⁶ Ouguergouz *The African Charter on Human and Peoples' Rights* 189.

³⁵⁷ 189.

³⁵⁸ 189.

(3) The state shall ensure the elimination of every discrimination against women and also ensure the protection of the rights of the woman and the child as stipulated in international declarations and conventions.

(4) The aged and the disabled shall also have the right to special measures of protection in keeping with their physical or moral needs.”

In relation to the formulation of this article, Ouguergouz argues that the article is formulated in a manner that does not define the term “family” in terms of either a nuclear or extended family.³⁵⁹ According to Ouguergouz, article 18 does not clearly demonstrate how States should implement this right.³⁶⁰

The formulation of this right demonstrates the protection of the family in five different aspects. Article 18(1) broadly defines the family as the natural unit and the basis of society. This broad formulation allows the inclusion of different forms of family, such as polygamous families and extended families. It also implicitly creates space for the inclusion of same sex families as a form of family.³⁶¹ In its Principles and Guidelines, the African Commission stated that the notion of family differs between individuals or societies.³⁶²

Article 18(1) imposes on States the obligation to protect the family, implying the adoption of both positive and negative measures to safeguard the family. These measures include the adoption of laws that guarantee the respect and protection of the family. According to the African Commission, the right to family imposes on Member States an obligation to adopt legislative measures and practices that enable individuals to freely form a family. The right also requires States to abolish customs, customary laws, and practices that violate an individual’s freedom to choose a spouse.³⁶³

³⁵⁹ 197.

³⁶⁰ 197.

³⁶¹ According to *State-Sponsored Homophobia: A World Survey of Laws: Criminalisation, Protection, and Recognition of Same-Sex Love* (2015), 34 African States criminalises same sex relationships. See <http://old.ilga.org/Statehomophobia/ILGA_State_Sponsored_Homophobia_2015.pdf> (accessed 16-05-2017). These countries are Algeria, Angola, Benin, Botswana, Burundi, Cameroon, Comoros, Egypt, Eritrea, Ethiopia, Gambia, Ghana, Guinea, Kenya, Liberia, Malawi, Mauritania, Mauritius, Morocco, Namibia, Nigeria, Senegal, Seychelles, Sierra Leone, Somalia, South Sudan, Sudan, Swaziland, Tanzania, Togo, Tunisia, Uganda, Zambia, and Zimbabwe. The aim of this dissertation is to show that the formulation of the provisions regarding the right to family in the African Charter is broad in the sense that it creates space to consider same sex families as a form of family. However, an in-depth discussion of the legality of the right to same sex families in Member States falls outside the scope of this dissertation.

³⁶² Principles and Guidelines para 94. See also UN HRC General Comment 19 (art 23): The Family (1990) Protection of the Family, the Right to Marriage and Equality of the Spouses UN Doc HRI/GEN/1/Rev.1/28 (‘General Comment 19’) para 2.

³⁶³ Principles and Guidelines para 95(a)-(c).

The measures should also ensure the protection of both the physical and moral health of the family. This obligation thus requires the measures taken by States to include the provision of financial, as well as other support relevant for the protection of families. According to the African Commission, States have an obligation regarding the right to family to ensure that social welfare programmes are in place for the protection of family life. Social programme measures may include social security benefits, tax-exemption, and housing and child-care assistance.³⁶⁴

In a similar vein, the UN Human Rights Committee states that the right to family imposes on states an obligation to adopt legislative, administrative, and other measures.³⁶⁵ States are required to indicate the extent to which it protects the family by providing financial or other support to various social institutions tasked with the protection of the family.³⁶⁶ Writing on the formulation of article 18(1), Ouguergouz observes that the provision requires the protection of an adequate standard of living, including adequate food, clothing, and housing.³⁶⁷

The formulation of article 18(2) strengthens the obligation established in sub-article 1 by conferring on States the duty to assist the family, as the custodian of morals and traditional values.³⁶⁸ The duty to assist in article 18(2) implies States' obligations to fulfil regarding the realisation of the right to family. The African Commission elaborates the duty to fulfil socio-economic rights as incorporating a State's duty to adopt measures with the aim of enabling and assisting individuals to gain access to the enjoyment of socio-economic rights.³⁶⁹

Article 18(3) takes into account two significant things, namely a prohibition of discrimination against women, and the obligation of States to protect women and children in accordance with relevant international human rights treaties. This formulation implies States' obligations to adopt legislative and other measures that guarantee non-discrimination to women. The formulation allows the consideration of laws and other measures that prohibit all discriminatory practices against women. These may include

³⁶⁴ Para 95(d).

³⁶⁵ The HRC is a UN body comprised of independent experts with a mandate to monitor the implementation of the ICCPR by its Member States, see <<http://www.ohchr.org/EN/HRBodies/CCPR/Pages/CCPRIntro.aspx>> (accessed 04-04-2017).

³⁶⁶ General Comment 19 para 3.

³⁶⁷ Ouguergouz *The African Charter on Human and Peoples' Rights* 192.

³⁶⁸ Rehman *International Human Rights Law* 247.

³⁶⁹ Principles and Guidelines para 11.

prohibitions of discrimination in various areas such as marriage, land ownership, employment opportunities, and other areas.

The African Commission states in its Principles and Guidelines that regarding the right to family, States have an obligation to ensure equality between partners in marriage.³⁷⁰ According to the African Commission, equality of partners includes “equal rights of women regarding adoption, guardianship and custody of children”.³⁷¹ Moreover, women shall have the same rights as men to hold and acquire nationality, to choose a family name, a profession and occupation”.³⁷²

States are also required to take positive and negative measures to protect children. This formulation allows the inclusion of a prohibition against child labour and the enjoyment of various children’s rights, such as educational, health, and other socio-economic rights. As Rehman rightly argues, article 18(3) is drafted in a manner that protects the rights of women and children.

In its Principles and Guidelines the African Commission states that the protection of children includes the adoption of measures that provide children with opportunities and facilities for their physical and psychological health without discrimination. It also incorporates measures to protect children from all forms of exploitation, neglect or cruelty and from being subject to trafficking. Other measures that govern work by children are particularly there to ensure that such work is not dangerous or harmful to children’s moral or physical well-being, as well as to their physical, intellectual and psycho-social development.³⁷³

The measures taken by the State should be in conformity with international human rights treaties. The formulation further allows interpretive organs to draw inspiration from relevant international instruments. Rehman,³⁷⁴ Ouguergouz,³⁷⁵ and Yeshanew³⁷⁶ confirm the requirement for interpretive organs to apply different relevant international human rights treaties, as enshrined in the provisions of article 18(3).

Article 18(4) recognises the rights of the aged and persons with disabilities. The provision imposes on States an obligation to take “special measures” to protect the aged

³⁷⁰ Para 94.

³⁷¹ Principles and Guidelines para 95(f).

³⁷² Para 95(g).

³⁷³ Para 95(aa)(1)-(4).

³⁷⁴ Rehman *International Human Rights Law* 247.

³⁷⁵ Ouguergouz *The African Charter on Human and Peoples’ Rights* 193.

³⁷⁶ Yeshanew *The Justiciability of Economic, Social and Cultural Rights* 256.

and persons with disabilities. The broad formation of the term “special measures” allows the inclusion of different measures.

3 3 4 6 Right of peoples to freely dispose of their natural wealth and resources

The right of peoples³⁷⁷ to freely dispose of their natural wealth and resources is provided for in article 21(1)-(5) of the African Charter. According to this article:

- “1. All peoples shall freely dispose of their wealth and natural resources. This right shall be exercised in the exclusive interest of the people. In no case shall a people be deprived of it.
2. In case of spoliation the dispossessed people shall have the right to the lawful recovery of its property as well as to an adequate compensation.
3. The free disposal of wealth and natural resources shall be exercised without prejudice to the obligation of promoting international economic co-operation based on mutual respect, equitable exchange and the principles of international law.
4. State parties to the present Charter shall individually and collectively exercise the right to free disposal of their wealth and natural resources with a view to strengthening African unity and solidarity.
5. State parties to the present Charter shall undertake to eliminate all forms of foreign economic exploitation particularly that practiced by international monopolies so as to enable their peoples to fully benefit from the advantages derived from their national resources.”

The formulation of this right is broad in that it implies that the holders of this right are the people in their collective capacity.³⁷⁸ Moreover, this right is formulated in a general manner in that it does not define the term “peoples”. The intention of this broad formulation is to accommodate various meanings, such as minority groups, indigenous people, citizens of a particular State, people in a particular State, and other possible meanings. The African Commission elaborates that:

“Peoples are any groups or communities of people that have an identifiable interest in common, whether this is from the sharing of an ethnic, linguistic or other factors ... peoples are therefore not to be equated solely with nations or states.”³⁷⁹

Dealing with indigenous peoples, the African Commission held in *Endorois* that the term “peoples” as used in the African Charter is necessary for claiming the collective rights enshrined in articles 20, 21, 22, 23, and 24 of the African Charter.³⁸⁰ The African

³⁷⁷ The concept of “people” is used in arts 19-24 of the African Charter. However, since this dissertation analyses only arts 21-22 and 24 regarding peoples’ rights, it analyses this notion in this part.

³⁷⁸ Ouguerouz *The African Charter on Human and Peoples’ Rights* 304, 308; and Viljoen *International Human Rights Law* 226.

³⁷⁹ Principles and Guidelines para 1(c). See also Viljoen *International Human Rights Law* 226.

³⁸⁰ *Endorois* paras 149-150.

Commission identified four criteria to identify indigenous peoples. These criteria are “the occupation and use of a specific territory; the voluntary perpetuation of cultural distinctiveness; self-identification as a distinct collectively, as well as recognition by other groups; an experience of subjugation, marginalisation, dispossession, exclusion or discrimination”.³⁸¹ Kiwanuka defines the concept of “peoples” to include four different meanings:

- “(a) all persons within the geographical limits of an entity yet to achieve political independence or majority rule;
- (b) all groups of people with certain common characteristics who live within the geographical limits of an entity referred to in (a), or in an entity that has attained independence or majority rule (i.e. minorities under any political system);
- (c) the state and the people as synonymous;
- (d) all persons within a state.”³⁸²

Moreover the prohibition against depriving people of their right in article 21 implies that both States and non-state actors are obliged to respect this right. This obligation requires that the States and non-state actors refrain from interfering with people’s right to freely dispose of their wealth and natural resources.

The formulation of article 21(2) qualifies the provisions of article 21(1) in two respects. Firstly, it entitles deprived people with the right to a lawful recovery of their property. Secondly, it entitles them to the right to adequate compensation.

Furthermore, the provisions of article 21 impose on States an obligation to “eliminate all forms of foreign economic exploitation”. This obligation denotes that States have a duty to protect people’s rights against third parties. In this regard, States are required to undertake legislative and other measures to ensure that people’s rights to their wealth and natural resources are protected against States’ entities and private actors.

3 3 4 7 Right to development

The right to development is provided for in article 22 of the African Charter:

- “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.”

³⁸¹ Para 150.

³⁸² Kiwanuka (1988) *American Journal of International Law* 100-101.

The right to development focuses on five concerns, namely “all peoples”; “development”; “freedom and identity”; “equal enjoyment”; and “common heritage”. The right to development is formulated in a general manner in that it does not define the terms “peoples”, “development”, and “identity”. This omission allow the consideration of the meaning of peoples as discussed above.³⁸³

Moreover, the broad formulation of the term “development” allows the inclusion of different aspects of development. As the UN Secretary-General stated in his report on an agenda for development, the term “development” incorporates five dimensions, namely peace, economy, environment, justice, and democracy.³⁸⁴ Furthermore, the broad formulation of the term “identity” implies that different meanings can be allocated to this term such as race, nationality, ethnicity, language, religion, and others.³⁸⁵

The formulation of article 22(1) requires account to be taken of two elements in the guarantee of the right to development, namely peoples’ freedom and identity as well as equality in the enjoyment of the common heritage. Regarding equality in enjoyment of the common heritage, the formulation requires non-discrimination in the enjoyment of the right as well as equality of men and women. These provisions are broadly formulated thus can assist in the consideration of various meanings and elements of “common heritage”. This concept has been defined by different scholars to include five main principles. Goedhuis identifies four elements of the common heritage as follows:

“The following basic implications of this concept are generally recognised: first, that the area to which it applies cannot be appropriated; second, that it requires a system of management in which all countries share; third, that it requires an active sharing of benefits from the exploration of the resources between all countries; and fourth, that it requires the dedication of the area to exclusively peaceful purposes.”³⁸⁶

Joyner adds the fifth element, which is that scientific research by States’ institutions and non-state actors should benefit all individuals.³⁸⁷ Furthermore, Joyner elaborates the meaning of these elements. According to Joyner, non-appropriation means that common

³⁸³ See part 3 3 4 6 above.

³⁸⁴ An Agenda for Development: Report of the Secretary-General UN Doc A/48/935, 6 May 1994, paras 16-138.

³⁸⁵ I Brownlie “The right of peoples in modern international law” (1985) 9 *Bulletin of the Australian Society of Legal Philosophy* 104 107-108.

³⁸⁶ D Goedhuis “Some recent trends in the interpretation and the implementation of the rules of international space law” (1981) 19 *Columbia Journal of Transnational L* 213 219. See also B Larschan & BC Brennan “The common heritage of mankind principle in international law” (1983) 21 *Columbia Journal of Transnational Law* 305 305; and CC Joyner “Legal implications of the concept of the common heritage of mankind” (1986) 35 *International and Comparative Law Quarterly* 190-192.

³⁸⁷ CC Joyner (1985) *International and Comparative Law Quarterly* 190 192.

heritage areas are not subject to either public or private ownership.³⁸⁸ Joyner argues that peoples' collective management means that States are merely the representative agents of all people whereby the interests of the people prevail rather than the interests of the States.³⁸⁹ He further argues that the equality of allocation of the benefits of natural resources requires the distribution of the natural resources to "enhance the common benefit" of all the people rather than the "agencies engaged in commercial or private gain".³⁹⁰ Regarding peaceful use rather than military use, Joyner argues that the element requires States to ensure the common heritage is used for peaceful purposes.³⁹¹ In relation to the conduct of scientific research, Joyner observes that the research should be conducted in a manner that does not physically threaten or impair the ecology of the common space.³⁹² It should be conducted in order to benefit all peoples, rather than the States that sponsor this research.³⁹³

However, according to Ouguergouz, the above-mentioned elements are not the exclusive characteristics of the concept of "common heritage of mankind", as other elements can be developed.³⁹⁴ The formulation of article 22(2) places an obligation on States in their individual and collective capacity to guarantee and enforce the exercise of the right to development. This formulation implies that States are the primary duty-bearers of the right to development.³⁹⁵

3 3 4 8 Right to a satisfactory environment

The right to a satisfactory environment is formulated in article 24 of the African Charter:

"All peoples shall have the right to a general satisfactory environment favourable for their development."

The right to a satisfactory environment is collective in nature in that it is recognised for all peoples. The formulation of this right reinforces the right to development in the sense that the enjoyment of a satisfactory environment is guaranteed for the purpose of

³⁸⁸ 191.

³⁸⁹ 191-192.

³⁹⁰ 192.

³⁹¹ 192.

³⁹² 192.

³⁹³ 192.

³⁹⁴ Ouguergouz *The African Charter on Human and Peoples' Rights* 322-323.

³⁹⁵ 319.

peoples' development. Its formulation is general in nature in that it does not explicitly define the term "general satisfactory environment" or specify its content. Ouguergouz,³⁹⁶ and Nmehielle³⁹⁷ confirm the fact that the broad formulation of the right to a general satisfactory environment creates space to include, through interpretation, many aspects rather than confining the meaning of environment exclusively to habitat.

The fact that the right to a satisfactory environment is a precondition for the realisation of socio-economic rights in the African Charter renders it a socio-economic right. There is a direct link between the right to a satisfactory environment and the socio-economic rights to property, education, work, health, and an adequate standard of living (including, water, food and housing), as well as the right to development. In *Social and Economic Rights Centre (SERAC) v Nigeria* ('SERAC'),³⁹⁸ the African Commission held that the right to a satisfactory environment in article 24 relates to other socio-economic rights.³⁹⁹ According to the ACHPR, the polluted environment adversely affects standards of healthy living conditions and individual's physical and mental health.⁴⁰⁰

In its Statement on the context of the Rio+20 Conference on the Green Economy in the Context of Sustainable Development and Poverty Eradication ('Green Economy Conference')⁴⁰¹ the CESCRC stated that the socio-economic rights provisions in the ICESCR are directly interlinked to the right to environment.⁴⁰² The violation of the right to a satisfactory environment adversely affects the enjoyment of these socio-economic rights. Economic and social activities related to environment, such as the extraction of natural resources, mining activities, and deforestation, violate not only the right to a satisfactory environment, but also other socio-economic rights in the African Charter.

The CESCRC stated in its Concluding observations on Uzbekistan⁴⁰³ that the effects caused by the Aral Sea catastrophe in Uzbekistan curtailed individuals' enjoyment of the socio-economic rights recognised in the ICESCR.⁴⁰⁴ The CESCRC also notes in its

³⁹⁶ 361.

³⁹⁷ Nmehielle *The African Human Rights System* 156.

³⁹⁸ *Social and Economic Rights Centre (SERAC) v Nigeria* Communication No 155/96 (2001) AHRLR 60 (ACHPR 2001).

³⁹⁹ Para 51.

⁴⁰⁰ Para 51.

⁴⁰¹ CESCRC Statement in the Context of the Rio+20 Conference on the Green Economy in the Context of Sustainable Development and Poverty Eradication, adopted at the forty-eighth session, 30 April-18 May 2012, UN Doc E/C12/2012/1.

⁴⁰² Para 5.

⁴⁰³ Concluding Observations of the Committee on Economic, Social and Cultural Rights: Uzbekistan 24 January 2006, UN Doc E/C12/UZB/CO/1.

⁴⁰⁴ Para 9.

Concluding observations on Cambodia⁴⁰⁵ that the extraction of natural resources, particularly in reserved zones, negatively affect “ecology and biodiversity” leading to the “loss of livelihood” and the dislocation of indigenous populations from their traditional lands.⁴⁰⁶ In its Report on the Solomon Islands,⁴⁰⁷ the CESCR notes that deforestation activities in the Solomon Islands and overfishing adversely affect the enjoyment of the right to an adequate standard of living in the ICESCR.⁴⁰⁸ In its General Comment 15,⁴⁰⁹ the CESCR states that the enjoyment of the right to water requires the prevention of contamination of water sources.⁴¹⁰

3 3 5 Duties provisions

3 3 5 1 States’ obligations to promote the rights in the African Charter

The African Charter formulates a State’s obligation to promote all the rights in the African Charter. This obligation is provided for in article 25:

“State parties to the present Charter shall have the duty to promote and ensure through teaching, education and publication, the respect of the rights and freedoms contained in the present Charter and to see to it that these freedoms and rights as well as corresponding obligations and duties are understood.”

The formulation of this article requires States to ensure individuals enjoy the rights protected in the African Charter. Article 25 is significant as it implies that interpretive organs can apply its provisions to consider a State’s obligation to promote socio-economic rights. Through article 25, States are required to implement the obligation to promote the rights of individuals by considering three mechanisms, namely teaching, education, and publication. Through these obligations, States are required to perform a variety of activities, such as training on human rights and publishing and disseminating information about human rights. The African Commission states in its Principles and

⁴⁰⁵ Concluding Observations of the Committee on Economic, Social and Cultural Rights: Cambodia 12 June 2009, UN Doc E/C12/KHM/CO/1.

⁴⁰⁶ Para 15.

⁴⁰⁷ Report of the Committee of Economic, Social and Cultural Rights for the Twentieth and Twenty-First Sessions, Consideration of Reports of States Parties: Solomon Islands, 26 April-14 May 1999 and 15 November-3 December 1999, UN Doc E/C12/1999/11.

⁴⁰⁸ Para 204.

⁴⁰⁹ CESCR General Comment 15: The Right to Water (2002) UN Doc E/C12/2002/11 (‘General Comment 15’).

⁴¹⁰ Para 10.

Guidelines that the obligation to promote requires States to avail people with accessible information regarding their socio-economic rights.⁴¹¹

3 3 5 2 States' obligations to guarantee the independence of the courts

Article 26 of the African Charter provides for the State's obligation to guarantee the independence of the courts:

“State parties to the present Charter shall have the duty to guarantee the independence of the courts and shall allow the establishment and improvement of appropriate national institutions entrusted with the promotion and protection of the rights and freedoms guaranteed by the present Charter.”

The formulation of article 26 establishes two types of duties. These duties are firstly, to guarantee the independence of domestic courts and secondly, the duty to establish and improve relevant domestic institutions. Moreover, the formulation requires established institutions to promote and protect all the rights enshrined in the African Charter. According to Anyangwe, the independence of the courts in article 26 means non-interference in the judicial system by the legislative or executive organs of the State.⁴¹² It also includes security of tenure for judges, as well as adequate conditions of work.

The formulation to establish and improve national institutions that promote and protect human rights in the Charter allows the consideration of a State's obligation to protect socio-economic rights, through the establishment of various institutions, such as human rights commissions.

3 3 5 3 Individual's duty to family, society, and State

Article 27 of the African Charter provides for the duty of every individual towards various institutions:

“1. Every individual shall have duties towards his family and society, the state and other legally recognised communities and the international community.
2. The rights and freedoms of each individual shall be exercised with due regard to the rights of others, collective security, morality and common interest.”

⁴¹¹ Principles and Guidelines para 8. See also C Anyangwe “Obligations of States Parties to the African Charter on Human and Peoples' Rights” (1998) 10 *African Journal of International and Comparative Law* 625 634.

⁴¹² 631.

The formulation of article 27(1) means that an individual is obligated to his family, society, State, and other legally recognised communities, as well as the international community. This formulation denotes that an individual is required to respect and protect the family. This obligation includes the duty of the individual to provide for the needs of family members, such as health and educational needs. Moreover, the reference to “society” imposes an obligation on an individual to respect and protect other people in their individual and collective capacities. The reference to “other legally recognised communities” implies the duty of the individual to respect and protect legally recognised communities, such as minority and indigenous communities. These include linguistic, ethnic, religious, and other communities. However, Ankumah argues that article 27(1) is vague in the sense that it does not elaborate the nature of the duties that an individual owes the family, society, State, and international community.⁴¹³

While article 27(1) does not explicitly state the nature of obligations that the individual owes the family, society, and State, it can be argued that the implication of the obligations in article 27(1) is two-fold in nature. Firstly, it embodies the African philosophy in the African Charter in the sense that it demonstrates the relationship between the individual and the family, as well as society and the State. These provisions elaborate the obligations of the individual enshrined in the African philosophy, to promote the values of responsibility, communitarianism, and participation. As such, the provisions impose on an individual the obligations to respect and protect the family, the society, the State, and the international community.

Secondly, article 27(1) demonstrates the avenue for the horizontal application of human rights in that it allows the application of human rights and their obligations to non-state actors. Writing on the obligations of multinational corporations under international law, Kinley and Tadaki argue that some provisions in human rights instruments can be construed in a manner that apply to non-state actors.⁴¹⁴

The implied horizontal application in article 27(1) is two-fold. Firstly, the provisions imply an individual’s obligation to respect. As discussed above,⁴¹⁵ the obligation to respect requires States and individuals to abstain from interfering with an individual’s enjoyment of rights. As such, regarding the socio-economic rights in the African Charter, this obligation in article 21(1) requires non-state actors to abstain from practices that interfere with an individual’s enjoyment of such rights. Secondly, the provisions of article

⁴¹³ Ankumah *The African Commission on Human and Peoples’ Rights* 170.

⁴¹⁴ Kinley and Tadaki (2004) *Virginia Journal of International Law* 948.

⁴¹⁵ See part 3 3 3 2 above.

27(1) allow the possibility of holding non-state actors accountable for violations of socio-economic rights through States' obligations to protect. As discussed above,⁴¹⁶ a State's responsibility to protect requires such States to protect individuals against violations of their fundamental rights by third parties. This argument is appropriate based on the fact that the African Charter, like other international human rights treaties, imposes obligations on Member States. As discussed in chapter two,⁴¹⁷ unlike bilateral treaties whose object and purpose is to safeguard the interests of Contracting States, the African Charter (like other human rights treaties) is a law-making body with a common object and purpose to protect human rights. As such, it is the responsibility of States to protect individuals against violations by State's agencies as well as non-state actors.

Scholars and institutions support the application of the doctrine of State responsibility. For example, Chirwa argues that State responsibility is the most appropriate means to hold non-state actors accountable for international and national human rights violations.⁴¹⁸ The ACHPR applied the doctrine of State responsibility in *SERAC*, whereby it held the respondent State responsible for its failure to protect, as well as facilitating, the private oil companies to violate the socio-economic rights of the Ogoni people.⁴¹⁹ Regarding the right to housing, the African Commission held that the obligation to protect requires the respondent State to prevent violations of the individual's right to housing by other individuals as well as non-state actors.⁴²⁰

While scholars' arguments regarding the need to hold non-state actors directly responsible for violations of human rights is significant, a State's obligation to protect continues to be an appropriate mechanism to hold non-state actors responsible. The need to hold non-state actors directly responsible for violations of socio-economic rights should be considered as an addition to State responsibility. As such, direct horizontal application does not replace the significance of State responsibility. The African Charter imposes obligations upon Member States. As such meaningful protection of socio-economic rights in the African Charter requires an emphasis on the duty of Member States to protect such rights. Article 27(2) is formulated in a manner that limits the enjoyment of the rights of individuals in that it requires the enjoyment of an individual's rights to take into account the rights of other individuals, both in their individual and

⁴¹⁶ See part 3 3 3 2 above.

⁴¹⁷ See chapter two, part 2 3 2 2.

⁴¹⁸ Chirwa (2004) *Melbourne Journal of International Law* 14 36.

⁴¹⁹ *SERAC* para 58.

⁴²⁰ Para 61.

collective capacities. Ankumah argues that the inclusion of the phrases “collective security, morality, and common interests” deprive the meaning of this article since the meaning of these terms is not clear.⁴²¹ Like article 27(1), the provisions of article 27(2) embody the African philosophy in the African Charter in the sense that it shows that the rights of the individual are not absolute. Mutua argues that this article acknowledges the fact that in Africa, as in the wider world, individual’s rights are conditional.⁴²² The formulation of article 27(2) qualifies all the rights’ provisions in the African Charter, including socio-economic rights.

3 3 6 ‘Drawing inspiration’ clauses

As discussed in chapter two,⁴²³ the provisions of articles 60 and 61 of the African Charter and article 7 of the African Court Protocol are relevant for the interpretation of socio-economic rights.⁴²⁴ These provisions avail the African Commission and the African Court with the mandate to consider other international and national human rights instruments and jurisprudence in interpreting the rights in the African Charter.

The provisions of articles 60 and 61 are mandatory in nature in the sense that the word “shall” obliges interpretive organs to draw inspiration from other relevant international, regional, and national instruments and jurisprudence. Moreover, the formulation of these articles is general in nature. Although the formulation lists some international, regional, and national sources to be applied by interpretive organs, the list is not exhaustive. For example the use of the terms “other instruments” in article 60, “relevant human rights instruments” in article 7, and other general or specialised international conventions and “legal precedents and doctrines” in article 61 denote that the formulation is general. In this regard, the general formulation creates substantial scope for interpretive organs to consider other various sources in developing the normative scope and content of socio-economic rights and their concomitant obligations. The discussion in chapter two developed the hierarchy of sources that the interpretive organs should consult in interpreting socio-economic rights.⁴²⁵

⁴²¹ Ankumah *The African Commission on Human and Peoples’ Rights* 170.

⁴²² Mutua (1995) *Virginia Journal of International Law* 369.

⁴²³ See chapter two, part 2 5 2 3.

⁴²⁴ These provisions are quoted in chapter two, part 2 5 2 3.

⁴²⁵ See chapter two, part 2 5 2 3.

3 4 Conclusion

The analysis in this chapter shows that the preparatory work of the African Charter is vital in interpreting socio-economic rights provisions. It consistently reveals the protection of human and peoples' rights as the sole object and purpose of the African Charter. The interpretation of socio-economic rights by supervisory organs should thus guarantee the protection of these rights. The emphasis on the promotion of the African philosophy and the values of equality, dignity, freedom, and justice, substantive provisions of socio-economic rights, and other related rights, as well as their concomitant obligations and the principle of interdependence of rights in the preparatory work provide the supervisory organs with insight into the appropriate meaning of socio-economic rights. These elements demonstrate a direct link between the preparatory work and the text of the African Charter in that they help to understand the provisions of the African Charter.

The text of the African Charter is an imperative interpretive aid that can enrich the interpretation of socio-economic rights provisions. The object and purpose of the African Charter, the African philosophy and the values of freedom, equality, justice and dignity, the principle of interdependence of rights, and "drawing inspiration" clauses enshrined in the preamble and substantive provisions provide the interpretive organs with possibilities available within the African Charter that can guide the interpretation of socio-economic rights. The values are implicit in each socio-economic right in the African Charter. The application of these elements in a methodology developed in chapter two guarantees the appropriate meaning of socio-economic rights.

The broad formulation of socio-economic rights provisions allows the interpretive organs to engage all the relevant provisions in the African Charter in order to generate the meaning of these rights. The general obligation provisions allow the immediate as well as progressive realisation of socio-economic rights taking into account the availability of resources. The duties' provisions include the non-state actors as duty-bearers of the individuals' socio-economic rights. This horizontal application broadens the scope of protection of individuals' socio-economic rights. The "drawing inspiration" clause demonstrates the possibility of applying other international and African instruments and jurisprudence to develop the meaning of socio-economic rights provisions. The following chapter analyses the interpretive mandate of the supervisory organs.

Chapter 4

The supervisory organs of the African Charter: Interpretive mandate and remedial jurisdiction

4 1 Introduction

Interpreting the socio-economic rights in the African Charter on Human and Peoples' Rights ('African Charter')¹ depends on the existence of autonomous supervisory organs. The autonomy of such organs is determined by various factors,² including a broad interpretive mandate that can ensure the practical and effective protection of socio-economic rights. Autonomous supervisory organs should also be able to redress violations. Additionally, supervisory organs' remedial jurisdiction is vital for the effective enforcement of socio-economic rights. For supervisory organs to maximise the effectiveness of socio-economic rights remedies, their mandate to monitor states' implementation of remedies is imperative.³

This chapter aims to examine the interpretive mandate and remedial jurisdiction of the supervisory organs of the African Charter.⁴ It analyses provisions relating to the establishment of these organs; the nature of their contentious jurisdiction; relevant provisions relating to legal standing; admissibility criteria; provisional measures; the legal status of decisions; remedies; and monitoring mechanisms. Significantly, the analysis indicates the nature of the legal power vested in the Charter's supervisory organs to develop the meaning, scope and content of socio-economic rights, as well as their concomitant obligations. It is also important for ensuring effective remedies and monitoring socio-economic rights decisions and judgments. Finally, this chapter links the

¹ African Charter on Human and Peoples' Rights (1981) OAU Doc.CAB/LEG/67/3 rev 5, 21 I.L.M 58 (1982) ('African Charter') adopted on 27th June 1981 and entered into force on 21st October 1986.

² NJ Udombana "Toward the African Court on Human and Peoples' Rights: Better late than never" (2000) 3 *Yale Human Rights and Development Law Journal* 45 70-72. Udombana identifies factors that limit the autonomy of the African Commission including dependence on Heads of States and Government, and a lack of resources.

³ CA Odinkalu "The individual complaints procedures of the African Commission on Human and Peoples' Rights: A preliminary assessment" (1998) 8 *Transnational Law and Contemporary Problems* 359 359-360.

⁴ Supervisory organs of the African Charter in the context of this dissertation refer to the African Commission on Human and Peoples' Rights, the African Court on Human and Peoples' Rights, and the African Court of Justice and Human Rights. Since the Protocol to the Statute of the African Court of Justice and Human Rights has not entered into force, the African Court of Justice is not yet in operation. This dissertation will demonstrate the implications for the African Commission and the African Court on Human and Peoples' Rights.

analysis of these jurisdictional elements and their implications for interpreting socio-economic rights provisions.

4 2 Establishing the supervisory organs of the African Charter

The African Charter's supervisory organs are established by three distinct instruments: the African Charter; the Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights ('African Court Protocol');⁵ and the Protocol on the Statute of the African Court of Justice and Human Rights ('African Court of Justice Protocol'). Article 30 of the African Charter establishes the African Commission on Human and Peoples' Rights ('African Commission').⁶ Article 1 of the African Court Protocol establishes the African Court on Human and Peoples' Rights ('African Court'),⁷ while article 2 of the African Court of Justice Protocol establishes the African Court of Justice and Human Rights ('African Court of Justice').⁸

These supervisory organs are significant for interpreting socio-economic rights in four respects. Firstly, they guarantee the existence of institutional mechanisms that grant the legal mandate for interpreting and protecting these rights. Secondly, they guarantee the existence of enforcement mechanisms that are vital for rights protection. As Pasqualucci argues, individuals' rights are meaningless if there is a lack of procedural enforcement mechanisms.⁹ International human rights courts and commissions are fundamental for protecting human rights and elaborating on State and non-state actors' obligations related to such rights.¹⁰

⁵ A total of 24 States have ratified the African Court Protocol, 25 States have signed but not yet ratified it, and 5 States have neither signed nor ratified the African Court Protocol, see <www.achpr.org/instruments/Court-establishment/ratifications> (accessed 07-11-2016).

⁶ Art 30 of the African Charter provides:

"An African Commission on Human and Peoples' Rights, hereafter called 'the Commission', shall be established within the Organisation of African Unity to promote human and peoples' rights and ensure their protection in Africa."

⁷ Art 1 of the African Court Protocol reads:

"There shall be established within the Organisation of African Unity an African Court on Human and Peoples' Rights hereafter referred to as 'the Court', the organisation, jurisdiction and functioning of which shall be governed by the present Protocol."

⁸ Art 2 of the African Court of Justice Protocol reads:

"The African Court on Human and Peoples' Rights established by the Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights and the Court of Justice of the African Union, are hereby merged into a single Court and established as "The African Court of Justice and Human Rights."

⁹ JM Pascualucci *The Practice and Procedure of the Inter-American Court of Human Rights* 2 ed (2013) 1.

¹⁰ 1.

Thirdly, they guarantee both quasi-judicial and judicial safeguards that are relevant for interpreting and protecting socio-economic rights through their interpretive mandate. Writing on the African Commission, Ankumah argues that through its interpretive mandate the African Commission demonstrates its quasi-judicial function.¹¹ In a similar vein, Mugwanya argues that the quasi-judicial functions of the African Commission are contained in its mandate to interpret and protect human rights.¹² Moreover, the judicial safeguards of the African Court are contained in its mandate to complement the African Commission's protective mandate, as stated in article 2 of the African Court Protocol.¹³

Lastly the supervisory organs, through their interpretive mandate, can interpret socio-economic rights in a manner that embraces the African philosophy.¹⁴ This understanding of African philosophy is significant, as it ensures that the meaning of the rights in the African Charter (including socio-economic rights) are interpreted in ways that are responsive to African States' particular historical trajectory and current socio-economic conditions. Regional human rights supervisory organs are conversant with the historical and philosophical background of the particular region and can elaborate individuals' rights and consider appropriate remedies.¹⁵ Writing on the comparison between the American and the European Conventions on Human Rights, Buergenthal argues that:

“[F]or better or for worse, the problems of our Hemisphere are more unique... than they are universal or European. They can only be solved within the framework of our own legal, cultural, political, and social traditions.”¹⁶

The following part analyses the African Commission's interpretive mandate and remedial jurisdiction.

¹¹ EA Ankumah *The African Commission on Human and Peoples' Rights: Practice and Procedures* (1996) 20-21.

¹² GW Mugwanya *Human Rights in Africa: Enhancing Human Rights through the African Regional Human Rights System* (2003) 243.

¹³ Art 2 of the African Court Protocol reads:

“The Court shall, bearing in mind the provisions of this Protocol, complement the protective mandate of the African Commission on Human and Peoples' Rights hereinafter referred to as ‘the Commission’, conferred upon it by the African Charter on Human and Peoples' Rights, hereinafter referred to as ‘the Charter’.”

¹⁴ See chapter three, part 3 2 4 2.

¹⁵ GL Neuman “Import, export, and regional consent in the Inter-American Court of Human Rights” (2008) 19 *European Journal of International Law* 101 106.

¹⁶ T Buergenthal “The American and European Conventions on Human Rights: Similarities and differences” (1981) 30 *American University Law Review* 155 166.

4 3 African Commission: Mandate and jurisdiction

The legal mandate of the African Commission is derived from articles 30 and 45 of the African Charter respectively. Article 30 grants the Commission the mandate to promote and protect individuals' human rights in Africa.¹⁷ Article 45 elaborates on the promotional and protective mandate stated in article 30 and confers on the African Commission an interpretative mandate in the form of advisory opinions.

Based on these provisions, the African Commission's mandate encompasses promoting and protecting the rights in the African Charter and providing advisory opinions. Regarding its promotional mandate, article 45(1)(a)-(c) enjoins the Commission to collect documents, undertake research relating to human rights problems in Africa, and disseminate human rights information through seminars, symposia and conferences. Moreover, it requires the Commission to formulate rules and principles that can be used to solve human rights problems in Africa.

Additionally, the African Commission is required to co-operate with African and international human rights institutions in order to promote and protect human rights. This promotional mandate is significant for protecting socio-economic rights in the African Charter, as it raises peoples' and States' awareness of such rights and their related obligations. Its fundamental objective is to educate and sensitise the general public to the human rights protected in the African Charter.¹⁸ The aim of the promotional mandate is to sensitise States Parties' awareness of human rights conditions in their respective states. It also enables the Commission to monitor the status of respect for human rights.

Hansungule notes that through promotional activities, the African Commission promotes human and peoples' rights in African states and institutions.¹⁹ Writing on state reporting mechanisms, Viljoen notes that these mechanisms enable States to understand their successes and shortfalls in safeguarding human rights.²⁰ Moreover, it enables the African Charter's supervisory organs to assess States' human rights protection.²¹ Human rights awareness helps people to ensure their rights are protected.²² In this regard, promotional activities can be used to achieve the protective

¹⁷ The provisions of art 30 of the African Charter are re-produced in part 4 2 above.

¹⁸ Ankumah *The African Commission on Human and Peoples' Rights* 21.

¹⁹ M Hansungule "African courts and the African Commission on Human and Peoples' Rights" in Bosl A & Diescho J (eds) *Human Rights in Africa: Legal Perspectives in their Protection and Promotion* (2009) 233 250.

²⁰ F Viljoen *International Human Rights Law in Africa* 2 ed (2012) 350.

²¹ 350.

²² Ankumah *The African Commission on Human and Peoples' Rights* 21.

mandate. Viljoen argues that promotional functions contribute to achieving the Commission's protective functions.²³ In particular, promotional activities such as special rapporteurs and the adoption of resolutions aim to protect human rights.²⁴ Odinkalu and Christensen argue that promotional and protective functions are closely interrelated in that the purpose of the promotional mandate is to protect individuals' rights from violations.²⁵ Nmehielle also argues that both promotional and protective mandates are specific manifestations of the Commission's interpretive mandate.²⁶

As the focus of this dissertation is interpreting socio-economic rights in quasi-adjudicatory and adjudicatory procedures, a detailed analysis of the African Commission's promotional mandate falls outside the scope of this dissertation. Reference will be made to this promotional mandate only to the extent that it facilitates socio-economic rights interpretation. The following part analyses the Commission's protective mandate.

4 3 1 Protective mandate of the African Commission

The African Commission's protective mandate is established through the provisions of articles 30, 45(2)-(3) and 46 of the African Charter respectively. While article 30 requires the Commission to protect human rights in Africa, article 45(2) requires the Commission to ensure such protection "under conditions laid down by the present Charter". This formulation of article 45(2) is broad and incorporates the protection of all rights in the African Charter through its communication procedures.²⁷ Viljoen argues that the Commission's protective mandate entails interpreting the African Charter's provisions through the consideration of communications.²⁸ Mutua argues that the consideration of communications is the main protective function of the African Commission,²⁹ which is required to consider communications that allege human rights

²³ Viljoen *International Human Rights Law* 295.

²⁴ 295.

²⁵ CA Odinkalu & C Christensen "The African Commission on Human and Peoples' Rights: The development of its non-state communications procedures" (1998) 20 *Human Rights Quarterly* 235 241.

²⁶ VO Nmehielle *The African Human Rights System: Its Laws, Practice, and Institutions* (2001) 181.

²⁷ See also Mugwanya *Human Rights in Africa* 245.

²⁸ Viljoen *International Human Rights Law* 295.

²⁹ M Mutua "The African human rights court: A two-legged stool?" (1999) 21 *Human Rights Quarterly* 342 346.

violations.³⁰ The protection of human rights through a communications procedure allows the Commission to clarify the meaning of rights' provisions.³¹

The conditions relating to the African Charter's communications procedure are two-fold: the inter-state communications provided for in articles 47-54 and the non-state communications elaborated in articles 55-59. These communications procedures enable the African Commission to interpret the scope and content of socio-economic rights invoked in such communications. It should, however, be noted that the Commission has so far decided only one inter-state communication.³² As Hansungule notes, States rarely approach the Commission to interpret the Charter's articles.³³ According to Hansungule, the African Commission protects human and peoples' rights mostly through an individual communications procedure.³⁴ This chapter focuses on non-state communications, as the decided inter-state communication did not deal with socio-economic rights.

The African Commission has decided a substantial number of socio-economic rights' non-state communications. This jurisprudence is vital in analysing the interpretive mandate of the African Commission in relation to the socio-economic rights in the African Charter. The analysis of the jurisprudence in this chapter confines itself to the procedural aspects of the interpretive mandate. The substantive jurisprudence is the subject of chapter 5 of this dissertation. The analysis in this chapter is based on *locus standi*, the admissibility of communications, the jurisdiction to issue provisional measures, the status of the African Commission's recommendations, and the jurisdiction to publish its reports, remedies, and follow-up jurisdiction.

4 3 2 African Commission's jurisdiction over non-state communications

The legal basis of the African Commission's mandate to receive communications from individuals and groups is found in articles 55-59 of the African Charter.³⁵ Article 55 is significant for elaborating the Commission's legal mandate regarding non-state communications. This article is broadly formulated in two respects. Firstly, the African Charter requires the Commission to "make a list of the communications other than those

³⁰ Udombana (2000) *Yale Human Rights and Development Law Journal* 66.

³¹ Nmeielle *The African Human Rights System* 181.

³² *Democratic Republic of Congo v Burundi, Rwanda and Uganda* Communication No 227/99 (2004) AHRLR 19 (ACHPR 2004).

³³ Hansungule "African courts" in *Human Rights in Africa* 251

³⁴ 251.

³⁵ See part 4 3 1 above.

of State parties”,³⁶ which enables it to consider both individual and *actio popularis* communications (those brought by individuals or groups in the public interest).³⁷ Nmehielle³⁸ and Yeshanew³⁹ confirm that individual communications are covered in the term “other communications”. Odinkalu and Christensen also affirm that the African Commission has considered individual communications based on article 55 of the African Charter.⁴⁰

The African Commission held in *Dawda Jawara v The Gambia* (‘*Jawara*’)⁴¹ that article 55 provides it with a mandate to determine communications submitted by complainants other than States.⁴² In *Social and Economic Rights Action Centre (SERAC) v Nigeria* (‘*SERAC*’),⁴³ the Commission acknowledged the initiative of two non-governmental organisations (‘NGOs’) that brought the communication to its attention, as it demonstrates the effectiveness of the *actio popularis* before the African Commission.⁴⁴

Despite textual indicators, scholarly opinions, and jurisprudence confirming the African Commission’s mandate regarding non-state communications, various scholars have challenged aspects of this jurisdiction. Their scepticism revolves particularly around whether article 55 extends to *actio popularis* communications. For example, Murray argues that the African Commission’s mandate in relation to communications from individuals or communications submitted by individuals or organisations acting in the public interest is not clear from the Charter’s text.⁴⁵

³⁶ Art 55(1) of the African Charter.

³⁷ The origin of public interest litigation can be traced to the Indian human rights proceedings. See PN Bhagwati “Judicial activism and public interest litigation” (1985) 23 *Columbia Journal of Transnational Law* 561 568. According to Bhagwati, public interest litigation is a result of the efforts by the highest court of India by relying on the basic objectives and values underlying the Constitution of India to ensure people and communities in India whose rights are deprived have access to justice. Forster and Jivan define public interest litigation as “proceedings in which the public or the community at large has some pecuniary or legal interest”. According to them public interest litigation enable the interest of the broader community or public to be recognised and enforced through adjudicatory mechanisms. See MC Forster & V Jivan “Public interest litigation and human rights implementation: The Indian and Australian experience” (2008) 3 *Asian Journal of Comparative Law* 1 1.

³⁸ Nmehielle *The African Human Rights System* 203.

³⁹ SA Yeshanew *The Justiciability of Economic, Social and Cultural Rights in the African Regional Human Rights System: Theories, Laws, Practices and Prospects* (2011) 153.

⁴⁰ Odinkalu & Christensen (1998) *Human Rights Quarterly* 239.

⁴¹ *Dawda Jawara v The Gambia* Communication Nos 147/95 & 149/96 (2000) AHRLR 107 (ACHPR 2000).

⁴² Para 42.

⁴³ *Social and Economic Rights Action Centre (SERAC) v Nigeria* Communication No 155/96 (2001) AHRLR 60 (ACHPR 2001).

⁴⁴ Para 49.

⁴⁵ R Murray “Decisions by the African Commission on individual communications under the African Charter on Human and Peoples’ Rights” (1997) 46 *International and Comparative Law Quarterly* 412 413

In its jurisprudence, the African Commission confirmed its mandate to determine communications in *actio popularis*. The Rules of Procedure of the African Commission on Human and Peoples' Rights ('Rules of Procedure')⁴⁶ do not explicitly elaborate on the Commission's mandate regarding *actio popularis*.⁴⁷ However, it can be argued that Rule 93(1) of the Rules of Procedure elaborates on article 55 by requiring "natural or legal" complainants of human rights violations to address their communications submitted under article 55 to the chairperson of the African Commission. The phrase "natural or legal person" can be broadly interpreted to permit individuals and/or organisations to submit communications to the African Commission in three distinct capacities. Firstly, to allow communications submitted by an individual in his own capacity as a victim of the violations. Secondly, to allow representative actions brought by groups of individuals or NGOs on behalf of victims of socio-economic rights violations. Lastly, to allow communications submitted by individuals or NGOs in the interest of the public or a broader community of people. As Viljoen correctly notes, a communication can be submitted to the African Commission by an individual, a group of individuals or by an NGO,⁴⁸ which can file a communication on behalf of the general public or in the public interest.⁴⁹

When interpreting socio-economic rights in the African Charter, the significance of standing on the basis of an *actio popularis* is two-fold. Firstly, it helps protect the socio-economic rights of people who, due to poverty, cannot reach the African Commission by their own means. It thus allows those with the means to access the African Commission and to submit cases on behalf of such poor people. As Hassan and Azfar note, the rationale for permitting litigation in the public interest is to facilitate access to justice for people living in poor socio-economic conditions.⁵⁰ Secondly, the *actio popularis* is relevant in communications involving the collective rights recognised in the African Charter under articles 21, 22 and 24. Thus, public interest standing enables the protection of peoples' socio-economic rights in their collective capacity and helps to stop

⁴⁶ The Rules of Procedure of the African Commission on Human and Peoples' Rights were adopted by the African Commission during its 2nd Ordinary Session held in Dakar, Senegal, from 2-13 February 1988, and they were revised by the African Commission during its 18th Ordinary Session held in Praia Cabo-Verde, from 2-11 October, 1995. They were later approved by the African Commission during its 47th Ordinary Session held in Banjul, The Gambia, in 2010.

⁴⁷ See also Viljoen *International Human Rights Law* 304.

⁴⁸ Viljoen *International Human Rights Law* 304.

⁴⁹ 304.

⁵⁰ P Hassan & A Azfar "Securing environmental rights through public interest litigation in South Asia" (2004) 22 *Virginia Environmental Law Journal* 215 226.

violations for the benefit of the whole community. As Forster and Jivan argue, litigation in the public interest facilitates the enforcement of a community's human rights as a whole, rather than focusing only on the rights of a particular individual.⁵¹ The benefits of *actio popularis* are collective in nature and shared by the entire community.

4 3 3 *Locus standi* and its implications for interpreting socio-economic rights

The African Charter does not explicitly state who can file a communication before the African Commission. Despite textual indicators and scholarly opinions on the African Commission's mandate to consider communications from individuals, various scholars have challenged the Charter's omission regarding *locus standi*.⁵² Murray, for instance, argues that this omission renders the Commission's mandate regarding individual communications uncertain.⁵³

These criticisms are based on a limited textual interpretative approach,⁵⁴ which does not allow for the application of other treaty provisions to generate effective meaning of the relevant provisions. Chapter two demonstrated that human rights treaties such as the African Charter should be interpreted broadly based on their object and purpose.⁵⁵ This allows for a holistic interpretation that engages all the relevant treaty provisions to generate their effective and practical meaning.

Although the African Charter does not explicitly state who can file a communication, this omission should not be construed narrowly as a restriction on individuals' or NGOs' access to the Commission. A narrow interpretation of *locus standi* weakens the Charter's object and purpose to protect human rights, as it restricts victims of human rights violations or their representatives from accessing the African Commission.

As discussed earlier, the African Charter's preparatory work and preamble clarify that its object and purpose are to protect the rights of the people of Africa.⁵⁶ Accordingly, interpretations that limit access to the Commission undermine the object and purpose of the Charter. Moreover, a narrow interpretation limits the Charter's effectiveness. The teleological approach to interpretation, and the methodology for its application, identifies

⁵¹ Forster & Jivan (2008) *Asian Journal of Comparative Law* 23.

⁵² Viljoen defines *locus standi* as the right to appear as a party to the adjudicatory body. See Viljoen *International Human Rights Law* 304. This dissertation adopts Viljoen's definition.

⁵³ Murray (1997) *International and Comparative Law Quarterly* 413.

⁵⁴ See chapter two, part 2 2 2.

⁵⁵ See chapter two, parts 2 2 3 and 2 3 2 3.

⁵⁶ See chapter three, parts 3 2 and 3 3 2.

the principle of effectiveness as a significant element of this approach.⁵⁷ The essence of this principle is to render treaty provisions practical and effective, rather than theoretical and illusory. Interpreting the African Charter in a manner that restricts people's access to the African Commission renders the Charter ineffective and therefore illusory.

The omission should be construed broadly in a manner that allows individuals or their representatives to petition the African Commission. This will enable the Commission to engage various provisions of the African Charter to allow individuals' *locus standi*. A broad interpretation is vital for interpreting socio-economic rights in two respects. Firstly, it allows individuals to access the African Commission in their personal capacity. Secondly, it allows petitions on *actio popularis*. Mutua argues that generously interpreting the African Charter enables any individual, group or NGO to access the African Commission in relation to violations of individuals' rights.⁵⁸

It is noteworthy that article 45(1)(b) of the African Charter allows the Commission to formulate principles and rules aimed at solving problems related to its human rights provisions. Based on this provision, the African Commission formulated its Rules of Procedure, which elucidate its *locus standi* rules. Rule 93(2)(a), for instance, requires that a communication should include the "name, nationality and signature of the person or persons filing it; or in cases where the Complainant is a non-governmental entity, the name and signature of its legal representative(s)". Rule 93(2)(e) identifies that, in circumstances where the victim of the human rights violations alleged is not the claimant, the communication should disclose the name of such a victim. Rule 94(2) allows for the right to legal representation for individuals or legal entities appearing before the African Commission.

Rule 93(2)(a) and (e) and Rule 94(2) are significant in three ways. Firstly, they solve the problem regarding the omission of *locus standi* in the African Charter. The requirement to include the name of a person or the name of the NGO's legal representative confirms this argument. Secondly, these provisions construe *locus standi* broadly in a manner that allows individuals' access to the African Commission in their individual capacity or as represented by NGOs. Thirdly, they ascertain that the Commission does not adopt a strict victim requirement by allowing NGOs to represent victims. This approach is imperative in interpreting socio-economic rights, as it enables victims of socio-economic rights violations, who for various reasons cannot personally

⁵⁷ See chapter two, part 2 2 3.

⁵⁸ Mutua (1999) *Human Rights Quarterly* 346.

submit their communications to the African Commission, to be represented by NGOs. Such reasons include poverty, lack of access to legal services and poor geographical infrastructure in most African countries.

In contrast to international and regional human rights bodies, the African Commission's jurisprudence clearly indicates that it does not adopt a strict 'victim' standing requirement. In *Article 19 v Eritrea* ('Article 19'),⁵⁹ the African Commission confirmed that it will accept *actio popularis* standing in instances where the petitioner is not strictly required to know the victim of the violations. This broad approach enables NGOs to assist victims of human rights violations who cannot financially, or due to geographical location, access the Commission.⁶⁰ This broad interpretation of *locus standi* allows the African Commission to address collective socio-economic rights communications. Viljoen argues that the narrow approach is confined to individual victims, which limits the communications by other interested parties. The broad approach allows communications in the public interest, which reinforces the concept of peoples' rights.⁶¹ The term "peoples" in the African Charter is broad and enshrines various meanings, including a community of people and the general public.⁶² Accordingly, public interest standing embrace peoples' rights.

4 3 4 Other admissibility requirements for non-state communications

For the African Commission to consider a communication it must be admissible. Article 56 of the African Charter contains admissibility requirements for non-state communications. A communication must reveal its author and be compatible with the Charter.⁶³ It must not include "disparaging or insulting language" and must be based "exclusively on news disseminated by mass media".⁶⁴ The communication should be submitted after exhausting local remedies and within reasonable time.⁶⁵ It should also not concern a matter that has already been settled at an international forum.⁶⁶

⁵⁹ *Article 19 v Eritrea* Communication No 275/03 (2007) AHRLR 73 (ACHPR 2007).

⁶⁰ Para 65.

⁶¹ Viljoen *International Human Rights Law* 305.

⁶² See chapter three, part 3 3 4 6.

⁶³ Art 56(1) and (2) of the African Charter.

⁶⁴ Art 56(3) and (4).

⁶⁵ Art 56(5) and (6).

⁶⁶ Art 56(7).

The Commission held in *Malawi African Association v Mauritania* ('*Malawi African Association*')⁶⁷ that article 56 of the Charter governs the admissibility of individual communications.⁶⁸ According to the Commission, the article states the underlying "conditions that communications must meet in order to be considered".⁶⁹ Some scholars note that the formulation of article 56 strictly requires each of the admissibility criteria to be fulfilled in order for the Commission to consider communications submitted before it.⁷⁰

Rule 106 of the Rules of Procedure reinforces article 56 by expressly indicating that communications must comply with all admissibility requirements. Failure to comply allows supervisory organs to reject a complaint's admissibility.⁷¹ Similarly, this dissertation argues in favour of parties fulfilling all admissibility requirements as prescribed in article 56. Compliance is important, as it allows supervisory organs to be presented with a properly formulated complaint that is based on well-founded facts, while avoiding being overburdened with frivolous and vexatious complaints. The strict interpretation of article 56, in a manner that requires the complainant to comply with each admissibility requirement can help to uphold the object and purpose of the African Charter to protect human rights.

However, in circumstances where parties cannot fulfil the admissibility requirements for genuine reasons, supervisory organs should interpret these requirements flexibly. There are various reasons that can prevent victims and complainants of socio-economic rights violations from fulfilling all the admissibility requirements enshrined in article 56. In *Malawi African Association*, the African Commission stated that the conditions of article 56 should be applied by considering the specificity of each communication.⁷² This generous interpretation should also be applied to the interpretation of Rule 106 in order to uphold the object and purpose of protecting human rights vested in the African Commission. As Udombana argues, Rules adopted by supervisory organs should be "broad, flexible and creative" in a manner that furthers the object and purpose of the

⁶⁷ *Malawi African Association v Mauritania* Communication Nos 54/91, 61/91, 98/93, 164/97, 196/97 and 210/98 (2000) AHRLR 149 (ACHPR 2000).

⁶⁸ Para 77.

⁶⁹ Para 77.

⁷⁰ See also Viljoen *International Human Rights Law* 311. See also Yeshanew *The Justiciability of Economic, Social and Cultural Rights* 158.

⁷¹ Viljoen *International Human Rights Law* 311.

⁷² *Malawi African Association* para 77.

African Charter.⁷³ The next part analyses the relevant admissibility requirements that require generous interpretation.

4 3 4 1 Exhaustion of local remedies

Exhausting local remedies before a complainant files a petition with an international supervisory body is a key admissibility criterion.⁷⁴ Pascualucci considers exhaustion of local remedies a fundamental principle of international law.⁷⁵ The African Charter provides for this requirement in article 56(5), which necessitates the communication's author to indicate that local remedies have been exhausted "unless it is obvious that this procedure is unduly prolonged". This requirement is significant as it furthers the Charter's object and purpose in relation to the protection of socio-economic rights in two respects.

Firstly, it allows for the protection of socio-economic rights and guarantees redress for the victims of rights violations at a domestic level. The exhaustion of local remedies provides States with an opportunity to redress alleged human rights violations within its domestic legal and administrative systems.⁷⁶ As a general human rights principle, the local remedies rule enables States to correct breaches of human rights obligations through their domestic legal and administrative system before the cases are challenged through an international mechanism.⁷⁷ In a similar vein, Viljoen argues that the requirement to exhaust local remedies implies that a State's legal system should be able to remedy the alleged human rights violations.⁷⁸ Stated differently, local courts should be the first to determine complaints of rights violations before they are submitted to the Commission.⁷⁹

The African Commission held in *Jawara* that the objective of the local remedies rule is to enable a State's domestic legal system to remedy a violation before the complaint is submitted to an international adjudicatory system.⁸⁰ Furthermore, the Commission

⁷³ Udombana (2000) *Yale Human Rights and Development Law Journal* 106.

⁷⁴ L Chenwi "An appraisal of international law mechanisms for litigating socio-economic rights, with a particular focus on the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights and the African Commission and Court" (2011) 3 *Stellenbosch Law Review* 683 691.

⁷⁵ Pasqualucci *The Practice and Procedure of the Inter-American Court* 92.

⁷⁶ NJ Udombana "So far so fair: The local remedies rule in the jurisprudence of the African Commission on Human and Peoples' Rights" (2003) 97 *American Journal of International Law* 1 2.

⁷⁷ Ankumah *The African Commission on Human and Peoples' Rights* 67.

⁷⁸ Viljoen *International Human Rights Law* 316.

⁷⁹ 316.

⁸⁰ *Jawara* para 31.

held in *SERAC* that the exhaustion of local remedies rule aims to provide domestic interpretive mechanisms with an opportunity to consider a dispute first, instead of directly challenging the alleged rights violation before an international supervisory body.⁸¹ In this regard, States are made aware of the human rights violations and availed with an opportunity to remedy them before they are brought before an international body.⁸²

The Inter-American Court of Human Rights ('Inter-American Court') held in the *Velasquez Rodriguez case* ('*Rodriguez*') that the requirement to exhaust local remedies in international human rights law enables the State to remedy violations through its domestic law.⁸³ Moreover, in *Acevedo Jaramillo et al v Peru* ('*Jaramillo*') the Inter-American Court stated that the State is the protector of human rights. As such, States must resolve rights violations through their domestic mechanisms before the violations are challenged through an international supervisory body.⁸⁴

Secondly, exhausting local remedies enables States to fulfil their international obligations relating to socio-economic rights. As Udombana argues, exhausting local remedies helps ensure that States implement their international human rights obligations in their domestic legal systems.⁸⁵ The African Commission found in *Amnesty International v Sudan* ('*Amnesty International*')⁸⁶ that exhausting local remedies helps States to be aware of and remedy alleged violations of individuals' rights.⁸⁷

However, Ankumah is critical of the formulation of article 56(5). According to her, its provisions do not conform to international human rights standards. International human rights standards related to exhaustion of local remedies broadly include circumstances where local remedies do not guarantee due process. Accordingly, article 56(5) considers only the circumstance where local remedies are unduly prolonged. Ankumah thus argues that the article does not account for circumstances where local remedies provided by the State are inadequate.⁸⁸

⁸¹ *SERAC* para 37.

⁸² Para 38.

⁸³ *Velasquez Rodriguez case* (Judgment) Inter-American Court of Human Rights Series C No 4 (29 July 1988) para 61.

⁸⁴ *Acevedo Jaramillo et al v Peru* (Interpretation of Judgment on Preliminary Objections, Merits, Reparations, and Costs) Inter-American Court of Human Rights Series C No 157 (24 November 2006) para 66.

⁸⁵ Udombana (2003) *American Journal of International Law* 9.

⁸⁶ *Amnesty International v Sudan* Communication Nos 48/90, 50/91, 52/91, and 89/93 (2000) AHRLR 297 (ACHPR 1999).

⁸⁷ Para 32.

⁸⁸ Ankumah *The African Commission on Human and Peoples' Rights* 67.

As discussed in chapter two, the interpretation of the African Charter as a human rights treaty requires the meaning of its provisions to be practical and effective.⁸⁹ Giving meaningful effect to article 56 requires a broad interpretation of provisions in a manner that includes adequate remedies. This broad interpretation furthers the object and purpose of the African Charter by securing effective remedies for violations of articles protecting socio-economic rights. As a supervisory organ, the African Commission is required to interpret the provisions of the African Charter in a manner that protects individuals' rights.⁹⁰ Interpreting the local remedies rule in a manner that contravenes the Charter's object and purpose weakens the protection of human rights.⁹¹ A narrow interpretation of the local remedies rule that excludes consideration of the adequacy of domestic remedies curtails the ability of the African Commission to provide effective remedies for socio-economic rights violations. The principles of interdependence and effectiveness discussed in chapter two can be invoked to require that the domestic remedies that must be exhausted in article 56(5) are adequate.⁹² These provisions include articles 1, 7 and 26 of the African Charter. The broad formulation of these articles creates scope to consider the adequacy of local remedies.

As discussed in chapter three, article 1 of the African Charter enjoins States to adopt legislative and other measures in order to ensure human rights protection.⁹³ The provisions of article 1 can be applied to require States to enact legislation that provides for substantive and procedural remedies. In *SERAC*, the Commission held that local remedies are inadequate in circumstances where a State's domestic legal system does not provide for substantive rights.⁹⁴ Article 7 recognises the individual's right to be heard in the domestic legal system. In *Amnesty International*, the African Commission held that the requirement to exhaust local remedies in article 56 should be applied in conjunction with article 7, which requires the right to a fair trial.⁹⁵

Article 26 obliges States to guarantee the independence of the judiciary and other institutions tasked with human rights protection. A lack of independence weakens the adequacy of local remedies. In this respect, Udombana argues that in states where domestic courts are not independent, it is impossible for complainants to obtain copies

⁸⁹ See chapter two, parts 2 2 3 and 2 5 2 4.

⁹⁰ Ankumah *The African Commission on Human and Peoples' Rights* 68.

⁹¹ 68.

⁹² See chapter two, parts 2 2 3, 2 5 2 1 and 2 5 2 4.

⁹³ See chapter three, part 3 3 3 1.

⁹⁴ *SERAC* para 37.

⁹⁵ *Amnesty International* para 31.

of judgments timeously so that they can challenge violations through international bodies.⁹⁶ The African Commission held in *SERAC* that the State's military government action to oust the jurisdiction of the courts demonstrated that there were no adequate domestic remedies.⁹⁷ These provisions help to ensure the local remedies rule in article 56 is adequate in the sense that local remedies are sufficient to protect socio-economic rights from violations. As it was held by the Inter-American Court in *Godinez-Cruz v Honduras (Merits)* ('Cruz') local remedies are adequate when they suitably redress the violation of a legal right.⁹⁸

It is vital that the domestic remedies rule only applies if domestic remedies exist, and if those remedies are adequate for protecting relevant rights. Regarding the adequacy of local remedies, the African Commission has established three criteria to determine the conditions under which applicants are required to exhaust domestic remedies: they must be "available, effective and sufficient".⁹⁹ A local remedy is considered "available" if the complainant can pursue it without obstacles.¹⁰⁰ The requirement to exhaust local remedies is not absolute. These remedies must not be exhausted in circumstances where there are hurdles in the process of exhausting them. In order for local remedies to be exhausted, States should ensure that complainants are not obstructed from exhausting such remedies. Pasqualucci argues that the purpose of this requirement is not to establish procedural hurdles for victims of human rights violations, but rather to ensure that States remedy such violations.¹⁰¹ A local remedy is effective if it provides possibilities for success.¹⁰² The Inter-American Court held in *Rodriguez* that for a local remedy to be effective it should be capable of achieving its expected outcomes.¹⁰³ In *Las Palmeras v Colombia* ('Las Palmeras') the Inter-American Court held that:

"It is not enough that recourses exist formally: they must be effective in that, they must give results or responses to the violations of rights established in the

⁹⁶ Udombana (2003) *American Journal of International Law* 18.

⁹⁷ SERAC para 41. See also *Constitutional Rights Project (on behalf of Wahab Akamu, Globan Adeaga and Others) v Nigeria* Communication No 60/91 (1995) para 10.

⁹⁸ *Godinez-Cruz v Honduras (Merits)* Inter-American Court of Human Rights Series C No 5 (20 January 1989) para 67.

⁹⁹ *Jawara* para 31.

¹⁰⁰ Para 32. See also *Jawara* para 35; *Krishna Achutan (on behalf of Aleke Banda) v Malawi* Communication No 64/92, 68/92, and 78/92 (1995) (2000) AHRLR 144 (ACHPR 1995); *Rencontre africaine pour la defence des droits de l'Homme (RADDHO) v Zambia* Communication 71/92 (2000) AHRLR 321 (ACHPR 1996) para 11.

¹⁰¹ Pasqualucci *The Practice and Procedure of the Inter-American Court* 96.

¹⁰² *Jawara* para 32.

¹⁰³ *Rodriguez* para 66.

Convention... remedies that... prove illusory cannot be considered effective. This may happen when for example, they prove to be useless in practice because the jurisdictional body does not have independence necessary to arrive at an impartial decision or because they lack means to execute their decisions; or which justice is denied, or such as cases in which there has been an unwarranted delay in rendering a judgment.”¹⁰⁴

A remedy is also sufficient if it is able to redress rights violations found to have been committed.¹⁰⁵ In this respect, the availability of local remedies requires States to provide substantive and procedural legal mechanisms that allow complainants to access institutions with a mandate to consider socio-economic rights cases. In situations where domestic legal mechanisms are restricted, there are no local remedies. Udombana confirms that deliberately obstructing the domestic legal system renders local remedies unavailable.¹⁰⁶

In *John K Modise v Botswana* ('*Modise*'),¹⁰⁷ the African Commission found the communication admissible after establishing that domestic legal procedures were deliberately being obstructed, thereby preventing the victim from accessing the justice system for sixteen years.¹⁰⁸ The African Commission held in *Media Rights Agenda v Nigeria* ('*Media Rights Agenda*')¹⁰⁹ that provisions that restrict domestic courts from determining rights violations render local remedies unavailable, ineffective and unlawful.¹¹⁰ In *Jawara*, the African Commission stressed that local remedies are unavailable and non-existent in circumstances where a State's laws limits a court's jurisdiction to determine cases.¹¹¹ The Commission held that local remedies are unavailable in circumstances where the victim of the violations cannot return to his or her own country to pursue such remedies.¹¹²

The availability of local remedies to exhaust within a reasonable time is significant for protecting socio-economic rights. In circumstances where local remedies are not available, a complainant should not be subjected to the requirement to exhaust what are in effect non-existent local remedies. Since the formulation of article 56(5) uses the

¹⁰⁴ *Las Palmeras v Colombia (Merits)* Inter-American Court of Human Rights Series C No 90 (6 December 2001) para 58.

¹⁰⁵ *Jawara* para 32.

¹⁰⁶ Udombana (2003) *American Society of International Law* 23.

¹⁰⁷ *John K Modise v Botswana* Communication No 97/93 (2000) AHRLR 30 (ACHPR 2000).

¹⁰⁸ Paras 18-22.

¹⁰⁹ *Media Rights Agenda v Nigeria* Communication Nos 105/93, 128/94, 130/94, 152/96 (2000) AHRLR 200 (ACHPR 1998).

¹¹⁰ Para 50.

¹¹¹ *Jawara* para 34.

¹¹² Para 35.

phrase “if any” this implies that if the remedies are not provided the complainant should not be forced to exhaust local remedies. Although the requirement to exhaust local remedies is significant, it should not be applied in a manner that limits an individuals’ access to the international mechanisms.¹¹³

The African Commission held in *Malawi African Association* that the requirement to exhaust local remedies cannot be applied in communications where complainants or victims cannot practically exhaust such remedies.¹¹⁴ Exhaustion of local remedies can be impracticable in circumstances where the communications involve too many victims.¹¹⁵ The Commission did not, however, elaborate on the manner in which many victims in a communication renders the exhaustion of local remedies impracticable.¹¹⁶ It can further be argued that, in circumstances where a communication involves too many victims, in a manner that renders exhaustion of local remedies impossible, complainants can use *actio popularis* to submit their communications to the African Commission. As discussed above, the *actio popularis* is relevant for communications involving violations of collective rights, as well as for victims who for reasons of poverty cannot access the African Commission.¹¹⁷

Complainants who have not exhausted local remedies should be required to show that such remedies are in effect unavailable. In *Socio-Economic Rights and Accountability Project v Nigeria* (‘SERAP’)¹¹⁸ the complainant alleged violations of the right to education under article 17 of the Charter.¹¹⁹ The complainant did not exhaust local remedies and raised five grounds for its failure to exhaust local remedies. Firstly, local remedies were unavailable due to strict interpretations of the *locus standi* rule in the respondent State.¹²⁰ Secondly, local remedies were unavailable due to the large number of victims involved.¹²¹ Thirdly, the courts in the respondent State lacked the legal mandate to determine cases of a socio-economic rights nature.¹²² Fourthly, the

¹¹³ Udombana (2003) *American Journal of International Law* 15.

¹¹⁴ *Malawi African Association* para 85.

¹¹⁵ Para 85. See also *Sudan Human Rights Organisation & Centre on Human Rights and Evictions (COHRE) v Sudan* Communications No 279/03-296/05 (2009) AHRLR 153 (ACHPR 2009) paras 100-102.

¹¹⁶ This dissertation demonstrates in this part and in part 4 3 4 2 below that violation of collective rights which mainly involve many victims, as well as poverty of some of these victims of collective human rights violations, can render the exhaustion of local remedies impracticable.

¹¹⁷ See part 4 3 2 above.

¹¹⁸ *Socio-Economic Rights and Accountability Project v Nigeria* Communication No 300/2005 (2008) AHRLR 108 (ACHPR 2008).

¹¹⁹ Paras 2-4.

¹²⁰ Para 25.

¹²¹ Para 25.

¹²² Para 26.

respondent State's laws do not recognise the socio-economic rights allegedly violated.¹²³ Lastly, the respondent State's judicial system was "weak and unduly prolonged" rendering local remedies ineffective.¹²⁴

The African Commission held that the complainant raised mere doubts regarding the effectiveness of local remedies in the respondent State. It is mandatory for the complainant to take all necessary steps or attempt to exhaust local remedies.¹²⁵ Complainants are required to show steps taken to exhaust local remedies. By not attempting to exhaust local remedies or substantiating their weaknesses or ineffectiveness, the complainant failed to justify the non-exhaustion of local remedies.¹²⁶ The African Commission held further that the respondent State's Constitution¹²⁷ incorporates socio-economic rights in its Fundamental Objectives and Directive Principles of State Policy.¹²⁸ It also domesticates the African Charter in its Constitution, which allows for socio-economic rights litigation and enforcement in domestic courts.¹²⁹

In *Ilesanmi v Nigeria* ('*Ilesanmi*'),¹³⁰ the African Commission established the procedure for establishing that complainants did not exhaust local remedies because they were unavailable, ineffective and insufficient.¹³¹ According to the Commission, this procedure is threefold. Firstly, the complainant must allege that it was impossible to exhaust local remedies, as they are unavailable, ineffective or insufficient. The complainant is, however, not required to prove this allegation.¹³² Secondly, the respondent State is obliged to prove that local remedies are available, effective and sufficient.¹³³ Thirdly, the complainant must show that he or she exhausted local remedies, but that such remedies were ineffective in this particular case.¹³⁴ The complainant can also demonstrate that although the local remedies were available, effective or sufficient, their exhaustion was not possible in the particular circumstances

¹²³ Para 26.

¹²⁴ Para 27.

¹²⁵ Paras 59-60.

¹²⁶ Para 61.

¹²⁷ The Constitution of the Federal Republic of Nigeria 1999.

¹²⁸ Arts 16 to 18 and 20 to 21 of the Constitution of the Federal Republic of Nigeria.

¹²⁹ *SERAP* paras 61-65.

¹³⁰ *Ilesanmi v Nigeria* Communication No 268/03 (2005) AHRLR 48 (ACHPR 2005) ('*Ilesanmi*').

¹³¹ Para 46.

¹³² Para 46.

¹³³ *Ilesanmi* para 46. See also Hansungule "African courts" in *Human Rights in Africa* 263. According to Hansungule, the requirement that the respondent State should prove the availability, effectiveness, and sufficiency of local remedies is based on the fact that the complainants are mostly not aware of the remedies at their exposure. It is the respondent State that determines the local remedies.

¹³⁴ *Ilesanmi* para 46.

of the case.¹³⁵ In *SERAC*, the African Commission acknowledged the fact that the communication did not indicate any information regarding the exhaustion of local remedies by the complainants. However, the Commission decided to proceed with hearing the communication based on the fact that the State never responded to the Commission's requests concerning the communication.¹³⁶

In *Purohit*, the complainants alleged that they could not exhaust local remedies as the respondent State's laws did not provide for such remedies.¹³⁷ The respondent State submitted that local remedies were available through the tortious liability actions of false imprisonment or negligence, and through the provisions of the Constitution.¹³⁸ The African Commission stated that although local remedies were available¹³⁹ they were not realistic to mental patients (the complainants represented in the communication). According to the Commission, the complainants in the communication were people picked from the streets or poor people who could not be expected to exhaust remedies provided through the Constitution. In this regard, the African Commission held that in the absence of legal aid services the remedies available in the Constitution or common law were not realistically available to them, and were thus ineffective.¹⁴⁰

A flexible interpretation of the exhaustion of local remedies is significant as it allows complainants who cannot exhaust such remedies, based on various impediments, to challenge violations at the African Commission. These impediments include the gravity of the violations and large number of individual victims. The African Commission held in *Sudan Human Rights Organisation & Centre on Housing Rights and Evictions (COHRE) v Sudan (COHRE)*¹⁴¹ that:

“The scale and nature of alleged abuses, the number of persons involved... make local remedies unavailable, ineffective and insufficient... due to the seriousness of the human rights situation and the large number of people involved, such remedies as might theoretically exist in the domestic courts are as a practical matter unavailable... such is the case... where tens of thousands of people have allegedly been forcibly evicted and their properties destroyed. It is impracticable and

¹³⁵ Para 46.

¹³⁶ *SERAC* para 40.

¹³⁷ *Purohit and Moore v The Gambia* Communication no. 241/2001 (2003) AHRLR 96 (ACHPR 2003) (*'Purohit'*) para 26.

¹³⁸ Para 28.

¹³⁹ Para 36.

¹⁴⁰ *Purohit* paras 37-38. See also *Ilesanmi* para 45 where the African Commission held that the complainant cannot exhaust local remedies if such remedies lack either one of the identified criteria of availability, effectiveness, and sufficiency.

¹⁴¹ *Sudan Human Rights Organisation & Centre on Housing Rights and Evictions (COHRE) v Sudan* Communication Nos 279/03-296/05 (2009) AHRLR 153 (ACHPR 2009) (*'COHRE'*).

undesirable to expect these victims to exhaust the remedies claimed by the State to be available.”¹⁴²

This part has demonstrated the importance of local remedies in protecting the socio-economic rights of individuals and people. It is important that States render these remedies available, effective and sufficient. Complainants of socio-economic rights violations should be required to demonstrate that they have exhausted domestic remedies before they bring complaints to the supervisory organs of the African Charter. The supervisory organs should ensure that these remedies have been exhausted as required by the African Charter. However, it should also be established that the domestic remedies are practically available, effective, and sufficient. Complainants should not be forced to exhaust local remedies in circumstances where either one of these requirements does not exist.

4 3 4 2 Communications must be submitted within a reasonable time after the exhaustion of local remedies

Article 56(6) requires a communication to be submitted within a reasonable period from the time local remedies were exhausted. The African Charter does not define the term “reasonable time”. This omission should be interpreted broadly in a manner that allows the African Commission to take into account various circumstances in determining the “reasonable time” rather than adopting a strict time limit. In *Darfur Relief and Documentation Centre v Sudan* (*Darfur*),¹⁴³ the Commission held that since the Charter is silent on the meaning of reasonable time the omission enables it to treat each communication based on its own circumstances.¹⁴⁴ The African Commission further held that article 56(6) aims to ensure that complainants are vigilant. However, in circumstances where there are compelling justifications for complainants’ failure to submit their communication within a reasonable time the Commission can proceed to determine the communication for the sake of “fairness and justice”.¹⁴⁵

It is imperative for protecting socio-economic rights that article 56 is construed broadly to allow the African Commission to consider the circumstances of each communication alleging a violation of socio-economic rights. The significance is based

¹⁴² Paras 100-102.

¹⁴³ *Darfur Relief and Documentation Centre v Sudan* Communication No 310/05 (2009) AHRLR 193 (ACHPR 2009).

¹⁴⁴ Para 75.

¹⁴⁵ Para 79.

on the fact that it allows victims, who could not submit their communications in the shortest period of time after the exhaustion of local remedies for various reasons, to submit their communications. For example, impoverished victims of socio-economic rights violations can face profound financial obstacles in gaining access to legal representation or other forms of NGO-assistance to submit their communications to the African Commission. Furthermore, victims who fail to get copies of judgments due to delays caused by domestic courts can fail to submit their communications immediately after the exhaustion of local remedies. Victims facing challenges of poor infrastructure and chronic delays inherent to the domestic legal system can also fail to access the Commission within a reasonable period.¹⁴⁶ According to Udombana, in most cases complainants obtain copies of judgments after a very long time when these copies no longer have a purpose.¹⁴⁷ The flexible interpretation of this requirement thus allows victims of socio-economic rights violations to access the African Commission after their failure to access domestic systems.

Viljoen argues that these provisions consider various conditions peculiar to Africa, which include a “low level of awareness” of the African Charter among people in Africa; the “material conditions in which the complainants may find themselves”; and the fact that judicial proceedings in many African countries take a long time before their final determination.¹⁴⁸ According to Viljoen, the African Charter’s omission to stipulate a fixed time responds to the “African landscape’s fluidity”.¹⁴⁹ Accordingly, the requirement to submit a communication within reasonable time should be interpreted flexibly, particularly to advance the object and purpose of the African Charter in the specific context of socio-economic rights cases.

Once a communication fulfils the admissibility criteria discussed in this dissertation, the African Commission proceeds to determine the merits of the communication and issue the findings and recommendations. Depending on the nature of the socio-economic rights violations involved,¹⁵⁰ the African Commission can be required to issue provisional measures, before the communication is decided. The following part analyses the African Commission’s mandate regarding provisional measures.

¹⁴⁶ Udombana (2003) *American Journal of International Law* 18.

¹⁴⁷ 18.

¹⁴⁸ Viljoen *International Human Rights Law* 319-320.

¹⁴⁹ 319-320.

¹⁵⁰ See chapter three, part 3 3 4 and chapter five, 5 5 2.

4 3 5 African Commission's jurisdiction to issue provisional measures

Elkind defines a provisional measure as a temporary remedy enabling a supervisory organ to issue an order that requires parties to a dispute “to perform or refrain from performing certain acts” pending the decision of the case.¹⁵¹ According to Elkind, no party to a pending case is allowed to act in a manner that jeopardises the case.¹⁵² The implications for interpreting human rights in the African Charter (including socio-economic rights) are two-fold. Firstly, provisional measures help to protect human rights, which are the subject of the main communication, from being violated. As Pasqualucci notes, the objective of interim measures in international human rights law is to protect individuals' rights from irreparable harm arising from violations.¹⁵³ Viljoen posits that provisional measures aim to safeguard the rights of individuals pending the final determination of a communication.¹⁵⁴ It is vital to safeguard victims' rights during the interim period since the hearing of the communication may take a long time.¹⁵⁵ Provisional measures thus protect individuals immediately by stopping rights violations pending the final determination of their cases.¹⁵⁶ This protective function of provisional measures is crucial in that it can protect the socio-economic rights of the people more appropriately than remedies issued at the final judgment.

Pasqualucci notes that the protective role of provisional measures is more significant than compensation issued at the final determination of the case.¹⁵⁷ Provisional measures further the object and purpose of the African Charter relating to socio-economic rights by preventing serious harm to life or health, which often results in cases of serious socio-economic rights violations. The protection of human rights is meaningless in circumstances where such rights are irreparably harmed before the determination of a case on merits.¹⁵⁸ Juma posits that provisional measures by

¹⁵¹ JB Elkind *Interim Protection: A Functional Approach* (1981) 3.

¹⁵² 30.

¹⁵³ JM Pasqualucci “Interim measures in international human rights: Evolution and harmonisation” (2005) 38 *Vanderbilt Journal of Transnational Law* 1 1 & 7.

¹⁵⁴ Viljoen *International Human Rights Law* 306. See also GJ Naldi “Interim measures of protection in the African system for protection of human and peoples' rights” (2002) 2 *African Human Rights Law Journal* 1 5; *Four Ngobe Indigenous Communities and their Members (Panama)*, Provisional Measures, Inter-American Court of Human Rights (28 May 2010) “considering” para 3.

¹⁵⁵ Viljoen *International Human Rights Law* 306. See also Pasqualucci (2005) *Vanderbilt Journal of Transnational Law* 3.

¹⁵⁶ Pasqualucci (2005) *Vanderbilt Journal of Transnational Law* 3.

¹⁵⁷ 4.

¹⁵⁸ 15.

supervisory organs are a significant protective tool against human rights violations.¹⁵⁹ According to Rieter, provisional measures are directly linked to the object and purpose of the treaty as well as the essence of the treaty's rights.¹⁶⁰

Several authors¹⁶¹ have argued that provisional measures perform a preventive role by preventing irreparable human rights abuses from State and non-state actors. They prevent irreparable damage such as harm to a complainant's health and well-being as well as preventing irreparable damage that cannot be restored by financial compensation. They can also be issued to prevent and redress massive peoples' rights violations.

The African Commission reiterated the preventive aspect of provisional measures in *International PEN, Constitutional Rights Project, Civil Liberties Organisation and Interrights (on behalf of Ken Saro-Wiwa Jnr) v Nigeria ('Saro-Wiwa')*.¹⁶² It held that the object of provisional measures is to prevent "irreparable damage" to victims of the violation during the determination of the communication.¹⁶³

However, the African Charter is silent on the mandate of the African Commission to issue provisional remedies. Scholars argue that this lack of jurisdiction renders the Commission ineffective. Benedek, for instance, argues that the Charter's failure to expressly provide the African Commission with a remedial mandate (including provisional remedies) renders it ineffective in redressing human rights violations.¹⁶⁴ Pasqualucci notes that states tend to reject the enforcement of provisional measures in circumstances where such measures are not explicitly stated in a treaty.¹⁶⁵

These criticisms are based on a restrictive textual approach to interpretation. As discussed in chapter two, a textual approach to interpretation that uses the literal

¹⁵⁹ D Juma "Provisional measures under the African human rights system: The African Court's order against Libya" (2012) 30 *Wisconsin International Law Journal* 344 344.

¹⁶⁰ E Rieter *Preventing Irreparable Harm: Provisional Measures in International Human Rights Adjudication* (2010) 207. See also *Urso Branco Prison (Brazil)* Provisional Measures, Inter-American Court of Human Rights (7 July 2004) Concurring Opinion, A A Cancado Trindade, para 11 whereby in his concurring opinion Trindade J stated that the underlying objective of the provisional measures is to protect human rights.

¹⁶¹ See Pasqualucci (2005) *Vanderbilt Journal of Transnational Law* 4 and 7; Rieter *Preventing Irreparable Harm* 83, 205 and 209; and Juma (2012) *Wisconsin International Law Journal* 346.

¹⁶² *International PEN, Constitutional Rights Project, Civil Liberties Organisation and Interrights (on behalf of Ken Saro-Wiwa Jnr) v Nigeria* Communication Nos 137/94 139/94 154/96 161/97 (2000) AHRLR 212 (ACHPR 1998).

¹⁶³ Para 114.

¹⁶⁴ W Benedek "The African Charter and Commission on Human and Peoples' Rights: How to make it effective" (1993) 11 *Netherlands Quarterly of Human Rights* 25 31.

¹⁶⁵ Pasqualucci (2005) *Vanderbilt Journal of Transnational Law* 7.

meaning and only the words of the text to extract its meaning is an interpretative flaw that fails to engage the treaty provisions.¹⁶⁶ A limited textual approach does not include other interpretive elements, such as the principle of effectiveness, which can assist supervisory organs in generating a mandate that is not explicitly stated in a treaty. A human rights treaty, such as the African Charter, should be interpreted broadly in a manner that furthers its object and purpose to protect human rights.¹⁶⁷

This dissertation demonstrates that the teleological approach to interpretation enables supervisory organs to engage various treaty provisions to elaborate their mandate.¹⁶⁸ When a treaty does not explicitly provide for provisional measures, its object and purpose allows the application of relevant provisions to identify measures for effective rights protection.¹⁶⁹ Accordingly, it can be argued that the African Charter's failure to explicitly provide the African Commission with a mandate to issue provisional measures does not necessarily mean that the Commission is incapable of issuing such remedies. The jurisdiction to issue provisional measures is implicit in various treaty provisions that recognise individuals' rights to challenge rights violations.¹⁷⁰

The legal basis for the African Commission's jurisdiction to issue provisional measures pending the substantive consideration of the communication can be found in articles 30, 45(1)(b), 45(2) and 46 of the African Charter. Article 45(1)(b) allows the Commission to formulate procedural rules for of procedure in order to solve any legal problems relating to the protection of human rights. Based on article 45(1)(b), the Commission formulated Rule 98(1) on its jurisdiction to issue provisional remedies:

“At any time after the receipt of a Communication and before a determination on the merits, the Commission may, on its initiative or at the request of a party to the Communication, request that the State concerned adopt Provisional Measures to prevent irreparable harm to the victim or victims of the alleged violation as urgently as the situation demands.”

The formulation of Rule 98(1) is significant in three ways. Firstly, it elaborates on the African Charter by incorporating the Commission's mandate to issue provisional measures. Juma argues that the Commission's rules relating to its provisional measures' mandate addresses the omission in the Charter.¹⁷¹ Similarly, Pasqualucci observes that

¹⁶⁶ See chapter two, part 2 2 2.

¹⁶⁷ See chapter two, part 2 2 3.

¹⁶⁸ See chapter two, parts 2 2 3 and 2 5 2 1.

¹⁶⁹ Pasqualucci (2005) *Vanderbilt Journal of Transnational Law* 14.

¹⁷⁰ 5.

¹⁷¹ Juma (2012) *Wisconsin International Law Journal* 357.

most supervisory organs whose mandate to issue provisional measures is not explicit delineate it through their procedural rules.¹⁷² Secondly, Rule 98(1) enables the Commission to issue provisional remedies on its own initiative, rather than waiting for requests from victims of socio-economic rights violations. This formulation is helpful as it enables the African Commission to require States to stop socio-economic rights violations by way of provisional measures. Thirdly, a party to a communication can request the Commission to issue provisional measures.

The African Commission can also apply article 46 in a manner that recognises its mandate to issue provisional measures, as it permits the Commission to “resort to any appropriate method of investigation”. This phrase is sufficiently broad to allow the Commission the opportunity to consider provisional measures as a means of investigating socio-economic rights violations. Mugwanya argues that article 46 justifies the Commission’s protective mandate and allows it to interpret the Charter holistically.¹⁷³ Moreover, the broad scope of the protective mandate enshrined in articles 30 and 45(2) can vest in the African Commission the power to issue provisional remedies to protect socio-economic rights from irreparable harm. The Commission’s protective mandate enables it to order a respondent State to adopt provisional measures in order to prevent irreparable harm to the victims of human rights violations at any time after the receipt of a communication.¹⁷⁴

The African Commission has ordered provisional measures in various communications,¹⁷⁵ but *Centre for the Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council v Kenya* (*‘Endorois’*)¹⁷⁶ is the only socio-economic rights communication where provisional measures were ordered. In *Endorois*, the Commission issued provisional measures requiring the respondent State to stop any actions that violated the complainants’ rights to property pending the final determination of the communication.¹⁷⁷

¹⁷² Pasqualucci (2005) *Vanderbilt Journal of Transnational Law* 12.

¹⁷³ Mugwanya *Human Rights in Africa* 245-246.

¹⁷⁴ Juma (2012) *Wisconsin International Law Journal* 357-358.

¹⁷⁵ The African Commission has mostly ordered provisional measures in communications of a civil and political rights in nature. These cases include *Saro-Wiwa* para 8; *Interights et al (on behalf of Mariette Sonjaleen Bosch) v Botswana* Communication No 240/01 (2003) AHRLR 55 (ACHPR 2003) para 10; *Lisbeth Zegveld v Eritrea* Communication No 250/02 (2003) para 10; *Interights (on behalf of Safia Yakubu Husaini and Others) v Nigeria* Communication No 269/03 (2005) AHRLR 56 (ACHPR 2005) para 14.

¹⁷⁶ *Centre for the Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council v Kenya* Communication No 276/2003 (2009) AHRLR 75 (ACHPR 2009).

¹⁷⁷ Para 32.

Scholars have commented on States' general non-compliance with the African Commission's provisional measures.¹⁷⁸ Viljoen, for example, notes that in *Saro-Wiwa* the respondent State disregarded the provisional measures and executed Mr Saro-Wiwa.¹⁷⁹ Juma also notes that States generally fail to comply with the Commission's provisional measures for various reasons.¹⁸⁰ Firstly, States' fail to comply with their international obligations to respect, protect and fulfil human rights. Secondly, the confidentiality requirement in article 59 causes the African Commission's weakness to protect human rights, as its lack of transparency limits the effectiveness of the Commission's protective mandate. Juma also criticises the Commission's narrow approach to confidentiality in its jurisprudence.¹⁸¹ Thirdly, reliance on States' good faith to enforce the Commission's decisions due to a lack of enforcement procedures. Lastly, States emphasise that the African Commission's decisions are mere recommendations thus they lack legal binding effect.¹⁸² Writing on provisional measures in international human rights law, Pasqualucci notes that certain States have rejected the binding nature of provisional measures issued by human rights commissions.¹⁸³

The object and purpose of the African Charter to protect individuals' rights, including socio-economic rights, entails State compliance with the provisional measures issued by its supervisory organs. In *La Grand*, the ICJ stated that the legally binding nature of provisional measures stems from a treaty's object and purpose. Thus, the State's argument that provisional measures are not legally binding contravenes the treaty's object and purpose.¹⁸⁴ According to the ICJ, a treaty's object and purpose in relation to provisional measures is to protect individuals' rights pending the determination of the final judgment.¹⁸⁵ Deciding on the question whether article 94 of the UN Charter curtails the binding effect of the provisional measures contained in article 41 of the ICJ Statute,¹⁸⁶ the ICJ stated that interpreting article 41 in light of the object and purpose of the ICJ Statute renders its provisional measures binding.¹⁸⁷

¹⁷⁸ In *Safia Husaini* the respondent state complied with the African Commission's provisional measures whereby the Federal Court of Appeal of the respondent State overturned the death sentence against Safia. *Safia Husaini* para 22.

¹⁷⁹ Viljoen *International Human Rights Law* 306-307.

¹⁸⁰ Juma (2012) *Wisconsin International Law Journal* 358.

¹⁸¹ Juma's concern regarding the confidentiality requirement will be responded to in part 4 3 8 below.

¹⁸² Juma (2012) *Wisconsin International Law Journal* 358.

¹⁸³ Pasqualucci (2005) *Vanderbilt Journal of Transnational Law* 2 & 5.

¹⁸⁴ *La Grand case (Germany v United States of America)* (Judgment) [2001] ICJ, (27 June 2001) para 102.

¹⁸⁵ Para 102.

¹⁸⁶ Para 108.

¹⁸⁷ Para 109.

Furthermore, the principle of effectiveness requires the African Charter to be interpreted in a manner that renders its substantive and procedural provisions effective and practical. As such, provisions relating to the Commission's mandate to issue provisional measures should be construed to incorporate States' obligations to enforce such measures. The ECHR stated in *Mamatkulov* that the requirement that a treaty should be interpreted in the light of its object and purpose and in accordance with the principle of effectiveness extends to procedural and regulatory provisions.¹⁸⁸ The African Commission stated in *Saro-Wiwa* that States are legally bound to respect provisional measures.¹⁸⁹

The requirement that States comply with provisional measures and the implications of violating their quartet typology of obligations have already been discussed.¹⁹⁰ The analysis demonstrated that States are bound to enforce their human rights obligations. The following part discusses the African Commission's mandate to issue remedies.

4 3 6 African Commission's jurisdiction to issue remedies

Shelton defines "remedies" in both the procedural and substantive sense.¹⁹¹ Procedurally, remedies entail the processes through which allegations of human rights violations are heard and decided by judicial and administrative organs.¹⁹² Substantively, remedies concern the outcome of proceedings and redress granted to successful claimants.¹⁹³ Remedies thus incorporate the substance of redress and the procedures through which such redress can be attained.¹⁹⁴ This part considers remedies in their substantive form, as procedural remedies were addressed earlier.¹⁹⁵

The meaningful protection of human rights through communications includes the power of supervisory organs to remedy established violations. Naldi argues that the hearing process should incorporate the mandate to remedy violations.¹⁹⁶ The African

¹⁸⁸ *Mamatkulov* para 109.

¹⁸⁹ *Saro-Wiwa* para 116.

¹⁹⁰ See chapter three, part 3 3 3 2.

¹⁹¹ D Shelton *Remedies in International Human Rights Law* 2 ed (2005) 7.

¹⁹² 7.

¹⁹³ 7. See also GM Musila "The right to an effective remedy under the African Charter on Human and Peoples' Rights" (2006) 6 *African Human Rights Law Journal* 442 446.

¹⁹⁴ Shelton *Remedies in International Human Rights Law* 8.

¹⁹⁵ See parts 4 3 1 to 4 3 5 above.

¹⁹⁶ GJ Naldi "Reparations in the practice of the African Commission on Human and Peoples' Rights" (2001) 14 *Leiden Journal of International Law* 681 684.

Commission held in *Free Legal Assistance Group v Zaire* ('*Free Legal Assistance*')¹⁹⁷ that the main aim of communications is to remedy rights violations complained about.¹⁹⁸ Shelton notes that international human rights instruments establish various mechanisms for the effective protection of human rights and that individuals' access to effective remedies represents the most effective mechanism for protecting human rights.¹⁹⁹

However, the African Charter does not explicitly define the Commission's remedial mandate. Scholars are critical of this silence. Benedek, for instance, argues that it restricts the African Commission from issuing remedies on the findings of violations.²⁰⁰ Enonchong argues that this renders the Commission's mandate to determine communications unsatisfactory.²⁰¹ Chirwa argues that the African Charter's omission to grant the Commission power to issue remedies renders it ineffective.²⁰² Benedek suggests that the African Charter should be amended to include an explicit remedial mandate for the African Commission.²⁰³

Similar to the scholarly criticisms of the lack of explicit provision for provisional measures,²⁰⁴ the above arguments are based on a narrow and literal textual approach that does not conform to a teleological approach to human rights interpretation.²⁰⁵ The fact that the African Charter does not explicitly provide for the Commission's jurisdiction to issue remedies does not necessarily mean that it cannot order remedies to redress human rights violations. A teleological approach to interpretation, which allows the broad application of various interpretative tenets to generate a treaty's meaning,²⁰⁶ supports this argument. Thus, through the teleological approach, the African Commission can apply various relevant Charter provisions to redress socio-economic rights violations.

Writing on the implementation of the Commission's decisions, Viljoen notes that the purpose of the communications procedure, through the teleological approach, is to

¹⁹⁷ *Free Legal Assistance Group v Zaire* Communications Nos 25/89, 47/90, 56/91, 100/93 (2000) AHRLR 74 (ACHPR 1995).

¹⁹⁸ Para 39.

¹⁹⁹ Shelton *Remedies in International Human Rights Law* 49.

²⁰⁰ Benedek (1993) *Netherlands Quarterly of Human Rights* 31.

²⁰¹ N Enonchong "The African Charter on Human and Peoples' Rights: Effective remedies in domestic law?" (2002) 46 *Journal of African Law* 197.

²⁰² Chirwa "African regional human rights system" in *Social Rights Jurisprudence* 335. See also Ankumah *The African Commission on Human and Peoples' Rights* 74-75.

²⁰³ Benedek (1993) *Netherlands Quarterly of Human Rights* 31.

²⁰⁴ See part 4 3 5 above.

²⁰⁵ See chapter two, part 2 2 2.

²⁰⁶ See chapter two, part 2 2 3.

ensure victims of human rights violations get appropriate remedies.²⁰⁷ He argues that a holistic interpretation of relevant provisions of the African Charter empowers the Commission with the mandate to remedy violations.²⁰⁸ Musila notes that a broad formulation of the Charter's provisions creates scope for interpretations that incorporate omitted provisions, as the drafters of the Charter intended to treat remedies as an implied right to be established through interpretation.²⁰⁹ He further argues that, in the context of human rights instruments, the right to remedy is self-evident and that there is no need for explicit articulation.²¹⁰

Various provisions of the African Charter can be construed broadly to incorporate the Commission's mandate to issue remedies. In particular, Shelton notes that provisions supporting effective remedies include 1, 7, 21(2), 26, 30, 45(1)(b), 45(2), and 55.²¹¹

Article 1 of the African Charter requires States to recognise the rights and duties in the Charter through legislative or other measures.²¹² Its formulation incorporates the African Commission's jurisdiction to issue remedies for socio-economic rights violations in two respects. Firstly, the obligation to adopt legislative measures allows the African Commission to require States to ensure that adopted legislation entrenches various substantive and procedural remedies that are appropriate for redressing socio-economic rights violations. The nature of this mandate allows the Commission to require States to amend legislation and other regulatory policies that violate socio-economic rights. In *Lawyers for Human Rights v Swaziland* ('Swaziland'),²¹³ the African Commission required the respondent State to amend a proclamation, which vested all legislative, executive and judicial powers in the King, to conform with the African Charter.²¹⁴

Secondly, the phrase "other measures" is broadly formulated and allows the African Commission to order States to remedy violations through other non-legislative measures. As Yeshanew correctly argues, the right to remedy is implicit in the phrase "other measures" in article 1 of the African Charter.²¹⁵ The right to remedy requires States to provide remedial mechanisms that can redress the victims of violations.²¹⁶

²⁰⁷ Viljoen *International Human Rights Law* 341.

²⁰⁸ 338.

²⁰⁹ Musila (2006) *African Human Rights Law Journal* 447.

²¹⁰ 447. See also Yeshanew *The Justiciability of Economic, Social and Cultural Rights* 169.

²¹¹ Shelton *Remedies in International Human Rights Law* 142.

²¹² See chapter three, part 3 3 3 1.

²¹³ *Lawyers for Human Rights v Swaziland* Communication No 251/02 (2005) AHRLR 66 (ACHPR 2005)

²¹⁴ *Swaziland* "Holding of the African Commission".

²¹⁵ Yeshanew *The Justiciability of Economic, Social and Cultural Rights* 168.

²¹⁶ 168.

Viljoen observes that the term “other measures” also includes remedies that are designed to redress the State’s rights violation.²¹⁷ Accordingly, the broad formulation of the general obligation clause in article 1 implicitly incorporates the mandate of the African Commission.

Musila posits that in human rights treaties the right to remedy is constituent of the provisions of States’ general obligations.²¹⁸ In *Zimbabwe Human Rights NGO Forum v Zimbabwe* (*‘Zimbabwe Human Rights NGO Forum’*),²¹⁹ the Commission held that the general obligations in article 1 of the African Charter requires States to ensure that victims of human rights violations have access to effective and enforceable remedies.²²⁰ According to Viljoen, the legislative and other remedies in article 1 are adequate for redressing the human rights violation.²²¹ Similarly, Shelton argues for considering the provision of effective remedies for human rights violations as part of States’ general obligations to realise human rights.²²²

“The legal basis for State responsibility for violations of human rights derives from breach of a human rights treaty or a human rights norm of customary international law. Most human rights treaties impose a duty on States parties to respect and ensure the rights recognized [sic], a formulation that imposes a due diligence obligation to respond to violations committed by private persons as well as to abstain from State-authored violations.”²²³

Article 7 of the African Charter represents another provision that allows the African Commission to issue remedies, as it recognises the right of every individual to be heard.²²⁴ Specifically, it recognises the right to “appeal to competent national organs” regarding human rights violations.²²⁵ This formulation of article 7(1)(a) is broad in the sense that it incorporates individuals’ rights to be heard by domestic judicial and administrative organs against rights violations in the African Charter. Through these

²¹⁷ Viljoen *International Human Rights Law* 338.

²¹⁸ Musila (2006) *African Human Rights Law Journal* 447.

²¹⁹ *Zimbabwe Human Rights NGO Forum v Zimbabwe* Communication No 245/02 (2006) AHRLR 128 (ACHPR 2006).

²²⁰ Para 171.

²²¹ Viljoen *International Human Rights Law* 338.

²²² Shelton *Remedies in International Human Rights Law* 8.

²²³ 47.

²²⁴ Art 7(1) of the African Charter.

²²⁵ Art 7(1)(a).

provisions, the African Commission can require States to avail victims of socio-economic rights violations access to quasi-adjudicatory and adjudicatory mechanisms.²²⁶

Shelton argues that the duty to issue remedies for human rights violations entails the “existence of remedial institutions and procedures” that are accessible to the victims of such violations. States’ legal systems should guarantee the independence of such institutions in a manner that they can afford a fair hearing to the victims of human rights violations.²²⁷ In *Civil Liberties Organisation v Nigeria* (*‘Civil Liberties Organisation’*),²²⁸ the African Commission held that the respondent State’s decree, which ousted the jurisdiction of the courts, violated article 7 of the African Charter as it limited individuals’ rights to seek redress for the violation of their rights.

Article 21(2) can also be used by the Commission to exercise its remedial mandate, as it recognises the right of people, whose property has been dispossessed or polluted, to lawfully recover their property and claim adequate compensation. This article thus enables the Commission to order compensatory remedies for victims of dispossession of individual or collective property rights.

Additionally, the African Commission can apply article 26 of the African Charter, which requires States to guarantee judicial independence and establish other domestic institutions responsible for individual rights protection. Through these provisions, the Commission can require States to ensure that established institutions are able to independently remedy socio-economic rights violations.²²⁹ In human rights discourse, remedies entail the existence of independent remedial enforcement mechanisms and individuals’ rights to access such bodies.²³⁰ In *Civil Liberties Organisation*, the African Commission held that the respondent State’s decrees, which ousted the jurisdiction of courts, weakened the independence of the judiciary, thus violating article 26 through a limitation of the rights of individuals to access courts for their remedies.²³¹

Articles 30 and 45(2) grant the African Commission its protective mandate and can be interpreted broadly to incorporate the Commission’s mandate to issue remedies. The meaningful protection of socio-economic rights incorporates redress for victims whose rights have been violated. Conferring a protective mandate on the African Commission

²²⁶ Musila confirms the application of article 7 as a remedial provision. See Musila (2006) *African Human Rights Law Journal* 448.

²²⁷ Shelton *Remedies in International Human Rights Law* 8.

²²⁸ *Civil Liberties Organisation v Nigeria* Communication No 129/94 (1995).

²²⁹ Musila confirms the use of article 26 of the African Charter as a remedial provision that can be applied by the African Commission. See Musila (2006) *African Human Rights Law Journal* 448.

²³⁰ Shelton *Remedies in International Human Rights Law* 8.

²³¹ *Civil Liberties Organisation* “Holding of the African Commission”.

through communications implies it has the authority to issue remedies upon finding violations of individuals' rights.²³² The provisions do not establish a dichotomy between the right and the remedy. The African Commission held in *Zimbabwe Human Rights NGO Forum* that once it finds a respondent State responsible for a human rights violation it has the mandate to "recommend the appropriate remedy" for the victim.²³³ To treat the Commission as a supervisory organ that lacks the authority to issue remedies rests on a flawed, sharp dichotomy between rights and remedies. As Fiss argues, rights and remedies are inseparable: while a right constitutes specified standards to be recognised to a human being, a remedy realises the right.²³⁴

Similarly, the argument that the African Commission lacks the mandate to issue remedies, based on the fact that the African Charter is silent on remedies, is based on the flawed argument that supervisory organs only have the mandate to interpret the rights, but not to remedy the violation. This argument simply means that supervisory organs can only construe the meaning of a right while leaving it to other institutions to remedy violations. Sager argues, while writing in a constitutional rights context:

"It is part of the intellectual fabric of constitutional law and its jurisprudence that there is an important distinction between a statement which describes an ideal which is embodied in the Constitution and a statement which attempts to translate such an ideal into a workable standard for the decision of concrete issues."²³⁵

Rights and remedies are, however, interdependent and the African Commission's protective mandate in articles 30 and 45(2) of the African Charter supports this argument. Similarly, Levinson argues that in constitutional adjudication the dichotomy between rights and remedies does not even exist.²³⁶

The effectiveness of socio-economic rights thus depends on the link between such rights and their corresponding remedies. The preparatory work of the African Charter demonstrates, for instance, that some provisions were omitted and left to supervisory

²³² Yeshanew *The Justiciability of Economic, Social and Cultural Rights* 169.

²³³ *Zimbabwe Human Rights NGO Forum* para 167.

²³⁴ OM Fiss "The Supreme Court 1978 term foreword: The forms of justice" (1979) 93 *Harvard Law Review* 1 52.

²³⁵ LG Sager "The legal status of underenforced constitutional norms" (1978) 91 *Harvard Law Review* 1212 1213.

²³⁶ DJ Levinson "Rights essentialism and remedial equilibration" (1999) 99 *Columbia Law Review* 857 857.

organs to construe them through interpretation.²³⁷ Writing on the lack of an express remedial provision in the African Charter, Musila argues that:

“The African Charter does not provide specifically for the right to an effective remedy... This ‘omission’ can be explained by at least two factors. One could take the view that it is one of the substantive rights that should have been included in the Charter but were not, especially when the regional initiative is seen within the context of the general character of the Charter... It is also possible that the drafters of the African Charter could have considered it superfluous to include such a right, which would be considered as an implied right. This is reflected in the Latin maxim *ubi jus ibi remedium*: For the violation of every right, there must be a remedy. In this regard, the view is that in a justiciable regime of rights such as that established by the Charter, the right to remedy is so self-evident that it need not be specifically enshrined.”²³⁸

A generous interpretation of article 55 can also incorporate the African Commission’s mandate to issue effective remedies. The phrase “consider communications other than States Parties communications” should be broadly construed to include the power to issue remedies. It should not be interpreted narrowly or limited to only the power to determine communications without the power to redress violations. A narrow interpretation defeats the object and purpose of effectively protecting socio-economic rights and unnecessarily sustains the dichotomy between rights and remedies.

Furthermore, through articles 60 and 61 of the African Charter, the African Commission can draw inspiration from international human rights bodies’ jurisprudence on remedies. The remedial jurisprudence of international bodies such as the Human Rights Committee (‘HRC’) under the ICCPR and the CESCR, as well as regional bodies such as the Inter-American Commission, can help the African Commission to garner insight regarding appropriate remedies relating to socio-economic rights violations. Although their decisions are not binding they are authoritative in the sense that States Parties committed to protecting and upholding the human rights in the African Charter should fulfil their commitments in good faith.

Supervisory organs should issue different effective remedies for redressing human rights violations.²³⁹ The formulation of the above-discussed provisions legally allows the African Commission to issue various types of appropriate remedies, including declaratory, restitutionary, and compensatory remedies. Their application is important to redress socio-economic rights violations in a manner that advances the object and

²³⁷ See chapter three, part 3 2 3 7.

²³⁸ Musila (2006) *African Human Rights Law Journal* 447.

²³⁹ Shelton *Remedies in International Human Rights Law* 10.

purpose of the African Charter. Human rights treaties are unique from other international law treaties in the sense that States are obliged to protect the rights of individuals and groups, as opposed to their interests.²⁴⁰ Shelton notes that the non-reciprocal nature of human rights instruments has a direct impact on remedial orders issued by supervisory organs. It also requires them to issue remedies that can effectively protect victims of human rights violations, while preventing future violations. Remedial orders should thus protect individuals' rights and deter re-occurrence of the violations.²⁴¹

Similar remedies exist in international human rights law and in other international instruments. This is due to the fact that, in both fields, remedies aim to prevent society from engaging in unlawful behaviour or illegal conduct.²⁴² They are also used, through punishment and fines, to condemn perpetrators of unlawful conduct.²⁴³ However, while remedial orders in international human rights law are similar to remedies in other international legal instruments, some differences exist. In human rights law, remedies must advance the object and purpose of human rights regarding the rights at stake. Shelton notes that, in human rights law, remedial orders must advance human rights goals.²⁴⁴ Moreover, in addition to compensation, the purpose of remedial orders is to rectify conditions caused by violations and provide restitution.

The Inter-American Court stated in *La Cantuta v Peru* ('*La Cantuta*') that remedies aim to redress human rights violations. The nature and form of remedies vary based on the violation and harm caused by such violation.²⁴⁵

Remedial powers are significant as they enable the African Commission to broadly and appropriately redress socio-economic rights violations. Supervisory organs are vested with the power to determine violations and remedy them.²⁴⁶ Shelton notes that human rights violations can be redressed through various remedies, including restitution, compensation, satisfaction, and guarantees of non-repetition.²⁴⁷ Writing on the African Commission's remedial mandate, Naldi argues that remedies broadly include orders for reparations which entail restitution, rehabilitation, and the payment of compensation.²⁴⁸

²⁴⁰ See chapter two, parts 2 3 2 2 and 2 3 2 3.

²⁴¹ Shelton *Remedies in International Human Rights Law* 49.

²⁴² 51.

²⁴³ 52.

²⁴⁴ 52.

²⁴⁵ *La Cantuta v Peru (Merits, Reparations and Costs)* Inter-American Court of Human Rights Ser C No 162 (29 November 2006) para 202.

²⁴⁶ Shelton *Remedies in International Human Rights Law* 10.

²⁴⁷ 8.

²⁴⁸ Naldi (2001) *Leiden Journal of International Law* 681.

These various forms of remedies are significant for effectively protecting socio-economic rights in the African Charter, as some remedies may be appropriate to remedy certain kinds of violations, whilst inappropriate for other. Restitution, for instance can be impossible where socio-economic rights violations cause the death of a person. In *Aloeboetoe v Suriname* ('*Suriname*')²⁴⁹, the Inter-American Court held that some remedies, such as restitution, are not "possible, sufficient or appropriate" in cases involving the violation of the right to life. These cases demand alternative remedies, such as compensation to the victim's relatives.²⁵⁰ Pasqualucci argues, however, that in some cases compensation can represent an insufficient remedy.²⁵¹ Other forms of remedies such as restitution, rehabilitation, and guarantees of non-repetition may be required.²⁵² These forms of remedies are discussed below.

4 3 6 1 Declaratory remedies

Declaratory remedies are common in international human rights law.²⁵³ They are issued by the United Nations, as well as regional supervisory organs, mainly as a means to require States to redress violations.²⁵⁴ Supervisory organs use declaratory remedies to establish whether a respondent State has violated the rights at stake.²⁵⁵ Declaratory remedies merely declare an act or omission unlawful and grant a State's authorities a margin of discretion to adopt appropriate redress mechanisms.²⁵⁶ A supervisory organ can merely issue a declaratory order and leave States to take appropriate domestic measures to redress the violations.²⁵⁷ These remedies mainly enable supervisory organs to require States' authorities to redress the unlawful situation.²⁵⁸

For Shelton, declaratory remedies are issued by supervisory organs when States violate their international obligations and must take certain measures, such as changing a law or practice that violate human rights.²⁵⁹ As such, a declaratory remedy indicates to a State that there is a violation of a Charter right and that appropriate legislative and

²⁴⁹ *Aloeboetoe et al v Suriname (Reparations and Costs)* Inter-American Court of Human Rights Ser C No 15 (10 September 1993).

²⁵⁰ Paras 49-50.

²⁵¹ Pasqualucci *The Practice and Procedure of Inter-American Court* 191.

²⁵² 191.

²⁵³ Shelton *Remedies in International Human Rights Law* 201.

²⁵⁴ 201.

²⁵⁵ 201.

²⁵⁶ 55.

²⁵⁷ 201.

²⁵⁸ 55.

²⁵⁹ 199.

other measures must be taken to redress this violation. Naldi argues that a declaratory remedy is significant as it constitutes a binding finding by an authoritative, treaty-monitoring body that the State concerned must take legislative measures to remedy the violation found at the merits phase, including the amendment of laws that violate human rights.²⁶⁰

As will be shown in the next chapter, the African Commission has issued declaratory remedies in all communications that found a violation of socio-economic rights. In *SERAC*, for instance, the African Commission issued a declaratory remedy holding that the respondent State has violated articles 2, 4, 14, 16, 18(1), 21 and 24 of the Charter.²⁶¹ Similarly, in *Purohit*, the African Commission issued a declaratory remedy finding the respondent State in violation of articles 2, 3, 5, 7(1)(a) and (c), 13(1), 16, and 18(4) of the African Charter. It urged the respondent State to repeal the Lunatics Detention Act ('LDA') and replace it with a new legislative regime for mental health which was compatible with the African Charter and international standards governing mentally ill or disabled persons; create an expert body to review the cases of all persons detained under the LDA and make appropriate recommendations for their treatment or release; provide adequate medical and material care for persons suffering from mental health problems in The Gambia. Finally, the Commission required the State to report to it on measures taken for implementation of the decision through periodic reports pursuant to article 62 of the Charter.

Declaratory remedies are important for protecting socio-economic rights as they help to ensure that States' laws and conduct do not violate human rights. Moreover, they assist States to fulfil their obligation to protect these rights. As Shelton observes, the effect of declaratory orders in human rights must not be underrated.²⁶² A declaration that a State has violated human rights confirms allegations of human rights abuses by a State and requires it to change.²⁶³ They are therefore relevant for preventing human rights violations.²⁶⁴

It can be argued that, on their own, declaratory remedies cannot effectively advance the object and purpose of the African Charter to protect socio-economic rights. Although these remedies are useful in preventing human rights violations, States may decide not

²⁶⁰ Naldi (2001) *Leiden Journal of International Law* 685.

²⁶¹ *SERAC* para 70.

²⁶² Shelton *Remedies in International Human Rights Law* 201.

²⁶³ 201.

²⁶⁴ 213.

to rectify a situation since they are left with the discretion to adopt domestic measures to redress violations. Shelton notes that respondent States may consider these remedies as less serious²⁶⁵ and that declaratory remedies are insufficient for redressing human rights violations.²⁶⁶ In addition to declaratory remedies, supervisory organs should issue remedial orders such as restitution.²⁶⁷

4 3 6 2 Restitution

Restitution is a remedial order that seeks to restore a victim of a human rights violation to the position he or she was before the violation. Its aim is to ensure that the perpetrator of human rights violations restores the position of the victim.²⁶⁸ Naldi argues that, through this category of remedies, the African Commission requires the respondent States to take “specific action” to redress the violations complained about.²⁶⁹ According to Viljoen, this remedy aims at correcting the violations through restoring the situation of the victim as far as possible to what it was prior to the violation.²⁷⁰ In *La Cantuta*, the Inter-American Court stated that the objective of restitution is to restore the victim of human rights violations to a position he was before the violations.²⁷¹

The African Commission has issued restitution remedies in different communications. In *Annette Pagnouille (on behalf of Abdoulaye Mazou) v Cameroon* (*‘Mazou’*),²⁷² the African Commission required the respondent State to “draw all necessary legal conclusions to reinstate the victim in his rights”.²⁷³ The Commission did not directly state that this was a restitutionary measure. However, it can be argued that, since the aim of restitution is to restore the victim to the situation he was before the violation of his right, the Commission’s recommendation to re-instate Mr Mazou was a restitutionary measure. Commenting on *Loayza Tamayo v Peru* (*‘Tamayo’*), where the Inter-American Court required the respondent State to re-instate the complainant to her teaching position and pay her salary as a restitutionary measure, Melish argues that the decision

²⁶⁵ 199.

²⁶⁶ 213.

²⁶⁷ 213.

²⁶⁸ 213.

²⁶⁹ Naldi (2001) *Leiden Journal of International Law* 686.

²⁷⁰ Viljoen *International Human Rights Law* 338.

²⁷¹ *La Cantuta* para 201.

²⁷² *Pagnouille (on behalf of Mazou) v Cameroon* Communication No 39/90 (2000) AHRLR 57 (ACHPR 1997).

²⁷³ Para 31.

by the Inter-American Court to re-instate the complainant was a “necessary” restitutionary measure.²⁷⁴

4 3 6 3 Compensation

Finally, the African Commission has the mandate to issue compensatory remedies upon finding rights violations. Through this remedy, the Commission can order States to pay compensation to individuals whose rights have been violated.²⁷⁵ Shelton describes compensatory remedies in human rights law as follows:

“Compensation serves to restore to the individuals to the extent possible their capacity to achieve the ends that they personally value. As such, compensation may have a rehabilitative effect, alleviate suffering, and provide for material needs.”²⁷⁶

In *Malawi African Association*, the African Commission required the respondent State to take appropriate measures to compensate the widows and other beneficiaries of the victims.²⁷⁷ In *SERAC* it required the respondent State to ensure adequate compensation to the victims of socio-economic rights violations.

4 3 7 Legal status of the African Commission’s remedial recommendations

The African Commission’s substantive remedies are issued in the form of recommendations.²⁷⁸ Through its jurisprudence on non-state communications, the Commission has made recommendations to respondent States concerning necessary redress measures. In *Dino Noca v Democratic Republic of the Congo* (*‘Noca’*),²⁷⁹ for instance, the African Commission found the respondent State in violation of article 14 and required it to either restore the complainant’s right to property (by reinstating his title deed) or compensating him expeditiously, justly and fairly.²⁸⁰ In *Endorois*, the Commission recommended that the respondent State should recognise victims’ rights to property ownership, as well as the restitution of their traditional land. Moreover, it required the respondent State to ensure that the Endorois enjoy their right of access to Lake Bogoria for religious and cultural practices, as well as for grazing their livestock.

²⁷⁴ TJ Melish “The Inter-American Court of Human Rights: Beyond progressivity” in M Langford (ed) *Social Rights Jurisprudence: Emerging Trends in International and Comparative Law* (2008) 372 401.

²⁷⁵ Viljoen *International Human Rights Law* 338.

²⁷⁶ Shelton *Remedies in International Human Rights Law* 11.

²⁷⁷ Part of the recommendations of the African Commission in the *Malawi African Association*.

²⁷⁸ Rule 112(5) of the Rules of Procedure.

²⁷⁹ *Dino Noca v Democratic Republic of the Congo* Communication No 286/2004 (2012).

²⁸⁰ See the decision of the African Commission in *Noca*.

The respondent State was also required to adequately compensate the victims.²⁸¹ In *INTERIGHTS, Institute for Human Rights and Development in Africa, and Association Mauritanienne des Droits de l'Homme v Mauritania* ('Mauritania'),²⁸² the African Commission also recommended that the respondent State pay adequate compensation to the victims for the loss they suffered.²⁸³

Scholars and States have contested the legal status of the African Commission's recommendations. Eno argues, for example, that the Commission's recommendations are not legally binding.²⁸⁴ Similarly, Udombana argues that mere recommendations render the African Commission ineffective.²⁸⁵ Additionally, Viljoen and Louw argue that the non-binding nature of the African Commission's recommendations is the reason for States' reluctance to comply with them.²⁸⁶

Moreover, scholars argue that the African Commission is merely a quasi-adjudicatory body. Stated differently, it only issues recommendations that are legally non-binding compared to court orders, which are legally binding and enforceable. Enonchong²⁸⁷ and Nmehielle²⁸⁸ argue that being a quasi-judicial body, the Commission has no jurisdiction to make legally binding decisions and can only make recommendations to the respondent State. In rejecting the African Commission's recommendations in *Kenneth Good v Republic of Botswana* ('Kenneth Good'),²⁸⁹ the respondent State argued that:

²⁸¹ *Endorois* Recommendations 1(a)-(c).

²⁸² *INTERIGHTS, Institute for Human Rights and Development in Africa, and Association Mauritanienne des Droits de l'Homme v Mauritania* Communication No 373/09 (2010).

²⁸³ *Mauritania* para 66(1). See also *Social and Economic Rights Action Centre (SERAC) v Nigeria* Communication No 156/96, (2001) AHRLR 60 (ACHPR 2001); *Purohit and Moore v The Gambia* Communication No 241/2001 (2003) AHRLR 96 (ACHPR 2003), *Sudan Human Rights Organisation & Centre on Human Rights and Evictions (COHRE) v Sudan* Communications No 279/03-296/05 (2009) AHRLR 153 (ACHPR 2009); and *Institute for Human Rights and Development in Africa v Angola* Communication no. 292/2004 (2008) AHRLR 43 (ACHPR 2008).

²⁸⁴ R Eno "The place of the African Commission in the new African dispensation" (2002) 11 *African Security Review* 63 65. See also F Viljoen & L Louw "State compliance with recommendations of the African Commission on Human and Peoples' Rights, 1994-2004" (2007) 101 *The American Journal of International Law* 1 2.

²⁸⁵ Udombana (2003) *Yale Human Rights and Development Law Journal* 64.

²⁸⁶ Viljoen & Louw (2009) *International Journal of Civil Society* 33.

²⁸⁷ Enonchong (2002) *Journal of African Law* 197.

²⁸⁸ Nmehielle *The African Human Rights System* 236.

²⁸⁹ *Kenneth Good v Republic of Botswana* Communication No 313/05 (2010).

“We are not going to follow on the recommendation made by the Commission; it does not give orders, and it is not a court. We are not going to listen to them. We will not compensate Mr Good.”²⁹⁰

Wachira and Ayinla also note that States have been ignoring the implementation of the African Commission’s remedial recommendations since its inception, leaving victims of violations without any remedy. Consequently, non-implementation renders the African Commission an ineffective protector of human rights.²⁹¹

Regarding the non-binding nature of recommendations, it can be argued that the aforementioned criticisms are limited and do not allow scope to consider the object and purpose the recommendations are meant to fulfil. The argument should not narrowly be that recommendations by their nature do not bind Member States. Mechlem advances that, since decisions of quasi-judicial treaty bodies are non-binding, their legal force largely depends on how persuasively and convincingly they are argued and consistently used and applied.²⁹²

Departing from this perspective, it is argued that the Commission’s recommendations are highly authoritative interpretations of the African Charter in the context of a communication procedure. Recommendations help to further the object and purpose of the African Charter. Accordingly, it constitutes a lack of good faith for States Parties to ignore them without very compelling reasons. As Shelton notes, recommendations issued by regional human rights commissions are authoritative and require States to enforce them in good faith.²⁹³ An enquiry into the object and purpose allows an established body a broad consideration of recommendations in the context of a treaty’s object and purpose.

The African Charter’s object and purpose is to protect human rights, including socio-economic rights. As such, in order to fulfil their obligations to further the object and purpose of the African Charter, States are required to comply with the Commission’s recommendations. Moreover, Member States are bound by the African Charter to

²⁹⁰ Botswana will not Honour African Union Ruling on Prof Good, Sunday Standard (02-08-2010), available at <http://www.sundaystandard.info/article.php?NewsID=8415&GroupID=1> and quoted in R Murray & E Mottershaw “Mechanisms for the implementation of decisions of the African Commission on Human Rights” (2014) 36 *Human Rights Quarterly* 349 353.

²⁹¹ GM Wachira & A Ayinla “Twenty years of elusive enforcement of the recommendations of the African Commission on Human and Peoples’ Rights: A possible remedy” (2006) 6 *African Human Rights Law Journal* 465 466-467.

²⁹² K Mechlem “Treaty bodies and the interpretation of human rights” (2009) 42 *Vanderbilt Journal of Transnational Law* 905 909.

²⁹³ Shelton *Remedies in International Human Rights Law* 213.

enforce supervisory organs' recommendations. Anyangwe advances that the object and purpose of the African Charter is to impose binding obligations upon Member States.²⁹⁴ As Viljoen argues, the debate should not be about the binding nature of recommendations, but rather about States' compliance with their obligations to protect human rights according to the interpretation assigned by supervisory organs.²⁹⁵ It is the Member States' obligations that are binding.²⁹⁶

Furthermore, the fact that the African Commission issues recommendations, rather than orders, does not necessarily mean that its recommendations are unenforceable. The object and purpose of a treaty, as well as the principle of effectiveness (as aspects of the teleological approach to interpretation), can be used to render recommendations enforceable. Interpretation based on a treaty's object and purpose, permits a generous understanding of the nature of the African Commission's recommendations and their enforceability. It enables the use of various Charter provisions in support of an interpretation of the Commission's recommendations that supports their enforceability. Viljoen and Louw argue that a generous interpretation of the African Charter's provisions demonstrates the enforceability of the remedial recommendations,²⁹⁷ including article 1.

Regarding article 1, Member States declare their commitment to "recognise" the rights entrenched in the African Charter through "legislative and other measures" in a manner that "gives effect" to such rights. The term "recognise", in relation to a State's compliance, requires it to recognise human rights in an effective manner through the implementation of remedial recommendations related to the protection of such rights. The formulation of article 1 requires States to legally recognise remedial recommendations issued by the African Commission. This obligation is supplemented by the obligation to adopt "legislative and other measures". The phrase broadly requires States to adopt and enforce legislative and other measures in a manner that responds to remedial recommendations by the African Commission. Apart from adopting legislation that promotes and protects socio-economic rights, the obligation to adopt other measures broadly requires States to create measures that show the implementation of the African Commission's recommendations.

²⁹⁴ C Anyangwe "Obligations of States Parties to the African Charter on Human and Peoples' Rights" (1998) 10 *African Journal of International and Comparative Law* 625 627.

²⁹⁵ Viljoen *International Human Rights Law* 339.

²⁹⁶ Art 1 of the African Charter.

²⁹⁷ F Viljoen & L Louw "The status of the findings of the African Commission: From moral persuasion to legal obligation" (2004) 48 *Journal of African Law* 1 18.

Viljoen and Louw persuasively argue that “other measures” incorporates States’ obligations to enforce remedial orders.²⁹⁸ As such, the object and purpose of the African Charter, read with States’ obligations in article 1, requires States to consider recommendations as enforceable for effective protection of human rights. Murray and Mottershaw argue that States’ obligations in article 1 regarding the implementation of recommendations are two-fold. Firstly, States should “reassert” the obligation to implement. Secondly, States should establish coherent mechanisms for implementing the African Commission’s recommendations.²⁹⁹ In a 2012 report, as one mechanism for implementation, the High Commissioner on Human Rights recommended that States should establish a National Reporting and Coordinating Committee to implement supervisory organs’ decisions.³⁰⁰

The phrase “to give effect” is broad and capable of incorporating States’ compliance with the African Commission’s recommendations regarding the protection of socio-economic rights. Member States’ refusal to enforce recommendations amounts to a violation of their commitment to give effect to rights, as required in article 1 of the African Charter.³⁰¹ Article 1 legally binds States to adhere to the Charter’s provisions and to recognise and comply with the competence and the recommendations of the African Commission. In *Saro-Wiwa*, the Commission held that the State’s failure to comply with its recommendations regarding human rights violations amounted to a violation of article 1 of the African Charter.³⁰²

Furthermore, it should be noted that by ratifying the African Charter, States are bound to implement the Commission’s recommendations in response to their obligations in article 1.³⁰³ The African Commission held in *Democratic Republic of Congo v Burundi, Rwanda, and Uganda* (‘DRC’)³⁰⁴ that by ratifying the African Charter, Burundi committed to co-operate with the Commission and enforce its decisions.³⁰⁵

²⁹⁸ 7.

²⁹⁹ Murray & Mottershaw (2014) *Human Rights Quarterly* 351.

³⁰⁰ OHCHR Strengthening the United Nations Human Rights Treaty Body System: A Report by the United Nations High Commissioner for Human Rights, Navanethem Pillay (2012), as quoted in Murray & Mottershaw (2014) *Human Rights Quarterly* 352.

³⁰¹ Viljoen *International Human Rights Law* 339.

³⁰² *Saro-Wiwa* paras 113-116.

³⁰³ Art 14 of the Vienna Convention on the Law of Treaties 81.L.M 679 (1969), adopted on 23 May 1969 and entered into force on 27 January 1980 (‘Vienna Convention’). See also Murray & Mottershaw (2014) *Human Rights Quarterly* 354.

³⁰⁴ *Democratic Republic of Congo v Burundi, Rwanda, and Uganda* Communication No 227/99 (2004) AHRLR 19 (ACHPR 2003).

³⁰⁵ Para 53.

Interpretation based on the object and purpose of the African Charter also requires its provisions to be construed in a manner that renders their meaning practical and effective.³⁰⁶ This principle of effectiveness generally requires the effective enforcement of supervisory organs' findings. Non-compliance with the African Commission's recommendations would render the object and purpose of the Charter meaningless and the Commission's protective mandate ineffective. As Wachira and Ayinla argue, non-enforcement renders the African Commission an ineffective protector of human rights.³⁰⁷

The fact that the African Commission issues recommendations does, therefore, not mean that States are at liberty to ignore such recommendations. Instead, States are bound to enforce the Commission's decisions relating to socio-economic rights violations for effective protection of such rights. As Tardu argues, the concern should not be whether the decision is "an order" or "a recommendation", but rather the legal purpose that the Member States are required to achieve.³⁰⁸

The argument that, as a quasi-adjudicatory organ the African Commission is incompetent to issue binding decisions, is also not convincing. Since the African Commission was established with the aim of furthering the Charter's object and purpose, the focus should be on the object and purpose of establishing the treaty body. It can be argued that the Commission's mandate should be the determining factor in States' compliance, rather than whether the body is a quasi-adjudicatory or an adjudicatory organ. Viljoen and Louw argue that the "nature of the body does not conclusively determine the issue of the status of its findings".³⁰⁹ As such, Member States' objecting to the Commission's competency defeats the object and purpose of protecting human rights. It should be noted that other quasi-adjudicatory bodies, with a similar mandate to the African Commission, have issued recommendations that are respected and implemented by States. As noted above, the African Commission has been interpreting the Charter and considers its recommendations as binding on Member States for the effective protection of human rights. The Commission's remedial recommendations further States' obligations in article 1, in socio-economic rights provisions and in other relevant provisions regarding rights protection.

³⁰⁶ See chapter two, parts 2 2 3 and 2 5 2 4.

³⁰⁷ Wachira & Ayinla (2006) *African Human Rights Law Journal* 466-467.

³⁰⁸ ME Tardu "The Protocol to the United Nations Covenant on Civil and Political Rights and the Inter-American System: A study of co-existing petition procedures" (1976) 70 *American Journal of International Law* 778 784.

³⁰⁹ Viljoen & Louw (2004) *Journal of African Law* 14.

The African Commission's jurisdiction to issue recommendations stems from its mandate to safeguard the rights in the African Charter.³¹⁰ Through its recommendations, the Commission furthers the underlying object and purpose of the Charter to protect human rights norms. The Commission's recommendations also enable Member States to fulfil their general obligations to protect individuals' and groups' socio-economic rights under the African Charter. By accepting the African Commission as a supervisory body with the mandate to elaborate the effective protection of individuals' socio-economic rights, States are required to enforce its recommendations in order to further the Charter's object and purpose. Pasqualucci posits that, by accepting the supervisory power to protect individuals' rights through complaints mechanisms, States allow such organs to fulfil the treaty's object and purpose.³¹¹

Apart from State obligations, and the measures discussed above, the African Commission has the legal mandate to ensure States comply with its remedial recommendations. The Commission's mandate to protect human rights, in articles 30, 45 and 55, broadly enables it to protect socio-economic rights by requiring States to implement its recommendations. Moreover, the Commission can apply articles 60, 61, and 62 to ensure States comply. The following discussion demonstrates how these provisions can be applied to support the binding status of the African Commission's findings and remedial recommendations.

The African Commission's mandate to promote human and peoples' rights, and to "ensure their protection in Africa" in article 30 as read with article 45(2), implies that the Commission can require States – through various mechanisms – to implement their recommendations for the effective protection of human rights. As such, the meaningful mandate to protect human rights incorporates the mandate to ensure States implement remedial recommendations. Odinkalu notes that the effective protection of human rights by supervisory organs includes their mandate to issue enforceable remedies.³¹² Through the provisions of article 45(1)(b), the Commission has the mandate to formulate rules for solving legal problems relating to human rights in the African Charter. This article allows the African Commission to formulate rules for enforcing its recommendations. Through these provisions, the Commission has formulated Rules 112 and 118, which are significant for enforcing of its recommendations.³¹³

³¹⁰ Arts 30 and 45(2) of the African Charter.

³¹¹ Pasqualucci (2005) *Vanderbilt Journal of Transnational Law* 2 & 5 & 14.

³¹² Odinkalu (1998) *Transnational Law and Contemporary Problems* 360.

³¹³ Rules 112 and 118 of the Rules of Procedure.

Rule 112 requires a State to inform the African Commission within 180 days of the measures it has taken to implement the Commission's decision.³¹⁴ The Commission also has the mandate, within 90 days of receiving a State's information concerning the implementation of its recommendation, to require such State to provide further information on the measures it has taken to enforce the recommendations.³¹⁵ Furthermore, the Commission can apply Rule 112(8) to report a State that fails to comply with its recommendations to the Sub-Committee of the Permanent Representatives Committee, as well as the Executive Council. The application of article 45(1)(b), read with Rules 112 and 118,³¹⁶ creates a firm legal basis for States to implement their binding obligations in the African Charter – thus ensuring the enforcement of the African Commission's recommendations.

Viljoen argues that the formulation of Rule 112 guarantees a State's commitment to give effect to its obligations in the African Charter, rather than focusing on whether the recommendations are binding.³¹⁷ Murray and Mottershaw argue, however, that it can be difficult for the Commission to enforce Rule 112 due to a lack of resources and efficient follow-up mechanisms.³¹⁸ A lack of resources is a "structural deficient" that requires States' political will to financially support the African Commission.³¹⁹ Udombana argues that the lack of resources can be solved by Member States and the OAU (AU) through a change of attitude towards the Commission.³²⁰ Mbazira notes that the African Commission has been and continues to be underfunded by the AU which negatively affects their operations.³²¹

Article 55 of the African Charter can be interpreted broadly to render the African Commission's remedial recommendations enforceable. The phrase "consider communications other than those of State Parties" can be broadly construed as the Commission's power to order an effective remedy. The discussion above showed that

³¹⁴ Rule 112(2).

³¹⁵ Rule 112(3).

³¹⁶ Through Rule 118(1) the African Commission can submit cases to the African Court. This Rule is discussed in part 4 3 10 below.

³¹⁷ Viljoen *International Human Rights Law* 339.

³¹⁸ Murray & Mottershaw (2014) *Human Rights Quarterly* 366.

³¹⁹ Udombana uses the phrase "structural deficiencies" to elaborate the challenges facing the African Commission. He identifies lack of resources as one among structural deficiencies faced by the African Commission. See Udombana (2000) *Yale Human Rights and Development Law Journal* 45 66-72.

³²⁰ Udombana (2000) *Yale Human Rights and Development Law Journal* 45 72.

³²¹ C Mbazira "Enforcing the economic, social and cultural rights in the African Charter on Human and Peoples' Rights: Twenty years of redundancy, progression and significant strides" (2006) 6 *African Human Rights Law Journal* 333 343.

article 55, through this phrase, enables the Commission to broadly consider communications submitted by individuals and groups.³²² The teleological approach to interpretation, through the principle of effectiveness, requires the African Charter to be interpreted generously in a manner that renders its meaning practical and effective, rather than illusory.³²³ The phrase “consider” will, therefore, be illusory if it only means the Commission’s mandate to determine communications without issuing appropriate remedies where it finds human rights violations. In this regard, the effective meaning of the word “consider” incorporates the Commission’s jurisdiction to issue effective remedies.

Additionally, articles 60 and 61 of the African Charter allow the African Commission to draw inspiration from other international and African instruments and jurisprudence. The Commission can apply these provisions by emphasising States’ obligations to perform their African Charter obligations in good faith, as provided for in article 26 of the Vienna Convention on the Law of Treaties (‘Vienna Convention’).³²⁴ The phrase to perform “treaty obligations in good faith” is broad in that it includes a State’s obligation to enforce recommendations issued by the supervisory organs created by such treaties. As Anyangwe argues, performing a treaty in good faith implies that the obligations established by a treaty are meant to be respected rather than ignored by States.³²⁵ Accordingly, Member States to the African Charter are obliged to implement the recommendations of the African Commission in good faith, regardless of its binding status. Viljoen argues that in addition to accepting the Charter’s binding nature, Member States also have to accept the competence of the African Commission’s recommendations issued pursuant to its communications procedure.³²⁶ A State’s non-compliance with the Commission’s recommendations amounts to a disregard of its obligation to perform in good faith.³²⁷

Although the findings and remedial recommendations of the African Commission are not formally binding on States Parties, they constitute influential and authoritative interpretations of the Charter by its supervisory organ. Moreover, through a teleological approach to interpretation various provisions of the Charter can be applied to demonstrate the authoritative nature of findings and remedial recommendations. This

³²² See part 4 3 2 above.

³²³ See chapter two, parts 2 2 3 and 2 5 2 4.

³²⁴ Vienna Convention.

³²⁵ Anyangwe (1998) *African Journal of International and Comparative Law* 628.

³²⁶ Viljoen *International Human Rights Law* 339.

³²⁷ 339.

analysis is important, as it shows the strengths of the Commission's interpretive and remedial mandate.

4 3 8 African Commission's jurisdiction to publish reports

Article 59 of the African Charter requires the African Commission's decisions to remain confidential until the ('AHS') decides otherwise.³²⁸ It has been the subject of criticism. Benedek, for example, argues that the requirement restricts the Commission from publishing the proceedings of the communications.³²⁹ Udombana argues that the confidentiality rule makes the Commission invisible and ineffective and undermines its relevance in human rights protection.³³⁰ Viljoen argues that the confidentiality requirement jeopardises the Commission's protective mandate.³³¹ Politicians have also challenged the confidentiality rule, by arguing that it curtails opportunities to make the protective mandate known to the public. The Liberian President Ellen Johnson Sirleaf, for instance, observed that:

"The Commission is generally unknown and invisible, it is regarded with suspicion by those who do not know it, and as seen from the eyes of a casual observer, it is not performing. I don't know of any cases that you have resolved related to any of the major human rights problems recently affecting our continent."³³²

The foregoing criticisms are based on the textual approach to interpretation, which mainly applies express provisions of the text being interpreted to generate its meaning. Interpretation through the teleological approach, however, allows the use of other interpretative aids, such as the principle of effectiveness, to construe the meaning of provisions.³³³ This principle applies to both substantive and procedural treaty provisions. The ECHR held in *Loizidou v Turkey* ('*Loizidou*') that the principle of effectiveness in its temporal dimension that requires a treaty to be interpreted in the present-day conditions is applicable to both substantive and procedural provisions that govern the operation of the supervisory organs.³³⁴

³²⁸ Art 59(1)-(3) of the African Charter.

³²⁹ Benedek (1993) *Netherlands Quarterly of Human Rights* 29.

³³⁰ Udombana (2000) *Yale Human Rights and Development Law Journal* 70.

³³¹ F Viljoen "A human rights court for Africa, and Africans" (2005) 30 *Brooklyn Journal of International Law* 1 16.

³³² Remarks by President Ellen Johnson Sirleaf, as quoted in Udombana (2000) *Yale Human Rights and Development Law Journal* 70.

³³³ See chapter two, parts 2 2 3 and 2 5 2 3.

³³⁴ *Loizidou v Turkey* (1995) Series A No 310 para 71.

The African Commission can apply the principle of effectiveness to justify its approach to publishing reports and ensuring that the confidentiality requirement in article 59 is not interpreted in a manner that weakens socio-economic rights protection. Effective interpretation of article 59 requires the African Commission's findings to be published, rather than rendering them confidential until the AHSB approves their publication. In *Stoll v Switzerland* ('*Stoll*'), the ECHR held that when the confidentiality requirement renders rights theoretical and illusory, the principle of effectiveness that renders the right practical and effective should be observed.³³⁵ Moreover, the substantive dimension of the principle of effectiveness requires the autonomy of Member States to be restricted at the expense of the protection and enjoyment of individuals' rights.³³⁶ As Bernhardt argues:

“Every protection of individual freedoms restricts State sovereignty, and it is by no means State Sovereignty which in case of doubt has priority. Quite the contrary, the object and purpose of human rights treaties may often lead to a broader interpretation of individual's rights on one hand and restriction of State activities on the other.”³³⁷

The principle of effectiveness, in its temporal dimension, allows treaty interpretation in a manner that reflects present-day conditions.³³⁸ Present-day conditions, in relation to the protection of human rights, require that the interpretation of the individuals' rights be published publicly. Transparency is a significant aspect of human rights protection. In *Scoppola v Italy (No 2)* ('*Scoppola*') the ECHR held that:

“Since the Convention is first and foremost a system for the protection of human rights, the Court must however have regard to the conditions in the respondent State and in the Contracting States in general and respond, for example, to any emerging consensus as to the standards to be achieved. It is of crucial importance that the Convention is interpreted and applied in a manner which renders its rights practical and effective, not theoretical and illusory. A failure by the Court to maintain a dynamic and evolutive approach would risk rendering it a bar to reform or improvement.”³³⁹

³³⁵ *Stoll v Switzerland* App no 69698/01 (ECHR, 10 December 2007) para 128.

³³⁶ See chapter two, part 2 2 3.

³³⁷ R Bernhardt “Evolutive treaty interpretation, especially of the European Convention of Human Rights” (1999) 42 *German Yearbook of International Law* 11 14, as quoted in D Rietiker “The principle of ‘effectiveness’ in the recent jurisprudence of the European Court of Human Rights: Its different dimensions and its consistency with public international law – No need for the concept of *sui generis*” (2010) 79 *Nordic Journal of International Law* 245 260.

³³⁸ See chapter two, part 2 2 3.

³³⁹ *Scoppola v Italy (No 2)* App no 10249/03 (ECHR, 17 September 2009) para 104.

It can be argued that the publication and transparency of the African Commission's findings is significant for protecting socio-economic rights. It helps States Parties, and all interested in socio-economic protection, to know the Commission decisions regarding the scope and content of these rights and their related obligations. In this way, States Parties can be aware of how effectively they should realise socio-economic rights in their countries and can assist them to avoid similar violations. As Ankumah notes, the publication of the Commission's decisions serves as a deterrent mechanism for further violations.³⁴⁰ Furthermore, publication and transparency can assist victims of subsequent socio-economic rights violations to use African Commission's findings as a basis for claiming the realisation of their rights. Ankumah rightly notes that a lack of published findings limits "potential litigants" from referencing such decisions as precedent.³⁴¹ Publication also helps to show the legal reasoning of the African Commission regarding its socio-economic rights jurisprudence. According to Ankumah, the African Commission can "develop an African human rights jurisprudence" through the publication of its findings.³⁴² As such, the African Commission can apply the principle of effectiveness to justify its mandate to publish its findings.

Moreover, the African Commission – through articles 60 and 61 – has the mandate to draw inspiration from relevant international instruments and jurisprudence. The African Commission can draw inspiration from the European Convention (article 32(3)) and Inter-American Convention (article 51(3)) respectively, which grant the European Commission and Inter-American Commission on Human Rights the mandate to publish their decisions. The African Commission has also altered the confidentiality requirement through practice. As Odinkalu observes, the African Commission has rectified the Charter's shortcomings relating to its powers through its practice, Rules of Procedures, and jurisprudence.³⁴³ According to Ankumah, the Commission's practice of publishing its decisions significantly impacts on the protection of individuals' rights.³⁴⁴

³⁴⁰ Ankumah *The African Commission on Human and Peoples' Rights* 75.

³⁴¹ 77.

³⁴² 77.

³⁴³ Odinkalu (1998) *Transnational Law and Contemporary Problems* 398.

³⁴⁴ Ankumah *The African Commission on Human and Peoples' Rights* 77.

4.3.9 African Commission's jurisdiction to follow-up States' compliance with its decisions

As is the case with the African Commission's remedial jurisdiction, the African Charter does not explicitly confer upon the Commission the jurisdiction to follow-up on States' compliance with its decisions. Scholars have challenged the Charter's silence by arguing that it limits the Commission's competence to undertake follow-up actions. Udombana, for instance, argues that the lack of a mandate to enforce decisions renders the African Commission ineffective and results in it being disregarded by States.³⁴⁵

As was discussed in the remedial mandate above, the scholars' criticisms are based on a textual approach to treaty interpretation. The textual approach to interpretation limits the interpretation of human rights treaties such as the African Charter. Protecting socio-economic rights in the African Charter will be meaningless if the supervisory organs' mandate to monitor State compliance with remedial orders is restricted. Writing in the Inter-American context, Pasqualucci argues that the effectiveness of remedial orders issued by the Inter-American Court depends heavily on their implementation.³⁴⁶ According to her, non-implementation of remedies renders the protection of human rights illusory.³⁴⁷ The teleological approach, which engages the treaty as a whole in the interpretive process, enables the African Commission to apply relevant Charter provisions to undertake follow-up measures. Viljoen argues that:

"If implementation is not regarded as intrinsically part of the consideration of a decision, the following question arises: Why does the Commission consider communications in the first place, if it remains unconcerned about their implementation and effect? Adopting views is not a purposeless, formulaic exercise. Using a teleological approach, the aim of the communications procedure must be to grant relief (in the form of a remedy) to a complainant or to change laws and practices. Follow-up is therefore integral to the process of individual communications and making sense of the overarching duty of states to give effect to the rights in the Charter."³⁴⁸

The provisions that avail the African Commission with avenues to issue follow-up orders in respect of its recommendations include articles 30, 45(1)-(b), 45(2), 46, 55, 60, 61 and 62. The protective mandate in articles 30 and 45(2) of the African Charter should be broadly construed to incorporate the African Commission's mandate to follow-up its

³⁴⁵ Udombana (2000) *Yale Human Rights and Development Law Journal* 67-68.

³⁴⁶ Pasqualucci *The Practice and Procedure of the Inter-American Court* 303.

³⁴⁷ 303.

³⁴⁸ Viljoen *International Human Rights Law* 341.

recommendations. Article 45(1)(b) allows the Commission to solve human rights problems through various rules and principles. Through these provisions, the African Commission formulated Rule 112, which governs follow-up mechanisms.³⁴⁹ Article 55 also empowers the Commission to consider non-state communications. A strict textual reading of article 55 limits the power of the African Commission to follow-up on its decisions. Viljoen argues that a narrow interpretation of the word “consider” in article 55 demonstrates that the Commission does not have a follow-up mandate.³⁵⁰ On the contrary, the teleological approach to interpretation, in accordance with the principle of effectiveness, allows the term “consider” to be construed broadly in a manner that incorporates the African Commission’s jurisdiction to follow-up on its decisions. Furthermore, articles 60 and 61 allow the Commission to draw inspiration from other relevant instruments and jurisprudence. These provisions can be applied to draw inspiration from other relevant instruments and jurisprudence relating to follow-up mandate.

Article 62 requires Member States to submit reports that demonstrate the measures they have taken to protect individuals’ rights. State obligations in these provisions are significant as they enable the African Commission to consider States’ compliance with recommendations relating to socio-economic rights. A State reporting mechanism assists the Commission to monitor the progress of States’ compliance with its decisions.³⁵¹ In a similar vein, writing on the Inter-American context, Pasqualucci posits that a State reporting procedure allows the supervisory organ to assess States’ compliance with its decisions.³⁵² As such, the underlying objective of a State reporting mechanism is to examine the extent to which States comply with the African Commission’s recommendations.³⁵³

The African Commission elaborated on article 62 in the specific context of socio-economic rights through the State Party Reporting Guidelines for Economic, Social and Cultural Rights in the African Charter on Human and Peoples’ Rights (‘Reporting

³⁴⁹ Rule 112(2) provides:

“In the event of a decision against a State Party, the parties shall inform the Commission in writing, within one hundred and eighty (180) days of being informed of the decision in accordance with paragraph one, of all measures, if any, taken or being taken by the State Party to implement the decisions of the Commission.”

³⁵⁰ Viljoen *International Human Rights Law* 341.

³⁵¹ 341.

³⁵² Pasqualucci *The Practice and Procedure of the Inter-American Court* 303.

³⁵³ Viljoen *International Human Rights Law* 349.

Guidelines’).³⁵⁴ These Reporting Guidelines are significant in that they outline the content of States’ reports relating to socio-economic rights.³⁵⁵ The African Commission can use the Reporting Guidelines mechanism to inquire into States’ enforcement of socio-economic remedies. The African Commission can also use the Reporting Guidelines to require States found to have violated socio-economic rights to explain in their reports the measures they have taken to implement the recommendations issued. In *Purohit*, the Commission required the respondent State to incorporate in its report the measures it took to implement the African Commission’s recommendations.³⁵⁶

There has been States’ failure to effectively comply with the African Commission’s recommendations. Viljoen and Louw observe that States fail to fully comply with the recommendations.³⁵⁷ Despite the Commission’s efforts to follow-up on implementation, very little information is available about State compliance.³⁵⁸ In August 2014, two NGOs (namely the Minority Rights Group International and International Network for Economic, Social and Cultural Rights) wrote to Commissioner Dr Mary Maboreke drawing her attention to the failure of the Government of Kenya to comply with the African Commission’s recommendations issued in *Endorois*.³⁵⁹ The NGOs requested the Commission to invoke Rule 112(8) of the Rules of Procedure.³⁶⁰ Rule 112(8) requires the African Commission to draw attention to the Sub-Committee of the Permanent Representative and the Executive Council on the Implementation of the Decision of the African Union in circumstances where a State fails to comply with its recommendations. It should be noted that the African Commission had already issued a resolution to Kenya, but it failed to comply with this resolution concerning *Endorois*.³⁶¹

³⁵⁴ State Party Reporting Guidelines for Economic, Social and Cultural Rights in the African Charter on Human and Peoples’ Rights, adopted on 24 October, 2011. Guideline 1 provides:

“These reporting guidelines are adopted to give further guidance to states parties to the African Charter on Human and Peoples’ Rights (the Charter) in reporting, pursuant to article 62 of the Charter, on implementation of their obligations to realise the enjoyment of economic, social and cultural rights under the Charter.”

³⁵⁵ Reporting Guidelines 2(a)-(e), 3 and 4.

³⁵⁶ *Purohit* para 85. See also *Legal Resources Foundation v Zambia* Communication No 211/98 (2001) AHRLR 84 (ACHPR 2001) para 76.

³⁵⁷ F Viljoen & L Louw “State compliance with the recommendations of the African Commission on Human and Peoples’ Rights, 1994-2004 (2007) 101 *The American Journal of International Law* 1 5-6.

³⁵⁸ 3.

³⁵⁹ The letter is on file with the author.

³⁶⁰ The letter is on file with the author.

³⁶¹ Resolution Calling on the Republic of Kenya to Implement the Endorois Case ACHPR/Res.257, concluded in Banjul, The Gambia, on 5 November 2013.

4 3 10 Complementarity between the African Commission and the African Court

The complementarity between the African Commission and the African Court is governed by the African Court Protocol, the African Court Rules and the Rules of Procedure. The relevant African Court Protocol provisions are articles 2, 5(1)(a), 6(1) and (3), 8, and 33. Elsheikh confirms the inclusion of the principle of complementarity between these two supervisory organs in articles 5 and 6 of the African Court Protocol.³⁶² Article 2 demonstrates that the mandate of the African Court is to complement the protective mandate of the African Commission. Article 5(1)(a) allows the African Commission to submit cases to the African Court.

Rule 118 elaborates four circumstances under which the African Commission can submit cases to the African Court. Firstly, it can submit a case in situations where States fail to comply with the African Commission's recommendations.³⁶³ Secondly, it can submit a case if States fail to comply with the provisional measures issued by the African Commission.³⁶⁴ Thirdly, it can submit a case in situations of serious or massive violations of human rights.³⁶⁵ Lastly, the Commission can submit a case to the African Court at any time it deems necessary.³⁶⁶ Rule 118(4) is significant in that it demonstrates the broad nature of article 5(1)(a).

Writing on the African Commission as a party before the African Court, Rudman notes that Rule 118 of the Rules of Procedure elaborate on "when and how" the Commission can refer a case to the Court.³⁶⁷ Rudman argues that through these provisions, the African Commission can refer a complaint to the African Court at any stage of the hearing, including referring a case before the consideration of the case's admissibility.³⁶⁸ Rudman warns, however, that although the African Commission can refer a case to the African Court at any stage, referral of a case before considering its admissibility undermines the purpose of complementarity. It also undermines the functions of the African Commission and fails to effectively utilise the meagre resources allocated to supervisory organs.³⁶⁹ With particular emphasis on Rule 118(3) and (4),

³⁶² IAB Elsheikh "The future relationship between the African Court and the African Commission" (2002) 2 *African Human Rights Law Journal* 252 256.

³⁶³ Rule 118(1) of the Rules of Procedure.

³⁶⁴ Rule 118(2).

³⁶⁵ Rule 118(3).

³⁶⁶ Rule 118(4).

³⁶⁷ A Rudman "The Commission as a party before the Court – Reflections on the complementarity arrangement" (2016) 19 *Potchefstroom Electronic Law Journal* 1 4.

³⁶⁸ 5.

³⁶⁹ 6.

Rudman contends that these provisions undermine the purpose of complementing and reinforcing the functions of the African Commission.³⁷⁰ She argues that in order to uphold the principle of complementarity, as envisaged by the provisions of the African Court Protocol and the Rules of Procedure in a manner that is also resource-conscious, the African Commission should refer the cases to the African Court after determining the admissibility of the case.³⁷¹

Rudman's observation regarding the danger of undermining the function of the African Commission, as well as the whole purpose of complementarity, is valid. Writing on the future relationship between these two supervisory organs, particularly the African Commission as a party before the African Court, Elsheikh notes that a significant concern relates to how the African Commission can exercise this mandate effectively.³⁷² This chapter argues that the African Commission should interpret Rule 118 in a manner that renders the socio-economic rights involved in cases (which should be referred to the African Court) effective and practical. In this regard, the African Commission should take into account the principle of effectiveness, being a tenet of the teleological approach, whenever it considers the referral of a case to the African Court, before considering its admissibility. This principle can be applied to restrict the Commission from referring a case that it has the mandate to consider. Failure to apply this generous interpretation can cause unnecessary delays for the victims of socio-economic rights violations to obtain justice. It will eventually render the protection of these rights ineffective and illusory, rather than practical and effective. As a result, the practice fails to uphold the object and purpose of the African Charter to protect peoples' socio-economic rights. Supervisory organs should interpret their rules of procedure generously in a manner that upholds the object and purpose of the African Charter regarding socio-economic rights.³⁷³ As Udombana argues, the Rules of supervisory organs should be flexible in a manner that advances the object and purpose of the African Charter.³⁷⁴ In a similar vein, writing on the complementarity of these two institutions, Elsheikh notes that the Rules of Procedure developed by these supervisory organs regarding their complementarity should uphold the Charters object and purpose relating to the human rights it protects.³⁷⁵

³⁷⁰ 21.

³⁷¹ 6.

³⁷² Elsheikh (2002) *African Human Rights Law Journal* 256.

³⁷³ See part 4 3 4 above.

³⁷⁴ Udombana (2000) *Yale Human Rights and Development Law Journal* 106.

³⁷⁵ Elsheikh (2002) *African Human Rights Law Journal* 258.

The African Court should apply a similar approach when interpreting article 5 of the African Court Protocol, which grants it a mandate to determine cases filed before it by the African Commission, as well as Rule 29(3)(a) of the African Court Rules that elaborates article 5(1)(a). As discussed in chapter two, the principle of effectiveness requires restrictions on the enjoyment of socio-economic rights to be narrowly construed. As such interpretation of the provisions, regarding referral of cases to the African Court if they practically restrict the enjoyment of these rights, should be narrowly construed to enable their effective and practical protection.

Article 2 of the African Court Protocol is also useful to elaborate this generous interpretation. In article 2, the term “complement” should be broadly construed to mean the African Court’s mandate to exclusively consider cases that are submitted by the African Commission, after determining their admissibility. As Rudman notes, for there to be effective complementarity between these two supervisory organs it is important for the African Court to restrict itself to the cases referred to it for determination on merits. Generous interpretation enables the African Court to restrict itself mainly to the cases referred to it for determination on the merits of a case. In other words, after the African Commission has already determined its admissibility.³⁷⁶ Furthermore, Rule 29(3) (a) of the African Court requires the African Commission to submit all the relevant documents relating to the case:

“In a case brought before the Court by the Commission under Article 5(1)(a) of the Protocol, its application shall be accompanied by its Report as well as all documents pertaining to the proceedings.”

A generous interpretation of Rule 29(3)(a), through the principle of effectiveness, would require the African Court to ensure that the African Commission determines a case’s admissibility and then submits its report on the admissibility, together with other relevant documents, for determination on its merits. As such, the term “report” in Rule 29(3)(a) should be interpreted generously in a manner that takes into account the report regarding the determination of the case’s admissibility. This approach to interpretation will enable the African Court to exclusively determine only cases referred to it by the African Commission after the latter has considered the admissibility of the case. Similar provisions are provided for under Rule 121(1) of the African Commission Rules:

³⁷⁶ Rudman (2016) *Potchefstroom Electronic Law Journal* 6.

“When, in pursuance of Article 5(1)(a) of the Protocol and Rule 120 of the Present Rules, the Commission decides to bring a communication before the Court, it shall submit an application seizing the Court in accordance with the Court Rules, accompanied by a summary of the communication and the communication file.”

Commenting on the formulation of Rule 121(1)(a) in relation to the wording of Rule 29(3)(a), Rudman notes a contradiction.³⁷⁷ While Rule 29(3)(a) requires the African Commission to submit a case with a report, Rule 121(1)(a) requires the Commission to refer a case to the African Court with a “summary of the communication”. Rudman notes that it is unclear whether the phrase “summary of the communication” in Rule 121(1)(a) should be understood as the word “Report” in Rule 29(3)(a).³⁷⁸ As argued above, the principle of effectiveness should be applied to interpret these Rules.

This chapter contends that a generous interpretation based on the principle of effectiveness is also required to interpret the phrase “in accordance with the Court Rules” in Rule 121(1)(a) of the African Commission Rules in a manner that considers the word “summary” in this Rule to be understood as the “Report” in line with Rule 29(3)(a) of the African Court Rules. The considerable implication of this generous interpretation is that it will enable the African Commission to submit to the African Court a case after it has determined its admissibility. The above discussion regarding the generous interpretation of the word “report” in Rule 29(3)(a) argues for a report to be submitted after considering a case’s admissibility. As will be discussed in part 4 4 2, in all four ways the African Commission can facilitate an individual’s access to the African Court. This broad standing of the African Commission is significant, as it furthers the object and purpose of the African Charter to protect socio-economic rights.

Writing on the justiciability of socio-economic rights, Yeshanew argues that these provisions guarantee the protection of socio-economic rights.³⁷⁹ Thus, the complementarity between the African Commission and the African Court strengthens the effective protection of individuals’ socio-economic rights, as guaranteed in the African Charter. Writing on scholarly debates on the relationship between the African Commission and the African Court, Ankumah argues that the establishment of the African Court does not diminish the relevance of the African Commission for protecting

³⁷⁷ 22.

³⁷⁸ 22.

³⁷⁹ Yeshanew *The Justiciability of Economic, Social and Cultural Rights* 206.

human rights.³⁸⁰ Complementarity also strengthens an individual's access to the Court, as will be discussed in part 4 4 2 below.

Finally, article 6(1) enables the African Court to request an opinion from the African Commission when deciding on the admissibility of cases. In relation to article 6(1), Rule 29(2) requires the African Court to specify the sections of a case in respect of which it seeks the African Commission's opinion, as well as the time limit within which it requires such opinion. Article 6(3) allows the African Court to transfer the case before it to the African Commission for determination. In relation to article 6(3), Rule 29(3) of the African Court Rules requires the African Court to submit to the African Commission a copy of the entire pleadings. Article 8 requires the African Court to consider its relationship with the African Commission when it determines cases. Article 33 requires the African Court, when it formulates its Rules of Procedure, to consult the African Commission.

4 4 The African Court: Mandate and jurisdiction

4 4 1 Contentious jurisdiction

The contentious jurisdiction of the African Court is provided for in article 3 of the African Court Protocol:

"1. 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.
2. In the event of a dispute as to whether the Court has jurisdiction, the Court shall decide."

Article 3(1) is formulated broadly and confers on the Court the mandate to interpret all rights in the African Charter and any other relevant human rights instruments ratified by the States concerned. Scholars are sceptical of this broad mandate. Naldi and Magliveras, for example, argue that the article controversially extends the Court's jurisdiction to international and other regional, as well as African, human rights instruments.³⁸¹ They the mandate to interpret other international human rights instruments is problematic, as it encroaches on the interpretive mandate of other supervisory organs specifically established by such instruments.³⁸² Similarly, Udombana

³⁸⁰ Ankumah *The African Commission on Human and Peoples' Rights* 196.

³⁸¹ GJ Naldi & K Magliveras "Reinforcing the African system of human rights: The Protocol on the establishment of a regional court of human and peoples' rights" (1998) 16 *Netherlands Quarterly of Human Rights* 431 435.

³⁸² 435.

argues that article 3 of the African Court Protocol extends the Court's mandate to "all regional, sub-regional, bilateral, multilateral, and international treaties" that have been ratified by States in dispute before the African Court.³⁸³

Scholars have developed means of restricting such a mandate. Heyns, for instance, argues that the term "relevant human rights instrument" contained in article 3(1) should be construed to cover only instruments that acknowledge the Court's competence.³⁸⁴ According to him, it is not common for a supervisory body of one regional or international system to enforce the instruments of another regional system.³⁸⁵ Viljoen suggests the use of the phrase "States concerned" to limit the African Court's contentious jurisdiction.³⁸⁶ Yeshanew³⁸⁷ is of the view that the African Court's mandate in article 3(1) should be exclusively restricted to the African Charter, the African Court Protocol, the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa ('Women's Protocol'),³⁸⁸ and the African Charter on the Rights and the Welfare of the Child ('Children's Charter').³⁸⁹ He argues that, since the African Court Protocol's object and purpose is to supplement the African Charter, it makes sense for the African Court to consider these three instruments.³⁹⁰ Restricting the Court to these three African regional human rights instruments may limit it from using other relevant ratified instruments to develop the scope and content of socio-economic rights.³⁹¹

I agree with criticisms of the broad nature of the African Court's contentious jurisdiction and its danger of encroaching on other supervisory bodies' interpretive mandates. I further agree with the need to restrict this broad mandate from extending to other international and regional human rights treaties that have already established their enforcement machinery. However, some scholarly solutions are problematic. Heyns' interpretation, for instance, limits the African Court's interpretive mandate exclusively to the African Charter and the Women's Protocol, while Viljoen's restriction allows the

³⁸³ Udombana (2000) *Yale Human Rights and Development Law Journal* 90. See also J Harrington "The African Court on Human and Peoples' Rights" in M Evans & R Murray (eds) *The African Charter on Human and Peoples' Rights: The System in Practice, 1986-2000* (2002) 305 318.

³⁸⁴ C Heyns "The African regional human rights system: In need of reform?" (2001) 2 *African Human Rights Law Journal* 155 168.

³⁸⁵ 167. See also Yeshanew *The Justiciability of Economic, Social and Cultural Rights* 193.

³⁸⁶ Viljoen *International Human Rights Law* 438.

³⁸⁷ Yeshanew *The Justiciability of Economic, Social and Cultural Rights* 194.

³⁸⁸ The Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa CAB/LEG/66.6 was adopted on 11 July 2003 and entered into force on 25 November 2005.

³⁸⁹ The African Charter on the Rights and Welfare of the Child CAB/LEG/24.9/49 (1999) was adopted on 11 July 1990 and entered into force on 29 November 1999.

³⁹⁰ Yeshanew *The Justiciability of Economic, Social and Cultural Rights* 194.

³⁹¹ 194.

African Court to encroach on the mandate of other treaty bodies. Yeshanew's suggestion that, based on the African Court Protocol's object and purpose, the Court should exercise jurisdiction on the African Charter and only instruments that supplement the Charter is feasible. Its feasibility centres on the fact that the African Court will not interpret and apply other international, regional, African regional, or sub-regional treaties with their own enforcement machinery. However, Yeshanew does not develop the argument as to how the object and purpose of the African Charter can be invoked to appropriately restrict the Court's mandate.

An appropriate way to restrict the broad mandate of the African Court's contentious jurisdiction is through the principle of effectiveness, which applies to both the Charter's substantive and procedural provisions. The Inter-American Court stated in *Serrano-Cruz Sisters v El Salvador* ('*El Salvador*')³⁹² that the principle of effectiveness is applicable to substantive as well as procedural provisions of human rights treaties.³⁹³ The principle of effectiveness in its general dimension allows the interpretation of treaty provisions in a manner that renders such provisions practical and effective, rather than theoretical and ineffective.³⁹⁴ This dimension of the principle is broad, as it allows the restriction of provisions to render them effective. The phrase "relevant human rights instruments" should be restricted and construed to mean relevant African human instruments that acknowledge the jurisdiction of the African Court, as well as protocols to the African Charter. This approach enables the African Court to interpret and apply African human rights instruments that acknowledge its competence. It will also save the African Court from encroaching on the interpretive mandate of other international, regional and sub-regional supervisory organs. Yeshanew argues that it makes sense to restrict the Court's mandate to interpret "other relevant treaties" to the relevant African regional human rights instruments.

Furthermore, this approach helps the African Court to consider "other relevant human rights instruments ratified by the States concerned" to guide its interpretation of socio-economic rights in African human rights instruments under its jurisdiction. The principle of effectiveness, in its systemic dimension, allows treaty provisions to be interpreted through other comparative legal sources.³⁹⁵ The systemic dimension of the principle of

³⁹² *Serrano-Cruz Sisters v El Salvador (Preliminary Objection)* Inter-American Court of Human Rights Judgment of 23 November 2004.

³⁹³ Para 69.

³⁹⁴ See chapter two, part 2 2 3.

³⁹⁵ See chapter two, parts 2 2 3 and 2 5 2 4.

effectiveness allows the interpretation of article 3(1) of the African Court Protocol in a manner that renders it effective and practical. It also allows the Court to consider other international and regional, as well as African, human rights instruments as a guide for interpreting the Charter's socio-economic rights. In this regard, the African Court's interpretation can assist in ensuring the consistency and harmony of the African Charter with other relevant international and African human rights instruments.

Related to the contentious jurisdiction, is the African Court's mandate to decide cases brought by individuals relating to human rights violations, including socio-economic rights. Rudman notes that this mandate collides considerably with the African Commission's mandate to consider communications, as well as matters relating to *locus standi*.³⁹⁶ However, the complementarity between the African Commission and the African Court can be applied to solve Rudman's jurisdiction and *locus standi* concerns.³⁹⁷ Writing on the African Commission as a party with a mandate to file cases before the African Court, Rudman admits that complementarity between these two supervisory organs has the potential to address such contradictions.³⁹⁸

The African Court of Justice Protocol provides the African Court of Justice with a mandate to interpret and apply the African Charter, the Children's Charter, the Women's Protocol, or any other legal instrument relating to human rights ratified by the States Parties concerned.³⁹⁹ These provisions are significant in that they consider broadly the African Charter and instruments that supplement it. Like the provisions of the African Court Protocol, the phrase "any other legal instrument" should be construed to mean instruments that acknowledge the competence of the African Court of Justice or supplement the African Charter. This will help the African Court of Justice to avoid interpreting and applying other international, regional, and sub-regional instruments vesting such mandate in other bodies.

4 4 2 *Locus standi* before the African Court and its implications for socio-economic rights interpretation

Locus standi before the African Court is governed by article 5 of the African Court Protocol:

³⁹⁶ See parts 4 3 1, 4 3 2, and 4 3 3 above.

³⁹⁷ See part 4 3 10 above.

³⁹⁸ Rudman (2016) *Potchefstroom Electronic Law Journal* 4.

³⁹⁹ Art 28(c) of the African Court of Justice Protocol.

- “1. The following are entitled to submit cases to the Court:
- (a) The Commission;
 - (b) The State Party which had lodged a complaint to the Commission;
 - (c) The State Party against which the complaint has been lodged at the Commission;
 - (d) The State Party whose citizen is a victim of human rights violation; and
 - (e) African Intergovernmental Organisations.
2. When a State Party has an interest in a case, it may submit a request to the Court to be permitted to join.
3. The Court may entitle relevant Non-Governmental organisations (NGOs) with observer status before the Commission, and individuals to institute cases directly before it, in accordance with article 34(6) of this Protocol.”

These provisions establish five categories of claimants who can access the Court. This wide range of claimants is significant for interpreting socio-economic rights. The significance is based on the fact that, in addition to the victims, article 5 allows a wide range of claimants to petition violations of individuals’ socio-economic rights to the African Court on their behalf. Through the African Commission and States’ *locus standi*, individuals can indirectly access the African Court.⁴⁰⁰ According to Udombana, these two sets of claimants have automatic access to the Court.⁴⁰¹

Scholars criticise article 5 for granting the African Commission and States direct access to the African Court, but not individuals or NGOs. Juma argues, for example, that to grant direct access to States is problematic since they are the main violators of individuals’ rights.⁴⁰² States and inter-governmental organisations may be reluctant to file cases involving human rights violations.⁴⁰³ Regarding the African Commission’s direct access, Juma argues that there is no legal duty on the African Commission to file cases to the African Court.⁴⁰⁴

States and institutions such as inter-governmental institutions, as well as the African Commission, are legally bound to protect human rights. As discussed in chapter three,⁴⁰⁵ article 1 of the African Charter requires States to protect human rights through legislative and other measures. Moreover, the African Commission is obliged – through articles 30, 45 and 46 – to protect the human rights in the African Charter. The effective and practical interpretation of these provisions imposes a legal obligation on Member States and the African Commission to file cases involving individuals’ socio-economic

⁴⁰⁰ Viljoen *International Human Rights Law* 426.

⁴⁰¹ Udombana (2000) *Yale Human Rights and Development Law Journal* 87.

⁴⁰² D Juma *Access to the African Court on Human and Peoples’ Rights: A Case of the Poacher turned Gamekeeper?* 1 3, available at <http://papers.ssrn.com/so13/papers.cfm?abstract_id=1391482> (accessed 11-05-2015).

⁴⁰³ 4.

⁴⁰⁴ 8.

⁴⁰⁵ See chapter three, part 3 3 3 1.

rights violations before the African Court. Articles 30 and 45(2) require the African Commission to protect human rights in the African Charter (including socio-economic rights). The word “protect” in these two articles should be construed broadly to include the obligation of the African Commission to submit cases involving socio-economic rights violations to the African Court. As Rudman notes, failure of the African Commission to submit cases to the African Court amounts to a failure to protect individuals’ and groups’ human rights.⁴⁰⁶

Moreover, article 45(1)(c) requires the African Commission to co-operate with other international institutions with a human rights mandate. It should be interpreted broadly to include the African Commission’s mandate to co-operate with the African Court by submitting cases involving the socio-economic rights violations in the African Charter. As discussed above,⁴⁰⁷ the African Commission through its complementarity with the African Court can submit cases to the African Court. In *Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism* (‘*Compulsory Membership*’) the Inter-American Court stated that:

“Considering that individuals do not have standing to take their case to the Court and that a Government that has won a proceeding in the Commission would have no incentive to do so, in these circumstances the Commission alone is in position, by referring the case to the Court, to ensure the effective functioning of the protective system established by the Convention. In such a context, the Commission has a special duty ... of coming to the Court.”⁴⁰⁸

In circumstances where States and the African Commission are reluctant to file cases at the African Court, the African Court Protocol allows the Court to issue provisional measures aimed at protecting individuals’ rights on its own initiative.⁴⁰⁹ The jurisdiction to issue advisory opinions⁴¹⁰ and provisional measures enables the Court to intervene in circumstances where States and the African Commission are reluctant to file cases.

⁴⁰⁶ A Rudman “The protection against discrimination based on sexual orientation under the African human rights system” (2015) 15 *African Human Rights Law Journal* 1 24-25.

⁴⁰⁷ See part 4 3 10 above.

⁴⁰⁸ *Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism* (Arts. 13 and 29 of the American Convention on Human Rights) Advisory Opinion OC-5, Inter-American Court of Human Rights Series A No 5 (13 November 1985) para 26.

⁴⁰⁹ The provisional mandate of the African Court is provided for in art 27(2) of the African Court Protocol, and the advisory mandate is provided for in art 4 of the African Court Protocol.

⁴¹⁰ Article 4(1) of the African Court Protocol enables the Member States of the OAU (now AU), the AU or any of its organs, or any African organisation recognised by the AU to request the African Court to provide an opinion on any legal matter relating to the Charter or any other relevant human rights instruments only on a condition that such matter should be related to a matter being examined by the African Commission.

While the African Court's jurisdiction to issue advisory opinions falls outside the scope of this dissertation, the jurisdiction to issue provisional measures is discussed in part 4 4 4 below.

Moreover, individuals can directly access the Court through article 5(3). Individuals' direct access to the African Court is subject to a respondent State's deposition of a declaration acknowledging the competence of the Court to determine cases submitted by individuals, as provided for in article 34(6) of the African Court Protocol.⁴¹¹ Article 5(3) should therefore be read in conjunction with article 34(6) of the African Court Protocol:

“At the time of the ratification of this Protocol or any time thereafter, the State shall make a declaration accepting the competence of the Court to receive cases under article 5(3) of this Protocol. The Court shall not receive any petition under article 5(3) involving a State Party which has not made such a declaration.”

Articles 5(3) and 34(6) have been criticised by various scholars. Udombana argues that these provisions weaken the Court's mandate to hear individuals' cases, as they limit their direct access.⁴¹² Articles 5(3) and 34(6) demonstrate the shortcomings of the African Court's jurisdiction to determine cases brought by individuals.⁴¹³ Moreover, Chenwi argues that the limitation of direct access arises from the fact that these provisions require the respondent State's declaration to allow an individual to submit a case.⁴¹⁴ Eno⁴¹⁵ and Mutua⁴¹⁶ argue that these provisions diminish the significance of the African Court as the protector of individuals' human rights and render it the protector of States. Harrington⁴¹⁷ and Juma⁴¹⁸ argue that the limitation renders the African Court less accessible by potential complainants. If these provisions of the African Court Protocol are not interpreted broadly they will render the African Court meaningless.⁴¹⁹

⁴¹¹ At the time of writing, only eight States had made a declaration in accordance with art 34(6). These States are Benin, Burkina Faso, Malawi, Mali, Tanzania, Ghana, Rwanda and Cote d'Ivoire, see <<http://en.african-court.org/index.php/news/press-releases/item/69-benin-makes-the-declaration-to-allow-ngos-and-individuals-to-directly-access-the-african-court-on-human-and-peoples-rights>> (accessed 18-05-2017).

⁴¹² Udombana (2000) *Yale Human Rights and Development Law Journal* 88.

⁴¹³ 88.

⁴¹⁴ Chenwi (2011) *Stellenbosch Law Review* 700.

⁴¹⁵ RW Eno "The jurisdiction of the African Court on Human and Peoples' Rights" (2002) 2 *African Human Rights Law Journal* 223 231.

⁴¹⁶ M Mutua "The African Human Rights Court: A two-legged stool?" (1999) 21 *Human Rights Quarterly* 342 355.

⁴¹⁷ J Harrington "The African Court on Human and Peoples' Rights" in MD Evans & R Murray (eds) *The African Charter on Human and Peoples' Rights: The System in Practice, 1986-2000* (2002) 305 319.

⁴¹⁸ Juma *Access to the African Court on Human and Peoples' Rights* 15.

⁴¹⁹ Harrington "The African Court" in *The African Charter on Human and Peoples' Rights* 355.

The African Court has also rejected cases submitted by individuals whose States have not deposited the declaration required by article 34(6). For example, in *Michelot Yogogombaye v The Republic of Senegal* ('Yogogombaye'),⁴²⁰ an individual applicant directly instituted a case against the respondent State. However, the African Court held that it lacked jurisdiction to determine the case since the respondent State had not yet deposited the declaration pursuant to article 34(6).⁴²¹ The African Court has reiterated this strict textual interpretation in other cases, including the recent case of *Femi Falana v The African Union* ('Falana').⁴²²

The foregoing criticisms and the practice of the African Court are based on the textual approach to interpretation. As mentioned above, the provisions of human rights treaties, such as the African Charter, require a holistic interpretation that renders such provisions practical and effective rather than theoretical and illusory. Although the textual formulation of these provisions does not provide for an individual's direct standing to the African Court it does not mean that an individual's standing is absolutely restricted.⁴²³ According to Viljoen, the African Court should not be construed as limiting individuals' access.⁴²⁴

Apart from an individual's access through states and NGOs, article 5(1)(a) enables individuals' standing through the African Commission. Indirect access to the African Court is significant, since the African Commission is obliged under the Charter to submit cases to the Court under the circumstances discussed above. A generous interpretation of this mandate requires the Commission to submit to the Court cases filed by individuals. Rudman rightly notes that the Commission fails to implement its obligation to protect human rights in the Charter if it fails to submit cases to the Court on behalf of individuals and groups whose States have not deposited the declaration required by article 34(6) of the African Court Protocol.⁴²⁵ As discussed above, the African Commission has developed four distinct mechanisms through which it can submit cases by individuals to the African Court.⁴²⁶

⁴²⁰ *Michelot Yogogombaye v The Republic of Senegal* Application No 001/2008.

⁴²¹ Para 37.

⁴²² *Femi Falana v The African Union* Application No 001/2011 para 73.

⁴²³ Some regional human rights treaties incorporate similar provisions requiring States to deposit a declaration accepting the competence of the court. For example, article 62(1) of the Inter-American Convention.

⁴²⁴ Viljoen *International Human Rights Law* 430.

⁴²⁵ Rudman (2015) *African Human Rights Law Journal* 25.

⁴²⁶ See part 4 3 10 above.

The above discussion demonstrates that individuals can access the African Court indirectly. Significantly, it also shows that States and the African Commission, based on their obligations to promote and protect human rights, are obliged to submit cases by individuals to the Court for effective rights protection.

Scholars question the nature of individuals' indirect access to the African Court. Their concern is whether restricting an individual's direct standing amounts to restricting such an individual from participating in the prosecution of the case filed by an entity with direct legal standing. Thus, whether an individual is eligible to appear before the African Court to argue his case or whether he is strictly required to rely on the representation of the African Commission. Viljoen notes that an individual who directly submits the case to the African Court is recognised as a party to a case. Accordingly, he questions the status of an individual whose case is submitted either by the African Commission or by the State.⁴²⁷

The African Protocol does not explicitly provide for an individual's participation in a case. It can be argued that the principle of effectiveness in its substantive dimension requires restrictions to be narrowly interpreted in order to enable the effective enjoyment of human rights. As such, the standing restriction in articles 5 and 34(6) of the African Court Protocol should be narrowly interpreted to enable individuals, whose complaints have been submitted by entities with direct legal standing, to participate in the prosecution of the case. This broad interpretation will ensure that victims of socio-economic rights violations are given independent procedural standing to the African Court once the African Commission submits their case. *In the matter of Viviana Gallardo* ('*Gallardo*'),⁴²⁸ Escalante J held that standing restrictions should be interpreted narrowly in order to further the object and purpose of the Inter-American Convention to protect human rights:

"This limitation, as such, is in the light of principles, an 'odious matter' (*materia odiosa*) and should thus be interpreted restrictively. Therefore, one cannot draw from that limitation the conclusion that the individual is also barred from his autonomous condition of 'party' in the procedures once they begun. On the other hand, it is possible, even imperative, to grant to the individual that role."⁴²⁹

⁴²⁷ Viljoen *International Human Rights Law* 341.

⁴²⁸ *In the matter of Viviana Gallardo et al* Advisory Opinion No 101/81 Inter-American Court of Human Rights (Ser A) (1984).

⁴²⁹ *Gallardo* explanation of vote of Judge Rodolfo Escalante para 8.

This broad interpretation will enable complainants and victims of socio-economic rights violations to have procedural standing before the African Court. As Escalante J stated in *Gallardo*, although an individual's direct standing is restricted by the Inter-American Convention it allows the Inter-American Court to grant victims of human rights violations "independent procedural standing once the proceedings have begun".⁴³⁰

Article 5(1)(a) is broad in that it regulates individuals' indirect access to the African Court on broad terms. It does not restrict victims or their representatives' procedural status and involvement in the litigation. Accordingly, the article should be interpreted broadly to ensure victims are afforded the right to appear before the African Court once the African Commission submits their case.

Rule 29(3)(c) of the African Court Rules enables the Court, when necessary, to hear the individual or NGO that submitted the communication to the African Commission.⁴³¹ This Rule is subject to Rule 45 of the African Court Rules governing the African Court's measures to "obtain" evidence. Rule 45 enables the Court to obtain evidence regarding the case before it by hearing any person as a witness or expert whose evidence, assertions or statements can assist the African Court to determine the case.⁴³² Rule 29(3)(c) read in conjunction with Rule 45 allows an individual to appear before the African Court as a witness to a case. As Vargas writes in the Inter-American context:

"Even if lack of standing is read to preclude individuals from having access to the Court as a party the individual may still be called upon to appear as a witness."⁴³³

However, treating an individual as a mere witness to a case limits his or her right to appear as a party to a case before the Court. Viljoen notes that a narrow reading of Rule 29(3)(c), read in conjunction with Rule 45, restricts an individual from being considered as a party to a case.⁴³⁴ Being a party is significant as it enables an individual to participate actively, directly or through his legal representatives in the case's proceedings. Commenting on the Rules of Procedure of the Inter-American Court,

⁴³⁰ Para 8.

⁴³¹ Rule 29(3)(a)-(c) of the African Court Rules.

⁴³² Rule 45(1).

⁴³³ MD Vargas "Individual access to the Inter-American Court of Human Rights" (1984) 1 *New York University Journal of International Law and Politics* 601 611.

⁴³⁴ Viljoen *International Human Rights Law* 441.

Melish argues that the Rules allow the “participation of the victims and their representatives in all procedural stages of litigation”.⁴³⁵

Based on similar reasoning, Rule 29(3)(c) read in conjunction with Rule 45(1), should be interpreted generously in a manner that allows the African Court to consider an individual complainant before the African Commission, as a party and a witness before the Court. This supports Viljoen’s argument that a broad interpretation of the Rules of the African Court entitles an individual to be party to a case submitted by the Commission or a State.⁴³⁶

The teleological approach to interpretation thus allows the construction of articles 5(3) and 34(6) and the Rules of the African Court in a manner that embraces the African Charter’s object and purpose regarding individuals’ access to the Court. The Court should therefore adopt this approach in interpreting the provisions of the African Charter, including provisions regarding the access of victims. Udombana argued earlier that:

“The real effectiveness of the Court... will depend on how creative its judges are in interpreting their mandate and jurisdiction. If the Court takes a conservative approach to these issues, there is little hope that it will be... effective... in protecting human rights in the continent. By contrast, if the Court takes a liberal and creative approach to interpreting its mandate under the Protocol, the Court has the potential to take the lead on many innovative trends in regional and international human rights protection. This is particularly true to the Court’s jurisdiction over persons and subject matter. Should the Court, for example, interpret Articles 34(6) and 5(3) of the Protocol narrowly, it could effectively foreclose NGO and individual access to the Court.”⁴³⁷

Regarding the African Court of Justice, *locus standi* is governed by articles 29 and 30 of the African Court of Justice Protocol. This Protocol, when it comes into operation, will provide for explicitly broad provisions regarding *locus standi*. It allows access to State Parties to the Protocol, the Assembly, Parliament and other organs of the Union, African Union staff members, the African Commission, African Committee of Experts on the Rights and Welfare of the Child, African Intergovernmental organisations, African National Human Rights Institutions, individuals, and NGOs.⁴³⁸

⁴³⁵ T Melish “Inter-American Court of Human Rights: Beyond progressivity” in M Langford (ed) *Socio-Rights Jurisprudence: Emerging Trends in International and Comparative Law* (2008) 372 373.

⁴³⁶ 441.

⁴³⁷ Udombana (2000) *Yale Human Rights and Development Law Journal* 45 102.

⁴³⁸ Arts 29(1) and 30 of the African Court of Justice Protocol.

The above provisions are significant as they allow both direct⁴³⁹ and indirect⁴⁴⁰ individual standing. As Wachira and Ayinla note, the African Court of Justice Protocol broadens individuals standing through individual direct access and other relevant human rights organisations.⁴⁴¹ Direct standing enables individual complainants of human rights violations, whose States have deposited a declaration acknowledging the competence of the Court, to enjoy the full exercise of their interest. Indirect individual standing is significant, as it enables individuals to access the African Court of Justice as witnesses in cases where the case is instituted by other institutions, such as the African Commission.

4 4 3 Admissibility requirements and their implications

The admissibility of cases submitted to the African Court is governed by article 6 of the African Court Protocol:

- “1. The Court, when deciding on the admissibility of a case instituted under article 5(3) of this Protocol, may request the opinion of the Commission which shall give it as soon as possible.
2. The Court shall rule on the admissibility of cases taking into account the provisions of article 56 of the Charter.
3. The Court may consider cases or transfer them to the Commission.”

Article 6(2) requires the Court to consider article 56 of the African Charter, which establishes admissibility requirements. The formulation of article 6(2), particularly the phrase “take into account”, is flexible in that it allows the Court to depart from the strict application of all requirements enshrined in article 56 of the African Charter. According to Naldi and Magliveras, these provisions do not oblige the African Court, but rather require it, to consider admissibility requirements.⁴⁴² Mugwanya also notes that article 6(2) indicates that the Court is not bound to strictly apply article 56’s admissibility requirements.⁴⁴³ The flexibility of article 6(2) of the African Court Protocol is significant for interpreting socio-economic rights, as it allows the Court to interpret admissibility requirements for the effective protection of socio-economic rights. As Mugwanya argues,

⁴³⁹ Art 30(f).

⁴⁴⁰ Arts 29(1)(a)-(c) and 30(a)-(f).

⁴⁴¹ Wachira & Ayinla (2006) *African Human Rights Law Journal* 490.

⁴⁴² Naldi & Magliveras (1998) *Netherlands Quarterly of Human Rights* 441.

⁴⁴³ Mugwanya *Human Rights in Africa* 330. See also Viljoen *International Human Rights Law* 441.

the African Court is given wide latitude to deliberately, for the sake of justice, overlook some admissibility requirements.⁴⁴⁴

Moreover, it should be noted that article 8 of the African Court Protocol allows the Court, through its Rules of Procedure, to elaborate the conditions on which it should consider cases submitted before it.⁴⁴⁵ This provision is significant as it allows the African Court to consider various admissibility requirements flexibly.⁴⁴⁶ Article 33 of the African Court Protocol also allows the Court to draw up its own Rules that determine the procedures to apply the African Charter. Based on these provisions, the African Court developed the African Court Rules that elaborate admissibility requirements.⁴⁴⁷ According to Rule 40 of the African Court Rules, the Court is required to apply all the admissibility requirements in article 56.

Scholars criticise the formulation of Rule 40 of the African Court Rules. For example, Viljoen argues that by strictly following the wording of article 56, Rule 40 restricts the flexibility allowed for by article 6 of the African Court Protocol.⁴⁴⁸ The Rules of the African Court should uphold the object and purpose to protect human rights, which the African Court is charged with. The effective interpretation is that broader protection should be opted for rather than the restriction offered by Rule 40. In this regard, Udombana argues that:

“The rules of the system should be broad, flexible and creative so that the purposes of the Banjul Charter will not be defeated... Accordingly, the Court should adopt an evolutionary approach to the interpretation of the Banjul Charter and other related instruments.”⁴⁴⁹

The foregoing discussion demonstrated that pursuant to article 6(2) of the African Court Protocol, the African Court can flexibly determine the admissibility of cases before it.

⁴⁴⁴ Mugwanya *Human Rights in Africa* 330. See also Naldi & Magliveras (1998) *Netherlands Quarterly of Human Rights* 440-441.

⁴⁴⁵ Art 8 of the African Court Protocol provides:

“The Rules of Procedure of the Court shall lay down the detailed conditions under which the Court shall consider cases brought before it, bearing in mind the complementarity between the Commission and the Court.”

⁴⁴⁶ Mugwanya *Human Rights in Africa* 330.

⁴⁴⁷ Rule 40 of the African Court Rules.

⁴⁴⁸ Viljoen *International Human Rights Law* 441.

⁴⁴⁹ Udombana (2000) *Yale Human Rights and Development Law Journal* 106.

4 4 4 African Court's mandate to issue provisional measures

The African Court Protocol empowers the African Court to order provisional measures through article 27(2):

“In cases of extreme gravity and urgency, and when necessary to avoid irreparable harm to persons, the Court shall adopt such provisional measures as it deems necessary.”

Like the African Commission's mandate to issue provisional measures, the Court's mandate furthers the object and purpose of the African Charter. Provisional measures protect individuals' socio-economic rights from being irreparably harmed as Trindade J held in *Urso Branco*.⁴⁵⁰ As discussed above,⁴⁵¹ provisional measures in international human rights law fulfil protective and preventative roles.⁴⁵² The Inter-American Court stated in *Panama* that the protective role aims to avoid irreversible harm.⁴⁵³ The preventive function preserves individuals' rights until the determination of the case.⁴⁵⁴

Through their preventive role, provisional remedies render socio-economic rights meaningful, as they help to preclude threats of violations of such rights until the case is finally determined. Furthermore, provisional measures can help to demonstrate the effectiveness of the Court's contentious jurisdiction by allowing it to issue temporary orders in order to avoid violations of the rights under consideration. The provisional measures, in a preventive capacity, can also assist the African Court to govern a State's compliance with its orders. The Inter-American Court held in *El Rodeo* that the objective of provisional measures in their preventive sense is to ensure the integrity and effectiveness of decisions issued by supervisory organs.⁴⁵⁵ In this regard, provisional measures prevent individuals' rights from being violated and thus render the final decision meaningful.⁴⁵⁶ Moreover, the court stated that provisional measures in the preventive form enable States to comply with the final decision issued by supervisory organs.⁴⁵⁷

The formulation of article 27(2) of the African Court Protocol is broad as it enables the Court to issue provisional measures on its own motion. Rule 51(1) of the African

⁴⁵⁰ *Urso Branco* para 11.

⁴⁵¹ See part 4 3 5 above.

⁴⁵² Pasqualucci *The Practice and Procedure of the Inter-American Court* 252.

⁴⁵³ *Panama* “considering” para 3.

⁴⁵⁴ Para 3.

⁴⁵⁵ *El Rodeo* “considering” para 7.

⁴⁵⁶ Para 7.

⁴⁵⁷ Para 7.

Court Rules also provides for this. In the *Libya* case, the African Court reiterated its mandate to issue provisional measures on its own motion.⁴⁵⁸ This power is significant for protecting socio-economic rights, as it enables the Court to protect such rights in circumstances where it finds a rights violation that needs urgent intervention. In this way, it furthers the African Charter's object and purpose to protect human rights.

Writing on the power of the Inter-American Commission to issue provisional measures without a case being submitted before it, Pascualucci argues that such mandate embraces the object and purpose of the American Convention, which is to protect individuals' rights.⁴⁵⁹ Restricting a supervisory organ from issuing provisional measures on its own motion is dangerous for the protection of human rights, as it limits the applications of such measures in the most urgent cases involving violations.⁴⁶⁰ This protective aspect of provisional measures was stated by the Inter-American Court in *Natera Balboa*:

“In view of the protective nature of provisional measures, it is possible to... order them even when there is not a contentious case as such within the Inter-American System, in situations that, *prima facie*, may result in a grave and urgent infringement of human rights. For this, an assessment of the problem presented, the effectiveness of the state's actions regarding the situation described, and the degree of lack of protection that fall upon the people over which the measures are requested if they are not adopted shall be assessed.”⁴⁶¹

The African Court has issued provisional measures in its jurisprudence. In *The African Commission on Human and Peoples' Rights v The Republic of Kenya* ('*The Republic of Kenya*'),⁴⁶² the African Court was satisfied that there was a risk of irreparable harm to the Ogiek Community regarding their socio-economic rights to property and development.⁴⁶³ The African Court issued provisional measures pursuant to article 27(2) of the African Court Protocol.⁴⁶⁴ In *African Commission on Human and Peoples' Rights v Libya* ('*Libya*') the African Court required the respondent State to refrain from actions that would cause loss of life or the physical integrity of persons,

⁴⁵⁸ *Libya* para 10.

⁴⁵⁹ Pascualucci *The Practice and Procedure of the Inter-American Court* 257.

⁴⁶⁰ 257.

⁴⁶¹ *Natera Balboa (Venezuela)* Provisional Measures, Inter-American Court of Human Rights (1 February 2010) “considering” para 8.

⁴⁶² *African Commission on Human and Peoples' Rights v The Republic of Kenya* Application No 006/2012.

⁴⁶³ Para 20.

⁴⁶⁴ Paras 21-25.

which can violate the provisions of the African Charter.⁴⁶⁵ Moreover, in *African Commission on Human and Peoples' Rights v Libya* ('*Libyan Provisional Measures*') the African Court, having been satisfied that the conditions of extremity and urgency were met, ordered the respondent State to refrain from judicial proceedings, investigations, or detention that could cause irreparable damage to the detainee.⁴⁶⁶

Harrington criticises the African Court Protocol in relation to the legal status of provisional measures issued by the African Court. According to her, the African Court Protocol does not expressly indicate whether States are bound by provisional measures or not.⁴⁶⁷ Writing on the binding nature of the provisional measures of the Court, Mugwanya argues that it should explicitly state in its jurisprudence that provisional measures are binding. According to Mugwanya, in this respect, the African Court can draw inspiration from the Inter-American Court's jurisprudence.⁴⁶⁸

Since the aim of provisional measures is to protect individuals' rights, States are required to respect and implement provisional measures issued by the African Court. Provisional measures of the Court have a legal binding effect as the phrase "shall adopt" in article 27(2) demonstrates.⁴⁶⁹ Moreover, article 28(2) of the African Court Protocol, relating to judgements of the African Court, states that "the judgment of the Court decided by majority shall be final and not subject to appeal." This clause is broad in that it does not define the term "judgment". This broad formulation allows the inclusion of orders, relating to provisional measures issued by the African Court, as authoritative judgments. Writing on the provisional measures of the Inter-American Court, Pascualucci argues that the requirement in article 67 of the American Convention, namely that a judgment of the Inter-American Court is final and not subject to appeal, extends to orders of provisional measures.⁴⁷⁰

Like the African Court, the African Court of Justice, when in operation will also have a mandate to issue provisional measures "on its own motion" or on the application of

⁴⁶⁵ *African Commission on Human and Peoples' Rights v Libya* Application No. 004/2011 para 25.

⁴⁶⁶ *African Commission on Human and Peoples' Rights v Libya* Application No. 002/2013.

⁴⁶⁷ Harrington "The African Court on Human and Peoples' Rights" in *The African Charter on Human and Peoples' Rights* 325.

⁴⁶⁸ Mugwanya *Human Rights in Africa* 334.

⁴⁶⁹ 334.

⁴⁷⁰ Pascualucci *The Practice and Procedure of the Inter-American Court* 253.

parties for purposes of preserving their rights pending the final determination of the case.⁴⁷¹

4 4 5 Judgment

The African Court has the mandate to render judgment after its deliberations. This mandate is provided for in article 28(1) of the African Court Protocol:

“The Court shall render its judgment within ninety (90) days of having completed its deliberations.”

The provisions on judgment are significant in that they establish the time when the African Court should deliver its judgment. The African Court Protocol helps to avoid unnecessary delays after hearing the case. Nmehielle notes that the time limit in article 28(1) is meant to preclude delays by the Court.⁴⁷² Furthermore, according to article 28(2), the decision of the African Court is final. These provisions imply that the decisions of the African Court are binding in that States are obliged to enforce them.⁴⁷³ In elaborating these provisions, the African Court states in its Rules of Procedure that the judgement of the Court shall be final and binding on the parties.⁴⁷⁴ This interpretation is significant for interpreting socio-economic rights, as Member States will be required to comply and implement the African Court’s decisions relating to socio-economic rights violations. It should be noted that, under article 30 of the African Court Protocol, Member States commit themselves to comply with the decisions of the African Court and guarantee to execute them.⁴⁷⁵

Moreover, article 28(6) of the African Court Protocol requires the African Court to state the reasons for its judgment. This is important in order to show the parties the legal grounds on which the African Court based its decision. The legal reasoning of the Court also helps to elaborate the scope and content of the socio-economic rights being interpreted. In turn, this helps to develop a consistent and well-reasoned jurisprudence of the African Court, which is critical for its legitimacy and credibility. The substantive legal reasoning of the African Court helps to identify the relevant national, regional, and

⁴⁷¹ Art 35(1)-(2) of the African Court of Justice Protocol.

⁴⁷² Nmehielle *The African Human Rights System* 301.

⁴⁷³ Viljoen *International Human Rights Law* 414.

⁴⁷⁴ Rule 61(4)-(5) of the African Court Rules.

⁴⁷⁵ Art 30 of the African Court Protocol provides:

“The States Parties to the present Protocol undertake to comply with the judgment in any case to which they are parties within the time stipulated by the Court and to guarantee its execution.”

international law it has taken into account in developing the content of socio-economic rights and remedial orders. In his critique on the African Commission's weak legal reasoning, Mbazira argues that the African Commission's inadequacy is based on its failure to justify its findings by relevant international human rights instruments.⁴⁷⁶

Like the African Court, the African Court of Justice also has jurisdiction to issue "its judgment within ninety (90) days" after its deliberations.⁴⁷⁷ Similarly, the judgment of the African Court of Justice should state legal reasoning for its findings.⁴⁷⁸ According to article 46(1)-(2) of the African Court of Justice Protocol, the judgment of the African Court of Justice shall be final and binding.

4 4 6 Remedies and their enforcement

Article 27(1) of the African Court Protocol governs the Court's mandate to remedy individual rights violations in the African Charter:

"If the Court finds that there has been violation of a human or peoples' rights, it shall make appropriate orders to remedy the violation, including the payment of fair compensation or reparation."

Scholars have criticised article 27(1) as being restrictive. Naldi and Magliveras, for instance, compare it with article 63(1) of the Inter-American Convention. According to them, the provisions are restrictive as they do not expressly enable the Court to order a respondent State to stop practices that violate human rights.⁴⁷⁹

The fact that the African Court Protocol is silent on the power of the Court to order States to stop human rights abuses does not necessarily mean that the Court lacks such a mandate. The term "appropriate" in article 27(1) is broad and enables the African Court to issue a wide range of remedies to victims of socio-economic rights violations. This provision gives the Court a broad and flexible power to order appropriate remedies.⁴⁸⁰ Writing on article 26(1) of the draft African Court Protocol, which is similar to article 27(1) of the African Court Protocol, Shelton notes that this provision is broader compared to the remedial provisions of other supervisory organs.⁴⁸¹ These remedies

⁴⁷⁶ Mbazira (2006) *African Human Rights Law Journal* 344.

⁴⁷⁷ Art 43(1) of the African Court of Justice Protocol.

⁴⁷⁸ Art 43(2).

⁴⁷⁹ Naldi & Magliveras (1998) *Netherlands Quarterly of Human Rights* 450.

⁴⁸⁰ See also TM Antkowiak "Remedial approaches to human rights violations: The Inter-American Court of Human Rights and beyond" (2008) 46 *Columbia Journal of Transnational Law* 351 414.

⁴⁸¹ Shelton *Remedies in International Human Rights Law* 226.

may include the requirement that States should stop practices of socio-economic rights violations. Viljoen notes that the remedial mandate of the African Court is broad in that it avails the Court with the “discretion to choose from an open-ended list of ‘appropriate remedies’”.⁴⁸² Furthermore, the phrase “including the payment of fair compensation or reparation” also demonstrates that the list is not exhaustive in the sense that other remedial measures or forms of remedies can be applied. Commenting on article 27(1) of the African Court Protocol, Mugwanya argues that the remedial power of the African Court in article 27(1) is broad in two senses. Firstly, it allows the African Court to order appropriate remedies to redress specific violations. Secondly, it enables the Court to order a change of legislation or practices that violate human rights.⁴⁸³

Yeshanew rightly argues that the general formulation allows the African Court to order compensatory orders, as well as remedies that can ensure social reform.⁴⁸⁴ Writing on the African Commission’s remedial mandate, Naldi argues that remedies broadly include orders for reparations, which entail restitution, rehabilitation, and the payment of compensation.⁴⁸⁵ The Inter-American Court defines the term “reparations” as “measures that are intended to eliminate the effects” of a violation. The nature and amount of reparations depends on the “damage done both at the material and moral values” are not meant to “enrich or impoverish the victim or his heirs”.⁴⁸⁶ These forms of reparations can be applied by the African Court in its remedies jurisprudence. It should be noted that, in elaborating its jurisdiction to issue remedies in article 27(1), the African Court uses the term “reparations” in its Rules of Procedure in the sense that remedies take the form of reparations. Rule 34(5) of the African Court provides that:

“Any applicant who on his/her own behalf or on behalf of the victim wishes to be granted reparation pursuant to article 27(1) of the Protocol shall include the request for the reparation in the application in accordance with sub-rule 4 above. The amount of the reparation and the evidence relating thereto may be submitted subsequently within the time limit set by the Court.”

Remedies aim to repair the damage caused by violations and, if possible, to restore the victim to the position he or she was before the violation. The Inter-American Court held in *Ituango Massacres v Colombia* (*‘Ituango’*) that:

⁴⁸² Viljoen *International Human Rights Law* 445.

⁴⁸³ Mugwanya *Human Rights in Africa* 333.

⁴⁸⁴ Yeshanew *The Justiciability of Economic, Social and Cultural Rights* 201.

⁴⁸⁵ Naldi (2001) *Leiden Journal of International Law* 681.

⁴⁸⁶ *Guatemala* para 34. See also *La Cantuta v Peru (Merits, Reparations and Costs)* Inter-American Court of Human Rights Series C No 162 (29 November 2006) para 202.

“The State must provide necessary and sufficient resources to ensure that the victims of forced displacement may resettle in similar conditions to those they had before... in a place they freely and voluntarily choose.”⁴⁸⁷

Moreover, in *La Cantuta*, the Inter-American Court held that the requirement to redress human rights violations requires States to fully restore the victims to the position they were in before the violations. In circumstances where full restitution is impossible the supervisory organ should order alternative remedies, such as compensation to effectively remedy the violations.⁴⁸⁸

The broad formulation of article 27(1) allows the African Court to order a wide-range of remedies, such as restitution, rehabilitation, orders to stop practices of human rights violations, and compensation. Mugwanya argues that, in developing its remedies jurisprudence, the African Court should draw inspiration from other international human rights bodies such as the Inter-American Court, which applies these forms of remedies. According to him, the broad nature of article 27(1) enables the African Court to apply forms of remedies applied in other jurisdictions.⁴⁸⁹ According to Viljoen, the formulation of article 27(1) of the African Court Protocol is similar to that of article 63(1) of the Inter-American Convention.⁴⁹⁰

The jurisdiction of the African Court to issue remedies is significant for the interpretation of socio-economic rights, as it furthers the African Charter’s object and purpose to protect such rights. Moreover, the mandate of the African Court to issue remedies is significant, as it helps States to redress socio-economic rights violations through their domestic legal and administrative systems. As Shelton notes, the existence of remedies for violations implies that States responsible for violations have an obligation to redress them. The supervisory organ’s role is to ensure that a State fulfils this obligation.⁴⁹¹

The African Court of Justice has a similar remedial mandate. According to article 45 of the African Court of Justice Protocol, this Court can order “any appropriate measures” to remedy human rights violations, including fair compensation. These provisions are similarly broad to the manner elaborated on in this part above regarding the remedial mandate of the African Court.

⁴⁸⁷ *Ituango Massacres v Colombia (Preliminary Objections, Merits, Reparations and Costs)* Inter-American Court of Human Rights Series C No 148 (1 July 2006) para 404.

⁴⁸⁸ *La Cantuta* para 201.

⁴⁸⁹ Mugwanya *Human Rights in Africa* 333.

⁴⁹⁰ Viljoen *International Human Rights Law* 445.

⁴⁹¹ Shelton *Remedies in International Human Rights Law* 114.

The enforcement of the African Court's remedial decisions is governed by the article 30 of the African Court Protocol. According to article 30, States are required to comply with the African Court's judgments within the time limits stipulated by the Court and to "guarantee its execution". This provision places an obligation on States Parties to enforce remedial orders issued by the African Court.⁴⁹² The States' compliance with the African Court's decisions renders the protected socio-economic rights practical and effective. Writing on the Inter-American context, Pasqualucci notes that the effectiveness of the Inter-American Court's decisions and remedies depends on States' enforcement. Non-enforcement by States can render decisions and human rights in the Inter-American Convention ineffective.⁴⁹³ The ECHR held in *Verein gegen Tierfabriken Schweiz (VgT) v Switzerland (No 2)* ('VgT') that States found responsible for human rights violations have an obligation to enforce the decisions of the ECHR regarding those violations.⁴⁹⁴

The African Court of Justice Protocol requires States to comply with its remedial decisions within the time prescribed by the African Court of Justice.⁴⁹⁵ In the case of a State's failure to comply, the Court is mandated to refer the matter to the AHSG, which has the mandate to impose sanctions in terms of article 23(2) of the Constitutive Act.⁴⁹⁶

4 5 Conclusion

The African Charter, the African Court Protocol, and the African Court of Justice Protocol grant supervisory organs a broad interpretive mandate that enables them to interpret socio-economic rights and effectively remedy violations. The interpretive mandate of supervisory organs involves various jurisdictional aspects. These aspects include the *locus standi* of victims of socio-economic rights violations or their representatives; admissibility requirements; the mandate to issue provisional measures; the legal status of the decisions; and the mandate to issue remedies and monitor their enforcement.

Apart from the mandate to determine communications from individuals, the African Commission has the mandate to determine communications submitted by individuals or NGOs in the public interest. The mandate over *actio popularis* is significant for

⁴⁹² Wachira & Ayinla (2006) *African Human Rights Law Journal* 488.

⁴⁹³ Pasqualucci *The Practice and Procedure of the Inter-American Court* 303.

⁴⁹⁴ *Verein Gegen Tierfabriken Schweiz (VgT) v Switzerland (No 2)* (App No 32772/02 (ECHR, 30 June 2009) para 85.

⁴⁹⁵ Art 46(3) of the African Court of Justice Protocol.

⁴⁹⁶ Art 46(4)-(5).

interpreting socio-economic rights as it enables the African Commission to determine communications relating to socio-economic rights violations committed against the public. The African Charter broadly provides the Commission with the mandate to issue provisional measures and remedies, as well as the mandate to follow-up on States' compliance with issued remedies. A generous reading of the Charter as a whole, through a teleological approach to interpretation, demonstrates that it grants the African Commission such powers. This generous reading is significant, as it furthers the African Charter's object and purpose of protecting socio-economic rights.

The requirement that complainants of socio-economic rights violations should first exhaust local remedies is important, as it enables domestic legal and administrative systems to remedy violations. However, provisions governing such a requirement should be interpreted flexibly to help complainants who, for various reasons, such remedies are not available, adequate, or efficient. This flexibility assists complainants in accessing the African Commission for redress of their socio-economic rights violations and to ensure effective protection. The Commission's decisions in the form of recommendations are legally binding and enforceable. The object and purpose of these recommendations require that States implement them to ensure the effective protection of socio-economic rights. Similarly, the mandate to safeguard socio-economic rights granted in the African Charter renders the African Commission capable of issuing enforceable recommendations.

Provisions regarding the contentious mandate of the African Court should be interpreted in a manner that renders them effective. The teleological approach, through the principle of effectiveness, is an appropriate means to render contentious mandate provisions effective and practical. This effective interpretation enables the Court to interpret and apply the African Charter and other treaties, which acknowledge the competence of the African Court, as well as the protocols that supplement the African Charter. It also enables the Court to consider other relevant human rights treaties for guidance when interpreting the socio-economic rights in the African Charter. The use of other relevant human rights instruments guarantees external consistency with these instruments and bodies, which are imperative in interpreting the socio-economic rights in the African Charter.

The African Court Protocol grants the African Court a mandate to hear individual complainants broadly, both directly and indirectly. Direct access by individuals and NGOs is predicated on the condition that a declaration is made by a State that

acknowledges the competence of the African Court to determine cases submitted by individuals and NGOs. Regarding indirect access, the African Court has a mandate to consider, as a party and a witness, an individual whose case is submitted by the African Commission or a State. The argument that an individual cannot appear before the African Court as a party should be avoided. The teleological approach to interpretation enables the African Court to interpret provisions relating to individual access broadly in a manner that enables them to appear as parties even in cases that are submitted by the African Commission or a State.

Like the African Court Protocol, the interpretive provisions of the African Court of Justice Protocol grant the African Court of Justice a broad mandate to interpret socio-economic rights and remedy their violations. When it enters into force, the African Court of Justice will have a mandate to determine cases submitted by individuals directly. It will also have a mandate to issue provisional measures, binding judgments and remedial orders. This understanding of the mandate of the African Court of Justice is significant for the effective protection of socio-economic rights. The following chapter analyses and evaluates the jurisprudence of the African Commission.

Chapter 5

Analysing and evaluating the jurisprudence of supervisory organs

5 1 Introduction

The analysis in chapter two and four demonstrated two significant aspects relevant for the analysis of socio-economic rights' jurisprudence of the supervisory organs of the African Charter on Human and Peoples' Rights.¹ Chapter two² identified the teleological approach as the most appropriate interpretive methodology for interpreting the normative scope and content of socio-economic rights in the African Charter on Human and Peoples' Rights ('African Charter').³ It also identified that the approach is relevant for elaborating the nature of States' obligations imposed by these rights.⁴ Chapter four demonstrated that the African Charter grants the supervisory organs with a broad interpretive mandate that enables such organs to interpret all the rights in the African Charter in a way that develops their effective normative scope and content.⁵

The supervisory organs' interpretation of the socio-economic rights in the African Charter is vital in developing their normative scope and content. Writing on the lack of a definition of the right to property in various human rights instruments Krause argues that the meaning and content of this right depends on its interpretation by the supervisory bodies.⁶ Ssenyonjo notes that the formulation of the socio-economic rights provisions and a clear understanding of the obligations they impose require interpretation by the supervisory bodies.⁷ Odinkalu argued earlier that the meaningful development of the

¹ The supervisory organs of the African Charter in the context of this dissertation include the African Commission on Human and Peoples' Rights; the African Court on Human and Peoples' Rights; and the African Court of Justice and Human Rights. Since the African Court of Justice has not entered into force, this dissertation will analyse the implications of the provisions relating to its interpretive and remedial mandate in the discussion of the African Court.

² See chapter two, parts 2 2 3, 2 4, and 2 5.

³ African Charter on Human and Peoples' Rights (1981) OAU Doc.CAB/LEG/67/3 rev 5, 21 ILM 58 (1982) was adopted on 27 June 1981 and entered into force on 21 October 1986.

⁴ See chapter two, parts 2 2 3, 2 4 and 2 5.

⁵ See chapter four.

⁶ C Krause "The right to property" in A Eide, C Krause & A Rosas (eds) *Economic, Social and Cultural Rights: A Textbook 2 ed* (2001) 191 198.

⁷ M Ssenyonjo "Economic, social and cultural rights in the African Charter" in M Ssenyonjo (ed) *The African Regional Human Rights System: 30 Years after the African Charter on Human and Peoples' Rights* (2012) 55 59-60. It should also be noted that the constitutional protection of socio-economic rights in African States varies. Some States such as South Africa, Kenya, Angola and Mozambique protect these rights explicitly in their constitutions. Other States such as Senegal, Ethiopia, Uganda, Ghana, Nigeria, and Cameroon protect some of these rights explicitly, and include other socio-economic rights implicitly as

content of socio-economic rights in the African Charter depends on the interpretative mechanisms of the African Charter.⁸

The interpretation of socio-economic rights by the supervisory organs, in a manner that develops their scope and content, can be effected through various mechanisms. The mechanisms include resolutions, declarations on socio-economic rights,⁹ principles and guidelines on the implementation of socio-economic rights,¹⁰ and communications procedures. Writing on the African Commission on Human and Peoples' Rights ('African Commission') Mugwanya posits that all these mechanisms have helped the African Commission to develop the normative content of human rights in the African Charter.¹¹ As mentioned in chapter four, this dissertation focuses on non-state communications.¹² This chapter therefore, focuses only on the analysis and evaluation of the jurisprudence developed through non-state communications. The objective of this chapter is to analyse

directive principles of State policy. See S Liebenberg "Direct Constitutional Protection of Economic, Social and Cultural Rights in South Africa" in DM Chirwa & L Chenwi (eds) *The Protection of Economic, Social and Cultural Rights in Africa: International, Regional and National Perspectives* (2016) 305 305; GO Odongo & GM Musila "Direct Constitutional Protection of Economic, Social and Cultural Rights under Kenya's 2010 Constitution" in DM Chirwa & L Chenwi (eds) *The Protection of Economic, Social and Cultural Rights in Africa: International, Regional and National Perspectives* (2016) 338 346; AC Mandlate, J Nhamposha, & DM Chirwa "Direct Constitutional Protection of Economic, Social and Cultural Rights in Lusophone Legal Systems: Angola and Mozambique" in DM Chirwa & L Chenwi (eds) *The Protection of Economic, Social and Cultural Rights in Africa: International, Regional and National Perspectives* (2016) 372 372; F Diallo "Direct Constitutional Protection of Economic, Social and Cultural Rights in Francophone Legal Systems: Senegal" in DM Chirwa & L Chenwi (eds) *The Protection of Economic, Social and Cultural Rights in Africa: International, Regional and National Perspectives* (2016) 396 396-397; SA Yeshanew "Ethiopia's Hybrid Constitutional Protection of Economic, Social and Cultural Rights" in DM Chirwa & L Chenwi (eds) *The Protection of Economic, Social and Cultural Rights in Africa: International, Regional and National Perspectives* (2016) 423 426; C Mbazira "Uganda's Hybrid Constitutional Protection of Economic, Social and Cultural Rights" DM Chirwa & L Chenwi (eds) *The Protection of Economic, Social and Cultural Rights in Africa: International, Regional and National Perspectives* (2016) 447 448; PA Atupare "Ghana's Hybrid Constitutional Protection of Economic, Social and Cultural Rights" in DM Chirwa & L Chenwi (eds) *The Protection of Economic, Social and Cultural Rights in Africa: International, Regional and National Perspectives* (2016) 476 477; ES Nwauche "Indirect Constitutional Protection of Economic, Social and Cultural Rights in Nigeria" DM Chirwa & L Chenwi (eds) *The Protection of Economic, Social and Cultural Rights in Africa: International, Regional and National Perspectives* (2016) 501 501; and AN Akonumbo "Indirect Constitutional Protection of Economic, Social and Cultural Rights in Cameroon" DM Chirwa & L Chenwi (eds) *The Protection of Economic, Social and Cultural Rights in Africa: International, Regional and National Perspectives* (2016) 527 527.

⁸ Odinkalu "Implementing economic, social and cultural rights under the African Charter on Human and Peoples' Rights" in MD Evans & R Murray (eds) *The African Charter on Human and Peoples' Rights: The System in Practice 1986-2000* (2002) 178 215.

⁹ See Pretoria Declaration on Economic, Social and Cultural Rights in Africa, 2004.

¹⁰ The Principles and Guidelines on the Implementation of Economic, Social and Cultural Rights in the African Charter on Human and Peoples' Rights was adopted on 24 October 2011.

¹¹ GW Mugwanya *Human Rights in Africa: Enhancing Human Rights through the African Regional Human Rights System* (2003) 265.

¹² See chapter four, part 4 3 1.

and evaluate the African Charter supervisory organs' socio-economic rights jurisprudence. The strengths and weaknesses of the supervisory organs' decisions and their implications for the development of the normative content of socio-economic rights will be considered. The chapter applies the teleological approach and methodology for its application as an evaluative paradigm.¹³

The African Court on Human and Peoples' Rights ('African Court'), decided on merits its first socio-economic rights case a few days after the submission of this dissertation for examination but before the final submission. Thus, the discussion in this chapter mainly focuses on the jurisprudence of the African Commission and briefly analyses the recently decided case of the African Court in a postscript to the dissertation. Finally, the chapter will consider the implications of the African Commission's jurisprudence for the African Court and the African Court of Justice and Human Rights ('African Court of Justice').

5 2 Evolution of the jurisprudence of the African Commission

The African Commission is established under the provisions of article 30 of the African Charter.¹⁴ It was officially inaugurated on 2 November 1987 in Addis Ababa, Ethiopia.¹⁵ The Headquarters of the African Commission is in The Gambia however, it sits in different countries twice a year, mainly between March and April as well as October and November.¹⁶ The African Commission consists of eleven Commissioners who are chosen from amongst highly reputable Africans with a high degree of morality and integrity.¹⁷ The Commissioners should also be competent in human rights matters.¹⁸ Furthermore, chapter four also showed that the African Commission has the legal mandate to determine State and non-state communications.¹⁹ Through these two forms

¹³ The teleological approach as an evaluative paradigm is analysed in part 5 3 below.

¹⁴ See chapter four, part 4 2.

¹⁵ African Commission on Human and Peoples' Rights "History" (2016) *African Commission on Human and Peoples' Rights* <<http://www.achpr.org/about/history>> (accessed 12-09-2016).

¹⁶ African Commission on Human and Peoples' Rights "History" (2016) *African Commission on Human and Peoples' Rights*. See also CA Odinkalu & C Christensen "The African Commission on Human and Peoples' Rights: The development of its non-state communication procedures" (1998) 20 *Human Rights Quarterly* 235 236.

¹⁷ Art 31(1) of the African Charter.

¹⁸ Art 31(1).

¹⁹ See chapter four, part 4 3 1.

of communication procedure, the African Commission has developed valuable human rights jurisprudence since 1989.²⁰

The African Commission's development of the socio-economic rights jurisprudence started in 1995 when it decided on merits its first socio-economic rights communication.²¹ From 1995 to date there has been a growing body of socio-economic rights jurisprudence by the African Commission. At the time of writing, the latest socio-economic rights communication was decided in 2013,²² and the African Commission has already decided seventeen socio-economic rights communications on merits.²³

As shown below²⁴ the African Commission's socio-economic rights jurisprudence has been gradually developing in terms of the normative scope and content of socio-economic rights and their related obligations. The jurisprudence between 1995 and 2000 did not sufficiently develop the scope and content of the relevant socio-economic rights and their concomitant obligations. However, a more detailed elaboration of the scope and content of socio-economic rights and the obligations they impose on States is noted in the jurisprudence since 2001. This chapter takes stock of the development of the

²⁰ M Ssenyonjo "The development of economic, social and cultural rights under the African Charter on Human and Peoples' Rights by the African Commission on Human and Peoples' Rights" (2015) 4 *International Human Rights Law Review* 147 158.

²¹ *Free Legal Assistance Group v Zaire* Communications Nos 25/89, 47/90, 56/91, 100/93 (2000) AHRLR 74 (ACHPR).

²² *Dino Noca v Democratic Republic of the Congo* Communication No 286/2004.

²³ *Free Legal Assistance Group v Zaire* Communications Nos 25/89, 47/90, 56/91, 100/93 (2000) AHRLR 74 (ACHPR); *Pagnouille (on behalf of Mazou) v Cameroon* Communication no. 39/90 (2000) AHRLR 57 (ACHPR 1997); *Union Inter-africaine des Droits de l'Homme v Angola* Communication no. 159/96 (2000) AHRLR 18 (ACHPR 1997); *International Pen (on behalf of Saro-Wiwa) v Nigeria* Communication nos. 137/94, 139/94, 154/96 and 161/97 (2000) AHRLR 200 (ACHPR 1999); *Malawi African Association v Mauritania* Communications Nos 54/91, 61/91, 98/93, 164/97, 196/97 & 210/98 (2000) AHRLR 149 (ACHPR 2000); *Media Rights Agenda v Nigeria* Communication Nos 105/93, 128/94, 130/94, 152/96 (2000) AHRLR 200 (ACHPR 1998); *John K. Modise v Botswana* Communication No 97/93 (2000) AHRLR 30 (ACHPR 2000); *Social and Economic Rights Action Centre (SERAC) v Nigeria* Communication No 156/96, (2001) AHRLR 60 (ACHPR 2001); *Purohit and Moore v The Gambia* Communication No 241/2001 (2003) AHRLR 96 (ACHPR 2003); *Prince v South Africa* Communication No 255/2002 (2004) AHRLR 105 (ACHPR 2004); *Sudan Human Rights Organisation & Centre on Human Rights and Evictions (COHRE) v Sudan* Communications No 279/03-296/05 (2009) AHRLR 153 (ACHPR 2009); *Institute for Human Rights and Development in Africa v Angola* Communication No 292/2004 (2008) AHRLR 43 (ACHPR 2008); *INTERIGHTS, Institute for Development and Human Rights in Africa, and Association Mauritanienne des Droits de l'Homme v Mauritania* Communication No 373/09 (2010) AHRLR 90 (ACHPR 2010); *Zimbabwe Lawyers for Human Rights & Associated Newspapers of Zimbabwe v Republic of Zimbabwe* Communication No 284/03 (2009) AHRLR 235 (ACHPR 2009); *Mouvement Ivoirien Droits de l'Homme (MIDH) v Cote d'Ivoire* Communication No 262/02 (2008); *Kevin Mgwanga Gunme et al v Cameroon* Communication no. 266/03 (2009) AHRLR 9 (ACHPR 2009); *Centre for the Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council v Kenya* Communication No 276/2003 (2009) AHRLR 75 (ACHPR 2009); and *Dino Noca v Democratic Republic of the Congo* Communication no. 286/2004 (2012).

²⁴ See parts 5.4 and 5.5 below.

jurisprudence of both categories. It does so by analysing and evaluating some key communications of the African Commission decided since 1995. The following part identifies and discusses the paradigm that is used in this chapter to evaluate the jurisprudence.

5 3 Evaluative criteria derived from the teleological methodology

Chapter two developed the teleological approach as an appropriate approach for interpreting socio-economic rights in the African Charter.²⁵ The chapter identified that this approach to interpretation potentially applies object and purpose of the treaty to generate the meaning, scope and content of the provisions of a treaty. The chapter identified that the potential of the teleological approach is based on the fact that, through identifying the object and purpose of a treaty, a supervisory organ may be able to apply a variety of interpretative tools to its provisions. Significantly, the chapter identified key tenets of the teleological approach that the supervisory organs may engage to interpret socio-economic rights in the African Charter. The identified tenets include: the object and purpose of the African Charter; the text of the African Charter as a whole; preparatory work of the African Charter; other relevant international, regional, and national laws and jurisprudence; and the principle of effectiveness.

As a teleological tenet “the text of the African Charter as a whole” encompasses the preamble to the African Charter that includes interpretative tools such as the values of equality, dignity, freedom, and justice; the principle of interdependence of the rights, and the notion of African philosophy. Furthermore, the text of the African Charter as a whole includes operational provisions including general obligations in article 1 and the right to non-discrimination in article 2. It also includes socio-economic rights’ provisions, provisions relating to States’ obligations and other relevant provisions. All these elements were identified in chapter two as relevant for interpreting socio-economic rights.²⁶ These tenets of the teleological approach to interpretation are useful in the interpretative process for developing the scope and content of socio-economic rights in the African Charter, expanding the scope of socio-economic rights to include derived rights, explaining the nature of States’ obligations imposed by these rights, and identifying relevant remedial orders to be issued by the supervisory organs. The effective interpretation of socio-economic rights in a manner that improves the socio-

²⁵ See chapter two, part 2 2 3.

²⁶ See chapter two, parts 2 2 3 and 2 5.

economic conditions of individuals and groups in Africa depends on the development of these aspects.

Significantly, chapter two developed the methodology for the application of the teleological approach to interpretation.²⁷ The methodology aims at guiding the supervisory organs to apply the tenets of this approach for the effective interpretation of the socio-economic rights coherently. The coherent application of the teleological approach is vital for the furtherance of the object and purpose of the African Charter relating to socio-economic rights.

This chapter uses the teleological methodology developed in chapter two as a paradigm to evaluate the jurisprudence of the African Commission. This part outlines the manner in which this evaluative paradigm is applied. It asks whether the African Commission applies the teleological approach in its jurisprudence. If the answer is to the affirmative, it evaluates the nature of the findings of the African Commission regarding the scope and content of the socio-economic rights and their related obligations. Particularly, it evaluates whether the African Commission sequentially applies the identified tenets in developing the scope and content of socio-economic rights, in developing the derived rights, in elaborating the nature of States' obligations, and in issuing the remedial recommendations. Thus, guiding questions in the evaluative process will be: has the African Commission applied the teleological approach? Does the application correspond with the methodology? What are the implications? The aim of the evaluation is to identify aspects of the socio-economic rights jurisprudence that correspond with the teleological approach and those that do not. At the end of the evaluation the implications for the socio-economic rights jurisprudence will be considered. However, it is important to analyse the jurisprudence of the African Commission before evaluating it. The following part analyses the jurisprudence of the African Commission.²⁸

²⁷ See chapter two, part 2.5.

²⁸ Considering the fact that some of the communications determined by the African Commission involve similar allegations of socio-economic rights and the reasoning of the African Commission in these communications has been similar, this chapter analyses four communications in the limited phase and five communications in the expansive phase. However, the communications that are not analysed in this chapter will be referred to, for the purposes of showing similarities or differences regarding the findings and reasoning of the African Commission. The communications analysed in the limited phase include *Free Legal Assistance Group v Zaire* Communications Nos 25/89, 47/90, 56/91, 100/93 (2000) AHRLR 74 (ACHPR 1995); *Pagnouille (on behalf of Mazou) v Cameroon* Communication No 39/90 (2000) AHRLR 57 (ACHPR 1997); *Union Interafricaine des Droits de l'Homme v Angola* Communication No 159/96 (2000)

5 4 Jurisprudence of the African Commission: Analysis

5 4 1 Introduction

As mentioned in chapter three the African Charter recognises a wide range of socio-economic rights.²⁹ Chapter four demonstrated the broad interpretive and remedial mandate vested on the African Commission by the African Charter to interpret socio-economic rights in its jurisprudence. As demonstrated above, since its inauguration in 1987 the African Commission has developed a valuable jurisprudence regarding socio-economic rights.³⁰ This jurisprudence is analysed in this chapter. The analysis focuses on the socio-economic rights' violations alleged by the complainants, the findings of the African Commission and its reasoning to the findings.

The jurisprudence of the African Commission can be divided in two phases. The first phase consists of communications in which there was a limited development of the normative scope and content of socio-economic rights by the African Commission. This phase ('the limited phase') includes all communications handed down prior to the African Commission's decision in *Social and Economic Rights Action Centre (SERAC) v Nigeria* ('SERAC')³¹ in 2001. The second phase includes communications in which the African Commission developed the scope and content of socio-economic rights more expansively and through better reasoning. The latter phase ('the expansive phase') includes all communications after the *SERAC* decision. The following part analyses the socio-economic rights jurisprudence in the limited phase.

AHRLR 18 (ACHPR 1997); *International Pen (on behalf of Saro-Wiwa) v Nigeria* Communication Nos 137/94, 139/94, 154/96 and 161/97 (2000) AHRLR 200 (ACHPR 1999). The communications that are analysed in the expansive phase include: *Social and Economic Rights Action Centre (SERAC) v Nigeria* Communication No 156/96, (2001) AHRLR 60 (ACHPR 2001); *Purohit and Moore v The Gambia* Communication No 241/2001 (2003) AHRLR 96 (ACHPR 2003); *Sudan Human Rights Organisation & Centre on Human Rights and Evictions (COHRE) v Sudan* Communications No 279/03-296/05 (2009) AHRLR 153 (ACHPR 2009); *Kevin Mgwanga Gunme et al v Cameroon* Communication No 266/03 (2009) AHRLR 9 (ACHPR 2009); *Centre for the Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council v Kenya* Communication No 276/2003 (2009) AHRLR 75 (ACHPR 2009).

²⁹ See chapter, part 3 3 4.

³⁰ Earlier scholarship notes that only a few socio-economic rights communications were brought before the African Commission. According to them, the African Commission's early jurisprudence dealt mainly with civil and political rights rather than socio-economic rights. See M Ssenyonjo "Analysing the economic, social and cultural rights jurisprudence of the African Commission: 30 years since the adoption of the African Charter" (2011) 29 *Netherlands Quarterly of Human Rights* 358 360.

³¹ *Social and Economic Rights Action Centre (SERAC) v Nigeria* Communication no. 155/96 (2001) AHRLR 60 (ACHPR 2001).

5 4 2 The limited phase: An analysis

5 4 2 1 *Free Legal Assistance Group v Zaire*

In *Free Legal Assistance Group v Zaire* ('*Free Legal Assistance*')³² the African Commission had to decide whether the confiscation of church property, denying the victims access to education, mismanagement of public finances, failure to provide basic services, shortages of medicine, as well as the closure of universities and secondary schools by the respondent State violated the rights to health and education as set out in articles 16 and 17 of the African Charter.³³

Regarding the right to health the African Commission stated that article 16 of the African Charter recognises the right of every individual to enjoy "the best attainable state of physical and mental health".³⁴ It stated further that the failure of the respondent State to provide basic services including safe drinking water and electricity, as well as a lack of medicine, amounts to a violation of article 16 of the African Charter.³⁵ On the right to education, the African Commission pointed out that article 17 of the African Charter recognises the right to education. The African Commission went on to decide that the closure of institutions of learning such as universities and secondary schools constitutes a violation of article 17.³⁶ The African Commission, without any legal reasoning, went on to state that the facts of the communication amount to serious and massive violations of article 16 and 17 of the African Charter.³⁷ Having found the respondent State to be in violation of articles 16 and 17 of the African Charter, the African Commission issued undetailed declaratory remedies.³⁸ It merely held that the facts in *Free Legal Assistance* amount to serious and massive violation of articles 16 and 17 of the African Charter.³⁹

The African Commission did not elaborate on the nature and scope of States' obligations that the rights to health and education impose on them. It remained unclear as to what the African Charter obliges the Member States to do to give effect to these rights. The African Commission issued declaratory remedies, which lack specificity and

³² *Free Legal Assistance Group v Zaire* Communications Nos 25/89, 47/90, 56/91, 100/93 (2000) AHRLR 74 (ACHPR 1995).

³³ Paras 3-4.

³⁴ Para 47.

³⁵ Para 47.

³⁶ Para 48

³⁷ Para 49.

³⁸ Para 49.

³⁹ Para 49.

detail. As mentioned in chapter four these remedies are inadequate to redress the violations of the socio-economic rights effectively.⁴⁰

5 4 2 2 Pagnouille (on behalf of Mazou) v Cameroon

In *Pagnouille (on behalf of Mazou) v Cameroon* ('Mazou'),⁴¹ the African Commission was called upon to decide on a communication regarding the right to work in article 15 of the African Charter. The complainant alleged that the respondent State's military tribunal sentenced the victim to five years imprisonment for the offence of hiding his brother who was alleged to have committed the offence of an attempted *coup de tat*. It was further alleged that the respondent State failed to reinstate the victim in his magisterial position after his release from prison. Thus, the complainant alleged a violation of the right to work contained in article 15 of the African Charter.⁴²

The African Commission merely noted that the provisions of article 15 of the African Charter protect the right to work "under equitable and satisfactory conditions".⁴³ It went on to state that the respondent State's failure to reinstate the victim in his position as a magistrate, while other people who were condemned of a similar offence had been reinstated, was a violation of article 15 of the African Charter.⁴⁴

In this communication, the African Commission did not elaborate on the scope and content of the right to work. It relied exclusively on the narrow and literal textual approach to interpret the provisions of article 15 of the African Charter. The broad formulation of article 15 does not provide sufficient details regarding the scope and content of the right to work. Moreover, the African Commission did not attempt to describe the nature and scope of States' obligations imposed by this right. It merely found the respondent State in violation of article 15 of the African Charter and proceeded to issue broad declaratory remedies.⁴⁵ It then recommended that the respondent State should draw all the "necessary legal conclusions" to reinstate the victim. It did not elaborate upon these "necessary legal conclusions" that the respondent State was required to take. It did not apply any legal reasoning for its remedial findings.

⁴⁰ See chapter four, part 4 3 3 1.

⁴¹ *Pagnouille (on behalf of Mazou) v Cameroon* Communication No 39/90 (2000) AHRLR 57 (ACHPR 1997).

⁴² *Mazou* paras 1-2.

⁴³ Para 22.

⁴⁴ Para 29.

⁴⁵ Para 30.

5 4 2 3 *Union Interafricaine des Droits de l'Homme v Angola*

In *Union Interafricaine des Droits de l'Homme v Angola* ('*Union Interafricaine*')⁴⁶ the complainants brought the communication on behalf of West African citizens who alleged that the respondent State has expelled them from its territory in 1996. The complainants alleged that during the expulsion the victims lost their belongings. The complainants alleged further that the respondent State violated the rights to non-discrimination, the right to be heard, and the right to freedom of movement in articles 2, 7(1)(a), 12(4) - (5) of the African Charter.⁴⁷

Importantly, the African Commission linked these allegations relating to the violation of the civil and political rights with socio-economic rights in the African Charter.⁴⁸ The African Commission started by stating that difficulties in economic conditions necessitate States to adopt various measures to protect their citizens and economy from foreigners.⁴⁹ However, the African Commission stated further that such measures should not violate the enjoyment of human rights.⁵⁰ The African Commission pointed out that mass expulsions of people on any ground amounts to "special" violations of human rights.⁵¹ It went further to state that deportations violate a variety of rights guaranteed in the African Charter such as the socio-economic rights to property, work, education, and protection of the family in articles 14, 15, 17(1) and 18(1) of the African Charter.⁵²

However, the African Commission failed to elaborate how deportation is connected to the violation of the socio-economic rights to property, work and education, though it noted their inter-relation.⁵³

Furthermore, although it linked deportation with rights to property, work, education and the protection of the family, it only elaborated on the violation of the right to protection of the family.⁵⁴ Thus the African Commission held that the deportation of the victims resulted in separating them from their families.⁵⁵ The African Commission found the respondent State to have infringed, amongst other rights, the right to property and

⁴⁶ *Union Interafricaine des Droits de l'Homme v Angola* Communication No 159/96 (2000) AHRLR 18 (ACHPR 1997).

⁴⁷ Paras 1-2.

⁴⁸ Para 17.

⁴⁹ Para 16.

⁵⁰ Para 16.

⁵¹ Para 16.

⁵² Para 17.

⁵³ Para 17.

⁵⁴ Para 17.

⁵⁵ Para 17.

family in articles 14 and 18(1) of the African Charter.⁵⁶ However, the African Commission failed to develop the scope and content of these rights. It went on to refer to the provisions of article 2 of the African Charter on non-discrimination and stated in a general way that this article requires Member States to guarantee the enjoyment of all the rights in the African Charter without distinction.⁵⁷

Without providing any supporting reasons, the African Commission issued declaratory remedies, requiring the respondent State to “draw all legal consequences arising from the present decision”.⁵⁸ It is uncertain as to what specifically the respondent State is required to do to redress the violations. Application of the teleological approach to interpretation would have assisted the African Commission, as was shown in chapter four,⁵⁹ to apply various provisions of the African Charter to issue detailed remedial orders including declaratory, restitutionary, and compensatory remedies.

5 4 2 4 *International Pen (on behalf of Saro-Wiwa) v Nigeria*

In *International Pen (on behalf of Saro-Wiwa) v Nigeria* (*‘Saro-Wiwa’*)⁶⁰ the African Commission was called upon to determine whether the respondent State violated the right to health in article 16 of the African Charter. The complainants in *Saro-Wiwa* brought the communication on behalf of Mr Kenule Beeson Saro-Wiwa and his co-defendants who were detained in the respondent State’s detention facilities. The complainants alleged that the respondent State denied the victim access to medical attention including medicine to regulate his blood pressure, access to his family, as well as detaining him in poor detention facilities.⁶¹ The complainants alleged that the respondent State violated, amongst other rights, the right to dignity in article 5 and the right to health in article 16 of the African Charter as well as the States obligations in article 1.⁶²

The African Commission started its judgment by determining the right to dignity. It stated that prohibition of torture, cruel, inhuman or degrading treatment in article 5 includes not only conducts that cause physical or psychological pain but also conducts

⁵⁶ Paras 16-17 and 21.

⁵⁷ Para 18.

⁵⁸ Para 22.

⁵⁹ See chapter four, part 4 3 6.

⁶⁰ *International Pen (on behalf of Saro-Wiwa) v Nigeria* Communication Nos 137/94, 139/94, 154/96 and 161/97 (2000) AHRLR 200 (ACHPR 1999).

⁶¹ Paras 1-2.

⁶² Para 13.

that humiliates or compels a person to unwillingly act in a certain way.⁶³ The African Commission went on to determine the violation of article 4 on the right to life.⁶⁴ Significantly, it connected the right to life with the State's obligation by broadly stating that this right imposes upon a State an obligation not to let an individual, who is in the State's custody, die.⁶⁵ It went on to hold that the State's conduct to deny Mr. Saro-Wiwa medical attention whilst in custody endangered his life and caused multiple violations of article 4.⁶⁶

In *Saro-Wiwa* the African Commission broadly demonstrated the inter-relation between the rights to dignity, life and health. However, it did not clearly elaborate upon this interdependence. Although the African Commission did make an attempt to develop the content of the right to dignity, it did not sufficiently explain the linkages between the right to dignity and the violations of the right to health.⁶⁷

Regarding the right to health the African Commission referred to provisions of article 16 of the African Charter and stated that the State's obligation is heightened where the victim is held in the State's custody.⁶⁸ It went on to state that the respondent State bore a "direct responsibility" by denying Mr. Saro-Wiwa access to a qualified medical doctor. According to the African Commission, this conduct by the respondent State endangered the life of Mr. Saro-Wiwa.⁶⁹

The African Commission went on to determine the violation of article 1 of the African Charter.⁷⁰ It stated that upon ratification Member States are obliged to respect the provisions of the African Charter.⁷¹ Without any legal reasoning that elaborates the State's obligations in terms of article 1 of the African Charter the African Commission held that the failure of the respondent State to implement its obligations violates article 1.⁷² The African Commission held that the respondent State's denial of medical attention to the victim constitutes a violation of article 16,⁷³ but it did not elaborate on the nature of State's obligations imposed by the right to health. Moreover, the African Commission did not elaborate on the scope and content of the right to health. Furthermore, the African

⁶³ Para 79.

⁶⁴ Para 102.

⁶⁵ Para 104.

⁶⁶ Para 104.

⁶⁷ Paras 78-84.

⁶⁸ Para 112.

⁶⁹ Para 112.

⁷⁰ Para 113.

⁷¹ Para 116.

⁷² Para 122.

⁷³ Paras 111-112.

Commission failed to elaborate on the normative scope and content of prisoners' right to health although *Saro-Wiwa* dealt with persons in prisons. This could have been an opportunity for the African Court to expand the scope of this right relating to its holders. It merely relied on the broad textual provisions of article 16 which, as discussed in chapter three, requires further interpretation to ascertain its application in various contexts.

Furthermore, although *Saro-Wiwa* alleged denial of the right to the protection of the family, the African Commission failed to direct its mind to this significant socio-economic right. Moreover, the African Commission broadly elaborated the nature of States' obligations. This broad definition of States' obligations is unhelpful, as it does not help States to understand what they should do to give effect to the relevant socio-economic rights. The African Commission proceeded to issue its usual broad declaratory remedies typified in this phase of its socio-economic rights jurisprudence.⁷⁴

5 4 2 5 Conclusion

The analysis above has demonstrated that the African Commission in the limited phase had an opportunity to interpret the explicit socio-economic rights to property, work, health, education and family. It also had an opportunity to determine the violations of the implicit socio-economic rights to food and water. However, in all the communications the analysis has shown that the African Commission failed to develop the scope and content of these rights and their related obligations in any detail. In some communications, it defined the obligations broadly in a manner that does not help States to understand their precise obligations in giving effect to the relevant socio-economic rights.

With regard to remedial recommendations the African Commission issued mainly very broadly formulated declaratory, restitutionary and compensatory remedies. The following part proceeds to analyse the jurisprudence of the African Commission in what I describe as "the expansive phase" of the African Commission's socio-economic rights jurisprudence.

⁷⁴ Para 117.

5 4 3 The expansive phase: An analysis

5 4 3 1 *Social and Economic Rights Action Centre (SERAC) v Nigeria*

The complainants in *SERAC* brought the communication on behalf of the citizens of the respondent State who belong to the Ogoni Community. The complainants alleged that the military government of the respondent State had been directly engaged in oil production through the State oil company, the Nigerian National Petroleum Company (NNPC), which was the majority shareholder in a consortium with Shell Petroleum Development Corporation (SPDC). According to the complainants, the oil production activities had been contaminating the environment, therefore causing environmental degradation and health problems to the Ogoni peoples. The complainants alleged that the respondent State had been disposing toxic wastes into the surroundings and local water sources, contrary to international environmental standards. It was further alleged that the respondent State's failure to maintain its oil facilities caused numerous avoidable spills of oil in the proximity of villages resulting in the contamination of water, soil and air, as well as in serious short and long-term health impacts such as skin infections, gastro-intestinal and respiratory ailments, increased risks of cancers, and neurological and reproductive problems. According to the complainants, the respondent State also failed to control the operations of the private oil companies as it has failed to require such companies to take safety measures. Furthermore, the respondent State failed to require the oil companies or its agents to conduct basic health and environmental studies relating to the dangers of oil operations. Moreover, the respondent State had been withholding relevant information on the possible risks created by oil production activities. It was further alleged that the victims were not engaged in the decision-making process concerning the development projects affecting their land. The complainants alleged that the respondent State, through its security forces attacked, burned and destroyed several villages and homes in Ogoniland, claiming that this action was taken to dislodge officials and supporters of the Movement of the Survival of Ogoni People (MOSOP). Allegedly, the respondent State destroyed and threatened food sources in Ogoniland through pollution of soil and water on which the Ogoni people relied for their farming and fishing activities. During the raids on villages the armed forces destroyed crops and killed animals. All these activities resulted in malnutrition and starvation among the Ogoni people. The complainants alleged that

these actions and omissions of the respondent State amounted to the violations of articles 2, 4, 14, 16, 18(1), 21 and 24 of the African Charter.⁷⁵

The African Commission commenced its decision by describing the States' obligations as set out in the African Charter. According to the African Commission, both civil and political rights as well as socio-economic rights impose upon States a quartet of obligations, namely: the duty to respect, protect, promote and fulfil the rights.⁷⁶ The obligation to respect requires States to refrain from interfering in the enjoyment of all fundamental rights of the right-holders.⁷⁷ With regard to socio-economic rights in particular, this obligation requires States to respect the free use of resources owned or at the disposal of individuals, both individually and collectively.⁷⁸ The obligation to protect entails a State's duty to protect, through legislation and provision of effective remedies, the right-holders against violation by third parties.⁷⁹ This obligation relates to the obligation to promote the enjoyment of all rights.⁸⁰ The obligation to fulfil requires a State to "move its machinery towards actual realisation" of the individuals' rights and freedoms as recognised by various international human rights instruments ratified by the State.⁸¹ By drawing inspiration from the provisions of article 2 of the International Covenant on Economic, Social and Cultural Rights ('ICESCR'),⁸² the African Commission stated that States are required to implement all these categories of obligations.⁸³ It went on to state that the provisions of articles 60 and 61 of the African Charter oblige the African Commission to draw inspiration from the relevant international and regional human rights instruments and jurisprudence. This reasoning and aspect of the application of relevant international, regional and national human rights laws and jurisprudence resonates strongly with the teleological approach to interpretation of socio-economic rights.

The African Commission went on to determine the allegations regarding the violations of articles 16 and 24 of the African Charter.⁸⁴ The African Commission stated

⁷⁵ *SERAC* paras 1-9.

⁷⁶ Para 44.

⁷⁷ Para 45.

⁷⁸ Para 45.

⁷⁹ Para 46.

⁸⁰ Para 46.

⁸¹ Para 47.

⁸² The International Covenant on Economic, Social and Cultural Rights GA Res 2200A (XXI) 16 December 1966, 993 UNTS 3 ('ICESCR') was adopted by the United Nations General Assembly on 16 December 1966 and entered into force on 3 January 1976.

⁸³ *SERAC* para 48.

⁸⁴ Para 50.

that the joint reading of the provisions of articles 16 and 24 guarantees the right to healthy environment.⁸⁵ It further explained that the right to a healthy environment relates to socio-economic rights.⁸⁶ The African Commission noted that polluted environment does not meet the standards of healthy living conditions and is dangerous to the individual's physical and mental health.⁸⁷ According to the African Commission, article 24 imposes upon States "an obligation to take reasonable legislative and other measures" to avoid air and environmental pollution as well as promoting progressive environmental conservation and "ecologically sustainable development and use of natural resources".⁸⁸ The African Commission drew inspiration from the provisions of article 12 of the ICESCR. According to the African Commission, these provisions require the respondent State to take all necessary steps to improve the environmental and industrial hygiene in all its aspects.⁸⁹ It stated further that both articles 16 and 24 require States to refrain from directly threatening the health and environment of their citizens. In line with the obligations in these articles, States must also order or allow independent scientific monitoring of threatened environments; require and publish environmental and social impact studies before introducing any major industrial development; undertake appropriate monitoring and provide information to those communities exposed to hazardous materials and activities; provide them with meaningful opportunities to be heard and to participate in the developmental decisions affecting their communities.⁹⁰ According to the African Commission, the respondent State failed to take these outlined measures, which would have protected the victims.⁹¹ It therefore found the respondent State to be in violation of articles 16 and 24 of the African Charter.

Moreover, the African Commission determined the alleged violation of article 21 concerning the right of peoples to dispose freely of their natural wealth and resources. It referred to the provisions of article 21 and started by explaining their origin.⁹² The article originates from the colonial time whereby the colonisers exploited Africa's human and natural resources.⁹³ The African Commission pointed out that this exploitation deprived

⁸⁵ Para 51.

⁸⁶ Para 51

⁸⁷ Para 51

⁸⁸ Para 52.

⁸⁹ Para 52.

⁹⁰ Paras 52-53.

⁹¹ Para 54.

⁹² Paras 55-56.

⁹³ Para 56.

people of their land and caused poverty.⁹⁴ The African Commission pointed out that the intention of the drafters of the African Charter to include article 21 was to remind Member States about this significant and painful history so that they protect the socio-economic rights of the people in Africa.⁹⁵ Although the African Commission referred to the provisions of article 21, it failed to state clearly the aspects of article 21 that were involved. The African Commission then elaborated upon the nature and scope of States' obligations imposed by this right.⁹⁶ According to the African Commission, the State has an obligation to protect its citizens through legislation and effective enforcement, as well as protecting them from damaging acts perpetrated by third parties.⁹⁷ Drawing inspiration from *Velasquez Rodriguez v Honduras* ('*Velasquez*')⁹⁸ the African Commission held that a State violates its obligation to protect when it permits third parties to act in a manner that violates peoples' rights.⁹⁹ The African Commission then held that the respondent State failed to protect the victims from interferences in the enjoyment of their rights.¹⁰⁰ Instead, it facilitated the destruction of Ogoniland. It therefore found the respondent State had violated article 21.¹⁰¹ The reference to the preparatory work of the African Charter and drawing inspiration from relevant international human rights instruments correspond with the teleological approach to interpretation.

The African Commission went on to determine the right to housing implicitly recognised in articles 14, 16 and 18(1) of the African Charter.¹⁰² The African Commission held that, while the African Charter does not expressly recognise the right to housing, this right is implicitly protected through the provisions protecting the rights to health, property and family.¹⁰³ According to the African Commission, when housing is destroyed, property, health and family are negatively affected.¹⁰⁴ It stated that, at the minimum the right to shelter imposes upon the respondent State an obligation to refrain from destroying the housing of its citizens and to desist from preventing their efforts to

⁹⁴ Para 56.

⁹⁵ Para 56.

⁹⁶ Para 57.

⁹⁷ Para 57.

⁹⁸ *Velasquez Rodriguez Case (Judgment)* Inter-American Court of Human Rights Series C 4 (29 July 1988).

⁹⁹ SERAC para 57.

¹⁰⁰ Para 58.

¹⁰¹ Para 58.

¹⁰² Para 60.

¹⁰³ Para 60.

¹⁰⁴ Para 60.

reconstruct the destroyed homes.¹⁰⁵ It stated further that this obligation requires States to refrain from conducting, supporting or tolerating conduct that violates the right to housing.¹⁰⁶ The obligation to protect housing requires the respondent State to prevent third parties from violating the right to housing.¹⁰⁷ According to the African Commission, the right to housing includes not only “a roof over one’s head” but also individuals’ “right to be left alone and to live in peace”.¹⁰⁸ The African Commission stated that the respondent State’s actions to destroy houses and villages in Ogoni, as well as its armed forces’ obstruction, harassment, beating and killing of innocent people demonstrate its failure to observe these two minimum obligations and constitute a massive violation of the rights to shelter. Thus, the respondent State violated articles 14, 16, and 18(1) of the African Charter.¹⁰⁹ Moreover, the African Commission held that the implicit right to adequate housing also incorporates the right to protection against forced evictions.¹¹⁰ Drawing on the Committee on Economic, Social and Cultural Rights’ (‘CESCR’)¹¹¹ definition, the African Commission defined forced evictions as the permanent removal, against their will, of individuals, families and communities from their homes which they occupy without the provision of, and access to, appropriate forms of legal or other protection.¹¹² According to the African Commission, forced evictions cause physical, psychological and emotional distress, loss of means of economic sustenance and increased impoverishment.¹¹³ They cause sporadic deaths, break up of families and homelessness.¹¹⁴ The African Commission drew inspiration from the CESCR General Comment 4 on the right to adequate housing (‘General Comment 4’)¹¹⁵ that recognises the right of every individual to possess a security of tenure that ensures legal protection against forced eviction, harassment, and other threats against his or her property.¹¹⁶ The

¹⁰⁵ Para 61.

¹⁰⁶ Para 61.

¹⁰⁷ Para 61.

¹⁰⁸ Para 61.

¹⁰⁹ Para 62.

¹¹⁰ Para 63.

¹¹¹ The Committee on Economic, Social and Cultural Rights (‘CESCR’) was established by the Economic and Social Council resolution 1985/17. The CESCR is composed of 18 experts who are competent in the human rights field.

¹¹² *SERAC* para 63.

¹¹³ Para 63.

¹¹⁴ Para 63.

¹¹⁵ CESCR General Comment 4, The right to adequate housing (1991) UN Doc E/1992/23 (‘General Comment 4’).

¹¹⁶ *SERAC* para 63.

respondent State's actions demonstrated a violation of this right enjoyed by the Ogoni as a collective right.¹¹⁷

The African Commission then dealt with the right to food alleged by the applicants to be impliedly incorporated in articles 4, 16 and 22 of the African Charter. The African Commission noted that the right to food is directly linked to the dignity of human beings and relevant for the enjoyment and fulfilment of other rights including, health, education, work and political participation.¹¹⁸ The respondent State is bound by the African Charter and international law to protect and improve existing food sources, and ensure access to adequate food for its citizens.¹¹⁹ The minimum core of the right to food requires the respondent State to desist from destroying or contaminating food sources and prevent peoples' efforts to feed themselves.¹²⁰ The respondent State violated the minimum core of the right to food, namely the destruction of food sources through armed forces and State oil companies, permitting private companies to destroy food sources.¹²¹ Through terror, it also prevented the Ogoni people from feeding themselves.¹²² Through these established actions, the respondent State violated the Ogoni peoples' right to food.¹²³

Regarding the violation of the right to life, the African Commission held that the violations of the rights to housing, food, property, health, and protection of the family amounted to the violation of the right to life.¹²⁴ This was done through the killings of Ogonis, environmental pollution and degradation, and the destruction of farms.¹²⁵

Having found violations of articles 2, 4, 14, 16, 18(1), 21 and 24 of the African Charter, the African Commission required the respondent State to guarantee the protection of the victims' rights to environment, health and livelihood. Moreover, the African Commission required the respondent State to adequately compensate the victims, as well as ensure that environmental and social impact assessment is conducted.

¹¹⁷ Para 63.

¹¹⁸ Para 65.

¹¹⁹ Para 65.

¹²⁰ Para 65.

¹²¹ Para 66.

¹²² Para 66.

¹²³ Para 66.

¹²⁴ Para 67.

¹²⁵ Para 67.

5 4 3 2 *Purohit and Moore v The Gambia*

In *Purohit and Moore v The Gambia* (*'Purohit'*)¹²⁶ the complainants called upon the African Commission to decide on the alleged violations of the rights to non-discrimination, equality, dignity, and health. The complainants brought the communication on behalf of the patients who were detained in a psychiatric unit of the Royal Victoria Hospital at Campama, and on behalf of both the current and future mental health patients who will be detained in accordance with the Mental Health Acts of the respondent State.¹²⁷ The complainants alleged that the law governing the mental health in the respondent State was out-dated.¹²⁸ They referred to the failure of the Lunatic Detention Act ('LDA') to define the term "lunatic", and to the lack of provisions and significant requirements to protect the mental health of patients during the diagnosis, certification and detention processes.¹²⁹ They further claimed that the psychiatric unit was overcrowded and that there was a lack of requirement of consent to treatment or continuation of treatment.¹³⁰ They also alleged the non-independence of the administration, management and living condition processes within the psychiatric unit.¹³¹ They further alleged that the LDA does not provide for legal aid scheme and compensatory mechanisms for the violations of the patients' rights.¹³² As such, the complainants alleged the violation of articles 16 and 18(4) of the African Charter that provide for the right to health.¹³³ Moreover, the complainants alleged that the treatment of mental patients to indefinite institutionalisation and the conditions in which they are held under the LDA violate the rights to non-discrimination, equality and dignity provided in articles 2, 3 and 5 of the African Charter.¹³⁴

In response, the respondent State submitted that it plans to amend the LDA. It further submitted that the Constitution of The Gambia contains provisions, which can be used by persons detained under the LDA, to challenge their detention.¹³⁵ The respondent

¹²⁶ *Purohit and Moore v The Gambia* Communication No 241/2001 (2003) AHRLR 96 (ACHPR 2003).

¹²⁷ Para 1.

¹²⁸ Para 3.

¹²⁹ Para 4.

¹³⁰ Para 5.

¹³¹ Para 6.

¹³² Para 8.

¹³³ Para 9.

¹³⁴ Para 9.

¹³⁵ Paras 33-34 and 50-51.

State admitted that it did not provide legal aid to this vulnerable group to access the legal procedures in the country to challenge their detention.¹³⁶

The African Commission commenced by describing the nature of States' obligation.¹³⁷ The African Commission stated that by ratifying the African Charter Member States are required to take immediate measures to comply with their obligations in the African Charter.¹³⁸ It explained further that ratification also requires Member States to ensure their domestic laws are in conformity with the African Charter.¹³⁹ It stated that the developments in international human rights law concerning persons with disabilities require the respondent State to amend the LDA in line with such international instruments.¹⁴⁰

The African Commission went on to determine the violation of the rights to non-discrimination and equality. The African Commission found the respondent State to be in violation of articles 2 and 3 of the African Charter.¹⁴¹ According to the African Commission, the provisions of articles 2 and 3 of the African Charter are significant in that they prohibit discrimination in all aspects and guarantee individuals' fair and just treatment in a country's legal system.¹⁴² The African Commission held that¹⁴³ the respondent State's argument that the persons described as lunatics can challenge their detention through provisions of the constitution, without legal aid or assistance,¹⁴⁴ do not satisfy the requirements of anti-discrimination and equal protection in articles 2 and 3 of the African Charter. Neither are they in conformity with Principle 1(4) of the United Nations Principles for the Protection of Persons with Mental Illness and the Improvement of Mental Health Care ('UN Principles for the Protection of Persons with Mental Illness').¹⁴⁵ According to the African Commission, since most of the mental patients are collected from the streets or come from poor backgrounds, they cannot afford the services of private lawyers.¹⁴⁶ The general legal

¹³⁶ Paras 34 and 52.

¹³⁷ Para 42.

¹³⁸ Para 42.

¹³⁹ Para 42.

¹⁴⁰ Para 42.

¹⁴¹ Para 54.

¹⁴² Para 54; and the Findings of the African Commission in *Purohit*.

¹⁴³ Para 54.

¹⁴⁴ Para 50.

¹⁴⁵ United Nations General Assembly A/RES/46/119 the Protection of Persons with Mental Illness and the Improvement of Mental Health Care, 75th Plenary Meeting, 17 December 1991.

¹⁴⁶ *Purohit* para 53.

provisions that allow persons who are injured by the actions of others can only benefit persons who are financially capable to afford the services of private lawyers.¹⁴⁷

The African Commission then determined whether the respondent State violated the right to dignity in article 5.¹⁴⁸ On this issue, it responded in the affirmative. It referred to the provisions of article 5 and stated that this right also imposes on every human being the obligation to respect this right.¹⁴⁹ It further stated that all Member States to the African Charter should respect this right.¹⁵⁰ With reference to *Media Rights Agenda and Others v Nigeria* ('*Media Rights Agenda*')¹⁵¹ and *John K Modise v Botswana* ('*Modise*')¹⁵² the African Commission stated that the LDA's description of persons with a mental illness as "lunatics", and "idiots" violates the right to dignity in article 5 as these terms dehumanise and deny such persons any form of dignity.¹⁵³ It further drew inspiration from UN Principles for the Protection of Persons with Mental Illness and stated that the dignity of persons with a mental disability should be respected.¹⁵⁴ Moreover, the right to dignity requires persons with a disability to be treated with humanity.¹⁵⁵ It then stated that persons with a mental disability have the right to enjoy the right to dignity and that the right should be protected by all Member States to the African Charter.¹⁵⁶ *Purohit* broadly referred to the rights to non-discrimination, equality, and dignity. Although the African Commission decided *Purohit* after *SERAC*, it failed to show clearly the interdependence between rights to non-discrimination, equality, dignity and the right to health.

Regarding the right to health, the African Commission found the respondent State in violation of article 16 of the African Charter, read in conjunction with article 18(4) of the African Charter.¹⁵⁷ The African Commission held that the right to health incorporates the right to health facilities, and access to goods and services without discrimination.¹⁵⁸ It further held that in particular, persons with a mental illness require special treatment that

¹⁴⁷ Para 53.

¹⁴⁸ Para 54.

¹⁴⁹ Paras 56-57.

¹⁵⁰ Para 61.

¹⁵¹ *Media Rights Agenda v Nigeria* Communication Nos 105/93, 128/94, 130/94, 152/96 (2000) AHRLR 200 (ACHPR 1998).

¹⁵² *John K Modise v Botswana* Communication No 97/93 (2000) AHRLR 30 (ACHPR 2000).

¹⁵³ *Purohit* paras 56-61.

¹⁵⁴ Para 60.

¹⁵⁵ Para 60.

¹⁵⁶ Para 61.

¹⁵⁷ Para 77.

¹⁵⁸ Para 80

will enable them to attain and sustain their independence and performance in accordance with article 18(4) and the standards applicable to the treatment of persons with a mental illness provided by the UN Principles for the Protection of Persons with Mental Illness.¹⁵⁹ These principles require recognition of the highest attainable standards of health care for persons with a mental illness during analysis and diagnosis, treatment, and rehabilitation.¹⁶⁰ According to the African Commission, the LDA falls short of objectives and provisions that provide for the resources and programmes for treating persons with a mental illness.¹⁶¹ Thus, the LDA fails to meet the standards set in articles 16 and 18(4) of the African Charter.¹⁶² Moreover, the African Commission held that the provisions of article 16 of the African Charter “impose upon States an obligation to take concrete and targeted steps within their available resources for the realisation of all aspects of the right to health without discrimination”.¹⁶³ However, the African Commission failed to elaborate on the meaning and content of the obligation “to take concrete and targeted steps”.

The African Commission then recommended the respondent State to repeal the LDA and replace it with legislation governing persons with a mental illness in a manner that is compatible with the African Charter and other international instruments. Moreover, the African Commission recommended that the respondent State realise the victims’ right to health by providing them with adequate medical treatment and medical care.

5 4 3 3 Sudan Human Rights Organisation & Centre on Housing Rights and Evictions (COHRE) v Sudan

In *Sudan Human Rights Organisation & Centre on Housing Rights and Evictions (COHRE) v Sudan* (‘COHRE’),¹⁶⁴ the second complainant (‘complainant’) alleged the violation of human rights by the respondent State against the indigenous black African tribes in the Darfur region found in the western part of the respondent State.¹⁶⁵ These tribes are Fur, Marsalit and Zaghawa.¹⁶⁶ The complainant alleged that in February 2003 the armed conflict in the Darfur region intensified as a result of the emergence of two

¹⁵⁹ Para 81.

¹⁶⁰ Para 82.

¹⁶¹ Para 83.

¹⁶² Para 83.

¹⁶³ Para 84.

¹⁶⁴ *Sudan Human Rights Organisation & Centre on Human Rights and Evictions (COHRE) v Sudan* Communications No 279/03-296/05 (2009) AHRLR 153 (ACHPR 2009).

¹⁶⁵ Para 2.

¹⁶⁶ Para 2.

armed groups, namely the Sudan Liberation Army ('SLA') and the Justice Equality Movement ('MEM').¹⁶⁷ Both of these armed groups originated from the Fur, Marsalit and Zaghawa tribes.¹⁶⁸ The armed groups were demanding that the respondent State stop the marginalisation and underdevelopment of the Darfur region.¹⁶⁹ According to the complainant, the respondent State established, armed and sponsored the Janjaweed, which was an Arab militia to fight the SLA and MEM.¹⁷⁰ The complainant alleged that through the Janjaweed the respondent State attacked the civilian population, raided and bombed their villages, markets and water wells by helicopter gunships and airplanes.¹⁷¹ They further claimed that the respondent State forcibly evicted a large number of people from their homes that were also totally or partially burned and destroyed. The complainant alleged that the respondent State deliberately and indiscriminately killed people and many other people were displaced.¹⁷² Based on this background the complainant alleged the respondent State's violation of, amongst others, articles 4, 5, 14, 16, 18(1) and 22 of the African Charter.¹⁷³

In response, the respondent State submitted that it has addressed the human rights violations in Darfur through the implementation of the Darfur Peace Agreement ('DPA').¹⁷⁴ The respondent State submitted that it has also improved the humanitarian situation and facilitated the flow of humanitarian assistance to internally displaced persons.¹⁷⁵ It further stated that it has rehabilitated various villages and provided basic services including water, health care, education and housing with the aim of encouraging voluntary return of the internally displaced persons to Darfur. It also submitted that it has provided people with agricultural facilities.¹⁷⁶

The African Commission started with the allegations regarding the violations of articles 4 and 5 on the right to life and dignity.¹⁷⁷ The African Commission found the respondent State in violation of articles 4 and 5 of the African Charter.¹⁷⁸ With regard to article 4, the African Commission noted that the right to life should be interpreted broadly

¹⁶⁷ Para 10.

¹⁶⁸ Para 10.

¹⁶⁹ Para 10.

¹⁷⁰ Paras 11-12.

¹⁷¹ Para 13.

¹⁷² Para 14.

¹⁷³ Paras 15-16.

¹⁷⁴ Para 127.

¹⁷⁵ Para 134.

¹⁷⁶ Paras 135-136.

¹⁷⁷ Para 145.

¹⁷⁸ Paras 153 and 168.

to include the right to dignity and livelihood.¹⁷⁹ It is a supreme right without which other rights become meaningless.¹⁸⁰ This right to life imposes upon States the duty to protect people from arbitrary actions committed by both public authorities and private persons.¹⁸¹ This duty is broad in that it includes strict control and limits circumstances under which a person may be deprived of his or her life by State authorities.¹⁸² The right also imposes a duty upon the State to respect the right to life by desisting from violating it and by protecting it from violation by non-state actors within its jurisdiction.¹⁸³ Referring to *Zimbabwe Human Rights NGO Forum v Zimbabwe* ('*Zimbabwe Human Rights NGO Forum*'),¹⁸⁴ the African Commission held that lack of due diligence on the part of the State to prevent the violation or for not taking steps to provide the victims with reparation, amounts to violation of the right.¹⁸⁵ Thus, the African Commission found the failure of the respondent State to investigate the arbitrary killing allegations and extra-judicial executions effectively amounted to a violation of article 4 on the right to life.¹⁸⁶

Regarding the right to dignity the African Commission started by, through reference to the United Nations Convention Against Torture, defining the phrase "torture or degrading treatment or punishment" in article 5. According to the African Commission, "torture or degrading treatment or punishment" is a deliberate conduct of inflicting on a person severe physical or mental pain. The African Commission explained further that such pain is inflicted with the aim of obtaining information from that person or a third person. According to the African Commission, as a means to obtain such information such a person is discriminatorily punished, intimidated or coerced at the approval or consent of a public official or a person acting in that capacity.¹⁸⁷ The African Commission elaborated further that "torture" is used to deliberately and systematically inflict physical or psychological pain on a person with the aim of getting information from that person.¹⁸⁸ The African Commission stated that States use torture as a mechanism to discriminate individuals or peoples with the intention of controlling such persons.¹⁸⁹

¹⁷⁹ Para 146.

¹⁸⁰ Para 146.

¹⁸¹ Para 147.

¹⁸² Para 147.

¹⁸³ Para 148.

¹⁸⁴ *Zimbabwe Human Rights NGO Forum v Zimbabwe* Communication No 245/2002 (2006) AHRLR 128 (ACHPR 2006).

¹⁸⁵ COHRE para 148.

¹⁸⁶ Para 153.

¹⁸⁷ Para 155.

¹⁸⁸ Para 156.

¹⁸⁹ Para 156.

Torture is inflicted for controlling individuals and peoples by destroying and frightening them, their leadership and communities.¹⁹⁰

Having defined “torture or degrading treatment or punishment” contained in article 5 of the African Charter, through reference to *Media Rights Agenda, Modise* and the decision of the United Nations Committee Against Torture in *Hajrizi Dzemajl et al v Yugoslavia* (*‘Hajrizi’*),¹⁹¹ the African Commission held that “cruel, inhuman and degrading punishment or treatment” in article 5 should be broadly interpreted to protect people from physical or mental abuse.¹⁹² It noted that forced evictions and destruction of housing amount to cruel, inhuman and degrading treatment or punishment. According to the African Commission, the forced eviction of Darfurians from their villages and homes, executed by the respondent State through the Janjaweed militia and its agents, amounted to cruel and inhuman treatment and threatened their right to human dignity. As such, the respondent State violated both articles 4 and 5 of the African Charter.¹⁹³

The African Commission went on to determine whether rights in the African Charter can be limited during armed conflicts.¹⁹⁴ Referring to *Constitutional Rights Project et al v Nigeria*, the African Commission emphasised that it is an obligation of States to respect the rights of individuals and peoples at all times.¹⁹⁵ According to the African Commission, restriction of human rights enshrined in the African Charter cannot be justified by emergencies or special circumstances.¹⁹⁶ The African Commission stated further that limitation of rights should only be justified through the conditions established in article 27(2) of the African Charter.¹⁹⁷ The conditions are that rights “shall be exercised with due regard to the rights of others, collective security, morality and common interest.”¹⁹⁸ The African Commission found that forced eviction executed by the respondent State does not pass the standards established in article 27(2). In elaborating the civil and political right to movement, the African Commission stated that Member States of the African Charter have an obligation not to arbitrarily restrict the rights. It

¹⁹⁰ Para 156.

¹⁹¹ *Hajrizi Dzemajl et al v Yugoslavia* Communication no. 161/2000 UN Doc No CAT/C/29/D/161/2000 (2 December 2002).

¹⁹² *COHRE* paras 158-159.

¹⁹³ Paras 158-168.

¹⁹⁴ Para 165.

¹⁹⁵ Para 165.

¹⁹⁶ Para 165.

¹⁹⁷ Para 165.

¹⁹⁸ Para 165.

emphasised that limitation of the rights must be proportional and necessary for a legitimate public need.¹⁹⁹

The African Commission then proceeded to determine the allegations regarding violation of article 14 on the right to property.²⁰⁰ The African Commission found the respondent State in violation of article 14 of the African Charter on the right to property.²⁰¹ The African Commission started by stating the significance of the right to property and the nature and scope of States' obligations imposed by this right.²⁰² According to the African Commission, right to property is a fundamental right in democratic States.²⁰³ The right imposes upon States obligations to respect and protect it from encroachment by the States and non-state actors.²⁰⁴ The African Commission went on to explain that States are required to ensure that this right is accessible to everyone while taking the public interest into account.²⁰⁵

The African Commission explained further that the right to property incorporates two principles, namely: ownership and peaceful enjoyment of property, as well as conditions for deprivation of the right such as public or general interest and "in accordance with the law".²⁰⁶ According to the African Commission, the respondent State's action through the Janjaweed militia to destroy the victims' villages and homes amounted to the deprivation of the right to property.²⁰⁷ The respondent State failed to demonstrate that it refrained from forcible evictions of the victims or demolition of their houses and other properties.²⁰⁸

The African Commission further found that the respondent State failed to take measures to protect the victims from attacks and bombings.²⁰⁹ Therefore, the African Commission held that the fact that the victims could no longer use their possessions to earn their living indicated that they were deprived the right to use their property in circumstances allowed by article 14 of the African Charter.²¹⁰

¹⁹⁹ Para 188.

²⁰⁰ Para 191.

²⁰¹ Para 205.

²⁰² Para 192.

²⁰³ Para 192.

²⁰⁴ Para 192.

²⁰⁵ Para 192.

²⁰⁶ Para 193.

²⁰⁷ Para 194.

²⁰⁸ Para 205.

²⁰⁹ Para 205.

²¹⁰ Para 205.

The African Commission then went on to consider the allegations regarding the right to health.²¹¹ It found the respondent State in violation of the right to health contained in article 16 of the African Charter.²¹² Significantly, the African Commission, defined the content of the broadly formulated right to health to include both health care and health conditions.²¹³ It then stated that the respondent State's destruction of homes, livestock, and farms as well as the poisoning of water sources such as wells, exposed the victims to serious health risks. Referring to CESCR General Comment 14 on the right to the highest attainable standard of health ('General Comment 14')²¹⁴ the African Commission held that, in addition to timely and appropriate health care, the right to health encompasses other underlying determinants such as access to safe and portable water, an adequate supply of food, nutrition and housing.²¹⁵ The African Commission, drawing inspiration from the General Comment 14, held that the right should be available, accessible, and acceptable, and it should be of good quality.²¹⁶ According to the African Commission, referring to the General Comment 14, the right to health imposes obligations to respect, fulfil and protect.²¹⁷ States should thus not infringe on the enjoyment of this right.²¹⁸ Through this obligation, States should refrain from polluting air, water and soil.²¹⁹ The right to health also imposes upon States an obligation to ensure that non-state actors do not restrict individuals or groups' accessibility to any information and services related to this right.²²⁰ The African Commission went on to state that the State's failure to adopt and enforce legislation that prevent water pollution equally amounts to the violation of the right to health.²²¹ Referring to *Free Legal Assistance* the African Commission held that failure to provide safe drinking water and electricity amounts to violation of the right to health.²²² The African Commission found that the respondent State's conduct of destroying housing, livestock and farmlands as

²¹¹ Para 206.

²¹² Para 212.

²¹³ Para 208.

²¹⁴ CESCR General Comment 14, The right to the highest attainable standard of health (2000) UN Doc E/C.12/2000/4 (2000).

²¹⁵ COHRE para 209.

²¹⁶ Para 209.

²¹⁷ Para 209.

²¹⁸ Para 209.

²¹⁹ Para 209.

²²⁰ Para 210.

²²¹ Para 210.

²²² Para 211.

well as the poisoning of water sources seriously endangered victims' health and therefore violated their right to health enshrined in article 16 of the African Charter.²²³

The African Commission also found the respondent State in violation of the right to the protection of the family contained in article 18(1) of the African Charter. The African Commission referred to article 18 and stated that it imposes upon States a positive obligation to protect the physical and moral well-being of family.²²⁴ It further explained that provisions of article 18 prohibit States' and non-state actors' arbitrary or unlawful interference with the family.²²⁵ Drawing inspiration from the CESCRC General Comment 19 on the right to social security ('General Comment 19')²²⁶ the African Commission stated that the right to the protection of the family imposes on States obligations to adopt legislative, administrative, or other measures to give effect to this right.²²⁷ It also obliges States to desist from conduct that may endanger the family unit such as arbitrary separation of family members and displacement of families involuntarily.²²⁸ Drawing inspiration from the judgment of the European Court of Human Rights ('ECHR') in *Dogan v Turkey* ('*Dogan*')²²⁹ the African Commission stated that the respondent State's refusal to allow the victims to access their homes and livelihood amounts to an interference with the family.²³⁰ Significantly, the African Commission connected the mass expulsions of the applicants with their right to the protection of the family.²³¹ Referring to *Union Interafricaine* it held that massive forced expulsions of people adversely affects the right to the protection of the family.²³² According to the African Commission, the respondent State's forcible eviction of the victims from their homes, killing of some family members and displacement of others threatened the foundation of family and made the enjoyment of the right to family difficult. As such, the respondent State was found to have violated the right to family.²³³

Then the African Commission moved on to determine allegations regarding the violation of the right to development in article 22 of the African Charter.²³⁴ The

²²³ Para 212.

²²⁴ Para 213.

²²⁵ Para 213.

²²⁶ CESCRC General Comment 19, The right to social security (art 9) (2008) UN Doc. E/C.12/GC/19.

²²⁷ COHRE para 214.

²²⁸ Para 214.

²²⁹ *Dogan v Turkey* App Nos 8803-8811/02, 8813/02 and 8815-8819/02 (ECtHR, 29 June 2004).

²³⁰ COHRE para 214.

²³¹ Para 215.

²³² Para 215.

²³³ Para 216.

²³⁴ Para 217.

respondent State was found to be in violation of the right to development provided in article 22 of the African Charter.²³⁵ According to the African Commission, article 22 is collective in nature in that it recognises individuals as a people.²³⁶ The African Commission reasoned that in order to establish the violation of article 22 the question whether victims constitute “people” in the context of the African Charter is vital.²³⁷ Therefore, the African Commission had to determine whether Darfurians constitute a “people” thus entitling them to the right to development.²³⁸ According to the African Commission, various characteristics can be used to identify persons referring to themselves as “a people”.²³⁹ These characteristics include language, religion, culture, the territory they occupy in a State and a common history.²⁴⁰ The African Commission stated further that race also characterises “people” in communities with a population of different racial composition.²⁴¹ It stated that in Africa racial and ethnic diversity contribute to cultural diversity that should be embraced.²⁴² Significantly, the African Commission elaborated on the object and purpose of the African Charter regarding peoples’ rights. It stated that the object and purpose of the African Charter is to protect peoples against external and internal rights’ violations.²⁴³ Based on this reasoning the African Commission pointed out that the African Charter protects individuals and groups of different racial, ethnic, religious and other social backgrounds.²⁴⁴ The African Commission applied article 19 of the African Charter to emphasise that Darfurians in their collective are “a people”.²⁴⁵ According to the African Commission, article 19 of the African Charter prohibits one group of people from dominating peoples of another group within the same State.²⁴⁶ The article recognises peoples’ right to equality and enjoyment of the same human rights without distinction.²⁴⁷ Thus, the respondent State’s action to

²³⁵ Paras 224 and 228.

²³⁶ Para 218.

²³⁷ Para 218.

²³⁸ Para 218.

²³⁹ Para 220.

²⁴⁰ Para 220.

²⁴¹ Para 220.

²⁴² Para 221.

²⁴³ Para 222.

²⁴⁴ Para 223.

²⁴⁵ Para 223.

²⁴⁶ Para 221.

²⁴⁷ Para 221.

target Darfur's civilians instead of combatants amounted to collective punishment.²⁴⁸

According to the African Commission:

“The attacks and forced displacement of Darfurian people denied them the opportunity to engage in economic, social and cultural activities. The displacement interfered with the right to education for their children and pursuit of other activities.”²⁴⁹

In this respect, the African Commission found the respondent State to have violated article 22 of the African Charter.²⁵⁰

The African Commission recommended that the respondent State take legislative and judicial measures to protect the individuals against serious and massive human violations, including destruction of property.²⁵¹ Moreover, the African Commission recommended the respondent State to compensate the victims adequately, and to rehabilitate their socio-economic infrastructure, including education, health, water and agricultural services.²⁵²

5 4 3 4 Kevin Mgwanga Gunme et al v Cameroon

In *Kevin Mgwanga Gunme et al v Cameroon* ('*Gunme*'),²⁵³ the complainants brought a communication on their own behalf and on behalf of the people of Southern Cameroon against the Republic of Cameroon.²⁵⁴ The complainants alleged that the violations of their socio-economic rights started when the respondent State became independent on January 1, 1960.²⁵⁵ The complainants alleged further that Southern Cameroon was under the British Trusteeship separate from the Francophone part of the Republic of Cameroon, which was under French Trusteeship.²⁵⁶ They alleged further that during the plebiscite in 1961 the Southern Cameroonians had to decide to join either Nigeria or Cameroon. They decided to join Cameroon. As a result the Southern Cameroon and the *La Republique du Cameroun* negotiated and adopted the Federal Constitution at

²⁴⁸ Para 223.

²⁴⁹ Para 224.

²⁵⁰ Para 224.

²⁵¹ Para 229.

²⁵² Para 229.

²⁵³ *Kevin Mgwanga Gunme et al v Cameroon* Communication No 266/03 (2009) AHRLR 9 (ACHPR 2009).

²⁵⁴ Para 1.

²⁵⁵ Para 2.

²⁵⁶ Para 2.

Foumban in September 1961.²⁵⁷ The complainants alleged that the right of Southern Cameroonians to form their own State of South Cameroon was ignored in the 1961 plebiscite.²⁵⁸ They alleged further that the disregard of the alternative to form their statehood was a source of all the socio-economic violations alleged in this communication.²⁵⁹ According to the complainants, most of the local administrative positions in the Southern Cameroon are predominantly occupied by the Francophone Cameroonians.²⁶⁰ They contended further that by this predominance Francophone Cameroonians deprive the Southern Cameroonians of their land and other economic resources and use these resources for their own benefit.²⁶¹ The complainants also alleged that the respondent State treats Southern Cameroonians unequally by denying them basic socio-economic infrastructures and the right to development.²⁶² According to the complainants, most of the socio-economic infrastructure and development projects are situated in the Francophone Cameroon.²⁶³ The complainants mentioned some of the development projects located in the Francophone Cameroon including Chad-Cameroon Oil Pipeline, the deep seaport, and the oil refinery.²⁶⁴ Moreover, the complainants alleged further that Francophone Cameroonians mostly dominate the Ministry of Education and that the respondent State has been underfunding primary education in Southern Cameroon.²⁶⁵ According to the complainants, the respondent State has not been building new schools and the existing ones are understaffed.²⁶⁶ They also alleged the closure of all teachers training colleges in Southern Cameroon by the respondent State.²⁶⁷ Based on this background the complainants alleged the violation of articles 2, 4, 5, 17(1), 21, 22, and 24 of the African Charter.²⁶⁸

The African Commission started by dealing with the alleged violation of article 2 of the African Charter on non-discrimination.²⁶⁹ It took note of the complainants' allegations regarding the respondent State's discriminatory practices relating to the rights to

²⁵⁷ Para 3.

²⁵⁸ Para 3.

²⁵⁹ Para 5.

²⁶⁰ Para 8.

²⁶¹ Para 8.

²⁶² Para 9.

²⁶³ Para 9.

²⁶⁴ Para 9.

²⁶⁵ Para 10.

²⁶⁶ Para 10.

²⁶⁷ Para 10.

²⁶⁸ Para 19.

²⁶⁹ Para 99.

education and development.²⁷⁰ However, it did not deal with the right to non-discrimination in relation to the rights to education and development. It exclusively dealt with the violation of the right of non-discrimination relating to the alleged denial of the registration of companies originating from Southern Cameroon.²⁷¹ The African Commission missed an important opportunity to elaborate the interdependence between non-discrimination and the socio-economic rights to education and development. The discussion in chapter three demonstrated that holistic reading of the African Charter as a tenet of the teleological approach considers right to non-discrimination as a relevant provision in developing the normative scope and content of socio-economic rights.²⁷²

The African Commission went on to determine the violation of article 4 where the complainants alleged the ill-treatment of arrested Southern Cameroonians in detention facilities and poor conditions in such facilities.²⁷³ The respondent State denied the allegation and contended that the complainants failed to show evidence in support of their allegations.²⁷⁴ The African Commission found the respondent State in violation of article 4.²⁷⁵ It held that the respondent State failed to investigate the violations of the right to life in its detention facilities and as such it violated the right to life.²⁷⁶ However, the African Commission did not elaborate the link between the right to life and health although the complainants alleged the poor conditions of the detention facilities and denial of medical treatment.²⁷⁷

The African Commission proceeded to determine the violation of article 5 on the right to dignity.²⁷⁸ The complainants alleged the violation of this right by the respondent State because of torture, amputations and denial of medical treatment to the victims who were arrested by the respondent State's police officials.²⁷⁹ The African Commission rejected the defence by the respondent State that the victims belonged to terrorist groups who vandalised State properties, stole weapons and ammunitions and killed police officers.²⁸⁰ It held that the defence does not justify exposing the victims to acts of torture, cruelty, inhuman and degrading punishment and treatment prohibited in article 5 of the

²⁷⁰ Para 100.

²⁷¹ Paras 102-108.

²⁷² See chapter three, part 3 3 3 4.

²⁷³ *Gunme* para 110.

²⁷⁴ Para 111.

²⁷⁵ Para 112.

²⁷⁶ Para 112.

²⁷⁷ Para 113.

²⁷⁸ Para 113.

²⁷⁹ Para 113.

²⁸⁰ Para 114.

African Charter.²⁸¹ The African Commission therefore found the respondent State in violation of article 5.²⁸² As with the right to life, the African Commission failed to elaborate the content of the right to dignity and clarify its inter-relationship with the right to health. The discussion in chapter three demonstrated that the teleological approach to interpretation by reading the African Charter holistically allows the application of the right to dignity as a relevant provision in developing the scope and content of socio-economic rights including the right to health.²⁸³

The African Commission then determined the violation of article 17 on the right to education.²⁸⁴ The African Commission held that the complainants have failed to convince the African Commission that the data and statistics issued by the respondent State on the measures it has adopted to realise the right to education in Southern Cameroon were unreliable.²⁸⁵ With regard to allegations of discriminatory practices concerning the admission of Southern Cameroonians to the *Polytechnique* in Yaounde the African Commission agreed with the respondent State that admission of students is carried out on the basis of qualification, and that the *Polytechnique* has admitted and trained a number of civil engineers from Southern Cameroon.²⁸⁶ Regarding the complainants' allegations on the refusal of the respondent State to register the Bameda University of Science and Technology, the African Commission held that the complainants have failed to prove that Bameda University of Science and Technology fulfilled the required criteria for registration.²⁸⁷ According to the African Commission, complainants should, in accordance with Rule 119 of its 1995 Rules of Procedure, provide it with all the necessary information for it to be able to make findings on any allegations.²⁸⁸ It however, allowed the parties to make oral submissions and found that the complainants failed to substantiate the allegations and thus there was no violation of article 17(1) of the African Charter by the respondent State.²⁸⁹

The African Commission proceeded to determine the violation of article 21 on the right of peoples to freely dispose of their natural wealth and resources.²⁹⁰ The African

²⁸¹ Para 114.

²⁸² Para 114.

²⁸³ See chapter three, part 3 4.

²⁸⁴ *Gunme* para 145.

²⁸⁵ Para 146.

²⁸⁶ Para 147.

²⁸⁷ Para 148.

²⁸⁸ Para 148.

²⁸⁹ Para 149.

²⁹⁰ Para 204.

Commission held the complainants did not provide any evidence to support their allegation.²⁹¹ As such, there was no violation of article 21 on the part of the respondent State.²⁹²

Finally, the African Commission dealt with the right to development enshrined in article 22 of the African Charter. The African Commission stated that it is aware of the challenges facing the respondent State and other Member States of the African Charter to realise the right to development due to scarcity of resources.²⁹³ It further held that the respondent State has an obligation to use its resources in a manner that guarantees the progressive realisation of the right to development and other socio-economic rights.²⁹⁴ Then the African Commission held that the lack of economic projects in Southern Cameroon does not necessarily amount to the violation of the right to development.²⁹⁵ As such, there was no violation of the right to development by the respondent State.²⁹⁶ Finally, the African Commission stated that the complainants failed to bring sufficient evidence to substantiate the violations of the right to a satisfactory environment in article 24 of the African Charter.²⁹⁷

5 4 3 5 Centre for the Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council v Kenya

In *Centre for the Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council v Kenya* ('Endorois'),²⁹⁸ the complainants brought the communication on behalf of the Endorois Community living in the respondent State. The complainants alleged the violation of a series of human rights that occurred as a result of the removal of the Endorois from their ancestral land located around Lake Bogoria in the Baringo and Koibatek Districts, as well as the Nakuru and Laikipia Districts in the Rift Valley Province. According to the complainants, approximately 60,000 Endorois have been living in areas around Lake Bogoria for a very long time and practising their sustainable way of life, which is directly connected to their ancestral land. They alleged that since 1973 the Endorois have been denied access to

²⁹¹ Para 204.

²⁹² Para 204.

²⁹³ Para 206

²⁹⁴ Para 206.

²⁹⁵ Para 206.

²⁹⁶ Para 206.

²⁹⁷ Para 206.

²⁹⁸ *Centre for the Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council v Kenya* Communication No 276/2003 (2009) AHRLR 75 (ACHPR 2009).

their land as a result of the creation of the Lake Hannington Game Reserve followed by the re-gazetting of the Lake Bogoria Game Reserve in 1978. They alleged that the respondent State forcibly evicted the Endorois from their traditional land and failed to adequately compensate them for the loss of their property. The respondent State has interfered with the Endorois pastoral life and violated their right to practice their religion and culture, as well as their right to development as the Endorois community. The complainants alleged further that the respondent State granted a private company ruby mining concessions on their ancestral land. According to the complainants, ruby mining operations on their ancestral lands is dangerous to water sources used for their personal as well as their livestock consumption. Based on this background the complainants alleged that the respondent State violated in particular, the rights to property, cultural life, natural resources, and the right to development contained in articles 14, 17, 21 and 22 of the African Charter.²⁹⁹

In response, the respondent State submitted that most of the tribes around Lake Bogoria do not reside solely in their ancestral land. According to the respondent State, such people move from one area to the other in search of pastures for their cattle and fertile land for agricultural activities. They were relocated by government for the creation of development projects, creation of irrigation schemes, national parks, game reserves, forests, as well as for extraction of natural resources, including minerals. The respondent State stated further that it has established a programme for universal free primary education and an agricultural recovery programme aiming at increasing the household income of poor and marginalised people, including the Endorois. The respondent State submitted that it has established programmes for the “equitable distribution of budgetary resources, economic recovery strategy for wealth and employment creation”³⁰⁰ as well as eradication of poverty and protection of the socio-economic rights of poor people, including the Endorois. Moreover, the respondent State submitted that the Endorois community is not the distinct community living around the Lake Bogoria area but rather that the area is occupied by the Tugen tribe comprising of four clans namely: the Endorois, the Lebus, the Somor and the Alor. The respondent State further stated that the Endorois community was compensated adequately.³⁰¹

In order for the African Commission to decide whether the respondent State violated the alleged rights of the Endorois, it first had to decide whether the Endorois constitute

²⁹⁹ Paras 1-6 and 14-21.

³⁰⁰ Para 139.

³⁰¹ Paras 138-143.

an indigenous people.³⁰² The African Commission noted that the difficulties in defining the term “peoples” led the drafters of the African Charter to avoid defining it.³⁰³ According to the African Commission, referring to its Working Group of Experts on Indigenous Populations and Communities,³⁰⁴ the term “peoples” as used in the African Charter is necessary for claiming the collective rights in the African Charter, recognised in articles 20, 21, 22, 23, and 24 of the African Charter.³⁰⁵ The African Commission identified four criteria to identify indigenous peoples. These criteria are: “the occupation and use of a specific territory; the voluntary perpetuation of cultural distinctiveness; self-identification as a distinct collectivity, as well as recognition by other groups; an experience of subjugation, marginalisation, dispossession, exclusion or discrimination”.³⁰⁶ The African Commission further identified two-significant characteristics of the indigenous peoples. Firstly, the indigenous peoples are mainly hunters and gatherers as well as pastoralists. Secondly, their survival depends largely on the access and rights to their ancestral land and natural resources found in such land.³⁰⁷ Thus, the African Commission stated the definition of the indigenous peoples incorporates their land, culture and desire to be recognised as a people.³⁰⁸ The African Commission pointed out that the provisions of article 61 of the African Charter requires it draw inspiration from other relevant human rights instruments in defining the term “peoples”.³⁰⁹ Based on this reasoning, it referred to the United Nations Working Group on Indigenous Populations read in conjunction with the African Commission’s Report on Working Group of Experts on Indigenous Populations to elaborate on the meaning of “indigenous peoples”.³¹⁰ Extracting from these sources the African Commission noted that indigenous peoples are the people who due to their common history consider themselves distinct from other groups of people in the State and maintain their socio-economic, cultural, and political identity.³¹¹ The African Commission thus found the

³⁰² Para 146.

³⁰³ Para 146.

³⁰⁴ Report of the African Commission Working Group of Experts on Indigenous Populations/Communities submitted in accordance with “Resolution on the Rights of Indigenous Populations/Communities in Africa” adopted by the African Commission on Human and Peoples’ Rights at its 28th Ordinary Session, 2005 AU DOC/OS(XXXIV)/345 49.

³⁰⁵ *Endorois* paras 149-150.

³⁰⁶ Para 150.

³⁰⁷ Para 150.

³⁰⁸ Para 151.

³⁰⁹ Para 152.

³¹⁰ Paras 152-153.

³¹¹ Paras 152-153.

Endorois to be an indigenous community and a distinct people who share a common history, culture and religion.³¹² According to the African Commission, as a community, the Endorois are entitled to the protection of the collective rights as set out in the African Charter, including the right to property separately from the Tugen tribe.³¹³

Having defined the term “peoples” and found that the Endorois constitutes an indigenous people the African Commission elaborated the limitation of the rights in the African Charter.³¹⁴ According to the African Commission, rights in the African Charter can be limited.³¹⁵ However, the limitation should not render the right illusory. It must be proportionate to the legitimate aim and in accordance with the law.³¹⁶ The African Commission further added that the limitation of the rights must be reasonable.³¹⁷ However, it did not elaborate the content of these States’ obligations.

The African Commission went on to determine the violation of article 14.³¹⁸ The African Commission found the respondent State to be in violation of article 14 of the African Charter.³¹⁹ The African Commission started by determining the meaning of right to property in the context of indigenous people.³²⁰ Referring to *Malawi African Association, SERAC*, and *Dogan* the African Commission noted that property rights in the context of article 14 of the African Charter includes land.³²¹ It further noted that, in addition to the right to access to property and the right not to be interfered with the enjoyment of property, property rights encompasses “the right to undisturbed possession, use and control of such property however the owner(s) deem fit.”³²² Moreover, “property rights” incorporates the economic resources and rights to the common land of the victims.”³²³

The African Commission held that, particularly in relation to indigenous communities, special measures must be adopted that guarantee their survival in a manner that protects their traditions and customs.³²⁴ The African Commission stated that a significant

³¹² Para 154.

³¹³ Para 161.

³¹⁴ Para 172.

³¹⁵ Para 172.

³¹⁶ Para 172.

³¹⁷ Para 172.

³¹⁸ Para 174.

³¹⁹ Para 238.

³²⁰ Para 185.

³²¹ Para 185.

³²² Para 186.

³²³ Para 186.

³²⁴ Para 187.

way to protect the African indigenous communities is to ensure their “rights, interests and benefits” in their ancestral lands constitute property within the context of the African Charter.³²⁵ It emphasised that the measures adopted must be able to protect indigenous peoples’ property rights.³²⁶ The African Commission further observed that property rights are not restricted to ownership of physical goods but rather includes other rights and interests such as assets, including houses. With reference to the Inter-American Court of Human Rights’ (‘IACtHR’) decision in *Dogan, and Mayagna (Sumo) Awas Tingni v Nicaragua* (‘*Mayagna*’),³²⁷ it held further that “property rights” includes the rights of the indigenous peoples over communal property that is not officially registered and issued a real title deed.³²⁸

Based on the foregoing observations the African Commission identified that the provisions of article 14 of the African Charter impose upon States the obligation to respect and protect the right to property.³²⁹ As such, the “confiscation and pillaging of the property” constitute a violation of the right to property in article 14 of the African Charter.³³⁰ It further held that the right to property, as guaranteed in article 14, is violated when people are forcibly removed from their homes.³³¹

The African Commission found the respondent State in violation of the Endorois community’s right to property as provided by article 14 of the African Charter.³³² In particular, the property rights of the Endorois community have been violated through the respondent State’s “expropriation and the effective denial of ownership of their land.”³³³ The African Commission held that, although the Constitution of Kenya provides that “Trust Land can be alienated and that the Trust Land Act provides comprehensive procedure for the assessment of compensation”, the trust land system created by the respondent State however, “has proved inadequate to protect” the rights of the Endorois.³³⁴

The African Commission referred to the General Comment 4, CESCR General Comment 7 on forced evictions and the right to adequate housing (‘General Comment

³²⁵ Para 187.

³²⁶ Para 187.

³²⁷ *The Mayagna Case (Judgment)* Inter-American Court of Human Rights Series C No 79 (31 August 2001).

³²⁸ *Endorois* paras 188-190.

³²⁹ Para 191.

³³⁰ Para 191.

³³¹ Para 191.

³³² Para 199.

³³³ Para 199.

³³⁴ Para 199.

7'),³³⁵ article 1 of Protocol 1 to the European Convention on Human Rights ('Protocol 1 to the European Convention'), and the case of *Akdivar v Turkey* ('*Akdivar*')³³⁶ to determine the forced removal of people from their traditional land they regard as their property.³³⁷ The African Commission noted that forced evictions violate the right to housing and that every person is entitled to peaceful enjoyment of his or her possessions.³³⁸ The African Commission observed that the right to ownership of property is not the mere access to the property.³³⁹ Access to the property would only have rendered the indigenous communities vulnerable to further dispossessions by the State or third parties.³⁴⁰ According to the African Commission, ownership of property enables indigenous peoples to engage actively with the State and non-state actors regarding development projects in their territories.³⁴¹ With reference to articles 26 and 27 of the UN Declaration on Indigenous Peoples, the African Commission noted that "indigenous peoples have a recognised claim to ownership to ancestral land under international law, even in absence of official deeds."³⁴² According to the African Commission, traditional ownership of land by the indigenous people is the same as with land with official title deeds.³⁴³ Based on this reasoning the African Commission found the respondent State to have encroached upon the traditional land of the Endorois.³⁴⁴

According to the African Commission, the encroachment of the Endorois' land was evidenced by their inability to freely access their ancestral land for keeping their livestock and conduct their religious activities.³⁴⁵ The African Commission clarified that encroachment done in accordance with the law does not violate article 14 of the African Charter.³⁴⁶ According to the African Commission, article 14 creates a two-fold test upon which the encroachment will be lawful. Firstly, the encroachment should be conducted "in the interest of public need or in the general interest of public".³⁴⁷ Secondly, the

³³⁵ CESCR General Comment 7, Forced evictions, and the right to adequate housing (1997) U.N. Doc. E/1998/22.

³³⁶ *Akdivar v Turkey* App Nos 99/1995/605/693 (ECtHR, 1 April 1998).

³³⁷ *Endorois* para 200.

³³⁸ Para 202.

³³⁹ Para 204.

³⁴⁰ Para 204.

³⁴¹ Para 204.

³⁴² Para 207.

³⁴³ Para 209.

³⁴⁴ Para 209.

³⁴⁵ Para 210.

³⁴⁶ Para 211.

³⁴⁷ Para 211.

encroachment should comply with appropriate laws.³⁴⁸ The African Commission held that this two-pronged test is conjunctive in the sense that the lawful encroachment should be proven to have been done “in the interest of public need or general interest of the community and was carried out in accordance with the appropriate laws.”³⁴⁹ According to the African Commission, the standard that is required to justify the “public interest” test is strict in cases dealing with encroachment of ancestral land of indigenous people. The African Commission relied on the report of the Special Rapporteur of the United Nations Sub-Commission for the Promotion and Protection of Human Rights that states:

“Limitations, if any, on the right to indigenous peoples to their natural resources must flow only from the most urgent and compelling interest of the state. Few, if any, limitations on indigenous resources rights are appropriate, because the indigenous ownership of the resources is associated with the most important and fundamental human rights, including the right to life, food, the right to self-determination, to shelter, and the right to exist as a people.”³⁵⁰

According to the African Commission, the limitations on the right to property in article 14 must be reviewed by using the proportionality test.³⁵¹ The African Commission noted that “the justification of limitations must be strictly proportionate with and absolutely necessary for the advantages which follow.”³⁵² The African Commission drew inspiration from the ECHR’s case of *Handyside v United Kingdom* (*‘Handyside’*).³⁵³ In this case the ECHR held that any limitation of rights must be proportionate to the legitimate goal aimed to be achieved.³⁵⁴ Referring to *Constitutional Rights Project, Civil Liberties Organisation and Media Rights Agenda v Nigeria* (*‘Constitutional Rights Project’*)³⁵⁵ the African Commission stated that limitation should not render the protected right illusory.³⁵⁶ Limitations cannot be proportionate in a moment they render rights illusory.³⁵⁷

The African Commission thus found the respondent State in violation of article 14 by unlawfully removing the Endorois from their traditional land and destroying their

³⁴⁸ Para 211.

³⁴⁹ Para 211.

³⁵⁰ Para 212.

³⁵¹ Para 213.

³⁵² Para 213.

³⁵³ *Handyside v United Kingdom* App Nos 5493/72 (ECtHR, 7 December 1976).

³⁵⁴ *Endorois* para 213.

³⁵⁵ *Constitutional Rights Project, Civil Liberties Organisation and Media Rights Agenda v Nigeria* Communication Nos 140/94, 141/94 and 145/95 (1999) para 42.

³⁵⁶ *Endorois* para 215.

³⁵⁷ Para 215.

belongings.³⁵⁸ According to the African Commission, such disruption and displacement of the Endorois from their homes and the denial of their rights over their traditional land was disproportionate to any public need served by the respondent State.³⁵⁹ The African Commission noted that although the creation of the game reserve was legitimate and served the public need, it could have been undertaken through other proportionate means. As such, the African Commission noted further, the limitation of right should not render such right an illusory. Where the right is rendered illusory by the limitation, such limitation cannot be regarded as proportionate but rather it becomes the violation of the right. Thus, the African Commission held that the respondent State's denial of the Endorois' rights to their traditional land rendered the Endorois' property rights illusory. As such, the creation of the game reserve that caused the removal of the Endorois from their land, violates their right to property and cannot substantiate the encroachment with reference to "the general interest of the community or public need" test in article 14 of the African Charter.³⁶⁰ According to the African Commission, the disproportionate encroachment of the land that belongs to the indigenous communities is greater when the encroachment is done by force. The proportionality test is not satisfied where the evictions are executed by force.³⁶¹

With regard to the "in accordance with the law" test in article 14, the African Commission held that the respondent State should be able to demonstrate that the evictions were in accordance with both domestic and international law. According to the African Commission, this test includes consultation with the indigenous people about the evictions and adequate compensation for evictions carried out by the State.³⁶² The consultation in the context of indigenous people requires obtaining their consent.³⁶³ The failure to enforce the obligations to consult, seek consent and compensate amount to the violation of the right to property in article 14.³⁶⁴ The African Commission found that the respondent State did not consult and adequately compensate the Endorois for the evictions in their ancestral land.³⁶⁵

³⁵⁸ Para 214.

³⁵⁹ Para 214.

³⁶⁰ Para 215.

³⁶¹ Para 218.

³⁶² Paras 219 and 225.

³⁶³ Para 226.

³⁶⁴ Para 226.

³⁶⁵ Para 228.

Moreover, the respondent State did not conduct an environmental and social impact assessment before the evictions. Consequently, the respondent State did not satisfy the “in accordance with the law” test, which amounts to the violation of the right to property in article 14 as well as the right to development in the African Charter.³⁶⁶ The African Commission found that the right to property of the Endorois had been severely encroached upon, and that the encroachment was not proportionate to the public need and was not in accordance with the domestic and international law. Based on these reasons, the African Commission found the respondent State in violation of the Endorois’ right to property in article 14 of the African Charter.³⁶⁷

Then the African Commission dealt with the violation of article 17(2) – (3) of the African Charter.³⁶⁸ The African Commission found the respondent State in violation of article 17(2) – (3) of the African Charter. The African Commission noted that article 17 is dualistic in nature in the sense that it protects individuals’ right to cultural life as well as imposing upon States the obligation to promote and protect traditional values recognised by the community.³⁶⁹ According to the African Commission, culture incorporates “spiritual and physical association with one’s traditional land, knowledge, belief, art, law, morals, customs and any other capabilities and habits acquired by humankind as a member of society.”³⁷⁰ The African Commission also held culture to include religion and language of such groups. Regarding the indigenous peoples, culture includes the manner in which such people use their traditional land and its resources, including fishing, hunting and the right to live in such lands. According to the African Commission, the respondent State’s laws that restrict the Endorois’ access to Lake Bogoria deny the Endorois access to an “integrated system of beliefs, values, norms, morals, traditions and artefacts closely linked to access to the lake.”³⁷¹

With reference to the preamble of the African Charter, and the Cultural Charter for Africa (‘African Cultural Charter’),³⁷² the African Commission stated that civil and political rights and socio-economic rights are interdependent.³⁷³ As such, the recognition of

³⁶⁶ Para 228.

³⁶⁷ Para 238.

³⁶⁸ Para 239.

³⁶⁹ Para 241.

³⁷⁰ Para 241.

³⁷¹ Para 250.

³⁷² Cultural Charter for Africa adopted on 5th July 1976, entered into force 19th September 1990.

³⁷³ *Endorois* para 242.

socio-economic rights guarantees the enjoyment of civil and political rights.³⁷⁴ It thus held that people have the right to enjoy their right to culture without interference.³⁷⁵ It then referred to the United Nations Human Rights Committee ('Human Rights Committee') comments³⁷⁶ regarding article 27 of the International Covenant on Civil and Political Rights ('ICCPR').³⁷⁷ Based on this legal source the African Commission held that in the context of indigenous peoples culture includes their use of land resources.³⁷⁸ It went on to state that the right to culture largely incorporates indigenous peoples' socio-economic activities including fishing or hunting as well as the right to live in reserved land.³⁷⁹ It emphasised that the indigenous peoples' right to culture imposes upon States an obligation to adopt positive legislative and other measures to ensure their active participation in decision-making.³⁸⁰ According to the African Commission, article 17(2) imposes on States an obligation to adopt measures that takes into account conservation, development and diffusion of indigenous peoples' culture in a manner that promotes their cultural identity among other members of the community.³⁸¹ The African Commission further explained that article 17(2) requires States to adopt measures that promote awareness and enjoyment of indigenous peoples' cultural heritage.³⁸² It proceeded to hold that the respondent State therefore has an obligation to take positive steps to protect the Endorois as well as promote their cultural life.³⁸³ According to the African Commission, this obligation requires the respondent State to create opportunities, policies, institutions or other mechanisms that guarantee the existence of cultural diversity in the communities.³⁸⁴ The measures should also take into account the challenges experienced by indigenous peoples including "exclusion, exploitation, discrimination and extreme poverty".³⁸⁵ Measures should also address indigenous

³⁷⁴ Para 242.

³⁷⁵ Para 242.

³⁷⁶ Human Rights Committee, General Comment no. 23, The right of minorities (art 27), CCPR/C/21/Rev.1/Add 5.

³⁷⁷ The International Covenant on Civil and Political Rights, GA Res 2200A (XXI) 16 December 1966, 999 UNTS 171 ('ICCPR') was adopted by the United Nations General Assembly on 16 December 1966 and entered into force on 16 March 1976.

³⁷⁸ *Endorois* para 243.

³⁷⁹ Para 243.

³⁸⁰ Para 243

³⁸¹ Para 246.

³⁸² Para 246.

³⁸³ Para 248.

³⁸⁴ Para 248.

³⁸⁵ Para 248.

peoples' expulsions from their traditional land, deprivation of their socio-economic means of livelihood, and their participation in decision-making.³⁸⁶

The African Commission further noted the omission of an internal limitation clause in the African Charter.³⁸⁷ It emphasised that the omission of the limitation clause demonstrates the deliberate intention of the drafters of the African Charter to have very few limitations regarding the right to culture.³⁸⁸ The African Commission went on to state that the respondent State's restriction of the right to culture must be proportionate to a legitimate aim to be achieved in a manner that does not infringe the enjoyment of this Endorois' right.³⁸⁹ The African Commission held that the respondent State failed to take into account the fact that restriction of the Endorois to access Lake Bogoria denies them access to their "integrated systems of beliefs, values, norms, mores, traditions and artefacts linked to access to the Lake".³⁹⁰

Based on the foregoing reasons, the African Commission found the respondent State in violation of the Endorois' right to culture provided in article 17(2) – (3) of the African Charter. The respondent State's action to force the Endorois to live on infertile lands without access to their medicinal salt licks and vital resources for the health of their livestock threatened the Endorois' pastoralist way of life. Moreover, their right to culture had also been denied by such denial and rendered the right an illusory.³⁹¹

The African Commission then proceeded to determine the alleged violation of article 21 of the African Charter concerning the right of peoples to freely dispose of their natural wealth and resources.³⁹² The African Commission referred to *SERAC* and stated that this right is also recognised to indigenous peoples.³⁹³ Drawing inspiration from the IACtHR jurisprudence, particularly *Saramaka People v Suriname* ('*Saramaka*')³⁹⁴ the African Commission noted that the survival of indigenous peoples' cultural and socio-economic well-being largely depends on their access and use of natural resources protected in article 21.³⁹⁵ Drawing inspiration from *Yakye Axa Yakye Axa Indigenous*

³⁸⁶ Para 248.

³⁸⁷ Para 249.

³⁸⁸ Para 249.

³⁸⁹ Para 249.

³⁹⁰ Para 250.

³⁹¹ Para 251.

³⁹² Para 252.

³⁹³ Para 255.

³⁹⁴ *The Saramaka Case (Judgment)* Inter-American Court of Human Rights Series C No 185 (12 August 2008).

³⁹⁵ *Endorois* para 260.

Community v Paraguay ('*Yakye Axa*')³⁹⁶ the African Commission further noted that indigenous peoples enjoy the right of ownership of the natural resources they have been traditionally using in their territories.³⁹⁷ They also have the right of ownership of land that they have been traditionally using and occupying.³⁹⁸

The African Commission pointed out that the right to natural resources imposes on States obligations to respect and protect this right.³⁹⁹ It obliges States to guarantee indigenous peoples' enjoyment of their traditional way of life, as well as the respect and protection of their cultural diversity and socio-economic systems.⁴⁰⁰ The African Commission insisted that article 21 safeguards traditionally used natural resources for the socio-economic existence of the indigenous peoples.⁴⁰¹ It therefore strictly includes natural resources traditionally used for indigenous peoples' subsistence, cultural and religious activities.⁴⁰² Drawing inspiration from *Saramaka* the African Commission noted that the right in article 21 is not exclusive. According to the African Commission, States can restrict this right.⁴⁰³ The African Commission noted that limitation of this right by States must be in accordance with the law and proportionate with the aim to be achieved by such limitation.⁴⁰⁴ The African Commission stated that the respondent State has an obligation to evaluate whether the limitation of the Endorois' right to natural resources is necessary for preserving the survival of the Endorois.⁴⁰⁵ It then referred to the provisions of article 14 of the African Charter to establish the conditions to justify States' limitation of the right to natural resources in article 21.⁴⁰⁶ It pointed out that article 14 of the African Charter establishes a two-pronged test 'in the interest of public need or in the general interest of the community' and 'in accordance with appropriate laws' to be satisfied.

The African Commission found that the respondent State failed to demonstrate that the Endorois have benefited from the tourism and mineral activities in their area. The respondent State did not evaluate whether its action to restrict the Endorois from freely disposing their wealth and natural resources was necessary for the survival of the

³⁹⁶ *The Yakye Axa Case (Judgment)* Inter-American Court of Human Rights Series C No 125 (17 June 2005).

³⁹⁷ *Endorois* para 260.

³⁹⁸ Para 260.

³⁹⁹ Para 260.

⁴⁰⁰ Para 260.

⁴⁰¹ Para 261.

⁴⁰² Para 263.

⁴⁰³ Para 263.

⁴⁰⁴ Para 265.

⁴⁰⁵ Para 267.

⁴⁰⁶ Para 267.

Endorois.⁴⁰⁷ The respondent State failed to meet the conditions established in article 14. The Endorois have the right to freely dispose of their wealth and natural resources in consultation with the respondent State. Article 21(2) imposes an obligation on States in cases of violations of this right to provide for restitution and compensation. The Endorois were not adequately compensated by the respondent State, and consequently violated article 21 of the African Charter.⁴⁰⁸

The African Commission then determined the violation of article 22.⁴⁰⁹ The African Commission found the respondent State in violation of the Endorois' right to development as provided for in article 22 of the African Charter. According to the African Commission, this right is dualistic in nature in that it is a means and an end to peoples' socio-economic development.⁴¹⁰ The African Commission emphasised that both the procedural and substantive elements of the right to development should be respected. It pointed out that the failure to observe either one amounts to the violation of the right.⁴¹¹ The African Commission agreed with the complainants that the right to development requires the observation of five criteria namely: "it must be equitable, non-discriminatory, participatory, accountable, and transparent."⁴¹² The right to development includes the right of people to choose freely the place to live and States must consult the indigenous community when it deals with their land.⁴¹³

The African Commission held that the consultation conducted by the respondent State was inadequate, thus failed to prove the effective participation of the Endorois.⁴¹⁴ As such, the Endorois were not given an opportunity to determine their role in the game reserve.⁴¹⁵ The African Commission went on to elaborate the content of the right to development. It drew inspiration from article 2(3) of the United Nations Declaration on the Right to Development ('Declaration on Development')⁴¹⁶ and noted that the right to development includes "active, free and meaningful participation" in development

⁴⁰⁷ Para 268.

⁴⁰⁸ Para 268.

⁴⁰⁹ Para 269.

⁴¹⁰ Para 277.

⁴¹¹ Para 277.

⁴¹² Para 277.

⁴¹³ Paras 278 and 281.

⁴¹⁴ Para 281.

⁴¹⁵ Para 281.

⁴¹⁶ Declaration on the Right to Development adopted by the UN General Assembly on 4th December 1986 A/RES/41/128, available at <http://www.un.org/documents/ga/res/41/a41r128.htm> (accessed 14-05-2016).

processes.⁴¹⁷ It noted further that it was not adequate for the respondent State to just provide food aid to realise the right to development, but the State rather should have improved the capabilities of the Endorois to feed themselves.⁴¹⁸ Drawing inspiration from *Yakye Axa* the African Commission noted that the Endorois were not provided with a collective land of equal value to their ancestral land but rather they were moved to semi-arid land that was uncondusive for pastoralism.⁴¹⁹ The right to development incorporates participation of people that requires States to disseminate information and constant communication between the parties.⁴²⁰ The consultations must be held in good faith.⁴²¹ The African Commission found that the consultation with the Endorois was not sufficient and that the respondent State did not obtain the consent of the Endorois before changing their land to a game reserve and executing the evictions.⁴²² The respondent State also did not adequately inform the Endorois that they would be denied their right to access their land for grazing and the medicinal salt licks for their livestock, as well as religious ceremonies, as they legitimately expected.⁴²³

The African Commission emphasised that in addition to the respondent State's duty to consult the Endorois, it also has an obligation to obtain their consent freely.⁴²⁴ The African Commission, referring to the case by the Inter-American Commission on Human Rights ('Inter-America Commission') *Mary and Carrie Dann v United States* ('*Dann*'),⁴²⁵ agreed with the complainants that the respondent State failed to accurately inform the Endorois of the nature and consequences of the development process.⁴²⁶ Drawing inspiration from the report of the UN Special Rapporteur on the situation of Human Rights and Fundamental Freedoms of Indigenous People, the African Commission noted that major development projects carried out in territories occupied by indigenous peoples tend to affect their socio-economic rights.⁴²⁷ As such, the African Commission insisted that their free and prior consent is significant for the protection of such rights.⁴²⁸

⁴¹⁷ *Endorois* para 283.

⁴¹⁸ Para 283.

⁴¹⁹ Para 286.

⁴²⁰ Para 289.

⁴²¹ Para 289.

⁴²² Para 290.

⁴²³ Para 290.

⁴²⁴ Para 291.

⁴²⁵ *Mary and Carrie Dann v United States*, Case 11.140 Report No 75/02, Inter-American Commission on Human Rights Doc. 5 rev 1 at 860 (2002).

⁴²⁶ *Endorois* para 292.

⁴²⁷ Para 293.

⁴²⁸ Para 293.

Furthermore, the African Commission, referring to *Saramaka*, stated that benefit sharing is an important element of the rights to development and property.⁴²⁹ According to the African Commission, benefit sharing is also an important indicator of compliance with property rights including adequate compensation.⁴³⁰ Failure to compensate adequately for the violation committed amounts to the violation of the right to property.⁴³¹ Drawing inspiration from the African Charter for Popular Participation in Development and Transformation ('African Participation Charter'),⁴³² the African Commission stated that benefit sharing is important in the development process.⁴³³ The African Commission stated further that based on the object and purpose of the African Charter right to "just compensation" means that the Endorois are entitled to a reasonable share to compensate them from restriction or deprivation of their right to use and enjoy their land and natural resources.⁴³⁴ With reference to the recommendation of the Committee on the Elimination of All Forms of Racial Discrimination, although prior and informed consent of the indigenous peoples is important when major development projects are carried out in their territories, equitable sharing of benefits deriving from such development projects must also be guaranteed.⁴³⁵

The African Commission held that the object and purpose of the African Charter requires reasonable and equitable compensation when traditionally owned lands and natural resources relating to the survival of the Endorois are exploited.⁴³⁶ According to the African Commission, the lack of adequate consultation caused the Endorois to feel marginalised in a significant process of development in their life as a people.⁴³⁷ Furthermore, the African Commission stated that the respondent State's failure to provide the Endorois with adequate compensation and other benefits as well as the failure to provide them with suitable land to graze their livestock, proves that the respondent State failed to involve the Endorois adequately in the development process.⁴³⁸

⁴²⁹ Para 294.

⁴³⁰ Para 294.

⁴³¹ Para 294.

⁴³² African Charter for Popular Participation in Development and Transformation adopted at the International Conference on Popular Participation in the Recovery and Development Process in Africa held in Arusha in 1990.

⁴³³ *Endorois* para 295.

⁴³⁴ Para 295.

⁴³⁵ Para 296.

⁴³⁶ Para 296.

⁴³⁷ Para 297.

⁴³⁸ Para 298.

Based on the violations found, the African Commission recommended that the respondent State should recognise the victims' rights of property ownership as well as restitution of their traditional land. Moreover, it recommended that the respondent State ensure that the Endorois enjoy their right of access to Lake Bogoria for religious and cultural practices as well as for grazing their livestock. The African Commission recommended that the respondent State compensate the victims adequately.⁴³⁹

5 5 Jurisprudence of the African Commission: Evaluation in light of the teleological approach

5 5 1 Development of the scope and content of explicit socio-economic rights

The analysis has established that the African Commission did not apply the teleological approach in developing the scope and content of these rights during the limited phase. It did not elaborate the object and purpose of the African Charter relating to the socio-economic rights involved. The African Commission did not consider the African Charter holistically in developing the content of the rights. During the limited phase, the African Commission relied exclusively on the narrow and literal textual approach to interpretation. As was demonstrated in chapter two⁴⁴⁰ the narrow and literal textual approach limits the ability of the supervisory organs to engage different interpretative tools to generate the meaning, scope and content of the provisions effectively. The approach strictly confines the supervisory organ to the letters of the provisions being interpreted.

During this phase, the African Commission found the violations of socio-economic rights by merely reiterating the provisions of such rights without elaborating what those rights entail. For example, in the *Union Interafricaine, Malawi African Association and Modise*, communications that involved the violation of the right to property, the African Commission did not elaborate the precise normative content of this broadly formulated right in the African Charter.⁴⁴¹ As such, jurisprudence in the limited phase failed to clarify clearly, what States should protect regarding the right to property. Ssenyonjo observes that the failure to develop the content of the right to property caused the lack of clarity of the elements of this right, including its meaning.⁴⁴² Similar to its approach with regard to

⁴³⁹ Para 298.

⁴⁴⁰ See chapter two, part 2 2 2.

⁴⁴¹ See also Ssenyonjo (2015) *International Human Rights Law Review* 161.

⁴⁴² Ssenyonjo "Economic, social and cultural rights" in *The African Regional Human Rights System* 63.

the right to property, the African Commission also failed to analyse the normative content of the right to work in *Mazou* and *Union Interafricaine*. Ssenyonjo argues that the African Commission was not clear on whether the right to work incorporates an exclusive and unconditional right to obtain employment as well as the individual's right to choose work.⁴⁴³ Although it established the unequal treatment between the victim and other people condemned of the same offence, it failed to use the value of equality and the right to equality to develop the content of the right to work in *Mazou*. The African Commission thus failed to elaborate on the interdependence between the right to work and the right to non-discrimination and equality.

In *Free Legal Assistance*, *Union Interafricaine*, *Saro-Wiwa*, *Malawi African Association* and *Media Rights Agenda* the African Commission failed to elaborate the elements that constitute the rights to health and education. Yeshanew confirms the failure of the African Commission to give an expansive analysis of the contents of the right to health in the *Free Legal Assistance*.⁴⁴⁴ In *Union Interafricaine* in particular, although the African Commission referred to the right to non-discrimination, it did not expound the interdependence between this right and the rights to property, work, education, and protection of the family. It also failed to use the right to non-discrimination to elaborate the scope and content of the rights involved in this communication. Mbazira⁴⁴⁵ and Ssenyonjo⁴⁴⁶ confirm the African Commission's failure to interpret and develop the contents of these rights. Ssenyonjo argues that the actual words in the provisions of the rights to health and education do not generate the normative contents of these rights.⁴⁴⁷ They require proper interpretation and elaboration in the context of the specific communications.

It should be noted that scholars have also identified various reasons that contributed to the limited development of the normative content of socio-economic rights in the jurisprudence of the African Commission during this phase. One of the reasons noted by Mbazira, Ssenyonjo and Umozurike is that various actors give less priority to socio-

⁴⁴³ 67.

⁴⁴⁴ SA Yeshanew "Approaches to the justiciability of economic, social and cultural rights in the jurisprudence of the African Commission on Human and Peoples' Rights: Progress and perspectives" (2011) 11 *African Human Rights Law Journal* 317 322-323. See also Ssenyonjo (2015) 4 *International Human Rights Law Review* 168.

⁴⁴⁵ C Mbazira "Enforcing the economic, social and cultural rights in the African Charter on Human and Peoples' Rights: Twenty years of redundancy, progression and significant strides" (2006) 6 *African Human Rights Law Journal* 333 345.

⁴⁴⁶ Ssenyonjo "Economic, social and cultural rights" in *The African Regional Human Rights System* 64.

⁴⁴⁷ 64-65.

economic rights than to civil and political rights. Many communications filed with the African Commission engaged mainly civil and political rights rather than socio-economic rights.⁴⁴⁸ Civil society actors such as the non-governmental organisations ('NGOs') did not give priority to violations relating to socio-economic rights in the same manner they did with the civil and political rights.⁴⁴⁹ Thus, the African Commission received few communications alleging the violations of socio-economic rights such as the rights to food, adequate housing and social security.⁴⁵⁰ Moreover, the African Commission was more reluctant to determine communications involving socio-economic rights than those involving civil and political rights.⁴⁵¹ Ssenyonjo also mentions lack of international jurisprudence as a reason that hindered the African Commission from elaborating the normative scope and content of the socio-economic rights.⁴⁵² Umozurike argued earlier that the development of the normative content of the socio-economic rights by the African Commission would burden the States with many problems that they could not solve.⁴⁵³

Another reason mentioned by scholars is the confidentiality requirement regarding the findings of the African Commission in article 59 of the African Charter. Umozurike argues that the confidentiality requirement pursuant to the provisions of article 59 of the African Charter jeopardised the power of the African Commission to develop the content of human rights in an elaborate manner.⁴⁵⁴ The requirement minimises the responsibility of the African Commission to elaborate the content of socio-economic rights.⁴⁵⁵ It should be noted that, as discussed in chapter four of this study,⁴⁵⁶ the principle of effectiveness incorporated in the teleological approach to interpretation allows the African Commission to publish its reports. Moreover, as discussed in chapter four⁴⁵⁷ since June 1994 the African Commission has been publishing its decisions.⁴⁵⁸ Scholars have also identified

⁴⁴⁸ Mbazira (2006) *African Human Rights Law Journal* 343.

⁴⁴⁹ Ssenyonjo "Economic, social and cultural rights" in *The African Regional Human Rights System* 69.

⁴⁵⁰ 69.

⁴⁵¹ 68-69. Ssenyonjo also mentions lack of international jurisprudence as a reason that hindered the African Commission from elaborating the normative scope and content of socio-economic rights.

⁴⁵² 69.

⁴⁵³ UO Umozurike "The African Charter on Human and Peoples' Rights" (1983) 77 *American Journal of International Law* 902 911.

⁴⁵⁴ UO Umozurike "The African Charter on Human and Peoples' Rights: Suggestions for more effectiveness" (2007) 13 *Annual Survey of International & Comparative Law* 179 182.

⁴⁵⁵ Mbazira (2006) *African Human Rights Law Journal* 343.

⁴⁵⁶ See chapter four, part 4 3 8.

⁴⁵⁷ See chapter four, part 4 3 8.

⁴⁵⁸ Seventh Activity Report of the African Commission on Human and Peoples' Rights 1993-1994, Thirtieth Ordinary Session, 13-15 June, 1994 Tunis, Tunisia.

the African Commission's lack of interdependence, expertise and financial resources as reasons for the under-development of the scope and content of socio-economic rights.

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The reasons identified by these scholars concerning the contribution of the identified factors to the limited development of the normative scope and content of socio-economic rights are valid. However, it can be argued that the main reason for such under-development is the failure of the African Commission to use the teleological approach for interpreting these rights. During this phase of its jurisprudence, the African Commission relied mainly on a narrow and literal textual approach to interpretation that does not take into account relevant interpretive tools of the teleological approach to human rights treaty interpretation as analysed in chapter two.

Ssenyonjo also argues that in its decisions the African Commission failed to draw inspiration from relevant international human rights instruments to develop the scope and content of socio-economic rights despite article 60 of the African Charter requiring it to do so.⁴⁶⁰ It should be noted that the formulation of article 60 is mandatory, not discretionary.⁴⁶¹ Commenting on *Malawi African Association*, Mbazira argues that reference to international instruments and jurisprudence would have assisted the African Commission to elaborate the scope of socio-economic rights' obligations.⁴⁶² Commenting on the failure of the African Commission to elaborate the normative content of the right to education, Nmehielle argues that the African Commission could draw inspiration from the CESCRC that considers the right to education as among the significant socio-economic rights.⁴⁶³

In the expansive phase, the African Commission applied various aspects of the teleological approach to interpret socio-economic rights involved. For example in *Dino Noca v Democratic Republic of the Congo* ('Noca'),⁴⁶⁴ *Endorois, Mauritania*, *COHRE*, and *IHRDA* the African Commission, engaging a number of provisions of the African Charter, applied relevant international, regional and national laws and jurisprudence to interpret the right to property. For example in *Noca*, in conjunction with the provisions of

⁴⁵⁹ See also Mbazira (2006) *African Human Rights Law Journal* 343; and Ssenyonjo "Economic, social and cultural rights" in *The African Regional Human Rights System* 68.

⁴⁶⁰ Ssenyonjo "Economic, social and cultural rights" in *The African Regional Human Rights System* 68. See also Umozurike (2007) *Annual Survey International & Comparative Law* 182.

⁴⁶¹ The formulation of art 60 uses the phrase "shall".

⁴⁶² Mbazira (2006) *African Human Rights Law Journal* 345.

⁴⁶³ VO Nmehielle *The African Human Rights System: Its Laws, Practice, and Institutions* (2001) 130-131.

See also Umozurike (2007) *Annual Survey International & Comparative Law* 182.

⁴⁶⁴ *Dino Noca v Democratic Republic of the Congo* Communication no. 286/2004.

article 2 of the African Charter, the African Commission identified that the right to property in article 14 is recognised for every individual.⁴⁶⁵ This interpretation by the African Commission is significant as it establishes the holder of the right to property. Krause correctly observes that in developing the holder of the right to property in article 14 of the African Charter, the African Commission has to use the provisions of article 2. As such, recognition of individuals and groups as the right holder of this right is necessary.⁴⁶⁶

In *COHRE*, *IHRDA* and *Noca*, the African Commission identified two main principles relating to the right to property. These principles include the general right to ownership and peaceful enjoyment of the right to property, as well as the possibility and condition of deprivation of the right to property.⁴⁶⁷ In *Noca* the African Commission stated that the right to property encompasses the right to an adequate compensation.⁴⁶⁸ The element of compensation is imperative in the right to property in that it recognises and protects an individual's right to ownership of property against unlawful deprivation. As Krause notes, the requirement to compensate for deprivation of ownership distinguishes the two forms of interferences namely: deprivation of property and control over the use of property.⁴⁶⁹ The African Commission also identified "land" as another component of the right to property.⁴⁷⁰ The inclusion of "land" as a component of property is significant as it broadens the scope of the right to property and cures the African Charter's silence on what constitutes property. Krause correctly observes none of the international human rights instruments "limit the protection of property to any particular kind of property."⁴⁷¹ Moreover, in *Endorois* the African Commission added other components of the right to property to include access to property, possession, use and control over the property as well as economic resources and rights on the collective land.⁴⁷² These elements are significant in that they assist to identify forms of interference by the States and their implications for the right to property ownership. Krause, when commenting on "control

⁴⁶⁵ Para 128.

⁴⁶⁶ Krause "The right to property" in *Economic, Social and Cultural Rights* 199.

⁴⁶⁷ *COHRE* para 143.

⁴⁶⁸ *Noca* para 147.

⁴⁶⁹ Krause "The right to property" in *Economic, Social and Cultural Rights* 200.

⁴⁷⁰ *Endorois* para 186.

⁴⁷¹ Krause "The right to property" in *Economic, Social and Cultural Rights* 198-199.

⁴⁷² *Endorois* para 186.

over the use of property”, argues that this is a lesser form of interference that does not infringe on the right to ownership.⁴⁷³

Moreover, the decision of the African Commission in *Endorois* is unique and important regarding the property rights of the indigenous peoples. The decision recognises the right of the indigenous peoples to their ancestral land even without formal title.⁴⁷⁴ This recognition of the indigenous peoples’ property rights without registered titles embraces the approach of the African Charter that draws on African realities and philosophical perspectives regarding peoples’ rights. It was demonstrated in chapter three that the African Charter not only recognises individuals’ but also peoples’ socio-economic rights.⁴⁷⁵ It was argued that the recognition of the collective socio-economic rights is justified by the notion of African philosophy entrenched in the preamble to the African Charter and elaborated in the provisions within the African Charter. It was elaborated that the notion of African philosophy is centred on the understanding that African societies are collective in nature.⁴⁷⁶ Particularly, chapter three demonstrated that based on African philosophy property rights in most of the African societies are collective in nature.⁴⁷⁷

In *Endorois* however, the African Commission did not invoke the notion of African philosophy to elaborate and develop this unique and important scope and content of the right to property relating to indigenous peoples. It exclusively relied on the relevant jurisprudence of the IACtHR. Although relevant jurisprudence of other regional bodies is an important tenet of the teleological approach the interpretive potential within the text of the African Charter as a whole need to be explored first. The methodology for application of the teleological approach, developed in chapter two, argued for the supervisory organs to start the interpretative process by the text of the African Charter as a whole.⁴⁷⁸ Exclusive reliance on the relevant jurisprudence, although it resonates strongly with the teleological approach, does not enable the African Commission to elaborate the manner in which the African Charter is sufficiently formulated to develop the scope and content of the socio-economic rights. The African Commission could apply the notion of African philosophy first to develop the scope and content of the

⁴⁷³ Krause “The rights to property” in *Economic, Social and Cultural Rights* 200.

⁴⁷⁴ *Endorois* paras 188-190.

⁴⁷⁵ See chapter three, parts 3 3 4 6 to 3 3 4 8.

⁴⁷⁶ See chapter three, part 3 2 4 2.

⁴⁷⁷ See chapter three, part 3 2 4 2.

⁴⁷⁸ See chapter two, parts 2 5, 2 5 2, and 2 5 2 1.

property rights of the indigenous peoples and then apply the relevant jurisprudence to establish the external coherence.

In *SERAC* the African Commission applied the ICESCR as a relevant international human rights instrument and the relevant provisions of the African Charter to interpret the right to health. Through these tenets of the teleological approach, the African Commission elaborated upon the normative content of the rights to health and the right to a healthy environment to include environmental and industrial hygiene, scientific monitoring of threatened environments, publishing of environmental and social impact studies, access to information and meaningful participation of the individuals.⁴⁷⁹ In *Purohit* the African Commission, by engaging the provisions of articles 16 and 18(4) of the African Charter, extended the content of the right to health to encompass right to health facilities and access to health goods and services without discrimination.⁴⁸⁰ In *COHRE* the African Commission drew inspiration from relevant international human rights instruments and expanded the content of the right to health.⁴⁸¹ According to the African Commission, the right to health also incorporates timely and appropriate health care, access to safe and portable water, an adequate supply of food, nutrition and housing, as well as safe drinking water and electricity.⁴⁸² Moreover, other determinants of the right to health include availability, accessibility and acceptability.⁴⁸³ These three elements are significant as they identify the guiding principles for the realisation of the right to health. Toebees argues that the criterion of “availability” guides the States to ensure health services are sufficient for the whole population and at an adequate standard. Accessibility requires States to ensure health services are financially affordable and they are geographically within reach as well as on an equal basis. Acceptability ensures that they are culturally acceptable by the population.⁴⁸⁴ Through this jurisprudence relating to the right to health, the African Commission has managed to cover two significant aspects relating to this right, namely health care as well as the underlying determinants of the right to health. As Toebees rightly argues:

⁴⁷⁹ *SERAC* paras 52-53.

⁴⁸⁰ *Purohit* para 80.

⁴⁸¹ *COHRE* para 209. It also applied relevant international human rights instruments and jurisprudence to interpret the right to the protection of the family.

⁴⁸² Paras 209 and 211.

⁴⁸³ Para 209.

⁴⁸⁴ B Toebees “The right to health” in A Eide, C Krause & A Rosas (eds) *Economic, Social and Cultural Rights: A Textbook* 2 ed (2001) 169 177-178.

“The elements that make up the right to health can be divided into two categories: one containing elements related to ‘health care’ (including curative as well as preventive health care), another one encompassing elements related to a number of ‘underlying preconditions for health’. The latter may be considered to include safe drinking water, adequate sanitation, adequate nutrition, health-related information, environmental health, and occupational health.”⁴⁸⁵

Furthermore, the African Commission in *SERAC* applied the preparatory work and the relevant international human rights jurisprudence to explain the right of peoples to freely dispose their wealth in article 21 of the African Charter. However, it failed to apply this important interpretative tool in the subsequent jurisprudence.

5 5 2 Broadening the scope of socio-economic rights: Derived rights

In the limited phase the communications did not expressly allege the violations of socio-economic rights that are not explicitly stated in the African Charter. These rights include the socio-economic rights to social security, and the highest standard of living including water, food and housing. For example, in *Free Legal Assistance* the complainants alleged that the respondent State’s failure to provide safe drinking water constituted a violation of the right to health in article 16 of the African Charter.⁴⁸⁶ In this communication the African Commission found denial of the basic services such as water to constitute a violation of the right to health. However, it failed to show the interdependence between the right to health and the right to water. The African Commission failed to use the opportunity in *Free Legal Assistance* to include in the African Charter the derivative right to water. In *Malawi African Association* the African Commission in determining the right to health held that denial of food to the victims violated right to health. However, it did not elaborate the existence of the right to food in the African Charter clearly. It also did not refer to any aspect of the teleological approach to elaborate the right to food.

In the expansive phase, the African Commission broadened the scope of socio-economic rights in the African Charter to include implicit socio-economic rights. It was demonstrated in the analysis that in *SERAC* the African Commission engaged some provisions of the African Charter to incorporate the right to food and housing in the African Charter.⁴⁸⁷ The African Commission held that by violating these existing rights the respondent State not only violated these explicit rights but also violated the right to

⁴⁸⁵ 174.

⁴⁸⁶ *Free Legal Assistance* para 4.

⁴⁸⁷ *SERAC* paras 60-67. See also part 5 4 3 1 above.

food that is implicit in the African Charter.⁴⁸⁸ As shown in the analysis above, in *COHRE* the African Commission interpreted the rights to adequate food, water and housing as the underlying components of the right to health.⁴⁸⁹ It relied on the relevant international instruments particularly, the UDHR, ICESCR, and General Comment 4 to include the derived rights.

The position taken by the African Commission draws on the principle of interdependence of the rights to incorporate omitted socio-economic rights as discussed in chapter three.⁴⁹⁰ Thus, the broadening of the scope to include omitted socio-economic rights in the African Charter is significant in two respects. Firstly, it implies that socio-economic rights that are not expressly formulated in the African Charter can be included in the African Charter through interpretation. Viljoen rightly argues that the concept of implied rights confirms that the express textually formulated rights do not necessarily prevent the recognition of other rights that are not textually formulated.⁴⁹¹ Ssenyonjo notes that the jurisprudence of the African Commission brings into the African Charter all missing socio-economic rights, including the rights to social security, water and sanitation.⁴⁹² Secondly, the extension of the scope of the African Charter affirms the interdependence of rights. As demonstrated in chapter three, the concept of interdependence of rights can be applied as a mechanism of recognising and incorporating into the African Charter significant socio-economic rights that are not explicitly formulated therein.⁴⁹³ Viljoen confirms the notion of the interdependence of rights through the notion of implied rights.⁴⁹⁴ In relation to interdependence of socio-economic rights Krause, when commenting on the link between the right to property and housing, correctly observes that:

“The link between housing rights and the protection of property is obvious. The home which one owns is protected by one’s right to property. In this way, the right to property also contributes to the realisation of the right to housing.”⁴⁹⁵

The use of interdependence of the rights to incorporate omitted socio-economic rights resonates strongly with a teleological approach and advances the object and

⁴⁸⁸ *SERAC* para 64.

⁴⁸⁹ *COHRE* para 209.

⁴⁹⁰ See chapter three, part 3 3 2 2.

⁴⁹¹ Viljoen *International Human Rights Law* 327.

⁴⁹² Ssenyonjo “Economic, social and cultural rights” in *The African regional human rights system* 74.

⁴⁹³ See chapter three, part 3 3 2 2.

⁴⁹⁴ Viljoen *International Human Rights Law* 327.

⁴⁹⁵ Krause “The right to property” in *Economic, Social and Cultural Rights* 207.

purpose of the African Charter. As Viljoen argues, implicit socio-economic rights should be incorporated in the African Charter by using the explicit rights.⁴⁹⁶ According to Viljoen, the right to food can be established through the provisions of articles 4, 16 and 22.⁴⁹⁷

5 5 3 Elaborating the scope and content of States' obligations

5 5 3 1 Obligations to respect, protect, promote, and fulfil

In the limited phase, the African Commission elaborated the nature and scope of States' obligations broadly. The broad elaboration of States' obligations is problematic, as it does not define the precise nature of these obligations. The African Commission did not apply any tenet of the teleological approach to interpret States' obligations imposed by the relevant rights.

To the contrary, in the expansive phase the African Commission elaborated the nature and scope of States' obligations in a detailed manner. In *SERAC* the African Commission applied the ICESCR to clarify the nature of States' obligations. It clarified the quartet typology of State obligations imposed by each socio-economic right. According to the African Commission, each right imposes upon States obligations to respect, protect, promote and fulfil the relevant rights. The African Commission applied its own jurisprudence and the relevant international laws to elaborate the nature of States' obligations imposed by the rights to property and health in *Endorois*,⁴⁹⁸ *Mauritania*, *COHRE*,⁴⁹⁹ and *Noca*. The African Commission stated that the provisions of articles 14 and 16 respectively, impose upon States the duties to respect, protect and fulfil the rights to property and health.⁵⁰⁰

The elaboration of States' typology of obligations in the development of the nature and scope of the obligations imposed by socio-economic rights is significant in two respects. Firstly, it demonstrates that the content and scope of each socio-economic right encompasses both negative and positive duties. As Odinkalu⁵⁰¹ and Chenwi⁵⁰² correctly observe, the human rights in the African Charter impose upon State Parties

⁴⁹⁶ Viljoen *International Human Rights Law* 328.

⁴⁹⁷ 328.

⁴⁹⁸ *Endorois* para 191.

⁴⁹⁹ *COHRE* paras 192 & 209.

⁵⁰⁰ Paras 192 & 209. See also *Endorois* para 191.

⁵⁰¹ Odinkalu "Implementing economic, social and cultural rights" in *The African Charter on Human and Peoples' Rights* 196.

⁵⁰² L Chenwi "An appraisal of international law mechanisms for litigating socio-economic rights, with a particular focus on the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights and the African Commission and Court" (2011) 3 *Stellenbosch Law Review* 683 689.

both negative and positive obligations. Through *SERAC* the African Commission outlines the negative and positive duties imposed upon States by the socio-economic rights in the African Charter.⁵⁰³ The negative obligations require States to desist from interfering in the enjoyment of the rights while positive obligations require States to take positive interventions. According to Heyns, the obligation to respect is negative in nature in that States are obliged to refrain from interfering with individuals' enjoyment of their socio-economic rights.⁵⁰⁴ The obligations to protect, promote and fulfil are positive in nature in that States are required to ensure third parties do not violate individuals' socio-economic rights, as well as to advance and sustain individuals' enjoyment of such rights.⁵⁰⁵ Thus, all human rights impose upon States obligations relating to non-interference, as well as taking positive measures to ensure enjoyment of these rights.⁵⁰⁶

Secondly, drawing on international law scholarship, it suggests that States must immediately ensure that socio-economic rights are respected, whilst taking progressive positive steps to protect, promote and fulfil socio-economic rights. Chirwa observes that the obligation to respect requires States to realise the rights immediately while the obligations to protect, promote, and fulfil require a progressive realisation.⁵⁰⁷ The aspect of progressive realisation will be analysed below.⁵⁰⁸

The African Commission failed to engage the duties' provisions in the African Charter to incorporate and elaborate the typology of obligations. In the *SERAC*, the African Commission failed to engage the provisions of article 1, 25, and 26 of the African Charter to elaborate the quartet typology of obligations. As demonstrated in chapter three, article 1 incorporates the obligations to respect, protect, promote, and fulfil.⁵⁰⁹ Moreover, articles 25, 26, and 28 provide for the obligations to promote and respect.⁵¹⁰ Thus, the failure to expound the typology of obligations from these provisions is problematic. The problem lies with the fact that the African Commission failed to use the

⁵⁰³ 689.

⁵⁰⁴ C Heyns "Civil and political rights in the African Charter" in MD Evans & R Murray (eds) *The African Charter on Human and Peoples' Rights: The System in Practice, 1986-2000* (2002) 137 138-139.

⁵⁰⁵ 138-139.

⁵⁰⁶ IT Winkler *The Human Right to Water: Significance, Legal Status and Implications for Water Allocation* (2012) 107.

⁵⁰⁷ DM Chirwa "African regional human rights system: The promise of recent jurisprudence on social rights" in M Langford (ed) *Social Rights jurisprudence: Emerging Trends in International and Comparative Law* (2008) 323 325.

⁵⁰⁸ See part 5 5 3 3 below.

⁵⁰⁹ See chapter three, part 3 3 3 2.

⁵¹⁰ See chapter three, parts 3 3 5 1 and 3 3 5 2.

relevant provisions of the African Charter to develop the nature and scope of the obligations imposed by the socio-economic rights.

5 5 3 2 Obligation of non-discrimination

Apart from the quartet typology of obligations, the jurisprudence of the African Commission identifies States' obligation to non-discrimination as a socio-economic rights' obligation. The African Commission in *Purohit* stated that the right to health imposes upon States an obligation to ensure realisation of this right without discrimination of any kind.⁵¹¹ Moreover, in *Endorois* the African Commission acknowledged States' obligation to non-discrimination in the right to property.⁵¹²

As discussed in chapter three of this dissertation,⁵¹³ the inclusion of the obligation to eliminate discrimination in the realisation of the socio-economic rights is significant in two respects. Firstly, it shows that these socio-economic rights incorporate obligations of immediate nature. Secondly, the jurisprudence's use of the term "any other kind"⁵¹⁴ shows that States should refrain from both direct and indirect discrimination of the rights to health and property.⁵¹⁵ This implies that socio-economic rights prohibit discrimination on the prohibited grounds, as well as discrimination on any other status. While commenting on the provisions of article 2(2) of the ICESCR, Winkler notes that prohibition of discrimination extends to both direct and indirect discrimination, which includes discrimination based on prohibited grounds as well as discrimination done without the intention to discriminate.⁵¹⁶

Significantly, the jurisprudence of the African Commission includes positive discrimination as a component of socio-economic rights' obligations. In *Endorois* the

⁵¹¹ *Purohit* para 80.

⁵¹² *Endorois* para 196.

⁵¹³ See chapter three, part 3 3 3 4.

⁵¹⁴ *Endorois* para 80.

⁵¹⁵ The CESCR defines direct and indirect discrimination in its General Comment 20, Non-discrimination in economic, social and cultural rights (art 2, para 2) (2009) UN Doc. E/C. 12/GC/20 ('General Comment 20') para 10 (a)-(b). According to CESCR:

"Direct discrimination occurs when an individual is treated less favourably than another person in a similar situation for a reason related to a prohibited ground; e.g., where membership of a trade union, or employment in educational or cultural institution is based on the political opinions of applicants or employees. Direct discrimination also includes detrimental acts or omissions on the basis of prohibited grounds where there is not comparable similar situation (e.g. the case of a woman who is pregnant)." While "Indirect discrimination refers to laws, policies or practices which appear neutral at first value, but have a disproportionate impact on the exercise of Covenant rights as distinguished by prohibited grounds of discrimination. For instance, requiring a birth certificate for school enrolment may discriminate against ethnic minorities or non-nationals who do not possess or have been denied, such certificates."

⁵¹⁶ Winkler *The Human Right to Water* 112-113.

African Commission recognised that States bear an obligation to consider preferential treatment for marginalised and disadvantaged groups in order to eliminate the discrimination they face and promote substantive equality. Thus the African Commission held:

“Positive discrimination or affirmative action helps to redress imbalance... it is a well-established principle of international law that unequal treatment towards persons in unequal situations does not necessarily amount to impermissible discrimination. Legislation that recognises said differences is therefore not necessarily discriminatory.”⁵¹⁷

The African Commission’s recognition of positive discrimination in socio-economic rights is vital in the sense that it enables States to consider preferential treatment to vulnerable individuals to ensure their effective enjoyment of socio-economic rights. Ssenyonjo argues that the jurisprudence of the African Commission demonstrates that States have a general obligation not to discriminate on prohibited grounds as well as taking special measures to help marginalised groups from the violations caused by discrimination.⁵¹⁸ Writing on the obligations imposed by the right to water, Winkler notes that States are obliged to adopt non-discriminatory measures. However, they are also obliged by the international human rights instruments to give preferential treatment to the most marginalised and vulnerable groups in order to redress the inequalities that perpetuate discrimination.⁵¹⁹ As such, the obligation to non-discrimination does not prohibit or prevent States from taking special measures to correct the inequalities. As the CESCR states in its General Comment 20 on non-discrimination in economic social and cultural rights (‘General Comment 20’),⁵²⁰ such special measures are valid provided they are “reasonable, objective and proportional” to remedy *de facto* discrimination.⁵²¹

5 5 3 3 Obligation of progressive realisation

In *Purohit* and in *Gunme* the African Commission stated that the right to health and the right to development impose upon States an obligation of progressive realisation.⁵²² While in *Gunme* the African Commission clearly used the phrase “progressive

⁵¹⁷ *Endorois* para 196. In this communication the respondent state argued that preferential treatment in favour of the Endorois can be perceived as discriminatory.

⁵¹⁸ Ssenyonjo “Economic, social and cultural rights” in *The African Regional Human Rights System* 84.

⁵¹⁹ Winkler *The Human Right to Water* 113.

⁵²⁰ CESCR General Comment 20 para 9.

⁵²¹ Para 9.

⁵²² *Purohit* para 84. See also *Gunme* para 205.

realisation”, in *Purohit* the African Commission stated that the State’s obligation to ensure the full realisation of the right to health entailed taking “concrete and targeted steps”.⁵²³ In this regard, the African Commission held that:

“The African Commission would however like to state that it is aware that millions of people in Africa are not enjoying the right to health maximally because African countries are generally faced with the problem of poverty which renders them incapable to provide the necessary amenities, infrastructure and resources that facilitate the full enjoyment of this right. Therefore, having due regard to this depressing but real state of affairs, the African Commission would like to read into Article 16 the obligation on part of States party to the African Charter to take concrete and targeted steps, while taking full advantage of its available resources, to ensure that the right to health is fully realised in all its aspects without discrimination of any kind.”⁵²⁴

Chenwi notes that whether the obligation “to take concrete and targeted steps” requires States to implement their obligations regarding the right to health immediately remains unclear.⁵²⁵ However, it can be argued that the obligation “to take concrete and targeted steps” incorporates the obligation to take immediate steps towards the progressive realisation of the right to health. This argument is based on the fact that not all requirements regarding the right to health can be realised immediately. Based on the scarcity of resources as mentioned by the African Commission and as argued in chapter three,⁵²⁶ right to health should be realised progressively. It was demonstrated in chapter three that the object and purpose of the African Charter to protect requires States through the provisions of article 1, to take legislative and other measures to realise socio-economic rights. The African Commission’s decision requiring States to take “concrete and targeted steps while taking full advantage of its available resources to ensure the right to health is fully realised” steps can broadly be argued to be incorporated in the provisions of article 1 that require States to take legislative and other measures. The African Commission reasoned that poverty prevents States from realising the right to health. This reasoning resonates with the argument of resource scarcity which makes the full realisation of all aspects of the right immediately impossible for many African states. As argued in chapter three, object and purpose of article 1 requires measures, taken for realisation of socio-economic rights, to be realised

⁵²³ *Purohit* para 84.

⁵²⁴ Para 84.

⁵²⁵ Chenwi (2011) *Stellenbosch Law Review* 695.

⁵²⁶ See chapter three, part 3 3 3 3.

progressively. In this way it can be argued that obligation “to take concrete and targeted steps” in *Purohit* implies an obligation of progressive realisation.

However, it should be noted that progressive realisation should not be considered as an excuse to delay taking immediate, relatively inexpensive steps such as designing a plan of action for the realisation of the rights. As such, if the relevant rights cannot be realised immediately, immediate and concrete steps must be taken towards full realisation. As the CESCR stated in its General Comment 3, “progressive realisation” in article 2 does not relieve States from realising the minimum essential levels⁵²⁷ of the socio-economic rights in the ICESCR.⁵²⁸

Commenting on the decision of the African Commission in *Purohit Ssenyonjo* notes that by the phrase “take concrete and targeted steps”, the African Commission read into article 16 the obligation to progressive realisation.⁵²⁹ While reviewing *Purohit Mbazira* notes that the African Commission’s statement that States should take concrete and targeted steps mindful of the availability of resources, denotes the inclusion of the obligation of progressive realisation towards full realisation of the right to health in the African Charter.⁵³⁰ However, as discussed above, States bear an obligation to take immediate steps towards full realisation of the relevant socio-economic rights.

Viljoen argues that the obligation “to take concrete and targeted steps” is only applicable to the right to health. Viljoen’s argument that the obligation to “take concrete and targeted steps” is relevant in the context of the right to health is valid. However, I contend that this obligation extends to other socio-economic rights in the African Charter. It has been demonstrated above that the obligation to take concrete and targeted steps is incorporated in the obligation to realise socio-economic rights progressively embodied in the provisions of article 1 of the African Charter. The essence of “progressive realisation” in article 1, as it was discussed in chapter three, takes into account the fact that, based on their dependence on resources and scarcity of such resources, socio-economic rights in the African Charter cannot be realised immediately. It can therefore be argued that it is the object and purpose of the African Charter to

⁵²⁷ The notion of minimum essential levels is analysed in chapter six, part 6 4 2.

⁵²⁸ CESCR General Comment 3, The Nature of States Parties’ Obligations UN Doc. E/1991/23 (‘General Comment 3’).

⁵²⁹ Ssenyonjo (2011) *Netherlands Quarterly of Human Rights* 387.

⁵³⁰ C Mbazira Case Review: The right to health and the nature of socio-economic rights obligations under the African Charter: The Purohit case (2005) 6 *ESR Review*, available at <<http://dullahomarinate.org.za/socio-economic-rights/research-and-publications/esr-review/Volume%206%20%204%20November%20%2005>> (accessed 15-05-2017).

realise socio-economic rights progressively towards their full realisation. This means the obligation in *Purohit*, as it is an obligation to progressive realisation is not restricted to the right to health but rather it is applicable to the positive duty to fulfil all the socio-economic rights in the African Charter. Moreover, as discussed in chapter two, the principle of effectiveness requires provisions to be interpreted in a manner that renders their meaning effective and practical rather than theoretical and illusory. It will be defeating the object and purpose of the African Charter and render the provisions of socio-economic rights in the African Charter theoretical and illusory if “progressive realisation” is restricted to the right to health only. Mbazira notes while the obligation to “take concrete and targeted steps” was applied to the right to health it is also applicable to all socio-economic rights in the African Charter.⁵³¹

As discussed in chapter 3, progressive realisation requires States to take positive measures towards the full realisation of individuals’ socio-economic rights.⁵³² States Parties should be able to show that sufficient measures are being taken for the realisation of the human rights of individuals within the shortest period in accordance with the maximum available resources.⁵³³ It is worth noting that, as demonstrated in chapter 3,⁵³⁴ the inclusion of “progressive realisation” in the African Commission’s socio-economic rights jurisprudence is significant in two respects. Firstly, it allows States to protect such rights on a progressive basis towards their full realisation. Secondly, “progressive realisation” provides the claimants of socio-economic rights violations with an opportunity to demonstrate the State’s failure to realise their rights within a reasonable period of time.

As is the case with the typology of obligations, the African Commission failed to construe the obligations to progressive realisation and available resources through the provisions of article 1. It should be noted that chapter three of this dissertation demonstrated that the formulation of the provisions of article 1 includes the obligation to progressive realisation.⁵³⁵ In *Purohit* the African Commission failed to use this possibility found in the African Charter to develop the scope of States’ obligations, imposed by the

⁵³¹ C Mbazira Case Review: The right to health and the nature of socio-economic rights obligations under the African Charter: The *Purohit* case. See also Ssenyonjo (2011) *Netherlands Quarterly of Human Rights* 388.

⁵³² See chapter three, 3 3 3 3.

⁵³³ M Craven *The International Covenant on Economic, Social and Cultural Rights: A Perspective on its Development* (1995) 330-331.

⁵³⁴ See chapter three, part 3 3 3 3.

⁵³⁵ See chapter, three, part 3 3 3 3.

right to health, in relation to progressive realisation and availability of resources in the realisation of socio-economic rights. In this communication the African Commission relied exclusively on the UN Principles for the Protection of Persons with Mental Illness. This position demonstrates the African Commission's inappropriate application of the teleological approach to interpretation, to engage the provisions of the African Charter in generating the normative content of the socio-economic rights and their scope of obligations.

5 5 4 Model of review

The discussion in chapter 3 showed that article 1 of the African Charter requires Member States to adopt legislative or other measures to give effect to the socio-economic rights and their concomitant obligations.⁵³⁶ It is important for supervisory organs, after interpreting the scope and content of socio-economic rights and their related obligations, to establish whether the legislative or other measures adopted by States give effect to such obligations. A model of review is required to enable the supervisory organs assess the measures adopted by States. Through a model of review supervisory organs can ascertain States' compliance with their socio-economic rights obligations. Writing on constitutional context Pieterse notes that, having established the scope and content of socio-economic rights and their related obligations, supervisory organs must establish whether measures adopted by States to realise the rights comply with these obligations.⁵³⁷ According to Pieterse, this requires supervisory organs to assess such compliance by using a model of review.⁵³⁸

The analysis has shown that the African Commission has applied different models of review in its jurisprudence, for example in *SERAC*, *Purohit*, *COHRE*, and *Endorois*. However, the African Commission has been inconsistent regarding the model of review it applies. In *SERAC* and *Endorois* the African Commission applied the reasonableness model of review.⁵³⁹ It stated in *SERAC* that States are required to take reasonable and other measures to give effect to the obligations imposed by article 24 of the African

⁵³⁶ See chapter, three, part 3 3 3 3.

⁵³⁷ M Pieterse "Coming to terms with judicial enforcement of socio-economic rights" (2004) 20 *South African Journal on Human Rights* 383 407.

⁵³⁸ 407.

⁵³⁹ *SERAC* para 52 ; and *Endorois* para 172.

Charter.⁵⁴⁰ In *Endorois* it held that States' interference with the enjoyment of rights must be reasonable.⁵⁴¹

In *SERAC* the African Commission also applied the minimum core obligation.⁵⁴² According to the African Commission, at the minimum, the right to shelter requires States to desist from destroying housing of the people, as well as their efforts to reconstruct the demolished homes.⁵⁴³ It further stated that the minimum core of the right to food obliges States to refrain from destroying and polluting food sources.⁵⁴⁴ Furthermore, this obligation requires States to ensure that third parties do not destroy or pollute food sources as well as peoples' efforts to feed themselves.⁵⁴⁵

In *Purohit* the African Commission required States Parties to take "targeted and concrete" steps in the compliance with their obligations imposed by the right to health.⁵⁴⁶ In *COHRE*⁵⁴⁷ and *Endorois*⁵⁴⁸ the African Commission applied the proportionality test stating that limitation of rights in the African Charter must be "proportionate and necessary" for achieving "public need". This inconsistency is problematic, as it does not offer a clear guidance as to the appropriate model of review to be applied. Moreover, the African Commission does not elaborate the content of these models of review. It therefore fails to correspond with the teleological approach to interpretation.

Scholars have criticised the African Commission regarding its application of these models. For example, Chirwa,⁵⁴⁹ Chenwi⁵⁵⁰ and Yeshanew⁵⁵¹ respectively challenge the African Commission for its inconsistency and its failure to elaborate the contents of these standards in its jurisprudence.⁵⁵² In *SERAC* and in *Purohit* the African Commission failed to state the ingredients of the reasonableness review standard.⁵⁵³ Moreover, the meaning of "targeted and concrete" steps as applied in *Purohit* is not clear.⁵⁵⁴ The African Commission failed further to relate the "targeted and concrete"

⁵⁴⁰ *SERAC* para 52.

⁵⁴¹ *Endorois* para 172.

⁵⁴² *SERAC* paras 61 and 65.

⁵⁴³ Para 61.

⁵⁴⁴ Para 65.

⁵⁴⁵ Para 65.

⁵⁴⁶ *Purohit* para 84.

⁵⁴⁷ *COHRE* para 188.

⁵⁴⁸ *Endorois* para 172.

⁵⁴⁹ Chirwa "African regional human rights system" in *Social Rights Jurisprudence* 326-327.

⁵⁵⁰ Chenwi (2011) *Stellenbosch Law Review* 694.

⁵⁵¹ Yeshanew *The Justiciability of Economic, Social and Cultural Rights* 314 and 321.

⁵⁵² Chirwa "African regional human rights system" in *Social Rights Jurisprudence* 326-327.

⁵⁵³ 326-327.

⁵⁵⁴ 327.

steps in *Purohit* with its earlier decision in *SERAC*.⁵⁵⁵ Owing to this inconsistency regarding the precise model of review in its jurisprudence it is difficult to identify a specific model that the African Commission follows.⁵⁵⁶

Scholars' concerns about the uncertainty of the African Commission regarding the model of review it applies and its failure to develop the content of such models are valid. Their concerns indicate the need to develop a specific model of review for the supervisory organs to apply when monitoring States' compliance with their socio-economic rights obligations. In an attempt to address this need, Yeshanew developed a model of review that combines minimum core and reasonableness.⁵⁵⁷ However, as will be shown in the next chapter the notion of minimum core does not sufficiently correspond with the teleological approach to interpretation.

I argue in the next chapter that a teleological model of review is required to assess States' compliance with their socio-economic rights' obligations. The viability of reasonableness integrated with minimum core and proportionality as an appropriate model of review for the supervisory organs to use is considered in the next chapter. This model can be applied to review States' compliance in a manner that furthers the object and purpose of the African Charter relating to socio-economic rights. The teleological model of review is vital for the effective realisation of socio-economic rights in the African Charter.

5 5 5 Remedial recommendations

During the limited phase, the African Commission failed to advance the object and purpose regarding remedial recommendations sufficiently. As shown in the analysis above the African Commission during the limited phase issued mainly broad and unspecific undetailed declaratory remedial recommendations. It issued restitutionary remedies only in *Mazou* and *Malawi African Association*. It issued compensatory remedial recommendations only in *Malawi African Association*. These vague remedial recommendations are problematic in the sense that they fail to protect socio-economic rights effectively in a manner that advances the object and purpose of the African Charter. They also fail to guide States clearly on how to implement the remedies effectively.

⁵⁵⁵ 327.

⁵⁵⁶ Chenwi (2011) *Stellenbosch Law Review* 694. See also Yeshanew *The Justiciability of Economic, Social and Cultural Rights* 321.

⁵⁵⁷ Yeshanew *The Justiciability of Economic, Social and Cultural Rights* 321.

In some communications the victims were not sufficiently redressed. For example in communications where the African Commission issued only undetailed declaratory remedies the victims were left without other effective remedies such as compensation or restitution. As Ssenyonjo notes, in some communications the African Commission did not order any remedial recommendations to benefit the victims directly.⁵⁵⁸ In *Mazou* where the African Commission issued restitutionary remedies it did not elaborate what the respondent State should do to re-instate Mr Mazou. In communications where the African Commission issued compensatory remedies it failed to clearly state how States should compensate. Furthermore, in all remedial recommendations the African Commission failed to apply the provisions of the African Charter to elaborate its remedial mandate as well as the remedial recommendations it issued.

The failure to apply the provisions of the African Charter does not correspond with the teleological approach that requires the African Charter to be applied holistically in elaborating the remedies. Ssenyonjo notes that the African Commission's priority on the amicable resolution was the reason for its failure to issue effective remedies.⁵⁵⁹ It can also be argued that the failure to engage the teleological approach that would have assisted it to apply various provisions of the African Charter to specify effective remedies also contributed to the African Commission's failure to issue effective and legally reasoned remedies.

In the expansive phase, as shown in the analysis above, the African Commission issued in some communications detailed declaratory, restitutionary and compensatory remedial recommendations to redress the victims of the violations effectively. For example, in *COHRE* the African Commission expansively elaborated the remedial recommendation that required the respondent State to "take all necessary and urgent measures" to protect the victims of the violations.⁵⁶⁰ Moreover, as shown in the analysis above, the reasoning of the African Commission on remedies during the expansive phase was more elaborate than in the limited phase. However, the African Commission failed to use aspects of the teleological approach to specify the remedies. The application of the teleological approach would have helped the African Commission to apply various provisions of the African Charter, as discussed in chapter four,⁵⁶¹ to issue effective remedies for the violations. In this way, the African Commission would have

⁵⁵⁸ Ssenyonjo (2015) *International Human Rights Law Review* 158

⁵⁵⁹ 158.

⁵⁶⁰ *COHRE* para 229.

⁵⁶¹ See chapter four, part 4 3 6.

used the provisions of the African Charter to elaborate the object and purpose of the African Charter regarding remedial orders.

5 6 Conclusion

The African Commission has developed remarkable socio-economic rights jurisprudence between 1995 and 2013. Significantly, the limited phase confirms that socio-economic rights, as their counterpart civil and political rights, are justiciable. However, the application of the textual approach to interpretation in the limited phase restricted the African Commission from elaborating the scope and content of socio-economic rights and their related obligations effectively. Moreover, the absolute application of the narrow and literal textual approach to interpretation during the limited phase restricted the possibility of the African Commission to expand the scope of socio-economic rights. Therefore, the African Commission failed to include the implicit rights to food, water and housing in the African Charter. The approach also inhibited the African Commission from issuing sufficient and detailed remedial recommendations to the victims of socio-economic rights violations. These weaknesses led to the ineffective protection of socio-economic rights and defeated the object and purpose of the African Charter.

In the expansive phase, the jurisprudence shows a shift in the approach to interpretation from the narrow and literal textual approach to the teleological approach. Through this approach, the jurisprudence in the expansive phase establishes the normative scope and content of various broadly formulated socio-economic rights in a more elaborate manner. Importantly, the jurisprudence expands the scope of socio-economic rights in the African Charter. The jurisprudence confirms that the African Charter incorporates implicit socio-economic rights to food, water and housing. Moreover, the jurisprudence establishes in the African Charter the States' typology of obligations to respect, protect, promote and fulfil. It also shows that socio-economic rights in the African Charter impose upon States obligations to progressive realisation and non-discrimination. Significantly, the jurisprudence in the expansive phase demonstrates the African Commission's detailed remedial orders.

The major challenge facing the African Commission is the inconsistencies in the application of these aspects of the teleological approach. There are some communications where the African Commission relied exclusively on the ICESCR, for example, in its decision in *SERAC*. In some communications like *Purohit* and *Gunme* it

mixed the teleological approach and the narrow and literal textual approach. In some communications such as *Endorois* it made a good use of the relevant provisions of the African Charter and the relevant international and regional human rights instruments. Moreover, the use of preparatory work of the African Charter is minimal.

The African Commission has also failed to make use of the principle of effectiveness in interpreting the socio-economic rights. Even a holistic use of the African Charter is insufficient as the African Commission failed to apply the provisions of article 1 to elaborate the nature of States' obligations, and the values of equality, dignity; freedom and justice have not been applied to elaborate the scope and content of the socio-economic rights. In chapters two and three, this study identified the significance of these provisions of the African Charter in interpreting socio-economic rights. The analysis of the jurisprudence in this chapter has shown that the African Commission does not have a consistent methodology for applying the teleological approach.

Moreover, the jurisprudence of the African Commission clearly shows the inconsistencies regarding the model of review that the African Commission applies to assess States' compliance with their socio-economic rights obligations. These weaknesses confirm that the jurisprudence of the African Commission on socio-economic rights has not been in line with the teleological approach in a manner that ensures effective protection of socio-economic rights. These inconsistencies in the application of the teleological approach also fail to advance the object and purpose of the African Charter. The following chapter will suggest a more coherent approach that may help the supervisory organs to align their socio-economic rights jurisprudence with the teleological approach to interpretation.

Chapter 6

Aligning the jurisprudence of the African Commission with the teleological approach

6 1 Introduction

The analysis and evaluation of the jurisprudence in the previous chapter has demonstrated that the African Commission on Human and Peoples' Rights ('African Commission')¹ developed both the scope and content of socio-economic rights and the nature and scope of obligations imposed by these rights more extensively in the expansive phase than in the limited phase. Moreover, the previous chapter has shown that in its jurisprudence the African Commission, during the limited phase, relied exclusively on the narrow and literal textual approach that is not consistent with the teleological approach to interpretation. In the expansive phase the African Commission applied the elements of the teleological approach in its jurisprudence to interpret the socio-economic rights.

The application of certain aspects of the teleological approach to the interpretation of the rights was, however, inappropriate. I pointed out in the previous chapter that the African Commission lacks a consistent methodology for applying the teleological approach to interpretation. Moreover, the previous chapter showed the inconsistencies regarding the model of review that the African Commission applies.

This chapter recommends a methodology that can assist the supervisory organs to align its socio-economic rights jurisprudence with the teleological approach to interpretation. The chapter also develops a teleological model of review as part of the recommendations and explores the viability of reasonableness as a model of review capable of advancing the object and purpose of the African Charter regarding socio-economic rights. The development of a teleological model of review is significant for assessing States' compliance with their socio-economic rights obligations. It is vital that States take into consideration the object and purpose of the African Charter while implementing their socio-economic rights obligations.

¹ The African Commission is established by art 30 of the African Charter on Human and Peoples' Rights (1981) OAU Doc. CAB/LEG/67/3 rev 5, 21 I.L.M 58 (1982) was adopted on 27th June 1981 and entered into force on 21st October 1986.

6 2 Towards an appropriate and coherent interpretation of socio-economic rights in the African Charter

6 2 1 Adoption of a methodology for the application of the teleological approach

The failure to apply the teleological approach systematically confirms that the African Commission lacks a methodology for applying the teleological approach. In chapter two, this dissertation developed the methodology that can assist the supervisory organs of the African Charter to apply the teleological approach to interpretation systematically.² It is recommended that the supervisory organs adopt this methodology. This part proceeds to elaborate on the steps of the methodology.

6 2 1 1 Interpreting socio-economic rights in light of the object and purpose of the African Charter

The discussion in chapter two demonstrated that the object and purpose of a treaty is a vital interpretative tool of a teleological approach to interpretation.³ Thus, the supervisory organs should interpret the socio-economic rights enshrined in the African Charter in the light of its object and purpose. This implies that they should take into account the object and purpose of the African Charter relating to these rights throughout the interpretative process. It should be noted that the articles of the socio-economic rights can be interpreted effectively only when the object and purpose of the African Charter regarding these rights is ascertained.

As shown in chapter two the object and purpose of the African Charter regarding socio-economic rights is to protect such rights in a manner that guarantees and improves the socio-economic conditions of the people and enable them to live a dignified life. An enquiry regarding the goal that the African Charter aims to achieve needs to be at the centre of the interpretative process. Through this enquiry supervisory organs should be able to identify and engage significant interpretative tools.

Debates about whether the object and purpose in the teleological approach to interpretation is a single or two distinct notions and whether the notion requires a specific or general meaning should be avoided. I demonstrated in chapter two that the notion “object and purpose” referred to in the teleological approach is a single notion

² See chapter two, part 2 5.

³ See chapter two, parts 2 2 3 and 2 5 2.

with a general definition.⁴ As such “object and purpose” elaborates the teleological approach to interpretation and the application of its tenets collectively and flexibly.

Considering the fact that the African Charter is a human rights treaty its interpretation should focus on embracing its object and purpose. The concept of object and purpose of the African Charter appears, in the analysis, to be a benchmark which supervisory organs can use to achieve an effective interpretation of socio-economic rights. As such, the analysis shows the need for the supervisory organs to adopt an object and purpose-centred approach to interpretation for the interpretation of socio-economic rights in the African Charter. Supervisory organs should see the object and purpose of the African Charter regarding socio-economic rights as a yardstick that they should embrace and use in the interpretative process. The discussion in chapter five confirms that the African Commission has not yet been able to appropriately consider this notion and develop an object and purpose-centred jurisprudence of socio-economic rights.

6 2 1 2 *Considering the text of the African Charter holistically*

As discussed in chapter two the teleological approach to interpretation interprets a treaty as a whole to develop the scope and content of such treaty’s provisions.⁵ As demonstrated further in chapter three the African Charter as a whole sufficiently offers a broad potential to develop the meaning, scope and content of socio-economic rights. Supervisory organs should start the interpretative process of the socio-economic rights in the African Charter by considering the text of the African Charter holistically. An object and purpose-centred interpretation of socio-economic rights requires the engagement of all relevant provisions of the African Charter and its interpretive potentials. The African Commission has not been able to engage the African Charter as a whole in its jurisprudence hence it has failed to engage the interpretative tools available within the African Charter in the interpretative process. Significantly supervisory organs should interpret socio-economic rights in the African Charter by showing the nexus between socio-economic rights and other substantive provisions in the African Charter such as the provisions relating to the rights to equality, non-discrimination, life and dignity.

Supervisory organs, when interpreting socio-economic rights, should consider the preamble to the African Charter. The argument that the preamble to a treaty is not part

⁴ See chapter two, parts 2 3 1 2 and 2 3 1 3.

⁵ See chapter two, part 2 2 3.

of the treaty cannot be sustained.⁶ As shown in chapter two and three, in human rights treaties the preamble forms a significant interpretative tool.⁷ The preamble of the African Charter should thus be seen as a significant interpretative aspect in interpreting the socio-economic rights in question. Supervisory organs should be able to consider the preamble to the African Charter when generating the meaning, scope and content of socio-economic rights. As such, the African Commission's failure to use the preamble in its socio-economic jurisprudence should be corrected. The use of the preamble will provide insight to the supervisory organs regarding the object and purpose of the socio-economic rights in question, values to be considered and a notion of interdependence of rights which is significant to the object and purpose-centred interpretation of socio-economic rights and the tenets of African philosophy. As discussed in chapter three, supervisory organs should take into account both senses of interdependence of the rights, that is, organic and related interdependence. Chenwi notes that interdependence of the rights should be considered to include the relationship between two categories of rights that is, civil and political rights as well as socio-economic rights.⁸ It should also be considered to include the inter-relationship that exists in the socio-economic rights category.⁹ As such, the supervisory organs should appropriately apply the notion of interdependence of rights stated in the preamble to the African Charter. The supervisory organs' interpretation of socio-economic rights should be able to show the link between such rights and other related rights within the African Charter. Writing on the permeability of rights in the jurisprudence of the African Commission, Chenwi argues that the recognition of the notion of independence of the rights in the preamble to the African Charter confirms the mutual inter-relationship between socio-economic rights and civil and political rights.¹⁰ As such, the interpretative process should link socio-economic rights with other provisions found in the African Charter. This practice of interdependence will help to develop the content of socio-economic rights through other provisions within the African Charter and confirm the existence of the relevant interpretative tools therein.

Supervisory organs should be able to take into account the values of equality, dignity, freedom and justice stated in the preamble to the African Charter for an object and

⁶ See also Fitzmaurice (1951) *British Year Book of International Law* 24-25.

⁷ See chapter two, part 2 2 3, and chapter three, part 3 3 2.

⁸ L Chenwi "Permeability of rights in the jurisprudence of the African Commission" (2014) 39 *Suppl SAYIL* 93 93-94.

⁹ 95.

¹⁰ 93-94.

purpose-centred interpretation of socio-economic rights. The African Commission's exclusion of these values in the interpretative process is a weakness as the jurisprudence fails to show the nexus between the values and the socio-economic rights in question. The use of these values will help supervisory organs to develop the content of the socio-economic rights to inform the meaning, scope and content of socio-economic rights. Moreover, the preamble to the African Charter reveals the Member States' commitment to embrace African philosophy. Supervisory organs should take into account the notion of African philosophy in developing the meaning, scope and content of socio-economic rights. Significantly, supervisory organs should use the potential of African philosophy in interpreting peoples' socio-economic rights as discussed in chapter three.¹¹

Apart from the preamble to the African Charter, the general obligation clause in article 1 of the African Charter should be seen as the underlying obligation imposed by each socio-economic right. Supervisory organs should apply the general obligations clause in order to identify the nature of a State's obligations regarding socio-economic rights provisions in the African Charter. The general obligation clause recognises the quartet typology of obligations. The linking of this clause with socio-economic rights will thus mean that these rights impose the obligations to respect, protect, promote, and fulfil. Moreover, the general obligation clause enshrines the obligation to progressive realisation and within maximum available resources. Interpretation of the socio-economic rights can benefit from this clause by incorporating these two forms of obligations into socio-economic rights provisions. The supervisory organs should be able to harness these obligations from within the African Charter rather than reading them through other instruments.

The scope and content of the broadly formulated substantive socio-economic rights provisions of the African Charter should be developed during the interpretative process. These rights are formulated in broad terms and as such they afford the supervisory organs enough room to flexibly develop their scope and content. Considering this broad formulation, supervisory organs should interpret these rights by integrating them with other provisions within the African Charter to generate their meaning, scope and content. It is recommended that the supervisory organs should avoid interpreting these broad provisions independently from other provisions of the African Charter. Moreover, the supervisory organs should interpret socio-economic rights by integrating such rights

¹¹ See chapter three, part 3 2 4 2.

with other related substantive provisions such as the right to equality, life, dignity and non-discrimination. These provisions have the potential for developing the content of socio-economic rights. The interdependence of rights can be seen as a significant mechanism to assist the supervisory organs in the application of these related rights provisions.

The reasoning of the supervisory organs in developing the scope and content of socio-economic rights should be developed along these lines. As Chenwi rightly argues, on the one hand, the interdependence of the rights should be applied to elaborate on the inter-relation between the categories of rights and, on the other hand, to develop the scope and content of the rights at stake.¹² This part has elaborated on the holistic consideration of the African Charter regarding the substantive provisions therein. The holistic interpretation of the African Charter in relation to the procedural provisions is discussed in part 6 2 1 6 below.

6 2 1 3 Utilising the preparatory work of the African Charter

Both internal and external¹³ preparatory work to the adoption of the African Charter should be seen as significant interpretative tools of the African Charter's socio-economic rights. The African Commission has rarely applied this significant aspect of the teleological approach in establishing the meaning of socio-economic rights. At the second step the supervisory organs should engage this interpretative tool in the interpretative process as demonstrated in the methodology for the application of the teleological approach. It is recommended that the supervisory organs avoid the arguments raised by scholars and institutions against the use of preparatory work as shown in chapter three. The arguments that preparatory work is merely the intention of the parties and that it is not necessary when the text of the treaty is clear should be avoided. The discussion in chapter two showed that the provisions of article 32 of the Vienna Convention recognises preparatory work as a significant interpretive tool relevant for the interpretation of a treaty of a human rights nature.¹⁴

¹² Chenwi (2013) 39 *Suppl SAYIL* 95.

¹³ See chapter three, part 3 2 1. The discussion in chapter three, part 3 2 1 categorised preparatory work of the African Charter in two categories namely: internal and external. It further showed that internal preparatory work represents historical initiatives by the OAU and anti-colonial struggles to adopt the African Charter; while external preparatory work represents historical initiatives played by the international institutions such as the ILC and the UN in the adoption of the African Charter. These two categories of the African Charter's preparatory work are discussed in chapter three, parts 3 2 2, 3 2 1 1 and 3 2 3.

¹⁴ See chapter two, parts 2 2 3 and 2 5 2 2.

This discussion showed that although the Vienna Convention places preparatory work as a supplementary interpretative tool it does not necessarily restrict the possibility of considering it as a primary interpretative tool. It was shown that the Vienna Convention in article 31(1) requires a treaty to be interpreted in the light of its object and purpose and mentions primary interpretative tools that can elaborate the object and purpose. Although the preparatory work is not included as a primary interpretative tool, the fact that the preparatory work of the African Charter elaborates its object and purpose renders it a primary interpretative tool. Moreover, the discussion in chapter three demonstrated that even when the text of the treaty is clear preparatory work can be deployed to ascertain the clarity of the object and purpose of the treaty regarding such text.¹⁵ The supervisory organs should disregard the argument that the application of preparatory work is unfair to the parties who did not participate in the negotiations for the adoption of the treaty. They should also not accept the argument that the preparatory work is genuinely not available. The debate should rather focus on the functions of the preparatory work and its relevance in the interpretative process. Responses to objections against the use of the preparatory work should show the manner in which preparatory work addresses the present day living conditions and provide insight into the object and purpose of the African Charter regarding the socio-economic rights being interpreted. Supervisory organs should use the preparatory work effectively to obtain insight into the object and purpose of the African Charter in relation to socio-economic rights. These organs should ensure that they use the values of equality, dignity, justice and freedom and the notion of African philosophy enshrined in the preparatory work to elaborate the object and purpose of the African Charter.

The responses to the arguments against the use of the preparatory work in the interpretation of socio-economic rights in the African Charter should also show the implications of the preparatory material of the African Charter for the interpretation of socio-economic provisions. The implications include promotion and protection of socio-economic rights; promotion of African philosophies and the values of equality, dignity, justice and freedom; developing the scope and content of socio-economic rights and their related obligations, consideration of the relevant international human rights treaties and jurisprudence and highlighting the interpretive mandate of the supervisory organs.

¹⁵ See chapter three, parts 3 2 to 3 2 4 3.

6 2 1 4 Considering the relevant international, regional and national legal sources

Considering the need for consistency with other relevant international, regional and national human rights legal sources, the supervisory organs should apply such sources at the third step of the interpretative process. Reference to these legal sources should be linked with the relevant provisions of the African Charter. As shown above,¹⁶ this practice is significant as it demonstrates the external coherence of the African Charter. As the African Charter is one of the international human rights treaties it should be consistent with other relevant international, regional and national human rights instruments and jurisprudence.

Therefore, after establishing the scope and content of the socio-economic rights and their related obligations the supervisory organs can invoke the provisions of articles 60 and 61 of the African Charter as well as article 7 of the African Court Protocol to draw inspiration from relevant international, regional, and national laws and jurisprudence regarding these rights.

6 2 1 5 Principle of effectiveness

The supervisory organs should apply the principle of effectiveness throughout the interpretative process. As demonstrated in chapter two¹⁷ the principle in its four dimensions will help the supervisory organs to ensure that the meaning assigned to the provisions of the socio-economic rights is practical and effective. It will also assist the supervisory organs to interpret these rights by considering the living conditions at the time of interpretation. Moreover, it will assist the supervisory organs to create external coherence by engaging other relevant legal sources in interpreting socio-economic rights. Finally, it will enable the supervisory organs to interpret socio-economic provisions generously in a manner that guarantee their holders' effective enjoyment.

6 2 1 6 Effective interpretation and use of the interpretive and remedial mandate of the supervisory organs

Reading the African Charter holistically also requires supervisory organs to engage various provisions in the African Charter in a manner that grant them an effective interpretative and remedial mandate. As argued in chapter four, the African Charter and the African Court Protocol vest the supervisory organs with an interpretive and remedial

¹⁶ See also chapter two, part 2 5 2 3.

¹⁷ See chapter two, part 2 2 3.

mandate which should be broadly interpreted. The argument that the omission of explicit provisions regarding *locus standi* to the African Commission limits individuals from accessing it is superfluous and should be discouraged. The African Commission should apply the principle of effectiveness¹⁸ to render the African Charter, regarding complainants' access, effective and practical. The African Commission can further apply the teleological approach to interpretation to construe other admissibility requirements such as exhaustion of local remedies flexibly. The discussion in chapter four showed that the rule regarding local remedies should in some circumstances not be interpreted in an overly restrictive manner, particularly where such remedies are unavailable, inadequate, ineffective, and insufficient.¹⁹ The African Commission should also flexibly interpret the requirement to submit the communication within reasonable time after exhaustion of local remedies. This will advance the object and purpose of the African Charter regarding protection of socio-economic rights.

Furthermore, the argument that the African Commission has no jurisdiction to issue provisional measures, due to the African Charter's omission of the explicit provision of provisional measures, cannot be sustained. The teleological approach through the principle of effectiveness broadly enables the African Commission to issue provisional measures in socio-economic rights communications. Although the African Commission has been issuing these measures in its jurisprudence, it has not shown the basis for its jurisdiction. It is recommended that the principle of effectiveness should be applied to establish the legal basis for the African Commission's mandate relating to provisional measures. The African Commission can broadly construe the provisions of articles 30, 45(1)(b), 45(2) and 46 of the African Charter as well as Rule 98(1) of the Rules of Procedure of the African Commission on Human and Peoples' Rights ('Rules of Procedure')²⁰ to establish its mandate to issue provisional measures.

Although the African Charter is silent regarding the African Commission's remedial jurisdiction the teleological approach can be applied to establish that mandate. The African Commission can generously interpret the provisions of articles 1, 7, 21(2), 26, 30, 45(1)(b), 45(2) and 55 of the African Charter to establish its mandate to issue

¹⁸ See chapter two, parts 2 2 3, 2 3 and 2 5 2 4.

¹⁹ See chapter four, part 4 3 4 1.

²⁰ The Rules of Procedure of the African Commission on Human and Peoples' Rights were adopted by the African Commission during its 2nd ordinary session held in Dakar, Senegal from the 2-13 February 1988 and they were revised by the African Commission during its 18th ordinary session held in Praia Cabo-Verde from the 2-11 of October, 1995. They were later approved by the African Commission during its 47th ordinary session held in Banjul, The Gambia in 2010.

various remedies for the effective protection of socio-economic rights. The arguments that the omission renders the African Commission ineffective should be avoided.

Furthermore, the argument that remedial recommendations as issued by the African Commission are non-binding and therefore should not be enforced should be rejected. Although by their nature recommendations are non-binding they are authoritative. Therefore, States' non-compliance on the basis of the non-binding nature of recommendations defeats the object and purpose of the African Charter. States should abide by their commitment to fulfil their international obligations in good faith. It will thus be a lack of good faith for States to ignore the recommendations of the African Commission without compelling reasons. Moreover, it should be noted that it is States' socio-economic rights obligations that bind them, rather than the recommendations. As argued in chapter four²¹ the African Commission's recommendations are authoritative and they are meant to advance the object and purpose of the African Charter. States' failure to implement these recommendations amounts to lack of good faith on their part.

The argument that article 59 of the African Charter on confidentiality of the African Commission's findings renders the Commission ineffective should be avoided. Although the findings are confidential the principle of effectiveness can facilitate the effective interpretation of article 59 and enable the publication of the findings. As shown in chapter four, although the African Commission has been publishing its findings, it has failed to elaborate the mechanisms that enable it to do so.²² The African Commission can apply the principle of effectiveness to justify the publication of its findings. Moreover, reading the text of the African Charter as a whole allows the use of articles 60 and 61 to draw inspiration from other legal sources to justify the publication of its findings.

It is recommended that the African Commission should reject the argument that the omission of the express provision in the African Charter, regarding the African Commission's mandate to follow-up States compliance with its decisions, renders the Commission ineffective. The African Commission can apply various provisions of the African Charter and its Rules of Procedure to establish this mandate. Thus the argument that the African Commission lacks jurisdiction to follow up States' compliance with its decisions should be avoided. The African Commission should use articles 30, 45(1)(b), 45(2), 46, 55, 60, 61 and 62 to establish its jurisdiction. This is facilitated by the

²¹ See chapter four, part 4 3 7.

²² See chapter four, part 4 3 8.

teleological tenet, which allows interpreting a treaty as a whole, as well as the principle of effectiveness.

Furthermore the argument that the establishment of the African Court diminishes the relevance of the African Commission is without foundation.²³ The African Commission is still relevant and the provisions regarding the complementarity between the African Commission and the African Court can be applied to demonstrate the relevance of the African Commission.²⁴ For example, as demonstrated in chapter four, Rule 118 of the Rules of Procedure recognises the African Commission as a party before the African Court with a mandate to refer cases to it. By recognising the African Commission as a party with *locus standi* before the African Court, Rule 118 of the Rule of Procedure renders the African Commission relevant machinery in the protection of the socio-economic rights. Exploring the complementarity arrangements between the African Commission and the African Court Rudman notes that the provisions of Rule 118 are relevant in demonstrating the inter-relationship between the African Commission and the African Court.²⁵

Regarding the African Court, its establishment gives it a contentious mandate to interpret all international human rights instruments.²⁶ This broad contentious mandate is problematic as it allows the African Court to potentially extend its contentious jurisdiction to other treaty bodies. As argued in chapter four, by this broad contentious mandate the African Court intrudes upon the interpretive mandate of other supervisory organs established by such instruments.²⁷ This broad contentious mandate should be restricted. The most effective way to restrict it is by using the principle of effectiveness. The African Court should use this principle to restrict the contentious mandate in a manner that renders such mandate effective and practical. As discussed in chapter 2²⁸ the principle of effectiveness in its general dimension allows the interpretation of provisions of a treaty in a manner that renders such provisions practical and effective rather than theoretical

²³ Ankumah notes the debate among the participants of the fifth ICJ workshop on the establishment of the African Court whereby some participants in support of the African Court argued that the African Court should be established in order to replace the African Commission as, according to those participants, it was ineffective. See Ankumah EA *The African Commission on Human and Peoples' Rights: Practice and Procedures* (1996) 194.

²⁴ See the preamble to the African Court Protocol and arts 2, 5(1)(a), 6(1) and (3), 8, and 33 of the African Court Protocol as well as Rule 118 of the Rules of Procedure and Rule 29 of the African Court Rules.

²⁵ A Rudman "The Commission as a party before the Court – Reflections on the complementarity arrangement" (2016) 19 *Potchefstroom Electronic Law Journal* 1 4.

²⁶ See art 3 of the African Court Protocol as well as the discussion in chapter four, part 4 4 1.

²⁷ See chapter four, part 4 4 1.

²⁸ See chapter two, part 2 2 3.

and ineffective. As argued in chapter four,²⁹ through this principle the phrase “relevant human rights instruments” can be restricted and construed to mean relevant African human instruments that acknowledge the jurisdiction of the African Court, as well as protocols to the African Charter. This understanding enables the African Court to interpret and apply African human rights instruments that acknowledge its competence. As such, this restricted approach will save the African Court from encroaching on the interpretive mandate of other international, regional and sub-regional supervisory organs.³⁰

Regarding the *locus standi* to the African Court two major raised arguments should be avoided. Firstly, the criticism that the African Commission and States can be reluctant to submit cases to the African Court, as per article 5 of the African Court Protocol should be avoided. States are obliged by the provisions of article 1 of the African Charter to protect human rights. Moreover, the African Commission is also obliged to protect human rights through articles 30, 45 and 46. The word “protect” should be broadly interpreted to ensure these institutions submit to the African Court cases relating to the violations of socio-economic rights. The African Court can also use its mandate that allows it on its own initiative to issue provisional measures with the aim of protecting violations of socio-economic rights. As shown in chapter four³¹ the African Court in *African Commission on Human and Peoples’ Rights v Libya* (*‘Libya’*)³² issued provisional measures on its own initiative.

In its recent judgment in *African Commission on Human and Peoples’ Rights v The Republic of Kenya* (*‘The Republic of Kenya’*),³³ the African Court issued provisional measures after a request was made by the applicant. In this case the applicant requested the African Court to issue provisional measures in order to avoid irreparable harm to the Ogiek Community of the Mau Forest regarding their socio-economic rights to culture, property, and development enshrined in articles 14, 17(2)(3) and 22 of the African Charter.³⁴ The applicant submitted the request for provisional measures pursuant to article 27(2) of the African Court Protocol and Rule 51 of the African Court Rules.³⁵ The African Court was satisfied that there existed a risk of irreparable harm to

²⁹ See chapter four, part 4 4 1.

³⁰ See chapter four, part 4 4 1.

³¹ See chapter four, part 4 4 4.

³² *African Commission on Human and Peoples’ Rights v Libya* Application No 004/2011 para 25.

³³ *African Commission on Human and Peoples’ Rights v The Republic of Kenya* Application No 006/2012.

³⁴ *The Republic of Kenya* paras 4 and 9.

³⁵ Para 11.

the Ogiek Community regarding their socio-economic rights to property, culture and development.³⁶ It therefore issued provisional measures pursuant to the provisions of article 27(2) of the African Court Protocol.³⁷

Secondly, the argument that the provisions of article 5(3) and 34(6) of the African Court Protocol limit the access of individuals to the African Court is not valid. Although the declaration by States is required other avenues can still be used to ensure individual access to the African Court. The African Commission can be used as an effective avenue to ensure individual's access to the African Court. Furthermore the argument that this indirect access of individuals to the African Court is ineffective should be discounted. This argument undermines the application of other avenues such as the African Commission, which can enable individuals to access the African Court. The African Court should apply the principle of effectiveness, which requires restrictions to be narrowly construed, to allow effective enjoyment of rights. This approach may allow the individuals, whose cases have been submitted by the African Commission, to be considered as parties and witnesses to the litigations, that is, independent procedural standing. Moreover, Rule 29(3) read in conjunction with Rule 45(1) of the African Court Rules should be interpreted generously to allow individuals as parties and witnesses to the socio-economic rights litigations.

With regard to admissibility criteria the provisions of article 6(2) of the African Court Protocol allow the African Court to "take into account" the provisions of article 56 of the African Charter. The African Court should construe the phrase "take into account" in a manner that allows flexibility in interpreting admissibility requirements. This approach may allow the African Court to ensure that, in circumstances where the complainants of socio-economic rights violations cannot fulfil all admissibility requirements for legitimate reasons, strict application is avoided. The provisions of Rule 40 that require strict application of admissibility requirements in article 56 should be interpreted in a manner that guarantees flexibility and advances the object and purpose of the African Charter regarding socio-economic rights. This can be done through the principle of effectiveness that requires restrictions of the rights to be narrowly interpreted in order to ensure effective and practical enjoyment of the rights.

The argument that the binding nature of the African Court's provisional measures is uncertain is not valid. Provisional measures issued by the African Court bind the

³⁶ Para 20.

³⁷ Para 21.

respondent State in a case. The African Court should broadly interpret the phrase “shall adopt” in a manner that gives its provisional measures binding force thereby nullifying the argument that the binding nature of the African Court’s provisional measures is uncertain. Moreover, it would be lack of States’ good faith to ignore the provisional measures that the African Court issue to advance the object and purpose of the African Charter regarding socio-economic rights. As such the provisional measures by the African Court should also be enforced in good faith.

It is recommended that the African Court give reasons for its decisions in order to ensure effective interpretation of socio-economic rights. The legal reasoning is important as it establishes the legitimacy and credibility of the African Court. It also demonstrates the relevant legal sources that the African Court has taken in its judgments and it helps to develop the scope and content of the socio-economic rights.

6 2 1 7 Conclusion

This part has developed and elaborated on an appropriate and coherent methodology that can assist the supervisory organs to align their jurisprudence with the teleological approach to interpretation and the methodology of its application as developed in chapter two. It is recommended that the supervisory organs adopt the teleological approach developed in chapter two and apply it in line with the methodology developed in chapter two. The adoption of the teleological approach will assist the supervisory organs in interpreting the socio-economic provisions in the African Charter based on its object and purpose. Interpretation based on the object and purpose of the African Charter will assist the supervisory organs to start the interpretative process by considering the text of the African Charter holistically. In this regard, the supervisory organs will interpret the provisions of the supervisory organs in the African Charter by taking into account the relevant provisions in the African Charter as a whole. This approach will enable the African Charter to take into account the preambular statements relating to values of equality, dignity, freedom and justice, as well as the notions of African philosophy and interdependence of the rights when interpreting the socio-economic rights. The supervisory organs will also be able to interpret the socio-economic rights by applying other relevant provisions such as article 1 of the African Charter regarding the general obligations, as well as those provisions relating to the rights to equality, non-discrimination, life and dignity. These should inform the interpretation of the socio-economic rights.

The supervisory organs should apply the preparatory work of the African Charter in the interpretative process to garner insight regarding the meaning of the provisions of the socio-economic rights in the African Charter. Moreover, the supervisory organs should also use the provisions of articles 60 and 61 in the African Charter as well as article 7 of the African Court Protocol to draw inspiration from other relevant international, regional and national laws and jurisprudence. They should also take into account the principle of effectiveness throughout the interpretative process. It has been recommended that the supervisory organs should also interpret the provisions relating to their interpretive and remedial mandate broadly for effective interpretation of socio-economic rights. Importantly, the supervisory organs should apply the teleological model of review in assessing States' obligations imposed by the socio-economic rights in the African Charter. The following part discusses different models of review with a view of developing a teleological model of review that is significant for supervisory organs to align their jurisprudence with the teleological model of review.

6 3 Models of review

6 3 1 Introduction

Monitoring States' compliance with their socio-economic rights obligations is the vital role of the supervisory organs for effective protection of these rights. Supervisory organs should ensure that the model of review they apply to assess States' compliance advances the object and purpose of the African Charter regarding socio-economic rights. The discussion in chapter five demonstrated that in its jurisprudence, the African Commission has been inconsistently applying different models of review, including the reasonableness review, minimum core obligation and proportionality. The chapter showed further that the African Commission failed to develop the content of these standards. These shortcomings regarding models of review failed to guide States' to effectively enforce their socio-economic rights' obligations. The inconsistent application of these models of review should be avoided. As stated above, this chapter develops a teleological model of review and recommends that supervisory organs consistently apply this model in reviewing States' measures regarding the implementation of their socio-economic rights obligations.

Since this chapter aims at developing a teleological model of review, the analysis of different models of review as applied by supervisory organs is required. This analysis is vital as it helps to identify the strengths and weaknesses of different models of review.

The discussion will further help the development of a teleological model of review. The following part analyses the models of review. It starts by showing the nexus between a model of review and the teleological methodology.

6 3 2 The link between models of review and the teleological methodology

Chapter two showed that the teleological approach to interpretation requires the supervisory organs to interpret socio-economic rights by using the object and purpose of the African Charter.³⁸ The methodology for application of the teleological approach to interpretation developed in chapter two requires supervisory organs to interpret the socio-economic rights in the light of the object and purpose of the African Charter regarding these rights.³⁹ It further requires the supervisory organs to apply the principle of effectiveness throughout the interpretative process. This principle aims at ensuring that the provisions of the African Charter are interpreted in a manner that renders socio-economic rights effective and practical rather than theoretical and illusory.⁴⁰ Chapter four showed that the supervisory organs have the mandate to interpret the socio-economic rights enshrined in the African Charter and their obligations.⁴¹ Moreover, chapter five showed that after establishing the normative scope and content of the socio-economic rights and their concomitant obligations the supervisory organs are required to assess States' compliance with their established obligations.⁴² The chapter showed further that the supervisory organs achieve this assessment process by using a model of review.⁴³ It can therefore be argued that there is a direct link between a model of review and the teleological methodology. Since the elaboration of the normative scope and content of the socio-economic rights and their related obligations advances the object and purpose of the African Charter, a model of review is a vital mechanism to ensure that States advance the object and purpose of the African Charter relating to the socio-economic rights by implementing their obligations. The object and purpose of the African Charter regarding socio-economic rights is a vital tenet of the teleological approach. It should also be applied to the model of review which the supervisory organs apply in developing the scope and content of socio-economic rights and assessing States' compliance with the obligations imposed by these rights. As Pieterse (writing on assessing States'

³⁸ See chapter two, part 2 2 3.

³⁹ See chapter two, parts 2 5 and 2 5 2.

⁴⁰ See chapter two, part 2 5 2 4.

⁴¹ See chapter four, parts 4 3 1 and 4 4 1.

⁴² See chapter five, part 5 5 4.

⁴³ See chapter five, part 5 5 4.

compliance with their socio-economic rights obligations) notes, supervisory organs rely on the nature, scope and content of the obligations imposed by these rights.⁴⁴ Furthermore, the principle of effectiveness can be applied to ensure that the interpretive mandate of the supervisory organs are generously interpreted to include a model of review that can effectively ensure States comply with their socio-economic rights obligations

Having established the link between model of review and the teleological methodology the following part discusses the reasonableness model of review.

6 3 3 Reasonableness review: Meaning, application and implications

Writing in the context of the socio-economic rights entrenched in the South African Constitution, Liebenberg considers reasonableness as a model of review that takes into consideration the historical, economic and social contexts of these rights.⁴⁵ This understanding of the reasonableness model of review is important in the sense that it enables a supervisory organ applying this model of review to apply a wide range of factors to assess States' measures. This broad meaning of reasonableness renders it a model of review that takes into account the purpose and values of socio-economic rights that are affected by the violations of these rights.⁴⁶ In this way, the reasonableness model of review inquires into the object and purpose as well as the scope and content of the rights that are at stake.⁴⁷ It therefore applies such object and purpose, as well as the scope and content of the socio-economic rights, to assess States' measures.⁴⁸

Liebenberg's understanding of the reasonableness model of review is significant in the context of interpretation and protection of socio-economic rights in the African Charter. It allows the supervisory organs to consider the object and purpose of a State's obligations regarding socio-economic rights and assess a State's measures in the light of such object and purpose. This approach enables the supervisory organs to assess whether a State's measure furthers the protection of socio-economic rights which is the object and purpose of the African Charter. As discussed in chapter two, consideration of the object and purpose of the socio-economic rights in the African Charter requires supervisory organs to interpret the African Charter holistically. The holistic interpretation

⁴⁴ M Pieterse "Coming to terms with judicial enforcement of socio-economic rights" (2004) 20 *South African Journal on Human Rights* 383 407.

⁴⁵ S Liebenberg *Socio-Economic Rights: Adjudication under a Transformative Constitution* (2010) 174.

⁴⁶ 223.

⁴⁷ 223.

⁴⁸ 223.

of the African Charter enables the supervisory organs to take into account the values of equality, dignity, justice and freedom to elaborate the meaning of socio-economic rights. It also requires supervisory organs to take into account the notions of African philosophy and interdependence of the rights in interpreting the socio-economic rights in the African Charter. A broad meaning of the reasonableness review enables the supervisory organs to consider all these contexts in assessing Member States' compliance with their socio-economic rights obligations in the African Charter.

Hershkoff, writing on socio-economic rights in the context of State constitutions in the United States, notes that when a State's constitution establishes a human right the courts should inquire whether a challenged State's measure fosters such constitutional right.⁴⁹ Bilchitz notes that the reasonableness of a State's measures should be assessed in the light of the object and purpose of the constitution.⁵⁰ Writing on reasonableness in the context of article 8(4) of the Optional Protocol, Porter argues that in interpreting socio-economic rights in the International Covenant on Economic, Social and Cultural Rights ('ICESCR'),⁵¹ the Committee on Economic, Social and Cultural Rights ('CESCR')⁵² should apply the reasonableness review in article 8(4) in light of the object and purpose of the Optional Protocol.⁵³

Griffey defines a reasonableness review as a standard that imposes limits on a State's discretion as well as guides supervisory organs to assess a State's measures to implement their legal obligations.⁵⁴ Griffey's definition demonstrates that the reasonableness model of review also has the potential to limit States' discretion if the measures adopted do not give effect to the socio-economic rights and advance their object and purpose. In this regard, the reasonableness review creates space for the supervisory organs to assess States' measures regarding the negative and positive

⁴⁹ H Hershkoff "Positive rights and State Constitutions: The limits of federal rationality review" (1999) 112 *Harvard Law Review* 1131 1137 and 1184.

⁵⁰ D Bilchitz "Giving socio-economic rights teeth: The minimum core and its importance" (2002) 119 *South African Law Journal* 484 496.

⁵¹ International Covenant on Economic, Social and Cultural Rights, GA Res 2200A (XXI) 16 December 1966, 993 UNTS 3 was adopted by the United Nations General Assembly on 16 December 1966 and entered into force on 3 January, 1976.

⁵² The Committee on Economic, Social and Cultural Rights was established by the Economic and Social Council resolution 1985/17. The CESCR is composed of 18 experts who are competent in the human rights field.

⁵³ B Porter "The reasonableness of Article 8(4) – Adjudicating claims from the margins" (2009) 27 *Nordic Journal of Human Rights* 39 53.

⁵⁴ B Griffey "The 'reasonableness' test: Assessing violations of State obligations under the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights" (2011) 11 *Human Rights Law Review* 275 304.

obligations imposed by the socio-economic rights. The supervisory organs applying this model of review can scrutinise States' measures to establish whether they uphold the object and purpose of the socio-economic rights at stake. Griffey's definition of the reasonableness model of review also enables the supervisory organs to apply the content of the socio-economic rights to assess whether States' measures comply with the obligations imposed by these rights in a manner that advances the object and purpose of the African Charter. As Hershkoff posits in the American context, States' constitutions elaborate the object and purpose to be achieved regarding socio-economic rights.⁵⁵ Socio-economic rights in these constitutions not only limit the States' discretion regarding their realisation but also impose upon States an obligation to further the object and purpose of the constitution regarding these rights.⁵⁶

As such, Griffey's understanding of the reasonableness links with Liebenberg's understanding of this model in that they both enable supervisory organs to apply socio-economic rights and other related provisions to ensure States' measures further the object and purpose of such rights. Thus, the question in assessing the reasonableness of a State's measures will basically consider whether such State's measures foster the object and purpose of the African Charter regarding socio-economic rights. Furthermore, reasonableness considers whether the limitation of socio-economic rights reasonably fosters the object and purpose of the African Charter regarding socio-economic rights. As Hershkoff notes, courts with a mandate to review State's measures should assess whether such measures achieve the constitutional object and purpose regarding the protection of human rights.⁵⁷

This dissertation adopts these definitions by Liebenberg and Griffey since they demonstrate two significant aspects. Firstly, the reasonableness model of review should place the object and purpose of States' socio-economic rights obligations as central to the assessment of a State's measures. As demonstrated in chapter two the object and purpose of the African Charter is to protect socio-economic rights.⁵⁸ It was shown that in order to advance this object and purpose the supervisory organs are required to interpret these rights by taking into account various interpretive tools. These tools include the African Charter as a whole, the preparatory work of the African Charter, relevant international, regional and national human rights laws and jurisprudence, and

⁵⁵ Hershkoff (1999) *Harvard Law Review* 1138 and 1156.

⁵⁶ 1138 and 1156.

⁵⁷ 1169-1170 and 1184.

⁵⁸ See chapter two, parts 2.2.3, 2.4 and 2.5.2.

the principle of effectiveness. The reasonableness model of review enables the reviewing supervisory organs to generously consider these significant elements of the object and purpose of the African Charter in assessing States' measures.

Secondly, reasonableness is flexible in that it allows other considerations, which are in line with the object and purpose of socio-economic rights, to play a role in the assessment of the State's measures.⁵⁹ This element of taking into account other considerations is important in interpreting socio-economic rights in the African Charter as it allows the supervisory organs to engage the values of equality, dignity and freedom in the reasonableness review. Engaging these values enables the supervisory organs to assess how State's measures have taken into account the values and object and purpose of the African Charter.

Writing on South Africa's constitutional context, Liebenberg and Goldblatt argue that for the reasonableness model of review to incorporate the content of socio-economic rights in a manner that advances the object and purpose of the Constitution it is important for the courts to elaborate on the significant role of the overarching values of human dignity, equality and freedom.⁶⁰ Commenting on South Africa's jurisprudence, Liebenberg argues that the failure to engage these values implies that these values and violations of the rights are given less priority in the assessment of States' measures.⁶¹ Moreover, chapter three demonstrated the manner in which these values can be interpreted in developing the scope and content of the socio-economic rights in the African Charter.⁶² The content of the socio-economic rights can be linked with the reasonableness review to assess whether States' measures reasonably advance such content. Liebenberg notes that courts have the task of developing the substantive commitments and values socio-economic rights impose.⁶³ The development of the values and purposes relating to socio-economic rights allows the courts to assess whether the State's adopted measures reasonably give effect to the enjoyment of the rights.⁶⁴

⁵⁹ Liebenberg *Socio-Economic Rights* 174.

⁶⁰ S Liebenberg & B Goldblatt "The interrelationship between equality and socio-economic rights under South Africa's transformative constitution" (2007) 23 *South African Journal on Human Rights* 335 355.

⁶¹ Liebenberg *Socio-Economic Rights* 176-177.

⁶² See chapter three, part 3 3 2 1.

⁶³ Liebenberg *Socio-Economic Rights* 183.

⁶⁴ 183.

The Constitutional Court of South Africa ('South African Constitutional Court') held in *Grootboom v Government of the Republic of South Africa* ('Grootboom'),⁶⁵ the assessment of a State's reasonable measures considers social, economic and historical context of such rights.⁶⁶ Moreover, the South African Constitutional Court stated in *Grootboom* that the assessment of a State's reasonable measures considers the Bill of Rights as a whole, particularly the values of human dignity and equality.⁶⁷ These elements are significant as they can assist supervisory organs to identify the factors relevant to the reasonableness model of review and to link them appropriately to the normative content, values and purposes of the relevant socio-economic rights.

6 3 4 Application of reasonableness review by judicial and quasi-judicial bodies and its implications

It was shown in chapter two that the teleological approach to interpretation requires the text of the African Charter to be applied holistically in interpreting the socio-economic rights.⁶⁸ The methodology for application of the teleological approach developed in chapter two demonstrated that the supervisory organs should apply the African Charter holistically by engaging various provisions of the African Charter.⁶⁹ The provisions of articles 60 and 61 of the African Charter and article 7 of the African Court Protocol were identified as relevant in assisting supervisory organs to draw inspiration from other relevant international, regional and national laws and jurisprudence in interpreting the socio-economic rights.⁷⁰ In this regard the discussion on the judicial and quasi-judicial bodies' application of the reasonableness model of review fits in with the teleological methodology. It reveals the relevant laws and jurisprudence that the supervisory organs, through the provisions of articles 60 and 61 of the African Charter and article 7 of the African Court Protocol as well as the notion of "object and purpose" of the African Charter and the principle of effectiveness as tenets of the teleological approach, can be used to establish a model of review relevant for assessing States' compliance with their socio-economic rights obligations.

Various judicial and quasi-judicial bodies have applied the reasonableness model of review. The Constitutional Court applies the reasonableness model of review in

⁶⁵ *Grootboom and Others v Government of the Republic of South Africa and Others* 2001 SA 46 (CC).

⁶⁶ Para 43.

⁶⁷ Para 44.

⁶⁸ See chapter two, part 2 2 3.

⁶⁹ See chapter two, parts 2 5 and 2 5 2 1.

⁷⁰ See chapter two, parts 2 5 2 1 and 2 5 2 3.

assessing a State's compliance with its socio-economic rights obligations. According to the Constitutional Court, the reasonableness model of review concerns an enquiry as to whether a State's legislative and other measures for the protection of socio-economic rights are reasonable.⁷¹ In this regard, the South African Constitutional Court stated in *Grootboom* that a court reviewing the reasonableness of a State's measures should only inquire whether measures taken are reasonable.

In *Grootboom*, *Minister of Health and Others v Treatment Action Campaign and Others* ('TAC'),⁷² *Mazibuko and Others v City of Johannesburg and Others* ('Mazibuko'),⁷³ and *Occupiers of 51 Olivia Road and Others v City of Johannesburg and Others* ('Olivia Road')⁷⁴ the South African Constitutional Court elaborated on various factors that a supervisory body can apply in assessing the reasonableness of a State's measures. According to the South African Constitutional Court, reasonable measures should demonstrate that the State has allocated appropriate financial and human resources to realise socio-economic rights.⁷⁵ Moreover, measures must be comprehensive, coherent and co-ordinated.⁷⁶ Measures must also be capable of facilitating the realisation of the socio-economic rights in question.⁷⁷ The conception and implementation of the measures must be reasonable.⁷⁸ Furthermore, such measures must be balanced and flexible and make appropriate provision for short, medium and long-term needs.⁷⁹ Measures must give priority to those who are in urgent need of the realisation of their rights.⁸⁰ They must demonstrate respect for human dignity, freedom and equality.⁸¹ They must be transparent and made known effectively to the general public.⁸² Furthermore, the reasonable measures of a State must guarantee meaningful engagement particularly with the poor, vulnerable or illiterate people.⁸³

These elements of the South African Constitutional Court's reasonableness model of review are relevant for the protection of socio-economic rights in the African Charter. As

⁷¹ C Courtis "Standards to make ESC rights justiciable: A summary exploration" (2009) 2 *Erasmus Law Review* 379 391.

⁷² *Minister of Health and Others v Treatment Action Campaign and Others* (No.2) 2002 SA 721 (CC).

⁷³ *Mazibuko and Others v City of Johannesburg and Others* 2010 SA 1 (CC).

⁷⁴ *Occupiers of 51 Olivia Road and Others v City of Johannesburg and Others* 2008 SA 1 (CC).

⁷⁵ *Grootboom* para 39.

⁷⁶ Paras 40-41.

⁷⁷ Para 41.

⁷⁸ Para 42.

⁷⁹ Para 43.

⁸⁰ Para 44.

⁸¹ Paras 44, 83.

⁸² *TAC* para 123, *Mazibuko* para 71.

⁸³ *Olivia Road* para 15.

mentioned above, the teleological approach to interpretation developed in chapter two requires the African Charter to be interpreted holistically. This holistic application of the African Charter, as was shown in chapters two and three, enables the supervisory organs to apply the values of dignity, equality, justice and freedom, as well as the notion of African Philosophy to elaborate the provisions of the reasonableness model of review as incorporated in the African Charter, as will be shown below. Through the provisions of articles 60 and 61 of the African Charter and article 7 of the African Court Protocol the supervisory organs can draw inspiration from the South African Constitutional Court regarding these important elements of the reasonableness model of review. As Yeshanew argues, the reasonableness model of review in the socio-economic rights' provisions entrenched in the South African Constitution of South Africa is an ideal model that can be applied in other human rights systems.⁸⁴

The CESCR elaborated on reasonableness earlier in its statement regarding the review of States' obligations in the context of "maximum available resources".⁸⁵ According to the CESCR, in dealing with socio-economic rights communications alleging a State's failure to take steps to the maximum of available resources the CESCR will assess whether a State's measures are reasonable.⁸⁶ According to the CESCR, to be reasonable a State's measures must be deliberate, concrete and targeted towards realisation of socio-economic rights.⁸⁷ Measures must not be discriminatory or arbitrary.⁸⁸ Measures should demonstrate that resources are allocated in accordance with international human rights standards.⁸⁹ A State should adopt the least restrictive policies.⁹⁰ Measures should indicate the time-frame when steps were taken for the realisation of the rights.⁹¹ Measures should take into consideration the most disadvantaged and marginalised individuals or groups in society.⁹² Measures should prioritise individuals in urgent need or at risk.⁹³ Other measures include a State's level of development, severity of the breach, a State's current economic condition, existence of

⁸⁴ Yeshanew *The Justiciability of Economic, Social and Cultural Rights* 315.

⁸⁵ UN Committee on Economic, Social and Cultural Rights, An Evaluation of the Obligation to Take Steps to the "Maximum of Available Resources" under an Optional Protocol to the Covenant UN Doc E/C.12/2007/1 (adopted 10 May 2007).

⁸⁶ Para 8.

⁸⁷ Para 8(a).

⁸⁸ Para 8(b).

⁸⁹ Para 8(c).

⁹⁰ Para 8(d).

⁹¹ Para 8(e).

⁹² Para 8

⁹³ Para 8(f).

other human rights claims on the State's scarce resources, a State's efforts to identify low-cost options and whether the State had sought international assistance or rejected the international community's support for the purposes of implementing the ICESCR.⁹⁴ Moreover, a State's measures must be transparent and engage people in decision-making at a national level.⁹⁵

The CESCR also applies the reasonableness model of review through the provisions of article 8(4) of the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights ('Optional Protocol')⁹⁶ to monitor States' compliance with their socio-economic rights obligations in the ICESCR. The Optional Protocol is applicable to determine the complaints of individuals whose States are members to the Optional Protocol.⁹⁷ It should be noted that the Optional Protocol is the only international human rights instrument that explicitly specifies the reasonableness review as a means to monitor States' compliance with the obligations imposed by socio-economic rights. As Griffey points out, the Optional Protocol to the ICESCR is the first international human rights instrument to establish a model of review to be applied by the CESCR.⁹⁸ Article 8(4) reads:

"When examining communications under the present Protocol, the Committee shall consider the reasonableness of the steps taken by the State Party in accordance with part II of the Covenant. In doing so, the Committee shall bear in mind that the State Party may adopt a range of possible policy measures for the implementation of the rights set forth in the Covenant."

In its early jurisprudence⁹⁹ under the Optional Protocol, the CESCR has elaborated the reasonableness model of review. For example, in *IDG v Spain* ('*IDG*') the CESCR had to decide whether the complainant's right to housing recognised in article 11(1) of the ICESCR was violated by the respondent State as a result of a mortgage enforcement proceeding that the complainant argues the respondent State had failed to notify her.¹⁰⁰ The CESCR held that the right to housing in the ICESCR imposes upon

⁹⁴ UN Committee on Economic, Social and Cultural Rights, An Evaluation of the Obligation to Take Steps to the "Maximum of Available Resources" under an Optional Protocol to the Covenant UN Doc E/C.12/2007/1 (adopted 10 May 2007) para 10 (a-f).

⁹⁵ Para 11.

⁹⁶ Optional Protocol to the International Covenant on Economic, Social and Cultural Rights was adopted by the United Nations General Assembly through its resolution A/RES/63/117 on 10 December, 2008.

⁹⁷ Art 1 of the Optional Protocol.

⁹⁸ Griffey (2011) *Human Rights Law Review* 277.

⁹⁹ See *IDG v Spain* Communication No. 2/2014.

¹⁰⁰ Para 10.6.

States an obligation to adopt measures that guarantee its full realisation.¹⁰¹ According to the CESCR, every person possesses security of tenure that incorporates protection against forced evictions.¹⁰² The CESCR further noted that States are therefore required to ensure that actions that can result into evictions take into account procedural protections. This includes meaningful consultation with the affected parties as well as “adequate and reasonable” notification to the affected persons before the eviction is carried out.¹⁰³ The CESCR held further that the provisions of article 2(1) of the ICESCR impose upon States an obligation to adopt legislative measures that give effect to the enjoyment of the rights enshrined therein.¹⁰⁴ According to the CESCR, this obligation incorporates States’ duty to guarantee effective judicial remedies.¹⁰⁵ As such, article 2(1) requires States to guarantee persons, whose right to housing is likely to be affected by forced evictions or mortgage enforcements, access to effective judicial remedies.¹⁰⁶ Referring to its General Comment 7 the CESCR held that “appropriate procedural protection and due process” are vital elements of all rights in ICESCR and they are more significant in issues relating to forced evictions.

According to the CESCR, as an element in the right to housing, procedural protection requires States to provide the affected persons with the “adequate and reasonable” notification regarding the evictions before the time that the eviction is scheduled. According to the CESCR, this requirement also applies to mortgage proceedings which also affect the right to housing.¹⁰⁷ States are therefore, obliged to adopt all reasonable measures to ensure that persons likely to be affected by evictions or mortgage proceedings are duly notified of any administrative and judicial orders in order to allow them an opportunity to defend their housing rights.¹⁰⁸ The CESCR held that insufficient notification regarding an application of mortgage enforcement, in a manner that precludes the affected persons from defending their rights, constitutes a violation of the right to housing.¹⁰⁹

It can be argued that reasonableness of States’ measures under article 8(4) of the Optional Protocol incorporate elements similar to the elements identified in the

¹⁰¹ Para 11.1.

¹⁰² Para 11.2.

¹⁰³ Para 11.2.

¹⁰⁴ Para 11.3.

¹⁰⁵ Para 11.3.

¹⁰⁶ Para 11.4.

¹⁰⁷ Para 21.1.

¹⁰⁸ Para 12.2.

¹⁰⁹ Para 12.4.

“maximum available resources” context above. Writing on reasonableness in the context of the Optional Protocol, Porter posits that the CESCR’s approach in assessing reasonableness of States’ measure in article 8(4) can differ from how it elaborated on reasonableness in other contexts such as “periodic reviews and General Comments”.¹¹⁰ However, the content of a reasonable measure in these documents can inform the CESCR’s approach in elaborating the reasonableness of States’ measures under article 8(4) of the Optional Protocol.

The elaboration of the elements of the reasonableness review by the South African Constitutional Court and the CESCR in its statement indicates, despite their different contexts, similarities in how these two organs approach the question of reasonableness. Both consider the time-frame for progressive realisation, budgetary allocation, planning, monitoring and impact assessment, meaningful engagement, transparency, and consideration of the most vulnerable victims. While the South African Constitutional Court considers the values of dignity, freedom and equality the CESCR considers the principle of non-discrimination. As discussed in chapter three of this dissertation the values of dignity, equality and non-discrimination are interrelated.¹¹¹ As such, the CESCR can use the values of dignity and equality to elaborate non-discrimination. Porter argues that the CESCR can use the values of human dignity and equality as used in South Africa’s reasonableness in interpreting article 8(4).¹¹² It can also use the socio-economic and historical contexts of socio-economic rights as well as the focus on both reasonable conception and implementation of a State’s measures.¹¹³ According to Porter, the formulation of article 8(4) of the ICESCR Optional Protocol emanates from the socio-economic rights jurisprudence of the South African Constitutional Court in the *Grootboom* case.¹¹⁴

However, despite these similarities, scholars argue that the reasonableness model of review in article 8(4) is different from South Africa’s reasonableness model of review discussed above. For example, Griffey notes that although there are similarities between reasonableness in *Grootboom* and the Optional Protocol, the two standards of review

¹¹⁰ B Porter “Reasonableness and Article 8(4)” in M Langford, B Porter, R Brown & J Rossi (eds) *Optional Protocol to the International Covenant on Economic, Social and Cultural Rights: A Commentary* (2016) 194 218.

¹¹¹ See chapter three, part 3 3 2 2.

¹¹² Porter (2009) *Nordic Journal of Human Rights* 51.

¹¹³ 51.

¹¹⁴ 49-51. See also Griffey (2011) *Human Rights Law Review* 302.

are distinct.¹¹⁵ According to him, South Africa's reasonableness does not focus on other measures that a State could have adopted which would be more likely to advance the goals of the rights.¹¹⁶ To the contrary, reasonableness in the Optional Protocol assesses a wide range of available measures that a State can adopt.¹¹⁷ It therefore allows the CESCR to assess whether the measure adopted by the State, out of the wide range of possible measures to realise socio-economic rights, is reasonable.¹¹⁸ Moreover, writing on the comparison between the reasonableness model of review in the South African context and the CESCR, Coomans notes the concern that since the CESCR is a quasi-judicial body, it cannot be compared to the South African Constitutional Court which is a judicial organ.¹¹⁹ According to Coomans, the concern refers to the fact that CESCR as a quasi-judicial body has the mandate to only issue recommendations as opposed to binding decisions issued by the judicial body such as the South African Constitutional Court.¹²⁰

However, it was argued in chapter four that recommendations by quasi-judicial bodies are authoritative and that it is an international obligation of States to implement them with the utmost good faith. Moreover, the mandate of the supervisory organs to protect socio-economic rights should be generously interpreted to include the mandate to assess States' compliance with the obligations imposed by these rights. With this similar mandate to assess States' measures it can be argued that quasi-judicial bodies can be compared with judicial bodies regarding the model of review applied. As Coomans argues, since the CESCR has the mandate to assess the implementation of States' compliance with their socio-economic rights obligations in the ICESCR it can therefore be compared to the South African Constitutional Court.¹²¹ In particular the supervisory organs in the African Charter can apply the provisions of articles 60 and 61 of the African Charter, as well as article 7 of the African Court Protocol to draw inspiration from judicial bodies as argued above. Yeshanew, commenting on the South

¹¹⁵ Griffey (2011) *Human Rights Law Review* 315.

¹¹⁶ 315.

¹¹⁷ 315.

¹¹⁸ 315.

¹¹⁹ F Coomans "Reviewing implementation of socio-economic rights: An assessment of the 'reasonableness' test as developed by South African Constitutional Court" (2005) 65 *ZaöRV* 167 183.

¹²⁰ 183.

¹²¹ 183.

African Constitutional Court's reasonableness, notes that South Africa's reasonableness review can be applied by other international and national human rights bodies.¹²²

Based on the discussion above regarding the meaning of reasonableness, this dissertation departs from the argument that the reasonableness review by the South African Constitutional Court and that of CESCR are inherently distinct concepts. Rather, I argued that the manner, in which these two bodies have *applied* the reasonableness model of review is distinct. The South African Constitutional Court's application of reasonableness is narrow in the sense that it confines itself to the question of only whether a State's measure under scrutiny is reasonable. This narrow approach of the South African Constitutional Court has led scholars to criticise its reasonableness model of review. Bilchitz posits that the notion of a reasonableness review is vague in the sense that it lacks meaning and does not clearly state the limits of the courts' powers to assess the reasonableness of a State's measures.¹²³ According to Bilchitz, a reasonableness review does not establish the means to clarify a State's general obligations relating to socio-economic rights.¹²⁴

Particularly, Bilchitz,¹²⁵ Iles,¹²⁶ Brand,¹²⁷ and Liebenberg¹²⁸ argue that the South African Constitutional Court's reasonableness review focuses on establishing the reasonableness of States' measures, but neglects developing the substantive content of the rights. This narrow approach is not effective for the interpretation of socio-economic rights as it limits the power of the supervisory organs to develop the content of the socio-economic rights before assessing States' compliance with the obligations. Supervisory organs will merely focus on the reasonableness of the measures adopted by the State, instead of assessing whether those measures are capable of progressively realising the normative goals of the socio-economic rights in question. Although identifying whether States' measures are reasonable is important, if the content of the rights are unknown it

¹²² Yeshanew *The Justiciability of Economic, Social and Cultural Rights* 315.

¹²³ D Bilchitz "Towards a reasonable approach to the minimum core: Laying foundations for future socio-economic rights jurisprudence" (2003) 19 *South African Journal on Human Rights* 1 10. See also Bilchitz (2002) *South African Law Journal* 495.

¹²⁴ Bilchitz (2003) *South African Journal on Human Rights* 10. See also Bilchitz (2002) *South African Law Journal* 495.

¹²⁵ Bilchitz (2002) *South African Law Journal* 496.

¹²⁶ K Iles "Limiting socio-economic rights: Beyond the internal limitations clauses" (2004) 20 *South African Journal on Human Rights* 448 454.

¹²⁷ D Brand "The proceduralisation of South African socio-economic rights jurisprudence, or what are socio-economic rights for?" in H Botha, A Van der Walt & J Van der Walt (eds) *Rights and Democracy in a Transformative Constitution* (2003) 33 45.

¹²⁸ Liebenberg *Socio-Economic Rights* 175.

becomes difficult for the supervisory organs to establish the criteria to assess the States' measures. The content of the rights is an important criterion for assessing States' measures. Writing on reasonableness in the context of the Optional Protocol, Porter similarly argues that the content of the socio-economic rights in the ICESCR should be the basis for assessing the reasonableness of States' measures.¹²⁹ As such, the question of the supervisory organs should be whether a State's measures can reasonably foster the constitutional objects and purposes as well as constitutional values. This form of approach would allow the South African Constitutional Court to first elaborate the normative content of socio-economic rights being interpreted and then use these rights to assess the reasonableness of a State's measure.

If this approach to the reasonableness review is adopted it would enable the supervisory organs of the African Charter to consider two significant aspects during the interpretative process. Firstly, they would interpret and elaborate on the scope and content of the socio-economic rights in question and their related obligations. Secondly, the supervisory organs would use such content as a normative benchmark against which to assess whether measures adopted by the State are reasonably capable of realising the identified content of socio-economic rights. This approach corresponds with the definitions of reasonableness discussed above and adopted in this study.

6 3 5 Reasonableness as a two-stage model of review

Development of the normative scope and content of the socio-economic rights in the African Charter and their related obligations is a vital aspect for the effective protection of these rights. The methodology for the application of the teleological approach developed in chapter two requires supervisory organs to develop the scope and content of the socio-economic rights in the light of the object and purpose of the African Charter relating to these rights. The discussion on the meaning of the reasonableness model of review identified that this model considers the object and purpose of the rights at stake to assess States' measures. The reference to the object and purpose of the rights in the reasonableness model of review enables it to ascertain the content of the rights and then assess whether States' measures takes into account such content to advance the object and purpose of the rights at stake. This understanding shows the nexus between the teleological methodology and the reasonableness model of review.

¹²⁹ Porter "Reasonableness" in *Optional Protocol to the International Covenant on Economic, Social and Cultural Rights* 218.

Based on the fact that scope and content of the socio-economic rights is a vital element of the teleological methodology the discussion on how the reasonableness review is capable of developing the scope and content of the socio-economic rights is relevant.

Scholars' criticism regarding South Africa's reasonableness model of review demonstrates that it is a single-stage model of review in that it does not start with the development of the scope and content of the rights. It only focuses on assessing the reasonableness of States' measures. Although scholars' criticisms are valid regarding the narrow approach of the South African Constitutional Court's reasonableness it does not necessarily mean that reasonableness as a model of review is incapable of developing the scope and content of the socio-economic rights. It can be argued that the reasonableness model of review is a two-stage model of review. It can be applied to develop the content of socio-economic rights and then engage such content as the assessment criteria to scrutinise States' measures. As Liebenberg similarly notes, the reasonableness model of review enables the supervisory organs to apply the object and purpose of the socio-economic rights, as well as the values on dignity, equality, justice and freedom, for the development of the socio-economic rights.¹³⁰ The developed content can then be applied to monitor States' compliance with the obligations imposed by the socio-economic rights.¹³¹ The content can further assist the supervisory organs in assessing whether the measures adopted by States further the object and purpose of socio-economic rights. As Brand notes, the reasonableness model of review requires adjudicative bodies to inquire whether States' measures can reasonably achieve the object and purpose of the rights.¹³² Writing on equality as a value, which is also an element of reasonableness that can promote the interpretation of socio-economic rights, Liebenberg notes that equality can assist in the understanding of the object and purpose of socio-economic rights.¹³³

The discussion above on the definition of the reasonableness review has shown that supervisory organs must inquire whether States' measures advance the object and purpose of socio-economic rights. The reference to the object and purpose of the socio-economic rights assists supervisory organs to ascertain how they should apply the

¹³⁰ Liebenberg *Socio-Economic Rights* 183.

¹³¹ 183.

¹³² Brand "The proceduralisation of South African socio-economic rights jurisprudence" in *Rights and Democracy* 43.

¹³³ S Liebenberg "Toward an equality promoting interpretation of socio-economic rights: Insights from the egalitarian liberal tradition" (2015) 132 *South African Law Journal* 411 416.

reasonableness review. It renders the elements of object and purpose significant elements of the reasonableness review. In this regard, the supervisory organs should consider the object and purpose of the African Charter as vital elements of the reasonableness model of review to be applied to the positive duties imposed by socio-economic rights. These elements include: the values of dignity, equality, justice and freedom; the interdependence of the rights; African philosophies, the rights to equality, life and dignity as well as other relevant provisions of the African Charter.¹³⁴ This approach would require the supervisory organs to inquire whether the States' measures to give effect to socio-economic rights are consistent with the values of human dignity, equality, justice and freedom. As the Constitutional Court held in *Grootboom*, the dignity of a human person is central to assessing the reasonableness of the State's measures.¹³⁵ This inquiry enables the supervisory organs to ascertain the content of the socio-economic rights at stake and apply that content to assess States' measures.

Moreover, as discussed in chapter three the object and purpose of the African Charter also requires supervisory organs to take into account the notion of African philosophy.¹³⁶ It was shown in chapter three that African philosophy is relevant to elaborate the object and purpose of the African Charter regarding peoples' socio-economic rights.¹³⁷ As such, supervisory organs should consider this element of the object and purpose of the African Charter as a crucial element of the reasonableness model of review. Supervisory organs applying the reasonableness model of review can therefore apply African philosophy to develop the content of peoples' socio-economic rights and then assess States' measures if they take into account this vital element for the protection of peoples' socio-economic rights.

Moreover, although the South African Constitutional Court focused on developing the necessary elements that should be used to assess the reasonableness of the State's measures, some of the elements are also useful in elaborating the normative scope and content of socio-economic rights. As Griffey notes, some of the factors developed by the South African Constitutional Court to assess the reasonableness of a State's measures can be used to develop the substantive content of socio-economic rights.¹³⁸ Thus supervisory organs are able to elaborate the content of socio-economic rights being

¹³⁴ See chapter two, parts 2 2 3, 2 5 and chapter three, part 3 3 2 1.

¹³⁵ *Grootboom* para 83.

¹³⁶ See chapter three, parts 3 2 3 5 and 3 2 4 2.

¹³⁷ See chapter three, part 3 2 4 2.

¹³⁸ Griffey (2011) *Human Rights Law Review* 316.

interpreted by using these identified elements. The elements can further assist the supervisory organs to assess whether the measures adopted by States further the object and purpose of socio-economic rights.

Therefore, regarding the criticisms relating to vagueness of the concept of the reasonableness review, it can be argued that the interpretation of this concept by Liebenberg, and Griffey as elaborated above, help one to understand the context in which the reasonableness review is to be applied. These interpretations identify the reasonableness review as a broad concept that considers socio-economic rights to assess a State's measures in a manner that fosters the object and purpose of such rights. As mentioned above, the reference to object and purpose incorporates in the reasonableness review the elements of a teleological approach to interpretation. This way the reasonableness review relates to the teleological approach to interpretation, based on the object and purpose of the treaty, which interprets a treaty holistically by using the historical background and the treaty as a whole. As such, object and purpose can be used to first develop the content of socio-economic rights.

The discussion above has established reasonableness as a two-stage model of review that develops the content of the socio-economic rights during the first stage, and applies such content to determine the States' measures at the second stage. The following part discusses reasonableness as a model of review applicable to both negative and positive obligations.

6 3 6 Reasonableness as a model for reviewing negative and positive socio-economic rights obligations

The application of the reasonableness model of review by the institutions discussed above, that is the South African Constitutional Court and the CESCR, confines the reasonableness review to exclusively positive obligations and leaves the negative obligations outside its scope.¹³⁹ Porter notes that the debates surrounding the adoption of the Optional Protocol centred on how the CESCR would review alleged violations of the positive obligations imposed by the rights in the ICESCR.¹⁴⁰ Supporters of the

¹³⁹ As discussed in chapter three negative obligations require states to refrain from interfering with the individuals' and groups' enjoyment of already existing socio-economic rights. Positive obligations require states to adopt measures for realising the socio-economic rights. See also D Bilchitz *Poverty and Fundamental Rights: The Justification and Enforcement of Socio-Economic Rights* (2007) 157, Liebenberg & Goldblatt (2007) *South African Journal on Human Rights* 353.

¹⁴⁰ Porter "Reasonableness" in *Optional Protocol to the International Covenant on Economic, Social and Cultural Rights* 195.

Optional Protocol argued for an adoption of the reasonableness review as an appropriate mechanism to assess States' measures regarding positive obligations to adopt legislative and other measures for realising socio-economic rights.¹⁴¹ This narrow approach limits the possibility of applying reasonableness to review States' measures regarding negative socio-economic rights' obligations. It should be noted that States can also violate the already existing socio-economic rights of individuals and groups. Writing on reasonableness in the context of the Optional Protocol, Porter notes that violations of socio-economic rights are not entirely based on the States' failure to enforce their positive obligations but also on States' conduct of interfering with individuals' right to housing through forced evictions as well as discriminatory practices in the enjoyment of socio-economic rights.¹⁴²

The reasonableness review may be applied to assess States' compliance with their socio-economic rights obligations, both negative and positive. With regard to the negative obligations, the failure of States to refrain from interfering with people's existing enjoyment of socio-economic rights amounts to a violation of such rights. The South African Constitutional Court held in *Jafftha v Schoeman; Van Rooyen v Stoltz* ('*Jafftha*')¹⁴³ that the deprivation of the applicants' existing right to housing amounts to the limitation of the right enshrined in article 26 of the Constitution.¹⁴⁴ As argued above, the reasonableness review should be focused on ascertaining the object and purpose of the relevant rights as a basis for assessing the justifiability of the State's acts or omissions in relation to the right. The reasonableness review can be applied to assess States' measures both to realise and restrict the enjoyment of the socio-economic rights.

As discussed in chapter two, a consideration of the object and purpose of rights considers the African Charter holistically.¹⁴⁵ The holistic application allows the supervisory organs to apply a number of provisions of the African Charter to provide a legal framework for assessing limitations of rights. It was discussed in chapter three that the African Charter does not expressly incorporate a limitation clause.¹⁴⁶ However, the provisions of article 27(2) of the African Charter can be generously interpreted to include a limitation clause.¹⁴⁷ The reasonableness review allows the supervisory organs to

¹⁴¹ 195-196.

¹⁴² 196.

¹⁴³ *Jafftha v Schoeman; Van Rooyen v Stoltz* 2005 2 SA 140 (CC), 2005 1 BCLR 78 (CC).

¹⁴⁴ Para 39.

¹⁴⁵ See chapter two, parts 2 5 2 and 2 5 2 1.

¹⁴⁶ See chapter three, part 3 3 5 3.

¹⁴⁷ See chapter three, parts 3 3 5 3, 5 4 3 3 and chapter five, part 5 4 3 5.

assess whether the restriction of socio-economic rights as a result of States' interference with individual's or groups' enjoyment of their socio-economic rights is justified under the conditions laid down in article 27(2). Through the provisions of article 27(2) of the African Charter the reasonableness model of review, as will be demonstrated below,¹⁴⁸ incorporates a proportionality model of review.¹⁴⁹ The following part discusses reasonableness as a model of review that takes into consideration immediate socio-economic needs of people in society.

6 3 7 Reasonableness as a model capable of considering immediate socio-economic rights needs

As demonstrated above, the definition of the reasonableness model of review requires supervisory organs to ascertain whether States' measures realise the object and purpose of the relevant socio-economic rights. As discussed in chapters two and three object and purpose requires the holistic interpretation of the African Charter to give effect to the socio-economic rights at stake. The element of object and purpose in the reasonableness model of review provides the supervisory organs with the opportunity to engage the provisions of article 1 of the African Charter that require States to adopt legislative and other measures for the realisation of socio-economic rights. Through the provisions of article 1, supervisory organs applying the reasonableness model of review can assess whether legislative and other measures adopted by the State take into account the immediate socio-economic needs of individuals and groups.

It is the object and purpose of the African Charter to fulfil the socio-economic rights of the people who are in desperate socio-economic circumstances as well as to take steps to progressively realise their rights. Writing on reasonableness in the South African context, Sunstein notes that a guaranteed constitutional right to housing requires the State to formulate policies that ensure the realisation of this right as well as urgent relief regarding housing to people in desperate housing need.¹⁵⁰ Responding to Bilchitz's argument,¹⁵¹ Steinberg notes that failure of the State to include in its measures the

¹⁴⁸ See part 6 6 1 3 below.

¹⁴⁹ See Liebenberg *Socio-Economic Rights* 214-220 and Liebenberg and Goldblatt (2007) *South African Journal on Human Rights* 352.

¹⁵⁰ CR Sunstein "Social and economic rights? Lessons from South Africa" (2000-2001) 11 *Constitutional Forum* 123 131.

¹⁵¹ Bilchitz (2002) *South African Law Journal* 499. Criticising reasonableness in the South Africa's context, Bilchitz argues that the reasonableness review fails to take into account short-term socio-economic needs of the people.

immediate socio-economic needs of the desperate people renders such measures unreasonable.¹⁵² Liebenberg notes that the reasonableness review is flexible in the sense that it enables a State to adopt appropriate measures to respond to the nature of the particular obligations imposed by socio-economic rights.¹⁵³ It thus enables supervisory organs to assess the reasonableness of the measures adopted to meet the urgent socio-economic needs of the most vulnerable individuals in society.¹⁵⁴

The values of dignity, equality and freedom are appropriate to assess States measures regarding the urgent socio-economic needs of the desperate people in society. It allows supervisory organs to inquire whether the measures reasonably take into account the immediate socio-economic needs of the people in a manner that enables them to live a dignified life and a life of equality without distinction from other sections or members of the society. As Steinberg notes, the values of equality and dignity as important elements of reasonableness provide effective protection to the socio-economic needs of the most vulnerable individuals in society.¹⁵⁵ As Wesson argues while commenting on reasonableness as developed in *Grootboom*:

“How then might the ratio of *Grootboom* best stated? To my mind, it is that such programs should not exclude a ‘significant sector of society’. This, it is submitted, underpins and precedes the Court’s finding that those whose needs are most basic should not be excluded in the sense of not being specifically, or adequately, catered for from the state’s housing program; they, in the view of the Court, constitute a ‘significant sector of society’. What, however, is meant by a ‘significant sector of society’? Clearly, this cannot be taken to mean any group in South African society. After all, certain groups such as the wealthy are simply not in need of assistance. Rather, it must be taken to include groups of people who cannot be expected to meet their socio-economic needs independently, on the basis of their own resources. If such a group is excluded, the legality of the state’s socio-economic program will be thrown into doubt. The mere fact that a group is vulnerable, or unable to meet its needs independently, does not, however, mean that it automatically has a claim to public resources. What is required, therefore, is a contextual examination of whether the group in question... has a legitimate claim to inclusion in a socio-economic program from which others already, benefit. This, it is submitted, is the paradigm form in which socio-economic claims will be brought before the courts.”¹⁵⁶

¹⁵² C Steinberg “Can reasonableness protect the poor? A review of South Africa’s Socio-economic rights jurisprudence” (2006) 123 *South African Law Journal* 264 280.

¹⁵³ Liebenberg *Socio-Economic Rights* 174.

¹⁵⁴ 174.

¹⁵⁵ Steinberg (2006) *South African Law Journal* 281.

¹⁵⁶ M Wesson “*Grootboom* and beyond: Reassessing the socio-economic jurisprudence of the South African Constitutional Court” (2004) 20 *South African Journal on Human Rights* 284 293.

Bilchitz objects to the approach argued by Wesson.¹⁵⁷ According to him, Wesson's "equality approach" misconstrued reasonableness in *Grootboom*. Bilchitz argues that the problem in *Grootboom* is not that measures adopted by the State excluded the Grootboom community but rather the measures failed to take into account the urgent housing needs of the Grootboom community.¹⁵⁸ Bilchitz notes that Wesson's equality approach relies on equality and non-discriminatory provisions of the Constitution to develop reasonableness.¹⁵⁹ He argues that non-discriminatory provisions are narrowly confined to specific groups such as race, sex and sexual orientation.¹⁶⁰ He argues further that these provisions are comparatively-oriented in a sense that they require a comparison between the "benefits and burdens of groups in society with one another".¹⁶¹ According to him, socio-economic rights cases are different.¹⁶² They are not necessarily comparative in nature but rather they focus on the nature of the socio-economic rights and the States' obligations they impose.¹⁶³ That is what the State is obliged to realise in order to give effect to the rights rather than who the right-holder is.¹⁶⁴ He argues therefore that the content of the rights should first be identified as they can assist the supervisory organs to know the beneficiaries of the rights.¹⁶⁵ He asserts that Wesson's approach implies that a needy group is defined independently from the content of the rights.¹⁶⁶

It is important to discuss the critique by Bilchitz as it implies that equality and non-discrimination are less relevant in a reasonableness inquiry. As discussed above, through the object and purpose of the treaty, equality and non-discrimination are vital elements of reasonableness. It should be noted that the grounds for discrimination in the South African Constitution are similar to those in provisions of the right to non-discrimination in the African Charter.¹⁶⁷ The discussion in chapter three demonstrated that the grounds for discrimination are not exclusive. As elements of the reasonableness review, equality and non-discrimination can be applied to develop the content of the socio-economic rights, as well as assess the measures taken by States.

¹⁵⁷ Bilchitz *Poverty and Fundamental Rights* 167.

¹⁵⁸ 168.

¹⁵⁹ 168.

¹⁶⁰ 168.

¹⁶¹ 168.

¹⁶² 168.

¹⁶³ 168.

¹⁶⁴ 168.

¹⁶⁵ 168-169.

¹⁶⁶ 169.

¹⁶⁷ See chapter three, part 3 3 3 4.

The following part demonstrates the place of the reasonableness review in the African Charter.

6 3 8 Reasonableness review in the African Charter

Unlike the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights ('Optional Protocol'), the African Charter does not explicitly provide for reasonableness as a model of review to monitor States' compliance with their obligations. According to Chenwi, the model of review in the Optional Protocol is clearer than in the African Charter.¹⁶⁸ The omission does not necessarily mean that the reasonableness model of review is not recognised in the African Charter. The principle of effectiveness as a tenet of the teleological approach requires a treaty to be construed in a manner that renders its provisions practical and effective. Through this principle the preparatory work, various statements and provisions of the African Charter can broadly be construed in a manner that supports the reasonableness model of review.

Chapter two identified the preparatory work of the African Charter as a vital interpretative tool for effective protection of the socio-economic rights. Chapter three identified the aspects of the preparatory work of the African Charter that can give insights in the interpretation of the socio-economic rights and their related obligations. The chapter showed that the preparatory work of the African Charter identifies protection of the socio-economic rights as an object and purpose of the African Charter. The fact that the preparatory work gives insights to the object and purpose of the African Charter links with the reasonableness model of review that applies the object and purpose of the rights to assess States' measures. Moreover, chapter three also identified that the preparatory work contains provisions relating to the general obligations of the Member States. The general obligations contain positive and negative obligations imposed by the rights provisions upon States.

The preparatory work also identifies values of dignity, equality, justice and freedom as well as the notion of African philosophy. Moreover, the preparatory work requires the supervisory organs to effectively interpret broadly formulated socio-economic rights. All these aspects can generously be construed to incorporate reasonableness as a model of review. Through the principle of effectiveness, as a tenet of the teleological approach, that requires provisions of the treaty to be construed in a manner that renders their

¹⁶⁸ See also Chenwi (2011) *Stellenbosch Law Review* 693.

meaning effective and practical, the reasonableness review can be included in interpreting these aspects.

The principle of effectiveness can be invoked to ensure that States' measures for the implementation of general obligations, imposed by the socio-economic rights in the African Charter, are reasonable. This principle can be applied to ensure that although the Member States should realise the socio-economic rights progressively, it does not necessarily mean that States are exempted from realising immediate socio-economic needs of the people. The discussion above has shown that as a model of review reasonableness can effectively be applied to develop the scope and content of the socio-economic rights and their obligations and apply such content to assess States' measures. It was shown above that as a model of review reasonableness can be applied to assess both negative and positive obligations as well as immediate socio-economic needs.

This understanding is vital in the interpretation of socio-economic rights in two respects. Firstly, it incorporates the reasonableness review as a significant content of socio-economic rights and their concomitant obligations. Secondly, it incorporates reasonableness as a model of review for assessing States' measures. The teleological approach interprets a treaty as a whole and enables the identification and the engagement of various provisions of the African Charter that enshrine elements of the reasonableness review. Reasonableness is enshrined in two statements of the preamble to the African Charter. As demonstrated in chapter two,¹⁶⁹ the preamble identifies the object and purpose of the African Charter to protect human rights (including socio-economic rights). It was demonstrated above,¹⁷⁰ that to be reasonable, a State's measure must show the object and purpose to be achieved by the relevant measure. The preambular statement can thus be used to elucidate the object and purpose to be achieved by the State's measure regarding socio-economic rights. Any measure adopted by the State regarding socio-economic rights should be able to protect and achieve the realisation of these rights. Furthermore, the preamble recognises the values of freedom, equality, justice and dignity as part of the object and purpose of the African Charter. It was demonstrated above,¹⁷¹ that in order to be reasonable the State's measures must promote the values of equality and dignity. Thus, the values recognised

¹⁶⁹ See chapter two, part 2 5 2 1.

¹⁷⁰ See part 6 3 3 above.

¹⁷¹ See part 6 3 3 above.

in the preamble to the African Charter can be applied to help assess the reasonableness of a State's measures.

The reasonableness model of review is implicitly incorporated in the African Charter through the preamble, articles 1, 2, 3, 5, 30, 45(2), 55, 60 and 61 as well as the socio-economic rights provisions. It is also included in articles 2 and 3 of the African Court Protocol and article 28(c) of the African Court of Justice Protocol. Article 1 of the African Charter incorporates the requirement for a reasonableness review. It was demonstrated in chapter three¹⁷² that this article requires States to adopt legislative and other measures to give effect to socio-economic rights in the African Charter. As demonstrated in chapter two¹⁷³ the principle of effectiveness requires the provisions of the African Charter to be construed in a manner that renders their meaning practical and effective. The phrase "to adopt legislative or other measures to give effect to socio-economic rights" can broadly be construed to require States to adopt reasonable measures for the realisation of these rights. Thus the obligation to adopt measures in article 1 effectively requires States to adopt reasonable legislative and other administrative and policy measures. Liebenberg rightly notes that the reasonableness review is premised on an obligation that the State adopts legislative and policy measures to give effect to the relevant human rights.¹⁷⁴

The provisions of articles 2, 3, and 5 of the African Charter regarding non-discrimination, equality and dignity can be broadly elaborated to include the reasonableness review. As demonstrated above¹⁷⁵ a reasonable measure must take into account human dignity, equality and non-discrimination. As such equality, dignity and non-discrimination as analysed in chapter three,¹⁷⁶ can be applied by the supervisory organs to inform the content of reasonableness. These contents can then be used in the interpretative process to assess the reasonableness of a State's measures.

The reasonableness model of review can also be derived from the socio-economic rights' provisions of the African Charter. As demonstrated in chapter three, the socio-economic rights' provisions are formulated in broad, general terms.¹⁷⁷ The general formulation allows the supervisory organs, through the principle of effectiveness as an element of the teleological approach to interpretation, to construe these provisions in a

¹⁷² See chapter three, part 3 3 3 1.

¹⁷³ See chapter two, part 2 2 3.

¹⁷⁴ Liebenberg (2015) *South African Law Journal* 413.

¹⁷⁵ See parts 6 3 3 and 6 4 below.

¹⁷⁶ See chapter three, parts 3 3 3 4 and 3 3 3 5.

¹⁷⁷ See chapter three, part 3 3 4.

manner that render their protection practical and effective. The broad interpretation enables the supervisory organs to include reasonableness as a content of socio-economic rights and their related obligations. It was shown in the discussion above that reasonableness as a model of review places the object and purpose of the rights at stake at the centre of the assessment process. In this regard, the reasonableness model of review can be invoked to ensure that States' measures advance the object and purpose of these rights as envisaged in the African Charter. As shown above, the model can be invoked to review both the negative and positive obligations imposed by the socio-economic rights in the African Charter. Moreover, reasonableness can be invoked to ensure that the content of the socio-economic rights that require immediate realisation are taken into account by States' measures. In *SERAC* the African Commission endorsed this interpretation by, for example, holding that the provisions of article 24 of the African Charter oblige States to adopt "reasonable measures" to prevent environmental pollution.¹⁷⁸

Provisions regarding the protective mandate of the supervisory organs and the mandate to determine cases can be broadly construed to incorporate the reasonableness review. Articles 30 and 45(2) of the African Charter, as demonstrated in chapter 4,¹⁷⁹ and article 2 of the African Court Protocol grant the African Commission and the African Court a protective mandate through the determination of complaints. It should be noted that the discussion above identified reasonableness as a model of review that on the one hand, allows States latitude to formulate the necessary policies and legislation for realising socio-economic rights and on the other hand, mandates the supervisory organs to assess whether such policies and legislation fall within the bounds of a reasonable measure to realise socio-economic rights. It can therefore be argued that the provisions relating to the supervisory organs' mandate to determine cases in article 55 of the African Charter, article 3 of the African Court Protocol, and article 28(c) of the African Court of Justice Protocol broadly enshrine the reasonableness model of review. These provisions can effectively be construed in a manner that requires the supervisory organs, when determining claims relating to socio-economic rights, to consider the reasonableness of a State's legislative, administrative and policy measures.

¹⁷⁸ *SERAC* para 52.

¹⁷⁹ See chapter four, part 4 3 1.

Moreover articles 60 and 61, as analysed above,¹⁸⁰ as well as article 3 of the African Court Protocol and article 28(c) of the African Court of Justice, allow the supervisory organs to draw inspiration and apply other relevant instruments in the interpretation of socio-economic rights. Through these provisions the supervisory organs can draw inspiration from the application of the reasonableness model of review of the CESCER in interpreting article 8(4) of the Optional Protocol as well as the South African Constitutional Court in its socio-economic rights jurisprudence. The following part discusses the minimum core as another approach to the model of review applicable to socio-economic rights.

6 4 Minimum core obligations

6 4 1 Introduction

Another potential model of review is one premised on the concept of minimum core obligations. This model of review is reflected in the African Commission's decisions on the rights to housing and food in *SERAC*. In relation to the right to housing the African Commission held that at a very minimum this right requires the respondent State to refrain from destroying individuals' houses and from hindering their efforts to rebuild their destroyed houses.¹⁸¹ With regard to the right to food the African Commission stated that:

“The minimum core of the right to food requires that the Nigerian Government should not destroy or contaminate food sources. It should not allow private parties to destroy or contaminate food sources, and prevent peoples' efforts to feed themselves.”¹⁸²

Chirwa argues that the African Commission misunderstood the notion of “minimum core” obligation by interpreting it in a manner similar to the negative obligation to respect socio-economic rights.¹⁸³ This misapplication of minimum core obligation raises the need to analyse this concept clearly.

¹⁸⁰ See chapter two, part 2 5 2 3.

¹⁸¹ *SERAC* para 61.

¹⁸² Para 65.

¹⁸³ DM Chirwa “African regional human rights system: The promise of recent jurisprudence on social rights” in M Langford (ed) *Social Rights jurisprudence: Emerging trends in international and comparative law (2008)* 323 326. A similar approach was taken by the South African Constitutional Court in *Grootboom* paras 46 & 95 and in *TAC* para 32. In *Grootboom* the South African Constitutional Court held that the provisions of articles 26 and 28 do not require the state to realise the socio-economic right to housing immediately. According to the South African Constitutional Court, this right is to be realised progressively

6 4 2 Minimum Core: Meaning and implications

Scholars and institutions have defined and elaborated the notion of a minimum core obligation. The African Commission in its Principles and Guidelines on the Implementation of Economic, Social and Cultural Rights in the African Charter on Human and Peoples' Rights ('Principles and Guidelines')¹⁸⁴ identifies that socio-economic rights enshrined in the African Charter impose upon Member States a minimum core obligation which is immediate in nature.¹⁸⁵ According to the African Commission, a minimum core obligation imposes upon Member States of the African Charter to guarantee the minimum essential levels of each socio-economic right enshrined in the African Charter.¹⁸⁶ The African Commission stated further that minimum core obligation is meant to ensure that individuals and groups are not denied enjoyment of the essential levels enshrined in each socio-economic right.¹⁸⁷ The CESCR in its various General Comments¹⁸⁸ earlier on introduced minimum core as a significant component in interpreting socio-economic rights in the ICESCR. In its General Comment 3 on the nature of States' Parties obligations ('General Comment 3')¹⁸⁹ the CESCR stated that socio-economic rights in the ICESCR impose upon States a minimum core obligation to guarantee the enjoyment of the minimum essentials of these rights.¹⁹⁰ However, it does not define the minimum essential levels.¹⁹¹ Commenting on the

within available resources. In *TAC* the South African Constitutional Court held that the socio-economic rights to housing, health, food, water and social security are not immediate, they should be realised progressively.

¹⁸⁴ Principles and Guidelines on the Implementation of Economic, Social and Cultural Rights in the African Charter on Human and Peoples' Rights (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).

¹⁸⁵ Para 16.

¹⁸⁶ Para 17.

¹⁸⁷ Para 17.

¹⁸⁸ See Committee on Economic, Social and Cultural Rights, *General Comment 3, The Nature of States Parties' Obligations* UN Doc. E/1991/23, Committee on Economic, Social and Cultural Rights, General Comment No. 11: Plans of Action for Primary Education (Article 14 of the Covenant), 10 May 1999, E/1992/23, Committee on Economic, Social and Cultural Rights, *General Comment No. 12, The right to adequate food*, UN Doc. E/C.12/1999/5 (1999), Committee on Economic, Social and Cultural Rights, *General Comment No. 13, The right to education (article 13 of the Covenant)*, UN Doc. E/C.12/1999/10, United Nations Committee on Economic, Social and Cultural Rights *General Comment No. 14, The Right to the Highest Attainable Standard of Health* (2000) UN Doc E/C.12/2000/4, United Nations Committee on Economic, Social and Cultural Rights *General Comment 19, The Right to Social Security (art. 19)* UN Doc E/C.12/GC/19.

¹⁸⁹ Committee on Economic, Social and Cultural Rights, *General Comment No.3, The nature of States parties obligations (Art. 2, para. 1)* (1990) UN Doc E/1991/23.

¹⁹⁰ Para 10.

¹⁹¹ See also Bilchitz *Poverty and Fundamental Rights* 189.

minimum core obligation introduced by the CESCR, Bilchitz notes that the degree of the levels of realising socio-economic rights varies in the sense that some levels of enjoyment of socio-economic rights are more urgent than others.¹⁹²

Craven notes that minimum core obligations help to ensure States realise the basic socio-economic needs of individuals.¹⁹³ Craven, in commenting on General Comment 3, posits that the minimum core concept requires States to achieve individuals' basic socio-economic needs irrespective of their economic hardships.¹⁹⁴ According to him, in times of economic hardship, the minimum core requires States to make use of resources obtained through international assistance to realise individuals' minimum levels of socio-economic rights.¹⁹⁵ In its Guidelines, the African Commission notes that the minimum core obligation requires States to realise minimum essential levels of socio-economic rights in the African Charter irrespective of the availability of resources.¹⁹⁶ For a State to rely on the failure to realise the minimum essential levels of the socio-economic rights in the African Charter it must prove that it has allocated all the available resources at its disposal for the realisation of the core content of these rights.¹⁹⁷ States are required to ensure the minimum essential levels of socio-economic rights of the most disadvantaged members of society are realised.¹⁹⁸

As Langford notes, the minimum core obligation allows available resources in a State to be used to determine whether States will be able to realise the minimum essential levels of socio-economic rights.¹⁹⁹ However, such State must prove the lack of resources.²⁰⁰ It should be noted that in General Comment 3 the CESCR requires an assessment of States' realisation of its minimum core obligations to take into consideration resource constraints facing the State in question.²⁰¹ When a State fails to realise its minimum core obligation it must be able to show that it exhausted its available

¹⁹² Bilchitz *Poverty and Fundamental Rights* 185-186.

¹⁹³ M Craven *The International Covenant on Economic, Social and Cultural Rights: A Perspective on its Development* (1995) 141.

¹⁹⁴ 141.

¹⁹⁵ 141.

¹⁹⁶ Principles and Guidelines para 17.

¹⁹⁷ Para 17.

¹⁹⁸ Para 17.

¹⁹⁹ M Langford "Substantive obligations" in M Langford, B Porter, R Brown and J Rossi (eds) *Optional Protocol to the International Covenant on Economic, Social and Cultural Rights: A Commentary* (2016) 227-262.

²⁰⁰ 262.

²⁰¹ General Comment 3 para 10.

resources.²⁰² While the CESCR took a lenient approach regarding the resource constraints defence in its General Comment 3, in the subsequent General Comments it took a stringent approach and omitted this defence in some General Comments.²⁰³ For example, although the right to education is not qualified by resource constraints, the CESCR in its General Comment 11 on plans of action for primary education ('General Comment 11')²⁰⁴ urges states not to rely on a lack of resources to justify their failure to adopt a plan of action regarding primary education in article 14 of the ICESCR.²⁰⁵ It requires States to consider international co-operation as a mechanism to secure necessary resources needed for the realisation of this right.²⁰⁶ Moreover, it requires the international community to assist States facing resource constraints to realise this right.²⁰⁷ In its General Comment 12 on the right to adequate food ('General Comment 12')²⁰⁸ the CESCR stated that a Member State that relies on the resource constraint as a reason for its failure to realise the right to adequate food, of the most vulnerable people in the society that cannot afford to access food on their own, must prove that it deployed all the resources at its disposal to realise the minimum obligations of the right to food.²⁰⁹

The CESCR stated in its General Comment 14 on the right to the highest attainable standard of health ('General Comment 14')²¹⁰ that States are obliged to realise the minimum essentials of this right.²¹¹ It then proceeded to urge Member States that are in a position, through "international assistance and cooperation", to help developing States to realise this obligation.²¹² It stated further that States cannot use resource constraints as a means to justify their failure to realise the right to health.²¹³ In its General Comment 19 on the right to social security ('General Comment 19')²¹⁴ the CESCR required States

²⁰² Para 10.

²⁰³ See also Langford "Substantive obligations" in *Optional Protocol to the International Covenant on Economic, Social and Cultural Rights* 261-262.

²⁰⁴ Committee on Economic, Social and Cultural Rights, General Comment No. 11, Plans of Action for Primary Education (Article 14 of the Covenant), UN Doc. E/1992/23

²⁰⁵ Para 9.

²⁰⁶ Para 9.

²⁰⁷ Para 9.

²⁰⁸ Committee on Economic, Social and Cultural Rights, General Comment No. 12, The right to adequate food, UN Doc. E/C.12/1999/5 (1999).

²⁰⁹ Para 17.

²¹⁰ United Nations Committee on Economic, Social and Cultural Rights General Comment No. 14, The Right to the Highest Attainable Standard of Health (2000) UN Doc E/C.12/2000/4.

²¹¹ Para 43.

²¹² Para 45.

²¹³ Para 47.

²¹⁴ United Nations Committee on Economic, Social and Cultural Rights General Comment 19, The Right to Social Security (art. 19) UN Doc E/C.12/GC/19

to realise the minimum essential levels of this right.²¹⁵ It required States relying on resource constraints to demonstrate that it deployed all its efforts to use the resources at its disposal for the realisation of the minimum obligation imposed by this right.²¹⁶ It also urges economically rich States to assist developing States to meet its minimum obligations.²¹⁷

Bilchitz argues that the minimum core obligation of socio-economic rights takes into account the fact that essential levels of socio-economic rights are important and require a higher standard of protection for the survival of the rights' holders.²¹⁸ Writing in the context of articles 26 and 27 of the South African Constitution, Bilchitz further notes that the "minimum core" obligation is designed to ensure individuals' basic socio-economic rights are protected for their survival.²¹⁹ He notes further that the minimum core takes into consideration the fact that socio-economic rights contain some basic elements that should be realised urgently for individuals' survival.²²⁰ He also notes that socio-economic rights also incorporate a secondary threshold that requires States to provide individuals with conditions that enable them to enjoy these rights.²²¹ According to Bilchitz, in this way the minimum core requires States to provide, without delay, individuals with the basic socio-economic services necessary for their survival.²²² Bilchitz posits that the delay in protecting individuals' survival rights renders all other rights meaningless. In a similar vein, the Inter-American Commission on Human Rights noted that the objective of States' legal obligation regarding realisation of socio-economic rights is to ensure priority is given to such rights for individuals' survival.²²³

Young notes that the concept of a minimum core is based on three broad approaches. She describes the first category as an "essence approach" that establishes the minimum legal contents of the right that should be prioritised for the protection of individuals' survival, life and dignity.²²⁴ According to Young, the essential levels of socio-economic rights, through the essence approach, are determined by their close link with

²¹⁵ Para 59.

²¹⁶ Para 60.

²¹⁷ Para 61.

²¹⁸ Bilchitz (2003) *South African Journal on Human Rights* 12.

²¹⁹ 11.

²²⁰ 11.

²²¹ 11.

²²² 12.

²²³ Annual Report of the Inter-American Commission on Human Rights (1979-1980) OEA/Ser. L/V/II. 50, doc.13 rev 1 2.

²²⁴ KG Young "The minimum core of economic and social rights: A concept in search of content" (2008) 33 *Yale Journal of International Law* 113 126-138.

the foundational norms such as survival and life.²²⁵ The essence approach takes into account the “basic needs” of the beneficiary of the right.²²⁶ It also incorporates the values of equality, dignity and freedom.²²⁷ The second category is the “minimum consensus” approach that focuses on States’ agreement on the elements constituting universal core content of socio-economic rights rather than the core contents of the rights themselves.²²⁸ The third approach focuses on the “minimum obligations” imposed by socio-economic rights rather than the rights themselves.²²⁹

Some aspects of the minimum core obligation as identified above undermine the object and purpose of the African Charter relating to socio-economic rights. For example, greater emphasis is placed on realising the minimum elements of socio-economic rights. Young notes that the minimum core focuses on establishing a minimum legal content of important socio-economic rights.²³⁰ Liebenberg notes that a conception of the minimum core that focuses exclusively on the aspect of survival ignores other values which are integral to socio-economic rights such as “participatory democracy, equality, freedom and human dignity”.²³¹

Moreover, the notion of a minimum core as identified above creates a dichotomy of socio-economic rights by establishing important and less important thresholds of socio-economic rights realisation. Wesson notes that the objective of the minimum core obligation is to prioritise some socio-economic rights over others.²³² Young notes that the proponents of the minimum core direct their attention to the severest socio-economic rights violations only as against less-severe violations.²³³ This dichotomy is problematic for the protection of socio-economic rights in two respects. Firstly, States can give more emphasis to the minimum levels of the rights and less emphasis to the extensive levels of the enjoyment through progressive realisation. Secondly, it can cause States to ignore the realisation of these rights progressively and focus only on meeting the minimum core obligations. Writing in the context of the right to health, Toebe argues that “minimum

²²⁵ 126.

²²⁶ 128.

²²⁷ 133.

²²⁸ 140-151. See also Wesson (2004) *South African Journal on Human Rights* 298.

²²⁹ Young (2008) *Yale Journal of International Law* 151-164.

²³⁰ 113.

²³¹ Liebenberg *Socio-Economic Rights* 167-168 and 173.

²³² Wesson (2004) *South African Journal on Human Rights* 298.

²³³ Young (2008) *Yale Journal of International Law* 114.

core” renders some content of such socio-economic right less important, as well as undermines the progressive realisation of such right.²³⁴

Liebenberg argues that “minimum core approach is in danger of encouraging minimalism in social provisioning when the context in fact renders such minimalism unnecessary and inappropriate.”²³⁵ She notes further that the minimum core obligation excludes or marginalises the socio-economic needs of various groups that do not fit in the requirements of the minimum core.²³⁶ According to her individuals’ socio-economic needs vary.²³⁷ She notes that the survival-based approach of minimum core fails to effectively respond to diverse socio-economic needs of different groups of people in society. The approach for example fails to accommodate the object and purpose of significant socio-economic rights that are not directly related to life such as the right to education.²³⁸ Sen challenges the survival-based approach that is not exclusive since individuals can survive even with minute nutrition or in situations where dietary standards are high.²³⁹

Another shortcoming of the minimum core concept is that it stresses the prioritising of socio-economic rights of the individual rather than the collective socio-economic rights. This is evidenced in Bilchitz’s statement where he notes that:

“Even if housing could be achieved for most people in a reasonable time, it would never be acceptable for some to have to suffer the dire effects of not being protected from elements or not having their other basic needs met. This is one of the prime reasons for the protection of socio-economic entitlements in the form of rights. Collective goals cannot outweigh protections for the most basic interests of individuals. The effect of not protecting people from the elements can have a dire impact on their lives, and affect their basic ability to live and be free from impairments of their physical functioning and freedom.”²⁴⁰

This individualistic understanding of the minimum core needs to be balanced with the collective socio-economic rights in the African Charter that are formulated and based on

²³⁴ B Toebes “The right to health” in A Eide C Krause & A Rosas (eds) *Economic, Social and Cultural Rights: A Textbook 2* ed (2001) 169 176. See also *Liebenberg Socio-Economic Rights* 170. Liebenberg notes that the distinction of socio-economic rights between core and non-core socio-economic needs is problematic in that there is no clear standard established to justify such distinction.

²³⁵ Liebenberg *Socio-Economic Rights* 169.

²³⁶ 169.

²³⁷ 169.

²³⁸ 170. See also Young (2008) *Yale Journal of International Law* 126-130.

²³⁹ A Sen Poverty and famines: An essay on entitlement and deprivation (1982) 12 quoted in Young (2008) *Yale Journal of International Law* 131.

²⁴⁰ Bilchitz (2002) 119 *South African Law Journal* 499.

the African philosophy of collectiveness as discussed in chapter 3 of this study.²⁴¹ The supervisory organs would be able to strike a balance through the limitation clause in article 27(2) of the African Charter. As will be discussed below the supervisory organs may apply the proportionality standard to assess States' limitation of the socio-economic rights.²⁴²

The South African Constitutional Court rejected the notion of minimum core in three significant cases. These cases are: *Grootboom*, *TAC*, and *Mazibuko*. In *Grootboom* the Constitutional Court stated that determination of socio-economic rights' minimum content requires sufficient information regarding the needs of such rights. The court held that variations in individuals' socio-economic needs and opportunities render the determination of the minimum core of socio-economic rights complex.²⁴³ For example, regarding the right of access to adequate housing the court stated some individuals need land, some land and houses, while others need financial support to enable them to build houses.²⁴⁴

In *TAC* the South African Constitutional Court stated that the formulation of article 26 does not oblige the State to implement the rights of access to housing, health care, sufficient food and water, and social security immediately. The article requires the State to implement its socio-economic rights obligations based on its available resources.²⁴⁵ According to the South African Constitutional Court, it is difficult to realise the minimum core of socio-economic rights for every individual immediately.²⁴⁶ Moreover, the court held that courts do not have the mandate to inquire and order the minimum content of socio-economic rights.²⁴⁷

The minimum core as an independent model of review is insufficient to achieve the protection of socio-economic rights. Firstly, it encourages States to focus on implementing only the minimum elements of socio-economic rights. Secondly, it exclusively prioritises essential levels of the socio-economic rights. Thirdly, it lacks the elements to achieve socio-economic rights progressively but rather focuses on immediate realisation of socio-economic rights. Finally, it undermines collective socio-economic rights.

²⁴¹ See chapter three, parts 3 3 4 6, 3 3 4 7 and 3 3 4 8.

²⁴² See part 6 5 below.

²⁴³ *Grootboom* para 32.

²⁴⁴ Para 33.

²⁴⁵ *TAC* para 32.

²⁴⁶ Para 35.

²⁴⁷ Paras 37-38.

Thus, the minimum core concept should be supplemented by another model of review that can guarantee the development of the normative content of all socio-economic rights in the African Charter and their progressive realisation. Liebenberg notes that opponents of minimum core do not argue for a total disregard of this notion since it helps States to ensure their measures prioritise the socio-economic needs of marginalised individuals.²⁴⁸ Lehmann, while commenting on the minimum core as elaborated by the CESCRC, also notes that the notion guides States in developing their measures.²⁴⁹ In a similar vein Young, while commenting on the concept of minimum core, notes that this concept helps States to prioritise the socio-economic rights of the most vulnerable individuals in society.²⁵⁰ Yeshanew argues that the best way to accommodate minimum core is to incorporate it in the reasonableness review.²⁵¹ According to Yeshanew, the minimum core obligations will assist the supervisory organs to assess States' negative and "basic level" positive obligations.²⁵² It can therefore be a useful tool to establish the minimum content of the socio-economic rights as well as assess the measures taken by States to implement such minimum content of these rights.²⁵³ Both, minimum core and the reasonableness review take into account the basic and immediate socio-economic needs of the most vulnerable groups in society.²⁵⁴ He further notes that as a combined model these two models of review can be a useful tool to monitor States' implementation of their socio-economic rights obligations effectively.²⁵⁵ As shown above, the reasonableness review incorporates the minimum core to the extent that it includes immediate socio-economic needs. Writing on the reasonableness in the South African context Liebenberg notes that as a model of review reasonableness lacks justification for immediate needs.²⁵⁶ She suggests that in this regard it can be combined with the minimum core concept that justifies the immediate needs.²⁵⁷

This dissertation adopts the model of review that merges reasonableness with minimum core as suggested by Yeshanew and Liebenberg respectively. However, this

²⁴⁸ Liebenberg *Socio-Economic Rights* 172-173.

²⁴⁹ K Lehmann "In defence of the Constitutional Court: Litigating socio-economic rights and the myth of the minimum core" (2007) 22 *American University of International Law Review* 163 185.

²⁵⁰ Young (2008) *Yale Journal of International Law* 172.

²⁵¹ Yeshanew *The Justiciability of Economic, Social and Cultural Rights* 321-324.

²⁵² 321.

²⁵³ 321.

²⁵⁴ 321.

²⁵⁵ 321.

²⁵⁶ Liebenberg *Socio-Economic Rights* 183-184.

²⁵⁷ 184-185.

model lacks a mechanism to assess States' measures that limit the enjoyment of existing socio-economic rights. It should be noted that the discussion in chapters three and five showed that the socio-economic rights in the African Charter are not absolute; they can be limited through the provisions of article 27(2) of the African Charter. The following part analyses proportionality as a model of review applied by the supervisory organs to assess the limitation of rights by supervisory organs. The teleological methodology developed in chapter two of this study demonstrated that supervisory organs should engage the text of the African Charter as a whole in interpreting the socio-economic rights. Chapter three showed that provisions of article 27(2) can be applied to limit the socio-economic rights for the effective interpretation of socio-economic rights. It was further shown in chapter five that the African Commission has invoked the provisions of article 27(2) to assess States' measures that limit socio-economic rights. As such, the discussion on proportionality as a model of review to assess the limitation of the rights by States links with the teleological approach methodology and is therefore relevant. The following part analyses the proportionality model of review.

6 5 Proportionality

6 5 1 Proportionality: Meaning and implications

The proportionality model of review is centred on the understanding that human rights are not absolute; they can be restricted for the protection of the human rights of others or for public interest.²⁵⁸ In *COHRE* the African Commission stated that human rights enshrined in the African Charter can only be restricted for reasons of protecting the "rights of others, collective security, morality and common interest".²⁵⁹ In *Ashingdane v The United Kingdom* ('*Ashingdane*')²⁶⁰ the European Court of Human Rights ('ECHR') held that the right of access to the courts is not absolute, it can be restricted provided the restriction does not render the right illusory.²⁶¹ Craig elaborates on proportionality as a standard of review that enables supervisory organs to assess whether a State's

²⁵⁸ AV Dolzhikov "The European Court of Human Rights on the principle of proportionality in 'Russian' Cases (2012) 82 *Teisés aktualijos* 215 215.

²⁵⁹ *Sudan Human Rights Organisation & Centre on Human Rights and Evictions (COHRE) v Sudan* Communications no. 279/03-296/05 (2009) AHRLR 153 (ACHPR 2009). para 165. See also *Centre for the Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council v Kenya* Communication no. 276/2003 (2009) AHRLR 75 (ACHPR 2009) para 172.

²⁶⁰ *Case of Ashingdane v The United Kingdom* App no 8225/78 (ECtHR, 28 May 1985).

²⁶¹ Para 57.

limitation measures are appropriate to achieve the intended purposes.²⁶² Craig posits, in relation to human rights enshrined in various treaties, proportionality is appropriate in assessing the limitations of such rights by States.²⁶³ According to Craig, courts assess whether a State's measures relates to the intended goals, as well as whether such measures are disproportionate and impair the object and purpose of the rights.²⁶⁴ Möller defines proportionality as a "doctrinal tool" applied by the supervisory organs to determine whether a State's restriction of individuals' rights is justified and proportionate to the purpose of such restriction.²⁶⁵ As a model of review proportionality assists the supervisory organs to establish whether a State's limitation measures are appropriate to achieve the intended purposes.²⁶⁶ It guides the supervisory organs to resolve a conflict between human rights as well as between rights and public interests.²⁶⁷

In common the above definitions demonstrate that human rights are not absolute; their enjoyment can be subjected to some limitations. Significantly, States must be able to justify the limitation of the rights. In *Constitutional Rights Project and Others v Nigeria* ('*Constitutional Rights Project*')²⁶⁸ the African Commission held that States' justification for the limitation of human rights entrenched in the African Charter should be "strictly proportionate and absolutely necessary" for the purpose aimed to be achieved.²⁶⁹ The African Commission further emphasised that the limitation must not render the limited right illusory.²⁷⁰ Writing in the context of the European Convention on Human Rights ('European Convention'), Gerards notes that States are allowed to restrict the rights in the European Convention provided they reasonably justify such restrictions.²⁷¹ As mentioned above, the African Commission held in *COHRE* that Member States to the African Charter can justify the limitation of the rights if the limitation aims at protecting the "rights of others, collective security, morality and common interest".²⁷² In *Endorois*

²⁶² P Craig "Proportionality, rationality and review" (2010) *New Zealand Law Review* 265 268.

²⁶³ 269.

²⁶⁴ 270.

²⁶⁵ K Möller "Proportionality and rights inflation" in G Huscroft, BW Miller & G Webber (eds) *Proportionality and the Rule of Law: Rights, Justification, Reasoning* (2014) 155 155. See also K Möller "Proportionality: Challenging the critics" (2012) 10 *International Journal of Constitutional Law* 709 709.

²⁶⁶ Craig (2010) *New Zealand Law Review* 268.

²⁶⁷ Möller "Proportionality" in *Proportionality and the Rule of Law* 156.

²⁶⁸ *Constitutional Rights Project and Others v Nigeria* Communication nos. 140/94, 141/94, 145/95 (1999) AHRLR 227 (ACHPR 1999).

²⁶⁹ Para 42.

²⁷⁰ Para 42.

²⁷¹ J Gerards "How to improve the necessity test of the European Court of Human Rights" (2013) 11 *International Journal of Constitutional Law* 466 466.

²⁷² *COHRE* para 165.

the African Commission held that the limitation of the rights in the African Charter should not render such rights illusory and ineffective.²⁷³ This aspect of proportionality links with the teleological methodology, particularly with the principle of effectiveness that requires supervisory organs to interpret the socio-economic rights in a manner that renders such rights practical and effective rather than theoretical and ineffective.²⁷⁴

This dissertation adopts the above discussed definitions of the proportionality model of review based on their relevance to the understanding of proportionality in the context of the African Charter. The dissertation invokes proportionality as a relevant model for reviewing the limitations of the enjoyment of the existing socio-economic rights by the Member States of the African Charter. Writing on the proportionality standard in the context of the ECHR, Rivers posits that the concept of proportionality helps supervisory organs to scrutinise a State's justification for restricting individuals' rights.²⁷⁵

Scholars have identified four elements of proportionality namely legitimate aim, suitability, necessity, and balancing.²⁷⁶ Legitimate aim focuses on ensuring that the measures adopted by the State to restrict the rights of the individuals and groups are in line with the law and the values of a democratic society. For States to restrict human rights they must prove to have a "legitimate aim".²⁷⁷ Limitation of the enjoyment of the rights by States should be strictly based on legitimate aims.²⁷⁸ The African Commission applied this element of proportionality in *Endorois* where it stated that restriction of the rights in the African Charter must be established by law.²⁷⁹ Writing in the context of the European Convention Eissen notes that legitimate aim of a State is justified when the

²⁷³ *Endorois* para 172.

²⁷⁴ See chapter two, part 2 5 2 4.

²⁷⁵ J Rivers "Proportionality and variable intensity of review" (2006) 65 *Cambridge Law Journal* 174 176-177.

²⁷⁶ See Möller "Proportionality and rights inflation" in *Proportionality and the rule of law* 155-156, Dolzhikov (2012) *Teisės aktualijos* 218, Gerards (2013) 11 *International Journal of Constitutional Law* 469, Rivers (2006) *Cambridge Law Journal* 181 and Craig (2010) *New Zealand Law Review* 271-272. These elements of proportionality model of review are analysed in depth by S Van der Berg *A capabilities approach to the judicial review of resource allocation decisions impacting on socio-economic rights* LLD dissertation Stellenbosch (2015) 238-241. However, the context within which Van der Berg discusses these elements is in relation to resource allocation decisions in South Africa. The current dissertation however, analyses and discusses the elements of proportionality with regard to assessing the level of states' compliance with their socio-economic rights obligations in the African Charter.

²⁷⁷ Dolzhikov (2012) *Teisės aktualijos* 218.

²⁷⁸ 218.

²⁷⁹ *Endorois* para 172.

limitation is “prescribed by law” and “necessary in a democratic society”.²⁸⁰ Dolzhikov notes that the legitimate goals of the State to limit the rights are also expressed in different phrases²⁸¹ but is mainly expressed in the phrases “to the protection or the rights of other persons or public interests”.²⁸² These two phrases are the basis for restricting human rights.²⁸³ In *Prince v South Africa* (*‘Prince’*)²⁸⁴ the African Commission held that the individual’s right to “hold religious beliefs” is absolute, however, the right to exercise such religious beliefs is not absolute.²⁸⁵

According to the African Commission, the manner in which an individual practices his or her religious beliefs must be in line with the “interests of society”.²⁸⁶ The African Commission did not define the phrases “public interest”, “public need” or “interests of society” in its jurisprudence. However, in its Guidelines it has interpreted the phrase “public interest” to mean the “common well-being or general welfare of the population”.²⁸⁷ It has also elaborated the phrases “public need” and “interest of the society” in the provisions of the African Charter to include “legitimate public interest objective such as economic reform or measures designed to achieve greater social justice”.²⁸⁸

Suitability determines whether the measures adopted to limit the rights are capable of achieving the legitimate purpose of the limitation.²⁸⁹ Significantly, suitability requires States’ measures to be reasonable in a manner that does not provide absurdity in the enjoyment of the rights.²⁹⁰ The reasonable link between the limitation and the purpose of the limitation is established when the measures taken are capable of achieving the aim.²⁹¹ If a measure fails to achieve the legitimate purpose then it does not pass the suitability test.²⁹² As such suitability requires States to develop a mechanism capable of

²⁸⁰ M Eissen “The principle of proportionality in the case-law of the European Court of Human Rights” in RSt.J Macdonald, F Matscher & H Petzold (eds) *The European System for the Protection of Human Rights* (1993) 125 126.

²⁸¹ Dolzhikov (2012) *Teises aktualijos* 218. See also Eissen “The Principle of proportionality” in *The European System for the Protection of Human Rights* 126.

²⁸² Dolzhikov (2012) *Teisės aktualijos* 219.

²⁸³ 219.

²⁸⁴ *Prince v South Africa* Communication no. 255/2002 (2004) AHRLR 105 (ACHPR 2004).

²⁸⁵ Para 41.

²⁸⁶ Para 41.

²⁸⁷ Principles and Guidelines para 1(h).

²⁸⁸ Principles and Guidelines para 55(c).

²⁸⁹ Dolzhikov (2012) *Teisės aktualijos* 219.

²⁹⁰ 219.

²⁹¹ Möller (2012) *International Journal of Constitutional Law* 712.

²⁹² 712.

achieving the legitimate aim of the limitation.²⁹³ In *Prince* the African Commission held that the effect of the State's restriction of the rights should be "strictly proportionate" with the legitimate goal aimed to be achieved.²⁹⁴ In the case of *Éditions Plon v France* ('*Plon*')²⁹⁵ the ECHR had to decide whether banning of the publication of the book that revealed the medical information of the late former President Mitterrand of France was suitable to achieve a legitimate aim to protect the rights of President Mitterrand and his family.²⁹⁶ The ECHR held that based on the fact that the book has already been sold and the information disseminated on the internet it was no longer confidential.²⁹⁷ As such the requirement for medical confidentiality was irrelevant. According to the ECHR the measures adopted by the State to ban the book was disproportionate to the "legitimate aim" to protect the rights of President Mitterrand.²⁹⁸

Necessity requires States, in limiting the rights, to adopt the least restrictive measures. States should ensure that there is no other less restrictive measure that could achieve the purpose equally well.²⁹⁹ In *Endorois* the African Commission held that restriction of the rights in the African Charter must be necessary for achieving the desired purpose and they should also be least restrictive.³⁰⁰ In *Fedesa* ('*Fedesa*')³⁰¹ the ECHR held earlier that proportionality requires States to show that limitations are necessary and that States have pursued the least restrictive measures.³⁰² In *Prince* the African Commission held that the effect of the State's restriction of the rights should be necessary for achieving the legitimate aim.³⁰³

The fourth element of proportionality is balancing. Contrary to suitability and necessity that are concerned with the link between the purpose of the measures and the means to achieve such purpose, balancing determines the inter-relation between the limited rights and the rights that the State aims to protect.³⁰⁴ Möller notes that at the balancing stage a supervisory organ establishes which of the two categories of rights at

²⁹³ Gerards (2013) *International Journal of Constitutional Law* 473.

²⁹⁴ *Prince* para 43.

²⁹⁵ Case of *Éditions Plon v France* App no 58148/00 (ECtHR, 18 May 2004).

²⁹⁶ Para 53.

²⁹⁷ Para 54.

²⁹⁸ Para 54.

²⁹⁹ Möller (2012) *International Journal of Constitutional Law* 712.

³⁰⁰ *Endorois* paras 213-214.

³⁰¹ *Fedesa and Others* Case C-331/88 [1990] ECR 1-4023.

³⁰² Para 13. See also Case of *Daróczy v Hungary* App no 44378/05 (ECtHR, 1 July 2008) paras 3, 26-28 and 33, Case of *Üpper and Others v Turkey* App nos 14526/07, 14747/07, 15022/07, 15737/07, 36137/07, 47245/07, 50371/07, 50372/07 and 54637/07 (ECtHR, 20 October 2009) paras 35 and 43.

³⁰³ *Prince* para 43.

³⁰⁴ Gerards (2013) *International Journal of Constitutional Law* 469.

stake should be prioritised.³⁰⁵ According to him, the inquiry at this stage is whether State's limitation of the right can assist the protection of the "competing right or interest".³⁰⁶ The balance between the limited right and the right aimed to be protected by the State should be reasonable.³⁰⁷ In the Principles and Guidelines the African Commission while interpreting the principle of proportionality, stated that the principle aims at "striking a fair balance" between the individual's socio-economic rights and the interest of the society.³⁰⁸ A State's limitation of socio-economic rights are not proportional in circumstances where the State fails to prove that it balanced the competing socio-economic rights of the individual with those of the general public before taking the limitation steps.³⁰⁹ The element of balancing was applied by the ECHR in *Mathieu-Mohin and Clerfayt v Belgium* ('*Mathieu*').³¹⁰ The ECHR stated that human rights are not absolute in the sense that States enjoy the discretion to restrict them.³¹¹ However, courts have the role to monitor such States' discretion.³¹² Courts must assess the measures taken by States to ensure that they do not render the rights illusory and ineffective.³¹³ The measures must aim to pursue a legitimate purpose and must be proportional.³¹⁴ Particularly, the restriction of the rights by States should not frustrate the rights for the protection of rights of the legislature.³¹⁵

These elements of proportionality are relevant to the interpretation of socio-economic rights. Firstly, they assist the supervisory organs to establish whether the measures adopted by the State fulfil the legitimate aim. However, it should be noted that exclusive legitimate aim is not sufficient justification for States to restrict socio-economic rights. Secondly, supervisory organs must ascertain the suitability of the measure. They should establish whether the measure adopted is suitable for achieving the legitimate aim. Thirdly, supervisory organs must ascertain that there is no other less restrictive measure that a State could adopt in order to lessen the effects of the limitation to the victims. Writing in the context of Europe, Craig argues that in relation to human rights, such as the rights to property and work, proportionality allows the courts to order that the

³⁰⁵ Möller (2012) *International Journal of Constitutional Law* 713.

³⁰⁶ 713.

³⁰⁷ Gerards (2013) *International Journal of Constitutional Law* 469.

³⁰⁸ Principles and Guidelines para 1(g).

³⁰⁹ Principles and Guidelines para 1(g).

³¹⁰ Case of *Mathieu-Mohin and Clerfayt v Belgium* App no 9267/81 (ECtHR, 2 March 1987).

³¹¹ Para 52.

³¹² Para 52.

³¹³ Para 52.

³¹⁴ Para 52.

³¹⁵ Para 52.

limitations of such rights should be less restrictive.³¹⁶ According to him, through a proportionality standard the courts ascertain whether the goals could be attained by less restrictive measures.³¹⁷ In a similar vein, Liebenberg notes that a proportionality assessment should aim at requiring States to demonstrate there are no less restrictive measures for achieving the required goals.³¹⁸ Finally, supervisory organs should balance the rights restricted and the rights protected by the measure and establish if justification is established.

6 5 2 Proportionality in the African Charter

The notion of proportionality is recognised in the African Charter. It should be noted that the discussion in chapter three of this study showed that socio-economic rights in the African Charter are not absolute. States can limit these rights through the provisions of article 27(2) of the African Charter. The African Commission held in *COHRE* that the human rights enshrined in the African Charter can only be limited by the provisions of article 27(2).³¹⁹ Moreover, the provisions of article 14 of the African Charter can be used to restrict socio-economic rights. These provisions provide an internal limitation clause. As Tsakyrakis posits, rights provisions in a treaty incorporate limitation clauses which are necessary restrictions for the protection of human rights of a larger community of people in the society.³²⁰

It can thus be argued that the conditions identified in the limitation provisions of articles 14 and 27(2) namely “interest of public need” or “general interest of the community” “rights of others, collective security, morality and common interest” implicitly incorporate the model of proportionality. Tsakyrakis writes that underlying assumptions regarding proportionality are twofold. Firstly, public interests override an individual’s interests. Secondly, a State’s measures to foster such public interests prevail only to the extent that they do not impose excessive restrictions on individuals.³²¹

However, the African Charter does not explicitly identify the elements of the proportionality model of review as enshrined in the provisions of article 27(2). The

³¹⁶ Craig (2010) *New Zealand Law Review* 269-270.

³¹⁷ 268.

³¹⁸ S Liebenberg “The value of human dignity in interpreting socio-economic rights” (2005) 21 *South African Journal of Human Rights* 1 27.

³¹⁹ *COHRE* para 165.

³²⁰ S Tsakyrakis “Proportionality: An assault on human rights?” (2009) *International Journal of Constitutional Law* 1 9.

³²¹ 9.

omission of express provisions regarding the elements of the proportionality model of review does not necessarily mean that these elements are excluded in the provisions of article 27(2). It can be argued that these elements are implicitly included in article 27(2) of the African Charter. It was demonstrated in chapter two that the teleological approach to interpretation through the principle of effectiveness requires provisions of the African Charter to be interpreted in a manner that renders such provisions effective and practical. This principle can thus be applied to include within article 27(2) the four elements of proportionality as identified by scholars, namely legitimate aim, suitability, necessity and balancing. In *Prince* the African Commission clearly stated that the right to freedom of religion in the African Charter is not absolute and that the provisions of article 27(2) of the African Charter provide a legitimate restriction of this right.³²² According to the African Commission, the justification for the limitation of the rights in article 27(2) is based on the general principle that enjoyment of one's right should not violate other human rights entrenched in the African Charter.³²³ Reasons for the limitation of the rights recognised in the African Charter should be justified by the "legitimate State interest".³²⁴

Having discussed the different models of review, the following part develops the teleological model of review by considering the viability of reasonableness, incorporating minimum core and proportionality.

6 6 Towards a model of review grounded in the teleological approach: Reasonableness incorporating minimum core and proportionality

6 6 1 Inter-relation between teleological approach and reasonableness review

The effective protection of the socio-economic rights in the African Charter will require an assessment of the States' compliance with the obligations imposed by these rights. The model of review suitable for assessing States' compliance with their socio-economic rights obligations must be able to correspond with the teleological approach and advance the object and purpose of the African Charter regarding these rights. The discussion above on the models of review identified reasonableness as a model of review that considers the object and purpose of the rights to assess States' compliance with the obligations imposed by such rights. The element of object and purpose of the

³²² *Prince* para 43.

³²³ Para 43.

³²⁴ Para 43.

rights in the reasonableness review corresponds with the teleological approach to interpretation, developed in chapter two of this dissertation.

The discussion in chapter two argued for a teleological approach as an appropriate approach to interpreting socio-economic rights in the African Charter. The discussion demonstrated that the appropriateness of the teleological approach centres on its use of the object and purpose of the treaty regarding socio-economic rights. The element of object and purpose as demonstrated in chapter two enables the supervisory organs to engage various interpretative tools to develop the meaning, scope and content of socio-economic rights and their related obligations. Supervisory organs are able to engage the text of the African Charter holistically to interpret socio-economic rights. Holistic interpretation of the African Charter allows them to apply the values of equality, dignity, freedom and justice in the interpretative process. It also allows the supervisory organs to take into account the relevant provisions in the African Charter, the preparatory work of the African Charter, relevant international, regional and national laws and jurisprudence, as well as the principle of effectiveness to interpret socio-economic rights and their concomitant obligations.

The above discussion has demonstrated the interrelation between the reasonableness review and the teleological approach to interpretation. Based on this interrelation between the reasonableness review and the teleological approach it can be argued that reasonableness can be developed as a teleological model of review. The aspect of object and purpose of the rights as an element of reasonableness can be applied in a manner that incorporates in this model of review the elements of the teleological approach identified above which are vital in elaborating the object and purpose of the socio-economic rights in the African Charter.

6 6 1 1 Identifying the scope and content of socio-economic rights at stake

As argued above, the object and purpose of the rights is a vital element of the reasonableness review. This element as elaborated above, as well as in chapter two, engages various interpretative aspects to develop the scope and content of the rights at stake. The element therefore renders reasonableness as a two-stage model of review in the sense that it first develops the scope and content of the socio-economic rights and then applies such content to assess states' measures.

As demonstrated above, the reference to the object and purpose enables a reviewing supervisory organ, applying reasonableness, to engage the values of dignity, equality,

justice and freedom to elaborate the content of the rights that the States must take into account when they develop measures to realise the rights. Furthermore, as shown above, the reference to the object and purpose enables reviewing supervisory organs to engage the provisions of the African Charter holistically to generate the scope and content of the socio-economic rights that States' measures must take into consideration.

6 6 1 2 *Minimum essentials of socio-economic rights*

Effective protection of socio-economic rights requires States to be able to give effect to these rights progressively as demonstrated in chapter three. However, this does not necessarily mean that States should ignore the immediate socio-economic needs of individuals and groups. The object and purpose of the African Charter as elaborated in chapter two requires that the socio-economic rights of the individuals and groups should be realised. The object and purpose of the African Charter regarding socio-economic rights will be defeated when States' measures fail to give effect to the minimum essentials of socio-economic rights. As such, object and purpose as an element of the reasonableness review creates space for a reviewing supervisory organ to assess the manner in which States' measures take into account the individual's and peoples' immediate socio-economic needs. In this regard, the measures of a State will be unreasonable when they leave the immediate socio-economic needs out of their scope. As Liebenberg similarly notes, in situations where immediate socio-economic needs of the people are not realised by the State, it exposes people to live an undignified life and fail to engage equally in society.³²⁵ She notes further that minimum core in the reasonableness model of review enables supervisory organs to place a heavy burden of justification in circumstances where individuals are denied their immediate socio-economic needs.³²⁶ In a similar vein, Yeshanew argues that if merged with the reasonableness model of review, the minimum core would help in establishing the content of immediate socio-economic needs and enable the supervisory organs to assess how States' measures have taken into account such needs.³²⁷

Furthermore, as demonstrated in chapter two, the object and purpose of rights incorporates the principle of effectiveness that ensures rights' provisions are assigned

³²⁵ Liebenberg *Socio-Economic Rights* 184.

³²⁶ 224.

³²⁷ Yeshanew *The Justiciability of Economic, Social and Cultural Rights* 321.

meaning that is effective and practical.³²⁸ In this regard, a reviewing supervisory organ, applying reasonableness, can apply the principle of effectiveness as an element of object and purpose to construe the provisions of socio-economic rights in a manner that renders their meaning effective and practical. This generous interpretation requires that the minimum essential of these rights are protected.

The incorporation of the minimum essential of socio-economic needs is significant in that it engages in the reasonableness review the minimum core model of review. It should be noted that the analysis of the minimum core obligation above identified that this model of review cannot independently advance the object and purpose of the African Charter regarding socio-economic rights. The discussion demonstrated the need to integrate minimum obligation with the reasonableness review. The integration of the reasonableness and minimum core models of review is vital in that it enables the supervisory organs to assess how States realise the immediate socio-economic needs of the most vulnerable people in the society while giving effect to the progressive realisation of these rights. As Yeshanew notes the minimum core obligation is useful for establishing the basic content of the socio-economic rights and the reasonableness review helps in establishing the content of the rights for progressive realisation.³²⁹

6 6 1 3 Reviewing positive and negative obligations

As demonstrated in chapter three, the provisions of article 1 of the African Charter incorporates both the negative and positive obligations imposed by the socio-economic rights. Positive obligations require States to adopt measures that realise socio-economic rights.³³⁰ It was argued above that the reasonableness review is implicitly incorporated in the provisions of article 1 of the African Charter. In this regard, the reasonableness review can be applied to review the positive obligations imposed by the socio-economic rights. As demonstrated above, a reviewing court can inquire as to whether the measures adopted by the State reasonably realise the obligations imposed by the socio-economic rights. In this regard, reasonableness sufficiently reviews the positive obligations.

Regarding the negative obligations, it was demonstrated above that the State is in breach of its negative obligation when it violates the enjoyment of the existing socio-

³²⁸ See chapter two, parts 2 2 3 and 2 5 2 4.

³²⁹ Yeshanew *The Justiciability of Economic, Social and Cultural rights* 321. See also Liebenberg *Socio-Economic Rights* 223.

³³⁰ See chapter three, part 3 3 3 1.

economic rights. When the enjoyment of existing rights is limited States should justify the limitation. It was demonstrated in chapter three that the object and purpose requires restriction of rights to be narrowly interpreted. Object and purpose of the rights as an element of reasonableness enables this model of review to assess States' restrictive measures. In this regard, reasonableness integrates the proportionality model of review. In the analysis regarding the proportionality model of review it was demonstrated that it cannot effectively review the obligations imposed by the socio-economic rights in a manner that advances their object and purpose. The need to integrate it with the reasonableness review was demonstrated. Writing on the model he developed that combines the reasonableness review and minimum core, Yeshanew notes that this model is not exclusive other models of review can be developed for the effective protection of the socio-economic rights.³³¹

6 7 Conclusion

In order to align the jurisprudence of the supervisory organs with the teleological approach this chapter recommended various mechanisms to be taken into account in the interpretative process. First and foremost is the adaption and application of the teleological approach to interpretation. This approach allows the supervisory organs to engage different interpretative tools to interpret socio-economic rights. These tools include the object and purpose of the African Charter regarding socio-economic rights, the text of the African Charter as a whole, its preparatory work, relevant international, regional and national human rights laws and jurisprudence, as well as the principle of effectiveness.

Significantly, the supervisory organs should apply the identified interpretative tools systematically. It is important for the supervisory organs to adapt and consistently apply the methodology for application of the teleological approach as developed in chapter two. In addition the supervisory organs, when interpreting the African Charter holistically, should generously interpret and apply their interpretive and remedial mandate for effective interpretation of the socio-economic rights. Finally, it is important for the supervisory organs to adopt and apply the teleological model of review as developed in this chapter for effective protection of the socio-economic rights.

When assessing States' compliance with their socio-economic rights obligations supervisory organs must be able to ascertain the scope and content of the socio-

³³¹ Yeshanew *The Justiciability of Economic, Social and Cultural Rights* 321.

economic rights at stake and then use such content as a mechanism to assess states' measures. Where the immediate socio-economic needs are at stake States' measures should be assessed to establish how they take such needs into account. Moreover, where the existing socio-economic rights are limited States' restrictive measures must be assessed. This chapter demonstrated that the reasonableness review integrating minimum core and proportionality as a teleological model of review can be applied by the supervisory organs to assess States' measures relating to the obligations imposed by the socio-economic rights.

The reasonableness model of review incorporating minimum core obligation and proportionality as a teleological model of review focuses on advancing the object and purpose of the socio-economic rights. It enables supervisory organs to develop the scope and content of socio-economic rights. It also requires supervisory organs to use such scope and content to limit States' discretion regarding their mandate to adopt measures and policies for realising these rights. Moreover, it helps supervisory organs, through the object and purpose of the rights, to develop the minimum essentials of the socio-economic rights that should be realised by Member States. Finally, it allows the supervisory organs, in circumstances where States limit the socio-economic rights, to assess the restrictive measures of States. The following chapter concludes the dissertation.

Postscript

African Commission on Human and Peoples' Rights v Republic of Kenya ('*Republic of Kenya – Judgment on Merits*'),¹ a judgment of the African Court on Human and Peoples' Rights ('African Court'),² was decided a few days after submitting this dissertation for examination, but before the examiner's comments were finalised. I consider it appropriate to include this brief postscript on the case as it demonstrates elements of the teleological approach advocated in this dissertation to the interpretation of the socio-economic rights in the African Charter.

The applicant in the *Republic of Kenya – Judgment on Merits* alleged that the Ogiek Community ('the Ogieks')³ in the respondent State are an indigenous minority ethnic group residing in the greater Mau forest complex.⁴ The applicant submitted that the State, through its agency the Kenya Forestry Service, issued the Ogieks and other settlers with a 30-day notice to vacate the Mau forest on the grounds that it is a reserved water catchment zone and "government land", as stipulated in section 4 of the Government Land Act.⁵ The applicant further argued that the eviction notice failed to consider the importance of the Mau forest for the Ogieks' survival.⁶ The applicant, therefore, alleged a violation of articles 1, 2, 4, 14, 17(2)-(3), 21, and 22 of the African Charter.

The African Court started by deciding on its material jurisdiction. It held that its establishment in article 3 of the African Court Protocol, and the principle of complementarity in article 2, enabled the applicant to submit before it any case alleging a violation of African Charter rights, including cases that reveal a series of serious or massive human rights violations.⁷ The African Court's decision resonates with the teleological approach, which requires (through the principle of effectiveness) that restrictions to the enjoyment of socio-economic rights be narrowly interpreted. However, the Court failed to broadly interpret articles 2 and 3 in a manner that upholds the African Charter's object and purpose. It did so by its omission to elaborate on how and when the

¹ *African Commission on Human and Peoples' Rights v Republic of Kenya* Application No 006/2012.

² The judgment on merits of the African Court on Human and Peoples' Rights in the case of the *African Commission on Human and Peoples' Rights v The Republic of Kenya* was issued on 26 May 2017 being a few days after the cut-off date 24 May 2017 for the analysis of the new jurisprudence of the supervisory organs.

³ Para 6.

⁴ Para 6.

⁵ Paras 7-8.

⁶ Para 8.

⁷ Para 53.

Commission should submit a case before it as argued in chapter four of this dissertation.⁸

Regarding admissibility, the respondent State argued that the applicant failed to comply with the requirement to exhaust local remedies, as provided for in Rule 40(5) of the Rules of the Court.⁹ In this regard, the Court held that exhausting local remedies reinforces the importance of domestic judicial systems in safeguarding human rights and must, therefore, be complied with.¹⁰ The African Court further noted that both article 56(5) of the African Charter, and Rule 40(5) of the Rules of the Court, require local remedies to be available and sufficient, while not being unduly prolonged.¹¹ According to the Court, Rule 40(5) mainly requires the applicant to prove that the case has passed through the domestic judicial system.¹² This decision aligns with the teleological approach, as it interprets restrictions to the enjoyment of socio-economic rights narrowly.

The African Court subsequently had to consider whether the Ogieks constitute indigenous peoples.¹³ It noted the African Charter's omission regarding the meaning of indigenous peoples.¹⁴ Through articles 60 and 61 of the African Charter, the Court drew inspiration from the African Commission's Working Group on Indigenous Populations/Communities, as well as the work of the United Nations Special Rapporteur on Minorities, which establish criteria to identify indigenous populations.¹⁵ According to the African Court, three factors must be taken into consideration when identifying indigenous peoples: (1) the presence of priority in time with respect to the occupation and use of a specific territory; (2) a voluntary perpetuation of cultural distinctiveness including, aspects of language, social organisation, religion and spiritual values, modes of production, laws and institutions, self-identification as well as recognition by other groups or by State authorities that they are a distinct collectivity; and (3) an experience of subjugation, marginalisation, dispossession, exclusion or discrimination.¹⁶ The Court further held that the most relevant factor regarding the identification of indigenous

⁸ See chapter four, part 4 3 10. It was argued in chapter four, part 4 3 10 that although the African Commission can submit cases to the African Court at any time, the object and purpose of the African Charter requires the African Commission to submit cases after the consideration of the admissibility of the particular case.

⁹ Para 90.

¹⁰ Para 93.

¹¹ Para 93.

¹² Para 94.

¹³ Para 102.

¹⁴ Para 105.

¹⁵ Paras 105-106 and 108.

¹⁶ Para 107.

populations is their strong connection with nature, particularly land and the natural environment.¹⁷ It found that the survival of indigenous populations hinges on “unhindered access to and use of their traditional land and the natural resources thereon”. Satisfied that the Ogieks possess all these requirements, the Court held that they are an indigenous people.¹⁸ This decision resonates with the teleological approach by applying articles 60 and 61 to draw inspiration from other relevant human rights sources to define the term “indigenous peoples”. Indigenous peoples are therefore legally identified as holders of the socio-economic rights in the African Charter.

Regarding the right to property in article 14 of the African Charter, the African Court found that this right is both individual and collective in nature.¹⁹ The right includes three elements namely the “right to use the property (*usus*)”; the “right to enjoy the property (*fructus*)”; and the “right to dispose the property or transfer it (*abusus*)”.²⁰ Drawing inspiration from the United Nations General Assembly Declaration 61/295 on the Rights of Indigenous Peoples, the Court held that the Ogieks have the right to occupy, use, and enjoy their traditional lands.²¹ Furthermore, the court held that the right to property under article 14 establishes conditions upon which this right can be limited. It may be limited in the public interest and only when necessary and proportional.²² The African Court held that, by failing to engage the Ogieks before evictions and by failing to take into consideration the conditions of expulsion in the public interest, the respondent State violated their right to property.²³

This decision is significant for the scope and content of the right to property, as it clarifies both the holders and content of this right. It also recognises indigenous peoples’ rights to their traditional land. Upholding indigenous peoples’ property rights embraces the African Charter’s approach, which draws on African realities and philosophical perspectives regarding peoples’ rights. As demonstrated in chapter three, the African Charter not only recognises the socio-economic rights of individuals, but also peoples’ socio-economic rights.²⁴ The recognition of collective socio-economic rights is justified by the notion of African philosophy entrenched in the African Charter’s preamble and elaborated on in its provisions. This dissertation also advanced that the notion of African

¹⁷ Para 109.

¹⁸ Paras 110-112.

¹⁹ Para 123.

²⁰ Para 124.

²¹ Paras 125-128.

²² Para 129.

²³ Para 131.

²⁴ See chapter three, parts 3 3 4 6 to 3 3 4 8.

philosophy centres on the understanding that African societies are collective in nature.²⁵ The African Court did not, however, invoke the notion of African philosophy to develop the unique and important scope and content of indigenous peoples' rights to property.

Regarding the right to non-discrimination in article 2, the African Court held that it guarantees the enjoyment of all the rights in the African Charter and that it is directly related to the right to equality in article 3.²⁶ The scope of the right to non-discrimination extends, however, beyond the right to equality in that it practically enables individuals' enjoyment of their rights without distinction.²⁷ According to the Court, the phrase "any other status" in article 2 includes any form of distinction that was not foreseen during the Charter's adoption.²⁸ The Court explained that it considers the African Charter's object and purpose when establishing the forms of distinction covered in the phrase "any other status". It noted that not all forms of distinction are discriminatory. A distinction is discriminatory when it is not objective, reasonably justifiable, necessary, or proportional.²⁹ The African Court held that denying the Ogieks their rights (which are recognised as similar to indigenous peoples in that their survival depends on their traditional lands) amounts to a distinction based on ethnicity and/or another status provided in article 2.³⁰

On the right to life in article 4, the African Court stated that this right guarantees the realisation of all rights in the African Charter.³¹ It held that the right to life prohibits the arbitrary deprivation of life and establishes a link between the right to life and the inviolable nature and integrity of human beings.³² The Court further found that violating socio-economic rights through evictions does not necessarily violate the right to life, but rather engenders conditions unfavourable to a decent life.³³ According to the Court, the right to life in article 4 refers to a physical right to life, rather than an existential understanding of the right.³⁴ It held further that the Ogieks' eviction negatively affected their decent existence of a group.³⁵ The African Court, however, held that the applicant failed to prove the direct link between the evictions of the Ogieks and the death of some

²⁵ See chapter three, part 3 2 4 2.

²⁶ Para 137.

²⁷ Para 138.

²⁸ Para 138.

²⁹ Para 139.

³⁰ Paras 142 and 146.

³¹ Para 152.

³² Para 152.

³³ Para 153.

³⁴ Para 154.

³⁵ Para 155.

members of their community.³⁶ It, therefore, held that the respondent State did not violate article 4.³⁷ This decision does not resonate with the teleological approach, as it interprets restrictions to the enjoyment of socio-economic rights broadly. The African Court applied a literal and narrow textual approach to the interpretation of article 4. As argued in this dissertation, based on the principle of interdependence, the right to life can be interpreted broadly to guarantee socio-economic rights protection.³⁸ The right entails more than a physical right to life. As such, the African Court is inconsistent in its application of the teleological methodology.

Regarding the right to freely dispose of wealth, the African Court started by defining the notion of “peoples”. It noted the African Charter’s omission regarding the meaning of this term. According to the Court, the omission was deliberate in order to allow supervisory organs the necessary flexibility to define it.³⁹ The African Court explained that, during anti-colonial struggles, the term “peoples” meant populations in countries struggling for their independence and national sovereignty.⁴⁰ In the independent States, the Court had to decide whether the term extends to ethnic groups or communities within a State.⁴¹ It held that, provided that such groups do not challenge the sovereignty and territorial integrity of a State, they should be recognised as peoples.⁴² The Court then held that the violation of the Ogieks’ right to property also amounts to a violation of their right to freely dispose of their wealth in article 21 of the African Charter.⁴³

With respect to the right to development, the African Court held that peoples are entitled to the socio-economic right to development in article 22 of the African Charter.⁴⁴ According to the Court, the respondent State’s eviction of the Ogieks without consultation violated their socio-economic right to development, as well as their rights to health, housing, and other socio-economic programmes related to the right to development.⁴⁵

Finally, regarding the violation of article 1 of the African Charter, the African Court held that this article imposes on States an obligation to take legislative and other

³⁶ Para 155.

³⁷ Para 156.

³⁸ See chapter two, parts 2 5 2 1 and chapter three, part 3 3 2 2.

³⁹ Para 196.

⁴⁰ Para 197.

⁴¹ Para 198.

⁴² Para 199.

⁴³ Para 201.

⁴⁴ Para 208.

⁴⁵ Paras 210-211.

measures to give effect to the rights in the African Charter.⁴⁶ Accordingly, the Court found that the respondent State's failure to take adequate legislative and other measures to give effect to the rights in articles 2, 8, 14, 17(2)-(3), 21, and 22 of the African Charter violated article 1 of the African Charter.⁴⁷

The *Republic of Kenya – Judgment on Merits* is a significant case as the African Court largely applies certain aspects of the teleological approach to interpret the collective socio-economic rights set out in articles 14, 17(2) and (3), 21, and 22 of the African Charter. These aspects include relevant international human rights instruments through an application of articles 60 and 61 of the African Charter. The Court also links the rights to non-discrimination and equality with the socio-economic rights in the African Charter. However, it provides a narrow interpretation of the right to life.

Whilst a very promising judgment in terms of the teleological approach, the future jurisprudence could benefit from a rigorous and consistent application of this approach. This dissertation has sought to provide a methodology which could usefully guide the Commission and Court in applying the teleological approach to the interpretation of the socio-economic rights in the African Charter.

⁴⁶ Para 215.

⁴⁷ Para 217. Regarding remedies the Court held that it will issue its ruling in a separate decision after additional submissions from the parties. See para 223.

Chapter 7

Conclusion

7 1 Need for a coherent approach to interpreting socio-economic rights

The protection of socio-economic rights is one of the major underlying objects and purposes of the African Charter. However, poverty, foreign direct investments, as well as other factors¹ curtail the enjoyment of socio-economic rights of many communities in Africa. States' failure to regulate most of the foreign investors has largely contributed to violations of socio-economic rights.² These socio-economic rights include the rights to health, work, education, adequate standard of living including water, food and adequate housing, as well as the rights to social security, development, and a healthy environment. Violations of these rights have rendered the enjoyment of the socio-economic rights in the African Charter a distant dream for many people in Africa. The violations have a serious impact on the economic conditions and the dignity of the African people. For example, as noted in chapter one, more than 220 million people in Sub-Saharan Africa are denied their right to food.³ While States have failed to effectively protect socio-economic rights, non-state actors do not consider themselves accountable for the violations of these rights.

The supervisory organs of the African Charter can play an important role in helping to elaborate on the scope and content of States Parties' obligations through their interpretation of the relevant articles protecting socio-economic rights in the African Charter. Interpretation can be appropriately used for improving the socio-economic conditions of the people in Africa. Interpretation may help to develop the normative scope and content of socio-economic rights, and identify the nature of States' obligations imposed by such rights. The aim of this dissertation has been to contribute to research regarding the manner in which interpretation can be used as a mechanism for advancing the object and purpose to protect socio-economic rights in the African Charter. It does

¹ Udombana identifies corruption as one of the factors that contributes to the violation of socio-economic rights. See NJ Udombana "Toward the African Court on Human and Peoples' Rights: Better late than never" (2000) 3 *Yale Human Rights and Development Law Journal* 45 51.

² See also D Kinley and J Tadaki "From talk to walk: The emergence of human rights responsibilities for corporations in international law" (2004) 44 *Virginia Journal of International Law* 931 933. According to Kinley and Tadaki, deregulation of the direct foreign investors contributes to the violation of human rights.

³ See chapter one, part 1 1.

this by suggesting a theoretically appropriate and coherent approach for interpreting socio-economic rights in the African Charter.

7 2 Need for adoption of a teleological approach to interpretation

In situations where States and non-state actors violate the socio-economic rights guaranteed in the African Charter their protection through supervisory organs' effective interpretation is required. In chapter two it was argued that effective interpretation require the adoption and application of an appropriate approach to interpretation.⁴ It was further argued that the teleological approach to interpretation is appropriate for the interpretation of the rights in the African Charter, including socio-economic rights.⁵

I demonstrated in chapter five that the African Commission has been applying various approaches in an inconsistent manner to interpret the socio-economic rights articles in the African Charter. Moreover, it does not always apply the teleological approach appropriately in its jurisprudence. By applying a textual approach to interpretation the African Commission has failed to develop the normative scope and content of socio-economic rights and their related obligations effectively. The failure to apply the teleological approach appropriately has caused the African Commission's failure to engage all the tenets of this approach to develop the normative content of socio-economic rights.

The normative content of socio-economic rights can be developed by inquiring to the object and purpose of the African Charter relating to such rights. This inquiry allows the supervisory organs to apply various tenets of the teleological approach to establish the object and purpose of the African Charter in a manner that develops the normative scope and content of these rights. It was demonstrated in chapter two that the teleological approach to interpretation engages various interpretive aids within and outside the treaty to generate the meaning of the provisions of the treaty.⁶ The text of the African Charter as a whole can shed light on the normative scope and content of socio-economic rights and elaborate its object and purpose on these rights. The historical background to the adoption of the African Charter can provide insight regarding the object and purpose of the African Charter on socio-economic rights. International, regional and national relevant human rights instruments and jurisprudence

⁴ See chapter two, parts 2 1.

⁵ See chapter two, part 2 2 3.

⁶ See chapter two, part 2 2 3.

may also be applied to develop the normative content of socio-economic rights in the African Charter and establish external coherence. The principle of effectiveness can assist the supervisory organs in interpreting the socio-economic rights articles in the African Charter effectively.⁷

7 3 Need for a methodology for the application of a teleological

The supervisory organs of the African Charter's application of the teleological approach also requires that they put in place a systematic methodology for its application. The teleological approach to interpretation is feasible only when it is applied systematically rather than through a random application of its tenets. I argued in chapter two that there is a pressing need for a methodology for the application of the teleological approach.⁸ A significant contribution of this dissertation is the development of a methodology for the application of the teleological approach. The methodology aims at ensuring that the teleological approach is applied appropriately as well as enabling the supervisory organs to justify their decisions relating to socio-economic rights.

According to the methodology proposed, the supervisory organs should first interpret the text of the African Charter based on its object and purpose. An interpretation based on the object and purpose of the African Charter will enable the supervisory organs to interpret the provisions of the socio-economic rights in the African Charter holistically. The holistic interpretation of the socio-economic rights in the African Charter can assist the supervisory organs to engage various interpretative tools within the African Charter to generate the scope and content of these rights and their relevant obligations effectively. It should be noted that scholars argue that the provisions of the socio-economic rights in the African Charter are insufficiently formulated.⁹ According to scholars the insufficient formulation renders the scope and content of these rights unclear.¹⁰

Based on the holistic application of the text of a treaty chapter three demonstrated that consideration of the text of the African Charter as a whole confirms that the socio-economic rights provisions in the African Charter are appropriately formulated.¹¹ It was demonstrated that socio-economic rights are formulated in general terms and their

⁷ See chapter two, part 2 2 3.

⁸ See chapter two, part 2 5.

⁹ See chapter three, part 3 3 4.

¹⁰ See chapter three, part 3 3 4.

¹¹ See chapter three, parts 3 3 4 1 – 3 3 4 8.

scope and content can be ascertained through interpretation by considering the text of the African Charter holistically. The development of the scope and content of socio-economic rights should not be considered in isolation from the rest of the provisions of the African Charter. Consideration of the provisions of the African Charter as a whole is essential in order to ascertain the normative scope and content of such rights. Chapter three showed that the text of the African Charter as a whole provides various interpretive avenues, through the preamble to the African Charter, its operative provisions, the substantive content of the socio-economic rights articles and other related provisions, to develop the scope and content of the socio-economic rights.¹²

The preamble to the African Charter may help to identify its object and purpose and the values as well as principles that the supervisory organs should consider in the interpretative process. The values of equality, freedom, justice and dignity, as well as the preambular statements regarding the principles of African philosophy and interdependence of rights can effectively enrich the scope and content of socio-economic rights in the African Charter. Furthermore, the holistic reading allows the consideration of the provisions of article 45(1)(b) of the African Charter that requires the African Commission to formulate principles to elaborate the scope and content of the rights protected, including socio-economic rights. Through the provisions of article 45(1)(b) the African Commission developed Principles and Guidelines on the Implementation of Economic, Social and Cultural Rights in the African Charter on Human and Peoples' Rights ('Principles and Guidelines')¹³ The African Commission should take into consideration its Principles and Guidelines that provide a detailed scope and content of the socio-economic rights. The consideration of the Guidelines is in line with the holistic reading of the African Charter for the development of the scope and content of the socio-economic rights articles.

The holistic consideration of the African Charter will also allow supervisory organs to apply both the provisions governing the general obligations of Member States and the duties provisions¹⁴ in order to develop the nature of states' socio-economic rights obligations. It was argued that the African Commission can also apply the Principles and Guidelines to elaborate the typology of obligations entrenched in the African Charter's

¹² See chapter three, parts 3 3 – 3 3 6.

¹³ Principles and Guidelines on the Implementation of Economic, Social and Cultural Rights in the African Charter on Human and Peoples' Rights (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).

¹⁴ See chapter three, parts 3 3 3 1 and 3 3 5.

general obligations' clause.¹⁵ Furthermore, provisions relating to the rights to non-discrimination, equality, life, and dignity in the African Charter can be applied to establish the scope and content of socio-economic rights.¹⁶ The Principles and Guidelines provide a detailed scope and content of these provisions that the African Commission can apply to interpret the socio-economic rights provisions. These provisions can assist the supervisory organs to interpret socio-economic rights articles in a manner that guarantees a dignified life and equality in the enjoyment of these rights. Engaging the text of the African Charter as a whole may further help the supervisory organs to create internal coherence and harmony among all the provisions of the African Charter.

Supervisory organs should then ascertain the object and purpose by engaging the preparatory work of the African Charter. It was argued that the text is not the exclusive means of identifying the object and purpose regarding the socio-economic rights. Once the text has been consulted the preparatory work of the African Charter should be applied to clarify and ascertain the scope of the object and purpose embedded in the socio-economic rights provisions. In chapter five it was demonstrated that the African Commission has had no sufficient recourse to the preparatory work of the African Charter in the interpretation of socio-economic rights. By not using the preparatory work, the African Commission has failed to engage a significant interpretative tenet of the teleological approach in the interpretative process. By failing to explore the historical context upon which socio-economic rights were formulated, this has rendered the African Commission incapable of developing the scope and content of socio-economic rights in a manner that resonates with the teleological approach to interpretation. If a teleological approach to interpretation is adopted, the preparatory work of the African Charter should be applied to garner insights into its object and purpose regarding socio-economic rights, as well as their normative scope and content. The teleological approach to interpretation broadly allows the consideration of both external and internal preparatory work of the African Charter in the interpretation of socio-economic rights.¹⁷

By using the preparatory work, supervisory organs can elaborate the object and purpose of the African Charter to protect the rights protected, including socio-economic rights, effectively. As shown in chapter three the preparatory work of the African Charter emphasises the values of freedom, equality, justice and dignity.¹⁸ These values can help

¹⁵ See chapter three, part 3 3 3 1.

¹⁶ See chapter three, part 3 4.

¹⁷ See chapter three, parts 3 2 2 and 3 2 3.

¹⁸ See chapter three, part 3 2 4 2.

supervisory organs to develop the scope and content of socio-economic rights in the African Charter. I demonstrated in chapter three that the preparatory work emphasises the notion of African philosophical approaches.¹⁹ This notion can contribute to the development of the scope and content of collective socio-economic rights as well as States Parties' obligations.

It was shown in chapter two that the Vienna Convention on the Law of Treaties ('Vienna Convention')²⁰ identifies the preparatory work of a treaty as a supplementary interpretive tool.²¹ It was, however, further argued that various circumstances may allow the supervisory organs to consider it as a primary interpretive tool.²² It was particularly argued that the preparatory work of the African Charter should be applied as a fundamental tool to interpret the socio-economic rights articles for three major reasons.²³

Firstly, the preparatory work of the African Charter gives insights into the object and purpose of the African Charter regarding the scope and content of socio-economic rights enshrined therein.²⁴ It should be noted that article 31(1) of the Vienna Convention requires the treaty to be interpreted in the light of its object and purpose. Although the preparatory work is not included in the category of primary interpretive tools in article 31(1), but rather as a supplementary interpretive tool, it does not mean that the Vienna Convention strictly restricts the consideration of the preparatory work of the treaty as a vital interpretive tool in the interpretative process. Yeshanew notes that the primary interpretive tools recognised in article 31(1) should not be construed to render preparatory work an irrelevant interpretive tool.²⁵ The fact that the Vienna Convention requires a treaty to be interpreted in the light of its object and purpose renders the preparatory work of the African Charter, that explains its object and purpose a primary rather than a mere supplementary interpretive tool. Yeshanew rightly argues that preparatory work of the treaty is vital in elaborating the purpose of the treaty in relation to the provisions in question.²⁶ It was further argued that the provisions of article 31(1) of

¹⁹ See chapter three, part 3 2 4 2.

²⁰ Vienna Convention on the Law of Treaties 8 I.L.M 679 (1969) was adopted on 23rd May 1969 and entered into force on 27th January 1980.

²¹ Art 32 of the Vienna Convention.

²² See chapter two, part 2 3.

²³ See chapter two, part 2 3.

²⁴ See chapter three, parts 3 2.

²⁵ SA Yeshanew *The Justiciability of Economic, Social and Cultural Rights in the African Regional Human Rights System: Theories, Laws, Procedures and Prospects* (2011) 52.

²⁶ 52.

the Vienna Convention implicitly enshrine the principle of effectiveness.²⁷ The inclusion of this principle enables these provisions to be construed in a manner that renders interpretation of a treaty effective and practical. The inclusion of the principle of effectiveness in article 31(1) creates space to generously construe these provisions in a manner that allows the interpretation of the African Charter to consider its preparatory work as a primary interpretative tool.

Secondly, the broad formulation of the socio-economic rights articles in the African Charter makes it necessary for the supervisory organs to consider the preparatory work of the African Charter, which provides insights into the scope and content of these rights, a primary interpretive tool.²⁸ Yeshanew argues that preparatory work of a treaty enables the supervisory organs to elaborate the content of the provisions of the treaty.²⁹ According to Yeshanew, the supervisory organs may consider the preparatory work as a significant part of the treaty.³⁰ Thirdly, preparatory work, as argued in chapter three, may provide the supervisory organs with the insight into other relevant legal sources that can assist them in interpreting the socio-economic rights in the African Charter.³¹

Once the scope and content of the socio-economic rights has been established through the historical context of the African Charter, then relevant international, regional and national human instruments and jurisprudence should be consulted. It was argued in chapter two that these sources are relevant in the interpretative process for drawing inspiration and establishing external coherence.³² Chapter two showed further that these legal sources are recognised in articles 60 and 61 of the African Charter, and article 7 of the African Court Protocol.³³ In this way it will assist the supervisory organs to avoid interpreting the socio-economic rights of the African Charter in isolation with other relevant international, regional and national standards. These standards are helpful in ascertaining international, regional and national acceptance of the decisions of the supervisory organs regarding the scope and content of socio-economic rights. They also indicate external coherence for harmonising the scope and content of socio-economic rights in the African Charter and the scope and content of such rights in other international, regional and national laws and jurisprudence.

²⁷ See chapter two, part 2 3.

²⁸ See chapter three, part 3 2.

²⁹ Yeshanew *The Justiciability of Economic, Social and Cultural Rights* 52.

³⁰ 52.

³¹ See also Yeshanew *The Justiciability of Economic, Social and Cultural Rights* 52.

³² See chapter two, part 2 5 2 3.

³³ See chapter two, part 2 5 2 3.

It is important that throughout the interpretative process, the supervisory organs consider and apply the principle of effectiveness. It was demonstrated in chapter two that the principle of effectiveness requires the interpretation to ensure the meaning assigned to the provisions renders them effective and practical.³⁴ The principle of effectiveness should be integrated throughout the interpretative process in order to ascertain that the interpretative aids in each stage of the interpretation promote the practical and effective meaning of socio-economic rights provisions.

7 4 Interpretive and remedial mandate of the supervisory organs

As argued in chapter four, the interpretive and remedial mandates of the supervisory organs of the African Charter are significant for effective interpretation and protection of socio-economic rights.³⁵ For practical and effective interpretation and protection of socio-economic rights in the African Charter supervisory organs must have autonomous interpretive and remedial jurisdiction. Chapter four identified scholars' criticism that the supervisory organs' interpretive and remedial mandates are ineffective.³⁶ Scholars argue that the ineffectiveness of the interpretive and remedial mandates limit effective interpretation and protection of socio-economic rights.

This dissertation argued in chapter four that the African Charter and the Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights ('African Court Protocol') grant the supervisory organs a broad interpretive and remedial jurisdiction for interpreting socio-economic rights and redressing their violations.³⁷ It showed that the strengths of supervisory organs' interpretive and remedial mandates are enshrined in their contentious mandate, *locus standing* provisions, admissibility, provisional measures, legal status of the decisions, remedial powers, and the power to enforce these remedies.

The African Charter grants the African Commission a contentious mandate to interpret all provisions of the African Charter, including socio-economic rights. Further it was shown that the African Court Protocol provides the African Court with a mandate to interpret and apply the African Charter and any other human rights instruments ratified by the States concerned.³⁸ Similar provisions are formulated for the contentious

³⁴ See chapter two, parts 2 2 3, 2 3, and 2 5 2 4.

³⁵ See chapter four, part 4 1.

³⁶ See chapter four, parts 4 3 2, 4 3 3, 4 3 5, 4 3 6, 4 3 7, 4 3 8, & 4 3 9.

³⁷ See chapter four, parts 4 1, 4 2, 4 3 – 4 4 6.

³⁸ Art 3(1) of the African Court Protocol.

mandate of the African Court of Justice and Human Rights³⁹ ('African Court of Justice').⁴⁰ It was demonstrated that this mandate is broad in the sense that it extends the jurisdiction of the African Court to other instruments, potentially interfering with the mandate of other treaty bodies. It was argued in chapter four that the principle of effectiveness, as a tenet of the teleological approach to interpretation, can be used to restrict this broad contentious mandate in a manner that renders the mandate practical and effective rather than theoretical and illusory. The restriction may then enable the African Court to consider other relevant human rights instruments as guidance to its interpretation of the African Charter and the instruments that acknowledge its mandate. In this context "relevant human rights instruments" refer to the international and regional human rights instruments as well as general international treaties recognised by the Member States of the African Charter. It also includes African practices that are in line with international human rights standards, the customs recognised as laws, the general principles of law applicable to African States, the Constitutions of the African States, and the legal precedents.⁴¹

Provisions relating to contentious jurisdiction in the African Charter, the African Court Protocol and the African Court of Justice Protocol allow the supervisory organs to determine complaints from individuals as victims of violations or from individuals or NGOs in *actiones populares*.⁴² This broad mandate can help supervisory organs to determine socio-economic rights cases submitted by individuals in their own capacity or cases submitted by individuals or NGOs in the public interest. The *actio popularis* mandate may further help supervisory organs to determine the socio-economic rights of people who by reason of poverty lack the means to access supervisory organs. A mandate to determine *actio popularis* can help supervisory organs to develop the scope and content of socio-economic rights in the African Charter in a manner that protect the general public. Chapter four showed scholars' concerns regarding the collision of contentious jurisdiction vested in the African Commission and the African Court. However, it was argued in chapter four that complementarity between these adjudicative bodies can be applied to resolve the collision. It was argued that Rules 118(3) – (4) and 121(1) of the African Commission Rules as well as Rule 29(3)(a) of the Rules of the

³⁹ The African Court of Justice is established by the Protocol on the Statute of the African Court of Justice and Human Rights.

⁴⁰ Art 28 (c) of the African Court of Justice Protocol.

⁴¹ See chapter two, part 2 5 2 3.

⁴² See chapter four, parts 4 3 2, and 4 4 2.

Court ('African Court Rules') regarding complementarity of these supervisory organs should be applied to solve the collision regarding their jurisdictions.⁴³ It was further argued that the principle of effectiveness should be applied to ensure that these Rules are applied in a manner that renders these supervisory organs' protection of the socio-economic rights practical and effective.

It was demonstrated in chapter four that the African Charter does not contain explicit provisions relating to *locus standi* to the African Commission. It was however argued that the omission should not be construed narrowly. The teleological approach to interpretation through the notion "object and purpose" that interprets a treaty as a whole, as well as through the principle of effectiveness, can be applied to establish provisions relating to *locus standi* in the African Charter. It was demonstrated that the teleological approach to interpretation allows various provisions to be construed in a manner that recognises the *locus standi* of individuals or their representatives to the African Commission. Moreover, the African Commission should take into account its Rules of Procedure to elaborate its mandate regarding *locus standi*. It was shown in chapter four that Rules 93(2)(a), 93(2)(e), and 94(2) elaborate the mandate of the African Commission regarding *locus standi* appropriately.

Chapter four also analysed the provisions relating to *locus standi* to the African Court where it was shown that the African Commission, States, African Intergovernmental Organisations, NGOs and the individuals have *locus standi* to the African Court.⁴⁴ It was demonstrated in chapter four that individuals can access the African Court directly and indirectly.⁴⁵ Direct individual access refers to the circumstances where an individual, whose State has deposited a declaration acknowledging the competence of the African Court to determine the case in accordance with article 34(6) of the African Court Protocol, files a case to the African Court. Indirect individual access refers to situations where the African Commission files a case to the African Court on behalf of an individual whose State has not deposited the declaration stated in article 34(6) of the African Court Protocol.⁴⁶

Chapter four showed that scholars are sceptical regarding both direct and indirect individual access to the African Court. The scepticism of scholars regarding direct access given to the African Commission and States, but not to individuals and NGOs,

⁴³ See chapter four, parts 4 3 10, and chapter six, part 6 2 1 6.

⁴⁴ See chapter four, part 4 4 2.

⁴⁵ See chapter four, part 4 4 2.

⁴⁶ See chapter four, part 4 4 2.

except where States parties have made a declaration in terms of article 5(3) read in conjunction with article 34(6) of the African Court Protocol, was discussed. Their major concern is that this approach is ineffective since these institutions are not bound to submit cases to the African Court. However, I argued in chapter four that the teleological approach to interpretation can be used to broadly construe the provisions relating to the mandate of the African Commission and States to protect socio-economic rights in a manner that incorporates their obligation to submit cases to the African Court.⁴⁷

Scholars' concern regarding the direct access of individuals to the African Court is that this approach is limited due to the requirement that States deposit the declaration acknowledging the competence of the African Court. The chapter also demonstrated the African Court's rejection of cases submitted by individuals whose States have not deposited the identified declaration in accordance with article 34(6) of the African Court Protocol. Chapter four argued that while the lack of a declaration limits individual's direct access to the African Court, the indirect access route can be effectively applied to enable them access to the African Court. It was argued that the teleological approach to interpretation, through the principle of effectiveness, can be used to ensure that the restriction of an individual's access to the African Court is narrowly interpreted in order to enable them to appear before the African Court as parties, or witnesses in situations where their cases are submitted by the African Commission. This interpretation will give the complainants and victims procedural standing before the African Court. Being a party to a case is significant as it enables an individual to participate actively, directly or through his legal representatives, in the entire proceedings of the case. In this regard it was argued that the African Court should apply its Rules of Procedure particularly Rule 29(3)(c) read together with Rule 45. The African Court of Justice Protocol explicitly gives the African Court of Justice the mandate to hear cases submitted by individuals.⁴⁸

Chapter four showed that the provisions regarding admissibility in the African Charter are formulated in a manner that requires conformity with all admissibility requirements. It was argued, however, that the provisions do not restrict a broad and flexible interpretation of such requirements in circumstances where individuals cannot genuinely conform to all admissibility requirements. It was expressly argued that for effective interpretation and protection of socio-economic rights, a flexible interpretation of such requirements is required. If an appropriate application of the teleological approach to

⁴⁷ See chapter four, part 4 4 2.

⁴⁸ Art 30(f) of the African Court of Justice Protocol.

interpretation is adopted supervisory organs can apply the principle of effectiveness to broadly and flexibly interpret the admissibility requirements.

It was further argued in chapter four that a broad and flexible interpretation allows supervisory organs to consider each case on its merits. This broad interpretation may further embrace the object and purpose of the African Charter in the sense that it enables the supervisory organs to determine socio-economic rights of complainants who could not fulfil admissibility requirements for genuine reasons. It was argued that this flexible interpretation should also be applied in the interpretation of Rule 40 of the African Court Rules that requires strict application of all the admissibility requirements regardless of the flexibility provided by article 6(2) of the African Court Protocol. Article 6(2) implicitly provides an avenue for flexible consideration of the admissibility requirements in situations where the complainants genuinely fail to conform to all the requirements.

Particularly, it was argued in chapter four that the requirement to exhaust local remedies should be construed broadly in a manner that ensures their adequacy.⁴⁹ Adequacy of local remedies helps to ensure that remedies are available, sufficient and effective. It was demonstrated in chapter four that various provisions of the African Charter can be interpreted and applied to ensure adequacy of local remedies.⁵⁰ It was further argued that the requirement to exhaust local remedies should be construed flexibly in a sense that where such remedies are not available, effective or sufficient the complainant should not be strictly required to exhaust them.⁵¹ The complainant should, however, demonstrate that local remedies are unavailable, inadequate and insufficient.⁵² The complainant should not raise a mere allegation or suspicion that such remedies are unavailable.

Furthermore it was argued in chapter four that the admissibility requirement to submit a communication within a reasonable time after exhaustion of local remedies should be construed flexibly. The broad and flexible interpretation of this requirement may help supervisory organs to consider various conditions in determining what constitutes a “reasonable time”. It enables the supervisory organs to consider the communications submitted by complainants who, for reasons of financial hardship, fail to get copies of

⁴⁹ See chapter four, part 4 3 4 1.

⁵⁰ See chapter four, part 4 3 4 1.

⁵¹ See chapter four, parts 4 3 4 1, and 4 4 3.

⁵² See chapter four, part 4 3 4 1.

judgments from the local courts immediately after the determination of their cases or poor infrastructure in their countries that delay their movements.

In circumstances where there is a violation that can cause irreparable harm while the matter is being determined, provisional measures are required to protect or prevent the irreparable harm pending the final determination of the case.⁵³ Chapter four showed that the African Charter does not explicitly provide for the mandate of the African Commission to issue provisional measures.⁵⁴ It was however argued that the teleological approach to interpretation through tenets of the treaty as a whole and the principle of effectiveness could be used to incorporate provisions relating to provisional measures in the African Charter.⁵⁵ Particularly it was argued that the omission should be construed broadly by engaging various provisions in the mandate of the African Commission to issue provisional measures in socio-economic communications.⁵⁶ Moreover, it was argued that the African Commission should apply the provisions of Rule 98(1) of its Rules of Procedure to elaborate its mandate to issue provisional measures effectively.⁵⁷

Regarding the African Court's mandate to issue provisional measures, chapter four highlighted scholars' concerns regarding uncertainties relating to the binding nature of such a mandate on States. However, I argued in chapter four that when the provisional measures are issued States' compliance is significant. It was argued that the object and purpose to protect socio-economic rights includes the obligation on the part of states to comply with the provisional measures issued by the supervisory organs. I argued that it would be lack of good faith on the part of the States if they refuse to implement the African Court's provisional measures.

With regard to the legal status of the African Commission's recommendations, it was argued in chapter four that recommendations of the African Commission are highly authoritative interpretations of the African Charter in the context of a communication procedure. These recommendations help to further the object and purpose of the African Charter and it constitutes a lack of good faith for Member States to ignore them without very compelling reasons. It was argued further that it is States' socio-economic rights obligations that bind rather than the recommendations.

⁵³ See chapter four, parts 4 3 5 and 4 4 4.

⁵⁴ See chapter four, part 4 3 5.

⁵⁵ See chapter four, part 4 3 5.

⁵⁶ See chapter four, part 4 3 5.

⁵⁷ See chapter four, part 4 3 5.

When the supervisory organs determine the matter to its finality the findings should be published for effective protection of socio-economic rights. While the African Court and the African Court of Justice can publish their findings, it was demonstrated in this dissertation that the findings of the African Commission remain confidential until they are approved by the Assembly of Heads of States and Governments ('AHSG'). It was also demonstrated that although the African Commission in practice has been publishing its findings it has not shown the basis for such publication. It was argued in this dissertation that the principle of effectiveness as an element of the teleological approach can be applied to justify the publication of the reports.

When the supervisory organs determine the case to its finality and order remedies the follow-up mechanisms are essential. In order to ensure States enforce the remedial decisions of the supervisory organs the mandate of such organs to follow-up states' compliance is vital. However, it was demonstrated in chapter four that the African Charter does not explicitly provide the African Commission with a follow-up mandate.⁵⁸ Therefore, it was suggested that the teleological approach to interpretation could be applied to incorporate such a mandate to the African Commission.⁵⁹ Through this approach, various provisions of the African Charter can be engaged to establish that mandate.⁶⁰ The African Commission should also apply the provisions of Rule 112 of its Rules of Procedure to elaborate its follow-up mandate.⁶¹

7 5 Need for a coherent model of review in the supervisory organs' jurisprudence

There is no coherent model of review of the socio-economic provisions in the African Charter based on the object and purpose of the African Charter. Supervisory organs, particularly the African Commission, have been inconsistently applying various models of review to monitor States' compliance with their socio-economic rights obligations. These models include the reasonableness review, minimum core obligations and proportionality. The failure to adopt a particular model of review and apply it consistently renders it difficult to analyse the jurisprudence of supervisory organs regarding States' compliance with their obligations. In all three models of review the African Commission has failed to demonstrate how it uses them to develop the normative content of socio-

⁵⁸ See chapter four, part 4 3 9.

⁵⁹ See chapter four, part 4 3 9.

⁶⁰ See chapter four, part 4 3 9.

⁶¹ See chapter four, part 4 3 9.

economic rights in a manner that ensures their effective protection. It was argued in chapter five that there is a pressing need to develop a teleological model of review.

7 6 A teleological model of review

Chapter six argued for a coherent model of review based on the object and purpose of the African Charter that can help the supervisory organs to have a consistent and appropriate model of review to monitor States' compliance with their socio-economic rights obligations. It analysed the three models of review applied by the African Commission with the aim of developing a teleological model for reviewing States socio-economic rights obligations.

A teleological model of review would commence with identifying the object and purpose of the rights. It was shown that the reasonableness model of review identifies the object and purpose of the rights by asking two significant questions. Firstly, whether States' measures foster the object and purpose of the socio-economic rights in question. Secondly, whether steps taken to realise socio-economic rights reasonably fosters the object and purpose of these rights. By placing the object and purpose of the socio-economic rights at the centre of the assessment process, the reasonableness model of review performs three functions. Firstly, it develops the scope and content of these rights and applies that content to assess States' measures. Secondly, it reviews States' negative and positive socio-economic rights obligations. Thirdly, it is capable of reviewing measures relating to immediate socio-economic needs.

Supervisory organs applying reasonableness as a teleological model of review should ensure the object and purpose of the African Charter as a key tenet of the teleological approach to interpretation is a determinative factor in scrutinising the States' measures. This implies that supervisory organs should ensure that States' measures advance the protection of socio-economic rights. In this regard, supervisory organs must satisfy themselves that States are knowledgeable of the normative scope and content of socio-economic rights. Finally, the supervisory organs must be satisfied that States have used such content in developing the measures for implementing socio-economic rights.

7 7 Aligning the socio-economic rights jurisprudence of the African Charter with the teleological approach

Chapter six of this dissertation demonstrated the implications of aligning the socio-economic rights jurisprudence of the African Charter's supervisory organs with the

teleological approach to interpretation. In an effort to contribute to scholarship this dissertation developed in chapter six, a coherent methodology that could assist supervisory organs to align their socio-economic rights' jurisprudence with the teleological approach to interpretation.

A significant characteristic of this methodology developed is to emphasise the key aspects that should be taken into account by the supervisory organs in the interpretation of socio-economic rights. A significant element of the coherent interpretation is to clearly identify and consistently apply an appropriate approach to interpretation that can effectively develop the normative scope and content of socio-economic rights. They should start by considering the text of the African Charter as a whole, apply the preparatory work of the African Charter, international, regional and national relevant human rights instruments and jurisprudence, and apply the principle of effectiveness throughout the interpretative process.

The proposed interpretative approach developed in chapter six emphasises the application of the African Charter as a whole when supervisory organs interpret socio-economic rights. The supervisory organs should engage the preamble to the African Charter, particularly the values of equality, freedom, justice and dignity as well as the principle of the interdependence of rights and the notion of African philosophy to develop the normative content of socio-economic rights and their concomitant obligations. Furthermore supervisory organs should engage other substantive rights provisions in the African Charter as well as the provisions relating to rights to equality, dignity, life and non-discrimination to ensure that the content of socio-economic rights enshrine these standards. Moreover, I demonstrated the application of the general provisions of article 1 and the duties provisions of the African Charter to generate the typology of obligations and other duties imposed on States by socio-economic rights.

The coherent approach for interpreting socio-economic rights in the African Charter also emphasises the utility of its preparatory work. Preparatory work can provide supervisory organs with insight into the object and purpose of the African Charter regarding socio-economic rights. Supervisory organs should use preparatory work to establish, ascertain, and confirm the object and purpose of the African Charter. Supervisory organs should use the values of equality, dignity, justice and freedom as well as the notion of African philosophy enshrined in the preparatory work to elaborate the scope and content of socio-economic rights and their related obligations.

The proposed coherent interpretative approach further emphasises the consideration of the relevant legal sources. The approach requires the application of the provisions of articles 60 and 61 of the African Charter as well as article 7 of the African Court Protocol thereby assisting the supervisory organs in drawing inspiration from other relevant international, regional and national human rights instruments and jurisprudence. This approach will guarantee and develop external coherence.

The proposed coherent interpretation emphasises the use of the principle of effectiveness throughout the interpretative process. Supervisory organs should use the principle to ensure that the interpretation of socio-economic rights is effective and practical rather than theoretical and illusory.

The coherent interpretation developed in chapter six also emphasises the effective interpretation and utilisation of the interpretive and remedial mandate of supervisory organs.⁶² The effective reading of these mandates provides the supervisory organs with sufficient powers to effectively interpret socio-economic rights and remedy their violations.⁶³

Another aspect that the coherent interpretation of socio-economic rights requires is the application of a teleological model of review developed in chapter six. Supervisory organs should assess States' implementation of their socio-economic rights obligations by engaging the reasonableness model of review combined with minimum core and proportionality.

7 8 Areas for further research

This dissertation intends to stimulate debate and research pertaining to the significance of the teleological approach to interpretation and the methodology for its application in the interpretation of socio-economic rights and human rights in general. While the dissertation confined itself to the use of the teleological approach to the interpretation of socio-economic rights, this approach can also be applied in the interpretation of the civil and political rights in the African Charter.

Furthermore, this dissertation was confined to an analysis of the socio-economic jurisprudence of the African Commission. Based on the non-existence of socio-economic rights inter-state communications and, for the time being, socio-economic jurisprudence by the African Court this dissertation did not focus on an analysis of these

⁶² See chapter six, part 6 2 1 6.

⁶³ See chapter six, part 6 2 1 6.

types of jurisprudence. There is scope for research in these areas as the jurisprudence, particularly of the African Court, in the area of socio-economic rights evolves. Furthermore, this dissertation was strictly confined to the existing supervisory organs and highlighted their implications for the African Court of Justice. Therefore there is scope for research regarding the interpretation of socio-economic rights by the African Court of Justice when it enters into force.

The dissertation has also applied relevant international, regional and national instruments to draw inspiration from regarding the interpretation of socio-economic rights. These sources were applied based on their relevance to the interpretation of socio-economic rights in the African Charter. The dissertation did not confine itself to detailed comparative analysis of particular instruments or jurisprudence. There is scope for in-depth comparative research between African regional human rights systems and other regional human rights systems, such as the Inter-American human rights system.

This dissertation focused on the interpretation of socio-economic rights in the African Charter. It laid a foundation of how possibly socio-economic rights in other African regional human rights instruments should be interpreted. There is therefore a need for further research in this regard on other specific African regional human rights instruments such as the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa ('Women's Protocol'),⁶⁴ and the African Charter on the Rights and the Welfare of the Child ('Children's Charter').⁶⁵

7 9 Significance of the dissertation

This dissertation seeks to demonstrate that the teleological approach to interpretation is appropriate for interpreting the socio-economic rights in the African Charter effectively. However, it warns that this approach is only feasible if the supervisory organs apply its tenets systematically rather than randomly. It argues that systematic application of the teleological approach will assist the supervisory organs to establish the object and purpose of the African Charter in relation to these rights. The dissertation therefore develops the methodology for the application of the teleological approach to enable the supervisory organs to apply this approach systematically.

⁶⁴ Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa CAB/LEG/66.6 was adopted on 11 July 2003 and entered into force on 25 November 2005.

⁶⁵ The African Charter on the Rights and Welfare of the Child CAB/LEG/24.9/49 (1999) was adopted on 11 July 1990 and entered into force on 29 November 1999.

The dissertation further seeks to demonstrate that the interpretive and remedial mandate of the supervisory organs can crucially contribute in the effective interpretation of the socio-economic rights entrenched in the African Charter. The dissertation therefore argues that the teleological approach to interpretation and the methodology for its application can enable the supervisory organs to develop the scope and content of these rights and their concomitant obligations in a manner that advances their object and purpose.

Moreover, the dissertation seeks to show that an appropriate model of review, that can assist the supervisory organs to review States' compliance with their socio-economic rights' obligations, is required. It contends that a model of review that is in line with the teleological approach to interpretation can allow the supervisory organs to review States' measures in a manner that embraces the object and purpose of the African Charter regarding these rights. Particularly, it develops the reasonableness model of review integrating minimum core obligations and proportionality as a teleological model of review to enable the supervisory organs to review States' measures adopted to give effect to the socio-economic rights.

It contends that the developed teleological model of review can allow the supervisory organs to first and foremost develop the scope and content of the socio-economic rights and apply such content to assess States' measures. The proposed model can therefore allow the supervisory organs to assess measures adopted for the realisation of the socio-economic rights progressively, the minimum essentials of these rights in circumstances where States experience resource hardships, as well as the States' measures that limit the enjoyment of these rights in situations where States argue that such limitation is necessary.

The supervisory organs should interpret their interpretive and remedial mandate generously to effectively interpret these rights and the obligations they impose in order to advance their object and purpose. They should adopt the teleological model of review to assess States' measures adopted to give effect to the socio-economic rights in the African Charter. Through the teleological approach to the interpretation of the socio-economic rights in the African Charter, the supervisory organs can make a meaningful contribution to protecting socio-economic rights on the continent.

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