FACULTY OF
LAW AND CRIMINOLOGY

# Economic, Social and Cultural Rights

***General Obligations in the African Charter on Human and Peoples' Rights***

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## Abbreviations

| | |
|---|---|
| African Charter | African Charter on Human and Peoples' Rights |
| African Children's Charter | African Charter on the Rights and Welfare of the Child |
| African Commission | African Commission on Human and Peoples' Rights |
| African Court | African Court on Human and Peoples' Rights |
| African Court Protocol | Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights |
| AHRLR | African Human Rights Law Report |
| American Convention | American Convention on Human Rights |
| American Declaration | American Declaration of the Rights and Duties of Man |
| APDH | Actions pour la Protection des Droits de l'Homme |
| ATE | Pensioners' Union of the Agricultural Bank of Greece |
| AU | African Union |
| AU Assembly | Assembly of Heads of State and Government of the African Union |
| CAL | Coalition of African Lesbians |
| CEC | Conference of European Churches |
| CESCR | Committee on Economic, Social and Cultural Rights |
| CFDT | Confédération Française Démocratique du Travail |
| COHRE | Centre on Housing Rights and Evictions |
| CRC | Convention on the Rights of the Child |
| CRPD | Convention on the Rights of Persons with Disabilities |
| ERRC | European Roma Rights Centre |
| ERTF | European Roma and Travellers Forum |
| EuroCOP | European Confederation of Police |
| EUROMIL | European Organisation of Military Associations |
| European Charter | European Social Charter |
| European Committee | European Committee of Social Rights |
| European Convention | European Convention on Human Rights (Convention for the Protection of Human Rights and Fundamental Freedoms) |
| European Court | European Court of Human Rights |
| EWLA | Ethiopian Women Lawyers Association |
| FEANTSA | European Federation of National Organisations working with the Homeless |
| FIDH | International Federation for Human Rights |
| GENOP-DEI | General Federation of Employees of the National Electric Power Corporation |
| GSEE | Greek General Confederation of Labour |
| ICCPR | International Covenant on Civil and Political Rights |
| ICESCR | International Covenant on Economic, Social and Cultural Rights |

| | |
|---|---|
| ICJ | International Court of Justice |
| IKA-ETAM | Federation of employed pensioners of Greece |
| Inter-American Commission | Inter-American Commission on Human Rights |
| Inter-American Court | Inter-American Court of Human Rights |
| ISAP | Pensioners' Union of the Athens-Piraeus Electric Railways |
| Malabo Protocol | Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights |
| Maputo Protocol | Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa |
| MFHR | Marangopoulos Foundation for Human Rights |
| Nairobi Principles | Principles and Guidelines on the Implementation of Economic, Social and Cultural Rights in the African Charter on Human and Peoples' Rights |
| NGO | Non-Governmental Organisation |
| NHRI | National Human Rights Institution |
| OAU | Organization of African Unity |
| OAU Assembly | Assembly of Heads of State and Government of the Organization of African Unity |
| OMCT | World Organization Against Torture |
| OP-ICESCR | Optional Protocol to the International Covenant on Economic, Social and Cultural Rights |
| POPS | Panhellenic Federation of Public Service Pensioners |
| POS-DEI | Panhellenic Federation of pensioners of the Public Electricity Corporation |
| Pretoria Declaration | Pretoria Declaration on Economic, Social and Cultural Rights in Africa |
| Protocol of San Salvador | Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights |
| SAGES | Syndicat des Agrégés de l'Enseignement Supérieur |
| SERAC | Social and Economic Rights Action Centre |
| SERF Index | Social and Economic Rights Fulfilment Index |
| Tunis Guidelines | State Party Reporting Guidelines for Economic, Social and Cultural Rights in the African Charter on Human and Peoples' Rights |
| UN | United Nations |
| Universal Declaration | Universal Declaration of Human Rights |
| VCLT | Vienna Convention on the Law of Treaties |
| WHO | World Health Organisation |

# CHAPTER ONE

# INTRODUCTION

## 1.1 Background

Everyone needs adequate access to essential goods and services, including food, water, housing, health care and education, in order to lead a dignified life. To satisfy their basic needs, individuals depend on their own means: property and labour. The deprived, namely individuals lacking the means, rely on the help of others. Depending on the ability to help, the responsibility of supporting the deprived shifted over time from one group to another, particularly from religious institutions to the state.[1] The responsibility to support the deprived is now recognised as state obligation and enshrined in international human rights law, particularly in human rights treaties guaranteeing economic, social and cultural rights.

The recognition of economic, social and cultural rights has not eliminated deprivation in the world. Large numbers of individuals and groups experience deprivation, particularly due to the problem of poverty in the world. In 2019, the total population in the world reached 7.7 billion people.[2] Around 17% of the total population (1.3 billion people) were poor, according to the 2019 Multidimensional Poverty Index.[3] They were unable to exercise their economic, social and cultural rights, because poverty indicates lack of access to essential goods and services. The remaining 83% of the total population do not experience multidimensional povery, implying that states do discharge their international human rights obligations, but they have not achieved full realisation of the rights.

The problems of poverty and non-performance of international obligation are more serious in Africa, particularly in Sub-Saharan Africa, than in other parts of the world. The majority of the population in Sub-Saharan Africa (around 58%) experience multidimensional poverty.[4] According to the World Bank data, of the 28 poorest countries in the world, 27 countries are in Sub-Saharan Africa, indicating that extreme poverty is an African problem.[5] The data also implies that the performance of African States in discharging their obligations contained in economic, social and cultural rights treaties is very low. States are accountable for failing to carry out their international legal obligations. For this purpose, it is necessary to identify the content and scope of the obligations.

In this research, I examine state obligations under economic, social and cultural rights treaties. I focus on African States because of the African problem of poverty and the resulting low enjoyment of economic, social and cultural rights in Africa. African States are party to several economic, social and cultural rights treaties. The development of these treaties took place within the framework of international organisations, mainly the United Nations (UN) and the Organisation of African Unity (OAU), which is now the African Union (AU). Of these treaties, I investigate state obligations under

[1] James Griffin, *On Human Rights* (Oxford University Press) 102-103.

[2] Department of Economic and Social Affairs, *World Population Prospects 2019: Highlights* (United Nations 2019) 5.

[3] United Nations Development Programme and Oxford Poverty and Human Development Initiative, *Global Multidimensional Poverty Index 2019: Illuminating Inequalities* (2019) 1.

[4] Ibid.

[5] World Bank Group, *Piecing Together the Poverty Puzzle* (World Bank 2018) 2.

the main human rights treaty of the AU, the African Charter on Human and Peoples' Rights (African Charter).[6]

In the next section of this chapter, I sketch models of human rights treaty-making in international law and their implications for economic, social and cultural rights to provide a background for the model adopted by the African Charter. This in turn sheds light on the nature of state obligations entrenched in the African Charter. In the third section, I briefly discuss the development of the African Charter as the first treaty of the OAU/AU, explain how the text of the Charter treats economic, social and cultural rights, identify judicial and quasi-judicial organs monitoring the implementation of the rights guaranteed in the Charter, and discuss how these organs developed economic, social and cultural rights in practice. In the fourth section, I introduce general state obligations in international human rights law as the main subject of this study and explain the reasons for selecting some general obligations, which are discussed in the remaining chapters. In the fifth section, I clarify the research questions that I seek to answer. In the sixth section, I describe the methodological approaches I employed to answer the research questions. Finally, I outline the structure of the study.

## 1.2 Economic, social and cultural rights in international human rights law

Economic, social and cultural rights are a category of human rights. In international human rights law, rights such as the rights to education, food, health, housing, social security, water and sanitation, work (including trade union rights) and cultural rights fall under this category. The right to property also falls under this category, although this right is guaranteed in predominantly civil and political rights treaties.[7] Economic, social and cultural rights are guaranteed in several international treaties. Chief among them are the European Social Charter (European Charter),[8] the International Covenant on Economic Social and Cultural Rights (ICESCR),[9] and the American Convention on Human Rights (American Convention)[10] along with the Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights (Protocol of San Salvador).[11]

Economic, social and cultural rights treaties have common features. Each treaty has its own distinctive features as well. Still, by assuming international human rights as a single project, it is possible to paint with a broad brush the treaty-making developments relating to economic, social and cultural rights since 1948, the year when the American Declaration of the Rights and Duties of Man (American Declaration)[12] and the Universal Declaration of Human Rights (Universal Declaration)[13] were adopted. Both declarations recognise economic, social and cultural rights. The declarations do not distinguish these rights from other categories of rights, for example, from civil and political rights. However, distinctions between these categories of rights began to emerge at the stage of developing treaties.

[6] Adopted 27 June 1981 & came into force 21 October 1986, OAU Doc. CAB/LEG/67/3 rev. 5; 1520 UNTS 217; 21 ILM 58 (1982).

[7] See Asbjørn Eide, 'Economic, Social and Cultural Rights as Human Rights' In Asbjørn Eide, Catarina Krause & Allan Rosas (eds), *Economic, Social And Cultural Rights: A Textbook* (Martinus Nijhoff Publishers 2001) 18.

[8] Adopted 18 October 1961, entered into force 26 February 1965, European Treaty Series No 35; European Social Charter (Revised), adopted 3 May 1996, entered into force 1 July 1999, European Treaty Series No 163.

[9] Adopted 16 December 1966 entered into force 3 January 1976; 993 UNTS 3.

[10] Adopted 21 November 1969, entry into force 18 July 1978, OAS Treaty Series No. 36; 1144 UNTS 123; 9 ILM 99 (1969).

[11] Adopted 17 November 1988, entry into force 16 November 1999, OAS Treaty Series No. 69; 28 ILM 156 (1989).

[12] Adopted by the Ninth International Conference of American States, Bogotá, Colombia, 2 May 1948.

[13] Adopted by the United Nations General Assembly Resolution 217 A (III) of 10 December 1948.

In 1950, the Council of Europe adopted the Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights).[14] The Convention was 'the first comprehensive treaty for the protection of human rights to emerge'.[15] The Universal Declaration significantly influenced its drafting.[16] However, unlike the Universal Declaration, the European Convention on Human Rights did not recognise economic, social and cultural rights—at least when it was adopted.[17] It originally established a commission and a court to supervise the civil and political rights that it guarantees.[18] Later, the Commission was phased out and was replaced by a permanent court that functions on a full-time basis.[19] It took the Council of Europe around a decade to adopt the European Social Charter in 1961, which was revised in 1996. The European Committee of Social Rights (European Committee) monitors the implementation of the European Social Charter.[20] The European Committee does not have the power to receive and determine individual complaints. It examines state reports and collective complaints.[21]

From the European model, as I prefer to call it, two features are notable. First, this model of treaty-making distinguishes civil and political rights from economic, social and cultural rights. The model provides a separate treaty for each category of rights. One may argue that this distinction is based on an unstated assumption that the nature of state obligations relating to each category of rights is different. Second, the model establishes different monitoring mechanisms for each category of rights. The supervision mechanism for civil and political rights is strong because it comprises a full-time court with the power to receive individual complaints and render binding judgments in cases of violations. On the other hand, the supervision mechanism for social rights is weak because it is a part-time quasi-judicial organ, which lacks the power to receive individual complaints and make binding decisions. Judged by the strength of supervision mechanisms, the European model places social rights in a lower class. The European model influenced later developments. Apart from some minor changes, other human rights systems replicated the European model except the African human rights system.

In 1966, the Universal Declaration bifurcated into the International Covenant on Civil and Political Rights (ICCPR) and the ICESCR following the European model. The Human Rights Committee monitors the implementation of the ICCPR.[22] It has the power to receive and determine individual complaints alleging violations of the ICCPR.[23] However, the ICCPR does not establish a court. In contrast, the ICESCR does not establish a treaty body, although its supervision mechanism evolved over time. In 1985, the Committee on Economic, Social and Cultural Rights (CESCR) was established.[24] The CESCR

[14] Adopted 4 November 1950, ETS 5.
[15] William A Schabas, *The European Convention on Human Rights: A Commentary* (OUP 2016) 1.
[16] Schabas (n 15) 1.
[17] Protocol No 1 adds the right to property and the right to education to the Convention.
[18] Schabas (n 15) 7.
[19] Protocol No 11 to the Convention for the Protection of Human Rights and Fundamental Freedoms, restructuring the control machinery established thereby, European Treaty Series No 155, adopted 11 May 1994, entered into force 1 November 1998.
[20] European Social Charter, Arts 24 & 25; European Social Charter (Revised), Art C.
[21] European Social Charter, Art 24; European Social Charter (Revised), Art C; Additional Protocol to the European Social Charter Providing for a System of Collective Complaints, adopted 9 November 1995 and entered into force 1 July 1998, European Treaty Series - No. 158
[22] ICCPR, Art 28;
[23] Optional Protocol to the International Covenant on Civil and Political Rights, General Assembly resolution 2200A (XXI), adopted 16 December 1966 and entered into force 23 March 1976, Art 1.
[24] Economic and Social Council resolution 1985/17.

gradually acquired the power to receive and determine individual complaints.[25] In a legal sense, the ICESCR's supervision mechanism had fully evolved to match that of the ICCPR by 2013, when the Optional Protocol to the ICESCR entered into force. Of course, the bifurcation of the Universal Declaration did not occur in a vacuum. The two Covenants were developed during the Cold War. During that period, the western capitalist states emphasised civil and political rights while socialist states prioritised economic, social and cultural rights.[26]

In 1969, the American Convention was adopted based on the European model. Like the European Convention on Human Rights, it mainly guarantees civil and political rights apart from few exceptions.[27] It establishes the Inter-American Commission on Human Rights (Inter-American Commission) and the Inter-American Court of Human Rights (Inter-American Court).[28] In 1988, around two decades later, a protocol to the American Convention (the Protocol of San Salvador) was adopted to guarantee economic, social and cultural rights. Even then, these rights were excluded from the jurisdiction of the Inter-American Court apart from few exceptions.[29]

In 1981, the Organisation of the African Unity (OAU) adopted the African Charter. By then, there were enough economic, social and cultural rights treaties at the global and regional levels to draw on. The European Social Charter, the ICESCR, the American Convention were already in force. Unlike these treaties, however, the African Charter does not replicate the European model. The African Charter adopts a different model of human rights treaty-making—an African model, as I prefer to call it. The Charter recognises all categories of rights: civil, political economic, social, cultural and collective rights. It does not make any distinction between these categories of rights in terms of the corresponding state obligations. It establishes the same mechanism for monitoring the implementation of all categories of rights. In this regard, the African Charter is the first international treaty to recognise supranational quasi-judicial enforcement of economic, social and cultural rights. In short, the Charter achieved conventional unity of rights that had never been achieved in treaties adopted hitherto.

The African model is replicated in other treaties adopted within the framework of the OAU/AU. An example includes the African Charter on the Rights and Welfare of the Child (African Children's Charter).[30] Three protocols to the African Charter are another set of examples.[31] The League of Arab States also adopted the African model as the Arab Charter on Human Rights indicates.[32] Since the adoption of the African Charter, the United Nations inclined towards the African model. This is

[25] Optional Protocol to the International Covenant on Economic, Social and Cultural Rights, General Assembly resolution A/RES/63/117, adopted 10 December 2008, entered into force 5 May 2013.

[26] Kitty Arambulo *Strengthening the supervision of the International Covenant on Economic, Social and Cultural Rights: Theoretical and procedural aspects* (1999) 17.

[27] American Convention, Arts 17, 19 & 21. One may consider the right to property, protection of children and family among social rights. cf ICESCR, Art 10.

[28] American Convention, Art 33.

[29] Protocol of San Salvador, Art 19(6).

[30] Adopted 11 July 1990, entered into force 29 November 1999, CAB/LEG/24.9/49 (1990).

[31] Protocol to the African Charter on Human and Peoples' Rights on the Rights of Persons with Disabilities in Africa, adopted 29 January 2018 by the 30th Ordinary Session of the Assembly held in Addis Ababa; Protocol to the African Charter on Human and Peoples' Rights on the Rights of Older Persons in Africa, adopted 31 January 2016 by the 26th Ordinary Session of the Assembly held in Addis Ababa; Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa, adopted 11 July 2003 by the 2nd Ordinary Session of the Assembly held in Maputo, entered into force 25 November 2005.

[32] Adopted by League of Arab States, 22 May 2004, entered into force 15 March 2008.

evident from the hybrid model adopted by the Convention on the Rights of the Child (CRC) and the Convention on the Rights of Persons with Disabilities (CRPD).[33]

## 1.3 Economic, social and cultural rights in the African Charter

The African Charter is the main subject of this study. I briefly introduce the Charter below by sketching the context in which it emerged, the organs monitoring the implementation of the rights it recognises, and the development of economic, social and cultural rights. I begin with the discussion of the Charter's development in the next subsection. The African Commission on Human and Peoples' Rights (African Commission) and the African Court on Human and Peoples' Rights (African Court) monitor the implementation of the rights recognised in the Charter. I briefly introduce these organs in the second and third subsections. In the last subsection, I introduce the development of economic, social and cultural rights as developed in the practice of the African Commission.

### 1.3.1 Development of the African Charter

The African Charter developed as the main African human rights treaty under the aegis of the Organisation of African Unity (OAU). When the OAU (now African Union) was established in May 1963, its Constitution (OAU Charter) mentioned human rights.[34] The OAU Charter states that the organisation observes the Charter of the United Nations and the Universal Declaration of Human Rights in promoting international cooperation.[35] The OAU Charter did not express the human rights commitment of the OAU until it was replaced by the Constitutive Act of the African Union.[36] The OAU was preoccupied with the protection of the state rather than the rights of the individuals within states.[37] Yet the OAU contributed to the achievement of peoples' self-determination and the prohibition of apartheid or racial discrimination in its early years.[38]

The African Charter was conceived in the 1970s. This period brought changes to the OAU as it did elsewhere. According to Moyn, the 1970s marks the rebirth of human rights.[39] Moyn emphasises that human rights obtained renewed attention and force during the 1970s due to the failure of other political models for achieving the cause of justice.[40] Several human rights events occurred during this period. Global and regional human rights treaties came into force. These include the ICESCR, the ICCPR, along with its first optional protocol, and the American Convention. During this period, 'human rights also became of more prominent concern in international politics, especially as an ideological tool in the West's Cold War armoury.'[41] Politicians, particularly the Carter administration in the United States, 'started to invoke human rights as the guiding rationale of the foreign policy of

[33] CRPD, adopted UN Doc.A/61/611, adopted 13 December 2006, entry into force 3 May 2008, 2515 UNTS 3; CRC, adopted 20 November 1989, entry into force 2 September 1990, GA res 44/25, annex, 44 UN GAOR Supp. (No. 49) at 167, UN Doc A/44/49 (1989); 1577 UNTS 3; 28 ILM 1456 (1989). Like the African Charter, these treaties guarantee economic, social and cultural rights as well as civil and political rights; they establish the same mechanism for monitoring the implementation of both categories of rights. Like the ICESCR, these treaties require progressive realisation of economic, social and cultural rights. Like the ICCPR, they do not require progressive realisation of civil and political rights.

[34] Charter of the Organization of African Unity, 479 UNTS 39, adopted 25 May 1963, entered into force 13 September 1963

[35] OAU Charter, Art II(1)(e).

[36] Adopted in Lomé, Togo, on 11 July 2000 and entered into force on 26 May 2001, Art 2(h). It provides that the objective of the African Union is to 'promote and protect human and peoples' rights in accordance with the African Charter on Human and Peoples' Rights and other relevant human rights instruments.'

[37] Rachel Murray, *Human Rights in Africa: From the OAU to the African Union* (CUP 2004) 7.

[38] Murray, From the OAU to the African Union, (n 37) 7-8.

[39] Samuel Moyn, *The Last Utopia: Human Rights in History* (Belknap Press 2010).

[40] Moyn (n 39) 5.

[41] Frans Viljoen, *International Human Rights Law in Africa* (OUP 2012) 159.

states.'[42] For Africa, this means that aid from the United States was linked to human rights.[43] Some events had also occurred on the African continent: in the 1970s, Africa witnessed the 'rise and fall of the three most brutal dictators (Amin of Uganda, 1971-79; Nguema of Equatorial Guinea, 1968-79 and Bokassa of the Central African Empire, 1966-1979).'[44] The violations of human rights in these countries indicate that the protection of post-colonial African States, which had been the main concern of the OAU, did not guarantee individual rights within each state. For these reasons, the OAU decided to establish an African Human Rights System in 1979.[45]

The decision was adopted by the Assembly of Heads of State and Government of the OAU during its sixteenth ordinary session held from July 17 to 20 1979 in Monrovia, Liberia. The Assembly instructed the Secretary-General of the OAU to organise a meeting of highly qualified experts 'to prepare a preliminary draft of an "African Charter on Human and Peoples' Rights" providing *inter alia* for the establishment of bodies to promote and protect human and peoples' rights.'[46] In its decision, the Assembly appears to emphasise economic, social and cultural rights. The Assembly underlined that it is 'essential to give special attention to economic, social and cultural rights in future.'[47] The emphasis on economic, social and cultural rights at the time was not peculiar to Africa. It reflected an international context in which the Third World countries asserted the priority of economic, social and cultural rights since the first international human rights conference of 1968.[48] As Burke demonstrates, the Third World countries (including African States) focused on economic, social and cultural rights partly because they were unable to uphold civil and political rights as they collapsed into authoritarianism.[49]

The OAU Assembly adopted the African Charter in Nairobi, Kenya, in 1981. Like the Monrovia decision, the text of the African Charter emphasises economic, social and cultural rights. In its preamble, the Charter proclaims that 'the satisfaction of economic, social and cultural rights is a guarantee for the enjoyment of civil and political rights.' According to some authors, this clause indicates that the African Charter attaches more importance to economic, social and cultural rights

[42] Moyn (n 39) 4.
[43] Issa G Shivji, *The Concept of Human Rights in Africa* (CODESRIA 1989) 94.
[44] Shivji (n 43) 94.
[45] Decision on Human and People's Rights in Africa, AHG/Dec.115 (XVI) Rev. 1, adopted by the Assembly of Heads of State and Government of the OAU held from 17 to 20 July 1979 in Monrovia, Liberia [hereafter 'Monrovia Decision'], at https://digitallibrary.un.org/record/5165/files/A_34_552-EN.pdf (accessed 16 January 2019).
[46] Monrovia Decision, para 2(b).
[47] Monrovia Decision, preamble.
[48] Roland Burke, 'From Individual Rights to National Development: The First UN International Conference on Human Rights, Tehran, 1968' (2008) 19/3 *Journal of World History* 275-296, 288. The conference declared that 'the full realization of civil and political rights without the enjoyment of economic, social and cultural rights is impossible.' Proclamation of Teheran, Final Act of the International Conference on Human Rights, Teheran, 22 April to 13 May 1968, UN Doc. A/CONF. 32/41 at 3 (1968), para 13.
[49] Roland Burke, *Decolonization and the Evolution of International Human Rights* (University of Pennsylvania Press 2010) 109.

than to civil and political rights.[50] Others read this clause as an expression of the indivisibility, interdependence, and interrelatedness of human rights.[51]

The African Charter guarantees all categories of rights. The most peculiar normative invention of the Charter is in the area of peoples' rights. The Charter recognises peoples' rights that are not guaranteed in any other human rights treaty. The right to freely dispose of wealth and natural resources (Article 21), the right to economic, social and cultural development (Article 22), and the right to peace (Article 23) are unique to the African Charter. The Charter also recognises peoples' rights guaranteed in other human rights treaties, for example, the right to self-determination (Article 20), which is also guaranteed in the ICCPR and ICESCR.[52] It also guarantees a collective right to a general satisfactory environment (Article 24).[53]

The Charter also guarantees individual rights. Civil and political rights guaranteed in the Charter include the right to life (Article 4), the prohibition of slavery and torture (Article 5), the right to liberty (Article 6), the right to a fair trial (Article 7), the right to freedom of religion (Article 8), the right to freedom of expression and information (Article 9), the right to freedom of association (Article 10), the right to freedom of assembly (Article 11), the right to freedom of movement (Article 12), and the right to participate in government (Article 13). The African Charter does not expressly guarantee some civil rights including the right to privacy, the right to be recognised as a person and the prohibition of imprisonment for inability to discharge contractual obligations.[54] The African Charter guarantees fewer economic, social and cultural rights compared to other treaties. The Charter guarantees the right to property (Article 14), the right to work (Article 15), the right to health (Article 16), the right to education (Article 17(1)), the right to participate in cultural life (Article 17(2)), and the right to protection of family (Article 18(1)).

The substantive rights under the African Charter have been expanded by states through additional protocols to the Charter, which guarantee the rights of specific groups, namely, women, older persons, and persons with disabilities. The substantive rights in the Charter have also been expanded in the practice of the African Commission and the African Court. I briefly discuss the Commission and the Court below and then turn to the development of economic, social and cultural rights, particularly in the practice of the Commission.

### 1.3.2 African Commission

The African Commission was established in 1987 and held its first session in Addis Ababa on 2 November 1987.[55] The Commission consists of eleven members appointed for a renewable term of

[50] Chidi Anselm Odinkalu, 'Analysis of Paralysis or Paralysis by Analysis? Implementing Economic, Social, and Cultural Rights under the African Charter on Human and Peoples' Rights' (2001) 23 *Human Rights Quarterly* 327, 337; EI-Obaid Ahmed EI-Obaid & Kwadwo Appiagyei-Atua 'Human Rights in Africa: A New Perspective on Linking the Past to the Present' (1996) 41 *McGill Law Journal* 819, 846.

[51] Manisuli 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* 147-193, 149.

[52] cf ICCPR, Art 1; ICESCR, Art 1.

[53] Cf Protocol of San Salvador, Art 11.

[54] cf ICCPR, Arts 11, 16 & 17.

[55] First Activity Report of the African Commission on Human and Peoples' Rights Covering the period from November 1987 through April 1988, adopted on 28 April 1988, reproduced in Rachel Murray & Malcolm Evans (eds) *Documents of the African Commission on Human and Peoples' Rights* (Hart Publishing 2001) 129; Rachel Murray, *The African Commission on Human and Peoples' Rights and International Law* (Hart Publishing 2000)11.

six years.[56] Members of the Commission elect a chairperson and a vice-chairperson from among themselves for a term of two years, renewable only once.[57] The Commission is not a permanent body—members of the Commission discharge their responsibilities on a part-time basis. The African Charter requires that the commissioners meet at least once a year.[58] The Commission's Rules of Procedure increase the number of meetings per year. The Rules require a minimum of two meetings in ordinary sessions, which last for about two weeks.[59] The Commission also meets in extraordinary sessions. Since 2008, the Commission usually holds two ordinary sessions and two extraordinary sessions; in total, four sessions in a year.[60]

The seat of the Commission is separate from the AU headquarters in Addis Ababa, Ethiopia. The Secretariat of the Commission is based in Banjul, The Gambia, where the Commission holds most of its sessions. The Commission also holds its sessions in other member states of the AU. The Secretary of the Commission is appointed by the Chairperson of the AU Commission without consulting the African Commission.[61]

The African Commission establishes subsidiary mechanisms such as special rapporteurs, committees, and working groups.[62] The Commission has established five special rapporteurs, four committees and seven working groups, in total 16 subsidiary mechanisms (also called special mechanisms).[63] The composition of special mechanisms is different from the special procedure of the UN Human Rights Council where mandate holders are different from members of treaty bodies. In the African Union system, all special rapporteurs are members of the African Commission. The chairpersons of all committees and working groups are also members of the Commission. Some subsidiary mechanisms (committees and working groups) exclusively comprise of members of the Commission, particularly when they relate to matters such as resolutions, communications, budget and staff. Other subsidiary mechanisms involve external experts.

In the area of economic, social and cultural rights, the African Commission established a subsidiary mechanism called the Working Group on Economic, Social and Cultural Rights by a resolution adopted in 2004.[64] The Resolution mandates the Working Group to prepare two draft documents: Principles and Guidelines on Economic, Social and Cultural Rights, and revised reporting guidelines pertaining to economic, social and cultural rights. The Working Group completed these tasks in 2011. In 2015, the Commission tasked the Working Group 'to prepare principles and guidelines on the right to water to assist states in the implementation of their obligations.'[65] In February 2016, the Commission assigned the task of drafting a protocol to the African Charter on the Rights of Citizens to Social Protection and Social Security jointly to the Working Group on Economic, Social and Cultural

[56] African Charter, Arts 30, 31 & 36.
[57] African Charter, Art 42(1); Rules of Procedure of the African Commission on Human and Peoples' Rights, adopted in May 2010 in Banjul, rule 12.
[58] African Charter, Art 64(2).
[59] African Commission's Rules (2010), rule 26(1).
[60] African Commission, Sessions at <http://www.achpr.org/sessions/> (accessed 10 May 2019).
[61] Viljoen (n 41) 293.
[62] African Commission's Rules (2010), rule 23(1).
[63] African Commission, Special Mechanisms, at <http://www.achpr.org/mechanisms/> (accessed 10 May 2019).
[64] African Commission, Resolution on Economic, Social and Cultural Rights in Africa, ACHPR/Res.73(XXXVI)04, adopted during 36th Ordinary Session held from 23 November to 7 December 2004 in Dakar, Senegal.
[65] African Commission, Resolution on the Right to Water Obligations, ACHPR/Res.300 (EXT.OS/XVII)2015, adopted during 17th Extraordinary Session held from 19 to 28 February 2015 in Banjul, The Gambia.

Rights and the Working Group on the Rights of Older Persons and People with Disabilities in Africa.[66] As reconstituted in 2017, the Working Group on Economic, Social and Cultural Rights consists of four commissioners and ten external experts.[67]

Article 45 of the African Charter empowers the African Commission to promote, protect, and interpret the African Charter. Article 45(1) of the Charter lists the promotional mandate of the Commission. Article 45(1)(a) of the Charter empowers the Commission to collect documents, undertake research, organize seminars, symposia and conferences, and disseminate information. In the area of economic, social and cultural rights, the Commission exercised this mandate and conducted a seminar in 2004 in Pretoria, South Africa.[68] The Seminar led to the adoption of the Pretoria Declaration on Economic, Social and Cultural Rights in Africa (Pretoria Declaration).[69]

The promotional mandate of the African Commission includes its power to 'formulate and lay down principles and rules aimed at solving legal problems relating to human and peoples' rights' according to Article 45(1)(b) of the Charter. Under this mandate, the Commission has adopted several documents. Of these documents, some are directly related to economic, social and cultural rights. As already noted, the Commission adopted the Pretoria Declaration in 2004. In 2011, it adopted the Principles and Guidelines on the Implementation of Economic, Social and Cultural Rights in the African Charter on Human and Peoples' Rights (usually referred to as 'Nairobi Principles and Guidelines' or simply 'Nairobi Principles' in the Commission's documents).[70] In the same year, the Commission adopted the State Party Reporting Guidelines for Economic, Social and Cultural Rights in the African Charter on Human and Peoples' Rights (usually referred to as 'Tunis Reporting Guidelines' or simply 'Tunis Guidelines' in the Commission's documents).[71] In 2012 and 2014, the Commission adopted two general comments on the right to (reproductive) health of women under the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (Maputo Protocol).[72]

The African Commission cooperates with African and international institutions to discharge its promotional mandate according to Article 45(1)(c) of the African Charter. The institutions include

[66] African Commission, Resolution on the Reconstitution and Renewal of the Mandate of the Working Group on Economic, Social and Cultural Rights in Africa and Renewal of the Appointment of its Chairperson and Members - ACHPR/Res. 391(LXI) 2017, adopted during 61st Ordinary Session held from 1 to 15 November 2017 in Banjul, The Gambia.

[67] African Commission, Resolution on the Reconstitution and Renewal of the Mandate of the Working Group on Economic, Social and Cultural Rights in Africa and Renewal of the Appointment of its Chairperson and Members - ACHPR/Res. 391(LXI) 2017, adopted during 61st Ordinary Session held from 1 to 15 November 2017 in Banjul, The Gambia.

[68] Sibonile Khoza 'Promoting economic, social and cultural rights in Africa: The African Commission holds a seminar in Pretoria' (2004) 4 *African Human Rights Law Journal* 334.

[69] African Commission, Resolution on Economic, Social and Cultural Rights in Africa, ACHPR/Res.73(XXXVI)04, adopted during 36th Ordinary Session held from 24 November to 7 December 2004 in Dakar, Senegal.

[70] 31st Activity Report of the African Commission on Human and Peoples' Rights, EX.CL/717(XX), para xi. The Nairobi Principles are available at http://www.achpr.org/files/instruments/economic-social-cultural/achpr_instr_guide_draft_esc_rights_eng.pdf (accessed 28 January 2019). See Resolutions of the African Commission ACHPR/Res. 391(LXI) 2017, ACHPR/Res. 316 (LVII) 15; ACHPR/Res.296 (EXT.OS/XVI) 14; ACHPR/Res.252 (LIV) 13; ACHPR/Res.193 (L) 11.

[71] African Commission, 31st Activity Report, EX.CL/717(XX), para xi. See Activity reports of the African Commission, eg, 40th Activity Report (para xxi) & 39th Activity Report (para xviii); Resolutions of the African Commission, eg, ACHPR/Res. 346 (LVIII) 2016, ACHPR/Res.193 (L) 11.

[72] African Commission, General Comments on Article 14 (1) (d) and (e) of the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa, adopted at 52nd Ordinary Session held from 9 to 22 October 2012 in Yamoussoukro, Côte d'Ivoire; General Comment No. 2 on Article 14.1 (a), (b), (c) and (f) and Article 14. 2 (a) and (c) of the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa, adopted at its 55th Ordinary Session held from 28 April to 12 May 2014 in Luanda, Angola.

National Human Rights Institutions (NHRIs) and Non-Governmental Organisations (NGOs). The Commission grants affiliate status to NHRIs.[73] By 2018, it had given affiliate status to 29 NHRIs.[74] The Commission grants observer status to NGOs.[75] By 2018, the Commission had granted observer status to 518 NGOs.[76] In its resolutions, the Commission expressly states that it suspends or withdraws an NGO that fails to fulfil the criteria stipulated by the Commission. The Commission hardly ever suspends or withdraws the observer status of NGOs. In 2018, however, the Executive Council of the AU forced the Commission to withdraw observer status of one NGO called Coalition of African Lesbians (CAL).[77] NGOs with observer status play important roles in the work of the African Commission. They provide administrative, financial and technical support to the Commission and its subsidiary mechanisms.[78] They participate in developing principles and rules. They submit communications to the Commission on behalf of victims. They influence the work and priorities of the Commission.[79]

State reporting is the core of the Commission's promotional mandate.[80] Yet the African Charter does not expressly mandate the Commission to examine state reports. Article 62 of the African Charter requires states to submit a report every two years. The report is about the legislative and other measures taken to give effect to the rights guaranteed in the African Charter. Upon the Commission's recommendation, the Assembly of Heads of State and Government of the OAU authorised the Commission to examine state reports in 1988.[81] Now protocols to the African Charter expressly require states to submit periodic reports to the African Commission.[82] Apart from few exceptions, states submit their reports to the African Commission.[83] In terms of regularity of submission, states differ. Some are up-to-date with their reporting obligations while others are late.[84] After the submission, state representatives present the report during public session of the Commission. Members of the Commission ask questions—usually relating to their mandate. For example, the Chairperson of the Working Group on Economic, Social and Cultural Rights asks questions relating to economic, social and cultural rights.[85] The outcome of the consideration of state reports is called

[73] African Commission, Resolution on the granting of Observer Status to National Human Rights Institutions in Africa, ACHPR/Res.31 (XXIV)98, adopted in Banjul on 31 October 1998; Resolution on the Granting of Affiliate Status to National Human Rights Institutions and specialized human rights institutions in Africa, ACHPR/Res. 370 (LX) 2017, adopted on 22 May 2017 in Niamey, Niger.

[74] African Commission, 45th Activity Report, para 34.

[75] African Commission, Resolution on the Criteria for Granting and Maintaining Observer Status to Non-Governmental Organizations working on Human and Peoples' Rights in Africa, adopted at 59th Ordinary Session held from 21 October to 4 November 2016 in Banjul, The Gambia; Resolution on the Criteria for Granting and Enjoying Observer Status to Non-Governmental Organizations Working in the field of Human and Peoples' Rights, adopted at 25th Ordinary Session held from 26 April to 5 May 1999 in Bujumbura, Burundi.

[76] African Commission, 45th Activity Reports, para 35.

[77] African Commission, 45th Activity Report, para 60.

[78] Nobuntu Mbelle, 'The Role of Non-governmental Organisations and National Human Rights Institutions at the African Commission' in Rachel Murray & Malcolm D Evans (eds), *The African Charter on Human and Peoples' Rights: the system in practice 1986-2008* (CUP 2008).

[79] Mbelle (n 78) 306.

[80] Viljoen (n 41) 349.

[81] Resolution on the African Commission on Human and Peoples' Rights, AHG/Res. 176 (XXIV), 24th Ordinary Session held from 25 to 28 May 1988. Second Activity Report of the African Commission on Human and Peoples' Rights, para 31, reproduced in Rachel Murray & Malcolm Evans (eds) *Documents of the African Commission on Human and Peoples' Rights* (Hart Publishing 2001) 172.

[82] Protocol on the Rights of Persons with Disabilities, Art 34(1); Protocol on the Rights of Older Persons, Art 22(1).

[83] Five states, namely, Comoros, Equatorial Guinea, Guinea Bissau, Sao Tome and Principe and Somalia have never submitted their report by 2018. See African Commission, 45th Activity Report, para 27.

[84] See African Commission, 45th Activity Report, para 27.

[85] My personal observation at the 61st session of the Commission held in Banjul, The Gambia, from 1 to 15 November 2017.

'concluding observations', a document that highlights positive developments as well as areas of concern and makes recommendations. The concerns raised and the recommendations made usually relate to mandates of the members of the Commission.

The Commission examines and determines allegations of human rights violations pursuant to its protection mandate stipulated under Article 45(2) of the African Charter. The Charter provides for both individual and inter-state complaints. The Commission received only one case from states.[86] All other cases were submitted to the Commission by individuals and NGOs. The Commission has a very liberal view on standing and receives communications from any person or organisation. By the end of 2018, the Commission had received 460 cases. Of the total number of cases received, 231 cases (around 50%) were pending before the Commission by the end of 2018.[87] It disposed of 229 communications over the last three decades.[88] It decided 96 cases on merits. Merit decisions constitute around 42% of decided cases. The Commission ruled 100 cases inadmissible. The remaining cases were stricken out or closed for lack of diligent prosecution or other reasons or disposed of on other procedural grounds. Some cases were withdrawn by the parties.

The African Charter does not expressly empower the Commission to order provisional measures. According to its 2010 Rules, the Commission may order provisional measures to prevent irreparable harm to victims at any time after the receipt of the communication but before the determination on the merits.[89] Accordingly, the Commission has issued several provisional measures.[90] After examining a case on the merits, the Commission usually makes a declaration of violations by identifying specific violated provisions of the African Charter. In some cases, it makes reparation orders including the payment of compensation.[91] It usually requires the determination of the amount of monetary compensation according to domestic laws. In some cases, it takes it upon itself to determine the exact amount of compensation—or at least part of the amount.[92]

The Commission's protective mandate was expanded by the Protocol to the African Charter on Human and People's Rights on the Establishment of an African Court on Human and People's Rights (African Court Protocol), which empowered the Commission to submit cases to the African Court.[93] The Commission can make referrals at any stage of its proceeding.[94] The Commission does not transfer all cases submitted to it, but makes referrals only in cases that fulfil three requirements. [95] The first requirement relates to cases decided on the merits. The Commission refers such cases to the African Court when the respondent state is unwilling or fails to comply with the Commission's recommendations.[96] Until March 2020, for more than a decade, the Commission did not refer any

[86] Manisuli Ssenyonjo, 'Responding to Human Rights Violations in Africa: Assessing the Role of the African Commission and Court on Human and Peoples' Rights (1987–2018)' (2018) 7 *International Human Rights Law Review* 1-42, 10. *Democratic Republic of the Congo v Burundi, Rwanda and Uganda* (2004) AHRLR 19 (ACHPR 2004).

[87] African Commission, 45th Activity Report, para 32.

[88] African Commission, Decision on Communications, at <http://www.achpr.org/communications/decisions/?sort=_date> (accessed 12 May 2019).

[89] African Commission's Rules of Procedure (2010), rule 98(1).

[90] Ssenyonjo, Responding to Human Rights Violations in Africa, (n 86) 21.

[91] Ssenyonjo, Responding to Human Rights Violations in Africa, (n 86) 21.

[92] See *Equality Now and Ethiopian Women Lawyers Association (EWLA) v Federal Republic of Ethiopia* Communication 341/2007, 57th Ordinary Session held from 4 to 18 November 2015 in Banjul; *Mbiankeu Geneviève v Cameroon* Communication No 389/10, adopted 6 May 2015 at 56th Ordinary Session held from 21 April to 7 May 2015 in Banjul.

[93] Adopted by the OAU Assembly on 10 June 1998, entered into force on 25 January 2004, Art 5.

[94] African Commission's Rules (2010), rule 118(4).

[95] African Commission's Rules (2010), rule 118.

[96] African Commission's Rules (2010), rule 118(1).

case decided on the merits to the African Court.[97] The Commission is trying perhaps to avoid the possibility of conflicting findings on the merits.[98] The second requirement relates to provisional measures: the Commission refers such cases to the African Court when the respondent state fails to comply with provisional measures ordered by the Commission.[99] The last requirement of referral relates to serious or massive violation of human rights. The African Charter requires the Commission to draw the attention of the AU Assembly to 'cases which reveal the existence of a series of serious or massive violations of human and peoples' rights.'[100] In addition, the Commission refers such cases to the African Court.[101] By March 2019, the Commission referred only three cases to the African Court.[102] The Commission made its first referral on 16 March 2011, which involves situations of serious and massive violations of human rights in Libya.[103] On 12 July 2012, the Commission made its second referral against Kenya in a case involving both the failure of the respondent state to comply with provisional measures and situations of serious and massive violations of human rights.[104] The third referral was made on 31 January 2013 against Libya, involving the failure of the respondent State to comply with provisional orders of the Commission.[105]

Finally, the Commission has the power to interpret the Charter upon request by states, AU institutions or organisations recognised by the AU in accordance with Article 45(3) of the African Charter. However, the Commission's documents do not show instances where the Commission has interpreted the Charter upon request. As a result, the Commission usually interprets the Charter under its promotional and protective mandates, for example, through its decision on individual communications (protective mandate) and principles and rules (promotional mandate).

### 1.3.3 African Court

The movement for establishing an African Court of Human Rights precedes even the establishment of the OAU.[106] Nevertheless, the establishment of the OAU in 1963 did not give the movement a new impetus, as the OAU was preoccupied with other priorities during its early years. Even by 1981 when the African Charter was adopted, it was still premature in the drafters' view to establish a court.[107] The idea matured in 1994 when the OAU assembly mandated the drafting process of a protocol establishing the Court.[108] The OAU Assembly adopted the Protocol to the African Charter on Human and Peoples' Rights on the Establishment of the African Court on Human and Peoples' Rights (African Court Protocol) on 10 June 1998 at its Summit held in Ouagadougou, Burkina Faso.[109] The Protocol

[97] See African Court, Contentious Matter, at <http://www.african-court.org/en/index.php/cases/2016-10-17-16-18-21> (accessed 14 May 2019).
[98] Ssenyonjo, Responding to Human Rights Violations in Africa, (n 86) 38.
[99] African Commission's Rules (2010), rule 118(2).
[100] African Charter, Art 58(1).
[101] African Commission's Rules (2010), rule 118(3).
[102] See African Court, Contentious Matter, at <http://www.african-court.org/en/index.php/cases/2016-10-17-16-18-21> (accessed 14 May 2019).
[103] *African Commission on Human and Peoples' Rights v Great Socialist People's Libyan Arab Jamahiriya* Application No 004/2011 (African Court, Order of Provisional Measures of 25 March 2011).
[104] *African Commission on Human and Peoples' Rights v the Republic of Kenya* Application No 006/2012 (African Court, Judgment of 27 May 2017) para 5 (Ogiek case).
[105] *African Commission on Human and Peoples' Rights v Libya* Application No 002/2013 (African Court, Order of Provisional Measures of 15 March 2013) para 3.
[106] Viljoen (n 41) 413.
[107] Viljoen (n 41) 412.
[108] Max du Plessis & Lee Stone, 'A court not found?' (2007) 7/2 *African Human Rights Law Journal* 522 – 544, 536.
[109] Solomon T Ebobrah, 'Towards a Positive Application of Complementarity in the African Human Rights System: Issues of Functions and Relations' (2011) 22/3 European Journal of International Law 663-688, 664.

came into force on 25 January 2004 but the judges' election took place two years later in January 2006.[110] The first judges were sworn in before the AU Assembly on 2 July 2006, and the Court began operating in Addis Ababa in November 2006, moving to its seat in Arusha, Tanzania, in August 2007.[111] The Court complements the protective mandate of the African Commission.[112]

The African Court consists of eleven judges elected for a term of six years, renewable only once.[113] The Court elects its President and Vice-President for a term of two years, renewable only once.[114] The President performs judicial functions on a full-time basis and resides at the seat of the Court in Arusha,[115] whereas all the other judges carry out their functions on a part-time basis.[116] The judges meet during ordinary and extraordinary sessions of the Court.[117] The Court holds four ordinary sessions in a year, each lasting around 15 days.[118]

The African Court receives cases from the African Commission, states and African inter-governmental organisations.[119] States may accept the competence of the Court to receive cases from individuals and NGOs by making a declaration at the time of ratification of the African Court Protocol or any later time.[120] Of the 30 states that ratified the African Court Protocol by March 2019, nine made the declaration permitting individuals and NGOs access to the Court.[121] Of the total 202 cases submitted to the Court until March 2019, almost all were submitted by individuals (187 cases, around 93%) and NGOs (12 cases, around 6%).[122] The majority of the cases (around 63%) were against the host State, Tanzania. Of the total cases received, the Court finalised 52 (around 26%) and transferred 4 cases to the African Commission. The remaining 146 cases (around 72%) were pending, which shows that the case backlog is mounting.[123]

The African Court exercises the most extensive jurisdiction over human rights matters among regional human rights courts. The jurisdiction of the Court goes beyond its foundational treaty, the African Charter and its protocol. In relation to contentious matters, the Court's jurisdiction extends to any 'relevant Human Rights instrument ratified by the States concerned.'[124] The Court applies 'the provisions of the Charter and any other relevant human rights instruments ratified by the States concerned.'[125] The Court has 'a unique mandate that is not directly matched by either of the Court's regional counterparts,' the Inter-American Court of Human Rights or the European Court of Human

[110] Viljoen (n 41) 413.
[111] African Court, Welcome to the African Court, at <http://www.african-court.org/en/index.php/12-homepage1/1-welcome-to-the-african-court> (accessed 16 May 2019).
[112] African Court Protocol, Art 2.
[113] African Court Protocol, Arts 11 & 15.
[114] African Court Protocol, Art 21(1).
[115] African Court Protocol, Art 21(2).
[116] African Court Protocol, Art 15(4). The AU Assembly can change the arrangement of part-time Court into full-time.
[117] African Court Rules (2010), rules 14 & 15.
[118] African Court Rules (2010), rule 14(1).
[119] African Court Protocol, Art 5(1).
[120] African Court Protocol, Arts 5(3) & 34(6).
[121] The nine states are Benin, Burkina Faso, Côte d'Ivoire, The Gambia, Ghana, Mali, Malawi, Tanzania and Tunisia. See African Court, at <http://www.african-court.org/en/> (accessed 16 May 2019).
[122] African Court, Statistics as at March 2019, at <http://www.african-court.org/en/index.php/cases/2016-10-17-16-18-21> (accessed 16 May 2019).
[123] African Court, Statistics as at March 2019, at <http://www.african-court.org/en/index.php/cases/2016-10-17-16-18-21> (accessed 16 May 2019).
[124] African Court Protocol, Art 3(1).
[125] African Court Protocol, Art 7.

Rights.[126] The African Court's advisory jurisdiction is even wider than its jurisdiction in contentious matters. The Court's advisory jurisdiction extends beyond ratified treaties. The Court provides 'an opinion on any legal matter relating to the Charter or any other relevant human rights instruments.'[127]

The African Court's jurisdiction is also extensive in terms of categories of rights. In other regional human rights systems, human rights courts are primarily civil and political rights courts save for a few exceptions and indirect application of economic, social and cultural rights. The African Court is the only human rights court that has a complete mandate over the adjudication of economic, social and cultural rights. Surprisingly, the Court acquired jurisdiction over economic, social and cultural rights guaranteed in the ICESCR a decade earlier than the CESCR itself obtained the power to examine individual complaints.[128] However, the Court's extensive jurisdiction has not yet attracted many cases in the area of economic, social and cultural rights.

In the future, if the Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights (Malabo Protocol) enters into force, the African Court will be transformed into the African Court of Justice and Human and Peoples' Rights.[129] The Malabo Protocol adds a criminal section to a merged court, the African Court of Justice and Human Rights.[130] The merger has not taken place yet.[131] The future African Court of Justice and Human and Peoples' Rights will have three sections: a general affairs section, a human and peoples' rights section, and an international criminal law section.[132]

### 1.3.4 Development of economic, social and cultural rights under the African Charter

The African Charter adopts a minimalist approach to economic, social and cultural rights as it omits some of the rights recognised in other treaties, particularly in the ICESCR.[133] Among the omitted rights are the right to an adequate standard of living for oneself and one's family, including adequate food, clothing and housing, and to the continuous improvement of living conditions—the right to be free from hunger, the right to social security, including social insurance.[134] Other rights such as the right to work and the right to education are missing some elements.[135] The Charter has been compared with the ICESCR and criticised as defective for these omissions.[136] Yeshanew suggests amending the Charter and adopting an additional protocol among possible solutions, but considers

[126] Yakaré-Oulé (Nani) Jansenreventlow & Rosa Curling, 'The Unique Jurisdiction of the African Court on Human and Peoples' Rights: Protection of Human Rights beyond the African Charter' (2019) 33 *Emory International Law Review* 203-222, 206.

[127] African Court Protocol, Art 4(1).

[128] The African Court Protocol entered into force in 2004 while the Optional Protocol to the ICESCR entered into force in 2013.

[129] Adopted 27 June 2014 by the AU Assembly held in Malabo, Equatorial Guinea.

[130] Protocol on the Statute of the African Court of Justice and Human Rights, adopted 1 July 2008 by the AU Assembly held in Sharm el-Sheikh, Egypt.

[131] While 15 ratifications are required for the merger (ie, entry into force of the Protocol on the Statute of the African Court of Justice and Human Rights), only seven ratifications were made by 6 February 2019. See status list at <https://au.int/sites/default/files/treaties/36396-sl-protocol_on_the_statute_of_the_african_court_of_justice_and_human_rights.pdf> (accessed 17 May 2019).

[132] Statute of the African Court of Justice and Human and Peoples' Rights, Art 16(1).

[133] Viljoen (n 41) 215.

[134] cf ICESCR, Arts 9 & 11.

[135] African Charter, Arts 15 & 17.

[136] J Oloka-Onyango 'Beyond the rhetoric: reinvigorating the struggle for economic and social rights in Africa' (1995) 26 *California Western International Law Journal* 1 51; Sisay Alemahu Yeshanew, *The Justiciability of economic, social and cultural rights in the African regional human rights system: Theory, practice and prospect* (Intersentia 2013) 266.

interpretation a preferred way of fixing the defects.[137] Interestingly, all of the rights that are now missing from the text of the Charter were included in the early draft of the Charter with sufficient details that rival the provisions of the ICESCR.[138] Unfortunately, the final text of the Charter does not contain them.

The African Commission has implied the omitted rights from other rights guaranteed in the Charter. In 1989, the Commission adopted the Guidelines for National Periodic Reports that heavily relied on international human rights law, including the ICESCR.[139] These guidelines require states to report on the right to an adequate standard of living, such as the right to food and the right to adequate housing under the right to health (Article 16) and the rights related to the family (Article 18).[140] The right to social security is also included under the right to health.[141] The Commission also requires reports on elements of rights missing from the Charter. For example, states should report on trade union rights under the right to work although the Charter does not guarantee that aspect of the right.[142]

In the 2004 Pretoria Declaration, the Commission adopted the view that access to the minimum essential food and 'to basic shelter, housing and sanitation and adequate supply of safe and potable water' are part of the right to health.[143] The Declaration provides that the African Charter implies recognition of the right to shelter, the right to basic nutrition and the right to social security when the economic, social and cultural rights expressly guaranteed are read together with the right to life and respect for human dignity.[144] In the Pretoria Declaration, the Commission modified its position in the 1989 Guidelines. While it acknowledges that these rights are not expressly guaranteed under the Charter, it goes beyond the right to health and refers to the right to life and the right to inherent human dignity as the sources of other economic, social and cultural rights.

The Commission identified a combination of expressly guaranteed rights, from which it derived each right omitted from the Charter in the Nairobi Principles. For example, it derived the right to housing from a combination of the right to property, the right to health and the protection of the family.[145] Similarly, the Commission implied other rights omitted from the Charter, including the right to food, the right to water, and the right to social security, from a range of expressly recognised rights.[146] The content of the rights read into the Charter mirrors the content of the rights guaranteed under the ICESCR as developed by the CESCR.

The Commission's decisions in individual complaints show a similar trend despite some inconsistencies. The Commission recognises economic, social and cultural rights that are not expressly guaranteed in the African Charter. In *Social and Economic Rights Action Centre (SERAC) and Another v Nigeria* (*Ogoniland* case) decided in 2001, the Commission held that the Charter

[137] Yeshanew (n 136) 270.

[138] Draft African Charter on Human and Peoples' Rights, prepared for the Meeting of Experts in Dakar, Senegal from 28 November to 8 December 1979, by Kéba Mbaye, CAB/LEG/67/1, Arts 6 - 13, reproduced in Christof Heyns (ed), *Human rights law in Africa 1999* (2002) 65 – 77.

[139] Guidelines for National Periodic Reports, Introductory para 6.

[140] Guidelines for National Periodic Reports, part II paras 31 - 33.

[141] Guidelines for National Periodic Reports, part II paras 17 - 19.

[142] Guidelines for National Periodic Reports, part II paras 10 - 14.

[143] Resolution on Economic, Social and Cultural Rights in Africa, ACHPR/Res.73 (XXXVI) 2004 (Pretoria Declaration), para 7.

[144] Pretoria Declaration, para 10.

[145] Nairobi Principles, para 77.

[146] Nairobi Principles, paras 81, 83, and 87.

recognises the right to housing and the right to food.[147] It held that 'the combined effect of articles 14, 16 and 18(1) reads into the Charter a right to shelter or housing.'[148] The destruction of Ogoni houses and villages and the obstruction, harassment, beating, and killing of citizens trying to rebuild their ruined homes 'constitute massive violations of the right to shelter.'[149] In the same case, the Commission accepted the complainants' argument that 'the right to food is implicit in the African Charter, in such provisions as the right to life (Article 4), the right to health (Article 16) and the right to economic, social and cultural development (Article 22).'[150] The Commission found Nigeria in violation of the right to food.[151]

In *Sudan Human Rights Organisation and Another v Sudan* (*Darfur* case) decided in 2009, the Commission examined an alleged violation of several Charter rights due to the conflict in Darfur.[152] The Complainants relied on the Commission's decision in the *Ogoniland* case and submitted that there was a violation of the right to housing. Instead, the Commission found that the eviction or demolition of victims' houses violates the right to property; that the destruction of homes is a violation of the right to health; and that evicting the victims violates the right to family life.[153] However, it did not find a violation of a separate right to housing. Similarly, it did not find a violation of a separate right to food, but it did find violations of the right to life, the right to health and the right to development from which it derived the right to food in the *Ogoniland* case.

In two cases decided in 2015, the Commission adopted different views on the right to housing, although the decisions were adopted in the same year.[154] In *Nubian Community v Kenya*, the Commission examined discrimination against members of the Nubian Community in obtaining nationality and the consequence of such discrimination on the enjoyment of other rights including the right to work, the right to health, the right to education and protection of the family.[155] It found a violation of the right to property due to an eviction without provision of alternative housing.[156] In addition, it found a violation of the right to health and the right to protection of the family.[157] However, it did not find a violation of a separate right to housing. On the other hand, the Commission found a violation of the right to housing in *Mbiankeu Geneviève v Cameroon*.[158] The complainant, a French national of Cameroonian origin living and working in France, and her husband acquired a plot of land for building a residential house. As the development of the land began with the construction of a hut on it, another person who claimed the land destroyed the hut and assaulted and chased away the complainant's husband. As the complainant's husband had obtained the land from a fraudulent seller, he could not obtain another plot of land as a replacement nor be reimbursed for the monies invested in it. Although the family was not living in Cameroon, the Commission found a violation of the right to adequate housing.[159]

[147] (2001) AHRLR 60 (ACHPR 2001).
[148] *Ogoniland* case, para 60.
[149] *Ogoniland* case, para 62.
[150] *Ogoniland* case, para 64.
[151] *Ogoniland* case, para 64.
[152] (2009) AHRLR 153 (ACHPR 2009).
[153] *Darfur* case, paras 205, 212, & 216.
[154] Communication 317/2006, *the Nubian Community in Kenya v the Republic of Kenya* and Communication 389/10, *Mbiankeu Geneviève v Cameroon*, Thirty-eighth Annual Activity Report.
[155] *Nubian Community v Kenya*, para 168.
[156] *Nubian Community v Kenya*, para 165.
[157] *Nubian Community v Kenya*, para 168.
[158] Communication 389/10, *Mbiankeu Geneviève v Cameroon*, 38th Activity Report.
[159] *Mbiankeu Geneviève v Cameroon*, para 124.

The African Commission has also contributed to the preparation of treaties that expanded economic, social and cultural rights under the African Charter. The Commission drafted three protocols to the Charter. The protocols relate to the rights of women, older persons and persons with disabilities. These protocols expressly recognise economic, social and cultural rights omitted from the Charter. The Maputo Protocol recognises the rights of women to food, water and housing.[160] The Protocol on the rights of older persons guarantees the right to social security.[161] The Protocol on the rights of persons with disabilities guarantees the right to an adequate standard of living, which includes 'adequate food, access to safe drinking water, housing, sanitation and clothing.'[162]

In sum, economic, social and cultural rights under the African Charter have been expanded. The expansion has occurred in the practice of the African Commission. Human rights treaties developed after the African Charter have also added rights omitted from the African Charter. As a result, the rights recognised under the African Charter and its protocols evolved to match the list of rights recognised under the ICESCR.

## 1.4 General obligations: Meaning and selection

Economic, social and cultural rights have evolved under the African Charter, as discussed above. The African Commission has played the major role in developing the rights. The rights in the African Charter have evolved to match the list of rights guaranteed in the ICESCR, indicating that the African Commission has used the ICESCR and its interpretation by the CESCR as a frame of reference to develop the rights in the African Charter. I will examine whether the same frame of reference works for general obligations under the African Charter. This is particularly interesting because the African Charter and the ICESCR adopt different models of treaty-making when it comes to economic, social and cultural rights and their corresponding state obligations. I first explain what I call general obligations.

The recognition of human rights in international treaties entails specific and general state obligations. Specific obligations correspond to one right or specific rights in a treaty, while general obligations are applicable to all rights in a treaty. In the formulation of treaty provisions, general and specific obligations may appear in diffident parts of a treaty. The ICESCR is an example, containing provisions relating to general obligations (ie, progressive realisation, non-discrimination/equality and limitation) in a separate part, preceding the provisions that guarantee specific rights.

State obligations cutting across specific rights are many, but the principal one is the 'progressive realisation' obligation.[163] Article 2(1) of the ICESCR contains this obligation:

> 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 realization of the rights recognized in the present Covenant by all appropriate means, including particularly the adoption of legislative measures.

The progressive realisation provision is not unique to the ICESCR. The provision is common in economic, social and cultural rights treaties adopting the European model of treaty-making including

[160] Maputo Protocol, Arts 15 & 16.
[161] Protocol to the African Charter on Human and Peoples' Rights on the Rights of Older Persons in Africa, Art 7.
[162] Protocol to the African Charter on Human and Peoples' Rights on the Rights of Persons with Disabilities in Africa, Art 20.
[163] CESCR, General comment No 3: The nature of states parties' obligations (1990), para 9.

the American Convention and the Protocol of San Salvador.[164] These treaties require states to gradually achieve full realisation of economic, social and cultural rights.

Defined as the principal obligation in the practice of the CESCR as well as in the literature,[165] progressive realisation is an interesting subject of study. It is necessary to identify the scope and nature of this obligation to praise states for their achievements or to condemn them and hold them internationally accountable for their failures. This is particularly important in Africa where the level of discharging obligations corresponding to economic, social and cultural rights is relatively low. Moreover, it is useful to examine the legal nature of the concept of progressive realisation under the African Charter, which does not contain the concept. The omission of the concept from the Charter does not mean the same thing for everyone. For some authors, it means that economic, social and cultural rights entail immediate obligations;[166] others consider immediate realisation impractical or unrealistic due to the underdevelopment of African States.[167]

Because of the status of being the principal obligation, progressive realisation has become a reference point for describing other general obligations as obligations related to, as being an exception to or as important for progressive realisation. The limitation clauses of economic, social and cultural rights treaties contain obligations related to progressive realisation. Immediate obligations are exceptions to progressive realisation and the obligation to ensure participation in the implementation of the rights is important in discharging the progressive realisation obligation. Thus, the study of exceptions to and relatives of the progressive realisation clarifies the scope and content of the progressive realisation obligation itself. I briefly discuss below these exceptions to and relatives of the progressive realisation obligation.

One of the concepts related to the progressive realisation obligation is limitation. Treaty texts contain the concept of progressive realisation and limitation in separate clauses. In the ICESCR, the progressive realisation provision (Article 2(1)) and the limitation clause (Article 4) are limitations of different kind;[168] but both are limitations, anyway. In the practice of the CESCR, the use of the progressive realisation is ubiquitous, while the use of the limitation clause is scanty. Like the ICESCR, the Protocol of San Salvador provide for progressive realisation and limitation in separate provisions.[169] The European Social Charter provides for a general limitation clause only.[170] In national constitutions, which provide for a general limitation clause along with progressive realisation clauses embedded in provisions guaranteeing each economic, social and cultural right, progressive realisation is considered an internal limitation, while a general limitation clause is an external

[164] American Convention, Art 26; Protocol of San Salvador, Art 1.

[165] General Comment 3, para 2; Malcolm Langford, 'Substantive Obligations' in Malcolm Langford et al (eds) *The Optional Protocol to the International Covenant on Economic, Social and Cultural Rights: A Commentary* (Pretoria University Law Press 2016) 228.

[166] Dejo Olowu, *An integrative rights-based approach to human development in Africa* (Pretoria University Law Press 2009) 58; Odinkalu (n 50) 349.

[167] Christian-Jr Kabange Nkongolo, 'The Justiciability of Socio-Economic Rights under the African Charter on Human and Peoples' Rights: Appraisal and Perspectives Three Decades After Its Adoption' (2014) 22/3 *African Journal of International and Comparative Law* 492 – 511, 502; Christopher 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) 6/2 *African Human Rights Law Journal* 333-357, 341; Evelyn A Ankumah, *The African Commission on Human and Peoples' Rights: Practice and Procedures* (Martinus Nijhoff Publishers 1996) 144.

[168] Philip Alston & Gerard Quinn, 'The Nature and Scope of states Parties' Obligations under the International Covenant on Economic, Social and Cultural Rights' (1987) *Human Rights Quarterly* 156-229, 194.

[169] ICESCR, Art 4; Protocol of San Salvador, Art 5.

[170] European Charter, Art 31; European Charter (Revised), Art G.

limitation.[171] Limitation clauses and the principle of proportionality have received wide scholarly attention in relation to civil and political rights guaranteed in international human rights treaties as well as in national constitutions.[172] The application of limitation clauses to economic, social and cultural rights and the relationship with the progressive realisation clause is as scarce as the practice of the CESCR. Among scholars that tackle the issue, the applicability of the principle of proportionality (as a component of the limitation analysis) to economic, social and cultural rights (particularly in relation to positive obligation) is a point of disagreement.[173]

In the African Charter, the relationship between progressive realisation and limitation is not straightforward. The text of the Charter is silent on both issues, omitting the general limitation clause as well as the progressive realisation clause. Scholars are limited to critiquing the African Charter for omitting a general limitation clause.[174] Thus, the existing literature does not address the relationship between limitation and progressive realisation clauses. Also missing from the literature is the discussion of the practice of the African Commission and the African Court on the application of limitation and proportionality to Charter rights in general and to economic, social and cultural rights in particular.

The exceptions to progressive realisation are immediate obligations.[175] These include the obligations to respect, protect, take steps, monitor the realisation of rights, adopt legislation and a plan of action, avoid retrogressive measures, ensure minimum essential levels of each right and ensure the realisation of the rights without discrimination on prohibited grounds.[176] The items in this list are not mutually exclusive. Protecting, monitoring or legislating does not happen without taking steps. Monitoring, remedying, planning can be subsumed under core obligations, as the practice of the CESCR shows. I investigate minimum core obligations and non-discrimination and equality as immediate obligations in line with the emphasis placed on them in practice by CESCR and the African Commission.

When states discharge minimum core obligations, individuals will be able to enjoy a minimum essential level of each right. Thus, minimum core obligations are a category of state obligations to ensure that individuals can obtain goods and services such as food, water, shelter and health care

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[171] Katharine G Young, *Constituting Economic and Social Rights* (OUP 2012) 101-104; NW Orago, 'Limitation of Socio-Economic Rights in the 2010 Kenyan Constitution: A Proposal for the Adoption of a Proportionality Approach in the Judicial Adjudication of Socio-Economic Rights Disputes' (2013) 16/5 *Potchefstroom Electronic Law Journal* 170-219, 178-181.

[172] See Vicki C Jackson & Mark Tushnet (Eds) *Proportionality: New frontiers, new challenges* (CUP 2017); Aharon Barak, *Proportionality: Constitutional Rights and their Limitations* (Doron Kalir tr, CUP 2012); Kai Möller, *The Global Model of Constitutional Rights* (OUP 2012); Matthias Klatt & Moritz Meister, *The Constitutional Structure of Proportionality* (OUP 2012). Grégoire C N Webber, The *Negotiable Constitution: On the Limitation of Rights* (CUP 2009); T Jeremy Gunn, 'Deconstructing Proportionality in Limitations Analysis' (2005)19 *Emory International Law Review* 465 – 498.

[173] See Stephen Gardbaum, 'Positive and Horizontal Rights: Proportionality's Next Frontier or a Bridge Too Far?' in Vicki C Jackson & Mark Tushnet (Eds) *Proportionality: New frontiers, new challenges* (CUP 2017); David Bilchitz, 'Socio-economic rights, economic crisis, and legal doctrine' (2014) 12/3 *International Journal of Constitutional Law* 710–739; Xenophon Contiades and Alkmene Fotiadou 'Social rights in the age of proportionality: Global economic crisis and constitutional litigation' (2012) 10/3 *International Journal of Constitutional Law* 660 – 686; Wouter Vandenhole 'Conflicting economic and social rights: the proportionality plus test' in Eva Brems (ed) *Conflicts between fundamental rights* (Intersentia 2008).

[174] Christof Heyns, 'The African regional human rights system: In need of reform?' (2001) 1/2 *African Human Rights Law Journal* 155 – 174, 160; Christof Heyns, 'The African Regional Human Rights System: The African Charter' (2004) 108 *Penn State Law Review* 679—702, 688; Yeshanew (n 136) 202-204.

[175] General Comment 3, para 2.

[176] Malcolm Langford, 'Substantive Obligations' in Malcolm Langford et al (eds) *The Optional Protocol to the International Covenant on Economic, Social and Cultural Rights: A Commentary* (Pretoria University Law Press 2016) 228.

that are necessary for their survival. No treaty text identifies or requires states to discharge minimum core obligations, yet the concept of minimum core in theory and its application by the CESCR has attracted wide scholarly publications.[177] Some authors argue that the African Commission has adopted the minimum core approach as a model for reviewing measures taken by states to implement economic, social and cultural rights.[178] That is, the African Commission has adopted the position of the CESCR.[179] However, whether there are points of divergence between the practice of the African Commission and that of the CESCR, and the normative implications of such divergence have not been investigated.

Non-discrimination is another immediate obligation of general application. Non-discrimination is applicable to all human rights—unlike progressive realisation and minimum core obligations, whose application is usually limited to economic, social and cultural rights. Human rights treaties usually contain provisions on non-discrimination. The European Social Charter, the ICESCR, the American Convention, and the Protocol of San Salvador prohibit discrimination.[180] Moreover, the American Convention provides for a self-standing right to equality.[181] States should ensure the enjoyment of economic, social and cultural rights without any discrimination on prohibited grounds. States can immediately eliminate *de jure* discrimination.[182] States may be unable to eliminate *de facto* discrimination immediately and achieve substantive equality.[183] Some authors link a substantive conception of equality to economic, social and cultural rights.[184] Some authors link non-discrimination and equality under the African Charter to the indirect enforcement of economic, social and cultural rights.[185] I will provide a comprehensive analysis of the practice of the African Commission and the African Court in relation to non-discrimination and equality, which is missing from the existing literature. Moreover, I will address a substantive conception of equality in relation to the enjoyment of economic, social and cultural rights under the African Charter.

Finally, the obligation to ensure the participation of individuals and groups in the implementation of their economic, social and cultural rights is an important obligation.[186] Participation, particularly the

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[177] See Malcolm Langford et al (eds) *The Optional Protocol to the International Covenant on Economic, Social and Cultural Rights: A Commentary* (PULP 2016); Diane A Desierto, 'ICESCR Minimum Core Obligations and Investment: Recasting the Non-Expropriation Compensation Model during Financial Crises' (2012) 44 *The George Washington International Law Review* 473—520; Manisuli Ssenyonjo, *Economic, Social and Cultural Rights in International Law* (Hart Publishing 2009); Katharine G Young, 'The Minimum Core of Economic and Social Rights: A Concept in Search of Content' (2008) 33 *Yale Journal of International Law* 113-175; David Bilchitz, *Poverty and Fundamental Rights: The Justification and Enforcement of Socio-Economic Rights* (OUP 2007); Audrey Chapman & Sage Russel (Eds) *Core Obligations: Building a Framework for Economic, Social and Cultural Rights* (Intersentia 2002).

[178] Nkongolo (n 167) 501; Yeshanew (n 136) 283-287.

[179] Lillian Chenwi 'Unpacking "progressive realisation", its relation to resources, minimum core and reasonableness, and some methodological considerations for assessing compliance' (2013) 46/3 *De Jure* 742-769, 753.

[180] European Charter, Art 30; European Charter (Revised), Art E; ICESCR, Art 2(2); American Convention, Art 1(1); Protocol of San Salvador, Art 3.

[181] American Convention, Art 24.

[182] Matthew C R Craven, *The International Covenant on Economic, Social and Cultural Rights: A Perspective on its Development* (Clarendon Press 1995) 182.

[183] Craven (n 182) 180.

[184] Sandra Fredman, 'Providing Equality: Substantive Equality and the Positive Duty to Provide' (2005) 21 *South African Journal on Human Rights* 163 – 190, 164-165; Murray Wesson, 'Equality and social rights: an exploration in light of the South African Constitution' (2007) *Public Law* 748—769.

[185] Takele Soboka 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(2) *University of Tasmania Law Review* 142-176, 164; Yeshanew (n 136) 312-314.

[186] CESCR, An evaluation of the obligation to take steps to the "maximum of available resources" under an Optional Protocol to the Covenant: Statement, E/C.12/2007/1, 21 September 2007 para 11.

right to take part in the conduct of public affairs, is a political right usually guaranteed in civil and political rights treaties. The American Convention and the African Charter guarantee this right, as they are civil and political rights treaties. Nevertheless, the European Social Charter, the ICESCR and the Protocol of San Salvador do not provide for the political right to take part in the conduct of public affairs since these treaties purely deal with economic, social and cultural rights.

The participation of individuals and groups in the conduct of public affairs, particularly in elections, has attracted a number of scholarly publications.[187] In relation to economic, social and cultural rights, several such studies find gaps in the participation of the deprived individuals and groups in the process of adjudication.[188] The existing literature does not address a general state obligation to ensure participation. This obligation has been established in the practice of the CESCR and other treaty bodies. In this research, I examine the legal basis and content of the obligation to ensure participation under the African Charter.

## 1.5 Research questions

In this study, I seek to answer five research questions. The first one relates to the concept of progressive realisation. What is the concept of progressive realisation under the African Charter? Progressive realisation is a relatively old human rights concept, but it is new to the African Charter. I will seek to answer this question by investigating the history, justification, meaning and implication of progressive realisation. That is, I will search for answers to a range of sub-questions. First, I will examine the reason for omitting the concept of progressive realisation from the Charter in the first place. This question is particularly intriguing in light of the fact that economic, social and cultural rights treaties adopted before the African Charter expressly incorporate progressive realisation. Second, I will examine why the African Commission has introduced the concept into the African Charter. In fact, the context in which the African Charter was adopted has not remained the same. Changes are inevitable. Are there new developments that justify the introduction of progressive realisation? Third, I will examine the meaning and content of this concept. Does the African Commission give the concept a new meaning? Does it transplant the meaning and content developed by the CESCR? Finally, I will examine whether the introduction of progressive realisation has any consequence for other rights guaranteed in the African Charter.

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[187] See Fabienne Peter, 'The Human Right to Political Participation' (2013) 7/1 *Journal of Ethics & Social Philosophy* 1-16; Abdulqawi A Yusuf, 'The Role That Equal Rights and Self-Determination of Peoples can Play in the Current World Community' in Antonio Cassese (ed), *Realizing Utopia: The Future of International Law* (OUP 2012); Cecile Vandewoude, 'The Rise of Self-Determination versus the Rise of Democracy' (2010) 2/3 *Goettingen Journal of International Law* 981-996; Morris Kiwinda Mbondenyi, 'The right to participate in the government of one's country: An analysis of article 13 of the African Charter on Human and Peoples' Rights in the light of Kenya's 2007 political crisis' (2009) 9/1 *African Human Rights Law Journal* 183-202; Yash Ghai, 'Public Participation, Autonomy and Minorities' in Zelim A Skurbaty (ed), *Beyond a One-Dimensional State: An Emerging Right to Autonomy?* (Martinus Nijhoff Publishers 2005); Thomas M Franck, 'The Emerging Right to Democratic Governance' (1992) 86/1 *The American Journal of International Law* 46-91; Henry J Steiner, 'Political Participation as a Human Right' (1988) 1 *Harvard Human Rights Yearbook* 77-134.

[188] See Daniel M Brinks and Varun Gauri 'The Law's Majestic Equality? The Distributive Impact of Judicializing Social and Economic Rights' (2014) 12/2 *Perspectives on Politics* 375-393; David Landau 'The Reality of Social Rights Enforcement' (2012) 53/1 *Harvard International Law Journal* 189-247; Natalia Angel-Cabo and Domingo Lovera Parmo, 'Latin American Social Constitutionalism: Courts and Popular Participation' in Helena Alviar García, Karl Klare, Lucy A Williams (eds), *Social and Economic Rights in Theory and Practice: Critical Inquiries* (Routledge 2014); Sandra Liebenberg, 'Participatory Approaches to Socio-Economic Rights Adjudication: Tentative Lessons from South African Evictions Law' (2014) 32/4 *Nordic Journal of Human Rights* 312–330; David Landau 'The Reality of Social Rights Enforcement' (2012) 53/1 *Harvard International Law Journal* 189-247; Octavio Luiz Motta Ferraz, 'Harming the Poor through Social Rights Litigation: Lessons from Brazil' (2011) 89 *Texas Law Review* 1643-1668; Virgilio Afonso da Silva and Fernanda Vargas Terrazas, 'Claiming the Right to Health in Brazilian Courts: The Exclusion of the Already Excluded?' (2011) 36/4 *Law & Social Inquiry* 825-853;.

The second research question relates to limitations. The question is this: What are limitations on economic, social and cultural rights under the African Charter? Are limitations different from progressive realisation? This question is relevant in light of the introduction of progressive realisation into the African Charter. The lack of available resources may justify a failure to achieve progressive realisation as well as retrogression (reduction in the level of enjoyment) in exceptional circumstances. In particular, the European Committee regards retrogressive measures as limitations. Thus, the relationship between progressive realisation and limitations is worth investigating. In this regard, I seek to answer this sub-question: What is the relationship between progressive realisation, retrogression and limitations? Moreover, it is useful to address how the African Commission and the African Court analyse limitations under the Charter in general and their application to economic, social and cultural rights. In this regard, I will answer the following sub-questions: what is the practice of the African Commission and the African Court on the development and application of a general limitation clause under the African Charter? Do the Commission and the Court evaluate the proportionality of limitations in relation to economic, social and cultural rights?

The third and fourth research questions relate to exceptions of progressive realisation. The exceptions are immediate obligations, the investigation of which is relevant in view of the dichotomy of obligations employed by the African Commission, despite the text of the African Charter not including such a classification. The Commission provides examples of immediate obligations, which include 'the obligation to take steps, the prohibition of retrogressive steps, minimum core obligations and the obligation to prevent discrimination.'[189] As already noted, I will deal with the obligation to take steps and the prohibition of retrogressive measures in addressing the first and second research questions. The third and fourth research questions relate to minimum core obligations and non-discrimination.

The third research question relates to the concept of minimum core. What are minimum core obligations under the African Charter? The text of the African Charter does not refer to the phrase 'minimum core obligation' or its equivalent, yet the African Commission has declared that economic, social and cultural rights require the implementation of minimum core obligations.[190] The African Court has yet to address this concept. To answer the third research question, I will respond to the following sub-questions: What does the African Commission mean by 'minimum core obligation'? What are the content and characteristics of these obligations?

The fourth research question relates to non-discrimination and equality. The African Charter stipulates a number of provisions on equality and non-discrimination;[191] however, it is not clear how these obligations apply to economic, social and cultural rights. Hence, the fourth research question: What does the obligation to ensure non-discrimination and equality entail for the implementation of economic, social and cultural rights? This research question has the following sub-questions. How does the African Commission and the African Court interpret equality and non-discrimination under the African Charter? Can substantive equality help the implementation of economic, social and cultural rights? What are the circumstances that require temporary special measures to advance these rights? What improvements should be made to the principle of equality/non-discrimination in order to make it more relevant to economic, social and cultural rights under the African Charter?

[189] Nairobi Principles, para 16.
[190] Nairobi Principles, para 17.
[191] African Charter, Arts 2, 3, 18(3), 19 & 28

The last research question relates to the obligation to ensure participation as an important element in the assessment of progressive realisation. Like other treaty bodies, the African Commission and the African Court explain that states have an obligation to ensure the participation of individuals in the implementation of their economic, social and cultural rights. On the other hand, individuals have the political right to participate in government while peoples have the right to self-determination. That is, the relationship between the obligation to ensure participation and the individual right to participate in government or the collective right to self-determination is not clear. This yields the fifth research question: What is the obligation to ensure participation of individuals or groups in the implementation of their economic, social and cultural rights? This research question has the following sub-questions: What is participation under the African Charter? What is the practice of the African Commission/Court in interpreting participation under the Charter? How does the requirement of participation enhance the protection of economic, social and cultural rights?

## 1.6 Methodological approach

In this research, I investigate general state obligations in relation to economic, social and cultural rights guaranteed in the African Charter. To answer the research questions described above, I analyse the text of the African Charter in light of the drafting history and the findings of the African Commission and the African Court. I examine the drafting history of the Charter to answer part of the first research question (why did the drafters omit the concept of progressive realisation from the African Charter?). Apart from this exception, I answer all research questions based on the analysis of the Charter text along with the findings of the African Commission and the African Court. I use field observations and interviews as additional sources of information where necessary.

For the purpose of this research, I use the term 'findings' broadly to include the official documents of any treaty body, whether such body is a judicial or a quasi-judicial organ. Findings of judicial organs include judgments, orders and advisory opinions. Findings of quasi-judicial bodies take different forms and names including comments, conclusions, decisions, declarations, guidelines, observations, opinions, principles, reports, resolutions, rules, and statements. The findings indicate practical application of human rights standards and show the practice of treaty bodies. I do not arrange these findings in any hierarchical order. I look for what the treaty bodies say about the meanings of a certain concept or about a content of a particular right or its corresponding obligation.

### 1.6.1 Findings of the African Commission and the African Court

The African Commission and the African Court publish their findings. The Court's findings include advisory opinions, judgments and orders. The Commission's findings include decisions on individual communications, concluding observations, advisory opinions,[192] and soft law instruments. The Commission's soft law instruments include general comments, declarations, guidelines, model law, principles and resolutions.[193] Conventionally, the term 'soft law' includes non-treaty agreements among states.[194] Such instruments can also be adopted by states through their participation in international organisations. The Commission's soft law instruments do not fall under non-treaty agreements among states, nor were they adopted by an international organisation, by the AU

[192] African Commission adopted only one advisory of opinion, *Advisory Opinion of the African Commission on Human and Peoples' Rights on the United Nations Declaration on the Rights of Indigenous Peoples*, adopted at the 41st Ordinary Session held in Accra, Ghana in May 2007.

[193] African Commission, at <http://www.achpr.org/instruments/> (accessed 26 May 2019).

[194] Hartmut Hillgenberg, 'A Fresh Look at Soft Law' (1999) 10/3 *European Journal of International Law* 499-515, 500.

Assembly, to be specific. Still, the Commission's documents may fall under the non-conventional meaning of soft law employed by some authors. Guzman and Meyer classify decisions of international tribunals among soft law.[195] They define soft law as 'nonbinding rules or instruments that interpret or inform our understanding of binding legal rules or represent promises that in turn create expectations about future conduct.'[196]

The African Charter does not describe the status of the Commission's findings. The Charter does not indicate whether the Commission's findings are binding or not. The African Court Protocol does not specify the status of the African Court's findings either. It is perhaps unnecessary to attach such status to the findings. In any event, the findings do not establish new obligations other than those established by the Charter. The Commission and the Court explain the obligations under the Charter (and other treaties) or determine whether there is a breach of those obligations or not. There is no point in establishing the Commission and the Court or accepting their jurisdiction unless states comply with their findings. In cases of a breach of the African Charter, it should not matter whether the breach is established by the Commission or the Court, because both have the power to do so. Whichever institution establishes the breach, it boils down to the willingness of the respondent state to comply with the decision or remedy the violation.

Despite the textual silence of the two treaties (the African Charter and the African Court Protocol), scholars distinguish the status of the findings of the two institutions. The findings of the Court are considered binding, while the findings of the Commission are not.[197] Writing in 2000, before the establishment of the African Court, Udombana labelled the Commission as a toothless bulldog for its normative and structural deficiencies that centred on 'the non-binding nature of the Commission's decisions.'[198] If this criticism was made with the hope that states would fully comply with the findings of the African Court, the hope has yet to materialise. Full or partial compliance with the Court's findings is an exception rather than the rule. In 2018, the Court reported that only one State (Burkina Faso) fully complied with its judgment.[199] The Court stressed that non-compliance with its findings is one of the major challenges it faced.[200] There is no guarantee that states fully comply with findings considered to be binding. As Murray and Long rightly observe, the debate on the binding/non-binding nature of findings is an unhelpful distraction.[201]

While analysing the findings, therefore, I do not find it necessary to distinguish the normative value of the Commission's findings from that of the Court. Nor do I distinguish the value of different types of findings. I do not attach a different value to the Commission's findings whether such findings were made in relation to individual communications, state reports, or in soft law instruments. I analyse the findings to discover how the African Commission and the African Court explain general state obligations in relation to economic, social and cultural rights in the African Charter.

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[195] Andrew T Guzman & Timothy L Meyer 'International Soft Law' (2010) 2/1 *Journal of Legal Analysis* 171-225, 172.

[196] Guzman & Meyer (n 195) 174.

[197] Viljoen (n 41) 414; Yeshanew (n 136) 150.

[198] Nsongurua J Udombana, 'Toward the African Court on Human and Peoples' Rights: Better Late Than Never' (2000) 3/1 *Yale Human Rights and Development Law Journal* 45-111, 64.

[199] African Court, Activity Report 2018, para 49.

[200] African Court, Activity Report 2018, para 48; Interview with Mr Nouhou Madani Diallo, Deputy Registrar of the African Court (9 March 2018) in Arusha, Tanzania.

[201] Rachel Murray & Debra Long, *The Implementation of the Findings of the African Commission on Human and Peoples' Rights* (CUP 2015) 58.

The findings of the Commission and the Court relate to various issues. Thus, rather than analysing all findings, I have selected those relevant to the research questions described above. From the Commission's soft law documents, I have selected those dealing with economic, social and cultural rights. In fact, the Commission has adopted its major interpretation of these rights in the Nairobi Principles. From the Commission's decisions in individual communications, I have selected cases relevant to general state obligations corresponding to economic, social and cultural rights. The Commission's cases had been reported in the African Human Rights Law Report (AHRLR) until 2011. The cases are also available on the Commission's website although they are not provided in a searchable database. The cases can be filtered by the outcome (eg, whether decided on merits or admissibility) or by respondent states. I have selected cases on economic, social and cultural rights from cases decided on the merits because the research questions do not relate to procedural issues. To filter these cases, I have used economic, social and cultural rights provisions of the African Charter (ie, Articles 14 (right to property), 15 (right to work), 16 (right to health), 17(right to education and culture), and 18(1) (right to protection of family)). Of the 99 cases decided on the merits by March 2020, violations of economic, social and cultural rights had been alleged in 39 cases, which were the subject of my analysis. The Commission found violations in 30 cases. Most of the findings of violations relate to the right to property (Article 14) and the right to protection of the family (Article 18(1)). I also analysed 38 concluding observations available on the Commission's website.

The African Court publishes its findings on its web page. It publishes orders and judgments in contentious cases as well as advisory opinions, but does not organise its judgments and opinions in a searchable database. I excluded cases that did not pass the admissibility or jurisdiction stage of the proceedings. I analysed judgments on the merits. By March 2020, the Court rendered 37 judgments on the merits. Of these, the Court found a violation of economic, social and cultural rights provisions of the African Charter in only two cases.[202] While the Court finalised 12 advisory opinions, none of them relate to substantive rights under the Charter. Thus, my analysis does not include advisory opinions.

### 1.6.2 Interviews and observations

In addition to desk research, I conducted interviews and observations. The purpose of the interviews and observations was to collect data that can be useful to answer the research questions. I conducted two field trips: from 31 October to 14 November 2017, I conducted the first field trip to the seat of the African Commission in Banjul, The Gambia. From 5 to 9 March 2018, I conducted the other field trip to the seat of the African Court on Human and Peoples Rights in Arusha, the United Republic of Tanzania. The main purpose of these field trips was to conduct interviews with commissioners, judges and legal officers of the African Commission and the African Court as well as with experts involved in the Working Group on Economic, Social and Cultural Rights. In addition, the aim of my trip to Banjul was to observe public sessions of the African Commission. I planned the trips to coincide with the sessions of the African Commission and the African Court. The commissioners and judges carry out their function on a part-time basis, as noted above. They are available only during the sessions.

With regard to the selection of interviewees, I used the expertise of the respondents as a criterion. I considered familiarity of the respondents with the work of the African Commission on economic,

[202] *Ogiek* case; *Sébastien Germain Ajavon v Republic of Benin* App No 013/2017 (Judgment of 29 March 2019).

social and cultural rights. Before requesting an interview with a particular person, I conducted a background study to find out who would be able to give me relevant answers to my interview questions. I found out that the Commission's work on economic, social and cultural rights is mostly carried out through its Working Group on Economic, Social and Cultural Rights, which prepared the Nairobi Principles mentioned above. The members of the working group are 14 as already mentioned.[203] In addition, the Secretariat of the Commission assigns one legal officer to assist the working group. My objective was to select as many respondents as possible from the members; however, this was challenging. Based on their availability, I interviewed two commissioners, the acting deputy secretary, two legal officers, and two expert members. In total, I conducted eight interviews in Banjul. The interviews helped me understand how the Commission conducts its business, including who prepares soft law instruments such as the Nairobi Principles, and who drafts the decisions on individual complaints. I also obtained views of the Chairperson of the working group on issues related to my research questions.

Another objective of the field trip to Banjul was to participate in the Commission's 61st Session held from 1 to 15 November 2017. During this session, the Commission celebrated its 30th Anniversary reflecting on its challenges and prospects. My participation in the 30th Anniversary celebration helped me understand how the practice of the Commission has emerged and developed. I attended the public sessions of the Commission and observed the presentation of reports by state representatives and the examination of the same by members of the Commission. The commissioners ask state delegates questions relating to their mandate in special procedures of the Commission. For example, the Chairperson of the Working Group on Economic, Social and Cultural Rights requests state delegates to clarify questions related to the realisation of economic, social and cultural rights in the concerned state party. I also participated in stakeholder consultation on draft guidelines and principles on Articles 21 and 24 of the African Charter. Although Articles 21 and 24 of the African Charter are not the subject of this research, the participation in stakeholders' consultation provided me insight into the process of adopting the Nairobi Principles. Thus, I found the 61st Session very instructive. From my participation in the Commission's public session, I learned about the actual process of state reporting and NGO participation.

The field trip to Arusha took place between 4 March and 11 March 2017 during the 48th ordinary session of the African Court. Unlike the Commission, the Court does not have special mechanisms that work on economic, social and cultural rights. Thus, my plan was to interview at least three judges and four legal officers. As is the case with the African Commission, it was challenging to meet the target. Based on their availability, I managed to interview two judges (including the president of the Court), the registrar and his deputy, the head of the legal division and two other legal officers. In total, I conducted seven interviews in Arusha. I found the interviews helpful in terms of understanding how the Court, particularly the registrar and the head of the legal division distribute the cases among legal officers. Since the Court has not dealt with general state obligations in economic, social and cultural rights cases, I learned how the legal officers and judges will deal with such issues in the future.

[203] African Commission, Resolution on the Reconstitution and Renewal of the Mandate of the Working Group on Economic, Social and Cultural Rights in Africa and Renewal of the Appointment of its Chairperson and Members, ACHPR/Res.391(LXI) 2017; Resolution on Economic, Social and Cultural Rights in Africa, ACHPR/Res.73(XXXVI)04..

### 1.6.3 Insights from the UN, European and Inter-American human rights systems

The African Charter requires the Commission to apply certain principles while monitoring the implementation of the Charter. Article 60 of the Charter requires the African Commission to draw inspiration from international human rights law. The Commission should take into consideration practices, customs, general principles, legal precedents and doctrine according to Article 61 of the Charter. These principles may apply to the African Court. While the Commission's jurisdiction is limited to the Charter and its protocols, the Court's jurisdiction extends to any human rights treaties ratified by respondent states.[204] The African Commission and the African Court usually refer to other human rights treaties and the practice of different treaty bodies. In line with the requirement of the African Charter and the practice of the African Commission and the African Court, I draw on the texts of selected treaties and the practice of treaty bodies supervising those selected treaties. The purpose of drawing on these treaties and the practice relating to them is to provide a background for the investigation of general state obligations in relation to economic, social and cultural rights in the African Charter.

For the purpose of drawing insights, the discussion of all economic, social and cultural rights treaties is not feasible. The African Charter is a general human rights treaty, since it is applicable to all groups. Since I examine general state obligations under a general human rights treaty, I draw on human rights treaties of general application. I excluded treaties dealing with economic, social and cultural rights of a particular group (eg, children, women or persons with disabilities) although I will refer to them when it is necessary to make a particular point. I selected some treaties from three human rights systems. One is global (the United Nation system). The other two are regional (European and Inter-American systems).

From the global human rights system operating under the umbrella of the United Nations, I selected the ICESCR for this purpose. I also draw on the practice of the CESCR. Documents of the CESCR, including general comments, concluding observations and statements, are available from its web page. It is feasible to examine all general comments, decided cases and statements given how few they are, however, it is not feasible to read all concluding observations given their very high number.[205] Instead, I have collected relevant concluding observations from the Universal Human Rights Index.[206] As a searchable database for use by different stakeholders including academics, the Index enables users to perform basic and advanced searches by using filters. I searched the Index for relevant terms, filtering the results using the CESCR, since the organ that issues a document can be used to filter the search results of the Universal Human Rights Index database.

From the European human rights system operating under the aegis of the Council of Europe, I selected the European Social Charter. I examined the European Social Charter along with the practice of the European Committee. Documents of the European Committee are available from the HUDOC database,[207] which is suitable for narrowing down the search results by using different criteria, such

[204] African Court Protocol, Arts 3 & 7.

[205] The number is 479 by 12 May 2018. The data is available at http://tbinternet.ohchr.org/_layouts/treatybodyexternal/TBSearch.aspx?Lang=en&TreatyID=9&DocTypeID=5 accessed 12 May 2018.

[206] The Index is available from the web page of the Office of High Commissioner for Human Rights, at https://uhri.ohchr.org/en (accessed 19 February 2019).

[207] The database is available at <https://hudoc.esc.coe.int/eng#{%22ESCDcType%22:[%22FOND%22,%22Conclusion%22,%22Ob%22]}> (accessed 19 February 2019.

as violated provisions of the European Social Charter and respondent states. I selected cases of the European Committee for analysis by searching relevant terms and filtering the results. Moreover, I used references to a case in another case or in scholarly writings to locate relevant cases.

From the Inter-American human rights system of the Organisation of the American States, I selected the American Convention on Human Rights along with the Protocol of San Salvador. I examined the provisions of these treaties along with the practice of the Inter-American Commission and the Inter-American Court. I located merits reports of the Inter-American Commission and advisory opinions and judgments of the Inter-American Court through secondary sources (ie, books, journal articles etc). I obtained relevant cases and documents cited in secondary sources written in English from the web pages of the Inter-American Commission and the Inter-American Court.

## 1.7 Structure of the research

This research is organised in seven chapters. In the first chapter (present chapter), I introduce the research. I identify the research problem in relation to the existing literature, frame the research questions, explain the research methodology, and provide the structure of the study. I will answer the research questions in five chapters (from chapter two to chapter six). In these chapters, I will first discuss the key concepts (ie, progressive realisation, limitation, minimum core, non-discrimination/equality and participation) by reviewing the literature and examining the practice of the CESCR, the European Committee, the Inter-American Commission and the Inter-American Court. Then I will turn to the investigation of the key concepts under the African Charter and in the practice of the African Commission and the African Court.

In the second chapter, I will investigate the concept of progressive realisation. In particular, I will challenge the conventional meanings of the concept. I will place the omission of the concept from the African Charter in historical context. I will search for the Commission's justification, if any, for importing the concept into the African Charter. I will also examine possible consequences of introducing the concept into the African Charter. In this chapter, I will answer the first research question: What is the concept of progressive realisation under the African Charter?

In the third chapter, I will examine the concept of limitation of rights in general and its applicability to economic, social and cultural rights, as well as the relationship between limitation and progressive realisation. I will then analyse the practice of the African Commission and the African Court and identify requirements to be observed while states impose limitation on rights guaranteed under the African Charter. Additionally, I will examine whether the identified requirements apply to economic, social and cultural rights, ultimately answering the second research question: What are limitations on economic, social and cultural rights under the African Charter?

In the fourth Chapter, I will deal with minimum core obligations, beginning with the definition of the concept of minimum core and responding to critics of the concept. I will then examine the content and characteristics of minimum core obligations. Since the African Commission transplants the concept from the practice of the CESCR, I will identify some modifications the Commission makes to the content and meaning of minimum core obligation while introducing the concept into the African Charter. In this chapter, I will answer the third research question: What are minimum core obligations under the African Charter?

In the fifth chapter, I will examine the immediate obligation to prohibit discrimination in the implementation of economic, social and cultural rights. I will also identify the relationship between the achievement of substantive equality and the realisation of economic, social and cultural rights. I will argue that substantive equality can be achieved by prioritising vulnerable groups, adopting temporary special measures in favour of them, and by modifying social structures impeding the enjoyment of their rights. In this chapter, I will answer the fourth research question: What does the obligation to ensure non-discrimination and equality entail?

In the sixth chapter, I will examine the obligation to ensure the participation of individuals and groups in the implementation of their economic, social and cultural rights. I will discuss provisions of the African Charter related to the participation of individuals and groups, and assess whether these provisions provide the legal basis for the obligation of states to ensure participation by analysing the practice of the African Commission and the African Court. I will also examine whether the African Commission and the African Court have developed criteria for the purpose of evaluating the effectiveness of participation. In this chapter, I will answer the last research question: What is the obligation to ensure participation of individuals and groups in the implementation of their economic, social and cultural rights?

Finally, I will summarise findings of the research in the last chapter. In the summary, I will identify problems with the African Commission's interpretation of the African Charter, and make some suggestions for consideration by both the African Commission and the African Court. I also identify a couple of topics for further research.

# CHAPTER TWO

# PROGRESSIVE REALISATION

## 2.1 Introduction

The concept of 'progressive realisation' usually describes state obligations corresponding to economic, social and cultural rights. Adopted in 1966, the International Covenant on Economic, Social and Cultural Rights (ICESCR)[1] incorporates the concept, implying obligations different from those undertaken by states under the International Covenant on Civil and Political Rights (ICCPR),[2] which does not refer to 'progressive realisation'. Some human rights treaties follow the ICESCR and require progressive realisation when they guarantee economic, social and cultural rights.[3] These treaties, however, do not provide the meaning of the concept.

The concept of progressive realisation refers to a principle that the enjoyment of human rights should advance or improve over time. The pace of advancement depends on the resources available to a particular state because resources are not only scarce but also unevenly distributed. As a result, the rate of advancement in wealthier states is supposed to be faster, but all states should always be advancing whether slowly or rapidly. A slow advancement is unacceptable, however, when a greater achievement is possible, since states should make maximum use of their resources.[4] An advancement or improvement necessarily eliminates the possibility of backsliding or decreasing the exercise of the rights. The Committee on Economic, Social and Cultural Rights (CESCR) has established a presumption against deliberately retrogressive measures,[5] indicating that progressive realisation includes the corollary principle of non-retrogression.[6] The concept of progressive realisation also gives states some flexibility or discretion in the implementation of the rights.[7]

The principle of progressive realisation arises from the scarcity of resources. The principle would have been unnecessary if resources were abundant. The realisation of any right is expensive.[8] It does not matter whether the right in question is civil, cultural, economic, political or social. The realisation of rights depends on available resources. The cost of each right varies; the realisation of some rights requires more resources than that of others. The general assumption is that civil and political rights

[1] International Covenant on Economic, Social and Cultural Rights, GA res. 2200A (XXI), 21 UN GAOR Supp. (No. 16) at 49, UN Doc. A/6316 (1966); 993 UNTS 3, art 2(1).

[2] International Covenant on Civil and Political Rights, GA res. 2200A (XXI), 21 UN GAOR Supp. (No. 16) at 52, UN Doc. A/6316 (1966); 999 UNTS 171.

[3] See Convention on the Rights of Persons with Disabilities, adopted UN Doc.A/61/611, adopted 13 December 2006, entry into force 3 May 2008, 2515 UNTS 3, art 4(2); Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights (Protocol of San Salvador), adopted 17 November 1988, entry into force 16 November 1999, OAS Treaty Series No. 69; 28 ILM 156 (1989), art 1; American Convention on Human Rights, adopted 21 November 1969, entry into force 18 July 1978, OAS Treaty Series No. 36; 1144 UNTS 123; 9 ILM 99 (1969), art 26.

[4] ICESCR, art 2(1).

[5] CESCR, General comment No. 3: The nature of states parties' obligations (1990), para 9.

[6] Aoife Nolan, Nicholas J Lusiani and Christian Courtis 'Two steps forward, no steps back? Evolving criteria on the prohibition of retrogression in economic and social rights' in Aoife Nolan (ed) *Economic and Social Rights After the Global Financial Crisis* (CUP 2014) 123.

[7] Lillian Chenwi 'Unpacking "progressive realisation", its relation to resources, minimum core and reasonableness, and some methodological considerations for assessing compliance' (2013) 46/3 *De Jure* 742-769, 744.

[8] Stephen Holmes & Cass R Sunstein *The Cost of Rights: Why Liberty Depends on Taxes* (WW Norton & Company 1999).

are cheaper than economic, social and cultural rights,[9] however, the application of the principle of progressive realisation is limited to human rights treaties that guarantee economic, social and cultural rights.[10] This limited application of the principle raises several questions: How did the principle evolve in international human rights treaties? Why is the principle included in these treaties? What are the meanings of the principle? Does it have any pitfalls? In the second section, I seek to answer these questions with the purpose of setting a comparative background for the remaining sections of the chapter. The section mainly analyses the ICESCR and the practices of the CESCR. It also draws on the American Convention on Human Rights (American Convention) and the European Social Charter (European Charter) and on the practice of their monitoring bodies.

The African Charter on Human and Peoples' Rights (African Charter or Charter) guarantees some economic, social and cultural rights.[11] The Charter does not contain the principle of progressive realisation, unlike other economic, social and cultural rights treaties, and its drafting history shows that the omission was not an accident. The drafters drew on the ICESCR and the American Convention, which were already in force and contain the principle of progressive realisation.[12] A provision in one of the early drafts of the Charter expressly required progressive realisation of economic, social and cultural rights, but the drafters jettisoned the principle in the end.[13] The African Charter established the African Commission on Human and Peoples' Rights (African Commission or Commission) to interpret the Charter and oversee its implementation.[14] Early practices of the Commission show that it understood the omission of the principle of progressive realisation as requiring immediate implementation of economic, social and cultural rights.[15] Later, the Commission introduced the principle into the interpretation of the Charter. This change of position raises some questions. Why did the drafters of the African Charter omit the principle? What are the processes used by the African Commission to introduce the concept later? I seek to answer these questions in the third section of the chapter. This and the remaining sections of the chapter examine the text of the African Charter and the practice of the African Commission.

The most legally technical argument against economic, social and cultural rights is that they entail vague obligations.[16] That is, the progressive realisation obligation under the ICESCR is not clear. One author described the concept as a 'monster' in international human rights law.[17] The CESCR issued several general comments to provide clarification. However, critics continued asking: 'what does

[9] Mark Tushnet, *Weak Courts, Strong Rights: Judicial Review and Social Welfare Rights in Comparative Constitutional Law* (Princeton University Press 2008) 234.

[10] Eva Brems 'Human Rights: Minimum and Maximum Perspectives' (2009) 9(3) *Human Rights Law Review* 349-372, 365.

[11] African Charter on Human and Peoples' Rights, adopted 27 June 1981 & came into force 21 October 1986, OAU Doc. CAB/LEG/67/3 rev. 5; 1520 UNTS 217; 21 ILM 58 (1982).

[12] Draft African Charter on Human and Peoples' Rights, prepared for the Meeting of Experts in Dakar, Senegal from 28 November to 8 December 1979, by Kéba Mbaye, CAB/LEG/67/1 (hereafter Mbaye's draft), reproduced in C Heyns (ed), *Human rights law in Africa 1999* (2002) 65 – 77, 65.

[13] Mbaye's draft, art 3.

[14] African Charter, arts 30 & 45.

[15] Presentation of the Third Activity Report, by the Chairman of the Commission, Professor U. O. Umozurike to the 26th Session of the Assembly of Heads of state and Government of the OAU (9 - 11 July 1990), reproduced in Rachel Murray & Malcolm Evans (eds) *Documents of the African Commission on Human and Peoples' Rights* (2001) 202 - 203.

[16] Wouter Vandenhole 'Completing the UN complaint mechanisms for human rights violations step by step: Towards a complaints procedure complementing the International Covenant on Economic, Social and Cultural Rights' (2003) 21/3 *Netherlands Quarterly of Human Rights* 423-462, 436.

[17] Gauthier de Beco 'The right to inclusive education according to article 24 of the UN Convention on the Rights of Persons with Disabilities: background, requirements and remaining questions' (2014) 33/2 *Netherlands Quarterly of Human Rights* 263–287, 268.

"progressive realization" mean?'[18] The concept raises the question as to the meaning of economic, social and cultural rights.[19] If progressive realisation has been a subject of criticisms for lacking clarity under the ICESCR, how does the African Commission define it? How are the Commission's definitions similar to or different from those adopted under the ICESCR? Section four deals with the meanings attributed to the concept of progressive realisation under the African Charter.

The African Charter mandates the African Commission and the African Court on Human and Peoples' Rights (African Court) to draw inspiration from international human rights law.[20] While introducing the principle of progressive realisation, the African Commission has drawn inspiration from the ICESCR.[21] From an institutional perspective, the CESCR, the Inter-American Commission on Human Rights (Inter-American Commission) and the Inter-American Court of Human Rights (Inter-American Court) do not need to justify the principle because it is enshrined in their respective treaties.[22] However, the African Charter does not provide the African Commission and the Court with the same treaty text. Thus, a question to be examined in the fifth section relates to the justifications provided for introducing the principle.

The supporters of progressive realisation during the drafting of the ICESCR viewed the principle 'as a necessary accommodation to the vagaries of economic circumstances'.[23] In other words, the principle addresses the economic diversity of states.[24] The CESCR affirmed that the principle is a flexibility device that reflects the realities of the real world.[25] On the other hand, the principle also had opponents even during the drafting of the ICESCR, who objected that it would make the ICESCR provisions a dead letter.[26] The objection did not vanish after the adoption and entry into force of the ICESCR. Unfortunately, the principle has remained one of the main targets of ICESCR critics, who argue that 'for good reason, economic, social, and cultural rights, unlike civil and political rights, have been defined primarily as aspirational goals to be achieved progressively'.[27] They point to the weakness of the progressive obligation 'as evidence of the secondary, non-legal, or non-binding nature of economic, social, and cultural rights'.[28] If the ICESCR is suffering from a defect because of the principle of progressive realisation, the African Charter is a 'healthy' treaty. Then, one wonders, what are the implications of the Commission's interpretation of the African Charter for economic, social and cultural rights and the Charter itself? The sixth section will address this issue by identifying some of the risks of introducing progressive realisation. Finally, the last section closes the chapter with some concluding remarks.

[18] Michael J Dennis & David P Stewart 'Justiciability of Economic, Social, and Cultural Rights: Should There Be an International Complaints Mechanism to Adjudicate the Rights to Food, Water, Housing, and Health?' (2004) *American journal of International Law* 462 – 515, 464.

[19] Aryeh Neier, *The International Human Rights Movement: A History* (Princeton University Press 2012) 107.

[20] African Charter, arts 60 & 61.

[21] Principles and Guidelines on the Implementation of Economic, Social and Cultural Rights in the African Charter on Human and Peoples' Rights (Nairobi Principles), adopted 24 October 2011, .

[22] ICESCR, art 2(1); American Convention, art 26.

[23] Philip Alston & Gerard Quinn, 'The Nature and Scope of states Parties' Obligations under the International Covenant on Economic, Social and Cultural Rights' (1987) *Human Rights Quarterly* 156-229, 175.

[24] Brems, 'maximum and minimum', (n 10) 365.

[25] CESCR, General Comment No 3, para 9.

[26] Alston & Quinn (n 23), 176.

[27] Dennis & Stewart (n 18) 465.

[28] Alston & Quinn (n 23) 175.

## 2.2 Progressive realisation: A general view

This section examines the principle of progressive realisation by comparing the ICESCR, the European Charter and the American Convention along with the practice of their monitoring bodies, the CESCR, the European Committee of Social Rights (European Committee), the Inter-American Commission, and the Inter-American Court. The first subsection locates these treaties on a chronological map showing the incorporation of progressive realisation in international human rights treaties. The second subsection deals with the meaning of the principle of progressive realisation. This part focuses on the practice of the CESCR. It also includes the experience of the Inter-American Commission, Inter-American Court, and the European Committee with regard to non-retrogression where they have dealt with the issue particularly in the context of economic crisis. The third subsection will assess the potential and pitfalls of the principle. The purpose of this section is to provide a background for the discussions on the African Charter that will follow in the remaining sections.

### 2.2.1 A brief history of progressive realisation

The adoption of the ICESCR in the year 1966 marks an important milestone in the history of progressive realisation. Economic, social and cultural rights instruments adopted before the ICESCR do not contain the concept. The American Declaration of the Rights and Duties of Man (American Declaration), which is geographically limited to the Americas, guarantees economic, social and cultural rights.[29] It was adopted on 2 May 1948, making it the world's first general international human rights instrument. As its names implies, the declaration is not a treaty, however, it would be difficult to classify the declaration under non-binding instruments. The Inter-American Court attaches some legal value to it, holding that the declaration is 'a source of international obligations'.[30] Whatever the legal nature and geographical coverage of the declaration, it is worth noting that it recognises economic, social and cultural rights but it does not contain the concept of progressive realisation.

On 10 December 1948, the General Assembly of the United Nations (UN) adopted the Universal Declaration of Human Rights (Universal Declaration).[31] Like the American Declaration, the Universal Declaration is not a treaty. However, it has wider geographical coverage and lays down standards that have global application. The Universal Declaration formulates each right in the same manner as entitlement of individuals, without distinguishing civil and political rights from economic, social and cultural rights.[32] The reference of the General Assembly to 'the draft covenant on human rights,' when it adopted the Declaration but deferred considering a right of petition, indicates the expectation that it was to grow into one binding treaty.[33] The position was confirmed in 1950 when it decided 'to include in the Covenant on Human Rights economic, social and cultural rights', stressing that 'the enjoyment of civic and political freedoms and of economic, social and cultural rights are

[29] Ninth International Conference of American states, Bogotá, Colombia. Reproduced in Theo van Banning et al, *Human Rights Instruments* (University for Peace 2004) 143 – 144.

[30] Inter-American Court of Human Rights, *Interpretation of the American Declaration of the Rights and Duties of Man within the Framework of Article 64 of the American Convention on Human Rights*, Advisory Opinion OC-10/89, 14 July 1989, para 45.

[31] General Assembly Resolution 217 A (III) of 10 December 1948.

[32] Compare, for example, art 3, which provides that '[e]veryone has the right to life', and art 22, which guarantees that '[e]veryone, as a member of society, has the right to social security'. In contrast, compare art 6(1) of the ICCPR, which provides that '[e]very human being has the inherent right to life', and art 9 of the ICESCR, which provides that '[t]he states Parties to the present Covenant recognize the right of everyone to social security'.

[33] Right to Petition, General Assembly Resolution 217 B (III) of 10 December 1948.

interconnected and interdependent'.[34] Unfortunately, the idea of a single treaty did not materialise in the end. Still, it is noteworthy that the Universal Declaration guarantees economic, social and cultural rights but does not contain the concept of progressive realisation. Therefore, it represents a period in history when the guarantee of economic, social and cultural rights was not linked to the concept of progressive realisation.

Adopted on 18 October 1961, the European Social Charter comes next in the chronology of events relevant to economic, social and cultural rights.[35] While this development covers a smaller geographical area, being limited to the region indicated by its name, it represents an important milestone in the history of economic, social and cultural rights in terms of its legal nature. It is a binding treaty. However, the European Charter guarantees social rights only, unlike the Universal Declaration. A separate treaty, the Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights or European Convention), guarantees civil and political rights. The European Charter does not contain an express provision on the concept of progressive realisation, and the revision in 1996[36] did not introduce an express provision either. Khaliq and Churchill argue that 'the rights found in the European Charter are in general not progressive in nature, i.e. they are not to be implemented gradually as a state party's resources and level of development permit, but are of immediate effect'.[37] Lougarre and Cullen assert an opposite view: Lougarre reads the preamble to the European Charter as implicitly recognising 'the principle of progressive realisation',[38] while Cullen argues that the European Committee addresses 'the issue of resources and the progressive realisation of economic and social rights'.[39] Cullen bases her argument on the decision in *Autism Europe v France*, in which the European Committee required states 'to achieve the objectives of the Charter within a reasonable time, with measurable progress and to an extent consistent with the maximum use of available resources'.[40] She cites *Marangopoulos Foundation for Human Rights (MFHR) v Greece*, which restates the holding in *Autism Europe v France*.[41] In *Centre on Housing Rights and Evictions (COHRE) v Italy*, the European Committee held that the 'realisation of the fundamental social rights recognised by the Revised Charter is guided by the principle of progressiveness'.[42]

Like the European Charter, the ICESCR guarantees only one category of rights. Its adoption in 1966 is a crucial turning point in the relationship between the concept of progressive realisation and economic, social and cultural rights because of how it made the obligation of progressive realisation the defining characteristic of each right. The ICESCR contains the principle of progressive realisation

[34] General Assembly Resolution 421 E (VI) of 4 December 1950, Draft International Covenant on Humans Rights and Measures of Implementation: Future Work of the Commission on Human Rights.

[35] European Social Charter (adopted 18 October 1961, entered into force 26 February 1965), European Treaty Series No 35.

[36] European Social Charter (Revised), adopted 3 May 1996, entered into force 1 July 1999, European Treaty Series No 163.

[37] Urfan Khaliq and Robin Churchill 'The European Committee of Social Rights: Putting Flesh on the Bare Bones of the European Social Charter' in Malcolm Langford (ed) *Social Rights Jurisprudence: Emerging Trends in International and Comparative Law* (CUP 2008) 430.

[38] Claire Lougarre 'What Does the Right to Health Mean? The Interpretation of Article 11 of the European Social Charter by the European Committee of Social Rights' (2015) 33/3 *Netherlands Quarterly of Human Rights* 326–354, 343.

[39] Holly Cullen 'The Collective Complaints System of the European Social Charter: Interpretative Methods of the European Committee of Social Rights (2009) 9/1 *Human Rights Law Review* 61—93, 91.

[40] *Autism Europe v France*, Complaint No. 13/2002, Decision on merits adopted on 4 November 2003, para 53.

[41] *Marangopoulos Foundation for Human Rights (MFHR) v Greece*, Complaint No. 30/2005, Decisions on the merits 6 December 2006, para 204.

[42] *Centre on Housing Rights and Evictions (COHRE) v Italy*, Complaint No. 58/2009, Decision on merits adopted on 25 June 2010, para 25.

in Article 2(1), a general provision applicable to every right recognised therein.[43] In contrast, a similar provision under the ICCPR does not make any connection between progressive realisation and civil and political rights.[44]

The evolution of the ICESCR since its adoption is also relevant for the history of progressive realisation. Two developments in particular are notable. One is the establishment of the CESCR in 1985,[45] which has since then been interpreting the principle of progressive realisation in its general comments and other instruments. In 1990, in particular, it explained the principle in its general comment on state obligations.[46] The other development is the adoption and entry into force of the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights (OP-ICESCR).[47] The protocol is weak in several ways;[48] however, it does decouple the concept of progressive realisation from that of justiciability at the global level. The principle of progressive realisation 'goes to the heart of the "justiciability" debate,'[49] and some have even understood the principle to mean non-justiciability.[50] The Optional Protocol disentangles these concepts. It leaves intact the content of the progressive realisation obligation under Article 2(1), but empowers the CESCR to examine complaints alleging violations of rights under the ICESCR, including a failure to ensure their progressive realisation.[51] The protocol has changed the nature of ICESCR rights by creating international justiciability.

The next development took place at a regional level in the Americas in 1969 when the Organisation of American States (OAS) adopted the American Convention in San José. The Convention does not guarantee many economic, social and cultural rights itself, but it requires the progressive realisation of the rights implicitly recognised in the Charter of the OAS.[52] An additional protocol 1988 (Protocol of San Salvador) guarantees economic, social and cultural rights and restates the progressive realisation obligation already incorporated in the American Convention.[53]

In 1981, the Organisation of African Unity (OAU), now the African Union (AU), adopted the African Charter, which guarantees economic, social and cultural rights.[54] The Charter draws on the ICESCR and the American Convention, but departs from these treaties with regard to the principle of progressive realisation because it does not contain the concept. Protocols to the African Charter have expanded substantive rights relating to specific groups, particularly women, older persons and

[43] Art 2(1) provides that: '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 realization of the rights recognized in the present Covenant by all appropriate means, including particularly the adoption of legislative measures'.

[44] ICCPR, art 2.

[45] Economic and Social Council resolution 1985/17 of 28 May 1985, para b.

[46] CESCR, General Comment No. 3.

[47] Adopted 10 December 2008, entry into force 5 May 2013; General Assembly Resolution A/RES/63/117, Doc. A/63/435.

[48] See Arne Vandenbogaerde & Wouter Vandenhole, 'The Optional Protocol to the International Covenant on Economic, Social and Cultural Rights: An *Ex Ante* Assessment of its Effectiveness in Light of the Drafting Process' (2010) 10/2 *Human Rights Law Review* 207 – 237, 232 – 236. They identify seven factors that undermine the potential effectiveness of the protocol.

[49] Dennis & Stewart (n 18) 496.

[50] Vincent O Orlu Nmehielle, *The African human rights system: its laws, practice, and institutions* (Martinus Nijhoff Publishers 2001) 124.

[51] OP-ICESCR, art 1(1).

[52] American Convention, art 26.

[53] Protocol of San Salvador, art 1.

[54] African Charter, arts 14 – 17.

persons with disabilities.[55] Although the protocols contain provisions relating to general state obligations, they do not contain the concept of progressive realisation.[56]

In 1989, the UN General Assembly adopted the Convention on the Rights of the Child (CRC).[57] The CRC guarantees economic, social and cultural rights. In terms of state obligations, the CRC requires states to take measures 'to the maximum extent of their available resources' only in relation to economic, social and cultural rights, distinguishing these rights from civil and political rights.[58] However, unlike the ICESCR, it does not use the qualification of 'progressive realisation'. As Eide and Rosas argue, under the CRC, 'the obligations arise immediately' only qualified by the requirement to use maximum resources.[59] However, the Committee on the Rights of the Child aligned the CRC with the ICESCR in 2003.[60] The Committee stated that the requirement of taking measures to the maximum of states' available resources 'introduces the concept of "progressive realization"' of economic, social and cultural rights into the CRC.[61]

In 1990, the OAU adopted the African Charter on the Rights and Welfare of the Child (African Children's Charter), guaranteeing economic, social and cultural rights of the child.[62] The African Children's Charter reflects the CRC with a few exceptions and modifications that make it more relevant to African realities. Unlike the CRC, the African Children's Charter does not distinguish state obligations that apply to economic, social and cultural rights from those applicable to civil and political rights. In a language reminiscent of the African Charter, it requires states to take necessary steps to 'adopt such legislative or other measures as may be necessary to give effect' to the rights it guarantees.[63] It does not require their progressive realisation in its general obligation provision.[64]

Adopted in 2004,[65] the Arab Charter on Human Rights recognises economic, social and cultural rights as well as civil and political rights.[66] This treaty provides for the same general obligations with regard to all the rights it guarantees,[67] yet does not incorporate the principle of progressive realisation of economic, social and cultural rights.

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[55] Protocol to the African Charter on Human and Peoples' Rights on the Rights of Persons with Disabilities in Africa, adopted 29 January 2018 by the 30th Ordinary Session of the Assembly held in Addis Ababa; Protocol to the African Charter on Human and Peoples' Rights on the Rights of Older Persons in Africa, adopted 31 January 2016 by the 26th Ordinary Session of the Assembly held in Addis Ababa; Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa, adopted 11 July 2003 by the 2nd Ordinary Session of the Assembly held in Maputo, entered into force 25 November 2005 (Maputo Protocol).

[56] Protocol on the Rights of Persons with disabilities, art 4; Protocol on the Rights of Older Persons, art 2, Maputo Protocol, art 2.

[57] Convention on the Rights of the Child, adopted 20 November 1989, entry into force 2 September 1990, GA res 44/25, annex, 44 UN GAOR Supp. (No. 49) at 167, UN Doc A/44/49 (1989); 1577 UNTS 3; 28 ILM 1456 (1989).

[58] CRC, art 4.

[59] Asbjørn Eide & Allan Rosas 'Economic, Social and Cultural Rights: A Universal Challenge' In Asbjørn Eide, Catarina Krause & Allan Rosas (eds), *Economic, Social And Cultural Rights: A Textbook* (Martinus Nijhoff Publishers 2001) 22.

[60] Committee on the Rights of the Child, General comment No. 5: General measures of implementation of the Convention on the Rights of the Child (arts. 4, 42 and 44, para. 6), para 7.

[61] Ibid.

[62] African Charter on the Rights and Welfare of the Child, adopted in Addis Ababa, Ethiopia on 11 July 1990 and entered into force on 29 November 1999, OAU Doc CAB/LEG/24.9/49 (1990).

[63] African Children's Charter, art 1(1).

[64] African Children's Charter, art 1(1).

[65] Adopted by League of Arab states, 22 May 2004, entered into force 15 March 2008.

[66] Mohammed Amin Al-Midani & Mathilde Cabanettes (Trs), Arab Charter on Human Rights (2006) 24 *Boston University International Law Journal* 147 – 164, arts 34 – 42.

[67] Arab Charter, arts 3 & 44.

Adopted in 2006, the Convention on the Rights of Persons with Disabilities (CRPD) represents the latest development in the area of economic, social and cultural rights.[68] The CRPD distinguishes state obligations corresponding to economic, social and cultural rights from those corresponding to civil and political rights.[69] Like the ICESCR, the CRPD requires the progressive realisation of economic, social and cultural rights.[70] This requirement should not affect obligations 'that are immediately applicable according to international law'.[71] Thus, unlike the ICESCR, the CRPD makes the exception that economic, social and cultural rights are subject to immediate obligations under Article 4(2).

In sum, a perusal of human rights treaties that guarantee economic, social and cultural rights in chronological order reveals that the relationship between the concept of progressive realisation and economic, social and cultural rights began in 1966 with the adoption of the ICESCR. This relationship was built on top of the existing treaty-making model adopted by the Council of Europe. The European treaty-making model separates economic, social and cultural rights from civil and political rights. The UN adopted the European model, which evolved in later treaties, particularly in the CRC, CRPD, and the OP-ICESCR. The CRC and CRPD guarantee economic, social and cultural rights as well as civil and political rights in the same treaty. Moreover, the OP-ICESCR makes economic, social and cultural rights under the ICESCR justiciable and thereby clarifies the confusion between progressive realisation and justiciability. The CRPD recognises that the obligation of progressive realisation should not affect immediate obligations. The AU and its predecessor, the OAU, adopted a different model of treaty making. As the African Charter (along with its protocols) and the African Child's Charter show, the African treaty-making model guarantees human rights in the same treaty. The Arab Charter indicates that the Arab League also adopted this model. Treaties that adopt the African model do not contain the concept of progressive realisation. The human rights treaties that contain the concept of progressive realisation do not explain the meaning of the concept, which leads to a need for an examination of the concept's interpretation. The following discussion searches for the meaning of the concept in the practice of the treaty bodies.

### 2.2.2 Meaning of progressive realisation

From the outset, one must concede that progressive realisation does not convey a single, universally accepted meaning and may therefore have several interpretations. On the one hand, the concept is used to strengthen the international accountability of states with regard to the realisation of economic, social and cultural rights. In this sense, it is submitted, the meaning of the concept includes three dimensions. First, progressive realisation implies advancement in the enjoyment of economic, social and cultural rights. Second, the concept implies non-retrogression. Finally, it also implies that states have discretion in the implementation of these rights. These meanings are evident from the explanations of the CESCR, Inter-American Court, Inter-American Commission, and the European Committee as discussed below.[72] On the other hand, progressive realisation has been invoked to undermine economic, social and cultural rights. This aspect of the meaning of progressive realisation will be discussed below among the pitfalls of the principle.

[68] Convention on the Rights of Persons with Disabilities, adopted UN Doc.A/61/611, adopted 13 December 2006, entry into force 3 May 2008, 2515 UNTS 3.
[69] CRPD, art 4(2).
[70] CRPD, art 4(2).
[71] CRPD, art 4(2).
[72] The contribution of the European Committee of Social Rights is limited because the European Social Charter does not contain the principle of progressive realisation.

#### 2.2.2.1 Progressive realisation as advancement in the enjoyment of rights

Progressive realisation refers to the achievement of economic, social and cultural rights over time because the full realization of these rights 'will generally not be able to be achieved in a short period of time'.[73] It refers to the obligation of states to make advancements or improvements in the enjoyment of economic, social and cultural rights,[74] with the goal of attaining full realisation of the rights. As the CESCR emphasises, 'states have an obligation to move as expeditiously and effectively as possible towards the goal'.[75] The goal (i.e. full realisation of the rights) is not something determinate, but rather 'more akin to a horizon line'[76] that recedes into the distance as one tries to reach it. The drafting history of the ICESCR reflects this view. As Alston and Quinn recount, progressive realisation was meant to convey the idea that the ICESCR does not set a final fixed goal to be achieved by states.[77] Rather, it implies that the implementation of these rights 'should be pursued without respite'.[78] To reach the goal, states should advance toward the goal as quickly as possible since they are required to make their move *expeditiously*. Whether a state has made an expeditious move depends on the circumstances of each case. In its assessment, the CESCR takes into account the period in which states take the measures.[79] Nevertheless, it correctly avoids dictating states a fixed period. What matters is whether the time taken or to be taken to achieve the goal is reasonable because states need to adopt measures that may take a short, medium or even long time to achieve.[80] In this regard, the European Committee emphasised in *Autism-Europe v France* that states must take measures to achieve the goals of the European Charter 'within a reasonable time'.[81] The efforts of states to achieve the full realisation of rights must produce results because they are required to make their move as *effectively* as possible. Measures taken must yield fruits. States should achieve 'measurable progress over time'.[82] Without a result, a state cannot claim to have carried out its progressive realisation obligation no matter how speedy its move may be.

The CESCR distinguishes the general principle of progressive realisation from specific immediate obligations that coexist with it. The latter includes the obligation to take steps, monitor the realisation of rights, ensure a minimum essential level of each right and guarantee non-discrimination.[83] The CESCR compares the two Covenants and characterises the obligations under the ICCPR as immediate obligations significantly different from the progressive realisation under the ICESCR.[84] This characterisation does not mean that one is the diametrical opposite of the other.

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[73] CESCR, General Comment 3, para 9.

[74] Manisuli Ssenyonjo, *Economic, Social and Cultural Rights in International Law* (Hart Publishing 2009) 59; Nolan et al (n 6) 123.

[75] CESCR, General Comment 3, para 9.

[76] Brems, 'Minimum and Maximum' (n 10) 355.

[77] Alston & Quinn (n 23) 174.

[78] Alston & Quinn (n 23) 175.

[79] CESCR, An evaluation of the obligation to take steps to the "maximum of available resources" under an Optional Protocol to the Covenant: statement, E/C.12/2007/1, 21 September 2007 para 8.

[80] See *Government of the Republic of South Africa and Others v Grootboom and Others*, Constitutional Court of South Africa, Case CCT 11/00, 4 October 2000, para 43, where Yacoob J required the state to address 'short, medium and long term needs'.

[81] *Autism-Europe v France* Complaint No 13/2002 (European Committee, 4 November 2003) para 53.

[82] Malcolm Langford 'Substantive Obligations' in Malcolm Langford et al (eds) *The Optional Protocol to the International Covenant on Economic, Social and Cultural Rights: A Commentary* (PULP 2016) 228.

[83] CESCR, General Comment 3; Langford considers the obligation to take 'particular steps to meet extra-territorial obligations' an immediate obligation. See Langford (n 82) 228.

[84] CESCR, General Comment 3, para 9.

Rather, as the CESCR itself suggests, progressive realisation is the sum of immediate obligations discharged over time with the effect of advancing the enjoyment of the rights. This view arises from the fact that the obligation 'to take steps' is an immediate obligation and its implementation over time constitutes progressive realisation. The CESCR observed that 'while the full realization of the relevant rights may be achieved progressively, steps towards that goal must be taken within a reasonably short time'.[85]

In defining progressive realisation in the context of housing rights in South Africa, Bilchitz establishes a relationship between progressive realisation and minimum core obligations. He does not maintain a watertight dichotomy between them, as he considers minimum core obligations a component of progressive realisation.[86] He defines progressive realisation as a movement from the realisation of minimum essential levels of rights to their full realisation. [87] Similarly, Chenwi argues that progressive realisation includes 'some immediate (as well as tangible) obligations' such as the obligation to take steps.[88] Bilchitz and Chenwi suggest that some immediate obligations are part of progressive realisation.

The dichotomy between immediate and progressive obligations could be dangerous because the classification of something as a progressive obligation 'might lead a state to believe that it does not need to act in any specific way immediately'.[89] States are always under an obligation to act, as they have an *immediate* obligation to take steps. Put differently, at a particular point in time, states have immediate obligations only. The progressive realisation obligation arises over a certain period. It would be difficult for a state to justify inaction on resource grounds if it adopts and implements a plan of action that sets goals and provides an estimate of available resources.[90] In such case, 'the issue of resource constraints begins to fade'.[91] As the CESCR stressed, '[t]he "availability of resources", although an important qualifier to the obligation to take steps, does not alter the immediacy of the obligation, nor can resource constraints alone justify inaction'.[92]

Indeed, lack of resources is not a defence for a state's inaction; however, the availability of resources does determine the degree of advancement in the enjoyment of economic, social and cultural rights. That is, the principle of progressive realisation reflects the view that most of the rights guaranteed in the ICESCR 'depend in varying degrees on the availability of resources'.[93] During the drafting of the ICESCR, the resource question united supporters of progressive realisation from the developing Global South and the developed Global North. As Whelan and Donnelly recount, the US representative echoed the argument of the Indian delegate that 'their resources and state of economic development did not permit them to implement the economic and social rights at one

[85] CESCR, General Comment 3, para 2.
[86] David Bilchitz *Poverty and Fundamental Rights: The Justification and Enforcement of Socio-Economic Rights* (OUP 2007) 193-194.
[87] Ibid.
[88] Chenwi (n 7) 745.
[89] Malcolm Langford & Jeff A King 'Committee on Economic, Social and Cultural Rights: Past, Present and Future' in Malcolm Langford, *Social Rights Jurisprudence: Emerging Trends in International and Comparative Law* (CUP 2008) 487.
[90] Langford (n 82) 232.
[91] Ibid.
[92] CESCR, statement on Available Resources (n 79), para 4.
[93] Alston & Quinn (n 23) 172.

stroke of the pen'.[94] Article 2(1) of the ICESCR, therefore, reflects resource scarcity in the principle of progressive realisation.

Progressive realisation is shorthand for the phrase 'with a view to achieving progressively the full realization of the rights recognized' used in Article 2(1) of the ICESCR.[95] It is the principal obligation of result dependent on, but different from, the obligation to take steps.[96] The latter is an obligation of conduct, which is of an immediate effect.[97] The requirement that each state party should take steps 'to the maximum of its available resources' supplements this obligation.[98] Alston and Quinn examine the drafting history of the ICESCR and explain that the reference to 'available resources' in this provision is not limited to budgetary appropriations,[99] but to the real resources of a country.[100] Without being exhaustive, Robertson identifies that 'financial, natural, human, technological, and informational resources are the most important resources in achieving ICESCR rights'.[101] To this list, Skogly adds cultural and scientific resources.[102] She finds in the literature a tendency to overemphasise and equate the term 'resources' with 'economic or financial resources' although the ICESCR does not refer to 'maximum of available financial or economic resources'.[103]

The view that 'all economic, social and cultural rights must be provided by the state' is a widespread misunderstanding.[104] It is the responsibility of the individual to satisfy his or her own needs 'through his or her own efforts and by use of own resources'.[105] The resources necessary for the implementation of economic, social and cultural rights do not come entirely from the state.[106] Article 2(1) therefore refers to those resources 'that are available within the society as a whole, from the private sector as well as the public'.[107]

Resources under Article 2(1) are also not limited to those existing within national boundaries. The CESCR emphasises that available resources include 'both the resources existing within a state and those available from the international community through international cooperation and assistance'.[108] The CESCR considers that states have the obligation to seek or provide international assistance and cooperation. It stressed that 'states parties facing considerable difficulties in achieving progressive realization of [economic, social and cultural rights] due to a lack of national resources have an obligation to seek international cooperation and assistance'.[109] They should also avail

[94] Daniel J Whelan & Jack Donnelly 'The West, Economic and Social Rights, and the Global Human Rights Regime: Setting the Record Straight' (2007) 29 *Human Rights Quarterly* 908–949, 934.
[95] CESCR, General Comment 3, para 9.
[96] Ibid.
[97] Ibid para 2.
[98] ICESCR, art 2(1).
[99] Alston & Quinn (n 23) 178.
[100] Ibid.
[101] Robert E. Robertson, 'Measuring state Compliance with the Obligation to Devote the "Maximum Available Resources" to Realizing Economic, Social, and Cultural Rights' (1994) *Human Rights Quarterly* 693 – 714, 697.
[102] Sigrun Skogly 'The Requirement of Using the 'Maximum of Available Resources' for Human Rights Realisation: A Question of Quality as Well as Quantity?' (2012)12/3 *Human Rights Law Review* 393-420, 408 – 409.
[103] Ibid.
[104] Eide & Rosas (n 59) 23.
[105] Ibid.
[106] Audrey Chapman & Sage Russell 'Introduction' in Audrey Chapman & Sage Russell (eds), *Core Obligations: Building A Framework for Economic, Social and Cultural Rights* (Intersentia 2002) 11.
[107] Ibid.
[108] CESCR, General Comment 3, para 13; CESCR, An evaluation of the obligation to take steps to the "maximum of available resources" under an Optional Protocol to the Covenant: statement, E/C.12/2007/1, 21 September 2007, para 5.
[109] CESCR, General Comments No 22, para 50; No 23, para 52.

themselves of the technical assistance and cooperation of the United Nations' specialized agencies when formulating and implementing national strategies with regard to these rights.[110]

While states that lack national resources have the obligation to seek, developed states have the obligation to provide international assistance and cooperation. The CESCR stressed that:

> [I]nternational cooperation for development and thus for the realization of economic, social and cultural rights […] is an obligation of states parties, especially of those states that are in a position to provide assistance. This obligation is in accordance with Articles 55 and 56 of the Charter of the United Nations, as well as articles 2, paragraph 1, and articles 15 and 23 of the [ICESCR].[111]

When developing states make a request for an assistance, developed states 'must respond to such requests in good faith and in accordance with the international commitment of contributing at a minimum 0.7 per cent of their gross national income for international cooperation and assistance'.[112] The CESCR's position on the legal nature of this obligation is unequivocal. Its source is international law, as its reference to the United Nations Charter indicates. However, it is important to note that some states were reluctant to accept international assistance and cooperation as a legal concept during the drafting of the OP-ICESCR.[113]

The pace of progressive realisation varies from one state to another depending on the quality as well as quantity of their available resources.[114] In its monitoring process, the CESCR distinguishes the inability from the unwillingness of a state party to comply with its obligations.[115] Empirical data shows that states with a similar level of resources may have different levels of achievement in the realisation of economic, social and cultural rights.[116] The unwillingness may be indicated by a failure to allocate resources or a failure to make proper use of the allocated resources. Article 2(1) requires states to allocate the highest possible amount of resources for the realisation of economic, social and cultural rights. In principle, the allocation of maximum available resources does not require states to use all resources at their disposal. However, when there is a failure to satisfy minimum core obligations corresponding to a right, states should be able to prove that they have made efforts 'to use all resources' at their disposal as a matter of priority.[117]

The unwillingness of a state may also manifest when that state fails to ensure the maximum utilisation of allocated resources. A proper utilisation of resources is as important as their allocation because factors such as corruption and improper spending undermine the efficiency of human rights implementation.[118] Putting available resources to full use is necessary. The CESCR does also monitor

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[110] CESCR, General Comments No 14, para 63; No 15, para 47; No 18, para 53; No 19 para 41 & 68; No 23, para 68.

[111] CESCR, General Comment No 21, para 58. See CESCR, General Comment No 22, para 50.

[112] CESCR, General Comment No 22, para 50. See CESCR, *statement in the context of the Rio+20 Conference on "the green economy in the context of sustainable development and poverty eradication*," E/C.12/2012/1, 4 June 2012, para 6(a); CESCR, *statement on the importance and relevance of the right to development*, E/C.12/2011/2, 12 July 2011, para 6.

[113] Fons Coomans, 'The Extraterritorial Scope of the International Covenant on Economic, Social and Cultural Rights in the Work of the United Nations Committee on Economic, Social and Cultural Rights' (2011) 11/1 *Human Rights Law Review* 1 – 35, 34 – 35; Magdalena Sepulveda, 'Obligations of "International Assistance and Cooperation" in an Optional Protocol to the International Covenant on Economic, Social and Cultural Rights' (2006) 24/2 *Netherlands Quarterly of Human Rights* 271 – 303, 273.

[114] See Skogly (n 102).

[115] CESCR, General Comments No 12, para 17; No 14, para 47; No 15, para 41; No 17, para 41; No 18, para 32.

[116] Sakiko Fukuda-Parr, Terra Lawson-Remer & Susan Randolph, *Fulfilling Social and Economic Rights* (OUP 2015) 121; Abby Kendrick, 'Measuring Compliance: Social Rights and the Maximum Available Resources Dilemma' (2017) 39/3 *Human Rights Quarterly* 657 – 679, 669.

[117] CESCR, General Comments No 3, para 10; No 19, para 60; No 21, para 6.

[118] Eitan Felner, 'Closing the 'Escape Hatch': A Toolkit to Monitor the Progressive Realization of Economic, Social, and Cultural Rights' (2009) 1/3 *Journal of Human Rights Practice* 402 – 435, 414.

this aspect, albeit mostly in an indirect way. For example, it requires states to make 'full use of the maximum available resources' before they take retrogressive measures.[119] Here it focuses on utilisation rather than allocation. In its statement on available resources, the CESCR has also made a similar indication. In examining 'a communication concerning an alleged failure of a state party to take steps to the maximum of available resources,' it considers 'whether the state party adopted the option that least restricts' the rights under the ICESCR from a range of several policy options.[120] Indirectly, this means that states should adopt measures that best enhance the enjoyment of rights. Its emphasis on low-cost measures can be another indication of its focus on how the allocated resources should be used.[121]

Unfortunately, in some instances the CESCR appears to shy away from monitoring resource allocation and utilisation. With regard to the right to social security, for example, it observed: 'In accordance with article 2(1), states parties to the Covenant must take effective measures, and periodically revise them when necessary, *within* their maximum available resources, to fully realize the right'.[122] It made a similar observation with regard to some other rights.[123] This approach has an implication for its supervision. The CESCR departs from the language of the ICESCR, which requires each state party to take steps 'to the maximum of its available resources'.[124] In so doing, it obliterates one of the requirements under the ICESCR. To illustrate, any use of resources logically falls somewhere on a continuum that ranges from the worst use to the best use. Similarly, any resource allocation ranges from none to maximum. Any amount of resource allocation or any degree of resource utilisation always falls within the maximum of available resources. Unless the CESCR requires states to make the best use of their resources or to make the highest possible allocation for the realisation of the rights under the ICESCR, it is not necessary to state that measures should be taken within available resources. The purpose of the CESCR is not to monitor whether states exceed their available resources in the implementation of the rights under the ICESCR. Therefore, the requirement of taking steps *within the maximum of available resources* lowers the standard set in the ICESCR.

#### 2.2.2.2 Progressive realisation as non-retrogression in the enjoyment of rights

Human rights conditions in a given state may take three directions over time: they may improve, remain the same, or even worse, decline. The improvement in the enjoyment of human rights over time is progressive realisation. On the other hand, if the enjoyment of the rights remains the same over time, there is no progressive realisation. Nor there is a progressive realisation when the enjoyment of the rights declines. In this respect, progressive realisation may mean non-retrogression. This is a necessary implication of the obligation to make improvement or advancement. The meaning of non-retrogression and the criteria for evaluating the appropriateness of retrogressive measures are discussed below.

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[119] CESCR, General Comment No 3, para 9. See General Comments No 13, para 45; No 14, para 32; No 15, para 19; No 16, para 42; No 17, para 27; No 18, para 21; No 19, para 42; No 21, paras 46 & 65.

[120] CESCR, statement on Available Resources (n 79), para 8(d).

[121] Ibid para 13(c).

[122] CESCR, General Comment 19, para 4. Italics added.

[123] CESCR, General Comments No 17, para 46; No 21, para 60; No 22, para 61; No 23, para 77. Regarding the right to just and favourable conditions of work, it observed that: 'states parties must demonstrate that they have taken all steps necessary towards the realization of the right *within* their maximum available resources'. Italics added.

[124] ICESCR, art 2(1). Italics added.

**i) Meaning of non-retrogression**

Retrogression is the decline in the enjoyment of economic, social and cultural rights. The concept 'involves two dimensions: normative and empirical'.[125] Empirical retrogression is concerned with de facto 'backsliding in the effective enjoyment of the rights,'[126] resulting from natural events or other occurrences over which a state has no control. For example, natural calamities such as flood or earthquake may destroy several factories. Obviously, the destruction of factories results in loss of jobs, leading to reduction in the enjoyment of the right to work. The actions or omissions of a state may also cause empirical retrogression. An omission can be a state's failure to regulate non-state actors such as corporations. Such omission may lead to unlawful dismissals of workers, which in turn results in a reduced enjoyment of the right to work. The acts of a state such as promulgation of a law may reduce the enjoyment of economic, social and cultural rights. That is, an empirical retrogression may result from a normative retrogression, which 'concerns steps backwards in terms of legal, de jure guarantees'.[127] For instance, a state may repeal an existing law prohibiting forced labour.[128] However, normative retrogression does not always result in empirical retrogression. For example, if no employer actually practices forced labour despite the repeal of the law, actual reduction in the enjoyment of the right to work would not happen.

Progressive realisation, therefore, implies non-retrogression in the enjoyment of economic, social and cultural rights. The principle of non-retrogression is a corollary principle of progressive realisation.[129] In defining progressive realisation under Article 2(1) of the ICESCR, the CESCR stressed that 'any deliberately retrogressive measures' can only be adopted with the most careful consideration.[130] Such measure can only be justified on two grounds: when it increases the overall enjoyment of the rights provided in the ICESCR; and when a state party has no resources after making the full use of its maximum available resources.[131] The CESCR includes this requirement in most of its general comments adopted since 1999.[132]

The Inter-American Commission on Human Rights and the Inter-American Court of Human Rights have adopted the same view while interpreting Article 26 of the American Convention, which is similar to Article 2(1) of the ICESCR. In *National Association of Ex-Employees of the Peruvian Social Security Institute et al v Peru*, the Inter-American Commission relied on the practice of the CESCR and held that:

> [T]he nature of the obligations derived from article 26 of the American Convention means that total effectiveness of such rights must be achieved progressively and in attention to the available resources. This means a correlative obligation not to back down in the advances achieved in this matter. That is the non regressive obligation developed by other international [treaty bodies].[133]

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[125] Nolan et al (n 6) 123.

[126] Ibid.

[127] Nolan et al (n 6) 123.

[128] CESCR, General comment No. 18: The Right to Work, E/C.12/GC/18, 6 February 2006, para 34.

[129] Ibid.

[130] CESCR, General Comment 3, para 9.

[131] Ibid.

[132] CESCR, General Comments No 13, para 45; No 14, para 32; No 15, para 19; No 16, para 42; No 17, para 27; No 18, para 21; No 19, para 42; No 21, paras 46 & 65.

[133] *National Association of Ex-Employees of the Peruvian Social Security Institute et al v Peru*, Case 12.670, Report No. 38/09, Admissibility and Merits of 27 March 2009, para 139, Inter-American Commission on Human Rights. Note that the Inter-American Commission uses a different term: 'non regressive' measure.

The Inter-American Commission shows that progressive realisation and non-retrogression are two sides of the same coin despite the different terminology.[134] If there is retrogression in the enjoyment of economic, social and cultural rights, *a priori*, there is no progressive realisation. In *Acevedo Buendía et al v Peru,* the Inter-American Court of Human Rights adopts the same view based on the practice of the CESCR and the Inter-American Commission.[135] It held that 'there is a duty – though conditioned – of not adopting retrogressive steps'.[136]

The European Committee invoked the principle of non-retrogression with respect to the right to social security, which requires states 'to endeavour to raise progressively the system of social security to a higher level'.[137] In *GENOP-DEI and ADEDY v Greece*, the Committee examined, among other things, the effects of measures taken in response to an economic crisis.[138] The Committee recognised that 'it may be necessary to introduce measures to consolidate public finances in times of economic crisis.' However, the Committee subjected such measures to two limits – sufficiency and inclusion – holding that 'any changes to a social security system must maintain in place a sufficiently extensive system of compulsory social security and refrain from excluding entire categories of worker from the social protection offered by this system'.[139] The Committee concluded that 'financial consolidation measures which fail to respect these limits constitute retrogressive steps which cannot be deemed to be in conformity with [the Charter]'.[140]

As to what constitutes a retrogressive measure, the practice of human rights treaty bodies do not provide a clear direction. The CESCR occasionally mentions that it considers state conduct to be retrogressive. In a couple of general comments, the CESCR lists some state conducts as examples of retrogressive measures,[141] most of which are legislative measures, as they relate to the promulgation of new laws or the abrogation of existing ones. For example, enacting laws that permit forced labour or repealing laws that provide protection against unlawful dismissal constitutes a retrogressive measure with regard to the right to work.[142] Also, enacting laws that revoke 'public health funding for sexual and reproductive health services' or passing laws that criminalise 'certain sexual and reproductive health conduct and decisions' amounts to taking retrogressive measures.[143] The bones of contention in the regional systems are also legislative measures decreasing the enjoyment of rights, particularly the right to social security. The European Committee found that a Greek law constitutes a retrogressive step for reducing the number of individuals who have access to a social security system.[144] Peruvian laws came under the spotlight before the Inter-American Commission on Human Rights and the Inter-American Court of Human Rights for decreasing the amount of pension payments.[145]

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[134] Note that the Inter-American Commission uses a different term: 'regressive' measure instead of 'retrogressive' measure.
[135] *Case of Acevedo Buendía et al ("Discharged and Retired Employees of the Comptroller") v Perú*, Judgment of 1 July 2009, Inter-American Court of Human Rights.
[136] Ibid para 103.
[137] European Social Charter (1961, 1996), art 12(3).
[138] *General Federation of Employees of the National Electric Power Corporation (GENOP-DEI) and Confederation of Greek Civil Servants' Trade Unions (ADEDY) v Greece*, Complaint No. 66/2011, Decision on the Merits of 23 May 2012, para 47.
[139] Ibid.
[140] Ibid.
[141] CESCR, General Comment 18, para 34; General Comment 22, para 38.
[142] CESCR, General Comment 18, para 34.
[143] CESCR, General Comment 22, para 38.
[144] *GENOP-DEI & ADEDY v Greece.*
[145] *National Association of Ex-Employees of the Peruvian Social Security Institute et al v Peru; Acevedo Buendía et al v Peru*.

The CESCR also lists retrogressive measures that at first glance do not appear to require the enactment or repeal of laws. For example, 'the removal of sexual and reproductive health medications from national drug registries' and 'the imposition of barriers to information, goods and services relating to sexual and reproductive health' are considered retrogressive measures.[146] A reduction or removal of subsidies also constitutes a retrogressive measure. In its concluding observations on Egypt, the CESCR was 'concerned that retrogressive measures, such as the reduction or removal of subsidies' affect the enjoyment of the right to food and called upon the state party to 'undertake immediate measures to address the retrogression in the right to adequate food'.[147] Even these measures cannot be dissociated from the enactment or repeal of laws. For example, laws may be enacted to place certain medications on national drug registries while repeal of the same laws results in their removal from the registries. For the same reason, subsidies on food supply may have been authorised by a legislative enactment.

The CESCR distinguishes between violations resulting from an omission and those arising from an act of commission.[148] It usually considers that retrogressive measures are a violation resulting from acts of commission.[149] The CESCR also distinguishes three levels or types of state obligations: duties to respect, to protect and to fulfil. Retrogressive measures can affect these levels of obligations. In the general comment on the right to work (Article 6 of the ICESCR), retrogressive measures are tantamount to a failure to carry out the duty to respect.[150] In the general comment on the right to sexual and reproductive health (Article 12 of the ICESCR), retrogressive measures are not clearly linked to the duty to respect.[151] However, the same conducts are regarded as retrogressive measures and as a failure to discharge the duty to respect. For example, 'enacting laws criminalizing certain sexual and reproductive health conduct and decisions' is a retrogressive measure.[152] The same legislative measure is considered contrary to the duty to respect.[153] In some other general comments, the CESCR limits itself to stating that retrogressive measures constitute a violation of the rights guaranteed under the ICESCR.[154]

Langford and King indicate that the duty to respect is related to the individual or discriminatory aspect of the violation, while 'non-retrogression refers to collective changes that affect all persons'—suggesting a nuanced distinction between them.[155] The collective changes caused by a retrogressive measure need not affect all persons in a particular state, for they can still be collective even if they affect only a certain sector of society. For example, in *GENOP-DEI and ADEDY v Greece,* the impugned measure affected specifically young workers, not even all

[146] CESCR, General Comment 22, para 38.
[147] CESCR, Concluding observations on the combined second to fourth periodic reports of Egypt, E/C.12/EGY/CO/2-4 (13 December 2013), para 18.
[148] See General Comments No 13, para 58; No 14, para 48-49; No 15, para 42-43; No 18, para 32; No 19, para 64-65; No 22, para 54-55; No 23, para 78-79; Responsibility of states for Internationally Wrongful Acts (2001), art 2. See Malcolm N. Shaw *International Law* (CUP 2008) 781-782.
[149] See General Comments No 14, para 48; No 15, para 42; No 17, para 42; No 19, para 64; No 23, para 78.
[150] CESCR, General Comment 18, para 34.
[151] CESCR, General Comment 22.
[152] CESCR, General Comment 22, para 38.
[153] CESCR, General Comment 22, para 57.
[154] See General Comments No 14, para 48; No 15, para 42; No 16, para 42; No 17, para 42; No 19, para 64; No 21, para 65; No 22, para 54-55; No 23, para 78.
[155] Langford & King (n 89) 485.

workers.[156] However, the CESCR does not distinguish an individual aspect from a collective aspect of a violation when it deals with the duty to respect. For example, it has explained that legislative measures can violate the duty to respect,[157] and as such, usually have a collective application since laws are not made for one individual.

Retrogressive measures relate to the duty to protect indirectly. A failure to regulate non-state actors that interfere with the enjoyment of rights is a violation of the duty to protect, while repealing laws that protect individuals against private actors is a retrogressive measure contrary to the duty to respect. For example, a failure to promulgate laws that regulate the dismissal of workers is a violation of the duty to protect while abrogation of laws that protect individuals against unlawful dismissal amounts to a retrogressive measure in violation of the duty to respect.[158] A similar example can be given with regard to the duty to fulfil. States should provide food to individuals who lose their crops due to natural disasters such as an earthquake, drought and flood.[159] The failure to provide food during such emergencies may amount to a violation of the duty to fulfil, but interrupting provision of foodstuff during such period could be retrogressive measures violating the duty to respect.

The obligation of non-retrogression is a conditional obligation, as it suffers from an exception. That is, the presumption against retrogressive measures is rebuttable, as there is no absolute prohibition of such measures. The CESCR does not completely bar retrogression. It requires justification for only 'deliberately' retrogressive measures.[160] Commentators suggest that non-retrogression is not always good. Drawing on national experiences, Landau argues that the principle 'may have dangerous and counterproductive effects' because instead of affecting the poor, it usually affects the middle and upper classes in the form of salary or pension cuts.[161] The prohibition of retrogressive measures, therefore, 'may prevent or slow necessary structural reforms'.[162] In other words, 'a prohibition against retrogressive measures may leave the non-enjoyment of economic and social rights by the poor undisturbed' and retain the status quo.[163]

The CESCR permits even 'deliberately retrogressive measures' on two conditions.[164] First, it is permissible when such a measure increases the total enjoyment of economic, social and cultural rights.[165] The rise in the sum of rights-holders may indicate the total increase in the enjoyment of the rights. This understanding dispels the concern that non-retrogression may be dangerous. Thus, a retrogressive measure (e.g. decreasing the pension or salary of middle and upper class) is permissible if it increases the enjoyment of the rights by the masses. Second, a retrogressive measure is permissible when a state party faces resource constraints despite maximum use of its available resources.[166] To assess compliance with this requirement, the CESCR adopted some criteria.[167]

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[156] *GENOP-DEI & ADEDY v Greece*, para 48.
[157] CESCR, General Comment 22, paras 56 – 58.
[158] CESCR, General Comment 18, paras 34-35.
[159] CESCR, General Comment 12, para 15.
[160] CESCR, General Comment 3, para 9.
[161] David Landau, 'The Reality of Social Rights Enforcement' (2012) 53/1 *Harvard International Law journal* 189 – 247, 238.
[162] Ibid.
[163] Katharine G Young, *Constituting Economic and Social Rights* (OUP 2012) 104 – 105.
[164] CESCR, General Comment 3, para 9.
[165] Ibid.
[166] Ibid.
[167] CESCR, statement on Available Resources (n 79) para 10.

Therefore, the CESCR does not prohibit retrogressive measures. It rather examines them with heightened scrutiny.[168] For making such scrutiny, it has developed some criteria discussed below.[169]

The Inter-American system also recognises the exceptions to the prohibition of retrogressive measures. The Inter-American Commission held that not every retrogressive measure is incompatible with Article 26 of the American Convention.[170] Strong reasons can justify taking retrogressive measures.[171] In examining a claim by Peruvian pensioners concerning a reduction of pensions, it found that the retrogressive measures were compatible with the American Convention. Its reasons are that 'the reduction affected a reduced number of pensioners with the aim of improving the conditions of the exercise of the right by the rest of the beneficiaries'.[172] This resonates with the CESCR's view that retrogressive measures are permissible if they increase the totality of the rights guaranteed under the ICESCR.

Similarly, the European Committee recognises conditions under which retrogressive steps are permissible with regard to the right to social security, permitting such measures when they 'maintain in place a sufficiently extensive system of compulsory social security and refrain from excluding entire categories of worker from the social protection offered by this system'.[173] It found that a Greek law which has the practical effect of excluding young workers from the social security system is incompatible with the state obligation to 'endeavour to raise progressively the system of social security to a higher level' under Article 12(3) of the European Charter.[174]

**ii) Criteria for reviewing retrogression**

The CESCR has been developing some criteria for evaluating retrogressive measures. These criteria have evolved tremendously over time. In 1990, when the CESCR developed the principle of non-retrogression as a logical implication of the principle of progressive realisation, it did not lay down detailed criteria for reviewing retrogressive measures.[175] Resource constraints are one of the conditions for which retrogressive measures are permissible, as noted above.[176] In 2007, the drafting of the OP-ICESCR prompted the CESCR to issue a statement on available resource.[177] The Statement outlined seven objective criteria for evaluating retrogressive measures taken due to resource constraints.[178] These criteria include consideration of factors such as economic recession, armed

[168] Langford (n 82) 240.

[169] statement by the Committee on Economic, Social and Cultural Rights, Public debt, austerity measures and the International Covenant on Economic, Social and Cultural Rights, E/C.12/2016/1, 22 July 2016, para 4.

[170] *National Association of Ex-Employees of the Peruvian Social Security Institute et al v Peru*, para 140.

[171] Ibid para 141.

[172] Ibid para 143.

[173] *GENOP-DEI & ADEDY v Greece*, para 47.

[174] Ibid para 47-49.

[175] CESCR, General Comment 3, para 9.

[176] CESCR, General Comment 3, para 9.

[177] CESCR, statement on Available Resources (n 79).

[178] Ibid para 10: 'Should a state party use "resource constraints" as an explanation for any retrogressive steps taken, the Committee would consider such information on a country-by-country basis in the light of objective criteria such as: (a) The country's level of development; (b) The severity of the alleged breach, in particular whether the situation concerned the enjoyment of the minimum core content of the Covenant; (c) The country's current economic situation, in particular whether the country was undergoing a period of economic recession; (d) The existence of other serious claims on the state party's limited resources; for example, resulting from a recent natural disaster or from recent internal or international armed conflict. (e) Whether the state party had sought to identify low-cost options; and (f) Whether the state party had sought cooperation and assistance or rejected offers of resources from the international community for the purposes of implementing the provisions of the Covenant without sufficient reason'.

conflicts and natural disasters.[179] It is clear from the 2007 statement that these criteria do not apply to the other condition (i.e. increasing the total enjoyment of rights).

In 2008, the CESCR identified criteria for assessing retrogressive measures in the general comment on the right to social security.[180] No such criteria were included in the general comments adopted hitherto. These criteria are significantly different from those adopted a few months earlier in the 2007 statement apart from the requirement of compliance with the minimum core content.[181] The CESCR does not limit the 2008 criteria to retrogressive measures adopted due to resource constraints. Thus, the criteria apply to all retrogressive measures as far as they affect the right to social security. Later, the CESCR reproduced the 2008 criteria in its statement on austerity measures adopted in 2016.[182] Thus, the 2008 criteria form part of the 2016 criteria as discussed below.

In 2012, the Chairperson of the CESCR sent an open letter to the state parties.[183] The letter called upon states to refrain from taking measures that infringe upon economic, social and cultural rights during the financial crisis. In this letter, the chairperson emphasised that: 'Economic and financial crises and a lack of growth impede the progressive realization of economic, social and cultural rights and can lead to regression in the enjoyment of those rights'. The letter acknowledges that some adjustments are inevitable during an economic and financial crisis. It lays down criteria for evaluating the appropriateness of retrogressive measures, adjustment policies, to borrow the terms used in the letter.[184]

In 2016, the CESCR adopted some instruments relevant to retrogressive measures. Notable among them are two general comments (No. 22 and No. 23) and a statement on public debt and austerity measures. While all of these instruments deal with criteria used to assess retrogressive measures, they do not provide an identical list. Under General Comment 22, states have the burden of proving the necessity of retrogressive measures.[185] states are required to ensure that retrogressive measures 'are only temporary, do not disproportionately affect disadvantaged and marginalized individuals and groups, and are not applied in an otherwise discriminatory manner'.[186] General Comment 23 refers

[179] Statement on Available Resources (n 79), para 10 (c) & (d). Some of these factors are associated with a state of emergency and derogation from rights under the ICCPR. Compare ICCPR, art 4 & Human Rights Committee's General Comment No. 29 states of Emergency (Article 4), CCPR/C/21/Rev.1/Add.11, 31 August 2001, paras 3 – 5.

[180] CESCR, General Comment 19, para 42, provides that: 'The Committee will look carefully at whether: (a) there was reasonable justification for the action; (b) alternatives were comprehensively examined; (c) there was genuine participation of affected groups in examining the proposed measures and alternatives; (d) the measures were directly or indirectly discriminatory; (e) the measures will have a sustained impact on the realization of the right to social security, an unreasonable impact on acquired social security rights or whether an individual or group is deprived of access to the minimum essential level of social security; and (f) whether there was an independent review of the measures at the national level'.

[181] cf Statement on Available Resources (n 79), para 10 (b) & General Comment 19, para 42(e).

[182] CESCR, Statement on Public Debt (n 169) para 4.

[183] Letter dated 16 May 2012 addressed by the Chairperson of the Committee on Economic, Social and Cultural Rights (Ariranga G. Pillay) to states parties to the International Covenant on Economic, Social and Cultural Rights.

[184] Ibid. The letter provides that 'any proposed policy change or adjustment has to meet the following requirements: First, the policy must be a temporary measure covering only the period of crisis. Second, the policy must be necessary and proportionate, in the sense that the adoption of any other policy, or a failure to act, would be more detrimental to economic, social and cultural rights. Third, the policy must not be discriminatory and must comprise all possible measures, including tax measures, to support social transfers to mitigate inequalities that can grow in times of crisis and to ensure that the rights of the disadvantaged and marginalized individuals and groups are not disproportionately affected. Fourth, the policy must identify the minimum core content of rights or a social protection floor, as developed by the International Labour Organization, and ensure the protection of this core content at all times'.

[185] CESCR, General Comment 22, para 38.

[186] Ibid.

to the 2012 Chairperson's Letter and provides that when a state party introduces retrogressive measures, 'it has to demonstrate that such measures are temporary, necessary and non-discriminatory, and that they respect at least its core obligations'.[187]

With some modifications to the criteria contained in the 2012 Letter, the CESCR reaffirmed these criteria in July 2016:[188]

> If the adoption of retrogressive measures is unavoidable, such measures should be necessary and proportionate [...]. They should remain in place only in so far as they are necessary; they should not result in discrimination; they should mitigate inequalities that can grow in times of crisis and ensure that the rights of disadvantaged and marginalized individuals and groups are not disproportionately affected; and they should not affect the minimum core content of the rights protected under the Covenant.[189]

One of the modifications concerns the duration of retrogressive measures. The 2012 criteria require that retrogressive measures should be temporary and that they should be limited to the period of the crisis.[190] In contrast, the 2016 statement does not limit retrogressive measures to the period of crisis. It does not use the word 'temporary'; it requires that retrogressive measures 'should remain in place only in so far as they are necessary'. Thus, states can extend retrogressive measures beyond the period of crisis.[191]

The 2016 statement dropped the emphasis on the range of measures to be adopted. The 2012 Letter requires that the measures to be adopted 'must comprise all possible measures'. In other words, the measures should be as comprehensive as possible. It also provides tax measures as one of the examples of measures to be taken. However, the 2016 statement omits two requirements: a) policies adopted during period of economic recession should be comprehensive; and b) states must take tax measures. That is, the 2016 Statement gives states more discretion than the 2012 Letter does.

Finally, the 2016 statement eliminated some requirements with regard to the minimum core content of a right. The 2012 Letter requires that retrogressive measures should identify the minimum core content of a right or social protection floor, which should be identified by reference to the work of the International Labour Organisation. In the 2012 Letter, the CESCR equates the minimum core content of a right with a social protection floor, but it changed that view in the 2016 statement. According to the 2012 Letter, states have the discretion to determine what constitutes a minimum core content of a right, while the 2016 statement is not clear on who determines the core. In addition, the 2016 statement avoids reference to social protection floors and to the work of the International Labour Organisation.

Some criteria emerge from the 2016 statement. The first one relates to the necessity and proportionality of a retrogressive measure. The CESCR does not distinguish necessity from proportionality, instead defining them together. A retrogressive measure is 'necessary and proportionate' when 'the adoption of any other policy or failure to act would be more detrimental to

[187] CESCR, General Comment 23: para 52.
[188] CESCR, statement on Public Debt (n 169), para 4.
[189] Ibid.
[190] Chairperson's letter (n 183).
[191] statement on Public Debt (n 169), para 4. It provides that: 'They should remain in place only insofar as they are necessary'.

economic, social and cultural rights'.[192] This criterion largely corresponds to the test of 'least restrictive means' employed to determine whether restrictions on rights are appropriate.[193] The second criterion is used to evaluate the duration or the life span of retrogressive measures. Such measures should not be put in place for an indefinite period. The CESCR emphasises that retrogressive measures 'should remain in place only in so far as they are necessary'.[194] Thus, it evaluates the temporal necessity of the measures.

The third and fourth criteria, prohibition of discrimination and mitigation of inequality, are closely related. Retrogressive measures should not be discriminatory in the first place. The CESCR does not require states to achieve equality when retrogressive measures are taken, however, it requires them to reduce the level of inequalities which may ensue from any given crisis. Thus, retrogressive measures should contain inbuilt mechanisms for lessening inequalities. In particular, states must ensure that 'disadvantaged and marginalized individuals and groups are not disproportionately affected'.[195] Finally, the requirement of respect for 'the minimum core content of the rights,' draws the line below which the reduction in the enjoyment of economic, social and cultural rights should not fall due to retrogressive measures.[196]

These 2016 criteria are applicable to evaluate the appropriateness of all retrogressive measures affecting all rights in the ICESCR. A caveat must be added to this conclusion, though: the 2016 statement takes the right to social security as an example. The statement reads:

> As regards the right to social security for instance, when faced with retrogressive measures adopted by states, the Committee examines whether: (a) there was reasonable justification for the action; (b) alternatives were comprehensively examined; (c) there was genuine participation of affected groups in examining the proposed measures and alternatives; (d) the measures were directly or indirectly discriminatory; (e) the measures will have a sustained impact on the realization of the right to social security, an unreasonable impact on acquired social security rights or whether an individual or group is deprived of access to the minimum essential level of social security; and (f) whether there was an independent review of the measures at the national level.[197]

The statement reproduced verbatim the 2008 criteria as the application of the 2016 criteria to the right to social security. The application, however, resulted in the introduction of additional elements. First, the requirement that retrogressive measures should be comprehensive ('b') was left out from the 2016 statement, although a similar idea was included in the 2012 Letter. Second, the requirement of genuine participation ('c') and independent national review ('f') do not seem to fall under any of the 2016 general criteria.

As a result, the 2016 statement may be subject to at least two alternative readings. One view is to regard the last two criteria (genuine participation and independent national review) as applicable to the right to social security only. This view is supported by the texts of the 2016 statement and the general comment on the right to social security. Neither instrument clearly extends the two criteria to evaluate retrogressive measures affecting other rights under the ICESCR. An alternative view is to

[192] Ibid.
[193] For detailed discussion see the next chapter.
[194] Ibid.
[195] Ibid.
[196] Ibid.
[197] Ibid. cf General Comment No 19, para 42.

consider these criteria applicable to all retrogressive measures, affecting all rights under the ICESCR as suggested by Nolan and others.[198] They derive this criterion from the general comment on the right to social security.[199] However, they do not clarify how a criterion intended to be applicable to one right (the right to social security) also extends to all the rights under the ICESCR.

**iii) Application of the criteria for reviewing retrogression**

The criteria laid down to evaluate the appropriateness of retrogressive measures are in their early development.[200] The CESCR does not evaluate whether a retrogressive measure complies with each of these criteria, nonetheless, the following can be inferred from its concluding observations. The CESCR usually expresses its concern that austerity measures or retrogressive measures reduce the enjoyment of rights; then, it calls the attention of states to the documents containing the criteria (the 2012 Letter and the 2016 statement), particularly in relation to reports submitted in the wake of the 2008 financial crisis and the ensuing austerity measures.[201] Sometimes, it reproduces the criteria in its recommendations.[202] It then requires states that came out of economic or financial crisis to review the austerity or retrogressive measures.[203]

Finally, the CESCR seems to have evaluated the appropriateness of retrogressive measures with at least some of the criteria, particularly, the mitigation of inequalities and temporariness. It found that Portugal's measures did not comply with the criterion of mitigating inequality, as it held that 'various measures, specifically those that target disadvantaged and marginalized individuals and groups, have not been sufficient to adequately protect them against the consequences of the crisis.'[204] It expressed similar concern with regard to measures taken by the United Kingdom as it 'is seriously concerned about the disproportionate, adverse impact that austerity measures introduced in 2010 are having on the enjoyment of economic, social and cultural rights by disadvantaged and marginalized individuals and groups'.[205] In line with its requirement that a retrogressive measure should be temporary, the CESCR seems to have suggested that Cyprus unnecessarily extended the duration of the measure when it required the state to '[e]nsure that austerity measures are gradually phased out'.[206]

[198] Nolan et al (n 6) 140.

[199] Ibid.

[200] Nolan et al (n 6) 132.

[201] Concluding observations on the sixth periodic report of Cyprus, E/C.12/CYP/CO/6, 28 October 2016, para 12; Concluding observations on the sixth periodic report of Ukraine, E/C.12/UKR/CO/6, 13 June 2014, para 5; Concluding observations on the combined fourth and fifth reports of Bulgaria, E/C.12/BGR/CO/4-5, 11 December 2012, para 11; Concluding observations on the fourth report of Iceland, E/C.12/ISL/CO/4, 11 December 2012, para 6; Concluding observations of the Committee on Economic, Social and Cultural Rights: Spain, E/C.12/ESP/CO/5, 6 June 2012, para 8.

[202] Concluding observations on the sixth periodic report of the United Kingdom of Great Britain and Northern Ireland, E/C.12/GBR/CO/6, 14 July 2016, para 19.

[203] Concluding observations on the sixth periodic report of Cyprus, E/C.12/CYP/CO/6, 28 October 2016, para 12; Concluding observations on the sixth periodic report of the United Kingdom of Great Britain and Northern Ireland, E/C.12/GBR/CO/6, 14 July 2016, para 19; Concluding observations on the fourth periodic report of Portugal, E/C.12/PRT/CO/4, 8 December 2014, para 6.

[204] Concluding observations on the fourth periodic report of Portugal, E/C.12/PRT/CO/4, 8 December 2014, para 6.

[205] Concluding observations on the sixth periodic report of the United Kingdom of Great Britain and Northern Ireland, E/C.12/GBR/CO/6, 14 July 2016, para 19

[206] Concluding observations on the sixth periodic report of Cyprus, E/C.12/CYP/CO/6, 28 October 2016, para 12.

#### 2.2.2.3 Progressive realisation as state discretion

The principle of progressive realisation denotes that states have some discretion in the implementation of the rights. It represents 'a necessary flexibility device, reflecting the realities of the real world and the difficulties involved for any country in ensuring full realization of economic, social and cultural rights'.[207] The CESCR indicates that the conditions necessary for the implementation of rights are not the same in all states. Thus, the concept is 'a tool developed to accommodate economic diversity among states subscribing to the same human rights obligations'.[208] It provides states 'some leeway in choosing the measures to be adopted according to the context'.[209] That is, progressive realisation implies that states have some discretion in the implementation of economic, social and cultural rights.

The CESCR recognises that the measures of implementation depend on the contexts in each state. It acknowledges that '[t]he most appropriate ways and means of implementing [economic, social and cultural rights] will inevitably vary significantly from one state party to another'.[210] For this reason, '[e]very state has a margin of discretion in assessing which measures are most suitable to meet its specific circumstances'.[211] The CESCR respects the discretion of states when it evaluates measures taken to achieve the progressive realisation of rights:

> At all times the Committee bears in mind its own role as an international treaty body and the role of the state in formulating or adopting, funding and implementing laws and policies concerning economic, social and cultural rights. To this end, and in accordance with the practice of judicial and other quasi-judicial human rights treaty bodies, the Committee always respects the *margin of appreciation* of states to take steps and adopt measures most suited to their specific circumstances. [212]

However, the CESCR does not establish a clear link between states' margin of discretion and the concept of progressive realisation. It appears that the two concepts have an indirect relationship. As a flexibility device, progressive realisation requires recognition of contextual diversity. To recognise contextual diversity, the CESCR respects states' margin of discretion. In other words, states have a margin of discretion in taking steps necessary to achieve the progressive realisation of the rights.

The CESCR has not adopted a clear position on the amount of discretion given to states. It simply acknowledges the discretion of states in most of its general comments, although at times it does qualify the breadth of this discretion. In its general comment on the right to take part in cultural life, it emphasised that 'states parties have a *wide* margin of discretion in selecting the steps they consider most appropriate for the full realization' of the rights.[213] In a later statement, it seems to

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[207] General Comment No 3, para 9.

[208] Brems, 'Minimum and Maximum Perspectives' (n 6) 365.

[209] Nolan et al (n 6) 122-123. See Chenwi (n 7) 744.

[210] CESCR, General Comment 12: The right to adequate food (art. 11), E/C.12/1999/5, 12 May 1999, para 21. The CESCR reaffirmed this approach in later general comments. See General Comments No 14, para 53; GC No. 15, para 45; GC No. 18, para 37; GC No. 19, para 66; GC No 21, para 66.

[211] CESCR, General Comment No. 14: The Right to the Highest Attainable Standard of Health (Art. 12), E/C.12/2000/4, 11 August 2000, para 53. The CESCR does not seem to be consistent in the use of words, though. It uses 'margin of discretion' and 'margin of appreciation interchangeably. In most of its general comments, it uses the phrase 'margin of discretion'. It uses 'margin of appreciation' in some of its statements. See statement on Available Resources (n 79), para 11; statement by the CESCR, Duties of states towards refugees and migrants under the International Covenant on Economic, Social and Cultural Rights, E/C.12/2017/1, 13 March 2017, para 5.

[212] CESCR, statement on Available Resources (n 79), para 11. Italics added.

[213] CESCR, General Comment No 21: Right of everyone to take part in cultural life (art. 15, para. 1 (a), of the International Covenant on Economic, Social and Cultural Rights), para 66. Italics added.

suggest that states have narrower discretion: 'Each state is left a *certain* margin of appreciation to decide which measures it should adopt to progressively realize the rights' under the ICESCR.[214] Langford and King raise some concerns over the CESCR's adoption of the margin of appreciation reasoning. They argue that leaving states a margin of discretion based on the approach of the European Court of Human Rights may unnecessarily dilute the provisions of the ICESCR.[215] They stress that the European Court uses the doctrine 'to rule out consideration of social policy issues' while the CESCR cannot avoid ruling on such issues, as they lie at the heart of its mandate.[216]

The European Committee has also adopted 'the concept of margin of appreciation and has made reference to it frequently'.[217] In *MFHR v Greece,* it took 'into consideration the margin of discretion granted to national authorities'.[218] In *GENOP-DEI and ADEDY v Greece*, it recognised 'that states enjoy a wide margin of appreciation when it comes to the design and implementation of national employment policies'.[219] However, the European Committee does not connect the doctrine with the concept of progressive realisation.

### 2.2.3 Potential and Pitfalls of progressive realisation: An assessment

The requirement of resources and the principle of progressive realisation, as discussed above, have the potential for strengthening the international accountability of states. It is needless to state that holding states internationally accountable is one of the purposes of international human rights treaties such as the ICESCR. States have undertaken the task of taking steps to the maximum of their available resources under Article 2(1) of the ICESCR. This is an immediate obligation of conduct, which is more onerous than the obligation of result.[220] Put differently, states are subject to international supervision for allocating resources and efficiently using those resources for the realisation of economic, social and cultural rights. In contrast, the ICCPR does not expressly lay down such a requirement. In other words, the ICCPR leaves more space to the states on how to allocate and use their resources.

The immediate obligation to take steps must result in progress because states have a progressive realisation obligation, which is an obligation of result.[221] States are subject to international scrutiny for advancing the enjoyment of economic, social and cultural rights. Even if they are successful in demonstrating that they have allocated resources and used those resources efficiently, they have to explain why they could not make advancement in the realisation of these rights. In contrast, the ICCPR does not refer to progressive realisation. This does not mean that the realisation of civil and political rights remains static over a particular period. The ICCPR itself requires states to report 'on the progress made in the enjoyment of those rights'.[222] In this sense, it would be absurd to limit progressive realisation to economic, social and cultural rights only.

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[214] CESCR, Statement on Refugees and Migrants, (n 223), para 5. Italics added.
[215] Langford & King (n 89) 500.
[216] Ibid.
[217] Cullen (n 39) 89.
[218] *MFHR v Greece*, para 221.
[219] *GENOP-DEI & ADEDY v Greece*, para 20.
[220] Nico Moons, 'Obligations of Result and Conduct in Private vs Public International Law: their Consequences and Added Value for Socio-Economic Rights [2016] *European Journal of Human Rights* 83 – 97, 87.
[221] CESCR, General Comment 3, para 9.
[222] ICCPR, art 40(1).

In fact, the artificial dichotomy between civil and political rights and economic, social and cultural rights resulted in the restriction of progressive realisation only to the latter.[223] This does not mean that the principle of progressive realisation is not relevant to civil and political rights. Indeed, the principle can be a useful tool for taking into accounts not only economic diversity of states but also other contextual differences, such as cultural factors.[224] The principle has the potential to facilitate maximum achievement in the realisation of human rights by allowing 'the measurement of degrees of good as well as bad human rights performance'.[225]

However, not all stakeholds employ the principle of progressive realisation to convey the meanings explained above; the principle is usually associated with problems of some sorts. Chief among them is the understanding of the principle as a defect in the legal nature of economic, social and cultural rights. Critics cite the weakness of the principle as 'evidence of the secondary, non-legal, or non-binding nature of economic, social, and cultural rights'.[226] This characterisation is usually made in comparison with civil and political rights. For example, Bossuyt argues that the observance of civil and political rights merely requires abstention; and that 'they must be observed immediately' while the implementation of economic, social and cultural rights requires 'an active intervention from the state;' and 'they may be implemented progressively'.[227] Along the same lines, Dennis and Stewart argue that 'for good reason, economic, social, and cultural rights, unlike civil and political rights, have been defined primarily as aspirational goals to be achieved progressively'.[228]

The objection to the legal nature of economic, social and cultural rights because of the principle of progressive realisation should be placed in context. This claim can be examined in light of the political conflict underlying the dichotomy between economic, social and cultural rights on the one hand, and civil and political rights on the other. When the Universal Declaration of Human Rights bifurcated, limiting the principle of progressive realisation only to the ICESCR, the division was blamed on the ideological divisions during the Cold War.[229] Similar concerns were raised after the Cold War. For example, during the consideration of the OP-ICESCR by the Third Committee of the General Assembly, the representative of the United states asserted that civil and political rights, and economic, social and cultural rights were 'fundamentally different in a legal sense', since the latter are subject to progressive realisation and available resources while the former are not.[230] In his article published in 2006, Aryeh Neier, the founder of Human Rights Watch and a former president of the Open Society Foundation, warned that 'it is dangerous to allow [the] idea of social and economic rights to flourish'.[231] These are two examples from representatives of states and non-governmental organisations indicating that the political conflict over the nature of economic, social and cultural

[223] Brems, 'Minimum and Maximum Perspectives', (n 10) 365.
[224] Ibid 366.
[225] Ibid 356.
[226] Alston & Quinn (n 23) 177.
[227] Marc Bossuyt, 'International Human Rights Systems: Strengths and Weaknesses' in Paul Mahoney & Kathleen E Mahoney (eds) *Human Rights in the Twenty-First Century: A Global Challenge* (Kluwer Academic Publishers 1993) 52.
[228] Dennis & Stewart (n 18) 465.
[229] Kitty Arambulo *Strengthening the Supervision of the International Covenant on Economic, Social and Cultural Rights: Theoretical and procedural aspects* (Intersentia 1999) 17; Alex Kirkup & Tony Evans 'The Myth of Western Opposition to Economic, Social, and Cultural Rights? A Reply to Whelan and Donnelly' (2009) 31 *Human Rights Quarterly* 221-238, 230; Ssenyonjo (n 74) 12.
[230] Press release, Third Committee Recommends General Assembly Adoption of Optional Protocol to International Convention on Economic, Social and Cultural Rights, GA/SHC/3938, 18 November 2008, at https://www.un.org/press/en/2008/gashc3938.doc.htm (accessed 4 August 2017).
[231] Aryeh Neier, 'Social and Economic Rights: A Critique' (2006) 13/2 *Human Rights Brief* 1- 3, 3.

rights is still alive, only now it is between the North and the South.[232] The South, a collection of developing countries constituting the majority of the General Assembly, has been pushing for global economic justice through initiatives such as the New International Economic Order and the Declaration on the Right to Development.[233] Therefore, it is submitted, the technical legal arguments against economic, social and cultural rights based on the principle of progressive realisation are a reflection of the underlying disagreements, whether past or present, in relation to economic and political issues.

The principle of progressive realisation does not sit well with the supporters of economic, social and cultural rights either. The central concern is that the principle negatively affects the recognition and protection of these rights by providing states with a legal defence for their failure. That is, 'the progressive realization clause will be increasingly embraced as an escape hatch by recalcitrant states'.[234] In other words, states that fail to discharge their obligations under the ICESCR may use the notion of progressive realization as a reason for avoiding any compliance at all with their human rights obligations.[235] Recalcitrant states may claim 'that the lack of progress is due to insufficient resources when, in fact, the problem is often not the *availability* but rather the *distribution* of resources'.[236] Similarly, Young classifies progressive realisation among ways of limiting economic, social and cultural rights. She argues that 'expressly protected economic and social rights are commonly limited by the obligation of "progressive realization," which introduces a relative standard for the discharging of duties owed by the state'.[237] Here, the principle of progressive realisation means a legal defence readily available to states when they fail to carry out their obligations.

Sometimes, progressive realisation is taken to mean that economic, social and cultural rights are non-justiciable. The concept is at least a reason for the non-justiciability of these rights. For example, during the adoption of the OP-ICESCR, the representatives of the United States and Denmark seem to have used the concept to mean non-justiciability when they emphasised the difficulty of adjudicating alleged violations of economic, social and cultural rights.[238] According to Canada, '[p]rogressive realization is not a concept which easily lends itself to adjudication'.[239] Similarly, some authors conflate progressive realisation and non-justiciability.[240]

Another concern relates to the means of operationalising the principle: it is not clear how to measure resource allocation and utilisation or progress in the enjoyment of rights. This concern does not pertain to the principle *per se;* the concern that the principle of progressive realisation would be used as an escape hatch may indicate a lack of tools or mechanisms for ascertaining whether a state

[232] Vandenhole (n 16) 430.
[233] Daniel J Whelan, *Indivisible Human Rights: A History* (University of Pennsylvania Press 2010), chapter 8.
[234] Scott Leckie, 'Another Step Towards Indivisibility: Identifying the Key Features of Violations of Economic, Social and Cultural Rights' (1998) 20/1 *Human Rights Quarterly* 81 – 124, 94.
[235] Felner (118) 404.
[236] Ibid.
[237] Young (n 163) 101.
[238] Press release, Third Committee Recommends General Assembly Adoption of Optional Protocol to International Convention on Economic, Social and Cultural Rights, GA/SHC/3938, 18 November 2008, at https://www.un.org/press/en/2008/gashc3938.doc.htm (accessed 4 August 2017).
[239] Comments received from Canada, Report of the Secretary-General, *Status of the International Covenants on Human Rights, Draft optional protocol to the International Covenant on Economic, Social and Cultural Rights*, E/CN.4/1998/84/Add.1, 16 March 1998.
[240] Nmehielle (n 50) 124; Evelyn A Ankumah *The African commission on human and peoples' rights: practice and procedures* (Martinus Nijhoff Publishers 1996) 144.

has taken steps to the maximum of its available resources. Indeed, no such tools have existed since the entry into force of the ICESCR in 1976.

One can easily dismiss some of these criticisms and concerns. The fact that economic, social and cultural rights are enshrined in international treaties dispels their mischaracterisation as non-legal, non-binding rights. The argument that economic, social and cultural rights do not impose immediate obligations is flawed. The CESCR has identified and confirmed that the ICESCR demands immediate obligations, observing that 'while the Covenant provides for progressive realization and acknowledges the constraints due to the limits of available resources, it also imposes various obligations which are of immediate effect'.[241] The Committee also identifies provisions of the ICESCR that are capable of immediate application,[242] warning against the misinterpretation of the ICESCR that deprives progressive realisation of all meaningful content.[243] It recommends the construction of the ICESCR in accordance with its overall objective 'which is to establish clear obligations for states parties in respect of the full realization of the rights'.[244] In terms of approach, the Committee's clarification flows from the context, object and purpose of the ICESCR. This is in line with the general rules of treaty interpretation.[245] Therefore, the immediate obligations identified by the CESCR originate from the text of the ICESCR.

The problem of operationalising the principle is not as difficult as it appears. Of course, it is unreasonable to expect the CESCR or a similar (quasi-) judicial body to have the necessary technical expertise to develop monitoring tools. However, efforts to measure the level of realisation of economic, social and cultural rights have been made by different bodies and disciplines. For example, the Office of the United Nations High Commissioner for Human Rights (OHCHR) published a guide on the measurement and implementation of human rights in 2012.[246] Monitoring bodies can also use tools developed by economists, such as the Social and Economic Rights Fulfilment (SERF) Index, which measures the difference between actual and potential achievements.[247]

To conclude, the principle of progressive realisation has the potential to improve the accountability of states on their human rights performance when understood in light of the purpose of human rights treaties. However, this is just one of the readings. The principle is also invoked as a defect in economic, social and cultural rights reflecting the underlying political conflict. Therefore, human rights bodies should be careful in applying the principle to treaties that do not incorporate the principle. One such treaty is the African Charter. The development of the principle of progressive realisation under the African Charter will be discussed shortly.

## 2.3 Evolution of progressive realisation under the African Charter

The concept of progressive realisation has evolved over time in the African Charter. In the beginning, the omission of the concept from the text of the African Charter was understood as imposing

[241] CESCR, General comment No. 3: The nature of states parties' obligations (1990), para 1.
[242] General comment No. 3, para 5.
[243] General comment No. 3, para 9.
[244] Ibid.
[245] Vienna Convention on the Law of Treaties, UN Doc. A/Conf.39/27; 1155 UNTS 331 (1969), art 31.
[246] OHCHR, *Human Rights Indicators: A Guide to Measurement and Implementation* (2012).
[247] Fukuda-Parr, Lawson-Remer & Randolph (n 116). See Abby Kendrick (n 116); Jody Heymann, Kristen McNeill, & Amy Raub, 'Rights Monitoring and Assessment using Quantitative Indicators of Law and Policy: International Covenant on Economic, Social and Cultural Rights' (2015) 37/4 *Human Rights Quarterly* 1071–1100; Felner (n 118).

immediate obligation on states. Later, this view was changed and the concept was imported into the Charter.

### 2.3.1 Omission from the text of the African Charter

An enquiry into how the African Charter treats the concept of progressive realisation should obviously start with its text according to the Vienna Convention on the Law of Treaties (VCLT).[248] Article 1 of the Charter provides that states to the 'Charter shall recognize the rights, duties and freedoms enshrined in this Chapter and shall undertake to adopt legislative or other measures to give effect to them'. This provision might have been an appropriate place to incorporate the concept of progressive realization because most human rights treaties usually contain the concept in clauses that provide for general state obligations.[249] Article 1 applies to all rights guaranteed in the Charter because there are no separate provisions of state obligations relating to different categories of Charter rights. This provision, however, does not contain any requirement to the effect that states should progressively achieve the full realisation of the recognised rights. Neither does it condition the enjoyment of these rights on the availability of resources. The text of the Charter is unequivocally clear that the drafters omitted the concept of progressive realisation from the Charter. Thus, the enquiry may continue beyond the text.

Chronologically, the African Charter came late in the development of the human rights project. The ICESCR had already been in force when the Charter was adopted in 1981 and 13 African states had already ratified it.[250] In particular, the two states (Senegal and The Gambia) that played an important role in the preparation and adoption of the Charter were already party to the Covenant by 1978.[251] Moreover, the American Convention could have provided a regional benchmark in terms of including the principle of progressive realisation in the text of the African Charter. Then, one may wonder why the African Charter did not follow the path taken by the ICESCR and the American Convention. In searching for an answer, recourse can be made to supplementary means of treaty interpretation in order to examine the preparatory work of the Charter and the circumstances of its conclusion.[252]

Indeed, the ICESCR and the American Convention were the basis for drafting the African Charter. Kéba Mbaye, a Senegalese jurist then Vice-President of the International Court of Justice and Chairperson of the legal experts committee drafting the African Charter, submitted to the experts a proposed draft, which was 'largely drawn from the provisions of the [ICESCR] and the American Convention on Human Rights'.[253] Mbaye's draft contains an almost verbatim reproduction of Article 2(1) of the ICESCR (the progressive realization provision) as Article 3 of his draft African Charter.

In his draft, Mbaye kept the distinction between economic, social and cultural rights and civil and political rights by dividing them, addressing them in different chapters.[254] He also prescribed different monitoring mechanisms. Under Article 14, Mbaye's draft requires states to report 'on the measures which they have adopted and the progress made in achieving the observance' of

[248] Vienna Convention on the Law of Treaties, adopted 23 May 1969, entry into force 27 January 1980, UN Doc. A/Conf.39/27; 1155 UNTS 331, art 31.
[249] Compare CESCR, art 2(1); CRPD, art 4(2); Protocol of San Salvador, art 1.
[250] Status of ratification of CESCR <http://indicators.ohchr.org/> (accessed 27 August 2016).
[251] Frans Viljoen, *International human rights law in Africa* (OUP 2012) 160.
[252] VCLT, art 32.
[253] Draft African Charter on Human and Peoples' Rights, Heyns (n 12) 65 - 77.
[254] Ch I (arts 5 - 15) of Mbaye's draft Charter deals with ESC rights while ch II (arts 16 - 32) provides for civil and political rights Heyns (n 12).

economic, social and cultural rights while requiring judicial protection of civil and political rights under Article 32.

However, the drafters did not accept Mbaye's proposal with regard to progressive realisation. As is abundantly clear from the experts' draft of the African Charter produced after their meeting in Dakar, the drafters not only excised the requirement of progressive realization but also eliminated the distinction between the two categories of rights and their monitoring mechanisms.[255] The ministerial conferences that considered the draft Charter did not reintroduce progressive realisation or adopt different monitoring mechanisms.[256]

The indivisibility of rights was a central theme during the drafting process. In his opening speech, President Senghor instructed the drafters that:

> We are certainly not drawing lines of demarcation between the different categories of rights. We are not grading these either. We wanted to show essentially that beside civil and political rights, economic, social and cultural rights should henceforth be given the important place they deserve.[257]

In line with Senghor's instruction, the drafters reported that '[e]conomic, social and cultural rights were given the place they deserved' in the Charter.[258] That is, they placed economic, social and cultural rights on the same footing as civil and political rights, as opposed to other global and regional human rights treaties that arguably accorded them less importance. The Charter thereby departs from the orthodoxies of the era,[259] and some even argue that the Charter attaches more importance to economic, social and cultural rights than to civil and political rights.[260]

In this respect, the Charter represents an African conception of human rights because it establishes a conceptual and conventional unity of all human rights.[261] The originality may have resulted from the fact that the Charter is a compromise among African states themselves and represents a common position towards international law. As the Charter itself declares allegiance to the Movement of Non-Aligned Countries, Africa did not subscribe to either camp of the Cold War.[262] If the western capitalist states emphasised civil and political rights as opposed to socialist states that prioritised economic, social and cultural rights at the time of drafting the Charter,[263] a neutral approach to human rights would treat all rights in the same way. However, that does not indicate a uniform economic system across the Continent. The unity of all human rights under the Charter can be understood as a compromise between the socialist and capitalist African countries that participated in the negotiation of its texts.[264] Its departure in this regard from global and regional human rights treaties

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[255] Preliminary draft of the African Charter prepared during the Dakar Meeting of Experts at the end of 1979, CAB/LEG/67/3/Rev. 1, reproduced in Heyns (n 12) 81 - 91.

[256] Rapporteur's Report, CAB/LEG/67/Draft Rapt. Rpt (ll) Rev 4, reproduced in Heyns (n 12) 94 - 105.

[257] Address delivered by Leopold Sedar Senghor, President of the Republic of Senegal, at the opening of the Meeting of African Experts preparing the draft African Charter in Dakar, Senegal 28 November to 8 December 1979, reproduced in Heyns (n 12) 78 - 80.

[258] Ibid.

[259] Chidi Anselm Odinkalu, 'Analysis of Paralysis or Paralysis by Analysis? Implementing Economic, Social, and Cultural Rights under the African Charter on Human and Peoples' Rights' (2001) 23 *Human Rights Quarterly* 327, 337.

[260] EI-Obaid Ahmed EI-Obaid & Kwadwo Appiagyei-Atua 'Human Rights in Africa: A New Perspective on Linking the Past to the Present' (1996) 41 *McGill Law Journal* 819, 846; Odinkalu (n 259) 337.

[261] Eva Brems, *Human rights: universality and diversity* (Martinus Nijhoff Publishers 2001) 119.

[262] African Charter, Preamble.

[263] Arambulo (n 229) 17.

[264] Odinkalu (n 259) 330.

can also be understood as an attempt of newly independent African states 'questioning mainstream international law'.[265]

### 2.3.2 Understanding of the textual omission by the African Commission

A piece of evidence of how the Commission understands the omission of progressive realisation from the Charter can be found in one of its statements. Umozurike, in his capacity as the Chairperson of the Commission, emphasised that '[the] Charter requires that all [economic, social and cultural] rights and more should be implemented *now*'.[266] He underscored that the Charter requires immediate implementation. That is, the Charter does not allow states to postpone their obligations—a view contrary to what the concept of progressive realisation entails. Other members of the Commission also echoed this view.[267] Based on his interview with some members of the Commission in 2009, Yeshanew reports that the Commissioners believe that 'the obligations of states relating to the economic, social and cultural rights in the [African] Charter are immediate'.[268]

In its case law, the Commission does not employ 'immediate obligation' terminology, but its decisions essentially imply that the Charter imposes immediate obligations. In *Free Legal Assistance Group and Others v Zaire*, the Commission held that the government's failure 'to provide basic services such as safe drinking water and electricity and the shortage of medicine' violates the right to health.[269] The Commission did not examine whether the respondent state had necessary resources or required time to mobilise those resources to provide safe drinking water, electricity and medicine. It is difficult to imagine that the Commissioners did not know that generating electricity, building water facilities and purchasing medicine not only require huge resources but also time. Rather, the above holding shows the Commission's conviction that the Charter provides for immediate obligations. As a result, the mere fact that there was no electricity, safe drinking water, and medicine was enough to constitute a violation of the Charter.

In *Purohit and Another v The Gambia,* which was decided in 2003, the Commission examined the detention of persons with mental disabilities and stated the following:[270]

> [T]he scheme of the [Lunatics Detention Act] is lacking in terms of therapeutic objectives as well as provision of matching *resources* and programmes of treatment of persons with mental disabilities, a situation that the Respondent state does not deny but which nevertheless falls short of satisfying the requirements laid down in Articles 16 and 18(4) of the African Charter.

Because of the respondent state's failure to provide a mental illness scheme with resources, the Commission found violations of the right to health (Article 16) and measures of protection for persons with disabilities (Article 18(4)).

In *Gunme and Others v Cameroon* (*Southern Cameroon* case), the Commission examined, among other things, an alleged violation of the right to development due to economic marginalisation and lack of economic infrastructure in the Southern Cameroon and held that '[t]he lack of such resources,

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[265] Brems, *Universality and diversity* (n 261) 93.

[266] Presentation of the 3rd Activity Report, by the Chairman of the Commission, Professor U. O. Umozurike to the 26th Session of the Assembly of Heads of state and Government of the OAU (9 - 11 July 1990), reproduced in Rachel Murray & Malcolm Evans (eds) *Documents of the African Commission on Human and Peoples' Rights* (2001) 202 - 203. Italics added.

[267] Odinkalu (n 259) 349 - 350**.**

[268] Sisay Alemahu Yeshanew *The Justiciability of economic, social and cultural rights in the African regional human rights system: Theory, practice and prospect* (2013) 251.

[269] (2000) AHRLR 74 (ACHPR 1995), para 47.

[270] (2003) AHRLR 96 (ACHPR 2003), para 83. Italics added.

if proven would constitute a violation of the right to development'.[271] Although the Commission did not find a violation, it indicated that a failure to allocate resources might constitute a violation. The finding of no violation was based on explanations and statistical data showing 'allocation of development resources in various socio-economic sectors' contrary to the allegation of the complainants.[272]

In *Social and Economic Rights Action Centre (SERAC) and Another v Nigeria* (*Ogoniland* case), the Commission examined an alleged violation of several economic and social rights in Nigeria due to the exploitation of oil reserves in Ogoniland without regard to the health and environment of the Ogoni people.[273] While explaining that all rights generate 'the duty to respect, protect, promote, and fulfil', the Commission observed that '[the ICESCR], for instance, under Article 2(1) stipulates exemplarily that states "undertake to take steps…by all appropriate means, including particularly the adoption of legislative measures."'[274] One expects a reference to Article 2(1) to come with all its baggage, particularly the concept of progressive realisation. The Commission, however, excluded the relevant phrase of the provision (i.e. 'to the maximum of its available resources, with a view to achieving progressively the full realization of the rights'). Nor did it discuss the concept in canvassing state obligations concerning the duty to fulfil. Apparently, the Commission used the quotation to emphasise that states should take steps and identify means of taking those steps. The undertaking to take steps even under the ICESCR is an immediate obligation.[275] Therefore, the Commission's reluctance to refer to the concept and its emphasis on taking steps instead can be read as an interpretive strategy adopted on purpose in order to eschew the concept of progressive realisation.

The Commission's view that the Charter demands immediate obligations has supporters in the literature. Odinkalu submits that 'the obligations that state parties assume with respect to economic, social and cultural rights are clearly stated as of immediate application'.[276] Ouguergouz, who later became a judge and Vice-President of the African Court, argues that 'states parties are legally bound to ensure that the individual immediately enjoys these rights'.[277] To Olowu, 'in the absence of any textual inference to the contrary, the spirit and letters of economic, social and cultural rights provisions connote immediate implementation under the African Charter'.[278]

### 2.3.3 Introduction of progressive realisation through the interpretation of the African Charter

The African Commission has avoided using the term 'progressive realisation' for a long time even with regard to the right to health under Article 16, whose wording is understood in the literature as an exception to the Charter's requirement of immediate obligation.[279] Viljoen argues that the Commission decided to qualify the right to health with 'available resources' in *Purohit and Another v The Gambia* but suggests that the case should not be the basis for applying the qualification of

[271] (2009) AHRLR 9 (ACHPR 2009), para 205.
[272] *Southern Cameroon case*, para 206.
[273] (2001) AHRLR 60 (ACHPR 2001).
[274] *Ogoniland* case, paras 44 & 48.
[275] General Comment 3, para 2.
[276] Odinkalu (n 259) 349.
[277] Fatsah Ouguergouz *The African Charter on Human and Peoples' Rights: A comprehensive agenda for human rights and sustainable democracy in Africa* (2003) 200.
[278] Dejo Olowu, *An integrative rights-based approach to human development in Africa* (2009) 58.
[279] Viljoen (n 251) 217; Odinkalu (n 259) 349; Ouguergouz (n 277) 200; Yeshanew (n 268) 254. Art 16 (1) of the African Charter provides that: 'Every individual shall have the right to enjoy the best attainable state of physical and mental health.

'available resources' to the 'unqualified' right to education.[280] Relying on the same case, Yeshanew argues that 'the African Commission read the "progressive realization" qualification' into Article 16 of the Charter.[281]

Indeed, the Commission referred to 'available resources' in *Purohit and Another v The Gambia,* which was decided in 2003, when it held that

> [H]aving 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.[282]

However, the case is more of a confirmation of immediate obligations than an introduction of progressive realisation for a number of reasons. First, the Commission did not use the 'best attainable' language of Article 16, which is the basis for commentators to consider the provision an exception to the immediate obligation requirement.[283] Second, the Commission emphasised immediate obligations, as it did in the *Ogoniland* case. It underscored the obligation to take steps and the prohibition of discrimination, which are immediate obligations even under the ICESCR.[284] Third, the Commission found a violation of Article 16 because of the respondent state's failure to provide resources to the mental health scheme. Finally, the respondent state did not argue that its failure was due to a lack of resources.

The Commission used the terms 'progressive realisation' in the *Southern Cameroon* case decided in 2009. The Commission held that the Republic of Cameroon is 'under obligation to invest its resources in the best way possible to attain the *progressive realisation* of the right to development, and other economic, social and cultural rights.'[285] It seems that the Commission introduced the terms inadvertently because it was not even dealing with rights usually classified under the economic, social and cultural rights category. It used the terms 'progressive realisation' in relation to the right to development, which is usually considered to be part of peoples' rights. Even when the complainants alleged a violation of the right to education because of the respondent state's conduct of 'underfunding and understaffing primary education', the Commission's finding of no violation was not based on lack of resources. Nonetheless, the case does evidence the Commission's use of the terms in its case law.

The wholesale importation of the concept has been made through what the Commission calls soft law instruments.[286] Even before deciding the *Southern Cameroon* case, the Commission used the term 'progressive realisation' in the Pretoria Declaration adopted in 2004.[287] The declaration requires states to prepare 'National Action Plans, which set out benchmark indicators for the progressive realisation of social, economic and cultural rights'.[288] In a language similar to Article 2(1) of the ICESCR, the declaration calls upon the states to give full effect to economic, social and cultural rights

[280] Viljoen (n 251) 217; *Purohit and Another v The Gambia*, para 84.
[281] Yeshanew (n 268) 254.
[282] *Purohit and Another v The Gambia*, para 84. Italics added.
[283] See Viljoen (n 251) 217; Odinkalu (n 259) 349; Ouguergouz (n 277) 200; Yeshanew (n 268) 254.
[284] General Comment 3, paras 1 & 2.
[285] *Southern Cameroon case*, para 206. Italics added.
[286] See Soft Law, available at <www.achpr.org/instruments/> (accessed 8 July 2016).
[287] Resolution on Economic, Social and Cultural Rights in Africa, 36th Ordinary Session, Dakar (7 December 2004).
[288] Pretoria Declaration, para 11(iv).

'by using the maximum of their resources'.[289] Similar to the *Southern Cameroon* case, the Commission did not provide any justification for the incorporation.

An elaborate introduction of the concept occurred in 2011 when the Commission adopted the Principles and Guidelines on the Implementation of Economic, Social and Cultural Rights (also known as Nairobi Principles) which expressly declare that the concept of progressive realisation is applicable to economic, social and cultural rights under the African Charter.[290] In the Preamble of the Nairobi Principles, the Commission lists a number of instruments from which it has drawn inspiration, but the contents of the Nairobi Principles show that the principles are merely a transplantation of the CESCR's interpretation because they reproduce, with some exceptions, the general comments of the CESCR. The Commission followed the approaches already adopted by the CESCR in identifying state obligations and explaining the substantive content of the rights.

In terms of approach, the Commission has travelled in an opposite direction of that of the CESCR, which started from the texts and carved immediate obligations out of progressive realisation. The CESCR states that 'the obligation [under Article 2(1) of the ICESCR] differs significantly from that contained in Article 2 of the [ICCPR] which embodies an immediate obligation'.[291] Still, it identified from Article 2 of the ICESCR immediate obligations to take steps and to guarantee rights without discrimination.[292] From the ICESCR's overall objective of establishing clear obligations for states, it identified state duties largely understood as immediate obligations, namely, the prohibition of retrogressive measures and minimum core obligations.[293] The CESCR convincingly proceeded towards establishing clarity in state obligations without abandoning its textual foundations.

On the contrary, the African Commission does not have similar texts to work with. Article 1, the general obligation provision of the Charter, is similar to Article 2 of the ICCPR, understood both by the Human Rights Committee and by the CESCR as enshrining immediate obligations.[294] The Commission admitted that 'the African Charter does not expressly refer to the principle of progressive realisation'.[295] Had the Commission proceeded from the texts, it would have ended up declaring that the Charter, like the ICCPR, provides for immediate obligations. As it skips this foundational stage, the Commission could not find particular provisions of the Charter from which the concept can be derived.

## 2.4 Meaning of progressive realisation in the African Charter

Progressive realisation has different meanings, as discussed above. Like the CESCR, the African Commission understands the concept as advancing or improving the enjoyment of economic, social and cultural rights over time. However, the Commission does not link the prohibition of retrogressive measures with progressive realisation. It introduces non-retrogression as an immediate obligation. Unlike the CESCR, the Commission does not connect discretion of states with the concept of progressive realisation.

[289] Pretoria Declaration, para 2.
[290] The Commission reported the adoption of the Nairobi Principles in its Thirty-first Activity Report to the Executive Council of the AU, EX.CL/717(XX).
[291] CESCR, General Comment 3, para 9.
[292] CESCR, General Comment 3, paras 1 - 2.
[293] CESCR, General Comment 3, paras 9 - 10.
[294] Human Rights Committee, General Comment 30, paras 5 & 14.
[295] Nairobi Principles, para 13.

### 2.4.1 Progressive realisation as advancement of economic, social and cultural rights

The Commission's view largely converges with that of the CESCR with regard to the meaning of progressive realisation. The Commission understands the concept as implying advancement in the enjoyment of economic, social and cultural rights. It defines the concept as '[t]he obligation to progressively and constantly move towards the full realisation of economic, social and cultural rights'.[296] States should advance towards the goal of full realisation. That is, they should continuously be improving the enjoyment of economic, social and cultural rights; a sporadic improvement is not sufficient since the Commission requires states to 'constantly move towards' the goal.

Like the CESCR, the Commission emphasises that states should be quick in taking measures. It observed that 'states parties are therefore under a continuing duty to move as expeditiously and effectively as possible towards the full realisation of economic, social and cultural rights'.[297] States complying with this requirement of taking steps expeditiously do not postpone actions necessary for the realisation of economic social and cultural rights, but rather take immediate action because the Commission emphasises that all 'states parties have immediate obligations to take steps'.[298] Such steps should be taken 'in accordance with a measurable national plan of action', indicating that such a plan should be prepared in the first place.[299] The steps taken by states must be effective, producing a visible result in the enjoyment of these rights.

In principle, the pace of advancement in the enjoyment of rights should be reasonable.[300] The Commission requires states not only to take measures that 'contain clear goals, indicators and benchmarks for measuring progress' under their obligation to fulfil,[301] but also state to set timeframes for achieving their goals.[302] Like other human rights bodies, the Commission does not have its own mechanisms to ascertain whether the states have actually made improvement that corresponds to the resources they command.

The pace of advancement or progress depends on available resources and varies from one state party to another. The Commission stresses that 'states need sufficient resources to progressively realise economic, social and cultural rights'.[303] The issue of resources forms an integral part of the Commission's definition of progressive realisation. For this reason, the Commission lays down some requirements with regard to the generation as well as the allocation of resources. It acknowledges that '[t]here are a variety of means through which states may raise these resources'.[304] It focuses on two means: taxation and international aid. The African Charter does not clearly link the payment of taxes or their collection to any of the rights it guarantees, however, it states that the individual has the duty 'to pay taxes imposed by law in the interest of the society' according to Article 29(6) under the chapter on duties. The African Commission derived a state obligation from this individual duty. It stresses that the 'duty of the individual to pay taxes imposed by the African Charter implies that there is an obligation on the state to institute an effective and fair taxation system'.[305] In terms of

[296] Ibid, para 13.
[297] Ibid, para 13.
[298] Ibid para 18.
[299] Ibid.
[300] Felner (n 118) 414.
[301] Nairobi Principles, para 10.
[302] Ibid para 14.
[303] Ibid para 15.
[304] Ibid.
[305] Ibid.

supervision, it is not clear how the Commission can ascertain whether states have put in place an effective and fair taxation system.

According to the Commission, the resources required to achieve the full realisation of economic, social and cultural rights include regional and international aid.[306] The Commission does not go to the details of distinguishing regional aid from international aid. One may argue that assistance, be it financial or technical, received from African states or African organisations is regional aid while that received from entities beyond the African continent is international aid. The Commission clearly establishes the obligation of states to seek international aid, emphasising that: 'All states have the obligation to engage in international cooperation for the realisation' of economic, social and cultural rights.[307] States parties to the African Charter are a collection of developing countries, so the Commission's requirement that these states must seek regional or international aid is understandable, but the Commission goes further to declare that 'It is particularly incumbent upon developed countries, as well as others which are in a position to assist others, to do so.'[308] However, it is not clear how the African Charter can bind developed countries, requiring them to assist developing countries when they are not parties to the Charter.

The African Commission has developed some requirements with regard to resource allocation, namely to prioritise economic, social and cultural rights in resource allocation regardless of whether resources were raised through taxation or obtained through regional or international aid. The Commission has underscored that 'there is an obligation on the state to institute […] a budgeting process that ensures that economic, social and cultural rights are prioritised in the distribution of resources.'[309] Surprisingly, it derives this obligation from an individual duty under Article 29(6) of the Charter rather than the general obligation provision under Article 1. Likewise, states must prioritise allocation of assistance obtained through international cooperation towards the realisation of economic, social and cultural rights.[310] The Commission also requires further prioritisation within the resources allocated for the realisation of economic, social and cultural rights. It has stressed that the 'essential needs of members of vulnerable and disadvantaged groups should be prioritised in all resource allocation processes'.[311]

Prioritisation presupposes classification. This is more apparent in the case of members of vulnerable and disadvantaged groups, who include persons belonging to groups such as women, children, persons with disabilities, indigenous people and refugees, according to the Commission.[312] For example, prioritisation of resource allocation in this case could mean that essential needs of women should be given preference over those of men or that essential needs of children should be addressed before proceeding to deal with those of adults. However, such classification is not readily apparent in the case of the general requirement to prioritise economic, social and cultural rights in budgeting. Does it mean priority should be given to economic, social and cultural rights over civil and political rights?

The preamble to the African Charter provides that 'the satisfaction of economic, social and cultural rights is a guarantee for the enjoyment of civil and political rights'. Early studies on the Charter cite

[306] Ibid, para 13.
[307] Ibid, para 39.
[308] Ibid.
[309] Ibid, para 15.
[310] Ibid, para 39.
[311] Ibid, para 14.
[312] Ibid, para 1(e).

this clause as evidence that the Charter gives priority to economic, social and cultural rights over civil and political rights. Gittleman argues that the Charter's 'language indicates the possibility that deference will be given to economic and social programs where they collide with civil and political rights'.[313] Others argue that African governments attach more importance to economic, social and cultural rights in practice.[314] For this reason, one may conclude that economic, social and cultural rights should be prioritised over civil and political rights in resource allocation. However, this conclusion would be contrary to the view that all human rights are 'universal, indivisible and interdependent and interrelated,'[315] a view that has been affirmed by the Commission itself.[316] Therefore, the prioritisation of economic, social and cultural rights in resource allocation does not imply priority over civil and political rights. Then what does giving priority to economic, social and cultural rights mean?

An alternative view is to give budgetary priority to departments or ministries of a government that are directly concerned with the implementation of economic, social and cultural rights over others whose contribution is less direct. For example, a ministry or a department of health will in this case have priority over that of defence in budgetary allocation. States have undertaken this obligation in the Protocol to the African Charter on the Rights of Women in Africa (Maputo Protocol), which the Commission monitors. The Maputo Protocol requires states to 'take the necessary measures to reduce military expenditure significantly in favour of spending on social development in general'.[317]

The Commission's budgetary prioritisation approach differs from the approach adopted under the ICESCR, which requires a state party to take steps 'to the maximum of its available resources'.[318] Central to the ICESCR's requirement is not only avoiding resource wastage but also producing the best possible outcome. Instead, the Commission uses in its definition of progressive realisation the terms 'within the resources available to a state' which implies that it does not incorporate a requirement for optimal utilisation of resources into its definition.[319] Thus, avoiding resource wastage does not seem to fall within the purview of the Commission's definition. The question of how states use their resources is particularly relevant to Africa, since the low implementation of economic, social and cultural rights there is usually attributed to mismanagement of resources.[320] The reason why the Commission chose to omit this element from its definition is subject to speculation: It could be an inadvertent omission or a deliberate strategic decision intended to avoid the technical complexity of assessing whether resources are put to maximum use or not.

Corruption is one of the factors that undermine maximum use of resources. Resources may be allocated for the implementation of economic, social and cultural rights. However, efficient utilisation of such resources would not be possible in states where corruption is rampant.[321] The

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[313] Richard Gittleman, 'The African Charter on Human and Peoples' Rights: A Legal Analysis' (1982) 22/4 *Virginia Journal of International Law* 667 – 714, 677; Odinkalu (n 259) 337.

[314] EI-Obaid & Appiagyei-Atua (n 260) 846.

[315] Vienna Declaration and Programme of Action, Adopted by the World Conference on Human Rights in Vienna on 25 June 1993, UN Doc. A/CONF.157/23; 32 ILM 1661 (1993), para 5.

[316] *Purohit and Another v The Gambia,* para 48.

[317] Maputo Protocol, art 10(3).

[318] CESCR, art 2(1).

[319] Compare Pretoria Declaration, para 2.

[320] Mashood A Baderin 'The African Commission on Human and Peoples' Rights and the implementation of economic, social and cultural rights in Africa' in Mashood A Baderin & Robert McCorquodale *Economic, social and cultural rights in action* (2007) 142.

[321] Joel M Ngugi 'Making the Link between Corruption and Human Rights: Promises and Perils' (2010) *American Society of International Law Proceedings* 246, 246; Felner (n 118) 414.

Commission does not provide clear guidance to states with respect to corruption in the Nairobi Principles. Nevertheless, in some instances, the Commission has recognised corruption as a factor that limits the enjoyment of the rights in the Charter and has thus required states to adopt adequate anti-corruption measures.[322] It has commended states when they adopted measures for combating corruption.[323] At times, the Commission has identified the failure of a state to provide accurate information on anti-corruption measures in its report as an area of concern.[324]

### 2.4.2 Non-retrogression under the African Charter

The African Commission introduced the principle of non-retrogression in its Nairobi Principles, following the CESCR's understanding of the principle as it did with the concept of progressive realisation.[325] Its approach is not necessarily identical to that of the CESCR insofar as it departs from the CESCR's approach in classifying retrogressive measures along the dichotomy of progressive and immediate obligations. The Commission identified the prohibition of retrogressive steps as one kind of state obligations that are immediate on ratification of the African Charter.[326] On the other hand, the CESCR derived a prohibition of retrogressive measures from the principle of progressive realization and avoided a general classification of such measures under immediate obligations.[327]

The African Commission does not define 'immediate obligation'. If it means part of state obligations that cannot be delayed for lack of resources, then as Chenwi argues, the prohibition of retrogressive measures is 'an immediate obligation not subject to the availability of resources'.[328] However, this view does not sound logical because lack of resources can justify retrogressive measures as the Commission indicated in the Nairobi Principles: retrogressive measures can be 'justified in the light of the totality of the rights provided for in the African Charter and in the context of the full use of the maximum available resources'.[329]

The African Commission defines retrogressive measures as steps 'that reduce the enjoyment of economic, social and cultural rights by individuals or peoples'.[330] Its practice does not provide clear guidance on how to identify specific measures that constitute retrogressive measures: unlike the CESCR, the African Commission does not provide examples. Central to the Commission's definition is the decrease in the enjoyment of economic, social and cultural rights. However, not every decrease constitutes a retrogressive measure. For example, in the *Ogoniland* case, the African Commission found a violation of the right to shelter because the Nigerian 'government has destroyed Ogoni houses and villages'.[331] The Commission also found a violation of the right to food, as the Nigerian government had 'destroyed food sources through its security forces and state oil company'.[332] In the

[322] Concluding Observations and Recommendations on the 5th Periodic Report of the Federal Republic of Nigeria (2011 – 2014), adopted at the 57th Ordinary Session held from 04 to 18 November, 2015, in Banjul, The Gambia, para 114; Concluding Observations and Recommendations on the Periodic Report of the Republic Cameroon, adopted at the 39th Ordinary Session held from 11 to 25 May 2005, Banjul, The Gambia, paras 12 & 20.

[323] Concluding Observations and Recommendations on the Second Periodic Report of the Republic of Cameroon, adopted at the 47th Ordinary Session held from 12 to 26 May 2010, Banjul, The Gambia, para 8.

[324] Concluding Observations and Recommendations on the Second Periodic Report of the Republic of Rwanda, adopted at the 36th Ordinary Session held from 23 November to 7 December 2004, Dakar, Senegal, para 20.

[325] Chenwi (n 7) 748.

[326] Nairobi Principles, para 16.

[327] CESCR, General Comments No. 3, para 9.

[328] Chenwi (n 7) 751.

[329] Nairobi Principles, para 20.

[330] Ibid, para 20.

[331] *Ogoniland* case, para 62.

[332] *Ogoniland* case, para 66.

*Darfur* case, the African Commission held that 'the destruction of homes, livestock and farms as well as the poisoning of water sources, such as wells exposed the victims to serious health risks and amounts to a violation' of the right to health (Article 16).[333] In both cases, the measures taken by the respondent states—destruction of houses, homes, livestock and farms and poisoning of water sources—decreased the enjoyment of economic, social and cultural rights collectively affecting the Ogonis in Nigeria and the people of Darfur in Sudan. However, the Commission did not consider these state conducts retrogressive measures.

The African Commission seldom deals with retrogressive measures in its concluding observations – even when it had an opportunity to condemn such measures, it has never been thorough in its analysis. While examining Uganda's report in 2015, for instance, one of the main concerns of the Commission with regard to the right to health was the reduction of HIV/AIDS funding due to both insufficient budget as well as the global economic crisis.[334] In its recommendation, the Commission required Uganda to increase its budget for the health sector to 15% of its annual budget.[335] However, it avoided condemning Uganda for taking retrogressive measures. Decreasing funds allocated for the realization of economic, social and cultural rights would have constituted retrogressive measures according to the CESCR, as it observed with regard to Egypt's withdrawal of food subsidies.[336]

The African Commission clearly specifies the consequence of taking retrogressive measures, stating that retrogressive measures are '*prima facie* in violation of the African Charter' unless they are justified by states.[337] The Commission adopted the wording of the CESCR and laid down two grounds for justifying retrogressive measures: they 'must be justified in the light of the totality of the rights provided for in the African Charter and in the context of the full use of the maximum available resources'.[338] One of the grounds is lack of available resources. Resource justification is acceptable when states show that they faced resource constraints after making full use of their maximum available resources. The Commission followed the practice of the CESCR and explained that international assistance and cooperation are considered available resources.[339] However, it does not identify types or elements of 'resources'. As discussed above, available resources should not be limited to financial resources.[340]

Second, retrogressive measures that increase the total enjoyment of economic, social and cultural rights are permissible. Whether there is an increase in the total enjoyment, as Liebenberg argues, depends on the meaning given to the terms 'total enjoyment'.[341] If the total enjoyment is calculated based on those individuals or groups who are negatively affected by retrogressive measures, there will be no increase. Such an interpretation 'can obstruct redistributive measures which reduce or even eliminate the benefits received by more advantaged groups in order to achieve a more equitable distribution of benefits'.[342] If the total enjoyment is calculated based on the total

[333] *Darfur* case, para 212.
[334] Concluding Observations and Recommendations on the 5th Periodic state Report of the Republic of Uganda (2010 – 2012), 57th Ordinary Session, 04 – 18 November 2015, Banjul, The Gambia, para 75.
[335] Concluding Observation on Uganda (2015), para 114.
[336] CESCR, Concluding Observation on Egypt (2013), para 18.
[337] Nairobi Principles, para 20.
[338] Ibid. cf CESCR, General Comments No. 3, para 9: Retrogressive measures should be 'fully justified by reference to the totality of the rights provided for in the [ICESCR] and in the context of the full use of the maximum available resources'.
[339] Nairobi Principles, para 20; CESCR, General Comments No. 3, para 13.
[340] Skogly (n 102).
[341] Sandra Liebenberg *Socio-Economic Rights: Adjudication under a Transformative Constitution* (Juta 2010) 189-190.
[342] Ibid 190.

population in a given state, retrogressive measures negatively affecting certain individuals or groups, particularly those most advantaged, may increase the total enjoyment of the rights.[343] Even the total increase based on the entire population is not flawless because 'the purpose of human rights norms is precisely concerned with the well-being of each individual and group' who should be treated with care and concern.[344]

Moreover, the Commission stipulated seven criteria for evaluating retrogressive measures. With little modification, at times distortion, these criteria have been taken from General Comment No 19 of the CESCR as the text of the Nairobi Principles themselves testifies:

> In determining whether a state party has violated the Charter by implementing a retrogressive measure the Commission will consider whether: a) there was reasonable justification for the action; b) alternatives were comprehensively examined and those which were least restrictive of protected human rights were adopted; c) there was genuine participation of affected groups in examining the proposed measures and alternatives; d) the measures were directly or indirectly discriminatory; e) the measures would have a sustained impact on the realisation of the protected right; f) the measures had an unreasonable impact on whether an individual or group was deprived of access to the minimum essential level of the protected right; and g) there was an independent review of the measures at the national level.[345]

The first criterion requires states to provide a reasonable justification for taking a retrogressive measure. One may argue that states comply with this criterion when the reason for their measures is one or both of the grounds provided by the Commission. These grounds are resource constraints and increase in the total enjoyment of the rights, as discussed above, but the grounds are not stated as part of the criterion.

The second criterion requires states to identify all possible measures that can be taken in the circumstances under consideration. This is because the Commission ascertains whether an impugned retrogressive measure was adopted after 'alternatives were comprehensively examined'. The purpose of identifying all alternatives is to find a measure or a combination of different measures that can most advance the rights guaranteed under the Charter, because the Commission requires states to adopt the least restrictive measure from the alternatives identified.

The third criterion sets one of the procedures to be observed during the process of identifying and selecting a retrogressive measure from a range of other alternatives. It requires participation in the process of adopting those measures. Genuine participation of the affected group is necessary, however, the Commission does not make a distinction between those who benefit from the measures and those who do not. Whether the rights holders are affected negatively or positively, the Commission requires a genuine participation.

The fourth criterion requires states to comply with the principle of non-discrimination, which permeates all the provisions of the Charter. Any discrimination, direct or indirect, is prohibited. States may not pass a measure that targets a particular group identified on any of the prohibited grounds of discrimination. According to the Commission, if a retrogressive measure has 'an adverse impact disproportionately on one group or other,' the measure would be indirectly discriminatory.[346]

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[343] Ibid 189-190.
[344] Ibid 190.
[345] Nairobi Principles, para 20.
[346] Ibid para 1(m).

Unlike the CESCR, the Commission does not expressly require states to reduce inequalities that may grow in times of crisis.[347] One may question the usefulness of this criterion, considering that any discrimination in the implementation of the rights guaranteed in the Charter is a violation of the Charter. States have expressly undertaken the obligation of non-discrimination in implementing the Charter rights under Article 2, so adopting the principle of non-discrimination as one of the criteria for evaluating the conformity of a retrogressive measure with the Charter does not add any value.

The fifth and the sixth criteria are concerned with the impact of retrogressive measures. The fifth criterion deals with temporal impact, and is used to assess the duration of the impact of retrogressive measures. The impact of retrogressive measures may end with the termination of the measures; however, sometimes the impact of such measures may last much longer than the lifespan of the measures themselves. One may argue that the level of scrutiny should be higher when the measures have a sustained impact on the enjoyment of economic, social and cultural rights under the Charter, that is, when a decrease in the enjoyment continues over a long period. Instead of evaluating the long-term impact of the measures, the CESCR requires that retrogressive measures remain in place only so far as they are necessary.[348]

The sixth criterion deals with the magnitude of the impact and determines how far a decrease in the enjoyment of the rights can go. The Commission draws the line below which the decrease in the enjoyment of the rights should not fall. That line is drawn by the requirement that states comply with the minimum core content of the rights. That is, states should perform their minimum core obligations even during times of crisis when they are allowed to take retrogressive measures.

The last criterion deals with another procedural guarantee: state parties taking retrogressive measures should put in place mechanisms for review at national level. Individuals or groups who are negatively affected by the measures must have the opportunity to be heard before an independent body. For that purpose, the Commission does not require the establishment of a separate body. The Commission's position is not clear on the relationship of this criterion with Article 26 of the Charter, which stipulates that the state parties have the duty to guarantee the independence of the courts and to allow the establishment of national institutions for the protection of the rights under the Charter. One may argue that states have the obligation to put in place an independent national review mechanism under this provision whether they are taking retrogressive measures or not. The Commission itself stressed that a violation of 'economic, social and cultural rights protected under the African Charter must entitle affected individuals and peoples to effective remedies and redress under domestic law'.[349]

To summarise, the African Commission has followed the practice of the CESCR in defining the principle of non-retrogression; however, minor differences are still noticeable. The CESCR derives the principle of non-retrogression from the principle of progressive realisation while the Commission categorises the prohibition of retrogressive measures among immediate obligations, as opposed to progressive obligations. The other difference relates to the criteria for evaluating the appropriateness of retrogressive measures. The CESCR adopted criteria that are more general in 2016. Because the Nairobi Principles were adopted earlier in 2011, the Commission relies on the criteria developed by the CESCR in 2008. As a result, the Commission's criteria, unlike that of the

[347] CESCR, statement on Public Debt (n 169), para 4.
[348] Nairobi Principles, para 20.
[349] Ibid para 21.

CESCR, do not expressly require states to ensure that retrogressive measures do not disproportionately affect the rights of vulnerable and disadvantaged individuals and groups.[350]

## 2.5 Justifications for introducing progressive realisation into the African Charter

The strength of the justifications supporting a particular interpretation of the African Charter – or any international human rights treaty, for that matter – is obviously important to generate the required acceptance. The reasons for choosing a particular interpretation over a range of other alternatives must persuade at least, as Tobin calls it, 'the relevant interpretive community', which is not limited to states but also includes non-state actors such as international organisations, non-governmental organisations, and even multinational corporations.[351] The African Commission does not dwell much on providing justifications for its interpretation. With regard to the principle of progressive realisation, its interpretation seems to fit into the principle of systemic integration.

Systemic integration is a general principle of treaty interpretation, which requires the construction of treaties in accordance with general international law.[352] This is because treaties are the creatures of international law.[353] The principle is incorporated in the Vienna Convention on the Law of Treaties (VCLT).[354] The African Commission does not expressly refer to the principle of systematic integration by name. Nor does it rely on the relevant provisions of the VCLT. From the provisions of the African Charter referenced in the Nairobi Principles, the Commission's approach falls under this principle as argued in the following sub-section. In addition, lack of resources or conditions of underdevelopment can be another reason for interpreting the African Charter as incorporating the principle of progressive realisation. In the academic literature, commentators usually recommend the progressive realisation of economic, social and cultural rights under the African Charter. The main reason for this recommendation is resource constraints. Although the Commission does not expressly state resource constraints as a reason for introducing progressive realisation, resource issues will also be examined below.

### 2.5.1 Systemic Integration

Article 31(3)(c) of the VCLT 'gives expression to the objective of "systemic integration"'.[355] The principle of systemic integration 'emphasizes both the "unity of international law" and the sense in which rules should not be considered in isolation of general international law'.[356] Despite the importance of this provision, international judicial and quasi-judicial organs appear to be reluctant to refer to it.[357] A lack of reference to this provision does not mean that the principle is not applied, though. This is because, in most cases, the principle operates 'as an unarticulated major premise in

[350] CESCR, statement on Public Debt (n 169), para 4.
[351] John Tobin 'Seeking to Persuade: A Constructive Approach to Human Rights Treaty Interpretation' (2010) 23 *Harvard Human Rights Journal* 1.
[352] Campbell Mclachlan 'The principle of systemic integration and article 31(3)(c) of the Vienna Convention' (2005) 54 *International and Comparative Law Quarterly* 279 – 320, 280.
[353] Ibid.
[354] Ibid; VCLT, art 31(3)(c).
[355] Conclusions of the work of the Study Group on the Fragmentation of International Law: Difficulties arising from the Diversification and Expansion of International Law (2006) 2 (part 2) *Yearbook of the International Law Commission* 176 – 184, 180; A/CN.4/SER.A/2006/Add.l (Part 2), para 17.
[356] Philippe Sands, 'Treaty, Custom and the Cross-fertilization of International Law' (1998) 1/1 *Yale Human Rights and Development Journal* 85 – 105, 95.
[357] Ibid 96.

the construction of treaties'.[358] Judicial or quasi-judicial reference to 'other rules of international law in the course of interpreting a treaty is an everyday, often unconscious, part of the interpretation process'.[359] Thus, international human rights bodies usually apply the principle of systemic integration.[360]

The principle of systemic integration may minimise the possibility of diverging or conflicting interpretation of similar or identical rules of international law.[361] The adoption of this principle requires harmonious interpretation of the African Charter with international human rights treaties. The African Charter seems to have adopted this principle by authorising the Commission and the Court to draw inspiration from international human rights law under Article 60.[362] The Charter also requires the Commission and the Court to consider general international law in its interpretation under Article 61.[363]

Article 60 of the African Charter authorises drawing 'inspiration from international law on human and peoples' rights'[364] as well as provides for an illustrative list of instruments that includes constitutions of two international organisations: the UN and the AU. The choice of the word 'instruments' instead of, for example, 'treaties' shows the breadth of sources from which inspiration is to be drawn. The Charter does not distinguish 'hard' law from 'soft' law and no precedence is given to one over the other. While the Charter does not refer to any human rights treaty in force at the time of its adoption, it lists the Universal Declaration on Human Rights along with the UN Charter and the Constitutive Act of the African Union to serve as sources of inspiration.[365] This can be taken as evidence indicating the importance accorded to 'soft' law. In fact, the Commission and the Court do refer to 'soft' law.[366]

The Charter directs the Commission and the Court to draw inspiration from human rights instruments adopted within the framework of the UN. Although the Charter does not name the ICESCR, the ICCPR and other UN human rights treaties, they obviously fall under 'other instruments

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[358] Mclachlan (n 362) 280.

[359] Ibid.

[360] See Adamantia Rachovitsa, 'The principle of systemic integration in human rights law' (2017) 66/3 *International & Comparative Law Quarterly* 557 – 588 (discussing the application of the principle by three regional human rights courts).

[361] Ibid 558.

[362] Art 60 of the African Charter provides that: 'The Commission shall draw inspiration from international law on human and peoples' rights, particularly from the provisions of various African instruments on human and peoples' rights, the Charter of the United Nations, the Charter of the Organization of African Unity, the Universal Declaration of Human Rights, other instruments adopted by the United Nations and by African countries in the field of human and peoples' rights as well as from the provisions of various instruments adopted within the Specialized Agencies of the United Nations of which the parties to the present Charter are members'.

[363] Art 61 of the African Charter provides that: 'The Commission shall also take into consideration, as subsidiary measures to determine the principles of law, other general or special international conventions, laying down rules expressly recognized by member states of the Organization of African Unity, African practices consistent with international norms on human and people's rights, customs generally accepted as law, general principles of law recognized by African states as well as legal precedents and doctrine'.

[364] Compare with ACRWC, which provides similar mandate to the African Committee of Experts on the Rights of the Child.

[365] Art 60 of the Charter refers to the Charter of the Organisation of African Unity, which is replaced by the Constitutive Act of the African Union.

[366] The Commission referred to 'soft' law in a number of cases. See *Malawi African Association and Others v Mauritania* (2000) AHRLR 149 (ACHPR 2000), para 135; *Good v Botswana* (2010) AHRLR 43 (ACHPR 2010), para 187 where the Commission refers to the Universal Declaration on Human Rights; *Purohit and Another v The Gambia* (2003) AHRLR 96 (ACHPR 2003), para 47, where the Commission refers to the UN Principles for the Protection of Persons with Mental Illness and the Improvement of Mental Illnesses and the Improvement of Mental Health Care; *Legal Resources Foundation v Zambia* (2001) AHRLR 84 (ACHPR 2001), para 67 referring to Vienna Declaration and Programme of Action. The Court has also referred to 'soft' law. See *African Commission on Human and Peoples' Rights v Republic of Kenya* (hereafter Ogiek case), Application No. 006/2012, judgment of 26 May 2017, paras 126 – 128.

adopted by the United Nations'.[367] The Commission frequently relies on them in its jurisprudence.[368] Respondent states before the Commission are usually state parties to most universal human rights treaties. In one instance, the Commission implied that it would not draw inspiration from a treaty not ratified by a respondent state.[369] The Commission expanded the scope of Article 60 when it interpreted the Charter in such a way that other instruments adopted by the United Nations 'include *decisions* and general comments by the UN treaty bodies'.[370] It seems more appropriate to refer to cases of the UN treaty bodies as 'legal precedents' that fall under Article 61 rather than under Article 60.

The African Charter requires the Commission and the Court to draw inspiration from instruments adopted by the Specialised Agencies of the UN when state parties to the African Charter are members thereof. Instruments adopted by organisations such as the International Labour Organisation provide sources of inspiration to the Commission.[371] The criterion here is the membership of an Organisation rather than the ratification of a treaty. The Commission should also draw inspiration from instruments adopted by African countries. The Commission went beyond drawing inspiration, however, and despite its lack of a mandate to monitor, found violations of the OAU Convention Governing the Specific Aspects of Refugee Problems in Africa.[372] Since the Charter does not limit the Commission to instruments adopted by the AU, the Commission can draw inspiration from sub-regional human rights instruments adopted by, for example, regional economic communities or from intercontinental instruments such as the Arab Charter on Human Rights.[373]

The African Charter provides for the role of general international law in its interpretation. Under Article 61, it refers to a modified version of the list provided under Article 38(1) of the Statute of the International Court of Justice (ICJ). Like the Statute, the list under the Charter includes conventions, custom, general principles, and judicial decisions. While the ICJ should apply international conventions, international customs, and the general principles, the African Commission considers them 'as subsidiary measures to determine the principles of law'. The Charter adds some qualifications, however, stating that not every international convention should be taken into consideration—only the conventions that lay down rules expressly recognized by member states of the African Union. Ratification of a treaty is an obvious form of express recognition of rules contained in it. The general principles to be taken into consideration should be recognised by African states. The Charter also increased the items on the list. Article 61 requires the Commission to take into consideration 'African practices consistent with international norms on human and peoples' rights'.

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[367] African Charter, art 60.

[368] See, for example, *Media Rights Agenda v Nigeria* (2000) AHRLR 262 (ACHPR 2000), para 52; *Civil Liberties Organisation and Others v Nigeria* (2001) AHRLR 75 (ACHPR 2001) paras 34 & 40; *Social and Economic Rights Action Centre* (SERAC) and Another v Nigeria (2001) AHRLR 60 (ACHPR 2001), para 48.

[369] *Wetsh'okonda Koso and Others v Democratic Republic of the Congo* (2008) AHRLR 93 (ACHPR 2008), para 92. The Commission held that it could refer to art 14(5) of the ICCPR 'in terms of article 60 of the African Charter on Human and Peoples' Rights. However, nothing in the dossier shows that the respondent state has adopted and ratified this Covenant, therefore this argument seems ineffective'.

[370] *Civil Liberties Organisation and Others v Nigeria* (2001) AHRLR 75 (ACHPR 2001), para 24. Italics added.

[371] *Centre for Minority Rights Development and Others v Kenya* (2009) AHRLR 75 (ACHPR 2009), paras 154-155. The Commission referred to the ILO Convention 169 on Indigenous and Tribal Peoples in Independent Countries but noted that Kenya is not party to it.

[372] African Institute for Human Rights and Development (on behalf of Sierra Leonean Refugees in Guinea) v Guinea (2004) AHRLR 57 (ACHPR 2004), para 75.

[373] For sub-regional human rights instruments see Solomon Ebobrah & Armand Tanoh *Compendium of African sub-regional human rights documents* (Pretoria: Pretoria University Law Press, 2010).

In sum, the African Charter determines, albeit blurredly, the role of treaty bodies with regard to itself, international human rights law, and general international law. The mandate of the Commission and the Court is to interpret and apply the Charter. To carry out this task, they draw inspiration from international human rights law and take into consideration general international law. In practice, there is no difference between drawing inspiration from an instrument and taking it into consideration. At least the Commission does not make such distinction, although the Court's position is yet to be seen. The Commission usually refers to Articles 60 and 61 together. The African Court has even wider power than the Commission, with a jurisdiction over any human rights treaty ratified by the respondent state.[374] In other words, the Court can declare a violation of international human rights treaties such as the ICESCR and the ICCPR.

The Commission relies entirely on its power to draw inspiration from Articles 60 and 61 of the Charter to justify its introduction of the concept of progressive realisation into the Charter. It proclaimed that 'While the African Charter does not expressly refer to the principle of progressive realisation, this concept is widely accepted in the interpretation of economic, social and cultural rights and has been implied into the Charter in accordance with Articles 61 and 62 [*sic*] of the African Charter'.[375] Ratification of a treaty is not a prerequisite for drawing inspiration from it, but the fact that the majority of state parties to the African Charter are also parties to the ICESCR and other treaties that contain the principle of progressive realisation could be a relevant factor.[376] However, some considerations may militate against the persuasive power of this justification.

The scope of the Commission's power is one of such considerations. The Commission's power to draw inspiration from international human rights law is limited. It cannot transform the African Charter into a different treaty. The Charter cannot be taken as a gigantic treaty that contains all the rules laid down in all human rights treaties. The 'application of the principle of systemic integration is limited by the explicit language of the treaty under interpretation'.[377] The text of the Charter does not allow such interpretation, as discussed above. The drafting history of the Charter can be another consideration, insofar as it also shows that the principle of progressive realisation was deliberately omitted from the Charter, as discussed above.

Moreover, the omission of the principle of progressive realisation from the Charter could have been justified by a reference to other principles. The *pro homine* principle could have been one such justification, because it requires the application of rules more favourable to the individual.[378] If one accepts the principle of progressive realisation as a limitation, a treaty that does not contain the principle is more favourable to the individual.[379] The other is the *lex specialis* maxim: '[t]he principle that special law derogates from general law'.[380] The principle provides that 'if a matter is being regulated by a general standard as well as a more specific rule, then the latter should take precedence over the former'.[381] In cases of conflict of norms, 'it is the role of *lex specialis* to point to

[374] African Court Protocol, arts 3 & 7.
[375] Nairobi Principles, para 13.
[376] Most African states are also parties to CESCR, CRC, and CRPD. See ratification status at https://treaties.un.org.
[377] Rachovitsa (n 370) 561.
[378] Yota Negishi 'The pro homine principle's role in regulating the relationship between conventionality control and constitutionality control' (2017) *European Journal of International Law* 457 – 481.
[379] Young (n 163) 101.
[380] The maxim provides that *lex specialis derogat lege generali*. Marti Koskenniemi, Report of the Study Group of the International Law Commission on 'Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law,' A/CN.4/L.682, 13 April 2006, para 56.
[381] Ibid para 56.

a set of considerations with practical relevance: the immediate accessibility and contextual sensitivity of the standard'.[382] The African Charter, a regional instrument, can be considered both as *lex specialis* concerning universal human rights treaties such as the ICESCR,[383] as well as providing practical relevance to the African socio-economic contexts. Therefore, it can be submitted that the Charter takes precedence over the universal human rights treaties even in cases of conflict, provided that the latter are not pre-emptory norms of international law.

### 2.5.2 Resources and underdevelopment

Resources by their nature are scarce. The scarcity of resources is closely related to the concept of progressive realisation. The underlying assumption is that a lack of resources at least partly prevents the immediate realisation of economic, social and cultural rights as opposed to civil and political rights. Thus, the progressive realisation of economic, social and cultural rights is said to be necessary, as discussed earlier.

Similarly, commentators recommend the progressive realisation of economic, social and cultural rights under the African Charter. Some make the recommendation based on views of 'the majority'. A claim is usually made that 'the majority' calls for progressive achievement while 'the minority' considers the rights justiciable. Ankumah, for example, argues that economic, social and cultural rights under the African Charter 'must be achieved progressively' according to the majority view.[384] She states that 'even if the African Commission were to find a state to be in violation of its duty to provide work, health care etc., in most cases due to underdevelopment, misallocation of resources etc. the complaint cannot get immediate relief'.[385] Nmehielle agrees with her that those 'who argue that economic, social and cultural rights, as guaranteed by the Charter, are justiciable, appear to be in the minority'.[386] He calls for 'progressive realization of the rights, taking into consideration the circumstances faced by the states Parties'.[387] Concurring with Nmehielle, Mbazira refers to Ankumah and argues that '[i]t is important that the socio-economic rights in the African Charter be realised progressively due to the underdevelopment of most African countries'.[388] One of the problems with this view is the conflation of two separate concepts: justiciability and progressive realisation. Justiciability, understood as 'a concept denoting the suitability of a case for judicial or quasi-judicial scrutiny,'[389] cannot be an issue under the African Charter.[390] In recognising justiciability of economic, social and cultural rights, the Charter is the pioneer among other human rights treaties.[391] Besides,

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[382] Ibid, para 87.

[383] Ibid, para 98.

[384] Evelyn A Ankumah *The African commission on human and peoples' rights: practice and procedures* (The Hague: Martinus Nijhoff Publishers, 1996) at 144.

[385] Ibid 144.

[386] Nmehielle (n 50) 124. It seems that Nmehielle conflates justiciability with progressive realisation.

[387] Ibid 124.

[388] Mbazira (n 113) 341. He adds changing standard as another reason for requiring progressive realisation. He argues that 'it is also important that socio-economic rights be realised progressively because the standards for their full realisation are dynamic; they are defined by changing socio-economic circumstances and establish shifting standards'.[388]

[389] Takele Soboka Bulto'Exception as norm: the local remedies rule in the context of socio-economic rights in the African human rights system' (2012) 16/4 *The International Journal of Human Rights* 555-576, 556.

[390] See Christian-Jr Kabange Nkongolo, 'The Justiciability of Socio-Economic Rights under the African Charter on Human and Peoples' Rights: Appraisal and Perspectives Three Decades After Its Adoption' (2014) 22/3 *African Journal of International and Comparative Law* 492 – 511, 496; Bulto (n 399) 556; Odinkalu (n 259) 349.

[391] cf the European Social Charter and the ICESCR, where justiciability of these rights were recognised only in 1995 and in 2008 respectively, much later than when the African Charter was adopted in 1981. Additional Protocol to the European Social Charter Providing for a System of Collective Complaints, adopted 9 November 1995, entry into force 1 July 1998, European Treaty Series - No. 158. OP-ICESCR.

who constitutes 'the majority' or 'the minority is not clear. Is it the majority of the state parties? Could it be the majority of academic writers?

Other commentators acknowledge that the Charter requires immediate implementation of economic, social and cultural rights but argue that such implementation would not be practical due to a lack of resources or underdevelopment in Africa. Umozurike argues that the inclusion of economic, social and cultural rights in the African Charter as 'progressive development is more realistic than as definite rights to be immediately enjoyed' because 'the possibility of achievement seems to be beyond the capability of most African states at present'.[392] Heyns finds the Charter problematic because the economic, social and cultural rights it recognises 'are not explicitly made subject to the usual internal qualifiers […] such as the provision that the state is only required to ensure progressive realisation, subject to available resources'.[393] This unconditional way in which the rights are stated 'could easily create unrealistic expectations, and as such could undermine the legitimacy of the Charter'.[394] Along the same line, Yeshanew concludes that one of the major lacunae in the African Charter is the fact that the resource-dependent obligations relating to many economic, social and cultural rights provisions 'are not expressly qualified by the conventional requirement of "progressive realization"'.[395] Yeshanew recommends that the African Commission and the Court should read progressive realisation into the Charter.[396] However, Yeshanew limits his recommendation to only resource-dependent obligations.[397]

However, this recommendation is wanting on some considerations. The recommendation fails to adopt a holistic view towards the rights under the Charter. It is generally accepted that the implementation of civil and political rights requires resources, yet the application of progressive realisation is recommended with regard to economic, social and cultural rights only. The recommendation also ignores the concern that progressive realisation may be used by recalcitrant states to escape their obligations.[398] Finally, the recommendation is made on the assumption that the Charter creates unrealistic expectations, an assumption that has been taken for granted without examination. First of all, whose expectations are unrealistic? Assuming that the reference is to the expectations of rights holders, the claim should have been made on empirical data, since the Charter has been in force for more than three decades. If the creation of unrealistic expectations were a fact, the Commission would have been flooded with cases, as Umozurike predicted long ago.[399]

The African Commission acknowledges the lack of resources as its major challenge. In *Purohit and Another v The Gambia*, the Commission held 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'.[400] Because of poverty the African states are incapable of providing 'the necessary

[392] Oji U Umozurike *The African charter on human and peoples' rights* (1997) 95. See Ankumah (n 394) 144; Nmehielle (n 50) 124.

[393] Christof Heyns, 'The African Regional Human Rights System: The African Charter' (2004) 108/3 *Penn state Law Review* 679 – 702, 690.

[394] Christof Heyns, The African regional human rights system: In need of reform?' (2001) 1/2 *African Human Rights Law Journal* 155 – 174, 161.

[395] Yeshanew (n 268) 266.

[396] Ibid 267 – 268, 272 – 273.

[397] Ibid.

[398] Leckie (n 234) 94.

[399] U O Umozurike 'The protection of human rights under the Banjul (African) Charter on Human and People's Rights' (1988) 1 *African Journal of International Law* 65, at p. 81, cited in J Oloka-Onyango 'Beyond the Rhetoric: Reinvigorating the Struggle for Economic and Social Rights in Africa' (1995) 26/1 *California Western International Law Journal* 1-73, 52.

[400] *Purohit and Another v The Gambia*, para 84.

amenities, infrastructure and resources that facilitate the full enjoyment of this right'.[401] The Commission espoused a similar view with regard to the right to development. In the *Southern Cameroon* case, the Commission held that 'the realisation of the right to development is a big challenge to the respondent state, as it is for state parties to the Charter, which are developing countries with scarce resources'.[402] Despite this trend in the case law, the Commission has not raised scarcity of resources as its justification for introducing progressive realisation into the African Charter.

## 2.6 Implications of introducing progressive realisation into the African Charter: An assessment

The African Commission has introduced the principle of progressive realisation into the Charter. To do so, it has heavily relied on its mandate to draw inspiration from international law, which includes the UN treaties, particularly the ICESCR and the practice of the CESCR. The Commission has made a fundamental change to the Charter, and while the Charter is not Holy Scripture, advantages and disadvantages should be weighed in the process of developing it; therefore, this section examines and evaluates the implications of introducing the principle into the African Charter.

The implications of introducing the principle of progressive realisation, it is submitted, can be examined from normative, structural and institutional perspectives. Here, a normative perspective relates to the nature of economic, social and cultural rights as legal rights and the extent to which they can be enjoyed or limited. An examination from a structural perspective looks at how the introduction of the principle affects the African Charter as a whole. An institutional perspective examines the consequences of introducing the principle for the Commission as an institution.

From the outset, it is worth restating that the principle of progressive realisation does not mean the same thing for the critics and supporters alike. From a normative perspective, one version of the principle has a positive consequence for economic, social and cultural rights. This version of progressive realisation ensures the maximum possible performance of human rights as discussed above. In this sense, the principle does not replace, rather supplements, immediate obligations of states with regard to economic, social and cultural rights. The principle puts in place an additional tool for holding states accountable. Therefore, one may argue that introducing the principle in this sense strengthens the accountability of states under the African Charter by monitoring a) whether they have allocated sufficient resources and properly used the allocated resources for the realisation of economic, social and cultural rights; and b) whether they have made improvement in the enjoyment of these rights.

Another version of the principle of progressive realisation has negative consequences for the recognition as well as the realisation of economic, social and cultural rights. The principle is not invoked in political discourse. Instead, different reasons are provided to argue that economic, social and cultural rights are not human rights. For example, Jeane Kirkpatrick, a US Ambassador to the UN during the Presidency of Ronald Reagan, was reported to have argued that economic, social and cultural rights cannot be human rights because 'they must be provided by others through forceful extraction (taxation) and that that negates other peoples' inalienable rights'.[403] Neier considers these

[401] Ibid.

[402] *Southern Cameroon case,* para 206.

[403] Cliff DuRand, *Human Rights Today* <http://globaljusticecenter.nationbuilder.com/human_rights> (accessed 30 August 2017).

rights dangerous 'particularly because there will always be different stages of development and different resources to consider in determining benefits'.[404] However, when it comes to legal discourse, a finger is pointed to the principle of progressive realisation to prove that these rights are not legal in nature, as discussed earlier. One may be quick to dismiss this view as a twentieth-century perspective or as an attitude prevalent during the Cold War. Certainly, there has been an undeniable transformation in the legal recognition and judicial enforcement of economic, social and cultural rights. However, there is little evidence showing that these rights have achieved the same level of recognition as civil and political rights today.[405] Thus, the introduction of progressive realisation poses a risk of further marginalisation to economic, social and cultural rights under the African Charter. Even in the absence of the principle, the Commission received very few economic, social and cultural rights cases despite the fear that it would be flooded with cases.[406] The Commission itself has already been criticised for neglecting these rights in its activities.[407] In its promotional mandate, the Commission has focused on civil and political rights and 'paid lip service to economic, social and cultural rights'.[408]

The conception of progressive realisation as a limitation is another negative consequence on economic, social and cultural rights under the Charter, but less damaging than the denial of their legal nature. This view does not question the legal nature of the rights. Rather, the principle is understood as a restriction of the enjoyment of the rights.[409] It is needless to state that most rights are not absolute since they can be limited. Economic, social and cultural rights can also be limited. However, the conception of progressive realisation as a limitation creates a second layer of restriction; the principle would provide states with an additional defence for their failure to make improvements over time. In Africa, however, 'poor governance and economic mismanagement rather than lack of resources' is identified as a problem for low implementation of economic, social and cultural rights.[410] It is a truism that resources are scarce everywhere in the world. Instead, how resources are used is central to the realisation of economic, social and cultural rights. That is why supranational supervision mechanisms like the African Commission are established to hold states accountable through international law.[411] Introducing progressive realization might offer an incentive for states to invoke lack of resources for their failure to comply with their obligations. Some states might view this as an opportunity to act in bad faith. As a result, the Commission has given an incentive to states to prioritise civil, political and peoples' rights over economic, social and cultural rights in the allocation of their resources, which may ultimately lead to the marginalisation of economic, social and cultural rights.

From the structural perspective, the introduction of the principle is risky even when it is understood in a positive sense. Its introduction is not necessary in the first place. The same purpose can be achieved partly by utilising the tool provided under Article 62 of the Charter, on state reporting. The

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[404] Neier, A critique, (n 255) 3.

[405] See Moons (n 220) 89; De Beco (n 17) 268.

[406] Oji U Umozurike 'The protection of human rights under the Banjul (African) Charter on Human and People's Rights' (1988) 1 *African Journal of International Law* 65, 81, cited in Oloka-Onyango (n 409) 52.

[407] Viljoen (n 251) 417.

[408] Sibonile Khoza 'Promoting economic, social and cultural rights in Africa: The African Commission holds a seminar in Pretoria' (2004) 4 *African Human Rights Law Journal* 334, 334.

[409] See Young (n 163) 101 – 102. Restrictions on economic, social and cultural rights under the Charter will be discussed in the next chapter.

[410] Baderin (n 320) 142; Shedrack C Agbakwa 'Reclaiming Humanity: Economic, Social, and Cultural Rights as the Cornerstone of African Human Rights' (2002) 5 *Yale Human Rights and Development Journal* 177, 195.

[411] Viljoen (n 251) 215.

provision requires states to submit reports on the measures they have taken to give effect to the rights under the Charter. If an issue concerning the failure of a state arises in communication procedures, nothing in the Charter prohibits the Commission or the Court from examining whether a respondent state has allocated resources or properly used the allocated resources. The African Commission and the Court can hold states accountable and promote maximum human rights performance under the existing provisions of the Charter. Therefore, the introduction of progressive realisation into the Charter does not add any value but is in fact problematic.

The introduction of progressive realisation into the text of the African Charter would undermine the integrity of the Charter itself. This problem does not arise from the introduction of the principle *per se*, but rather from the limitation of the principle to economic, social and cultural rights only. The realisation of other rights under the African Charter (civil, political and peoples' rights) depends on the availability of resources too. Because of the scarcity of resources, their full realisation does not happen overnight. One then wonders why the African Commission does not monitor these factors for the realisation of other Charter rights, for example, whether states have allocated resources; whether they have properly utilised the allocated resources; and whether such resource allocation and utilisation have advanced the enjoyment of other Charter rights. There is no reason to limit the potential benefits of progressive realisation.

However, the African Commission has limited the application of progressive realisation to economic, social and cultural rights only. This raises another issue. Have state parties achieved full realisation of civil, political, and peoples' rights? It is common knowledge that the answer is negative. Then why does the African Commission avoid monitoring progress in the enjoyment of civil, political, and peoples' rights? Does that mean the Commission is less concerned with monitoring the enjoyment of other Charter rights? Here, one should acknowledge the challenges that the Commission may face. There is no jurisprudential experience for the Commission or the Court to draw on even if they found it necessary to extend progressive realisation to civil, political and peoples' rights, because international human rights bodies that supervise civil and political rights do not use the principle of progressive realisation.

From the institutional perspective, the form in which the principle of progressive realisation has been introduced has some ramifications for the Commission itself. The Commission has risked its credibility in at least two ways. First, the Commission compromised its consistency and predictability by contradicting its earlier approach. As discussed above, the Commission has taken the view that the Charter provides for immediate obligations. Now it adopts contrary views by introducing progressive realisation and treating economic, social and cultural rights in a different way. The Commission undermined its authority by failing to provide convincing reasons. In the *Southern Cameroon* case, the Commission adopted a sweeping statement for which it did not provide any reason at all: a 'state is under obligation to invest its resources in the best way possible to attain the progressive realisation of the right to development, and other economic, social and cultural rights'.[412] When the concept was adopted in the Nairobi Principles, the Commission relied on Articles 60 and 61 of the Charter. That is, it introduced the concept because other human rights treaties include it. The Commission does not bother to show how the Charter is identical or at least similar to those treaties in this respect.

[412] *Southern Cameroon case,* para 206.

Second, the Commission casts doubt on the quality of its expertise. The Commission heavily relies on the work of the CESCR when it deals with economic, social and cultural rights. In principle, there is nothing wrong with that and the Commission has indeed the mandate to do so. Because its mandate springs from the Charter, the Commission should make the necessary adaptations to dovetail the lessons it learns from the CESCR (and other similar organs) with the Charter's context. The African regional context is obviously the raison d'être of the Charter and cannot be ignored in any interpretive exercise. Therefore, if the Commission interprets the Charter by introducing a new concept such as progressive realisation, it must do so in such a way that the concept is adapted to keep the Charter's central features intact. Otherwise, it runs the risk of being perceived as an organ that lacks the required expertise to distinguish the contextual difference of the ICESCR from that of the Charter or as an organ that has no ability to understand the Charter's nuanced approach. All of these factors, namely, consistency, predictability, expertise and reasoned decisions, have implications for the legitimacy of the Commission.[413]

## 2.7 Conclusion

The principle of progressive realisation can be understood as a tool necessary for ensuring maximum human rights performance. In this sense, the principle can be used to hold states internationally accountable for a failure to make progress in the enjoyment of human rights – including economic, social and cultural rights. The principle coexists with immediate state obligations. This is implicit in the *raison d'être* of international human rights treaties such as the African Charter and their monitoring organs such as the African Commission and the African Court. Therefore, the African Charter cannot be interpreted to exclude mechanisms of supervising progress made in the enjoyment of human rights. Progress *a priori* does not happen overnight and varies from one state to another depending on their resources, whether they come in financial, natural, human, or technological form, whether they are private or public, or from within state parties or from outside sources.

However, the principle of progressive realisation has also been invoked as evidence that economic, social and cultural rights are not legal or human rights. It is also understood as an additional limitation applicable to these rights only. The African Charter does not incorporate the principle in this sense and should not be interpreted to do so. The absence of the principle from the Charter does not exclude its potential benefits from the Charter. Nevertheless, interpreting the Charter to include the principle of progressive realisation brings into the Charter meanings that have serious repercussions for economic, social and cultural rights. This understanding of the principle undermines the recognition of these rights and subjects them to additional restrictions.

Irrespective of what the principle of progressive realisation might entail, the form in which the principle has been introduced has negative consequences for the Commission itself. In introducing the principle, the Commission has not taken into consideration the drafting history of the Charter. Neither has it justified the introduction of the principle on the ground of changes in the circumstances in which the Charter was drafted and adopted. It has also failed to adapt lessons from other human rights organs to the African Charter and its contexts, and has not examined the

[413] Magdalena Sepulveda Carmona *Nature of the Obligations under the International Covenant on Economic, Social and Cultural Rights* (Intersentia 2003) 91; Laurence R. Helfer and Anne-Marie Slaughter Toward a Theory of Effective Supranational Adjudication (1997) 107 *The Yale Law Journal* 273, 284; Jean d'Aspremont and Eric De Brabandere 'The complementary faces of legitimacy in international law: the legitimacy of origin and the legitimacy of exercise' (2011) 34 *Fordham International Law Journal* 190, 215.

consequence of introducing the concept on its earlier jurisprudence. As a result, the Commission has been inconsistent and unpredictable, exposing itself to the accusation that it has shown a questionable professional expertise. These factors may undermine its legitimacy.

# CHAPTER THREE

# LIMITATION AND PROPORTIONALITY

## 3.1 Introduction

Progressive realisation, as indicated in Chapter 2, is a form of limitation. Young identifies progressive realisation among six modes of limiting economic, social and cultural rights. She argues that 'expressly protected economic and social rights are commonly limited by the obligation of "progressive realization".'[1] Alston and Quinn also consider progressive realisation a different kind of limitation.[2] Understood in this sense, progressive realisation is an additional limitation to economic, social and cultural rights. This is because progressive realisation is associated only with economic, social and cultural rights, not with civil and political rights. If progressive realisation is an additional limitation, then, what is a limitation on economic, social and cultural rights?

Limitations (also called restrictions) are justified infringements permitted under human rights instruments. Limitations on human rights do not constitute violations if they respect certain conditions, which are specified in the treaty and/or developed by human rights monitoring bodies. In this kind of assessment, proportionality analysis generally plays an important role. The second section of this chapter begins with the discussion of the concepts of limitations and proportionality in theories. It examines the application of proportionality to negative as well as to positive obligations. The third section examines the normative bases of limitations in the European Social Charter,[3] the International Covenant on Economic, Social and Cultural Rights (ICESCR)[4] and the Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights (Protocol of San Salvador).[5] The third section also examines the application of limitations by the European Committee of Social Rights (European Committee), the Committee on Economic, Social and Cultural Rights (CESCR) and the Inter-American Commission on Human Rights (Inter-American Commission) and the Inter-American Court of Human Rights (Inter-American Court). The purpose of the second and third sections is to set a theoretical as well as a comparative framework for the discussion of the remaining sections on the African Charter on Human and Peoples' Rights (African Charter or Charter).[6]

The African Charter provides for limitation clauses with regard to provisions that guarantee civil and political rights. The Charter, however, does not provide for a general limitation clause unlike the European Social Charter, the ICESCR, and the Protocol of San Salvador. In contrast, provisions of the Charter on economic, social and cultural rights are not circumscribed by limitation clauses. Yet that

[1] Katharine G Young, *Constituting Economic and Social Rights* (OUP 2012) 101.

[2] Philip Alston & Gerard Quinn, 'The Nature and Scope of States Parties' Obligations under the International Covenant on Economic, Social and Cultural Rights' (1987) *Human Rights Quarterly* 156-229, 194.

[3] European Social Charter (Revised), adopted 3 May 1996, entered into force 1 July 1999, European Treaty Series No 163, Art G; European Social Charter, adopted 18 October 1961, entered into force 26 February 1965, European Treaty Series No 35, Art 31.

[4] Adopted 16 December 1966, entry into force 3 January 1976, GA res. 2200A (XXI), 21 UN GAOR Supp. (No. 16) at 49, UN Doc. A/6316 (1966); 993 UNTS 3, Art 4.

[5] Adopted 17 November 1988, entry into force 16 November 1999, OAS Treaty Series No. 69; 28 ILM 156 (1989), Art 5.

[6] Adopted 27 June 1981 & came into force 21 October 1986, OAU Doc. CAB/LEG/67/3 rev. 5; 1520 UNTS 217; 21 ILM 58 (1982).

does not mean that there are no justifiable restrictions of these rights, nor does it imply that there are no conditions determining the justifiability of restrictions. The fourth section of this chapter examines limitations under the African Charter with a particular reference to Article 27(2) of the Charter, which requires individuals to exercise their rights with due regard to rights of others, collective security, morals and common interest.

The African Commission on Human and Peoples Rights (African Commission or Commission) and the African Court on Human and Peoples' Rights (African Court or Court) have assigned the role of a general limitation clause to Article 27(2) of the African Charter. This provision has evolved into a full-fledged limitation clause. They also employ the principle of proportionality to evaluate restrictions to the exercise of the rights guaranteed under the Charter. The fifth section of this chapter examines the practice of the African Commission and the African Court in light of the theoretical and comparative framework in the second and third sections. This section deals with components of the principle of proportionality in general, which has evolved mainly in relation to negative obligations arising from civil and political rights. The sixth section deals with the application of this principle to economic, social and cultural rights. Finally, the chapter provides concluding remarks in the last section.

## 3.2 An overview of limitation and proportionality analysis

In general, human rights, whether guaranteed in national constitutions or international treaties, are not absolute. With limited exceptions - such as the right to protection against torture - human rights can be limited. Human rights instruments usually contain provisions authorising limitations, which are called limitation clauses. Judicial and quasi-judicial organs evaluate compliance of state conduct with the limitation clauses and thereby determine the scope of state obligations. They usually employ the judicial doctrine of proportionality. The use of proportionality analysis is ubiquitous. The principle has attracted wide scholarly interest. Not every court applies proportionality analysis, however,[7] which implies that there is an alternative.

In this section, I examine limitation and proportionality analysis. I will first discuss the concept of limitation (restriction), distinguishing it from the concept of progressive realisation. I will then discuss proportionality analysis, and summarise the components of proportionality analysis in relation to negative obligations, discussing whether the identified components are equally applicable to positive obligations.

### 3.2.1 Limitation

A limitation on human rights means their infringement.[8] According to Barak, 'a limitation occurs whether the effect on the right is significant or marginal; whether the limitation is related to the right's core or to its penumbra; whether it is intentional or not; or whether it is carried out by an act or an omission.'[9] Not every infringement is a limitation, though: only justified infringements constitute a limitation. When justified, a limitation determines the scope of a right and the scope of

[7] See Kai Möller, 'US Constitutional Law, Proportionality, and the Global Model' in Vicki C Jackson & Mark Tushnet (Eds) *Proportionality: New frontiers, new challenges* (CUP 2017). Möller discusses that the US Supreme Court does not apply proportionality analysis.

[8] Aharon Barak, *Proportionality: Constitutional Rights and their Limitations* (Doron Kalir tr, CUP 2012) 101 (hereafter 'Rights and their Limitations').

[9] Barak, Rights and their Limitations, (n 8) 102.

state obligations corresponding to that right. Thus, states are 'both a protector of rights and the site for the unavoidable infringement and violation of these same rights.'[10]

A limitation on human rights in general may take two forms: internal and external limits.[11] Rights that have internal limits are restrictively defined.[12] Internal limits determine the definitional scope of a right.[13] That is, restrictively defined rights have qualifying terms.[14] The right to food under Article 11 of the ICESCR can be an example.[15] This provision guarantees 'the right of everyone to an adequate standard of living for himself and his family, including adequate food.' Insofar as this provision contains the qualifying term 'adequate', by definition, it limits the amount of food to be provided by states. Of course, providing insufficient food in terms of quantity and quality falls below the requirement of the right when states' obligation to provide is triggered.

External limits are permissible restrictions.[16] Human rights treaties and constitutional texts introduce external limits in two ways.[17] Some use specific limitation clauses, which are applicable to a particular right. For example, Article 8 of the ICESCR provides for a specific limitation clause. It guarantees the right of everyone to form trade unions and join the trade union of one's choice. The specific limitation clause of this provision stipulates that: 'No restrictions may be placed on the exercise of this right other than those prescribed by law and which are necessary in a democratic society in the interests of national security or public order or for the protection of the rights and freedoms of others.'[18] This limitation clause is specific because it does not apply to other provisions of the ICESCR. The other form of external limit is a general limitation clause. This is applicable to all rights guaranteed in a particular legal instrument. Article 4 of the ICESCR is quintessentially a general limitation clause. This provision applies to all rights guaranteed in the ICESCR unless they contain specific limitation clauses.

Both general and specific limitation clauses in international human rights treaties permit states to impose restrictions on the exercise of the rights guaranteed in those treaties. These clauses burden rights with qualifications.[19] They were included in different treaty texts for a couple of reasons. Limitation clauses are political compromises. As such, these clauses serve 'to reassure countries hesitating to embrace' a certain treaty regime.[20] Limitation clauses also provide a protective function.[21] They are 'primarily intended to be protective of the rights of individuals rather than permissive of the imposition of limitations by the State.'[22] The limitation clauses are protective since

[10] Grégoire C N Webber, The *Negotiable Constitution: On the Limitation of Rights* (CUP 2009) 3.
[11] Stephen Gardbaum, 'The structure and scope of constitutional rights' in Tom Ginsburg & Rosalind Dixon, *Comparative Constitutional Law* (Edward Elgar 2011) 388 (hereafter 'structure of constitutional rights').
[12] Nihal Jayawickrama, *The Judicial Application of Human Rights Law: National, Regional and International Jurisprudence* (CUP 2002) 183.
[13] Gardbaum, structure of constitutional rights, (n 11) 388.
[14] Jayawickrama (n 12) 183.
[15] cf ICESCR, Art 12, which guarantees 'the highest attainable standard of physical and mental health.' Thus, the right to health has a qualifying terms.
[16] Gardbaum, structure of constitutional rights, (n 11) 388.
[17] Ibid 389.
[18] ICESCR, Art 8(1)(a).
[19] Ronald Dworkin, Is *Democracy Possible Here? Principles for a New Political Debate* (Princeton University Press 2006) 48.
[20] Dworkin (n 19) 49.
[21] Alston & Quinn (n 2) 193.
[22] UN Commission on Human Rights, Note verbale dated 5 December 1986 from the Permanent Mission of the Netherlands to the United Nations Office at Geneva addressed to the Centre for Human Rights ("Limburg Principles"), 8 January 1987, E/CN.4/1987/17, available at: http://www.refworld.org/docid/48abd5790.html (accessed 21 March 2018), para 46; CESCR, General Comment 13, para 42; General Comment 14, para 28.

they restrict the limitation itself. States cannot restrict rights guaranteed under these treaties as they choose. Therefore, states must comply with requirements of limitation clauses.

In terms of procedure, internal limits and external limits are determined at different stages. Of course, this assumes that the adjudication of a human rights dispute, at least in theory, proceeds in two stages.[23] Internal limitations are determined at the first stage, which deals with defining the scope of a right. A party alleging a violation has the burden of proof at the first stage. If the claimant succeeds in establishing a prima facie violation, the adjudication proceeds to the second stage. Otherwise, the proceeding ends there. The second stage is about external limits and the burden shifts to the respondent. The processing of human rights complaints in two stages has the advantage of distributing the burden of proof between parties. The examination at the second stage is whether a state has complied with the criteria in the limitation clause. In other words, the examination ascertains that limitations are determined by law (legality); that they serve legitimate goals (legitimacy); that they are necessary (necessity); that they are suitable (suitability); and that they are proportional (balancing or proportionality in the narrow sense). The assessment of the last four criteria is usually called proportionality analysis in the literature although suitability and balancing are not clearly apparent from the text of limitation causes. I now discuss proportionality analysis.

### 3.2.2 Proportionality analysis

Proportionality is 'a doctrinal tool for the resolution of conflicts between a right and a competing right or interest, at the core of which is the balancing stage which requires the right to be balanced against the competing right or interest.'[24] The origin of proportionality is traced to philosophical thoughts.[25] As a positive legal concept, proportionality was developed in German public law.[26] From Germany, the principle has migrated to other jurisdictions.[27] International courts including the European Court of Human Rights have accepted the proportionality analysis.[28] Proportionality is now the main feature of limitation clauses in international human rights instruments.[29] The principle of proportionality 'creates a conceptual framework in which to define the appropriate relationship between human rights and considerations that may justify their limitation.'[30] Courts around the world use proportionality tests to adjudicate human rights disputes.[31] They use the principle as 'a test to determine whether an interference with a prima facie right is justified.'[32]

In the application of proportionality analysis, a distinction may be made between positive and negative obligations. A positive obligation under a human rights treaty means that states should 'undertake specific affirmative tasks.'[33] It is an obligation to take action.[34] It contrasts with a negative

[23] Gardbaum, structure of constitutional rights, (n 11) 388.
[24] Kai Möller, 'Proportionality: Challenging the critics' (2012) 10/3 *International Journal of Constitutional Law* 709-731, 710 (hereafter 'Challenging the critics').
[25] Barak, Rights and their Limitations, (n 8) 175.
[26] Barak, Rights and their Limitations, (n 8) 178.
[27] Barak, Rights and their Limitations, (n 8) 178—202.
[28] Gunn (n 31) 469.
[29] Barak, Rights and their Limitations, (n 8) 204.
[30] Aharon Barak, 'Proportionality and Principled Balancing' (2010) 4/1 *Law & Ethics of Human Rights* 1—18, 4 ('Principled Balancing').
[31] Francisco J Urbina, 'A Critique of Proportionality' (2012) 57 *American Journal of Jurisprudence* 49 – 80, 49 ("Critique of Proportionality").
[32] Möller, Challenging the critics, (n 24) 711.
[33] A R Mowbray, *The Development of Positive Obligations under the European Convention on Human Rights by the European Court of Human Rights* (Hart Publishing 2004) 2.

obligation, which requires states to refrain from interfering with the enjoyment of human rights.[35] That is, states have to do something to carry out their positive obligations. This dichotomy between negative and positive obligations may subsume the tripartite obligations to respect, to protect and to fulfil. Thus, the obligation to respect is negative obligations while the obligations to protect and to fulfil are positive obligations.[36]

In principle, states have both positive and negative obligations with respect to each right. In particular, economic, social and cultural rights impose a negative obligation to respect and positive obligations to protect and to fulfil. However, some authors distinguish positive rights from negative rights, instead of a negative obligation from a positive one. 'Negative rights forbid to destroy, obstruct, or interfere with a legal interest.'[37] They 'impose limits or duties of forbearance on (mostly) government action, on what governments can lawfully do.'[38] On the other hand, positive rights imply an entitlement to a positive action by state authorities.[39] 'They impose affirmative obligations – rather than limits – or duties of action on (mostly) government actors.'[40] This dichotomy is different from the traditional division between economic, social and cultural rights on the one hand and civil and political rights on the other hand. The right to vote (a political right) and the right to education (a social right) are equally positive rights.[41] This, however, might create the wrong impression that a positive right, for example a right to vote, does not impose a negative obligation. For the sake of clarity, I use positive obligation instead of positive right.

The application of proportionality analysis to negative obligations is common. Positive obligations have attracted little attention in this regard. Therefore, I discuss them separately. I begin with the discussion of proportionality analysis in negative obligations.

#### 3.2.2.1 Limitation and proportionality in negative obligations

The application of proportionality analysis is well-developed in the area of negative obligations, but the formulation of the proportionality test is not uniform – there are slight variations. In theory, the proportionality analysis has essentially four aspects: legitimate goal, suitability, necessity and proportionality in the narrower sense (balancing).[42] Not all theorists, however, consider that legitimate goal is one of the components of the proportionality test. Robert Alexy, for example, argues that this requirement is superfluous[43] and limits the components to suitability, necessity and proportionality in the narrower sense.[44] Although national and international courts do not necessarily employ all four of these components of the proportionality analysis, I briefly discuss them as identified in the literature.

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[34] Laurens Lavrysen, *Human Rights in a Positive State: Rethinking the relationship between positive and negative obligations under the European Convention on Human Rights* (Intersentia 2016) 11.
[35] Lavrysen (n 34) 11.
[36] Lavrysen (n 34) 12.
[37] Matthias Klatt & Moritz Meister, *The Constitutional Structure of Proportionality* (OUP 2012) 88.
[38] Gardbaum, structure of constitutional rights, (n 11) 397.
[39] Klatt & Meister (n 37) 85.
[40] Gardbaum, structure of constitutional rights, (n 11) 397.
[41] Gardbaum, structure of constitutional rights, (n 11) 397.
[42] Möller, Challenging the critics, (n 24) 711; Urbina, Critique of Proportionality, (n 31) 49; Klatt & Meister (n 37) 8. Robert Alexy, 'The Construction of Constitutional Rights' (2010) 4/1 *Law & Ethics of Human Rights* 19—32, 24; Robert Alexy, 'Constitutional Rights and Proportionality' (2014) 22 *Revus* 51–65, 52.
[43] Robert Alexy, 'Proportionality and Rationality' in Vicki C Jackson & Mark Tushnet (Eds) *Proportionality: New frontiers, new challenges* (CUP 2017) 14 (hereafter 'Proportionality and Rationality').
[44] Alexy, Proportionality and Rationality, (n 43) 14.

The first component of the principle of proportionality is legitimate goal, or the requirement of legitimacy. This component requires that the measure or the policy that interferes with a right must have a legitimate goal.[45] The goal of 'the legislation setting out the limitation must be of sufficient importance to warrant infringing a right.'[46] The limitation must serve a proper purpose.[47] Limitation clauses in national constitutions and human rights treaties identify proper purposes for restricting human rights.[48] Barak identifies the protection of human rights and the promotion of public interest as the most pertinent to the proper purpose component of the principle of proportionality.[49]

Suitability is the second component. Suitability requires that 'the measure that interferes with the right has to be apt to attain the legitimate aim.'[50] This requirement precludes restrictions on human rights that obstruct the realisation of a particular right without promoting any other right or goal for which such restrictions have been adopted.[51] There should be a rational connection between the restrictions on the rights and the purposes intended to be achieved by such restrictions.[52] The 'practical relevance of the sub-principle of suitability is relatively low' because the measures restricting rights usually promote legitimate aims to a certain degree.[53]

Necessity is the third component of the principle of proportionality. The rule of necessity requires that 'the means should impair the right as little as possible.'[54] If the state can choose a measure from a range of alternatives to achieve a legitimate goal, it must choose one that least restricts the rights in question.[55] States can resort to the restriction of human rights only if there is no other method through which they can achieve the legitimate goal.[56]

The fourth component is balancing (proportionality in the narrower sense). Balancing is 'a consequential test and requires an appropriate relationship between the benefit gained by the law limiting a human right and the harm caused to the right by its limitation.'[57] This component requires that the restriction of a right must be justified 'in light of the gain in the protection for the competing right or interest.'[58] The balancing test may proceed in three stages.[59] It begins with establishing the degree to which a human right has been restricted.[60] This is followed by determining the importance of achieving the legitimate goal. Finally, whether the importance of achieving a legitimate goal justifies the restriction of a human right should be determined.[61] If we picture a scale, decision-makers are expected to place rights on one side of the scale and legitimate goals on the other side.[62]

[45] Möller, Challenging the critics, (n 24) 711.
[46] Webber (n 10) 71.
[47] Barak, Rights and their Limitations, (n 8) 245.
[48] Barak, Rights and their Limitations, (n 8) 260.
[49] Barak, Rights and their Limitations, (n 8) 253—255.
[50] Urbina, Critique of Proportionality, (n 31) 49.
[51] Alexy, Proportionality and Rationality, (n 43) 14.
[52] Barak, Rights and their Limitations, (n 8) 303.
[53] Alexy, Proportionality and Rationality, (n 43) 15.
[54] Webber (n 10) 72.
[55] Barak, Rights and their Limitations, (n 8) 317.
[56] See Eva Brems & Laurens Lavrysen, ''Don't Use a Sledgehammer to Crack a Nut': Less Restrictive Means in the Case Law of the European Court of Human Rights' (2015) 15/1 *Human Rights Law Review* 139–168 (showing that the Court does not always apply the least restrictive means).
[57] Barak, Principled Balancing, (n 30) 7.
[58] Möller, Challenging the critics, (n 24) 715.
[59] Alexy, Construction of Constitutional Rights, (n 42) 28.
[60] Alexy, Construction of Constitutional Rights, (n 42) 28.
[61] Alexy, Construction of Constitutional Rights, (n 42) 28.
[62] Barak, Principled Balancing, (n 30) 7.

However, the decision-makers do not expect the scale to tilt to one side mechanically; the weighing process involves value judgment.[63]

There are two major ways of applying these four components. One is sequential. A court checks whether a limitation complies with each component. For example, if a court finds that the goal of limitation is not legitimate, it does not proceed to examine whether such limitation is suitable. This is a vertical proportionality test first adopted by German courts and later spread to other jurisdictions.[64] The other alternative is the horizontal proportionality test whereby a court examines the components of proportionality as a whole without following any predetermined order.[65]

To conclude, justifications for limitation are evaluated based on limitation clauses and components of proportionality derived from those clauses. The evaluation is usually raised in relation to state interference with the enjoyment of civil and political rights contrary to their negative obligation to respect. However, the application of components of proportionality to positive obligation is not frequently discussed. I examine the application of proportionality analysis to positive obligations below.

**3.2.2.2 Does proportionality analysis apply to positive obligations?**

Courts all over the world apply the proportionality analysis in settling human rights disputes.[66] However, courts do not apply proportionality to all rights. In particular, the application of a four-pronged proportionality analysis (i.e., proportionality in a broad sense) to positive obligations is not common.[67] It does not matter whether the positive obligations arise from economic, social and cultural rights or from civil and political rights. A number of reasons may explain this reluctance.

First, the application of proportionality to positive obligations raises a conceptual issue.[68] As Gardbaum argues, the core application of proportionality across different areas of international law is 'to situations of prima facie prohibitions on government conduct.'[69] Proportionality applies to what states cannot do, not to what they must do.[70] Put differently, 'proportionality is most essentially a condition for permitting limited exceptions to negative duties.'[71] Second, applying proportionality to positive obligations raises a normative tension. Gardbaum argues that applying proportionality to positive socio-economic rights creates 'certain tensions with the ideal of human dignity that prompts their recognition in the first place.'[72] He adds that human dignity itself may require that socio-economic rights be met, particularly when these rights seek to ensure the conditions of basic

[63] Barak, Principled Balancing, (n 30) 8.
[64] Brems & Lavrysen (n 56) 141.
[65] Brems & Lavrysen (n 56) 141.
[66] Urbina, Critique of Proportionality, (n 31) 49; Grant Huscroft, Bradley W Miller & Grégoire Webber 'Introduction' in Grant Huscroft, Bradley W Miller & Grégoire Webber, *Proportionality and the Rule of Law: Rights, Justification, Reasoning* (CUP 2014) 1.
[67] Stephen Gardbaum, 'Positive and Horizontal Rights: Proportionality's Next Frontier or a Bridge Too Far?' in Vicki C Jackson & Mark Tushnet (Eds) *Proportionality: New frontiers, new challenges* (CUP 2017) 230 (hereafter 'positive and horizontal rights'). According to Gardbaum, even the most robust court in establishing positive obligations, the European Court of Human Rights, does not use proportionality in its leading positive obligation cases. 'Rather, the court focuses almost exclusively on the first stage issues of determining the content and scope of the right, and whether it has been infringed.' cf Lavrysen (n 34) 172. Lavrysen argues that the European Court of Human Rights 'has applied some form of proportionality analysis in order to verify whether this "fair balance" test has been complied with or not.'
[68] Gardbaum, Positive and horizontal rights, (n 67) 241—246.
[69] Gardbaum, Positive and horizontal rights, (n 67) 244.
[70] Gardbaum, Positive and horizontal rights, (n 67) 244.
[71] Gardbaum, Positive and horizontal rights, (n 67) 244.
[72] Gardbaum, Positive and horizontal rights, (n 67) 245.

survival, 'rather than not disproportionately infringed.'[73] For this reason, courts might focus on defining the contents of these rights and on identifying whether there is a violation.[74]

Third, the doctrine of the margin of appreciation may bar the application of proportionality to positive obligations. Young argues that courts have not invoked the proportionality analysis in prominent economic and social rights cases 'because the "margin of appreciation" that attends a proportionality inquiry is more likely to be triggered under present conceptions of economic and social rights.'[75] She distinguishes the proportionality analysis from the principle of proportionality. She summarises the proportionality principle as the view that "the graver the impact of the decision upon the individual affected by it, the more substantial the justification that will be required".'[76] She proposes proportionality inflected reasonableness for a better protection of economic, social and cultural rights.[77]

Finally, the scarcity of resources can also be a reason why proportionality does not apply to positive obligations. As Möller argues, proportionality does not make much sense with regard to economic, social and cultural rights 'because in almost all circumstances the realization of those rights requires scarce resources.'[78] Of the four components of the proportionality test, states can easily satisfy the requirement of three of them by invoking resource scarcity. Thus, Möller concludes, 'any limitation will always further the legitimate goal of saving resources and will always be suitable and necessary to the achievement of that goal.'[79] This argument is not compelling since scarcity of resources is not one of the legitimate reasons specified in most limitation clauses.[80]

Despite such reluctance in practice and the reasons thereof, the proportionality analysis may have a potential application in the field of economic, social and cultural rights. The scholarly writings provide some options in this regard. The broadest option is to employ other criteria in addition to the proportionality test, particularly when the case involves conflicts of economic, social and cultural rights according to Vandenhole. Additional criteria are necessary because 'the proportionality test as used in the context of civil and political rights is not sufficient.'[81] The additional criteria involve two kinds of prioritisation. One is to prioritise vulnerable groups while the other is to give priority to the implementation of core content of rights or to the performance of core obligations.[82]

Another option makes no distinction between positive and negative obligations. Proportionality in the broad sense also applies to positive obligations. That is, all four components of proportionality discussed above are applicable to positive obligations in the same way these components apply to negative obligations. As Barak argues, positive rights, which include economic and social rights, are subject to proportionality analysis in the same way as negative rights.[83] He argues that the

[73] Gardbaum, Positive and horizontal rights, (n 67) 245.
[74] Gardbaum, Positive and horizontal rights, (n 67) 245.
[75] Katharine G Young, 'Proportionality, Reasonableness, and Economic and Social Rights' in Vicki C Jackson & Mark Tushnet (Eds) *Proportionality: New frontiers, new challenges* (CUP 2017) 271.
[76] Young (n 1) 271.
[77] Young (n 1) 272.
[78] Kai Möller, *The Global Model of Constitutional Rights* (OUP 2012) 179 (hereafter 'global model').
[79] Möller, Global model, (n 78) 179.
[80] Gardbaum, Positive and Horizontal Rights, (n 41) 242.
[81] Wouter Vandenhole 'Conflicting economic and social rights: the proportionality plus test' in Eva Brems (ed) *Conflicts between fundamental rights* (Intersentia 2008) 586.
[82] Vandenhole (n 81) 586.
[83] Barak, Rights and their Limitations, (n 8) 429.

'determination that an omission is disproportional in relation to a positive right is reached much in the same way as the determination that a limitation on a negative right was disproportional.'[84] A state can justify the omission only when there is a partial protection.[85] A state cannot justify a total omission.

Still another option involves applying proportionality on a miniature scale. This can be done by dropping all the components but one: of the four components, only proportionality in the narrow sense (balancing) is applicable to positive obligations. According to Möller, the balancing stage applies to economic, social and cultural rights.[86] Likewise, Contiades and Fotiadou emphasise balancing.[87] They suggest skipping some of the components of proportionality analysis when applying the principle to economic, social and cultural rights.[88] They argue that proportionality gradually develops into a balancing technique,[89] and state that 'Proportionality is balancing and balancing is proportionality.'[90] When applied to economic, social and cultural rights, 'proportionality operates as a limit to limitations.'[91] Contiades and Fotiadou further argue that proportionality also determines substantive contents of economic, social and cultural rights by balancing conflicting interests.[92] However, this view is contested: according to Bilchitz, the view that proportionality determines the contents of economic, social and cultural rights is 'a serious misunderstanding of the proportionality inquiry.'[93] He argues that 'application of the proportionality test to socio-economic rights involves much complexity and needs to be thought through in some detail.'[94] Bilchitz suggests that proportionality applies to economic, social and cultural rights but he does not provide detailed analysis of the application.

In sum, three possible proposals have been identified with respect to a potential application of proportionality analysis to positive obligations. The first proposes that proportionality alone is not enough and calls for coupling the principle with additional criteria. The second proposal posits that proportionality applies to positive obligations in the same way it applies to negative obligations. The last proposal suggests that only one component of the proportionality test applies to positive obligations. In the following sections, I analyse limitation clauses and the practice of treaty bodies to identify whether these proposals have practical application or not.

## 3.3 Limitation clauses and practice of treaty bodies

Human rights treaties that guarantee economic, social and cultural rights provide for limitation clauses.[95] This section discusses the texts of limitation clauses and examines how human rights treaty bodies, namely, the CESCR, the European Committee, the Inter-American Court and the Inter-

[84] Barak, Rights and their Limitations, (n 8) 429.
[85] Barak, Rights and their Limitations, (n 8) 430.
[86] Möller, Global model (n 86) 179.
[87] Xenophon Contiades and Alkmene Fotiadou 'Social rights in the age of proportionality: Global economic crisis and constitutional litigation' (2012) 10/3 *International Journal of Constitutional Law* 660 – 686.
[88] Contiades & Fotiadou, Social rights in the age of proportionality, (n 87) 668.
[89] Contiades & Fotiadou, Social rights in the age of proportionality, (n 87) 669.
[90] Xenophon Contiades & Alkmene Fotiadou, 'Socio-economic rights, economic crisis, and legal doctrine: A reply to David Bilchitz' (2014) 12/3 *International Journal of Constitutional Law* 740–746, 742.
[91] Contiades & Fotiadou, Social rights in the age of proportionality, (n 87) 669.
[92] Contiades & Fotiadou, Social rights in the age of proportionality, (n 87) 669.
[93] David Bilchitz, 'Socio-economic rights, economic crisis, and legal doctrine' (2014) 12/3 *International Journal of Constitutional Law* 710–739, 737 (hereafter 'economic crisis, and legal doctrine').
[94] Bilchitz, Economic crisis and legal doctrine, (n 93) 736.
[95] European Social Charter (Revised), Art G; ICESCR, Art 4; Protocol of San Salvador, Art 5.

American Commission interpret limitation clauses in their respective treaties. After discussing limitation clauses in the first sub-section, I will identify components of proportionality analysis from the practice of treaty bodies in the second subsection.

### 3.3.1 Limitation clauses

The European Social Charter, the ICESCR, and the Protocol of San Salvador all include both general and specific limitation clauses. The ICESCR contains a general limitation clause under Article 4, which provides that:

> The States Parties to the present Covenant recognize that, in the enjoyment of those rights provided by the State in conformity with the present Covenant, the State may subject such rights only to such limitations as are determined by law only in so far as this may be compatible with the nature of these rights and solely for the purpose of promoting the general welfare in a democratic society.

In terms of its scope of application, it is submitted, Article 4 seems to extend beyond the rights guaranteed in the ICESCR. This provision refers to limitations on 'the enjoyment of those rights provided by the State in conformity' with the ICESCR. The exercise of the rights subjected to a limitation need not be guaranteed in the ICESCR. This is evident from the comparison of terms used in other provisions in part II. For example, Article 2(1) refers to 'rights recognised' in the ICESCR while Article 3 refers to rights set forth in the ICESCR.

Article 4 also applies to all rights guaranteed in the ICESCR. This provision is located in part II, which provides for general principles and rules applicable to all substantive rights in part III. This makes it a general limitation clause. In other words, the exercise of all the rights guaranteed in the ICESCR is subject to a limitation, and as a result, none of the economic, social and cultural rights guaranteed in the ICESCR are absolute. This can be contrasted with the ICCPR, which guarantees some absolute rights partly because such rights are not circumscribed by limitation clauses.[96]

The scope of Article 4 can also be determined in relation to specific limitation clauses. Article 4 does not specify its relationship with other limitation clauses. Nevertheless, it is a trite rule of interpretation that special rules prevail over general ones. Article 4 is a general rule. Its application can be set aside by a special rule. That is, Article 4 does not apply when provisions in part III of the ICESCR (Articles 6-15) contain a limitation clause. In particular, Article 4 does not apply to rights guaranteed in Article 8 of the ICESCR (trade union rights).

Article 8 of the ICESCR is the only substantive provision in part III that contains detailed specific limitation clauses.[97] One such clause relates to the right of everyone to form trade unions and join the trade union of one's choice, a right which also falls under the category of civil and political rights.[98] It provides that:

> No restrictions may be placed on the exercise of this right other than those prescribed by law and which are necessary in a democratic society in the interests of national security or public order or for the protection of the rights and freedoms of others.[99]

[96] eg ICCPR, Arts 7 & 8. Prohibition of torture and slavery are examples of absolute rights.
[97] Alston & Quinn (n 2) 210. They argue that the right to education also contains minor limitation.
[98] ICCPR, Art 22(1). This provision also provides for the same right.
[99] ICESCR, Art 8(1)(a).

Article 8 also places a similar limitation on the right of trade unions to function freely. This right is subject to restrictions, which are 'prescribed by law and which are necessary in a democratic society in the interests of national security or public order or for the protection of the rights and freedoms of others.'[100] Besides, states can impose additional restrictions on the exercise of trade union rights by soldiers, police and civil servants.[101]

The formulation and content of Article 8 is different from Article 4. Article 8 shares more features with Article 22(2) of the ICCPR. Apart from the number of legitimate grounds, these provisions are the same. Public safety, public health and morals are legitimate grounds for restricting trade union rights under Article 22(2) of the ICCPR. These three grounds are omitted from Article 8. National security, public order, and rights and freedoms of others are common to both Article 22(2) of the ICCPR and Article 8 of the ICESCR. Still, Article 8 contains more legitimate goals than Article 4 does; the latter contains only one legitimate goal, implying narrow states discreation.

Like the ICESCR, the Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights (Protocol of San Salvador) contains general and specific limitation clauses. Article 5 of the Protocol states the general limitation clause:

> The State Parties may establish restrictions and limitations on the enjoyment and exercise of the rights established herein by means of laws promulgated for the purpose of preserving the general welfare in a democratic society only to the extent that they are not incompatible with the purpose and reason underlying those rights.

This provision shares more common features with the general limitation clause of the ICESCR than it shares with the general limitation clauses of the American Convention on Human Rights. The latter provides for two general limitation clauses. Article 30 of the Convention provides that:

> The restrictions that, pursuant to this Convention, may be placed on the enjoyment or exercise of the rights or freedoms recognized herein may not be applied except in accordance with laws enacted for reasons of general interest and in accordance with the purpose for which such restrictions have been established.

In addition, Article 32(2) of the Convention provides that: 'The rights of each person are limited by the rights of others, by the security of all, and by the just demands of the general welfare, in a democratic society.'

Like the ICESCR, the Protocol of San Salvador mentions only one legitimate ground for restricting the rights it guarantees: the preservation of the general welfare. On the other hand, the American Convention provides for two additional legitimate goals: rights of others and security of all. Like the ICESCR again, the Protocol of San Salvador requires that restrictions to the rights it guarantees must be compatible with the purpose and reasons underlying those rights. On the other hand, the American Convention does not expressly state such requirement.

Regarding its scope, Article 5 of the Protocol of San Salvador applies to all rights guaranteed in the same Protocol. This is particularly the case when other provisions of the Protocol do not contain specific limitation clauses. However, Article 5 does not apply to trade union rights (Article 8 of the

[100] ICESCR, Art 8(1)(c).
[101] ICESCR, Art 8(2).

Protocol of San Salvador) because there is a specific limitation clause applicable to these rights.[102] This view is in line with the Inter-American Court's position on the relationship between general and specific limitation clauses under the American Convention. The Inter-American Court has explained that a general limitation clause under Article 32(2) of the American Convention is applicable when there are no specific limitation clauses under other provisions. It held that 'Article 32(2) contains a general statement that is designed for those cases in particular in which the Convention, in proclaiming a right, makes no special reference to possible legitimate restrictions.'[103] In the same line, the general limitation clause under Article 5 of the Protocol of San Salvador is not applicable because the specific limitation clause under Article 8 of the same Protocol prevails as a special rule.

Under Article 8(2), the specific limitation clause in the Protocol of San Salvador stipulates that:

> The exercise of the rights set forth above may be subject only to restrictions established by law, provided that such restrictions are characteristic of a democratic society and necessary for safeguarding public order or for protecting public health or morals or the rights and freedoms of others. Members of the armed forces and the police and of other essential public services shall be subject to limitations and restrictions established by law.

This provision shares little with the general limitation clause under Article 5 of the Protocol of San Salvador. Instead, it shares more features with restrictions under Article 16 of the American Convention (freedom of association). Article 8 of the Protocol contains fewer legitimate goals than Article 16 of the Convention does. Apart from this, the two provisions are essentially the same.

In terms of formulation and content, the general limitation clause in the European Social Charter is different from those clauses in the ICESCR and the Protocol of San Salvador. The European Social Charter states that:

> The rights and principles set forth [in the European Social Charter] shall not be subject to any restrictions or limitations not specified in those parts, except such as are prescribed by law and are necessary in a democratic society for the protection of the rights and freedoms of others or for the protection of public interest, national security, public health, or morals.[104]

This provision is similar with specific limitation clauses relating to trade union rights guaranteed in the ICESCR and the Protocol of San Salvador. As a result, the European Social Charter provides for more legitimate grounds for restricting rights it guarantees than the ICESCR and the Protocol of San Salvador. One may wonder whether the general limitation clauses in the ICESCR and the Protocol of San Salvador represent a change in the way limitation on economic, social and cultural rights is understood in international human rights law in general. The European Social Charter is the pioneer. It predates both the ICESCR and the Protocol of San Salvador. Therefore, one may argue, the ICESCR and the Protocol of San Salvador represent a trend towards allowing fewer legitimate goals to restrict the enjoyment of economic, social and cultural rights, apart from the trade union rights which are akin to civil and political rights.

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[102] Protocol of San Salvador, Art 8(2).

[103] *Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism (Arts 13 and 29 American Convention on Human Rights)*, Advisory Opinion OC -5/85, 13 November 1985, para 65.

[104] European Social Charter (1961), Art 31; European Social Charter (1996), Art G.

### 3.3.2 Application of limitation clauses

The ICESCR, the European Social Charter, and the Protocol of San Salvador, provide for limitation clauses as discussed above. Their respective treaty bodies, namely, the CESCR, the European Committee, the Inter-American Commission and the Inter-American Court, refer to at least some components of proportionality analysis highlighted in the previous section. They use these components when they assess whether restrictions by states comply with the limitation clauses although the use of these components is not uniform.

Based on the general limitation clause under Article 4 of the ICESCR, the CESCR requires that 'restrictions must be in accordance with the law, […] in the interest of legitimate aims pursued, and strictly necessary.'[105] It also requires limitations to be proportional.[106] These components can also be traced in the practice of the European Committee of Social Rights, which has held that a restriction is compatible with the European Social Charter 'if the requirements of Article G are met, i.e. if the restriction is established by law, pursues a legitimate aim and is objectively necessary in a democratic society, that is to say proportionate to the aim pursued.'[107]

The Inter-American Court also uses similar components. The Court has established requirements of permissible restrictions to the enjoyment and exercise of rights under the American Convention: 'a) they must be established by law; b) they must be necessary; c) they must be proportional, and d) their purpose must be to attain a legitimate goal in a democratic society.'[108] In addition, in cases involving conflicts between indigenous communal property and individual private property, the restrictions should not amount to a denial of traditions and customs of indigenous people in a way that endangers the very survival of the group and of its members.[109] I will begin with the requirement of legality as emphasised by these treaty bodies.

#### 3.3.2.1 Legality

Limitation clauses usually require that restrictions be 'prescribed by law'.[110] In the Limburg Principles, it has been suggested that limitations under Article 4 of the ICESCR should be 'provided for by national law of general application which is consistent with the Covenant and is in force at the time the limitation is applied.'[111] Such national law should 'be clear and accessible to everyone.'[112] States should not use arbitrary or unreasonable or discriminatory laws to limit rights.[113] Müller argues that the term 'law' in Article 4 should not be limited to statute law.[114] Relying on the drafting history of the ICESCR, she suggests that the term 'law' should mean 'the whole body of legal precedent and practice' although that is not apparent from the ICESCR and the practice of the CESCR.[115]

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[105] CESCR, General Comment 14, para 28.
[106] CESCR, General Comment 14, para 29.
[107] *European Confederation of Police (EuroCOP) v Ireland*, Complaint No. 83/2012, adopted 2 December 2013, para 104.
[108] *Yakye Axa Indigenous Community v Paraguay* (Inter-American Court, 17 June 2005) para 144.
[109] *Saramaka People v Suriname* (Inter-American Court, 28 November 2007) para 128.
[110] Art 8(1)(a & c), ICESCR; Art 31, European Social Charter (1961); Art G, European Social Charter (1996). cf 'determined by law' Art 4, ICESCR; 'by means of laws' Art 5, Protocol of San Salvador; 'established by law' Art 8(2), Protocol of San Salvador; 'in accordance with laws' Art 30, American Convention on Human Rights;
[111] Limburg Principles, paras 48.
[112] Limburg Principles, para 50.
[113] Limburg Principles, para 49.
[114] Amrei Müller, 'Limitations to and Derogations from Economic, Social and Cultural Rights' (2009) 9/4 *Human Rights Law Review* 557—601, 578.
[115] Müller (n 114) 578.

The European Committee does not seem to give such a broad definition to the term 'law' under the general limitation clause of the European Social Charter.[116] It has emphasised that laws that restrict the rights guaranteed under the European Social Charter should be passed by a democratic legislature. In *GSEE v Greece*, the Committee held that restrictive 'measures must have a clear basis in law, i.e. they must have been agreed upon by the democratic legislature.'[117] Thus, the Committee's emphasis on the agreement by the legislature implies that rights guaranteed in the European Social Charter cannot be restricted by laws emanating from the other branches of the government, which includes subsidiary legislation and judicial precedents.

The Inter-American Court has limited the term 'laws' under Article 30 of the American Convention to mean legislative enactment. The Court has stressed that 'the word "laws" in Article 30 of the Convention means a general legal norm tied to the general welfare, passed by democratically elected legislative bodies established by the Constitution.'[118] The Court has developed a particularly demanding interpretation of the requirement of legality included in the general limitation clause of the American Convention:[119] not every law that provides for restrictions on human rights complies with the American Convention. The Court has underlined the importance of the organ that promulgates the laws. Not every legislative body can restrict human rights; only 'democratically elected' ones can do. Moreover, the formal proclamation of the laws is not sufficient by itself. The Court has emphasised that 'there must also be a system that will effectively ensure their application and an effective control of the manner in which the organs exercise their powers.'[120] Since this interpretation of the Inter-American Court relates to the general limitation clause, it applies to all rights recognised in the American Convention.

#### 3.3.2.2 Legitimacy

Limitation clauses usually specify few legitimate aims for adopting restrictions to rights. The reasons for justifying restrictions are limited, not infinite. Under the general limitation clause of the ICESCR, there is only one legitimate aim: promoting 'the general welfare.'[121] The American Convention and its Protocol of San Salvador also provide for a single legitimate aim. Under the American Convention, the only legitimate aim is 'general interest.'[122] In the Protocol of San Salvador, the legitimate aim is preservation of 'the general welfare.'[123]

The meaning of the phrase 'general welfare' is not clear from the drafting history of the ICESCR, nor from the practice of the CESCR. In the Limburg Principles, it has been suggested that the phrase 'promoting the general welfare' should be 'construed to mean furthering the well-being of the people as a whole.'[124] This phrase should not be construed to include the protection of public order,

[116] European Social Charter (1961), Art 31; European Social Charter (1996), Art G.
[117] Greek *General Confederation of Labour (GSEE) v Greece*, Complaint No. 111/2014, decision on the merits, 23 March 2017, para 83.
[118] Inter-American Court of Human Rights, *The Word 'Laws' in Article 30 of the American Convention on Human Rights,* Advisory Opinion OC -06/86, 9 May 1986, para 38.
[119] Olivier De Schutter, *International Human Rights Law: Cases, Materials, Commentary* (CUP 2010) 293.
[120] Inter-American Court of Human Rights, *The Word 'Laws' in Article 30 of the American Convention on Human Rights,* Advisory Opinion OC -06/86, 9 May 1986, para 24.
[121] ICESCR, Art 4.
[122] American Convention, Art 30.
[123] Protocol of San Salvador, Art 5.
[124] Limburg Principles, para 52.

morals, national security and rights and freedoms of others because such grounds were intentionally left out from the ICESCR.[125]

The Inter-American Court has explained the concept of 'general welfare' under Article 32(2) of the Convention. The Court held that the concept of general welfare refers to 'the conditions of social life that allow members of society to reach the highest level of personal development and the optimum achievement of democratic values.'[126] This concept requires 'the organization of society in a manner that strengthens the functioning of democratic institutions and preserves and promotes the full realization of the rights of the individual.'[127] The Court has stressed that states may under no circumstances invoke 'general welfare' 'as a means of denying a right guaranteed by the Convention or to impair or deprive it of its true content.'[128] Since Article 32(2) of the American Convention is a general limitation clause, the meaning of 'general welfare' under this provision applies to all rights guaranteed in the same Convention.

In contrast, the European Social Charter does not include 'general welfare' among the legitimate aims. Instead, the Charter permits limitations when they are intended 'for the protection of the rights and freedoms of others or for the protection of public interest, national security, public health, or morals.'[129] These aims have hardly been examined in the practice of the European Committee of Social Rights.[130] It has indicated the meaning of 'public interest', though. In *GSEE v Greece*, the Committee has explained that the legislature, although not free to ignore international obligations, has a margin of appreciation in legitimising and defining 'the public interest by striking a fair balance between the needs of all members of society.'[131] The Committee is of the opinion that restrictive measures can serve the public interest when they are taken to alleviate a very high unemployment rate and a dramatic shrinkage of the national economy.[132] It should be noted that the European Committee has given this explanation in the context of alleged interferences with the enjoyment of rights guaranteed in the European Social Charter.

#### 3.3.2.4 Suitability

Suitability is a sub-principle of proportionality, as discussed above. This sub-principle requires that there must be a rational connection between the restrictive measure and the legitimate aim.[133] The texts of limitation clauses do not include this element. Still some treaty bodies require that restrictive measures should be a suitable way of achieving legitimate aims. An example is the decision of the Inter-American Commission in *National Association of Ex-Employees of the Peruvian Social Security Institute et al v Peru*.[134] The Inter-American Commission has examined Peruvian legal reforms affecting pension schemes. The reforms, among other things, revised the equalisation of pensions with the wages earned by active employees, introduced maximum limits of payable amount, and

[125] Müller (n 114) 573.

[126] Inter-American Court of Human Rights, *Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism (Arts 13 and 29 American Convention on Human Rights)*, Advisory Opinion OC -5/85, 13 November 1985, para 66.

[127] Ibid.

[128] Ibid para 67.

[129] Art 31, European Social Charter (1961); Art G, European Social Charter (1996).

[130] Müller (n 114) 572.

[131] *GSEE v Greece*, para 85.

[132] *GSEE v Greece*, para 89.

[133] Möller, Challenging the critics, (n 24) 713.

[134] *National Association of Ex-Employees of the Peruvian Social Security Institute et al v Peru*, Case 12.670, Report No. 38/09, Decision of the Inter-American Commission on Human Rights on Admissibility and Merits, 27 March 2009

established mechanisms for periodically adjusting pensions.[135] The Inter-American Commission has found that the reforms 'are suitable to achieve' the legitimate aim of ensuring the financial stability of the state and of eliminating the inequity in the social security system.[136]

Another example is the European Committee of Social Rights. In *GSEE v Greece*, the Committee has emphasised that 'even under extreme circumstances the restrictive measures put in place must be appropriate for reaching the goal pursued.[137] It added that such measures should be the most suitable for responding to a pressing social need.[138] The European Committee ensures compliance with the requirement of suitability by rejecting a restrictive measure that has no connection with the legitimate goals. In *European Confederation of Police (EuroCOP) v Ireland*, the European Committee dealt with the restriction on the right to organise of members of the police guaranteed under Article 5 of the European Social Charter. [139] The respondent State did not prohibit members of the police from forming their representative organisation; however, it prohibited them from joining national trade unions on the ground of public safety and public interest. The European Committee held that 'a prohibition on police associations from becoming members of a national organisation of trade unions has no inherent connection with enhancing public safety and other important public interests.'[140]

Suitability, one may submit, is in principle an ex ante evaluation, since it examines whether there is a rational connection between the restrictive measures and the legitimate goal. It is not an ex post examination of whether the restrictive measures have actually achieved the intended outcome (i.e. the legitimate goal). A brief discussion of *GSEE v Greece* may illustrate this point. In this case, the European Committee has examined the legislation adopted by the respondent State 'between 2010 and 2014 in response to the economic and financial crisis.'[141] These measures, so-called austerity measures, are restrictive of the rights under the European Social Charter. In particular, the measures, among other things, exclude the application of collective agreements, dismantle existing collective bargaining arrangements, and favour 'a balance of power that allows employers to downgrade recruitment, pay and working conditions.'[142] The aims of these measures are to improve 'the dramatic shrinkage of the Greek economy' and reduce 'the very high rate of unemployment'.[143] The assumption of this solution is that deregulation of the labour market provides incentives for investments, which may in turn create jobs and improve the Greek economy. One may argue that if the European Committee were examining these measures in 2010 when they were adopted, it would have given the respondent State the benefit of doubt by finding that the austerity measures would have been suitable. Of course, the reality is much more complex.[144]

However, the European Committee decided *GSEE v Greece* in 2017 when it had the data:

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[135] Ibid, para 119.
[136] Ibid, para 120.
[137] *GSEE v Greece*, para 87.
[138] *GSEE v Greece*, para 89.
[139] *European Confederation of Police (EuroCOP) v Ireland*, Complaint No 83/2012, Decision on merits adopted 2 December 2013.
[140] *EuroCOP v Ireland*, para 116.
[141] *GSEE v Greece*, para 70.
[142] *GSEE v Greece*, para 70.
[143] *GSEE v Greece*, para 89.
[144] The international financial institutions (the International Monetary Fund (IMF), the Commission and the European Central Bank (ECB) (the "Troika")) forced the Greek Government to adopt the austerity measures. For the purposes of obligations under the European Social Charter, I will continue assuming that Greece is a sovereign State and leave aside the issue whether human rights law is capable of addressing such issue.

> The information produced by the Government itself shows that over a period of six years unemployment has increased by 26%, poverty by 27%, while the gross domestic product (GDP) has fallen by more than 25% and *the measures adopted have not made it possible either to restore the labour market or sustainable growth* or to achieve the main objective of the support programmes since during the same period public debt increased from 109% to 175% of GDP.[145]

The Committee decided the case when it had the outcome of restrictive measures adopted by the respondent State. Therefore, the Committee made an ex post evaluation. It held that 'the legislative measures in the present case, if construed as aimed at restoring the economic and financial situation of Greece and of the labour market, did not achieve any of these objectives.'[146] For this reason, the European Committee concluded that the restrictions are not permitted under Article 31 of the 1961 Charter.[147]

#### 3.3.2.3 Necessity

As a component of the proportionality analysis, the requirement of necessity prohibits adopting a restriction, when there is 'a less restrictive but equally effective alternative' as discussed above.[148] This requirement, one may argue, can be derived from limitation clauses, which usually require that restrictions to human rights should be 'necessary in a democratic society.'[149] However, this criterion is not readily clear from the text of general limitation clauses in the ICESCR, the American Convention and its Protocol of San Salvador.[150]

In practice, the CESCR requires that restrictions be necessary although this requirement is not clear from Article 4 of the ICESCR. Explaining restrictions that may be imposed on the right to health in accordance with Article 4 of the ICESCR, the CESCR has underlined that

> Such restrictions must be in accordance with the law, including international human rights standards, compatible with the nature of the rights protected by the Covenant, in the interest of legitimate aims pursued, and *strictly necessary* for the promotion of the general welfare in a democratic society.[151]

The CESCR has made similar pronouncements with regard to the rights guaranteed under Article 15(1) of the ICESCR. It explained that limitations can be imposed on the exercise of the right guaranteed under Article 15(1)(c) and emphasised that such limitations 'must be determined by law in a manner compatible with the nature of these rights, must pursue a legitimate aim, and must be strictly necessary for the promotion of the general welfare in a democratic society.'[152] The CESCR does not define the requirement of necessity as the least restrictive means as discussed above;. rather, it explains that 'limitations must be proportional, i.e. the least restrictive alternative must be adopted where several types of limitations are available.'[153] Put differently, the CESCR takes proportionality to mean the least restrictive alternative.

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[145] *GSEE v Greece*, para 92. Italics added.
[146] *GSEE v Greece*, para 92.
[147] *GSEE v Greece*, para 93.
[148] Kai Möller, 'Proportionality and Rights Inflation' in Grant Huscroft, Bradley W Miller & Grégoire Webber, *Proportionality and the Rule of Law: Rights, Justification, Reasoning* (CUP 2014) 156.
[149] ICESCR, Art 8(1); European Social Charter (1961), Art 31; European Social Charter (1996), Art G(1). cf Protocol of San Salvador, Art 8(2).
[150] ICESCR, Art 4; Protocol of San Salvador, Art 4; American Convention, Art 30.
[151] CESCR, General Comment 14, para 28. Italics added.
[152] CESCR, General Comment 17, para 22; General Comment 21, para 19.
[153] CESCR, General Comment 14, para 29. See General Comment 17, para 23; General Comment 21, para 19.

The requirement of necessity as the least restrictive means is traceable in the practice of the European Committee of Social Rights. In *GSEE v Greece*, the European Committee held that restrictive measures are permissible on the condition that such 'measures could be regarded as […] the least restrictive' of the rights guaranteed in the European Social Charter.[154] The Committee has found a violation because 'there has been no real examination or consideration of possible alternative and less restrictive measures' by the respondent State.[155]

Moreover, the European Committee considers other grounds when it evaluates whether a restriction to the rights under the European Social Charter is 'necessary in a democratic society' in accordance with the general limitation clause of the European Charter. For example, it held that a restrictive measure is not necessary when there is no 'pressing social need'.[156] In *GSEE v Greece*, the Committee indicated what can be considered a 'pressing social need': 'the dramatic shrinkage of the Greek economy and the very high rate of unemployment represented a pressing social need which could have necessitated the adoption of measures restricting or limiting the rights guaranteed by the Charter.'[157] In *EuroCOP v Ireland*, the European Committee indicated that providing services in relation to immigration and state security does not constitute a pressing social need for placing a complete ban on the exercise of the right to strike. In this case, it has examined an absolute ban on the right to strike by members of the police under Article 6(4) of the European Social Charter. The respondent State has justified such a ban on the ground that it relies on its police in the context of immigration control and state security.[158] According to the European Committee, however, these reasons 'do not demonstrate the existence of a concrete pressing social need.'[159] As a result, the European Committee held that the law that places an absolute prohibition on the right to strike 'is not proportionate to the legitimate aim pursued and, accordingly, is not necessary in a democratic society.'[160]

A restriction is not necessary when a state fails to provide sufficient information as to why it has put such a restriction in place. The European Committee has emphasised this requirement in *European Organisation of Military Associations (EUROMIL) v Ireland*.[161] In this case, it examined a complaint concerning the respondent State's failure to ensure the participation of members of the armed forces in national pay negotiations under Article 6(2) of the European Social Charter:

> The Committee has been provided with little information as to why the practical exclusion of the armed forces from the scope of direct pay negotiations is necessary within the meaning of Article G of the Charter, nor why such a near total exclusion could be considered as proportionate. The Committee therefore considers that the nearly total exclusion of the representative military organisations from direct negotiations concerning pay cannot be considered as necessary under Article G of the Charter.[162]

The requirement of necessity as *least restrictive means* is traceable in the jurisprudence of the Inter-American Court of Human Rights. The Inter-American Court has stressed that a restriction 'must be

[154] *GSEE v Greece*, para 89.
[155] *GSEE v Greece*, paras 90 & 91.
[156] *GSEE v Greece*, para 83; *EuroCOP v Ireland*, para 209.
[157] *GSEE v Greece*, para 89.
[158] *EuroCOP v Ireland*, para 208.
[159] *EuroCOP v Ireland*, para 209.
[160] *EuroCOP v Ireland*, para 213.
[161] Complaint No. 112/2014, Decision on merits adopted 12 September 2017, para 94.
[162] *EUROMIL v Ireland*, para 94.

necessary, which means that it must be shown that it cannot reasonably be achieved through *a means less restrictive of a right* protected by the Convention.'[163]

#### 3.3.2.5 Balancing

Texts of limitation clauses do no refer to proportionality or balancing. In practice, treaty bodies require states to conduct a thorough balancing analysis when they subject human rights to restrictions. The CESCR requires that 'limitations must be proportional'[164] and has also declared that the 'right to the protection of the moral and material interests resulting from one's scientific, literary and artistic productions is subject to limitations and must be *balanced* with the other rights recognized in the Covenant.'[165] This may show that the CESCR has inclined towards requiring states to conduct balancing. However, it has yet to require balancing in concrete cases before it.

The European Committee requires states to conduct a thorough balancing analysis as it has indicated in *GSEE v Greece*. It has found 'no evidence, especially from the side of the Government, that a thorough balancing analysis of the effects of the legislative measures has been conducted by the authorities.'[166] Therefore, the Committee has not found restrictive measures adopted by Greece to be proportionate and in conformity with Article 31 of the European Social Charter.[167]

To summarise the practice of applying limitation clauses, one may make two general observations. First, one or more components of proportionality (i.e., legitimate goal, suitability, necessity and balancing) are traceable in the practice of the CESCR, the Inter-American Commission and the Inter-American Court. All components are traceable in the practice of the European Committee. While the European Committee seems to employ all the components, it does not examine each component in a sequential order. That is, it does not conduct a vertical proportionality analysis. Second, these treaty bodies employ the components of proportionality with regard to interference with the exercise of the rights guaranteed in the respective treaties. In other words, they invoke proportionality in relation to the negative obligation to respect.

### 3.3.3 Limitation and retrogression

The CESCR and the European Committee do not treat limitation and retrogression in the same way. The CESCR does not establish a clear relationship between limitation and retrogression. Although it has yet to develop detailed criteria for evaluating restrictive or retrogressive measures, its rudimentary criteria for assessing both categories of measures have some similarities. As discussed in the previous chapter, the CESCR explained that: 'If the adoption of retrogressive measures is

[163] Inter-American Court of Human Rights, *Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism (Arts 13 and 29 American Convention on Human Rights)*, Advisory Opinion OC -5/85, 13 November 1985, para 79. Italics added.

[164] CESCR, General Comment 14, para 29. See General Comment 17, para 23; General Comment 21, para 19.

[165] General Comment 17, para 23. Italics added.

[166] *GSEE v Greece*, para 90.

[167] *GSEE v Greece*, para 91. The European Committee of Social Rights does not replace decisions made at national level with its own. Rather, it supervises whether the decision-makers at national level have followed certain procedures. That is, the finding that the restrictive measures were disproportionate was made on procedural grounds. For example, the Committee did not examine the proportionality of the degree by which recruitment, pay or working conditions was downgraded. The Committee has not examined the magnitude of downgrading in relation to achieving the legitimate goals. It has found non-conformity with the European Social Charter because the respondent State did not follow certain procedures in adopting the restrictive measures. In particular, the respondent State failed to evaluate the impact of the restrictive measures on vulnerable groups, to make genuine consultation, to examine possible alternative measures, and to adopt less restrictive measures.

unavoidable, such measures should be necessary and proportionate.'[168] In *López Rodríguez v Spain*, the CESCR held that a social security benefit cannot be withdrawn, reduced or suspended 'unless the measure is provided for by law, is reasonable and proportionate, and guarantees at least a minimum level of benefits [...]. The reasonableness and proportionality of the measure should be evaluated on a case-by-case basis.'[169] In this case, the CESCR does not clearly classify a reduction, withdrawal or suspension of a social security benefit of an individual as a retrogressive or a restrictive measure. It has not evaluated such a measure based on the requirements in Article 4, nor has it assessed the measure according to the criteria it developed for evaluating retrogressive measures. However, it employs the principle of proportionality. If one understands this requirement to mean compliance with the principle of proportionality in the broad sense, one may expect the CESCR to use the same criteria for evaluating whether retrogressive or restrictive measures comply with the obligations under the ICESCR. The Inter-American Court and the Inter-American Commission follow the practice of the CESCR as discussed in chapter 2.[170]

On the other hand, the European Committee does not distinguish retrogression from restrictions. Thus, its practice differs from that of the CESCR. Regarding the right to work, for example, 'the abrogation of legislation protecting the employee against unlawful dismissal' is a retrogressive measure according to the CESCR.[171] Such a measure is considered a restrictive measure according to the European Committee. In *GSEE v Greece*, when the respondent State shifted 'the regulation of employment, pay and working conditions from branch level to company level or even down to the individual worker', it favoured 'a balance of power that allows employers to downgrade recruitment, pay and working conditions.'[172] In essence, the respondent State abrogated at least in part the legislation protecting workers from dismissal. However, the European Committee does not call such measures retrogressive; although it does take note of the CESCR's criteria for evaluating retrogressive measures.[173]

The European Charter does not provide for the progressive realisation of rights it guarantees. One may argue that this could be one of the reasons why the European Committee does not make a distinction between retrogressive and restrictive measures. This point can be buttressed by the Committee's reference to 'retrogressive steps' in relation to Article 12(3) of the European Charter. This provision guarantees the right to social security and requires states 'to raise progressively the system of social security to a higher level.' Thus, one may conclude that since Article 12(3) requires progressive increase in the enjoyment of the right to social security, the Committee has legal ground to identify measures that may constitute a retrogressive step.[174]

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[168] Statement by the Committee on Economic, Social and Cultural Rights, Public debt, austerity measures and the International Covenant on Economic, Social and Cultural Rights, E/C.12/2016/1, 22 July 2016, para 4 (hereafter 'Statement on public debt').

[169] *López Rodríguez v Spain*, Communication No. 1/2013, CESCR views adopted 4 March 2016, para 14.1.

[170] *Case of Acevedo Buendía et al ("Discharged and Retired Employees of the Comptroller") v Perú*, Judgment of 1 July 2009, Inter-American Court of Human Rights, para 103; *National Association of Ex-Employees of the Peruvian Social Security Institute et al v Peru*, Case 12.670, Report No. 38/09, Admissibility and Merits of 27 March 2009, Inter-American Commission on Human Rights, para 139.

[171] CESCR, General Comment 18, para 34.

[172] *GSEE v Greece*, para 70.

[173] *GSEE v Greece*, para 65. The European Committee of Social Rights takes note of the CESCR's Statement on public debt (n 180).

[174] *General Federation of Employees of the National Electric Power Corporation (GENOP-DEI) and Confederation of Greek Civil Servants' Trade Unions (ADEDY) v Greece*, Complaint No. 66/2011, Decision on the Merits of 23 May 2012, para 47.

Despite these differences, some areas of common concern for both the CESCR and the European Committee can still be identified. Both committees pay particular attention to the enjoyment of economic, social and cultural rights by members of vulnerable groups. According to the CESCR, retrogressive measures should 'ensure that the rights of disadvantaged and marginalized individuals and groups are not disproportionately affected.'[175] The European Committee considers whether states have assessed possible impacts of restrictive measures on 'the most vulnerable groups' to determine the proportionality of such measures.[176]

Consultation or participation is another element that both committees have stressed in their practice. In addition to the requirement that retrogressive measures be proportionate, the CESCR requires a 'genuine participation of affected groups in examining the proposed measures and alternatives.'[177] In contrast, the European Committee considers that consultation is an element of the proportionality analysis. To determine the proportionality of a restrictive measure, the European Committee first ascertains whether 'a genuine consultation has been carried out with those most affected by the measures.'[178]

Ensuring a certain level of protection of economic, social and cultural rights is also another common concern of both committees. The CESCR emphasises that retrogressive measures 'should not affect the minimum core content of the rights protected' under the ICESCR.[179] Article 4 of the ICESCR requires that limitations should be compatible with the nature of the rights provided in conformity with the ICESCR. This requirement ensures compliance with minimum core content of those rights according to Müller. She argues that limitations that affect the minimum core content of rights in the ICESCR are not compatible with the nature of those rights.[180] According to the CESCR, states should bring limitations in line with Article 4 of the ICESCR and ensure that such limitations 'do not interfere with the core minimal content of the rights.'[181] However, the CESCR does not clearly establish that the core content of a right represents the nature of that right. The European Committee does not use the language of minimum core content of a right. It still requires that restrictive measures 'must maintain a level of protection which is adequate.'[182]

To sum up, the CESCR distinguishes between a restrictive measure (limitation) and a retrogressive measure (retrogression). In contrast, the European Committee does not make such distinction. It evaluates the proportionality of restrictive measures, which include both limitation and retrogression.

[175] CESCR, Statement on Public debt (n 180), para 4.
[176] *GSEE v Greece*, para 90.
[177] CESCR, Statement on Public debt (n 180), para 4.
[178] *GSEE v Greece*, para 90. See *Federation of employed pensioners of Greece (IKA-ETAM) v Greece,* Complaint No. 76/2012, Decision on the Merits of 7 December 2012, para 79; *Panhellenic Federation of Public Service Pensioners (POPS) v Greece*, Complaint No. 77/2012, Decision on the Merits of 7 December 2012, para 74; *Pensioners' Union of the Athens-Piraeus Electric Railways (I.S.A.P.) v Greece*, Complaint No. 78/2012, Decision on the Merits of 7 December 2012, para 74; *Panhellenic Federation of pensioners of the Public Electricity Corporation (POS-DEI) v Greece*, Complaint No. 79/2012, Decision on the Merits of 7 December 2012, para 74; *Pensioners' Union of the Agricultural Bank of Greece (ATE) v Greece*, Complaint No. 80/2012, Decision on the Merits of 7 December 2012, para 74.
[179] CESCR, Statement on Public debt (n 180), para 4.
[180] Müller (n 114) 575.
[181] Concluding observations on Viet Nam, E/C.12/VNM/CO/2-4, 15 December 2014, para 8.
[182] *GSEE v Greece*, para 90.

## 3.4 Limitation under the African Charter

Limitation on human rights including economic, social and cultural rights can be either internal or external as discussed above. The African Charter uses both forms of limitation, but it does not contain a general limitation clause. Despite the textual omission, the African Commission and the African Court have explained that Article 27(2) of the Charter serves as a general limitation clause. This section examines the context and historical origin of Article 27(2), a provision that has evolved into a general limitation clause in the practice of the African Commission and the African Court. To provide a full picture, I will start this section with a discussion of types of limitation under the African Charter. After that, I will return to the discussion of Article 27(2).

### 3.4.1 Types of limitations in the African Charter

Limitations in the African Charter are internal as well external. The African Charter qualifies some Charter rights with internal limitations that are applicable to economic, social and cultural rights as well as to civil and political rights.[183] Two provisions on economic, social and cultural rights contain expressly internal limitations. These are Articles 15 (the right to work)[184] and 16 (the right to health).[185] The qualification in Article 15 relates to conditions of work, which should be 'equitable and satisfactory'. Conditions of work include work place safety and hygiene, remuneration, rest, leisure and limitation of working hours, periodic holidays, public holidays and parental leave.[186] The right to work does not entitle an individual, for example, to a certain number of holidays. States are required to ensure 'satisfactory' conditions – what goes beyond that is not part of the right. Of course, what constitutes satisfactory conditions should be defined based on the types of work. Not all aspects of the right to work have qualifications, though (e.g. the right of every individual to 'receive equal pay for equal work' has no qualification).

The internal limitations on the right to health in Article 16 are implied by two qualifications. One is expressed by the phrase 'the best attainable state' of health. It is not humanly possible to ensure that every person becomes and remains healthy. It is common knowledge that there are several incurable diseases occurring anywhere, irrespective of the resources and technologies at the disposal of a particular state. Thus, by definition, the right to health does not entitle one to be healthy. The other qualification relates to the measures that states should take to ensure the protection of health and provision of medical attention during sickness. Such measures should be 'necessary'. While this qualification gives broad latitude to states, their discretion is subject to the supervisory mechanisms of the Charter, the African Commission and the African Court. Thus, not every measure is necessary. Some commentators read these qualifications as a requirement of resource availability as discussed in chapter 2.[187]

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[183] E.g., African Charter, Arts 4 & 6. Art 4 provides that: 'No one may be arbitrarily deprived of [the right to life];' Art 6 provides that 'no one may be arbitrarily arrested or detained.' The Charter does not place an absolute bar on the deprivation of life or liberty. It leaves a space for States parties to determine what constitutes an arbitrary deprivation.

[184] African Charter, Art 15 provides that: 'Every individual shall have the right to work under equitable and *satisfactory* conditions, and shall receive equal pay for equal work.' Italics added.

[185] African Charter, Art 16 provides that: '1. Every individual shall have the right to enjoy *the best attainable state* of physical and mental health. 2. States 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.' Italics added.

[186] Nairobi Principles, para 59(h).

[187] Sisay Alemahu Yeshanew, *The Justiciability of economic, social and cultural rights in the African regional human rights system: Theory, practice and prospect* (Intersentia 2013) 253-254.

The African Charter guarantees the right to education (Article 17(1)) and the right to participate in cultural life (Article 17(2)) without any qualification. Does the absence of an express qualification have any implication? One reading, as Viljoen suggests, is to consider it to mean no qualifications were intended. Thus, a qualification should not be inferred, as in 'the "unqualified" right to education.'[188] For example, a failure to provide tertiary education may constitute a violation according to this reading. In terms of procedure, such reading implies bypassing the first stage of rights analysis, the stage at which the scope of a right is defined as discussed above. It also implies an expansive definition of a right, since this reading assumes an allegation as a prima facie violation and proceeds to the second stage to determine external limits. In a way, this may be considered a right inflation because the reading appears to protect 'every interest that could be understood to fall within the semantic reach' of the concerned right.[189]

An alternative reading is to regard the absence of express qualification as no bar on limitation. As Gardbaum argues, there are implied internal limits to human rights in general.[190] The right to education, for example, does not include everything that comes within the semantic reach of the term 'education'. Thus, the right to education under the African Charter may include free and compulsory primary education. A similar guarantee under the ICESCR may support this position.[191] The right to education may also include tertiary education. Are states obliged to make tertiary education free and compulsory? The answer to this question may not be necessarily clear from the absence of any qualification from Article 17(1) of the African Charter.

External limitations are further divided into general and specific limitations. The African Charter provides for two types of specific external limitations. According to Viljoen, one category is 'norm-based limitations'.[192] The limitation clause in Article 11 of the African Charter is quintessentially a norm-based one. It provides that the right to freedom of assembly 'shall be subject only to necessary restrictions provided for by law in particular those enacted in the interest of national security, the safety, health, ethics and rights and freedoms of others.' This limitation clause is similar to those clauses applicable to the trade union rights under the ICESCR and the Protocol of San Salvador discussed above. Norm-based limitation clauses identify criteria for restricting Charter rights. None of the economic, social and cultural rights guaranteed in the Charter is subject to a norm-based limitation clause.

In the other category of specific external limitations are clawback clauses.[193] A clawback clause is a provision 'which permits a state, in its almost unbounded discretion, to restrict its treaty obligations or the rights guaranteed by the African Charter.'[194] Most civil and political rights in the African Charter contain clawback clauses, the incorporation of which is a much criticized feature of the

[188] Frans Viljoen, *International human rights law in Africa* (OUP 2012) 217.
[189] Francisco J Urbina, *A Critique of Proportionality and Balancing* (CUP 2017) 240; Brems & Lavrysen (n 56) 149.
[190] Gardbaum, structure of constitutional rights, (n 11) 389.
[191] ICESCR, Art 13(2)(a).
[192] Viljoen (n 188) 330.
[193] Rose M D'Sa, 'Human and Peoples' Rights: Distinctive Features of the African Charter' (1985) 29/ 1 *Journal of African Law* 72—81; EI-Obaid Ahmed EI-Obaid & Kwadwo Appiagyei-Atua 'Human Rights in Africa: A New Perspective on Linking the Past to the Present' (1996) 41 *McGill Law Journal* 819—854, 836.
[194] Ebow Bondzie-Simpson, 'A Critique of the African Charter on Human and People's Rights' (1988) 31/4 Howard Law Journal 643—665, 660.

Charter.[195] Clawback clauses refer to domestic law of states,[196] and they permit the state to restrict Charter rights including the right to property 'to the extent permitted by domestic law.'[197] The clauses allow restrictions that are 'almost totally discretionary.'[198] They 'do not provide the external control over State behaviour.'[199] For these reasons, critics of the Charter text recommend that it is necessary to eliminate clawback clauses, since the clauses are insidious.[200]

Of economic, social and cultural rights, only the right to property provides for a clawback clause. Article 14 of the Charter states: '[t]he 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.' However, Odinkalu observes that 'the economic, social, and cultural rights guaranteed by the Charter are free of both clawbacks and limitations.'[201] Like some other commentators, Odinkalu seems to exclude the right to property from the category of economic, social and cultural rights.[202] The African Commission, however, considers the right to property among economic, social and cultural rights.[203]

Article 14 allows states to limit the right to property when it is 'in the interest of public need or in the general interest of the community.' Although Article 14 appears to provide two legitimate goals, it seems that there is not much difference between 'public need' and 'general interest of the community'. Article 14 appears to limit state discretion to a certain degree. States cannot limit the right to property for any reasons they choose since there are only two legitimate grounds. Accordingly, one may argue, states cannot limit the right to property on grounds such as the protection of national security, public order, public health or for the protection of the rights and freedoms of others. However, the grounds under Article 14 are very broad. For this reason, one may argue that 'general interest of the community' might include, for example, the protection of national security or public order.

In sum, provisions of the African Charter on economic, social and cultural rights fall into three categories: those with internal limitations, those with specific external limitation, and those with no limitations. The rights to work and health have internal limitations. The right to property has specific external limitation (clawback clause). The Charter does not circumscribe the right to education and the right to participate in cultural life with any limitation.

### 3.4.2 General Limitation clause in the African Charter

The African Charter does not contain a general limitation clause unlike the ICESCR, the European Social Charter or the Protocol of San Salvador. This is problematic according to some

[195] Evelyn A Ankumah, *The African commission on human and peoples' rights: practice and procedures* (Martinus Nijhoff Publishers 1996) 176.

[196] Christof Heyns, 'The African regional human rights system: In need of reform?' (2001) 1/2 *African Human Rights Law Journal* 155 – 174, 160.

[197] Richard Gittleman, 'The African Charter on Human and Peoples' Rights: A Legal Analysis' (1982) 22/4 *Virginia Journal of International Law* 667 – 714, 691. See Makau Wa Mutua, 'The Banjul Charter and the African Cultural Fingerprint: An Evaluation of the Language of Duties' (1995) 35 *Virginia Journal of International Law* 339—380, 359; D'Sa (n 193) 75.

[198] Gittleman (n 197) 691.

[199] Gittleman (n 197) 692.

[200] Bondzie-Simpson (n 194) 654, 660, 665.

[201] Chidi Anselm 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—369, 348.

[202] See Odinkalu (n 201) 340—341; Gittleman (n 197) 687.

[203] Nairobi Principles, paras 51 – 55. The African Commission considers that the right to property falls under economic, social and cultural rights.

commentators.[204] Heyns argues that the absence of a general limitation clause from the Charter 'means that there are no general guidelines on how Charter rights should be limited.'[205] According to Heyns, '[a] society in which rights cannot be limited will be ungovernable, but it is essential that appropriate human rights norms be set for the limitations.'[206]

The drafting history of the African Charter shows that the drafters considered including a general limitation clause into the Charter. This is evident from a document prepared for discussion by Kéba Mbaye, the Chairperson of the Group of African Experts convened to draft the African Charter. Mbaye prepared a draft African Charter, which was largely drawn from the ICESCR and the American Convention on Human Rights.[207] Mbaye's draft provides for a separate provision on limitations of rights guaranteed in his draft African Charter.[208] Article 36 of Mbaye's draft stipulates that:

> The restrictions that, pursuant to this Charter, may be placed on the enjoyment or exercise of the rights or freedoms recognised herein may not be applied except in accordance with laws enacted for reasons of general interest and in accordance with the purpose for which such restrictions have been established.[209]

As Mbaye indicated, this is a verbatim reproduction of Article 30 of the American Convention on Human Rights except for replacing the word 'convention' with the word 'Charter'.[210] It seems that the Group of African Experts that Mbaye was chairing did not accept this proposal. This is clear from the preliminary draft of the African Charter that the Group of Experts produced at the end of their meeting in Dakar. The preliminary draft does not contain the general limitation clause proposed by Mbaye.[211] However, the reason for dropping the proposed general limitation clause is not clear from the drafting history of the Charter.

One may also examine another provision in Mbaye's Draft African Charter. Mbaye included a provision on the relationship between duties and rights in his draft. This provision states that: 'The rights of each person are limited by the rights of others, by the security of all, and by the just demands of the general welfare, in a democratic society.'[212] Mbaye took the verbatim copy of Article 32(2) of the American Convention and reproduced it in his draft.[213] The Group of Experts that Mbaye was chairing did not drop Mbaye's proposal altogether. It is clear from their preliminary draft of the African Charter that the Group of Experts adopted a modified version of this provision. Article 27(2) of the preliminary draft provides that: '[t]he rights and freedoms of each person shall be exercised

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[204] Heyns, In need of reform? (n 196) 160.

[205] Christof Heyns, 'The African Regional Human Rights System: The African Charter' (2004)108 *Penn State Law Review* 679—702, 688.

[206] Heyns, the African Charter, (n 205) 688.

[207] Draft African Charter on Human and Peoples' Rights, prepared for the Meeting of Experts in Dakar, Senegal from 28 November to 8 December 1979, by Kéba Mbaye, CAB/LEG/67/1 (hereafter 'Mbaye's draft'), reproduced in C Heyns (ed), *Human rights law in Africa 1999* (2002) 65 – 77, 65.

[208] Ibid.

[209] Mbaye's draft African Charter, Art 36.

[210] Art 30 of the American Convention provides that 'The restrictions that, pursuant to this Convention, may be placed on the enjoyment or exercise of the rights or freedoms recognized herein may not be applied except in accordance with laws enacted for reasons of general interest and in accordance with the purpose for which such restrictions have been established.'

[211] See Preliminary draft of the African Charter prepared during the Dakar Meeting of Experts at the end of 1979, CAB/LEG/67/3/Rev. 1, reproduced in Heyns (n 207) 81 - 91.

[212] Mbaye's draft African Charter, Art 37(2).

[213] Art 32(2) of the American Convention provides that: 'The rights of each person are limited by the rights of others, by the security of all, and by the just demands of the general welfare, in a democratic society.'

with due respect to the rights of others, by collective security and by morals and common interest.'[214] With few editorial changes, this provision has become the present Article 27(2) of the African Charter, which stipulates that: 'The rights and freedoms of each individual shall be exercised with due regard to the rights of others, collective security, morality and common interest.'

Therefore, the origin of Article 27(2) of the African Charter is Article 32(2) of the American Convention. Although Article 32(2) of the American Convention deals with the relationship between rights and duties, it expressly deals with grounds for limiting individual rights. However, Article 27(2) of the African Charter does not use the language of limitation. Coupled with the rejection of the proposed general limitation clause, dropping the language of limitation from Article 27(2) may indicate the reluctance of the drafters to embrace limitations of a general application. From the foregoing, one may conclude that it was not the intention of the drafters to make Article 27(2) of the African Charter a general limitation clause.

Article 27(2) is in the part of the African Charter that provides for duties.[215] From its physical location under the Charter, one can tell that Article 27(2) deals with duties of individuals. It requires individuals to exercise their rights in a manner that does not affect the rights of other individuals, collective security, morality and common interest. From the cumulative reading of Articles 27(2) and 1 of the African Charter, one may argue for an indirect limitation clause. Under Article 1 of the African Charter, states have undertaken the obligation to give effect to the duties provided in the Charter. This obligation requires states to implement the duties of individuals to exercise their rights 'with due regard to the rights of others, collective security, morality and common interest.'[216] As a result, states can limit the rights of individuals on these grounds to give effect to individual duties.

Some issues still arise even if one successfully establishes Article 27(2) as a general limitation clause. One of the issues is whether Article 27(2) applies to all Charter rights, particularly to peoples' rights. The Charter deals with individual duties. It does not provide for peoples' duties as opposed to peoples' rights. In particular, the duties under Article 27(2) are with regard to exercising 'the rights and freedoms of each individual'. It does not relate to the exercise of peoples' rights. As a result, one may conclude, Article 27(2) can serve as a general limitation clause only with regard to individual rights (Articles 2 to 18 of the Charter). That is, a general limitation clause derived from Article 27(2) of the Charter cannot apply to people's rights (Articles 19 to 24 of the Charter).

Another issue relates to some common elements of limitation clauses, whether general or specific. Limitation clauses usually require that restrictions on human rights be provided by law; that they should be necessary; and that they should serve some interests or be based on some grounds. An evaluation of Article 27(2) of the Charter in light of these elements is worth considering. First, one of the elements common in the general limitation clauses is the requirement of legality. According to this requirement, limitations or restrictions should be provided by law. The general limitation clauses of the ICESCR and the European Social Charter expressly require that limitations or restrictions be determined or prescribed by law as discussed above.[217] This element is, however, missing from Article 27(2) of the African Charter. Since the drafters of the African Charter had no intention to

[214] Preliminary draft of the African Charter prepared during the Dakar Meeting of Experts at the end of 1979, CAB/LEG/67/3/Rev. 1, reproduced in Heyns (n 207) 86.
[215] African Charter, Chapter II.
[216] African Charter, Art 1 cum Art 27(2).
[217] See ICESCR, Art 4; European Social Charter (revised), Art G; European Social Charter, Art 31.

make Article 27(2) a general limitation clause, one may argue, the omission of the requirement of legality from this provision is logical. Besides, the drafters included that requirement in other provisions of the Charter when their intention was to limit the exercise of some other rights.[218]

Second, limitation clauses usually require that restrictions on human rights be necessary. This element is also missing from Article 27(2) of the African Charter. The component of necessity is missing from this provision, but not from the Charter. For example, the Charter permits only necessary restrictions to the exercise of the right to freedom of assembly.[219] Therefore, it would be difficult to conclude that the omission of necessity is made inadvertently.

Third, limitation clauses usually specify legitimate goals, grounds for imposing restrictions on human rights. Limitation clauses identify interests to be served by restrictions on human rights. Such goals or interests, for example, include 'the protection of the rights and freedoms of others or the protection of public interest, national security, public health, or morals.'[220] Article 27(2) of the Charter includes some elements, which can be regarded as grounds of limitations. These are 'rights of others, collective security, morality and common interest.' Of all elements common to limitation clauses, Article 27(2) provides for one element only – the legitimate goals.

Article 27(2) mentions four legitimate goals. The protection of the rights of others and morality are usually stated in the limitation clauses of other treaties.[221] One may also argue that 'common interest' carries a meaning similar to the meaning of 'general welfare' used under Article 4 of the ICESCR. The meaning of 'collective security', however, may be more ambiguous and worth considering more in depth. Article 27(2) of the African Charter refers to 'collective security' instead of 'national security'. The latter phrase is common in limitation clauses permitting restrictions on the exercise of some rights, particularly the right to freedom of association, assembly, expression and movement.[222] The Charter itself refers to the protection of 'national security' with regard to restrictions on the exercise of the right to the freedom of assembly and movement.[223] Therefore, one may automatically rule out the interpretation of 'collective security' to mean 'national security'. It is a trite rule of interpretation that the same word or phrase is expected to have the same meaning throughout a single legal document. Accordingly, the phrase 'collective security' under Article 27(2) of the Charter should have a meaning different from that of the phrase 'national security' under Articles 11 and 12(2) of the Charter.

The use of 'collective security' under Article 27(2) of the African Charter can be examined in light of general international law. In the law of use of force in particular, the concept of collective security is linked to the relationship among states as opposed to the relationship between states and their citizens. The concept 'implies an arrangement by which states act collectively to guarantee one another's security.'[224] The preservation of international peace is central to the concept of collective

[218] African Charter, Arts 11 & 12(2).
[219] African Charter, Art 11.
[220] cf European Social Charter (revised), Art G.
[221] African Charter, Arts 11 & 12(2); European Social Charter (revised), Art G.
[222] cf European Social Charter (revised), Art G.
[223] African Charter, Arts 11 & 12(2).
[224] Gary Wilson, *The United Nations and Collective Security* (Routledge 2014) 5.

security. It is one of the purposes of the United Nations to maintain international peace through collective security measures.[225]

Obviously, the African Charter is a human rights treaty. However, it provides for relationships among states. Article 23(1) of the Charter refers to the United Nations Charter with regard to peoples' right to 'national and international peace and security.' It provides that the 'principles of solidarity and friendly relations [...] shall govern relations between States.'[226] It permits restrictions on the exercise of the right of asylum for 'the purpose of strengthening peace, solidarity and friendly relations' among states.[227] Therefore, the African Charter deals with international peace, which is central to the concept of collective security. Moreover, the Charter specifically puts restrictions on the right of asylum to strengthen peace. Still, it would be difficult to conclude that 'collective security' under Article 27(2) refers to the collective security as understood in the law of use of force. This provision refers to the exercise of rights by individuals within the jurisdiction of states.

From its drafting history, one may conclude, Article 32(2) of the American Convention on Human Rights served as the basis for the formulation of Article 27(2) of the African Charter as discussed above. Article 32(2) of the American Convention provides that the rights of each person are limited 'by the security of all'. This may mean that the exercise of individual rights must not endanger the security of other persons. One may therefore read Article 27(2) as imposing duties on individuals to exercise their rights in a manner that does not expose others to danger or threat of danger.

This reading of Article 27(2) of the Charter may apply to some of the Charter rights. The applicability of this reading to economic, social and cultural rights is still questionable. This is because the enjoyment of economic, social and cultural rights by some individuals does not affect the security of others. It is for this reason that Article 4 of the ICESCR does not provide for the protection of the security of others as a reason for imposing restrictions on the enjoyment of rights guaranteed therein.

In sum, the African Charter does not provide for a general limitation clause. Article 27(2) does not expressly permit states to restrict rights guaranteed under the African Charter. Moreover, this provision does not have some common elements of limitation clauses. However, the African Commission and the African Court have assigned the function of a general limitation clause to Article 27(2). In the next section, I will discuss the practice of the African Commission and the African Court in relation to Article 27(2) of the African Charter. I will demonstrate that this provision has evolved into a full-fledged general limitation clause, despite the original intention.

## 3.5 The African Commission and the African Court on limitation and proportionality

The African Charter does not contain a general limitation clause similar to those contained in the ICESCR, the Protocol of San Salvador and the European Social Charter discussed above. Despite the textual omission, both the African Commission and the African Court have discovered that Article 27(2) of the Charter is the general limitation clause or serves the purpose thereof. I begin the section with this discovery. In examining the compliance of states with the requirements of limitation clauses, both the African Commission and the African Court employed at least some of the components of the proportionality analysis discussed above. In the second subsection, I trace the use

[225] UN Charter, Art 1(1).
[226] African Charter, Art 23(1).
[227] African Charter, Art 23(2).

of these components in relation to negative obligations that mainly arise from civil and political rights since they are the locus for the development of these components. In the third subsection, I will identify kinds and stages of proportionality analysis. I will return to economic, social and cultural rights in the next section.

### 3.5.1 The discovery of a general limitation clause in the African Charter

The African Commission and the African Court recognise that the African Charter does not contain a general limitation clause. According to the Commission, the omission of a general limitation clause is one of the distinguishing features of the African Charter:

> [O]ne of the peculiarities of the African Charter is that it does not include any general limitation clause. The spirit behind the absence of such a general limitation must be understood as *the desire to avoid abusive restriction of rights*, a restriction which will be applied only under very limited and legally circumscribed conditions.[228]

The Commission has also explained the rationale for omitting a general limitation clause. It is 'the desire to avoid abusive restrictions of rights,' as the above passage indicates. It qualifies the kinds of restrictions intended to be avoided. Not every restriction is prohibited – only 'abusive restrictions' should be avoided, but no explanation of that term is provided. Still, one may submit, the Commission does not suggest that the absence of a general limitation clause turns the Charter rights into absolute rights, even if those rights are not circumscribed by specific limitation clauses.

Moreover, the African Court acknowledges that Article 27(2) of the African Charter was not intended to serve the role of a general limitation clause.[229] In his separate opinion in *Mtikila v Tanzania*, Judge Fatsah Ouguergouz (then Vice-President of the Court) stressed that

> [Article 27(2)] is *a priori* intended to prevent the abuse that the individual might likely commit in the exercise of his or her rights and freedoms rather than to protect the individual from abusive limitations to his or her rights and freedoms by the State, as it is emphatically suggested in the formulation of this Article and its location in the Charter relating to the duties of the individual.[230]

According to Ouguergouz, Article 27(2) does not permit states to restrict the exercise of Charter rights. That is, this provision does not serve one of the functions of a limitation clause, which is permitting states to impose restrictions. Ouguergouz derives this reading from the text of Article 27(2) and its location in the structure of the Charter.

The purposive interpretation of the Commission and the contextual reading of the Court, it is submitted, bear out at least two conclusions. Both the Commission and the Court recognise that the African Charter does not contain a general limitation clause. According to the Commission, the absence of a general limitation clause serves a protective function by excluding abusive restrictions. Moreover, the African Court acknowledges that Article 27(2) was not intended to serve the purpose

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[228] *Groupe de Travail sur les Dossiers Judiciaires Stratégiques v Democratic Republic of Congo*, Communication 259/2002, Decision of the African Commission 14th Extraordinary Session, 20 to 24 July 2011, para 66. Italics added.

[229] *Tanganyika Law Society and Legal and Human Rights Centre and Reverend Christopher R Mtikila v United Republic of Tanzania* (hereafter 'Mtikila v Tanzania'), App Nos 009 & 011/2011, Judgment on merits, 14 June 2013, Separate Opinion of Vice-President Fatsah Ouguergouz, para 30.

[230] *Mtikila v Tanzania*, Separate opinion of Ouguergouz, para 30.

of a general limitation clause. However, the African Commission has assigned the role of a general limitation clause to Article 27(2) of the Charter.[231] The African Court has also affirmed this view.

In *Media Rights Agenda and Others v Nigeria*, the African Commission held that: 'The *only* legitimate reasons for limitations to the rights and freedoms of the African Charter are found in Article 27(2).'[232] It added that 'the evils of limitations of rights must be strictly proportionate with and absolutely necessary for the advantages which are to be obtained.'[233] The Commission followed this ruling in its later decisions.[234] Article 27(2) is not the only place to find legitimate goals. The African Charter provides additional legitimate goals under other provisions.[235] Article 27(2) of the Charter does not contain elements of a conventional limitation clause except the legitimate goals as discussed above. For this reason, it seems, the African Commission adds the missing elements.

The African Court has adopted the Commission's view. In *Mtikila v Tanzania*, it held that

> The Court agrees with the African Commission, that the limitations to the rights and freedoms in the Charter are only those set out in Article 27(2) of the Charter and that such limitations must take the form of "law of general application" and these must be proportionate to the legitimate aim pursued.[236]

Like the Commission, the Court mistakenly limits legitimate goals to those listed under Article 27(2) of the African Charter. Despite its holding in *Mtikila v Tanzania*, the Court recognised other grounds as a legitimate goal in a later case as discussed below.[237] Like the Commission, the Court also adds elements of limitation clauses missing from Article 27(2). In *Umuhoza v Rwanda* and *Konaté v Burkina*, the African Court listed the criteria used to evaluate restrictions to Charter rights.[238] It has underlined that it examines 'whether such restriction was admissible, in that, it was provided by law, served a legitimate purpose, and was necessary and proportional in the circumstances of the case.'[239] None of these criteria can be derived from the text of Article 27(2) of the African Charter. The Court does not claim that, neither in *Umuhoza v Rwanda* nor in *Konaté v Burkina*. It still regards this provision as a general limitation clause.[240]

Therefore, it is submitted, the African Commission and the African Court have identified criteria used for evaluating restrictions to Charter rights. These criteria require that limitations be provided by law; that they be legitimate; that they be necessary; and that they be proportionate. The criteria are much broader than the content of Article 27(2) of the African Charter. As a result, one would not be able to fit them under this provision. They have outgrown the text of Article 27(2). I will discuss these criteria below.

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[231] Heyns, In need of reform, (n 160) 161.

[232] *Media Rights Agenda and Others v Nigeria* (2000) AHRLR 200 (ACHPR 1998), para 68. Italics added.

[233] *Media Rights Agenda and Others v Nigeria*, para 69.

[234] See *Good v Botswana* (2010) AHRLR 43 (ACHPR 2010), para 190; *Sudan Human Rights Organisation and Another v Sudan* (2009) AHRLR 153 (ACHPR 2009), para 166; *Zimbabwe Lawyers for Human Rights and Another v Zimbabwe* (2009) AHRLR 235 (ACHPR 2009), para 176; *Interights and Others v Mauritania* (2004) AHRLR 87 (ACHPR 2004), para 78; *Constitutional Rights Project and Others v Nigeria* (2000) AHRLR 227 (ACHPR 1999), paras 41—43.

[235] cf African Charter, Arts 11 & 12(2).

[236] *Mtikila v Tanzania,* para 107.1.

[237] *Lohé Issa Konaté v Burkina Faso*, App No 004/2013 (Judgment on merits, 5 December 2014) paras 136-137 (hereafter 'Konaté v Burkina Faso').

[238] *Ingabire Victoire Umuhoza v Republic of Rwanda*, App No 003/2014 (Judgment on the merits, 24 November 2017) para 136 (hereafter 'Umuhoza v Rwanda'); *Konaté v Burkina Faso*, para 134.

[239] *Umuhoza v Rwanda,* para 136.

[240] *Umuhoza v Rwanda,* para 140.

### 3.5.2 Limitation analysis and proportionality in practice

The African Commission and the African Court have developed criteria for evaluating limitations on rights guaranteed under the African Charter, as already indicated above. These criteria include components of proportionality analysis. I discuss below each of these criteria. I begin with the requirement of legality, which is employed by both the Commission and the Court.

#### 3.5.2.1 Legality

The limitation clauses in the other treaties, particularly the ICESCR, the European Social Charter and the Protocol of San Salvador, stipulate that limitation to a right should be provided by law. Article 27(2) of the African Charter does not contain this element, as discussed above, nevertheless, both the African Commission and the African Court require that limitations be provided by law. In *Interights and Others v Mauritania*, the African Commission summarised the requirements for evaluating limitations:

> [F]or a restriction imposed by the *legislators* to conform to the provisions of the African Charter, it should be done 'with due regard to the rights of others, collective security, morality and common interest', that it should be based on a *legitimate* public interest and should be 'strictly *proportionate* with and absolutely *necessary*' to the sought after objective. And moreover, the *law* in question should be in conformity with the obligations to which the state has subscribed in ratifying the African Charter and should not render the right itself an illusion.'[241]

In this passage, the African Commission refers to 'a restriction imposed by the legislators.' While the passage suggests that it is the power of the legislators to restrict rights guaranteed under the African Charter, it does not lay down stringent requirements that the restrictions should be by law promulgated by democratically elected representatives, unlike the Inter-American Court of Human Rights.[242]

In *Mtikila v Tanzania*, the African Court adopted the Commission's position on requirements for evaluating limitations:

> The Court agrees with the African Commission, that the limitations to the rights and freedoms in the Charter are only those set out in Article 27(2) of the Charter and that such limitations must take the form of "law of general application" and these must be proportionate to the legitimate aim pursued.[243]

The Court does not expressly require that the law limiting the exercise of rights be passed by a legislature, but it lays down other requirements. The Court states that the law restricting rights should be 'law of general application.'[244] The African Commission has also adopted this requirement. In *Prince v South Africa*, the Commission accepted restrictions on the right to work on the ground that 'the limitations are of general application.'[245] When a restrictive law is promulgated to regulate behaviour of a single person, it does not qualify as 'law of general application'. Although the Commission did not refer to the element of generality in *Constitutional Rights Project and Others v*

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[241] *Interights and Others v Mauritania* (2004) AHRLR 87 (ACHPR 2004), para 79. Italics added; Footnotes omitted.

[242] Inter-American Court of Human Rights, *The Word 'Laws' in Article 30 of the American Convention on Human Rights,* Advisory Opinion OC -06/86, 9 May 1986, para 38.

[243] *Mtikila v Tanzania*, para 107.1.

[244] *Mtikila v Tanzania*, para 107.1.

[245] *Prince v South Africa* (2004) AHRLR 105 (ACHPR 2004), para 44.

*Nigeria*, where the respondent State proscribed some publications by name, it found a violation.[246] The Commission held that 'laws made to apply specifically to one individual or legal personality raise the serious danger of discrimination and lack of equal treatment before the law', and are therefore contrary to the African Charter.[247]

Clarity is another requirement of law that limits the exercise of rights. In *Umuhoza v Rwanda*, the African Court emphasised that 'domestic laws on which restrictions to rights and freedoms are grounded must be sufficiently clear, foreseeable and compatible with the purpose of the Charter and international human rights conventions.'[248] In *Konaté v Burkina Faso*, the Court explained the purpose of clarity in the law. It held that the objective of requiring laws to be clear is 'to enable an individual to adapt his/her conduct to the Rules and to enable those in charge of applying them to determine' what constitutes a legitimate restriction.[249] Therefore, the clarity of laws is useful not only to the rights-holders but also to the courts with the power to determine the rights and obligations of individuals.

A related issue is the requirement in some provisions of the Charter that some rights should be exercised 'within the law' or 'in accordance with the law' or similar requirements.[250] As discussed above, some commentators criticised the African Charter for providing states with wide discretion through clawback clauses.[251] The African Commission seems to dispel this fear. In *Interights and Others v Mauritania*, the Commission explained that:

> To allow national legislation to take precedence over the Charter would result in wiping out the importance and impact of the rights and freedoms provided for under the Charter. International obligations should always have precedence over national legislation, and any restriction of the rights guaranteed by the Charter should be in conformity with the provisions of the latter.[252]

In sum, both the African Commission and the African Court require states to comply with the requirement of legality, although Article 27(2) of the Charter does not expressly state such a requirement. According to this requirement, limitations should be provided by a law of general application, which should be clear.

#### 3.5.2.2 Legitimacy

The component of legitimate goal in proportionality analysis identifies aims that justify a restriction being imposed on rights. Article 27(2) of the African Charter requires individuals to exercise their rights 'with due regard to the rights of others, collective security, morality and common interest.' The African Commission and the African Court have identified these four grounds as legitimate goals whose protection justifies limitations on the rights under the African Charter.

Since its decision of 1998 in *Media Rights Agenda and Others v Nigeria*, the African Commission often quotes this statement: 'The *only* legitimate reasons for limitations to the rights and freedoms of the African Charter are found in Article 27(2), that is, that the rights of the Charter "shall be exercised

[246] *Constitutional Rights Project and Others v Nigeria* (2000) AHRLR 227 (ACHPR 1999), para 44.
[247] *Constitutional Rights Project and Others v Nigeria*, para 44.
[248] *Umuhoza v Rwanda*, para 136.
[249] *Konaté v Burkina Faso*, para 131.
[250] See African Charter, Arts 9(2) & 14.
[251] Gittleman (n 197) 691.
[252] *Interights and Others v Mauritania* (2004) AHRLR 87 (ACHPR 2004), para 77.

with due regard to the rights of others, collective security, morality and common interest".'[253] The African Court has also held that 'the limitations to the rights and freedoms in the Charter are *only* those set out in Article 27(2) of the Charter.'[254] The Court has added that the states should provide 'evidence that the restriction serves one of the purposes set out in Article 27(2) of the Charter.'[255] From the use of the term 'only' in both quotes of the Commission and the Court, it appears that the legitimate goals are limited. No reason other than those stated in Article 27(2) justifies the restriction of the rights guaranteed in the Charter. If one reads Article 27(2) of the Charter only, its formulation buttresses this reading since the provision restrictively lists the goals. That is, Article 27(2) is not illustrative.

However, the list of legitimate goals is not hermetically sealed. The text of the African Charter and the practice of both the African Court and the African Commission all show that there are other legitimate goals that can justify restrictions of Charter rights. Some provisions of the Charter itself provide for other legitimate goals, such as national security, law and order, public health, safety, ethics, general interest and public need.[256] In *Good v Botswana*, the Commission held that 'national security or public interests are recognised as justifiable grounds to limit freedom of expression under the African Charter.'[257] The Court has also recognised legitimate goals other than those specified under Article 27(2) of the Charter. In *Umuhoza v Rwanda*, the Court held that restrictions on freedom of expression 'may be made to safeguard the rights of others, national security, public order, public morals and public health.'[258]

The African Commission and the African Court require that restrictions to Charter rights advance one of the legitimate goals, whether those goals are provided under Article 27(2) or identified by the Court and the Commission. In *Konaté v Burkina Faso*, the African Court held that restrictions, which are provided by Burkinabé libel laws limiting the exercise of the right to freedom of expression contrary to Article 9(2) of the Charter, serve a legitimate goal since they are passed 'to protect the honour and reputation of the person or a profession.'[259] One may argue that this falls under the goal of protecting 'the rights of others' under Article 27(2) although the Court does not squarely place it under this provision.

The African Commission has referred to 'collective security' in *Sudan Human Rights Organisation and Another v Sudan*.[260] The Commission dealt with eviction and displacement of the civilian population in Darfur because of an internal armed conflict. It did not clearly rule that the eviction is a restriction to the exercise of the right to housing, however, it seems to suggest that evictions conducted for the protection of the civilian population from attacks or threats of attacks may serve the purpose of ensuring 'collective security'.[261] Both the Commission and the Court hardly examined cases in which

[253] *Good v Botswana*, para 190; *Sudan Human Rights Organisation and Another v Sudan*, para 166; *Zimbabwe Lawyers for Human Rights and Another v Zimbabwe*, para 176; *Interights and Others v Mauritania*, para 78; *Constitutional Rights Project and Others v Nigeria*, para 41; *Media Rights Agenda and Others v Nigeria*, para 68. Italics added.
[254] *Mtikila v Tanzania*, para 107.1. Italics added.
[255] *Mtikila v Tanzania*, para 106.1; *Konaté v Burkina Faso*, para 134.
[256] African Charter, Arts 11, 12(2) & 14.
[257] *Good v Botswana*, para 190.
[258] *Umuhoza v Rwanda,* para 140.
[259] *Konaté v Burkina Faso*, para 136.
[260] *Sudan Human Rights Organisation and Another v Sudan* (2009) AHRLR 153 (ACHPR 2009), para 166.
[261] Ibid, para 166.

states claim that their goals are the protection of 'morality and common interest'. However, they have examined other legitimate goals that are not stipulated in Article 27(2).

In *Scanlen and Holderness v Zimbabwe*, the African Commission defined 'public order' as 'conditions that ensure the normal and harmonious functioning of institutions on the basis of an agreed system of values and principles.'[262] It explained that the concept of public order 'demands the greatest possible amount of information. It is the widest possible circulation of news, ideas and opinions as well as the widest access to information by society as a whole that ensures this public order.'[263] The Commission concluded that 'the restrictions imposed on the practice of individual journalists can thus not be justified on the grounds of public order.'[264] In *Umuhoza v Rwanda*, the Court found that restrictions to the right to freedom of expression, which criminalises expressions minimising genocide committed in Rwanda, serve 'the legitimate interests of protecting national security and public order.'[265]

Sometimes, the African Commission does not clearly identify the legitimate goal intended to be served by the restrictions to the rights. In *Prince v South Africa*, for example, the African Commission examined restrictions to the right to work due to the complainant's use of cannabis. The Commission held that such restrictions serve a legitimate purpose,[266] however, did not identify a particular legitimate goal from among those listed in Article 27(2) of the Charter or those added by the Commission.

In sum, the African Commission and the African Court recognise that states can limit rights guaranteed in the African Charter if there is evidence that those restrictions serve the protection of the rights of others, collective security, morality or the common interest. Moreover, the Commission and the Court have also accepted restrictions to Charter rights that serve the public interest, national security, public order or public health. Therefore, both the Court and the Commission have expanded the list of legitimate goals that justify restrictions to some Charter rights.

#### 3.5.2.3 Suitability

The African Commission and the African Court hardly examine the suitability of restrictions to Charter rights. At the suitability stage, as discussed above, a decision-maker examines whether there is a rational connection between the restrictions and the legitimate goal.[267] In *Umuhoza v Rwanda*, the African Court clearly identified each component of the proportionality analysis against which it evaluated the conduct of the respondent State.[268] However, it did not identify suitability among these components.

In the *Ogiek* case, the African Court passed a suitability analysis as an examination of the legitimate goal stage. In this case, Kenya evicted Ogiek indigenous peoples from their ancestral land to preserve the environment in the Mau Forest. Because of the eviction, the Ogieks were unable to carry out their cultural practices. The Court accepted the preservation of the environment as a legitimate goal and held that 'the restriction of the cultural rights of the Ogiek population to preserve the natural

[262] *Scanlen and Holderness v Zimbabwe* (2009) AHRLR 289 (ACHPR 2009), para 109.
[263] *Scanlen and Holderness v Zimbabwe*, para 110.
[264] *Scanlen and Holderness v Zimbabwe*, para 111.
[265] *Umuhoza v Rwanda*, para 141.
[266] *Prince v South Africa* (2004) AHRLR 105 (ACHPR 2004), para 43.
[267] Möller, Global model, (n 78) 181.
[268] *Umuhoza v Rwanda,* paras 134-162.

environment of the Mau Forest Complex may in principle be justified to safeguard the "common interest" in terms of Article 27 (2) of the Charter.'[269]

However, the respondent State was not able to establish that the environmental degradation of the Mau Forest was caused by the Ogieks or their activities. This is evident from the Court's holding: 'Although the Respondent alleges generally [...] that certain cultural activities of the Ogieks are inimical to the environment, it has not specified which particular activities and how these activities have degraded the Mau Forest.'[270] In essence, the Court is saying that the respondent State did not establish a rational connection between the eviction of the Ogieks and the preservation of the environment. In proportionality theory, this kind of analysis is conducted at the suitability stage. Nevertheless, the Court concluded that 'the purported reason of preserving the natural environment cannot constitute a legitimate justification for the Respondent's interference with the Ogieks' exercise of their cultural rights.'[271] Therefore, the African Court merges the suitability stage with the legitimate goal stage – at least in the *Ogiek* case.

#### 3.5.2.4 Necessity

The component of necessity in proportionality analysis requires that restrictions to rights 'should impair as little as possible the affected right' as discussed above.[272] The African Charter expressly requires that restrictions to the exercise of the right to freedom of assembly be necessary[273], but this requirement is missing from Article 27(2) of the African Charter. Despite the textual silence, both the African Commission and the African Court require that restrictions to Charter rights be necessary.[274]

As discussed above, restrictions to rights under the European Social Rights are necessary when there is a pressing social need,[275] but neither the African Commission nor the African Court have yet required the existence of a pressing social need. Although the Commission and the Court have not explained the requirement of necessity, they require that states choose the least restrictive means. In the *Nubian Community* case, the African Commission underlined that 'any limitations should be the least restrictive measures possible.'[276] In another case, the Commission added that 'where it is necessary to restrict rights, the restriction should be as minimal as possible.'[277]

Likewise, the African Court has emphasised that states should adopt 'less restrictive measures' to attain their objectives.[278] In terms of procedure, the Court expects respondent states to show that the restrictions to the exercise of the rights are necessary. In *Konaté v Burkina Faso*, the Court has found that the respondent State 'failed to show how a penalty of imprisonment was a necessary limitation to freedom of expression.'[279]

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[269] *African Commission on Human and Peoples' Rights v Republic of Kenya*, App. No. 006/2012, Judgment on merits, 26 May 2017, para 188 (hereafter 'Ogiek case').
[270] *Ogiek* case, para 189.
[271] *Ogiek* case, para 189.
[272] Urbina, Critique of Proportionality, (n 31) 49.
[273] African Charter, Art 11.
[274] *Interights and Others v Mauritania*, para 79; Mtikila v Tanzania, para 106.1.
[275] *GSEE v Greece*, para 83.
[276] *The Nubian Community in Kenya v The Republic of Kenya*, Communication 317/2006, Decision of the African Commission, 17th Extraordinary Session, 19 – 28 February 2015, para 89.
[277] *Amnesty International and Others v Sudan* (2000) AHRLR 297 (ACHPR 1999), para 80.
[278] *Umuhoza v Rwanda,* para 162.
[279] *Konaté v Burkina Faso*, para 163.

#### 3.5.2.5 Balancing

Proportionality in the narrow sense is called balancing, as discussed above.[280] Balancing lies at the core of proportionality in the broad sense.[281] Balancing requires decision-makers to compare the evils of restrictions to rights with the benefits of achieving the legitimate goals. However, the African Charter does not clearly stipulate that restrictions to rights under the African Charter should be proportionate to the legitimate goal. In their practice, both the African Commission and the African Court examine whether restrictions on rights are proportionate to legitimate goals sought to be achieved.[282]

In *Zimbabwe Lawyers for Human Rights and Another v Zimbabwe*, the African Commission examined a complaint alleging that Zimbabwean police stopped the work of a newspaper organisation and seized its property because of the organisation's failure to register according to a new law.[283] Emphasising that the respondent State 'ought to have responded proportionally,' the African Commission explained that the 'principle of proportionality seeks to determine whether, by the action of the state, a fair balance has been struck between the protection of the rights and freedoms of the individual and the interests of the society as a whole.'[284] Moreover, the Commission identified five questions that should be asked to determine whether state conduct is proportionate: a) 'Were there sufficient reasons supporting the action?' b) 'Was there a less restrictive alternative?' c) 'Was the decision-making process procedurally fair?' d) 'Were there any safeguards against abuse?' and e) 'Does the action destroy the very essence of the Charter rights in issue?'[285]

Some of these questions, however, do not seem helpful for the balancing stage. The first question relating to whether the limitation is supported by sufficient reasons should be asked at the legitimate goal stage, whereas the second question about the less restrictive alternative should be answered at the necessity stage. Thus, these two questions are redundant, particularly when the proportionality analysis is conducted in a sequential order. The other questions relate to new elements. The Commission usually emphasises the point reflected in the last question relating to whether the limitation destroys 'the very essence of the Charter rights.' In *Media Rights Agenda and Others v Nigeria*, the Commission underlined that 'a limitation may not erode a right such that the right itself becomes illusory.'[286] When a limitation is so severe that 'a right becomes illusory, the limitation cannot be considered proportionate — the limitation becomes a violation of the right.'[287]

The practice of the African Commission and the African Court shows that both determine the proportionality of a restriction irrespective of how they go about it. In *Amnesty International and Others v Sudan*, the African Commission held that prohibiting any assembly for a political purpose 'in all places is disproportionate to the measures required by the government to maintain public order,

[280] See Alexy, Proportionality and Rationality, (n 43) 24.
[281] Möller, Challenging the critics, (n 24) 710.
[282] *Interights and Others v Mauritania*, para 79; *Mtikila v Tanzania*, para 106.1.
[283] *Zimbabwe Lawyers for Human Rights and Another v Zimbabwe* (2009) AHRLR 235 (ACHPR 2009), paras 10 & 11.
[284] *Zimbabwe Lawyers for Human Rights and Another v Zimbabwe*, para 176.
[285] *Zimbabwe Lawyers for Human Rights and Another v Zimbabwe*, para 176.
[286] *Media Rights Agenda and Others v Nigeria*, para 70. See *Centre for Minority Rights Development and Others v Kenya* (2009) AHRLR 75 (ACHPR 2009), para 215 (hereafter 'Endorois case'); *Constitutional Rights Project and Others v Nigeria*, para 42.
[287] *Endorois* case, para 215.

security and safety.'[288] In another communication, the Commission found that proscribing 'a particular publication, by name, is thus disproportionate and not necessary.'[289]

The African Court has also found a number of restrictions contrary to the principle of proportionality. In *Umuhoza v Rwanda*, the African Court has held that the conviction and sentencing of an opposition political figure for making a statement that negates genocide in Rwanda was not proportionate to the legitimate goals said to be achieved.[290] In *Konaté v Burkina Faso*, the African Court found that a custodial sentence 'constitutes a disproportionate interference in the exercise of the freedom of expression.'[291] In *Mtikila v Tanzania*, the African Court also held that a restriction on the exercise of the right to participate in government 'through the prohibition on independent candidacy is not proportionate' to the legitimate aim.[292]

### 3.5.3 Stages of limitation analysis and kinds of proportionality

The adjudication of rights in general proceeds in two stages as discussed above. The first stage concerns internal limitation and involves defining the scope of a right. The assessment of restrictions to rights against the criteria established in limitation clauses usually takes place in the second stage. Proportionality or the compliance with its components is determined at the second stage. The African Court emphasised these stages in *Mtikila v Tanzania*:

> Once the complainant has established that there is a prima facie violation of a right, the respondent state may argue that the right has been legitimately restricted by "law", by providing evidence that the restriction serves one of the purposes set out in Article 27(2) of the Charter.[293]

From this passage, it is clear that the Court's evaluation of limitations has two stages in line with the Commission's practice. The Commission established that 'there has to be a two-stage process. First, the recognition of the right and the fact that such a right has been violated, but that, secondly, such a violation is justifiable in law.'[294] As the Court emphasised, the complainant has the burden of proving that 'there is a prima facie violation of a right.'[295]

Once a complainant has shown that there is a prima facie violation, the burden of proof shifts to the respondent state. In principle, rights guaranteed in the Charter should be enjoyed without any limitation or restriction. The Commission emphasised that: 'Any restrictions on rights should be the exception.'[296] While dealing with a specific limitation clause under Article 12(2) of the Charter, the Commission cautioned states 'against a too easy resort to the limitation clauses in the African Charter'.[297] However, in exceptional circumstances where a state resorts to subjecting a right to limitation, the onus is on itself 'to prove that it is justified to resort to the limitation clause.'[298] Thus,

[288] *Amnesty International and Others v Sudan* (2000) AHRLR 297 (ACHPR 1999), para 82.
[289] *Constitutional Rights Project and Others v Nigeria* (2000) AHRLR 227 (ACHPR 1999), para 44.
[290] *Umuhoza v Rwanda*, para 162.
[291] *Konaté v Burkina Faso*, para 164.
[292] *Mtikila v Tanzania*, para 107.2.
[293] *Mtikila v Tanzania,* para 106.1. Italics added.
[294] *Legal Resources Foundation v Zambia* (2001) AHRLR 84 (ACHPR 2001), para 67.
[295] *Mtikila v Tanzania*, para 106.1.
[296] *Amnesty International and Others v Sudan* (2000) AHRLR 297 (ACHPR 1999), para 80.
[297] *Amnesty International v Zambia* (2000) AHRLR 325 (ACHPR 1999), para 42.
[298] *Amnesty International v Zambia* (2000) AHRLR 325 (ACHPR 1999), para 42.

a respondent 'State is required to convince the Commission that the measures or conditions it had put in place were in compliance with' the provisions of the African Charter.[299]

In terms of kinds of proportionality test, one may distinguish a vertical proportionality test from the horizontal one as discussed above. The African Commission does not evaluate each component of the proportionality analysis. Since it does not evaluate the components in a sequential order, the Commission applies a horizontal proportionality test. In *Amnesty International and Others v Sudan*, the Commission held that prohibiting any assembly for a political purpose 'in all places is disproportionate.'[300] In *Media Rights Agenda and Others v Nigeria*, the Commission held that proscribing 'a particular publication, by name, is disproportionate.'[301] However, the Commission did not examine each component of the proportionality analysis to reach these conclusions.

On the other hand, the African Court applies a vertical proportionality test. In both *Umuhoza v Rwanda* and *Konaté v Burkina Faso*, the Court identified each component of the limitation analysis and proportionality and evaluated conduct of respondent states against each component.[302] In these cases, it first examined the requirement of legality,[303] and proceeded to the legitimate aim stage only after finding that the restrictions were provided by law.[304] After ascertaining that the restrictions serve a legitimate goal, the Court proceeded to evaluate whether the restrictions were necessary and proportionate,[305] however, the Court does not assess whether a restriction complies with the suitability criterion as discussed above.

To summarise, both the African Commission and the African Court evaluate the proportionality of limitations on Charter rights. This is in line with the practice of other treaty bodies. They assigned the role of a general limitation clause to Article 27(2) of the Charter. They expanded legitimate goals that may justify restrictions on the Charter rights. The Commission applies a horizontal proportionality test while the Court applies a vertical proportionality test. With few exceptions, most of the practice of the African Commission and the African Court relates to the Charter rights traditionally regarded as civil and political rights. In the following section, I will examine the scanty practice of the Commission and the Court to identify whether the same conclusion about limitations and proportionality also applies to economic, social and cultural rights.

## 3.6. Limitation on economic, social and cultural rights under the African Charter

Economic, social and cultural rights in the African Charter are not circumscribed by external limits as discussed above. An exception is the right to property, which falls under the economic, social and cultural rights category according to the African Commission. I will examine the implication of the absence of limitation clauses from these rights in the first sub-section. This will be followed by an examination of how the African Commission and the African Court apply the proportionality analysis to economic, social and cultural rights.

[299] *Gunme and Others v Cameroon* (2009) AHRLR 9 (ACHPR 2009), para 118.
[300] *Amnesty International and Others v Sudan* (2000) AHRLR 297 (ACHPR 1999), para 82.
[301] *Media Rights Agenda and Others v Nigeria* (2000) AHRLR 200 (ACHPR 1998), para 71.
[302] *Konaté v Burkina Faso*, paras 125-164; *Umuhoza v Rwanda*, paras 134-162.
[303] *Konaté v Burkina Faso*, paras 126-131; *Umuhoza v Rwanda*, paras 135-138.
[304] *Konaté v Burkina Faso*, paras 132-138; *Umuhoza v Rwanda*, paras 139-141.
[305] *Konaté v Burkina Faso*, paras 139-164; *Umuhoza v Rwanda*, paras 142-162.

### 3.6.1 Absence of limitation clauses

Economic, social and cultural rights in the African Charter are free from external limitations, unlike the traditional civil and political rights.[306] Nevertheless, these rights do not become absolute rights because of the absence of a limitation clause from the Charter as the practice of the African Commission and the African Court indicates. In *Centre for Minority Rights Development and Others v Kenya* (Endorois case), the African Commission examined, among other things, an alleged violation of cultural rights of the Endorois Indigenous peoples under Article 17 of the Charter, which does not permit restrictions or limitations.[307] The Commission held that 'Article 17 has no claw-back clause. The absence of a claw-back clause is an indication that the drafters of the Charter envisaged few, if any, circumstances in which it would be appropriate to limit a people's right to culture.'[308] Therefore, the absence of a clawback clause or a limitation clause from the text does not mean that the Charter prohibits limitation, implying that states can limit or restrict economic, social and cultural rights.

The Commission's observation on the right to work supports this conclusion too. The right to work under Article 15 of the African Charter does not contain any external limitation. In *Prince v South Africa*, the Commission noted that one of the purposes of Article 15 of the Charter 'is to ensure that states respect and protect the right of everyone to have access to the labour market without discrimination.'[309] It also emphasised that the 'protection should be construed to allow certain *restrictions* depending on the type of employment and the requirements thereof.'[310] Accordingly, the Commission held that a state does not violate the right to work by subjecting this right to restrictions.[311]

The African Commission and the African Court established that Article 27(2) is a general limitation clause as discussed above. Although the African Commission has held that the right to work (Article 15 of the Charter) and cultural rights (Article 17 of the Charter) permit restrictions on their exercise both in *Prince v South Africa* and the *Endorois* case, the Commission has avoided pronouncing the normative basis of imposing those restrictions. In contrast, the African Court's position is clear: in an application submitted to it by the African Commission on behalf of the Ogiek indigenous people against Kenya (Ogiek case), the African Court stressed that 'Article 17 of the Charter does not provide exceptions to the right to culture. Any restrictions to the right to culture shall accordingly be dealt with in accordance with Article 27 of the Charter.'[312]

In the *Ogiek* case, the African Court did not suggest that the absence of a limitation clause implies fewer restrictions. On the other hand, in the *Endorois* case, the Commission seems to suggest that provisions of the Charter that do not have a clawback clause or a limitation clause permit fewer restrictions than other provisions with a clawback or limitation clauses. The Commission stressed that the 'absence of a claw-back clause is an indication that the drafters of the Charter envisaged *few*, *if any*, circumstances' for restricting rights.[313] One may read the suggested fewer restrictions to mean fewer legitimate goals. This reading holds when Article 27(2) applies only to those provisions

[306] Odinkalu (n 214) 348.
[307] *Centre for Minority Rights Development and Others v Kenya* (2009) AHRLR 75 (ACHPR 2009) (hereafter 'Endorois case').
[308] *Endorois* case, para 249.
[309] *Prince v South Africa* (2004) AHRLR 105 (ACHPR 2004), para 46.
[310] *Prince v South Africa*, para 46. Italics added.
[311] *Prince v South Africa*, para 46.
[312] *Ogiek* case, para 187.
[313] *Endorois* case, para 249. Italics added.

without their own norm-based specific limitation clauses because Article 27(2) contains fewer legitimate goals than specific limitation clauses do. For example, Article 11 of the Charter lists more legitimate goals than Article 27(2) does. In that case, one may conclude, the only legitimate grounds for restrictions to economic, social and cultural rights in the Charter are those listed in Article 27(2) (i.e., the rights of others, collective security, morality and common interest). A common rule of interpretation supports this view, although the African Commission and the African Court have not clarified how Article 27(2) of the African Charter applies to the Charter rights, which are circumscribed by norm-based specific limitation clauses. Here, the rule of interpretation that a special rule prevails over the general one is relevant. That is, as a general limitation clause, Article 27(2) is not applicable to the provisions of the African Charter that contain norm-based specific limitation clauses. This reading is similar to the view of the Inter-American Court that a general limitation clause applies only when a provision in the American Convention does not have a specific limitation clause.[314]

An objection may be raised against this conclusion. Based on the drafting history of the Charter discussed above, one may argue that economic, social and cultural rights cannot be limited on the grounds listed under Article 27(2). This provision was not intended to serve as a general limitation clause, as both the African Commission and the African Court recognise.[315] Still, it would be difficult to claim that economic, social and cultural rights are absolute, because there are few absolute rights in international human rights law. Thus, one may propose a middle ground. Economic, social and cultural rights in the African Charter are not absolute, but they can be limited to serve only one legitimate goal. This proposal may draw on comparative international law. The general limitation clauses of the ICESCR and that of the Protocol of San Salvador allow only one legitimate goal for justifying restrictions to the exercise of the rights they guarantee. As discussed above, the only legitimate goal is 'the general welfare'.[316] The drafting history of the ICESCR shows that grounds such as the protection of rights of others, public order or morals cannot be considered legitimate for restricting the exercise of rights under the ICESCR.[317] Therefore, economic, social and cultural rights in the African Charter can be limited on the ground of general welfare. This conclusion still faces a practical hurdle. In practice, both the African Commission and the African Court have expanded legitimate goals beyond those provided in Article 27(2) of the Charter as discussed above. The expansion was made in cases concerning civil and political rights, but whether these legitimate goals are also applicable to economic, social and cultural rights is not clear.

An evaluation of the adoption of Article 27(2) of the African Charter as a general limitation clause can still be made. An important function of limitation clauses is a protective function.[318] Limitation clauses reduce state discretion when they limit the number of legitimate goals justifying restrictions to the exercise of rights. As evident from the ICESCR and the Protocol of San Salvador, only one legitimate goal (i.e., general welfare) justifies restrictions. By adopting Article 27(2) as a general limitation clause applicable to economic, social and cultural rights under the African Charter, the

[314] *Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism (Arts 13 and 29 American Convention on Human Rights)*, Advisory Opinion OC -5/85, 13 November 1985, para 65.

[315] *Groupe de Travail sur les Dossiers Judiciaires Stratégiques v Democratic Republic of Congo*, Communication 259/2002, Decision of the African Commission 14th Extraordinary Session, 20 to 24 July 2011, para 66. *Mtikila v Tanzania*, Separate Opinion of Vice-President Fatsah Ouguergouz, para 30.

[316] ICESCR, Art 4; Protocol of San Salvador, Art 5.

[317] Müller (n 114) 571.

[318] CESCR, General Comment 13, para 42; General Comment 14, para 28.

African Commission and the African Court expand legitimate goals that justify restrictions when compared to the ICESCR and the Protocol of San Salvador. That is, states can invoke rights of others, collective security, morals and common interest to justify limitations on the exercise of economic, social and cultural rights under the African Charter. Therefore, the African Court and the African Commission give states wider discretion than the text of the Charter does.

In sum, the African Commission and the African Court have interpreted the African Charter as permitting restrictions on economic, social and cultural rights despite the absence of a limitation clause. They have adopted more legitimate goals than allowed under the ICESCR and the Protocol of San Salvador. This interpretation of the African Charter might widen the discretion of states, and in that sense, it might be less protective of the Charter rights. In the next sub-section, I will discuss the application of the proportionality analysis to economic, social and cultural rights.

### 3.6.2 Limitation analysis and proportionality

The African Commission and the African Court conduct limitation analysis and apply proportionality to civil and political rights as discussed above. They apply proportionality analysis to economic, social and cultural rights as well. I discuss below the application of limitation analysis and proportionality to economic, social and cultural rights. In this regard, I distinguish negative state obligations from positive state obligations.

#### 3.6.2.1 Negative obligations

The interpretation that the African Charter permits limitations on the exercise of economic, social and cultural rights does not give states unlimited discretion. Like other treaty bodies, both the African Commission and the African Court require states to comply with a test including the principle of proportionality. In general, the practice of the Commission and the Court on economic, social and cultural rights is very scanty. Still, the Commission and the Court clearly require compliance with the components of proportionality with regard to negative obligations arising from the right to property (Article 14) and cultural rights (Article 17 (2) & (3)). Both hardly address the suitability stage, as discussed above, but the other components of limitation analysis and proportionality are traceable.

The African Commission required that limitations should comply with the components of proportionality analysis in the *Endorois* case. In this case, the Commission examined restrictions to the exercise of cultural rights of indigenous people under Article 17 of the Charter. The restrictions were due to the eviction of the indigenous people from their ancestral land. The Commission held that 'if the respondent state were to put some limitation on the exercise of such a right, the restriction must be *proportionate* to a *legitimate aim* that does not interfere adversely on the exercise of a community's cultural rights.'[319] Obviously, it is not enough to have a legitimate goal. States should ensure that restrictions are proportional to the legitimate goal. That is, the Commission addressed two components of the proportionality analysis: legitimate goal and proportionality in the narrow sense (balancing).

In the *Ogiek* case, the African Court also examined an alleged violation of cultural rights under Article 17 of the Charter in circumstances similar to those in the *Endorois* case. A violation was alleged due to the eviction of Ogiek indigenous people from their ancestral land. After establishing that the respondent State interfered with the enjoyment of cultural rights of the Ogiek people, the African

[319] *Endorois* case, para 249. Italics added.

Court proceeded to examine whether such interference was justified.[320] The Court emphasised that 'any interference with the rights and freedoms guaranteed in the Charter shall be *necessary* and *proportional* to the *legitimate interest* sought to be attained by such interference.'[321] Thus, the Court also adds the requirement of necessity.

With regard to the right to property under Article 14 of the Charter, both the Commission and the Court affirmed these components. In *Dino Noca v Democratic Republic of the Congo* (*Noca v DR Congo*), the Commission held that

> [T]he limitations to the right to property should be determined in the light of the principle of proportionality, meaning that interference in the right to property must be "proportional to a legitimate need, and should represent the least restrictive measure possible".[322]

The African Court also stated the components of proportionality while examining an alleged violation of the right to property under Article 14 of the African Charter. In the *Ogiek* case, the Court held that 'Article 14 envisages the possibility where a right to property including land may be restricted provided that such restriction is in the *public interest* and is also *necessary* and *proportional*.'[323] Thus, the Commission and the Court clearly establish the components of legitimate goal, necessity and balancing.

The African Commission has also addressed the requirement of legality. In *Mbiankeu Geneviève v Cameroon*, the African Commission underlined that limitations on the right to property must be 'determined by the relevant laws.'[324] Moreover, the Commission laid down some particular requirements in relation to Article 14 of the Charter, allowing states to encroach upon the right to property 'in accordance with the provisions of appropriate laws.' According to the Commission's holding in the *Endorois* case, for a restriction to the right to property to be 'in accordance with the provisions of appropriate laws,' the respondent State must avoid forced eviction;[325] it must ensure effective participation;[326] and it must provide adequate compensation.[327] The African Court examines the requirement of legality as a separate stage as discussed above.[328] In the *Ogiek* case, however, the Court skipped examining this requirement while assessing restrictions to the right to property and the right to culture. The restrictions to these rights arose from an eviction of the Ogieks from their ancestral land.[329] Despite the respondent State's claim that the eviction was conducted in accordance with the law, the Court did not examine whether the eviction was 'provided by law'.[330]

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[320] *Ogiek* case, para 189.
[321] *Ogiek* case, para 188. Italics added.
[322] *Dino Noca v Democratic Republic of the Congo*, Communication 286 /2004, Decision of the African Commission, 52nd Ordinary Session, 9 to 22 October 2012, para 145 (hereafter 'Noca v DR Congo').
[323] *Ogiek* case, para 129. Italics added.
[324] *Mbiankeu Geneviève v Cameroon*, Communication 389/10 (African Commission, 6 May 2015) para 104. The Commission at times finds a violation of the right to property when respondent state fails to comply with the requirement of legality. See *Open Society Justice Initiative (on behalf of Pius Njawe Noumeni) v the Republic of Cameroon* Communication 290/2004 (African Commission, 25th Extra-Ordinary Session 19 February to 5 March 2019) para 201.
[325] *Endorois* case, para 218.
[326] *Endorois* case, para 225.
[327] *Endorois* case, para 225.
[328] *Konaté v Burkina Faso*, paras 126-131; *Umuhoza v Rwanda*, paras 135-138.
[329] *Ogiek* case, paras 129-131 & 183-184.
[330] *Ogiek* case, para 120.

The African Commission has addressed the requirement of the legitimate goal with regard to the right to work in *Elgak and others v Sudan*.[331] The interference was due to the respondent State's conduct of closing down a human rights non-governmental organisation that provided employment opportunity for the complainants. The respondent State closed down the organisation because its employees (the complainants) allegedly helped the investigation of the International Criminal Court in the Sudan,[332] however, the respondent 'State has not provided any information showing that the activities of the organization endangered national security, morality, or the rights of other people in Sudan.'[333] Thus, the Commission did not find that there was a legitimate goal for restricting the freedom of association (Article 10 of the Charter). As a result of a violation of the right to freedom of association, the Commission found a violation of the right to work contrary to Article 15 of the Charter because the respondent State had no legitimate reasons for interfering with the enjoyment of the right to work.[334]

In the *Endorois* case, the African Commission found that the creation of a game reserve is a legitimate goal for restricting the exercise of cultural rights under Article 17 of the Charter.[335] Nevertheless, the Commission did not examine whether this goal falls under Article 27(2) or not. Examining an alleged violation of the same provision in the *Ogiek* case, the African Court accepted that the preservation of the natural environment is a legitimate goal for limiting the exercise of cultural rights. According to the Court, a 'common interest' under Article 27(2) of the Charter includes the preservation of the natural environment. It held that 'the restriction of the cultural rights of the Ogiek population to preserve the natural environment of the Mau Forest Complex may in principle be justified to safeguard the "common interest" in terms of Article 27 (2) of the Charter.'[336] However, the respondent State was unable to prove that the Ogiek's culture had caused the degradation of the Mau Forest Complex. For this reason, the Court ruled that 'the purported reason of preserving the natural environment cannot constitute a legitimate justification for the Respondent's interference with the Ogiek's exercise of their cultural rights.'[337] This point could have been dealt with at the suitability stage as discussed above. Incidentally, the Court's application of a vertical proportionality analysis is noticeable. Because of its finding that there was no legitimate justification, the Court considered it 'unnecessary to examine further whether the interference was necessary and proportional to the legitimate aim invoked by the Respondent.'[338]

Regarding the right to property, Article 14 of the Charter itself provides for legitimate goals. Restrictions to this right should serve 'the interest of public need'; or they should be 'in the general interest of the community.' In the *Endorois* case, the African Commission accepted that the creation of a game reserve advances a legitimate goal. That is, the creation of the game reserve advances public interest or general interest of the community. Besides, the Commission emphasised that this requirement 'is met with a much higher threshold in the case of encroachment upon indigenous land rather than individual private property. In this sense, the test is much more stringent when applied to

[331] *Monim Elgak, Osman Hummeida and Amir Suliman (represented by FIDH and OMCT) v Sudan*, Communication 379/09, adopted at 15th Extra-Ordinary Session in Banjul, 07 to 14 March 2014 (Elgak & Others v Sudan).
[332] *Elgak & Others v Sudan*, para 119.
[333] *Elgak & Others v Sudan*, para 119.
[334] *Elgak & Others v Sudan*, para 131.
[335] Endorois case, para 249.
[336] *Ogiek* case, para 188.
[337] *Ogiek* case, para 189.
[338] *Ogiek* case, para 189.

ancestral land rights of indigenous peoples.'[339] While examining an alleged violation of the same provision in the *Ogiek* case, the African Court seemingly accepted 'the preservation of the natural ecosystem' as a legitimate goal furthering public interest.[340]

The requirement of necessity follows the legitimate goal stage since neither the African Commission nor the African Court engaged in the analysis of suitability as discussed above. In the *Endorois* case, the Commission underlined that limitation on rights 'should be the least restrictive measures possible.'[341] In *Noca v DR Congo*, the Commission affirmed that limitations on Charter rights, when permitted, should be by the least restrictive measure. Although this is the requirement of necessity as discussed above in the literature, the Commission does not define it as such. In the *Endorois* case, the Commission indicated that it was possible to create the game reserve (the legitimate goal) through an alternative means less restrictive of the right to property, i.e. without the eviction. According to the Commission, the alternative means was possible because the Endorois people were cooperative, but it did not indicate what that alternative means was.

In the *Ogiek* case, the African Court did not examine whether there were less restrictive means, even though it found that the limitation to the right to property did not pass the requirement of necessity. The respondent State argued that the purpose of evicting Ogiek indigenous people from their property (the Mau Forest) was to preserve the natural ecosystem.[342] According to the Court, however, the respondent State was unable to prove that the Ogiek people actually caused the degradation of the Mau Forest.[343] Instead, the Court identified that 'the main causes of the environmental degradation are encroachments upon the land by other groups and government excisions for settlements and ill-advised logging concessions.'[344] For this reason, the Court held that 'the continued denial of access to and eviction from the Mau Forest of the Ogiek population cannot be *necessary or proportionate* to achieve the purported justification of preserving the natural ecosystem of the Mau Forest.'[345]

The African Commission and the African Court have been inclined to engage in the balancing stage. In the *Endorois* case, the African Commission seems to have made a balancing analysis in relation to alleged violations of the right to property and cultural rights. To create a game reserve, the respondent State not only evicted the Endorois community from their ancestral land but also denied them access to the land for the purpose of cultural practices. With regard to the right to property guaranteed under Article 14 of the Charter, the Commission held that:

> [I]n the pursuit of creating a game reserve, the Respondent State has unlawfully evicted the Endorois from their ancestral land and destroyed their possessions. … [T]he upheaval and displacement of the Endorois from the land they call home and the denial of their property rights over their ancestral land is disproportionate to any public need served by the game reserve.[346]

[339] *Endorois* case, para 212.
[340] *Ogiek* case, para 130.
[341] *Endorois* case, para 214.
[342] *Ogiek* case, para 130.
[343] *Ogiek* case, para 130.
[344] *Ogiek* case, para 130.
[345] *Ogiek* case, para 130.
[346] *Endorois* case, para 214.

The Commission's finding of disproportionality is different from its findings on the requirement of legitimate goal and necessity. The respondent State can create the game reserve, which is accepted as a legitimate goal as indicated above. The Commission does not seem to suggest that Article 14 of the Charter prohibits all kinds of evictions. Of course, one may argue, this particular eviction was not necessary because the Commission indicated that there was a less restrictive alternative.[347] Rather, the disproportionality relates to the type and the effect of the eviction. By type, the eviction was unlawful because 'the Respondent State has not been able to prove without doubt that the eviction of the Endorois community satisfied both Kenyan and international law.'[348] Besides, the respondent State failed to ensure the effective participation of members of the Endorois community.[349] It had the effect of nullifying the right to property for the Endorois Community because the respondent State failed to provide prompt and full compensation.[350] For these reasons, the eviction was disproportional to the legitimate goal.

The Commission has also found that the restrictions to cultural rights under Article 17(2) and (3) of the Charter were disproportional to the legitimate goal. On top of the unlawful eviction, the respondent State denied members of the Endorois community access to cultural rights on their ancestral land.[351] The Commission concluded that:

> Thus, even if the creation of the game reserve constitutes a legitimate aim, the Respondent State's failure to secure access, as of right, for the celebration of the cultural festival and rituals cannot be deemed proportionate to that aim. The Commission is of the view that the cultural activities of the Endorois community pose no harm to the ecosystem of the game reserve and the restriction of cultural rights could not be justified.[352]

The eviction of members of the Endorois community from their communal property means removal from their cultural sites. This, it seems, was sufficient for the creation of the game reserve. However, when the respondent State denied them access to their ancestral land for celebrating cultural festivals and rituals, it went far beyond what it needed. Access to their ancestral land for this purpose does not affect the game reserve. Therefore, one may submit, the Commission found the restriction disproportional to the legitimate goal.

Addressing similar issues and facts in the *Ogiek* case, the African Court held that 'the continued denial of access to and eviction from the Mau Forest of the Ogiek population cannot be necessary or proportionate to achieve the purported justification of preserving the natural ecosystem of the Mau Forest' as indicated above.[353] Denial of access to the Mau Forest goes far beyond what is needed for preserving the natural ecosystem. As a result, the restriction was not proportional to the legitimate goal.

In sum, the African Commission and the African Court examine the proportionality of limitations on the exercise of economic, social and cultural rights. They have adopted the same approach whether they are evaluating limitations on economic, social and cultural rights or on civil and political rights.

[347] *Endorois* case, para 215.
[348] *Endorois* case, para 224.
[349] *Endorois* case, para 228.
[350] *Endorois* case, para 231.
[351] *Endorois* case, para 239.
[352] *Endorois* case, para 249.
[353] *Ogiek* case, para 130.

So far, their examination is limited in two ways. They have assessed only interference with the exercise of Charter rights. That is, their evaluation deals with the negative obligation to respect. The assessment is also limited to two rights, the right to property and cultural rights. I will discuss below whether proportionality also applies to positive obligations.

**3.6.2.2 Positive obligations**

Different proposals have emerged on whether the four-pronged proportionality analysis applies to positive obligations in general and to those arising from economic, social and cultural rights in particular, as discussed above. The African Commission and the African Court have not engaged with this issue in a concrete case. The main reason, one may argue, has to do with the kind of issues brought to them. The issue whether the respondent states have taken sufficient positive steps in the realisation of economic, social and cultural rights rarely arises before them.[354] If they address the issue at all, it would be in passing. In the *Endorois* case, for example, the African Commission underlined that 'the Respondent State has a higher duty in terms of taking positive steps to protect groups and communities like the Endorois, but also to promote cultural rights including the creation of opportunities, policies, institutions, or other mechanisms.'[355]

Unlike the African Court, the African Commission has the mandate to lay down rules and principles without waiting for a concrete case to be decided.[356] It is in this capacity that the Commission adopted the Nairobi Principles, which show an indication of the applicability of the principle of proportionality. The Nairobi Principles seem to affirm the Commission's earlier decision in *Zimbabwe Lawyers for Human Rights and Another v Zimbabwe*. In this case, while examining an alleged violation in relation to the negative obligation to respect discussed above, the Commission stated that the 'principle of proportionality seeks to determine whether, by the action of the State, a fair balance has been struck between the protection of the rights and freedoms of the individual and the interests of the society as a whole.'[357]

In the Nairobi Principles, the Commission stresses that the principle of proportionality requires 'striking a fair balance between the demands of the general interest of the community and the requirements of the protection of the individual's fundamental rights.'[358] The Commission has transplanted this description of proportionality from the European Court of Human Rights. This is clear from a reference to *Soering v the United Kingdom* in the earlier draft of the Nairobi Principles.[359] In this and other cases, the European Court usually emphasises that 'a search for a fair balance between the demands of the general interest of the community and the requirements of the protection of the individual's fundamental rights' is inherent in the European Convention on Human Rights.[360] As the quote from the European Court shows, the African Commission used a verbatim reproduction of the European Court's formulation. The Commission clearly states that it provides this

[354] *Purohit and Another v The Gambia* (2003) AHRLR 96 (ACHPR 2003).
[355] *Endorois* case, para 248.
[356] African Charter, Art 45.
[357] *Zimbabwe Lawyers for Human Rights and Another v Zimbabwe*, para 176.
[358] Nairobi Principles, para 1(g).
[359] Principles and Guidelines on Economic, Social and Cultural Rights in the African Charter on Human and Peoples Rights (on file with the author), footnote no 7.
[360] *Soering v the United Kingdom*, Application no 14038/88 (Plenary), 7 July 1989, para 89. See *Paposhvili v Belgium*, Application no 41738/10 (Grand Chamber), 13 December 2016, para 169; *N v the United Kingdom*, Application no 26565/05(Grand Chamber), 27 May 2008, para 44; *Öcalan v Turkey*, Application no. 46221/99 (Grand Chamber), 12 May 2005, para 88.

description for the purpose of the Nairobi Principles.[361] Although it does not state that the principle of proportionality is inherent in the African Charter too, the practice of the African Court and the Commission discussed above suggest a tendency towards this position.

The African Commission also uses an explanation that can be related to the jurisprudence of the European Court of Human Rights. Explaining the principle of proportionality under the European Convention in the 2009 edition of their book, Harris and others observed that:

> A limitation upon a right, or steps taken positively to protect or fulfil it, will not be proportionate, […] where there is no evidence that the state institutions have balanced the competing individual and public interests when deciding on the limitation or steps, or where the requirements to be met to avoid or benefit from its application in a particular case are so high as not to permit a meaningful balancing process.[362]

The African Commission uses the same explanation although there is no reference to this work. The Nairobi Principles were adopted in 2011.[363] Since the principles were adopted later than the publication of the book, one may argue that the Commission uses the verbatim reproduction of the explanation given by Harris and others. This is evident from the text of the Nairobi Principles:

> A limitation upon a right, or *steps taken positively to protect or fulfil it*, will not be proportionate, where there is no evidence that the state institutions have balanced the competing individual and public interests when deciding on the limitation or steps, or where the requirements to be met to avoid or benefit from its application in a particular case are so high as not to permit a meaningful balancing process.[364]

The Commission's definition can be traced to the jurisprudence of the European Court of Human Rights. The Nairobi Principles do not acknowledge the origin of the definition of proportionality, though, so it is not clear whether the Commission's intention is to transplant the principle as developed by the European Court of Human Rights.

From the definition, it seems that the Commission applies the principle of proportionality to all three typologies of obligations. Defined as an interference with the exercise of a right, a limitation is contrary to a state obligation to respect, which is a negative obligation. In the passage quoted above, the Commission expressly refers to 'steps taken positively to protect or fulfil' a right. This implies the application of the principle to positive obligations. In other words, proportionality applies to all state obligations, negative or positive.

In the Nairobi Principles, the Commission gives states at least two instructions, which spring from the definition of proportionality. One of the instructions relates to handling interests underlying state conduct. When states take actions, they should balance individual and public interests. They should provide the Commission with evidence that their authorities have weighed metaphorically individual interest against the public interest. The other instruction relates to the requirements to be met by individuals to avoid limitation on the enjoyment of their rights or to benefit from protection provided

[361] Nairobi Principles, para 1(g).
[362] David Harris, Michael O'Boyle, Ed Bates, & Carla Buckley, *Harris, O'Boyle, and Warbrick: Law of the European Convention on Human Rights* (2nd edn OUP 2009) 11.
[363] African Commission, 31st Activity Report of the African Commission on Human and Peoples' Rights, EX.CL/717(XX), paras 11(xi) & 40(i).
[364] Nairobi Principles, para 1(g). Italics added.

by states. States should not lay down very high requirements. With regard to the right to social security, for example, qualifying conditions for social benefits must be reasonable.[365]

The Commission's brief definition of the principle of proportionality is wanting in certain aspects. The definition does not make clear that the principle is applicable to assess whether a state has taken sufficient steps to ensure the realisation of a right. The 'steps taken positively to protect or fulfil' a right may mean a limitation. At times, there is no difference in substance. In other words, state conduct can be a limitation with respect to some rights holders while the same state conduct can be a step taken to protect or fulfil a right with regard to other rights holders at least in some circumstances. The facts submitted to the Inter-American Commission with regard to the right to social security may illustrate this point.[366] The respondent State introduced a reform reducing the amount of pension payment of the complainants whose payments were relatively high. The objective was to increase payment for low-paid pensioners and to extend the pension system to new categories of people. From the perspective of the complainants (victims of the reform), this is an interference or a limitation on their right. The reform is a step taken to fulfil a right from the perspective of other people concerned (beneficiaries of the reform). Therefore, the mere fact that the African Commission refers to 'steps taken positively to protect or fulfil' a right is not conclusive. There are circumstances where such steps themselves can be a limitation.

Moreover, an assessment of eligibility requirements may not always mean an assessment of state compliance with the positive obligations to protect or fulfil. In the Nairobi Principles, the Commission suggests that states should not put in place eligibility requirements that are too difficult to meet. It appears that the Commission is likely to find disproportionality when the eligibility requirement to benefit from steps taken to protect or fulfil a right is high. However, the eligibility requirements only arise if there is a sufficient protection or provision in the first place. An assessment may be conducted to determine whether the eligibility requirements are stringent or not. Nevertheless, such assessment does not necessarily address whether a state has taken sufficient steps to ensure the protection or provision for which individuals have to be eligible.

The Commission emphasises balancing in its definition. Balancing could mean only one of the four components of the principle of proportionality. Indeed, some commentators argue that only the balancing stage applies to economic, social and cultural rights as discussed above.[367] From the Commission's definition, it is not clear whether the principle of proportionality also includes components other than the balancing stage (ie, legitimate goal, suitability and necessity).

To summarise, the African Court has yet to deal with the application of proportionality in positive obligations. The African Commission defines the principle of proportionality in the Nairobi Principles. When states take steps to protect or fulfil a right, the Commission requires them to balance competing individual and public interests and set reasonable requirements to benefit from the step taken. From this, one may conclude, the Commission applies the principle of proportionality to positive state obligations to protect and to fulfil. However, two issues are still outstanding. One relates to the components of proportionality. Since the Commission focuses on balancing, it is not clear if the other components of proportionality analysis are also applicable. The other issue relates

[365] Nairobi Principles, para 82(f).

[366] *National Association of Ex-Employees of the Peruvian Social Security Institute et al v Peru*, Case 12.670, Report No. 38/09, Decision of the Inter-American Commission on Human Rights on Admissibility and Merits, 27 March 2009

[367] Möller, *Global Model* (n 86) 179; Contiades & Fotiadou, Social rights in the age of proportionality, (n 87) 669.

to the Commission's assessment of the level of realisation. Even when states balance individual and public interests and set reasonable requirements, their level of achievement in implementing economic, social and cultural rights can still be inadequate.

## 3.7 Conclusion

Human rights treaties usually provide for limitation clauses, whether general or specific, to permit restrictions on the exercise of economic, social and cultural rights. The European Social Charter, the ICESCR and the Protocol of San Salvador are among these treaties. Limitation clauses are also protective of these rights since they require states to comply with certain criteria. The European Committee of Social Rights, the CESCR, the Inter-American Commission, and the Inter-American Court frequently use the principle of proportionality to evaluate whether interferences with the exercise of economic, social and cultural rights are justified. They usually apply this principle to the negative obligation to respect. There are no apparent trends applying the principle to positive obligations, but some differences in approach are noticeable. The CESCR does not employ identical criteria for evaluating retrogressive measures and restrictive measures. For the European Committee, both limitation and retrogression are restrictive measures.

The African Charter does not provide for a general or specific limitation clause applicable to economic, social and cultural rights except with regard to the right to property. The African Commission and the African Court have assigned Article 27(2) of the Charter the role of a general limitation clause applicable to economic, social and cultural rights. Compared to the limitation clauses in the ICESCR and the Protocol of San Salvador, the discovery of a general limitation clause under the African Charter expands the list of legitimate goals for justifying restrictions to the exercise of economic, social and cultural rights. As a result, collective security, morality and rights of others are legitimate goals under the African Charter, whereas they are not under the ICESCR and the Protocol of San Salvador. Therefore, the African Commission and the African Court have interpreted the African Charter in a way that gives more discretion to states. This consequence arises because Article 27(2) of the African Charter is made to serve a purpose different from originally thought, as both the Commission and the Court recognise.

The African Commission and the African Court apply the principle of proportionality to evaluate limitations on the exercise of economic, social and cultural rights. They apply the principle to negative obligations in the same way, whether such obligation arises from economic, social and cultural rights or from civil and political rights. The African Commission applies a horizontal proportionality analysis. In general, the African Court evaluates restrictions against each component of the principle of proportionality in a sequential order. The Court uses a vertical proportionality analysis. This is not always the case, however – at times, the Court skips some components. It does not examine the suitability stage at all; even when circumstances arise, it has merged the examination of the suitability stage with that of the legitimate goal stage.

The African Commission and the African Court have not yet explored the applicability of proportionality analysis to positive obligations. It does not matter whether the positive obligations correspond to economic, social and cultural rights or to civil and political rights. Still, the Commission's definition of the principle of proportionality in the Nairobi Principles might show its signal towards applying the principle to positive obligations. The definition requires states to balance competing individual and public interest when they take steps positively to protect or fulfil a right.

This definition emphasises balancing, which is just one component of the four-fold proportionality analysis. Therefore, it is not conclusive on the application of all the components to positive obligations.

# CHAPTER FOUR

# MINIMUM CORE OBLIGATIONS

## 4.1 Introduction

The concept of minimum core obligation has emerged as one of the exceptions to the progressive realisation obligation, as indicated in Chapter Two. As the principal obligation corresponding to the recognition of economic, social and cultural rights, progressive realisation represents the idea that the full realisation of these rights cannot be achieved immediately while minimum core obligations are exceptions that have immediate effect irrespective of resource availability. The African Charter on Human and Peoples' Rights (African Charter or Charter) contains neither the concept of progressive realisation,[1] nor the concept of minimum core. Nevertheless, the African Commission on Human and Peoples' Rights (African Commission or Commission) has explained that states have undertaken to implement minimum core obligations immediately when they become parties to the African Charter.[2] The African Court on Human and Peoples' Rights (African Court or Court) has not yet dealt with the concept.

This chapter examines minimum core obligations under the African Charter by analysing the practice of the African Commission. The minimum core obligations correspond to the minimum core content of rights. The performance of minimum core obligations by states implies the realisation of the minimum core content of economic, social and cultural rights. The minimum core content of a right is essential for the existence of the right. Without minimum core content, a right loses its essence. The concept of minimum core content or minimum core obligations has been first articulated in academic publications.[3] For this reason, the chapter begins with a theoretical discussion of the minimum core concept as a background in the next section.

This chapter draws insight from experiences under other treaties, particularly the International Covenant on Economic, Social and Cultural Rights (ICESCR).[4] The ICESCR does not provide for the minimum core concept. The Committee on Economic, Social and Cultural Rights (CESCR) derives this concept from the raison d'être of the ICESCR.[5] It identifies and defines state obligations to elaborate the normative content of the rights guaranteed in the ICESCR. When it introduced the concept, it defined 'minimum core obligations'. As time goes by, it appears, the CESCR shifted to 'core obligations' instead. It has now identified core obligations for almost all rights guaranteed in the ICESCR, however, the methods or criteria used to identify core obligations are not clear. The third section analyses the practice of the CESCR to discover some elements common to core obligations. It

[1] Adopted 27 June 1981 & came into force 21 October 1986, OAU Doc. CAB/LEG/67/3 rev. 5; 1520 UNTS 217; 21 ILM 58 (1982).

[2] Principles and Guidelines on the Implementation of Economic, Social and Cultural Rights in the African Charter on Human and Peoples' Rights, para 16 (hereafter 'Nairobi Principles').

[3] David Bilchitz, *Poverty and Fundamental Rights: The Justification and Enforcement of Socio-Economic Rights* (OUP 2007) 186 (hereafter 'Poverty and Fundametnatl Rights'); Phillip Alston, 'Out of the Abyss: The Challenges Confronting the New U.N. Committee on Economic, Social and Cultural Rights' (1987) 9/3 *Human Rights Quarterly* 332—381, 351.

[4] Adopted 16 December 1966, entry into force 3 January 1976, GA res. 2200A (XXI), 21 UN GAOR Supp. (No. 16) at 49, UN Doc. A/6316 (1966); 993 UNTS 3, art 2(1).

[5] CESCR, General Comment No. 3: The nature of States parties' obligations (art. 2, para. 1, of the Covenant), E/1991/23, 1990, para 10 (hereafter 'General Comment 3').

also identifies their characteristics. Although the concept of minimum core is hardly elaborated in the practice of the European Committee of Social Rights (European Committee), the Inter-American Commission on Human Rights (Inter-American Commission), and the Inter-American Court of Human Rights (Inter-American Court), the fourth and fifth sections discuss these systems.

The African Commission draws on the practice of the CESCR to explain the concept of minimum core obligations under the African Charter. Interesting questions arise from how the African Commission uses the experience of the CESCR. Does the concept of minimum core under the African Charter have the same meaning, content and characteristic as the concept of minimum core defined and identified by the CESCR? While transplanting the concept into the African Charter, does the Commission make any modification? If the Commission makes modifications, how do those modifications affect the normative content of economic, social and cultural rights under the African Charter? The sixth section answers these questions by examining the findings of the African Commission. The section identifies points of divergence between the practice of the African Commission and that of the CESCR. Finally, the last section concludes the chapter by indicating the consequences of diverging interpretation.

## 4.2 An overview of the minimum core concept

The concept of the minimum core has emerged in academic publications as a conceptual tool for clarifying the normative content of economic, social and cultural rights. Commentators have been attempting to define 'the seemingly crude obligation of "progressive realisation"'.[6] This section deals with the meaning, purposes, and characteristics of minimum core obligations in scholarly publications, thereby providing a background for examining the concept in practice in the next sections.

### 4.2.1 Meaning of minimum core obligations

Minimum core is a concept applicable to rights as well as obligations. When applied to a right, it is submitted, the concept presupposes the division of a right's content into parts. These are core and non-core parts. The minimum core content of a right refers to its nature or essence.[7] It implies the essential element or elements without which a right 'loses its substantive significance as a human right'.[8] The concept implies 'an absolute minimum entitlement'.[9] Thus, the minimum core content of a right is its irreducible part. The concept of the minimum core also applies to obligations when a right is examined from the vantage point of the duty-bearer. Rights and obligations are inseparable. They are different sides of the same coin. A right of someone is usually an obligation of another person. Therefore, every 'right has a minimum core content which gives rise to minimum core entitlements to individuals and groups and corresponding minimum core state obligations'.[10] This chapter discusses the concept of minimum core in relation to obligations because the concept is

[6] Sisay Alemahu 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) 11/2 *African Human Rights Law Journal* 317—340, 321.

[7] Audrey R Chapman & Sage Russell, 'Introduction' in Audrey Chapman & Sage Russel (Eds) *Core Obligations: Building a Framework for Economic, Social and Cultural Rights* (Intersentia 2002) 9.

[8] Chapman & Russell (n 7) 9.

[9] Alston (n 3) 353.

[10] Manisuli Ssenyonjo, 'Reflections on state obligations with respect to economic, social and cultural rights in international human rights law' (2011) 15/6 *The International Journal of Human Rights* 969—1012, 978.

usually applied to identify and explain state obligations rather than the content of rights both in theory and practice.

The minimum core concept presupposes a classification of obligations into core obligations and others. Chapman and Russell define minimum core obligations in terms of timing. They argue that the concept implies steps that a state must take immediately to realise the right.[11] Such obligation directs the state to what it must do first to achieve the ultimate goal of full realisation.[12] It appears that prioritisation is central to the definition provided by Chapman and Russell. These authors order state obligations over time. Core obligations are positive obligations if one defines them as steps to be taken, as Chapman and Russell do.[13] That is, core obligations require states to take actions. Contrary to their definition, however, Chapman and Russell argue that core obligations include the obligations to respect.[14] These are negative obligations because states can perform obligations to respect by refraining from interfering with the enjoyment of a right. States do not need to take steps. Similarly, Young argues that a 'minimum core points to the content of the state's negative obligation to respect rights'.[15]

Craven defines minimum core obligation as 'actions and omissions which may reasonably be required of a State in any circumstance, and hence limited to those actions and omissions that are not contingent upon resource availability'.[16] Craven's definition includes both negative and positive obligations. Actions imply positive obligations, while omissions imply negative obligations. Craven's definition, it is submitted, includes the obligation to respect among core obligations. This is because the obligation to respect is a negative obligation. An additional element in his definition is 'resource availability', meaning core obligations are not conditional upon available resources. States must carry out these obligations in all circumstances, and the fact that they do not have resources cannot justify their failure.

Bilchitz explains the concept of minimum core by specifying 'thresholds of resources that must be provided to individuals'.[17] He distinguishes three thresholds. The first threshold ensures 'the general conditions necessary to be free from threats to survival'.[18] This is a 'survival threshold' and represents an absolute minimum core.[19] At this threshold, states provide resources to protect minimal interest, which 'reflects the respect in which people are most vulnerable, and most needy'.[20] In other words, by providing the first threshold of resources, states discharge their minimum core obligations. In the case of the right to housing, for example, minimum core obligations may include the protection of individuals from elements such as cold and wet conditions that are fatal. This can serve as 'a universal objective standard that applies across the world that flows from the most basic

[11] Chapman & Russell (n 7) 9.
[12] Chapman & Russell (n 7) 9.
[13] Chapman & Russell (n 7) 9.
[14] Chapman & Russell (n 7) 11-12. They use the terms 'minimum State obligations'.
[15] Katharine G Young, 'The Minimum Core of Economic and Social Rights: A Concept in Search of Content' (2008) 33 *Yale Journal of International Law* 113-175, 158.
[16] Matthew Craven, 'Assessment of the Progress on Adjudication of Economic, Social and Cultural Rights' in John Squires, Malcolm Langford & Bret Thiele (eds), *The Road To A Remedy: Current Issues in the Litigation of Economic, Social and Cultural Rights* (University of New South Wales Press 2005) 39.
[17] David Bilchitz, 'Socio-economic rights, economic crisis, and legal doctrine' (2014) 12/3 *International Journal of Constitutional Law* 710–739, 730 ('Socio-economic rights').
[18] Bilchitz, Socio-economic rights, (n 17) 730.
[19] Bilchitz, Socio-economic rights, (n 17) 733.
[20] Bilchitz, Poverty and Fundamental Rights, (n 3) 189.

needs and interests of human beings in being free from threats to survival'.[21] Thus, the obligation to provide the first threshold of resources is urgent.

The second threshold addresses less urgent obligations. This is the sufficiency threshold, which concerns 'achieving the general necessary conditions to be in a position to realize one's purposes or to live a life of dignity'.[22] Thus, the second threshold of provision concerns maximal interest.[23] Put differently, the obligation to ensure the provision of the second threshold of resources is not urgent. When states carry out this obligation, they perform beyond their minimum core obligations and ensure progressive realisation. Bilchitz originally limits his analysis to the first and the second thresholds, only later adding the third threshold, which was largely triggered by the 2008 financial crisis that affected the enjoyment of rights particularly in Europe.[24]

The third threshold, which is called the relative minimum core, falls between survival and sufficiency thresholds. The relative minimum core applies to developed countries, particularly during economic crisis, and addresses some drawbacks of the absolute minimum core.[25] The absolute minimum core does not address the suffering of individuals in developed countries, who have suffered severe losses to their economic security and well-being due to the economic crisis but who still have resources to be free from threats to their survival.[26] It encourages selective appraisal by 'focusing attention on poorer, rather than wealthier countries'.[27] Such understanding may 'ignore the victims who find themselves living in undignified conditions in wealthier countries'.[28] Therefore, the relative minimum core avoids the tendency of defining the minimum core on the basis of deprivation in relatively poor states.

Moreover, it is submitted, the determination of an absolute minimum core applicable across the world would not be practically possible. The resources required for physical survival are different even within one country let alone across the globe. For example, the type and number of resources needed to provide basic shelter vary depending on the climate of a place. The shelters suitable in lowland deserts are totally different from those required in rainy highlands. Diseases common in the tropical zone may not even exist in the temperate zone showing variation of health needs. Moreover, the resources needed for physical survival may depend on the perception or culture prevalent in a place. An example contrasting extreme differences can be illustrative. The number and type of resources required for the physical survival of a person in Rio de Janeiro are different from those required by a person who lives in the Amazon forests of Brazil. This is particularly true when one recognises indigenous peoples' way of life and world outlook. Because of these variations, minimum core obligations cannot be the same for all states. Some states are endowed with abundant resources when compared to others. For wealthy states, it would be easy to discharge much more

[21] Bilchitz, Socio-economic rights, (n 17) 732.
[22] Bilchitz, Socio-economic rights, (n 17) 730.
[23] Bilchitz, Poverty and Fundamental Rights, (n 3) 188—189.
[24] Bilchitz, Socio-economic rights, (n 17).
[25] Bilchitz, Socio-economic rights, (n 17) 732-733.
[26] Bilchitz, Socio-economic rights, (n 17) 732.
[27] Craven (n 16) 41.
[28] Malcolm Langford & Bret Thiele, 'Introduction: The Road to a Remedy' in John Squires, Malcolm Langford & Bret Thiele (eds), *The Road To A Remedy: Current Issues in the Litigation of Economic, Social and Cultural Rights* (University of New South Wales Press 2005) 7.

than their minimum core obligations. Poor states, those with relatively fewer resources, should meet at least their minimum core obligations.[29]

As Craven rightly observes, it is necessary 'to contextualise the minimum by insisting upon the development of national benchmarks to which states might commit themselves'.[30] States with more resources have a higher level of core content or obligations than those with fewer resources.[31] Therefore, the minimum core is essentially relative. The adoption of a relative minimum core also reflects economic measures such as poverty lines, which vary across different nations. Beyond national levels, different poverty lines have been adopted to indicate variations across wider geographical or economic regions.[32] Just like poverty lines, the minimum core is dynamic, and changes over time. It evolves with the advancement of science and technology.[33]

The view that minimum core obligations change over time may give rise to the issue of the 'rising floor'. This concept considers that the minimum core metaphorically represents the 'floor' while full realisation represents the 'ceiling'. As the human rights history shows, a minimum core today will change and expand over time.[34] That is, the floor rises towards the ceiling, which is not static either, but more akin to a horizon line that recedes into the distance as someone tries to reach for it.[35] Therefore, the conception of the minimum core as relative in terms of time and place is plausible and does not contradict the principle that human rights are universal. Rather, it reflects contextual variations in their implementation.

Unlike some authors,[36] Bilchitz does not include the negative obligation to respect among minimum core obligations. In his view, the purpose of the minimum core concept is to clarify the positive obligation to fulfil. It is also intended to prioritise the identified minimum core obligations.[37] Bilchitz provides another reason for excluding negative obligations. He argues that prioritising negative obligations over positive ones 'may have unwarranted practical implications'[38] because 'giving priority to the interests of the worst off may involve interference with the higher levels of socio-economic goods enjoyed by the better off'.[39] For example, it may be necessary to interfere with the enjoyment of the right to property of the owners (the better off) to guarantee the right to housing of the tenants (the worst off). Similarly, Landau demonstrates that the prohibition of interference with the enjoyment of economic, social and cultural rights by the middle and upper classes (the better off) 'may prevent or slow necessary structural reforms', which can benefit the poor (the worst off).[40] In short, the definition of minimum core obligations, which include the negative obligation to respect

[29] cf Sisay Alemahu Yeshanew, *The Justiciability of Economic, Social and Cultural Rights in the African Regional Human Rights System: Theory, practice and prospect* (Intersentia 2013) 280; Craven (n 16) 39—40. Yeshanew argues that it may be too much to expect poor States to provide the minimum core content of each right for all citizens.

[30] Craven (n 16) 39—40.

[31] Asbjørn Eide, 'Economic, Social and Cultural Rights As Human Rights' in Asbjørn Eide, Catarina Krause & Allan Rosas (eds), *Economic, Social And Cultural Rights: A Textbook* (Martinus Nijhoff Publishers 2001) 27.

[32] World Bank adopts different poverty lines by levels of income (US$1.90 for low income, US$3.20 for lower-middle income, US$5.50 for upper-middle income and US$21.70 for high income countries). See World Bank Group, *Piecing Together the Poverty Puzzle* (World Bank 2018) 69.

[33] Christian Courtis, *Courts and the Legal Enforcement of Economic, Social and Cultural Rights: Comparative experiences of justiciability* (International Commission of Jurists 2008) 23; Yeshanew, Approaches to justiciability, (n 6) 321.

[34] Chapman & Russell (n 7) 14.

[35] Eva Brems 'Human Rights: Minimum and Maximum Perspectives' (2009) 9(3) *Human Rights Law Review* 349-372, 355.

[36] cf Chapman & Russell (n 7) 11-12; Young, Minimum core, (n 15) 158.

[37] Bilchitz, Poverty and Fundamental Rights, (n 3) 195.

[38] Bilchitz, Poverty and Fundamental Rights, (n 3) 195.

[39] Bilchitz, Poverty and Fundamental Rights, (n 3) 195.

[40] David Landau, 'The Reality of Social Rights Enforcement' (2012) 53/1 *Harvard International Law Journal* 189-247, 240.

particularly in regard to higher levels of enjoyment, bars redistribution of resources. That is, such definition is contrary to the central concern of economic, social and cultural rights.

Defining core obligations as inclusive of negative obligations may also give rise to other concerns. It is submitted that such definitions water down state obligations. The purpose of defining core obligations in the first place is to identify elements of economic, social and cultural rights that states should not postpone indefinitely under the pretext of progressive realisation. Defining core obligations as negative obligations implies that states have nothing to do except refraining from interfering with the exercise of the rights. Therefore, such definition thwarts the purpose of identifying core obligations. One can also explain this point from the perspective of rights-holders. Central to the minimum core concept is addressing the deprived, those who have no means of their own. In the case of extreme deprivation, the obligations to respect and protect have no relevance. For example, these obligations make no sense for a person who has no shelter: there is no enjoyment to respect and protect, as there is no shelter in the first place. These obligations are relevant only to those who are already exercising their rights. Therefore, this definition maintains the status quo.

Another concern relates to the conceptual confusion that such a definition creates. States have the negative obligation to respect corresponding to civil and political rights, but this obligation is not defined as a core obligation. For example, the Human Rights Committee does not employ the language of minimum core obligation in relation to the negative obligation to respect, nor does it use the progressive realisation language with regard to positive obligations corresponding to civil and political rights guaranteed in the ICCPR.[41] Nevertheless, it emphasises that states have positive obligations to 'adopt legislative, judicial, administrative, educative and other appropriate measures in order to fulfil their legal obligations'.[42] For example, a state takes educative measures (or discharges its obligation to promote) when it trains people (police officers, judges, prosecutors, members of the general public) on proper treatment of persons suspected or accused of committing a crime.

Therefore, minimum core obligations can be better defined as state obligations to provide resources, which are required for acquiring goods and services necessary for physical survival, to individuals who do not have their own means for reasons beyond their control. This definition is narrow, as it relates to the sub-obligation to provide. By determining that the minimum core obligations are positive by nature, the definition avoids the wrong impression that states have nothing to do but refrain from interfering with the enjoyment of the rights.

Despite the concerns related to defining minimum core obligations as negative obligations, human rights treaty bodies, particularly the African Commission and the CESCR, unfortunately consider that core obligations include the negative obligations to respect as discussed below in the third and the sixth sections.

### 4.2.2 Purposes and characteristics of minimum core obligations

The minimum core approach seeks to identify the irreducible minimum core content of a right or its corresponding obligation.[43] In other words, it 'entails a definition of the absolute minimum needed,

[41] Human Rights Committee, General Comment 31: The Nature of the General Legal Obligation Imposed on States Parties to the Covenant, CCPR/C/21/Rev.1/Add. 13, 26 May 2004, para 6.

[42] Human Rights Committee, General Comment 31, para 7.

[43] Diane A Desierto, 'ICESCR Minimum Core Obligations and Investment: Recasting the Non-Expropriation Compensation Model during Financial Crises' (2012) 44 *The George Washington International Law Review* 473—520, 487.

without which the right would be unrecognizable or meaningless'.[44] Obviously, such identification must serve some purpose.[45] The concept of minimum core may improve the normative clarity of economic, social and cultural rights. Critics consider that economic, social and cultural rights are vague.[46] As a response to this criticism, the concept of minimum core may serve as a conceptual tool for better understanding. According to Coomans, the concept is 'a useful means or instrument in helping to analyse and clarify the normative content of economic, social and cultural rights, which are often described as vague and open-ended'.[47] The concept does not appear in the text of human rights treaties. As Alston observes, the existence of a minimum core content of a right is 'a logical implication of the use of the terminology of rights'.[48]

The minimum core obligations derive some characteristics from their purposes. The objective is to identify obligations that are not subject to progressive realisation. Since progressive realisation is attained over time, minimum core obligations have to be implemented in a short time. The recognition of minimum core obligations emphasises the fact that some elements of economic, social and cultural rights are not subject to progressive realization.[49] Therefore, immediate effect is an important characteristic of minimum core obligations.

Another characteristic of minimum core obligations relates to resources. Unlike progressive realisation, minimum core obligations do not depend on available resources. States should carry out these obligations under any circumstances, 'irrespective of their available resources'.[50] This does not mean that the implementation of minimum core obligations happens without resources; rather, it means that 'the lack of sufficient resources does not exonerate a state party, including developing states, from a threshold or the "minimum core obligation" to ensure, at the very least, "minimum essential levels" of each of the rights' guaranteed in a particular treaty.[51]

Prioritisation is another characteristic of minimum core obligations. Identifying the minimum core has a consequence for states. Minimum core obligations should be given priority in the allocation of state resources[52] because the minimum core is immediate and applicable irrespective of available resources.[53] The prioritisation of resource allocation is not an end in itself. States should meet the core obligations relative to a particular right, otherwise, they 'will be in prima facie breach of their obligations'.[54] Prioritisation is also applicable to rights-holders. States should give attention to the most vulnerable. The minimum core, by definition, addresses the most urgent situations 'in which people are most vulnerable, and most needy'.[55] The fact that minimum core obligations have an

[44] Courtis (n 33) 23.
[45] Malcolm Langford 'Substantive Obligations' in Malcolm Langford et al (eds) *The Optional Protocol to the International Covenant on Economic, Social and Cultural Rights: A Commentary* (PULP 2016) 234.
[46] Ida Elisabeth Koch*, Human Rights as Indivisible Rights: The Protection of Socio-Economic Demands under the European Convention on Human Rights* (Martinus Nijhoff Publishers 2009) 7.
[47] Fons Coomans, 'Exploring the Normative Content of the Right to Education as a Human Right: Recent Approaches' (2004) 50 *Persona & Derecho* 61—100, 73.
[48] Alston (n 3) 352.
[49] Manisuli Ssenyonjo, *Economic, Social and Cultural Rights in International Law* (Hart Publishing 2009) 66; Brigit Toebes, 'The Right to Health' in Asbjørn Eide, Catarina Krause & Allan Rosas (eds), Economic, Social And Cultural Rights: A Textbook (Martinus Nijhoff Publishers 2001) 176.
[50] Toebes (n 49) 176.
[51] Ssenyonjo, Economic, Social and Cultural Rights, (n 49) 66.
[52] Bilchitz, Socio-economic rights, (n 17) 730; Ssenyonjo, Economic, Social and Cultural Rights, (n 49) 65.
[53] Radhika Balakrishnan & Diane Elson, 'Auditing Economic Policy in the Light of Obligations on Economic and Social Rights' (2008) 5/1 *Essex Human Rights Review* 1—19, 6.
[54] Bilchitz, Socio-economic rights, (n 17) 729.
[55] Bilchitz, Poverty and Fundamental Rights, (n 3) 189.

immediate effect, implies that 'it is the duty of the state to prioritize the rights of the poorest and most vulnerable people'.[56] Because of the urgency of interests it addresses, the minimum core 'strongly justifies recognizing an unconditional obligation to realize it as a matter of priority'.[57]

The minimum core approach divides state obligations into core and non-core. In the words of Craven, the approach distinguishes 'between minimal and less than minimal obligations'.[58] A caveat must be added, though, for the identification of minimum core obligations should not lead to conceptual confusion; it does not mean that other obligations are unimportant.[59] It should not foster 'the normalisation of disadvantage beyond the level of subsistence'.[60] States must go beyond realising the minimum core content,[61] and not postpone indefinitely parts of obligations that are not core.[62] It is necessary to emphasise that discharging core obligations does not mean full compliance. It is only the starting point for the realisation of economic, social and cultural rights.[63] States should move beyond the achievement of the minimum core. They 'must set benchmarks to move progressively beyond the core content and to harness the national resources for that purpose'.[64]

## 4.3 Minimum core obligations in the practice of the CESCR

In its practice, the Committee on Economic, Social and Cultural Rights (CESCR) has been developing the concept of the minimum core to clarify the normative content of rights guaranteed in the ICESCR. It defines minimum core obligations using different terms and determining their content by identifying core obligations corresponding to most rights guaranteed in the ICESCR. From the description of these obligations, some characteristics emerge. This section examines the meaning, content, and characteristics of core obligations in the practice of the CESCR. It begins with the use of terms.

### 4.3.1 Use of terminology

The ICESCR does not contain the concept of minimum core or similar concepts in its text. The CESCR introduced the concept to overcome one of the challenges it was facing. The rights guaranteed in the ICESCR lack normative clarity. Philip Alston, one of the initial members of the CESCR, observed that the vagueness of the normative implications of these rights was one of the challenges of the CESCR.[65] It was the intention of the drafters that the CESCR 'should seek to identify some minimum core content of each right that cannot be diminished'.[66]

The CESCR does not derive the concept of minimum core from the text of the ICESCR. Rather, it derives the concept from the purpose of the ICESCR. The CESCR emphasises that if the ICESCR 'were to be read in such a way as not to establish such a minimum core obligation, it would be largely deprived of its raison d'être'.[67] It expresses the concept in a range of phrases used in its documents. These phrases include minimum core obligations, core obligations, minimum core content, core

[56] Balakrishnan & Elson (n 53) 6.
[57] Bilchitz, Poverty and Fundamental Rights, (n 3) 189.
[58] Craven (n 16) 39.
[59] Toebes (n 49) 176.
[60] Craven (n 16) 41.
[61] Chapman & Russell (n 7) 9.
[62] Toebes (n 49) 176.
[63] Bilchitz, Socio-economic rights, (n 17) 730.
[64] Eide (n 31) 27.
[65] Alston (n 3) 351.
[66] Alston (n 3) 352.
[67] General Comment 3.

content, and minimum essential levels. In its general comment on state obligations, the CESCR explains that 'a *minimum core obligation* to ensure the satisfaction of, at the very least, *minimum essential levels* of each of the rights is incumbent upon every State party'.[68] From this passage, the 'minimum core obligation' is the duty to ensure the realisation of 'minimum essential levels' of each of the rights. In other words, if a state discharges its minimum core obligations, it will be able to achieve the realisation of minimum essential levels of each right. Moreover, 'minimum essential levels' of a right may mean a 'minimum core content' of that right although this point does not clearly come out from the CESCR's practice. The CESCR uses the term 'minimum core content'[69] in some documents while it uses 'minimum essential levels'[70] in others.

The CESCR identifies 'core obligations' for almost all the rights guaranteed in the ICESCR. When it began explaining the normative content of the rights in its general comment on the right to food in 1999, the CESCR included the explanation of both 'core content' of the right and 'core obligations' of states.[71] It explains that 'the *core content* of the right to adequate food implies' availability and accessibility of food.[72] It also emphasises that 'States have a *core obligation* to take the necessary action to mitigate and alleviate hunger'.[73] In other words, states achieve the realisation of core content of a right when they carry out their core obligations in relation to that right. Since then, the CESCR frequently uses the term 'core obligations' instead of 'minimum core obligations'. It hardly refers to minimum core obligations in its documents issued since its general comment on state obligations adopted in 1990. Of course, it refers to the minimum core obligations when it quotes this general comment in more recent documents,[74] but otherwise, the 'minimum core obligations' have fallen into disuse, giving way to 'core obligations'. The CESCR does not explain the changes in the use of terminologies, so it is not clear whether the change is intentional.

However, the CESCR is not consistent. Its relatively recent documents evidence a couple of changes. First, it appears that the CESCR has connected minimum essential levels of rights with core obligations. That is, it has continued using 'minimum essential levels' and its equivalent (minimum core content). It has emphasised that each state party must meet '*core obligations* by ensuring that the *minimum essential levels* relating to the rights to housing, health, social security and education

[68] General Comment 3, para 10. Italics added

[69] See General Comment 3, para 10; Statement by the Committee on Economic, Social and Cultural Rights, Public debt, austerity measures and the International Covenant on Economic, Social and Cultural Rights, E/C.12/2016/1, 22 July 2016, para 4 (hereafter 'Statement on public debt'); Letter dated 16 May 2012 addressed by the Chairperson (Ariranga G Pillay) of the Committee on Economic, Social and Cultural Rights to States parties to the International Covenant on Economic, Social and Cultural Rights, para 7 (hereafter 'Chairperson's letter'); Statement on Available Resources, para 10(b). See Concluding observations on the Sudan, E/C.12/SDN/2, 9 October 2015, para 18; Angola, E/C.12/AGO/CO/4-5, 15 July 2016, para 8; the UK, E/C.12/GBR/CO/6, 14 July 2016, para 19; Canada, E/C.12/CAN/CO/6, 23 March 2016, para 10; Italy, E/C.12/ITA/CO/5, 28 October 2015, para 45; Ireland, E/C.12/IRL/CO/3, 8 July 2015, para 11(a); Ukraine, E/C.12/UKR/CO/6, 13 June 2014, para 5; Iceland, E/C.12/ISL/CO/4, 11 December 2012, para 6; Spain, E/C.12/ESP/CO/5, 6 June 2012, para 8.

[70] General Comment 15, para 44; Concluding observations on Sweden, E/C.12/SWE/CO/6, 14 July 2016, para 20; the Sudan, E/C.12/SDN/2, 9 October 2015, para 52; Chad, E/C.12/TCD/CO/3, 16 December 2009, para 25.

[71] General Comment 12, paras 6 & 8.

[72] General Comment 12, para 8. Italics added.

[73] General Comment 12, para 6. Italics added.

[74] CESCR, Duties of States towards refugees and migrants under the International Covenant on Economic, Social and Cultural Rights (hereafter 'Statement on Refugees'), E/C.12/2017/1, 13 March 2017, para 10; General comment 21, para 55; General Comment 19, para 60; An evaluation of the obligation to take steps to the "maximum of available resources" under an Optional Protocol to the Covenant: Statement ('Statement on Available Resources'), E/C.12/2007/1, 21 September 2007, para 10(b); General Comment No. 13: The right to education (Article 13 of the Covenant), E/C.12/1999/10, 8 December 1999, para 57.

are respected, protected and fulfilled'.[75] Second, from the general comment on the right to food, it is clear that in the beginning the CESCR took up the task of explaining the core content of rights as well as the core obligations of states.[76] As time goes by, it has limited itself to explaining core obligations only. It has begun stressing that the responsibility to identify the minimum core content of the rights under the ICESCR lies with the states themselves. It emphasises that 'policy reforms should identify and protect the minimum core content of Covenant rights at all times'.[77] The CESCR requires states to determine the minimum core content of rights, especially when states adopt austerity measures.[78]

From the ordinary meaning of the words, core obligations are a sub-category of obligations. Similarly, minimum core obligations are a sub-category of core obligations. However, the CESCR does not make a clear distinction between them. The term 'core obligation' is adopted in the following discussion, since the CESCR uses this term most frequently.

### 4.3.2 Meaning and content of core obligations

The CESCR defines core obligation as duties of states to ensure the minimum essential levels of each of the rights guaranteed in the ICESCR.[79] It emphasises that 'a state party in which *any significant number of individuals* is deprived of essential foodstuffs, of essential primary health care, of basic shelter and housing, or of the most basic forms of education is, prima facie, failing to discharge its obligations' under the ICESCR.[80] The CESCR does not determine core obligations in terms of each individual, but rather suggests a collective determination. It requires that the number of individuals deprived of their rights should be significant to condemn a state for its failure to discharge core obligations. Accordingly, one has to first assess the number of individuals deprived of essential levels of each right.

The CESCR does not determine how many individuals constitute a 'significant number'; it does not establish a fixed threshold, nor does it set this number in terms of the ratio of the deprived individuals to the total population in a given country. Despite the absence of a defined number, the CESCR sometimes identifies a proportion of the population suffering from the deprivation of their rights and condemns the states concerned for their failure, particularly when such states are developing countries. For example, it has expressed its concern that '*half of the population* does not have access to basic health services' in the Sudan.[81] Thus, the state should 'take measures to ensure access to the essential primary health package for all'.[82] It made a similar assessment with regard to Chad, condemning it for 'the chronic food insecurity experienced by *a large section of the*

[75] Concluding observations on Sweden, E/C.12/SWE/CO/6, 14 July 2016, para 20. See Concluding observations on Lebanon, E/C.12/LBN/CO/2, 24 October 2016, para 12; the Netherlands, E/C.12/NDL/CO/4-5, 9 December 2010, para 25; Chad, E/C.12/TCD/CO/3, 16 December 2009, para 25.

[76] General Comment 12, paras 6 & 8.

[77] Concluding observations on the Sudan, E/C.12/SDN/2, 9 October 2015, para 18.

[78] See Concluding observations on Angola, E/C.12/AGO/CO/4-5, 15 July 2016, para 8; the UK, E/C.12/GBR/CO/6, 14 July 2016, para 19; Canada, E/C.12/CAN/CO/6, 23 March 2016, para 10; Italy, E/C.12/ITA/CO/5, 28 October 2015, para 45; Ireland, E/C.12/IRL/CO/3, 8 July 2015, para 11(a); Ukraine, E/C.12/UKR/CO/6, 13 June 2014, para 5; Iceland, E/C.12/ISL/CO/4, 11 December 2012, para 6; Spain, E/C.12/ESP/CO/5, 6 June 2012, para 8; Statement on public debt, para 4; Chairperson's letter, para 7; Statement on available resources, para 10(b).

[79] General Comment 3, para 10.

[80] General Comment 3, para 10. Italics added.

[81] Concluding observations on the Sudan, E/C.12/SDN/2, 9 October 2015, para 51. Italics added.

[82] Concluding observations on the Sudan, E/C.12/SDN/2, 9 October 2015, para 52.

*population*'.[83] It recommended that Chad ensure 'physical and economic access to the minimum of essential food that is sufficient, nutritionally adequate and safe to ensure freedom from hunger'.[84]

Diplomatic language aside, the CESCR established that the Sudan violated the right to health, while Chad violated the right to food. It clearly condemned these states for their failure to ensure minimum essential levels of the rights to health and to food for a large section of their population, which constituted as much as 50% of the total population in the case of Sudan. In both cases, the CESCR took into account the magnitude of the number of individuals deprived of the rights. However, it avoided saying that it takes as high as 50% of the population to consider them significant. Therefore, it is submitted, the reference to the number of people deprived of minimum essential levels of rights should be understood as an emphasis on the magnitude of the deprivation.

In principle, the number of individuals deprived of their rights should be immaterial. A violation due to the failure to carry out core obligations should not be based on whether the number of individuals deprived of a right is significant or not. By definition, human rights are inherent in every individual. It is still a violation even if one individual is deprived of his or her right. The violation is more serious when an individual is deprived of the core content of his or her rights. States realise core content of rights when they discharge minimum core obligations corresponding to those rights. Indeed, the CESCR has the mandate to receive and examine communications alleging violations under the Optional Protocol to the ICESCR even if those violations affect only a single individual.[85] Therefore, defining core obligations in terms of the number of individuals deprived of their rights is not useful but misleading.

Another element in the definition of core obligations is the 'minimum essential levels' of each right. The CESCR does not identify minimum essential levels of each of the rights. For example, one may ask, what is the minimum amount of water a person needs per day? The general comment on the right to water explains that a state violates the right to water if it fails 'to ensure that the minimum essential level of the right is enjoyed by everyone'.[86] However, it does not specify the quantity in litres or other measurements. In contrast, the Inter-American Court has held that 7.5 litres are a minimum requirement, as discussed below.[87] The CESCR does not express the essential minimum levels of any right in figures. Whether the CESCR has the expertise to make such a specific determination is, of course, a different issue.

The CESCR explains that states have the core obligation to ensure access to minimum essential food, basic housing, a minimum essential amount of water, and a social security scheme that provides the minimum essential level of benefits.[88] These obligations can be examined from the perspective of the obligations to respect, protect and fulfil. More relevant in this regard is the obligation to fulfil, particularly the sub-obligation to provide. In the general comment on the right to water, for example, the CESCR explains that a state violates its obligation to fulfil when it fails 'to ensure that the minimum essential level of the right is enjoyed by everyone'.[89] Although the CESCR does not clearly

[83] Concluding observations on Chad, E/C.12/TCD/CO/3, 16 December 2009, para 25. Italics added.
[84] Concluding observations on Chad, E/C.12/TCD/CO/3, 16 December 2009, para 25.
[85] Optional Protocol to the International Covenant on Economic, Social and Cultural Rights, General Assembly resolution A/RES/63/117, adopted 10 December 2008, entered into force 5 May 2013.
[86] General Comment 15, para 44.
[87] *Xákmok Kásek Indigenous Community v Paraguay* (Inter-American Court, 24 August 2010) para 195.
[88] General Comment 14, para 43; General Comment 15, para 37; General Comment 19, para 59.
[89] General Comment 15, para 44.

state this point with regard to other rights, one may argue that the failure to provide minimum essential levels of a right is a violation of the sub-obligation to provide.

In principle, individuals depend on their own resources to enjoy their rights. As discussed in the previous chapter, 'available resources' in Article 2(1) of the ICESCR include those coming from both state coffers and private sectors. Individuals have the primary responsibility to obtain the resources necessary for the enjoyment of their rights. In that case, the state obligations to respect and protect are relevant. However, these obligations are not relevant to individuals who are unable to exercise their rights for reasons beyond their control. For such individuals, it is submitted, the obligations to respect and protect would not be relevant. The deprived are unable to exercise their rights. As a result, there is no point in requiring states to refrain from interfering with the enjoyment that does not exist in the first place. Similarly, there is no objective to be achieved by requiring states to prevent third parties from interfering with the enjoyment where there is none. Once states carry out their core obligation to provide the deprived with minimum essential levels of each right, the obligations to respect and protect would come into the picture.

The CESCR does not distinguish stages when each level of obligation becomes relevant. It generally emphasises that states must meet their 'core obligations by ensuring that the minimum essential levels relating to the rights to housing, health, social security and education are *respected*, *protected* and *fulfilled*'.[90] This statement obscures the difference among levels of state obligations in relation to the provision of minimum essential levels. The core obligation to fulfil, particularly the sub-obligation to provide, is limited to minimum essential levels because of resource scarcity. Nevertheless, other levels of obligations are not limited to minimum essential levels. States have the obligations to respect and protect even when the enjoyment is much more than minimum essential levels. This is particularly true with regard to the obligation to respect.

In its general comments (summarised in table 1 below), the CESCR identifies the obligations to respect and protect as core obligations, even when they do not relate to the provision of minimum requirements. Regarding the right to education, for example, it explains that the obligation 'to ensure free choice of education without interference from the State' is a core obligation.[91] Similarly, with regard to the right to social security, it explains that the obligation to 'respect existing social security schemes' is a core obligation.[92] In both examples, the CESCR identifies the obligation to respect as a core obligation. Examples of core obligations to protect include the protection of material interest of authors (cultural rights),[93] the prohibition of harmful practices and gender-based violence (right to health),[94] and the prohibition of sexual harassment (right to just and favourable conditions of work).[95] In sum, the core obligations identified by the CESCR contain all levels of state obligations (ie, to respect, to protect and to fulfil).

The concept of 'minimum essential levels' of each right is central to the CESCR's definition of core obligations, however, this trend has not continued over time. It seems that the change occurred when the CESCR identified core obligations for each right. The general comments do not specify the obligation to provide minimum essential levels for every right. In its general comment on the right to

[90] Concluding observations on Sweden, E/C.12/SWE/CO/6, 14 July 2016, para 20. Italics added.
[91] General Comment 13, para 57.
[92] General Comment 19, para 59(c).
[93] General Comment 17, para 39(a).
[94] General Comment 22, para 49(d).
[95] General Comment 23, para 65(e).

food adopted in 1999, the CESCR did not identify the obligation to provide minimum essential food. A year later, it explained that the right to health requires states to provide not only minimum essential food but also basic shelter and water. This shows that core obligations corresponding to some rights overlap. This is particularly true with regard to the rights to health, food and water. In some general comments, the CESCR does not specify the obligation to provide minimum essential levels. Examples are the general comments on the right to work and cultural rights.[96]

**Table 1: Summary of core obligations**

| **Common Core Obligations** | **Other Core Obligations** |
|---|---|
| **1. Right to Food** (art 11), General Comment 12 (1999) | |
| | ▪ mitigating and alleviating hunger |
| **2. Right to Education** (art 13), General Comment 13 (1999) | |
| ▪ national educational strategy<br>▪ non-discrimination in access to institutions and programmes | ▪ appropriate educational objectives<br>▪ primary education for all<br>▪ free choice of education |
| **3. Right to Health** (art 12), General Comment 14 (2000) | |
| ▪ national health strategy and plan of action<br>▪ non-discrimination<br>▪ equitable distribution of goods and services | ▪ minimum essential food<br>▪ basic shelter, water and sanitation<br>▪ essential drugs |
| **4. Right to water** (art 11), General Comment 14 (2002) | |
| ▪ national water strategy and plan of action<br>▪ non-discrimination in access to water and water facilities and services<br>▪ equitable distribution of facilities and services<br>▪ monitoring the realization of the right to water | ▪ minimum essential amount of water<br>▪ physical access to water facilities or services<br>▪ personal security while accessing water<br>▪ low-cost targeted water programmes<br>▪ access to sanitation (prevent water borne diseases) |
| **5. Right to Culture** [*benefits of authors*] (art 15(1)(c)), General Comment 17 (2005) | |
| ▪ equal access to remedies | ▪ protection of the interests of authors<br>▪ Recognition of authors as creators<br>▪ protection of the material interests of authors<br>▪ balancing the interests of authors with rights of others |
| **6. Right to Work** (art 6), General Comment 18 (2005) | |
| ▪ national employment strategy and plan of action<br>▪ non-discrimination and equal treatment | ▪ access to employment |
| **7. Social security** (art 9), General Comment 19 (2007) | |
| ▪ national social security strategy and plan of action<br>▪ non-discrimination<br>▪ monitoring the extent of the realization | ▪ minimum essential level of benefits<br>▪ non-interference in existing social security schemes<br>▪ taking steps to implement social security schemes |
| **8. Right to Take part in cultural life** (art 15(1)(a)), General Comment 21 (2009) | |
| ▪ participation in the design and implementation of laws and policies<br>▪ non-discrimination and gender equality | ▪ right to identify oneself with one or more communities<br>▪ right of everyone to engage in cultural practices<br>▪ elimination of barriers preventing access to culture |
| **9. Right to Reproductive health** (art 12), General Comment 22 (2016) | |
| ▪ national strategy and action plan<br>▪ universal and equitable access to goods and services<br>▪ access to effective remedies | ▪ access to facilities, services, goods and information<br>▪ prohibition of harmful practices<br>▪ Safe abortions and post-abortion care and counselling<br>▪ access to education and information<br>▪ essential medicines, equipment and technologies |
| **10. Right to Just and favourable Conditions of work** (art 7), General Comment 23 (2016) | |
| ▪ national policy<br>▪ Non-discrimination<br>▪ combat gender discrimination | ▪ establishing minimum wages<br>▪ prohibition of harassment<br>▪ minimum standards for conditions of work |

[96] See General Comments 17, 18 and 21.

In addition to the provision of minimum essential levels, the CESCR identifies other elements of core obligations. Some of these elements are peculiar to state obligations corresponding to a particular right. For example, one of the core obligations relating to the right to water is ensuring personal security while accessing water.[97] The implementation of this obligation is important in areas where right-holders, particularly women and children, travel for several hours to fetch water. Given that the ICCPR guarantees the protection of personal security, one may question the significance of identifying such protection as a core obligation under the ICESCR.[98] This example may indicate that the CESCR sometimes regards the protection of civil and political rights as a core obligation of economic, social and cultural rights.

Other elements are applicable to almost all rights for which the CESCR has identified core obligations.[99] These include the obligations (1) to adopt a national strategy; (2) to ensure non-discrimination in the enjoyment of rights; (3) to ensure equitable distribution of facilities and services; (4) to monitor the levels of realisation; and (5) to provide remedies. These core obligations appear in relation to two or more rights. Although the CESCR omits these obligations in relation to some rights, one may argue that they are applicable to all rights. Thus, they are labelled as 'common core obligations' in Table 1 shown above. They are discussed below separately.

#### 4.3.2.1 Obligation to adopt a national strategy

A strategy, by definition, is a plan of action.[100] It involves setting goals, identifying actions to achieve the goals and mobilising the necessary resources to execute those actions.[101] The CESCR usually emphasises the need to adopt and implement a national strategy. In its first general comment on state reporting, it explained that states have an obligation to 'adopt a detailed plan of action for the progressive implementation' of each of the right guaranteed in the ICESCR.[102] This obligation springs from the undertaking to take steps by all appropriate means provided under Article 2(1) of the ICESCR.[103] The CESCR emphasised that the obligation to devise strategies and programmes for the implementation of these rights is 'not in any way eliminated as a result of resource constraints'.[104]

The CESCR identifies the obligation to adopt and implement a strategy as a core obligation for most of the rights.[105] It omits this obligation from some rights, particularly the rights to take part in cultural life, housing, and food. It is not clear why the CESCR omits this obligation from some rights. As the CESCR has already explained, the obligation to adopt a strategy is implied in Article 2(1) of the

[97] General Comment 15, para 37.
[98] ICCPR, art 9(1).
[99] The CESCR has not identified core obligation for the right to housing and the right to protection of the family.
[100] See English Oxford Living Dictionaries, <https://en.oxforddictionaries.com/definition/strategy> accessed 22 May 2018.
[101] Wikipedia, <https://en.wikipedia.org/wiki/Strategy> accessed 22 May 2018.
[102] CESCR, General comment No. 1: Reporting by States parties, E/C.12/1989/5, 1989, para 4.
[103] CESCR, General comment No. 1: Reporting by States parties, E/C.12/1989/5, 1989, para 4.
[104] General Comment 3, para 11.
[105] CESCR, General comment No. 23 (2016) on the right to just and favourable conditions of work (Article 7 of the International Covenant on Economic, Social and Cultural Rights), E/C.12/GC/23, 27 April 2016, para 65(d); General comment No. 22 (2016) on the right to sexual and reproductive health (Article 12 of the International Covenant on Economic, Social and Cultural Rights), E/C.12/GC/22, 2 May 2016, para 49;; General Comment No. 19: The right to social security (art. 9), E/C.12/GC/19, 4 February 2008, para 59; The Right To Work: General comment No. 18, Article 6 of the International Covenant on Economic, Social and Cultural Rights, E/C.12/GC/18, 6 February 2006, para 31; General Comment No 15: The right to water (arts. 11 and 12 of the International Covenant on Economic, Social and Cultural Rights), E/C.12/2002/11, 20 January 2003, para 37(f); General Comment No. 14: The Right to the Highest Attainable Standard of Health (Art. 12), E/C.12/2000/4), 11 August 2000, para 43; General Comment No. 13: The right to education (Article 13 of the Covenant), E/C.12/1999/10, 8 December 1999, para 57.

ICESCR, a progressive realisation provision applicable to all substantive rights in the ICESCR.[106] From this, one may argue, states have the obligation to adopt a strategy for every right guaranteed in the ICESCR.

The CESCR stipulates what a national strategy should contain. It provides more details with regard to some rights than it does with regard to others. In its general comment on the right to water, for example, it stipulates that a state has an obligation:

> To adopt and implement a national water strategy and plan of action addressing the whole *population*; the strategy and plan of action should be devised, and periodically reviewed, on the basis of a participatory and transparent *process*; it should include *methods*, such as right to water indicators and benchmarks, by which progress can be closely monitored; the process by which the strategy and plan of action are devised, as well as their content, shall give particular attention to all disadvantaged or marginalized groups.[107]

In this passage, the CESCR indicates the scope and content of a national strategy. As to the scope, it explains that a national strategy should address the entire population of the concerned State party. It also explains that states should give particular attention to vulnerable groups as an important part of the population. In principle, one may argue, a strategy adopted for the whole population is applicable to vulnerable groups. Still, it is in relation to these groups that the obligation to provide usually arises. Therefore, any national strategy should set separate goals to be achieved with regard to them. Such strategy should also identify actions to be taken to achieve the goals. In terms of content, a national strategy should provide for methods of monitoring the progress. Thus, strategies should include indicators and benchmarks. Moreover, the CESCR specifies other requirements. The process of adopting a national strategy should be participatory and transparent.[108] A strategy should be reviewed from time to time.

In its concluding observations, the CESCR frequently expresses its concern that the State concerned has no strategy in place and calls upon it to adopt one.[109] Sometimes, it requires the adoption of a strategy on a very specific aspect of a right, such as 'teenage and youth health',[110] 'child poverty',[111] 'domestic and gender-based violence',[112] and 'homelessness'.[113] For the states that have already adopted various strategies, the CESCR calls on them to implement or monitor the implementation.[114] However, it hardly explains that states should adopt strategies because it is among their core obligations.

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[106] CESCR, General Comment No. 1: Reporting by States parties, E/C.12/1989/5, 1989, para 4.

[107] General Comment 15, para 37(f). Italics added.

[108] General Comment 15, para 37(f).

[109] Concluding observations on Honduras, E/C.12/HND/CO/2, 11 July 2016, para 34; Tunisia, E/C.12/TUN/CO/3, 4 November 2016, para 49; The Philippines, E/C.12/PHL/CO/5-6, 26 October 2016, para 48; Costa Rica, E/C.12/CRI/CO/5, 21 October 2016, para 47; Dominican Republic, E/C.12/DOM/CO/4, 21 October 2016, para 52; The former Yugoslav Republic of Macedonia, E/C.12/MKD/CO/2-4, 15 July 2016, paras 20(b) & 44; Angola, E/C.12/AGO/CO/4-5, 15 July 2016, para 52(d); UK, E/C.12/GBR/CO/6, 14 July 2016, para 48; Canada, E/C.12/CAN/CO/6, 23 March 2016, para 40; Iraq, E/C.12/IRQ/4, 9 October 2015, paras 46 & 52; Burundi, E/C.12/BDI/1, 9 October 2015, para 48.

[110] Concluding observations on Angola, E/C.12/AGO/CO/4-5, 15 July 2016, para 52(d).

[111] Concluding observations on the UK, E/C.12/GBR/CO/6, 14 July 2016, para 48.

[112] Concluding observations on Venezuela , E/C.12/VEN/3, 19 June 2015, para 23(b).

[113] Concluding observations on France, E/C.12/FRA/CO/4, 13 July 2016, para 37(b); Canada, E/C.12/CAN/CO/6, 23 March 2016, para 42; Italy, E/C.12/ITA/CO/5, 28 October 2015, para 41(b).

[114] Concluding observations on Tunisia, E/C.12/TUN/CO/3, 4 November 2016, para 49; The former Yugoslav Republic of Macedonia, E/C.12/MKD/CO/2-4, 15 July 2016, para 28; Angola, E/C.12/AGO/CO/4-5, 15 July 2016, paras 44, 48; Angola, E/C.12/AGO/CO/4-5, 15 July 2016, para 54(a); Sweden, E/C.12/SWE/CO/6, 14 July 2016, para 28; Kenya, E/C.12/KEN/CO/2-5, 6 April 2016, para 28; Canada, E/C.12/CAN/CO/6, 23 March 2016, para 38; Italy, E/C.12/ITA/CO/5, 28 October 2015, para 45(a); Iraq, E/C.12/IRQ/4, 9 October 2015, para 40(c), 48 & 56..

#### 4.3.2.2 Obligation to prohibit discrimination and inequitable distribution

In the general comment on state obligations, the CESCR explains that the obligation to prohibit discrimination is an obligation of immediate effect as opposed to progressive realisation.[115] I will discuss equality and non-discrimination in detail in the next chapter. For now, it suffices to state that the CESCR identifies non-discrimination as a core obligation in relation to most of the rights guaranteed in the ICESCR.[116] It usually emphasises that states should ensure access to facilities, institutions, and services on a non-discriminatory basis.[117] Given that non-discrimination is an obligation of immediate effect, one may wonder about the significance of identifying it among core obligations. Besides, it is useful to note the practice under the ICCPR in this regard. Article 26 of the ICCPR prohibits discrimination. The Human Rights Committee interprets this provision to cover the prohibition of discrimination in the enjoyment of economic, social and cultural rights.[118] The Human Rights Committee does not use the language of core obligations. Thus, it does not identify the prohibition of discrimination as a core obligation.

A related obligation is the duty to ensure equitable distribution of facilities, services and goods. The CESCR identifies this obligation among the core with respect to the right to health and the right to water.[119] An inequitable distribution of facilities, services and goods is certainly discrimination if it is based on prohibited grounds or on analogous grounds. Distribution based on other grounds such as geographic factors may not constitute discrimination. The CESCR still condemns imbalanced geographic distribution of facilities, goods and services in its concluding observations.[120] It sometimes requires equitable distribution based on the obligation to ensure non-discrimination in the enjoyment of rights guaranteed in the ICESCR.[121]

#### 4.3.2.3 Obligations to monitor the implementation of rights

The CESCR emphasises that states have a core obligation to 'monitor the extent of the realization, or the non-realization' with regard to the right to water and the right to social security.[122] However, the CESCR does not identify this obligation as a core obligation with regard to other rights guaranteed under the ICESCR. This is surprising given its emphasis on monitoring since its first general comment on state reporting in 1989. It underlines that one of the objectives of state reporting is 'to ensure that the State party *monitors* the actual situation with respect to each of the rights on a regular basis and is thus aware of the extent to which the various rights are, or are not, being enjoyed by all individuals within its territory or under its jurisdiction'.[123]

States may provide the CESCR with national aggregate data on the extent of realisation, but that is not sufficient. In addition, they should monitor the level of enjoyment of economic, social and

[115] General Comment 3, para 1.

[116] General Comment 23, para 65(a); General Comment 22, para 49(f); General Comment 21, para 55(a); General Comment 19 para 59(b); General Comment 18, para 31; General Comment 15, para 37; General Comment 14, para 43; General Comment 13, para 57.

[117] General Comment 19 para 59(b); General Comment 15, para 37; General Comment 14, para 43; General Comment 13, para 57.

[118] Martin Scheinin, 'Human Rights Committee: Not Only a Committee on Civil and Political Rights' in Malcolm Langford (ed) *Social Rights Jurisprudence: Emerging Trends in International and Comparative Law* (CUP 2008) 340-352.

[119] General Comment 22, para 49(c); General Comment 15, para 37(e); General Comment 14, para 43(e).

[120] Concluding observations on Lebanon, E/C.12/LBN/CO/2, 24 October 2016, paras 57-58; China, E/C.12/CHN/CO/2, 13 June 2014, para 35; Algeria, E/C.12/DZA/CO/4, 7 June 2010, para 20.

[121] Concluding observations on Lebanon, E/C.12/LBN/CO/2, 24 October 2016, para 58.

[122] General Comment 19, para 59(f); General Comment 15, para 37(g).

[123] CESCR, General comment No. 1: Reporting by States parties, E/C.12/1989/5, 1989, para 3. Italics added.

cultural rights by members of vulnerable groups. Thus, the CESCR stresses that states should give special attention 'to any worse-off regions or areas and to any specific groups or subgroups which appear to be particularly vulnerable or disadvantaged'.[124]

Monitoring realisation is not a simple process, nor is it cost-free, and the CESCR does not ignore this. It acknowledges that monitoring the degree of realisation requires resources, which may sometimes be beyond the capacity of states.[125] However, the lack of resources does not extinguish their obligation: in that case, states should seek international assistance and cooperation.[126] In its general comment on state obligations, the CESCR explained that 'the obligations to monitor the extent of the realization, or more especially of the non-realization, of economic, social and cultural rights […] are not in any way eliminated as a result of resource constraints'.[127]

#### 4.3.2.4 Obligation to provide remedies

The ICESCR does not expressly require states to provide judicial remedies – unlike Article 2(3)(b) of the ICCPR.[128] The CESCR acknowledges the textual omission. In its general comment on the domestic application of the ICESCR adopted in 1998, it derives the obligation to provide remedies from Article 2(1) of the ICESCR.[129] Article 2(1) requires states to take steps 'by all appropriate means', among other things. The CESCR explains that

> [A] State party seeking to justify its failure to provide any domestic legal remedies for violations of economic, social and cultural rights would need to show either that such remedies are not "appropriate means" within the terms of Article 2.1 of the Covenant or that, in view of the other means used, they are unnecessary.[130]

In the 1998 general comment on domestic application, the CESCR does not label the obligation to provide remedies as a core obligation. The same is true in almost all general comments on substantive rights in which the CESCR usually emphasises that states have an obligation to ensure access to remedies in cases of violations.[131]

The obligation to provide remedies is considered a core obligation with regard to two rights, the right to health and cultural rights.[132] The CESCR issued two general comments on cultural rights under Article 15 of the ICESCR. In 2005, it adopted the first one in relation to the benefits of authors from their scientific, literary or artistic productions (Article 15(1)(a)).[133] In 2009, it adopted another general comment on the right to take part in cultural life (Article 15(1)(a)).[134] With regard to the former, the CESCR recognises that states have a core obligation to ensure access to remedies. Similarly, the CESCR issued two general comments on the right to health under Article 12 of the ICESCR. It issued the first one in 2000 on the right to health in general.[135] It adopted another one on the right to

[124] CESCR, General comment No. 1, para 3.
[125] CESCR, General comment No. 1, para 3.
[126] CESCR, General comment No. 1, para 3.
[127] General Comment 3, para 11.
[128] Art 2(3)(b) of the ICCPR provides that States parties should ensure that any person claiming a remedy 'shall have his right thereto determined by competent judicial, administrative or legislative authorities'.
[129] General Comment 9, para 3.
[130] General Comment 9, para 3.
[131] In General Comment 13, the CESCR does not refer to violations and remedies.
[132] General comment 22, para 49; General Comment 17, para 39.
[133] General Comment 17.
[134] General Comment 21.
[135] General Comment 14.

reproductive health in 2016.[136] It is only with regard to the right to reproductive health that the CESCR requires states to ensure access to remedies as their core obligation. It emphasises that states should 'ensure access to effective and transparent remedies and redress, including administrative and judicial ones, for violations of the right to sexual and reproductive health'.[137] The CESCR does not identify the obligation to ensure access to remedies as a core obligation of states with regard to other rights. Even in the cases of the right to health and cultural rights, it considers access to remedies a core obligation in relation to aspects of them, not to the whole rights. However, the CESCR does not provide any reason why the obligation to provide remedies is core in relation to some rights but not in relation to other rights. It would be difficult to justify such a distinction.

### 4.3.3 Characteristics of core obligations

Core obligations arguably have some characteristics that distinguish them from other state obligations. The CESCR does not provide a list of characteristics that describe core obligations. Yet from the qualifications it uses, there are some identifiable characteristics. Therefore, I would argue that core obligations are of immediate effect; that they are not subject to resource availability; that they should be prioritised over other obligations; that they are absolute; and that they are non-derogable.

First, core obligations are immediate. The minimum core approach aims at discovering immediate obligations as opposed to progressive realisation. As the CESCR emphasises, the principal obligation under the ICESCR is progressive realisation.[138] Still, the CESCR recognises that the ICESCR 'imposes various obligations which are of immediate effect'.[139] Core obligations are among obligations of immediate effect.[140] The CESCR explains immediate obligation in contrast to progressive realisation. Put differently, states should implement core obligations forthwith.

Second, core obligations do not depend on the availability of resources. However, these apparent distinctions between progressive realisation and immediate obligations collapse into one if one recognises that progressive realisation is not immediate because of resource scarcity. Moreover, the CESCR does not expressly say that the implementation of core obligations does not require resources. Still, it explains the relationship between core obligations and resources. In its 2007 Statement, it explains that:

> As regards the core obligations of States parties in relation to each of the Covenant rights, General Comment No. 3 states that, in order for a State party to be able to attribute its failure to meet its core obligations to a lack of available resources, it must demonstrate that every effort has been made to use all resources that are at its disposal in an effort to satisfy, as a matter of priority, those core obligations.[141]

From this passage, it is clear that states can attribute their failure to discharge their obligation to lack of resources; all they have to do is to explain two conditions, the first of which relates to resources. The explanation should relate to the efforts made, not to the actual use of resources: they should explain that they made every *effort* to use all resources at their disposal. The other condition relates

[136] General Comment 22.
[137] General comment 22, para 49; General Comment 17, para 39.
[138] General Comment 3, para 9.
[139] General Comment 3, para 1.
[140] General comment 17, para 25. Italics added.
[141] Statement on Available Resources, para 6. See Statement on Refugees, para 10; General Comment 19, para 60; General comment 17, para 41; General Comment 3, para 10.

to the attention given to core obligations: states should show that they have prioritised core obligations. According to this view, the significance of the immediate nature of core obligations is weakened. The reason is simple. In principle, a state must justify why it has failed to achieve the full realisation of rights. Otherwise, there is no point in requiring progressive realisation. For this reason, it is submitted, it does not make much difference whether core obligations are subject to resource availability or not. In fact, the CESCR at times gives the impression that it requires progressive achievement of core obligations. In its concluding observations, it has declared that a 'State party should take measures to *progressively* bring its State social standards in line with its core obligations under Articles 7, 9 and 11 of the Covenant'.[142]

Third, core obligations are absolute. One may explain core obligations in terms of defences available to states. States have no defence if they fail to comply with their core obligations. Indeed, the CESCR underlines that 'a State party cannot, under any circumstances whatsoever, justify its non-compliance with the core obligations'.[143] In other words, core obligations are not subject to limitation. This view has a radical consequence. It makes the core content of economic, social and cultural rights absolute, exposing some states as permanent violators, especially when minimum core is defined as absolute minimum core.

Fourth, core obligations should be given priority. The CESCR emphasises that a state must make every effort to meet its core obligations 'as a matter of priority'.[144] According priority to core obligations implies that they are more important than other obligations. The concept thus involves comparison insofar as states should execute core obligations before proceeding to others. Priority, one may argue, refers to the importance of core obligations over other obligations. In fact, the CESCR suggests this meaning in one of its statements, explaining that 'after a State party has ensured the core obligations of economic, social and cultural rights, it continues to have an obligation to move as expeditiously and effectively as possible towards the full realization of all the rights in the Covenant'.[145] Thus, it appears that the CESCR arranges the obligations under the ICESCR in hierarchical order.

Finally, core obligations are non-derogable according to the CESCR. It explains that 'because core obligations are non-derogable, they continue to exist in situations of conflict, emergency and natural disaster'.[146] Taken to its logical conclusion, this description has a certain ramification: the CESCR creates two categories of state obligations, one of which is core obligations, which correspond to the minimum core content of a right. If core obligations are non-derogable, the corresponding minimum core rights are also non-derogable. The other category relates to the remainder of state obligations. One may call these non-core obligations, although the CESCR does not use these terms. There are aspects of a right that correspond to these non-core obligations, which one could call the peripheral content of a right. Qualifying core obligations as non-derogable implies that non-core obligations and the corresponding peripheral content of a right are derogable. There is no point of qualifying core obligations as non-derogable unless one wants to distinguish them from derogable obligations. As a

[142] CESCR, Concluding observations on Ukraine, E/C.12/UKR/CO/6, 13 June 2014, para 15. Italics added. See Concluding Observations on India, E/C.12/IND/CO/5, 8 August 2008, paras 20 & 45.

[143] General Comment 14, para 47. See General Comment 15, para 40.

[144] Statement on Available Resources, para 6. See Statement on Refugees, para 10; General Comment 19, para 60; General comment 17, para 41; General Comment 15, para 6; General Comment 3, para 10.

[145] CESCR, 'Substantive Issues Arising in the Implementation of the International Covenant on Economic, Social and Cultural Rights: Poverty and the International Covenant on Economic, Social and Cultural Rights', Statement adopted on 4 May 2001, E/C.12/2001/10, 10 May 2001, para 17.

[146] Statement on Refugees, para 9. See General Comment 14, para 47; General Comment 15, para 40.

result, all rights under the ICESCR have derogable and non-derogable aspects. Both derogability and non-derogability run through the ICESCR, since the CESCR identifies core obligations for almost all rights under the ICESCR. However, this does not sit well with the conventional concept of derogation and its place under the ICESCR.

The ICESCR does not contain a derogation clause, a provision that allows states to suspend rights guaranteed by a treaty during a state of emergency.[147] In contrast, the International Covenant on Civil and Political Rights provides for a derogation clause.[148] It permits states to suspend the enjoyment of some of the rights it guarantees. These are derogable rights. It clearly prohibits derogation from some provisions that guarantees rights such as the right to life.[149] These are non-derogable rights. States cannot suspend them during a state of emergency. The CESCR does not use the concept in this sense. It does not distinguish derogable rights from non-derogable ones. One may argue that it regards a single right as having both derogable and non-derogable aspects. This flows from qualifying core obligations as non-derogable.

The CESCR does not address the absence of a derogation clause from the ICESCR. The absence of such clause may mean that the ICESCR does not permit states to derogate from rights it guarantees. In other words, states cannot suspend rights guaranteed under the ICESCR during times of emergency. The purpose of the ICESCR is to ensure that a state implement the rights it guarantees. The drafters would have included any exception, as is the case with the ICCPR, if that were necessary. As Alston and Quinn convincingly argue, a combination of three factors explains the absence of a derogation clause.[150] These are the nature of the rights, the general limitation clause, and the nature of state obligations under the ICESCR.[151] Müller justifies the absence on the ground of the purpose of derogation such as the protection of public order.[152] She argues that 'it is hard to imagine a situation in which it is necessary to deny people their rights to food, health care or basic shelter in order to maintain or restore the public order'.[153] She rightly concludes that it is not necessary to suspend economic, social and cultural rights in times of emergency.[154]

From the foregoing, one may wonder whether the concept of non-derogability has any significance at all. According to Coomans, 'the qualification of core obligations as non-derogable would greatly strengthen their legal character' since they would apply under all circumstances.[155] This conclusion assumes that the nature of rights under the ICESCR, or at least core obligations corresponding to such rights, have been derogable or have some comparable nature before the CESCR introduces the qualification. However, if one acknowledges that the ICESCR rights or their corresponding obligations

[147] The ICESCR refers to the term 'derogation' under Article 5(2), which provides that: 'There shall be no restriction upon or derogation from any of the fundamental human rights recognized or existing in any State Party to the present Covenant pursuant to law, conventions, regulations or custom on the pretext that the present Covenant does not recognize such rights or that it recognizes them to a lesser extent'. This provision is not a derogation clause.

[148] ICCPR, art 4.

[149] ICCPR, art 4(2).

[150] Philip Alston & Gerard Quinn, 'The Nature and Scope of States Parties' Obligations under the International Covenant on Economic, Social and Cultural Rights' (1987) *Human Rights Quarterly* 156-229, 217.

[151] Alston & Quinn (n 150) 217

[152] Amrei Müller, 'Limitations to and Derogations from Economic, Social and Cultural Rights' (2009) 9/4 *Human Rights Law Review* 557—601, 593.

[153] Müller (n 152) 593.

[154] Müller (n 152) 593.

[155] Fons Coomans, 'The Extraterritorial Scope of the International Covenant on Economic, Social and Cultural Rights in the Work of the United Nations Committee on Economic, Social and Cultural Rights' (2011) 11/1 *Human Rights Law Review* 1—35, 23.

are non-derogable in the first place, the CESCR's qualification has no significance. It might even have a worse consequence and create a wrong perception that non-core obligations are derogable.

## 4.4 Minimum core obligations in the practice of the European Committee

The European Committee of Social Rights (European Committee) does not identify the core obligations of each right guaranteed under the European Social Charter. While it does not follow the practice of the CESCR, it sometimes refers to core obligations for a different purpose, for advancing a particular view, for example. An example is its decision in *Conference of European Churches (CEC) v The Netherlands*.[156] It has examined, among other things, an alleged violation of the right to social and medical assistance of undocumented adult migrants under Article 13(4) of the European Social Charter. The Charter limits this right to individuals, who are lawfully in the territories of states parties and who are from other states. Accordingly, the respondent State argued that it does not have an international obligation to provide social and medical assistance to adult migrants in an irregular situation.[157] The European Committee has rejected this argument. It has established that 'all persons without resources […] have a legally recognised right to the satisfaction of basic human material need (food, clothing, shelter) in situations of emergency'.[158] It has supported its argument with reference to the ICESCR and the practice of the CESCR. It observed that:

> It firstly notes in this regard that also the relevant instruments of the United Nations guarantee an adequate standard of living, that is, food, clothing and housing, to everyone without limitations based on the regularity of residency […]. The Committee secondly takes note of the so-called *core obligations* defined by the Committee on Economic, Social and Cultural Rights of the United Nations.[159]

Thus, the European Committee has established the view that undocumented adult migrants have the right to assistance in emergencies under the European Social Charter.

Moreover, the European Committee uses a couple of concepts that share some characteristics of core obligations. These are the European averages and the sufficient level of protection. The European averages relates to evaluating compliance with the right to health. The averages represent statistical mean achievements such as maternal or infant mortality rates.[160] According to Lougarre, the European Committee has established that states have 'an obligation to perform "comparably" with European averages, in the field of healthcare'.[161] Any achievement below these statistical averages does not automatically result in violation of the European Social Charter.[162] The achievement must be significantly below the European average to constitute a violation. Therefore, Lougarre argues, the European Committee draws 'a legal threshold where significantly poor results in healthcare are unacceptable, regardless of external factors such as the availability of resources within the State'.[163] This, she concludes, is in line with the minimum core approach developed by the CESCR.[164]

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[156] Complaint No. 90/2013, adopted 1 July 2014, paras 38 & 114. See *European Federation of National Organisations working with the Homeless* (FEANTSA) v The Netherlands, Complaint No. 86/2012, adopted 2 July 2014,para 32.
[157] *CEC v The Netherlands*, para 113.
[158] *CEC v The Netherlands*, para 108.
[159] *CEC v The Netherlands*, paras 113-114.
[160] Claire Lougarre 'What Does the Right to Health Mean? The Interpretation of Article 11 of the European Social Charter by the European Committee of Social Rights' (2015) 33/3 *Netherlands Quarterly of Human Rights* 326–354, 337.
[161] Lougarre (n 160) 342.
[162] Lougarre (n 160) 344.
[163] Lougarre (n 160) 345.
[164] Lougarre (n 160) 345.

The European Committee relates the sufficient level of protection to the right to social security under Article 12(3) of the European Social Charter. It has decided a series of cases against Greece alleging a violation of the right to social security due to decreases in social security benefits that followed the economic crisis in Greece.[165] It has held that:

> In general, the Committee thus concludes that the Government has not established, as is required by Article 12§3, that efforts have been made to maintain a *sufficient level of protection* for the benefit of the most vulnerable members of society, even though the effects of the adopted measures risk bringing about a large scale pauperisation of a significant segment of the population.[166]

As a result, the European Committee has found Greece in violation of the European Social Charter.[167] The reduction in itself does not constitute a violation. The European Committee emphasised that 'reductions in the benefits available in a national social security system will not automatically constitute a violation of Article 12§3'.[168] However, the reduction violates the Charter when it falls below a sufficient level of protection. This shows that the European Committee adopts the minimum core approach according to Letnar Černič.[169]

## 4.5 Minimum core obligations in the practice of the Inter-American Commission and Court

The Inter-American Commission on Human Rights and the Inter-American Court of Human Rights do not seem to follow the CESCR. However, the Inter-American Commission at times refers to core obligations in a different sense. In its guidelines on progress indicators, for example, it has identified the collection of disaggregated data as a core obligation. It has emphasised that 'the generation of information suitably disaggregated to identify […] disadvantaged sectors or groups deprived of the enjoyment of rights is not only a means to ensure the effectiveness of a public policy, but a core obligation that the State must perform in order to fulfil its duty to provide special and priority assistance to these sectors'.[170] However, the Inter-American Commission has yet to identify minimum core content or obligations for each right guaranteed under the Protocol of San Salvador. It sometimes chooses to dispose of a case on a different ground, although the parties' arguments revolve around whether measures taken by the respondent state affect the core content of a particular right. In *National Association of Ex-Employees of the Peruvian Social Security Institute et al v Peru,* the parties addressed the Inter-American Commission on the core content of the right to

[165] *Federation of employed pensioners of Greece (IKA-ETAM) v Greece*, Complaint No 76/2012, adopted 7 December 2012; *Panhellenic Federation of Public Service Pensioners (POPS) v Greece*, Complaint No 77/2012, adopted 7 December 2012; *Pensioners' Union of the Athens-Piraeus Electric Railways (ISAP) v Greece*, Complaint No 78/2012, adopted 7 December 2012; *Panhellenic Federation of pensioners of the Public Electricity Corporation (POS-DEI) v Greece*, Complaint No. 79/2012, adopted 7 December 2012; *Pensioners' Union of the Agricultural Bank of Greece (ATE) v Greece*, Complaint No. 80/2012, adopted 7 December 2012.

[166] *IKA-ETAM v Greece*, para 81; *POPS v Greece*, para 76; *ISAP v Greece*, para 76; *POS-DEI v Greece*, para 76; *ATE v Greece*, para 76. Italics added.

[167] *IKA-ETAM v Greece*, para 83; *POPS v Greece*, para 78; *ISAP v Greece*, para 78; *POS-DEI v Greece*, para 78; *ATE v Greece*, para 78.

[168] *IKA-ETAM v Greece*, para 68; *POPS v Greece*, para 63; *ISAP v Greece*, para 63; *POS-DEI v Greece*, para 63; *ATE v Greece*, para 63.

[169] Jernej Letnar Černič, 'State Obligations Concerning Socio-Economic Rights in Times of the European Financial Crisis' (2015) 11 *International Law & Management Review* 125-147, 137.

[170] Inter-American Commission on Human Rights, Guidelines for Preparation of Progress Indicators in the Area of Economic, Social and Cultural Rights (19 July 2008), OEA/Ser.L/V/II.132 Doc. 14, para 58.

social security.[171] In particular, the respondent state submitted that its pension reform 'did not entail an impairment of the core content of the right to a pension'.[172] However, the Inter-American Commission did not examine whether the core content of the right was affected.

Some commentators, however, argue that the Inter-American Commission also adopts the minimum core approach. According to Ssenyonjo, the Inter-American Commission echoes the position of the CESCR.[173] It requires members of the Organisation of American States 'to guarantee a minimum threshold' of economic, social and cultural rights regardless of their level of economic development.[174] Melish derives the minimum core from the discussion of the Inter-American Commission on the right to judicial personality (Article 3 of the American Convention) in the context of forced disappearance.[175]

The Inter-American Court does not use minimum core language either, but rather provides a more specific explanation of the minimum core concept in relation to some rights. The Court provides this explanation as part of the right to a dignified life (*vida digna*) under Article 4 of the American Convention.[176] In *Yakye Axa Indigenous Community v Paraguay*, the Court found a violation of Article 4(1) because the respondent State had failed to take measures that ensure members of the Yakye Axa indigenous community a decent life.[177] The Court held that 'detriment to the right to health, and closely tied to this, detriment to the right to food and access to clean water, have a major impact on the right to a decent existence'.[178]

In *Xákmok Kásek Indigenous Community v Paraguay*, the inter-American Court examined the provision of water, food, health and education services to determine whether there was a violation of the right to a dignified life.[179] It determined a minimum requirement of provision of water and a minimum provision of food, finding. that the water supplied by the respondent State 'amounted to no more than 2.17 liters per person per day'.[180] It explained that:

> [A]ccording to international standards, most people need a minimum of 7.5 liters per day per person to meet all their basic needs, including food and hygiene. Also according to international standards, the quality of the water must represent a tolerable level of risk. Judged by these standards, the State has not proved that it is supplying sufficient amounts of water to meet the minimum requirements'.[181]

With regard to food, the Court has ascertained that the respondent State provided approximately 0.29 kilograms of food per person per day.[182] It has held that 'the amount of food provided was insufficient to satisfy, even moderately, the basic daily dietary needs of any individual'.[183] The Court

[171] *National Association of Ex-Employees of the Peruvian Social Security Institute et al v Peru*, Case 12.670, Report No. 38/09, Admissibility and Merits of 27 March 2009, paras 3, 32 & 37.
[172] *National Association of Ex-Employees of the Peruvian Social Security Institute et al v Peru*, para 3.
[173] Ssenyonjo, Economic, Social and Cultural Rights, (n 49) 66.
[174] Ssenyonjo, Economic, Social and Cultural Rights, (n 49) 66.
[175] Tara Melish, *Protecting Economic, Social and Cultural Rights in the Inter-American Human Rights System: A Manual on Presenting Claims* (Yale Law School & CDES 2002) 237.
[176] According to Antkowiak, *vida digna* is often translated as the 'right to a dignified life' or the 'right to a dignified existence'. It is also translated as the 'right to a decent life' or 'right to a decent existence' in some judgments of the Court. See Thomas M Antkowiak, 'Rights, Resources, and Rhetoric: Indigenous Peoples and the Inter-American Court' (2013) 35/1 *University of Pennsylvania Journal of International Law* 113-187, 147, 150, 174.
[177] (Inter-American Court, 17 June 2005) para 176.
[178] *Yakye Axa Indigenous Community v Paraguay*, para 167.
[179] *Xákmok Kásek Indigenous Community v Paraguay* (Inter-American Court, 24 August 2010).
[180] *Xákmok Kásek Indigenous Community v Paraguay*, para 195.
[181] *Xákmok Kásek Indigenous Community v Paraguay*, para 195. Footnotes omitted.
[182] *Xákmok Kásek Indigenous Community v Paraguay*, para 200.
[183] *Xákmok Kásek Indigenous Community v Paraguay*, para 200.

has not determined the exact minimum kilograms of food needed by an individual in a day, but it indicated that 0.29 kilograms per person per day or anything falling below this amount is below the minimum requirement.

## 4.6 Minimum core obligations under the African Charter

The African Charter does not provide for a minimum core content of a right, nor does it provide for its corresponding minimum core obligations of states. For that matter, there is no human rights treaty that incorporates this concept. Even under the ICESCR as discussed above, a minimum core obligation is an implied duty.[184] The African Commission employs the concept of minimum core in the interpretation of the African Charter as discussed below. The Commission does not derive the concept from any provision of the Charter. One may argue that the Commission has a mandate under Articles 60 and 61 of the African Charter. Article 60 requires the Commission to draw inspiration from international human rights treaties and instruments while Article 61 requires the Commission to take into consideration legal precedents and doctrine.

On the other hand, the African Court has not yet employed the minimum core concept in its interpretation. This does not relate to the application of Articles 60 and 61 of the African Charter. Of course, these provisions refer to the African Commission since the African Court was not envisaged when the Charter was drafted. The African Court has an even wider power than the African Commission has. While the Commission's power is to draw inspiration from other treaties, the African Court can directly apply them as far as a respondent State is a party to those treaties.[185] One may argue that other factors account for the absence of the minimum core concept from the practice of the African Court. The length of the Court's experience could be one factor. The African Court is relatively young, although it has been operating for more than a decade. Another factor may relate to the types of cases that usually come to the Court: cases dealing with economic, social and cultural rights had hardly come to the African Court by March 2020.

Moreover, the African Commission and the African Court are different in terms of institutional nature. As a judicial organ, the African Court has to receive a concrete case to interpret the African Charter. Unlike quasi-judicial organs like the African Commission, it does not adopt general comments or similar documents to interpret the Charter. For this reason, it may not even adopt the minimum core or similar concepts that apply to all economic, social and cultural rights. Justice Rafâa Ben Achour stresses this point, emphasising that the African Court renders judgments on a case-by-case basis.[186] It is therefore not possible to give a definitive theoretical answer to a question whether the Court will apply a concept such as a minimum core.[187]

On the other hand, the African Commission can interpret the African Charter in advance without referring to any particular case. It does not need to wait for a case to adopt a particular interpretation. It has the mandate to lay down rules and principles under Article 45(1)(b) of the African Charter. Consequently, the African Commission has dealt with the minimum core in a range of documents including cases, principles and guidelines, declarations and resolutions. For this reason,

[184] Ben TC Warwick, 'A Hierarchy of Comfort? The CESCR's Approach to the 2008 Crisis' in Gillian MacNaughton & Diane F Frey (eds) *Economic and Social Rights in a Neoliberal World* (CUP 2018) 136.
[185] African Court Protocol, arts 3 & 7.
[186] Interview, 6 March 2018, Office of Justice Rafâa Ben Achour, African Court premises, Arusha.
[187] Interview with Justice Rafâa Ben Achour.

I begin with the evolution of the concept and discuss the minimum core in the practice of the African Commission.

### 4.6.1 Evolution of minimum core obligations in the practice of the African Commission

The African Commission introduced the concept of minimum core around a decade later than the CESCR. The CESCR introduced the concept in 1990 as discussed above, whereas the African Commission began employing the concept in 2001. The concept first appeared in its decisions on individual communications. The African Commission expressly refers to 'minimum core' or minimum obligations in *Social and Economic Rights Action Centre (SERAC) and Another v Nigeria* (*Ogoniland* case).[188] This was followed by an elaboration in other documents, namely the 2004 Pretoria Declaration on Economic, Social and Cultural Rights (Pretoria Declaration)[189] and the 2011 Principles and Guidelines on the Implementation of Economic, Social and Cultural Rights in the African Charter on Human and Peoples' Rights (Nairobi Principles). I discuss these in the following sections.

#### 4.6.1.1 Minimum obligations: The *Ogoniland* case

Yeshanew argues that the concept of minimum core is traceable in earlier decisions of the African Commission.[190] One such case is *Free Legal Assistance Group & Others v Zaire* decided in 1995.[191] In this case, the African Commission has found the respondent State in violation of the right to health under Article 16 of the African Charter because of the 'failure of the Government to provide basic services such as safe drinking water and electricity and the shortage of medicine'.[192] Here, the Commission uses the term 'basic'. According to Yeshanew, this is a reference to basic elements of economic, social and cultural rights central to the minimum core concept.[193]

The African Commission expressly introduced the concept of minimum core in its interpretation of the African Charter in the *Ogoniland* case decided in 2001.[194] In this case, the African Commission has examined alleged violations of the African Charter due to oil exploitation in areas where Ogoni people of Nigeria live. The oil development 'poisoned much of the soil and water upon which Ogoni farming and fishing depended'.[195] The case involves collusion between oil companies and State security forces, which attacked and displaced villagers, rendering thousands homeless.[196] The security forces 'destroyed crops and killed farm animals' creating a state of terror and insecurity.[197] As a result, the Ogoni people were unable to return to their fields and animals. This led to malnutrition and starvation among the Ogoni people.[198] The African Commission has examined, among other things, the rights to housing and food in this case, although the African Charter does not expressly recognise either of those rights.[199]

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[188] (2001) AHRLR 60 (ACHPR 2001).

[189] Pretoria Declaration, available at <http://www.achpr.org/files/instruments/pretoria-declaration/achpr_instr_decla_pretoria_esc_rights_2004_eng.pdf> (accessed 3 June 2018).

[190] Yeshanew, Approaches to justiciability, (n 6) 322-323.

[191] (2000) AHRLR 74 (ACHPR 1995).

[192] *Free Legal Assistance Group & Others v Zaire*, para 47.

[193] Yeshanew, Approaches to justiciability, (n 6) 321.

[194] (2001) AHRLR 60 (ACHPR 2001).

[195] *Ogoniland* case, para 9.

[196] *Ogoniland* case, paras 7 &8.

[197] *Ogoniland* case, para 9.

[198] *Ogoniland* case, para 9.

[199] *Ogoniland* case, paras 60 & 64. The African Commission derives the right to housing from other rights expressly guaranteed in the Charter, namely, the right to property (Article 14), the right to health (Article 16) and the right to

The African Commission identified 'two minimum obligations' regarding the right to housing. It emphasised that: 'At a very minimum, the right to shelter obliges the Nigerian Government not to destroy the housing of its citizens and not to obstruct efforts by individuals or communities to rebuild lost homes'.[200] The Commission held that

> [T]he Government of Nigeria has failed to fulfil these *two minimum obligations*. The government has destroyed Ogoni houses and villages and then, through its security forces, obstructed, harassed, beaten and, in some cases, shot and killed innocent citizens who have attempted to return to rebuild their ruined homes. These actions constitute massive violations of the right to shelter, in violation of Articles 14, 16, and 18(1) of the African Charter.[201]

One minimum obligation, according to the Commission, is to refrain from destroying the existing shelters. The other is to abstain from interfering with individual efforts of building shelters. Both involve acts of commission interfering with the exercise of the right to housing. In terms of the level of obligations involved, both acts are contrary to the obligation to respect. It appears that the Commission divides the obligation to respect with regard to the right to housing into two minimum obligations. In terms of terminological preference, it uses 'minimum obligations', not 'minimum core obligations'.

In the same case, the African Commission has identified 'three minimum duties' of states corresponding to the right to food:

> [T]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. […] The government's treatment of the Ogonis has violated all *three minimum duties* of the right to food. The government has destroyed food sources through its security forces and state oil company; has allowed private oil companies to destroy food sources; and, through terror, has created significant obstacles to Ogoni communities trying to feed themselves.[202]

As is the case with the right to housing, the African Commission divides the obligation to respect into two with regard to the right to food. One is violated by acts of security forces destroying food sources. The violation of the other minimum duty is due to acts of security forces preventing Ogoni people from obtaining their own food. Both acts of the security forces are acts of interference with the exercise of the right to food contrary to the respondent State's obligation to respect. The Commission identifies one more obligation, which it has not identified with respect to the right to housing: the obligation to protect. The respondent State failed to prevent third parties from interfering with the enjoyment of the right to food. In the Commission's words, the respondent 'allowed private oil companies to destroy food sources'. Regarding the choice of terminologies, the Commission appears to use 'minimum core' to refer to core content of the right to food, while it uses 'minimum duties' instead of 'minimum obligations' regarding its holding on the right to housing.

Concerning the violation of the rights to food and housing, the *Ogoniland* case does not involve a violation due to the failure to carry out the sub-obligation to provide. The violations arise from the

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protection of family (Article 18(1)). It drives the right to food from the cumulative reading of the right to life (Article 4), the right to health (Article 16) and the right to development (Article 22).

[200] *Ogoniland* case, para 61.

[201] *Ogoniland* case, para 62. Italics added.

[202] *Ogoniland* case, paras 65 & 66. Italics added.

respondent State's failure to perform its obligations to respect and protect. Thus, the Commission regards the obligations to respect and protect as minimum duties.

Surprisingly, however, the African Commission is not consistent, not even within one case. In the *Ogoniland* case, the rights to food and housing are not the only violations of economic, social and cultural rights; the Commission also found violations of the rights to health and property. It has found a violation of the right to health due to the respondent State's conduct of directly 'participating in the contamination of air, water and soil and thereby harming the health of the Ogoni population'.[203] The Commission emphasised that Article 16 of the African Charter (right to health) requires states 'to desist from directly threatening the health' of their citizens.[204] Further, it explained that the State is 'under an *obligation to respect* the [right to health] and this entails largely non-interventionist conduct from the state for example, not [...] carrying out, sponsoring or tolerating any practice, policy or legal measures violating the integrity of the individual'.[205] Although the Commission identified the obligation to respect as a minimum obligation with regard to the rights to food and housing, it does not regard the obligation to respect as a minimum obligation when it comes to the right to health. In particular, the Commission has not attempted to identify minimum obligations despite the allegation of the complainants that the respondent State had failed to discharge its 'minimum duties'.[206] Similarly, the Commission has found a violation of the right to property (Article 14 of the African Charter) due to wanton destruction of shelter.[207] As is the case with the right to housing, the destruction of shelters is contrary to the State's obligation to respect, yet the Commission does not consider this a minimum obligation.

In the *Ogoniland* case, the African Commission has adopted inconsistent approaches. In *Sudan Human Rights Organisation and Another v Sudan* decided in 2009, the African Commission has found a violation of the rights to property and health.[208] The facts of this case are similar to those in the *Ogoniland* case. The Commission found a violation of the right to property (Article 14 of the Charter) because the military forces of the respondent State and armed groups 'acting on their own, or believed to be supported by the Respondent State' destroyed the property.[209] According to the Commission, 'the Respondent State had failed to show that it refrained from the eviction, or demolition of victims' houses and other property. It did not take steps to protect the victims'.[210] With regard to the right to health, the Commission has held that 'the destruction of homes, livestock and farms as well as the poisoning of water sources, such as wells exposed the victims to serious health risks and amounts to a violation of Article 16 of the Charter'.[211] The violations of both rights are due to the failure of the respondent State to carry out its obligations to respect and protect. However, the Commission does not consider these obligations to be minimum obligations. In other words, the commission does not follow its holding in the *Ogoniland* case that the obligations to respect and protect are minimum obligations.

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[203] *Ogoniland* case, para 50.
[204] *Ogoniland* case, para 52.
[205] *Ogoniland* case, para 52. Italics added.
[206] *Ogoniland* case, para 50.
[207] *Ogoniland* case, paras 59-62.
[208] (2009) AHRLR 153 (ACHPR 2009).
[209] *Sudan Human Rights Organisation and Another v Sudan*, para 194.
[210] *Sudan Human Rights Organisation and Another v Sudan*, para 205. The Commission has not found a violation of the right to housing.
[211] *Sudan Human Rights Organisation and Another v Sudan*, para 212.

In *the Nubian Community in Kenya v the Republic of Kenya* (Nubian Community case) decided in 2015, the African Commission has found violations of Article 15 (right to work), Article 16 (right to health), and Article 17(1) (right to education).[212] The violations occurred because the respondent State subjected members of the Nubian Community to discriminatory treatment in the process of issuing identity documents, which are required in the respondent State to obtain basic services related to health, education and employment in the public service.[213] While discriminatory treatment is interference with the enjoyment of the rights contrary to the duty to respect, the African Commission has not declared that such treatment constitutes a failure to discharge core obligations. In contrast, the CESCR considers non-discrimination among core obligations as discussed above.

In the *Ogoniland* case, the African Commission does not tackle issues central to the concept of minimum core even with regard to the rights to food and housing. In principle, it has recognised the State obligation to fulfil,[214] yet it does not identify the obligation to provide minimum essential levels of the rights to food and housing. It could have stated the obligation to provide minimum essential levels of these rights as a matter of principle, but since it fails to state the principle, it is not clear whether states have minimum obligations, core or otherwise, with respect to their obligation to fulfil, especially their sub-obligation to provide. Unlike the CESCR, the Commission has limited itself to the obligations to respect and protect only. For this reason, Chirwa rightly observes that the Commission's view in the *Ogoniland* case reflects 'a misunderstanding of the concept of minimum core obligations'.[215]

#### 4.6.1.2 Core content: The Pretoria Declaration

The Pretoria Declaration on Economic, Social and Cultural Rights (Pretoria Declaration) was adopted after the African Commission's decision in the *Ogoniland* case. The Commission considers the Declaration a soft law instrument.[216] The Declaration is the outcome of a seminar that the Commission organised in Pretoria from 13 to 17 September 2004.[217] One of the objectives of the seminar was to specify the nature of state obligations in relation to economic, social and cultural rights guaranteed in the African Charter.[218] Later, the African Commission passed a resolution adopting the 'Declaration of the Pretoria Seminar on Economic, Social and Cultural Rights in Africa'.[219]

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[212] *The Nubian Community in Kenya v the Republic of Kenya,* Communication 317/2006, adopted at 17th Extraordinary Session held from 19 – 28 February 2015.

[213] *Nubian Community* case, para 168.

[214] *Ogoniland* case, para 44.

[215] Danwood Mzikenge Chirwa, 'The Promise of Recent Jurisprudence on Social Rights' in Malcolm Langford (ed), *Social Rights Jurisprudence: Emerging Trends in International and Comparative Law* (CUP 2008) 326.

[216] Pretoria Declaration, available at <http://www.achpr.org/files/instruments/pretoria-declaration/achpr_instr_decla_pretoria_esc_rights_2004_eng.pdf> (accessed 3 June 2018).

[217] Eighteenth Activity Report of the African Commission on Human and Peoples' Rights, para 39 & 48, available at <http://www.achpr.org/files/activity-reports/18/achpr36and37_actrep18_20042005_eng.pdf> (accessed on 3 June 2018). The Activity report was authorized for publication by the African Union Executive Council Decision, EX.CL/Dec. 220 (VII).

[218] Sibonile Khoza 'Promoting economic, social and cultural rights in Africa: The African Commission holds a seminar in Pretoria' (2004) 4 *African Human Rights Law Journal* 334-343, 335.

[219] Resolution on Economic, Social and Cultural Rights in Africa, ACHPR/Res.73(XXXVI)04, adopted at the 36th Ordinary Session in Dakar, Senegal, on 7 December 2004, available at http://www.achpr.org/files/sessions/36th/resolutions/73/achpr_instr_decla_pretoria_esc_rights_2004_eng.pdf (accessed on 3 June 2018).

The Pretoria Declaration specifies that 'States parties have an obligation to ensure the satisfaction of, at the very least, the minimum essential levels of each of the economic, social and cultural rights contained in the African Charter'.[220] This requirement obviously comes from the CESCR's general comment on state obligations.[221] While the Declaration uses the CESCR's definition of 'minimum core obligation', it eschews using these terms. It puts more emphasis on the content of the rights rather than on the obligations of states. Thus, it identifies the core content of each economic, social and cultural right expressly guaranteed in the African Charter.[222] It recognises that some rights such as the rights to food, housing, and social security are implied from expressly guaranteed Charter rights.[223] However, the Declaration does not specify the core content of such implied rights.

The Pretoria Declaration makes recommendations to states and other stakeholders.[224] However, it is not clear if any of these recommendations correspond to the core content of rights specified in the Declaration. For example, states should adopt national action plans for the implementation of economic, social and cultural rights.[225] According to the CESCR, adopting a national strategy or a plan of action is one of the core obligations corresponding to most rights as discussed above. Nevertheless, the Declaration does not clearly identify the adoption of a national strategy as part of the core of any right or state obligation in regard to that right.

The Pretoria Declaration focuses on the core content of rights. In contrast, the general comments of the CESCR identify core obligations instead, except with respect to the right to food.[226] A comparison of the Pretoria Declaration with the general comments of the CESCR reveals that there are some common elements. One may argue that the sources of the Pretoria Declaration include the general comments of the CESCR. For example, the Declaration provides that the right to health under Article 16 of the African Charter entails '[a]ccess to basic shelter, housing and sanitation and adequate supply of safe and potable water'.[227] This is a verbatim reproduction of one of the core obligations from the CESCR's general comment on the right to health.[228] However, the Declaration as a whole is not a mere reproduction and consolidation of the content of the CESCR's general comments in regard to core obligations. One may still submit that what the CESCR considers core obligations to a certain degree overlaps with what the African Commission considers core content, at least in the Pretoria Declaration.

In sum, the African Commission identified 'minimum obligations' or at least referred to 'minimum core' in passing in the *Ogoniland* case. However, it has not made such identification or reference in later cases where it found a violation of economic, social and cultural rights for similar reasons. Likewise, the Commission does not seem to follow its *Ogoniland* rulings in developing the Pretoria Declaration. Since the Declaration does not deal with the obligation to respect as a core content of any particular right, one may argue that the Declaration has no seeds from the *Ogoniland* case. One may also wonder whether the Declaration has influenced later developments, particularly the Nairobi Principles. The Declaration deals with core content. Some core content in the Declaration corresponds to some core obligations in the CESCR's general comments. From this perspective, one

[220] Pretoria Declaration, para 2.
[221] cf General Comment 3, para 10.
[222] Pretoria Declaration, paras 5-9 &11.
[223] Pretoria Declaration, para 10.
[224] Pretoria Declaration, para 11.
[225] Pretoria Declaration, para 11(a)(iv).
[226] General Comment 12, para 8.
[227] Pretoria Declaration, para 7.
[228] General Comment 14, para 43.

may wonder how the minimum core obligations adopted in the Nairobi Principles are related to core content of the Pretoria Declaration and to core obligations identified by the CESCR. I will discuss minimum core obligations under the Nairobi Principles and examine their relationship with other instruments below.

#### 4.6.1.3 Minimum core obligations: The Nairobi Principles

The Pretoria Declaration recommends that the African Commission elaborate 'principles and guidelines on economic, social and cultural rights and establish a working group for this purpose'.[229] According to this recommendation, the African Commission has developed the Nairobi Principles and launched them in 2011. The Nairobi Principles define the concept of minimum core obligations. Moreover, the Principles identify and list minimum core obligations corresponding to each right expressly or impliedly guaranteed in the African Charter.

As noted above, a clear relationship between the rulings in the *Ogoniland* case and the Pretoria Declaration is not apparent. On the other hand, there are elements in the Nairobi Principles that are traceable in the *Ogoniland* case as well as in the Pretoria Declaration. The *Ogoniland* case identifies minimum duties to respect and protect citizens from the destruction and/or contamination of food sources.[230] This obligation is affirmed as a minimum core obligation with regard to the right to food in the Nairobi Principles.[231] As a result, the Nairobi Principles incorporate rules laid down in the *Ogoniland* case. However, the Nairobi Principles diverge from the practice of the CESCR on this point. As discussed above, the CESCR does not specify the obligation to respect as a core obligation with respect to the right to food.

The Nairobi Principles also incorporate elements of the Pretoria Declaration. They emphasise that 'States parties have an obligation to ensure the satisfaction of, at the very least, the minimum essential levels of each of the economic, social and cultural rights contained in the African Charter'.[232] Some minimum core obligations under the Nairobi Principles are taken from the core content of rights identified in the Pretoria Declaration. An example is the 'immunisation against major infectious diseases'. The Nairobi Principles identify this item as one of the minimum core obligations relating to the right to health.[233] Under the Pretoria Declaration, 'immunisation against major infectious diseases' is a core content of the right to health.[234] As already noted, the Pretoria Declaration does not identify the minimum core obligations for each right.

Therefore, some elements of the Nairobi Principles are traceable in earlier documents of the Commission. Nevertheless, it is submitted that the main source of the Nairobi Principles is the general comments of the CESCR. This is clear from the numerous references in an earlier draft and the similarity of the texts. Moreover, by 2011 when the African Commission adopted the Nairobi Principles, the CESCR had already identified core obligations corresponding to most rights in the ICESCR. Thus, a comparison of minimum core obligations in the Nairobi Principles with core obligations in the general comments of the CESCR may shed light on some issues, especially on points of divergence between the CESCR and the African Commission.

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[229] Pretoria Declaration, para 11(c)(i).

[230] *Ogoniland* case, para 65-66.

[231] Nairobi Principles, para 86(b). An earlier version clear refers to para 65 of the *Ogoniland* case.

[232] Nairobi Principles, para 17. cf Pretoria Declaration, para 2.

[233] Nairobi Principles, para 67(c). cf Pretoria Declaration, para 7.

[234] Pretoria Declaration, para 7. Incidentally, this obligation was first formulated by the CESCR in its general comment on the right to health adopted in 2000. However, the CESCR does not consider it a core obligation.

Concerning the choice of terms, the African Commission identifies 'minimum core obligations' in the Nairobi Principles.[235] Unlike the Pretoria Declaration, the Nairobi Principles do not identify the content of rights. Rather, the Commission focuses on the content of obligations in the Nairobi Principles. It refers to two other related phrases. These are 'minimum core content' and 'minimum essential levels'. The Commission appears to use these phrases interchangeably. It is submitted that minimum core content or minimum essential levels of a right are achieved when a state carries out the minimum core obligations corresponding to that right. Unlike the list of minimum core obligations, the Commission does not provide a list of minimum core content or minimum essential levels.

The Commission's choice of terms can be examined from the perspective of the CESCR's practice. The CESCR has apparently shifted from minimum-core-obligation language to core-obligation language as discussed above. In contrast, the African Commission identifies and describes 'minimum core obligations'. These are summarised in Table 2. The Commission does not use the term 'core obligation'. Thus, there is a clear mismatch in the use of terms. The remainder of this section deals with meaning, content and characteristics of 'minimum core obligations' identified by the African Commission in the Nairobi Principles. I will refer to the practice of the CESCR to show points of convergence as well as points of divergence.

### 4.6.2 Meaning of minimum core obligation

The Commission defines the 'minimum core obligation' as 'the obligation of the State to ensure that no significant number of individuals is deprived of the essential elements of a particular right'.[236] This is similar with the CESCR's definition adopted in its general comment on state obligations.[237] Like the CESCR, the African Commission does not specify the exact number of persons considered to be 'significant', thus it is not easy to tell when a state fails. For example, of the estimated 108 million people in Ethiopia,[238] close to eight million people require critical humanitarian care according to an assessment of the United Nations Office for the Coordination of Humanitarian Affairs.[239] A similar estimate by the World Vision disclosed that around eight million people need food or cash assistance.[240] Are eight million people (around 7% of the population) significant in number? The Commission is not clear on how many people it considers a 'significant number of individuals'. Irrespective of the lack of clarity, defining the minimum core obligation in terms of the number of deprived is problematic. As discussed above, it does not matter whether the Commission provides the exact figure or not. In principle, it should not require the suffering of millions to constitute a violation. The failure of a state to carry out its minimum core obligations even in respect to one single individual should be considered a violation.

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[235] The African Commission used the phrase 'minimum core obligation' in an even earlier instrument. It has called on states to fulfil the 'access to medicines by adopting measures to promote, provide and facilitate access to needed medicines, including […] immediately meeting the minimum core obligations of ensuring availability and affordability to all of essential medicines'. Resolution on Access to Health and Needed Medicines in Africa, ACHPR/Res.141(XLIV)08, Abuja (Nigeria), 24 November 2008.

[236] Nairobi Principles, para 17.

[237] cf General Comment 3, para 10.

[238] July 2018 estimate. See The World Factbook: Africa: Ethiopia, at https://www.cia.gov/library/publications/the-world-factbook/geos/print_et.html.

[239] United Nations Office for the Coordination of Humanitarian Affairs, (11-25 November 2018) Issue 68 *Humanitarian Bulletin: Ethiopia* 1-4, 2.

[240] World Vision, *East Africa Hunger Crisis Situation Report: Ethiopia* (28 February 2018) 1, at https://reliefweb.int/sites/reliefweb.int/files/resources/Ethiopia_FebSitRep_final.pdf (accessed 3 December 2018).

**Table 2: Summary of minimum core obligations in the Nairobi Principles: A comparison with the ICESCR**

| No | Charter Rights | **Minimum Core Obligations** (Nairobi Principles) | **Core Obligations** (General Comments of CESCR) |
|---|---|---|---|
| 1 | Right to **Work** [Article 15] | ▪ prohibition of slavery and forced labour<br>▪ right to freedom of association<br>▪ protection against dismissal | |
| | | | ▪ access to employment<br>▪ establishing minimum wages<br>▪ prohibition of harassment<br>▪ minimum standards for conditions of work<br>▪ national strategy and plan of action<br>▪ non-discrimination and equal treatment<br>▪ combat gender discrimination |
| 2 | Right to **Health** [Article 16] | ▪ essential drugs to all<br>▪ education and access to information<br>▪ non-discrimination | ▪ essential drugs<br>▪ education and access to information<br>▪ non-discrimination |
| | | ▪ universal immunisation against major infectious diseases;<br>▪ control epidemic and endemic diseases | |
| | | | ▪ minimum essential food<br>▪ basic shelter, water and sanitation<br>▪ access to facilities, services, goods and information<br>▪ prohibition of harmful practices<br>▪ Safe abortions and post-abortion care<br>▪ essential medicines, equipment and technologies<br>▪ national strategy and plan of action<br>▪ equitable distribution<br>▪ access to effective remedies |
| 3 | Right to **Education** [Article 17(1)] | ▪ primary education for all; | ▪ primary education for all |
| | | ▪ Elimination/reduction of the costs of attending primary school | |
| | | | ▪ appropriate educational objectives<br>▪ free choice of education<br>▪ national educational strategy<br>▪ non-discrimination |
| 4 | Right to **Protection of the Family** [Article 18] | ▪ entry into marriage with consent<br>▪ abolition of laws and practices affecting the choice of a spouse<br>▪ Prohibition of child marriage | [the CESCR has not identified core obligations] |
| 5 | Right to **Housing** [Articles 14, 16 & 18(1)] | ▪ basic shelter for everybody<br>▪ protection against and refraining from forced evictions;<br>▪ ensuring security of tenure | [the CESCR has not identified core obligations] |
| 6 | Right to **Social Security** [Articles 4, 5, 6, | ▪ minimum essential level of benefits | ▪ minimum essential level of benefits |
| | | | ▪ non-interference in existing social security schemes<br>▪ taking steps to implement social security schemes |

| | | | |
|---|---|---|---|
| | 15, 16 & 18] | | ▪ national strategy and plan of action<br>▪ non-discrimination<br>▪ monitoring level of realization |
| 7 | Right to **Food** [Articles 4, 16 & 22] | ▪ mitigating and alleviating hunger | ▪ mitigating and alleviating hunger |
| | | ▪ preventing destruction of food<br>▪ avoiding destruction of food<br>▪ avoid using food as a political tool | |
| 8 | Right to **Water** and **Sanitation** Articles 4, 5, 15, 16, 22 & 24 | ▪ minimum essential amount of water<br>▪ access to water facilities/services; | ▪ minimum essential amount of water<br>▪ access to water facilities/services |
| | | ▪ avoid using water as a political tool | |
| | | | ▪ personal security while accessing water<br>▪ low-cost targeted water programmes<br>▪ access to sanitation<br>▪ national strategy and plan of action<br>▪ non-discrimination<br>▪ equitable distribution<br>▪ monitoring level of realization |

Another element of the Commission's definition is the provision of 'essential elements' of a right. These terms are slightly different from the terms 'minimum essential levels' used by the CESCR.[241] It is submitted that the Commission's definition has a wider scope. Like the CESCR's definition, 'essential elements' include the provision of minimum levels of a right. That is, a state must provide, for example, the minimum amount of food an individual needs to survive. Like the CESCR, the Commission does not set the minimum requirements of a particular right. As discussed above, it may not be easy to determine a minimum requirement given the differences among states in terms of several factors such as climate, resources and cultural attitudes.

The Commission usually frames its findings in general terms. For example, in its concluding observation on Ethiopia adopted in 2015, the Commission expressed its concern about a section of the population who 'lack access to basic amenities such as food, health care, education, housing and employment'.[242] The Commission reaches this conclusion without determining, for example, what constitutes 'basic food'. Nor does it indicate the number of people deprived of 'basic amenities'. In contrast, it must be noted, the Inter-American Court determines the minimum amount of water a person needs in a day as discussed above.[243]

Sometimes, the Commission hints at the minimum requirements. For example, in the same concluding observations on Ethiopia, it quantified the deprivation with regard to the right to work. The Commission does not require that the minimum core obligations relating to the right to work include the obligation to ensure access to employment.[244] Nevertheless, it indicated that Ethiopia's performance was not adequate because of a 'high rate of unemployment which in urban areas is officially 17.5 percent for 2011/2012'.[245] The Commission does not set an acceptable rate of unemployment by reference to what economists call a natural rate of unemployment.[246] This rate is

[241] cf General Comment 3, para 10.

[242] Concluding Observations and Recommendations on the 5th and 6th Periodic Report of the Federal Democratic Republic of Ethiopia, adopted at 18th Extra-Ordinary Session (29 July to 7 August 2015) para 34(ii).

[243] *Xákmok Kásek Indigenous Community v Paraguay* (Inter-American Court, 24 August 2010) para 195.

[244] cf General Comment 18, para 31(a).

[245] Concluding observation on Ethiopia (2015), para 34(iii).

[246] See Mark R Reiff, *On Unemployment: A Micro-Theory of Economic Justice* (Volume I, Palgrave Macmillan 2015) 29.

somewhere between three and five per cent.[247] Indeed, the unemployment of 17.5% is very high if the Commission made two assumptions: that states have the obligation to ensure access to employment; and that they must bring the unemployment rate down to its natural rate. Even in the absence of such an assumption, the Commission implies that there is a violation of the right to work under the African Charter if a state experiences an unemployment rate of 17.5% or above.

The compondent of 'essential elements' in the Commission's definition also includes items other than the provision of minimum levels. These items include minimum core obligations identified by the African Commission, which has identified minimum core obligations for almost all rights guaranteed explicitly or implicitly in the African Charter (See the summary in Table 2).[248] Under the minimum core obligations corresponding to the right to work, for example, the Commission identifies three minimum core obligations: (a) prohibition of slavery and forced labour,[249] (b) the right to freedom of association,[250] and (c) the protection against dismissal from employment.[251] The Commission considers that these obligations represent 'essential elements' of the right to work. However, the essential nature of some of the elements identified by the Commission is questionable (I will return to the discussion of this issue below). I begin discussing the identified elements, that is, the content of the minimum core obligations.

### 4.6.3 Content of minimum core obligation

By 'content', I mean the items or the elements identified as minimum core obligations. Since the main source of the Nairobi Principles is the general comments of the CESCR, I will discuss the content of 'minimum core obligations' identified by the African Commission with a reference to the 'core obligations' identified by the CESCR. They are summarised in Table 2. As mentioned above, the African Commission and the CESCR have the same views on some elements, but differ on others. I begin with points of convergence.

#### 4.6.3.1 Converging practice of the African Commission and the CESCR

For some rights, particularly the rights to health, education, food, social security, and to water and sanitation, the African Commission considers minimum core obligations the same elements already identified by the CESCR as core obligations. Regarding the right to health, the Commission considers that states have minimum core obligations under the African Charter to provide essential drugs and to provide education and information about health problems. It emphasises that states must ensure 'the provision of essential drugs to all those who need them, as periodically defined under the WHO Action Programme on Essential Drugs, and particularly anti-retroviral drugs'.[252] The Commission specifically requires the provision of anti-retroviral drugs although the CESCR does not mention any particular drugs.

[247] Ayele Gelan, 'Commentary: What is happening to EPRDF's developmental state?' (29 October 2018) Addis Standard, at http://addisstandard.com/commentary-what-is-happening-to-eprdfs-developmental-state/ accessed 4 December 2018.

[248] Nairobi Principles, paras 59 (a-c) (right to work), 67(a-e)(right to health), 71(a & b) (right to education), 79(a-c) (right to housing), 82(a) (right to social security), 86(a-c) (right to food), 92(a-c) (right to water and sanitation) & 95(a-c) (right to protection of the family).

[249] Nairobi Principles, para 59 (a).

[250] Nairobi Principles, para 59 (b).

[251] Nairobi Principles, para 59 (c).

[252] Nairobi Principles, para 67(b).

The African Charter guarantees an unqualified right to education.[253] The Charter does not expressly require states to provide free and compulsory primary education. In contrast, the ICESCR expressly guarantees the right to free and compulsory education.[254] On top of this express requirement, the CESCR specifies that the provision of primary education is among the core obligations.[255] In line with this practice, the African Commission considers that states have a minimum core obligation to provide primary education for all. It stresses that states must 'ensure that all children enjoy their right to free and compulsory primary education'.[256]

The African Charter does not expressly guarantee the right to food. In line with its holding in the *Ogoniland* case, the Commission derives the right to food from expressly guaranteed Charter rights.[257] The Commission confirms that 'the right to food is inherent in the Charter's protection of the rights to life, health and the right to economic, social and cultural development'.[258] In relation to the implied right to food, the Commission considers that states have a minimum core obligation to ensure 'the right of everyone to be free from hunger and to mitigate and alleviate hunger'.[259] This is in line with the practice of the CESCR.[260]

Unlike the ICESCR, the African Charter does not expressly guarantee the right to social security. The African Commission acknowledges the textual silence of the Charter. Nevertheless, it derives this right 'from a joint reading of a number of rights guaranteed under the Charter including (but not limited to) the rights to life, dignity, liberty, work, health, food, protection of the family and the right to the protection of the aged and the disabled'.[261] After deriving the right to social security from other provisions of the Charter, the Commission explains that states have a minimum core obligation to ensure 'access to a social security scheme that provides a minimum essential level of benefits'.[262] As already noted, the Commission has taken this formulation verbatim from the CESCR.[263]

The right to water and sanitation is another implied right. The African Charter does not expressly guarantee this right. The African Commission derives the right to water and sanitation from 'the rights to life, dignity, work, food, health, economic, social and cultural development and to a satisfactory environment'.[264] In line with the practice of the CESCR, the Commission explains that states have a minimum core obligation to ensure 'access to the minimum essential amount of water that is sufficient and safe for personal and domestic use, including preventing disease, together with access to adequate sanitation'.[265] States also have a minimum core obligation to ensure 'physical access to water facilities or services'.[266] Unlike the Inter-American Court, the African Commission does not define the 'minimum essential amount of water' in terms of litres or other units of measure.[267]

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[253] African Charter, art 17(1) provides that: 'Every individual shall have the right to education'.
[254] cf ICESCR, art 13(2)(a) provides that 'Primary education shall be compulsory and available free to all'.
[255] General Comment 13, para 57.
[256] Nairobi Principles, para 71 (a).
[257] *Ogoniland* case, paras 64-66.
[258] Nairobi Principles, para 83.
[259] Nairobi Principles, para 86(a).
[260] cf General Comment 12, para 6.
[261] Nairobi Principles, para 81.
[262] Nairobi Principles, para 82(a).
[263] cf General Comment 19, para 59(a).
[264] Nairobi Principles, para 87.
[265] Nairobi Principles, para 92(a). cf General Comment 15, para 37(a).
[266] Nairobi Principles, para 92(b). cf General Comment 15, para 37(c).
[267] cf *Xákmok Kásek Indigenous Community v Paraguay* (Inter-American Court, 24 August 2010) para 195.

#### 4.6.3.2 Diverging practice of the African Commission and the CESCR

The African Commission differs from the CESCR on many elements. As indicated in Table 2, one identifies more points of divergence than points of convergence. For some rights, the Commission omits some elements from core obligations identified by the CESCR. For other rights, the Commission adds elements, which are not considered core obligation according to the practice of the CESCR. The major area of omission relates to cross-cutting obligations. These are obligations that are relevant to all rights. As discussed above (sections 4.3.2.1 to 4.3.2.4), the CESCR considers that some core obligations (ie, the obligations to adopt a national strategy, to prohibit discrimination and inequitable distribution, to provide remedies, and to monitor the implementation of rights) are applicable to most rights. For the Commission, however, these are not minimum core obligations.[268] The Commission still emphasises the importance of these cross-cutting obligations: it requires states to devise and periodically review national plans and policies for each protected right 'on the basis of a participatory and transparent process';[269] it relates the obligation of adopting national plans and policies to the obligation of monitoring the implementation of rights, explaining that the 'plans and policies should include information on indicators, time-frames and benchmarks, by which progress can be closely monitored';[270] it underlines that states have the obligation to provide effective domestic remedies which include establishing legal aid schemes for vulnerable and marginalised groups;[271] and it stresses that 'any discrimination against individuals in their access to or enjoyment of economic, social and cultural rights on any of the prohibited grounds is a violation of the African Charter'.[272]

Another omission relates to elements of core obligations corresponding to each right. The African Commission drops some elements from the CESCR's list of core obligations. For example, The CESCR considers that the obligations to ensure access to the minimum essential food and 'to basic shelter, housing and sanitation, and an adequate supply of safe and potable water' are core obligations with respect to the right to health.[273] These are also part of the core content of the same right in the Pretoria Declaration.[274] In the Nairobi Principles, however, these obligations are not among the minimum core obligations. By omitting these core obligations, the Commission at times gives the impression that 'minimum core obligation' and 'core obligation' do not mean the same thing. The obligations corresponding to the right to social security may illustrate this point.

The CESCR identifies six core obligations with respect to the right to social security.[275] The African Commission reproduces only one of these six obligations in the Nairobi Principles. This is shortened in Table 2 as the obligation to provide a 'minimum essential level of benefits'. The Commission reproduces this obligation verbatim from the general comment of the CESCR.[276] It emphasises that states have a minimum core obligation to ensure 'access to a social security scheme that provides a

[268] An exception is non-discrimination in relation to the right to health. cf Nairobi Principles, para 67(a) & General Comment 14, para 43(a). The Commission makes a verbatim reproduction of the CESCR's formulation.
[269] Nairobi Principles, para 26.
[270] Nairobi Principles, para 27.
[271] Nairobi Principles, paras 21-23.
[272] Nairobi Principles, para 19.
[273] General Comment 14, para 43.
[274] Pretoria Declaration, para 7.
[275] General Comment 19, para 59.
[276] General Comment 19, para 59(a) provides that a state party has a core obligation to 'ensure access to a social security scheme that provides a minimum essential level of benefits to all individuals and families that will enable them to acquire at least essential health care, basic shelter and housing, water and sanitation, foodstuffs, and the most basic forms of education'.

minimum essential level of benefits to all individuals and families that will enable them to acquire at least essential health care, basic shelter and housing, water and sanitation, foodstuffs, and the most basic forms of education'.[277] It omits the remaining five obligations. In addition, both the Commission and the CESCR recognise that there are obligations that are not core. Like the CESCR, for example, the African Commission emphasises that states have the obligation to take 'effective measures to fully realise the right of all persons to social security'.[278]

Compared to the practice of the CESCR as indicated in Table 2, one finds that three layers of state obligations would apparently emerge, although the Commission does not expressly use these layers. It appears that the inner layer is minimum core obligations (the obligation to provide a minimum essential level of benefits). The middle layer is core obligations (five core obligations identified by the CESCR but omitted by the Commission). The remaining obligations may form the outer layer (obligations that do not fall under (minimum) core obligations). In other words, the minimum core obligations identified in the Nairobi Principles are part of, but fewer than, the CESCR's core obligations. Terminologically, this reading seems to hold. Since the term 'minimum' qualifies the term 'core', a minimum core appears to be within the core or at least part of the latter. Moreover, one may wonder whether the Commission considered the African regional context. From almost all rights, the Commission omits some elements of core obligations specified by the CESCR. It is not clear whether the Commission has made the omissions because states in Africa are developing countries.

Regarding the rights to work and culture, the African Commission drops all core obligations identified by the CESCR. It specifies new minimum core obligations in relation to the right to work as indicated in Table 2. It identifies none for the right to culture. Similarly, the Commission does not specify minimum core obligations in relation to the right to property. The CESCR does not identify core obligations for the right to property either, but its reason is understandable because the ICESCR does not guarantee the right to property. That is, the Nairobi Principles do not identify corresponding minimum core obligations for all economic, social and cultural rights expressly guaranteed in the African Charter. In contrast, the Pretoria Declaration includes some core content of these rights. An example is peaceful 'enjoyment of property and protection from arbitrary eviction'.[279] Two general comments of the CESCR identify core obligations corresponding to cultural rights under Article 15 of the ICESCR.[280] The Pretoria Declaration also highlights the core content of the right to culture under Article 17 of the African Charter. Despite these precedents, the Nairobi Principles do not identify minimum core obligations corresponding to property and cultural rights. The omission raises the issue relating to the scope of application of minimum core obligations. One may argue that the concept is not applicable to all rights as adopted in the Nairobi Principles. Only some rights have corresponding minimum core obligations while others do not.

The African Commission also deviates from the practice of the CESCR by adding new elements that are not identified as core obligations by the CESCR. As indicated in Table 2, for almost all rights, the Commission specifies minimum core obligations that are not identified by the CESCR. With respect to the right to health, for example, the minimum core obligations to ensure 'universal immunisation against major infectious diseases' and to 'control epidemic and endemic diseases' are peculiar to the

[277] Nairobi Principles, para 82(a).
[278] Nairobi Principles, para 82(b). cf General Comment 19, para 4.
[279] Pretoria Declaration, para 5.
[280] General Comment 21, para 55; General Comment 17, para 39.

Nairobi Principles.[281] The CESCR recognises that states have the obligation to 'provide immunization against the major infectious diseases occurring in the community'.[282] It also recognises the obligation to 'take measures to prevent, treat and control epidemic and endemic diseases'.[283] However, the CESCR does not consider them core obligations.

The Commission does not explain why its new minimum core obligations are essential. From the identified new elements, the essential nature of the new elements is questionable. Some examples can be illustrative. Article 15 of the African Charter guarantees the right to work. In relation to this right, the African Commission explains that states have minimum core obligations to prohibit slavery and forced labour and to ensure the right to freedom of association.[284] These obligations clearly correspond to other rights guaranteed in the Charter, namely, the prohibition of slavery (Article 5) and the right to freedom of association (Article 10).

Article 5 of the Charter provides that 'All forms of exploitation and degradation of man particularly slavery [...] shall be prohibited'. The Commission has found a violation of this provision in *Malawi African Association and Others v Mauritania*.[285] It has held that 'there was a violation of Article 5 of the Charter due to practices analogous to slavery and [...] that unremunerated work is tantamount to a violation of the right to respect for the dignity inherent in the human being'.[286] Article 5 of the Charter does not expressly deal with forced labour. It can still be understood as prohibiting forced labour, particularly in light of the ICCPR, which provides that 'No one shall be required to perform forced or compulsory labour'.[287]

Article 10 of the Charter guarantees the right to freedom of association. It provides that 'Every individual shall have the right to free association'. Article 10 is brief compared to Article 22 of the ICCPR. The latter expressly states that the right to freedom of association includes 'the right to form and join trade unions'. Article 10 of the African Charter does not contain such an explicit reference. It does not contain a provision similar to Article 8 of the ICESCR, which requires states to ensure the 'right of everyone to form trade unions and join the trade union of his choice'. It is submitted that this provision includes the protection of trade union rights. This is because the right to 'form and join trade unions is merely a special case of freedom of association'.[288]

A violation of the right to dignity or a failure to prohibit slavery (Article 5) may lead to a violation of the right to work (Article 15) since human rights are interdependent. Slavery by definition nullifies the right to work because slaves have no choice to work or not to work and derive income from their labour. Similarly, a violation of the right to freedom of association, especially trade union rights, (Article 10) affects the enjoyment of the right to work (Article 15). However, such correlation does not make one right a core part of the other right. Therefore, the Commission merely duplicates rights recognised in the Charter when it identifies the obligation to prohibit slavery and forced labour and the obligation to ensure the right to freedom of association as minimum core obligations relating to the right to work.

[281] Nairobi Principles, para 67(b)&(c).
[282] General Comment 14, para 44(b).
[283] General Comment 14, para 44(c).
[284] Nairobi Principles, para 59(a).
[285] (2000) AHRLR 149 (ACHPR 2000).
[286] *Malawi African Association and Others v Mauritania*, para 135.
[287] ICCPR, art 8(3).
[288] Manfred Nowak, *UN Covenant on Civil and Political Rights: CCPR Commentary* (2nd edn NP Engel Publisher 2005) 500.

Another example is the right to food. In the Nairobi Principles, the Commission explains that states have a minimum core obligation to refrain from and 'protect against destruction and/or contamination of food sources'.[289] This obligation is traceable in the *Ogoniland* case, where the Commission has emphasised that the respondent State 'should not destroy or contaminate food sources. It should not allow private parties to destroy or contaminate food sources'.[290] In the *Ogoniland* case, the respondent State not only failed to prevent but also participated in the destruction of farmlands, crops and animals.[291] These are not only food sources. They are also subject of ownership although the Commission did not find a separate violation of Article 14 (right to property) in the *Ogoniland* case.

In the Nairobi Principles, the Commission explains that each state has an obligation to ensure peaceful enjoyment of property by protecting 'the enjoyment in all its forms, from interference by third parties as well as its own agents'.[292] If one accepts that things such as farmlands, crops and farm animals are property, the destruction of such things, whether by state agents or third parties, is an interference with the enjoyment of the right to property. Therefore, it would be a duplication of the right to property when the Commission specifies the obligation to refrain from and protect against destruction of food sources as a minimum core obligation of states in relation to the right to food.

#### 4.6.4 Characteristics of minimum core obligations

The characteristics of minimum core obligations in the Nairobi Principles and those of core obligations in the CESCR's general comments are more or less similar. Like the CESCR, the African Commission considers that minimum core obligations are immediate; that states should give them priority; and that they are not subject to suspension during a state of emergency.

In the Nairobi Principles, the African Commission explains that minimum core obligations are immediate:

> Despite the obligation to progressively realise economic, social and cultural rights, some of the obligations imposed on States parties to the African Charter are *immediate* upon ratification of the Charter. These obligations include but are not limited to […] minimum core obligations.[293]

Like the CESCR, the African Commission describes the immediate nature of the minimum core obligations in contrast to progressive realisation. This means that states should perform such obligations forthwith. The immediate nature of an obligation cannot be dissociated from the availability of resources. Obligations subject to progressive realisation are not immediate mainly because of resource scarcity. The Nairobi Principles explain that a minimum core obligation 'exists regardless of the availability of resources'.[294] However, this does not mean resources are not required to carry out these obligations. As the African Commission explains, when 'a State claims that it has failed to realise minimum essential levels of economic, social and cultural rights it must be able to show that it has allocated *all* available resources towards the realisation of these rights and particularly towards the realisation of the minimum core content'.[295] That is, the Commission requires that resources be allocated to implement minimum core obligations. Therefore, states that

[289] Nairobi Principles, para 86(b).
[290] *Ogoniland* case, para 65.
[291] *Ogoniland* case, para 9.
[292] Nairobi Principles, para 55(a).
[293] Nairobi Principles, para 16.
[294] Nairobi Principles, para 17.
[295] Nairobi Principles, para 17. Italics added.

fail to perform their minimum core obligations violate these rights irrespective of whether they have resources or not.

The African Commission further explains that when 'the State does suffer from demonstrable resource constraints, caused by whatever reason, including economic adjustment, the State should still implement measures to ensure the minimum essential levels of each right to members of vulnerable and disadvantaged groups'.[296] The Commission defines members of vulnerable and disadvantaged groups. They 'are people who have faced and/or continue to face significant impediments to their enjoyment of economic, social and cultural rights'.[297] Given the breadth of this definition, one may argue, a state facing demonstrable resource constraints does not have fewer minimum core obligations or a lighter burden of proof than other states do. This position of the African Commission is strict in contrast to that of the CESCR. The latter appears to accept justifications for failing to carry out core obligations it has identified.[298]

Priority is another characteristic of minimum core obligations. While the CESCR emphasises that core obligations should be given priority, it does not clearly identify other obligations over which core obligations have precedence as discussed above. In contrast, the African Commission is clearer in the Nairobi Principles. Even during times of demonstrable resource constraints, states should 'implement measures to ensure the minimum essential levels of each right to members of vulnerable and disadvantaged groups, particularly by prioritising them in all interventions'.[299] In other words, states should give priority to members of vulnerable groups. States should first perform minimum core obligations corresponding to the rights of members of these groups before proceeding to others. Here, it seems, individuals who are not members of vulnerable groups are assumed to have the means necessary for enjoying minimum levels of their economic, social and cultural rights.

The African Commission emphasises the priority of minimum core obligations; however, this does not mean that neglecting other obligations is tolerable. The Nairobi Principles underscore that: 'While the obligation to realise the minimum core content of the rights means that the state should prioritise the realisation of the rights for the poorest and most vulnerable in society it does not remove the obligation to progressively realise the rights for all individuals'.[300] The fact that a state party gives priority to minimum core obligations is not a defence for failing to implement progressive realisation obligations.

The African Commission considers that minimum core obligations are non-derogable.[301] In principle, this description makes them applicable at all times. That is, states cannot suspend them during a state of emergency.[302] In this regard, the Commission adopts the CESCR's description of core obligations. While there is no harm in adopting the CESCR's view, it seems that the Commission fails to consider the text of the African Charter and its own jurisprudence in adopting this view.

All rights under the African Charter are non-derogable. This point is clear from the text of the African Charter and the jurisprudence of the African Commission. The African Charter does not contain a

[296] Nairobi Principles, para 17.
[297] Nairobi Principles, para 1(e).
[298] cf Statement on Available Resources, para 6.
[299] Nairobi Principles, para 17.
[300] Nairobi Principles, para 17.
[301] Nairobi Principles, para 17.
[302] Manisuli 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—193, 152—153.

derogation clause. This is a problem in the Charter according to some commentators.[303] Ouguergouz argues that the absence of a derogation clause cannot be interpreted as a prohibition of a state from suspending rights during a state of emergency.[304] However, the African Commission has interpreted the absence of a derogation clause to mean a prohibition of derogation in a number of cases.[305] That is, all state obligations under the African Charter are non-derogable. It does not matter whether such obligations relate to economic, social and cultural rights or civil and political rights. As a result, non-derogability does not distinguish minimum core obligations from other kinds of obligations under the African Charter. Therefore, this description does not have any significance.

### 4.6.5 Minimum core obligations vis-à-vis levels of obligations

The African Commission has explained in the *Ogoniland* case that all rights under the African Charter generate obligations to respect, protect, promote and fulfil.[306] This framework of analysis is in line with the practice of the CESCR, except for the obligation to promote. According to the CESCR, the obligations to promote, facilitate, and provide are part of the obligation to fulfil.[307] In the Nairobi Principles, the African Commission does not identify minimum core obligations relating to all rights under the African Charter. It exclusively deals with economic, social and cultural rights guaranteed explicitly or implicitly under the African Charter. The minimum core obligations identified in relation to these rights can be examined from the analytical framework of the obligations to respect, protect, promote and fulfil.

The African Commission does not frame all minimum core obligations it identifies along these four levels of obligations. Yet one can find an item for each level. For example, with regard to the right to housing, the Commission follows its rulings in the *Ogoniland* case and explains that states have a minimum core obligation to '[r]efrain from and protect against forced evictions from home(s) and land, including through legislation'.[308] It makes a similar statement in relation to the right to food, declaring that states have a minimum core obligation to '[r]efrain from and protect against destruction and/or contamination of food sources'.[309] Thus, the obligation to refrain from forced eviction or destruction of food sources is an *obligation to respect* while the obligation to protect individuals against forced eviction or destruction of food sources is an *obligation to protect*.

An example of the obligation to promote is found under the right to health. The Commission explains that the minimum core obligations of the right to health include, among other things, the obligation to provide 'education and access to information concerning the main health problems in the community, including methods of preventing and controlling them'.[310] The Commission requires

[303] Laurent Sermet, 'The absence of a derogation clause from the African Charter on Human and Peoples' Rights: A critical discussion' (2007) 7/1 *African Human Rights Law Journal* 142-161, 153; Christof Heyns, 'The African regional human rights system: In need of reform?' (2001) 1 *African Human Rights Law Journal* 155-174, 161.

[304] Fatsah Ouguergouz, *The African Charter on Human and Peoples' Rights: a comprehensive agenda for human dignity and sustainable democracy in Africa* (Nijhoff 2003) 425;

[305] *Malawi African Association and Others v Mauritania* (2000) AHRLR 149 (ACHPR 2000), para 84; *Commission Nationale des Droits de l'Homme et des Libertés v Chad* (2000) AHRLR 66 (ACHPR 1995), para 21 ; *Media Rights Agenda and Others v Nigeria* (2000) AHRLR 200 (ACHPR 1998), para 67; *Constitutional Rights Project and Others v Nigeria* (2000) AHRLR 227 (ACHPR 1999), para 41; *Amnesty International and Others v Sudan* (2000) AHRLR 297 (ACHPR 1999), 42; *Article 19 v Eritrea* (2007) AHRLR 73 (ACHPR 2007), para 87; *Sudan Human Rights Organisation and Another v Sudan* (2009) AHRLR 153 (ACHPR 2009), paras 165 & 167; *Zegveld and Another v Eritrea* (2003) AHRLR 84 (ACHPR 2003), para 60.

[306] *Ogoniland* case, para 44.

[307] CESCR, General Comment 12, para 37.

[308] Nairobi Principles, para 79(a).

[309] Nairobi Principles, para 86(b).

[310] Nairobi Principles, para 67(e).

states to raise awareness. Incidentally, the Commission reproduces this formulation verbatim from the CESCR's general comment on the right to health.[311] However, the CESCR does not consider the obligation to provide education and access to information to be a core obligation in relation to the right to health. The obligation to fulfil, especially the sub-obligation to provide, is implicit in a number of minimum core obligations. For example, the Commission emphasises that states have the minimum core obligation to ensure 'at the very least basic shelter for everybody'.[312] It is not possible to ensure basic shelter for everyone unless states provide shelter for those who do not have their own means.

The minimum core obligations identified by the Commission consist of obligations to respect, protect, promote and fulfil. However, the Commission does not apply this analysis to all rights. For some rights, the Commission identifies the obligation to fulfil only. An example is the right to social security. As noted above, states have the minimum core obligation to ensure 'access to a social security scheme that provides a minimum essential level of benefits'.[313] For this right, the Commission does not identify minimum core obligations to respect and protect. For other rights, the Commission does not specify the obligation to fulfil. For example, it does not identify a minimum core obligation to fulfil in relation to the right to work. Therefore, the Commission's minimum core obligations are hotchpoth of items when considered against the framework of obligations to respect, protect, promote and fulfil.

Each right is different in nature, which may explain why minimum core obligations relating to some rights do not contain all levels of obligations. As Koch argues, 'there *are* rights which do not lend themselves easily to grading' along the respect-protect-fulfil framework.[314] She argues that it is hardly possible to identify state obligations to provide in relation to trade union rights.[315] However, the Commission's inconsistency in identifying different levels of obligations as minimum core obligations does not seem to arise from the specific nature of a particular right. In relation to the right to social security, for example, the Commission does not consider the obligation to respect among minimum core obligations – although such an obligation is identifiable. As the CESCR emphasises, states have a core obligation to 'respect existing social security schemes'.[316] Therefore, it is not clear why the Commission considers one level of obligation (eg, the obligation to respect) in relation to one right (eg, the right to food) but not in relation to other rights (eg, the right to social security) to be a minimum core obligation. Defining a minimum core obligation as inclusive of the obligations to respect and protect is self-defeating, as discussed above (Section 4.2.1). By adopting this definition, the Commission allows states to tolerate deprivation.

Another issue relates to the scope of application. Is the concept of the minimum core applicable to all rights guaranteed under the African Charter? In the Nairobi Principles, the African Commission identifies minimum core obligations corresponding to economic, social and cultural rights. It is not clear if the Commission is going to do the same for other Charter rights (ie, civil, political and group rights). If minimum core obligations include the obligations to respect and protect, it is submitted, the concept is applicable to all Charter rights. This is because all Charter rights engender the

[311] CESCR, General Comment 14, para 44(d).
[312] Nairobi Principles, para 79(c).
[313] Nairobi Principles, para 82(a).
[314] Koch (n 46) 20.
[315] Koch (n 46) 20-21.
[316] General Comment 19, para 59(c).

obligations to respect, protect, promote and fulfil as the Commission has held in the *Ogoniland* case.[317] Such a conclusion, however, defeats the purpose of identifying minimum core obligations.

## 4.7 Conclusion

This chapter has examined the concept of the minimum core in the literature and the practice of treaty bodies (the CESCR, the European Committee, the Inter-American Commission, the Inter-American Court and the African Commission). The concept represents irreducible minimum elements of economic social and cultural rights, which are minimum essential levels or minimum core content of rights. The obligations of states to ensure the minimum core content of a right are minimum core obligations. These obligations exist irrespective of resource availability. In practice, the CESCR and the African Commission have adopted the concept of the minimum core. The CESCR was the first to introduce the concept into its practice. The African Commission followed in the CESCR's footsteps a decade later, however, they differ on the content and characteristics of state obligations.

The CESCR identifies core obligations for almost all rights under the ICESCR. The core obligations relate to different rights, but have some elements common to core obligations corresponding to two or more rights. These include the obligations to adopt a national strategy, to ensure access to goods and services on a non-discriminatory basis, to monitor the realisation of the rights and to ensure access to remedies. It is not clear why these obligations are core with respect to some rights but not with respect to others. The CESCR does not expressly relate core obligations to members of vulnerable groups, although it does require that attention be paid to them. It requires that states discharge core obligations as a matter of priority. However, the point that core obligations have priority over other obligations does not strongly come out from the CESCR's practice. The CESCR states that core obligations are of immediate effect. This effect seems to disappear when one considers that the CESCR accepts the justification of resource scarcity. Therefore, the characteristics and implications of core obligations have been watered down in the practice of the CESCR.

Both the CESCR and the African Commission define minimum core obligations in terms of the number of individuals deprived of a minimum core content of each economic, social and cultural right. Both are yet to determine the number of individuals considered to be significant in concrete terms. This element of the definition gives the wrong perception, an implied approval of trampling some people's rights if they are insignificant in number. Both the CESCR and the African Commission are yet to determine the minimum core content of each right in the way they determined (minimum) core obligations.

The practice of the African Commission challenges the assumed universal content of rights. The Commission provides content, which is, at least in part, different from that identified by the CESCR. The African regional context may justify such differences. However, this justification would not be convincing since the national context in each state would have justified different minimum core obligations. The Commission clearly specifies that states should give priority to members of vulnerable groups. In addition, it does not accept any justification for a failure to carry out minimum core obligations. Therefore, the African Commission has adopted a stricter view of state obligations than the CESCR has developed.

The African Commission has transplanted the concept of minimum core into the African Charter from the practice of the CESCR, making some changes in the process. It is not clear whether the changes

[317] *Ogoniland* case, para 44.

are intentional and necessary due to the textual requirements of the African Charter or the reality in African countries, because the Commission does not give any explanation. Whichever change is made to the concept, the implication is clear: Economic, social and cultural rights do not have the same normative content under the ICESCR and the African Charter so far as the minimum core obligations clarify the normative content of rights. The changes are numerous, including terminological ones.

The major change relates to the content. The Commission's minimum core obligations at times differ from the CESCR's core obligations in relation to a single right. Of course, the practice of both organs converges when the Commission takes items from the practice of the CESCR. The divergence occurs when the Commission leaves out items from the CESCR's core obligations or when it identifies its own minimum core obligations. The Commission sometimes specifies other rights guaranteed in the African Charter as minimum core obligations, which is a mere duplication. In cases of duplication, the identification of minimum core obligations is not helpful to states and complainants because the duplication does not add clarity to the rights under the African Charter or to their corresponding state obligations.

The divergence of interpretation has a serious consequence for different stakeholders, including the complainants, states and treaty bodies. The Commission's interpretation may encourage forum shopping by the complainants. Almost all states parties to the African Charter are also parties to the ICESCR.[318] It is submitted that states naturally tend to choose the less onerous interpretation if one right has different content under the ICESCR and the African Charter. The judicial organs such as the African Court have jurisdiction over both the African Charter and the ICESCR.[319] The Commission's interpretation puts the African Court in a difficult position. The African Court has to choose either the CESCR's core obligations or the Commission's minimum core obligations to the extent they are different. The Court usually follows the Commission's interpretation. Still, nothing prohibits the Court from developing its own interpretation, which can be different from the Commission's or the CESCR's interpretations.

[318] The exceptions are Botswana, Comoros, Mozambique and South Sudan. See https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg_no=IV-3&chapter=4&clang=_en (accessed 21 December 2018).

[319] African Court Protocol, arts 3 & 7.

# CHAPTER FIVE

# EQUALITY AND NON-DISCRIMINATION

## 5.1 Introduction

In the previous chapter, I discussed minimum core obligation as an exception to the concept of progressive realisation. Another exception to progressive realisation is non-discrimination. States have the obligation to ensure economic, social and cultural rights without discrimination on prohibited grounds. The prohibition of discrimination relates to the right to equality. In this chapter, I discuss equality and non-discrimination in the enjoyment of economic, social and cultural rights.

The principles of equality and non-discrimination are central to international human rights law.[1] Human rights treaties usually guarantee the enjoyment of rights they recognise without any discrimination on prohibited grounds.[2] Treaty bodies have explained and further developed these principles. The Inter-American Court of Human Rights (Inter-American Court) considers the principles of equality and non-discrimination peremptory norms (*jus cogens*).[3] According to the European Committee of Social Rights (European Committee), the principles require states to pay particular attention to vulnerable groups.[4] The Committee on Economic, Social and Cultural Rights (CESCR) has explained that the non-discrimination provision of the International Covenant on Economic, Social and Cultural Rights (ICESCR) envisages a substantive conception of equality.[5] Other treaty bodies also distinguish a formal from a substantive conception of equality in line with scholarly writings and theories.[6] Scholars, however, do not agree on a single meaning of equality: equality is a contested concept that 'has been given all forms of meanings and characteristics'.[7] Some of the concerns of a substantive conception of equality overlap with state obligations to implement economic, social and cultural rights.[8] Examining relevant aspects of substantive equality theories, the second section of this chapter argues that addressing the plight of vulnerable groups is common to the requirements of ensuring substantive equality and implementing economic, social and cultural rights. The section

[1] The principle constitutes one of the rules of customary international law. See Malcolm N Shaw *International Law* (CUP 2008) 275.

[2] International Covenant on Economic, Social and Cultural Rights, GA res. 2200A (XXI), 21 UN GAOR Supp. (No. 16) at 49, UN Doc. A/6316 (1966); 993 UNTS 3, Art 2(2); See Convention on the Rights of Persons with Disabilities, adopted UN Doc.A/61/611, adopted 13 December 2006, entry into force 3 May 2008, 2515 UNTS 3, Art 5; Convention on the Rights of the Child, adopted 20 November 1989, entry into force 2 September 1990, 1577 UNTS 3, Art 2(2); African Charter, Art 2; American Convention on Human Rights, adopted 21 November 1969 & entered into force 18 July 1978, OAS Treaty Series No. 36; 1144 UNTS 123, Art 1(1); [2] International Covenant on Civil and Political Rights, 999 UNTS 171, Art 2(2).

[3] *Juridical Condition and Rights of Undocumented Migrants*, Advisory Opinion OC-18/03, Inter-American Court of Human Rights, 23 September 2003, para 101.

[4] See *European Roma and Travellers Forum (ERTF) v the Czech Republic*, Complaint No. 104/2014, para 112; *European Roma Rights Centre (ERRC) v Bulgaria*, Complaint No. 46/2007, para 45; *International Federation for Human Rights (FIDH) v Ireland*, Complaint No. 110/2014, 12 May 2017, para 140.

[5] CESCR, General Comment No 20: Non-discrimination in economic, social and cultural rights (Art. 2, para. 2, of the International Covenant on Economic, Social and Cultural Rights), E/C.12/GC/20, 2 July 2009, para 7.

[6] See *Juridical Condition and Rights of Undocumented Migrants*, Advisory Opinion OC-18/03, Inter-American Court of Human Rights, 23 September 2003, paras 103 & 112.

[7] Matthew C R Craven, *The International Covenant on Economic, Social and Cultural Rights: A Perspective on its Development* (Clarendon Press 1995) 154.

[8] Sandra Fredman, 'Providing Equality: Substantive Equality and the Positive Duty to Provide' (2005) 21 *South African Journal on Human Rights* 163 – 190, 164.

examines practice under the European Social Charter, the ICESCR and the American Convention on Human Rights along with its Protocol of San Salvador. The purpose of this section is to set a general background for the remaining sections on equality and non-discrimination under the African Charter on Human and Peoples' Rights (African Charter or Charter).[9]

The African Charter guarantees economic, social and cultural rights along with civil, political and peoples' rights. States have undertaken general obligations to give effect to the rights guaranteed in the Charter.[10] The Charter does not distinguish state obligations corresponding to each category of rights. With regard to economic, social and cultural rights, the African Commission on Human and Peoples' Rights (African Commission or Commission) classifies state obligations into two: progressive and immediate obligations.[11] I have discussed progressive realisation obligations in Chapter 2. The African Commission identifies a few immediate obligations.[12] In this chapter, I will focus on only one such obligation – non-discrimination. The African Commission derives a non-discrimination obligation from the principles of equality and non-discrimination guaranteed in a number of provisions of the Charter.[13] However, the scope of these provisions and their relationship are not clear. I will discuss that issue in the third section of this chapter.

The African Commission and the African Court on Human and Peoples' Rights (African Court or Court) have interpreted the principles of equality and non-discrimination. How do the Commission and the Court define discrimination in their practice? How do they interpret prohibited grounds of discrimination? What criteria do they use to determine whether a distinction amounts to discrimination? Do they establish any relationship between the right to equality and the right to non-discrimination? The fourth section of this chapter attempts to answer these questions by the practice relating to non-discrimination and equality provisions of the Charter. The Commission is older and has more experience than the Court. For this reason, the fourth and fifth sections of this chapter focus on the practice of the Commission.

The African Commission adopts a substantive conception of equality, maintaining that the right to equality requires states to accord particular attention to members of vulnerable groups, to adopt temporary special measures in favour of them, and to modify social structures that constitute a barrier to their enjoyment of economic, social and cultural rights.[14] Who are members of vulnerable groups? What is the significance of identifying them for their enjoyment of economic, social and cultural rights? What does it mean to pay particular attention to them? What are the purposes of temporary special measures? What are the implications of modifying social structures for the enjoyment of economic, social and cultural rights by vulnerable groups? The fifth section attempts to answer these questions. I will make some concluding remarks in the sixth section.

[9] African Charter on Human and Peoples' Rights, adopted 27 June 1981 & came into force 21 October 1986, OAU Doc. CAB/LEG/67/3 rev. 5; 1520 UNTS 217; 21 ILM 58 (1982).

[10] African Charter, Art 1.

[11] African Commission, Principles and Guidelines on the Implementation of Economic, Social and Cultural Rights in the African Charter (Nairobi Principles), 2011, para 14.

[12] Immediate obligations 'include but are not limited to the obligation to take steps, the prohibition of retrogressive steps, minimum core obligations and the obligation to prevent discrimination in the enjoyment of economic, social and cultural rights'. Nairobi Principles, para 16.

[13] African Charter, Arts 2, 3, 18(3), 19 & 28.

[14] Nairobi Principles, paras 32—35.

## 5.2 General overview of substantive equality

This section discusses a substantive conception of equality as distinguished from a formal conception of equality. The section argues that prioritising vulnerable groups, adopting affirmative action (temporary special measures), and modifying social structures at the root of inequality are central to a substantive conception of equality. The section begins with the discussion of theories of equality in general and focuses on substantive equality. The section also examines the extent to which the CESCR addresses the plight of vulnerable groups, and then checks whether the practice of the European Committee, the Inter-American Commission on Human Rights, and the Inter-American Court are similar to or different from that of the CESCR.

### 5.2.1 Equality and non-discrimination: Some conceptions and theories

Defining equality is not an easy task. It is 'extraordinarily difficult to forge consensus regarding the proper definition of equality in any legal context'.[15] As Dworkin notes, '[e]quality is a contested concept: people who praise or disparage it disagree about what it is they are praising or disparaging'.[16] The concept is even dismissed as an empty idea, as Westen concludes: 'Equality will cease to mystify—and cease to skew moral and political discourse—when people come to realize that it is an empty form having no substantive content of its own'.[17] Still others emphasise that equality has more than one meaning.[18] I will focus on formal and substantive conceptions of equality.

#### 5.2.1.1 Formal equality and non-discrimination

Equality can mean 'sameness of treatment or a prohibition on discrimination'.[19] In this sense, it simply means non-discrimination.[20] Thus, non-discrimination expresses equality from the negative point of view.[21] This meaning is the most pervasive interpretation of the right to equality.[22] This understanding of equality is similar to formal equality or the principle of equal treatment.[23] Formal equality refers to a symmetrical treatment of individuals or groups in a similar situation.[24] Its articulation is traced back to Aristotle's formulation that 'things that are alike should be treated alike, while things that are unalike should be treated unalike in proportion to their unalikeness'.[25] The goal of formal equality is 'to ensure that all are treated identically'.[26] It is 'concerned with ensuring that laws or policies do not impose disadvantages on individuals by treating them according to false stereotypes associated with irrelevant personal characteristics'.[27]

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[15] Paul Stancil, 'Substantive Equality and Procedural Justice (2017) 102 *Iowa Law Review* 1633—1689, 1640.
[16] Ronald Dworkin, *Sovereign Virtue: The Theory and Practice of Equality* (Harvard University Press 2000) 2.
[17] Peter Westen, 'The Empty Idea of Equality' (1982) 95/3 *Harvard Law Review* 537 – 596, 596.
[18] Nicholas Bamforth, Maleiha Malik, Colm O'Cinneide & Geoffrey Bindman, *Discrimination Law: Theory & Context, Text and Materials* (Sweet & Maxwell 2008) 174.
[19] Martha Albertson Fineman, 'The Vulnerable Subject: Anchoring Equality in the Human Condition' (2008) 20/1 *Yale Journal of Law and Feminism* 1- 23, 3.
[20] Mark Bell, 'The Right to Equality and Non-Discrimination' in Tamara K Hervey & Jeff Kenne, *Economic and Social Rights under the EU Charter of Fundamental Rights: A Legal Perspective* (Hart Publishing 2003) 92—94.
[21] Craven (n 7) 155.
[22] Sandra Fredman, 'Substantive Equality Revisited' (2016) 14/3 *International Journal of Constitutional Law* 712–738, 716.
[23] See Fredman, Substantive Equality Revisited, (n 22) 716; Fineman, The Vulnerable Subject, (n 19) 2.
[24] Charilaos Nikolaidis, *The Right to Equality in European Human Rights Law: The Quest for Substance in the Jurisprudence of the European Courts* (Routledge 2015) 15.
[25] Aristotle*, Ethica Nicoimachea* V3 1131a-1131b (W Ross tr 1925), quoted in Westen (n 17) 543.
[26] Stancil (n 15) 1640.
[27] Bruce Ryder, Cidalia C Faria and Emily Lawrence, 'What's Law Good For? An Empirical Overview of Charter Equality Rights Decisions' (2004) 24 *Supreme Court Law Review* 104 – 136,105 – 106.

Scholars usually criticise formal equality as a limited way of achieving equality.[28] According to Fineman, a formal conception of equality is limited since this conception of equality does not prohibit discrimination on all grounds.[29] According to Fredman, it usually requires 'active engagements with the political process' to recognise a new prohibited ground of discrimination.[30] Another reason for criticising formal equality lies in the assumption that 'the same treatment is always appropriate'.[31] According to Fineman, formal equality 'fails to take into account existing inequality of circumstances'.[32] She argues that formal equality does not disturb 'existing institutional arrangements that privilege some and disadvantage others'.[33] Formal equality cannot achieve genuine equality. In addition, formal equality is also criticised for failing to address historical injustices. It is contrary to affirmative action that might generate remedies for past inequalities.[34] Finally, it would be difficult to find a breach of formal equality unless there is a perpetrator of discrimination.[35] However, forms of discrimination are 'frequently embedded in the structure of society, and cannot be attributed clearly to any one person'.[36]

Despite these criticisms, a formal conception of equality is still relevant. This conception prohibits discrimination in the enjoyment of all rights including economic, social and cultural rights. This conception, however, is not capable of addressing the most egregious deprivation of economic, social and cultural rights.

#### 5.2.1.2 Substantive equality theories

Equality theorists propose a substantive conception of equality to remedy the limitations of formal equality. There are as many versions of a substantive conception of equality out there as there are theorists. I limit my discussion to a selected few, discussing aspects of Fineman's vulnerability theory, Fredman's framework of analysis, and Parfit's priority view, which are relevant to my later analysis of the practice of human rights bodies. I begin with the vulnerability theory.

Fineman proposes vulnerability theory to analyse equality.[37] The theory replaces a liberal subject with a vulnerable subject and considers vulnerability a human condition. Vulnerability, according to the theory, is universal, not limited to individuals for belonging to a particular group for reasons of their race, colour, language, and religion or similar other characteristics.[38] Human beings are by nature vulnerable to harm, natural or artificial because 'we are born, live and die within a fragile materiality'.[39] The purpose of societal institutions is to provide protection against vulnerability. These institutions, private or public, are the creation of the state through law.[40] They provide individuals with assets to withstand vulnerability,[41] and distribute those assets.[42] The assets may take different

[28] Fineman, The Vulnerable Subject, (n 19) 2—5.
[29] Ibid 3.
[30] Fredman, Substantive Equality Revisited, (n 22) 718.
[31] Fredman, Substantive Equality Revisited, (n 22) 718.
[32] Fineman, The Vulnerable Subject, (n 19) 3.
[33] Ibid.
[34] Fineman, The Vulnerable Subject, (n 19) 4.
[35] Fredman, Substantive Equality Revisited, (n 22) 720.
[36] Ibid.
[37] Fineman, The Vulnerable Subject, (n 20).
[38] Frank Rudy Cooper, 'Always Already Suspect: Revising Vulnerability Theory' (2015) 93 *North Carolina Law Review* 1339—1379, 1371. Instead of one universal human condition, Cooper suggests that people are '*universally* vulnerable'.
[39] Fineman, The Vulnerable Subject, (n 19) 12.
[40] Ibid 8.
[41] Ibid 13.

forms: 'physical, human, social, ecological or environmental, and existential'.[43] In the distribution of the assets, individuals may find themselves in different positions: 'some are more privileged, while others are relatively disadvantaged'.[44] In this process, institutions create and replicate inequalities. The state is thus not a bystander by any means; it determines, through law, the creation and dissolution of those institutions.[45] It also shapes 'the ways in which those institutions produce and replicate inequalities'.[46] For this reason, the state should be responsive – it must ensure 'that the distribution of such assets is equitable and fair'.[47] One may read Fineman to mean that if the state fails in equitable and fair distribution of assets or resources, the result will be discrimination in the enjoyment of economic, social and cultural rights – as well as any other right, for that matter.

Fineman also addresses issues of affirmative action, arguing that affirmative action plans are 'perceived as temporary adjustments to the formal equality paradigm necessitated by past discrimination'.[48] Affirmative action plans are limited since their focus is on historic individual identity categories.[49] Rather, Fineman argues, the more complicated forms of disadvantage can be addressed by focusing on institutions.[50]

Fineman's call that the state should be responsive is central to discharging international human rights obligations, particularly with regard to obligations to protect and fulfil. Her theory examines 'the organization, operation, and outcomes of the institutions and structures through which societal resources are channelled'.[51] Again, addressing issues concerning institutions and structures is important in the implementation of economic social and cultural rights. For this reason, vulnerability theory is useful for the analysis of economic, social and cultural rights.[52] I will discuss below how human rights bodies employ the concept of vulnerability (sections 2.2 (a) and 5.1) and examine how they deal with structural barriers (sections 2.2(c) and 5.3).

Another theory of substantive equality is Fredman's framework of analysis. Fredman stipulates 'a four-dimensional framework of aims and objectives of the right to equality':[53] the distributive, recognition, participative and transformative dimensions.[54] The distributive dimension of substantive equality should aim to redress disadvantage. The recognition dimension should counter prejudice, stigma, stereotyping, humiliation and violence arising from prohibited grounds of discrimination. The participative dimension should address political and social exclusion, whereas the transformative dimension should accommodate difference and achieve structural change. When these dimensions

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[42] Ibid 256.

[43] Martha Albertson Fineman, 'The Vulnerable Subject and the Responsive State' (2010) 60 *Emory Law Journal* 251—275, 270.

[44] Fineman, The Vulnerable Subject, (n 19) 15.

[45] Fineman, The Responsive State, (n 43) 274.

[46] Ibid.

[47] Fineman, The Vulnerable Subject, (n 19) 15.

[48] Fineman, The Vulnerable Subject, (n 19) 18 (footnote 47).

[49] Ibid.

[50] Ibid.

[51] Fineman, The Responsive State, (n 43) 274.

[52] Carolina Yoko Furusho, 'Uncovering the human rights of the vulnerable subject and correlated state duties under liberalism' (2016) 5(1) *UCL Journal of Law and Jurisprudence* 175—205, 199.

[53] Fredman, Substantive Equality Revisited, (n 22) 727; Sandra Fredman 'Emerging from the Shadows: Substantive Equality and Article 14 of the European Convention on Human Rights' (2016) 16 *Human Rights Law Review* 273–301, 281—284; Sandra Fredman, 'The Potential and Limits of an Equal Rights Paradigm in Addressing Poverty' (2011) 22 *Stellenbosch Law Review* 566—590, 577; Sandra Fredman, *Human Rights Transformed: Positive Rights and Positive Duties* (Oxford University Press 2008) 179; Fredman, Providing Equality (n 8) 167.

[54] Fredman, Substantive Equality and Article 14, (n 53) 282. Cf Catharine A MacKinnon 'Substantive Equality Revisited: A Reply to Sandra Fredman' 14/3 *International Journal of Constitutional Law* 739 – 746, 741.

conflict, the aim is to look for synthesis or compromise.[55] All dimensions of Fredman's substantive equality are relevant for the analysis of economic, social and cultural rights, but I will save the issue of participation for later discussion under a separate topic, and for now, will focus on the distributive and transformative dimensions.

The distributive dimension should redress primarily socio-economic disadvantage.[56] It 'operates to address under-representation in jobs, under-payment for work of equal value, or limitations on access to credit, property, or similar resources'.[57] It should also redress other forms of disadvantage such as 'the constraints which power structures impose on individuals because of their status'.[58] A 'deprivation of genuine opportunities to pursue one's own valued choices' is also a disadvantage.[59] The distributive dimension focuses on the groups that have suffered disadvantage, such as women, ethnic minorities, black people, and disabled people, because they 'tend to be among the lowest earners, to experience the highest rates of unemployment, and to predominate among those living in poverty or social exclusion'.[60] The distributive dimension is expressly asymmetric and permits affirmative action.[61] Affirmative action advances substantive equality by taking steps to redress the disadvantage.[62] Thus, Fredman treats affirmative action as part of the distributive dimension, and also recognises that the role of affirmative action 'is limited and must not be a substitute for a more thoroughgoing and radical programme of structural change'.[63]

The transformative dimension of substantive equality requires that 'existing social structures must be changed to accommodate difference'.[64] Fredman derives this dimension from duties of accommodation in relation to religion and disability,[65] arguing that sexism, racism, and other forms of discrimination are frequently embedded in the structure of society.[66] Fredman does not define 'social structures', but does provide an example: 'working hours have always been patterned on the assumption that childcare takes place outside the labor market'.[67] In this case, changing the structure means that working hours should be changed to suit workers with family responsibilites.[68] Another example is the built environment, which should be changed to become accessible to persons with disabilities.[69] Fredman's transformative dimension, it is submitted, is similar to Fineman's emphasis on institutions, defined as 'the structures and arrangements that can almost invisibly produce or exacerbate existing inequality'.[70]

Finally, Prioritarianism, or the priority view, is another theory worth considering. The priority view holds that '[b]enefiting people matters more the worse off these people are'.[71] This holds when

[55] Fredman, Substantive Equality Revisited, (n 22) 728.
[56] Ibid 729.
[57] Ibid.
[58] Ibid.
[59] Ibid.
[60] Ibid 728—729.
[61] Ibid.
[62] Ibid 729.
[63] Sandra Fredman, 'Affirmative Action and the European Court of Justice: A Critical Analysis' in Jo Shaw (ed) *Social Law and Policy in an Evolving European Union* (Hart Publishing 2000) 172.
[64] Fredman, Substantive Equality Revisited, (n 22) 733.
[65] Ibid 727.
[66] Ibid 720.
[67] Ibid 733.
[68] Ibid.
[69] Ibid.
[70] Fineman, The Vulnerable Subject, (n 19) 21.
[71] Derek Parfit, 'Equality and Priority' (1997) 10 *Ratio* 202—221, 213.

those who are worse off are not 'substantially responsible for their condition in virtue of their prior conduct'.[72] The priority view is 'concerned only with people's absolute levels'.[73] It is not concerned with 'how each person's level compares with the level of other people'.[74] At times, equality could mean giving priority to the disadvantaged. In such cases, equality is used in a rhetorical sense and is 'relevant to the distribution of goods'.[75] Wesson, it seems, employs this sense of equality when he argues that the notion of prioritising worse-off groups is a key feature of substantive equality.[76] This prioritization, he argues, is central to the enforcement of social rights.[77] Affirmative action policies, one may submit, can be an example of the priority view. This is because such policies accord preferences to one group over another.[78] Fredman argues that the distributive dimension of substantive equality is compatible with a prioritarian theory.[79] I will examine, later in this chapter, whether the human rights bodies under consideration understand equality in a sense that includes priority (sections 2.2 and 5.2).

#### 5.2.1.3 Substantive equality and economic, social and cultural rights

Commentators attempt to connect a substantive conception of equality with economic, social and cultural rights in jurisdictions such as South Africa, where the Constitution guarantees economic, social and cultural rights. Fredman argues that they raise overlapping concerns.[80] She distinguishes their applicability, though. She explains that socio-economic disadvantage per se should be addressed by social rights such as the right to social security. However, when such disadvantage is associated with 'stigma, lack of voice, or structural factors which lock individuals and their families into a cycle of disadvantage,' the right to equality applies.[81] Fredman does not discuss the cause of socio-economic disadvantage. However, if one takes the view that the state creates the socio-economic disadvantage through its laws and institutions,[82] it would be difficult to see the distinctions Fredman makes. This is because, one may submit, socio-economic disadvantage arises from structural factors.

Wesson argues that economic, social and cultural rights expand the purview of a substantive conception of equality by extending 'principles of substantive equality to the fields of poverty and welfare'.[83] Substantive equality does not reach these areas on the basis of discrimination law alone. Courts do not have sufficient legitimacy to expand substantive equality in the absence of an express mandate. Therefore, he concludes, the added value of economic, social and cultural rights 'lies partly in the fact that they *authorise* the extension of principles of substantive equality to areas' of poverty

[72] Richard J Arneson, 'Luck Egalitarianism and Prioritarianism' (2000) 110(2) *Ethics: An International Journal of Social, Political, and Legal Philosophy* 339—349, 340.
[73] Parfit (n 71) 214.
[74] Ibid.
[75] Bamforth et al (n 18) 182.
[76] Murray Wesson, 'Equality and social rights: an exploration in light of the South African Constitution' (2007) *Public Law* 748—769, 756.
[77] Ibid.
[78] See George Gerapetritis, *Affirmative Action Policies and Judicial Review Worldwide* (Springer 2016).
[79] Ibid.
[80] Fredman, Providing Equality, (n 8) 164.
[81] Fredman, Substantive Equality Revisited, (n 22) 735.
[82] See Dworkin, Sovereign Virtue (n 17); Fineman, The Vulnerable Subject, (n 20).
[83] Wesson (n 76) 749.

and welfare.[84] Bilchitz, however, dismisses the interpretation of economic, social and cultural rights on the basis of equality as a conflation of issues of scope with issues of contents.[85]

Wesson examines the added value of economic, social and cultural rights to principles of substantive equality. For an international treaty such as the ICESCR, which guarantees economic, social and cultural rights only, a different question should be asked. What is the added value of a substantive conception of equality to the interpretation of economic, social and cultural rights? Before answering this question, it will be useful to examine the similarities and differences between a substantive conception of equality and economic, social and cultural rights.

Both substantive equality and economic, social and cultural rights address issues of the distribution of resources. Both require positive actions. This, it is submitted, does not imply that they are one and the same thing. A couple of imaginary scenarios may clarify their differences. If everyone in a particular state has an equal amount of resources, the issue of inequality does not arise. However, equality in the distribution of resources does not automatically translate into the full realisation of economic, social and cultural rights. Even if everyone in this imaginary State has sufficient means to enjoy the basic requirements of these rights, the State still has the obligation to make improvements according to the principle of progressive realisation. This State does not have any obligation with regard to achieving substantive equality as long as the equal distribution of resources does not change. One may assume the State met its obligation with regard to economic, social and cultural rights apart from the obligation to make progress. Certainly, this imaginary State is rich. This by itself does not mean that this State has achieved substantive equality – it is still possible that the distribution of wealth is unequal along racial, religious and other lines.

The realisation of economic, social and cultural rights and the achievement of substantive equality share a similar concern, which is the distribution of resources. However, it is submitted that their focus is different. A substantive equality approach focuses on the structural factors that give rise to inequalities in the first place. At least some theories of substantive equality identify the state as a culprit that creates and maintains structures and institutions that result in the unequal distribution of resources. This approach, however, does not identify specific state obligations when it comes to the provision of goods and services such as food, medicine, education and health. On the other hand, economic, social and cultural rights imply specific state obligations in the provision of goods and services. However, they do not directly require states to address structural problems – at least in theory. For example, so far as a state carries out, say, its duty to provide food, its obligations as regards the right to food do not require it to address the cause of food shortage. Nonetheless, in practice, it would be futile to talk about executing state obligations with regard to a particular right without addressing the causes of the problem.

Therefore, the added value of a substantive conception of equality lies in identifying the causes of rights deprivation. Put differently, the lack of enjoyment of economic, social and cultural rights results, at least partly, from laws and institutions in place and the way they function. This, in turn, has some advantages. First, it debunks one of the objections against the recognition of economic, social and cultural rights. The classification of these rights as human rights is sometimes questioned on the

[84] Ibid.

[85] David Bilchitz, *Poverty and Fundamental Rights: The Justification and Enforcement of Socio-Economic Rights* (Oxford University Press 2007) 167.

ground that they are provided for by others through taxation.[86] The underlying assumption of this objection is the neutrality of the laws and institutions of the state. However, the theories of substantive equality demonstrate that state laws and institutions may privilege taxpayers or the rich and disadvantage the poor. The wealth of taxpayers is not only the result of their hard work but also the production of the legal order, to use Dworkin's phrase.[87] This understanding would render the objection groundless.

Second, a substantive conception of equality can address the side effects of programmes intended for the implementation of economic, social and cultural rights. Sometimes stigma and stereotype may accompany programmes designed to implement these rights. For example, studies show that welfare recipients are characterised as lazy,[88] or as irresponsible freeloaders dependent on public welfare.[89] A proper understanding of the role of laws and institutions in the distribution of resources would eliminate the misconception that gives rise to the stigma and the stereotype.

Third, a substantive conception of equality provides stronger justification. This is because a substantive conception of equality identifies the state as part of the problem. Substantive equality emphasises that the inability to enjoy economic, social and cultural rights is not a matter of individual blameworthiness.[90] Rather, it results from 'choices about how we organise our society and economy and about deeply inscribed patterns of group discrimination'.[91] Obviously, the state determines the organisation of society and economy. States should recognise that such organisation might disadvantage some individuals. Finally, achieving substantive equality is an immediate obligation, especially in the context of the ICESCR as discussed below.

### 5.2.2 Equality and non-discrimination: A comparative view of treaty bodies' practice

The ICESCR guarantees the enjoyment of rights 'without discrimination of any kind as to race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status'.[92] The ICESCR also guarantees that women and men have the equal right to enjoy these rights.[93] The Revised European Social Charter prohibits discrimination in the exercise of the rights it guarantees.[94] The American Convention on Human Rights guarantees the right to equality before the law and equal protection of the law in addition to the general prohibition on discrimination.[95] The Protocol of San Salvador guarantees the enjoyment of rights it recognises without any discrimination.[96]

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[86] Cliff DuRand, *Human Rights Today* <http://globaljusticecenter.nationbuilder.com/human_rights> (accessed 30 August 2017).

[87] Dworkin, Sovereign Virtue, (n 16) 1.

[88] Fredman, Substantive Equality Revisited, (n 22) 737;

[89] Sandra Liebenberg and Beth Goldblatt, 'The Interrelationship between Equality and Socio-Economic Rights under South Africa's Transformative Constitution' (2007) 23 South African Journal on Human Rights 335—361, 351.

[90] Liebenberg and Goldblatt (n 89) 340.

[91] Ibid.

[92] ICESCR, Art 2(2).

[93] ICESCR, Art 3. Art 7(a)(i) requires payment of equal remuneration for work of equal value for women and men. It also requires equal pay for equal work. Art 7(c) guarantees equal opportunity in employment and promotion.

[94] European Social Charter (Revised), adopted 3 May 1996, entered into force 1 July 1999, European Treaty Series No 163, Art E.

[95] American Convention on Human Rights, adopted 21 November 1969 & entered into force 18 July 1978, OAS Treaty Series No. 36; 1144 UNTS 123; 9 ILM 99 (1969), Art 1 & 24.

[96] Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights (Protocol of San Salvador) OAS Treaty Series No. 69; 28 ILM 156 (1989), Art 3.

The ICESCR does not guarantee equality and non-discrimination as independent rights; it physically separates them from the part that guarantees substantive rights.[97] That is, a violation of equality and non-discrimination is examined only in conjunction with substantive rights.[98] In the European Social Charter, the location of the non-discrimination provision is outside the part that guarantees substantive rights.[99] For this reason, the European Committee held that the provision 'has no independent existence and has to be combined with a substantive provision of the Charter'.[100] In the American Convention on Human Rights, the non-discrimination provision (article 1(1)) is located in the section dealing with general obligations.[101] It also guarantees the right to equality (article 24), which is a substantive right in a different section. With regard to their difference, the Inter-American Court held that the non-discrimination provision applies in conjunction with substantive rights when the alleged discrimination relates to the rights guaranteed in the Convention, while the right to equality applies when the alleged discrimination relates to domestic law or its application.[102]

Non-discrimination provisions impose an immediate obligation on states. Under the ICESCR, the states have undertaken 'to guarantee that the rights enunciated in the present Covenant will be exercised without discrimination of any kind'.[103] The ICESCR uses the term 'guarantee' to convey that the state obligation under this provision is immediate.[104] The physical separation of the non-discrimination obligation (article 2(2)) from the obligation of progressive realisation (article 2(1)) buttresses this view.[105] The drafting history of the ICESCR shows that the drafters intended an immediate obligation under article 2(2).[106] In most of its general comments, the CESCR has identified non-discrimination as one of the immediate obligations under the ICESCR.[107] It also explained that the 'equal right of men and women to the enjoyment of economic, social and cultural rights is a mandatory and immediate obligation of States parties'.[108] The text and drafting history of the ICESCR are not clear on whether non-discrimination requires the achievement of substantive equality. The CESCR has cleared the doubt by explaining that article 2(2) envisages substantive equality.[109]

#### 5.2.2.1 Definition and forms of discrimination

The ICESCR, the European Social Charter, and the American Convention on Human Rights do not define the term 'discrimination', unlike other treaties such as the International Convention on the

[97] Art 2(2) and Art 3 are in part II while substantive rights are in part III (Arts 6—15).
[98] See *López Rodríguez v Spain*, Communication No. 1/2013, CESCR views adopted 4 March 2016, paras 14.1 – 14.9.
[99] Substantive rights are in part II while the non-discrimination provision is in part V.
[100] *Syndicat des Agrégés de l'Enseignement Supérieur (SAGES) v France*, Complaint No. 26/2004, Decision on the merits of European Social Committee of 15 June 2005, para 34.
[101] Art 1(1), the non-discrimination provision is in chapter I while the right to equality
[102] *Case of the Afro-Descendant Communities Displaced from the Cacarica River Basin (Operation Genesis) v Colombia,* Judgment of 20 November 2013, para 333.
[103] ICESCR, Art 2(2). Italics added.
[104] Manisuli Ssenyonjo, *Economic, Social and Cultural Rights in International Law* (Hart Publishing 2009) 86.
[105] Craven (n 7) 181.
[106] Yvonne Klerk, 'Working Paper on Article 2(2) and Article 3 of the International Covenant on Economic, Social and Cultural Rights' (1987) *Human Rights Quarterly* 250—273, 260—261.
[107] General Comment 3, para. 1; General Comment 11, para 10; General Comment 13, paras 31 & 43; General Comment 14, para 30; General Comment 15, para 17; General Comment 16, paras 16 & 40; General Comment 18, paras 19 & 33; General Comment 19, para 40; General Comment 20, para 7; General Comment 21, para 40; General Comment 22, para 34; General Comment 23, para 53; General Comment 24, para 17.
[108] General Comment 16, para 16.
[109] General Comment 20, para 8(b).

Elimination of All Forms of Racial Discrimination (CERD).[110] Referring to definitions from other treaties and treaty bodies, the CESCR has provided that:

> [Discrimination means] any distinction, exclusion, restriction or preference or other differential treatment that is directly or indirectly based on the prohibited grounds of discrimination and which has the intention or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of Covenant rights.[111]

The definitions of discrimination by the European Committee and the Inter-American Court contain fewer details than that of the CESCR. The Inter-American Court defines discrimination as 'any exclusion, restriction or privilege that is not objective and reasonable, and which adversely affects human rights'.[112] In *CFDT v France*, the European Committee held that '[t]he notion of discrimination within the meaning of Article E includes, in general, cases where a person or group is treated, without proper justification, less favourably than another'.[113]

Identifying forms of discrimination adds some clarity to the definition. The treaty bodies identify other forms of discrimination with qualifiers such as direct, indirect, multiple, intersectional, systemic, formal and substantive discrimination. Direct discrimination is overt because it involves a differential treatment based on a prohibited ground. It 'occurs when an individual is treated less favourably than another person in a similar situation for a reason related to a prohibited ground'.[114] In contrast, indirect discrimination is covert in the sense that 'laws, policies or practices which appear neutral at face value' disproportionately impact the enjoyment of rights by individuals or groups based on prohibited grounds.[115] According to the European Committee, 'indirect discrimination may arise by failing to take due and positive account of all relevant differences or by failing to take adequate steps to ensure that the rights and collective advantages that are open to all are genuinely accessible by and to all'.[116]

Systemic discrimination refers to 'legal rules, policies, practices or predominant cultural attitudes in either the public or private sector which create relative disadvantages for some groups, and privileges for other groups'.[117] When discrimination involves differential treatment based on two or

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[110] International Convention on the Elimination of All Forms of Racial Discrimination (CERD), adopted 21 December 1965, entry into force 4 January 1969, 660 UNTS 195, Art 1(1); See Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), adopted 18 December 1979, entry into force 3 September 1981, 1249 UNTS 13; 19 ILM 33 (1980), Art 1; Convention on the Rights of Persons with Disabilities, adopted 13 December 2006, entry into force 30 March 2007, 2515 UNTS 3; UN Doc. A/61/611 (2006), Art 2.

[111] CESCR, General Comment No. 20: Non-Discrimination in Economic, Social and Cultural Rights (Art. 2, para. 2, of the International Covenant on Economic, Social and Cultural Rights), para 7.

[112] *Juridical Condition and Rights of Undocumented Migrants*, Advisory Opinion Requested by the United Mexican States, OC-18/03 (17 September 2003), para 84. In *CFDT v France*, the European Committee of Social Rights held that: The notion of discrimination within the meaning of Article E includes, in general, cases where a person or group is treated, without proper justification, less favourably than another'. *Confédération Française Démocratique du Travail (CFDT) v France*, Complaint no. 50/2008, Decision of the European Committee of Social Rights (9 September 2009), para 42.

[113] *Confédération Française Démocratique du Travail (CFDT) v France*, Complaint no. 50/2008, Decision of the European Committee of Social Rights (9 September 2009), para 42.

[114] General Comment 20, para 10(a).

[115] Ibid, para 10(b); *Nadege Dorzema et al v Dominican Republic*, Judgment of the Inter-American Court of Human Rights (24 October 2012), para 235.

[116] *Autism Europe v France*, Complaint No. 13/2002, Decision on merits adopted on 4 November 2003, para 52.

[117] General Comment 20, para 12.

more grounds, it is called multiple discrimination.[118] The intersection of discrimination on two or more prohibited grounds gives rise to intersectional discrimination.[119]

Discrimination is formal when entrenched in constitutions, laws and policy documents.[120] Elimination of formal discrimination does not ensure substantive equality under article 2(2) of the ICESCR.[121] States should also address discrimination in practice (*de facto* or substantive discrimination) by 'paying sufficient attention to groups of individuals which suffer historical or persistent prejudice'.[122] To eliminate substantive discrimination, states should adopt 'special measures to attenuate or suppress conditions that perpetuate discrimination'.[123]

#### 5.2.2.2 Criteria for identifying discrimination

States usually classify and distinguish individuals. Thus, not every distinction amounts to discrimination. The CESCR evaluates differential treatment based on legitimacy of purpose, proportionality of means and aims, and objectivity and reasonability of criteria. The CESCR explained that

> Differential treatment based on prohibited grounds will be viewed as discriminatory unless the justification for differentiation is reasonable and objective. This will include an assessment as to whether the aim and effects of the measures or omissions are legitimate, compatible with the nature of the Covenant rights and solely for the purpose of promoting the general welfare in a democratic society. In addition, there must be a clear and reasonable relationship of proportionality between the aim sought to be realized and the measures or omissions and their effects.[124]

In *López Rodríguez v Spain*, the CESCR reaffirmed these criteria although it appears to omit the proportionality element.[125] The European Committee does not have to develop these criteria as the Revised Charter itself allows a differential treatment based on 'an objective and reasonable justification'.[126] However, it has added proportionality and legitimacy elements.[127] The Inter-American Court uses similar criteria to assess the appropriateness of differential treatment.[128] I discussed proportionality in Chapter 3.

#### 5.2.2.3 Convergence of substantive equality and economic, social and cultural rights

The distinction between formal and substantive discrimination is similar to the distinction between formal and substantive equality. The CESCR considers that formal (*de jure*) equality is concerned with

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[118] Ibid, para 17.
[119] Ibid, para 27.
[120] General Comment 20, para 8(a).
[121] Ibid, para 8(b).
[122] Ibid.
[123] Ibid, para 9.
[124] General Comment 20, para 13; General Comment 16, para 11.
[125] *López Rodríguez v Spain*, Communication No. 1/2013, CESCR views adopted 4 March 2016, para 14.1.
[126] European Social Charter (Revised), Art E (Appendix).
[127] *Associazione Nazionale Giudici di Pace v Italy*, Complaint No. 102/2013, Decision on the merits of 5 July 2016, para 73; *European Roma Rights Centre (ERRC) v France*, Complaint No. 51/2008, Decision on the merits of 19 October 2009, para 82; *Confédération Française Démocratique du Travail (CFDT) v France*, Complaint No. 50/2008, decision on the merits of 9 September 2009, para 38.
[128] *Expelled Dominicans and Haitians v Dominican Republic*, IACtHR Judgment of 28 August 2014, para 316; *Nadege Dorzema et al v Dominican Republic*, IACtHR 24 Judgment of October 2012, para 233; *Vélez Loor v Panama*, IACtHR Judgment of 23 November 2010, para 248; Juridical Condition and Rights of the Undocumented Migrants, IACtHR Advisory Opinion OC-18/03 of 17 September 2003, para 168.

neutral treatment by a law or policy.[129] It recognises a substantive conception of equality as concerned 'with the effects of laws, policies and practices and with ensuring that they do not maintain, but rather alleviate, the inherent disadvantage that particular groups experience'.[130] I will examine below three areas on which the requirements of a substantive conception of equality converge with state obligations corresponding to the realisation of economic, social and cultural rights. These are priority to members of vulnerable groups, temporary special measures, and structural changes. I use the term 'social structures' to refer to the organisation and operation of society including legal or customary rules, institutions, practices, procedures and attitudes that cause inequality, particularly in the enjoyment of economic, social and cultural rights. By 'structural changes', I mean modification of the social structures.

**a) Identifying and prioritising vulnerable groups**

The protection of members of vulnerable[131] groups is central to the interpretation of economic, social and cultural rights. Human rights treaty bodies identify members of vulnerable groups. The purpose of distinguishing vulnerable groups from those who are not, one can argue, is to give priority to the vulnerable. I will further examine whether human rights treaty bodies adopt prioritarianism by requiring states to accord priority to vulnerable groups.

According to Fineman, vulnerability is 'universal and constant, inherent in the human condition'.[132] In practice, however, treaty bodies use a different vulnerability concept. The CESCR accords importance to the subject of vulnerability,[133] however, it does not offer a clear-cut conception or definition of vulnerability or related terminology,[134] nor does it 'provide criteria for identifying which individuals or groups qualify as vulnerable or disadvantaged in general or in specific contexts'.[135]

The CESCR does not list vulnerable groups in a particular document. It is still possible to extrapolate a non-exhaustive list of vulnerable groups from its documents. The list, for example, includes women, infants, children, adolescents, older persons, ethnic minorities, indigenous populations, impoverished segments of the population, informal workers, landless persons, non-nationals, people living in disaster-prone areas, persons with disabilities, victims of natural disasters, persons with HIV/AIDS, lesbian, gay, bisexual, transgender and intersex persons, refugees, persons with persistent medical problems and persons with albinism.[136] The European Committee and the Inter-American Commission on Human Rights recognise similar groups as vulnerable.[137] Paradoxically, vulnerability is

[129] General Comment 16, para 7.

[130] General Comment No. 16: The equal right of men and women to the enjoyment of all economic, social and cultural rights (Art. 3 of the International Covenant on Economic, Social and Cultural Rights), E/C.12/2005/4, 11 August 2005, paras 6 – 7. The CESCR uses *de facto* equality or equality in practice as synonyms of substantive equality.

[131] Treaty bodies use different terms interchangeably. For instance, the CESCR uses terms such as 'disadvantaged', 'marginalised', 'persons in precarious situations', and 'groups which suffer historical and persistent prejudice'. In this work, I use the term 'vulnerable' for the sake of consistency.

[132] Fineman, The Vulnerable Subject, (n 19) 1.

[133] Audrey R Chapman & Benjamin Carbonetti, 'Human Rights Protections for Vulnerable and Disadvantaged Groups: The Contributions of the UN Committee on Economic, Social and Cultural Rights' (2011) 33 *Human Rights Quarterly* 682–732, 723.

[134] Ibid.

[135] Ibid.

[136] General Comment 12, para 13; General Comment 14, paras 12(b) & 35; General Comment 22, para 23; Statement by the CESCR, Social protection floors: an essential element of the right to social security and of the sustainable development goals, 15 April 2015, para 8; Concluding observation on Lebanon (24 October 2016), E/C.12/LBN/CO/2, para 19.

[137] Claire Lougarre, 'Clarifying the Right to Health through Supranational Monitoring: The Highest Standard of Health Attainable' (2015) *Public Health Ethics* 1—14, 9; Inter-American Commission on Human Rights, Guidelines for

both universal and particular at the same time.[138] It is worth noting that being identified as vulnerable might put one at risk of further stigmatisation.[139]

Irrespective of its side effect, the purpose of this classification, it is submitted, is to give priority to vulnerable groups. This is prioritarianism. As discussed above, prioritarianism is one of the meanings of equality in general, particularly in philosophical discourse. The concept also conveys an aspect of the meaning of a substantive conception of equality.[140] Prioritarianism implies giving priority to the worse-off. Largely, the treaty bodies under consideration seem to adopt this view. The CESCR recognises that effective enjoyment of economic, social and cultural rights is 'often influenced by whether a person is a member of a group characterized by the prohibited grounds of discrimination'.[141] Thus, it is necessary to ensure enjoyment of these rights without discrimination. States should ensure that members of vulnerable groups have equal access to the enjoyment of economic, social and cultural rights.

Accessibility is one of the normative elements of economic, social and cultural rights. With regard to the right to adequate housing, for example, accessibility requires that housing law and policy should take into account the special needs of vulnerable groups.[142] Accessibility also requires that states should ensure enjoyment of economic, social and cultural rights by members of vulnerable groups without discrimination.[143]

However, the formal equal treatment of individuals does not guarantee that members of vulnerable groups have equal access to the enjoyment of the rights compared to other members of society who are better off.[144] Therefore, different treatment of members of vulnerable groups is necessary. Such treatment involves allocation of resources, which are scarce by nature. As a result, states should attend to the needs of members of vulnerable groups before addressing needs of other members of society. For this reason, the CESCR emphasises that eliminating substantive discrimination 'requires paying sufficient attention to groups of individuals which suffer historical or persistent prejudice'.[145] It is submitted that paying sufficient attention to vulnerable groups implies priority. That is to say, while discharging their positive obligations to protect or to fulfil, states should accord priority to members of vulnerable groups.

The priority requirement seems to emanate from another source too. In its first general comment adopted in 1989, the CESCR stressed that the implementation of the ICESCR requires that 'special attention be given to any worse-off regions or areas and to any specific groups or subgroups which appear to be particularly vulnerable or disadvantaged'.[146] This requirement applies even when states face a shortage of resources. The CESCR explained that 'even in times of severe resource constraints whether caused by a process of adjustment, of economic recession, or by other factors the vulnerable members of society can and indeed must be protected by the adoption of relatively low-

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Preparation of Progress Indicators in the Area of Economic, Social and Cultural Rights (19 July 2008), OEA/Ser.L/V/II.132 Doc. 14.

[138] Lourdes Peroni & Alexandra Timmer, 'Vulnerable groups: The promise of an emerging concept in European Human Rights Convention law' (2013) 11(4) *International Journal of Constitutional Law* 1056—1085, 1058.

[139] Ibid 1072.

[140] Wesson (n 76) 749.

[141] General Comment 20, para 8.

[142] General Comment 4, para 8(e).

[143] General Comment 15, para 12(c)(iii); General Comment 13, para 6(b); General Comment 12, para 6(b).

[144] Ibid.

[145] General Comment 20, para 8.

[146] General Comment No 1, para 3.

cost targeted programmes'.[147] In evaluating the reasonableness of the measures taken to implement economic, social and cultural rights, the CESCR examines the attention given to members of vulnerable and disadvantaged groups.[148]

States must pay special attention to members of vulnerable groups. This requirement by itself, one may argue, implies that states should give priority to the worse off. This reading is plausible because the CESCR expressly requires priority be given to members of vulnerable groups in several instances. In the general comment on the right to health, for example, the CESCR underlined that: '*Priority* in the provision of international medical aid, distribution and management of resources, such as safe and potable water, food and medical supplies, and financial aid should be given to the most vulnerable or marginalized groups of the population'.[149] The CESCR stresses this requirement in its concluding observations as well. For example, it urged Lithuania 'to ensure that its national housing policy prioritizes the needs of marginalized and vulnerable groups who lack access to adequate housing and basic facilities and amenities'.[150]

The European Committee has a similar practice of paying particular attention to members of vulnerable groups:

> In assessing whether the right to protection of health can be effectively exercised, the Committee pays particular attention to the situation of disadvantaged and vulnerable groups. Hence, it considers that any restrictions on this right must not be interpreted in such a way as to impede the effective exercise by these groups of the right to protection of health. This interpretation imposes itself because of the non-discrimination requirement.[151]

The European Committee has unequivocally explained that the requirement of paying special attention to the vulnerable groups arises from the principle of non-discrimination. It has explained this view while supervising the implementation of the right to health. It also made similar pronouncements with regard to other rights.[152]

The Inter-American Commission on Human Rights requires states to accord priority to members of vulnerable groups under the principle of equality. States should first 'ascertain which groups require priority or special assistance in the exercise of social rights'.[153] Then, they should 'adopt concrete protection measures for those groups or sectors in their plans of action'.[154] In monitoring progress in the implementation of economic, social and cultural rights, the Inter-American Commission ascertains the existence of 'priorities in resource allocation to poor or vulnerable sectors'.[155]

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[147] General Comment No 3, para 12.

[148] Statement on available resources, para 8(f).

[149] General Comments No 14, paras 40 & 65; See also General Comment 15, para 60; General Comment No 12, paras 13 & 38; Statement on available resources, para 8(f). Italics added.

[150] Concluding observations on Lithuania (24 June 2014), E/C.12/LTU/CO/2, para 17. The CESCR made similar recommendations to other countries. See Concluding observations on Kazakhstan (19—20 May 2010), E/C.12/KAZ/CO/1, para 30; Concluding observations on Chad (16 December 2009), E/C.12/TCD/CO/3, para 18.

[151] *European Roma and Travellers Forum (ERTF) v the Czech Republic*, Complaint No. 104/2014, para 112; *European Roma Rights Centre (ERRC) v Bulgaria*, Complaint No. 46/2007, para 45; *International Federation for Human Rights (FIDH) v Ireland*, Complaint No. 110/2014, 12 May 2017, para 140.

[152] *European Federation of National Organisations working with the Homeless (FEANTSA) v the Netherlands*, Complaint No. 86/2012, para 105; *European Roma Rights Centre (ERRC) v Ireland*, Complaint No. 100/2013, 1 December 2015, para 70.

[153] Inter-American Commission on Human Rights, Guidelines for Preparation of Progress Indicators in the Area of Economic, Social and Cultural Rights (19 July 2008), OEA/Ser.L/V/II.132 Doc. 14, para 55.

[154] Ibid.

[155] Ibid, para 65.

Therefore, these treaty bodies (the CESCR, the Inter-American Commission on Human Rights and the European Committee) adopt prioritarianism. This view arises from the principles of equality and non-discrimination. The link is not straightforward from the practice of the CESCR. Another reading of the CESCR's practice leads to the conclusion that the requirement of priority to the vulnerable group arises from the nature of economic, social and cultural rights. This is because the CESCR requires states to accord priority to vulnerable groups without deriving this requirement from the principles of equality and non-discrimination. As discussed above, affirmative action policies are one form of giving priority to vulnerable groups. I will now discuss affirmative action policies (temporary special measures).

**b) Temporary special measures**

Theories of a substantive conception of equality address affirmative action. According to Fredman's distributive dimension of substantive equality, affirmative action advances a substantive conception of equality.[156] The practice of treaty bodies being examined shows that they do address affirmative action also called temporary special measures.[157] I will examine this practice as to whether the principles of equality and non-discrimination allow as well as require temporary special measures. Because of its frequent use by the CESCR and the African Commission, I will use the term 'temporary special measures' (instead of the term 'affirmative action').

The CESCR defines 'temporary special measures' as steps taken 'to bring disadvantaged or marginalized persons or groups of persons to the same substantive level as others'.[158] It clarifies some important points about these measures. First, the CESCR has addressed one of the limitations of formal equality. As discussed above, some reject temporary special measures, arguing that they are contrary to equality,[159] but the CESCR dispelled this concern. It explained that temporary special measures are not contrary to the principle of equality, highlighting the idea that the 'adoption of temporary special measures intended to bring about de facto equality for men and women and for disadvantaged groups is not a violation of the right to non-discrimination'.[160] These measures are not discriminatory because 'they are grounded in the State's obligation to eliminate disadvantage caused by past and current discriminatory laws, traditions and practices'.[161] Therefore, the principle of equality allows temporary special measures.

Second, the CESCR explained that the principles of equality and non-discrimination require states to adopt temporary special measures. It emphasised that '[t]emporary special measures may sometimes be needed in order to bring disadvantaged or marginalized persons or groups of persons to the same substantive level as others'.[162] In line with one of Fredman's dimensions of substantive equality, the CESCR places addressing disadvantage (whether past, present or future) at the core of

[156] Fredman, Substantive Equality Revisited, (n 22) 728.

[157] Treaty bodies interchangeably use 'affirmative action' and 'temporary special measures' (or simply special measures). The CESCR mostly uses 'temporary special measures'. It occasionally uses 'affirmative action' or the combination of the two phrases, i.e., 'affirmative measures'. The CESCR uses the latter terms in General Comment 22, paras 48 & 63. See *Expelled Dominicans and Haitians v Dominican Republic*, Judgment of the Inter-American Court of Human Rights (28 August 2014), para 264.

[158] General Comment 16, para 15; General Comment 20, para 38.

[159] Fineman, The Vulnerable Subject, (n 19) 4.

[160] General Comment 13, para 32; General Comment 17, para 21.

[161] General Comment 16, para 36.

[162] General Comment 16, para 15.

its conception of substantive equality. It does not identify different forms of disadvantage, although disadvantage may take different forms, including stigma, prejudice, stereotyping and exclusion.[163]

The CESCR particularly emphasises the need to achieve substantive equality between women and men in the enjoyment of economic, social and cultural rights. It stated that '[t]emporary special measures aim at realizing not only de jure or formal equality, but also de facto or substantive equality for men and women'.[164] Temporary special measures fall under the state obligation to fulfil.[165] In its concluding observations, it frequently draws states' attention to the achievement of substantive equality between women and men in the enjoyment of economic, social and cultural rights. With regard to Canada, for example, the CESCR identified that women are overrepresented in part-time work and in low-paid sectors due to their primary role as caregivers in the family.[166] This fact is 'perpetuating the gender segregation in the workplace and the gender wage gap'.[167] The CESCR includes temporary special measures such as quota among its recommendations for addressing the problem.[168]

The CESCR also calls on states to adopt temporary special measures in favour of other vulnerable groups. With regard to the Lebanon, for example, the CESCR condemned the discrimination against 'marginalized groups such as persons with disabilities, persons living with HIV, lesbian, gay, bisexual, transgender and intersex persons and refugees' and recommended the adoption of a comprehensive legislative framework that provides for temporary special measures.[169]

Third, the CESCR requires that temporary special measures be legitimate. It stipulates criteria for evaluating the legitimacy of the measures, stating that such 'measures are legitimate to the extent that they represent reasonable, objective and proportional means to redress de facto discrimination and are discontinued when substantive equality has been sustainably achieved'.[170] Some of these criteria are similar to those adopted to evaluate whether a particular distinction, usually based on prohibited grounds, amounts to discrimination.

As one of the legitimacy criteria, the CESCR requires that temporary special measures should not be in place for an indefinite period; as the name indicates, such measures 'should be distinguished from permanent policies and strategies undertaken to achieve equality'[171] and states should discontinue

[163] MacKinnon, *A reply* (n 54) 740 & 743.

[164] General Comment 16, para 15.

[165] General Comment 16, para 21.

[166] Concluding observation on Canada (23 March 2016), E/C.12/CAN/CO/6, para 22. For similar findings and recommendations see Concluding observations on Poland (26 October 2016), E/C.12/POL/CO/6, para 14; Sweden (14 July 2016), E/C.12/SWE/CO/6, paras 25 & 26; The Gambia (20 March 2015), E/C.12/GMB/CO/1, para 13; Tajikistan (25 March 2015), E/C.12/TJK/CO/2-3, para 16; Mongolia (7 July 2015), E/C.12/MNG/CO/4, para 14; Greece (27 October 2015), E/C.12/GRC/CO/2, paras 15 & 16; Iraq (9 October2015), E/C.12/IRQ/CO/4, para 29 & 30; Guyana (28 October 2015), E/C.12/GUY/CO/2-4, paras 26 & 27; Indonesia (19 June 2014), E/C.12/IDN/CO/1, para 14; El Salvador (19 June 2014), E/C.12/SLV/CO/3-5, para 10; Czech Republic (23 June 2014), E/C.12/CZE/CO/2, para 11; Lithuania (24 June 2014), E/C.12/LTU/CO/2, para 9; Nepal (12 December 2014), E/C.12/NPL/CO/3, para 13.

[167] Concluding observation on Canada (23 March 2016), E/C.12/CAN/CO/6, para 22.

[168] Ibid.

[169] Concluding observation on Lebanon (24 October 2016), E/C.12/LBN/CO/2, paras 18 & 19. For similar observations and recommendations see concluding observations on Sweden (14 July 2016), E/C.12/SWE/CO/6, paras 23 & 24; Sudan (9 October 2015), E/C.12/SDN/CO/2, paras 19 & 20; Burundi (9 October 2015), E/C.12/BDI/CO/1, paras 15 & 16; Indonesia (19 June 2014), E/C.12/IDN/CO/1, para 11; Iran (10 June 2013), E/C.12/IRN/CO/2, para 11; Lithuania (24 June 2014), E/C.12/LTU/CO/2, para 23; Slovenia (15 December 2014), E/C.12/SVN/CO/2, para 26; Rwanda (10 June 2013), E/C.12/RWA/CO/2-4, para 8; Yemen (22 June 2011), E/C.12/YEM/CO/2, para 8. See General Comment 13, para 32 and General Comment 17, para 21.

[170] General Comment 20, para 9.

[171] General Comment 16, para 35.

such measures when they have achieved substantive equality.[172] The CESCR warns against maintaining 'a separate system of protection for certain individuals or groups of individuals'.[173] Thus, it distinguishes temporary special measures from permanent special measures. The latter, for example, include measures 'such as interpretation services for linguistic minorities and reasonable accommodation of persons with sensory impairments in accessing health-care facilities'.[174]

Like the CESCR, the Inter-American Court considers that the principles of equality and non-discrimination imply temporary special measures.[175] It held that:

> States are obliged to take affirmative action to reverse or change discriminatory situations that exist in their societies to the detriment of a specific group of persons. This implies the special obligation to protect that the State must exercise with regard to acts and practices of third parties who, with its tolerance or acquiescence, create, maintain or promote discriminatory situations.[176]

The Inter-American Commission on Human Rights also stressed that the principles of equality and non-discrimination require that states adopt affirmative action measures and policies to ensure that vulnerable groups enjoy economic, social and cultural rights.[177]

The European Committee requires special considerations for vulnerable groups. In *ERRC v Ireland*, emphasising 'the imperative of achieving equal treatment by taking differences between individuals into account,' it held that 'special consideration should be given to the needs and different lifestyle of Travellers, which are a specific type of disadvantaged group and vulnerable minority'.[178] The Committee's formula of different treatment and special consideration of vulnerable groups, one may argue, corresponds to temporary special measures used by other treaty bodies.

Therefore, the principles of equality and non-discrimination entail temporary special measures according to the practice of treaty bodies examined above. Such measures should benefit vulnerable groups.

**c) Structural changes**

Theories of a substantive conception of equality require the removal of structural barriers that disadvantage some and privilege others, as discussed above. I will examine the extent to which the practice of treaty bodies addresses structural barriers to the enjoyment of economic, social and cultural rights. I will first discuss the practice of the CESCR and then investigate whether the practice of the European Committee, the Inter-American Commission on Human Rights, and the Inter-American Court is the same or different.

The practice of the CESCR shows that it addresses causes of inequality and structural barriers to the enjoyment of economic, social and cultural rights. It requires states to 'immediately adopt the necessary measures to prevent, diminish and eliminate the conditions and attitudes which *cause* or

[172] General Comment 21, para 24.
[173] Ibid.
[174] General Comment 20, para 9.
[175] *Juridical Condition and Rights of Undocumented Migrants*, Advisory Opinion Requested by the United Mexican States, OC-18/03 (17 September 2003), para 104.
[176] Ibid.
[177] Inter-American Commission on Human Rights, Guidelines for Preparation of Progress Indicators in the Area of Economic, Social and Cultural Rights (19 July 2008), OEA/Ser.L/V/II.132 Doc. 14, para 48.
[178] *European Roma Rights Centre (ERRC) v Ireland*, Complaint No. 100/2013, adopted 1 December 2015, para 70. For similar holdings see *European Roma Rights Centre v Portugal*, Complaint No. 61/2010, adopted 30 June 2011, para 20; *Centre on Housing Rights and Evictions (COHRE) v Italy*, Complaint No. 58/2009, adopted 25 June 2010, para 39;

*perpetuate* substantive or de facto discrimination'.[179] With regard to women, for example, it identifies the causes of the problem, stating that gender-based assumptions and expectations place women at a disadvantage.[180] It underlined that 'strong negative traditional attitudes or practices and deep-rooted stereotypes which discriminate against women [...] are *root causes* for the disadvantaged position of women' in the enjoyment of economic, social and cultural rights.[181] It identified similar factors in relation to the right to work: factors such as gender-biased job evaluation or the perception that women are less productive than men are the underlying causes of the pay gap.[182] Thus, in its concluding observations it frequently recommends that states eliminate the gender pay gap.[183]

The CESCR recognises that states have the obligation to respect the equal right of women and men in the enjoyment of economic, social and cultural rights,[184] which is mainly a negative obligation to refrain from discrimination against women. More important are the positive state obligations to address causes of inequality and barriers to the enjoyment of economic, social and cultural rights. These positive obligations fall under both the obligations to protect and to fulfil.[185] The obligation to protect requires states to eliminate 'prejudices, customary and all other practices that perpetuate the notion of inferiority or superiority of either of the sexes, and stereotyped roles for men and women'.[186] To do so, states should take steps including constitutional, legislative, administrative and institutional measures.[187] They should establish 'public institutions, agencies and programmes to protect women against discrimination' by third parties.[188]

The obligation to fulfil – the obligation to promote in particular – requires states to change gender-based assumptions and expectations that constitute the root causes of inequality between women and men in the enjoyment of economic, social and cultural rights. States can bring about such changes through teaching, training and raising awareness about the proper role of both sexes, for example by integrating the principle in both formal and non-formal education.[189] Awareness raising programmes can also target specific groups, such as judges and public officials.[190] Moreover, states should 'establish appropriate venues for redress such as courts and tribunals or administrative mechanisms that are accessible to all on the basis of equality, including the poorest and most

[179] General Comment 20, para 8. Italics added. See CESCR, Substantive Issues Arising in the Implementation of the International Covenant on Economic, Social and Cultural Rights: Poverty and the International Covenant on Economic, Social and Cultural Rights, E/C.12/2001/10, 10 May 2001, para 12 where the CESCR has underlined that: 'Sometimes poverty arises when people have no access to existing resources because of who they are, what they believe or where they live. Discrimination may cause poverty, just as poverty may cause discrimination'.

[180] General Comment 16, para 14.

[181] Concluding observations on Turkmenistan (13 December 2011), E/C.12/TKM/CO/1, para 10. Italics added.

[182] General Comment 16, para 24.

[183] Concluding observations on Portugal (8 December 2014), E/C.12/PRT/CO/4, para 9; Belgium (23 December 2013), E/C.12/BEL/CO/4, para 11; Norway (13 December 2013),E/C.12/NOR/CO/5, para 9; Iceland (E/C.12/ISL/CO/4) E/C.12/ISL/CO/4, para 8; New Zealand (13 May 2012), E/C.12/NZL/CO/3, para 14; Kazakhstan (19—20 May 2010) E/C.12/KAZ/CO/1, para 19; Afghanistan (7 June 2010), E/C.12/AFG/CO/2-4, para 24; Poland (2 December 2009), E/C.12/POL/CO/5, para 17; Angola (1 December 2008), E/C.12/AGO/CO/3, para 17; UK (12 June 2009),E/C.12/GBR/CO/5, para 18 . In its concluding observation on Mauritius it condemned the unemployment gap between women and men. See E/C.12/MUS/CO/4 (8 June 2010), para 17.

[184] General Comment 16, para 17.

[185] General Comment 16, para 17.

[186] Ibid para 19.

[187] Ibid.

[188] General Comment 16, para 20.

[189] General Comment 16, para 21.

[190] General Comment 16, para 21.

disadvantaged and marginalized men and women'.[191] They should also provide 'appropriate remedies, such as compensation, reparation, restitution, rehabilitation, guarantees of non-repetition, declarations, public apologies, educational programmes and prevention programmes'.[192] However, one may question the effectiveness of such venues and remedies unless there are well resourced institutions carrying the responsibilities of teaching, training and raising awareness and thereby changing prejudices and harmful customary practices against women.

Similarly, the CESCR has ascertained that prejudice and stigma against other vulnerable groups, such as persons with disabilities, persons living with HIV, lesbian, gay, bisexual, transgender and intersex persons and refugees, are factors that impede their enjoyment of economic, social and cultural rights.[193] The CESCR requires states to address the social stigma experienced by such groups through information campaigns and other awareness-raising efforts.[194]

The CESCR also identifies corruption, illicit financial flows and tax evasions as structural factors impeding the enjoyment of economic, social and cultural rights and increasing inequalities. The CESCR stresses the need to fight corruption usually in relation to the principle of progressive realisation.[195] It identifies corruption as an obstacle to the enjoyment of economic, social and cultural rights.[196] It has explained that corruption reduces available resources, leads to violations of human rights, and 'denies redress to victims'.[197] Similarly, the CESCR identifies illicit financial flows and tax evasions as factors that impede the realization of economic, social and cultural rights.[198] It emphasised that these factors are 'leading to the draining of resources and increasing inequalities between geographic regions and social groups'.[199] That is to say, corruption, illicit financial flows, and tax evasions are causes of inequality in the enjoyment of economic, social and cultural rights.

Some theorists identify the state as the major culprit for the inequalities and barriers to the enjoyment of economic, social and cultural rights. They argue that the state is responsible – through its laws and institutions – for the unequal distribution of resources that disadvantage some and privilege others.[200] In this regard, the CESCR hardly condemns states for causing inequalities or barriers to the enjoyment of economic, social and cultural rights. That, one may surmise, may be because of the non-adversarial nature of examining state reports. Nevertheless, one may argue, the

[191] General Comment 16, para 21.
[192] Ibid.
[193] Concluding observations on Lebanon (24 October 2016), E/C.12/LBN/CO/2, para 18.
[194] Concluding observations on Burundi (9 October 2015), E/C.12/BDI/1, para 16; Armenia (16 July 2014), E/C.12/ARM/CO/2-3, para 12.
[195] See Concluding observations on Kenya (6 April 2016), E/C.12/KEN/CO/2-5, para 17; Lebanon (24 October 2016), E/C.12/LBN/CO/2, para 14; The Gambia (20 March 2015), E/C.12/GMB/CO/1, para 9; Guyana (28 October 2015), E/C.12/GUY/CO/2-4, para 18; Italy (28 October 2015), E/C.12/ITA/CO/5, para 10; Mongolia (7 July 2015), E/C.12/MNG/CO/4, para 11; (9 October2015), E/C.12/SDN/CO/2, paras 15; (9 October2015), E/C.12/SDN/CO/2, paras 12; Armenia (16 July 2014), E/C.12/ARM/CO/2-3, para 8; Indonesia (19 June 2014), E/C.12/IDN/CO/1, para 9; Nepal (12 December 2014), E/C.12/NPL/CO/3, para 7; Romania (9 December 2014), E/C.12/ROU/CO/3-5, 7; Slovenia (15 December 2014), E/C.12/SVN/CO/2, para 7; Djibouti (30 December 2013), E/C.12/DJI/CO/1-2, para 9; Gabon (27 December 2013), E/C.12/GAB/CO/1, para 10; Algeria on (7 June 2010), E/C.12/DZA/CO/4, para 7; Kazakhstan (19—20 May 2010), E/C.12/KAZ/CO/1, para 11; Kenya (1 December 2008), E/C.12/KEN/CO/1, para 10.
[196] Concluding observations on Burundi (9 October 2015), E/C.12/BDI/1, para 11; Guyana (28 October 2015), E/C.12/GUY/CO/2-4, para 18; Iraq (9 October2015), E/C.12/IRQ/CO/4, para 11; Kazakhstan (19—20 May 2010), E/C.12/KAZ/CO/1, para 11;.
[197] Concluding observations on Indonesia (19 June 2014), E/C.12/IDN/CO/1, para 9.
[198] Concluding observations on Kenya (6 April 2016), E/C.12/KEN/CO/2-5, para 17; Honduras (11 July 2016), E/C.12/HND/CO/2, para 19.
[199] Concluding observation on Angola (15 July 2016), E/C.12/AGO/CO/4-5, para 9.
[200] See Dworkin, Sovereign Virtue, (n 16) 1; Fineman, The Vulnerable Subject, (n 20).

CESCR indirectly condemns states for causing inequalities and barriers to the enjoyment of economic, social and cultural rights, which may be inferred from its mandate to 'eliminate disadvantage *caused by past and current discriminatory laws, traditions and practices*'.[201] That is, states currently promulgate discriminatory laws that are causing the disadvantages. In other instances, the CESCR has disapproved of a state party's tax system since 'the tax system cannot be used to reduce the high level of inequality because it essentially relies on indirect taxes and provides for many unjustified exemptions'.[202] The CESCR has also condemned a tax system that includes a low level of flat tax on personal and corporate income as 'ineffective in reducing poverty and in ensuring appropriate redistribution of income'.[203] Here, one may understand the CESCR to be declaring that states are causing, at least increasing, inequalities through their tax systems.

The Inter-American Commission on Human Rights requires states to identify social groups such as women, indigenous peoples, Afro-American peoples and illegal immigrants, who suffer from structural inequalities and provide them priority in their plans of action.[204] For example, it recognises that colonial domination and slavery have caused discrimination against indigenous people and Afro-descendants by limiting their ability to enjoy economic, social and cultural rights.[205] After finding a structural discrimination against women, the Inter-American Court ordered the respondent State to implement permanent education and training programs and courses for public officials and the public in general.[206] The purpose of such programs and courses is 'to overcome stereotyping about the role of women in society'.[207] According to the Court's findings in another case, laws that protect property rights of private owners over indigenous peoples' territorial claims partly result in a *de facto* discrimination, which the respondent State should eliminate.[208]

The European Committee identifies barriers, which includes discriminatory laws, to the enjoyment of rights under the European Social Charter. In *COHRE v Italy*, for example, the Committee has found that lack of identification documents results in civil marginalisation, which in turn leads to segregation and poverty.[209] That is, a lack of identification documents, particularly among members of vulnerable groups such as Roma and Sinti, 'is a *cause* of marginalization and social exclusion' because of the 'discriminatory treatment with regard to the right to vote or other forms of citizen participation'.[210]

## 5.3 Equality and non-discrimination under the African Charter

The African Charter provides for the principles of equality and non-discrimination in its preamble and substantive provisions. In the preamble, the Charter underlines the duty of African states to

[201] General Comment 16, para 36. Italics added.
[202] Concluding observations on Dominican Republic (21 October 2016), E/C.12/DOM/CO/4, para 17.
[203] Concluding observations on Macedonia (15 July 2016), E/C.12/MKD/CO/2-4, para 41. For similar criticisms see Canada (23 March 2016), E/C.12/CAN/CO/6, para 9; Costa Rica (21 October 2016), E/C.12/CRI/CO/5, 14; Honduras (11 July 2016), E/C.12/HND/CO/2, para 19; United Kingdom (14 July 2016), E/C.12/GBR/CO/6; Ireland (8 July 2015), E/C.12/IRL/CO/3; Paraguay (20 March 2015), E/C.12/PRY/CO/4, para 10; Guatemala (9 December 2014), E/C.12/GTM/CO/3, para 8.
[204] Guidelines for Preparation of Progress Indicators in the Area of Economic, Social and Cultural Rights (19 July 2008), OEA/Ser.L/V/II.132 Doc. 14, paras 52—55.
[205] Ibid.
[206] *González et al ("Cotton Field") v Mexico*, Judgment of 16 November 16 2009, paras 542—543 & 602.
[207] Ibid.
[208] *Xákmok Kásek Indigenous Community v Paraguay*, Judgment of 24 August 2010, paras 273—275 & 309—310.
[209] *Centre on Housing Rights and Evictions (COHRE) v Italy*, Complaint No. 58/2009, Decision on the merits adopted 25 June 2010, para 103.
[210] *COHRE v Italy*, para 109.

dismantle 'all forms of discrimination, particularly those based on race, ethnic group, color, sex, language, religion or political opinions'. From the outset, the Charter makes it clear that African states have a positive obligation to eliminate discrimination; the preamble does not limit state obligations to the negative duty of refraining from discrimination. The substantive provisions of the Charter deal with the principles of equality and non-discrimination in five instances. These are the right to non-discrimination (article 2), the right to equality (article 3), the state duty to eliminate discrimination against women (article 18(3)), the right to equality of peoples (article 19), and the individual duty to respect others without discrimination (article 28).

The African Charter does not use the term 'discrimination' in article 2, which guarantees the rights and freedoms recognised in the Charter without discrimination.[211] Article 2 of the Charter provides that:

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

Article 2 of the Charter limits prohibition of discrimination to 'the enjoyment of the rights and freedoms guaranteed' by the African Charter. To invoke a violation of this provision, Ankumah argues, one or more of the substantive provisions of the Charter must be at issue.[212] That is, one finds a violation of Article 2 only in conjunction with other provisions of the Charter. In this respect, Article 2 is similar to most non-discrimination clauses in other treaties.[213] However, unlike those treaties, the physical location of Article 2 is among the substantive provisions of the Charter.[214] In addition, Article 2 identifies right-holders unlike non-discrimination clauses in other human rights treaties.[215] Those treaties often express the non-discrimination provision in terms of state obligations rather than individual entitlements; in contrast, the right-holders under Article 2 of the Charter are individuals.

Article 2 expands the prohibited grounds of discrimination listed in the preamble. The provision adds 'opinions' (other than political ones), 'national and social origin', 'fortune' and 'birth' to the list. Article 2 does not include 'age' and 'disability' among the prohibited grounds of discrimination. One may argue that Article 18(4) of the Charter prohibits discrimination on the grounds of age and disability since this provision requires special protection for 'the aged and the disabled'.[216] It is clear from Article 2 and the preamble that the list of prohibited grounds is not exhaustive, as the Charter uses the terms 'such as' and 'other status' in Article 2, and uses the term 'particularly' in the preamble. The list of prohibited grounds under Article 2 mainly mirrors similar provisions in other human rights treaties.[217] The Charter uses 'fortune' instead of 'property' used in the ICESCR and the ICCPR. One notable addition is the prohibition of discrimination based on 'ethnic group'. By adding

[211] Cf Art 2(1) of the ICCPR. With regard to the use of terms, the African Charter is similar to the ICCPR.

[212] Evelyn A Ankumah, *The African commission on human and peoples' rights: practice and procedures* (Martinus Nijhoff Publishers 1996) 173 – 174.

[213] Cf ICESCR, Art 2(2); ICCPR, Art 2(1); ACHR, Art 1(1); PSS, Art 3; European Social Charter (Revised), Art E; CRC, Art 2; CRPD, Art 5.

[214] Other treaties provide for non-discrimination clause in a different part, not among the substantive provisions. Cf ICESCR, Art 2(2); Revised European Social Charter, Art E; ACHR, Art 1(1); ICCPR, Art 2(1).

[215] See ICESCR, Art 2(2); PSS, Art 3; European Social Charter (Revised), Art E; CRC, Art 2; CRPD, Art 5.

[216] Art 18 (4) of the African Charter provides that: The aged and the disabled shall also have the right to special measures of protection in keeping with their physical or moral needs'.

[217] Compare ICESCR, Art 2(2); ICCPR, Art 2(1); Art E, European Social Charter (Revised).

this ground, Ouguergouz argues, the Charter takes into account 'an important sociological aspect of virtually all African States'.[218] By prohibiting discrimination on the ground of one's ethnic group, Article 2 of the Charter may contribute to the promotion of peace on the continent because discrimination 'based on ethnic difference is not only pervasive in much of Africa, it is a major source of conflict and the erosion of security in many parts of the continent'.[219]

The right to equality under the African Charter immediately follows the non-discrimination clause in terms of its physical location. Article 3 of the Charter provides that: '1. Every individual shall be equal before the law. 2. Every individual shall be entitled to equal protection of the law'. This provision of the African Charter is similar to the American Convention on Human Rights and the ICCPR in terms of the use of words and physical location. Both treaties provide for the right to equality among substantive rights.[220] Like the American Convention on Human rights, but unlike the ICCPR, Article 3 of the African Charter does not list prohibited grounds of discrimination. Thus, the African Charter is different from the ICESCR and the European Social Charter, which do not provide for a separate provision on the right to equality.

Article 3 of the Charter (the right to equality) is different from the non-discrimination provision (Article 2) in at least two respects. First, Article 3 does not refer to the rights guaranteed in the African Charter. That is, the equality under Article 3 is not in relation to the enjoyment of the Charter rights. Second, Article 3 does not list any prohibited grounds of discrimination. The African Charter does not establish a clear relationship between these provisions. Ouguergouz argues that '[t]he principles of non-discrimination and equality are very closely linked, so much so in fact that the latter may be said to be a positive expression of the former'.[221] Similarly, Bulto argues that non-discrimination is the flip side of the right to equality.[222]

Given Articles 2 (non-discrimination) and 3 (equality), one may wonder about the relevance of Article 18(3), which requires the elimination of discrimination against women. Article 18(3) of the Charter provides that: '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'. The protocol to the Charter provides a definition:

> "Discrimination against women" means any distinction, exclusion or restriction or any differential treatment based on sex and whose objectives or effects compromise or destroy the recognition, enjoyment or the exercise by women, regardless of their marital status, of human rights and fundamental freedoms in all spheres of life.[223]

Certainly, both provisions on equality and non-discrimination are applicable to women. Article 2 in particular prohibits discrimination on the ground of sex. Obviously, the term 'every individual' used in both Articles 2 and 3 includes all sexes and genders. With regard to phrasing, the formulation of Article 18(3) does not follow the formulation used in Articles 2 and 3. Article 18(3) focuses on a positive state obligation to eliminate discrimination. As Ouguergouz argues, a state party to the

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[218] Fatsah Ouguergouz, *The African Charter on Human and Peoples' Rights: A comprehensive agenda for human rights and sustainable democracy in Africa* (2003) 85.

[219] Frans Viljoen, *International human rights law in Africa* (Oxford University Press 2012) 95.

[220] Cf ICCPR, Art 2(1); ACHR, Art 24.

[221] Ouguergouz (n 218) 77.

[222] Takele Soboka 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(2) *University of Tasmania Law Review* 142.

[223] Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (African Women's Protocol), adopted 11 July 2003, entry into force 25 November 2005, Art 1(f).

Charter is 'bound to eliminate all kinds of discrimination against women, be it *de jure* or *de facto*; this implies that in certain cases the state should adopt a policy of positive discrimination in their favour'.[224] Therefore, it is submitted, the value of Article 18(3) is only its additional emphasis on the positive state obligations to eliminate all discrimination against women.

At least two more distinctions are still apparent. First, Article 18(3) is broader than at least Article 2 of the Charter. Article 18(3) does not limit the prohibition of discrimination to the rights guaranteed in the Charter.[225] Second, Article 18(3) expands the scope of the Charter itself when it comes to the rights of women and requires states to comply with other international instruments – whether binding or otherwise[226] – insofar as it requires the protection of women's rights 'as stipulated in international declarations and conventions'. Thus, one may argue, Article 18(3) of the African Charter incorporates treaties such as the CEDAW by reference. Since 2005, the Protocol to the African Charter on the Rights of Women in Africa has expanded the provision of Article 18(3).

Articles 2 and 3 specify the right-holder. That is, both Articles 2 and 3 identify 'every individual' as a right-holder. Although Article 18(3) does not use this formulation, one may argue that the right-holder is an individual. That is, it envisages an individual woman. The individual orientation of Articles 2, 3 and 18(3) may raise the issue of their applicability to groups because the Charter has a separate provision on all peoples' right to equality. Under Article 19, the Charter stipulates that: 'All peoples shall be equal; they shall enjoy the same respect and shall have the same rights'.

Identifying individuals as right-holders may not raise any concern under other human rights treaties tailored to individual rights. As the Charter also provides relatively extensive groups' or peoples' rights, one may wonder whether the non-discrimination and equality clauses are applicable to groups or peoples because the Charter usually uses the terms 'all peoples' to identify right-holders when it guarantees peoples' rights.[227] Solomon Dersso, who later became a member of the Commission, argues that Article 2 is applicable to groups. He opines that 'this right can be interpreted as giving substantive protection to the right of particular ethno-cultural communities'.[228] On the other hand, Ouguergouz, who later became a judge and a vice-president of the African Court, suggests that Article 2 is limited to individual rights, arguing that '[t]he equality of peoples' rights is a logical consequence of the postulated equality of peoples. Therefore, it might be regarded as a kind of principle of non-discrimination; Article 19 would thus be to the collective rights what Article 2 is to the individual rights'.[229] In terms of formulation, one may submit, Article 19 is similar to Article 3 (right to equality), not to Article 2 (non-discrimination).

The Charter furthermore deals with discrimination in inter-personal relations in its second chapter on individual duties.[230] The provisions of individual duties represent one of the distinguishing features of the African Charter.[231] Under Article 28, the Charter provides that '[e]very individual shall have the duty to respect and consider his fellow beings without discrimination', from which we understand

[224] Ouguergouz (n 218) 85.
[225] Sisay Alemahu Yeshanew, *The Justiciability of economic, social and cultural rights in the African regional human rights system: Theory, practice and prospect* (2013) 227.
[226] Viljoen (n 219) 253. Such instruments include binding treaties such as the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) & African Women's Protocol.
[227] African Charter, Arts 19 – 24.
[228] Solomon Dersso, 'The African Human Rights System and the Issue of Minorities in Africa' (2012) 20/1 *African Journal of International and Comparative Law* 42-69, 44.
[229] Ouguergouz (n 218) 214.
[230] Ibid 86.
[231] Viljoen (n 219) 239.

that not only a state but also an individual has a duty to refrain from discrimination. However, this provision does not list prohibited grounds of discrimination. One may submit that the grounds listed under Article 2 also apply to Article 28, and the importance of article 28 can be examined given the provisions on non-discrimination and equality (Articles 2 and 3). Article 28 seems to extend the scope of duty-bearers beyond states. As the Charter is a human rights treaty, states should implement even the duties of individuals to refrain from discrimination. Treaty bodies usually recognise a state obligation to protect third parties from discriminating others. For this reason, Article 28 adds emphasis to the content of Articles 2 and 3.

In sum, the African Charter includes the principles of equality and non-discrimination in a number of provisions. These are non-discrimination in the enjoyment of Charter rights (Article 2), the right to equality (Article 3), state obligation to eliminate discrimination against women (Article 18(3)), the equal rights of peoples (Article 19), and the duty of individuals to refrain from discrimination (Article 28). In the following section, I examine how the African Commission and the African Court interpret these provisions. I discuss Articles 2 and 3 more in-depth as the practice of the Commission and the Court relate to these provisions.

## 5.4 Equality and Non-Discrimination: The practice under the African Charter

In their practice, the African Commission and the African Court have defined 'discrimination'. Both have dealt with – and the Commission in particular has expanded – the prohibited grounds of discrimination. Moreover, they have laid down criteria for evaluating whether a distinction amounts to discrimination. I will discuss definition and prohibited grounds of discrimination in the first subsection. In the second sub-section, I will deal with criteria for evaluating the appropriateness of a distinction. The Commission and the Court have also dealt with the right to equality by attempting to define the similarities and differences between non-discrimination (Article 2) and equality (Article 3). I will discuss the right to equality and its relationship with non-discrimination in the third sub-section.

### 5.4.1 Definition and prohibited grounds of discrimination

The African Commission decided *Meldrum v Zimbabwe* in 2009.[232] This communication concerns the deportation of a US citizen working as a journalist in Zimbabwe for publishing an article critical of the government.[233] The deportation took place in defiance of a court order.[234] The communication does not allege violations of economic, social and cultural rights; however, it is instructive insofar as it provides the definition of discrimination that equally applies to economic, social and cultural rights.[235] The African Commission provided the following definition:

> [Discrimination is any] act which aims at distinction, exclusion, restriction or preference which is based on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status, and which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise by all persons, on equal footing, of all rights and freedoms.[236]

[232] *Zimbabwe Lawyers for Human Rights and Institute for Human Rights and Development in Africa (on behalf of Andrew Barclay Meldrum) v Zimbabwe*, Communication 294/2004, 6th Extra-Ordinary session (Banjul), April 2009, 26th Activity Report (hereafter *Meldrum v Zimbabwe*); (2009) AHRLR 268 (ACHPR 2009).
[233] *Meldrum v Zimbabwe*, paras 3—6.
[234] *Meldrum v Zimbabwe*, para 6.
[235] See *Meldrum v Zimbabwe*, para 58.
[236] *Meldrum v Zimbabwe*, para 91.

This definition has expanded the scope of Article 2. It prohibits discrimination in the enjoyment or exercise of all categories of rights by employing an all-inclusive phrase, 'all rights and freedoms', which includes individual rights as well as peoples' rights. That is, Article 2 applies to group or peoples' rights guaranteed in the Charter. The definition also extends the application of Article 2 beyond the rights guaranteed in the Charter because rights and freedoms can also be guaranteed in other laws, domestic or international. This understanding may be criticised for lack of consistency since the Commission decided earlier, in *Bissangou v Republic of Congo,* that Article 2 'only prohibits discrimination where it affects the enjoyment of a right or freedom guaranteed by the Charter'.[237]

In 2011, a couple of years after *Meldrum v Zimbabwe*, the Commission adopted another definition in the Principles and Guidelines on the Implementation of Economic, Social and Cultural Rights in the African Charter on Human and Peoples' Rights (Nairobi Principles). The Commission defined 'discrimination' as 'any conduct or *omission* which has the purpose or effect of nullifying or impairing the equal access to and enjoyment of economic, social and cultural rights'.[238] It has separated prohibited grounds of discrimination from the definition, putting out a non-exhaustive list of grounds that 'include but are not limited to race, ethnic group, colour, sex, gender, sexual orientation, language, religion, political or any other opinion, national and social origin, economic status, birth, disability, age or other status'.[239]

The definition in the Nairobi Principles has an effect different from *Meldrum v Zimbabwe* with regard to the scope of Article 2. On the one hand, this definition is narrower than the *Meldrum* definition and is very specific to economic, social and cultural rights. On the other hand, it expands the definition in *Meldrum* in certain aspects. *Meldrum* defines 'discrimination' as an 'act' that raises the question as to whether an 'omission' amounts to discrimination. The Commission dispels that concern by clarifying that an 'omission' can also constitute discrimination. The definition in the Nairobi Principles focuses completely on economic, social and cultural rights. That may raise the question as to whether 'omission' constitutes discrimination only with regard to economic, social and cultural rights, not in the cases where a violation of civil and political rights is at issue. This doubt may be dismissed on the ground that Article 2 does not make any distinction between these categories of rights, but it cannot be conclusive of the Commission's view since it uses different sources. On the one hand, the definition in *Meldrum*, as the Commission acknowledges, has been taken from the Human Rights Committee's definition in General Comment No. 18.[240] On the other hand, the definition in the Nairobi Principles was taken from the CESCR, although the Commission does not make specific reference to its source.[241]

The cross-fertilization of the two definitions does not occur in the Commission's jurisprudence even when it examines communications alleging discrimination that affects economic, social and cultural rights as well as civil and political rights. In *Nubian Community v Kenya*, where the Commission found discrimination in the enjoyment of both categories of rights, it reaffirmed only the *Meldrum*

[237] *Antonie Bissangou v Republic of Congo*, Communication No 253/02, 40th Ordinary Session, 15 – 29 November 2006 (Banjul); (2006) AHRLR 80 (ACHPR 2006), para 69.

[238] Nairobi Principles, para 19. Italics added.

[239] Nairobi Principles, para 1(d).

[240] *Meldrum v Zimbabwe*, para 91, footnote 5; Human Rights Committee, General Comment No. 18: Non-discrimination (1989), para 7.

[241] Nairobi Principles, para 19. An earlier version of the Principles refer to General Comment No. 15: The right to water (Arts. 11 and 12 of the International Covenant on Economic, Social and Cultural Rights), E/C.12/2002/11, 20 January 2003, paras 13 – 16.

definition.[242] Given that the *Nubian Community* case was decided after the adoption of the Nairobi Principles, one may wonder whether the Commission has changed its position.

There is another problem with the definition in *Meldrum*: it replaces the list of prohibited grounds under Article 2 of the Charter with that of the ICCPR, which are not identical to those under the Charter.[243] As a result, the definition omits 'ethnic group' from the prohibited grounds. The omission might undermine the contextual relevance of the Charter given the pervasiveness of discrimination based on ethnic group. The Commission also replaces another prohibited ground, 'fortune', with 'property'. Although the importance of 'fortune' to the African context is not clear, the Commission contradicts the texts of the Charter when it replaces it with another ground.

The reaffirmation of *Meldrum* in the *Nubian Community* case in 2015 adds another problem. It is problematic because the definition in *Meldrum* ignores other prohibited grounds of discrimination, which the Commission had already recognised before 2015. Even before the *Meldrum* decision in 2009, the Commission found discrimination on the grounds of mental disability in 2003.[244] In 2011, the Commission underlined that the list of prohibited grounds under Article 2 is non-exhaustive, and added gender, sexual orientation, economic status, disability and age to the list.[245] The expansion continued after the *Nubian Community* case. In 2017, the Commission recognised gender identity, health status, indigenous status, reason of one's detention, asylum-seekers, and refugees or others under international protection as prohibited grounds.[246]

The Commission has modified its definition in *Meldrum* even though it does not justify the changes. In a communication alleging discrimination against the Dioula ethnic group in Côte d'Ivoire, the Commission provided that:

> [Discrimination is any] act aimed at distinction, exclusion, restriction or preference based on one of the reasons listed under Article 2 of the Charter, and which aims at or has the effect of annulling or restricting recognition, enjoyment or exercise by all persons and on an equal basis, of all rights and freedoms.[247]

The *Dioula* case shortens the definition in *Meldrum* and avoids the incongruence of prohibited grounds under Article 2 and the ICCPR. However, it does not change the uncertainties about the scope of application of Article 2 and the fate of the definition adopted in the Nairobi Principles.

The African Court does not adopt the Commission's definition. In its judgment on the eviction of the Ogiek Community from the Mau Forest by the Republic of Kenya, the Court defines discrimination under Article 2 of the Charter as follows:

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[242] *Nubian Community in Kenya v Kenya*, Communication No. 317/06, 17th Extraordinary Session, 19 - 28 February 2015, para 125.

[243] See ICCPR, Art 2(1) & Art 26.

[244] *Purohit and Moore v The Gambiai,* Communication 241/01, 33rd Ordinary Session May 2003 (Niamey); Annika Rudman, 'The protection against discrimination based on sexual orientation under the African human rights system' (2015) 15 *African Human Rights Law Journal* 1-27.

[245] Nairobi Principles, paras 1(d) & 19.

[246] African Commission, General Comment No. 4 on the African Charter on Human and Peoples' Rights: The Right to Redress for Victims of Torture and Other Cruel, Inhuman or Degrading Punishment or Treatment (Article 5), 21st Extra-Ordinary session, 27 February to 4 March 2017, para 20.

[247] *Open Society Justice Initiative v Côte d'Ivoire,* Communication 318/06, 17th Extraordinary Session, 18 – 28 February 2015 (Banjul) (hereafter *Dioula* case), para 144.

> [Discrimination is] any distinction, exclusion or preference made on the basis of race, colour, sex, religion, political opinion, national extraction or social origin, which has the effect of nullifying or impairing equality of opportunity or treatment.[248]

The African Court does not refer to any source in its definition, however, the language used by the Court, the type of prohibited grounds and the order in which they were listed all correspond to the definition of the term adopted under the International Labour Organisation Convention on Discrimination in Employment.[249] The list of prohibited grounds in the *Ogiek Community* case does not include all the grounds listed under article 2 of the Charter. Omitted are ethnic group, language, fortune and birth. The term 'other status' includes those grounds unforeseen during the adoption of the Charter.[250] Although the Court avoided adopting additional prohibited grounds identified by the Commission, it promised to recognise such grounds based on the 'general spirit of the Charter'.[251]

### 5.4.2 Criteria for identifying discrimination

The African Commission has developed a test to determine an alleged violation of discrimination. In *Bissangou v Republic of Congo*, a complaint alleging discrimination as a result of the respondent State's failure to execute a judgment of a national court, the Commission emphasised that Article 2 does not ban all distinctions.[252] Rather its violation occurs only when 'the enjoyment of one of the rights guaranteed by the Charter had been hindered in a discriminatory manner […] based on any of the grounds of discrimination listed out in Article 2 or on grounds similar to the latter'.[253] The Commission made the criteria for evaluating discrimination clearer in a later case concerning the Zimbabwean courts' failure to act swiftly enough on disputes arising from the 2000 General Elections.[254] It held that

> To establish discrimination, it must be shown that, the Complainants have been treated differently in the enjoyment of any of the Charter rights by virtue of their race, ethnic group, colour, sex, language, religion, political or any other opinion, national and social origin, fortune, birth or any status.[255]

The Commission further developed the test by adding other elements. In *Good v Botswana*, the Commission found a violation of Article 2 because of a discrimination based on a political opinion by employing the following test:

> The test to establish whether there has been discrimination has been well settled. A violation of the principle of non-discrimination arises if:
>
> a) equal cases are treated in a different manner;
> b) a difference in treatment does not have an objective and reasonable justification; and
> c) […] there is no proportionality between the aim sought and the means employed.[256]

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[248] *African Commission on Human and Peoples' Rights v Republic of Kenya* (hereafter Ogiek Community case), Application No. 006/2012, judgment of 26 May 2017, para 137.
[249] ILO, Discrimination (Employment and Occupation) Convention, 1958 (No. 111), Art 1(1(a)).
[250] *Ogiek* case, para 138.
[251] Ibid.
[252] *Bissangou v Republic of Congo*, para 69.
[253] *Bissangou v Republic of Congo*, para 69.
[254] *Zimbabwe Lawyers for Human Rights and the Institute for Human Rights and Development in Africa v Zimbabwe*, Communication No. 293/04, 43rd Ordinary Session, 7- 22 May 2008 (hereafter Zimbabwe Election case); (2008) AHRLR 120 (ACHPR 2008).
[255] Ibid, para 121.
[256] *Kenneth Good v Botswana*, Communication No. 313/05, 47th Ordinary Session, 12 – 26 May 2010 (Banjul); (2010) AHRLR 43 (ACHPR 2010), para 219.

Although the prohibited grounds do not feature among the elements identified in *Good v Botswana*, the Commission emphasised that differential treatment must be based on one of the prohibited grounds to constitute discrimination.[257] Later, the Commission stated that it would allow different treatment 'to achieve a rational and legitimate purpose'.[258] Even in such case, the differential treatment should not 'impair the fundamental dignity of the affected persons or unjustifiably infringe on their enjoyment of the rights and freedoms guaranteed in the Charter'.[259]

In sum, a differential treatment based on prohibited grounds constitutes discrimination unless it has objective and reasonable justification; it has rational and legitimate purpose; and it uses proportionate means. The Commission emphasised that the elements of the test are cumulative.[260] The Commission uses a similar test to examine alleged violations of Article 18(3) of the Charter, which requires states to eliminate discrimination against women.[261]

In most cases, the Commission found violations of Article 2 because the respondent states had not passed the justification element of the test. In some cases, the respondent State did not provide any justification,[262] whereas in other cases, the Commission found unacceptable such justifications as national security,[263] violation of terms of residence permit,[264] and immigration policy.[265] In a case involving violence and sexual harassment of women demonstrators in Egypt, the Commission found discrimination because the respondent State was unable to show that 'male protesters in the scene were also stripped naked and sexually harassed as the women were'.[266] In this case, differential treatment alone amounted to discrimination without searching for a justification. Obviously, gender-based violence cannot be justified; but the Commission neither states that point clearly nor makes an adequate proportionality or legitimacy analysis.

The African Court also uses similar criteria. In the *Ogiek* case, the Court held that '[a] distinction or differential treatment becomes discrimination, and hence, contrary to Article 2, when it does not have an objective and reasonable justification and, in the circumstances where it is not necessary and proportional'.[267] Kenya's justification that the eviction of Ogiek Community members was necessary 'to preserve the natural ecosystem of the Mau Forest' did not meet the Court's 'objective and reasonable justification' criteria.[268]

The elements of the discrimination test are similar to the Commission's limitation criteria. In its evaluation, the Commission usually requires that limitations to rights be determined by law; necessary; proportional; and legitimate.[269] In the discrimination test, it does not require

[257] *Good v Botswana*, para 221.
[258] *Nubian Community in Kenya v Kenya*, para 126; Dabalorivhuwa Patriotic Front v the Republic of South Africa, Communication No. 335/06, 53rd Ordinary Session 9 – 23 April 2013, Banjul, para 117.
[259] Ibid.
[260] *Good v Botswana*, para 222.
[261] *Egyptian Initiative for Personal Rights and INTERIGHTS v Egypt* (Egyptian gender based violence (GBV) case), Communication No. 323/06, 10th Extra-Ordinary Session, 12 – 16 December 2011, para 149.
[262] *Dioula* case, para 151; See *Institute for Human Rights and Development in Africa (on behalf of Esmaila Connateh & 13 others) v Angola* (hereafter Connateh v Angola), Communication No. 292/04, 43rd Ordinary Session, 7 – 22 May, 2008, Ezulwini; (2008) AHRLR 43 (ACHPR 2008), para 79.
[263] *Good v Botswana*, para 224.
[264] *Meldrum v Zimbabwe*, para 92.
[265] *Nubian Community* case, para 129.
[266] *Egyptian GBV* case, para 138.
[267] *Ogiek* case, para 139.
[268] *Ogiek* case, para 145.
[269] *Media Rights Agenda & Others v Nigeria*, Communication No. 105/93-128/94-130/94-152/96, 31 October 1998, Banjul; (2000) AHRLR 200 (ACHPR 1998), para 69.

differentiations to be determined by law, but they should be proportional and legitimate. They should also be necessary since they should be justified.

### 5.4.3 The right to equality and its relation to non-discrimination

The right to equality is important for the enjoyment of other rights according to the African Commission. It held that '[t]he right to equality is all the more important since it determines the possibility for the individual to enjoy many other rights'.[270] It emphasised that '[e]quality or lack of it affects the capacity of a person to enjoy many other rights'.[271] Following the text of Article 3, the Commission distinguishes 'equality before the law' from 'equal protection of the law'.

*Equality before the law* refers to 'a principle under which each individual is subject to the same laws, with no individual or groups having special legal privileges'.[272] In other words, 'existing laws must be applied in the same manner to those subject to them'.[273] Thus, the concept requires uniformity in application of the law. For example, the Commission found a violation of Article 3(1) when the Zimbabwean authorities deported a non-national for an offence that would have resulted in the payment of a fine if it had been committed by a national in the same circumstances.[274]

*Equal protection of the law* refers to 'the right of all persons to have the same access to the law and courts'.[275] The concept 'includes the guarantee that individuals will have access to mechanisms, institutions and processes for vindication of their rights and obtaining remedies when they suffer violations'.[276] Respondent States' failure to protect victims from gender-based violence in the first place and failure to investigate the crime and prosecute the perpetrators after the violence occurs constitutes a violation of Article 3.[277] In *Meldrum v Zimbabwe*, the Commission found a violation of equal protection of the law, Article 3(2), for denying the victim 'the opportunity to seek protection of the courts' because the victim was deported in defiance of court orders while his case was pending before the Supreme Court of Zimbabwe.[278] In *Bissangou v Republic of Congo*, the respondent State violated equal protection of the law for failing to execute a court judgment.[279] On the other hand, in *Good v Botswana*, the Commission did not find a violation of Article 3(2) since the victim was deported after his case was dismissed by Botswana's Court of Appeal.

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[270] Bissangou v Republic of Congo, para 68.

[271] *Legal Resources Foundation v Zambia* (2001) AHRLR 84 (ACHPR 2001), para 63; *Zimbabwe Lawyers for Human Rights and Another v Zimbabwe* (2008) AHRLR 120 (ACHPR 2008), para 121-125.

[272] *Zimbabwe Election* case, para 124.

[273] *Meldrum v Zimbabwe*, para 97.

[274] *Meldrum v Zimbabwe*, paras 97 – 98.

[275] *Zimbabwe Election* case, para 124. The Commission mistakenly claims to have drawn on Chief Justice Earl Warren's opinion in *Brown v Board of Education of Topeka*, 347 US 483 (1954). However, there are no such texts in *Brown*. The source of the Commission's quotation is www.legal-explanations.com, which it acknowledges. Despite errors of source, the Commission understands 'equal protection of the law' to mean, among others, access to the courts, the meaning given to the terms by the website, not by the US Supreme Court. Now, this quotation is taken as the Commission's view in case laws as well as in the literature. See *Meldrum v* Zimbabwe, para 100; *Gondo and Others v Zimbabwe* (2010) AHRLR 152 (SADC 2010), para 36; Claudia Martin, Diego Rodríguez-Pinzón & Bethany Brown, *Human Rights of Older People: Universal and Regional Legal Perspectives* (Springer 2015) 318; Takele Soboka Bulto, 'Public Duties for Private Wrongs: Regulation of Multinationals (African Commission on Human and Peoples' Rights), in Mark Gibney & Wouter Vandenhole (eds), *Litigating Transnational Human Rights Obligations: Alternative Judgments* (Routledge 2014) 255.

[276] *Equality Now and Ethiopian Women Lawyers Association (EWLA)* [on behalf of Woineshet Zebene Negash] *v Federal Republic of Ethiopia* (Hereafter 'Negash v Ethiopia'), Communication 341/2007, 57th Ordinary Session, 4-18 November 2015, Banjul, para 142.

[277] *Negash v Ethiopia,* para 139; *Egyptian GBV* case.

[278] *Meldrum v Zimbabwe*, para 101.

[279] *Bissangou v Republic of Congo* (2006) AHRLR 80 (ACHPR 2006), para 70.

However, the meaning of the right to equality and its elements under Article 3 is hardly clear from the Commission's jurisprudence. The Commission's definition is circular at best: In its oft-quoted passage, the Commission defines the right to equality as equal treatment: the right to equality means that citizens should expect to 'be assured of *equal treatment* before the law and *equal enjoyment* of the rights available to all other citizens'.[280] In *Purohit and Moore v The Gambia*, the Commission held that 'Article 3 is important because it guarantees fair and just treatment of individuals within a legal system of a given country'.[281] It made similar pronouncements in subsequent cases.[282]

The Commission does not seem to have successfully distinguished the right to equality under Article 3 from non-discrimination under Article 2. The Commission laid down the requirements for a successful claim under Article 3(2): 'In order for a Complainant to establish a successful claim under Article 3(2) of the Charter therefore, it must show that, the Respondent State had not given the victims the *same treatment* it accorded to the others'.[283] In essence, this is a different way of asking, whether there is a 'differential treatment', the term the Commission uses under Article 2. Besides, the Commission held that the 'non-discrimination principle generally ensures *equal treatment* of an individual or group of persons'.[284]

Establishing a link between non-discrimination (Article 2) and equality (Article 3) has been a daunting task for the Commission. In *Negash v Ethiopia*, the Commission held that 'Article 2 embodies the principle of non-discrimination which reinforces the equality rights under Article 3'.[285] In this case, the Commission described equality as the main principle, ie, the principle of non-discrimination only strengthens or supplements equality. However, the Commission's explanation lacks consistency. For example, the Commission espoused an opposite view in another case, where it held that 'Article 3 of the African Charter contains a general guarantee of equality which supplements the ban on discrimination provided for in Article 2'.[286] Here, the Commission represents non-discrimination (Article 2) as the main principle, ie, equality (Article 3) only supplements non-discrimination.

The Commission has also explained whether a violation of non-discrimination (Article 2) also leads to a violation of the right to equality (Article 3). In *Negash v Ethiopia,* the Commission stressed that discrimination 'infringes on the right to equality and equal protection of the law'.[287] Similarly, in the *Dioula* case, the Commission explained that 'where discrimination occurs, equality and equal protection of the law are automatically undermined. It follows that whenever a violation of Article 2 of the Charter is established, the rights under Article 3 have *necessarily* been violated'.[288] It has also added that the principle of non-discrimination 'constitutes a legal guarantee to ensure the enjoyment of the rights to equality before the law and equal protection of the law.[289]

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[280] *Legal Resources Foundation v Zambia,* 23 April to 7 May 2001, Tripoli*;* (2001) AHRLR 84 (ACHPR 2001), para 63. Italics added. The Commission uses a similar definition in later cases. See *Negash v Ethiopia*, para 141; *Egyptian GBV* case, para 173; *Meldrum v Zimbabwe*, paras 96, 100; *Connateh v Angola*, paras 45 – 46; *Zimbabwe Election* case, para 124 – 126;.

[281] *Purohit and Moore v The Gambia*, para 49. See *Legal Resources Foundation v Zambia*, para 63.

[282] *Negash v Ethiopia*, paras 140 & 145; *Egyptian GBV* case, paras 129 & 173; *Meldrum v Zimbabwe*, para 95 – 96; *Zimbabwe Election* case, para 125; *Bissangou v Republic of Congo*, para 68.

[283] *Connateh v Angola*, para 47. Italics added. The Commission passed similar decision in *Meldrum v Zimbabwe*, para 101; and *Zimbabwe Election* case, para 127.

[284] *Egyptian GBV* case, para 119. Italics added.

[285] *Negash v Ethiopia*, para 143.

[286] *Bissangou v Republic of Congo* (Communication No. 253/02), para 70.

[287] *Negash v Ethiopia*, para 140.

[288] Ibid*.* Italics added.

[289] *Dioula* case, para 155.

Like the Commission, the African Court has also attempted to establish a link between the two provisions. In the *Ogiek* case, the Court held that the 'right not to be discriminated against is related to the right to equality before the law and equal protection of the law as guaranteed by Article 3'.[290] The Court added that '[t]he scope of the right to non-discrimination extends beyond the right to equal treatment by the law'.[291] The Court is of the opinion that non-discrimination has a broader application than the right to equality, thereby holding a view contrary to the Commission on the scope of the two provisions: The Court's view seems to set aside a separate opinion of Fatsah Ouguergouz, then vice-president of the African Court, in its earlier judgment. Ouguergouz observed that

> The principle of non-discrimination, on one hand, and the principles of equality before the law and of equal protection of the law, on the other, are in close relationship. They are so to say the two sides of the same coin, the first principle being the corollary of the second ones. Their main difference under the African Charter lies in their respective scope. Indeed, according to Article 2 and 3 of the Charter, the principle of non-discrimination applies only to the rights guaranteed in the Charter, whereas the principles of equality apply to all the rights protected in the municipal system of a State party even if they are not recognised in the Charter.[292]

Judge Ouguerouz's view is identical to the position adopted by the Inter-American Court on the distinction between non-discrimination (Article 1(1) of the American Convention on Human Rights) and the right to equality (article 24 of the American Convention).[293] The Commission's jurisprudence shows a trend towards considering equality and non-discrimination as one single principle. However, it is not clear whether that trend grew as a response to its attempted failure to distinguish equality from non-discrimination.

In the *Dioula* case, the African Commission held on the relationship between non-discrimination and equality the following:

> [T]he Commission raises an intrinsic inter-connection between equality before the law and equal protection of the law, on the one hand, and the right to the enjoyment of rights guaranteed by the Charter, on the other hand. This inter-dependence is not specific to the African Charter. It is noteworthy that the Inter-American Human Rights Court combines these three legal prerogatives and treats them as a single principle.[294]

The Commission refers to an advisory opinion of the Inter-American Court to show the link between equality and non-discrimination, however, it was hesitant to declare that the two concepts form a single principle.[295]

The Commission avoided separate discussion of equality and non-discrimination in the 2015 *Nubian Community* case. For example, it observed that 'the principle of equality and non-discrimination does

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[290] *Ogiek* case, para 138; *Tanganyika Law Society & Legal and Human Rights Centre, and Rev Christopher Mtikila v United Republic of Tanzania* (Mtikila v Tanzania), Application no. 009/2011 & No. 011/2011, Judgment of 14 June 2013, para 119.

[291] Ibid.

[292] *Mtikila v Tanzania*, Separate opinion of vice-president Fatsah Ouguerouz, para 36.

[293] See *Case of the Afro-Descendant Communities Displaced from the Cacarica River Basin (Operation Genesis) v Colombia,* Judgment of 20 November 2013, para 333.

[294] *Dioula* case, para 154.

[295] *Juridical Condition and Rights of Undocumented Migrants*, Advisory Opinion OC-18/03 of September 17, 2003, Requested by the United Mexican States.

not require all individuals in similar circumstances to be necessarily treated in the same manner'.[296] It treats them as a single principle without expressly stating their unity. It also found violations of both Articles 2 and 3.[297] However, the Commission is not consistent, as its subsequent decision in the same year suggests.[298]

In 2016, the African Commission adopted a draft protocol to the Charter on the rights of persons with disabilities.[299] The Draft Protocol largely reproduces provisions of the Convention on the Rights of Persons with Disabilities (CRPD). Under the same heading, it provides for equality and non-discrimination in a single provision just like the CRPD, which does not make distinction between the two concepts.[300] The CRPD expressly guarantees 'equality before and under the law' and 'equal protection and equal benefit of the law'.[301] Interestingly, however, the Draft Protocol omits these guarantees. A similar trend is traceable in the Commission's concluding observations. In its 2015 concluding observation on Uganda, the Commission made recommendations on non-discrimination and equality under the same heading.[302]

In its major instrument on economic, social and cultural rights, the Nairobi Principles, the Commission shows its ambivalence on the differences and similarities between the principles of equality and non-discrimination. On the one hand, the African Commission has explained that equality and non-discrimination imply the same kind of state obligations. Thus, the Commission does not make distinctions between equality and non-discrimination while explaining state obligations concerning equality and non-discrimination under each economic, social and cultural right.[303] Besides, the Commission seems to suggest that paying attention to vulnerable groups is a requirement of equality and non-discrimination.[304]

On the other hand, the African Commission has indicated that equality and non-discrimination imply different kinds of state obligations. The Commission refers to non-discrimination under Article 2 as an immediate obligation.[305] It does not specify whether state obligations under the principle of non-discrimination require states to treat vulnerable groups in a particular way. In a different part of the Nairobi principles, the Commission explains that equality requires states to discharge some positive obligations, which include the obligation to pay particular attention to vulnerable groups, to adopt temporary special measures, and to modify social structures although the Commission does not make such classification.[306] I will discuss these issues in the next section.

[296] *Nubian Community* case, para 126.
[297] Ibid, para 135.
[298] *Negash v Ethiopia*, paras 139 & 149. The Commission found a violation of Art 3 (equal protection before the law) but it declared that there was no violation of article 2(non-discrimination).
[299] Draft Protocol to the African Charter on Human and Peoples' Rights on the Rights of Persons with Disabilities in Africa, adopted at the 19th Extra-Ordinary Session, 16 – 25 February 2016, Banjul.
[300] Ibid, Art 3.
[301] CRPD, Art 5(1).
[302] Concluding Observations and Recommendations on the 5th Periodic State Report of the Republic of Uganda (2010 – 2012), 57th Ordinary Session, 04 – 18 November 2015, Banjul, The Gambia, paras 87 – 88.
[303] Nairobi Principles, paras 55(f – h) (property), 59(i – p)(work), 67(x – kk) (health), 71(p – y)(education), 76(e – h)(culture), 79(n – r)(housing), 82(h – l)(social security), 86(x – z)(food), 92(p – v)(water), 95(f – aa)(family)
[304] Ibid.
[305] Nairobi Principles, para 19.
[306] Nairobi Principles, paras 31—38.

## 5.5 Equal enjoyment of economic, social and cultural rights: Vulnerable groups under the African Charter

The African Commission has emphasised the requirement of paying particular attention to members of vulnerable groups in its interpretation of economic, social and cultural rights under the African Charter. I would argue that this requirement arises from the principles of equality and non-discrimination. In the first subsection, I first discuss who constitute vulnerable groups, and in the remaining subsections, I discuss the purpose of identifying vulnerable groups.

### 5.5.1 Identifying vulnerable groups

The African Commission, unlike the CESCR, provides a definition of vulnerable groups. It defines 'vulnerable and disadvantaged' groups as 'people who have faced and/or continue to face significant impediments to their enjoyment of economic, social and cultural rights'.[307] The Commission combines two groups: the vulnerable and the disadvantaged. The use of two terms, one may surmise, implies that vulnerable groups are not necessarily disadvantaged groups. It is also possible that the same individuals can belong to both groups. Like the CESCR, the Commission is not consistent in its use of these terms: even within the same document, it sometimes uses different terms. In the Nairobi Principles, for example, it used 'vulnerable or marginalised' groups.[308] When it comes to the enjoyment of economic, social and cultural rights, however, distinguishing a vulnerable group from a disadvantaged group does not serve any purpose, because the Commission provides one definition for both groups. For the sake of consistency, I use the term 'vulnerable groups'.

The Commission defines vulnerable groups as 'people'. It is necessary to avoid the confusion that might arise from the use of the term 'people'. Even the African Charter does not seem to use the term to convey a single meaning. Article 16(2) of the Charter, for example, seems to use the term 'people' to refer to all individuals in the jurisdiction of states because this provision is about the individual right to health. The provision does not deal with collective rights guaranteed under the Charter. The provisions that guarantee collective rights (Articles 19 to 24 of the Charter) use the terms 'people' and its plural 'peoples' in a different sense. In these provisions, the term 'peoples' refer to '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 factor'.[309] Thus, the term 'people' in the definition of vulnerable groups should refer to a collection of individuals, since vulnerable groups need not have any interest in common.

The Commission identifies members of vulnerable groups based on whether they have faced or continue to face *impediments* to the enjoyment of economic, social and cultural rights. The impediments or barriers faced should be significant. Whether the impediments are significant or not should be determined on a case-by-case basis. Instead of impediments, one may wonder whether it would have been more appropriate to define vulnerable groups as those enjoying less than the minimum essential levels of each right. The Commission recognises state obligations 'to ensure the satisfaction of, at the very least, the minimum essential levels of each of the economic, social and cultural rights contained in the African Charter'.[310] According to the Commission, these are minimum

[307] Nairobi Principles, para 1(e).
[308] Nairobi Principles, para 67(a); See concluding observations on Cameroon (7 to 14 March 2014), para ii (Recommendations); Gabaon (7 to 14 March 2014), para 66(xxxii); *Endorois* case, para 148.
[309] Nairobi Principles, para 1(c).
[310] Nairobi Principles, para 17.

core obligations.[311] Moreover, it requires states 'to ensure the minimum essential levels of each right to members of vulnerable and disadvantaged groups' even during demonstrable resource constraints.[312]

The Commission's definition of vulnerable group, one may argue, is capable of universal application: any group of persons who have faced or continue to face impediments to their enjoyment of economic, social and cultural rights can qualify as a vulnerable group. In addition to the definition, the Commission provides an extensive list of vulnerable groups:

> Vulnerable and disadvantaged groups include, but are not limited to, women, linguistic, racial, religious minorities, children (particularly orphans, young girls, children of low-income groups, children in rural areas, children of immigrants and of migrant workers, children belonging to linguistic, racial, religious or other minorities, and children belonging to indigenous populations/communities), youth, the elderly, people living with, or affected by, HIV/AIDS, and other persons with terminal illnesses, persons with persistent medical problems, child and female-headed households and victims of natural disasters, indigenous populations/communities, persons with disabilities, victims of sexual and economic exploitation, detainees, lesbian, gay, bisexual, transgendered and intersex people, victims of natural disasters and armed conflict, refugees and asylum seekers, internally displaced populations, legal or illegal migrant workers, slum dwellers, landless and nomadic pastoralists, workers in the informal sector of the economy and subsistence agriculture, persons living in informal settlements and workers in irregular forms of employment such as home-based workers, casual and seasonal workers.[313]

The Commission's list of vulnerable groups is long, but as the use of the phrase 'groups include, but are not limited to' indicates, it is not exhaustive. The list is, however, more complete than the CESCR's list. It includes all human beings except adult males in certain age groups. The Commission considers children, youth and the elderly among vulnerable groups. One may estimate these age groups to constitute more than half of any country's population. When one adds women, who usually constitute more than half of any country's population, to the above age groups as vulnerable, it is possible to imagine that the chance of an individual belonging to at least one of the vulnerable groups is very high, indicating the Commission's definition is very broad.

The African Charter guarantees economic, social and cultural rights to individuals. However, the Commission defines a group, not an individual, as vulnerable. One may still accept the Commission's group based approach. This is because it is more reasonable to expect states to adopt programs or measures targeting a certain group, instead of an individual; although ultimately, since groups consist of individual members, measures adopted to address a group benefit its individual members.

Despite providing this long list of vulnerable groups, the Commission does not refer to any criterion for identifying the groups in its list. While criteria used to identify the groups, if any, are not readily discoverable, the relationship between the groups in the list and the prohibited grounds of discrimination appears conspicuous insofar as it is possible to find a vulnerable group for almost all prohibited grounds of discrimination that the Commission identifies. Obviously, the Commission has used race, sex, gender, sexual orientation, language, religion, disability and age to identify a vulnerable group. However, the Commission does not establish a clear causal relationship between discrimination and vulnerability. That is, the Commission does not clearly conclude whether discrimination is a cause or a consequence of vulnerability.

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[311] Ibid.
[312] Ibid.
[313] Nairobi Principles, para 1(e).

The Commission does not state the purpose of defining and identifying vulnerable groups clearly. However, it identifies steps that states should take under each economic, social and cultural right for the benefit of vulnerable groups. For this reason, it is submitted, the Commission has defined and listed vulnerable groups to give them priority, although one may doubt the feasibility of according them priority due to the breadth of the Commission's definition of vulnerable groups. According priority to vulnerable groups also entails adopting temporary special measures in favour of this group. However, vulnerable groups remain vulnerable unless states remove structural barriers that impede the enjoyment of their rights. Therefore, it is necessary to remove structural barriers or impediments that define vulnerability. I discuss these issues in turn shortly.

### 5.5.2 Prioritisation of vulnerable groups

In a rhetorical sense, equality is 'a convenient way of drawing attention to the need to give priority to a group' as discussed above.[314] In the South African context, Wesson argues that 'substantive equality allows for preference to be accorded to disadvantaged' and it may be pursued to the extent that such preference is consistent with the dignity of others.[315] It is submitted that an understanding of equality as a requirement to give priority to vulnerable groups is traceable in the practice of the African Commission.

Like the CESCR, the African Commission requires that states 'pay particular attention to members of vulnerable and disadvantaged groups' to ensure 'effective equality in the enjoyment of economic, social and cultural rights'.[316] It is clear from this requirement that states should not neglect members of vulnerable groups in any measure taken to implement economic, social and cultural rights. As observed above with regard to the CESCR, the requirement of paying particular attention to vulnerable groups amounts to a requirement of priority. The Commission's emphasis on priority for vulnerable groups buttresses this submission. Under the requirements of equality and non-discrimination, for example, the Commission has emphasised prioritisation of members of vulnerable groups with regard to the right to health and housing. Equality and non-discrimination under the right to health require states to ensure that 'national plans prioritise members of vulnerable and disadvantaged groups in access to health care'.[317] Similarly, the Commission has stressed state obligations to ensure that 'priority in housing and land allocation should be given to members of vulnerable and disadvantaged groups' according to the requirement of equality and non-discrimination.[318] Therefore, the Commission adopts prioritarianism.

The Commission's priority view, like the CESCR, also springs from economic, social and cultural rights themselves. The Commission specified that this requirement is applicable to both immediate and progressive state obligations. With regard to minimum core obligations, which are immediate, the Commission observed that 'the State should still implement measures to ensure the minimum essential levels of each right to members of vulnerable and disadvantaged groups, particularly by *prioritising* them in all interventions' even when the state faces demonstrable resource constraints.[319] With regard to state obligations to fulfil economic, social and cultural rights under the

[314] Bamforth et al (n 18) 187 – 188.
[315] Wesson (n 76) 765.
[316] Nairobi Principles, para 32.
[317] Nairobi Principles, para 67(x).
[318] Nairobi Principles, para 79(n).
[319] Nairobi Principles, paras 14 & 17. Italics added.

African Charter, the Commission stressed that the 'rights of vulnerable and disadvantaged groups should be *prioritised* in all programmes of social and economic development'.[320]

### 5.5.3 Temporary special measures

Temporary special measures are an example of the priority view as discussed above. The principles of equality and non-discrimination require states to take temporary special measures in favour of vulnerable groups. The African Commission has also adopted a similar view. However, the Commission has suggested that the requirement to take temporary special measures can also arise from another source. In the *Endorois* case, the African Commission held that states should take special measures to protect the interests and benefits of indigenous communities in their traditional land.[321] Rejecting an argument by the respondent State that such measures may be perceived as discriminatory, it held that 'in certain cases, positive discrimination or affirmative action helps to redress imbalance'.[322] The Commission did not link the concept to the right to equality under Article 3 of the Charter; it drew on international law and held that 'unequal treatment towards persons in unequal situations does not necessarily amount to impermissible discrimination'.[323] Two conclusions, it is submitted, may flow from the Commission's holdings in the *Endorois* case: First, states parties to the African Charter should take affirmative action in favour of indigenous people whom the Commission recognises as vulnerable groups. Second, affirmative action is not discriminatory.

In the Nairobi Principles, the African Commission derives temporary special measures directly from the right to equality. The Commission has declared that

> The right to equality includes the adoption of special measures for the purpose of securing the adequate advancement of members of vulnerable and disadvantaged groups to enable their *equal* enjoyment of economic, social and cultural rights. This means that *in some cases* States will have to take temporary special measures in favour of these groups in order to reduce or suppress conditions that perpetuate discrimination and to realise substantive equality.[324]

The Commission has explained that the right to equality entails temporary special measures, however, it does not refer to Article 3 of the Charter, which guarantees the right to equality. As discussed above (Section 3), the African Charter also guarantees a collective right to equality under Article 19. Thus, one may wonder whether the right to equality of peoples also entails temporary special measures. The Nairobi Principles deal with economic, social and cultural rights, which are individual rights. The right to equality in the above quote, one may argue, refers to Article 3 of the Charter. This conclusion, however, does not bar the reading of Article 19 as requiring temporary special measures because the Commission has already required affirmative action for the benefit of indigenous people in the *Endorois* case.[325]

The African Commission clearly specifies that the beneficiaries of temporary special measures are vulnerable groups. As the phrase 'in some cases' indicates the Commission finds that it is not necessary to take such measures in every case. However, the Commission does not identify the cases in which it is necessary to adopt temporary special measures. It appears, rather, to give states some discretion to identify vulnerable groups that need temporary special measures. Nevertheless, this

[320] Nairobi Principles, para 12. Italics added.
[321] *Endorois* case, para 187 &196.
[322] *Endorois* case, para 196.
[323] Ibid.
[324] Nairobi Principles, para 34. Italics added.
[325] *Endorois* case, para 187 &196.

does not prevent the Commission from specifying particular cases where states should adopt temporary special measures. For example, with regard to women's right to work, the Commission explained that states should take 'special steps to ensure that women have equal opportunities to accept employment'.[326] Thus, special education and training programmes should be provided to women to equip them to seek decent work of their own choice.[327]

The African Commission explains the purpose of temporary special measures. It is to enable the beneficiaries to enjoy economic, social and cultural rights on equal footing with others.[328] It also provides how states should attain this purpose.

> Such temporary special measures should accelerate the improvement of the position of vulnerable and disadvantaged groups to achieve their de facto or substantive equality, and to effect the structural, social and cultural changes necessary to correct past and current forms and effects of discrimination, as well as to provide them with compensation.[329]

To achieve equality in the enjoyment of economic, social and cultural rights, the Commission seems to require states: a) to reduce or suppress conditions that perpetuate discrimination;[330] b) to effect the structural, social and cultural changes necessary to correct past and current forms and effects of discrimination; c) to achieve de facto or substantive equality; and d) to provide compensation. In form, it appears that the Commission requires states to discharge several duties. In effect, the first two items (reducing causes of discrimination and effecting structural changes) are the means for achieving the third item (achieving substantive equality). Requiring states to provide compensation (the last item) appears to be more of a remedy than a temporary special measure.

In principle, temporary special measures are not permanent – as the name itself indicates. They should be discontinued when the disadvantages intended to be removed cease to exist.[331] The Commission does not mention whether some of those measures can exceptionally be permanent. In contrast, the CESCR recognises that special measures can be permanent in exceptional cases.[332] Peculiar examples include 'interpretation services for linguistic minorities and reasonable accommodation of persons with sensory impairments in accessing health-care facilities'.[333] According to the Committee, denial of a reasonable accommodation, by definition, constitutes discrimination.[334] Thus, the concept does not fall within the purview of temporary special measures.

One may examine the Commission's view on temporary special measures against the limitations identified in equality theories. As discussed above, Fineman argues that affirmative action policies, at least in the United States, are limited because they focus on historic individual identity categories.[335] The Commission approach, it is submitted, does not suffer from this limitation. This is because the Commission requires temporary special measures for all vulnerable groups. Vulnerable groups, according to the Commission's definition examined above, are not limited to historic individual identity categories. For example, victims of a natural disaster who had never suffered from historic

[326] Nairobi Principles, para 59(j).
[327] Ibid.
[328] Nairobi Principles, para 34.
[329] Nairobi Principles, para 35.
[330] Nairobi Principles, para 34, quoted above.
[331] Nairobi Principles, para 35.
[332] General Comment 20, para 9.
[333] Ibid.
[334] Draft Protocol on the Rights of Persons with Disabilities, Art 1(d).
[335] Ibid.

disadvantage can benefit from temporary special measures because they are members of vulnerable groups according to the Commission's definition.[336]

Another limitation that Fineman identifies is that affirmative action policies cannot address the more complicated forms of disadvantage entrenched in institutions.[337] Fredman also recognises that affirmative action policies cannot bring about a radical programme of structural change.[338] However, the African Commission seems to adopt a different view. The Commission requires states 'to effect the *structural, social and cultural changes* necessary to correct past and current forms and effects of discrimination' through temporary special measures.[339] Noting that structural changes have a lasting effect, one may argue that they are not temporary special measures. I will next examine the practice of the African Commission to identify whether it requires states to adopt structural changes.

### 5.5.4 Structural changes

According to equality theories discussed above, it is necessary to address the social structures that cause inequalities. Like the CESCR, the African Commission requires states to modify the social structures that cause inequalities, particularly in the enjoyment of economic, social and cultural rights by vulnerable groups. According to the Commission, 'States must pay particular attention to members of vulnerable' groups to ensure '*effective equality* in the enjoyment of economic, social and cultural rights'.[340] The Commission explains that two reasons justify this requirement. First, members of vulnerable groups 'are often disproportionately affected by a failure of the State to ensure economic, social and cultural rights'.[341] Second, members of vulnerable groups 'are *direct victims* of discriminatory laws, policies and customary practices'.[342] In other words, the Commission explains that discriminatory laws, policies and customary practices are reasons for the lack of enjoyment of economic, social and cultural rights by members of vulnerable groups. In the long list of vulnerable groups, the Commission focuses on the situation of women, indigenous peoples, and persons with disabilities, occasionally referring to other vulnerable groups. For this reason, I focus on social structures that impede the enjoyment of economic, social and cultural rights by women, indigenous peoples, and persons with disabilities.

#### 5.5.4.1 Women

The African Commission has underlined that because of 'entrenched patterns of sex/gender discrimination, women often do not enjoy equality in relation to economic, social and cultural rights'.[343] Thus, the Commission recognises that discrimination against women is the cause that impedes the enjoyment of economic, social and cultural rights by women. The Commission emphasises this causal relationship in almost every right. For example, with regard to women's right to property under Article 14 of the African Charter, the Commission recognises that women 'continue to experience difficulty with regard to access to economic opportunities, particularly land

[336] Nairobi Principles, para 1(e).
[337] Ibid.
[338] Sandra Fredman, Affirmative Action, (n 63) 172.
[339] Nairobi Principles, para 35. Italics added.
[340] Nairobi Principles, para 32. Italics added.
[341] Ibid.
[342] Ibid. Italics added.
[343] Nairobi Principles, para 37.

holding' in many parts of Africa'.[344] Defined by gender hierarchy, 'most cultures and traditions often deny female children rights of inheritance'.[345] Women usually depend on men who are entitled to inherit land, which is an essential resource to produce food or to build a house. By requiring states to 'ensure equitable and non-discriminatory access, acquisition, ownership, inheritance and control of land and housing, especially by women,' the Commission is indicating that the cause of deprivation is discrimination.[346] Therefore, states should 'modify or prohibit harmful social, cultural or other practices that prevent women' from enjoying their right to property.[347]

The Commission identifies misrecognition of the economic value of caregiving and other household work as one of the structural barriers to the enjoyment of women's right to work under Article 15 of the African Charter. Thus, the Commission has stressed that the principles of equality and non-discrimination require states to take 'the necessary measures to recognise the economic value of care giving and other household work, for example, subsistence and market gardening, cooking, and caring for children and the elderly'.[348] They should also 'adopt systems that record the value of women's unpaid contributions to society' when they prepare their national budget.[349] The Protocol to the African Charter on the Rights of Women in Africa expressly requires states to discharge this obligation. The Protocol provides that states have the obligation to 'take the necessary measures to recognise the economic value of the work of women in the home'.[350] This requirement now forms one of the targets under the Sustainable Development Goal 5: 'Achieve gender equality and empower all women and girls'. The target is to '[r]ecognize and value unpaid care and domestic work through the provision of public services, infrastructure and social protection policies and the promotion of shared responsibility within the household and the family as nationally appropriate'.[351]

Discrimination against women goes beyond their access to resources. It affects their body and the enjoyment of their right to health under Article 16 of the African Charter. Research findings show that female genital mutilation and violence against women are some of the cultural practices that 'continue to endanger the health and well-being of African women and girls'.[352] Therefore, the African Commission underscores state obligations to eliminate 'harmful traditional practices, including particularly female genital mutilation, that interfere with the right to health'.[353] They should also take 'measures to prevent violence against women'.[354] Such measures include, among other things, community mobilisation and education, counselling and education of men, and training of health and law enforcement personnel.[355]

Violence against women, when it occurs despite preventive measures, constitutes a violation of the right to health and the right to equality and non-discrimination as the Commission held in the

[344] Ebenezer Durojaye and Olubayo Oluduro, 'The African Commission on Human and People's Rights and the woman question' (2016) 24/3 *Feminist Legal Studies* 315–336, 319.
[345] Ibid.
[346] Nairobi Principles, para 55(h).
[347] Ibid.
[348] Nairobi Principles, para 59(l).
[349] Ibid.
[350] Women's Protocol, Art 13 (h).
[351] Sustainable Development Goals, target 5.4, available at <https://sustainabledevelopment.un.org/> (accessed 22 January 2018).
[352] Durojaye & Oluduro (n 344) 319.
[353] Nairobi Principles, para 67(dd).
[354] Nairobi Principles, para 67(ii).
[355] Ibid.

*Egyptian GBV* case.[356] The case involves sexual assault on some women who participated in a demonstration, a protest against the government. The police officers expressly told the assaulted women that the violence and the assault were because women came 'to the areas belonging to men'.[357] This clearly shows that agents of the respondent State actually believe that women should not take part in public gatherings. This practice of excluding women from public spaces constitutes a structural barrier to the enjoyment of their rights. The Commission has recognised the systemic nature of the violence explaining the context in which it happened: 'perpetrators of the assaults seemed to be aware of the context of the Egyptian society; an Arab Muslim society where a woman's virtue is measured by keeping herself physically and sexually unexposed except to her husband'.[358] The Commission has held that: 'Victims were physically and emotionally traumatized as a result of sexual violence and assaults on their person. The trauma and injuries sustained has affected their physical, psychological and mental health clearly in violation of Article 16(1) of the African Charter'.[359] One may acclaim the Commission for identifying structural barriers to enjoyment of the right to health by women; at the same time, the Commission's decision is disappointing for failing to provide appropriate remedies that address the identified structural barriers, unlike the Inter-American Court of Human Rights.[360]

In *Negash v Ethiopia,* the African Commission has examined alleged violations of non-discrimination (Article 2) and the respondent State's duty to eliminate discrimination against women (Article 18(3)). The communication concerns the abduction, rape and subsequent captivity of a 13-year-old girl. Although the communication has been about one girl, the Commission established that the practice of marriage by abduction and rape has continued to exist in the respondent State.[361] As a result, the Commission noted that 'other girls and women are under a continuing risk of being abducted, raped and forcibly married'.[362] It has emphasised that 'the Respondent State is under the obligation to adopt escalated and targeted measures to ensure that this practice ceases completely'.[363] The Commission has ordered the respondent State to take measures, which include 'launching sensitisation campaigns in the area about the illegality of the practice of forced marriage by abduction and rape and the attendant penal consequences'.[364]

By ordering sensitisation campaigns, one may argue, the African Commission requires states to modify social structures that impede the enjoyment of rights by women. However, the Commission misses a couple of important points in *Negash v Ethiopia*. First, the Commission has recognised the prevalence of the practice of marriage by abduction and rape in Ethiopia. It ascertained the practice is a crime, but the Ethiopian authorities failed to protect the victim. Yet the Commission has failed to find a violation of non-discrimination (both Articles 2 and 18(3)) despite the allegations to that effect. Such facts would have amounted to structural discrimination against women according to the Inter-American Court.[365] Second, the Commission has stipulated in the Nairobi Principles that equality and non-discrimination in the enjoyment of the right to health (Article 16 of the Charter) require states to

[356] *Egyptian GBV* case, paras 139, 154, 180, & 265.
[357] *Egyptian GBV* case, para 151.
[358] *Egyptian GBV* case, para 152.
[359] *Egyptian GBV* case, para 265.
[360] *González et al ("Cotton Field") v Mexico*, Judgment of 16 November 16 2009, para 602.
[361] *Negash v Ethiopia*, para 152.
[362] Ibid.
[363] Ibid.
[364] *Negash v Ethiopia*, para 128.
[365] See *González et al ("Cotton Field") v Mexico*, Judgment of 16 November 16 2009, paras 542—543 & 602.

take 'measures to prevent violence against women,'[366] stressing that such measures include criminalisation of rape, punishment of offenders, community mobilisation and education, and training of health and law enforcement personnel.[367] In *Negash v Ethiopia*, however, the Commission failed to examine a violation of the right to health.

#### 5.5.4.2 Indigenous peoples

The African Commission identifies indigenous peoples as vulnerable groups, defining and describing them as follows:

> [Indigenous people are] any group of people whose culture and way of life and mode of production differ considerably from the dominant society, whose culture depends on access and rights to their traditional land and the natural resources thereon, and whose cultures are under threat. They suffer from *discrimination* as they are regarded as less developed and less advanced than other more dominant sectors of society, which often prevents them from being able to genuinely participate in deciding on their own future and forms of development.[368]

Being discriminated against is indigenous people's defining feature. The Commission, through its Working Group on Indigenous Populations/Communities in Africa, has also found that the dominant sectors of society consider indigenous peoples 'underdeveloped', 'backward', and 'primitive'.[369] They have been subjected to negative stereotypes and discrimination.[370] The Commission's Working Group has identified deplorable conditions with regard to indigenous peoples' access to the enjoyment of some economic, social and cultural rights, and has furthermore observed that 'the health situation of indigenous peoples is often very precarious and receives very limited attention' due to 'the general *marginalization* that indigenous peoples suffer from economically and politically'.[371] The Working Group concluded that indigenous people's 'health situation is in many cases extremely critical and this is a violation of Article 16 of the African Charter'.[372] The Working Group also examined the level of enjoyment of the right to education by indigenous peoples. For most indigenous peoples, the Working Group found poor literacy rates and school attendance.[373] For example, the Working Group found that the rate of primary school attendance among the Batwa, an indigenous community in the Democratic Republic of Congo, is 11% as opposed to 72% nationally.[374]

Indigenous peoples face the most serious violation with regard to the enjoyment of their right to property. By definition, their culture 'depends on access and rights to their traditional land and the natural resources thereon'.[375] Therefore, access to land and natural resources is essential to the enjoyment of economic, social and cultural rights by indigenous people. For this reason, the Commission's Working Group has concluded that dispossession of 'land and natural resources is a

[366] Nairobi Principles, para 67(ii).
[367] Nairobi Principles, para 67(ii).
[368] Nairobi Principles, para 1(b). Italics added.
[369] Report of the African Commission's Working Group on Indigenous Populations/Communities, 28th Ordinary Session, DOC/OS(XXXIV)/345 (14 May 2003) 5.
[370] Ibid, 22 – 24.
[371] Report of the African Commission's Working Group on Indigenous Populations/Communities, 28th Ordinary Session, DOC/OS(XXXIV)/345 (14 May 2003) 37. Italics added.
[372] Ibid.
[373] Ibid 40.
[374] Ibid 41.
[375] Nairobi Principles, para 1(b).

major human rights problem for indigenous peoples'.[376] This is because land and other natural resources are sources of food, water, and medicine and places of shelter and worship for indigenous peoples. By taking away land from indigenous people, states violate their economic, social and cultural rights, including the rights to food, to water and to housing.

The purpose of dispossession of indigenous peoples has been 'to give way for the economic interests of other more dominant groups and to large scale development initiatives that tend to destroy their lives and cultures'.[377] The Commission's Working Group has found that the land occupied by indigenous peoples is considered *terra nullius*, which means nobody's land.[378] The assumption that their land is 'empty or not used productively has stimulated land alienation at all levels'.[379] Besides, the Working Group has found that indigenous peoples have limited 'legal titles to their land as their customary laws and regulations are not recognized or respected and as national legislation in many cases does not provide for collective titling of land'.[380]

In their case law, the African Commission and the African Court have examined cases alleging violations of economic, social and cultural rights of indigenous peoples. The issue of access to land and natural resources is central in all cases. The African Commission identifies Ogoni people of Nigeria among indigenous people, 'who have been denied rights to the rich oil resources' found on their land.[381] The drilling operation by Shell Oil Company since 1958 decreased Ogoni people's agricultural production and fishing catches.[382] In relation to oil exploration on the Ogoniland, the African Commission found violations of some economic, social and cultural rights of the Ogonis. It declared a violation of the right to food because the government of Nigeria 'has destroyed food sources through its security forces and state oil company; has allowed private oil companies to destroy food sources; and, through terror, has created significant obstacles to Ogoni communities trying to feed themselves'.[383] It also found violations of the rights to health and to housing.[384] Although the Commission found discrimination contrary to Article 2 of the Charter, it has not clearly identified the ground of discrimination.[385]

In the *Endorois* case, the African Commission examined eviction of Endorois Communities of Kenya from their ancestral land. It has recognised that indigenous peoples face several challenges, including 'exclusion, exploitation, discrimination and extreme poverty; displacement from their traditional territories and deprivation of their means of subsistence'.[386] The complainants have submitted to the Commission that:

> Common problems faced by indigenous groups include the lack of "formal" title recognition of their historic territories, the failure of domestic legal systems to acknowledge communal property rights, and the claiming of formal legal title to indigenous land by the colonial authorities. This [...] has led to

[376] Report of the African Commission's Working Group on Indigenous Populations/Communities, 28th Ordinary Session, DOC/OS(XXXIV)/345 (14 May 2003) 11.
[377] Ibid, 11.
[378] Ibid 12.
[379] Ibid.
[380] Ibid.
[381] Ibid 17—18.
[382] Ibid.
[383] *Ogoniland* case, para 66.
[384] *Ogoniland* case, paras 50—54 & 59—63,
[385] *Ogoniland* case, para 69 (holding).
[386] *Endorois* case, para 248.

> many cases of displacement from a people's historic territory, both by colonial authorities and post-colonial states relying on the legal title they inherited from the colonial authorities.[387]

The African Commission seems to agree with the complainants, since it proposed a solution for these common problems. It emphasised that 'the first step in the protection of traditional African communities is the acknowledgement that the rights, interests and benefits of such communities in their traditional lands constitute "property" under the Charter'.[388] Relying heavily on the jurisprudence of the Inter-American Court of Human Rights, the Commission has drawn the following conclusions:

> (1) traditional possession of land by indigenous people has the equivalent effect as that of a state-granted full property title; (2) traditional possession entitles indigenous people to demand official recognition and registration of property title; (3) the members of indigenous peoples who have unwillingly left their traditional lands, or lost possession thereof, maintain property rights thereto, even though they lack legal title, unless the lands have been lawfully transferred to third parties in good faith; and (4) the members of indigenous peoples who have unwillingly lost possession of their lands, when those lands have been lawfully transferred to innocent third parties, are entitled to restitution thereof or to obtain other lands of equal extension and quality.[389]

Therefore, the African Commission devised a solution for the problem of indigenous peoples' limited legal entitlement to their land. Based on these conclusions, the Commission declared that 'the land of the Endorois has been encroached upon'.[390] It ordered restitution and compensation because the eviction of Endorois indigenous people from their ancestral land is a violation of their right to property (article 14 of the African Charter).[391] The Commission stresses that the right to property requires states to ensure that indigenous peoples are 'adequately compensated for both historical and current destruction or alienation of wealth and resources'.[392]

In the *Ogiek* case, the African Commission submitted to the African Court a case concerning the Ogiek people, an indigenous community evicted from Mau Forest by the Republic of Kenya. In line with its findings in the *Endorois* case, the African Commission argued before the Court that 'the failure of the Respondent to recognise the Ogieks as an indigenous community denies them the right to communal ownership of land as provided in Article 14 of the Charter'.[393] The Commission has further submitted that 'the Ogieks' eviction and dispossession of their land without their consent and without adequate compensation, and the granting of concessions of their land to third parties, mean that their land has been encroached upon'.[394] Noting that Article 14 of the Charter is applicable to groups and communities, the African Court held that the Ogieks have 'the right to occupy their ancestral lands, as well as use and enjoy the said lands'.[395] It concluded that 'by expelling the Ogieks from their ancestral lands against their will, without prior consultation and without respecting the conditions of expulsion in the interest of public need, the Respondent violated their rights to land'.[396]

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[387] *Endorois* case, para 187.
[388] Ibid.
[389] *Endorois* case, para 209.
[390] Ibid.
[391] *Endorois* case, recommendation.
[392] Nairobi Principles, para 55(f).
[393] *Ogiek* case, para 114.
[394] *Ogiek* case, para 114.
[395] *Ogiek* case, paras 123 & 128.
[396] *Ogiek* case, para 131.

The African Commission argued before the African Court that the differential treatment of the Ogieks 'in relation to the lack of respect for their property rights', among other things, 'constitutes unlawful discrimination and is a violation of Article 2 of the Charter'.[397] The African Court in turn ascertained that the Ogieks requested recognition as a tribe in 1933, long before Kenya achieved its independence, but were denied recognition at that time.[398] It also found that the denial of recognition 'denied them access to their own land as, at the time, only those who had tribal status were given land,' and that this condition of the Ogieks has continued after the independence of Kenya and came before the Court for determination.[399] The Court has concluded that Kenya's conduct, that is, 'failing to recognise the Ogieks' status as a distinct tribe like other similar groups and thereby denying them the rights available to other tribes,'[400] constitutes discrimination 'based on ethnicity and/or "other status" in terms of Article 2 of the Charter'.[401]

None of these cases clearly demonstrate that discriminatory law is one of the main social structures that impede the enjoyment of economic, social and cultural rights by indigenous peoples. As discussed above, the African Commission has not stated its reason for finding discrimination in the *Ogoniland* case. It has not even found discrimination in the *Endorois* case. Based on the Commission's argument, the African Court has found discrimination in the *Ogiek* case; but the Court shied away from identifying discrimination as a structural problem. Still, the decisions in these cases, one may argue, address social structures that impede indigenous peoples' enjoyment of economic, social and cultural rights. A comparison with decisions made in the Inter-American system illustrates this point.

The decisions in these cases, at least in some respects, are similar to the arguments of the Inter-American Commission on Human Rights and the decision of the Inter-American Court in *Xákmok Kásek Indigenous Community v Paraguay* as discussed above.[402] According to the argument of the Inter-American Commission before the Inter-American Court, that case 'illustrates the persistence of structural discrimination factors in Paraguayan law with regard to the protection' of the right to property of the indigenous peoples.[403] The Inter-American Commission submitted that legal provisions in Paraguayan law 'result in the discriminatory functioning of the State system, because they give preference to the protection of the right to "rationally productive" private property over the protection of the territorial rights of an indigenous population'.[404] The Inter-American Court has found that 'the prevalence of a vision of property that grants greater protection to the private owners over the indigenous peoples' territorial claims' is one of the factors that reveals '*de facto* discrimination against the members of the Xákmok Kásek Community'.[405]

In the *Endorois* case, the African Commission has dealt with problems similar to those faced by the Xákmok Kásek Community. As the African Commission identified in its report on indigenous peoples and in the *Endorois* case, one of the problems is the lack of recognition of indigenous peoples'

[397] *Ogiek* case, para 133.
[398] *Ogiek* case, para 141.
[399] *Ogiek* case, para 141.
[400] *Ogiek* case, para 146.
[401] *Ogiek* case, para 142.
[402] See J L Caballero Ochoa & M Aguilar Contreras 'New Trends on the Right to Non-Discrimination in the Inter-American System of Human Rights' (2015) 8 *Inter-American and European Human Rights Journal* 80.
[403] *Xákmok Kásek Indigenous Community v Paraguay*, Judgment of 24 August 2010, para 265.
[404] *Xákmok Kásek* case, para 265.
[405] *Xákmok Kásek* case, paras 273 & 274.

customary rules of communal land ownership.[406] For this reason, the African Commission has recognised collective land ownership by indigenous people without obliging them to have a formal title.[407] In effect, the African Commission has determined that the systems of private property in African States exclude indigenous peoples, and for this reason, they are discriminatory. Unlike the Inter-American Commission, however, the African Commission has avoided declaring that the laws establishing private property systems constitute structural discrimination against indigenous peoples. Similarly, the African Court has also avoided that kind of pronouncement in the *Ogiek* case.

The *Ogoniland* case is, however, different from the *Endorois* and the *Ogiek* cases. It does not deal with the respondent State's failure to recognise communal land ownership. One may identify the structural problem to be the laws that grant concessions to the oil company without regulating the impact of oil extraction on the livelihood of the Ogonis, particularly the enjoyment of their rights to food, to housing, to water, and to health. These laws, one may argue, are discriminatory, like the laws establishing and maintaining private property systems. The laws benefit members of dominant sectors of society, who include, one may assume, users of services funded by tax revenues from the companies, the employees receiving income, shareholders reaping profits and others. The benefits do not only exclude indigenous people, the Ogonis in this case, but also cause them multiple forms of suffering, for example, sickness due to the contamination of water and the pollution of air. One may further argue that the orders and remedies made by the African Commission can address these problems. The remedies include compensation for the victims and cleaning up of the pollution. The Commission has also required environmental and social impact assessments in future oil development programmes.[408]

#### 5.5.4.3 Persons with Disabilities

Persons with disabilities are a category of vulnerable groups. In *Purohit and Moore v The Gambia*, the African Commission had the opportunity to deal with some structural problems impeding the enjoyment of economic, social and cultural rights by persons with disabilities. It decided this communication in 2003. The Commission examined, among other things, the respondent State's law called the Lunatics Detention Act,[409] which subjects persons with mental disability to an indefinite institutionalisation.[410] The Act resulted in 'the practice of detaining persons regarded as mentally ill indefinitely' in an overcrowded psychiatric unit.[411] The Act was archaic since it was promulgated in 1917 and amended in 1964.[412] The respondent State has admitted that there were no significant resource shortages, at least with regard to drug supplies.[413] The Commission confirmed that persons who would be detained under the Act are 'likely to be people picked up from the streets or people from poor backgrounds'.[414] The Commission also ascertained that the scheme of Lunatics Detention Act was 'lacking in terms of therapeutic objectives as well as provision of matching resources and programmes of treatment'.[415] The Commission found the Gambia in violation of the right to health

[406] Report of the African Commission's Working Group on Indigenous Populations/Communities, 28th Ordinary Session, DOC/OS(XXXIV)/345 (14 May 2003) 12; *Endorois* case, para 187.
[407] *Endorois* case, para 209.
[408] *Ogoniland* case, para 69 (holding).
[409] *Purohit and Moore v The Gambia*, para 4.
[410] Ibid para 44.
[411] Ibid paras 5 & 45.
[412] *Purohit and Moore v The Gambia*, paras 42 & 85.
[413] Ibid, para 85.
[414] Ibid para 53.
[415] Ibid, para 83.

under Article 16 of the African Charter.[416] Moreover, the Commission held that the detention of persons with mental disabilities without providing them with legal assistance violates both Articles 2 and 3 of the Charter (non-discrimination and the right to equality).[417]

The Lunatics Detention Act itself, one may argue, is a discriminatory law, since this law makes disability in itself a justification for the deprivation of liberty. This is not acceptable nowadays. Deinstitutionalisation has been attracting the attention of policymakers.[418] Human rights treaty bodies emphasise that disability cannot justify institutionalisation.[419] In particular, the Committee on the Rights of Persons with Disabilities usually underlines that an accelerated process of deinstitutionalisation is necessary. For example, it has stressed that a state must 'expedite the process of deinstitutionalization and implement, without delay, its action plan for deinstitutionalization, including timelines for closing all remaining institutions'.[420] Of course, most of these developments in the rights of persons with disabilities have taken place after the Commission's decision in 2003. As a result, the African Commission did not find the Act discriminatory. One may still argue that the Commission indirectly identified the Act as the major factor impeding the enjoyment of the right to health. The Commission has ordered the respondent State to repeal the Lunatics Detention Act. Therefore, the Commission's remedy has the same effect of addressing the problem.

The Protocol to the African Charter on the Rights of Persons with Disabilities drafted by the African Commission emphasises that 'The existence of a disability or perceived disability shall in no case justify deprivation of liberty'.[421] Moreover, the Commission identified in the protocol several structural problems that impede the enjoyment of rights by persons with disabilities. For example, the protocol stresses that states should take 'measures to modify or abolish existing policies, laws, regulations, customs and practices that constitute discrimination against persons with disabilities'.[422]

In the Nairobi Principles, the African Commission explained state obligations with regard to persons with disabilities. It has underlined that the right to work under Article 15 of the African Charter requires states to promote 'employment opportunities and career advancement for persons with disabilities in the labour market, as well as assistance in finding, maintaining and returning to employment'.[423] They should have 'effective access to general technical and vocational guidance programmes'.[424] The Commission emphasises that the principle of equality and non-discrimination

[416] Ibid, para 83.
[417] Ibid, paras 50 – 54.
[418] Arlene S Kanter, *The Development of Disability Rights Under International Law: From Charity to Human Rights* (2015) 127.
[419] Human Rights Committee, General comment No 35: Article 9 (Liberty and security of person), CCPR/C/GC/35, 16 December 2014, para 19.
[420] Concluding observation of the Committee on the Rights of Persons with Disabilities on Armenia, CRPD/C/ARM/CO/1, 8 May 2017, para 32; See Concluding observations on Moldova, CRPD/C/MDA/CO/1, 18 May 2017, para 37; Canada, CRPD/C/CAN/CO/1, 8 May 2017, para 38; Honduras, CRPD/C/HND/CO/1, 4 May 2017, para 38; Bosnia and Herzegovina, CRPD/C/BIH/CO/1, 2 May 2017, para 35; Uruguay, CRPD/C/URY/CO/1, 30 September 2016, para 36.
[421] Protocol on Persons with Disabilities, Art 5(5).
[422] Ibid Art 2(c).
[423] Nairobi Principles, para 59(n).
[424] Ibid.

and the right to health under Article 16 require the 'provision of those specific health services needed by persons with psychosocial, intellectual and physical disabilities'.[425]

In sum, the practice under the African Charter (particularly that of the African Commission) shows that equality in the enjoyment of economic, social and cultural rights by the vulnerable groups requires states to modify social structures that impede their enjoyment. Such social structures include discriminatory laws and customary rules and practices. The Commission does not usually declare those laws and practices discriminatory; however, the Commission does address these structural problems through remedies (eg, recognition of communal land ownership and an order to repeal discriminatory laws).

## 5.6 Conclusion

Equality is a contested concept, with as many theories and definitions as there are theorists. This chapter has attempted to identify meanings and theories of equality that address problems in the realisation of economic, social and cultural rights, and has argued that a substantive conception of equality may mean according priority to the worse-off and that this includes the adoption of affirmative action policies. The Chapter has also argued that it is necessary to modify disadvantaging social structures, including legal or customary rules, institutions, practices, procedures and attitudes, to achieve substantive equality. In light of these requirements, the Chapter has investigated the practice of the CESCR, the European Committee, the Inter-American Commission on Human Rights and Inter-American Court of Human Rights.

The African Charter enshrines the principles of equality and non-discrimination. The African Commission draws on the jurisprudence of other international human rights bodies and explains state obligations under the African Charter with regard to economic, social and cultural rights. Like the CESCR, the Commission has explained that non-discrimination is an immediate state obligation. The Commission defines and identifies vulnerable groups, and conceives equality and non-discrimination as requirements to improve the plight of vulnerable groups. To achieve effective equality in the enjoyment of economic, social and cultural rights, the Commission requires states to give priority to vulnerable groups. The Commission recognises that persons deprived of their economic, social and cultural rights largely overlap with those suffering from discrimination based on prohibited grounds. In particular, the Commission requires states to adopt temporary special measures for the benefit of vulnerable groups. Above all, the Commission requires states to modify social structures including discriminatory laws, policies and customary practices in the Nairobi Principles. In its case law, the Commission does not declare such structures discriminatory, but provides remedies to address the structural problems. The Commission sometimes fails to identify discriminatory structural factors, particularly with regard to women's rights.

[425] Nairobi Principles, para 67(ee).

# CHAPTER SIX

# THE OBLIGATION TO ENSURE PARTICIPATION

## 6.1 Introduction

Participation is an important element in the assessment of the progressive realisation of economic, social and cultural rights, the principal state obligation discussed in Chapter 2.[1] States have the obligation to ensure the participation of individuals and groups in the implementation of their economic, social and cultural rights. The obligation to ensure participation corresponds to the recognition of participation as a right in international human rights law. Participation is 'an end in itself, which meets a fundamental aspiration of human beings'.[2] As social animals, human beings value participation in political and social life, which may justify the recognition of participation as a right.[3] The right to take part in the conduct of public affairs and other related rights such as freedoms of assembly, association, expression and information are recognized as political rights. In addition to its intrinsic value, participation is an essential means of 'ensuring the full exercise of human rights'.[4] As is the case with other rights, participation plays an important role in the implementation of economic, social and cultural rights. States have the obligation to take measures to implement these rights. Such measures can be legislative, judicial, administrative or others. This chapter examines the instrumental role of the participation of individuals and groups in measures taken to implement their economic, social and cultural rights.

The chapter examines the theoretical basis of the roles of participation in the second section. In fact, the implementation of economic, social and cultural rights involves political decisions. Participation in those decisions enables individuals to bring their interests to the attention of public officials and demand the realisation of their rights. Participation in political decisions requires the exercise of political rights by individuals and groups, and at the same time, has consequences for the implementation of economic, social and cultural rights. The deprivation of these rights may arise from the lack of participation. In the fight against social exclusion, the notion of indivisibility of human rights takes special importance. The second section identifies roles of participation, its relation to deprivation and its recognition as a right.

The International Covenant on Economic, Social and Cultural Rights (ICESCR)[5] and the European Social Charter (European Charter)[6] do not guarantee the right to take part in the conduct of public affairs and other related political rights. These treaties do not provide for participation as a right, and as a result, human rights bodies monitoring the implementation of these treaties arguably lack a mandate in this sphere. Yet the Committee on Economic, Social and Cultural Rights (CESCR) and the

[1] An evaluation of the obligation to take steps to the 'maximum of available resources' under an Optional Protocol to the Covenant: Statement, E/C.12/2007/1, 21 September 2007 para 11.

[2] Study by the UN Secretary-General, 'Popular Participation in its Various Forms as an Important Factor in Development and in the Full Realization of Human Rights', E/CN.4/1985/10, 31 December 1985, para 25(b).

[3] Amartya Sen, *Development as freedom* (Anchor Books 1999) 152.

[4] Study by the UN Secretary-General (n 2) para 25(b).

[5] Adopted 16 December 1966 entered into force 3 January 1976, GA res. 2200A (XXI), 21 UN GAOR Supp. (No. 16) at 49, UN Doc. A/6316 (1966); 993 UNTS 3.

[6] European Social Charter (adopted 18 October 1961, entered into force 26 February 1965), European Treaty Series No 35; European Social Charter (Revised), adopted 3 May 1996, entered into force 1 July 1999, European Treaty Series No 163.

European Committee of Social Rights (European Committee) address participation in their supervision. The American Convention on Human Rights (American Convention) guarantees political rights.[7] Nevertheless, the Inter-American Court of Human Rights (Inter-American Court) does not derive participation in the implementation of economic, social and cultural rights from political rights, although the Inter-American Commission on Human Rights (Inter-American Commission) has requested such an interpretation. While these treaty bodies establish the obligation to ensure the participation of everyone, their practice usually relates to those deprived of economic, social and cultural rights. The third section examines the practice of these treaty bodies and their legal basis for requiring states to ensure participation. The purpose of this section is to provide a background for the discussion of the African Charter on Human and Peoples' Rights (African Charter).[8]

The African Charter guarantees all categories of rights. As a result, the African Commission on Human and Peoples' Rights (African Commission) and the African Court on Human and Peoples' Rights (African Court) have the mandate to supervise the implementation of all rights. The African Commission requires states parties to ensure participation in the implementation of economic, social and cultural rights. However, it does not always explain the legal basis of this requirement, and when it does, it lacks consistency. The fourth section examines the practice of the African Commission and the African Court. This section focuses on the Commission since the Court has yet to develop its jurisprudence in this area. The last section provides conclusions.

## 6.2 An overview of participation

Participation has an intrinsic value, which is protected by guaranteeing civil and political rights, as already mentioned. Regarding the implementation of economic, social and cultural rights, participation plays an instrumental role. This section first identifies different roles of participation and focuses on the instrumental role. Next, the section explores the relationship between participation and the deprivation of economic, social and cultural rights. Finally, this section deals with participation as a right recognised in international human rights law.

### 6.2.1 Roles of participation

Participation plays three roles.[9] In the first place, it has an intrinsic importance. Participation is priceless irrespective of the outcome it produces. The mere fact that people cast their votes or attend a meeting about the implementation of a policy is valuable in itself. This is because, as Sen explains, it is reasonable for human beings 'to value unrestrained participation in political and social activities'.[10] Participation provides a psychological benefit.[11] When people increase their 'participation in the institutions affecting their lives, they develop a sense of their worth and significance'.[12] Participation provides a 'possibility of self-realization through development of the social self as a member of the polity'.[13]

[7] Adopted 21 November 1969, entry into force 18 July 1978, OAS Treaty Series No. 36; 1144 UNTS 123; 9 ILM 99 (1969).
[8] Adopted 27 June 1981 & came into force 21 October 1986, OAU Doc. CAB/LEG/67/3 rev. 5; 1520 UNTS 217; 21 ILM 58 (1982).
[9] Sen (n 3) 148.
[10] Sen (n 3) 152.
[11] Henry J Steiner, 'Political Participation as a Human Right' (1988) 1 *Harvard Human Rights Yearbook* 77-134, 105.
[12] Steiner (n 11) 105.
[13] Steiner (n 11) 105.

Participation also plays a constructive role.[14] People develop their preferences through participation. In other words, people derive 'their own preferences through encounters with others'.[15] Through discussions, people may identify the problems affecting the implementation of their rights. For example, a public discussion may concern crises in an education system. Some participants may raise the issue of student discipline as a problem. Others may be concerned about shortage of funding. Still others may worry about the relevance of school curricula. If the participants conclude that school curricula require revision, participation played a constructive role because the public discussion led to the conceptualisation of the problem itself.

The main focus of this chapter is the instrumental role of participation. Participation plays an instrumental role when it is a means of achieving a particular objective.[16] In national elections, for example, people vote to elect a candidate of their choice into an office. Voting is just a means of achieving one's choice of candidate. Similarly, participation in the formulation and implementation of a particular policy is to ensure that it takes into account the interests of the participants. In other words, participation produces an outcome, including a material benefit.[17] In these examples, the outcome is the most favourite policy or leader, and participation is thus a means of achieving these outcomes. Avoiding an unwanted candidate or an alternative policy can also be an outcome. An outcome may include avoiding a dreadful deprivation such as famine.

Participation can be an instrument of efficiency and effectiveness. According to one empirical study, institutions 'that are more open to the public and more actively seek its input achieve higher results in terms of efficiency and effectiveness'.[18] An institution is effective when it achieves the desired results. Thus, effectiveness implies meeting objectives.[19] For example, an institution may design a project to provide clean water for 100 households. If all the households obtain access to clean water after the implementation of the project, it is effective; the objective has been met. On the other hand, efficiency requires 'making the best use of resources'.[20] In this example, the project may be inefficient if it consumes resources that can provide clean water to more than 100 households. Effectiveness is a precondition for efficiency because whether a project has made the best use of resources cannot be measured when that project has never been implemented.[21] Efficiency and effectiveness are principles of good governance.[22]

Efficiency and effectiveness result from the quality of decisions reached through participation. Citizens work together with experts to identify and resolve collective problems.[23] Individuals enduring sufferings such as the deprivation of economic, social and cultural rights may approach their problems from different perspectives when compared with the approach of bureaucratic

[14] Sen (n 3) 148.
[15] Rod Dacombe, *Rethinking Civic Participation in Democratic Theory and Practice* (Palgrave Macmillan 2018) 27.
[16] Sen (n 3) 148.
[17] Steiner (n 11) 105.
[18] Milena I Neshkova & Hai (David) Guo, 'Public Participation and Organizational Performance: Evidence from State Agencies' (2012) 22 *Journal of Public Administration Research and Theory* 267–288, 282.
[19] Valencia Declaration, adopted by 15th Conference of European Ministers responsible for local and regional government (Valencia, 15-16 October 2007), Annex I, available <https://search.coe.int/cm/Pages/result_details.aspx?ObjectID=09000016805d47c5> accessed 2 August 2018.
[20] Valencia Declaration, Annex I.
[21] Ulrich Karpen, 'Good Governance' (2010) 12 *European Journal of Law Reform* 16-31, 29.
[22] Valencia Declaration, Annex I. Of the 12 principles of good governance of the Council of Europe, one is efficiency and effectiveness.
[23] Dacombe (n 15) 28.

experts. Since they bear the brunt of the deprivation, they may provide invaluable inputs in terms of identifying the cause of the problem.[24] They can propose an effective solution for the problems they are facing.[25] On the other hand, experts do not necessarily face the problem themselves. As a result, they cannot have the lived experiences of the deprived. According to Wesson, 'legislators, and affluent members of society in general, tend to have little social interaction with poor people, or people dependent upon welfare, and therefore lack an understanding of their problems'.[26] However, experts have the technical knowledge. The blend of the lived experience and technical expertise produces a better outcome at least in theory. Put differently, 'public agencies can become more efficient and effective by seeking greater input from the public and incorporating it in their decision making'.[27] In fact, empirical evidence indicates that 'the public contributes to more economical allocation of state resources'.[28]

Participation is a means of controlling the mobilisation and allocation of resources. In general, participation has the ability 'to enhance popular control over the actions of public officials and representatives working in democratic institutions'.[29] Citizen control represents the highest degree of participation.[30] Citizens are in control of their community development programmes when they govern those programmes including both policy and managerial aspects.[31] Citizen control has a profound effect on how resources are generated and allocated, whether the participation takes place at the local level in communities or at higher levels of administrative hierarchies. With respect to mobilising resources, for example, a meaningful participation can influence the source and number of tax revenues, which in turn affect the implementation of economic, social and cultural rights.

A meaningful participation also influences the allocation of resources. Citizens can put pressure on their government to address situations that may lead to catastrophic events such as famine. Famine is a serious violation of, among other rights, the right to food. Using empirical evidence, Sen demonstrates that famine has never happened in jurisdictions where people exercise a meaningful participation in the conduct of public affairs.[32] People can draw the attention of their government to conditions leading to famine. This can be done through public criticisms including demonstrations. Leaders have the incentive to respond to people's demand when they know that they have to return to people for support.[33] Of course, a meaningful participation such as this does not happen everywhere.

In addition to the benefits for the mobilisation and allocation of resources, 'an element of citizen control through participatory initiatives can also add to the legitimacy of the actions taken by public bodies'.[34] An action or a decision is legitimate when it results from a process 'in which all persons

[24] Tara J Melish, 'Maximum Feasible Participation of the Poor: New Governance, New Accountability, and a 21st Century War on the Sources of Poverty' (2010) 13/1 *Yale Human Rights and Development Journal* 1-134, 18.
[25] Melish (n 24) 18.
[26] Murray Wesson, 'Equality and Social Rights: An Exploration in Light of the South African Constitution' (2007) *Public Law* 748-769, 760.
[27] Neshkova & Guo (n 18) 269.
[28] Neshkova & Guo (n 18) 282.
[29] Dacombe (n 15) 29.
[30] Sherry R Arnstein, 'A Ladder of Citizen Participation' (1969) 35/4 *Journal of the American Institute of Planners* 216-224, 217.
[31] Arnstein (n 30) 223.
[32] Sen (n 3) 51, 152.
[33] Sen (n 3) 152.
[34] Dacombe (n 15) 30.

affected by the decision ought to have an equal right to participate in the process'.[35] An acceptance of a decision enhances its legitimacy. Citizens acquire information about the practicalities of public administration and about difficult choices faced by public officials when they participate in decisions that affect them.[36] In other words, participation has educational benefits; this educational function of participation is crucial,[37] insofar as it may 'result in higher levels of acceptance of and trust in the actions taken by public bodies'.[38] This is particularly important when officials have to make difficult decisions such as 'reallocating funding or changing eligibility criteria for social welfare payments'.[39] As discussed in the previous chapter, the CESCR and the European Committee of Social Rights require a genuine participation of rights holders in decisions to reduce social security benefits.

Related to both control as well as efficiency and effectiveness is the role of participation in addressing corruption. Corruption decreases 'the levels of revenue available to the government, which directly reduces the capacity of the government to fund basic services'.[40] The reduction of available resources undermines the ability of states to meet their obligations with regard to economic, social and cultural rights.[41] Consequently, corruption undermines efficiency and effectiveness since it affects the capacity of states to carry out their objectives, such as meeting their international obligations while making best use of their resources. Meaningful participation by members of vulnerable groups helps them exercise their rights, which in turn plays an important role in alleviating the problem of corruption. This is because corruption is reproduced 'when elites are able to perpetuate their privileges while disadvantaged groups have no means to defend their interests'.[42] As Ely puts it, 'those with most of the votes are in a positon to vote themselves advantages at the expense of the others'.[43] Equal citizen participation disrupts the cycle of elite privileges and advantages. 'It can help to prevent corruption at all points of decision-making'.[44] Thus, participation is 'part of both the human rights and anti-corruption agendas'.[45] The CESCR emphasises participation as a means of ensuring efficiency and effectiveness and addressing corruption as discussed below.

### 6.2.2 Participation and deprivation

Participation and deprivation are inversely related. Deprivation inhibits participation. The lack of participation contributes to deprivation. Studies show that the level of participation of individuals is low when they are deprived.[46] Deprivation may manifest itself in the form of low income or low levels of education, which indicates that there are barriers to the enjoyment of economic, social and cultural rights. The inverse relationship between participation and deprivation emerges whether the

[35] Yasmin Dawood, 'Classifying Corruption' (2014) 9 *Duke Journal of Constitutional Law and Public Policy* 103-133, 129.
[36] Dacombe (n 15) 30.
[37] Carole Pateman, *Participation and Democratic Theory* (CUP 1970) 38.
[38] Dacombe (n 15) 30.
[39] Dacombe (n 15) 30.
[40] Joel M Ngugi, 'Making the Link between Corruption and Human Rights: Promises and Perils' (2011) 104 *American Society of International Law Proceedings* 246-250, 246.
[41] Ngugi (n 40) 246.
[42] International Council on Human Rights Policy, *Integrating Human Rights in the Anti-Corruption Agenda: Challenges, Possibilities and Opportunities* (2010) 2.
[43] John Hart Ely, *Democracy and Distrust: A Theory of Judicial Review* (Harvard University Press 1980) 135.
[44] International Council on Human Rights Policy (n 42) 2.
[45] Gauthier De Beco, 'Monitoring corruption from a human rights perspective' (2011) 15/7 *The International Journal of Human Rights* 1107-1124, 1117.
[46] Dacombe (n 15) 39.

deprived are exercising their right to vote or their right to freedom of association.[47] This relationship is also evident in relation to institutions related to the exercise of participation, whether such institutions are run by elected or unelected officials. I will discuss below how institutions run by elected officials such as the legislature as well as those run by unelected officials such as the judiciary exclude the deprived.

The effectiveness of participation depends on how the right to participate in government is exercised.[48] It is easier to draw the attention of the government to some deprivations than others.[49] The plight of famine victims may easily attract attention while other deprivations such as undernourishment and illiteracy may call for 'deeper analysis and more effective use of communication and political participation'.[50] Although one may assume that there is better participation in places where democracy works well, this does not necessarily prevent deprivation. To use Sen's example, the working of American democracy has not prevented 'the extraordinary deprivations in health care, education, and social environment of African Americans in the United States'.[51] Sen also notes 'the low percentage of voting in American elections, especially by African Americans'.[52] As Key observes, 'if certain groups or classes of citizens habitually do not vote their interest will be neglected in the actions and policies of governments'.[53] This argument that elected officials neglect social rights of groups excluded from voting was presented to the European Committee of Social Rights, as discussed below.

The inverse relationship between participation and deprivation appears to lock the deprived individuals in a vicious circle. On the one hand, the participation of the deprived is low, at least in the case of voting. On the other hand, elected officials neglect the interests of those who do not vote.[54] In other words, institutions such as the legislature do not address the needs of the deprived because the votes of the deprived are not a threat to the power of the legislators. In short, the elected officials are not accountable to the deprived since votes of the deprived play no role in electing an official to a public office or in removing an official from that office.

One may wonder whether institutions that do not depend on popular vote, such as courts, are more responsive to the interests of the deprived. As Ely observes, courts are appropriate organs to protect 'those groups in society to whose needs and wishes elected officials have no apparent interest in attending'.[55] As already noted, the elected officials might neglect the interests of the deprived. Thus, the deprived should be protected by courts. However, courts have their own downside. Court processes also show vulnerabilities in terms of the participation of the deprived. These processes involve limited parties.[56] Courts address primarily litigants. The deprived are not necessarily among the litigants. It is possible that court decisions may benefit the litigants only. Moreover, court

[47] Dacombe (n 15) 39.
[48] Sen (n 3) 154.
[49] Sen (n 3) 154.
[50] Sen (n 3) 154.
[51] Sen (n 3) 154-155.
[52] Sen (n 3) 155. See V O Key, *Southern Politics in State and Nation* (Vintage Books 1949) 510 (observing that 'Negroes do not vote in substantial numbers'.)
[53] Key (n 52) 508.
[54] Dacombe (n 15) 40.
[55] Ely (n 43) 151.
[56] Sandra Liebenberg, 'Participatory Approaches to Socio-Economic Rights Adjudication: Tentative Lessons from South African Evictions Law' (2014) 32/4 *Nordic Journal of Human Rights* 312–330, 313.

processes involve specialised rules.[57] The deprived may have little knowledge about these rules. Both factors (ie, limited parties and specialised rules) undermine the participation of the deprived. These factors are obstacles to 'meaningful participation by those whose rights are affected'.[58]

Therefore, courts run the risk of incurring two kinds of deficit when they adjudicate economic, social and cultural rights.[59] One is a democratic deficit resulting from the fact that court processes are limited to litigants. The democratic deficit occurs when courts 'hand down judgments which have major policy implications without the opportunity for large sections of the population who may be affected by the decision to be heard'.[60] The other is a distributional deficit, which occurs when 'those with the resources to access the courts gain preferential access to social benefits ahead of groups in a worse-off position'.[61]

Silva and Terrazas explain a type of distributional deficit.[62] Based on empirical data related to the enjoyment of the right to health, they demonstrate that court processes in Brazil operate to exclude the worse off and benefit the better off.[63] They argue that 'since access to courts presupposes financial resources as well as access to information and since the poor in Brazil have both limited financial resources and highly limited access to information, the judiciary remains far from being an institutional voice for the poor'.[64] Instead, Ferraz argues, courts harm the poor in the area of the right to health.[65] This is because 'litigation is likely to produce reallocation from comprehensive programs aimed at the general population to […] privileged litigating minorities'.[66] That is, the deprived do not participate in and benefit from the judicial process. The Brazilian health right litigations do highlight instances showing that the exclusion of the deprived from the judicial process does occur in reality. That, however, does not mean that court processes always exclude the deprived. Even in Brazil itself, Brinks and Gauri provide empirical data that 'the poor were overrepresented in Brazil's more collective right-to-education litigation' since at least 78 per cent of the beneficiaries of the right to education litigation were underprivileged.[67]

The distributional deficit, which arises from the exclusion of deprived individuals from court processes, may be attributed to the types of remedies courts adopt rather than to their institutional nature. Landau argues that 'social rights enforcement is essentially majoritarian in many cases, and the beneficiaries are middle and upper class groups rather than the marginalized'.[68] He also argues that courts can avoid capacity and legitimacy costs of their judgments by adopting individualised enforcement models or 'by issuing negative injunctions striking down a law and maintaining the status quo'.[69] Both remedies (ie, individualised enforcement and negative injunction) 'are heavily

[57] Liebenberg (n 56) 313.
[58] Liebenberg (n 56) 313.
[59] Liebenberg (n 56) 315.
[60] Liebenberg (n 56) 316.
[61] Liebenberg (n 56) 316.
[62] Virgilio Afonso da Silva and Fernanda Vargas Terrazas, 'Claiming the Right to Health in Brazilian Courts: The Exclusion of the Already Excluded?' (2011) 36/4 *Law & Social Inquiry* 825-853, 848.
[63] Silva & Terrazas (n 62) 848.
[64] Silva & Terrazas (n 62) 848.
[65] Octavio Luiz Motta Ferraz, 'Harming the Poor through Social Rights Litigation: Lessons from Brazil' (2011) 89 *Texas Law Review* 1643-1668.
[66] Ferraz (n 65) 1646.
[67] Daniel M Brinks and Varun Gauri 'The Law's Majestic Equality? The Distributive Impact of Judicializing Social and Economic Rights' (2014) 12/2 *Perspectives on Politics* 375-393, 384.
[68] David Landau 'The Reality of Social Rights Enforcement' (2012) 53/1 *Harvard International Law Journal* 189-247, 200.
[69] Landau (n 68) 199.

tilted toward middle class and upper income groups rather than poor plaintiffs'.[70] The individualised enforcement benefits the privileged because 'individual middle class rather than poor plaintiffs are more likely to know their rights and to be able to navigate the expense and intricacies of the legal system'.[71] The negative injunctions favour the better off because 'the state usually tries to cut middle class pension and health care benefits for civil servants and other middle class groups rather than those few services going to the very poor'.[72] Nevertheless, he does not attribute this effect to the institutional structure of courts. Thus, courts may remedy the exclusion of the deprived by adopting remedies that cater for the interests of the worst off. Structural remedies may be appropriate although they require a lot of resources and do not work in certain political contexts.[73]

A participatory model of adjudicating economic, social and cultural rights may remedy both democratic and distributional deficits when different strategies are adopted.[74] One such strategy is to broaden the range of parties that have access to courts.[75] The other strategy is to adopt a flexible model of adjudication. Flexibility can be achieved by taking into account several factors such as 'consideration of the particular circumstances of the complaint, the broader social context, including those similarly placed or worse off than the complainant, and the available resources and capacity which the state can marshal at the particular juncture'.[76] Another strategy is to adopt dialogic and participatory modalities of rights adjudication.[77]

The deprived individuals benefit from participatory models of adjudication when such models work. One example is the dialogic model. According to this model, courts provide remedies to protect not only the claimants who file the cases but also others who are similarly situated, particularly the multitude of individuals affected by repeated and constant violations due to structural problems 'requiring intervention of several state authorities'.[78] The Constitutional Court of Colombia has applied the model, among other cases, to complaints of Colombians who were internally displaced due to conflicts in the country.[79] The Court employed the model to address the situation of around four million internally displaced Colombians.[80] The participatory nature of this model lies primarily in how the Colombian Constitutional Court monitored the implementation of the remedy. The Court retained jurisdiction to monitor its judgment through a permanent chamber, which provided 'space for dialogue and debate among state institutions and between government and civil society'.[81] It also 'organized public hearings and informal meetings'.[82] The Court developed a mechanism that allowed different actors such as the Ombudsman, international refugee organizations, and civil society groups

[70] Landau (n 68) 199.
[71] Landau (n 68) 200.
[72] Landau (n 68) 200.
[73] Landau (n 68) 246.
[74] Liebenberg (n 56) 317.
[75] Liebenberg (n 56) 317. Liebenberg observes that 'developing generous rules of legal standing and permitting class actions, public interest actions, amici curiae ("friends of the court) briefs, and ordering the joinder of non-parties' broadens accessibility of courts.
[76] Liebenberg (n 56) 317-318.
[77] Liebenberg (n 56) 318.
[78] Natalia Angel-Cabo and Domingo Lovera Parmo, 'Latin American Social Constitutionalism: Courts and Popular Participation' in Helena Alviar García, Karl Klare, Lucy A Williams (eds), *Social and Economic Rights in Theory and Practice: Critical Inquiries* (Routledge 2014) 90.
[79] Angel-Cabo & Parmo (n 78) 90.
[80] Angel-Cabo & Parmo (n 78) 91.
[81] Angel-Cabo & Parmo (n 78) 91.
[82] Angel-Cabo & Parmo (n 78) 91.

to respond to reports of the government on the implementation measures of the judgment.[83] When this process reveals a particular problem, the Court analysed different views and made orders to correct the problem. Besides, civil society organizations and social movements interested in the issue organised public hearings.[84]

The participation of the deprived (as well as other stakeholders) improves the dialogic model of adjudication, as the above example from Colombia demonstrates. This example also shows that courts themselves can address barriers to participation by adopting a certain model of adjudication. It is still worth noting that the deprived may be unable to participate in decisions affecting their lives, whether those decisions are made by representative institutions such as parliaments or by other institutions whose officials are not elected such as courts. Thus, if participation is limited from the beginning, the benefit of its instrumental role in improving the implementation of economic, social and cultural rights would also be limited.

### 6.2.3 Participation as a right

Participation involves a number of activities. These include taking part in politics (forming and joining political parties, voting, standing for elections), influencing policies (conducting media campaigns, lobbying), influencing decision-making (bringing relevant facts to or arguing before decision-makers, proposing reforms, opposing legislative or administrative proposals), consultations and negotiations.[85] Participation necessarily implies the exercise of a number of rights recognised in international human rights law. The subjects of these rights are either individuals or groups. Chief among individual rights is the right to take part in the conduct of public affairs guaranteed in international human rights treaties and other human rights instruments. These treaties guarantee the right of every citizen to 'take part in the conduct of public affairs, directly or through freely chosen representatives'.[86] The right to take part in the conduct of public affairs includes the rights to vote and to be elected at periodic elections.[87] In some human rights treaties, the right to vote and to be elected are not expressly guaranteed.[88] The text of other treaties appears to be narrower in scope. An example is the European Convention of Human Rights, which does not provide for the right to take part in the conduct of public affairs, being rather limited to elections and voting.[89]

Citizens have the right to participate in 'the conduct of public affairs'. They have the 'right to participate in government'.[90] This can be shortened to the 'right to participate' or simply 'participation'. The locus of participation is the government or 'the conduct of public affairs', which is a broad concept. The Human Rights Committee explains that

> The conduct of public affairs […] is a broad concept which relates to the exercise of political power, in particular the exercise of legislative, executive and administrative powers. It covers all aspects of

[83] Angel-Cabo & Parmo (n 78) 91.
[84] Angel-Cabo & Parmo (n 78) 92.
[85] Yash Ghai, 'Public Participation, Autonomy and Minorities' in Zelim A Skurbaty (ed), *Beyond a One-Dimensional State: An Emerging Right to Autonomy?* (Martinus Nijhoff Publishers 2005) 6.
[86] ICCPR, art 25(a); American Convention, art 23(a). See African Charter, art 13(1).
[87] ICCPR, art 25(b); American Convention, art 23(b).
[88] See African Charter, art 13.
[89] European Convention on Human Rights (Protocol No 1), art 3.
[90] American Convention, art 23.

public administration, and the formulation and implementation of policy at international, national, regional and local levels.[91]

Thus, participation in the conduct of public affairs includes involvement in the formulation and implementation of a policy. A policy may relate to issues such as food security or access to water in a particular community. The right to participate, therefore, entails much more than involvement in national elections whether an individual votes or competes for an office. The right to vote and the right to be elected remain indispensable for the participation in the conduct of public affairs.[92] However, elections and the accompanying processes, including the discussion of public issues and the expression of ideas, are themselves insufficient 'to realize the democratic ideal of the citizenry's continuing involvement in public life'.[93] Strictly speaking, voters do not determine policies when they participate in elections. When they vote for a candidate or a party, they choose a policy formulated by one elite group from among policies prepared by other elite groups. Thus, limiting the participation of citizens to periodic elections denies them 'the benefits of a continuing experience of involvement in public life, of "taking part" in the conduct of public affairs'.[94] As discussed below, the CESCR warns against the danger of equating participation with voting and elections.[95]

The ideal participation goes far beyond holding periodic elections and ensuring the enjoyment of rights necessary for the conduct of fair and free elections. However, it is not practical to involve everyone in a national government.[96] The alternative is to devise other contexts in which widespread civic participation can be practical. Such contexts may include the decentralization of authority that may lead to the creation of local governments conducive to public participation.[97] Such participation may take various forms: 'citizen representation on governmental boards, public meetings and discussions, formally structured relationships between the managers of public enterprises and their consumers or the general citizenry, more extensive functions of city government responsive to citizens' needs'.[98] The Human Rights Committee emphasises such decentralised contexts as sites of exercising the right to participate directly. It explains that 'citizens may participate directly by taking part in popular assemblies which have the power to make decisions about local issues or about the affairs of a particular community and in bodies established to represent citizens in consultation with government'.[99]

The right to participate shares the general characteristics of other human rights. Human rights are interdependent by nature.[100] In other words, the exercise of a particular right may constitute the enjoyment of another right; similarly, the violation of one right may lead to the violation of another right. The right to participate depends on other rights. For example, when individuals exercise their

[91] Human Rights Committee, General Comment 25: The right to participate in public affairs, voting rights and the right of equal access to public service (Art. 25) 12 July 1996, para 5.
[92] Steiner (n 11) 102.
[93] Steiner (n 11) 102.
[94] Steiner (n 11) 103.
[95] CESCR, Substantive Issues Arising in the Implementation of the International Covenant on Economic, Social and Cultural Rights: Poverty and the International Covenant on Economic, Social and Cultural Rights, E/C.12/2001/10, 10 May 2001, para 12 (hereafter 'Statement on Poverty').
[96] Dacombe (n 15) 5.
[97] Steiner (n 11) 103.
[98] Steiner (n 11) 103.
[99] Human Rights Committee, General Comment 25, para 6.
[100] Vienna Declaration and Programme of Action, adopted by the World Conference on Human Rights in Vienna on 25 June 1993, para 5.

rights directly by attending popular assemblies, they are exercising their right to freedom of assembly at the same time. Whether the purpose of such assembly is to debate a particular issue or to simply share information, the participants are simultaneously exercising their right to freedom of expression. In other words, the 'freedoms of expression, procession, association and conscience imply, and facilitate, participation in politics and public policies'.[101] The Human Rights Committee emphasises that citizens can 'take part in the conduct of public affairs by exerting influence through public debate and dialogue with their representatives or through their capacity to organize themselves. This participation is supported by ensuring freedom of expression, assembly and association'.[102] Without simultaneously exercising these rights, the right to participate cannot be meaningful. In this regard, the Office of the United Nations High Commissioner for Human Rights observes that

> [I]f people […] are to participate meaningfully in the conduct of public affairs, they must be free to organize without restriction (right of association), to meet without impediment (right of assembly), to say what they want to without intimidation (freedom of expression) and to know the relevant facts (right to information).[103]

Participation, one may argue, is nominal unless it is accompanied by the exercise of the freedoms of assembly, association, expression and information. These rights are worth implementing given their intrinsic value. Moreover, they are instrumental in giving effect to the right to take part in the conduct of public affairs. They can be regarded as participation rights.[104]

Participation has a collective dimension: it is related to the right to self-determination, the subjects of which are groups or peoples. By definition, a people is a collection of individuals. The enjoyment of participation rights by individuals enhances the realisation of the peoples' right to self-determination. In other words, when a state violates participation rights of individuals, it denies its people the right to self-determination.[105]

The right to self-determination emerged as 'the right of peoples under colonial, foreign, or alien domination to self-government, whether through formation of a new state, association in a federal state, or autonomy or assimilation in a unitary (non-federal) state'.[106] This represents an external aspect of self-determination. It implies the formation of a separate independent state or secession. This aspect has 'widely been recognised as part of *jus cogens*, a peremptory norm of international law'.[107] In the post-colonial era, however, the external self-determination of ethnic groups within a sovereign state is rarely recognised unless it is won through a bloody conflict.[108]

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[101] Ghai (n 85) 5.

[102] Human Rights Committee, General Comment 25, para 8.

[103] OHCHR, *Principles and Guidelines for a Human Rights Approach to Poverty Reduction Strategies*, HR/PUB/06/12, para 74.

[104] Ghai (n 85) 5.

[105] Cecile Vandewoude, 'The Rise of Self-Determination versus the Rise of Democracy' (2010) 2/3 *Goettingen Journal of International Law* 981-996, 992.

[106] James R Crawford, *Brownlie's Principles of Public International Law* (8th edn, OUP 2012) 646.

[107] Surendra Bhandari, 'From External to the Internal Application of the Right to Self-Determination: The Case of Nepal' (2014) 21 *International Journal on Minority and Group Rights* 330-370, 331-332. See Marti Koskenniemi, Report of the Study Group of the International Law Commission on 'Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law', A/CN.4/L.682, 13 April 2006, para 374.

[108] Michael P Scharf, 'Earned Sovereignty: Juridical Underpinnings' (2003) 31 *Denver Journal of International Law and Policy* 373-385, 380-381. Scharf argues that there is a modern trend that supports the right of non-colonial people 'to secede from an existing state when the group is collectively denied civil and political rights and subject to egregious abuses'.

The recognition of the right to self-determination in the common article 1 of the ICESCR and the ICCPR is an important milestone. This provision codifies the internal dimension of self-determination.[109] Recounting the history of the ICCPR, Franck notes that states rejected the notion that the right to self-determination applies 'only to colonial "peoples"'.[110] Rather, the right applies 'to peoples anywhere, whether in a politically independent state or a dependent territory'.[111] With the entry into force of the ICCPR, Franck argues, the right reached an important phase of enunciation. It 'stopped being a principle of exclusion (secession) and became one of inclusion: the right to participate. The right now entitles peoples in all states to free, fair and open participation in the democratic process of governance freely chosen by each state'.[112] Thus, participation represents an internal aspect of self-determination. Yusuf succinctly describes this strand of self-determination:

> The right of self-determination, in its post-colonial conception, chiefly operates today inside the boundaries of existing states in various forms and guises, particularly as a right of the entire population of the state to determine its own political, economic, and social destiny and to choose a representative government; and, equally, as a right of a defined part of the population, which has distinctive characteristics on the basis of race or ethnicity, to participate in the political life of the state, to be represented in its government, and not to be discriminated against.[113]

According to Yusuf, the subjects of internal self-determination include a defined part of the population of the state whose race or ethnicity is different from that of the rest of the population. Thus, internal self-determination entails the participation of a particular group such as indigenous peoples. As discussed below, the CESCR indeed finds non-compliance with the right to self-determination of indigenous peoples contrary to Article 1 of the ICESCR when states fail to put in place or adequately enforce laws for 'consultation with, and the participation of, indigenous peoples in decisions affecting them'.[114]

## 6.3 Participation in the practice of treaty bodies

Human rights treaty bodies, namely, the CESCR, the European Committee, the Inter-American Commission and the Inter-American Court, emphasise the state obligation to ensure the participation of rights holders in the implementation of economic, social and cultural rights. Nevertheless, the legal basis of participation and that of the state obligation to ensure participation varies across different human rights systems. The CESCR usually requires that states ensure participation in relation to most substantive rights guaranteed in the ICESCR. The European Committee establishes a link between participation and the right to protection against poverty and social exclusion. The Inter-American Court of Human Rights derives the requirement of participation from the right to property of indigenous peoples. The practice of these treaty bodies is discussed briefly in the next sub-sections.

[109] Russell A Miller, 'Self-Determination in International Law and the Demise of Democracy' (2003) 41 *Columbia Journal of Transnational Law* 601-648, 620-621.
[110] Thomas M Franck, 'The Emerging Right to Democratic Governance' (1992) 86/1 *The American Journal of International Law* 46-91, 58.
[111] Franck (n 110) 58.
[112] Franck (n 110) 59.
[113] Abdulqawi A Yusuf, 'The Role That Equal Rights and Self-Determination of Peoples can Play in the Current World Community' in Antonio Cassese (ed), *Realizing Utopia: The Future of International Law* (OUP 2012) 384.
[114] Ben Saul, *Indigenous Peoples and Human Rights: International and Regional Jurisprudence* (Hart Publishing) 87.

### 6.3.1 The CESCR

Participation requires the exercise of political rights. The ICESCR does not guarantee political rights. The CESCR derives the state obligation to ensure participation from rights guaranteed in the ICESCR. This sub-section first examines the legal basis of participation (3.1.1). When the CESCR requires states to ensure participation, it usually states the roles that participation can play. This sub-section also identifies those roles (3.1.2). From the practice of the CESCR emerge some requirements of participation, particularly when states conduct consultations with indigenous peoples (3.1.3).

#### 6.3.1.1 The legal basis of participation

The ICESCR, unlike the ICCPR, does not expressly refer to the right to take part in government. In its supervision, the CESCR addresses participation with regard to the implementation of almost all rights guaranteed in the ICESCR. However, it does not always specify the legal basis for requiring states to ensure participation of rights holders. When the CESCR states its legal basis, it does not clarify how the provisions of the ICESCR relate to participation. It frequently requires participation when it deals with violations arising from evictions or displacements. When the evictions affect city dwellers, the CESCR relates the requirement of participation or consultation to the realisation of the right to housing (article 11).[115] When the evictions affect indigenous people especially in the contexts of the exploration and exploitation of natural resources, the CESCR relates participation to the realisation of, among other rights, the right to self-determination (Article 1),[116] the prohibition of discrimination (Article 2(2))[117] and the right to take part in cultural life (Article 15).[118]

The right to self-determination includes the right of peoples to 'freely determine their political status and freely pursue their economic, social and cultural development'.[119] For indigenous peoples, the right to self-determination includes the right to self-government in certain matters.[120] The free determination of political status, one may argue, involves participation in government. At times, the CESCR requires states to ensure the participation of peoples in the governance of their country.[121] The free pursuit of economic, social and cultural development also involves participation. That is, states should engage peoples in economic, social and cultural policies,[122] which may include participation in programmes designed for the implementation of economic, social and cultural rights.

According to the CESCR, the right to self-determination under Article 1 of the ICESCR entails the obligation to seek free, prior and informed consent of indigenous peoples. In its concluding observations, the CESCR requires that 'indigenous peoples are regularly consulted with a view to

[115] Concluding observations on Namibia, E/C.12/NAM/CO/1, 23 March 2016, para 56; .

[116] Concluding observations on Angola, E/C.12/AGO/CO/4-5, 15 July 2016, para 19; Honduras, E/C.12/HND/CO/2, 11 July 2016, para 11; Indonesia, E/C.12/IDN/CO/1, 19 June 2014, para 28; Gabon, E/C.12/GAB/CO/1, 27 December 2013, para 6; Argentina, E/C.12/ARG/CO/3, 14 December 2011, para 9; Colombia, E/C.12/COL/CO/5, 7 June 2010, para 9; the Democratic Republic of the Congo, E/C.12/COD/CO/4, 16 December 2009, para 14.

[117] Concluding observations on Angola, E/C.12/AGO/CO/4-5, 15 July 2016, para 19; Canada, E/C.12/CAN/CO/6, 23 March 2016, para 19; Ethiopia, E/C.12/ETH/CO/1-3, 31 May 2012, para 21.

[118] Concluding observations on the United Republic of Tanzania, E/C.12/TZA/CO/1-3, 13 December 2012, para 29; Cameroon, E/C.12/CMR/CO/2-3, 23 January 2012, para 15; Argentina, E/C.12/ARG/CO/3, 14 December 2011, para 9.

[119] ICESCR, art 1(1); United Nations Declaration on the Rights of Indigenous Peoples, UN General Assembly Resolution, A/RES/61/295, 2 October 2007, art 3.

[120] Declaration on the Rights of Indigenous Peoples, art 4.

[121] Observations made in the absence of an initial report from the Congo, E/C.12/COG/CO/1, 2 January 2013, para 11.

[122] Declaration on the Right to Development, UN General Assembly Resolution, A/RES/41/128, 4 December 1986. Art 2(3) provides that States have 'the duty to formulate appropriate national development policies that aim at the constant improvement of the well-being of the entire population and of all individuals, on the basis of their active, free and meaningful participation in development'.

obtaining their free, prior and informed consent in respect of decision-making processes that may affect their ability to exercise their economic, social and cultural rights'.[123] Therefore, the right to self-determination entails the obligation to ensure participation, including the obligation to seek consent in cases of indigenous peoples. However, the argument that the right to self-determination provides a legal basis for the CESCR to require participation may be difficult to make when it comes to individuals. The right to self-determination is a collective right. The subjects of this right are peoples, whereas the subjects of other rights under the ICESCR are individuals.

The CESCR sometimes derives the obligation to ensure participation from Article 15 of the ICESCR (cultural rights). In particular, it emphasises a core obligation of states to 'allow and encourage the participation of persons belonging to minority groups, indigenous peoples or to other communities in the design and implementation of laws and policies that affect them'.[124] The CESCR does not explain why it requires the participation of members of certain groups only, yet it has adopted a view similar to the interpretation of the Human Rights Committee. According to the Human Rights Committee, the exercise of cultural rights includes 'a particular way of life associated with the use of land resources'.[125] Traditional activities such as fishing and hunting are examples of a way of life, especially in the case of indigenous peoples.[126] The realisation of these rights requires states to adopt measures to ensure the effective participation of members of indigenous peoples or other minority communities in decisions affecting them.[127] The Human Rights Committee's interpretation is based on the text of Article 27 of the ICCPR, which provides for the protection of minorities. However, the CESCR does not have such a textual basis. If one accepts the CESCR's interpretation that the implementation of Article 15 of the ICESCR requires participation, this interpretation would apply to cultural rights only. Article 15 is not a general provision applicable to all rights in the ICESCR. Thus, it would be difficult to claim that Article 15 is a legal basis for participation in the implementation of all rights guaranteed in the ICESCR.

International human rights law certainly guarantees the right to participate. The CESCR explains that the right to participate in decisions affecting one's life is recognised in the normative framework of international human rights. It has stated that

> [T]he international human rights normative framework includes the right of those affected by key decisions to participate in the relevant decision-making processes. The right to participate is reflected in numerous international instruments, including the International Covenant on Economic, Social and Cultural Rights and the Declaration on the Right to Development.[128]

In this passage, the CESCR refers to Article 13(1) of the ICESCR, which provides that 'education shall enable all persons to participate effectively in a free society'. Article 13(1) states the purpose of education, thereby implying the importance of participation in a society in general. Thus, it may be submitted that participation in decision-making processes that affect one's life is just a form of participation in a society. Nevertheless, the CESCR hardly relies on Article 13(1) when it requires states to ensure participation in decision-making processes.

[123] Concluding observations on Honduras, E/C.12/HND/CO/2, 11 July 2016, paras 11-12. See Concluding observations on Angola, E/C.12/AGO/CO/4-5, 15 July 2016, paras 19-20.
[124] General Comment 21, para 55.
[125] Human Rights Committee, General comment No 23(50) (art 27), CCPR/C/21/Rev.1/Add.5, 26 April 1994, para 7.
[126] Human Rights Committee, General comment No 23, para 7.
[127] Human Rights Committee, General comment No 23, para 7.
[128] Statement on Poverty, para 12.

Locating the right to participate in the international human rights normative framework as a whole is a plausible alternative, as the right is guaranteed in regional and global human rights instruments,[129] which clearly recognise the right to participate and thereby establish the corresponding state obligation to ensure participation. The CESCR emphasises the relevance of the right to take part in government, including participation in elections. It recognises that 'free and fair elections are a crucial component of the right to participate'.[130] It warns against reducing participation to elections only, stressing that elections 'are not enough to ensure that those living in poverty[131] enjoy the right to participate in key decisions affecting their lives'.[132] With regard to the right to health, it clearly underlines the importance of 'participation in political decisions relating to the right to health taken at both the community and national levels'.[133] It is needless to state that the implementation of economic, social and cultural rights requires political decisions; however, the CESCR does not have the mandate to supervise the implementation of the right to participate *per se*. Thus, it emphasises the instrumental role of participation in the realisation of economic, social and cultural rights.

#### 6.3.1.2 The instrumental role of participation

The CESCR sometimes states why it requires participation. In its general comment on the right to housing, it explains that

> Both for reasons of relevance and effectiveness, as well as in order to ensure respect for other human rights, […] a strategy should reflect extensive genuine consultation with, and participation by, all of those affected, including the homeless, the inadequately housed and their representatives.[134]

The CESCR recognises that participation in a strategy for the implementation of economic, social and cultural rights has two benefits. As the proverb goes, states kill two birds with one stone when they ensure participation in their strategies. They respect the right to participate while enhancing the effectiveness of their strategies. The CESCR requires participation of all members of the community, including vulnerable groups. It expresses its concern 'at the lack of meaningful consultation with civil society and relevant stakeholders in formulating and implementing policies and legislation, particularly relating to persons with disabilities, people living in poverty' and other vulnerable groups.[135] The CESCR states that policies and legislation are less effective when states fail to ensure participation, particularly when they fail to consult members of vulnerable groups.[136]

A proper utilisation of resources enhances the effectiveness as well as the efficiency of a strategy, as discussed above. Participation plays an important role in avoiding the misuse of resources and other vices such as corruption. The CESCR recognises the role of participation in this regard. It requires states to ensure participation along with transparency and accountability to counter corruption. With regard to Guyana, for example, the CESCR has found that 'corruption, which has a devastating impact

[129] See Universal Declaration, art 21; ICCPR, art 25; American Convention on Human Rights, art 23; African Charter, art 13.
[130] Statement on Poverty, para 12.
[131] Statement on Poverty, para 8. Poverty is the deprivation of economic, social and cultural rights as well as other human rights. The CESCR defines poverty as 'a human condition characterized by sustained or chronic deprivation of the resources, capabilities, choices, security and power necessary for the enjoyment of an adequate standard of living and other civil, cultural, economic, political and social rights'.
[132] Statement on Poverty, para 12.
[133] General Comment 14, para 17.
[134] General Comment 4, para 12. See Statement on Poverty, para 12, where the CESCR has also emphasised that 'a policy or programme that is formulated without the active and informed participation of those affected is most unlikely to be effective'.
[135] Concluding observations on Ireland, E/C.12/IRL/CO/3, 8 July 2015, para 10.
[136] Concluding observations on Ireland, para 10.

on the enjoyment of economic, social and cultural rights, is pervasive in the country'.[137] It has required Guyana to address 'the root causes of corruption, including by enhancing transparency, participation and accountability in the conduct of public affairs'.[138]

The implementation of economic, social and cultural rights requires political decisions. However, politicians may have the propensity to neglect the demands of citizens when the latter have no influence on how politicians obtain and retain their power as discussed above. The CESCR seems to recognise this problem when it has examined the implementation of the ICESCR in the Congo. It has underlined that 'one of the root causes of violations of economic, social and cultural rights in the State party is the lack of public participation in the governance of the country and the limited involvement of non-governmental organizations in public policymaking'.[139] If lack of participation is a root cause of these violations, there is no other solution than ensuring participation. Thus, the CESCR has required the State party to identify 'the factors hindering genuine forms of participation on the part of the general public in the governance of the State party'.[140]

The CESCR requires states to ensure participation, even when they are relatively more democratic than other states. It makes this recommendation when the policy being examined adversely affects the full realisation of economic, social and cultural rights. For example, the United Kingdom is considered more democratic than Congo is, insofar as it is more democratic than any other country in Africa.[141] Yet the CESCR has required the United Kingdom to ensure participation in its fiscal policy. The fiscal policy resulted in, among other things, 'the increase in the threshold for the payment of inheritance tax and the increase of the value added tax, as well as the gradual reduction of the tax on corporate incomes'.[142] Such a policy has a negative impact on the capacity of the state to ensure the enjoyment of the rights by disadvantaged and marginalized individuals and groups.[143] The CESCR has required the United Kingdom to conduct a human rights impact assessment of the fiscal policy 'with broad public participation'.[144] The impact assessment should include 'an analysis of the distributional consequences and the tax burden of different income sectors and marginalized and disadvantaged groups'.[145] An assumption underpinning this recommendation stands out, namely that there was no broad participation in the fiscal policy, particularly by marginalised and disadvantaged groups.

Participation is an important tool for avoiding the exclusion of vulnerable groups from the enjoyment of economic, social and cultural rights. The CESCR emphasises this function with regard to the achievement of Sustainable Development Goals. It states that the implementation of 'the Goals on the basis of the principle of participation, accountability and non-discrimination would ensure that no one is left behind'.[146]

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[137] Concluding observations on Guyana, E/C.12/GUY/CO/2-4, 28 October 2015, para 18. See Concluding observations on the Philippines, E/C.12/PHL/CO/5-6, 26 October 2016, para 17.

[138] Concluding observations on Guyana, para 19; the Philippines, para 18.

[139] Observations made in the absence of an initial report from the Congo, E/C.12/COG/CO/1, 2 January 2013, para 11.

[140] CESCR, Observations made in the absence of an initial report from the Congo, E/C.12/COG/CO/1, 2 January 2013, para 11.

[141] See The Economist Intelligence Unit, *Democracy Index 2017: Free speech under attack* (2018) 5.

[142] Concluding observations on the United Kingdom of Great Britain and Northern Ireland, E/C.12/GBR/CO/6, 14 July 2016, para 16.

[143] Concluding observations on the United Kingdom, para 16.

[144] Concluding observations on the United Kingdom, para 17.

[145] Concluding observations on the United Kingdom, para 17.

[146] CESCR, Concluding observations on Cyprus, E/C.12/CYP/CO/6, 28 October 2016, para 47. See Concluding observations on Tunisia, E/C.12/TUN/CO/3, 14 November 2016, para 58; the Philippines, E/C.12/PHL/CO/5-6, 26 October 2016, para 61;

#### 6.3.1.3 Requirements of consultation

Participation in the implementation of rights involves consultation with the subjects of those rights. The CESCR has developed some requirements of consultation. Although the ICESCR does not distinguish one category of rights holders from another, the CESCR has developed most of these requirements in relation to the rights of indigenous peoples. In certain respects, it applies these requirements to urban dwellers affected by evictions.

According to the CESCR, states should put in place a specific regulatory or legislative framework for the implementation of 'the *right to prior informed consultation* of indigenous peoples'.[147] While emphasising that indigenous peoples have the right to consultation, it indicates two requirements of such consultation. One is the requirement of *prior* consultation. In other words, consultations should be conducted in advance, preceding a permission to implement a development project. States parties should 'always enter into effective consultations with indigenous communities before granting concessions for the economic exploitation of the lands and territories traditionally occupied or used by them'.[148]

States should also conduct consultations before carrying out evictions in urban centres. According to the CESCR, 'any relocation of homes necessary for city renewal is carried out with prior consultations among affected households'.[149] Irrespective of the purpose of evictions, consultations are necessary to provide procedural protection. In *Ben Djazia et al v Spain*, the CESCR has examined the eviction of complainants from rental accommodation due to their inability to pay rent.[150] In principle, such an eviction is compatible with the ICESCR but states should comply with a number of criteria, as developed by the CESCR.[151] Among these criteria is the requirement of prior consultation.[152] The CESCR has emphasised that 'there must be a real opportunity for genuine prior consultation between the authorities and the persons concerned' even when the eviction from a private rental accommodation is justified.[153]

The CESCR indicates the second requirement while emphasising the right to 'prior *informed* consultation'. This requirement relates to information and involves exercising the right to freedom of expression including the right to receive information. It is the right of individuals to request and obtain information held by state authorities even though this right is not guaranteed in the ICESCR. According to the CESCR, state authorities should provide information necessary for conducting a consultation.[154] It has commented negatively on a state party because state 'authorities did not

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Poland, E/C.12/POL/CO/6, 26 October 2016, para 62; Lebanon, E/C.12/LBN/CO/2, 24 October 2016, para 70; Costa Rica, E/C.12/CRI/CO/5, 21 October 2016, para 67; the Dominican Republic, E/C.12/DOM/CO/4, 21 October 2016, para 70.

[147] Concluding observations on Gabon, E/C.12/GAB/CO/1, 27 December 2013, para 6. Italics added.

[148] Concluding observations on Argentina, E/C.12/ARG/CO/3, 14 December 2011, para 9. See Concluding observations on Honduras, E/C.12/HND/CO/2, 11 July 2016, para 11; Mongolia, E/C.12/MNG/CO/4, 7 July 2015, para 8; Ethiopia, E/C.12/ETH/CO/1-3, 31 May 2012, para 21; India, E/C.12/IND/CO/5, 8 August 2008, para 71.

[149] Concluding observations on Azerbaijan, E/C.12/AZE/CO/3, 5 June 2013, para 22. See Concluding observations on China, E/C.12/CHN/CO/2, 13 June 2014, para 30; the Philippines, E/C.12/PHL/CO/4, 1 December 2008, para 30; Rwanda, E/C.12/RWA/CO/2-4, 10 June 2013, para 24. The CESCR has required Rwanda to 'conduct full and prior consultation to seek the consent of those to be expropriated or evicted' in the contexts of urban planning.

[150] *Mohamed Ben Djazia and Naouel Bellili v Spain* communication No 5/2015 (CESCR, 20 June 2017).

[151] *Ben Djazia et al v Spain*, para 15.1.

[152] *Ben Djazia et al v Spain*, para 15.1-15.2. Other criteria are: the eviction should be provided by law; it should be carried out as a last resort ('there must be no less onerous alternative means or measures available'); it 'should not render individuals homeless'; the person concerned has access to prior effective judicial remedy; and it should not expose the concerned person to situations of other human rights violation.

[153] *Ben Djazia et al v Spain*, para 15.1.

[154] Concluding observations on Gabon, E/C.12/GAB/CO/1, 27 December 2013, para 6.

provide accurate information on the scope and the impact' of a development project.[155] Individuals participating in a consultation have the right to freedom of expression. The exercise of this right is indispensable for conducting 'open, participatory and meaningful consultations'.[156] Otherwise, a consultation would be a mere procedural formality. Thus, the CESCR stresses that states should allow free expression while conducting consultations.[157]

The requirement to conduct an informed consultation also implies another duty. States should provide information concerning the scope and impact of a development project. They are unable to discharge this duty unless they carry out comprehensive studies in advance. The CESCR requires impact assessments on a number of issues. It requires states to implement development projects 'only after comprehensive studies are carried out, with the participation of the peoples concerned, to assess the social, spiritual, cultural and environmental impact on them'.[158] Conducting impact assessments is also necessary to comply with rights under the ICESCR whether a consultation is anticipated or not.[159] For example, the CESCR requires that environmental impact assessments be carried out on a regular basis in order to comply with the right to health under Article 12 of the ICESCR.[160]

Establishing a mechanism of consultation is another requirement. States should put in place 'a legal framework for consultation with the affected communities'.[161] They should develop institutional and procedural guarantees 'to ensure the effective participation of indigenous communities in decision-making on issues that affect them'.[162] The legal framework to be adopted should not replace traditional institutions of indigenous peoples because 'consultations should be conducted in accordance with the community consultation procedures'.[163]

The CESCR does not require that consultation result in free, prior and informed consent, but nonetheless indicates that that is the precise objective of consultation. Accordingly, states should ensure that 'indigenous peoples are regularly consulted with a view to obtaining their free, prior and informed consent in respect of decision-making processes that may affect their ability to exercise their economic, social and cultural rights'.[164] The ICESCR does not expressly provide for the right of indigenous peoples to free, prior and informed consent, in contrast to other international human rights instruments that clearly guarantee this right.[165] Thus, the CESCR interprets the ICESCR in light of other instruments on the rights of indigenous peoples. Moreover, the CESCR requires free, prior

[155] Concluding observations on Colombia, E/C.12/COL/CO/5, 7 June 2010, para 9.
[156] Concluding observations on Cambodia, E/C.12/KHM/CO/1, 12 June 2009, para 30; Philippines, E/C.12/PHL/CO/4, 1 December 2008, para 30, India, E/C.12/IND/CO/5, 8 August 2008, para 71.
[157] Concluding observations on Gabon, E/C.12/GAB/CO/1, 27 December 2013, para 6.
[158] Concluding observations on Democratic Republic of the Congo, E/C.12/COD/CO/4, 16 December 2009, para 14. See Concluding observations on Mongolia, E/C.12/MNG/CO/4, 7 July 2015, para 9; Cambodia, E/C.12/KHM/CO/1, 12 June 2009, paras 15 & 16.
[159] Concluding observations on India, E/C.12/IND/CO/5, 8 August 2008, para 84.
[160] Concluding observations on Canada, E/C.12/CAN/CO/6, 23 March 2016, para 54.
[161] Concluding observations on Angola, E/C.12/AGO/CO/4-5, 15 July 2016, para 19.
[162] Concluding observations on Argentina, E/C.12/ARG/CO/3, 14 December 2011, para 10.
[163] Concluding observations on Ecuador, E/C.12/ECU/CO/3, 13 December 2012, para 9.
[164] Concluding observations on Honduras, E/C.12/HND/CO/2, 11 July 2016, para 12. See Concluding observations on Costa Rica, E/C.12/CRI/CO/5, 21 October 2016, paras 8 & 9; Angola, E/C.12/AGO/CO/4-5, 15 July 2016, paras 19 & 20; Uganda, E/C.12/UGA/CO/1, 8 July 2015, para 13. cf Human Rights Committee, concluding observations on Thailand, CCPR/C/THA/CO/2, 25 April 2017, para 44. States should ensure that 'prior consultations are held with a view to obtaining their free, prior and informed consent regarding decisions that affect them, in particular with regard to their land rights'.
[165] ILO Convention No 169, art 16(2);

and informed consent in the context of evictions from urban centres even where a violation of the rights of indigenous peoples is not necessarily at issue. The CESCR urges states to ensure that 'any relocation necessary for city renewal is carried out after prior consultation with the affected individuals and households, with their free, prior and informed consent and with full respect for their safety and dignity'.[166]

### 6.3.2 European Committee of Social Rights

Like the ICESCR, the European Social Charter does not guarantee the right to take part in the conduct of public affairs or other related rights. Still, the European Committee of Social Rights addresses participation in relation to the right to protection against poverty and social exclusion.[167] To ensure the effective exercise of this right, states should adopt necessary measures. The Charter provides that

> [T]he Parties undertake […] to take measures within the framework of an overall and co-ordinated approach to promote the effective access of persons who live or risk living in a situation of social exclusion or poverty, as well as their families, to, in particular, employment, housing, training, education, culture and social and medical assistance.[168]

The European Committee has stressed the importance of participation or consultation to ensure the right to protection against poverty and social exclusion. In *European Roma Rights Centre (ERRC) v France*, the Committee stressed the contribution of the right to vote.[169] The case concerns Travellers, persons who move around in France without a fixed domicile or residence. To exercise their right to vote, Travellers who hold circulation documents should be attached to a particular municipality for a period of three years. Even if the Travellers fulfil this condition, they can be excluded from exercising their right to vote if their number exceeds three per cent of the total population of the municipality to which they are attached. What is more, both requirements did not apply to other French citizens without a fixed abode: they can exercise their right to vote if they reside in a given municipality for six months.

The issue central to the complaint was not whether the respondent State violated the right to vote or not. For that matter, the European Committee does not have jurisdiction to examine whether there is a violation of the right to vote. The crux of the matter relates to the instrumental role of exercising (or not) the right to vote. The complainant argued: 'Travellers have virtually no political influence. As a result, they suffer discrimination and are not in fact in a position to vote in elections, thereby allowing local authorities to ignore them and perpetuate their social exclusion'.[170] Deprivation and the lack of participation including the right to vote reinforce each other, as discussed above. Thus, this relationship was submitted for examination to the European Committee.

The respondent State made a clear distinction between Travellers and other French citizens: to achieve the right to vote, the Travellers should be attached to a particular municipality for three years while only six months are required of other citizens. The number of Traveller voters should not

[166] Concluding observations on China, E/C.12/CHN/CO/2, 13 June 2014, para 30. See Concluding observations on Azerbaijan, E/C.12/AZE/CO/3, 5 June 2013, para 22.

[167] The European Charter guarantees the right of everyone 'to protection against poverty and social exclusion'. European Social Charter (1996), art 30 (Part I).

[168] European Social Charter (1996), art 30 (Part II).

[169] Complaint No 51/2008, Decision on the Merits adopted 19 October 2009.

[170] *ERRC v France*, para 97.

exceed three per cent of the total vote of a given municipality, while there is no such limitation on other citizens. At first glance the distinction appears neutral; however, it disproportionately affects Travellers. The European Committee recognised the effect of the distinction:

> [L]imiting the number of persons with the right to vote to 3% has the effect of excluding some potential voters. In practice this restriction affects Travellers. The Committee considers that setting this limit at such a low level leads to *discriminatory treatment* with regards to access to the right to vote for Travellers and, thus, is a possible cause of marginalisation and social exclusion.[171]

The non-discrimination provision of the European Charter is not a self-standing provision.[172] The European Committee finds a violation of this provision only in relation to other rights guaranteed in the Charter. That is not the case with the right to vote. Thus, the European Committee established a causal relationship between voting and exclusion, stating that the respondent's conduct is discriminatory treatment with respect to voting although this would not amount to a violation of the European Social Charter. Thus, the Committee has recognised the importance of the right to vote in the realisation of the right to protection against poverty and social exclusion:

> [T]he reference to the social rights enshrined in Article 30 should not be understood too narrowly. In fact, the fight against social exclusion is one area where the notion of the indivisibility of fundamental rights takes a special importance. In this regard, the right to vote, as with other rights relating to civic and citizen participation, constitutes a necessary dimension in social integration and inclusion and is thus covered by article 30.[173]

Noting the indivisibility of fundamental rights, the European Committee has gone beyond the instrumental role of the right to vote in particular and the rights relating to civic and citizen participation in general. The Committee has explained that these rights are a dimension of the right to protection against poverty and social exclusion guaranteed under Article 30 of the European Social Charter. Therefore, the Committee has concluded that the respondent State's conduct is discriminatory and a violation of Article 30 of the European Social Charter.

In *ERRC v France*, the European Committee also addressed positive measures that states should adopt. It examined an allegation that the respondent State did not put in place an overall national policy for addressing the problem of poverty and social exclusion.[174] The European Committee has emphasised that states should adopt a comprehensive and coordinated policy to protect Travellers against poverty and social exclusion. Such policy should consist of 'an analytical framework, a set of priorities and measures to prevent and remove obstacles' to accessing fundamental rights and should be supported with adequate resources.[175] It should also consist of 'monitoring mechanisms involving all relevant actors, including civil society and persons affected by exclusion'.[176] The respondent State acknowledged 'the need to provide Travellers with the means to participate in the process of conceiving, designing, implementing and monitoring policies and programmes' aimed at improving their situation.[177] However, since the respondent State did not have a coordinated

[171] *ERRC v France*, para 104. Italics added.
[172] *Syndicat des Agrégés de l'Enseignement Supérieur (SAGES) v France*, Complaint No. 26/2004, Decision on the merits of European Social Committee of 15 June 2005, para 34.
[173] *ERRC v France*, para 97.
[174] *ERRC v France*, para 91.
[175] *ERRC v France*, para 93-94.
[176] *ERRC v France*, para 93.
[177] *ERRC v France*, para 92.

national policy in place, particularly on housing, the European Committee found a violation of the right to protection against poverty and exclusion under Article 30 of the European Social Charter.

The European Committee dealt with a similar issue in *International Federation of Human Rights (FIDH) v Belgium*.[178] In this case, the respondent State had policies in place which covered all inhabitants in a situation of poverty or exclusion. However, the policies did not specifically target Travellers.[179] Besides, there was 'no system for Travellers to be consulted on and take part in the framing and supervision of policies relating to them' in parts of the respondent State.[180] One of the reasons for finding the respondent State in violation of Article 30 was 'the fact that the representatives of Travellers are not involved in the various stages of policy making'.[181]

The European Committee also addresses issues of participation in relation to the right to housing guaranteed under Articles 16 and 31 of the European Social Charter.[182] It requires consultation with the affected persons. In *International Movement ATD Fourth World v France*, the Committee has laid down some requirements to be complied with when states carry out evictions.[183] The Committee does not say that the European Social Charter prohibits evictions. It defines the term 'eviction' as 'the deprivation of housing which a person occupied, on account of insolvency or wrongful occupation'.[184] In principle, evictions in themselves do not violate the right to housing under the European Social Charter. However, it is possible that states may contravene the Charter if they do not follow appropriate eviction procedures. Thus, the Committee has stressed that '[l]egal protection for persons threatened by eviction must include, in particular, an obligation to consult the affected parties in order to find alternative solutions to eviction and the obligation to fix a reasonable notice period before eviction'.[185] In its decisions, the Committee usually emphasises this requirement as well as other additional safeguards.[186]

The European Committee finds violations of the Charter when laws regulating evictions do not provide for procedural safeguards including consultation. In *European Roma Rights Centre (ERRC) v Ireland*, it has found that 'some of the legislation permitting evictions fails to provide for consultation with those to be affected'.[187] In *European Roma and Travellers Forum (ERTF) v the Czech Republic*, it has expressed its dissatisfaction with the way 'all legislation permitting evictions ensures the necessary safeguards required by Article 16 of the 1961 Charter, such as the *prior* consultation of

[178] Complaint No 62/2010 adopted 21 March 2012.
[179] *FIDH v Belgium*, paras 202-203.
[180] *FIDH v Belgium*, para 188.
[181] *FIDH v Belgium*, para 204.
[182] Art 16 provides that 'the Parties undertake to promote the economic, legal and social protection of family life by such means as […] provision of family housing'. Art 31 provides that 'the Parties undertake to take measures designed: 1 to promote access to housing of an adequate standard; 2 to prevent and reduce homelessness with a view to its gradual elimination; 3 to make the price of housing accessible to those without adequate resources'.
[183] Complaint no 33/2006, adopted 5 December 2007, para 78.
[184] *International Movement ATD Fourth World v France*, para 78.
[185] *International Movement ATD Fourth World v France*, para 78.
[186] *International Movement ATD Fourth World v France*, para 78. The European Committee has underlined that: 'The law must also prohibit evictions carried out at night or during winter and provide legal remedies and offer legal aid to those who are in need so they may seek redress from the courts. Compensation for illegal evictions must also be provided. Even when an eviction is justified by the public interest, authorities must adopt measures to re-house or financially assist the persons concerned'. See *Médecins du Monde – International v France* Complaint No 67/2011 adopted 11 September 2012, para 75; *European Roma Rights Centre (ERRC) v Ireland* Complaint No. 100/2013 adopted 1 December 2015, para 136; *European Roma and Travellers Forum (ERTF) v the Czech Republic* Complaint No. 104/2014 adopted 17 May 2016, para 81.
[187] *ERRC v Ireland*, para 165.

affected parties'.[188] Here, the Committee has indicated that consultations should be conducted before evictions take place.

### 6.3.3 The Inter-American system

In the Inter-American system, a right to participation is derived from the right to property of indigenous and tribal peoples. In general, human rights are interdependent and interrelated. This relationship evidently exists between the right to property and other rights including economic, social and cultural rights. The right to property 'serves as a basis for entitlements which can ensure an adequate standard of living'.[189] The enjoyment of the right to property provides the means for meeting one's basic needs. Thus, individuals who have adequate properties enjoy their rights to food, water and housing. In addition, they also have the means to access education and health services and thereby exercise their rights to education and health. One may argue that this relationship is even stronger with regard to the right to property of indigenous peoples. The Inter-American Court stresses this relationship. In *Yakye Axa Indigenous Community v Paraguay*, the Inter-American Court has held that the failure of the respondent States to guarantee the right to property of an indigenous people has 'a negative effect on the right of the members of the Community to a decent life'.[190] The denial of the right to property prevents the members of indigenous peoples from 'the possibility of access to their traditional means of subsistence, as well as to use and enjoyment of the natural resources necessary to obtain clean water and to practice traditional medicine to prevent and cure illnesses'.[191] Therefore, the denial of the right to property implies a violation of a number of economic, social and cultural rights in the context of indigenous and tribal peoples.

The Inter-American Court requires effective participation of indigenous and tribal peoples in the context of development or investment projects. The Court laid down this requirement in *Saramaka People v Suriname* (Saramaka case).[192] In this case, the Court examined the failure of the respondent State to recognise and protect the system of communal land ownership of a tribal people, the Saramaka. It held that indigenous and tribal peoples are entitled to the recognition and protection of their territories.[193] The Court also recognised that their right to property is subject to restrictions. In line with its rulings in other cases, the Court has explained that restrictions on the right to property are permissible provided that they are established by law; that they are necessary; that they are proportional; and that they are adopted to attain a legitimate goal as discussed in the previous chapter.[194] An additional requirement applies when the restrictions concern the right to property of indigenous and tribal peoples over their traditionally owned land and natural resources. The Court held that 'another crucial factor to be considered is whether the restriction amounts to a denial of their traditions and customs in a way that endangers the very survival of the group and of its members'.[195] In other words, the Court is of the view that Article 21 of the American Convention permits states to grant concessions for the exploration and extraction of natural resources. By

[188] *ERTF v the Czech Republic*, para 85. Italics added.
[189] Asbjørn Eide, 'Economic, Social and Cultural Rights as Human Rights' In Asbjørn Eide, Catarina Krause & Allan Rosas (eds), *Economic, Social And Cultural Rights: A Textbook* (Martinus Nijhoff Publishers 2001) 18.
[190] *Yakye Axa Indigenous Community v Paraguay* (Inter-American Court, 17 June 2005) para 168.
[191] *Yakye Axa Indigenous Community v Paraguay* para 168.
[192] *Case of the Saramaka People v Suriname* (Inter-American Court, 28 November 2007) para 128 (hereafter 'Saramaka case').
[193] *Saramaka* case, para 115.
[194] *Saramaka* case, para 127; See *Case of the Kaliña and Lokono Peoples v Suriname* (Inter-American Court, 25 November 2015) para 155; *Yakye Axa Indigenous Community v Paraguay* (Inter-American Court, 17 June 2005) para 144.
[195] *Saramaka* case, para 128.

granting concessions, states can restrict the right to the property of indigenous and tribal peoples, particularly their right 'to use and enjoy their traditionally owned lands and natural resources'.[196] Such restriction is permissible only when 'it does not deny their survival as a tribal people'.[197]

In the *Saramaka* case, the Inter-American Court has established three safeguards. The safeguards ensure the survival of the members of the indigenous and tribal communities as a people. The Court has observed that

> First, the State must ensure the effective participation of the members of the Saramaka people, in conformity with their customs and traditions, regarding any development, investment, exploration or extraction plan […]. Second, the State must guarantee that the Saramakas will receive a reasonable benefit from any such plan within their territory. Thirdly, the State must ensure that no concession will be issued within Saramaka territory unless and until independent and technically capable entities, with the State's supervision, perform a prior environmental and social impact assessment.[198]

In the *Saramaka* case, therefore, the Inter-American Court has established the requirement of effective participation as one of the sub-criteria for assessing the permissibility of restrictions on the right to property.[199] In order to ensure an effective participation in development or investment plans, states have a duty to actively consult with the members of indigenous and tribal peoples.[200] Effective participation mainly consists of consultation, or to use the Court's language, the 'right to consultation'. States should conduct the consultation 'in good faith, through culturally appropriate procedures and with the objective of reaching an agreement' in accordance with the customs and traditions of indigenous peoples.[201]

Another element of effective participation is consent. The requirement of consent comes into the picture when states implement 'large-scale development or investment projects that would have a major impact' within the territories of indigenous peoples. The Court has emphasised that states have not only a duty to consult but also a duty to obtain 'free, prior, and informed consent' of indigenous and tribal peoples according to their customs and traditions.[202] The consultation is required in any development or investment plan while the consent is required when two conditions are met. These conditions relate to the magnitude and impact of development or investment plans. In terms of magnitude, the development plans should involve large-scale projects. A large-scale project may not necessarily have a significant effect on indigenous peoples. When it does have a major impact, it is necessary to obtain prior informed consent of the affected peoples. Antkowiak and Gonza point out that due to these conditions, the protection for the indigenous peoples is insufficient.[203] For example, a 'small-scale operation that destroys a sacred site could devastate a community, yet it would not likely require consent by the Court'.[204]

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[196] *Saramaka* case, para 128.
[197] *Saramaka* case, para 128.
[198] *Saramaka* case, para 129.
[199] Since the Court adopt this criterion in relation to the right property of indigenous people only, one may submit that the effective participation requirement does not apply to permissibility of restrictions on everyone's right to property.
[200] *Saramaka* case, para 133.
[201] *Saramaka* case, para 133.
[202] *Saramaka* case, para 134.
[203] Thomas M Antkowiak and Alejandra Gonza, *The American Convention on Human Rights: Essential Rights* (OUP 2017) 282.
[204] Antkowiak & Gonza (n 203) 282.

The Inter-American Court has further elaborated the right to consultation in *Kichwa Indigenous People of Sarayaku v Ecuador* (Sarayaku case).[205] The case concerns a permit given by the respondent State to a private oil company for oil exploration and exploitation activities in Sarayaku.[206] The permit was granted without consulting the Sarayaku people and without obtaining their consent. The exploration by the company prevented the Sarayaku people from seeking means of subsistence and exercising their freedoms of movement and cultural expression, since the company used high-powered explosives.

In its submission, the Inter-American Commission on Human Rights related the right to consultation with two other rights. It argued that the respondent State violated Article 13 (right to freedom of thought and expression) and Article 23 (right to participate in government) of the American Convention.[207] The violation of these rights was in relation to Article 21 (right to property) of the American Convention.[208] The right to freedom of thought and expression includes the 'freedom to seek, receive, and impart information and ideas of all kinds'. The Inter-American Commission emphasised the access to information element. It stressed that 'the right of access to information has special meaning and consequences where Indigenous Peoples are concerned'.[209] It also underlined that 'while the right to prior consultation is not simply a matter of supplying information, that information is nonetheless a condition *sine qua non* for the consultation to be an effective consultation'.[210] The Inter-American Commission argued that a similar relationship exists between the right to consultation and the right to participate in government. It stated in its application that:

> States not only have an obligation to consult indigenous peoples or communities before approving any project that might affect them, but also to respect the particular system of consultation that each indigenous people or community practices, as that is their method of exercising their political rights. The law requiring prior consultation is one dimension of the exercise of indigenous peoples' political rights.[211]

The Inter-American Commission argued unequivocally that the right to consultation in the context of implementing development projects is a dimension of exercising political rights. However, the Inter-American Court has declined to rule on whether the respondent State had violated Articles 13 and 23 of the American Convention.[212] Similarly, the Court has declined to rule on the relationship between the right of access to information in the context of development projects and the right to participate in government in *Claude-Reyes et al v Chile*.[213]

The right to consultation ensures the participation of indigenous peoples. The Inter-American Court affirmed this instrumental purpose of the right to consultation in the *Sarayaku* case. It held that 'one of the fundamental guarantees to ensuring the participation of indigenous peoples and communities in decisions regarding measures that affect their rights and, in particular, their right to communal

[205] *Case of the Kichwa Indigenous People of Sarayaku v Ecuador* (Inter-American Court, 27 June 2012) (hereafter 'Sarayaku case').
[206] *Sarayaku* case, para 2.
[207] *Sarayaku* case, para 125.
[208] *Sarayaku* case, para 125.
[209] Application to the Inter-American Court of Human Rights in the case of Kichwa People of Sarayaku and its members (Case 12.465) against Ecuador, 26 April 2010, para 141 ('Commission's application in the *Sarayaku* case').
[210] Commission's application in the *Sarayaku* case, para 143.
[211] Commission's application in the *Sarayaku* case, para 143.
[212] *Sarayaku* case, para 230.
[213] *Claude-Reyes et al v Chile* (Inter-American Court, 19 September 2006), paras 104-107.

property, is precisely the recognition of their right to consultation'.[214] In addition, the Court has explained the dual sources of the state obligation to consult. One of the sources is a treaty provision, Article 21 of the American Convention (right to property) interpreted in the light of other treaties, particularly the Convention concerning Indigenous and Tribal Peoples in Independent Countries (ILO Convention No 169).[215] The Inter-American Court has also found another source. It has held that 'the obligation to consult, in addition to being a treaty-based provision, is also a general principle of international law'.[216] To reach this conclusion, the Court refers extensively to domestic legislation and case law of Member States of the Organisation of American States.[217] According to Brilman, although the Court does not refer to 'the right to consultation as customary international law', its extensive references to domestic norms and case law could be interpreted 'as an effort to establish an *opinio iuris* or state practice'.[218]

The Inter-American Court has identified the corresponding state obligations of the right to consultation. The Court has established 'the minimum standards and essential requirements of a valid consultation process'.[219] First, the consultation must be carried out in advance, that is, before the implementation of any development project or any legislative or administrative decision affecting indigenous peoples.[220] Recalling its holdings in the *Saramaka* case, the Court affirmed that the purpose of conducting consultations in advance is to give notice to indigenous peoples and to allow them 'sufficient time for an internal discussion within the community'.[221]

Second, the consultation must be conducted in good faith with the aim of reaching an agreement. States should ensure that consultations are a true instrument for participation, not a matter of mere formality.[222] Good faith involves establishing a climate of mutual trust and respect among the parties. The presence of members of armed forces in the areas where development projects are expected to take place may undermine mutual trust and respect.[223] Good faith does not exist when coercion is used, nor when there are 'attempts to undermine the social cohesion of the affected communities, either by bribing community leaders or by establishing parallel leaders, or by negotiating with individual members of the community'.[224] Since 'the obligation to consult is the responsibility of the State,' it cannot be avoided by delegating it to third parties, particularly to a private company that has an interest in implementing a development project.[225] A delegation in this respect shows that the conduct of consultations is not in good faith.[226] The aim of consultations is to reach an agreement,[227] and this depends on the consent of both sides. The consent of indigenous peoples is particularly important, since states are usually interested in the implementation of development projects. There

[214] *Sarayaku* case, para 230.
[215] Adopted 27 June 1989, entered into force 5 September 1991, 28 ILM 1382 (1989).
[216] *Sarayaku* case, para 125.
[217] *Sarayaku* case, para 164.
[218] Marina Brilman 'Consenting to Dispossession: The Problematic Heritage and Complex Future of Consultation and Consent of Indigenous Peoples' (2018) 49 *Columbia Human Rights Law Review* 1- 72, 25.
[219] *Sarayaku* case, para 178.
[220] *Sarayaku* case, paras 180-182.
[221] *Sarayaku* case, para 180.
[222] *Sarayaku* case, para 180.
[223] *Sarayaku* case, para 193.
[224] *Sarayaku* case, para 186.
[225] *Sarayaku* case, para 187.
[226] *Sarayaku* case, para 199.
[227] *Sarayaku* case, para 185.

is an agreement when the concerned indigenous peoples accept the proposed development project. An agreement cannot exist without consent.

Third, the consultation must be adequate and accessible. A consultation complies with these criteria when it is conducted in accordance with the traditions of indigenous peoples.[228] Consultations should take into account different forms of political organisation of indigenous peoples as well as respect their decision-making processes.[229] When language barriers exist, translation should be provided, 'particularly in those areas where the official language is not spoken by a majority of the indigenous population'.[230]

Finally, the consultation must be informed. An informed consultation involves constant communications between the parties because states should receive and provide information.[231] The purpose of providing information is to ensure that indigenous peoples become aware of 'the potential risks of the proposed development or investment plan, including the environmental and health risks'.[232] Thus, the obligation to provide information presupposes environmental and social impact studies,[233] because without such studies, it would not be possible to identify environmental and health risks. States should respect the culture and traditions of indigenous peoples when they conduct environmental impact assessments.[234]

In the *Saramaka* case, it seems that the Inter-American Court addressed the issue of consent in the requirements of consultation, clearly explaining that free, prior, and informed consent is an element of participation.[235] However, the Court did not address this issue separately in the *Sarayaku* case. According to Brilman, the Court's decision in the *Sarayaku* case 'solidifies the distinction made between consultation and consent in *Saramaka*; consent is to be understood as something *additional* to consultation that is only required in certain circumstances'.[236] One may submit that the Court's detailed requirements on consultation reduce the relevance of free, prior, and informed consent. The requirement that consultations should be conducted in good faith with the aim of reaching an agreement implies consent, since an agreement cannot exist without the consent of indigenous peoples. Good faith and prohibition of coercion ensure that the consent of indigenous peoples be free. The requirement that the consultation should be conducted in advance ascertains that the consent is prior to the implementation of any development project. The requirement that states receive and provide information, particularly after conducting environmental and social impact assessments, ensures that the consent of indigenous peoples is informed.

[228] *Sarayaku* case, para 201.
[229] *Sarayaku* case, para 202.
[230] *Sarayaku* case, para 201.
[231] *Sarayaku* case, para 208.
[232] *Sarayaku* case, para 208.
[233] *Saramaka* case, para 129. Environmental impact assessment is instrumental to provide important information. The assessment is also one of the safeguards the Inter-American Court has established to ensure that restrictions on the right to property of indigenous people do not deny them their right to survival as people.
[234] *Sarayaku* case, para 206.
[235] *Saramaka* case, para 134.
[236] Brilman (n 218) 32. Brilman provides list of circumstances in which consent is necessary. 'Those circumstances would include (i) displacement or resettlement of indigenous peoples, (ii) storage or elimination of dangerous materials in indigenous peoples' territories, (iii) realization of military activities in ancestral territories, (iv) implementation of projects on a grand scale, (v) promotion of the application of traditional knowledge, innovations, and practices, and (vi) access to genetic resources'.

The Inter-American Court ascertains whether states comply with the essential requirements of a valid consultation process outlined above. By specifying these requirements, the Court established when (i.e., in advance) and how (ie, in good faith) states should conduct the consultation. It has also identified positive state obligations to arrange for translation services, provide information and conduct environmental impact assessments. Moreover, the obligations to structure law and institutions and to take special measures, which are positive obligations of a general nature, arise from the obligation to consult indigenous peoples. These obligations flow from the relationship between Articles 21 and 1(1) of the American Convention. As discussed above, the obligation to consult arises from Article 21 (right to property). As a general obligation provision, Article 1(1) requires states to ensure the free and full exercises of the rights guaranteed in the Convention.[237] States have the obligation to structure their laws and institutions so that indigenous peoples can be consulted effectively.[238] In relation to Article 1(1), the effective protection of the right to property under Article 21 'imposes on States the positive obligation to adopt special measures' to ensure that indigenous peoples enjoy the full and equal exercise of their right to their lands.[239]

## 6.4 Participation under the African Charter

The African Charter guarantees a self-standing right to participate in the government of one's country (discussed in Subsection 6.4.1) and a collective right to self-determination (discussed in Subsection 6.4.2). In these subsections, I would argue that these rights entail the obligation to ensure the participation of individuals and groups in the implementation of their economic, social and cultural rights. The obligation to ensure participation is clearly established in the practice of the African Commission and the African Court.

However, neither the Commission nor the Court explains that the legal basis of the obligation to ensure participation is the right to participate in the government of one's country and the right to self-determination. The Commission sometimes requires states to ensure participation in plans and policies relating to the implementation of economic, social and cultural rights but it does not state its legal basis (discussed in Subsection 6.4.3). The Commission and the Court sometimes explain the legal basis of the state obligation to ensure participation, particularly in their case law, and in those cases, they derive the obligation from other rights guaranteed in the African Charter. The African Commission cites a category of these rights in relation to environmental protection (discussed in Subsection 6.4.4). It derives the obligation to ensure participation from the right to health (Article 16 of the African Charter) and the right to a general satisfactory environment (Article 24 of the African Charter). In relation to evictions, the African Commission and the African Court derive the obligation to ensure participation from another category of rights (discussed in Subsection 6.4.5). These rights include the right to property (Article 14 of the African Charter) and the right to development (Article 22 of the African Charter). From the eviction cases, one may glean the requirements of effective participation (discussed in Subsection 6.4.6).

[237] *Sarayaku* case, para 166.
[238] *Sarayaku* case, para 166.
[239] *Sarayaku* case, para 171.

### 6.4.1 Individual participation

Article 13 of the African Charter guarantees the right of every citizen to participate freely in the government of one's country.[240] The Charter does not expressly refer to the right to vote and the right to be elected, nor does it lay down election requirements.[241] For this reason, according to Mbondenyi, the Charter's provision is very superficial, since 'it does not expressly guarantee the holding of periodic and genuine elections'.[242] In contrast, other human rights instruments contain provisions on elections.[243] In these instruments, the 'right to political participation has two parts: an "election clause" and a "take part" clause'.[244] The take part clause has a general scope of application[245] and is an all-embracing provision which by itself requires elections open to contest.[246] The election clause is 'one realization or institutionalization of citizens' right to take part in public affairs and government'.[247]

An election clause is missing from the African Charter. Nevertheless, in substantive terms, Article 13(1) of the Charter includes the right to vote and the right to be elected. This view is confirmed in the practice of the African Commission and the African Court. In *Legal Resources Foundation v Zambia*, the African Commission examined a communication alleging a violation of the right to be elected.[248] The communication concerns a constitutional amendment that changes eligibility requirements for presidential candidates. According to the amendment, around 35% of the Zambian population would not be eligible to be elected as the president of the Country.[249] The Commission has found that the amendment is a violation of Article 13 of the Charter.[250] In addition, the Commission has also found a violation of the right to vote because the amendment limits the choice of Zambian citizens by disqualifying preferred presidential candidates.[251] In *Jawara v The Gambia*, the Commission has examined alleged violations of the African Charter due to suppressions that followed a coup d'état in the respondent State.[252] The government that came to power through a coup banned former ministers and members of parliament from taking part in any political activities.[253] The Commission has found that such ban is a violation of Article 13(1) of the Charter.[254]

Like the African Commission, the African Court has confirmed that Article 13(1) of the African Charter includes the right to vote and the right to be elected. In *Tanganyika Law Society and Legal and Human Rights Centre and Reverend Christopher R Mtikila v United Republic of Tanzania* (Mtikila v

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[240] Art 13(1) provides that: 'Every citizen shall have the right to participate freely in the government of his country, either directly or through freely chosen representatives in accordance with the provisions of the law'.

[241] These requirements include the followings: elections should be genuine and periodic; they should be by universal and equal suffrage; and they should be held by a secret ballot. See Universal Declaration, art 21; ICCPR, art 25; American Convention, art 23.

[242] Morris Kiwinda Mbondenyi, 'The right to participate in the government of one's country: An analysis of article 13 of the African Charter on Human and Peoples' Rights in the light of Kenya's 2007 political crisis' (2009) 9/1 *African Human Rights Law Journal* 183-202, 187.

[243] cf Universal Declaration, art 21; ICCPR, art 25; American Convention, art 23.

[244] Fabienne Peter, 'The Human Right to Political Participation' (2013) 7/1 *Journal of Ethics & Social Philosophy* 1-16, 11.

[245] Steiner (n 11) 87.

[246] Steiner (n 11) 87.

[247] Steiner (n 11) 87.

[248] AHRLR 84 (ACHPR 2001).

[249] *Legal Resources Foundation v Zambia*, para 2.

[250] *Legal Resources Foundation v Zambia*, paras 52, 64, 72 & 74. See *Modise v Botswana* (2000) AHRLR 30 (ACHPR 2000), paras 95 & 96.

[251] *Legal Resources Foundation v Zambia*, para 72.

[252] (2000) AHRLR 107 (ACHPR 2000).

[253] *Jawara v The Gambia*, para 66.

[254] *Jawara v The Gambia*, para 67.

Tanzania), the Court has examined an alleged violation of the African Charter due to amendments to the respondent State's Constitution.[255] The amendments require that 'any candidate for Presidential, Parliamentary and Local Government elections had to be a member of, and be sponsored by, a political party'.[256] Because of these amendments, the complainant was unable to run in an election as a presidential candidate. The Court has found a violation of Article 13(1) of the Charter due to the amendments.[257]

In *Actions pour la Protection des Droits de l'Homme (APDH) v Republic of Côte d'Ivoire* (APDH v Côte d'Ivoire), the Court established the obligation of states to organise an independent and impartial electoral body.[258] In this case, the respondent State constituted an electoral body by law. According to the law, the ruling party was represented by eight members, while the opposition parties were represented by four members.[259] The Court found that the electoral body was not independent and impartial.[260] The Court has interpreted Article 13(1) of the African Charter in light of Article 17(1) of the African Charter on Democracy, Elections and Governance,[261] which requires states to establish and 'strengthen independent and impartial national electoral bodies responsible for the management of elections'. It found that a failure to establish an independent and impartial electoral body is a violation of Article 13(1) of the African Charter.[262] In the above cases, the African Commission and the African Court have examined violations concerning the right to be elected. In these cases, the bone of contention is power. The disputes arose from competitions for political power. While these cases are not directly related to the participation in the implementation of economic, social and cultural rights, the instrumental role of competition for political power should be acknowledged, as discussed above.

In their practice, the African Commission and the African Court are developing the election clause under the African Charter, although that clause is still missing from the Charter's text. The African Charter provides for the take part clause in Article 13(1). However, this clause is yet to develop in the practice of the African Commission and the African Court. Still, it is submitted, Article 13(1) includes participation in the formulation and implementation of policies relating to economic, social and cultural rights. In particular, this view is in line with the interpretation of the take part clause under Article 25 of the ICCPR. As discussed above, the take part clause under the ICCPR encompasses participation in 'the formulation and implementation of policy at international, national, regional and local levels'.[263] The Human Rights Committee does not distinguish areas of policy formulation and implementation. Thus, one may argue that the Human Rights Committee refers to all state policies, including those relating to the implementation of economic, social and cultural rights.

The African Commission and the African Court recognise the right to participate in development programmes, which includes the formulation and implementation of policies relating to the realisation of economic, social and cultural rights as discussed below. However, they do not seem to

[255] Application Nos 009 & 011/2011 (African Court, 14 June 2013).
[256] *Mtikila v Tanzania*, para 67.
[257] *Mtikila v Tanzania*, para 111.
[258] Application 001/2014 (African Court, 18 November 2016).
[259] *APDH v Côte d'Ivoire*, para 130.
[260] *APDH v Côte d'Ivoire*, para 133.
[261] Adopted in Addis Ababa, Ethiopia, on 30 January 2007 and entered into force on 15 February 2012.
[262] *APDH v Côte d'Ivoire*, para 136.
[263] Human Rights Committee, General Comment 25, para 5.

consider that the take part clause under Article 13(1) of the African Charter entails participation in development programmes.

### 6.4.2 Collective participation

The African Commission derives the right to participate in elections from the right to self-determination under Article 20(1) of the Charter.[264] It emphasises the internal dimension of self-determination. In *Katangese Peoples' Congress v Zaire*, the Commission examined a claim for external self-determination.[265] In this case, the complainant was a liberation front seeking the secession of Katanga from Zaire (now Democratic Republic of Congo), alleging a violation of the right to self-determination.[266] The Commission refused to find a violation of the right to self-determination and emphasised that

> In the absence of concrete evidence of violations of human rights to the point that the territorial integrity of Zaire should be called to question and in the absence of evidence that the people of Katanga are denied the right to participate in government as guaranteed by Article 13.1 of the African Charter, the Commission holds the view that Katanga is obliged to exercise a variant of self-determination that is compatible with the sovereignty and territorial integrity of Zaire.[267]

The Commission found no violation because the complainant was unable to prove that individuals in Katanga were denied the right to vote. Therefore, it is submitted, the Commission establishes a clear link between the individual right to participate in government (Article 13(1) of the Charter) and the collective right to self-determination (Article 20(1) of the Charter). The Commission suggests that a violation of the right to vote leads to a violation of the right to self-determination.

In *Gunme and Others v Cameroon*, the Commission has examined another claim for external self-determination.[268] In this case, the complainants sought the independence of English speaking Southern Cameroon from the French-speaking part of the Republic of Cameroon. Although the Commission found a number of violations of the rights of Southern Cameroonians,[269] it declined to find a violation of Article 13(1) of the Charter,[270] by reasoning that Southern Cameroonian representatives were elected to the National Assembly and that they constituted 20% of the members of the National Assembly.[271] For this reason, the Commission did not find a violation of the right to self-determination.[272] In fact, the Commission underlined that 'secession is not recognised as a variant of the right to self-determination within the context of the African Charter'.[273]

Even when the right to external self-determination is not an issue before the Commission, as is the case in *Jawara v The Gambia*, the Commission seems to confirm the relationship it has established between the right to vote and the right to self-determination. As discussed above, the Commission

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[264] Art 20(1) provides that: 'All peoples shall have the right to existence. They shall have the unquestionable and inalienable right to self- determination. They shall freely determine their political status and shall pursue their economic and social development according to the policy they have freely chosen'.

[265] (2000) AHRLR 72 (ACHPR 1995), paras 4 & 6.

[266] *Katangese Peoples' Congress v Zaire*, para 1.

[267] *Katangese Peoples' Congress v Zaire*, para 6.

[268] (2009) AHRLR 9 (ACHPR 2009).

[269] *Gunme and Others v Cameroon,* para 214. The violations include the right to equality of people (art 19 of the Charter).

[270] *Gunme and Others v Cameroon,* para 144.

[271] *Gunme and Others v Cameroon,* paras 142-143.

[272] *Gunme and Others v Cameroon,* para 197.

[273] *Gunme and Others v Cameroon,* para 200.

found a violation of an individual right to participate in government in *Jawara v The Gambia*.[274] Moreover, the Commission has also examined an alleged violation of the collective right to self-determination, finding that overthrowing an elected government by force denies the people their right to freely choose their government as expressed in Article 20(1) of the Charter.[275] Obviously, the coup d'état in the Gambia denied everyone his or her right to vote. Yet the African Commission did not find a violation of the right of every Gambian citizen to participate in the government (Article 13(1) of the African Charter). Therefore, the Commission appears to say that there is a violation of the right to self-determination of a people when individual members of that people are denied their right to vote.

In the Nairobi Principles, the African Commission confirms that the right to self-determination under the African Charter does not include external self-determination or secession.[276] The Commission emphasises that the right to self-determination at the national level 'implies the right to take part in the democratic governance of the state, especially through free and fair national elections'.[277] Moreover, it explains that

> States parties must take special steps to encourage participation by all peoples, including indigenous populations/communities, in the democratic process of national governance. This may include governance schemes that provide more power and authority to regional and local authorities and/or proportional representation systems.[278]

The African Commission clarifies a number of issues. It explains that states should encourage participation in a democratic process, a process that presupposes the enjoyment of a number of rights including the right to vote and be elected, freedom of expression and information, freedom of association and freedom of assembly. Obviously, states should refrain from unjustified interferences with the enjoyment of these rights, but simply refraining would not be sufficient, the Commission requires states to take special steps to ensure the participation of all peoples in the democratic process. What are 'special steps'?

The Commission does not explain the special steps to be taken by the states. It is submitted that such steps may include measures such as enacting laws, providing funding and establishing institutions that promote participation. The establishment of institutions such as electoral commissions is necessary. As noted above, the African Court has established that states parties to the African Charter have the obligation to establish an independent and impartial electoral body.[279] It is submitted that states should take additional measures to ensure the participation of the deprived, particularly members of vulnerable groups, in the implementation of their economic, social and cultural rights. This is because the participation of the deprived is low even in countries where democracy works well, as discussed above.[280]

[274] *Jawara v The Gambia*, para 67.
[275] *Jawara v The Gambia*, para 73.
[276] Nairobi Principles, para 47. 'The right to self-determination in Africa does not include a right to secession'.
[277] Nairobi Principles, para 41.
[278] Nairobi Principles, para 46.
[279] *APDH v Côte d'Ivoire*, para 136.
[280] Dacombe (n 15) 39.

According to the Commission, participation should take place at all levels: national, regional and local levels.[281] A direct participation at the national level may not be practical as discussed above. Thus, participation in the national governance can be indirect. Self-determination includes decentralisation because the Commission requires states to provide more power to local and regional authorities, as it stresses in paragraph 46 of the the Nairobi Principles. With decentralisation, direct participation becomes more practical, as discussed above.

Participation in a democratic process of governance, one may argue, includes involvement in the decisions and policies relating to the implementation of economic, social and cultural rights. In fact, the African Commission explains that the 'right to self-determination in its application to peoples, including indigenous populations/communities, encompasses economic, social and cultural rights'.[282] One may immediately rule out the reading that self-determination is a composite right that contains economic, social and cultural rights. Since the Charter already provides for these rights, such an interpretation would have no point.[283] A plausible reading might be that self-determination entitles peoples to decide, at least to be involved in, policies and plans involving the implementation of economic, social and cultural rights. These policies and plans may be adopted at different levels of administrative hierarchies. As discussed below, however, the African Commission does not clearly explain that the right to self-determination entails the obligation to ensure participation in the implementation of economic, social and cultural rights.

From the Nairobi Principles, it appears that the right to self-determination includes a state obligation to obtain free, prior and informed consent of indigenous peoples. Under the right to self-determination, the Commission requires that 'States parties should ensure the prior informed consent by indigenous populations/communities to any exploitation of the resources of their traditional lands and that they benefit accordingly'.[284] The prior and informed consent of indigenous peoples cannot happen without consultations. As discussed above particularly in relation to the practice of the Inter-American Court, consultations with indigenous peoples are conducted to obtain their free, prior and informed consent. It is submitted that the requirement of the African Commission that states should obtain prior and informed consent of indigenous peoples presupposes participation. Therefore, the right to self-determination under the African Charter entails participation in the implementation of economic, social and cultural rights, at least in relation to the rights of indigenous peoples. In its practice discussed above, the CESCR adopts the same view.[285]

The subjects of the right to self-determination are peoples according to Article 20 of the African Charter. It does not matter whether they are indigenous or not. If this right entails not only the obligation to ensure participation but also the obligation to obtain prior informed consent of indigenous peoples, this should apply to other subjects of the right. However, the Commission seems to limit the obligation to obtain consent to the enjoyment of the right solely to indigenous peoples. As discussed in the third subsection below, the Commission contradicts its earlier decision where it derives the requirement of free, prior and informed consent from the right to property.

[281] Nairobi Principles, para 42.
[282] Nairobi Principles, para 42.
[283] African Charter, arts 14-18.
[284] Nairobi Principles, para 44.
[285] Concluding observations on Honduras, E/C.12/HND/CO/2, 11 July 2016, paras 11-12. See Concluding observations on Angola, E/C.12/AGO/CO/4-5, 15 July 2016, paras 19-20.

To conclude, participation in elections plays an instrumental role in the implementation of economic, social and cultural rights, as discussed above in relation to the practice of the CESCR and that of the European Committee. Although the African Commission and the African Court do not identify the instrumental role of elections, they interpret the right to participate in the government of one's country (Article 13(1) of the African Charter) as guaranteeing the right to vote and the right to be elected. Moreover, the African Commission derives these rights from the right to self-determination (Article 20(1) of the African Charter).

In their practice, the African Commission and the African Court have not addressed whether the individual right to participate in the government of one's country and the collective right of self-determination entail the obligation to ensure participation in the implementation of economic, social and cultural rights. The exception in this regard is the obligation to obtain consent of indigenous peoples. Still, it is submitted, the right to participate in the government of one's country (Article 13(1) of the African Charter) entails the obligation to ensure the participation of individuals in the implementation of economic, social and cultural rights. This view is similar to the view adopted in the practice of the Human Rights Committee. It is also submitted that the right to self-determination (Article 20(1) of the African Charter) entails the obligation to ensure the participation of peoples in the implementation of economic, social and cultural rights. This view is in line with the practice of the CESCR.

### 6.4.3 Participation in plans and policies

According to Article 1 of the African Charter, states parties have undertaken the obligation 'to adopt legislative or other measures to give effect' to rights recognised in the Charter. It is submitted that this obligation includes, among other things, the duty to design, implement, monitor and review plans and policies on the implementation of economic, social and cultural rights. The African Commission underlines the state obligation to adopt such plans and policies.[286] Nevertheless, the Commission does not explain that this obligation springs from Article 1 of the African Charter.

In addition to establishing the obligation to adopt plans and policies, the African Commission establishes two requirements that should be observed during the adoption process of those plans and policies. According to the Commission, for each economic, social and cultural right, 'national plans and policies should be devised and periodically reviewed, on the basis of a participatory and transparent process'.[287] One of the requirements is a transparent process, which is by definition open to the public and lacks secrecy among its actors.[288] A transparent process of adopting plans and policies should thus be open to the public.

The other requirement relates to participation. The Commission requires a participatory process of devising and reviewing plans and policies to implement all economic, social and cultural rights.[289] This requirement relates to the process. The requirement does not address what the plans and policies should do. With regard to the right to water and sanitation, the Commission adds an additional requirement relating to the content of these plans and policies. According to the Commission, the adopted plans and policies should 'ensure the right of everyone to participate in decision-making

[286] Nairobi Principles, para 26.
[287] Nairobi Principles, para 41.
[288] Carolyn Ball, 'What Is Transparency?' (2009) 11/4 *Public Integrity* 293-307, 297.
[289] Nairobi Principles, para 41.

affecting their right to water and sanitation'.[290] Although the Commission does not establish such a requirement in relation to each right, it is submitted that this requirement should also apply to all other rights guaranteed in the African Charter.

In a participatory process of adopting plans and policies, states should conduct consultations with relevant stakeholders. They should invite such stakeholders to contribute to the plans and policies through activities such as raising relevant facts, proposing alternatives, and conducting media campaigns. This is because participation by definition involves activities such as taking part in politics, influencing policies or decision-making and conducting consultations and negotiations.[291] The practice of the Commission sometimes indicates who should participate. It indicates that those individuals and groups who are affected by the plans and policies should participate.[292]

Individuals and groups may be affected in a positive or negative way. When a policy benefits some individuals, it has a positive effect on them. For example, a policy may aim at increasing access to social benefits for some groups such as individuals living in poverty. Such individuals should be involved in the policy. The fact that a policy benefits some individuals cannot be a reason for excluding them. A policy may affect other individuals negatively. For example, a policy may redistribute social funds, which may result in the reduction of payments for some beneficiaries.[293] For this reason, a policy can be a retrogressive measure, and in principle, such measures are not permitted except in exceptional circumstances, particularly when they increase the total enjoyment of the rights.[294] To assess whether such a policy violates the African Charter, the Commission considers whether 'there was genuine participation of affected groups in examining the proposed measures and alternatives'.[295] Thus, those affected, whether positively or negatively, should be able to participate in a policy.

For the purpose of participation, it is submitted, affected individuals and groups may include a category of persons broader than claimants of a particular right. With regard to the right to health for example, the Commission has urged states to work on access to medicines by 'promoting meaningful participation by affected individuals and groups in decisions that affect access to medicines'.[296] Here, affected individuals and groups in a narrow sense may include those persons who need medicine because of their current illness. In a broader sense, one may argue, affected individuals and groups may include health professionals, persons involved in the provision of health services and medicines and bureaucrats authorised to regulate the provision of those services and medicines.

The African Commission requires that participation be necessary in all phases of a policy.[297] The Commission seems to adopt the 'stages model' of the public policy-making process. This model assumes that 'policy making proceeds step by step, starting at the beginning and ending at the

[290] Nairobi Principles, para 92(h).

[291] Ghai (n 85) 6.

[292] Nairobi Principles, para 20; African Commission, Resolution on Access to Health and Needed Medicines in Africa, ACHPR/Res.141(XLIV)08, Abuja (Nigeria), 24 November 2008.

[293] See *National Association of Ex-Employees of the Peruvian Social Security Institute et al v Peru* Case 12.670, Report No. 38/09 (Inter-American Commission, 27 March 2009), where the State reduced pension of highly paid individuals to include individuals not covered by the pension systems.

[294] Nairobi Principles, para 20.

[295] Nairobi Principles, para 20.

[296] African Commission, Resolution on Access to Health and Needed Medicines in Africa.

[297] Nairobi Principles, para 76(a). Eg, the African Commission requires States parties to ensure 'participation at all levels in the determination of cultural policies'.

end'.[298] According to the Commission, states should ensure 'effective participation of the population in all phases of policy and programme design, implementation, monitoring and review'.[299] Thus, the Commission identifies four stages or phases of a policy-making process. Designing a policy is the first phase and is thus the starting point, which means affected individuals and groups should be engaged right from the beginning. Once the designed policy is adopted, the next phase is implementation. The third phase involves monitoring the implementation, and the final phase of a policy is revision, which should be based on the experience on the ground. Involvement in just one of the phases can still be called participation, albeit insufficient participation: affected individuals and groups should be involved in all phases. . In reality, however, policy making is not 'a linear process, with a clear beginning, middle and end'.[300]

Participation obviously requires resources. For example, an individual interested in participation regarding a certain policy needs to spend time and money to take part in a debate or to obtain the necessary information. Individuals deprived of economic, social and cultural rights, particularly those living in poverty, lack the required resources. Thus, the African Commission requires states to provide 'political and financial support' to ensure effective participation in plans and policy relating to the implementation of economic, social and cultural rights.[301] With regard to cultural rights for example, states should provide financial support by making 'funds available for the promotion of cultural development and popular participation in cultural life'.[302] States provide political support when they establish institutional infrastructure for 'the implementation of policies to promote popular participation in culture'.[303]

In sum, the African Commission emphasises the obligation to ensure participation in plans and policies relating to the implementation of economic, social and cultural rights. In this regard, the Commission's view is the same as the position of the CESCR. Unlike the CESCR, however, the Commission does not explain why it requires states to ensure participation. It is submitted that ensuring participation advances the realisation of the individual right to participate in one's government and the collective right to self-determination. The enjoyment of these rights is instrumental in the realisation of economic, social and cultural rights.

#### 6.4.4 Participation in environmental protection

The African Charter guarantees both individual and collective aspects of participation as discussed above. Despite these guarantees, the African Commission derives the obligation to ensure participation from other Charter rights in *Social and Economic Rights Action Centre (SERAC) and Another v Nigeria* (Ogoniland case).[304] In this case, the Commission has examined a complaint arising from oil development activities that affected the health of the Ogoni communities due to environmental pollution. While examining the alleged violations of the right to health (Article 16) and the right to a general satisfactory environment (Article 24), the Commission laid down the following requirements to be met when oil reserves are exploited:

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[298] Thomas A Birkland, *An Introduction to the Policy Process: Theories, Concepts, and Models of Public Policy Making* (3rd edn, Routledge 2011) 26.
[299] Nairobi Principles, para 29.
[300] Peter Dorey, Policy Making in Britain: An Introduction (Sage Publications 2005) 5.
[301] Nairobi Principles, para 29.
[302] Nairobi Principles, para 76(d).
[303] Nairobi Principles, para 76(d).
[304] (2001) AHRLR 60 (ACHPR 2001).

> Government compliance with the spirit of Article 16 and Article 24 of the African Charter must also include ordering or at least permitting independent scientific monitoring of threatened environments, requiring and publicising environmental and social impact studies prior to any major industrial development, undertaking appropriate monitoring and providing information to those communities exposed to hazardous materials and activities and providing meaningful opportunities for individuals to be heard and to participate in the development decisions affecting their communities.[305]

The Commission lists the requirements to be met to comply with Articles 16 and 24 of the African Charter. Among these requirements is the obligation to provide meaningful opportunities for individuals to participate in the development decisions. It is submitted that the right to take part in the government of one's country (Article 13(1) of the African Charter) entails the same obligation. Thus, the failure of the respondent State to ensure participation in development decisions would have been a violation of Article 13. However, the Commission has not found a violation of this provision.

Two other requirements to comply with Articles 16 and 24 relate to the right to receive information. First, states should publicise environmental and social impact studies. This may take place through different media including publication in print or broadcasting media. Publicising the studies (ie, through their publication in a particular newspaper) provides information to the general public. Second, states should provide information to communities affected by environmental pollution. If the concerned state properly publicises the environmental and social impact studies, the communities affected by the development activities would receive the information. The importance of the second requirement lies in the emphasis of the Commission on the recipients of the information. That is, states should ensure that the relevant information gets to the communities exposed to hazardous materials and activities.

Article 9(1) of the African Charter guarantees the right to receive information. Explaining the content of this provision, the African Commission emphasises that organs of states should actively publish 'important information of significant public interest'. [306] It also explains that individuals have the right to request and obtain information held by public and private bodies.[307] In particular, the Commission establishes not only the state obligation to publish environmental impact assessment reports but also the timeframe within which such reports should be published.[308] The Commission requires the publication of environmental impact assessment reports within 30 days to be counted from the date of receipt or generation of the reports.[309] Therefore, the communities affected by the pollution in the *Ogoniland* case have the right to request the information under Article 9(1) of the Charter. However, the African Commission has not examined the publication of environmental and social impact studies in relation to freedom of information. Consequently, the Commission has not found a violation of Article 9(1) of the African Charter.

Access to information is indispensable in itself. Access to information also facilitates the realisation of the right to participate. As discussed above, participation involves the exercise of several rights including the exercise of freedom of information.[310] It is submitted that access to information is a

[305] *Ogoniland* case, para 53.
[306] Declaration of Principles on Freedom of Expression in Africa (2002), para 4.
[307] Declaration of Principles on Freedom of Expression in Africa (2002), para 4.
[308] African Commission, Model Law on Access to Information for Africa (2011) Section 7.
[309] Model Law on Access to Information for Africa, section 7.
[310] OHCHR, *Principles and Guidelines for a Human Rights Approach to Poverty Reduction Strategies*, HR/PUB/06/12, para 74.

prerequisite to participation in the implementation of economic, social and cultural rights. In the *Ogoniland* case, the Commission has not examined a violation of the right to participate in the government of one's country (Article 13(1)) and the right to receive information (Article 9(1)). Nevertheless, it has explained that a state failure to provide information and ensure participation may lead to a violation of the right to health (Article 16). In other words, the Commission has derived the requirement of participation from the right to health and the right to a general satisfactory environment (Article 24).

The African Commission recognises that the Ogoni people are indigenous communities or populations.[311] As discussed above, the Commission explains that the right to self-determination (Article 20(1) of the African Charter) entails the state obligation to obtain prior and informed consent of indigenous peoples. In the *Ogoniland* case, however, the African Commission has not examined the right to self-determination of the Ogoni people. Thus, it has not required the Nigerian government to obtain free, prior, and informed consent of the Ogoni people. In later eviction cases discussed below, the Commission emphasises that states should obtain free, prior and informed consent of indigenous peoples when they explore and exploit resources in their ancestral territories.

**6.4.5 Participation in eviction processes**

The African Commission and the African Court have dealt with two cases concerning evictions of indigenous peoples from their ancestral land. The cases were submitted against the Republic of Kenya. The African Commission has decided one of the cases itself and submitted the other one to the African Court. In these cases, the Commission and the Court have derived participation from the right to property (Article 14) and the right to development (Article 22). In *Centre for Minority Rights Development and Others v Kenya* (Endorois case), the African Commission has examined the alleged violations of the rights of the Endorois Indigenous People,[312] which were due to their eviction from their ancestral land. The respondent State wanted the land for the creation of a game reserve. The Commission has considered participation in relation to the rights to property, to development and to freely dispose of natural resources. In deciding this case, the Commission heavily relied on the case law of the Inter-American Court.

The African Commission submitted to the African Court a case involving facts similar to those of the *Endorois* case. The Commission relied on its jurisprudence in the *Endorois* case in its submission to the Court in the case of *African Commission on Human and Peoples' Rights v the Republic of Kenya,* a case concerning the eviction of the Ogiek indigenous people from the Mau Forest (Ogiek case).[313] In this case, the African Court has dealt with participation in relation to the right to property and the right to development. Based on these cases, participation in relation to the right to property (6.4.5.1) and the right to development (6.4.5.2) will be discussed below.

**6.4.5.1 Participation and the right to property**

In the *Endorois* case, the African Commission has found a violation of the right to property guaranteed under Article 14 of the African Charter. Article 14 permits encroachment upon the right to property 'in the interest of public need or in the general interest of the community and in accordance with the provisions of appropriate laws'. In the *Endorois* case, the African Commission

[311] Report of the African Commission's Working Group on Indigenous Populations/Communities, 28th Ordinary Session, DOC/OS(XXXIV)/345 (14 May 2003) 17.

[312] *Centre for Minority Rights Development and Others v Kenya* (2009) AHRLR 75 (ACHPR 2009) (hereafter 'Endorois case').

[313] Application No 006/2012, Judgment of 27 May 2017.

established that 'the land of the Endorois has been encroached upon'.[314] The encroachment occurred because the Endorois were evicted and prevented from accessing their ancestral land 'to have free access to religious sites and their traditional land to graze their cattle'.[315] The denial of access was due to activities such as the building of roads, gates, game lodges and a hotel on their ancestral land, the implementation of mining operations and the demarcation of Endorois historic lands for sale.[316] The Commission emphasised that the 'encroachment in itself is not a violation of Article 14 of the Charter, as long as it is done in accordance with the law'.[317] The Commission conducts an analysis of limitations on the right to property to determine whether the encroachment took place in accordance with the law as discussed in Chapter 3.

Moreover, the Commission addressed the issue of participation to determine whether the encroachment upon the right to property was 'in accordance with the provisions of appropriate laws'. It explained that 'further elements of the "in accordance with the law" test relate to the requirements of consultation and compensation'.[318] It thereby emphasised that

> In terms of consultation, the threshold is especially stringent in favour of indigenous peoples, as it also requires that consent be accorded. Failure to observe the obligations to consult and to seek consent - or to compensate - ultimately results in a violation of the right to property.[319]

Echoing the three safeguards (participation, benefit sharing and environmental impact assessment) established by the Inter-American Court in the *Saramaka* case, the African Commission held that

> [N]o effective participation was allowed for the Endorois, nor has there been any reasonable benefit enjoyed by the community. Moreover, a prior environment and social impact assessment was not carried out. The absence of these three elements of the 'test' is tantamount to a violation of Article 14, the right to property, under the Charter.[320]

From the above passages, it is clear that the African Commission derives the obligation to ensure participation from the right to property (article 14). It explains that States have the obligations to consult and seek consent under Article 14 of the African Charter. These obligations should be discharged during evictions, particularly that of indigenous peoples. The failure to ensure effective participation is a violation of the African Charter.

Based on its decision in the *Endorois* case, the African Commission argued the *Ogiek* case before the African Court. The Commission argued that the eviction of Ogiek indigenous people from the Mau forest was a violation of their right to property. The Commission submitted that 'the Ogieks' eviction and dispossession of their land without their consent and without adequate compensation, and the granting of concessions of their land to third parties, mean that their land has been encroached upon'.[321] The respondent State argued that 'its land laws recognise community ownership of land and provide for mechanisms by which communities can participate in forest conservation and

[314] *Endorois* case, para 209.
[315] *Endorois* case, para 210.
[316] *Endorois* case, para 210.
[317] *Endorois* case, para 211. Italics added.
[318] *Endorois* case, para 225.
[319] *Endorois* case, para 226.
[320] *Endorois* case, para 228.
[321] *Ogiek* case, para 114.

management'.[322] However, it did not show that it ensured the participation of the Ogieks in the process that led to their eviction from the Mau Forest.

The African Court has held that 'by expelling the Ogieks from their ancestral lands against their will, without prior consultation and without respecting the conditions of expulsion in the interest of public need, the Respondent violated their rights to land [...] as guaranteed by Article 14 of the Charter'.[323] The Court has confirmed that states have the obligations to consult and obtain consent under Article 14 of the African Charter. In other words, states should ensure participation during evictions. Unlike the Commission, the Court does not clearly derive participation from the requirement of 'in accordance with the provisions of appropriate laws' provided under Article 14 of the Charter.

In both the *Endorois* and *Ogiek* cases, the African Commission and the African Court applied Article 14 (individual right to property) to peoples. In the *Endorois* case, the Commission also applies Article 21 (collective right to natural resources) to peoples.[324] It has referred to the analysis of the Inter-American Court in the *Saramaka* case and concluded that the 'same analysis would apply regarding concessions in the instant case of the Endorois'.[325] The Commission does not distinguish the individual right to property from the collective right to natural resources in the *Endorois* case. In the *Ogiek* case, the Court has not examined whether there was a violation of the right to natural resources since the Commission has not alleged a violation of Article 21 of the African Charter. As a result, the practice of the Commission is not clear on the conditions necessary for the application of Article 21.

While drawing on the jurisprudence of the Inter-American Court, it appears that the African Commission has missed the textual context of the African Charter. The American Convention does not guarantee the collective right to natural resources. Thus, the Inter-American Court has developed the individual right to property (Article 21 of the American Convention) to protect collective rights of indigenous and tribal peoples. In contrast, the African Charter distinguishes the individual right to property (Article 14) from the collective right to natural resources (Article 21 of the African Charter). Since the African Commission misses this textual difference, the Commission has decided the *Endorois* case under Article 14. Instead, both the *Endorois* and *Ogiek* cases could have been determined under Article 21 of the Charter because the claimants were peoples in both cases.

Moreover, the African Commission does not seem to properly grasp the Inter-American Court's jurisprudence relating to the individual right to property (Article 21 of the American Convention).

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[322] *Ogiek* case, para 121.

[323] *Ogiek* case, para 131.

[324] African Charter, Art 21, which provides that

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 cooperation based on mutual respect, equitable exchange and the principles of international law.
4. States 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. States 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'.

[325] *Endorois* case, para 266.

Under this provision, the Inter-American Court has developed the collective right to property as an exception only applicable to indigenous and tribal peoples, not to other groups. It appears that the African Commission misses this point since it contradicts itself in a later case. The Commission appears to ignore the *Endorois* requirements in *Nubian Community in Kenya v Kenya*.[326] The members of the Nubian Community are descendants of Sudanese soldiers forcefully conscripted by the British colonial authorities and settled in a military reserve in Kibera in 1904.[327] Since the British colonial period, members of the Nubian Community have been enjoying occupation and the right of use over land in Kibera for over a century.[328] The African Commission has found that such use entitles them to request and obtain an official recognition and registration of their land as a communal property.[329] It has held that 'the property rights of the Nubians in Kibera have been encroached on, in violation of Article 14 of the Charter' because 'Nubians have severally been evicted from Kibera with no provision made for alternative housing; no compensation provided to the displaced and no notice of such evictions given to the occupants'.[330] However, the African Commission has not examined whether the respondent State had consulted the members of the Nubian Community and obtained their free, prior, and informed consent.

In fact, there are a couple of differences between the *Endorois* and the *Nubian Community* cases, which should not affect the obligation to ensure participation. One relates to indigeneity: the Commission considers that the Endorois people are indigenous, but does not give that status to the Nubians. The other difference relates to the land over which the right to property under Article 14 is claimed. In the *Nubian Community* case, the land that is the subject of the claim lies in the capital, Nairobi, and is thus urban land, whereas in the *Endorois* case, the subject of the claim is not urban land. With regard to participation, none of these differences are material. Article 14 of the African Charter does not make any distinction among the subjects of the right – it does not matter whether the claimants are indigenous or not. Neither does Article 14 distinguish among the objects of the right to property – the provision is applicable to any plot of land whether it is urban or not. These cases thereby evidence inconsistency in the Commission's jurisprudence.

#### 6.4.5.2 Participation and the right to development

The African Charter is among few international human rights treaties that guarantee the right to development.[331] The right to development is among collective rights guaranteed in the Charter. The subjects of this right are groups while economic, social and cultural rights in the Charter are individual rights. The African Commission does not identify the right to development among economic, social and cultural rights in the Nairobi Principles. One may still argue that the text of the Charter implies that the right to development is related to economic, social and cultural rights. Article 22(1) of the African Charter guarantees the right of all peoples to 'economic, social and cultural development'. It is submitted that economic, social and cultural development implies the realisation of economic, social and cultural rights.

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[326] *Nubian Community in Kenya v Kenya* Communication No. 317/06 (African Commission, 19 - 28 February 2015).

[327] *Nubian Community* case, para 156.

[328] *Nubian Community* case, para 160.

[329] *Nubian Community* case, para 160.

[330] *Nubian Community* case, paras 165-166.

[331] African Charter, Art 22, which reads: '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'. See Arab Charter on Human Rights, adopted by League of Arab States, 22 May 2004, entered into force 15 March 2008, art 37.

This relationship seems to emerge from the practice of the African Commission and the African Court. The Commission addresses the lack of enjoyment of economic, social and cultural rights as a violation of the right to development in the *Endorois* case. The Commission has noted lack of clean drinking water and the disruption of traditional means of subsistence as issues affecting the right to development.[332] Similarly, the African Court addresses programmes related to economic, social and cultural rights under the right to development in the *Ogiek* case.[333]

Article 22 of the African Charter does not expressly state the role of participation in the right to development. In contrast, other human rights instruments expressly provide for participation. For example, the right to development essentially means participation according to the Declaration on the Right to Development.[334] The Arab Charter provides that 'every citizen shall have the right to participate in the development'.[335] In line with the provisions of these instruments, the African Commission and the African Court interpret the right to development under the Charter as inclusive of participation.

In the *Endorois* case, the complainants submitted to the Commission that the violation of the right to development was due to 'the Respondent State's creation of a game reserve and the Respondent State's failure to adequately involve the Endorois in the development process'.[336] Interestingly, the respondent State denied the violation, arguing that it complied with its obligation in relation to the right to vote and the right to be elected. It submitted that its 'political system embraces the principle of a participatory model of community through regular competitive election' and the Endorois were represented in county councils.[337] The African Commission, however, did not address the issue in relation to the right to participate in government (Article 13(1) of the African Charter) or the right to self-determination (Article 20(1) of the African Charter). It did not rule on whether holding regular elections is enough to ensure participation in development activities. Nevertheless, it seems that the Commission accepted as a form of participation, albeit insufficient, the representation of the Endorois in the decision making structures.[338] It held that 'the consultations that the Respondent State did undertake with the community were inadequate and cannot be considered effective participation' because the consultations did not fulfil the required standard 'in a form appropriate to the circumstances'.[339] Similar to the Inter-American Court's ruling in the *Saramaka* case, the African Commission considers that there is an effective participation when consultations comply with certain requirements.

In the *Ogiek* case, the African Court examined participation in relation to health, housing and other similar programmes as aspects of the right to development guaranteed under Article 22 of the African Charter. In line with its decision in the *Endorois* case, the African Commission argued before the Court that the respondent State failed 'to consult with and/or seek the consent of the Ogiek

[332] *Endorois* case, para 288.
[333] *Ogiek* case, para 211.
[334] General Assembly Resolution 41/128, adopted 4 December 1986. Art 1 provides that 'The right to development is an inalienable human right by virtue of which every human person and all peoples are entitled to participate in, contribute to, and enjoy economic, social, cultural and political development, in which all human rights and fundamental freedoms can be fully realized'.
[335] Arab Charter, art 37.
[336] *Endorois* case, para 269.
[337] *Endorois* case, para 270.
[338] *Endorois* case, para 280.
[339] *Endorois* case, para 281.

Community in relation to the development of their shared cultural, economic and social life within the Mau Forest'.[340] It added that the respondent State failed to recognise their 'right to determining development priorities and strategies and exercising their right to be actively involved in developing economic and social programmes affecting them'.[341] Rather than stating that it consulted members of the Ogiek community, the respondent State argued that 'consultations were held with the Ogieks' democratically elected area representatives'.[342] The respondent State seems to have too narrowly interpreted the right to participate in the government of one's country (Article 13(1)) and the right to self-determination (Article 20(1)). Since the Court was examining the right of Ogieks as a people, the collective right to self-determination is more relevant than the individual right to participate. In other words, the respondent State seems to argue that elections are a sufficient form of participation. The Court held that

> [T]he Ogieks have been continuously evicted from the Mau Forest by the Respondent, without being effectively consulted. The evictions have adversely impacted on their economic, social and cultural development. They have also not been actively involved in developing and determining health, housing and other economic and social programmes affecting them.[343]

The African Court established that the respondent State had not consulted the Ogieks before the eviction took place. It also established the Commission's allegation that the respondent State failed to ensure participation of the Ogieks in 'health, housing and other economic and social programmes'.[344] For these reasons, the Court found a violation of the right to development (Article 22).[345] Like the Commission, the Court did not address the respondent State's argument that the Ogieks were consulted through their democratically elected representatives, nor did it explain and distinguish community level participation from participation in elections. Nevertheless, it does not seem to have accepted the consultations allegedly held with elected representatives as sufficient.

In the *Ogiek* case, the Court did not examine the eviction in relation to the right to health (Article 16) or the right to housing (Articles 14, 16 and 18(1)). It did not find a violation of these provisions. However, the Court examined whether the respondent State had ensured the participation of the Ogieks in the programmes intended to implement the right to health, the right to housing and other similar rights.[346] The Court found that the failure to ensure participation in such programmes is a violation of the right to development. Therefore, the Court indicated that the implementation of the right to development improves the implementation of economic, social and cultural rights. Moreover, the Court indicated the type of consultations required under Article 22 of the Charter. It requires effective consultations. In other words, the Court would not accept every kind of consultation. Unlike the Inter-American Court, however, the African Court does not lay down detailed criteria for effective participation. Some criteria can nonetheless be gathered from the decisions of the Commission and the Court.

[340] *Ogiek* case, para 202.
[341] *Ogiek* case, para 202.
[342] *Ogiek* case, para 206.
[343] Ogiek case, para 210.
[344] Ogiek case, para 210.
[345] *Ogiek* case, para 211.
[346] Ogiek case, para 210.

### 6.4.6 Requirements for effective participation

The African Commission relied on the jurisprudence of the Inter-American Court to decide the *Endorois* case as already noted. In the *Endorois* case, the Commission by and large transplanted the requirements of effective participation developed by the Inter-American Court. Based on its jurisprudence in the *Endorois* case, the Commission argued the *Ogiek* case before the African Court. In the *Ogiek* case, the Court confirmed some requirements of effective participation transplanted by the Commission. The Commission lacks the clarity with which the Inter-American Court explains these requirements. Some requirements of participation can still be gleaned from the decisions of the African Commission and the African Court.

One of the requirements relates to when the consultations should be conducted. The Commission indicates that states should conduct consultations before implementing a particular development project such as the establishment of a game reserve. In the *Endorois* case, the Commission found that the consultations conducted by the respondent State were inadequate because 'community members were informed of the impending project as a *fait accompli*, and not given an opportunity to shape the policies or their role in the game reserve'.[347] In other words, consultations conducted after a final decision to implement a project do not amount to effective participation. In the *Ogiek* case, the African Court confirmed this requirement. While finding a violation of the right to property (Article 14 of the Charter), the Court qualified the kind of consultations that the respondent State should have conducted. The Court has stressed a prior consultation,[348] which means that the respondent State should have consulted the Ogieks before granting concessions of their land to third parties. This is comparable to the Inter-American Court's requirement that consultations take place in advance.

The Commission implies the requirement of accessibility in conducting consultations. Noting that the representatives of the Endorois were illiterate and had a conception of property different from that of the authorities of the respondent State, the Commission stressed that 'it was incumbent upon the Respondent State to conduct the consultation process in such a manner that allowed the representatives to be fully informed of the agreement, and participate in developing parts crucial to the life of the community'.[349] The Commission found that the respondent State did not ensure that the Endorois understood the consequences of establishing a game reserve since they 'continued to believe that 'the game reserve and their pastoralist way of life would not be mutually exclusive and that they would have a right of re-entry on to their land'.[350] This shows that the consultation was inadequate according to the Commission. From this, one may submit that the Commission adopts the requirement that consultations should be accessible to the indigenous people.[351]

The Commission's decision in the *Endorois* case implies that states should conduct an informed consultation. The same facts that the representatives of Endorois people were illiterate and did not understand the documents produced by the respondent State also show another problem with the consultation, namely that the Endorois and their representatives did not have the necessary information. For this reason, the Commission found that 'the Respondent State did not ensure that

[347] *Endorois* case, para 281.
[348] *Ogiek* case, para 131.
[349] *Endorois* case, para 282.
[350] *Endorois* case, para 282.
[351] cf Sarayaku case, paras 201-203. Consultations must be accessible and adequate.

the Endorois were accurately informed of the nature and consequences of the process'.[352] As a result, the Commission implied the requirement that consultations must be informed, however, it did not specify whether the obligation of the respondent State to provide information arises from the right to receive information (Article 9(1) of the African Charter).

The Commission indicates that the consent of indigenous peoples affects the adequacy of consultation. It has addressed the relevance of free, prior and informed consent and its relationship with consultation. With respect to 'any development or investment projects that would have a major impact within the Endorois territory, the State has a duty not only to consult with the community, but also to obtain their free, prior, and informed consent, according to their customs and traditions'.[353] It found that 'the Respondent State did not obtain the prior, informed consent of all the Endorois before designating their land as a Game Reserve and commencing their eviction'.[354] As a result, the Commission concludes, 'this consultation was not sufficient'.[355] In this holding, the Commission has not referred to any specific case; however, it is obvious from the phrasing that the African Commission borrowed this requirement from the Inter-American Court's decision in the *Saramaka* case.[356] Nonetheless, there are a couple of distinctions: the Inter-American Court requires free, prior and informed consent as an element additional to the consultation whereas the African Commission considers a consultation inadequate if there is no free, prior, and informed consent. The Inter-American Court requires free, prior, and informed consent in cases of large-scale development or investment projects, whereas the African Commission does not make a distinction among development projects based on whether they are large-scale or not.

In the *Ogiek* case, the African Court implies the requirement of consent, holding that the eviction of 'the Ogieks from their ancestral lands against their will' was a violation of the right to property (article 14 of the Charter).[357] According to the Court, the willingness of individuals to be evicted is an important element for an eviction to comply with the requirements of Article 14. In other words, an eviction conducted without the consent of the evicted violates the right to property. Unlike the Commission, which requires the 'free, prior and informed consent', the Court does not describe the kind of consent it requires.

In sum, the Commission has indicated that consultations should be conducted in advance; that they should be accessible; that they should be informed; and that they should result in free, prior, and informed consent. The Commission has laid down these criteria in relation to development projects affecting indigenous peoples. Unlike the Inter-American Court, however, the African Commission has not clearly stated that a prior environmental and social impact assessment is necessary for the purpose of conducting an informed consultation. Yet it has found a violation of the right to property due to the respondent State's failure to carry out such assessment.[358] In the *Ogoniland* case discussed above, the Commission has held that the failure to conduct an environmental and social impact assessment is a violation of the rights to health and to a general satisfactory environment.

[352] *Endorois* case, para 292.
[353] *Endorois* case, para 291.
[354] *Endorois* case, para 290.
[355] *Endorois* case, para 290.
[356] *Saramaka* case, para 134. The Court has held that 'regarding large-scale development or investment projects that would have a major impact within Saramaka territory, the State has a duty, not only to consult with the Saramakas, but also to obtain their free, prior, and informed consent, according to their customs and traditions'.
[357] *Ogiek* case, para 131.
[358] *Endorois* case, para 228.

The Commission also does not expressly address the requirement of conducting consultations in good faith and with the aim of reaching an agreement. One may argue that the requirement of free, prior and informed consent obviates the need to refer to good faith. Nevertheless, the Commission referred to a provision of the ILO Convention No 169, which contains this requirement.[359] As discussed above, the Inter-American Court has clearly established the requirement of good faith in conducting consultations.

## 6.5 Conclusion

States have the obligation to ensure participation of individuals in the implementation of their economic, social and cultural rights. This is clearly established in the practice of the CESCR, the European Committee, and the Inter-American Court. Their practice converges on the issue of whether this obligation exists: states do have the obligation regardless of whether a treaty text recognises the right to participate in the conduct of public affairs or other related rights. The ICESCR and the European Charter do not guarantee such rights. Still, the CESCR and the European Committee require states to ensure participation.

However, the practice diverges on the legal basis of the obligation. The CESCR does not always explain its legal basis. It emphasises the obligation to ensure participation with regard to most rights guaranteed in the ICESCR. It relies more frequently on the right of self-determination, the prohibition of non-discrimination, the right to adequate housing and participation in cultural rights than it does on other rights. The European Committee derives the obligation from the right to protection against poverty and social exclusion. The Inter-American Court derives the obligation from the right to property. This divergence implies that the content of the obligation is different in different systems. It seems that the CESCR requires participation of everyone, although most of its concerns and recommendations in this respect relate to indigenous peoples and individuals subjected to evictions in urban centres. The Inter-American Court has adopted the narrowest state obligation by limiting this obligation to indigenous peoples. As a result, there is a clear convergence on the state obligation to ensure participation of indigenous peoples, which includes consultations as well as free, prior and informed consent. The CESCR and the Inter-American Court establish the requirement of such consultations; however, it is not clear whether the requirement of consultation established by the CESCR with respect to indigenous peoples also applies to consultation with other individuals or groups claiming rights under the ICESCR.

The African Charter provides textual bases for requiring states to ensure participation of individuals in the implementation of their economic, social and cultural rights. It guarantees the right to participate in government, the right to self-determination and other rights relevant to participation such as the rights to freedoms of association, assembly, expression and information. Like other treaty bodies, the African Commission requires states to ensure the participation of rights-holders in the implementation of economic, social and cultural rights. In particular, the Commission requires states to ensure the participation of individuals and groups in the design, implementation, monitoring and review of plans and policies, which are necessary for the realisation of economic, social and cultural rights. In its case law, particularly in cases involving indigenous peoples, the Commission has identified the requirements of effective participation: conducted in advance, accessible, informed and results in free, prior, and informed consent. When one of these requirements is missing, the

[359] *Endorois* case, para 281. Footnote no 153.

Commission finds a violation of rights. Thus, it found violations of the rights to health, housing, property and culture.

The Commission, however, lacks clarity in terms of identifying the legal basis of the obligation. It does not clearly link the obligation to ensure participation of individuals and groups in the implementation of their economic, social and cultural rights to the recognition of the the individual right to participate in the government of one's country and the peoples' right to self-determination in the African Charter. Sometimes, the Commission copies the Inter-American Court and derives the obligation from the right to property of indigenous peoples as it did in the *Endorois* case and argued before the African Court in the *Ogiek* case. In the Nairobi Principles, the Commission follows the practice of the CESCR and requires participation in all phases of a policy; but it fails to explain the purpose and legal basis of such a requirement. The Commission does not address the importance of participation or consultation during eviction processes as its decision in the *Nubian Community* case demonstrates. This happens perhaps when the Commission does not find similar jurisprudence from other treaty bodies.

# CHAPTER SEVEN

# CONCLUSION

## 7.1 Introduction

The recognition of economic, social and cultural rights entails state obligations. The clarity of state obligations is important in the implementation of the rights. States should be able to identify the actions to be performed or avoided. To facilitate the identification of required actions or omissions, it is necessary to define state obligations in the treaties that guarantee the rights. Human rights treaty bodies established to monitor the implementation of these rights may also define and classify state obligations. Thus, the process of defining and classifying is an on-going process, not a one-time project. Focusing on the African Charter on Human and Peoples' Rights (African Charter), I have examined the definition and classification of state obligations corresponding to economic, social and cultural rights.

The research questions I have sought to answer relate to general state obligations, those applicable to all economic, social and cultural rights. In international human rights law, the concept of progressive realisation is identified as the principal general obligation relating to all economic, social and cultural rights. In Chapter 2, I have addressed the questions relating to the concept of progressive realisation under the African Charter. Once the principal obligation is identified, other general obligations can be defined from the perspective of the principal obligation. At times, the concept of progressive realisation is defined as a form of rights limitation. In Chapter 3, I have examined permissible limitations of rights under the African Charter. The concept of progressive realisation can also be distinguished from its exceptions, the immediate obligations. In Chapters 4 and 5, I have examined immediate obligations: minimum core obligations and obligations relating to non-discrimination and equality. Finally, in Chapter 6, I have examined the obligation to ensure participation as an important obligation. When the Committee on Economic, Social and Cultural Rights (CESCR) assesses progressive realisation, it places great importance on participatory decision-making processes at the national level.[1] Put differently, the CESCR requires the participation of individuals and groups in the implementation of their economic, social and cultural rights. Participation in decision-making involves the exercise of political rights. Although the CESCR lacks the jurisdiction to monitor the implementation of political rights, it recognises the instrumental role of participation in the implementation of economic, social and cultural rights. Against this background, I examined the state obligation to ensure participation of individuals and groups in the implementation of their economic, social and cultural rights under the African Charter.

To answer the research questions, I have analysed the text of the African Charter along with the findings of the African Commission on Human and Peoples' Rights (African Commission) and the African Court on Human and Peoples' Rights (African Court). I have drawn on the texts of the European Social Charter (European Charter), the International Covenant on Economic, Social and

[1] CESCR, 'An evaluation of the obligation to take steps to the "maximum of available resources" under an Optional Protocol to the Covenant: Statement', E/C.12/2007/1, 21 September 2007, para 11.

Cultural Rights (ICESCR), and the American Convention on Human Rights (American Convention) along with its Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights (Protocol of San Salvador). I have also drawn on the practice of the judicial and quasi-judicial organs monitoring these treaties, namely, the European Committee of Social Rights (European Committee), the CESCR, the Inter-American Commission on Human Rights (Inter-American Commission) and the Inter-American Court of Human Rights (Inter-American Court).

In this chapter, I summarise the findings of the research with some reflections. As discussed throughout all chapters, the African Commission, and to some extent the African Court, have interpreted economic, social and cultural rights by defining and categorising state obligations. Through their interpretation, they have articulated a particular conception of these rights. In the next section, I identify the conception of economic, social and cultural rights articulated by the Commission and the Court. In the third section, I show how the Commission's interpretation (the way it defines and categorises state obligations) affects the indivisibility and interdependence of human rights under the Charter. In the fourth section, I note the link between deprivation and discrimination transplanted by the Commission from the practice of the CESCR and suggest that it is necessary to identify such a link in concrete cases. In the fifth section, I summarise the legal basis and use of proportionality analysis and other similar tests in the practice of the African Commission and the African Court. I suggest ways of consolidating and extending the application of the analysis to determine the scope of state obligations. In the sixth section, I engage with the Nairobi Principles, and suggest a reformulation of some specific paragraphs in light of the findings of this study. Finally, I make suggestions for future lines of research.

## 7.2 Conception of economic, social and cultural rights

The African Commission and, in some instances, the African Court have articulated a particular conception of economic, social and cultural rights under the African Charter by defining and classifying corresponding state obligations. From the analysis of their findings emerges a trend that erodes some of the uniqueness of the African Charter, affecting the substantive scope of economic, social and cultural rights guaranteed in the African Charter in certain respects. First, the African Commission has introduced a distinction between obligations of progressive realisation and immediate obligations. It has introduced the concept of progressive realisation although there is ample historical evidence as well as economic and political reasons for omitting the concept from the African Charter, as discussed in Chapter 2 (section 2.3).

The concept of progressive realisation does not mean the same thing to everyone. A version of progressive realisation, advocated by the CESCR in particular, refers to improvement in the level of enjoyment of economic, social and cultural rights. The CESCR indicates that states should make progress in the realisation of rights guaranteed in the ICESCR. The ICESCR contains a state reporting procedure that can be used as a tool to ascertain whether states have made progress or not. In respect of some states, which are also parties to the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights (OP-ICESCR), the complaint procedure can be an additional tool. Defined as an obligation to improve levels of enjoyment, progressive realisation is applicable to all human rights. This version of the concept is implicit in international human rights treaties requiring states to report on their progress. For example, Article 40 of the International Covenant on Civil and Political Rights (ICCPR) expressly requires states to report on their progress in the realisation of civil and political rights. Similarly, the African Charter requires states to report on their progress.

As discussed in Chapter 2 (section 2.6), Article 62 of the African Charter stipulates the obligations of states to report on their progress not only in the realisation of economic, social and cultural rights but also in other rights guaranteed in the Charter. In short, the African Charter recognises the concept of progressive realisation when the concept is understood as an obligation to improve the levels of enjoyment of rights. Therefore, the introduction of the concept into the Charter is not necessary unless a different meaning is intended.

Another version of the concept of progressive realisation connotes some form of defect in the legal or judicial nature of economic, social and cultural rights or some kind of limitation on these rights, as discussed in Chapter 2. The concept implies that economic, social and cultural rights need not be enforced to the letter any time soon. From the views of state representatives expressed during the adoption of the OP-ICESCR in 2008, it is clear that some states understand the concept of progressive realisation to mean non-justiciability of economic, social and cultural rights. In the literature, some authors conflate non-justiciability with the concept of progressive realisation while others regard the concept as a limitation on economic, social and cultural rights. The African Commission applies the concept to economic, social and cultural rights only, indicating that it uses the concept as a form of limitation. Consequently, the Commission undermines the substantive scope of economic, social and cultural rights guaranteed in the African Charter. Still, the Commission cannot take the concept of progressive realisation to mean non-justiciability because of the direct and complete jurisdiction of the African Court over economic, social and cultural rights guaranteed in any human rights treaty so far as a respondent state is a party to that treaty.

Second, the African Commission has introduced a limitation clause applicable to economic, social and cultural rights although the African Charter does not contain such a clause, as discussed in Chapter 3. In this regard, the Charter is different from other treaties, particularly from the European Charter, the ICESCR and the Protocol of San Salvador, all of which contain a general limitation clause. As the drafting history of the Charter indicates, the drafters considered including a general limitation clause in the early draft of the Charter, but dropped the clause from its final text. Instead, the Charter contains claw-back or specific limitation clauses that are limited to civil and political rights, but are missing from most provisions on economic, social and cultural rights. Since the Charter does not circumscribe most economic, social and cultural rights with claw-back clauses or limitation clauses, it guarantees broader rights compared to other treaties.

The absence of a limitation clause does not transform economic, social and cultural rights in the African Charter into absolute rights. With a few exceptions, human rights are not absolute in international human rights law. Economic, social and cultural rights are not among the exceptions and, therefore, are not absolute rights in international human rights law. In principle, this status in international human rights law does not prohibit African States from defining economic, social and cultural rights as absolute rights in the African Charter. However, as discussed in Chapter 3, the Charter itself contains internal and external limitations on the economic, social and cultural rights it guarantees. The introduction of a general limitation clause is an additional limitation. By introducing a general limitation clause into the Charter, the African Commission and the African Court narrowed the substantive scope of economic, social and cultural rights and harmonised the Charter with other treaties, particularly with the ICESCR. Moreover, the Commission and the Court identify more legitimate goals for limiting rights than those provided in the ICESCR, making state obligations in the

African Charter narrower than state obligations in the ICESCR. Therefore, a narrow state obligation means a narrow scope of economic, social and cultural rights in the African Charter.

Third, the African Commission introduced the concept of minimum core obligations as an exception to progressive realisation. As discussed in Chapter 4, the concept emerged in the literature to identify elements of economic, social and cultural rights for immediate implementation. Like the CESCR, the African Commission has clarified state obligations corresponding to economic, social and cultural rights by defining and listing minimum core obligations. The Commission has underlined that minimum core obligations are immediate obligations, are non-derogable, are not dependent on available resources, and have priority over other obligations. Unfortunately, the Commission's interpretation contains problematic aspects that reduce the substantive scope of economic, social and cultural rights. To begin with, the Commission defines minimum core obligations in terms of the number of the deprived. It stresses that no significant number of individuals should be deprived of essential elements of each right. In other words, the Commission says that the failure of states to discharge their minimum core obligations does not necessarily constitute a violation of the Charter unless the number of the deprived is significant. This definition excludes some individuals whose number is not significant and, therefore, is contrary to the idea that human rights are inherent in each individual.

The analysis of the list of minimum core obligations in Chapter 4 shows that the Commission has watered down state obligations. It has identified fewer minimum core obligations compared to the core obligations identified by the CESCR. Fewer minimum core obligations mean fewer state obligations and narrower scope of economic, social and cultural rights. The classification of the obligations to respect and protect among minimum core obligations is another way of watering down state obligations. This has a serious repercussion on the enjoyment of economic, social and cultural rights. From the perspective of rights-holders, particularly in the case of the most serious deprivation occurring due to the failures in the implementation of the rights, there is no enjoyment to be respected or protected by states in the first place. Discharging the obligations to respect and protect is relevant only to those who are already enjoying the rights, not to those who are totally deprived and need protection.

Finally, the African Commission adopts a narrow interpretation of the obligation to ensure participation of individuals and groups in the implementation of their economic, social and cultural rights, as the analysis in Chapter 6 shows. Since the African Charter recognises all categories of rights in the same treaty, it guarantees the enjoyment of the individual right to take part in the government of one's country and the collective right to self-determination because not only are these rights invaluable in themselves, but are also means of ensuring the enjoyment of all economic, social and cultural rights. The recognition of these rights gives rise to the corresponding state obligation to ensure participation. Nevertheless, the analysis in Chapter 6 shows that the African Commission does not derive the obligation to ensure participation from the right to participate in government and the right to self-determination. As a result, the Commission has limited the obligation to ensure participation to a couple of economic, social and cultural rights (the right to property and the right to health) and to a particular group (the indigenous peoples).

In sum, in the text of the African Charter, economic, social and cultural rights entail broader state obligations than the rights contained in other treaties, particularly those guaranteed in the ICESCR.

However, the African Commission has watered down state obligations and harmonised them with those obligations undertaken by states parties to the ICESCR. Sometimes, the Commission adopts a narrower interpretation than the CESCR does. By defining and classifying the state obligations undertaken in the African Charter, the African Commission has articulated a narrow conception of economic, social and cultural rights, which removes some burdens from states but undermines a meaningful protection of individuals.

## 7.3 Indivisibility and interdependence of human rights

Indivisibility and interdependence are common characteristics of human rights. By 'indivisibility', I mean the recognition and protection of economic, social and cultural rights on equal footing as civil and political rights or other categories of rights. An interpretation of human rights treaties erodes indivisibility when that interpretation weakens the recognition and protection of economic, social and cultural rights, particularly in relation to the recognition and protection accorded to other categories of rights. The classification of human rights into different categories and their recognition in separate treaties *per se* do not affect the indivisibility of human rights. Human rights are interdependent because the realisation of a right (a category of rights) often leads to the realisation of another right (another category of rights); or the violation of a right (a category of rights) often leads to the violation of another right (another category of rights).

The African Charter recognises the indivisibility and interdependence of human rights because the Charter recognises economic, social and cultural rights along with other categories of rights in the same treaty and establishes the same mechanisms of monitoring their implementation, as mentioned in Chapter 1. Indivisibility of human rights is the hallmark of the Charter, making the African human rights system distinct from international (United Nations) and regional (European and Inter-American) human rights systems. However, the treatment of economic, social and cultural rights separately from civil and political rights in international and regional human rights systems has influenced the interpretation of the African Charter, particularly the interpretation by the African Commission.

The analysis throughout the previous chapters reveals that the African Commission usually takes the ICESCR and the interpretation by the CESCR as a point of reference when explaining the scope of economic, social and cultural rights and their corresponding state obligations in the African Charter. The Commission treats economic, social and cultural rights guaranteed in the African Charter in isolation because that is how the ICESCR and the CESCR treat these rights. Indeed, like other international courts and quasi-judicial organs, it is necessary for the African Commission and the African Court to consider the text of international human rights treaties along with its interpretation in practice while interpreting and applying the African Charter. The problem lies in disregarding, and in some cases displacing, the context and text of the African Charter, particularly when the Charter recognises a wider scope of rights and stronger mechanisms of protection.

From the analysis in Chapter 2, it is clear that the Commission considers the concept of progressive realisation applicable to economic, social and cultural rights, but not to other rights in the Charter. The Commission has re-introduced a concept, which the Charter drafters had discussed and rejected for economic and political reasons. As long as the concept of progressive realisation means an additional limitation on economic, social and cultural rights, the re-introduction of the concept undermines the indivisibility of the rights in the Charter. If the Commission wanted to maintain the

indivisibility under the Charter, it would have rejected the concept of progressive realisation just the way the drafters of the Charter did. Alternatively, the Commission could have adapted the concept for all rights in the Charter, a position that would have been logical, particularly if the Commission's intention were to recognise that the realisation of all rights requires resources and improves over time.

Chapter 4 shows that the concept of minimum core is understood as the irreducible part of a right or as an obligation that can be applicable to all rights. The idea of core and periphery is implicit in the concept of limitation, as discussed in Chapter 3. The Commission itself declared that limitations are not permissible if they render a right illusory, implying that there are parts of the right that cannot be taken away through limitations. Yet the Commission restricts the concept of minimum core to economic, social and cultural rights only. More surprisingly, the Commission regards as minimum core obligations the obligations to respect and protect in relation to economic, social and cultural rights, but not in relation to civil and political rights. The Commission makes this decision although it recognises that each right in the Charter engenders the obligations to respect, protect, promote and fulfil.

The analysis in Chapter 6 shows that the Commission also misses the opportunity to capitalise on the interdependence of human rights entrenched in the African Charter. The implementation of economic, social and cultural rights involves political decisions such as the allocation of state budget. Participation and deprivation have a negative correlation. Individuals and groups who are deprived of the enjoyment of economic, social and cultural rights are unable to participate in decisions relating to the implementation of their rights. At the same time, public officials do not have incentives to address the need of the deprived, locking them up in a vicious circle. The deprived, who are usually members of vulnerable groups, do not participate in decision-making; and because they do not participate, public officials ignore the implementation of their rights. Given this correlation, the individual right to take part in the government of one's country and the collective right to self-determination have not only an intrinsic value but also an instrumental role in the realisation of economic, social and cultural rights. The recognition of these rights entails the corresponding state obligation to ensure the participation of individuals and groups in the implementation of their rights. Exercised individually or collectively, participation requires the enjoyment of a host of political rights including the rights to freedom of assembly, freedom of association, freedom of expression and freedom of information, which are also guaranteed in the African Charter. Therefore, the obligation to ensure participation arises from the recognition of political rights in the African Charter. However, the African Commission misses the interdependence of rights adopted in the Charter because of its uncritical incorporation of the practice of the CESCR, which lacks the mandate to monitor the implementation of civil and political rights.

In sum, the African Commission and the African Court should maintain the indivisibility and interdependence of human rights in the interpretation of economic, social and cultural rights under the African Charter. They should apply these rights in a way that takes into account civil and political rights and the peoples' rights guaranteed in the Charter. That approach may be challenging at times, particularly if the Commission and the Court rely, as they often do, on the jurisprudence of other human rights systems that separate economic, social and cultural rights from civil and political rights. It is certainly useful to draw on the experience of the Human Rights Committee to interpret civil and political rights under the African Charter. Similarly, it is useful to tap into the practice of the CESCR

while interpreting economic, social and cultural rights under the African Charter. However, the Commission and the Court should not heavily rely on materials from other human rights systems to the extent that undermines the indivisibility and interdependence of economic, social and cultural rights and civil and political rights.

## 7.4 Discriminatory social structures

The African Commission has undermined the indivisibility and interdependence of human rights under the African Charter, as discussed above. An exception is in the area of equality and non-discrimination, discussed in Chapter 5, but not because the Commission has finally discovered that the African Charter is different from the ICESCR or that its own mandate is different from that of the CESCR; rather, it is because the CESCR integrates equality and non-discrimination into economic, social and cultural rights based on provisions of the ICESCR prohibiting discrimination. While transplanting the practice of the CESCR, the Commission misses the textual nuances of the African Charter. Unlike the ICCPR, the ICESCR does not guarantee a separate right to equality. Thus, the CESCR derives the state obligation to achieve equality in the enjoyment of economic, social and cultural rights from the non-discrimination provisions of the ICESCR. Like the ICCPR, the African Charter guarantees a separate right to equality (Article 3 of the Charter). The Commission's interpretation of the non-discrimination clause (Article 2 of the Charter) is in line with the practice of the CESCR and thus makes the right to equality under the African Charter superfluous.

A rather important transplantation is the link between discriminatory social structures and deprivation of economic, social and cultural rights. According to the CESCR, the non-discrimination provisions (Articles 2(2) and 3 of the ICESCR) require states to eliminate social structures, which are barriers to the enjoyment of economic, social and cultural rights, particularly barriers to the enjoyment by members of vulnerable groups who are victims of discrimination. The CESCR stresses that states should eliminate the deprivation of economic, social and cultural rights caused by past and current discriminatory laws, traditions and practices. In particular, the CESCR finds that national laws such as tax laws lead to inequality in the enjoyment of economic, social and cultural rights, attributing discrimination to states at least partly. Like the CESCR, as discussed in Chapter 5, the African Commission identifies discrimination as a cause of deprivation.

The Commission identifies members of vulnerable groups as individuals who faced or continue to face significant impediments to their enjoyment of economic, social and cultural rights. As direct victims of discriminatory laws, policies and customary practices, members of vulnerable groups are the deprived. The Commission considers their deprivation to be the result of discrimination embedded in social structures such as laws, policies and practices. The Commission implies that perpetrators of discrimination are states because the discriminatory laws and policies emanate from states. States do not create discriminatory customary practices but they are still responsible for perpetuating or tolerating the perpetuation of those practices. Therefore, states are responsible for the significant impediments to the enjoyment of economic, social and cultural rights by vulnerable groups. In short, the Commission also establishes that states cause deprivation to the extent that such deprivation is the result of discriminatory laws, policies and practices. Like the CESCR, the Commission emphasises that states should effect structural, cultural and social changes by changing discriminatory laws, policies and customary practices. It also requires states to correct effects of discrimination by according priority to the deprived and by adopting temporary special measures in their favour.

The African Commission has no difficulty following the practice of the CESCR and establishing discrimination as a cause of deprivation. However, in concrete cases where the CESCR has no experience to offer, the Commission misses the social structures that are discriminatory and a cause of deprivation. This is true even when the victims were indigenous peoples, women and persons with disabilities, whom the Commission identifies as members of vulnerable groups. In its decision in the *Endorois* case and its submission in the *Ogiek* case, where indigenous peoples were denied access to their ancestral land in Kenya, the African Commission failed to identify the system of private property laws and institutions as a structure that constitutes discrimination against indigenous peoples. Likewise, in the *Ogoniland* case, where pollution from oil extraction destroyed food and water sources, and affected the health of the Ogoni People in Nigeria, the Commission did not identify laws relating to investment or those relating to the exploitation of natural resources as the social structure that led to violations of economic, social and cultural rights.

In *Negash v Ethiopia*, where a marriage by abduction, a prevalent customary practice that does not affect boys, prevented a thirteen-year-old girl from going to school, the Commission did not find discrimination. Nor did it find a violation of the victim's right to education. In *Purohit and Moore v the Gambia*, the Commission did not find an archaic law called Lunatic Detention Act discriminatory, although persons with mental disabilities were victims of a violation of their right to health due to that law. In concrete cases, therefore, the Commission has been unable to spot deprivation of economic, social and cultural rights resulting from discriminatory social structures including discriminatory laws, policies and customary practices. While the African Court has yet to develop its jurisprudence on economic, social and cultural rights, it could have still found the respondent State's law discriminatory in the *Ogiek* case.

In short, it is advisable to identify the link between discriminatory social structures and deprivation for a couple of reasons. As the saying goes, a stitch in time saves nine. It would be late to address the deprivation of members of a community who were denied their livelihood due to the application of private property systems as happened in the *Endorois* and *Ogiek* cases. An early intervention strategy would have been the recognition of traditional property systems that would ensure the protection of indigenous peoples' traditional territories. Similarly, as the facts in *Negash v Ethiopia* suggest, eliminating a practice that bars girls from school is a better strategy than attempting to address the deprivation of women due to the lack of education. Moreover, the identification of the link clarifies that the deprivation suffered by individuals such as members of the Endorois or Ogiek Community or by women such as Ms Negash is caused by state actions or omissions in the first place. Therefore, It is necessary to eradicate social structures that are barriers to the enjoyment of economic, social and cultural rights.

## 7.5 Proportionality analysis

The African Commission and the African Court use some form of proportionality analysis as a tool for defining state obligations and determining the substantive scope of rights guaranteed in the African Charter. As discussed in Chapter 3, the proportionality analysis consists of several steps or components, namely, legitimate goal, suitability, necessity and balancing. In a narrow sense, proportionality analysis may be limited to checking compliance with the component of balancing. Moreover, for the purpose of examining allegations of discrimination and assessing the appropriateness of retrogressive measures, the Commission has laid down criteria, which are similar to the components of proportionality. The proportionality analysis usually takes place in the

application of a limitation clause. In this section, I summarise the introduction of a general limitation clause into the African Charter and the application of proportionality analysis and propose the consolidation of components of proportionality and other similar criteria to enhance the clarity and consistency of the proportionality analysis as a tool.

The African Commission and the African Court employ different versions of the proportionality analysis; some relating to the application of limitation clauses while others not. As discussed in Chapter 3, the African Commission has assigned the role of a general limitation clause to Article 27(2) of the African Charter. This provision imposes a duty on individuals to exercise their rights 'with due regard to the rights of others, collective security, morality and common interest.' The African Court also recognises this provision as a general limitation clause in line with the practice of the Commission. As Article 27(2) was not intended to serve as a general limitation clause, it omits some elements usually contained in conventional limitation clauses. It does not state that limitations must be determined by law. The provision contains a restrictive list of items that can be taken as legitimate goals of limitations. It does not contain other legitimate goals of limitations such as national security, public health, public safety and public order, which are common in limitation clauses of human rights treaties. Article 27(2) does not state that limitations should be necessary.

Despite these textual limitations, the African Commission and the African Court have developed Article 27(2) into a full-fledged conventional limitation clause that applies to economic, social and cultural rights in the Charter. In other words, Article 27(2) of the Charter now requires that limitations be determined by law; that they serve legitimate goals; that they be necessary and that states consider and balance competing interests (proportionality in the narrow sense). The Commission does not follow any particular order while assessing state compliance with these components. On the other hand, the Court assesses compliance with each component in a sequential order, starting with the assessment of whether a limitation is determined by law. The Court then proceeds to the assessment of whether the limitation serves a legitimate goal and finally evaluates whether the limitation is necessary and proportional. If the Court finds non-compliance with one component it does not proceed to the next one. Neither the Commission nor the Court assesses compliance with the component of suitability. They can still be regarded as employing proportionality analysis for assessing state compliance with the components of legitimate goals, necessity and balancing. The development of a general limitation clause and proportionality analysis has taken place in relation to negative obligations usually corresponding to civil and political rights. The Commission and the Court have also applied proportionality analysis to the rights to take part in cultural life and the right to property. Both rights fall under the category of economic, social and cultural rights.

The African Commission and the African Court employ a similar proportionality analysis for examining allegations of discrimination, as the analysis in Chapter 5 shows. The Commission considers that discrimination is a distinction made on prohibited grounds unless the distinction has objective and reasonable justification; and unless there is proportionality between the aim sought and the means employed. Similarly, the Court stresses objective and reasonable justification and proportionality; it also adds an element of necessity. That is, the criteria used to identify discrimination overlap with the components of proportionality. The Commission and the Court have derived the components of proportionality from the newly discovered general limitation clause under Article 27(2) of the African Charter, but they do not explain the sources of the criteria used to

identify discrimination. Thus, the examination of the allegation of discrimination is different from the limitation analysis in some respects. First, a limitation must be determined by law to be permissible, whereas a distinction on prohibited grounds need not be determined by law. Second, a permissible limitation must serve one of the legitimate goals restrictively listed in limitation clauses, whereas a distinction on prohibited grounds need not serve any predetermined goal as long as there is an objective and reasonable justification.

Although the rationale for these differences is not clear, the implication is obvious. States have more discretion when they make distinctions on prohibited grounds than when they impose limitations on the exercise of rights, because they do not have to enact laws or serve a particular predetermined goal. The differences also raise another question: Is the newly discovered general limitation clause under Article 27(2) applicable to the right to non-discrimination (Article 2 of the African Charter)? This question is apposite given that the Commission and the Court regard Article 2 of the Charter as an independent right. In contrast, as discussed in Chapter 5, some other treaty bodies find a violation of non-discrimination provisions only when such provisions are read together with substantive rights, not when they are read alone. Therefore, the Commission and the Court may avoid these concerns by examining allegations of discrimination based on the criteria established in the newly discovered general limitation clause.

The criteria adopted for assessing the appropriateness of retrogressive measures under the African Charter can also be assimilated with the components of proportionality. As discussed in Chapter 2, the African Commission explains that retrogressive measures are prohibited under the African Charter save exceptional situations. Even in those exceptional cases, retrogressive measures should comply with certain criteria transplanted by the Commission from the practice of the CESCR, which requires that retrogressive measures should be necessary and proportionate. The analysis in Chapter 2 shows that the Commission requires a reasonable justification for adopting retrogressive measures. It also requires states to adopt the least restrictive alternative. The first requirement is similar to the legitimate goal component, while the second one is similar to the component of necessity. Apart from terminological differences, the criteria for evaluating retrogressive measures overlap with the components of proportionality analysis and, therefore, become an unnecessary duplication and a source of confusion. The Commission and the Court may avoid the duplication and the confusion if they regard retrogressive measures as limitations. A helpful insight in this regard is the practice of the European Committee, which considers that retrogressive measures are the same as restrictive measures and are subject to a general limitation clause and proportionality analysis, as discussed in Chapter 3.

The African Commission utilises proportionality analysis in relation to positive steps taken by states to fulfil economic, social and cultural rights, as the analysis in Chapter 3 shows. For this purpose, the Commission defines the principle of proportionality as balancing, implying that the other components of proportionality, namely, legitimate goals, suitability and necessity, are not applicable. The Commission requires the balancing of competing individual and public interests, indicating that the positive steps interfere with the enjoyment of rights by individuals. In that case, the same measures become positive steps and retrogressive measures at the same time. A typical example from other systems is the measures examined by the Inter-American Commission in *National Association of Ex-Employees of the Peruvian Social Security Institute et al v Peru*, where the Respondent State adopted some measures to reduce the pension of highly paid individuals (victims

of the measure) to increase the pension of individuals who received little or no payment (beneficiaries of the measures). The measures were positive steps for the beneficiaries but retrogressive measures for the victims. Since all components of proportionality are applicable to retrogressive measures, the African Commission's definition of proportionality as balancing is confusing.

The proportionality analysis is not used to evaluate the adequacy of positive steps taken to achieve the realisation of economic, social and cultural rights. Thus, the African Commission and the African Court do not apply proportionality for this purpose. To extend the application of proportionality to positive steps, particularly when such steps lead to the realisation of rights without interfering with the existing level of enjoyment, the African Commission needs to make some modifications to the conventional components of proportionality, particularly to the component of necessity. If defined as the least restrictive alternative as discussed in Chapter 3, necessity may not be applicable. When the Commission assesses the adequacy of steps taken, the preferable alternative is the most effective means of achieving the realisation. Therefore, the conventional proportionality analysis requires some slight adjustment when utilised to assess positive steps taken to fulfil economic, social and cultural rights. With this kind of adjustment, the Commission and the Court can apply proportionality analysis to positive steps as well.

In sum, the Commission and the Court should fine-tune the application of the limitation clause and the principle of proportionality. First, they may consider evaluating the suitability of a limitation for achieving one of the legitimate goals. The fewer the components, the weaker the justification for limitation becomes. The application of the component of suitability requires stronger justification for imposing a limitation. Second, they may consider applying all components of proportionality to limitations imposed on the right to non-discrimination (Article 2 of the Charter) or on the right to equality (Article 3 of the Charter). Third, they may draw on the practice of the European Committee of Social Rights, and consider defining retrogressive measures as limitations and assessing the compliance of such measures with each component of proportionality. This definition enables the Commission and the Court to apply the newly discovered general limitation clause to all rights in the African Charter. Finally, they need to make modifications to extend the application of proportionality to evaluate the adequacy of positive steps taken to fulfil economic, social and cultural rights.

## 7.6 The Nairobi Principles

The African Charter mandates the African Commission to formulate and lay down principles and rules for the purpose of solving legal problems related to human and peoples' rights in African States. Exercising this mandate, the Commission adopted the Principles and Guidelines on the Implementation of Economic, Social and Cultural Rights in the African Charter on Human and Peoples' Rights (Nairobi Principles). The Commission developed the Nairobi Principles based on regional and global human rights treaties and the practice of judicial and quasi-judicial organs monitoring the implementation of those treaties. The objective of the Nairobi Principles is to assist states to comply with their obligations under the African Charter, as clearly stated in the Preamble. To achieve this objective, the Commission identifies, defines, classifies and explains state obligations corresponding to economic, social and cultural rights, thereby clarifying the content of economic, social and cultural rights expressly or impliedly guaranteed in the African Charter. Therefore, the Nairobi Principles represent an important contribution of the Commission to the normative development of economic, social and cultural rights.

The Nairobi Principles address all economic, social and cultural rights expressly and impliedly guaranteed in the African Charter. Therefore, the Nairobi Principles are comprehensive, particularly when compared with the piecemeal development of the general comments of the CESCR, which usually address one right or a single issue at a time. As mentioned in Chapter 1, the number of cases regarding economic, social and cultural rights decided by the Commission is very low. As a result, the Commission's comprehensive interpretation of economic, social and cultural rights has emerged from the Nairobi Principles, not from concrete cases. However, one's point of reference is important as noted in Chapter 2. The Nairobi Principles are comprehensive so long as one's point of reference remains the ICESCR and the practice of the CESCR, which are limited to economic, social and cultural rights. The African Charter adopts a different model of treaty-making, integrating all rights in one treaty, as discussed in the previous chapters. The Nairobi Principles single out economic, social and cultural rights under the Charter for separate treatment. Considered from the perspective of the integrated framework of rights provided by the Charter, the Nairobi Principles are not only lacking in terms of comprehensiveness, but also undermine the interdependence and indivisibility of rights embedded in the African Charter.

By revising the Nairobi Principles, the African Commission may address some of the problems with its interpretation of economic, social and cultural rights identified above, namely the compartmentalisation of human rights and the narrow conception of economic, social and cultural rights. Revision of previous interpretation is not new in the field of human rights. Some United Nations human rights treaty bodies regularly update their interpretation by replacing previous general comments with new ones. It is also the practice of the African Commission to revise earlier interpretations of the Charter. In 2016, the Commission had already decided to revise the Declaration of Principles on Freedom of Expression in Africa. Noting the experiences of other treaty bodies and that of its own, the African Commission can revise the Nairobi Principles. To this end, I identify specific paragraphs of the Nairobi Principles that should be revised. In the following subsections, I divide the paragraphs into five groups based on the topics discussed in the previous chapters.

### 7.6.1 Progressive realisation

The Nairobi Principles contain the concept of progressive realisation. Because of the negative connotation of the concept discussed above, it is advisable to remove the reference to 'progressive realisation' from the Nairobi Principles. In particular the Commission should revise paragraphs 13 to 16. Paragraph 13 states: 'While the African Charter does not expressly refer to the principle of progressive realisation this concept is widely accepted in the interpretation of economic, social and cultural rights and has been implied into the Charter in accordance with articles 61 and 62[sic] of the African Charter.' This formulation is problematic for several reasons. First, the Commission overlooks the fact that the omission of the concept from the African Charter was intentional, although it is true that the Charter does not refer to the concept of progressive realisation. The intention of the drafters is clear from the drafting history of the Charter as well as from economic and political interests of the African States, as discussed in Chapter 2.

Second, the Commission's view that the concept of progressive realisation is 'widely accepted in the interpretation of economic, social and cultural rights' is misleading in the African context. Economic, social and cultural rights treaties that follow the European model of treaty-making, as indicated in Chapter 1, expressly recognise the concept of progressive realisation. However, the African Charter is

not one of those treaties. Within the framework of the African Union (AU), previously the Organisation of African Unity (OAU), African states adopted their own model of treaty-making, which departs from pre-existing European model followed by the Council of Europe, the United Nations and the Organisation of American States. The acceptance of the concept of progressive realisation does not apply to the African Charter unless one denies that African States are sovereign, that they can depart from existing models of treaty-making and can adopt their own treaties.

Third, the Commission mistakenly considers that the concept of progressive realisation 'has been implied into the African Charter.' Indeed, the Commission has the mandate to adopt concepts implied in the text of the African Charter, but not every concept, especially when a particular concept was intentionally omitted. Finally, the Commission often cites Articles 60 and 61 of the Charter to justify the recognition of legal concepts and doctrines in the African Charter. These provisions certainly mandate the Commission to borrow and develop legal concepts and doctrines. However, the provisions do not give the African Commission a blank check. The provisions do not empower the Commission to change the fundamental nature of state obligations in the Charter. Since Articles 60 and 61 do not give the Commission a treaty-making power, the Commission lacks the power to introduce the concept of progressive realisation into the African Charter.

Paragraph 14 of the Nairobi Principles provides: 'The concept of progressive realisation means that States must implement a reasonable and measurable plan, including set achievable benchmarks and time frames, for the enjoyment over time of economic, social and cultural rights within the resources available to the state party. Some obligations in relation to progressive realisation are immediate.' This paragraph is equally problematic. First, Article 1 of the African Charter specifies state obligation to give effect to Charter rights including economic, social and cultural rights. Giving effect to the rights requires states to take different measures such as the implementation of 'a reasonable and measurable plan, including set achievable benchmarks and time frames.' However, Paragraph 14 conveys a different message. The Paragraph gives the impression that the African Charter does not require states to take measures unless the concept of progressive realisation is introduced into the Charter. Second, the requirement of ensuring the realisation of economic, social and cultural rights 'within the resources available to the state party' is unnecessary. Obviously, states implement rights within their available resources, which are scarce by nature and are distributed unevenly among states. Instead, the African Commission could have specified a more helpful requirement. It could have underlined the obligation to allocate resources for the realisation of economic, social and cultural rights and the obligation to make the maximum use of the allocated resources.

Finally, Paragraphs 14 and 16 explain that states have some immediate obligations. Paragraph 16 states: 'Despite the obligation to progressively realise economic, social and cultural rights, some of the obligations imposed on States parties to the African Charter are immediate upon ratification of the Charter.' Paragraphs 14 and 16 classify as immediate only 'some of the obligations', not all obligations in the Charter. This dichotomy between obligations of progressive realisation and immediate obligations alters the nature of state obligations in the Charter, which does not contain such classification or a provision permitting states to postpone their obligations. That is, all state obligations in the Charter are immediate upon ratification and continue for an indefinite period. Moreover, the performance of immediate obligations over time leads to progress in the realisation of the rights in the Charter as it is evident from the mechanism of regular reporting and monitoring established by the Charter. The pace of progress may vary from one state to another depending on

the context in each state, particularly due to uneven distribution of resources. Therefore, Paragraphs 14 and 16 should be reformulated.

### 7.6.2 Limitation and proportionality

The African Commission and the African Court have developed a general limitation clause containing specific criteria for assessing the proportionality of a limitation, as noted above. The Commission and the Court applied these criteria to different rights guaranteed in the Charter. However, the definition under the Nairobi Principles does not conform to these criteria. Paragraph 1(g) states that: 'A limitation upon a right, or steps taken positively to protect or fulfil it, will not be proportionate, where there is no evidence that the state institutions have balanced the competing individual and public interests.'

Paragraph 1(g) does not contain all the criteria to be complied with when states limit the exercise of rights in general. In particular, the requirements of legitimate goals and necessity are obviously missing. Moreover, it appears that the Commission seeks evidence relating to whether the institutions of a state have examined competing interests. If the Commission finds such evidence, it appears, the limitation would be proportional. In other words, the Commission does not need to conduct the limitation analysis by itself. In practice, however, the Commission and the Court actually evaluate a limitation against specific criteria provided in the newly discovered limitation clause of Article 27(2).

Paragraph 1(g) of the Nairobi Principles uses the term 'public interests' to explain limitation and the principle of proportionality. Paragraph 1(h) defines public interest as 'the common well-being or general welfare of the population.' Thus, it is not clear whether all the legitimate goals developed under Article 27(2) of the Charter are considered public interests. To avoid such confusion, it is advisable to reformulate the definition of the principle of proportionality under Paragraph 1 in line with the general limitation clause developed under Article 27(2) of the African Charter.

### 7.6.3 Minimum core obligations

The Nairobi Principles define minimum core obligations and identify their central characteristics. Paragraph 17 states that: 'The minimum core obligation is the obligation of the State to ensure that no significant number of individuals is deprived of the essential elements of a particular right.' This paragraph defines minimum core obligation in terms of the number of individuals deprived of the enjoyment of economic, social and cultural rights. This definition is problematic because human rights are inherent in each individual. It should not matter whether the number of the deprived is significant or not. There should be a violation even when one individual is deprived. Therefore, the definition in Paragraph 17 should be modified to reflect the deprivation of each individual.

Paragraph 17 states that a minimum core obligation 'exists regardless of the availability of resources and is non-derogable.' The description that minimum core obligations are non-derogable is misleading in light of the text of the African Charter and the practice of the African Commission. Unlike some human rights treaties, the African Charter does not contain a derogation clause, a provision permitting suspension of rights during a state of emergency. Because of the absence of a derogation clause, the Commission considers that all rights guaranteed in the African Charter including economic, social and cultural rights are non-derogable. The description of minimum core obligations as non-derogable may give the impression that other obligations corresponding to

economic, social and cultural rights are derogable. Therefore, it is advisable to avoid describing minimum core obligations as non-derogable.

In addition to the definition and the description, the Nairobi Principles identify elements of minimum core obligations relating to each right guaranteed in the African Charter expressly or by implication. Paragraphs 59(c) (right to work), 79(a) (right to housing), 86(b-c) (right to food) and 92(c) (right to water and sanitation) identify obligations to respect and protect as minimum core obligations. These levels of obligations are relevant to individuals who are already enjoying economic, social and cultural rights, as discussed above. It would be advisable to put greater emphasis on the obligations to fulfil, particularly on the sub-obligation to provide, because the main purpose of identifying minimum core obligations is to address a serious deprivation, particularly a total deprivation.

Minimum core obligations corresponding to the right to work should also be revised. Paragraph 59(a) specifies the prohibition of slavery and forced labour as a minimum core obligation. Paragraph 59(b) requires states to ensure the right to freedom of association as a minimum core obligation corresponding to the right to work. These paragraphs merely reproduce the right to protection from slavery (Article 5 of the Charter) and the right to freedom of association (Article 10 of the Charter). The right to work under Article 15 of the Charter is a separate right with content different from those specified in Articles 5 and 10 of the Charter. Nevertheless, Paragraph 59 redefines the right to work as a composite right. Instead, it would be advisable to specify a certain level of employment as a minimum core obligation relating to the right to work. This requirement would not be new as the African Commission considers certain rates of unemployment a violation of the right to work in its concluding observations.

**7.6.4 Equality and non-discrimination**

The equality and non-discrimination provisions of the African Charter are similar to corresponding provisions of other human rights treaties. The explanations in the Nairobi Principles are more or less consistent with the text of the African Charter. Yet there is still room for improvement. Paragraph 19 defines discrimination and reiterates the prohibition of discrimination stated under Article 2 of the Charter, which contains a non-exhaustive list of prohibited grounds of discrimination. Paragraph 1(d) has expanded the list in Article 2. However, Paragraphs 1(d) and 19 omit one of the grounds listed under Article 2. Therefore, it is advisable to maintain the list provided by the Charter.

The Nairobi Principles explain equality and non-discrimination in separate parts. Under Part II that deals with the nature of state obligations under the Charter, Paragraph 19 explains that Article 2 of the Charter entails an obligation to protect individuals from discrimination. Under Part III, Paragraphs 31 to 38 explain that equality is one of the key obligations under the Charter; but it is not clear whether this obligation arises from the right to non-discrimination (Article 2 of the Charter), the right to equality (Article 3 of the Charter) or the right to equality of peoples (Article 19 of the Charter). It is advisable to explain the relationship among these provisions to improve the clarity of the Nairobi Principles.

Paragraph 19 states that the obligation to protect individuals from discrimination is an immediate obligation, whereas Paragraphs 31 to 38 do not describe the obligation to achieve equality as immediate obligation. These formulations suggest that the obligation to protect individuals from discrimination is an immediate obligation while the obligation to achieve equality is not. The binary division of obligations under the Charter into immediate and progressive obligations is not helpful, as

already suggested above. What is more, the difference between the obligation to protect individuals from discrimination and the obligation to achieve equality is not significant, because Paragraph 35 explains that correcting 'past and current forms and effects of discrimination' results in the achievement of 'de facto or substantive equality' in the enjoyment of economic, social and cultural rights, particularly by members of vulnerable groups. Therefore, it is advisable to clarify the relationship between the obligation to achieve equality and the obligation to protect individuals from discrimination.

#### 7.6.5 Participation

With regard to participation, the problem with the Nairobi Principles arises from treating economic, social and cultural rights in isolation, with little attention to the feature of the African Charter relating to the indivisibility of human rights. From Paragraph 29 of the Nairobi Principles, it is clear that states have the obligation to ensure the effective participation of individuals and groups in the design, implementation, monitoring and review of policies and programmes relating to their economic, social and cultural rights. It seems from the formulation of Paragraph 29 that the Nairobi Principles contain new obligations not envisaged in the Charter. Instead, it is advisable to reformulate Paragraph 29 with the emphasis on the instrumental role of realising political rights. Such a reformulation is necessary because participation involves the exercise of not only the right to participate in the government of one's country (Article 13 of the Charter) but also the exercise of other political rights including freedom of expression and information (Article 9 of the Charter), freedom of association (Article 10 of the Charter) and freedom of assembly (Article 11 of the Charter).

Moreover, the Nairobi Principles emphasise the importance of exercising the right to self-determination as a collective form of participation in the realisation of economic, social and cultural rights. The Principles underline the state obligation to ensure the participation of all peoples; but Paragraph 44 of the Principles restricts the obligation to obtain prior informed consent to cases where indigenous peoples are the subjects of the right. If the obligation to obtain prior informed consent flows from the right to self-determination (Article 20 of the Charter), it should apply to all peoples as defined under Paragraph 1(c) of the Nairobi Principles. Therefore, it is advisable to reformulate Paragraph 44 accordingly.

### 7.7 Topics for further research

Some topics for further research emerge from the discussions in the previous chapters. In this section, I suggest three topics that relate to issues covered in the previous chapters but that require further investigation. These topics relate to the submission and examination of state reports, remedies and reparations, and accessibility to the African Commission and the African Court.

#### 7.7.1 Submission and examination of state reports

In Chapter 2, I identified different meanings of the concept of progressive realisation. Because of one of the meanings (that is, the understanding that progressive realisation is a defect in the legal recognition of economic, social and cultural rights), I argued against introducing the concept into the African Charter in the guise of interpretation. The objection is to conceptions that weaken the state obligation to improve the level of realisation of all rights guaranteed in the Charter, not to the obligation itself. To improve the level of realisation of economic, social and cultural rights, it is necessary to enhance the state performance of this obligation.

A future line of research may contribute in this regard by identifying ways of strengthening the supervisions of the implementation of economic, social and cultural rights guaranteed in the African Charter. The Charter contains a clear state obligation to report on improvements made in the realisation of the rights every two years. States submit their reports to the Commission for examination. There are some challenges relating to the submission as well as the examination of reports. According to the 2019 Activity Report of the Commission, of the 54 state parties to the African Charter only 10 states (less than 20% of the total number of states) have discharged their reporting obligations. The majority of states (around 72%) fail to maintain the regularity required by the Charter but they have submitted at least one report. Five states have never submitted any report. Although there is variation in the degree of performance, it is clear that more than 80% of the state parties fail in their reporting obligations. Therefore, a future line of research may study ways of improving the submission of regular reports to the Commission.

The examination of state reports also faces challenges. The reports usually specify and list measures taken by states. The Commission identifies areas of concern and makes recommendations. Nevertheless, the Commission is unable to evaluate the adequacy of measures particularly in light of the level of development of each state. Like any other treaty body, the African Commission needs a tool, which is helpful to identify failures of States to discharge their obligations, particularly by assessing the allocation and utilisation of resources for the purpose of ensuring the realisation of economic, social and cultural rights. Scholars and international organisations have made efforts to come up with such tools. The Office of the United Nations High Commissioner for Human Rights has developed human rights indicators.[2] Economists have developed the Index of Social and Economic Rights Fulfilment (SERF Index) that shows the gap between actual performance of States and their potential.[3] Achievements of States depend on their resources.

The African Commission does not use any particular tool for the purpose of examining state reports. It is helpful to use tools such as human rights indicators to monitor the realisation of economic, social and cultural rights under the African Charter. In this regard, future research may investigate how the African Commission can adapt tools developed by scholars and international organisations or develop its own tool for assessing the adequacy of improvements in the realisation of rights guaranteed in the Charter. This line of research may also identify advantages and disadvantages of using indicators and indices.

### 7.7.2 Remedy and reparation

In Chapter 4, I examined the obligation to provide a remedy as one of the core obligations identified by the CESCR (section 4.3.2.4); but I have not examined the forms of remedies and reparation measures at national levels or before regional forums, particularly the remedies and reparations ordered by the African Commission. In the Nairobi principles, the African Commission stresses the obligation to provide effective domestic remedies in cases of violations of economic, social and cultural rights although it does not classify this obligation among the minimum core obligations. When states fail to provide domestic remedies, the African Commission and the African Court provide remedies as subsidiary mechanisms. Future lines of research may study domestic remedies as well as remedies and reparations made by the African Commission and the African Court.

[2] Office of High Commissioner for Human Rrights, *Human Rights Indicators: A Guide to Measurement and Implementation* (2012).

[3] Sakiko Fukuda-Parr, Terra Lawson-Remer & Susan Randolph, *Fulfilling Social and Economic Rights* (OUP 2015).

With regard to effective domestic remedies, Paragraph 21 of the Nairobi Principles underlines that: 'A rigid classification of economic, social and cultural rights which puts them, by definition, beyond the reach of the courts would be incompatible with the principle that human rights are indivisible and interdependent.' The Nairobi Principles stress the obligation to 'recognise the justiciability of economic, social and cultural rights.' Thus, one line of research may study the extent to which states recognise the justiciability of economic, social and cultural rights before domestic courts and administrative tribunals.

Another line of research may study international remedies and reparation measures. The African Charter does not expressly authorise the African Commission to make reparation orders in cases of violations of the economic, social and cultural rights it guarantees. In the absence of a clear mandate to order a specific remedy, the African Commission usually limits itself to declaring violations of rights and recommends very general remedies. In cases of compensation, the Commission leaves the determination of the exact amount to domestic systems. In its recent cases, the Commission has begun issuing specific remedies such as predetermined lump sum compensation.[4] On the other hand, the African Court has a clear mandate to order remedies and to determine the amount.[5] While the Commission and the Court are refining their jurisprudence on remedies for violations of individual rights, neither the African Charter text nor the practice of these bodies address remedies for systemic violations involving groups. Thus, future research may examine the remedies available under international human rights law in general and how the African Commission and the African Court choose to apply those remedies. Such research may also identify remedies appropriate for systemic violations of economic, social and cultural rights.

### 7.7.3 Accessibility to the African Commission and the African Court

In Chapter 1, I noted that the African Commission and the African Court have decided a very low number of cases relating to economic, social and cultural rights although they have been operating for a long period of time. When the Commission was established, there was an expectation that the Commission would be flooded with cases alleging violations of economic, social and cultural rights. The concern is understandable given the relatively liberal standing before the African Commission: any individual or NGO has standing before the Commission, according to its Rules. In addition, the low level of enjoyment of these rights in Africa would still give rise to similar concerns. Nevertheless, that concern never materialised: the Commission and the Court have never been flooded with cases regarding economic, social and cultural rights, even after operating for decades. The low number of cases shows that the Commission and the Court have been underutilised. The normative and structural problems underlying the underutilisation should be investigated. This future line of research may identify the problems and suggest solutions.

A future line of research may also examine the beneficiaries of litigation in the areas of economic, social and cultural rights at the African regional level. Empirical evidence shows that litigation of economic, social and cultural rights may not serve its purpose. Litigation usually benefits only the middle class, the litigating minority who have access to courts and who are already better off, not the

[4] *Equality Now and Ethiopian Women Lawyers Association (EWLA) v Federal Republic of Ethiopia* Communication 341/2007, 57th Ordinary Session (4 to 18 November 2015); *Mbiankeu Geneviève v Cameroon* Communication 389/10, 56th Ordinary Session (21 April to 7 May 2015).

[5] Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights Adopted on 10 June 1998 in Ouagadougou, Burkina Faso, and entered into force 25 January 2004.

vulnerable groups who constitute the non-litigating majority. So other actors, particularly NGOs, should have access to the African Court, which is relatively inaccessible to individuals and NGOs. Thus, future research may investigate ways of improving accessibility to the African Court. An important factor for improving accessibility is the availability of funds for that purpose. While the Commission requires the provision of legal assistance in domestic courts, it has not dealt with financial assistance and its own accessibility. In this regard, it is worth evaluating the decision of the African Union to establish funds for the African Court.

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**5. Cases**

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## Summary

Food, health care, housing and water are basic goods and services necessary to lead a dignified life. The main means of accessing basic goods and services are usually property ownership and work, save exceptional circumstances where individuals rely on the support of their fellow human being or institutions. Since the advent of the United Nations, access to basic goods and services has been recognised as economic, social and cultural rights guaranteed in international human rights treaties. State parties have undertaken the international obligations to give effect to these rights. The treaties were adopted within the framework of international organisations. The pioneer is the Council of Europe whose model of treaty-making has been replicated first by the United Nations and then by the Organisation of American States. The Organisation of African Unity (now the African Union) was the late comer to the human rights project when it adopted the African Charter on Human and Peoples' Rights (African Charter), the main human rights treaty of the African Union. The African Charter applies to the Continent of Africa, where the implementation of economic, social and cultural rights is relatively low.

This research examines the scope of general legal obligations undertaken by states in the African Charter, considering the progressive realisation obligation as the principal obligation corresponding to the recognistion of economic, social and cultural rights. The research distinguishes the progressive realisation obligation from its exceptions, the immediate obligations, which include minimum core obligations and non-discrimination/equality. It links the progressive realisation obligation to the limitations on economic, social and cultural rights and recognises the the importance of participation of individuals and groups in the implementation of their economic, social and cultural rights.

To examine the general legal obligation of states in the African Charter, the research analyses text of the African Charter and findings of the African Commission on Human and Peoples' Rights (African Commission) and the African Court on Human and Peoples' Rights (African Court), which include cases, comments, declarations, guidelines, observations, opinions, principles, reports and resolutions. The research draws insights from the text of the Europian Social Charter (European Charter), the International Covenant on Economic, Social and Cultural Rights (ICESCR), the American Convention on Human Rights (American Convention), and the Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights (Protocol of San Salvador), and from the practice the Eurpean Committee of Social Rights (European Committee), the Committee on Economic, Social and Cultural Rights (CESCR), Inter-American Commission on Human Rights (Inter-American Commission), and Inter-American Court of Human Rights (Inter-American Court).

The research finds that the recognition of economic, social and cultural rights in the African Charter envisages broader state obligations than in the European Charter, the ICESCR, and the Protocol of San Salvador. It also finds that the African Commission reduces the state obligations by interpreting economic, social and cultural rights in the African Charter in line with the ICESCR and the practice of the CESCR. The Commission imported the concept of progressive realisation without adapting the concept to the textual contexts of the Charter and introduced a general limitation clause into the Charter. It has interpreted economic, social and cultural rights in isolation, undermining the indivisibility of all rights in the African Charter. The Commission and the Court have overlooked the

individual right to participate in government of one's country and the collective right to self-determination, reducing the state obligation to ensure participation of individuals and groups in the implementation of their economic, social and cultural rights only to the rights to property, health, and a general satisfactory environment. The research finds that the Commission's interpretation of state obligations in the African Charter is sometimes narrower than the CESCR's interpretation of state obligations in the ICESCR. In particular, the Commission identified fewer minimum core obligations compared to those identified by the CESCR as core obligations. While developing a general limitation clause under the Charter, the Commission and the Court expanded grounds for limiting the enjoyment of economic, social and cultural rights that are not incorporated in the ICESCR.

The research concludes that the African Commission and the African Court have articulated a narrow conception of economic, social and cultural rights. It recommends that the Commission and the Court should avoid the interpretation that erodes substantive content of economic, social and cultural rights guaranteed in the African Charter. In particular, the research recommends the revision of the Principles and Guidelines on the Implementation of Economic, Social and Cultural Rights in the African Charter on Human and Peoples' Rights (Nairobi Principles), which contains the major interpretation of the Commission.

## Samenvatting

Voedsel, gezondheidszorg, huisvesting en water zijn basisgoederen en –diensten die noodzakelijk zijn om een menswaardig leven te kunnen leiden. Behoudens uitzonderlijke omstandigheden, waarin individuen op de steun van anderen of van de overheid moeten rekenen, kan men deze basisnoden vervullen door te werken, of door op een andere manier eigendommen te vergaren. Het fundamentele belang van toegang tot deze goederen en diensten, is wereldwijd erkend door de formulering van mensenrechten: economische, sociale (en culturele) rechten (ESC rechten) maken sinds de Universele Verklaring van de Mensenrechten (1948) deel uit van het arsenaal van universele mensenrechten. Staten die partij zijn bij internationale mensenrechtenverdragen in dit domein, hebben internationaalrechtelijke verplichtingen om deze rechten ten uitvoer te brengen. Behalve op het niveau van de Verenigde Naties, krijgen deze rechten en de bijhorende verplichtingen vorm in verdragen die worden afgesloten binnen regionale organisaties. In Europa is dat in de eerste plaats de Raad van Europa. Daarnaast is er op het Amerikaanse continent de Organisatie van Amerikaanse Staten. Dit proefschrift handelt over mensenrechtenbescherming op het Afrikaanse continent, binnen het kader van de Afrikaanse Unie. Het voornaamste mensenrechtenverdrag van de Afrikaanse Unie is het Afrikaans Handvest van de Rechten van Mensen en Volkeren.

Dit onderzoek handelt over de interpretatie van de ESC rechten in het Handvest. Het zoomt met name in op de reikwijdte van de algemene statenverplichtingen onder dit verdrag. Het gaat daarbij in de eerste plaats om de verplichting van 'progressieve verwezenlijking' van ESC rechten. Vervolgens worden twee algemene verplichtingen onderzocht die gelden als uitzonderingen op het principe van progressieve verwezenlijking, omdat ze een onmiddellijk karakter hebben. Dit zijn de 'minimale kernverplichtingen' en het principe van gelijkheid/non-discriminatie. Daarna komen de beperkingsmodaliteiten van ESC rechten aan bod, en tenslotte het belang van de participatie van individuen en groepen bij de tenuitvoerlegging van ESC rechten.

In dit onderzoek wordt de tekst van het Afrikaans Handvest geanalyseerd, samen met de bevindingen van de Afrikaanse Commissie voor de Rechten van Mensen en Volkeren, en het Afrikaans Hof voor de Rechten van Mensen en Volkeren. Deze bevindingen zijn vervat in diverse bronnen: (quasi-) gerechtelijke uitspraken, commentaren, verklaringen, richtlijnen, opinies, principes, rapporten en resoluties. Het onderzoek betrekt ook andere regionale systemen in de analyse, met name de interpretatie van het Europees Sociaal Handvest, het Internationaal Verdrag inzake Economische, Sociale en Culturele Rechten (IVESCR), het Amerikaans Verdrag van de Rechten van de Mens, en het toegevoegd Protocol bij het Amerikaans Verdrag van de Rechten van de Mens in het domein van Economische, Sociale en Culturele Rechten (Protocol van San Salvador). Daarbij komt ook de interpretatieve praktijk aan bod van het Europees Comité voor Sociale Rechten, het VN Comité inzake Economische, Sociale en Culturele Rechten (CESCR), de Inter-Amerikaanse Commissie voor de Rechten van de Mens, en het Inter-Amerikaanse Hof voor de Rechten van de Mens.

Het onderzoek stelt vast de erkenning van ESC rechten in de tekst van het Afrikaans Handvest verdergaande overheidsverplichtingen omvat dan deze in het Europees Sociaal Handvest, het IVESCR en het Protocol van San Salvador. Het stelt ook vast dat de Afrikaanse Commissie deze overheidsverplichtingen reduceert door de ESC rechten in het Afrikaans Handvest te interpreteren in lijn met het IVESCR en de interpretatieve praktijk van de CESCR. De Afrikaanse Commissie voerde met name het concept van progressieve verwezenlijking in zonder dit aan te passen aan de tekstuele

context van het Handvest. Ze introduceerde bovendien een algemene beperkingsclausule in het Handvest. De Afrikaanse Commissie interpreteert ESC rechten in isolatie, waardoor ze tekort doet aan de ondeelbaarheid van alle mensenrechten in het Afrikaans Handvest. De Commissie en het Hof doen bovendien te weinig recht aan het individuele recht om deel te nemen aan het bestuur en aan het collectieve zelfbeschikkingsrecht. Hierdoor reduceren ze de overheidsverplichting om participatie van individuen en groepen te verzekeren in de tenuitvoerlegging van hun ESC rechten, tot amper drie rechten: het eigendomsrecht, het recht op gezondheid en het recht op een aanvaardbaar leefmilieu. Het onderzoek stelt vast de interpretatie door de Commissie van de overheidsverplichtingen in het Afrikaans Handvest soms enger is dan de interpretatie van de overheidsverplichtingen in het IVESCR door de CESCR. In het bijzonder heeft de Afrikaanse Commissie een kleiner aantal minimale kernverplichtingen geïdentificeerd in vergelijking met de CESCR. Bovendien hebben de Afrikaanse Commissie en het Afrikaanse Hof bij het ontwikkelen van een algemene beperkingsclausule onder het Handvest, de gronden voor de beperking van het genot van ESC rechten uitgebreid op een wijze die verder gaat dan de beperkingen in het IVESCR.

Het onderzoek besluit dat de Afrikaanse Commissie en het Afrikaanse Hof een enge interpretatie van ESC rechten hebben uitgewerkt. Het formuleert de aanbeveling dat de Commissie en het Hof interpretaties zouden vermijden die de inhoudelijke bescherming van de ESC rechten in het Handvest eroderen. Meer specifiek beveelt het onderzoek een herziening aan van de ‘Nairobi Principles’ (Principles and Guidelines on the Implementation of Economic, Social and Cultural Rights in the African Charter on Human and Peoples’ Rights), die de krijtlijnen van de interpretatie van de Commissie in deze materie vastleggen.