Interpretation of Economic, Social and Cultural Rights under the African Charter on Human and Peoples' Rights

Abdi Jibril Ali[*]

Abstract

Economic, social and cultural rights are guaranteed under the African Charter on Human and Peoples' Rights. As the Charter is relatively younger than similar human rights treaties at regional and global levels, it has incorporated experiences existing at the time of its conception and adoption. The Charter also brought new development to the international human rights law. Indivisibility is its hallmark since it guarantees all human rights in the same treaty without giving preference to one category of rights over the others in terms of the corresponding state obligations and institutional framework. In particular, the Charter does not contain the concept of progressive realisation, a concept common to other economic, social and cultural rights. The Charter also departs from other treaties as it guarantees fewer economic, social and cultural rights. The African Commission on Human and Peoples' Rights is one of the organs monitoring the implementation of the Charter. It is interesting to examine how the Commission has approached the interpretation of economic, social and cultural rights under the Charter in light of its unique features. These features of the Charter are discernible when the text of the Charter is read in light of its drafting history and compared with other treaties, particularly with the International Covenant on Economic, Social and Cultural Rights. This article argues that through the Commission's interpretation changes have been introduced to the Charter, affecting its unique features. The Commission has done this through the cases it has decided and the declarations, guidelines, principles and resolutions it has adopted.

Key terms: Implied rights, immediate obligations, indivisibility of human rights, progressive realisation

Introduction

The African Charter on Human and Peoples' Rights (African Charter or Charter),[1] the main human rights treaty of the African Union, establishes standards and mechanisms for the regional promotion and protection of human rights in Africa. As

[*] Assistant Professor, Addis Ababa University School of Law; Doctoral researcher, Ghent University Human Rights Centre. The author thanks Professor Dr Eva Brems and Dr Lourdes Peroni for their invaluable comments on the earlier version of this article. He is also grateful to the anonymous reviewers for their comments and suggestions.

[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).

a continuation of the human rights project, the African Charter was built on the global experiences and benchmarked regional mechanisms in the Americas and Europe. The Charter adds new features: it unites all human rights (civil, collective, cultural, economic, political and social rights) in a single binding treaty. In particular, it places economic, social and cultural rights on the same footing with civil and political rights in terms of formulation of the rights, corresponding state obligations and mechanisms of supervision. In these respects, the Charter has more similarities with the International Covenant on Civil and Political Rights (ICCPR)[2] than with the International Covenant on Economic, Social and Cultural Rights (ICESCR).[3]

The Charter significantly departs from the ICESCR with regard to general state obligations and rights guaranteed. Unlike the ICESCR, the Charter does not require progressive realisation of economic, social and cultural rights to the maximum of available resources despite a proposal to that effect during its drafting.[4] Rather, the Charter was understood as imposing immediate obligations in relation to all rights. Moreover, the Charter does not guarantee as many rights as the ICESCR does. It omits important social rights such as the right to food, the right to water, the right to housing, and the right to social security.

The African Charter establishes the African Commission on Human and Peoples' Rights (African Commission or Commission) to monitor the implementation of the rights guaranteed in the Charter. The Commission has the mandate to promote, protect and interpret these rights. The African Court on Human and Peoples' Rights (African Court or Court) complements the protective mandate of the Commission. Both the Commission and the Court interpret the Charter. This article deals with the Commission's interpretation of economic, social and cultural rights guaranteed under the Charter. As a relatively young institution, the African Court has yet to develop its jurisprudence in this area. For this reason, this article focuses on the interpretation of the Commission.

The article argues that the African Commission has interpreted the Charter to harmonise it with the ICESCR. The harmonisation exercise affects the fundamental features of the Charter. The Commission has made the harmonisation through two major changes to the Charter. One of these changes concerns the introduction of progressive realisation obligation into the Charter. The article will discuss the

[2] Adopted 16 December 1966, entry into force 23 March 1976, GA res. 2200A (XXI), 21 UN GAOR Supp. (No. 16) at 52, UN Doc. A/6316 (1966); 999 UNTS 171.

[3] 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.

[4] cf ICESCR, Art 2(1), which 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.

concept of progressive realisation in section one, following this introduction. The section will explore how the concept has found its way into the Charter by examining the drafting history of the Charter and the Commission's jurisprudence.

The other change made to the African Charter relates to the introduction of rights that are not expressly recognised. The Charter does not expressly recognise some rights such as the right to privacy, which is traditionally regarded as belonging to the civil and political rights category. However, the changes introduced by the Commission pertain only to rights usually regarded as economic, social and cultural rights. The second section will first identify economic, social and cultural rights omitted from the Charter and the reasons for the omissions. The section will then investigate how the Commission has introduced the omitted rights into the African Charter.

The African Commission has made these changes through interpretation of the Charter. In any interpretive exercise, the decision to adopt a particular alternative among other options should be supported by reasons. Although the Commission does not clearly articulate reasons for its interpretation, some justifications can be implied from its jurisprudence. The third section will attempt to extrapolate the Commission's justifications for its line of interpretation and search for additional explanations for the changes brought to the Charter by the Commission.

Irrespective of whether the justifications are convincing or not, the Commission's interpretation has consequences for both the rights holders and the duty bearers. The Commission's interpretations cannot be dismissed out rightly as irrelevant. There are some benefits in it. There are also risks. The fourth section will pinpoint these benefits and risks particularly from the perspective of the rights holders. The section will, metaphorically, place the benefits on one side of the scale and the risks on the other side to identify whether the scale tilts to one side or the other. The article will close by drawing conclusions.

1. Progressive Realisation

Progressive realisation refers to the gradual implementation of economic, social and cultural rights. It denotes an obligation to continuously improve the provision of economic, social and cultural rights.[5] It is based on the assumption that the full realisation of these rights takes long time because of scarcity of resource.[6] The concept implies that state parties to a human rights treaty can delay their obligation of fully realizing the rights. They cannot, however, delay their obligation to start the implementation which leads to immediate partial fulfilment that will gradually

[5] MANISULI SSENYONJO, ECONOMIC, SOCIAL AND CULTURAL RIGHTS IN INTERNATIONAL LAW 59 (Hart Publishing 2009).

[6] Lillian Chenwi, *Unpacking 'progressive realisation', its relation to resources, minimum core and reasonableness, and some methodological considerations for assessing compliance*, 46 DE JURE (2013) 742, 744.

constitute full realisation of the rights. While the concept of progressive realisation is usually provided in human rights treaties that guarantee economic, social and cultural rights, it is omitted from the text of the African Charter.

1.1. Omission of progressive realisation

An enquiry of how the African Charter treats the concept of progressive realisation should obviously start with an examination of its texts according to the Vienna Convention on the Law of Treaties.[7] Article 1 of the Charter provides that "States parties 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 enshrine the concept of progressive realization because most human rights treaties usually incorporate the concept in clauses that provide for general state obligations.[8] 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 state parties should progressively achieve full realisation of the recognised rights. Neither does it condition the enjoyment of these rights on availability of resources. The text of the Charter is unequivocally clear that the concept of progressive realisation is omitted. Thus the enquiry may continue beyond the text.

Chronologically, the African Charter came late in the proliferation of human rights instruments globally. The ICESCR had already been in force when the Charter was adopted in 1981 and 13 African states had already ratified the ICESCR at the time of adopting the Charter.[9] In particular, the two states (Senegal and The Gambia) that played an important role in the preparation and adoption of the Charter were already parties to the ICESCR by 1978.[10] Moreover, the American Convention on Human Rights could have provided regional benchmark.[11] Then, one may wonder why the African Charter did not follow the path taken by the ICESCR and the American Convention on Human Rights. In searching for an answer, recourse can be

[7] Vienna Convention on the Law of Treaties, UN Doc. A/Conf.39/27; 1155 UNTS 331; 8 ILM 679 (1969); 63 AJIL 875 (1969) (VCLT), Art 31.

[8] Compare ICESCR, Art 2(1); Convention on the Rights of Persons with Disabilities, UN Doc.A/61/611, adopted 13 December 2006, entry into force 3 May 2008, 2515 UNTS 3, art 4(2); Protocol of San Salvador, Art 1.

[9] See status of ratification of the ICESCR <http://indicators.ohchr.org/> accessed 27 August 2016.

[10] FRANS VILJOEN, INTERNATIONAL HUMAN RIGHTS LAW IN AFRICA 160 (2007, OUP).

[11] Adopted 21 November 1969, entry into force 18 July 1978, OAS Treaty Series No. 36; 1144 UNTS 123; 9 ILM 99 (1969), Art 26, which provides that:
The States Parties undertake to adopt measures, both internally and through international cooperation, especially those of an economic and technical nature, with a view to achieving progressively, by legislation or other appropriate means, the full realization of the rights implicit in the economic, social, educational, scientific, and cultural standards set forth in the Charter of the Organization of American States as amended by the Protocol of Buenos Aires.

made to the preparatory work of the Charter and the circumstances of its conclusion.[12]

Indeed, the ICESCR and the American Convention on Human Rights 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."[13] Mbaye's draft contains almost a verbatim reproduction of Art 2(1) of the ICESCR (the progressive realization provision) as article 3 of his draft African Charter. The draft stipulates that:

> States Parties undertake to take steps, individually and through international co-operation, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realisation of the rights recognised in the present Charter by all appropriate means, including particularly the adoption of legislative measures.[14]

From the texts of Art 2(1) of the ICESCR, Mbaye omitted the requirement of taking steps through international assistance. He replaced the word 'covenant' with 'Charter'. Otherwise, Mbaye's proposed article 3 of the Draft African Charter was the same with Art 2(1) of the ICESCR.

In addition, Mbaye kept the distinction between economic, social and cultural rights and civil and political rights by providing them under different chapters.[15] He also prescribed different monitoring mechanisms. Under Art 14, Mbaye's draft requires state parties to report "on the measures which they have adopted and the progress made in achieving the observance" of economic, social and cultural rights while requiring judicial protection of civil and political rights under Art 32.

However, the committee of experts did not accept Mbaye's proposal with regard to progressive realisation. As it 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 kept between the two categories of rights and their monitoring mechanisms.[16] The

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[12] VCLT, Art 32.

[13] 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* HUMAN RIGHTS LAW IN AFRICA 1999 65 - 77 (Christof Heyns ed., 2002).

[14] Mbaye's draft, Art 3.

[15] Ch I (Arts 5 - 15) of Mbaye's draft Charter deals with economic, social and cultural rights while ch II (arts 16 - 32) provides for civil and political rights. Heyns, *Supra* note 13.

[16] 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, *Supra* note 13, at 81 - 91.

ministerial conferences that considered the draft Charter did not reintroduce progressive realisation or adopt different monitoring mechanisms.[17]

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.'[18]

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.[19] 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 lesser importance. Therefore, the Charter departs from the orthodoxies of the era.[20] Some even argue that the Charter attaches more importance to economic, social and cultural rights than to civil and political rights.[21]

In this respect the Charter represents an African conception of human rights because it establishes conceptual and conventional unity of all human rights.[22] The originality may have resulted from the fact that the Charter is a compromise among African states themselves and 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.[23] 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,[24] a neutral approach to human rights would treat all rights in the same way. But that does not mean that there was a uniform economic system across the African continent. The unity of all human rights under the Charter can be understood as a compromise between socialist and capitalist African countries that participated in the

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[17] Rapporteur's Report, CAB/LEG/67/Draft Rapt. Rpt (ll) Rev 4, reproduced *in* Heyns *Supra* note 13, at 94 - 105.

[18] 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 *Supra* note 13, at 78 - 80.

[19] *Ibid.*

[20] 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* 23 HUMAN RIGHTS QUARTERLY 327, 337 (2001).

[21] EI-Obaid Ahmed EI-Obaid & Kwadwo Appiagyei-Atua, *Human Rights in Africa: A New Perspective on Linking the Past to the Present* 41 MCGILL LAW JOURNAL 819, 846 (1996); Odinkalu *Supra* note 20, at 337.

[22] EVA BREMS, HUMAN RIGHTS: UNIVERSALITY AND DIVERSITY 119 (Martinus Nijhoff Publishers 2001).

[23] African Charter, Preamble, para 9.

[24] KITTY ARAMBULO, STRENGTHENING THE SUPERVISION OF THE INTERNATIONAL COVENANT ON ECONOMIC, SOCIAL AND CULTURAL RIGHTS: THEORETICAL AND PROCEDURAL ASPECTS 17 (Intersentia 1999).

negotiation of its text.[25] Its departure in this regard from global and other regional human rights treaties can also be understood as an attempt by newly independent African states "questioning mainstream international law."[26]

1.2. The African Commission's understanding of the textual omission

A piece of evidence on how the African Commission understands the omission of progressive realisation from the African 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 of [economic, social and cultural] rights and more should be implemented *now*."[27] 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.[28] 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."[29]

In its case law, the Commission does not expressly employ the phrase "immediate obligation". 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.[30] The Commission did not examine whether the respondent state had the necessary resources or whether it needed time to mobilise those resources to provide for 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; no hydroelectric power can be built over night, for instance. Rather, the aforementioned holding of the Commission 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 attribute state responsibility.

In *Purohit and Another v The Gambia,* which was decided in 2003, the Commission examined the detention of persons with mental disabilities and held that:

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[25] Odinkalu, *Supra* note 20, at 330.

[26] Brems, *Supra* note 22, at 93.

[27] 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 DOCUMENTS OF THE AFRICAN COMMISSION ON HUMAN AND PEOPLES' RIGHTS 202 - 203 (R Murray & M Evans eds., Hart Publishing 2001). Italics added.

[28] Odinkalu, *Supra* note 20, 349 - 350.

[29] SISAY ALEMAHU YESHANEW, THE JUSTICIABILITY OF ECONOMIC, SOCIAL AND CULTURAL RIGHTS IN THE AFRICAN REGIONAL HUMAN RIGHTS SYSTEM: THEORY, PRACTICE AND PROSPECT 251 (Intersentia 2013).

[30] (2000) AHRLR 74 (ACHPR 1995), para 47.

> [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.[31]

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

In *Gunme and Others v Cameroon* (*Southern Cameroon* case), the Commission examined, among others, an alleged violation of the right to development due to economic marginalisation and lack of economic infrastructure in part of Cameroon and held that "[t]he lack of such resources, if proven would constitute violation of the right to development."[32] Although the Commission did not find violation, it confirmed that lack of resource constitutes 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.[33]

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 exploitation of oil reserves in Ogoni land without regard to the health and environment of the Ogoni people.[34] 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.'"[35] One expects a reference to Art 2(1) to be in full, including 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 even with regards to 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.[36] Therefore, the Commission's reluctance to refer to the

[31] (2003) AHRLR 96 (ACHPR 2003), para 83. Italics added.

[32] (2009) AHRLR 9 (ACHPR 2009), para 205.

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

[34] (2001) AHRLR 60 (ACHPR 2001).

[35] *Ogoniland* case, paras 44 & 48.

[36] CESCR, General comment No. 3: The nature of States parties' obligations (Art. 2, para. 1, of the Covenant) (hereafter 'General Comment 3'), E/1991/23 (1990), para 2.

concept and its emphasis on taking steps instead can be read as an interpretive strategy adopted on purpose in eschewing the concept of progressive realisation.

The Commission's view that the Charter provides for immediate obligations has been supported by a number of scholars. Odinkalu, for example, submits that "the obligations that state parties assume with respect to economic, social and cultural rights are clearly stated as of immediate application."[37] 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."[38] 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."[39]

1.3. Introduction of 'progressive realization'

The African Commission has avoided using either the terms 'progressive realisation' or its substance for a long time even with regard to the right to health under Art 16 whose wording is understood as an exception to the Charter's requirement of immediate obligation.[40] 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 'available resources' to the 'unqualified' right to education.[41] Relying on the same case, Yeshanew argues that "the African Commission read the 'progressive realization' qualification" into Art 16 of the Charter.[42]

Indeed, the Commission referred to 'available resources' in *Purohit and Another v The Gambia* 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.[43]

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[37] Odinkalu, *Supra* note 20, at 349.

[38] FATSAH OUGUERGOUZ, THE AFRICAN CHARTER ON HUMAN AND PEOPLES' RIGHTS: A COMPREHENSIVE AGENDA FOR HUMAN RIGHTS AND SUSTAINABLE DEMOCRACY IN AFRICA 200 (Nijhoff 2003).

[39] DEJO OLOWU, AN INTEGRATIVE RIGHTS-BASED APPROACH TO HUMAN DEVELOPMENT IN AFRICA 58 (Pretoria University Law Press 2009).

[40] Viljoen, *Supra* note 10, at 217; Odinkalu, *Supra* note 20, at 349; Ouguergouz, *Supra* note 38, at 200; Yeshanew, *Supra* note 29, at 254.

[41] Viljoen, *Supra* note 10, at 217; *Purohit and Another v The Gambia*, para 84.

[42] Yeshanew, *Supra* note 29, at 254.

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

However, the case is more of a confirmation of immediate obligation than an introduction of progressive realisation for a number of reasons. First, the Commission did not use the 'best attainable' language of Art 16, which is the basis for commentators to regard the provision as an exception to the immediate obligation requirement.[44] 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.[45] Third, the Commission found violation of Art 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 phrase 'progressive realisation' in the *Southern Cameroon* case decided in 2009. The Commission held that the "respondent 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."[46] It seems that the Commission introduced the terms inadvertently because it did not clearly articulate its holding; nor did it provide reasons for its decision. Surprisingly, it was not dealing with an alleged violation of economic, social and cultural rights. Rather, it was examining the right to development, which does not fall under economic, social and cultural rights according to the Commission's classification of rights. Even when a violation of the right to education resulting from the respondent state's conduct of "underfunding and understaffing primary education" was alleged, its finding of no violation was not based on lack of resources. But 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.[47] Even before deciding the *Southern Cameroon* case, the Commission used the terms 'progressive realisation' in the Pretoria Declaration adopted in 2004.[48] The Declaration requires state parties to prepare "National Action Plans, which set out benchmark indicators for the progressive realisation of social, economic and cultural rights."[49] In a language similar to Art 2(1) of the ICESCR, the Declaration calls upon the state parties to give full effect to economic, social and cultural rights "by using the maximum of their resources."[50] As it was the case in the decision of the *Southern Cameroon* case,

[44] See Viljoen, *Supra* note 10, at 217; Odinkalu, *Supra* note 20, at 349; Ouguergouz, *Supra* note 38, at 200; Yeshanew, *Supra* note 29, at 254.

[45] General Comment 3, paras 1 & 2.

[46] *Southern Cameroon case*, para 206. Italics added.

[47] See Soft Law, available at <http://www.achpr.org/instruments/> accessed 8 July 2016.

[48] Resolution on Economic, Social and Cultural Rights in Africa, 36th Ordinary Session, Dakar (7 December 2004).

[49] Pretoria Declaration, para 11(iv).

[50] *Ibid.*, para 2.

the Commission did not provide any justification for the incorporation of the notion of progressive realisation in the Declaration.

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 (Nairobi Principles) which expressly declare that the concept of progressive realisation is applicable to economic, social and cultural rights under the African Charter.[51] In the Preamble, the Nairobi Principles list a number of instruments from which the inspiration has been drawn but their contents show that they are mere transplantation of the interpretative approach under the ICESCR.

In terms of approach, the Commission differs from the Committee on Economic, Social and Cultural Rights (CESCR), which interprets and monitors the implementation of the ICESCR. The CESCR started from the text of the ICESCR and carved immediate obligation out of the notion of progressive realisation provided under Art 2(1) of the ICESCR. The CESCR states that "the obligation [under Art 2(1)] differs significantly from that contained in Art 2 of the [ICCPR] which embodies an immediate obligation."[52] Still, it identified from Art 2 of the ICESCR immediate obligations to take steps and to guarantee rights without discrimination.[53] From the ICESCR's overall objective of establishing clear obligations for state parties, it identified some state duties largely understood as immediate obligations, namely, prohibition of retrogressive measures and minimum core obligations.[54] The CESCR convincingly proceeded to establishing clarity in state obligations without abandoning its contextual foundations.

On the contrary, the African Commission does not have similar texts to work with. Art 1, the general obligation provision of the Charter, is similar to Art 2 of the ICCPR which is understood both by the Human Rights Committee and the CESCR as enshrining immediate obligations.[55] The Commission admitted that "the African Charter does not expressly refer to the principle of progressive realisation."[56] Had the Commission proceeded from the texts, it would have ended up declaring that the Charter, like the ICCPR, provides for immediate obligations. That being the case, the Commission could not find particular provisions of the Charter from which the concept can be implied.

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[51] 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).

[52] General Comment 3, para 9.

[53] General Comment 3, paras 1 - 2.

[54] General Comment 3, paras 9 - 10.

[55] Human Rights Committee, General Comment No. 31 [80], The Nature of the General Legal Obligation Imposed on States Parties to the Covenant, adopted on 29 March 2004 (2187th meeting), CCPR/C/21/Rev.1/Add.13 (26 May 2004), paras 5 & 14.

[56] Nairobi Principles, para 13.

The Commission's view largely converges with that of the CESCR with regard to the meaning and content of the concept. However, the relationship between 'progressive realisation' and 'available resources' is not straight forward in the ICESCR. The scarcity of resources or lack of available resources can be taken as the main reason for the requirement of progressive realisation. Emphasising time as another important factor, the CESCR observed that: "The concept of progressive realization constitutes a recognition of the fact that full realization of all economic, social and cultural rights will generally not be able to be achieved in *a short period of time*."[57]

The concept refers to 'realisation over time' as opposed to immediate obligations.[58] The implication is that the full realisation takes time even if there is no limitation of resources. This appears sound to common sense as, for instance, a school or a hospital cannot be built and staffed overnight even if a state has sufficient financial resources; planning and construction of such a project take a long time let alone training of teachers or medical professionals.

The Commission's definition, albeit circular, clearly combines both factors: resource availability and time. It defines progressive realisation as "[t]he obligation to progressively and constantly move towards the full realisation of economic, social and cultural rights, *within the resources available to a State*, including regional and international aid."[59] It adds that "States must implement a reasonable and measurable plan, including set[ting] achievable benchmarks and timeframes, for the *enjoyment over time* of economic, social and cultural rights."[60]

However, the Commission omits optimal resource utilisation element from its definition. That element is clear from the ICESCR's requirement that a state party should take steps "to the maximum of its available resources."[61] Central to this requirement is not only avoiding resource wastage but also producing the best possible outcome. Instead, the Commission uses the phrase "within the resources available to a State" which implies that it does not incorporate a requirement for optimal utilisation of resources into its definition.[62] 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 is usually attributed to mismanagement of resources.[63] The reason why the Commission chose to omit this

[57] General Comment 3, para 9. Italics added.

[58] *Ibid.*

[59] Nairobi Principles, para 13. Italics added.

[60] Nairobi Principles, para 14. Italics added.

[61] ICESCR, Art 2(1).

[62] Compare Pretoria Declaration, para 2.

[63] Mashood A. Baderin, *The African Commission on Human and Peoples' Rights and the Implementation of Economic, Social and Cultural Rights in Africa, in* ECONOMIC, SOCIAL AND CULTURAL RIGHTS IN ACTION 142 (Mashood A. Baderin & Robert McCorquodale eds., OUP 2007).

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.

2. Expansion of Recognised Rights

The African Charter is said to have adopted a minimalist approach.[64] In fact, the standard one adopts to measure the qualities of the Charter is important. Since the Charter guarantees fewer economic, social and cultural rights than the ICESCR does, it could be deemed minimalist. On the contrary, as it guarantees more economic, social and cultural rights than its regional counterparts — the American Convention on Human Rights and the European Convention on Human Rights — it can be characterised as a maximalist human rights treaty. Commentators usually take the ICESCR as a point of reference for praising or condemning the Charter. Similarly, the Commission relies on the ICESCR to expand the substantive scope of the Charter as discussed in the following subsections.

2.1. The Charter's defect

As alluded to in the introductory part of this article, the African Charter omitted some economic, social and cultural rights such as 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.[65] Moreover, rights such as the right to work and the right to education recognized in the Charter are missing some elements.[66] The Charter has been compared with the ICESCR and criticised as defective for these omissions.[67] While amending the Charter and adopting an additional protocol were considered among possible solutions, interpretation is a preferred way of fixing the defects.[68]

The criticism against the African Charter for omitting some rights misses some important points. First, the fact that the omitted rights are identified in comparison with the ICESCR implies that the ICESCR is a perfect flawless human rights treaty to which others should conform. Critics ignore those objections to economic, social and cultural rights as human rights are partly based on the differences between the ICESCR and the ICCPR. That is, the ICESCR is defective when compared to ICCPR. Second, the critics fail to recognise that their proposal was considered during drafting of the Charter but jettisoned in the end. As discussed above, all of

[64] Viljoen, *Supra* note 10, at 215.

[65] Compare ICESCR, Arts 9 and 11.

[66] African Charter, Arts 15 & 17.

[67] J Oloka-Onyango, *Beyond the rhetoric: reinvigorating the struggle for economic and social rights in Africa,* 26 CALIFORNIA WESTERN INTERNATIONAL LAW JOURNAL 1 51 (1995); Yeshanew, *Supra* note 29, at 266.

[68] Yeshanew, *Supra* note 29, at 270.

the rights, which are now missing from the Charter, were included in Mbaye's draft with sufficient details that was similar to the provisions of the ICESCR.[69] The drafters, for one reason or another, had to make a judgment and select some rights. However, the criteria used for selection are not clear.[70] The bipolar political climate in which the ICESCR was adopted should always be born in mind. Third, the critics assume that the contexts in which the ICESCR and the African Charter were adopted were identical.

The African contextual reality, both political and economic, should not be ignored. The African leaders did not have the political commitment to human rights, which have been considered matters of internal affairs. That can be inferred from the Charter of the Organisation of African Unity (OAU) that makes no reference to human rights but emphasises non-interference in the internal affairs of states.[71] Human rights abuses that left more than 100,000 persons dead in Uganda did not prevent the election of Amin as the Chairperson of the OAU in 1975, few years before the adoption of the African Charter.[72] That provides an indication that human rights were of little concern for African leaders at the time.

The political reality on the ground was not friendly to human rights and the drafters were aware of that. The fear that the African leaders would not accept the Charter or at least delay its adoption was, in fact, reasonable. The Chairperson of the Drafting Committee expressed that fear when he stated that: "The concise and general formulation adopted by the authors of the preliminary draft with respect to economic, social and cultural rights is in line with the concern to spare our young states too many but important obligations."[73] Apparent from this statement is the strategy adopted to sell the Charter to the African leaders. The aim of the drafters was to appease the leaders that they were not undertaking too many obligations.[74]

The Chairperson's statement also indicates the drafters' concern about the African economic contexts within which economic, social and cultural rights would be realised. It appears that some choice had to be made since the 'young' states would not be able to implement all economic, social and cultural rights. Therefore, only a few economic, social and cultural rights were selected for inclusion in the Charter. In other words, some rights were prioritised.

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[69] Mbaye draft, Arts 6 - 13.

[70] Yeshanew, *Supra* note 29, at 241.

[71] Charter of the OAU, Art III. Under Art II, the Charter refers to the UDHR and the UN Charter for guidance in conducting international cooperation.

[72] KOFI OTENG KUFUOR, THE AFRICAN HUMAN RIGHTS SYSTEM: ORIGIN AND EVOLUTION 24 (Palgrave Macmillan 2010).

[73] Rapporteur's Report on the Draft African Charter, OAU Doc CAB/LEG/67/Draft Rapt.Rpt. (II) Rev.4, para 13, Heyns, *Supra* note 13, at 95 - 96.

[74] Viljoen, *Supra* note 10, at 215.

The omission of the progressive realisation from the Charter was accompanied by the recognition of fewer rights than the ICESCR guarantees. This is, it is submitted, a compromise made to maintain the indivisibility of rights. The logic, it seems, is that the economic contexts of the 'young' states do not allow the immediate realisation of many rights. Hence, the need to spare them from 'too many but important obligations.'[75]

2.2. The Commission's fix

The African Commission started introducing additional rights, which were originally omitted from the Charter almost from the beginning of its operation. In 1989, the Commission adopted the Guidelines for National Periodic Reports that heavily relied on international human rights law, including the ICESCR.[76] These guidelines require states to report on the right to 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 (Art 18).[77] The right to social security is also included under the right to health.[78] The Commission also requires reports on elements of rights missing from the Charter. For example, state parties should report on trade union rights under the right to work although the Charter does not expressly guarantee that aspect of the right.[79]

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.[80] 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.[81] Here, 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.

In 2011, 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

[75] Rapporteur's Report, *Supra* note 67.

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

[77] *Ibid.*, part II paras 31 - 33.

[78] *Ibid.*, part II paras 17 - 19.

[79] *Ibid.*, part II paras 10 - 14.

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

[81] Pretoria Declaration, para 10.

property, the right to health and the protection of the family.[82] 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.[83] 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 also adopted State Party Reporting Guidelines for Economic, Social and Cultural Rights in the African Charter on Human and Peoples' Rights (Tunis Reporting Guidelines), which require states to report on economic, social and cultural rights omitted from the Charter.[84]

The case law of the Commission shows a similar trend. In its oft-cited *Ogoniland* case decided in 2001, the Commission read into the Charter the right to housing and the right to food.[85] It held that "the combined effect of articles 14, 16 and 18(1) reads into the Charter a right to shelter or housing."[86] The destruction of Ogoni houses and villages, obstruction, harassment, beating, and killing of citizens trying to rebuild their ruined homes "constitute massive violations of the right to shelter."[87]

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 (Art 4), the right to health (Art 16) and the right to economic, social and cultural development (Art 22)."[88] It identified three minimum core state duties: the duty to refrain from destroying or contaminating food sources, the duty not to allow private actors from destroying or contaminating food sources, and the duty not to "prevent peoples' efforts to feed themselves."[89] The Commission found Nigeria in violation of the right to food because the government had failed to carry out all three minimum duties.[90]

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.[91] 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

[82] Nairobi Principles, para 77.

[83] *Ibid.*, paras 81, 83, and 87.

[84] Tunis Reporting Guidelines, Thirty-first Activity Report (2011).

[85] (2001) AHRLR 60 (ACHPR 2001).

[86] *Ogoniland* case, para 60.

[87] *Ibid.*, para 62.

[88] *Ibid.*, para 64.

[89] *Ibid.*, para 65.

[90] *Ibid.*

[91] (2009) AHRLR 153 (ACHPR 2009).

right to health; and that evicting the victims violates the right to family life.[92] However, it did not find violation of a separate right to housing. Similarly, it did not find a violation of a separate right to food although it found violation 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.

From two communications decided in 2015, it appears that the Commission's jurisprudence has bifurcated.[93] In *Nubian Community v Kenya*, the Commission examined discrimination against 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.[94] It found a violation of the right to property resulting from an eviction without provision of alternative housing.[95] In addition, it found violation of the right to health and the right to protection of the family.[96] However, in line with the *Darfur* case, it did not find violation of a separate right to housing.

On the other hand, in *Mbiankeu Geneviève v Cameroon*, the Commission found violation of the right to housing in line with its decision in the *Ogoniland* case.[97] 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 obtained the land from a fraudulent seller, he could not obtain another plot of land as a replacement or the monies invested on it. Although the family was not living in Cameroon, the Commission found a violation of the right to health and protection of family because they intended to establish a home. The Commission has found that:

> By destroying or allowing the destruction of the hut, the Respondent State and its employees destroyed or at least frustrated the project to realise the right to adequate housing. In the circumstances of the case, the Commission is of the view that such acts constitute a violation of both the provisions of Articles 16 and 18 of the African Charter and the right to adequate housing arising therefrom following a combined interpretation.[98]

These cases show not only an inconsistency in the Commission's jurisprudence but also the absurdity of its findings. Sudanese families' homes were destroyed as a result

[92] *Darfur* case, paras 205, 212, & 216.

[93] 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.

[94] *Nubian Community v Kenya*, para 168.

[95] *Ibid.*, para 165.

[96] *Ibid*, para 168.

[97] Communication 389/10, *Mbiankeu Geneviève v Cameroon*, 38th Activity Report.

[98] *Ibid.*, para 124.

of the conflict in Darfur and families were left without shelter. In Kenya, an eviction left stateless Nubian families homeless. Loss of shelter did not result in a violation of the right to housing in both cases. In contrast, the Commission found violation of the right to housing in *Geneviève v Cameroon* although there was no loss of shelter. The facts of the *Ogoniland* case, at least on the issue of shelter, are similar to the facts both in *Darfur* and in *Nubian Community* cases because loss of shelter is the common denominator in all three cases. However, the Commission's finding in *Geneviève v Cameroon* goes far beyond the *Ogoniland* case and, in essence, led to the conclusion that an automatic violation of the right to housing results from a violation of the right to property, at least where property relates to residential house or land on which such a house is going to be built.

3. Justifications

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 'the relevant interpretive community' as Tobin calls it.[99] The Commission's justification for its interpretation seems to fit into the principle of systemic integration. Lack of resources or conditions of underdevelopment can also be another reason. Both justifications are examined below.

3.1. Systemic integration

Systemic integration is a general principle of treaty interpretation, which requires construction of treaties in accordance with general international law because treaties are the creatures of international law.[100] The principle is incorporated in the Vienna Convention on the Law of Treaties.[101] It is also applied by international courts.[102]

The adoption of this principle requires harmonious interpretation of the African Charter with international human rights treaties. The African Charter seems to have adopted the systemic integration principle by authorising the Commission to "draw inspiration from international law on human and peoples' rights" under Art 60. The Charter also provides for the role of general international law in its interpretation under Art 61. The Commission should draw inspiration from international human rights law and should take into consideration general international law.

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[99] John Tobin, *Seeking to Persuade: A Constructive Approach to Human Rights Treaty Interpretation*, 23 HARVARD HUMAN RIGHTS JOURNAL 1 (2010).

[100] Campbell Mclachlan, *The principle of systemic integration and article 31(3) (c) of the Vienna Convention*, 54 INTERNATIONAL AND COMPARATIVE LAW QUARTERLY 279, 280 (2005).

[101] VCLT, Art 31(3) (c).

[102] See *Al-Saadoon and Mufdhi v the United Kingdom*, no. 61498/08, judgment of the European Court of Human Rights, 2 March 2010, para 126.

The Commission relies on its power to draw inspiration under Arts 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.[103]

The same justification applies to the introduction of the rights into the Charter although the Commission does not clearly state that. The reason is that the instruments in which the Commission introduced these rights generally refer to Arts 60 and 61 of the Charter. These provisions are referred to as "the lighthouse directing the course followed and determining the substance included" in the Guidelines for National Periodic Reports.[104] In the Preamble to the Nairobi Principles, the Commission acknowledges that it has drawn inspiration from almost all human rights instruments and works of human rights organs. Because of their relevance to economic, social and cultural rights, the influence of the ICESCR and the CESCR's interpretation is clearly visible from the formulation and contents of the rights read into the Charter.

The Commission's justification appears relevant given that the majority of states parties to the African Charter are also parties to the ICESCR and other treaties that require progressive realisation and provide for rights omitted from the Charter.[105] However, it is important to note that the Charter's departure could have also been justified on the ground of the *lex specialis* maxim: "[t]he principle that special law derogates from general law."[106] 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."[107] In cases of conflict of norms, "it is the role of *lex specialis* to point to a set of considerations with practical relevance: the immediate accessibility and contextual sensitivity of the standard."[108]

The African Charter, a regional instrument, can be considered *lex specialis* in regard to universal human rights treaties such as the ICESCR.[109] The Charter can be seen as providing practical relevance to the African socio-economic contexts. Therefore, it

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[103] Nairobi Principles, para 13.

[104] Guidelines for National Periodic Reports, para 6.

[105] Most African states are also parties to ICESCR, CRC, and CRPD. See ratification status at https://treaties.un.org.

[106] 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.

[107] *Ibid.*, para 56.

[108] *Ibid.*, para 87.

[109] *Ibid.*, para 98.

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.

3.2. 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 lack of resources, at least partly, prevents the immediate full realisation of economic, social and cultural rights. Hence, the progressive realisation of economic, social and cultural rights. For that matter, it is ideological differences based on the issue of resource that split the Universal Declaration of Human Rights into two separate treaties.

The African Commission acknowledges lack of resources as the 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.'[110] Because of poverty the African states are incapable of providing "the necessary amenities, infrastructure and resources that facilitate the full enjoyment of this right."[111] 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.'[112] Despite this trend in the case law, the Commission has not raised scarcity of resources as its justification for introducing progressive realisation in the Nairobi Principles.

On the other hand, commentators usually acknowledge that the Charter requires immediate implementation of economic, social and cultural rights but argue that such implementation would not be practical due to lack of resources or under development 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."[113] Similarly, Mbazira argues that "[i]t is important that the socio-economic rights in

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

[111] *Ibid.*

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

[113] U OJI UMOZURIKE, THE AFRICAN CHARTER ON HUMAN AND PEOPLES' RIGHTS 95 (Martinus Nijhoff Publishers 1997). See also EVELYN A ANKUMAH, THE AFRICAN COMMISSION ON HUMAN AND PEOPLES' RIGHTS: PRACTICE AND PROCEDURES 144 (Martinus Nijhoff Publishers 1996); VOO NMEHIELLE, THE AFRICAN HUMAN RIGHTS SYSTEM: ITS LAWS, PRACTICE, AND INSTITUTIONS 124 (Martinus Nijhoff Publishers 2001).

the African Charter be realised progressively due to the underdevelopment of most African countries."[114]

4. Benefits and Risks of the African Commission's Interpretative Approach

The African Commission has introduced the concept of progressive realisation and additional rights into the Charter. To do so, it has heavily relied on its mandate to draw inspiration from international law, which includes the ICESCR and the work of the CESCR. The changes made to the Charter are so fundamental that they appear amendments to the Charter. Therefore, it is submitted, the African Commission has rewritten the African Charter. Of course, the Charter is not an immutable holy scripture. However, advantages and disadvantages should be weighed in the process of developing it. The following subsections examine and evaluate the benefits and risks that come with the changes or the rewriting.

4.1. Benefits

One of the benefits of the Commission's approach is its extension of protection in theory. It seems that the possibility of claiming protection has been expanded. The African Charter has been subjected to criticisms for omitting "the rights to social security, the right to an adequate standard of living, and freedom from hunger."[115] "[T]he Charter remained silent on some of the most pressing socio-economic needs of Africa's predominantly rural impoverished communities."[116] Therefore, interpreting the Charter as implying other rights extends at least in theory its protection to those in need.

Reading rights into the Charter is also advantageous in enhancing the indivisibility of human rights. Indivisibility is often brought up in arguments against tendencies whereby civil and political rights are distinguished from economic, social and cultural rights and given higher status in terms of recognition and enforcement. In this sense, the Charter recognises indivisibility of rights. On the other hand, it can be submitted that the African Charter divides economic, social and cultural rights into two categories: those guaranteed in the Charter and those omitted from it. The rights recognised in the Charter *a priori* are given a higher status no matter how rational the motive may be. In this sense, the Charter divided and ranked economic, social and cultural rights. Therefore, the Commission eliminated the distinction and upheld their indivisibility when it read other rights into the Charter.

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[114] 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*, 6 AFRICAN HUMAN RIGHTS LAW JOURNAL 333, 341 (2006).

[115] Oloka-Onyango, *Supra* note 67, at 51.

[116] Viljoen, *Supra* note 10, at 215.

The way in which rights are implied into the Charter also confirms indivisibility, interrelatedness and interdependence of rights. The Commission disregarded the traditional division of rights into generations when it read additional rights into the Charter. For example, the Commission considers that the right to food is implicit in the right to life (civil right), the right to health (social right), and the right to development (collective/group right).[117] Other implied rights are also connected to more than one traditional category.[118]

Finally, introducing progressive realisation into the Charter in line with the ICESCR and its interpretation by the CESCR integrates the African Charter into the global system of which it is a part. That will enable the Commission to benefit from the work of the CESCR or other similar human rights organs. However, this benefit comes at a cost dear to the African Charter in particular but also to the normative development of economic, social and cultural rights in general, as discussed below.

4.2 Risks

The changes made to the Charter also come with some risks. One of the risks is undermining the indivisibility of human rights through the introduction of progressive realisation for only economic, social and cultural rights. The African Charter has been acclaimed for according the same treatment to all categories of human rights.[119] It allows the Commission to emphasise in its jurisprudence that economic, social and cultural rights are "indivisible, interdependent and interrelated with other human rights."[120] The Commission has espoused this view in a number of ways.

First, the Commission takes into account this principle when it draws inspiration from international human rights law. In *Purohit and Another v The Gambia*, the Commission referred to the Vienna Declaration and emphasised that it takes into account the principle that "all human rights are universal, indivisible, interdependent, and interrelated" when it accepts arguments based on international human rights instruments.[121] Second, the Commission finds that the same actions or omissions result in violations of multiple rights that traditionally fall in different categories.[122] For example, the Commission found that forced eviction and destruction of property constitute cruel and inhuman treatment, and a violation of

[117] Nairobi Principles, para 83; *Ogoniland* case, para 64.

[118] Nairobi Principles.

[119] Viljoen, *Supra* note 10, at 214.

[120] Manisuli Ssenyonjo, *Analysing the economic, social and cultural rights jurisprudence of the African Commission: 30 years since the adoption of the African Charter*, 29 NETHERLANDS QUARTERLY OF HUMAN RIGHTS 358, 396 (2011).

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

[122] *Malawi African Association and Others v Mauritania* (2000) AHRLR 149 (ACHPR 2000); *International Pen and Others (on behalf of Saro-Wiwa) v Nigeria* (2000) AHRLR 212 (ACHPR 1998), para 112.

the right to health.[123] Finally, the Commission identified the same levels and types of state obligations for all human rights in the *Ogoniland* case.[124]

However, it seems, the African Commission has changed this distinctive feature of the African Charter. In the Nairobi Principles, the Commission has declared that States parties to the African Charter have progressive obligation with regard to economic, social and cultural rights. Consequently, the Commission makes a distinction between civil and political rights on the one hand and economic, social and cultural rights on the other hand in terms of corresponding state obligations.

The Commission also 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 professed the indivisibility of rights. It 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.

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 adaptation 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 concept new to the Charter such as progressive realisation, it must do so in such a way that the concept is adapted to maintain intact the Charter's central features such as the indivisibility of rights. 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.

The Commission undermined its authority by failing to provide convincing reasons. In the *Southern Cameroon* case, the Commission adopted a sweeping statement that 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."[125] For so holding, it did not provide any reason at all. When the concept was adopted in the Nairobi Principles, the Commission relied on Arts 60 and 61 of the Charter. That is, it introduced the concept because other human rights treaties include it. The Commission does not bother itself to show how the Charter is identical or at least similar to those treaties in this respect. All of these factors,

[123] *Sudan Human Rights Organisation and Another v Sudan* (2009) AHRLR 153 (ACHPR 2009), paras, 164 & 212.

[124] (2001) AHRLR 60 (ACHPR 2001), para 44.

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

namely, consistency, predictability, expertise and reasoned decisions, have implications for the legitimacy of the Commission.[126]

The Commission's approach also poses a risk of further marginalisation to economic, social and cultural rights. The Commission has already been criticised for neglecting these rights in its activities.[127] In its promotional activities, the Commission has focused on civil and political rights and "paid lip service to economic, social and cultural rights."[128] It received very few economic, social and cultural rights cases despite the fear that it would be flooded with such cases.[129]

Now, the Commission has not only introduced progressive realisation but also adopted a separate reporting guidelines that do not apply to other rights.[130] There is a probability that facts, which once constituted a violation of the Charter according to the standards adopted in the Commission's jurisprudence, may not constitute a violation any more. The Commission has sent out a clear message that the bar has been raised.

In Africa, "poor governance and economic mismanagement rather than lack of resources" is identified as a problem for low implementation of economic, social and cultural rights.[131] 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 international monitoring mechanisms such as the African Commission are established to hold states accountable through international law.[132] Generally states are often in bad faith in relation to their human rights obligations.[133] Introducing progressive realization might encourage states to invoke lack of resources for their failure to comply with these obligations. Some states might view this as an opportunity to act in bad faith.

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[126] See MAGDALENA SEPÚLVEDA CARMONA, NATURE OF THE OBLIGATIONS UNDER THE INTERNATIONAL COVENANT ON ECONOMIC, SOCIAL AND CULTURAL RIGHTS 91 (2003); Laurence R Helfer and Anne-Marie Slaughter, *Toward a Theory of Effective Supranational Adjudication*, 107 THE YALE LAW JOURNAL 273, 284 (1997); Jean d'Aspremont and Eric De Brabandere, *The Complementary Faces of Legitimacy in International Law: the legitimacy of origin and the legitimacy of exercise*, 34 FORDHAM INTERNATIONAL LAW JOURNAL 190, 215 (2011).

[127] Viljoen, *Supra* note 10, at 417.

[128] Sibonile Khoza, *Promoting Economic, Social and Cultural Rights in Africa: The African Commission holds a seminar in Pretoria*, 4 AFRICAN HUMAN RIGHTS LAW JOURNAL 334, 334 (2004).

[129] U O Umozurike, *The Protection of Human Rights under the Banjul (African) Charter on Human and People's Rights*, 1 AFRICAN JOURNAL OF INTERNATIONAL LAW 65, 81 (1988), cited in Oloka-Onyango, *Supra* note 67, at 52.

[130] Tunis Reporting Guidelines.

[131] Baderin, *Supra* note 63, 142; Shedrack C Agbakwa, *Reclaiming Humanity: Economic, Social, and Cultural Rights as the Cornerstone of African Human Rights*, 5 YALE HUMAN RIGHTS AND DEVELOPMENT JOURNAL 177, 195 (2002).

[132] Viljoen, *Supra* note 10, at 215.

[133] Eva Brems, *Should Pluriform Human Rights Become One? Exploring the Benefits of Human Rights Integration*, 4 EUROPEAN JOURNAL OF HUMAN RIGHTS 447, 462 (2014).

The Commission allows state parties to invoke scarcity of resources as a defence for their failure. However, such a defence is not available to states with regard to civil and political rights. The Commission seems to reject the idea that the enforcement of rights, even the enforcement of those arising under private law of tort, contract and property is expensive and depend on taxpayers' money.[134] Despite the fact that the realisation of civil and political rights requires resources, the Commission conditioned only economic, social and cultural rights on availability of resources. As a result, the Commission has given an incentive to states to prioritise civil and political rights over economic, social and cultural rights in the allocation of their resources.[135] In turn, this would marginalise the protection of economic, social and cultural rights.

Finally, the Commission exposed itself to an accusation of illegitimate usurpation of treaty-making power.[136] By introducing rights into the Charter, the Commission went beyond the initial agreement of states parties to the African Charter, which like any other treaty is based on consent.[137] In this respect, the Commission's mandate can be contrasted with that of the African Court. The Court has the power to apply the provisions of the African Charter and any other relevant human rights treaties ratified by respondent States.[138] That is, the Court has the power to find violations of those rights read into the Charter under other international treaties, including the ICESCR. However, the African Commission lacks such clear mandate.

Conclusion

This article has argued that the African Commission has made two major changes while interpreting the African Charter. The Commission has introduced the concept of progressive realisation into the Charter. It has also read into the Charter additional rights originally omitted from the Charter. Progressive realisation is one of the main technical factors underlying the division of human rights into two separate treaties. As a result, the African Charter avoided the concept and adopted an alternative approach. Therefore, the changes made by the Commission are so fundamental that they appear amendments to or rewriting of the Charter.

In its interpretation exercise, the Commission has not taken into consideration the drafting history of the Charter. Neither has it justified its interpretation on changes in circumstances. It has failed to adapt lessons from other human rights organs to the African Charter and its contexts. Consequently, the Commission's interpretation

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134 STEPHEN HOLMES & CASS R. SUNSTEIN, THE COST OF RIGHTS: WHY LIBERTY DEPENDS ON TAXES (Norton 1999).

135 See Eva Brems, *Human Rights: Minimum and Maximum Perspectives*, 9 HUMAN RIGHTS LAW REVIEW 349, 366 (2009).

136 Viljoen, *Supra* note 10, at 328.

137 *Ibid.*

138 African Court Protocol, Art 7.

runs more risks than benefits. The Commission has extended the protection of the Charter to some rights at the cost of compartmentalising the Charter and marginalising all economic, social and cultural rights. Its inconsistency, unpredictability and questionable professional expertise undermine its own legitimacy.

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