Retrieving the Rejected Stone: Rethinking the Marginalization of the Economic, Social and Cultural Rights under the African Charter on Human and Peoples' Rights

Shedrack Chukwuemeka Agbakwa
RETRIEVING THE REJECTED STONE:
RETHINKING THE MARGINALIZATION OF THE ECONOMIC, SOCIAL AND CULTURAL RIGHTS UNDER THE AFRICAN CHARTER ON HUMAN AND PEOPLES' RIGHTS

BY

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DEDICATION

To

My wife, Nkiru:
A jewel of inestimable value, an epitome of love and a fountain of inspiration.
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ABSTRACT

The *African Charter on Human and Peoples' Rights* is unique in its conceptualization of rights. Among other things, it provides in a single document a core of both economic, social and cultural rights, as well as civil and political rights. However, the *Charter’s* Preamble clearly demonstrates where the emphasis of the document lies. The *African Charter* asserts a belief that the satisfaction of economic, social and cultural rights is a guarantee for the enjoyment of civil and political rights.

Given the grave economic problems facing Africa, the emphasis on economic, social and cultural rights as a precondition for the enjoyment of civil and political rights is hardly surprising. It is justified in a continent where basic human survival needs are barely met. What is astounding today is the abandonment of such *Charter* ideals, by the marginalization of enforcement of the economic, social and cultural rights under the *Charter*.

This study analyzes the existing situation with respect to the observation, enforcement and implementation of the economic, social and cultural rights under the *African Charter* by States Parties as a step towards rethinking the marginalization of these rights. It is shown that an holistic approach to human rights enforcement is indeed in consonance with African culture. Consequently, the current practice of enforcing civil and political rights while ignoring economic, social and cultural rights is antithetical to the importance traditionally attached to these rights.

It is also revealed that while some states are more progressive in the protection of economic, social and cultural rights, others either are not doing enough to protect these rights, or maintain constitutions that render economic, social and cultural rights non-justiciable. For States Parties, it is argued that domestic constitutional provisions making the economic, social and cultural rights non-justiciable are invalid under the *African Charter*.

Analysis of the newly established African Court of Human Rights discloses that the mere addition of a court is not likely, by itself, to sufficiently address the normative and structural weaknesses impinging on the enforcement of economic, social and cultural rights in particular, and on the African human rights system in general. A far-reaching amendment of the *Charter* is required.

The problems hindering the realization of these rights in Africa are also explored. As a contribution to the rethinking process, alternative enforcement approaches - both the integrated and minimum threshold models of enforcement - are advocated as ways to overcome the constitutional limitations on the enforcement of these rights, as well as to ensure the realization of the eloquent declarations of the *African Charter*. The thesis emphasizes that human rights transcend merely restraining governments from *abusing* their citizens; they demand proactively preventing governments from *neglecting* their citizens.
**LIST OF ABBREVIATIONS**

<table>
<thead>
<tr>
<th>Abbreviation</th>
<th>Description</th>
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<tbody>
<tr>
<td>ACHR</td>
<td>American Convention on Human Rights</td>
</tr>
<tr>
<td>AC</td>
<td>Appeal Cases</td>
</tr>
<tr>
<td>All E R</td>
<td>All England Reports</td>
</tr>
<tr>
<td>BYIL</td>
<td>British Yearbook of International Law</td>
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<tr>
<td>CA</td>
<td>Court of Appeal</td>
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<tr>
<td>CC</td>
<td>Constitutional Court</td>
</tr>
<tr>
<td>ECHR</td>
<td>European Convention on Human Rights</td>
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<tr>
<td>EHRR</td>
<td>European Human Rights Report</td>
</tr>
<tr>
<td>ECOSOC</td>
<td>Economic and Social Council of the United Nations</td>
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<tr>
<td>ICCPR</td>
<td>International Covenant on Civil and Political Rights</td>
</tr>
<tr>
<td>ICESCR</td>
<td>International Covenant on Economic, Social and Cultural Rights</td>
</tr>
<tr>
<td>ICJ</td>
<td>International Commission of Jurists</td>
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<tr>
<td>I.C.J. Reports</td>
<td>International Court of Justice Reports</td>
</tr>
<tr>
<td>IHRR</td>
<td>International Human Rights Report</td>
</tr>
<tr>
<td>ILM</td>
<td>International Legal Materials</td>
</tr>
<tr>
<td>JHRLP</td>
<td>Journal of Human Rights Law and Practice</td>
</tr>
<tr>
<td>JSC</td>
<td>Justice of the Supreme Court</td>
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<tr>
<td>Nig. J.R.</td>
<td>Nigerian Juridical Review</td>
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<tr>
<td>NLR</td>
<td>Nigeria Law Reports</td>
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<tr>
<td>NWLR</td>
<td>Nigerian Weekly Law Report</td>
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<tr>
<td>OAU</td>
<td>Organisation of African Unity</td>
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<tr>
<td>OAS</td>
<td>Organization of American States</td>
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<tr>
<td>Abbreviation</td>
<td>Description</td>
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<td>--------------</td>
<td>--------------------------------------------------</td>
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<tr>
<td>PCIJ</td>
<td>Permanent Court of International Justice</td>
</tr>
<tr>
<td>Q.B.</td>
<td>Queens Bench</td>
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<tr>
<td>RADIC</td>
<td>Revue Africaine de Droit International et Compare'</td>
</tr>
<tr>
<td>RIAA</td>
<td>Reports of International Arbitral Awards</td>
</tr>
<tr>
<td>SAJHR</td>
<td>South African Journal on Human Rights</td>
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<td>SAYIL</td>
<td>South African Year Book of International Law</td>
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<td>SC</td>
<td>Supreme Court</td>
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<tr>
<td>UDHR</td>
<td>Universal Declaration of Human Rights</td>
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<td>UNTS</td>
<td>United Nations Treaty Series</td>
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<tr>
<td>WLR</td>
<td>Weekly Law Reports</td>
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ACKNOWLEDGMENTS

Among the Igbos of South Eastern Nigeria, it is said that if a man attempts to bury himself, a part of him, either his hand or his leg, must remain exposed. This aphorism underscores the importance of collective endeavours and emphasizes the risk inherent in acting alone. Writing a thesis is like a person burying himself/herself, no one can successfully do it alone. Accordingly, the writing of this thesis would not have been undertaken or completed without the active support of numerous persons who contributed in diverse ways to make the dream of its writing and completion a reality. I am inevitably indebted to more people than I can name here.

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I owe an immeasurable debt of gratitude to my wife, Nkiru, for her love, understanding and support. She cheerfully bore my long absence from home and provided
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The invaluable assistance of the staff of the Law Library made the writing and completion of this thesis possible. Ann Morrison, the Law Librarian, Anne-Marie White, Debbie Ritchie, Carla Gobessi-Lynch and Julie Lavigne, among others, were very helpful and quite understanding in accommodating my numerous requests for assistance. This thesis also benefited immensely from the kind assistance of my good friend, Mr. Tony Brown Ikwueme, who sent me valuable materials from Nigeria, and Ms. Lerato Mashile, Communications Officer, South African Information Centre, Johannesburg, who diligently provided me with helpful information about South Africa. Professor Terence Agbeyegbe, a friend I have never met, supplied me with vital information and materials from the United States. Mr. & Mrs. Victor Mbagwu’s benevolence ensured that I arrived in Halifax in good time to commence my programme.

I benefited immensely from Ikechi Mgbeoji and Obijiofor Aginam who laid their
wealth of experience at my disposal and gave vital hints. My long hours in the Library would have been more torturous but for the friendship and companionship of fellow scholars, Ben Amoyaw and Chioma Ekpo, whose perseverance and hard work inspired courage in me.

My parents, Christopher and Hope Agbakwa, and my uncle Kevin Anyanwu, as well as my sister, Mabel Onwuka (nee Agbakwa), jointly and severally laid the necessary foundations that made the writing of this thesis possible. I owe them much more than I can ever recount.

I need hardly mention that the shortcomings of this work are solely my responsibility.

TO GOD BE ALL THE GLORY
PROLOGUE

“The stone which the builders rejected, the same is ... the head of the corner...”

Matthew 21:42; Mark 12:10; Psalm 118:22
(King James Version of the Holy Bible).

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CHAPTER ONE

INTRODUCTION

The *Universal Declaration of Human Rights* (UDHR) as adopted in 1948\(^1\) contains in one consolidated text the whole range or corpus of human rights. This was borne out of the belief in the universality, indivisibility, interdependence and interrelatedness of all rights. However, in transforming the UDHR’s provisions into legally binding obligations, the United Nations adopted two separate International Covenants,\(^2\) the *International Covenant...* 

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\(^2\) This division of human rights into two main categories was a consequence of a controversial and contested decision made by the UN General Assembly in 1951 during the drafting stages of the International Bill of Human Rights. It was decided that two separate covenants should be prepared, one protecting civil and political rights, and the other economic, social and cultural rights. See Sandra Liebenberg, “The International Covenant on Economic, Social and Cultural Rights and its Implications for South Africa” (1995) 11 *South African Journal on Human Rights* 359 at 361; Asbjorn Eide “Economic, Social and Cultural Rights as Human Rights” in Asbjorn Eide, et al, *Economic, Social and Cultural Rights: A Textbook* (Dordrecht: Martinus Nijhoff, 1995) 21 at 23. The controversy arose as a result of the perceived origins of these rights. Historically, Western political philosophers identified with civil and political rights, while economic, social and cultural rights were viewed as socialist rights. Civil and political rights are traceable to the pronouncements of the American and French Revolutions, while the concept of economic, social and cultural rights is generally assumed to have originated from the Russian Revolution of 1917. See Jason M. Waite, “The United States Supreme Court’s Anomalous Approach to Discriminatory Alienage Classifications: International, Canadian, and Domestic Law Compared” (1997) 11 *Emory Intl. L Rev.* 697 at 704-705 [The article may also be found at <http://www.law.emory.edu/ELIR/volumes/fall97/waite.html> (visited 4:28 PM January 31, 2000). Note: In this thesis, “visited” in Internet citations refers to more permanent materials in web sites, while “Accessed” refers to daily Newspapers and Magazines on the Internet]. See also Louis B. Sohn, “The New International Law: Protection of the Rights of Individuals Rather Than States” (1982) 32 *Am. U. L. Rev.* 1 at 32-33. However, it has been noted that despite the general view in the West towards economic rights, and the perception of the rights as 'socialist' rights, the first announcement of economic rights came in the Constitution of Mexico in 1917. See Johan D. van der Vyver, *Book Review*, (1994) 8 *Emory Intl. L Rev.* 787 at 801. It has been pointed out that “[t]his division has (undeniably) influenced international activities in the field of human rights.” See *Preliminary Report of The New International Economic Order and the Promotion of Human Rights: Realization of Economic, Social and Cultural Rights* MEETING/ITEM at 5, UN Doc. E/CN.4/Sub.2/1989/19, (June 28, 1989)(Mr. Danilo Turk, Special Rapporteur); *Final Report of the New International Economic Order and the Promotion of Human Rights: Realization of Economic, Social and...
on Economic, Social and Cultural Rights\textsuperscript{3} and the International Covenant on Civil and Political Rights\textsuperscript{4} which, taken together constitute the bedrock of the international normative regime of human rights.\textsuperscript{5} The effect of this division on the levels of respect afforded to these different types of rights has been monumental in discourse, enforcement and realization.

Consequently, in the countries of both the North\textsuperscript{6} and the South\textsuperscript{7} as well as on the international and regional scenes, the arena of human rights discourse and practice has been dominated by a hysterical attention to civil and political rights.\textsuperscript{8} Economic, social and


\textsuperscript{6}The North here refers to the industrialized or 'developed' countries.

\textsuperscript{7}The South here refers to the developing countries. For an exposition of the 'North' - 'South' concepts see Ivan L. Head, The Mutual Vulnerability of South and North (Toronto: University of Toronto Press, 1991).

\textsuperscript{8}Mario Gomez, "Social Economic Rights and the Human Rights Commissions" (1995) 17 Human Rights Quarterly 155 at 160 furnishes several reasons hampering the development of a strong global socioeconomic culture. He writes: 'First, the modern human rights discourse has been strongly influenced by traditional natural law ideas; the result is that the focus of the discourse has been curbing the excesses in relation to civil and political liberties. A consequence of this has been that human rights are initially addressed to states. Human rights have become a standard against which state conduct is evaluated. They have been used as a method of challenging state action, especially when questions of liberty have been involved. Secondly, while states, both in the North and the South, have incorporated civil and political rights in their constitutions, few states have similarly incorporated socioeconomic rights either in their constitutions or in domestic legislation. Socioeconomic rights have remained at the level of non-justiciable principles of state policy. See also Asbjorn Eide & Allan Rosas, "Economic, Social and Cultural Rights: A Universal Challenge" in Asbjorn Eide, et al., supra, note 2 at 15.
cultural rights have continued to be neglected and dismissed, and have remained, in the words of one writer, “the poor relation of their civil and political counterparts.”

At its inception, the *African Charter on Human and Peoples’ Rights* took a radical approach by declaring its conviction that “it is henceforth essential to pay a particular attention to development and that civil and political rights cannot be dissociated from economic, social and cultural rights in their conception as well as universality and that the satisfaction of economic, social and cultural rights is a guarantee for the enjoyment of civil and political rights.” One would have thought that such a seemingly radical posture would

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12 See the 8th paragraph of the Preamble to the *African Charter*. See infra, the Appendix, for a reproduction of the *Charter’s* Preamble and provisions on economic, social and cultural rights.
have enhanced the practical implementation and/or enforcement of economic, social and cultural rights in the continent of Africa more than in any other region of the world where such robust commitment and declaration are lacking. To date, such has not been the case. This apparently revolutionary step so far has not advanced the cause of economic, social and cultural rights in Africa.

One of the reasons for this lacklustre performance is the ambivalence of African leaders and scholars. There is the tendency among African leaders to regard the fulfilment of civil and political rights as dependent on the economic and social rights and at the same time contend that their respective countries are too poor to realize the latter. This posture has been construed, rightly or wrongly, as an excuse to justify or rationalize the violation of the civil and political rights.13

On their part, some African scholars also made the claim that the protection of civil and political rights should first await the implementation of economic, social and cultural rights and, in one and the same breath, they upheld the assertion that African states are too poor to realize the economic, social and cultural rights.14 In this way, they maintained the same rhetorical and ambivalent position as the African leadership.15

Furthermore, African human rights scholarship shows a disturbing disproportionality


15See J. Oloka-Onyango, supra, note 10 at 5 where he also observed that “[c]ontemporary African scholarship too, tended to be constricted by the respective ideological blinkers of the east and the west.”
against the economic, social and cultural rights. While the literature dealing with the civil and political rights in Africa is quite considerable, that dealing with economic, social and political rights is quite scanty. Non-governmental organizations (NGOs) in Africa dealing with economic, social and cultural rights are remarkable for their virtual non-existence.

It is thus evident that notwithstanding the lofty ideals of the African Charter in giving prominence to economic, social and cultural rights, these rights have not grown beyond the non-justiciable imprimatur placed on them in almost all domestic constitutions. Economic, social and cultural rights are still regarded as mere aspirations for African countries because of their often asserted “complicated economic circumstances.” The situation has remained unchanged despite the escalation of civil and political strife in Africa, exacerbated by economic and social conditions of existence that have both rendered impossible the realization and enjoyment of the civil and political rights by the vast majority of the population and have cast doubt on the ability of African states to sustain the minimum standards of human rights. This calls for a rethinking of the whole situation in order to lay emphasis where it is due with the hope of realizing the objectives of the innovative African Charter as articulated by the founders. Such a rethinking process requires a thorough examination of the existing situation with respect to observation, enforcement and

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implementation of the economic, social and cultural rights under the *African Charter* by state parties. The aim is to lay bare the prevalent hypocrisy of African states in upholding a *Charter* that purportedly holds the key to integrated and interdependent human rights practice while at the same time practically ignoring the perceived essence of that very *Charter* in their domestic jurisdictions.

It will be shown that integrated human rights practice, as sought to be reflected in the *African Charter*, is indeed in consonance with African culture and that the current practice, (as exemplified in a survey of certain domestic constitutions), of enforcing civil and political rights while ignoring economic, social and cultural rights is antithetical to the "importance traditionally attached to these rights and freedoms in Africa" and projects the image of, in the words of Scott and Macklem, "a truncated humanity." The rethinking process draws attention to the economic, social and cultural rights as the rejected cornerstone on which the realization and enjoyment of human rights in Africa depend. This necessitates fashioning ways to realize economic, social and cultural rights through active enforcement in the spirit of the integrated African way of life without being constricted by Western ideological blinkers.

It is contended that, given the present socioeconomic circumstances of African states, the realization of the economic, social and cultural rights in Africa holds the key to a meaningful enjoyment of all other rights in Africa, and that the realization of these other rights - especially civil and political rights - will remain illusory unless economic, social and

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18See the last paragraph of the preamble to the *African Charter*.

cultural rights are accorded due prominence in practical implementation and effective enforcement. The prevailing situation, as one writer has argued, "demands a more nuanced and critical reconsideration of both national policy and international practice that simultaneously transcends the rhetorical smokescreen erected by African leaders, and directly challenges the traditional ambivalence of the international community."\textsuperscript{20}

Furthermore, this thesis argues that a holistic approach to enforcement is imperative. The traditional view that the enforcement of economic, social and cultural rights depends on development is challenged with the argument that the enforcement of these rights is a prerequisite for the creation of wealth, hence the neglect of their enforcement in itself negates development and is, therefore, self defeating. Factors militating against the realization of economic, social and cultural rights in Africa are also examined.

1.1. Research Objectives

This study seeks to underscore the indispensability of the economic, social and cultural rights under the African Charter by an examination of the prevailing state practice with respect to observation, enforcement and implementation of the economic, social and cultural rights under the African Charter by States Parties. It attempts to expose the mendacity of African states\textsuperscript{21} in adopting a Charter that is allegedly an embodiment of an

\textsuperscript{20} Olokû-Onyango, supra, note 10 at 6-7.

\textsuperscript{21} It should not be supposed, however, that only African states are guilty of marginalizing enforcement of the economic, social and cultural rights. The international community (especially the developed countries) are united in their contemptuous attitude towards the enforcement of economic, social and cultural rights. See the "Final Report on the Question of Impunity of Perpetrators of Human Rights Violations (Economic, Social
integrated and interdependent human rights practice while, at the same, time disregarding, in practice, the perceived essence of the Charter within their domestic jurisdictions. It is aimed at reasserting the relevance of the economic, social and cultural rights under the African Charter as the rejected corner stone of African human rights, which nonetheless holds the key to the Eldorado of African human rights. Also, it strives to highlight the problems or factors hampering the effective protection of these rights and to explore possible ways of overcoming such problems.

1.2. Research Limitations

In a work of this nature it would have been more appropriate to cover the whole of Africa in order to appropriately reflect the general attitude of states with respect to practical implementation or enforcement of economic, social and cultural rights. However, since Africa is a continent - the second largest continent in the world - and not a country, it is difficult to cover the entire spectrum of its diverse socio-political traditions and culture. The complexity of the states, the intimidating cost of research, and the limitations of time and distance, among other reasons, make such an extensive research a virtual impossibility. Consequently, analysis is restricted in most cases to certain states.

It is for this reason that the chapter on implementation / enforcement of the economic,
social and cultural rights under the *African Charter* in domestic jurisdictions (Chapter Four) focuses only on Nigeria and South Africa. Given the constraints of time and resources to conduct a country by country assessment of performance, the examination of governmental efforts towards practical implementation/enforcement is restricted to available legislative, judicial and executive measures.

1.3. Thesis Outline

This thesis is divided into seven chapters. Chapter One, apart from its general introductory nature, discusses the evolution of human rights protection in Africa. The legal framework of these rights under the *African Charter* is also highlighted, thus setting the stage for a proper appreciation of the *Charter* and the thesis.

Chapter Two focuses on the evolution of economic, social and cultural rights in the international human rights system by tracing the evolution of these rights under the United Nations and regional human rights systems. Furthermore, the Chapter compares the place of these rights under the African, European and Inter-American human rights regimes, and stresses the importance of these rights. Essentially, this Chapter locates the African human rights system within the international human rights movement. As such, it underscores the fact that the African system is but a part of the international human rights movement, and therefore, still very much subject to the influences and predilections of the international and regional systems.

The third chapter compares economic, social and cultural rights in traditional and
modern Africa. After defining the concepts, the Chapter discusses these rights in traditional Africa starting with the controversy surrounding the existence of a concept of human rights in traditional Africa. In addition, the nature, substance and protection of these rights in traditional Africa are addressed. A discussion of the fate of these rights in colonial Africa follows, focusing on the impact of colonialism on the protection and enjoyment of these rights as a prelude to discussing the nature and fate of these rights in modern Africa. Provisions of the *African Charter* on economic, social and cultural rights are analyzed and the acute problem of implementation / enforcement facing these rights in modern Africa is discussed. Chapter Three concludes by emphasizing that the indivisibility of rights, in theory and in practice, is the only way to keep faith with the past, considering the importance traditionally attached to these rights and freedoms in Africa. By linking the past with the present, this chapter underscores the fact that even before the *Charter* came into being, economic, social and cultural rights had been protected in Africa. Therefore, to be relevant and meaningful to the people, the old foundation ought to be respected and improved upon in the light of modern realities and not discarded.

Chapter Four is a comparative analysis of the implementation / enforcement of economic, social and cultural rights under the *African Charter* in the domestic jurisdictions of Nigeria and South Africa. The choice of these two states is informed by their different constitutional approaches to economic, social and cultural rights which, to a certain extent, reflect the general attitude to these rights across Africa. This comparison adds to the thesis by actually showing the extent to which the States Parties are living up to their obligations under the *Charter*. 
The prospect of enforcing the economic, social and cultural rights under the newly established African Court of Human Rights forms the focus of Chapter Five and is examined against the backdrop of the euphoria that greeted the establishment of the Court and the belief in some quarters that the Court holds the key to the intractable human rights abuses in Africa. The Chapter examines the existing enforcement machinery under the African Charter and the necessity of establishing a human rights court for Africa. It also traces the genesis of the African Court, analyses its legal framework and the likelihood of its effectivity in the African human rights equation, especially with regard to the enforcement of economic, social and cultural rights under the African Charter.

Chapter Six discusses economic, social and cultural rights as the cornerstone of African human rights movement. The Chapter opens by emphasizing the imperativeness of a holistic approach to human rights enforcement. It then discusses the vexed issue of hinging compliance to human rights enforcement on the level of development, and contends that it is not lack of development or the absence of development, but rather the lack of political will that is responsible for marginalizing the enforcement of these rights. Problems militating against the realization of these rights are brought into focus. The Chapter proposes alternative methods of enforcement in the form of minimum threshold, and integrated approaches to enforcement. They are offered as creative ways to effectuate economic, social and cultural rights even where the domestic constitution precludes the justiciability of these rights. Whereas the integrated approach envisages a system whereby economic, social and cultural rights are enforced by the courts using the instrumentality of civil and political rights and vice versa, the minimum threshold approach emphasizes the realization of the basic
minimum of all rights necessary to achieve the human dignity of all persons without discrimination. The thesis concludes by restating that economic, social and cultural rights are the only means of self defence available to the majority of Africans, hence the need for a rethinking of the present state of marginalized enforcement.

1.4. Evolution of Human Rights Protection in Contemporary Africa

Human rights promotion and protection have, for a long time, been a universally espoused ideal not only in Africa, but also in other parts of the world. Hence, this section is concerned with the evolution of a systematized body of norms geared towards the enjoyment and protection of human rights in the modern sense of the term in the African continent.

Although the atrocities of World War II galvanized unprecedented interest in human rights that culminated in the adoption of the Universal Declaration of Human Rights (UDHR) by the United Nations (UN) in 1948, the birth of the UN in 1945 and the subsequent adoption of the UDHR in 1948 are generally accepted by most scholars as the starting points for any discussion of human rights in contemporary international law. This was followed by regional arrangements with the adoption of the European Convention on

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However, with regard to the African continent, the evolution of human rights protection in Africa can be located in the period even before the 1948 adoption of the UDHR. As oppressed and colonized people, the Africans' struggles against colonization and the subsequent movements for independence which took different forms can all be located within the context of human rights protection. According to Makau wa Mutua, "the stuff of rights animated Africans long before the eruption of (the) spate of Western interest. Struggles against (colonization and ) colonial rule ... form the unbroken chain of the quest for just societies" 25 which started in traditional Africa.

Accordingly, the period of African nationalism and Pan-Africanism 26 has been described as "[t]he starting point for analyzing African human rights ... in contemporary Africa." 27 African resistance to colonial conquest, nationalism and Pan-Africanism 28 were


all movements engaged in the fight against abuses of human rights in Africa and the plundering of Africa's resources by colonial authorities.\textsuperscript{29} These abuses and plundering animated the resolution of the Pan-African Congress of 1915, held in Paris, which resolved, \textit{inter alia}, that "the allied and associated governments [should] establish an international code of laws for the protection of the natives of Africa and that a permanent secretariat in the League of Nations should be established to see to the application of these laws."\textsuperscript{30} They also demanded self-determination for the colonized peoples, holding of lands in trust for the natives, abolition of forced labour, circumspection in the granting of concessions to avoid exhaustion of the natural wealth of the natives, and the right to free education.\textsuperscript{31}

At the London session of the 1921 Pan-African Congress, which has been described as "the most radical of all the Congresses,"\textsuperscript{32} most of the speakers openly criticized aspects of colonial policy. The resolutions passed at the end of the session, which became known as

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\textsuperscript{29}See E.A El-Obaid & K. Appiagyei-Atua, \textit{supra} note 27 at 823. See also Walter Rodney, \textit{How Europe Underdeveloped Africa} (Washington: Howard University Press, 1974). In addition, Umozurike, "\textit{African Charter.}" \textit{supra}, note 16 at 21-22 points out that "[w]hatsoever the administrative philosophy of the colonial power, the aim and result were the same - the maximum exploitation of the human and material resources of the continent and the appropriation of African peoples and territories ...." He further notes that "[f]orced labour was rampant .... No freedoms could be tolerated that challenged colonial domination. The right to self-determination, freedom of speech, freedom of assembly, etc. were cabined within the limits of colonial domination and exploitation. Nationalist leaders ... were jailed for speaking up against colonial denial of rights of self-determination. Political, economic, social and cultural development was thus stultified ... Colonialism encouraged racism, for while the traits and habits of the colonizers were glorified, those of the colonized were denigrated and despised. The destruction or denigration of African religion, culture, language and traditions weakened African roots .... Colonialism denied the basic right of a people to determine their political, economic, and social future. On self-determination rest the other human rights. It follows that colonialism was antithetical to human rights."

\textsuperscript{30}Quoted in J. Ayodele Langley, \textit{supra}, note 26 at 65.

\textsuperscript{31}\textit{Ibid.}

\textsuperscript{32}\textit{Ibid} at 76.
the Declaration To The World or the London Manifesto, \(^{33}\) "were soberly presented but remarkably outspoken in their condemnation of imperialism and racism." \(^{34}\) These movements for freedom, equality and justice continued and gathered momentum. They inspired other movements such as the National Congress of British West Africa and contributed immensely to whetting African desire for a larger share in their own affairs as well as to firing their ever growing quest for freedom and a just society. \(^{35}\)

The zenith of the Pan-African movement was, however, the Fifth Pan-African Congress of 1945 which provided the outlet for African nationalism and brought about the awakening of African political consciousness with its attendant human rights implications. \(^{36}\) The Congress declared its belief that "the struggle for political power by colonial and subject peoples is the first step towards, and the necessary prerequisite to, complete social, economic and political emancipation." \(^{37}\) Part of the Declaration of the Congress read:

> We are determined to be free. We want education. We want the right to earn a decent living; the right to express our thoughts and emotions, to adopt and create forms of beauty. We will fight in every way we can for freedom, democracy, and social betterment. \(^{38}\)

African nationalists were therefore persistent and consistent in their struggle. They

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\(^{33}\) For a full text, see J. Ayodele Langley, Ibid at 375-379.

\(^{34}\) Ibid at 76.


appealed to the colonial authorities and the international community concerning the need to respect the rights of colonized people, just as they made Africans aware of their rights.

Human rights were, as a result, an important basis for the struggle for independence of African states. In their struggles to free themselves from European colonialism, African nationalists brought to the forefront an important right which was missing from the UDHR, that is, the right to self-determination, which entitles all "peoples" to freely determine their political status and freely pursue their economic, social and cultural development.

Notwithstanding the foregoing, human rights protection as it is commonly known in contemporary international law, evolved in Africa well after the independence of most African States. Political independence of African states from colonial rule started in 1957 with Ghana's independence. Some other states followed in the 1960s. By the end of 1970, most African states were independent. To Africa, still under the yoke of colonialism, the 1960s became very essential as the era of self-determination and decolonization. Consequently, at the formation of the Organization of African Unity (OAU) in 1963 the

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41 *Ibid*.

42 *Ibid* at 824. For the right to self-determination see, *ICESCR, supra*, note 3, article 1(1), and *ICCPR, supra*, note 4, article 1(1).


agenda was dominated by decolonization, elimination of racism and the political emancipation of Africa. This does not however mean that the protection of other aspects of human rights received no attention whatsoever.

The Preamble to the OAU Charter mentions the UDHR as containing the principles to which all the state parties affirm their adherence. In the first paragraph of its Preamble, the OAU Charter affirms that it is the “inalienable right of all people to control their own destiny,” while its second paragraph recognizes that “freedom, equality, justice and dignity are essential objectives for the achievement of legitimate aspirations of African peoples.” The OAU’s adherence to the principles articulated in the UDHR has been described as manifesting an “unwavering commitment to the pursuit of human rights at the moment of its creation.”

However, it has been argued that, “[t]he protection of human rights is merely peripheral in the scheme of priorities of the OAU. Conceived of principally as a political organization, whose abiding, if not consuming, preoccupation is the unity of African states, ...the OAU Charter recognizes the protection of human rights only within the context of promoting African unity.” This argument is hardly controvertible and has in fact been justified by massive human rights violations in most African countries, with the OAU

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45 O. Gye-Wado, “The Effectiveness of the Safeguard Machinery for the Enforcement of Human Rights in Africa” (1992) 2 JHRLP 144 at 150

46 Arthur E. Anthony, supra, note 22 at 512

lacking the moral clarity and vision to do anything in that regard.\textsuperscript{48} Noteworthy also is the fact that the OAU itself was largely an association of heads of states and governments whose primary concerns "focus upon self preservation, regime security and the sovereignty and territorial integrity of their states."\textsuperscript{49}

Thus, it has been posited that it was the unspeakable atrocities and sadistic mayhem committed by Jean Bedel Bokassa of Central African Republic, the grotesque massacres of Idi Amin of Uganda, and the insensate and despicable murders of Macias Nguema of Equatorial Guinea,\textsuperscript{50} as well as the horrors of apartheid in South Africa and Namibia that gave additional impetus to the undertaking of initiatives aimed at staving off future human rights violations.\textsuperscript{51} The attempt to articulate a methodology for promoting and protecting human rights in Africa culminated in the adoption of the \textit{African Charter}.

In an effort to improve the human rights situation in Africa, and to establish a formal regional system of human rights, the African Conference on the Rule of Law was held in Lagos, Nigeria, in 1961, under the aegis of the International Commission of Jurists. It attracted about 194 jurists from thirty-two countries - twenty-three of whom were Africans -


\textsuperscript{49} Oluosola Ojo and Amadu Sesay, "The OAU and Human Rights: Prospects for the 1980s and Beyond" (1986) 8 \textit{Human Rights Quarterly} 89 at 92.

\textsuperscript{50} Oluosola Ojo and Amadu Sesay, \textit{Ibid.} at 92 observed that it was the emergence of these three contemporary tyrants on the continent - Idi Amin of Uganda, Francisco Nguema of Equatorial Guinea and Jean Bokassa of Central African Republic - that inevitably compelled the OAU to turn its attention to the serious human rights violations in Africa.

\textsuperscript{51} See Arthur E. Anthony, \textit{supra}, note 22 at 512. See also B. Obinna Okere, \textit{supra}, note 47 at 142.
to consider questions of human rights enforcement in Africa. Although the Conference did not go very far, yet it adopted some conclusions and recommendations under the title "The Law of Lagos," declaring that African states should be committed to constitutionalism, the avoidance of tyranny and the rule of law. The Conference also suggested an African Human Rights Charter with a court to which individuals and groups might have recourse. It thus declared:

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

Many other calls to establish an African regional human rights system followed this initiative of the International Commission of Jurists. Other conferences were organized in 1967 and 1968 by the Francophone African Bar Association in collaboration with the International Commission of Jurists. Also, there were additional conferences such as the United Nations-sponsored study session in Cairo (1969), Addis-Ababa (1971), Dar-es-

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Salaam (1973), Dakar (1978), and Monrovia (1979).55

At the 1978 Dakar conference, a committee established to follow up on the conclusions and recommendations canvassed the support of Francophone heads of state and succeeded in convincing President Sedar Senghor of Senegal56 to present a resolution at the Monrovia summit of African Heads of State in 1979. It was at this summit that the OAU Secretary-General was instructed to set machinery in motion for a draft charter.

The Secretary-General appointed a committee of experts to prepare a draft charter and enjoined them to take cognizance of the “African concept of Human Rights” in drafting the charter. The objective, according to him, was to make the proposed charter distinct from other conventions already adopted in other regions.57 They were instructed to:

(a) Give importance to the principle of non-discrimination;

(b) Lay emphasis on the principles and objectives of the OAU as defined in Article II of the OAU Charter with particular emphasis on respecting the sovereignty and territorial integrity of each state and each state’s inalienable right to independent existence and on reflecting the absolute dedication to the total emancipation of African territories which are still dependent;


56It appears that the African experts who drafted the Charter gave a favourable consideration to the views of President Sedar Senghor of Senegal who advised that: “Europe and America have construed their system of rights and liberties with reference to a common civilization, to respective peoples and some specific aspirations. It is not for us either to copy them or seek originality for originality’s sake. It is for us to manifest both imagination and skill. Those of our traditions that are beautiful and positive may inspire us. You should therefore constantly keep in mind our values and the real needs of Africa.” Quoted in Ankumah, supra, note 52 at 6, quoting O. Ojo, “Understanding Human Rights in Africa,” Paper Presented for the Netherlands Commissions for UNESCO Conference of Human Rights: Individual or Collective Rights (June 1988) at 2.

57See Olusola Ojo and Amadu Sesay, supra, note 49 at 93.
(c) Include peoples’ rights in addition to individual rights;

(d) Determine the duties of each person towards the community in which he lives and more particularly towards the family and the state;

(e) Show that African values and morals still have an important place in our societies; and,

(f) *Give our economic, social and cultural rights the place they deserve.*

Meanwhile, a UN Seminar organized in Monrovia in 1979 had done some preliminary work on what it called ‘Monrovia Proposals for Setting-up an African Commission on Human Rights.’ Relying on the proposals made by the UN Secretariat, Division of Human Rights, in Geneva, a working group set up under Justice E.K. Wiredu of Ghana produced the proposals which were used in part by the Committee appointed by the OAU Secretary-General to produce the Draft Charter.

The OAU ministerial conferences in Dakar (1979) and Banjul (1980 and 1981) discussed the Draft Charter which was approved by the Assembly of Heads of States at its 18th General Assembly meeting held in Nairobi, Kenya on June 27, 1981. This Charter

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60 See Umozurike, “African Charter” supra, note 16 at 26; Ankumah, supra, note 52 at 4-8.

61 Throughout their discussions, emphasis seemed to have been concentrated on ensuring that the final document was distinctly ‘African’ as reflected in some of the amendments made to the original draft, notably, locating and justifying individual rights within the context of group, family and community rights. Thus, they advocated for the inclusion of peoples’ rights. See Report of the Secretary-General, supra, note 58 at 3.

62 Ankumah, supra, note 52 at 7-8.
came to be known as the *African Charter on Human and Peoples' Rights* and it entered into force on October 21, 1986, three months after its ratification by a simple majority of OAU members in accordance with Article 63(3).

Until 1981, the OAU had neither any specific Charter provision nor any constituted body to deal with the rampant cases of human rights violations within member states. This deficiency was also compounded by the principle of non-interference in the internal affairs of member states in the OAU Charter which was constantly invoked as a shield by violators of human rights. Thus, the entry into force of the Charter has been described as marking "the point of departure of African regional human rights system... (and a) no mean achievement in a continent whose history has been punctuated by massive and gross suppression of human rights, a continent sometimes referred to as human rights grave yard."65

With the appalling human rights record imputed to most African states at that time one would have thought that the move to establish a regional human rights machinery would have been a bold internal move anchored on a strong human rights enforcement body. But that was not to be. External influences played a tremendous role in the establishment of the *African Charter* and in the general development of human rights on the African continent.66

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63 See Article 3 of the OAU Charter.

64 Edward Kannyo, *supra*, note 47 at 132.


Apart from the activities of the United Nations on human rights and the pressure of NGOs, especially Amnesty International, which popularized and strengthened the demand for respect and promotion of human rights, some donor countries attached human rights strings to financial aid. More particularly, foreign assistance programmes were linked with human rights records of prospective recipient states.

For instance, President Carter of the United States cut off aid to Uganda and placed an embargo on the importation of Ugandan coffee as a sanction against Idi Amin's violations. This, among other things, drove home the point to most African countries that it was no longer business as usual. They were, thus, put in a position where they had to navigate between the Scylla of financial realities and the Charybdis of human rights imperatives that offered very little manoeuvring space. Thus, caught in the route of a long overdue blazing human rights tornado, African states were roused from their lingering

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67 For instance the United States and some countries of the European Economic Community (EEC).


69 See Olusola Ojo and Amadu Sesay, supra, note 49 at 92.

70 See Umozurike, “African Charter” supra, note 16 at 28; Olusola Ojo and Amadu Sesay, Ibid. at 92.

71 With dictatorial regimes (military and civilian) whose abiding, if not consuming, preoccupation was to douse the fires of legitimacy crisis, both at home and abroad, dotting African political landscape at that time, the adoption of a human rights charter was seen as a way of stemming off the criticisms (at least from abroad) and ensure the continued inflow of the much needed aids. Consequently, a balance was struck in adopting a Charter with flabby enforcement machinery, thus appearing compliant to outside ‘friends’ while telling the ‘enemies’ inside that the only way out is to conform or perish. It was therefore no surprise that when the Charter actually came into being, it came as a weakling, without any strong enforcement body. The only enforcement or rather supervisory body was the African Commission on Human and Peoples’ Rights. Without an effective enforcement body, the African Charter and the African human rights system became no more than a toothless bulldog - all bark, but no bite.
somnambulant inertia to adopt a charter that turned out to be unique not only in its, though hardly surprising, emphasis on economic, social and cultural rights,\textsuperscript{72} but also in the imposition of duties on the individual and in the provision of peoples rights. The following brief description of the structure of the \textit{Charter} is necessary in order to highlight its various components.

1.5. \textbf{Framework of the African Charter}

The \textit{African Charter} is divided into three parts in addition to its eleven paragraph preamble. Part I which deals with rights and duties has two chapters. The first chapter sets out the human and peoples' rights protected under the \textit{Charter}: Articles 1-14 relate to the civil and political rights while Articles 15-17 deal with economic, social and cultural rights.\textsuperscript{73} Family rights and prohibition of discrimination against women are provided for in Article 18. Rights of 'peoples' are delineated in Articles 19-26. The second chapter of Part I (made up of Articles 27-29) sets out the duties of the individual towards his/her family and society, the state, other legally recognized communities and the international community.

Part II of the \textit{Charter}, dealing with the measures of safeguard for the rights set out in Part I, is made up of four chapters. The first chapter (Articles 30-44) establishes the African Commission on Human and Peoples' Rights and outlines the structure of the

\textsuperscript{72}See Carol M. Tucker, \textit{supra}, note 17 at 161.

\textsuperscript{73}Economic, social and cultural rights covered in the \textit{Charter} include right to work (Article 15), right to health (16), right to education (Article 17(1), and right to freely take part in the cultural life of the community (Article 17(2)).
Commission in detail. Chapter II with only one article (Article 45) elaborates the functions of the Commission, while the procedure of the Commission is dealt with in Chapter III (Articles 46-59). Applicable principles by which the Commission will secure the protection of human rights in Africa are outlined in Chapter IV which is comprised of Articles 60-63.

Lastly, Part III containing Articles 64-68 deals with the general provisions concerning the commencement of the Charter and the Commission, special protocols, and the amendment of the Charter. With these detailed and largely peculiar provisions of the African Charter, Africa grandiosely announced its appearance on the international human rights centre stage, with a definite step on the divisive and polarized, not to say, extremely ideologized murky swamp of (international) economic, social and cultural rights.

\footnote{There is a further division of Chapter III into articles dealing exclusively with communications from states (Articles 47-54) and those dealing with other communications, such as individuals and NGO communications (Articles 55-59).}
CHAPTER TWO

EVOLUTION OF ECONOMIC, SOCIAL AND CULTURAL RIGHTS IN THE
INTERNATIONAL HUMAN RIGHTS SYSTEM

2.1. Introduction

The historical origins of the recognition of economic, social and cultural rights are diffuse. These rights appeared to have found acceptance at the international level well before civil and political rights.¹ They have drawn inspiration, for instance, from the injunctions reflected in various religious traditions to care for the needy and for those who cannot look after themselves. Virtually all of the major religions manifest concerns in different ways for the poor and the oppressed.² There are also other philosophical sources which include analyses as diverse as those of Thomas Paine, Karl Max, Immanuel Kant and John Rawls. Scholars also point to the political programmes of the nineteenth century Fabian socialists in Britain, and to Chancellor Bismark of Germany’s introduction of social insurance schemes in the 1880s.³

The later part of the nineteenth century witnessed increased recognition of the importance of international cooperation and coordination in the improvement of working


conditions at the national level. In 1890, Germany convened the first conference to adopt international agreements in this field. Recommendations adopted at the conference did not, however, receive much follow-up. Also, the Swiss government convened conferences in Bern in 1905 and 1906 which adopted the first conventions in this field. The conferences followed the preparatory work of the International Association for the Legal Protection of Workers which was founded by a group of scholars and administrators. Even though these efforts were temporarily brought to a halt by the political turmoil in Europe leading to World War I, they were renewed with a much stronger impetus with the establishment of the International Labour Organization (ILO) in 1919, aimed at abolishing the 'injustice and privation' which workers suffered and to guarantee 'fair and humane conditions of labour.'

Prior to the Treaty of Versailles of 1919 under which the ILO was established, there was already an impressive list of economic, social and cultural rights in the 1917 Constitution of Mexico. There were also other constitutional precedents such as the first and subsequent Soviet Constitution(s), and the 1919 Constitution of the Weimar Republic. Thus, it has been asserted that the ILO was "conceived as the response of Western countries to

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4 Ashbjorn Eide, supra, note 1 at 28.

5 Ibid.


8 Ibid.
ideologies of Bolshevism and socialism arising out of the Russian Revolution."

Also, in his annual State of the Union Address to Congress in 1941, President Franklin Roosevelt made a significant contribution towards the unfolding economic, social and cultural rights by alluding to "freedom from want" as one component of the four freedoms which must be pursued. Then, in his State of the Union message of 1944, he elaborated on the theme and articulated an impressive list of rights that clearly belong to this set of rights. His pronouncements no doubt influenced the inclusion of socioeconomic rights in the UDHR of 1948 which extended the human rights platform to embrace the whole field - civil, political, economic, social and cultural. Subsequent to that, economic, social and cultural rights received special treatment in the Constitution of India of 1947 as matters of 'state policy.'

The emergence of the economic, social and cultural rights as rights in the international human rights system has been steeped in the controversy over the appropriate conception of human rights which emerged very early in the discussions for the creation the United Nations. The disagreement was, however, not confronted until the UN Commission

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9Virginia Leary, supra, note 6 at 582.


11The rights mentioned include: the right to a useful and remunerative job; the right to earn enough to provide adequate food, clothing, and recreation; the right of every farmer to raise and sell his products; the right of every businessman to trade in an atmosphere of freedom from unfair competition and domination by monopolies; the right of every family to a decent home; the right to adequate medical care; the right to protection from the economic fears of old age, sickness, accident, and unemployment; and the right to good education.

12Johan D. van der Vyver, supra, note 7 at 802.
for Human Rights convened in 1949. What followed was reflective of the ideological and socioeconomic standpoint of each group - whether socialist, capitalist "developed" or developing countries.

Even though the UN official position which dates back to the UDHR and has since been reaffirmed in innumerable resolutions is that 'all rights are universal, indivisible and interdependent and interrelated', this "formal consensus masks a deep and enduring disagreement over the proper status of economic, social and cultural rights." The impact of this apparent lack of unanimity on the status of economic, social and cultural rights has been mammoth, divisive and distracting.

This chapter recasts the debate surrounding the proper status of these rights. It shows how the evolution and development of economic, social and cultural rights in the international human rights system have been a hostage of ideological wrangling between the East and the West. While various arguments have been canvassed to justify the inferior status of this category of rights to the civil and political rights, the veracity and cogency of these

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15Henry J. Steiner and Philip Alston, supra, note 3 at 256.
arguments will be tested in the light of the real nature and relevance of these rights.

The evolution of economic, social and cultural rights in the regional system is indubitability symptomatic, and in fact a replication, of the ideological altercations which have been the bane of these rights in the international arena. It depicts the ideological standpoints of the various regions and their different perceptions of these rights which is manifested in the relevance accorded to the economic, social and cultural rights in the various regional human rights instruments. Four regional instruments - African, European, Inter-American and Middle East systems - are juxtaposed to draw out the relevance accorded to economic, social and cultural rights in these regional instruments. Additionally, the importance of economic, social and cultural rights to the actualization of the ideals of the international human rights system, and the realization of the dignity of the human person that actuated the human rights movement in its entirety are stressed.

2.2. ECONOMIC, SOCIAL AND CULTURAL RIGHTS UNDER THE UNITED NATIONS

The United Nations Charter,\(^{16}\) which entered into force on 24 October 1945, established as one of the purposes of the United Nations and its members the promotion of "universal respect for, and observance of, human rights and fundamental freedoms for all

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without distinction...." 17 The Economic and Social Council was set up as the Charter body with the primary responsibility for the promotion of these human rights and obligations. 18 In 1946 the Economic and Social Council established the United Nations Commission on Human Rights whose first assignment was to draft an International Bill of Rights, comprising a declaration and a multilateral treaty. 19

The Commission on Human Rights' first major achievement was to draft the UDHR which was adopted by the General Assembly in 1948. 20 The UDHR integrates rights classified as civil and political as well as economic, social and cultural rights. 21 Having accomplished that, the UN Commission on human rights shifted emphasis to the drafting of an international convention which would give legal force to a general range of human rights and provide a mechanism for supervision. The entire exercise was to be enmeshed in a contumacious controversy which finally saw the emergence of, not one but, two international covenants. As one writer rightly observed, "[i]deological differences between East and West made it impossible to produce a single treaty giving legal effect to the Universal

17 Article 55(c) read together with Article 56, the preamble and Article 1(3) of the UN Charter. See Marc Bossuyt, "International Human Rights Systems: Strengths and Weaknesses" in Kathleen E. Mahoney and Paul Mahoney, Human Rights in the Twenty-First Century: A Global Challenge (Dordrecht: Martinus Nijhoff, 1993) 47.


20 UN General Assembly Resolution 217A(III) of 10 December 1948, UN Doc A/811.

Consequently, the UN Commission split on the question of whether there should be one or two covenants. The polarization within the Commission set the stage for the birth of the non-identical twin covenants - one loved and favoured, and the other spurned and deprived.

2.2.1. Birth of the Deprived Child

Following the division that arose within the UN Commission on Human Rights as to whether there should be one or two covenants, the UN General Assembly adopted a resolution in 1950 emphasizing the interdependence of all categories of human rights and called on the Commission to adopt a single convention. The decision did not go down well with the Western states led by the United States who felt it was a triumph of socialist ideology and doctrine over the Western liberal conception of rights. Thus, the debate was a casualty of the then engraging and ferocious Cold War.

The socialist states argued that human rights should express a “new bright future for

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22 John Dugard, *supra*, note 19 at 174. See also Shadrack B. O. Gutto, “Beyond Justiciability: Challenges of Implementing/Enforcing Socio-Economic Rights in South Africa” (1998) 4 *Buffalo Human Rights Law Review* 79 at 86-87 which states that “[t]he bipolar ideological divisions within the United Nations that intensified after 1948, the year of the adoption of the Universal Declaration, culminated in the adoption of two instruments on human rights and freedoms, civil and political, and economic, social and cultural, with different implementation/enforcement mechanisms and institutional arrangements at the UN level.”

23 General Assembly Resolution 421 (V) of 4 December 1950.

24 See Tony Evans, *supra*, note 13 at 8.

the individual in the vast field of social rights," not one that paralleled the French Declaration of the Rights of Man and the Citizen, which, it was argued, represented a reactionary attempt to legitimate outdated, middle class, bourgeois values. At this extreme lies the view that the economic, social and cultural rights are superior to civil and political rights 'both in terms of an appropriate value hierarchy and in chronological terms.' The socialist states were joined by a small group of less developed states which supported a view of human rights that included economic, social and cultural rights.

On the part of the Western states, mirroring the views of Western political philosophers and their liberal conception of rights, it was argued that economic, social and cultural rights do not constitute rights (as properly understood) at all and that treating them as rights would inevitably undermine the enjoyment of individual freedom, justify large-scale state interventionism and would provide an excuse to downgrade the importance of civil and political rights. The nature of these rights, it was argued, justifies the creation of legal obligations of a different nature and a different system of supervision from the civil and political rights.

It seems that the mutual fear and suspicion existing between the different ideological camps for the most part, dogged the consensus to establish one covenant. In this regard, the


28 See Tony Evans, supra, note 13 at 8-9.

29 Henry J. Steiner and Philip Alston, supra, note 3 at 256.
socialist states were perceived to be totally against the liberal conception of rights because of their dictatorial tendencies and the repressive nature of their governments. Thus, their staunch stand for economic, social and cultural rights was seen as an excuse to suppress civil and political rights. Already, the suppression of basic civil and political rights in pursuit of economic, social and cultural rights in the USSR and other communist states appeared to be a veritable example which put the Western states on notice. The USSR's insistence on assigning priority (instead of equality) to economic, social and cultural rights over civil and political rights worked against the adoption of one covenant since it was seen as a ploy to foster communist ideology. That drew the ire of Western States who apparently had the upper hand in the negotiations and who were prepared to go to any lengths to checkmate the further spread of the communist virus. These ideological differences meant that it was impossible to agree upon a single document to protect the various rights.\textsuperscript{30}

However, scholars have argued that what led to the ultimate decision to adopt two separate covenants, and the eventual emasculation of the economic, social and cultural rights, was the tremendous hegemonic influence wielded by the United States over the entire process and the need to satisfy domestic pressures from the conservatives and the isolationists within the United States.\textsuperscript{31} Thus it has been opined that "[i]n the face of the alternative conceptions of rights offered by the socialist and less developed states, the US


found it increasingly difficult to sustain domestic support for full engagement in the human rights debate."32 In particular, the "so-called economic and social rights ... were targeted by American conservatives and isolationists as the greatest potential threat to the Constitution."33 These groups (conservatives and isolationists) saw negotiations on the international covenants as promising socialism by treaty and a destruction of the 'American Way.'34 This 'socialism by treaty' was particularly viewed with overt suspicion because of its perceived potential to extend the conception of universal human rights to oblige the abandoning of "existing social practices - for example, racist and segregationist policies such as those thriving in the southern states of the USA"35 at that time.

Consequently, any proposal to include economic, social and cultural rights in a binding agreement was seen as "an attempt to ensnare the United States into a complex international legal system that sought to penetrate, influence and finally bring down the traditional social and political freedoms for which America stood."36 Thus, for any process to receive the support of the United States, which was nearly indispensable at that time, it

32 Tony Evans, Ibid. at 9.


35 Tony Evans, supra, note 13 at 8. A fact that should not be overlooked is that the aversion towards giving concrete legal relevance to economic, social and cultural rights was rooted in the fear and suspicion that taking those rights seriously would imply a commitment to social integration, solidarity and equality, including tackling the question of income distribution. This, no doubt, placed the rights in direct confrontation with the, yet to be rested, bludgeoning arms of racism and the then officially oiled segregationist policies and practices.

must conform to the United States' constitutional model and vision of rights. It was, therefore, the apparent inability of the proposed international covenant to meet this constitutional model and vision that made the division inevitable and the setting aside of the General Assembly resolution for one unified covenant inescapable.

Accordingly, as a result of the domineering influence and seemingly indispensability of the United States, and under the overarching pressure of the Western-dominated UN Commission on Human Rights, the General Assembly regretfully reversed its earlier decision and decided that two separate Covenants should be prepared, the one predominantly protecting civil and political rights, and the other economic, social and cultural rights. Also, it was decided that the Covenants should contain 'as many similar provisions as possible' and to be approved and opened for signature simultaneously, in order to emphasize the unity of purpose. Drafting work on both Covenants was completed in 1966 when they were adopted by the General Assembly by its resolution 2200 A (XXI) of 16 December 1966. They entered into force only in 1976, after receiving the required thirty-fifth

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37 It has been argued that the influence of American constitutional rights on international human rights norms highlights more than just similarities. Thus, an analysis of this influence makes clear not only the similarities with the civil and political rights, but also the division that has occurred "between American and international norms in the area of economic and social rights." See Jason Waite, supra, note 31 at 704.


39 UN General Assembly Resolution 545 (VI) of 5 February 1952. See Henry J. Steiner and Philip Alston, supra, note 3 at 261; Sandra Liebenberg, Ibid.

ratification.41

It has been contended that the "US opposition did not signify the rejection of economic and social rights per se."42 In support of this contention, reference is made to President Roosevelt's nomination in 1941 of 'freedom from want' as one of the four freedoms that should characterize the future world order.43 Weighty as this might be, it is merely indicative of the inseparability and indivisibility of all rights rather than constituting a positive proof of United States' acceptance of the economic and social rights. This is further reflected in what one writer regards as:

"... the adamant refusal of the United States to view social and economic rights as human rights, let alone justiciable, in negotiations surrounding new human rights treaties and on votes on United Nations' resolutions."44

Even though the end of the Cold War appears to have formally brought to a close, if not driven underground, the ideological struggle over human rights, it has not in any way emancipated the economic, social and political rights from their state of deprivation. Rather, it has been seen as the triumph of Western liberal conception of rights over the socialist

41See John Dugard, supra, note 19 at 174; Sandra Liebenberg, supra, note 18 at 361. The International Covenant on Economic, Social and Cultural Rights entered into force on January 3, 1976, three months after the date of deposit with the UN Secretary-General of the thirty-fifth instrument of ratification or accession, as provided in Article 27. On its own, the International Covenant on Civil and Political Rights entered into force on March 23, 1976, three months after the date of deposit with the Secretary-General of the thirty-fifth instrument of ratification or accession, as provided in Article 49.

42Henry J. Steiner and Philip Alston, supra, note 3 at 258.

43See Franklin Delano Roosevelt, supra, note 10 at 173.

conception, and, by extension, a reassertion of the supremacy of the civil and political rights over the economic, social and cultural rights.⁴⁵ These historical forces which shaped the birth/evolution of economic, social and cultural rights have continued to retard their maturity into adulthood. While economic, social and cultural rights are helplessly nurtured with the ‘feeding bottle’ of international bureaucratic gibberish and ambivalence, their more favoured siblings, civil and political rights, have not only triumphantly passed the stage of adolescence but have become full-blown adults and the unwitting acolytes of the hegemonic forces of the North.

2.2.2. Indivisibility and Interdependence of Rights

The concepts of interdependence and indivisibility of human rights have remained a much valued commodity in international human rights discourse, but, more easily embraced than implemented. At the UN level, interdependence and indivisibility of rights have become more of a slogan which merely inspires platitudeous articulations. Yet, the reality of human rights protection in the contemporary world remains that one person’s platitude holds the key to another person’s protection and dignity. This holds true not only for African human rights, but also for human rights in the international system, hence the continued relevance of these concepts in international human rights discourse.

The principle of indivisibility of rights holds that a strict distinction among all

⁴⁵Tony Evans, supra, note 13 at 11 states that “[s]ymbolic of this superiority is the USA’s ratification of the International Covenant on Civil and Political Rights (ICCPR) [only], following years of procrastination, and its continued refusal to sign the International Covenant on Economic, Social and Cultural Rights.”
classifications of rights, whatever its touted theoretical relevance, is not possible in practice. Since the essence of human rights is the respect for human dignity, the notion of indivisibility presupposes that the totality of what it takes to be human and lead a meaningful life should be protected and upheld through the medium of equally potent enforcement mechanisms.

Similarly, the principle of interdependence of all human rights holds that “the full and meaningful enjoyment of a particular right is dependent on the possession of all other rights.” It thus opposes the fragmentation of human rights, as well as the horizontal subdivision of rights according to their (supposedly) distinct levels of importance. Viewed from this angle, interdependence encompasses, if not transcends, the notion of indivisibility of rights.

The principle of interdependence also presupposes that human rights are mutually reinforcing and mutually dependent. Craig Scott aptly explains it thus:

Interdependence suggests a mutual reinforcement of rights, so that they are more valuable together, as a complete package, than a simple summation of individual rights would suggest; for example, having civil and political rights but not economic, and social rights is not “half a loaf” but

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47 Johan D. van der Vyver, supra, note 7 at 800.

48 Ibid at 798-799.

49 Ibid.

50 Craig Scott, “The Interdependence and Permeability of Human Rights Norms: Towards a Partial Fusion of the International Human Rights” (1989) 27 Osgoode Hall Law Journal 769 at 779 has noted that “[w]hile it might appear that ‘indivisible’ and ‘interdependent’ must have distinct meanings, an overview of the relevant General Assembly resolutions warns against trying too much semantics.”
Underlying the primacy given to civil and political rights, and the apparent neglect of the economic, social and cultural rights is the assumption that the former group of rights is more important than the latter. A distinction between the former and the latter is usually based on the nature of interests they aim to protect. But, as Pierre De Vos points out, "[a]ll rights are aimed at guaranteeing each individual the freedom to live his or her life with dignity and respect." This underlying philosophy has underpinned many UN resolutions, and official pronouncements dating back to the *Universal Declaration*. It was reaffirmed in General Assembly resolution 421(V) of 4 December 1950, and also formed the basis of inserting a common paragraph in both the *International Covenant on Civil and Political Rights* and the *International Covenant on Economic, Social and Cultural Rights* affirming the indivisibility and interdependence of human rights. Both Covenants, in accordance with the UDHR, respectively declare in paragraph 3 of their Preamble that:

> [T]he ideal of free human beings enjoying freedom from fear and want can only be achieved if conditions are created whereby everyone may enjoy his [her] economic, social and cultural rights, as well as his [her] civil and political rights.\(^{54}\)

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\(^{51}\)Ibid. at 783

\(^{52}\)Asbjorn Eide, *supra*, note 1 at 23 observes, with a benefit of hindsight, that "many of the assumptions have been overstated or mistaken."

\(^{53}\)Pierre De Vos, *supra*, note 38 at 70.

\(^{54}\) *International Covenant on Economic, Social and Cultural Rights*, 993 U.N.T.S. 3, paragraph 3 of the Preamble; *International Covenant on Civil and Political Rights*, 999 U.N.T.S. 171, paragraph 3 of the preamble. Henry J. Steiner and Philip Alston, *supra*, note 3 at 263 point out that "[t]he interdependence principle (in the preamble to the Covenants) was accepted as a necessary political compromise between the two principal competing visions. But it also reflects the fact that the two sets of rights can neither logically nor practically be separated in entirely watertight compartments." See also Vladimir Kartashkin, "Economic, Social and Cultural Rights" in Karel Vasak, (ed.) *The International Dimensions of Human Rights*, vol.1 (Westport:
Ever since the adoption of these Covenants, the principle of indivisibility, interdependence and universality of rights have resonated in many UN human rights fora and declarations. Thus in Article 13 of *The Proclamation of Tehran, 1968*, delegates to the International Conference on Human Rights, reemphasizing the interdependence and indivisibility of human rights, proclaimed that:

> Since human rights and fundamental freedoms are indivisible, the full realization of civil and political rights without the enjoyment of economic, social and cultural rights is impossible.\(^{55}\)

Supporting the validity of these principles was a main element of the agenda at the World Conference on Human Rights in Vienna in June of 1993. The Declaration and Programme of Action adopted at Vienna states:

> All human rights are universal, indivisible and interdependent and interrelated. The international community must treat human rights globally in a fair and equal manner, on the same footing, and with the same emphasis...\(^{56}\)

Prior to Vienna, a group of distinguished experts on international law convened to consider the nature and scope of the obligations of state parties to the *International Covenant on Economic, Social and Cultural Rights* adopted the *Limburg Principles on the*

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Implementation of the International Covenant on Economic, Social and Cultural Rights.\textsuperscript{57}

Principles 2 and 3 emphasize that economic, social and cultural rights are indivisible part of international law and should therefore be accorded the same promotion and protection as civil and political rights.\textsuperscript{58} In particular, Principle 3 affirms:

As human rights and fundamental freedoms are indivisible and interdependent, equal attention and urgent consideration should be given to the implementation, promotion and protection of both civil and political, and economic, social and cultural rights.\textsuperscript{59}

Apparent in these eloquent declarations is the emergence of an international

\textsuperscript{57}See The Limburg Principles on the Implementation of the International Covenant on Economic, Social and Cultural Rights, adopted 8 January 1987, UN. ESCOR, Commission on Human Rights, 43\textsuperscript{rd} Session, Agenda Item 8, UN. Doc. E/CN.4/1987/17/Annex (1987). Reprinted in (1987) 9 Human Rights Quarterly 122-135, [hereinafter “Limburg Principles”]. A group of distinguished experts in international law, convened by the International Commission of Jurists, the Faculty of Law of the University of Limburg (Maastricht, the Netherlands), and the Urban Morgan Institute for Human Rights, University of Cincinnati (Ohio, United States), met in Maastricht on 2-6 June 1986 to consider the nature and scope of the obligations of state parties to the ICESCR, the consideration of States Parties’ reports by the then newly constituted ECOSOC Committee on Economic, Social and Cultural Rights, and international cooperation under Part IV of the Covenant. The participants agreed unanimously upon the principles which they believe reflect the present state of international law. For the background paper which served as the framework for the discussions on the Limburg Principles, see Philip Alston and 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. [hereinafter “The Nature and Scope of States Parties’ Obligations”] The Limburg Principles have been described as constituting the first effort to substantiate the meaning of violations of economic, social and cultural rights. See Victor Dankwa, et al., “Commentary on the Maastricht Guidelines,” supra, note 14 at 712.

\textsuperscript{58}See E.V.O. Dankwa and Cees Flinterman, “Commentary by the Rapporteurs on the Nature and Scope of State Parties’ Obligations” (1987) 9 Human Rights Quarterly 136 at 137 [hereinafter “Commentary by the Rapporteurs”].

\textsuperscript{59}The Limburg Principles, supra, note 57 at 123. On the occasion of the tenth anniversary of the Limburg Principles, a group of more than 30 experts met in Maastricht from 22-26 January 1997. The objective of the meeting was to elaborate on the Limburg Principles as regards the nature and scope of violations of economic, social and cultural rights and appropriate responses and remedies. The participants unanimously agreed on what became known as The Maastricht Guidelines on Violations of Economic, Social and Cultural Rights. Reprinted in (1998) 20 Human Rights Quarterly 691-705. The 4\textsuperscript{th} guideline states as follows: “It is now undisputed that all human rights are indivisible, interdependent, interrelated and of equal importance for human dignity. Therefore, states are as responsible for violations of economic, social and cultural rights as they are for violations of civil and political rights.” See generally Victor Dankwa, et al., “Commentary on the Maastricht Guidelines,” supra, note 14 at 711.
consensus that economic, social and cultural rights should enjoy the same level of attention and protection as civil and political rights.\textsuperscript{60} This, in effect, is a recognition of the futility inherent in protecting one set of rights, at the expense, and/or to the total neglect, of the others. These frequent affirmations of the indivisibility and interdependence of human rights preclude any attachment of greater priority to one category of rights and underscore the absolute inevitability of a unified approach to human rights protection. This is further reinforced by the apparent impossibility and downright impotency of any definitive distinction or division of rights on the basis of the various interests they are designed to protect.\textsuperscript{61}

Tragically, as Audrey Chapman points out, "[d]espite a rhetorical commitment to the indivisibility and interdependence of human rights, the international community, including the international human rights movement, has treated civil and political rights as more significant and has consistently neglected economic, social and cultural rights."\textsuperscript{62}

Consequently, in the debates particularly under the item "violations of human rights," at the

\textsuperscript{60}See Sandra Liebenberg, \textit{supra}, note 18 at 363.


Commission on Human Rights and the Sub-Commission on Prevention of Discrimination and Protection of Minorities, most accusations of serious human rights violations, often made by Western-based human rights NGOs are related to civil and political rights. The pleas made by delegates or experts coming from the developing world to focus more on the tragic situations of violations of basic economic, social and cultural rights are largely ignored.63

Rather than a negation of the validity of the indivisibility and interdependence of rights, this seemingly fierce commitment to rhetoric and hypocrisy is merely indicative of the fact that the hegemonic and manipulative forces which undermined the adoption of a single Covenant still hold great sway. This has made one scholar disconsolately assert that "there is no reason to believe that those diverse forces which have hitherto been content to neglect economic, social and cultural rights will change their attitudes overnight."64

While the above noted hypocrisy continues to offer credible evidence of the possibility of virtue,65 the irrepressible truth, whose immortal signpost is the UDHR, in addition to all other relevant declarations, remains that "human rights constitute an indivisible whole reflecting the unity and uniqueness of the human being."66

63 Yozo Yokota, supra, note 38 at 205.


66 El Hadji Guisse, supra, note 61 at paragraph 11. See also Alwine A. de van Steenwijk, “The Poorest Teach Us the Indivisibility of Human Rights” in Yael Danieli, et al., The Universal Declaration of Human Rights: Fifty Years and Beyond (New York: Baywood Publishing Co., 1999) 411 at 413. The writer stresses the interdependence that exists between liberties, civil and political rights, and economic, social and cultural ones, and trenchantly asserts that “[w]ithout basic security, liberty is jeopardized. At the same time, when liberties are not exercised, basic security is not guaranteed.”
pointed out in 1944, in his State of the Union Address, while advocating the adoption of an ‘Economic Bill of Rights,’ “true individual freedom cannot exist without economic security and independence. ‘Necessitous men are not free men.’ .... In our day these economic truths have become accepted as self evident.” These 1944 ‘self evident’ ‘economic truths’ remain patently so.

2.2.3. Nature of Economic, Social and Cultural Rights: Assumptions and Misconceptions

The continued marginalization of economic, social and cultural rights has been generously encrusted with certain misconceptions and some, not well founded, overstated or mistaken assumptions. In the main, these misconceptions and assumptions served as the tool with which the death knell of a unified and enforceable covenant were sounded. Ever since, they have remained hallowed instruments in the hands of those fervently committed to scuttling the emergence of any possible basis for a truly fair world economic order where economic, social and cultural rights would have a chance of being realized. Most of these misconceptions are the offsprings of the, now triumphant and rampaging, Western Liberal conception of human rights.

Indubitably, these misconceptions and facile assumptions have served as platforms for questioning, and sometimes for outright denial of the legality and legitimacy of

\[^{67}\text{Franklin Delano Roosevelt, supra, note 10 at 173-174. In 1941 President Roosevelt had nominated 'freedom from want' as one of the four freedoms that should characterize the future world order. The President defined freedom from want as "economic understandings which will secure to every nation a healthy peacetime life for its inhabitants everywhere in the world." See Frank Newman & David Weissbrodt, International Human Rights: Law, Policy, and Process (Cincinnati: Anderson Publishing Co., 1990) at 361-363. See also Johan D. van der Vyver, supra, note 7 at 801.}\]
economic, social and cultural rights. In their extreme forms, either the position is taken which expressly denies a legal binding character to economic, social and cultural rights, or these rights are alleged to so differ from civil and political rights in such fundamental respects as to make the conclusion that economic, social and cultural rights are inferior from a legal point of view largely inescapable. A methodology often adopted is to unduly exaggerate the alleged differences in nature and implications between these rights.

This section examines some of the differences often prejudicially attributed to the nature of economic, social and cultural rights and discusses some widely held assumptions and misconceptions. It challenges the assumptions and confutes the misconceptions with the aim of unmasking the real nature and relevance of economic, social and cultural rights in contemporary international human rights discourse and practice.

2.2.3.1. Positivity versus Negativity

The more frequently touted difference and, in fact, the most common assumption and/or misconception, is that civil and political rights involve negative rights or duties, or

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69 The chief proponents of this view are E W Vierdag, "The Legal Nature of the Rights Granted by the International Covenant on Economic, Social and Cultural Rights," (1978) 9 Netherlands Journal of International Law 103; Marc Bossuyt, "La distinction entre les droits civils et politiques et les droits économiques, sociaux et culturels" (1975) 8 Human Rights Journal 783, cited in Van Hoof, Ibid. (arguing that civil and political rights require non-interference on the part of the state, whereas the implementation of economic, social and cultural rights require active intervention by the state); and M Cranston What are Human Rights? (1973) cited in Nicholas Haysom "Constitutionalism, Majoritarian Democracy and Socio-Economic Rights" (1992) 8 SAJHR 451. See also John Dugard, supra, note 19 at 177.
as Hohfeld would describe them, liberties against which other parties with the polity (society) have no claim. Thus should A have a right to freedom of speech the balance of society has ‘no right’ against A and he/she can express his/her views freely and fully without hindrance. Accordingly, civil and political rights are characterized as negative in that they supposedly require only governments’ abstention from activities that would violate them. By placing negative obligations on the state not to interfere with the freedom and integrity of the individual, their implementation is said to be free or at least inexpensive because they merely require the state to refrain from acting.

On the other hand, economic, social and cultural rights are said to be positive rights which impose duties on states to provide certain resources. Or, put differently, require ‘positive governmental action’ as well as ‘active intervention on the part of government and [therefore] cannot be realized without such intervention.’ Once a positive duty is imposed on a party, it is argued, the nature of the right becomes conceptually different.

Scholars have found this rigid distinction difficult to uphold. Van Hoof maintains that

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73 See Pierre De Vos, *supra*, note 38 at 69.

74 Jason M. Waite, *supra*, note 31 at 705.


"[t]here are well-known examples of civil and political rights which in fact demand active intervention on the part of the state, such as the right to fair trial." In relation to resource availability, especially to developing countries, he submits that the expenditure involved in, for instance, the holding of free and secret ballot elections or the setting up of adequate judiciary and legal aid systems may be quite considerable.

Echoing Henry Shue, Donnelly has argued that virtually all human rights are both 'negative' and 'positive', entailing ('negative') duties to forebear and ('positive') duties to protect and to aid - although there may be no single duty-bearer who stands under all three types of obligation. This is especially evident when the varying actions which, depending on circumstances, may be required to discharge the obligation of the duty-bearer or guarantee the enjoyment of the right by the right holder are considered in extenso. Thus, "whether a particular right, as held by a particular person, is positive or negative depends, at least, as much on circumstances as on essential character of the right." This makes the negative-positive distinction uncharacteristic of rights per se, but of particular rights in real

77 G J H Van Hoof, supra, note 68 at 97.
78 Ibid.
81 Ibid.
82 Ibid. The author adds, as an example, that protection from torture will be largely "negative" in Mexico or Costa Rica, but "positive" in Chile or Argentina. Subsistence will be largely "negative" right in the wheat fields of Kansas, somewhat more "positive" in New York city and very "positive" indeed in Bangladesh.
circumstances, since the character of any single right may change with time and place.\textsuperscript{83}

Shelton sees categorizing rights as problematic especially where such categorization purports to rely on a distinction between positive and negative obligations.\textsuperscript{84} Also, the Inter-American Court of Human Rights set a significant precedent by rejecting this positive-negative distinction drawn in the \textit{Velasquez Rodriguez Case}.\textsuperscript{85} In that case, the Inter-American Court held that article 1 of the \textit{American Convention on Human Rights}, requiring states to respect and ensure the rights guaranteed in the \textit{Convention}, imposes on each state a ‘legal duty to take reasonable steps to prevent human rights violations and to use means at its disposal to carry out serious investigation of violations committed within its jurisdiction, to identify those responsible, and to impose the appropriate punishment and to ensure the victim adequate compensation.’\textsuperscript{86}

This decision takes the sand off the feet of the argument that civil and political rights impose negative duties and do not involve the expenditure of resources. It confirms that even civil and political rights can, and do, impose positive obligations. As Donnelly argues:

\begin{quote}
Even such a quintessential "negative" right as a right not to be tortured, generally will have a major "positive" component. Simple restraint on the part of government and its functionaries is necessary, but often insufficient in itself ...."
\end{quote}

\begin{footnotesize}
\textsuperscript{83}Ibid.


\textsuperscript{86}Ibid.

\textsuperscript{87}J. Donnelly, supra, note 80. The writer further observed that in many countries, major changes in law, administrative practice and personnel would be necessary to guarantee the right. Institutions with “positive” powers, are needed to investigate allegations and prosecute accused persons. See also Gregorio Perces-Barba,
\end{footnotesize}
Furthermore, Trakman and Gatien have forcefully argued that “[o]bligations in international conventions, at least concerning human rights, require both non-interference in certain respects and positive action to ensure rights in other respects.” It would be too simplistic, if not naive, to assume that civil and political rights correspond exclusively to the notion of negative rights or rights of abstention. These simplistic assumptions do not adequately reflect contemporary realities in legal practice or human rights doctrine, and should, therefore, be jettisoned.

In addition to counteracting the assumptions that only economic, social and cultural rights are “positive” rights while civil and political rights are “negative” rights, the foregoing arguments also undermine the resource-intensive, (for economic, social and cultural rights),


88 Leon Trakman and Sean Gatien, Rights and Responsibilities (Toronto: University of Toronto Press, 1999) at 241 fn. 116. See also Alexandre Kiss “Concept and Possible Implications of the Right to Environment” in Kathleen E. Mahoney and Paul Mahoney, supra, note 17, 551 at 552. The writer asserts that in the present economic, social and political context even the guarantee of most “traditional” rights may necessitate the intervention of state to ensure their full observance.


91 See John Dugard, supra, note 19 at 177. This ‘resource intensive’ argument usually finds expression in the analysis of Article 2(1) of the ICESCR under which state parties undertook to take steps “to the maximum of its available resources, with a view to achieving progressively the full realization of the rights” recognized in the Covenant. While this is a limitation to the rights provided in the ICESCR, care should be taken not to distort its meaning. Discussions so far have shown that the availability of resources affects the realization of all rights. ‘Progressive realization’ was inserted as an escape hatch by those who interested in scuttling the effectivity of economic, social and cultural rights. The issue of ‘progressive realization is discussed in detail below. Etienne Mureinik, supra, note 87 at 465-467 has ably trashed the ‘expense argument’ against economic, social and cultural rights.
and cost free,92 (for civil and political rights), arguments usually advanced for neglecting the enforcement of economic, social and cultural rights. Therefore, any distinction, on this basis, between these rights is at best misconceived.

Attempts have been made to further advance the difference in character between civil and political rights on the one hand, and economic, social and cultural rights on the other hand by assigning an absolute character to civil and political rights: ‘In recognizing civil rights, positive law can only protect those things that a man already possesses,’ while economic, social and cultural rights can only be enjoyed ‘to the extent that these rights have become subjective rights.’93 This assertion cannot be supported in so far as it purports to ascribe absoluteness to, for instance, the right to life simply because it emanates from human dignity, and at the same time denying such absoluteness to, for instance, the right to health or food which is an inseparable component of any right to life. A distinction on this basis is feeble in attempt and futile in impact. It is neither accurate nor practical. Such an argument fails to recognize that abuse can be both positive and negative.

Admittedly, the right to life in the ICCPR is couched in a definite manner94 while the rights to food95 and health96 in the ICESCR are merely recognised. However, that does not

92Marc Bossuyt, supra, note 69.

93See Van Hoof, supra, note 68.

94Article 6(1) of the ICCPR provides: “Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life.”

95Article 11(1) of the ICESCR states: “The state parties recognize the right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing and housing, and to continuous improvement of living conditions....”

96Article 12(1) of the ICESCR provides: “The States Parties to the present Covenant recognize the right of everyone to the enjoyment of the best attainable standard of physical and mental health.”
obliterate the inextricable link existing between them as essential components of human dignity. Other than regarding the right to life in the ICCPR as meant for only the rich who can afford the food and the resources to keep healthy, it is hard to deny the absoluteness of the rights to food and health, without, at the same time, denying the absoluteness of the right to life. Differences in the wording of the provisions of both ICCPR and ICESCR only demonstrate the perceptions of the drafters and are not based on any actual differences in the nature of the various rights.

2.2.3.2. Immediate Implementation versus Progressive Realization

Economic, social and cultural rights are also distinguished from civil and political rights by reference to the different language and terminology used in the two Covenants regarding the obligations of states parties. Whereas civil and political rights are described as being ‘immediately enforceable,’ economic, social and cultural rights are often described as ‘programmatic’ or ‘promotional’ in the sense that “they represent aspirations or policy objectives rather than justiciable rights whose violations can be remedied immediately.”

Article 2(1) of the ICESCR provides that, “[e]ach State Party to the present Covenant undertakes to take steps, with a view to achieving progressively the full realization of the

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rights recognized in the present Covenant." The wording of this provision is usually contrasted with Article 2(1) of the ICCPR which stipulates: “Each party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant.”

Some scholars have posited that the ‘progressive realization’ clause in Article 2(1) of ICESCR calls into question the binding nature of the obligations created under the Covenant. In fact governments and judiciaries in many countries still tend to view the entire ICESCR with clouded judgement, only giving priority to norms dealing with misguided notions of progressivity.

Nevertheless, Scott Leckie has convincingly argued that the determination of violations of economic, social and cultural rights should not be hindered by the progressive realization provisions. He maintains that it is “difficult to dispute that the full realization

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99 Emphasis added.


101 See The Shioji Case, Supreme Court of Japan (1989), cited in Scott Leckie, supra, note 97 at 92. In this case the court, relying on Article 2(1) argued that Article 9 of the ICESCR (on social security and social insurance) did not provide a concrete right to be granted to individuals immediately. See also Yuji Iwasawa, “The Relationship Between International Law and National Law: Japanese Experiences” (1993) 64 British Y.B. Intl. L. 333.

102 Scott Leckie, Ibid. at 92-93. The Committee on Economic, Social and Cultural Rights in The Nature of States Parties Obligations, General Comment No. 3, adopted 13-14 Dec. 1990. U.N. Doc. E/C.12/1990/8, notes in paragraph 9 that “the fact that realization over time, or in other words progressively, is foreseen under the Covenant should not be misinterpreted as depriving the obligation of all meaningful content. It is on the one hand a necessary flexibility device, reflecting realities of the real world and the difficulties involved for any country in ensuring full realization of economic, social and cultural rights. On the other hand, the phrase must be read in the light of the overall objective, indeed the raison d’être, of the Covenant, which is to establish clear obligations for State Parties in respect of the full realization of the rights in question.”
of all human rights will invariably be a progressive undertaking. Even though the term 'progressive' is utilized only in the ICESCR, it does not imply that no immediate obligations exist in the Covenant.

While there are inherent limitations implicit in the term 'progressive' it should be noted that it was inserted in the Covenant by those whose motive was to secure an ideological victory by undermining the enforcement of the economic, social and cultural rights. Thus, as Alston and Quinn have rightly observed:

"[It was] those states that, when the Covenant was being drafted, made the greatest effort to affirm that the obligation of progressive realization was indeed meaningful, [who] are now often among those that cite the weakness of the obligation as evidence of the secondary, non-legal, or non-binding nature of economic, social and cultural rights. By contrast, those that were outspoken and damning in criticizing the weakness of Article 2(1) at the time of drafting, are now among those that insist most strongly on the importance of economic rights and the seriousness of the relevant obligations of states parties."

It is, therefore, not as a result of any superiority of civil and political rights over economic,

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103 Scott Leckie, Ibid. at 93. See also Dominic McGoldrick, The Human Rights Committee: Its Role in the Development of the International Covenant on Civil and Political Rights (1994) at 346, cited in Scott Leckie, Ibid at 93, fn 39, who states that "the Human Rights Committee has interpreted article 6 [of the ICCPR, the right to life] as encompassing wide-ranging positive obligations, some of which are clearly of a progressive nature"

104 See Principle No. 21 of the Limburg Principle, supra, note 57 which provides that "[t]he obligation 'to achieve progressive realization of the rights' requires States parties to move as expeditiously as possible towards the realization of rights. Under no circumstances shall this be interpreted as implying for States the right to defer indefinitely efforts to ensure full realization. On the contrary, all States parties have the obligation to begin immediately to take steps to fulfil their obligations under the Covenant."

105 See Philip Alston and Gerard Quinn, "The Nature and Scope of States Parties' Obligations," supra, note 57 at 177. The Travaux Preparatoires to the ICESCR shows that the proponents of the 'progressive' term include, Denmark, France, Australia, and United States, while Soviet Union, Lebanon and Yugoslavia, among others opposed it.
social and cultural rights. Using the 'immediate' and 'progressive' realization clauses as a basis of asserting superiority and/or priority of one set of rights over the other is not only unjustified but unjustifiable.

In addition, the word ‘progressive’ used in Article 2(1) of ICESCR does not mean ‘indefinite.’ It merely denotes that the rights enunciated in the Covenant will be fully realised in a progressive manner.106 As such, ‘progressive realisation’ is a characteristic shared by both civil and political rights and economic, social and cultural rights, albeit not stipulated in the ICCPR. As Philip Alston and Gerard Quinn have persuasively argued, “the reality is that the full realization of civil and political rights is heavily dependent both on the availability of resources and the development of the necessary structures,”107 which makes them incapable of immediate realization in spite of all pretensions to the contrary.

Moreover, there are certain rights in the ICESCR, such as trade union rights108 and cultural rights,109 that are not dependent on availability of resources (to any greater extent than, for instance, the right to freedom of expression110 or the right to freedom of thought, conscience and religion111) and therefore should not have been subjected to the regime of

106 E.V.O. Dankwa & Cees Flinterman, “Commentary by the Rapporteurs” supra, note 58 at 139.

107 Philip Alston & Gerard Quinn, “The Nature and Scope of States Parties’ Obligations,” supra, note 54 at 172. Note should also be taken of the fact that during the drafting stages, delegates generally agreed that “the notion of implementation at the earliest possible moment was implicit in article 2 (of ICESCR) as a whole.” See, 18 U.N. GAOR (5655th Plenary Meeting) para. 23, U.N. Doc. A/5655 (1963), cited in Philip Alston & Gerard Quinn, Ibid.

108 See Article 8 of the ICESCR.

109 See Article 15 of ICESCR.

110 See Article 19 of ICCPR.

111 See Article 18 of ICCPR.
'progressive achievement.' The fact that such rights were not excluded from the regime of 'progressive realization' as embodied in Article 2 of ICESCR is an eloquent testimony that the tag of 'progressive realization' is rather arbitrary and, therefore, not a valid basis for asserting the superiority of one class of rights over another.

2.2.4. Relevance of Categorization of Rights: The Concept of "Generations"

Having affirmed the indivisibility and interdependence of all human rights; and having dismissed, as neither accurate nor practical, any attempt to prioritize rights based on any distinctive characteristics of the respective rights, it remains to establish the extent to which it is relevant to classify human rights into different categories or generations. This is justified by the habitual categorization of rights into generations. Thus, civil and political rights are commonly classified as 'first generation rights,' while economic, social and cultural and the so-called solidarity rights (such as the right to self-determination and development) are respectively categorized as 'second' and 'third' generation of human rights.113

Ever since the notion of three generations of rights was first put forward by Karel Vasak in 1979,114 it has been habitually used in human rights discourse. Vasak distinguished

112 Jason M. Waite, supra, note 31 at 705.


114 See Karel Vasak's Inaugural Lecture to the Tenth Study Session of the International Institute of Human Rights, July 1979, cited in Stephen P. Marks, supra, note 89 at 441. See also Asbjorn Eide & Allan Rosas, "Economic, Social and Cultural Rights: A Universal Challenge" in Asbjorn Eide, et al., supra, note 1 at
the three generations of human rights as corresponding successively to each of the three elements of the motto of the French revolution, namely, *liberte*, *egalite*, and *fraternite*.*115* However, it has been opined that the present catalogue of human rights contained in the *International Bill of Human Rights* can be traced to the three different revolutionary movements in world history: first the “bourgeois” revolutions, particularly in France and America, in the last quarter of the 18th century; second, the socialist, anti-exploitation revolutions of the first two decades of the 20th century; and third, the anti-colonialist revolutions that began immediately after the Second World War and culminated in the independence of many nations around 1960.*116*

Given this historical origin, it may seem plausible and auspicious to categorize human rights into generations according to their evolutionary processes. Accordingly, it has been asserted that “[c]ategorizing rights into generations does demonstrate the dynamic and evolving nature of rights [and] also underscores the need to reconceive rights in response to changing needs ....”*117* Yet, as Eide and Rosas have insightfully observed, “the history of the evolution of human rights at the national level does not make it possible to place the emergence of different human rights into clear-cut stages [as any] [e]fforts to do so would in any case make it necessary to distinguish also between civil and political rights, since the

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political rights were accepted much later than some civil rights."  

Nevertheless, it has been contended that even though categories of rights represent mere classifications for convenience rather than based on distinctive characteristics of respective rights, yet it is still useful to classify human rights into different groups (generations) for analytical convenience. Persuasive as this contention may seem, it should be viewed with doubly-tinted spectacles of suspicion. The notion of ‘generations’ of human rights is not only deceptive but also problematic. It is most likely to concentrate on divergencies rather than convergencies, and may even be suggestive of the fact that the more established sets of rights are in some way less relevant today. This undermines the little utility such categorizations might have.

In lieu of classifying or categorizing human rights into generations, it has been suggested that rights may be conceived in two dimensions: the nature of rights, and the extent and number of rights. Under the ‘nature of rights,’ as canvassed, rights are to be conceived depending on whether they are procedural or substantive rights. The ‘extent and number of rights’ envision expanding rights within existing categories or extending them to

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119 Yozo Yokota, supra, note 38 at 204.

120 See Leon Trakman and Sean Gatien, supra, note 88 at 241.


122 Leon Trakman and Sean Gatien, supra, note 88 at 241.
protect new categories and new recipients of rights, such as the rights of distinct peoples.\textsuperscript{123}

Though seemingly attractive, the so-called 'alternative' is not without its own problems. Legal norms do not readily yield themselves to easy classifications as to whether they are substantive or procedural. Thus, a guaranteed right may exhibit a substantive as well as procedural character. Classifying such rights as either substantive or procedural in such a situation is bound to be problematic. Again, expanding rights within existing categories or extending them to protect new categories, may suffice to accommodate new or emerging rights, but it hardly offers any solution as to how to deal with the existing categories of rights. It is, therefore, a one-legged stool and, as such, cannot be expected to stand.

The present writer is of the view that an unnecessary search for classifications, and actual classifications, are inimical to human rights protection and discourse. They are distracting, divisive and diversionary. If it is accepted that human rights constitute an indivisible whole reflecting the unity and uniqueness of the human being, categorizing human rights, with its attendant prioritization of rights, defeats the very essence of unity and indivisibility. It should be discarded or at best confined to the archives of international human rights discourse as a relic of historical antiquity.

\textsuperscript{123}Ibid at 241-242.
2.3. Economic, Social and Cultural Rights in the Regional Instruments: A Comparison

Supplementing the international globally-oriented human rights activity are the international human rights regimes operating regionally in Europe, the Americas, Africa, and, lately, the Middle East, which the Arab League recently brought into being when it adopted the Arab Charter on Human Rights in 1994. No human rights system currently exists in Asia. Continuing efforts are, however, underway to create a regional system for Asia.

Scholars have canvassed interesting arguments as to the necessity or desirability for the advancement of human rights on a regional basis. Such arguments, interesting as they

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may seem, are extraneous to the objects of this thesis, and thus, not explored herein.

The purpose of this section is to give a brief overview of the place of economic, social and cultural rights in the different regional instruments, notably: African, Arab, European and Inter-American systems. The analysis remains cursory, therefore, no attempt will be made, except where necessary, to do a comprehensive and in-depth analysis of the provisions of the instruments on economic, social and cultural rights. It is also not the intention here to examine the historical evolution of the various regional systems, as that is, more or less, beyond the scope of this thesis.

While the regional systems had elements of uniformity and diversity in their origins, each region had its own particular issues and concerns. This is more marked in their varying levels of emphasis on, and attention to, economic, social and cultural rights, which oscillates in accordance with the region in question and its ideological standpoint. Consequently, while the regions appear to be thinking globally by having provisions dealing with economic, social and cultural rights, yet, they seem to be acting regionally by the level of importance attached to these rights. Nevertheless, in practical terms, no region has consistently followed up its rhetorical commitment with practical enforcement and sustained programmes of implementation. Be that as it may, some regions have evolved, or are evolving, dynamic and proactive approaches for the enforcement of economic, social and cultural rights. Some of these approaches are canvassed (in Chapter 6) and recommended for the African system as likely ways to overcome the rampant non-enforcement of economic, social and cultural

rights. As the first regional system to be fully operational, the European system opens the discussion, followed respectively by the American, African, and the Middle East systems.

2.3.1. The European System

The European human rights system came into being following the adoption and entry into force of the *ECHR*. It was adopted as "the first steps for the collective enforcement of certain of the rights stated in the Universal Declaration." Thus, while protecting civil and political rights, economic, social and cultural rights were deliberately left out. It seems, however, that there was the intention at the outset to supplement the Convention with an instrument on economic, social and cultural rights. But this plan was not fulfilled until 1961, when the *European Social Charter* was adopted.

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131 See Dinah Shelton, "Promise of Regional Human Rights Systems" supra, note 127 at 356.

132 See supra, note 124.

133 See paragraph 6 of the Preamble.


Contrary to the claim of some scholars that the *Social Charter* was intended to provide an immediate legal guarantee of economic and social rights comparable to that in the *ECHR* for civil and political rights, the *Social Charter* was not aimed at creating binding obligations on state parties in the form of enforceable rights. This is evident in the opening paragraph of Part I in which the “Contracting Parties accept[ed] as the aim of their policy, to be pursued by all appropriate means, both national and international in character, [to be] the attainment of conditions in which the following rights and principles can be effectively realised ...” The foregoing opening paragraph is followed by the enumeration of the rights in question in 19 paragraphs. None of these rights are binding on the Contracting States, for they may, within the limits defined by the *Social Charter*, choose by which articles they consider themselves bound. This has prompted some scholars to observe that “there is a somewhat vague legal obligation to promote all the 19 rights enumerated, and a stronger opportunities and equal treatment in matters of employment.

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138 Contrast this provision with the provisions of Article 2 of the *ICESCR* and Article 1 of the *African Charter* under which States Parties assumed definite obligations with respect to all rights therein provided.

139 The rights enumerated in Part I are defined in detail in Part II.

140 According to Article 20 (1)(b) a Contracting State undertakes to consider itself bound by at least five of the following Articles of Part II: Articles 1 [right to work], 5 [right to organize], 6 [right to bargain collectively], 12 [right to social security], 13 [right to social and medical assurance], 16 [right of the family to social, legal and economic protection], and 19 [right of migrant workers and their families to protection and assistance]. David Harris, “The European Social Charter” *supra*, note 137 at 307, notes that a result of a combined reading of Article 20(1)(b) and (c) is that a state need accept only between a half and two-thirds of the substantive undertakings in Part II. He further notes that most of the 22 Contracting Parties have accepted far more than this and that six states (Belgium, France, Italy, the Netherlands, Portugal and Spain) have accepted all or virtually all of the articles in Part II.
obligation with respect to some of them."¹⁴¹

Unlike its civil and political counterparts enforceable under the ECHR, the economic, social and cultural rights are only subject to supervision. This is corroborated by Part III of the Appendix to the Social Charter: "It is understood that the Charter contains legal obligations of an international character, the application of which is submitted solely to the supervision provided for in Part IV thereof." The international supervision mechanism provided by Part IV is based on the Contracting Parties' duty to submit reports on the application of the Social Charter.¹⁴²

An assessment of the Social Charter shows that it protects most of the rights thought of as economic and social rights. But there are some omissions, notably, the right to education, and a general guarantee to a right to housing, among others. Many of these gaps have been filled by the Revised Social Charter¹⁴³ that entered into force on July 1, 1999.

¹⁴¹ Matti Pellonpaa, supra, note 135 at 856. The writer further notes (at 857) that "in so far as economic and social rights are concerned, the substantive provisions have been spelled out as State obligations of a somewhat less straightforward nature, and international supervision is far less effective than the system established by the ECHR." Another scholar has pointed out that the obligation imposed is an obligation to use all means reasonably available towards the attainment of a result, but not a guarantee that it will be attained since they are not enforceable individual rights. See Khan-Freund, "The European Social Charter" in F G Jacobs (ed.) European Law and the Individual (1976) at 181, cited in Matti Pellonpaa, Ibid. See also Burns H. Weston, Robin Ann Lukes & Kelly M. Hnatt, supra, note 129 at 597.


¹⁴³ Revised European Social Charter, ETS No. 163.
Except in a very marginal way, the *Social Charter* does not cover cultural rights.144

In all, the European human rights system, as in the United Nations system, reflects a basic distinction between civil and political rights on the one hand, and economic, and social rights on the other. The distinction, and their different regimes, reflect the traditional perception that these rights are essentially distinct from each other. However, this distinction has not been consistently upheld even at the textual level of the *ECHR* and the *Social Charter*.145 For instance, the right to education, which is not a traditional civil or political right, is regulated in Article 2 of the First Protocol to the *ECHR*. Also, there are some decisions of the *European Court of Human Rights* tending to show that there is an extent of overlapping between the *ECHR* and the *Social Charter*.146 This, to a great extent, has enhanced the protection by enforcement of otherwise unenforceable economic and social rights under the *Social Charter*. To this extent, the European system, owing to the dynamism of the *European Court of Human Rights*, has a perspective that other regional systems (which are hereinafter examined) can borrow.

144Mattia Pellonpaa, *supra*, note 135 at 857, fn. 15.

145See Mattia Pellonpaa, *ibid.* at 859.

2.3.2. The Inter-American System

The Inter-American system for the protection of human rights is anchored on the ACHR,147 also known as the Pact of San José, which entered into force on July 18, 1978. Although the Bogota' Conference proclaimed the American Declaration on the Rights and Duties of Man, 1948, it was generally acknowledged that the Declaration did not, and was not intended to, create contractual binding obligations and therefore lacked the status of positive substantive law.148 It has, however, been argued that the Declaration remains an important source of obligation for the parties to the ACHR inasmuch as it protects rights (particularly economic, social and cultural rights) that are not found in the ACHR.149 Nevertheless, since the Declaration was not intended to create binding obligations, it seems that, save to the extent otherwise provided for under the ACHR, the Declaration cannot be invoked as a source of obligation binding on state parties. The subsequent moves towards, and actual adoption of a Protocol on economic, social and cultural rights, show that the Declaration was really not intended to be a source of binding obligation.150 A possibility

147 Supra, note 125.


150 See Interpretation of the American Declaration of the Rights and Duties of Man Within the Framework of Article 64 of American Convention on Human Rights, Advisory Opinion No. OC-10/89, reported in (1990) 11 Human Rights Law Journal 118, [hereinafter, “Advisory Opinion”], where the Inter-American Court conceded that the American Declaration was not a treaty under international law but a non-binding declaration of moral principles. The Court went on to note that the Declaration could be relevant in the interpretation of the American Convention and the Charter of the OAS. See also, David Harris, “Regional Protection of Human Rights,” Ibid at 4 arguing that “[a]lthough it still does not have direct legal effect, the Declaration has come to be indirectly legally binding by virtue of human rights obligations in the OAS Charter, which incorporate the substance of the American Declaration.”
would be that it has come to state the rules, and acquire the status, of regional customary international law in the way that the UDHR has at the international level. But, as David Harris has noted, "this would appear not to have happened."\(^{151}\) Hence, the ACHR remains the source of binding legal obligations.

Like the ECHR, (after which it was patterned),\(^{152}\) the ACHR clearly concentrates on civil and political rights, paying only peripheral attention to the observance of economic, social and cultural rights. In fact, it was agreed during the drafting stages that only a passing reference would be made to economic, social and cultural rights.\(^{153}\) It contains only a single article on economic, social and cultural rights. In a very generally worded obligation, the states agreed to "adopt measures ... with a view to achieving progressively ... the full realization of the rights implicit in the economic, social, education, scientific, and cultural standards set forth in the Charter of the Organization of American States...."\(^{154}\) From the wording of this article, there appears to have been a conscious effort not to provide a coherent enumeration of all the rights concerned. This is evident in the reference to the.

\(^{151}\) *Ibid.*

\(^{152}\) See Thomas Buergenthal, "The Inter-American System for the Protection of Human Rights" in Theodor Meron, *supra*, note 100, 439 at 441.

\(^{153}\) See Matthew Craven, "The Protection of Economic, Social and Cultural Rights under the Inter-American System of Human Rights" in David J. Harris and Stephen Livingstone, *supra*, note 149, 289 at 307 [hereinafter "Protection of Economic, Social and Cultural Rights"]). In general economic, social and cultural rights were regarded 'more as byproducts of economic development than as values themselves' and were therefore treated as marginal and diversionary concern. See L. Leblanc, "The Economic, Social and Cultural Rights Protocol to the Inter-American Convention and its Background" (1992) 10 *Netherlands Quarterly of Human Rights* 130. This is also a reflection of the utter contempt to which these rights were held in the region which overflowed into the international arena during the debates for the Covenants.

\(^{154}\) *ACHR*, Article 26.
Charter of the Organization of American States (OAS).^{155}

The ACHR does not provide a clear-cut system of supervision and control with a view to improving the observance of economic, social and cultural rights.^{156} Article 42 merely enables the Commission to ‘watch over’ the promotion by taking cognizance of copies of reports which are to be submitted annually to designated organs of the OAS. All these prompted a scholar to regard the economic, social and cultural rights provisions of the ACHR as a ‘disappointment.’^{157}

In 1988, a Protocol on Economic, Social and Cultural Rights (the San Salvador Protocol)^{158} was adopted by the OAS General Assembly, in a bid to increase the prevailing scant attention to economic, social and cultural rights. The Protocol entered into force on November 16, 1999, after receiving the necessary 11 ratifications.^{159} It recognizes a number of economic, social and cultural rights comparable to the European Social Charter. Also, the Protocol recognizes family rights, rights of the child and the elderly. But it has been criticized for not appearing to have been specially tailored to suit the problems of the region.^{160}

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^{156}See Harmen van der Wilt & Viviana Krsticvic, supra, note 148 at 384.

^{157}See Matthew Craven, “Protection of Economic, Social and Cultural Rights,” supra, note 153 at 299.


^{159}In accordance with Article 21(3) of the Protocol, it entered into force on the date it received the eleventh ratification. Costa Rica ratified as the eleventh state of November 16, 1999. Status of ratification is available at <http://www.cidh.oas.org/Basicos/Basic%20Documents/enbas5.htm>. Also, at the Inter-American Commission on Human Rights web page at <http://www.cidh.oas.org/basic.htm> (Both visited 2:34 PM, July 7, 2000).

^{160}See Matthew Craven, “Protection of Economic, Social and Cultural Rights,” supra, note 153 at 301. The criticism is based on the fact that the Protocol gave no recognition to the rights of indigenous populations, and the rights of migrant workers.
It is noteworthy that the Protocol creates a dichotomy in the catalogue of economic, social and cultural rights by declaring a petition system applicable with regard to trade union rights (Article 8) and the right to education (Article 13), while preserving the reporting procedure for the other rights.\textsuperscript{161} This distinguishes it from the other regional instruments.

While the adoption of the Protocol represents a step forward, even if belated, nothing further need be said about it, as it has yet to come into force. It is, however, evident that, until now, economic, social and cultural rights were regarded either as contextual considerations in the implementation of civil and political rights or as interests that would be met once the civil and political rights were ensured. Thus, in the Inter-American system respect for economic, social and cultural rights remains largely haphazard, and, to some extent, lacking in direction. These rights have hitherto been “overlooked or treated as merely parenthetic concerns”\textsuperscript{162} just like under the European system before the Social Charter, and very much unlike the African system.

\subsection{The African System}

Although the African Charter is very much like the ECHR and the ACHR in the way it seeks to protect civil and political rights, it moves beyond the traditional Western concept of individual rights by its equal emphasis on economic, social and cultural rights. The Charter provides in a single document a core of both economic, social and cultural rights,\footnote{\textsuperscript{161}See Harmen van der Wilt & Viviana Krsticevic, \textit{supra}, note 148 at 384.} \footnote{\textsuperscript{162}Matthew Craven, "Protection of Economic, Social and Cultural Rights" \textit{supra}, note 153 at 321.}
and civil and political rights, in addition to other newly-codified rights. This sets it apart as the first international instrument to enshrine such rights, and distinguishes it from the European and Inter-American system. In this regard it is comparable with the newly created Middle East system.

Also, the African Charter is outstanding in its belief in the indivisibility of rights given the Charter's stipulation that civil and political rights cannot be dissociated from economic, social and cultural rights either in conception or in universality. It eloquently declares that the satisfaction of the latter rights is a guarantee for the enjoyment of the former. However, like the other systems, the machinery of enforcement or supervision for the economic, social and cultural rights under the African system is virtually nonexistent, thus, reducing the so-called uniqueness of the African system to little more than a mere

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window dressing. No more need be said about the *African Charter* here since it is the main focus of this thesis and sufficiently discussed in subsequent chapters.

Notwithstanding the difficulties of implementation, the ideals of the *African Charter* make it distinct from other regional systems, notably the European and Inter-American systems. The Middle East system reflects some of these ideals.

### 2.3.4. The Middle East System

On September 15, 1994, the League of Arab States approved the *Arab Charter on Human Rights*. Until then there were no Middle Eastern Regional institutions or procedures for monitoring human rights. The *Charter* will enter into force when it has been ratified by at least seven states.

Comparable to the *African Charter*, the *Arab Charter* embodies, in a single document, a core of civil and political rights as well as economic, social and cultural rights. Again like the *African Charter*, there is no separate supervisory machinery for civil and political rights on the one hand, and economic, social and cultural rights on the other hand. This distinguishes it from the European and Inter-American system. However, the system of supervision established by the *Arab Charter* seems largely bereft of any serious functions for the promotion and protection of the rights specified in the *Charter*. The Committee

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167 *Supra*, note 127.

168 The Arab states appear to be dragging their feet in ratifying the instrument. By the end of 1999 only Egypt had ratified the Charter.

merely has powers to receive periodic reporting from state parties. After studying the report, it is enjoined to ‘distribute a report accompanied by the opinions and comments of the States to the Human Rights Committee of the Arab League.’\(^{170}\) No other functions of human rights promotion or protection are specified in the \textit{Charter}.

The probable ineffectiveness notwithstanding, the \textit{Arab Charter} is a commendable step forward in maintaining the indivisibility of human rights as in the \textit{African Charter}. This distinguishes the Arab system and the African system from the European and Inter-American system. How this equality, (evident in the notion of indivisibility), is carried out in practice is a different matter.

It is noteworthy that the regional systems seem to be unified in their realization of the importance of paying more than a marginal attention to economic, social and cultural rights. Even in the regions where these rights were regarded as peripheral concerns, there seems to have been a rethink as it has become evident that there cannot be true freedom for those wallowing in abject poverty and destitution. What has happened so far is a greater recognition of economic, social and cultural rights, but it falls short of an equal treatment with civil and political rights. Desirable as it may be, it seems that the full importance of economic, social and cultural rights, especially to the developing countries, is yet to be appreciated. This justifies reemphasizing (even though briefly) the indispensability of these rights.

\(^{170}\)Article 41(3).
2.4. Importance of Economic, Social and Cultural Rights

Human rights constitute an inseparable whole reflecting the unity and uniqueness of the human being. The concept of human rights itself is an acknowledgment of the inherent dignity and value of the human person. As the UDHR recites, the recognition of the inherent dignity and of the equal and inalienable rights of all human persons of the human family is the foundation of freedom, justice and peace in the world. A true foundation of freedom, justice and peace cannot, therefore, be built when the totalities of the rights of human persons are not protected, as true individual freedom cannot exist without economic security and independence.

One pertinent question that underscores the indispensability of the economic, social and cultural rights is: to what extent can civil and political rights be protected and realized without the equal protection and realization of economic, social and cultural rights? There is no gainsaying the fact that civil and political rights cannot be realized unless freedom from want, which encapsulates the totality of economic, social and cultural rights, is guaranteed. According to Chandrachud C.J. of the Supreme Court of India, both sets of rights are nothing but the "two wheels of a chariot," each indispensable to the other and both necessary for there to be any forward movement toward the realization of a progressive vision.

It is trite but true that civil and political rights cannot be seriously respected without simultaneously respecting economic, social and cultural rights. Many traditional civil

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171 UDHR, paragraph 1 of Preamble.
liberties are illusory to those living in poverty.\textsuperscript{173} Most others depend on some socioeconomic rights for their realization. Thus, it has been asserted that the denial of the right to education (a social right) amounts to a denial of other rights, since ignorance, which is the consequence of an incomplete (or total lack of) education deprives individuals of their dignity and of the means of achieving recognition.\textsuperscript{174} Moreover, civil and political rights, like freedom of expression, freedom of association or the right to political participation, only acquire substance and meaning for persons who have been educated.\textsuperscript{175} This point is particularly apposite for developing countries (especially in Africa) where the illiteracy level is overwhelmingly high.

Furthermore, economic and social conditions of existence exacerbate civil and political strife which underlie many violations of civil and political rights. This fact has remained a consistent theme for the Inter-American Commission on Human Rights. In its 1979-80 annual report, for instance, the Commission recognized the existence of an "organic relationship between the violation of the rights to physical security on the one hand, and the neglect of economic and social rights ... on the other."\textsuperscript{176} It declared that "the neglect of economic, and social rights, ... produces the kind of social polarization that then leads to acts

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{173}Craig Scott \& Patrick Macklem, "Constitutional Ropes of Sand" \textit{supra}, note 44 at 85.
\item \textsuperscript{175}Ibid. See also, Manfred Nowak, "The Right to Education" in Asbjorn Eide, et al., \textit{supra}, note 1 at 189.
\item \textsuperscript{176}Inter-American Commission on Human Rights, Annual Report 1979-80 at 151, cited in Matthew Craven, "Protection of Economic, Social and Cultural Rights," \textit{supra}, note 153 at 312.
\end{itemize}
\end{footnotesize}
of terrorism by and against the government." The Commission reemphasized this point more than ten years later in its study on economic, social and cultural rights where it noted that "it is evident that in many cases poverty is the wellspring of political and social conflict."  

It is also beyond dispute that the deplorable and deteriorating economic and social conditions of existence in Africa have been the incubators hatching the eggs of endemic and sweeping violent internecine conflagrations which, in their stride, have swept away the already contorted frame of civil and political rights. Perhaps, Africa, more than any other region of the world, stands out as the lighthouse drawing attention to the fact that realizing civil and political rights, and indeed any other human right, in a situation of extreme destitution occasioned by the unbridled neglect of economic, social and cultural rights, is like playing Hamlet without the Prince of Denmark.

It might be worth stressing, even at the risk of overemphasis, that economic, social and cultural rights protect a substantial part of what it takes to be a full person. With discriminative enforcement, the international community is wittingly suppressing half of what it is to be a full person, thus “excluding those segments of society for whom autonomy means little without the basic necessities of life.” Sadly, but tragically true for Africa, as the next chapter shows, it amounts to replacing cracked lenses with opaque ones.

177 Ibid.


CHAPTER THREE

ECONOMIC, SOCIAL AND CULTURAL RIGHTS IN TRADITIONAL AND MODERN AFRICA: A COMPARATIVE ANALYSIS

3.1. INTRODUCTION

The *African Charter* sets up a system for the promotion and protection of human rights that is global in outlook but regional in orientation. It is tailored to be responsive to African needs and based on African legal philosophy. In addition to emphasizing the importance of economic, social and cultural rights, the *Charter* fundamentally underscores the indispensability of economic, social and cultural rights to any meaningful realization of civil and political rights: "...the satisfaction of economic, social and cultural rights is a guarantee for the enjoyment of civil and political rights."2

The *African Charter’s* bold declarations were anchored in, and inspired by, the necessity to promote and protect human rights in Africa, taking into full consideration the

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2 Preamble, paragraph 8. Osita Eze, ‘African Concept of Human Rights’ in Awa U. Kalu and Yemi Osinbajo (eds.) *Perspectives on Human Rights* (Lagos: Federal Ministry of Justice 1992) 8 at 19 [hereinafter ‘African Concept of Human Rights’] points out that this declaration marks a philosophical shift from “the predominant practice of emphasizing civil and political rights at the expense of other rights.” A.H. Robertson & J.G. Merrills, *Human Rights in the World* (Manchester: Manchester University Press, 1989) at 216 observe that, “the States concerned wished to put forward a distinctive conception of human rights in which civil and political rights were seen to be counter-balanced by duties of social solidarity, just as they are complemented by economic and social rights and supplemented by peoples’ rights.”
virtues of African historical tradition and the values of African civilization. In adopting the Charter, the States Parties saw as their duty the promotion and protection of human rights and freedoms in Africa on the basis of the importance traditionally attached to these rights and freedoms in Africa.

This amounts to a tacit acceptance of traditional Africa as the foundational basis of the African Charter and African human rights.

The seemingly lacklustre performance of African states in the enforcement of economic, social and cultural rights vis-a-vis the expressive declarations of the African Charter, kindles a glimpse into the traditional protection of these rights. Put differently, since the African States Parties to the Charter were firmly convinced of their duty “to promote and protect human and peoples’ rights and freedoms, taking into account the importance traditionally attached to these rights and freedoms in Africa,” the question then remains: to what extent is that which is currently obtainable a reflection of “the importance traditionally attached” to economic, social and cultural rights.

This question entails an inquiry into the past (the African past), first to expose whether and how economic, social and cultural rights were protected, and then to make a

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4Preamble, paragraph 11. [Emphasis added].

5Mario Gomez, “Social Economic Rights and the Human Rights Commissions” (1995) 17 Human Rights Quarterly 155 at 160 observes that “violations of civil and political rights have continued to be treated as though they are more serious, and more patently intolerable, than are massive and direct denials of economic, social and cultural rights.”

6Emphasis added.

7See Preamble, paragraph 11.
comparison with the present situation in contemporary Africa. It also involves a critical and incisive examination of the nature and quality of protection of economic, social and cultural rights during the various stages of African history which covers three distinct periods - traditional or pre-colonial, colonial, and modern or contemporary Africa. These concepts - traditional, colonial and modern Africa - are definitively set within the appropriate historical contexts under which they are used and referred to in this Chapter.

The existence of human rights in traditional Africa has been variously asserted and denied. Largely, the debate has been as divisive and controversial as it is distracting. At the risk of joining the debate, though not oblivious to it, it will be shown that economic, social and cultural rights were in existence in traditional Africa and were adequately taken care of by the traditional systems. This will be compared with the protection of these rights in modern Africa. The fate of these rights in colonial Africa is highlighted to the extent it aids proper elucidation of issues.

This Chapter contends that economic, social and cultural rights were better protected in traditional Africa than in colonial and modern Africa. Traditional African features which

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ensured the enjoyment of these rights were relentlessly undermined and distorted by colonialism, and made virtually incongruous to the post colonial Westphalian model African state. Thus, this comparison does not, in any way, pretend to be ignorant of the existence of conditions making a wholesale reversion to the status quo ante impossible and impracticable. However, it is done in the belief that the past is, and has been, a glowing lamp on the future’s meandering dark alley which may guide the prudent sojourners within its sphere. While the past cannot be recreated, its lessons can be, and usually are, instructive.

3.2. DEFINITION OF CONCEPTS

"[T]here is...rather too much talk about definitions. A definition, strictly speaking, is nothing but an abbreviation in which the user of the term defined may please himself..."10

3.2.1. Traditional Africa

Defining the term "traditional Africa" has not really been of interest to African human rights scholars who have had to write about that epoch in African history.11 Consequently, although the term has been largely used without any attempt to define it or circumscribe its use, nevertheless there seems to be an implicit agreement as to the period covered by the use of that term.

9See infra, note 1 of Chapter Four.


11See supra, note 8 for some of the works dealing with traditional Africa.
Traditional Africa is the first of the three phases under which the historical, political and legal evolution of Africa can be generally categorized. That is the pre-colonial, colonial and post colonial (independent) Africa. According to Osita Eze, traditional Africa refers to "pre-capitalist Africa (pre-colonial) comprising the primitive communal stage, the slave and feudal modes of production." Why he chose to define the traditional society in terms of the means of production is far from being clear. Besides, his definition is too narrow for the purposes of this analyses.

In a nutshell, traditional Africa refers to that period in African history before Europe’s imperialistic conquest and consequent colonization of Africa. The conquest and colonization of Africa occurred in different parts of Africa at different times. European interest in Africa began to develop in the early 15th century. In 1415, the Portugese succeeded in establishing their first foothold in North Africa. By the late 19th century, Europe had become the dominant factor in the political scene of Africa. By 1914, the whole of the continent was under the control of one colonial power or the other, except Ethiopia, and to a lesser extent, Liberia.

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13 Carol M. Tucker, “Regional Human Rights Models in Europe and Africa: A Comparison” (1983) 10 Syracuse J. Intl. L. 135 at 151, fn. 113, observes that "pre-colonial Africa encompasses the period before 1830, when European holdings consisted primarily of Portuguese enclaves, slave-trading operations, and provisions posts along the coast. The French annexation of Algeria in 1830 was the first European claim to densely populated African lands." While it is true that French annexation of Algeria in 1830 was the first European claim to densely populated African lands, it is incorrect and misleading to set 1830 as the terminal date of pre-colonial Africa. By that date a significant portion of Africa was not under colonial rule. The annexation of Algeria, even though symbolic, is not enough to mark the terminal date of pre-colonial Africa for the whole of the African continent.

Traditional African society was largely pre-literate\textsuperscript{15} and this has made traditional Africa a subject of undue romanticization and misunderstanding leading to hasty and unwarranted condemnation.\textsuperscript{16} Attempts to properly understand it has led to various and varying classifications\textsuperscript{17} the propriety of which is not of much relevance to this thesis.

\textsuperscript{15}Being ‘largely-pre-literate’ in this context means that writing was not widely used, even though not wholly absent. It should not be taken to mean a total absence of literature (written and/or orature). However, orature was more commonly known and this accounts for the absence of documentary evidence.


\textsuperscript{17}Keba M’Baye, ‘Human Rights in Africa’ in K. Vasak and P. Alston (eds), \textit{The International Dimensions of Human Rights}, vol. 2 (Westport: Greenwood 1982) 583 at 588-589, sees traditional Africa as hierarchically divided by the caste system but unified by the mythical beliefs where the individual was not poised against the group but was indeed part of it. In this period according to him, “the purpose of law is to maintain society in the state in which it had been transmitted by the elders.” This has been challenged by Osta Eze, \textit{Human Rights in Africa: Some Selected Problems} (Lagos: Macmillan 1984) at 12-14, [hereinafter ‘Selected Problems’] who contends that no society was static and that the analysis basically ignores the fluid and dynamic nature of law in the evolutionary society changing from one socioeconomic formation to another. He proffered a classification of traditional Africa into communal or primitive mode; slave owning mode and feudal mode. On his own, Nguema divided traditional African society into four, namely, the gregarious society made up of bands living under the direction of pre-eminence of a man of worth - the group’s chief such as the pygmies of central Africa; the familial society, in which all attitudes, behaviour, gestures and activities of the members of the community are determined by the familial link; the hierarchical society in which the rules of conduct, attitudes, behaviour and activities depend upon where one stands on the social ladder or what role one plays in society; and the society en route to statehood which adopted progressive and systematic application of rules to all subjects of the sovereign. See I. Nguema ‘Human Rights Perspectives in Africa’ (1990) 2 \textit{HRLJ} 261 at 266. This classification has been rejected by Umozurike who argues that all societies are to some extent gregarious or otherwise the individuals would not form a society at all; that the subdivision of the “familial society” applies to all societies and is not restricted to any particular one; that there was hierarchy in most organised societies for all people were not, and are not necessarily, equal in status. He went on to canvas a broad division into those with “advanced systems” and the “atomistic communities.” See Umozurike, ‘African Charter’ \textit{Ibid.} at 14. In choosing this classification, Umozurike used Western paradigm of advancement to classify traditional societies. This should be rejected. It is tantamount to mixing oil with water. Save for comparative purposes, it is illegitimate to use the cultural paradigm of one society to judge the other. Whatever its worth, Western notion of advancement should be regarded as being of limited applicability, and thus, an improper yardstick to determine the advancement of other non-Western societies. Traditional Africa can be properly classified into centralized (those with established central administrative machinery) and non-
3.2.2 Colonial Africa

As earlier noted, Africa as a whole did not come under colonial rule at the same time. Although European interest in Africa began to develop in the early 15th century, it was not until the second half of the 19th century that Europe became a dominant power in Africa.\textsuperscript{18} By 1914, the whole of Africa (with the exception Ethiopia and, to an extent, Liberia\textsuperscript{19}) had come under one colonial power or the other.\textsuperscript{20} Ethiopia fell under Italian domination in 1936 but became free again in 1941.\textsuperscript{21} Africa remained under colonial rule until the second half of the 20th century when some states started regaining their independence with Ghana blazing the trail in 1957. Most other African states regained their independence in the 1960s. Consequently, the second half of 1800 up to the second half of 1900 is generally regarded as the period of colonialism in African history.\textsuperscript{22} It is this period that is referred to in this thesis as colonial Africa.

\textsuperscript{18}See J. D. Fage, A History of Africa, 3rd edn. (London: Routledge, 1995) at 391. He observes that "[t]he confrontation at Fashoda in 1898 and the British conquest of the Afrikaner republics in the following three years were the climatic acts in the European (conquest and) partition of Africa. Thereafter there were only loose ends to be dealt with."

\textsuperscript{19}Fage suggests that Liberia did not suffer the fate of others because neither the British nor the French governments could intervene to add the indifferently governed territory to their adjacent territory adjacent colonies without offending the other and also the United States, which increasingly - if hardly willingly - was forced into the role of becoming a protectorate state. See, J. D. Fage, \textit{Ibid}.

\textsuperscript{20}See note 14 and the authorities cited.


3.2.3. **Modern Africa**

The term “modern Africa” as employed in this thesis refers to the post independence era of African political history. However, it will be used in a restricted sense to depict the African human rights era since the adoption of the *African Charter on Human and Peoples’ Rights* in 1981. It is, therefore, used to cover the period from the adoption of the *Charter* to the present time. The choice is rather arbitrary and does not pretend to be an authority on what constitutes ‘modern Africa’ in African human rights discourse. It is informed by the writer’s belief that the period commencing with the adoption of the *African Charter* actually represents a new (modern) era in African human rights discourse and practice.

3.2.4. **Justification For Use of Terms**

Human rights debate in Africa has been identified as reflecting “the continent’s political and legal history [and] therefore any discussion of human rights in Africa must be grounded in the political and ideological history of the continent,”23 a history which covers pre-colonial, colonial and post colonial Africa. In the context of the *African Charter* this becomes more meaningful in view of the much touted uniqueness of the *Charter* as a reflection of African values. This justifies the location of these values within their proper historical context.

Moreover, the three stage classification of African history is, and will continue to be,

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23 E.A El-Obaid & K. Appiagyei-Atua, *Ibid* at 821. The authors drew a distinction between post colonial and contemporary Africa. Their classification of contemporary Africa appears to be in tandem with its use in this thesis to depict the era of African human rights since the *Charter*. 
a historical fact that dictates and shapes African attitudes and response to issues - regional and international. The terms are therefore used to designate the historical realities which they represent in Africa's political and legal history as well as in human rights practices and discourse.

3.3. ECONOMIC, SOCIAL AND CULTURAL RIGHTS IN TRADITIONAL AFRICA

3.3.1. The Concept of Human Rights in Traditional Africa

"A group of people bent on denying or ignoring one another's rights cannot exist as a society."24

Scholars of African human rights are not agreed on the issue of the existence of human rights in traditional Africa. On the one part is the school of thought made up of those arguing that traditional Africa lacked any sense or notion of human rights.25 According to Jack Donnelly, "most non-western cultural and political traditions lack not only the practice of human rights but the very concept. As a matter of historical fact, the concept of human rights is an artefact of modern Western Civilization."26 He maintains that "the idea of human rights, as the term is ordinarily understood - namely, as rights / entitlements / claims held by


26 Jack Donnelly, 'Human Rights and Human Dignity' Ibid.
all individuals simply because they are human beings - is foreign to traditional African society and political culture."27 He further argues that even in many cases where Africans had personal rights vis-a-vis their government, those rights were not based on one's humanity per se but on membership in the community, social status, or some other ascriptive characteristics.28 Even though he admits that in traditional African societies rights were assigned on the basis of communal membership, family status or achievement, he denies that these were personal human rights. He is only prepared to concede the fact that "Africans...have always devoted much of their best energies to attempts to realize human dignity.29

There are certain fundamental flaws inherent in Donnelly's argument. There are obvious contradictions in the assertion that African traditional society did not accord rights to individuals by the fact of their humanity but on the basis of their membership in the community. One is not sure whether this community being talked about is a community of beasts or of human beings. If it is a community of beasts then Donnelly's assertion can hardly be faulted because such a community must surely lack all attributes of humanity. But if it is a community of human beings, then it amounts to standing logic on its head to think and argue, as Donnelly attempts to do, that a people who granted rights on the basis of membership to their community did not recognize that they were all human beings and so could not have done so on the basis of their humanity.

27 Jack Donnelly, 'The Right to Development,' supra, note 25 at 268

28 ibid., at 269

29 ibid
To take this argument further, if it is conceded, as Donnelly seems prepared to concede, that a people have the notion of human dignity, with all its implications to human existence, then it becomes a matter of stretching inelastic logic to argue that they are accorded rights, not in realization of their humanity but, on the basis of their community. People exist in a community because they are human, they are not human because they exist in a community.

It is fundamentally wrong to deny the existence of the concept of human rights in traditional Africa on the basis of the absence of ‘equal rights’ among all members of the society. If equality of rights is the parameter for measuring the existence of the concept of human rights, all human societies, including Western societies, would be marked out for lack of it. The history of the evolution of human rights in Western societies shows that it was founded on the fulcrum of inequality. For one thing, the so-called ‘rights of man’ were, literally, only the rights of white men. It took a very long time, and a major political struggle, for the United States, which otherwise had been in the forefront in the elaboration of human rights as part of the constitutional order, to include black men in their concepts of equal rights. It took an even longer time to include women in this process and thereby move away from ‘the rights of man’ to human rights. History shows that the ‘self-evident truth,’

30 A. Belden Fields & Wolf-Dieter Narr, “Human Rights as a Holistic Concept” (1992) 14 Human Rights Quarterly 1 at 4 posit that even though equality, as proclaimed in both the French and US historical rights texts, is fundamental, if not the most fundamental, component of human rights, yet “inequality not only persist today, but within most societies, and between the Western industrialized countries and most countries of the third world, it has been increasing.”


32 Ibid.
which subsequently received "universal endorsement" in the UDHR, was proclaimed by persons who owned slaves, and who never intended to include the slaves in their concept of equality. Thus, the absence of 'equal rights' in traditional Africa, while an evidence of human rights violation, is not evidence of the total absence of the very concept of human rights.

On her own, Howard has contended that the "African concept of justice" unlike human rights, "is rooted, not in individual claims against the state, but in the physical and psychic security of group membership." While admitting that both dignity and justice were served in these societies, she maintains that "[t]hese were certainly not societies based on rights, ... and to assert their human rights as individuals would undercut their dignity as group members."
Howard seems to have an obsessive preoccupation with the Western oriented statist paradigm as the only basis to found, and validate, any idea of human rights. While the Western notion of human rights developed in response, and as a check, to the Westphalian statist model, extant international realities show that the state-centric ideology as envisaged in the UDHR has woefully failed to account for the constantly mutating power dynamics that shape and reshape the daily lives of the individual in the society.\(^{37}\) Hence, the shifting emphasis from the state to other sources of power affecting the individual in society. This demonstrates that the Westphalian sovereign territorial state per se is not a \textit{conditio sine qua non} for the existence of a concept of human rights,\(^{38}\) and thus invalidates the denial of an African concept of human rights on the basis that the rights were not held against the state.

Makau wa Mutua has pointed out that while it is probably correct to argue that traditional African societies did not emphasize individual rights in the same way that the European societies did, it is an incorrect presumption to claim that they did not know the conception of individual rights at all.\(^{39}\) This is because "a brief examination of the norms governing legal, political, and social structures in pre-colonial societies demonstrates that the

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\(^{38}\)Cf. Jack Donnelly, "The Social Construction of International Human Rights" in Tim Dunne & Nicholas J. Wheeler, \textit{Ibid}, 71 at 85 [hereinafter, "Social Construction"], (insists that "[h]uman rights ... are held with respect to, and exercised against, the sovereign territorial state." He however admits [at 96] that "[t]he shortcomings of the state-centric systems of delivering internationally recognised human rights are manifest....")

\(^{39}\)Makau wa Mutua, \textit{African Cultural Fingerprint}, supra, note 17 at 348.
concept of rights ... informed the notion of justice and supported a measure of individualism.\textsuperscript{40}

The other school of thought are those asserting that there is an African concept of human rights because no group of people can exist as a society if they do not respect one another's right.\textsuperscript{41} According to Umozurike, "[t]he existence of a society ... presupposes the recognition of the rights of the members. This truism applies as much to human society as to the society of nations."\textsuperscript{42} The concept of human rights is therefore not a prerogative of one society, notwithstanding terminological differences.\textsuperscript{43} As Ronald Cohen ably articulated, a right is an entitlement:

At its most basic level, a human right is a safeguarded prerogative granted because a person is alive. This means that any human being granted personhood has rights by virtue of species membership. And a right is a claim to something (by the right-holder) that can be exercised and enforced under a set of grounds or justifications without interference from

\textsuperscript{40}Ibid.


\textsuperscript{42}Umozurike, 'African Charter' supra, note 16 at 17-18.

The subject of the right can be an individual or a group and the object is that which is being laid claim to as a right.\(^44\)

It is thus deducible that each society evolves means of granting personhood to members of that society. Even though human rights as presently espoused in the international fora and as contained in the UDHR is a surfeit of Western Liberalism,\(^45\) each society has over the years evolved means of protecting the rights of its members.\(^46\) As individuals and groups differ, so also do their perception of human rights, even though convergencies may exist.\(^47\)

For instance, the value and sanctity of human life is universally recognized and accepted even though different societies take different views on when life begins and ends and what respect for it entails.\(^48\)

Traditional Africa may have lacked the equivalent terminology to encapsulate the totality of rights today asserted as human rights, (like most societies that existed contemporaneously), but the substance of the practices today regarded as human rights were


\(^{46}\)See Richard Harries, “Human Rights in Theological Perspectives” in Robert Blackburn & John Taylor, Human Rights for the 1990s: Legal, Political and Ethical Issues (London: Mansell, 1991) at 1, (states that “[a]ll talk about human rights presupposes a recognition of the dignity and worth of the human person”). See also Chris Brown, “Universal Human Rights: A Critique” in Tim Dunne & Nicholas J. Wheeler, supra, note 37 at 120. He forcefully argues that “[t]o overemphasise rights in isolation from their social context is counter-productive, potentially undermining the very factors which create the context in which rights are respected.”


\(^{48}\)Bhikhu Parekh, Ibid. at 150-151.
not lacking. Moreover traditional African beliefs and ideas were not compartmentalized and were therefore interwoven in their institutions and practices. There were no formal distinctions between the sacred and the secular, between the religious and non-religious and/or between the spiritual and the material areas of life.

This state of affairs may appear to the uninitiated as an indication of the absence of a particular notion or concept. This cannot be correct for, as Osita Eze points out:

African societies in their process of development have evolved ideas of right and duty, right and wrong, as well as notions of justice and fairness. These ideas and notions as in other societies, formed the foundations of what subsequently came to be known as human rights in western jurisprudence which provided the framework for their conceptualization and doctrinal development.

Consequently, if human rights consists in the attribution of certain rights to, and imposition of certain duties on the individual to enable him/her lead a full and meaningful existence, and to contribute as a useful member of society, then it is not an idea alien to traditional Africa as these are well founded in the traditional African beliefs and institutions. Admittedly, there was complete absence of extreme individualism. The pursuit of human rights or human

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49 Asmarom Legesse, *supra*, note 41 at 127, notes that “[d]ifferent societies formulate their conception of human rights in diverse cultural idioms.” Keba M’Baye, *supra*, note 17 at 589 notes that “[traditional] African society was both socialist and humanistic. It could not fail to have respect for man and for all that attaches to him, including his rights.”


52 See B. Obinna Okere, *supra*, note 41 at 141.
dignity was not, therefore, concerned with an individual asserting or vindicating his/her right against the whole world.\textsuperscript{53} It sought a vindication of the communal well-being. But the traditional system was one in which the individual was well protected within his/her group.

Even though individualism was not entirely lacking, it was countered by a deep and lasting proclivity towards ‘we-thinking’, resulting in a conception of the self that is unlike the Western conception, which encourages individuality, differences, competition and independence.\textsuperscript{54} The resolution of a claim was not necessarily directed at satisfying or remedying an individual wrong. It was, as Mutua points out, an opportunity for society to contemplate the complex web of individual and community duties and rights to seek a balance between the competing claims of the individual and society.\textsuperscript{55}

There is no doubt that those arguing against a “concept of human rights” in traditional Africa are doing so on the basis of a Western conceived and defined “human rights” applicable universally without exception. Thus, while plainly admitting that the historical roots of human rights are Western, Donnelly forcefully advanced the view that the concept has universal application.\textsuperscript{56} It was through his spectacles doubly-tinted with a “Western-

\textsuperscript{53}Josiah A.M. Cobbah, \textit{supra}, note 41 at 322.

\textsuperscript{54}\textit{Ibid.} Also, B. Obinna Okere, \textit{supra}, note 41 at 148 has pointed out that “African conception of man is not that of an isolated and abstract individual, but an integral member of a group animated by a spirit of solidarity.” Makau wa Mutua, \textit{“African Cultural Fingerprint” supra}, note 17 at 361, notes that “this philosophy of the group-centred individual evolves through a series of carefully taught rights and responsibilities. At the root were structures of social and political organization, informed by gender and age, which served to enhance solidarity and ensure the existence of the community into perpetuity.”

\textsuperscript{55}Makau wa Mutua, \textit{“African Cultural Fingerprint” Ibid} at 344-345.

\textsuperscript{56}Jack Donnelly, \textit{“Human Rights and Human Dignity”}, \textit{supra}, note 8 at 313. On her part Rhoda Howard is so fixated with the Western notion of human rights attaching only to the atomized individual that she summarily dismisses arguments by African scholars that individual rights were, and are capable of being, held in a social, collective context. Consequently, she vehemently refuses to acknowledge that pre-colonial African
Universal" concept of human rights that he looked into the African traditional societies and discovered nothing resembling a Western notion of human rights. A concept of human rights need not be Western in order to exist in Africa. To be located in African traditional societies, it has to be African. It is therefore wrong to deny the existence of a concept of human rights in traditional Africa based on alien characterization of rights. As Nobels insightfully observed:

The world view, normative assumptions, and referential frame upon which the paradigm is based, must, like the science they serve, be consistent with the culture and cultural substance of the people. When the paradigm is inconsistent with the culture and cultural definition of the phenomena, the people who use it to assess and / or evaluate that phenomena become essentially conceptually incarcerated.57

societies knew human rights as a concept. See Rhoda Howard, 'Group versus Individual Identity' supra, note 8 at 167.

It is from this standpoint of conceptual incarceration that the existence of human rights in traditional Africa has been denied.

Other than the widely recognized truculent intransigence with which some Western scholars and opinion vendors unversedly regard Western ideals, ideas and belief systems as having universal application, there is nothing universal about the Western notion of human rights. In fact, the Western notion of human rights is inherently a denial of universalism. This is because, philosophically speaking, the Western Liberal doctrine of individual human rights, (with its roots in the 18th century British and French Enlightenment), excludes, if not denies, economic, social and cultural rights which are widely recognised by other cultural traditions. Again, despite the 'great role' played by some Western states in 1993 in getting the World Conference on Human Rights in Vienna to affirm the universality of rights, some have continued to deny the validity of, and have maintained their contemptuous posture approach as fostering a relativism that is antithetical to the universal character of human rights. It is thus, argued that the concept of human rights would not account for much if it cannot be equally applied to all peoples. The usefulness of adopting a cross-culturally sensitive approach to the conceptualisation and promotion of human rights cannot be overemphasised. While not rooting for extreme relativism or rabid universalism, a human rights approach that takes into consideration the socio-cultural context is preferable to one which seeks the lock, stock and barrel transplantation of unmitigated Western Liberalism. The modern content of 'universal' human rights ought to be tempered by specific cultural experience of each society.

58 A. Belden Fields & Wolf-Dieter Narr, supra, note 30 at 2 aptly captured the contradictions inherent in characterizing the Western notion of human rights as universal by describing it as “the particular presented as the universal.” See also Josiah A.M. Cobbah, supra, note 41 at 314-315 (noting, inter alia, the exportation and superimposition of Western concepts of human rights to non-western cultures through colonialism). But see, Guyora Binder, “Cultural Relativism and Cultural Imperialism in Human Rights Law” (1999) 5 Buffalo Human Rights Law Review 211-221.


60 See Adamantia Pollis, supra, note 57 at 318-319, (noting that “this lack of consideration for economic and social rights is one of the major differences between the Western doctrine and other cultural traditions - traditions that are far more extensive than the ideological stance of the exsocialist states.”).
towards economic, social and cultural rights. One, therefore, wonders the basis of vaunting Western Liberalism as if it encompassed the universal notion of human rights recognised by all the peoples of the world.

Human rights as a concept derives its credibility from its function as a mechanism for protecting human dignity and ensuring the enjoyment of certain conditions necessary for a good life. This, it has been observed, "is valid in the West where it provides a protective bulwark against the Western state system by limiting the powers of the state in its relations with the populace, whereas the traditional systems may have developed similar, albeit terminologically different, means of protecting the human person against institutional or other abuses." Attempts to show the existence of an African concept of human rights are not necessarily relativist. Rather, such efforts demonstrate that, just as in the West and other societies, methods of conferring and/or protecting the entitlements and human dignity of members of the society were not lacking in traditional Africa. These means of protection existed in the form of norms or principles regulating acceptable interpersonal relationships of the individual with the larger group and vice versa. They existed in the beliefs and ideas of the societies and were intimately interwoven in their way of life, practices, values and

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62 Okay Martin Ejidike, supra, note 8 at 72. The writer notes that "the concept of human rights is much older than the terminology of human rights which originated in documents on post-war organization produced in the US during the war years. Legitimacy, justice, integrity and dignity of the individual, safeguards against arbitrary rule, freedom from oppression, and persecution and individual participation in collective endeavours (including government of the community) are concepts found in similar forms in all civilizations."

63 Ibid.
institutions. The manifestations of these rights in the values of the societies will now be examined.

3.3.2. Human Rights as a Manifestation of Societal Values

Having argued above that traditional African society did not lack a concept of human rights; that such a concept of human rights was inherent and discernible in the society, although a terminology that equates the traditional African concept to the current notion of human rights may be lacking, therefore, its existence, nature and manifestation in the traditional set up has to be located within the society. This is evident in the social values of traditional Africa.

Every human society is characterized by certain sets of values be they economic, political, social, religious, moral or aesthetic values. The values in a society will, to a very large extent, determine the character and nature of the society. “A social system” according to Radcliffe Brown, “can be conceived and studied as a system of values and a society cannot

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64 It might be argued that the “practices, values and institutions” of a society may not necessarily support or uphold universal value of human rights. For instance, the practices, values and institutions of Germany in the 1930s and 1940s towards the Jews in its midst. Be that as it may, the practices, values and institutions of Germany in the 1930s and 1940s against the Jews are not more relativist or more antithetical to the universal values of human rights than the state sanctioned (until recently) racial discrimination against the blacks by other Western states. This underscores the fact that no society (traditional or modern) has been ideal in its practices, values and institutions with regard to human rights. As such, no society can justifiably lay claim to universalist principles in the sense of its practices, values and institutions being the quintessence humanity’s aspirations for a just society. That the practices, values and institutions of traditional African societies may not have been the ideal, as it is known in contemporary human rights practices, is no sufficient reason to deny the validity of the traditional African practices, values and institutions.
exist except on the basis of [a] certain measure of similarity in the interest of the members.\(^{65}\)

These values of the society are based on their utility.\(^{66}\) The traditional African society manifests values that evolved in response to the needs and well-being of the society and for the protection of the rights of the members. Human rights in traditional African societies must therefore be sought in the value systems which are rooted in the social facts prevalent in these societies. It is the most basic of those values on whose protection hinges the very existence of the society\(^{67}\) that are termed human rights. As explained by David Ritche:

> If there are certain mutual claims which cannot be ignored without detriment to the well being and, in the last resort, to the very being of a community, these claims may in an intelligible sense be called rights. They represent the minimum of security and advantage which a community must guarantee to its members at the risk of going to pieces, if it does not with some degree of efficiency maintain them.\(^{68}\)

Notwithstanding the apparent divergencies in African human rights scholarship, there appears to be a consistent descriptive pattern that can be gleaned therefrom which points to the fact that "traditional African society embodies values that are consistent with and supportive of human rights, but the effects of colonialism and difficulties of nation building and development have contributed to an erosion of those values or, at least, bred disrespect

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\(^{67}\) According to Umozurike, "African Charter" *supra*, note 16 at 17-18, "[t]he existence of a society ... presupposes the recognition of the members" since no group of people who are bent on denying or ignoring one another's rights can exist as a society.

and abuse of human rights.”

According to Howard, “...in many of the... societies of pre-colonial Africa, both economic and political ‘rights’ were guaranteed, at least at the local level, by communal structures. Obligations to family and kin ensured sharing of resources, however scarce. Land was distributed on the basis of need: even domestic slaves were allocated land to support themselves. Even after a great deal of social change, this pattern of resource distribution and family-based sharing continues in contemporary Africa.” She further adds: “...on the civil and political level, many of the non-differentiated, ethnically homogeneous societies of rural Africa had effective means for guaranteeing what is now known as human rights.” These values were inherent in the society and were society’s antidote to existential challenges confronting the society. The well-being of members of the traditional society was anchored on the health and stability of the society as a whole.

Describing the values of traditional Africa, Umozurike, notes that:

African societies had stabilizing factors which included the sense of obligation to one’s kith and kin, the fear of the deity that was omnipotent and omniscient, and accountability for Him for all human actions on earth. This had a restraining effect on human activities, since the good were expected to be appropriately rewarded and the wicked and their successors to be condemned.

The obligation to one’s kith and kin carries with it a bundle of rights and duties. The rights

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71 Ibid

claimer must be ready to carry out the obligations that go with them because these rights were intertwined with duties. It was a member’s right to belong to a family, a compound, a village and age group or any other social unit. This entitled him/her to support and assistance and s/he could not be banished from the group, village or clan except on commission of a serious offence such as murder. However, doing one’s duty was a condition precedent to enjoying these rights in these societies where social order was ontologically oriented and which solved its problems through kinship, reciprocity and redistribution. Uchendu puts it succinctly thus:

The kinship principle provided the individual with a community whose moral order emphasized shared values, a sense of belonging, security and social justice. In such social order duties preceded rights. The principle was clear: to enjoy your rights you must do your duty; and duty and right have a reciprocal relationship, and structurally both were balanced.

Unlike constitutions protecting rights in modern Africa which can be suspended, amended or abrogated by military adventurers, the kinship or the extended family on the other hand is not subject to the whims and caprices of any adventurer, no matter how strong. It is permanent and exists as long as the individuals who form it exist. There was no equivalent of a modern constitution which could be overthrown by a military despot enforcing his decrees even when such decrees conflict with human rights. This minimizes the vulnerability of the traditional system. In addition, the system of kinship units is seen

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as belonging to three categories of members - the living, the dead and the unborn. This adds to its stability.

Human rights in traditional Africa therefore are not located in the abstract but in the value system of the society which has inbuilt mechanisms to ensure their continued enjoyment and protection. It is the enduring values of this system that was sought to be reflected in the African Charter. The workability of such an arrangement is an entirely different matter, given the different and changed circumstances. A brief examination of the nature and contents of economic, social and cultural rights in traditional Africa is revealing especially to the extent it contrasts with such rights provided in the African Charter.

3.3.3. Substance of Economic, Social and Cultural Rights in Traditional Africa

Notwithstanding the organic and holistic nature of traditional African society and its rejection of compartmentalization of aspects of life, the contents of economic, social and cultural rights of the traditional society can still be discerned from the prevailing practices. Economic, social and cultural rights were fully accorded to members of the society. However, all members of the societies were not accorded equal rights. As in most societies that existed contemporaneously with traditional African society, women and children were

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76 See Amoudu Tijani v. Secretary to the Government of Southern Nigeria [1921] 2 A.C. 399 where the Privy Council quoted with approval the testimony of Chief Elesi of Odogbolu before the West African Land Commission (1908) where he said: "I conceive that land belongs to a vast family of which many are dead, few are living and countless members still unborn." This implies that the ownership of the land is vested in the community as a corporate entity, every member of which has the right of sharing in the bounties which he helps to produce. Consequently not the individual but the family or clan or village has the power to alienate land. See also Mbonu Ojike, My Africa, (New York: The John Day Company, 1946), particularly chapter viii.
not accorded equal rights with adult males. In matrilineal societies, however, women had greater rights to property than men especially with regard to property inheritance. The economic, social and cultural rights protected in traditional Africa include, rights to work, shelter, health, education and the right to participate in the cultural life of the community or society.

Traditional African society guaranteed the right to work of its members. Agriculture being the main occupation of the people, every person was meaningfully engaged in the prevailing activities of his/her community. Land, however, has been described as the central focus of any discussion on the socio-economic rights of traditional African society. If broadly construed, this may include grazing areas and fishing spots. All these were shared on the basis of need. This ensured that on attainment of manhood, one was given one’s entitlement as well as the resources to cultivate. According to M’Baye, in traditional African society “[w]ork was both a right and a duty.... In certain social units ... the division of labour according to age made it possible to call on everyone so as to ensure, in the best conditions, the life and prosperity of all.”

Through this way the society ensured that nobody was left without the means of sustenance. Ejidike has observed that the society “recognized its duty to provide both the

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77 See Okay Martin Ejidike, supra, note 8 at 94.

78 See Mbonu Ojike, supra, note 76 at 111; Okay Martin Ejidike, Ibid. at 93.

79 See Rhoda Howard, “Evaluating Human Rights in Africa,” supra, note 25 at 174 (noting that even domestic slaves were allocated portions to support themselves).

80 See Ejidike, supra, note 8 at 93.

81 Keba M’baye, supra, note 17 at 590-591.
means of economic well-being, .... and the right of its citizens to make such claims on their kin-groups. The right to land, work and shelter was assured...."82 He argues that "[i]f the lineage (community) is duty bound to provide the necessary conditions for the enjoyment of the conditions in question, it is therefore not difficult to see that those to whom this duty is owed have a right to (them)"83

The family and the community84 at large also ensured the provision of shelter to all who desired to own one. Houses were provided through community effort.85 In some parts of traditional Africa, it was considered an abomination for a man to refuse his brother's request to assist in building or rehabilitating his house.86 In this way the society effectively dealt with the problem of houselessness and guaranteed shelter for all, irrespective of financial status.

Traditional African societies also guaranteed the right to health. Each family and community ensured that the sick received the best medical treatment available to the society at that point in time. As Mbonu Ojike rightly observed, "every (traditional) African home is

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82 Ibid.

83 Ejidike, Ibid. See also Mbonu Ojike, supra, note 76 at 116-117; Umozurike, 'African Charter' supra, note 16 at 15.

84 Community is this context refers to the largest autonomous unity exercising control, as the modern state, over a group of people. In traditional African society, such communities were either centralized (those with established central administrative machinery) or non-centralized (i.e. those with more centralized and less intrusive central systems of administration). See Makau wa Mutua "African Cultural Fingerprint," supra, note 17 at 347. It is pertinent to point out here that the centralized and non-centralized communities (states) of traditional Africa, were the equivalent of the modern state, and possessed the full powers of a modern sovereign (Westphalian) state.


86 Ejidike, supra, note 8 at 93.
a medical school and every mother a doctor.” The ability of each family or kinship group to provide cure for their sick ones ensured free medical treatment for those in need. However, when it involved getting a doctor, it ceases to be free. Nonetheless, it remained the duty of the family and/or the kinship group to pay when the person in question could not afford the fees. In this way, the traditional societies guaranteed not only the best attainable state of health but also the right to free health services to those who could not afford it themselves.

Traditional Africa guaranteed the right to education for all without exception. Education in traditional Africa was geared towards inculcating the right behaviour and attitude of the members of the community on the younger generation, and also to equip the recipients with all it takes to survive in the society and to be a good citizen. Thus, education in traditional Africa was both formal and informal. It afforded the same philosophy and access to both the poor and the rich. The right to education in traditional Africa involved

87 Mbonu Ojike, supra, note 76 at 154.

88 Traditional African doctors were derogatorily referred to as ‘medicine men’ or ‘black magicians’ by Europeans and other Westerners who denigrated their practices because they lacked the trappings of Western ‘civilized’ orthodox medicine. Even to date, some Westerners and westernized Africans still refer to African traditional doctors as ‘healers’ and not doctors. But if doctors are those ‘trained in the healing arts and licensed to practice’ as defined by the World Wide Web dictionary, then there is no reason why traditional African doctors cannot, and should not, be addressed as such.

89 See generally, Mbonu Ojike, supra, note 76 at 153-156. See also Mokwugo Okoye, African Responses, (Devon: Arthur H. Stockwell Ltd., 1964) at 260-261.

90 Keba M’Baye, supra, note 17 at 591, writes: “The right to education took the form of a duty to be borne by the community in order to make each child a fitting and useful element of the group. Education was the responsibility not only of the parents but also of grandparents, brothers, sisters, uncles and aunts, cousins and even friends and neighbours. Everyone took active part in the training and supervision of young men and women with a view of turning them into ‘good citizens’.”

91 See Mbonu Ojike, supra, note 76 at 150 - 153 (describes some of the processes of formal and informal education in traditional Africa).

92 Ibid. at 150; Mokwugo Okoye, supra, note 89 at 265-268.
not only the provision of facilities but also access to all without exception. Moreover, it was free for all.93

The right to free participation in the cultural life of the community was one of the entitlements of the individual as a member of a community. It was simply taken for granted and it enured to the individual by virtue of the fact of his/her being a member of that community.94 It was not only a right to freely participate in the cultural life of the community, but also a right to have the culture preserved which was the responsibility of the entire community. However, there were restrictions as to participation in some aspects that were exclusively for a particular gender.95

These economic, social and cultural rights enjoyed in traditional African societies were guaranteed by the system to the members by virtue of their being members of the community. Furthermore, these rights of members were integrated into the rights of the society as a whole and were not held against the society but were complementary with societal rights.96 A person could not be ostracised or banished as to be denied these rights except for heinous crimes (abominations) like intentional killing of a member of the family or community.97 The mechanism by which these rights were protected in traditional African

93 Ibid.
94 See J.S Mbiti, supra, note 50 at 102.
95 See Mbonu Ojike, supra, note 76 at 152.
96 Umozurike, 'African Charter' supra, note 16 at 17.
97 See supra, note 73 and the authority cited. See also Ejidike, supra, note 8 at 83. Ostracism or banishment, if arbitrary, may, in contemporary international human rights law, violate Article 12(2) of the African Charter and Article 12(4) of the International Covenant on Civil and Political Rights which prohibit arbitrary deprivation of the right of entry into one’s own country, but it appears to be more humane than a lengthy prison sentence or outright execution. This is not to say, that in all cases murderers are banished.
societies will now be considered.

3.3.4. Protection of Economic, Social and Cultural Rights in Traditional Africa

The traditional African societies had not only the concept of human rights, but also all the mechanisms for ensuring their enjoyment. These are located in the traditional institutions, beliefs and practice as the discussion in this section will reveal.

This section is not concerned with the protection of civil and political rights in traditional Africa. Rather, its focus is on the protection of the economic, social and cultural rights. It seeks to pose and answer the question as to what extent traditional Africa protected the economic, social and cultural rights and the mechanism or institutions through which their enjoyment were ensured.

3.3.4.1. The Idea and Mechanism of Protection / Enforcement

It is often asserted that traditional Africa lacked any formal or official body or mechanism for the protection of any form of human rights. That being the case, how then is it possible to conceive of an idea of protection? Assuming, but not conceding, that there was the absence of a formal or official mechanism of protection, the economic, social and cultural rights of members of the society were protected all the same. Even the critics of traditional

Revenge killings were not unknown, although largely obtainable when the victim is from a different community.
African concepts of human rights admit that these rights were protected. The idea of protection is one grounded in people’s beliefs and practices that evolved over time and have been internalized as forming part of the system against which no derogation is permitted. Even though informal, (in the sense that it is not like a Human Rights Commission of the present time), the system was quite effective in meeting the demands of the time. The fear of a supernatural being with pervasive powers and to whom all owe a duty of accountability had a very restraining and stabilizing effect on the system and ensured that everybody got what was due to him or her.

The order being maintained was not the order imposed by men but the order of a supreme being who was accepted and acknowledged as the ultimate custodian of law and order and the moral and ethical codes. Consequently, disobedience to, or the breaking of such order, whether by the individual or by a group was ultimately an offence against the supreme being and the corporate body of society. The fear engendered by the pervasive reality of the supreme being ensured societal order and balance, and compliance to norms

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98 Rhoda Howard admits that “in many of the relatively homogeneous, undifferentiated simple societies of pre-colonial Africa, both economic and political rights were guaranteed, at least at the local level, by communal structures. Obligations to the family ensured sharing of resources, however scarce. Land was distributed on the basis of need: even domestic slaves were allocated land to support themselves.” see Rhoda Howard, “Evaluating Human Rights in Africa,” supra, note 25 at 174. Osita Eze has argued that at this stage there was no “legal obligation on society to provide the means of sustenance to the indigent except to some extent in societies that shared Islamic tradition.” See Osita Eze, ‘African Concept of Human Rights’ supra, note 2 at 15. This argument lacks merit because the traditional society did not make any distinction between legality and morality or between the sacred and the secular. A thing was legal if it was morally prescribed. Morality, and not legality (though not distinct from it) was of the greatest importance in private and public life.


100 See J.S. Mbiti, supra, note 50 at 206.

101 ibid.
without the necessity of human intervention or enforcement as punishment for non-compliance was visited not only on the individual but also on his family and community.\textsuperscript{102}

In traditional Africa, the procedural difficulties of modern legal systems, constitutional limitations, economic restrictions, or other debilitating and crippling technicalities are not present as whatever is available is meant for everyone. This ensured considerable success in realizing these rights.\textsuperscript{103} As a member of a family unit or kinship unit, the individual in traditional Africa enjoyed his/her economic and social rights under the family as such member.\textsuperscript{104} Among the Yoruba of Western Nigeria for instance, land is not subject to private ownership. Any alienation of such land requires the consent of the principal members of that family including the head of the family, in the absence of whom such alienation would be void.\textsuperscript{105} This ensured that the interests of members of the family were

\textsuperscript{102}The Gikuyu of Kenya for instance held the belief that the disobedience of one person brings harm to the whole corporate body of society. This appears to be a general belief of most traditional African societies. The Nuer of Sudan and various societies across West Africa held such beliefs. See J.S. Mbiti, \textit{Ibid}. at 204-210.

\textsuperscript{103}This can be contrasted with modern African constitutions where, economic, social and cultural rights are confined to the non-justiciable parts of the constitution, for instance under the Fundamental Objectives and Directive Principle of state Policy as in the Nigerian Constitution. [See Chapter II, sections 13-21 of the Constitution of the Federal Republic of Nigeria, 1999. For a discussion of the non-enforceability of the Fundamental Objectives and Directive Principles under the Nigerian Constitution see, G.G.I. Ojiako, \textit{In the Name of Justice} (Owerri: Judiciary Committee, 1997)].

\textsuperscript{104}See T W Bennett, \textit{Human Rights and African Customary Law under the South African Constitution} (Cape Town: Juta & Co. Ltd., 1995) at 5 (notes that "at the heart of the African socio-political order lay the family, a unit that was extended both vertically and horizontally to encompass a wide range of people who could be called 'kin'. This large accommodating group provided for all the individual's material, social and emotional needs....")

\textsuperscript{105}See Angaran \textit{v. Olushi} (1908) 1 N.L.R. 78. See generally, G. B. A. Coker, \textit{Family Property Among the Yorubas}, 2\textsuperscript{nd} edn. (London: Sweet & Maxwell, 1966). This is also true of the Igbos of South Eastern Nigeria. Under the Igbo land tenure, land belongs to the community and cannot be alienated without its consent. The individual has security of tenure in respect of land for houses, farms and gardens and there were no landless adult member. However, while some parts do not give land to women, in others, women are part of the sharing process and even get more than the men, for instance in matrilineal societies of Abiriba and Ohafia in the present Abia State of Nigeria.
not jeopardized without their consent thereby depriving them of their economic rights and means of sustenance. This institutionalized mechanism of protection, being an essential part of their social organization guaranteed the existence of these rights and made it less vulnerable and more permanent than is currently obtainable in modern Africa.  

But this is not the case in modern Africa where land is now owned by the state and the citizens are only granted occupancy rights in the form of long term leases which can be revoked at the pleasure of the government. This is in addition to those deprived and dispossessed of their own land through colonial greed and by white settlers.

In addition to economic rights, social and cultural rights were secured and enforced through the instrumentality of the family and the society at large. The right to education was guaranteed for both the rich and the poor and safeguarded by both the family and the community. Also, the family and the community ensured that there was the same philosophy of education for the poor and the rich. Full responsibility for the sick, the handicapped and the elderly was taken by the family and the society at large. Both the family and the community stopped at nothing to provide cure and succour to the afflicted member. Housing (shelter) was not left out. It was the responsibility of the family and the entire community to help a member to build his own house. Among the Igbos of South Eastern

\[^{106}\text{Lakshman Marasinghe, } supra\text{ note at } 44.\]

\[^{107}\text{For instance. Section } 1\text{ of the Nigerian } Land\text{ Use Act, } 1978\text{ confers the radical title in land to the governor of the state who has the power to grant right of occupancy to applicants. Existing titles are deemed to have been granted under the Act. Section } 28\text{ gives power of revocation to the governor. Under Section } 34\text{ any alienation, lease, mortgage, sale or any other transfer without the prior consent of the governor is void.}\]

\[^{108}\text{Mbonu Ojike, } '\text{African Charter}'\text{ supra, note at } 150.\]

\[^{109}\text{ibid.}, \text{ at } 153-154.\]
Nigeria, it has been noted that "the whole neighbourhood afford their unanimous assistance in building (houses)" - a practice that was so strong that it was considered an abomination for a man to refuse his brother's request to assist in building or rehabilitating his house.¹¹¹

The various families, and to a very large extent the society at large, as well as the fear of a pervasive supreme being, were therefore a major mechanism that ensured the protection and enforcement of economic, social and cultural rights. They ensured that everybody received what was due to him/her and that none was deprived because whatever belonged to the family belonged to all its members.

3.3.4.2. Holistic Nature of Traditional Society and Interdependence of Rights.

Traditional African society did not compartmentalize or isolate any aspect of life, be it social, political, religious, economic or cultural and treat it in contradistinction to others. This is as a result of the organic and holistic nature of traditional African society.¹¹² Religion was not dissociated from other aspects of life and there was no distinction between the social and sacred life. Social order and peace were regarded as essential and sacred. Social, political and economic aspects of life were part and parcel of the religious life and were given sanctity by it. Consequently, it has been observed that, "social life derives its force and validity from

¹¹⁰ O. Equiano, supra, note 85.

¹¹¹ See Okay Martin Ejidike, supra, note 8 at 93-94. Brother in this sense is not defined restrictively to mean just one blood brother. It has an extensive connotation and embraces every member of the community.

religion. Political decisions are legitimized and validated by religious forces (and) economic life find meaning and relevance only when given religious connotations.  

Given the largely informal nature of the traditional society, where social order was ontologically oriented, and emphasis was laid on the community rather than on the individual, rights were not categorized in any form whatsoever. The traditional social and political organizations and institutions did not admit any compartmentalization. Their beliefs and ideas were most intimately interwoven. The fact of membership of a family or community conferred upon one all the rights that were necessary for his/her living a meaningful life - whether civil and political rights, or economic, social and cultural rights, or the rights to development and self-determination. All rights were interdependent.

It should, however, be pointed out that the fact of the interdependence of rights, their non-categorization and the importance placed on all rights without distinction do not imply that there were no violations of some of these rights. Traditional societies recognized slavery and there were other forms of discrimination. In most societies women and slaves were excluded from decision making bodies. There were human sacrifices, the killing of twins and existence of a caste system in some societies. Nonetheless, this was not peculiar to African


114 See Okay Martin Ejidike, supra, note 8 at 72.

115 In Igboland for instance, the Osu caste system was recognized. Intermarriage with them was forbidden and social interaction was kept to the barest minimum. With regard to human sacrifice, the atonement or cleansing for serious offences or to prevent a major calamity required human sacrifice. Some dignitaries were buried with human heads. However, this could not be done with a member of the community. Also, a fellow member of the community could not be enslaved by another member of the community. This was regarded as an abomination. Thus, rights and privileges were community bound and defined. Osita Eze observed that even though human rights were observed and protected in traditional Africa the "categories of rights protected as well
traditional society. Injustice has been a feature of all human societies. Manipulation and exploitation of the weak and the poor have been existing in human societies since the advent of humanity.

3.4. ECONOMIC, SOCIAL AND CULTURAL RIGHTS IN COLONIAL AFRICA

For a better appreciation of the economic, social and cultural rights in modern Africa, it is germane to highlight, even if briefly, the state of these rights under colonial rule as well as in post colonial Africa before the African Charter. As earlier stated, African states came under colonial rule at different times. However by 1914 almost all African states were under one European power or another.116

It is really oxymoronic to talk about economic, social and cultural rights, or indeed any other rights, in colonial Africa. Colonization is itself a denial of rights, since the right of peoples to self determination is the supreme human right on which every other right depends.117 Colonial Africa was notoriously remarkable more for the absence of economic, social and cultural rights than for its presence, for as Jeanne Hersch observed, “[t]he colonialists’ prime object was to go on exploiting their victims, and they justified their

as their scope and ultimately who enjoys any of these rights are in the end determined by the nature and character of the society that is being examined.” See Osita Eze, ‘African Concept of Human Rights’ supra, note 2 at 16. While this is true to some extent, it should be realized that the situation is almost the same in modern Africa notwithstanding the provisions of the African Charter. Some countries have better human rights records than others. One cannot but agree with Ejidike that in “both traditional and modern perceptions, one’s rights have meaning and context within a certain social unit, a specific locality.” See Okay Martin Ejidike, supra, note 8 at 97.

116See supra, note 14 and the authorities cited therein.

117Keba M‘Baye, supra, note 17 at 584.
exploitation by an appeal to racial prejudice - the claim that those they were exploiting were intellectually inferior."^{118}

Contrary to all pretensions that the fundamental purpose of European colonial expansionism was the improvement of the moral and material well-being of Africans,^{119} it remains a fact that whatever the administrative philosophy of the colonial powers were, the aim and the result dovetailed and manifested in the maximum exploitation of the human and material resources of the continent.^{120} Apart from massive violations of civil and political rights,^{121} there was also the despicable dislocation, depredation and despoliation of economic rights,^{122} and the bastardization and truncation of social and cultural rights. In some parts of Africa, hundreds of thousands were expelled from their lands to make way for white settlers, and most others were forbidden to grow profitable crops in competition with the whites.^{123}

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^{120}See Umozurike, Ibid, at 21.

^{121}For an insight into some of these violations see Michael Crowther, (ed.), West African Resistance: The Military Response to Colonial Occupation (London: Hutchinson, 1971); A scholar rightly observed that "the authoritarianism marking European colonial rule... was mammoth in its impact. These abuses of individual and collective rights echo to the present. Harmful effects of the periods of slavery, partition, and colonial rule have yet to be totally overcome." See Claude E. Welch, Protection of Human rights in Africa: Roles and Strategies of Non-Governmental Organizations (Philadelphia: University of Pennsylvania Press 1995) at 3 [hereinafter 'Protection of Human rights in Africa']. See also Claude E. Welch, "The African Charter and Freedom of Expression in Africa," (1998) 4 Buffalo Human Rights Law Review 103 at 108-109 [hereinafter 'African Charter and Freedom of Expression'].


Culturally, the introduction of Christian churches and mission schools, though well intended, constituted the greatest assault to African cultural values. As Howard observed:

Cultural diffusion, in which Africans might have made their own choices about what aspects of Western mores they wished to adopt, was accompanied by cultural compulsion: the price of schooling was conversion to Christianity. Newly Westernized “young men” challenged the authority of their elders, while the traditional relations between the sexes were distorted by the imposition of Western patriarchal ideals.\(^{124}\)

The imposed religions, languages and educations systems demonized and exorcized the African equivalents.\(^{125}\) Colonialism also muddled up African law - its rules, institutions, procedures, and meanings, as well as the way African peoples perceived and understood law,\(^{126}\) and thus, ushered in the most contradictory transformations in Africa.

It was in this state of economic exploitation, social disorationation, and cultural bastardization and traumatization that African states gained their political, if not flag, independence. The process started with Ghana in 1957 and was followed by most others in the 1960s. Notwithstanding the high hopes for the protection and promotion of human rights as well as the restoration of African dignity, the economic, social and cultural rights did not fare any better, as the leaders who took over from the colonial powers conducted their affairs as if their government was an extension of the colonial rule. The privatization of state affairs, massive corruption, ineptitude, political instability and foreign neo-colonial manipulations permanently structured the lack of meaningful progress towards the realization of these

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\(^{125}\)E A El-Obaid & K Appiagyei-Atua, *supra*, note 22 at 822.

\(^{126}\)Kristin Mann & Richard Roberts (eds.), *Law in Colonial Africa* (Porstmouth: Heinemann, 1991) at 5.
It was in this state of affairs that the African Charter was born\textsuperscript{128} with its, perhaps, not unexpected emphasis on economic, social and cultural rights.

3.5. ECONOMIC, SOCIAL AND CULTURAL RIGHTS IN MODERN AFRICA

Modern African human rights, as encapsulated in the African Charter on Human and Peoples’ Rights, include the recognition and ‘protection’ of economic, social and cultural rights. The exercise and enjoyment of these rights are made a condition precedent to the enjoyment of civil and political rights.\textsuperscript{129} However, in practice more importance has been attached to the civil and political rights, thereby creating problems not only for the material well being of those who are supposed to enjoy these rights but also for the actual realization of the civil and political rights. In the face of such dilemma, civil and political rights, and economic, social and cultural rights suffer almost the same fate notwithstanding the preferences. As earlier noted, this preferential enforcement varies with the situation in traditional Africa. An examination of economic, social and cultural rights under the Charter underscores this fact.


\textsuperscript{128}See Chapter One for the history of the Charter’s adoption.

\textsuperscript{129}The African Charter in its 8th preambular paragraph states: Convinced that ... civil and political rights cannot be dissociated from economic, social and cultural rights in their conception as well as universality and that the satisfaction of economic, social and cultural rights is a guarantee for the enjoyment of civil and political rights.
3.5.1. Economic, Social and Cultural Rights under the Charter.

Since its inception, the African Charter has been showcased as an embodiment of traditional African values. It embraces all spheres of, and places equal emphasis (at least on paper) on all, human rights. Also, the Charter imposes duties on holders of rights. These attributes make the African Charter peculiar and "the most authoritative rendering of the African tradition in the fields of human rights."\(^{130}\)

The Charter contains several provisions on the economic, social and cultural rights. It clearly demonstrates in its preamble an emphasis on these rights. While recognizing the interconnectedness of the civil and political rights with the economic, social and cultural rights both in conception as well as in universality, the Charter declares that "the satisfaction of economic, social and cultural rights is a guarantee for the enjoyment of civil and political rights."\(^{131}\) This emphasis is hardly surprising given the peculiar legal and political history of the Continent having passed through the triple scourge of slavery, colonialism and neocolonialism, and the consequent grave economic problems now facing the various states.\(^{132}\)


\(^{131}\) See para. 8 of the Preamble to the Charter.

\(^{132}\) See Carol M. Tucker, supra, note 13 at 161.
3.5.1.1. **Analysis of Economic, Social and Cultural Rights under the Charter**

The *African Charter* embodies a number of economic, social and cultural rights. These include the right to work and equal pay for equal work (Article 15), the right to health (Article 16), the right to education (Article 17(1)), and the right to take part in the cultural life of the community (Article 17(2)). Given the emphasis of the *Charter*, one would expect that the substantive aspects of the instrument would amplify the focus on the economic, social and cultural rights. However, a critical examination of these specific rights in the *Charter* raises questions about the manner in which they were couched and the commitment of the states to their realization.

Article 15 provides that “every individual shall have the right to work under equitable and satisfactory conditions, and shall receive equal pay for equal work.” From this provision, it is clear that the *Charter* does not guarantee the right to work per se. It merely provides for the right to “work under equitable and satisfactory conditions” and to “receive equal pay for equal work.” Thus, it is not the responsibility of the state to provide jobs but to provide good working conditions.

The present writer is of the opinion that this particular provision fails to meet the eloquent declaration of the *Charter* with regard to emphasis on economic rights. In a continent with few viable industries and a limited wage system, where the bulk of the

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133 See infra, the Appendix, for the *Charter*‘s provisions on economic, social and cultural rights.


population are peasants combining farming with petty trading, or are cattle rearers, merely providing for equitable and satisfactory conditions of work rings hollow. What satisfactory condition of work does a worker have when sacked because of the non-viability of his company? What equitable and satisfactory condition will the State provide to the cattle rearer who spends all his time in the grazing field? Does a farmer whose land has been acquired by the government for ‘development’ projects have any satisfactory conditions of work?

It is the opinion of this writer that such provisions are best suited to the industrialized countries. The Charter’s provision on the right to work is not meaningful to the people, as it is not relevant either to the existing type of work or to their unemployed state. States Parties to the Charter ought to have assumed a greater obligation to provide work by undertaking to lay the necessary foundations to reduce or eliminate widespread unemployment. Where a large majority of the people are unemployed, ‘equitable and satisfactory conditions’ of work or ‘equal pay for equal work’ remain esoteric, if not meaningless.

This provision differs from what was obtainable in traditional Africa where, as previously seen, economic rights were guaranteed by the communal structures. There was

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136 The high level mismanagement of governmental affairs across Africa has led to the closure of many companies and the laying off of staff. Also, as a result of devaluation of currencies in the wake of structural adjustment policies, many companies have been shut down because of their inability to meet up with spiral inflation or their inability to meet the high cost of imported raw materials. At the same time, the expected inflow of foreign capital as a result of deregulation of the economy seem too distant in coming.

137 U. O. Umozurike, ‘Significance of the African Charter’ supra, note 135 at 46, states that “[t]he bulk of the populations are peasant farmers and it is for government to ensure an efficient marketing system, preservation of produce, credit facilities and unnecessary inputs at subsidized prices.” It is doubtful if this satisfies the requirement of the Charter. It is submitted that the availability of all these neither guarantees equitable nor satisfactory conditions of work.
no unemployment as a result of the ability of the prevailing system to adequately provide for the people. Land was distributed on the basis of need and, as a result, traditional Africa ensured the right to work whereas the substance of such a right is lacking in modern Africa.

Article 16(1) provides for the right of every individual “to enjoy the best attainable state of physical and mental health.” Paragraph (2) obligates the state to “take the necessary measures to protect the health of their people and to ensure that they receive medical attention when they are sick.” This provision is heedlessly vague. It is by no means clear precisely to what individuals are entitled, nor is it clear what the resulting obligations are on the part of states. Akpalu is of the opinion that the operative word in this is article is “attainable” which means that the extent of State obligation with regard to the provision of health facilities would depend on available financial resources. It is doubtful if this represents the correct interpretation to this provision. Under Article 16(1), it is the right of the individual to enjoy the “best attainable state of physical and mental health.” This implies the highest state of health to which the individual can reach in order to maintain a healthy mind and body, and does not refer to the ability of the state to provide, as Akpalu seems to suggest.

As a right, this provision has been honoured more in breach than in fulfilment.

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Accordingly, it has been observed that the presence of the sick and mentally disturbed persons in the streets of African towns and cities is a negation of the right to health and exposes the irresponsibility of their governments. In most domestic jurisdictions the right to health does not exist as a justiciable right but as a non-justiciable objective of state policy.

A comparison with traditional Africa reveals the contrary. The right to health of the members of the community was not only guaranteed, it was also observed in fulfilment. Every sick person was the responsibility of not only his/her immediate and extended family, but also that of the community at large. Both the family and the community stopped at nothing in search of a cure for a member even when such remedies are beyond the borders of the community. This ensured that the individual never lacked proper and adequate medicare available in his/her time.

The Charter in its Article 17(1) guarantees the right to education. This has been interpreted to mean “right to unlimited education up to any level” and includes “the right to primary, secondary, vocational, adult and tertiary education, and, for illiterate adults, the right to special education.” However, another scholar has contended that it is a matter for determination as to whether what is granted is a right of access to education or right to state

\begin{footnotes}
\item[142] Ibid.
\item[144] Mbonu Ojike. supra, note 76 at 154.
\item[145] Umozurike, ‘African Charter’ supra, note 16 at 47.
\end{footnotes}
In the absence of any express provisions regarding free education it is doubtful whether this particular provision can be interpreted to signify the right to state sponsored education. The article does not mention free education - not even free primary education. One is therefore inclined to hold the view that it is not the right to unlimited state sponsored education but the right of access that is provided for in the Charter. This is likely to make education open only to those who can afford it.

In traditional Africa the right to education was guaranteed and open to all. There was the same philosophy of education for both the rich and the poor. Not only was education accessible to all without exception, it was free. This applies to both the formal and informal education. There were, however, some exceptions with regard to formal education. Where it involved the acquisition of professional experience, it was not always free. Because of the different objects of formal education in traditional and modern Africa, there seems to be no practical basis for comparing the levels of education for the two periods.

The Charter also guarantees the right of every individual to freely take part in the cultural life of his/her community. It appears that this article is aimed at obviating the

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148 See Mbonu Ojike, *supra*, note 76 at 150.


150 See Article 17(2).
elimination of a people’s culture through the imposition of alien cultures. But Akpalu has suggested that it might mean the right of individuals to take part in ethnic or ethnic national activities thereby reinforcing the aim of states to protect traditional African values. This view is reinforced by the further provision in Article 17(3) imposing a duty on the state for the “promotion and protection of morals and traditional values recognized by the community.” Both interpretations seem equally valid. It is hoped that this provision should be construed accordingly so as to make it more meaningful.

Culture being the totality of a peoples’ way of life, the right to freely participate in the cultural life of the community or society was guaranteed and almost taken for granted in traditional Africa. It was the responsibility of each society to maintain its cultural values and to transmit it from generation to generation. Consequently, there was no need for the individual to fear any cultural imposition since the society cannot work against the continued survival of its identity.

The African Charter contains no provisions regarding the right to shelter. This is so notwithstanding the prevalent homelessness in most African countries, especially among urban dwellers. Not only has the cost of building materials gone beyond the reach of even

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151 Culture has been defined as “the fabric of ideas, beliefs, skills, tools, aesthetic objects, methods of thinking, of eating and talking as well as customs and institutions into which each member of society is born.... It includes the way each individual makes a living, the music he plays, celebration and festivals, modes of communication and transportation, the house we live in and the food we eat.” See N.S.S. Iwe, Christianity, Culture and Colonialism in Africa, (Port Harcourt: Dept. of Religious Studies, C.O.E., 1985) at 55.

152 John Akpalu, supra, note 140 at 106.

153 See Article 17(3).

154 See N.S.S. Iwe, supra, note 151 at 55.

155 See T.N. Nwokorie, supra, note 112 at 43-44.
the middle class, but also the majority of the population cannot afford to pay for decent accommodation in most of the cities across Africa. While traditional Africa developed mechanisms towards ensuring that every member of the society had his/her own shelter,\textsuperscript{156} the individual in modern Africa is left without such protection.

It is noteworthy that the obligations undertaken by African states with regard to economic, social and cultural rights are freed from the asphyxiating phrase of “to the maximum of its available resources with a view to achieving progressively the full realization of the rights recognized ...” as contained in Article 2(1) of the \textit{International Covenant on Economic, Social and Cultural Rights},\textsuperscript{157} which has, no doubt, blunted the cutting edge of the \textit{Covenant}. Having been freed from the paralysing grip of this phrase, one might be tempted to conclude that the \textit{African Charter} ensures a better protection and enjoyment of economic, social and cultural rights than the \textit{Covenant}. But this appears not to be the case.

Taking the provisions of the \textit{African Charter} on economic, social and cultural rights as a whole, it could be seen that there seem to be no certainty and clarity as to the real content and scope of these provisions. The vagueness of the \textit{African Charter}'s provisions on economic, social and cultural rights makes it difficult to actually appreciate the exact extent of what they are supposed to be protecting.\textsuperscript{158} This is distinguishable from traditional Africa

\textsuperscript{156}See Okay Martin Ejidike, \textit{supra}, note 8 at 93.


\textsuperscript{158}See \textit{infra}, Chapter 6 for a more detailed discussion of the vagueness of the \textit{Charter}'s provisions on economic, social and cultural rights.
where, as explained earlier, no one was in doubt as to what was due to him/her with regard to these rights as a result of any uncertainty. Accordingly, the Charter’s provisions do not reflect the promise of the Preamble with regard to the place of economic, social and cultural rights in the scheme of African human rights. Given this uncertainty, the contents of the articles cannot but be a huge betrayal of the hopes of equality and interconnectedness of all rights. As one scholar puts it:

...[T]he content of the articles is a significant let down from the promise of the Preamble, and belies what could have been an altogether novel and radical approach to the interconnectedness of the two categories of rights.\(^{159}\)

The scant regard for these rights is apparent not only in all these provisions and the language of the Charter but also in the actual implementation of its provisions. States Parties to the Charter have not really shown any willingness to fully implement these provisions. Even the Commission charged with the implementation of the Charter has not done much to encourage petitions relating to these rights.\(^{160}\) The problems and attitudes surrounding the implementation of these rights will now be examined.

\(^{159}\)J.Oloka-Onyango, *supra*, note 134 at 51.

\(^{160}\)A former Chairman of the Commission, Prof. U. Oji Umozurike of Nigeria, was reported to have said while in office, in a rather pointed explicit reversal of the philosophy of the Charter, that the Commission would concentrate on civil and political rights. He argued that any attempt to deal with economic, social and cultural rights would “result in too many cases and in too many countries” for the Commission to cope with. See O. Umozurike, “The Protection of Human Rights under the Banjul (African) Charter on Human and Peoples’ Rights” (1988) 1 *African J. Int’l. L* 65 at 81 [hereinafter ‘Protection of Human Rights’].
3.5.1.2. Problem of Implementation

The Charter in its Article 30 created the African Commission on Human and Peoples’ Rights to promote human and peoples’ rights and ensure their protection.⁶¹ The mandate of the Commission as set out in Article 45 shows that the Commission does not make binding resolutions, even if, on the merit of a complaint against a State Party to the Charter, it finds that a violation of human or peoples’ rights has actually occurred.⁶² In addition, all proceedings are confidential and only the OAU Assembly of Heads of States may authorize the publication of a Commission report. This puts the actual protection of human rights in the hands of a self-serving political body which itself has a proven track record of prizing state interests more highly than the protection of human rights.⁶³ The weaknesses of the Commission united scholars in their rejection of the Commission for its impotency. Makau wa Mutua was perhaps echoing the frustration of scholars with the Commission when he said:

We cannot and should not, continue to delude ourselves that we have a human rights system. What we have is a facade, a

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⁶¹ See infra Chapter 5 for a detailed discussion of the performance of African Commission in discharging in the protection and promotion of human rights in Africa.

⁶² Obijiofor Aginam, “Legitimate Governance under the African Charter on Human and Peoples’ Rights” in E.K. Quashigah & O.C. Okafor (eds.), Legitimate Governance in Africa (The Hague: Kluwer Law International, 1999) 345 at 367. See also Evelyn A. Ankumah, The African Commission on Human and Peoples’ Rights: Practice and Procedures (The Hague: Martinus Nijhoff, 1996) at 74 where the author states that “…unlike the other human rights systems, once the Commission reaches a decision on the merits, its final authority is to make recommendations to the Assembly of Heads of States and Government. If the Assembly so decides, the Commission may publicize violations of human rights by State parties….The African Commission does not have the power to enforce its decisions against states that have violated the provisions of the Charter.”

yoke that African States have put around our necks. We must cast it off and reconstruct a system that we can proudly proclaim as ours.164

The weaknesses of the Commission and the deficiencies of the Charter apart, there has also been unwillingness on the part of the Commission to enforce economic, social and cultural rights.165 Besides, there is nothing to show that the Commission is paying any significant attention to economic, social and cultural rights compared to civil and political rights.

While the Charter has been hailed for its novel approach in giving equal emphasis to all rights, the problem has remained that of implementation of these rights. In practice, the civil and political rights have received more prominence whereas the economic, social and cultural rights have been largely ignored. The excuse often given for the non implementation of these rights is the economic situation of most African countries.166 However, this raises a question as to the objective behind their inclusion as rights in the Charter and the eloquent declarations of the Preamble.

164 Makau wa Mutua, "The African Human Rights System in a Comparative Perspective" (1993) 3 Review of the African Commission on Human and Peoples' Rights, 11. To Mutua's view one should add that of a retired Justice of the Nigerian Supreme Court to wit: "with the greatest respects to the founding fathers of the Charter and the eminent personalities that serve in the Commission, what we have set up is, in appropriate metaphor, a toothless bull-dog." See P. Nnaemeka-Agu, "Constitutional and Human Rights Proceedings," Continuing Legal Education Lecture Series (Lecture 4A) 7 March 1991. It has further been observed that the abilities of the Commission are restricted by the fact that it was envisaged almost exclusively as a body to promote rather than protect human rights. See Claude E. Welch, "The African Commission on Human and Peoples' Rights: A Five Year Report and Assessment" (1992) 14 Human Rights Quarterly 43 at 43-44 (hereinafter "African Commission on Human and Peoples' Rights").

165 See supra, note 160.

166 See for instance, Richard Gittleman, supra, note 1 at 687; John K. Akpalu, supra, note 140 at 103; Umozurike, 'African Charter' supra, note 16 at 7.
3.5.1.3. **Implementation / Enforcement Problem as a Manifestation of Misconceived Objectives.**

Given the eloquent declaration of the *Charter* in its Preamble that "it is henceforth essential to pay a particular attention to the right to development and that civil and political rights cannot be dissociated from economic, social and cultural rights in their conception as well as universality and that the satisfaction of economic, social and cultural rights is a guarantee for the enjoyment of the civil and political rights "; the fact that the African states at the time of making these declarations were in no better condition than they presently are; the fact that these economic, social and cultural rights were actually enshrined as rights in the *Charter*; and the virtual opposite that is obtainable in practice, the actual objective that animated the inclusion of these rights in the *Charter* requires a critical examination.

Even though the *African Charter*, to a great extent, truly reflects the traditional African philosophy and conception of rights, yet, it seems that at the time of adopting the *Charter* (1981) the African states were still not really certain as to who was supposed to fulfil the obligations in the *Charter*. African states were unmindful of the fact that they were creating obligations which they would be required to fulfil for their citizens. Had the contrary been the case, the *Charter* would, perhaps, have been less flamboyant in its provisions on economic, social and cultural rights in view of their often touted severe economic circumstances. Rather, their focus for the satisfaction of these rights was external rather than

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167 See paragraph 8 of the Preamble to the *African Charter*.

168 Cf. James W. Nickel, "How Human Rights Generate Duties to Protect and Provide" (1993) 15 *Human Rights Quarterly* 77 (noting that "[a] common frustration with human rights instruments such as the Universal Declaration of Human Rights is that they do not clearly define who is obligated to ensure the enforcement and implementation of the rights they declare").
internal. These rights were consequently addressed, not to African states themselves but, to the external elements of their historic exploitative and extractive past and the entire sympathetic world before whom they were, and still are), lying prostrate begging for alms.

Thus, Umozurike warned that “the influence of external forces on the development of human rights on the [African] continent must not be underestimated.

As Oloka-Onyango rightly noted, “...the focus of these rights (economic, social and cultural) is primarily the external dynamic - the elements of historical exploitation and contemporary maldevelopment - without a parallel approach to the inequities of the domestic arena. Apart from what the Charter contains, what it fails to mention speaks even louder of the actual position of the African leaders on these rights.”

It was, therefore, not clear to them (African leaders) whether they were creating a political instrument or a legally binding one.

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169 Claude E. Welch, “African Commission on Human and Peoples’ Rights,” supra, note 164 at 44 rightly observed that “[the OAU, ... historically, has considered human rights largely in the guise of self-determination, through the ending of alien or settler rule.” This perhaps beclouded OAU members’ sense of judgement to properly appreciate the practical implications of the normative human rights regime adopted by them. It was also the basis of their illusion that by adopting such a Charter they would be making a resounding claim for the redressing of past (colonial exploitative and other related) wrongs.

170 The Charter was adopted at a time when donors were no longer blowing muted trumpets about the egregious human rights situation in the continent and moves were made to not only channel financial aid into activities that promote human rights, but also to deny aid to countries who were seen to be doing nothing to promote human rights. Thus, when President Carter of the US cut off aid to Uganda and placed an embargo on the importation of Ugandan coffee as a sanction against Idi Amin’s violations, most African States needed no other prompting to ‘fall in line’ in order to escape the dangling ‘Sword of Damocles’ and to be seen to be ‘committed’ in order to maintain the vital sources through which the much needed aids trickled in to momentarily, if at all, quench the thirst of their Oliver Twisted economy. See A. Young-Anawety, “Human Rights and ACP-EEC Lome II Convention.” (1980) 13 NYUJ Int'l. L. & Pol. Science 63, (describing the attempt to incorporate human rights into the EEC-ACP Pact, Lome II Convention).

171 Umozurike, supra, note 16 at 27.

172 J. Oloka-Onyango, supra, note 134 at 51.
This point is supported by the fact that the *Charter* appears to be a compromise between those who wanted to promote human rights and those who were more concerned with protecting their sovereignty but who had to bow to external pressures.\(^{173}\) Consequently, there appears to be a tacit agreement that the *Charter* was actually to satisfy the external elements other than the internal ones. The *Charter* was thus a trade-off.\(^{174}\) It was, therefore, no coincidence that many important rights\(^ {175}\) granted by the *Charter* are massively and unduly restricted by the use of clawback clauses\(^ {176}\) which give states unqualified power to infringe upon certain rights with the implication that national laws take precedence over charter granted rights.\(^ {177}\)

This misconception led to the creation of an instrument that was the first of its kind not only in content, but also in non-implementation, and non-enforcement. And this goes to the root of all the implementation problems facing the economic, social and cultural rights under the *African Charter*.

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\(^{173}\) Umozurike, *African Charter* supra, note 16 at 81-82 states that “[t]he Charter was a compromise between the few states that genuinely wanted to promote human rights and many that were more concerned with entrenching non-interference with what they considered to be matters of internal affairs or indeed the enlargement of exclusive state jurisdiction.”

\(^{174}\) But see Edward Kannyo, “The Banjul Charter on Human and Peoples’ Rights: Genesis and Political Background” in Claude E. Welch and Ronald I. Meltzer, *Human Rights and Development in Africa*, supra, note 8, at 128-151 which described the political and diplomatic background to the *African Charter*, indicating the factors that influenced its development, and considerations that limited its scope and content.

\(^{175}\) Some of the provisions unduly restricted by clawback clauses include, Articles 6(2); 9(1); 10(2); 12(1); 13(1) and 14(1). These provisions are in the following form: “Every individual shall have the X-right or Y-freedom *provided he abides by the law or in accordance with the law*.”

\(^{176}\) See *infra*, Chapter 5 for a discussion of the clawback clauses in the *Charter*.

\(^{177}\) See Cees Flinterman and Catherine Henderson, *supra*, note 3 at 390.
3.5.1.4. Indivisibility and Interdependence of Rights: Keeping Faith with the Past

Axiomatic to the idea of human rights is the respect for human dignity. As such, discriminatory enforcement of human rights is bound to produce a human rights regime with a distorted or mangled face. Indivisibility of rights is embedded in, and in fact, the bedrock of, traditional African practice and conception of human rights. It also forms the philosophical underpinning of the *African Charter* and has been emphasized by the UN General Assembly in a resolution adopted in 1950 that asserted the interdependence, interrelatedness and indivisibility of human rights. As was noted in the preceding chapter, this interdependence has continuously resonated ever since in United Nations fora, and, most recently, it was reaffirmed at the 1993 Vienna World Conference on Human Rights.

The fact of interdependence and interconnectedness of rights implies that human rights cannot be observed or enforced in parts. This ideal recognized in the *African Charter* obligates states to carry it out. The practical recognition of the indivisibility of rights and the effectuation of these (economic, social and cultural) rights as enforceable rights in domestic constitutions will likely improve the quality of life and the general human rights situation in Africa.

As has been shown, traditional African conception and practices regarding economic, social and cultural rights were rooted in the peoples’ way of life and the socioeconomic and political systems of that time ensured their enjoyment, not in isolation but as a collectivity

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178 General Assembly Resolution 421 (V) of December 4, 1950.

with other rights. This contrasts sharply with present realities in modern Africa where rights are categorized and divided into enforceable and unenforceable ones.

Whereas in modern Africa there are provisions (in the *African Charter*) protecting economic, social and cultural rights, these provisions are not only vague and lacking clarity both in content and scope, but also they are not as far reaching as the rights in traditional Africa. In addition, while traditional Africa had effective in-built mechanisms and institutions for the protection and enjoyment of these rights, the mechanisms and institutions for the protection and enjoyment of these rights in modern Africa are weak and ineffective. While traditional Africa recognized the importance of these rights, (both in practice and in theory), for the continued existence of society, modern Africa merely pays lip service to them. Thus, while trying to reflect these traditional values in the *African Charter*, it was done in such a way as to distort their real meaning and content. Whatever value the inclusion of these rights would have had is also lost in the fact that these rights are not accorded full relevance in practical terms, hence there relegation to a second (and non-justiciable) position in most domestic jurisdictions, as the next chapter reveals.

A reality often overlooked today is that, although the traditional system functioned within a given set of social and legal relationships different from the contemporary African social and legal systems, to a great extent, albeit subservient to the existing politico-legal structures, the traditional system is still in existence. Even though one need not look too far to see that it has largely cushioned, and is still cushioning, the monstrous ineptitude of

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African states in the area of economic, social and cultural rights, much of the traditional African community no longer functions in the old ways.\textsuperscript{181} The traditional community structure that concretizes the relationship between the individual and the family at a broader level has lost much of its bonding in the wider structure of the modern state due, among other things, to increased population growth and urbanization, the emergence of the professional political class, and the consequent "subordination of the basic needs of the wider community to the imperative of personal advancement."\textsuperscript{182} Needless to add that the virtual weakening of the traditional system has increased the socioeconomic / political stakes and peoples' expectations of their governments whose achievements so far, as the next chapter shows, seem not enough to scratch the surface of the enormous problems.

\textsuperscript{181}Cf. Sakah S. Mahmud, \textit{Ibid} at 491.

CHAPTER FOUR

IMPLEMENTATION / ENFORCEMENT OF THE ECONOMIC, SOCIAL AND CULTURAL RIGHTS UNDER THE AFRICAN CHARTER IN DOMESTIC JURISDICTIONS: A COMPARISON OF NIGERIA AND SOUTH AFRICA

4.1. INTRODUCTION

Contemporary international human rights regimes are anchored on the imperative of regulating the activities of the Westphalian state in its relations with its citizens by prescribing certain acceptable rules of conduct. The need for such regulation is rooted in the recognition of the intrinsic worth, and the equal and inalienable rights, of all members of the human family to a dignified existence. It is appreciated that the observance of human rights is a necessity for the promotion of social progress and better standards of life for all humanity. The ability of the state to fulfill its international obligations, especially those freely entered into, determines how it is viewed among "civilized nations." These

1The modern state system based on the principle of territorial sovereignty which was ushered in by the Peace of Westphalia of 1648. The Westphalian state is a West European arrangement necessitated by the conspicuous lack of unifying influences as no central power replaced the former authorities of Emperor and Pope. See Charles S. Rhyne, International Law: The Substance, Processes, Procedures and Institutions for World Peace With Justice (Washington, DC: CLB Publishers, 1971) at 16-17.


4The term ‘civilized nations’ is used cautiously here generically to refer to all members of the international community, though not oblivious of its misuse in the past to exclude nations considered as barbaric (in the eyes of some self-appointed civilizing agents) and thus in need of being civilized. Some writers in discussing the development of international law use the term ‘civilized nations’ to refer to Western Christian nations at the turn of the 19th Century and to those non-Christian states which had shown themselves worthy of being admitted to their limited family of nations. See H. Lauterpacht, (ed.) Oppenheim’s International Law: A Treatise, vol. 18th edn. (London: Longman, 1955) at 48. To this end, Africans and others, like the Chinese, were regarded as barbarians. Indeed, throughout the 18th and 19th centuries, international society led by the
obligations require certain positive and negative steps toward their actualization. Besides its international image, the success or failure of a state in fulfilling its human rights obligations has increasingly become a major determinant of its legitimacy. While norms prescribing state conduct are an indispensable component of an effective human rights regime, some legal scholars are of the view that such norms, notwithstanding the extent of their platitudinous articulations, cannot, of themselves, produce results unless they are backed up with meaningful action towards enforcement or implementation.

Consequently, the African Charter's extolled unique conceptualization of the notion of human rights by its emphasis on economic, social and cultural rights can only be meaningful if it is translated into practice by States Parties to the Charter. Hence, the

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5The meaning and contents of the concept of legitimate governance are still intensely debated in international law. Scholars appear to be divided on the processes of measuring the legitimacy of governance. See Obiora C. Okafor, "The Concept of Legitimate Governance in the Contemporary International Legal System" (1997) 44 Netherlands International Law Review 33-60. See also, Obijiofor Aginam, "Legitimate Governance under the African Charter of Human and Peoples' Rights" in E K Quashigah & O C Okafor (eds.) Legitimate Governance in Africa (Netherlands: Kluwer Law International, 1999) at 345. However, the extent to which a government (and by extension the state) respects the human rights of the citizens has increasingly become the yardstick for determining its legitimacy.


obligations imposed on States Parties, in addition to their general undertaking, to carry out the provisions of the Charter. Unlike the ICESCR, the obligation of States Parties to the African Charter on economic, social and cultural rights are not stated to be dependent on availability of resources or as achievable progressively. Accordingly, the African Charter prescribes an identical form of state obligation for all rights therein provided. In practice, however, States Parties' obligations in connection with economic, social and cultural rights are perceived, treated and performed as though they are qualified and progressive. It is therefore necessary to examine the implementation of the economic, social and cultural rights in the municipal domain of various States Parties in order to ascertain the extent to which States Parties have discharged, or are discharging their obligations.

Owing to the virtual impossibility of covering the domestic domain of all States Parties, this Chapter assumes a modest task of comparatively examining the implementation/enforcement of economic, social and cultural rights in the domestic jurisdictions of Nigeria.

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8The obligations assumed by States Parties to the Charter may conveniently be classified into two broad categories, each consisting of other layers of obligations. Some obligations are of general nature while others exist only with respect to certain specific rights. Under obligations of a general nature, four types of obligations can be distinguished: an obligation to perform the Charter in good faith, an obligation to give effect to the rights in the Charter, an obligation to address a communication, and an obligation to submit periodic reports. Particular obligations are specific obligations, apart from the general obligations, assumed by virtue of the rule of pacta sunt servanda and also under Articles 1, 25, and 26 of the Charter. See Carlson Anyangwe, “Obligations of States Parties to the African Charter on Human and Peoples’ Rights” (1998) 10 RADIC 625 at 627-642. See, also Obijiofor Aginam, supra, note 4 at 352. The Charter submits all the rights therein proclaimed to an identical form of state obligation. Consequently, as Anyangwe rightly observed, “none of the state obligations in the Charter is expressed as being dependent on available resources and so achievable only progressively.” See Carlson Anyangwe, Ibid at 642. Thus, Sieghart was right in suggesting that the Charter imposes on states parties absolute and immediate obligations to take action to ensure that the rights it guarantees are fully respected. See P. Sieghart, The International Law of Human Rights (London: Butterworths, 1983) at 57.

9See Article 2(1) of the ICESCR.

10See Carlson Anyangwe, supra, note 8 at 642.
and South Africa. Nonetheless, where possible, the position in other States Parties, and not just Nigeria and South Africa, will be highlighted. To this end, the Chapter examines the relationship between the Charter and the domestic constitutions of the two states with the aim of portraying, among other things, the Charter's application in domestic jurisdictions. The constitutional protection of economic, social and cultural rights is examined to show the adequacy or otherwise of the juridical measures taken by States Parties in fulfilment of their Charter obligations. Also, the validity of constitutional provisions inconsistent with the Charter is examined in the light of a State Party's responsibility to live up to its international obligations as embodied in international agreements freely entered into by such a State Party.

The Chapter concludes with a brief inquiry into governmental efforts, legislative or otherwise, deployed towards the realization of the economic, social and cultural rights, the essence of which is to show the extent of the government's commitment towards the implementation of these rights. In addition, some relevant cases entertained by the courts are analysed to show the various courts' attitude to the enforcement of economic, social and cultural rights.

4.2. RATIONALE FOR COMPARISON

A keen observer's mind may be agitated as to the rationale behind the comparison of, or the criteria used to select, these two states - Nigeria and South Africa - of all the states in Africa. The choice is as informed as it is arbitrary. It is informed by this writer's belief that Nigeria and South Africa's juridical and practical implementation / enforcement of the
economic, social and cultural rights under the African Charter are, in one way or the other, typical of other African states. Whereas, South Africa symbolizes a more progressive regime recognizing constitutionally enforceable economic, social and cultural rights, Nigeria represents the ultra conservative regime (of the majority of states) that constitutionally discriminates against the enforcement of economic, social and cultural rights.

The fact that there may be other states sharing the above characteristics, wholly or partly, with either of the two chosen states underscores the arbitrary nature of the choice. Nevertheless, it is hoped that analyses of the practices of these two states will establish a pattern, and thereby provide an insight into the attitude to, and performance of other African states of the obligations undertaken by them, in respect of economic, social and cultural rights, as state parties to the African Charter.

4.3. RELATIONSHIP BETWEEN THE CHARTER AND DOMESTIC CONSTITUTIONS

The question of the proper relationship between international law and municipal laws in Africa is an interesting jurisprudential issue which is reflected in the opposing doctrines termed the monist and the dualist theories.11 While a detailed exploration of these

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well-known theories, or an examination of their historical and philosophical origins, lies outside the scope of this thesis, a brief examination is, however, apposite. For one thing, in spite of their little practical utility in actually inspiring any remarkable differences among states in their application of international law, the opposing doctrines provide a theoretical basis for understanding the major propositions regarding the relationship between international law and municipal law in Africa. Besides, the ghosts of the opposing doctrines still lurk in the shadows of some notable decisions involving the application of international law in the domestic jurisdictions of some African States.\textsuperscript{12}

Monism holds that both international law and municipal law belong to one unified legal science that transcends national boundaries. In this scheme of things, international law and municipal law are regarded as "related parts of the same legal structure"\textsuperscript{13} and "the legal system of every state is a single system consisting of international law and the state’s own domestic law, with international law supreme."\textsuperscript{14} Thus, under this theory, international law has primacy over municipal law within the same system.\textsuperscript{15} And the state’s constitutional

\textsuperscript{12}For instance see the recent Supreme Court of Nigeria decision in General Sani Abacha & Ors. v. Chief Gani Fawehinmi [2000] 6 NWLR (Pt. 660) 228.

\textsuperscript{13}Tijanyana Maluwa, "Incorporation of International Law" supra, note 11 at 49.

\textsuperscript{14}Louis Henkin, supra, note 11 at 64.

system must recognize the supremacy of international law. 16

The origins of monism can be traced to the medieval unity of western Europe, which then fell under the twin hegemony of Pope and Emperor and, in the natural law philosophy of the Scholastics, which proposed an ultimate authority for all law. 17 It was subsequently embraced by both Kantian philosophy (which favours a unitary conception of law) and Kelsenian positivism. 18 A variant of monism, 'inverted monism', concedes primacy to municipal law. It is associated with Bergbohm. 19 According to O’Connell, due to its exaggerated emphasis on the state will, inverted monism never found favour in international tribunals, and therefore, remains "no more than an abstract possibility." 20

On its own, dualism maintains that the question of the primacy of the two legal orders is relative, depending on the forum in which the matter arises, whether it is a domestic court or international tribunal. 21 Dualists argue that whereas municipal law is a manifestation of internally directed sovereign will, international law is a manifestation of sovereign will

16Louis Henkin, supra, note 11 at 64. The further implication of constitutional recognition of the supremacy of international law, according to Henkin, is that the national legislature is bound - constitutionally bound - to respect international law in enacting legislation; the national executive is constitutionally required to take care that international law be faithfully executed, even in the face of inconsistent domestic law; and the national judiciary must give effect to international law, notwithstanding inconsistent domestic law, even domestic law of constitutional character.

17Tiyanjana Maluwa, “Post-Colonial Africa” supra, note 11 at 34.

18Tiyanjana Maluwa, Ibid. See also D. P. O’Connell, “International Law” supra, note 11 at 39. Ian Brownlie, supra, note 11 at 34 observes that “[w]hile Kelsen establishes monism on the formal bases of his own theory, he does not support the ‘primacy’ of international law over municipal law: in his [Kelsen’s] view the question of ‘primacy’ can only be decided on the basis of considerations which are not legal.”


20D. P. O’Connell, “International Law” Ibid.

21See Tiyanjana Maluwa, “Incorporation of International Law” supra, note 11 at 49.
directed externally and exercised in common with other sovereigns. The dualists, therefore, contend that the two legal orders are, in origin and purpose, separate and self-contained systems, only having contacts with each other and requiring the recognition of one by the other. For the dualist, international law can never automatically be assumed to form part of municipal law. Where a conflict arises between international law and municipal law, the dualist would assume that a municipal court would apply municipal law.

Differences between the monist-dualist positions seem very theoretical and appear not to have inspired any significant differences between states in their application of international law. International law and international political system are mainly concerned with only the result: whether the state complies with international law. The monist-dualist controversy notwithstanding, most scholars agree that the theories are relevant only in the specific context of customary international law. The cardinal principle in most legal systems is that the internal application of treaties, which is our main concern here, is


23 I. A. Shearer, Starke's International Law, 11th edn., (London: Butterworths, 1994) at 64.

24 See Tijanyana Maluwa, "Post-Colonial Africa" supra, note 11 at 34-35.

25 See Ian Brownlie, supra, note 11 at 33. Some scholars view the entire monist-dualist controversy as highly "unreal, artificial and strictly beside the point" because it assumes a non-existent precondition for a controversy - "namely a common field in which the two legal orders ... both simultaneously have their spheres of activity." See D. J. Harris, supra, note 11 at 68. Some others argue that between the extreme versions of monism on the one hand, and dualism on the other, as opposing approaches or doctrines, lies, in reality, a whole range of intermediate relationships which do not lend themselves to ready classification. See Tijanyana Maluwa, "Incorporation of International Law" supra, note 11 at 50.

26 See Louis Henkin, supra, note 11 at 65 (notes that "[i]n modern international life, the political system has largely proved uninterested in the monist-dualist debate").

27 See supra, note 11 and accompanying texts.
4.3.1. **Application of the African Charter in Domestic Jurisdictions**

The application of the *African Charter* in the domestic jurisdictions of African states follows the general rules for the application of treaties, which are governed by specific constitutional provisions. In this regard, the practice of African states has been determined in part by their respective colonial experiences and the inherited colonial legal cultures and systems. Consequently, there is a distinction between the approach followed by the common law countries (former British colonies), and the civil law countries (mainly former French colonies and former colonies of some other continental European powers, such as Germany, Portugal, Italy and Spain).

In the civil law jurisdictions following the approach of France, treaties to which the state concerned is a party and which have been duly ratified or approved and published in the official gazette, have force of law in the domestic jurisdiction, even if they are in conflict with domestic legislation.

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30 See P.F. Gonidec, *supra*, note 29 at 245; Umozurike, *African Charter* *supra*, note 11 at 109. Tiyanjana Maluwa, *Incorporation of International Law* *supra*, note 11 at 54; Tiyanjana Maluwa, *Post-Colonial Africa* *supra*, note 11 at 39. With the exception of Ethiopia and the Democratic Republic of Congo (former Zaire), countries in this category are all former French colonies. Most of them adopted a verbatim formulation of Article 55 of the French Constitution of 1958, which provides: “Treaties or agreements duly ratified or approved shall, upon their publication, have an authority superior to that of [domestic] legislation, subject, for each agreement or treaty, to [reciprocal] application by the other party.” See: Article 123 of
By contrast, in the common law countries, to which Nigeria and South Africa belong, any international agreement has to be first incorporated into the national legal order as an enactment of the National Assembly in order to become part of the law of the land.\textsuperscript{31} To this end, section 12(1) of Nigerian Constitution provides:

\begin{quote}
No treaty between the Federation and any other country shall have the force of law except to the extent to which any such treaty has been enacted into law by the National Assembly.\textsuperscript{32}
\end{quote}

By virtue of this provision the Nigerian Court of Appeal held in the case of \textit{Fawehinmi v. Abacha}\textsuperscript{33} that where there is no enactment to give effect to the spirit of a treaty, notwithstanding its adoption, recognition and due regard by a sovereign government, it cannot be justiciable in the Nigerian municipal court.\textsuperscript{34}

With regard to South Africa, section 231(4) of the South African Constitution provides:

\begin{quote}
Any international agreement becomes law in the Republic
\end{quote}

\textsuperscript{31}See P. F. Gonidec, \textit{Ibid}.

\textsuperscript{32}Constitution of the Federal Republic of Nigeria, 1999. The provision was the same under the 1979 Constitution (coincidentally the same section 12) which was in existence when the \textit{African Charter} was adopted.

\textsuperscript{33}[1996] 9 NWLR (Pt. 475), 710. See \textit{infra}, at 153-156 for facts of the case.

\textsuperscript{34}\textit{Ibid.} at 756 per Pats-Acholonu, J.C.A.
when it is enacted into law by national legislation; but a self-
executing provision of an agreement that has been approved
by Parliament is law in the Republic unless it is inconsistent
with the Constitution or an Act of Parliament. 35

Even though a measure of uncertainty exists about the definition of a self-executing
agreement under the South African law, 36 it is clear that an international agreement of the
nature of the African Charter is not self-executing. 37 A legislative enactment is, therefore,
required in South Africa, as in Nigeria, for the Charter to become law in the municipal
sphere. This is so notwithstanding the provisions of section 231(2) of the South African
Constitution. 38 It is submitted that the legislative approval does not, ipso facto, make an
international agreement applicable in South Africa’s domestic jurisdiction. Subsections 2 and
4 must therefore be read together, as providing a ‘two-step’ transformation procedure which
must be followed in order to make an international agreement applicable in the municipal

35 Constitution of the Republic of South Africa, 1996. The Constitution can also be found online at

36 See Andre Stemmet, “A Future African Court for Human and Peoples’ Rights and Domestic Human
Rights Norms” (1998) 23 SAYIL 233 at 244. According to the South African Constitution, section 231(4), a
self-executing provision of an agreement that has been approved by the Parliament is law in the Republic unless
it is inconsistent with Constitution or an Act of Parliament. The Constitution did not, however, define ‘a self-
executing provision of an agreement.’ The courts are yet to define or pronounce on it, thus leaving it enmeshed
in uncertainty.

37 The state parties to the African Charter recognized the non-self-executing nature of the Charter.
Thus, Article 1 of the Charter states: “The Member States of the Organization of African Unity Parties to the
present Charter shall recognize the rights, duties and freedoms enshrined in this Charter and shall undertake
to adopt legislative or other measures to give effect to them.” (Emphasis added). This provision has been
interpreted as creating an ‘outcome-based system’ by which states are expected to give effect to the rights
enshrined in the Charter, but have a free choice in how to achieve this. See Andre Stemmet, Ibid.

38 Section 231(2) provides that: “An international agreement binds the Republic only after it has been
approved by resolution in both the National Assembly and the National Council of Provinces, unless it is an
agreement referred to in subsection 3.” Section 231(3) refers to an international agreement of a technical,
administrative or executive nature, or to an agreement which does not require either ratification or accession.
system of South Africa. It follows that for the African Charter to be incorporated into South African domestic law, legislation will be required in accordance with section 231(4) of the Constitution.

However, the Charter may be made applicable in a state’s municipal jurisdiction otherwise than by express legislative incorporation, in view of the provisions of the African Charter, Article 1, which envisages an ‘outcome-based system’ of effectivity. Thus, where a state has signed and ratified the Charter and has taken other measures, (other than through legislative incorporation) to apply the Charter’s provisions in its municipal law, that state is not in breach of its international obligations under the Charter. Accordingly, by

30 For a contrary view, see Tiyanjana Maluwa, “Post-Colonial Africa” supra, note 11 at 162 (arguing that once a treaty has been ratified by parliament, it would form part of South African law without any need for a further specific act of legislative incorporation). But see Dermott J. Devine, supra, note 28 at 15 for a different interpretation, namely that a legislative enactment would be required to translate treaties into municipal law. It has been argued that section 231(4) “is qualification or modification of the dualist approach pioneered by British jurisprudence, according to which a treaty signed and ratified by the executive is binding at the international level, but it is not part of municipal or domestic law until it has been incorporated into such law by legislation.” See G.E. Devenish, A Commentary on the South African Constitution (Durban: Butterworths, 1998) at 324. This supports the view that, unless incorporated into domestic law by legislative enactment, a treaty does not form part of the municipal law in South Africa.

31 See Andre Stemmet, supra, note 36 at 244.

32 See supra, note 37.

33 But see Ibrahim Ali Badawi El-Sheikh, “The African Regional System of Human Rights: Notes and Comments” in Pearson Nherere & Marina d’ Engelbronner-Kolf, (eds), The Institutionalisation of Human Rights in Southern Africa (Copenhagen: Nordic Human Rights Publications, 1993), 101 at 105, arguing that “national implementation requires basically a legislative action to enable individuals to invoke relevant national legislation in the domestic courts in defence of their rights.” El-Sheikh’s argument fails to recognize that Article 1 of the African Charter makes legislative action optional. On his own, Andre Stemmet, Ibid. at 245, has opined that as a way of avoiding conflicts between its court and the African Court on Human Rights, South Africa should not incorporate the African Charter into its domestic law, since that does not amount to a breach of its obligations under the Charter so long as effect is given to the rights, duties and freedoms enshrined in the African Charter. This argument is at best misconceived. By signing and ratifying the necessary instruments, South Africa would be violating its international obligations if it fails to abide by the decision of the African Court even though the Charter was not incorporated into its domestic law. Non incorporation in the domestic law merely renders the provisions of the Charter unenforceable in the South African court.
integrating the major provisions of the *Charter* into its Constitution, as an enforceable bill of rights, the provisions of the *African Charter* are fully applicable in South Africa, notwithstanding. As Frans Viljoen ably articulated:

> International law can be incorporated into local legal systems in one or two ways: by explicit reference, or through reception. Explicit reference entails the enactment by name, as part of domestic legislation, of an international agreement. Reception takes place if the provisions of an international agreement are reproduced in national legislation, or if national legislation is amended or repealed to conform to international norms, without explicit reference being made to the source of these norms.

The advantage of this reception approach adopted by South Africa is that the process of inclusion into the constitution, affords the opportunity to, where necessary, elaborate upon


45 This is, however, fraught with problems, especially where there are rights provided for in the *Charter* but not in the Constitution. It would be difficult for a claimant to invoke the portions not in the constitution before municipal courts. See Pearson Nherere, “The Limits of Litigation in Human Rights Enforcement” in Pearson Nherere & Marina d' Engelbronn-Kolf, *supra*, note 43, 117 at 122-127.

46 Booyzen, has persuasively argued that “*[t]he method of giving effect to international human rights through legislation does not necessarily ensure that international human rights are implemented in a uniform manner (as) [n]ational legislation can differ both from one state to another, ... (and) [s]light differences in wording can mean different results in practice.” See Hercules Booyzen, "The Dilemma of International Economic Human Rights: Their Application Through an Integrated System Approach" (1998) 23 SA YIL 93 at 94-95.

more vague provisions.\textsuperscript{48} It is, nonetheless, open to misuse. The state might use the opportunity to dilute an international agreement\textsuperscript{49} or provide for itself escape routes which it was unable to secure during the negotiation process.\textsuperscript{50} \textit{A fortiori}, reception inflicts extreme hardship on the citizens who would not be able to invoke the provisions of the \textit{Charter} before municipal courts. A better way of implementing international human rights agreements appears to be through the direct application of the original documents by national courts.\textsuperscript{51}

Unlike South Africa, the \textit{African Charter} has been expressly incorporated into the Nigerian municipal law by legislation,\textsuperscript{52} with the treaty appearing as a schedule to the incorporating statute. Even though this mode of incorporating a treaty is suitable for some treaties, it has certain disadvantages which tend to make it unsuitable for human rights treaties,\textsuperscript{53} especially the \textit{African Charter} with its vague provisions on economic, social and cultural rights. Such a procedure leaves no room for redefining the vague provisions in such a way as to make them more meaningful and more user friendly. This is especially so where,

\footnotesize

\textsuperscript{48}See Pearson Nherere, \textit{supra}, note 45 at 125.

\textsuperscript{49}See Hercules Booysen, \textit{supra}, note 46 at 95.

\textsuperscript{50}See for instance, section 27(2) of South African Constitution, 1996 under which the state is to adopt 'reasonable legislative and other measures, within its available resources, to achieve the progressive realisation' of rights therein provided. Such a provision is not only absent in the \textit{African Charter} but has, in effect, provided an escape route unavailable in the Charter.

\textsuperscript{51}Hercules Booysen, \textit{supra}, note 46 at 95.

\textsuperscript{52}See \textit{The African Charter on Human and Peoples' Rights (Ratification and Enforcement) Act}, Cap 10 Law of the Federation of Nigeria, 1990. The incorporation of the \textit{African Charter} into Nigerian law was rather clumsy. For a brief history of the incorporation into Nigerian domestic law, see \textit{infra}, at 152.

\textsuperscript{53}See Pearson Nherere, \textit{supra}, note 45 at 124.
as in the case of Nigeria, there are apparent conflicts between the provisions of the scheduled Charter and the Constitution, and without the constitution being amended to bring it in line with the Charter, or a legislation to that effect passed. In spite of the Charter's application as domestic law, the Nigerian Constitution still maintains a dichotomous relationship between (enforceable) civil and political rights and (unenforceable) economic, social and cultural rights contrary to the provisions of the Charter.

Also, in the event of military intervention, as is often the case in Africa and elsewhere, the laws and the constitution of the affected state are usually suspended, wholly or partly, and / or made subject to military decrees. Suspension of the constitution also implies the suspension of all the schedules, including the Charter. The application of the Charter and its incorporation into domestic law, therefore, raise some fundamental jurisprudential questions regarding its status in relation to domestic laws and constitutions.

4.3.2. Status of the Charter Vis-a-vis Domestic Laws and Constitutions

The question of the status of the African Charter in the domestic jurisdictions of state parties is one that does not lend itself to straightforward and easy answers. In all African countries, as a general rule, the constitution is sacrosanct and is considered the supreme and fundamental law of the state. The supremacy of the constitution is guaranteed by a system that controls the constitutionality of the laws and which voids, to the extent of their
inconsistencies, all laws inconsistent with the constitution.\textsuperscript{54} This seemingly unbounded supremacy of the constitution, gives rise to a conflict of status in the application of the \textit{African Charter}.

Obviously, where the domestic jurisdictions accord the same or higher levels of protection to the rights provided for in the \textit{African Charter}, the issue of status or supremacy of the \textit{Charter} over the national constitution ceases to be a pertinent one. The issue arises where a right is either not provided for in the Constitution of a state or where the \textit{Charter} provides a greater protection. A survey of the constitution of some African states is bound to reveal some discrepancies existing in the rights provided for in the \textit{Charter} and the constitution, with the \textit{Charter} offering greater protection in some cases.\textsuperscript{55}

Even though the South African Constitution accords a prominent role to international law in the interpretation of the Bill of Rights,\textsuperscript{56} the status of international human rights agreements is not defined. Section 1 affirms the Constitution as the supreme law of the Republic and invalidates all inconsistent laws or conduct. By virtue of section 231(2), an international agreement binds the state only after it has been approved by the legislature. Gonidec has suggested that any problem of conflict which may arise between an international agreement and the Constitution may, at this stage, be settled by the legislature, and, if


\textsuperscript{55}Compare \textit{The African Charter} (Articles 2-20) with Chapter 2 of South Africa's Constitution and Chapters 2 \& 4 of the Nigerian Constitution.

necessary, the Constitution may be amended to comply with the international agreement. 57 Nevertheless, the African Charter passed through this legislative process of adoption, 58 notwithstanding the differences between some of its provisions and the provisions of the Constitution. 59 It, thereby, left the question of the status of the Charter in South Africa still unresolved.

It has been argued that the question of status becomes material only when an international agreement has been made part of the municipal law since an unincorporated international agreement merely creates obligations at the international plane. 60 For this reason, as a general rule, domestic courts ordinarily apply domestic statutes even when they are in conflict with treaties, 61 (except for aspects of the treaties that have become part of international customary law) while leaving the question to be settled at the international level.

57 See P. F. Gonidec, supra, note 29 at 247.


59 One of such differences is the property clause in the Constitution (section 25). While the right to property finds strong protection in Article 14 of the African Charter, the property clause in the South African Constitution makes provision for redressing the unequal distribution of land that resulted from past racially discriminatory laws and practices. Also, the Charter (Article 16) guarantees the right of every individual to enjoy ‘the best state of physical and mental health’ which is not subjected to availability of funds and progressive realization, while the Constitution (section 27) merely provides for the right of access to health care, to be achieved progressively subject to available resources.

60 See Pearson Nherere, supra, note 45 at 123.

through diplomacy or other means.\textsuperscript{62} It is, however, arguable that in South Africa, an international agreement, approved by the legislature in accordance with the constitution, prevails over a conflicting constitutional provision. This may be deduced from a combined reading of sections 39(1)(b) and 233.\textsuperscript{63} Unfortunately, these provisions appear to be merely useful for purposes of interpretations,\textsuperscript{64} and do not confer any supremacy. In fact, in \textit{S v Makwanyane}\textsuperscript{65} while construing similar provisions in the 1993 Interim Constitution, Chakalson P, reminded the courts to "bear in mind that [they] are to construe the South African Constitution, and not an international instrument. [Therefore, they] can derive assistance from public international law ... but are in no way bound to follow it."\textsuperscript{66}

Nevertheless, the Constitution expressly prohibits the application of any rule of customary international law inconsistent with constitutional provisions\textsuperscript{67} without containing any similar provisions with regard to international agreements (like the \textit{African Charter}) to which South Africa is a party. Using the principle of \textit{inclusio unius est exclusio alterius}, it is hardly unreasonable, even if unsafe, to submit that inconsistent international agreements prevail over constitutional provisions. After all, as Mohamed DP stated in \textit{Azania Peoples Organization (AZAPO) v President of South Africa} [1996] 8 BCLR 1015 (CC) at 1031-1032.

\begin{quote}
\textsuperscript{62}See U. Oji Umozurike, "\textit{African Charter}" supra, note 11 at 109.
\end{quote}

\begin{quote}
\textsuperscript{63}Section 39(1)(b) provides: 'When interpreting the Bill of Rights, a court ... must consider international law.' Section 233 provides: 'When interpreting any legislation, every court must prefer any reasonable interpretation that is consistent with international law over and above any alternative interpretation that is inconsistent with international law.'
\end{quote}

\begin{quote}
\textsuperscript{64}See the dictum of Mohamed DP, as he then was, in \textit{Azanian Peoples Organization (AZAPO) v President of South Africa} [1996] 8 BCLR 1015 (CC) at 1031-1032.
\end{quote}

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\textsuperscript{65}[1995] 6 BCLR 665 (CC)
\end{quote}

\begin{quote}
\textsuperscript{66}\textit{Ibid.} at 687-688.
\end{quote}

\begin{quote}
\textsuperscript{67}See Section 232 of the South African Constitution.
\end{quote}
Organization (AZAPO) v President of South Africa,68 "the law makers of the Constitution should not lightly be presumed to authorise any law which might constitute a breach of the obligations of the state in terms of international law."69

The problem with the above-stated position is that it probably opens a wide gate through which the judiciary may embark on a very controversial exercise in search of the highly elusive and hardly determinate intentions of law makers, even if legitimately entitled to do so. Be that as it may, there is nothing strange about the courts embarking on an exercise to discover the intentions of the legislature, especially in the face of conflicting or ambiguous provisions. Besides, the South African courts have a very strong constitutional backing to lean in favour of international law. Section 233 of the South African Constitution empowers the courts to prefer any reasonable interpretation that is consistent with international law as against any alternative interpretation.70 Hence, there is little doubt that the courts in South Africa are not only entitled to, but also would, in all probability, lean in favour of advancing the African Charter. As Professor B.O. Nwabueze eminently observed, "the court's task is to try to strike a balance between the individual's [rights and] freedoms and the right of the state to self-preservation."71 There is nothing contained in the African Charter that constitutes a threat to, or violates, or is likely to violate, the right to self preservation of South Africa, and indeed of any other State Party to the Charter. Per contra, respecting and

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68See supra, note 64.
69Ibid. at 1032.
70See supra, note 63.
promoting recognised international human rights norms, as embodied in the *Charter*, would enhance, instead of undermine, a state's right to self preservation. After all, the protection of the rights of the citizens is the *raison d'être* for the continued existence of the state.\(^2\)

Nonetheless, the foregoing argument does not seem to provide a strong enough platform on which to categorically assert the higher status of the *African Charter* over the Constitution. Therefore, in the absence of express constitutional provisions, and judicial decisions directly in point, it is difficult to say with any certainty that the provisions of the *African Charter* will prevail over South Africa's constitutional provisions.

In Nigeria, the Constitution, as amended by military decrees, was until recently, held to be of a higher status than the *African Charter*. This stems from the clumsy and haphazard manner in which the *Charter* was incorporated into the domestic system. The Nigerian National Assembly passed an Act incorporating the *Charter* into domestic law in March 1983, and empowered the then civilian President to appoint a date for it to take effect. Unfortunately, the President was overthrown in a *coup d'etat* before he could set the date.\(^3\)

No action was taken on the Act until 1990 when the *African Charter* appeared in the *Revised Laws of the Federation of Nigeria* with its commencement backdated to March 17, 1983. Section 5(2) of the *Revised Edition (Laws of the Federation of Nigeria) Decree No. 20 of 1990*, the enabling Act provides:

\(^2\)To this effect, a scholar has rightly observed that "[i]t is not a coincidence that African states characterized by ... gross and systemic abuse of human rights ... have found themselves enmeshed in civil conflicts." See Ikechi Maduka Mgbeoji, *Collective Security and the Legality of the ECOWAS Intervention in the Liberian Civil War* (LL.M. Thesis: Dalhousie Law School, 1999) at 207, citing Sean Murphy "The Security Council, Legitimacy and the Concept of Collective Security After the Cold War" (1994) 32 *Colum. J. Transnat'l* L. 210.

\(^3\)See U. Oji Umozurike, "*African Charter*" supra, note 11 at 111.
Nothing in this section shall be construed to imply the validity of any enactment included in the revised edition where such enactment is inconsistent with the Constitution . . . as amended.

In a view shared by many scholars, the Constitutional Rights Project of Nigeria unimpeachably elucidated the implications of this provision thus:

The implication of the above provision therefore, is that where the African Charter is inconsistent with the Constitution as amended, its provisions will to the extent of its inconsistency be void and inapplicable. The African Charter being an enactment included in the revised edition, would apply only in so far as it conforms with the Constitution of Nigeria as amended.74

In fact, section 1 of the African Charter on Human and Peoples' Rights (Ratification and Enforcement) Act, lends credence to the above view by further subjecting the Charter to the Constitution, which is itself subject to military decrees by virtue of section 1 of The Federal Military Government (Supremacy and Enforcement of Powers) Decree No. 1 of 1984.

It was this subordination of the African Charter to the Nigerian Constitution and, worse still, military decrees that became the bone of contention in the cause celebre of Gani Fawehinmi v. Sani Abacha & Ors.75 In that case, the appellant, who was arrested and detained indefinitely under the infamous Decree 2 of 1984,76 sought to obtain his release by relying, inter alia, on the African Charter. The respondents objected to the action arguing

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that they were immune to any legal liabilities in respect of anything done pursuant to the Decree. On that basis, they challenged the jurisdiction of the court to entertain any action relating to the enforcement of the African Charter on Human and Peoples' Rights (Ratification and Enforcement) Act. It was argued that the Charter cannot override the Constitution since the Constitution itself is subject to decrees. The court of first instance upheld their contention and declined jurisdiction.

Among other issues, the Court of Appeal was asked to decide whether the Articles of the African Charter are inferior or subject to municipal laws, particularly Decrees made by the omnicompetent Federal Military Government. In a unanimous judgement allowing the appeal, the Court of Appeal held:

The provisions of the African Charter on Human and Peoples' Rights are in a class of their own and do not fall within the classification of local legislation in Nigeria in order of superiority. In the instant case, the learned trial judge acted erroneously when he held that the African Charter ... is inferior to the Decrees of the Federal Military Government.

Elaborating further on the status of the African Charter, Musdapher, J.C.A. affirmed:

It is commonplace that no Government will be allowed to contract out by local legislation, its international obligations.... [N]otwithstanding the fact that Cap. 10 (incorporating the African Charter) was promulgated by the National Assembly..., it is a legislation with international flavour and the ouster clauses contained in Decree No. 107 of

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77 The Constitution was subjected to the Federal Military Government (Supremacy and Enforcement of Powers) Decree No. 12 of 1994 and the Constitution (Suspension and Modification) Decree No. 107 of 1993, and all other decrees made thereunder.

78 See Suit No: FHC/L/CP/107/96 (Unreported). Ruling delivered on Tuesday, March 26, 1996 by Nwaogwugwu, J of the Federal High Court, Lagos, Nigeria.

79 See supra, note 75 at 718. See also Labiyi v Anretiola [1992] 8 NWLR (Pt. 258) 139, where Bello C.J.N made a similar observation.
1993 or No. 12 of 1994 cannot affect its operation in Nigeria.  

Pats-Acholonu, J.C.A., further underscored the matter when he stated:

By not merely adopting the African Charter but enacting it into our organic law, ... it has been elevated to a higher pedestal.... [B]ecause of its genesis it has an aura of inviolability unlike most municipal laws and may as long as it is in the statute book be clothed with vestment of inviolability.

Dissatisfied with the judgement of the Court of Appeal, the respondents appealed to the Supreme Court of Nigeria. While dismissing the appeal on other grounds, the Supreme Court of Nigeria curiously held that:

*The African Charter is not superior to and does not override the Constitution of the Federal Republic of Nigeria.*

In reasserting the supremacy of the Constitution, the Court emphatically held that:

The Constitution is the supreme law of the land; it is the *grundnorm*. Its supremacy has never been called to question in ordinary circumstances. Thus any treaty enacted into law in Nigeria by virtue of section 12(1) of the Constitution is

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82 See *General Sani Abacha & Ors. v. Gani Fawehinmi* [2000] 6 NWLR (Pt. 660) 228.

83 The appeal was dismissed while the cross appeal was upheld on the ground that section 4 of *State Security (Detention of Persons)* Act which suspended the fundamental rights section of the Nigerian Constitution did not mention the *African Charter (Ratification and Enforcement)* Act. The appeal was dismissed by a split decision of four to three. Apart from minor differences bordering mainly on choice of words, all the Justices unanimously agreed on the issue of the status of the *African Charter* vis-a-vis the Constitution. Most of their Lordships upbraided the Learned Justices of the Court of Appeal for ever suggesting that the African Charter may be higher in status than all the laws of the land.

circumscribed in its operational scope and extent as may be
prescribed by the legislature.\textsuperscript{85}

As if to clear any scintilla of doubts, the learned Justices of the Supreme Court went
on to define a treaty to include the \textit{African Charter}.\textsuperscript{86} The implication is that the scheduled
\textit{African Charter} is circumscribed in its scope since, as will be shown shortly, the Nigerian
Constitution expressly renders economic, social and cultural rights unjusticiable.

What is perhaps more startling is the position of the Court on the status of the
\textit{Charter} vis-a-vis other domestic legislation. On this issue, the Nigerian Supreme Court
approbated and reprobated when it held that:

\textit{If there is a conflict between it [African Charter] and
another statute, its provisions will prevail over those of that
other statute for the reason that it is presumed that the
legislature does not intend to breach an international
obligation;}\textsuperscript{87}

and at the same time holding that:

\textit{The validity of any other statute cannot be affected by the
mere fact that it violates the African Charter or any other
treaty, for that matter.}\textsuperscript{88}

More disturbing is the conclusion of the learned Justices that the \textit{African Charter’s}
‘international flavour’ cannot “prevent the National Assembly, or the Federal Military

\textsuperscript{85}See \textit{supra}, note 82 at 258 and also at 315-316.

\textsuperscript{86}\textit{Ibid} at 340.

\textsuperscript{87}\textit{Ibid} at 289, per Ogundare, JSC (delivered the leading judgement. Other Justices concurred on this
point).

\textsuperscript{88}\textit{Ibid}. Achike, JSC saw it as ‘rather startling’ “that a law passed to give effect to a treaty should stand
on a ‘higher pedestal’ above all other municipal laws, without more in the absence of any express provision in
the law that incorporated the treaty into municipal law.” \textit{Ibid} at 316.
Government before it [to] remove it [the Charter] from our body of municipal laws.\textsuperscript{89} In making these sweeping conclusions, the learned justices of the Supreme Court, with due respect, failed to advert their minds to the actual nature of human rights treaties and the implications of ratifying and incorporating them into the municipal law. Their Lordships appeared to have been led into error by their misleading supposition of the African Charter as a mere treaty like any other bilateral or multilateral treaty. This is evident in their undue reliance on the definition of treaty contained in Article 2 of the Vienna Convention on the Law of Treaties, 1969.\textsuperscript{90}

By adopting a simplistic definition of treaties as mere agreements between states, their lordships failed to recognise that human rights treaties are not just like any other bilateral or multilateral treaties. Because of their nature, human rights instruments belong to a special "category of obligations \textit{erga omnes}, which do not create a series of parallel bilateral relationships, but only a omni-directional, non-bilateral, relation\textsuperscript{91} which binds all states. For this reason, except to the extent reservations are allowed, and duly entered at the time of ratification or accession, it is patently absurd to suggest, as their lordships tend to do,

\textsuperscript{89} \textit{Ibid.} While further advancing the proposition, Mohammed, JSC stated that "a state is always at liberty if it deems desirable due to domestic circumstances or international considerations to legislate a law inconsistent with its treaty obligations." See \textit{Ibid} at 301. For this proposition he relied on Lord Denning's statement in the case of \textit{Macarthy's Ltd. v. Smith} [1979] 3 All ER 325 at 329. In that case, Denning was not dealing with an international human rights instrument but with an ordinary treaty. It is submitted that the position would, probably, have been different if he were dealing with an international human rights instrument. To the extent that Mohammed, JSC seemed to have generalized his statement to include international human rights instrument, his view appears unsupportable.

\textsuperscript{90}See \textit{supra}, note 82 at 314 where Achike, JSC, simplistically defined treaties as mere agreements between states.

that a state can de-ratify or withdraw from a human rights treaty by just repealing the Act authorising the ratification or repealing the scheduled Act. Moreover, some of the rights protected in the *African Charter* have acquired the status of *jus cogens* in international law, and are, therefore, binding on all states irrespective of their will.

Also, as a result of the *erga omnes* character of the obligations created by human rights treaties, they ought not be ranked *pari passu* with other laws of the lands, and are, for that reason, of a higher pedestal than the provisions of the Constitution. Section 12(1) of the Nigerian Constitution, on which their lordships relied heavily, does not justify the subordination of the *African Charter*, but in fact reinforces its higher status. For clarity purposes, that all important section merits being requoted. It states:

No treaty between *Nigeria and any other country* shall have the force of law except to the extent to which any such treaty has been enacted into law by the National Assembly.  

A close reading of the above section shows that it is merely referring to a treaty between Nigeria and any other country (bilateral treaty). It does not refer to ‘countries’ and therefore excludes multilateral treaties, especially human rights treaties which are multilateral treaties with a distinct character. If the lawmakers had intended that provision to include multilateral treaties, like human rights treaties, they ought to have, as their lordships expressly recognised, stated so in no uncertain terms. In the absence of that, any

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92Emphasis added.

93See *supra*, note 82 at 303, per Iguh, JSC.

94See *Pyx Granite Co. Ltd. v. Ministry of Housing and Local Government* [1960] A.C. 260 at 286, where Viscount Simonds, delivering the judgement of the House of Lords expressed the principle of law as follows:

It is a principle not to be whittled down that the subject’s recourse to Her Majesty’s courts
doubts or ambiguities should be resolved in favour of international law, as the lawmakers cannot lightly be presumed to enact a law that will defeat the country's international obligations.

Moreover, since the 'treaty' (*African Charter*) has been enacted into law without any amendments or alterations, its provisions have the force of law to that extent. Accordingly, so long as the 'treaty' (*African Charter*) remains in force, and in addition to its international flavour, any legislation, including the Constitution, that conflicts with it shall be void to the extent of the inconsistency. To this extent, the learned justices of the Nigerian Supreme Court, with respect, erred when they purported to subordinate the *Charter* to the Constitution and other municipal laws on the basis on section 12(1).

The Court of Appeal decision is to be preferred to the Supreme Court's decision, not only for being more progressive, but also because it is more consistent with international

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for the determination of his rights not to be excluded except in clear words. [Emphasis added].

—See U. O. Umozurike, *Human Rights Instruments* supra, note 74 at 14-15, (arguing that once an international agreement has been incorporated into the municipal systems, its provisions prevail over any inconsistent constitutional or other municipal law provisions).

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In the wake of the jubilatory ecstasy set off by the 1996 Court of Appeal decision, Umozurike, after reflecting on its implications in the face of governmental intransigence, warned that the "remedy lies not in judicial activism but in political and international action to enforce *pacta sunt servanda*." See U. O. Umozurike, *Human Rights Instruments* *Ibid* at 16. This highly instructive warning underscores the daunting nature of the challenges ahead in the battle to snatch the economic, social and cultural rights in the African Charter from the crushing jaws of non-justiciability under the Nigerian Constitution. However, an activist judiciary is indispensable if the masses will ever be extricated from the vice grip of an unconscionable executive and a somnambulant legislature. See I. C. Pats-Acholonu, "Human Rights in the Next Millennium: The Nigerian Experience - A Judicial View Point" Paper Presented at the 1999 Annual Lecture of Nigerian Bar Association (Lagos Branch) Human Rights Committee, May 27, 1999, at 12. [On file with the writer]. The decision of the Supreme Court, more than justify the need to intensify international action.
law. Apart from being very conservative, the Supreme Court’s decision introduces a very dangerous dimension into human rights protection in Nigeria. If the decision is not overruled, it may turn out to be a judicial instrument for the suppression of human rights. The decision is so sweeping that it makes a mockery of the very essence of incorporating the Charter into municipal law, since, as their lordships stated, laws contrary to the African Charter, even if by implication, remain valid. Regrettably, while states like South Africa are adopting a more progressive approach towards international and international human rights, Nigeria is further retreating into an ultra conservative cocoon. Analysis of the constitutional protection of the economic, social and cultural rights in Nigeria and South Africa not only reveals more glaring differences, but also a contemptuous marginalization of enforcement.

4.4. CONSTITUTIONAL PROTECTION OF ECONOMIC, SOCIAL AND CULTURAL RIGHTS

Economic, social and cultural rights are all provided for in the Constitutions of both Nigeria and South Africa. However, fundamental differences characterize the protection of these rights in the two constitutions. A juxtaposition of the two Constitutions to the African Charter shows that while one constitution reflects greater similarities than differences, the other is notoriously remarkable for its dissimilarities.

\[97\text{It is worth noting that the Nigerian Supreme Court has been, in recent times, remarkably conservative. In another case, Badejo v. Federal Minister of Education [1996] 8 NWLR (Pt. 475 ) 15, the Court jolted the human rights community when it held that although a fundamental right is certainly a right which stands above the ordinary laws of the land, its enforcement should not stand above the country, the state and the people. The Court used that statement to camouflage its effeness to redress apparent injustice merely because the act impugned has been completed by an agency of the state. Meanwhile, available evidence showed that the act was completed when litigation was pending.}\]
4.4.1. Extent of Protection: Rights Versus Objectives

As has been demonstrated in the previous section, accession to international agreements does not necessarily guarantee its applicability in municipal systems. A lot still depends on the constitution.98 Even where an international agreement, such as the African Charter, has been incorporated into the municipal system, there may still be extant constitutional provisions clogging the wheels of its enforcement. As a result, it is pertinent to examine the extent to which the economic, social and cultural rights are actually protected in domestic constitutions. This is aimed at ascertaining a country’s seriousness or otherwise in carrying out its international obligations, as undertaken under the African Charter, at least on paper.

South Africa’s constitution protects a number of economic, social and cultural rights which are interspersed with other rights under a justiciable ‘Bill of Rights.’99 The South African Bill of Rights is more comprehensive than the African Charter in the economic, social and cultural rights it guarantees. One example is the inclusion of a provision on the right to adequate housing which the African Charter does not address. Section 26 protects the right of everyone to have access to adequate housing and also prohibits arbitrary evictions.100 What is recognised is ‘a right to have access to adequate housing’ as opposed to ‘a right to adequate housing.’ This distinction is significant because “it makes it clear that

98 See Pearson Nherere, supra, note 45 at 123.


100 See Section 26(1)&(3) of South African Constitution. As noted in Chapter 3, the African Charter does not provide for the right to shelter. However, the right to adequate housing is recognised in a number of international human rights declarations, such as the UDHR (Art. 25) and ICESCR (Art. 11) to mention a few.
there is no unqualified obligation on the state to provide free housing on demand for all members of the public." There are also certain other dimensions of the right: "The state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of this right." This inevitably mirrors the conditional nature of the obligations undertaken by the state, and constitutes a tacit acknowledgement that the right to adequate housing cannot be immediately fulfilled by the state. No doubt, it provides an escape hatch for a government so minded to utilise it, while leaving high and dry the purported guarantees of the right.

Another example of a more extensive right is found in section 27 which provides for the right to have access to health care services, including reproductive health care; sufficient food and water; and social security and social assistance. Again, only the right of access


102 See Section 26(2) of the South African Constitution. This qualification is comparable to Article 2(1) of the *ICESCR* which subjects all rights provisions of the Covenant to the same measure of "maximum available resources, with a view to achieving progressively the full realization...." Further to that, Article 11(1) of the same *Covenant* (on rights to food, clothing and housing) further reinforces the ‘progressive realization’ by assuming a somewhat indefinite obligation. This is evident in its assertion that the “States Parties will take appropriate steps to ensure the realization of this right.”


104 Scholars and the Committee on Economic, Social and Cultural Rights, involved in the interpretation of the Covenant on Economic, Social and Cultural Rights, have made it clear that very definite obligations are engendered by rights even when they are subject to ‘progressive realisation’. See Sandra Liebenberg, “The International Covenant on Economic, Social and Cultural Rights and its Implications for South Africa” (1995) 11 *SAJHR* 359 at 365-366; Philip Alston & Gerard Quinn, “The Nature and Scope of States Parties Obligations Under the International Covenant on Economic, Social and Cultural Rights” (1987) 9 *Human Rights Quarterly* 158 at 172-177. It has been suggested that the same is true for the obligations engendered by the state under the South African Constitution. See Pierre De Vos, *Ibid.* at 93. Nevertheless, the practical effect of section 26(2) of South Africa's Constitution is to undermine the effectivity of the granted right.

105 See Section 27(1) of the South African Constitution. Cf. Article 16 of the *African Charter* which guarantees the ‘best attainable state of physical and mental health.’ In this regard, the *ICESCR* has an identical provision with the *African Charter*. But unlike the Charter which confers the right, Article 11(1) of the *ICESCR*
is provided here and not the right to any of the stipulated services. The right of everyone to emergency medical assistance is protected. A set of social and economic rights engendering more or less the same obligations are bundled together in this section. As in section 26, this section has another dimension which limits its impact and effectivity. It obligates the state to take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of the rights granted. However, under the section, the right to ‘emergency medical treatment’ is not subject to the qualification of progressive realization and resource constraints, unlike other rights in the same section.

Further, and without prejudice to the rights guaranteed under section 27, section 28 provides for the right of every child to basic nutrition, shelter, basic health care services and social services. A child’s right to be protected from exploitative labour practices and not merely ‘recognizes’ the right of “everyone to the enjoyment of the highest standard of physical and mental health.” But unlike the African Charter, the ICESCR (Article 9) provides for the right to social security in the same way as the South African Constitution.

See Section 27(3) of the South African Constitution. By this provision, the South African Constitution may seem to have gone beyond both the African Charter and the ICESCR. However, by providing for the “highest attainable standard of physical and mental health” these two instruments seem to equally cover the right to emergency medical treatment.

See Pierre De Vos, supra, note 103 at 73.

Section 27(2) of the South African Constitution. Cf. Article 16(2) of the African Charter which states: ‘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.’ This does not make the right granted subject to availability of resources or to progressive realization, thus offering better protection than the South African Constitution. Even though all rights under the ICESCR are subject to progressive realization, the provisions of Article 12, by outlining the various steps the parties are expected to take in order to achieve the full realization of the right to health, seem to be more realistic than both the African Charter and the South African Constitution.

See G. E. Devenish, supra, note 39 at 74.

See section 28(1)(c) of the South African Constitution. Section 28(3) defines a child for the purposes of the section as ‘a person under the age of 18 years.’
be required or permitted to perform work or provide services that place at risk the child's well-being, education, physical or mental health or spiritual, moral or social development are guaranteed. This section is neither dependent on the availability of resources nor made subject to progressive realization. It affords a better protection, (at least on paper), albeit to a section of the population - children - and by so doing underscores the inadequacies of the protection offered under section 27.

Section 29 guarantees the right to basic education, including adult basic education. What constitutes basic education is open to debate as it is not defined by the Constitution. There is also a right to 'further education' which the state, through reasonable measures, must make progressively available and accessible. The framing of section 29(1)(b) shows that it is only the right to further education that is dependent on progressive availability and

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112 Section 29(1)(a) of the South African Constitution. The Constitution does not define 'basic education.' While interpreting a similar provision in the 1993 Interim Constitution, Cachalia, et. al. have suggested that the meaning to be given to the term 'basic' will be either elementary or primary education, if not a lower standard. See Azhar Cachalia, et al., Fundamental Rights in the New Constitution (Kenwyn: Juta & Co. Ltd, 1994) at 104.

113 See Section 29(1)(b) of the South African Constitution.
accessibility. Basic education and basic adult education are thus freed from any qualifications of measure laden progressive availability. It is noteworthy that this section does not require that education be free and compulsory. Thus, it does not preclude the charging of schools fees.

Also protected are the rights of people to use the language and to participate in the cultural life of their choice in a manner not inconsistent with the Bill of Rights. The rights of cultural, religious and linguistic communities are protected. Consequently, persons belonging to a cultural, religious or linguistic community may not be denied the right, with other members of that community to enjoy their culture, practise their religion and use their language.

With regard to the economic, social and cultural rights constitutionally guaranteed

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114 It is noteworthy that Art. 17 of the African Charter which guarantees the right to education does not contain any qualifications either as to the level of education or to its availability. The ICESCR contains a more detailed provisions on the right to education. Under Article 13(2), it recognizes the right to free and compulsory primary education; available and accessible secondary as well as vocational education, with provision for them progressively free for all; and accessible higher education, also to be made progressively free.

115 See G. E. Devenish, supra, note 36 at 76.

116 Ibid.

117 See Section 30 of the South African Constitution.

118 See section 31(1)(a) of the South African Constitution. The right to form, join and maintain cultural, religious and linguistic associations and other organs of civil society are also protected. See section 31(1)(b). By section 31(2), the rights in subsection 1 may not be exercised in a manner inconsistent with any provisions of the Bill of Rights. The importance of section 31, as Devenish observes, lies in the fact that "South Africa is a kaleidoscope of cultural, linguistic and religious heterogeneity, which is a source both of infinite richness as well as intense historical, contemporary and potential conflict." See G. E. Devenish, supra, note 39 at 77. Comparable provisions of the African Charter and ICESCR on culture are not as detailed as the provisions of the South African Constitution. Article 17(2) of the African Charter merely provides that everybody may take part in the cultural life of his/her community. Article 15(1)(a) of the ICESCR recognizes the right of everyone to "take part in cultural life." Nonetheless, it seems that the provisions of the ICESCR and the African Charter cover the same field as the provisions of the South African Constitution.
under an enforceable 'Bill of Rights,' South Africa remains a model for other African states. Ostensibly, this is attributable to the political history of the country. Given that freedom and democracy are mere shibboleths without due provisions for people's basic material needs, as one scholar points out, "a constitution of South Africa supposedly marking the transition from apartheid to freedom while imposing no duty on the state to see to the matter of relief from the privations of gross historical injustice, would be a travesty."119 Ironically, some of the rights principally meant to provide relief from such 'privations of gross historical injustice' also contain deliberate latches to facilitate governmental inertia, and ensure the useful inactivity of the rights provided.120

Unlike South Africa's, the Nigerian Constitution provides for economic, social and cultural rights, not as (fundamental) rights, but as fundamental objectives. These objectives are provided for under Chapter two of the constitution entitled 'Fundamental Objectives and Directive Principles of State Policy.'121 They are not couched in the form of rights, nor do they entitle the citizens to any claim. As the name shows, it is only an objective - a mere directive principle of state policy recognised as only long term affirmations of government's


120Notable rights such as rights to housing, health care, food, and water as well as education which massively violated during the apartheid era are all subjected to 'progressive realization to the extent of available resources. In this way, they are subject to the vicissitudes of policy and therefore vulnerable.

121Fundamental Objectives and Directive Principles of State Policy made its first appearance in Nigeria in the 1979 Nigerian Constitution. The Constitution Drafting Committee of the 1979 Constitution explained the concept thus: "By Fundamental Objectives, we refer to the identification of ultimate objectives of the Nation whilst Directive Principles of State Policy indicate the paths which lead to these objectives. Fundamental objectives are ideals towards which a Nation is expected to strive, whilst Directives Principles lay down the policies which are expected to be pursued in the efforts of the Nation to realize national ideals." See Report of the Constitution Drafting Committee, vol. 1, 1976 at (xvi). See also B. O. Okere, "Fundamental Objectives and Directive Principles Under the Nigerian Constitution" (1978-1988) 3 Nig. J. R. 74.
moral obligations to provide basic amenities for the citizens. It merely imposes a non-enforceable duty on all those exercising legislative, executive and judicial powers.\footnote{122}{See section 13 of the Constitution of Federal Republic of Nigeria, 1999. See also, G G I Ojiako, \textit{In the Name of Justice} (Owerri: Judges' Committee, 1997) at 9. An eminent Nigerian scholar, Prof. B. O. Nwabueze, writing about the fundamental objectives under the Nigerian constitution, succinctly observed, to wit: "These are worthy declarations of objectives. But it is necessary that their nature as declarations of objectives ... and not as declarations of justiciable rights should be appreciated. The state is enjoined as a matter of constitutional duty to observe and apply the objectives and directives - although this confers on the individual no right to go to court to enforce their observance." See B. O. Nwabueze, \textit{The Presidential Constitution of Nigeria} (London: Hurst & Co. Publishers, 1982) at 456.}

As part of the economic objectives, the state is enjoined to "harness the resources of the nation and promote national prosperity and an efficient, dynamic and self-reliant economy" and also to "control the national economy in such a manner as to secure the maximum welfare, freedom and happiness of every citizen on the basis of social justice and equality of status and opportunity."\footnote{123}{See section 16(1)(a)&(b) of the Nigerian Constitution.} By virtue of section 16(2)(d), the state is to direct its policy towards ensuring that "suitable and adequate shelter, suitable and adequate food, reasonable national minimum living wage, old age care and pensions, unemployment, sick benefits and welfare of the disabled are provided for all citizens."\footnote{124}{See also section 16(2)(b)&(c) of the Nigerian Constitution which further exhorts the state to ensure that "the material resources of the nation are distributed as best as possible to serve the common good [and] that the economic system is not operated in such a manner as to permit the concentration of wealth or the means of production in the hands of a few individuals or of a group."}

Section 17 provides for the social objectives of the state. It requires the state, to focus its policy towards ensuring that:

- conditions of work are just and humane, and that there are adequate facilities for leisure and social, religious and cultural life;\footnote{125}{Section 17(3)(b) of the Nigerian Constitution.}
the health, safety and welfare of all persons in employment are safeguarded and not endangered or abused;\(^{126}\)

that there are adequate medical and health facilities for all persons;\(^{127}\)

equal pay for equal work without discrimination on account of sex, or on any other ground whatsoever.\(^{128}\)

Whereas the South African Constitution guarantees rights which, if breached, are actionable in the courts, the Nigerian Constitution leaves no one in doubt that all these provisions are merely high sounding directives addressed to the state, to be enforced at the propitious disposition of individual governments.\(^{129}\) Embittered by the absolute emptiness of the constitutional provisions on economic, social and cultural rights, Onyema lamented that:

It is indeed repugnant to the human conscience that in a country that can boast of abundant material resources, a poverty-ridden and dehumanised majority with no shelter, no employment and little food to eat rub shoulders with a few pot-bellied corrupt public officers and overnight millionaires. Yet there is no constitutional protection to give the common man [and woman] the ground to question the basis of his [or her] sub-human existence.\(^{130}\)

Also, Kachikwu and Ozekhome, bewildered by this constitutional anomaly, angrily asked:

\(^{126}\) Section 17(3)(c) of the Nigerian Constitution.

\(^{127}\) Section 17(3)(d) of the Nigerian Constitution.

\(^{128}\) Section 17(3)(e) of the Nigerian Constitution.

\(^{129}\) Section 6(6)(c) of the Nigerian Constitution ousts the jurisdiction of the courts to adjudicate on any aspect of the Fundamental Objectives and Directive Principles as set out in chapter two of the Constitution.

With the abundant resources available to government, why shouldn't a citizen who sleeps under Eko or Carter bridge in Lagos for lack of shelter and means of livelihood be free to walk into a court of law and come out smiling with an order that the government should rehabilitate him?131

Even though the concern of many seems to be the non-justiciability of the constitutional provisions on economic, social and cultural rights, it is arguable whether there is indeed any economic, social or cultural right conferred on individuals under the Nigerian Constitution. Unlike the definite economic, social and cultural rights provisions in the South African Constitution which inhere in the individual, the surfeit of economic, social and cultural directives in the Nigerian Constitution are not addressed to the citizens. To this extent, one can safely submit that economic, social and cultural rights are not protected under the Nigerian Constitution.

Regrettably, the Nigerian attitude to economic, social and cultural rights is not uncommon in Africa, though hardly restricted to it. For example, while the Zambian Constitution guarantees civil and political rights, it does not accord the same significance to economic, social and cultural rights and the state cannot be sued for failure to provide them.132 In the same vein, apart from the right to work, the Tanzanian Bill of Rights does not accord any relevance to economic, social and cultural rights.133 Also, the Constitution of


Botswana contains no provisions on economic, social and cultural rights.\textsuperscript{134} The Namibian Constitution devotes Chapter Eleven to Principles of State Policy in which provision is made for certain social and economic goals without pretensions of creating justiciable rights.\textsuperscript{135} This pattern is also replicated in most other African Commonwealth states with the unsavoury effect that “the scope of rights and freedoms in their national Bills of Rights [constitutions] is [to a very large extent] limited to civil and political rights only.”\textsuperscript{136}

What is curious in non-constitutionalisation of economic, social and cultural rights in most African states is that these constitutions came into being after the African Charter entered into force. As Lindholt points out, “... a question which can still not be answered clearly is whether it [African Charter] did serve as the primary model for the drafters of the[se] Constitutions....”\textsuperscript{137} It goes to show that the ideals of the African Charter are largely not reflected in the constitutions of most African countries given their apparent disinclination towards constitutionalising economic, social and cultural rights. Where these rights are included at all in the constitution, they are not subject to judicial adjudication or


\textsuperscript{136} Lone Lindholt, supra, note 134 at 247-248. The Constitution of Malawi, 1995 only provides (in section 29) for the right to economic activity which can hardly be classified as economic, social or cultural right. It should be noted that the practices of French speaking African Countries are no better with regard to constitutionalizing economic, civil and political rights. For instance, even though Togo took immediate steps in 1982, shortly after ratifying the African Charter, to implement it, it did not constitutionalize justiciable economic, social and cultural rights, neither did it include these rights within the mandate of the National Human Rights Commission (Commission Nationales des Droits de l’Homme) established in 1987. According to Umozurike, the Commission was set up “as an autonomous body with the objectives of protecting civil and political rights....” See U. Oji Umozurike, “African Charter” supra, note 11 at 110.

\textsuperscript{137} Ibid. at 248.
4.4.2. **Justiciability of Rights**

The term 'justiciability' broadly means the extent to which a matter or issue is suitable for adjudication. Justiciability "refers to the ability to judicially determine whether or not a person's right has been violated or whether the state has failed to meet a constitutionally recognized obligation to respect, protect or fulfill a person's right." To say that an issue is justiciable means that it is real, substantial and appropriate for judicial determination.

Constitutional provisions are not meant to be hollow shibboleths or cosmetic window dressings. Essentially, the main point of protecting a right in a constitution is to identify and underscore its fundamentality by putting it beyond the depredations and predilections of the temporal forces of the day. This is mainly achieved by subjecting any infraction of such rights to judicial adjudication. Excluding certain constitutional provisions from judicial adjudication is plainly to declare them worthless and illegitimate aspirations of modern governance. In fact, non-justiciable rights are hardly worth the paper on which they are

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140 See Etienne Mureinik, *supra*, note 119 at 468.
written. Marshall C.J. put this fact beyond dispute in *Mardbury v Madison*¹⁴¹ where he stated:

> To what purpose are powers limited and to what purpose are these limitations committed into writing, if these limits can, at any time, be passed by those intended to be restrained. The distinction between government with limited and unlimited powers is abolished if these limits do not confine those upon whom they are imposed, thereby making acts allowed and acts prohibited of equal obligation.

Indeed there is no sense, as Mureinik points out, "in including economic, [social and cultural] rights in the constitution in a form short of which makes them constitutional rights, just for the sake of being able to say that they are in the constitution."¹⁴² Yet, this is the method usually adopted by many African States and other states in the international community. The Nigerian Constitution itself is anything but silent on the legal unviability of these rights. As highlighted above, economic, social and cultural rights (that is, if they can be properly so regarded under the Nigerian Constitution) are provided for in Chapter 2 of the Nigerian Constitution on Fundamental Objective and Directive Principles of State Policy. Regarding its justiciability, section 6(6)(c) of the Constitution provides:

> The judicial powers vested in accordance with the foregoing provisions of this section - shall not, except as otherwise provided by this Constitution, extend to any issue or question as to whether any act or omission by any authority or person or as to whether any law or judicial decision is in conformity with the Fundamental Objectives and Directive Principles of

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¹⁴¹(1803) Cranch 137.

¹⁴²Etienne Mureinik, supra, note 119 at 469. It has been observed that the main rationale for the inclusion of directive principles is that they provide a code of conduct according to which the governance of a country should take place. See Bertus De Villiers, "Directive Principles of State Policy and Fundamental Rights: The Indian Experience" (1992) 8 SAJHR 29 at 32 [hereinafter 'Directive Principles']. However, owing to the unenforceability of the directive principles, Seervai described them as "rhetorical language, hopes, ideals and goals rather than actual reality of government." See H M Seervai, *Constitutional Law of India* (1984) at 1577, cited in Beruts De Villiers, "Directive Principles" Ibid.
State Policy set out in Chapter II of this Constitution.\textsuperscript{143}

In spite of the fact that what is provided under the so-called Fundamental Objective and Directive Principle of State Policy are not rights which inhere in any person or group of persons, the above constitutional provision effectively forecloses any constitutional/judicial review, even a review for the sincerity and rationality of governmental actions or inactions towards these provisions. By forbidding the justiciability of economic, social and cultural rights, the Nigerian Constitution, like the Constitution of many other African states,\textsuperscript{144} “under the guise of false libertarianism, [became] an instrument of human abandonment, heartlessness and neglect.”\textsuperscript{145} Also, the provisions of the Nigerian constitution fly in the face of the African Charter which recognises the equal enforceability of all rights therein provided.

Unlike the Nigerian constitution which demeans the underpinning values of economic, social and cultural rights with its fervent commitment to non-justiciability, the

\textsuperscript{143}Emphasis added. Compare Section 46(1) which provides for a 'special jurisdiction' of the High Court to adjudicate cases of violation of Chapter IV of the Constitution (on civil and political rights).

\textsuperscript{144}See Nicholas Haysom, “Constitutionalism, Majoritarian Democracy and Socio-Economic Rights” (1992) 8 SAJHR 541 at 462, (noting Namibia as one of the African countries that relegated economic, social and cultural rights to non-justiciable ‘directive principles of state policy’). Other African States upholding the non-justiciability of economic, social and cultural rights as directive principles of state policy include, but are not limited to, Ghana, Tanzania, Togo and Zambia. India is usually cited as a model for adopting the non-justiciability approach.

\textsuperscript{145}Albie Sachs, Affirmative Action and Good Governance (1991) at 13, cited in D M Davis, “The Case Against the Inclusion of Socio-Economic Demands in a Bill of Rights Except as Directive Principles” (1992) 8 SAJHR 475 at 476. Scot and Macklem persuasively argues: “If there is no forum that is socially recognized as authoritative and in which individuals or communities of people similarly disadvantaged can make submissions about the profound barriers they face in attempting to lead meaningful lives, those difficulties will increasingly be deemed irrelevant, and the underlying values that social rights are designed to protect will diminish in meaning and importance.... Denying an individual or group the ability to make constitutional claims against the state with respect to nutrition, housing, health, and education excludes those interest from a process of reasoned interchange and discussion, and forecloses a useful forum for the recognition and redressing of injustice. See Craig Scot & Patrick Macklem, supra, note 138 at 28.
South African Constitution distinguishes itself with its declared dedication to the justiciability of these rights. Its 'Bill of Rights' not only "enshrines the rights of all people"146 in South Africa without theoretical distinctions, but also obligates the state to "respect, protect, promote and fulfil the[se] rights."147 By ensuring the justiciability of all rights, the constitution underscores the fundamentality of rights and also the particular institutional advantages of the courts as an important forum for not only the accountability of the leadership for all its actions and inactions, but where the stories of those whose humanity and place in the community have been, or would be, marginalized are told.148

The imperative of making economic, social and cultural rights justiciable is that it is only when they are so recognised that the question of other non-judicial or quasi-judicial remedies, such as administrative boards adjudication, commissions, ombudspersons, etc, would arise. Before these non-judicial or quasi-judicial avenues can be exploited, there should first be an acknowledgement by the state that these rights are capable of being violated, which is the bone marrow of justiciability. Non-judicial or quasi-judicial bodies, such as human rights commissions have been relatively successful in the case of civil and political rights because these rights are, in the first place, justiciable. If they are non-justiciable, and therefore mere discretionary privileges, a non-judicial or quasi-judicial body

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146 Section 7(1), South African Constitution, 1996.

147 Section 7(2). It has been observed that this provision is of "considerable operational significance" since it is clear that the Bill of Rights is not just merely a "negative enforcement mechanism shielding subjects against the abuse of governmental power, but also imposes a positive duty on the state to protect, promote and fulfil the entrenched rights." See G. E. Devenish, supra, note 39 at 45, citing Du Plessis & Gouws, "The Gender Implications of the Final Constitution with particular Reference to the Bill of Rights" (1996) SAPL 473 at 475.

148 See Craig Scot & Patrick Macklem, supra, note 138 at 147.
will be as helpless, and estranged as the judiciary is presently with regard to economic, social and cultural rights. Governments all over the world hardly admit violations of entrenched and justiciable rights, let alone when they are non-justiciable.

To the extent of its non discriminatory justiciability of rights, the South African Constitution conforms with the spirit of the *African Charter*. With this, the South African Constitution seems to be standing head and shoulders above the constitutions of most African states. This constitutional non-compliance of most African states with regard to justiciability of economic, social and cultural rights raises a very pertinent issue, namely, the validity of the provisions in the states parties’ constitutions that are inconsistent with the *African Charter*.

### 4.4.3. Validity of Constitutional Provisions Inconsistent with the Charter

The issue of the validity, or otherwise, of constitutional provisions inconsistent with the *African Charter* is more or less tied to the issue of the status of the *Charter* in its relations with domestic constitutions. As noted earlier, in Africa, the constitution is sacrosanct and, as a rule, considered as the supreme and fundamental law of the state.\(^\text{149}\) One of the consequences of this is that the application of international agreements in municipal systems depends on whether they have become part of the law of the land in accordance with

\(^{149}\) For instance, Article 2 of the 1984 Liberian Constitution, proclaims the Constitution as ‘supreme and fundamental’ with its provisions having binding force on all authorities, and any “treaties ... found to be inconsistent with it shall to the extent of (the) inconsistency, be void and of no effect.” See P. F. Gonidec, *supra*, note 29 at 247.
the provisions of the constitution. This is largely because, as noted earlier, international law and municipal law of a given country are believed to be two different systems operating on two different planes.\textsuperscript{150} Thus, a breach of duty created by, and owed under international law, does not, of itself, give rise to a remedy in municipal law, unless such breach is also constitutive of a breach under the relevant municipal law.\textsuperscript{151} In the main, this springs from the exercise by the state of its sovereignty.

Be that as it may, by becoming a party to an international instrument creating a supranational legal system, a state accedes to the establishment of a new level of jurisdiction which demands the proper accountability of the state. Such a higher level of jurisdiction should hold sway regardless of a state’s internal constitutional arrangements. The \textit{African Charter} imposes on States Parties absolute and immediate obligations to take action to ensure that the rights it guarantees are fully respected.\textsuperscript{152} To this end, the \textit{Charter} provides for justiciable economic, social and cultural rights which are immediately enforceable and not dependent on the availability of resources. It thereby obliges States Parties to take necessary measures to give full effect to the provisions of the \textit{Charter}, such as adapting their municipal laws, including their constitution, to conform to the \textit{Charter}. Consequently, any constitutional provision that renders economic, social and cultural rights non-justiciable (as in the Nigerian Constitution), or make them progressively realisable, depending on

\textsuperscript{150} See Pearson Nherere, \textit{supra}, note 45 at 123.


\textsuperscript{152} See P. Sieghart, \textit{supra}, note 8 at 57.
availability of resources (as in the South African Constitution) cannot be valid since it is inconsistent with the provisions of the Charter.\footnote{153}

However, it has been argued that the effect which an international agreement, such as the African Charter, may have on an inconsistent constitutional provision depends on whether the Charter has been incorporated into the constitution or not.\footnote{154} Thus, where the Charter has been incorporated, it prevails over any inconsistent constitutional provision.\footnote{155} But, Andre Stemmet would appear to suggest that even when an instrument has been incorporated into the municipal law, and a conflict develops, the municipal system will prevail.\footnote{156} Stemmet’s position is in tandem with the recent decision of the Nigerian Supreme Court in the case of Abacha v. Fawehinmi.\footnote{157}

The present writer is of the opinion that any constitutional provisions inconsistent with an international agreement ought to be void, whether or not the international agreement is incorporated into the municipal system, provided it has been ratified. It is well established that an international obligation is not obviated by internal legislative arrangements.\footnote{158} A state

\footnotesize{\textsuperscript{153}In making this submission, the present writer is not oblivious of the rule that a conflict between a state’s municipal law and its international obligations does not necessarily affect the validity of that law on the municipal plane. However, it is the present writer’s contention that a municipal law, even if the constitution, or its provisions thereof, that has been invalidated at the international level, attracts little or no legitimacy before the citizens who are called upon to obey the said law. Where it involves human rights, the opprobrium, local and international, that follows a government’s insistence on continuing with its internationally unlawful act, is capable of adversely affecting the legitimacy of such a recalcitrant government.}

\footnotesize{\textsuperscript{154}See U.O. Umozi, “Human Rights Instruments” supra, note 74 at 14-15.}

\footnotesize{\textsuperscript{155}Ibid at 15.}

\footnotesize{\textsuperscript{156}Andre Stemmet, supra, note 36 at 244.}

\footnotesize{\textsuperscript{157}See supra, note 82.}

\footnotesize{\textsuperscript{158}See Norwegian Loans Case (1957) ICJ Reports 9 at 37. See also Robert Brown’s Claim [United States v. Britain] (1923) 6 RIAA 120.}
cannot plead the provisions of its own law, not even its constitution,159 or deficiencies in that law or even the absence of any legislative provision or of a rule of internal law in answer to a claim against it for an alleged breach of its obligations under international law.160 Thus, in Alabama Claims Arbitration,161 the Tribunal rejected the British attempt to rely on deficiencies in its constitutional law to escape its international obligations. It stated:

... the government of Her Britanic Majesty cannot justify itself for a failure in due diligence on the plea of insufficiency of legal means of action which it possessed.162

In the Free Zones case,163 the Permanent Court of International Justice (PCIJ) authoritatively observed that "it is certain that France cannot rely on her own legislation to limit the scope of her international obligations."164 Also, in the advisory opinion on the

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159 See United Nations Headquarters Agreement Case (1988) ICJ Reports at 12. See also, the Case of Free Zones of Upper Savoy and the District of Gex (1932) PCIJ, Series A/B No. 46 at 167.

160 See Article 27 of the Vienna Convention on the Law of Treaties (1969), supra, note 43. See also I. A. Shearer, supra, note 23 at 78; Malcolm N. Shaw, supra, note 11 at 104-105.

161 [U.S. v Britain], Moore, (1872) 1 Int. Arb. 495

162 Ibid. at 656.

163 Supra, note 159.

164 Ibid. This point was also succinctly put in the course of proceedings in the Finnish Ships Arbitration, Vol. 3 United Nations Reports of International Arbitral Awards, 1484; (1934) 3 R.I.A.A. 1479, to wit: "As to the manner in which its municipal law is framed, the state has under international law, a complete liberty of action, and its municipal law is a domestic matter in which no other state is entitled to concern itself, provided that the municipal law is such as to give full effect to all international obligations of the state." Also, in 1949 the International Law Commission adopted the Draft Declarations of Rights and Duties of States, Article 13 of which provides: "Every State has the duty to carry out in good faith its obligations arising from treaties and other sources of international law, and may not invoke the provisions in its constitution or its laws as an excuse for failure to perform its duty." [Emphasis added]. The UN General Assembly in G.A. Resolution 375 (IV), G.A.O.R., 4th Session, Resolutions, (1949) at 66, quoted in D.J. Harris, supra, note 9 at 71, noted the above Draft Declaration and commended it to members and jurists as a "notable and substantial contribution towards the progressive development of international law and its codification."
"Graeco-Bulgarian Communities Case," the PCIJ stated:

It is a generally accepted principle of international law that in the relations between powers who are contracting parties to a treaty, the provisions of municipal law cannot prevail over those of the treaty.

The same court affirmed this principle in the "Advisory Opinion on the Treatment of Polish Nationals in Daznig" where it declared that:

... a state cannot adduce ... its own constitution with a view to evading obligations incumbent upon it under international law or treaties in force.

The foregoing import a duty on the state, to bring its constitution in line with, and where appropriate, pass the necessary legislation to fulfil, its international obligations. In doing this, unless to the extent reservations are permitted, where applicable, a state is not allowed to pick and choose between the obligations created under an international agreement. Therefore, fanciful barriers erected to diminish the full impact of obligations assumed under an international agreement cannot stand.

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165 (1930) PCIJ Reports, Series B. No. 17 at 32.
166 (1931) PCIJ, Series A/B, No. 44 at 24. It has also been observed that "[a] state cannot plead that its domestic law exonerated it from performing obligations imposed by an international treaty, unless in giving its consent to the treaty, a fundamental rule of municipal law concerning constitutional competence to conclude the treaty concerned was broken, and this breach of municipal constitutional law was manifest. See I. A. Shearer, supra, note 20 at 78-79. (Citations omitted).
167 See Advisory Opinion on the Exchange of Greek and Turkish Populations (1925) PCIJ Series B, No. 10 at 20. See also, I. A. Shearer, ibid. at 78.
168 But see Andre Stemmet, supra, note 36 at 245 who argues that: "While any conflict between a state's international obligations and its domestic law is undesirable and should be avoided at all costs, such a situation has the advantage that the state's domestic law will remain unaffected while it is afforded an opportunity to reflect on how to solve the problem." In view of the undertaking executed by states parties to the African Charter in Article 30 of the Protocol establishing the African Court of Human Rights by which they agreed to comply with, and guarantee the execution of, the judgement of the court, it is submitted that short of refusal to comply with Article 30, there is no way domestic law will remain unaffected if declared inconsistent with the Charter.
Whatever may be applicable in municipal systems where municipal courts apply local statutes and uphold the municipal system, even when in conflict with the provisions of an international instrument, the existence of a supra-national court to enforce international agreements certainly means that such agreements will be enforced notwithstanding the provisions of municipal constitutions. As such, the African Court of Human Rights, it is submitted, should apply the provisions of the Charter and ought not to be hamstrung by internal constitutional arrangements. Moreover, as a supra-national court, in the absence of any limitations in this regard, it has the powers to decide on the validity or otherwise of states parties' constitutional provisions vis-a-vis the African Charter. It is noteworthy that neither the Charter nor the Protocol establishing the African Court contains the equivalent of Article 60 of the European Convention which regulates the relationship between the Convention and national constitutions. The implication of this is that the States Parties to the African Charter have no such protection as that which the European Convention accords to their European counterparts. As such, the internal constitutional arrangements of African

169 See U.Oji Umozurike, “African Charter” supra, note 11 at 109. But see, I. A. Shearer supra, note 23 at 78, who observes that “[t]he fact municipal courts must pay primary regard to municipal law in the event of conflict with international law, in no way affects the obligations of the state concerned to perform its international obligations. A municipal court which defers to municipal law, notwithstanding an inconsistent rule of international law, itself acts in breach of international law, and will, as an organ of the state, engage the international responsibility of that state.”

170 U.O. Umozurike, “Human Rights Instruments” supra, note 74 at 13 notes: “As between international courts and municipal courts, the former generally give primacy to international law. Municipal law to an international tribunal is a question of fact, even a constitution has not special sanctity.”

171 See infra Chapter 5 for a discussion on the African Court.

172 See Article 60 of the European Convention which provides that the Convention shall not be construed as limiting or derogating from any of the human rights and fundamental freedoms which may be ensured under the laws of the contracting states or any agreement to which such states may be a party.
states do not have any privilege or special sanctity and cannot escape being declared invalid where it is inconsistent with the Charter.

Given that the African Charter provides for absolute, immediate and justiciable economic, social and cultural rights, any State Party's constitution which does not recognise the justiciability of economic, social and cultural rights or regards them as a non-justiciable fundamental objectives and directive principles or treats these rights as though they are qualified and progressive, cannot but be inconsistent with the obligations assumed by the state under the Charter. As a fact, the constitution of many states parties have not been lacking in inconsistencies in this regard. What appears to be lacking is the proper forum where they can be so declared. Even if a supra-national, court such as the African Court, may not directly declare a State Party’s constitutional provisions null and void, a decision to the effect that such a provision negates the State Party’s obligations under the Charter indirectly invalidates such provisions even without expressly so declaring.

A direct consequence of the discriminatory constitutionalisation\(^{173}\) of economic, social and cultural rights by States Parties to the African Charter is the abysmal and shabby protection of these rights in practical terms. In the absence of accountability owing to non-justiciable or other forms of discriminatory constitutionalisation, economic, social and cultural rights are marginally - where at all - implemented.

\(^{173}\)Discriminatory constitutionalisation may be as a result of rendering some rights justiciable while others are not, or introducing conditions, such as 'progressive realization to the maximum available resources' to qualify only some rights in the constitution.
4.5. PRACTICAL IMPLEMENTATION / ENFORCEMENT

The account of the practical implementation/enforcement of the economic, social and cultural rights enshrined in the *African Charter* is, with all probability, an account of States Parties' acute economic and social crisis as well as of their lack of political will. For states without a justiciable economic, social and cultural rights provisions, it has not gone beyond the irritating rhetorical verbiage of 'heaven and earth' promises during political campaigns, which are usually confined to the garbage bin of unfulfilled electoral pledges soon after the election (or consolidation of power base, in the case of unelected military politicians). While such a scenario is not absent in those states with a justiciable Bill of Rights, the justiciability of rights affords their citizens the opportunity to assert their rights, at least to the extent allowed by the relevant provisions. Nigeria and South Africa are illustrative of these patterns of enforcement/implementation.

Because of the welfare nature of some economic, social and cultural rights, it is difficult to embark on a meaningful assessment of a state's performance in the implementation/enforcement of its economic, social and cultural rights obligations under the *African Charter* without reducing the evaluation to an analysis of the conditions of living in a state. Although some general comments may be made on the conditions of living in a state, emphasis will be on judicial, legislative and executive measures affecting economic, social and cultural rights.

As a practical measure of implementation/enforcement, South Africa incorporated economic, social and cultural rights into a justiciable Bill of Rights. It is a singular act of great import having empowered the citizens to challenge any perceived violations of their
rights. The case of *Soobramoney v Minister of Health (Kwazulu-Natal)*\(^{174}\) represents the first where this constitutional right was effectively exercised under the South African Bill of Rights.

In this case, the appellant was in dire need of renal dialysis in order to stave off death from acute kidney disease. When he ran out of funds to pay private providers, he sought service at a state hospital. He was refused treatment at the state hospital because his physical condition as a whole did not qualify him for dialysis services according to the standards used by the hospital to ration limited resources. The appellant challenged the hospital’s refusal, basing his claim in part on section 27(3)\(^{175}\) of the Constitution which provides that ‘no one may be refused emergency treatment’. Finding the hospital’s standards well within the bounds of reason and fairly applied to the applicant, the Constitutional Court unanimously held that the appellant’s right to emergency medical treatment was not violated as his case did not qualify as an emergency treatment. The court, in effect, held that the appellant had no legal claim to relief under the Bill of Rights.\(^{176}\)

Even though not necessary for the determination of the case before it, the court


\(^{175}\)The appeal was based on two sections of the Constitution: section 27(3), providing that ‘no one may be refused emergency medical treatment’ and section 11, granting everyone ‘the right to life’.

\(^{176}\)In rejecting the claim under section 27(3), the court held that emergency does not refer to chronic illness at an advanced or critical stage, but to “sudden catastrophe which calls for immediate medical attention” that ought not be refused, when otherwise available, ‘by reason of bureaucratic requirements or other formalities’. It further held that the appellant’s right to life was not infringed by a state hospital’s application of reasonable rules for apportioning scarce resources among many who urgently need services when it is not possible to serve them all. See *supra*, note 151 at para. 20.
ventured an opinion, in construing the respective subsections 2 of section 26 and 27,\textsuperscript{177} which tends to suggest sections 26(1) and 27(1)\textsuperscript{178} confer no claims on anybody beyond the claim to have the state perform the obligation to take reasonable positive measures, within available resources to provide everyone with access to the listed services. The Court per Chakalson P remarked:

What is apparent from these provisions is that the obligations imposed on the state by sections 26 and 27 in regard to access to housing, health care, food water and social security are dependent upon resources available for such purposes, and that the corresponding rights themselves are limited by reason of lack of resources.\textsuperscript{179}

If the above statement actually meant what it says,\textsuperscript{180} then all the provisions of the Bill of Rights on economic, social and cultural rights with such qualifications as in, and including, sections 26 and 27 are no more than decorative appendages to the Bill of Rights. It is perhaps a sign of reluctance on the part of the Constitutional Court to enforce the economic, social and cultural rights as provided in the Constitution without the shackles of resource availability and the manacles of progressive realisation.

In all, the case shows that under the right circumstances, an individual can have his

\textsuperscript{177}Subsection 2 of sections 26 and 27 provides: "The state must take reasonable legislative and other measures, within its available resources to achieve the progressive realisation of this right."

\textsuperscript{178}Section 26(1) provides: "Everyone has the right to have access to reasonable housing." Section 27(1) provides: "Everyone has the right to have access to (a) health care services, including reproductive health care; (b) sufficient food and water; and (c) social security, including, if they are unable to support themselves and their dependents, appropriate social assistance."

\textsuperscript{179}See supra, note 174 at para. 11.

\textsuperscript{180}Frank Michelman, supra, note 119 at 503-504 states: "... such a reading may not be at all what the Court intended to convey, and the remark is at any rate open to future dismissal as dictum not required for decision of the case before the court that uttered it. But in any event, such a casual intimation by the Court of an answer to such a crucial question must be counted as unfortunate."
or her economic, social and cultural rights under the South African Constitution vindicated
in a court of law just as any other right. Save for the qualification of some provisions with
the 'resource availability and progressive realization' clause, which is not in accordance with
the relevant provisions of the African Charter, there would appear to be a propitious
atmosphere for judicial enforcement of economic, social and cultural rights in South
Africa. 181

Apart from judicial enforcement, South Africa has already taken some legislative
measures towards the implementation of the economic, social and cultural rights. And, as a
sequel to the obligations imposed by section 26 of the Constitution, the parliament passed
the Housing Act. 182 The object of the Act is, inter alia, to lay down general principles
applicable to housing development in order to facilitate a sustainable housing development
process and to provide for the financing of national housing programmes. This is in
recognition that "housing, as adequate shelter, fulfils a basic human need" and is "vital to the
socio-economic well-being of the nation." 183 Other legislative measures taken to effectuate
the right of access to housing include the Housing Consumers Protection Measures Act 184

181 See generally, Pierre De Vos, supra, note 83 at 93.

182 See Housing Act No. 107, of 1997, published in Government Gazette No. 18521 of December 19,
states: "Whereas in terms of section 26 of the Constitution of the Republic of South Africa, 1996, everyone has
the right to have access to adequate housing, and the state must take reasonable legislative and other measures,
within its available resources, to achieve the realisation of this right." This is perhaps the best evidence of the
essence of the Act.

183 Para. 2 of Preamble to the Housing Act, Ibid.

184 See Housing Consumers Protection Measures Act No. 95 of 1998, as amended by the Housing
Consumers Protection Amendment Act No. 27 of 1999.
and the *Rental Housing Act*,\(^{185}\) all aimed at making shelter available to those in need.

In addition, in furtherance of the obligations imposed by the right to education and to further education, the parliament has enacted the *National Student Financial Aid Scheme Act*\(^{186}\) to provide for, among other things, the granting of loans and bursaries to students at public higher education institutions and for the administration of such loans and bursaries. There is also, the *Higher Education Act*\(^{187}\) which was passed in order redress past discrimination and ensure representivity and equal access to higher education for all, especially to the historically disadvantaged group.

Indubitably, South Africa has taken some impressive legislative measures in furtherance of the economic, social and cultural rights under its Constitution and in the *African Charter*. However, laws are not self-executory and usually require even more involving measures before they can achieve desired positive results. Short of the 'normal' bureaucratic shuffling, nothing tangible seems to be happening in this regard.

More importantly, the people for whose benefit these laws are enacted must be made aware that such laws are actually in existence for their benefit. This underscores the usefulness of effective human rights education to enlighten the masses on their economic, social and cultural entitlements under the constitution and the *African Charter*. The paucity of litigation to enforce socioeconomic rights under the South African Constitution points to

\(^{185}\text{See Rental Housing Act No. 50 of 1999.}\)


the absence of such awareness by the majority who are being seared in the flames of withering poverty and helplessness.

South Africa is understandably a new entrant in the scheme of Africa’s Regional Human Rights regime. Having writhed for a long time under the crushing heels of the apartheid system, known for its negation of humanity, South Africa’s efforts so far, no matter how modest, argue in its favour. The same, however, cannot be said of Nigeria and many other States Parties to the *African Charter*.

Unlike South Africa, Nigeria has no enforceable economic, social and cultural rights under its Constitution. These rights are provided for under the non-justiciable directive principles of state policy. Consequently, judicial enforcement of such rights is non-existent, as is amply demonstrated by the case of *Adeyinka Badejo v. Federal Minister of Education & Ors.* In this case the applicant sat for the entrance examination into the Federal Government Colleges. Notwithstanding her very high score, she was denied admission because her score was not up to the cut-off mark set for her state of origin, even though people with lower scores, but from different states were admitted. On an application to enforce her right to, *inter alia*, education under the 1979 Nigerian Constitution (which is substantially the same as the 1999 Constitution), the court held that education being under the directive principles of state policy, it is not justiciable and cannot be enforced by the courts.

With regard to legislative measures, none has, so far, been taken since the coming

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188 See section 6(6)(c) of the Nigerian Constitution, 1999.

189 Suit No. M/500/88 of High Court of Lagos State (Ruling delivered on November 4, 1988).
Prior to the coming into force of the present Constitution, there were virtually no legislative measures taken in the area of economic, social and cultural rights apart from decrees making workers' strikes illegal and empowering employers to dismiss striking workers. The military administration neither allowed for the enforcement of economic, social and cultural rights under the Charter, nor actively initiated meaningful programmes under the directive principles or state policy, to improve the socioeconomic lot of Nigerians. Successive governments in Nigeria have conducted their affairs in a manner that suggests that the citizens are not entitled to any economic social and cultural rights. Since the failings of the Nigerian state and leadership for the past two decades have been amply documented elsewhere any efforts to rehearse it here will be


192 With regard to programmes to alleviate the sufferings of the masses, one's attention may be drawn to programmes like Family Economic Advancement Programme and Better Life for Rural Women respectively initiated by Mrs. Maryam Abacha and Mrs. Maryam Babangida (wives of two former military heads of state). But, as the Civil Liberties Organisation pointed out in their 1997 Annual Report, these were "hare-brained, extra-constitutional and extra-budgetary programmes designed to accommodate the ego of the wives of military heads of state in Nigeria." See Civil Liberties Organisation, Ibid at 166.

193 The Committee for the Defence of Human Rights in its 1998 Annual Report observed thus: "One of the main obligations of a government to its people is to create an enabling environment for the people to enjoy these [economic, social and cultural] rights. Economic and political policies are the main instruments through which government[s] promote the welfare of the citizens. Unfortunately, in Nigeria, government's economic and political policies and decisions are designed to foster the abridgement and denial of human rights." See Committee for the Defence of Human Rights, 1998 Annual Report on the Human Rights Situation in Nigeria (Lagos: CDHR, 1999) at 118 [hereinafter "1998 Annual Report"].

unnecessary.

The impact of those failures and neglects on the enjoyment of the economic, social and cultural rights of the people is, however, worth noting here. Momoh and Adejumobi have summarised the decadence in the educational sector due to prolonged neglect thus:

Facilities and social infrastructure are in a decadent state of disrepair from primary school to university level. Worst still, teachers' salaries especially at the primary and secondary school levels, are not paid on time, often months late. Universities have had to rely on World Bank loans to import books.... The result of the loans has been that meaningless books have been imported without consulting the individual universities or lecturers. Many of these books lie unshelved in libraries.195

Although education may seem to have improved its standing recently in terms of the actual amount allocated to it in the nation's budget, much of the allocation was earmarked for recurrent expenditure and very little designated for capital expenditure and research.196 Even at that, teachers at all levels of the educational system are poorly renumerated and motivated with the effect that most teachers have to look elsewhere for survival, including unwholesome practices which impact negatively on the quality of education.197

Health wise, the people have not fared better. Budgetary allocations to the health sector, as at 1999, remained short of 5 percent of national the budget as recommended by the


196 *Ibid* at 207.

197 In a study conducted by the Academic Staff Union of Nigerian Universities, the pay of university teachers was shown to be the worst among African states. See Attahiru Jega, *Nigerian Academics Under Military Rule*, University of Stockholm, Department of Political Science, Report No. 1994:3, cited in Abubakar Momoh & Said Adejumobi, *Ibid*.
World Health Organisation. Equipment and facilities in government owned hospitals, including specialist ones, have broken down or are virtually non existent. Hospitals which, before then, had degenerated into consulting clinics appear to have "become helpless abattoirs and antechambers to the cemetery due to the appalling state of neglect and the irresponsibility of successive governments."

Similarly, there has been serious deterioration in family diets as a result of low and untimely wages, hyper-inflationary trends and anti-people economic polices, such as structural adjustment programmes. The attendant implication of this for the health of the people is vividly captured in the following words of Deji Popola:

Deteriorating diets have led to lowered resistance to diseases among wide sectors of the population. Indeed, ailments that had been declared completely eradicated, such as small pox and guinea worm infestation, have appeared in recent years. Recorded cases of malaria increased from 1.2 in 1984 to 1.8 million in 1988, and most other notifiable diseases have shown yearly increases as well.

As appalling as the Nigerian performance in the enforcement/implementation of economic, social and cultural rights may be, its case appears to be not peculiar. Some other States Parties to the African Charter are also committed to the total neglect of the economic, social and cultural rights of their citizens. It has been observed that the spate of conflicts engulfing most African states are the peoples' response to, or direct consequences of, the

198 Ibid.


various government’s failures to implement effective socioeconomic programmes.\textsuperscript{201}

Perhaps, one might attribute the failures of States Parties in fulfilling their obligations under the \textit{African Charter} to the hitherto absence of a supra-national court to enforce the provisions of the \textit{Charter}. In most cases, the municipal courts were either alienated by military or civilian dictatorships, or the judges were too terrified to go against the wishes of the ‘omnipotent’ political lords of the day. Perhaps, this accounts for the euphoria that greeted the adoption of the Protocol establishing the African Court of Human Rights. The extent to which the African Court, as presently established, can effectively change the status quo is the subject for the next chapter.

CHAPTER FIVE

ENFORCEMENT PROSPECTS FOR ECONOMIC, SOCIAL AND CULTURAL RIGHTS IN THE NEW AFRICAN COURT OF HUMAN RIGHTS

5.1. INTRODUCTION

The quest for a human rights court in Africa predated the establishment of the African Charter on Human and Peoples’ Rights. It existed contemporaneously with the demand for the creation of an African regional human rights system or instrument. However, when the regional human rights system was established, the adjudicative body of enforcement was jettisoned under dubious and questionable circumstances. African states, still jealous of their, then, newly acquired sovereignty, and run by governments with doubtful validity and limited moral clarity, could not come to terms with conceding the adjudication and enforcement of human rights issues to an international judicial organ.

Ever since the African Charter came into force, there have been unrelenting demands for the creation of an effective enforcement machinery under the African Charter to

1As far back as 1961, the International Commission of Jurists (ICI) in the Law of Lagos recommended the establishment of an African regional human rights system which would be “...safeguarded by the creation of a court of appropriate jurisdiction and recourse thereto made available for all persons under the jurisdiction of the signatory states.” For a text of the resolution see M. Hamalengwa, et. al., The International Law of Human Rights in Africa: Basic Documents and Annotated Bibliography (Dordrecht: Martinus Nijhoff, 1988) at 37-38.

strengthen the African human rights system. This is due to the apparent ineffectiveness of the African Commission on Human and Peoples’ Rights (the Commission) which was entrusted with the responsibility for promoting and protecting human rights under the Charter. It is fair to say that the Commission was not, ab initio, meant to be very effective in the enforcement of human rights. It was merely the truncated image of an effective protector of human rights.

At the 36th Session of the Assembly of Heads of States and Government of the Organization of African Unity (OAU) a Protocol was adopted establishing the African Court on Human and Peoples’ Rights. This was done with the apparent, though belated, conviction that the “attainment of the objectives of the African Charter on Human and Peoples’ Rights requires the establishment of an African Court on Human and Peoples’ Rights to complement and reinforce the functions of the African Commission on Human and Peoples’ Rights.”

The signing of the Protocol has generated a lot of interest in human rights circles and attracted a few scholarly commentaries. However, there appears to be no detailed inquiry into

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4The Session was held in Ouagadougou, Burkina Faso on June 9, 1998.


6See the last paragraph of the preamble to the Protocol, Ibid.
the real likelihood of this Court, as presently established under the Protocol, ensuring the
effective protection of human rights in Africa. While the Court constitutes a welcome
development to the African human rights system, there is a need to look beyond the euphoria
that heralded the signing of the Protocol. This is all the more necessary in view of certain
emboldened overstatements already made by some commentators as to the efficacy of the
new Court in protecting human rights in Africa under the African Charter on Human and
Peoples' Rights. Consequently, it has become imperative to critically examine the Court as
established under the Protocol and the African Charter with the aim of ascertaining the
extent to which the Court can strengthen the African human rights system and ensure the
effective enforcement of human rights, especially violations of economic, social and cultural
rights.

This Chapter, therefore, discusses the mechanism of enforcement under the Charter
prior to the signing of the Protocol. It also examines the rationale or justification for a
human rights court for the African Human rights system. The various arguments for and
against the establishment of the Court are highlighted. While relevant provisions of the
Protocol will be considered, the analysis will focus mainly on the jurisdiction, right of access
and enforcement powers of the Court. Lastly, it evaluates the prospects of effective human
rights protection under the Court in the light of the Protocol and the provisions of the African
Charter as they affect, or are likely to affect, the effective performance of the Court. The
Chapter concludes that the African Human Rights Court, as presently established, holds little
or no promise for effective human rights protection in Africa.
5.2. ENFORCEMENT MACHINERY UNDER THE AFRICAN CHARTER

In order to ensure the promotion and protection of human rights in Africa, the African Charter established the African Commission on Human and Peoples' Rights as the basic machinery for the enforcement of human rights in Africa. The Commission is made up of eleven members who serve in their personal capacity with not more than one national of the same state. Members have a six-year term of office and they are subject to re-election.

The Chairperson of the Commission and his or her deputy (vice) are elected by the members of the Commission and the OAU pays the emoluments and allowances of the members.

Article 45 sets out the functions of the Commission which includes the promotion and protection of human rights in diverse ways. In the exercise of its promotional functions, the Commission is mandated to:

(a) collect documents, undertake studies and research on African problems in the field of human and peoples' rights; organize seminars, symposia and conferences, disseminate information, encourage national and local institutions concerned with

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7See Article 30 of the Charter.

8See Article 31(1). Members are chosen from amongst African personalities of the highest reputation, known for their high morality, integrity, impartiality and competence in matters of human and peoples' rights, particular consideration being given to persons having legal experience. Given the subjective and relative nature of most of these qualities, the extent to which these can be effectively applied in the practical selection of members is subject to serious doubts. Competence in matters of human and peoples' rights does not mean that the person will be a human rights activist, s/he might as well be merely competent by virtue of his involvement in human rights as an academic interest.

9Article 31(2)

10Article 32. States may however, nominate a person who is not a national of the nominating state. See Article 34.

11Article 36

12Article 44
human and peoples' rights, and should the case arise, give its views or make recommendations to Governments.\(^{13}\)

(b) formulate and lay down principles and rules aimed at solving legal problems relating to human and peoples' rights and fundamental freedoms upon which African Governments may base their legislation;

(c) cooperate with other African and international institutions concerned with the promotion and protection of human and peoples' rights.\(^{14}\)

In addition to its promotional functions, the Commission must ensure the protection of human and peoples' rights under the conditions laid down by the present Charter. It also has responsibility for interpreting the provisions of the Charter at the request of a State Party, an institution of the OAU or an African organization recognized by the OAU. The Commission must also perform other tasks which may be assigned to it by the Assembly of Heads of States and Governments.\(^{15}\)

The Commission has powers to resort to appropriate methods of investigation to

\(^{13}\)The duty of the Commission to give its views here does not mean the same thing as giving an advisory opinion. See Emmanuel Bello, "The Mandate of the African Commission on Human and Peoples' Rights" (1988) 1 African J. Int'l L. 31 at 34.

\(^{14}\)See Article 45(1). The promotional activities of the Commission are fraught with problems. According to Umozurike, "[t]he sheer size of the continent and the number of countries that the Commission has to work in make the present human and material resources inadequate for effective promotion. With one Commissioner working part time and responsible for promoting the Charter in three to five countries, the chances of effective promotion are few." See U. Oji Umozurike, The African Charter on Human and Peoples' Rights (The Hague: Martinus Nijhoff, 1997) at 71-72 [hereinafter "African Charter"].

investigate human rights violations\textsuperscript{16} and may also hear from the Secretary-General of the OAU or any other person capable of enlightening it.\textsuperscript{17} It is also authorized to review periodic reports which states are required to submit every two years from the date the Charter comes into force, on any legislative measures the states have undertaken to give effects to the rights and freedoms guaranteed by the Charter.\textsuperscript{18}

The Charter also provides for the filing of communications to the Commission. Communications are receivable from States Parties\textsuperscript{19} and from entities other than State Parties including, individuals and NGOs. Such communications are, however, subject to more stringent scrutiny than those from State Parties.\textsuperscript{20}

\textsuperscript{16}In the exercise of its investigative powers, the Commission has undertaken a number of missions in relation to communications received, including missions to Senegal, Mauritania, Sudan, Nigeria and Togo. See Tenth Annual Activity Report of the African Commission on Human and Peoples’ Rights, ACHPR/RFT/10th at 6. Some of these missions ended up with unsatisfactory results because of the Commission’s lack of boldness to pronounce on violations of the Charter, preferring instead to adopt amicable settlement which did not work given the insistence of the complainants on apportioning blame. For an assessment of the Commission’s on-site visits, especially to Mauritania and a comparison with the Inter-American Commission, see, Rachel Murray, “On-site Visits by the African Commission on Human and Peoples’ Rights: A Case Study and Comparison with the Inter-American Commission on Human Rights” (1999) 11 RADIC 460 [hereinafter, “On-site Visits”].

\textsuperscript{17}See Article 46.


\textsuperscript{19}See Article 47

\textsuperscript{20}See Article 55 &56. See also Umozurike, “African Charter” supra, note 14 at 75.
Where a State Party has good reasons to believe that another State Party has committed a breach of the Charter, it may, by written communication, call the attention of that state to the breach and send copies to the Secretary-General of the OAU and the Chairperson of the Commission. The state against which a complaint is lodged is required to give written explanation or statement elucidating the matter. The matter may be referred to the Commission if there were no satisfactory solutions. Article 49 authorizes states to file a communication against another state directly to the Commission. The Commission is authorized under Article 51 to request information from the state concerned. After obtaining all relevant information, the Commission prepares a report of its findings which is sent to the concerned state and communicated to the Assembly of Heads of States and Government, and the Commission may make such recommendations as it deems useful to the Assembly of Heads of States.

The usefulness of this state communication procedure to the protection of human rights in Africa remains doubtful and questionable. As Obinna Okere rightly points out, "Experience has shown that African heads of state comport themselves like a club or trade union in their solidarity. Political, ideological, and diplomatic considerations might well (and have been known to) assume primacy over, and might well frustrate, the need for justice."

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21 Article 47.
22 Article 48.
23 Article 52
24 Article 53.
25 B. Obinna Okere, supra, note 2 at 159.
African states are not known to have initiated any communications against other states notwithstanding the widespread massive violations of human rights going on in Africa.\(^{26}\) Thus, this provision, so far as it remains unutilized, is superfluous or at best a window dressing designed to give the appearance of seriousness on the part of African states in promoting and protecting human rights while in actual fact they look the other way in the face of grave violations, preferring to sacrifice human rights on the altar of non-interference and diplomatic goodwill.

Furthermore, the Commission has no power to make any binding resolutions, even if, on the merits of a complaint against a State Party to the *Charter* it finds that a violation has occurred. The Commission can only make such recommendations as it deems useful.\(^{27}\) It has thus been observed that without any sanctions attaching to a State Party which fails to abide by the recommendations of the Commission, and with the Commission unnecessarily tied to the apron strings of the Assembly of Heads of States, the "state of human rights under the *Charter* is therefore what the Assembly wants it to be (and the) Commission is therefore far from being independent."\(^{28}\) With this overbearing influence and the role of the Assembly of Heads of States and Government, the Commission is incapacitated in relation to

> \(^{26}\)Evelyn A. Ankumah, *supra*, note 18 at 24 has noted that [to date, the Commission has not received communications submitted by a State against the other. This is hardly strange, inter-state procedures are hardly used ... as a mechanism for human rights protection. Therefore one is left with individual and NGO complaint procedure as the major mechanism for human rights protection."

> \(^{27}\)Obijiofor Aginam, *supra*, note 18 at 367. Evelyn Ankumah, *supra* note 18 at 74 has observed that "... unlike other human rights systems, once the Commission reaches a decision on the merits, its final authority is to make recommendations to the Assembly of Heads of States and Government. If the Assembly so decides, the Commission may publicize violations of human rights by State parties."

independent decision.29

The extent to which the Assembly of Heads of States and Government will act on the Commission’s report has remained a source of concern to scholars and other observers of African human rights.30 Those running autocratic and dictatorial regimes (military or civilian) lack the requisite moral high ground and vision to indict another ‘colleague’ because it may be their own turn the next time. Thus, while the masses reel under the most atrocious violations, the Assembly engages in a symbiotic game of “you scratch my back, I scratch your back.”

The barriers erected by the Charter for non-state communication merit close examination and scrutiny. Under Article 56 such non state communications are subjected to more stringent scrutiny than those from state parties.31 First of all, the Commission has to determine by simple majority whether or not to consider the particular recommendation.32 To be considered the communication must:

(a) indicate their authors, even if they request anonymity;

29 O. Gye-Wado, “The Effectiveness of the Safeguard Machinery for the Enforcement of Human Rights in Africa” (1992) 2 JHRLP 144 at 165. According to C.M. Peter, “[t]he mandate of the Commission is limited. At most after investigating a reported violation of human rights, the Commission can only report to the Assembly of Heads of State and Government (Article 52). This is why there have been complaints that the Commission has no teeth.” See C.M. Peter, “The African Court of Justice: Jurisdictional, Procedural and Enforcement Problems: Some Thoughts” in M.A. Ajomo & O. Adewale, (eds.), African Economic Treaty Issues: Problems and Prospects, (Lagos: Nigerian Institute of Advanced Legal Studies, 1993) 322 at 324.

30 See Obijiofor Aginam, supra, note 18 at 367-368.


(b) be compatible with the Charter of the OAU or with the African Charter;\(^{33}\)

(c) not be written in disparaging or insulting language directed against the State concerned and its institutions or to the OAU;

(d) not based exclusively on news disseminated through the mass media;

(e) be sent after exhausting local remedies, if any, unless it is obvious that this procedure is unduly prolonged;

(f) be submitted within a reasonable period from the time the local remedies are exhausted or from the date the Commission is seized of the matter; and

(g) not deal with matters which have been settled by other means (in accordance with the Charter of the UN or the OAU or the provisions of the African Charter).\(^{34}\)

Reflecting on the above provisions, Benedek has argued that the Commission lacks the mandate to remedy individual human rights violations.\(^{35}\) Similarly, Murray argues that the power of the Commission to address non-state communications is not clear on the face of the Charter since the Commission is only required to make a list of such cases which it will consider if the majority of its members agree and if certain admissibility conditions are

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\(^{33}\)The requirement of compatibility with the OAU Charter seems to be patently absurd. It tends to suggest that the OAU Charter is a source of rights guarantees which it is clearly not. Again, it appears to be suggesting that both the OAU Charter and the *African Charter* are covering the same subject matter which is clearly not the case.

\(^{34}\)Article 56(1)-(7).

satisfied under Article 56, in addition to such communications pertaining only to special cases which reveal the existence of a series of serious or massive violations of human rights.\(^{36}\)

Also, Umozurike has pointed out that some provisions of Article 56 seem largely unnecessary. According to him, “[t]he language test for a communication is superfluous.... Frequently the information about events in other lands comes from the media and victims of human rights violations may be incarcerated and unable to communicate their plight to the outside world. The only eye-witnesses may be the very perpetrators of the human rights violations, or their agents.”\(^{37}\) One need not look too far to discover that all these barriers were erected as obstacles in the path of the victims.

For instance, relying on the requirement that communications must not be written in disparaging or insulting language directed against the state, its institutions, or the OAU, the African Commission, at its Twenty-First Ordinary Session,\(^{38}\) declared Communication 65/92 *Ligue Camerounaise des Droits l’Homme v. Cameroun*,\(^{39}\) inadmissible. The Communication alleged, among other things, the existence of serious and massive violations of human rights in Cameroun, and listed at least forty-six cases of torture and deprivation of food, repression

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\(^{38}\)The Session was held in Nouakchott, Mauritania, in April 1997.

of free expression, denial of fair hearing, ethnic discrimination, and massacres of civilian population. Although the Commission found that the allegations constituted a "series of serious violations of the Charter," it held that statements contained in the Communication such as: 'Paul Biya (the President of Cameroun) must respond to crimes against humanity,' 'regime of torturers,' and 'government barbarisms' were insulting. The Commission, therefore, declared the Communication inadmissible owing to what may, in the first place, be symptomatic of the depth of revulsion aroused by the violations alleged in the complaint.

In addition to all these restrictions, most rights in the Charter are further curtailed by clawback clauses that allow states considerable discretion in restricting rights and freedoms protected under the Charter provided that such activities are in accordance with the domestic law of the state involved. There is no provision in the Charter imposing any standard or test of reasonableness which such domestic law must meet. Nor is there any reference to circumstances that may lead to the limitations of those rights curtailed by

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40See Chidi A. Odinkalu & Camilla Christensen, Ibid. at 255.

41See for example, Articles 6(2); 9(1); 10(2); 12(1); 13(1) and 14(1). These provisions are couched in the following form: "Every individual shall have the X-right or Y-freedom provided he abides by the law or in accordance with the law."

clawback clauses.\textsuperscript{43} Unlike derogation clauses,\textsuperscript{44} clawback clauses provide a means for member states to permanently circumvent the restrictions imposed by the Charter.\textsuperscript{45} As Flinterman and Henderson have rightly pointed out the "clawback clauses severely limit supposedly protected rights by granting governments the power to infringe upon them,"\textsuperscript{46} thereby making the African Charter to fall short of a truly effective human rights protection instrument.

Umozurike has, however, argued that the effects of the clawback clauses are "not as grim as some authors put it, if the Charter is read as a whole, including Articles 60 and 61."\textsuperscript{47} Both articles 60 and 61 enjoin the Commission to draw inspiration from international law on human and peoples' rights. Relevant sources of inspiration include, but are not limited to, the UN Charter, UDHR, OAU Charter, and other instruments adopted by the UN and African countries in the field of human rights as well as other general or special international conventions laying down rules recognized by member states of the OAU. In consequence,

\textsuperscript{43}See Emmanuel Bello, supra, note 13 at 55.

\textsuperscript{44}Derogation clauses allow merely for temporary suspension. The effect is to carefully define the limits of state behaviour towards its nationals during times of national emergencies. While derogation clauses permit suspension of previously granted rights, clawback clauses restrict rights \textit{ab initio}. See Gittleman, "Legal Analysis" supra, note 42 at 692. Umozurike, "African Charter" supra, note 14 at 29, in differentiating between derogation and clawback clauses states: "The difference between the two is that a derogation states the circumstances in which the rights may be limited, for example, by law reasonably justifiable in a democratic society; the clawback clause, however, confers a wider discretion to exclude the enjoyment of the right totally. Further, the right may be limited by law, the standards of which are not specified." See also Rosalyn Higgins, "Derogations under Human Rights Treaties" (1978) 48 \textit{British Yearbook of International Law} 281.


\textsuperscript{47}Umozurike, "African Charter" supra, note 14 at 29.
it was argued that, "[c]onsidered along with international customary law and civilized state practice, there are implicit grounds for judging the reasonableness of laws that detract from rights. [Therefore,] [t]he absence of a provision in the Charter that such laws should be reasonably justified in a democratic society is not necessarily fatal."48

In support of Umozurike’s contention, the Commission may, for instance, subject any state legislation curtailing rights and freedoms to standards of reasonableness by drawing from various international human rights instruments or the decisions of other regional human rights courts or commissions. In this regard the vast jurisprudence of the European system may be very useful. Again, the Commission may draw from the municipal constitutional law analogy requiring laws curtailing rights and freedoms to be no more than are ‘necessary in a democratic society in the interests of national security or public safety.’49 Regrettably, the Commission’s decisions so far have woefully failed to reference jurisprudence from both national and international tribunals.50

It might well be that in interpreting the provisions of the Charter the Commission will take into consideration international customary law and civilized state practice. It is also conceded that, as a recognized principle of international law, a state cannot rely on its domestic or internal arrangements as a defence for its failure to live up to its international

48 Ibid. at 35

49 There is nothing strange about an international body like the Commission applying municipal law analogy. As part of the general principles of law, the International Court of Justice has applied principles of municipal law on several occasions. See for example, the Temple of Preah Vihear Case [1962] I.C.J. Reports 6 at 26, where the ICJ drew a municipal law of contract analogy. Also in the Gulf of Maine Case (Canada v. U.S.) [1984] I.C.J. Reports 246, the ICJ drew a municipal law analogy of acquiescence and estoppel. See also, the Chorzow Factory Case (1928) P.C.I.J. Series A, No. 17 at 29.

obligations. However, it has not been shown that the Commission has not, in practice, given undue deference to these limiting clawback clauses in the Charter. Also, given the fact that these international instruments and norms were in existence prior to the adoption of the Charter, it is arguable that the African states wanted a more restrictive enjoyment and exercise of these rights, hence the insertion of these clauses. The extent to which the Commission has made successful use of the provisions of Article 60 and 61 remains questionable.

In the face of all these, any little effect which the Commission may have on the protection of human rights in Africa is rendered illusory. Consequently, scholars have expressed their pessimism, indignation and frustration regarding the impotency and near irrelevance of the African Commission. Edem Kojo, Secretary-General of the OAU at the time of the adoption of the Charter, believes that, compared with other regional human rights regimes in Europe and the Americas both of which were in existence before the African

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52In Media Rights Agenda and Constitutional Rights Project v. Nigeria, Communication Nos. 105/93, 128/94, 130/94 and 152/96, reported in (2000) 7 IHRR 265, but for the lack of response of the defendant state, the Commission appeared willing to defer to the clawback clause in Article 6 of the Charter permitting deprivation of freedom "for reasons and conditions previously laid down by law." See particularly paras. 83-86. Under the peculiar circumstances of the defendant, that law might be a decree hurriedly prepared and back dated.

53For more critical views on the effect of clawback clauses to the enforcement of the Charter see, Richard Gittleman, "The Banjul Charter" supra, note 42 157-165.
Charter, the protective mandate of the African Commission "appears very elementary."54

Echoing a deeper frustration, Makau wa Mutua, sees the entire human rights system on the basis of which the Commission was established as "a facade, a yoke that African states have put around our necks."55 He urges the collective action of African scholars and intellectuals in order to "cast it off and reconstruct a system that we can proudly proclaim as ours."56

Also commenting on the lacklustre performance of the Commission, a former Justice of the Nigerian Supreme Court has declared:

... I am not unaware of the fact that the African Charter ... contains provisions to safeguard human rights. It sets up a Commission, enjoins it inter alia, to ensure the protection of human and peoples' rights. Its procedures were spelt out. For these see Articles 30-61. With the greatest respects to the founding fathers of the Charter and eminent personalities that serve in the Commission, what they have set up is, in appropriate metaphor, a toothless bull-dog.57

54 Edem Kojo, supra, note 32 at 280.


56 Ibid.

57 P. Nnaemeka-Agu, supra, note 3 [Emphasis added]. Evelyn Ankumah, supra, note, 18 at 9 is optimistic and believes that in spite of the weaknesses of the Commission, it still has the potential to become an effective protector of human rights in Africa. However, by the mid-1990s, it had become clear that the African system was a disappointment, if not an embarrassment for the continent. This was even clear to the OAU Assembly of Heads of State and Government that in 1994, it asked the Secretary General to convene a meeting of government experts to "ponder in conjunction with the African Commission on Human and Peoples' Rights over the means to enhance the efficiency of the Commission in considering particularly the establishment of an African Court on Human and Peoples' Rights." See Report of Government Experts Meeting, AHG/Res 230(xxx), 30th Ordinary Session of the Assembly of Heads of State and Government, Tunis, Tunisia, June 1994, cited in Ibrahim Ali Baldwi El-Sheikh, "Draft Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights: Introductory Note" (1997) 9 RADIC. 943.
In spite of the foregoing deficiencies of the Charter and the Commission, it is noteworthy that the Charter's provisions on economic, social and cultural rights are themselves free from the clawback clauses. Besides, in recent times, the Commission appears to have been stirred from its slumber and has actually pronounced on the violations of economic, social and cultural rights provisions of the African Charter. In Annette Pagnoulle (on behalf of Abdoulaye Mazou) v. Cameroon, the Commission found that the failure of Cameroon to reinstate Mazou, a magistrate, who had been unlawfully detained and, thereafter removed from his former position constituted a violation of the right to work under equitable and satisfactory conditions as stipulated by Article 15 of the Charter.

Likewise, in Media Rights Agenda and Constitutional Rights Project v. Nigeria, and International Pen, Constitutional Rights Project, Interights on behalf of Ken Saro-Wiwa Jr. and Civil Liberties Organisation v. Nigeria, the Commission held that denying a detainee access to doctors, and not giving him any medical help, even though his health was deteriorating, constitutes a violation of Article 16 of the African Charter which guaranteed the individual the right to enjoy the best attainable state of physical and mental health.

Similarly, in the Free Legal Assistance case, the Commission held that, as a result

58 See Articles 14-17.
59 Communication No. 39/90, reported in (1999) 6 IHRR 819.
of proven mismanagement of resources, the failure of government to provide basic services necessary for a minimum standard of health, such as safe drinking water and electricity and the storage of medicine amounted to a violation of Article 16 of the Charter. In addition, it held that the closure of universities for two years and the non-payment of teachers' salaries so as to prevent them from holding classes, constituted a violation of the right to education under Article 15 of the Charter.

Notwithstanding these commendable and progressive decisions, the Commission has been treating economic, social and cultural rights rather dismissively. An in-depth inquiry reveals that the pronouncements prove to be merely incidental to the real issues under consideration in those cases which border on civil and political rights, and, therefore, cannot be said to represent an emerging pattern of greater attention to economic, social and cultural rights. Consequently, one would be justified to regard the above noted pronouncements as

63 As per Communication No. 100/93. See (1997) 4 IHRRT 89 at 93.

64 Ibid.

65 In 1988, a former Chairman of the Commission (Umozurike) disclosed that it (the Commission) had decided to concentrate on civil and political rights. He claimed that the Commission would easily become overwhelmed with too many cases from many countries if it attempted to encompass economic, social and cultural rights within its immediate priorities. See U.O. Umozurike, “The Protection of Human Rights Under the African Charter on Human and Peoples’ Rights” (1988) 1 African J. Intl. L. 82.

66 It might be argued in favour of the Commission that it can only entertain cases brought before it. While the Commission has no mandate to be an errant knight in shining armour going about to fight the cause of hapless and helpless Africans, one of its primary mandates as provided for in Article 45(1)(a) is to “undertake studies and researches on African problems in the field of human and peoples’ rights, organise seminars, symposia and conferences, disseminate information, encourage national and local institutions concerned with human and peoples’ rights ....” That it has not been receiving cases exclusively on the massive violations of economic, social and cultural rights in Africa shows that it has not done enough to encourage or sensitize the people or even the NGOs within and outside Africa to lay such communications before it. Moreover, it is within its mandate to undertake studies and researches on the violations of economic, social and cultural rights. Therefore, it is the Commission’s responsibility to ensure due respect and observance of all the rights provided for in the Charter without distinction.
no more than flashes in the pan.\textsuperscript{67}

Some scholars seem to be united in the view that the Commission's overall performance has been less than satisfactory.\textsuperscript{68} Andre Stemmet has attributed the Commission's inadequacies to its "lack of powers and the strong political influence wielded by the Assembly [of Heads of States] through the procedure of appointing members of the Commission."\textsuperscript{69} The Commission appears to have seen its principal objective as that of creating dialogue between parties, leading to the amicable settlement of the dispute in question.\textsuperscript{70} For example, the Commission has been only too willing to conclude that amicable settlement has been reached in cases as serious as those that come before it, without even recording the terms of such settlements or instituting any mechanisms to monitor the compliance of the state parties with the presumed settlement.\textsuperscript{71} Additionally, as Odinkalu and Christensen observed, the Commission readily accommodates "the tardiness of [defendant] 67. The Commission's decisions have been criticized as "formulaic" and neither referencing "jurisprudence from national and international tribunals," nor firing the imagination. "They are non-binding and attract little, if any, attention from governments and the human rights community." See Makau Mutua, "Two Legged Stool" supra, note 50 at 348.


\textsuperscript{70} See Makau Mutua, "Two Legged Stool" supra, note 50 at 349.

\textsuperscript{71} For instance see Civil Liberties Organisation v. Nigeria, Communication 67/91, where the Commission interpreted the failure of further contact with the author of the communication as lack of desire to pursue the communication, and relying on the information supplied by the defendant, inferred the likelihood that the complainant considers the case satisfactorily resolved. See also Henry Kalenga v. Zambia, Communication 11/88, where the Commission interpreted the author's silence as a wish to withdraw his communication, even though the complainant never expressed or communicated a wish to do so. See Chidi Anslem Odinkalu & Camilla Christensen, supra, note 39 at 279.
states, in many cases resulting in considerable delay in the consideration of the communications [but] has failed to tolerate similar failings on the part of NGOs and authors of communications."\textsuperscript{72}

Furthermore, as pointed out earlier, the Commission does not make any binding resolutions. It only makes such recommendations as it deems useful. Apart from the fact that there are no sanctions for failure to abide by its recommendations, the Commission has been unnecessarily apologetic (and not assertive and forceful) in its recommendations.\textsuperscript{73} Again, its power to criticize human rights violations is hamstrung by the requirement of confidentiality and delayed by the procedure of reporting first to the Assembly of Heads of State and Governments.\textsuperscript{74}

The Commission's numerous shortcomings have been attributed to deficiencies inherent in the \textit{African Charter} and the Commission's rules of procedure. According to Odinkalu, "the very text of the \textit{African Charter} itself, ... like the rules of procedure, is opaque

\textsuperscript{72}Ibid.

\textsuperscript{73}In \textit{Union Inter Africaine des Droits de l'Homme, Federation Internationale des Ligues des Droits de l'Homme, Rencontre Africain des Droits de l'Homme, Organisation Nationale des Droits de l'Homme au Senegal and Association Malienne des Droits de l'Homme au Angola v. Angola}, Communication No. 159/96, reported in (1999) 6 \textit{IHRR} 1139, after finding that the defendant violated many provisions of the \textit{Charter} by its illegal and mass expulsion of West African nationals without giving them the opportunity to plead their cases before the national courts, it failed to make any consequential orders with regard to damages suffered by the victims. It merely "urge[d] the Angolan government and the complainants to draw all the legal consequences arising from the present decision." Similarly, in \textit{International Pen, Constitutional Rights Project, Interights on behalf of Ken Saro-Wiwa Jr. and Civil Liberties Organisation v. Nigeria, supra}, note 54, it merely declared that "in ignoring its obligations to institute provisional measures, Nigeria has violated Article 1", without issuing any necessary consequential directives. See also \textit{Amnesty International v. Zambia}, Communication No. 212/98, (of May 5, 1999), reported in (2000) 7 \textit{IHRR} 286.

\textsuperscript{74}Umozurike, \textit{supra}, note 14 at 83.
and difficult to interpret." In the same vein, Benedek asserts that "the rules of procedure of the African Commission suffer from a number of inaccuracies and deficiencies which unnecessarily restrict the African Commission in the execution of its tasks."

Whatever may account for the Commission's ineffectiveness, it justified and sustained the demands for establishment of an African Human Rights Court as many believed (and still do believe) that the Commission is not suited to solve the multifarious ills afflicting the African Human Rights system. There were, therefore, calls for the creation of a court, in the hope that such a supra-national body would be better placed to transcend the crippling shortcomings of the Commission. The extent to which the African Human Rights Court, as established, will meet these expectations remains to be seen.

5.3. RATIONALE FOR AN AFRICAN COURT OF HUMAN RIGHTS

The importance of effective judicial remedy in the enforcement of human rights cannot be overemphasized, especially, as norms prescribing state conduct are not meaningful unless they are anchored in functioning and effective institutions. In fact, a corpus of human rights norms, in itself, is not self-executory. Just as in domestic legal systems, effective


77Makau Mutua, "Two Legged Stool" supra, note 50 at 351.
obedience and compliance to rules depend very much on the effectiveness of the enforcement machinery and apparatuses. The weaknesses of the African Commission and the entire African human rights system fostered the belief that a strong enforcement system was necessary if the human rights system in Africa were to be salvaged. The performance of other regional systems - European and Inter-American systems - with judicial enforcement argued strongly in favour of the indispensability of a human rights court in Africa where flagrant violations of human rights have been (rightly) attributed to the absence of such an institution.

The importance of a human rights court for the African human rights system had been recognized long before the adoption of the Charter. In one of the first moves to establish an African human rights system, the International Commission of Jurists in its “Law of Lagos” called upon African governments to “study the possibility of adopting an African Convention of Human Rights in such a manner that the Conclusions of this Conference will be safeguarded by the creation of a court of appropriate jurisdiction and that recourse thereto be made available for all persons....”78 This proposal was, however, rejected. The experts who drafted the Charter contended that they favoured negotiation, diplomatic and bilateral settlement of disputes in an amicable manner instead of adjudication.79

It was further argued that since African culture does not allow, but seriously frowns upon, litigation, a system which entrones negotiation and conciliation rather than


79Ebow Bondzie-Simpson, supra, note 3 at 662. See also P. Amoah, supra, note 68 at 237.
adversarial open confrontation approach, would better serve the African purpose. This view has been articulately echoed by Keba M'Baye thus:

According to African conception of law, disputes are settled not by contentious procedures, but through reconciliation. Reconciliation generally takes place through discussions which end in consensus leaving neither winners nor losers. Trials are always carefully avoided. They create animosity. People go to court to dispute rather than to resolve a legal difficulty.

According to African conception of law, disputes are settled not by contentious procedures, but through reconciliation. Reconciliation generally takes place through discussions which end in consensus leaving neither winners nor losers. Trials are always carefully avoided. They create animosity. People go to court to dispute rather than to resolve a legal difficulty.

Buttressing the point further, Umozurike has argued that:

African traditions in dispute settlement draw no strict lines between legality and morality. It is not an all-for-one-and-nothing-for-the-other affair. An individual refusing to talk to members of his family causes concern, and that would be a good cause for a dispute as would be stealing. Both disputes are settled with a view to restoring good relations between the parties... The inclusion of a court system will necessitate a demarcation between the two...

While it is correct to assert that traditional Africa favoured amicable settlement of disputes and preferred negotiation and arbitration to litigation, it is not correct to assume that traditional the African system totally excluded litigation. As Van Velsen has pointed out, “although reconciliation was an important value, it was not an ‘ultimate, almost mythical,

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80See Evelyn Ankumah, supra, note 18 at 9; Ebow Bondzie-Simpson, Ibid.

81International Commission of Jurists, supra, note 78. See also Arthur E. Anthony, supra, note 45 at 519.


83For an insight into the nature of judicial process in traditional Africa see Kofi Quashigah, “Reflections on the Judicial Process in Traditional Africa” (1989-1990) 4 Nig. J. R. 1. Dispute settlement in traditional Africa favoured a greater degree of reconciliation rather rigid adjudication. The judge in traditional Africa strove to let the law take its normal course but in a manner as not to estrange the parties.
value' of [traditional] African courts to which legal norms were sacrificed."\textsuperscript{84} Consequently, "judgement by agreement" and "judgement by decree" were not mutually exclusive alternatives.\textsuperscript{85} It is therefore erroneous and misleading, in the words of Quashigah, "to view the traditional process as wholly arbitrative in nature."\textsuperscript{86}

Assuming, but not conceding, that traditional Africa eschewed litigation, yet it is instructive to point out that the situation under which that system worked and the contemporary systems are no longer the same. \textit{A fortiori}, these African states which rejected litigation and a court system at the regional level do have them in their domestic level. If the traditional system is adequate and effective in contemporary African dispute resolution, why have these states not abolished the colonial legacy of a court system? If the desire is to maintain a unity between legality and morality, as it has been argued, then why do they not start at home by demolishing all domestic court structures. Besides, it was not shown that settlement of disputes through reconciliation ensures greater unity between legality and morality than adjudication.

Perhaps the most cogent reason for the rejection of a court system is "the fear that African states would not want to be subjected to the jurisdiction of a supra-national body."\textsuperscript{87} They were guarding their newly acquired sovereignty jealously and any idea of an


\textsuperscript{85}Van Velsen, \textit{Ibid}.

\textsuperscript{86}Kofi Quashigah, \textit{supra}, note 83 at 4. The emphasis had been to strike a balance between maintaining family and group cohesion by reconciliation and doing justice according to the laws of the land.

\textsuperscript{87}Evelyn Ankumah, \textit{supra}, note 18 at 9.
international judicial organ to arbitrate human rights questions was loathed and seen as derogating from the exercise of the full amplitude and plenitude of the powers of a sovereign state.\textsuperscript{88}

However, when the ineffectiveness of the Commission in protecting and promoting human rights became so glaring, and in the face of widespread demands for a human rights court by different interest groups, it became clear to African States that a human rights court for Africa was an idea whose time could no longer be delayed. Nnaemeka-Agu, a retired Justice of the Nigerian Supreme Court, ably articulated the imperativeness and urgency for a court thus:

Upon a calm view of the factors militating against human rights proceedings in Nigeria, I am convinced there is only one viable solution. Nigeria, in fact the whole of Africa needs a supra-national court on human rights on the pattern of the European Court of Human Rights, a court whose decisions will be binding on various national courts on such matters. An efficient and functional African or regional court on human rights will eliminate political pressure and enforced delays in such proceedings. Judging from the content and extent of violation of international human rights norms in many parts of the African continent, the need for such a court is not only imperative but also urgent...\textsuperscript{89}

\textsuperscript{88}See B. Obinna Okere, \textit{supra}, note 2 at 158.

\textsuperscript{89}P. Nnaemeka-Agu, \textit{supra}, note 3.
5.4. HISTORICAL GENESIS OF THE AFRICAN COURT

The movement for the establishment of the African Court of Human Rights produced "two polar views." On one end are those who favoured the immediate creation of a court as the only way to put some teeth and bite into the African human rights system so as to effectively keep the states in check. To this group, "the deficiencies of the African system, both normative and institutional, are so crippling that only an effective human rights court can jump-start the process of its redemption." 

On the other end are those who hold the "gradualist" view. This group holds the view that the major problem facing African human rights is the lack of awareness by the general populace of its rights and the process of vindicating those rights. This view sees the establishment of a court as less urgent than the education of the public, and that even if established, the court might still be crippled by the same problems that have beset the Commission. It was thus urged that the "potentialities of the Charter in its present form should first be maximized and fully tested" instead of creating another institution that will end up not being effective. The adoption of the Protocol establishing the African Court of Human Rights is a clear indication that the views of the "gradualists" did not prevail.

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90Makau Mutua, "Two Legged Stool," supra, note 50 at 351.


92Makau Mutua, "A Two Legged Stool", supra, note 50 at 351. The chief proponents of this view are Evelyn Ankumah, supra, note 18 at 194-195; Umozurike, "African Charter" supra, note 14 at 91-92, 104.

93Evelyn Ankumah, Ibid.


95Evelyn Ankumah, supra, note 18 at 9.
The history of the African Court of Human Rights can be traced to 1993, when the International Commission of Jurists, under the auspices of President Abdou Diouf of Senegal, then Chairman of OAU, convened a small group of African jurists and other human rights experts to brainstorm on the possibilities of establishing a court of human rights. \(^{96}\) This was followed by other meetings of experts and reinforced by strategic lobbying to convince African leaders to fully subscribe to the idea and to take the necessary steps towards its realization. \(^{97}\)

However, the actual journey for the establishment of an African Court was started by the OAU Assembly of Heads of State in its 30\(^{th}\) Ordinary Session in Tunis, Tunisia via Resolution No. 230/30 of June 1994 in which the Assembly requested the Secretary-General of the OAU to "convene a meeting of Governments Experts to ponder, in conjunction with the African Commission on Human and Peoples' Rights, over the means to enhance the efficiency of the African Commission in considering particularly the establishment of an African Court on Human and Peoples' Rights." \(^{98}\)

Following this directive, the OAU Secretary-General convened, in collaboration with the government of the Republic of South Africa, a meeting of Government Legal Experts in

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\(^{97}\) Ibid.


At its 64th Ordinary Session held in Yaoundé, Cameroon, between July 1 and 5, 1996, the OAU Council of Ministers deferred the consideration of the Draft Protocol in order to allow more time for extra observations and comments from states. The Council decided, however, at its 65th Ordinary Session in Tripoli, Libya, between 24 and 28 February, 1997, that a second meeting of Governmental Experts be convened in April 1997 to finalize the Draft Protocol so as to reflect the comments and observations made by OAU member states. The meeting was convened from April 11 to 14, 1997 at Nouakchott, Mauritania, and it adopted an amended text of the Draft, The Nouakchott Draft, which was to be presented to the Council of Ministers for consideration and adoption.

At its 66th Ordinary Session, the Council of Ministers directed that a third meeting of Government Legal Experts, which was enlarged to include diplomats, be convened to examine and finalize the Draft Protocol to be submitted to the Conference of Ministers of Justice/Attorneys-General for consideration and adoption. The third meeting held in Addis-


101 El-Sheikh, supra, note 52 at 944.
Ababa, Ethiopia adopted an amended text, the Addis-Ababa Draft, which it recommended for adoption by the conference of the Ministers of Justice and Attorneys-General. On December 12, 1997, the conference held in Addis-Ababa adopted the text with minor changes.

The Draft Protocol was adopted by the Council of Ministers in February 1998. The OAU Assembly of Heads of State and Government gave its final blessing, by adopting the Protocol at its 36th Session on June 9, 1998 at Ouagadougou, Burkina Faso. The Protocol will come into force thirty days after fifteen instruments of ratification or accession have been deposited with the Secretary-General of the OAU. However, for those states ratifying or acceding subsequently, it shall come into force, with regard to such state, on the date of the deposit of its instrument of ratification or accession.

The Protocol suggests in its Preamble that the African Court of Human Rights, designed to complement the protective mandate of the African Commission, will make the


103 El-Sheikh, Ibid. at 945. The text of the Draft Protocol adopted at this meeting is reproduced in (1997) 9 RADIC 953.

104 OAU/LEG/EXP/AFCHPR/PROT III. For the text of the Protocol, see (1999) 6 IHRR 891-897.


106 Article 34(4).

107 In the 7th preambular paragraph the Protocol recites the conviction of the OAU members that “the attainment of the objectives of the African Charter on Human and Peoples’ Rights requires the establishment of an African Court on Human and Peoples’ Rights to complement and reinforce the functions of the African Commission on Human and Peoples’ Rights. Article 2 of the Protocol reiterates that “the court shall ... complement the protective mandate of the African commission on Human and Peoples’ Rights ... (Emphasis
promotion of human rights in Africa more effective. Although a significant development, it is doubtful whether the mere addition of a court is "likely by itself to address sufficiently the normative and structural weaknesses that have plagued the African human rights system since its inception." Analysis of the framework of the Court will reveal its structural strengths and weaknesses, and provide the basis for assessing the extent to which it will positively affect the status quo.

5.5. ANALYSIS OF THE LEGAL FRAMEWORK OF THE COURT

5.5.1. Jurisdiction

The jurisdiction of the Court can be broadly divided into three categories, namely, contentious, advisory and conciliatory jurisdictions. The contentious jurisdiction of the Court extends to all cases and disputes submitted to it concerning the interpretation and application of the African Charter, the Protocol and any other relevant human rights instrument ratified by the states concerned.

It has been suggested that this provision extends the jurisdiction of the Court to, for example, the OAU Convention on Refugees, and the African Charter on the Rights and

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108 Makau Mutua, "Two Legged Stool", supra, note 50 at 343.

109 See El-Sheikh, supra, note 57 at 946.

110 See Article 3(1).
Welfare of the Child.\textsuperscript{111} A close reading of the provision shows that it is wide enough to cover not only the suggested instruments but also all other relevant human rights instruments ratified by the OAU members, either at the regional level or at the international level. This seems an appropriate interpretation to be given to "...any other relevant human rights instrument ratified by the States concerned" forming the concluding part of the Article 3(1). It is submitted that the provision covers all international human rights instruments so long as they have been ratified by the states involved.\textsuperscript{112} The Court is therefore urged to adopt this broad interpretation of its jurisdiction in order to give as much protection as possible to all victims of human rights violations. "In order to entrench itself as a protector of international human rights," according to Mutua, "it is important that the Court's jurisdiction not be circumscribed or limited to cases and disputes arising out of the African Charter."\textsuperscript{113}

Perhaps, reliance on relevant international human rights instruments ratified by States Parties to the Protocol will enable the Court to overcome obstacles posed by clawback clauses and other provisions of the African Charter that may prove to be more limiting than those other binding international instruments. In this way, the Court may be able to strike down clawback clauses that unduly restrict the scope of the rights stipulated in the Charter by relying on the International Bill or Rights to establish international standards and civilized


\textsuperscript{112}Naldi & Magliveras, \textit{Ibid.}, suggest that this jurisdiction may extend to enable the Court to pronounce on regional human African instruments such as the proposed South African Development Community (SADC) Human Rights Charter presently under consideration. The present writer does not see why the jurisdiction of the Court should not extend to such sub-regional arrangements. This does not mean that the court should act in such a manner as to render these sub-regional arrangements redundant. It can at least assume appellate jurisdiction over them as a way of exercising all the plenary and plenitude of its powers.

\textsuperscript{113}Makau Mutua, "Two Legged Stool", \textit{supra}, note 50 at 354.
state practices against which no derogations are permitted.

Where there is any dispute as to whether the Court has jurisdiction, the matter will be settled by the Court.\textsuperscript{114} This challenge to the Court's jurisdiction may come by way of preliminary objection\textsuperscript{115} or arise in the course of considering the case on the merits.

In addition to its contentious jurisdiction, an advisory jurisdiction is also conferred on the Court. At the request of a member state of the OAU, the OAU, any of its organs, or any African organization recognized by the OAU, the Court may provide an opinion on any legal matter relating to the African Charter or any other relevant human rights instruments, \textit{provided that the subject matter of the opinion is not related to a matter being examined by the Commission}.\textsuperscript{116} The Court is required to give reasons for its advisory opinions and every judge is entitled to deliver a separate or dissenting decision.\textsuperscript{117}

The proviso to Article 4(1) is far from clear. Under it, the Court is prevented from giving its advisory opinion on any subject matter if it is related to a matter being examined by the Commission. It appears that this provision may preclude any reference from the Commission to the Court at the request of an individual or an NGO. But this might not be the case if the Commission is taken as an organ of the OAU, and the Commission itself is referring the matter. Even if the Commission is not regarded as an organ of the OAU under

\textsuperscript{114}Article 3(2).

\textsuperscript{115}The Protocol did not make any provision for preliminary objection, but it is submitted that this does not preclude its use, given the fact that the issue of preliminary objection is procedural and can be provided for by the Court while drawing up its rules which it has the power to do under Article 33.

\textsuperscript{116}Article 4(1). [Emphasis added].

\textsuperscript{117}Article 4(2).
Article 4(1), the Commission may still utilize its right of access under Article 5(a) to refer cases to the Court. This is more so since the Court is to “complement the protective mandate” of the Commission. Moreover, at the time of reference to the Court, the matter is not, technically speaking, “being examined by the Commission” and therefore cannot come within the prohibitive reach of Article 4(1).

In this regard, individuals and NGOs might have an indirect, probably delayed and more expensive, access to the Court through the Commission. However, it appears that individuals or NGOs cannot do anything where the Commission refuses to refer the matter for the opinion of the Court. Article 4(1), therefore, appears unduly limiting, and perhaps intended to further stifle individual and NGO access. The fact that neither an individual nor NGO has direct access to the Court makes it more grave and ominous, especially as the jurisdiction of the Court in such cases is dependent on the consent of the affected (defendant) state.

The Court also has conciliatory jurisdiction. To this end, the Court is enjoined to reach an amicable settlement in a case pending before it in accordance with the provisions of the African Charter. It is not clear how this will operate in actual practice. Perhaps, the

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118 Under Article 48 of the European Convention, the European Commission is one of those empowered to bring cases before the European Court. The European Commission relies on Article 48 to refer matters to the European Court since the right to refer a case to the Court is also limited to the Commission and to concerned states. See Erik Friberg & Mark E. Villiger, “The European Commission of Human Rights” in R. St. J. Macdonald et al. (eds.), The European System for the Protection of Human Rights (Dordrecht: Martinus Nijhoff Publishers, 1993) 605 at 614-615. In fact, under Article 47 of the European Convention, the Court may not adjudicate on a case unless the case has first been processed by the Commission and did not result in a friendly settlement. See Paul Mahoney & Soren Prebensen, “The European Court of Human Rights” in R. St. J. Macdonald et al., Ibid, 621 at 624.

119 See Article 2.

120 See Article 9.
Court may, before entering into the merits of the case, initiate conciliatory moves. But, it is submitted that this should be with the consent of all the parties, as consent of all parties is a conditio sine qua non for any peaceful settlement. Without the consent of a party, any purported amicable settlement would be nothing but an imposition.

5.5.2. **Right of Access**

The Protocol provides for two types of access: automatic and optional. The first type is automatic because it applies once a state has ratified or acceded to the Protocol. The second type is optional in the sense that it depends on the discretion of the Court, and on the acceptance of the affected state, by a separate declaration, of the competence of the Court to receive cases from NGOs and individuals.

Article 5(1) provides an enumerated list of those entitled to automatic access to the Court. They include,

(a) the African Commission;

(b) the State party which has lodged a complaint to the Commission;

(c) the State party against which the complaint has been lodged at the Commission;

(d) the State party whose citizen is a victim of human rights violations; and

(e) African Intergovernmental Organizations.

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121 See El-Sheikh, *supra*, note 57 at 946; Makau Mutua, "Two Legged Stool", *supra*, note 50 at 355.

122 El-Sheikh, *ibid*.

123 *ibid*.
Also, by Article 5(2), when a State party has an interest in a case under consideration, it may submit a request to the Court to be permitted to join. It seems that the Court has no discretion in the matter so long as the interest of the State party in the case is established to the satisfaction of the Court. The onus of establishing such an interest, however, ought to lie on the State party.

With regard to the optional right of access, the Protocol provides that "the Court may entitle Non-Governmental Organizations with observer status before the Commission, and individuals to institute cases directly before it, in accordance with article 34(6). Accordingly, Article 34(6) provides: "[a]t the ratification of this Protocol or any time thereafter, the State shall make a declaration accepting the competence of the Court to receive cases under article 5(3) of this Protocol. The Court shall not receive any petition under article 5(3) involving a state party which has not made such a declaration." In the light of this clear provision, Adama Dieng's euphoric assertion, without qualification, that "...Article 5 allows the Court to receive cases directly from NGOs and individual as well as State parties and African intergovernmental organizations" is misconceived, or, at best, misleading.

It has been observed that the condition subjecting NGOs and individuals' petitions to the acceptance of the Court's jurisdiction by the concerned state, was a compromise position which took into consideration the need to encourage African states to ratify the Protocol without necessarily accepting the jurisdiction of the Court to entertain NGO and

124 El-Sheikh, *Ibid.* at 947 notes that some delegations wanted to confine the possibility of NGOs submitting cases to the Court to African NGOs, but both the Experts' Meeting and the Conference of the Ministers of Justice rejected it and settled the article as formulated.

125 See, M. Adama Dieng, *supra*, note 96 at 282.
individual petitions, because as El-Sheikh has noted “[t]he question of allowing NGOs and individuals to submit cases to the Court was one of the most complicated issues during the consideration of the Draft Protocol.”

However, it has been forcefully and persuasively argued that “[w]hile limiting the access of NGOs and individuals to the Court may be necessary to get the states on board, it is nevertheless disappointing and a terrible blow to the standing of the Court in the eyes of most Africans. After all, it is individuals and NGOs, and not the African Commission, regional intergovernmental organizations, or [S]tate [P]arties, who will be the primary beneficiaries and users of the Court.” Apart from blocking the real potential beneficiaries and users, this provision unduly limits the Court and may render it virtually redundant. Perhaps, African states lost sight of the fact that the right of individual and NGO petition is in line with contemporary thought in this regard.

It is arguable that the further restrictions on individual and NGO access to the Court became necessary in view of the known tendency of the African Commission to allow individuals who are not victims, and African and non-African NGOs to bring petitions before

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127 El-Sheikh, supra, note 57 at 947. See also, André Stemmet, supra, note 69 at 235.


129 For instance, Article 44 of the European Convention has been amended by Protocol 9, which now extends to persons, NGOs and other groups the right to bring cases before the Court.
it, so long as such petitions comply with Article 56 of the African Charter. Thus, Article 34(6) of the Protocol is a veritable antidote to checkmate the gadfly NGOs who have been thorns in the flesh of many African states and governments.

The Protocol equally erected another hurdle for NGO and individual access. This relates to the admissibility of cases brought by NGOs and individuals. When deciding on the admissibility of cases brought by NGOs and individuals under article 5(3), the Court shall take into account the provisions of article 56 of the African Charter which stipulates certain conditions or requirements that communications must meet before their submission to, and acceptance by, the Commission. The implication of this may be that the Court will not hear petitions that do not meet these requirements. It is submitted that these restrictions are likely to undermine the effectiveness of the Court to a large extent.

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130 See for instance, Annette Pagnoule (on behalf of Abdoulaye Mazou) v. Cameroon, Communication No. 39/90, (April 1997) reported in (1999) 6 IHRR 819, which was submitted on behalf of the victim (Abdoulaye Mazou) by Annette Pagnoule of Amnesty International. See also, Free Legal Assistance Group et al. v. Zaire, Communication No. 25/89; Lawyers' Committee for Human Rights v. Zaire, Communication No. 47/90; Les Temons de Jehovah v. Zaire, Communication No. 56/91; Union Interafrique des Droits de l'Homme v. Zaire, Communication No. 100/93, all reported in (1997) 4 IHRR 89. Communication 25/89 was filed by the Free Legal Assistance Group, the Austrian Committee Against Torture, the Centre Haitien des Droits et Libertes, all members of the World Organization Against Torture. Communication 47/90 was filed by the Lawyers Committee for Human Rights New York. See also Commission Nationale des Droits de l'Homme et des Libertes v. Chad, Communication No. 74/92, which was filed by La Commission Nationale des Droits de l'Homme et des Libertes de la Federation Nationale des Unions de Jeunes Avocats de France; Constitutional Rights Project and Civil Liberties Organisation v. Nigeria, Communication No. 102/93, reported in (2000) 7 IHRR 259, filed by two Nigerian NGOs; Media Rights Agenda and Constitutional Rights Project v. Nigeria, Communication Nos. 105/93, 128/94, 130/94, and 152/96, reported in (2000) 7 IHRR 265, also filed by Nigerian NGOs. Almost all of these complaints were brought by individuals or NGOs based within and outside Africa, and who are not victims. It is doubtful whether any African state or government will consent to being dragged to the African Court by an African NGO let alone a non-African NGO which many African governments consider as meddlesome interlopers.

131 Article 6. See supra at 200-203 for a discussion of these conditions under article 56 of the African Charter.

132 See Makau Mutua, supra, note 50 at 355.
While there are many instances whereby the African Commission has allowed individuals and NGOs to submit to it written complaints against actions of States Parties that are in violation of the principles set forth in the African Charter, it should be noted that the African Court does not possess any powers to act in like manner without the prior consent of the state party concerned. This is because, while Article 56 of the African Charter merely provides for conditions which non-state communications must meet in order to be admissible, Article 34(6) of the Protocol strips the Court of all powers to entertain individual and NGO petitions, except when the state party against which the complaint is made has itself expressly consented to such a petition.\textsuperscript{133} Consequently, the considerable latitude so far enjoyed by the African Commission in entertaining individual and NGO petitions is not available to the Court. The full implication of this state of affairs on the utility and usefulness of the Court would be better appreciated if viewed against the backdrop of the virtual absence of complaints by a state party against another state party before the African Commission.\textsuperscript{134}

\textsuperscript{133}It is interesting to note that the Government Legal Experts Meeting on the Question of the Establishment of an African Court of Human and Peoples' Rights, held in Cape Town South Africa, in September 6-12, 1995, produced the Draft Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights, OAU/LEG/EXP/AFC/HPR(I), reprinted in (1996) 8 \textit{RADIC} 493, Article 6(1) of which provides for an 'exceptional jurisdiction' under which 'the Court may, on exceptional grounds, allow individuals, non-governmental organisations and groups to bring cases before the Court.' According to Article 6(2) of this draft section, such non-state complaints need only comply with the conditions stipulated in Article 56 of the African Charter. This draft provision was, however, not included in the final Protocol.

\textsuperscript{134}Evelyn Ankumah, \textit{supra}, note 18 at 24 points out that "[t]o date, the Commission has not received communications submitted by a state against the other."
5.5.3. **Composition**

Article 11 provides for the composition of the Court. It shall consist of eleven judges, nationals of member states of OAU, elected in an individual capacity\(^{135}\) from among jurists of high moral character and of recognized practical, judicial or academic competence and experience in the field of human and peoples' rights.\(^{136}\) Judges are elected for a six-year term and are subject to reelection once.\(^{137}\) No two judges shall be nationals of the same state.\(^{138}\) All judges except the President shall perform their functions on a part-time basis. However, the Assembly of Heads of State and Government can change this arrangement at any time it deems appropriate.\(^{139}\) It has been observed that this provision may not augur well for the integrity and independence of the Court.\(^{140}\)

The independence of the judges is guaranteed in accordance with international law and they are to enjoy diplomatic immunities.\(^{141}\) A judge can only be removed or suspended from office if he or she can no longer fulfill the conditions required to be a judge of the Court, a fact which is decided by the unanimous decision of the other judges of the Court.\(^{142}\)

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\(^{135}\) This has been interpreted to mean that they are not required to follow instructions from the state of their nationality. See Naldi & Magliveras, *supra*, note 99 at 956.

\(^{136}\) Article 11(1).

\(^{137}\) Article 15(1).

\(^{138}\) Article 11(2).

\(^{139}\) See Article 15(4).

\(^{140}\) Makau Mutua, *supra*, note 50 at 356.

\(^{141}\) See Article 17.

\(^{142}\) Article 19.
It is an improvement over the *African Charter* that the *Protocol* provides for gender representation in the composition of judges. Thus, article 14(1) provides that in the election of judges, "the Assembly shall ensure that there is adequate gender representation." However, since what constitutes 'adequate' gender representation is not defined, it therefore remains what the male dominated Assembly wants it to be.

5.5.4. **Enforcement Powers**

According to Article 27(1), where the Court finds that there has been a violation, it may "make appropriate orders to remedy the violation" and this includes "payment of fair compensation or reparation." Both 'appropriate orders' and 'fair compensation' are not defined by the *Protocol*. This would seem to confer on the Court a wide margin of discretion, especially to make any orders it may consider necessary to remedy particular violations. In cases of extreme gravity and urgency, the Court may, in order to avoid irreparable harm to persons, adopt such provisional measures as it deems fit and necessary. Such provisional

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143 Article 14(3). There is no such provision in the *African Charter* regarding the African Commission. This attracted severe criticisms to the Commission. Until June 1993, shortly before its 14th Session, the composition of the Commission was all male. It was in 1993 that the first female Commissioner, Ms Vera Duarte Martins of Cape Verde was elected. In 1995, Ms. Julienne Ondziel of Congo was also elected. Ankumah, *supra*, note 18 at 16-17 deplorrs this exclusion of those who constitute more than 50% of the population of Africa. It should be noted, however, that while article 14(3) of the *Protocol* is an improvement on the *African Charter* with regard to gender representation, it falls short of enthroning gender equity. "Adequate gender representation" does not mean equal gender representation. Moreover, adequacy in this context is what the Assembly deems it to be. It is worthy to note that the Assembly itself is composed exclusively of men. It is therefore doubtful if it will ensure equality in representivity.

144 Article 27(1).

145 Article 27(2).
measures have been construed to include injunctions.\textsuperscript{146}

The judgement of the Court, which should be delivered within ninety days after completion of deliberations and read in open court, is final and not subject to appeal. The Court may, however, review its decision in the light of new evidence.\textsuperscript{147} After delivering its judgement, the Court notifies all the parties and transmits copies of the judgement to member states. The Council of Ministers, whose responsibility it is to monitor the execution of the judgement, is also notified.\textsuperscript{148}

The Court has no powers to execute its judgements. However, Article 30 contains an undertaking of States Parties to guarantee the execution of, and compliance with, the judgement of the Court in any case to which they are parties and within the time stipulated by the Court. The Council of Ministers is saddled with the responsibility to monitor the execution of the Court’s judgements.\textsuperscript{149} In its annual report to the Assembly of Heads of States the Court shall specify the cases in which a State has not complied with the Court’s judgement.\textsuperscript{150} It has rightly been pointed out that this provision is designed to be “a ‘shaming’ tactic that marks out the violator.”\textsuperscript{151}

The effectiveness of this shaming tactic is questionable. Most African leaders seem

\begin{itemize}
\item[\textsuperscript{146}] Makau Mutua, \textit{"Two Legged Stool"}, supra, note 50 at 357.
\item[\textsuperscript{147}] See Article 28.
\item[\textsuperscript{148}] See generally Article 29.
\item[\textsuperscript{149}] Article 29(2).
\item[\textsuperscript{150}] Article 31.
\item[\textsuperscript{151}] Makau Mutua, \textit{"Two Legged Stool"}, supra, note 50 at 357.
\end{itemize}
to have no shame. The brazen and callous manners with which they indulge in massive violations of human rights and the near total indifference and nonchalance with which they confront international condemnation, argue against such a tactic. It is noteworthy that the avalanche of international condemnation and criticism that followed the dubious trial of Ken Saro-Wiwa, did not deter his subsequent unlawful and debauched execution in 1995 by the Nigerian government.\(^{152}\) Neither has it stopped the recent politically motivated occupation of farmlands in Zimbabwe widely believed to have been engineered by the government. This shows how ineffective the so-called shaming tactic can sometimes be. Shand Watson's well articulated view which eloquently elucidates this fact is worth quoting in extenso:

It is unrealistic to expect that human rights implementation can be done by relying on the unilateral actions of the deviant governments. They will not incur obligations voluntarily, nor will they comply unilaterally with the purported norms.... Any effective protection of human rights at the international level is inevitably dependent upon the availability of sanctions against deviant governments.... Nonintrusive sanctions work where the government being criticized is sensitive about its international reputation and is prone to change its behaviour in response to criticism for noncompliance with international rules. This, however, is not likely to be the case when one is dealing with governments engaged in substantial and flagrant violations of human rights. It is naive to think that criticism in the world press or in international organizations will affect those who are willing to kill large numbers of their fellow men, and who rose to power by means of violence and deceit.\(^{153}\)


\(^{153}\) Shand Watson, Theory and Reality in the International Protection of Human Rights (New York: Transnational Publishers, Inc., 1999) at 49. He further notes that while non-intrusive sanctions such as diplomatic protest, public criticism, withdrawals of ambassadors, withholding of benefits etc are quite effective in maintaining compliance with rules which are well-established lex lata or rules which do not involve a high level of national interest, they cannot hope to provide sufficient motivation to change behaviour of governments
The foregoing argument applies with equal force to the African human rights system and argues against any enforcement of human rights that is solely based on a purported "shaming tactic." African - and indeed most other world - leaders are known for their insensitivity and obduracy to international public opinion. Consequently, "the possibility of efficacious human rights norms being implemented [whether in Africa or elsewhere] by nonintrusive sanctions must be rejected. In order to induce states to comply with... [human rights] norms..., resort must be had to a regime of sanctions..."\textsuperscript{154} This stand may be pessimistic and cynical, but, as Mutua observed, "[t]he modern African state, which in many respects is colonial to its core, has been such an egregious violator that skepticism about its ability to create [and comply with] an effective regional human rights system [devoid of intrusive sanctions] is appropriate."\textsuperscript{155}

5.6. EFFECTIVE HUMAN RIGHTS PROTECTION UNDER THE COURT

5.6.1. Another Hope Betrayed?

For those who had thought that the opportunity presented by the process of establishing a human rights court for Africa would be utilized by African states to enthrone an effective human rights enforcement mechanism, the \textit{Protocol of the African Court of Human and Peoples' Rights} as adopted has turned out to be another hope betrayed. The first

\textsuperscript{154}J. Shand Watson, \textit{Ibid.} at 50.

\textsuperscript{155}Makau Mutua, "A Two Legged Stool", \textit{supra}, note 50 at 343.
hope was betrayed in 1981 when, contrary to all expectations, the African Charter was adopted without providing for an adjudicatory body, notwithstanding the recommendations of the International Commission of Jurists as embodied in the “Law of Lagos.”

Limiting and making the right of access of NGOs and individuals dependent on the consent of the alleged state violator amounts to another painful betrayal of Africans in their greatest hour of need. The essence of a corpus of human rights norms should be to protect individuals (humans) from all sources of violations, and not to protect states. To expect that an African state violator would readily give its consent to be sued in the Court for its failure to fulfill its economic, social and cultural rights obligations under the Charter is to expect the ideal which, as yet, has no precedence.

It has been optimistically asserted that, even though individuals’ and NGOs’ access to the Court are dependent on the consent of the concerned states, such state consent would be a yardstick for measuring a state’s willingness to protect human rights because, “states who are willing to grant the Court the competence to receive complaints from individuals and NGOs, would be providing an additional outlet for the protection of human rights.”

While sharing the (misconceived) optimism inherent in the above assertion, Abdelsalam Mohamed has noted that “the possibility exists that States may tend to use the

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156 See supra, note 78 and accompanying texts.

157 Makau Mutua, “Two Legged Stool”, supra, note 50 at 355 states that: “[a] human rights court is primarily a forum for protecting citizens against the state and other state agencies.” It is submitted that while this statement remains true of the current regime of international law with regard to violators, international law, to be effective in the next century and beyond, should evolve a system of accountability for violations of human rights that locates violations in all actors regardless of whether they are states or non-state entities. The statist paradigm of international law is no longer in tune with current realities of human rights violations.

158 El-Sheikh, supra, note 57 at 951.
power granted thereunder to stifle, rather than encourage, the direct institution of actions by NGOs and individuals." It is, however, arguable that given the antecedents of these states, the likelihood of their using Article 34(6) to stifle individual and NGO petitions is more probable than possible. Human rights granted and recognized by international law being the basic minimum standard, its observance and enforcement should not be seen as an added favour done by the state to its citizen. A court of human rights is, therefore, necessary primarily for the protection of individuals and not as a public relations stunt to the state. The denial of that basic right therefore amounts to a huge betrayal of Africans and "a terrible blow to the standing and reputation of the Court...." It is perhaps in recognition of this betrayal, and in reaction to it, that barely one year after the signing of the Protocol establishing the African Court of Human Rights, some sub-regional arrangements are being made to establish human rights courts wherein the individual can have a direct access and right to sue his/her state. In a recently held meeting of Justice Ministers of the Economic Community of West African States (ECOWAS), a decision was taken to establish an ECOWAS Sub-regional Court where "citizens can sue their governments for perceived violations of (human) rights." The Court which will be a permanent court will sit every working day. It is to be constituted of seven judges with not

159 Abdelsalam A. Mohamed, supra, note 126 at 203.

160 Makau Mutua, "Two Legged Stool" supra, note 50 at 355.

more than one being nominated from one state. This is a welcome development and is quite in line with the contemporary African dream of human rights enforcement in Africa.

5.6.2. Uncleared Minefields: Impediments to the Court’s Effectiveness

There are certain flaws inherent in the African human rights system that predate the establishment of the African Court on Human and Peoples’ Rights. These were problems surrounding the African Charter and which greatly undermined its effectiveness and the viability of the entire African human rights system under the Commission. Consequently, it was argued that there is no sense in creating an institution which merely duplicates the weaknesses of the Commission. It was further argued that “[w]hat the OAU and the African regional system do not need is yet another remote and opaque bureaucracy that promises little and delivers nothing. If the Court is to be such a bureaucracy, then it would make more sense to expend additional resources and energy to address the problems of the African Commission....”

It seems that the Court is not very much different from the Commission and that those

162Ibid. States represented at the meeting include, Nigeria, The Republic of Benin, Burkina Faso, Côte d’Ivoire, The Gambia, Ghana, Mali, Niger, Senegal and Togo. Besides individuals suing their governments for violations of human rights, the proposed court will have jurisdiction to adjudicate inter-state hostilities and any state feeling aggrieved by the perceived ill treatment from another may take recourse to the court for redress. It seems therefore that the jurisdiction of the court is not restricted to human rights violations. However, cases of state ill treating another state may still come within the ambit of human rights where, for instance, the complainant state is aggrieved by the treatment meted out to its nationals by the respondent state.


164Ibid.
problems which undermined the effectiveness of the Commission are still potent, and remain the greatest threats to the Court's effectiveness. The African Charter, which is the basic working instrument of the Court, has some extant active mines that still constitute a serious threat to the African Court. Apart from the clawback clauses, one normative land mine which is likely to impede the Court's effectiveness is the abstruseness of the economic, social and cultural rights provisions. These rights as contained in the Charter, are ill-defined and characterized by uncertainty.\textsuperscript{165} Faced with such vague provisions, it will be an uphill task for the Court to effectively enforce these rights, especially since the Court cannot ignore the express provisions of the Charter, which is its main source of law,\textsuperscript{166} for to do so would be \textit{ultra vires} its powers and therefore a nullity.

It is also worth noting that the Protocol did not effectively streamline the relationship between the Court and the Commission. In its Article 2, the Protocol states that the "Court shall ... complement the protective mandate of the African Commission on Human and Peoples' Rights ... conferred upon it by the African Charter on Human and Peoples' Rights..."\textsuperscript{167} This complementary role does not really make the Court separate and independent of the Commission and does not make for a clear demarcation of roles. Apart from foisting on the Court the image problems of the Commission, as some scholars have

\textsuperscript{165}See infra, Chapter 6 for the discussion of the problem of the ambiguity of the Charter's provisions on economic, social and cultural rights.

\textsuperscript{166}See Article 7 which makes the Charter the Court's main source of law.

\textsuperscript{167}The Protocol in the last paragraph of its Preamble also declares the conviction of the OAU member states that "the attainment of the objectives of the African Charter on Human and Peoples' rights requires the establishment of an African Court on Human and Peoples' Rights to complement and reinforce the functions of the African Commission on Human and Peoples' Rights." (Emphasis added).
feared,\textsuperscript{168} it might lead to squabbles between the Court and the Commission as to which comes first in the hierarchy of precedence. Such a development is not unlikely, given that the Commission still retains its promotional as well as protective functions which the Court now complements, a situation that might also lead to duplication of roles.

All these, coupled with the conditional access for individuals and NGOs as well as the lack of enforcement powers\textsuperscript{169} will in no small way impede the effectiveness of the African Court. They are all land mines laid in the two main operating instruments of the Court, (the Charter and the Protocol). They must first be identified and deactivated if the Court is to be an effective force in the protection of human rights in Africa, particularly, economic, social and cultural rights which, as is argued in the next chapter, constitute the fulcrum for a meaningful enjoyment of human rights in Africa.

\textsuperscript{168}See for instance, Makau Mutua, "A Two Legged Stool", supra, note 50 at 360.

\textsuperscript{169}See supra, at 230-233 for the discussion of the enforcement powers of the Court.
CHAPTER SIX

ECONOMIC, SOCIAL AND CULTURAL RIGHTS AS THE CORNERSTONE OF THE AFRICAN HUMAN RIGHTS MOVEMENT

6.1. INTRODUCTION

In human rights practice, but certainly not in discourse, the point that economic, social and cultural rights are the only means of self-defence for the millions of the impoverished and marginalised groups all over the world is very often missed. Despite the international rhetoric on the equal relevance and indivisibility of all human rights, states have, in practice, paid less attention to the enforcement/implementation of economic, social and cultural rights with its attendant impact on the quality of life and human dignity of the citizenry. African states, still living with the nightmares of slavery and colonial exploitation by the Europeans, have fared very well, and perhaps remain unsurpassed, in this reverie of rhetorical eloquence.

There is no gainsaying the fact that African states ought to be at the vanguard of the

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enforcement of these rights in view of the deplorable socioeconomic conditions of life in Africa. Accordingly, African states ought not to emulate the industrialised states of the North who can afford the luxury of astounding rhetoric in the implementation of economic, social and cultural rights. Regrettably, African states have so far failed to match their words with appropriate actions.\(^3\) Even where the leaders seem very active in affirming the satisfaction of economic, social and cultural rights as a precondition for the enjoyment of other rights, most of them have done so with the diabolical intention of using it as a ploy to suppress civil and political rights.\(^4\)

In view of the indivisibility of human rights and the exacerbation of civil and political strife owing to worsening social and economic conditions of existence,\(^5\) it is more or less a \textit{fait accompli} that the existing scant regard for, or lack of interest in, the enforcement of economic, social and cultural rights in effect means that no aspect of human rights will be

\(^1\)This may be attributed in part to the widespread and prevailing unwillingness of the international community to match its high-minded rhetoric with commensurate actions. In fact, notwithstanding all pretensions to the contrary, there is evidence to support active undermining of the efforts of the developing countries to realize economic, social and cultural rights by the developed countries. See, El Hadji Guisse, (Special Rapporteur), \textit{The Realization of Economic, Social and Cultural Rights}, Final Report on the Question of the Impunity of Perpetrators of Human Rights Violations, E / CN.4 / Sub.2 / 1997 / 8, 27 June 1997, online at <http://www.derechos.org/nizkor/impu/guisse.html> (Visited 4:25 PM, January 31, 2000), at para. 16.

\(^4\)Repressive regimes in Africa have often claimed that they cannot allow basic civil and political rights in their various states as long as there are prevailing economic hardships and the population is underfed and economically underdeveloped. While it is true that economic development might lead to the improvement of the civil and political rights as a result of improvement in the quality of life of the people, it cannot be shown that the curtailment of the civil and political rights of the people can, in any way, contribute to the improvement of their socioeconomic rights and development. Its only contribution is the preservation of the repressive regimes in question. See Peter R. Baehr, “Concern for Development Aid and Fundamental Human Rights: The Dilemma as Faced by the Netherlands” (1982) 4 \textit{Human Rights Quarterly} 39 at 43-44. See also, Rhoda Howard, “The Full-Belly Thesis: Should Economic Rights Take Priority Over Civil and Political Rights? Evidence from Sub-Saharan Africa” (1983) 5 \textit{Human Rights Quarterly} 467 at 468-478; Rhoda Howard, “The Dilemma of Human Rights in Sub-Saharan Africa” (1980) 35 \textit{International Journal} 724 at 725.

realized in Africa. Such a state of affairs, even if largely unintended, is brought about by the apparent neglect of a substantial part of an indivisible whole. Only a change of attitude and relocation of emphasis, from neglect and discriminatory enforcement to respect and equal (balanced) enforcement, can lead to a meaningful and desired result.

To this end, the present chapter emphasizes the imperative of a holistic and non-discriminatory enforcement of all human rights in Africa. While linking the failure of African governments to meet the socioeconomic rights of the citizens to the rampant cases of civil and political strife and crises of state/governmental legitimacy in Africa, it is contended that the ability of a government to guarantee and protect the economic, social and cultural rights of the people, more than any other thing, determines the legitimacy of a government in contemporary Africa.

Whereas many scholars and commentators have fingered underdevelopment and acute economic crises of African states as being responsible for their inability to enthrone enforceable economic, social and cultural rights, it is argued here that these rights create development and are inextricable therefrom. Therefore, any quest for meaningful development ought to be predicated on the effective protection, enforcement and realization of these economic, social and cultural rights. Though not unmindful of the economic realities of many African states, it is argued that such realities are relevant only to the degree to which these rights are enjoyed in those states and does not justify outright non-enforcement.

Some factors militating against the realization of these rights are highlighted and

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discussed. In strategizing the way forward, alternative enforcement approaches that will ensure a non-discriminatory and more effective enforcement of economic, social and cultural rights are discussed as a possible way out for ending the marginalization of these rights. It is concluded that without equal protection and enforcement of economic, social and cultural rights the dream of effective protection and enjoyment of civil and political rights in Africa will continue to remain a nightmare.

6.2. THE IMPERATIVE OF A HOLISTIC APPROACH TO ENFORCEMENT

"Perils to the part imperil the whole."7

In spite of the ideological differences that led to the adoption of two international covenants with its attendant implications on the economic, social and cultural rights, the convergence of opinions, as expressed in the 1993 Vienna Declaration, recognizes the futility (to the advancement of humanity) inherent in entrenching the most impressive so-called civil and political rights without the corresponding economic, social and cultural rights in a situation of want, destitution and misery. Long before Vienna, the UDHR had set the parameters for evaluating the legitimacy of governmental actions by codifying the hopes of the oppressed, and by supplying authoritative language to the semantics and rhetoric of their claims.8 The "Never Again" declaration after World War II encapsulates the resolve of

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humanity to banish human misery in all its ramifications, whether arising from physical abuse, (which, as a matter of practical reality, has socioeconomic dimensions), or from want.

Therefore, if the essence of government is for the overall welfare and security of all citizens, (and not for the protection of the privileged class), such governmental imperatives cannot be said to be met only when the state assumes some definite enforceable obligations not to violate the civil and political rights of the citizens. Such an ‘ostrichian’ posture camouflages the various forms of state abuse, against which the citizen must be protected, the apogee of which is the neglect of its citizens. This trite fact is not lost even to those who were, and still are, opposed to encompassing economic, social and cultural rights within the framework of enforceable human rights. Thus, notwithstanding the staunch opposition of the Western states to encompass economic, social and cultural rights within the ambit of enforceable human rights, the de facto commitments of these states to a welfare ethos, apart from assuring a high degree of compliance to protecting the rights of their citizens, shows a recognition of the abject futility of purporting to protect the citizens from only civil and political abuses, while ignoring a more consuming and dehumanising abuse.

The realities of modern governance show that governments are not passive

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9. In Laxmi Kant v Union of India [1987] 1 SCC 67, the Indian Supreme Court held that the right of children to life and livelihood included the right to be protected by the state against emotional and material neglect.


11. It should, however, be pointed out that the de facto commitment to welfarist ethos has become a victim of globalisation even in rich societies where the dismantling of the institution of the welfare state is seen as a necessary step for the efficacy of state management, thus transforming social exclusion and human misery into a new economic ideology. See Jose A. Lindgren Alves, supra, note 8 at 485.
spectators, but active participants, in events that fundamentally impact on the ability of the people to lead a meaningful and dignified life.\textsuperscript{12} Governance ceases to be meaningful and relevant if the majority of the people are put in a situation where they cannot appreciate the value of life, let alone enjoy its benefits, and where they lack the appropriate mechanisms to compel a change. Under conditions where human survival needs are frequently not met, as in Africa, protection of human rights ought to be more preoccupied with preventing governmental abuse inherent in the mindless neglect of citizens.\textsuperscript{13}

One important point often overlooked in contemporary human rights discourse and practice is that the greatest benefit of guaranteeing enforceable rights is the assurance it gives to people that there are extant effective mechanisms to adjudicate any violations, or threatened violations of their rights. As events in most parts of Africa have shown, the absence of such mechanisms generally give the impression that resort to extra-legal (unconstitutional) means, such as armed rebellion, is the only effective way to improve one's condition or challenge governmental abuse and neglect.\textsuperscript{14}

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\textsuperscript{12}See Abubakar Momoh & Said Adejumobi, \textit{The Nigerian Military and the Crisis of Democratic Transition: A Study in the Monopoly of Power} (Lagos: Civil Liberties Organisation, 1999) at 211 (questioning the basis, rationale and justification for the existence of the state and its control over national wealth, and its overall responsibility where it fails to live up to its health, educational, employment and other social obligations to the people).


\textsuperscript{14}This assertion holds true for all rights. Generally people have the tendency to develop means of expressing their grievances. Where they are denied an organised avenue, such as the courts or other tribunals, they invariably resort to extra-legal means. Essentially the gist of human rights has always revolved around maintaining a balance between the Haves and the Have-nots. Even the so-called civil and political rights, as a pseudonym for Western Liberalism, emerged in different forms, as Richard Falk points out, "as a centrist compromise that offered enough to those currently disadvantaged to discourage recourse to revolution while providing essential stability for existing social and economic hierarchies." See Richard Falk, "\textit{Challenge of Genocide}" \textit{supra}, note 10 at 180. It seems that the denial of socioeconomic rights in Africa have assumed revolutionary proportions akin to the pre-revolution denial of civil and political rights in Europe, thereby
passing through one form of conflict or the other tend to suggest that people are not fighting themselves, but are fighting poverty and governmental criminal inaction in the face of utter destitution.\textsuperscript{15} This is due to many years of impoverishing neglect and owing to the absence of other viable ways of compelling a meaningful change. Since governments are increasingly expected to meet the basic needs of their citizens, there is a growing tendency to demand results in militant terms, particularly, in the absence of a proper forum to compel governmental action.\textsuperscript{16} For as Callisto Madavo, World Bank Vice President for the African region, has pointedly observed:

\begin{quote}
Africa's wars are not driven just by ethnic differences. As elsewhere, they reflect poverty, lack of jobs and education, rich natural resources that tempt and sustain rebels, and [ineffective and insensitive] political systems ...."\textsuperscript{17}
\end{quote}

Even though the enthronement of an effective means of redress for the violation of all rights, whether civil and political or economic, social and cultural in nature, would not have prevented some inevitable conflicts, it is arguable that most of these conflicts are triggered and / or sustained by elements who fan the embers of the peoples' abject conditions justifying similar empowerment.

\textsuperscript{15}Notable examples in this regard are the internecine fratricidal conflicts involving different communities in Nigeria: Niger Delta and Ife-Modekeke conflicts, to mention only a few. Other examples are the Liberian, Sierra Leonean conflicts as well as the unending conflicts in Somalia.


and deprivations. Apparently, a causal link exists between these conflicts, which are a people’s violent resistance to their deplorable socioeconomic conditions, and legal deprivations of perceived modes of effecting a change. Accordingly, it has been observed that:

... the gap between what a people expect as being just and fair and what they actually have can heighten a sense of unfair treatment and so develop a sense of deprivation... Feelings of deprivation ... provide fertile grounds for mobilizing opposition and the affected group with the real potential for collective violence and social instability. Economic, social and political institutions that are perceived to have failed to address the conditions producing deprivation become victims of vicious campaigns that can lead to [violence].... [T]he fear of unemployment and the strain of reduced economic security in people’s private lives can [and do] create tremendous anxiety and agitation. Psychologically, reactions to unemployment, especially when it is rising, and its attendant strain of reduced economic security may create fear, frustration and aggression.... Conceivably, the fear of social instability may increase the potential for violence.

The foregoing underscores the fundamental link between protection of human rights of the people and stability, which in turn underlies the necessity of guaranteeing the protective enforcement of all human rights without exception. Since the different rights are interconnected and operate in support of each other, it goes without saying that the full

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realization of one set remains dependent on the realization of the other. In a state of instability resulting from the denial of basic economic, social and cultural rights, it becomes difficult, if not impossible, to meaningfully realise civil and political rights, and vice versa.

Apart from instability resulting from socioeconomically induced civil strife, the non realisation of economic, social and cultural rights remains an insurmountable obstacle to the enjoyment of civil and political rights. People can only truly be free from abuse and exploitation when they have what it takes to assert their rights and free themselves from the shackles of exploitive and oppressive rule. Where, as in Africa, the vast majority are illiterate, ignorant and reeling under the heavy and crushing heels of poverty, they lack the requisite means and awareness to assert any rights, let alone enjoy them. Umozurike puts this point in perspective:

A great impediment to the attainment of civil and political rights is constituted by illiteracy, ignorance and poverty. To the many rural dwellers in any African state, and indeed to the

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21 See Pierre De Vos, "Pious Wishes or Directly Enforceable Human Rights?: Social and Economic Rights in South Africa’s 1996 Constitution" (1997) 13 SAJHR 67 at 71. The writer also notes that “[starving people may find it difficult to exercise their freedom of speech while a restriction of freedom of speech may make it difficult for individuals to enforce their right of access to housing.”


We share the conviction that social development and social justice are indispensable for the achievement and maintenance of peace and security within and among nations. In turn, social development and social justice cannot be attained in the absence of peace and security or in the absence of respect for all human rights and fundamental freedoms.

urban poor, the lack of awareness or means make it impossible for them to assert their rights. They are very much at the mercy of their rulers.23

Inasmuch as maintaining an unflagging enforcement of civil and political rights is desirable, economic, social and cultural rights should also be given the same kind of committed and unrelenting enforcement.24 Where such a commitment is lacking, it deepens the feeling of collective injustice in society, especially by the majority, the more vulnerable members of the society, who are denied a recognised and accepted forum for the recognition and redressing of injustices.25 In addition, it makes a mockery of the so-called autonomy of the individual which is the linchpin of civil and political rights, for certain socioeconomic conditions must exist for there to be personal autonomy.26 That they can be likened to a Siamese twin is well illustrated by Raz, as follows:

A person whose every major decision was coerced, extracted from him by threats to his life or that of children, has not led an autonomous life. Similar considerations apply to a person who has spent the whole of his life fighting starvation and disease, and has no opportunity to accomplish anything other


24 Selby convincingly argues that “human rights do not stop at counting political prisoners any more than they stop at counting the unemployed. Human rights are about human needs - needs that extend from proper nutrition, clothing, shelter, health care and education to participating in decisions that frame our lives.” See D. Selby, Human Rights (1987) at 77, quoted in R. R. Akankwasa, “Human Rights Education and the Quest for Development: The Case of Ugandan Schools” (1999) 5 East African J. Peace & Human Rights 105 at 108.

25 The discovery of injustice as such depends upon the feeling that one has rights which are not being respected. See Pierre Bourdieu, “The Force of Law: Toward a Sociology of the Juridical Field” (1988) 38 Hastings L. J. 805 at 833. The feeling of injustice is heightened when those who are making excuses of lack of resources for non-recognition of the people’s rights to adequate nutrition, housing health, and education, as critical components of social existence are unabashedly flaunting the wealth amassed from their concerted fleecing of the people.

than to stay alive.... 27

According to Raz, autonomy "affects wide-ranging aspects of social practices and institutions.... Almost all major social decisions and many of the considerations both for and against each one of them [whether civil and political rights or economic, social and cultural rights] bear on the possibility of personal autonomy, either instrumentally or inherently." 28

The dangers of a selective and balkanised, as opposed to a holistic and unified, recognition of human dignity have not been lost on African states, although this remains largely a seductive international rhetoric unmatched with domestic action. At least, the African Charter remains the testament of the collective recognition of the indivisibility of human rights and dignity. It would therefore seem that African states fully appreciate the necessity of a holistic approach to enforcement justified by their own circumstances. While this must be pursued at the international and regional levels, as the African Charter seeks to do, the essential point of active enforcement must be at the domestic level where the mechanism of enforcement will be within the easy reach of aggrieved citizens and, thus, be widely utilized. 29 Moreover, international protection or enforcement mechanisms are designed to be complementary in relation to domestic protection of human rights. 30 And as


28 Ibid.


Theo van Boven pointedly observed, international procedures, can never be considered as substitutes for national mechanisms and national measures with the aim to give effect to human rights standards. Human rights have to be implemented first and foremost at national levels.\[31\]

In effect, anything falling short of a holistic enforcement of human rights at the domestic level not only makes nonsense of all the international and regional pretensions of African states, but also ridicules the African Charter's recognition that "the satisfaction of economic, social and cultural rights is a guarantee for the enjoyment of civil and political rights."\[32\] Much more, a bifurcated enforcement cannot be said to be in keeping with the virtues of Africa's historical tradition and the values of African civilization which is one of the founding philosophies of the Charter.\[33\] As demonstrated in Chapter Three, traditional Africa thrived on the holistic approach. Since African states subscribed to a Charter that took into consideration the importance traditionally attached to these rights, they ought to be estopped from merely paying lip service to it.

Rather than the existing dichotomous approach to enforcement which marginalizes economic, social and cultural rights, action should be taken across the board to ensure a minimum level of enjoyment of all human rights. As argued in the next section, the excuse

\[31\] See para. 8 of the Preamble to the African Charter. [Emphasis added].

\[32\] See para 5 of the Preamble to the African Charter.
of impossibility of performance owing to underdevelopment often put forward by African leaders and some scholars,\textsuperscript{34} plausible as it may seem, is palpably meretricious and does not represent the whole truth. It is too often an exaggerated rationalization for lack of political will used to whitewash the senseless fleecing of the masses, and the continued elevation of luxury over necessity.

6.3. RIGHTS AND THE ARGUMENT OF DEVELOPMENT

The varying definitions of development can be likened to the proverbial definition of an elephant by three blindfolded men. For the first who touched the ear, an elephant is like the plantain leaves. The second who touched the legs said that an elephant is like a tree. For the third one who touched the trunk, an elephant is like a wall. Accordingly, development is a concept with varying definitions that are as diverse and numerous as there are authors. However, development is often equated with economic development which has come to be “usually measured as economic growth, improved balance of payment, and other macroeconomic variables.”\textsuperscript{35} The level of development in a given country is determined by the country’s gross national product (GNP) per capita\textsuperscript{36} and it is generally believed that

\textsuperscript{34}See for instance U. Oji Umozurike, “African Charter” supra, note 23 at 111.


\textsuperscript{36}But Wesley T. Milner, Steven C. Poe & David Leblang, have insightfully observed that: Economic development, which is typically measured with per capita gross national product (GNP) or gross domestic product (GDP) variables, is not usually considered synonymous with the fulfilment of basic needs, in large part because the predominant measures fail to take into account economic inequality among citizens. For example, a country could have a high overall per capita GDP but also have a majority of the population living in poverty.
economic development guarantees automatic improvement in other sectors and segments of society.\(^{37}\)

Thus, the point is often made in many quarters, with unwavering tenacity, that development of Africa, and indeed of all Third World countries, is a necessary, if not sufficient, precondition for the effective enjoyment of human rights, particularly, economic, social and cultural rights.\(^{38}\) Accordingly, it has been contended that African states cannot reasonably be expected to fulfill their economic, social and cultural obligations under the *African Charter* given their implacable socioeconomic woes resulting from underdevelopment and “existing patterns of international trade.”\(^{39}\) Also, it has been variously propounded that since African states are too poor to realise economic, social and cultural rights\(^{40}\) it suffices if these rights are treated as directive principles of state policy.\(^{41}\)

Therefore, these conventional measures can sometimes mask the true underlying extent of development.


\(^{38}\) See Peter R. Baehr, *supra*, note 4 at 43. Sometimes, this point assumes an ambivalent dimension with repressive regimes arguing that they cannot allow basic civil and political rights in their states as long as the population is underfed and economically underdeveloped. The implication is that the satisfaction of civil and political rights is also dependent on economic development.

\(^{39}\) See R. M. D'Sa, *supra*, note 6 at 114 (citations omitted).


\(^{41}\) U. Oji Umezurike, “*African Charter*” *supra*, note 23 at 110. Indeed there are a number of studies demonstrating that economic development has a strong, positive impact on the fulfilment of basic human needs. In his study, Han Park came to the conclusion that economic development is the strongest predictor of improved
Undoubtedly, African states, if not the poorest, are among the most impoverished states of the world. Therefore, an argument that they are too poor to realise, the often ascribed resource intensive, economic, social and cultural rights cannot but be weighty. However, these arguments, which have more or less become seductive rhetoric, often proceed from two interrelated but erroneous and misleading suppositions. First, that economic, social and cultural rights are resource intensive and require government's direct intervention, unlike civil and political rights which do not involve government expenditure, but merely entail government's forbearance from interfering with the rights of the people.42 Secondly, that African states' underdevelopment is enough excuse to justify non-enforcement of economic, social and cultural rights but not civil and political rights.

A close scrutiny of the relevant provisions of the African Charter shows that it does not impose separate or more onerous obligations on States Parties with respect to economic, social and cultural rights.43 The Charter's provisions on these rights are mild and modest. For instance, on the right to education, it merely provides that "every individual shall have the right to education" but does not make it free. This does not impose a more resource intensive obligation than the right to a fair trial. Then why should a state be justified in not providing necessary medical or educational facilities, but not be exculpated for failing to provide the

basic needs achievement. See Han S. Park, "Correlates of Human Rights: Global Tendencies" (1987) 9 Human Rights Quarterly 405 at 410-413. See also, Bruce E. Moon & William J. Dixon, "Politics, the State, and Basic Human Needs: A Cross National Study" (1985) 29 American Journal of Political Science 661 at 689-690. While economic development may be the strongest evidence to predict the meeting of basic needs, it does not follow that basic needs are actually met, as events in the industrialised countries have shown.

42The resource intensive argument has been laid to rest in Chapter Two above.

necessary machinery for law enforcement, fair trial or dignified prison conditions?44

One possible explanation appears to be that provision of equitable and satisfactory conditions of work, education and health are not regarded as important as law enforcement or fair trial even though the absence of the former exacerbate those conditions that necessitate the latter. Again, the people’s poverty and lack of political consciousness, owing to the neglect of these rights, provide the enabling environment for the perpetuation of the ruling elites in power.45 How else can one exercise the right to participate freely in the government of one’s country if one has been disenfranchised by lack of education and thus cannot engage in meaningful political discourse, or make informed choices. No doubt being kept perpetually poor and uneducated benefits the ruling class who look upon such people’s right to vote as a commodity to be sold and bought for the ruler’s personal use.46

If the reason for marginalizing the enforcement of these economic, social and cultural rights is for lack of development, how does the state intend to develop where the overwhelming majority of the citizens are illiterate. According to a report to UNESCO,

44Etienne Mureinik, “Beyond A Charter of Luxuries: Economic Rights in the Constitution” (1992) 8 SAJHR 464 at 466, forcefully argues: “If judges decide that no one may be imprisoned without fair trial, and therefore that an order of habeas corpus must issue to secure the release of a person detained without trial, the effect is to burden the state with massive costs of a criminal justice system. The effect is to require the state to pay the salaries of judges, prosecutors and their administrative staff, to build court houses, and much more.... It is true, of course, that judicial protection of personal liberty does not expressly compel the state to commit resources. The state could instead refrain from prosecuting; but that would put it in breach of its duty to maintain peaceful order, and in a prospering society this option is in any event not a real possibility. Judicial protection of personal liberty consequently makes considerable expenditure inevitable.”

45See Richard Falk, “Severe Violations” supra, note 16 at 226 (notes that the “[t]he deprivation of basic human needs can be used to achieve explicit political ends...”). This may involve denying such ‘benefits’ (as these rights are often regarded) to an ethnically distinct antagonistic component of the population as a means of settling ethnic conflicts or to punish a segment of the population for supporting the opposition.

46See Carol M. Tucker, supra, note 13 at 164 (noting that “[a]dvantaged classes will be threatened by a human needs approach that transfers income to benefit the poor”).
“[n]ational development hinges on the ability of working populations to handle complex technologies, and to demonstrate inventiveness and adaptability, qualities that depend to a great extent on the level of initial education.” Accordingly, the realisation of the right to education and other economic, social and cultural rights are, as Booysen rightly observed, “a prerequisite for the creation of wealth” and development and, as such, there cannot be any development without them.

It is arguable that even if underdevelopment is such a potent factor, it merely goes to the extent to which these rights can be realised and does not justify outright non-enforcement. Accordingly, underdevelopment does not justify enforcement in parts, which itself is akin to a (wo)man with more than one child consistently feeding one to the neglect of others simply because there is not enough money to feed them all. In any case, it is on record that many African states are richly endowed to such an extent that, under appropriate conditions, including the effective enforcement of economic, social and cultural rights, they would have attained a level where basic survival needs would have been met. However, due

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50 Basic survival needs in this context “refers to the minimum requirements for sustaining physical life, that is, health, food, housing, clothing, work, literacy.” See Richard Falk, “Severe Violations” supra, note 16 at 225. See also, Frances Stewart, “Basic Needs Strategies, Human Rights and the Right to Development”
to maladministration and the mind boggling kleptomania of rulers, past and present, most of whom are (were) richer than their states, available resources were squandered. Thus, “it is not scarcity (of resources) which is the first problem, but maldistribution” or inequitable “allocation of resources ... [and] provision of government controlled benefits.” Also, as Richard Falk forcefully argues,

[available] research strongly suggests that most Third World countries possess the resources to eliminate poverty and satisfy basic human needs if their policy makers were so inclined.

Thus, the often asserted ‘underdevelopment’ of African states is not “something akin


51 J. Oloka Onyango, supra, note at 5, notes that the late Mobutu Sese Sekou wa Zabanga of Zaire “is believed to have amassed a fortune far in excess of his country’s national debt, bankrupting what must have been one of the richest nations on the continent.” Zaire has a natural endowment of a host of mineral riches which includes extensive reserves of gold, diamond, copper, cobalt and zinc. See infra, note 76 for Afe Babalola’s exposure of how some Nigerians stashed over 30 billion US dollars in European and North American banks.

52 Carol M. Tucker, supra, note 13 at 162.


54 See Richard Falk, “Severe Violations” supra, note 15 at 225. See also, Graciela Chichilnisky, “Development, Basic Needs, and the International Order” (1977) 31 Journal of International Affairs 275. See also, UNDP, Human Development Report, 1990 at 4, (states that: “Developing countries are not too poor to pay for human development and take care of economic growth.” It listed some factors inhibiting the realisation of human development in developing countries. These include, disoriented national priorities, debt repayments, very high military spending, inefficient parastatals, unnecessary government controls).
to an original state of nature." The prevailing state of affairs in many African states today is not actually the result of lack of the wherewithal to satisfy the socioeconomic rights of the people, at least to a minimum level of human dignity. It is the direct consequence of an active process of impoverishment. In some cases, even international loans and grants, purportedly secured or given to provide certain essential facilities, have ended up lining private pockets and being used to secure safe nests for the advantaged class, or being spent to protect the advantaged class from the ire of the dispossessed, all in the name of 'security.' It is, therefore, totally unacceptable and unconscionable for those who squandered, and are still squandering, developmental opportunities, or indeed any other person on their behalf, to rely on the same conditions they themselves created as a legitimate ground for marginalizing the enforcement of the economic, social and cultural rights of the people.

It is debatable that some governments' wrong policies, maldistribution and inequitable allocation of resources might have been prevented or reconsidered had there been an effective regime of legally enforceable or justiciable economic, social and cultural rights. In such a situation, it might have provided an opportunity for accountability to call on the government of the day to justify, for instance, the anti-people conditionalities, and/or account for the expenditure of, contemplated or secured, international loans, whose burden


56 Ibid.

57 Sigrun I. Skogly, "Adjustment and Development" supra, note 35 at 753, relying on UNDP Human Development Report of 1990, at 128-160, writes: "It is now widely recognised that assistance towards economic development does not necessarily improve income distribution, education, or health for the majority of people in Africa."
significantly erodes the socioeconomic rights of the poor and the most vulnerable group.\textsuperscript{58}

The certainty of such justification is likely to improve accountability and the quality of governance, for as Mureinik convincingly argues,

> a decision maker who is aware in advance of the risk of being required to justify a decision will always consider it more closely than if there were no risk. A decision maker alive to that risk is under pressure consciously to consider and meet all the objections, consciously to consider and thoughtfully to discard all the alternatives, to the decision contemplated. And if in court the government could not offer a plausible justification for the programme that it had chosen ... then the programme would have to be struck down.\textsuperscript{59}

While not denying the reality of the severe economic downturn presently facing many African states, which substantially impair their financial ability, it is submitted that it is not really this somewhat grim economic situation, but the lack of political will and the diabolical machinations of the ruling elite, that have so far prevented them from according economic, social and cultural rights the same level of emphasis in enforcement accorded to civil and political rights. For one thing, the introduction of a regime of judicially enforceable economic, social and cultural rights in South Africa has not, so far, paralysed the state developmentally or conduced to a new state of underdevelopment. In addition, it has neither been shown that South Africa is overwhelmingly endowed with resources over and above every other African state, nor that the committed enforcement of economic, social and


\textsuperscript{59}See Etienne Mureinik, \textit{supra}, note 44 at 471-472. According to Mureinik, the court might intervene to quash a legislation which created fourteen departments of health if it found multiple bureaucracies to be a senseless squandering of precious resources. The court might also intervene "if the annual Budget appropriated funds to build a replica of St. Peter's, [as Houphet Boigny of Cote d'Ivoire did], or perhaps a nuclear submarine before the rights of education promised by the constitution had been delivered." \textit{Ibid}. at 472.
cultural rights, equal to that accorded to civil and political rights, will have any more direct bearing on the developmental conditions of the states than the financial implications of enforcing civil and political rights.

It is noteworthy that underdevelopment has not been shown to have affected "services which are of concern to the richer and more powerful sections of the society, such as... prestige development projects," nor induced any cuts in military spending.\(^{60}\) This makes it all the more difficult to sustain the lack of development argument as the major reason for the prevailing marginalization of the enforcement of economic, social and cultural rights. Also, it makes underdevelopment a smokescreen for what apparently is the lack of political will as well as deliberate political action and / or inaction.

Therefore, instead of the preoccupation with lack of development, as if it were an original state of nature, attention ought to be shifted to the likely dominant factors working against the realisation of the economic, social and cultural rights in Africa, some of which are apparently at the root of the so-called underdevelopment. Some of those factors will be addressed in the next section.

\(^{60}\) See James P. Grant, *supra*, note 58 at 16. In 1995 the Ugandan government evicted 'peasants' from their land in Kibale district, western Uganda to make way for national parks, thus dispossessing them of their means of livelihood and security to make way for prestige projects. See A. A. Akankwasa, *supra*, note 24 at 113.

\(^{61}\) See UNDP, *Human Development Report*, 1990 at 4 (noting that "more than half the spending [in national budgets of developing countries] is swallowed by the military, among other vices").
6.4. FACTORS MILITATING AGAINST REALIZATION OF ECONOMIC, SOCIAL AND CULTURAL RIGHTS UNDER THE CHARTER

The problems bedevilling the non-realization and enforcement of the economic, social and cultural rights under the *African Charter* can be attributed to the ungodly alliance of some internal and external factors. The internal factors stem from the normative flaws of the *Charter* itself and the nature of its provisions on economic, social and cultural rights, while the external ones are a potpourri of forces plaguing the ability of States Parties to fulfil their economic, social and cultural obligations under the *Charter*. No attempt is made here to address all the multifarious impediments to the effective enforcement of the economic, social and cultural rights in Africa. As a result, the factors discussed do not, by any means, represent the totality of all the problems, some of which predate the modern African states. The havoc wreaked by the Cold War\(^{62}\) and the horrendous impact of historical factors such as slavery and colonialism\(^{63}\) are consciously left out, but by no means ignored.

\(^{62}\) For a brief insight into the atrocities of the Cold War, see Adebayo Adedeji, "*Comprehending African Conflicts*" in Adebayo Adedeji, *supra*, note 18 at 9-10.

6.4.1. Content and Scope of Charter Provisions on Economic, Social and Cultural Rights

The normative inadequacies of the African Charter, particularly the provisions on economic, social and cultural rights have commanded the attention of many scholars. In addition to all other shortcomings hampering the effective realization of the Charter's provisions, a serious obstacle to the enforcement of the Charter provisions on economic, social and cultural rights is their lack of conceptual clarity and the ensuing uncertainties. However, the problem of abstruseness and definitional imprecision of economic, social and cultural rights is not limited to the African Charter but constitutes a noted problem inherent in economic, social and cultural rights in general. Scholars have largely acknowledged that the ill-defined nature and the vagueness of the content of economic, social and cultural rights impact negatively on their enforcement.

Yozo Yokota has attributed the lack of clarity both in content and scope to the relative novelty of these rights and their not being 'well and clearly defined.' Gomez writes that "the norms [of economic, social and cultural rights] are vague because they have not yet

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66 Yozo Yokota, Ibid at 205.
received sufficient attention from the courts, academics, or other agencies. Civil and political
dights, on the other hand, have long been the subject of interpretation by courts and other
agencies, and have thus acquired a degree of clarity.67

The African Charter's provision on the right to health68 is a typical example of such
dights characterised by conceptual ambiguity. It entitles individuals to enjoy "the best
attainable state of physical and mental health" without prescribing the standard of health,
whether national or international,69 or defining what is meant by "the best attainable state."
Given this uncertainty, the Charter's right to health might mean everything or nothing to
States Parties depending on how a state construes it. Often, it is construed to impose an
unlimited obligation to provide free medical services. This appears to have informed the
thinking that "[e]ven if governments employ the services of modern doctors as well as
traditional healers [sic]...it seems quite impossible for them to carry out the obligation."70
In all fairness, it is by no means clear to what individuals are entitled under the Charter's right
to health provisions. Likewise, the extent of obligation thereby imposed on states is far from
clear. A comparable measure of uncertainty also surrounds the right to health provisions of

67 Mario Gomez, supra, note 65 at 161. Gomez may be speaking the minds of no few scholars when
he asserts that "[g]iving clarity and content to these standards [rights] is one of the major tasks awaiting the
human rights movement."

68 Article 16 of the Charter. It provides: (1) Every individual shall have the right to enjoy the best
attainable state of physical and mental health; (2) State Parties to the present Charter shall take necessary
measures to protect the health of their people and ensure that they receive medical attention when they are sick.


70 Ibid.
the International Covenant on Economic, Social and Cultural Rights.\textsuperscript{71}

Similar uncertainties and ambiguities surround other economic, social and cultural rights provisions of the Charter. The right to work under Article 15 merely entitles individuals to “work under equitable and satisfactory conditions” and to “receive equal pay for equal work.” Such a shallow provision is more or less meaningless to the teeming numbers of unemployed. States Parties are neither obligated to provide, nor obliged to initiate measures to create jobs. Worse still, Article 15 does not confer any right on the unemployed person.

By the same token, the right to education under Article 17(1) is shrouded in laconic ambiguity. It tersely provides: “Every individual shall have the right to education.” In the context of economic, social and cultural right, such a provision is not only ambiguous for what it says, but also vague for what it omits to state. The obligation imposed on a State Party is as indeterminate as it is nebulous. Amidst these uncertainties in content and scope of the economic social and cultural rights, it is hardly surprising that economic, social and cultural rights are still thriving in non-enforcement.

6.4.2. Lack of Effective Enforcement and Promotion

Another impediment to the enforcement and realization of the economic, social and cultural rights under the Charter is the absence of effective and efficient promotion and

\textsuperscript{71}For an attempt to clarify the scope and implications of the right to health under the International Covenant on Economic, Social and Cultural Rights, see Brigit Toebes, “International Human Right to Health,” supra, note 65.
enforcement. Notwithstanding the apparent lack of clarity and vagueness of the Charter's provisions on economic, social and cultural rights, it is arguable that sufficient attention from the relevant enforcement and promotion agency would have clarified some of the apparent ambiguities by shedding some light on the dark faces of the Charter's provisions. However, this appears not to have been the case. Not only has the Commission not so much bothered with the promotion and enforcement of economic, social and cultural rights, its decisions and pronouncements, where they do exist, remain "formulaic" and "do not reference jurisprudence from national and international tribunals, nor do they fire the imagination."72

Both in promotion and enforcement, the Commission seems to have concentrated all its efforts exclusively on the civil and political rights to the detriment of economic, social and political rights. The shortcomings of the Commission, and the likely ineffectiveness of the African Court on Human Rights, in the protection of economic, social and cultural rights have been already been fully addressed in the preceding chapters. Suffice it to say that with an effective and efficient promotion, individuals would have been more alert to their rights and the extent of the protection accorded by the Charter. In the absence of such promotion, individuals are less likely to assert their rights, even if couched in superlative clarity.

6.4.3. Inept and Corrupt Leadership

One of the greatest problems hampering the enforcement and realization of economic, social and cultural rights in Africa is inept, often corrupt and exploitative, leadership. It is

72Makau Mutua, "Two Legged Stool" supra, note 64 at 348.
a truism that the destiny of a people is collectively tied to the quality of their leadership. While colonialism left Africa and Africans socioeconomically bruised (and bruising), the ineptitude and corruption of past and present government leaders and officials of some African states have left the people socioeconomically battered and mortally wounded. Thus, George Kent’s observation that “[s]ome (African states) have had corrupt governments that exploited their own people as viciously as any outsiders have ever done” can hardly be controverted. In many African states kleptocracy has been elevated to a state art and adorned with the toga of officialdom, apparently as a recognised new form of government. As a result, resources that should have been utilised to provide basic facilities have been filched and transferred into Western banks by high-ranking leaders and officials. Umozurike justifiably regards this as “a high-ranking cause of underdevelopment, resulting in malnutrition, lack of healthcare and other deprivations.” In this regard also, Afe Babalola lamented:

It is ... no understatement to say that Africa has been impoverished and destabilised by the kleptocracy of its elite in both business and government circles. For example, it has been stated in a leading European journal, The Financial Times, in 1992, that three hundred Nigerians own over 30 billion US dollars in European and North American banks. Similar cases of mind boggling foreign accounts belonging to other African citizens abound. It is also an open secret that there are some African Heads of State[,] past or present,

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73 George Kent, “Food Security”, supra, note 55.

74 U. Oji Umozurike, “African Charter” supra, note 23 at 48. The former Nigerian military Head of State, General Sani Abacha, is believed to have stashed away billions of dollars in foreign accounts in several parts of the world. The present Nigerian civilian government has been making efforts to recover Abacha’s loot. See. Vanguard, “How we Fared in the Last One Year, by Obasanjo: Being the Text of President Olusegun Obasanjo’s May 29 Broadcast Commemorating One Year of Civil Rule in the Country,” available online at <http://www.vanguardngr.com/WK206200/f660600.htm>. (Accessed June 13, 2000).

75 Ibid.
whose assets in various parts of the globe, if valued, would be more than the yearly earnings of their respective countries.\footnote{Afe Babalola, “Legal and Judicial System and Corruption,” in \textit{Africa Leadership Forum: Corruption, Democracy and Human Rights in West Africa}, Republic of Benin, 19-21 September, 1994 (Ibadan: Intec Printers, 1994) at 93-94, quoted in U. Oji Umozurike, \textit{Ibid}. See also, J. Oloka-Onyango, \textit{supra}, note 3 at 3 (noting how Mobutu’s corruption and vice directly impinged upon the people of Zaire’s economic and social human rights to adequate health care, sufficient food and appropriate shelter).}

Arguably, official corruption impacted negatively on the quality of leadership. In most cases, it created the impression that there is no difference between state and private funds of the rulers and that politics is a winner-take-all affair with respect not only to patronage and the prerogatives of office but also to the nation’s wealth and resources.\footnote{Segun Odunuga, “Achieving Good Governance in Post-Conflict Situations: The Dialectic Between Conflict and Good Governance” in Adebayo Adedeji, \textit{supra}, note 17, 41 at 44.} Notably, it attracts the wrong kinds of persons to leadership and raises the political stakes as politics becomes a ‘do or die’ affair. Also, it engenders nepotism in addition to being a breeding ground for ethnic animosities, hatred and conflicts. As Frederick Forsyth pointedly observed, “political power means success and prosperity, not only for the man who holds it but for his family, his birth place and even his whole region. As a result, there are many who will go to any length to get it and having got it, will surpass themselves in order to keep it.”\footnote{Frederick Forsyth, \textit{The Making of an African Legend: The Biafra Story} (London: Penguin Books, 1977) at 25.}

In the pursuit of selfishly corrupt interest, economically oriented proactive policies necessary for economic growth and social well-being are sacrificed for other policies that guarantee more money to the political leadership of the day and its lackeys. The interests of the people are pursued only to the extent that they coincide with the selfish interest of those in power. In such an atmosphere of endemic corruption, it becomes difficult, if not
impossible to put in place or maintain the facilities necessary for the enforcement and realization of any human rights, particularly economic, social and cultural rights. There is no doubt that widespread corruption in Africa or elsewhere equally affects the enjoyment of civil and political rights since those emboldened enough to call for accountability and transparency in the conduct of public affairs are regarded as ‘security risks,’ or as enemies of the ‘people,’ and even imprisoned for inciting (or attempting to incite) the people against the government.79

It must be stressed that the unbridled debauchery of most African rulers would not have been such a huge success without outside support and interference. As the Igbos of Nigeria say, when an individual is dancing alone at the centre of the road, his/her drummers must be somewhere in the bush. One must, therefore, not fail to highlight the influence of external forces in propping up most of the debauched rulers across the African continent. In this regard, the era of the Cold War was notable for the nihilistic competition between the United States and the Soviet Union to outdo each other in keeping the most corrupt African rulers in power. As Adebayo Adedeji succinctly stated:

The exigencies of the Cold War Era did compel the two competing major powers (USA and USSR) to support [corrupt and] repressive regimes and to prop them up in power so that the opposite side of the East-West divide would not take control. The American support for Siad Barre to continue to repress and suppress the Somalis sowed the seed of the country’s tragic disintegration. Similarly, the Soviet support[ed] Mengistu Haile Mariam to decimate the

Ethiopian people.... These two are unfortunate examples of the havoc of the Cold War.\textsuperscript{80}

In addition to propping up corrupt rulers, the Cold War also ensured the continued influx of external loans to many African rulers despite their known distinction in mismanagement. As a result, many African states incurred huge debts, which were more or less pay offs to maintain ideological loyalty and did not in any way contribute to economic development of the people. However, the servicing of these spurious debts, as the next section shows, is one of the greatest hindrances to the realization of economic, social and cultural rights Africa.

6.4.4. Debt and Structural Adjustment

Many African states, like other developing countries, are carrying a heavy debt burden which stymies any meaningful economic development. Debt and debt-servicing have progressively impoverished, and are still impoverishing, many African states and peoples, systematically preventing them from recording any significant achievement in the enforcement, or exercise and enjoyment, of their basic rights.\textsuperscript{81} According to the 1992 UNDP \textit{Human Development Report} "[i]n 1983-89, rich creditors received a staggering 242 billion

\textsuperscript{80}Adebayo Adedeji, \textit{supra}, note 62 at 9-10. One other example is worth noting. In spite of the well known graft of Mobutu Sese Sekou wa Zabanga, believed to have amassed a fortune far in excess of his country's national debt, several attempts made to overthrow him were scuttled by the United States.

\textsuperscript{81}See El Hadji Guisse, \textit{supra}, note 3 at para. 54.
[US dollars] in net transfers on long term lending from indebted developing countries.\footnote{United Nations Development Programme, \textit{Human Development Report} (New York: Oxford University Press, 1992) at 45. The report also noted yearly debt-related net transfers of $50 billion from developing to industrial countries up to the year of the report (1992). See the overview of the report, available at \texttt{http://www.undp.org/hdrole920ver.htm}. (Visited 4: 40 PM, June 19, 2000).} The greatest impact of this transfer, according to George Kent, "is in sub-Saharan Africa where the debt load is approximately equal to the region's cumulative gross national product."\footnote{George Kent, "Food Security" \textit{supra}, note 55. Curiously, in spite of several years of debt servicing, these loans, some of which are of doubtful validity, are not about to be paid off. On the contrary, the debt increases as it is repaid. Even new loans obtained in the name of development end up being used to service existing debts. Painfully, most of the loans have been, of doubtful validity and for questionable purposes. In some cases, the loans are "misappropriated by those responsible for managing them, to be redeposited in the banks of the creditor countries [often to their knowledge and condonation] or reinvested in companies in those same countries." See El Hadji Guisse, \textit{supra}, note 3 at para 57. These reprehensible acts are partly, if not largely, responsible for the debt crisis currently facing Africa.}\footnote{Nigeria currently spends US$3.5 billion (more than 40 percent of its 2000 budget) annually to service its debt burden of about US$33 billion. See Laolu Akande, "Ahead Visit, Clinton Begins Debt-Pardon Crusade for Nigeria" \textit{The Guardian}, Thursday, July 13, 2000, available online at \texttt{http://www.ngrguardiannews.com/news2/nn791404.html} (Accessed 11: 32 AM, July 13, 2000).} This situation has led the states involved into debt crises, necessitating the current seemingly inconclusive moves for alleviation or renegotiation of their debts. Servicing these debts,\footnote{El Hadji Guisse, \textit{Ibid.} at para 57.} some of which are "merely a series of fictitious operations bringing no benefit to the populations concerned, which they are nevertheless called on to repay,"\footnote{See Yemi Osinbajo \& Olukonyisola Ajayi, "Human Rights and Economic Development in Developing Countries" (1994) 28 \textit{International Lawyer} 727 at 731.} greatly incapacitate the states involved. They also undermine the prospects of the affected states to provide even the most basic of the facilities necessary for the fulfilment of their economic, social and cultural rights obligations. Apart from the virtual drying up of foreign capital and reserves,\footnote{See Yemi Osinbajo \& Olukonyisola Ajayi, "Human Rights and Economic Development in Developing Countries" (1994) 28 \textit{International Lawyer} 727 at 731.} debt servicing has had "especially negative impacts on the poor and their children, obliging them to do without food subsidies and health and other services, and often pressing them into
exploitative working conditions." The devastating impact of debt servicing on the poor is not mitigated by international development assistance, because, as George Kent persuasively argues, "[t]he amount of money going from the [S]outh to the [N]orth for debt servicing greatly exceeds the current amounts of official development assistance going from the [N]orth to the [S]outh. Moreover, official development aid is likely to benefit the rich and the middle class than the poor... [since it] does not concentrate on the most needy either within countries or among countries."98

In response to the economic pressures resulting from the heavy debt burden and the virtual drying up of foreign reserves, many African states adopted the pernicious structural adjustment policies99 of the International Monetary Fund (IMF) and World Bank which appear to have worsened their economic circumstances.90 As part of the policy adjustments, these countries have had to reduce their imports, devalue their currencies, deregulate capital movements, privatise State public utilities, dismantle social programmes by cutting

97George Kent, “Food Security” supra, note 55.

98Ibid.

99Structural adjustment has been defined as “reforms of policies and institutions covering micro-economic (such as taxes and tariffs), macro-economic (fiscal policy) and institutional interventions - these are changes designed to improve resource allocation, increase economic efficiency, expand growth potential and increase resilience to shocks.” See World Bank, Structural Adjustment and Poverty: A Conceptual, Empirical and Policy Framework, February, 1990 at 22, cited in Sigrun I. Skogly, “Adjustment and Development” supra, note 35 at 755. According to Skogly, “[t]he premise of structural adjustment conditions is that certain economic factors should be altered in a given country to ensure better economic performance with a view to repay debt and debt servicing, to achieve a better balance of payment situation, and to achieve a healthier economy in general.” Ibid at 756. See also, Caroline Thomas, “International Financial Institutions and Social and Economic Human Rights: An Exploration” in Tony Evans, supra, note 2, 161 at 167 (writes that “[t]here was an unspoken agreement that adjustment and debt repayment would be rewarded by inflows of new finance and investment”). However, instead of leading to a healthier economy, the adjustments policies of the IMF and World Bank have merely ushered in a comatose economy which greatly depends on the life support of trickling international aid.

90See Yemi Osinbajo & Olukonyisola Ajayi, supra, note 86 at 731.
government expenditures on social services, such as health care, education and removal of subsidies on market staples, and provide "national treatment" to foreign investors.\textsuperscript{91} These provisions," according to Chossudovsky, "are often coupled with a ‘bankruptcy programme’ under the supervision of the World Bank with a view to ‘triggering the liquidation of competing national enterprises.”\textsuperscript{92} Oloka-Onyango perspicaciously put the effects of structural adjustment on the economic, social and cultural rights in perspective as follows:

In more specific ways, structural adjustment affects working conditions and the right to work through retrenchment as a result of deindigenization, privatization and the liberalization of trade controls. The extent of available health care and its costs is severely affected by the introduction (as in Zimbabwe) of user fees, which is an additional burden on people who are already impoverished and exist largely in a subsistence economy. The nature of educational services and their accessibility is affected by the increase in fees for tuition.... Finally, the ability to provide food and combat poverty is affected by the overall concentration on export crops and removal of subsidies for market staples.\textsuperscript{93}

In addition to the austerity measures which unleash sweeping impoverishment and pauperization on the majority of the people, Osinbajo and Ajayi have also echoed the “deleterious consequences” of structural adjustment for the majority of the countries leading to, "a severe deterioration in the abilities of these countries to uphold the economic and cultural rights of their people."

\begin{itemize}
\item \textsuperscript{91}See George Kent, "Food Security" supra, note 55. See also Michel Chossudovsky, "World Trade Organisation (WTO): An Illegal Organisation that Violates the Universal Declaration of Human Rights" available online at \texttt{<http://www.derechos.org/nizkot/doc/articulos/chossudovskye.html>}. (Visited 4:17 PM, January 31, 2000).
\item \textsuperscript{92}Michel Chossudovsky, \textit{Ibid}.
\item \textsuperscript{93}J. Oloka-Onyango, \textit{supra}, note 5 at 27 (citations omitted). Zimbabwe used to provide free education for all until adherence to IMF structural adjustment programme brought it to an end. See Maria Nzomo, "The Political Economy of the African Crisis: Gender Impacts and Responses" (1996) \textit{51 Intl. J. 78}; Bharati Sadasivam, “The Impact of Structural Adjustment on Women: A Governance and Human Rights Agenda” (1997) \textit{19 Human Rights Quarterly} 630 at 641.
\end{itemize}
social rights of their peoples.94 Besides,

[1]he fundamental objectives of providing education, health care, housing, and domestic control of their economies have been abandoned, since SAPs by definition result in cut backs in funding of such programs. Privatization and de-indigenization, especially when carried in conjunction with debt-equity swaps, have created the potential for the loss of indigenous control of critical areas of the economy. Faced with standards of living well below poverty levels, the citizenry has usually responded with strikes, rioting, and other forms of dissent, which have almost always been met with suppression by force or draconian legislation...95

The obvious impact of structural adjustment programmes is to reduce the capacity of the states to meet their human rights obligations.96 Evidently, in Africa and elsewhere, structural adjustment programmes adversely affect not only economic, social and cultural rights, but also civil and political rights.97 Even though the impression is usually created that

94 Yemi Osinbajo & Olukonyisola Ajayi, supra, note 86 at 731.


97 See Lawrence Tshuma, Ibid at 230. See also, Margaret Conklin & Daphne Davidson, “The I.M.F. and Economic and Social Human Rights: A Case Study of Argentina, 1958-1985” (1986) 8 Human Rights Quarterly 227-269, for exploration of the violations of all human rights following the adoption of structural adjustment policies in Argentina.
the adoption of the structural adjustment policies will improve the economic fortunes of the affected states and subsequently reduce their debt burdens, the adjustment policies have merely worsened the state of economic ruin of the states, leading a UN Sub-Commission on Human Rights Special Rapporteur to conclude that the adjustment policies “are actually means designed to recover the sums owed to the wealthy countries without any concern for the debtor countries.”

Tragically, the debts have increased exponentially instead of decreasing, thereby making the attempt at debt control and recovery such an undisguised “failure as blatant as it is significant.”

With the track record of inflicting enormous inhuman and counter-productive suffering on the populations of the affected countries, structural adjustment sustains an atmosphere of deprivation of economic, social and cultural rights by ensuring that none of these rights are observed or protected by the state. Structural adjustment measures are externally induced by actors who are not accountable to the suffering and pulverized people. Despite the astounding failures of the adjustment policies, not to repeat the

98 El Hadji Guisse, supra, note 3 at para. 66.


101 The economic and technical reasons usually advanced by the IMF and the World Bank are fraught with political implications even though the initiators of such decisions (the IMF and the World Bank) are not subject to the peoples’ political control. Such actions render the exercise of sovereignty meaningless, as the people are controlled and manipulated from remote centres of authority beyond their immediate borders and
dehumanization of the populations, many African states are still being goaded into adopting them, as a precondition for rescheduling or cancelling their debts.\textsuperscript{102} One is, therefore, tempted to agree with the suggestion that "perpetuating the debt of the developing countries is the result of a deliberate and political decision designed solely to frustrate any attempt by the developing countries and their peoples to achieve economic and social progress."\textsuperscript{103} The fact that "countries that oppose the measures suggested by the institutions (themselves agents of neo-colonial interests) do not receive any financial assistance"\textsuperscript{104} amply lends credence to the suggestion.

Just as debts and structural adjustments are vital instruments sustaining the continued deprivation of economic, social and cultural rights of the people, there are growing fears that globalization will do more in further exacerbating human suffering and erosion of socioeconomic rights.\textsuperscript{105} Be that as it may, African states' relative achievement in the

\footnotesize{\textsuperscript{102}For instance, the United States, through its Treasury Secretary Larry Summers, recently announced that it would support Nigeria's bid for debt rescheduling only if Nigeria accepts the structural adjustment policies of the IMF and "manages to keep up with the terms of [the] programme with the International Monetary Fund." See Stephen Fidler, "Nigeria Wins US Debt Backing" \textit{Financial Times}, June 12, 2000, at \url{http://news.ft.com/ft/gx.cgi/ftc?pagenme= Vie & ~ &= Article&cid= FT3DVHNGE9C&live=true&useoverridetemplate=IXLZHNNP94C} (Last Updated June 12, 2000; Visited June 12, 2000). See also, Arthur Obayuwana, "U.S. Links Support for Debt Relief to IMF Conditions" \textit{The Guardian}, Tuesday, June 13, 2000, online at \url{http://www.ngguardiannews.com/nn788402.html}. (Visited June 13, 2000).

\textsuperscript{103}El Hadji Guisse, \textit{supra}, note 3 at para. 59.

\textsuperscript{104}Sigrun I. Skogly, \textit{supra}, note 35 at 756.

enforcement of civil and political rights shows that where the international will does exist greater achievements will be made in the enforcement of economic, social and cultural rights.

6.4.5. International Apathy / Hostility

One of the greatest impediments to the enforcement and realization of economic, social and cultural rights in Africa is the indifference, and even hostility, of the international community towards enforceable economic, social and cultural rights. This international lethargy dates back to the period before the adoption of the two international covenants, and eventually saw to the adoption of two covenants instead of one. Whatever lip service that was paid to the notion of economic, social and cultural rights during the Cold War eventually snowballed into indifference and apparent hostility since the end of the Cold War. Following on the heels of the demise of the Soviet Union, the end of Cold War signalled the end of an era of active support to the cause of economic, social and cultural rights. It also deprived economic, social and cultural rights at the international stage of the support of a superpower. More or less, the end of the Cold War and the demise of the Soviet Union seem to have discredited the ideology that emphasizes economic, social and cultural rights. Even


106But see, George William Mugwanya, supra, note 64 at 38 (celebrating the end of cold war as having liberated international efforts to promote human rights from ideological conflicts and political sloganeering). Such euphoric celebrations are rather uncalled for. The end of cold war merely shifted ideological battle fronts, making it more covert and dangerous. To the detriment of economic, social and cultural rights, it enthroned a mentality of ideological victors and vanquished, making the ‘victors’ more entrenched in their ways which are detrimental to the enforcement of economic, social and cultural rights.
without expressly saying so, it was regarded as a remarkable triumph for the liberal ideology that emphasises civil and political rights to the exclusion of economic, social and cultural rights.

The ‘victory’ of liberal ideology following the end of the Cold War brought about the current development orthodoxy,\(^\text{107}\) based on economic and political liberalism, which is being sold as the best method for maximizing global welfare.\(^\text{108}\) Yet, as Caroline Thomas insightfully points out, “the evidence of such a claim is lacking, resting largely on the perceived absence of alternatives. [\textit{Per contra,}] evidence against seems to be mounting.”\(^\text{109}\)

Even the supporters of the neoliberal market economics have had to admit its abysmal failure to assist the poor and improve the realization of economic, social and cultural rights. Rather, they have questioned its potential in this regard.\(^\text{110}\) Hence, despite all the praises for the market system of wealth creation as the most effective that humanity has yet devised,\(^\text{111}\) “it remains an imperfect force since two-thirds of the world’s population have gained little or no substantive advantage from rapid economic growth. [Even] in the developed world, the lowest quartile has witnessed trickle-up rather than trickle-down.”\(^\text{112}\) It is therefore doubtful

\(^{107}\)Caroline Thomas, \textit{supra}, note 89 at 164.

\(^{108}\)\textit{Ibid.}


\(^{111}\)The theory has been that in a liberal market economy, the rich would invest their money and create new jobs. As a result, wealth would trickle down and everyone would benefit. The enjoyment of economic, social and cultural rights would be, therefore, enhanced and ensured for all. However, its major achievement remains the continued sacrifice of distributional equity on the altar of rapid capital accumulation.

\(^{112}\)Caroline Thomas, \textit{supra}, note 89 at 165 (notes and citations omitted).
whether the market economy is really capable of delivering economic and social rights for the majority of humanity.\textsuperscript{113}

In view of the remarkable role played by external pressures in the establishment of the \textit{African Charter on Human and Peoples' Rights},\textsuperscript{114} one cannot underestimate the impact of such pressures on the overall improvement of the human rights situation in Africa. While this has so far worked very well in ensuring a somewhat moderate level of compliance with regard to civil and political rights, including entrenching those rights as enforceable rights in the various constitutions, such outside pressures have been lacking with regard to economic, social and cultural rights. Even transnational human rights organisations such as \textit{Human Rights Watch},\textsuperscript{115} \textit{Amnesty International},\textsuperscript{116} \textit{Interights} and \textit{Article 19},\textsuperscript{117} to mention a few, have not risen to the occasion to defend or to report the massive violations of economic, social and cultural rights.

\begin{enumerate}
\item\textsuperscript{113} The \textit{UNDP Human Development Report 1996} shows quite clearly that the gap between the rich and the poor is widening within states and between them. See generally, \textit{UNDP, Human Development Report, 1996} (Oxford: Oxford University Press, 1996).
\item\textsuperscript{114} See supra, Chapter one at 24-25.
\item\textsuperscript{115} \textit{Human Rights Watch} is transnational NGO that conducts regular, systematic investigations of human Rights abuses in some seventy countries around the world. Their goal is to hold governments accountable for violating the rights of their people. Human Rights Watch began in 1978 with the founding of its Helsinki division. Presently, it includes five divisions covering Africa, the Americas, Asia, the Middle East, as well as the signatories of the Helsinki accords. See Human Rights Watch, \textit{Human Rights Watch World Report 1998} (New York: Human Rights Watch, 1997) at vii.
\item\textsuperscript{116} Founded in 1961, \textit{Amnesty International} is a 'worldwide voluntary activist movement working towards the observance of all human rights as enshrined in the Universal Declaration of Human Rights and other international standards.' See \textit{Amnesty International, Amnesty International Report 1999} (London: Amnesty International Publications, 1999) at ii. There are more than 4,300 Amnesty International groups in more than 105 countries and territories in Africa, the Americas, Asia, Europe and the Middle East. For the history of the founding of Amnesty International see Marie Staunton et al., \textit{The Amnesty International Handbook} (Claremont: Hunter House, 1991) at 5-8.
\item\textsuperscript{117} \textit{Interights} (International Centre for the Legal Protection of Human Rights) and \textit{Article 19} are London based international NGOs.
\end{enumerate}
social and cultural rights. Thus, while there is always a hue and cry whenever there are perceived violations of civil and political rights, the impression is conveyed (albeit by silence) that in the field of economic, social and cultural rights, all is fair - a situation that has encouraged impunity and emboldened perpetrators. Without the international community raising an eyebrow in the face of massive denials of socioeconomic rights, the governments of several African states continue to disregard and deny the enforcement and justiciability of these rights, preferring to misuse or squander resources (some even engaging in fratricidal and senseless wars) while putting up a facile and spurious defence of 'lack of development.'

There is no gainsaying the fact that the modest efforts of some African states and governments, and indeed most other states in the international community, with respect to the enforcement of civil and political rights would not have come about without the pressures of the international community, - states and civil society. Similarly, it is arguable that commendable efforts would have been made in the enforcement and realisation of economic, social and cultural rights if there had been pressures commensurate with that exacted in relation to civil and political rights violations. Unfortunately, economic, social and cultural rights remain the province of unchecked impunity where almost every state is tainted and without any moral high ground from which to criticize others.

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118 African and African based NGOs largely have been as unconcerned as international human rights organisations in this regard. This is unfortunate for as Scoble has rightly observed, while underscoring the importance of human rights NGOs, human rights are not "given"; they are "taken" through struggle against the political elite. See Harry M. Scoble, "Human Rights Non-Governmental Organisations in Black Africa: Their Problems and Prospects in the Wake of the Banjul Charter" in Claude E. Welch & Ronald I. Meltzer, Human Rights and Development in Africa (Albany: State University of New York Press, 1984) at 177.

119 In spite of all pretensions, human rights and law, especially international law, remain what a community, or its powerful members, say they are. See John O'Manique, "Development, Human Rights and Law" (1992) Human Rights Quarterly 383 at 405-406.
Apart from widespread international apathy, there appears to be a deliberate effort of industrialized countries to undermine or scuttle the efforts of developing countries, notably African states, towards the implementation, enforcement, and realisation of economic, social and cultural rights. The aversion of some Western states to enforceable economic, social and cultural rights,\(^{120}\) plays itself out fully in their various tactics to undermine the efforts of developing (African) states. This has been achieved through direct involvement, or by proxy, using as agents, multinational corporations and/or international financial institutions, and lately the World Trade Organization (WTO).\(^{121}\) In his ‘Final Report’ on the question of impunity of perpetrators of human rights violations (economic, social and cultural rights), UN Commission on Human Rights Special Rapporteur, Mr. El Hadji Guisse noted:

During the discussions on the methods of implementing economic, social and cultural rights, ... the representatives of

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\(^{120}\) According to Philip Alston, the United States has through the Regan and Bush administrations rejected the notion of economic, social and cultural rights. See Philip Alston, “US Ratification of the Covenant on Economic, Social and Cultural Rights: The Need for an Entirely New Strategy” (1990) 84 American J. Intl. L. 365 [hereinafter “U.S. Ratification”].

\(^{121}\) Notable tactics usually adopted in this regard include, perpetuation of indebtedness and initiation of catastrophic economic policies (see El Hadji Guisse, supra, note 3 at para 60; Rhoda E. Howard, “Civil Conflict in Sub-Saharan Africa: Internally Generated Causes” (1996) 51 Intl. J. 26 at 32; Anne Orford, supra, note 101 at 464-475); pressuring the various countries to open up their borders to permit the dumping of products which end up stifling the local industries (see George Kent, supra, note 51); toppling regimes that are opposed to their pernicious antics (see Ariande K. Sacharoff, “Multinationals in Host Countries: Can They Be Held Accountable for Human Rights Violations?” (1998) 23 Brook. J. Intl. L. 928-964, for accounts of an instance where a regime was toppled for insisting on improving the lots of the people); and exporting harmful and hazardous waste which imperil the health of the recipient states, while at the same time goading them to cut back on health care (See James H. Colopy, “Poisoning the Developing World; The Exportation of Unregistered and Severely Restricted Pesticides from the United States” (1995) 13 UCLA J. Envtl. L. & Policy 167 at 171-181). The current United States Treasury Secretary, as World Bank Chief Economist, in an infamous internal World Bank memo, wrote:

I think the economic logic behind dumping a load of toxic waste in the lowest wage country is impeccable and we should face up to that.... I've always thought that under-populated countries in Africa are vastly under-polluted; their air quality is probably vastly inefficiently [high] compared to Los Angeles or Mexico City.

See, Let Them Eat Pollution, Economist (London), February 8, 1992 at 66. See also, Pollution and the Poor, Economist (London), February 15, 1992 at 18.
several developing countries expressed the fear that the inevitably slow progress in realizing those rights might be taken for unwillingness on their part. *They had not reckoned with the developed countries' determination to undermine any possible basis for a truly fair world economic order where economic, social and cultural rights would have a fair chance of being realized.* It was soon observed afterwards that the fears of the former and the hypocrisy of the latter very rapidly became a source of massive grave violations of economic, social and cultural rights.  

The inescapable conclusion, therefore, is that economic, social and cultural rights would have fared better in many African states but for the hostile indifference, if not naked hostility, of some 'god-father' 'developed' states who would neither allow the enforcement of these rights, nor permit others to do so. Even without outwardly thwarting the efforts of developing states, the developed states' insidious insistence on non-enforcement of economic, social and cultural rights, remains a disincentive to the enforcement of these rights in Africa. Given the 'resource intensive' mythology surrounding economic, social and cultural rights, developing states are cowed to walk on territories where developed states fear to tread. Examples of rich states without enforceable economic, social and cultural rights not only discourage less endowed states, but provide sufficient justification for others committed to non-enforcement.

When the foregoing is considered along with the problems earlier discussed, it becomes apparent that it may still be some time before economic, social and cultural rights are directly enforced in many African states. While direct judicial enforcement of all rights should be the ultimate goal, other alternative, but equally effective, means or approaches to

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enforcement should be explored. The essence of this is to give reprieve to the victims of economic, social and cultural rights, so as to put a cap on the gaping hole of prevailing impunity. At least, that may serve to arrest some of the disturbing implications of neglecting enforcement.

6.5. CONSEQUENCES OF CONTINUED MARGINALIZATION OF ECONOMIC, SOCIAL AND CULTURAL RIGHTS

Certain consequences are discernible from the continued marginalization of the enforcement of economic, social and cultural rights. In the first instance, not many can dispute the uselessness of a right without a remedy. *Ubi jus ibi remedium* is a hallowed legal principle. Thus, a right existing without a remedy is rather contradictory in terms and serves no useful purpose. As Henry Shue succinctly observed, “to enjoy something only at the discretion of someone else, especially someone powerful enough to deprive you of it at will, is precisely not to enjoy a *right* to it.”¹²² The notion of a non-enforceable right is nothing but a negation of the very concept of right.¹²⁴ Continued marginalization of the enforcement of economic, social and cultural rights, especially in domestic jurisdictions, not only denies their character as rights, but also dresses them in the deceptive garb of luxuries, which they certainly are not. A further implication is that it is symbolic and symptomatic of the


continued marginalization, and relegation to second class citizens, of those most dependent on such rights for basic survival.125

For a region that has staked its integrity on the adoption of a document which gives equal prominence to all aspects of human rights, the continued adoption of a contradictory posture at the domestic level is nothing but an exercise in self ridicule. Such a position remains a source of opprobrium both at home and abroad. It also casts the Charter in a bad light for proclaiming that which it cannot guarantee. As such, the African claim (that the satisfaction of economic, social and cultural rights is the precondition for the enjoyment of civil and political rights) in international fora rings hollow and remains exposed for what it is: a mere apologism for insensate and inexcusable violations.

Besides, the continued marginalization of economic, social and cultural rights deepens the collective feeling of betrayal of the African hoi polloi given the near total erosion of their traditional system by the exigencies of the modern state which do not offer a suitable replacement. This feeling of betrayal manifests itself in various forms, including lack of faith in the process of governance by the majority of the people. With the virtual destabilisation of the traditional system which ensured the welfare of every member of the community,126 the modern state’s failure to adequately ensure the socioeconomic well-being of the people portray it in a bad light, as a remote centre of power that has no modicum of relevance to the lives of the people. Where governance and its processes do not impact positively on the

125See Sigun I. Skogly, “Adjustment and Development,” supra, note 35 at 770 (discussing the advantages of effective recognition of all human rights, especially economic, social and cultural rights).

126See supra, Chapter Three on the protection of economic, social and cultural rights in traditional Africa.
masses, they see governments more as the problem than as a solution.

Accordingly, one of the most serious consequences of the continued marginalization of economic, social and cultural rights is the prolongation, if not perpetuation, of the existing crisis of state and governmental legitimacy in Africa. It is a trite fact that people hold minimum expectations of their state and government. The expectations are "the irreducible duties of any ruling apparatus to its subjects, such that a failure to discharge these duties vitiates the legitimacy of the regime's assertion of authority." When such expectations are not met, it fuels the general level of disaffection and dissatisfaction that may lead to the fall of the government, either by constitutional or extra-constitutional means. As Jack Donnelly persuasively argues,

"[t]he link between a regime's ability to foster development (prosperity) and the public's perception of the regime's legitimacy is close to a universal, cross-cultural political law. Whatever a ruling regime's sociological and ideological bases, its sustained or severe inability to deliver prosperity, however that may be understood locally, typically leads to a serious political challenge."\[128\]

Donnelly's argument, while valid for all societies, remains particularly apt for Africa. More than anything else, the inability to fulfill the basic socioeconomic rights of the people, has been a recurring reason advanced by African military political adventurers for toppling existing governments. The noise of the jubilating masses hardly dies down before the socioeconomic rights of the people are subjected to the same, if not a more heinous fate. As


has been argued earlier, apart from the ordinary removal of an incumbent government, the
continued deprivation of economic, social and cultural rights sometimes leads to popular
insurrections, and civil war.\footnote{In its 1979-80 annual report, the Inter-American Commission on Human Rights noted the existence of an "organic relationship between the violation of rights to physical security on the one hand, and neglect of economic and social rights ... on the other." It further noted that "neglect of economic and social rights, especially when political participation has been suppressed, produces the kind of social polarization that leads to acts of terrorism by and against the government" See Inter-American Commission on Human Rights, \textit{Annual Report}, 1979-80, at 151. The Commission reiterated this point in its 1991 Annual Report, at 305, where it commented that "it is evident that in many cases poverty is a wellspring of political and social conflict." See also, Anne Orford, \textit{supra}, note 102 at 451-455 (noting the role of economic crisis in the loss of legitimacy of the Yugoslav federal government which snowballed into the fratricidal civil conflict). But see, Wesley T. Milner, Steven C. Poe \& David Leblang, \textit{supra}, note 22 at 412 (arguing that "people at the lowest level of needs fulfilment would have neither the wherewithal nor the energy to pose threats to a regime, no matter how displeased they were with the status quo").} In such situations, existing governments are perceived as
having outlived their usefulness as a result of the deterioration of the basic socioeconomic
rights of the people.\footnote{Most conflicts in Africa have their roots in the deterioration of the basic socioeconomic rights of the people. Such conditions, it has been observed, make the deprived a willing tool in the hands of some self-serving politicians and elites. Many a time, in order to attract widespread support, appeals are made using the abject conditions of the people which may be couched in ethnic or regional terms. The civil wars in Liberia, Sierra Leone, and to an extent Angola owe their origin, and or continuation to this. See generally, Adebayo Adedeji, \textit{supra}, note 18. See also, Okwudibia Nnoli, (ed.), \textit{Ethnic Conflicts in Africa} (Nottingham: CODESRIA, 1998).} As in the case of Somalia, crisis generated by an attempt to oust an
incumbent government threatens the very foundations of the state and might lead to its
disintegration.

In the ensuing crisis of legitimacy, whether of government or state, political stability
is sacrificed. Without stability, maintaining law and order is well nigh impossible, and as
such, civil and political rights will be cast overboard, especially where people are displaced
as refugees. Economic activities are also truncated, thus imperiling all development efforts.

Even in the absence of a full blown civil conflagration, the very situation of want and
deprivation creates an atmosphere that is not conducive to the enjoyment of civil and political

\footnote{As in the case of Somalia, crisis generated by an attempt to oust an incumbent government threatens the very foundations of the state and might lead to its disintegration.}
rights, or any other rights for that matter. As Donnelly rightly observed, "those living on the economic edge or with no realistic prospect of a better life for their children are much less likely to be willing to accommodate the interests and rights of others."

Thus, in the absence of measures that are likely to ensure the realization of all rights, protecting only civil and political rights without economic, social and cultural rights would be tantamount to making ropes out of sand.

6.6. STRATEGIZING THE WAY FORWARD

6.6.1. Rejection of the Western Model

Substantial progress towards the enforcement of economic, social and cultural rights in Africa may continue to elude African states unless there is a committed rejection of the Western paradigm which sees civil and political rights as the only rights worthy of enforcement. While the West can afford to maintain such a model given their attainment of an appreciable standard of living that in turn provides the enabling environment for the enjoyment of civil and political rights, African states cannot afford it without facing widespread civil and social strife. Already, by adopting a Charter that departed markedly from the existing European Convention and Inter-American Convention, African states will be taken to have recognised the inadequacies of the two systems for their purposes. A rejection of the Western model, therefore, merely requires practical commitment to the noble intentions expressed in the Charter.

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131 Jack Donnelly, *supra*, note 128 at 610.
Such a practical commitment does not necessarily entail guaranteeing the maximum enjoyment of all the Charter's provisions on economic, social and cultural rights. Rather, it advocates the necessity of judicial, legislative and executive actions being taken to ensure equal enforcement of all rights - an equal enforcement that ensures the minimum enjoyment of all human rights. It is more or less a call to adopt the South African approach without its deficiencies. To achieve this undoubtedly requires considerable political commitment and will, the lack of which have remained the bane of economic, social and cultural rights.

In the absence of a legislative action permitting the enforcement of economic, social and cultural rights, national courts, the African Court on Human Rights, national human rights commissions, (where they exist), and the African Commission should exploit alternative ways or approaches to give effect to the economic, social and cultural rights. Some viable alternative approaches include, but are not limited to, the ones discussed below.

6.6.2. Alternative Enforcement Approach

Indubitably, the best way to effectuate any human rights provision is by subjecting it to direct judicial scrutiny. However, for economic, social and cultural rights, such a procedure is lacking in many African States. Given the necessity of ensuring effective protection of human dignity (which presupposes the enjoyment and protection of all rights

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132 While the importance of judicial remedies as the principal guarantees of human rights may not be questioned, it should be noted that it is not without its limits. Sometimes, given the costly, time consuming and procedure laden nature, individuals may prefer other administrative means of settling their disputes. There is, in fact, growing evidence of individuals preferring non-judicial remedies. See Roman Wieruszewski, supra, note 29 at 279. To this end, approaches to be discussed below are amenable to both judicial, quasi-judicial and administrative measures.
without discrimination), alternative means ought to be utilized to give effect to economic, social and cultural rights provisions. In the absence of direct judicial enforcement, other (judicial and administrative) means of giving effect to the economic, social and cultural rights provisions of the Charter are hereunder discussed.

6.6.2.1. Integrated / Concerted Approach

The economic realities in Africa today clearly demonstrate that the enjoyment of civil and political rights cannot be divorced from economic, social and cultural rights given the interrelatedness, interconnectedness and indivisibility of these rights in real life. The fact that these economic, social and cultural rights are regarded as mere aspirations in domestic constitutions and largely ignored at the regional level means that there is as yet no hope for their direct judicial enforcement as independent rights, except in South Africa.

It is the opinion of the present writer that economic, social and cultural rights can and should be enforced if the domestic courts and the African Court of Human Rights (when it becomes operational) as well as the African Commission, and national human rights commissions, where they exist, can give teeth to them through a concerted and integrated approach to human rights enforcement in Africa. This presupposes a recognition of the

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133By the end of 1999, fifteen African countries had established national human rights commissions. They include, Benin, Cameroon, Chad, Ghana, Kenya, Liberia, Malawi, Nigeria, Rwanda, Senegal, South Africa, Sudan, Togo, Uganda and Zambia. Plans are underway to establish such commissions in Ethiopia and Tanzania. Many of the commissions have remained an administrative outpost for the government of the day and have proved to be a disappointment. Many have very limited and flawed mandates with limited ability to investigate, monitor or make public statements. However, some, like the Ghanaian, Senegalese, South African, and Ugandan commissions appear very promising in their activities so far. For an account of the activities of some of these commissions, see Human Rights Watch, Human Rights Watch World Report 1999 at 12-13.
indivisibility of rights as enshrined in the African Charter and as obtained in traditional Africa. The essence of this is underscored by the following statement of C.A. Oputa, retired Justice of the Nigerian Supreme Court:

The fundamental rights provisions of our Constitution (dealing with civil and political rights) cannot be appreciated let alone enjoyed in a state of utter illiteracy and abject poverty. To attain true liberty and freedom the average [citizen] must need to have equal access to direct housing and health services. If these opportunities are not equal and, or equally accessible, then talk of liberty, of equality or even justice will be a far cry....

The concerted and integrated approach envisaged here is one that seeks to enforce economic, social and cultural rights through the much recognized civil and political rights. Using this method, economic, social and cultural rights are ensured, developed and enforced through case law and procedures relative to civil and political rights. This is a more or less functional or interpretative approach, and is in accord with the practice of the European Court of Human Rights. As explained earlier (in Chapter Two), under the European system of human rights, States Parties’ obligations with respect to socioeconomic rights are, in the words of Matti Pellonpaa, “of a somewhat less straightforward nature, and the international supervision far less effective....” In the absence of judicial enforcement for rights provided under the European Social Charter comparable to rights provided under the European

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Convention on Human Rights, the European Court assumed a dynamic mode of interpretation that seeks to effectuate the socioeconomic rights provided under the Social Charter.

Consequently, in Johana Airey v. The Republic of Ireland\textsuperscript{137} the European Court of Human Rights noted that 'there is no water-tight division' between the classical civil liberties covered by the European Convention, on the one hand, and socioeconomic rights covered by the Social Charter. In emphasizing the right to free legal assistance as a social dimension of the right to fair trial (Article 6), the Court said:

Whilst the Convention [the European Convention on Human Rights] sets forth what are essentially civil and political rights, many of them have implications of a social or economic nature. The Court therefore considers, like the Commission, that the mere fact that an interpretation of the Convention may extend into the sphere of social and economic rights should not be a decisive factor against such an interpretation; there is no water-tight division separating that sphere from the field of the Convention.\textsuperscript{138}

In that case the applicant's effective access to court was rendered impossible in breach of Article 6 of the European Convention. Ms. Airey wanted a legal separation from her husband but could not afford a lawyer to represent her in the complicated legal proceedings before the High Court. Since access to court could not be secured by simpler proceedings, a right to demand from the state a certain kind of service was derived from Article 6 guaranteeing the right to fair trial. The Court rejected the Government's argument that "the [European] Convention should not be interpreted so as to achieve social and

\textsuperscript{137}Judgement of October 9, 1979, Publications of the European Court of Human Rights, Series A, No. 32. Also reported in [1979] 2 E.H.R.R. 305.

economic developments in a Contracting State.”

Also, in Schuler-Zgraggen v. Switzerland, the Court advanced somewhat further in extending the protection under Article 6(1) and Article 14 (on non-discrimination) to economic and social rights. It noted: “today the general rule is that Article 6(1) does apply in the field of social insurance, including even welfare assistance.” This approach was also applied in the cases of Feldbrugge v. The Netherlands and Deumeland v. Germany, concerning health insurance allowances (a social security benefit) through the application of Article 6(1) of the European Convention.

The UN Human Rights Committee has equally applied the integrated approach in a case concerning unemployment benefits through the application of Article 26 of the International Covenant on Civil and Political Rights (on non-discrimination). An integrated approach may also be inferred from the Human Rights Committee’s elaboration on the ‘social dimension’ of the right to life. In its General Comments No. 6, on the right

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139 Ibid.


141 Ibid at para. 46. See also, Salesi v. Italy, Judgement of February 26, 1993, Publications of the European Court of Human Rights, Series A, No. 257-E.


to life, the Committee noted the desirability for states to take "all possible measures to reduce infant mortality and to increase life expectancy, especially in adopting measures to eliminate malnutrition and epidemics."\textsuperscript{146}

Using the integrated approach, therefore, a public-health system falling below a certain minimum standard of quality could be interpreted as a breach of a state’s obligation to protect the right to life. In \textit{Tavares v. France},\textsuperscript{147} the European Commission dealt with the issue of whether public health services falling under a certain quality standard and thereby contributing to the death of a patient could be classified as a violation of the deceased’s right to life under Article 2 of the \textit{European Convention}. Although the Commission did not find the respondents liable in this case, it clearly demonstrated that regulatory measures aimed at protecting life with regard to the hospital system are inherent in the \textit{Convention}'s protection of the right to life.\textsuperscript{148}

Following examples such as these, the domestic courts, the African Court, and the African Commission can enforce economic, social and cultural rights through the civil and political rights. Using this integrated and concerted approach, for instance, the right to health can be enforced through the right to life for it is absurd to claim to have a right to life if the individual is so poor that s/he cannot afford the cost of adequate medical treatment to enable him/her to enjoy the right to life. Thus, it may amount to unlawful and arbitrary deprivation

\textsuperscript{146}\textit{Ibid.} at para 5.

\textsuperscript{147} Application No. 16593/90, decision of 12 September 1991 (unpublished), reported by Matti Pellonpaa, \textit{supra}, note 136 at 865.

\textsuperscript{148} See Matti Pellonpaa, \textit{Ibid.}
of life\textsuperscript{149} if the victim does not have access to adequate and sufficient medical facilities or treatment.\textsuperscript{150}

Also, the integrated and concerted approach can be used to enforce the right to education through the right to freedom of expression and the right to participate in the governance of one's country. It is a fact that in Africa, as one of the legacies of colonialism, the affairs of many states are conducted in official language(s) that are different from the peoples' original language. Again, most states have laws imposing a minimum qualification as a precondition for aspiring to elective positions. The implication is that those who lack the requisite qualifications and basic education are both disbarred from participating in the governance of their respective countries, and even participating in the affairs (and national discourse) of the state.

In fact, the foregoing example constitutes a proper ground for invoking the right to freedom from discrimination, for those who do not meet the imposed minimum qualifications for aspiring to elective offices due to their educational incapacities are properly victims of state sanctioned discrimination. It is also discrimination \textit{simpliciter} against those who lack the basic education to understand the national discourse which is conducted in a language other than the local language(s). As such, the 'victims' can enforce their rights to education through the right to freedom from discrimination, the right to freedom of expression, and the right to participate in the governance of one's country.

\textsuperscript{149}See Article 4 of the \textit{African Charter}. See also Section 33 of the Constitution of the Federal Republic of Nigeria, 1999; Section 11 of the Constitution of the Republic of South Africa, 1996.

\textsuperscript{150}See Matti Pellonpaa, \textit{supra}, note 136 at 868-869 (arguing that right to life presupposes a certain minimum level of health services, and that respect for private and family life under Article 8 of the European Convention may in certain circumstances oblige the state to provide housing to the homeless).
Admittedly, the vagueness and lack of clarity, in scope and content, of some of the economic, social and cultural rights provisions under the *African Charter* militate against their enforcement. However, using the integrated and concerted approach, the obstacles posed by the vagueness and lack of clarity may be avoided since it does not really involve the interpretation of these rights but a practical effectuation of their spirit and substance. Apart from that, such integrated and concerted approach will be in keeping with the holistic traditional African philosophy and conception of rights, "the virtues" of which are the "historical tradition and values of African civilization [that] inspire[d] and characterize[d the] reflection on the concept of human and peoples’ rights" in the *African Charter*.\(^{151}\)

This may be considered an interim measure which does (and should) not foreclose the growing calls for the amendment of the *Charter* to strengthen its normative and institutional framework.\(^{152}\) To those amendments should be added a rethinking and possible amendment of the *Protocol of the African Court* to provide for direct individual access. It is not part of Africa’s traditional heritage that a person against whom a complaint is to be made must first give his consent. The fact that a State is now in that position does not change anything.

\(^{151}\) See para. 5 of the Preamble to the *African Charter*.

\(^{152}\) See Makau Mutua, "*Two Legged Stool*" supra, note 64 at 358.
6.6.2.2. Minimum Threshold Approach

The 'minimum threshold approach' to implementation is a term employed to describe the Inter-American Commission's attempt to give effect to economic and social rights, even though not provided in the Convention. The emphasis of this approach is on equal recognition and implementation of all human rights. As explained by Craven, "[r]ather than creating any a priori hierarchy of rights or emphasizing categorical differences in implementation, the minimum threshold approach advocates the necessity of action being taken across the board to ensure for all a minimum level of enjoyment of the whole range of human rights."

The Commission had in 1980 determined that State Parties should "strive to attain the economic and social aspirations of its people by following an order that assigns priority to ... the ‘rights of survival’ and ‘basic needs.’" Later in 1993, the Commission, explained that the obligation to observe and defend human rights of individuals in the American Declaration and the American Convention "obligates [states], regardless of the level of economic development, to guarantee a minimum threshold of these rights."


\[154\] See Chapter Two for a discussion of the state of economic, social and cultural rights under the Inter-American human rights system.


\[157\] Inter-American Commission, Annual Report, 1993 at 524.
As recognized by the Commission, the minimum threshold approach encapsulates a number of basic principles which are fundamental to the implementation of economic, social and cultural rights. Among other things, this approach “assumes that in the creation and implementation of economic and social policies, states should place emphasis, as a priority, upon assisting the poorest and the most vulnerable in society.” In order to realize the minimum threshold, the Commission is to “pay close attention to the equitable and effective use of available resources and the allocation of public expenditures to social programs that address the living conditions of the more vulnerable sectors of society....”

Although, for the most part, the Commission’s pronouncements seem to be hovering in the region of the abstract, since the Commission has not put itself in a position whereby alleged violations of economic, social and cultural rights are brought before it, the threshold approach appears to hold a potential which, if exploited, will advance the cause of economic, social and cultural rights. In the hands of a viable human rights commission, national or regional, it holds a promise of being exploited to require state accountability for those policies which entail a decreased observance of economic, social and cultural rights, such as structural adjustment policies. Also, the minimum threshold approach may be used by a court or a commission to ensure that a state party does not amass instruments of torture in the name of state security while paying lip service, for instance, to necessary measures to protect the health of the people. In this case, a court or a commission can inquire into the adequacy of measures taken in the light of the ‘equitable and effective use of available resources.’

158 Matthew Craven, supra, note 155 at 318.

159 Annual Report, 1993 at 533.
Moreover, using the minimum threshold approach, the African Commission or the African Court could set up country-specific thresholds measured by indicators to determine what amounts to, for instance, ‘the best attainable state of physical and mental health’ or what amounts to ‘necessary measures to protect the health of their people.’ This baseline approach could also be used to set up benchmarks to measure the ‘equity’ and ‘satisfaction’ in ‘equitable and satisfactory working conditions.’ With the aid of such indicators, it would be easier to ascertain or monitor when a state fails to fulfil its obligations. Admittedly, fixing a minimum threshold is more of an administrative duty properly exercisable by a non-judicial body like the Commission. Nonetheless, it is not inconceivable for a court to embark on such an exercise. A court can always encompass such an exercise within its notions of fairness and equity. After all, the category of fairness is never closed and can be expanded to embrace new situations.

One obstacle against involving the courts in the fixing of minimum standards for the minimum threshold approach is that such an exercise is necessarily a matter of policy which

160 See Article 15 of the African Charter.

161 See Bar-Anders Andreassen, et al., supra, note 153 at 341 (noting that when the threshold approach is adopted “[t]he scope of violation of socio-economic rights would then refer to the percentage of the population not assured of this minimal threshold, in the first instance, and further involve the question of whether such failure of minimal threshold assurance is evenly or unevenly distributed by group, defined by ethnicity, race, occupation etc). Philip Alston must be making a case for the minimum threshold approach when he stated thus:

The fact that there must exist such a [minimum] core [content of each right that cannot be diminished under any pretext] ... would seem to be a logical implication of the use of the terminology of rights. In other words, there would be no justification for elevating a “claim” to the status of a right (with all the connotations that concept is generally assumed to have) if its normative content could be so indeterminate as to allow for the possibility that the right holders possess no particular entitlement to anything. Each right must therefore give rise to an absolute minimum entitlement in the absence of which a state party is to be considered to be in violation of its obligations.

the ought to be left for the executive and the legislature. It is not denied here that the allocation of resources is a policy decision and that decisions on economic, social and cultural rights may likely revolve around priorities in the allocation of resources. Also, it is admitted that it is not for the courts to decide for the executives and the legislatures on how best to apply available resources in any given set of circumstances.

At the outset it can be confidently stated that obstacles such as the above stated, are more apparent than real. Hence, objections in respect of the courts’ involvement are largely misplaced. There is nothing atypical in the courts offering directions and making policy decisions¹⁶² or decisions that impact on the application of resources. On the issue of policy, there is evidence attesting to the courts’ use of policy arguments in deciding issues before it. Some notable judges, Lord Denning and Lord Diplock, have, on separate occasions, expressly alluded to their consideration of policy issues in determining cases before them.¹⁶³ The difference with respect to the courts’ involvement in the minimum threshold approach, therefore, would “be one of degree and not kind.”¹⁶⁴

As to the courts’ decisions impacting on the application of resources, it cannot be denied that most civil and political rights decisions of the courts affect the government’s allocation of resources. For example, where the court finds the state liable for violating a citizen’s right to personal liberty and awards damages for unlawful detention, it cannot be


¹⁶⁴David Kinley, *supra*, note 162 at 9 (citations omitted).
denied that such a decision has some implications on the state’s application of resources. Also, a court may find the state liable for violating a citizen’s right to freedom of expression, where, for instance, the state fails to protect the citizen from counter demonstrators while in the lawful exercise of his/her freedom of expression. In this case, lack of resources to recruit and equip police officers will not avail the state. In addition to the financial implications of paying damages, the decision will certainly entail considerable expenditure on the part of the state to recruit, train, and equip law enforcement agents. Yet, at the time of making the decision, the court was supposedly not making decisions on the allocation of resources.

In advocating for the courts’ involvement in fixing minimum standards for the minimum threshold approach, therefore, one is not advocating an entirely novel practice, but an extension of the already existing practice to adequately cover economic, social and cultural rights. Even if it were to be an entirely new practice, the fact that it had not been tried before is no sufficient reason for its rejection. It is untenable to argue that the courts are not sufficiently equipped to carry out such functions. Assuming, but not conceding, that the courts are not sufficiently equipped, the earlier they are equipped the better. The courts are put in place to serve the interests of the society. Those interests are always shifting and expanding, and can always be shifted and expanded, to cover new situations in accordance with the changing times.

The minimum threshold approach may also be used by the Commission or the Court to reinforce the integrated approach and make it more effective. Thus, a State Party can be held to be in violation of the right of an individual to "respect of the dignity inherent in a
human being" where the individual has been made to live below the threshold set for the defendant State Party. In this way, it would be more difficult for a state or government to set up lack of development as a defence because the state’s minimum threshold would have factored in the state’s financial abilities.

If these two (integrated and minimum threshold) approaches are combined effectively, economic, social and cultural rights provisions under the Charter will most likely receive increased, greater and perhaps effective protection even in the absence of national judicial enforcement. This should however not foreclose the ultimate aim of achieving directly enforceable economic, social and cultural rights both at the regional level and in the domestic jurisdiction of States Parties to the African Charter. As such, the combined use of the integrated and minimum threshold approaches should only be a starting point in the overall effort to give the economic, social and cultural rights provisions under the African Charter their pride of place.

\[165\text{See Article 5 of the African Charter.}\]
CONCLUSION

At the time the African Charter made its entrance onto the international human rights scene, it was both welcomed and celebrated: embraced because it came when the egregious abuses of human dignity were reaching epidemic proportions across the continent; and celebrated as a unique conceptualisation of human rights because of the radical nature and novelty of its provisions. By providing for an enforceable economic, social and cultural rights, the Charter took the centre stage in elevating the status of these rights on the international human rights scene, and took a staunch stand for the indivisibility of rights.

Emerging from a region which had traditionally maintained an undivided philosophy of life, wherein life was seen as a holistic, and not compartmentalized concept, the African Charter is justified in taking such a strong stand for the indivisibility of rights by adopting a holistic concept of human rights. Apart from the traditional links, the African continent’s slavery and colonial experience must have taught great lessons, notably that human rights abuses can assume various shapes, and are not just limited to civil and political abuses. Thus, it was rightly conceived that the denial of economic, civil and cultural rights can be just as dehumanising as the deprivation of civil and political rights and freedoms. Hence, the need to establish a human rights regime which was designed to be a quintessence of the totality of humankind’s attempt to reclaim humanity from the precipice of oppression, misery and want. This means equal emphasis on what it takes to be human, which in turn translates into promoting and protecting all human rights without exception.

However, while the Charter has been exemplary in its provisions, its implementation and enforcement have been less than satisfactory. While the Charter imposes on State Parties
absolute and immediate obligations to take action to ensure that the rights it guarantees are respected, in practice, however, the economic, social and cultural rights provisions are discriminated against in enforcement and perfunctorily treated as if they are mere luxuries which can be attained once everything else is guaranteed. Such a contemptuous attitude to economic, social and cultural rights manifests itself in the status accorded to these rights in domestic jurisdictions of most African states where they are regarded merely as non-justiciable aspirations. With social and economic conditions of existence in Africa exacerbating civil and political strife, a modest attempt has been made in this thesis to critically examine the existing situation and to refocus attention on the dilemma inherent in the continued neglect and marginalization of the enforcement of economic, social and cultural rights.

As has been shown, the enforceability problems surrounding economic, social and cultural rights are not limited solely to the African system, but are a general plight of these rights in the international and regional human rights system. For the most part, the discrimination against the enforcement of economic, social and cultural rights is rooted in the divisive ideological altercations between the East and the West. Also, it is a product of numerous misconceptions on the basis of which economic, social and cultural right are thought to be different from civil and political rights and therefore not amenable to the same mode of enforcement.

It has also been shown that, by providing for equally enforceable civil and political, as well as economic, social and cultural rights, the African Charter not only recognized the importance traditionally attached to these rights, but also truly reflected the virtues of
Africa's historical tradition and values of African civilization. However, while traditional Africa recognized, both in practice and in theory, the importance of these rights for the continued harmonious existence of society, modern Africa currently pays only lip service to them. Thus, whatever value the inclusion of these rights would have had is lost in the fact that these rights, not being accorded full relevance in practical terms, are relegated to a second class, and non-justiciable position in most domestic jurisdictions. With the notable exception of South Africa, economic, social and cultural rights remain, for the most part, mere aspirations in the domestic jurisdiction of States Parties to the African Charter. The status of these rights has been revealed through a modest comparison of Nigeria and South Africa, a juxtaposition which exposed the dissonance and hypocrisy inherent in purporting to uphold the Charter at the regional level while refusing to give effect to its essence at the national level.

An attempt was also made to trace the implementation / enforcement problems of these rights to the weak enforcement machinery set up by the African Charter. As always, it is not enough to make provisions for norms regulating the conduct of states if these norms are not anchored on effective institutions to ensure their realization. Regrettably, the African human rights system is anchored on weak institutions whose unwillingness for enforcement further compounds the problems for economic, social and cultural rights. While it was hoped that the system would be strengthened by the addition of a court, it has been shown that the mere addition of a court will not make any difference, especially where the access of individuals and NGOs are completely dependent on the consent of a defendant State Party.

It is emphasized that unless genuine efforts are made to enforce economic, social and
cultural rights, realization of human rights in Africa will remain illusory, due to the inextricable link between the prevalent social and civil strife and the denial of effective outlets for redress. While acknowledging the economic woes of many African states, it is submitted that these do not constitute sufficient reason to discriminate against economic, social and cultural rights since all rights entail considerable expenditure on the part of the state. As a creative way to ensure the enforcement of economic, social and cultural rights, the integrated and minimum threshold approaches have been offered.

The need for a change of attitude towards economic, social and cultural rights can hardly be overstated. The present practice whereby these rights are regarded as mere aspirations flies in the face, and negates the very essence of the African Charter. Enforcing civil and political rights without economic, social and cultural rights is tantamount to running an exclusionary policy, that excludes that section of the society for whom autonomy means little without the basic necessities of life. More importantly, apart from enforcing less than what it takes to be a full person, it leaves a vast majority of the people without their only means of self defence. A society that insists on the continued dehumanisation of its majority is doomed.
EPILOGUE

[T]o marginalize rights [because] some lawyers ... consider [them] as non-justiciable, is to accept bias in favour of the powerful; it is to accept a truncated view of humanity; it is like throwing a rope of sand to the poor and the dispossessed.

BIBLIOGRAPHY

INTERNATIONAL MATERIALS

TREATIES AND CONVENTIONS


UN DOCUMENTS


The Vienna Declaration and Programme of Action, UN Doc A/Conf. 157/24 (1993).


UN General Assembly Resolution 217A (III), UN Doc. A/811 (1948).
CASES

Adeyinka Badejo v Federal Minister of Education & Ors., Suit No. M/500/88 of High Court of Lagos State (Ruling delivered on November 4, 1988).

Advisory Opinion on the Exchange of Greek and Turkish Populations (1925) PCIJ Series B, No. 10.

Advisory Opinion on the Treatment of Polish Nationals in Daznjig (1931) PCIJ, Series A/B, No. 44.


Angaran v. Olushi (1908) 1 N.L.R. 78.


Azanian Peoples Organization (AZAPO) v. President of South Africa [1996] 8 BCLR 1015 (CC).

Badejo v. Federal Minister of Education [1996] 8 NWLR (Pt. 475 ) 15

Case of Free Zones of Upper Savoy and Gex (1932) P.C.I.J., Series A/B No. 46, 167.


Free Legal Assistance Cases, Communication Nos. 25/89, 47/90, 56/91, and 100/93 (1995); (1997) 4 IHRR 89.

Graeco-Bulgarian Communities Case (1930) P.C.I.J. Reports, Series B. No. 17, 32.


Macarths Ltd. v. Smith [1979] 3 All ER 325.


Mardbury v. Madison (1803) Cranch 137.


R. v. Chief Immigration Officer (Heathrow Airport) & Anor., Ex Parte Salamat [1976] 1 WLR 969.


Sani Abacha & Ors. v. Gani Fawehinmi [2000] 6 NWLR (Pt. 660) 228. SC.


Velasquez Rodríguez Case, 4 Inter-American Court of Human Rights (Ser. C) (1988).

Young, James and Webster's case, Judgement of 13 August 1981, Publications of European Court of Human Rights, Series A, No. 44.


LEGISLATION


Higher Education Act No. 101 of 1997 (South Africa).

Higher Education Amendment Act No. 55 of 1999 (South Africa).

Housing Act No. 107 of 1997 (South Africa).

Housing Consumers Protection Measures Act No. 95 of 1998 (South Africa).

Housing Consumers Protection Amendment Act No. 27 of 1999 (South Africa).

National Student Financial Aid Scheme Act No. 56 of 1999 (South Africa).

Public Officers (Retirement from Office) Decree No. 17 of 1984.

Rental Housing Act No. 50 of 1999 (South Africa).

The Constitution (Suspension and Modification) Decree No. 107 of 1993.


BOOKS


COLLECTIONS OF ESSAYS


JOURNAL ARTICLES


NEWSPAPERS AND MAGAZINES


Lean G. & Y. Cooper, “The Theory Was That As The Rich Got Richer We’d All Benefit. But It Hasn’t Worked” Independent on Sunday, July 21, 1996 at 52-53.

UNPUBLISHED MATERIALS


ELECTRONIC MEDIA

INTERNET


<http://www.unhcr.ch/Huridoca/Hur...9ce76802567c9002f6dec?OpenDocument> (Visited 5:01 PM, February 1, 2000).


APPENDIX

AFRICAN CHARTER ON HUMAN AND PEOPLES' RIGHTS

Adopted at Nairobi, Kenya on 26 June 1981

Entry into Force: 21 October 1986

PREAMBLE


Recalling Decision 115 (XVI) of the Assembly of Heads of States and Government at its Sixteenth Ordinary Session held in Monrovia, Liberia, from 17 to 20 July 1979 on the preparation of a “preliminary draft on the African Charter on Human and Peoples’ Rights providing inter alia for the establishment of bodies to promote and protect human and peoples’ rights”;

Considering the Charter of the Organization of African Unity, which stipulates that “freedom, equality, justice and dignity are essential objectives for the achievement of legitimate aspirations of the African peoples”;

Reaffirming the pledge they solemnly made in Article 2 of the said Charter to eradicate all forms of colonialism from Africa, to co-ordinate and intensify their co-operation and efforts to achieve a better life for the peoples of Africa and to promote international co-operation having due regard to the Charter of the United Nations and the Universal Declaration of Human Rights;

Taking into consideration the virtues of their historical tradition and the values of African civilization which should inspire and characterize their reflection of the concept of human and peoples’ rights;

Recognizing, on the one hand, that fundamental human rights stem from the attributes of human beings, which justifies their national and international protection, and on the other hand that the reality and respect of peoples’ rights should necessarily guarantee human rights;

Considering that the enjoyment of rights and freedoms also implies the performance of duties on the part of everyone;

Convinced that it is henceforth essential to pay a particular attention to the right to development and that civil and political rights cannot be dissociated from economic, social
and cultural rights in their conception as well as universality and that the satisfaction of economic, social and cultural rights is a guarantee for the enjoyment of civil and political rights;

Conscious of their duty to achieve the total liberation of Africa, the peoples of which are still struggling for their dignity and genuine independence, and undertaking to eliminate colonialism, neo-colonialism, apartheid, Zionism and to dismantle aggressive foreign military bases and all forms of discrimination, particularly those based on race, ethnic group, colour, sex, language, religion or political opinion;

Reaffirming their adherence to the principles of human and peoples' rights and freedoms contained in the declarations, conventions and other instruments adopted by the Organization of African Unity, the Movement of Non-Aligned Countries and the United Nations;

Firmly convinced of their duty to promote and protect human and peoples' rights and freedoms taking into account the importance traditionally attached to these rights and freedoms in Africa;

Have agreed as follows:

PART I

RIGHTS AND DUTIES

CHAPTER I. HUMAN AND PEOPLES' RIGHTS

Article 15

Every individual shall have the right to work under equitable and satisfactory conditions, and shall receive equal pay for equal work.

Article 16

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.
Article 17

1. Every individual shall have the right to education.
2. Every individual may freely take part in the cultural life of his community.
3. ..........................