

Moreover, human rights organisations and other actors have yet to optimise the important advantages of sharing their insights and experiences in order to formulate common perspectives and goals which could shape the Commission's understanding and agenda setting on this subject. Consequently, ESCR issues have been deferred on the Commission's agenda, thereby augmenting States Parties' indifference to their aggregate Charter obligations and fostering a culture of disrespect of human rights,²⁷⁶ including ESCR.

It is noted that the Commission is often regarded as impotent owing to serious and systemic abuses of human rights,²⁷⁷ including ESCR. Whatever power exists to implement the Commission's findings seems to be vested in the OAU's Assembly of Heads of States, which, as a political body, should not be trusted to put human rights above State interests. Regrettably, the clawback clauses of the ACHPR severely limit supposedly protected rights by granting governments the power to infringe them.²⁷⁸

In reference to the above situation, a number of factors have been identified as contributing to the ineffectiveness of the African Commission in exercising its mandate.²⁷⁹ The Commission had neither the authority nor the power when African States were tardy at best, and friendly

ACHPR available at www.forestpeoples.org/sites/fpp/files/publication/.../endorois-decision.pdf (accessed 2 July 2014).

²⁷⁴ *Centre on Housing Rights and Evictions vs The Sudan* : Communication Nos. 279/03 & 296/05, (2009), supra note 65. This is a communication alleging violation of massive and systemic violations of their human rights, including economic, social and cultural rights in the context of forced displacement experienced by the indigenous groups in the Darfur region of Sudan. See Ssenyonjo M *Analyzing the Economic, Social and Culture Rights Jurisprudence of the African commission: 30 Years since the Adoption of the African Charter* (2011) 392 available at <http://www.corteidh.or.cr/tablas/r26994.pdf> (accessed 3 July 2014).

²⁷⁵ African Commission, Principles and Guidelines on the Implementation of Economic, Social and Cultural Rights in the African Charter on Human and Peoples' Rights available at [www.peopletoparliament.org.za/.../socio-economic-rights/...Guidelines/...](http://www.peopletoparliament.org.za/.../socio-economic-rights/...Guidelines.../) (accessed 2 July 2014).

²⁷⁶ Module 28 The African Commission on Human and Peoples 'Rights and ESC Rights, using Module 28 in a training program, Circle of Rights, Economic, Social & Cultural Rights Activism: A training Resource, available at <http://www1.umn.edu/humanrts/edumat/IHRIP/circle/modules/module28.htm> (accessed on 29 April 2013).

²⁷⁷ Smith R K.M *Textbook on International Human Rights* 5ed (2012) 150.

²⁷⁸ Hanski R & Suksi M (eds) *An Introduction to the International Protection of Human Rights: A Textbook* 2ed (1999) 395.

²⁷⁹ Mbazira C 'Enforcing the Economic, Social and Cultural Rights in the African Charter on Human and Peoples' Rights: Twenty Years of Redundancy, Progress and Significant strides' in Lliopoulos-Strangas J & Roux T (eds) *Perspectives Nationales et Internationales des Droits Sociaux, National and International perspectives on social rights* (2008) 302.

negligent, in submitting reports (late or missing) to the Commission about how they were applying the Charter.²⁸⁰ Since 1995, at least 31 of the African States have not bothered to honour their reporting obligations and in the case of those who have responded, reports have been submitted long after they were due.²⁸¹ When the Commission raised questions about the reports that were submitted, States tended toward silence.²⁸² Likewise, when private Communications were submitted to the Commission claiming a violation of the Charter, States tended to disregard the entire process of inquiry and friendly settlement that the Commission was trying to conduct.²⁸³

In addition, doubts have been expressed about the independence and impartiality of the members of the African Commission.²⁸⁴ The independence and the impartiality of this Commission are suspect and its powers are in any case somewhat limited in terms of the Charter.²⁸⁵ Since its commencement, a sizeable number of commissioners have simultaneously held posts in the public service of their countries, either as attorneys-general, cabinet ministers or ambassadors.²⁸⁶ The Commission operates completely under the political influence of Member States, and suffers from the principle of confidentiality.²⁸⁷ The imposition of confidentiality made the Commission's promotion and protection work exceedingly difficult.²⁸⁸

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²⁸⁰ Smith R K.M *Textbook on International Human Rights* 5ed (2012) 150.

²⁸¹ Church J et al *Human Rights from a Comparative and International Law Perspective* (2007) 261.

²⁸² Forsythe D.P *Human Rights in International Relations* 2ed (2006) 147.

²⁸³ Forsythe D.P *Human Rights in International Relations* 2ed (2006) 147.

²⁸⁴ Mbazira C 'Enforcing the Economic, Social and Cultural Rights in the African Charter on Human and Peoples' Rights: Twenty Years of Redundancy, Progress and Significant strides' in Lliopoulos-Strangas J & Roux T (eds) *Perspectives Nationales et Internationales des Droits Sociaux, National and International perspectives on social rights* (2008) 302.

²⁸⁵ Church J et al *Human Rights from a Comparative and International Law Perspective* (2007) 260.

²⁸⁶ Mbazira C 'Enforcing the Economic, Social and Cultural Rights in the African Charter on Human and Peoples' Rights: Twenty Years of Redundancy, Progress and Significant strides' in Lliopoulos-Strangas J & Roux T (eds) *Perspectives Nationales et Internationales des Droits Sociaux, National and International perspectives on social rights* (2008) 302.

²⁸⁷ Symonides J (ed) *Human Rights: International Protection, Monitoring, Enforcement* (2003) 228.

The ability to enforce such rights and for them to be protected is still dependent on the will of the States to co-operate and to guarantee the rights, which few may be prepared, or indeed able, to do. The main responsibility, thus, still seems to fall on the States to ensure the rights are protected in the first place. Furthermore, neither the preventive nor response powers of the Commission are strong.²⁸⁹

This intended the Commission to be and to function. Thus, any human rights, including ESCR, violations which governments wish to hide remain hidden from the public, including human rights watches, non-government organisation activists, academicians and other interested bodies who are denied access to the Commission's deliberations.²⁹⁰ This appears to have compromised their independence and stopped them from condemning their governments.²⁹¹

All socio-economic rights decisions made by the African Commission during the redundancy stage are inadequate in normative terms. In these decisions, there is no effort on the part of the Commission to draw from international human rights law in the area of socio-economic rights. Most decisions just declare that the State has violated rights without elaborating the normative basis of the right.²⁹²

3.3.2.3 The absence of an expeditious and effective individual complaints procedure before the Commission

Although any individual (victim (s) or anyone on their behalf) or NGO may bring a Communication before the African Commission, the African Charter is silent on the issue of

²⁸⁸ Welch C E 'The African Commission on Human and Peoples' Rights: A Five-Year Report and Assessment' (1992) 43-61, *Human Rights Quarterly*, 14.

²⁸⁹ Church J et al *Human Rights from a Comparative and International Law Perspective* (2007) 260.

²⁹⁰ Symonides J (ed) *Human Rights: International Protection, Monitoring, Enforcement* (2003) 228.

²⁹¹ Mbazira C 'Enforcing the Economic, Social and Cultural Rights in the African Charter on Human and Peoples' Rights: Twenty Years of Redundancy, Progress and Significant strides' in Lliopoulos-Strangas J & Roux T (eds) *Perspectives Nationales et Internationales des Droits Sociaux, National and International perspectives on social rights* (2008) 302.

²⁹² Mbazira C 'Enforcing the Economic, Social and Cultural Rights in the African Charter on Human and Peoples' Rights: Twenty Years of Redundancy, Progress and Significant strides' in Lliopoulos-Strangas J & Roux T (eds) *Perspectives Nationales et Internationales des Droits Sociaux, National and International perspectives on social rights* (2008) 303.

standing and the rules of procedure of the African Commission do not provide for a victim requirement.²⁹³

This absence of an expeditious and effective individual complaints procedure before the African Commission has impeded the development of appropriate jurisprudence on human rights in general and economic, social and cultural rights in particular.²⁹⁴

3.3.2.4 The ineffectiveness of the proposed African Court of Human and Peoples Rights

The African Court of Human and Peoples' Rights is in operation since 2006. Though its decisions are binding, the most outstanding challenge at the African Court is overcoming the problem of non-enforcement of the judgments of the Court.²⁹⁵ To date, twenty seven States have ratified the Protocol to the African Charter establishing the African Court, but only five countries, namely Burkina Faso, Ghana, Malawi, Mali and Tanzania, have made a special declaration under Article 34.6 of the Protocol which allows individuals and NGOs to appeal directly to the Court. Senegal was the first African country to ratify the Protocol establishing the Court. Thus, it has been required to guarantee individuals and NGOs access to the African Court.²⁹⁶ The effectiveness of the Court is thus frequently called into question by the very low number of States allowing citizens to directly appeal to it.²⁹⁷

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²⁹³ African Commission on Human and People's Rights, Celebrating the African Charter at 30: A Guide to the African Human Rights system 2011 24 available at www.achpr.org/files/pages/about/african.../human_rights_guide_en.pdf (accessed 4 July 2014).

²⁹⁴ Module 28 The African Commission on Human and Peoples 'Rights and ESC Rights, using Module 28 in a training program, Circle of Rights, Economic, Social & Cultural Rights Activism: A training Resource, available at <http://www1.umn.edu/humanrts/edumat/IHRIP/circle/modules/module28.htm> (accessed on 29 April 2013).

²⁹⁵ *Burkina Faso / Norbert Zongo Case* : The African Court recognizes the responsibility of the State of Burkina Faso in the denial of justice for the victims available at <http://www.fidh.org/en/africa/burkina-faso/15142-burkina-faso-norbert-zongo-case-the-african-court-recognizes-the> (accessed 21 April 2014).

²⁹⁶ FIDH, African Court on Human and Peoples' Rights , Senegal Must Guarantee Individuals and NGOs Access to the African Court 2012 available at <http://www.fidh.org/en/africa/senegal/Senegal-Must-Guarantee-Individuals> (accessed 3 July 2014).

²⁹⁷ *Burkina Faso / Norbert Zongo Case* : The African Court recognizes the responsibility of the State of Burkina Faso in the denial of justice for the victims available at <http://www.fidh.org/en/africa/burkina-faso/15142-burkina-faso-norbert-zongo-case-the-african-court-recognizes-the> (accessed 21 April 2014).

3.3.2.5 International apathy and hostility

The indifference and hostility of the international community towards enforceable ESCR constitute one of the greatest impediments to the enforcement and realisation of ESCR in Africa, in general, and in DRC in particular. The most notable monument to this attitude is the fact that the UDHR had to be translated into two covenants instead of one. Although lip service was paid to the notion of ESCR during much of the Cold War, indifference and apathy towards enforceable ESCR grew increasingly in the later years of the Cold War and especially since the end of the Cold War.²⁹⁸

The end of the Cold War deprived ESCR of the support of a superpower, the Soviet Union, on the international stage. The demise of the Soviet Union was taken as the defeat of an ideology that emphasises ESCR and a victory for liberal ideology.²⁹⁹ Over the past few years, some Western States, particularly the United States, have undermined the efforts of certain developing countries to obtain cheaper generic drugs by threatening trade sanctions, notwithstanding that “drug costs account for up to 60 percent of health care budgets in poor countries”.³⁰⁰

3.4 Consequences of continued marginalisation of the ESCR of the ACHPR

Certain implications are conspicuously discernible from the continued marginalisation of the enforcement of ESCR. As Henry Shue 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.³⁰¹

²⁹⁸ Agbakwa S.C ‘Reclaiming Humanity: Economic, Social, and Cultural Rights as the Cornerstone of African Human Rights’ (2002) 200 *Yale Human Rights & Development L.J.* Vol.5 available at www.law.yale.edu/documents/pdf/.../Shedrack_Agbakwa_YHRDLJ.pdf (accessed 19 April 2014).

²⁹⁹ Agbakwa S.C ‘Reclaiming Humanity: Economic, Social, and Cultural Rights as the Cornerstone of African Human Rights’ (2002) 200 *Yale Human Rights & Development L.J.* Vol.5 available at www.law.yale.edu/documents/pdf/.../Shedrack_Agbakwa_YHRDLJ.pdf (accessed 19 April 2014).

³⁰⁰ Agbakwa S.C ‘Reclaiming Humanity: Economic, Social, and Cultural Rights as the Cornerstone of African Human Rights’ (2002) 203 *Yale Human Rights & Development L.J.* Vol.5 available at www.law.yale.edu/documents/pdf/.../Shedrack_Agbakwa_YHRDLJ.pdf (accessed 19 April 2014).

³⁰¹ Agbakwa S.C ‘Reclaiming Humanity: Economic, Social, and Cultural Rights as the Cornerstone of African Human Rights’ (2002) 204 *Yale Human Rights & Development L.J.* Vol.5 available at www.law.yale.edu/documents/pdf/.../Shedrack_Agbakwa_YHRDLJ.pdf (accessed 19 April 2014).

The notion of a non-enforceable right is nothing but a negation of the very concept of right. Continued marginalisation of the enforcement of ESCR dresses these rights in the garb of mere luxuries. This deception is emblematic and symptomatic of the continued oppression, and relegation to second-class citizens, of those most dependent on such rights for basic survival.³⁰² For a region that has staked its integrity on the adoption of a document that gives equal prominence to all aspects of human rights, maintaining a contradictory posture at the domestic level is an exercise in self-ridicule. It also casts the Charter in a bad light for proclaiming what cannot be guaranteed.³⁰³

The fact that the so-called second and third generations of rights are not taken seriously by the DRC government and that the most recent ones depict a close connection to its inability to provide for the socio-economic welfare of its people,³⁰⁴ result in continued marginalisation of ESCR and, accordingly, their violations, which are at the core of every conflict that Africa in general and DRC in particular has witnessed, not only as a contributor to the causality factors but also the major casualty.³⁰⁵

Because the DRC government is increasingly expected to meet the basic needs of the citizens, there is a growing tendency to demand results in militant terms, particularly in the absence of a proper forum to compel governmental action. As Callisto Madavo, World Bank Vice President for the Africa region, observed: Africa's war, including the DRC, are not driven...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 system...³⁰⁶

³⁰² Agbakwa S.C 'Reclaiming Humanity: Economic, Social, and Cultural Rights as the Cornerstone of African Human Rights' (2002) 204 *Yale Human Rights & Development L.J.* Vol.5 available at www.law.yale.edu/documents/pdf/.../Shedrack_Agbakwa_YHRDLJ.pdf (accessed 19 April 2014).

³⁰³ Agbakwa S.C 'Reclaiming Humanity: Economic, Social, and Cultural Rights as the Cornerstone of African Human Rights' (2002) 204 *Yale Human Rights & Development L.J.* Vol.5 available at www.law.yale.edu/documents/pdf/.../Shedrack_Agbakwa_YHRDLJ.pdf (accessed 19 April 2014).

³⁰⁴ Juma L *Human Rights in Africa and Conflicts transformation in Africa* (2013) 16-7.

³⁰⁵ Juma L *Human Rights in Africa and Conflicts transformation in Africa* (2013) 125.

³⁰⁶ Agbakwa S.C 'Reclaiming Humanity: Economic, Social and Cultural Rights as the cornerstone of the African Human Rights' in Heynes C & Steliszyn K (eds) *Human Rights, Peace and Justice in Africa. A Reader* (2006) 70.

The marginalisation of SERs causes consequences, including: HIV and AIDS, diseases, poverty, exclusion, racism, xenophobia, inequality, corruption, conflicts, bad governance, and violence against women and children.³⁰⁷ This continued marginalisation of ESCR also deepens the collective feeling of betrayal of the people.³⁰⁸

As long as these challenges affect the Congolese people's everyday lives, the problems of sustaining democracy and development and the protection and promotion of human rights, including ESCR, will continue to haunt the country. For example the poverty is defined by Oxfam as:

...a symptom of deeply rooted inequalities and unequal power relations, institutionalized through policies and practices at all levels of state, society, and household.³⁰⁹

In such situations, the existing government is perceived as having outlived its usefulness as a result of the deterioration of the basic socio-economic rights of the people.³¹⁰

3.5 Conclusion

The socio-economic rights provisions enshrined in the DRC Constitution, especially in Title 2 Human Rights, Fundamental Liberties and the Duties of Citizen and the State, and Chapter 2 Economic, Social and Cultural Rights, in Articles 34 to 49, are consequences of adherence to declarations and ratification by the DRC government of certain international human rights instruments, such as, conventions, treaties, amongst others, the ACHPR at regional level.

Through the analysis of the real situation of those rights in DRC, it has mostly been a case of the inaction of ESCR rather than ESCR in action. The latter are not protected and realised and accordingly, are marginalised and violated from day to day. The Government is therefore unable

³⁰⁷ Gawanas B 'The African Union: Concepts and Implementation mechanisms relating to Human Rights' in Bosl A & Diescho J *Human Rights in Africa* (2009) 148.

³⁰⁸ Agbakwa S.C 'Reclaiming Humanity: Economic, Social, and Cultural Rights as the Cornerstone of African Human Rights' (2002) 204 *Yale Human Rights & Development L.J.* Vol.5 available at www.law.yale.edu/documents/pdf/.../Shedrack_Agbakwa_YHRDLJ.pdf (accessed 19 April 2014).

³⁰⁹ Green D *From poverty to power: How active citizens and effective states can change the world* (2008) 27.

³¹⁰ Agbakwa S.C 'Reclaiming Humanity: Economic, Social, and Cultural Rights as the Cornerstone of African Human Rights' (2002) 205 *Yale Human Rights & Development L.J.* Vol.5 available at www.law.yale.edu/documents/pdf/.../Shedrack_Agbakwa_YHRDLJ.pdf (accessed 19 April 2014).

to bring a solution to the expectations of its population in reducing or bringing an end to poverty leading to dignified human life.

However, a number of factors at the national level as well as at the regional level constitute barriers to their protection and realisation in DRC. At the national level, the barriers include, amongst others: bad governance, mismanagement of public finances, weak institutions or organs for implementation or verification of ESCR, ignorance of the Congolese about their socio-economic rights, and character of non-justiciability of ESCR before the Congolese courts.

At the regional level, the barriers include: interpretation of ESCR provisions of the ACHPR whose formulation is vague in terms of content and scope, lack of effective enforcement and promotion of ESCR (the virtual inaction of the African Commission), the absence of an expeditious and effective individual complaints procedure before the Commission, the ineffectiveness of the proposed African Court of Human and People's Rights, international apathy and hostility.

Consequent to the marginalisation of socio-economic rights which results in their non-protection, non-realisation in DRC leads to minimum expectations of the State and government from the people, in respect of corruption, exclusion, racism, xenophobia, inequality, diseases, poverty, feeling of betrayal of the people, crisis of State and governmental legitimacy, and popular insurrections and civil war in the country.³¹¹

The aforementioned factors at national level as well as at international level may contribute to the protection and realisation of socio-economic rights of the ACHPR in DRC if only they are taken into account. These provisions would not only address social and economic injustices in Congolese society but also improve the social and economic conditions of most Congolese living in abject poverty.

³¹¹ Gawanas B 'The African Union: Concepts and Implementation mechanisms relating to Human Rights' in Bosl A & Diescho J *Human Rights in Africa* (2009) 148.

CHAPTER FOUR:

NATURE OF THE OBLIGATIONS OF DRC IN RELATION TO THE ECONOMIC, SOCIAL AND CULTURAL RIGHTS GUARANTEED AND PROTECTED IN ITS CONSTITUTION AND THE ACHPR

4.1 Introduction

Having ratified and acceded to the ACHPR, the DRC³¹² had been bound by a range of obligations relating to ESCR generated by the aforementioned treaty. In addition, the African Commission has said that the rights and obligations in the Charter are immediate and have to be implemented instantly despite hostile economic conditions.³¹³ As regards the real situation of the ESCR of the ACHPR contained in the DRC Constitution, most of them are not implemented and, accordingly, violated by the government in most cases. For instance, the majority of Congolese live in poverty, disease and ignorance; they lack jobs, food and other basic necessities, such as water.³¹⁴ This is due to certain reasons or factors at the national level as well as regional level constituting barriers to their protection and realisation, as discussed in the previous chapter. Therefore, to redress the aforementioned situation, the Congolese State is not only obliged to refrain from acts that defeat the object and purpose of the Treaty,³¹⁵ but also to scrupulously respect its international obligations as discussed below.

³¹² It has ratified the ACHPR on 20/07/1987. See Table 5.1 Chart of Ratifications of AU Human Rights-related Treaties (as at 31 July 2011) in Viljoen F *International Human Rights Law in Africa* 2ed (2012) 285.

³¹³ Presentation of the Third Activity Report of the African Commission by the Chairman U Umzurike, to the 26th Session of Heads of State and Government of the Organisation of African Unity, 9 – 11 July 1990 available at <http://www.achpr.org/html/africancommissiononhuman.html> (accessed 26 April 2014).

³¹⁴ Mbazira C ‘ A path to realising ESCR in Africa ?...35 available at www.ahrlj.up.ac.za/.../ahrlj_vol4_no1_2004_christopher_mbazira.pdf (accessed 18 May 2014).

³¹⁵ Article 17 of the Vienna Convention on the Law of Treaties, 1969. See also Dugard J *International Law: A South African Perspective* (2001) 330.

4.2 General obligations of DRC in relation to ESCR guaranteed and protected in the ACHPR

4.2.1 *Obligation to take measures to ensure enjoyment of ESCR*³¹⁶

Article 1 of the African Charter³¹⁷ which defines the obligations of States provides:

The member states of the Organisation of African Unity, parties to the present Charter shall recognise the rights, duties and freedoms enshrined in the Charter and shall undertake to adopt legislative or other measures to give effect to them.

Such measures include providing for the protection and realisation of ESCR through constitutional rights³¹⁸ and institutions, legislative³¹⁹, policy and budgetary measures, educational and public awareness measures³²⁰ and administrative action as well as ensuring appropriate administrative and judicial remedies³²¹ for the violation of these rights.³²²

The DRC is under a general obligation in respect of all the ESCR in the African Charter to ensure that at least the following key elements of the rights are guaranteed:

The availability of the rights which requires DRC to ensure that the necessary goods and services and institutional arrangements needed to enjoy a right are practically available to an individual

³¹⁶ A state is under an obligation to take measures to realise the esc rights listed in the ICESCR. See Coomans F ‘Some Remarks on the Extraterritorial Application of the International Covenant on Economic, Social and Cultural Rights’ in Coomans F & Kamminga M T (eds) *Extraterritorial Application of Human Rights Treaties* (2004) 183.

³¹⁷ A fifth characteristic of the AfrCHPR is the unusually specific and broad range of obligations it creates for the states. See Gibran V E *International Human Rights Law* (2004) 116.

³¹⁸ The first para. 11(c) (iii) of the Declaration of the Pretoria Seminar on Economic, Social and Cultural Rights in Africa (hereinafter the “Pretoria Declaration”), as adopted by Res.73(XXXVI) 04 of the African Commission on Human and Peoples’ Rights: Resolution On Economic, Social And Cultural Rights In Africa.

³¹⁹ For example, legislation to ensure the protection of health, housing, education, food and social security rights on a comprehensive and co-ordinated basis, and to prevent any form of discrimination in the enjoyment of the various rights. See the Pretoria Declaration, para. 11(c)(ii).

³²⁰ Art. 25 of the ACHPR.

³²¹ Art. 26 of the ACHPR.

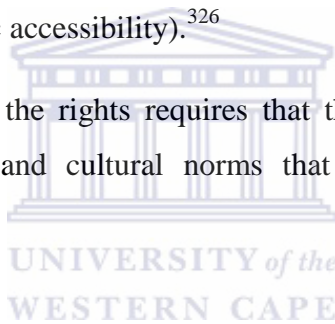
³²² The UN Committee on Economic, Social and Cultural Rights (hereinafter the “UN CESCR”), General Comment 3: *The nature of States parties obligations* (Art. 2, para.1 of the ICESCR) (Fifth session, 1990), para. 7.

regardless of how this is achieved.³²³ For example, with regards to the right to water: the water supply for each person must be sufficient and continuous for personal and domestic uses.³²⁴

The adequacy of the benefits provided in terms of the rights: this requires that the goods and services provided to the individual are sufficient to meet all the requirements of the rights protected. For example, with regards to the right to food: the food must at a minimum be of quantity and quality sufficient to satisfy the dietary needs of individuals and free of harmful substances.³²⁵

The physical and economic accessibility/ or affordability of the rights to all, particularly vulnerable and disadvantaged groups. For example, with regards to the right to health: DRC should ensure that health facilities are accessible to people with disabilities (physical accessibility). In terms of the right to education: DRC should ensure that secondary and tertiary education are affordable (economic accessibility).³²⁶

The acceptability of provision of the rights requires that the ESCR should be provided in a manner which respects societal and cultural norms that are consistent with African and international human rights law.³²⁷



³²³ African Commission, Draft Principles and Guidelines on the Implementation of Economic, Social and Cultural Rights in the African Charter on Human and Peoples' Rights available at www.achpr.org/.../economic-social-cultural/achpr_instr_guide_draft_esc... (accessed 17 May 2014).

³²⁴ UN CESCR, General Comment 15: *The right to water* (Arts. 11-12 of the ICESCR) UN doc. E/C.12/2002/11, para. 12(a).

³²⁵ See, for example, UN CESCR, General Comment 12: *The right to adequate food* (Art. 11 of the ICESCR) UN doc. E/C.12/1999/5.

³²⁶ African Commission, Draft Principles and Guidelines on the Implementation of Economic, Social and Cultural Rights in the African Charter on Human and Peoples' Rights available at www.achpr.org/.../economic-social-cultural/achpr_instr_guide_draft_esc... (accessed 17 May 2014).

³²⁷ African Commission, Draft Principles and Guidelines on the Implementation of Economic, Social and Cultural Rights in the African Charter on Human and Peoples' Rights available at www.achpr.org/.../economic-social-cultural/achpr_instr_guide_draft_esc... (accessed 17 May 2014).

For example: this includes the requirement that provision of housing, particularly regarding construction and the building materials used, should be culturally appropriate³²⁸, for example, for minorities and indigenous peoples.

4.2.2 Obligations to respect, protect, promote and fulfil

All human rights, including ESCR, impose a combination of negative and positive duties on DRC.³²⁹ A useful framework for understanding the nature of the duties imposed by ESCR is the duty “to respect, protect, promote and fulfil” these rights.³³⁰

Obligation to respect

This obligation requires DRC, at a primary level, to refrain from interfering directly or indirectly with the enjoyment of all human rights, including ESCR, and the freedom of the individual to use material resources—alone or in association with others—to satisfy basic needs or enjoy the right in question.³³¹ DRC has to comply with this obligation to not run the risk of pursuit for acting in any way to encroach upon recognised rights and freedoms, such as, in the case of *Free Legal Assistance Group, Lawyers’ Committee for Human Rights, Union Interafricaine des Droits de l’Homme, Les Témoins de Jehovah vs Zaire*. In this regard, the failure of the Government to provide basic services, the shortage of medicines, and the closure of universities and secondary schools for two years were a violations and, accordingly, result in non-satisfaction

³²⁸ UN CESCR, General Comment 4: *The right to adequate housing* (Art. 11(1) of the ICESCR) (Sixth session, 1991), para. 8(g).

³²⁹ African Commission, *SERAC & CESR v Nigeria*, Com. No. 155/96 (2001), para. 44.

³³⁰ This framework is used by the UN CESCR in analysing the obligations imposed on States Parties by the International Covenant on Economic, Social and Cultural Rights (hereinafter, the “ICESCR”). See, for example, General Comment 12: *The right to adequate food* (Art. 11 of the ICESCR) UN doc. E/C.12/1999/5, para. 15; General Comment 14: *The right to the highest attainable standard of health* (Art. 12 of the ICESCR) UN doc. E/C.12/2000/4, paras. 33-37; General Comment 15: *The right to water* (Arts. 11-12 of the ICESCR) UN doc. E/C.12/2002/11, paras. 21-29. See also The Maastricht Guidelines on Violation of Economic, Social and Cultural Rights (1998) 20 *Human Rights Quarterly*, 691–705 (hereinafter, the “Maastricht Guidelines”), para. 6. The framework was expressly utilised by the Commission in *SERAC & CESR v. Nigeria*, Com. No. 155/96 (2001), para. 44-48.

³³¹ Eide A ‘Economic and Social Rights’ in Symonides J (ed) *Human Rights: Concepts and Standards* (2000) 109–74 at 127.

or enjoyment of the rights to health (Art.16) and education (Art.17) of the ACHPR by the Zairian people.³³²

Obligation to protect

The obligation to protect requires DRC to take measures that prevent NSAs (third parties or private parties) including individuals, groups, corporations and other entities as well as agents acting under their authority from interfering in any way with ESCR.³³³ Referring to violations of the rights to health and education in the above-mentioned case, the Commission simply stated as follows:

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

48. Article 17 of the Charter guarantees the right to education. The closures of universities and secondary schools as described in communication 100/93 constitute a violation of Article 17.³³⁴

Obligation to promote

As ESCR are not promoted in DRC by the Government in order to enhance people's awareness of their rights and the means of any kind for realising them,³³⁵ DRC is required to adopt measures to enhance people's awareness of their ESCR, and to provide accessible information relating to the programmes and institutions adopted to realise them.³³⁶ In this regard, the African Charter explicitly places an obligation on DRC "to promote and ensure through teaching, education and publication, the respect of the rights and freedoms contained in the present Charter

³³² Baderin M A & McCorquodale R *Economic, Social and Cultural Rights in Action* (2007) 154,157.

³³³ Ssenyonjo M *Economic, Social and Cultural Rights in International Law* (2009) 24.

³³⁴ Ssenyonjo M *Analysing the Economic, Social and Culture Rights Jurisprudence of the African commission: 30 Years since the Adoption of the African Charter* (2011) 367-8 available at <http://www.corteidh.or.cr/tablas/r26994.pdf> (accessed 7 August 2013).

³³⁵ Symonides J (ed) *Human Rights: International Protection, Monitoring, Enforcing* (2003) 229.

³³⁶ *SERAC & CESR v. Nigeria*, Com. No. 155/96 (2001), para. 46.

and to see to it that these freedoms and rights as well as corresponding obligations and duties are understood".³³⁷

Obligation to fulfil

DRC must take the necessary steps and actions to comply with the obligation to fulfil. Such measures include providing for the protection and realisation of ESCR through constitutional rights and institutions, legislative, policy and budgetary measures, educational and public awareness measures and administrative action as well as by ensuring appropriate administrative and judicial remedies for the violation of these rights.³³⁸ The above-mentioned measures have to be taken in order to ensure the satisfaction of the needs of the individual that cannot be secured by the personal efforts of that individual.³³⁹ Non-compliance of DRC with this obligation would result in failure of its duties under the ACHPR such as in the case *Free Legal Assistance Group and others vs Zaire*. In this case, Zaire had surely omitted to take the necessary measures to ensure the satisfaction of the needs of the individuals (Zairian people) in realising the rights to health and education respectively protected by Articles 16 and 17 of the ACHPR.

4.2.3 Resources and progressive realisation³⁴⁰

The obligation to progressively and constantly move towards the full realisation of ESCR, within the resources available to DRC, including regional and international aid, is referred to as progressive realisation.³⁴¹ Most times these available resources are the fruit of taxation.³⁴² The

³³⁷ Art.25 of the ACHPR.

³³⁸ The UN CESCR, General Comment 3: *The nature of States parties obligations* (Art. 2, para.1 of the ICESCR) (Fifth session, 1990), para. 7.

³³⁹ Craven M *The International Covenant on Economic, Social and Cultural Rights A Perspective on its Development* (1995) 109.

³⁴⁰ Authority for the concept of progressive realisation may be found in: the ICESCR; The Limburg Principles on the Implementation of the International Covenant on Economic, Social and Cultural Rights, UN doc. E/CN.4/1987/17, Annex, paras. 19 and 51; and the Maastricht Guidelines on Violations of Economic, Social and Cultural Rights, para 22.

³⁴¹ It is open to States to implement the rights in a progressive manner, they must take immediate steps to that end and do so to the 'maximum of available resources'. It is not open to states to delay indefinitely the implementation of the rights, or to use resource constraints as an excuse for doing nothing. See Hanski R & Suksi M *An Introduction to the International Protection of Human Rights A Textbook* 2rev.ed (2004) 108.

funds collected from taxation are allocated to ESCR issues in providing for and improving basic facilities for citizens such as, electricity, water, building of schools, hospitals, etc. Generally, the realisation of ESCR in DRC, at a minimum level, remains poor.³⁴³ Where regional/international aid is provided to a State, as seen from the CESCR's Concluding Observation on the combined second to fourth periodic reports of DRC, a sustainable institutional framework on the use of such aid must be adopted.³⁴⁴

The African Charter does not explicitly refer to the principle of progressive realisation. This concept is widely accepted in the interpretation of ESCR and has been implied in the Charter in accordance with Articles 61 and 62 of the African Charter. The concept of progressive realisation means that DRC must implement a reasonable and measurable plan, including setting achievable benchmarks and timeframes, for the enjoyment over time of ESCR within the resources available to it.³⁴⁵

4.2.4 Immediate obligations regarding the implementation of ESCR

Despite the obligation to progressively realise ESCR, some of the obligations imposed on DRC as a party to the African Charter are immediate upon ratification of the Charter. These obligations include, but are not limited to, the obligation to take steps, the prohibition of retrogressive steps, minimum core obligations and the obligation to prevent discrimination in the enjoyment of ESCR.³⁴⁶

³⁴² Art. 29(6) of the ACHPR.

³⁴³ Mbazira C ' A path to realising ESCR in Africa ?....³⁵ available at www.ahrlj.up.ac.za/.../ahrlj_vol4_no1_2004_christopher_mbazira.pdf (accessed 18 May 2014).

³⁴⁴ CESCR, Concluding Observations on the Combined Second to Fourth Periodic Reports of the Democratic Republic of the Congo, UN doc. E/C.12/COD/CO/4, 16 December 2009, paras 16 & 29.

³⁴⁵ The Declaration of the Pretoria Seminar on Economic, Social and Cultural Rights in Africa, para. 11(c)(iv)(hereinafter the "Pretoria Declaration") as adopted by Res.73(XXXVI)04 of the African Commission on Human and Peoples' Rights. Resolution on Economic, Social and Cultural Rights in Africa.

³⁴⁶ African Commission ,Draft Principles and Guidelines on the Implementation of Economic, Social and Cultural Rights in the African Charter on Human and Peoples' Rights available at www.achpr.org/.../economic-social-cultural/achpr_instr_guide_draft_esc... (accessed 17 May 2014).

Minimum core obligations

DRC as a State Party has an obligation to ensure the satisfaction of, at the very least, the minimum essential levels of each of the ESCR contained in the African Charter.³⁴⁷ The minimum core obligation is the obligation of DRC to ensure that no significant number of individuals is deprived of the essential elements of a particular right,³⁴⁸ such as, ensuring that all children enjoy their right to free and compulsory primary education.³⁴⁹ The notion of minimum core obligation is sometimes subject to controversy since it is difficult in some cases to ascertain what constitutes the minimum core of a right, such as, the rights to property and culture, respectively contained in Articles 14 and 17(2) and (3) of the ACHPR.

Obligation to take steps

DRC Party has immediate obligations to take steps, in accordance with a measurable national plan of action, towards the realisation of the protected ESCR. The measures adopted should be deliberate, concrete and targeted as clearly as possible towards ensuring enjoyment of the rights protected in the African Charter.³⁵⁰ Therefore, DRC as a State Party is obliged to take legislative measures for the protection of ESCR,³⁵¹ by enacting legislation, such as, the Law relating to a system of social protection, and the Law-frame on primary and secondary teaching as planned in the DRC Government Action Programme 2012-2016.

³⁴⁷ UN CESCR, General comment 3: *The nature of States parties obligations* (Art. 2, para.1 of the ICESCR) (Fifth session, 1990) . See also: The Maastricht Guidelines, para. 9; the Pretoria Declaration, para. 2; AHG/Res.236 (XXXI) Annex 1995 – Relaunching Africa’s Economic and Social Development: The Cairo Agenda For Action (hereinafter, the “Cairo Agenda for Action”), which reads: “Member States should give priority in their development programmes to the basic needs of the people by developing appropriate infrastructure (such as rural roads, potable water supply ...), meeting basic food requirements, providing primary health services, education and skills and generating productive and remunerative employment opportunities as a means of eradicating poverty.”

³⁴⁸ UN CESCR, General Comment 3: *The nature of States parties obligations* (Art. 2, para.1 of the ICESCR) (Fifth session, 1990), para. 10.

³⁴⁹ The Reporting Guidelines, Part II, para. 48.

³⁵⁰ UN CESCR, General Comment 3: *The nature of States parties obligations* (Art. 2, para.1 of the ICESCR) (Fifth session, 1990), para. 11.

³⁵¹ African Commission ,Draft Principles and Guidelines on the Implementation of Economic, Social and Cultural Rights in the African Charter on Human and Peoples' Rights available at www.achpr.org/.../economic-social-cultural/achpr_instr_guide_draft_esc... (accessed 17 May 2014).

Non-discrimination

Article 2 of the African Charter prohibits any discrimination in the enjoyment of the protected rights on the following non-exhaustive grounds including race, ethnic group, colour, sex/gender, language, religion, political or any other opinion, national and social origin, economic status and birth. In this regard, the African Commission, through the case *Purohit and Moore v The Gambia*³⁵² in relation to the right to health, had explained the meaning of discrimination and equality before the law, in that the right to health facilities, and access to goods and services had to be guaranteed to all without discrimination of any kind.³⁵³

As inequality and marginalisation are acute in many social life sectors in terms of access to ESCR in DRC,³⁵⁴ the Congolese State has a duty to prevent and prohibit any discrimination against individuals in their access to or enjoyment of ESCR on any of the prohibited grounds which is a violation of the African Charter.³⁵⁵

Presumption against retrogressive measures

The DRC has an obligation to avoid taking measures that reduce the enjoyment of ESCR by individuals or peoples which are prima facie in violation of the African Charter. Any such measures must be justified in the light of the totality of the rights provided for in the African Charter and in the context of the full use of the maximum available resources.³⁵⁶ In this context available resources refers to both the DRC's own resources and international assistance and co-operation.³⁵⁷

³⁵² Communication no. 241/2001 (2003).

³⁵³ Baderin M A & McCorquodale R *Economic, Social and Cultural Rights in Action* (2007) 156.

³⁵⁴ Gender inequality and social institutions in the DRC available at www.peacewomen.org/.../hrinst_genderinequalityinthedrc_wilpf_decem (accessed 11 August 2014).

³⁵⁵ African Commission ,Draft Principles and Guidelines on the Implementation of Economic, Social and Cultural Rights in the African Charter on Human and Peoples' Rights available at www.achpr.org/.../economic-social-cultural/achpr_instr_guide_draft_esc... (accessed 17 May 2014).

³⁵⁶ UN CESCR, General Comment 3: *The nature of States parties obligations* (Art. 2, para.1 of the ICESCR) (Fifth session, 1990), para. 9; General Comment 14: *The right to the highest attainable standard of health* (Art. 12 of the ICESCR) UN doc. E/C.12/2000/4 , para. 19, the Limburg Principles, para. 72; The Maastricht Guidelines, para. 14(e).

Effective domestic remedies

As there are no instances where courts in DRC have made any pronouncement on ESCR in cases at domestic level due to the fact that DRC has never enacted any legislation, legal or judiciary mechanisms and procedures, these must be put in place in order not only to allow affected individuals and peoples (Congolese people) to sue the Government in case of violation of its ESCR,³⁵⁸ but also to make ESCR effective under national the legal system.³⁵⁹ Thus, DRC must ensure that persons within its jurisdiction, particularly members of vulnerable and disadvantaged groups, enjoy effective access to quality legal services.³⁶⁰

Designing and implementing a national policy

In DRC, national plans and policies are most times not periodically reviewed and, accordingly, not implemented owing to the general bad governance of the country.³⁶¹

For each protected right, national plans and policies should be devised and periodically reviewed, on the basis of a participatory and transparent process.³⁶² In this regard, DRC should ensure, through political and financial support, the greater effective participation of the

³⁵⁷ African Commission ,Draft Principles and Guidelines on the Implementation of Economic, Social and Cultural Rights in the African Charter on Human and Peoples' Rights available at www.achpr.org/.../economic-social-cultural/achpr_instr_guide_draft_esc... (accessed 17 May 2014).

³⁵⁸ Mayimona N M 'Quel bilan dresser de l'effectivite et de la justiciabilite des Droits economiques,sociaux et culturels en DRC au regard de la Declaration Universelle des Droits de l'homme et de la Charte Africaine des Droits de l'homme et des peuples'2009 7 available at <http://www.congoforum.be/upldocs/Nzati.pdf> (accessed 12 August 2013).

³⁵⁹ In 1989, the Commission adopted the Resolution on the Integration of the Provisions of the African Charter on Human and Peoples' Rights into National Laws of States, which stressed the importance of the integration of the provision of the African Charter into the national laws of states, and recommended member states to introduce articles 1 to 29 "in their constitutions, law and regulations and other acts relating to human rights."

³⁶⁰ The Commission has observed that access to legal services is a critical aspect of the effective protection of economic, social and cultural rights - see in this regard: *Purohit and Moore v. the Gambia*, Com. No. 241 (2001), paras. 34 - 38, 54; Protocol on the Rights of Women, Art. 9. Appropriate legal assistance and legal aid for vulnerable groups should be made available in all African countries in cases involving violations of economic, social and cultural rights. See African Commission on Human and Peoples' Rights, Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa, section H.

³⁶¹ Radio Okapi available at <http://radiookapi.net/actualite/2012/03/30/gestion-des-finances-publiques-la-rdc-toujours-dans-la-zone-rouge-selon-la-banque-mondiale/#.U3jNvl4aLIU> (accessed 18 Mai 2014).

³⁶² African Commission ,Draft Principles and Guidelines on the Implementation of Economic, Social and Cultural Rights in the African Charter on Human and Peoples' Rights available at www.achpr.org/.../economic-social-cultural/achpr_instr_guide_draft_esc... (accessed 17 May 2014).

population in all phases of policy and programme design, implementation, monitoring and review.³⁶³

4.3 Other key obligations

4.3.1 Equality

Studies and investigations show that inequality is existing in several domains of national life regarding equal access to and enjoyment of ESCR in DRC.³⁶⁴ Therefore, to redress this situation, guarantees of equality and non-discrimination should be interpreted, to the greatest extent possible, in ways which facilitate the full protection of ESCR.³⁶⁵ In ensuring effective equality in the enjoyment of ESCR, DRC must pay particular attention to members of vulnerable and disadvantaged groups.³⁶⁶ To ensure realisation of equal access to ESCR, DRC should ensure the provision of basic social services (such as, water, electricity, education and health care) and equitable access to resources (such as, land and credit) to members of vulnerable and disadvantaged groups.³⁶⁷

4.3.2 International Co-operation

As poor mobilisation of public ordinary resources due to customs fraud is obvious in DRC, resort to international aid/assistance constitutes the public extraordinary resources of the State.³⁶⁸ To do

³⁶³ Limburg Principles, para. 11.

³⁶⁴ Gender inequality and social institutions in the DRC available at www.peacewomen.org/.../hrinst_genderinequalityinthedrc_wilpf_decem (accessed 11 August 2014).

³⁶⁵ UN CESCR, General Comment 9: *The domestic application of the Covenant* (3 December 1998) UN doc. E/C.12/1998/24, para. 15.

³⁶⁶ African Commission, Draft Principles and Guidelines on the Implementation of Economic, Social and Cultural Rights in the African Charter on Human and Peoples' Rights available at www.achpr.org/.../economic-social-cultural/achpr_instr_guide_draft_esc... (accessed 17 May 2014).

³⁶⁷ The Pretoria Declaration, para. 11(c)(xi). See also: UN CESCR General Comment 16: *the equal right of men and women to the enjoyment of all economic, social and cultural rights* (Art. 3 of the ICESCR) (11 August 2005), para. 15. Special measures include, for example, employment equity programmes and legislation that aims to increase representation by vulnerable and disadvantaged groups in the workforce or special educational bursary programmes reserved for girls or members of groups who have been victims of previous racial and other forms of discrimination.

so, DRC has the obligation to engage in international co-operation³⁶⁹ for the realisation of ESCR and must prioritise the allocation of such assistance towards the realisation of these rights.³⁷⁰ It is particularly incumbent upon developed countries, as well as others which are in a position to assist, to do so.³⁷¹ DRC must avoid entering into all forms of agreements which undermine the enjoyment of ESCR by individuals and/or peoples within their jurisdiction.³⁷²

4.3.3 Right to self-determination of peoples

The right to self-determination as guaranteed under Article 20 (1) the African Charter is exercised within the inviolable national borders of DRC by taking due account of the sovereignty of the State.³⁷³ In addition, in terms of *Katangese Peoples' Congress v Zaire*,³⁷⁴ the African Commission believes that self-determination may be exercised in any of the following ways: independence, self-governance, federalism, confederalism, unitarism or any other form of relations that accords with the wishes of the people but is fully cognizant of other principles,

³⁶⁸ Lambert T *Controle Fiscal, Droit et Pratique*, in TSHIMPAKA K 'L'Assainissement des Finances Publiques en Republique Democratique du Congo: Analyse, Critique et Perspectives d'Avenir' 2007 40, *Memoire*, Faculte de Droit, Universite de Kinshasa.

³⁶⁹ The DRC, a member of the community of states, is dependent on international cooperation to cope with problems that go beyond national borders. The need for international co-operation as key principle of present-day life comes very much to the fore in the era of globalisation in which we live. The process of globalisation is crucial for a proper understanding of the extraterritorial dimensions of the realisation of esc rights. See Coomans F & Kamminga MT (eds) *Extraterritorial Application of Human Rights Treaties* (2004) 183.

³⁷⁰ Gondek M *The Reach of Human Rights in a Globalising World: Extraterritorial Application of Human Rights Treaties* (2009) 18.

³⁷¹ UN CESCR, General Comment 3 : *The nature of States parties obligations* (Art. 2, para.1 of the ICESCR) (Fifth session, 1990) , para. 14; UN CESCR, 'Poverty and the International Covenant on Economic, Social and Cultural Rights' (2001) UN doc. E/C.12/2001/10, para. 16.

³⁷² The Pretoria Declaration, para. 11(c)(xixi).

³⁷³ UN General Assembly, Report of the Human Rights Committee (2000) UN doc. A/55/40 Vol. I 43, concluding observations on Congo, para. 291-292. See also: *Katangese Peoples' Congress v. Zaire*, Com. No. 75/92 (1995) ACHPR decision.

³⁷⁴ *Katangese Peoples' Congress v Zaire* (2000) AHRLR 72 (ACHPR 1995) is a case brought before the African Commission (Eighth Annual Activity Report 1994-1995) by the president of the Katangese Peoples' Congress through the communication 75/92 to recognize, among other things, the independence of Katanga by virtue of Article 20(1) of the African Charter. This request therefore had no merit under the African charter. It is important to note the distinction that the Commission envisaged in its decision between Katanga and the state of Zaire. See Dersso S.A 'Peoples' Rights under the African Charter on Human and Peoples' Rights: Much ado about nothing?' available at www.docstoc.com/.../1-Peoples-Rights-under-the-African-Charter-on-Hu (accessed 10 August 2014).

such as, sovereignty and territorial integrity.³⁷⁵ This right in its application to peoples, including indigenous populations/communities, encompasses ESCR, including (but not limited to) the right to recognition of their structures and traditional ways of living as well as the freedom to preserve and promote their cultures.³⁷⁶ The enjoyment of these rights by individuals obliges DRC to promote the abolition of, or amend, cultural norms that result in discrimination or violation.³⁷⁷

4.3.4 Engaging with and respecting the rights of civil society

DRC is a State Party which does not engage with and respect the rights of civil society while it has a key role to play in the implementation of ESCR in the country.³⁷⁸ To this end, DRC should actively engage with civil society in the realisation of these rights. DRC should also respect and protect the rights of civil society actors and human rights defenders. In turn, civil society organisations should prioritise the monitoring and enforcement of ESCR in their advocacy work.³⁷⁹

4.3.5 National human rights institutions

Actually, at present no National Human Rights Institution (NHRI) exists in DRC as it became defunct in 2006.³⁸⁰ In this regard, recognising that NHRIs play a significant role in the promotion and protection of ESCR, DRC should effectively establish a NHRI which meets the standards set by the Paris Principles Relating to the Status of National Institutions.³⁸¹ In addition to active

³⁷⁵ Dersso SA ‘The jurisprudence of the African Commission on Human and Peoples’ Rights with respect to peoples’ rights’ 2006 365 published in African Human Rights Law Journal available at www.ahrlj.up.ac.za/dersso-s-a (accessed 11 August 2014).

³⁷⁶ UN General Assembly, Report of the Human Rights Committee (1998) UN doc. A/53/40 Vol. I 40, concluding observations on Finland, para. 255.

³⁷⁷ UN General Assembly, Report of the Committee on the Elimination of Racial discrimination (2003) UN doc. A/58/18, concluding observations on Ecuador, para. 59 and 62.

³⁷⁸ Intervention orale de l’Observatoire pour la protection des défenseurs des droits de l’Homme ‘Intervention de la FIDH et l’OMCT sur la situation des défenseurs des droits de l’Homme en Afrique’ 2013, 53ème Session de la CADHP available at <http://www.fidh.org/fr/afrique> (accessed 11 August 2014).

³⁷⁹ See generally the Pretoria Declaration.

³⁸⁰ DRC: National Observatory of Human Rights (defunct) available at <http://www.content.eisa.org.za/old-page/drc-national-observatory-human-rights-defunct> (accessed 19 April 2014).

promotion and enforcement of ESCR, the NHRI should be involved in the development and monitoring of implementation policies, including the setting of national benchmarks and indicators.³⁸²

4.3.6 State Party reporting

DRC is one of the African States which do not honour their reporting obligations vis-à-vis the African Commission on realisation of human rights in general and ESCR in particular.³⁸³ Thus, to redress this situation, DRC as a Party to the African Charter has to undertake to file periodic reports to the African Commission on the steps taken to realise all the rights protected in the Charter, including ESCR.³⁸⁴ The Commission urges the DRC, by utilising both the Charter principles and guidelines on State Party reporting, to periodically report on steps taken to realise all the ESCR (explicitly and implicitly) guaranteed under the Charter and included in these principles and guidelines.³⁸⁵

4.4 Policies and programmes of the DRC Government in relation to ESCR with regard to its international obligations

The DRC Government had instituted an action programme, for the period 2012-2016, aimed at poverty reduction and improvement in the living conditions of citizens of DRC.³⁸⁶ This intervention encapsulated national plans, policies and systems in relation to ESCR, albeit not clearly defined. These are observable through the following targeted rights:

³⁸¹ UN General Assembly, Principles relating to the Status of National Institutions (The Paris Principles) (1994) UN doc. A/RES/48/134.

³⁸² UN CESCR, General Comment 10: *The role of national human rights institutions in the protection of economic, social and cultural rights*, UN doc. E/C.12/1998/25, para. 3, which lists a number of activities that can be undertaken by NHRIs.

³⁸³ Church J et al *Human Rights from a Comparative and International Law Perspective* (2007) 261.

³⁸⁴ Nickel J W *Making sense of Human Rights* 2 ed (2007) 19.

³⁸⁵ African Commission ,Draft Principles and Guidelines on the Implementation of Economic, Social and Cultural Rights in the African Charter on Human and Peoples' Rights available at www.achpr.org/.../economic-social-cultural/achpr_instr_guide_draft_esc... (accessed 17 May 2014).

³⁸⁶ Face aux Députés ce lundi,Voici le Programme du Gouvernement Matata ! Kinshasa, le 07/05/2012 available at <http://www.laprosperteonline.net/show.php?id=10664&rubrique=La%20Une> (accessed 4 August 2014).

Right to work

The DRC Government, through this programme, provided for the creation of employment through a national fund for employment that will cater for workers in both the public and private sectors. The Government put in place appropriate political measures to absorb (young) unemployed persons and alleviate poverty. In realising these objectives, the program provides for creation of job opportunities, through innovative initiatives (e.g. agriculture, workers cooperative, micro-credits...) for idle young people, the poor and villagers. It also reinforces incubation centres in order to facilitate employment creation by training low-skilled private operators.³⁸⁷ This programme/ or policy is not in line with DRC's international obligations and lacks in-depth consistency as it excludes other important policies ,such as, taking appropriate steps to realise the right of everyone to gain their living by work which they freely choose and accept. Such steps include, for example, technical and vocational guidance and training programmes; ³⁸⁸promoting a social environment that is conducive to business creation,³⁸⁹opportunities for self-employment, entrepreneurship, and the development of co-operatives; ensuring that educational systems prepare young people with the skills necessary to obtain initial employment;³⁹⁰ensuring the right of everyone to equitable and satisfactory conditions of work, including, for instance, safe and hygienic working conditions,³⁹¹ etc.

Right to health

Some of the policies and programmes adopted by the DRC Government to realise this right by ensuring that the population, especially vulnerable groups, have access to primary, quality health care and at affordable prices; combatting serious diseases; and developing progressively the health centres for increasing access of the population to quality health care. The specific

³⁸⁷ Face aux Députés ce lundi,Voici le Programme du Gouvernement Matata ! Kinshasa, le 07/05/2012 available at <http://www.laprosperteonline.net/show.php?id=10664&rubrique=La%20Une> (accessed 4 August 2014).

³⁸⁸ The Reporting Guidelines, Part II, para. 4(b).

³⁸⁹ The Pretoria Declaration, para. 6.

³⁹⁰ UN CESCR, General Comment 18: *the right to work* (2006) UN doc. E/C.12/GC/18 , para. 14.

³⁹¹ UN CESCR,General Comment 14: *The right to the highest attainable standard of health* (Art. 12 of the ICESCR) UN doc. E/C.12/2000/4 , para. 15.

objectives of the programme in this sector is to fight against the resistance of certain diseases, such as, malaria, diarrhoea, breathing infections, tuberculosis, etc.; HIV/AIDS; improving maternal and infant health; improving efficiency of the health system; building modern infrastructures; and providing essential medicines.³⁹² To comply with its international obligations under international law for realising ESCR, DRC should elaborate on these policies and include other policies and programmes, such as, setting a target of allocating at least 15% of its annual budget to the improvement of the health sector;³⁹³ ensuring that plans aim to ensure access for all to adequate medical care and treatment in the event of sickness or accident;³⁹⁴ ensuring that national plans and policies are designed to ensure that health systems are able to deal with an individual's health holistically by addressing all aspects that may affect his/her health;³⁹⁵ etc.

Right to education

The main objective of the DRC government program on education is to contribute to economic growth and poverty alleviation through provision of inclusive and quality primary, secondary and technical/ vocational teaching systems that will offer the same opportunities to young girls and boys.³⁹⁶ However, this programme also lacks in-depth consistency and therefore is not in line with DRC obligations under International Law owing to the fact that some policies are omitted – for instance, those policies that develop a system at all levels that ensures that education is physically and economically accessible to everyone³⁹⁷ (including the provision of finance, the

³⁹² Face aux Députés ce lundi,Voici le Programme du Gouvernement Matata ! Kinshasa, le 07/05/2012 available at <http://www.laprosperteonline.net/show.php?id=10664&rubrique=La%20Une> (accessed 4 August 2014).

³⁹³ Framework Plan of Action for the Implementation of the Abuja Declaration on the Control of HIV/AIDS, Tuberculosis, and other related Infectious Diseases in Africa, AHG/228 (XXXVII).

³⁹⁴ The Reporting Guidelines, Part II, para. 36(e).

³⁹⁵ World Health Organisation, Everybody's Business: Strengthening Health Systems to Improve Health Outcomes: WHO's Framework for Action (2007) available at http://who.int/healthsystems/strategy/everybodys_business.pdf (accessed 14 August 2014). See also Human Rights Council, Report of the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health, Paul Hunt (31 January 2008) UN doc. A/HRC/7/11 (hereinafter, the "Special Rapporteur Health Report 2008"), para. 38.

³⁹⁶ Face aux Députés ce lundi,Voici le Programme du Gouvernement Matata ! Kinshasa, le 07/05/2012 available at <http://www.laprosperteonline.net/show.php?id=10664&rubrique=La%20Une> (accessed 4 August 2014).

³⁹⁷ The Pretoria Declaration, para. 8.

building of schools and the provision of educational materials);³⁹⁸ establishing an adequate scholarship and/or fellowship system;³⁹⁹ ensuring continued education for teachers and instructors including education on human rights;⁴⁰⁰ ensuring that secondary education is made generally available and accessible to all by all appropriate means, and in particular by the progressive introduction of free education;⁴⁰¹ ensuring that higher education is made generally available and accessible to all, on the basis of capacity, by all appropriate means, and in particular by the progressive introduction of free education;⁴⁰² etc.

Right to culture

The program designed for this seeks to promote sports, leisure and culture by building modern sport centres, creation of specialised schools for sports in all areas, construction of specialised leisure public spaces, and modern national libraries. The appropriate mechanisms are to be set up to encourage sports in primary and secondary schools, at Congolese universities, and for awarding the youth who will excel in different sporting activities. A specific law should be enacted before 2012 concerning culture with the participation of painters, musicians, sculptors, etc. in order to protect intellectual works.⁴⁰³ These policies and programmes are not congruent with DRC international obligations under International Law. Some of the elements omitted include strategies that ensure participation at all levels in the determination of cultural policies and in cultural and artistic activities;⁴⁰⁴ implement measures for safeguarding, protecting and building awareness of tangible and intangible cultural heritage, including traditional knowledge systems;⁴⁰⁵ ensure recognition of and respect for the diverse cultures existing in Africa;⁴⁰⁶ and

³⁹⁸ The Reporting Guidelines, Part II, para. 52.

³⁹⁹ The Reporting Guidelines, Part II, para. 53.

⁴⁰⁰ The Pretoria Declaration, para. 8.

⁴⁰¹ UN CESCR, General Comment 13: *The right to education* (Art. 13 of the ICESCR), para 13.

⁴⁰² UN CESCR, General Comment 13: *The right to education* (Art. 13 of the ICESCR) , para. 18, 19 and 20.

⁴⁰³ Face aux Députés ce lundi, Voici le Programme du Gouvernement Matata ! Kinshasa, le 07/05/2012 available at <http://www.laprosperteonline.net/show.php?id=10664&rubrique=La%20Une> (accessed 4 August 2014).

⁴⁰⁴ The Pretoria Declaration, para. 9.

⁴⁰⁵ The Pretoria Declaration, para. 9.

implement policies generally aimed at the conservation, development and diffusion of culture and the promotion of cultural identity.⁴⁰⁷

Right to housing

The objective of the program in this sector is to increase the access rate of the population to decent housing; improve land management in order to reduce shanty towns; modernise certain areas; and make villages economically viable. In this regard, the actions should have the following aims:

a) at land level: clean up the area through reform of land law; demolition of old/ or deteriorated buildings; modernisation and securisation of property; and responsabilisation of curator in charge of lands titles (property) for all reprehensible deed for exercising their responsibilities; proceed with amalgamation of villages, first on a voluntary basis (others will follow later if the experience is a success), in order to render them economically viable. This amalgamation would allow the optimisation of the use of collective goods supplied by the State (schools, hospitals, administration...);⁴⁰⁸

b) at urbanism and housing levels: proceed with creating an inventory and the securisation of property heritage of private estate of state in order to rehabilitate, modernise and render it viable; provide the country with a general arrangement of the territory and particular plans of each province and great towns; encourage private initiatives and public/private partnership in the building of housing and building at least 30000 social houses between 2011-2016; make a feasibility survey in order to proceed with the creation of a housing bank and finalise the law on lease credit; and define an absorption policy for accord shanty town and healthy housing.⁴⁰⁹ The abovementioned policies and programmes are not in line with DRC obligations under

⁴⁰⁶ The Pretoria Declaration, para. 9.

⁴⁰⁷ The Reporting Guidelines, Part III para. 14(b)(vii).

⁴⁰⁸ Face aux Députés ce lundi,Voici le Programme du Gouvernement Matata ! Kinshasa, le 07/05/2012 available at <http://www.laprosperteonline.net/show.php?id=10664&rubrique=La%20Une> (accessed 4 August 2014).

⁴⁰⁹ Face aux Députés ce lundi,Voici le Programme du Gouvernement Matata ! Kinshasa, le 07/05/2012 available at <http://www.laprosperteonline.net/show.php?id=10664&rubrique=La%20Une> (accessed 4 August 2014).

International Law in that some important policies are lacking, such as, carrying out comprehensive reviews of relevant national legislations and policies with a view to ensuring their conformity with international human rights provisions;⁴¹⁰ implementing housing programmes, including subsidies and tax incentives, to expand housing construction to meet the needs of all categories of the population, particularly low income families;⁴¹¹ prioritising in national plans and policies the provision of shelter for all persons in desperate need of emergency housing;⁴¹² etc.

Right to social security

The objective of the program is to reinforce the social security and retreat system in order to guarantee the best social cover for retired persons and others whose rights are guaranteed. Thus, this program provides for: institute co-management systems with social partners (employees, employers and State) in order to improve transparency and efficiency in management; increase deduction rate which should evolve from 7% actually to 12,5% before 2016; create medical insurance by a mutualisation system of risk in order to assure access to health care to the public; organise general states of employment and social security; and affect deducted funds towards property by applying building system by serial owing to pre-financing by banks for first objective of 10000 average villas.⁴¹³ These policies are not in accord with international human rights standards and accordingly, DRC should take effective measures to fully realise the right of all persons to social security, including social insurance;⁴¹⁴ ensure that a system, whether composed of a single or variety of schemes, is available and in place to ensure that benefits are provided for the relevant social risks and contingencies;⁴¹⁵ ensure that the social security system

⁴¹⁰ Human Rights Council, Report of the Special Rapporteur on adequate housing as a component of the right to an adequate standard of living, Miloon Kothari (5 February 2007) UN doc. A/HRC/4/18 (hereinafter the “Special Rapporteur Housing Report”). , Annex 1, para. 24.

⁴¹¹ The Reporting Guidelines, Part II para. 34(b).

⁴¹² *Government of Republic of South Africa and Ors v. Grootboom and Ors* 2000 (11) BCLR 1169 (CC).

⁴¹³ Face aux Députés ce lundi, Voici le Programme du Gouvernement Matata ! Kinshasa, le 07/05/2012 available at <http://www.laprosperteonline.net/show.php?id=10664&rubrique=La%20Une> (accessed 4 August 2014).

⁴¹⁴ UN CESCR, General Comment 19: *The right to social security* (Art. 9 of the ICESCR), UN doc. E/C.12/GC/19 , para 4.

provides for the following nine principal branches of social security: health care, sickness, old age, unemployment, employment injury, family and child support, maternity, disability;⁴¹⁶ Survivors and orphans: States should guarantee to widows and orphans adequate benefits and assistance under social security schemes, including ensuring that they are entitled to inherit property from their husbands, parents or other relatives;⁴¹⁷ ensure that qualifying conditions for benefits are reasonable, proportionate and transparent;⁴¹⁸ and ensure that where a social security scheme requires contributions, these are stipulated in advance.⁴¹⁹

Right to food

The programme aims to restore food security around the country. Some strategies in agricultural and rural policies had been set up to reach this goal. The restoration of food security around the country touches on sensitisation, production, evacuation, stocking, transformation and commercialisation of food producing products. The programme targets a sub-sector of agriculture (vegetable production) to intensify food production in order to realise self-sufficiency regarding basic foodstuffs before 2015. This will also concern reinforcing the programme of agricultural mechanisation, improving the infrastructures for agronomic research, availability of agricultural inputs to farmers and the promotion of appropriate post harvesting technology; re-energise agriculture on a firm foundation, through mobilisation and framing rural populations in order to realise the objective of an area of 1 ha per household; promote professionalisation of agricultural actors (incubators); of idle youth, retired and mobilised in agricultural production in order to proceed with self-taking care.⁴²⁰ The aforementioned policies and programmes do not

⁴¹⁵ UN CESCR, General Comment 19: *The right to social security* (Art. 9 of the ICESCR), UN doc. E/C.12/GC/19, para 11.

⁴¹⁶ UN CESCR, General Comment 19: *The right to social security* (Art. 9 of the ICESCR), UN doc. E/C.12/GC/19, para 12-20.

⁴¹⁷ Protocol on the Rights of Women, Art. 21.

⁴¹⁸ UN CESCR, General Comment 19: *The right to social security* (Art. 9 of the ICESCR), UN doc. E/C.12/GC/19, para. 24.

⁴¹⁹ UN CESCR, General Comment 19: *The right to social security* (Art. 9 of the ICESCR), UN doc. E/C.12/GC/19, para. 25.

⁴²⁰ Face aux Députés ce lundi, Voici le Programme du Gouvernement Matata ! Kinshasa, le 07/05/2012 available at <http://www.laprosperteonline.net/show.php?id=10664&rubrique=La%20Une> (accessed 4 August 2014).

comply with the DRC international obligations under International Law and the DRC Government should consequently elaborate more by adding other policies, such as, developing national plans and policies to ensure food security,⁴²¹ which includes constantly accessible and quality food that meets the requirements of nutrition and cultural acceptability;⁴²² addressing critical issues and measures with regard to all aspects of the food system, including the production, processing, distribution, marketing and consumption of safe food, as well as parallel measures in the fields of nutrition, health, education, employment and social security;⁴²³ care should be taken to ensure the most sustainable management and use of natural and other resources for food at the national, regional, local and household levels;⁴²⁴ ensure that all persons are able to feed themselves directly through environmentally, economically and socially sustainable methods from productive land or other natural resources, or from well-functioning distribution, processing and market systems that can move food from the site of production to where it is needed in accordance with demand;⁴²⁵ etc.

Right to water

The DRC government in its action programme had formulated policies to supply quality drinking water in urban and rural areas, which should be available and permanent. Taking into account the challenge that it is facing with respect to improving the quality of drinking water in the country, specific actions had been undertaken for reaching these objectives. The aim is to increase public investment in the sector to about 2% of gross domestic product(GDP) from year 2013 to 2016; reinforcing the capacities of catching, treatment, stocking and distributing of Regideso water by

⁴²¹ UN CESCR, General Comment 12: *The right to adequate food* (Art. 11 of the ICESCR) UN doc. E/C.12/1999/5 , para.15.

⁴²² Food and Agriculture Organisation *The State of Food Insecurity in the World 2009: Economic crises – impacts and lessons learned* (2009) 8.

⁴²³ See generally the Food and Agriculture Organisation *Voluntary Guidelines to support the progressive realization of the right to adequate food in the context of national food security* (2005) (hereinafter, the “FAO Voluntary Guidelines”) available at <http://www.fao.org/docrep/meeting/009/y9825e/y9825e00.htm> (accessed 14 August 2014).

⁴²⁴ UN CESCR, General Comment 12: *The right to adequate food* (Art. 11 of the ICESCR) UN doc. E/C.12/1999/5, para. 25.

⁴²⁵ UN CESCR, General Comment 12: *The right to adequate food* (Art. 11 of the ICESCR) UN doc. E/C.12/1999/5, especially para.12

rehabilitation of existing installations and other constructions, notably: the Tshikapa centre (50.000 m³/day), Lisala centre (5.000 m³/day), Kasangulu centre (1.500 m³/day),etc.; improving the governance of the sector, by finalizing a Water Code which should include the aspects of protection and integrated management of water resources and the definition of private operators' role; proceeding with payment of the water bills of official instances by the State (about 40% of business numeral), in order to increase the intervention capacity of Regideso; pursuing and intensifying the unity establishment of water drilling, especially in rural areas; encouraging the transfer in rural areas, in view of decentralisation policies and rural development, to independent systems of community management of water, such as, NGOs, associations of civil society and basic communities.⁴²⁶ These actions are not in accord with international human rights standards and accordingly, DRC should elaborate more by adding other policies, such as, taking appropriate measures for the national management of water resources and the preservation of water against pollution;⁴²⁷ promoting sustainable use of water resources;⁴²⁸ ensuring that there is appropriate education concerning the hygienic use of water, protection of water sources and methods to minimise water wastage;⁴²⁹ formulate and implement national water and sanitation strategies and plans of action that should respect, inter alia, the principles of non-discrimination and ensure the right of everyone to participate in decision-making affecting their right to water and sanitation;⁴³⁰ etc.

⁴²⁶ Face aux Députés ce lundi,Voici le Programme du Gouvernement Matata ! Kinshasa, le 07/05/2012 available at <http://www.laprosperteonline.net/show.php?id=10664&rubrique=La%20Une> (accessed 4 August 2014).

⁴²⁷ The Cairo Agenda For Action, which reads: “Member States should give priority in their development programmes to the basic needs of the people by developing appropriate infrastructure (such as rural roads, potable water supply ...), meeting basic food requirements, providing primary health services, education and skills and generating productive and remunerative employment opportunities as a means of eradicating poverty.”, para. 12(iv).

⁴²⁸ FAO Voluntary Guidelines, para. 8.11. Organisation of African Unity, The African Convention on the Conservation of Nature and Natural Resources (Revised Version 2003) includes in Art. 5: “The Parties shall establish and implement policies for the planning, conservation, management, utilization and development of underground and surface water, as well as the harvesting and use of rain water, and shall endeavour to guarantee for their populations a sufficient and continuous supply of suitable water, ...”

⁴²⁹ UN CESCR, General Comment 15: *The right to water* (Arts. 11-12 of the ICESCR) UN doc. E/C.12/2002/11, p , para. 25.

⁴³⁰ UN CESCR, General Comment 15: *The right to water* (Arts. 11-12 of the ICESCR) UN doc. E/C.12/2002/11, p , para. 48. See also: Guidelines for the realization of the right to drinking water and sanitation, above n.374, para.

4.5 Justiciability as a necessary element for effective protection and realisation of ESCR at the DRC national level: Drawing lessons from South Africa's experience

The necessity for the justiciability of the ESCR of the ACHPR enshrined in the DRC Constitution at the national level is meaningful in that: first, the judiciary plays an important role where there exists a sufficiently gross failure to uphold basic socio-economic rights: when the other two branches of government have comprehensively failed to fulfil their responsibilities, then 'the least dangerous branch' has a duty to intervene.⁴³¹ Secondly, it plays an essential role in promoting the protection of ESCR, a role that is particularly important for the most vulnerable groups in society.⁴³² It provides an avenue for the poor and vulnerable to have their voices heard.⁴³³ Domestic courts are potentially highly effective in safeguarding human rights, including ESCR.⁴³⁴ Finally, it is a useful tool for assessing the implementation or lack of implementation of ESCR at the domestic level. It serves a crucial accountability function. The governmental authorities are therefore forced to justify their policies as they are drafted, implemented and reviewed.⁴³⁵

However, the justiciability shall be regarded as contingent, meritable, on the judiciary, but also on the nature of the State obligations arising from the specific rights that are at stake. The obligations of States, on which justiciability is dependent, in respect of all rights are at three

8.1. See also the African Union Assembly, Sharm-el-Sheikh Commitments for Accelerating the Achievement of Water and Sanitation Goals in Africa", 1 July 2008, promoting public participation in water and sanitation activities, para. (I).

⁴³¹ Gauri V & Brinks D M (eds) *Courting Social Justice Judicial Enforcement of Social and Economic Rights in the Developing world* (2008) 185.

⁴³² Ghai Y & Cottrell J (eds) *Economic, Social & Cultural Rights in Practice The Role of Judges in Implementing Economic, Social & Cultural Rights* (2004) 21.

⁴³³ Gearty C & Mantouvalou M *Debating Social Rights* (2011) 116.

⁴³⁴ Morawa A H E & Shreuer C 'The role of Domestic Courts in Enforcement of International Human Rights- A view from Austria' in Conforti B & Francioni F(eds) *Enforcing International Human Rights in Domestic Courts*(1997) 175.

⁴³⁵ Hannum H (ed) *Guide to International Human Rights Practice* 3 ed (1999) 21.

levels: “respect”, “protect”, and “fulfil”.⁴³⁶ The latter shall effectively be followed and applied due to their imperative character.

In light of the above assertion, all of the obligations imposed by the ESCR have been found to be justiciable and the DRC courts have to enforce both the positive and the negative aspects of the different duties.⁴³⁷ To do so, DRC shall be inspired by South Africa’s experience as an African country and party to the ACHPR where socio-economic rights are justiciable⁴³⁸, due to the fact that the formal recognition of ESCR in the Constitution does not automatically guarantee their practical and effective protection, such as in the case of DRC. The most far-reaching constitutional provisions relating to ESCR may amount to no more than paper promises.⁴³⁹

South Africa is an exemplary case in Africa in making ESCR justiciable for their protection and realisation at the national level. The South African courts have accordingly been at the forefront, providing that these rights are subject to judicial review. The jurisprudence of the South African Constitutional Court on socio-economic rights provides rich comparative insights into judicial methodology and interpretation. Cognisant of its historic and constitutional role, the South African Constitutional Court has long transcended the usual objections of enforceability and lack of government resources to adjudicate cases involving governmental distributive programs that impact on socio-economic rights.⁴⁴⁰

⁴³⁶ Donders Y & Volodin V (eds) *Human Rights in Education, Science and Culture Legal Developments and Challenges* (2007) 56.

⁴³⁷ Coomans F ‘Reviewing Implementation of Social and Economic Rights: An Assessment of the “Reasonableness” Test as Developed by the South African Constitutional Court’ 2005 available at www.zaerv.de/65_2005/65_2005_1_a_167_196.pdf (accessed 10 July 2014).

⁴³⁸ South Africa provides an example of explicit constitutional protection of legally enforceable socio-economic rights that cannot be ignored. Several cases on ESCR have been brought and litigated before the SA Constitutional Court, notably, *Republic of South Africa v. Grootboom*, *Minister of Health v. Treatment Action Campaign(TAC)*, *Soobramoney v. Minister of Health(KwaZulu-Natal)*, *Lindiwe Mazibuko and Others v The City of Johannesburg and Others and Others*. See Githii J ‘The Case for Justiciability of Socio-Economic Rights in Kenya: Drawing from the Experience in South Africa, India and The United States’ 2008 73-9 available at www.etd.ceu.hu/2009/githii_john.pdf (accessed 9 July 2014).

⁴³⁹ Eide A et al *Economic, social and cultural rights A textbook* 2rev.ed (2001) 84.

⁴⁴⁰ Desierto D A ‘Justiciability of Socio-Economic Rights: Comparative Powers, Roles, and Practices in the Philippines and South Africa’ 2009 116 available at blog.hawaii.edu/aplpj/files/2011/11/APLPJ_11.1_desierto.pdf (accessed 30 May 2014).

Exemplar cases, such as, *Republic of South Africa v. Grootboom*⁴⁴¹, *Minister of Health v. Treatment Action Campaign*,⁴⁴² and *Soobramoney v. Minister of Health*,⁴⁴³ among others, show that socio-economic rights and governmental duties can indeed be calibrated in modern constitutional adjudication.⁴⁴⁴

Drawing from comparative South African scholarship, the adoption and practice of the triangulated theory (“Purpose-Role-Norm”) is significant to inspire DRC in making the socio-economic rights enshrined in its Constitution of 18 February 2006 justiciable before the courts. First, the DRC courts could look to the purpose of the justiciability constraint, and whether maintaining the traditionally high justiciability threshold set by *Baker v. Carr*⁴⁴⁵ is consistent with this purpose.⁴⁴⁶ Secondly, the DRC courts should also look to their constitutional role, and whether, under their expanded judicial review and rule making powers, they may adjudicate the case or controversy involving socio-economic rights. This analytical prong should be examined

⁴⁴¹ *Republic of South Africa v. Grootboom*, 2001 (1) SA 46 (CC) (S. Afr.) is a case in which the Constitutional Court found violation of the right to housing for families who were living in deplorable conditions with barest of shelter. See Church J et al *Human Rights from a Comparative and International Law Perspective* (2007) 289.

⁴⁴² *Minister of Health v. Treatment Action Campaign*, 2002 (5) SA 721 (CC) (S.Afr.). TAC is a case where the Constitutional Court ordered that anti-retroviral medication be made available to pregnant mothers shows that it is possible to grapple with challenges of justiciability and develop sound jurisprudence in accordance with well-established principle of judicial interpretation. See Gauri V & Brinks D M (eds) *Courting Social Justice Judicial Enforcement of Social and Economic Rights in the Developing world* (2008) 54-5.

⁴⁴³ *Soobramoney v. Minister of Health*, 1998 (1) SA 765 (CC) (S. Afr.) is a case where the SA Constitutional Court adopted a deferential stance to the executive’s refusal to grant dialysis for a diabetic patient who was chronically ill. See Gauri V & Brinks D M (eds) *Courting Social Justice Judicial Enforcement of Social and Economic Rights in the Developing world* (2008) 54.

⁴⁴⁴ Desierto D A ‘Justiciability of Socio-Economic Rights: Comparative Powers, Roles, and Practices in the Philippines and South Africa’ 2009 116 available at blog.hawaii.edu/aplpj/files/2011/11/APLPJ_11.1_desierto.pdf (accessed 30 May 2014).

⁴⁴⁵ *Baker v. Carr*, 369 U.S. 186 (1962), was a landmark United States Supreme Court case that retreated from the Court's political question doctrine, deciding that redistricting (attempts to change the way voting districts are delineated) issues present justiciable questions, thus enabling federal courts to intervene in and to decide redistricting cases. The defendants unsuccessfully argued that redistricting of legislative districts is a "political question", and hence not a question that may be resolved by federal courts. Available at www.infoplease.com/us/supreme-court/cases/ar02.html (accessed 12 July 2014).

⁴⁴⁶ Desierto D A ‘Justiciability of Socio-Economic Rights: Comparative Powers, Roles, and Practices in the Philippines and South Africa’ 2009 116 available at blog.hawaii.edu/aplpj/files/2011/11/APLPJ_11.1_desierto.pdf (accessed 30 May 2014).

in tandem with the third aspect of this theory, which is to look at the norm as constitutionally formulated.⁴⁴⁷

4.6 Conclusion

In terms of Article 1 of the ACHPR, DRC as a Member State of the AU, and Party to the present Charter, shall recognise the rights, duties and freedoms enshrined in the Charter and shall undertake to adopt legislative or other measures to give effect to them. Such measures include providing for the protection and realisation of ESCR through constitutional rights and institutions, legislative, policy and budgetary measures, educational and public awareness measures and administrative action, as well as ensuring appropriate administrative and judicial remedies for the violation of these rights.

The ESCR of the ACHPR are also enshrined in the DRC Constitution⁴⁴⁸, as the logical consequence of their ratification by the DRC as Member of the AU, and Party to the ACHPR, at regional level. From those rights, some general obligations are generated and are therefore imposed on the African States, one of which is DRC: obligation to take measures to ensure enjoyment of ESCR; obligations to respect, protect, promote and fulfil; resources and progressive realisation; immediate obligations regarding the implementation of ESCR; presumption against retrogressive measures; and effective domestic remedies.⁴⁴⁹

Other key obligations, include: the guarantee of equality and non-discrimination, international co-operation between countries, the guarantee of the right to self-determination of peoples, active engagement with civil society, effective establishment of a national human rights institution, and the undertaking to file period reports to the African Commission on the steps taken for the protection and realisation of ESCR.⁴⁵⁰ Specific obligations generated from the ESCR of the

⁴⁴⁷ Desierto D A 'Justiciability of Socio-Economic Rights: Comparative Powers, Roles, and Practices in the Philippines and South Africa' 2009 116 available at blog.hawaii.edu/aplpj/files/2011/11/APLPJ_11.1_desierto.pdf (accessed 30 May 2014).

⁴⁴⁸ Articles 34-48 of the DRC Constitution of 18 February 2006.

⁴⁴⁹ African Commission 'Draft Principles and Guidelines on the Implementation of Economic, Social and Cultural Rights in the African Charter on Human and Peoples' Rights available at www.achpr.org/.../economic-social-cultural/achpr_instr_guide_draft_esc.. (accessed 17 May 2014).

ACHPR entrenched in the DRC Constitution should be read in the light of the general obligations of States in relation to those rights.⁴⁵¹

As the African Charter complements human rights protection at the domestic level where the rights protected in the Charter should be realised, the DRC should ensure that the ESCR of the ACHPR protected in its Constitution are given full legal effect in domestic law, such that the Charter's rights are made justiciable, and that effective remedies (e.g. compensation, reparation, restitution, rehabilitation, guarantees of non-repetition, and public apologies) are available for victims of all violations of ESCR at the domestic level.⁴⁵²



⁴⁵⁰ African Commission ,Draft Principles and Guidelines on the Implementation of Economic, Social and Cultural Rights in the African Charter on Human and Peoples' Rights available at www.achpr.org/.../economic-social-cultural/achpr_instr_guide_draft_esc.. (accessed 17 May 2014).

⁴⁵¹ African Commission, Draft Principles and Guidelines on the Implementation of Economic, Social and Cultural Rights in the African Charter on Human and Peoples' Rights available at www.achpr.org/.../economic-social-cultural/achpr_instr_guide_draft_esc.. (accessed 17 May 2014).

⁴⁵² Ssenyonjo M *Analyzing the Economic, Social and Culture Rights Jurisprudence of the African Commission: 30 Years since the Adoption of the African Charter* (2011) 397 available at <http://www.corteidh.or.cr/tablas/r26994.pdf> (accessed 29 October 2013).

CHAPTER FIVE:

CONCLUSION AND RECOMMENDATIONS

5.1 Conclusion

The realisation of socio-economic rights in DRC, even at a minimum level, remains poor.⁴⁵³ Although DRC is a rich country which is endowed with abundant natural resources (such as, oil and gas); minerals (such as, cobalt, vanadium, manganese, phosphate, and bauxite); iron ore; and precious tropical rain forests,⁴⁵⁴ the majority of Congolese live in poverty, disease and ignorance; they lack jobs, food and other basic necessities ,such as water.⁴⁵⁵

DRC as an African State and member of the AU, had ratified the ACHPR (the foundational normative instrument for the protection and promotion of human rights in Africa) containing CPR, on the one hand, and ESCR, on the other hand.⁴⁵⁶ It had consequently incorporated them into its Constitution of 18 February 2006, which made them legally enforceable under the Constitution. Interestingly, the implementation of ESCR, contrary to CPR, is problematic in DRC given that those rights remain marginalised and, accordingly, are violated most times,⁴⁵⁷ especially in terms of providing for ESCR in domestic legal documents. Experience has

⁴⁵³ Mbazira C ‘ A path to realising ESCR in Africa ?....35 available at www.ahrlj.up.ac.za/.../ahrlj_vol4_no1_2004_christopher_mbazira.pdf (accessed 18 May 2014).

⁴⁵⁴ Viljoen F *International Human Rights Law in Africa* 2ed (2012) 545 & 544.

⁴⁵⁵ Mbazira C ‘ A path to realising ESCR in Africa ?....35 available at www.ahrlj.up.ac.za/.../ahrlj_vol4_no1_2004_christopher_mbazira.pdf (accessed 18 May 2014).

⁴⁵⁶ Keetharuth S B ‘Major African legal instruments’ in Bosl A & Diescho J *Human Rights in Africa Legal Perspectives on their Protection and Promotion* (2009) 166.

⁴⁵⁷ The violations of ESCR had already been demonstrated through the case of *Free Legal Assistance Group, Lawyers’ Committee for Human Rights, Union Interafricaine des Droits de l’Homme, Les Témoins de Jehovah vs Zaire*. See Baderin M A & McCorquodale R *Economic, Social and Cultural Rights in Action* (2007) 154,157. Also Scott Campbell, the High Commissioner of United Nations in charge of Human Rights in DRC, at the occasion celebrating the 65th international day of human rights on 10 December 2013, had made a declaration according to which “*socioeconomic rights are violated from day to day in DRC. These rights are violated every day more than violences which are being committed in eastern DRC.*” See Radio Okapi available at <http://radiookapi.net/actualite/2013/12/10/scott-campbell-les-droits-sociaux-economiques-sont-violes-tous-les-jours-en-rdc/> (accessed 17 March 2014).

indicated that it is easier to provide for human rights, including ESCR, than it is to implement them.⁴⁵⁸ Even though the ESCR of the ACHPR are provided for in the DRC Constitution, their implementation in DRC remains a challenge. The real situation of these rights is disturbing because they are violated in most cases by governments.⁴⁵⁹ This situation is due to certain reasons or factors at the national and regional levels that constitute barriers to their protection and realisation. At the national level: factors include: bad governance, mismanagement of public finances, lack of or weak institutions or organs of implementation, verification of ESCR, ignorance of the Congolese people about their socio-economic rights, and non-justiciability of ESCR before the Congolese courts; and these pose barriers. Whereas at the regional level: the interpretation of the ESCR provisions of the ACHPR whose formulation is vague regarding content and scope, lack of effective enforcement and promotion of ESCR (the virtual inaction of the African Commission), the absence of an expeditious and effective individual complaints procedure before the Commission, the ineffectiveness of the proposed African Court of Human and Peoples Rights, and international apathy and hostility; are all problematic.

Consequently, the marginalisation of socio-economic rights which results in their non-protection, and non-realisation in DRC, leads to: low expectation of the State and Government by the people, corruption, exclusion, racism, xenophobia, inequality, diseases, poverty, feeling of betrayal of the people, crisis of State and governmental legitimacy, and popular insurrections and civil war in the country.⁴⁶⁰

To prevent the above consequences requires DRC to comply with Article 1 of the ACHPR⁴⁶¹. With regard to all the human rights of the ACHPR, including ESCR, enshrined in the

⁴⁵⁸ Maina P C 'Human Rights Commissions in Africa-Lessons and challenges' in Bosl A & Diescho J *Human Rights in Africa Legal Perspectives on their Protection and Promotion* (2009) 351.

⁴⁵⁹ Scott Campbell, the High Commissioner of United Nations in charge of Human Rights in DRC, at the occasion celebrating the 65th international day of human rights on 10 December 2013, had made a declaration according to which "socioeconomic rights are violated from day to day in DRC" See Radio Okapi available at <http://radiookapi.net/actualite/2013/12/10/scott-campbell-les-droits-sociaux-economiques-sont-violes-tous-les-jours-en-rdc/> (accessed 17 March 2014).

⁴⁶⁰ Gawanas B 'The African Union: Concepts and Implementation mechanisms relating to Human Rights' in Bosl A & Diescho J *Human Rights in Africa* (2009) 148.

⁴⁶¹ Article 1 of the ACHPR declares that 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.

DRC Constitution, general obligations are generated and are therefore imposed on the African States, including the DRC. The general obligations include: obligation to take measures to ensure enjoyment of ESCR; obligations to respect, protect, promote and fulfil; resources and progressive realisation; immediate obligations regarding the implementation of ESCR; presumption against retrogressive measures; and effective domestic remedies. Other key obligations are: guarantee of equality and non-discrimination; international co-operation between countries; guarantee of the right to self-determination of peoples; active engagement with civil society; effective establishment of a national human rights institution; and undertaking to file period reports with the African Commission; and are the steps taken for the protection and realisation of ESCR.⁴⁶²

Since the African Charter complements human rights protection at the domestic level where the rights protected in the Charter should be realised, it is important for DRC to ensure that the ESCR of the ACHPR protected in its Constitution are given full legal effect under domestic law, such that the Charter's rights are made justiciable.⁴⁶³

5.2 Recommendations

5.2.1 To the DRC Government

5.2.1.1 Good governance

Good governance for the DRC government implies accountability, transparency, combating corruption, legal and judiciary reforms,⁴⁶⁴ participation of all citizens with regards to the development of the country, improvement of administrative performance and public institutions,

⁴⁶² African Commission, Draft Principles and Guidelines on the Implementation of Economic, Social and Cultural Rights in the African Charter on Human and Peoples' Rights available at www.achpr.org/.../economic-social-cultural/achpr_instr_guide_draft_esc.. (accessed 17 May 2014).

⁴⁶³ Ssenyonjo M *Analyzing the Economic, Social and Culture Rights Jurisprudence of the African Commission: 30 Years since the Adoption of the African Charter* (2011) 397 available at <http://www.corteidh.or.cr/tablas/r26994.pdf> (accessed 29 October 2013).

⁴⁶⁴ Heynes C & Steliszyn K (eds) *Human Rights, Peace and Justice in Africa. A Reader* (2006) 141.

improvement of the provision of public services, and respect for the rule of law and human rights.⁴⁶⁵

5.2.1.2 Good management of public finances

Strong mobilisation of public resources (finances) by public service fund generators, such as, the DGI, DGDA, DGRAD and other public companies and administrations. The funds collected should be utilised to provide basic facilities to citizens and directed towards productive sectors, thereby making more financial resources available to realise the ESCR. Moreover, the collected funds should not be subject to embezzlement by not only those managing these companies, but also the political authorities of the country for their personal gain. The DRC should also avoid heavy debts. Debt burdens are major obstacles to meaningful economic development in DRC and contribute to non-enforcement of ESCR.⁴⁶⁶

5.2.1.3 Complying with the imposed general and specific obligations generated by the ESCR of the ACHPR through the Guidelines and Principles on the implementation of ESCR.

The DRC Government shall effectively comply with the general obligations imposed by the ACHPR, including: obligation to take measures to ensure enjoyment of ESCR; obligation to respect, protect, promote and fulfil; resources and progressive realisation; immediate obligations regarding the implementation of ESCR; presumption against retrogressive measures; and effective domestic remedies. Other key obligations include: guarantee of equality and non-discrimination, international co-operation between countries, guarantee of the right to self-determination of peoples, active engagement with civil society, effective establishment of a NHRI; and undertaking to file period reports with the African Commission on the steps taken for the protection and realisation of ESCR.⁴⁶⁷

⁴⁶⁵ Nowak M *Introduction to International Human Rights Regime* (2003)47.

⁴⁶⁶ Bakandeja wa Mpungu G *Droit des Finances Publiques. Moyens d'action et Plan financier de l'État* (1997).

⁴⁶⁷ African Commission ,Draft Principles and Guidelines on the Implementation of Economic, Social and Cultural Rights in the African Charter on Human and Peoples' Rights available at www.achpr.org/.../economic-social-cultural/achpr_instr_guide_draft_esc. (accessed 17 May 2014).

5.2.1.4 Sensitising and vulgarising international conventions and national laws on socio-economic rights in DRC.

International (regional) as well as national instruments in relation to ESCR, such as, the UDHR 1948 (Articles 22-8); ICERD 1965 (Article 5); ICESCR 1966 (Articles 1,3,6-15); DSPD 1969; CEDAW 1979 (Article 1); DRD 1986; CRC 1989; ICRMW 1990; ACHPR 1981, DRC Constitution 2006 (especially the provisions referring to ESCR, Articles 34-48) etc. shall be vulgarized in order to sensitise the Congolese people about their socio-economic rights.

5.2.1.5 Educating the Congolese people about their ESCR, and the role of the NHRI

Once instituted, the NHRI should give particular attention to the education of the majority of the Congolese people, especially with respect to its role in assisting in the education of public opinions towards, and awareness of, a respect for human rights, including socio-economic rights.⁴⁶⁸

5.2.1.6 Enacting legislation, legal or judiciary mechanisms and procedures that allow the Congolese people to sue the DRC State in case of violation of their ESCR.

Since no legislation, legal or judiciary mechanisms and procedures to remedy ESCR violations exist in DRC, their elaboration by its Parliament (National Assembly and Senate) will be very significant for contributing to the protection and realisation of ESCR in DRC.

5.2.1.7 Making socio-economic rights of the ACHPR justiciable before the Congolese courts

As the African Charter complements human rights protection at the domestic level where the rights protected in the Charter should be realised, DRC should ensure that the ESCR of the ACHPR protected in its Constitution are given full legal effect in domestic law, such that the Charter's rights are made justiciable, and that effective remedies (e.g. compensation, reparation,

⁴⁶⁸ Ramcharan B *The Quest for Protection A human rights Journey at the United Nations* (2004) 97.

restitution, rehabilitation, guarantees of non-repetition, and public apologies) are available for victims of all violations of ESCR at the domestic level.⁴⁶⁹

5.2.2 To the international/regional community

5.2.2.1 Making clear the content and scope of the ESCR of the ACHPR through the African Commission

The African Commission should of its own accord make resolutions, statements, general comments, concluding observations on State Party reports, and principles or guidelines clarifying the content of the rights protected in the Charter.⁴⁷⁰

5.2.2.2 Making effective enforcement and promotion of ESCR (action of African Commission)

Being the principal body mandated to monitor the implementation of the African Charter in Africa, the African Commission should be active in the promotion and protection of human rights, including ESCR. The Commission should be potent in the face of serious and systemic abuses of human rights, including ESCR. Whatever power exists to implement the Commission's findings, seems to be vested in the OAU's Assembly. Hence, human rights, including ESCR, should be a State's top priority. The Commission members should be independent and impartial and should observe the principle of confidentiality.⁴⁷¹

5.2.2.3 Existence of an expeditious and effective individual complaints procedure before the African Commission which will enhance the development of appropriate jurisprudence on human rights in general and economic, social and cultural rights in particular.

⁴⁶⁹ Ssenyonjo M *Analyzing the Economic, Social and Culture Rights Jurisprudence of the African Commission: 30 Years since the Adoption of the African Charter* (2011) 397 available at <http://www.corteidh.or.cr/tablas/r26994.pdf> (accessed 29 October 2013).

⁴⁷⁰ Ssenyonjo M *Analyzing the Economic, Social and Culture Rights Jurisprudence of the African Commission: 30 Years since the Adoption of the African Charter* (2011) 364 available at <http://www.corteidh.or.cr/tablas/r26994.pdf> (accessed 6 June 2014).

⁴⁷¹ Functions of the African Commission. See Articles 45-9 of the ACHPR.

5.2.2.4 Effectiveness of the proposed African court of Human and Peoples Rights

The African Court judgments shall be effectively applied. This will ensure the effectiveness of the Court which is frequently called into question by the few States that allow citizens to directly appeal to it.

5.2.2.5 Regard and vigilance of the international community with respect to the enforceability of ESCR in DRC.

The pressure on the efforts of the international community (States, NGOs, and civil society) in relation to the protection and realisation of CPR shall also be made with regard to enforceability of ESCR in DRC.⁴⁷²

Word count: 35,890 including footnotes



⁴⁷² Agbakwa S.C 'Reclaiming Humanity: Economic, Social, and Cultural Rights as the Cornerstone of African Human Rights' (2002) 202 *Yale Human Rights & Development L.J.* Vol.5 available at www.law.yale.edu/documents/pdf/.../Shedrack_Agbakwa_YHRDLJ.pdf (accessed 19 April 2014).

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