



FACULTY OF LAW
University of Lund

Master of International Human Rights Law

Using the Law To Alleviate Poverty:
Opportunities and Challenges

Master thesis

By
Augustine Kaheeru Bahemuka

Supervisor

Prof. Katarina Tomasevski

Lund, Sweden
November 2001

Contents

ACKNOWLEDGMENTS	1
DEDICATION	2
ABBREVIATIONS	3
1 INTRODUCTION	4
1.1 Background	5
1.2 Aims and Purpose of the Study	6
1.3 Scope of the Study	6
1.4 Methodology	7
1.5 Structure	8
2 THE REVISED EUROPEAN SOCIAL CHARTER	9
2.1 Introduction	9
2.2 An overview	9
2.3 Economic, Social and Cultural Rights under the Charter	11
2.4 Implementation and Monitoring Mechanism	13
2.4.1 State Reports	13
2.4.2 The Committee of Independent Experts	14
2.4.3 The Governmental Committee of the ESC	15
2.4.4 The Committee of Ministers	15
2.4.5 Collective Complaints	16
2.5 Article 30: <i>The Legal Implications</i>	16
2.6 Conclusions	17
3 THE INTER-AMERICAN SYSTEM	18
3.1 Introduction	18
3.2 An over view	19
3.3 Economic, Social and Cultural Rights Under the System	21
3.4 The Protocol of San Salvador	24
3.4.1 State Obligation under the Protocol of San Salvador	26

3.5	Monitoring and Implementation Mechanism	27
3.5.1	Violation of Economic, social and Cultural rights	29
3.5.2	Country Reports	30
3.5.3	Annual Reports	31
3.5.4	Other Monitoring Procedures employed by the Commission	31
3.5.5	Individual Petitions/Complaints	32
3.5.6	The Inter- American Court	33
3.6	The Question of Poverty and Exclusion under The Inter- American Commission on Human Rights	35
3.6.1	Decided cases	38
3.7	Conclusions	40
4	THE AFRICA COMMISSION ON HUMAN AND PEOPLES RIGHTS	41
4.1	Introduction	41
4.2	An Overview	42
4.3	Economic, Social and Cultural Rights under the Charter	43
4.4	Machinery of Enforcement	46
4.4.1	The African Commission on Human and Peoples' Rights	46
4.4.2	Interstate Complaints	48
4.4.3	Individual Complaints	49
4.4.4	State Reports	49
4.5	The Question of Poverty:<i>Opportunities and Challenges</i>	50
4.6	Conclusion	57
5	NATIONAL IMPLEMENTATION OF ESCR AND POVERTY ALLEVIATION: <i>THE CASE OF SOUTH AFRICA</i>	59
5.1	Introduction	59
5.2	An Overview of the Constitutional Provisions on ESC Rights	60
5.2.1	Application and enforcement	62
5.2.2	Interpretation of the Provisions	63
5.3	The role of the Judiciary	63
5.3.1	Decisions of the South African Constitutional Court and how they have interpreted socio-economic provisions (<i>Government of RSA and others V Grootboom and others</i>)	64
5.4	Poverty Alleviation: The Constitution and the Courts	66
5.5	The Role of The Human Rights Commission	67
5.6	Conclusions	68
6	CONCLUSIONS AND RECOMMENDATIONS	70

BIBLIOGRAPHY	72
TABLE OF CASES	78

Acknowledgments

I wish to register my sincere gratitude and thanks to the Raoul Wallenberg Institute and through them to the Swedish International Development Agency (SIDA), without whose generous material and financial support, this Masters program would have remained a pipe dream.

Am also thankful to all staff at the Institute and more so, the Librarians, Habteab, Lena, Camilla and Chris (Yes Cassetta!) who were always too willing and enthusiastic in helping to locate resource materials throughout the entire process of writing this thesis.

To all my classmates for having made my Lund experience more worthwhile, very enriching and comfortable, it was always a pleasure to have those ever stimulating discussions and debates that characterized our stay in Lund. Thandiwe deserves particular mention for enthusiastically accepting to act as my opponent.

Special thanks to my supervisor, Professor Katarina, for all the invaluable advice and guidance from the initial stages, up to the completion of this thesis.

I owe a lot to my friends back in Uganda, Charles, Nelson, Gellah, Robert, Michael, Larry, Louis, David, Moses, et al, for all the support, moral, material and otherwise that came in handy when it was most needed.

To my parents, who have nurtured and modelled me from inception to date, what you mean to me is just indescribable. To the entire “Kaheeru Clan”, I would not have reached this stage without your support, guidance and love; you have all continued to play a pivotal role in my life, most important of which has been the ‘pace setting’ role. To my dear son Jordan, for having endured my long absence with fortitude and determination.

And lastly, my sincere and heartfelt immeasurable gratitude to my “editor” and friend, Rulan, who endured long nights and expended a lot of energy and enthusiasm while painstakingly and tenaciously, editing this work.

Kaheeru Bahemuka
Lund, 30 November 2001

Dedication

To Pearl

Abbreviations

ACHR	American Convention on Human Rights
AU	African Union
CERD	International Convention on the Elimination of All forms of Racial Discrimination
CIE	Committee of Independent Experts
CM	Council of Ministers
ECHR	European Convention for the Protection of Human Rights and Fundamental Freedoms
ESC	European Social Charter, Economic Social and Cultural Rights
ETS	European Treaty Series
GC	Governmental Committee
ICESCR	International Covenant on Economic, Social and Cultural Rights
ICJ	International Commission of Jurists
ILO	International Labour Organisation
NGO	Non Governmental Organisation
OAS	Organisation of American States
OAU	Organisation of African Unity
TRC	Truth and Reconciliation Commission
UDHR	Universal Declaration of Human Rights
UN	United Nations
UNDP	United Nations Development Programme

1 Introduction

‘Poor people around the world, and the organizations that represent them see poverty as an injustice, a denial of freedom from want, and in their efforts to lift themselves out of the poverty trap; they are claiming their right to development.’¹ This statement succinctly illustrates the link between poverty alleviation, development, law and human rights. It also goes to emphasize that poverty is not only a social issue, within the exclusive domain of socio-economic interventions, but also a human right and legal issue with legal solutions. This thesis, therefore, attempts to examine the legal framework that has been put in place within which poverty, as a human right and legal issue, can be adjudicated upon as possible solutions are posited.

During the execution of carrying out research for this thesis, it became apparent that within the realm of the UN legal machinery, there is want of a binding legal document that specifically legislates against poverty and social exclusion. It was ascertained earlier on in this research, that the only legal recourse available for poverty stricken individuals, groups and communities could only be found within the ambit of the so-called 1503 procedure². However the problems associated with this procedure are so well known to warrant any illustration herein. Suffice it to say that the procedure does not offer any effective or meaningful protection or tangible solutions to the issue at hand.

Another legal machinery that could be fished out of the UN legal labyrinth is to be found under the aegis of the Committee against Racial Discrimination set up within the precincts of Art 8 of the CERD. The Committee is mandated to and actually accepts complaints without any distinction, be it civil and political or socio-economic and cultural in nature. A number of poverty related cases have been adjudicated upon under this procedure. Unfortunately, it can only have limited effect given the fact the one has to prove social exclusion or unequal treatment based along racial lines in order to access redress thereunder.

With that in mind, it was not found necessary to focus on the UN procedures that have been designed, if at all, to address the issue of poverty and social exclusion. It was strongly felt, from the onset therefore, that for effective legal remedies against poverty and social exclusion, one would have to rummage around and find recourse elsewhere, hence the inevitable swing of focus to the regional and national echelons.

¹ James Gustave Speth, was the UNDP Administrator, 1997

² The so-called 1503 procedure, is a procedure that was set up under the auspices of the UN Economic and Social Council, ostensibly to respond to systematic and gross violation of human rights

1.1 Background

Millions of people live in poverty, not the relative one of those living in wealthy nations, but absolute poverty, they lack adequate food, clean water, sanitation, and access to medical services, shelter and education. It is estimated that close to 3 billion people live in unjustifiable poverty.³ Moreover, it is estimated that nearly a billion people entered the 21st century, unable to read a book or sign their names. What is ironical however, is the fact that only less than one percent of what the world spends every year on weapons would be enough to put every child into school.⁴

The above statistics, though not in any way exhaustive, are only meant to show the undeniable link between denial of what have been recognized and enunciated as human rights and poverty. However this is not to simplify the enormous task that is likely to be encountered by anyone trying to devise workable solutions to this injustice. One should be well aware that the proliferation of international human rights standard setting has sometimes created an illusion that whatever has been called a right in some inter-governmental documents indeed constitutes a human right. Reality dictates that this is not the case and some commentators have observed that, Human Rights cannot exist unless there are corresponding governmental obligations. Where obligations are impossible to define or not clearly defined as in many of the socio-economic rights, rights cannot easily be claimed, but have yet to be fought for and conquered.⁵

What is clear however is that, the basic principles of the Rule of law enunciated in New Delhi in 1959 and reaffirmed in the Law of Lagos 1961, all under the auspices of the ICJ, recognize the importance of the use of law for the advancement of the will of the people and the political rights of the individual and to establish social, economic, educational and cultural conditions under which the individual may achieve his dignity and realize their legitimate aspirations.

However, it is not immediately apparent whether poverty is an obstacle to the realization of human rights, which both governments and individuals should be assisted to diminish, or has resulted from an abuse of power and could therefore be addressed as a human rights violation. Besides, there are many obstacles in

³ The *New York Times* in one of their email updates, in their quote of the Day section, for July 18, 2001 provided the following quote: “A world where some live in comfort and plenty, while half of human race lives on less than \$2 a day, is neither just, nor stable”—President Bush

⁴ Poverty Facts and States: <www.globalissues.org/TradeRelated/Facts.asp> In order for one to appreciate the problem, it is imperative to have a glimpse of the statistics which are indicative that, half the world, nearly three billion people. Live on less than two dollars a day. The GDP (gross Domestic Product) of the poorest 48 nations (i.e. a quarter of the world's countries) is less than the wealth of the world's three richest people combined.

⁵ See Katarina Tomasevski, , ‘Justiciability of Economic, Social and Cultural Rights’ *The Review* [ICJ] No 55, 1995 206

litigating violations of economic and social rights one of which is the paucity of concrete proposals to distinguish between government *inability* to implement its human rights obligations and its *unwillingness* to do so.⁶

Either way, what is crystal clear is that the implementation of economic social and cultural rights, like all human rights, requires deep structural changes; which is, so to say, a *sine qua non* for democracy peace and security.

1.2 Aims and Purpose of the Study

This study aims at evaluating the existing Human Rights law relating to freedom from want, and the right to achieve the highest attainable standard of living, albeit, at regional level, with one specific example at national level. One should be able to determine as to whether there exists legally binding specific provisions under the regional systems, or at national level that thrust obligations upon States to compel them to act upon poverty, and how they can be used in case of non-compliance therewith.

This study also demonstrates the link between human dignity, poverty and other economic, social and cultural rights. It is also illustrative of the fact that poverty is a state of affairs that affects the individuals enjoyment of all the other rights, be it civil, political, economic, social cultural or even collective rights. Therefore the quest for freedom from deprivation must necessarily be examined within the broader, social, political and economic set up.

It should, at the end of the day, be patent, that deprivation of the basic necessities of life to a human being is a gross violation of human rights and therefore goes against the spirit and letter of the human rights discourse in its entirety, starting from the Charter of the UN⁷, the UDHR, all the conventions, treaties, declarations, resolutions and national constitutions

1.3 Scope of the Study

This study addresses the issue of the law relating to poverty alleviation as enshrined under the European Social Charter (Revised), the Charter of the Organization of American States (OAS), the American Declaration on the Rights and Duties of man, the American Convention on Human Rights and the Protocol thereto (Protocol of San Salvador relating to economic, social and cultural rights), the African Charter on Human and People's Rights. It concludes by making a case study of South Africa so as to elucidate the position at national level and how the law and the legal machinery, under the realm of the constitution is being

⁶ Ibid

⁷ Specifically see Articles 1, 55 and 56

utilized to redress issues relating to socio-economic rights, deprivation and poverty eradication.

Inevitably this involves an in-depth analysis of the monitoring, supervision and implementation mechanisms that have been instituted, more so as to their effectiveness in executing their mandate. The justiciability of ESC rights encapsulated in the instrument under examination is executed in light of the extent they relate to poverty, and to a lesser degree, development.

The study will look at the national implementation in South Africa, and how it has tried to put in place measures to fight poverty and encourage development. Are ESC rights perceived, by both the rights holders and duty bearer, to be legally enforceable human rights obligations or just socio-political concerns with no legal ramifications? The answer to that will be found in not only the constitutional provisions, but also the reasoned and carefully crafted decisions of the South African bench.

In scaling the heights of the legal machinery that may be available to redress poverty and related rights, the thesis did not lose sight of the fact that poverty alleviation necessarily calls for extra legal structural solutions, in which case, States are expected and indeed must accept certain standards of good governance, based on legitimacy, accountability, competence, and respect for human rights⁸

1.4 Methodology

This study can best be described as a 'desk-based' research to the extent that the research is generally based on already existing legal instruments that had to be thoroughly scrutinized, with a view of discerning and isolating therefrom, specific provisions relating to socio-economic rights and freedom from poverty, social and economic exclusion. This necessarily meant that the researcher had to painstakingly leaf through a maze of legal documents, reports commentaries, decisions and judgments.

Perusing through, analyzing and internalizing existing academic literature and scholarly writings on the subject at hand took a good portion of the research. Once more, a multitude of textbooks, research studies, human rights law journals and other materials on the subject had to be consulted, both in hard copy and from the Internet.

⁸ Udombana, N.J. 2000. "The Third World and the Right to Development: Agenda for the Next Millennium." *Human Rights Quarterly*, v23, no.1, pp. 753-787.

1.5 Structure

This thesis is divided into six chapters including this general introduction. The second chapter examines the European system of protection to the extent it relates socio-economic rights, poverty and social exclusion, and looks at the legal machinery that has been put in place to monitor the implementation and oversee the enforcement of the recognized rights. The Revised European Social Charter forms the bulk of this chapter. Chapter 3 deals with the Inter-American system, social-economic rights recognized therein, the enforcement mechanism and how it has handled poverty related rights. The fourth chapter examines the African Charter and Commission and being the younger of the 2, challenges are identified and possible opportunities explored and posited. The fifth chapter then looks at action at national level, there could be no better ground for analysis than the South African scenario, a country with a constitution that postulates and encompasses almost all if not more of the international human rights norms. The thesis is brought to rest with suggested recommendations and conclusions in chapter 6 and ends with a list of appendices and bibliography.

2 The Revised European Social Charter

2.1 Introduction

Coming in 1961, the European Social Charter is the oldest and by far the most comprehensive, binding Human Rights treaty that provides a guarantee for the protection of Economic and Social Rights. Indeed, according to some scholars, the Charter was meant to provide an immediate legal guarantee of Economic and Social Rights, comparable to the ECHR, which is restricted to only Civil and Political Rights. Together with an effective implementation mechanism, the Charter can be said to provide real protection to the nationals of the Contracting Parties. In this Chapter, a general overview of the Charter will be given, following which; will be a cursory look at the Charter provisions. Thereafter, the Chapter will dwell on the implementation and monitoring system under the Charter giving an in-depth analysis of its efficacy and development. In light of that, Charter provisions that provide guarantees to protection from poverty and social exclusion will be examined and commented upon, wherein an attempt at interpreting their legal consequences will be done.

2.2 An overview

According to David Harris⁹ the ESC is a creation of the Council of Europe that is meant to be a counter part of the Convention for The Protection of Human Rights and Fundamental Freedoms, (ECHR). Together, the two treaties should secure for the individual in Europe, most of the Human Rights set forth in the Universal Declaration of Human Rights¹⁰

Although Economic and Social Rights were reflected in post 2nd World War Constitutions of France, Germany and Italy, they were not included in the European Convention (EHRC), which, basically provided, almost exclusively for civil and political rights. This, according to the drafters, was because it was necessary to guarantee political democracy in the EU and coordinate the economies before undertaking the generalization of social democracy.

⁹ See David Harris, **The Council of Europe II, The European Social Charter**, in *An Introduction to International Protection Of Human Rights*: (1999), 2nd Revised Edition, Raija Hanski and Markku Suksi, (eds) Institute for Human Rights, Åbo Akademi University, 309

¹⁰ The UN adopted the UDHR in 1948 and has overtime attained the Status of customary International Law that is binding upon all nations, its normative character is now universally accepted as a standard measure for respect of Human Rights.

Consequently, Economic and Social Rights had to wait until 1961 when they were enshrined under the European Social Charter.¹¹

As of now, the ESC system is comprised of; the original Charter of 1961; an Additional Protocol of 1988 extending some of the rights; an amending protocol of 1991 that revises some of the original monitoring arrangements; a revised and consolidated Charter of 1996, that updates the earlier documents as well as adds some new rights, and a further Additional Protocol of 1995, which provides for a collective complaints system.¹²

The Charter and its Additional Protocol of 1988 guarantee a series of rights and principles, with respect to employment conditions and social cohesion. With 13 ratification as of October 2001, the European Social Charter (Revised), entered into force on July 1, 1999. Of the 13 ratifications, France, Italy, Slovenia, Sweden and Norway¹³ have accepted to be bound by Art.30, the subject of this thesis. The consolidated provisions, relate *inter alia*, to non-discrimination, prohibition of forced labour, trade union rights, decent working conditions, equal pay for equal work, prohibition of child labour, maternity protection, social security, and *protection against poverty and social exclusion* [Emphasis mine]. In all, the system provides a catalogue of 31 rights and principles.¹⁴

What is peculiar however is that these rights are not binding *per se*. The legal obligations designed to ensure their effective exercise are contained in Part II, which details the specific measures to be taken in relation to each of the rights. Given the nature of social and economic rights, it's against these, that the standard of compliance for contracting states is measured. In part I of the Charter and the Additional Protocol, the rights are therefore, declared in general terms where the High Contracting parties declare that they,

“... accept as the aim of their policy, to be pursued by appropriate means, both national and international in character, the attainment of conditions in which all... these rights and principles may be effectively realized”¹⁵

From the onset, it is important to note that the intention of the ESC was to provide for the establishment of an enabling environment within which the rights enumerated could be realized, rather than social economic rights as ends *inter se*. Consequently the rights are not absolute, in comparison to civil and political rights under the ECHR. Part II of the Charter and the Additional Protocol is what spells out the meaning of the rights and principles that are proclaimed in general terms

¹¹ See Henry J. Steiner and Philip Alston: 'International Human Rights in Context, A text Book' 2nd Edition, Oxford University Press, 2000, 794

¹² *ibid*, 795

¹³ See Status of Ratification <<http://conventions.coe.int/treaty/Html.htm>>

¹⁴ See Summary of the European Social Charter (Revised), on <<http://conventions.coe.int/treaty/en/Summeries/Html/163.htm>>

¹⁵ See European Social Charter, ETS No. 036?

under Part I.¹⁶ For instance the right to protection against *poverty and social exclusion* which is set out as such under paragraph 30 of Part I, is defined under Article 30 of part II wherein the Parties undertake to do the following;

- a) to take measures within the frame work of an overall and co-ordinated approach to promote the effective access to persons who live or risk living in a situation of exclusion or poverty, as well as their families, to, in particular, employment, housing, training, education, culture and social and medical assistance;
- b) to review these measures with a view to their adaptation if necessary¹⁷

Inevitably, the implementation of the ESC is heavily dependent on the political will of the contracting Parties. Nevertheless, as will be demonstrated later on in this chapter, this, has to a large extent, been influenced by an effective monitoring and implementation mechanism that was put in place to oversee the realization thereof.

In a nutshell therefore, the Revised Charter is divided as follows; Part I that sets out the principles, Part II, setting out the binding obligations, Part III lays down the Undertakings, Part IV providing for the Supervision mechanism, including State Reports and Collective complaints. Part V on its part contains, *inter alia*, a general provision on non discrimination¹⁸, sets circumstances for derogation¹⁹, a general claw-back clause²⁰, relations between the charter and domestic legislation and international agreement²¹ as well as lays down the methods of implementation.²²

2.3 Economic, Social and Cultural Rights under the Charter

In the earlier arrangement a state party was under obligation to accept at least 5 of the 7 Articles, namely, Articles 1,5,6, 12, 13, 16, and 19²³. This position was changed, albeit slightly, by the Revised Charter, which added articles 7 and 20 to the list, as well as increasing the number of minimum obligatory articles to 6.²⁴ Although the Charter Provisions may in their wording appear too general, the conclusions of the Committee of Independent Experts-CIE, has given them a progressive meaning in their interpretation. For instance the Committee has defined the Right to work Under Article 1, thence,

¹⁶ Thomas Buergenthal, 'International Human Rights in a Nutshell' 2nd Edition , West Publishing Co, , (1995) 153

¹⁷ European Social Charter (revised), ETS no. 168

¹⁸ *ibid*, Art. E

¹⁹ *ibid*, Art. F

²⁰ *ibid*, Art. G

²¹ *ibid*, Art. H

²² *ibid*, Art. I

²³ See European Social Charter, ETS No. 036, 1961

²⁴ See Revised Charter, Part III.

‘... by accepting this Article, States accept as one of their primary aims and responsibilities, the achievement and maintenance of as high and stable, a level of employment as possible with a view of the attainment of full employment. And that if at anyone time a State Party abandoned the said objective of full employment in favour of job cuts, it would amount to an infringement on Charter’²⁵.

The CIE is of the view that measures should be taken to implement the required policy and has insisted that information sufficient to evaluate implementation be submitted to it in national Reports²⁶ This implies that even in the absence of actual performance, a Contracting Party must demonstrate that it has adopted reasonable measures to improve its performance, if it is to comply with Article 1(1) of the Charter.²⁷

This is further illustrated by the decision in *ICJ v Portugal*²⁸ wherein it was stated *inter alia* that the aim and purpose of the Charter being a Human Rights protection Instrument, is to protect rights, not merely theoretically, but also in fact... thus the satisfactory application of Article 7 cannot be ensured solely by operation of legislation, if this is not effectively applied and rigorously supervised.

Although, the Revised Social Charter fills many gaps with provisions concerning housings, poverty and social exclusion, the right to protection in cases of termination of employment, etc., the right to education only finds expression in Article 17, albeit half-heartedly.²⁹ Thus the right to education, which is central to the realization of many of the rights like Employment and freedom from poverty, still remains outside the ambit of the Charter. It is only the ECHR that has a provision relating to education, but as a negative right, under which the State is only supposed to refrain from denying access, but not obligated to take any positive measures³⁰.

²⁵ David Harris, *ibid*, 308

²⁶ *ibid*, 309

²⁷ This goes to elaborate the point that what is required of Contracting States is not respect of the Rights, per se, but must demonstrate the political will and action on the ground aimed at creating an enabling environment.

²⁸ Complaint No.1/1998, Reported in the *International Human Rights Report [IHRR]* Vol 7 No2 (2000) at page 530, See also CIE Conclusion XIII-3 pp 283-286

²⁹ See Revised Charter Art 17. An explicit Right to education was conspicuously missing in the 1961 Charter, ostensibly because; education is a question of culture. However given that education is central to for instance realisation of full employment and eradication of poverty, this exclusion was most unfortunate. Perhaps this goes to underline the fact that all rights are interrelated and re-enforce each other, and that any attempt to recognise Human Rights in piece meal, is a futile venture. What is even more disheartening is that, the Appendix to the Revised Charter maintains this position by stating that Article 17, does not imply an obligation to provide for compulsory education.

³⁰ See Protocol 1 of the European Convention on Human Rights, Art 2. See also Donna Gouven, David Harris and Leo Zwaak: **Law and Practice of the European Convention of Human Rights and the European Social Charter**’ Strasbourg,, Council of Europe Publishing House, 408 (1996), Council of Europe Publishing House, 408

The Charter undertakings with regard to Social Rights are in the main, extremely general in their wording, much more so than in the wording for Economic Rights. However, given the presence of an Independent Supervisory Organ, capable of filling in the details this characteristic is no longer considered a weakness.³¹ Indeed a guarantee, which does not appear ambitious on paper, may nonetheless stretch or grow with time if it has an Independent and demanding supervisory body to mark its limits and to adjust them as conditions and aspirations change and develop. In monitoring these rights, the CIE uses the ILO and ICESCR standards, which underline the fact that aspirations of the Council of Europe, do not essentially differ from those of other states worldwide.

There is evidence to show that some States have changed their law in order to become contracting parties. And Periodically, the Council of Europe publishes lists of changes made by contracting Parties in their national law and practice that are attributed to the influence of the Charter

2.4 Implementation and Monitoring Mechanism

In 1991, an amending Protocol³² to the Charter was adopted with proposals aimed at changing the Charter Supervision System. This Protocol was prompted by the fact that the Charter had failed to realize its full potential and that the main reason being that the system of supervision was inadequate both in its structure and in the manner of implementation³³. It should be noted that although the amending Protocol is not yet in force, the supervising organs are already implementing most of its provisions. There are also a number of changes that have been made independently of the Amending Protocol. As outlined below (see section 2.4.5) the amending Protocol, aims at reducing reliance on State Reports by introducing a radical system of Collective complains

2.4.1 State Reports

According to Article 21 of the Protocol, Contracting Parties must submit a report at two yearly intervals, concerning the application of such provisions of Part II of the Charter as they have accepted. And as a general rule, the Party is expected to continue submitting biannual reports, but only on a limited number of provisions. Under Article 20 however, reports on the core Articles must still come in biennially, while the other provisions should be reported on, only once every four years. The fortunate thing is that states have to a large extent complied with these rules, a phenomenon that can be attributed to the fact that Contracting Parties are

³¹ See also David Harris, *op cit*, 317

³² ETS No. 142

³³ David Harris, *op cit*, 319

members of a small and politically homogeneous group of States within which a large scale failure to submit reports would be surprising. Moreover, Article 22 is to the effect that occasional reports should be made on even unaccepted provisions.³⁴ As of now, the practice is that Parties report annually, but only on a limited number of articles, especially the so-called, ‘*hard core articles*’

2.4.2 The Committee of Independent Experts

In order to oversee the implementation of the ESC as well as monitor the progress of the Contracting Parties, the States themselves conceived the CIE as an impartial body capable of objectively interpreting the provisions by which States are bound and assessing their application uninfluenced. Therefore according to Art 24(2)³⁵, the Committee ‘shall assess from a legal stand point the compliance of the national law and practice with the obligations arising from the Charter for the Contracting Party concerned’

The CIE membership is provided for under Article 25(1), wherein it is stated that members thereof should be Experts of the *Highest Integrity* and recognized competence in International social Question. From the *travaux preparatoires*, it is clear that the CIE is intended and indeed plays, a role akin to that, which the ILO Committee of Experts has come to exercise at the same initial stages of the ILO implementation system.

The CIE is thus an independent body whose task is to discover what the law and practice of the Contracting Parties is, and to consider whether it complies with the undertakings in Part II that the Parties have accepted only in accordance with the meaning of those undertakings in law. The CIE, in its pragmatism, has interpreted its role as being ‘to determine whether the legislation and practice of the Contracting States are in conformity with the undertaking accepted’...and that, its determinations are legally binding.³⁶

The reports that are submitted under Art 21 are first examined by the CIE, which will adopt conclusions based thereon. In these conclusions, the CIE will indicate its views as to whether each party has complied, during the reporting period, with the provisions that it has reported on.

At the request of either CIE or Contracting Party, a meeting between the CIE and representative of the State will be arranged, this procedure assists the CIE to fully understand the law and practice of the particular state, while allowing the State to explain itself other than relying on reports.

³⁴ See Dona Gomein, Davi Harris and Leo Zwaak, op cit, 416

³⁵ See Amending Protocol, ETS No. 142

³⁶ See David Harris, op cit ,321

2.4.3 The Governmental Committee of the ESC

According to Art 27(1) of the Amending Protocol, reports and conclusions of the CIE are submitted to a sub-committee of the Governmental Social Committee of the Council of Europe. This is comprised of one representative of each of the Contracting Parties. The membership is basically comprised of civil servants appointed by the government. The GC goes through the reports and together with the Conclusions of the CIE, advises the European Council of Ministers on all matters concerning the Charter.

Art 27(3) states that on the basis of the CIEs determinations on compliance with the Charter, the GC will advise the Committee of Ministers as to which case a recommendation should be made and to which contracting Party.

As from 1993, following the enactment of Art 27(3), the GC acting under its new mandate has proposed to the CM that recommendations be made to a number of parties, under which, the State concerned would be recommended. ‘... To take into account, in an appropriate manner, of the negative conclusions of the CIE *and invited it to provide information in it’s next report* on the measures taken to this effect. This has inevitably resulted in considerable coherence and credibility of the Charters’ system of supervision. This is also indicative of the fact that the State Party that is at fault will be obliged to put into place corrective measures before sending in the next report. This ensures continuity since it is assumed that a state is obligated to update the situation on the ground in the subsequent report. Moreover, the monitoring bodies are kept abreast of the developments within each Contracting Party.

2.4.4 The Committee of Ministers

According to Art 29 of the Amending Protocol, the end result of the supervisory process in each reporting cycle was intended to be the making, by the CM of recommendations to individual states concerning their compliance with the obligations in the light of the CIE conclusions and the GC report. Though such recommendations have no binding legal force, States Parties are expected to take them very seriously.

The new article 28 the position has so changed. The Amending Protocol makes it easier to adopt individual recommendations by changing the voting Rules- this coupled with a general change in political will, the State can even be advised to amend its regulations, bring them in line with the Charter provisions, and report in its next report the measures it has taken in response to the recommendations³⁷. It

³⁷ David Harris 323

is yet to be seen as to what will happen should a State fail to take remedial steps in compliance with the Committee recommendations³⁸

2.4.5 Collective Complaints

In order to improve the effective enforcement of the social rights guaranteed by the ESC³⁹, a collective Complaints Protocol was put in place in 1995. Under the Protocol, a complaint may be filed by a designated NGO, both national and international, trade Unions and employee organizations.⁴⁰ This arrangement does not allow individuals to bring complaints and a complaint may not relate to an individual case. Cases should therefore be of a general nature relating to existing situations. By October 2001, a total of 10 complaints had been registered. The complaints are filed with the Secretary General, Council of Europe, who in turn submits them to the CIE. It is the CIE that is charged with the responsibility of making a ruling on admissibility as well as deciding as to whether a breach has occurred or not. Whatever conclusions the CIE may reach are then referred to the CM, which makes recommendations to the party concerned, bringing the proceedings to a close. In most cases the recommendation will call upon the party concerned to take into account of any adverse findings by the CIE. In exceptional circumstances, the CM may consult the GC where the case raises new issues.

2.5 Article 30: *The Legal Implications*

For the first time in international human rights discourse, the revised ESC provides an explicit guarantee to the right to protection against poverty and social exclusion⁴¹ This underlines the fact that poverty is not merely a social issue with social solutions, but a human rights matter with a legal solution. Under this Article, the Contracting State is enjoined to adopt measures aimed at promoting effective access of the poor to employment, housing, training, culture and social and medical assistance. States are further required to review these, if they already existed and adapt them to the Charter Provisions.⁴²

According to the Explanatory Report to the ESC (revised), the purpose of Article 30 is not to repeat the juridical aspects of the protection afforded by other articles, but rather to provide for a comprehensive and coordinated approach with relief of poverty and social exclusion as the essential and explicit aim.⁴³ The

³⁸ *ibid*

³⁹ See Preamble, 'Additional Protocol to the European Social Charter Providing for a System of Collective Complaints' ETS no. 158, See also Revised Charter, Part IV, Art. D

⁴⁰ see ETS No 158 Art.1

⁴¹ See ETS No. 163, Part II, Art 30

⁴² *ibid* para. (b)

⁴³ See Council of Europe, 'Explanatory report to the European Social Charter (revised), Para. 112-117, Can also be found on <<http://conventions.coe.int/treaty/en/Reports/Html/163.htm>>

Report goes on to describe what is meant by “poverty” as well as “social exclusion”, and these include persons in situations of extreme poverty through;

“...accumulation of disadvantages, who suffer from degrading situations or events or from exclusion.... Social exclusion also strikes.... persons who without being poor are denied access to certain rights or services as a result of long periods”⁴⁴

From the foregoing, it is evident that, although poverty, may not be actionable *per se*, the door is now wide open for it to be addressed both through the well laid out state reporting and examination procedure as well as through the Collective Complaints procedure. Article 30 should indeed be read together with Articles 4, 13 and 14⁴⁵, all of which can be said to contain some segments about poverty alleviation. Although Article 30 makes an attempt to break away from the tendency by the state to issue financial benefits, in favor of removal of the causal setbacks, financial assistance still remains inevitable, at least in the short run. What we have now is a concept that is reminiscent of the Biblical ‘if people have no fish teach them how to fish’ attitude, in order to minimize the dependency syndrome. The State is encouraging the tendency towards equipping the poor with tools to enable them stand on their own, other than reliance on handouts from the State. The tools to be accessed include employment, housing, training, etc.⁴⁶ What is of interest to note however, is that a leeway has finally been opened to have the causes of poverty and social exclusion addressed as a properly laid down quasi-judicial procedure.

2.6 Conclusions

It should be appreciated that a human rights guarantee is as good as its system of supervision and monitoring. Where the system is weak, there cannot be any iota of effective implementation. The ESC system is, as indicated above, quite progressive in the sense that it not only requires States to report on a fairly frequent basis, but provides for a collective complaints procedure as well. More to that, reports are examined and measured against the Charter by an independent body that carries out its work of interpreting and applying the Charter guarantees in a rigorous way. With the Collective Complaints Protocol now in place the monitoring machinery can only be equaled to the ILO.

⁴⁴ *ibid*

⁴⁵ See ETS No 163,

⁴⁶ *ibid* Art 30

3 The Inter-American System

3.1 Introduction

Absolute poverty levels in so many of the countries in the region are unacceptably high. In general, throughout the region, there are unacceptable numbers of people who live in conditions that deny them minimum levels of material well-being which is able to guarantee respect of the rights to personal security, dignity, equality of opportunity and freedom from discrimination.

In the 1993 Annual Report⁴⁷, the Commission recommended, *inter alia*, that not only should member States guarantee conditions that enable people to gain access to food, health services and education...but should establish legislation that makes those rights meaningful and effective. They went further to point out that priority attention should be paid to enabling the people satisfy the most elementary necessities including *decent housing, jobs, education and health*. Consequently, the coming into force of the Protocol of San Salvador constitutes a legal mechanism through which these basic rights can be effectively realized.

The Commission firmly believes that the realization of economic and social rights is the basis of authentic, on going development and is part of the inalienable enjoyment of human rights⁴⁸. In this regard, the Commission's attitude and approach appears to be that the effectiveness of human rights instruments fundamentally rests on the ability to define and monitor, in the most certain terms, what should *not be done* to people.⁴⁹

With that in mind, this Chapter proceeds to make a general overview of the Inter-American protection of human Rights, it will examine the provisions relating to, first economic, social and cultural rights, then proceed to provisions specific to poverty, before looking at the enforcement mechanism that is made available under the system. A brief glance at some of the decided cases will be done before concluding this section. In the final analysis, one should be able to clearly understand the legal instruments under the Inter-American system, how the issue of poverty alleviation is addressed therein, and the enforcement machinery that is made available for potential litigants. We shall conclude by making a bird's-eye

⁴⁷ See Annual Report of The Inter-American Commission On Human Rights 1993, [OEA/Ser.L/V/II.85], Washington, D.C. 1994, 517-567

⁴⁸ The electronic version of the 1993 Annual Report can be accessed on <<http://www.cidh.org/annualrep/93english/93ench5.htm>>

⁴⁹ For a more detailed analysis on this concept, please see, Aif Morte Jerve; ' **Social Consequences of Development in Human Rights Perspective**' in Hugo Stokke and Arne Tostensen(eds), *International Human Rights Year Book* ,1998' Kluwer Law International, 1999, 39

view comparison of the Inter-American and European system to the extent they relate to poverty alleviation.

3.2 An over view

The Inter-American system is more complex than the European system because it is based upon two overlapping instruments, namely, the American Declaration on the Rights and Duties of Man, the American Convention and lately the “Protocol of San Salvador”, additional thereto, relating to economic, social and cultural rights. Not forgetting the OAS Charter to some extent as well. It is important to point out from the onset that the Commission has more than one dimension in that it not only entertains and hears individual petitions, but is also mandated to conduct *in loco* visits, culminating in the adoption of country reports on the Human Rights situation in OAS member states.⁵⁰

The *UN Charter* and the *OAS Charter*, Articles 103 and 137 respectively govern International Human Rights Obligations of the OAS member States. Accordingly, OAS member States may enter into agreement according more rights to individuals within their jurisdiction, but cannot violate rights recognized in the Charter⁵¹

Based on the Charter of the OAS, the Inter-American System of Protection of Human Rights is probably one of the oldest in the world.⁵² Basically, the Inter-American System of protection of human Rights is comprised of the *OAS Charter*, Bogotá, (1948), the *American Declaration on Rights and Duties of Man*, Bogotá, (1948), the *American Convention on Human Rights*, San Jose, (1969), the *Additional Protocol to The American Convention in the area of Economic, Social and Cultural Rights*, San Salvador, (1988).

For purposes of implementation and monitoring, the Inter-American Commission on Human Rights (here after referred to as “The Commission”), was established in terms of Resolution VII, part II of the Fifth meeting of the Consultation of the Ministers of Foreign Affairs of the Organization of American States in 1959, primarily to over see the realization of the American Declaration of 1948⁵³ Thus, it preceded the Convention that came in ten years later (1969). Indeed the Commission is recognized as a Charter organ under Chapter XV, Article 106 of the OAS Charter⁵⁴

⁵⁰ See David Harris, ‘**Regional Protection of Human Rights: The Inter-American Achievement**’ excerpts in Henry J Steiner (eds) ‘*International Human Rights in Context*’. 2nd edition, Oxford University Press, 2000, 874

⁵¹ Thomas Buergenthal and Dinah Shelton; ‘**Protecting Human Rights in the Americas-Cases and Materials**’, Fourth Revised edition, NP Engel Publisher, 1995, 63

⁵² Hermen Van der Witt and Viviana Krstiecvic: ‘**The OAS System for the Protection of Human Rights**’ in Raija Hanski &Markku Suski op cit pp371-386

⁵³ Henry J Steiner (eds), opcit, 689

⁵⁴ See Charter of the OAS, Bogotá 1948[as amended]

Later the Inter- American Court of Human Rights was created under Article 52 of the American Convention as an organ thereof. In accordance with Article 20(b) of its new Statute that enjoins it to seek advisory opinion from the Court, the Commission, has, systematically been submitting cases to the court and allowing it expand its jurisdiction.

It is important to note from the onset, that the principles articulated in the American Declaration of the Rights and Duties of man were elaborated and expanded into the American Convention on Human Rights, like wise the Protocol of San Salvador is an extension of norms and principles set forth in the previous two texts as well as in the Charter.

Articles 18, 19 and 20 of the Statute that lays down its powers and functions, the Commission is empowered to, *inter alia*, carry out onsite visits under Art.18 (g)⁵⁵ Like wise, Article 41 of the Convention codifies the Commission as per existing functions as an organ of OAS, and more or less replicates its powers derived from the Statute under Articles 44 through to 54.

Consequently, the Commission finds itself dealing with human Rights at three levels; with respect to all member States of the OAS; with respect only to States Parties to the American Convention as far as the Convention is concerned; and finally, with regards to the OAS member states who are only bound by the American Declaration and have not yet ratified the Convention.⁵⁶

The Commission is therefore granted very wide powers, and specifically mandated to give particular attention to the observance of the Human rights referred to in Articles I, II, III, IV, XVIII, XXV and XXVI of the American Declaration of Human Rights, make country studies and receive and examine individual complaints. As a result, country visits and examination of individual complaints have occupied most of the Commissions time. The *Protocol of San Salvador* adds trade Union rights and the Right to education on the list of the already existing catalogue of rights where the Commission can entertain individual complaints. It is important to note that the country on site visits always culminate in comprehensive reports that cover all human rights, without distinction.⁵⁷

⁵⁵ See Statute of The Inter-American Commission on Human Rights, La Paz, Bolivia, October 1979, can be found on <<http://www.cidh.org/Basicos/basic15.htm>>

⁵⁶ Michelo Hansungule. 'Protection Of Human Rights Under the Inter-American System' in Gudmundur Alfredsson,(Eds), '*International Human Rights Monitoring Mechanisms*'; , Kluwer law International, 2001, 696-697

⁵⁷ For a clear illustration of what the commission was been able to do under this mandate. Please refer to the 'Second Report on the Situation of Human Rights in Peru' OEA/Ser.L/V/II.106, Doc. 59 rev., June 2, 2000. Can also be found on <<http://www.oigh.org>>. The report not only makes an extensive and in-depth coverage of civil and political rights, but dwells at length on the implementation of Economic, social and cultural rights as well as the link between their none observance and extreme poverty

Unlike the European and global system, the Inter- American is like the African system when it comes to *locus standi* of complaints. Indeed once a State has ratified the Convention, any person or group of persons or any non- governmental entity legally recognized in one or more Member State of the Organisation can lodge communication against a State Party. Again the Individual communication under the system is automatic upon ratification while the interstate mechanism, which allows Member States the same standing as individuals in relation to making of complaints is optional, the reverse in Europe In Africa both the Interstate and individual mechanisms are available upon ratification. What is unique about the Inter-American system is the *action popularis* that allows other persons other than the real victims to petition.⁵⁸

3.3 Economic, Social and Cultural Rights Under the System

The OAS Charter, as amended, gives the foundation for the implementation of economic, social and cultural rights in the American system, by embedding guidelines therein.⁵⁹ In fact this has been the bedrock upon which the Commission has relied to make major in roads into monitoring the observance of these rights in the individual countries within the region.⁶⁰

Though in general terms, economic, social and cultural rights are also found in the American Declaration of the Rights and Duties of Man (“Declaration”). It enumerates a list of civil and political rights as well as economic, social and cultural ones.⁶¹ The economic-social rights contained therein, include Article 11(health), Article 12(education), Article 13(benefits of culture), Article 14 (right to work), Article 15(leisure) and Article 16 (social security).

Although the Declaration was adopted as a non-binding Instrument, today it is seen and indeed has the normative character that embodies the authoritative interpretation of the fundamental rights and freedoms of the individuals that are

⁵⁸ Article 44 of the Convention in essence allows *action popularis*. This enables NGOs to lodge complaints on behalf of victims. Of course NGOs are better equipped than individuals that have limited accesses to legal aid, with expertise, knowledge of the systems and financial resources. NGOs are able to help create a more equal situation between defendant States and victims.

⁵⁹ See OAS Charter, Chapter VII, Articles 29 and 51. A more detailed analysis of Economic, Social and cultural rights within the American system can be found in the Annual Report of the Commission for the year 1992-1993, 222

⁶⁰ For instance, in 1992, the commission, basing on a General Assembly resolution AG/RES. 1044, wrote a letter requesting all member States of the Organisation seeking information from them pertaining to the observance and promotion of Economic, social and cultural rights, within their respective countries. Indeed under this Charter-based procedure, it is immaterial whether the country has ratified the Convention and its Protocol. What is important is membership to the OAS.

⁶¹ American Declaration of the Rights and Duties of Man, Bogotá, 2 May 1948, Preamble

proclaimed by Art 3(k) of the OAS Charter. In this regard, the Inter-American court has insisted that, ‘...for the Member States of the Organization, the Declaration is the text that defines the human rights referred to in the Charter...[and] it is a source of international obligations relating to the Charter of the Organization’⁶²

In addition, the Declaration does contain a number of rights closely associated with economic, social and cultural rights such as the right to associate for the protection of labor unions interests (Article XXII), the rights of women and children to special protection (Article VII), the right to inviolability of the home, (Article IX) and the right to property (Article XXIII). It is noteworthy that before the coming into force of the Protocol of San Salvador in 1999, the Declaration was the only instrument in the inter-American system that gave detailed recognition of economic, social and cultural rights.⁶³

In this regard, the inter-American court considered the legal status of the Declaration in its advisory opinion OC-10/89. Wherein it noted that though the Declaration was not intended to be a treaty within the meaning of Article 64(1) of the Vienna Convention on the Law of Treaties, 1969,⁶⁴ it was still relevant in the interpretation of the Convention and the Charter, in so far as its provisions have become customary international law.

When the Commission was given power to handle communications, request information and make appropriate recommendations, studies and reports,⁶⁵ it interpreted the resolution as granting it power to examine communications concerning violations of the civil and political rights mentioned therein, while retaining its right to ‘take cognizance’ of communications for purposes of identifying gross and systematic violations of human rights.

This same procedure is what eventually evolved and became part of the general case procedure and was later used in the examination of the general situation in a country. The commission was therefore in a position to receive and act upon complains relating to economic, social and cultural rights.

This was later to become Article 54 of the Commission Regulations which mandates the Commission to receive and examine any petition that contains an alleged violation of human rights set forth in the *American Declaration* concerning Members States of the OAS that are not parties to the Convention.

⁶² See Thomas Buergenthal; ‘International Human Rights in a Nutshell’, op cit 180

⁶³ See Matthew Craven, ‘**The Protection of Economic, Social and Cultural Rights under the inter-American System**, in Harris and Livingstone, ‘*The Inter American System of Human Rights*, Oxford, Clarendon Press, 1998, 292

⁶⁴ 1155, UNTS 331

⁶⁵ See Resolution XXII of 1965, OAS doc. OEA/ser. C/1.13/ Final Act (1965) 32-34

Article 1(2) of the Commission Statute specifies that for purposes of the statute, human rights are understood to be

- a) The rights states forth in the Inter-American Convention in relation to state parties thereto
- b) The rights set forth in the American Declaration in relation to other member states

By approving this statute, the Court concluded, the Members States of the OAS signaled their agreement that the Declaration contains and defines the fundamental Human Rights referred to in the Charter.

Prior to the coming into force of the Protocol of San Salvador, Economic Social Rights could also be found in Articles 1 and 26 of the American Convention. Article 1 obliges states;

“...to respect the rights and freedoms recognized (...) and to ensure to all persons subject to their jurisdiction, the free and full exercise of those rights and freedoms, without any discrimination for reasons of race, colour, sex, language, religion, (...) *economic status*, birth, or any other social condition”.
(Emphasis supplied)

Article 26 on its part, reinforces the principle of progressive development, and states as follows:

“State Parties undertake to adopt measures, both internally and through international cooperation, especially those of economic and technical nature, with a view to achieving progressively, by legislation or other appropriate means, the full realization of the rights *implicit* in the economic, social, educational, scientific, and cultural standards set forth in the Charter of the Organization of American States as amended...”⁶⁶

Although this Article does not go on to enumerate the various social economic rights that are guaranteed, the coming into force of Protocol of San Salvador in 1999, rectifies this very serious anomaly.

Hence, though modeled upon the terms of Article 2(1) of the ICESCR, Article 26 is peculiar in a number of respects; it does not, for instance, refer to a list of rights enumerated in the Convention itself, but rights in another instrument-the AOS Charter. The rights referred to are not even rights specifically recognized, but *implicit* in the economic, social, educational, scientific and cultural standards set forth in the Charter. This is indicative of the link between Charter rights and the Declaration as an authoritative statement of the human rights provision in the

⁶⁶ American Convention on Human Rights, [Pact of San Jose', Costa Rica], San Jose', Costa Rica, 22 November 1969

Charter⁶⁷ And unlike the ICESCR; the obligation is not made upon contingent the availability of material resources.

That notwithstanding however, the Commission has in the past used Article 29(d) in order to continue with its Charter role in supervising the implementation of economic, social and cultural rights in the Declaration even in relation to States Parties to the Convention on the basis of Charter obligations concerning Human Rights ‘ no provision shall be interpreted as excluding or limiting the effect of the American Declaration and other acts of the same nature’ this makes the Declaration a relevant source material for the interpretation of the Convention.

The Commission has now adopted the view that it can in certain circumstances consider petitions referring to rights in the Declaration even in relation to States Parties to the convention. In its advisory opinion on the implications of art 29(d), the Court considered this matter⁶⁸ and reiterated that though the principle source of their obligations is the Convention, States cannot escape their obligations under the Declaration as members of the OAS. The Court was of the firm view that, the ratification of the Convention by Member States *at least complemented, augmented or perfected* the international protection of human rights in the inter-American system but did not create them *ex novo*, nor did it extinguish the previous or subsequent validity of the American Declaration⁶⁹ By this ruling, the normative force of the declaration was retained and saved.

3.4 The Protocol of San Salvador

Some authors have criticized the Protocol as having fallen short of addressing the problems of the region, more especially so, the rights of indigenous populations as well as immigrant workers. Craven points out that much effort appears to have been put upon making the Protocol compatible with the terms of the ICESCR at the expense of developing a text that truly represented the regional value and interests. The only ‘face saving’ provisions as far as the supervision of the Protocol is concerned are the subsidiary role retained for the Commission in Articles 19(6) and 19(7) thereof. [See section 3.4.1, *infra* for more on these Articles]

Before going on to set out in detail, the rights to be protected, Article 1 of the Protocol goes to emphasis the progressive nature of the rights protected therein. It states that;

“The State Parties to this Additional Protocol to the American Convention on Human Rights undertake to adopt the necessary

⁶⁷ See Matthew Craven, *supra* note 63

⁶⁸ OC-10/89

⁶⁹ See Report No 74/90, Res. 22/88 case 9850(Argentina), Annual Report 1990-1, Para. 6, see also Craven *opcit*, 305

measures, both domestically and through cooperation among the states, especially economic and technical, *to the extent allowed by their available resources*, and taking into account their *degree of development*, for the purpose of achieving progressively and pursuant to their internal legislation, the full observation of the rights recognized in this Protocol”⁷⁰[emphasis supplied]

Although the obligation imposed on the parties is not different from other instruments that provide for economic-social rights, that is, it comes as no surprise that they are progressive and programmatic. This is not only consistent with Article 26 of the Convention, but resonates with the provisions of Article 2(1) of the ICESCR⁷¹ The Protocol however, adopts a more conservative outlook. It pegs the implementation thereof, not only to the available resources, but also to the degree of development.

According to Buergethal,⁷² in determining whether adequate measures have been taken to implement and secure Economic, Social and cultural rights, the Commission shall pay close attention to the equitable and effective use of available resources and the allocation of public expenditures to social programs that address the living conditions of the most vulnerable sectors of society which have been historically excluded from the political and economic process. The Commission has observed that when one looks at statistics that are available there exists a demonstrable direct correlation between neglect of economic, social and cultural rights and poverty.⁷³

It is also important to keep in mind that the Protocol of San Salvador was structured around 3 basic rights; the right to work, the right to health and the right to education. Although primarily supervised through State reports, individuals as already noted, have a right of petition in relation to specific rights (Articles 8 and 13).

However, even before the coming into force of the Protocol, the Court had, in one of its advisory opinions, taken up this matter by stating that although not all economic and social rights could be the subject of complaints mechanism, some rights could be considered jurisdictionally enforceable and therefore could be a

⁷⁰ Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights “Protocol of San Salvador”, San Salvador, 17 November 1988, Art.1

⁷¹ See Article 2 (1)

⁷² *ibid*, 423

⁷³ See 1993 Annual Report. Since this thesis is more concerned with the legal machinery available for the enforcement of economic, social and cultural rights, aimed at the consequent alleviation of poverty, we shall not dwell so much on the issue of resource allocation, rather we shall concern ourselves with available remedies, if any, *vis a vis* current state of affairs.

subject of the system of protection by the Court as it is under the American Convention⁷⁴

3.4.1 State Obligation under the Protocol of San Salvador

As outlined in the previous section, Article 1 of the Protocol of San Salvador governs obligations relating to the realization of economic- social rights.⁷⁵ However, before making out a broad outline of the recognized rights, Article 2 of the Protocol obligates States Parties to enact domestic legislation or other measures as may be necessary for making the rights therein a reality.

According to the Commission, the Protocol therefore compiles in treaty form principles of social equality and individual rights set forth in earlier Human Rights Instruments. The rights set therein are geared towards creating conditions “whereby everyone may enjoy his [sic] economic, social and cultural rights as well as his [sic] civil and political rights.” Accordingly, the rationale behind the principle of progressive rights is that governments are under the obligation to ensure conditions that, according to the State’s material resources, will advance *gradually* and *consistently* towards the fullest achievements of these rights.⁷⁶

According to Scott Davidson⁷⁷, the immediate and unconditional obligation imposed upon States Parties to the Convention under Art 1(1) is greatly contrasted by the obligation under Article 1 of the Additional Protocol thereto, which is progressive and programmatic. This was perhaps to bring the Protocol in line with Article 26 of the Convention, which hitherto, was the blanket provision relating to ESC rights.

However, this provision imposes a clear obligation of conduct upon States Parties to adopt measures in order to make progress towards the objective of full observance of the rights contained in the Protocol. This being an unqualified obligation, States are bound to take appropriate measures immediately upon becoming party to the Protocol. It also calls for cooperation among States so as to realize the necessary economic expansion for the realization of the enumerated rights.

Furthermore, the obligation of conduct is dependant on the resources available to the state at the time, which does not absolve the poor countries in anyway but is indicative that the level of enjoyment should be commensurate to the available

⁷⁴ See IACHR Annual Report, 1986 IV, 41

⁷⁵ Supra, note 52

⁷⁶ See 1993 Annual Report

⁷⁷ See Scott Davidson “ **The Inter-American Human Rights System**” Aldershot: Dartmouth, 1992, 43

resources, so it's a question of degree.⁷⁸ When Article 1 is read together with Article 19, which requires States to submit periodic reports on the measures they have taken to *ensure* due respect to the rights set forth. This would mean that States not only have the duty to give maximum effect to these ESC rights, but they are required to put in place institutional legal structures for their vindication, given that the very nature of ESC rights dictates that they are not automatically justiciable.⁷⁹ The drafting history of the protocol indicates that a lot of emphasis was placed on how to make the reporting system as weak as possible, rather than on the adjunction of violations of economic, social and cultural rights.⁸⁰

3.5 Monitoring and Implementation Mechanism

As mandated under Article 34 of the Convention, the Commission is charged with the responsibility to 'promote the observance and protection of human rights and to serve as a consultative organ of the Organization in these matters', and states that 'the inter-American Convention on Human Rights shall determine the structure, competence, and procedure of this Commission, as well as those of other organs responsible for these matters'.⁸¹

The Commission is comprised of 7 experts elected in their personal capacity, not as representatives of the state. According to Article 41, its functions include; processing individual complaints, preparing reports on Human Rights situations in member states; propose measures to strengthen respect for Human Rights in the region. In this regard, the Commission accepts both interstate and individual complaints and makes declarations thereon. However, interstate complaints are only accepted if both States have made a declaration recognizing the competence of the Commission, today this procedure has not been put to any use.⁸²

Even before the Protocol of San Salvador, Article 42 of the Convention permitted the Commission to monitor the level of compliance with economic social and cultural rights through state reports that should be submitted annually. The individual petitions system is, on the other hand, mandatory and automatically binding on all States parties to the ACHR upon Ratification. Under Article 44, any person or group of persons, or any NGO regardless of whether the complainant is a victim may lodge a petition with the commission⁸³ According to Scott Davidson, the Convention, in this regard clearly contemplates the possibility of persons initiating a class action or *action popularis*, given that there is no

⁷⁸Scott Davidson, *ibid*, 44

⁷⁹ *ibid*

⁸⁰ For a more detailed historical background and analysis of the drafting history of the Protocol, see Larry LeBlanc " **The Economic, social and cultural Rights Protocol**", Vol. 10 *Netherlands Quarterly of Human Rights*, 1992, 130-154

⁸¹ See American Convention, Art 41

⁸² See Scott Davidson, *op cit* , 375

⁸³ See 'Pact of San Jose' *op cit*

primary requirement that petitioners be the actual victims of a convention violation.⁸⁴

While Article 42 further enjoins States Parties to submit reports to the Commission in regard to implementation of economic-social rights, Article 48(1) provides for an option for friendly settlement, which allows petitioners to reach a broad and effective reparation agreement. It affords States an opportunity to comply with their international legal obligations without subjecting themselves to public criticism from an international body.

Although some states have been very reluctant to comply with the recommendations of the Commission, arguing that they are not binding, the Inter American court of Human Rights has stated that in accordance with the *Vienna Convention on The Law of Treaties*⁸⁵, the principle of *good faith* entails that a State that ratifies an international treaty such as the American Convention, has an obligation to make every effort to comply with the recommendations of the protection organs instituted thereunder, like the Commission.⁸⁶

Building on the experience of the European and UN Human Rights bodies, the Commission has, over the time, not only managed to apply and refine sections of the American Convention, but has developed new standards. The Commission, which is endowed with extensive powers, may, in urgent cases, even take precautionary measures in cases of imminent irreparable harm to an individual, including requesting the state concerned to adopt such measures as to safeguard the rights of persons involving risks to their lives and property.⁸⁷

What is interesting to note in this regard is that the Commission does not derive all its powers from the Convention, but from Article 29 of its Rules of procedure. Moreover, the principle of precautionary measures allows the Commission to act even in the absence of a pending case before it and without requiring the party concerned to exhaust domestic remedies. This procedure is peculiar because it allows the Commission to take proactive measures, other than responding to complaints, some of which may reach when irreparable damage has already been occasioned. More to that Article 68 permits the Commission to seek the intervention of the Court in cases that are not yet before it but under which precautionary measures have been decided upon, but failed to be complied with.

Both Articles 26 and 42 of the American Convention refer to economic, social, educational, scientific, and cultural standards set forth in the OAS Charter from which rights are implicitly deduced. Consequently, before the coming into force of the Protocol of San Salvador, the responsibility for monitoring economic, social

⁸⁴ Scott Davidson op cit, 157

⁸⁵ Concluded, 23 My 1969, entered into force, 27 January 1980, 8 ILM 697

⁸⁶ See Loayza Tamayo Case, ' Series C', No 33, Para. 78-82

⁸⁷ Hermen Van der Witt and Viviana Krstiecvic; optic, 381

and cultural rights vested in the Inter-American Council for Education, science and culture as well as the Inter-American Economic and Social Council, both of which would report to the General Assembly. While Convention Article 26 directs states Parties to adopt measures aimed at progressive realization of the said Rights, which Rights are not enumerated, one has to scale through the OAS Charter to find them. Article 42 empowers the Commission to watch over the implementation of economic, social and cultural rights, through State reports, which reports form the basis for the Commission to frame its recommendations and observations.⁸⁸

Unfortunately, the Protocol does not alter this state of affairs that much, what it actually does is to limit the Case and Complaints procedures of the Commission and the Court to the protection of trade union rights and the right to education.⁸⁹

3.5.1 Violation of Economic, social and Cultural rights

As to what amounts to a violation of economic, social and cultural rights, the Commission has observed that this occurs when the most vulnerable members of society are denied access to the basic needs for survival which would enable them to break out of their condition. It results in the right to be free from discrimination; the right to the consequent principles of equality, equity and distribution; and the general commitment to protect the vulnerable elements in society being *willingly* or *complicity* contravened.⁹⁰

In order to oversee and monitor the effective implementation and subsequent realization of the economic, social and cultural rights that are recognized under the System the Commission is empowered in three ways; through state reports, individual petitions (complaints), and country studies or on-site investigations.⁹¹ On-site investigations, though originally not part of its mandate have come to constitute one of the most important features of the Commission. The country studies are normally carried out following the filing of a complaint about the human rights situation in a member state. The resultant report covers all human rights without distinction.

⁸⁸ In order to restate its supervisory role, Article 64 of the Commission Regulation, among others, stipulates that (1) States Parties shall forward copies referred to in Article 42 of the American Convention on Human Rights on the same day on which they submit them to the pertinent organs. This is in addition to the Commission being empowered to request annual reports from member states regarding ESC rights under the Declaration

⁸⁹ Protocol of San Salvador, Art 19(2)

⁹⁰ See 1993 Commission Annual Report; this is indicative of the holistic and integrated approach view that the Commission has adopted in order to deal with the issue of poverty alleviation that is not clearly legislated in the Convention and the Additional Protocol thereto relating to economic, social and cultural rights. As will be shown elsewhere in this thesis, the Commission has taken a firm view that the violation of Economic, social and cultural rights, has a direct coloration to the unacceptably high levels of poverty in the region.

⁹¹ See American Convention, Articles 41-47

3.5.2 Country Reports⁹²

The first occasion upon which the Commission addressed economic, social and cultural rights in a meaningful way was in 1978 following onsite investigation in El Salvador.⁹³ After reporting on the widespread violation of civil and political rights, the Commission noted that the appalling social economic condition in which the majority of the population lived, to a considerable extent correlate the extent the serious violations of human rights that had occurred. It therefore recommended that necessary measures be taken to improve the economic and social conditions so that the inequalities would not constituted an obstacle to the observance of human rights. The Commission concluded that ‘*it is evident that in many cases poverty is a wellspring of political and civil conflict*’.

Unfortunately however, with the exception of reports on Cuba,(1983 , 1994) and Guatemala in 1993.The Commission has only infrequently ventured into economic, social and cultural rights in its country reports, besides, the Commission did not, at that time, have any mechanism for discussing or inquiring further into the information provided. It would only recommend *inter alia*, ‘that the enjoyment of economic, social and cultural rights is the basis of genuine lasting development and is part of the inalienable enjoyment of human rights—and that economic adjustments must be structured in such a way that they do no further injury to the most needy and most vulnerable sectors.’

However from 1993, the Commission began to take issues a little more seriously by devoting several pages of its annual reports to analysis of the general obligations relating to ESC rights, and made specific recommendations. Sadly, the Commission did not continue with this development in the following years.

However, it is worth to note that in their 1978 Annual report, the Commission noted that whatever development model was adopted, it must assign priority to attaining those fundamental rights that make it possible to *eliminate extreme poverty*.⁹⁴The Commission in applying standards to economic, social and cultural rights had thus adopted the ‘*minimum threshold approach*’ to implementation.

In this regard, the Commission asserts that necessary action must be taken across the board, to ensure a minimum level of enjoyment of the whole range of human rights. This would also assume that in the creation and implementation of economic policies, States should place emphasis, as a matter of priority, upon

⁹² For a detailed analysis of the genesis, content and role of Country reports under the Inter-American System, see Cecilia Medina; “ **The Role of Country Reports in the Inter-American System of Human Rights**” 15 *Netherlands Quarterly of Human Rights* 1997, 457-473

⁹³ See Commission Report on El Salvador, 1978

⁹⁴ Annual Report 1979-80, 152

assisting the *poorest and most vulnerable in society*.⁹⁵The Commission concluded by saying that in view of the ‘unequal distribution of wealth with States in the region (...) the commitment of States to take steps with the aim of achieving *progressively*, the full realization of economic, social and cultural rights requires effective use of available resources, to guarantee a minimum standard of living for all.

3.5.3 Annual Reports

In relation to Economic, Social and Cultural Rights, Annual reports are provided for under Article 26 and 42 of the Convention, which has also found expression in Article 19(1) of the Protocol of San Salvador. Under the said Article 19(1), the Protocol provides for the submission by States Parties of Periodic reports, outlining the *progressive* measures they have undertaken to ensure due respect for the rights set forth in the Protocol. Paragraph 2 of the same Article 19, provides that the reports submitted to the Secretary General are then transmitted to the Inter American Economic and social Council as well as the Inter-American Council of Education, Science and Culture for examination. These two Commissions are supposed to set standards, consider reports made by States and make recommendations. Only a copy is sent to The Inter-American Commission, which Commission is clumped together with specialized agencies in its supervisory role under the Protocol.⁹⁶

In their reports to the General Assembly, the above named Councils are empowered to include a summary of the progressive measures adopted by States Parties together with some general recommendations.⁹⁷However, it should be appreciated that, this machinery has achieved very little in relation to economic, social and cultural rights, as the best that ever happens to the reports is the occasional review by the Commission.

Article 19(7), of the Protocol, on its part, gives the Commission a leeway to formulate such observations and recommendations as it deems pertinent concerning the *economic, social and cultural rights* in all or some of the States Parties, which it may include in its Annual Reports to the General Assembly or in special reports, at its discretion.

3.5.4 Other Monitoring Procedures employed by the Commission

⁹⁵ Annual Report 1993, 524-6

⁹⁶ See Protocol of San Salvador, Art 19(3)

⁹⁷ *ibid*, Art 19(5)

In its 1998 Annual Report the Commission included a press release no. 15/98, which was concerning the on-site visit to Guatemala. In the release it makes observations on all human rights: civil and political, economic social and cultural. Regarding economic, social and cultural rights, it noted that the majority of the Guatemalan population live ‘in *extreme poverty* and are unable to satisfy basic needs such as food, health, education, and housing [...] thus excluding vast sectors of the population from social development.’⁹⁸

In the past Special Rapporteurs have been appointed to carry out special studies on the rights of indigenous peoples, situation of migrant workers, the rights of women and the rights of the Child. The findings from such studies are published in the Commission Annual Reports. In all these studies, economic, social and cultural rights are considered, and feature quite prominently in the consequent reports.

However the thrust of this thesis being the legal remedies available for enforcement of socio-economic rights, it is not necessary to dwell into and analyze, the details of the various studies under this initiative. Suffice it to say that this is indicative of the many ways through which matters relating to poverty and social exclusion can be identified and remedies thereto, conjectured.

3.5.5 Individual Petitions/Complaints

Given that the American Convention does not provide for a clear-cut system of supervision and control with a view to improving the observance of economic, social and cultural Rights, one would have imagined that the Protocol of San Salvador is designed to redress this malaise. However, what the Protocol succeeds in doing is to create a dichotomy in the category of economic, social and cultural rights by restricting individual petitions to Article 8 (trade union rights) and Article 13 (right to education). The rest of the situation remains very much the same as before advent of the Protocol.

For purposes of implementation and monitoring therefore, the rest of the rights are relegated to the less known and non-core institutions of the system, the Inter-American Council for Education, Science and Culture and the Inter-American Economic and Social Council hence monitored only through the reporting system.⁹⁹ What Article 19(6) of the Protocol does therefore, is to import the provisions of Articles 44 through 51, and 61 through 69 of the American Convention, as far as they relate to individual petitions but only in respect to the trade Unions Rights and the Right to education. [Infra]

That notwithstanding, some commentators have observed that, the Inter American system has over time, evolved from a system of promotion to one of

⁹⁸ See 1998 Annual Report, 1281, Can be accessed on <<http://www.cidh.org>>

⁹⁹ Protocol of San Salvador Art 19(6)

protection. The contribution of the Commission in this regard was immense as it has not only been energetic in making global assessment of the Human rights situations in OAS states, but has taken the lead in developing the petition system. Therefore, in addition to Country Reports, the Commission's Annual Reports have emerged as complementary in following up on general situations of Human Rights in specific countries. This procedure is further complemented by the Commission's mandate to start investigations on its own volition, making it independent of State and individual initiatives. In essence, this creates space for redress and prevention of Human Rights violation.¹⁰⁰

The most significant claims relating to economic, social and cultural rights that have been considered under the Declaration by way of individual petitions have been those involving the persecution and mistreatment of minorities and indigenous populations. In the *Ache' Tribe case*¹⁰¹ of Paraguay which involved persecution including murder, torture, the withholding of medical attention, inhuman conditions of work, the sale of children and acts aimed at the destruction of the culture, the Commission found that violations not only included the right to life, liberty and security of the person (Declaration Article I), but also of the right to protection of the family, (Declaration Article VI), the right to work and fair remuneration (Declaration Article XIV), the right to leisure (Declaration Article XV).¹⁰²

In the *Jehovah's Witnesses* case that involved closure of their meeting hall as well as the exclusion of their children from schools, the Commission found *inter alia*, that the right to education, (Declaration Article XII), right to residence, (Declaration Article VIII) and right to health (Declaration Article XI) had been infringed.¹⁰³ This is indicative of the willingness, on the part of the Commission to give lend a broader interpretation to the rights protected in the Declaration in order to grant greater protection to individuals and groups.

3.5.6 The Inter- American Court

The Inter American Court is a creature of the American Convention created under Article 52, and its main function is to apply and interpret the Convention. The Court is mandated to exercise both contentious (Convention Article 62) and advisory jurisdiction (Convention Article 64). However, only States Parties and the Commission, not individuals, have *locus* before the court¹⁰⁴. But since the Commission is more often than not obligated to bring individual cases before the Court, it sometimes acts as the 'advocate' for the victims before the court¹⁰⁵.

¹⁰⁰ See Buergenthal *supra*, note 51

¹⁰¹ Case no, 1802

¹⁰² IACHR Annual Report 1977 30-44

¹⁰³ IACHR Annual Report 1984-5

¹⁰⁴ See American Convention, Art 61

¹⁰⁵ Hermen van der Wilt & Vivian Krsticevic, *op cit*, 378

Under its contentious jurisdiction, case law of the Court with respect to ESC rights is almost non-existent. Moreover, the opinions on justiciability of ESC rights are in the context of its general pronouncements and are made during its consideration of matters relating to civil and political rights. It is important to note however, that during the drafting of the Protocol of San Salvador, the court was asked whether ESC rights could be subjected to judicial or quasi Judicial examination, and it unequivocally stated that they (ESC rights) are ‘authentic fundamental rights (...) since human rights and fundamental freedoms are indivisible, the full realization of civil and political rights without enjoyment of ESC rights is impossible.’¹⁰⁶ The Court also took the occasion to make a pronouncement with regard to justiciability by stating that,

“.... among the so-called ESC rights, there are also some that act or can act as subjective rights jurisdictionally required.”

Sadly, the Courts’ advisory jurisdiction has not directly been used to ask it spell out the obligations of the states in the area of neither ESC rights nor their specific content. This indeed constitutes a challenge to the Commission, which is in a way duty bound to seek a binding elaboration of the meaning and content of ESC rights. The Court itself has indicated that it would view this as a positive way in which to contribute to the observance of ESC rights.¹⁰⁷

While the Court has not been seized with the opportunity to issue a directly related advisory opinion on ESC rights, Advisory Opinion No.11/1990¹⁰⁸ is important. The question before the Court in this instance, related to the exhaustion of local remedies by indigents. The court states that,

“If it can be shown that an indigent need legal counsel to effectively protect a right, which the Convention guarantees and his *indigency* prevents him [sic] from obtaining such counsel, he [sic] does not have to exhaust the relevant domestic remedies.”

In declaring so, the Court undeniably recognized the inability to access legal counsel due to indigence as amounting to discrimination because of his/her *economic* position. To illustrate this point Court stated that:

“The meaning of the term discrimination employed by art 24 must then, be interpreted by reference to the list enumerated in Art 1 (1). If a person who is seeking protection of law in order to assert rights which the Convention guarantees finds that his *economic status* (...) prevents him from so doing because he cannot afford either necessary

¹⁰⁶ See Antonio A. Cancado Trindade “ **Justiciability of ESC rights in international law**” in *Presente y Futuro de los Derechos Humanos: Ensayos en honor a Fernando Volio Jimenez*(San Jose´: Inter-American Institute of Human Rights, 1998), 190-191

¹⁰⁷ *ibid*

¹⁰⁸ See Inter-American court of Human Rights, Annual Report 1986 OEA/Ser.L/III.15 Doc.13, 29.

legal counsel or the costs of the proceedings, that person is being discriminated against by reason of his *economic status* and hence, is not receiving equal protection before the law. Protection of the law consist, fundamentally, of the remedies the law provides for the protection of the rights guaranteed by the Convention”

It is important to note that the advisory jurisdiction of the Inter-American Court as per Article 62(1) and (2) of the Convention is quite extensive compared to other international tribunals. First, it is open to all Member States of the OAS, whether parties to the Convention or not. Second, its interpretative mandate extends to *all* treaties concerning protection of Human Rights in the American States. Third, all OAS Charter organs have standing before it and may request for an advisory opinion. Fourth, Opinion may be sought not only regarding compatibility of domestic law with the Convention, but also any other American Human Rights treaty.¹⁰⁹

3.6 The Question of Poverty and Exclusion under The Inter- American Commission on Human Rights

Provisions relating to Poverty in the Inter- American system can be traced to the Charter of the OAS, under Article 2(g) of which, the essential purposes of the organization include [2] ‘to *eradicate extreme poverty*, which constitutes an obstacles to the full democratic development of the peoples....¹¹⁰[Emphasis mine] This is in addition to the undertaking to,

‘...promote, by cooperative action, their economic, social and cultural development’¹¹¹

Poverty is again mentioned in Chapter II of the Charter that deals with the Principles of the Organization of American States. Under this heading, Article 3(f) states that,

“...the elimination of *extreme poverty* is an essential part of the promotion and consolidation of representative democracy and is the common and shared responsibility of the American States”
[Emphasis supplied]

Under Art 34, of the Charter, member states agree, *inter alia*, that the *elimination of extreme poverty...is the basic objective of integral development*. Unfortunately, however, apart from social and economic measures to achieve this, the Charter inexplicably falls short of mentioning and advocating

¹⁰⁹ See Thomas Buergenthal and Dinah Shelton, op cit , 61

¹¹⁰ See Charter of the Organisation of American States, Bogotá, February 27 1967

¹¹¹ Ibid Art. 2(f)

the establishment of an enabling legal regime in the catalogue of basic goals aimed at achieving this.

Article 32 of the OAS Charter describes development as the primary responsibility of each and every individual state and should constitute an integral and continuous process for the establishment of a more *just economic and social order...*'

In giving a general non-discrimination clause as well as labor rights, Article 45(f) talks of incorporation and increased participation of the *marginal sectors of the population...*in the *economic, social, civic, cultural, and political life* of the nation. On its part, Article 46 talks of social legislation in relation to labor rights and *social security*, while Article 47 underlines the importance of education and calls upon member States to direct it towards the overall improvement of the individual, as a foundation for democracy, *social justice* and progress¹¹².

In its 1993 Annual report¹¹³, the Commission recognized and restated the Resolution of the General Assembly¹¹⁴ “that the ideal of a free human being, *unfettered by fear or poverty*, can only be realized if conditions are established which permit individuals to enjoy their *economic, social and cultural rights*, as well as their civil and political rights.¹¹⁵ In this same Annual Report, the Commission observed that,

“...*poverty* is, in part, a result of a state’s inadequate commitment and organization to protect and promote *economic, social and cultural rights*...the states failure to guarantee economic, social and cultural rights, also signals a lack of civil and political guarantee.... it therefore follows that without progress in the area of *economic and social rights*, the pursuit of civil and political rights...will remain merely aspirations [sic] for particularly those sectors with the least resources and lowest levels of education...”¹¹⁶[Emphasis supplied]

Here the Commission adopts an integrated approach and continues to cite Article 33 of the Charter which stipulates, *inter alia*, that equality of opportunity, equitable distribution of wealth and income, and the full participation of their peoples in decisions related to their own development are among others, basic objectives of integral development.¹¹⁷

¹¹² See also Article 48, 49-52

¹¹³ See Annual Report of The Inter-American Commission On Human Rights 1993, [OEA/Ser.L/V/II.85], Washington, D.C. 1994, 517-567

¹¹⁴ See AG/RES. 1213 (XXIII-0/93)

¹¹⁵ This resolution, said to have been inspired by Articles 33 and 45(f) of the Charter, goes a long way in indicating as to how the Commission has tried to fill the lacuna created by lack of a binding specific provision relating to poverty alleviation *per se*.

¹¹⁶ See 1993 Annual Report 522

¹¹⁷ *ibid*

The Commission further describes *Extreme Poverty* to mean conditions of life so limited by *malnutrition, disease, illiteracy, low life expectancy and high infant mortality* as to be beneath any rational definition of human decency and dignity.¹¹⁸

From the above it should be apparent that though the issue of poverty alleviation or freedom from poverty and want is not clearly defined under the Inter-American system, the Commission has interpreted the OAS Charter in such a way that it is able to deal with the issue while monitoring the implementation of economic, social and cultural rights. Not so much as under the Convention, but as an OAS Charter body. Under this guise, the Commission has, been able to include sections on poverty while making its Annual Reports, as well as in discharging its mandate to carry out on-site visits.¹¹⁹

It is very disappointing to note however, that the basic legally enforceable documents, vide, the Convention and its Additional Protocol on Economic, social and Cultural rights, by relegating the monitoring of economic, social and cultural rights to the weakest and non binding of procedures, it in essence chose to ignore the issue of poverty alleviation. However, the Commission has been on the alert, and of the rights that it has pointed out to be central to *poverty alleviation; the rights to food, employment, housing, health and education, only education made it to the individual complaints mechanism.*¹²⁰

On a positive note, there has been a growing recognition within the OAS that it is no longer feasible to set aside consideration of *poverty or social justice* in its approach to human rights. Matthew Craven states that although, the Commission treated those rights as a marginal and diversionary concern, the Inter-American system was the first to give express recognition to economic social and cultural rights.¹²¹ Indeed specific provisions on economic, social and cultural rights are to be found in all the major Human Rights Instruments of the Inter-American system; the OAS treaty, the American Declaration, the American Convention (though in general terms) with its additional protocol.¹²²

However, there is no coherent body of rights under the Charter, and the obligations are vague and imprecise, which is indicative that they were merely designed as objectives of social and economic development rather than Rights to

¹¹⁸ *ibid* 523

¹¹⁹ See for instance the Second Report on Human Rights situation in Peru

¹²⁰ 1993 Annual Report

¹²¹ Matthew Craven; '**The Protection of Economic, social and Cultural Rights under the Inter American System**' in David J Harris & Steven Livingstone; '*The Inter- American System of Human Rights*', Claredon Press Oxford, 1998, 289

¹²² The OAS treaty art 45 provides for the Material well being, and spiritual development, the right to work and the right of employees to associate for the defense and promotion of their interests. Art 49 mentions the right to education.

be enforced.¹²³ Chapter XIII of the Charter, which creates the Inter-American Economic and Social Council, charged with the promoting 'cooperation among the American Countries in order to attain accelerated economic and social development', buttresses this point of view. In its 1983-4 Annual Report, the Commission re-asserted that the rights in the Charter are only objectives of economic and social development to be reached by States through internal effort and international cooperation.

In the final analysis, it should be remembered that while *in loco* visits and country reports remains vital and invaluable, the consideration of individual petitions under the American Convention, has come to play an increasing role, given that the Commission has a possibility of referring cases to the Inter American Court for final and legally binding decisions. With the coming into force of the Protocol of San Salvador, it will be possible to get legally binding decisions in regard to selected social and economic rights (Trade union rights and the right to education).

Unless the Commission puts itself in a position whereby putative violations of economic, social and cultural rights are brought before it, many of its afore stated pronouncements will remain at an abstract level and be void of real significance. In this respect, there exists clear opportunities for the Commission to develop a more systematic approach to monitoring the implementation of Economic, Social and Cultural rights, both as a Charter organ as well as a Convention appendage. Hitherto, its approach remains largely haphazard and lacking in its direction.¹²⁴

3.6.1 Decided cases

To demonstrate what is justiciable as group rights under the Inter-American system, a few illustrative cases that indicate that groups do possess social, economic and cultural rights that are enforceable under the system will suffice. In the *Colotengo v Guatemala*¹²⁵ friendly settlement, government paid compensation to various persons who were injured, threatened and harassed and even forced to leave their homes. In deciding on social reparation for the community, Court ordered *inter alia*, for timely completion of 15 development projects, a clear indicator that in dealing with indigenous peoples, when the rights of a member of a community are violated, not only is the member affected but so is the entire community.¹²⁶

In the *Yanomami Indians*¹²⁷ case, the Commission found the government of Brazil to have violated the rights of the whole community of Yanomami Indians

¹²³ For a more detailed analysis on this point, see Mathew Craven, *supra* note 121, at, 290

¹²⁴ *ibid*, at 321

¹²⁵ See IHRR Vol. 5 No2 [1998], 405

¹²⁶ See IACHR, Annual Report 1996

¹²⁷ See 1993 Annual report of The Inter-American Commission on Human Rights; Resolution no. 12/85, Case no. 7615 (Brazil), 24-34

and ordered for the institution of *social and economic* measures to redress the injury that had been occasioned to them. In deciding this case, the Commission heavily relied on the provisions of the American Declaration on the Rights and Duties of Man. Having found that the Government of Brazil had violated the right to life, liberty and personal security (Art. 1), the right to residence and movement (art VIII); and the right to the preservation of health and the well-being (art XI), of the Declaration, the Commission recommended, *inter alia* that;

- a) ... the Government of Brazil continue to take preventive and curative measures to protect the lives and the health of Indians exposed to infectious or contagious diseases;
- b) ...
- c) ... the programs of education, medical protection, and social integration of the Yanomamis be carried out ...
- d) ...the government of Brazil inform the Commission of the measures taken to implement these recommendations

What these cases illustrate is perhaps the fact that the individual complaints procedure that is so much suited for civil and political rights may not adequately address human rights of a social, economic, or cultural nature. Economic, social and cultural rights, by their very nature cannot be treated individually, but rather call for a concerted effort, calculated at uplifting sections of society from abject poverty.

Indeed while an individual will have a difficult task to prove that he/she has been deliberately excluded from enjoying social goods, the redress granted to one individual will not necessarily benefit the immense majority or the rest of the population that may continue to suffer from deprivation, exclusion and want. Since, as observed above, [*see part 3.5*], the Commission rightly points out that poverty is a result of deficiency in the enjoyment of health, education and food, there is dire need to have these rights clearly defined and the measures for the realization thereof well spelt out as is the case in the Revised European Social Charter [please refer to previous Chapter]. Once this is done, it should be easier for marginalized groups to hold the governments legally accountable in case they should fail to implement any or all of the designated measures.

It is important to note that in many of the cases where the Commission has recognized a violation of ESC rights, it begins by taking note of the civil and political rights. In case *No. 6091*(Cuba), the Commission, after considering the torture and repeated jailing of the victim, held Cuba, *inter alia*, liable for violating the right to the preservation of health and the well-being (Declaration Article 11), while in case *No. 2137* (Argentina), in which a presidential decree ordered that all activities of Jehovah's Witnesses cease, the Commission found Argentina

responsible for violating the right to education, (Declaration Article 12), in the context of the right to assembly.¹²⁸

3.7 Conclusions

The Inter American system tries, albeit with modest success, to oversee the implementation of and full realization of economic, social and cultural rights. In summary, the inter-American protection of Human Rights has two-tier enforcement mechanism, that is mandated to enforce economic, social and cultural rights, through the realization of which, the nemesis of poverty and deliberate deprivation is being addressed. The Commission that is mandated to submit matters to the Court has taken advantage of the legally binding nature of courts decisions to submit some cases, especially where some States have neglected to comply with its recommendations. Nevertheless, there remains a lot of room for improvement if the law has to come to effective aid of socially and economically marginalized groups that need to redress the adversary called poverty.

¹²⁸ See Circle of rights: The Inter-American System for the Protection of Human Rights and ESC Rights on <<http://www.hrsa.org/hrmaterials/IHRIP/circle/modules/module30.htm>>

4 The Africa Commission On Human and Peoples Rights

4.1 Introduction

The African Charter, which entered into force in October 1986, sets up a system whose purpose is to promote and protect fundamental Human Rights with particular emphasis on African Tradition and Peoples Right to development.¹²⁹ Unlike other systems, the African Charter combines; into one document all categories of rights thus deflating the dichotomy between, civil and political Rights on one hand and economic, social and cultural rights on the other. Consequently, in the African Charter are found Civil and political rights¹³⁰- (so called first generation rights), economic, social and cultural rights,¹³¹(2nd generation), as well as collective rights of the people, including the right to development, peace, security, clean and healthy environment (-so called 3rd generation rights).¹³² However, what emerges from the Charter is the cross cutting nature of the rights, indeed one may not clearly draw the line to observably demarcate and isolate the rights using the traditional distinction considering that some of them overlap.

The African Charter was adopted by the OAU following the example of the Council of Europe and the Organization of American States. Being the youngest of the 3 regional arrangements, in many respect, the Charter can be referred to as a hybrid, if for anything, that it does try to blur the unfortunate hierarchical treatment that has riddled the human rights discourse since the debate on, and subsequent adoption by the UN of separate instruments for Civil and political rights on one hand, and economic, social and cultural rights on the other. In the African Charter, not only are all the rights set out together without distinction, but the so called third generation rights are elevated to the same level and given equal treatment and attention.¹³³

This Chapter will therefore give a general overview of the African Charter, and then proceed to comment on provisions relating to Economic, Social and Cultural

¹²⁹ Cees Flinterman and Catherine Henderson; “**The African Charter on Human and People’s Rights**”, in Raija Hanski and Markku Suksi, (eds) ‘*An Introduction to International Protection Of Human Rights*’: (1999), 2nd Revised Edition, Institute for Human Rights, Åbo Akademi University, 387

¹³⁰ African Charter on Human and people’s Rights, *adopted* 27 June 1981, OAU Doc. CAB/LEG/67/3, Article 2-14

¹³¹ *ibid* Art. 15-22(1)

¹³² *ibid* Art. 22(2)-24

¹³³ See *Ibid*, Articles 22 through to 25. Among the new rights that some have come to call “solidarity rights”, include the right to peace, to satisfactory environment, and to development

right, and the implementation machinery. Thereafter, the author will make an attempt to analyze as to how the question of poverty alleviation can be handled as a question of law in light of substantive Charter rights and the implementation mechanism. It will be appreciated that the Charter in itself left lots of gaps to the African Commission to fill in. In this regard, the author will give a few illustrative examples where the Commission has come in to give a broad interpretation of Charter provision in order to lend effect to the rights therein, as well as point out some areas of concern that need particular and preferential treatment. This chapter will be concluded by giving just a glimpse of what could be the way forward to make the Charter provisions relevant in the legal fight against poverty, a condition that bedevils more than half of the Continents' population. In this Chapter, the term "Banjul Charter" and "the African Charter" is used interchangeably while referring to the *African Charter on Human and Peoples' Rights*.

4.2 An Overview

The African Charter establishes a system for the protection and promotion of human rights that is designed to function within the framework of the OAU (now AU). The Charter contains a total of 68 Articles. The rights stipulate therein however are so broad and general in terms of what is the actual import of some of them¹³⁴. Nevertheless, in terms of scope, the African Charter is the most elaborate of the regional systems, and contains all generations of rights, as well as enumerating rights and duties. However as will be argued later in this thesis, some of these rights lack legally clarity and the Charter falls short of making a detailed articulation of the content of the rights in the instrument.¹³⁵

Having said that, it is imperative to note at this stage that for the first time in the human rights discourse, a legally binding and enforceable instrument, contains, without any pretence, all categories of rights, to be accorded equal emphasis and treatment. The rights and duties that are recognized therein can only be categorized as individual, or collective solidarity rights [peoples' rights], with out any hierarchy and differential treatment as is the case in other jurisdictions. Also notable is the fact that the African Charter is the first legally binding regional Human Rights instrument to elaborate on the rights of peoples and other collectivities.

Among the individual rights to be respected and ensured by States Parties, include equality, integrity of the person, life, liberty and security of the person, the right to defense, freedom of belief and religion, freedom of movement, association, assembly, the right to seek asylum, the protection of non-nationals,

¹³⁴ See E Bello 'Article 22 of the African Charter on Human and People's Rights' in E. Bello & B. Ajibola (Eds) *Essays in Honour of Judge Taslim Olawale Elias*, vol. I, 450

¹³⁵ According to some commentators, the rights fail to create binding obligations that can be advanced before a judge or arbitrator, and non-respect of the rights does not necessarily constitute an act, giving rise to an international obligation.

the right to property, the right to work, the right to best attainable state of physical and mental health.¹³⁶

The peoples' or solidarity rights recognized in the Charter include, the equality of all peoples, the right to self determination, sovereign equality over resources and the right to economic, social and cultural development with due regard to Human and People's rights, the right to a general satisfactory environment, the right to development and the right to national and international peace and security.¹³⁷ Articles 24-29 lay out the duties of the individual towards the family, society and the State. On close scrutiny these rights and duties, not only reflect African traditions and norms, but also reflect the grim reality that some of the rights cannot be enjoyed in the absence of solidarity, development and peace.¹³⁸ The implementation and supervisory mechanism is dealt with in another section to this Chapter. [See section 4.3.1]

4.3 Economic, Social and Cultural Rights under the Charter

Having looked at the general overview of the Charter provisions, it is now time to attempt an in-depth analysis of the content of some of the rights, relating to economic, social and cultural rights, and at a later stage endeavour to make a case as to how they relate to the right to freedom from poverty and development. But first the focus should be turned to economic, social and cultural provisions in the Charter the provisions.

Chidi Odinkalu,¹³⁹ has noted that the distinguishing feature of the African Charter in respect of Economic, social and cultural rights is that it declines to bifurcate Human Rights, instead, it articulates a truly indivisible and interdependent normative frame work, addressing all the rights equally in the same coherent text. In all, economic, social and cultural rights are found in Arts 14 through to 26, however as already observed, some, such as Articles 19-24 are not individual rights but collective ones.

Among the classical social and economic rights guaranteed by the Charter are the rights to work under equitable and satisfactory conditions, equal pay for equal

¹³⁶ See Article 2 to 18, African Charter; also see Ibrahim Ali Badawi El-Sheik, 'The African Regional System of Human Rights: Notes and Comments' in M. Cherif Bassiouni and Ziyad Motala(Eds) ' *The Protection of Human Rights in African Criminal Proceedings*' 1995 Kluwer Academic Publishers, 25

¹³⁷ *ibid* Articles 19-24, African Charter

¹³⁸ Also see Brahim Ali Badawi, *etal*, *supra* note 136

¹³⁹ See Chidi Anslem Odinkalu ' Analysis of Paralysis or Paralysis by Analysis? Implementing Economic, Social and Cultural Rights Under the African Charter on Human and People's Rights' *Human Rights Quarterly* 23.2(2000), 339, can also be found on <http://muse.jhu.edu/journals/human_rights_quarterly/v023/23.2odinkalu.html>

work¹⁴⁰. The rights to health and to enjoy the best attainable state of physical and mental health; this on further obliges states to take the necessary measures to protect the health of their people and ensure that they are cared for while they are sick¹⁴¹. Article 17 of the Charter deals with the right to education and the right of individuals to take part in the cultural life of their communities. Unfortunately, the Charter does not contain specific guarantees on the right to food, social security, an adequate standard of living, housing and prohibition of forced labor¹⁴² or freedom from want.

Sadly, unlike the European Social Charter (Revised)¹⁴³ that has an explicit and specific provision relating to freedom from poverty, the Charter does not succinctly address the concept, and one had to unmask it from the veil with in which it is deeply buried. As will be elaborated upon later in this Chapter, in order to import this concept and allow it to permeate the Charter provisions therefore, recourse must necessarily be had to other international instruments as permitted by Article 60 of the African Charter. It also calls for heavy reliance on the innovative abilities and flexibility of the Commission, in executing their wide interpretative mandate that the Charter so abundantly bestows on it.¹⁴⁴

Again, it is interesting to note, that unlike the European Social Charter, that lays out in detail, what steps the state must adopt in order to realize each right recognized therein, the African Charter only relies on the provisions of Art.1. This article enjoins State Parties to adopt “legislative or other measures to give effect”¹⁴⁵ to the rights therein, which measures are unfortunately not defined. It is only Rule 81 of the Rules of Procedure of the African Commission On Human and Peoples rights (“The African Commission”) that makes a halfhearted attempt to elaborate on what is expected of the state under this Article¹⁴⁶. While elaborating on the contents of the reports under Article 62, the Rule provides, among other things, that

States parties to the Charter shall submit reports *on measures they would have taken to give effect to the rights recognized by the Charter and on the progress made with regard to the enjoyment of these rights.* The reports should indicate, *where possible*, the factors and difficulties impeding the implementation of the provisions of the Charter.
[Emphasis added]

¹⁴⁰ Banjul Charter, Art. 15

¹⁴¹ *ibid.* Art. 16

¹⁴² See Chidi Anslem Odinkalu, *supra*, note 139

¹⁴³ See European Social Charter (Revised), Article 30

¹⁴⁴ For a clear illustration of this very wide mandate, one can have a glimpse on Art 18, relating to women’s right that allows, while dealing with such issues, to take into consideration of not only binding international instruments, but declaration as well. See also Art. 61 of the Charter

¹⁴⁵ Banjul Charter, Art.1

¹⁴⁶ See *Rules of Procedure of The African Commission on Human and Peoples’ Rights*, Dakar, Senegal, 13 February 1988

Consequently, the details and the content of the expected measures antecedent for the enjoyment and fulfillment of each particular right are left to the respective State Parties to decide. This obviously makes it relatively difficult, if not impossible to hold the States accountable in case of failure to adopt specified and precise measures that will allow the citizens enjoy the recognized rights.

Notably absent from the Charter are the rights to social security, the right to an adequate standard of living, and freedom from hunger¹⁴⁷, all of which are rights that are closely associated with poverty alleviation. In his analysis, Onyango observes that the content of the articles relating to economic, social and cultural rights is a significant let down from the promise of the preamble and that it belies what could have been an altogether novel and radical approach to the interconnectedness of the two categories of rights. He further contends that the focus of the rights is primarily the external dynamic-the element of historical exploitation and contemporary maldevelopment-without a parallel approach to the inequities of the domestic arena.¹⁴⁸

Some commentators have rightly argued that, one of the obstacles to litigating violations of ESC rights has been the paucity of concrete proposals to distinguish between governmental *inability* to implement its human rights obligations and its *unwillingness* to do so. This is glaringly so, if one considers that the purpose of human rights is to prevent abuses of power, which should be the main target of any litigation.¹⁴⁹

In order to be more relevant to the rights holders, the African Commission needs to adopt and put more emphasis on the integrated approach. In this way, it will necessarily shift its focus to the rights, which people do have and which are seen to be denied or violated, under the guise of lack of clearly defined normative characteristics associated with some rights. In this respect, *the right to development*, which is still internationally contested but explicitly situate in the African Charter can be properly addressed.¹⁵⁰

In the same vein, the focus on poverty would therefore require a move away from the emphasis on legislative measures as the key methods for implementing Human Rights obligations. Attention should thence necessarily be focused on economic policies and measures, meaning that procedural standards could become the object of litigation rather than substantive rights.¹⁵¹ Economic and Social rights

¹⁴⁷ See J. Oloka-Onyango “**Beyond the Rhetoric: Reinvigorating the Struggle for Social and Economic Rights in Africa**” in *California Western International Law Journal*, Vol 26, Fall 1995, No. 1 can be accessed on <<http://www1.umn.edu/humanrts/africa/Oloka-Onyango.html>>

¹⁴⁸ *ibid*

¹⁴⁹ Katarina Tomasevski *supra* note 5 at 207

¹⁵⁰ *ibid*

¹⁵¹ Katarina Tomasevski, *ibid* 216-217

therefore ultimately, entail governmental obligations to create conditions for their realization, namely an enabling environment. These, it must be appreciated, are norms which are more difficult to interpret and monitor because they necessarily require governments to undertake specific policies and measures rather than refraining from prohibited action.¹⁵²

4.4 Machinery of Enforcement

According to Obinna Okere¹⁵³, observance of the rights and duties guaranteed under the African Charter, are to be ensured by 2 Organs, namely the Assembly of heads of State and the African Commission of Human and people's Rights. He further states that the exercise of competence by the Commission is predicted upon satisfaction of the *three traditional conditions of razione loci, razione materiae and razione personae*. The competent *ratione personae* envisages both states and individual, even though the modalities of the seisin of the Commission vary, depending on whether the complainant is a state, an individual or group.¹⁵⁴

4.4.1 The African Commission on Human and Peoples' Rights

Created under Article 30 of the African Charter, the Commission is established, 'within the Organization of African Unity to promote Human and Peoples' rights and ensure their protection in Africa.'

The mandate of the Commission as per Article 45, also include promotional work through awareness raising programs, and Standard setting involving the formulation of '*principles and rules aimed at solving legal problems relating to human and people's rights upon which African Governments may base their legislation*'. Moreover, unlike the other systems, the Charter does not leave much room for progressive implementation of rights enshrined therein, but rather the obligations are immediate upon ratification.¹⁵⁵

Consequently, upon ratification, States Parties assume the obligations, to *respect, protect and fulfill* all the rights in the Instrument, whether economic, social, and cultural, or civil and political.¹⁵⁶ In this regard, the obligation to *respect* imposes a negative duty to refrain from interfering with the enjoyment of these rights on one

¹⁵² *ibid*

¹⁵³ See B Obinna Okere; 'The Protection of Human Rights in Africa and the African Charter on Human and Peoples' Rights: A Comparative Analysis with The European and American Systems', 6 *Human Rights Quarterly*, 149-151 (1984)

¹⁵⁴ *ibid*

¹⁵⁵ See *Third Annual Activity Report of the African Commission, On human and People's Rights* [to The Assembly of Heads of State of The OAU], 1989-90

¹⁵⁶ For more information about the nature and scope of State obligations, please look at **The Maastricht Guidelines on Violations of Economic, Social and cultural Rights**, 20 *Human Rights Quarterly*, (1998), 691-694

hand. While the duty to *protect* would inadvertently mean that the state has to take positive measures to ensure, for example that, third parties respect these rights or refrain from violating them.¹⁵⁷ By analogue therefore, this obligation would be violated, if, actions or omissions would make the affected persons worse off than they were before. The obligation to *fulfill* has been interpreted to mean that States take appropriate legislative, administrative, budgetary and other measures towards the full realization of the rights¹⁵⁸

The African Commission is also succinctly given a protective mandate that includes considering Cases and Communications.¹⁵⁹ States or non-state entities may initiate these communications and cases¹⁶⁰. This is in addition to investigative powers with respect to emergency situations or special cases, which reveal the existence of a series of serious and massive violations of Charter rights.¹⁶¹ By the very nature of the Charter that does not distinguish between rights, there is nothing to suggest that massive violation of economic, social and cultural rights could not fall in this ambit.¹⁶²

In interpreting the Charter provisions, the commission is enjoined to rely on Articles 60 and 61, under which it is given latitude to take into account [*draw inspiration from*] all the other human rights instruments and other norms and customs that are accepted as law under international law. A cursory look at Article 60 illustrates this as follows.

The Commission shall draw inspiration from international law on Human and people's rights, particularly from the provisions of various African instruments on human and people's rights, the Charter of the UN, the Charter of the OAU, The UDHR, other instruments adopted by the United Nations and by African Countries in the field of human and people's rights, *as well as from the provisions of various instruments adopted within the specialized agencies of the United Nations of which the parties to the present Charter are members.* (Emphasis supplied)

This article gives the Commission a greater implementation and constructive latitude than the other 2 Regional Instruments. It would be expected therefore, that the Commission would use such a generous provision to ensure that States parties are held accountable for all their international Human Rights obligations while interpreting the Charter. A better reading of this provision however, should reveal that the Commission is provided with complementary and cumulative tools of implementation, integrating both violations and progressive realization

¹⁵⁷ This would mean the states use due diligence to ensure the horizontal application and respectability of the rights recognised in the Charter.

¹⁵⁸ Supra Note 156

¹⁵⁹ African Charter, Art. 47-59

¹⁶⁰ *ibid* Art 55-57

¹⁶¹ *ibid* Art 58 Para.1-3

¹⁶² See Chidi Amselm Odinkalu, *supra* note 139, at 352

approaches. [Articles 60 and 61 of the Charter will be revisited in the next section]

This enforcement mechanism has been considered by some commentators to be rather weak and the attitude of the Commission has made little to encourage the petitions relating to ESC rights. Although the Charter collapsed the dichotomy between the generations of rights, to date only a handful of petitions have directly sought to enforce Article 14-17, provisions in the Charter that relate to economic social and cultural rights. The Commission itself has only made half-hearted and inconsistent overtures to marry the focus on civil and political rights to the progressive realization of economic, social and cultural rights.¹⁶³ It should also be noted that the Commission in its general commentary has failed to take any serious cognizance of issues such as poverty, development or SAPs, all of which, according to Onyango, are matters that are central to the broad struggle for Human Rights in Africa.

Some commentators has posited that the African Charter and by extension the African Commission, can be more effective through a dynamic and purposeful interpretation of the procedural and substantive provisions of the Charter. It is only through such effort that the rights guaranteed might be translated into a practical reality for the masses that are supposed to enjoy protection under the Charter.¹⁶⁴

4.4.2 Interstate Complaints

Under Articles 47 through to 54, when the commission receives a complaint, it is required to first, notify the accused state and may investigate the matter by all means it deems appropriate; it attempts amicable settlement; it writes a detailed report; and it eventually transmits this report to the states concerned and to the Assembly of Heads of State and government with its recommendations¹⁶⁵ The report may finally be published by the chairman of the commission if the Assembly of Heads of State and Government so decide as per Article 59(2).

However the powers of the Commission under this procedure are very feeble, given that the Commission cannot enforce its decisions against errant States. This state of affairs can only be out classed by the Commissions political influence and credibility amongst States Parties. To date, the Commission has hardly received any such interstate complaints. One which was filed by the Democratic Republic of Congo against Uganda and Rwanda, is still pending.¹⁶⁶

¹⁶³ Oloka-Onyango, op cit, 16

¹⁶⁴ Ankumah, Evelyne A, **The African Commission on Human and Peoples' Rights: Practices and Procedures**, The Hague, Martinus Nijhoff Publishers, 1996,179

¹⁶⁵ See Article 54, Banjul Charter

¹⁶⁶ Communication no [10/ 1998??]

4.4.3 Individual Complaints

Apart from interstate complaints made under Article 47, individual complaints are accepted under Article 55. The qualifications for admissibility under Article 56 are much the same as required by other instruments only that they should be compatible with the Charter of the OAU and the present Charter.¹⁶⁷ Again, there is no distinction whether the complaint relates to civil, political, economic social or cultural rights, under this procedure. Rule 114 illustrates on individual complaints and makes it clear that there is no chance for anyone to complain from the blue and sadly makes it victim based.

However a complaint may be filed on behalf of actual victim or victims by any body that may not necessarily be a victim.¹⁶⁸ Unfortunately there appears to be a lacuna in the Charter that does not provide for effective remedies. A remedy is provided for only in special cases, which reveal the existence of a series of serious or massive violations of human, and people's rights in which case, the Commission is enjoined to draw attention of the Assembly of Heads of State and Government to these special cases.¹⁶⁹ This anomaly can however be redressed, if the Commission could resort to application of interim measures as one of the most effective way of protecting human rights, by invoking Article 46 of the Charter, read together with Rule 111 of the amended Rules of Procedure. This Rule permits the Commission to suggest to States Parties application of interim measures to avoid irreparable damage.¹⁷⁰

This same complaints procedure can also be used to implement collective rights alleging violations of any of the collective rights set forth in the African Charter. This approach could be useful in instances of poverty and social exclusion where it can be proved that the State has double standards in its treatment of the different groups within the confines of its borders.

4.4.4 State Reports

Article 62 of the Charter provides for periodic State Reports on adopted measures every two years indicating both legislative and other measures [adopted] with a view to giving effect to the rights and freedoms recognized and guaranteed by the Charter, again no there in no distinction, all rights for all. As already observed in *section 4.3* hereof, the contents of these reports are elaborated upon by the Rules of procedure as well as reporting Guidelines that the Commission has adopted to clarify on what is required of the state.¹⁷¹

¹⁶⁷ See Article 56(2)

¹⁶⁸ See Rules of Procedure, *supra* note 103, Rule 114, Para.3 (b)

¹⁶⁹ See Wolfgang Benedek “ **The African Charter On Human And Peoples’ Rights; How to make it more effective**” 11 *Netherlands Quarterly of Human Rights* 1993, 31

¹⁷⁰ Evelyn A. Ankumah *op cit* 180

¹⁷¹ See Guidelines to periodic reporting under the African Charter, OAU Doc/05/27(XXIII)

Odinkalu has observed that ‘...state reporting in international Human Rights procedures aims to achieve multiple objectives including...initial review by the implementing institution by which it is apprized of relevant domestic laws, context, practice and problems; monitoring with a view to addressing systematically associated problems of implementation; policy formulation, etc.’¹⁷²In this regard, there still exists considerable opportunity for the Commission, to further develop through clarifications, standard setting, policy formulation, and benchmarking, the implementation of economic, social and cultural rights.

While commenting on the enforcement of ESC rights, Evelyne Ankumah, has observed that the State reporting procedure could be a significant way, through which many of the Charter provisions can be implemented. She observes that while the ESC rights provisions are clearly justiciable, the beneficiaries cannot always exercise their enjoyment.¹⁷³ Through examination of State reports, the Commission can put pressure on States Parties to provide legislative and other measures in order to give effect to the rights in question. Nevertheless, maximum effect can only be realized if there is constant follow-up as is the case under the Revised European Social Charter. [See Chapter II, *infra*, for a detailed analysis of the European system]

4.5 The Question of Poverty: *Opportunities and Challenges*

Having considered the nature and content of some of the Charter provisions as well as the structural and normative framework for monitoring, implementation and interpretation, attention should necessarily turn to the issue of poverty alleviation under the Charter and how best it can be addresses *vis a vis* the existing legal framework.

For want of a specific provision relating to the freedom from poverty, one has to look hard and analyze the Charter provisions relating to other rights in order to ascertain what rights one can cling on in order to hold the state accountable in cases where it is have deliberately created condition or failed to remove obstacles debilitating against the right to freedom from poverty and exclusion.

In this unenviable task there is no better premise to start from than the preamble to the Charter itself. Preamble Paragraph 8 states as follows,

“ Convinced that it is (...) essential to pay a particular attention to the right to development and that civil and political rights cannot be dissociated from economic, social and cultural rights in their conception as well as universality and that the satisfaction of

¹⁷² Chidi Anslem Odinkalu, *supra* note 139

¹⁷³ Evelyn A. Ankumah, *opcit* 181

economic social and cultural rights is a guarantee for the enjoyment of civil and political rights...”¹⁷⁴

Before proceeding to analyze some of the Charters provisions, it is important to keep in mind the wording of Article 1 of the Charter. Under this provision, it is enunciated that States 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 them effect.’[Emphasis supplied]

For purposes of clarity, when considering the issue of poverty under the African Charter, the author proceeds on the premises of the combined definitions elaborate on by the European Social Charter (revised) and the Inter-American Commission on Human Rights. [See chapter 2 and 3]. It shall not be necessary therefore, to go into the debate as to what social, economic, and cultural rights should be implemented in order to deal with poverty, as it must be comprehensible at this stage. Rather what is going to be done is to examine and analyze the provisions of Article 22 paragraphs (1) and (2) of the Charter.

Article 22 reads as follows;

1. All peoples shall have the right to their economic, social and cultural development with due regard to their freedom and identity and in the equal enjoyment of the common heritage of mankind.
2. States shall have a duty, individually or collectively to ensure the exercise of the right to development.

It is suggested that for purposes of clarity this Article should inevitably be read together with the preamble, which in its totality, clearly sets out the objectives for which the Charter was adopted.

Unfortunately, however this right to development was left just hanging, without defining what actually is entailed therein. It nevertheless gives a clear understanding that the enjoyment the economic, social and cultural rights, necessarily correlates to the right to development.

Consequently, in order for one to get a clear grasp of what the right to development entails, as well as lend credence to this “dry” Charter provision, recourse must inevitably be had to the UN Declaration on the Right to Development, this should be able to give the constitutive aspects that are required of states if they are not to be found in violation thereof. But first it is necessary to consider that Article 22 in its entirety is a miniature and precursor of the Un Declaration on the Right to Development.¹⁷⁵ Indeed a cursory look at the

¹⁷⁴ Banjul Charter Preamble, Para. 8

¹⁷⁵ Adopted by the General Assembly of the United Nations, resolution 41/128 of 4 December 1986.

provisions of Articles 2(3) and 8(1) of the said Declaration illustrates this point. Art 2(3) states;

“States have the right and duty to formulate appropriate national development policies that aim at the constant improvement of the well-being of the entire population and of all the individuals, on the basis of their active, free and meaningful participation in development and in the fair distribution of the benefits resulting therefrom.”

Article 8(1)

“States should undertake, at the national level, all necessary measures for the realization of the right to development and shall ensure, *inter alia*, equality of opportunity for all in their access to basic resources, education, health services, food, housing, employment and the fair distribution of income. Effective measures should be undertaken to ensure that women have an active role in the development process. Appropriate economic and social reforms should be carried out with a view to *eradicating all social injustices*”[emphasis added]

While examining the Initial report for Namibia,¹⁷⁶ the Commission declared that, “we cannot talk about human rights without insisting on the need to emphasis [sic] social, economic and cultural rights and to allow a major portion of our population to have *minimum living standards*, this extends to a commitment to *eliminate poverty* and provide access to public utilities, health, and access to electricity”

Some authors have examined the right to development, and have concluded that much effort has gone into defining what this should be, with little consensus emerging rather than trying to define what it is not. It would appear that the only way to claim the right to development is through looking at what is denied by its being absent. In this way conditions violative of human rights can be identified, and is likely to create an understanding of development-related violations¹⁷⁷.

While writing for the 2000 Human Development Report, Joe Oloka-Onyango rightly interpreted the right to development to mean, “freedom from want, deprivation and marginalisation”¹⁷⁸ This means therefore that by ratifying the Charter, States Parties agree to undertake measures to ensure that their respective populations are freed from *want or poverty*. Onyango further notes that by making reporting guidelines that essentially provide a wider framework for implementation, and devote more attention to ESC rights, it could be the basis for

¹⁷⁶ See Report on the Twelfth Session of the African Commission on Human and Peoples’ Rights 1991-1992, held in Banjul the Gambia, 12-21 October 1992, at 19 also quoted In Chidi Anslem Odinkalu supra note 139

¹⁷⁷ Katarina Tomasevski; “**Justiciability of Economic, Social and Cultural Rights**” in *The Review no. 55* (International Commission of Jurists) 1995, 203

¹⁷⁸ Joseph Oloka-Onyango, **Human Rights and Sustainable Development in Contemporary Africa: A new Dawn, or Retreating Horizon?** *Human Development Report 2000*, Background Paper 3

a much more vigorous action on ECS than is laid down in the Charter. In this regard the Commission could begin by initiating a process of imaginative translation of the bare rights [like Art 22] in the Charter into appropriate frame works for implementation.¹⁷⁹

According to Paul JIM de Waart,¹⁸⁰ it can also be argued, that the very rationale of solidarity rights, [where the right to development squarely falls], is to consider it as a legal principle relating to an international economic order and (...) lies in the promotion and protection of human rights in such a way that people are at least prevented from suffering under *absolute poverty* through no fault of their own (...) and that the interplay between freedom, equality and solidarity as legal principles underlying the International economic order should promote and protect the social and international order in such a way that *every one's basic needs can be met everywhere as a matter of right....*

Considering that the Commission is expected to take into account other international legal obligations while scrutinizing State Reports. It would mean that the provisions of the International Covenant on Economic Social and Cultural Rights must be taken into account while considering Reports from States Parties thereto and should be judged accordingly. Odinkalu has rightly pointed out that in operationalizing economic, social and cultural rights under the African Charter, the Commission should take due notice of those states that have ratified the ICESCR. Though the Covenant itself is vague in it's wording, it would in this respect provide the Commission with 'complementary and cumulative tools of implementation, integrating both the violations and progressive realization approaches',¹⁸¹

The African Charter, having adopted aspects of structural approach to Human Rights therefore, calls for structural remedies in case of none compliance therewith. In this regard I would agree with Bello¹⁸² who quotes Prof Alston as saying 'that the single most important element in the launching of a structural approach to human rights at the international level was [is] the concept of the right to development'. However, this calls for a detailed articulation, by the African Commission, of the content of the right to development so that it can easily be claimed and enforced by the *peoples* under the Charter. Thence, using the wording of Art. 8 of the Declaration on The Right to Development, it can be argued that by inserting Article 22 in the Charter, African States are firmly bound to institute structural reforms that are deliberately focused on, *inter alia*, eradicating all forms of social and economic injustices, including abject poverty.

¹⁷⁹ Oloka-Onyango ibid

¹⁸⁰ See Paul J.M.L. de Waart 'State Rights and Human Rights as Two sides of one principle in International Law' in Paul de Waart (eds) *International Law and Development*, 1988, Nijhoof Publishers, 373

¹⁸¹ Chidi Anslem Odinkalu supra note 139 at 354

¹⁸² E. Bello, supra note 134

Obviously this calls upon the Commission to create benchmarks and recommend a series of measures that States need to undertake in order to eradicate poverty. It will be against such recommended series of measures that individuals as well as *peoples* will use as abedrock upon which they will stand to claim their collective rights from the state.

Evelyn Amkumah¹⁸³ has pointed out that the claims involving the right of people to development are synonymous to class action suits, to the extent that an individual or individuals can invoke it as representatives of the class interested in the matter without having to join every member of the class. In order to brighten the chances of a successful claim however, she rightly asserts, that such an action would be most persuasive if it is linked with civil and political issues. This would be especially so if the group is experiencing unequal treatment solely because of the group to which they belong. It is indeed true that such a class action alleging violation of the right to development as outlined in Article 22 of the Charter would have as much chances of succeeding or not, as any individual claim for discrimination, say based on gender.¹⁸⁴

The government only has to create the enabling environment for the realization of the rights. In reviewing factors that determine the eradication of poverty, the World bank concluded that 'larger policy environment was perhaps the single most important factor in the success or failure of anti poverty projects'¹⁸⁵ Katarina asserts that poverty is a structural phenomenon which calls for a policy framework to be adopted and put into practice by the public authorities.¹⁸⁶ This would mean that States could be held accountable where they fail to institute such measures.

Although the obligation to pursue an anti poverty policy can easily be deduced from the existing international human rights law, the human rights focus on individual entitlements does not seem to offer an appropriate conceptual basis for designing indicators in view of the fact that structural problems require structural remedies. Since individual remedies may not sufficiently redress the structural imbalances that characterizes many of the majority of African populations to day.

The Challenge for the Commission therefore is to lay out in a systematic manner what kind of structural framework is required to be adopted by each State Party in order to address the issue of poverty, once this is in place the nationals of each state should be able to monitor and discern as to whether their respective countries have acted in compliance therewith or not. There is urgent need

¹⁸³ See Evelyn A. Amkumah , op cit, 166

¹⁸⁴ *ibid* 167

¹⁸⁵ Katarina, Tomasevski ' **Indicators** ', in Asbjorn Eide, Catarina Krause and Allan Rosas, '*Economic, Social and Cultural Rights*' 1995, Kluwer Academic Publishers, the Netherlands, 394

¹⁸⁶ *ibid*

therefore, to move from the human rights emphasis on legislative measures as the sole method for implementing human rights. Though poverty is no justification for non-realization of human rights, the need for resources for the promotion of human rights cannot be ignored, since these are beyond the reach of the majority of states. However, priorities need to be identified and bold steps towards their realization taken if States are not to be found in violation of Human Rights.

Poverty, according to Asbjorn Eide¹⁸⁷ is often combined with malnutrition, lack of education, low life expectancy, and substandard housing, factors that in turn impede efforts to move out of poverty. Efforts to redress the situation must necessarily take into account the different forms of poverty. For instance, the poverty that arises in situations of crisis (famine), requires measures to assist persons and families to cope, pockets of poverty in the developed world can be resolved through appropriate targeted interventions (affirmative action); endemic poverty in poor countries would however require entirely different measures. He advocates for attitude change so that social and economic policies address problems of those below the poverty line, and most important specific policies aimed at *realization of economic, social and cultural rights must be made the central concern of development policies*¹⁸⁸ [emphasis added] However, for purposes of this thesis, the question remains that can one get legal redress under the African Charter in case of a State Party's failure to put such measures in place?

For the moment the answer would lie in the principle of non-discrimination, equal opportunity and equality in the processes influencing distribution and redistribution of income in society, employment. The wage and salary differentials, the tax structures and the use of other public revenue resources as well as availability of and access to public services and social benefits.¹⁸⁹

While searching for legal redress to poverty, Katarina has rightly observed that since poverty does not divide itself neatly into food, health, housing, or other explicitly recognized rights, it can only be tackled through an integrated approach.¹⁹⁰ However, legal solutions should not lose sight of the fact that, any effort geared towards the enjoyment of economic, social and rights for the vulnerable must respect their integrity and dignity, focusing on assisting them to identify and implement their own solutions to their problems. Obviously, this would mean that legal solutions must necessarily be combined with social, political, fiscal and other reforms.

¹⁸⁷ Esbjorn Eide 'Obstacles and Goals to be Pursued' in Asbjorn Eide, Catarina Krause and Allan Rosas, 'Economic, Social and Cultural Rights' 1995, Kluwer Academic Publishers, the Netherlands, 384

¹⁸⁸ *ibid* 385

¹⁸⁹ *ibid* 386

¹⁹⁰ Katarina Tomasevski, "Justiciability of Economic, Social and Cultural Rights", in *The Review* Issue no. 55 (International Commission of Jurists), Economic, Social and Cultural Rights and the Role of Lawyers, , 207

This predicament is exacerbated, by the fact that it is not immediately apparent whether poverty in itself is an obstacle to the realization of human rights, which both governments and individuals should be assisted to diminish, or has resulted from an abuse of power and could therefore be addressed as a human rights violation. Either way, the state of poverty is a gross violation of human rights and any society or individual people who find themselves in such a state must be able to seek and receive legally enforceable remedies.

In this regard, the Commission is enjoined to exploit the provisions of Article 58 of the Charter to undertake case based monitoring of economic, social and cultural rights by investigating, verifying, and considering complaints about situations of mass noncompliance with Charter rights, like mass illiteracy or high mortality. Such a procedure would enable the Commission to undertake a public investigation of the causes of such wide spread violations and would be expected to provide systematic remedies and recommendation.¹⁹¹

Therefore in making the African Charter relevant to the individuals and peoples that it is meant to protect, there is need to adopt a two pronged approach whereby the Commission clearly defines the rights by recommending appropriate structural remedies for implementation and realization thereof. As already pointed out, it will be against such suggested structural reforms that the impoverished peoples of the continent will rely to institute legal proceedings, the outcome of which should culminate in holding the Governments accountable.

In this regard, it is interesting to note that the Commission is already on the right truck, albeit half heartedly and haphazardly. One example will suffice to illustrate this point; while considering a communication filed by the *World Organization Against Torture et al v. Zaire*¹⁹², the Commission adjudged that there was a violation of article 16 of the Charter, after finding the State, by reason of corruption and mismanagement of resources of the country to have failed to provide basic services necessary for basic health, including safe drinking water, electricity, and basic medicine for its health facilities.

However, for effective monitoring of ESC rights the Commission could and must adopt the so-called violations approach as outlined by the *Limburg Principles*¹⁹³ on the scope and nature of state obligation under the ICESCR. This will not only make it easier for the Commission to hold the States Parties accountable for non

¹⁹¹ See Chidi A. Odinkalu *opcit* 361-362

¹⁹² See *Ninth Annual Activity Report of The African Commission on Human and Peoples' Rights* 1995-1996, 32nd Ordinary Session, 7-10 July 1996,

¹⁹³ The Limburg Principles were developed by a group of distinguished experts in international law convened by the International Commission of Jurists, they met at the Faculty of Law of the University of Limburg, hence the name.

compliance, but will make it easier for the populace to identify and claim implementation of the ESC rights in the Charter.¹⁹⁴

This, as already pointed out, will inevitably mean the laying out of invariable indicators for effective monitoring of compliancy with core obligations that are inherent in each ESC right. As Katarina has rightly observed,¹⁹⁵ ‘monitoring necessitates a conceptual framework to define what to monitor before one can proceed to discuss how and move to the design of the indicators. In order to develop such a framework, human rights obligations ought to be operationalised. The purpose of indicators should therefore be aimed at capturing two key factors, the *willingness* as well as the *capacity* of a government to protect and promote human rights¹⁹⁶’.

Perhaps one would even be constrained to agree with Rhoda Howard, on her part, she realistically argues that only the enjoyment of civil and political rights, can guarantee social and cultural rights and that Civil and political rights are necessary for economic development and redistribution of wealth. She argues that any attempt to implement economic rights or basic human need of the poor (...) requires consistent participation by them.¹⁹⁷ This is correct, only to the extent that it goes to emphasize the indivisible and interdependent nature of human rights and the dangers that one is bound to encounter in the murky waters of the now outdated hierarchical approach to human rights issues.

In summary, though the African Commission has made some observations on ESC rights, it has to a large extent failed to articulate ESC rights in a more aggressive fashion, which position is regrettable in view of the economic and social crisis that has bedeviled African States for generations. Although, the Charter elevated a number of new and collective rights to the international arena by lending them binding force upon States Parties, this has sadly not translated into actual tangible results on the ground, at least not as yet.

4.6 Conclusion

In all, the African charter leaves no room for any justification on the part of a State Party for failure to put legislative measures in place in order to facilitate the realization of all the rights recognized and guaranteed therein. For instance if a state has a court system to oversee the enjoyment of civil and political rights, there can not be any excuse under the Charter, to dichotomize and neglect the

¹⁹⁴ For a detailed analysis of this so called violations *approach* for monitoring of ICESCR see Audrey Chapman “ A violations Approach” for monitoring the International Covenant on Economic, Social and Cultural Rights”, *Human Rights Quarterly*, 18.1 (1996) 23-66

¹⁹⁵ Katarina Tomasevski , *supra* note 185, at 389

¹⁹⁶ *ibid*

¹⁹⁷ See Rhoda Howard “ **The Full-Belly Thesis: Should Economic Rights Take Priority Over Civil and political Rights? Evidence from Sub-Saharan Africa**”, *Human Rights Quarterly*, 5(1983), 467-490

vindication of economic, social and cultural rights through the same legal system. Therefore any departure from the holistic approach agreed upon under the Charter would amount to a violation thereof. As of now however, the African Commission can only issue non binding resolutions and recommendations, there is urgent need to have the African Court in place whereby legally binding decisions can be made just as it is Under the Inter-American System.

In the final analysis, it is important to point out that unless the implementation mechanism is strong enough and is able and willing to clearly define, interpret and lay out the measures that States Parties must adopt to realize these rights, the recognized and guaranteed rights will remain a classical case of what, one of the most distinguished jurists, Jeremy Bentham called ‘anarchical fallacies’ while referring to human rights.¹⁹⁸

¹⁹⁸ Jeremy Bentham was one of the leading theorists and philosophers of his time, 19 Century, and he strongly opposed the notion of human rights as being mere fallacies.

5 National Implementation of ESCR and Poverty Alleviation: *The case of South Africa*

5.1 Introduction

Having looked at the regional protection and enforcement of Economic, Social and Cultural rights, it is now imperative to examine the enforcement at domestic level, which level is probably the most important within which Human Rights could be protected. Geraldine Van Bueren has opined that ‘people have a legitimate expectation that human rights law can and must be used to eradicate gross inequalities, including inequalities of resources.’¹⁹⁹

As we move the microscope to examine the legal mechanism that has been put in place to address human rights concerns at national level, it should be borne in mind that hunger, malnutrition, serious illness, homelessness, violence, pollution and underdevelopment [poverty] are rife in many places around the world leading to early death and low life expectancy for millions, and if nothing is done to address these, it may well amount to violation of the right to life.²⁰⁰ Indeed this debilitating state of affairs has led some commentators to argue that it would make more sense to use the strong protection of the right to life to battle for socio-economic rights.²⁰¹

In this chapter therefore, attention is turned to examining as to how socio-economic rights have found expression at the national level, their justiciability and how they impact on the quest to concretise the struggle towards the use of the law and legal remedies to alleviate poverty that continues to ravage large section of society.

The statistics about poverty are well known and it shall not be necessary to elaborate on them in this thesis. However, of the countries that have made bold steps towards devising and enforcing legal solutions to the debacle, the 1996 South Africa Constitution (the Constitution) stands tall with not only a ground breaking Bill of Rights hitherto unknown on the African Continent, but also provides for effective remedies through an effective court system and Human Rights Commission.

¹⁹⁹ See Geraldine Van Bueren, ‘**Alleviating Poverty Through the Constitutional Court**’ 15 *SAJHR*, 1999, 52

²⁰⁰ See F. Menghistu “**The Satisfaction of Survival Requirements**” in B G Ramcharan(ed) *The Right to life in International Law* (1985) 63

²⁰¹ See note 190

This Chapter will therefore give a brief overview of the socio-economic rights enshrined in the Constitution of South, in the first part; and examine how the Courts have interpreted some of these provision, through analysis of some decided cases. The role of the Human rights Commission in the implementation and monitoring process and how this has impacted on the issue of poverty alleviation will be examined in the next part. While summing up, an attempt will be made at an in-depth analysis of how the monitoring mechanism has so far been used.

5.2 An Overview of the Constitutional Provisions on ESC Rights

The Bill of Rights is encapsulated under Chapter 2 of South Africa's 1996 Constitution, and contains an elaborate list of universally accepted fundamental rights, freedoms and civil liberties. The catalogue of rights contains all categories of rights, civil and political, economic, social and cultural.

A cursory look at the Constitution reveals that social, economic rights in the Constitution can be divided into 2 broad categories;²⁰² the fully justiciable ones which include the right not to be evicted²⁰³, the right not to be refused emergency medical treatment,²⁰⁴ the right of prisoners adequate nutrition and medical treatment,²⁰⁵ the right to Children's, basic nutrition, shelter, basic healthcare and social services,²⁰⁶ these rights are phrased imperatively without qualification, which lends them an immediate substantive binding character.

The second category is the so-called "access rights", these include access to adequate housing,²⁰⁷ health care services,²⁰⁸ sufficient food and water,²⁰⁹ and social security,²¹⁰ these rights are progressively phrased and are subject to availability of resources.²¹¹ The right to education under section 29 (1) falls in this category as well. These rights, according to the Constitutional Court will at the very least provide negative protection against improper invasion.²¹²

Although some commentators have argued that, socio-economic rights place a positive obligation on the state to ensure their progressive realisation and are

²⁰² M Pieterse (376-377)

²⁰³ Section 26(3)

²⁰⁴ Section 27(3)

²⁰⁵ Section 35(2) (e),

²⁰⁶ Section 28(1)(c)

²⁰⁷ Section 26 (1),

²⁰⁸ Section 27(1) (a)

²⁰⁹ Section 27(1) (b),

²¹⁰ Section 27(1)(c)

²¹¹ See sections 26(2) and 27(2)

²¹² *Certification of Constitution case*(see note 214)

accordingly thought to have more significant budgetary implication than those imposed by civil and political rights,²¹³ the Constitutional Court has stated, that

“ ...any of the civil and political rights entrenched in the [constitution] will give rise to similar budgetary implications without compromising with justiciability. The fact that socio-economic rights will almost inevitably give rise to such implications does not seem to us to be a bar to their justiciability. At the very minimum, socio-economic rights can be negatively protected from improper invasion”²¹⁴

This position reverberates with Section 7(2) of the Constitution, which states that, the State must *respect, protect, promote and fulfill* the rights in the Bill of Rights. This, not only enhances the justiceability of socio-economic rights, but mandates positive state action for all rights, civil and political, economic, social and cultural. In this sense, therefore, the duties to *promote* and *fulfill* the right to life,²¹⁵ for instance, might mandate the State to create suitable living conditions for its people thereby awarding the right to life a socio-economic dimension. This kind of reasoning can easily be discerned from the case of *Soobramoney*²¹⁶ where the Constitutional Court decided *inter alia*, that

“Health care, housing, food, water, work and social security—all form part of the rights to [*human life*]”

The link between the right to life and socio-economic rights can also be detected from the Preamble of the Constitution, which aspires to improve the quality of life of all citizens and free the potential of each person.²¹⁷

Though the Constitution of South Africa is very much acclaimed, it is worth noting that there are some important socio-economic rights that did not make it into the coveted document. These include the right to clothing; sanitation, employment and means to secure a livelihood, these rights are very important to the extent that if violated, they seriously affect the quality of human life, and may in some instances even threaten survival.²¹⁸

It should be appreciated that given South Africa’s history, the right to equality is closely related to socio-economic rights, to make sure that there is no discrimination in accessing and enjoying them. As Sandra Liebenberg has observed, “the full and equal enjoyment of all rights and freedoms...affirmative

²¹³ See Marius Pieterse “ **A different shade of Red: Socio-economic Dimensions of the Right to Life in South Africa: Cases and Comments**” *SAJHR* 15 1999, 372

²¹⁴ *Ex Parte Chairperson of Constitutional Assembly: In Re Certification of the Constitution of South Africa* 1996 at para 78

²¹⁵ South African Constitution, Section 11

²¹⁶ Para 15-16

²¹⁷ See Constitution Preamble generally

²¹⁸ M Pieterse 384

action...real equality can only be achieved if the State takes positive steps to ensure that vulnerable and disadvantaged groups enjoy meaningful access to socio-economic rights. *Without access to an education, sufficient food, health care and housing, poor people will not be able to participate equally in the economic and social life of the country.*²¹⁹[Emphasis added]

In this regard, what the State is enjoined to do therefore, is to create an enabling environment, which will make it possible for people to gain access to the rights and improve their quality of life. It should also endeavor to remove all barriers or obstacles that may stand in the way of people gaining access to the rights. Obviously the adoption of special measures to assist vulnerable and disadvantaged groups to gain access to the rights need not be emphasised. This must have influenced the Constitutional Court in the *Grootboom case* (details of which are analyzed herein below), when court observed that the ‘state must create the conditions for access to adequate housing for people at all *economic levels* of [our] society. And that State policy dealing with housing must therefore take account of different *economic levels* in [our] society’

5.2.1 Application and enforcement

Section 8 of the Constitution, provides that the Bill of Rights applies to all law and is binding on all organs of the State. The Bill of Rights is also explicitly stated to apply both *vertically* (as against the State) as well as *horizontally* (as against private individuals and other legal entities). It does not distinguish whether a person is natural or juristic. The only distinction is that a juristic person is entitled to the rights in the Bill of Rights to the extent required by the nature of the rights and the nature of that juristic person. This is a very important provision to the extent that juristic persons like transnational corporations that have many times engaged in gross and systematic abuse of socio-economic rights, can no longer escape liability.

According to section 38, Court is mandated to grant appropriate relief if any of the rights in the Bill of Rights is infringed or threatened. Again there is no distinction, as to whether the right is civil, political, economic, social, cultural or so-called third generation, like environmental rights under section 24. This section (s 38), also gives a list of persons who may approach the Court for redress, and these include; anyone acting in their own interest, anyone acting on behalf of another person who cannot act in their own name, anyone acting as a member of, or in the interest of, a group or class of persons; anyone acting in public interest and an association acting in the interest of its members.²²⁰

²¹⁹ See Sandra Liebenberg and Karrisha Pillay (eds) ‘ **Socio-economic Rights in South Africa**’, A resource book, Community Law Centre (University of Western Cape),[2000,], 24

²²⁰ See South African Constitution, Section 38 paragraphs (a)-(e)

5.2.2 Interpretation of the Provisions

In interpreting the Bill of Rights in the Constitution, Courts are obligated under section 39, to take into account international law which, according to the Judge Chaskalson in *Mukwayane*²²¹ imports the full force and application of International law that includes both binding and non binding law. In reference to the then section 35 of the Interim Constitution, which later became section 39, he [Judge Chaskalson] summed it up as follows;

“ . . . public international law would include non-binding as well as binding law. They may both be used under the section as tools of interpretation. International agreements and customary international law accordingly provide a framework within which [the Bill of Rights] can be evaluated and understood, and for that purpose, decisions of tribunals dealing with comparable instruments, such as the United Nations Committee on Human Rights, the Inter-American Commission on Human Rights, the Inter-American Court of Human Rights, the European Commission on Human Rights, and the European Court of Human Rights, and, in appropriate cases, reports of specialised agencies such as the International Labour Organisation, may provide guidance as to the correct interpretation of particular provisions of [the Bill of Rights]

Justice Chaskalson P in *Soobramoney* succinctly described the context in which the Bill should be interpreted²²²

“We live in a society in which there are great disparities in wealth. Millions of people are living in deplorable conditions and in *great poverty*. There is high level of *unemployment, inadequate social security*, and many do not have access to clean water or adequate health services. These conditions already existed when the constitution was adopted and a commitment to address them, and transform our society into one in which there will be human dignity, freedom and equality, lies at the heart of our new constitutional order. *For as long as these conditions continue to exist that aspiration will have a hollow ring*” [Emphasis added]

5.3 The role of the Judiciary

Despite all the constitutional guarantees as outlined in the previous section, of this Chapter, there has been only modest interest in using the law and litigation to alleviate poverty in South Africa. This has led to commentators like Geraldine Van Beuren to suggest that a test case strategy for combating poverty, focusing on a specific group could probably offer a significant advantage.²²³ The South African Judiciary has a very big role to play in the implementation of socio-

²²¹ *S v Mukwanyane and Another* 1995 (3) SA 391 (para 35)

²²² *Soobramoney v Minister of Health, KwaZulu-Natal* 1998(1) SA 765 (CC); 1997(12) BCLR 1969(CC) at para 8

²²³ Geraldine Van Beuren, *opcit* 53

economic rights due to the fact that the Constitution makes no distinction; all the rights in Chapter 2 are justiciable and enforceable. In summing up his findings in the *Grootboom case* Justice Yacoob could not have put it any better, when in reference to the progressive nature of socio-economic rights he stated that,

“...despite all these qualifications, these are rights and the Constitution obliges the state to give effect to them. This is an *obligation that courts can, and in appropriate circumstances, must enforce.*”²²⁴

5.3.1 Decisions of the South African Constitutional Court and how they have interpreted socio-economic provisions (*Government of RSA and others V Grootboom and others*)

The question of justiciability of socio-economic rights as expressly included in the Bill of Rights of the SA Constitution was put to rest when in his lead judgment, Justice Yacoob stated that section 7(2), requires the State to “respect, protect, promote and fulfill *all* the rights in the Bill of Rights and that the Courts are constitutionally bound to ensure that they are protected and fulfilled.” He emphasized that; “*the question is therefore not whether socio-economic rights are justiciable under [our] Constitution, but how to enforce them in a given case*”²²⁵ [emphasis supplied]

Though the *Grootboom Case* was brought in relation to the right to access to adequate housing under section 26, the Constitutional Court went on to elaborate on ways in which the State would meet its obligations under section 27, (which includes social security) and stated that these Rights could possibly be realized through a social welfare programme providing maintenance grants and other material assistance to families in need in defined circumstances.²²⁶

The Constitutional Court observed that the rights under sections 26 and 28 need to be considered in the context of the cluster of socio-economic rights enshrined in the Constitution. These rights, *inter alia*, entrench the right to land,²²⁷ to adequate housing and health care, food, water and social security.²²⁸ They also protect the rights of the child²²⁹ and the right to education.²³⁰

²²⁴ *Grootboom* para. 94

²²⁵ *Government of RSA and others v Grootboom and others*

CCT11/00 (4 October 2000), 18. Justice Yacoob observed that section 38 of the Constitution empowers the court to grant appropriate relief for the infringement of any right entrenched in the Bill of Rights. [2001 (1) SA 46 (CC)]

The Judgement was accessed on <<http://www.concourt.gov.za/date2000.html>>

²²⁶ See *Grootboom*, [para 78]

²²⁷ See “The Constitution of the Republic of South Africa”, Act 108 of 1996, [hereafter the “The Constitution”] Section 25(5)

²²⁸ South African Constitution, Section 27

²²⁹ *ibid*, Section 28

²³⁰ *ibid*, Section 29

While clarifying the link between all the rights in the Constitution and the effect poverty would have thereto, the judge in the *Grootboom Case* observed that there can be ‘no doubt that human dignity, freedom and equality, the fundamental values of [our] society, are denied to those who have no food, clothing or shelter.’²³¹

While defining as to what is expected of the State in relation to the realization of socio-economic rights, the Court could not avoid commenting as to what amounts to the ‘*minimum core obligation*’ of each of the socio-economic rights. The Court interpreted it to mean “the floor beneath which the conduct of the State must not drop if there is to be compliance with the obligations.”²³² The Court went further to state that minimum core obligation is determined generally by having regard to the needs of the most vulnerable group that is entitled to protection of the right in question.²³³

The Court went on to observe that issues of *development* and *social welfare* are raised in respect of those who cannot afford to provide themselves with housing and that State policy need to address both these issues. That the *poor* are particularly vulnerable and their needs require special attention, and it is in this context that the relationship between section 27 and the other socio-economic rights is most apparent. If the State has in place programmes to provide adequate social assistance to those who are otherwise unable to support themselves and their dependants, under section 27 that would be appropriate to the State’s obligations in respect of other socio-economic rights.²³⁴ In essence, it could mean that once the issue of social security is central and once it is addressed and put to rest, then there should be no impediment in realizing the other socio-economic rights.

While appreciating the progressive nature of socio-economic rights, Justice Yacoob adopted the interpretation of paragraph 9 of General Comment no 3, adopted by the UN Committee on Economic, Social and Cultural Rights. He observed that “progressive realization” must strike a balance between goal and means. And that the measures must be calculated to attain the goal as *expeditiously* and as *effectively* as possible, taking into account the availability of resources.²³⁵ He further noted that those whose needs are the most urgent and whose ability to enjoy all the rights, therefore, is most in peril, must not be ignored by the measure of achieving realization of the right.

²³¹ See *Grootboom* para 23.

²³² *Ibid* Para 31

²³³ In arriving at this, the Court was inspired by the UN Committee on Economic, Social and Cultural Rights General Comment no 3 para. 10. Though South Africa signed the ICESCR on 3 Oct 1994 it has not ratified it to date.

²³⁴ *Grootboom* para 36

²³⁵ *ibid* para 44-45

5.4 Poverty Alleviation: The Constitution and the Courts

Although not explicitly framed as such, the right to freedom from poverty finds expression under section 27(1)(c) which is to the effect that ‘every one has a right to access to...(c) social security, including, if they are unable to support themselves and their dependants, appropriate social assistance.’²³⁶ However, all the socio-economic rights, according to the courts should be read together as a package in the setting of the Constitution as a whole. This is more pertinent given the kind of scenario where, unlike Article 30 of the *Revised European social Charter*, there is no single right, which specifically protects against poverty. Obviously this goes to emphasize the dire need for a holistic approach.²³⁷

Consequently in deciding some of the cases relating to socio-economic rights, courts have not been slow to emphasize the close relationship between all socio-economic rights. On the question of poverty they have stated that the State is obliged to take positive action to meet the needs of those living in *extreme poverty*, homelessness or intolerable housing. Their inter connectedness need to be taken into account in interpreting the socio- economic rights and in particular in determining whether the State has met its obligations in terms of them.²³⁸

The position taken by the Truth and Reconciliation Commission (TRC) goes to emphasize this point, as the report stressed that

“...government [should] accelerate the closing of the intolerable gap between the advantaged and the disadvantaged in our society by, *inter alia*, giving even more urgent attention to the transformation of *education, the provision of shelter, access to clean water and health services and the creation of job opportunities*. The recognition and protection of socio-economic rights are crucial to the development and sustaining of a culture of respect for human rights”²³⁹[emphasis supplied]

In a unanimous decision [Justice Yacoob] it was noted that the Constitution obliges the State to act positively to ameliorate the plight of the hundreds of thousands of people living in deplorable conditions throughout the country. It must provide access to housing, health-care, sufficient food and water, and social security to those unable to support themselves and their dependants and that *those in need have a corresponding right to demand that this be done.*²⁴⁰ By

²³⁶ This unequivocally means that the Constitution of South Africa specifically provides for provision of hand out for those who are not able to support themselves and their dependants as the progressive measures are being taken to address the causes of such a state of affairs.

²³⁷ See G Van Bueren op cit 52

²³⁸ *ibid* 20

²³⁹ TRC Report, vol.5, 308

²⁴⁰ *Grootboom* para 93

stating so, the courts have laid the cornerstone for the broad interpretation of the concept of poverty.

5.5 The Role of The Human Rights Commission

The functions of the South African Human Rights Commission (the Commission) are outlined under Section 184 of the Constitution. Among which is the obligation to require, “relevant organs of state to provide the Commission with information on measures they have taken towards the realisation of human rights in the Bill of Rights concerning housing, health care, food, water, social security, education and the environment.

These are the so called access rights that are for progressive realisation, so the Commission is enjoined to monitor the concrete and deliberate steps that are being taken for their effective realisation. This is a unique reporting system akin to the UN and other Human rights bodies, albeit at the national level. Section 181(5) requires the Commission to present an Annual Report to Parliament.

The monitoring process under section 184(3) has the potential, if used creatively, to make an important contribution to the progressive realisation of economic, social and cultural rights. The structure of the monitoring process is relatively straightforward, relevant organs submit reports on steps taken and the Commission analyses them and drafts its own report which it submits to Parliament, before subsequently publishing them. However, Danie Brand asserts that the,

‘Issue crucial to the success of the section 184(3) process as a human rights enforcement system is (...) not the structure according to which the system is run, but the approach the Commission adopts in analysing the reports of the organs of the state and in drafting its own report.’²⁴¹

The Commission released its first annual report for 1997-1998 with contents ranging from baseline information that is calculated to form the basis of assessment for compliance in subsequent years. The point of interest is that the six distinct volumes include a report on Poverty and Human rights. The Commission, in analysing the reports and drafting its own evaluates and pronounces its assessment on the extent to which the State organs have complied with the obligations to implement socio-economic rights. This is analogous to the international reporting systems, where compliance of States Parties to human rights treaties with their obligations in terms of those treaties is measured.

²⁴¹ See Danie Brand; “ **Assessing the South African Human Rights Commission’s assessment of socio-economic rights implementation: the First Economic and social Rights Report**” Can be accessed on < http://www.up.ac.za/chr/socio/socio_research.html >

This is in line with section 184(1)(c) that obligates the Commission to *monitor* and *assess* the observance of human rights in South Africa. Parliament went ahead to enact The Commission Act, which *inter alia*, criminalizes non-compliance with the reporting procedure under this Section.²⁴² Under the same act, a State official can be summoned to appear before the Commission in cases where an allegation of non-compliance is reported.²⁴³ The Commission has also adopted reporting guidelines- Protocols- on which the departmental reports are based. The guidelines demand information on among other issues, policy, legislative, and budgetary measures taken as well as the outcome thereof. Poverty is one of the issues that are reported upon and has been taken as encapsulated under section 27(1) (c) of the Constitution.

A cursory look at the Commission Reports indicates that the Commission has been compiling and summarising the reports received from the State organs in terms of section 184(3), instead of analysing and evaluating the extent of compliance with Constitutional Obligations in relation to socio-economic rights. While analysing the performance of the Commission, Danie Brand²⁴⁴ has observed that Commission reports as they stand now are only a summary of statistics with no attempt at evaluating and analysing the data. In this respect, since what the Commission is something that is quite new and to a large extent unprecedented, one can expect a better clearer role in future. In which case the Commission would be called upon to act more aggressively in the execution of its Constitutional mandate.²⁴⁵

5.6 Conclusions

There is no better way of ending this country situation analysis other than reiterating the position taken by the South African Constitutional court in the case of *Grootboom* wherein they stated *inter alia*, that the 'proposition that rights are interrelated and are all equally important is not merely a theoretical postulate.'²⁴⁶ The concept, as the Court went on to observe, has immense human and practical significance in a society founded on human dignity, equality and freedom.

Poverty alleviation is something that can best be described as cross cutting in all aspects. Whatever approach or situation one may choose, poverty affects all manner of people be it in the developed or developing world, it is only a question of degree, and the earlier that tangible and concrete measures are taken to

²⁴² See The South African Human Rights Commission Act, article 18(a)

²⁴³ *ibid.* Article 9(c)

²⁴⁴ See note 241 (*supra*)

²⁴⁵ In order to get a more balanced picture of the maze that the Commission has created for itself one needs to access the Reports which can be found on

<http://www.sahrc.org.za/main_frameset.htm>

²⁴⁶ See *Grootboom* Para 83

combat it, the better. This obviously calls for concerted effort and necessarily needs the use of all possible means that may present themselves to the afflicted, not least putting to use, the available legal machinery as efforts are being made to have it refined.

6 Conclusions and Recommendations

Having gone through the entire 3 regional systems of human rights protection as well as the close scrutiny of the national implementation case study, it should be abundantly clear that the struggle for litigation against poverty is still long and arduous. This is so, because there is still dire need to have the concept clearly defined and make it easily identifiable in order to facilitate justiciability. Unless this is done, as is the case under the European Social Charter, it will take time before there can be any effective redress and anticipated remedies.

As demonstrated in the thesis, the question of justiciability of freedom from poverty and other socio-economic rights is now settled, what remains is to identify the most appropriate forum for this task and how best it can be done. In this respect, there is still some bit of work to be done as new standards and norms solidify into tangible avenues through which, poverty and related rights can be addressed.

A lot of challenges also beset the African Commission that needs to have more clout and use the abundant latitude enunciated in the Charter. This calls for a more effective, dynamic and purposeful interpretation of the procedural and substantive provisions of Charter provisions, and to do it in a manner that grants greater protection to the individuals and peoples whose rights, it was designed to protect. In this regard, the African Commission activity report must as of necessity not only be confined to describing the contents of the Charter, but must indicate how it (the African commission) has interpreted specific provisions thereof.

The Inter-American Commission also needs to be more consistent in the manner it deals with social-economic rights. Though very much more creative than their African cousins, what happens there can best be described as irregular, leaving no consistent and identifiable track which one can easily follow. This is more so in regard to State reports which have not been so consistent in pointing out the status of socio-economic rights in the countries under scrutiny. The Europe and on their part have taken on the Mantle of torch bearers leading the way not only with specific provisions but a strong and independent body of experts to oversee the implementation and realization of Socio-economic rights including the right to freedom from poverty and social exclusion.

It is also an inescapable fact that, states are legally obligated to create an enabling environment and should strive not only to create opportunities for all, but must come in to give actual support where individual or groups are unable to support themselves regardless of the causes. The bottom line is that such people must remove all obstacles that vitiates against social and economic emancipation.

It is also clear that failure to institute effective legal remedies for redress of ESC rights is an abuse in itself. States must do their part, and then the individuals and groups should be able to claim their entitlements. The legal machinery should be set in such a way that one is enabled to get redress, not only when the State fails to adopt measures, but even in cases where such adopted measures prove retrogressive.

In dealing with this matter, it is recommended that structural solutions must also be sought, adopted and implemented. In this regard, a holistic and integrated approach is called for; there is dire need to have baseline data that is easily accessible and easy to interpret. Then states must have a blue print and what, how, and when the implementation of policy measures is going to take place. Every State must as a consequence do all it can to satisfy the minimum core obligations, projected under each and every socio-economic right.

In essence therefore this broad approach to poverty alleviation, envisages wide ranging structural reforms that must be combined with legislative, judicial and other appropriate measures to make it easier to access redress either through the political system, workable economic policies, micro schemes, employment, education, health care and judicial remedies. It should be a whole package, deliberately designed to uplift the quality of life of not only for each and every individual person, but identifiable constituent groups of peoples in each State.

Having said that, it is rather gratifying to observe that to address poverty as a legal and Human Right concern is already in place in many countries and the 3 regions but needs fine-tuning to make it more relevant to the people. In this regard, the Inter-American Court has taken the cue by categorizing indigence among the exceptions to the now international requirement of the need to exhaust domestic remedies before getting *locus standi* under the international tribunals. This was a bold step taken and augers well with the other emerging principle that, such remedies must be effective, where they exist.

The role of national human rights commissions in regard data collection and analysis cannot be over emphasized. As indicated in the South African example there is still more work to be done at the domestic level, where most of the action should take place. In order to help the domestic courts, access reliable and verifiable data, national human rights commissions are expected, and indeed should take on the role of streamlining the “domestic reporting procedures.”

Bibliography

Primary sources: **International Instruments**

Additional Protocol to the American Convention On Human Rights in the Area of Economic, Social and Cultural Rights, San Salvador, 17 November, 1998

Additional Protocol to the European Social Charter Providing for a Collective Complaints system

European Social Charter (revised) ETS No. 168

European Social Charter, ETS No. 036

The African Charter on Human and People's Rights, Nairobi, 27 June 1981

The American Convention on Human Rights, San Jose, Costa Rica, 22 November 1969.

The American Declaration on The Rights and Duties of Man, Bogotá, 2 May 1948

The Charter of OAS, Bogotá, 30 April 1948

The Charter of the OAU, Addis Ababa, 1963

The Charter of the United Nations, San Francisco, 26 June 1945

The Constitution of the Republic of South Africa, Act No 108 of 1996

The European Convention for the Protection of Human Rights and Fundamental Freedoms, Rome, 4 November 1950

The International Convention on Elimination of all Forms of Discrimination, G.A Res. 2106 A(XX) of 21 December 1965

The International Covenant on Economic, Social and Cultural Rights, G.A Res. 2200 A (XXI), 16 December 1966

The Universal Declaration on Human Rights, Adopted and proclaimed by the General assembly Resolution 217 A (III) of 10 December 1948

Literature

Ankumah, Evelyne A, **The African Commission on Human and Peoples' Rights: Practices and Procedures**, The Hague, Martinus Nijhoff Publishers, 1996.

Asbjorn Eide, etal(eds); **Economic, social and cultural Rights: A Text Book**, Dordrecht, The Netherlands, Kluwer Academic Publishers , 1995

Bassiuni, M Cherif & Ziyad , Motala(eds) **The Protection of Human rights in African Criminal Proceedings**, Boston, Kluwer Academic Publishers, 1995.

Bello, Emmanuel, etal(eds) **Essays in honour of Judge Taslim Olawale Elias**, Boston, Nijhoff publishers, 1992.

Buergenthal, Thomas & Shelton, Dinah, **Protecting Human Rights in The Americas-Cases and Materials**, 4th Revised edition, Strasbourg, Kelm Publishers, 1995.

Buergenthal, Thomas, **International Human Rights in a Nutshell**, 2nd edition, St Paul Minnesota: West Publishing Company, 1995.

Cancado, Antonio, **Justiciability of ESC rights in International Law: Presente Futuro de los Derechos Humanos: Ensayos en honra Fernando Volio Jimenez**, San Jose, Inter-American Institute of Human Rights, 1998.

De Waat, Paul, **International law and Development**, Boston, Nijhoff Publishers, 1988.

Gonven Donna, Harris, David & Leo Zwaak, **Law and Practice of the European Convention of Human Rights**, Strasbourg, Council of Europe Publishing House, 1996.

Gudmundur, Alfredsson(eds) **International Human Rights Monitoring Mechanisms**, The Hague, Kluwer Law International, 2001.

Hannum, Hurst, **Guide to International Human Rights Practice**, 2nd edition, Philadelphia, University of Pennsylvania Press, 1994

Hanski, Raija & Markku Suksi,(eds) **An Introduction to International Protection of Human Rights**, 2nd Revised edition, Turku/Abo, Abo Akademi University , 1999.

Harris, J David & Livingstone, Steven, **The Inter American system and Human Rights**, Oxford, Clarendon Press 1998.

Leibenberg, Sandra & Karrisha Pillay, **Socio-economic rights in South Africa: A Resource Book**, Community Law Centre; University of Western Cape, 2000.

Ramcahran, BG,(ed) **The Right To Life in International Law**, Boston, Nijhoff Publishers, 1995.

Scott, Davidson, **The Inter-American Human Rights System**, Aldershot, Dartmouth Publishing company limited, 1997.

Stakke, Hugo & Tostens, Anne, **International Human Rights Year Book**, The Hague, Kluwer Law International, 1999.

Steiner, Henry & Alston, Philip (eds), **International Human Rights in Context: A textbook**, 2nd edition, London, Oxford University Press, 2000.

Symonides,Janusz,(ed) **Human Rights: New Dimensions and Challenges**, Ashgate, UNESCO publishing, 1998.

Articles and Journals

Brand, Danie, **Assessing the South African Human Rights Commissions' assessment of socio-economic rights implementation-the first socio-economic rights report**. (Occasional paper)

Chapman, Audery, **Violations Approach for monitoring economic, social and cultural rights** *Human Rights Quarterly* Vol. 1 No.18, 1996 pp 23-66

De Vos, Pierre, **Pious wishes or Directly enforceable Human Rights?: Social and Economic Rights in South Africa's 1996 Constitution**, *South African Journal Of Human Rights* Vol 13, 1997 pp 67-101

Howard, Rhoda, **The Full belly Thesis: Should Economic Rights take priority over civil and political rights? Evidence from sub-Saharan Africa**, *Human Rights Quarterly* 2 1983. pp 467-490

Liebenberg, Sandra, **International Convention on Economic, Social and Cultural rights and its implications for South Africa**, *South African Journal of Human Rights*, Vol 11, 1995 pp 359-378

LeBlanc, Larry, **The Economic, Social and Cultural Rights Protocol and its background**, *Netherlands Quarterly of Human Rights* Vol. 10, 1992. pp 130-154

Medina,Cecilia, **The Role of Country Reports in the Inter-American system of Human Rights**, *Netherlands Quarterly of Human Rights* Vol.15. 1997, pp 94-98

Odinkalu, Amslem Chidi, **Analysis of Paralysis or Paralysis by Analysis? Implementation of economic, social and cultural rights under the African Charter on Human and Peoples Rights** *Human Rights Quarterly* Vol, 23 No. 2, 2000 pp 327-369

Okere, Obina, **Protection of human rights in Africa and the African Charter on Human and People's rights. A comparative Analysis with European and American Systems.** *Human Rights Quarterly*, Vol. 6. 1984 pp 141-159

Oloka Onyango, Joseph, Human Rights and Sustainable development in Contemporary Africa: A new Dawn or Retreating Horizon?

Oloka-Onyango, J, **Beyond Rhetoric, re-invigorating the struggle for economic, social and cultural rights in Africa**, *California Western International Law Journal* Vol. 26 No. 1, Fall 1995 pp [internet edition]

Pieters, Marius, **A different Shade of Red: Social economic dimensions of the Right to life in South Africa: Cases and Comments**, *South African Journal of Human Rights* Vol. 15, 1999 pp 67-101

Scott, Creig & Alston, Phillip, **Adjudicating Constitutional Priorities in an Transnational Context: A comment on Soobramoney's Legacy and Grootbooms' Promise**, *South African Journal of Human Rights*, Vol. 16, 2000 pp 206-268

Scott Leckie, **Another step Towards Indivisibility: Identifying the Key Features of Violations of Economic, social and Cultural Rights**, *Human Rights Quarterly*, Vol.20 No.1 1998 pp 81-124

Tomasevski, Katarina, **Justiciability of Economic, Social and Cultural Rights** *The Review* [ICJ] No 55, 1995.pp 203-218

Udombana, N.J. **"The Third World and the Right to Development: Agenda for the Next Millennium.** *Human Rights Quarterly*, Vol. 23, no.1, 2000 pp 753-787

Van Bueren, Geraldine, **Alleviating Poverty through the Constitutional Court**, *South African Journal of Human Rights* Vol. 15,1999.pp 52-93

Reports and Documents

Report on the Twelfth Session of the African Commission on Human and Peoples Rights 1991-1992

The Third Annual activity Report of the African Commission on Human and People's Rights 1997-1998

The Ninth Activity Report of the African Commission on Human and Peoples Rights 1995-1996

Annual Report of the Inter-American Commission on Human Rights, 1993, OEA/Ser.L/V/II.85 Washington, DC 1994

Resolution XXII of 1965 OAS doc. OEA/Ser.C/1.13/ Final Act, 1965

Annual Report of the Inter-American Commission on Human Rights, 1990 Report No. 74/90, Res. 22/88

Annual Report of the Inter- American Commission on Human Rights, 1986 OEA/ser. L/III.15

Inter-American Commission on Human Rights report on the state of Human Rights in El Salvador, 1978

Annual report of the Inter-American Commission on Human Rights, 1978

Annual Report of the Inter-American Commission on Human Rights, 1979-1980

Annual report of the Inter-American Commission on Human Rights, 1998

Inter-American Commission Annual Report, 1977

Inter-American Commission Annual Report 1984-1985

Second Report on the Human Rights Situation in Peru, 1996

Websites

<http://www.concourt.gov.za/date>

http://www.up.ac.za/chr/socio/socio_research.html

http://www.sahrc.org.za/main_frameset.htm

www.globalissues.org/TradeRelated/Facts.asp

<http://conventions.coe.int/treaty/Html.htm>

<http://conventions.coe.int/treaty/en/Summaries/Html/163.htm>

<http://conventions.coe.int/treaty/en/Reports/Html/163.htm>

<http://cidh.org/annualrep/93english/93ench5htm>

<http://cidh.org/Basicos/basico15.htm>

<http://www.hrsa.org/hrmaterials/IHRIP/circle/modules/module30.htm>

http://www.jhu.edu/journals/human_rights_quarterly/v023/23.2odinkalu.html

<http://www1.umu.edu/humanrts/africa/oloka-onyango.html>

<http://www.cidh.org>

Table of Cases

Ache Tribe case No 1802

Advisory Opinion Number 11/1990

Case No 6091 –Cuba

Case No. 2137-Guatamela

Colotenango v Guatamela , IHRR Vol 5 No2 [1998] , 405

Exparte Chairperson of the Constitutional Assembly: In Re Certification of the Constitution [1996]

Government of RSA & others v Grootboom & others (CCT 11/2000)

International Commission of Jurists v Portugal, Complaint No.1/ 1998

Loayza Tamayo case IHRR Vol. 5 No 2 [1998]

S v Mukwanyane & another [1995] 3 SA 391

Soobramoney v Ministry of Health, KwaZulu-Natal 1998(1) SA 765 (CC)

World Organisation Against Torture et al. v Zaire, Ninth Annual Activity Report [1995]

Yanomami Indians v Brazil, Case no.7615; Annual Report, [1985]