AN APPRAISAL OF INTERNATIONAL LAW MECHANISMS FOR LITIGATING SOCIO-ECONOMIC RIGHTS, WITH A PARTICULAR FOCUS ON THE OPTIONAL PROTOCOL TO THE INTERNATIONAL COVENANT ON ECONOMIC, SOCIAL AND CULTURAL RIGHTS AND THE AFRICAN COMMISSION AND COURT

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1 Introduction

The effective implementation of socio-economic rights ("SERs") is crucial in the fight against poverty and underdevelopment,[1] as they provide a framework through which accountability for poverty can be strengthened. These rights are aimed at addressing some of the underlying conditions of poverty such as lack of access to food, social security and assistance, health care and housing. They are therefore useful tools through which people can gain access to basic social services and resources, in order to improve their situations and live a dignified life.[2] This is particularly important for disadvantaged groups such as those living in poverty. However, the extent to which SERs have and can contribute towards improving the situations of people living in poverty has been limited, to some extent, by the fact that their justiciability was (and in some cases still is) unsettled.[3] Though the Universal Declaration of Human Rights, 1948 ("UDHR") recognised SERs as fundamental to a person's well-being and dignity,[4] their justiciability was subsequently questioned; resulting in the adoption, in 1966, of the International Covenant on Economic, Social and Cultural Rights ("ICESCR")[5] without a complaints[6] mechanism, as was the case with its sister covenant, the International Covenant on Civil and

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1 See C Mbazira "Enforcing the Economic, Social and Cultural Rights in the African Charter on Human and Peoples' Rights: Twenty Years of Redundancy, Progression and Significant Strides" (2006) 6 *AHRLJ* 333 333, where a similar point is advanced

2 S Liebenberg "South Africa's Evolving Jurisprudence on Socio-Economic Rights: An Effective Tool in Challenging Poverty?" (2002) 6 *LDD* 159 159

3 For further reading on reasons advanced for non-justiciability of socio-economic rights, see M Brennan "To Adjudicate and Enforce Socio-Economic Rights: South Africa Proves that Domestic Courts are a Viable Option" (2009) 9 *QUTLJJ* 64 65

4 Art 22 of the Universal Declaration of Human Rights (1948) UN Doc A/810 at 71 ("UDHR")

5 International Covenant on Economic, Social and Cultural Rights (1966) UN Doc A/6316 ("ICESCR")

6 The term "complaints" as used in this article includes "communications" or "petitions"

Political Rights ("ICCPR").[7] In addition, while the ICCPR explicitly required States "to develop the possibilities of judicial remedy",[8] the ICESCR did not contain such an explicit provision. Consequently, until recent years, not much attention was paid to developing mechanisms for their enforcement, particularly at the United Nations ("UN") level. The lack of a dedicated mechanism for these rights was seen as "starving the law of oxygen needed to develop a more coherent understanding" of these rights.[9]

The situation changed in 2008 with the adoption of the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights ("OP-ICESCR"),[10] which makes provision for a complaints mechanism for violations of SERs.[11] The Protocol is seen as "an important mechanism to expose abuses that are typically linked to poverty, discrimination, and neglect, and that victims frequently endure in silence and helplessness".[12] Once a State ratifies the OP-ICESCR, the effective enforcement of SERs and the provision of an effective remedy for their violation is the only way it can escape the adjudication of these rights under this new mechanism.[13]

Increasingly, litigation[14] is becoming an attractive tool for human rights movements worldwide and is fundamental to building international justice.[15] International law mechanisms for litigating rights are useful for marginalised groups and people living in poverty based on their important role of ensuring that States meet the obligations they have committed to through the ratification of treaties, including the provision of effective remedies in cases of violations. The existence of international litigation mechanisms therefore encourages governments to ensure the availability of more effective local remedies in respect of SERs. The ability to litigate SERs at the global and regional levels further "enables international jurisprudence on these rights to develop in the context of concrete cases", which would be a useful resource in developing national jurisprudence on SERs.[16] However, it should be noted that national jurisprudence can also influence the development of international law.

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7 International Covenant on Civil and Political Rights (1966) UN Doc A/6316 ("ICCPR")

8 Art 2(3)(b)

9 M Scheinin & M Langford "Evolution or Revolution? – Extrapolating from the Experience of the Human Rights Committee" (2009) 27 *Nordic Journal of Human Rights* 97 100

10 The Optional Protocol to the International Covenant on Economic, Social and Cultural Rights (2008) UN General Assembly Resolution 63/117 ("OP-ICESCR") is not yet in force, as it requires ten ratifications As of September 2011, it had been ratified by four States (Ecuador, El Salvador, Mongolia and Spain) and signed by 32 others

11 The path to the adoption of the OP-ICESCR can be traced to as far back as 1948 when the UDHR was adopted See L Chenwi "Correcting the Historical Asymmetry between Rights: The Optional Protocol to the International Covenant on Economic, Social and Cultural Rights" (2009) 9 *AHRLJ* 23 26-29, where it is traced from 1990; M Langford "Closing the Gap? – An Introduction to the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights" (2009) 27 *Nordic Journal of Human Rights* 1 3-9, where it is traced to as far back as 1948

12 L Arbour "Human Rights Made Whole" (2008) *Policy Innovations* <http://www policyinnovations org/ideas/commentary/data/000068> (accessed 17-06-2011)

13 Brennan (2009) *QUTLJJ* 65

14 Litigation is used in this article broadly to refer to the process of taking a case through a judicial or quasi-judicial treaty-body

15 Carnegie Council on Ethics and International Affairs "Litigating Human Rights: Promise v Perils – Introduction" (2000) 2 *Human Rights Dialogue* 1 1

16 S Liebenberg *Socio-Economic Rights: Adjudication under a Transformative Constitution* (2010) 117

This article assesses the mechanisms for litigating SERs at the international level. In particular, it focuses on four aspects (standing; admissibility criteria; standard of reviewing State compliance; and remedies and enforcement) of the complaints mechanisms under the OP-ICESCR and of the African Commission on Human and Peoples' Rights ("African Commission") and the African Court on Human and Peoples' Rights ("African Court"). With regard to the OP-ICESCR and the African Court, the fact that the former mechanism is not yet in force and the latter is relatively new yet undergoing structural changes, implies that the scope of this article is limited to an analysis of their potential. While reference is made to some case law, the scope of the article does not allow for a detailed analysis of these. Some broad principles are borne in mind in assessing the effectiveness of the complaints mechanisms. An effective complaints mechanism should be able to provide States with clear authoritative guidance on the meaning of treaty provisions and the obligations, as well as an understanding of SERs in general. It should also be able to augment the practical relevance and status of the particular treaty. It should further have a broad and flexible approach to standing so as to ensure that its use is maximised in a way that facilitates accessibility for the poor and marginalised groups. The kind of remedies issued should be concrete, targeted and clear so as to facilitate implementation and improve rights enjoyment on the ground. An effective mechanism must also be able to address complaints within reasonable time, and ensure prompt and effective action in cases where violations have occurred. Effectiveness can also be affected by the kind of language used in the treaty provisions (for example, the OP-ICESCR has been criticised for using weak language that would impact negatively on its effectiveness), and whether the mechanism takes into consideration current realities[17] as seen in the case of the African Commission.

It should be noted that the structure and approach to litigation at the international level is different from that at the national level. For instance, at the international level, human rights litigation is before quasi-judicial and judicial mechanisms. The complaints mechanisms of treaty bodies fall under the former. Quasi-judicial complaints mechanisms differ from judicial or court proceedings in that they are seen as "a distinctive form of adjudication".[18] It involves a body of independent experts (not necessarily having a legal background) that decides a claim of violation by applying international human rights norms and then makes its decision with recommendations on appropriate remedies for a violation, which are then transmitted to the parties. Generally, there are no oral proceedings and individual complaints are considered in

[17] See A Vandenbogaerde & W Vandenhole "The Optional Protocol to the International Covenant on Economic, Social and Cultural Rights: An *Ex Ante* Assessment of its Effectiveness in Light of the Drafting Process" (2010) 10 *HRLR* 207 207-237, where it is stated that potential effectiveness is jeopardised by weak wording since a weak procedure is unlikely to be able to adequately respond to violations of rights The authors also state that "[a] potentially effective mechanism is one that is attuned to the specificity of [socio-economic] rights and to current realities, rather than to the prejudices that have compromised [these] rights" (237)

[18] K Mechlem "Treaty Bodies and the Interpretation of Human Rights" (2009) 42 *Vand J Transnat'l L* 905 926

closed sessions.[19] Another difference between international and national litigation processes relates to the question of access to the mechanisms. While national courts adopt a very broad approach to access (granting everyone access and State consent is not required), access to international mechanisms is restricted by a number of factors including whether a State is a party to the mechanism's constitutive treaty and/or has recognised the competence of the relevant body to receive complaints. The question of access is discussed further in this article when dealing with standing in relation to quasi-judicial bodies and also in the discussion on the African Court, which highlights other factors that impact on access.

2 Quasi-judicial mechanisms: The OP-ICESCR and the African Commission

2 1 Overview

Before considering the four aspects – standing; admissibility criteria; standard of reviewing State compliance; and remedies and enforcement – of the complaints mechanisms under the OP-ICESCR and the African Commission, a brief overview of quasi-judicial mechanisms at the UN and regional levels is relevant for two reasons. First, it would place the OP-ICESCR and the African Commission mechanisms in context. Second, it would provide further understanding of the structure and approach to international litigation processes under quasi-judicial mechanisms.

As regards the UN system, treaty-based quasi-judicial mechanisms for litigating rights have been established by:[20] the ICCPR; the Optional Protocol to the International Covenant on Civil and Political Rights, 1966 ("OP-ICCPR");[21] the International Convention on the Elimination of All Forms of Racial Discrimination, 1965 ("CERD");[22] the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 1984 ("CAT");[23] the International Convention on the Rights of All Migrant Workers and Members of Their Families, 1990 ("CRMW");[24] the Optional Protocol to the International Convention on the Elimination of All Forms

[19] Regional mechanisms, such as that of the African Commission, allow oral representation See Rule 99 of the Rules of Procedure of the African Commission on Human and Peoples' Rights (2010) ("African Commission Rules of Procedure") See also R Murray "Decisions by the African Commission on Individual Communications under the African Charter on Human and Peoples' Rights" (1997) 46 *Int'l & Comp LQ* 412 427 Also, in order to enhance the complaints procedure under the OP-ICCPR, the use of oral hearings has been encouraged See H Steiner, P Alston & R Goodmand *International Human Rights in Context: Law, Politics, Morals* 3 ed (2007) 895

[20] At the time of writing, an optional complaints mechanism for the Convention on the Rights of the Child (1989) UN Doc A/44/49 ("CRC") had been adopted by the Human Rights Council and transmitted to the UN General Assembly for adoption

[21] Optional Protocol to the International Covenant on Civil and Political Rights (1966) UN Doc A/6316 ("OP-ICCPR") See also art 41 of the ICCPR

[22] Art 14 of the International Convention on the Elimination of All Forms of Racial Discrimination (1965) UN Doc A/6014 ("CERD")

[23] Art 22 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (1984) UN Doc A/39/51 ("CAT")

[24] Arts 76 and 77 of the International Convention on the Rights of All Migrant Workers and Members of Their Families (1990) UN Doc A/45/49 ("CRMW") This mechanism requires ten declarations from States accepting the mechanism in order for it to enter into force

of Discrimination against Women, 1999 ("OP-CEDAW");[25] the Optional Protocol to the Convention on the Rights of Persons with Disabilities, 2006 ("OP-CRPD");[26] the International Convention for the Protection of All Persons from Enforced Disappearance, 2006 ("CPED");[27] and the OP-ICESCR.

With the exception of the OP-ICESCR, whose scope extends to all economic, social and cultural rights, the scope of the other mechanisms are limited to some SERs or the rights of certain groups. The mechanisms further provide for both individual[28] and inter-State[29] complaints mechanisms. However, some of the mechanisms or procedures require States to either opt-in or opt-out. That is, a State has to make a declaration upon ratification or subsequently, recognising (opt-in) or not recognising (opt-out) the competence of the relevant committee to receive and consider complaints under specific procedures. The opt-in approach is adopted in the case of the complaints mechanism under the CAT, the CRMW, and the CPED; the inter-State procedures under the ICCPR and OP-ICESCR; and the individual complaints procedures under CERD. The OP-CRDP adopts an opt-out approach for individual and inter-State complaints.

The OP-ICESCR is consistent with existing UN complaints mechanisms as it allows for the possibility of interim measures in exceptional circumstances in order to prevent irreparable damage to victims is provided for.[30] This is one of the most important functions of any judicial or quasi-judicial body adjudicating complaints, as it ensures such body's effectiveness. The practical challenge would be to get States to comply with a request to take interim measures, since many States are yet to accept that interim measures specified by international quasi-judicial bodies are binding on them.[31] The OP-ICESCR also allows for the friendly settlement of disputes.[32] The UN Committee on Economic, Social and Cultural Rights ("CESCR") is further empowered to conduct inquiries into grave or systematic violations of SERs, based on reliable information it receives, which is an opt-in procedure.[33] The initiation of the inquiry is at the discretion of the Committee and not based on

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[25] Optional Protocol to the International Convention on the Elimination of All Forms of Discrimination against Women (1999) UN Doc A/54/49 (Vol I) ("OP-CEDAW") The main treaty being the International Convention on the Elimination of All Forms of Discrimination against Women (1979) UN Doc A/34/46 ("CEDAW")

[26] Optional Protocol to the Convention on the Rights of Persons with Disabilities, (2006) UN Doc A/61/49 ("OP-CRPD") The main treaty being the International Convention on the Rights of Persons with Disabilities (2006) UN Doc A/61/49 ("CRPD")

[27] Arts 31 and 32 of the International Convention for the Protection of All Persons from Enforced Disappearance (2006) UN Doc A/RES/61/177 ("CPED")

[28] Complaints brought by individuals or groups of individuals or by others on their behalf

[29] Complaints brought by a State against another State, relating to a failure to meet obligations under the applicable treaty The OP-CRPD is silent on inter-State complaints

[30] Art 5 of the OP-ICESCR

[31] J Pasqualucci "Interim Measures in International Human Rights: Evolution and Harmonization" (2005) 38 *Vand J Transnat'l L* 1 2 See also F Viljoen *International Human Rights Law in Africa* (2007) 326-329, which illustrates States' uniform disregard for interim measures made by the African Commission

[32] Art 7 of the OP-ICESCR

[33] Arts 10-11 of the OP-ICESCR

the receipt of a formal complaint.[34] This is therefore useful in instances where individuals are precluded or prevented by circumstances beyond their control to submit a complaint.

Pending the entry into force of the OP-ICESCR, the Human Rights Committee established under the ICCPR is seen as "the most important forum for the further evolution of jurisprudence in respect of equality and non-discrimination in the enjoyment of economic, social and cultural rights".[35] The Committee has interpreted article 26 of the ICCPR – on equality and non-discrimination – not only as an independent right, but also as a right that is applicable to the rights in the ICESCR. It has found a violation of this provision regarding access to social security rights,[36] the right to work and right to property; and has also addressed issues relating to the rights to education, health, reproductive rights and the right to culture.[37] Similarly, the CERD Committee has found a breach of the right to equality in relation to the right to housing.[38] The CEDAW Committee has also found a State in breach of its obligation to provide information and obtain full consent for reproductive health procedures.[39] While these decisions are commendable, their scope is restrictive in that it addresses SERs through the equality lens only, or as it relates to women. Hence the need for a separate individual complaints mechanism specifically for SERs that deals with all its dimensions and assesses its implementation from various lenses.

At the African regional level, the African Commission's complaints mechanism has been used in the litigation of SERs contained in the African Charter on Human and Peoples' Rights, 1981 ("African Charter"),[40] and the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa, 2003 ("African Women's Protocol").[41] Children's SERs in the African Charter on the Rights and Welfare of the Child, 1990 ("African

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[34] The inquiry and inter-State mechanisms can be used to draw attention to issues relating to extra-territorial violations of rights in the ICESCR See C Courtis & M Sepúlveda "Are Extra-territorial Obligations Reviewable under the Optional Protocol to the ICESCR?" (2009) 27 *Nordic Journal of Human Rights* 54 61

[35] M Scheinin "Human Rights Committee: Not only a Committee on Civil and Political Rights" in M Langford (ed) *Social Rights Jurisprudence: Emerging Trends in International and Comparative Law* (2008) 540 552 See also M Scheinin "Economic and Social Rights as Legal Rights" in A Eide, C Krause & A Rosas (eds) *Economic, Social and Cultural Rights: A Textbook* 2 ed (2001) 29 32-34, in relation to cases in which provisions of the ICCPR such as equality and non-discrimination have been used to protect socio-economic rights

[36] See, for example, *Young v Australia* Communication 941/2000 UN Doc CCPR/C/78/D/941/2000; *Gueye et al v France* Communication 196/1985 UN Doc CCPR/C/35/D/196/1985; *Zwaan de Vries v the Netherlands* Communication 182/1984 UN Doc Supp No 40 (A/42/40) 160 See also *Broeks v The Netherlands* Communication 172/1984 UN Doc CCPR/C/OP/2 196

[37] See Scheinin "Human Rights Committee" in *Social Rights Jurisprudence* 540-552; Scheinin "Economic and Social Rights" in *Economic, Social and Cultural Rights* 32-34; A Rosas & M Scheinin "Implementation Mechanisms and Remedies" in A Eide, C Krause & A Rosas (eds) *Economic, Social and Cultural Rights: A Textbook* 2 ed (2001) 425 440-441

[38] *L.R. et al v Slovakia* Communication 31/2003 UN Doc CERD/C/66/D/31/2003

[39] *A.S. v Hungary* Communication 4/2004 UN Doc CEDAW/C/36/D/4/2004

[40] African Charter on Human and Peoples' Rights (1981) OAU Doc CAB/LEG/67/3 rev 5 ("African Charter")

[41] Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (2003) OAU Doc CAB/LEG/66 6 ("African Women's Protocol")

Children's Charter")[42] can be litigated through the complaints mechanism of the African Committee of Experts on the Rights and Welfare of the Child ("African Committee on Children's Rights").[43]

In contrast with the OP-ICESCR, there is no provision in the African Charter requiring the African Commission resorting to the friendly settlement of disputes or to adoption of provisional measures in the case of individual complaints. However, the power to make provisional measures is contained in its African Commission Rules of Procedure;[44] and in practice, the Commission has occasionally resorted to the amicable settlement of disputes.[45] The Rules of Procedure go a step further than article 5 of the OP-ICESCR by including a follow-up mechanism for provisional measures; and where there is non-compliance, the Commission can refer the case to the African Court.[46] As mentioned earlier, the ability to prescribe provisional measures is one of the most important functions of a judicial or quasi-judicial body adjudicating rights claims. For such a body to be effective, it should be able to perform a pre-emptive function – that is, stop harm before it can occur, stop an ongoing harm from continuing, or at least mitigate the effects of that harm.[47] The inclusion of the friendly settlement of disputes mechanism is important because friendly settlement is a general principle of international law.

Since the African Court is still in its early years, and undergoing structural changes as noted earlier and explained further subsequently in this article, the African Commission remains the principal body through which SERs can be litigated.[48] The African Commission has dealt substantively with SERs in a few cases.[49] The decisions provide some guidance on the obligations and substantive content of the rights in the African Charter, including augmenting the explicit rights in it. The Commission also made extensive recommendations in the cases, which would have far reaching implications for the poor if implemented effectively.

The most notable case is *Social and Economic Rights Action Centre and the Centre for Economic and Social Rights v Nigeria*[50] ("*SERAC*"), in which the Commission found the Nigerian government to be in violation of the rights to health, food, housing and environmental rights, among others. It is the first

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[42] African Charter on the Rights and Welfare of the Child (1990) OAU Doc CAB/LEG/24 9/49 ("African Children's Charter")

[43] At the time of writing, the Committee was finalising its first decision in the case of *Nubian Children in Kenya v Kenya* Communication 002/2009

[44] Rule 98 of the African Commission Rules of Procedure

[45] Viljoen *International Human Rights Law* 329

[46] Rule 118(2) of the African Commission Rules of Procedure

[47] Chenwi (2009) *AHRLJ* 37

[48] For the steps in the litigation process, see SM Weldehaimanor "Towards Speedy Trials: Reforming the Practice of Adjudicating Cases in the African Human Rights System" (2010) 1 *University for Peace LR* 14 19-21

[49] In addition to the cases below, the Commission has found violations of specific socio-economic rights in *Malawi African Association and Others v Mauritania* Communications 54/91, 61/91, 98/93, 164/97-196/97 and 210/98 (2000) AHRLR 146; *Free Legal Assistance Group and Others v Zaire* Communications 25/89, 47/90, 56/91, 100/93 (2000) AHRLR 74

[50] *Social and Economic Rights Action Centre and the Centre for Economic and Social Rights v Nigeria* Communication 155/96 (2001) AHRLR 60

case in which the Commission delineated the negative and positive obligations of States in relation to SERs in the African Charter. The Commission also read some missing rights – food and housing, including the prohibition against forced eviction – into the African Charter.

In *Purohit and Moore v The Gambia*[51] ("*Purohit*"), while finding a violation of the right to health, among others, the Commission fleshed out its substantive content. The Commission took into account African realities in defining the SERs obligation of States. In particular, the Commission considered the fact that "millions of people in Africa are not enjoying the right to health maximally because African countries are generally faced with the problem of poverty which renders them incapable to provide the necessary amenities, infrastructure and resources that facilitate the full enjoyment of this right".[52]

Based on this "depressing but real state of affairs", the Commission read into the relevant provision "the obligation on part of States party to the African Charter to take concrete and targeted steps, while taking full advantage of its available resources, to ensure that the right to health is fully realised in all its aspects without discrimination of any kind".[53]

The Commission, with reference to a previous decision, read the right to water into the African Charter in *Sudan Human Rights Organisation v The Sudan Communication 279/03 and Centre on Human Rights and Evictions v The Sudan*[54] ("*Sudan*"). This decision speaks to the indivisibility of human rights and advances SERs such as housing, food, water and health, as well as the need for effective domestic remedies. The Commission elaborated on the right to property,[55] the prohibition on forced eviction,[56] and the right of peoples to their economic, social and cultural development.[57] In its most recent case, *Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council v Kenya*[58] ("*Endorois*"), the Commission for the first time recognised the rights of indigenous peoples to own land and to development. This case is important in its elaboration of the right to development. It also places emphasis on empowerment, better processes, respecting the agency of all individuals and improving their capabilities and choices in the realisation of rights. The decision further emphasised the need for States to give an equivalent degree of constitutional protection to civil, political, economic, social and cultural rights.

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51 *Purohit and Moore v The Gambia* Communication 241/2001 (2003) AHRLR 96
52 Para 84
53 Para 84
54 *Sudan Human Rights Organisation v The Sudan* Communication 279/03 and *Centre on Human Rights and Evictions v The Sudan* Communication 296/05 (2009) AHRLR 153
55 See paras 191-205
56 See, for example, paras 177, 186-189 and 216
57 See paras 217-224
58 *Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council v Kenya* Communication 276/2003 (2010)

2 2 Some key aspects

2 2 1 Standing

Standing is an unqualified pre-condition to all legal actions and is different from admissibility. Standing refers to the "'right to appear as a party' before a judicial tribunal or quasi-judicial body", while admissibility relates to the substantive basis of a claim.[59]

The mechanisms under the OP-ICESCR and the African Commission recognise standing for victims, the representatives of victims, and third parties acting on behalf of victims with or without their consent.[60] Where consent has not been obtained, the author has to justify why it is acting without such consent. With regard to others submitting on behalf of victims, the OP-ICESCR is not clear on whether or not an organisation or institution acting on behalf of victims must have consultative status with the UN Economic and Social Council. The position under the African Commission mechanism is clear. A non-governmental organisation ("NGO") for instance, need not have observer status with the Commission, the author need not be a national or be registered in the territory of the State concerned, and there is no requirement on the author to be African, be based in an African State, or to be composed of people of African origin. However, what is clear in relation to the OP-ICESCR is that NGOs cannot submit a complaint in the public interest, as they have to act on behalf of individuals or groups of individuals.[61]

The OP-ICESCR can be contrasted with the African Commission mechanism in this regard. The African Commission has adopted a generous approach to standing. In addition to allowing individuals, groups of individuals or NGOs, the African Commission has allowed the submission of a complaint in the public interest. The *SERAC* case is instructive in this regard. The Commission in this case thanked the two NGOs that had brought the case, stating that it "is a demonstration of the usefulness to the Commission and individuals of *actio popularis*, which is wisely allowed under the African Charter".[62]

2 2 2 Admissibility criteria

Complaints can only be received and considered if they meet certain admissibility criteria. Key among the criteria is that all available domestic remedies – judicial and administrative – must have been exhausted. This requirement is based on the principle that the full and effective implementation of international human rights obligations is intended to improve the enjoyment of rights at the national level.[63] When taking a case to UN bodies, the exhaustion of regional remedies is not part of this requirement. This ensures

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[59] Viljoen *International Human Rights Law* 323

[60] Art 2 of the OP-ICESCR This is also the position of the African Commission A victim is different from the author of a complaint, as the person submitting a compliant does not have to be the victim

[61] The OP-ICESCR does not include "collective complaints" as used in the European System

[62] *Social and Economic Rights Action Centre and the Centre for Economic and Social Rights v Nigeria* Communication 155/96 (2001) AHRLR 60 para 49

[63] NJ Udombana "So Far, So Fair: The Local Remedies Rule in the Jurisprudence of the African Commission on Human and Peoples' Rights" (2003) 97 *Am J Int'l L* 1 9

that a hierarchy is not established between the UN and regional mechanisms, especially because regional mechanisms ordinarily play a complementary role to UN mechanisms rather than provide a basis for denying complaints from regions where regional remedies are available. Moreover, regional mechanisms are better placed to take into account a State's level of development and regional specificities. This is not to say that the UN mechanisms would not consider regional specificities if they are aware of it or if placed before them.

Since a remedy should be available (that is, it can be used without impediment), effective (that is, it should offer a prospect of success) and sufficient (that is, it is capable of redressing the wrong complaint about),[64] exceptions to the rule exists. The particular circumstance of a case is relevant in any determination of whether domestic remedies are in fact available. In the *Sudan* case, for example, it was impossible to bring issues of human rights violations before independent and impartial courts since the State was under a military regime resulting in intimidation, threats and harassment when a case was brought.[65] Displacements into remote regions also made it impossible for people to avail themselves of any remedies.[66] The African Commission, while finding the case to be admissible, stated that "the scale and nature of the alleged abuses, the number of persons involved *ipso facto* make local remedies unavailable, ineffective and insufficient".[67]

Since this case involved a large number of people – in fact tens of thousands who had been forcibly evicted and their properties destroyed –the Commission found it impracticable and undesirable to expect them to exhaust local remedies that were in any case ineffective.[68] The African Commission has interpreted the requirement to exhaust domestic remedies substantively, identifying instances where local remedies would be non-existent.[69]

In addition, complaints must be submitted within a specific time frame following the exhaustion of domestic remedies. While the OP-ICESCR stipulates a one-year time frame (with room for justifiable exceptions),[70] the African Commission is more flexible in its approach, as complaints have to be submitted "within a reasonable period from the time local remedies are exhausted".[71] This implies that establishing what amounts to a reasonable time is done on a case-by-case basis, taking into consideration the facts and circumstances of the particular case. In this regard, the African system is acclaimed for its "responsiveness to the African landscape's fluidity rather than an adherence to inflexible time standards".[72] Other admissibility grounds

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64 Viljoen *International Human Rights Law* 336

65 *Sudan Human Rights Organisation v The Sudan* Communication 279/03 and *Centre on Human Rights and Evictions v The Sudan* Communication 296/05 (2009) AHRLR 153 para 64

66 Para 67

67 Paras 96-102

68 Paras 101-102

69 See Udombana (2003) *Am J Int'l L* 1-37; F Viljoen "Admissibility under the African Charter" in M Evans & R Murray (eds) *The African Charter on Human and Peoples' Rights: The System in Practice, 1986-2000* (2002) 61 81-99; Viljoen *International Human Rights Law* 331-340

70 Art 3(2)(a) of the OP-ICESCR

71 See art 56(6) of the African Charter

72 Viljoen *International Human Rights Law* 339

common to the OP-ICESCR and African Commission are contained in article 3(2)(b)-(g) of the OP-ICESCR and article 56 of the African Charter.

A novel requirement, absent in the African Commission mechanism but included in the OP-ICESCR, is the discretion given to the CESCR to "decline to consider a communication where it does not reveal that the author has suffered a clear disadvantage, unless the Committee considers that the communication raises a serious issue of general importance".[73] The provision adds a threshold that would allow the CESCR not to deal with complaints of minor importance and to prevent a flood of cases. However, caution would have to be used in applying this provision so as not to eliminate cases that do not on the face of it reflect serious violations, which would otherwise have been considered. Caution is important because, as noted by Vandenbogaerde and Vandenhole, it is only at the merits stage that the substantive issues of a case can be adequately investigated. They also state that adding admissibility requirements reduces potential effectiveness since this implies additional hurdles of a procedural nature before the substance of a complaint can be examined.[74]

2 2 3 Standard of review

The standard of reviewing State compliance with its obligations is clearer under the OP-ICESCR than under the African Commission mechanism. Consistent with both international and domestic standards of review in the field of SERs, the standard to be applied under the OP-ICESCR when considering complaints and in assessing State compliance is that of reasonableness.[75] The African Commission has also referred to reasonable steps but with very limited elaboration on what it means.

As rightly observed by Porter, the wording of the relevant provision in the OP-ICESCR is derived from the South African Constitutional Court's jurisprudence.[76] In fact, during the negotiations of the OP-ICESCR, the way in which courts in various systems, including South Africa, have approached the question of enforcement of SERs was considered. The interpretation and application of the reasonableness standard, as Porter has observed, is at the core of the effectiveness of the OP-ICESCR in providing relief to litigants.[77] He

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[73] Art 4 of the OP-ICESCR See also Scheinin & Langford (2009) *Nordic Journal of Human Rights* 110, where the importance of the CESCR adopting such an approach is stated with reference to the Human Rights Committee's experience

[74] Vandenbogaerde & Vandenhole (2010) *HRLR* 235

[75] Art 8(4) of the OP-ICESCR For the various instances in which the concept of reasonableness has been used, see UNHRC Working Group on an Optional Protocol to the International Covenant on Economic, Social and Cultural Rights *The Use of the Reasonableness' Test in Assessing Compliance with International Human Rights Obligations* (2008) UN Doc A/HRC/8/WG 4/CRP 1

[76] B Porter "The Reasonableness of Article 8(4): Adjudicating Claims from the Margins" (2009) 27 *Nordic Journal of Human Rights* 39 49-51, which also explains what the reasonableness standard in the OP-ICESCR means The South African Constitutional Court first developed the reasonableness standard in *Government of the Republic of South Africa v Grootboom* 2000 11 BCLR 1169 (CC) para 41, which it now applies in assessing the State's compliance with its obligation to take steps towards realising socio-economic rights See also L Chenwi "Putting Flesh on the Skeleton: South African Judicial Enforcement of the Right to Adequate Housing of Those Subject to Evictions" (2008) 8 *HRLR* 105 119, where the South African reasonableness standard is discussed

[77] Porter (2009) *Nordic Journal of Human Rights* 40

goes further to describe it as a "double edged sword".[78] From one standpoint, it can be used to deny adequate adjudication of, or effective remedies for, substantive SERs claims based on the margin of discretion accorded to States. From another standpoint, it can be used to respond to challenges that go to the systemic causes of poverty and exclusion. Since the OP-ICESCR is not yet in force, there is no jurisprudence from the CESCR on this standard of review. However, the Committee has identified a number of factors (which are not exhaustive) that it would take into account in assessing States' compliance with their obligations under the ICESCR, as well as to determine whether the measures they have taken are adequate or reasonable. The factors identified by the Committee were the following: measures taken must be deliberate, concrete and targeted; the State must exercise its discretion in a non-discriminatory and non-arbitrary manner; whether decisions relating to resources accord with international human rights standards; whether the policy option adopted is the one that least restricts rights; the time frame within which the measures were taken; and whether the situation of the disadvantaged and marginalised has been taken into account and priority given to grave situations or situations of risk.[79] The reasonableness standard in the OP-ICESCR therefore acknowledges the institutional roles and limitations in giving effect to the right to effective remedies. Where States use resource constraints as an excuse for a retrogressive step taken, the Committee has indicated other factors that it would take into account in its assessment.[80] Furthermore, importance is placed on transparent and participative decision-making processes at the national level.[81]

It should be noted that the reasonableness standard (as is the case in the South African context) has not been without challenges, including placing a heavy burden on the claimants to prove the unreasonableness of measures.[82] Accordingly, a number of suggestions have been made in relation to strengthening the standard under the OP-ICESCR. These include the need, in applying the standard, to ensure that the voice of rights claimants are adequately heard, that appropriate and effective remedies are fashioned taking into consideration the needs and context of claimants and the purpose of the OP-ICESCR, and that the standard be interpreted as a recognition of the multiplicity of entitlements and actors that are involved in allegations of SERs violations.[83]

The African Commission's jurisprudence does not provide much clarity as regards the standard it applies. In *SERAC*, the Commission referred to the State's obligation to "take *reasonable and other measures*" in relation to the

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79 UN Committee on Economic, Social and Cultural Rights *An Evaluation of the Obligation to Take Steps to the Maximum of Available Resources' under an Optional Protocol to the Covenant* (2007) UN Doc E/C12/2007/1 para 8

80 Para 10

81 Para 11

82 See S Liebenberg "South Africa: Adjudicating Social Rights under a Transformative Constitution" in M Langford (ed) *Social Rights Jurisprudence: Emerging Trends in International and Comparative Law* (2008) 75 89-91, where the challenges in the South African context are highlighted

83 Porter (2009) *Nordic Journal of Human Rights* 52-53

right to a satisfactory (or healthy) environment favourable to development,[84] but failed to elaborate on what constitutes reasonable steps. Subsequently, in *Purohit*, the Commission read into the right to health in the African Charter, an obligation on States to "take *concrete and targeted steps*, while taking full advantage of its available resources, to ensure that the right to health is fully realised in all its aspects without discrimination of any kind".[85]

Again, it failed to link this to the "reasonable measures" in *SERAC* or to national jurisprudence that applies the reasonableness concept. Questions such as whether "concrete and target steps" should be considered within South Africa's reasonableness concept or within the CESCR's interpretation, or whether State obligations should be discharged as a matter of priority where resources are lacking, have therefore been left unanswered in the Commission's decisions.[86]

In *Endorois*, the African Commission stated that the State bears the burden of proving that a measure it has adopted is reasonable.[87] This would be useful to poor litigants who lack the resources to prove unreasonableness. The Commission also acknowledged the need for measures adopted to be based on objective and reasonable grounds, and based on equality[88] But again, the Commission made these statements without linking them to its previous SERs jurisprudence. However, the case is illustrative of the importance attached by the Commission to the participation of beneficiaries in the planning and implementation of measures that affect them. This is in line with the standard that the CESCR intends to apply, which also speaks to participative decision-making.

Furthermore, the Commission in *Endorois* engaged in a proportionality analysis, with reference to its previous jurisprudence and that of the Human Rights Committee. The Commission acknowledged that it may be necessary in some instances to place some form of limited restrictions on a right protected by the African Charter.[89] However, such restrictions must be established by law, not be applied in a manner that would completely vitiate the right, be applied only for those purposes for which they were prescribed, be directly related and proportionate to the specific need on which they are predicated, be based on exceptionally good reasons, and not be negligible.[90] In the *Sudan* case as well, the Commission held that restrictions on the enjoyment of rights should be proportionate and necessary to respond to a specific public need or

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[84] *Social and Economic Rights Action Centre and the Centre for Economic and Social Rights v Nigeria* Communication 155/96 (2001) AHRLR 60 para 52 (emphasis added)

[85] Para 84 (emphasis added)

[86] DM Chirwa "African Regional Level: The Promise of Recent Jurisprudence on Social Rights" in M Langford (ed) *Social Rights Jurisprudence: Emerging Trends in International and Comparative Law* (2008) 323 326-327

[87] *Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council v Kenya* Communication 276/2003 (2010) para 172

[88] Para 234 See also paras 227, 228, 296

[89] Para 172

[90] Para 172

pursue a legitimate aim.[91] The burden is again on the State to prove that an interference with a right is proportionate.[92]

The Commission has further made statements that imply its acknowledgement of the minimum core approach. In *SERAC*, for example, the Commission stated that

> "the minimum core of the right to food requires that the Nigerian Government should not destroy or contaminate food sources. It should not allow private parties to destroy or contaminate food sources, and prevent peoples' efforts to feed themselves".[93]

It then found the Government to be in breach of its minimum duties of the right to food.[94] However, Chirwa has criticised the statements in *SERAC* as not reflecting an understanding of the minimum core approach as developed by the CESCR. It is rather, as he states, a misunderstanding of the concept as the pronouncements speak to the duty to respect as opposed to the government taking positive measures to satisfy minimum essential levels of the right.[95] Notwithstanding, it is evident from its jurisprudence and standards on SERs that the Commission recognise the minimum core approach as applicable to these rights in the African Charter.[96]

2 2 4 Remedies and enforcement

The OP-ICESCR does not explicitly refer to remedies. It states that the CESCR shall transmit its views (decision) together with recommendations to the State party after the consideration of a complaint.[97] However, the CESCR has identified the following remedies that it could issue: compensation; requesting the State to remedy the violation; suggesting a range of measures to be adopted; or recommending a follow-up mechanism to ensure on-going accountability of the State.[98]

Similarly, the African Charter does not explicitly recognise the African Commission's role in granting remedies. Notwithstanding this, the Commission has issued remedies, some of which are open-ended, such as requesting a State to bring its laws in line with the African Charter. This is problematic in that it does not spell out what the State is supposed to do or shed light on the entitlements of the claimant. In other instances, relatively clear and targeted or detailed remedies have been issued. For example, requesting a State: to rehabilitate economic and social infrastructure, such

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91 *Sudan Human Rights Organisation v The Sudan* Communication 279/03 and *Centre on Human Rights and Evictions v The Sudan* Communication 296/05 (2009) AHRLR 153 para 188

92 *Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council v Kenya* Communication 276/2003 (2010) para 172

93 *Social and Economic Rights Action Centre and the Centre for Economic and Social Rights v Nigeria* Communication 155/96 (2001) AHRLR 60 para 65 See also para 61 on the right to housing

94 Para 66

95 Chirwa "African Regional Level" in *Social Rights Jurisprudence* 325-326

96 See the African Commission on Human and Peoples' Rights *Principles and Guidelines on the Implementation of Economic, Social and Cultural Rights in the African Charter on Human and Peoples' Rights* (formally launched in October 2011)

97 Art 9 of the OP-ICESCR

98 UN Committee on Economic, Social and Cultural Rights *An Evaluation of the Obligation to Take Steps* para 13

as education, health, water, and agricultural services, and to resolve issues of water rights;[99] to repeal the challenged law and adopt a new legislative regime, create an expert body to review the cases of all persons detained under challenged legislation, provide adequate medical and material care for persons suffering from mental health problems;[100] to investigate violations and provide adequate compensation, including relief and resettlement;[101] and to provide compensation for loss suffered and restitution of land.[102]

However, enforcement of the decisions of treaty bodies is a challenge, as their decisions are not binding. Their implementation is therefore largely dependent on political will. Accordingly, follow-up mechanisms are relevant in ensuring implementation of the decisions. Follow-up is also a means of assessing direct impact of decisions. With regard to follow-up mechanisms, the OP-ICESCR requires States to submit to the CESCR, within six months, a written response to its views and recommendations.[103] The State may also be invited to submit further information on any measures taken in response to the views or recommendations in its subsequent State report under the ICESCR.[104] This follow-up mechanism provides an opportunity for the CESCR to become aware of and address problems encountered by the State when implementing its views and recommendations, so as to ensure their effective implementation. This follow-up mechanism is similar to that of other treaty bodies. For instance, the Human Rights Committee requires States to reply within a period not exceeding 180 days; in practice, it usually indicates a period of 90 days.[105] The difference, however, is that the requirement under the OP-ICESCR is explicitly stated in the treaty.

Compliance with the CESCR's decisions can also be facilitated through article 14 of the OP-ICESCR. It requires the Committee to transmit, when appropriate and with the consent of the State party, to UN specialised agencies, funds and programmes and other competent bodies, its views and recommendations concerning communications and inquiries that indicate a need for technical advice or assistance.[106] The CESCR can also bring to the attention of these bodies "the advisability of international measures likely to contribute to assisting States Parties in achieving progress in implementation of the rights [recognised] in the Covenant".[107]

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[99] *Sudan Human Rights Organisation v The Sudan* Communication 279/03 and *Centre on Human Rights and Evictions v The Sudan* Communication 296/05 (2009) AHRLR 153 para 229

[100] See *Purohit and Moore v The Gambia* Communication 241/2001 (2003) AHRLR 96 110

[101] See *Social and Economic Rights Action Centre and the Centre for Economic and Social Rights v Nigeria* Communication 155/96 (2001) AHRLR 60 para 71

[102] See *Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council v Kenya* Communication 276/2003 (2010) Recommendation 1(a) and (c)

[103] See art 9(2) of the OP-ICESCR

[104] See art 9(3) of the OP-ICESCR

[105] E de Wet "Recent Developments Concerning the Draft Optional Protocol to the International Covenant on Economic, Social and Cultural Rights" (1997) 13 *SAJHR* 514 514

[106] Art 14(1) of the OP-ICESCR The OP-ICESCR also provides for the establishment of a fund in order to facilitate international assistance and cooperation, through which States can receive expert and technical, as opposed to financial, assistance (art 14(3))

[107] Art 14(2) of the OP-ICESCR

With regard to the African Commission, the impact of its decisions has been limited by the lack of a mechanism to monitor implementation. Therefore, follow-ups to its decisions have for the main part been very limited, with the State reporting procedure being the main avenue used. This has been exacerbated by the lack of political will of States to implement its decisions, which further erodes the Commission's credibility.

The Commission has explicitly, though mainly in very weak language, required States to report back on implementation and failed, in some instances, to give a time frame. In *SERAC*, for example, the Commission urged the Nigerian government to keep it informed;[108] and in *Purohit*, it went a step further to require the Gambian government to include in its next periodic report, measures taken to comply with its recommendations and directions.[109] The Commission adopted a more stringent stance in line with its 2006 resolution in the *Endorois* case, requiring the Kenyan government to engage in dialogue with the complainants for the effective implementation of its recommendations and to report within three months on their implementation.[110] The Commission further avail its good offices to assist the parties in the implementation of the recommendations.[111]

In 2006, in order to strengthen the implementation of its recommendations, the Commission adopted a resolution requiring States to "respect without delay the recommendation of the Commission"; "submit at every session of the Executive Council a report on the situation of the compliance with its recommendations"; and to indicate within 90 days of being notified of the recommendations, "the measures taken and/or the obstacles in implementing the recommendations".[112] The African Commission has incorporated this follow-up mechanism in its Rules of Procedure, but extended the number of days within which a State should respond after being notified of the recommendation to 180 days.[113] Also, the Commission may request further information on measures taken in response to its decision, within 90 days of receipt of the State's written response.[114] In situations of non-compliance, the Commission can bring the case to the attention of the Sub-Committee of the Permanent Representatives Committee and the Executive Council on the Implementation of the Decisions of the African Union;[115] or submit it to the African Court.[116] Despite the adoption of the follow-up mechanism in 2006, implementation of decisions is still to be improved.

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[108] *Social and Economic Rights Action Centre and the Centre for Economic and Social Rights v Nigeria* Communication 155/96 (2001) AHRLR 60 para 72

[109] *Purohit and Moore v The Gambia* Communication 241/2001 (2003) AHRLR 96 110

[110] *Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council v Kenya* Communication 276/2003 (2010) Recommendation 1(g)

[111] Recommendation 2

[112] African Commission on Human and Peoples' Rights *Resolution on the Importance of the Implementation of the Recommendations of the African Commission on Human and Peoples' Rights by States Parties* (2006) *ACHPR/Res.97(XXXX)06* <http://www achpr org/english/resolutions/resolution102_en html> (accessed 17-06-2011)

[113] Rule 112(2) of the African Commission Rules of Procedure

[114] Rule 112(3)

[115] Rule 112(8)

[116] Rule 118(1)

3 Judicial mechanisms: The African Court

This section focuses on the judicial mechanisms at the African regional level. A consideration of the judicial mechanisms in the European and Inter-American regional systems is beyond the scope of this paper.

In 1998, a Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights ("African Court Protocol")[117] was adopted – establishing and empowering the African Court to, among other things, consider violations of human rights. The judicial mechanisms were initially constituted as two separate courts – the African Court to deal with allegations of human rights violations, and the African Court of Justice[118] to deal with issues of a political and economic nature. However, due to the possibility of overlap and concerns around institutional redundancy, as well as a desire to alleviate financial resources constraints,[119] a decision was taken in 2004 to integrate both courts into a single court. The overlap in competence and jurisdiction can be seen from the following: The African Court of Justice has jurisdiction over disputes and applications that relate to, among other things, the interpretation and application of treaties and subsidiary instruments of the African Union (AU), and public international law.[120] The African Court also deals with disputes regarding interpretation and application of AU treaties, among others.[121] Therefore, the conflict of jurisdiction has been seen as one of the overlaps that the merger would address.[122] Consequently, in 2008, a Protocol on the Statute of the African Court of Justice and Human Rights was adopted ("2008 Protocol"), invalidating the 1998 and 2003 Protocols.[123] However, the African Court Protocol remains valid until the 2008 Protocol comes into force, and following that, for a transitional period not exceeding one year or any other period determined by the Assembly of Heads of States and Governments of the AU.[124] The joint court consists of a General Affairs Section and a Human and Peoples' Rights Section;[125] and once the joint court is in operation, it would take over cases that were pending before the African Court.[126]

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[117] Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights (1998) OAU Doc OAU/LEG/EXP/AFCHPR/PROT (III) ("African Court Protocol")

[118] See Protocol of the Court of Justice of the African Union (2003) AU Doc Assembly/AU/Dec 45 (111) ("2003 Protocol")

[119] A Zimmermann & J Bäumler "Current Challenges facing the African Court on Human and Peoples' Rights" (2010) 7 *KAS International Reports* 38 48-49 See also GM Wachira (Minority Rights Group International) *African Court on Human and Peoples' Rights: Ten Years On and Still No Justice* (2008) 14

[120] Art 19 of the 2003 Protocol

[121] Art 3 of the African Court Protocol

[122] African Legal Aid *Introducing the New African Court of Human and Peoples' Rights: Narrative Report* (2006) 13

[123] See art 1 of the Protocol on the Statute of the African Court of Justice and Human Rights (2008) AU Doc Assembly/AU/Dec 196 (XI) ("2008 Protocol")

[124] Art 7 of the 2008 Protocol

[125] Art 16 of the 2008 Protocol At the time of writing, discussions on amendments to the 2008 Protocol were underway in order to create a third section to the joint court – the International Criminal Law Section

[126] Art 5 of the 2008 Protocol

The African Court can consider both individual and inter-State complaints; and is also empowered to give advisory opinions on any legal matter relating to the African Charter or other relevant human rights instruments, provided that the subject matter of the opinion is not related to a matter being examined by the Commission.[127] However, direct access to the Court is limited to the African Commission, the applicant and respondent States, the State of the victim of the human rights violation, and African Intergovernmental Organisations.[128] While NGOs with observer status before the African Commission and individuals can also have access, this is subject to the relevant State making a declaration upon ratification or thereafter recognising the competence of the Court to receive complaints from these groups.[129] Though access for individuals and NGOs is subject to a State making the necessary declaration, the Court still has the discretion to decide on whether or not to consider the case, for example, if it does not meet other jurisdictional grounds.

Though there is the possibility of individual complainants accessing the Court through the African Commission,[130] restricting standing for NGOs and individuals is in fact a setback. The African Charter, as seen above, does not contain such restrictions and the African Commission has adopted a generous approach to standing. Therefore, the use of litigation, in the context of the African Court, by marginalised groups and peoples living in poverty to access their rights will be further restricted. There is already a restriction in the sense that States have to first become a party to the Court's constitutive treaty. In addition to that, the State party must enter a declaration allowing individuals to bring a case before the Court. As a result, the first case that came before the Court was dismissed on the basis that the Court had no jurisdiction because Senegal had not made the necessary declaration granting standing to individuals.[131]

Concerning the African Court's procedure in considering complaints, the African Court Protocol does not provide much. However, the Interim Rules of Procedure of the Court indicate that the Court would first conduct a

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[127] Art 4(1) of the African Court Protocol Arts 5-6, 8 and 33 of the Protocol, as well as part 4 of the African Commission Rules of Procedure, set out this complementarity relationship

[128] Art 5(1) of the African Court Protocol

[129] Arts 5(3) and 34(6) of the African Court Protocol This restrictive standing is also contained in art 30(f), read with art 8, of the 2008 Protocol Of the 26 States that have ratified the African Court Protocol, only five – Burkina Faso, Ghana, Malawi, Mali and Tanzania – have made such a declaration (see African Union "List of Countries which have Signed, Ratified/Acceded to the Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights" (11-03-2011) *African Union* <http://www au int/en/sites/default/files/992achpr pdf> (accessed 17-06-2011))

[130] By virtue of art 5(1)(a) of the African Court Protocol, the African Commission can refer cases it receives to the Court; or file cases (as a complainant) based on its own findings, even where the State concerned has not made the declaration giving individuals standing before the Court (see also Rule 118(3) and (4) of the African Commission Rules of Procedure) However, the Commission is yet to identify clear criteria for referring cases to the African Court (see African Commission on Human and Peoples' Rights "Communique Final de la 49ème Session Ordinaire de la Commission Africaine des Droits de l'Homme et des Peuples qui s'est tenue a Banjul, Gambie du 28 Avril au 12 Mai 2011" (12-05-2011) *African Commission on Human and Peoples' Rights* para 37 <http://www achpr org/english/communiques/Final%20Communique_49 pdf> (accessed 17-06-2011), where the Commission requested its Secretariat to conduct further research and propose criteria for referral of cases to the African Court, for the Commission to consider at its next extraordinary session)

[131] See *Yogogombaye v Senegal* Application 001/2008 (2009) AHRLR 315

preliminary examination of its jurisdiction and admissibility before going on to consider substantive issues .[132]

With regard to admissibility, the criteria under the African Charter are applicable; and when considering the admissibility of complaints from NGOs or individuals, the Court may seek the opinion of the African Commission. The African Court may also refer cases to the Commission.[133] These provisions show the complementarity between the Commission and the Court, which is recognised in the Court's constitutive treaty.[134]

Conversely, due to the lack of clarity on when one could use the Commission or the Court, Steiner, Alston and Goodman have seen the bodies as being in competition with each other, without any clear hierarchy, which could result in duplication of efforts.[135] Looking at other regional systems, the Inter-American system for example sets a hierarchy between the Inter-American Court of Human Rights and Inter-American Commission on Human Rights, where cases must first go through the latter before they can be brought before the former.[136]

Furthermore, similar to UN and other regional bodies, the Court can try to settle a case amicably.[137] Similar to the OP-ICESCR, the protection of witnesses or persons that appear before the Court is guaranteed.[138]

A distinguishing point between the Court and UN treaty bodies and the African Commission is that the hearings are held in public, and therefore presumably includes oral hearings, except where it is necessary to consider a complaint *in camera*.[139] This provision is a relief for many who have been concerned about the African Commission's closed hearings. As Udombana has pointed out, it ensures that "justice is not only done but manifestly seen to be done".[140] Also, free legal representation during hearings is available, where the interest of justice so requires.[141] However, the provision does not say if this extends to the filing of complaints. This would be crucial since one of the constraints of the African Commission's complaints mechanism has been the submission of poorly written and unclear cases that may likely allege serious violations but are difficult to process due to their format.[142]

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[132] Rule 39 of the Interim Rules of Court of the African Commission on Human and Peoples' Rights, adopted and entered into force on 20-06-2008 <http://www chr up ac za/images/files/documents/ahrdd/theme03/african_court_rules pdf> (accessed 17-06-2011)

[133] Art 6 of the African Court Protocol

[134] See Rules 114-123 of the African Commission Rules of Procedure

[135] Steiner et al *International Human Rights in Context* 1082

[136] See TJ Melish "The Inter-American Court of Human Rights: Beyond Progressivity" in M Langford (ed) *Social Rights Jurisprudence: Emerging Trends in International and Comparative Law* (2008) 371 378

[137] Art 7 of the African Court Protocol

[138] Art 10(3)

[139] Art 10(1) and (2)

[140] NJ Udombana *The African Regional Human Rights Court: Modelling its Rules of Procedure* (2002) Danish Centre for Human Rights Research Partnership 5/2002 110 <http://www humanrights dk/files/Importerede%20filer/hr/pdf/udombana_-_african_human_rights_court pdf> (accessed 17-06-2011)

[141] Art 10(2) of the African Court Protocol

[142] J Harrington "The African Court on Human and Peoples' Rights" in M Evans & R Murray (eds) *The African Charter on Human and Peoples' Rights: The System in Practice, 1986-2000* (2002) 305 324

The African Court is required to pass its judgment within 90 days after hearing a case.[143] This addresses a deficiency in the African Commission's mechanism where there is a huge time lapse between the hearing and the issuance of a decision in some instances.[144] Upon finding a violation, the Court can grant remedies, including the payment of fair compensation and reparation.[145] It can also take provisional (interim) measures *proprio motu* in cases of extreme gravity and urgency in order to avoid irreparable harm.[146] However, the African Court Protocol fails to say if these measures are binding as is the case with the Court's judgments. The Court recently, in its second ruling, issued an order for provisional measures in the case of *African Commission on Human and Peoples' Rights v Great Socialist People's Libyan Arab Jamahiriya*[147] ("*Libya*"). This is the first case brought before it by the African Commission. It relates to alleged serious and massive violations, by Libyan authorities, of human rights guaranteed under the Charter, including the State's obligation to adopt legislative and other measures to give effect to the rights and ensure non-discrimination in the enjoyment of rights. Though the Commission did not request in its application that the Court should grant provisional measures, the Court found it necessary to do so due to an imminent risk of loss of life and the difficulties in serving the application on Libya due to the ongoing conflict.[148] The Libyan authorities were ordered to "immediately refrain from any action that would result in loss of life or violation of physical integrity of persons, which could be a breach of the provisions of the Charter or of other international human rights instruments to which it is a party".[149]

The case is does not specifically deal with SERs but deals with rights such as non-discrimination and the obligations of States, both of which are relevant to SERs. The case is also illustrative of the potential use of provisional measures to protect the rights of those who cannot access the Court; of course, subject to the measures being implemented. This is particularly important for individuals in Libya because Libya has not made the necessary declaration recognising the competence of the Court to receive complaints from individuals. Also, though implementation of the order is uncertain because of the ongoing conflict in Libya, it is significant as it is the first judicial response to the situation in Libya and would influence how other bodies and institutions respond to the situation.

The implementation of the decisions of the African Court is monitored by the Council of Ministers.[150] This is reinforced by the undertaking by State parties to guarantee the execution of the Court's decision and to implement

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[143] Art 28 of the African Court Protocol

[144] Harrington "African Court on Human and Peoples' Rights" in *African Charter on Human and Peoples' Rights* 325

[145] Art 27(1) of the African Court Protocol

[146] Art 27(2)

[147] *African Commission on Human and Peoples' Rights v Great Socialist People's Libyan Arab Jamahiriya* Application 004/2011 (2011)

[148] Paras 9-13

[149] The authorities were also required to report to the Court within fifteen days on the measures taken to implement the order (see para 25)

[150] Art 29(2) of the African Court Protocol

them within the time frames stated by the Court.[151] This addresses some of the deficiencies in the African Charter relating to remedies and follow-up, mentioned earlier, which have impacted on the effectiveness of the complaints mechanism of the African Commission. The remedial and enforcement powers granted to the Court presents better prospects for the protection of SERs, as some judgments would require supervision in order to ensure their effective implementation.[152]

4 Concluding remarks

International complaints mechanisms are important in complementing domestic mechanisms. The UN High Commission for Human Rights, for example, has noted the contribution of UN treaty bodies to the development of jurisprudence that is frequently referred to by national and regional tribunals and in the provision of individual relief for victims.[153] International law complaints mechanisms have gone beyond providing justice to individuals or groups before it. For example, through the consideration of complaints, the African Commission has provided individual relief such as ordering compensation, as well as recommended proactive measures to prevent similar violations from occurring such as requiring a State to review the relevant domestic legislation and monitor institutions providing services.

The OP-ICESCR is not yet in force, so an assessment of its efficacy is limited to its potential. Through the consideration of complaints, the CESCR would gain more insight into the challenges and limitations in the realisation of SERs, enabling it to develop jurisprudence that is sensitive to global realities. This would provide a useful framework through which subsequent complaints can be analysed and understood.[154] However, for it to be effective, a number of practical points need to be taken into consideration. Scheinin and Malcolm have pointed to the need for the CESCR to make its decisions expansive and in-depth in their legal reasoning; and to consider experiences and jurisprudence from other jurisdictions or regions so as to refrain from further promoting the fragmentation of public international law.[155] Langa has, among other things, cautioned against the CESCR using too formalistic and technical approaches in analysing complaints; and emphasised the importance of the Committee using the tools of dignity and equality in addition to reasonableness in upholding and enforcing SERs.[156] In addition, effective implementation of the decisions of the Committee is crucial to ensuring that rights claimants have access to remedies and that the decisions have an impact on the ground.

The individual complaints mechanism of the African Commission has been instrumental in enforcing and expanding on the SERs in the African

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[151] Art 30

[152] Chirwa "African Regional Level" in *Social Rights Jurisprudence* 337

[153] UN Human Rights Instruments *Concept Paper on the High Commissioner's Proposal for a Unified Standing Treaty Body* (2006) UN Doc HRI/MC/2006/2 para 13

[154] P Langa "Taking Dignity Seriously – Judicial Reflections on the Optional Protocol to the ICESCR" (2009) 27 *Nordic Journal of Human Rights* 29 31

[155] Scheinin & Langford (2009) *Nordic Journal of Human Rights* 111-112

[156] Langa (2009) *Nordic Journal of Human Rights* 37

Charter, as seen in *SERAC*, *Purohit*, *Sudan* and *Endorois*, for example, where the Commission further developed the substantive content of these rights, clarified to some extent the obligations of States, and adopted a progressive interpretation of the African Charter and the doctrine of implied rights. However, the complaints mechanism of the Commission is not without drawbacks, many of them, procedural. While the Commission has been commended for developing the individual complaints mechanism into a "higher level human rights mechanism", the need to reform its practice of adjudicating cases has also been stressed.[157]

In addition to the limitation in terms of remedies, the binding nature of its decisions and their enforcement, the Commission – as is the case with UN treaty bodies – is inaccessible to the poor based on where it is located. Complaints also take a long time to be finalised – a problem common to quasi-judicial treaty bodies. It takes two and a half to three years for a case to be disposed of; which is clearly at odds with the notion of a speedy trial.[158] This has frustrated many, particularly rights claimants. The complaint mechanism has therefore been criticised for doing very little to protect an individual complainant, "as it 'starts too late, takes too much time, does not lead to a binding results and lacks any effective enforcement'".[159] There is an urgent need for an effective complaint procedure that is accessible and relatively speedy, and for the rapporteurs of the Commission to be diligent in gathering information relating to the facts stated in complaints before it.[160]

The effectiveness of the African Court becomes relevant in complementing the African Commission's mechanism. In fact, its recent ruling on Libya has been seen as a practical example of how "the Commission and the Court may cooperate in responding to human rights situations in the region".[161] Despite the limitations in the African Court Protocol such as taking a step back in terms of standing, generally, the Court's procedure and enforcement goes further than that of the Commission. It would therefore be instrumental in giving meaning to the SERs in the African Charter and other treaties. The initial omission of the Court was in fact seen as undermining public confidence in the African human rights system, since its absence made it impossible to compel violating States to conform to international norms and to provide remedies to victims.[162] Whether in practice the Court would be a more powerful and structured body than the Commission remains to be seen; this would depend on the aptitude, boldness and creativity of the judges. It would seem the Court is moving towards this direction if one considers its recent order of provisional measures that indicate that the Court is taking

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[157] Weldehaimanor (2010) *University for Peace LR* 19

[158] 18

[159] Udombana *African Regional Human Rights Court* 19

[160] Udombana (2003) *Am J Int'l L* 36-37 Weldehaimanor (2010) *University for Peace LR* 27-19 also makes a number of useful suggestions relating to reforming the adjudication mechanism

[161] AA Mulugeta "A Landmark Provisional Ruling of the African Court on Human and Peoples' Rights on Libya" (02-04-2011) *International Law Observer* <http://internationallawobserver eu/2011/04/02/acthpr_provisional_ruling_on_libya/> (accessed 31-08-2011)

[162] NJ Udombana "An African Human Rights Court and an African Union Court: A Needful Duality or a Needless Duplication?" (2003) 28 *Brook J Int'l L* 811 826

its mandate seriously. It is premature to make a decisive assessment on the Court's aptitude based on this single landmark ruling; but it is illustrative of the fact that Court's potential cannot be overruled.

SUMMARY

Litigation of socio-economic rights at international level is a viable option where access to justice at the national level is unattainable. International law mechanisms for litigating these rights are therefore useful for marginalised groups and people living in poverty. This is also based on the important role of these mechanisms in ensuring that States meet the obligations they have committed to in human rights treaties, and provide effective remedies in cases of violations. This article assesses, taking into consideration some broad principles, the international law mechanisms for litigating socio-economic rights at the UN and African regional levels, particularly the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights ("OP-ICESCR") and the African Court on Human and Peoples' Rights and the African Commission on Human and Peoples' Rights complaints mechanisms. The article illustrates that while these mechanisms have the potential to advance the rights of the poor and marginalised, and in some case have been successful in doing so, they are not without drawbacks that impact on their effectiveness.