ResearchGate

See discussions, stats, and author profiles for this publication at: https://www.researchgate.net/publication/254244414

Exception as norm: The local remedies rule in the context of socio-economic rights in the African human rights system

Article *in* The International Journal of Human Rights · January 2011

DOI: 10.1080/13642987.2011.614235

CITATIONS
6

READS
639

1 author:



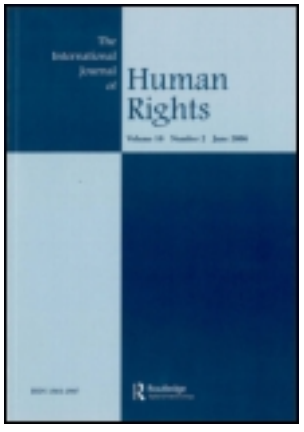
Takele Soboka Bulto
RMIT University
27 PUBLICATIONS **133** CITATIONS

SEE PROFILE

All content following this page was uploaded by Takele Soboka Bulto on 20 May 2014.

The user has requested enhancement of the downloaded file.

This article was downloaded by: [University of Canberra]
On: 22 March 2012, At: 16:23
Publisher: Routledge
Informa Ltd Registered in England and Wales Registered Number: 1072954 Registered office: Mortimer House, 37-41 Mortimer Street, London W1T 3JH, UK



The International Journal of Human Rights

Publication details, including instructions for authors and subscription information:
http://www.tandfonline.com/loi/fjhr20

Exception as norm: the local remedies rule in the context of socio-economic rights in the African human rights system

Takele Soboka Bulto [a]

[a] Centre for International Governance and Justice, School of Regulation, Justice and Diplomacy, Regulatory Institutions Network (RegNet), The Australian National University, Canberra, Australia

Available online: 13 Oct 2011

To cite this article: Takele Soboka Bulto (2012): Exception as norm: the local remedies rule in the context of socio-economic rights in the African human rights system, The International Journal of Human Rights, 16:4, 555-576

To link to this article: http://dx.doi.org/10.1080/13642987.2011.614235

PLEASE SCROLL DOWN FOR ARTICLE

Full terms and conditions of use: http://www.tandfonline.com/page/terms-and-conditions

This article may be used for research, teaching, and private study purposes. Any substantial or systematic reproduction, redistribution, reselling, loan, sub-licensing, systematic supply, or distribution in any form to anyone is expressly forbidden.

The publisher does not give any warranty express or implied or make any representation that the contents will be complete or accurate or up to date. The accuracy of any instructions, formulae, and drug doses should be independently verified with primary sources. The publisher shall not be liable for any loss, actions, claims, proceedings, demand, or costs or damages whatsoever or howsoever caused arising directly or indirectly in connection with or arising out of the use of this material.

The International Journal of Human Rights
Vol. 16, No. 4, May 2012, 555–576

Routledge
Taylor & Francis Group

Exception as norm: the local remedies rule in the context of socio-economic rights in the African human rights system

Takele Soboka Bulto

Centre for International Governance and Justice, School of Regulation, Justice and Diplomacy, Regulatory Institutions Network (RegNet), The Australian National University, Canberra, Australia

It is widely acknowledged that rights and freedoms guaranteed in the African Charter on Human and Peoples' Rights are justiciable. However, any complaints about violations of the Charter's guarantees are admissible before the African Commission on Human and Peoples' Rights only if they are lodged after local remedies available in the domestic legal system of the implicated state are exhausted. The local remedies rule can be bypassed, however, when such remedies are unavailable, inadequate, ineffective or unduly prolonged. This article argues that normative incompatibility between the charter's socio-economic rights undertakings and the status of the rights in domestic legal systems in numerous local jurisdictions in Africa makes it apparent that there is a clear lack of necessary preconditions for justiciability of and remedies to this category of rights. Local remedies to socio-economic rights in such jurisdictions could simply be lacking or are ineffective or inadequate. Thus, the application of the local remedies rule could well be less relevant to socio-economic rights complaints at the regional level and hence constitute an exception in relation to numerous African States. Consequently, direct invocation of charter-based remedies, supposedly an exception, may supplant the rule until and unless state parties to the charter ensure normative compatibility between their charter-based undertakings and domestic legislation and practices relative to socio-economic rights enshrined in the charter.

Downloaded by [University of Canberra] at 16:23 22 March 2012

1. Introduction

The African Charter on Human and Peoples' Rights[1] has been hailed for its distinct approach in the incorporation, on equal footing, of socio-economic rights and civil and political rights in a manner that emphasises the indivisibility, interdependence and interrelatedness of human and peoples' rights.[2] The charter stresses the link between the two categories of rights in stating that 'the satisfaction of economic [and] social ... rights is a guarantee for the enjoyment of civil and political rights'.[3] The interrelatedness of the two categories of rights remains true not only in terms of their enforcement but also their justiciability.[4] In a similar vein, the African Commission on Human and Peoples' Rights emphasised that 'there is no right in the African Charter that cannot be made effective'.[5]

However, the commission is not a forum of first instance and cannot replace domestic tribunals for the adjudication of alleged violations of the charter's rights. All complaints alleging violations of charter-based guarantees must be sent to the commission only after exhausting local remedies available to victims in the domestic legal system of the

ISSN 1364-2987 print/ISSN 1744-053X online
© 2012 Taylor & Francis
http://dx.doi.org/10.1080/13642987.2011.614235
http://www.tandfonline.com

implicated state. Under Article 56 (5) of the charter, communications alleging violations of human rights 'shall be considered if they . . . are sent after exhausting local remedies, if any, unless it is obvious that this procedure is unduly prolonged'. Thus, victims of violations of charter-based rights are normally required to seek and access domestic remedies before attempting to invoke those available under the charter.

Communications relating to the socio-economic rights of the charter, like any others, must also pass the admissibility test, involving proof of exhaustion of the local remedies rule. According to the commission, one of the major purposes of the local remedies rule is to enable the commission to 'avoid playing the role of a court of first instance, a role that it cannot under any circumstances arrogate to itself'.[6]

This article argues that the combination of the case law of the African Commission on the local remedies rule, on the one hand, and the domestic legislative practice of numerous African states, on the other, has produced an effect that is the polar opposite of the jurisprudence that the commission has sought to establish. The commission's consistent jurisprudence *vis-à-vis* the non-justiciability of socio-economic rights in many domestic jurisdictions in Africa would mean that the commission has fallen into exactly the one trap that it wanted to avoid: the duty to act as a court of first instance. Despite the ratification of the charter by all member states of the African Union (AU),[7] many of the state parties to the charter are still either recalcitrant or ambivalent about embracing the duties relating to socio-economic rights enforcement and justiciability that are entailed by the act of ratification of the charter. The practice of many African states poses particularly serious challenges to the domestic justiciability of socio-economic rights treaties.[8] In many cases, socio-economic rights are non-justiciable in the domestic legal systems. This allows complainants of socio-economic rights violations an easy recourse to the regional system to seek regional remedies. In effect, the local remedies rule could turn out be an exception and non-exhaustion thereof the rule.

Section 2 sets the scene as it presents the conflation of justiciable socio-economic rights in the African Charter and local legislative obstacles in numerous African states. This section demonstrates that there is a settled jurisprudence, according to which states owe obligations to ensure compatibility between their domestic legislation and practice on the one hand and the norms of treaties that they have ratified on the other. Section 3 analyses the *raison d'être* underlying the requirement of exhaustion of local remedies before complainants resort to the regional mechanism. It demonstrates that whenever the incompatibility between domestic laws and the charter renders the rationales of domestic remedies irrelevant, victims of the charter's socio-economic rights can have direct access to the commission. Section 4 turns to the analysis of the limitations of direct application of the local remedies rule under the charter, and posits that these limitations may be more relevant to socio-economic rights in numerous African states than the local remedies rule. Section 5 presents instances where such is the case, in the light of consistent case law of the commission. Section 6 traces the problem of domestic justiciability to the relatively recent emergence of socio-economic rights before Section 7 draws the analysis together and offer conclusions.

2. Justiciability and the deterrent effects of domestic laws

As noted above, the socio-economic rights in the regional instrument have been rendered justiciable in just the same way as the civil and political rights counterparts of the charter.[9] Denoting the suitability of a case for judicial or quasi-judicial scrutiny,[10] justiciability of a right rests on three cumulative normative pillars: the *claim*, the *setting* and the *consequence* of the claim.[11] The *claim* is about the violations of the rights protected. The African Charter has given express recognition to a modest list of important socio-economic

Downloaded by [University of Canberra] at 16:23 22 March 2012

rights.[12] The *setting* is the judicial or quasi-judicial body with a jurisdiction to hear and review violations of the rights protected. The African Commission, under its protective mandate, is empowered to receive communications from state and non-state entities that are entitled to bring communications to the commission and *locus standi* before the commission is virtually unlimited.[13] The *consequence* of the finding of a violation of charter-based guarantees – including socio-economic rights – entails the ordering of remedies by the commission.[14] The *three-pronged test* of justiciability has thus been cumulatively met, and the justiciability of socio-economic rights has been ripe since the establishment of the commission in 1987.

However, accessing remedies that are available under the African Charter is not a straightforward procedure, and communications must pass, *inter alia*, the local remedies requirement. The principles of subsidiarity[15] of and complementarity between national norms and their international counterparts[16] means that complainants of charter-based rights should seek national remedies before invoking those that are available under the charter. Primacy is accorded to national legal remedies as opposed to those available through international procedures.[17] There is a *structural* (as opposed to substantive) dependence of international human rights law on domestic laws, procedures and institutions for its implementation.[18]

Thus, remedies enshrined in the international human rights regime are merely subsidiary to national remedies and not meant to replace, but rather supplement domestic remedies.[19] As Henkin observed: '[t]he international law of human rights parallels and supplements national law, superseding and supplying the deficiencies of national constitutions and laws, but it does not replace and indeed depends on national institutions'.[20]

The African Commission has observed that:

> . . .the [domestic remedies] rule is founded on the premise that the full and effective implementation of international obligations in the field of human rights is designed to enhance the enjoyment of human rights and fundamental freedoms at the national level.[21]

This stance assumes the domestic justiciability of the relevant rights, and the availability of adequate and effective remedies to redress their violations at the domestic level.

However, in many domestic jurisdictions across Africa, socio-economic rights of the charter face distinct hurdles, which have particularly hindered their domestic justiciability and enforcement. In some cases, only a selective list of socio-economic rights is provided for in the domestic legal systems, while other guarantees are absent. For instance, only a handful of African constitutions guarantee the right to housing, food and water.[22] In those countries, domestic justiciability of these rights is hampered due to their questionable existence in the local legal system. In many of the common law jurisdictions – such as Lesotho, Namibia, Nigeria and Sierra Leone – socio-economic rights form part of directive principles of state policy ('DPSP'), and they are not justiciable.[23] In other jurisdictions, including Ethiopia, Ghana, The Gambia and Uganda, the status of socio-economic rights is unclear as they are both part of fundamental rights, on the one hand, and are placed under DPSP on the other.[24] In some other states, such as Botswana, Tunisia, Zambia and Zimbabwe, there is no legal guarantee of socio-economic rights in the domestic legal system whatsoever.[25]

Charter-based socio-economic rights holders in many African jurisdictions have therefore faced the problem of domestic legal deterrence to justiciability of socio-economic rights.[26] Questions arise therefore as to how to reconcile the lack of domestic justiciability of the socio-economic rights with their justiciable status under the African Charter. The emerging scenario thus engenders an uneasy co-existence between the charter's rule of

Downloaded by [University of Canberra] at 16:23 22 March 2012

local remedies and domestic non-justicability or unavailability, ineffectiveness or inadequacy of remedies to violations of socio-economic rights in the domestic sphere.

The situation of remedial deterrence to socio-economic rights complaints in many of the African national legal systems has thus given rise to what Neuman called 'dual positivisation and the production of dissonance'.[27] Having ratified the regional charter with justiciable rights, many African states have fallen short in translating the charter's promises into reality, giving rise to normative conflict between the charter's promises and domestic legislation or practice.[28] More specifically, they have maintained or issued laws that are in contradiction with their charter obligations. In so doing, states have denied complainants of effective access to domestic judicial and quasi-judicial bodies, or barred the latter from hearing and passing impartial judgements on such complaints. This is a clear violation of the charter via legislative means. There is a need – and indeed a duty – to bring domestic legislation, administrative rules and practices into conformity[29] with the rules of ratified international human rights treaties, which are 'high minded-legal formulations'.[30]

With respect to obligations arising from international law, the principle of *pacta sunt servanda* dictates that treaties wilfully entered into should be executed (fulfilled) in good faith.[31] Indubitably, the principle of *pacta sunt servanda* in the law of treaties has constituted 'since time immemorial the axiom, postulate and categorical imperative of the science of international law'.[32] According to Hugo Grotius:

> For good faith, in the language of Cicero, is not only the principal hold by which all governments are bound together, but is the key-stone by which the larger society of nations is united. Destroy this, says Aristotle, and you destroy the intercourse of man.[33]

The principle of good faith, itself a customary rule of international law,[34] requires states to domestically maintain such laws and institutions as will enable them to discharge their international obligations. This has been codified under the Vienna Convention on the Law of Treaties ('VCLT'), which provides that: 'A State is obliged to refrain from acts which would defeat the object and purpose of a treaty when … (b) it has expressed its consent to be bound by the treaty'.[35] This provision reflects customary international law, the rules and principles of which are binding on all nations irrespective of consent, including those states that have yet to ratify the VCLT.[36] As Brownlie observed, the law and jurisprudence in this area is 'settled':

> … a state cannot plead provisions of its own law or deficiencies in that law in answer to a claim against it for an alleged breach of its obligations under international law. The acts of the legislature and other sources of internal rules and decision-making are not to be regarded as acts of third party for which the state is not responsible, and any other principle would facilitate evasion of obligations.[37]

In this regard, the jurisprudence of the Permanent Court of International Justice (PCIJ), the International Court of Justice (ICJ) and the African Commission and the UN human rights bodies are in unanimous agreement. In the *Free Zones* case,[38] the PCIJ observed that 'it is certain that France cannot rely on her own legislation to limit the scope of her international obligations'. Similarly, in its advisory opinion in the *Greco-Bulgarian Communities* case, [39] the PCIJ stated:

> It is a generally accepted principle of international law that in the relations between Powers who are Contracting Parties to a treaty, the provisions of municipal law cannot prevail over those of the treaty.

Downloaded by [University of Canberra] at 16:23 22 March 2012

So too, the PCIJ, in the case of *Polish Nationals in Danzig*,[40] held that 'a state cannot adduce as against another state its own constitution with a view to evading obligations incumbent upon it under international law or treaties in force'.

In the same vein, the ICJ too has affirmed this principle. Thus, in the *Fisheries* case[41] and *Nottebohm* case,[42] it decided that a state cannot present its domestic law as a defence to evade its international obligations. Afterwards, the VCLT codified the rule that a 'party may not invoke the provisions of its internal law as justification for its failure to perform a treaty'.[43] Similarly, the Inter-American Court of Human Rights ruled that:

> . . . pursuant to international law, all obligations imposed by it must be fulfilled in good faith; domestic law may not be invoked to justify nonfulfillment. These rules may be deemed to be general principles of law and have been applied by the Permanent Court of International Justice and the International Court of Justice.[44]

The African Commission invariably decided that a state cannot plead its domestic law as a defence to evade its obligations under international law. In *Legal Resources Foundation v. Zambia*,[45] the commission held that international treaty law prohibited Zambia from relying on its constitution as a justification for its non-compliance with its international obligations. Similarly, the commission decided that 'Nigeria cannot negate the effects of its ratification of the [African] Charter through domestic action. Nigeria remains under the obligation to guarantee the rights of [the charter's] article 7 of its citizens'.[46] In another judgment, against The Gambia, the African Commission ruled that:

> By suspending chapter 3 (the Bill of Rights [of The Gambia's Constitution]), the Government therefore restricted the enjoyment of the rights guaranteed therein and, by implication, the rights enshrined in the Charter. . . It should, however, be stated that the suspension of the Bill of Rights does not *ipso facto* mean the suspension of the domestic effect of the Charter. . . [T]he Commission held that 'the obligation of the . . . government remains, unaffected by the purported revocation of the domestic effect of the Charter.' . . . The suspension of the Bill of Rights and consequently the application of the Charter was not only a violation of article 1 [general obligations clause of the charter] but also a restriction on the enjoyment of the rights and freedoms enshrined in the Charter, thus violating article 2 of the Charter as well.[47]

So too, the UN Committee on Economic, Social and Cultural Rights has stated that states have an obligation to promote interpretations of domestic laws that give effect to their international obligations. Accordingly:

> . . . legally binding international standards should operate directly and immediately within the domestic legal system of each State Party, thereby enabling individuals to seek enforcement of their rights before national Courts and tribunals.[48]

Ideally, a state should conduct a compatibility study that in some cases results in the amendment of existing municipal laws, so as to bring it into conformity with international instruments. Either before or immediately after a state ratifies a treaty, it is expected to review its domestic laws and practices to ensure that it is in compliance with the obligations contained in the treaty. As far back as 1925, the PCIJ ruled that a ratifying state's obligation to make the changes to its legislation that is necessary for the fulfilment of the duties undertaken in the treaties is simply 'a principle that is self-evident'.[49]

The African Commission has stressed the requirement of a state's duty to ensure domestic compatibility of international human rights treaties and domestic legislations. It stated:

> In principle, where domestic laws that are meant to protect the rights of persons within a given country are alleged to be wanting, the African Commission holds the view that it is within its

Downloaded by [University of Canberra] at 16:23 22 March 2012

> mandate to examine the extent to which such domestic law complies with the provisions of the African Charter. This is because when a State ratifies the African Charter it is obligated to uphold the fundamental human rights contained therein. Otherwise if the reverse were true, the significance of ratifying a human rights treaty would be seriously defeated. This principle is in line with Article 14 of the Vienna Convention on the Law of Treaties of 1980.[50]

In Africa, the process of compatibility studies have in some cases resulted in legislative amendments as part of the ratification process.[51] There have been practices of pre-ratification compatibility studies in Senegal, South Africa and Zambia.[52] The initial review may be undertaken in conjunction with each of the relevant national ministries or other authorities responsible for policy making and implementation in the different fields covered by the treaty concerned.[53] Sometimes, states undertake pre-ratification reviews primarily by the foreign ministry or its equivalent with relatively limited inputs from other ministries or from the principal sectors of society.[54] Accordingly, state parties to the charter are required to amend their domestic laws to conform to and facilitate the domestic application and justiciability of the socio-economic rights guaranteed in the continental instrument.[55]

Failing compatibility between the charter and domestic norms, at international law the charter would apply regardless of inconsistent domestic norms in force, superseding and replacing the latter to the degree of their inconsistency.[56] If the domestic legislative or judicial and quasi-judicial bodies disregard a ratified human rights treaty in favour of inconsistent domestic law, which bar justiciability of socio-economic rights, individuals and groups have the option of directly accessing the commission, which would find the country in violation of its treaty obligations through maintaining contradictory domestic laws and denial of local remedies.[57] This would mean that, more often than not, complaints of socio-economic rights in numerous African states would immediately pass the admissibility criterion imposed by the local remedies rule, rendering the commission a forum of first instance. As the following sections demonstrate, such a conclusion is an outcome – if unintended - of the case law of the African Commission.

3. Rationales of the local remedies rule under the African Charter

The rule of exhaustion of local remedies has long been used in international law and international human rights disputes to reinforce the primacy of national remedies over international remedies. Just like the right to a remedy, the rule of exhaustion of local remedies is part of customary international law.[58] Originally, it was imposed upon aliens who sought the diplomatic protection of their state of nationality against a foreign state, wherein or whereby their rights were violated without a remedy.[59] It is one of the most frequently used objections or defences to admissibility of international claims.[60] Its application means that a state cannot espouse a complaint of its nationals against another state before the individual or groups exhaust remedies available in the implicated state, without obtaining reparation for the harm suffered.[61] It has thus been a means of preventing horizontal (inter-state) complaints and consequent extraterritorial remedies between states.[62] Unless and until the direct victims (individuals or groups) have exhausted local remedies that are available in the state that is responsible for the injury or violation, the national state of the complainants could not espouse a case on their behalf or the claim is inadmissible in international tribunals.[63] Thus, the field of application of the local remedies rule has been horizontal (between states). It has applied to cases of diplomatic protection as opposed to instances of direct injury to the state espousing the case.[64]

With its incorporation into the human rights treaties, not least in the African Charter, the rule came to have additional dimensions and application vertically as between residents and

Downloaded by [University of Canberra] at 16:23 22 March 2012

their state of residence. While imposing the duties on the complainants to exhaust local remedies, it also entails states' duty to maintain the legal basis for the domestic protection of treaty-based rights as well as to provide adequate and effective remedies in cases of their violations.

The African Commission has repeatedly and consistently stressed that the exhaustion of local remedies is one of the crucial preconditions for admissibility of communications that come before it from time to time. Therefore, resorting to international tribunals and remedies is a remedy of last resort.[65] This was made starkly clear in the commission's ruling in a case against The Gambia, wherein it stated that the rule of exhaustion of local remedies:

> . . . is one of the most important conditions for admissibility of communications, no doubt therefore, in almost all the cases, the first requirement looked at by both the Commission and state concerned is the exhaustion of local remedies.[66]

The commission has established a set of rationales behind the application of the rule of exhaustion of local remedies. First, the rule of exhaustion of local remedies under Article 56 (5) seems to assume that a state might have prevented or remedied the violations complained of had it been notified of their existence. Thus an attempt by victims or those acting on their behalf to exhaust local remedies may bring the complaint and alleged violations to the attention of the implicated state, whose authorities could have been unaware of the circumstances. The commission stated that '[t]he exhaustion of domestic remedies requirement should be properly understood as ensuring that the State concerned has ample opportunity to remedy the situation of which applicants complain'.[67] This principle has also been long accepted by the ICJ, which declared that 'the responsible State must have an opportunity to redress by its own means within the framework of its domestic system the wrong alleged to be done to the individual'.[68]

The enquiry therefore starts by giving the benefit of the doubt to the state concerned. Thus, a government should be made aware of a human rights violation in order to have the chance to remedy such violation.[69] The exhaustion of local remedies is therefore necessitated in order to 'establish beyond doubt that the wrongful act or denial of justice complained of is the deliberate act of the State, and that it is willing to leave the wrong unrighted'.[70] According to the African Commission, the exhaustion of local remedies rule 'is founded on the principle that a government should have notice of human rights violations in order to have the opportunity to remedy matters through its own local system'.[71] In cases where proof of a government's awareness was obvious or proved, the commission declared communications admissible without requiring exhaustion of the domestic remedies that were probably available. In a case against Zaire (now Democratic Republic of Congo), the commission ruled that 'the government has had ample notice of the violation'[72] and declared the case admissible. Similarly, it ruled, in the SERAC case, that '[i]t is not necessary here to recount the international attention that Ogoniland has received to argue that the Nigerian government has had ample notice and, over the past several decades, more than sufficient opportunity to give domestic remedies'.[73]

Second, from the perspective of the complainants, resort to local remedies – as opposed to international remedies – is usually cost-effective and more expedient. Thus, the commission has stated that:

> . . . local remedies are normally quicker, cheaper, and more effective than international ones. They can be more effective in the sense that an appellate court can reverse the decision of a lower court, whereas the decision of an international organ does not have that effect, although it will engage the international responsibility of the state concerned.[74]

Downloaded by [University of Canberra] at 16:23 22 March 2012

Third, the rule requiring exhaustion of local remedies, as a filtering mechanism, is also a means to protect the reputation of an implicated state. The availability of international procedures for redressing domestic human rights violations is not meant – as a primary aim – to shame the state. The commission repeatedly stressed that the local remedies rule offers the state 'an opportunity to … save its reputation, which would be inevitably tarnished if it were brought before an international jurisdiction'.[75]

Fourth, as noted above, the rule of exhaustion of domestic remedies is a means of ensuring the principle of subsidiarity of international law to national law.[76] The principle of subsidiarity dictates that 'legitimate governmental objective should in principle be taken at the lowest level of government capable of effectively addressing the problem'.[77]

Fifth, the rule is a means of ensuring the continued complementarity between national and international jurisdictions, thereby obviating the possibility of contradictory judgements and jurisprudence of domestic and international tribunals.[78] As stated in the SERAC case:

> One purpose of the exhaustion of local remedies requirement is to give the domestic courts an opportunity to decide upon cases before they are brought to an international forum, thus avoiding contradictory judgements of law at the national and international levels.[79]

Finally, and more importantly for our present purposes, the commission has used the rule as a means of curbing the possibility of an emergence of a situation in which it becomes a forum of first instance to hear human rights complaints for which domestic remedies exist. Therefore, as well as respecting the jurisdictions of local judicial and quasi-judicial bodies capable of redressing the injury complained of, the commission has used the rule as a means of preventing itself being flooded by unfiltered flow of communications. It emphasised that the requirement of exhaustion of local remedies 'also ensures that the African Commission does not become a tribunal of first instance for cases for which an effective domestic remedy exists'.[80] The commission reiterated that the application of the rule would therefore enable the commission to 'avoid playing the role of a court of first instance, a role that it cannot under any circumstances arrogate to itself'.[81]

In the final analysis, despite the general agreement that human rights are generally considered to be permissible 'derogations'[82] from and 'erosion'[83] of state sovereignty, the rule of exhaustion of local remedies is partly a means of protecting state sovereignty and is an expression of the continued importance states attach to it.[84] It seeks to achieve this by delaying and/or preventing adjudication of a state's domestic human rights and other issues by foreign/international tribunals before a state's own legal processes have a chance to operate domestically.

4. Preconditions for exhaustion of local remedies

A precondition itself, the rule of exhaustion of domestic remedies applies only if certain cumulative criteria are satisfied. The primacy of national remedies over international ones and the requirement of exhaustion of local remedies are not absolute. International remedies may be resorted to immediately and local remedies may be disregarded in exceptional circumstances where national laws and state conduct fails to meet certain criteria. The African Commission ruled that it 'has never held the requirement of local remedies to apply literally in cases where it is impractical or undesirable for the complainant to seize the domestic courts in the case of each violation'.[85] It is clear from the case law of the African Commission that a remedy must meet all prongs of the three-prong test: '[t]hree major criteria

Downloaded by [University of Canberra] at 16:23 22 March 2012

could be deduced from the practice of the [African] Commission in determining this rule, namely: the remedy must be available, effective and sufficient'.[86] Failing any of the availability, effectiveness and/or sufficiency tests, the duty of the complainant to exhaust domestic remedies is excused and direct resort to international remedies would be allowed.

The commission has elaborated the meanings of availability, effectiveness and adequacy of a domestic remedy. A remedy is considered *available* 'if the petitioner can pursue it without impediment',[87] i.e., if it is 'readily obtainable [and/or] accessible'.[88] The African Commission has ruled that a remedy, 'the availability of which is not evident, cannot be invoked by the state to the detriment of the complainant'.[89] A remedy is deemed *effective* 'if it offers a prospect of success',[90] i.e., if it is 'adequate to accomplish a purpose; producing the intended or expected result'.[91] A remedy whose very existence or applicability is not sufficiently certain fails both tests of availability and effectiveness.[92] And, a remedy is deemed *sufficient* 'if it is capable of redressing the complaint',[93] or put otherwise, 'if it is adequate for the purpose of redressing the injury caused by the violation.[94]

The availability of a remedy is gauged from an objective standpoint, with the implication that 'a remedy is considered available only if the applicant can make use of it in the circumstance of his case'.[95] Thus, complaints of socio-economic rights violations could be required to exhaust domestic remedies only if the remedial scope provided in the implicated state's legal system applies to the particular situation of the complainants.

A remedy is deemed insufficient if the complainant cannot have recourse to the jurisdiction competent to decide the relevant case, as, for example, is the case when the complainant's access to such is prevented by DPSP provisions,[96] or by the generalised fear for life or safety of the complainant or even that of the complainant's relatives.[97] In a decision against Sudan, the commission reiterated this stance:

> The African Commission is of the view that, even if certain domestic remedies were available, it was not reasonable to expect refugees [Complainants] to seize the Sudanese Courts of their complaints, *given their extreme vulnerability and state of deprivation, their fear of being deported and their lack of adequate means to seek legal representation.*[98]

Additionally, remedies in this context of the case law of the African Commission refer to judicial, non-extraordinary and non-discretionary remedies as opposed to discretionary or executive remedies such as presidential amnesty in cases of the death penalty.[99] Similarly, in cases where the jurisdictions of the ordinary courts over the subject matter of a complaint is ousted by domestic laws and procedures, or where such jurisdictions have been given to special tribunals, or are vested in an executive state official, the local remedies are said to be insufficient.[100]

Therefore, once a case is lodged in the African Commission, the question of burden of proof of availability, effectiveness and adequacy of the domestic remedies, if any, would normally be raised by the state to have the case dismissed by the relevant international forum. The complainant has a relatively easier task of 'some prima facie evidence of an attempt to exhaust local remedies'[101] and/or deny their availability or effectiveness. Given such *prima facie* proof of exhaustion or denial of availability and/or effectiveness of local remedies, the onus of proof now shifts to the state to adduce sufficient evidence in order to prove that ordinary, and non-discretionary, timely and non-prolonged effective remedies are available to redress the particular complaint at issue. When an accused state argues that communication to the African Commission must be declared inadmissible for want of exhaustion of local remedies, 'the government then has the burden of demonstrating

Downloaded by [University of Canberra] at 16:23 22 March 2012

the existence of such remedies'.[102] If the government succeeds in proving the existence of effective and adequate local remedies, the burden shifts once more to the complainant, who must prove exhaustion or unavailability, ineffectiveness and/or inadequacy of the remedies, failing which the communication will be declared inadmissible.[103]

5. Exceptions to the local remedies rule and socio-economic rights

It is clear from the foregoing discussion that the requirement of exhaustion of local remedies assumes the availability, adequacy and effectiveness of local remedies, in the absence of which complainants of human rights violations (including violations of treaty-based guarantees) will be allowed to lay their cases before international human rights bodies. Under the African Charter, the complainant's duty of prior exhaustion of local remedies can be dispensed with when one or more of the triple preconditions of availability, adequacy and effectiveness of the domestic remedies is lacking or where the *raison d'être* for exhausting the remedies is absent.

In instances where there are no domestic remedies, or where the available remedies are less than effective or adequate, the commission would be a forum of first instance to hear cases of and mete out appropriate remedies to redress the violations of charter-based rights by local authorities.[104] The African Charter provides for grounds of exemptions from exhausting local remedies in some selected cases. In those instances, individual and group complainants (or those who act on their behest) would be exempt from the burden of seeking local remedies and are allowed to access the African Commission and charter's remedies immediately and directly.

In the domestic legal systems of many African states, the interplay of the non-justiciability of socio-economic rights *vis-à-vis* resultant lack or inadequacy of remedies available to complainants of the rights' violations renders the application of the local remedies rule more of an exception rather than the norm. In relation to numerous domestic legal systems of African states, it is indeed the exemptions from the direct application of the rule of exhaustion of domestic remedies that seems to have immediate relevance to the enforcement of the charter's socio-economic rights at the regional level. In those cases, the complainant would be allowed to directly and immediately access the regional mechanism and remedies available under the regional human rights system.

i. Lack of domestic legal protection of the right

The requirement of exhausting local remedies before submitting a case for adjudication by judicial or quasi-judicial bodies presupposes the existence of a right, which is the subject of the complaint and corresponding remedies in the event of its violation. Thus, not only the remedy but the substantive right must have a legal basis and be actionable in the domestic law. It could be enshrined in the national constitution, or other legislation. Or it could result from the ratification and domestication by the relevant state of a regional or international treaty such as the African Charter. In the latter case, the treaty that is the basis of the right in question must have a direct domestic application, and be granted judicial notice for individual and group complainants to invoke it in the domestic administrative and judicial proceedings of the state. But 'if the right is not well provided for, there cannot be effective remedies or any remedies at all'.[105] Complainants of the (treaty-based) rights are then exempt from the burden of exhausting local remedies before approaching the regional mechanism.

Downloaded by [University of Canberra] at 16:23 22 March 2012

Some states ratify the African Charter (and other treaties) with justiciable rights and freedoms and fail to domesticate them. Domestic courts could thus find it difficult to take judicial notice of the treaties that are not domesticated. In other cases, the jurisdiction of the ordinary courts over the subject matter of a complaint is ousted by domestic laws and procedures, or such jurisdictions may be given to special tribunals that are not impartial and/or competent. In such situations, the local remedies are said to be unavailable.[106]

It has also been shown that many states in Africa sign and ratify international human rights treaties without necessarily having the underlying commitment to implement these rights and freedoms domestically.[107] Heyns and Viljoen have found significant evidence in Africa – and elsewhere – of states wanting to '"jump on the bandwagon," or respond to international pressure to ratify'.[108] Having ratified treaties with justiciable socio-economic rights such as the African Charter, they promulgate or maintain national legislation that is in conflict with the treaties they have become parties to, thereby undertaking the obligations of ensuring justiciability and availability of domestic remedies for the rights contained therein. This entails an incompatibility between the national and the international norms relative to a given human right.

Where the substantive right that is violated is a breach of a ratified human rights treaty but not of domestic law (which fails to provide for the right), 'the local remedies rule does not *ex hypothesi* come into play at all; for since there has been nothing done contrary to the local law, there can be no local remedies to exhaust'.[109] This is only logical because 'if the right is not well provided for [in the domestic legal system], there cannot be effective remedies, or any remedies at all'.[110] Individuals and groups who are victims of violations of (treaty-based) human rights would thus be given treaty-based remedies irrespective of a domestic law that denies or restricts access to such by the right holders.

As noted at the outset, in many African states, some or all socio-economic rights are not provided for.[111] In others, socio-economic rights are declared non-justiciable and individuals could not approach national bodies with judicial powers to seek redress for violations of their fundamental socio-economic rights.[112] In either case, seeking remedies for violations of such rights is a futile exercise. This will lead to the consequence that the African Commission becomes a court of first instance for litigations related to the charter's socio-economic guarantees.

ii. Problems posed by Directive Principles of State Policy (DPSP)

A crucial importance of the right to access a tribunal that is competent to investigate into and judicially appraise violations of human rights lies in the fact that it leads to the award of an adequate and effective remedy. The remedy could take a variety of forms, including injunctions, compensations, restorations of confiscated property, reinstatement in a job, guarantee against repetition, or a combination of these or other types of relief.[113] So too, the lack of a remedy, its ineffectiveness or inadequacy is a violation of the fundamental rights in issue. In such instances, the regional bodies would be the principal and primary port of call for holding the state accountable for such violations.

One of the most fundamental problems that stand on the path towards the domestic justiciability of socio-economic rights on the African continent is the fact that, in many of the national jurisdictions, socio-economic rights are consigned to the status of Directive Principles of State Policy[114] and hence non-justiciable *per se*. The inclusion of the right under the DPSP excludes the possibility of complaining about their violations in the regular courts or quasi-judicial bodies.[115] The DPSP are meant to guide the executive and legislative branches of the state to the exclusion of the judicial branch.[116] Consequently,

Downloaded by [University of Canberra] at 16:23 22 March 2012

the ratification of the charter alone without domestic justiciability may be of little assistance in the search for domestic remedies and the enjoyment of the rights at the local level may still be illusory. In Namibia, for instance, the Supreme Court decided that the DPSP 'are not enforceable in any court of law, and, therefore, should they be ignored or infringed the aggrieved have no legal remedy to compel positive action'.[117]

Where the violated socio-economic right is part of the DPSP of a country's constitution, the African Commission excused complainants from exhausting local remedies and took it upon itself to serve the purpose of a court of first instance. This was the prevailing situation in Nigeria in which the commission decided to be seized of the SERAC case, which it later declared admissible. In the SERAC case, the commission commented that one of the underlying justifications behind the admissibility requirement of exhaustion of domestic remedies is the need to avoid the rendition of contradictory judgements from international and national forums.[118] Accordingly, '[*w*]*here a right is not well provided for in domestic law such that no case is likely to be heard, potential conflict does not aris*e'.[119]

The problem in such cases is not so much about the lack of the substantive right itself as it is about the legal hurdle that puts the adjudication of complaints about violations of such rights beyond judicial reach. Effectively, DPSP present an ouster of judicial jurisdiction in matters relating to the socio-economic rights in general.[120]

Where the domestic laws curtail judicial scrutiny of socio-economic rights provisions (via the DPSP clause), the duty of exhausting local remedies is dispensed with and complainants can approach the regional mechanisms for redress. In cases where judicial power of scrutinising human rights complaints is ousted, local remedies are said to be 'non-existent' or 'ineffective'.[121] Such a scenario illustrates 'the futility of seeking a remedy' in the domestic courts.[122]

While constituting domestic obstacles to the judicial and/or quasi-judicial enforcement of socio-economic rights, the DPSP provisions do not affect the applicability of the rights at the regional level as it absolves the complainant from exhausting local remedies.[123] The complainants would thus have direct access to the procedures and mechanisms of the regional human rights system.[124]

iii. Series of serious and massive violations

There is an established case law of the African Commission according to which victims of serious or massive violations are not required to exhaust local remedies available within the legal system of the perpetrating state. Whether the violations complained of are 'serious or massive' depends upon whether the alleged violations are of such a nature that it is of 'vast and varied scope and [reflective of] the general situation' in the relevant state.[125] In the *Free Legal Assistance Group and Others v Zaire*, the commission ruled that the widespread arrests, detentions, extrajudicial executions, unfair trials, restrictions of press freedom, deprivation of property and access to education constituted serious and massive violations of human rights. According to the commission, in such instances 'it is impractical or undesirable for the complainant to seize the domestic courts in the case of each violation'.[126] The commission reiterated its position in a recent decision against Sudan, and stated that 'where the violations involve many victims, it becomes neither practical nor desirable for the complainants or the victims to pursue such internal remedies'.[127]

Serious and massive human rights violations engender a *prima facie* presumption that domestic remedies are not available or effective.[128] In addition, as outlined above, the requirement of exhaustion of local remedies loses its *raison d'être* in cases of serious and massive violations. One of the principal justifications behind the local remedies rule

Downloaded by [University of Canberra] at 16:23 22 March 2012

is the consideration that a state must be given prior adequate notice of the complaint so that it is able to remedy the violations. In the cases of serious and massive violations, the situation is too rampant to elude the attention of the state authorities, and a state's non-reparation of the violations triggers the presumption that the state condones or is unwilling to prevent, abate or remedy the violations. In the *Free Legal Assistance Group* case, the commission stated: 'the government has had ample notice of the violation' and complainants are not required to exhaust the state's local remedies.[129]

The emerging jurisprudence is of close relevance to violations of socio-economic rights, such as the human right to water. In cases where the human right to water is violated through pollution, or the construction of dams to divert such an amount of water that would cause significant harm to those who had hitherto access to the water resources, the problem would affect thousands of victims. It would be serious in degree and massive in terms of victims (to be) affected. In this age of information technology and free flow of information, it would be unlikely for states to be unaware of the situation. Inaction to remedy the situation may thus point to a *prima facie* evidence of a state's complicity in the violations or unwillingness to remedy it at all. More often than not, projects and activities related to damming of rivers are usually the subject of a state's prior approval or are planned and undertaken by the state agencies.

Thus, under the 'serious and massive violations' jurisprudence of the commission, victims of the human right to water and similarly affected socio-economic rights would more likely be exempt from exhausting local remedies. Violations of such scale and scope would hardly escape the attention of the media, which would bring the problem to the attention of the state authorities. In the SERAC case, where the Nigerian government was accused of complicity in the despoliation and destruction of water and food sources of the Ogoni people of its Niger Delta region, the commission bypassed the local remedies rule and declared the communication admissible. It stated that the government must have been aware of the violations due to the sustained international attention given to the Ogoniland situation.[130]

It is relatively easier to prove that the state was duly aware of the situation and that the violations caused to the beneficiaries of socio-economic rights are serious and massive. Complainants of violations of such rights would, in such and similar situations, be able to directly submit their cases to the African Commission without the need to resort to domestic remedies and procedures of the implicated state.

6. Justiciable remedies: from regional to domestic, and back again?

The rights traditionally placed in the civil and political category took roots in domestic struggles for human rights from which they eventually evolved into international law rules.[131] In contrast, the journey for socio-economic rights has been along the reverse route. Many of the socio-economic rights have originally appeared in international instruments such as the Universal Declaration of Human Rights and others before they found their way into domestic legal systems.[132] Compared to traditional civil and political rights, socio-economic rights are late comers to the international scene.[133] Indeed, socio-economic rights came into full prominence only in the late twentieth century.[134] They emerged much later than the civil and political rights whose standards had gone through long processes of progressive development, norm clarification and judicial scrutiny.[135] Some socio-economic rights are still evolving. The human right to water, for instance, which came into the human rights catalogue through a General Comment of the UN Committee on Economic, Social and Cultural Rights,[136] is said to be a 'new born thing'[137] and a

Downloaded by [University of Canberra] at 16:23 22 March 2012

'novel right'.[138] Because the right has been an 'unknown quantity' thus far, commentators have even asked 'if it is proper to name it so [as a human right]'.[139] In other words, socio-economic rights represent a regime that is in normative evolution, and the clarification of their normative content, domestic justiciability and enforcement is a work in progress in contrast to the relatively more settled civil and political rights.

Emerged as they have from international law, socio-economic rights have yet to be fully embraced by the domestic legal and institutional systems. This is not unique to African states. States elsewhere also remain unconvinced to accept domestic legal enforcement and justiciability of these categories of rights. Some states still fail to recognise socio-economic rights within their domestic human rights instruments.[140] The difference between states elsewhere and African states is that the latter have been parties to the charter that incorporates justiciable socio-economic rights. But others are only parties to the International Covenant on Economic, Social and Cultural Rights,[141] which will be justiciable when its optional protocol comes into force.[142]

The consequence of the late emergence of socio-economic rights has meant that, with the exception of few jurisdictions such as South Africa, socio-economic rights are not grounded in significant bodies of domestic jurisprudence in Africa.[143] Put differently, socio-economic rights jurisprudence generally does not benefit from the history of domestic adjudication or judicial scrutiny in Africa. Some socio-economic rights would thus be litigated before the African Commission for the first time.

Such a scenario inevitably presents the commission with the opportunity and challenge of examining domestic violations of socio-economic rights as a tribunal of first instance. Granted that the adjudication and resultant jurisprudence of socio-economic rights have yet to take root in a great majority of domestic jurisdictions across the continent, 'the fate of economic, social and cultural rights under the African Charter is bound up with the prospects of the African regional human rights mechanism generally'.[144] As Busia and Mbaye noted: 'the Commission should exercise original jurisdiction on economic and social rights since individuals cannot be expected to exhaust domestic remedies which do not exist'.[145] In the same vein, the commission stressed that 'it is only to the extent that the Commission is prepared to interpret and apply the Charter that Governments would appreciate the extent of its obligations and citizens understand the scope of the rights they have under the Charter'.[146]

The lack of domestic remedies to or justiciability of socio-economic rights entails the exemption from local remedies rule by the complainants of the violation of this category of rights. Direct access to the commission may still play a crucial role in enhancing justiciability of socio-economic rights at the domestic level. It may have the effect of enhancing the domestic justiciability of these (and indeed all sets of) rights. This is because domestic judicial organs can scarcely ignore the developments of international law relative to the cases before them.[147]

The charter seeks to ensure its own domestic implementation mainly via two avenues. First, it empowered the commission to set standards and formulate 'principles and rules aimed at solving legal problems relating to human and peoples' rights and fundamental freedoms'.[148] The expectation is that the domestic courts and tribunals will emulate the commission's example in interpreting and applying human rights norms at the domestic level. Studies have shown that the emerging regional jurisprudence of the African Commission has had its impacts on the domestic adjudication of human rights issues.[149]

Second, the charter contemplates that the principles and rules on human and peoples' rights and freedoms 'formulated' and 'laid down' by the commission would provide a basis upon which 'African Governments may base their legislation'.[150] The process would help the commission kill two birds with one stone: the interpretation and jurisprudence

Downloaded by [University of Canberra] at 16:23 22 March 2012

that would emerge from socio-economic litigations would boost the promotional mandate of the commission by elaborating some of the charter's vague socio-economic rights and freedoms, making it possible for the protective and promotional roles of the commission to mutually reinforce each other.

Be that as it may, the ideal result is for the domestic right holders to be able to access remedies within the legal and institutional arrangement of their home states. It is closer, cheaper, and more accessible, for the complainants. After all, the success or failure of a human rights treaty – including the charter – is gauged by the amount of its influence and the degree to which its guarantees are enjoyed by rights holders at the domestic level.[151] From this perspective, the exemption from the duty of exhaustion of local remedies and direct access to the commission is only a short-term solution to the normative conflict between the charter and domestic norms.

However, the commission needs to devise various means of enhancing states' duty of ensuring domestic compatibility between the charter's socio-economic rights guarantees and local laws and practices. One way of achieving this could be to insist on member states issuing new laws or repealing or bringing existing ones, in order to ensure that their domestic norms and charter-based obligations are compatible.[152] One way for the commission to achieve this is to require states to include this topic in their biennial reports to it, and subject the situation to public scrutiny in the context of examination of state reports. This will allow the state to publicly acknowledge the problem and rectify it. It will also enable the commission to issue its concerns in the resultant concluding observations and follow it up with the state. Individual commissioners could also be more vocal on their promotional visits to members states of the charter, and take it up with the relevant domestic authorities and follow it up. In the interim, as long as such conflicts and problems of (quasi-)judicial enforcement of charter-based socio-economic rights persist, it is vital that the commission continues to serve as a forum of first instance for complaints relating to charter-based socio-economic rights.

7. Conclusion

As demonstrated above, the rule of exhaustion of local remedies admits numerous exemptions, and the duty to exhaust local remedies for violations of socio-economic rights may not always be applicable. The domestic legal systems of African states pose numerous remedial deterrence mechanisms, such that many of the complaints about violations of the charter's socio-economic rights may directly be lodged in and immediately be admissible before the African Commission. The duty to exhaust local remedies may also be excused due to the lack of substantive rights in the national legal system. Or relevant remedies to redress the rights' violations may be unavailable, inadequate or ineffective. Moreover, judicial and quasi-judicial bodies may be prevented from hearing complaints based on violations of socio-economic rights due to the DPSP clauses. The ensuing situation leads to an absence, inadequacy or ineffectiveness of domestic remedies. This does not necessarily mean that victims of socio-economic rights violations lack remedies altogether, or states responsible for violations are exempt from repairing such violations. The commission, in what constitutes the reversal of roles between national and regional tribunals, would step in and award appropriate remedies in place of the national courts.

As such, the direct application of the local remedies rule may turn out to be the exception, and exemptions may then become the rule until states remove domestic obstacles, in order to enable socio-economic litigants to access their domestic remedies on the same footing as those complaining about civil and political rights violations. State parties to

Downloaded by [University of Canberra] at 16:23 22 March 2012

the charter are obligated to bring their domestic norms into line with their charter-based obligations. Until and unless African states accord domestic protection to charter-based socio-economic rights and ensure normative compatibility between their domestic laws relating to socio-economic rights and their charter-based undertakings, complainants seeking remedies for violations of this category of rights would base their claims on the regional human rights treaties. For the foreseeable future, the fate of socio-economic rights in numerous African states remains firmly tied to the effectiveness of the African Charter and the works of the African Commission (and African Court).

While this clearly defies the principles of complementarity and subsidiarity, the multitude of normative deterrence mechanisms installed by numerous African states to hinder domestic justiciability of socio-economic rights makes the regional mechanism the primary forum of redress for violations of the charter's socio-economic rights guarantees. In the end, the commission may become a tribunal of first instance for socio-economic rights of the charter, and exhaustion of local remedies, normally the rule, becomes the exception and the exception becomes the rule for the foreseeable future. This leaves the commission with the hefty task of convincing the states to ensure normative compatibility between the charter's norms and domestic legislation and practices.

Downloaded by [University of Canberra] at 16:23 22 March 2012

Acknowledgements

I would like to thank Professor Hilary Charlesworth and the associate editor of this journal for their illuminating comments on an earlier version of this work.

Notes

1. Organization of African Unity, African [Banjul] Charter on Human and Peoples' Rights, adopted 27 June 271981, OAU Doc. CAB/LEG/67/3 Rev. 5, 21 I.L.M. 58 (1982); entered into force 21 October 1986.
2. Christof Heyns, 'Civil and Political Rights in the African Charter' in *The African Charter on Human and Peoples' Rights: The System in Practice, 1986–2000*, ed. Malcolm Evans and Rachel Murray (Cambridge: Cambridge University Press, 2002), 137, 137; J. Oloka-Onyango, 'Reinforcing Marginalized Rights in an Age of Globalization: International Mechanisms, Non-State Actors, and the Struggle for Peoples' Rights in Africa', *American University International Law Review* 18 (2003), 851, 853–854; Dinah Shelton, 'Decision Regarding Communication 155/96 (Social and Economic Rights Action Centre/Centre for Economic and Social Rights v. Nigeria)', *American Journal of International Law* 96 (2002), 937, 941.
3. African Charter, preamble, Para 8.
4. For an elaboration of the concept 'justiciability', see Section 2, below.
5. Communication 155/96, *The Social and Economic Rights Action Center and the Center for Economic and Social Rights vs Nigeria*, 15th Annual Activity Report (2002), Para 68 (hereinafter the SERAC case).
6. (Combined) Communications 54/91, 61/91, 98/93. 164-196/97 and 210/98, *Malawi African Association and Others v Mauritania*, 13th Annual Activity Report (2000) Para 80 (hereinafter *Malawi African Association* case).
7. The then newly emerging Eritrea was the last state to accede to the charter in January 1999. See the status of ratification of African Union treaties at http://www.achpr.org/english/ratifications/ratification_african%20charter.pdf (accessed 15 May 2011).
8. See Section 5, below.
9. Takele Soboka Bulto, 'The Indirect Approach to Promote Justiciability of Socio-Economic Rights of the African Charter on Human and Peoples' Rights', in *Human Rights Litigation and the Domestication of International Human Rights in Sub-Saharan Africa*, ed. Rachel H Murray (Stockholm and Nairobi: International Commission of Jurists, 2009), 135, 149–150.
10. Michael K. Addo, 'Justiciability Re-Examined' in *Economic, Social and Cultural Rights: Progress and Achievement*, eds. Beddard Ralph and Dilys M. Hill (London: Macmillan 1992) 93,

Downloaded by [University of Canberra] at 16:23 22 March 2012

94–96; Monica Feria Tinta, 'Justicability of Economic, Social, and Cultural Rights in the Ainter-American System of Protection of Human Rights: beyond Traditional Paradigms', *Human Rights Quarterly* 29 (2007), 431, 433; Kitty Arambulo, *Strengthening the Supervision of the International Covenant on Economic, Social and Cultural Rights: Theoretical and procedural Aspects* (Cambridge: Intersentia, 1999), 55.

11. Frans Viljoen, 'National Legislation as a Source of Justiciable Socio-Economic Rights' *ESR Review* 6 no. 3 (2005), 6.
12. See, for instance, 'the right to work under equitable and satisfactory conditions' (Article 15), 'the right to enjoy the best attainable state of physical and mental health' (Article 16), and 'the right to education' (Article 17).
13. The African Commission ruled that complainants 'do not necessarily have to be the victim of such violations or members of their families. This characteristic of the African Charter reflects sensitivity to the practical difficulties that individuals can face in countries where human rights are violated. The national or international channels of remedy may not be accessible to the victims themselves or may be dangerous to pursue'. See *Malawi African Association* case, Para 78. See also Morten Peschardt Pedersen, 'Standing and the African Commission on Human and Peoples' Rights' *African Human Rights Law Journal*, 6 (2006), 407, 411; George William Mugwanya, 'Realising Universal Human Rights Norms through Regional Human Rights Mechanisms: Reinvigorating the African System', *Indiana International and Comparative Law Review* 10 (1999), 35–46.
14. Despite the lack of an explicit legal basis in the charter for the provision of legal remedies, the commission has developed a practice of ordering appropriate remedies for violations of charter-based rights and freedoms. See Frans Viljoen, 'A Human Rights Court for Africa, and Africans', *Brooklyn Journal of International Law* 30 (2004), 1, 14–15; Godfrey M. Musila, 'The Right to an Effective Remedy Under the African Charter on Human and Peoples' Rights', *African Human Rights Law Journal* 6 (2006), 442, 447–458. See also, generally, Gino J. Naldi, 'Reparation in the Practice of the African Commission on Human and People's Rights', *Leiden Journal of International Law* 14 (2001), 681.
15. See Notes 76–77, below, and accompanying text.
16. See Notes 78–79, below, and accompanying text.
17. W. Gary Vause, 'The Subsidiarity Principle in European Union Law – American Federalism Compared', *Case Western Reserve Journal of International Law* 27 (1995), 61, 65–66.
18. Carlos Manuel Vazquez, 'Treaties as Law of the Land: The Supremacy Clause and Presumption of Self-Execution', *Harvard Law Review*, 121, no. 1 (2008), 1, 14.
19. Frans Viljoen, 'Communications under the African Charter: Procedure and Admissibility' in *The African Charter on Human and Peoples' Rights: The System in Practice 1986–2006*, 2nd edn, eds. Malcolm Evans and Rachel Murray (Cambridge: Cambridge University Press, 2008), 76, 111.
20. Louis Henkin, *The Rights of Man Today* (Flemington, NJ: Stevens and Son, 1979), 79.
21. Communication 299/05, *Anuak Justice Council v Ethiopia*, 20th Annual Activity Report, Para 47.
22. Frans Viljoen, *International Human Rights Law in Africa* (Oxford: Oxford University Press, 2007), 573.
23. Ibid., 576.
24. Ibid., 580–581.
25. Ibid., 582.
26. Perhaps the remaining other options available to victims of domestic socio-economic rights violations are to resort to administrative law remedies – where available, not only generally but also in the context of a complainant's specific case – and to use civil and political rights to render socio-economic rights (indirectly) justiciable. For a general analysis of the latter option, see Takele Soboka Bulto, 'The Utility of Cross-Cutting Rights in Enhancing Justiciability of Socio-Economic Rights in the African Charter on Human and Peoples' Rights', *The University of Tasmania Law Review* 29, no. 2 (2009), 142.
27. Gerald L. Neuman, 'Human Rights and Constitutional Rights: Harmony and Dissonance' *Stanford Law Review* (2002), 1,863.
28. See Jean Allain and Andrea O'shea, 'African Disunity: Comparing Human Rights Law and Practice of North and South African States', *Human Rights Quarterly* (2002) 24, 86; John Cantius Mubangizi, 'The Constitutional Protection of Socio-economic Rights in Selected African Countries: A Comparative Evaluation', *African Journal of Legal Studies* 2 (2006), 1.

29. This is part of states' explicit undertaking under the obligations clause of the charter, which specifically require state parties to take, *inter alia*, legislative measures to ensure the domestic applicability of the charter's rights and freedoms. See African Charter (Art 1).
30. Philip Alston, 'The Purposes of Reporting', in *Manual on Human Rights Reporting Under Six Major International Human Rights Instruments* (Office of the UN High Commissioner for Human Rights, 1997), 24.
31. Under Art 26 of the VCLT, 'Every treaty in force is binding upon the parties to it and must be performed by them in good faith'.
32. J.F. O'Connor, *Good Faith in English Law* (Aldershot: Dartmouth, 1990), 5–10.
33. Hugo Grotius, *De Jure Belli ac Pacis* (1925), quoted in: Maria Manuela Farrajota, 'Notification and Consultation in the Law Applicable to International Watercourses', in *Water Resources and International Law*, eds. L Boisson De Chazournes, and Salman A Salman (Leiden: Martinus Njhoff Publishers, 2005), 281.
34. O'Connor (n 32 above) 35–42; Georg Schwarzenberger, *International Law*, 3rd edn (Flemington, NJ: Stevens and Sons, 1957) 15.
35. VCLT, Art 18.
36. Curtis A. Bradley, 'Unratified Treaties, Domestic Politics, and the US Constitution', *Harvard International Law Journal* 48, no. 2 (2007), 307.
37. Ian Brownlie, *Principles of Public International Law*, 7th edn (Oxford: Oxford University Press, 2008), 34.
38. (1932) *PCIJ Reports*, Ser.A/B, No. 46, 167.
39. (1930) *PCIJ Reports*, Ser.A/B, No. 17, 32.
40. (1931) *PCIJ Reports*, Ser.A/B, No. 44, 24.
41. *ICJ Reports* (1951), 116 at 132
42. *ICJ Reports* (1955), 4 at 20–21.
43. Art. 27 of the convention.
44. See Inter-American Court Of Human Rights, Advisory Opinion Oc-14/94, *International Responsibility for the Promulgation and Enforcement of Laws in Violation of the Convention (Arts. 1 and 2 of the American Convention on Human Rights)*, 9 December, 1994, Para 35.
45. Communication No 211/98, *Legal Resources Foundation vs Zambia*, 14th Annual Activity Report, (African Commission on Human and Peoples' Rights, 2001), Para 59–60.
46. Communication 129/94, *Civil Liberties Organisation v Nigeria*, 9th Annual Activity Report (African Commission on Human and Peoples' Rights, 1996) Para 12.
47. Communications 147/95 and 149/96, *Sir Dawda K Jawara v The Gambia*, 13th Annual Activity Report (African Commission on Human and Peoples' Rights, 2000), Paras 48–50.
48. CESCR General Comment 9, 'The Domestic Application of the Covenant' E/C12/1998/24, CESCR, 3 December, Nineteenth Session (1998), 8–52.
49. *Exchange of Greek and Turkish Populations*, Permanent Court of International Justice, Advisory Opinion, PCIJ Reports 1925, Series B, No. 10, 20.
50. Communication 241/2001, *Purohit and Moore v The Gambia*, 16th Annual Activity Report (2003) Para 43.
51. C.H. Heyns and Frans Viljoen, *The Impact of the United Nations Human Rights Treaties on the Domestic Level* (London: Kluwer Law International, 2002), 14.
52. Ibid.
53. Comment, cited above at note 36 above, Para 2.
54. Alston, cited above at note 30, 21.
55. Purohit and Moore (note 50 above) Para 42–43.
56. Takele Soboka Bulto, 'The Monist–Dualist Divide and the Supremacy Clause: Revisiting the Status of Human Rights Treaties in Ethiopia', *Journal of Ethiopian Law* 23, no. 1 (2009), 132, 145.
57. As the Inter-American Court emphasised: 'the promulgation of a law that manifestly violates the obligations assumed by a state upon ratifying or acceding to the Convention constitutes a violation of that treaty and, if such violation affects the guaranteed rights and liberties of specific individuals, gives rise to international responsibility for the state in question'. See Advisory Opinion Oc-14/94 (n 44 above) Para 50.
58. Riccardo Pisillo Mazzeschi, 'Exhaustion of Domestic Remedies and State Responsibility for Violation of Human Rights', *Italian Yearbook of International Law* 10 (2000), 17; J.E.S.

Downloaded by [University of Canberra] at 16:23 22 March 2012

Fawcett, 'The Exhaustion of Local Remedies: Substance or Procedure?', *British Year Book of International Law* 31 (1954), 452.
59. See Mazzeschi (n 58 above), 17.
60. Fawcett (n 58 above), 452; Ian Brownlie, *Principles of Public International Law*, 7th ed, (Oxford: Oxford University Press, 2008), 492.
61. Louis B. Sohn, 'The New International Law: Protection of the Right of Individuals Rather Than States', *American University Law Review* 32 (1983), 1, 4; Mazzeschi (58 above), 17.
62. See generally Dinah L. Shelton, 'Case Concerning Avena and other Mexican Nationals (Mexico v United States)', *American Journal of International Law* 98 (2004), 559.
63. Sohn (n 61 above), 4; Ian Brownlie, *Principles of Public International Law*, 7th ed, (Oxford: Oxford University Press, 2008), 492.
64. Francisco Forrest Martin et. al., *International Human Rights and Humanitarian Law: Treaties, Cases and Analysis* (1st ed, 2006), 290.
65. *Anuak Justice Council* (n 21 above), Para 48.
66. (Joined) *Communications 147/95 and 149/96, Sir Dawada K Jawara v The Gambia*, 13th Annual Activity Report (2000), Para 30.
67. SERAC case (n 5 above), Para 38.
68. *Interhandel* case (Switzerland v United States), ICJ Reports (1959), 6, Para 27.
69. Jawara (n 66 above), Para 32.
70. Fawcett (n 58 above), 452.
71. Jawara (n 66 above), Para 31; (Joined) Communication Nos. Nos. 25/89, 47/90, 56/91, 100/93, *Free Legal Assistance Group, Lawyers' Committee for Human Rights, Union Interafricaine des Droits de l'Homme, Les Temoins de Jehovah vs Zaire*, 9th Annual Activity Report, *1995/1996* (AHG/207 (XXXII), Para 36 (hereinafter *Free Legal Assistance Group* case); see also *Malawi African Association* (n 6 above), Para 80; *Anuak Justice Council* (n 21 above), 47.
72. *Free Legal Assistance Group* Case (n 71 above), Para 36.
73. SERAC case (n 5 above), Para 38.
74. Ibid.
75. *Malawi African Association* (n 6 above), Para 80; (Joined) Communications 48/90, 50/91, 52/91, 89/93, *Amnesty International and Others v Sudan*, 13th Annual Activity Report (2002), Para 32; *Anuak Justice Council* (n 21 above), Para 48.
76. Ibid.; see also Viljoen (n 19 above), 111.
77. George A. Bermann, 'Subsidiarity and the European Community', *Hastings International and Comparative Law Review* 17 (1994), 97.
78. *Anuak Justice Council* (n 21 above), Para 48.
79. SERAC case (n 5 above), Para 37.
80. Ibid., 39.
81. *Malawi African Association* (n 6 above), Para 80.
82. Louis Henkin, 'Human Rights and State "Sovereignty"', *Georgia Journal of International and Comparative Law* 25 (1995–1996), 31, 34.
83. Frans Viljoen, *International Human Rights Law in Africa* (Oxford: Oxford University Press, 2007), 17.
84. Viljoen (n 76 above), 88.
85. *Free Legal Assistance Group* Case (n 71 above), Para 36.
86. Jawara (n 66 above), Para 31.
87. Ibid., Para 32.
88. *Anuak Justice Council* (n 21 above), Para 51.
89. Jawara (n 66 above), Para 34.
90. Ibid., Para 32; *Anuak Justice Council* (n 21 above), Para 52.
91. *Anuak Justice Council* (n 21 above), Para 52.
92. Ibid.; Jawara (n 66 above), Para 35.
93. Jawara (n 66 above), Para 32.
94. *Anuak Justice Council* (n 21 above), Para 52.
95. Jawara (n 66 above), Para 35.
96. SERAC case (n 5 above), Para 41.
97. Jawara (n 66 above), Para 35; *Anuak Justice Council* (n 21 above), Para 52.

Downloaded by [University of Canberra] at 16:23 22 March 2012

98. Communication 235/2000, *Dr Curtis Francis Doebbler v Sudan*, 27th Annual Activity Report (2009), Para 116.
99. Communication 231/99, *Avocats Sans Frontieres (on behalf of GaëtanBwampamye) v Burundi, 14th Annual Activity Report* (2001), Para 23; *Anuak Justice Council* (n 21 above), Para 52.
100. Jawara (n 66 above), Para 33–34; *Anuak Justice Council* (n 21 above), Para 50.
101. Jawara (n 66 above), Para 33–34; *Anuak Justice Council* (n 21 above), Para 52.
102. Comunication 71/92, *Rencontre Africaine pour la Defence des Droits de l'Homme v Zambia*, 10th Annual Activity Report (1997), Para 13.
103. Communication 198/97, *SOS–Esclaves v. Mauritania*, 12th Annual Activity Report (1999), Para 14–16.
104. See Bulto (n 9 above), 169; see SERAC case (n 5 above), Para 36–41.
105. SERAC case (n 5 above), Para 36–41.
106. Jawara (n 66 above), Para 33—34.
107. In general, see Jean Allain and Andrea O'shea, 'African Disunity: Comparing Human Rights Law and Practice of North and South African States', *Human Rights Quarterly* 24 (2002), 86.
108. Christof and Frans Viljoen Heyns, 'The Impact of the United Nations Human Rights Treaties on the Domestic Level', *Human Rights Quarterly* 23 (2001), 483, 492.
109. Fawcett (n 58 above), 455.
110. SERAC case (n 5 above), Para 37.
111. See Viljoen (n above), 582–583.
112. Ibid., 576–581.
113. See, generally, Kent Roach, 'Crafting Remedies for Violations of Economic, Social and Cultural Rights' in *The Road to a Remedy: Current Issues in the Litigation of Economic, Social and Cultural Rights*, eds. Malcolm Langford and Bet Thiele John Squires (Sydney: Australian Human Rights Centre, 2005), 111; Naldi (n 14 above), 685–689.
114. See generally John Cantius Mubangizi, 'The Constitutional Protection of Socio-economic Rights in Selected African Countries: A Comparative Evaluation', *African Journal of Legal Studies*, 2 (2006), 1; Viljoen (n above), 568–585.
115. See Viljoen (n above), 576; in general also see Mubangizi (n 114 above); Justice N. Nwobike, 'The African Commission on Human and Peoples' Rights and the Demystification of Second and Third Generation Rights under the African Charter: Social and Economic Rights Action Centre (SERAC) and the Centre for Economic and Social Righst (CESCR) v Nigeria', *African Journal of Legal Studies*, 1 (2005), 129, 140–141.
116. Viljoen (n above), 576.
117. See *Government of the Republic of Namibia and others v Mwilima and Others*, 2002 NR 235 (SC), Para 53.
118. SERAC case (n 5 above), Para 37.
119. Ibid.
120. The possibility of using administrative remedies or the use of civil and political rights in a way that enhances the domestic justiciability of socio-economic rights might hedge down this drastic scenario. See also Bulto (n 104 above).
121. (Joined) Communications 105/93, 128/94, 130/94 and 152/96, Media Rights Agenda and others v Nigeria, 12th Annual Activity Report (1999), Para 50.
122. Ibid., Para 51.
123. See A.A. Oba, 'The African Charter on Human and Peoples' Rights and Ouster Clauses Under the Military Regimes in Nigeria: Before and After September 11', *African Human Rights Law Journal* 4 nos. 275–302 (2004), 301.
124. Lilian Chenwi, 'Correcting the Historical Asymmetry between Rights: The Optional Protocol to the International Covenant on Economic, Social and Cultural Rights', *African Human Rights Law Journal* 9 (2009), 23, 36.
125. *Free Legal Assistance Group* Case (n 71 above), Para 37.
126. Ibid.
127. Communication 235/2000, *Dr Curtis Francis Doebbler v Sudan*, 27th Annual Activity Report (2009), Para 117.
128. Viljoen (n 76 above), 119.
129. *Free Legal Assistance Group* Case (n 71 above), Para 36.
130. SERAC case (n 5 above), Para 38. See n 73 and accompanying text.

Downloaded by [University of Canberra] at 16:23 22 March 2012

131. Martin Scheinin, 'Economic, Social and Cultural Rights' in *Economic, Social and Cultural Rights: A Textbook*, eds. Asbjørn Eide, Catarina Krause and Allan Rosas, 2nd edn (Martinus Nijhoff Publishers, 2001), 29, 42.
132. Robert E. Robertson, 'Measuring State Compliance with the Obligations to Devote the "Maximum Available Resources" to Realizing Economic, Social, and Cultural Rights' *Human Rights Quarterly* 16 (1994), 693–694; Philip Alston, 'Out of the Abyss: The Challenges Confronting the New UN Committee on Economic, Social and Cultural Rights', *Human Rights Quarterly* 9 (1987), 332, 351–353.
133. Jernej Letnar Cernic, 'Corporate Obligations under the Human Right to Water', *Denver Journal of International Law and Policy* 39, no. 1 (2011), 303, 305.
134. Onora O'Neill, 'The Dark Side of Human Rights', *International Affairs* 81, no. 2 (2005), 427, 427.
135. Ibid.; Robertson (n 132 above), 693–694.
136. See CESCR, 'General Comment No. 15: Substantive Issues Arising in the Implementation of the International Covenant on Economic, Social and Cultural Rights (adopted 11–29 November 2002)' (UN Committee on Economic, Social and Cultural Rights, (2002).
137. Stephen C. McCaffrey, 'The Human Right to Water', in *Fresh Water and International Economic Law*, eds. Edith Brown Weiss, Laurence Boisson de Chazournes and Nathale Bernasconi-Osterwalder (2005), 93, 115.
138. Stephen Tully, 'A Human Right to Access Water? A Critique of General Comment No. 15', *Netherlands Quarterly of Human Rights* 23 (2005), 35, 35.
139. Richard P. Hiskes, 'Missing the Green: Golf Course Ecology, Environmental Justice, and Local "Fulfillment" of the Human Right to Water', *Human Rights Quarterly* 32 (2010), 326, 327.
140. For an ongoing debate whether to incorporate socio-economic rights within the charter of rights in Australia, see generally Andrew Byrnes, 'Second-Class Rights Yet Again? Economic, Social and Cultural Rights in the Report of the National Human Rights Consultation', (2010) 33(1) *University of New South Wales Law Journal* 193. See also Hilary Chalesworth, et al, 'Australian Capital Territory Economic, Social and Cultural Rights Research Project: Report -September 2010' (2010) available at : http://acthra.anu.edu.au/PESCR/Final%20report/Final%20Report%20of%20the%20ACT%20ESCR%20Research%20Project_9%20December%202010.pdf; accessed 26 May 2011.
141. Adopted and opened for signature, ratification and accession by General Assembly resolution 2200A (XXI) of 16 December 1966; entry into force 3 January 1976, in accordance with article 27.
142. Optional Protocol to the International Covenant on Economic, Social and Cultural Rights, adopted by the UN General Assembly on 10 December 2008 (not yet in force). As at the date of writing only three states – Ecuador, Mongolia and Spain – have ratified the protocol in that particular order. In terms of its Article 18(1), seven more ratifications/accessions are required to trigger the Optional Protocol into force.
143. Carlson Anyangwe, 'Obligations of State Parties to the African Charter on Human and Peoples' Rights', *African journal of International and Comparative Law* 10, no. 4 (1998), 625, 658.
144. Chidi Anselm Odinkalu, 'Analysis of Paralysis or Paralysis by Analysis? Implementing Economic, Social, and Cultural Rights under the African Charter on Human and Peoples' Rights', *Human Rights Quarterly* 23 (2001), 327, 366.
145. Nana K.A. Busia, Jr. and Bibiane G. Mbaye, 'Filing Communications on Economic and Social Rights under the African Charter on Human and Peoples' Rights (The Banjul Charter)', *East African Journal of Peace and Human Rights* 3, no. 2 (1996), 188, 197.
146. Communication 211/98, *Legal Resources Foundation v Zambia*, 14th Annual Activity Report (2001), Para 62.
147. Michael Kirby, 'The Growing *Rapproachment* between International Law and National Law', in *Legal Visions for the 21st Century: Essays in the Honour of Judge Christopher Weeramantry*, eds. Anthony Anghie, and Garry Sturgess (London: Kluwer Law International, 1998), 333, 354
148. Article 45 (1) (b), Kluwer Law International African Charter.
149. See generally Frans Viljoen, 'Application of the African Charter on Human and Peoples' Rights by Domestic Courts in Africa', *Journal of African Law* 43, no. 1 (1999), 1; Obiora

Downloaded by [University of Canberra] at 16:23 22 March 2012

Chinedu Okafor, *The African Human Rights System: Activist Forces and International Institutions* (Cambridge University Press, 2007), 91–219.

150. Article 45 (1) (b), African Charter.

151. C.H. Heyns and Frans Viljoen, *The Impact of the United Nations Human Rights Treaties on the Domestic Level* (London: Kluwer Law International, 2002), 14.

152. This proposal is not entirely new to the commission, but there has been lack of consistency in effort towards this solution. In a joint statement by the Commissioners of the African Commission, academics and NGOs, this issue was taken and stressed, but the subsequent practice of the commission does not show clear follow up or insistence on this position. In this statement, states were to 'incorporate into domestic law and fully implement the provisions of regional and international treaties' on socio-economic rights. See 'Statement from Seminar on Social, Economic and Cultural Rights in the African Charter', (adopted in Pretoria, 13–17 September 2004) *African Human Rights Law Journal* 182 (2005), 189, Para 11 (c) (ii).

Downloaded by [University of Canberra] at 16:23 22 March 2012

View publication stats