

Promoting economic, social and cultural rights in Africa: The African Commission holds a seminar in Pretoria

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1 Introduction

The African Charter on Human and Peoples' Rights (African Charter) bestows a specific mandate on the African Commission on Human and Peoples' Rights (African Commission) to promote and protect human rights in Africa. Article 45 of the African Charter states that, in order to fulfil this mandate, the African Commission should, amongst others, organise 'seminars, symposia and conferences'. The Commission's promotional activities have paid lip service to economic, social and cultural rights by being predominantly focused on civil and political rights.¹ Concerns have been raised by representatives of civil society organisations during several of the Commission's sessions that there is a need for a focus on socio-economic rights too.²

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¹ For a review of the Commission's promotional activities, see EVO Dankwa 'The promotional role of the African Commission 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) 335–352.

² See eg the Report of the 17th session of the African Commission on Human and Peoples' Rights, Lomé, Togo, 13–22 March 1995, published by the African Society of International and Comparative Law 8. In the 35th session of the African Commission, the Community Law Centre, through the Human Rights Institute of South Africa (HURISA), made a statement on the role of the Commission in promoting and

Thus, in conformity with the above-mentioned mandate, and probably also in response to the aforesaid concerns, the African Commission, in collaboration with the International Centre for Legal Protection of Human Rights (Interights), the Cairo Institute for Human Rights Studies and the Centre for Human Rights at the University of Pretoria, co-hosted a seminar on 'Economic, Social and Cultural Rights in Africa', held in Pretoria from 13 to 17 September 2004. Participants, who were from both anglophone and francophone countries, included members of the African Commission, representatives of 12 African states, United Nations (UN) agencies, regional economic communities, civil society organisations, national human rights institutions, as well as academics and legal practitioners.

The background to the seminar was the widespread prevalence of poverty in Africa, on the one hand, and in sharp contrast, the numerous strides that have been made on the realisation of economic, social and cultural rights in Africa, on the other. The African Commission and some national courts have developed an impressive body of jurisprudence on these rights. However, the implementation of this jurisprudence from the governments' side has either been dismally lacking, or has been tortoise-like. Lack of implementation effectively makes a mockery of these heralded achievements. It makes them nothing more than symbolic gestures of a progressive judiciary in delineating the meaning of these rights.

Another challenge, at times worsened by the lack of compliance with the courts' decisions,³ is the prevalence of endemic poverty and under-development on the continent. The seminar was therefore premised on this contrasting reality and the need to make effective achievements in order to overcome challenges. Thus, the objectives of the seminar were:

- to specify the nature of state obligations in relation to socio-economic rights as enshrined in the African Charter;
- to identify, in the light of African realities, the priorities for the African Commission regarding the promotion of these rights; and
- to determine the measures to be undertaken to effectively realise socio-economic rights on the continent.

The deliberations within these broad objectives were to culminate in the development of a concrete outcome: the adoption of a declaration with

protecting socio-economic rights and called for an increased attention to these rights. See (2004) 5(3) *ESR Review* 16.

³ Although the South African Constitutional Court delivered a highly renowned decision in *Government of the Republic of South Africa & Others v Grootboom & Others* 2001 1 SA 46 (CC) (*Grootboom*), four years after that decision, the litigants in that case are still living in deplorable conditions. See K Pillay 'Implementation of *Grootboom*: Implications for the enforcement of socio-economic rights' (2002) 2(6) *Law, Democracy and Development* 255–277.

a set of guidelines for the implementation of socio-economic rights in Africa, to be submitted to the African Commission for further adoption and endorsement. However, the seminar ended up adopting a statement instead. I deal with the nature and overview of the statement later.

2 Themes and format of the seminar

Predictably, the seminar focused on how to implement the provisions of the African Charter relating to economic, social and cultural rights effectively with respect to the role of the African Commission. It dealt with issues ranging from theoretical, conceptual to specific themes relating to these rights under the African Charter.

The seminar was officially opened by South Africa's Deputy Minister of Foreign Affairs, Ms Sue van der Merwe. It was then divided into plenary and breakaway group sessions. Papers delivered during plenary were, on theoretical and conceptual themes, the following:

- 'The nature of state obligations on economic, social and cultural rights under international law' by Prof Michelo Hansungule of the Centre for Human Rights (University of Pretoria). This paper extrapolates from the international jurisprudence the nature and scope of state duties in respect of these rights.
- 'A review of the protection of social and economic rights under the African constitutions' by Ibrahim Kane of Interights. This paper advocated for the inclusion of these rights in national constitutions, the incorporation of the relevant international instruments (for example the International Covenant on Economic, Social and Cultural Rights and the African Charter) into municipal law, and the passage of national legislation giving effect to them.
- 'The importance of equality for the realisation of economic, social and cultural rights under the African Charter' by Prof Alain Olinga of the Institut des Relations Internationales du Cameroun (IRIC). This paper dealt with the conceptual relationship between the principle of equality and non-discrimination and socio-economic rights, and argued that the advancement of the former facilitates the enjoyment of the latter, and the other way round.

Papers were also delivered on the right to primary education, primary health care, HIV/AIDS and the right of access to treatment, cultural rights, land rights and the role of women in the implementation of economic, social and cultural rights. Another presentation was delivered on the mechanisms and institutions for realising economic, social and cultural rights under the African Charter.

During the six workshops, further discussions were conducted for the purposes of developing concrete proposals for the declaration. These

workshops dealt with education, work and employment, health, land, culture and women's rights respectively. The recommendations emerging from the workshops were further discussed at the plenary sessions.

3 Some intriguing discussion points

While those heated debates leading to the recommendations are beyond the scope of this paper, one can hardly resist discussing some intriguing observations that some proposals were nothing short of ambition and vagueness. First, there was a tendency to propose a multiplicity of institutions as a solution to the lack of implementation of economic, social and cultural rights. For example, proposals were made for the establishment of special rapporteurs on education, work and employment, health, education, respectively, to operate under the auspices of the African Commission. Some even suggested that the commissioners should act as these special rapporteurs. This proposition, as the commissioners warned, was ignorant of the resource and capacity constraints in the African Commission itself, including the fact that they do not have the research staff complement like other similar institutions elsewhere,⁴ and that some commissioners are part-time members.

A proposal was also made that the state should spend more on health than on defence. The danger that such a proposal poses is that it reintroduces the hierarchical proposition that some rights are more important than others – a proposition that is ignorant of the universal principle of the interdependence and indivisibility of rights. It also has the danger of not only dividing civil society organisations who are working in different areas of economic, social and cultural rights, but it also assumes the poor and marginalised would choose health services over education, food or housing, etc.

A suggestion was made that there should be a national task force and national special rapporteurs over and above national human rights institutions, to monitor the implementation of the rights (particularly education rights). The difficulty this proposal had was that it would encourage the duplication of functions and the drainage of resources. Another proposal naively imposed unlimited obligations on non-state actors to provide social protection to poor people. Yet, while it is clear that non-state actors have a duty to respect, it is disputable whether they have an obligation to fulfil, particularly 'to provide'. The undisputed recommendations culminated into a statement.

⁴ Eg, each of the South African Constitutional Court judges has one or two assistant researchers. The Committee on Economic, Social and Cultural Rights also has a research staff complement during the time of preparing for the development of the General Comments.

4 The statement: A reflection on some controversial issues during the concluding stage

The draft statement adopted at the end of the seminar was a result of intense deliberations and heated debates. It reflects the wide-ranging nature of these deliberations *vis-à-vis* the deplorable socio-economic conditions within which a majority of African people live and the lack of effective implementation of the political commitments made in relation to several international and regional instruments, in particular, the African Charter.

4.1 The status of the statement

The status of the statement is dealt with in the introductory section of the document. As noted, the original idea of the organisers was to achieve a specific outcome: the adoption of a declaration. However, in the concluding session, during the consultative discussion stage on the so-called 'draft declaration', some commissioners objected to the use of the term 'declaration'. They argued that it would be improper for the commissioners to adopt a declaration that will also be presented to them for consideration and adoption at the next ordinary session of the African Commission. By adopting this declaration as participants would have effectively meant that they would be binding the African Commission prematurely and inappropriately. This anomaly was clear from the manner in which the sentence referring to the adoption of a declaration was framed in the introductory paragraph: 'The participants at the workshop, who included members of the African Commission' adopted the following declaration'.

It was thus felt that the word 'declaration' was too loaded in the circumstances. Rather, it should be replaced with the word 'statement'. The aforesaid anomaly was further cured by the insertion of a directional sentence:

The participants at the workshop, who included members of the African Commission . . . adopted the following statement, *which is recommended for consideration and adoption by the African Commission on Human and Peoples' Rights at its next ordinary session* (my emphasis).

The statement is not intended to be a binding document. But, as the organisers envisaged, it sets out guidelines for the implementation of economic, social and cultural rights in the region of Africa. It is prepared to guide the work of the African Commission in respect of the obligations of various stakeholders in protecting and promoting economic, social and cultural rights. However, once the African Commission adopts it by way of a resolution, then it will, like other resolutions⁵ and similar

⁵ The resolutions of the African Commission are available online at <http://www.achpr.org> (accessed 31 August 2004).

international documents,⁶ have an authoritative value in the interpretation of economic, social and cultural rights.

4.2 The Preamble

The statement describes, in the Preamble, the broad commitment of African states in implementing economic, social and cultural rights as enshrined in international human rights instruments, and highlights some of the current socio-economic deprivations that most African people continue to endure, notwithstanding these commitments. Amongst the crucial omissions in the draft document, which are now included in the statement, was whether mention should be made of the Constitutive Act of the African Union. While some argued that the Constitutive Act was irrelevant to the realisation of economic, social and cultural rights, a majority was of the view that it contained fundamental principles of democratic and human rights norms, the rule of law and good governance, all of which are prerequisites for the promotion of all human rights. Putting to an end the resistance in acknowledging economic, social and cultural rights as having the same status of justiciability as civil and political rights, was viewed as one of the serious impediments to realising the former category of rights. The questions of lack of human security due to prevailing conditions of poverty and underdevelopment and the failure to address poverty through development were raised as critical omissions in the statement. The statement identifies a catalogue of constraints to the enjoyment of economic, social and cultural rights, and calls upon states to take appropriate measures to address them. This catalogue expanded considerably from nine to 18 identified constraints (at paragraph 3) during the consultative discussion stage.

4.3 Equality and the principle of non-discrimination in the implementation of socio-economic rights

Before discussing the content of the economic, social and cultural rights under the African Charter, in line with the principle of interdependence and indivisibility of rights, the statement reiterates the obligations of the state to eliminate all forms of discrimination (at paragraph 4). An interesting observation, though, in this provision is the specific mention of only three vulnerable groups: women, refugees and internally

⁶ The General Comments generated by the Committee on Economic, Social and Cultural Rights, the supervisory body of the International Covenant on Economic, Social and Cultural Rights, have been very useful and instructive in construing socio-economic rights at both international and municipal level. Eg, the African Commission itself has relied on it; see eg Communication 155/96, *The Social and Economic Rights Action Center and Center for Economic and Social Rights v Nigeria (SERAC)*. So has the South African Constitutional Court in *Grootboom* (n 3 above).

displaced persons. This reflects the strong voices and representation of the representatives of these groups, and perhaps the absence of representativity of other vulnerable groups who often and similarly face discrimination, for example indigenous peoples and people with disabilities. Another observation is that the seminar deliberations rarely addressed issues from children's rights perspectives other than girl children. It is important that in future seminars, the organisers look into the issue of representation with great sensitivity.

4.4 Content of the rights

The draft statement contained a closed list of the contents of each socio-economic right under the African Charter. During the closing discussion, a non-exhaustive list phrase was introduced. Thus, each introductory sentence states that 'the right to . . . under the Charter entails, *amongst other things*, the following . . .' (my emphasis). This phrase was not only important in giving leeway to the African Commission and other judicial bodies to expand on it, but it was also in line with the specific brief to the workshops and paragraph 11 of the statement. The brief was that delegates would identify only the essential content of the rights. So, the lists contained in the workshop reports, which culminated into a comprehensive list in the statement, were not, in the first place, exhaustive. Paragraph 11 specifically states that contents identified are only the core essentials of economic, social and cultural rights.

The drafters of the document probably envisaged a much more expansive list of rights in the final statement. They included not only the African Charter provisions, but also those that are not expressly recognised under the Charter, like the right to social security and protection, shelter, housing and food. They were arguably motivated to do so by the African Commission's innovative reading in of these rights into the Charter in *SERAC*.⁷ However, the seminar objected to these rights being included alongside protected rights. It was argued that, rather, there should be a provision at the end of the statement that describes the core content of the unprotected rights and their relationship with other rights. Paragraph 10 of the final statement attempts to do this, but inadequately so. It simply mentions the indivisibility and interdependence between the protected and unprotected rights and enlists the latter without substantiating on its core content as was done with the former.

Perhaps, to link these core contents to the much broader contents, a specific cross-reference should have been made to the other international documents that are authoritative on the nature and scope

⁷ n 6 above.

of these rights in fuller detail. These documents include the relevant General Comments.⁸ On unprotected rights, reference could also have been made, at least, to the relevant international documents such as General Comment No 12 (the right to adequate food) and General Comment No 4 (the right to adequate housing), where the content of these rights is much more detailed, save to say that the scope of the content of the right to social security has not yet been established. Another way of referencing these interpretive documents would have been to recognise them in the Preamble as important reference documents for construing economic, social and cultural rights under the African Charter.

An interesting observation, though, is that not only is the list of the core contents of cultural rights (compared to others) short, but there also seems to be an obvious lack of substance to it. As noted in the Preamble, the provisions relating to cultural rights are found in articles 17(2) and (3), 18(1) and (2) and 61 of the African Charter. It is unimaginable (even to a person not working in the field of cultural rights) that those five core contents are really the only identifiable ones. However, the lack of substance and the shortness of the list are reflective and a consequence of the spirited debates that the session on cultural rights triggered. Unlike with other rights, differences on the points of departure on cultural rights were enormous and a stumbling block to moving the discussion to the recommendation stage. In serious contention were conceptual and definitional issues of what constitutes 'culture' as opposed to (as was confused with) 'customs' and 'traditions'. Thus, what transpires in the final statement is not really surprising.

However, the substantial lack of consensus on the nature and scope of cultural rights requires urgent attention. The seminar recommended broadly (without action attached to it) that consensus needs to be developed in this area. However, this recommendation is unfortunately not captured in the final statement. A specific recommendation should have been that the African Commission should hold a seminar specifically on cultural rights with the view to developing consensus on its nature and scope. This seminar would also address the tendency, as was highlighted during the seminar, to de-link cultural rights from economic and social rights, thus often neglecting or marginalising the former.⁹ Perhaps the proposed seminar should re-affirm the importance

⁸ In particular, General Comment No 14, 'The right to the highest attainable standard of health (art 12 of the Covenant)'; General Comment No 13, 'The right to education (art 13 of the Covenant)'; and General Comment No 4, 'The right to adequate housing (art 11(1) of the Covenant)'.

⁹ This was particularly pointed out by Thiphanyane in critiquing his former institution, the South African Human Rights Commission. Thiphanyane was with the South African Human Rights Commission from 1996 to 2004 as Head of the Research and Documentation Unit. He is now with the Commission on Cultural, Linguistic and Religious Rights as Operations Officer.

of the interdependence and indivisibility of these rights by exploring, not only culture as a self-standing right, but also the cultural aspects of all economic and social rights as well as civil and political rights.

4.5 The recommendations

The statement makes a number of guiding recommendations on the duties of various stakeholders, namely the African Union, the African Commission, the states, civil society organisations, national human rights institutions and international and regional entities in realising economic, social and cultural rights. The emphasis of these recommendations is not so much on creating new duties, but on pointing out and quashing inaction and/or the inadequacies of actions in implementing these rights in accordance with the commitment enshrined in the international instruments and regional frameworks to which most states are bound.

However, the core content of the rights and the recommendations (with obligations of stakeholders) seem to be de-linked from one another. To link them, perhaps, there should have been a provision, following paragraph 11, stating that states and other relevant stakeholders must take all appropriate measures to achieve the realisation of the core content of economic, social and cultural rights as described in the preceding provisions. Without this linking provision, the danger exists that some stakeholders will read their obligations narrowly to exclude those inherent in the core content of the right. This is further exacerbated by the fact that obligations under the recommendations are — without 'amongst others' after, for example, 'states should' — a closed list, meanwhile they do not exonerate all the duties that the aforesaid core content of the rights should naturally impose. Also, the recommendations refer to the obligations of selected core contents of the rights. A declaration of what a right entails is useless if it is not linked to specific measures that ensure that it is realised. For core contents, measures are expressly spelt out under the recommendations. What should be done with those that are not so explicitly spelt out, and who should do it?

The significance of recognising human rights as a fundamental objective of development and that development should achieve the full realisation of all human rights was emphatically articulated in the closing paragraph of the statement.

5 Conclusion

The seminar was an important departure to the African Commission activities for the promotion and protection of economic, social and cultural rights. Participants from wide ranging sectoral representation

applauded the African Commission and its partners for this epoch making event, notwithstanding some serious shortfalls and difficulties experienced during the planning and organisation stage. For example, the fact that some important speakers, like Katarina Tomasevski (UN Special Rapporteur on the Right to Education), Paul Hunt (UN Special Rapporteur on the Right to Health) and Judith Bueno de Mesquita, could not attend the seminar, is an example in point.

The final statement, while incomplete in some areas, provides a useful guide to the core content of and recommendations on how to implement economic, social and cultural rights under the African Charter effectively. Some of the recommendations were quite profound. Unlike a judicial body, the African Commission's decisions are recommendatory and accordingly have no legal force. This was noted as the greatest weakness and that to cure it, the African Union should speed up the establishment of the African Court on Human and Peoples' Rights. In the meantime, the African Union should follow up on the recommendations of the African Commission to ensure implementation of its decisions by the state parties to the African Charter. Non-governmental organisations and civil society organisations should continue bringing cases to the African Commission, and engage in other collaborative initiatives with the Commission.

No doubt, the recommendations in the final statement, if implemented accordingly, will go a long way to strengthening the efforts to the realisation of economic, social and cultural rights on the continent. The ball is now in the African Commission's court to endorse and adopt this statement and its recommendations in its next ordinary session from 23 November to 7 December 2004. Once this is done 'hopefully it becomes a resolution of the Commission' this document will become a useful tool for advocacy activism between civil society organisations and states.