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Approaches to the justiciability of economic, social and cultural rights in the jurisprudence of the African Commission on Human and Peoples' Rights: Progress and perspectives

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Summary

Various approaches to the adjudication of economic, social and cultural rights have developed out of jurisprudential and doctrinal debates around the justiciability of these rights. This article advocates for the application of both direct and indirect approaches to the justiciability of economic, social and cultural rights in the African human rights system. Under the direct approach, it argues for a model that combines the analysis of relevant provisions to identify normative standards and the evaluation of the conduct of states based on those standards. Under the indirect approach, it makes a case for the interdependent interpretation of substantive rights falling in different commonly-used categories to bridge gaps in the protection of specific economic, social and cultural rights and to ensure the coherent application of human rights norms. There is evidence in the jurisprudence of the African Commission on Human and Peoples' Rights that it applies both approaches. Its reasoning in many of the relevant decisions has, however, been lacking in the level of rigour, soberness, detail and consistency that is needed for a principled disposition of cases. The further development of its jurisprudence based on the evaluation of competing approaches to the justiciability of economic, social and cultural rights could increase the legal value of its decisions and the likelihood of their implementation.

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1 Introduction

In contrast with the prevailing trend at the time of its adoption, the African Charter on Human and Peoples' Rights (African Charter) clearly recognises the indivisibility of human rights,[1] and enshrining economic, social and cultural rights together with civil and political rights and collective rights. In addition to such cross-cutting rights as the rights to equality and non-discrimination and the right to dignity, the African Charter guarantees the right to equitable and satisfactory conditions of work, the right to health, the right to education and the right to culture.[2] It supplements these classic economic, social and cultural rights with such related rights as the right to property, the right to protection of the family, the right to economic, social and cultural development and the right to a satisfactory environment.[3]

The African Charter further subjected the aforementioned rights to monitoring by the African Commission on Human and Peoples' Rights (African Commission) – an 11-member quasi-judicial body with promotional and protective mandates.[4] Under its protective mandate, the African Commission is granted power to examine inter-state communications and 'communications other than those of states parties'.[5] Based on the latter provision, the Commission established its individual communications mechanism, under which it considers claims of violation of rights by individuals, groups or their representatives in an adversarial procedure and issues authoritative findings and remedies.

The protection of economic, social and cultural rights as substantive norms and their subjection to adjudicatory enforcement by the African Commission mean that the rights are generally justiciable. The establishment of the African Court on Human and Peoples' Rights (African Court) to complement the protective mandate of the Commission with a judicial mechanism of enforcement leading to binding judgments increases the justiciability of the economic, social and cultural rights protected under the African Charter.[6] Although the Charter does not provide for an exhaustive list and content of economic, social and cultural rights, the authorisation of the African Commission to draw inspiration from international human rights law and practice and

1 Preamble, para 7 African Charter on Human and Peoples' Rights, CAB/LEG/67/3/Rev 5 (1985).

2 Arts 2, 3, 5, 7 & 15-17 African Charter.

3 Arts 14, 18, 22 & 24 African Charter.

4 Arts 30 & 45 African Charter.

5 Arts 46-58 African Charter.

6 Arts 2 & 26-28 Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights, OAU/LEG/EXP/AFCHPR/PROT (III) (2004). A decision has been taken to merge the African Court with the Court of Justice of the African Union, resulting in the Protocol on the Statute of the African Court of Justice and Human Rights which is not yet in force.

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the power of the African Court to enforce any relevant human rights instrument ratified by the states concerned may be used to close the normative gaps.[7] While the African Court has not yet handed down any relevant decision, the African Commission has developed a young economic, social and cultural rights jurisprudence from the small, but relatively sizable, number of pertinent cases.[8] The latter has over the years been applying and giving content to the terse economic, social and cultural rights provisions of the African Charter. Especially in its early days, the Commission's reasoning in its decisions lacked in proper analysis and rigour, but it has improved the quality of its arguments and findings.[9]

The article reviews the jurisprudence of the African Commission to see whether it has developed or followed principled approaches in the application of the economic, social and cultural rights provisions of the African Charter to actual cases. It measures the progress of the Commission's practice of adjudication of economic, social and cultural rights in comparison with approaches developed in other systems and provides perspectives for the further development of its jurisprudence. It argues for the application of methods of adjudication leading to well-reasoned decisions that ultimately increase the legitimacy, and hence compliance with the Commission's findings and recommendations.

2 Approaches to the justiciability of economic, social and cultural rights

Objections to the justiciability of economic, social and cultural rights, which question the legal nature of these rights and the competence of judicial and quasi-judicial organs to enforce them, fail to realise that there is 'no monolithic model of judicial enforcement for all human rights'.[10] Models of review that respect the limits of the power of adjudicatory organs and take the circumstances of each case into account

7 Arts 60-61 African Charter; arts 3 & 7 African Court Protocol.

8 Out of only 71 cases which the African Commission finalised on the merits by the end of 2009, it decided 13 cases involving claims of violations of one or more of the classic economic, social and cultural rights. If we add cases in which violations of the right to property and the right to protection of the family were found, the number jumps to 25, which is 35% of the cases decided on the merits by the end of 2009. There were some relevant pending cases at the time of writing.

9 For a review and characterisation of the African Commission's approach with regard to economic, social and cultural rights cases decided until 2003, see C Mbazira 'Enforcing the economic, social and cultural rights in the African Charter on Human and Peoples' Rights: Twenty years of redundancy, progression and significant strides' (2006) 6 *African Human Rights Law Journal* 333 342-353.

10 AA An-Na'im 'To affirm the full human rights standing of economic, social and cultural rights' in Y Ghai & G Cottrell (eds) *Economic, social and cultural rights in practice: The role of judges in implementing economic, social and cultural rights* (2004) 7.

respond to possible challenges to the justiciability of economic, social and cultural rights. Judicial or quasi-judicial organs may measure the compliance of the actions or inactions of states or their organs against standards that may be derived from provisions of human rights instruments. Approaches or models of adjudication or review are methods by which judicial or quasi-judicial organs derive the standards of evaluation from relevant legal provisions and apply them in their findings on specific issues.

Various approaches to the litigation and adjudication of economic, social and cultural rights have been developed and advanced in the practices of judicial and quasi-judicial organs and in scholarly writings.[11] They may be broadly categorised as direct and indirect approaches. Direct approaches are based on the argument that economic, social and cultural rights are directly enforceable by adjudicatory organs and they apply in systems where the rights are expressly protected as justiciable substantive norms. Indirect or interdependence approaches, which rely on the indivisibility, interdependence and interrelatedness of all human rights, are typically employed in systems where economic, social and cultural rights are not clearly or sufficiently protected in applicable legal instruments.

In the African human rights system where economic, social and cultural rights are protected as (quasi-) judicially enforceable substantive norms, direct approaches to the justiciability of the rights apply. Based on the integrated protection of the various groups of rights in the African Charter, the interdependence approach may also be used to close normative gaps in the Charter that result from the non-inclusion or incomplete protection of some economic, social and cultural rights. The latter is, in a way, an approach for the stronger protection and enforcement of economic, social and cultural rights in the system.

2.1 Direct approaches

In systems where a judicial or quasi-judicial organ has subject matter jurisdiction over clearly protected economic, social and cultural rights, direct approaches have been advocated and applied in the enforcement of negative (non-interference) as well as positive (action-oriented and resource-dependent) duties of states. Two such approaches are as follows: one that relies on the identification of the minimum essential elements of rights, and another that inquires into the reasonableness or justifiability of a state's action or inaction.

2.1.1 Minimum core model

Adopted first by the United Nations (UN) Committee on Economic, Social and Cultural Rights (ESCR Committee), the minimum core model

11 See T Melish *Protecting economic, social and cultural rights in the Inter-American human rights system: A manual on presenting claims* (2002) 193-357.

is a model for the 'assessment' of a state's action in the discharge of its obligations relating to economic, social and cultural rights based on whether it meets minimum essential levels of a right.[12] The model has since been a subject of doctrinal debate as a standard for monitoring and enforcement of economic, social and cultural rights. Young summarises the various approaches to the minimum core as those that identify an 'essential' minimum or absolute foundation for economic, social and cultural rights, those that seek minimum consensus surrounding these rights, and those that correlate the minimum core with minimum obligations.[13] Best exemplified by a definition of the core as the intrinsic and fundamental elements of rights, a normative understanding that identifies minimum entitlements and duties is the prevailing sense in which the minimum core model has been referred to.[14]

Much as it has the advantage of giving normative content to the seemingly crude obligation of 'progressive realisation' and serving as a standard against retrogressive measures, the minimum core model, especially as defined by the ESCR Committee, has limitations in terms of providing clear, simple, consistent and common standards of monitoring or adjudication.[15] The contents of the core have been expanding from 'immediately realisable' negative duties to positive obligations, including the provision of essential drugs and access to education and water facilities.[16] The definition of core obligations does not provide a clear mechanism or methodology for the identification of minimum duties. There is also a question as to whether the minimum core model is suitable for individual or group claims of economic, social and cultural rights.[17] Nonetheless, while the determination of minimum core entitlements and duties should be contextualised, the following may be considered common denominators of the various definitions: the negative obligations of non-interference and non-discrimination; the

12 United Nations Committee on Economic Social and Cultural Rights (ESCR Committee) General Comment 3 The nature of states parties' obligations *(*1990) paras 4 & 10.

13 K Young 'Conceptualising minimalism in socio-economic rights' (2008) 9 *ESR Review* 6 7-9.

14 See F Coomans 'In search of the core content of the right to education' in D Brand & S Russell (eds) *Exploring the core content of economic and social rights: South African and international perspectives* (2002) 166-167. See generally A Chapman & S Russell (eds) *Core obligations: Building a framework for economic, social and cultural rights* (2002).

15 For example, while the Committee makes failure to meet the core minimum exceptionally justifiable under General Comment 3 para 10, it says that the minimum core is non-derogable in General Comment 14, The right to the highest attainable standard of health (2000) para 47 and General Comment 15, The right to water (2003) para 40.

16 See General Comment 13, The right to education (1999) para 57; General Comment 14 para 43; General Comment 15 para 37.

17 See *Government of the Republic of South Africa & Others v Grootboom & Others* 2000 11 BCLR 1169 (CC) para 33.

duty to lay down a legal and policy framework for the realisation of rights, at least part of the duty to protect from the breach of rights by third parties; and the duty to prioritise those in urgent and desperate need. There is also no reason why the definition of such core obligations cannot apply in relation to individual as well as group claims of economic, social and cultural rights.

While adjudicatory organs in various systems have recognised and applied basic and fundamental elements of rights without necessarily using the minimum core concept,[18] the South African Constitutional Court considered the model as a competing approach of adjudication. The Court consistently rejected the idea of directly justiciable minimum core obligations based mainly on a lack of sufficient information, the diversity of needs and opportunities for the enjoyment of the core, the impossibility of giving everyone immediate access to the core and the competence of courts to determine the minimum core standard.[19] Although the difficulty of fully defining the core minimum that applies in all circumstances may be recognised, the Constitutional Court's insistence that it starts from obligations of states in the application of rights and that it does not do rights analysis is difficult to understand.[20] The Court may make a context-based incremental determination of the minimum core by starting with an analysis of rights provisions and the identification of their basic or fundamental elements. Nevertheless, the Court does not reject the minimum core model out of hand as it said that it may take it into account in determining whether measures adopted by the state are reasonable, rather than as a self-standing right conferred on everyone.[21]

In some of its early decisions, the African Commission enforced the 'basic' and 'immediate' elements of economic, social and cultural rights without expressly referring to them as the minimum core. In one such case it held that 'the failure of the government to provide basic services such as safe drinking water and electricity and the shortage of medicine' constituted a violation of the right to health under article 16 of the African Charter.[22] Although the African Commission's conclusion is not based on a proper analysis of the normative contents of the right

18 See M Langford 'Judging resource availability' in J Squires *et al* (eds) *The road to a remedy*: *Current issues in the litigation of economic, social and cultural rights* (2005) 99-100.

19 *Grootboom* (n 17 above) paras 29–33; *Minster of Health & Others v Treatment Action Campaign & Others* 2002 10 BCLR 1033 (CC) (*TAC*) paras 26–39. See also *Lindiwe Mazibuko & Others v City of Johannesburg & Others* 2009 ZACC 28 paras 52-58, 60-62 & 68 (rejecting the argument of the lower courts indicating the possibility of determining the minimum core in relation to the right to water).

20 See D Bilchitz 'Towards a reasonable approach to the minimum core: Laying the foundations for future socio-economic rights jurisprudence' (2003) 19 *South African Journal on Human Rights* 1.

21 *Grootboom* (n 17 above) para 33; *TAC* (n 19 above) para 34.

22 *Free Legal Assistance Group & Others v Zaire* (2000) AHRLR 74 (ACHPR 1995) para 47.

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to health, the case exemplifies the use of basic or essential components of rights, which define the minimum core,[23] in the enforcement of the duty to fulfil the right to health. The finding in the same case that the closure of universities and secondary schools constitutes a violation of the right to education under article 17 of the Charter also coincides with the related minimum duties of states and the principle against retrogressive measures.[24]

The African Commission places a heightened responsibility on states and finds it easy to establish the violation of the right to health in conditions of detention. In a couple of cases it found a denial of access to doctors, and a lack of food, blankets and adequate hygiene in prisons in violation of the right to health under article 16 of the African Charter.[25] The Commission considers the pertinent positive duties of states to be immediate. If the minimum core of the right to health is to be defined in the context of prisons, it would most probably include the elements identified by the Commission. Reading between the lines, one may argue that the Commission's reasoning and findings indicate that the obligations of states to provide health services to prisoners and to maintain healthy prison conditions are among the core minimum of the right to health.

In its celebrated decision in a case that concerned the economic, social and cultural rights of the people of the Ogoni region of Nigeria, the African Commission used the minimum core language more clearly in enforcing the rights to shelter and food, which as shown further below were read into the African Charter through the interdependence approach.[26] First, the Commission observed that the fact that the government gave the green light to private actors to devastatingly affect the well-being of the Ogonis 'falls short of the minimum conduct expected of governments'.[27] It then said that the right to shelter 'at the very minimum' obliges the government to avoid destroying the housing of its citizens and obstructing their efforts to rebuild their homes and to prevent the violation of the right to housing by any other individuals, and found that the government of Nigeria 'has failed to fulfil

23 See ESCR Committee General Comment 14 para 43 (enumerating access to safe and potable water and the provision of essential drugs as part of the minimum core of the right to health). Note that the provisions of art 12(1) of the International Covenant on Economic Social and Cultural Rights, which the General Comment elaborates, resemble those of art 16(1) of the African Charter.

24 *Free Legal Assistance Group* (n 22 above) 48.

25 *Malawi African Association & Others v Mauritania* (2000) AHRLR 146 (ACHPR 2000) paras 121-122; *Media Rights Agenda & Others v Nigeria* (2000) AHRLR 200 (ACHPR 1998) paras 89-91; *International PEN & Others (on behalf of Saro-Wiwa) v Nigeria* (2000) AHRLR 212 (ACHPR 1998) paras 111-112.

26 *Social and Economic Rights Action Centre & Another v Nigeria* (2001) AHRLR 60 (ACHPR 2001) (*Ogoni* case) paras 58-68.

27 *Ogoni* case (n 26 above) para 58.

these two minimum obligations'.[28] The Commission further noted that 'the minimum core of the right to food requires' that the government should not destroy or contaminate food sources, allow private parties to do the same or prevent peoples' efforts to feed themselves, and held that 'the government's treatment of the Ogonis has violated all three minimum core duties of the right to food'.[29] It finally concluded that the Nigerian government 'did not live up to the minimum expectations of the [African] Charter'.[30]

The use of the minimum core language demonstrated that the African Commission has been following the jurisprudential debates about the definition of the normative content of economic, social and cultural rights.[31] The Commission considered the duties to respect (duty to refrain from interference with enjoyment of rights) and protect (duty to protect right-holders against third parties) the rights to housing and food as the minimum core obligations. It did so without engaging in a proper analysis and definition of the normative content of the rights it applied. Its understanding of minimum duties also does not fit perfectly with that of the ESCR Committee, which, for example, elaborated the minimum core of the right to food in terms of availability, acceptability and accessibility of food.[32] Nonetheless, the Commission applied the concept in connection mainly with duties of states which in any case are considered to be among the minimum contents of economic, social and cultural rights.

In a later decision in a case concerning mental health patients in The Gambia, the African Commission defined the obligations of state parties relating to the right to health as 'to take concrete and targeted steps' to realise the right 'without discrimination of any kind'.[33] Although it has not used clear minimum core language in this case, the Commission imported the standards which the ESCR Committee adopted in defining the nature of states' obligations in the General Comment in which it adopted the minimum core model for the first time.[34] It is probably for this reason that commentators close to the Commission considered its definition of the obligations of states in this case as an indication that it was 'leaning towards' or 'importing' the minimum core standard of the ESCR Committee.[35] Even though the latter does not specifically

28 *Ogoni* case (n 26 above) paras 61-62.

29 *Ogoni* case (n 26 above) paras 65-66.

30 *Ogoni* case (n 26 above) para 68.

31 F Coomans 'The *Ogoni* case before the African Commission on Human and Peoples' Rights' (2003) 52 *International and Comparative Law Quarterly* 749 757.

32 General Comment 12, The right to adequate food (1999) paras 8-13. See also Coomans (n 31 above) 756.

33 *Purohit & Another v The Gambia* (2003) AHRLR 96 (ACHPR 2003) para 84.

34 General Comment 3 paras 1-2.

35 Mbazira (n 9 above) 353; F Viljoen *International human rights law in Africa* (2007) 240.

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incorporate the duties identified by the Commission into its list of core obligations, they may be taken as the minimum of the positive obligations of states.

In applying the right to culture in the more recent case concerning the Endorois community of Kenya, the African Commission seems to have followed what Young called the 'essence approach' to minimum core.[36] After observing that imposing restrictive rules on culture 'undermines its enduring aspects', it found the threat to the pastoralist way of life of the Endorois community of Kenya by their relocation and the restriction of access to resources for their livestock to be a denial of 'the very essence of the Endorois' right to culture'.[37] This indicates that the obligation to refrain from imposing restrictions on cultural ways of life is an essential element of the right to culture that may be characterised as its minimum core. It is only that the Commission has not specifically used such language in this case.

While one may say, based mainly on the *Ogoni* case, that the minimum core model has generally formed part of the jurisprudence of the African Commission, it should also be acknowledged that the standards of review are not articulated sufficiently well as to make it a model of review of economic, social and cultural rights chosen and followed by the Commission. Its approach of considering the duties to respect and protect economic, social and cultural rights as minimum core obligations is also not a consistent one. It did not, for example, apply the model in its recent decision in the case relating to atrocities committed in the Darfur region of Sudan, where it found a violation of the right to property, the right to health and the right to development mainly because of the failure of the state to refrain from destructive acts and to protect the people of Darfur from the Janjaweed militia.[38] The Commission should engage in an analysis of applicable rights provisions and the prudent evaluation of models of review that suit the nature and circumstances of various cases. Wisely employed, the minimum core model that involves the scrupulous identification of essential or fundamental elements of rights and duties provides a principled approach to the justiciability of economic, social and cultural rights protected in the African Charter.

2.1.2 Reasonableness model

Judicial and quasi-judicial organs in national as well as international jurisdictions have inquired into the compatibility, justifiability or reasonableness of states' conduct in the light of their obligations relating to

36 Young (n 13 above) 7.

37 *Centre for Minority Rights Development & Others v Kenya* (2009) AHRLR 75 (ACHPR 2009) (*Endorois* case) paras 250-251.

38 *Sudan Human Rights Organisation & Another v Sudan* (2009) AHRLR 153 (ACHPR 2009) (*Darfur* case) paras 205, 212, 216 & 223. See text accompanying n 91/93 below.

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socio-economic rights.[39] The reasonableness model developed by the South African Constitutional Court stands out as a veritable standard of review of positive duties that may also apply in other legal/human rights systems. The model escapes institutional legitimacy objections as it involves the scrutiny of government programmes for reasonableness without dictation or pre-emption of policy choices and by giving appropriate deference to the executive and legislative branches.[40] The government would be required to take steps where it has taken none, and to revise adopted measures to meet constitutional standards where they are found to be unreasonable.[41]

From the South African Constitutional Court's judgments in the relevant cases, a 'reasonable' programme must be comprehensive, coherent, co-ordinated, balanced and flexible; should make appropriate provision for short, medium and long-term needs; should not exclude a significant sector of society, and take account of those who cannot pay for the services; have appropriate human and financial resources; be both reasonably conceived and implemented; be transparent and involve realistic and practical engagement with concerned communities; provide relatively short-term relief for those whose situation is desperate and urgent; and be continually reconsidered to meet the needs of relatively poorer households. [42]

Some of the above criteria have also been applied by the United States Supreme Court in connection with a state's treatment programme for persons with mental disability[43] and by the European Committee of Social Rights in evaluating the compatibility of the conduct of states with positive obligations under the European Social Charter.[44] It is by taking these jurisprudential developments into account that the recent

39 See M Langford 'The justiciability of social rights: From practice to theory' in M Langford (ed) *Social rights jurisprudence: Emerging trends in international and comparative law* (2008) 3 43.

40 See D Brand 'Socio-economic rights and courts in South Africa: Justiciability on a sliding scale' in F Coomans (ed) *Justiciability of economic and social rights: Experiences from domestic systems* (2006) 227; CR Sunstein *Designing democracy: What constitutions do?* (2001) 222-23.

41 *Mazibuko* (n 19 above) para 67.

42 *Grootboom* (n 17 above) paras 39-43; *TAC* (n 19 above) paras 68, 78, 95 & 123; *Residents of Joe Slovo Community, Western Cape v Thubelisha Homes & Others* 2009 ZACC 16 paras 115-117; and *Mazibuko* (n 19 above) para 93. For the elaboration of some of the criteria, see S Liebenberg *Socio-economic rights: Adjudication under a transformative constitution* (2010) 151-157.

43 *Olmstead v LC* 527 US 581 (1999) part III B 18-22 (whether the state had a comprehensive and effectively working plan and a waiting list that moved at a reasonable pace).

44 Eg, see Complaint 39/2006, *European Federation of National Organisations Working with the Homeless (FEANTSA) v France* (5 December 2007) paras 56-58; and Complaint 41/2001, *Mental Disability Advocacy Centre (MDAC) v Bulgaria* (3 June 2008) para 39 (applying such criteria as reasonable timeframe, measureable progress, meaningful statistics on needs, resources and results, regular reviews of the impact of the strategies adopted and special attention to vulnerable groups).

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Optional Protocol to the International Covenant on Economic, Social and Cultural Rights (ICESCR) incorporated reasonableness as a predefined model of review for communications to be submitted to the ESCR Committee.[45]

The reasonableness model best exemplifies the adoption of an appropriate model of review as the ultimate response to objections to the justiciability of economic, social and cultural rights. While their association with policies is seen as an impediment to the justiciability of the rights, the reasonableness model shows that state policies meant to implement the rights can be reviewed by adjudicatory organs. Nevertheless, the reasonableness model, especially as developed by the South African Constitutional Court, has limitations in terms of responding to claims for direct socio-economic benefits for an individual or a class of individuals, throwing the burden of proof of the unreasonableness of the state's programme on the litigants and failing to link the reasonableness standard with more detailed elaboration of the content of specific rights.[46] It is in connection with its failure to do 'rights analyses' that the Constitutional Court has been urged to integrate the minimum core model – an argument which it openly rejected.

Despite the development of the reasonableness model in a domestic system quite close to it, the African Commission has an immature jurisprudence with regard to models of review applying to positive obligations. In the famous *Ogoni* case, in which it referred to the minimum core model, the Commission has not gone beyond underlining the obligation of states 'to take reasonable measures' in connection with the right to the environment.[47] Even though it only specified the measures that need to be taken without elaborating what constitutes 'reasonable' steps to achieve them, the observation of the Commission indicates that the general obligation of states under the African Charter to take 'legislative and other measures' should be interpreted as requiring 'reasonable measures' to realise economic, social and cultural rights. This can be a solid basis for the application of the reasonableness standard of review in the style of the Constitutional Court in relation to positive state obligations.

The African Commission has nevertheless applied what may be called a variant of the reasonableness model in evaluating states' conduct in cases concerning the infringement of property rights. It used the internal qualifiers of article 14 of the African Charter, which allow encroachment upon property in the interest of the public and

45 Optional Protocol to ICESCR (2008) art 8(4); B Porter 'The reasonableness of article 8(4) – Adjudicating claims from the margins' (2009) 27 *Nordic Journal of Human Rights* 39 46-50.

46 See Liebenberg (n 42 above) 308; S Liebenberg 'Enforcing positive socio-economic rights claims: The South African model of reasonableness review' in Squires *et al* (n 18 above) 83; Bilchitz (n 20 above) 9 19.

47 *Ogoni* case (n 26 above) para 52.

in accordance with the law, to require states to justify their actions affecting property rights. In a mass deportation case against Angola, for example, the Commission found a violation of the right to property because the state failed to provide a 'public interest' justification for its actions of deportation of foreign citizens that resulted in the confiscation and abandonment of their properties.[48] In the *Endorois* case, in which it interpreted the right to property as including a justiciable right to the use of land by an indigenous community without real title,[49] the Commission laid down more detailed requirements for the justification of encroachment upon property.

The African Commission examined the justifiability of the state's eviction of the Endorois from their ancestral land against the criteria of proportionality, participation, consent, compensation and prior impact assessment which it basically derived from article 14 of the African Charter.[50] It found the state in violation of the right to property as well as the right to development for its 'disproportionate' forced removal of the community, its failure to allow effective participation or hold prior consultation with a view to secure the consent of the Endorois, the absence of reasonable benefit enjoyed by the community, the failure to provide collective land of equal value or compensation after dispossession, and the failure to conduct prior environmental and social impact assessment.[51] It further noted that the standards derived from article 14 require the state to evaluate whether a restriction of the Endorois property rights is necessary to preserve the community's survival.[52] The standards of review applied in this case show by and large that the Commission examines the justifiability or reasonableness of states' actions that restrict the article 14 right to property or affect the right to economic, social and cultural development under article 22 of the African Charter. The standards helped the Commission in deciding the complex issues relating to the impact of states' development initiatives on the economic, social and cultural rights of a community.

There are also cases where the African Commission found violations of specific economic, social and cultural rights based on the impropriety of states' conduct in light of relevant provisions of the African Charter. It, for example, found the abrupt expulsion of foreign nationals without any possibility of due process to challenge the state's actions in violation of the victims' right to work.[53] The problem is that the Commission's reasoning in such cases is too short and shallow to allow the conclusion that it applied a proper model of review. With further

48 *Institute for Human Rights and Development in Africa v Angola* (2008) AHRLR 43 (ACHPR 2008) *(IHRDA)* paras 72-73.

49 *Endorois* case (n 37 above) para 187.

50 *Endorois* case (n 37 above) paras 218 & 224-228.

51 *Endorois* case (n 37 above) paras 238 & 281-298.

52 *Endorois* case (n 37 above) para 267.

53 *IHRDA* (n 48 above) paras 74-76.

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articulation and rationalisation, the style of reasoning in relation to the rights to property and development in the *Endorois* case may lead to the adoption of a model of review of positive duties. Especially the criterion of meaningful engagement with affected people, which is also an important element of the South African Constitutional Court's reasonableness model, may be used to address the democracy deficit that characterises the denial of economic, social and cultural rights in many parts of Africa.

2.1.3 Model of review combining minimum core and reasonableness standards

The previous sections show that both minimum core and reasonableness models are possible approaches to the direct justiciability of economic, social and cultural rights. While the minimum core model seems to be best suited to the justiciability of negative and 'basic level' positive obligations, the reasonableness model provides more advanced standards for the review of positive obligations. Whereas the former more or less concentrates on the content of rights to identify minimum entitlements and duties, the latter focuses on the obligations of states or measures to realise rights. They respectively use normative and more of 'empirical or sociological' standards of review. Both models also provide well for those in urgent need or vulnerable groups. These characteristics of the two models make it logical to conceive a model of review that combines elements or features of both.[54] Without an intention to exclude other possibly effective models, an approach that carefully combines the analysis of rights and obligations provisions and the evaluation of measures taken by a state against standards derived from such analysis could work well in practice.

There is no good practical example of a case where the 'combined approach' has been applied so far, but the ESCR Committee indicated in a statement issued in mid-2007 that it would apply standards that may broadly fall within such an approach. In elaborating the standards that it will apply in considering communications concerning an alleged failure of a state party to take steps to the maximum of available resources, the ESCR Committee stated that it would examine the adequacy or reasonableness of measures taken by the state based on a list of criteria that effectively encapsulated minimum core and reasonableness standards.[55] The 'combined model' appears to provide promising

54 See Bilchitz (n 20 above) 1-26.

55 Statement 'An evaluation of the obligation to take steps to the "maximum available resources" under an Optional Protocol to the Covenant' (10 May 2007). The criteria include that the measures taken towards the fulfilment of economic, social and cultural rights be deliberate, concrete and targeted, non-discriminatory and non-arbitrary, recognise the precarious situation of disadvantaged and marginalised individuals, and follow transparent and participative decision-making process. Elements of core obligations are also made part of the criteria in the examination of

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standards of review of positive as well as negative obligations. It should, however, pay attention to the legitimacy and competence objections to the adjudicatory enforcement of economic, social and cultural rights and also to the limitations of the minimum core and reasonableness models indicated earlier. It should, for example, rein in the expanding definition of the minimum core and also allow provision for individual claimants at least in some circumstances.

Some of the ESCR Committee's standards of the 'combined model' were identified by the African Commission as measurements of the positive obligations relating to the right to health in the Gambian mental health case.[56] Although it has not expressly identified its reasoning with the minimum core or the reasonableness models in that case, its criteria of 'taking concrete and targeted steps and avoiding discrimination' may be applied in the evaluation of states' obligations relating to other economic, social and cultural rights. It is also interesting to see in this case that the African Commission made 'rights analysis' in defining the contents of the right to health in general and the right to mental health in particular.[57] It finally concluded that the impugned Lunatic Detention Act 'is lacking in terms of therapeutic objectives as well as provisions of matching resources and programmes of treatment of persons with mental disabilities' and found the state in violation of the right to health.[58] This is the result of an evaluation of the propriety or reasonableness of the legislative measure taken by the state to realise the right to (mental) health based on criteria derived through 'rights analysis'. Even though it lacks articulation as a proper model of review, the reasoning in the case shows an attempt at normative analysis and evaluation of the state's conduct against specific duties derived from applicable legal provisions.

Together with the jurisprudence in the *Ogoni* case, the *Endorois* case and other relevant cases where variants of either or both of the minimum core and reasonableness models have been applied, the reasoning of the African Commission in the Gambian mental health case may be used as a good starting point for the development of a 'combined model'.

2.1.4 Some remarks on the direct approaches of the African Commission

The study of cases it decided so far shows that the African Commission has been practically applying the right to work, the right to health, the right to education, the right to culture and other related rights. In the *Ogoni* case, it made the far-reaching observation that it 'will apply any

failure to take steps and retrogressive measures.

56 *Purohit* (n 33 above).

57 *Purohit* (n 33 above) paras 80-82.

58 *Purohit* (n 33 above) para 83.

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of the diverse rights contained in the [African] Charter' and welcomed the 'opportunity to make clear that there is no right in the Charter that cannot be made effective'.[59] Considered a 'radical approach', for it sees all rights as equally enforceable,[60] the pronouncement of the African Commission confirmed the direct justiciability of the economic, social and cultural rights enshrined in the African Charter.

Although the Commission has been courageous in directly applying the economic, social and cultural rights provisions of the Charter, including in the most complex of cases involving resource-dependent duties and development policy issues, it has also exhibited serious reasoning deficits in many of the relevant cases it decided. In the early years of its existence, the Commission rushed to conclusions after merely summarising the complaints and citing applicable provisions of the Charter. Some of its more recent decisions show evolution towards more reasoned decision making.[61] Nonetheless, even at the current improved phase of the Commission's decisions, there is much to be desired in terms of a systematic analysis of facts and laws, evaluation of competing perspectives, soberness of findings, consistency in details and justification of remedies. The quality of decisions differs from one case to another. The shallowness and inconsistent quality of the reasoning of the Commission in many of the economic, social and cultural rights cases it decided is reflected in the underdevelopment of its jurisprudence with respect to models of review.

The African Commission's approach to the direct justiciability of rights in many of its decisions may basically be characterised as the mechanical application of provisions of the African Charter to the facts of the various cases. Seeing that the Commission often begins with a recital of the relevant rights and obligations provisions of the Charter, one would expect 'rights analysis' to find specific norms that apply to the particular circumstances of the cases. It creates an expectation that it will derive standards based on which it evaluates the action or inaction of the state in question. However, in many cases, the Commission made haste to reach conclusions, sometimes merely following the arguments of the complainants.

The African Commission has been attempting to develop its case law by referring to its own decisions and those of international as well as national human rights bodies based on article 61 of the African Charter.[62] It is unfortunate that it has not referred to the widely-cited jurisprudence of the South African Constitutional Court in its decisions

59 *Ogoni case* (n 26 above) para 68.

60 GJ Naldi 'The African Union and the regional human rights system' in M Evans & R Murray *The African Charter on Human and Peoples' Rights: The system in practice, 1986-2006* (2008) 20 30.

61 See Viljoen (n 35 above) 354.

62 *Ogoni* case (n 26 above); *Purohit* (n 33 above); *Endorois* case (n 37 above); *Darfur* case (n 38 above).

relating to economic, social and cultural rights. In the direct application of economic, social and cultural rights, the Commission may find it useful to begin with a 'rights analysis' to identify the normative contents of relevant provisions which may result in the definition of the minimum essential levels of rights. The specific normative standards may then be used for the evaluation of states' conduct. An approach combining facets of the minimum core and reasonableness models may work well in the African system if accompanied by the rationalisation of the definition of the core and the criteria of reasonableness. The reference to the minimum core model in the *Ogoni* case, the application of a variant of the reasonableness standard in the *Endorois* case, and the brief combination of rights analysis and evaluation of the state's measure against specifically identified duties in the Gambian mental health case may be used as starting points for the development of a more comprehensive model of review of economic, social and cultural rights in the African system. This is not, however, to foreclose the development of other suitable models that do not necessarily rely on the ones discussed above.

2.2 Interdependence approach

The interdependence approach is a method of judicial or quasi-judicial enforcement of economic, social and cultural rights that relies on process and procedural rights that are common to all groups of rights (including the right to equality and non-discrimination), and the overlapping components of substantive rights normally placed in different categories. It is based on the intertwinement of human rights and seeks to undermine their artificial categorisation and create a coherent human rights norm system. The integrated protection of different groups of rights which are clearly stated to be indivisible and interdependent in the African Charter provides a solid basis for the approach.[63] It is probably for this reason that the African Commission declared in one of its economic, social and cultural rights decisions that it is 'more than willing to accept legal arguments' that take into account the principle that 'all human rights are universal, indivisible, interdependent and interrelated'.[64] The requirement that the Commission draw inspiration from other international human rights instruments and the African Court's broad subject matter jurisdiction widen the substantive basis for their interdependence approach as they allow the cross-fertilisation of human rights norms or contents across treaties.[65]

The interdependence approach has been put to creative use in systems where there are substantive and procedural gaps in the protection of economic, social and cultural rights. The UN Human Rights Committee

63 Preamble, para 7 African Charter.

64 *Purohit* (n 33 above) para 48.

65 Arts 60-61 African Charter; arts 3 & 7 African Court Protocol.

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and the European Court of Human Rights gave socio-economic rights dimensions to the cross-cutting rights to non-discrimination and a fair trial, respectively, especially in cases concerning social security.[66] The two organs have also shown some interest in making use of the interdependence between substantive rights. The European Court, for example, protected the right to work by reading together provisions on non-discrimination and the right to respect for private life, and also indicated that the right to life covers aspects of the right to health.[67] The Human Rights Committee read socio-economic aspects into the right of members of minorities to enjoy their own culture in community with others.[68] The Inter-American Court of Human Rights has also affirmed the justiciability of indigenous land and resource rights through the right to property and the right to judicial protection.[69] The right to property, which is often enshrined in instruments devoted to civil and political rights, has also been used for the protection of components of such economic, social and cultural rights as the rights to housing and social security.[70]

The most robust utilisation of the approach based on the interdependence of substantive rights is to be found in the jurisprudence of the Indian Supreme Court where the right to life has been interpreted as including the right to a livelihood, the right to health care, the right to shelter, the right to the basic necessities of life, such as adequate nutrition, clothing and reading facilities, the right to education, and the right to just and human conditions of work.[71] While the understanding of the interdependence among substantive rights is good, care should

66 For the analysis of relevant cases, see M Scheinin 'Economic and social rights as legal rights' in A Eide *et al* (eds) *Economic, social and cultural rights: A textbook* (2001) 32-38; C Krause & M Scheinin 'The right not to be discriminated against: The case of social security' in T Orlin *et al* (eds) *The jurisprudence of human rights law: A comparative interpretive approach* (2000) 259-264.

67 *Sidabras & Dziautas v Lithuania* (2004) 42 EHRR 104 paras 50 & 62; *Zdzislaw Nitecki v Poland*, application 65653/01, decision, ECHR (2002) para 1.

68 M Scheinin 'The right to enjoy a distinct culture: Indigenous and competing uses of land' in Orlin *et al* (n 66 above) 164-168.

69 *Mayanga (Sumo) Awas Tingni Community v Nicaragua* IACHR (2001) Ser C 79 paras 137-139 & 148-155.

70 *Akdivar & Others v Turkey* application 21893/93, ECHR 1998-II 69 (1998) (finding forced evictions and destruction of housing in violation of the right to property); *Gaygusuz v Austria*, application 17371/90, ECHR 1996-IV 14 (1996) para 41 (social benefits as pecuniary rights covered by the right to property); and *Case of the 'Five Pensioners' v Peru* IACHR (2003) Ser C 98 paras 102, 103 & 121 (finding arbitrary changes in the amount of pensions to be in violation of the right to property).

71 *Tellis & Others v Bombay Municipal Corp & Others* (1987) LRC (Const) 351; *Pashim Banga Khet Mazdoor Samity v State of West Bengal* (1996) AIR SC 2426; *Shantistar Builders v Narayan Khimalal Totame & Others* (1990) 1 SCC 520; *Ahmedabad Municipal Corporation v Nawab Khan Gulab Khan & Others* (1997) AIR SC 152; *Francis Coralie Mullin v The Administrator Union Territory of Delhi* (1981) 2 SCR 516 529; *Jain v State of Karnataka* (1992) 3 SCC 666; *Krishnan v State of Andhra Pradesh & Others* (1993) 4 LRC 234; *Bandhua Mukti Morcha v Union of India* (1984) 2 SCR 67.

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be taken with regard to the extent to which the right to life or any other right may be expanded.[72] Interpretations should be able to show a genuine substantive interrelationship between the rights in question or their components.

As indicated earlier, the application of the interdependence approach is not limited to systems where there are substantive and/or procedural gaps in the protection of economic, social and cultural rights. In the African system, the approach can be used to bridge gaps and strengthen the protection of economic, social and cultural rights. The African Charter enshrines rights that are not commonly categorised under economic, social and cultural rights but may serve as bases for the enforcement of the latter. These rights include the cross-cutting rights to non-discrimination or equality, equal protection of the law, and a fair trial; the highly permeable substantive rights to life and dignity; the instrumental right to freedom of movement, including the rights of non-nationals; the right to equal access to public property and services; and the multi-faceted right to property and development-related rights, which may also be treated as economic, social and cultural rights.[73] In its practice, the African Commission is inclined to see all human rights as interconnected set of values and used some of the aforementioned rights for its interdependence approach. It has also utilised the approach to protect economic, social and cultural rights that are not expressly incorporated in the African Charter.

2.2.1 Interdependence approach in the jurisprudence of the African Commission

The African Commission in many cases underscored the value of the rights to non-discrimination and equal protection of the law under articles 2 and 3 of the African Charter respectively as the foundations for the enjoyment of all other rights.[74] It observed that equality or lack of it 'affects the capacity of a person to enjoy many other rights' and presented the goals of article 2 as 'the elimination of all forms of discrimination (in all its guises) and to ensure equality among all human beings' .[75] It indicated in one case that individuals may successfully establish a claim for a violation of the right to equal protection of the law by showing that the state has not given them the same

72 See T Melish 'Rethinking the "less as more" thesis: Supranational litigation of economic, social and cultural rights in the Americas' (2006) 39 *New York University Journal of International Law and Politics* 326-327.

73 Arts 2, 3, 4, 5, 7, 12, 13(2) & (3), 14, 19 & 20-22 African Charter.

74 *Purohit* (n 33 above) para 49; *Zimbabwe Human Rights NGO Forum v Zimbabwe* (2006) AHRLR 128 (ACHPR 2006) para 169.

75 *Legal Resources Foundation v Zambia* (2001) AHRLR 84 (ACHPR 2001) para 63; *Malawi African Association* (n 25 above) para 131; *Purohit* (n 33 above) para 49; *IHRDA* (n 48 above) para 78; *Mouvement Ivoirien des Droits Humains (MIDH) v Côte d'Ivoire* (2008) AHRLR 75 (ACHPR 2008) para 87.

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treatment it accorded to others.[76] In another decision it demonstrated the applicability of the equality provisions of the African Charter to the protection of the economic rights of individuals or peoples in a state party. It found the requirement of the use of the French language for the registration of companies in anglophone Cameroon and the concentration and relocation of business enterprises and economic projects in francophone Cameroon in violation of articles 2 and 19 of the African Charter.[77] In the Gambian mental health case, the African Commission implied that it expected states to provide legal aid and assistance to vulnerable groups and found that the absence of such legal aid failed to meet the standards of anti-discrimination and equal protection of the law under the African Charter.[78] The foregoing review shows the actual and potential relevance of the cross-cutting rights to equality and non-discrimination to the interdependence approach of the African Commission.

The African Commission has repeatedly applied the right to dignity and the related right against inhumane and degrading treatment that are protected under article 5 of the African Charter in an approach of interdependence of substantive rights.[79] It positions the right to dignity as an inherent right or a primordial and foundational value that underlies all human rights.[80] Violations of many economic, social and cultural rights would meet the African Commission's standards of 'unfair treatment, so as to result in [one's] loss of worth and integrity' and '[feeling] devalued, marginalised, and ignored' for the violation of the right to dignity.[81] The Commission also recognises the potential of the permeable right to life to be used in an interdependent approach to cover issues of livelihood and facets of such rights as the rights to health and food.[82]

In detention cases where the main issues concerned such civil and political rights as the right to personal liberty and the right against arbitrary detention, the African Commission found detention in dark, overpopulated or 'roofless' facilities under conditions of poor hygiene, insufficient food and/or a lack of access to medicine and medical care, and without access to family members, to be inhuman and degrading forms of treatment constituting a violation of article 5 of the African

76 See *IHRDA* (n 48 above) paras 45-48.

77 *Gunme & Others v Cameroon* (2009) AHRLR 9 (ACHPR 2009) paras 102-108 & 162.

78 *Purohit* (n 33 above) paras 34-38 & 52-54.

79 The right to the respect of the dignity inherent in a human being under this article is taken as a self-standing right that may be applied to a wide range of cases. Eg, see *Amnesty International v Zambia* (2000) AHRLR 325 (ACHPR 1999) para 58; and *Malawi African Association* (n 25 above) para 135.

80 See *Purohit* (n 33 above) para 57; and *Darfur case* (n 38 above) para 163.

81 *Prince v South Africa* (2004) AHRLR 105 (ACHPR 2004) para 49.

82 See *Darfur* case (n 38) para146.

Charter.[83] The findings demonstrate the fundamental nature of the right against inhuman and degrading treatment and its interdependence with aspects of the rights to health, housing, food and the right to family life. In establishing a link between these rights and the basic right to life in one of the cases, the Commission further observed that denying detainees food and medical attention pointed to a shocking lack of respect for life and constituted a violation of article 4 of the African Charter.[84] Its findings of violations of other specific civil and political rights as well as economic, social and cultural rights, such as the right to health and the right to protection of the family, in some of the detention cases demonstrate the Commission's understanding of the various rights in the Charter as interdependent in practice. The cases also exemplify the utilisation of the interdependence approach based on rights that normally fall in the category of civil and political rights to reinforce the protection of economic, social and cultural rights. It is only unfortunate that the Commission failed to engage in the analysis of the normative contents of the relevant provisions of the Charter in order to show the interdependent components of the various rights.

In a case involving claims of slavery and exploitation in Mauritania, the African Commission further demonstrated the interdependence between the right to dignity under article 5 and the right to work. It emphasised that 'unremunerated work is tantamount to a violation of the right to respect for the dignity inherent in the human being'.[85] The argument of the Commission shows that the right to dignity can be interpreted to protect substantive aspects of the right to work that are not clearly covered by the provisions of article 15 of the African Charter. However, it is not clear why the Commission failed to refer to this latter article while reciting provisions of the Universal Declaration of Human Rights and ICESCR on the right to just and favourable remuneration through what may be called 'cross-treaty interdependence of substantive rights'.

In the *Ogoni* case, the African Commission used the interdependence approach in a more advanced way to find normative bases for the protection of the rights to shelter and food that are not clearly incorporated in the African Charter. Based on the interdependent interpretation of the Charter provisions, it read the right to food into the rights to life, to health and to development, and the right to housing into the

83 *Civil Liberties Organisation v Nigeria* (2000) AHRLR 243 (ACHPR 1999) paras 5, 25 & 27; *Constitution Rights Project & Another v Nigeria* (2000) AHRLR 235 (ACHPR 1999) paras 5 & 28; *Malawi African Association* (n 25 above) paras 116 & 118; *Huri-Laws v Nigeria* (2000) AHRLR 273 (ACHPR 2000) paras 40-41; and *IHRDA* (n 48 above) paras 49–53. See also *Amnesty International & Others v Sudan* (2000) AHRLR 297 (ACHPR 1999) para 54.

84 *Malawi African Association* (n 25 above) para 120.

85 *Malawi African Association* (n 25 above) para 135.

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rights to property, to health and to family life.[86] In deriving the right to housing, the Commission argued that the corollary of the combination of the provisions of the Charter protecting the rights to property, to health and to family life 'forbids the wanton destruction of shelter because when housing is destroyed, property, health and family life are adversely affected'.[87] It observed in a further illustration of the substantive interdependence of rights that 'the right to food is inseparably linked to the dignity of human beings and is, therefore, essential for the enjoyment and fulfilment of such other rights as health, education, work and political participation'.[88] The African Commission exploited the interdependence between substantive socio-economic and civil and political rights for the purpose of filling gaps in the protection of economic, social and cultural rights.

In the more recent *Darfur* case, despite the request of one of the applicants that it follow the *Ogoni* case approach of reading rights into the African Charter,[89] the African Commission used the facts of the case that relate to the rights to housing, food and water to find a violation of article 5. It argued that the forced eviction of civilian population from their homes and villages, and the destruction of their houses, water wells, food crops, livestock and social infrastructure by the state and its agents amount to cruel, inhuman and degrading treatment that threatened the very essence of human dignity.[90] In a typical approach of interdependence of substantive rights, the Commission interpreted 'the right to dignity and against cruel and inhuman treatment' as covering facts which, taken separately, would also constitute violations of the right to property as well as the rights to housing, water and food. While one may wonder if the approach in the *Darfur* case signifies a change in the Commission's approach of 'reading missing rights into the Charter', members of the Commission who were part of the decision disagree.[91]

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86 *Ogoni* case (n 26 above) paras 59-60 & 64-65. (In the case of the right to food, the African Commission basically accepted the interdependence argument advanced by the communication.)

87 *Ogoni* case (n 26 above) para 60.

88 *Ogoni* case (n 26 above) para 65.

89 *Darfur* case (n 38 above) paras 112-126. (The applicant requested the African Commission to read the rights to housing and food into the African Charter and to develop its jurisprudence further by reading the right to water into some specific provisions.)

90 *Darfur* case (n 38 above) paras 155-164 & 168.

91 Interviews with Commissioners Mumba Malila (on 12 November 2009); Faith Pansy Tlakula (on 14 November 2009), Catherine Dupe Atoki (on 14 November 2009); Yeung Kam John Yeung Sik Yuen (on 16 November 2009); and Musa Ngary Bitaye (17 November 2009) (all arguing for reading rights into the African Charter based on the interdependence of human rights).

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The African Commission also showed that it may use the right to property under article 14 of the African Charter in the interdependence approach to cover the physical aspects of the right to an adequate standard of living, including shelter, food and water. The *Ogoni* case illustrates the interdependence between the right to property and the right to housing. In the *Darfur* case, the Commission found Sudan in violation of the right to property for it failed to refrain, and protect victims, from eviction or demolition of their houses.[92] In the case against Mauritania, it similarly found the expropriation and destruction of the houses of black Mauritanians before forcing them to go abroad a violation of the right to property.[93] The cases demonstrate the interdependence between the right to property and the right to housing, which directly relates to the core violation. In accordance with the jurisprudence of the Inter-American and European Courts, the African Commission may also systematically apply the right to property for the protection of some aspects of the right to social security (social benefits including pension) which is not clearly incorporated in the African Charter.

Finally, deportation cases present a special example of the interdependence approach that relies on the cross-cutting right to non-discrimination and the substantive interdependence between aspects of the right to movement (or the right of non-nationals) under article 12 of the African Charter and specific economic, social and cultural rights. Without foreclosing the possibility of deportation of non-nationals, the African Commission observed that the mass expulsion of any category of persons constituted a 'flagrant' or 'special' violation of human rights.[94] It also stated in a case concerning the nationality of an individual that 'deportation or expulsion has serious implications on other fundamental rights of the victim, and in some instances, the relatives'.[95] The Commission quite logically depicted mass expulsion or deportation as an action of compound effects that entails the violation of a range of rights, including the rights to property, to work, to education and to the protection of the family.[96] It further found the measures of mass expulsion to be discriminatory and hence in violation of the

92 *Darfur* case (n 38 above) para 205.

93 *Malawi African Association* (n 25 above) para 128.

94 *Rencontre Africaine pour la Défense de Droits de l'Homme (RADDHO) v Zambia* (2000) AHRLR 321 (ACHPR 1996) paras 20 & 31; *Union Inter-Africaine des Droits de l'Homme & Others v Angola* (2000) AHRLR 18 (ACHPR 1997) paras 15-16, *IHRDA* (n 48 above) paras 63 & 67-69; *African Institute for Human Rights and Development (on behalf of Sierra Leonean Refugees in Guinea) v Guinea* (2004) AHRLR 57 (ACHPR 2004) paras 69 & 71.

95 *Modise v Botswana* (2000) AHRLR 30 (ACHPR 2000) para 90.

96 *Union Inter-Africaine* (n 94 above) para 17 (but a violation of arts 15 and 17 was not found in the operative part of the decision). See also *Modise* (n 95 above).

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cross-cutting right to non-discrimination.[97] It is the discriminatory nature of the expulsions (including on the enjoyment of the economic, social and cultural rights of the deportees) that made them rights-violating acts. Although the African Commission was too brief in its arguments, in the mass expulsion cases it has laid down a basis for an interdependence approach by which articles 2 and 12 of the African Charter may be used as vehicles for the protection of economic, social and cultural rights.

The decisions of the African Commission in the above-reviewed cases show that it has been making use of the interdependence approach in enforcing economic, social and cultural rights. They demonstrate the Commission's understanding of human rights as an interdependent and coherent set of values. In some of the cases, the Commission related the main issues of the complaints to specific economic, social and cultural rights in very general terms or only tangentially. Although the arguments of the Commission were not detailed enough in terms of clearly setting out the interdependent elements of specific rights falling in different commonly used categories, the interdependence approach helped it to bridge normative gaps in the justiciability of economic, social and cultural rights.

3 Conclusion

Both the direct and interdependence approaches to the justiciability of economic, social and cultural rights apply in the African human rights system. The direct justiciability of the rights protected under the African Charter should not make the interdependence approach irrelevant. The latter should not also overshadow or undermine the justiciability of economic, social and cultural rights in their own right. Nor should the approaches be seen as necessarily separate and self-standing methods of adjudication of economic, social and cultural rights as both of them may sometimes apply in one and the same case.

The African Commission has directly applied many of the economic, social and cultural rights provisions of the African Charter. It made some use of models of review applied in the adjudication of economic, social and cultural rights cases in other systems. It also utilised the interdependence approach for the protection of economic, social and cultural rights (through equality rights and civil and political rights) and also to find substantive bases for economic, social and cultural rights that are not protected in the African Charter. However, in many of its relevant decisions, the Commission made hasty findings and conclusions without defining a method of inquiry. Even though the quality of reasoning of the Commission has been improving, it is still

97 *RADDHO* (n 94 above) paras 20-25; *Union Inter-Africaine* (n 94 above) para 18; and *IHRDA* (n 48 above) paras 77-80.

somewhat difficult to talk of a model of review of economic, social and cultural rights that has been chosen and applied or developed in the African system. It should show greater soberness and make a jurisprudential probe in interpreting and applying provisions on economic, social and cultural rights to actual cases. Its interdependence approach should also engage in proper normative analysis to identify the overlapping components of rights. Reasoned decisions with principled and consistent arguments increase the likelihood of compliance with the remedies that the African Commission issues.