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A teleological approach to interpreting socio-economic rights in the African Charter: Appropriateness and methodology

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Summary: *The incorporation of socio-economic rights in the African Charter on Human and Peoples' Rights should be considered a vital move towards the transformation of socio-economic conditions of the people on the continent. However, the envisaged socio-economic transformation depends largely on how these rights are interpreted. It is the task of the supervisory organs of the African Charter to develop the scope and content of these rights and their related obligations through interpretation. To achieve this interpretative objective, interpretive process of the supervisory organs should be guided by an appropriate approach to interpretation that is applied coherently. This article argues that the teleological approach to treaty interpretation is an appropriate approach to interpreting socio-economic rights in the African Charter. The article develops a methodology for application of the teleological approach through which socio-economic rights in the African Charter may be effectively interpreted.*

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Key words: *socio-economic rights; African Charter; effective interpretation; teleological approach to interpretation*

1 Introduction

Realising socio-economic rights¹ is significant for improving the living conditions of Africa's people, as these rights help to ensure individuals' access to socio-economic services² and a dignified life.³ Despite their significance, millions of Africans are still denied access to socio-economic rights,⁴ and socio-economic rights violations are a daily concern.⁵ Since independence there have been frequent and serious incidences of socio-economic rights violations all over the continent.⁶ Africa's colonial and post-colonial legacy continues to manifest widespread incidences of mass impoverishment, disease, unemployment and under-development, as well as other socio-economic rights violations.⁷ The continent also faces many challenges to the enjoyment of socio-economic rights, such as insufficient access to clean water, food insecurity, inadequate shelter, poor health care⁸ and inadequate housing.⁹ Other challenges affecting the enjoyment of socio-economic rights in Africa include poverty, insufficient resource allocation to key sectors, notably social protection, health, housing, agriculture and education, which are of significant importance for the enjoyment of socio-economic rights.¹⁰

1 For purposes of this article, socio-economic rights are defined as the rights that protect and improve the material living conditions of all human beings in their individual capacity and in groups. These include the rights to property, work, health, education, family, social security, adequate standard of living including water, food and housing, as well as the rights to freely dispose of wealth, development and a general satisfactory environment.

2 MA Baderin 'The African Commission on Human and Peoples' Rights and the implementation of economic, social and cultural rights in Africa' in MA Baderin & R McCorquodale (eds) *Economic, social and cultural rights in action* (2007) 139.

3 M Ssenyonjo 'Analysing the economic, social and cultural rights jurisprudence of the African Commission: 30 Years since the adoption of the African Charter' (2011) 29 *Netherlands Quarterly of Human Rights* 358-359.

4 Baderin (n 2) 144.

5 JC Mubangizi 'The constitutional protection of socio-economic rights in selected African countries: A comparative evaluation' (2006) 2 *African Journal of Legal Studies* 1-2.

6 NJ Udombana 'Toward the African Court on Human and Peoples' Rights: Better late than never' (2000) 3 *Yale Human Rights and Development Law Journal* 86.

7 CA Odinkalu 'Implementing economic, social and cultural rights under the African Charter on Human and Peoples' Rights' in MD Evans & R Murray (eds) *The African Charter on Human and Peoples' Rights: The system in practice 1986-2000* (2002) 180-181.

8 SB Keetharuth 'Major African legal instruments' in A Bosl & J Diescho (eds) *Human rights in Africa: Legal perspectives in their protection and promotion* (2009) 180.

9 Udombana (n 6) 50.

10 M Ssenyonjo 'Development of economic, social and cultural rights under the African Charter on Human and Peoples' Rights by the African Commission on Human and Peoples' Rights' (2015) 4 *International Human Rights Review* 150.

There are also low levels of awareness of the general public, members of the legal profession and the judiciary of socio-economic rights and the justiciability of those rights.¹¹ In its 2004 Resolution on Economic, Social and Cultural Rights in Africa (Resolution on SERs)¹² the African Commission on Human and Peoples' Rights (African Commission) noted that apart from the consensus on the notion of the indivisibility of human rights among African states, socio-economic rights remain marginalised.¹³ According to the African Commission, states' failure to adequately realise socio-economic rights sustains their continued violation.¹⁴

The meaningful effect of the socio-economic rights in the African Charter on Human and Peoples' Rights (African Charter)¹⁵ depends on their interpretation by the interpretive organs of the African Charter.¹⁶ In short, this interpretation should address the socio-economic needs of the African people.¹⁷ The African Commission on Human and Peoples' Rights (African Commission) held in the *SERAC* case that all human rights in the African Charter can be made effective.¹⁸ This article demonstrates how such efficacy can be achieved in the specific context of rights with a socio-economic character.

In interpreting socio-economic rights under the African Charter, the African Commission has not always been consistent in its approach to treaty interpretation.¹⁹ For example, the African Commission has on different occasions applied the textual, the 'golden thread',²⁰

11 As above.

12 The African Commission Resolution on economic, social and cultural rights in Africa (2004) ACHPR/Res.73 (XXXVI)04.

13 Resolution on SERs (n 12) para 4.

14 Resolution on SERs para 5.

15 African Charter on Human and Peoples' Rights (1981) OAU Doc. CAB/LEG/67/3/rev 5, 21 ILM 58 (1982) (African Charter) adopted on 27 June 1981 and entered into force on 21 October 1986.

16 In this article the interpretive organs of the African Charter refer to the African Commission on Human and Peoples' Rights (African Commission); the African Court on Human and Peoples' Rights (African Court); and the African Court of Justice and Human Rights (African Court of Justice). The African Court was replaced by art 1 of the Protocol on the Statute of the African Court of Justice and Human Rights, adopted in Sharm el-Sheikh, Egypt on 1 July 2008. The African Court of Justice, however, is not in operation as the African Court of Justice Protocol has not yet entered into force.

17 EA Ankumah *The African Commission on Human and Peoples' Rights: Practice and procedures* (1996) 111.

18 *Social and Economic Rights Action Centre (SERAC) v Nigeria* (2001) AHRLR 60 (ACHPR 2001) para 68 (*SERAC* case).

19 F Viljoen *International human rights law in Africa* (2012) 323-324.

20 See F Viljoen 'The African Charter on Human and Peoples' Rights: The *travaux préparatoires* in the light of subsequent practice' (2004) 25 *Human Rights Law Journal* 325, where he defines the 'golden thread' as an interpretation of rights that favours the individual and peoples' human rights. A detailed discussion of these approaches to treaty interpretation falls beyond the scope of this article. For a detailed discussion of these approaches, see A Amin 'A teleological approach

and the teleological approaches in interpreting socio-economic rights under the African Charter. This inconsistent approach to treaty interpretation has led to some jurisprudential inconsistencies. Moreover, the Commission does not always apply the teleological approach appropriately in its jurisprudence.²¹ Similarly, the African Court on Human and Peoples' Rights (African Court) in its emerging socio-economic rights jurisprudence has been inconsistent regarding its interpretative approach and applied the teleological approach inappropriately.²² This has led to socio-economic rights being ineffective in the sense that their scope and content is not transparent or predictable in offering meaningful guidance to beneficiaries and state parties.

This article examines the teleological approach to interpretation and argues that, if applied consistently, it has the potential to enhance the effectiveness of socio-economic rights under the African Charter.²³

The article analyses the model of the teleological approach as formulated by the Harvard Research in International Law programme,²⁴ and Sir Gerald Fitzmaurice,²⁵ and codified in the Vienna Convention on the Law of Treaties (Vienna Convention).²⁶

to the interpretation of socio-economic rights in the African Charter on Human and Peoples' Rights' unpublished LLD thesis, University of Stellenbosch, 2017 22-27.

21 Amin (n 20) 371.

22 See *African Commission on Human and Peoples' Rights v Republic of Kenya* (Ogiek case) ACTHPR Application 6/2012.

23 Through the teleological approach the interpretation of socio-economic rights in the African Charter can benefit from the adjudicative procedure and detailed socio-economic rights provisions in the Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights (African Court Protocol); the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (African Women's Protocol); and the African Charter on the Rights and Welfare of the Child (African Children's Charter) respectively. As such relevant instruments will be referred to the extent, they elaborate the understanding of interpretation of socio-economic rights in the African Charter.

24 The Harvard Research in International Law was a research programme into international law carried out under the auspices of the Harvard Law School between the late 1920s and early 1930s. Through this programme, Harvard Law School developed the Harvard Draft Convention on the Law of Treaties.

25 At the time of writing his two articles, Sir Gerald Fitzmaurice was the United Kingdom Counsel to the International Court of Justice. Fitzmaurice ascertained that there existed three major approaches to treaty interpretation, namely, the intention of the parties, the textual, and the teleological approaches. See GG Fitzmaurice 'The law and procedure of the International Court of Justice: Treaty interpretation and certain other treaty points' (1951) 28 *British Year Book of International Law* 1-2; GG Fitzmaurice 'The law and procedure of the International Court of Justice 1951-4: Treaty interpretation and certain other treaty points' (1957) 33 *British Year Book of International Law* 207-209.

26 The Vienna Convention on the Law of Treaties 8 ILM 679 (1969) was adopted on 23 May 1969 and entered into force on 27 January 1980.

By focusing on socio-economic rights, the article does not claim that the teleological approach is not also useful for interpreting other human rights in the African Charter. Various scholars have argued in favour of the viability of the teleological approach to all human rights.²⁷ However, the article focuses on socio-economic rights given doubts surrounding their interpretation, particularly the formulation of these rights, the nature of the obligations they impose, the absence of an explicit model of review in respect of states' compliance with their obligations under the African Charter and the Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights (African Court Protocol).

The analysis in the article is divided into three parts. The first part discusses the teleological approach and its elements and how they feature in the African context. In part 2 I examine the criticisms surrounding the interpretation of socio-economic rights in the African Charter, and the appropriateness of the teleological approach for their interpretation. The final part develops the methodology for the application of the teleological approach.

2 Teleological approach: Elements

The teleological approach is one of three major approaches to treaty interpretation. The other two are the textual approach²⁸ and the intention of the parties' approach.²⁹ The teleological approach emerged in international law in 1935 through article 19(a) of the Harvard Draft Convention on the Law of Treaties (Harvard Draft),³⁰ as formulated by the Harvard Research in International Law programme, and later elaborated by Fitzmaurice in his 1951 classification on approaches to treaty interpretation and subsequently codified in the Vienna Convention.

27 H Senden *Interpretation of fundamental rights in a multilevel legal system: An analysis of the European Court of Human Rights and the Court of Justice of the European Union* (2011) 55-59.

28 The textual approach, which sometimes is referred to as the 'ordinary meaning' approach, posits that the meaning of the text of a treaty should be derived exclusively from the words of the text itself. See Fitzmaurice (n 24) 7.

29 The intention of the parties approach posits that a treaty should be interpreted by exclusively using the common intention of the parties to the treaty at the time of its conception. See M Fitzmaurice 'Interpretation of human rights treaties' in D Shelton (ed) *International human rights law* (2013) 745.

30 Art 19(a) of the Draft Convention on the Law of Treaties (1935) 29 *American Journal of International Law* Supp 971.

The teleological approach considers the object and purpose³¹ of a treaty as the main element in its interpretation. The object and purpose of a treaty as the main elements of the teleological approach are established through a wide range of other significant elements from within and outside the treaty in question. These elements include the treaty's historical background and its preparatory work; the subsequent conduct of the parties in applying the provisions of the treaty; and the conditions prevailing at the time the treaty is interpreted.³² Other elements include the treaty as a whole, relevant international, regional and national legal instruments and jurisprudence, and the principle of effectiveness.

2.1 Object and purpose of the treaty

The meaning of the object and purpose of a treaty is surrounded by two key concerns. The first is whether object and purpose is a single concept or two distinct concepts. The second is whether the notion requires a specific definition or a general definition. The debates among scholars and institutions regarding these concerns fall beyond the scope of this article. Rather, the article considers the approach adopted in the Vienna Convention, which treats 'object and purpose' as a single discursive concept. The efficacy of treaty interpretation requires the notion of 'object and purpose' of a treaty to be defined with a form of flexibility. The meaning of 'object and purpose' should not be limited to a specific fixed meaning,³³ since the content of the treaties changes on a regular basis.³⁴ The interpretation of a treaty is a single combined process,³⁵ whereby the text of the treaty and its context, as well as its object and purpose, should be examined together.³⁶ While the text is considered the logical starting point,³⁷ its effective meaning should always be obtained in the context in

31 J Klabbers 'Some problems regarding the object and purpose of treaties' (1999) 8 *Finnish Yearbook of International Law* 138, quoted in SA Yeshanew *The justiciability of economic, social and cultural rights in the African regional human rights system: Theories, laws, practices and prospects* (2013) 45. Klabbers identifies the object and purpose of a treaty as a 'comprehensive blanket term' referring to the 'aims, nature and end' of a treaty. It applies to a treaty 'as a whole rather than to its parts or articles'. In addition to Klabbers's definition, this article considers the 'object and purpose' of a treaty as a single concept (rather than two distinct concepts) that requires a general meaning rather than a specific fixed meaning. For a thorough discussion, see Amin (n 20) 43-49.

32 Harvard Draft (n 30).

33 Klabbers (n 31) 141.

34 C McLachlan 'The principle of systemic integration and Article 31(3)(c) of the Vienna Convention' (2005) 54 *International and Comparative Law Quarterly* 282.

35 ILC *Yearbook of the International Law Commission* (1966) 219-220 para 8.

36 K Mechlem 'Treaty bodies and the interpretation of human rights' (2009) 42 *Vanderbilt Journal of Transnational Law* 911.

37 As above.

which it was formulated and in light of its object and purpose.³⁸ In relation to human rights treaties, article 31 of the Vienna Convention specifically requires their interpretation to be performed in a manner that commits the parties to respect the object and purpose enshrined therein.³⁹ For example, in the case of the *Engel* case⁴⁰ the European Court of Human Rights (European Court) held that although the parties have the discretion to interpret the treaty in accordance with their domestic laws, this discretion should be compatible with the object and purpose of the European Convention on Human Rights (European Convention).⁴¹

In the context of socio-economic rights in the African Charter, this element enables the interpretive organs to engage the object and purpose of the African Charter which is to 'promote and protect human and peoples' rights'.⁴² In interpreting socio-economic rights in the African Charter, the interpretive organs applying the teleological approach must inquire into this general object and purpose of the African Charter. In the *SERAC* case the African Commission referred to the object and purpose of the African Charter in relation to the requirement to exhaust local remedies.⁴³ It stated that the aim of the requirement to exhaust local remedies enshrined in the African Charter is to avail the domestic judicial system with an opportunity to determine cases in their states and issue appropriate remedies before such cases are referred to the international machinery.⁴⁴

The African Court applied the notion of object and purpose of the African Charter in its landmark *Ogiek* case. In elaborating the nexus between the rights to non-discrimination and equality and socio-economic rights in the African Charter, the African Court stated that it considers the African Charter's object and purpose when establishing the forms of distinction covered in the phrase 'any other status' in the provisions of article 2 of the African Charter.⁴⁵

2.2 Treaty as a whole

In establishing the object and purpose of a treaty in relation to provisions being interpreted, the teleological approach considers

38 Art 31(1) Vienna Convention.

39 M Scheinin 'Characteristics of human rights norms' in C Krause & M Scheinin (eds) *International protection of human rights: A textbook* (2012) 21.

40 *Engel v The Netherlands* (1976) Series A No 22.

41 *Engel* case (n 40) para 81.

42 Preamble to the African Charter para 11.

43 *SERAC* case (n 18) paras 37-38.

44 As above. See also *Media Rights Agenda & Others v Nigeria* (2000) AHRLR 200 (ACHPR 1998) para 59.

45 *Ogiek* case (n 22) paras 142 & 146.

the treaty as a whole. Considering a treaty as a whole requires interpretive organs to engage the Preamble to the treaty and other relevant provisions in a treaty to assign meaning to the provisions in question.⁴⁶ The Preamble is composed of two characteristics, namely, interpretive and binding characters. Regarding its interpretive character, a treaty's Preamble enshrines and elaborates its object and purpose.⁴⁷ This inclusion renders it a useful interpretative tool for elaborating on the meaning of treaty provisions, as well as clarifying the context in which such provisions should be construed.⁴⁸ In its binding character the Preamble, when applied as an interpretive aid, becomes binding just as any other treaty provision.⁴⁹ It is for this reason that parties' statements contained in the Preamble to the treaty must be treated as relevant when interpreting the treaty in question.⁵⁰

In the context of the African Charter, this element enables the interpretive organs to consider a wide range of preambular statements relevant to socio-economic rights. Specifically, the Preamble to the African Charter articulates the object and purpose of the African Charter to 'promote and protect human and peoples' rights'.⁵¹ It also contains statements that give the interpretive organs a mandate to draw on the 'values of freedom, equality, justice, and dignity'; the principle of 'interdependence of human rights'; 'individual duties'; the notion of African philosophy;⁵² and adherence to other international treaties of a human rights nature in order to elaborate the object and purpose of the African Charter. The values of freedom, equality, justice and dignity referred to in the Preamble are 'essential objectives for the achievement of the legitimate aspirations of the African peoples'.⁵³ As such, the interpretation of socio-economic rights in the African Charter should promote these values.

Furthermore, these values are elaborated in the substantive provisions of articles 1 to 5 of the African Charter. Article 1 of the African Charter provides for the general obligations of the parties. Through this article, the parties are required to 'recognise the rights, duties and freedoms enshrined in the African Charter' and 'to adopt legislative or other measures to give effect' to these rights, duties and freedoms. The provisions of article 2 embody the principle of non-

46 See also art 31(2) of the Vienna Convention.

47 Fitzmaurice (n 25) 25.

48 As above.

49 Fitzmaurice 229.

50 As above.

51 Preamble to the African Charter para 11.

52 A detailed discussion on the values, historical background and the notion of African philosophy falls in parts 2.3 and 2.3.4 of this article.

53 Preamble to the African Charter para 3.

discrimination that is relevant in the interpretation of the provisions of human rights, including the provisions of socio-economic rights. Article 3 embodies the individual's right to equality before the law, and the equal protection of the law, while article 4 provides for the right to life and article 5 provides for the right to dignity. These articles are significant in that they strengthen the values stated in the Preamble and have the potential to enrich the meaning of socio-economic rights enshrined in the African Charter. The interpretation of the treaty as a whole requires the interpretive organs to engage these provisions in interpreting socio-economic rights holistically.⁵⁴

Considering the African Charter as a whole requires the interpretive organs to engage other civil and political rights provisions to assign meaning to the socio-economic rights being interpreted. These rights include the rights to be heard, freedom of conscience, freedom of information, freedom of association, freedom of assembly, freedom of movement and residence, and equal access to public services.⁵⁵ The use of these civil and political rights can help to enrich the scope and content of the socio-economic rights.⁵⁶ The African Charter as a whole provides the interpretive organs with the scope to engage the duties' provisions to ascertain the object and purpose of the African Charter in relation to socio-economic rights. These provisions include articles 27 to 29 of the African Charter which provide for the individual's duties to his or her family, 'respect his or her fellow beings without discrimination', and 'preserve the harmonious development of the family'.

Treating the African Charter as a whole also enables the interpretive organs to embrace the principle of interdependence of rights envisaged in the Preamble. The Preamble to the African Charter reiterates that 'civil and political rights cannot be dissociated from economic, social and cultural rights'.⁵⁷ In the *SERAC*⁵⁸ and *COHRE* cases⁵⁹ the African Commission applied this principle. It held in the *SERAC* case⁶⁰ that by violating these existing rights the respondent state not only violated these explicit rights but also violated the right to food that is implicit in the African Charter. In the *COHRE* case it

54 J Tobin 'Seeking to persuade: A constructive approach to human rights treaty interpretation' (2010) *Harvard Human Rights Journal* 39.

55 Arts 7-13 African Charter.

56 ST Bulto 'The utility of cross-cutting rights in enhancing justiciability of socio-economic rights in the African Charter on Human and Peoples' Rights' (2010) *University of Tasmania Law Review* 158.

57 Preamble to the African Charter para 7.

58 *SERAC* case (n 18) para 64. See also para 60 regarding the implicit right to housing.

59 *Sudan Human Rights Organisation & Another v Sudan* (2009) AHRLR 153 (ACHPR 2009) para 209 (*COHRE* case).

60 *SERAC* case (n 18) para 65.

interpreted the rights to adequate food, water and housing as the underlying components of the right to health.⁶¹ In interpreting the right to life in the *Ogiek* case the African Court stated that this right guarantees the realisation of all rights in the African Charter.⁶² It held that the right to life prohibits the arbitrary deprivation of life and establishes a link between the right to life and the inviolable nature and integrity of human beings.⁶³ It should, however, be noted that the African Court, in part, interpreted the right to life narrowly by stating that the right to life in article 4 refers to a physical right to life, rather than an existential understanding of the right.⁶⁴

2.3 Preparatory work and historical background of the treaty

The teleological approach to interpretation engages the preparatory work and historical background as its vital element of treaty interpretation. Essentially, preparatory work includes 'exchanges among the parties and with the drafting body, treaty drafts, negotiation records, minutes of commission and plenary proceedings, notes and reports of drafters of a treaty worked, if any'.⁶⁵ The Vienna Convention endorses preparatory work (*travaux préparatoires*) as a supplementary element of treaty interpretation. Acknowledging preparatory work as a supplementary element implies that the interpretive organs can draw on this element only as a peripheral element of the treaty interpretation. Preparatory work should, however, be treated as a central element in interpreting the socio-economic rights in the African Charter. This understanding is important because the preparatory work of the African Charter incorporates significant historical background pertaining to the inclusion of socio-economic rights. This historical background helps to identify the object and purpose of the African Charter in relation to socio-economic rights. The preparatory work of the African Charter also enshrines and elaborates the object and purpose of the socio-economic rights recognised in the African Charter.

The Vienna Convention requirement that the text should be interpreted considering its object and purpose logically allows the consideration of the preparatory work of the African Charter, which enshrines its object and purpose, as a primary interpretative tool. It should be noted that in some international treaties, a treaty's

61 *COHRE* case (n 59) para 209.

62 *Ogiek* case (n 22) para 152.

63 *As above*.

64 *Ogiek* case (n 22) para 154.

65 *Yeshanew* (n 31) 52.

preparatory work forms part of the relevant law and it cannot be treated as a supplementary means of interpretation.⁶⁶

The ensuing sub-parts analyse all the preparatory work of the African Charter relevant for interpretation of socio-economic rights.

2.3.1 *Decolonisation movements*

Decolonisation movements in Africa provide significant insight into the protection of socio-economic rights in the African Charter. The movements for decolonisation, particularly through Pan-African congresses, emphasised the respect and protection of human rights in Africa.⁶⁷

The 1919 Pan-African Congress in Paris marked the beginning of African leaders' efforts to protect the human rights of African people, which eventually contributed to the adoption of the African Charter. At this congress, participants from Africa raised three significant concerns: first, the need for land ownership and equitable economic development in a manner that allows African people to benefit from the sale and extraction of their natural resources; second, provisions for educational opportunities in industrial fields, in language programmes, and access to health care, which was considered an effective tool for economic development. In the third place they requested the participation of African people in local government and the independence of African colonies.⁶⁸

The second Pan-African Congress⁶⁹ emphasised self-determination and the protection of labour rights (especially the elimination of involuntary servitude, inadequate pay, and hard-working conditions). The third and fourth Pan-African Congresses took place in 1923 and 1927 respectively⁷⁰ and reiterated the concerns raised in the previous congresses. The fifth Pan-African Congress⁷¹ emphasised

66 Yeshanew (n 31) 52.

67 M Killander 'African human rights law in theory and practice' in S Joseph & A McBeth (eds) *Research handbook on international human rights law* 389-391, <http://ssrn.com/abstract=1438555> (accessed 5 December 2019). See also Viljoen (n 19) 151-156.

68 1919 Pan-African Congress, http://www.panafricanmovement.org/?page_id=391 (accessed 5 December 2019); Pan-African Congress in 1919, www.diaspora.northwestern.edu (accessed 21 October 2015).

69 1921 Pan-African Congress, http://www.panafricanmovement.org/?page_id=393 (accessed 5 December 2019).

70 1923 Pan-African Congress, http://www.panafricanmovement.org/?page_id=395 and 1927 Pan-African Congress, http://www.panafricanmovement.org/?page_id=397 (accessed 5 December 2019).

71 1945 Pan-African Congress, <http://www.firstcutmedia.com/pac45-1945/pan-african-congress-in-manchester-1945> (accessed 5 December 2019).

the abolition of discriminatory land laws; forced labour; the inclusion of the right to freedom from poverty; the right of Africans to develop their economic resources without hindrance; the right to freedom of association and assembly; the right to compulsory free education, including free uniforms, meals, books and school equipment; the right to health, including the rights to medical services, equality of access to health and welfare services; and the right to work, including the right to equal pay for equal work.⁷²

In 1958 the All African People's Conference was held in Accra and was attended by 300 delegates. This conference adopted a Resolution on Imperialism and Colonialism,⁷³ which extended fundamental human rights to all men and women in African countries, and the rights of African people to the fullest use and protection of their lands.⁷⁴ The Resolution required the independent African states to ensure that fundamental human rights were extended within their states to serve as an example to the colonial nations who violated and ignored the rights of African people.⁷⁵ The resolutions passed by the Pan-African congresses and the All-African People's Conference can give an insight into the normative scope and content of the socio-economic rights to work, education, health, property, food, as well as peoples' socio-economic rights to freely dispose of their natural wealth, development, and a satisfactory environment in the African Charter. This element of the preparatory work as a tenet of the teleological approach may be applied to interpret the scope and content of socio-economic rights in the Charter and advance the teleological approach to interpretation.

2.3.2 *Organisation of African Unity Charter*

A few years after the Resolution on Imperialism and Colonialism African leaders adopted the Charter of the Organisation of African Unity (OAU Charter).⁷⁶ Significantly, the OAU Charter contained provisions relevant to the protection of socio-economic rights and some human rights standards for which African leaders stood in their anti-colonial struggles.⁷⁷ Through its Preamble, African leaders

72 5th Pan-African Congress Resolutions and Declarations, www.13.+5th+PAC++resolutions+and+declarations,+1945.pdf (accessed 5 December 2019).

73 Resolution on Imperialism and Colonialism, Accra, 5-13 December 1958, <http://nixonland74.files.wordpress.com/2016/1958colonies.pdf> (accessed 5 December 2019).

74 Resolution on Imperialism and Colonialism (n 73) 5.

75 Resolution on Imperialism and Colonialism 7.

76 Charter of the Organisation of African Unity (OAU Charter), entered into force 13 September 1963, 479 UNTS 39.

77 Killander (n 67) 390-391.

declared the significance of the values of freedom, equality, justice and dignity for the realisation of human rights.⁷⁸ They also affirmed their adherence to the principles of human rights contained in the UN Charter and the Universal Declaration of Human Rights (Universal Declaration).⁷⁹ According to African leaders, these principles ensured common cooperation among states.⁸⁰ Moreover, they expressed the desire to protect the welfare and well-being of all individuals in Africa⁸¹ through cooperation in various areas related to human rights,⁸² including economic, educational and cultural, as well as health, sanitation and nutritional cooperation.⁸³ These provisions can significantly provide an insight into the scope and content of the socio-economic rights in the African Charter. The application of the OAU Charter as part of the preparatory work of the African Charter will create an avenue for the supervisory organs to advance the teleological approach to interpretation regarding the scope and content of the socio-economic rights in the African Charter.

2.3.3 Decision on human and peoples' rights in Africa

In their initiatives to adopt the African Charter, in 1979 the Summit of the African Leaders met in Monrovia (Monrovia Summit)⁸⁴ and declared their commitment to protecting human rights and the principles of dignity, equality and justice contained in the UN Charter. They also stressed their goal to protect socio-economic rights on the same level as civil and political rights. African leaders agreed to pay special attention to the socio-economic rights of individuals. Based on this background, these leaders adopted a resolution (OAU Resolution)⁸⁵ that initiated the process to draft the African Charter. The commitments of African leaders in the OAU Resolution are relevant for interpreting socio-economic rights and advance the teleological interpretation of these rights.

2.3.4 Opening speech by President Senghor

In response to the OAU Resolution, the OAU Secretary-General convened the Meeting of Experts in Dakar which was opened by

⁷⁸ Preamble to the OAU Charter para 2.

⁷⁹ Preamble to the OAU Charter para 8.

⁸⁰ As above.

⁸¹ Preamble to the OAU Charter para 9.

⁸² Art II(2) OAU Charter.

⁸³ Arts II(2)(b)-(d) OAU Charter.

⁸⁴ 16th ordinary session of the OAU Assembly of Heads of State and Government, Monrovia, Liberia, 16-20 July 1979.

⁸⁵ Decision on Human and Peoples' Rights in Africa, Resolution AHG/Dec 115 (XIV) Rev 1 1979.

the then President of Senegal, Leopold Sedar Senghor.⁸⁶ In his speech (Address by Senghor) President Senghor highlighted the object and purpose of the African Charter to be adopted, including safeguarding the values of dignity, equality, freedom and justice,⁸⁷ taking into account the needs of African people, including their socio-economic needs.⁸⁸ He also highlighted the need for an African Charter that protects socio-economic rights in such a manner that it would improve the socio-economic conditions of African people.⁸⁹ Moreover, Senghor's speech stressed African leaders' goal of protecting socio-economic rights, both at the individual and collective level.⁹⁰ The recognition of these rights in the African Charter was significant for the socio-economic development of all people in Africa.⁹¹ African leaders considered socio-economic rights and civil and political rights as equally important.⁹² Senghor's speech emphasised the importance of the right to development, which embraces all rights of a socio-economic character. The full realisation of the right to development should be considered in a manner that improves the socio-economic conditions of individuals.⁹³ President Senghor also urged the experts to take African philosophy into account when developing the African Charter.⁹⁴

The foundation of an African philosophy is the collective way of living in African societies. It is founded in the phrase 'I am, because we are; and since we are, therefore I am'.⁹⁵ The phrase demonstrates that the African philosophy is built on the collective nature of human beings, rather than on an individual basis. African philosophy is characterised by the vital relationship that an individual maintains with other members of the community.⁹⁶ The communal oriented nature of an individual in a society is characterised as an African philosophy since it was practised by many pre-colonial African societies. Scholars in contemporary African society identify the African philosophy as 'African personality'; 'negritude'; and *Ujamaa* (the Kiswahili term for African socialism).⁹⁷ Winks terms the

86 Address delivered by Leopold Sedar Senghor, President of the Republic of Senegal, OAU Doc CAB/LEG/67/5 (Address by Senghor).

87 Address by Senghor (n 86) para 3.

88 Address by Senghor para 16.

89 Odinkalu (n 7) 187.

90 Address by Senghor (n 86) para 19.

91 As above.

92 Address by Senghor (n 86) para 20.

93 Address by Senghor paras 21-22.

94 Address by Senghor paras 27 & 29.

95 JS Mbiti *African religions and philosophy* (1990) 106 141.

96 H Maurier 'Do we have an African philosophy?' in RA Wright (ed) *African philosophy: An introduction* (1984) 35.

97 M Mutua 'The Banjul Charter and the African cultural fingerprint: An evaluation of the language of duties' (1995) 35 *Virginia Journal of International Law* 352.

African philosophy 'African humanism'⁹⁸ which was pre-dominant in pre-colonial societies and is similar to Kwame Nkrumah's modern reformulation of 'consciencism'; Kenneth Kaunda's 'humanism'; and Julius Nyerere's *Ujamaa*.⁹⁹ In South Africa it is known as ubuntu,¹⁰⁰ originating from the Zulu phrase *Umuntu ngumuntu ngabantu*, which literally means 'a person is a person through other persons'.¹⁰¹ The concept of an African philosophy has direct implications for the interpretation of both individual and collective socio-economic rights in the African Charter. An African philosophy based on the values of cooperation, collectiveness, obligations, and interdependence is appropriate for developing socio-economic rights.¹⁰²

2.3.5 *M'Baye's draft of the African Charter on Human and Peoples' Rights*

Keba M'Baye, who was the president of the Supreme Court of Senegal, prepared the preliminary draft of the African Charter (M'Baye Draft).¹⁰³ The M'Baye Draft incorporated various provisions on socio-economic rights and other related rights. These provisions were similar¹⁰⁴ to the provisions of the International Covenant on Economic, Social and Cultural Rights (ICESCR).¹⁰⁵ The M'Baye Draft refers to socio-economic rights in three distinct provisions, namely, the preambular clauses; the general provisions; and the specific socio-economic rights provisions. The preambular clauses of the M'Baye Draft identify two significant elements relevant for interpreting socio-economic rights. First, the Preamble identifies the apparent object and purpose, as well as the underlying values, of the African Charter. According to the Preamble, African leaders commit to protecting fundamental human rights, including socio-economic rights, and the value of human dignity.¹⁰⁶ The respect for human dignity and fundamental rights is not restricted to civil and political rights but

98 BE Winks 'A covenant of compassion: African humanism and the rights of solidarity in the African Charter on Human and Peoples' Rights' (2011) 11 *African Human Rights Law Journal* 456.

99 As above.

100 As above.

101 T Metz 'Toward an African moral theory' (2007) 15 *Journal of Political Philosophy* 323. Based on available literature on ubuntu, this dissertation uses the notion of ubuntu to elaborate on the notion of African philosophy.

102 JAM Cobbah 'African values and the human rights debate: An African perspective' (1987) 9 *Human Rights Quarterly* 331.

103 K M'Baye Draft African Charter on Human and Peoples' Rights, OAU Doc CAB/LEG/67/1 (M'Baye Draft).

104 M'Baye Draft (n 103) para 1.

105 International Covenant on Economic, Social and Cultural Rights (ICESCR), GA Res 2200A (XXI) 16 December 1966, 993 UNTS 3. The final provisions of the African Charter, however, are quite different from those of ICESCR.

106 M'Baye Draft (n 103) para 2.

extends to socio-economic rights.¹⁰⁷ Therefore, every individual is entitled to the enjoyment of his or her socio-economic rights and civil and political rights.¹⁰⁸ Second, it stated the commitment of African leaders to protecting fundamental rights in accordance with the UN Charter and the Universal Declaration.¹⁰⁹

The general provisions, on the one hand, recognise individuals' socio-economic rights and, on the other, they impose obligations on states to protect socio-economic rights. The M'Baye Draft also protected socio-economic rights through the formulation of specific substantive provisions on socio-economic rights, including the right to equal enjoyment of the socio-economic rights to work;¹¹⁰ social security;¹¹¹ an adequate standard of living;¹¹² health;¹¹³ and education.¹¹⁴ Through the application of the preparatory work, the supervisory organs can engage these rights in the M'Baye Draft to interpret socio-economic rights in the African Charter in a manner that corresponds with the teleological approach to interpretation.

2.3.6 *Dakar Draft*

A group of experts under the chairmanship of Keba M'Baye met in Dakar and prepared the draft African Charter (Dakar Draft).¹¹⁵ The Dakar Draft formulated various socio-economic rights and other provisions relevant to socio-economic rights. According to the Dakar Draft, the promotion and protection of human rights should be able to improve peoples' needs, including their socio-economic needs.¹¹⁶ It recognised the values of freedom, equality, justice, and dignity as significant for the achievement of peoples' needs.¹¹⁷ It formulated substantive provisions in relation to these values, including provisions on the rights to non-discrimination, equality, life and dignity.¹¹⁸ The Dakar Draft emphasised the improvement of individuals' socio-economic conditions through the protection of socio-economic rights.¹¹⁹

107 As above.

108 M'Baye Draft (n 103) para 4.

109 M'Baye Draft para 1.

110 Art 6 M'Baye Draft (n 103).

111 Art 7 M'Baye Draft.

112 Art 10 M'Baye Draft.

113 Art 11 M'Baye Draft.

114 Art 12 M'Baye Draft.

115 Preliminary Draft of the African Charter, prepared during the Dakar Meeting of Experts at the end of 1979, OAU Doc CAB/LEG/67/3/Rev 1 (Dakar Draft).

116 Governing Principle of the Dakar Draft (n 115).

117 Preamble to the Dakar Draft (n 115) para 3.

118 Arts 2-5 & 19 Dakar Draft (n 115).

119 Governing Principle of the Dakar Draft (n 115) para 6.

Socio-economic rights in the Dakar Draft included the rights to property, work, health, education, family, wealth and natural resources, as well as the right to economic, social and cultural development.¹²⁰ Unlike the M'Baye Draft, the Dakar Draft formulated socio-economic rights in a general form in that it does not elaborate on their normative scope and content. The Dakar Draft also omitted some significant socio-economic rights provisions including the right to social security, as well as the right to an adequate standard of living.¹²¹ Significantly, it provided the mechanism with which the omitted rights, and the normative content of socio-economic rights, should be developed. It required interpretive organs to develop the normative content of these rights through interpretation.¹²²

The Dakar Draft also imposed obligations on states and individuals to realise socio-economic rights.¹²³ States are generally obliged to 'recognise' and 'guarantee' human rights and to adopt 'legislative and other measures' in order to 'give effect' to these rights.¹²⁴ The Dakar Draft recognised an individual's duties towards his or her family, community, other individuals and the country.¹²⁵ The formulation of rights provisions in the Dakar Draft does not distinguish between socio-economic rights and civil and political rights. This formulation allows the interpretation of socio-economic rights through the concept of the interdependence of rights and can assist interpretive organs to interpret socio-economic rights in a manner that recognise various states' obligations. The use of the principle of interdependence rights advances the teleological interpretation of socio-economic rights in that it allows other relevant rights provisions to enrich the scope and content of socio-economic rights in question and their concomitant obligations.

2.3.7 Report of the Rapporteur on the Dakar Draft

The Report of the Rapporteur (Rapporteur's report)¹²⁶ represents another significant piece of preparatory material for interpreting the socio-economic rights in the African Charter. The significance of the Rapporteur's report is found in the remarks by the Chairperson of the Committee of Experts that allow the interpretive organs to flexibly develop the scope and content socio-economic right and

120 Arts 14-19 Dakar Draft (n 115).

121 ICESCR contains these socio-economic rights in arts 9 and 11 respectively.

122 Dakar Draft (n 115) paras 2-3.

123 Arts 16(2) & 17(2) Dakar Draft (n 115).

124 Art 1 Dakar Draft.

125 Arts 27-29 Dakar Draft.

126 Rapporteur's report OAU Doc CAB/LEG/67/Draft Rapt Rpt (II) Rev 4.

their related obligations.¹²⁷ The Dakar Draft was submitted to the OAU Ministers of Justice for deliberation. Significantly, the provisions of the Dakar Draft did not undergo any substantial change during deliberation.¹²⁸ After deliberation, the Dakar Draft was submitted to the Assembly of Heads of State and Government, which adopted the African Charter on 17 June 1981.

In the *SERAC* case the African Commission applied the preparatory work to explain the right of peoples to freely dispose their wealth in article 21 of the African Charter.¹²⁹ It stated that article 21 traces its origin to colonial times when colonial powers violated peoples' rights and deprived them of their land and resources.¹³⁰ Through article 21, the drafters of the African Charter aim at reminding African governments of this painful history and restore co-operative economic development to African communities.¹³¹ The African Court applied preparatory work in the *Ogiek* case and stated that during anti-colonial struggles the term 'peoples' meant populations in countries struggling for their independence and national sovereignty.¹³² In the independent states the Court held that, provided that such groups do not challenge the sovereignty and territorial integrity of a state, they should be recognised as peoples.¹³³

2.4 Reference to the relevant international treaties and the parties' subsequent agreements and practices

The 'relevant rules of international law' is another element of the teleological approach. The rules of international law encompass both customary and general international law related to the interpreted treaty of a similar nature.¹³⁴ Articles 60 and 61 of the African Charter enables the interpretive organs to clarify the scope and content of socio-economic rights in light of other international instruments.

The subsequent conduct of the parties includes the decisions of the interpretive organs,¹³⁵ and the rules of procedure formulated by

¹²⁷ Rapporteur's report (n 126) para 13.

¹²⁸ Yeshanew (n 31) 285.

¹²⁹ *SERAC* case (n 18) para 56.

¹³⁰ As above.

¹³¹ As above.

¹³² *Ogiek* case (n 22) para 197.

¹³³ *Ogiek* case para 199.

¹³⁴ International Law Commission 'Fragmentation of international law: Difficulties arising from the diversification and expansion of international law' Report of the Study Group of the International Law Commission, 58th session (2006) A/CN.4/L.682) ch F, Systemic integration and art 31(3)(c) of the Vienna Convention para 461.

¹³⁵ Fitzmaurice (n 25) 9. See also Fitzmaurice (n 25) 211.

these interpretive organs.¹³⁶ Recourse to such practices during the interpretative process is significant in that they assist in ascertaining the effective meaning of the treaty.¹³⁷ The subsequent conduct of the parties may take two forms, namely, subsequent agreements and practices of the parties.¹³⁸ While a subsequent agreement focuses 'on the fact of an agreement between the treaty parties',¹³⁹ subsequent practice includes 'executive, legislative and judicial acts'.¹⁴⁰ The parties' subsequent practices may be found in the rules of procedure and decisions formulated by interpretive organs.¹⁴¹ In the context of human rights treaties, the parties' enforcement of the decisions of interpretive organs establishes their subsequent practices.¹⁴² Such practices allow the application of decisions of interpretive organs, as well as states' undertakings (such as subsequent treaties and protocols) in the interpretation of socio-economic rights in the African Charter.

The African Commission has mostly applied this element in its socio-economic rights jurisprudence.¹⁴³ The African Court applied relevant international law in the *Ogiek* case through the provisions of articles 60 and 61 of the African Charter to define 'indigenous people'.¹⁴⁴ Through articles 60 and 61 of the African Charter, the Court drew inspiration from the African Commission's Working Group on Indigenous Populations/Communities, as well as the work of the United Nations Special Rapporteur on Minorities, which establish criteria to identify indigenous populations.¹⁴⁵

2.5 Principle of effectiveness

The principle of effectiveness¹⁴⁶ presumes that texts are formulated to fulfil a specific effect. The principle requires the text to be interpreted in light of the declared or apparent object and purpose of the treaty. This should be done in a manner that gives such a text its effective meaning, consistent with the words used to formulate it and with

¹³⁶ As above.

¹³⁷ As above.

¹³⁸ Arts 31(3)(a)-(b) Vienna Convention.

¹³⁹ A Roberts 'Power and persuasion in investment treaty interpretation: The dual role of states' (2010) 104 *American Journal of International Law* 199.

¹⁴⁰ Roberts (n 139) 200.

¹⁴¹ Fitzmaurice (n 25) 9.

¹⁴² Scheinin (n 39) 21.

¹⁴³ See *SERAC* case (n 18) paras 52-53, *Purohit and Moore v The Gambia* (2003) AHRLR 96 (ACHPR 2003) para 80; *COHRE* case (n 59) para 209.

¹⁴⁴ *Ogiek* case (n 22) paras 105-106, 108.

¹⁴⁵ As above.

¹⁴⁶ Fitzmaurice (n 25) 203 211. The principle of effectiveness is sometimes referred to as *ut res magis valeat quam pereat*.

the other provisions of the treaty.¹⁴⁷ In order to assign an effective meaning to the text, the principle of effectiveness, in its general meaning,¹⁴⁸ allows the interpretive organs to consider and apply different possibilities of interpretation, which will safeguard the effectiveness of the text.¹⁴⁹ In its substantive dimension, it requires interpretive organs to interpret human rights treaty broadly.¹⁵⁰ It also requires the limitations of such rights to be interpreted narrowly.¹⁵¹ The implications of the substantive dimension of the principle of effectiveness, particularly for the human rights treaties, are twofold. First, the principle of effectiveness means that the texts of human rights treaties should be interpreted broadly.¹⁵² Second, the principle of effectiveness requires the limitations and restrictions to human rights (including socio-economic rights provisions in the treaty) to be interpreted narrowly.¹⁵³

In its temporal dimension,¹⁵⁴ the principle of effectiveness considers a treaty as a living instrument.¹⁵⁵ This means that a treaty should be interpreted in light of present-day conditions prevalent in society,¹⁵⁶ as this 'keeps the meaning of the rights both contemporary and effective'.¹⁵⁷ Significantly, this promotes an interpretation of socio-economic rights that takes into account the living conditions of people at the time of the treaty's interpretation. In this regard, interpretive organs can consider conditions that were not foreseen by the state parties to the African Charter at the time of its conception. Accordingly, this interpretation considers both the protection against the violations prevalent at the time of interpretation and at the time of the adoption of a treaty.¹⁵⁸

The systemic dimension represents another facet of the principle of effectiveness. This dimension consists of both the internal and external coherence dimensions.¹⁵⁹ The internal coherence dimension

147 Fitzmaurice (n 25) 211.

148 D Rietiker 'The principle of "effectiveness" in the recent jurisprudence of the European Court of Human Rights: Its different dimensions and its consistency with public international law – No need for the concept of treaty *sui generis*' (2010) 79 *Nordic Journal of International Law* 256.

149 Rietiker (n 148) 256.

150 Rietiker 259.

151 As above.

152 M Killander 'Interpreting regional human rights treaties' (2010) 7 *International Journal on Human Rights* 147.

153 M Craven *The International Covenant on Economic, Social and Cultural Rights: A perspective on its development* (1995) 3.

154 Rietiker (n 148) 261.

155 As above.

156 As above.

157 K Dzehtsiariou 'European consensus and the evolutive interpretation of the European Convention on Human Rights' (2011) 12 *German Law Journal* 1730.

158 Killander (n 152) 151.

159 Rietiker (n 148) 267-275.

emphasises a form of interpretation that reads the treaty as a whole in a manner that advances internal consistency and harmony among the various provisions of the treaty.¹⁶⁰ In relation to external coherence, the principle of effectiveness focuses on interpreting a treaty through other comparative legal sources. As such, interpretive organs should interpret treaties in light of other relevant international instruments.¹⁶¹ This dimension is significant as it gives interpretive organs the latitude to interpret the socio-economic rights in the African Charter in a manner that harmonises with the normative provisions in other relevant human rights instruments.

Having discussed the elements of the teleological approach and the way it corresponds with the African Charter's context; the ensuing part demonstrates the criticisms of socio-economic rights under the African Charter and the appropriateness of the teleological approach for their interpretation.

3 Criticisms of socio-economic rights in the African Charter and the appropriateness of the teleological approach for their interpretation

3.1 Criticisms based on the broad formulation of socio-economic rights provisions

Scholars contend that socio-economic rights are broadly formulated and, therefore, their precise scope and content remain unclear.¹⁶² However, the broad formulation of a treaty's provisions is not exceptional to socio-economic rights in the African Charter. Whether included in national bills of rights or regional or global human rights treaties, human rights often are vague.¹⁶³

The scholars' doubts regarding the generic nature of socio-economic rights in the African Charter based on the stance of the narrow textual approach, namely, that the meaning of the text of a treaty should be derived from the text itself,¹⁶⁴ is a theoretical flaw. Considered holistically, the broad formulation of these rights avails the interpretive organs with an opportunity to interpret them flexibly in a manner that gives effect to the object and purpose of the African Charter. The generic formulation allows interpretive organs

160 Rietiker 267.

161 Rietiker 271.

162 Ssenyonjo (n 10) 153.

163 Killander (n 152) 145.

164 Fitzmaurice (1951) (n 25) 7.

to consider socio-economic changes at the time of interpretation of socio-economic rights in question. The Rapporteur's report acknowledged that these rights were formulated in general terms in order to allow interpretive organs the flexibility to interpret them by an appropriate interpretative approach.¹⁶⁵ Given the nature of the broad formulation of these rights in the African Charter, the teleological approach (which utilises various interpretive elements and principles) is appropriate to ascertain their adequate meaning. Although the text of the treaty is a starting point in the interpretation of human rights provisions, an approach to treaty interpretation that constructs the meaning of these rights through several interpretive tools is required.¹⁶⁶ The African Commission applied various aspects of the teleological approach to interpret socio-economic rights involved. For example, in the *Noca* case,¹⁶⁷ the *Endorois* case¹⁶⁸ and the *COHRE* case, the African Commission applied various relevant international, regional and national laws to interpret the right to property. In the *Noca* case, in conjunction with the provisions of article 2 of the African Charter, the African Commission identified that the right to property in article 14 is recognised for every individual.¹⁶⁹ This interpretation by the African Commission is significant as it establishes the holder of the right to property. In the *COHRE* and the *Noca* cases the African Commission identified two main principles relating to the right to property. These principles include the general right to ownership and peaceful enjoyment of the right to property, as well as the possibility and condition of deprivation of the right to property.¹⁷⁰ In the *Noca* case the African Commission stated that the right to property encompasses the right to adequate compensation.¹⁷¹ The element of compensation is imperative in the right to property in that it recognises and protects an individual's right to ownership of property against unlawful deprivation. In the *Endorois* case the African Commission added other components of the right to property to include access to property, possession, use and control over the property as well as economic resources and rights on the collective land.¹⁷² These elements are significant in that they assist to identify forms of interference by states and their implications for the right to property ownership. In the *SERAC* case the African Commission applied ICESCR as a relevant international

165 Rapporteur's report (n 126) para 13.

166 Senden (n 27) 52.

167 *Dino Noca v Democratic Republic of the Congo* Communication 286/2004.

168 *Centre for the Minority Rights Development & Others v Kenya* (2009) AHRLR 75 (ACHPR 2009) (*Endorois* case).

169 *Noca* case (n 167) para 128.

170 *COHRE* case (n 59) para 143.

171 *Noca* case (n 167) para 147.

172 *Endorois* case (n 168 above) para 186.

human rights instrument and the relevant provisions of the African Charter to interpret the right to health. The African Commission elaborated upon the normative content of the rights to health and the right to a healthy environment to include environmental and industrial hygiene; scientific monitoring of threatened environments; the publishing of environmental and social impact studies; access to information; and meaningful participation by individuals.¹⁷³ In the *Purohit* case the African Commission, by engaging the provisions of articles 16 and 18(4) of the African Charter, extended the content of the right to health to encompass the right to health facilities and access to health goods and services without discrimination.¹⁷⁴ In the *COHRE* case the African Commission drew inspiration from relevant international human rights instruments and expanded the content of the right to health.¹⁷⁵ According to the African Commission, the right to health also incorporates timely and appropriate health care, access to safe and potable water, an adequate supply of food, nutrition and housing, as well as safe drinking water and electricity.¹⁷⁶ Moreover, other determinants of the right to health include availability, accessibility and acceptability.¹⁷⁷ These three elements are significant as they identify the guiding principles for the realisation of the right to health.

Furthermore, the African Commission in the *SERAC* case applied the preparatory work and the relevant international human rights jurisprudence to explain the right of peoples to freely dispose of their wealth in article 21 of the African Charter.

Critics of socio-economic rights challenge the lack of internal qualifiers of 'progressive realisation' and 'within maximum available resources'. Odinkalu argues that the omission of these two phrases implies that the socio-economic rights in the African Charter impose on states immediate obligations rendering their justiciability difficult.¹⁷⁸ The argument by scholars is based on the literal textual approach that considers a text of a treaty to be self-sufficient. It is admitted that unlike the provisions of article 2(1) of ICESCR, the formulation of article 1 of the African Charter does not expressly include a state's obligation to realise rights 'progressively' and within 'available resources'. The omission, however, does not necessarily

173 *SERAC* case (n 18) paras 52-53.

174 *Purohit* case (n 143) para 80.

175 *COHRE* case (n 59) para 209. It also applied relevant international human rights instruments and jurisprudence to interpret the right to the protection of the family.

176 *COHRE* case (n 59) paras 209 & 211.

177 *COHRE* case para 209.

178 Odinkalu (n 7) 196.

mean that these qualifiers are excluded from article 1 of the African Charter. The teleological approach that considers a wide range of interpretative tools in addition to the text in question is a viable approach. It can be applied through the principle of effectiveness and the element of a treaty as a whole to holistically interpret the phrase 'to adopt other measures' in article 1 to read into the African Charter the notions of 'progressive realisation' and 'within maximum available resources'. The phrases allow states to take into account non-legislative progressive measures,¹⁷⁹ such as resource consideration, planning and budgeting to realise the socio-economic rights in the African Charter.

Considering the scarcity of resources in many African countries, socio-economic rights need to be interpreted in a manner that guarantees progressive realisation. The poor levels of economic development, as well as the uneven allocation of resources, can hinder states from immediately realising these rights.¹⁸⁰ In the *Purohit* case the African Commission stated that poverty in many African countries hinders the enjoyment of the right to health.¹⁸¹ The Commission confirmed that resource scarcity and poverty contribute to the failure of African states to effectively realise individuals' rights to health.¹⁸²

It should also be noted that the notions of 'progressive realisation' and 'within maximum available resources' also impose on states concrete substantive and procedural obligations to make measurable progress in relation to the full realisation of socio-economic rights and to mobilise resources for their realisation. The African Commission in its Principles and Guidelines on the Implementation of Economic, Social and Cultural Rights in the African Charter on Human and Peoples' Rights (Guidelines)¹⁸³ elaborated that 'progressive realisation' requires states to implement 'a reasonable and measurable plan' by setting 'achievable benchmarks and time frames' for the realisation of socio-economic rights based on the available resources.¹⁸⁴ It further stated that states require adequate resources to realise socio-economic rights progressively. As such they have an obligation to put in place 'effective and fair taxation system' and 'budgeting process' to give effect to these rights.¹⁸⁵

179 See also *Purohit* case (n 143) para 42.

180 *Ankumah* (n 17) 144.

181 *Purohit* case (n 143) para 84.

182 As above.

183 Principles and Guidelines on the Implementation of Economic, Social and Cultural Rights in the African Charter on Human and Peoples' Rights, as adopted on 24 October 2011 (Guidelines).

184 Guidelines (n 183) para 14.

185 Guidelines (n 183) para 15.

Dealing with the right to housing in the Djazia case the UN Committee on Economic, Social and Cultural Rights (ESCR Committee) stated that article 2(1) of ICESCR requires state parties to take all necessary steps within their available resources to give effect to this right. State parties can develop a wide range of policies 'including the establishment of housing subsidies for those unable to obtain affordable housing'.¹⁸⁶ Whenever a state fails to provide alternative accommodation for persons evicted from their housing, it must prove that despite taking all reasonable measures within its maximum available resources it could not realise the victims' right to housing.¹⁸⁷

Socio-economic rights are also considered to be imposing on states positive obligations and, therefore, they are resource-oriented.¹⁸⁸ While it is admitted that socio-economic rights entail positive obligations, they also incorporate negative obligations. Moreover, 'resource implication' is not exclusive to socio-economic rights, but the full realisation of civil and political rights also requires the deployment of resources. The rights to vote, fair trial and equality, for example, have resource and policy implications.¹⁸⁹ Considering socio-economic rights as exclusively positive in nature is a flaw of the narrow textual approach and does not give effect to the object and purpose of the African Charter. The teleological approach through the principle of effectiveness and interdependence of rights allows the interpretation of the provisions of articles 1 and 3 on non-discrimination to include in the provisions of socio-economic rights negative obligations.

3.2 Criticisms based on the legal status of the African Commission's recommendations

The legal status of the African Commission's recommendations has also been challenged. Eno argues, for example, that the Commission's recommendations are not legally binding.¹⁹⁰ In rejecting the African Commission's recommendations in *Kenneth Good v Republic of Botswana (Kenneth Good)* the respondent state argued that, unlike judicial bodies, the African Commission is a mere quasi-judicial

¹⁸⁶ *Djazia and Bellili v Spain* Communication 5/2015 para 15.3 (*Djazia case*).

¹⁸⁷ *Djazia case* (n 186) para 15.5.

¹⁸⁸ Yeshanew (n 31) 76.

¹⁸⁹ S Liebenberg *Socio-economic rights: Adjudication under a transformative constitution* (2010) 55.

¹⁹⁰ R Eno 'The place of the African Commission in the new African dispensation' (2002) 11 *African Security Review* 65.

body with no mandate to give binding orders.¹⁹¹ In response, the teleological approach has the potential to facilitate a holistic interpretation of the provisions of the African Charter in a manner that influences states to comply with decisions in good faith. The teleological approach enables interpretive organs to demonstrate that their recommendations are not alien to the Charter but that they rather emanate from it and reveal the effective meaning of socio-economic rights envisaged by the drafters.

States also challenge the mandate of the interpretive organs to review states' implementation of socio-economic rights.¹⁹² In a broader context interpretation involves the mandate of the interpretive organs to review states' compliance to socio-economic rights obligations. It is in this spirit that the teleological approach becomes an appropriate approach for interpreting various provisions of the African Charter to read into the African Charter a model of review that advances the accountability for violations of socio-economic rights by states. Interpretive organs should apply a model of review that clears states' doubts regarding their sovereignty and discretion on socio-economic policies. A model of review is a vital mechanism to ensure that states advance the object and purpose of the African Charter by implementing their obligations. The teleological approach can be applied to demonstrate the model of review implicitly incorporated in the African Charter.

4 Coherent application of the teleological approach: Methodology

The major challenge facing the African Commission and the African Court is the inconsistencies in the application of these aspects of the teleological approach. In the *SERAC* case the African Commission relied exclusively on ICESCR. In some communications such as *Purohit* and *Gunme* it mixed the teleological approach and the narrow textual approach. The African Court also mixed the two approaches in the *Ogiek* case. In *Endorois* the African Commission made good use of the relevant provisions of the African Charter and the relevant international and regional human rights instruments only. This part suggests a methodology for the application of the teleological approach to guide the interpretive organs.

191 'Botswana will not honour African Union ruling on Prof Good' *Sunday Standard* 2 August 2010, <http://www.sundaystandard.info/article.php?NewsID=8415&GroupID=1> and quoted in R Murray & E Mottershaw 'Mechanisms for the implementation of decisions of the African Commission on Human Rights' (2014) 36 *Human Rights Quarterly* 353.

192 Yeshanew (n 31) 79-80.

4.1 Interpreting the socio-economic rights in the African Charter in light of its object and purpose

The object and purpose of the African Charter are vital for developing the effective meaning, scope and content of socio-economic rights and their related obligations. The significance is threefold. First, it helps the interpretive organs to identify the goals to be achieved, in relation to the substantive and procedural provisions being interpreted. Second, it helps the interpretive organs to identify the interpretive aids enshrined in the African Charter as a whole. As Swart correctly argues, the object and purpose of the treaty guides the interpretive organs to interpret the treaty in its entirety.¹⁹³ Third, it assists the interpretive organs to identify appropriate external interpretive aids that can be consulted during the interpretative process. As Senden rightly observes, the interpretive organs establish the interpretive aids to support the interpretation of the treaty through the object and purpose.¹⁹⁴ Thus, referring to the object and purpose of the African Charter requires the interpretive organs to take internal and external interpretive aids into account when interpreting its socio-economic rights provisions. The interpretive organs should engage these interpretive aids in line with the methodological sequence explained in order to give effect to the object and purpose of the African Charter.

4.1.1 *Textual synthesis*

In identifying the object and purpose of the socio-economic rights provisions in the African Charter the interpretive organs should start with the textual synthesis to identify the object and purpose of the African Charter in relation to the socio-economic rights provisions being interpreted. This sequence is justified within the provisions of articles 31(1)(2) of the Vienna Convention. Through the textual synthesis, the interpretive organs should apply the key elements, emerging from the African Charter read as a whole, to develop the meaning of the socio-economic rights provisions. The interpretive organs should begin with the Preamble to the African Charter and its clauses elaborated above.

Furthermore, the interpretive organs should engage the substantive provisions of articles 1 to 5 of the African Charter elaborated above. These articles are significant in that they strengthen the values

193 M Swart 'Is there a text in this court? The purposive method of interpretation and the *ad hoc* tribunals' (2010) 70 *Heidelberg Journal of International Law* 782.

194 Senden (n 27) 210.

stated in the Preamble to the African Charter. They also facilitate the construction of socio-economic rights.¹⁹⁵ For example, the right to equality enables the equal distribution of public resources related to socio-economic rights such as health, labour and education.¹⁹⁶ The provision of poor-quality food, and the denial of access to adequate medical care violate the right to dignity.¹⁹⁷ Furthermore, these provisions can be used to identify the socio-economic rights implicit in the African Charter through their socio-economic dimensions. They can, therefore, give effect to the scope of the socio-economic rights in the African Charter¹⁹⁸ and further the notion of the interdependence of rights. As Viljoen rightly argues, socio-economic rights are inter-linked with civil and political rights.¹⁹⁹

Moreover, the textual synthesis creates room for interpretive organs to engage other civil and political rights provisions to give meaning to socio-economic rights. These rights include the rights to be heard, freedom of conscience, freedom of information, freedom of association, freedom of assembly, freedom of movement and residence, and equal access to public services.²⁰⁰ Bulto rightly argues that the use of civil and political rights can help to enrich the scope and content of socio-economic rights.²⁰¹ Moreover, the textual synthesis provides interpretive organs with the scope to engage the duties provisions to ascertain the object and purpose of the African Charter in relation to socio-economic rights. These provisions include articles 27 to 29 of the African Charter.

4.1.2 *Preparatory work of the African Charter*

At the second stage of the interpretative process, interpretive organs should consider the African Charter's preparatory work, which embodies the object and purpose of the African Charter and should be applied as a primary interpretative tool. Thus, at this stage the interpretive organs should apply all relevant preparatory work detailed in part 2.3 above.

195 Odinkalu (n 7) 188-189.

196 TS Bulto 'The utility of cross-cutting rights in enhancing justiciability of socio-economic rights in the African Charter on Human and Peoples' Rights' (2010) 29 *University of Tasmania Law Review* 163.

197 C Heyns 'Civil and political rights in the African Charter' in MD Evans & R Murray (eds) *The African Charter on Human and Peoples' Rights: The system in practice 1986-2000* (2002) 150.

198 Bulto (n 196) 159.

199 Viljoen (n 7) 320.

200 Arts 7-13 African Charter.

201 Bulto (n 196) 158.

4.1.3 *Reference to the relevant international treaties and the parties' subsequent agreements and practices*

At the third stage of the interpretative process, interpretive organs should have recourse to other relevant international treaties, as well as the parties' subsequent agreements and conduct. The significance of applying the relevant international treaties at the third stage of the interpretative process is fourfold. First, they fill in the *lacunae* in the African Charter, which could not be solved by the application of the textual synthesis and the preparatory work. Second, they help to resolve ambiguities in the textual formulation of the provisions being interpreted. Third, they guarantee international acceptance of the interpretive organs' decisions. Fourth, they help to achieve external coherence²⁰² for maximum harmonisation between the interpretation of socio-economic rights provisions in the African Charter and the interpretation of socio-economic rights in line with other international and regional treaties recognised by African states. The relevant international laws to be applied²⁰³ by the supervisory organs are provided in articles 60 and 61 of the African Charter, as well as articles 3 and 7 of the African Court Protocol and article 31 of the African Court of Justice Protocol.²⁰⁴

4.1.4 *Principle of effectiveness*

The principle of effectiveness as elaborated upon should be integrated throughout the above-mentioned interpretative process. This engagement is useful in ensuring that all interpretive aids referred to by interpretive organs assist in attaining the practical and effective meaning of the provisions being interpreted. Constant engagement of the principle of effectiveness ensures the effectiveness of treaty provisions.²⁰⁵ The effectiveness of the provisions implies that the rights are broadly interpreted, and their restrictions are interpreted narrowly. Moreover, the principle of effectiveness ensures consistency and uniformity in the interpretation of the treaty.²⁰⁶ This principle

202 The term 'external coherence' was used by Rietiker in his work on the principle of effectiveness to mean the interpretation of a treaty in light of other relevant international sources. See Rietiker (n 148) 271. In this article the term 'external coherence' is applied in the context envisaged by Rietiker and expanded to include relevant national legal sources.

203 The author develops the methodology for application of the relevant international treaties in Amin (n 7) 80-81.

204 The African Court of Justice Protocol has not yet entered into force. However, the discussion in this part is relevant to the understanding of art 31 of the African Court of Justice Protocol which provides for the laws that the African Court of Justice should be consulting in the interpretation of the African Charter.

205 N Fennelly 'Legal interpretation at the European Court of Justice' (1996) 20 *Fordham International Law Journal* 674.

206 As above.

also guarantees an interpretation of a treaty that addresses the conditions prevalent at the time of interpretation. In this regard, all four dimensions of this principle should be engaged in the entire interpretative process.

5 Conclusion

This article has shown that effective interpretation of socio-economic rights in the African Charter largely depends on its interpretive organs. To achieve effective interpretation, the interpretive organs should be guided by an appropriate approach to interpretation throughout the interpretative process.

The African Charter formulates socio-economic rights in generic form. As such, the meaning, scope and content of these rights and their related obligations remain unclear. Moreover, the African Charter lacks an express formulation of a significant number of socio-economic rights, as well as the nature of obligations imposed by these rights. Based on their potential to transform the socio-economic conditions of African people, the interpretive organs should apply an approach to interpretation that is suitable for interpreting socio-economic rights and their related obligations broadly.

The article demonstrates that the teleological approach to interpretation is appropriate for effectively interpreting socio-economic rights in the African Charter. However, it warns that this approach is feasible only if supervisory organs apply its tenets systematically rather than randomly. It argues that the systematic application of the teleological approach will assist supervisory organs to establish the object and purpose of the African Charter in relation to these rights. The article, therefore, develops the methodology for the application of the teleological approach to enable supervisory organs to apply this approach systematically.