

# THE JUSTICIABILITY AND ENFORCEMENT OF THE RIGHT TO HEALTH UNDER THE AFRICAN HUMAN RIGHTS SYSTEM

Bahar Jibriel \*

## **Abstract**

*The right to health is a fundamental human right which is recognized in international and regional human rights systems. The African Human Rights System is also duly recognized the right to health. Although recognizing the right in the human rights instrument is important, the meaningful protection of the right needs appropriate and consistent interpretation and adequate implementation mechanisms. Thus, this article tries to scrutinize the Justiciability and Enforcement of the right to health in the African Human Rights System. Based on analysis of relevant African Human Rights Instruments, literatures and cases of African Commission, it argued that the Justiciability of the right to health in African Human Rights System is upheld. Regarding its enforcement, the article argued that there are relevant institutional frameworks in African Human Rights System and African Political Architecture. Hence, the enforcement of the right to health falls squarely in most of these institutions' mandate.*

**Keywords:** *Africa, African Commission, Banjul Charter, enforcement, justiciability, Ogoni Case, Right to Health.*

## **I. INTRODUCTION**

The right to health is a fundamental human right which encompasses the right to access healthcare and underlying determinants of health. It is recognized in international and regional human rights systems. There are plethoras of international human rights instruments that have recognized

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\* Lecturer and Research and Publication Coordinator at Ambo University School of Law, LL.B. (Haramaya University College of Law), LL.M. (Addis Ababa University School of Law in Human Rights Law). The author is very much grateful to *Haramaya Law Review* editors and anonymous external assessor. I am also highly indebted to Abdi Jibril who has consistently encouraged me to publish this piece. But I am solely responsible for all errors.

the right to health. Just to mention the major ones: Article 25 of the Universal Declaration of Human Rights (UDHR),<sup>1</sup> Article 12 of the International Covenant on Economic, Social and Cultural Rights (ICESCR),<sup>2</sup> Article 5 of the international Convention on the elimination of all forms of Racial Discrimination (CERD),<sup>3</sup> Article 12 of the International Convention on the Elimination of all forms of Discrimination Against Women (CEDAW),<sup>4</sup> and Article 24 of the Convention on the Rights of Child (CRC).<sup>5</sup> It is also recognized in the African human rights system. For example, Article 16 of the African Charter on Human and Peoples' Rights (Banjul Charter),<sup>6</sup> Article 14 of the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (Women Protocol)<sup>7</sup> and Article 14 of the African Charter on the Rights and Welfare of the Child (Children Rights Charter) have enshrined the right to health.<sup>8</sup>

Although recognizing the right in the human rights instruments is important, the meaningful protection of the right needs appropriate and consistent interpretation and adequate implementation mechanisms. This article tries to scrutinize the justiciability and enforcement of the right to health in the African human rights system. It tries to shed light on the extent of justiciability of the right to health in African human rights system,

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1. *The Universal Declaration of Human Rights* (hereafter UDHR) GA Res 217(III) of 10 December 1948, UN Doc A/810.

2. *The International Covenant on Economic, Social and Cultural Rights* (hereafter ICESCR) adopted and opened for signature by General Assembly resolution 2200A (XXI) of 16 December 1966 entered into force on 3 January 1976.

3. *The International Convention on the Elimination of all forms of Racial Discrimination* (hereafter CERD) adopted and opened for signature by General Assembly resolution 2106 A (XX) of 21 December 1965 entered into force on 4 January 1969.

4. *The Convention on the Elimination of all forms of Discrimination Against Women* (hereafter CEDAW) adopted and opened for signature by General Assembly resolution 34/180 of 18 December 1979 entered into force on 3 September 1981.

5. *The International Convention on the Rights of Child* (hereafter CRC) adopted in 1989 and opened for signature by General Assembly resolution 44/25 of 20 November 1989 entered into force on 2 September 1990.

6. *The African Charter on Human and Peoples' Rights* (hereafter Banjul Charter) 1 adopted on 27 June 1981, OAU Doc. CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982), entered into force 21 October 1986).

7. *The Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa* (hereafter the Women Protocol) adopted in 2003.

8. *The African Charter on the Rights and Welfare of the Child* (hereafter Children Rights Charter) adopted in 1990 OAU Doc. CAB/LEG/24.9/49 (1990), entered into force on 29 November 1999.

the content of this right and the corresponding state obligation by analyzing African Commission on Human and Peoples' Rights (hereafter the Commission) cases. Moreover, it will assess the institutional framework available within the African human rights system and political architecture which in one way or another have mandate to enforce the right to health.

This article has three main sections. Following this short introduction, the right to health in international and African regional human rights system will be discussed. In connection, the nature and content of states obligation under the right to health in African human rights system will be elaborated. The second section deals with the justiciability of the right to health in the African human rights system. A particular focus is given to how the Commission has approached the content of the right to health and the corresponding states' obligation through its cases. The last section deals with the enforcement of the right to health in the African human rights system where the mandate of African human rights bodies and political frameworks is briefly reviewed before some conclusion is drawn from the discussion.

Before I proceed two caveats are in order. First, the article does not purport to give exhaustive discussion of all issues with regard to the justiciability and enforcement of the right to health in African human rights system. For example, the article does not directly deal with issues such as: the obligation of Non-State Actors under the right to health, the link between health and environment, and limitation on the right to health and derogation from the same. It also does not provide discussion regarding enforcement and follow ups of the Commission's decision. Second, while reviewing domestic cases (jurisprudence) of African countries would have contributed a lot in elaborating issue of justiciability and enforcement of the right to health in Africa, regrettably, that is not made in this article.

## **II. The Right to Health in International and Regional Human Rights Instruments**

### ***A. The Right to Health in International Human Rights Instruments***

Normatively, the right to health is recognized under numerous international and regional human rights instruments. The UDHR is the first international human rights instrument which has enshrined the right to health. Accordingly, Article 25 of the UDHR provides that “[e]veryone has

the right to a standard of living adequate for the health of himself and of his family, including food, clothing, housing and medical care and necessary social services.”<sup>9</sup> The ICESCR also offers the most comprehensive article on the right to health in international human rights law. Article 12 of the same provides that “[s]tates parties recognize the right of everyone to the enjoyment of the highest attainable standard of physical and mental health.”<sup>10</sup> Apart from these, the right to health is also recognized in article 5 of the CERD, in Articles 11.1 (f) and 12 of the CEDAW and in Article 24 of the CRC.

The United Nations (UN) Committee on International Covenant on Economic Social and Cultural Rights (ICESCR) has interpreted the right to health in its General Comment 14, as inclusive fundamental human rights which include not only the right to access health care but also “the right to the underlying determinants of health.”<sup>11</sup> The latter includes “access to safe and potable water and adequate sanitation, an adequate supply of safe food, nutrition and housing, healthy occupational and environmental conditions, and access to health-related education and information, including on sexual and reproductive health.”<sup>12</sup> It also encompasses “the right to control one’s health and body, including sexual and reproductive freedom, and the right to be free from interference,” and finally the entitlements to a system of health protection which provides equality of opportunity for people to enjoy the highest attainable level of health.<sup>13</sup>

The right to health is also recognized in several regional human rights instruments, namely the Revised European Social Charter<sup>14</sup> and the Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights.<sup>15</sup> In a similar vein, the right

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9. Art. 25 of UDHR.

10. Art. 12(1) of ICESCR.

11. UN Office of the High Commissioner for Human Rights, *ICESCR General Comment No. 14: The Right to the Highest Attainable Standard of Health (Art. 12)*, adopted by UN Committee on ICESCR in 2000 UN doc. E/C.12/2000/4 (here after General Comment 14), para.11.

12. *Id.*

13. *Id.* at para. 8.

14. Art. 11 of the *Revised European Social Charter* adopted in 1996.

15. Art. 10 of the *Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights* (San Salvador Protocol) adopted in 1988.

to health has been proclaimed in certain soft laws such as WHO Constitution,<sup>16</sup> the Alma-Ata Declaration,<sup>17</sup> Vienna Declaration and Programme of Action of 1993.<sup>18</sup>

The above paragraphs showed that the right to health is duly recognized in international and regional human rights instruments. Having said these, let us look at the right to health in the African human rights system in depth in the following section.

### ***B. The Right to Health in African Regional Human Rights System***

The African human rights system is credited for integrating Civil and Political rights with Economic, Social and Cultural (ESC) rights in its normative frameworks unlike its regional and international counterparts.<sup>19</sup> The ESC rights are enshrined alongside the Civil and Political rights in African regional human rights instruments.<sup>20</sup> Further, the preamble of Banjul Charter provides that civil and political rights cannot be disassociated from economic, social and cultural rights in their conception as well as universality.<sup>21</sup> The right to health is among those ESC rights mentioned by name in the African regional human rights instruments, like Banjul Charter,<sup>22</sup> the Women Protocol,<sup>23</sup> and the Children Rights.<sup>24</sup>

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16. WHO, *Constitution of the World Health Organization* adopted in 1946 (entered into force 7 April 1948), preamble. The preamble provides the holistic definition of health stating that "health is state of complete physical, mental and social well being and not merely the absence of disease or infirmity."

17. *Declaration of Alma-Ata*, International Conference on Primary Health Care, Alma-Ata, USSR, September 1978.

18. *Vienna Declaration and Programme of Action*, World Conference on Human Rights, U.N. Doc. A/CONF.157/23 (1993), part I & 5.

19. See FRANS VILJOEN, *INTERNATIONAL HUMAN RIGHTS LAW IN AFRICA* (Oxford University Press, Oxford, 2007), at 237.

20. Not only in the Banjul Charter, perhaps the founding instrument of African Human Rights System, the ESC rights are recognized alongside Civil and Political in Children's Rights Charter and Women's Protocol as well.

21. See preamble of Banjul Charter.

22. Art. 16 (1) of *Banjul Charter*.

23. Art. 14. of *Women Protocol*.

24. Art. 14 of *Children's Rights Charter*.

In accordance with Article 16(1) of Banjul Charter, “[e]very individual shall have the right to enjoy the best attainable state of physical and mental health.” This is similar with Article 12 (1) of ICESCR which reads as “The States Parties to the present Covenant recognize the right of everyone to the enjoyment of the highest attainable standard of physical and mental health.” Furthermore, the Banjul Charter provides that “[s]tates parties to the present Charter shall take the necessary measures to protect the health of their people and to ensure that they receive medical attention when they are sick.”<sup>25</sup> It purports to elaborate state obligation with regard to realizing the right to health. Accordingly, states parties are duty bound to take preventive and curative measures to realize the right to health to its people.

The right to health is also recognized under African Children’s Rights Charter. Accordingly, Article 14 (1) states that “[e]very child shall have the right to enjoy the best attainable state of physical, mental and spiritual health.” The Children’s Rights Charter has brought social element of the right to health on board. This is in line with the Constitution of WHO which defines health as “complete physical, mental and social well being.”<sup>26</sup> In other words, the spiritual health phrases mentioned under Children’s Rights Charter would fit into social well being aspect of health stated under the WHO Constitution. In terms of states obligation, the Children’s Rights Charter elaborated obligations more clearly and concretely than the Banjul Charter.<sup>27</sup> It provides specific measures that states have to take to pursue the full implementation of children’s right to health such as: reducing infant and child mortality rate; ensuring the provision of primary health care; ensuring the provision of adequate nutrition and safe drinking water; and so forth.<sup>28</sup>

Moreover, the right to health has also been proclaimed under Article 14 of Women’s Protocol.<sup>29</sup> The Protocol has provided for women’s right to sexual and reproductive health which includes: the right to control their

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25. Art. 16(2) of *Banjul Charter*.

26. *WHO Constitution*, *supra* note 16.

27. Art. 14(2) of *Children’s Rights Charter*.

28. *Id.* Art. 14.

29. The right to health of women is also implied in Art.15 (right to food security), Art.16 (the right to adequate housing), and Art.18 (the right to a healthy and sustainable environment) of *Women’s Protocol*.

fertility, the right to decide on numbers and spacing of children, the right to choose any method of contraception, the right to self-protection and to be protected against sexually transmitted infections, including HIV/AIDS, and the right to have family planning education.<sup>30</sup> Interestingly, it has allowed medical abortion in cases of sexual assault, rape, incest and where the continued pregnancy endangers the health or life of the mother or the fetus.<sup>31</sup> In terms of obligation, it stipulates that state parties shall take measures to provide adequate, affordable and accessible health services, to establish and strengthen existing pre-natal, delivery and post-natal health and nutritional services during pregnancy, authorizing medical abortion in cases mentioned above.<sup>32</sup>

Interestingly, the right to health is also closely related with other human rights such as the right to a healthy environment, the right to food, the right to adequate housing, the right to safe drinking water, the right to education, work and so forth. Needless to say, that is why the indivisibility, interdependence and interrelatedness of human rights have been reaffirmed under Vienna Declaration.<sup>33</sup> As the Committee on the ICESCR correctly noted, the right to health is closely related to and dependent upon the realization of other human rights.<sup>34</sup> Considering the right to health as not only the right to health care services, goods and facilities, but also the right to underlying determinants of health is clear indication of the fact that the right to health is dependent on, and contributes to, the realization of other

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30. See *Women's Protocol* Art. 14(1) (a-g).

31. See Charles G. Ngwena, *Inscribing Abortion as a Human Right: Significance of the Protocol on the Rights of Women in Africa*, 32 HUMAN RIGHTS QUARTERLY, 783-864 (2010).

32. The Women's Protocol also imposes other obligations apart from those laid down under Art. 14. These are the obligation to: prohibit harmful practices which endanger the health and general well being of women (Art. 2(1) (b)); prohibit all medical or scientific experiments on women without their informed consent (Art. 4(2)); eliminate Female Genital Mutilation and other harmful practices (Art. 5(b)); and provide basic health services to the victims of harmful practices (Art. 5(c)) guarantee adequate and paid pre-and post-natal maternity leave for women (Art. 13(i)). Moreover, it calls up on states parties to reduce military expenditure in favor of spending on social development (which includes health systems) (Art. 10 (3)).

33. *Vienna Declaration*, *supra* note 18.

34. *General Comment 14*, *supra* note 11, para. 3.

human rights.<sup>35</sup> Thus, the right to health should be read with these rights and freedoms instead of narrowly and separately interpreting it textually.

### ***C. State Obligations under the Right to Health***

#### ***1. Duty to Respect, Protect and Fulfill the right to health***

As the case for other rights, the right to health imposes what is now known as the tripartite typology of human rights obligation on states parties, that is, the obligations to respect, protect and fulfill.<sup>36</sup> Accordingly, the obligation to respect, as a negative obligation, requires States to refrain from interfering directly or indirectly with the enjoyment of the right to health.<sup>37</sup> This, among others, entails obligation to refrain from “carrying out, sponsoring or tolerating any practice, policy or legal measures violating the integrity of the individual.”<sup>38</sup> On the other hand, the obligation to protect requires States to take measures that prevent third parties from interfering with the enjoyment of the right to health.<sup>39</sup> Finally, the obligation to fulfill requires States to adopt appropriate legislative, administrative, budgetary, judicial, promotional and other measures towards the full realization of the right to health.<sup>40</sup> In a similar vein, the Commission has summarized the positive obligations, i.e. obligation to protect and fulfill, expected of states parties to comply with the right to health and a healthy environment in Ogoni case as:

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35. *Id.* See also Office of the United Nations High Commissioner for Human Rights, FACT SHEET 31, THE RIGHT TO HEALTH, available at <http://www.ohchr.org> (accessed on 1 February 2011).

36. See also ASBJØRN EDIE, ECONOMIC, SOCIAL AND CULTURAL RIGHTS AS HUMAN RIGHTS, IN ECONOMIC, SOCIAL AND CULTURAL RIGHTS: A TEXT BOOK, at 23 (Asbjørn Eide et al., eds., 2001), and *The Maastricht Guidelines on Violations of Economic, Social and Cultural Rights*, para. 6 (1997). For the discussion of tripartite states obligation on the right to health; see *General Comment 14*, *supra* note 11, para. 33.

37. *Id.*

38. See *Communication 155/96, Social and Economic Rights Action Center and Another v Nigeria (2001) AHRLR 60 (ACHPR 2001) (15th Activity Report) (Ogoni Case)* para. 52.

39. *General Comment 14*, *supra* note 11, para.33.

40. *Id.*

the obligation to order independent scientific monitoring, requiring and publicizing environmental and social impact studies, undertaking appropriate monitoring and providing information to those affected by environmental hazardous and to provide the opportunity for individuals and communities to participate in development decisions affecting their communities.<sup>41</sup>

Hence, the right to health gives rise to both negative obligation to refrain from directly violating the right to health, and positive obligation to undertake to protect and fulfill the right to health care and the underlying determinants of health.

## ***2. The Nature of States Obligation under African Human Rights System***

Regarding the general nature of states legal obligation under African human rights system, the Banjul Charter provides that:

[t]he Member States of the Organization of African Unity parties to the present Charter shall recognize the rights, duties and freedoms enshrined in this Chapter and shall undertake to adopt legislative or other measures to give effect to them.<sup>42</sup>

Apparently, the Banjul Charter does not provide for qualification of progressive realization and maximum available resources for the realization of ESC rights.<sup>43</sup> As a result, some authors argued that the ESC rights in the Banjul Charter have to be realized immediately.<sup>44</sup> The question is to what extent such argument is tenable in light of African countries economic reality and the very nature of ESC rights.

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41. *Ogoni Case*, *supra* note 38, para. 53.

42. *See* Art.1 of *Banjul Charter*. The Children's Rights Charter also provides similar general legal obligation under Art. 1(1).

43. Compare with Art. 2(1) of ICESCR; *See also General Comment 3, The Nature of States Parties Obligations*, (Art. 2, Para. 1 of the Covenant) UN Doc.E/1991/23.

44. Chidi Anselm Odinkalu, *Analysis of Paralysis or Paralysis by Analysis? Implementing Economic, Social, and Cultural Rights under the African Charter on Human and Peoples' Rights*, 23 HUMAN RIGHTS QUARTERLY, 349 (2001); and FATSAH OUGUERGOUZ, *THE AFRICAN CHARTER ON HUMAN AND PEOPLES' RIGHTS: A COMPARATIVE AGENDA FOR HUMAN DIGNITY AND SUSTAINABLE DEMOCRACY IN AFRICA*, (2003), at 201.

In response to this assertion, one would point out at least four reasons to belie the former argument. In the first place the economic realities of most of African states do not afford immediate realization of ESC rights. As Mbazira observed, considering the poor economic conditions and under development of most African states, it is difficult to expect that such economies to immediately overcome their structural problems and to marshal the resources necessary to provide for all socio-economic needs immediately.<sup>45</sup> In a similar fashion, Fatsah Ouguergouz notes that great majority of states parties lack the material resources enabling them to enforce ESC rights immediately.<sup>46</sup>

Secondly, maintaining the argument of immediate realization of ESC rights is at odds with the dynamic nature of standards of those rights. That is, to say, the full realizations are dynamic as they are defined by changing socioeconomic circumstances and establish shifting standards.<sup>47</sup> Another reason is that all major human rights instruments contain progressive realization qualification of enforcing ESC rights.<sup>48</sup> So the missing of progressive qualification from Banjul Charter is not justified by “Africannes.”<sup>49</sup> It is also worth to mention that some African human rights

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45. Christopher 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*, 6 AHRLJ, 340 (2006).

46. OUGUERGOUZ, *supra* note 44, at 200-201. Mathew Craven also argues that ESC rights in African Charter are generally considered to be incapable of immediate implementation owing to the considerable expenses involved in their realization. MATHEW C.R. CRAVEN, *THE INTERNATIONAL COVENANT ON ECONOMIC, SOCIAL AND CULTURAL RIGHTS: A PERSPECTIVE ON ITS DEVELOPMENT*, (1995). M'baye also noted that the desire of minimalist approach “is not to overburden our young states” as quoted in VILJOEN, *supra* note 19, at 240. Thus, the drafters hardly envisaged the immediate realization of ESC rights which overburden the states.

47. Mbazira, *supra* note 45, at 341. During the drafting process of ICESCR, some have commented that the introduction of the word progressively introduced a dynamic element, indicating that no fixed goal had been set, and that the realization of those rights did not stop at a given level. CRAVEN, *supra* note 46, at 129.

48. All major human rights instruments relating to ESC rights provide for implementation in a piecemeal fashion, CRAVEN, *Id.*, at 130.

49. This refers to African conception (values) of human rights, for African values in African Human Rights System; see FRANS VILJOEN, *THE AFRICAN REGIONAL HUMAN RIGHTS SYSTEM IN INTERNATIONAL PROTECTION OF HUMAN RIGHTS: A TEXTBOOK*, 518-519 (C Krause and M Scheinin eds., 2009).

instruments, namely, Women's Protocol and Children's Rights Charter provide for progressive realization of ESC rights.<sup>50</sup>

Finally, the immediate realization of civil and political rights, let alone ESC rights, itself is even debatable. For example some scholars have argued that the full realization of civil and political rights is dependent on availability of resources.<sup>51</sup>

Interestingly, as will shortly be shown below, the African Commission on Human and Peoples' Rights (the Commission) has interpreted that the qualification of available resource and progressive realization is implicit in the implementation of Charter's ESC Rights.<sup>52</sup> Furthermore, the Commission's reporting guidelines give some indication that ESC rights have to be realized progressively.<sup>53</sup> Here, it is suffice to note that the realism and weights of scholarly literatures and even approach of the Commission leans towards subjecting the realization of ESC rights, including the right to health, to progressive realization and available resources qualifications.

### **III. Justiciability of the Right to Health in African Human Rights System**

In African human rights system, ESC rights including the right to health are made unequivocally justiciable as civil and political rights. This follows from the fact that the main human rights instruments have incorporated the ESC rights alongside the civil and political rights in one

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50. C. HEYNS AND M. KILLANDER, *THE AFRICAN REGIONAL HUMAN RIGHTS SYSTEM IN INTERNATIONAL HUMAN RIGHTS LAW IN A GLOBAL CONTEXT* 864, (F.G. Isa and K. de Feyter eds., 2009). See for example Arts, 11(3) (b) (provides for making secondary education free progressively), 13(2) & (3) (provides for progressive realization of ESC rights of children with disability subject to available resource) of Children Rights Charter.

51. Philip Alston & Gerard Quinn, *The Nature and Scope of States Parties' Obligations under the International Covenant on Economic, Social and Cultural Rights*, 9 HUMAN RIGHTS QUARTERLY (1987), as quoted in Craven, *supra* note 48, at 130.

52. See *Communication 241/2001, Purohit and Moore v. The Gambia*, (2003), AHRLR 96(ACHPR 2003) (16th Activity Report) (Purohit Case), para. 84.

53. VILJOEN, *supra* note 19, at 240-241. He states that "for example states are required, even in respect of education which is framed without qualification, to report about measures for the progressive implementation of the principle of compulsory education free of charge."

document.<sup>54</sup> Further, the Commission confirmed unequivocally the justiciability of ESC rights in Ogoni Case underscoring that “there is no right in the African Charter that cannot be made effective.”<sup>55</sup> Thus, as far as African human rights system is concerned, the cloud of suspicion regarding the justiciability of ESC rights has been cleared. It is in light of this understanding that the review of some of Commission’s cases, where the right to health or certain aspect of it has been considered, will be made as follows.

So far, the violation of the right to health or some aspects of it has been alleged and the Commission has found violation in several cases, and few of them are discussed below. The selection of cases is, in fact, not exhaustive but rather illustrative of the justiciability of the right to health; and how the Commission has approached the right to health and corresponding states obligation.

#### **A. *Free Legal Assistance Group v Zaire Case***

Communication 100/93 was submitted by the *Union Interafricaine des Droits de l’Homme* against Zaire alongside other communications alleging, among other things, that the mismanagement of public finances, the failure to provide basic services, and the shortage of medicines was a violation of the right to health.<sup>56</sup> In finding the violation of Article 16 of the Banjul Charter, the Commission has linked the failure to provide basic services such as safe drinking water, electricity, and shortage of medicine to the violation of the right to health.<sup>57</sup> In effect, the Commission held that the failure to provide basic health facilities constitutes the violation of state’s

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54. See generally *Banjul Charter and Children’s Rights Charter and Women’s Protocol* (all of them provide both civil and political rights and ESC rights on equal footing). The preamble of Banjul Charter in particular provides that “... civil and political rights cannot be dissociated from economic, social and cultural rights in their conception ...”; See also VILJOEN, *supra* note 19, at 237.

55. *Ogoni Case*, *supra* note 38, para. 68.

56. *Free Legal Assistance Group and Others v Zaire* (2000) AHRLR 74 (ACHPR 1995) (9th Activity Report).

57. *Id.*, para. 47. One could read the Commission saying that the right to health gives rise to such rights as water and electricity; rights not expressly protected by the Charter. However, the scanty nature of the decision does not give chance for concrete imputation on the Commission of this position. Mbazira, *supra* note 45, at 345.

obligation imposed under the right to health which says that states parties should take the necessary measures to protect the health of their people.

### **B. *International Pen and Others (on behalf of Saro-Wiwa) v Nigeria***

The Communication against Nigeria was brought to the Commission on behalf of the Ogoni environmental activist and writer, Ken Saro-Wiwa.<sup>58</sup> The communication alleged a number of irregularities and human rights violations in Saro-Wiwa's detention and trial. Regarding the right to health, the communication alleged that while in detention, Saro-Wiwa had been severely beaten, and in spite of his high blood pressure, he had been denied access to medicine and a doctor.<sup>59</sup>

The Commission held that the responsibility of the state in respect of the right to health is heightened when a person is in detention as a person's integrity and wellbeing are completely dependent on the state.<sup>60</sup> The Commission has interpreted the denial of access to Saro-Wiwa (prisoner) to a qualified doctor and medicine as violation of the right to health enshrined under Article 16 of Banjul Charter.<sup>61</sup>

### **C. *The Mauritania Slavery Case***

The communication concerns the marginalization and human rights violations suffered by black Mauritians following a *coup d'état* that took place in 1984, and which brought Colonel Maaouya Ould Sid Ahmed Taya to power.<sup>62</sup> The communication alleged, *inter alia*, that some detainees had been starved to death, left to die in severe weather without blankets or clothing, and were deprived of medical attention. The Commission decided that the starvation of prisoners, and denying them access to blankets, clothing, and healthcare violated Article 16 of the Banjul Charter and is

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58. *International Pen and Others (on behalf of Saro-Wiwa) v. Nigeria* (2000) AHRLR 212 (ACHPR 1998) (12th Activity Report).

59. *Id.*, para. 2

60. *Id.*, para. 112

61. *Id.*

62. *Malawi African Association and Others v Mauritania* (2000) AHRLR 149 (ACHPR 2000) (13th Activity Report).

violations of the right to health.<sup>63</sup> Like in Saro-Wiwa case, the Commission has adopted the medicalized approach (the right to access health care) aspect of the right to health.<sup>64</sup> But later on, as shown in case of Darfur, it has expanded the realm of the right to health as encompassing both the right to access health care and the right to healthy condition.

#### **D. *The Purohit Case***

The communication was brought before the Commission by two mental health advocates, Ms. H. Purohit and Mr. P. Moore, on behalf of existing and future mental patients detained under the Mental Health Acts of the Republic of the Gambia at its psychiatric unit.<sup>65</sup> The complainants alleged that the provisions of the Lunatic Detention Act of the Gambia and the manner in which mental patients were being treated amounted to a violation of various provisions of the Banjul Charter, including the right to health. The Commission, in finding the violation of the right to health, stated that the right to health includes “the right to health facilities, access to goods and services to be guaranteed to all without discrimination of any kind.”<sup>66</sup> The Commission further noted that mental health patients deserve special treatment because of their condition and by virtue of their disability.<sup>67</sup> Hence, the Commission held that the Lunatic Detention Act was deficient in terms of therapeutic objectives and provision of matching resources and programmes for the treatment of persons with mental disabilities.<sup>68</sup>

The Commission, cognizance of implication of resource constraints in interpreting the right to health, stated that:

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63. *Id.*, at para. 122. Similar violation has been found in case of *Media Rights Agenda and Others v Nigeria* (2000) AHRLR 200 (ACHPR 1998).

64. Benjamin Mason Meier and Ashley M. Fox, *Development as Health: Employing the Collective Right to Development to Achieve the Goals of the Individual Right to Health*, 30 HUMAN RIGHTS QUARTERLY, 299 (2008).

65. *Purohit Case*, *supra* note 52. For review of Purohit case, see C Mbazira, *The right to health and the nature of socio-economic rights obligations under the African Charter The Purohit Case*, 6 ESR Review 15-18 (2005).

66. *Purohit Case*, *supra* note 52, para. 80.

67. *Id.*, para. 81.

68. *Id.*, para. 83.

[M]illions of people in Africa are not enjoying the right to health maximally because African countries are generally faced with problems of poverty which renders them incapable to provide the necessary amenities, infrastructure and resources that facilitate the full realization of this right.<sup>69</sup>

Thus, it is due to this depressing but real state of affairs that the Commission has read into Article 16 of the Banjul Charter and defined obligation of States party to the Banjul Charter “to take concrete and targeted steps, while taking full advantage of its available resources,” to ensure that the right to health is fully realized in all its aspects without discrimination.<sup>70</sup>

In this case, the Commission has interpreted the right to health as the right to access health facilities, goods and services. It seems that the Commission has adopted the right to access health care aspect of the broader concept of the right to health in this case.<sup>71</sup> In addition, it has considered special measures that are necessitated for mental health patients due to their condition and disabilities.<sup>72</sup> Thus, states are duty bound to provide special measures to mental health patients in order to realize their right to health.

As argued in the preceding section, the realization of ESC rights in African human rights system are sought to be subject to available resources and progressive realization qualification. The Commission has reaffirmed this position in the present case. In other words, the Commission confirmed that the argument of immediate realization is not tenable at least as regards the right to health. Whether Purohit case can be taken as precedent regarding the nature of states’ obligation as to the realization of ESC rights of the Charter: the authorities tend to differ. While some argue in favor of taking it as precedent with the

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69. *Id.*, para. 84

70. *Id.*

71. The right to health has the right to health care and the right to underlying determinants of health aspects. See *General Comment 14*, *supra* note 11. The Commission has applied the latter aspect of the right to health in Darfur case.

72. In the words of the Commission the special measures are those “[w]hich would enable mental health patients not only attain but also to sustain their optimum level of independence and performance.” *Purohit Case*, *supra* note 52, para. 81.

potential of being invocable in other cases of ESC rights,<sup>73</sup> others hold that this case is specific and as such fall short of setting precedent.<sup>74</sup> At any rate, as far as African reality is concerned, the progressive realization of ESC rights while making use of available resources maximally is inevitable.

### E. *The Ogoni Case*

This communication was brought before African Commission by two nongovernmental organizations: the Social and Economic Rights Action Center (SERAC) and the Center for Economic and Social Rights (CESR) against the government of Nigeria.<sup>75</sup> The complaint alleged, *inter alia*, that the military government of Nigeria had been directly involved in irresponsible oil development practices in the Ogoni region through the Nigerian National Petroleum Company in consortium with Shell Petroleum Development Corporation, and the operations produced contamination causing environmental degradation and health problems. In particular, the complaint alleged that the widespread contamination of soil, water and air; the destruction of homes; the burning of crops and killing of farm animals; and the climate of terror under which the Ogoni communities had been suffering resulted in violation of their rights to health, a healthy environment, housing and food (Articles 16 and 24 of the Banjul Charter).

In this case, the Commission has analyzed both the negative and positive obligations of states with regard to the right to health, and the right to a healthy environment. Accordingly, these rights impose negative obligation “to desist from directly threatening the health and environment of their citizens.”<sup>76</sup> It also noted that the state is under an obligation “to refrain from carrying out, sponsoring or tolerating any practice, policy or

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73. *Mbazira*, *supra* note 65, at 17.

74. *Viljoen*, *supra* note 19, at 240.

75. *Ogoni Case*, *supra* note 38. For a review of Ogoni case, see *inter alia*, Dinah Shelton, *Decision Regarding Communication 155/96 (Social and Economic Rights Action Center/Center for Economic and Social Rights v. Nigeria)*. Case No. ACHPR/COMM/A044/1, 96 THE AMERICAN JOURNAL OF INTERNATIONAL LAW, 937 (2002); and Fons Coomans, *The Ogoni Case before the African Commission on Human and Peoples' Rights*, 52 THE INTERNATIONAL AND COMPARATIVE LAW QUARTERLY, 749 (2003).

76. *Ogoni Case*, *supra* note 38, para. 52.

legal measures violating the integrity of the individuals.”<sup>77</sup> The positive obligation under these rights includes:

[O]rdering or at least permitting independent scientific monitoring of threatened environments, requiring and publicising environmental and social impact studies prior to any major industrial development, undertaking appropriate monitoring and providing information to those communities exposed to hazardous materials and activities and providing meaningful opportunities for individuals to be heard and to participate in the development decisions affecting their communities.<sup>78</sup>

In examining the conduct of Nigerian government in light of these obligations, the Commission held that the Nigerian government has failed to take necessary care required to comply with the provisions.<sup>79</sup> To make even matters worse, the government engaged in conduct of violation of the rights of the Ogonis by attacking, burning and destroying several Ogoni villages and homes.<sup>80</sup> For these reasons, the Commission found the Nigerian government in violation of articles 16 and 24 of Banjul Charter.

#### **F. *The Darfur Case***

This communication is consolidation of two communications brought by the Sudan Human Rights Organization and Others, and by the Center on Housing Rights and Evictions against the government of Sudan.<sup>81</sup> The communications alleged, *inter alia*, gross, massive and systematic violations of human rights by the Republic of Sudan against the indigenous black African tribes in the Darfur region. It further alleged that the

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77. *Id.*

78. *Id.*, para. 53.

79. *Id.*, para. 54.

80. *Id.*

81. *Communications 279/2003 and 296/2005(joined), Sudan Human Rights Organization and Another v Sudan* (28th Activity Report, annex V) (Darfur Case).

government of Sudan, in addition to attacking rebel targets, has targeted the civilian population, raided and bombed villages, markets, and water wells by helicopter gunships and *antonov* airplanes. The complaints alleged in particular that the government of Sudan has violated the right to health (Article 16 of Banjul Charter) by being complicit in looting and destroying foodstuffs, crops and livestock as well as poisoning water wells and denying access to water sources in the Darfur region.

The Commission, in interpreting the right to health, noted that, “[i]n recent years, there have been considerable developments in international law with respect to the normative definition of the right to health, which includes both health care and healthy conditions.”<sup>82</sup> The Commission stated that the violation of the right to health can occur through the direct action of states or other entities insufficiently regulated by states.<sup>83</sup> It further held that the failure of the government to provide basic services such as safe drinking water and electricity, and the shortage of medicine constitutes a violation of Article 16 of the Banjul Charter. Thus, it found that the destruction of homes, livestock and farms as well as the poisoning of water sources, such as wells exposed the victims to serious health risks, and amounts to a violation of Article 16 of the Banjul Charter.<sup>84</sup>

Here, the Commission has adopted comprehensive aspect of the right to health as including both the right to health care and healthy conditions. It has tried to catch up with the internationally evolving and developing concept of the right to health. In a similar vein, it has confirmed that the violation of the right to health could occur not only through the direct activity of the states but also by private entities insufficiently regulated by the states. More importantly, it has expanded the realm of the violation of the right to health to include cases such as destruction of homes, livestock and poisoning of water sources as well.

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82. *Id.*, para. 208.

83. *Id.*, para. 210.

84. *Id.*, para. 212.

#### IV. The Enforcement of the Right to Health in the African Human Rights System

The institutions in African human rights system and political frameworks have got in one way or the other human rights mandate which indeed encompasses the right to health.<sup>85</sup> To begin, the African Commission on Human and People's Rights (the Commission) has been given a clear mandate to promote and protect human rights including the right to health.<sup>86</sup> Consequently, as discussed in preceding section, so far the Commission has considered numerous communications whereby the right to health has been invoked; and found violations in majority of the cases. It has also recommended remedies states have to take to address alleged violation of rights.<sup>87</sup> Apart from this, the Commission is entrusted with mandate to undertake the review of periodic state reports on the implementation of the Banjul Charter.<sup>88</sup> Hence, it can enhance the enforcement of the right to health by reviewing measures taken in this regard and recommending further improvement needed by considering state reports.

The monitoring organ established to oversee the implementation of African Charter on Rights and Welfare of Child, the African Committee of Experts on Rights and Welfare of Child, is also in a position to monitor the enforcement of children's rights to health through states reporting, on-site visit and considering complaints.<sup>89</sup> In particular, the Committee is mandated to:

[C]ollect and document information, commission inter-disciplinary assessment of situations on African problems in the fields of the rights and welfare of the child, organize

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85. For discussion on the institutions with human rights mandate and their functions in Africa, see, *inter alia*, RACHEL MURRAY, HUMAN RIGHTS IN AFRICA: FROM THE OAU TO THE AFRICAN UNION (2004); OUGUERGOUZ, *supra* note 44; HEYNS AND KILLANDER, *supra* note 50; VILJOEN, *supra* note 19; U.O. UMOZURIKE, THE AFRICAN CHARTER ON HUMAN AND PEOPLES' RIGHTS (1997); B Manby, *The African Union, NEPAD, and Human Rights: The Missing Agenda*, 26 HUMAN RIGHTS QUARTERLY, 983(2004); and A. Lloyd and R. Murray, *Institutions with Responsibility for Human Rights Protection under the African Union*, 48 JOURNAL OF AFRICAN LAW 165 (2004).

86. See Arts. 30 and 45 of *Banjul Charter*.

87. See for instance *Ogoni Case*, *supra* note 38 and *Purohit Case*, *supra* note 52.

88. Art. 62 of *Banjul Charter*.

89. See Arts. 32-45 of *Children's Rights Charter*.

meetings, encourage national and local institutions concerned with the rights and welfare of the child, and where necessary give its views and make recommendations to governments.<sup>90</sup>

It is also entrusted to formulate and lay down principles and rules aimed at protecting the rights and welfare of children in Africa.<sup>91</sup> Further, it is charged with task to “co-operate with other African, international and regional institutions and organizations concerned with the promotion and protection of the rights and welfare of the child” including the right to health of children.<sup>92</sup>

On the other hand, the judicial arm of African human rights system, the African Court on Human and Peoples’ Rights, would reinforce the protection of the right to health, *inter alia*, by giving binding decisions and ordering wide array of remedies.<sup>93</sup> The court’s establishment protocol specifically provides that when the Court finds violation of a human or peoples’ right, it can make appropriate orders to remedy the violation, including the payment of fair compensation or reparation.<sup>94</sup> Moreover, in cases of extreme gravity and urgency, and to avoid irreparable harm to persons, the Court is vested with the power to adopt provisional measures as it deems necessary.<sup>95</sup>

Apart from the proper regional human rights system, the right to health could be enforced by African Union’s (AU) political architecture.<sup>96</sup> The most influential and relevant of these are: the Assembly, the Executive

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90. *Id.*, Art. 42 (a)(i).

91. *Id.*, Art. 42 (a)(ii).

92. *Id.*, Art. 42 (a)(iii).

93. *Protocol to the African Charter on Human and Peoples’ Rights on the Establishment of an African Court on Human and Peoples’ Rights* (adopted in 1998 and entered in to force in 2004). But there is ongoing process to merge the African Court on Human and Peoples’ Rights with African Court of Justice. See *Protocol on the Statute of the African Court of Justice and Human Rights* (adopted on July 2008 and not yet in force). Viljoen, on his part, states that “the avoidance of duplication of labour and cost saving are the main reasons for considering merging of these two courts,” VILJOEN, *supra* note 49, at 514.

94. Art. 27(1) of the *Protocol to the African Charter on Human and Peoples’ Rights on the establishment of an African Court on Human and Peoples’ Rights*.

95. *Id.*, Art. 27(2)

96. See VILJOEN, *supra* note 49, at 514-517.

Council, a Permanent Representatives Committee on Economic, Social and Cultural Council, and the Pan-African Parliament.<sup>97</sup> For instance, the Executive Council is mandated “to co-ordinate and take decisions on policies in areas of common interest to the member states,” such as “environmental protection, humanitarian action and disaster response and relief; education, culture, health and human resources development”; and “social security, including the formulation of mother and child care policies, as well as policies relating to the disabled and the handicapped” which are relevant to realization of the right to health.<sup>98</sup> Further, among the Pan-African Parliament’s objectives are to “promote the principles of human rights and democracy in Africa” and to “encourage good governance, transparency and accountability in Member States.”<sup>99</sup> Though, there has been reportedly lack of coordination and integration between these bodies and human rights bodies,<sup>100</sup> the enforcement of the right to health would find itself in the mandate of these political organs as far as the corresponding political will and determination of member states is shown.

Finally, the New Partnership for African Development (NEPAD), the blue print for Africa’s economic recovery,<sup>101</sup> through its peer review mechanism, i.e., the African Peer Review Mechanism (APRM), would enhance the realization of the right to health as well. Interestingly, the APRM integrates the political level of the AU/NEPAD in a way that other parts of the African human rights system have not done.<sup>102</sup> Further, it is worth to state that “NEPAD has been praised for attempting to look at development holistically, dealing with both political and economic issues.”<sup>103</sup>

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97. Arts. 9, 13, 22 & 17 of the *Constitutive Act of the African Union* (adopted in 2000 and entered into force in 2001).

98. *Id.*, Art.13 (1) (e), (h) & (k).

99. *Protocol to the Treaty Establishing the African Economic Community relating to the Pan-African Parliament* (adopted in 2001 and entered to force in 2003), Arts.3 (2) and 3 (3).

100. See VILJOEN, *supra* note 49, at 514. Further some kin observers of human rights notes that the human rights organs are “... still geographically and otherwise isolated, separated from the other OAU (AU) organs and therefore with limited integration and co-ordination among them.” Lloyd and Murray, *supra* note 85, at 183.

101. See VILJOEN, *supra* note 49, at 515.

102. HEYNS AND KILLANDER, *supra* note 50, at 892.

103. Lloyd and Murray, *supra* note 85, at 178.

## V. Conclusion

The right to health is incorporated in major African human rights catalogues as a justiciable ESC rights. The major African human rights instruments have recognized the right to health and other ESC rights on equal footing with Civil and Political rights. Further, the African Commission on Human and Peoples' Rights has unequivocally proved the justiciability of ESC rights including the right to health in its jurisprudence. It has also emphatically confirmed in Ogoni Case that all rights in the Banjul Charter are justiciable. Thus, the progressive interpretation of the Commission as evidently reflected in groundbreaking Ogoni case, indeed, deserves due appreciation in crystallizing the justiciability of ESC rights including the right to health.

It is gatherable from the cases reviewed in this article that the Commission has expanded the conception of the right to health over time from narrowly defined health care aspect to include the right to underlying determinants of health. Similarly, the obligation of states parties is broadened as to including not only refraining from directly violating the right to health but also to regulate private entities to respect the right to health.

Interestingly, the issue of resource implication (i.e., the availability of resource) and progressive realization of the right to health has been dealt with as well. The Commission, as repeatedly argued in this article, confirmed obligation of progressive realization of the right to health while utilizing the available resources maximally.

Regarding the enforcement of the right to health in African human rights system, it is discussed that there are relevant institutional frameworks in African human rights system and political architecture. The enforcement of the right to health falls squarely in most of these institutions' mandate. Henceforth, the remaining issue is: strengthening coordination among these institutions on the one hand, and trying to generate political will and determination of African states on the other to see improved and sustained implementation of the right to health; and of course other human rights in Africa.

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