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The African Commission on Human and Peoples' Rights and the Demystification of Second and Third Generation Rights under the African Charter: *Social and Economic Rights Action Center (SERAC) and the Center for Economic and Social Rights (CESR) v. Nigeria*

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Abstract

This article argues that the decision of the African Commission on Human and Peoples' Rights in the Ogoni case represents a giant stride towards the protection and promotion of economic, social and cultural rights of Africans. This is predicated on the African Commission's finding that the Nigerian Government's failure to protect the Ogoni people from the activities of oil companies operating in the Niger Delta is contrary to international human rights law and is in fact a step backwards since Nigeria had earlier adopted legislation to fulfill its obligation towards the progressive realization of these rights. The findings of the African Commission demonstrate that economic, social and cultural rights are not vague or incapable of judicial enforcement. They also illustrate how the Charter can be interpreted generously to ensure the effective enjoyment of rights. Novel and commendable as the decision is, it is not without its shortcomings. These shortcomings lie in the failure of the Commission to pronounce on the right to development, its silence on the desirability of holding transnational corporations accountable for human rights violations, and the institutional weakness of the Commission in enforcing its decisions.

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I. Introduction

Since its inception eighteen years ago, no decision of the African Commission on Human and Peoples' Rights (the "Commission") has generated the same level of interest as *Social and Economic Rights Action Center (SERAC) and the Center for Economic and Social Rights (CESR) v. Nigeria*.¹ This is understandable. The decision, which has been described as groundbreaking,² cuts across a wide spectrum of rights guaranteed under the *African Charter on Human and Peoples' Rights* (the "African Charter" or the "Charter").³ Since its establishment pursuant to Article 30 of the African Charter, the majority of decisions handed down by the Commission has largely dealt with civil and political rights. The few cases that have dealt with economic, social and cultural rights have involved widespread and serious violations of Charter rights.⁴ The aim of this paper is to analyze the decision with a view to highlighting its contribution to human rights jurisprudence in Africa and internationally, while at the same time identifying some of its shortcomings. The analysis will focus on rights guaranteed by the African Charter, particularly economic, social and cultural rights and the right to development, with a view to determining whether the decision of the Commission detracts from, is consistent with, or is an advancement of international human rights law.

This article is divided into three parts. Part I provides an overview of the case and the Commission's decision on the issue of admissibility. Part II examines Nigeria's obligations under international human rights law and the rights of the Ogoni people that were violated by the government of Nigeria. Part III examines the contribution of this decision to human rights jurisprudence along with its shortcomings, followed by a conclusion.

II. Summary of the facts and the Commission decision on admissibility

The Communication alleges that the military government of Nigeria was directly involved in oil production through the State oil company, the Nigerian National Petroleum Company ("NNPC"), which is the majority shareholder in a consortium with Shell Petroleum Development Corporation ("SPDC"). It further alleges that these operations

¹ Communication 155/96; Decision handed down at the 30th Ordinary session of the Commission held in The Gambia. For text, see University of Minnesota Human Rights Library website, online: <<http://www1.umn.edu/humanrts/africa/comcases/155-96b.html>> (last accessed: May 30, 2005) ["Communication 155/96"].

² Danwood M. Chirwa, "A Fresh Commitment to Implementing Economic, Social and Cultural Rights in Africa: Social and Economic Rights Action Center (SERAC) and the Center for Economic and Social Rights v. Nigeria" ESR Review, Vol. 3, No. 2, September 2002, online: <http://www.communitylawcentre.org.za/ser/esr2002/2002sept_africa.php#africa> (last accessed: May 30, 2005) ["Implementing Economic, Social and Cultural Rights in Africa"].

³ Adopted on June 27, 1981, OAU Doc. CAB/LEG/67/3 rev.5, reproduced in 21 I.L.M 58 and came into force on October 21, 1986.

⁴ Communications 25/89, 47/90, 56/91, 100/93 Free Legal Assistance Group, Lawyers Committee for Human Rights, *Union Inter-africaine des Droits de l'Homme, Les Temoins de Jehovah/ Zaire*; and 54/91, 61/91, 98/93, 164/97 a 196/97, 210/98 Malawi African Association, Amnesty International, Ms. Sarr Diop, *Union Inter-africaine des Droits de l'Homme* and RADDHO, *Collectif des vœux et Ayants-Droit, Association Mauritanienne des Droits de l'Homme/ Mauritania*. For text of these communications see: *Compilation of Decisions of the African Commission on Human and Peoples' Rights* (African: Institute for Human Rights and Development in Africa, 2nd ed., 2002).

caused environmental damage and health problems among the Ogoni People,⁵ an indigenous community in the Niger Delta region of the country. The Communication maintains that the extraction of oil by the consortium was without regard to applicable international environmental standards. The company's disposal of toxic waste into the environment and its neglect, or failure, to maintain its facilities resulted in avoidable spills, contaminating the surrounding water, soil and air, leading to disease and other serious short and long-term health problems. The destruction of farmland, rivers and other sources of livelihood triggered malnutrition and starvation among certain Ogoni communities. It is alleged that the Nigerian Government condoned and facilitated these violations by placing the legal and military powers of the State at the oil companies' disposal. There were no consultations with the Ogoni people in the decision-making process about the development of their land by either the Government or the oil companies, nor were the Ogoni informed of the potential dangers posed by oil exploration in the area. Independent scientists were prevented from carrying out environmental impact assessments, and non-violent campaigns by the Movement for the Survival of the Ogoni People ("MOSOP") were met with violent reprisals on villages by security personnel leading to the killing of civilians and the destruction of houses, farmland, crops and animals.

Evidence of the involvement of Nigeria's security forces was found in several memos exchanged between officials of the SPDC and the Rivers State Internal Security Task Force, which devoted itself to the suppression of the Ogoni campaign. These memos along with a video recording of a meeting in which Major Okuntimo, head of the Task Force, described the repeated invasion of Ogoni villages by his troops was admitted as evidence and relied upon by the Commission in the consideration of the case.

These facts, the Communication alleged, constituted violations of Articles 2 (non-discrimination), 4 (right to life), 14 (right to property), 16 (right to health), 18(1) (right to family life), 21 (right to free disposal of wealth and natural resources), and 24 (right to satisfactory environment favourable to development) of the African Charter.⁶

The Commission started by considering the admissibility of the case in accordance with various provisions of the Charter.⁷ While this paper does not devote much space to the examination of the Commission's admissibility decision, it is important to comment on it, albeit briefly, because one of the conditions for admissibility of a communication under the Charter is the exhaustion of local remedies – unless it is obvious that this procedure is unduly prolonged.⁸ The questions, which naturally arise therefore, are what was the nature of the pronouncement made by the domestic tribunal and were the local remedies in fact exhausted?

Local remedies are also deemed to have been exhausted where they are non-existent. The Commission recalled and relied on one of its earlier decisions in which it took notice of the practice of the Nigerian Military Government of promulgating decrees, thereby ousting the jurisdiction of the courts. Under such circumstances, "it is reasonable to presume that domestic remedies will not only be prolonged but are certain to yield no results."⁹

⁵ Communication 155/96, *supra* note 1, paragraph 1.

⁶ *Ibid.* at paras. 1-10.

⁷ African Charter, Article 56.

⁸ *Ibid.*, Article 56(5).

⁹ Communication 129/94: *Civil Liberties Organization v. Nigeria*, paragraph 9, Compilation of Decisions of the African Commission on Human and Peoples' Rights (African: Institute for Human Rights and Development in Africa, 2nd ed., 2002), p. 203.

III. Nigeria's obligations under international human rights law

Nigeria, not unlike other countries, has obligations under international human rights law. These obligations arise from the provisions of treaties, which the country is party to, and rules of customary international law. A treaty is "an agreement concluded between states in written form and governed by international law, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation,"¹⁰ while customary international law derives from the practice of States.¹¹ While the African Commission is not constrained in respect of legal principles it may apply in the determination of cases before it,¹² Nigeria is party to the major international human rights treaties. These include the International Covenant on Civil and Political Rights (the "ICCPR"),¹³ the International Covenant on Economic, Social and Cultural Rights (the "ICESCR"),¹⁴ the International Convention on the Elimination of All Forms of Racial Discrimination (the "ICERD"),¹⁵ the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (the "CAT"),¹⁶ the Convention on the Elimination of All Forms of Discrimination Against Women (the "CEDAW")¹⁷ and the Convention on the Rights of the Child (the "CRC").¹⁸

At the regional level, Nigeria not only signed and ratified the African Charter, it also adopted the *African Charter on Human and Peoples' Rights (Ratification and Enforcement) Act* (the "African Charter Act") on 17 March 1983.¹⁹ The Constitution of the Federal Republic of Nigeria 1999 provides that no treaty between the Federation and any other country shall have the force of law except if the treaty has been incorporated into domestic law by the National Assembly.²⁰ The enactment of the African Charter Act into

¹⁰ Article 2(1) Vienna Convention on the Law of Treaties 1969.

¹¹ M. Dixon and R. McCorquodale, *Cases and Materials on International Law* (New York: Oxford, 2003), p. 28.

¹² See Articles 60 and 61 of the African Charter, which provides as follows:

60. The Commission shall draw inspiration from international law on human and peoples' rights, particularly from the provisions of various African instruments on human and peoples' rights, the Charter of the United Nations, the Charter of the Organization of African Unity, [now the African Union], the Universal Declaration of Human Rights, other instruments adopted by the United Nations and by African Countries in the field of human and peoples' rights as well as from the provisions of various instruments adopted within the Specialized Agencies of the United Nations of which the parties to the present Charter are members.

61. The Commission shall also take into consideration, as subsidiary measures to determine the principles of law, other general or special international conventions, laying down rules expressly recognized by member states of the Organization of African Unity, African practices consistent with international norms on human and people's rights, customs generally accepted as law, general principles of law recognized by African states as well as legal precedents and doctrine.

¹³ Ratified October, 29 1993.

¹⁴ Ratified October 29, 1993.

¹⁵ Ratified January 4, 1969.

¹⁶ Ratified July 28, 2001.

¹⁷ Ratified July 13, 1985.

¹⁸ Ratified April 19, 1991. Nigeria has also signed the two optional protocols related to this Convention: The Optional Protocol to the Convention on the Rights of the Child on the involvement of Children in Armed Conflict and the Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography, both signed on September 8, 2000.

¹⁹ Now contained in Chapter 10, Laws of the Federation 1990.

²⁰ Section 12(1).

law by the National Assembly therefore demonstrated the country's commitment to be bound by the letter and spirit of the Charter.

The nature, scope and extent of a State Party's obligation flowing from its ratification of a treaty has at times been confused and misunderstood. For example, the obligations of State Parties are spelt out in Article 2(2) of the International Covenant on Civil and Political Rights and Article 2(1) of the International Covenant on Economic, Social and Cultural Rights. These provisions are apparently in a bid to clarify and provide "jurisprudential insights"²¹ into the concept of State Party obligations. The ICESCR, for instance, stipulates that each State Party "undertakes to take steps, individually and through international assistance and co-operation, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant by all appropriate means, including particularly the adoption of legislative measures"²² The Committee on Economic, Social and Cultural Rights has even issued guidance on the nature of State Party obligations in General Comment No. 3.²³ Like civil and political rights, economic, social and cultural rights impose three different types of obligations on States: the obligation to *respect*, to *protect* and to *fulfill*.²⁴ These represent the primary, secondary and tertiary levels of obligations. The obligation to respect requires States to refrain from interfering with the enjoyment of economic, social and cultural rights. The obligation to protect requires States to prevent the violation of such rights by third parties, and the obligation to fulfill requires States to take appropriate legislative, administrative, budgetary, judicial and other measures towards the full realization of such rights. The obligations to respect, protect and fulfill, each contain expectations of conduct and result. While an obligation of conduct requires action reasonably calculated to realize the enjoyment of a particular right, the obligation of result requires States to achieve specific targets to satisfy a detailed substantive standard.²⁵ Minimum core obligations ensure the satisfaction, at the very least, of a minimum level of each of the rights that is incumbent upon every State party.²⁶

Nigeria is therefore under an obligation to respect, protect and fulfill not only the rights guaranteed under the Covenants, but also the African Charter in strict fidelity to the principle of *pacta sunt servanda*, which provides that "[e]very treaty in force is binding upon the parties to it and must be performed by them in good faith".²⁷

A. Rights violated under the African Charter

Having undertaken a general overview of Nigeria's obligations, the next step is to examine the decision of the Commission on its merits. In arriving at its decision, the

²¹ M. Craven, *The international Covenant of Economic, Social and Cultural Rights: A Perspective on its Development*, (New York: Oxford, 1995), p. 91.

²² Article 2(1).

²³ The nature of States parties obligations (Art. 2, par. 1): 14/12/90 (General Comment 3) in *Compilation of General Comments and General Recommendations adopted by the Human Rights Treaty Bodies*, UN Doc/HRI/GEN/1/Rev.7 (May 12, 2004) at 15-18.

²⁴ Maastricht Guidelines on Violations of Economic, Social and Cultural Rights, January 22-26, 1997, paragraph 6, online: <http://www1.umn.edu/humanrts/instree/Maastrichtguidelines_.html> (last accessed: May 31, 2005).

²⁵ *Ibid.* at para. 7.

²⁶ General Comment No. 3 of 14/12/1990 issued by the Committee on Economic Social and Cultural Rights, paragraph 10.

²⁷ Article 26, Vienna Convention on the Law of Treaties.

Commission noted with regret that the only written response from the government of Nigeria was an admission of the gravamen of the complaints, which was contained in a *note verbale* delivered to the Commission at its 29th session.²⁸ Under the circumstances, the Commission was compelled to proceed with the examination of the matter on the basis of the uncontested allegations of the complainants.²⁹ What follows is a step-by-step analysis of the rights held to have been violated.

B. The right to non-discrimination

Article 2 of the African Charter provides as follows:

Every individual shall be entitled to the enjoyment of the rights and freedoms recognized and guaranteed in the present Charter without distinction of any kind such as race, ethnic group, color, sex, language, religion, political or any other opinion, national and social origin, fortune, birth or other status.

This provision is a recognition and entrenchment of the principle of equality and non-discrimination, which is found in most international human rights instruments.³⁰ The Constitution of the Federal Republic of Nigeria 1999 provides in Chapter IV, which contains fundamental rights as follows:

A citizen of Nigeria of a particular community, ethnic group, place of origin, sex, religion or political opinion shall not, by reason only that he is such a person:-

(a) be subjected either expressly by, or in the practical application of, any law in force in Nigeria or any executive or administrative action of the government, to disabilities or restrictions to which citizens of Nigeria of other communities, ethnic groups, places of origin, sex, religions or political opinions are not made subject.³¹

This provision is in tandem with the requirement of the adoption of legislative measures to give effect to the rights guaranteed under various international treaties³² to which Nigeria is a party. However, the Nigerian Constitution limits justiciability to fundamental rights contained in Chapter IV (mostly civil and political rights). Economic, social and cultural rights are found in Chapter II of the Constitution, which addresses fundamental objectives and directive principles of state policy, and are declared to be non-justiciable. A learned commentator has argued that the right to non-discrimination in Chapter IV of the Nigerian Constitution may found a claim that

²⁸ Communication 155/96, *supra* note 1 at para. 49.

²⁹ *Ibid.*

³⁰ United Nations Charter 1945, Article 55(c); Universal Declaration of Human Rights 1948, Articles 1, 2; International Covenant on Civil and Political Rights 1966, Article 3; Convention on the Elimination of All Forms of Discrimination Against Women 1979, Article 1; Convention on the Rights of the Child 1989, Article 2.

³¹ Section 42(1)(a).

³² Universal Declaration of Human Rights, Article 2; International Covenant on Civil and political Rights, Article 2(2); International Covenant on Economic, Social and Cultural Rights, Article 2(1); African Charter on Human and Peoples' Rights, Article 1.

seeks to enforce, albeit indirectly, an otherwise non-justiciable economic, social or cultural right.³³

The African Commission held that the action of the Nigerian government amounted to a violation of Article 2 of the Charter. The targeting and wanton violation of the rights of the Ogoni people both individually and collectively, ran afoul of this Charter provision.

C. The right to life

The African Charter does not prioritize the rights it protects. However, a breach or denial of certain rights protected under the Charter would invariably result in a breach or denial of other Charter rights. This is true of Article 4 of the Charter. It provides:

Human beings are inviolable. Every human being shall be entitled to respect for his life and the integrity of his person. No one may be arbitrarily deprived of this right.

It follows that any act, which amounts to disrespect for the life and integrity of a person or group of persons, or an arbitrary denial of that right, will result in a violation of Article 4. In finding a violation of this article, the Commission observed that given the widespread violations perpetrated by the government of Nigeria and by private actors (whether accompanied or not by the Government's blessing), the most fundamental of all human rights, the right to life, had been violated. The terrorizing and killing of Ogonis along with the unacceptable levels of pollution and environmental degradation that destroyed farmland and waterways threatened not only the Ogoni way of life, but also their very existence.³⁴

The finding of a violation based on environmental degradation and its threat to, and destruction of, Ogoni sources of livelihood was a positive step forward by the African Commission in the purposive interpretation of the right to life. It marked a departure from earlier decisions³⁵ in which violations of the right to life were based on executions, assassinations, arrests and detentions without trial, torture and other acts that either threatened or actually harmed the individuals concerned. The right to life and respect for the dignity and integrity of all human beings, if expansively interpreted, will give an effective content to all guaranteed rights – economic, civil, political, social and cultural.³⁶

³³ O. Okwu-Okafor, "The Non-discrimination Norm as a Basis for the Legal Protection of Economic, Social and Cultural Rights", in E. Onyekpere (ed.), *Manual on the Judicial Protection of Economic, Social and Cultural Rights (Lagos: Shelter Rights Initiative, 2000)*, p. 155.

³⁴ Communication 155/96, *supra* note 1 at para. 67.

³⁵ Communication 68/92 Amnesty International/Malawi; Communication 205/97 Kazeem Aminu/Nigeria; Communication 223/98 Forum of Conscience Sierra Leone; Communication 204/97 *Mouvement Burkinabe des Droits de l'Homme et des Peuples/Burkina Faso* and Communication 64/92 Krishna Achuthan/Malawi, *Compilation of Decisions* op. cit. pp. 155, 282, 331, 43 and 155.

³⁶ An interesting line of jurisprudence has emerged from the Indian Supreme Court that could be useful to the Commission's interpretive exercise. See, for example, *Mohini Jain v. State of Karnataka* AIR (1981) Sup. Ct. 1864 (App. 6).

D. The rights to property and to the family as the natural unit and basis of society

Although the right to housing or shelter is not explicitly provided for under the African Charter, the corollary of the combination of provisions protecting the right to enjoy the best attainable state of mental and physical health under Article 16, the right to property, and the protection accorded to the family, forbids the wanton destruction of shelter because when housing is destroyed, property, health and family life are adversely affected. Thus, the combined effect of Articles 14, 16 and 18 (1) reads into the Charter a right to shelter or housing which the Nigerian government violated.³⁷ For ease of analysis, Articles 14 and 18(1) will be taken together. Article 14 provides:

The right to property shall be guaranteed. It may only be encroached upon in the interest of public need or in the general interest of the community and in accordance with the provisions of appropriate laws.

Article 18(1) of the Charter provides that:

The family shall be the natural unit and basis of society. It shall be protected by the State which shall take care of its physical health and moral.

Since “ownership rights are not absolute,”³⁸ Article 14 attempts to balance the relationship between property ownership and eminent domain.³⁹ The Charter permits the encroachment upon this right but only on two conditions: 1) the encroachment is in the public interest and 2) that it accords with the provisions of appropriate laws. Article 18(1) is a recognition of the unique role the family plays in African tradition and culture and an affirmation of the provisions of the ICCPR and the ICESCR.⁴⁰ In this context, Nigeria’s domestic law is highly relevant. The provisions relating to suitable and adequate shelter are contained in Chapter II of the Constitution and are declared non-justiciable.⁴¹ However, the same Constitution in Chapter IV guarantees the right to acquire and own immovable property anywhere in Nigeria.⁴² It further provides that no interest in such property can be acquired compulsorily except in a manner and for the purposes prescribed by law, that among other things requires the prompt payment of compensation and gives individuals claiming such compensation a right of access to the appropriate Nigerian tribunal to determine their interest in the property and the amount owed in compensation.⁴³ The right to private and family life is also guaranteed under the Constitution.⁴⁴

The destruction of houses and villages of the Ogoni people and the obstruction, harassment and in some cases killing of innocent citizens attempting to

³⁷ Paragraph 60.

³⁸ Janeth Dine, *Property Rights, International Trade and Human Rights*, University of Essex Brown Bag Seminar series, delivered on March 10, 2004 (on file with the author) [*“Property Rights”*].

³⁹ Richard Gittleman, “The African Charter on Human and Peoples’ Rights: A Legal Analysis”, *Virginia Journal of International Law*, Vol. 22:4 (1982), p. 699.

⁴⁰ ICCPR, Article 23 and ICESCR, Article 10.

⁴¹ Section 16(2)(d).

⁴² Section 43.

⁴³ Section 44(1)(a), (b). See, also, section 37 which guarantees the right to private and family life.

⁴⁴ Section 37.

rebuild their houses amounted to forced eviction which the Committee on Economic, Social and Cultural Rights defined as ‘the permanent or temporary removal against their will of individuals, families and/or communities from the homes and/or land which they occupy, without the provision of, and access to, appropriate forms of legal or other protection’.⁴⁵ It is recognized that women, children, youth, older persons, indigenous people, ethnic and other minorities and other vulnerable individuals or groups suffer disproportionately from the practice of forced evictions.⁴⁶ It follows that the Nigerian government was in violation of not only the relevant provisions of the African Charter, but also its own Constitution.

E. The rights to health and to a general satisfactory environment favourable to development

The rights to health and to a satisfactory environment are interrelated and interdependent. The respect, protection and fulfillment of one directly impacts positively on the other. It is not surprising therefore that both rights are protected within one article under the ICESCR.⁴⁷ The provisions relating to both, under the African Charter state:

Article 16

1. Every individual shall have the right to enjoy the best attainable state of physical and mental health.
2. States 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.

Article 24

All peoples shall have the right to a general satisfactory environment favourable to their development.

The two provisions of the Charter impose a duty on State Parties to take steps to respect, promote and fulfill the rights in order to ensure the best attainable standard of physical and mental health as well as a general satisfactory environment favourable to development. Unpacking the levels of obligations reveals that the obligation to respect requires States to refrain from interfering directly or indirectly with the enjoyment of the right to health. The obligation to protect requires States to take measures that prevent third parties from interfering with Article 12 guarantees. 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.⁴⁸ In a bid to fulfill its obligations, the Nigerian

⁴⁵ General Comment No. 7 (1997) The right to adequate housing: forced evictions (Article 11.1) at paragraph 3.

⁴⁶ *Ibid.*, paragraph 10.

⁴⁷ Article 12.

⁴⁸ General Comment No. 14 on the right to the highest attainable standard of health (art.12) E/C.12/2000/4, paragraph 33.

government promulgated a plethora of laws that sought to promote a clean and healthy environment. These included the *Oil in Navigable Waters Act*⁴⁹ (prohibiting the discharge of certain oils into Nigeria's coastal waters) and the *Harmful Waste (Special Criminal Provisions, etc.) Act*⁵⁰ (prohibiting the importation, possession, depositing or dumping of any harmful waste on any land or in any territorial waters or contiguous zones or exclusive economic zone or its inland waterways). Others were the *Environmental Impact Assessment Decree*,⁵¹ which made such assessments mandatory before any public or private project was carried out, and the *Federal Environmental Protection Agency Decree*,⁵² which established an agency to regulate water and air quality as well as noise and hazardous substances.⁵³

Despite these laws, the government of Nigeria failed to apply them to regulate the exploration of oil in Ogoniland by SPDC and the state owned company NNPC. The lack of health facilities and infrastructure in the area in addition to an absence of health related information on the effects of oil exploration amounted to a failure to fulfill Nigeria's obligations under the African Charter. In examining Nigeria's conduct in relation to Articles 16 and 24, the African Commission recognized the right of the Government to extract oil, the income from which could be used to meet the economic and social needs of Nigerians. However, the Commission lamented the total disregard for the rights of the Ogoni people in the exercise of this right. By not undertaking environmental impact studies and refusing independent assessments, the Government was in deliberate violation of the Charter.

F. The right to free disposal of wealth and natural resources

Article 21 of the African Charter provides:

1. All peoples shall freely dispose of their wealth and natural resources. This right shall be exercised in the exclusive interest of the people. In no case shall a people be deprived of it.
2. In case of spoliation the dispossessed people shall have the right to the lawful recovery of its property as well as to an adequate compensation.
3. The free disposal of wealth and natural resources shall be exercised without prejudice to the obligation of promoting international economic cooperation based on mutual respect, equitable exchange and the principles of international law.
4. States parties to the present Charter shall individually and collectively exercise the right to free disposal of their wealth and natural resources with a view to strengthening African unity and solidarity.

⁴⁹ Chapter 337, Laws of the Federation of Nigeria 1990 came into force on 22nd April 1968.

⁵⁰ Chapter 165, Laws of the Federation of Nigeria, 1990 came into force on November 25, 1988.

⁵¹ Decree No. 86 of 1992, came into force on December 10, 1992.

⁵² Decree No. 58 came into force on December 30, 1988 (amended by Decree No. 59 of 1992).

⁵³ For the full texts of all Nigeria's Environmental Laws visit the Pace Virtual Environmental Law Library website, online: <<http://www.virtualref.com/subj/3.htm>> (last accessed: May 31, 2005).

5. States parties to the present Charter shall undertake to eliminate all forms of foreign economic exploitation particularly that practiced by international monopolies so as to enable their peoples to fully benefit from the advantages derived from their national resources.

The notion of 'peoples' in the African Charter has been highly controversial. Does the term refer to minorities, indigenous, ethnic or tribal groups, or does it refer to the State parties as "peoples"? As Richard Gittleman puts it, two interpretations of the term "peoples" under the Charter are possible within the context of economic self-determination. In the first instance, "peoples" can refer to all groups including tribal groups residing within a sovereign state. A second and more realistic interpretation is that for the purposes of economic self-determination the term "peoples" refers exactly to the same groups that are entitled to political self-determination.⁵⁴ A combined reading of the provisions in Article 21 reveals that the mention of "State parties" and reference to "international economic cooperation" connotes that this right is vested in the State parties to the Charter. According to the Commission, the origin of this Article can be traced to colonial times, during which Africa's human and material resources were largely exploited for the benefit of outside powers, thereby creating a tragedy for Africans. The framers of the Charter obviously wanted to remind African governments of the painful legacy of colonialism and to restore cooperative economic development to its traditional place at the heart of African society.⁵⁵

However, the State party should not act arbitrarily in exercising the right to freely dispose of its wealth and natural resources. The non-participation of the Ogoni people and the absence of any benefit accruable to them in the exploitation of the oil resources by the Nigerian government and the oil companies, were undoubtedly contrary to Article 21 of the Charter. The Nigerian government was therefore in breach of its obligation under the Charter to exercise this right in the "exclusive interest" of the people⁵⁶ and the obligation to eliminate all forms of foreign economic exploitation, particularly, that practiced by international monopolies. The government had therefore failed to enable its people to fully benefit from the advantages derived from their natural resources.⁵⁷

IV. Contributions of the decision to human rights jurisprudence

Having examined the rights that the Commission found had been violated by the government of Nigeria, it is important to inquire into the juridical significance of the decision for human rights discourse both within and beyond the African continent. Some issues of consequence are worth noting.

A. Reaffirming the indivisibility of rights

The African Charter contains all three generations of rights (civil and political, economic, social and cultural rights and collective or solidarity rights), but does not prioritize among them. This is a manifestation of the belief in the indivisibility,

⁵⁴ *Property Rights*, *supra* note 38 at 682.

⁵⁵ Communication 155/96, *supra* note 1 at para. 56.

⁵⁶ African Charter, Article 21(1).

⁵⁷ *Ibid.*, Article 21(5).

interdependence and interrelatedness of rights.⁵⁸ The distinguishing feature of the Charter in this respect is that it declined to bifurcate human rights at a time when this was a staple of international legal thought. Instead, it articulated a truly indivisible and interdependent normative framework, addressing all rights equally in the same coherent text.⁵⁹

The treaty framework and institutional arrangements of the African Charter in particular were beset from their inception with doubts about their credibility, efficacy and relevance to the continent.⁶⁰ The commendation that greeted this decision of the African Commission was, therefore, not misplaced. This case was significant in the development of jurisprudence on economic, social and cultural rights in Africa and elsewhere. It effectively and unequivocally rejected all arguments against the recognition of economic, social and cultural rights and the so-called third generation rights.⁶¹

B. Recognition of group rights

The communication gave the Commission an opportunity to make far-reaching pronouncements on environmental, collective, economic, social and cultural rights in applying the diverse rights contained in the Charter, and to declare that there was no right in the African Charter that could not be made effective.⁶² It also put beyond question the competence of a group to seek the protection and enforcement of rights, which accrued to them as a people under the Charter.

C. Justiciability of economic, social and cultural rights

Some of the reasons commonly given to justify the different juridical treatment of economic, social and cultural rights rest upon the notion of justiciability.⁶³ The non-recognition of these rights as capable of being justiciable and the restrictive application of the *locus standi* principle under various national legal systems has been an impediment towards their realization. The shifting trend in the application of these concepts has made the realization of these rights feasible. In *Oronto Douglas v. Shell Petroleum Development Company Limited*,⁶⁴ the applicant sued for the protection of the right to a safe environment guaranteed by Article 24 of the African Charter. He contended that contrary to the environmental impact assessment law, the defendants engaged in the construction of a hazardous liquefied natural gas plant without the requisite environmental impact assessment study. A High Court in

⁵⁸ Article 13, Proclamation of Teheran 1968; reaffirmed in the Vienna Declaration and Programme of Action, UN World Conference on Human Rights, June 14-25, 1993, UN Doc. A/CONF. 157/24 (Part 1), Article 5.

⁵⁹ C. Odinkalu, *Implementing Economic, Social and Cultural Rights under the African Charter on Human and Peoples Rights* in M. Evans and R. Murray (eds.) *The African Charter on Human and Peoples' Rights: The System in Practice, 1986-2000* (Cambridge: Cambridge University Press, 2002), p. 192.

⁶⁰ V. Dankwa, *African Charter on Human and Peoples' Rights: Development, Context, Significance* (Marburg: African Law Association, 1990) at 4, 5, cited in Odinkalu op. cit. at 179.

⁶¹ *Implementing Economic, Social and Cultural Rights in Africa*, supra note 2.

⁶² Communication 155/96, supra note 1 at para. 68.

⁶³ P. Hunt, *Reclaiming Social Rights: International and National Perspectives*, Dartmouth, 1996, p. 24.

⁶⁴ (1999) 2 Nigerian Weekly Law Reports (Pt. 591).

Nigeria refused to entertain the suit on the grounds of *locus standi*, but the Court of Appeal subsequently sent the case back to the lower court for hearing. The decision of the Commission in the *Ogoni* case indicated that redress was available at the regional level, especially in cases where remedy at the national level was illusory as a result of legal or other impediments, provided the conditions for admissibility under the Charter were satisfied.

D. Purposive interpretation of Charter rights

The Charter does not contain any provision guaranteeing the right to food. However, the Commission employed a purposive interpretation for which it is becoming known⁶⁵ by a combined reading of such provisions as right to life (Art. 4), right to health (Art. 16) and the right to economic, social and cultural development (Art. 22) to hold that the right to food was implicit in the African Charter.⁶⁶ The right to food is inseparably linked to the dignity of human beings and is therefore essential for the enjoyment and fulfillment of other rights such as health, education and political participation. According to the Commission, the African Charter and international law required Nigeria to protect and improve existing food sources and to ensure that all citizens had access to adequate food. Without touching on the duty to improve food production and to guarantee access, the minimum core of the right to food forbade the Nigerian Government from destroying or contaminating food sources, or from allowing private parties to do the same, thereby preventing peoples' efforts to feed themselves.⁶⁷

E. Shortcomings of the decision

Novel and commendable as the decision was, it was not without its shortcomings. These shortcomings lay in the failure of the Commission to make a categorical pronouncement on the right to development, its silence on the desirability of holding transnational corporations accountable for human rights violations, and the institutional weakness of the Commission in its inability to enforce its decisions.

The right to development

The importance that the drafters of the Charter attached to the right to development can be found in the instrument's preamble:

Convinced that it is henceforth essential to pay a particular attention to the right to development and that civil and political rights cannot be dissociated from economic, social and cultural rights in their conception as well as universality and that the satisfaction of economic, social and cultural rights is a guarantee for the enjoyment of civil and political rights;⁶⁸

⁶⁵ The development of non-state communication procedures under the African system has largely been attributed to the generous interpretation of the Charter by the Commission. For a detailed discussion see Chidi Odinkalu, "The African Commission on Human and Peoples' Rights: the development of its non-state communication procedures", HRQ Vol. 20, 1998, pp. 235-280.

⁶⁶ Communication 155/96, *supra* note 1 at para. 64.

⁶⁷ *Ibid.* at para. 65.

⁶⁸ Preamble to the African Charter on Human and Peoples' Rights.

This is reinforced in the Charter's substantive provisions. In particular, Article 22 provides as follows:

1. All peoples shall have the right to their economic, social and cultural development with due regard to their freedom and identity and in the equal enjoyment of the common heritage of mankind.
2. States shall have the duty, individually or collectively, to ensure the exercise of the right to development.

The provision is at the very least visionary because it preceded the United Nations Declaration on the Right to Development,⁶⁹ which recognizes that development is a comprehensive economic, social, cultural and political process, aiming at the constant improvement of the well-being of the entire population and of all individuals on the basis of their active, free and meaningful participation in development and in the fair distribution of benefits resulting therefrom.⁷⁰ It is instructive to note the Comment of the Committee on Economic, Social and Cultural Rights to the effect that the Declaration on the Right to Development was not designed to be operational but to be a statement of broad principles.⁷¹ However, a distinction needs to be drawn because whereas the Comment refers to a Declaration, which is non-binding, the African Charter is a treaty, which expressly recognizes the right.

Despite the express provision in the Charter for the right to development, its clear contravention in the *Ogoni* case, and the reference to it in finding a violation of the right to food, the Commission made no finding specifically in relation to the right to development under Article 22. Thus, an opportunity for pronouncing on that right and how it could be operationalized was lost. Perhaps this could be attributed to the authors of the Communication who did not allege a violation of this right, leaving the Commission to deal only with those allegations before it.

Several cases have come before the Human Rights Committee for adjudication.⁷² Where the complainants belonged to indigenous communities, these cases dealt with alleged violations of the right to enjoy their own culture under Article 27 of the ICCPR stemming from development projects in their communities. While these cases did not on their own establish a right to development, they helped crystallize the rights of indigenous peoples within the right to development. The cases established the need to recognize the group rights of indigenous peoples in the quest to realize the right to development. These include participation rights, the right to sovereignty over their natural resources, self-determination and the right to enjoy their own culture. State parties must put in place necessary measures in the execution of developmental projects to limit the impact on the rights of indigenous peoples. The fact that the process of development might only have a marginal effect on the way of life of

⁶⁹ Adopted by the UN General Assembly resolution 41/128 of December 4, 1986.

⁷⁰ Preamble to the Right to Development.

⁷¹ The Incorporation of Economic, Social and Cultural Rights into the United Nations Assistance Framework (UNDAF) Process, Comment adopted by the Committee on Economic, Social, and Cultural Rights, May 15, 1998, para 5, cited in Anne Orford, "Globalisation and the Right to Development" in Philip Alston (ed.) *Peoples' Rights* (Oxford University Press, 2001), at 172.

⁷² *Ilmari Lansman et al. v. Finland*, Communication No 511/1992: UN Doc. CCPR/C/52/D/511/1992; *Jouni E. Lansman et al. v. Finland*, Communication No 671/1995: UN Doc. CCPR/C/58/D/671/1995 and *Apirana Mahuika v. New Zealand (NZ)*, Communication No. 547/1993: UN Doc. CCPR/C/70/D/547/1993.

indigenous peoples should in no way trump the economic and development values that are derivable therefrom. Governments need to develop a test to balance the interests between improving the well-being of the entire population through development and the rights and concerns of individuals and groups who may be adversely affected.

It follows, therefore, that a categorical finding of a violation of the right to development by the Commission would have better served the advancement of the right to development, to which Africa is committed, and provide a precedent for other adjudicatory bodies from which to draw inspiration.

Accountability of transnational corporations for human rights violations

Violations of economic, social and cultural rights can occur through the direct action of states or other entities insufficiently regulated by states.⁷³ This might include the failure to regulate activities of individuals or groups to prevent them from violating the rights of others, or the failure of a state to take into account its international legal obligations regarding economic social and cultural rights when entering into agreements with other states or with international organizations.⁷⁴

Over the years, state regulation of activities of transnational corporations has been weak. The failure to regulate may result from a lack of political will on the part of a state or its officials, or perhaps even corruption. This is true of transnational corporations operating in developing countries. In some cases, the violation of rights is carried out in collusion with the state. The difficulty in holding corporations accountable is that they are not party to the various international human rights treaties. The primary responsibility for human rights continues to rest with host governments.⁷⁵ Problems arise when authorities of the host state are unwilling or unable to implement all aspects of internationally recognized human rights instruments and adopt the necessary regulations concerning the activities of transnational corporations.⁷⁶ Where companies are jointly involved with governments in activities of police-state repression (such as detention and torture of environmental activists, union leaders, or political opponents of government policy regarding the company), the violations by the government should in principle lead to a company's accountability, even when employees or contractors of the company are not the immediate agents of harm.⁷⁷

The need to attribute accountability to transnational corporations for human rights violations has led to initiatives aimed at protecting the rights of individuals and groups in which they operate. For example, the ILO Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy⁷⁸ requires, among others, that states and multinational corporations "respect the Universal Declaration of Human Rights and the corresponding International Covenants adopted by the

⁷³ Maastricht Guidelines on Violations of Economic, Social and Cultural Rights, January 22-26, 1997, paragraph 14.

⁷⁴ General Comment No. 12 paragraphs 17-20.

⁷⁵ Asbjorn Eide, "Obstacles and Goals to be Pursued" in A. Eide, C. Krause and Allan Ross at 558.

⁷⁶ *Ibid.* at 559.

⁷⁷ Craig Scott, "Multinational Enterprises and Emergent Jurisprudence on Violations of Economic, Social and Cultural Rights" in Asbjorn Eide, Economic, Social and Cultural Rights as Human Rights, in A. Eide, C. Krause and Allan Ross, *Economic, Social and Cultural Rights: A Textbook*, (The Hague, Kluwer, 2001, 2nd ed.) pp. 563-595 at 563.

⁷⁸ Adopted in 1977.

General Assembly of the United Nations as well as the Constitution of the International Labour Organization.⁷⁹

In addition to its applicability beyond states, the Declaration states in paragraph 8 an important general principle that, in the future, could assume great importance in influencing the development of the direct application of international human rights obligations to corporate actors.⁸⁰

Two recent judgments by American courts have employed principles from the interface between US constitutional and tort law to decide whether American companies abroad could be held jointly accountable for the abuse of human rights by foreign governments.⁸¹ In the Bhopal case,⁸² the release of toxic gases from a plant operated by an Indian subsidiary of Union Carbide (an American company) led to thousands of deaths and disabilities. A case was instituted by the Indian Government against the company in United States courts but was referred back to the Indian courts for trial. A settlement was reached and compensation paid to the victims.⁸³

The United Nations has also been working towards a regime of regulation of transnational corporations. In its resolution 1998/8, the Sub-Commission on the Promotion and Protection of Human Rights established a sessional working group in 1999 for a period of three years to examine the working methods and activities of transnational corporations. During its fifth session in July 2003, the working group considered the Draft Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with regard to human rights. The working group observed that the right to development cannot be realized without an adequate, fair and just international economic order which takes into account the human rights responsibilities of transnational corporations. Secondly, the activities and working methods of transnational corporations also have an impact on the enjoyment of individual rights, such as workers' rights, the right to health and the right to life.⁸⁴

Under the UN draft principles, transnational corporations and other business enterprises are under an obligation to inform themselves of the impact in human rights terms of their actual and proposed operations and to ensure that their activities do not directly or indirectly add to human rights abuses. In addition, they must not knowingly benefit from such abuses and should not undermine the rule of law as well as governmental and other efforts to promote and ensure respect for human rights. They should also be held to use their influence to help promote and ensure such variegated forms of respect.⁸⁵

A strong condemnation by the African Commission of the human rights violations carried out by Shell Petroleum Development Company in Ogoniland would

⁷⁹ Article 8.

⁸⁰ Craig Scott op. cit. p. 570.

⁸¹ *Doe v. Unocal*, 963 F.Supp. 880 (C.D. Cal, 1997) (henceforth: Unocal No. 1); and *Beanal v. Freeport-Mcmoran, Inc.*, 969 F.Supp. 362 (E.D. La. 1997).

⁸² *In re. Union Carbide Corporation Gas Plant Disaster at Bhopal, India* in December 1984, 634 F.Supp. 842, discussed in C. Scott op. cit. pp.587-588.

⁸³ The Alien Tort Claims Act of 1789 grants US Federal Courts jurisdiction over civil actions by aliens for wrongs committed in violation of the law of nations or a treaty to which the United States is a party. See 28 U.S.C. § 1350.

⁸⁴ Report of the Sessional Working Group on the working methods and activities of transnational corporations on its fifth session. E/CN.4/Sub.2/2003/13, August 6, 2003.

⁸⁵ U. Baxi, *Globalisation and Human Rights: the proposed United Nations Draft Principles for Transnational Corporations and Other Business Enterprises*, being a paper presented at a conference on Developing the Notion of Human Rights: Human Rights in Development held at the University of Nottingham, Saturday March 13, 2004.

have lent voice to the evolution of accountability of transnational corporations for human rights violations.

Lack of an enforcement mechanism

Yet a commendation by the Commission would be meaningless if the victims are left to endure the continued violation of their rights. The greatest institutional weakness of the African Commission is its inability to enforce its decisions against State parties. After finding the Nigerian government to be in breach of Articles 2, 4, 16, 18(1), 21 and 24 of the African Charter, the Commission merely appealed to the government to ensure protection of the environment, health and livelihood of the Ogoni people and urged the Government to keep the Commission informed of the steps taken to redress these violations.

V. Conclusion

The African Charter represents a significantly new and challenging normative framework for the implementation of economic social and cultural rights, placing the implementing institutions of the Charter and human rights advocates working in or Africa in a position to pioneer imaginative approaches to the realization of these rights.⁸⁶ The Charter has been described as “modest in its objectives and flexible in its means”.⁸⁷ The problem of obtaining justice and redress for human rights in Africa can create despair, but it can also create hope for change.⁸⁸ The decision of the African Commission in the *Ogoni* case represents a giant stride towards the manifestation and realization of that hope. The Commission convincingly countered the often overstated arguments that these rights are vague and incapable of judicial enforcement. It also illustrated how the Charter can be interpreted generously to ensure the effective enjoyment of rights. Perhaps more importantly, the case highlighted the pressing need to have an African Court on Human and Peoples' Rights with increased powers to enforce such important decisions.⁸⁹

The conduct of the Nigerian Government in the *Ogoni* case ran contrary to international human rights laws, which it has ratified, and was tantamount to taking retrogressive steps, having already adopted legislative measures as a way of fulfilling the obligation ‘to take steps’ towards the progressive realization of these rights. While development through economic growth is permissible, the challenge of sustainable development does not lie in the choice between economic growth and environmental protection. Environmental concerns are not a science of fiction, but a growing and real danger for human survival. However, it is clear that environmental protection cannot be isolated from the general issues of development, and must be

⁸⁶ Chidi Odinkalu, op. cit. p. 186.

⁸⁷ Obinna Okere, *The Protection of Human Rights in Africa and the African Charter on Human and Peoples' Rights: A Comparative Analysis with European and American Systems*, HRQ 6 (1984) 141 at 158, cited in Gido Naldi, *Future Trends in Human Rights in Africa* in M. Evans and R. Murray (eds.) op. cit. p. 6.

⁸⁸ L. M. Wanyeki, *Strategic and Thematic Considerations: Proceedings of the Dakar Conference* in A. An-Na'im (ed.) *Universal Rights, Local Remedies: Implementing Human Rights in the Legal Systems of Africa* (London: Interights/Afronet/GTZ, 1999), p. 104.

⁸⁹ *Implementing Economic, Social and Cultural Rights in Africa*, supra note 2 at 5.

viewed as an integral part of the development process.⁹⁰ The African regional human rights system has come of age. The recent coming into force of the Protocol on the Establishment of an African Court on Human and Peoples' Rights⁹¹ marks a turning point in the system.⁹² Its contribution to the promotion and protection of human rights on the continent lies fundamentally in its ability to hand down declaratory and enforceable judgments. Only a constructive delineation of the relationship and responsibilities between the Court and the Commission will ensure the realization of the vision that gave rise to the Charter.

⁹⁰ M.T. Ladan, *Human Rights and Environmental Protection* in A. O. Obilade and C. Nwankwo (eds.) *Text for Human Rights Teaching in Schools* (Lagos: Constitutional Rights Project, 1999), pp. 95-108 at 97.

⁹¹ Adopted by the Assembly of Heads of State at its 34th session in June 1998 in Ouagadougou, Burkina Faso and came into force on January 25, 2004 with the deposit of the 15th instrument of ratification by the Union of Comoros. For text see the African Commission website, online: <http://www.achpr.org/english/_info/court_en.html> (last accessed: May 30, 2005).

⁹² In this regard, see in particular, Article 30 (Execution of Judgment) of the *Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights* in which signatory states "undertake to comply with the judgment in any case to which they are parties within the time stipulated by the Court and to guarantee its execution".