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The Social and Economic Rights Action Center and the Center for Economic and Social Rights/Nigeria[1]

Introduction

In 1996 a communication was brought to the African Commission on behalf of the Ogoni people, by the Social and Economic Rights Action Center (SERAC), a Nigerian-based NGO, and the Economic and Social Rights Action Center, a New York-based NGO. This communication averred the Nigerian government's involvement in the environmental degradation and resultant health problems amongst the Ogoni, as well as the destruction of their housing and food sources, through uncontrolled and irresponsible oil production by the State oil company (a majority shareholder in a consortium of oil companies), as well as the ruthless actions of the Nigerian military in support thereof.

After having repeatedly postponed consideration of the merits of the communication, the Commission eventually handed down what can be regarded as a landmark decision in May 2002.[2] Whilst the Commission has decided on economic, social and cultural rights issues before, this is the first time in which it was asked to deal almost exclusively with this category of rights.[3] This decision is also noteworthy in that it places beyond the pale the justiciability of economic, social and cultural rights, by making an unequivocal statement that "there is no right in the African Charter that cannot be made effective".[4] Finally, it represents the most comprehensive decision on economic, social and cultural rights issued to date by any intergovernmental body.

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[1] Communication 155/96 *The Social and Economic Rights Action Center and the Center for Economic and Social Rights/Nigeria*, Fifteenth Annual Activity Report of the African Commission, 2001–2002, Annex V.

[2] It should be noted that only on two occasions could the postponement be said to have been justifiable. The first was in April 1997, when the Commission delayed taking a decision on the merits until it had received further submissions from the complainants, and the second was in November 1997 when the Commission deferred consideration pending the discussion of the Nigerian Mission Report.

[3] The Commission has previously dealt with economic, social and cultural rights in conjunction with civil and political rights. See in this regard, Communication 97/93 *John K Modise/Botswana* Seventh Annual Activity Report of the African Commission, 1993–1994, Annex IX, Tenth Annual Activity Report of the African Commission 1996–1997 Annex X & Fourteenth Annual Activity Report of the African Commission 2000–2001, Annex V; Communication 39/90 *Annette Pagnoulle (on behalf of Abdoulaye Mazou)/Cameroon* Eighth Annual Activity Report of the African Commission 1994–1995, Annex VI & Tenth Annual Activity Report of the African Commission 1996–1997, Annex X; Communications 25/89, 47/90, 56/91, 100/93 *Free Legal Assistance Group, Lawyers' Committee for Human Rights, Union Interafricaine des Droite de l'Homme, Les Témoins de Jehova/Zaire,* Ninth Annual Activity Report of the African Commission 1995–1996, Annex VIII; Communication 159/96 *Union InterAfricaine de Droits de l'Homme, Federation Internationale des Ligues des Droits de l'Homme, Recontre Africaine des Droits de L'Homme, Organisation Nationale des Droits de l'Homme au Sénégal and Association Malienne des Droits de L'Homme/Angola* Eleventh Annual Activity Report of the African Commission 1997–1998, Annex II; Communication 212/98 *Amnesty International/Zambia* Twelfth Annual Activity Report of the African Commission 1998–1999, Annex V; Communications 140/94, 141/94, 145/95 *Constitutional Rights Project, Civil Liberties Organisation and Media Rights Agenda/Nigeria* Thirteenth Annual Activity Report of the African Commission 1999–2000, Annex V; Communications 54/91, 61/91, 98/93, 164/97, 210/98 *Malawi African Association, Amnesty Intenational, Ms Sarr Diop, Union Interafricaine des Droite de l'Homme and RADDHO, Collectif de Veuves et Ayants-Droit, Association Mauritanienne de Droit de l'Homme/Mauritania* Thirteenth Annual Activity Report of the African Commission 1999–2000, Annex V Addendum and Communication 225/98 *Huri-Laws/Nigeria* Fourteenth Annual Activity Report of the African Commission 2000–2001, Annex V.

[4] See para. 68.

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Admissibility

Before dealing with the merits of the case, the Commission touched on the issue of admissibility. In this regard, the only topic on which the Commission focused its attention was that of the exhaustion of domestic remedies. The Commission commenced its discussion of this issue by elaborating on the rationale for the requirement of this provision. It noted that the Nigerian government had had more than sufficient opportunity to provide for domestic remedies[5] and that, in the absence of any response from them, it had to decide on the basis of the facts provided by the complainants.[6] Although the Commission did not expressly deal with the issue, it is clear that in keeping with its own jurisprudence, its decision was made on the basis of the facts at the time of the submission of the complaint.[7] Thus, the fact that the new Nigerian government had subsequently taken steps to address the violations as set out in its *Note Verbale*, submitted to the Commission in November 2000, was deemed to have been irrelevant.[8] The communication was therefore considered to be admissible, as at the time of the complaint having been brought, various decrees ousting the jurisdiction of the Nigerian courts were in force, effectively providing for no adequate domestic remedies.[9]

Merits

The Commission embarked on its discussion of the merits of the case by detailing the various duties incumbent on States when adhering to a human rights regime, as originally espoused by Henry Shue[10]—namely the duties to respect, protect, promote and fulfil the rights in question. It then proceeded to deal in turn with the rights to health and healthy environment, the right to

[5] See para. 38.

[6] See para. 40 of the judgment. The Commission goes on to note in para. 42 of the judgment, that the new Nigerian government admitted to the violations in a *Note Verbale* stating, *inter alia*, that: "there is no denying the fact that a lot of atrocities were and are still being committed by the oil companies in Ogoni Land and indeed in the Niger Delta area."

[7] In this regard see para. 12 of Communications 64/92, 68, 92, 78, 92 *Krishna Achuthan* (*on behalf of Aleke Banda*), *Amnesty International* (*on behalf of Orton and Vera Chriwa*), *Amnesty International* (*on behalf of Orton and Vera Chirwa*)*/Malawi*, Eighth Annual Activity Report of the African Commission 1994–1995, Annex VI, which notes that "Principles of international law stipulate, however that a new government inherits the previous government's international law obligations. . . . Although the present government of Malawi did not commit the human rights abuses complained of, it is responsible for the reparation of these abuses." Also see para. 36 of Communications 27/89, 46/91, 49/91 and 99/93 *Organisation Mondiale Contre La Torture and Association Internationale de Juriste Democrates, Commission Internationale de Juristes (C.I.J), Union Interafricaine des Droits des l'Homme/Rwanda* Tenth Annual Activity Report of the African Commission 1996–1997, Annex X, where the Commission held that: "[it] is aware of the fact that the situation in Rwanda has undergone dramatic change in the years since the communications were introduced. Furthermore, [it] has to rule on the facts which were submitted to it." Finally, also see para. 37 of Communication 224/98 *Media Rights Agenda/Nigeria* Fourteenth Annual Activity Report of the African Commission 2000–2001, Annex V, which provides that ". . . even if the situation has improved . . . the position remains that the responsibility of the present Government of Nigeria would still be engaged for acts of human rights violations, which were perpetrated by its predecessors."

[8] See para. 30 of the judgment for an exposition of the remedial measures being taken by the new civilian administration.

[9] See para. 41 of the judgment. This is in conformity with the Commission's extensive pronouncements on this issue. For a general discussion on the issue of admissibility including the topic of exhaustion of domestic remedies, see F. Viljoen, "Admissibility under the African Charter" in M. Evans and R. Murray (eds.), *The African Charter on Human and Peoples' Rights: The System in Practice 1986–2000*, Cambridge, 2002.

[10] See H. Shue, *Basic Rights: Subsistence, Affluence and US Foreign Policy*, Princeton, NJ, 1980.

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freely dispose of natural wealth and resources and other related rights, the rights to shelter and housing, the right to food and the right to life.

Prior to considering each of the rights as dealt with by the Commission, it is important to note that there are fundamental differences in formulation between the rights contained in the International Covenant on Economic, Social and Cultural Rights (to which the Commission makes extensive reference in the course of its decision), and the economic, social and cultural rights contained in the African Charter on Human and Peoples' Rights. The International Covenant on Economic, Social and Cultural Rights is characterized by the terms "maximum available resources" and "progressive realization".[11] In contrast, the rights contained in the Charter are immediately enforceable and are not subject to resource constraints, although in reality, the availability of resources could potentially play a role in the determination of whether or not a State Party has met its obligations in terms of the Charter. In this particular instance, given the nature and scale of the violations that were alleged to have taken place, budgetary constraints were not even an issue.

Right to health and healthy environment

The Commission emphasized the importance of a clean and safe environment to the realization of other social rights.[12] It stressed that the obligations imposed by the Charter in terms of article 24[13] require the government to "take reasonable measures to prevent pollution, ecological degradation, promote conservation, and to secure an economically sustainable development and use of natural resources".[14] Furthermore, in terms of article 16,[15] it pointed out that the government has to "desist from directly threatening the rights to health and environment of its citizens".[16] Compliance with the above-mentioned articles according to the Commission, requires the government to order, or at the very least permit, monitoring of the situation, allow the conducting of environmental impact studies and make provision for the participation of the affected communities in decision-making.[17] The Commission held that the Nigerian government failed to exercise the necessary care in order to safeguard the rights of the victims and that this situation was exacerbated by the actions of the security forces who were involved in attacks, burning and destruction of Ogoni homes and villages.[18]

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[11] For a general discussion of the content of these terms, see General Comment No. 3: The Nature of States Parties Obligations (art. 2(1)) Report of the Committee on Economic, Social and Cultural Rights UN Doc. E/1991/23; The Limburg Principles on the Implementation of the International Covenant on Economic, Social and Cultural Rights UN Doc. E/CN.4/1987/17 and the Maastricht Guidelines on Violations of Economic, Social and Cultural Rights, reproduced in 20 *Human Rights Quarterly* (1998) 691–704.

[12] See para. 51.

[13] Article 24 provides as follows:

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

[14] Para. 52.

[15] Article 16 provides as follows:

"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."

[16] Ibid.

[17] See para. 53.

[18] See para. 54.

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Right to freely dispose of wealth and natural resources and elimination of foreign economic exploitation

Article 21[19] of the Charter provides for the free disposition of wealth and natural resources by all peoples as well as State Parties, and the elimination on the part of government of all forms of foreign economic exploitation. The Commission set out its consideration of this provision by firstly tracing its historical origins.[20] It then proceeded to highlight the duty incumbent on governments to protect citizens, stating that it extends to safeguarding them from harmful actions perpetrated by private parties.[21] In this regard, the Commission found a clear violation of the minimum conduct expected of governments, in terms of article 21, in that the Nigerian authorities facilitated the destruction of Ogoniland by giving the green light to the oil companies to "devastatingly affect the well-being of the Ogonis".[22]

Rights to shelter and housing

The right to housing is not explicitly recognized in the Charter. However, the complainants creatively argued, and the Commission accepted, that the rights to housing and shelter could be found in the combined reading of the provisions of the right to the best attainable state of mental and physical health (article 16),[23] the right to property (article 14)[24] and protection accorded to the family (article 18(1)).[25] The Commission defined the right to shelter as more than merely having a roof over one's head. It held that the right to shelter "embod[ies] the individual's right to be let alone and to live in peace—whether under a roof or not".[26] It held that at a minimum the right to shelter obliges the Nigerian government to respect this right by refraining from destroying homes or preventing communities from rebuilding lost homes.[27] Furthermore, the government, according to the Commission, is also required to prevent violations of these rights by non-state actors and to guarantee access to legal remedies.[28] The

[19] Article 21 provides as follows:
"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.
5. States parties to the present Charter shall undertake to eliminate all forms of foreign economic exploitation particularly that practised by international monopolies so as to enable their peoples to fully benefit from the advantages derived from their national resources."

[20] See para. 56.

[21] See para. 57.

[22] Para. 58.

[23] See fn. 15.

[24] Article 14 provides as follows:
"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."

[25] Article 18(1) provides as follows:
"1. 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 and moral health."

[26] Para. 61.

[27] Ibid.

[28] Ibid.

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Commission held that the Nigerian government failed to respect as well as protect the right in question and that its actions in this regard constituted massive violations of the right to shelter.[29]

In relation to the right to housing, the Commission held that it encompasses protection against forced evictions.[30] It then went on to state that the conduct of the Nigerian government was a clear violation of this collective right as enjoyed by the Ogonis.[31]

Right to food

In the same vein as the right to housing, the Commission also found a violation of the right to food in the absence of a direct provision to this effect in the Charter by accepting the argument of the complainant that the right to food can be found in a combined reading of the provisions of the right to life (article 4),[32] the right to health (article 16)[33] and the right to economic, social and cultural development (article 22).[34]

The Commission held that the right to food is "inseparably linked to the dignity of human beings and is therefore essential for the enjoyment and fulfilment of other rights . . .".[35] It further held, that the minimum core requires that the Nigerian government should not itself, nor permit private parties to, destroy or contaminate food sources.[36] The Commission found the Nigerian government in violation of all three duties in respect of the right to food. This decision was made by virtue of the fact that the Nigerian government was found to have destroyed Ogoni food sources through its security forces and state oil company and the fact that it had allowed private companies to do the same. In addition it was also held that it had created significant obstacles to Ogoni efforts to feed themselves.[37]

Right to life

Finally, the Commission found a violation by the Nigerian government of the right to life (article 4),[38] both through its direct action as well as its failure to protect the Ogoni against violations by non-state actors. The Commission noted that the security forces were given the green light to terrorize and kill, thus, directly violating the right.[39] The Commission also held that "The survival of the Ogonis depended on their land and farms that were destroyed by the direct involvement of the Government", thus also constituting a violation of the right

[29] See para. 62.
[30] See para. 63.
[31] Ibid.
[32] Article 4 provides as follows:
"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."
[33] See fn. 15.
[34] 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."
[35] Para. 65.
[36] Ibid.
[37] See para. 66.
[38] See fn. 32.
[39] See para. 67.

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to life.[40] Finally, it is also worth pointing out that the Commission appears to have given an expansive definition to the right to life, by implicitly recognzing the right to a certain quality of life, holding that "The pollution and environmental degradation to a level humanly unacceptable has made living in the Ogoni land a nightmare".[41]

Remedies

The Commission appealed to the Nigerian Government to: cease all attacks, permit free access to the territories, conduct investigations and prosecute those involved in abuses, ensure adequate compensation to the victims, ensure that in future appropriate impact assessments are conducted and that further oil development is overseen by effective and independent bodies and also to provide information on health and environmental risks as well as access to regulatory and decision-making bodies to affected communities. Furthermore, it urged the Nigerian government to keep the Commission informed of the outcomes of the measures it had taken as described in its *Note Verbale* to the Commission, in order to address the situation.

Conclusion

Overall, the drafting of the decision leaves much to be desired. Thus, for example it is unclear as to why the rights to shelter and housing are at times used interchangeably by the Commission and at other times sharply distinguished from each other. In the decision, shelter is given a broad expansive definition and housing is seemingly limited to a mere prohibition against forced evictions. The Commission in its decision does not always follow an argument through to its logical conclusion, leaving the reader guessing as to their intention. At times, it is also difficult to distinguish between the arguments made by the complainants and the decision of the Commission.

Although the Commission did not explicitly state that the Ogoni constitute a peoples as envisaged in the Charter, it nevertheless appears to be implicit in its decision. It is regrettable however, that the Commission failed to use this opportunity to set the parameters of one of the unique features of the Charter. Similarly the fact that the Commission fails to provide insights into why, for example, the right to housing, traditionally an individual right, is seen to be a collective right in the African context, is equally disconcerting.

The Commission's unambiguous choice in favour of a "violations" approach to economic, social and cultural rights is to be welcomed.[42] Thus ending speculation as to whether or not the economic, social and cultural rights in the Charter, in spite of the absence of a formulation to this effect, might nonetheless be subject to progressive realization. In terms of remedies, the Commission's decision is somewhat disappointing, amounting to little more than a politely phrased request to the government to improve the situation and keep the Commission informed of progress in this regard. The Commission could have used the opportunity to find creative ways of enforcing the rights in the Charter.

[40] Ibid.
[41] Ibid.
[42] On a "violations" approach in general, see A. Chapman, "A 'violations approach' to monitoring economic, social and cultural rights", (1996) 18 *Human Rights Quarterly* 23–66.

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At the very least it could have requested that the government report back to it on the measures taken to address the violations within a specified period of time.

Through the course of the decision, the Commission makes extensive reference to the jurisprudence of the Committee on Economic, Social and Cultural Rights. Whilst this is to some extent expected, the lack of reference to domestic African jurisprudence is nevertheless somewhat unsatisfactory, thus, effectively making the statement in paragraph 68 that "[T]he uniqueness of the African situation and the special qualities of the African Charter on Human and Peoples Rights imposes on the African Commission an important task" ring hollow. The Commission could fruitfully have referred to the South African Constitutional Court decision of *Government of RSA and Others* v. *Grootboom and Others* 2001 (1) SA 46 (CC), which dealt extensively with the issue of the right to adequate housing. In spite of its shortcomings, the decision remains one of the most important the Commission has issued to date.

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