



# The right to a satisfactory environment and the African Commission

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## Summary

*This article emphasises that the right to a satisfactory, healthy or clean environment is enshrined in over 60 constitutions from all regions of the world. Moreover, it is suggested that there is an increasing trend by victims of environmental damage to invoke human rights for protection and redress. National courts and global and regional human rights monitoring bodies, such as the UN Human Rights Committee and the Inter-American Commission, have addressed this issue. It is encouraging that the African Commission recently decided a case concerning the impact of oil operations in the Niger Delta, concluding that the African Charter recognises the importance of a clean and safe environment. The decision recognises a nexus between socio-economic rights and the right to environment to the extent that the environment affects the quality of life and safety of individuals and groups. In finding Nigeria in violation of the Charter, the Commission stated that the right to a satisfactory environment 'requires the state to take reasonable and other measures to prevent pollution and ecological degradation, to promote conservation, and to secure an ecologically sustainable development and use of natural resources'.*

## 1 Introduction

In contemporary times, the 'environmental issue' (particularly, environmental protection) is arguably one of the most important

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subjects on the global community's agenda. United Nations (UN) Special Rapporteur, Mrs Fatma Zohra Ksentini, observed in her report on human rights and the environment that the state of the environment is nowadays seen as a worldwide problem that should be addressed globally, 'in a co-ordinated and coherent manner and through the concerted efforts of the international community'.<sup>1</sup> More specifically, part of the current international discourse on the subject centres on the concept of the 'right to environment'.<sup>2</sup> The controversial question is whether there is an international 'human right to environment'. While some

<sup>1</sup> See Final Report prepared by Mrs Fatma Zohra Ksentini on her study of human rights and the environment (E/CN.4/Sub.2/1994/9/Corr.1, para 117). The study was commissioned by the United Nations (UN) Sub-Commission on Prevention of Discrimination and Protection of Minorities, by its decision 1989/108 of 31 August 1989.

<sup>2</sup> It has been suggested that the right to a satisfactory environment means that all human beings have the fundamental right to an environment adequate for their health and well-being and the responsibility to protect the environment for the benefit of present and future generations. See Charter on Environmental Rights and Obligations of Individuals, Groups and Organisations, art 1 (reprinted in Report on the Regional Conference at Ministerial Level on the Follow-Up to the Report of the World Commission on Environment and Development in the Economic Commission for Europe Region, Action for a Common Future, held at Bergen, Norway, 16–18 May 1990). Note that the concept of 'human right to a satisfactory environment' has a number of ramifications, including 'right to a satisfactory environment', 'right of environment' and 'environmental rights'. Briefly explained, 'right to a satisfactory environment' may be defined as 'the right to conserve, protect and improve the current environment' for the benefit of man. Essentially, this is substantive in character and anthropogenic in perspective. On the other hand, 'the right of environment is founded upon the notion that the environment possesses rights derived from its own intrinsic value, separate and distinct from human use of the environment'. See LE Rodriguez-Rivera 'Is the human right to environment recognised under international law? It depends on the source' (2001) 12 *Colorado International Environmental Law and Policy* 1. In contrast with 'right to a satisfactory environment' which confers rights on human beings, 'right of environment' confers right directly on the environment — as the best way of protecting the environment. On its part, 'environmental rights' 'encapsulate the procedural human rights necessary for the implementation of the substantive rights that are part and parcel of the expansive right to a satisfactory environment' (Rodriguez-Rivera 15). Notwithstanding these different shades of meanings, this article uses the expression 'right to a satisfactory environment' to denote the three ramifications of the 'human right to a satisfactory environment' noted here (and interchangeably with the other expressions). In any case, there is the issue of the quality of environment involved in the right to a satisfactory environment. As at yet, there is no agreement on the proper descriptive adjective; some of the adjectives employed by various authors and instruments include: healthy, healthful, adequate, satisfactory, decent, clean, natural, pure, ecologically sound, ecologically balanced and viable. Even so, it has been questioned whether it is realistic to have a precise minimum standard of environmental quality that allows for a life of dignity and well-being, given the scientific uncertainty surrounding the issue (Rodriguez-Rivera 10). Undoubtedly, definitional problems are inherent in any attempt to postulate environmental rights in qualitative terms: Surely, what constitutes a satisfactory, decent, viable or healthy environment is bound to suffer from uncertainty and ambiguity. Arguably it may even be incapable of substantive definition, or prove potentially meaningless and ineffective, like the right to development, and may undermine the very notion of human rights. (See A Boyle 'The

scholars maintain that an international human right to environment presently exists as part of the international bill of rights, others contend that no such right has emerged.<sup>3</sup> In fact, there is abundant legal literature affirming or rejecting the existence of a right to environment.<sup>4</sup> It is proposed to briefly consider the proponents' view here.

The proponents of the right to environment have pointed to its acceptance and incorporation into more than 60 national constitutions (as well as the constitutions of several component states of the United States of America).<sup>5</sup> In some cases, such constitutional provisions are declaratory of the state's duty to pursue environmentally sound development, sustainable use of natural resources and the maintenance of safe and healthy environment for the citizens of the state, while in others the constitution provides for the individual's right to a clean and healthy environment and a person's duty to protect and conserve the environment and natural resources. Moreover, in a few cases, these two approaches are combined. For the present purposes, a few examples will suffice to illustrate this increasing state practice.<sup>6</sup>

On the African continent, the relatively recent Constitutions of Mali, the Democratic Republic of Congo (DRC) and the Republic of South Africa provide good examples. In the case of Mali, section 15 of its 1992 Constitution provides:

Every person has a right to a healthy environment. The protection and defence of the environment and the promotion of the quality of life are a duty for all and for the state.

Similarly, section 46 of the 1992 Constitution of the DRC provides as follows:

Every citizen shall have the right to a satisfactory and sustainable healthy environment, and shall have the duty to defend it. The state shall supervise the protection and the conservation of the environment.

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role of international law in the protection of the environment' in A Boyle & M Anderson (eds) *Human rights approaches to environmental protection* (1996) 43 50.) Nonetheless, it has been rightly pointed out that ambiguity has not been an obstacle in implementation and enforcement of recognised human rights (such as economic, social and cultural rights) because 'in the public conscience of a given society, these concepts can have sufficient precision to permit a judge or administration to apply them' (Rodriguez-Rivera 11 — quoting A Kiss & D Shelton *International environmental law* (1991) 23). This article will not indulge in the 'doctrinal' debate, and employs the various qualitative adjectives interchangeably to denote an environment conducive to human health.

<sup>3</sup> For an interesting and informative discussion of the ongoing debate, see Rodriguez-Rivera (n 2 above).

<sup>4</sup> This point was also made by Rodriguez-Rivera (n 2 above) 4.

<sup>5</sup> See eg Ksentini (n 1 above) Annex III.

<sup>6</sup> Some of the relevant constitutional provisions are reproduced in Ksentini (n 1 above) Annex III. See also EB Weiss *In fairness to future generations: International law common patrimony and intergenerational equity* (1988) 306 (Appendix B).

With regard to South Africa, the first post-apartheid Constitution of the Republic of South Africa (which came into force on 27 April 1994) stipulates in section 29 that '[e]very person shall have the right to an environment which is not detrimental to his or her health or well-being'. This formulation has been extended in the 1996 Constitution.<sup>7</sup>

The same trend is also found in the constitutions of many Asian countries — for example, India and China. In India, the Federal Constitution of 1949 provides as follows in article 51A(g):

It shall be the duty of every citizen of India to protect and improve the natural environment including forests, lakes, rivers, and wild life, and to have compassion for living creatures.

China's 1982 Constitution imposes a duty on the state to protect and improve the living environment, and prevent and remedy pollution and other public hazards.<sup>8</sup> The Constitution also provides for the rational use of natural resources and the protection of rare animals and plants.<sup>9</sup>

Regarding Latin American and Caribbean countries, evidence indicates that all constitutions enacted in those regions since the 1972 Stockholm Conference on the Human Environment contain important environmental protection principles. Moreover, older constitutions have been amended to incorporate such principles. For example, the 1980 Constitution of Peru provides various rights and duties with regard to the environment. These include the rights of citizens to live in a healthy environment which is ecologically balanced and adequate for the development of life and the preservation of the countryside and nature, citizens' duty to conserve the environment, and the state's duty to prevent and control environmental pollution.<sup>10</sup> In the same vein, the 1980 Constitution of Chile guarantees all persons the right to live in an uncontaminated environment, and imposes a duty on the state to watch over the protection of this right and the duty to preserve nature. Moreover, the state has the power to make certain restrictions on the exercise of certain rights or freedoms where that is necessary to preserve the environment.<sup>11</sup>

<sup>7</sup> See sec 24 of the 1996 Constitution, which provides as follows: 'Everyone has the right (a) to an environment that is not harmful to their health or well-being; and (b) to have the environment protected, for the benefit of present and future generations, through reasonable legislative and other measures that (i) prevent pollution and ecological degradation; (ii) promote conservation; and (iii) secure ecologically sustainable development and use of natural resources while promoting justifiable economic and social development.'

<sup>8</sup> Ch 1 art 9.

<sup>9</sup> Ch 1 art 26. Similar constitutional provisions are contained in the Constitution of Philippines.

<sup>10</sup> Political Constitution of Peru, ch 2 art 123.

<sup>11</sup> Political Constitution of the Republic of Chile, ch 3 art 19(8). Similar constitutional provisions can be found in the Constitutions of Colombia and Costa Rica. In Europe, the Constitutions of Portugal and Bulgaria exemplify the trend. In Portugal, its 1982

Many state courts have rendered decisions enforcing the relevant constitutional provisions on the right to a satisfactory environment. In *Mehta v Union of India*,<sup>12</sup> for example, the Supreme Court of India restrained a series of tanneries from disposing of effluent into the river Ganges on the petition of an interested citizen. In reaching its decision, the Court relied on article 48A (which enjoins the state to endeavour to protect and improve the environment and to safeguard the wildlife of the country) and article 51A of the Indian Constitution.<sup>13</sup>

Further support for the existence of an international right to environment may be found in decisions of international human rights tribunals. Specifically, a number of international human rights committees and tribunals have increasingly recognised the application of the fundamental right to a healthy or healthful environment to situations concerning life-threatening environmental risks.<sup>14</sup> For example, within the UN system, the Human Rights Committee<sup>15</sup> has

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Constitution provides that 'everyone shall have the right to a healthy and ecologically balanced human environment and the duty to defend it' (pt 1 sec III). The Constitution further imposes a duty on the state to protect the environment, stipulating the necessary measures to be taken towards that goal (ch II art 66). In the case of Bulgaria, the 1991 Constitution obligates the Bulgarian state to ensure the protection and conservation of the environment, the sustenance of animals and the maintenance of their diversity and the rational use of natural resources. On the other hand, citizens also have an obligation to protect the environment (ch 2 art 31). In the United States, although there is no provision for a right to an environment in the national Constitution, a number of the component states of the country have included such a right in their constitutions. For example, art XI sec 9 of the Constitution of the state of Hawaii provides for the right to an environment: 'Each person has the right to a clean and healthful environment, as defined by laws relating to environmental quality, including control of pollution and conservation, protection and enhancement of natural resources. 'A more detailed provision for right to a clean environment can be found in the Constitution of Massachusetts, which states (art 49, adopted on 7 November 1972): 'The people shall have the right to clean air and water, freedom from excessive and unnecessary noise, and the natural, scenic, historic, and aesthetic qualities of their environment; and the protection of the people in their right to the conservation, development and utilization of the agricultural, mineral, forest, water, air and other natural resources is hereby declared to be a public purpose.'

<sup>12</sup> (1988) AIR 1037 SC.

<sup>13</sup> In another Case, the same court expressly held that the right to life is a fundamental right which includes the right of enjoyment of pollution-free water and air for full enjoyment of life. Accordingly, it said, if anything endangers or impairs that quality of life in derogation of laws, a citizen has the right to have recourse to art 32 of the Constitution for removing the pollution of water or air which may be detrimental to the quality of life (noted in FZ Ksentini 'Human rights, environment and development' in S Lin *et al* (eds) *UNEP's new way forward: Environmental law and sustainable development* (1995) 107).

<sup>14</sup> See PR Kalas 'International environmental dispute resolution and the need for access by non-state entities' (2001) 12 *Colorado Journal of International Environmental Law* 191 217.

<sup>15</sup> The Committee monitors state party implementation of the International Covenant on Civil and Political Rights (ICCPR).

examined a number of cases under the Optional Protocol dealing with threat to life in violation of article 6(1) of the International Covenant on Civil and Political Rights (ICCPR).<sup>16</sup> In *EHP v Canada*,<sup>17</sup> Canadian residents alleged that radioactive waste that remained after the government had conducted a cleanup constituted serious risks to health in violation of article 6 of the ICCPR. Although the Committee declared the case inadmissible,<sup>18</sup> it noted that the case 'raised serious issues with regard to the obligation of state parties to protect human life'.<sup>19</sup>

The same approach has also been followed in regional human rights protection bodies, particularly the Inter-American Commission on Human Rights. For instance, in a case filed by the Yanomami Indians of Brazil,<sup>20</sup> the Commission determined that environmental degradation

<sup>16</sup> Adopted on 16 December 1966. Art 6(1) provides: 'Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life.'

<sup>17</sup> Communication 67/80, reported in 2 Selected Decisions of the Human Rights Committee Under the Optional Protocol (1990) 20.

<sup>18</sup> Specifically, the Committee held the communication inadmissible because domestic remedies have not been exhausted as required under Canadian law.

<sup>19</sup> Similarly, in the Communication 167/84, *Ominiyak v Canada* (26 March 1990) (*Lubicon Lake Band case*), UN Report A/45/40 vol II, Annex LX A, the Committee found that art 27 of the ICCPR (dealing with the protection of minority rights) had been violated. The case was submitted to the UN Human Rights Committee in 1984 by Bernard Ominayak, the Chief of Lubicon Band in the Province of Alberta, Canada. His argument was that Canada violated the Band's right to self-determination under art 1 of the ICCPR, particularly the rights of his people (1) to pursue their own development; (2) to freely dispose of their natural resources; and (3) not to be deprived of their own means of subsistence. According to him, the Lubicon Lake Band had continuously hunted, trapped and fished in their territory (a large area encompassing 10 000 square kilometres) in the province of Alberta. The Canadian government had allowed the Province of Alberta to expropriate part of the Band's territory for oil and gas exploitation. The Band challenged the expropriation policy through domestic political and legal processes, contending that the continued resource development caused irreparable harm to its way of life. (The government conceded that the Band had suffered a historical inequity.) Giving its decision, the Committee took the view that it was procedurally incompetent to address the claim of a right to self-determination. However, it found that many of Chief Ominayak's claims raised issues under art 27 of the ICCPR, which reads as follows: 'In those states in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practise their own religion, or to use their own language.' Significantly, the Committee recognised that the rights protected by this article (art 27, ICCPR) include the right to engage in traditional economic and social activities that are part of the culture of the community. In this regard, the Committee concluded that: 'Historical inequities, to which the state refers, and certain more recent developments threaten the way of life and culture of the Lubicon Lake Band, and constitute a violation of art 27 so long as they continue . . .' See Communication 167/84, *Ominiyak v Canada* (26 March 1990), Report A/45/40 vol II, Annex LX A, para 33.

<sup>20</sup> *Yanomami v Brazil*, Case No 7615, Inter-American Commission on Human Rights 24, OEA/Ser L/V/II 66, Doc 10 rev 1 (1985) (*Yanomami case*).

of Yanomami lands violated the right to life and other human rights (including right to cultural identity and right to property) set out in the American Convention on Human Rights.<sup>21</sup>

Although it may still be uncertain how the right to life may be interpreted in various environmental contexts, these cases demonstrate an increasing trend by victims of environmental damage to invoke human rights doctrine for protection and redress and an emerging trend by human rights tribunals to apply this doctrine, especially in life-threatening situations.<sup>22</sup>

In a recent case complaining about the abuse of human rights and the degradation of the Niger Delta environment by oil operations undertaken by Nigerian-based multi-national oil companies (especially Shell Oil Company), the African Commission on Human and Peoples' Rights (African Commission or Commission) was faced with questions relating to human rights to a 'satisfactory' and 'healthy' environment.<sup>23</sup> The article focuses on this decision with a view to determining the attitude of the Commission to the concept of a human right to a satisfactory environment, particularly in life-threatening situations. The context of the environmental impact of oil operations in the Niger Delta as well as related human rights abuses is now briefly sketched.

<sup>21</sup> *Yanomami* case 26–27. The complainants alleged that the degradation arose from the Brazilian government permission to private companies to exploit natural resources on Yanomami lands, and the construction of the Trans-Amazonian highway, the incursion of disease and outsiders into Yanomami territory, and the displacement of Yanomami people (a minority and indigenous group in Brazil). In giving its decision, the Commission stated that the Brazilian government approved development in the Amazonian region caused various life and culture threatening harms to the Yanomami population, including their displacement, the break-up of social organisation, introduction of prostitution and disease and destruction of encampments. A further example is a petition filed in 1990 on behalf of the Huaorani people of Ecuador against the government of the country, where it was alleged that oil operations violated the people's human rights under the American Convention on Human Rights (the violations allegedly included the contamination of water, soil and air). Finding in favour of the petitioners, the Commission stated that 'development must take place under conditions that respect and ensure human rights of the individuals affected. Decontamination is needed to correct mistakes that ought never to have happened' (noted in Kalas (n 14 above) 218–219).

<sup>22</sup> See ML Schwartz 'International legal protection for victims of environmental abuse' (1993) 18 *Yale Journal of International Law* 355–364. See further PE Taylor 'From environmental to ecological human rights: A new dynamic in international law?' (1998) 10 *Georgetown International Environmental Law Review* 309–341. Proponents of the existence of the right to a clean environment further support their position by pointing out that since 1968 an increasing number of international declarations and statements have, with growing specificity, recognised the fundamental connection between environmental protection and respect for human rights. For a discussion of some of these, see Kalas (n 14 above).

<sup>23</sup> See Communication 155/96, *The Social and Economic Rights Action Centre and another v Nigeria*, Fifteenth Annual Activity Report (SERAC case).

## 2 Oil operations and environmental degradation in the Niger Delta

Nigeria's vast oil resources are concentrated in the Niger Delta region of the country. As with other high technology-based industrial activities, the extraction of oil has as consequence different types of environmental problems occurring at different stages of oil operations.<sup>24</sup> However, for the purposes of this article it is sufficient to briefly consider two of the most important and well-known problems of oil operations in the Niger Delta, namely oil spills and gas flares. Additionally, the related problem of human rights abuses is briefly considered.

### 2.1 Oil spill and gas flare: Their impact on the Niger Delta environment

Several studies have provided evidence showing that oil spilling is a frequent occurrence in the Niger Delta (mostly in the swamp forests and offshore), inhabited by indigenous ethnic minorities.<sup>25</sup> More seriously, such spillages have resulted in several environmental problems that affect both the region and its local inhabitants. Interestingly, oil companies operating in the region acknowledge the frequency of oil spillages and their potential to cause damage to the inhabitants of the region. For example, Shell Oil Company — the leading oil multinational company operating in Nigeria's Niger Delta area — states that since 1989 it has recorded 'an average of 221 spills per year in its operational area' and that it is 'committed to paying compensation to affected communities'.<sup>26</sup>

<sup>24</sup> The principal stages of oil operations are seismic surveys, exploratory drilling, and production.

<sup>25</sup> See, eg, E Hutchful 'Oil companies and environmental pollution in Nigeria' in C Ake (ed) *Political economy of Nigeria* (1985) 113; C Iporukpo 'Management of oil pollution of natural resources in Nigeria' (1985) 20 *Journal of Environmental Management* 204; JG Frynas *Oil in Nigeria: Conflict and litigation between oil companies and village communities* (2000) 165; KSA Ebeku 'Legal aspects of environmental issues and equity considerations in the exploitation of oil in Nigeria's Niger Delta' unpublished PhD thesis, University of Kent at Canterbury, 2002, ch 3 (especially 192–198).

<sup>26</sup> See Shell Petroleum Development Corporation of Nigeria (SPDC) 'The environment' <<http://www.shell.com/nigeria>> (accessed 28 February 2003). However, there are suggestions that the incidence of oil spill is far higher than the 221 cases per year, as admitted by Shell. See Annual Reports of the Civil Liberties Organisation (CLO) — a Nigerian-based non-governmental organisation. Obviously, the payment of compensation suggests that damage has been done by the oil spill. Even so, critics have suggested that oil companies are usually unwilling to pay compensation to victims of their operations. See eg KSA Ebeku 'Compensation for damage arising from oil operations: *Shell Petroleum Development Company of Nigeria v Ambah* revisited' (2002) 7 *International Energy Law and Taxation Review* 155.



In one of the most important scientific studies of the environmental impact of oil operations in the Niger Delta region, it has been found that incessant oil spills of various magnitudes have resulted in massive pollution of water bodies as well as degradation of agricultural land, destruction of artisanal fishery, and generally adverse socio-economic consequences.<sup>27</sup>

With specific respect to land, it has been found, for instance, that oil spills adversely affect the availability and productivity of farmlands. In fact, scientific studies following the 1972 major oil spill at Shell's Bomu-11 oil field (which affected 242,8 hectares of farmlands close to human settlements) indicate that while the less affected soils were returned to production in less than one and a half year, the heavily affected soils remained agriculturally unusable for several years.<sup>28</sup>

In the case of the impact of oil spills on the ubiquitous water systems of the region,<sup>29</sup> it is now well known that water pollution as a result of oil spillages constitutes one of the most pressing problems in the Niger Delta region.<sup>30</sup> More specifically, it affects the local inhabitants' source of drinking water (the local inhabitants depend mostly on streams for the supply of their drinking water). Moreover, oil spillages frequently cause a film of oil to form on affected water bodies, thereby preventing natural aeration and causing the death of marine life (particularly fish) trapped below. Furthermore, fish ingest the spilled oil and thereby become unpalatable and sometimes poisonous for human consumption. A non-governmental organisation (NGO) had described the situation as 'catastrophic'.<sup>31</sup> Hutchful summed up the impact as follows:<sup>32</sup>

[S]pill of crude [oil], dumping of by-products from [oil] exploration, exploitation and refining operations (often in fresh-water environments) and overflowing of oily wastes in burrow pits during heavy rains has had deleterious effects on bodies of surface water used for drinking, fishing and other household and industrial purposes. The percolation of industrial wastes (drilling and production fluids, buried solid wastes, as well as spills of crude) into the soil contaminates ground-water aquifers.

<sup>27</sup> O Osibanjo 'Industrial pollution management in Nigeria' in EOA Aina & NO Adedipe (eds) *Environmental consciousness for Nigerian national development* (1992) 97.

<sup>28</sup> Hutchful (n 25 above) 118.

<sup>29</sup> One of the natural features of the Niger Delta is the multiplicity of rivers.

<sup>30</sup> JP Eaton 'The Nigerian tragedy, environmental regulation of transnational corporations, and the human right to a healthy environment' (1997) 15 *Boston University International Law Journal* 261 267.

<sup>31</sup> Nigerian Environmental Study/Action Team (NEST) *Nigeria's threatened environment: A national profile* (1991) 87.

<sup>32</sup> Hutchful (n 25 above) 118. See also Greenpeace, *UK Oil Briefing No 7: Human health impacts* (1993). It is common for oil companies operating in Nigeria's Niger Delta to discharge their effluents directly into fresh water bodies. Even where such direct disposal does not occur, the techniques adopted have not been pollution-proof. See Hutchful (n 25 above) 119. See also JP van Dessel *Internal position paper: Environmental position in the Niger Delta* (1995). (Van Dessel was a former head of Environment Department at Shell, Nigeria, and reportedly resigned in protest against Shell's 'environmental devastation' of the Niger Delta.)

In summary, oil pollution (oil spilling) is a frequent incidence in the Niger Delta.<sup>33</sup> More significantly, it has far-reaching adverse effects on the environment of the region, particularly on agricultural lands of the local inhabitants of the region, whose major occupations are farming and fishing. Frequent oil spills damage the soil nutrients, resulting in diminished yields. Moreover, oil spills and careless disposal of oil or petroleum by-products degrade water bodies (including underground water), thereby affecting people's source of drinking water and fish supply. Based on various findings, these effects appear to be the result of careless attitude of the oil companies operating in the region to environmental issues. The prevailing situation is better summed up by a journalistic account of a recent incident:<sup>34</sup>

About ten persons have been admitted at various hospitals in Sapele, Delta State, as a result of the side-effects [of] crude oil spillage which occurred at Ugborikoko village, near Sapele. The oil spillage occurred on a Shell Petroleum Development Company (SPDC) facility located on the Mayuka Creek on the river Ethiope, adjacent to Sapele gas station. The victims, our sources revealed, were rushed to hospitals, because of the complications arising from the consumption of polluted water from the adjoining rivers. Already, the accident had destroyed aquatic and other economic life of the people in [the] neighbourhood. Specifically, fishing activities had been paralysed in the entire Sapele and its environs as the spillage reportedly killed the fish in all the rivers in the areas. Our correspondent who visited the scene yesterday sighted condensed crude floating on the river and uncountable number of burnt shacks and dry trees. The *Vanguard* checks in the areas so revealed that the crude had spilled to over 35 kilometres on the river. The secretary, Sapele/Okpe community, Mr Onoriode Temiagin, who spoke with the *Vanguard*, confirmed the admission of ten of his kinsmen at various hospitals in Sapele. Temiagin, who claimed that the incident had brought untold hardship to his people, since they were predominantly fishermen, further lamented that 'it has rendered us jobless, it is unfortunate to recall that nobody has caught fish here since the incident occurred'.

Apart from the incidence of oil spillage, flaring of associated gas (that is gas produced alongside oil)<sup>35</sup> is another critical and hazardous aspect of oil operations in the Niger Delta region of Nigeria.<sup>36</sup> Moffat and Linden point out that Nigeria flares more gas than any other country in the world.<sup>37</sup> In fact, since the late 1950s when oil exploitation began in

<sup>33</sup> Most spills occurred in the swamp forests of the Delta, while much of the remainder occurred offshore. 'In other words, most spillage was located precisely where the greatest ecological damage might be inflicted' — Hutchful (n 25 above) 116.

<sup>34</sup> See 'Oil spillage occurs in Sapele' *Vanguard* 2002-02-18.

<sup>35</sup> When oil is first produced from the earth's crust, it is mixed with gas and water which are separated at different stages of the production.

<sup>36</sup> Gas flare is a process that uses tall flaming towers which burn off natural gas, a by-product of the [crude oil] refining process — Eaton (n 30 above) 261 (fn 18).

<sup>37</sup> D Moffat & O Linden 'Perception and reality: Assessing priorities for sustainable development in the Niger Delta' (1995) 24 *Ambio* 527 533. By way of comparison, the World Bank states that in 1995 up to 76% of the associated gas from oil wells in

the Niger Delta, virtually all associated gas had been flared,<sup>38</sup> and this has resulted in significant environmental problems. For example, the continuous flaring of associated gas has significantly contributed to the release of greenhouse gases into the atmosphere and reportedly caused acid rain.<sup>39</sup> Moreover, it has been claimed by the local inhabitants that 'gas flaring has destroyed plant and wildlife'.<sup>40</sup> The words of an Ogoni song bemoan the problem of gas flare:<sup>41</sup>

The flames of Shell are flames of hell, we bask below their light, nought for us to serve the blight, of cursed neglect and cursed Shell.

Remarkably, the effects of gas flaring are similar to those of oil spills in the region. The following statement sums up this position:<sup>42</sup>

Gas flaring has been the most constant environmental damage because in many places [in the Niger Delta] it has been going on 24 hours a day for over 35 years. There are hundreds of gas flares throughout the Niger Delta. It affects plant life, pollutes the surface water and as it burns, it changes to other gases which are not very safe. It also results in acid rain. With the pullout of Shell from Ogoniland, gas flaring has stopped in four of the five flow stations. Where the gas flaring has stopped, people were able to see a difference in their vegetation; farm yields are better than before. The people did not know what it was like to live without Shell. It is only now that the people in these areas can see what type of environmental devastation the gas flaring had been causing for the past 35 years. . . .

## 2.2 Protection of oil installations in the Niger Delta and human rights abuses

Closely associated with the problems of oil pollution and gas flares is the issue of human rights abuses, allegedly in the course of protection of oil installations by Nigerian security agencies.<sup>43</sup> Based on reported

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Nigeria was flared, as compared with 0.6% in the United States and 4.3% in the United Kingdom. See World Bank *Defining an environmental strategy for the Niger Delta* (1995) 59. This situation has led an author to conclude that 'if judged by the example of gas flaring, it would appear that oil companies have taken environmental concerns in Nigeria less seriously than in other countries'. See Frynas (n 25 above) 178 (fn 378).

<sup>38</sup> Explaining the practice of flaring associated gas and the quantity flared daily, SPDC claims that when most of its facilities were built there was no significant market for Nigerian gas nationally or internationally. In this situation, the company states, no system was built to collect associated gas, which is produced along with the oil, as a by-product. 'Consequently, almost all SPDC's associated gas is flared — some 1 000 million scf/d' (noted in M Kassim-Momodou 'Gas re-injection and the Nigerian oil industry' (1986/87) 6 & 7 *Journal of Private and Property Law* 69).

<sup>39</sup> Osibanjo (n 27 above) 97.

<sup>40</sup> See Human Rights Watch/Africa, *Nigeria: The Ogoni crisis — A case study of military repression in South-Eastern Nigeria* (1995) 8.

<sup>41</sup> Reproduced in AA Ikein *The impact of oil on a developing country: The case of Nigeria* (1990) 262.

<sup>42</sup> D Robinson *Ogoni: The struggle continues* (1996) 28.

<sup>43</sup> The authorities justify the protection on the ground that the country's economy is solely dependent on oil revenue.

accounts, since 1990 the local victims of environmental pollution frequently protest the degradation of their environment and the destruction of their means of livelihood by oil companies, asking for appropriate compensation. Often, the protest is in the form of blockade of oil pipelines and other oil production facilities, which may result in the stoppage of oil production.

There is abundant evidence to indicate that several human rights abuses have been perpetrated in the Niger Delta in the name of protection of oil production facilities against the actions of protesters. Several protesters have been beaten, unlawfully arrested and detained and even killed by the mobile police (a paramilitary organisation), the Nigeria Police, the Nigerian Army and a number of other specialised security forces based in the region (such as the Rivers State Internal Security Task Force, Rivers State Operation Fire For Fire, and the Bayelsa State-based Operation Salvage). Several international NGOs (for example, Human Rights Watch) have investigated a number of such abuses. In general it has been found that activists from human and environmental organisations who campaign against oil company disregard of environmental standards face regular harassment from the Nigerian authorities.<sup>44</sup> For example, Ken Saro-Wiwa was arrested and detained several times by various security agencies before his unlawful execution on 10 November 1995 along with eight other activists, after a trial for alleged murder charges before a tribunal which the international community rejected for non-compliance with international standards of due process.<sup>45</sup>

Although repressive military regimes, which had been blamed for authorising the abuses, had been replaced by civilian governments at all levels of government in Nigeria since 29 May 1999, oil facilities related human rights abuses do not appear to be at an end nor even in retreat. On the contrary, the local inhabitants of the Niger Delta continue to be under military siege, and only in 2000 did President Obasanjo allegedly authorise the destruction of the Odi community in Bayelsa state, where youths were protesting against environmental degradation of their area and inequity in the distribution of oil revenue among the states of the Federation of Nigeria.<sup>46</sup> That operation also witnessed the loss of several innocent lives in the community.

Against the background of the foregoing, the recent decision of the African Commission on human and environmental rights of the Ogoni people of the Niger Delta will now be considered.

<sup>44</sup> See Human Rights Watch *The price of oil* (1999), especially ch VIII.

<sup>45</sup> As above, 9.

<sup>46</sup> See Human Rights Watch 'The destruction of Odi and rape in Choba December 22, 1999' <<http://www.hrw.org/press/1999/dec/nibg1299.htm>> (accessed 28 February 2003).

### 3 The African Commission and the right to a satisfactory environment: *SERAC v Nigeria*

In 1996, two NGOs brought a complaint before the African Commission on behalf of the Niger Delta people of Nigeria (specifically the Ogoni people), in whose area Nigeria exploits its vast oil resources.<sup>47</sup> The case was aimed at achieving the redress of human rights abuses and the protection of the Niger Delta environment from degradation. This was the first time the Commission expanded on the meaning, interpretation and scope of the right to a satisfactory environment provided in the African Charter on Human and Peoples' Rights (African Charter or Charter).<sup>48</sup> In their communication<sup>49</sup> to the Commission, the complainants alleged as follows:<sup>50</sup>

- 1 That the government of Nigeria has been directly involved in oil production through the state oil company — the Nigerian National Petroleum Company (NNPC) — the majority shareholder in a consortium with Shell Petroleum Development Corporation (SPDC) — and that these operations have caused environmental degradation and health problems resulting from the contamination of the environment among the Ogoni People.
- 2 That the oil consortium has exploited oil reserves in Ogoniland with no regard for the health or environment of the local communities, disposing toxic wastes into the environment and local waterways in violation of applicable international environmental standards. The consortium also neglected and/or failed to maintain its facilities causing numerous avoidable spills in the proximity of villages. The resulting contamination of water, soil and air has had serious short and long-term health impacts, including skin infections, gastrointestinal and respiratory ailments, and increased risk of cancers, and neurological and reproductive problems.
- 3 That the Nigerian government has condoned and facilitated these violations by placing the legal and military powers of the state at the disposal of the oil companies. (The Communication contains a memo from the Rivers State Internal Security Task Force, calling for 'ruthless military operations'.)
- 4 That the Nigerian government has neither monitored operations of the oil companies nor required safety measures that are standard procedure within the industry. The government has withheld from Ogoni communities information on the dangers created by oil activities. Ogoni communities have not been involved in the decisions affecting the development of Ogoniland.

<sup>47</sup> *SERAC* case (n 23 above).

<sup>48</sup> For a review of the recent cases decided by the Commission, see CA Odinkalu 'African Commission on Human and Peoples' Rights: Recent cases' (2001) 1 *Human Rights Law Review* 97. See further GJ Naldi 'Interim measures of protection in the African system for the protection of human and peoples' rights' (2002) 2 *African Human Rights Law Journal* 1, especially at fn 11 (reference to recent cases).

<sup>49</sup> The equivalent of writ of summons or statement of claim under domestic judicial process.

<sup>50</sup> This summary is taken from the *SERAC* case (n 23 above) paras 1, 2, 3, 4, 5, 6 & 9.

- 5 That the government has not required oil companies or its own agencies to produce basic health and environmental impact studies regarding hazardous operations and materials relating to oil production, despite the obvious health and environmental crisis in Ogoniland. The government has even refused to permit scientists and environmental organisations from entering Ogoniland to undertake such studies. The government has also ignored the concerns of Ogoni communities regarding oil development, and has responded to protests with massive violence and executions of Ogoni leaders.
- 6 That the Nigerian government does not require oil companies to consult communities before beginning operations, even if the operations pose direct threats to community or individual lands.  
...
- 9 That the Nigerian government has destroyed and threatened Ogoni food sources through a variety of means. The government has participated in irresponsible oil development that has poisoned much of the soil and water upon which Ogoni farming and fishing depended. In their raids on villages, Nigerian security forces have destroyed crops and killed farm animals. The security forces have created a state of terror and insecurity that has made it impossible for many Ogoni villagers to return to their fields and animals. The destruction of farmlands, rivers, crops and animals has created malnutrition and starvation among certain Ogoni communities.

It could be observed that the substance of these complaints is consistent with the environmental impacts of oil exploitation in the Niger Delta as well as related human rights abuses, as briefly stated above. On the foregoing claims, the complainants alleged that the Nigerian state has violated articles 2, 4, 14, 16, 18(1), 21 and 24 of the African Charter. At this juncture, the most important of these are articles 16 and 24, which provide thus:

- 16(1) Every individual shall have the right to enjoy the best attainable state of physical and mental health.
- (2) State 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.
- 24 All peoples shall have the right to a general satisfactory environment favourable to their development.

Interestingly, the respondent state (Nigeria) 'admitted the gravamen of the complaints'<sup>51</sup> in its response to the case. In a *note verbale* submitted to the Commission at its 28th session in Cotonou, Benin, the Nigerian government admitted the violations of the alleged articles, stating that there is no denying the fact that a lot of atrocities 'were and are still being committed by oil companies in Ogoni-land and indeed in the Niger Delta area'.<sup>52</sup>

<sup>51</sup> As above, para 30.

<sup>52</sup> As above, para 42. Nonetheless, it proceeded to state the following, *inter alia*, as the measures it is taking to deal with the violations: (1) Establishing for the first time in the history of Nigeria, a Federal Ministry of Environment with adequate resources to

In its decision after considering the complaint, the Commission pertinently stated that articles 16 and 24 of the African Charter recognise the importance of a clean and safe environment that is closely linked to economic and social rights in so far as the environment affects the quality of life and safety of the individual.<sup>53</sup> It found that the Niger Delta environment suffers from degradation as a result of oil pollution and held that an environment degraded by pollution and defaced by the destruction of all beauty and variety is as contrary to satisfactory living conditions and development as the breakdown of the fundamental ecologic equilibrium is harmful to physical and moral health.<sup>54</sup> While acknowledging the right of the Nigerian state to produce oil, it pointed out that the care that should have been taken by the government to ensure sustainable development and the protection of the environmental and human rights of the local inhabitants of the region (specifically the Ogoni people) had not been taken.<sup>55</sup> Accordingly, the Commission found the Nigerian state to be in violation of the right to a clean environment under articles 16 and 24 of the African Charter.<sup>56</sup> Outlining the obligations of state parties under articles 16 and 24 of the Charter as well as under other relevant international instruments, the Commission pertinently stated:<sup>57</sup>

The right to a general satisfactory environment, as guaranteed under article 24 of the African Charter or the right to a healthy environment, as it is widely known . . . imposes clear obligations upon a government. It requires the state to take reasonable and other measures to prevent pollution and ecological degradation, to promote conservation, and to secure an ecologically sustainable development and use of natural resources. Article 12 of the International Covenant on Economic, Social and Cultural Rights (ICESCR), to which Nigeria is a party, requires governments to take necessary

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address environmental related issues prevalent in Nigeria and as a matter of priority in the Niger Delta area. (2) Enacting into law the establishment of the Niger Delta Development Commission (NDDC) with adequate funding to address the environmental and social related problems of the Niger Delta area and other oil producing areas of Nigeria.

<sup>53</sup> As above, para 51.

<sup>54</sup> As above.

<sup>55</sup> As above, para 54. See also paras 52–53.

<sup>56</sup> In line with the approach of the American Commission on Human Rights, it recommended that the Federal Republic of Nigeria should ensure the protection of the environment, health and livelihood of the Niger Delta people (in particular, the Ogoni people) by (a) ensuring adequate compensation to victims of the human rights violations and undertaking a comprehensive cleanup of lands and rivers damaged by oil operations; (b) ensuring that appropriate environmental and social impact assessments are prepared for future oil development and that safe operation of any further oil development is guaranteed through effective and independent oversight bodies for the petroleum industry; and (c) providing information on health and environmental risks and meaningful access to regulatory and decision-making bodies to communities likely to be affected by oil operations.

<sup>57</sup> *SERAC* case (n 23 above) paras 52–53.

steps for the improvement of all aspects of environmental and industrial hygiene. The right to enjoy the best attainable state of physical and mental health enunciated in article 16(1) of the African Charter and the right to a general satisfactory environment favourable to development (article 16(3)) . . . obligate governments to desist from directly threatening the health and environment of their citizens. The state is under an obligation to respect the just noted rights and this entails largely non-interventionist conduct from the state; for example, not from carrying out, sponsoring or tolerating any practice, policy or legal measures violating the integrity of the individual . . . Government compliance with the spirit of articles 16 and 24 of the African Charter must also include ordering 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.

The foregoing statement clearly shows the position of the Commission on the question of a human right to a satisfactory environment. Essentially, the Commission's view is that the right enjoins governments to provide sustainable development and forbids measures, actions or activities that may threaten the life and sustenance of a people. In this way, the decision is in line with the trend in other parts of the world in respect of the human right to a satisfactory environment.

Furthermore, with regard to allegations of violations of human rights (particularly the right to life and integrity of the human person under article 4 of the African Charter), the Commission found that various security forces were given the green light to 'decisively deal with the Ogonis' and that this was illustrated by the 'widespread terrorisations and killings'.<sup>58</sup> Accordingly, it held that killings of and other brutalities against the local people by security agencies violate the most fundamental of all human rights — the right to life. More significantly, the Commission held that pollution and environmental degradation to a level humanly unacceptable has made living in Ogoniland a nightmare, thus linking environmental protection to human rights in line with the trend elsewhere in the world. In the Commission's express words:<sup>59</sup>

International law and human rights must be responsive to African circumstances. Clearly, collective rights, environmental rights, and economic and social rights are essential elements of human rights in Africa.

Overall, the Commission's decision was a victory for the deprived, bruised and dehumanised people of Nigeria's oil region, specifically Ogoni people. However, it is merely a moral victory since the Commission's decisions are not binding but merely recommendatory. There is no evidence that oil-related environmental degradation has

<sup>58</sup> As above, para 67.

<sup>59</sup> As above, para 68.



ceased or that the brutalisation of the local people in the name of protection of oil facilities has abated. In any case, the decision is important in establishing that the people of the region as well as the people of other African state parties to the African Charter have a human right to a healthy environment, which insists, among others, that development must respect environmental issues and human rights.

#### 4 Conclusion

This article has examined the attitude of the African Commission to the concept of human right to a satisfactory environment. The opportunity for the Commission to address this issue came in a recent decision given in a case between the Ogoni people of the Niger Delta and the Nigerian state. The Commission considers environmental degradation as a violation of the right to a satisfactory environment and also the right to life and dignity of the human person. Being the decision of a regional quasi-judicial body, the case has helped to highlight the environmental problems of the Niger Delta region of Nigeria, oil development related human rights abuses and the general plight of the indigenous inhabitants of the region as a result of oil operations in the region. The facts contained in the communication and the findings of the Commission are consistent with the findings of various studies on the impact of oil operations in the Niger Delta as stated above.

Although the Commission's decisions are recommendatory and not legally binding,<sup>60</sup> it must not be supposed that they are devoid of any value. As Kalas has argued, it is not true that condemnation before an international tribunal or complaints body is without value. On the contrary, the mobilisation of political pressure on those who are violating recognised norms is one way of influencing a national government to implement environmentally favourable policies.<sup>61</sup> This is especially so where an indicted party has made a treaty part of its domestic law, as Nigeria has done with the African Charter. As a Nigerian judge put it in *Garuba & Others v Attorney-General of Lagos State*:<sup>62</sup>

The African Charter on Human and Peoples' Rights, of which Nigeria is a signatory, is now made into our law [*sic*] by the African Charter (Ratification & Enforcement) Act, 1983. Even if its aspect of our Constitution is suspended or ousted by any provision of our local law, the international aspect of it cannot be unilaterally abrogated . . . By signing international treaties we have put ourselves on the window of the world. We dare not unilaterally breach any of the terms without incurring some frowning of our international friends.

<sup>60</sup> Arts 52 & 53. For a suggestion that the Commission may have come to regard its decisions as binding, see Naldi (n 48 above) 3–4, especially fn 10.

<sup>61</sup> Kalas (n 14 above) 219, fn 116.

<sup>62</sup> Suit No ID559M/90 (unreported).

From this statement, one possibility is that the decision of the African Commission on the human right to a satisfactory environment will ultimately influence the decisions of Nigerian domestic judges. In any case, the African Commission has established that environmental degradation constitutes a violation of the right to a satisfactory environment under the African Charter.