

Considering the interpretation and implementation of article 24 of the African Charter on Human and Peoples' Rights in light of the *SERAC* communication

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Summary

In accordance with article 30 of the African Charter on Human and Peoples' Rights, an African Commission on Human and Peoples' Rights was established in 1987 with a mandate to promote and protect human rights in Africa. Under the Charter, the African Commission is empowered to consider complaints from both individuals and states. Until the SERAC communication, individual communications rarely dealt with socio-economic rights and in considering the Commission's jurisprudence, it becomes evident that the Commission showed a reluctance to elaborate on socio-economic rights. This contribution mainly deals with the Commission's consideration of the SERAC communication with a specific focus on the right to a satisfactory environment as guaranteed by the African Charter. It highlights the procedural aspects of this communication, the significance of article 24 as well as the Commission's interpretation of this article. Finally, aspects relating to the implementation and follow-up of the recommendations contained in this decision, specifically in relation to the environment, are examined.

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1 Introduction

The Social and Economic Rights Action Centre (SERAC) and the Centre for Economic and Social Rights (CESR) communication against Nigeria before the African Commission on Human and Peoples' Rights (African Commission or Commission) reiterates the fact that inadequate protection of human rights at a domestic level necessitates the existence of human rights mechanisms at an international level.

The communication was jointly brought to the African Commission by SERAC and CESR based in Nigeria and the USA respectively. The communication alleges that the Nigerian government, through its involvement in the exploitation of the Niger Delta, contributed both directly and indirectly to gross violations of the rights of the Ogoni people. The rights that were allegedly infringed include the right to a healthy or satisfactory environment, the right to an adequate standard of health, the right to property and the right to housing. These rights have allegedly been violated through both the actions of Nigerian military forces, in protecting government's interest in the oil venture, and the negligent and environmentally unsound management of the oil exploration in the Niger Delta.¹

The events that preceded the lodging of the complaint to the African Commission can be traced back at least four decades.² The starting point was in 1958 when the first oil drill was sunk into Ogoniland (Nigeria).³ The oil exploration was restricted to the Niger Delta, the largest wetland in the world comprising four ecological zones.⁴ From an environmental and conservation viewpoint, sound environmental practises are essential as the Delta contains high biodiversity characteristics with many unique plant and animal species as well as diverse and delicate ecosystems.⁵ The oil exploration in Nigeria has over the last four decades contributed to the situation that prevails in the Delta. Transnational corporations, inadequate environmental regulations, ineffective policing of legislative measures, oil exploitation and the non-implementation of environ-

¹ Summary of the facts in Communication 155/96, *The Social and Economic Rights Action Centre and another v Nigeria* (SERAC case), Fifteenth Annual Activity Report; this report is available at <<http://www.achpr.org>> (accessed 28 February 2003); as well as the original complaint lodged to the African Commission by both SERAC and CESR.

² As above.

³ Indicators are legislation adopted in order to regulate the oil exploration in Nigeria. Examples of this include the Oil Pipelines Act (31 of 1956), the Oil in Navigable Waters Act (34 of 1968), the Petroleum Act (51 of 1968), the Petroleum (Drilling and Production) Regulations (1969) and the Associated Gas (Reinjection) Act (1979).

⁴ Coastal barrier islands, mangroves, fresh water swamp forests and lowland rainforests.

⁵ Also see Human Rights Watch *The price of oil: Corporate responsibility and human rights violations in Nigeria's oil producing communities* available on the internet at <<http://www.hrw.org/reports/1999/nigeria>> (accessed 28 February 2003).

mentally sound management practices, greed and corruption on the part of government officials finally culminated in the 'SERAC decision'.

The complexity of the communication cannot be overemphasised as it extends beyond the violation of socio-economic rights. Events leading up to this communication severely impacted on both civil and political⁶ and socio-economic rights.⁷ However, in as far as socio-economic rights are concerned, it is indeed a landmark decision. This communication was the first time, since the inception of the African Commission in 1987, that the African Commission proclaimed a meaning to article 24 of the African Charter on Human and Peoples' Rights (African Charter or Charter), which stipulates that '[a]ll people shall have the right to a general satisfactory environment favourable to their development'. This decision thus established jurisprudence on the content of article 24, which was uncontested in the negotiation of the African Charter.⁸ The mere adoption of article 24 without thorough consideration of the possible impact of a complaint based on this article is indicative of the failure of the negotiators to foresee the complexity of the inclusion of the right to a satisfactory environment in an international human rights instrument. Not only was the African human rights system the first regional system to

⁶ Although not specifically claimed for, the Nigerian government violated both civil and political as well as socio-economic rights due to the actions of the River State Internal Task Force, government's inaction to stop the ongoing human rights violations in Ogoniland and government's direct interest in the oil venture. Civil and political human rights violations can be ascribed to the River State Internal Task force regularly burning houses, terrorising and killing animals of local communities. The Task Force also participated in waste operations coupled with psychological tactics of displacement. Security forces succeeded in displacing 80 000 people in 1993 during one month of looting and destroying villages of local communities (as per original communications submitted to the African Commission). Going beyond the wording of the communication and considering the unlawful detention and execution of Ken Saro Wiwa (an Ogoni environmental activist) in 1995, it becomes evident that the Ogoni crisis extended beyond violations of socio-economic rights.

⁷ The environmentally unsound oil exploration resulted in a severe dilapidation of the Niger Delta environment. This led to grave violations of peoples' rights to a generally satisfactory environment and their right to health as guaranteed by the African Charter. The Ogoni people are primarily farmers and fisher folk. The irresponsible oil operations have contaminated the natural environment through gas flares, oil spillages and the dumping of toxic waste in unlined pits. This has in turn led to the eradication of aquatic life, an essential life source of the Ogoni people. In addition, the soil has been rendered virtually unusable by severe pollution. Not only have the Delta people been deprived of essential natural resources, but grave health problems have been experienced by the Ogoni as a direct consequence of the oil operations and environmental degradation. These problems include gastrointestinal problems, skin diseases, cancers and respiratory ailments.

⁸ See the Report of the Secretary-General on the Draft African Charter which was presented at the 37th ordinary session of the OAU Council of Ministers, held in Nairobi, Kenya on 15–21 June 1981, reprinted in C Heyns (ed) *Human rights law in Africa 1999* (2002) 92.

recognise the right to a satisfactory environment but it was also the first system to pronounce on the meaning and content of the right.

The discussion that follows will firstly set out the procedure for lodging a complaint within the individual complaints mechanism of the African Commission. It will specifically relate to socio-economic rights and the approach followed in the *SERAC* communication. Secondly, the definition and content of article 24, on the right to a satisfactory environment, is analysed briefly, followed by a discussion pertaining to the merits of the *SERAC* case in an environmental context. Lastly, this discussion focuses on the recommendations made by the African Commission as well as on ways to achieve actual implementation. The importance of discussing the recommendations in detail is directly linked to the fact that the recommendations have a strong socio-economic backbone and appeal to the government of Nigeria to do more than merely realise socio-economic rights progressively within their available resources.

2 Litigating socio-economic rights within the individual complaints mechanism

A critical discussion on the merits of the *SERAC* case should be preceded by a brief clarification as to the functioning of the individual complaints procedure in the African regional human rights system. The focus here is specifically on how the communication was brought to and found admissible by the African Commission. The African Charter, forming the normative framework of the African human rights system, was adopted by the Assembly of Heads of State and Government of the Organisation of African Unity (OAU) on 27 June 1981 and came into force on 21 October 1986.⁹ The African Charter not only guarantees civil and political rights but also economic, social and cultural rights. This is viewed as one of the characteristics that distinguish the African Charter from the founding treaties of the European and Inter-American regional human rights systems.¹⁰

In the past, economic, social and cultural rights were often viewed as being different in nature from civil and political rights. This was used as justification for the adoption of separate international instruments for

⁹ All 53 AU member states have ratified the African Charter. Nigeria ratified the Charter on 22 July 1983.

¹⁰ T Buergethal *International human rights in a nutshell* (1995) 229. Other distinguishing characteristics include the fact that the Charter sets forth not only rights but also duties, it addresses individual as well as peoples' rights and through 'claw-back clauses' it allows states to limit the extent of proclaimed rights.

these categories of rights.¹¹ The African Commission not only challenged this assumption but in deciding the *SERAC* communication, which primarily dealt with socio-economic rights, it reaffirmed the justiciability of socio and economic rights.¹²

In accordance with article 30 of the African Charter, an African Commission was established with a mandate to promote and protect human and peoples' rights.¹³ In terms of the African Commission's protective mandate it can receive inter-state communications as well as 'other communications'.¹⁴ The African Charter is not clear as to the meaning of 'other communications', but the African Commission developed its Rules of Procedure in such a way as to enable it from its third session (in 1988) to accept communications from individuals alleging human rights violations by a state party.¹⁵ Communications from individuals are considered if a simple majority of the commissioners so decide.¹⁶ Before considering an individual communication on its merits, certain admissibility criteria must be met, as set out in article 56 of the African Charter. Although seven conditions are specified in this article, it is sub-article (5) that is usually scrutinised by the African Commission.¹⁷ This provision states that communications will only be considered if they 'are sent after exhausting local remedies, if any, unless it is obvious that this procedure is unduly prolonged'. The purpose of the exhaustion of local remedies requirement is three-fold: (a) to avoid contradictory judgments of law at the national and international levels; (b) to afford governments an opportunity to remedy human rights violations domestically before they are held accountable to an international tribunal; and (c) to ensure that the African Commission does not become a tribunal of first instance.¹⁸

¹¹ Economic, social and cultural rights were described as rights of which the full realisation was dependent on the available resources of a state and which could only be realised progressively. Art 2(1) of the International Covenant on Economic, Social and Cultural Rights of 1966 is a case in point. Civil and political rights were (and still are) considered as absolute and immediate.

¹² A Eide 'Economic, social and cultural rights as human rights' in A Eide, C Krause and A Rosas (eds) *Economic, social and cultural rights — A textbook* (1995) 22.

¹³ Art 45 of the Charter states the mandate of the African Commission.

¹⁴ Arts 47 & 55 respectively.

¹⁵ R Murray 'Decisions by the African Commission on individual communications under the African Charter on Human and Peoples' Rights' (1997) 46 *International and Comparative Law Quarterly* 413.

¹⁶ Art 55(2) African Charter.

¹⁷ In para 73 of Communications 137/94, 139/94, 154/96 & 161/97, *International PEN and others (on behalf of Ken Saro-Wiwa) v Nigeria*, Twelfth Annual Activity Report, the African Commission stated in reference to art 56(5): 'This is just one of the seven conditions specified by article 56, but it is that which usually requires the most attention.'

¹⁸ See paras 37–39 of the *SERAC* case (n 1 above).

In the *SERAC* communication the African Commission held that notwithstanding the fact that Nigeria incorporated the African Charter into its domestic legal system (thus enabling the complainants to invoke all Charter rights in domestic courts), no adequate domestic remedies existed. This situation was created through the enactment of various decrees by the military government of Nigeria ousting the jurisdiction of domestic courts in cases alleging human rights violations committed by the government.¹⁹

Upon finding a communication admissible, the African Commission then moves on to a substantive consideration of the alleged human rights violations. Where the African Commission finds a state party in violation of its Charter obligations, it lists the articles violated and makes recommendations to assist the state party in rectifying the situation. The Assembly of Heads of State and Government (AHSG) of the AU (formerly the OAU) must approve the observations and recommendations made by the African Commission.²⁰ In practice the AHSG has always, without amendment, approved the Annual Activity Reports of the African Commission, with the African Commission's recommendations annexed. However, due to an overly strict interpretation of article 59 of the African Charter, annual activity reports initially only contained brief statements as to the number of communications received and considered without any reference to the African Commission's findings or recommendations.²¹ The African Commission eventually adopted a more transparent approach and since its Seventh Annual Activity Report (in 1994), it publishes its observations on admissibility, merits and recommendations.

Nevertheless, it is only recently, since its Thirteenth Annual Activity Report (1999–2000), that the African Commission started to elaborate not only in its legal reasoning in finding violations of the African Charter but also in the formulation of recommendations. This becomes apparent if the *SERAC* communication is compared to previous communications that dealt with socio-economic rights.²² In the past the African

¹⁹ Para 41 of Communication 155/96.

²⁰ Rule 120 of the revised Rules of Procedure of the African Commission as adopted at its 18th session in October 1995.

²¹ Art 59 stipulates that 'All measures taken within the provisions of the present Chapter shall remain confidential until such a time as the Assembly of Heads of State and Government shall otherwise decide'.

²² The majority of communications previously considered by the African Commission dealt with civil and political rights. Before the *SERAC* decision the only economic, social and cultural rights addressed by the African Commission were the right to property (art 14); the right to work (art 15); the right to health (art 16); the right to education (art 17); and the right to protection of the family and vulnerable groups (art 18). The *SERAC* decision therefore greatly contributed to the jurisprudence of the African regional human rights system by finding, for the first time, a violation of arts 21 and 24. Art 21 guarantees the right of all peoples to freely dispose of their wealth and natural resources and art 24 provides for the right of all peoples to a general satisfactory environment favourable to their development.

Commission merely stated the alleged facts and the corresponding article of the African Charter without any legal explanation for its findings.²³ In this sense the *SERAC* communication is progressive, in that it predominantly focuses on the violation of socio-economic rights and includes detailed discussions as to the content of the various rights followed by specific and comprehensive recommendations. In the following sections the legal substance of the *SERAC* communication is analysed in more detail followed by a discussion of the recommendations given by the African Commission with reference to ways of assuring implementation by the government of Nigeria.

3 The right to a satisfactory environment in the African human rights system

It is essential to briefly analyse the right to a satisfactory or healthy environment before considering the Commission's findings in this regard in the *SERAC* communication.²⁴ Through the adoption of the African Charter, the right to a satisfactory environment was finally recognised and included in an internationally binding human rights instrument.²⁵ Prior to this inclusion the right to a satisfactory environment or the relationship between this right and the natural environment found recognition only in non-binding international 'soft law'.²⁶ Elements of the core meaning of this right can, however, be

²³ In Communications 25/98, 47/90, 56/91 & 100/93, *Free Legal Assistance Group and others v Zaire*, Ninth Annual Activity Report, the African Commission held Zaire in violation of art 17 (the right to education). However, instead of outlining the content of the right to education, never previously considered by the African Commission, it simply stated that 'the closures of universities and secondary schools as described in Communication 100/93 constitutes a violation of article 17' (para 48). For a definite improvement in the jurisprudence of the African Commission, see Communications 54/91, 61/91, 98/93, 164/97 & 210/98, *Malawi African Association and others v Mauritania*, Thirteenth Annual Activity Report. In this decision the African Commission not only made the most concrete and specific recommendations ever, but it also discussed in detail certain socio-economic rights (arts 14, 16(1) & 18(1)) found to be violated by the government of Mauritania.

²⁴ Note that the right to a satisfactory environment and the right to a healthy environment should be interpreted as the same for the purpose of this discussion.

²⁵ The adoption of the Charter (1981) with the inclusion of this right in art 24.

²⁶ Examples of this would include a resolution passed by the United Nations General Assembly recognising the relationship between the quality of the environment and the enjoyment of human rights (UNGA Res 2398 XXII of 1968), the Declaration of the United Nations on the Human Environment (1972) which recognised the fundamental right to freedom, equality and adequate conditions of life *in an environment of a quality* that permits of dignity and well-being.

traced back at a regional level to the African Convention on the Conservation of Nature and Natural Resources of 1968.²⁷

The right as phrased in the African Charter is vague and ambiguous. No clear indication is given by the African Charter as to what the terms 'satisfactory' and 'environment' entail. This allowed for different interpretations as to the exact meaning of this right by human rights scholars and environmentalists. This lack of clarity has initiated both positive and negative aspects of the interpretation. In a positive sense, the vagueness in itself can allow for a wider and more accommodating interpretation of the right to a satisfactory environment. On the other hand, the negative impact also tolerates a narrower and more restricted sense of interpretation, not giving this right the full recognition it deserves. A decision on the *SERAC* communication was expected to give jurists a better understanding as to the core content of this right. As will be discussed below, this was not the case.

Since its inclusion in the African Charter academics endeavoured to clarify the nature and content of the right to a satisfactory environment. Not only has the content of this right been contested, but to some extent its very existence.²⁸ Although the exact content and demarcation of this right was not determined in the *SERAC* decision, the African Commission did reaffirm its existence and established a certain amount of jurisprudence on the issue.

Traditionally, the right to a satisfactory environment and environmental rights have been categorised as 'third generation rights' or solidarity rights.²⁹ The nature of this right is relatively uncontested in that it is a right to which individuals, communities and the public at large can be beneficiaries of. This right also possesses the characteristics

²⁷ This treaty is reprinted in GJ Naldi (ed) *Documents of the Organization of African Unity* (1992) 65. These elements are elements such as conservation, development, customary rights and the notion of sustainable development. For a detailed discussion on this Convention and its revision process, see M Van der Linde 'A review of the African Convention on Nature and Natural Resources' (2002) 2 *African Human Rights Law Journal* 33.

²⁸ The debate between the existence of the right to a healthy environment in the context of the human rights-based approach to environmental protection brings to the foreground issues such as the protection of the environment as an environmental law concern and the issue of anthropocentrism. Anthropocentrism denotes the idea that the environment possesses an intrinsic value in its own right. This would not always be consistent with human rights ideologies. For a discussion on the issue of anthropocentrism see M Anderson 'Human rights approaches to environmental protection: An overview' in A Boyle & M Anderson (eds) *Human rights approaches to environmental protection* (1996) 15. Also see C Stone 'Should trees have standing — Towards legal rights for natural objects' (1972) *Southern Californian Law Review* 450.

²⁹ See A Rosas 'So-called rights of the third generation' in Eide *et al* (n 12 above) 243; J Glazewski *Environmental law in South Africa* (2000) 17; M Kidd *Environmental law: A South African perspective* (1997) 34.

of civil and political rights as well as socio-economic rights in that government must refrain from action or inaction that would impair an individual's enjoyment of the right to a satisfactory environment and refrain from practices that might be harmful to the environment. Government is further under the obligation to progressively realise and fulfil the right to a satisfactory environment. This would include conservation, the environmentally sound management of the environment as well as an attempt at improving the natural environment.³⁰

The scope and effective application of the human rights approach to environmental protection relies on a two-fold process. The first would be procedural rights such as the right to information, the right to be informed of environmental risks, the right to legal address when this right has been violated, the facilitation of public environmental litigation, the right to effective redress in the event of environmental damage and the right to participate in environmental decision making. The procedural rights will play an integral role in ascertaining whether the right to a generally satisfactory environment has been violated. Procedural rights will furthermore assist in ascertaining the content of this right in a given situation such as the *SERAC* communication. The substantive rights denote the central part and meaning of this right. As indicated above, there is as yet no clear definition of this right nor is the content of this right clearly demarcated. To illustrate this point, consider the following observations on the right to a healthy environment:

. . . [W]hat States seek to secure in acknowledging a human right to the environment is not the right to an 'ideal' environment, which is probably difficult both to define and achieve. . .³¹

The existing concept of human rights protection should be extended in order to include the right to a healthy and decent environment, to include freedom from pollution and corresponding rights to pure air and water.³²

In addition to the above, a number of African constitutions have devoted provisions to the environment or the right to a healthy environment.³³ The various viewpoints as expounded in these constitutions do not give a clear demarcation of the right to a healthy environment. What becomes evident is that in the determination of whether this right has

³⁰ E Ankumah *The African Commission on Human and Peoples' Rights: Practices and procedures* (1996) 168.

³¹ T Maluwa *International law in post-colonial Africa* (1999) 311.

³² R Cassin quoted by C Peter 'Taking the environment seriously: The African Charter on Human and Peoples' Rights and the environment' (1993) 3 *Review of the African Commission on Human and Peoples' Rights* 39.

³³ These constitutions include those of Benin (27), Burkina Faso (14 & 29), Congo (46-48), Ethiopia (44), Ghana (chapter 21), Lesotho (art 36), Madagascar (art 39), Malawi (13(4)), Mozambique (art 72), Niger (art 27), South Africa (art 24), and Uganda (arts 13, 21-23 & 27).

been violated a contextual approach is probably more suitable. In ascertaining the content of this right one must rely on both procedural and substantive rights.

The African Charter also links the right to a satisfactory environment to the issue of development through article 24. According to Maluwa, the relationship between the environment and development is a controversial relationship which is both contributory and remedial. In the contributory sense, environmental degradation is often caused by aspects relating to development and industrialisation. On the other hand, measures employed to remedy environmental degradation are often related to development processes.³⁴ The right as provided for by the African Charter potentially runs the risk of being negatively balanced by the right to development. In considering the African Commission's previous restrictive interpretations, this could have had as consequence that the right to a satisfactory environment in the *SERAC* communication could only be invoked in the event that it will not infringe on the requirements of social and economic developments.³⁵

Regardless of the lack of clarity on the substance of this right, the inclusion of the right to a satisfactory environment is a progressive step and potentially a powerful mechanism in addressing environmental concerns in Africa. The fact that the African Commission has found the Nigerian government in violation of article 24 of the African Charter highlights the justiciability of this right. What remains unclear is whether a claim on the basis of a violation of the right to a satisfactory environment will succeed in isolation from the right to health or any other right contained in the African Charter.³⁶

4 Considering the merits of the *SERAC* communication

In evaluating the *SERAC* communication, it is crucial to consider the African Commission's previous actions in respect of the right to a satisfactory environment. Under the African Charter, states are required to report to the African Commission every two years on steps they have taken to give effect to the rights and freedoms contained in the African Charter.³⁷ According to the African Commission, states must report on

³⁴ For a full discussion on the linkage between the environment and development, see ch 12 'Environment and development in Africa the 1990s: Some legal issues' in T Maluwa *International law in post-colonial Africa* (1999) 307.

³⁵ Anderson (n 28 above).

³⁶ Also consider the *Lopez-Ostra* case European Court of Human Rights *Lopez-Ostra v Spain*, Series A, No 303-C (1995) 20 *European Human Rights Reports* 277.

³⁷ Art 62 African Charter.

the environment in order to ensure that the environment is protected and to ensure the establishment of an effective waste monitoring system in order to prevent pollution. In addition to the above countries are also to report on related matters such as the disposal of natural resources, adequate standards of living and the right to physical and mental health.³⁸

In communications 25/98, 47/90, 56/91 and 100/93, *Free Legal Assistance Group and others v Zaire*, the Commission had an opportunity to consider article 24 of the Charter. In this instance the Commission could possibly have linked article 24 with article 16 (health) in their consideration of the Zairian government's duty to provide basic services such as clean drinking water. Although the Commission did find a violation of article 16, it unfortunately did not pronounce on article 24 of the Charter.

In March 1996 the African Commission received the *SERAC* communication against Nigeria alleging amongst others a violation of the right to a satisfactory environment. At its 20th ordinary session held in Mauritius in October 1996, the African Commission declared the communication admissible. However, the Commission did not take a decision on the merits of the communication until its 30th ordinary session held in The Gambia in October 2001.³⁹

When the African Commission reached its decision, it was undisputable that this right does provide a great scope of protection for human beings, the environment and the relationship shared between them. It was also a breakthrough in the sense that jurisprudence was established by a regional complaints mechanism firmly pronouncing a violation of this contentious right and making remedial recommendations pertaining to the situation prevalent in the Niger Delta. The communication alleged that in respect of the environment and the right to health the Nigerian government failed to fulfil its minimum obligations under the African Charter as it participated directly in the contamination of the environment through air, water and soil pollution which in turn also adversely affected the health of the Ogoni people. The government failed to protect the local community against the harm caused by the oil consortium and failed to conduct impact and risk assessment studies on the potential and actual risk both to the environment and local communities.⁴⁰

³⁸ See the Guidelines for National Periodic Reports under the African Charter adopted by the African Commission at its 5th ordinary session in April 1989, reprinted in C Heyns (ed) *Human rights law in Africa 1999* (2002) 176.

³⁹ The five year lapse would have been plausible had the Commission's consideration of the substance of article 24 in particular been remarkable and more substantial. The tendency of deferral is also questionable.

⁴⁰ Para 50 of the *SERAC* decision (n 1 above).

Before considering the merits of the communication, the African Commission emphasised at great length the obligation of governments to ensure that rights contained in the African Charter are respected, protected, promoted and fulfilled.⁴¹ It also effectively reiterated the strong linkage between the environment and other rights in the African Charter, in this case the right to health.⁴² Although this reaffirms the notion that human rights are indivisible, it raises earlier concerns as to whether or not a claim pertaining to the right to a satisfactory environment will succeed in isolation.

The African Commission briefly considered the right to a satisfactory environment as a right that requires a government to:

- take reasonable measures to prevent pollution and ecological degradation;⁴³
- promote conservation and ensure ecological sustainable development and the use of natural resources;⁴⁴
- permit independent scientific monitoring of threatened environments;⁴⁵
- undertake environmental and social impact assessments prior to industrial development;⁴⁶
- provide access to information to communities involved;⁴⁷
- grant those affected an opportunity to be heard and participate in the development process.⁴⁸

These obligations as spelled out by the African Commission clearly contain both the procedural aspects such as a right to access environmental information or information relating to a possible adverse impact on the natural environment and the opportunity to have one's case heard in the event that one's environmental rights are impaired or runs the risk of being impaired. It also contains substantive aspects such as government's duty to prevent pollution and ecological degradation as well as the obligation to promote conservation and sustainable development. In addition these obligations also reflect the values contained in international environmental principles such as the *preventative principle* and the *duty of care principle*.⁴⁹ These obligations,

⁴¹ As above, para 44.

⁴² As above, para 51. Note that this discussion will predominantly focus on the right to a satisfactory environment and not on other rights discussed in the decision, ie right to health, right to housing and the right to property.

⁴³ As above, para 52.

⁴⁴ As above.

⁴⁵ As above, para 53.

⁴⁶ As above.

⁴⁷ As above.

⁴⁸ As above.

⁴⁹ Kidd (n 29 above) 8.

additionally, clearly emphasise the socio-economic nature of these rights, which in the context can severely impact on the financial resources of the Nigerian government.

The African Commission acknowledged the fact that this communication would be examined in accordance with articles 60 and 61 of the African Charter which allows the African Commission to consider other relevant international and regional human rights principles in their interpretation of the provisions of the African Charter. In respect of the right to a satisfactory environment it is not clear which international instruments were considered when the African Commission interpreted the right to a satisfactory environment. It would have been an invaluable decision if the African Commission had actually explained how it arrived at government's obligations in terms of article 24 of the Charter. Contrary to Shelton⁵⁰ it becomes uncertain whether the African Commission considered the wealth of information on international environmental law and human rights jurisprudence available on the subject matter.⁵¹ What is apparent is that the African Commission did not consider contemporary environmental developments on the continent such as the revised African Convention on the Conservation of Nature and Natural resources which is yet to be adopted.⁵² What is also somewhat disappointing in the analysis of article 24 is that the African Commission did not pronounce itself on the core content and minimum obligation of article 24, with due regard to a contextual approach, as was the case in its discussion on the right to housing.⁵³

Nevertheless, the African Commission boldly ventured out to consider this contentious right. In doing this, the African Commission gave clarity on the fact that although it can be balanced against development, the right to a satisfactory environment will not necessarily take a back seat if it impacts negatively on economic development.

⁵⁰ See D Shelton 'Decision regarding communication 155/96 (Social and Economic Rights Action Center/ Center for Economic and Social Rights v Nigeria)' (2002) 96 *American Journal of International Law* 941. Shelton is of view that the Commission did in fact consider the wealth of information available on the subject matter.

⁵¹ These include but are not limited to the Stockholm Declaration on the Human Environment (1972); the Charter of Economic Rights and Duties of State (UNGA Res 3281 (XXIX) 1974); the Declaration on the Right to Development (UNGA Res 41/128 1986); the UN Convention on the Rights of the Child (1989); the Rio Declaration on Environment and Development (1992); Agenda 21 (1992); and the Draft Principles on Human Rights and the Environment (adopted by an experts group at the United Nations in Geneva) 1994. In addition to the above there also exists a wealth of academic scholarly on the topic.

⁵² This revised convention could have aided the African Commission in their analysis of the substantive right. For a detailed discussion of this convention see Van der Linde (n 27 above).

⁵³ Paras 60 & 61 of the *SERAC* decision (n 1 above).

5 Implementing the recommendations of the African Commission in Nigeria

In utilising the individual complaints procedure as set out in the African Charter, the complainant seeks redress from a state party either by asking for a specific remedy such as compensation or more generally seeking a change in offending legislation to prevent similar violations in future. This relief is usually given in the form of recommendations by the African Commission to be implemented by the state party. The African Commission is not a judicial body and its recommendations therefore do not bind a state, as would the judgments of a court.⁵⁴ The African Commission has, however, been labelled as a quasi-judicial body, interpreting its functions to consider inter-state and 'other communications' as judicial functions, especially in the absence of an African Court on Human and Peoples' Rights (African Court).⁵⁵ Neither the African Charter nor the African Commission's Rules of Procedure sets out any mechanism to ensure follow-up to the recommendations given by the African Commission. There are also no legally prescribed consequences for a state's non-compliance with the African Commission's

⁵⁴ It has nevertheless been argued that it is not important whether such 'recommendations' bind the state parties and thus limit their sovereignty and power but 'what is relevant is the moral and legal authority which governments and other members of the international community attach to published reports and conclusions of the organs concerned'. M Tardu 'The protocol to the United Nations Covenant on Civil and Political Rights and the Inter-American system: A study of coexisting petition procedures' (1976) 70 (4) *American Journal of International Law* 784, quoted in R Murray *The African Commission on Human and Peoples' Rights and international law* (2000) 53–54.

⁵⁵ According to Umozurike, the African Commission in most communications acts quasi-judicially using the rules of natural justice such as *audi alteram partem* if the state is co-operative. In his view the recommendations may not have the judicial flavour of a court of human rights but they approximate to those of the former European Commission and the Inter-American Commission; UO Umozurike *The African Charter on Human and Peoples' Rights* (1997) 80. The Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights (OAU/LEG/MIN/AFCHPR/PROT (1) Rev.2) was adopted, with the signature of 30 states, in June 1998. The Protocol requires 15 ratifications to come into force and has up to date only been ratified by six states. One of the reasons for the creation of an African Court is the fact that a Court can deliver judicially binding judgments. The legal value of the Court's decisions combined with the fact that the Protocol provides for a follow-up mechanism to be overseen by the AU Council of Ministers is viewed as important in the strive towards ensuring state compliance within the African regional human rights system. The African Commission will, however, co-exist with the Court and the prospect of a Court should therefore not diminish the importance of finding ways of achieving state compliance to its recommendations, especially where they are as comprehensive as in the SERAC communication.

recommendations.⁵⁶ Therefore, in the absence of an implementation mechanism, this section explores ways of achieving compliance by the government of Nigeria to recommendations of the African Commission in the communication at hand.

As a starting point to this discussion, a brief overview of the African Commission's progress in awarding remedies is given. Initially the African Commission did not award any relief to complainants and confined its powers in individual communications to merely finding a violation of the African Charter without making any remedial recommendations.⁵⁷ In other communications, such as those against the former Zaire, where evidence indicated the existence of a series of serious or massive violations of human and peoples' rights, the African Commission initially referred communications to the AHSG.⁵⁸ This practice stopped after it became apparent that the AHSG never followed up on these communications as stipulated in article 58 of the African Charter.⁵⁹ Eventually the African Commission developed a practice whereby it started to formulate recommendations. Nevertheless, most of these recommendations simply 'urge', 'request' or 'appeal' to governments to 'draw the necessary legal conclusions' or 'take the necessary steps' to comply with its obligations under the African Charter.⁶⁰ Some recommendations, on the other hand, were more specific and even recommended the payment of damages by the

⁵⁶ It therefore comes as no surprise that non-compliance is the rule rather than the exception and the African Commission in 1997 officially noted this. At its 22nd ordinary session the Secretariat stated that non-compliance by state parties to the recommendations of the African Commission constituted one of the major factors of the erosion of the African Commission's credibility. This discussion resulted in the drafting of a 'Draft Resolution on the Implementation of the Recommendations of the African Commission on Human and Peoples' Rights' (DOC/OS/50b (XXIV)). This resolution was never subsequently adopted and could be seen as living proof of the state parties' reluctance to add 'teeth' to the regional human rights system.

⁵⁷ See joined Communication 64/92, 68/92 & 78/92, *Krishna Achutan and another (on behalf of Orton and Vera Chirwa) v Malawi*, Eighth Annual Activity Report 1994-95, where the African Commission held that there has been a violation of arts 4, 5, 6 & 7(1)(a) (c) & (d) of the African Charter. The African Commission did not, however, specify how the situation should be rectified. This inaction on the part of the African Commission left complainants powerless especially since the African Commission did acknowledge that 'although the present government of Malawi did not commit the human rights abuses complained of, it is responsible for the reparation of these abuses', but did not indicate what actions should be taken by the new government. See para 14 of the communication.

⁵⁸ This procedure was in line with the African Commission's mandate as set forth in art 58 of the African Charter. See Communication 47/90, *Lawyers Committee for Human Rights v Zaire*, Seventh Annual Activity Report.

⁵⁹ According to comments made by African Commissioner Dankwa during a lecture at the University of Pretoria, 14 May 2002.

⁶⁰ See eg Communications 140/94, 141/94 & 145/95, *Constitutional Rights Project and others v Nigeria*, Thirteenth Annual Activity Report and Communications 147/95 & 149/96 *Sir Dawda K Jawara v The Gambia*, Thirteenth Annual Activity Report.

government⁶¹ or ordered the release of journalists unlawfully arrested and detained.⁶²

In 2000, the African Commission set a new precedent by making the most concrete and specific recommendations it has ever made.⁶³ It is too soon to determine whether this trend will be followed in all future communications, but the detailed recommendations set forth in the *SERAC* communication could be a positive indication. In the absence of an implementation mechanism in the African regional human rights system, the formulation of detailed recommendations is crucial in ensuring firstly state compliance to the provisions of the African Charter and secondly that the complainants receive the relief sought from the African Commission.

In the *SERAC* communication the African Commission found the Federal Republic of Nigeria to be in violation of articles 2, 4, 14, 16, 18(1), 21 and 24 of the African Charter.⁶⁴ The African Commission appealed to the government to ensure protection of the environment, health and livelihood of the people of Ogoniland and set forth five specific recommendations to achieve these goals.⁶⁵ In addition, the African Commission urged the government to keep it informed about the outcome of the work of (1) the Federal Ministry of Environment which was established to address environmental and environment related issues prevalent in Nigeria; (2) the Niger Delta

⁶¹ Communication 59/91, *Embga Mekongo Louis v Cameroon*, Fifth Annual Activity Report.

⁶² Communication 206/97, *Centre for Free Speech v Nigeria*, Thirteenth Annual Activity Report and Communication 102/93 *Constitutional Rights Project and another v Nigeria*, Twelfth Annual Activity Report.

⁶³ Communications 54/91, 61/91, 98/93, 164/97 & 210/98 *Malawi African Association and others v Mauritania*, Thirteenth Annual Activity Report.

⁶⁴ Since arts 14, 16, 18(1), 21 & 24 all address economic, social and cultural rights it makes the *SERAC/CESR* communication the first to be decided predominantly on rights other than civil and political. It is also the first communication finding violations of the right of all peoples to freely dispose of their wealth and natural resources (art 21) and the right of all peoples to a general satisfactory environment favourable to their development (art 24).

⁶⁵ The African Commission recommended (1) the stopping of all attacks on Ogoni communities and leaders by the Rivers State Internal Security Task Force and permitting citizens and independent investigators free access to the territory; (2) conducting an investigation into the human rights violations described above and prosecuting officials of the security forces, NNPC and relevant agencies involved in human rights violations; (3) ensuring adequate compensation to victims of the human rights violations, including relief and resettlement assistance to victims of government sponsored raids, and undertaking a comprehensive cleanup of lands and rivers damaged by oil operations; (4) ensuring that appropriate environmental and social impact assessments are prepared for any further oil development and that the safe operation of any further oil development is guaranteed through effective and independent oversight bodies for the petroleum industry; and (5) 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.

Development Commission (NDDC) which was constituted by law to address the environmental and other social related problems in the Niger Delta and other oil producing areas in Nigeria; and (3) the Judicial Commission of Inquiry that was inaugurated to investigate issues of human rights violations.⁶⁶

In specifically asking the government to keep it informed about the outcome of the work of the above mentioned institutions the African Commission is demonstrating an interest in the implementation of its recommendations.⁶⁷ Since little else is done from the African Commission's side to ensure follow-up, the task has in recent years fallen upon the shoulders of those non-governmental organisations (NGOs) that either filed the communication or litigated it before the African Commission. Some are truly successful in achieving state compliance, case in point being the *Modise* communication.⁶⁸ Others are fighting an uphill battle in the absence of support from the Secretariat of the African Commission or other organs of the AU.⁶⁹

⁶⁶ The government indicated that these three institutions were part of remedial measures taken by the new civilian administration in respect of the grave violations reflected in the communications. This was done in a *note verbale* submitted by the government at the 28th ordinary session of the African Commission. See para 30 of the *SERAC* communication.

⁶⁷ A similar sentiment has been expressed by the African Commission in Communication 211/98, *Legal Resource Foundation v Zambia*, Fourteenth Annual Activity Report, where the African Commission requested the government to report back on measures taken to comply, when it submits its next country report in terms of art 62. For a critical opinion as to the successful utilising of the state reporting system in establishing follow-up, see J Harrington 'Introduction' to the *Compilation of decisions on communications of the African Commission on Human and Peoples' Rights* (2001) 6. Some attempt at follow-up to decisions has also been made during the presentation of state reports to the African Commission. African commissioners, in examining state reports during public sessions, have previously raised questions as to the implementation of recommendations made in communications against a state party.

⁶⁸ In Communication 97/93, *Modise v Botswana*, Fourteenth Annual Activity Report, the African Commission urged the government of Botswana to take appropriate measures to recognise Mr Modise as its citizen by descent and also to compensate him adequately for the violation of his rights as set out in the communication. The Attorney-General of Botswana agreed during the African Commission's 31st ordinary session to implement the recommendations upon receiving a written request from the African Commission in this regard together with specifications on implementation. The NGO Interights took it upon them to pursue the implementation of these recommendations, especially due to the willingness to cooperate displayed by the government. After officially meeting with high level governmental officials in Botswana in the months following the 31st session an agreement was reached whereby both Mr Modise and his children will be awarded citizenship together with monetary compensation. Information supplied by Chidi Odinkalu, lawyer with Interights, who represented Mr Modise and negotiated with the Government of Botswana.

⁶⁹ In the *Mauritania* case (n 23 above), NGOs have been lobbying, to no avail, both the African Commission and the government of Mauritania to achieve compliance with the African Commission's detailed recommendations. This communication has been highly praised for its elaborate remedies but due to the lack of political will on the part

SERAC is pursuing various strategies to ensure implementation of the recommendations set out above.⁷⁰ Firstly, in a bid to create widespread public awareness, SERAC disseminated copies of the decision together with a cover letter explaining the importance of the communication to various stakeholders including the President of Nigeria, relevant Nigerian government departments, the judiciary, media houses and multi-national oil companies. Secondly, the director of SERAC met with the leader of the Movement for the Survival of the Ogoni Peoples (MOSOP) to discuss strategies for implementation of those recommendations directly affecting the Ogoni. Thirdly, SERAC established contact with the Federal Ministry of Environment, the NDDC and the Judicial Commission of Inquiry, that were put in place by the government as part of its remedial measures. In this regard SERAC met with both the Federal Ministry of Environment and the chairman of the NDDC.⁷¹ Fourthly, SERAC is monitoring the functioning of the Committee set up under the Federal Ministry of Petroleum Resources.⁷² This Committee was established with the mandate to monitor oil exploration activities in the Niger Delta and to ensure that oil companies operate within the rules governing oil exploration.⁷³ Lastly, SERAC is campaigning for the drafting of new legislation to regulate oil exploration in Nigeria. Ideally this new law will combine all the existing legislation and will include a specific focus on the activities of multinational oil companies.⁷⁴

From the above it is clear that SERAC is striving to achieve state compliance to the recommendations of the African Commission.

of the Government of Mauritania none of the recommendations have been implemented up to date. The NGOs involved in this communication, during the 32nd ordinary session, formed a coalition headed by the Institute for Human Rights and Development in Africa to strengthen their efforts.

⁷⁰ The facts stated below in regard to the strategies pursued by SERAC were gathered during an interview held with Ndidi Bowei, senior legal counsel for SERAC, on 19 October 2002 during the 32nd ordinary session of the African Commission held in Banjul, The Gambia.

⁷¹ In fulfilling its mandate, the NDDC has since July 2002 focused its resources on addressing health issues in the Niger Delta. New health centres were built and health personnel were stationed there. Only 3 000 people are reached through these efforts, a limited number if taken into account that the Niger Delta covers five states and houses a large portion of the Nigerian population. Other burning issues such as environmental clean-up exercises, food production through farming and housing problems are yet to be addressed by the NDDC.

⁷² According to SERAC, the establishment of this Committee could be ascribed in part to the communication before the African Commission and in part due to the ongoing problems in the Niger Delta.

⁷³ The Committee was given 18 months to clean up drilling cuttings in the Niger Delta. In October 2002 it was unclear whether these operations have commenced or not.

⁷⁴ In March 2002 SERAC hosted a workshop for legislatures that focused specifically on sensitising them towards existing environmental problems that should be addressed through subsequent legislation.

However, on closer examination it is also apparent that they are not following up on all the recommendations set forth by the African Commission, especially those relating to prosecution of the perpetrators and the payment of compensation. The conclusion to be drawn here is that it should not be up to the NGO (that initiated the communication in the first place) alone to struggle to ensure the implementation of recommendations of the African Commission. There is a definite need within the African regional human rights system for a follow-up mechanism, that would function along the same lines as those already existing within the European and Inter-American regional human rights systems.

The European system is mentioned here, but it is not as applicable to the realities faced by Africa, as is the case with the comparisons drawn from the Inter-American system. This is due not only to socio-economic realities but also due to the fact that since the entry into force of Protocol 11 to the European Convention for the Protection of Human Rights and Fundamental Freedoms, the European Commission and Court of Human Rights were replaced with a singular permanent court. Within this system, the execution of the judgments of the European Court is the duty of the Committee of Ministers of the Council of Europe.⁷⁵ The upcoming African Court on Human and Peoples' Rights will function side by side with the African Commission.⁷⁶ This system will closely resemble that of the Inter-American system and it follows therefore that the development of a follow-up mechanism should be guided by the principles already existing in the Inter-American system.

With a view to improving and strengthening the Inter-American system, the Organisation of American States (OAS) General Assembly adopted Resolution AG/RES 1828 (XXXI-O/01) and subsequently amended its Rules of Procedure to provide for follow-up on compliance with recommendations of the IACHR. Articles 46(1) and (2) of the amended Rules of Procedure read as follows:⁷⁷

- (1) Once the Inter-American Commission has published a report on a friendly settlement or on the merits in which it has made recommendations, it may adopt the follow-up measures it deems appropriate, such as requesting information from the parties and

⁷⁵ Art 46(2) of the European Convention on Human Rights determines that 'the final judgment of the Court shall be transmitted to the Committee of Ministers, which shall supervise its execution'.

⁷⁶ Art 2 of the Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights explains the relationship between the Court and the African Commission. The monitoring of the execution of the judgments of the African Court will be the responsibility of the Council of Ministers, as is the case in the European system. In this regard see art 29 of the Protocol.

⁷⁷ Art 46 entered into force on 1 May 2000.

holding hearings in order to verify compliance with friendly settlement agreements and its recommendations.

- (2) The Inter-American Commission shall report on progress in complying with those agreements and recommendations as it deems appropriate.

In addition to these measures, the Inter-American Commission also developed a procedure whereby it requests information from the states concerning compliance with the recommendations issued in previous annual reports. From the 2001 Annual Report onwards, state compliance with recommendations are published in a table indicating full, partial and non-compliance. The Inter-American Commission also decided to include a copy of the responses of member states on its web page. Of recommendations made in 2000, there was partial compliance with two recommendations, and non-compliance with 16 recommendations.⁷⁸

During the 32nd ordinary session of the African Commission, held in The Gambia from 17 to 22 October 2002, an appeal was made to the African Commission to devise an appropriate strategy aimed at increasing the likelihood of compliance by member states to its recommendations in individual communications.⁷⁹ The appeal mentioned some measures for the African Commission's consideration, most of which were closely modelled on those incorporated in the Inter-American system as discussed above. In addition it also suggested that the African Commission designate a special rapporteur on follow-up.

It will be up to NGOs such as SERAC, which have taken communications to the African Commission and received detailed recommendations, to continue lobbying the African Commission to get these or similar measures adopted.

6 Conclusion

In deciding the *SERAC* case as progressively as indicated above, the Commission has paved the way for increasingly filing complaints based on socio-economic rights in addition to civil and political rights. The Commission has indicated that it will not hesitate to make thorough and detailed recommendations that urge governments to oblige with their socio-economic obligations, as set out in the African Charter, beyond the boundaries of available resources and progressive realisation. These recommendations, however, will amount to nothing if measures are not put in place to ensure the establishment of a follow-up mechanism within the African regional human rights system. Without

⁷⁸ See <http://www.cidh.org> (accessed 28 February 2003).

⁷⁹ The appeal was made by the Institute for Human Rights and Development in Africa, an NGO based in The Gambia.

implementation and systematic follow-up, that should not be the sole responsibility of NGOs, the impact of cases such as the *SERAC* case will not make a difference to the human rights situation in Africa.⁸⁰ In the last instance implementation depends on the willingness of states to give effect to the Commission's recommendations. Political will depends on a multiplicity of factors, including the extent of democratisation in a particular country. It should also be highlighted that the case at hand is likely to have an impact on the socio-economic rights jurisprudence of the upcoming African Court on Human and Peoples' Rights.

⁸⁰ Shelton phrases it differently stating that, 'If the Nigerian government acts to implement the recommendations of the Commission, the decision has the potential to have an impact on human rights law and practice well beyond Africa'. Shelton (n 50 above) 942.