

Human Rights and Resource Development Project

**Protecting Environmental and
Health Rights in Africa:
Mechanisms for Enforcement**

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Canadian Institute of Resources Law
Institut canadien du droit des ressources

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Foreword

The Canadian Institute of Resources Law and the Alberta Civil Liberties research Centre have been working on the overlap between human rights law and the law governing the development of oil and gas for over four years. Although we intend to expand the scope of the work in the near future, the focus so far has been on the relationship between these two bodies of law as they arise in the province of Alberta.

However, it is always useful to know more about the relevant law in other jurisdictions, especially in those where oil and gas dominate the local economy, as is the case in Alberta. Accordingly, we invited Ibironke Odumosu – then a graduate student in the Faculty of Law at the University of Calgary – who is from Nigeria to do some research on the human rights law applicable to oil and gas development in her homeland. This discussion paper is the result of her work on the *African Charter of Human and Peoples' Rights*, on the incorporation of the *African Charter* in Nigerian domestic law and the broader institutional context of which the *Charter* is a part.

There was a time, perhaps not so long ago in fact, when it might have been thought quite odd to suggest that North Americans stood to learn from an examination of human rights law in Africa. But much has changed in recent years, both on the ground in Africa and in received views on Africa in the West. Around the world people have been inspired by African struggles for greater freedom and dignity. It is not just the very famous figures, such as Nelson Mandela, who have provided that inspiration, but others as well. Another outstanding figure was Ken Saro-Wiwa, a leader of the Ogoni people, who have been resisting the devastating consequences of badly managed oil and gas developments in Nigeria for many years.

In his award winning account of grassroots struggles against the oil and gas industry in the Peace River region of Alberta, Andrew Nikiforuk writes that local commitment to the cause “owed much to Ken Saro-Wiwa, a jaunty, pipe-smoking Nigerian journalist”, who for nearly ten years prior to his death at the hands of the Nigerian government, was engaged in non-violent opposition to both the government and multi-national oil companies in the delta of the Niger River. Saro-Wiwa’s view of the importance of environmental protection was cherished by some of the Peace River activists: “The environment is man’s first right. Without a clean environment man cannot exist to claim other rights be they political, social or economic.”*

The inspirational power of African human rights movements arises not only, we think, from awareness of the immensity of past, and continuing, abuses on the continent, or the brilliance of the movements’ leaders. It flows too from the directness with which the African human rights documents address issues. For example, Article 24 of the

*Andrew Nikiforuk, *Saboteurs: Wiebo Ludwig’s War against Big Oil* (Toronto: Macfarlane Walter & Ross, 2002) pp. 46-47. See also, p. 254.

African Charter provides that “All peoples shall have the right to a general satisfactory environment favorable to their development”. In contrast, such a right – if it is, indeed, to be found in the *Canadian Charter of Human Rights and Freedoms* – has to be discovered through legal interpretation, as it is not plainly stated.

It is of note too that Canadian courts have already occasionally made reference to the *African Charter of Human and Peoples’ Rights* in their decisions. For example, the Supreme Court of Canada used the prohibition on the exploitation and degradation of human beings contained in Article 5 of the *African Charter* to support its view that the right not to be tortured is a peremptory norm. Litigation using the *African Charter* is also expanding. Section 7 discusses recently initiated litigation in Nigeria, the object of which is to have wells, from which gas is being flared, shut down for contravening, amongst other laws, Article 24 of the *Charter*. As the internationalization of human rights jurisprudence continues, the *African Charter*, along with human rights documents from other regions of the world, is likely to figure ever more prominently in Canadian case law.

Linda McKay-Panos
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February 2006

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1.0 Introduction

Many African countries have engaged in large scale natural resource development for many decades. These natural-resource-dependent African nations are developing States and many of them rely on investments by developed countries and their transnational corporations for the natural resource exploitation projects on their territories. By its very nature, natural resource production almost inevitably entails environmental damage and negative health impacts, and these consequences of natural resource development are beginning to attract more serious attention. The global human rights community is among those concerned about the impacts of natural resource production, including in Africa. And there is law on which to base such concerns, for environmental and health issues have been accorded the status of human rights in international law and under the domestic law of some States.

At the inception of the first African regional organization, the Organization of African Unity (OAU), African leaders did not consider human rights protection a high priority issue. Instead, the focus was on decolonization, the eradication of apartheid in South Africa, and the protection of the statehood of the newly independent nation-states.¹ As a result of these early concerns, the first right that garnered attention in Africa was the right to self-determination. Even then however, while the OAU did not place much emphasis on human rights, it clearly adopted human rights standards in its work against apartheid in South Africa.² As well, prior to the creation of the OAU, and during the period when human rights did not feature prominently in OAU deliberations, some African States had human rights provisions entrenched in their Constitutions.³

Apart from the decolonization and anti-apartheid struggles in Africa which necessitated the adoption of a human rights approach, albeit on a restrictive scale, events on the international scene also prompted the development of an African human rights

¹See generally, Rachel Murray, *Human Rights in Africa: From the OAU to the African Union* (Cambridge, UK: Cambridge University Press, 2004), especially the first chapter that focuses on the historical overview of human rights in Africa's major regional organizations.

²Murray, *ibid.* at 18.

³For example, in Nigeria, one could trace the origins of constitutional human rights provisions to the Sir Henry Willink-led Minorities Commission, which was set up in 1957. The Commission's recommendations were incorporated in Nigeria's Independence Constitution of 1960. See Chinonye Obiagwu & Chidi Anselm Odinkalu, "Nigeria: Combating Legacies of Colonialism and Militarism" in Abdullahi Ahmed An-Na'im, ed., *Human Rights under African Constitutions: Realizing the Promise for Ourselves* (Philadelphia: University of Pennsylvania Press, 2003) 211 at 219. Presently, Nigeria's Constitution only includes civil and political rights. Under the Constitution, economic, social and cultural rights are non-justiciable. The latter set of rights, usually referred to as second-generation rights, only gained legislative recognition through the work of Africa-wide human rights instruments.

regime. These include the work of the International Labour Organization (ILO), the adoption of regional human rights documents on other continents, United Nations (UN) influence, international human rights conferences, some of which were held in Africa, and the OAU's decision to grant observer status to human rights inclined non-governmental organizations (NGOs), which continually lobbied the OAU on human rights issues.⁴ The cumulative effect of these events resulted in the negotiation of human rights protection instruments in Africa and the establishment of African human rights enforcement institutions. Over two decades later, the human rights enforcement mechanism in Africa's Charter on Human and Peoples' Rights is still undergoing renegotiation by the African States.

This paper examines the protection of the environment and health through Africa's supranational human rights protection mechanism – the African Charter on Human and Peoples' Rights. The paper concentrates on enforcement mechanisms, because there is a history on the continent of human rights abuses which have gone without redress. Even though rights to a general satisfactory environment favourable to development and the best attainable state of physical and mental health are recognized in Africa, the continent still has enormous problems with the protection of the environment and health. While one might attribute the persistence of these problems to several factors – including those of a political and economic nature – this paper only examines the role that effective human rights guarantees could play in protecting environment and health in Africa. Nigeria serves as the country in focus in this paper, primarily because the widely acclaimed decision from the Africa-wide human rights system on protection of the environment and health emanated from that country – the *Ogoni*⁵ decision – and because Nigeria is Africa's largest oil and gas producer.

Apart from the introduction and conclusion, the paper is divided into six sections. Each section provides basic information and analysis on the subject under discussion. Section 2 describes the supranational institutions and documents that are responsible for protecting human rights in Africa. It analyzes and critiques the relevance of these documents and institutions, and their roles in the African human rights system. In Section 3, the human rights guarantees that are provided for and their applicability to States, individuals and transnational corporations are discussed. The discussion in this section emphasizes the culpability of these entities for human rights abuses in Africa. The next section focuses exclusively on the protection of the environment and health through the human rights system in Africa. It analyzes the relevant human rights documents and quasi-judicial decisions.

Sections 5 and 6 discuss the institutional mechanisms for enforcement that are in force and their effects on the protection of the environment and health in Africa. In

⁴See Murray, *supra* note 1 at 21-22.

⁵This decision is discussed in detail later in the paper. See especially, Section 4.1.5.

Section 7, the application of Africa's supranational system in Nigerian domestic law is considered. This section also includes a discussion and analysis of recent developments in Nigeria on the domestic enforceability of environmental and health rights.

This paper provides basic information necessary for understanding the African human rights system generally, with a focus on environmental and health rights. In order to achieve this purpose, and to put the environmental and health rights in perspective, some relevant general issues in the African human rights regime are also discussed.

2.0 Institutional Framework for Human Rights Protection in Africa

Several institutions are responsible for protecting human rights on the African continent. These institutions are creations of regional treaties and agreements. This section provides background information on these institutions, their duties and operational structures, in order to foster a better understanding of the African human rights regime. It also includes a critique of these institutions and their roles in human rights protection in Africa.

2.1 The Organization of African Unity (OAU)

The OAU was established on 25 May 1963, with its headquarters in Addis Ababa, Ethiopia. Representatives of thirty-two African governments signed the *Organization of African Unity Charter*⁶ and twenty-one other African countries joined the organization over the following years. With South Africa's signature in May 1994, all fifty-three African countries had become members of the OAU. At its creation, the OAU was preoccupied with securing and protecting the territorial integrity of its Member States, de-colonization, eradication of apartheid in South Africa, and protection against neo-colonialism.⁷

The OAU was established to promote the unity and solidarity of African States; to coordinate and intensify the cooperation and efforts of African States to achieve a better life for the peoples of Africa; to defend the sovereignty, territorial integrity and independence of African States; to eradicate all forms of colonialism from Africa; and to

⁶The *Organization of African Unity Charter*, 25 May 1963, (1964) 3 I.L.M. 1116 [OAU Charter]. See generally, Gino J. Naldi, *The Organization of African Unity: An Analysis of its Role* (London: Mansell, 1999); Taslim Olawale Elias, "The Charter of the Organization of African Unity" (1965) 59 A.J.I.L. 243.

⁷Gino J. Naldi, "Future Trends in Human Rights in Africa: The Increased Role of the OAU?" in Malcolm Evans & Rachel Murray, ed., *The African Charter on Human and Peoples' Rights: The System in Practice, 1986-2000* (Cambridge, UK: Cambridge University Press, 2002) 1 at 2.

promote international cooperation, having due regard to the *Charter of the United Nations*⁸ and the *Universal Declaration of Human Rights*.⁹ The *OAU Charter* called for the coordination and harmonization of Member States' general policies in the areas of politics and diplomacy, economy, transport, communication, education, culture, health, sanitation and nutrition, science, and defence and security.¹⁰ The OAU's purposes reflect the issues that dominated African political thought at the time of the organization's inception. As a result of these primary focus areas, the OAU directed most of its resources towards its Member States as distinct entities, and not on individuals as such. Hence, Matthews has criticized the OAU as an "institution of the African heads of state, by the heads of state for the heads of state."¹¹

The OAU had four principal organs – the Assembly of Heads of State and Government (OAU Assembly), the Council of Ministers, the General Secretariat and the Commission of Mediation, Conciliation and Arbitration.¹² The *OAU Charter* provided for three specialized commissions – Economic and Social Commission, Educational, Scientific, Cultural and Health Commission, and the Defence Commission.¹³ The third organ, the General Secretariat, had a legal division, which did not do more than draft treaties, monitor ratifications and provide advice to the Secretariat on a number of human rights issues.¹⁴

Apart from the reference to the *Universal Declaration of Human Rights*, the *OAU Charter* did not include any express provisions on human rights protection; neither did it provide for any human rights institutional mechanisms. However, in the struggle for self-determination and against apartheid in South Africa, the OAU dabbled in some human rights issues that defined the organization's human rights focus and approach for many years.

The end of colonialism, as it existed before the 1960s, and apartheid in South Africa, paved the way for the OAU to focus on issues other than freedom struggles. From the early 1990s, the OAU was in a more favourable position to build economic, political and social unity in Africa. This led to the establishment of the African Union (AU). The AU

⁸26 June 1945, 59 Stat. 1031, T.S. 993, 3 Bevans 1153 (entered into force Oct. 24, 1945).

⁹*OAU Charter*, *supra* note 6, art. 2(1). *Universal Declaration of Human Rights*, 10 December 1948, G.A. Res. 217A (III), U.N. Doc A/810 at 71.

¹⁰*OAU Charter*, *ibid.*, art. 2(2).

¹¹K. Matthews, "The Organization of African Unity" in D. Mazzeo, ed., *African Regional Organizations* (Cambridge: Cambridge University Press, 1984) 49 at 80.

¹²*OAU Charter*, *supra* note 6, arts. 8-19.

¹³*OAU Charter*, *ibid.*, art. 20.

¹⁴See Murray, *supra* note 1 at 6-7.

replaced the OAU as Africa's regional political organization on 9 July 2002, when the former was inaugurated in Durban, South Africa.¹⁵

2.2 The African Union

The OAU was, in principle, a political organization that also discussed matters of economic and social concern. However, the African Union (AU) was established as an organization aimed at economic integration and social unity, which would lead to political unity.¹⁶

In July 1999, the OAU Assembly decided to convene an extraordinary session to expedite the process of economic and political integration in Africa. On 9 September 1999, the OAU Assembly issued a Declaration (the Sirte Declaration) calling for the establishment of the AU, with a view, amongst other things, to accelerate the process of integration on the continent. The goal was to enable Africa to play its rightful role in the global economy while addressing the multifaceted social, economic and political problems, which have been compounded by negative aspects of globalization.

At the Lome Summit on 11 July 2000, the *Constitutive Act* of the AU was adopted.¹⁷ The Lusaka Summit, held in 2001, provided further impetus for implementing the Act, and the Durban Summit in 2002, launched and convened the first Assembly of Heads of State of the AU.

The AU is Africa's premier institution and principal organization for promoting accelerated socio-economic integration of the continent, which would in turn lead to greater unity and solidarity among African countries and peoples. The objectives of the AU include the promotion and protection of human and peoples' rights in accordance with both the *African Charter on Human and Peoples' Rights* and other relevant human rights instruments; the promotion of sustainable development at the economic, social and cultural levels as well as integration of African economies; and cooperation with

¹⁵See Nsongurua J. Udombana, "An African Human Rights Court and an African Union Court: A Needful Duality or a Needless Duplication" (2003) 28 Brooklyn J. Int'l L. 811 at footnote 18.

¹⁶Generally, Africa is moving toward economic integration. On 23 October 2001, in Abuja, Nigeria, the AU launched the New Partnership for Africa's Development (NEPAD), to address Africa's challenges, especially poverty, underdevelopment and continued marginalization. See online: New Partnership for Africa's Development <<http://www.nepad.org/2005/files/home.php>>. See also, N.J. Udombana, "How Should we Then Live?: Globalization and the New Partnership for Africa's Development" (2002) 20 B.U. Int'l L. J. 293 for an analysis and critique of NEPAD's role in Africa.

¹⁷See online, African Union <http://www.africa-union.org/About_AU/AbConstitutive_Act.htm> [*Constitutive Act/The Act*]. The Act entered into force on 26 May 2001.

international partners in the eradication of preventable diseases and the promotion of good health on the continent.¹⁸

The AU inherited all the organs and bodies of the OAU, including the African Commission on Human and Peoples' Rights, which was established by article 30 of the *African Charter on Human and Peoples' Rights*.¹⁹ As a point of departure from the *OAU Charter*, article 3(h) of the *Constitutive Act* states that one of the objectives of the AU shall be to “promote and protect human and peoples' rights in accordance with the *African Charter on Human and Peoples' Rights* and other relevant human rights instruments.” However, the *Constitutive Act* does not entrust human rights promotion and protection to any of the organs of the AU listed under the Act, neither does the Act list any of the human rights protection and/or enforcement institutions as its organs.

Commenting on the human rights provisions in the AU's *Constitutive Act*, Udombana argues that:

“The AU Treaty is an old wine in new wine skin; and the AU is a reincarnation of the OAU. As such, it is not likely to take human rights seriously – even though that is greatly desired – for the simple reason that a married woman does not recover her virginity by divorce. To hope that many of the present crop of rulers in Africa will respect human and peoples' rights is as foolish and futile as hoping to have iced water in the middle of the Sahara. The adoption of the AU Treaty has more to do with the hysteria of globalization than the euphoria of unity or, for that matter, human rights.”²⁰

While there are merits to Udombana's arguments that the *Constitutive Act* is more related to globalization than to African unity or human rights, it is rather overly pessimistic to assume that African leaders would not respect human rights. One should not expect a dramatic change but it is worth the effort to have the necessary instruments and institutions for protecting human rights in place. Udombana, however, concedes that the

¹⁸*Constitutive Act, ibid.*, art. 3.

¹⁹27 June 1981, OAU Doc. CAB/LEG/67/3/Rev.5, (1982) 21 I.L.M. 58 [*African Charter/The Charter*]. A copy of the *African Charter* is included in Appendix 1 of this paper. The *African Charter* and African Commission are discussed later in this section. Scholars have noted the absence of the African Commission and the proposed African Court on Human and Peoples' Rights in the *Constitutive Act* of the AU, and some view it as evidence of lack of interest in human rights protection. Rachel Murray, however, regards the omissions as incoherence in the *Constitutive Act* because the Act also omits some other OAU organs. See Murray, *supra* note 1 at 33.

²⁰N.J. Udombana, “Can the Leopard Change its Spots? The African Union Treaty and Human Rights” (2002) 17 Am. U. Int'l L. Rev. 1177 at 1258-1259.

AU can succeed in its “self appointed enterprise of taking rights seriously” if it exhibits some accountability in its activities.²¹

2.3 The African Charter on Human and Peoples’ Rights

In spite of the endorsement of the *Universal Declaration of Human Rights*²² in the *OAU Charter*, as earlier indicated, the protection of human rights on the continent was not an early priority. Nevertheless, in the early days of the OAU, pressure groups including NGOs exposed some human rights violations on the continent, the United Nations expressed support for regional human rights protection and some African leaders recognized the importance of human rights protection in other States. These factors contributed to the adoption of a regional human rights document in Africa.²³

In July 1979, the OAU Assembly met in Monrovia, Liberia. At this summit, a resolution was adopted calling on the OAU Secretary General to form a committee of experts, which would draft an *African Charter on Human and Peoples’ Rights*. The group of experts began work in 1979 and produced a draft, which was unanimously adopted by the OAU Assembly at a 1981 meeting in Nairobi, Kenya. The *African Charter on Human and Peoples’ Rights*²⁴ came into force on 21 October 1986, which was declared “African Human Rights Day.”²⁵

The *African Charter* introduced some innovations to the international human rights scene. It was the first human rights treaty to incorporate civil and political rights and economic and social rights in one document. It was also the first to include the right to a general satisfactory environment favourable to development. Thus, the human rights

²¹*Ibid.* at 1259.

²²*Supra* note 9.

²³Murray, *supra* note 1 at 22.

²⁴See U.O. Umozurike, “The African Charter on Human and Peoples’ Rights” (1983) 77 A.J.I.L. 902. There is also the *African Charter on the Rights and Welfare of the Child* OAU Doc.CAB/LEG/24.9/49 (1990) (entered into force 29 November 1999) [*African Children’s Charter*] and the *Protocol on the Rights of Women in Africa* (adopted on 11 July 2003). See online: African Commission <http://www.achpr.org/english/info/women_en.html>. For information on the ratification of the *Protocol on the Rights of Women in Africa*, see Amnesty International, “African Union: Protocol on the Rights of Women in Africa must be Ratified” AI Index: IOR 30/019/2004 (Public) News Service No: 172, 8 July 2004, online: Amnesty International <<http://web.amnesty.org/library/Index/ENGIOR300192004?open&of=ENG-312>>.

²⁵The *African Charter* is also known as the Banjul Charter. Some refer to the *African Charter* as the Banjul Charter because of its ties to Banjul, the capital city of the Gambia. For example, the headquarters and secretariat of the African Commission on Human and Peoples Rights are located in Banjul, the Gambia.

protection body created under the *Charter* was the first international human rights body to decide on multiple breaches of both first and second-generation human rights in one decision.²⁶

All fifty-three Member States of the AU – that is, all African States – have ratified the *African Charter*. But three countries (Egypt, Zambia and South Africa) made reservations to the *African Charter*.²⁷ The term “reservation” is common in international law. It applies to efforts of countries signing an agreement to carve out, exclude or “reserve” for themselves a right that is not expressly provided for in the agreement. Unlike some other international documents, however, the *Charter* is silent on reservations and has no provision for their acceptance or rejection.

Scholars have severely criticized the *African Charter* and its application. Naldi is of the opinion that the adoption of the *Charter* “has largely proved to date to be a false dawn for the promotion and protection of human rights in Africa.”²⁸ For Vincent Nmehielle,

²⁶See the African Commission on Human and Peoples’ Rights decision in *Social and Economic Rights Action Centre and the Center for Economic and Social Rights v. Nigeria* Communication No. 155/96, African Commission on Human and Peoples’ Rights, Delivered, May 27, 2002 [*The Ogoni Case*]. Human rights scholars generally recognize three “generations” of human rights. The first generation is the civil and political rights. These are the fundamental or basic rights that deal with the liberty of the individual. The International Covenant of Civil and Political Rights (G.A. Res. 2200A, 21 U.N. GAOR Supp. (No. 16) at 52, U.N. Doc. A/6316 (1966) entered into force 23 March 1976) recognizes these rights. Economic, social and cultural rights are generally referred to as second generation rights. The international document on this set of rights is the International Covenant on Economic, Social and Cultural Rights (G.A. Res. 2200A, 21 U.N. GAOR Supp. (No. 16) at 49, U.N. Doc. A/6316 (1966) entered into force 3 January 1976). Collective rights are otherwise known as third generation rights. Even though human rights are often divided into different generations or categories, they are not mutually exclusive but interdependent. An illustration would help make the point better. Take for example, the following familiar illustration on the first generation right to life. Where an individual is deprived of his second generation right to the best attainable state of physical and mental health, or a community is deprived of the third generation right to a general satisfactory environment favourable to development, their right to life is affected. See Louis B. Sohn, “The New International Law: Protection of Rights of Individuals Rather than States” (1982) 32 Am. U.L. Rev. 1. See also G.A. Res. 32/130, 32 U.N. GAOR Supp. (No. 45) at 150-51, U.N. Doc. A/32/45 (1977), which states as follows: All human rights and fundamental freedoms are indivisible and interdependent; equal attention and urgent consideration should be given to the implementation, promotion and protection of both civil and political, and economic, social and cultural rights.”

²⁷Udombana, *supra* note 20 at 1189-1190. Udombana cites Christof Heyns, ed., *Human Rights Law in Africa*, 1996, where it was stated that Zambia made reservations to articles 13(3) and 37 of the *African Charter*. Zambia amended article 13(3) as follows: “every individual shall have the right to access to any place, services or public property intended for use by the general public”. The purpose of the amendment according to Heyns book, as cited by Udombana, was to exclude any claimed right to use all public property other than what is fairly established. Egypt made reservations to articles 8(3), 9 and 18(3) of the *Charter*, in order to ensure *inter alia* that the rights guaranteed in those articles are implemented in accordance with Islamic law.

²⁸Naldi, *supra* note 7 at 5.

the *African Charter* is “an ineffective compromise”, “at least in spirit”.²⁹ Of course, it is commendable that all African countries have endorsed the *Charter*. However, according to Nmehielle, one has also to ask why this has been the case, given the fact that human rights abuses occur on a rather large scale on the African continent. In the opinion of some commentators, the fact that many Member States ratified the *African Charter* indicates that the *Charter* was not intended to achieve much of its purpose.³⁰ States were prepared to ratify it as long as it did not ‘impose heavy burdens’ on them.³¹ As evidence of this thesis, writers point to the enforcement machinery set up under the *Charter* and opine that it is ineffective.

For example, Udombana argues that despite the adoption of the *African Charter*, the actual human rights practice in Africa has remained contradictory and there is a sharp contrast between rhetoric and reality.³² He points to serious human rights abuses that persist on the continent including non-intervention in recent conflicts, extra-judicial executions, torture, degrading treatment and slavery, denials of the right to freedom of expression, denials of the right to fair trials and attacks on the judiciary, and absence of genuine democracies in Africa. However, one should note that Africa is not alone in this situation of having good laws but inefficient enforcement mechanisms. Indeed, enforcement inadequacies are common to human rights instruments. For example, the Constitutions adopted during the Soviet era were glorious on paper, even when tens of thousands (or even more), were being tortured and executed by the State, and similar situations occur in many developed nations of the world and are perpetrated by their governments and other relevant institutions.

2.4 The African Commission on Human and Peoples’ Rights

Article 30 of the *African Charter* created the African Commission on Human and Peoples’ Rights (the Commission/the African Commission). It is Africa’s principal quasi-judicial human rights organization.³³ The Commission is headquartered and also has its

²⁹Vincent O. Orlu Nmehielle, “Towards an African Court of Human Rights: Structuring the Court” (2000) 6 Ann. Surv. Int’l & Comp. L. 27 at 30.

³⁰*Ibid.*

³¹*Ibid.* at 30.

³²Udombana, *supra* note 20 at 1220. See also, Naldi, *supra* note 7 at 1; Paul Williams, “Indifference and Intervention: International Society and Human Rights in Africa”, (2001) 5 Int’l J. Hum. Rts. L. 140.

³³There is also an African Committee of Experts on the Rights and Welfare of the Child, (African Children’s Committee), which was created pursuant to the *African Children’s Charter*, *supra* note 24.

Secretariat in Banjul, the Gambia.³⁴ It is an eleven-member Commission,³⁵ which sits twice a year in different parts of the continent, with members normally elected for a six-year period and eligible for re-election.³⁶ The Commission was officially inaugurated on 2 November 1987, in Addis Ababa, Ethiopia, after the 23rd OAU Assembly had elected its members in July of the same year.

Article 45 of the *African Charter* enumerates the Commission's mandate as follows: to promote human and peoples' rights; to protect human and peoples' rights; to provide interpretations of *Charter* provisions; and to carry out any other task assigned to it by the OAU Assembly. According to a statement by the AU, the OAU's successor, the African Commission was created to provide "a more proactive, comprehensive and robust framework for building and consolidating African security architecture that will strengthen the continent's institutions, programmes and initiatives for preventive diplomacy, peace-building and peace-making, thus enhancing the state of security and stability in Africa."³⁷

There has been a fair bit of commentary on the Commission, its creation and operations.³⁸ One of the many who have criticized the Commission's ineffectiveness is Vincent Nmehielle. In his article, "Towards an African Court of Human Rights: Structuring and the Court", Nmehielle writes that:

"When the Charter came into force in 1986, many commentators viewed the document as unique, impressive in its elaborate provisions, and groundbreaking in such progressive provisions as "Peoples' Rights" and the incorporation of economic, social and cultural rights. Yet analysis has since shown that the mechanism for the protection and enforcement of human rights under the Charter is not effective. The African Commission (the Commission) created under the Charter with the responsibility of giving effect to its provisions lacks the necessary effective authority to carry out its mandate."³⁹

³⁴Rachel Murray regards this choice of venue for the African Commission's headquarters as a factor contributing to the disintegration of the Commission from the rest of the OAU, which had its headquarters in Addis Ababa, Ethiopia. See Murray, *supra* note 1 at 22.

³⁵*African Charter*, *supra* note 19, art. 31.

³⁶*African Charter*, *ibid.*, art. 36.

³⁷Cited in P. Odiaka and Y. Aderibigbe, "Hunger and War as African Leaders Meet" *The Guardian Newspaper* (Nigeria) (5 July 2004).

³⁸See generally, Inger Osterdahl, *Implementing Human Rights in Africa: The African Commission on Human and Peoples' Rights and Individual Communications* (Uppsala, Sweden: Iustus Forlag, 2002).

³⁹Nmehielle, *supra* note 29 at 28.

At the time he was writing, Nmehielle argued that the lack of a judicial organ – a court – contributes to the weakness of the African human rights enforcement mechanism.⁴⁰

One of the African Commission's weaknesses is the political control, which the OAU Assembly – now the AU Assembly – exercises over it. The Commission is subject to the control of the Assembly, which is composed of leaders of Member States whose actions the Commission was established to consider.⁴¹ A basic problem created by this control is the lack of publicity given the Commission's work, contrary to article 59(2) of the *African Charter*, which requires the publication of the Commission's activities after consideration by the Assembly of Heads of State and Government.

The Commission lacks adequate resources, equipment and support to make it effective. The financial problems of the parent body – the AU – affect the Commission, as the AU funds the Commission.⁴² Many of the Member States are poor nations who cannot meet their financial obligations to the Union.⁴³ As well, Nmehielle states that the members of the Commission have lacked activism, and this has led to a vacuum in the development of the jurisprudence of the Commission. However, the Commission's conclusion in the *Ogoni Case*⁴⁴ is a landmark decision that has received more commendation from several quarters than any other by the African Commission.

Oloka-Onyango takes the position that the African Commission has attracted more criticism than praise in spite of the innovations included in the *African Charter*.⁴⁵ He identified several problems that the Commission is facing, including insufficient protective powers and enforceable remedies.⁴⁶ However, in line with other commentators, he applauded the Commission's decision in the *Ogoni Case*.

Like many, Nmehielle argued for the creation of an African Court on Human and People's Rights, especially because of the ineffective remedies provided under the *African Charter* through the Commission, which he refers to as “merely a committee

⁴⁰*Ibid.* A lot has changed since Nmehielle wrote his article. A Protocol on the establishment of an African Human Rights Court, which is discussed in Section 2.5 has been adopted and there are on-going negotiations on the establishment of a single formal judicial system in Africa.

⁴¹*Ibid.* at 31.

⁴²*African Charter*, *supra* note 19, art. 41.

⁴³Nmehielle, *supra* note 29 at 32.

⁴⁴*Supra* note 26.

⁴⁵J. Oloka-Onyango, “Reinforcing Marginalized Rights in an Age of Globalization: International Mechanisms, Non-State Actors, and the Struggle for Peoples' Rights in Africa” (2003) 18 Am. U. Int'l L. Rev. 851 at 855-856.

⁴⁶*Ibid.* at 859.

making recommendations to the Assembly of Heads of State and Government of the Organization of African Unity, which holds the ultimate word.”⁴⁷

Given the many criticisms of the African Commission, most stemming from its relationship to the OAU/AU and its inability to offer redress on human rights violations, the OAU/AU eventually, in the last years of the 20th century, responded to the call for the establishment of a judicial organ with the power to make binding decisions. However, the controversy is far from settled as is clear from recent developments on the AU’s judicial organs.⁴⁸

2.5 The African Court on Human and Peoples’ Rights

Initially, African leaders rejected the idea of having an African Court on Human and Peoples’ Rights (African Human Rights Court) because the traditional African system is not adversarial but hinges on negotiation and conciliation.⁴⁹ Another prominent reason for the delay in advancing the need for a regional Court in Africa has been the desire of African nations to protect their sovereignty from intrusion by supranational entities.⁵⁰ However, the leaders were able to get past these initial doubts and began to work towards the creation of the Court, especially since the African Commission’s role is more supervisory and its decisions are mostly recommendatory.⁵¹

The Summit of Heads of State and Government of the OAU adopted the initiative of establishing an African Human Rights Court in Tunis in 1994.⁵² The Summit adopted a

⁴⁷Nmehielle, *supra* note 29 at 39.

⁴⁸These developments are discussed in Section 2.7 below.

⁴⁹Naldi, *supra* note 7 at 12.

⁵⁰Udombana, *supra* note 15 at 818. In 1963, OAU founding members had rejected a draft Charter that included a Court of Mediation, Conciliation and Arbitration as a means for dispute settlement, but settled for an ad hoc Commission of Mediation, Conciliation and Arbitration instead. This was a period when most of the African States were just gaining independence from colonial rule. See Udombana, *ibid.* at 819.

⁵¹According to Motala, NGOs actually began the initiative of establishing an African Human Rights Court in 1993 and the OAU adopted this initiative a year later. See Ahmed Motala, “Non-governmental Organizations in the African System” in Evans & Murray, *supra* note 7 at 274.

⁵²See Motala, *ibid.* at 275. A dual international human rights enforcement mechanism is not a novel idea. The Inter-American Commission on Human Rights and the Inter-American Court of Human Rights exist simultaneously. See article 33 of the *American Convention on Human Rights* 22 November 1969, O.A.S. Treaty Series No. 36, 1144 U.N.T.S. 123, (1970) I.L.M. 673 (entered into force 18 July 1978). Also, article 19 of the *European Convention for the Protection of Human Rights and Fundamental Freedoms* 213 U.N.T.S. 222 (entered into force 3 September 1953) provides for a European Commission of Human Rights and a European Court of Human Rights. This Convention has been amended by Protocols No. 3, 5, 8 and 11 that entered into force on 21 September 1970, 20 December 1971, 1 January 1990, and 1 November 1998 respectively.

resolution requesting the Secretary General of the OAU to convene a meeting of government experts to examine ways of enhancing the efficiency of the African Commission and to discuss the establishment of an African Court on Human and Peoples' Rights.⁵³ A meeting of the government experts in Cape Town, South Africa, received a draft Protocol in September 1995, which was adopted at the meeting of Ministers of Justice in December 1997.⁵⁴

At its 19th Ordinary session on 9 July 1998, in Ouagadougou, Burkina Faso, the OAU Assembly adopted the Protocol to the African Charter on Human and Peoples' Rights on the Establishment of the African Court on Human and Peoples' Rights,⁵⁵ pursuant to article 68 of the African Charter.⁵⁶ The AU inherited this Protocol from the OAU, alongside other documents and institutions, pursuant to article 3(h) of the Constitutive Act of the AU.

The *Protocol on the African Human Rights Court* was to come into force thirty days after fifteen instruments of ratification or accession had been deposited.⁵⁷ On 26 December 2003, the Union of Comoros became the 15th Member State of the African Union to deposit the instrument of ratification of the *Protocol on the African Human Rights Court* with Professor Alpha Oumar Konare, the Chairperson of the AU Commission.⁵⁸ With the deposit of the instrument, the *Protocol on the African Human Rights Court* entered into force on 25 January 2004. Other States that have ratified the Protocol are Algeria, Burkina-Faso, Burundi, Cote d'Ivoire, Gambia, Gabon, Kenya, Lesotho, Libya, Mali, Mauritius, Mozambique, Niger, Nigeria, Rwanda, Senegal, South Africa, Togo and Uganda.⁵⁹

⁵³Resolution N° AHG 230 (xxx). See doc. OAU/LEG/EXP/AFC/HPR, September 95. See also, Motala, *ibid.* at 275.

⁵⁴Fordham O. Wara, "Bibliographical Pathfinder: African System for the Protection and Promotion of Human Rights (2002)" online: University of Minnesota <<http://www1umn.edu/humanarts/bibliog/Africanpathfinder.html>>.

⁵⁵Reprinted in (1999) 7 Afr. Y.B. Int'l L. 419 [*Protocol on the African Human Rights Court*].

⁵⁶Wara, *supra* note 54.

⁵⁷*Protocol on the African Human Rights Court*, *supra* note 55, art. 34.

⁵⁸"The Protocol on the African Court on Human and Peoples' Rights to Come Into Force Soon" African Union Press Release No. 121/2003. Addis Ababa, 26 December 2003. See also, "25th January 2004: A Turning Point in the History of the African System for the Protection of Human and Peoples' Rights" online: African Commission on Human and Peoples' Rights <http://www.achpr.org/english/news/press_court_en.html>.

⁵⁹African Union: List of Countries which have Signed, Ratified/Accessed to the Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights, online: African Union <<http://www.africa-union.org/root/au/Documents/Treaties/treaties.htm>>. See also, "Africa Union: Entry into force of the Protocol Establishing an African Court on Human and Peoples' Rights" online: African Union <<http://www.africa-union.org/root/au/Documents/Treaties/treaties.htm>>.

A newspaper article, commenting on the then forthcoming three-day summit of the African heads of State and government in Addis Ababa, Ethiopia, commencing on 6 July 2004, stated as follows:

“With many countries signing the protocol, the court would play major roles in checking human rights abuses in the continent.

Like the Security Council, the legal mandate for the African Court is a marked departure from the largely political African Commission on Human and People’s Rights. While decisions made by the latter were, to a greater extent, mediating appeals, the judgments of the African Court would be binding on the member states that have ratified the protocol.”⁶⁰

The African Human Rights Court has not been established. This has been a source of concern for many in Africa including human rights NGOs.⁶¹ The concern stems from several factors, among which is the need for an effective enforcement mechanism for redressing human rights violations on the continent, especially because, as already noted, the African Commission’s decisions are not binding but recommendatory.

2.6 The African Court of Justice

The *Treaty Establishing the African Economic Community* was the international agreement that first provided for an African Court.⁶² The *AEC Treaty* provided for an AEC Court of Justice, which has not been established. Article 18 of the *AEC Treaty* provides for the functions of the AEC Court of Justice. These include adherence to the law by the interpretation and application of the *AEC Treaty*, providing advisory opinions at the request of organs of the OAU/AU and adjudicating disputes pursuant to the *AEC Treaty*.

A judicial structure, which has received more attention than the AEC Court of Justice, is the also yet to be established Court of Justice of the AU (AU Court). Article 5(1)(d) of

Rights – a Significant Development” online: Human Strategies for Human Rights (HSHR) <<http://www.hshr.org/jan252004auenglish.htm>>.

⁶⁰P. Odiaka & Y. Aderibigbe, “Hunger and War as African Leaders Meet” *The Guardian Newspaper* (Nigeria) (5 July 2004).

⁶¹Amnesty International Public Statement, “African Union: Assembly Should Establish an Effective African Court on Human and Peoples’ Rights” AI Index: IOR 30/018/2004 (Public), News Service No: 169, 6 July 2004, online: Amnesty International <<http://web.amnesty.org/library/print/ENGIOR300182004>> [Amnesty International, “Assembly Should Establish an Effective African Human Rights Court”]; Amnesty International Public Statement, “African Union: The Establishment of an Independent and Effective African Court on Human and Peoples’ Rights Must be a Top Priority” AI Index: IOR 30/002/2005 (Public), News Service No: 022, 28 January 2005, online: Amnesty International <<http://web.amnesty.org/library/print/ENGIOR300022005>> [Amnesty International, “Top Priority”].

⁶²3 June 1991, (1991) ILM 1241 (entered into force 11 May 1994) [*AEC Treaty*].

the *Constitutive Act* of the AU lists the AU Court as an organ of the AU. The *Constitutive Act* does not define the composition of the AU Court, but in article 18, calls for both the establishment of the Court of Justice and a Protocol to define the statute, composition and functions of the Court.⁶³ On the relationship between the proposed AEC Court of Justice and the AU Court, Udombana argues that with the apparent conflict in jurisdictions of the two, the AEC Court of Justice will be subsumed in the AU Court.⁶⁴ He bases his argument on the premises that the AU was established in conformity with the ultimate objectives of the *OAU Charter* and the *AEC Treaty* and that the provisions of the *Draft Protocol of the Court of Justice of the African Union* duplicates the functions of the AEC Court of Justice.⁶⁵ There has not been much academic debate on the relationship between the AEC Court of Justice and the AU Court and it seems that Udombana's argument reflects the view of writers on Africa's supranational courts.

The *Constitutive Act* is silent on the relationship between the AU Court and the African Human Rights Court.⁶⁶ But more than one commentator has turned his or her attention to this matter. For example, Udombana writes that Africa does not need two or more courts. He opines that the AU should settle for a single court to interpret all African international legal instruments and adjudicate any conflicts that may arise from their interpretation or implementation. Two courts in Africa would present financial difficulty and also unnecessarily duplicate efforts and create political inconsistency. Udombana also observes that the different institutions may give the same rule of law different interpretations in different cases. He recommends that the AU should establish a single Court as an autonomous institution with different specialized chambers to deal with the major problems facing the continent, including human rights. He concludes that "having more than one court in Africa is not a sensible decision."⁶⁷

Others feel quite differently about the necessity of an African court devoted exclusively to human rights issues. For example, Amnesty International advocates for a speedy establishment of the African Human Rights Court.⁶⁸ This does not however, mean that the international NGO does not support the idea of a single African Court.

⁶³Article 20 of the *AEC Treaty* also includes a similar provision but states some of the Court of Justice's functions including giving advisory opinions to other organs and deciding on actions brought by Member States.

⁶⁴Udombana, *supra* note 15 at 841.

⁶⁵*Ibid.*

⁶⁶See on this point, Udombana, *supra* note 20 at 1243-1249.

⁶⁷Udombana, *supra* note 15 at 849-864.

⁶⁸Amnesty International, "Top Priority", *supra* note 61.

The Assembly of the Heads of State and Government of the African Union (AU Assembly) adopted the *Protocol of the Court of Justice of the African Union*⁶⁹ on 11 July 2003 at the second Ordinary Session of the AU Assembly in Maputo, Mozambique. Thirty-seven African Union Member States have signed the *Protocol of the AU Court*, but, as of January 2006, only eight have ratified it.⁷⁰ The *Protocol of the AU Court* is to enter into force thirty days after the deposit of the instruments of ratification by fifteen Member States of the AU.⁷¹ It provides that the Court – the principal judicial organ of the AU – would consist of eleven judges who are nationals of State parties.⁷² Article 3(5) of the *Protocol of the AU Court* requires the representation of the principal legal traditions of Africa. Article 4 demands impartiality and independence of the Judges who are to be elected from among persons of high moral character.⁷³ In article 13, the Protocol specifically provides for judicial independence in accordance with international law. According to the *Protocol of the AU Court*, the decisions of the AU Court will be both binding on the parties and in respect of the particular case,⁷⁴ and final, subject to the provisions on default judgments and revisions of the Court’s judgments.⁷⁵

Article 19 of the *Protocol of the AU Court* reserves a wide and, one might even say, unlimited jurisdiction for the Court, but no where in the document does the AU Court specifically assume competence on human rights issues. Parties who can appear before the AU Court are rather limited. These are State parties to the protocol, the AU Assembly, the Parliament and other AU organs authorized by the Assembly, the Commission of the AU and third parties under conditions to be determined by the Assembly with the consent of the State party concerned.⁷⁶ Like articles 5 and 34(6) of the *Protocol on the African Human Rights Court*, which is discussed in section 5 of this paper, the *Protocol of the AU Court* implicitly denies individuals and NGOs access to the AU Court. However, third parties may have access to the AU Court under conditions to be determined by the AU Assembly, but the *Protocol* does not define the term “third parties”. Surprisingly, the African Commission does not have automatic access to the AU

⁶⁹Available online: African Union <<http://www.african-union.org>> [*Protocol of the AU Court*].

⁷⁰African Union: List of Countries which have Signed, Ratified/Acceded to the Protocol of the Court of Justice of the African Union, online: African Union <<http://www.africa-union.org/root/au/Documents/Treaties/treaties.htm>>.

⁷¹*Protocol of the AU Court*, *supra* note 69, art. 60.

⁷²*Protocol of the AU Court*, *ibid.*, arts. 2(2) & 3(1). By article 3(2), the AU Assembly may review the number of judges when it deems it necessary.

⁷³The Assembly elects the judges by secret ballot and by two-thirds majority of the Member States eligible to vote. See *Protocol of the AU Court*, *ibid.*, art. 7(1). Article 7(3) provides that in the election of the judges, the Assembly would ensure that there is equal gender representation.

⁷⁴*Protocol of the AU Court*, *ibid.*, art. 37.

⁷⁵*Protocol of the AU Court*, *ibid.*, art. 35(4).

⁷⁶*Protocol of the AU Court*, *ibid.*, art. 18.

Court. By these provisions, it is apparent that the AU Court was not established to deal with human rights issues; the human rights jurisdiction was specifically reserved for the African Human Rights Court at the time of drafting the *Protocol of the AU Court*.

2.7 The Merged African Court of Justice and African Court on Human and Peoples' Rights

There have been several recent developments within the African Union system that could significantly impact the human rights enforcement mechanisms. On 4-8 July 2003, at the Third Ordinary Session of the Executive Council of the AU at Maputo, Mozambique, the Executive Council decided that the African Human Rights Court would remain a separate and distinct institution from the AU Court.⁷⁷ The Executive Council recommended the draft *Protocol of the AU Court* to the AU Assembly for adoption. At the Second Ordinary Session of the AU Assembly, held at Maputo, Mozambique on 10-12 July 2003, the AU Assembly adopted the *Protocol of the Court of Justice of the African Union*.⁷⁸ It also appealed to all Member States to sign and ratify the Protocol in order to ensure that it enters into force speedily. However, at the Third Ordinary Session of the AU Assembly held at Addis Ababa, Ethiopia, on 6-8 July 2004, contrary to the decisions of the Executive Council, which the AU Assembly adopted at the preceding Ordinary Session, the Assembly decided that the African Human Rights Court and the AU Court should be integrated into one Court.⁷⁹

The African Commission on Human and Peoples' Rights reacted to the decision on the integrated Court by adopting the Resolution on the Establishment of An Effective African Court on Human and Peoples' Rights on 11 May 2005, at its 37th Ordinary Session held from 27 April to 11 May 2005 at Banjul, The Gambia.⁸⁰ In the Resolution, the Commission considered that the African Human Rights Court and the AU Court have essentially different mandates and litigants. The Commission seemed to find some basis for hope in the January 2005 decision of the AU Executive Council that allows the operationalization of the African Human Rights Court notwithstanding the continuing discussions on the merger of both Courts, and the Executive Council's recommendation requesting AU Member States that have not ratified or acceded to the *Protocol on the*

⁷⁷Decision on the Draft Protocol of the Court of Justice, Doc. EX/CL/59 (III), EX/CL/Dec.59 (III).

⁷⁸Decision on the Draft Protocol of the Court of Justice of the African Union Dec.EX/CL/59 (III), Assembly/AU/Dec.25 (II).

⁷⁹Decision on the Seats of the African Union, Assembly/AU/Dec.45 (III), Assembly/AU/Dec. 33-54 (III).

⁸⁰ACHPR/Res.76 (XXXVII) 05, online: African Commission on Human and Peoples' Rights <http://www.achpr.org/english/resolution/resolution81_en.html>.

African Human Rights Court to do so as soon as possible.⁸¹ The Commission expressed its concern about the negative impacts of the merger decision and non-ratification of the *Protocol on the African Human Rights Court*, on the establishment of an effective African human rights court.

In this Resolution, the African Commission adopted the role of an advocate for the protection of human rights in Africa. It called on the AU Assembly to operationalize the African Court on Human and Peoples' Rights within the earliest possible period through the election of judges, determination of the Court's seat and allocation of necessary and adequate resources. Significantly, it called on Member States, which have not already done so, to make and deposit the declaration needed to grant individuals and NGOs access to the African Human Rights Court pursuant to article 34(6) of the *Protocol on the African Human Rights Court*. It also called on Member States to fulfill their financial obligations to the AU, establish the Human Rights Fund and make regular voluntary contributions to the fund.⁸²

Notwithstanding the concerns expressed in the African Commission's Resolution, the AU Assembly at its Fifth Ordinary Session held in Sirte, Libya, from 4-5 July 2005, still maintained its decision on the merger of the AU Court and the African Human Rights Court.⁸³ It decided that review of a draft legal instrument relating to the establishment of the merged court should be completed by the next ordinary sessions of the Executive Council and the AU Assembly. However, in consonance with some of the provisions of the African Commission's Resolution, the AU Assembly decided that all necessary measures – the election of judges, the determination of the budget and operationalization of the Registry – should be taken for the functioning of the African Human Rights Court. It also decided that the Member States of the Eastern Region should determine the seat of the integrated Court, which would also serve as the seat of the African Human Rights Court pending the merger.

As a result of the July 2005 decision of the AU Assembly, the merger decision still stands. However, the African Human Rights Court remains relevant in the interim, until the necessary AU organs and the Member States finalize the merger. NGOs seem to be in

⁸¹Executive Council, Decision on the Merger of the African Court on Human and Peoples' Rights and the Court of Justice of the African Union, Doc. EX.CL/162 (VI), EX.CL/DEC.165 (VI).

⁸²The First AU Ministerial Conference held in Kigali, Rwanda, in May 2003, recommended the establishment of the human rights fund.

⁸³Assembly of the AU, Decision on the Merger of the African Court on Human and Peoples' Rights and the Court of Justice of the African Union, Assembly/AU/6 (V), Assembly/AU/Dec.83 (V).

support of the continuing jurisdiction of the African Human Rights Court pending the merger of the AU Court and the African Human Rights Court.⁸⁴

The Executive Council of the AU has issued a Draft Protocol on the Integration of the African Court on Human and Peoples' Rights and the Court of Justice of the African Union.⁸⁵ The Draft Protocol on the Integrated Court recognizes that merging the two courts will enhance their capacity to attain their objectives and increase their effectiveness and efficiency. Article 2(1) of the Draft Protocol on the Integrated Court creates the Court of Justice and Human Rights of the African Union (Integrated Court) to function in accordance with the provisions of the Protocol on the African Human Rights Court and the Protocol of the AU Court. The Integrated Court will be the principal judicial organ of the AU and will be committed to the "promotion of justice and protection of human and peoples' rights in Africa." A Specialized Human and Peoples' Rights Judicial Division and any other Judicial Division that the Assembly establishes will constitute the Integrated Court.⁸⁶ This provision is very important to the realization of human rights protection in African through a formal judicial system. If nothing else, a Specialized Judicial Division devoted to human rights issues will ensure expertise on human rights cases, and prevent the relegation of human rights to a, perhaps, inferior position in the Integrated Court.

The Integrated Court will be composed of fifteen judges, at least seven of which will be competent in human and peoples' rights.⁸⁷ Article 4 of the *Draft Protocol on the Integrated Court* includes competence and experience in human and peoples' rights as a qualification for appointment of judges to the Integrated Court. However, from a reading of article 4, this is not a compulsory requirement because of the use of the word "or". By this article, it is sufficient if a judge only possesses the "necessary practical, judicial or academic qualifications" that his or her country requires for appointment to the highest judicial offices. Article 11 requires judges to be independent. The *Draft Protocol on the Integrated Court* also provides for female representation, terms of office, presidency and vice-presidency of the Court, resignation, suspension and removal from office and vacancies.⁸⁸ Article 15 resolves inconsistencies between the *Draft Protocol on the*

⁸⁴The Coalition for an Effective African Court on Human and Peoples' Rights, "Legal and Institutional Issues Arising from the Decision by the Assembly of Heads of State and Government of the African Union to Integrate the African Court on Human and Peoples' Rights and the Court of Justice of the African Union", A Submission to the African Union by the Coalition for an Effective African Court on Human and Peoples' Rights, October 2004, online: The Coalition for an Effective African Court on Human and Peoples' Rights <<http://www.africancourtcoalition.org>>; Amnesty International, "Top Priority", *supra* note 61.

⁸⁵African Union, EX.Cl/195 (VII) Annex I [*Draft Protocol on the Integrated Court*].

⁸⁶*Draft Protocol on the Integrated Court, ibid.*, art. 2(3). The Rules of Court will set out the quorum for the Specialized Human and Peoples' Rights Judicial Division. See article 3.

⁸⁷*Draft Protocol on the Integrated Court, ibid.*, art. 3(1).

⁸⁸*Draft Protocol on the Integrated Court, ibid.*, arts. 5-6 & 8-10.

Integrated Court and the *Protocol on the African Human Rights Court* or the *Protocol of the AU Court* in favour of the provisions of the draft Protocol.

The *Draft Protocol on the Integrated Court* does not clarify the relationship between the *Protocol of the AU Court* and the *Protocol on the African Human Rights Court*. Generally, it amends both Protocols but gives more weight to the provisions of the *Protocol of the AU Court*. It seems that what the *Draft Protocol on the Integrated Court* has done is to incorporate some human rights requirements in the mandate of the AU Court and an optional provision stating that judges have some competence and experience in human rights issues. The *Draft Protocol on the Integrated Court* does not include any provisions on the jurisdiction of the integrated Court; neither does it make provision for the parties that may appear before it. This leaves one wondering whether all the parties that have access to the AU Court and the African Human Rights Court under the relevant Protocols will be accorded standing before the integrated Court.

Since the provisions of the *Draft Protocol on the Integrated Court* are far from comprehensive and it does not provide that the Protocols on the AU Court and the African Human Rights Court will be repealed upon the entry into force of the *Draft Protocol on the integrated Court*, it is not clear what the status of the Protocols of the African Human Rights Court and the AU Court will be and how their provisions will be reconciled after the *Draft Protocol on the Integrated Court* comes into force. From the provisions of the *Draft Protocol on the Integrated Court*, which merely seems to be an amendment to the Protocols of the African Human Rights and AU Courts, it seems that all three Protocols will operate simultaneously. However, this could lead to lack of clarity and resulting inefficiency in the operation of the integrated Court. A single re-written document is a better option, if the AU is really serious about forging ahead with the idea of an integrated Court within the Union.

3.0 Provisions of the African Charter

This section discusses the human rights guarantees in, duties of States and individuals under, and the general provisions of the *African Charter*. It analyzes the provisions of the *African Charter* and other related instruments on the parties that are subject to the *Charter's* enforcement procedures. Particular emphasis is placed on the applicability of the *African Charter* to transnational corporations in relation to human rights violations in Africa.

3.1 The Rights and Freedoms Protected by the Charter

The *African Charter* protects two main categories of rights – individual (human) rights and collective (peoples’) rights.⁸⁹ The *Charter* protects all three generations of human rights – civil and political rights, social, economic and cultural rights and people/collective rights.⁹⁰ While the *African Charter* does not include derogation clauses, it includes extensive and undefined claw back clauses.⁹¹ For example, article 10 protects the right to free association provided it is in accordance with the law. The rights to assembly and freedom of movement in articles 11 and 12 respectively, also include similar restrictions. In the same vein, by article 14, the right to property could be restricted based on public interest or in accordance with the provisions of appropriate laws. Generally, claw back clauses might serve a useful purpose in the society, but in the hands of dictators, these clauses might be hijacked for unscrupulous purposes. The African Commission does not seem to be in favour of these restrictive rights and has held that international human rights guarantees should not be undermined by domestic interpretations.⁹² The Commission asserted as follows:

“To allow national law to have precedent over the international law of the Charter would defeat the purpose of the rights and freedoms enshrined in the Charter. International human rights standards must always prevail over contradictory national law. Any limitation on the rights of the Charter must be in conformity with the provisions of the Charter. In contrast to other

⁸⁹It is outside the purview of this paper to do a detailed analysis of the rights guaranteed by the *African Charter*. For a discussion on the interpretation of the rights included in the *African Charter*, see Vincent O. Orlu Nmeielle, *The African Human Rights System: Its Laws, Practice, and Institutions* (Dordrecht: Martinus Nijhoff Publishers, 2001) at 84-158; Evelyn A. Ankumah, *The African Commission on Human and Peoples’ Rights: Practice and Procedures* (Dordrecht: Martinus Nijhoff Publishers, 1996) 111-151.

⁹⁰See *supra* note 26 for a discussion of generations of human rights.

⁹¹While derogations from treaty provisions permit the suspension of a State’s obligations arising from the treaty, claw back clauses tend to limit the rights granted in human rights documents.

⁹²See *Media Rights Agenda and Constitutional Rights Project v. Nigeria*, Communication Nos. 105/93, 128/94, 130/94 and 152/94, Twelfth Activity Report 1998-1999, Annex V reprinted in Rachel Murray & Malcolm Evans, *Documents of the African Commission on Human and Peoples’ Rights* (Oxford; Portland, Oregon: Hart Publishing, 2001) at 718. The Commission stated unequivocally as follows: “Governments should avoid restricting rights, and have special care with regard to those rights protected by constitutional or human rights law. No situation justifies wholesale violation of human rights. In fact, general restrictions on rights diminish public confidence in the rule of law and are often counter-productive.” See also *Civil Liberties Organization in Respect of the Nigerian Bar Association v. Nigeria*, Communication No. 101/93, Eighth Activity Report 1994-1995, Annex VI [*Media Rights Agenda v. Nigeria*] reprinted in Murray & Evans, *ibid.* at 394. In this Communication, the Commission found that the legislation in question had violated articles 6, 7, and 10 of the *African Charter*. It asserted that “freedom of association is enunciated as an individual right and is first and foremost a duty for the State to abstain from interfering with the free formation of associations. There must always be a general capacity for citizens to join, without State interference, in associations in order to attain various ends”.

international human rights instruments, the African Charter does not contain a derogation clause. Therefore limitations on the rights and freedoms enshrined in the Charter cannot be justified by emergencies or special circumstances.”⁹³

Even though the rights to a general satisfactory environment favourable to development, and the best attainable state of mental and physical health are not qualified rights under the *African Charter*, the Commission’s assertion above remains relevant to these rights, as it could curtail any restriction of these rights under domestic laws. According to the Commission, the only legitimate reasons for limiting the guaranteed rights and freedoms in the *African Charter* are due regard to the rights of others, collective security, morality and common interest.⁹⁴ Having regard to the Commission’s decisions, it seems that the Commission recognises the faults and limitations of the *African Charter* and seeks to remedy these in its decisions.

3.1.1 Individual Rights

Persons enjoy this category of rights and freedoms as individuals and not because of an affiliation with, or being a member of, a particular community or group. Individual rights under the *African Charter* are divided into civil and political rights; and economic, social and cultural rights. However, the Charter does not place greater emphasis on the protection of one category of rights above another. In this respect, the *African Charter* is similar to other international human rights instruments that do not place priority on one generation over another. For example, Part 1, paragraph 5 of the *Vienna Declaration and Programme of Action* states as follows: “All human rights are universal, indivisible and interdependent and interrelated. The international community must treat human rights globally in a fair and equal manner, on the same footing, and with the same emphasis. While the significance of national and regional particularities and various historical, cultural and religious backgrounds must be borne in mind, it is the duty of States, regardless of their political, economic and cultural systems, to promote and protect all human rights and fundamental freedoms.”⁹⁵

3.1.1.1 Civil and Political Rights

The *African Charter* protects several civil and political rights. These include such fundamental rights like the right not to be discriminated against, the right to equality and

⁹³*Media Rights Agenda v. Nigeria*, *ibid.* at 726.

⁹⁴*Ibid.*

⁹⁵*Vienna Declaration and Programme of Action* (adopted by the World Conference on Human Rights on 25 June 1993, A/CONF.157/23).

equal protection before the law, the right to life and integrity of the person and protection from arbitrary deprivation of one's rights, freedom from torture, cruel, inhuman or degrading punishment and treatment, and the right to inherent dignity and freedom from exploitation, slavery and slave trade and the right to personal liberty and security of the person.⁹⁶

Article 7 of the *Charter* protects the right to a fair trial/fair hearing and article 13 guarantees the right to participate in the government of one's country, the right of equal access to public service and the right of access to public property and services in strict equality of all persons before the law. Articles 8 through 12 also protect such freedoms as the freedom of conscience, worship and religion, the right to receive information and freedom of expression, freedom of association (provided the law is abided by), freedom of assembly, and freedom of movement, including the right to leave and enter one's country and the right to seek asylum when persecuted.

While the provisions of the *African Charter* on civil and political rights are comprehensive and are supposed to be *inter alia*, an avenue for protecting residents of African countries from dictatorial governments and regimes, this has not always been the case. At least in recent times, some African States have been able to maintain democratically elected governments without incursions from the military.

3.1.1.2 *Economic, Social and Cultural Rights*

This category of rights which are protected by articles 14-16 of the *African Charter* includes property rights, the right to equitable and satisfactory labour standards, and the right to the best attainable state of physical and mental health. Article 17(1) of the *Charter* provides for the right to education but does not specify either what this right entails, or the level of education that satisfies this provision. The *Charter* protects the freedom to take part in cultural activities in one's community, the family right to protection and assistance from the State and the right to special measures of protection for the aged and disabled.⁹⁷ Article 18(3) guarantees the freedom from discrimination of women and children.

3.1.2 *Peoples' Rights*

From an African context, it is understandable that the *Charter* protects communal rights, because of the divergent communities and cultures that make up the continent. However,

⁹⁶*African Charter*, *supra* note 19, arts. 2-6.

⁹⁷*African Charter*, *ibid.*, arts. 17(2) and 18.

the *Charter* does not define the term “peoples’ rights”.⁹⁸ Generally, these rights pertain to the rights of communities to self-determination and how their economies and cultures should develop. They are also known as solidarity rights. While the African Commission has not expressly defined the term “peoples”, it has stated that “people” is not the State or necessarily an ethnic minority, but has indicated that “people” could be a group less than the entire population of a State.⁹⁹ Richard Kiwanuka opines that “the Banjul Charter, by separating peoples from human rights, does not obfuscate but progressively develops international human rights law. It shows in clear terms that there is a conceptual difference between collective (peoples’) rights and individual (human) rights.”¹⁰⁰ However, in her discussion of the African Commission’s approach to people’s rights, Rachel Murray states that the Commission has treated some individual rights as having a ‘collective element’ and thus, as a peoples’ right.¹⁰¹ On this point, she concludes that given the varying definitions of the term “people”, it is arguable that the concept is more dynamic than static and changes with time.¹⁰² Notwithstanding the interpretation given to the meaning of the term “peoples”, the *African Charter*, which is the principal document in the world providing for these rights, approaches the two categories of rights – individual and peoples’ rights – in a balanced manner and does not seem to favour one above the other.

Peoples’ rights that the *African Charter* protects include the ubiquitous rights to self-determination,¹⁰³ and sovereignty over natural resources.¹⁰⁴ These two rights received tremendous support from colonial peoples during decolonization and, because a major focus of the OAU during its earlier years was the eradication of colonialism, it is not surprising that the *African Charter* protects these rights. However, self-determination and permanent sovereignty over natural resources have attained post-colonial significance

⁹⁸For a discussion of the “peoples” rights included in the *African Charter*, see T. Van Boven, “The Relationship between Peoples’ Rights and Human Rights in the African Charter” (1986) 7 H.R.L.J. 183; Rachel Murray, *The African Commission on Human and People’s Rights and International Law*, (Oxford, UK: Hart Publishing, 2000) 103.

⁹⁹Murray, *ibid.* at 105-106.

¹⁰⁰Richard N. Kiwanuka, “The Meaning of People in the African Charter on Human and Peoples’ Rights” (1988) 82 A.J.I.L. 80 at 86.

¹⁰¹Murray, *supra* note 98 at 109. For example, the freedom of expression or of association could involve not only one individual at a time, but a group that require these rights to get their voices heard on an issue. Also, the right to the best attainable state of mental and physical health could also involve a group, especially where violations of the right stem from natural resource production in a community or in areas proximate to the community in question.

¹⁰²Murray, *ibid.* at 109-110.

¹⁰³*African Charter*, *supra* note 19, art. 20.

¹⁰⁴*African Charter*, *ibid.*, art. 21.

and remain relevant at the present time.¹⁰⁵ Other guaranteed collective rights are the equality of peoples and freedom from domination by another group,¹⁰⁶ the right to economic, social and cultural development with due regard to freedom and identity and in the equal enjoyment of the common heritage of mankind, and the right to national and international peace and security.¹⁰⁷ Finally, article 24 of the *Charter* guarantees the right to a general satisfactory environment favourable to development, which having regard to the magnitude of environmental degradation occurring in African countries, it seems States have adhered to more in breach than in compliance.

3.2 The African Charter: General Provisions

The *African Charter*, purporting at the time of its introduction to be the major human rights instrument for the African continent, included general provisions on human rights protection in Africa, apart from the specific rights it seeks to protect. The *Charter* enjoins State parties to recognize the rights, freedoms and duties enshrined in the *Charter*. Further, in article 1, it encourages State parties to undertake to adopt legislative or other measures to give effect to the provisions of the *Charter*.

Unlike most international human rights documents, the *African Charter* provides for States and individuals' duties. State parties have duties to promote and ensure the respect of the rights and freedoms contained in the *Charter* through teaching, education and publication, to guarantee judicial independence, and to allow the establishment and improvement of appropriate national human rights institutions that promote and protect the *Charter* rights and freedoms.¹⁰⁸ *African Charter* duties relating to individuals include duties towards the family, society, the State and other legally recognized communities and the international community.¹⁰⁹ These individuals' duties are non justiciable as the *African Charter* can only be enforced against State parties. Notwithstanding their unenforceability, authors have argued that States could deny guaranteed rights based on these duties.¹¹⁰ Others argue that the duties included in the *African Charter* relating to

¹⁰⁵See generally, Nico Schrijver, *Sovereignty over Natural Resources: Balancing Rights and Duties* (Cambridge, UK: Cambridge University Press, 1997).

¹⁰⁶*African Charter*, *supra* note 19, art. 19.

¹⁰⁷*African Charter*, *ibid.*, arts. 22-23.

¹⁰⁸*African Charter*, *ibid.*, arts. 25-26.

¹⁰⁹*African Charter*, *ibid.*, arts. 27-29.

¹¹⁰See Ankumah, *supra* note 89 at 171.

individuals are not correlatives of any of the guaranteed rights and could not be used to limit any of the guaranteed rights.¹¹¹

The *African Charter* requires each State party to undertake to submit biannual reports on legislative or other measures taken, with a view to giving effect to the rights and freedoms recognized and guaranteed by the *Charter*.¹¹² By article 66, special protocols or agreements, may, if necessary, supplement the provisions of the *Charter*. Article 68 provides for the procedural requirements for amending the *African Charter*. State parties may make a written request to the Secretary General of the OAU (now AU) for the amendment of the *Charter*. Amendments require approval by a simple majority of the State parties.

3.3 Application of the African Charter

This section of the paper examines the extent of the applicability of the *African Charter*. It is of particular relevance when determining the liability of States and transnational corporations for environmental damage, violations of the right to health and other human rights abuses in Africa. The *African Charter* does not explicitly state the parties to whom it applies. However, a perusal of the provisions of the *Charter*, the *Guidelines for Submission of Communications to the Commission*, the *Commission's Rules of Procedure* and the *Protocol on the African Human Rights Court* sheds more light on the applicability of the *Charter*.

3.3.1 The Charter

This subsection discusses the provisions of the *African Charter* that impliedly relate to the parties to whom the regional African human rights protection document applies. Paragraph 1 of the preamble to the *Charter* refers only to member States of the OAU, who are parties to the *Charter*. By article 1, the *African Charter* enjoins OAU members, who are parties to the *Charter*, and no others, to recognize the rights, duties and freedoms

¹¹¹Nmehielle, *supra* note 89 at 163. He argues that the duties only reflect the communal African system, which was prevalent in the colonial era. For a discussion of Hohfeldian analysis of rights and duties see, Joseph William Singer, "The Legal Rights Debate in Analytical Jurisprudence from Bentham to Hohfeld", 1982 *Wis. L. Rev.* 975.

¹¹²*African Charter*, *supra* note 19, art. 62. The African Commission has adopted Guidelines on State reporting. See *Promotion, Protection and Restoration of Human Rights, Guidelines for National Periodic Reports*, ACHPR.Doc.AFR/COM/HRP.5(IV) (1988), reprinted in Murray & Evans, *supra* note 92 at 49; Amendment of the General Guidelines for the Preparation of Periodic Reports by States Parties, Twenty-third Ordinary Session, Banjul, The Gambia, 20-29 April 1998, DOC/OS/27 (XXIII), reprinted in Murray & Evans, *supra* note 92 at 80. See also, The African Commission on Human and Peoples' Rights, *State Reporting Procedure*, Information Sheet No. 4.

enshrined in the *Charter* and adopt legislative or other measures to give effect to them. However, this does not mean that only State parties need recognize the rights in the *Charter*, because individuals also have duties under the *Charter*. Nevertheless, nowhere in the *Charter* is it provided that the provisions of the *Charter* can be implemented against individuals, as all communications initiated before the Commission must be against a State party to the *Charter* and no other person.

Article 47 deals with interstate communications by a State party to the *African Charter* to another State party to the *Charter* that the former believes to have violated provisions of the *Charter*. By virtue of article 49, a State party to the *Charter*, which considers that another State party has violated provisions of the *Charter*, may address a communication to the African Commission to that effect. Article 55 provides for other communications, not initiated by State parties. Individuals, groups or NGOs address this category of communications to the Commission against State parties that have violated *Charter* provisions. But regardless of who initiates communications, according to the *Charter*, they can only be issued against State parties to the *Charter*.

3.3.2 Guidelines on Submission of Communications to the African Commission on Human and Peoples' Rights

In the introduction to the *Guidelines on Submission of Communications to the African Commission on Human and Peoples' Rights*,¹¹³ it is stated that persons, groups of persons or State parties alleging a violation, should first ascertain whether the State committing the violation has ratified the *Charter*. Where the complainant is a State, it must be a party to the *Charter* before initiating a complaint against another State party to the *Charter*.

The *Guidelines on Submission of Communications* also provide that anybody, either on his or her own behalf or on behalf of someone else, can submit a communication to the Commission denouncing a violation of human rights.¹¹⁴ Ordinary citizens, a group of individuals, NGOs, and State parties to the *African Charter* can all put in claims. The complainant or author of the communication need not be related to the victim of the abuse in any way, although the victim must be mentioned. Nowhere in the *Guidelines on Submission of Communications* is it mentioned that parties that have *locus standi* before the Commission can file complaints or communications against individuals or corporations.

¹¹³African Commission on Human and Peoples' Rights, Information Sheet No. 2 [*Guidelines on Submission of Communications*].

¹¹⁴See generally, Chidi Anselm Odinkalu, "The Individual Complaints Procedures of the African Commission on Human and Peoples' Rights: A Preliminary Assessment" (1998) 8 *Transnat'l L. & Contemp. Probs.* 359.

To buttress the point that the *Charter* provisions can only be implemented against State parties, one of the ten requirements in the *Guidelines on Submission of Communications* on how to submit a communication to the Commission is that the government accused of the violation must be stated and that government has to be a State party to the *African Charter*.

3.3.3 Rules of Procedure of the African Commission on Human and Peoples' Rights

The *Rules of Procedure of the African Commission on Human and Peoples' Rights* relate to the procedural requirements before the African Commission.¹¹⁵ They too, like the other documents examined above, confirm that the communications brought before the Commission are against State parties to the *African Charter* only. Rule 88 deals with the procedure on communications received under article 47 of the *Charter*. By this rule, a communication is to be submitted to the Secretary General, the Chairman of the Commission and to the State party involved. Rule 102 provides for the procedure by which the Commission becomes seized of a matter. The Commission does not receive communications against non-state parties to the *Charter*.¹¹⁶ Rule 102(2) provides that no communications concerning a State, which is not a party to the *Charter*, shall be received by the Commission or placed in a list under Rule 103 of the *Rules of Procedure of the African Commission*.¹¹⁷ At the conclusion of the hearing, the Secretary communicates the report of the Commission to the State parties involved.¹¹⁸

Parties before the African Commission have to comply with the rule of exhaustion of local remedies as provided for under the *African Charter* and international law.¹¹⁹ In article 50, the *Charter* provides that “the Commission can only deal with a matter submitted to it after making sure that all local remedies, if they exist, have been exhausted, unless it is obvious to the Commission that the procedure of achieving these remedies would be unduly prolonged.” This rule has been a constant reference point in cases before the Commission because parties usually appear before the Commission without giving the State involved the opportunity to redress the alleged wrong within the

¹¹⁵*Rules of Procedure of the African Commission on Human and Peoples' Rights*, Deliberated and Adopted by the African Commission on 6 October 1995 at its 18th Session Held in Praia, Cape Verde.

¹¹⁶*Rules of Procedure of the African Commission, ibid.*, rule 102(2).

¹¹⁷By Rule 103, the Secretary to the Commission prepares lists of communications submitted to the Commission and attaches a brief summary of the contents. The Secretary distributes these lists to members of the Commission and keeps a permanent register of these communications, which are made public.

¹¹⁸*Rules of Procedure of the African Commission, supra* note 115, rule 101(4).

¹¹⁹See generally, N.J. Udombana, “So Far, So Fair: The Local Remedies Rule in the Jurisprudence of the African Commission on Human and Peoples' Rights” (2000) 97 A.J.I.L. 1.

framework of its domestic legal system, on the basis that either the mechanisms for redress are non-existent, inadequate or that there would be no fair hearing.¹²⁰

On general procedural and evidentiary issues, article 46 of the *African Charter* provides that the Commission may resort to any appropriate method of investigation and may hear from the Secretary General of the OAU or any other person capable of enlightening it. The Commission, in the *Guidelines of Submission of Communications*, has also expressed the willingness to accept any form of evidence including documentary proof of human rights violations, for example, letters, legal documents, photos, autopsies and tape recordings.

Written documents that the Commission has accepted include the following:¹²¹ copies of legislative instruments in force,¹²² judicial decisions,¹²³ photocopied newspaper articles describing judicial decisions,¹²⁴ post mortem reports,¹²⁵ transcripts of judgments,¹²⁶ affidavits,¹²⁷ expert opinion,¹²⁸ opinions from NGOs,¹²⁹ and scholarly articles.¹³⁰

¹²⁰See for example, *Bamidele Aturu v. Nigeria*, African Commission on Human and Peoples' Rights, Communication No. 72/92 (February 21, 1992); *Civil Liberties Organization v. Nigeria*, African Commission on Human and Peoples' Rights Communication No. 45/90 (October 4, 1990).

¹²¹See generally Rachel Murray, "Evidence and Fact-Finding by the African Commission" in Evans & Murray *supra* note 7 at 100. She refers to the Commission's decisions cited in this section in her article.

¹²²*Bob Ngozi Njoku v. Egypt*, Communication No. 40/90, Eleventh Activity Report 1997-1998, Annex II reprinted in Murray & Evans, *supra* note 92 at 604.

¹²³*Ibid.* See also, *Amnesty International v. Zambia*, Communication No. 212/98, Twelfth Activity Report 1998-1999, Annex V, para. 28 reprinted in Murray & Evans, *supra* note 92 at 745.

¹²⁴*Njoku v. Egypt*, *supra* note 122.

¹²⁵*Sir Dawda K. Jawara v. The Gambia*, Communication Nos. 147/95 and 149/96, Thirteenth Activity Report 1999-2000, Annex V.

¹²⁶*Amnesty International v. Zambia*, *supra* note 123.

¹²⁷*Ibid.* at para. 28.

¹²⁸*Recontre Africaine pour la Defense de Droits de l'Homme v. Zambia*, Communication No. 71/92, Tenth Activity Report 1996-1997, Annex X, para. 16 reprinted in Murray & Evans, *supra* note 92 at 563. In this Communication, the complainants submitted a letter from an expert on refugee law at Oxford University.

¹²⁹*Media Rights Agenda v. Nigeria*, *supra* note 92 at 718. The Secretariat received a letter from Mr. Olisa Agbakoba on behalf of Interights titled "Preliminary Objections and Observations to the Mission of the Commission which visited Nigeria from 7-14 March 1997".

¹³⁰*Media Rights Agenda v. Nigeria*, *ibid.* at 718.

The *African Charter* requires that the Commission should not base its decisions exclusively on news disseminated through the mass media.¹³¹ Where information from the media is before the Commission, “the author must be able to investigate and ascertain the truth of the facts before requesting the Commission’s intervention” in order to establish a *prima facie* case for admissibility.¹³² In *Jawara v. The Gambia*¹³³ the Commission was of the opinion that the important issue was not whether the media was the source of the information but whether the information was correct.¹³⁴ As part of its fact-finding duties, the Commission has undertaken on-site missions to Togo, Senegal, Nigeria,¹³⁵ Sudan and Mauritania.¹³⁶

On evidence and burden of proof, the Commission’s document on *Communication Procedure* states as follows:

“For the purpose of seizure and admissibility, the author of the communication can confine himself to presenting a *prima facie* case and satisfying the conditions laid down in article 56 of the Charter. The author should make precise allegations of facts by attaching relevant documents, if possible, and avoid making allegations in general terms.

Likewise, a rejection of the allegations by a State is not enough. The state party must submit specific responses and evidence refuting the allegations.”¹³⁷

The *Communication Procedure* also states that a communication which does not illustrate a *prima facie* violation of the *African Charter* or some of the basic principles of the *OAU Charter*, such as “freedom, equality, justice and dignity”, will not be examined.”¹³⁸ The complainant therefore, has to establish a *prima facie* case before his communication is admissible. A blanket denial of responsibility by the government does not discharge the

¹³¹*African Charter*, *supra* note 19, art. 56(4).

¹³²African Commission on Human and Peoples’ Rights, Information Sheet No. 3, *Communication Procedure* at 9. This document is available at the African Commission’s website, <http://www.achpr.org/english/information_sheets/ACHPR%20inf.%20sheet%20no.3.doc>. See Murray, *supra* note 121 at 103. See generally on admissibility, Frans Viljoen, “Admissibility under the African Charter” in Evans & Murray, *supra* note 7 at 61. The rules on admissibility are included in article 56 of the *African Charter*. Before a communication is admissible, the conditions it must satisfy include provision of the author’s identity, compatibility with the *OAU Charter* and the *African Charter*, and exhaustion of local remedies. Also, it must not be written in disparaging or insulting language, and it must not be based exclusively on news disseminated by the media.

¹³³*Supra* note 125.

¹³⁴Murray, *supra* note 121 at 103.

¹³⁵In *The Ogoni Case*, *supra* note 26, the Commission conducted an on-site mission to Nigeria.

¹³⁶See Murray, *supra* note 121 at 107.

¹³⁷*Communication Procedure*, *supra* note 132 at 7.

¹³⁸*Ibid.* at 5.

subsequent burden of proof on the government.¹³⁹ In *Commission Nationale des Droits de l'Homme et des Libertés v. Chad*, the African Commission stated that, “in the absence of a substantive response by the government, in keeping with its practice, the Commission will take its decisions based on the events alleged by the complainants.”¹⁴⁰ Also where the government refuses to make any response, the facts are taken as stated by the complainants.¹⁴¹ Where the State contradicts the complainant, it bears the burden of proving its assertions.¹⁴²

On the required standard of proof for a communication, it seems the Commission adopts varying standards. The Commission has indicated a variety of standards of proof for allegations; they have included ‘valid and logical’,¹⁴³ ‘concrete’,¹⁴⁴ or ‘compelling’,¹⁴⁵ evidence. It is not clear if all that is needed is to provide a *prima facie* case in order for the Commission to find a case in a complainant’s favour.¹⁴⁶ The Commission has held that an incoherent and uncoordinated demand is inadmissible under the *African Charter*.¹⁴⁷ Rachel Murray states that “cases have been held inadmissible ... for failing to

¹³⁹Murray, *supra* note 121 at 112.

¹⁴⁰Communication No. 74/92, Ninth Activity Report 1995-1996, Annex VIII, para. 24. See Murray, *ibid.* at 112.

¹⁴¹This was the situation in *The Ogoni Case*, *supra* note 26.

¹⁴²Murray, *supra* note 121 at 120. The author states that the Commission has so held in some communications e.g., Communication 71/92, *Recontre Africaine pour la Defense de Droits de l'Homme v. Zambia*, Tenth Activity Report 1996-1997, Annex X, para. 27 reprinted in Murray & Evans, *supra* note 92 at 563.

¹⁴³*Peoples’ Democratic Organization for Independence and Socialism v. The Gambia*, Communication No. 44/90, Tenth Activity Report 1996-1997, Annex X, para. 16, reprinted in Murray & Evans, *ibid.* at 559.

¹⁴⁴*Katangese Peoples’ Congress v. Zaire*, Communication No. 75/92, Eighth Activity Report 1994-1995, Annex VI, reprinted in Murray & Evans, *ibid.* at 388.

¹⁴⁵*Amnesty International v. Zambia*, *supra* note 123, 745 at para. 37.

¹⁴⁶Murray, *supra* note 121 at 122-123.

¹⁴⁷*Tanko Bariga v. Nigeria*, Communication No. 57/91, Seventh Activity Report 1993-1994, Annex IX, reprinted in Murray & Evans, *supra* note 92 at 346.

state the violations suffered,¹⁴⁸ for being ‘vague’¹⁴⁹ ... and for failing to provide a certain degree of specificity’.¹⁵⁰

3.3.4 Protocol to the African Charter Regarding the Establishment of the African Court of Human and Peoples’ Rights

The *Protocol on the African Human Rights Court*, like the other documents considered above, applies to State parties to the *African Charter*. By article 3 of the Protocol, the jurisdiction of the court extends to all cases submitted to it concerning the interpretation and application of the *African Charter*, the *Protocol on the African Human Rights Court* and any other relevant human rights instrument ratified by the States concerned.

In accordance with article 5(1) of the *Protocol on the African Human Rights Court*, as regards the Court’s compulsory jurisdiction, only the Commission on Human and Peoples’ Rights, the State party which has lodged a complaint with the Commission, the State party against which a complaint has been lodged at the Commission, the State party whose citizen is a victim of a human rights violation and African Intergovernmental Organizations, are entitled to submit cases to the Court. State parties with interests in a case may also be permitted to join.¹⁵¹ The Court may entitle individuals or NGOs with observer status before the African Commission to institute cases before it directly.¹⁵² The exercise of this optional jurisdiction is, however, conditional upon the State against which the complaint has been lodged first recognizing the Court’s competence to receive the

¹⁴⁸*Hadjali Mohammad v. Algeria*, Communication No. 13/88, Seventh Activity Report 1993-1994, Annex IX, reprinted in Murray & Evans, *ibid.* at 340.

¹⁴⁹*Seyoum Ayele v. Togo*, Communication No. 35/89, Seventh Activity Report 1993-1994, Annex IX, reprinted in Murray & Evans, *ibid.* at 343.

¹⁵⁰*Ligue Camerounaise des Droits de l’Homme v. Cameroon*, Communication No. 65/92, Tenth Activity Report 1996-1997, Annex X, reprinted in Murray & Evans, *ibid.* at 562. See Murray, *supra* note 121 at 123.

¹⁵¹*Protocol on the African Human Rights Court*, *supra* note 55, art. 5(2).

¹⁵²*Protocol on the African Human Rights Court*, *ibid.*, art. 5(3). Article 45 of the *African Charter* requires the African Commission to cooperate with other African and international institutions concerned with the promotion and protection of human rights. By the end of the 28th Ordinary Session of the African Commission on Human and Peoples’ Rights, in November 2000, 247 NGOs had observer status before the Commission. See Motala, *supra* note 51 at 249.

case.¹⁵³ By this provision, the *Protocol on the African Human Rights Court* also applies only to States.

3.3.5 Conclusions Regarding the Applicability of the African Charter

Generally, based on the documents considered above, it is clear that human rights violations under the *African Charter* can be alleged only against State parties to the *Charter* and their institutions.¹⁵⁴ Access to the justice system, however, varies from the Commission to the African Human Rights Court as outlined above.

The African Commission's decision in *the Ogoni Case* is quite instructive on which parties may be liable for human rights violations under the *Charter*.¹⁵⁵ The communication alleged that the then military government of Nigeria had been directly involved in oil production through the State oil company, the Nigerian National Petroleum Company (NNPC), which is the majority shareholder in a consortium with Shell known as the Shell Petroleum Development Company (SPDC), and that these operations caused environmental degradation, and health problems resulting from the contamination of the environment among the Ogoni people. Throughout the decision, the African Commission referred to the NNPC/SPDC consortium, but found the Federal Republic of Nigeria in violation of some of the provisions of the *African Charter* and made recommendations to the Nigerian government.

To the extent that a transnational company is in a joint venture with a State oil company of a country, which is a party to the *African Charter*, it may be subject to the provisions of the *Charter*. But ultimately, as was done in the *Ogoni case*, the recommendations will be made to the government of the country found in violation of the rights protected in the *Charter*.

¹⁵³*Protocol on the African Human Rights Court, ibid.*, art. 34(6). Proponents of human rights in Africa have raised reasonable concerns on this provision because it is unlikely that States will grant access to individuals and NGOs to appear before the AU Court of Justice.

¹⁵⁴The Commission has so decided in many of the communications brought before it and dismissed communications directed against States that are non-parties to the *African Charter*. These decisions include: *Prince J.N. Makoge v. USA*, African Commission on Human and Peoples' Rights, Communication No. 5/88 (August 29, 1986); *Simon B. Ntaka v. Lesotho*, African Commission on Human and Peoples' Rights, Communication No. 33/89; *Wesley Parish v. Indonesia*, African Commission on Human and Peoples' Rights, Communication No. 38/90; *Union Nationale de Liberation de Cabinda v. Angola*, African Commission on Human and Peoples' Rights, Communication No. 24/89 (April 12, 1988).

¹⁵⁵*Supra* note 19.

Transnational companies may, however, be subject to the provisions of the *African Charter*, where their country of operation has enacted the *African Charter* as its domestic law, as Nigeria has done. But in this instance, the *African Charter* would not be applicable *qua Charter*, but as the domestic law of a State party to the *Charter*. Even if transnational companies cannot be directly liable under the *African Charter*, for human rights abuses, a State party that abides by a human rights redress judgment against it, may be able to compel transnational companies to take remedial measures through other means, including domestic regulation. For example, the State party may enact comprehensive legislation to curb environmental degradation and insist on its enforcement. Also, were the African Human Rights Court, for example, to hold State parties vicariously liable for the actions of their joint venture partners or other companies, which are not in joint ventures with the Government, but nevertheless operate within its territory, this might provide an incentive for States to be more conscious of environmental, and other forms of regulation.

4.0 Human Rights and the Environment and Health in Africa

4.1 Introduction

The African continent is blessed with large deposits of natural resources. Presently, there is no African country with an industrialized/developed economy. This contributes greatly to the continent's reliance on extractive industries for economic growth and development. By their very nature, the development of natural resources involve environmental harm at varying levels, and without proper environmental and social impact assessments with adequate mitigation measures, natural resource extraction would have a lot of negative impacts. The negative impact syndrome has been the norm, rather than the exception in Africa. Because natural resource extraction provides the mainstay of most of the economies, all other impacts are treated as less important and economic development trumps environmental and health considerations. Apart from natural resource extraction, there are also many other sources of environmental pollution in Africa, like in the rest of the world. Usually, the environment-degrading substances are also harmful to human and animal health.

More often than not, there are no comprehensive statutes and regulations in place to manage the externalities generated by natural resource production and even where these legal instruments exist, Governments and regulators lack the political will to enforce them. As a result of the unwillingness or inability to appropriately weigh economic development against other impacts of natural resource production, communities and NGOs have turned to human rights guarantees under the *African Charter* for solutions. However, at this stage, because the decisions of the African Commission are merely

recommensatory, it is very important that the AU establishes the African Human Rights Court and ensure that the necessary mechanisms for enforcement are in place.

In this section, the guarantees for protecting the right to a general satisfactory environment favourable to development and the right to physical and mental health under the *African Charter* and other relevant African regional instruments are discussed. This part of the paper also provides a comprehensive summary of the African Commission's decision and analysis in the widely acclaimed *Ogoni Case*.¹⁵⁶

4.1.1 *The African Charter*

As stated earlier, the *African Charter* was the first international human rights document to incorporate the right to a healthy environment in its provisions. It also includes provisions on the right to health and the duties of State parties regarding the protection of these rights, which are particularly relevant in the resource producing regions of the continent.

Article 24 specifically provides that "all peoples shall have the right to a general satisfactory environment favorable to their development." Several authors have tried to interpret the right to a general satisfactory environment and some have stated that it is "vague and subject to divergent interpretations".¹⁵⁷ It is difficult to classify the right to a general satisfactory environment under any one category of human rights because it spans civil and political rights, and economic, social and cultural rights.¹⁵⁸ While it is an independent right on its own, it also relates closely to the right to life and several other rights. It involves an individual right for reparation for harm suffered and a collective duty to refrain from acts that degrade environmental quality.¹⁵⁹ Under the *African Charter*, States have a duty to protect the rights of individuals to a general satisfactory environment and to adopt measures that ensure the promotion of this right.

Article 16 of the *African Charter* provides for the right to health. It states as follows:

"(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."

¹⁵⁶*Supra* note 26.

¹⁵⁷Ankumah, *supra* note 89 at 168.

¹⁵⁸Nmehielle, *supra* note 89 at 156.

¹⁵⁹*Ibid.*

In *Media Rights Agenda v. Nigeria*¹⁶⁰ the African Commission found that a denial of access to medical care when the health of an accused person in detention was deteriorating was a violation of article 16 of the *African Charter*.¹⁶¹

Other rights related to environmental and health rights include the article 17(2) protected individuals' right to take part in the cultural lives of their communities. Article 21(1) guarantees the right to sovereignty over wealth and natural resources, which is to be exercised in the exclusive interest of the people.¹⁶² It seems that the right is absolute because the *Charter* states that a people shall in no case be deprived of this right. The *Charter* also protects the corollary to the right to sovereignty over natural resources – the right to adequate compensation in the event of damage to a people's property.

Pursuant to article 22(1), “all peoples shall have the right to their economic, social and cultural development with due regard to their freedom and identity and in [sic, probably, “to” was intended] the equal enjoyment of the common heritage of mankind.” Generally, the *African Charter* provisions above, are those which protect the rights that might be violated as a result of natural resource exploitation.

4.1.2 Guidelines for Submission of Communications to the Commission

Under the *Guidelines for Submission of Communications*, complainants may submit communications to the African Commission for consideration. In certain instances, a communication might result in the invocation of provisional measures urging or precluding the State in question from taking actions that might cause “irreparable damage” until the case is heard, where the communication is regarded as an emergency communication. A communication is deemed an emergency communication if the victim's life, personal integrity or health is in imminent danger. By virtue of these Guidelines, environmental degradation might not be considered an emergency if it does not constitute an immediate threat to human life.

¹⁶⁰*Supra* note 92.

¹⁶¹See also *Union Inter-Africaines des Droits de l'Homme v. Zaïre*, Communication No. 100/93, where the Commission found that the government's failure to provide safe drinking water, access to medicines and electricity constitutes a violation of article 16 of the *African Charter*. In this instance, the Zairean government refused to reply to the communication and the Commission based its decision on the allegations in the communication.

¹⁶²In articles 21(1)-(5), the *African Charter* provides for the general principles inherent in the doctrine of permanent sovereignty over natural resources including the eradication of foreign exploitation. See generally, Schrijver, *supra* note 105.

4.1.3 *The Grand Bay Declaration*

The OAU's first Ministerial Conference on Human Rights adopted the Grand Bay (Mauritius) Declaration and Plan of Action 1999, on 16 April 1999.¹⁶³ In article 8, the Declaration recognized that the causes of human rights violation in Africa include *inter alia*, poverty, disease, social dislocations and environmental degradation. Apart from the provision on environmental protection, the Declaration generally sought to reemphasize the indispensable nature of human rights protection in Africa.

4.1.4 *The Kigali Declaration*

The first AU Ministerial Conference adopted the Kigali Declaration on 8 May 2003, in Kigali, Rwanda.¹⁶⁴ In article 4, it urged Member States and regional institutions to accord the same importance to economic, social and cultural rights as to civil and political rights, and apply, at all levels, a rights-based approach to policy, programme planning, implementation and evaluation. Even though, in principle, the right to best attainable state of physical and mental health and a general satisfactory environment favourable to development may not be categorized as civil and political rights (first generation rights), in the spirit of the *African Charter* and the Vienna Declaration and Programme of Action, these rights assume the same status as the so-called first generation rights.

4.1.5 *Decision of the Commission: The Social and Economic Rights Action Centre and the Center for Economic and Social Rights v. Nigeria*¹⁶⁵

The two complainant NGOs – Social and Economic Rights Action Center and the Center for Economic and Social Rights – filed the communication in this case, on 14 March 1996. Between a failure to respond from the military government of Nigeria at the time, communicating with the present Nigerian government and the Commission's on-site visit,¹⁶⁶ it took the Commission five years to release its decision.¹⁶⁷ The Commission

¹⁶³CONF/HRA/DECL (I). Rachel Murray notes that this Declaration represents a shift in the OAU's human rights policy. At this stage, human rights was no longer regarded as a policy area restricted to the African Commission in Banjul but worthy of the attention of the OAU as the regional political organization. See Murray, *supra* note 1 at 27.

¹⁶⁴MIN/CONF/HRA/Decl.1 (I).

¹⁶⁵*The Ogoni Case*, *supra* note 26.

¹⁶⁶The Commission visited Nigeria in March 1997.

forwarded a copy of the communication to the Nigerian government on 13 August 1996. Until the nation returned to civil rule in 1999, the Nigerian government refused to respond to the Communication. During the Commission's session in November 2000, the democratically elected Nigerian government issued a Note Verbale¹⁶⁸ to the Commission, admitting the alleged human rights violations and stated that it was adopting remedial measures.¹⁶⁹

One good effect of the delay is that by 2002, when the decision was released, Nigeria had a democratically elected government that was willing to cooperate with the Commission to redress the human right violations.¹⁷⁰ Although this section of the paper focuses on the right to a general satisfactory environment favourable to development and the right to the best attainable state of mental and physical health, a cursory examination is also given to the decision of the Commission on other rights, including the right to sovereignty over natural resources and the rights to food and shelter.

Summary of Facts:

The communication alleged that the military government of Nigeria through the State oil company, the Nigerian National Petroleum Company (NNPC) – the majority shareholder in the Shell Petroleum Development Corporation (SPDC) consortium – carried out oil production operations that caused environmental degradations of Ogoni land, and health problems for the people. According to the communication's allegations, SPDC exploited oil reserves in Ogoniland without regard for the health or environment of the local communities. It disposed toxic wastes into the environment and local waterways in violation of applicable international environmental standards. SPDC neglected and/or failed to maintain its facilities causing several avoidable oil spills within the proximity of villages. The resulting atmospheric, water and soil contamination had various short and long-term health impacts, including skin infections, gastrointestinal and respiratory ailments, increased risk of cancers, and neurological and reproductive problems.

The communication alleged that the Nigerian Government condoned and facilitated these violations by placing legal and military powers at the disposal of the oil companies. Nigerian security forces carried out multiple attacks on the communities in response to the peoples' non-violent campaign to oppose the destruction of their communities. The

¹⁶⁷See Dinah Shelton, "Decision Regarding Communication 155/96 (*Social and Economic Rights Action Center/Center for Economic and Social Rights v. Nigeria*) Case No. ACHPR/COMM/A044/1" (2002) 96 A.J.I.L. 937 at 941.

¹⁶⁸A note verbale represents an unsigned but formal diplomatic document or memorandum.

¹⁶⁹See the Note Verbale, Reference No. 127/2000 quoted in *The Ogoni Case*, *supra* note 26 at para. 42.

¹⁷⁰However, cooperation is one thing and significant change another. Violations of the right to a clean environment and health have not completely stopped in Nigeria. Oil spills still occur occasionally without immediate clean up and gas flaring occurs 24 hours a day, 7 days a week.

attacks left several people homeless and destroyed their food sources. The Government did not monitor oil companies' operations, neither did it require or enforce standard oil and gas industry safety measures. It did not require any environmental impact assessments from the companies and prevented other scientists access to the area to carry out the necessary studies. The government withheld vital information from the communities and there were no provisions for consultation or public participation in the decision-making affecting the communities, no matter how directly affected landowners or others were. The communication alleged violations of articles 2, 4, 14, 16, 18, 21, and 24 of the *African Charter*.¹⁷¹

On the preliminary issue of admissibility, the Commission determined that the communication met the requirements of article 56, which governs admissibility, including exhaustion of local remedies. The Commission noted that while the law of torts might provide a remedy for some people, many of the substantive rights infringed in this case do not exist under domestic law and as such cannot be remedied, and class actions are also not well developed under Nigerian law. The Nigerian Government also had sufficient opportunity to remedy the human rights violations, given the level of international attention that the case had garnered. Also, because the *African Charter* protects collective human rights, the Commission does not require each individual to appear before a domestic court where there is a large number of victims. The Commission considers domestic remedies that might theoretically exist as unavailable where there are serious alleged human rights violations and where a large number of people are involved.

Merits:

On the merits of the communication, the Commission found as follows. Civil and political rights and social and economic rights generate four levels of duties for a State – the duties to respect, protect, promote and fulfill the rights in question. The obligations arising from these duties apply to all rights and entail both positive and negative duties. This includes at a primary level, that the government refrains from interfering with the enjoyment of fundamental rights and on a secondary level, that it ensures that others also respect and protect those rights by enacting appropriate legislation and providing effective remedies. The obligation of States under the *African Charter* is to provide machinery for the actual realization of the rights protected by the *Charter*, for example, the direct provision of food through food aid or social security.

This communication provided the opportunity to treat extensive violations of the rights enshrined in the *African Charter* as indivisible and interdependent. The Commission acknowledged the two NGOs that brought the communication and deplored the failure of the Nigerian government to submit any responses to the allegations of

¹⁷¹See Appendix 1: The *African Charter*.

human rights violations. As a result of the refusal of the Nigerian Government to participate, the Commission proceeded, based on the complainants' uncontested allegations that the Nigerian government violated the right to health and the right to a general satisfactory environment favourable to development, as recognized under articles 16 and 24 of the *African Charter* respectively. The Commission recognized the relationship between the rights to health and a clean environment and economic and social rights because they affect the quality of life and safety of individuals. It found that the right to a general satisfactory environment imposes clear obligations on government to take reasonable measures to prevent pollution and ecological degradation, to promote conservation and to ensure ecologically sustainable development and use of natural resources.

At their most basic level, the rights to a general satisfactory environment favourable to development and the best attainable state of physical and mental health prohibit governments from directly threatening the citizens' health and environmental well being. However, on a practical level, compliance with articles 16 and 24 of the *African Charter* requires more positive attitudes and actions from government. These include requiring environmental and social impact assessments prior to industrial developments, permitting independent scientific monitoring of the impacts of ongoing projects on the environment, undertaking effective monitoring and providing information for public participation in decision-making that affects communities.

The Commission concluded that the Nigerian government had violated the provisions of articles 16 and 24 of the *African Charter*. Through the Government's involvement in the NNPC, it directly participated in contaminating the air, water and soil and harmed the health of the Ogoni people. The Government did not take steps to protect the people from harms done by SPDC but actively facilitated and compounded the damage through its security forces. It also refused to permit studies of health and environmental risks resulting from the oil operations; neither did the government provide such studies.

The Complaints also alleged that the Nigerian government had violated article 21 of the *African Charter*, which protects sovereignty over natural resources. The Commission traced the origin of this provision on sovereignty over natural resources to colonialism and concluded that the acts of the Nigerian Government and the SPDC consortium, coupled with the apparent lack of public participation in oil production decision-making, amounted to a breach.

Although the *African Charter* does not expressly provide for the right to shelter or housing, the Commission inferred this from the right to enjoy the best attainable state of mental and physical health, and provisions of articles 14 and 18 of the *Charter*, which provide for the right to property and the protection of the family unit as a basis of society by the State, respectively. When read together, these rights protect the family from destruction of their shelter because when shelter is destroyed, the rights to health, property and family protection are affected. The State's obligation in this regard requires

it or its agents to refrain from any acts, practices, policies and legal measures that would amount to a breach of this right and to protect against violations by non-state actors. The Commission further opined that the right to shelter goes beyond having a roof over one's head. It includes an individual's "right to be left alone and to live in peace", regardless of whether he or she has a roof or not. The Nigerian Government breached this right, which the Commission referred to as "massive violations of the right to shelter" and the "right to protection against forced evictions" by destroying the homes of the Ogoni people and obstructing, harassing, beating and even shooting and killing some who attempted to rebuild their homes, through its security agents.

Like the right to shelter, the communication argued that the right to food is implicit in the *African Charter* provisions on the right to life (article 4), the right to health, and the right to economic, social and cultural development (article 22). The Commission found that at a minimum, the right to food requires that the Nigerian Government should refrain from destroying or contaminating food sources, or undermining peoples' efforts to feed themselves, and should prevent private parties from doing so. In this instance, the Government breached these minimum duties by destroying food sources through its security agents, allowing oil companies to destroy food sources and preventing people from trying to feed themselves.

The communication alleged the violation of the inviolability of human beings and the right to life and integrity of the person, as protected in article 4 of the *African Charter*. The Commission conducted a mission to Nigeria from 7-14 March 1997, witnessed the deplorable situation and environmental degradation in Ogoni land and went on to hold that by virtue of the widespread human rights violations in Nigeria, the Government had breached the right to life.

In this communication, the African Commission tried to make it clear that despite the uniqueness of the African situation, all the rights in the *African Charter* are enforceable and effective. It indicated that the Nigerian Government fell way short of the minimum expectations of the *Charter*. Noting the peculiarities of the African continent, the Commission expressly stated that its motive was not to fault governments working under labourious conditions to improve the lives of their people. In the Commission's view, the attitude of the Nigerian Government towards the Ogoni people at the time needed reconsideration. It noted that the presence of transnational corporations might augur well for the nation's development, if the State and the corporations are mindful of the rights and common good of individuals and communities. It acknowledged the positive clarification that the present Nigerian, democratically elected, government provided concerning the matter by a Note Verbale (Note 127/2000).

In conclusion, the Commission found the Federal Republic of Nigeria in violation of articles 2, 4, 14, 16, 18, 21 and 24 of the *African Charter*. It appealed to the Nigerian Government to ensure protection of the environment, health and livelihood of the people of Ogoniland through several means. First, it requested that all attacks by security agents

on the people and leaders of the Ogoni communities be stopped and that citizens and independent investigators be granted free access to the territory. Second, it stated that the Nigerian Government should conduct investigations into the human rights violations identified in the communication and to prosecute officials of the security forces and the NNPC involved in the violations. Third, the Commission requested that the government ensures that victims of the human rights violations receive adequate compensation, relief and resettlement assistance and undertake comprehensive clean up of damaged areas. Fourth, the Commission adopted a futuristic approach and required that subsequent oil development be preceded by environmental and social impact assessments. Fifth, it required that the Nigerian Government provides the affected communities with information on health and environmental risks and meaningful access to decision-making bodies.

The African Commission urged the Nigerian government to keep the African Commission informed of the activities of the Federal Ministry of Environment, the Niger Delta Development Commission (NDDC), which is a body created by legislation to address environmental and social related problems in the Niger Delta, and other oil producing areas of Nigeria, and the Judicial Commission of Inquiry, which was inaugurated to investigate human rights violations.

Some authors have lauded the efforts of the African Commission in this decision. For example, Dinah Shelton notes as follows:

“The case is a landmark ... in the Commission’s articulation of the duties of governments in Africa to monitor and control the activities of multinational corporations. The Commission took other innovative steps in inferring rights not expressly included in the Charter, and also in further liberalizing the requirement that local remedies be exhausted before a case can be heard by an international tribunal. The Commission took pains to support its analysis and findings through numerous references to the decisions of other global and regional human rights bodies. The result is a sweeping decision on the duties of African states to ensure respect for economic, social and cultural rights.”¹⁷²

While the African Commission’s decision in this case is commendable, it does not seem that it achieved much of its intended purpose. Although the denial of the right to food and shelter no longer continue on the scale at which they occurred at the time the NGOs filed the communication with the African Commission, environmental degradation and the violation of the right to health still continue in Nigeria at an alarming magnitude as a result of incessant gas flaring and frequent oil spills.

¹⁷²Shelton, *supra* note 167 at 941.

5.0 Mechanisms for Enforcement

As reiterated throughout this paper, the problem of Africa's human rights system is not the lack of human rights guarantees, rather it stems from ineffective enforcement mechanisms. States sometimes delay the ratification of human rights enforcement instruments, the AU and its predecessor, the OAU, have been known to prolong negotiations of the instruments to establish these mechanisms and States generally do not carry out their monitoring and enforcement duties under the *African Charter*.

Presently, the African Commission is the only African supranational entity that provides some form of enforcement of the *African Charter's* provisions, albeit its opinions are non-binding. The African Human Rights Court has not been established and, as for the integrated Court, the Protocol to establish it has not been finalized as it is still in draft form. As has become the norm with many international agreements, it might take African countries another half decade to ratify the provisions of the *Draft Protocol on the Integrated Court*.

This section sets out the enforcement mechanisms available in Africa to remedy human rights violations. It includes the provisions of the African Commission and the yet-to-be established African Human Rights Court. It does not discuss the enforcement mechanisms under the provisions of the *Draft Protocol on the Integrated Court* as the *Protocol* is too sketchy and does not include such provisions.

5.1 The African Commission on Human and Peoples' Rights

Article 30 of the *African Charter* establishes the African Commission to promote human and peoples' rights and ensure their protection in Africa. The *Charter* lays out the mandate of the Commission in article 45 as follows:

“The functions of the Commission shall be:

1. To promote Human and Peoples' Rights and in particular:

(a) To collect documents, undertake studies and researches on African problems in the field of human and peoples' rights, organize seminars, symposia and conferences, disseminate information, encourage national and local institutions concerned with human and peoples' rights, and should the case arise, give its views or make recommendations to Governments. (Emphasis added)

(b) To formulate and lay down principles and rules aimed at solving legal problems relating to human and peoples' rights and fundamental freedoms upon which African Governments may base their legislation.

(c) To co-operate with other African and international institutions concerned with the protection and promotion of human and peoples' rights.

2. Ensure the protection of human and peoples' rights under conditions laid down by the present Charter.

3. Interpret the provisions of the present Charter at the request of a State party, an institution of the OAU or an African Organization recognized by the OAU.

4. Perform any other tasks, which may be entrusted to it by the Assembly of Heads of State and Government.”

Article 58 of the *African Charter*, empowers the Commission to draw the attention of the OAU/AU's principal organ to the existence of serious or massive violations of the Charter.¹⁷³ The AU Assembly, upon receiving such an observation from the Commission, may request the Commission to carry out an in-depth study of the violations and submit a report on its findings and recommendations.¹⁷⁴

Article 62 of the *African Charter* also requires State parties to submit reports on legislative and other measures taken to promote and protect *Charter* guaranteed human rights within their jurisdictions. However, many of the States fail to comply with this provision¹⁷⁵ as they do with many other international obligations.

The African Commission's *Communication Procedure* reiterates that the Commission does not have a fixed procedure for supervising the implementation of its recommendations. However, the Secretariat sends letters of reminder to States found in violation of human rights guaranteed or implied by the *Charter*.¹⁷⁶ It sends the first letters immediately upon the OAU/AU Assembly's adoption of the Commission's Annual Activity Report. The Secretariat sends letters of reminder as often as necessary. The Commission's Information Sheet acknowledges that its major problem is the lack of an

¹⁷³Article 58(3) of the *African Charter* deals with the Commission's report on emergency situations. The Commission has reported several article 58(1) situations to the Assembly of Heads of State and Government. See for example, *Constitutional Rights Project and Civil Liberties Organization v. Nigeria*, Communication 102/93, Twelfth Annual Activity Report of the African Commission on Human and Peoples' Rights, Annex v, AHG/215 (XXXV). According to Rachel Murray, the Assembly has made no responses to these submissions mostly because of procedural lapses emanating from the Commission itself. See Murray, *supra* note 1 at 60.

¹⁷⁴*African Charter*, *supra* note 19, art. 58(2).

¹⁷⁵Murray, *supra* note 1 at 60.

¹⁷⁶The Secretariat sends these letters in the spirit of article 1 of the *African Charter* that calls on all States to recognize the rights, duties and freedoms enshrined in the *Charter* and to implement them through legislative and other measures.

established enforcement mechanism. According to the Information Sheet, a lot depends on the “good will of the States.”¹⁷⁷

The Commission’s range of action includes requesting provisional measures, amicable settlement and recommendations or decisions.¹⁷⁸ Each of them is discussed below.

5.1.1 Request for Provisional Measures

The African Commission requests provisional or interim measures when a State is required to take immediate steps to stop or prevent a human rights violation.¹⁷⁹ Provisional measures are taken to avoid irreparable damage being caused to the victim of the alleged violation pending the final determination of a matter before the Commission. A State can be requested to take provisional measures to prevent a human rights violation, for example, to stay the execution of a death penalty pending the determination of the case before the Commission. In the context of oil and gas development, the Commission could require shutting in of wells, where the operator is not complying with the required regulations and polluting the environment as a result. However, on the face of it, and from past activities in Africa, the likelihood of compliance with a provisional measure of this nature is low.

5.1.2 Amicable Settlement

The Commission could try to facilitate a settlement between the complainant and the alleged State violator, by placing its good offices at the disposal of the interested parties. The goal is to reach an amicable solution based on the respect for human rights and fundamental liberties as recognized by the *Charter*.¹⁸⁰ Friendly settlements are, however, only possible where both parties to the matter consent to the proceeding. It is not unusual for human rights commissions to exercise such meditative function. For example, section 21 of the Alberta *Human Rights, Citizenship and Multiculturalism Act*¹⁸¹ requires the director of the Alberta Human Rights and Citizenship Commission to attempt to effect the settlement of a complaint by means of conciliation or through the appointment of an

¹⁷⁷*Communication Procedure, supra* note 132 at 9.

¹⁷⁸See the African Commission on Human and Peoples’ Rights, online: <http://www.frontlinedefenders.org/manual/en/afc_m.htm>.

¹⁷⁹*Rules of Procedure of the African Commission, supra* note 115, rule 111.

¹⁸⁰*Rules of Procedure of the African Commission, ibid.*, rule 98.

¹⁸¹R.S.A. 2000, c. H-14.

investigator to investigate the complaint. In Africa, oil and gas disputes can be resolved in this manner, where the parties consent to amicable settlement.

5.1.3 Recommendation (or Decision) of the Commission

After examining a communication, the Commission reaches a final decision.¹⁸² If the Commission finds that a human rights violation under the *African Charter* has occurred, it lays out the steps it expects the offending State to take to remedy the situation. The Commission's observations are communicated to the Assembly through the Secretary General and to the State party concerned.¹⁸³ The recommendations of the Commission are not binding; therefore, States are not under any obligation to comply with them.¹⁸⁴ Pursuant to article 59 of the *Charter*, the Assembly of Heads of State and Government decides the time of the publication of the Commission's report and until so decided, all enforcement mechanisms remain confidential. Thus, and as noted earlier, the Commission's decisions are subject to the political whims of the Assembly, which includes the human rights violating governments.

In general, as noted, the Commission's final recommendations are advisory only. However, where a final recommendation of the Commission is included in the Commission's Annual Activity Report, and the latter is adopted by the Assembly, the recommendation becomes legally binding on the State concerned.¹⁸⁵ This may allow a complainant to seek enforcement of the decision in a domestic Court. For example, pursuant to the African Commission's recommendations in *Media Rights Agenda v. Nigeria*,¹⁸⁶ the NGO that instituted the communication – Media Rights Agenda¹⁸⁷ – filed a suit at the Federal High Court Lagos, Nigeria, to compel the Federal Government of Nigeria to repeal the *Newspapers Decree* No. 43 of 1993 in compliance with the Commission's decision.¹⁸⁸ The African Commission had found that the Decree violated

¹⁸²*Rules of Procedure of the African Commission*, *supra* note 115, rule 120. The Commission's final decisions are known as recommendations. See the *Communication Procedure*, *supra* note 132 at 8.

¹⁸³*Rules of Procedure of the African Commission*, *ibid.*, rule 12(2).

¹⁸⁴The *Communication Procedure*, *supra* note 132 states that “the mandate of the Commission is quasi-judicial and as such, its final recommendations are not in themselves legally binding on the States concerned.”

¹⁸⁵The *Communication Procedure*, *supra* note 132 at 9.

¹⁸⁶*Supra* note 92.

¹⁸⁷Media Rights Agenda is an independent NGO established in August 1993, to promote and protect press freedom and freedom of expression in Nigeria. It has observer status before the African Commission.

¹⁸⁸*The Matter of Media Rights Agenda v. The Attorney General of the Federation and the Provisional Ruling Council*, Suit No. FHC/L/CS/201/99. See also, “MRA Seeks Enforcement of African Commission's Verdict on Decree 43” online: Media Rights Agenda <http://mediarightsagenda.org/pressmarch_99_03.html>.

the provisions of the *African Charter*, but at the time Media Rights Agenda filed the domestic suit, almost six months after the decision, the Nigerian Government had not taken any steps to repeal or modify the Decree. Subsequently, Media Rights Agenda filed a motion to discontinue the suit following the repeal of the *Newspapers Decree* by section 1 of the *Newspapers (Repeal) Decree* No. 17 of 1999.¹⁸⁹

One could argue that because parties which initiate communications before the African Commission need to exhaust all local remedies before the Commission can be seized of a matter, going before the same Courts that refused to provide a remedy for the human rights violations, for the enforcement of the Commission's decisions, is a waste of time. While this might be right in some instances, it might not be so where the violating State's Courts could not provide a remedy, not because they were unwilling to, but because such remedies simply do not exist under its laws. For example, it is possible that a States' laws do not recognize the right to a general satisfactory environment favourable to development. However, hurdles might include the fact that the African Commission's decisions are by themselves not binding decisions but mere recommendations, and there is an absence of reciprocity in enforcing judgments. The foreign judgment enforcement laws of many States might not recognize such non-binding recommendations.¹⁹⁰ However, going by the provisions of the Communication Procedure discussed above, African Commission recommendations assume a binding character where they are included in an Annual Activity Report adopted by the Assembly. The case might be clearer, if judicial decisions like those of the African Human Rights Court are in issue and reciprocity in enforcement is not required under the applicable domestic law.

5.2 The African Court on Human and Peoples' Rights

The *Protocol on the African Human Rights Court*¹⁹¹ has come into force. By virtue of articles 3 and 4 of the Protocol, the Court is empowered to act both in an adjudicatory and advisory capacity. Generally, the advisory opinions are not binding. Article 3 states that "the jurisdiction of the Court shall extend to all cases and disputes submitted to it concerning the interpretation and application of the *Charter*, this Protocol and any other relevant Human Rights instrument ratified by the States concerned. In the event of a dispute as to whether the Court has jurisdiction, the Court shall decide."

The Commission had found the *Newspapers Decree* to be in violation of the rights to receive and disseminate information under article 9 of the *African Charter* and the right to protection against retroactive legislation guaranteed under article 7 of the same *Charter*.

¹⁸⁹This information was gathered from personal communication with staff of Media Rights Agenda.

¹⁹⁰For an example of the foreign judgments enforcement law of a State, see the Nigerian *Foreign Judgments (Reciprocal Enforcement) Act*, L.F.N. 1990 Cap. 152.

¹⁹¹*Supra* note 55. See generally, Frans Viljoen, "A Human Rights Court for Africa, and Africans" (2004) 30 Brooklyn J. Int'l L. 1.

Article 5 provides for ‘persons’ that have access to the African Human Rights Court. They are the Commission; the State party which lodged a complaint to the Commission; the State party against which the complaint has been lodged to the Commission; the State party whose citizen is a victim of human rights violation; African Intergovernmental Organizations and a State party intervener that has been permitted by the Court to join. The Court may entitle relevant NGOs with observer status before the Commission, and individuals, to institute cases directly before it in accordance with article 5(3) of the *Protocol on the African Human Rights Court*. By article 34(6), the Court shall not receive any petition under article 5(3) involving a State party, which has not made such a declaration at the time of ratification of the Protocol or at any time thereafter.

It is apparent from the provisions of article 34(6) that the drafters of the *Protocol on the African Human Rights Court* are pro-State and this might constitute a major weakness of the African Human Rights Court. It is rather unlikely that most African States will grant the necessary article 34(6) declaration to enable individuals and NGOs have *locus standi* before the Court.¹⁹² Given the fact that individuals are the primary victims of human rights violations and NGOs are usually their representatives before supranational organizations, the *locus standi* provisions in the *Protocol on the African Human Rights Court* are fundamentally flawed. These provisions are a striking departure from the rules applicable to the African Commission on parties with standing before the Commission. However, individuals might eventually get access to the Court where the Commission exercises its right of standing under article 5 of the *Protocol* on a communication before it, which has been instituted by individuals.

The *Protocol on the African Human Rights Court* requires the African Human Rights Court to apply the provisions of the *African Charter* and any other relevant human rights instruments ratified by the States concerned.¹⁹³ On the relationship between the Court and the Commission, article 2 of the Protocol simply provides that, the Court shall, bearing in mind the provisions of the Protocol, complement the protective mandate of the Commission conferred upon it by the *Charter*.

Where the African Human Rights Court finds that there has been violation of human or peoples’ rights, it shall make appropriate orders to remedy the violation including the

¹⁹²As of 10 August 2005, twenty AU Member States had ratified and deposited instruments of ratification of the *Protocol on the African Human Rights Court* with the AU Commission. See online: African Union <<http://www.africa-union.org>>. Writing in July 2004, when only eighteen Member States had ratified the *Protocol*, Amnesty International noted that only Burkina Faso had adopted a declaration stating that it would grant direct access to individuals and NGOs before to the African Human Rights Court. See Amnesty International, “Assembly Should Establish an Effective African Human Rights Court”, *supra* note 61. Amnesty International argues that article 34(6) and the unwillingness of States to adopt a declaration granting access to individuals and NGOs before the AU Court would undermine the effectiveness of the Court.

¹⁹³*Protocol on the African Human Rights Court*, *supra* note 55, art. 7.

payment of fair compensation or reparation. In cases of extreme gravity and urgency, and when necessary to avoid irreparable harm to persons, the Court shall adopt such provisional measures as it deems necessary.¹⁹⁴ The judgment of the Court will be decided by majority, be final and not subject to appeal. The African Human Rights Court may, however, review its decisions in the light of new evidence under conditions to be set out in the *Rules of Procedure*.¹⁹⁵ Article 30 of the *Protocol on the African Human Rights Court* requires State parties to undertake to comply with the judgment in any case to which they are parties within the time stipulated by the Court and to guarantee its execution. Pursuant to article 29, the Council of Ministers would monitor the execution of judgments on behalf of the AU Assembly. The African Human Rights Court shall submit a report on its work during the previous year to each regular session of the AU Assembly and shall specify, in particular, the cases in which a State has not complied with the Court's judgment.

The *Protocol* does not include provisions on the means of enforcing the Court's judgments. It only provides that the Council of Ministers would monitor the execution of judgments on behalf of the AU Assembly.¹⁹⁶ Arguably, where African States have independent judiciaries, providing for a more formal approach through domestic enforcement of the African Human Rights Court's judgment would be one way of executing the Court's judgments.¹⁹⁷ This would be most appropriate where a private citizen has been able to obtain a judgment in his or her favour to redress human rights violations against him or her or a group of people. For example, in the case of environmental harm arising from natural resource production, an independent judiciary is particularly important because governments view continued and uninterrupted production of natural resources as the principal means of economic development and would more often than not, disregard their harmful effects. And of course, the conventional international enforcement means of diplomatic pressure would equally remain relevant.

¹⁹⁴*Protocol on the African Human Rights Court, ibid.*, arts. 27(1)-(2).

¹⁹⁵*Protocol on the African Human Rights Court, ibid.*, arts. 28(2)-(3).

¹⁹⁶*Ibid.*

¹⁹⁷See generally, on the enforcement of international human rights law, Anne Bayefsky, *Enforcing International Human Rights Law: The Treaty System in the Twenty-First Century* (Ottawa: Canadian Centre for Foreign Policy Development, 1997); Anne Bayefsky, ed., *The UN Human Rights Treaty System in the 21st Century* (The Hague: Kluwer Law International, 2000).

6.0 The African Commission on Human and Peoples' Rights and the African Court on Human and Peoples' Rights: Differences and Overlaps

Presently, the African Commission remains the only established regional human rights enforcement institution in Africa. Despite the negotiations on the Integrated Court, the AU Assembly has decided that the African Human Rights Court would be established pending the entering into force and establishment of the Integrated Court. As a result, the two relevant institutions for enforcing human rights in Africa are the African Commission and the African Human Rights Court. This section outlines the relationship between the two institutions and outlines any differences or overlaps.

Article 2 of the *Protocol on the African Human Rights Court*, titled “Relationship between the Court and the Commission”, provides that the African Human Rights Court shall, bearing in mind, the provisions of the Protocol, complement the protective mandate of the Commission conferred upon it by the *African Charter*. It includes nothing more than what the Preamble has indicated on the two bodies.¹⁹⁸ However, from a perusal of the principal documents regulating the two African dispute resolution bodies, one can decipher some overlap and differences in their functions.¹⁹⁹

The major differences between the Court and the Commission seem to be *locus standi*, mechanisms for enforcement and the nature of their decisions. Their mandates and other issues do not seem to be as clearly distinguished from one another. These issues are discussed next.

¹⁹⁸*Protocol of the AU Court*, *supra* note 69, art. 2. For a critique of the relationship between the African Court and the African Commission, see Amnesty International, “African Court on Human and Peoples’ Rights: An Opportunity to Strengthen Human Rights Protection in Africa” 1 July, 2002, AI INDEX: IOR 63/001/2002, online: Amnesty International, <<http://web.amnesty.org/library/print/ENGIOR6300120002>>. [Amnesty International, “An Opportunity to Strengthen Human Rights in Africa”]. The article states that division of labour between the Commission and the Court has to be ensured and provided for, to avoid unnecessary duplication, dispute or competition. For example, article 2 of the *Protocol of the AU Court* and article 45 of the *African Charter* duplicate the protective functions of the bodies.

¹⁹⁹Julia Harrington, “The African Court on Human and Peoples’ Rights” in Evans & Murray, *supra* note 7 at 317 argues that the absence of any helpful provisions on the relationship between the African Commission and the African Human Rights Court seems to stem from the fact that the details were too technical and too controversial to work out within the time frame the drafters had.

6.1 Mandate/Jurisdiction

By virtue of articles 3 and 4 of the *Protocol on the African Human Rights Court*, the African Human Rights Court is empowered to act in both adjudicatory and advisory capacities. The African Commission's mandate, which has been discussed earlier, is to promote human and peoples' rights in Africa and ensure their protection, through the means provided in the *African Charter*, and to interpret the provisions of the *Charter* at the request of Member States or organs of the OAU (now AU).²⁰⁰

The African Human Rights Court has a wider and almost unlimited jurisdiction, when compared to the African Commission on Human and Peoples' Rights. The Court is concerned with enforcement of human rights in Africa, while the Commission concentrates on the promotion of human rights and receiving and considering State reports.

6.2 Locus Standi

Anybody, either on his or her own behalf or on behalf of someone else, can submit a communication to the Commission claiming a violation of human rights. Ordinary citizens, victims of human rights violations or their relatives, a group of individuals, NGOs and State parties to the *African Charter* can all put in claims. The complainant or author of the communication need not be related to the victim of the abuse in any way, but the victim must be mentioned.²⁰¹ State parties to the *African Charter* can also bring communications before the Commission, if they have good reason to believe that another State party to the *Charter* has violated the provisions of the *Charter*.²⁰²

Article 5 of the *Protocol on the African Human Rights Court* makes provision for *locus standi* before the African Human Rights Court, which is restrictive when compared to access to the African Commission. Generally, it seems that apart from individuals and NGOs, which have no automatic access to the Court, parties, especially States, have a choice of forum between the Court and the Commission. However, an Amnesty International Report states that, a prior communication to the Commission, either by a State, or against a State, is generally required for instituting proceedings before the

²⁰⁰See articles 30 and 45 of the *African Charter*. Article 45(3), which provides for the Commission's interpretative role, could be a source of duplicating functions between the two human rights enforcement bodies in Africa. See Gino J. Naldi & Konstantinos Magliveras, "Reinforcing the African System of Human Rights: The Protocol on the Establishment of a Regional Court of Human and Peoples' Rights" (1998) 16 *Netherlands Q. Hum. Rts.* 431 at 434.

²⁰¹See the *Guidelines on the Submission of Communications*, *supra* note 113.

²⁰²See articles 47 and 49 of the *African Charter*, *supra* note 19.

Court.²⁰³ By implication therefore, it seems from this argument, that only the African Commission has unlimited access to the African Human Rights Court.

6.3 Mechanisms for Enforcement and Status of Decisions

There is a difference between the enforcement mechanisms of the African Human Rights Court and the African Commission and the nature of their decisions. Although the *Protocol on the African Human Rights Court* does not expressly state that the Court's decisions will be binding, the language adopted in the Protocol tends toward formal adjudication, when compared to the *African Charter's* language on the nature of the African Commission's decisions.

Where the African Human Rights Court finds that there has been violation of human or peoples' rights, it shall make appropriate orders to remedy the violation including the payment of fair compensation or reparation.²⁰⁴ Article 27(2) of the *Protocol on the African Human Rights Court* provides that in cases of extreme gravity and urgency, and when necessary to avoid irreparable harm to persons, the African Human Rights Court shall adopt such provisional measures, as it deems necessary. By article 28(2), the Court's decisions are enforceable and final; they are not subject to appeal. However, the Court's advisory opinions are not binding. Pursuant to article 28(3), the African Human Rights Court may review its decisions in the light of new evidence. As part of the enforcement procedures, State parties to the *Protocol on the African Human Rights Court* undertake to comply with judgments that relate to them.²⁰⁵ By article 29(2), the Council of Ministers would monitor the execution of judgments on behalf of the AU Assembly.

On the other hand, the African Commission's recommendations are not binding on Member States and the Commission's range of action includes the request of provisional measures, amicable settlement, and recommendation (or decision) of the Commission. However, as noted earlier, the recommendations become binding on the State parties where the recommendations have been included in the Commission's Annual Activity Reports, submitted to and adopted by the OAU (now AU) Assembly and published.

Other comparable issues include the procedural requirements of admissibility,²⁰⁶ evidence and fact-finding of the two bodies. The evidentiary and fact finding requirements distinguish the African Human Rights Court from the African Commission as an essentially judicial body, with procedures more akin to the judiciary, when

²⁰³ Amnesty International, "An Opportunity to Strengthen Human Rights in Africa", *supra* note 198.

²⁰⁴ *Protocol on the African Human Rights Court*, *supra* note 55, art. 27(1).

²⁰⁵ *Protocol on the African Human Rights Court*, *ibid.*, art. 30.

²⁰⁶ This is mostly similar, as article 6 of the *Protocol on the African Human Rights Court*, refers to article 56 of the *African Charter*. As a result, the rules on admissibility are similar.

compared to the African Commission.²⁰⁷ On sources of law, article 7 of the *Protocol on the African Human Rights Court* requires the Court to apply the provisions of the *African Charter* and any other relevant human rights instruments ratified by the States concerned, while the *African Charter* requires the African Commission to apply the laws the African Human Rights Court is empowered to apply and further, international law generally.²⁰⁸

Apart from the supranational human rights protection mechanism in Africa, an avenue for domestic application of the *African Charter* exists. The *Charter's* application in Nigeria and relevant recent developments in the area of environmental and health rights are discussed next.

7.0 Application of the African Charter in Nigeria

7.1 The Legal Provisions

Nigeria is singled out for discussion in this paper for several reasons, prominent among which is the fact that it is the State against which most of the *African Charter* based communications before the African Commission have been filed. The *Constitution of the Federal Republic of Nigeria, 1999*²⁰⁹ in Chapter IV, makes provisions for the protection of fundamental human rights in Nigeria. The rights protected are mostly civil and political rights. These are the right to life, respect for the dignity of the person, the right to personal liberty, the right to fair hearing, the right to privacy, freedom of thought, conscience and religion, freedom of expression, freedom of association, freedom of movement, freedom from discrimination and the right to acquire and own property.²¹⁰

In Chapter II, the *Nigerian Constitution* provides for “Fundamental Objectives and Directive Principles of State Policy” in the nature of economic and social rights. The principles include the obligations of the State to improve the environment, provide healthcare and ensure that adequate and suitable food and shelter is provided. Section 20 for example, provides that “the State shall protect and improve the environment and safeguard the water, air and land, forest and wildlife of Nigeria.” Although section 13 provides that “it shall be the duty and responsibility of all organs of government, and of all other authorities and persons exercising legislative, executive or judicial powers to

²⁰⁷*Protocol on the African Human Rights Court*, *supra* note 55, arts. 10, 26-30.

²⁰⁸*African Charter*, *supra* note 19, arts. 60-61.

²⁰⁹*Constitution of the Federal Republic of Nigeria (Promulgation) Decree No. 24 of 1999*, Laws of the Federation of Nigeria [*Nigerian Constitution 1999/Nigerian Constitution*].

²¹⁰*Nigerian Constitution 1999*, *ibid.*, ss. 33-43.

conform to, observe and apply the provisions of this Chapter of this Constitution”, the provisions of Chapter II of the *Nigerian Constitution* are non-justiciable.²¹¹ Authors have argued that the unenforceability of the rights in Chapter II of the *Nigerian Constitution* could curtail the realization of the enforceable rights guaranteed in Chapter IV.²¹²

Where there is an allegation that a fundamental right protected under Chapter IV of the *Nigerian Constitution* has been, is being or likely to be contravened in any Nigerian state, an application may be made to a High Court in that state for redress.²¹³ An application for an allegation of a breach of a fundamental right is brought under the *Fundamental Right Enforcement Procedure Rules*.²¹⁴

It is significant that the *Nigerian Constitution* does not include provisions on economic, social and cultural rights, except the right to own and acquire property.²¹⁵ The *African Charter on Human Rights (Ratification and Enforcement) Act* compensates for these omissions.²¹⁶ This piece of legislation was enacted on 17 March 1983, to enable the Federal Republic of Nigeria to give effect to the *African Charter*.²¹⁷ Section 1 of the

²¹¹Subsection 6(6)(c) of the *Nigerian Constitution* provides that “the judicial powers vested in accordance with the foregoing provisions of this section shall not except as otherwise provided by this Constitution, extend to any issue or question as to whether any act or omission by any authority or person or as to whether any law or any judicial decision is in conformity with the Fundamental Objectives and Directive Principles of State Policy set out in Chapter II of the Constitution.”

²¹²Obiagwu & Odinkalu, *supra* note 3 at 240. The authors also argue that the nonjusticiability clause in section 6(6) of the *Nigerian Constitution* calls into question the applicability of the provisions of the *African Charter*, which have been domesticated in Nigeria. However, in my view, the provisions of section 6(6)(c) apply only to the duties of the government in Chapter II of the *Nigerian Constitution* and no other laws, as that subsection expressly includes only Chapter II, thereby excluding other laws. The economic, social and cultural rights under the *African Charter* remain applicable in Nigeria, not as constitutional provisions but as domestic law, as the *Charter* has been enacted into law by the Nigerian legislature.

²¹³*Nigerian Constitution, 1999, supra* note 209, s. 46.

²¹⁴*The Constitution of the Federal Republic of Nigeria, Fundamental Rights (Enforcement Procedure) Rules, 1979, S.I. 1 of 1979 [Fundamental Rights Rules]*.

²¹⁵See E. Onyekpere, “The Constitutional Conference: A Case for the Inclusion of Economic and Social Rights in the Fundamental Rights Chapter of the 1999 Constitution” *This Day Newspaper* (Nigeria) (3 June 2004). The author made a case for the inclusion of economic and social rights in the *Nigerian Constitution* so that they can have the character of constitutionally guaranteed fundamental rights. References were made to resource development and the impact of human rights on oil and gas development in Nigeria, especially in the Niger Delta.

²¹⁶Vol. 1, Cap. 10, LFN 1990 [*African Charter Act*]. Because these rights are not included in the Constitution, they do not have constitutional force.

²¹⁷Nigeria gave the *African Charter* domestic force less than two years after the *Charter* was adopted and over four years before the *Charter* actually came into force. At the time the *African Charter* was domesticated in Nigeria, the country had a democratically elected government. On human rights institutions and their influence within States, see Obiora Chinedu Okafor, “The African System on Human and

African Charter Act states that as from the commencement of the Act, the provisions of the *African Charter* shall have the force of law in Nigeria, be given full recognition and effect and shall be applied by all authorities and persons exercising legislative, executive or judicial powers in Nigeria.

On the application of the *African Charter* domestically in Nigeria, the Supreme Court of Nigeria,²¹⁸ in *Abacha & Ors v. Fawehinmi*²¹⁹ overruled the Court of Appeal²²⁰ and held that the lower court erred in holding that the *Fundamental Rights Rules* are a special procedure enacted and reserved for the rights provided for in the *Nigerian Constitution*. The Supreme Court held that a person aggrieved under the *African Charter* is entitled to bring his case in the usual way, whether under the appropriate procedure for fundamental rights, judicial review, common law or statute.

The decisions of the Supreme Court of Nigeria and the Court of Appeal in *Abacha v. Fawehinmi* are very instructive on the application of the *African Charter* in Nigeria. The Supreme Court held that as a general rule, an international treaty entered into by the government does not become binding until enacted into law by the National Assembly²²¹ and prior to this, the treaty has no force in domestic law to make its provisions justiciable.²²² The *African Charter's* provisions are in a class of their own on the legislative hierarchy.²²³ The *African Charter*, having been incorporated into domestic law, is binding and the courts must give effect to it. Thus, *African Charter* rights are justiciable.²²⁴ The *African Charter Act* has an international character, therefore, in any conflict between it and another domestic statute, its provisions will prevail based on the presumption that the legislature does not intend to breach an international obligation.²²⁵

Peoples' Rights, Quasi-Constructivism, and the Possibility of Peacebuilding *within* African States" (2004) 8 Int'l J. Human Rights 413.

²¹⁸The Supreme Court of Nigeria is Nigeria's apex Court.

²¹⁹[2000] 6 N.W.L.R. 228; (2000) 4 S.C. (Pt. II) 1; (2000) 4 N.I.L.R. 28; [2000] I.C.H.L.R. 23; (2000) 3 C.H.R.L.D. 207. See also *FRN v. Ifegwa* (2003), 15 N.W.L.R. (Pt. 842) 113 (S.C.) [*Abacha v. Fawehinmi*].

²²⁰*Fawehinmi v. Abacha & Ors*, [1996] 9 N.W.L.R. (Pt. 475) 710; [1996] I.C.H.R.L. 94.

²²¹The National Assembly is Nigeria's federal legislature. *Nigerian Constitution 1999*, *supra* note 209, s. 12(1).

²²²*Fawehinmi v. Abacha*, *supra* note 220.

²²³*Labiya v. Anretiola*, [1992] 8 N.W.L.R. (Pt. 258) 139 (S.C.).

²²⁴See *Ogagu v. The State* (1994) 9 N.W.L.R. (pt. 336).

²²⁵In 1999, Media Rights Agenda sought the domestic enforcement of the African Commission's decision in *Media Rights Agenda v. Nigeria*, *supra* note 92, and other reliefs on several grounds. See *supra* note 189. It sought a declaration that by virtue of section 1 of the *African Charter Act*, the Federal Government of Nigeria is obliged to ensure that its laws are in conformity with the provisions of the *African Charter*. Section 1 of the *African Charter Act* states as follows: "As from the commencement of

The *African Charter* and *African Charter Act* are superior to all municipal laws in Nigeria and cannot be ousted by decrees of the military government.²²⁶ To this extent, the *African Charter Act* possesses “a greater vigour and strength” than any other domestic statute, although this does not mean that it is superior to the *Nigerian Constitution* of course, or that its international flavour prevents the National Assembly from repealing the Act.

In all, the Supreme Court of Nigeria has demonstrated a willingness to apply the provisions of the *African Charter Act* and accord to it, a standing higher than other domestic legislation but lower to the *Nigerian Constitution*. Thus, apart from the supranational enforcement institutions – the African Commission and the African Human Rights Court – the *African Charter Act* provides an additional avenue for the enforcement of human rights guaranteed under the *African Charter* by Nigeria’s domestic Courts. Apart from the judiciary, other domestic human rights tribunals encourage the application of the *African Charter* in Nigeria.²²⁷ Recently, the application of the *African Charter Act* in the protection of environmental and health rights has been put to test and this is discussed next.

7.2 Recent Developments

As has already been noted, Nigeria’s environmental issues have been the subject of the African Commission’s attention, and controversies over the environmental and health

this Act, the provisions of the African Charter on Human and Peoples’ Rights which are set out in the Schedule to this Act shall, subject as thereunder provided, have force of law in Nigeria and shall be given full recognition and effect and be applied by all authorities and persons exercising legislative, executive or judicial powers in Nigeria.”

²²⁶See *Ubani v. Director of State Security Services & Anor*, [1999] I.C.H.L.R. 105; *Comptroller of Prisons & Ors v. Adekanye* (1990), 10 N.W.L.R. (Pt. 623) 400 (C.A.).

²²⁷The Nigerian Human Rights Violations Investigations Commission (HRVIC) – otherwise known as the Oputa Panel, after its Chair, Justice Chukwudifu Oputa, Justice Emeritus of the Supreme Court of Nigeria – which was instituted by the President Obasanjo led administration to investigate the human rights abuses that had occurred in the country during the sixteen years of military rule prior to 1999, submitted its report in May 2002. In the report, it suggested *inter alia* that the *African Charter* should be popularized in the country through seminars, workshops and publications. It found some human rights violations to be in breach of both the rule of law and the *African Charter*. It urged officials to comply with the provisions of the *African Charter*, which had been domesticated in Nigeria. Based on the non-conformity of many actions of the preceding military governments with the provisions of the *African Charter*, the Oputa Panel made recommendations for the redress of the resulting human rights violations. See online: Center for Democracy and Development <<http://cddnig.org/oputapanelreport/>>. Although most of the human rights violations in Nigeria occurred when the military was in power, and many of the violations of the civil and political rights no longer occur at the magnitude at which they used to, the situation has not changed substantially regarding human rights violations that emanate from natural resource extraction.

impacts of oil and gas production in Nigeria continue significantly.²²⁸ Gas flaring is one of the major practices contributing to environmental degradation and negative health, economic and social impacts in the country. The statistics on gas flaring in Nigeria are staggering. Nigeria has the highest rate of gas flaring in the world, flaring more than half of the gas it produces.²²⁹ Some flares in the Niger Delta area of Nigeria have burnt non-stop for over 40 years. In 2003, companies flared about 56.6 million cubic meters of associated gas in Nigeria daily²³⁰ and about 17.2 bcm of natural gas is flared annually.²³¹ Nigeria's flared gas accounts for about 20 percent of global flaring.²³² In a reaction to the problems engendered by gas flaring, Ken Saro Wiwa, in his struggle against Shell and the Nigerian Government, represented by the Nigerian National Petroleum Corporation (NNPC), wrote the following poem on gas flaring in Nigeria.

“The flares of Shell are flames of hell;
We bake beneath their light;
Nought for us save the blight;
Of cursed neglect and cursed Shell.”²³³

²²⁸See *The Ogoni Case*, *supra* note 26.

²²⁹Natural Gas, online: Nigerian National Petroleum Corporation <http://www.nigeriaoil-gas.com/natural_gas/index.htm>. Note that there are conflicting statistics on the percentage of gas flared in Nigeria annually. The World Bank in 2004 confirmed a 75% annual gas flaring rate. See Nigeria: Country Analysis Brief (April 2005), online: Energy Information Administration <<http://www.eia.doe.gov/emeu/cabs/nigeria.html>>. In August 2005, it was reported that gas flaring in Nigeria had been reduced from 70% to 43% between 1999 and 2004. However, the report that quoted this still maintained that the Government's plans to achieve zero flare-out by 2008 is underway and this is definitely not so as the Government and oil companies have conceded that they cannot achieve the 2008 zero flare-out target. See Taiwo Hassan, “Gas Flaring down by 27 per cent in Four Years, Says Report” *The Guardian Newspaper* (Nigeria) (16 August 2005). See also Jide Olatuyi, “Nigeria is the World's Largest in Gas Flaring, Says Governor” *The Guardian Newspaper* (Nigeria) (11 August 2004) where the Bayelsa State (one of the major oil producing states in Nigeria's Niger Delta) Governor was quoted to state as follows, “of course researches have shown that the world standard of gas flaring as at today is 4%. Nigeria alone has recorded above 70% of world's stipulated standard of gas flaring...It is bad enough for God's sake. The amount of gas being flared in this country does not and cannot happen in the developed countries where all these multinational companies operating in the country come from. Our point is that you don't have to eliminate our race simply because you want to make profit.”

²³⁰J. Gerth & L. Labaton, “Shell Withheld Reserves Data Aid in Nigeria” *New York Times* (19 March 2004). 85% of all flared gas in Nigeria is associated gas. See “Nigeria in the Gas Age” *Nigeria's Oil and Gas Monthly* (September 1998) 10.

²³¹Global Gas Flaring Reduction, “Report on Consultation with Stakeholders” World Bank-GGFR Report 1, 2002, online: World Bank Group <www.worldbank.org/ogmc/global_gas.htm>.

²³²*Ibid.* Nigeria flares about 16% of the world's total associated gas.

²³³Cited in Andrew Nikiforuk, *Saboteurs: Wiebo Ludwig's War Against Big Oil* (Toronto: Macfarlane Walter and Ross, 2002) 46.

The Nigerian Government and the oil-producing companies operating in Nigeria stated that they would achieve a total flare-out by 2008, although the date for the flare-out had been changed several times before. However, in May 2005, some of the oil companies including Shell Nigeria, and the Federal Government, indicated that they would not be able to meet the set deadline.²³⁴ In reaction to these statements by the Nigerian government and Shell Nigeria at the end of May 2005, communities in the Niger Delta, with the support of Environmental Rights Action/Friends of the Earth Nigeria filed a suit against the Attorney General of the Nigerian Federation, the NNPC and Shell Nigeria, in the Federal High Court, Benin, Nigeria, on 20 June 2005, to compel the companies to shut-in wells where there are no gas utilization facilities in place.²³⁵ The communities sued for compensation for the damaging effects of gas flaring on the environment, health and economy of the people of the region. They based their claims on the human rights enshrined in the *Nigerian Constitution* and articles 16 and 24 of the *African Charter Act*,²³⁶ which provide for the protection of the rights to the best attainable state of physical and mental health, and a general satisfactory environment favourable to a peoples development.

The Court's ruling on the application, *Gbemre v. Shell Petroleum Development Company & Ors*,²³⁷ which was handed down on 14 November 2005 has been heralded as a landmark and historic decision in the Niger Delta people's struggle for the implementation of their environmental and health rights.²³⁸ In finding in favour of the applicant – the text of the decision includes the applicant suing on behalf of himself and one community – the Court declared that the respondents were in breach of several laws and in violation of a number of human rights. First, the Court found that the respondents

²³⁴Vandna Synghal, "We'll Miss Our Target to Stop 'Flaring' in Nigeria, Admits Shell" *Guardian Unlimited* (28 May 2005), online: *Guardian Unlimited* <<http://www.guardian.co.uk/business/story/0,3604,1494367,00.html>>; "Government may Waive 2008 Deadline set for Zero Gas Flare" *The Guardian Newspaper* (Nigeria) (15 June 2005).

²³⁵Friends of the Earth Press Release, "Communities Sue Shell to Stop Nigerian Gas Flaring" June 20, 2005, online: Friends of the Earth <http://www.foe.co.uk/resource/press_release/communities_sue_shell_to_s_20062005.html>. For a detailed report on human rights, gas flaring and the recent suit filed against the oil companies in the Nigerian Federal High Court, see "Gas Flaring in Nigeria: A Human Rights, Environmental and Economic Monstrosity" A Report by the Climate Justice Programme and Environmental Rights Action/Friends of the Earth Nigeria, 20 June 2005.

²³⁶*Supra* note 216.

²³⁷Suit No: FHC/B/CS/53/05, Federal High Court of Nigeria, Benin Judicial Division (C.V. Nwokorie, Presiding Judge). Available online: Environmental Rights Action/Friends of the Earth Nigeria <<http://www.eraction.org/modules/Publications/docs/judgment.pdf>>.

²³⁸Environmental Rights Action, "Court Declares Gas Flaring Illegal In Nigeria!" November 14, 2005 Press Release, online: Environmental Rights Action/Friends of the Earth Nigeria <http://www.eraction.org/modules.php?name=ERA_News&file=article&sid=41>; Ike Okonta, "Dance those Flares to Silence" (18 November, 2005), available online: Environmental Rights Action/Friends of the Earth Nigeria <http://www.eraction.org/modules.php?name=ERA_News&file=article&sid=44>.

were in violation of the constitutionally guaranteed right to life and dignity of the human person – which according to a specific finding of the Court, includes the rights to health and a clean environment – and reinforced by the *African Charter Act*. Second, the respondent’s failure to carry out environmental impact assessments on the effects of gas flaring on the communities amounted to a breach of section 2(2) of the *Environmental Impact Assessment Act*²³⁹ and is a contributing factor in the violation of the rights to life and dignity of the human person and their antecedent constituents – the rights to health and a clean environment.

Third, the Court declared that the provisions of the *Associated Gas Re-Injection Act*²⁴⁰ and the regulations made pursuant to it that permit the continued flaring of gas, subject to the payment of fines, are in contravention of the constitutionally guaranteed right to life, as interpreted by the Court, and the provisions of the *African Charter Act*. Being inconsistent with the Constitution, the Court declared the offending sections of the *Associated Gas Re-Injection Act* and the relevant regulations unconstitutional and null and void, by virtue of section 1(3) of the Constitution, which provides as follows: “if any other law is inconsistent with the provisions of this Constitution, this Constitution shall prevail, and that other law shall, to the extent of the inconsistency, be void.”

Based on its findings and declarations, the Court issued an order restraining the respondents from continuing the flaring of gas in the applicant’s community. Finally, the Court also ordered the Attorney General of the Federation, who was included as a respondent, but did not put up an appearance or defend the proceedings, to set a process in motion for the amendment of the relevant sections of the *Associated Gas Re-Injection Act* and the Regulations made pursuant to the Act, to conform with the human rights guarantees in Chapter IV of the Constitution.

In its initial reaction to the judgment, Shell Petroleum Development Company (SPDC) argued that the Court passed the judgment notwithstanding the former’s preliminary appeals on the basis of jurisdiction, which were still pending at the time of judgment. In addition, it “filed a notice of appeal challenging the validity of the judgment on the basis of violation of legal process.”²⁴¹ It has been argued that this move by SPDC is to avoid arraignment for contempt of court.²⁴²

Unfortunately, despite the decision of the Court declaring gas flaring illegal in Nigeria, the communities need to wait for total flare-out as appeals are still pending. The

²³⁹Cap. E12 Vol. 6, LFN 2004.

²⁴⁰Cap. A25 Vol. 1 LFN 2004.

²⁴¹“Court Stops Gas Flaring, Shell Appeals” *The Guardian Newspaper* (Nigeria) (15 November 2005).

²⁴²The Westerner, “ERA chides Shell over appeal on Gas Flaring” (27 November, 2005) online: Environmental Rights Action/Friends of the Earth Nigeria <http://www.eraaction.org/modules.php?name=ERA_News&file=article&sid=46>.

case also reflects the realities of the legal system, as the Court only ordered that SPDC stop gas flaring in the community that was a party to the suit, although the legislative amendments that it ordered have implications for all the Niger Delta communities where gas flaring occurs. There are no reports yet regarding the implementation of the orders issued by the Court, including the one directed to the Attorney General. It seems, therefore, that though some legal battles are being won, the war against gas flaring and the attendant human rights violations continue.

8.0 Conclusion

From the time the *African Charter* entered into force in 1986, Africa's regional human rights system has taken slow, but sure, steps toward maturity. However, continued improvement still depends on the political will of the individual Governments and the AU leaders as a whole. The continent has the necessary instruments in place for preventing, or providing redress for, human rights violations, although some of them still require some negotiation or re-negotiation, if human rights are to be taken seriously in Africa. It is up to the leadership of the AU to ensure that they establish the African Human Rights Court as soon as is practicable, with the necessary mechanisms for enforcement. NGOs also have a vital role to play in helping people understand the necessity of balancing a clean environment with economic development.

The provisions of the *Protocol on the African Human Rights Court*, which deny individuals and NGOs access to the Court in the absence of a declaration from the alleged offending State, are far from satisfactory. Individuals and NGOs have initiated the greater number of communications before the African Commission and it would be doing human rights enforcement in Africa a disservice to exclude these most important parties from the *locus standi* provisions of the African Human Rights Court. For example, if a case like *Gbemre v. Shell Petroleum Development Company & Ors*,²⁴³ recently decided in a Nigerian Court, were to be filed before the African Human Rights Court when it is established, the communities that filed the suit, and the supporting NGOs, would lack standing before the Court, unless Nigeria adopts the necessary article 34(6) declaration.

As well, the draft Protocol on the Integrated Court seems far from completion. In order to take environmental and health rights seriously in Africa, the AU needs to speed up the negotiation process for the Integrated Court, with a clear provision granting individuals and NGOs access to the Integrated Court, and refrain from backpedaling on its decision to establish the African Human Rights Court in the interim. In addition, domestic enforcement could play an important role in ensuring compliance with the

²⁴³*Supra* note 237.

African Charter, and for this purpose, the need for independent domestic judiciaries cannot be over-emphasized. Hence, while African leaders negotiate on the regional level for supranational enforcement mechanisms, they need to recognize the great need for strengthening their own courts.

Africa's resources are going to continue to be exploited, and this may be necessary for the economic development of the continent. But natural resource development projects do not have to result in environmental degradation and negative health impacts on the scale at which they are occurring. However, until the AU sees these negative impacts for what they are, it will not accord them the same level of attention it gave apartheid in South Africa. For the immediate subjects of environmental and health rights abuse, and for all of us on the long run, environmental degradation and disregard for health are just as serious as some of the human rights violations that have been accorded more attention. This neglect of the environment and of human health should not be allowed to continue.

Appendix 1: African Charter on Human and Peoples' Rights

PREAMBLE

The African States members of the Organisation of African Unity, parties to the present Convention entitled “African Charter on Human and Peoples’ Rights”.

Recalling Decision 115 (XVI) of the Assembly of Heads of State and Government at its Sixteenth Ordinary Session held in Monrovia, Liberia, from 17 to 20 July 1979 on the preparation of “a preliminary draft on an African Charter on Human and Peoples’ Rights, providing inter alia for the establishment of bodies to promote and protect human and peoples’ rights”;

Considering the Charter of the Organisation of African Unity, which stipulates that “freedom, equality, justice and dignity are essential objectives for the achievement of the legitimate aspirations of the African peoples”;

Reaffirming the pledge they solemnly made in Article 2 of the said Charter to eradicate all forms of colonialism from Africa, to coordinate and intensify their cooperation and efforts to achieve a better life for the peoples of Africa and to promote international cooperation having due regard to the Charter of the United Nations and the Universal Declaration of Human Rights;

Taking into consideration the virtues of their historical tradition and the values of African civilization which should inspire and characterize their reflection on the concept of human and peoples’ rights;

Recognizing on the one hand, that fundamental human rights stem from the attitudes of human beings, which justifies their international protection and on the other hand that the reality and respect of peoples’ rights should necessarily guarantee human rights;

Considering that the enjoyment of rights and freedoms also implies the performance of duties on the part of everyone;

Convinced that it is henceforth essential to pay particular attention to the right to development and that civil and political rights cannot be dissociated from economic, social and cultural rights in their conception as well as universality and that the satisfaction of economic, social and cultural rights is a guarantee for the enjoyment of civil and political rights; Conscious of their duty to achieve the total liberation of Africa, the peoples of which are still struggling for their dignity and genuine independence, and undertaking to eliminate colonialism, neo-colonialism, apartheid, zionism and to dismantle aggressive foreign military bases and all forms of discrimination, language, religion or political opinions;

Reaffirming their adherence to the principles of human and peoples' rights and freedoms contained in the declarations, conventions and other instruments adopted by the Organisation of African Unity, the Movement of Non-Aligned Countries and the United Nations;

Firmly convinced of their duty to promote and protect human and peoples' rights and freedoms and taking into account the importance traditionally attached to these rights and freedoms in Africa;

HAVE AGREED AS FOLLOWS:

PART I: RIGHTS AND DUTIES

CHAPTER I: HUMAN AND PEOPLES' RIGHTS

ARTICLE 1

The Member States of the Organisation of African Unity, parties to the present Charter shall recognise the rights, duties and freedoms enshrined in the Charter and shall undertake to adopt legislative or other measures to give effect to them.

ARTICLE 2

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

ARTICLE 3

1. Every individual shall be equal before the law.
2. Every individual shall be entitled to equal protection of the law.

ARTICLE 4

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

ARTICLE 5

Every individual shall have the right to the respect of the dignity inherent in a human being and to the recognition of his legal status. All forms of exploitation and degradation of man, particularly slavery, slave trade, torture, cruel, inhuman or degrading punishment and treatment shall be prohibited.

ARTICLE 6

Every individual shall have the right to liberty and to the security of his person. No one may be deprived of his freedom except for reasons and conditions previously laid down by law. In particular, no one may be arbitrarily arrested or detained.

ARTICLE 7

1. Every individual shall have the right to have his cause heard. This comprises:
 - a. The right to an appeal to competent national organs against acts of violating his fundamental rights as recognized and guaranteed by conventions, laws, regulations and customs in force;
 - b. The right to be presumed innocent until proved guilty by a competent court or tribunal;
 - c. The right to defence, including the right to be defended by counsel of his choice;
 - d. The right to be tried within a reasonable time by an impartial court or tribunal.
2. No one may be condemned for an act or omission which did not constitute a legally punishable offence at the time it was committed. No penalty may be inflicted for an offence for which no provision was made at the time it was committed. Punishment is personal and can be imposed only on the offender.

ARTICLE 8

Freedom of conscience, the profession and free practice of religion shall be guaranteed. No one may, subject to law and order, be submitted to measures restricting the exercise of these freedoms.

ARTICLE 9

1. Every individual shall have the right to receive information. 2. Every individual shall have the right to express and disseminate his opinions within the law.

ARTICLE 10

1. Every individual shall have the right to free association provided that he abides by the law.
2. Subject to the obligation of solidarity provided for in Article 29, no one may be compelled to join an association.

ARTICLE 11

Every individual shall have the right to assemble freely with others. The exercise of this right shall be subject only to necessary restrictions provided for by law, in particular

those enacted in the interest of national security, the safety, health, ethics and rights and freedoms of others.

ARTICLE 12

1. Every individual shall have the right to freedom of movement and residence within the borders of a State provided he abides by the law.
2. Every individual shall have the right to leave any country including his own, and to return to his country. This right may only be subject to restrictions, provided for by law for the protection of national security, law and order, public health or morality.
3. Every individual shall have the right, when persecuted, to seek and obtain asylum in other countries in accordance with the law of those countries and international conventions.
4. A non-national legally admitted in a territory of a State Party to the present Charter, may only be expelled from it by virtue of a decision taken in accordance with the law.
5. The mass expulsion of non-nationals shall be prohibited. Mass expulsion shall be that which is aimed at national, racial, ethnic or religious groups.

ARTICLE 13

1. Every citizen shall have the right to participate freely in the government of his country, either directly or through freely chosen representatives in accordance with the provisions of the law.
2. Every citizen shall have the right of equal access to the public service of the country.
3. Every individual shall have the right of access to public property and services in strict equality of all persons before the law.

ARTICLE 14

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

ARTICLE 15

Every individual shall have the right to work under equitable and satisfactory conditions, and shall receive equal pay for equal work.

ARTICLE 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.

ARTICLE 17

1. Every individual shall have the right to education.
2. Every individual may freely take part in the cultural life of his community.
3. The promotion and protection of morals and traditional values recognized by the community shall be the duty of the State.

ARTICLE 18

1. The family shall be the natural unit and basis of society. It shall be protected by the State which shall take care of its physical health and moral.
2. The State shall have the duty to assist the family which is the custodian of morals and traditional values recognized by the community.
3. The State shall ensure the elimination of every discrimination against women and also ensure the protection of the rights of women and the child as stipulated in international declarations and conventions.
4. The aged and the disabled shall also have the right to special measures of protection in keeping with their physical or moral needs.

ARTICLE 19

All peoples shall be equal; they shall enjoy the same respect and shall have the same rights. Nothing shall justify the domination of a people by another.

ARTICLE 20

1. All peoples shall have the right to existence. They shall have the unquestionable and inalienable right to self-determination. They shall freely determine their political status and shall pursue their economic and social development according to the policy they have freely chosen.
2. Colonized or oppressed peoples shall have the right to free themselves from the bonds of domination by resorting to any means recognized by the international community.

3. All peoples shall have the right to the assistance of the State Parties to the present Charter in their liberation struggle against foreign domination, be it political, economic or cultural.

ARTICLE 21

1. All peoples shall freely dispose of their wealth and natural resources. This right shall be exercised in the exclusive interest of the people. In no case shall a people be deprived of it.
2. In case of spoliation, the dispossessed people shall have the right to the lawful recovery of its property as well as to an adequate compensation.
3. The free disposal of wealth and natural resources shall be exercised without prejudice to the obligation of promoting international economic cooperation based on mutual respect, equitable exchange and the principles of international law.
4. State Parties to the present Charter shall individually and collectively exercise the right to free disposal of their wealth and natural resources with a view to strengthening African Unity and solidarity.
5. State Parties to the present Charter shall undertake to eliminate all forms of foreign exploitation particularly that practiced by international monopolies so as to enable their peoples to fully benefit from the advantages derived from their national resources.

ARTICLE 22

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

ARTICLE 23

1. All peoples shall have the right to national and international peace and security. The principles of solidarity and friendly relations implicitly affirmed by the Charter of the United Nations and reaffirmed by that of the Organisation of African Unity shall govern relations between States.
2. For the purpose of strengthening peace, solidarity and friendly relations, State Parties to the present Charter shall ensure that:

- a. any individual enjoying the right of asylum under Article 12 of the present Charter shall not engage in subversive activities against his country of origin or any other State Party to the present Charter;
- b. their territories shall not be used as bases for subversive or terrorist activities against the people of any other State Party to the present Charter.

ARTICLE 24

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

ARTICLE 25

State Parties to the present Charter shall have the duty to promote and ensure through teaching, education and publication, the respect of the rights and freedoms contained in the present Charter and to see to it that these freedoms and rights as well as corresponding obligations and duties are understood.

ARTICLE 26

State Parties to the present Charter shall have the duty to guarantee the independence of the Courts and shall allow the establishment and improvement of appropriate national institutions entrusted with the promotion and protection of the rights and freedoms guaranteed by the present Charter.

CHAPTER II: DUTIES

ARTICLE 27

1. Every individual shall have duties towards his family and society, the State and other legally recognised communities and the international community.
2. The rights and freedoms of each individual shall be exercised with due regard to the rights of others, collective security, morality and common interest.

ARTICLE 28

Every individual shall have the duty to respect and consider his fellow beings without discrimination, and to maintain relations aimed at promoting, safeguarding and reinforcing mutual respect and tolerance.

ARTICLE 29

The individual shall also have the duty:

1. To preserve the harmonious development of the family and to work for the cohesion and respect of the family; to respect his parents at all times, to maintain them in case of need;

2. To serve his national community by placing his physical and intellectual abilities at its service;
3. Not to compromise the security of the State whose national or resident he is;
4. To preserve and strengthen social and national solidarity, particularly when the latter is strengthened;
5. To preserve and strengthen the national independence and the territorial integrity of his country and to contribute to his defence in accordance with the law;
6. To work to the best of his abilities and competence, and to pay taxes imposed by law in the interest of the society;
7. To preserve and strengthen positive African cultural values in his relations with other members of the society, in the spirit of tolerance, dialogue and consultation and, in general, to contribute to the promotion of the moral well being of society;
8. To contribute to the best of his abilities, at all times and at all levels, to the promotion and achievement of African unity.

PART II: MEASURES OF SAFEGUARD

CHAPTER 1: ESTABLISHMENT AND ORGANISATION OF THE AFRICAN COMMISSION ON HUMAN AND PEOPLES' RIGHTS

ARTICLE 30

An African Commission on Human and Peoples' Rights, hereinafter called "the Commission", shall be established within the Organisation of African Unity to promote human and peoples' rights and ensure their protection in Africa.

ARTICLE 31

1. The Commission shall consist of eleven members chosen from amongst African personalities of the highest reputation, known for their high morality, integrity, impartiality and competence in matters of human and peoples' rights; particular consideration being given to persons having legal experience.
2. The members of the Commission shall serve in their personal capacity.

ARTICLE 32

The Commission shall not include more than one national of the same State.

ARTICLE 33

The members of the Commission shall be elected by secret ballot by the Assembly of Heads of State and Government, from a list of persons nominated by the State Parties to the present Charter.

ARTICLE 34

Each State Party to the present Charter may not nominate more than two candidates. The candidates must have the nationality of one of the State Parties to the present Charter. When two candidates are nominated by a State, one of them may not be a national of that State.

ARTICLE 35

1. The Secretary General of the Organisation of African Unity shall invite State Parties to the present Charter at least four months before the elections to nominate candidates;
2. The Secretary General of the Organisation of African Unity shall make an alphabetical list of the persons thus nominated and communicate it to the Heads of State and Government at least one month before the elections;

ARTICLE 36

The members of the Commission shall be elected for a six year period and shall be eligible for re-election. However, the term of office of four of the members elected at the first election shall terminate after two years and the term of office of three others, at the end of four years.

ARTICLE 37

Immediately after the first election, the Chairman of the Assembly of Heads of State and Government of the Organisation of African Unity shall draw lots to decide the names of those members referred to in Article 36.

ARTICLE 38

After their election, the members of the Commission shall make a solemn declaration to discharge their duties impartially and faithfully.

ARTICLE 39

1. In case of death or resignation of a member of the Commission, the Chairman of the Commission shall immediately inform the Secretary General of the Organisation of African Unity, who shall declare the seat vacant from the date of death or from the date on which the resignation takes effect.

2. If, in the unanimous opinion of other members of the Commission, a member has stopped discharging his duties for any reason other than a temporary absence, the Chairman of the Commission shall inform the Secretary General of the Organisation of African Unity, who shall then declare the seat vacant.
3. In each of the cases anticipated above, the Assembly of Heads of State and Government shall replace the member whose seat became vacant for the remaining period of his term, unless the period is less than six months.

ARTICLE 40

Every member of the Commission shall be in office until the date his successor assumes office.

ARTICLE 41

The Secretary General of the Organisation of African Unity shall appoint the Secretary of the Commission. He shall provide the staff and services necessary for the effective discharge of the duties of the Commission. The Organisation of African Unity shall bear cost of the staff and services.

ARTICLE 42

1. The Commission shall elect its Chairman and Vice Chairman for a two-year period. They shall be eligible for re-election.
2. The Commission shall lay down its rules of procedure.
3. Seven members shall form the quorum.
4. In case of an equality of votes, the Chairman shall have a casting vote.
5. The Secretary General may attend the meetings of the Commission. He shall neither participate in deliberations nor shall he be entitled to vote. The Chairman of the Commission may, however, invite him to speak.

ARTICLE 43

In discharging their duties, members of the Commission shall enjoy diplomatic privileges and immunities provided for in the General Convention on the Privileges and Immunities of the Organisation of African Unity.

ARTICLE 44

Provision shall be made for the emoluments and allowances of the members of the Commission in the Regular Budget of the Organisation of African Unity.

CHAPTER II : MANDATE OF THE COMMISSION

ARTICLE 45

The functions of the Commission shall be:

1. To promote human and peoples' rights and in particular:
 - a. to collect documents, undertake studies and researches on African problems in the field of human and peoples' rights, organise seminars, symposia and conferences, disseminate information, encourage national and local institutions concerned with human and peoples' rights and, should the case arise, give its views or make recommendations to Governments.
 - b. to formulate and lay down, principles and rules aimed at solving legal problems relating to human and peoples' rights and fundamental freedoms upon which African Governments may base their legislation.
 - c. cooperate with other African and international institutions concerned with the promotion and protection of human and peoples' rights.
2. Ensure the protection of human and peoples' rights under conditions laid down by the present Charter.
3. Interpret all the provisions of the present Charter at the request of a State Party, an institution of the OAU or an African Organisation recognised by the OAU.
4. Perform any other tasks which may be entrusted to it by the Assembly of Heads of State and Government.

CHAPTER III: PROCEDURE OF THE COMMISSION

ARTICLE 46

The Commission may resort to any appropriate method of investigation; it may hear from the Secretary General of the Organisation of African Unity or any other person capable of enlightening it.

COMMUNICATION FROM STATES

ARTICLE 47

If a State Party to the present Charter has good reasons to believe that another State Party to this Charter has violated the provisions of the Charter, it may draw, by written communication, the attention of that State to the matter. This Communication shall also be addressed to the Secretary General of the OAU and to the Chairman of the Commission. Within three months of the receipt of the Communication, the State to which the Communication is addressed shall give the enquiring State, written explanation or statement elucidating the matter. This should include as much as possible, relevant

information relating to the laws and rules of procedure applied and applicable and the redress already given or course of action available.

ARTICLE 48

If within three months from the date on which the original communication is received by the State to which it is addressed, the issue is not settled to the satisfaction of the two States involved through bilateral negotiation or by any other peaceful procedure, either State shall have the right to submit the matter to the Commission through the Chairman and shall notify the other States involved.

ARTICLE 49

Notwithstanding the provisions of Article 47, if a State Party to the present Charter considers that another State Party has violated the provisions of the Charter, it may refer the matter directly to the Commission by addressing a communication to the Chairman, to the Secretary General of the Organisation of African unity and the State concerned.

ARTICLE 50

The Commission can only deal with a matter submitted to it after making sure that all local remedies, if they exist, have been exhausted, unless it is obvious to the Commission that the procedure of achieving these remedies would be unduly prolonged.

ARTICLE 51

1. The Commission may ask the State concerned to provide it with all relevant information.
2. When the Commission is considering the matter, States concerned may be represented before it and submit written or oral representation.

ARTICLE 52

After having obtained from the States concerned and from other sources all the information it deems necessary and after having tried all appropriate means to reach an amicable solution based on the respect of human and peoples' rights, the Commission shall prepare, within a reasonable period of time from the notification referred to in Article 48, a report to the States concerned and communicated to the Assembly of Heads of State and Government.

ARTICLE 53

While transmitting its report, the Commission may make to the Assembly of Heads of State and Government such recommendations as it deems useful.

ARTICLE 54

The Commission shall submit to each Ordinary Session of the Assembly of Heads of State and Government a report on its activities.

ARTICLE 55

1. Before each Session, the Secretary of the Commission shall make a list of the Communications other than those of State Parties to the present Charter and transmit them to Members of the Commission, who shall indicate which Communications should be considered by the Commission.
2. A Communication shall be considered by the Commission if a simple majority of its members so decide.

ARTICLE 56

Communications relating to Human and Peoples' rights referred to in Article 55 received by the Commission, shall be considered if they:

1. Indicate their authors even if the latter requests anonymity,
2. Are compatible with the Charter of the Organisation of African Unity or with the present Charter,
3. Are not written in disparaging or insulting language directed against the State concerned and its institutions or to the Organisation of African Unity,
4. Are not based exclusively on news disseminated through the mass media,
5. Are sent after exhausting local remedies, if any, unless it is obvious that this procedure is unduly prolonged,
6. Are submitted within a reasonable period from the time local remedies are exhausted or from the date the Commission is seized with the matter, and
7. Do not deal with cases which have been settled by those States involved in accordance with the principles of the Charter of the United Nations, or the Charter of the Organisation of African Unity or the provisions of the present Charter.

ARTICLE 57

Prior to any substantive consideration, all communications shall be brought to the knowledge of the State concerned by the Chairman of the Commission.

ARTICLE 58

1. When it appears after deliberations of the Commission that one or more Communications apparently relate to special cases which reveal the existence of a

series of serious or massive violations of human and peoples' rights, the Commission shall draw the attention of the Assembly of Heads of State and Government to these special cases.

2. The Assembly of Heads of State and Government may then request the Commission to undertake an in-depth study of these cases and make a factual report, accompanied by its finding and recommendations.
3. A case of emergency duly noticed by the Commission shall be submitted by the latter to the Chairman of the Assembly of Heads of State and Government who may request an in-depth study.

ARTICLE 59

1. All measures taken within the provisions of the present Chapter shall remain confidential until the Assembly of Heads of State and Government shall otherwise decide.
2. However the report shall be published by the Chairman of the Commission upon the decision of the Assembly of Heads of State and Government.
3. The report on the activities of the Commission shall be published by its Chairman after it has been considered by the Assembly of Heads of State and Government.

CHAPTER IV: APPLICABLE PRINCIPLES

ARTICLE 60

The Commission shall draw inspiration from international law on human and peoples' rights, particularly from the provisions of various African instruments on Human and Peoples' Rights, the Charter of the United Nations, the Charter of the Organisation of African Unity, the Universal Declaration of Human Rights, other instruments adopted by the United Nations and by African countries in the field of Human and Peoples' Rights, as well as from the provisions of various instruments adopted within the Specialised Agencies of the United Nations of which the Parties to the present Charter are members.

ARTICLE 61

The Commission shall also take into consideration, as subsidiary measures to determine the principles of law, other general or special international conventions, laying down rules expressly recognised by Member States of the Organisation of African Unity, African practices consistent with international norms on Human and Peoples' Rights, customs generally accepted as law, general principles of law recognised by African States as well as legal precedents and doctrine.

ARTICLE 62

Each State Party shall undertake to submit every two years, from the date the present Charter comes into force, a report on the legislative or other measures taken, with a view to giving effect to the rights and freedoms recognised and guaranteed by the present Charter.

ARTICLE 63

1. The present Charter shall be open to signature, ratification or adherence of the Member States of the Organisation of African Unity. 2. The instruments of ratification or adherence to the present Charter shall be deposited with the Secretary General of the Organisation of African Unity. 3. The present Charter shall come into force three months after the reception by the Secretary General of the instruments of ratification or adherence of a simple majority of the Member States of the Organisation of African Unity.

PART III: GENERAL PROVISIONS

ARTICLE 64

1. After the coming into force of the present Charter, members of the Commission shall be elected in accordance with the relevant Articles of the present Charter.
2. The Secretary General of the Organisation of African Unity shall convene the first meeting of the Commission at the Headquarters of the Organisation within three months of the constitution of the Commission. Thereafter, the Commission shall be convened by its Chairman whenever necessary but at least once a year.

ARTICLE 65

For each of the States that will ratify or adhere to the present Charter after its coming into force, the Charter shall take effect three months after the date of the deposit by that State of the instrument of ratification or adherence.

ARTICLE 66

Special protocols or agreements may, if necessary, supplement the provisions of the present Charter.

ARTICLE 67

The Secretary General of the Organisation of African Unity shall inform members of the Organisation of the deposit of each instrument of ratification or adherence.

ARTICLE 68

The present Charter may be amended if a State Party makes a written request to that effect to the Secretary General of the Organisation of African Unity. The Assembly of Heads of State and Government may only consider the draft amendment after all the State

Parties have been duly informed of it and the Commission has given its opinion on it at the request of the sponsoring State. The amendment shall be approved by a simple majority of the State Parties. It shall come into force for each State which has accepted it in accordance with its constitutional procedure three months after the Secretary General has received notice of the acceptance.

Adopted by the eighteenth Assembly of Heads of State and Government, June 1981 – Nairobi, Kenya.



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