

# Toward Revitalizing Economic, Social, and Cultural Rights in Africa: *Social and Economic Rights Action Centre and the Center for Economic and Social Rights v. Nigeria*

by Danwood Mzikenge Chirwa\*

At its ordinary session held October 13-27, 2001, the African Commission on Human and Peoples' Rights (Commission) delivered a landmark decision involving the direct application of a range of economic, social, and cultural rights entrenched in the African Charter on Human and Peoples' Rights (African Charter). The African Charter is currently the only regional human rights instrument that incorporates economic, social, and cultural rights as well as civil and political rights and subjects all of these rights to a complaint procedure. The judgment handed down by the Commission in *The Social and Economic Rights Action Centre and the Center for Economic and Social Rights v. Nigeria (SERAC Case)* marked the first decision that directly addresses the enforcement of economic, social, and cultural rights since the Commission became operational in November 1987.

## Recapturing the Debate on the Justiciability of Economic, Social, and Cultural Rights

Whether economic, social, and cultural rights are capable of judicial enforcement elicited heated debate in the United Nations during the drafting of the International Bill of Human Rights. The outcome of the controversy was the bifurcation of the Universal Declaration of Human Rights into the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social, and Cultural Rights (ICESCR). The contention that economic, social, and cultural rights are different in nature from civil and political rights was central to the decision to adopt the two instruments. Animated by the Cold War, Western countries maintained that economic, social, and cultural rights are ideals to be attained. The countries argued that enforcement of these rights is programmatic and costly, and therefore dependent on the availability of state resources. Furthermore, they argued that economic, social, and cultural rights lack specificity and entail intricate policy decisions regarding their implementation. The Western countries' view is that the judiciary is not institutionally competent and not democratically legitimate enough to make such difficult policy choices, therefore rendering judicial enforcement inappropriate.

Although socialist countries made persuasive arguments for the equal treatment of economic, social, and cultural rights and civil and political rights, the adoption of the two Covenants marked victory for the West on the issue. While the ICCPR has a provision for judicial enforcement, the ICESCR provides for state reporting as the ultimate supervisory mechanism. The right of petition by individuals or groups alleging violations of these rights fell away from the ICESCR with the rejection by the UN of a complaint procedure as an additional implementation measure.

Since the two Covenants were adopted in 1966, economic, social, and cultural rights have enjoyed marginal status as compared to civil and political rights. Although later international human rights instruments such as the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) and the Convention on the Rights of the Child (CRC) make no distinction among categories of rights, the enforcement mechanisms do not



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Ogoni villagers from the Bori region in Nigeria.

provide for the adjudication of economic, social, and cultural rights. Only recently has serious consideration been given to boosting the monitoring mechanisms of economic social, and cultural rights. At the international level, efforts regarding judicial enforcement resulted in the adoption of an optional protocol concerning economic, social, and cultural rights to CEDAW on March 12, 1999. A similar draft optional protocol to the ICESCR was concluded in 1996 and is pending before the Commission on Human Rights.

## The African Charter: A Brief Introduction

The African Charter was adopted in 1981 by the Organization of African Unity (OAU), marking the introduction of a third regional human rights system in the world, after the creation of the European and inter-American systems. Adopted partly due to external pressure on African governments to develop a human rights regime on the continent and partly as a response to the massive human rights violations committed by African leaders such as Idi Amin of Uganda, Dr. Banda of Malawi, Emperor Bokassa of Central African Republic, and Mengistu of Ethiopia, the African Charter is distinctive in its attempt to attach an "African fingerprint" on human rights discourse.

Human rights scholars have acclaimed the African Charter for including economic, social, and cultural rights as well as civil and political rights in one binding instrument. Its preamble affirms the cardinal principle of interdependence and indivisibility of all human rights by expressly declaring, "civil and political rights cannot be dissociated from economic, social and cultural rights in their conception as well as universality." Among other rights, the African Charter gives express recognition to the right to property, the right to work, the right to enjoy the best attainable state of physical and mental health, the right to education, and the right to family protection, including special measures for the protection of the aged and disabled.

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It is striking to note that the economic, social, and cultural rights enshrined in the African Charter are formulated as direct entitlements of individuals or groups. This is unlike the ICESCR, which uses such language as “the state undertakes to recognize” and “the state undertakes to take steps.” The advantage with the Charter’s formulation is that it allows more room for the application of these rights to non-state actors, who are increasingly regarded as having human rights obligations. Furthermore, the economic, social, and cultural rights provisions in the Charter are couched in such a way as to create immediate obligations. By contrast, the ICESCR qualifies these rights with such phrases as “progressive realization” and “to the maximum of available resources.” This formulation of the ICESCR was adopted to emphasize economic, social, and cultural rights as ideals to be attained depending on the availability of resources, as opposed to civil and political rights, which are deemed to be precise and immediately claimable. In 1990, the Committee on the ICESCR clarified in General Comment 3 that the term progressive realization implies an obligation of states to move as expeditiously and effectively as possible towards the attainment of the right in question. The Committee further stated, based on extensive examination of state reports, this term engenders a core obligation to ensure the satisfaction of minimum essential levels of each of the rights. In comparison to the ICESCR, Chidi Odinkalu, a leading scholar on the African regional system of human rights, has argued that the creation of immediate obligations by the Charter enables the Commission to adopt a “violations approach” to the implementation of these rights. This approach allows the Commission to make decisions based on real-life situations and specific allegations, as opposed to the ICESCR, which requires that countries, according to their level of resources, develop different performance standards for each right over time.

As part of bolstering the principle of interdependence of all rights, the African Charter entrenches third generation rights, which the international system has persistently sidelined. Third generation rights are the newest set of rights to be recognized by the international community. They include the right of all peoples to freely dispose of their wealth and natural resources (Article 21); the right to economic, social, and cultural development (Article 22); and the right to a generally satisfactory environment favorable to their development (Article 24). These rights arise out of the demand by the Third World countries for global redistribution of power, wealth, and other important standards. Also described as solidarity rights, these rights require that all members of the international community make concerted efforts for their realization. They are therefore critical to the enjoyment of both economic, social, and cultural rights and civil and political rights. The *SERAC Case* highlights the importance of these rights in the African context.

Significantly, the African Charter proffers the same enforcement mechanism to all categories of rights. Under Articles 47, 55, and 56, the African Commission hears complaints alleging violations of any rights recognized in the Charter and the standing requirements for bringing cases before the Commission is admirably broad. Individuals as well as non-

governmental organizations (NGOs) with observer status in the Commission can commence cases against a state. The Commission grants observer status to any organization working in the human rights field whose objectives and activities comply with the fundamental principles of the OAU Charter and the African Charter. The organization must also declare its financial resources and must have an established structure. Apart from engaging in public interest litigation, NGOs with observer status are given wide space to participate in the sessions of the Commission, including making statements and proposals, asking questions, commenting on promotional reports, and submitting amicus briefs.

Despite these positive aspects, the Charter has received wide-ranging criticisms from international and African scholars. Disapproval has primarily focused on the Charter’s weak enforcement mechanism, since the Charter chose to rely on the Commission instead of a court. This choice was motivated

by the OAU’s preference for a diplomatic and bilateral dispute settlement mechanism. The argument was that confrontational litigation, common to Western legal systems, is alien to African culture. Participants also feared that on the basis of the apparent insufficiency of political will at the time, African governments would not ratify the Charter if it provided for

a court. Thus, the Commission was established as the body to promote human rights, although it has no powers of enforcement, cannot award damages or condemn an offending state, and can only make recommendations to the parties when a violation of a right is found.

Recognizing these weaknesses, the OAU adopted the Protocol to the African Charter establishing an African Court on Human and Peoples’ Rights on June 9, 1998. Five of the 15 states needed to bring the Court into operation have ratified the Protocol: Burkina Faso, The Gambia, Mali, Senegal, and Uganda. Predictably, the Protocol empowers the Court to provide remedies for violations such as compensation and provisional measures to avoid irreparable harm. Provision is made for the Council of Ministers to monitor the execution of judgment.

The Charter’s recognition of third generation rights has been further criticized for being redundant since they have no specific content and can be realized through the implementation of already recognized individual rights. Professor Joe Oloka-Onyango described the exclusion of these rights from the Charter, such as the right to housing and shelter; the right to social security; the right to adequate standard of living; and freedom from hunger, as a “significant letdown.” Additionally, some commentators have expressed pessimism regarding the African Commission’s ability to translate the provisions of the Charter into practice.

### **SERAC Case**

#### **The Facts**

The complainants brought an action against the Nigerian government for violations of an array of economic, social, and cultural rights committed by the state-owned National Nigerian Petroleum Company (NNPC) and Shell Petroleum Development Corporation, in which the NNPC held a majority of shares. The complaint alleged that the companies exploited oil in Ogoniland, Nigeria without regard for the environment or

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health of the local communities. Toxic wastes were deposited into the local environment and waterways without developing or properly maintaining appropriate facilities intended to prevent the wastes from affecting surrounding local villages. The resulting water, soil, and air contamination caused serious short- and long-term health problems, including skin infections, gastrointestinal and respiratory ailments, increased risk of cancer, and neurological and reproductive complications.

The complaint further alleged that the Nigerian government not only condoned these harmful operations but aided in their perpetration by placing the legal and military powers of the state at the disposal of the oil companies. It also alleged that the Nigerian Army carried out a series of ruthless military operations, including the burning and destruction of houses and food, and the killing of people and their livestock. The government neither monitored the oil companies nor required them to consult with the Ogoni people on issues concerning the development of their land. The government of Nigeria did not respond to the Commission's notification of the complaint, therefore the Commission accepted the complaint's allegations as facts.

#### **Admissibility**

Two NGOs, the Social and Economic Rights Action Centre and the Center for Economic and Social Rights, brought this action to the Commission on behalf of the Ogoni people. Because a domestic tribunal or court in Nigeria had not heard the complaint, a decision had to be made whether it was admissible within the requirements of the exhaustion of local remedies rule. Under Article 56(5) of the Charter, a complainant must exhaust all local remedies before approaching the Commission. According to the Commission's previous jurisprudence, this rule serves to give the responding government notice of the violation, thereby affording it an opportunity to remedy the situation. However, the rule is not enforced if there are no adequate or effective remedies, or if the complaint discloses gross violations of human rights.

Relying on this well established exception to the exhaustion of local remedies rule, the Commission declared the Ogoni complaint admissible. The Commission found that the action alleged many atrocities committed by the oil companies. Secondly, it found as fact that the military government passed several decrees making the prospect of receiving a domestic remedy impossible. Finally, the Commission took the view that the government of Nigeria had ample notice to remedy the situation given the enormous international attention focused on the circumstances in Ogoniland. For these reasons, the government could not insist on the exhaustion of local remedies rule to justify dismissal of the complaint.

#### **The Merits**

##### *Obligations and Indivisibility of Human Rights*

The Commission emphasized that all rights generate the duties to respect, protect, promote, and fulfill. The Commission underscored that these obligations engender a combination of positive and negative dimensions. The duty to respect requires that the state should refrain from interfering in the enjoyment of all fundamental rights. The duty to

protect obliges the state to protect rights-holders against other subjects by, among other things, legislation and provision of effective remedies. The duty to promote enjoins the state to ensure that individuals are able to exercise their rights and freedoms by, for example, promoting tolerance, raising awareness, and even building infrastructures. The duty to fulfill is a positive expectation on the state to make a good faith effort toward realizing the rights. For instance, according to the Commission, this could consist of the direct provision of food or other basic needs. The Commission emphasized that the application of these duties varies depending upon the right under consideration. Thus, the full enjoyment of some rights demand that the state take concerted action consisting of more than one of those duties.

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##### *The Rights to Physical and Mental Health and the Right to a Clean Environment*

The Commission found that the Nigerian government violated the right to health and a third generation right to a clean environment by directly contaminating water, soil, and air; harming the health of the Ogoni people; and failing to protect them from the harm

caused by the oil companies.

In reaching this conclusion, the Commission underlined that the right to a clean and safe environment is enshrined under Article 24 of the African Charter. According to the Commission, the right to a clean environment is extremely critical to the enjoyment of economic, social, and cultural rights "in so far as the environment affects the quality of life and safety of the individual." This right, it held, requires a state "to take reasonable . . . measures to prevent pollution and ecological degradation, to promote conservation, and to secure an ecologically sustainable development and use of natural resources."

Regarding the right to enjoy the best attainable state of physical and mental health, under Article 16(1) of the Charter, and the right to a generally satisfactory environment favorable to development, recognized under Article 24 of the Charter, the Commission held that governments are prohibited from directly threatening the health and environment of their citizens. The Commission found that the duty to respect these rights largely entails non-interventionist conduct from the state, such as refraining from carrying out, sponsoring, or tolerating any practice, policy, or legal measures that violate the integrity of the individual.

The Commission stated that compliance with both the right to health and the right to a clean environment must include ordering, or at least permitting, independent scientific monitoring of threatened environments and requiring and publicizing environmental and social impact studies prior to any major industrial development. These rights also require that the state must undertake appropriate monitoring, provide information to the communities exposed to hazardous materials and activities, and guarantee meaningful opportunities for individuals to be heard and participate in development decisions affecting their communities. The Nigerian government, it was held, failed to discharge these obligations.

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### *The Right to Natural Resources*

Whether a group of people within a state may constitute “a people” has long been contested, especially in the context of the right to self-determination. In *Katangese Peoples’ Congress v. Zaire*, for instance, the African Commission acknowledged the controversy but avoided defining the term, “a people.” Likewise, the Commission did not define the term in the present case, but it found that the right of the Ogoni people, under Article 21 of the Charter, to dispose of their wealth and natural resources had been violated. This finding was based on the fact that the oil exploitation in Ogoniland was pursued in a destructive and selfish fashion without any material benefit to the local population. By implication, the Commission considered the Ogoni population to be “a people.”

### *State Liability for Acts of Private Actors*

Drawing on jurisprudence from the Inter-American Court of Human Rights and the European Court of Human Rights, the Commission postulated that a state violates its duty to protect rights if it allows private persons or groups to act freely and with impunity to the detriment of recognized rights. The Commission found that the Nigerian government had given a “green light” to the oil companies to commit human rights violations. Nigeria’s failure to protect the Ogoni people from the selfish acts of the oil companies amounted to a violation of Article 21.

### *The Right to Life*

Furthermore, the Commission stated that the right to life is the most fundamental of all human rights. This right was violated by the Nigerian government when it permitted its security forces to commit widespread terrorism and killings and allowed pollution and environmental degradation, making living conditions in Ogoniland a “nightmare.” The Commission also cited the destruction of land and farms as part of its rationale that the right to life was violated.

## **Violations of Rights beyond the Charter**

### ***The Right to Food and Housing***

Interestingly, the Commission also found violations of the rights to housing and food, which are not expressly recognized under the Charter. It determined, quite innovatively, that the right to housing or shelter is implicitly entrenched in the rights to property, family protection, and in the right to enjoy the best attainable state of mental and physical health. Likewise, the Commission inferred the right to food from the rights to life and health and to economic, social, and cultural development.

The Commission held that the minimum core of the right to shelter obliges the state not to destroy its citizens’ houses, let alone obstruct efforts by individuals or communities to rebuild lost homes. The duty to respect this right requires that the state and its agents refrain from carrying out, sponsoring, or tolerating any practice, policy, or legal measure that violates the integrity of the individual or infringes upon the freedom of an individual to use available resources necessary for satisfying individual, family, household or community housing needs. The duty to protect includes the prevention against violations by any individual or non-state actors like landlords, property developers, and landowners.

According to the Commission, the right to shelter goes further than the provision of a roof over one’s head. It encom-



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Children collecting water in Ebubu, Nigeria.

passes the right to be left alone and to live in peace, whether or not a person has actual shelter. It also extends to the protection against forced evictions. The destruction of houses, homes, and villages and the harassment and obstruction of those who attempted to rebuild their homes were held by the Commission to be massive violations of the right to shelter.

The Commission underlined that the right to food is inseparably linked to the dignity of human beings and, it was therefore essential for the enjoyment of other rights such as health, education, work, and political participation. The right to food binds states to protect and improve existing food sources and ensure access to adequate food for all citizens. The minimum core of this right obliges the government to desist from destroying or contaminating food sources or allowing private actors to contaminate food sources or prevent peoples’ efforts to feed themselves. The Commission found that the Nigerian government violated its obligations under this right by destroying, and allowing the private oil companies to destroy, food sources. In addition, the Commission found that the Nigerian government had obstructed the Ogoni people from feeding themselves.

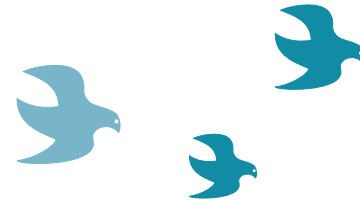
This is the first time the Commission has found violations of rights not expressly enshrined in the Charter. The Commission, however, has interpreted the provision of the Charter generously in the past in order to ensure better protection of human rights. For example, it has done so in respect of clawback clauses, such as “subject to law” and “in accordance with law,” to several human rights provisions. The Commission has construed these clauses, which provide room for state parties to impose restrictions on given rights through legislation, narrowly so that they permit limitations to rights so long as those limitations do not defeat the purpose of the Charter.

modifications of its penalties in order to comply with the ICCPR's protection of minorities, the right to life, and the right to be free from torture or cruel, inhuman or degrading treatment. Even with safeguards, it is not clear that fundamental rights will be protected with the introduction of Sharia criminal law because its provisions affect both public and private conduct of individuals. A commonly raised question regards how to regulate the consumption of alcohol, where such consumption is criminalized under Sharia but legal for non-Muslims. Furthermore, in multi-religious states where Sharia mandates the separation of the sexes in public education and public transportation, rights of women in minority religious groups that do not require the separation of the sexes will inevitably be impaired.

In light of the above analysis, it is clear that the recommendations by the Presidential Committee on the Review of the 1999 Constitution promote freedom of religion to all members of society and promote fundamental rights under the ICCPR, in conformity with Nigeria's international human rights obligations. At the same time, the Committee's conclusions address the conflict of rights dilemma by calling for the protection of the rights of minorities to practice their religion. Moreover, preserving a secular state in which a diversity of religions is practiced promotes peaceful co-existence.

Once modified, a limited application of Sharia law may be permissible under Nigeria's international human rights obligations, but a new framework for Sharia law that guarantees these rights has yet to be developed and implemented in Nigeria. 🌐

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### Remedy

The Commission concluded its opinion by making an appeal to the Nigerian government to ensure the protection of the environment, health, and livelihood of the people of Ogoniland through stipulated measures. These measures include stopping all attacks on the Ogoni people, conducting investigations into rights violations, and ensuring adequate compensation to victims and appropriate environmental and social impact assessments for any future oil development. The Commission also recommended that Nigeria provide information on health and environmental risks and meaningful access to regulatory and decision-making bodies to communities likely to be affected by the exploitation. Finally, the Commission urged the Nigerian government to keep it informed of progress made by the institutions mandated to respond to environmental and human rights issues in Ogoniland.

### Conclusion

This case established strong precedent for the judicial enforcement of economic, social, and cultural rights within the international community. It is the first claim before an international human rights monitoring body that deals directly with alleged violations of economic, social, and cultural rights. By basing so much of its ruling within the social and economic rights guaranteed under the African Charter, the Commission effectively undermined arguments against the full recognition of these rights.

For Africa, the case marks a renewed commitment by the Commission to the implementation of economic, social, and cultural rights. Indeed, the African Commission indicated at its latest session held in July 2002 that it would host seminars and conferences on these rights as part of the fulfillment of its promotional mandate. These developments are encouraging, because most of the African constitutions adopted since the end of the Cold War have entrenched economic, social, and cultural rights in their bills of rights (for example, in Burkina Faso, Cape Verde, Ghana, Malawi, Sao Tome and Principe, and South Africa). This decision and other norm-setting activities of the Commission will be instructive to domestic courts in Africa on the enforcement of these rights.

Perhaps more importantly, the *SERAC Case* demonstrates that economic, social, and cultural rights are justiciable. This calls for the speedy ratification of the Protocol to the Charter establishing the African Court on Human and Peoples' Rights to ensure that such important decisions are enforced. 🌐

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