The Ogoni Case before the African Commission on Human and Peoples' Rights*

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1. Introduction

In 2001, the African Commission on Human and Peoples' Rights concluded consideration of a communication under Article 55 of the African Charter on Human Rights and Peoples' Rights which dealt with alleged violations of human rights of the Ogoni people in Nigeria.[1] This communication is important and special, because, for the first time, the Commission was able to deal in a substantive and groundbreaking way with alleged violations of economic, social and cultural rights which formed the substance of the complaint. In addition, in dealing with the communication, the Commission took a firm and dynamic approach that may contribute to a better and more effective protection of economic, social and cultural rights in Africa. This article discusses the case before the Commission and tries to characterize the decision of the Commission as an application of recent approaches to strengthen implementation and supervision of economic, social and cultural rights.

2. The Case

In March 1996, the complaint was lodged by two non-governmental organisations. These were the Social and Economic Rights Action Centre (SERAC), based in Nigeria and the Centre for Economic and Social Rights (CESR) in New York. The communication dealt with quite a number of alleged serious human rights violations of the Ogoni people. The complaint alleged that the military government of Nigeria had been directly involved in irresponsible oil development practices in the Ogoni region. The Nigerian National Petroleum Company (NNPC), the State oil company, formed a joint venture with Shell Petroleum Development Corporation (SPDC) whose activities in the Ogoni region allegdly caused environmental degradation and health problems among the Ogoni people, resulting from the contamination of the environment. In particular, the complaint denounced the widespread contamination of soil, water and air; the destruction of homes; the burning of crops and killing of farm animals; and the climate of terror the Ogoni communities had been suffering of, in violation of their rights to health, a healthy environment, housing and food. In terms of the African Charter, these allegations included violations of Articles 2 (non-discriminatory enjoyment of rights), 4 (right to life), 14 (right to property), 16 (right to health), 18 (family rights), 21 (right of peoples to freely dispose of their wealth and natural resources) and 24 (right of peoples to a satisfactory environment). The communication further alleged that the Nigerian government had condoned and facilitated these violations by placing the legal and military forces of the state at the disposal of the oil companies. In addition, the complainants argued that the Nigerian government neither monitored operations of the oil companies nor required safety measures. The government had also withheld information on the dangers created by the oil activities from the Ogoni communities. Furthermore, the communication complained of Nigerian security forces attacking, burning and destroying several Ogoni villages and homes under the pretext of dislodging officials and supporters of the Movement of the Survival of

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[1] Communication 155/96, The Social and Economic Rights Action Center and the Center for Economic, and Social Rights / Nigeria. The text of the petition may be consulted at http://www.cesr.org/text%20files/nigeria.PDF
For background information about the general human rights situation in Ogoniland, see S.I. Skogly, Complexities in Human rights Protection: Actors and Rights Involved in the Ogoni confict in Nigeria, in: 15 *Netherlands Quarterly of Human Rights* (1997), 47-60.

Ogoni People (MOSOP) between 1993 and 1996. Finally, the government failed to investigate these attacks, let alone punish the perpetrators, in other words failed to exercise due diligence in this respect.

In addition to a description of the background of the situation in Ogoni Land, the complaint lodged by SERAC and CESR contained detailed information about the alleged violations of the right to health, the right to a healthy environment, the right to housing and the right to food. It also made ample reference to the legal dimensions of these human rights in terms of entitlements of people and obligations of states. As for the obligations of the Nigerian state, the communication defined obligations in terms of duties to refrain from violating human rights and duties to protect the Ogoni people from infringements of their rights by private parties.

As already mentioned, the complaint was lodged in March 1996; in October 1996 the complaint was declared admissible. Only in October 2001 did the African Commission reach a decision on the merits of the communication.[2] This long period to take a decision was caused by the desire for an amicable settlement, delay in receiving responses from the Nigerian government, a change of government in Nigeria, the limited duration of the sessions of the Commission and a desire for a reasonably good decision.[3] In 2000, a new civilian administration took power in Nigeria. In a Note Verbale submitted to the Commission in October 2000, the new government admitted that "there is no denying that a lot of atrocities were and are still being committed by the oil companies in Ogoni Land and indeed in the Niger Delta area".[4]

3. Economic, Social and Cultural Rights in the African Charter

The African Charter includes civil and political rights, economic, social and cultural rights, as well as collective rights. There is no categorization between these groups of rights in the Charter. On the contrary, one might say that the relationship between them is emphasised in the preamble of the Charter which recognises "on the one hand, that fundamental human rights stem from the attributes of human beings, which justifies their national and international protection and on the other hand that the reality and respect of peoples' rights should necessarily guarantee human rights". The economic, social and cultural rights in the Charter include the right to property (Art. 14), the right to work (Art. 15), the right to health (Art. 16), the right to education (Art. 17(1)), and the freedom to take part in cultural life (Art. 17(2)). It is clear, however, that the collective rights listed in articles 20-24 also have important social, economic and cultural connotations, for example Article 21(1) which guarantees the right of all peoples to freely dispose of their wealth and natural resources and Article 24 which guarantees the right of peoples to a satisfactory environment favourable to their development. Odinkalu rightly points out that these rights are relevant for communities as such, but also for those individual subsistence farmers and fishermen who seek guarantees of physical and economic security for themselves and their families.[5]

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[2] The decision has been published at http://www.cesr.org/ESCR/africancommission.htm It was communicated to the parties on 27 May 2002.

[3] Information provided by Commissioner Dankwa, Rapporteur in this case; on file with the author.

[4] Note Verbale 127/2000 submitted by the Nigerian government at the 28th session of the Commission in October 2000.

[5] See Chidi Anselm Odinkalu, *Analysis of Paralysis or Paralysis by Analysis? Implementing Economic, Social and Cultural Rights under the African Charter on Human and Peoples' Rights*, 23 Human Rights Quarterly (2001) 327-369 at 346-347.

Another important feature of the economic and social rights provisions in the Charter is that the text does not use the wording of progressive realisation of these rights, as is usually the case with respect to economic, social and cultural rights. That would mean that the obligations of State Parties in this respect are of immediate application and would underscore the fact that all rights are on an equal footing.[6] In other words, the Charter itself is of an integrated nature, which means that all the substantive standards are interdependent and permeate each other. Respect for human dignity (laid down in Article 5) is the central concept and value and serves as a touchstone for the assessment of state conduct.[7] It should be noted that the Charter does not recognise as such the right to housing or the right to an adequate standard of living as provided for in Article 11 of the International Covenant on Economic, Social and Cultural Rights (ICESCR). However, in its earlier case-law the African Commission has decided that the starvation of prisoners and the deprivation of blankets and clothing violated Article 16 of the Charter (the right to enjoy the best attainable state of physical and mental health). In addition, forced evictions of people from their homes was considered to be a violation of the right to freedom of movement and the right to property under Articles 12(1) and 14 of the Charter.[8] Finally, deprivation of basic services necessary for basic health, including safe drinking water, electricity and basic medicine, has also been characterised as a violation of Article 16 of the Charter.[9] Therefore, it may be concluded that the Commission is willing to read some of the economic and social rights not listed in the Charter into the economic and social rights provisions that are part of the Charter by way of extensive interpretation. Through such a way of reasoning, the Commission is giving substance and meaning to the concept of human dignity provided for in Article 5 as the over-arching concept of the Charter.

4. The admissibility of the case

Article 56(5) of the Charter provides that communications shall be considered by the Commission after exhausting local remedies, if any, unless it is obvious that this procedure is unduly prolonged. In his report on the present case, the Rapporteur of the Commission observed that at the time of submitting this communication the then Military government of Nigeria had enacted various decrees ousting the jurisdiction of the courts. These measures thus deprived the people in Nigeria of adequate domestic remedies, making it impossible to make the rights effective at the national level. Consequently, the Commission is of the opinion that in this case no adequate domestic remedies existed. In addition, the Commission emphasised that on numerous occasions, it had brought this case to the attention of the Nigerian authorities, but no response was received. This also meant that the Commission had to deal with the facts as presented by the complainants and treat them as given.[10] The communication was declared admissible in October 1996.

5. The merits of the case: the Commission's "obligations" approach

In the discussion of the merits of the case, the Rapporteur links up with recent developments and approaches in the field of the international protection of economic, social and cultural rights. In particular he adopts and applies ideas and concepts, developed in academic thinking,

[6] Odinkalu, *supra* note 5, at 349. Compare Article 2(1) of the International Covenant on Economic, Social and Cultural Rights (ICESCR) which provides for progressive realisation of rights as the general state obligation.
[7] Odinkalu, *supra* note 5, at 366.
[8] See Communications 54/91, 61/91, 98/93, 164/97 and 210/98 against Mauritania, as mentioned by Odinkalu, *supra* note 5, at 364.
[9] See Communications 25/89, 47/90, 56/91 and 100/93, World Organization Against Torture *et al v.* Zaire, as mentioned by Odinkalu, *supra* note 5, at 365.
[10] Communication 155/96, Report of the Commission, § 40, 41 and 49.

to refine and specify obligations of states resulting from human rights. It is now increasingly recognised and accepted that all human rights, be they civil and political, or economic, social and cultural, may give rise to a variety of state obligations. These multiple obligations may be characterised as a typology of obligations, or different levels of obligations. This typology includes obligations *to respect*, *to protect* and *to fulfil* human rights. These obligations may encompass negative as well as positive state duties. The idea of distinguishing between various types of obligations, rather than between rights (civil and political *versus* economic, social and cultural) has been suggested by Henry Shue in an influential book.[11] For every basic right, Shue proposed three types of correlative obligations: 'to avoid depriving', 'to protect from deprivation' and 'to aid the deprived'. This idea of a typology has been developed further within the framework of a study on the normative content of the right to adequate food by the former United Nations Special Rapporteur on the right to food, Mr. Asbjorn Eide.[12] In the present case, the African Commision distinguishes between obligations to respect, to protect, to promote and to fulfil.

The obligation to *respect* means that the State should refrain from interfering in the enjoyment of fundamental rights. It should respect right-holders, individuals as well as groups, their freedoms, autonomy, resources and liberty of action.[13] For example, a State may not arbitrarily evict people from their homes. This is a negative state obligation.

The second type of obligation is the duty to *protect* right-holders against other actors (third parties) by legislation and the provision of effective remedies. This is a positive obligation, because it requires the State to take positive measures to protect beneficiaries of rights against political, economic and social interference by other non-state actors (for example, companies).[14] For example, the state must adopt legislation to guarantee that private companies comply with labour standards. It must also monitor observance of these standards, for example through a labour inspection service.

As a third level of obligation, the Rapporteur in the present case identified the obligation to *promote*. This is an obligation of a long term character: the State should make sure that individuals are able to exercise their rights and freedoms, for example by promoting tolerance, raising awareness and building infrastructures.[15] Clearly, this obligation can only be achieved progressively. The obligation to promote is not part of the typology developed by Eide. However, it has been suggested by other academic writers.[16]

Finally, the obligation to *fulfil* requires a State to take positive measures in order to realise the direct enjoyment of a right.[17] For example, in order to realise the right to education, the State must directly engage in building schools, pay teachers and develop a curriculum.

It is interesting to note that the Rapporteur of the Commission adopts this 'obligation' oriented approach without much argument. He only mentiones that "it would be proper to establish what is generally expected of governments under the Charter and more specifically

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[11] H. Shue, *Basic Rights; Subsistence, Affluence and U.S. Foreign Policy*, New Jersey: Princeton University Press, first edition 1980, second, revised edition 1996.

[12] See A. Eide, *Final report on the right to adequate food as a human right*, UN. Doc. E/CN.4/Sub.2/1987/23. See also for a more recent version, A. Eide, 'Universalization of Human Rights versus Globalization of Economic Power', in: F. Coomans *et al* (eds.), *Rendering Justice to the Vulnerable – Liber Amicorum in Honour of Theo van Boven*, The Hague: Kluwer Law Interantional, 2000, 99-119, at 110-111.

[13] Communication 155/96, Report of the Commission, § 45.

[14] Report of the Commission, *supra* note 10, § 46.

[15] *Ibid.*

[16] Compare G.J.H. van Hoof, 'The legal nature of economic, social and cultural rights: a rebuttal of some traditional views', in: Ph. Alston & K. Tomasevski (eds.), *The Right to Food*, Utrecht: Martinus Nijhoff, 1984, 97-110, at 106, 108.

[17] Report of the Commission, *supra* note 10, § 47.

vis-à-vis the rights themselves".[18] He also indicates that "as a human rights instrument, the African Charter is not alien to these [obligation oriented] concepts".[19] It should be added here that the United Nations Committee on Economic, Social and Cultural Rights (CESCR) has also used the typology of obligations in its General Comments on the right to food, the right to education and the right to health.[20] Nigeria is a State Party to the ICESCR since 1993. In addition, the development of the typology has influenced the drafting of national constitutions. For example, the Constitution of South Africa provides that the state must respect, protect, promote and fulfil the rights in the constitutional Bill of Rights.[21]

The use of the typology implies that realisation of each separate right in the African Charter may involve duties to respect, to protect, to promote and to fulfil. In other words, a State Party may not limit itself to observance of one specific obligation only. In most cases, implementation of civil and political rights as well as economic, social and cultural rights will require observance of all levels of duties: all types of obligations are interrelated and interdependent. This idea is also articulated in the report on the Ogoni case, where the Rapporteur stated that "sometimes the need to meaningfully enjoy some of the rights demands a concerted action from the State in terms of more than one of the said duties".[22] The emphasis on obligations also accentuates that civil and political rights on the one hand and economic, social and cultural rights on the other hand are on an equal footing: they may require observance of the same type of obligation. Finally, the typology is an analytical tool for the elaboration and better understanding of treaty obligations and it can help to determine whether a State's action, policy and practice are in conformity with its obligations under the Charter.

6. Violations of substantive rights

6.1. The right to health

The right to health is recognised in Article 16 and it implies concrete obligations for States, namely to "take the necessary measures to protect the health of their people".[23] The right to a general satisfactory environment, laid down in Article 24, includes the right to a healthy environment, which means a clean and safe environment. In the view of the Commission, these provisions obligate governments to desist from directly threatening the health and the environment of their citizens. In addition, the State must take measures to prevent pollution and ecological degradation. In stead, the Nigerian government was actively involved in the pollution, the contamination of the environment and related health problems of the Ogoni people, by condoning and facilitating the activities of the oil companies through placing the legal and military powers of the state at the disposal of the oil companies. Furthermore, the government also kept the Ogoni communities uninformed about the damages created by the activities of the oil companies. It also failed to produce basic health and environment impact studies, nor asked the oil companies to do so. In other words, the government has not taken care to protect the inhabitants of Ogoni Land against the harmful activities of the oil

[18] Report of the Commission, *supra* note 10, § 43.
[19] *Idem*, § 44.
[20] See General Comment no. 12, UN Doc. E/C.12/1999/5, General Comment no. 13, UN Doc. E/C.12/1999/10, General Comment no. 14, UN. Doc. E/C.12/2000/4 respectively.
[21] Constitution of the Republic of South Africa 1996, Section 7(2).
[22] Report of the Commission, *supra* note 10, § 48.
[23] Art. 16 (2).

companies.[24] One may therefore say that these are instances of violations of obligations to respect and to protect resulting from Articles 16 and 24.

In addition, the conduct of the government of Nigeria was also a violation of Article 21, which provides for the right of peoples to dispose freely of their wealth and natural resources. This right may only be exercised in the exclusive interest of the people concerned and they may not be deprived of the enjoyment of this right (Art. 21(1)). In violation of this right, the Nigerian government facilitated the destruction of Ogoni Land and failed to protect its inhabitants from the devastating activities of the oil companies, thus making the right of the Ogonis to freely dispose of their wealth and natural resources an illusion. In support of this assessment, the Commission refers to the Judgment of the Inter-American Court of Human Rights in the *Velásquez Rodríguez* Case. According to the Inter-American Court, "a State violates human rights when the State allows private persons or groups to act freely and with impunity to the detriment of the rights recognised by the Convention". In addition, "an illegal act which violates human rights and which is initially not directly imputable to a State (for example, because it is an act of a private person or because the person responsible has not been identified) can lead to international responsibility of the State, not because of the act itself, but because of the lack of due diligence to prevent the violation or to respond to it as required by the Convention".[25] The African Commission concludes, as far as this aspect is concerned, that the practice of the Nigerian government "falls short of the minimum conduct expected of governments, and therefore, is in violation of Article 21 of the African Charter".[26] In other words, the Nigerian government failed to exercise due diligence with respect to the activities of the oil companies and their effects upon the population of Ogoni Land.

6.2. The right to housing

Although not provided for in the text of the Charter, the Commission recognises a right to housing or shelter as being implicitly part of the treaty, being the result of the combination of Articles 14 (property), 16 (health) and 18 (family rights). The right to shelter implies first of all an obligation to respect. As a minimum this right obliges the Nigerian government not to destroy the houses of its citizens and not to obstruct efforts by individuals or communities to rebuild their lost homes. The right to shelter also implies an obligation to protect. It means that the government must protect its citizens from interference with their right to be let alone and to live in peace by non-state actors, such as the oil companies, and guarantee access to legal remedies to challenge this interference. In the opinion of the Commission, the Nigerian government violated both these obligations, which are qualified as minimum obligations.[27]

The Commission adds to its position that the right to housing also includes a right to be protected against forced evictions. To underscore this view, the Commission draws inspiration from the work of the CESCR, in particular its General Comments, as permitted under Article 60 of the African Charter. This body, which monitors implementation of the ICESCR, has

[24] Report of the Commission, *supra* note 10, § 53, 54. See in this respect also the observations made by the CESCR when it examined Nigeria's initial report on the implementation of the ICESCR in 1998. The CESCR "notes with alarm the extent of the devastation that oil exploration has caused to the environment and the quality of life in those areas, including Ogoniland where oil has been discovered and extracted without due regard for the health and well-being of the people and their environment". These concluding observations are reproduced in U.N. Doc. E/1999/22, at 31, § 123.

[25] *Velásquez Rodríguez v. Honduras*, Inter-American Court of Human Rights, Judgment of 19 July 1988, Series C, No. 4, § 166, 172.

[26] Report of the Commission, *supra*, note 10, § 58.

[27] Report of the Commission, *supra*, note 10, § 60-62.

defined forced evictions as "the permanent or temporary removal against their will of individuals, families and/or communities from the homes and/or land which they occupy, without the provision of, and access to, appropriate forms of legal or other protection".[28] In addition, the Commission emphasises the importance of legal security of tenure as an essential guarantee against forced evictions. The concept of security of tenure as a feature of the right to adequate housing has been identified by the CESCR in its General Comment on Article 11(1) ICESCR.[29] In this Comment the Committee noted that "instances of forced eviction are *prima facie* incompatible with the requirements of the Covenant".[30] On the basis of these semi-legal sources and an assessment of the facts, the Commission concludes that "the conduct of the Nigerian government clearly demonstrates a violation of this right [to adequate housing] enjoyed by the Ogonis as a collective right".[31] Here we find a combined application of individual rights and collective rights.

6.3. The right to food

Similar to the right to housing, the right to food is not provided for in the African Charter. However, the Commission interpretes Articles 4 (right to life), 16 (right to health) and 22 (the right of all peoples to their economic, social and cultural development) as encompassing the right to food. The Commission is of the view that the minimum core of this right requires the Nigerian government to comply with three minimum duties. The minimum core of a right should be understood as the minimum level of enjoyment of a right that should be guaranteed under all circumstances. However, the Commission does not define the core content of the right; it only lists the three minimum obligations resulting from this core. These obligations include the duty not to destroy or contaminate food resources; not to allow private parties to destroy or contaminate food resources; and not to prevent peoples' efforts to feed themselves. These obligations may be qualified as obligations to respect and to protect. The Commission concludes that Nigeria violated all three of these minimum duties.[32]

It should be noted that the Commssion did not formulate these minimum duties itself, but it adopted suggestions for elaborating these obligations brought forward by the complainants. It should also be noted that the Commission does not quite follow here the approach adopted by the CESCR. In its General Comment on the right to adequate food, the CESCR defines the core content of this right as "the availability of food in a quantity and quality sufficient to satisfy the dietary needs of individuals, free from adverse substances, and acceptable within a given culture; and the accessibility of such food in ways that are sustainable and do not interfere with the enjoyment of other human rights".[33] The UN Committee does not identify minimum obligations. The African Commission lists minimum duties, but does not identify the core from which these obligations emanate. It is obvious, however, that the three minimum duties identified by the Commission, link up with the typology of obligations mentioned earlier and with examples of such obligations listed in the General Comment on the right to adequate food. The CESCR, for example, interpretes the obligation to respect existing access to adequate food as to require a State Party not to take any measures that result in preventing such access. The obligation to protect requires measures by the State to ensure that enterprises or individuals do not deprive individuals of their access to adequate food.[34]

[28] Text of General Comment no. 7 (1997) on forced evictions, published in U.N. Doc. E/1998/22, annex IV (§ 3).
[29] General Comment no. 4 (1991) on the right to adequate housing, U.N. Doc. E/1992/23, annex III.
[30] General Comment no. 4, *supra*, note 29, § 18.
[31] Report of the Commission, *supra* note 10, § 63.
[32] Report of the Commission, *supra* note 10, § 64-66.
[33] General Comment no. 12 (1999) on the right to adequate food, UN Doc. E/C.12/1999/5, § 8.
[34] General Comment no. 12, *supra* note 33, § 15.

7. The decision of the Commission

The African Commission found violations of Articles 2, 4, 14, 16, 18(1), 21 and 24 of the African Charter. It appealed to the new civil government in Nigeria to protect fully the environment, health and livelihood of the people in Ogoniland. In order to accomplish this, the government should, *inter alia*, stop the attacks on Ogoni communities, conduct an investigation into the human rights violations and prosecute officials of the security forces and officials of the Nigerian National Petroleum Company. The government should also make adequate compensation to the victims, including relief and resettlement assistance, and undertake a cleanup of land and rivers polluted and damaged by the activities of the oil operations. The government should also take measures to ensure that appropriate environmental and social impact assessments are undertaken in case of future oil development activities. Finally, the population should be properly informed about possible health and environmental risks. By making these recommendations to the Nigerian government, the Commission adopted almost all of the suggestions for governmental measures of redress suggested by the complainants in the communication.

8. Assessment of the Commission's approach

8.1. The justiciability issue

The views of the African Commission in the present case show that the Commission is able and willing to adopt a creative and dynamic way of interpreting the Charter. Not only does it recognise rights that are not explicitly provided for in the Charter (right to housing, right to food) by reading them in other rights. It is also willing to condemn a State Party for serious violations of economic, social and cultural rights as well as collective rights when such a case is brought before it. The present case therefore demonstrates that cases of alleged violations of economic, social and cultural rights and collective rights can be fully justiciable. The justiciability of a case under the African Charter, therefore, is not limited to violations of civil and political rights. The Commission is of the same opinion when it observes that "it will apply any of the diverse rights contained in the African Charter (...) and there is no right in the African Charter that cannot be made effective".[35] This point of view would counter the traditional view that economic, social and cultural rights require only positive obligations from the State to provide financial resources that cannot be made subject to judicial or quasi-judicial review. In general, justiciability is a fluid concept: the justiciable character of a right depends on the features and the context of a specific case, the wording of the provision and the approach taken and attitude of the body dealing with the case. In the present case, the Nigerian government had clear obligations to abstain from interfering in the enjoyment of economic, social, cultural and collective rights by the people themselves, and to protect them from violations of their rights by the oil companies. The obligation to protect is indeed a positive obligation. The typology of obligations then is a useful means to spell out these obligations and consequently identify violations. In addition, it should be noted that the collective rights in the present case (Articles 21, 22 and 24) are facilitative of the enjoyment of individual rights, but are also capable of being claimed by a group (the Ogoni).[36]

8.2. The core content of rights

[35] Report of the Commission, *supra* note 10, § 68.
[36] Odinkalu, *supra* note 5, at 346-348.

It is interesting that the Commission briefly touches upon the concept of the minimum core of the right to food and minimum duties for governments, thereby demonstrating that the Commission has been following discussions about the normative content of human rights in the academic debate and the work of the CESCR. In its General Comment no. 3 on the nature of States' Parties obligations under the ICESCR, the CESCR is of the view that "a minimum core obligation to ensure the satisfaction of, at the very least, minimum essential levels of each of the rights is incumbent upon every State party. Thus, for example, a State party in which any significant number of individuals is deprived of essential foodstuffs, or essential primary health care, or basic shelter and housing, or of the most basic forms of education, is *prima facie*, failing to discharge its obligations under the Covenant. If the Covenant were to be read in such a way as not to establish such a minimum core obligation, it would be largely deprived of its *raison d'être*".[37] This idea is a useful approach to identify what rights really mean in terms of minimum entitlements and which minimum state obligations may be inferred from this level that should be complied with under all circumstances. The African Commission could benefit from the work already done in this respect by the CESCR in its General Comments on housing, food, education and health, as well as from the ongoing academic debate on this issue.[38]

8.3. A "violations" approach

Another interesting characteristic of the present case is that the Commission seems to have adopted a so-called "violations approach" when assessing the conduct of the Nigerian authorities. The "violations approach" has been developed to identify cases and situations which may be qualified as violations of economic, social and cultural rights.[39] It has been proposed in order to complement the approach of monitoring progressive realisation of economic, social and cultural rights by the CESCR. It has also been suggested that identifying violations of economic, social and cultural rights is more feasible and manageable than the assessment of progressive realisation only. In addition, a "violations approach" offers a better possibility of protecting and promoting economic, social and cultural rights and provides a greater stimulus for states to make available remedies and forms of redress for victims. Finally, states are sensitive for the use of "violations language"; therefore a violations approach may be an effective instrument.[40] Chapman distinguishes between three types of violations: (1) violations resulting from actions and policies on the part of governments; (2) violations related to patterns of discrimination; (3) violations related to a state's failure to fulfil the minimum core obligations of rights.[41] The concept of the nature and meaning of violations of economic, social and cultural rights was further developed with the adoption of a set of guidelines on violations of these rights, the so-called "Maastricht Guidelines".[42] These Guidelines provide important clues for assessing a state's compliance with economic, social and cultural rights, not only those listed in the ICESCR. According to the Maastricht Guidelines, a violation of economic, social and cultural rights occurs when a State pursues, by

[37] General Comment no. 3 (1990), § 10, contained in U.N. Doc. E/1991/23, Annex III.

[38] See for example, A. Chapman & S. Russell, *Core Obligations: Building a Framework for Economic, Social and Cultural Rights*, Intersentia: Antwerp-Oxford-New York, 2002. This book contains chapters on the core content and core obligations emanating from separate economic, social and cultural rights.

[39] This approach has been suggested first by Audrey Chapman in an article in the Human Rights Quarterly. See A. Chapman, A "Violations Approach" for Monitoring the International Covenant on Economic, Social and Cultural Rights, 18 *Human Rights Quarterly* (1996), 23-66.

[40] Chapman, at 38.

[41] Chapman, at 43.

[42] The Maastricht Guidelines on Violations of Economic, Social and Cultural Rights, adopted by a group of experts at the end of a Seminar which took place in January 1997 at Maastricht University, the Netherlands. The Guidelines have been published in the 20 *Human Rights Quarterly* (1998), 691-705.

action or omission, a policy or practice which deliberately contravenes or ignores obligations of the ICESCR, or fails to achieve the required standard of conduct or result.[43] In more concrete terms, a violation by a State includes, for example, the active support for measures adopted by third parties which are inconsistent with economic, social and cultural rights; the active denial of such rights to particular individuals and groups, whether through legislated or enforced discrimination; the failure to meet a generally accepted international minimum standard of achievement, which is within the State's powers to meet.[44] In addition, the Maastricht Guidelines stipulate that States are responsible for violations of economic, social and cultural rights that result from their failure to exercise due diligence in controlling the behaviour of non-state actors, in particular transnational corporations.[45] These Guidelines have influenced the drafting of the CESCR's General Comments on the right to food, education and health.

It is submitted that this violations approach, developed in the academic debate, has influenced and guided the African Commission in assessing the conduct of the Nigerian government in the present case. The fact that the text of the provisions on economic, social and cultural rights in the Charter does not use the wording of progressive realisation probably has made it easier for the Commission to adopt a "violations approach" with respect to these rights. One may say that, following Chapman's approach, the conduct of the government, through its action and policy, directly violated the rights of the Ogoni population. It also failed to comply with certain minimum core obligations resulting from the right to housing, health and food. The government was actively involved in acts denying the free exercise of these rights. In stead, the government should have abstained from interfering in the free enjoyment of these rights by the Ogoni people themselves. In addition, it is submitted that the African Commission applied the criteria of the Maastricht Guidelines when assessing the conduct of the Nigerian government. In particular the active support by the government for the policy of the oil companies in Ogoni Land and the failure to comply with minimum standards with respect to not polluting or contaminating the land, not destroying food crops and not evicting people from their homes amount to violations of the relevant economic, social, cultural and collective rights. It is also obvious that the Nigerian government failed to regulate, monitor and investigate the behaviour of the oil companies in Ogoniland. This is clearly an example of a breach of the violation to protect the people living in that region from the harmful activities of third parties.

9. Concluding remarks

Overall, the decision of the African Commission in the present case is a welcome and positive contribution to a stronger protection of economic, social, cultural and collective rights in the African context. The condemnation of Nigeria is clear and unequivocal. However, it should be noted that the Nigerian government did not participate in the procedure before the Commission. Consequently, the Commission was obliged to decide on the facts, as presented by the complainants. It also meant that the uncontested allegations of the complainants were accepted by the Commission.[46] As a result, the wording of the Report is very similar to the wording of the complaint. Sometimes, the Commission even adopts literally the allegations as phrased in the complaint. Of course, this is understandable and acceptable from a procedural point of view. But the question is whether it would have been appropriate for the Commission

[43] Maastricht Guidelines, § 11.
[44] Maastricht Guidelines, § 14 (b), (c), 15 (i).
[45] Maastricht Guidelines, § 18.
[46] Report of the Commission, *supra* note 10, § 40, 49.

to use also other sources of information than only those presented by the complainants in order to shed more light on the present case, as permitted under Article 46 of the African Charter. One should also take into account that the violations were committed by the former dictatorial Nigerian regime and the new government was not involved in the crimes. Would this have made it easier and more acceptable for the Commission to identify violations and adopt strong language?

In the present case, the African Commission could only deal with the responsibility of the Nigerian State for violations of human rights as a State Party to the African Charter. These concerned not only violations by state organs and officials, but also violations as a result of the failure of the Nigerian government to exercise the required degree of due diligence with regard to the conduct of the oil companies. A state corporation, NNPC, was directly involved in a consortium with private companies, of which Shell Petroleum Development Corporation was the main operator. However, the Commission was not competent to give its views about the conduct of the private companies, so one will find nothing about this question in the decision.[47]

This case also shows the potential of a class-action complaint, prepared and lodged by ngo's, that are qualified and experienced in the field of economic, social and cultural rights. The added value of a strategy in which a national and an international ngo work together to formulate the complaint, each contributing from its particular field of knowledge and expertise, should be underlined.

It is to be hoped that the Commission will continue along this road in future cases. In particular, the question may be raised whether the Commission is equally willing to identify violations when obligations to fulfil are involved, for example, when a state fails to take positive measures aimed at securing the right to education (Art. 17(1)) by constructing schools and providing sufficient and qualified teachers. The relevant question is then whether such obligations are also of an immediate nature. The answer would depend on the financial resources allocated, the measures taken, if any, and their effects on those students who are most in need of getting access to education. Another case would be how the Commission would assess the introduction of fees at African universities, when governments would argue that such a measure was part of austerity programmes imposed by the international financial institutions. Such cases deal with the allocation of scarce financial resources and are much more complicated to decide. It would be interesting to see how the Commission would deal with these aspects of economic, social and cultural rights which imply positive obligations for states.

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[47] See, for a discussion of the trend towards an increased recognition of the applicability of human rights standards to corporations, N. Jägers, *Corporate Human Rights Obligations: in Search of Accountability*, Antwerp-Oxford-New York: Intersentia, Netherlands School of Human Rights Research Series No. 17, 2002, chapter III.