

**Towards effective realisation of the right to a satisfactory environment in the African Charter on Human and Peoples' Rights: A case for domestic horizontal application**

**Submitted in partial fulfilment of the requirements of the LLM (Human Rights and Democratisation in Africa) of the University of Pretoria**

**By**

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## DECLARATION

I, **Ebobrah, Solomon Tamarabrakemi** declare that the work presented in this dissertation is original. It has never been presented to any other University or Institution. Where other people's works have been used, references have been provided. It is in this regard that I declare this work as originally mine. It is hereby presented in partial fulfillment of the requirements for the award of the LL.M Degree in Human Rights and Democratisation in Africa.

Signed.....

Date.....

Supervisor: Professor (Dr) Gilles Cistac

Signature .....

Date.....

## **DEDICATION**

The very reason for my existence is the Lord God Almighty. This work is dedicated to Him. It is by His grace that I took part in and successfully completed this programme. To him be power, glory and honour for ever and ever, amen.

## **ACKNOWLEDGEMENTS**

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God reward you all.

## LIST OF ABBREVIATIONS

ACHPR	African Commission on Human and Peoples' Rights
ACtHR	African Court on Human and Peoples' Rights
AHRLR	African Human Rights Law Reports
AU	African Union
CC	Constitutional Court (South Africa)
CESR	Centre for Economic and Social Rights
CESCR	International Covenant on Economic Social and Cultural Rights
DRC	Democratic Republic of Congo
ECHR	European Convention on Human Rights
ECtHR	European Court on Human Rights
ESCR	Economic, Social and Cultural Rights
FHC	Federal High Court
Inter-Am C.H.R	Inter American Commission on Human Rights
NGO	Non Governmental Organisation
NWLR	Nigeria Weekly Law Reports
OAU	Organisation of African Unity
SERAC	Social and Economic Rights Action Center
SPDC	Shell Petroleum Development Company
TNC	Transnational Corporations
UN	United Nations
UNGA	United Nations General Assembly
US	United States

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## Chapter One

### Introduction

#### 1.1 Background

While the debate on the existence of an internationally recognised human rights to the environment raged, the African Charter on Human and Peoples Right (the African Charter or Charter)<sup>1</sup> became the first binding human right instrument to guarantee the right to a satisfactory environment.<sup>2</sup> The African Commission on Human and Peoples' Right (the African Commission or Commission) considered article 24 of the African Charter, which provides for the right, for the first (and so far only) time in the *SERAC v. Nigeria* case<sup>3</sup>. The importance of both the right in article 24 of the African Charter and the *SERAC* decision lies *inter alia* in the fact that African states face the challenge of balancing the need for development against threats of environmental degradation posed by industrial activities.<sup>4</sup> Despite its inclusion in the Charter, the justiciability of the right in article 24 had been doubted, leading to arguments that it was merely an expression of programmatic aspirations.<sup>5</sup> Hence, the *SERAC* decision came as an affirmation of the existence of the right in the African Charter.<sup>6</sup>

In the African context, the challenge to be addressed by a human right to the environment extends beyond the direct control of state parties to the Charter as the activities of non-state actors especially the Transnational Corporations (TNCs) greatly contribute to the problem.<sup>7</sup> A significant challenge for human rights is to develop the framework to address this concern. The failure to adequately address this problem in the Nigerian context seems to be one of the shortcomings of the *SERAC* decision.<sup>8</sup> While the challenge of non-state actor impunity is global, the effects of environmental violations by non-state actors are more in the third world. Different approaches have

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<sup>1</sup> OAU Doc CAB/LEG/67/3 Rev 5.

<sup>2</sup> D Shelton 'The Links between international human rights guarantees and environmental protection' (2004) 4, 6. Also P Cullet, 'Definition of an environmental right in a human rights context' *Occasional paper* <<http://www.ielrc.org/content/a9502.pdf>> 3.

<sup>3</sup> *The Social and Economic Rights Action Centre and Centre for Economic and Social Rights v Nigeria* (2001) AHRLR 51 (ACHPR 2001).

<sup>4</sup> G Handl, 'Human Rights and Protection of the Environment' in A Eide, & al (eds) *Economic, social and cultural rights* (2001) 309.

<sup>5</sup> AE Boyle, 'The role of international human rights law in the protection of the environment' in AE Boyle and MR Anderson (eds) *Human rights approaches to environmental protection* (1996) 46.

<sup>6</sup> M Van der Linde, & L Louw, 'Considering the interpretation and implementation of article 24 of the African Charter on Human and Peoples' Rights in light of the *SERAC* communication' (2003) 3 *African Human Rights Law Journal* 167, 177.

<sup>7</sup> JG Frynas, 'The oil Industry in Nigeria: Conflicts between oil companies and local people' in JG Frynas & S Pegg (eds) *Transnational corporations and human rights* (2003) 108.

<sup>8</sup> JC Nwobike, 'The African Commission on Human and Peoples' Rights and the demystification of second and third generation rights under the African Charter: *Social and Economic Rights Action Center (SERAC) and the Center for Economic and Social Rights (CESR) v Nigeria*' (2005) 1 *African Journal of Legal Studies* 141.



been suggested to address these concerns, but as Oloka-Onyango notes, 'the domestic level is where enforcement of human rights must find ultimate expression'.<sup>9</sup>

Although the African Commission recognised that non-state actors (in this case the TNCs) contributed to the violations that prompted the *SERAC* communication, it failed to hold the TNCs accountable for the violations. The Commission rather held the State party responsible failing to prevent the violations in its territory.<sup>10</sup> The reason for the failure of the Commission to hold the non-state actor accountable is obvious. As Anderson has noted, 'conventional jurisprudence contends that human rights are enforceable only against the acts or omissions of the state rather than the acts of private entities'.<sup>11</sup> Consequently, especially in international fora, violations by non-state actors have gone largely unaccounted for. Hence, commentators have argued in favour of seeking an appropriate regime for holding non-state actors accountable for such violations, some arguing for horizontal application at international fora.<sup>12</sup> However, non-state actors lack the status to allow Charter institutions exercise jurisdiction over them. This leaves the option of domestic systems as fora for their accountability. Thus, the emerging principle of horizontal applicability of human rights in domestic jurisdictions and the assumption of independent judiciaries provide the premises for this study.

## 1.2 Research question

Against the background above, this study investigates whether article 24 of the African Charter can be applied horizontally in domestic legal systems in Africa as an option to strengthen the realisation of the right to a satisfactory environment.

To properly ground the discussion, the study also examines the scope and content of the right contained in article 24 of the African Charter. Though 'horizontal application' may have several meanings, the intended meaning in this study is its usage as the application of human rights law in disputes between private parties.<sup>13</sup> While focus may tilt towards TNCs, the principles discussed apply to other private entities.

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<sup>9</sup> J Oloka-Onyango, 'Human rights and sustainable development in contemporary Africa: A new dawn or retreating horizon?' (2000) 6 *Buffalo Human Rights Law Review* 39, 45.

<sup>10</sup> Nwobike (n 8 above) 143.

<sup>11</sup> MR Anderson, 'Human rights approaches to environmental protection: An overview' in AE Boyle & MR Anderson (eds) *Human rights approaches to environmental protection* (1996) 218.

<sup>12</sup> D Kinley & J Tadaki, 'From talk to walk: The emergence of human rights responsibilities for corporations at international law' (2004) 44 *Virginia Journal of International Law* 931, for eg.

<sup>13</sup> J Van der Walt, 'Blixen's difference: horizontal application of fundamental rights and the resistance to neo-colonialism' (2003) *T35 Journal of South African Law* 311-331.

Aware that 'we can only know what is and what is not possible by looking at what is the case and seeing how it can be rearranged',<sup>14</sup> the study examines the prospects for horizontal application of article 24 under existing domestic systems and specifically examines the Nigerian case of *Gbemre v SPDC*<sup>15</sup> as a case study for horizontal application of article 24 of the African Charter in a domestic legal system.

### 1.3 Literature survey

Domestic application of international human rights law and horizontal application of human rights have been addressed in separate fora. Conforti and Francioni edited a work that examines international human rights law in domestic courts.<sup>16</sup> Specific to domestic application of the African Charter, Viljoen has done an instructive study.<sup>17</sup> Both of these works treat the possibility of domestic application of international human rights law against states.

Clapham has two works dealing with the human rights obligations of non-state actors.<sup>18</sup> Though largely theoretical, these works make arguments for the applicability of human rights law in the private sphere. A work edited by Addo<sup>19</sup> and another edited by Frynas and Pegg<sup>20</sup> address the question of TNCs accountability. These focus on international responsibility. Doctrinal issues relating to horizontal application of constitutional human rights are discussed in separate articles by Wahi<sup>21</sup> and Van der Walt<sup>22</sup>.

The work edited by Boyle and Anderson in the area of human rights and the environment kick-starts the discussion on the right to a satisfactory environment.<sup>23</sup> Other essays including the article by Rodriguez-Rivera<sup>24</sup> also discuss environmental rights. Ouguergouz<sup>25</sup> and Yemet<sup>26</sup> both examine

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<sup>14</sup> Frynas, (n 7 above) 4.

<sup>15</sup> *Gbemre v Shell Petroleum Development Company Nigeria Limited and 2 ors*, (unreported) Suit no: FHC/B/CS/53/05

<sup>16</sup> B Conforti & F Francioni, (eds) *Enforcing international human rights in domestic courts*, (1997).

<sup>17</sup> F Viljoen, 'Application of the African Charter on Human and Peoples' Rights by domestic courts in Africa' (1999) 43 *Journal of African Law* 1.

<sup>18</sup> A Clapham, *Human rights in the private sphere*, (1993) and A Clapham, *Human rights obligations of non-state actors* (2006).

<sup>19</sup> M Addo (ed) *Human rights standards and the responsibility of transnational corporations* (1999).

<sup>20</sup> JG Frynas & S Pegg (eds) *Transnational corporations and human rights* (2003).

<sup>21</sup> N Wahi, 'Human rights accountability of the IMF and the World Bank: A critique of existing mechanisms and articulation of a theory of horizontal accountability' (2006) 12 *U.C Davies Journal of International Law and Policy* 331

<sup>22</sup> Van der Walt, (n 13 above).

<sup>23</sup> AE Boyle & MR Anderson (eds) *Human rights approaches to environmental protection* (1996).

<sup>24</sup> LE Rodriguez-Rivera, 'Is the human right to environment recognised under international law? It depends on the source' (2001), 12 *Colorado Journal of International Environmental Law and Policy* 1.

the scope and content of article 24 of the African Charter from a pre-*SERAC* decision perspective. Van der Linde and Louw discuss a post- *SERAC* decision perspective in their article.<sup>27</sup> Though not specific to the African Charter, Currie and de Waal present discussions on domestic enforcement of environmental justice rights especially in South Africa.<sup>28</sup>

#### **1.4 Objective and significance of study**

Literature survey indicates that focus has been on international liability for the environmental human rights abuses perpetuated by non-state actors. The objective of this study is to examine the possibilities for the realisation of the Charter based right to environment (this term is used widely to include any quality of environment in this essay) as a demand against private violators in domestic legal systems of state parties to the African Charter. The significance of the study is that it draws attention to the justiciability of the right to a satisfactory environment by departing from the traditional call for enforcement of environmental human rights at the international level and focusing on the option of domestic use of international rights in the African context.

#### **1.5 Methodology**

The study is mostly non-empirical and library based.

#### **1.6 Limitation of study**

The notion of horizontal application of human rights is still unsettled.<sup>29</sup> This amplifies the need for strong doctrinal examinations. However, for obvious reasons, this study only makes a passing reference to these doctrinal issues. The focus on TNCs as representative of non-state actors is recognised as a generalisation.

Domestic application of the African Charter is a wide issue and detailed studies are essential for a comprehensive treatment of the issue.<sup>30</sup> But this essay relies on the study by Viljoen, which is evidently also limited by time. This affects the currency of that aspect of the study.

In the light of continuing debate on the existence of an international right to a satisfactory environment, a detailed discourse may have been required. The study also proceeds on an

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<sup>25</sup> F Ouguergouz, *The African Charter on Human and Peoples' Rights* (2003) 353.

<sup>26</sup> VE Yemet, *La Charte Africaine Des Droits de L'Homme et Des Peuples* (1996) 223.

<sup>27</sup> Van der Linde & Louw (n 6 above).

<sup>28</sup> I Currie & J de Waal *The Bill of rights handbook* (2005) 521.

<sup>29</sup> Addo (n 19 above) 13.

<sup>30</sup> Viljoen (n 17 above) 15.

assumption of the existence of independent judiciaries in African states, without engaging in that enquiry. These all limit the comprehensiveness of the study.

### **1.7 Overview of chapters**

Chapter 1 contains a general overview of the study. In Chapter 2, the essay examines the scope and content of the right to a satisfactory environment as contained in the African Charter. Chapter 3 examines the existing framework for the realisation of the right to a satisfactory environment under the African Charter. The *SERAC* case<sup>31</sup> is considered briefly in this chapter as an example of the difficulty to arrest non-state actor violations in the existing framework.

Chapter 4 presents the case for horizontal application of article 24 of the African charter at the domestic level as a complimentary approach to realisation of the right. The debate on horizontal applicability of human rights is highlighted to show that it is not yet widely accepted but it is presented as a basis for this option. The recent Nigerian case of *Gbemre v SPDC*<sup>32</sup> is examined as an example of the possibility of horizontal application of the article 24 right in a domestic tribunal. Chapter 5 summarises the conclusions from the study and makes recommendations in support of applying the African Charter based right horizontally in domestic courts.

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<sup>31</sup> n 3 above.

<sup>32</sup> n 15 above.

## Chapter Two

### The right to a satisfactory environment under the African Charter on Human and Peoples' Rights

#### 2.1 Introduction

Commentators recognise the importance of a certain quality of environment and its link to the overall enjoyment of human rights.<sup>33</sup> The United Nations (UN) has acknowledged this link since 1968, leading to the making of a variety of instruments and documents to address issues relevant to the relationship between a qualitative environment and the enjoyment of human rights.<sup>34</sup> While some have lauded these developments,<sup>35</sup> others either oppose the idea of using a human rights platform to pursue environmental goals or challenge the essence of a distinct right to the environment.<sup>36</sup> The result of is a raging debate as to the existence of an internationally recognised right to a quality of environment.<sup>37</sup> Other commentators have taken the position that, while it may exist in some form, the existence of such a human right to the environment is not a foregone conclusion.<sup>38</sup> Some even cite the willingness of states to bind themselves to international documents addressing environmental concerns as evidence that the right to a healthy environment is obligatory.<sup>39</sup>

Despite the stalemate over the existence of a human right to the environment, the drafters of the African Charter took a seminal step in including an environmental human right in article 24 of the Charter.<sup>40</sup> However, it has been suggested that this was done without due regard to the complexities of its inclusion.<sup>41</sup> Indeed there are concerns raised as to its actual intendment and the possibility of its implementation.<sup>42</sup> Relative to implementation, there is a need to first determine the existence of a recognisable right before the follow up question as to the justiciability of such a right.

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<sup>33</sup> MA Geer 'Foreigners in their own land: Cultural land and transnational corporations – Emergent international rights and wrongs' (1998) 38 *Virginia Journal of International Law* 377.

<sup>34</sup> Ouguergouz (n 25 above) 354.

<sup>35</sup> See eg MT Leighton 'Legal and normative references: Environmental human rights' <[http://www.omced.org/casescase\\_Scwhatz.pdf](http://www.omced.org/casescase_Scwhatz.pdf)> (accessed 13/09/06)

<sup>36</sup> See eg G Handl 'Human rights and protection of the environment: A mildly revisionist view' in AAC Trindade (ed) *Human rights, sustainable environment and the environment* (1992) 117.

<sup>37</sup> Rodriguez-Rivera (n 24 above) 2.

<sup>38</sup> LA Feris & D Tladi 'Environmental rights' in D Brand & C Heyns (eds) *Socio-economic rights in South Africa* (2005) 249.

<sup>39</sup> L Herz 'Litigating environmental abuses under the Alien Tort Claims Act: A practical assessment' (2000) 40 *Virginia Journal of International Law* 589.

<sup>40</sup> Oloka-Onyango (n 9 above) 56.

<sup>41</sup> Van der Linde & Louw (n 6 above) 169.

<sup>42</sup> Ouguergouz (n 25 above) 361.

As Herz notes, a right has to be 'specific' and 'definable' before a question of its violation can arise in a judicial forum.<sup>43</sup> Commentators have also pointed out the need to identify a 'right holder', a 'duty bearer' and the scope of the given right as prerequisites for effective implementation of a right.<sup>44</sup> These are issues relevant to the implementation of article 24 of the African Charter.

This section of the study outlines both sides of the environmental rights debate, examines article 24 of the African Charter, and considers the beneficiaries of the right and those upon whom duty is imposed. Reference will be made to environmental rights in other regional human rights instruments and in domestic constitutions of African states.

## 2.2 The environmental rights debate

Ouguerouz traces the history of linking the environment and human rights by the UN to 1968. He however, identifies the 1972 United Nations Conference on the Human Environment in Stockholm and its resultant declaration (Stockholm Declaration)<sup>45</sup> as the starting point for the recognition of a right to a satisfactory environment.<sup>46</sup> By 1989, the UN Sub-Commission on the Prevention of Discrimination and Protection of Minorities commissioned a study on human rights and the environment under the Chairpersonship of Mrs F. Z Ksentini, culminating in a final report in 1994 (the Ksentini Report).<sup>47</sup> Between the 1972 Stockholm Declaration and the 1994 Ksentini Report, a number of significant events touching on the environmental rights occurred. Razzaque sums up the most important events when he said:<sup>48</sup>

The 1972 Stockholm Declaration proclaimed that man's natural and man made environment are essential to his well-being and to the basic human rights – even the right to life itself. In 1986, the United Nations General Assembly recognised the relationship between the quality of human environment and the enjoyment of basic human rights [UNGA resolution 2398 (XXII) 1986]. The 1992 Rio Declaration emphasised sustainable development and environmental protection. Moreover, Agenda 21 called for the fulfilment of basic needs, improved living standards for all, better protected and managed eco-systems and a safer, more prosperous future.

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<sup>43</sup> Herz (n 39 above) 556.

<sup>44</sup> JG Merrills 'Environmental protection and human rights: Conceptual aspects' in Boyle & Anderson (eds) (1996) 31.

<sup>45</sup> Declaration of the United Nations Conference on the Human Environment, U.N. June 16 1972, Doc./A/CONF.48/14/Ref.1.

<sup>46</sup> Ouguerouz (n 25 above) 354.

<sup>47</sup> U.N. Doc. E/CN.4/Sub.2/1994/9

<sup>48</sup> J Razzaque 'Human rights and the environment: the national experience in South Asia and Africa' Background paper no. 4 (2002)

Essentially, the 1992 Rio Declaration on Environment and Development (Rio Declaration)<sup>49</sup> made 20 years after Stockholm was an important indicator for the existence of a universally recognised right to the environment. Critics argue that the Rio Declaration failed to recognise ‘an explicit right to a decent, healthy or viable environment’.<sup>50</sup> It is thus suggested that this failure indicates that ‘the recognition of such a right is neither necessary nor desirable’.<sup>51</sup> Notwithstanding the position of the Rio Declaration, the Ksentini Report came to a conclusion that there is some recognisable right to a healthy and decent environment. In the Boyle’s words:<sup>52</sup>

The Ksentini Report’s most fundamental conclusion is that there has been a shift from environmental law to the right to a healthy and decent environment. This right, it argues, is part of existing international law and is capable of immediate implementation by existing human rights bodies. Its substantive elements include the right to development, life, and health, and it also has procedural aspects such as due process, public participation, and access to effective national remedies.

Rather than put an end to the debate, the Ksentini Report has itself been caught up in the debate on the existence of a universally recognised right to the environment. Writing earlier, Nickel had stressed that scepticism exists as to whether there is a right to a satisfactory environment which is recognised as a ‘genuine human rights’ either at national or international levels.<sup>53</sup> Geer supports Boyle’s position as he contends that there is ‘no definitive norm establishing an international human right to a particular environment’.<sup>54</sup> However, Geer agrees that the critical importance of environmental protection to human rights is now recognised. Others like Handl<sup>55</sup> and Kinley and Tadaki<sup>56</sup> also align with this position. Collectively, these commentators represent the school of thought that (to some degree), reject the existence of a right to any quality of environment as a distinct international human right.

On the other part of the debate are those who align with the conclusion in the Ksentini Report that there is some internationally recognised right to a quality of environment. Rodriguez-Rivera has argued that depending on where one looks, there is an international right to a healthy environment.<sup>57</sup> Cullet takes the perspective that even though there are discrepancies in formulation

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<sup>49</sup> U.N. Doc. A/CONF.151/26/Vol 1.

<sup>50</sup> Boyle (n 5 above) 49.

<sup>51</sup> As above.

<sup>52</sup> Boyle (n 5 above) 44.

<sup>53</sup> JW Nickel ‘The human right to a safe environment: Philosophical perspectives on its scope and justification’ (1993) 18 *Yale Journal of International Law* 281.

<sup>54</sup> Geer (n 33 above) 377.

<sup>55</sup> n 36 above.

<sup>56</sup> n 12 above 984.

<sup>57</sup> Rodriguez-Rivera (n 24 above)

and legal status, there is evidence of a basic aspiration to a qualitative environment.<sup>58</sup> This admittedly falls short of acknowledging the existence of a right. Herz also acknowledges the existence of an environmental human right, contending that it is both universal and obligatory and has a definable core of prohibited behaviour.<sup>59</sup> In different degrees, these commentators argue in favour of its existence.

In the absence of a legally binding universal instrument recognising a right to the environment, the debate on its existence will continue to rage. But as Leighton has suggested, it is not debatable that there is reference to the right to environment within the international community.<sup>60</sup> This is where Rodriguez-Rivera's advice becomes essential to the extent that the source of the given right should determine whether in the given circumstance, a legal right to the environment exists.<sup>61</sup> Hence while the right to environment is not a foregone conclusion at international law, its presence in a legally binding international human rights instrument can give it the quality of a legal right in the jurisdiction of that instrument.<sup>62</sup> It is thus arguable that the right to a satisfactory environment exists as a legal right under the African Charter.

### **2.3 The article 24 right in the African Charter**

Article 24 of the African Charter states that 'all peoples shall have the right to a generally satisfactory environmental favourable to their development'. Notwithstanding what part of the divide they stand, commentators agree that this provision guarantees environmental human rights under the Charter.<sup>63</sup> Though lauded as a 'progressive step' and a 'potentially powerful mechanism' for addressing environmental concerns in the continent, there seems to be consensus on its relative lack of clarity.<sup>64</sup> There are other environmental instruments relating to, or are applicable to Africa, however, as this study relates to article 24 of the African Charter, those are not considered here.<sup>65</sup>

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<sup>58</sup> Cullet (n 2 above) 3.

<sup>59</sup> Herz (n 39 above) 581.

<sup>60</sup> Leighton (n 35 above) 23. General Comment No 14 of the UN Committee on ESCR interprets art 12 of the CESCR to include qualitative natural and working environment.

<sup>61</sup> Rodriguez-Rivera (n 24 above) 45.

<sup>62</sup> Van der Linde & Louw (n 6 above) 173.

<sup>63</sup> Frynas (n 7 above) 106.

<sup>64</sup> Van der Linde & Louw (n 6 above) 176.

<sup>65</sup> See M Van der Linde 'A review of the African Convention on Nature and Natural Resources' (2002) 2 *African Human Rights Law Journal* 33 for a discussion of that instrument.



Although commentators question the precise meaning and scope of the right in article 24 of the Charter, some have argued that the difficulty in definition of a quality of environment is one that opens the opportunity for supervisory institutions and other judicial bodies to develop their own interpretations.<sup>66</sup> Unfortunately, the African Commission has considered article 24 only in the *SERAC* decision.<sup>67</sup>

### 2.3.1 Scope and content of the right

The difficulty in pinning down a definite meaning to environmental quality has always been acknowledged.<sup>68</sup> Article 24 of the African Charter also falls prey to this indeterminate nature.<sup>69</sup> Hence writers merely speculated on its exact scope and content. Before the *SERAC* decision, the guidelines for state reports under article 62 of the African Charter provided the best inspiration for interpreting the right.<sup>70</sup> Hence Churchill notes that the guidelines state that the 'main purpose' of article 24 'is to protect the environment and keep it favourable for development'. In furtherance of this, the African Commission is recorded as suggesting that state parties should establish a system to monitor disposal of waste in order to prevent pollution. Churchill views this position of the Commission as being 'narrow and largely anthropocentric' and raising questions concerning the content and scope of the right.<sup>71</sup>

Writing before the *SERAC* decision, Ouguergouz argued that as 'article 24 assigns no precise content to the right which it proclaims, it would be wrong to view it solely from the ecological standpoint'.<sup>72</sup> He suggested that 'liberty, peace and economic development' might justifiably be regarded as part of the right as would be a healthy natural environment. Accordingly he describes the right in article 24 as 'a kind of synthesis-right'.<sup>73</sup> However he concedes that this approach is more academic than practical and went on to conclude that the right includes 'a quality environment: relatively unpolluted air and water, and the protection of the flora and fauna'.<sup>74</sup> For Yemet, the protection of health and well-being is the primary justification for recognising the right to environment. He thus considers article 24 as a programmatic right for African States to balance

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<sup>66</sup> Kiss & Sheldon *International environmental law* quoted by Boyle (n 5 above) 50.

<sup>67</sup> Van der Linde & Louw (n 6 above) 169.

<sup>68</sup> Frynas, (n 7 above) 106

<sup>69</sup> RR Churchill 'Environmental rights in existing human rights treaties' in Boyle & Anderson (eds) (n 22 above) 106.

<sup>70</sup> As above.

<sup>71</sup> As above. See Rodriguez-Rivera (n 24 above) for a discussion of anthropocentrism and other doctrinal issues.

<sup>72</sup> Ouguergouz (n 25 above) 361.

<sup>73</sup> As above.

<sup>74</sup> Ouguergouz (n 25 above) 365.

development and environmental concerns that impact on the health of people.<sup>75</sup> The dilemma of defining the content of article 24 is exacerbated by its classification as a third generation or solidarity right. This allows the argument that it is merely an aspiration and a call for cooperation and solidarity.<sup>76</sup> These differ from discourse outside the African context.

Outside of article 24 of the African Charter, more enterprising contents have been ascribed to environmental rights. This raises the question whether the African human rights system ought not to explore elsewhere for guidance as to the content of the right to environment. While acknowledging the difficulty of definition, Nickel sees the right broadly as safety from pollution and contamination.<sup>77</sup> Apple prefers a broad definition that includes procedural (right to know) and substantive (right to enjoy) rights.<sup>78</sup> Similarly the definition of environmental justice in the United States (US) as recorded by Stephens and Bullock is expressed as both a right to a healthy environment and the right to participate in the decision making process to obtain that right.<sup>79</sup> Rodriguez-Rivera also agrees with a definition of environmental rights in this perspective.<sup>80</sup>

The definitions given to environmental rights outside the African system hold greater potentials for beneficiaries of the right. Although they argue that the exact content and demarcation of the right was not set out in the *SERAC* decision, Van der Linde & Louw tilt in favour of interpreting the article 24 right expansively to cover both procedural and substantive contents.<sup>81</sup> They agree that the right is a solidarity right but contend that it possesses characteristics of political and civil rights as well as socio-economic rights.<sup>82</sup> Writers have also identified 'sustainable development' as part of the right contained in article 24 of the African Charter.<sup>83</sup>

Making reference to an article by Alexander Kiss,<sup>84</sup> the African Commission stated in the *SERAC* decision that article 24 imposes obligations on governments and requires states to 'take

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<sup>75</sup> Yemet (n26 above) 224, 228. (Portions translated by present author from original French text)

<sup>76</sup> Rodriguez-Rivera (n 24 above) 20.

<sup>77</sup> Nickel (n 53 above) 284.

<sup>78</sup> B Apple 'Commentary on "The enforceability of environmental rights"', (2004) *Human Rights Dialogue*.

<sup>79</sup> C Stephens & S Bullock 'Civil society and environmental justice' in Gready (ed) *Fighting for Human Rights* (2004) 135.

<sup>80</sup> Rodriguez-Rivera (n 24 above) 16.

<sup>81</sup> Van der Linde & Louw (n 6 above) 174.

<sup>82</sup> As above

<sup>83</sup> Leighton (n 35 above) 6.

<sup>84</sup> A Kiss, 'Concept and possible implications of the right to environment' in K Mahoney & P Mahoney (eds), *Human rights in the twenty-first century: A global challenge*, 553.

reasonable and other measures to prevent pollution and ecological degradation'.<sup>85</sup> From the views of commentators read along with the Commission's decision in the *SERAC* communication, the right in article 24 of the Charter includes:

- States obligation to secure an ecologically sustainable development and use of natural resources.
- An obligation to permit independent scientific monitoring of threatened environments, require and publish environmental and social impact studies.
- Duty to monitor and provide appropriate information to those communities exposed to hazardous materials and activities.
- The provision of 'meaningful' opportunities for individuals to be heard and to participate in the development decisions affecting their communities.<sup>86</sup>

This goes beyond any definition anticipated before the decision. As Van der Linde & Louw note, it contains both the procedural and substantive aspects of the right to environment.<sup>87</sup> Notwithstanding that it is not a fine delimitation and does not state a core minimum content, it appears sufficient to base a demand for justiciability. It is thus safe to argue that article 24 of the Charter confers a right to a pollution free environment that supports sustainable development, as well as the right of access to participate in the process towards such an environment, and to seek redress in the event of interference with the enjoyment of the right. This is the definition with which this study will proceed.

### 2.3.2 Beneficiaries of the right

As Merrills notes, since the function of rights is to mark out protected areas for the benefit of someone or something, the identity of a rights holder is crucial to the content of a right.<sup>88</sup> This demonstrates the need to identify the beneficiaries of the right in article 24 of the Charter. In this regard, Ouguergouz again considers article 24 to be ambiguous. He contends that the reference to 'peoples' in article 24 is open to several interpretations. Thus he argues that 'the people-state' can claim to be subjects of the right as easily as 'the people-ethnic group'.<sup>89</sup> However, he concludes that the reference to 'peoples' is similar to its usage in article 22 of the Charter.<sup>90</sup> Kiwanuka agrees with the position that the reference is to the 'people-state'.<sup>91</sup> While this interpretation is very

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<sup>85</sup> *SERAC* case (n 3 above) para 52.

<sup>86</sup> As above, para 53.

<sup>87</sup> Van der Linde & Louw (n 6 above) 178

<sup>88</sup> Merrills (n 44 above) 31.

<sup>89</sup> Ouguergouz (n 25 above) 371.

<sup>90</sup> As above. In 304, Ouguergouz explains 'peoples' as used in art 22 and adds that it can have an individual dimension.

<sup>91</sup> RN Kiwanuka, 'The meaning of 'people' in the African Charter of Human and Peoples' Right, 82 American

possible, it raises questions.<sup>92</sup> From the perspective of justiciability for example, it would mean that it could only be the subject of a state complaint as no person or group would be positioned to bring an action. This cannot be the intendment of the drafters. It may however refer to the people as contained in article 22. Yemet agrees with the suggestion that the use of 'people' in article 24 may be interpreted as it is used in article 22 of the Charter. But in doing this, he emphasises that it is a collective right as against being an individual right. Yemet even suggests that the term 'peoples' can be interpreted as referring to people of the earth and therefore, the whole of humanity.<sup>93</sup>

Despite the differences in interpretation, there is consensus that the right accrues to something more than an individual. Hence Merrills notes that:<sup>94</sup>

On the right to a clean or healthy environment as a collective right; what is posited is that groups or communities, defined in some way, should be the beneficiaries of a right which could be argued to be vital to their existence or survival.

The facts of the *SERAC* communication lend credence to this argument in the same way that it defeats the argument that the reference is to the entire people of a state.<sup>95</sup> Thus, while an individual cannot be the beneficiary of the right in his individual capacity, a group of individuals and not the people-state are the beneficiaries of the right.

### 2.3.3 Duty bearers

The necessity of identifying the duty bearer is captured by Merrills<sup>96</sup> as well as by Nickel.<sup>97</sup> With respect to environmental rights generally, Frynas argues that they are primarily construed with reference to state actors.<sup>98</sup> This suggests that state actors are the duty bearers in such situations. Specific to article 24 of the Charter, Ouguerouz seems to hold the same view. Hence even though he concedes that article 24 imposes no clear duty on the state parties, he argues that by article 1 of the African Charter, it is states that are legally responsible for implementing the collective rights set out in it.<sup>99</sup> Geer<sup>100</sup>, McClymonds<sup>101</sup> and Cullet<sup>102</sup> support this position in various forms as they

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Journal of International Law (1988).

<sup>92</sup> Churchill (n 69 above).

<sup>93</sup> Yemet (n 26 above) 228 – 229.

<sup>94</sup> Merrills (n 44 above) 8.

<sup>95</sup> n 3 above

<sup>96</sup> n 44 above 34.

<sup>97</sup> n 53 above 286.

<sup>98</sup> n 7 above 106.

<sup>99</sup> Ouguerouz (n 25 above) 364 – 365, 373.

all recognise that the duty in environmental rights claims is on the state parties though non-state actors may cause the violation. This latter position is similar to that held by the African Commission in the *SERAC* decision as the Commission acknowledged that the non-state actors were also involved in the violations complained of.<sup>103</sup>

Not every commentator agrees with the position that only state parties bear the duty. Merrills accepts the argument that states bear obligation in relation to environmental rights but refers to that obligation as the 'primary obligation' and states that this is different from holding the 'exclusive' duty.<sup>104</sup> Accordingly, he argues that:<sup>105</sup>

As with individual rights, it is also worth noting that holding the primary obligation is different from holding the exclusive obligation. Thus it has been pointed out that so-called 'peoples' rights in international law, which would include the right to a clean environment, might well also involve obligations for entities other than the states, although the issues is far from clear.

Yemet concurs in part with this possibility. In analysing the duty bearer in relation to article 24 of the Charter, he points out that no express duty is prescribed for state parties under article 24 and that unlike the preceding rights, no mention is made of a duty on the state. Hence, he reasons that it could raise a demand against states and against individuals. He concludes that 'it is possible to envisage a sort of "*drittwirkung*"'.<sup>106</sup> Thus, while they accept that the state parties are duty bearers under provisions conferring environmental rights, these writers also recognise the possibility of such provisions imposing duties on non-state actors. They have support in Nickel who states that persons, organisations and corporations have duties to respect environmental rights and to make compensations in the event of violations.<sup>107</sup> Herz also supports the view as he argues that state action is not an element in a claim for environmental rights.<sup>108</sup>

The possibility of non-state actor duty under the African Charter is accepted generally. Ouguergouz himself accepts that the basis for including duties of the individual in the African Charter is to tackle

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<sup>100</sup> n 33 above 355.

<sup>101</sup> JT McClymonds 'The human right to a healthy environment: An environmental legal perspective' (1992) 37 *New York Law School Law Review* 583.

<sup>102</sup> n 2 above.

<sup>103</sup> n 3 above.

<sup>104</sup> Merrills (n 44 above) 34.

<sup>105</sup> As above.

<sup>106</sup> n 26 above 229.

<sup>107</sup> Nickel (n 53 above) 286.

<sup>108</sup> Herz (n 39 above) 595.

impunity as the state cannot be regarded as the 'only potential violator of human rights'.<sup>109</sup> Heyns also acknowledges that the African Charter imposes duties on non-state actors in certain cases.<sup>110</sup> Together, these show that article 24 may impose duties on non-state actors. It can thus be concluded that whereas by the nature of the African Charter, only states are parties and as such hold primary duties under article 24, non-state actors can, and do have duties under the present article.

## 2.4 Environmental rights in other regional human rights systems

The uncertainty surrounding the recognition of environmental human rights at the universal level does not appear to be replicated in the regional human rights system. In the Inter-American human rights system, there is an express right to the environment. Hence, Ouguergouz notes that article 11 of the Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights 1988 (Protocol of San Salvador)<sup>111</sup> provides for a right of everyone to live in a healthy environment and to have access to basic public services.<sup>112</sup> Article 11 of the San Salvador Protocol is proclaimed to be an individual right.<sup>113</sup>

Commentators like Handl have raised doubts concerning the willingness or ability of the supervising institutions of the Inter-American system to use the San Salvador Protocol to further environmental protection.<sup>114</sup> However, prior to the San Salvador Protocol, the supervisory institutions of the Inter-American system had addressed environmental concerns often on the basis of the right to health. Shelton records the *Yanomani* case<sup>115</sup> as an example of environmental jurisprudence in the Inter-American system.<sup>116</sup> In addition, the Inter-American Commission undertook environmental studies in Ecuador and Brazil, resulting in findings of a state duty to protect residents from pollution.<sup>117</sup> The jurisprudence of the Inter-American system appears to approach environmental rights in terms similar to article 24 of the African Charter as it finds a

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<sup>109</sup> n 25 above 384

<sup>110</sup> C Heyns 'Civil and Political Rights in the African Charter' in Evans & Murray (eds) *The African Charter on Human and Peoples' Rights* (2002) 146.

<sup>111</sup> OAS Treaty Series No 69.

<sup>112</sup> n 25 above 358.

<sup>113</sup> Ferris & Tandl (n 38 above) 256.

<sup>114</sup> G Handl 'Human rights and protection of the environment' in A Eide, *et al* (eds) *Economic, social and cultural rights* (2001) 310.

<sup>115</sup> Case 7615 (Brazil) Inter-American Commission on Human Rights 1984-1985 Annual Report 24, L/V/II.66, doc. 10 rev.1 (1985).

<sup>116</sup> D Shelton (n 2 above) 11.

<sup>117</sup> Inter-Am. C.H.R. *Report on the situation of human rights in Ecuador*, OEA/Ser.L/V/II.96.doc.10. Also Inter-Am. C.H.R. *Report on the situation of human rights in Brazil*, OEA/Ser.L/V/II.97.doc.29.rev.

balance between the need for economic development and concerns for environmental protection.<sup>118</sup> It remains to be seen how article 11 of the San Salvador Protocol will be used by the Inter-American system.

The European Convention on Human Rights (ECHR) does not contain an environmental right and attempts at introducing environmental rights into the system have failed so far.<sup>119</sup> However, environmental harms have been the basis for successful individual claims under the ECHR. In *Lopez-Ostra v Spain*<sup>120</sup>, the European Court on Human Rights (ECtHR) found a violation of the right to privacy in article 8 of the ECHR upon complaints of environmental harm. Since the decision in *Lopez-Ostra*, the ECtHR has found violations for environmental violations in other cases such as *Arrondelle v. United Kingdom*,<sup>121</sup> *Baggs v United Kingdom*<sup>122</sup> and *Powell and Raynor v United Kingdom*.<sup>123</sup> The jurisprudence indicates an individual right and the ECtHR balances individual interests against community interests in these cases just as it holds that severe environmental pollution can interfere with the enjoyment of human rights.<sup>124</sup> This is a recognition of the link between environmental rights and the enjoyment of other human rights. The summary of this inquiry is that environmental rights have a place in the other regional human rights systems.

## 2.5 Environmental rights in domestic constitutions in Africa

The significance of this part of the inquiry lies in the fact that at international law, state practice is relevant to show the existence of an emerging principle.<sup>125</sup> Environmental rights in domestic constitutions and the manner they are couched show that the right to environment is a recognised right and it imposes some form of duty on non-state actors as it does on the given state. Shelton has noted that over 100 constitutions around the world provide for a right to a clean environment in some form.<sup>126</sup> In Africa, Ouguergouz records that 'constitutions of many African States now grant quite a substantial place to protection of the environment'.<sup>127</sup> Ebeku agrees with this and points out that environmental rights in domestic constitutions either proclaim a duty of the state to pursue environmentally sound development and the maintenance of safe and healthy environments for

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<sup>118</sup> Herz (n 39 above) 589.

<sup>119</sup> Feris& Tladi (n 38 above) 256. Handl (n 114 above) 308.

<sup>120</sup> 20 Eur. Ct. H.R. (Ser. A) 277 (1994).

<sup>121</sup> 19 D & R (1980) 186.

<sup>122</sup> 44 D & R (1985) 13.

<sup>123</sup> 18 Eur. Ct. H.R. (Ser. A) 172 (1990).

<sup>124</sup> Churchill (n 69 above) 94.

<sup>125</sup> I Brownlie *Principles of public international law* (2003) 8.

<sup>126</sup> Shelton (n 2 above) 4.

<sup>127</sup> Ouguergouz (n 25 above) 370.

citizens or provide for the individual's right to a clean and healthy environment and the person's duty to protect the environment.<sup>128</sup> A survey of constitutions in Africa indicates that 18 out of the 53 state parties to the Charter had environmental rights provisions in their constitutions.<sup>129</sup> Eight of these also imposed duties on individuals to protect the environment. Another eight state constitutions contained environmental provisions in directive principles of state policy.<sup>130</sup>

The South African Constitution of 1996 for example, provides a clear right to a healthy environment. As Feris notes, section 24 of the South African Constitution is framed as an individual right.<sup>131</sup> She also makes the point that section 24 is a justiciable right and is either a demand against the state or an individual.<sup>132</sup> She argues that 'the possibility of direct horizontal application is important since it is often private actors that cause massive environmental degradation'.<sup>133</sup> Glazewski sees the inclusion of section 24 in the South African Constitution as invoking 'the spirit of the African Charter'.<sup>134</sup> Similarly section 15 of the Mali Constitution 1992 provides for the right of 'every person to a healthy environment'. It makes the protection and defence of the environment a duty for all and the state. In the same vein, article 90 of the Mozambican Constitution of 2004 guarantees the right of citizens to a healthy environment and imposes a duty on everyone to defend the environment. Other states like Nigeria do not have a justiciable right to a healthy environment but provide for environmental concerns in the directive principles of state policy.<sup>135</sup>

Subject to its limitations, it is evident from the limited study that the right to a quality of environment is an accepted constitutional right in a number of African states.

## 2.6 Conclusion

It is obvious from the discussion in this chapter that the link between environmental protection and the enjoyment of human rights is acknowledged. Yet the fact remains that the existence of a universal right to a quality environment by any nomenclature is still an aspiration. It is also evident

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<sup>128</sup> KSA Ebeku 'The right to a satisfactory environment and the African Commission' (2003) 3 *African Human Rights Law Journal* 151.

<sup>129</sup> Based on constitutions that were operative in 2004, Angola, Benin, Burkina Faso, Cape Verde, Chad, DRC, Cote d'Ivoire, Ethiopia, Guinea, Madagascar, Mali, Mozambique, Niger, Sao Tome, Senegal, Seychelles, South Africa, Sudan, Togo and Uganda had environmental rights provisions. See C Heyns (ed) *Human Rights Law in Africa* (2004) 853.

<sup>130</sup> Cameroon, Comoros, Gabon, Gambia, Ghana, Lesotho, Malawi, and Nigeria. Some constitutions may have been replaced or amended since 2004.

<sup>131</sup> L Feris 'Environment' in Currie & Waal (n 28 above) 522.

<sup>132</sup> As above.

<sup>133</sup> As above, 524

<sup>134</sup> J Glazewski 'Environmental rights and the new South African Constitution' in Boyle & Anderson (n 22 above) 196.

<sup>135</sup> See for eg art 20 of Nigerian Constitution (1999).



that in spite of the constant reference to a right to the environment, there is a raging disagreement as to the exact definition of such a right. A consequence of this disagreement is the indeterminacy that trails the expression of environmental rights in international instruments. This has led to arguments that question the justiciability and indeed possibility of implementation of these rights. But the interdependency of rights is not contested and threats to the environment have been held to threaten the enjoyment of more recognised rights like the right to life.

However, the right to a satisfactory environment is concretely guaranteed in the African Charter. While the Charter is a binding legal instrument, debates have also arisen as to the real legal consequence of the inclusion of article 24. Fortunately, the African Commission has used the opportunity of the *SERAC* decision to confirm the existence of the right to a satisfactory environment under the Charter. The decision has made a significant contribution to environmental rights jurisprudence by confirming aspects of the right and acknowledging that non-state actors could violate the right to a satisfactory environment, hence indicating that they do have duties under article 24. The discussion has also shown that the beneficiaries of the right are 'people' as the right is a collective rather than an individual right but does not exclude individual enjoyment of the right as part of a group.

Finally, the chapter pointed out the status of environmental rights in the other regional human rights system. It also highlighted the growing recognition of environmental rights in domestic constitutions in Africa. As the right in article 24 has been examined here, the next section of this study explores the framework for realisation of the right under the African human rights system.

## Chapter Three

### Realisation of the article 24 right under the African Charter

#### 3.1 Introduction

The essence of a right is to confer some benefit on someone or something.<sup>136</sup> Such a benefit can only be available upon demand by the beneficiary of the right. The concept of human rights is all about this process of identifying rights and the means for their realisation. In the preceding section of this study, the existence of a legal right to a satisfactory environment in article 24 of the African Charter was considered. Having concluded that the right exists and that it confers benefits on 'people' and imposes both a primary duty on the states parties and a lesser duty on non-state actors, this section assesses the provision made for realisation of the right under the African Charter and the African human rights system.

There being no special mechanism for the realisation of specific rights, the general framework for the rights realisation under the African Charter is analysed with attention on the realisation of the right in article 24 of the Charter through the present mechanisms. Although some learned commentators regard the Assembly of the Union of the African Union as essential in the framework for the realisation of rights under the African human rights system,<sup>137</sup> the focus here is on the Commission and the newly emerged African Court on Human and Peoples' Rights (ACtHR or Court).

#### 3.2 The institutional framework for realisation of rights under the African Charter

Part II of the African Charter makes provision for the institutional framework for the realisation of the rights contained in the Charter.<sup>138</sup> By article 30, the Charter established the African Commission to promote and protect human rights in Africa. From its inauguration in 1987 till July 2006,<sup>139</sup> the African Commission remained the only institution directly involved with promoting and protecting the Charter based rights under the African human rights system.<sup>140</sup> However, the Charter also left room for additional protocols and agreements to 'supplement' the provisions of the Charter as it stood at adoption.<sup>141</sup> In furtherance of this 'allowance', the then Organisation of African Unity (OAU) Assembly adopted the Protocol to the African Charter on the establishment of

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<sup>136</sup> Merrills (n 44 above) 31.

<sup>137</sup> For eg Ouguergouz (n 25 above) 481.

<sup>138</sup> Part II of the African Charter deals with the 'measures for safeguard'.

<sup>139</sup> The ACtHR was inaugurated on 2/7/06 but is yet to hear its first case.

<sup>140</sup> C Heyns 'The African regional human rights system: In need of reform?' (2001) 1 *African Human Rights Law Journal*, 155, 162.

<sup>141</sup> Art 66.

an African Court on Human and Peoples' Rights (Court Protocol)<sup>142</sup> in June 1998. On 25 January 2004, the Court Protocol entered into force following the submission of the required number of instruments of ratification.<sup>143</sup>

With the entry into force of the Court Protocol and the subsequent inauguration of the African Court on Human and Peoples' Rights, there are now two institutions with the responsibility to guarantee or protect human rights based on the Africa Charter.<sup>144</sup> These institutions are examined in details in the following sections.

### 3.3 Realisation through the African Commission

#### 3.3.1 The African Commission

The African Commission needs little introduction in human rights circles.<sup>145</sup> The Commission is elected by the Assembly of the Heads of State and Government of the OAU<sup>146</sup> and is a quasi-judicial body.<sup>147</sup> It makes its own rules of procedure.<sup>148</sup>

The mandate of the Commission is developed into three main duties of promoting human rights, protecting rights and interpreting the provisions of the Charter.<sup>149</sup> Some commentators suggest that the promotional mandate of the Commission primes over the protective mandate.<sup>150</sup> The Rules of the Commission indicate that the promotional activities of the Commission are as laid down in article 45 of the Charter and include the consideration of State reports.<sup>151</sup> The protective function is basically the consideration of communications relating to alleged human rights violations though not confined to such consideration.<sup>152</sup> The distinction between these two aspects of the Commission's mandate is not in watertight compartments.<sup>153</sup>

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<sup>142</sup> OAU/LEG/MIN/AFCHPR/Prot.1 rev 2.

<sup>143</sup> Art 34 of the Court Protocol.

<sup>144</sup> The African Charter on the Rights and Welfare of the Child adopted in 1990 establishes a Committee of Experts under its article 32. It is not a protocol to the Charter unlike the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women. This latter protocol is to be implemented by the African Commission and (from July 2006) the African Court. See F Viljoen 'The African Commission on Human and Peoples' Rights' in Heyns (n 140 above) 497.

<sup>145</sup> History of the Commission available at <[http://www.achpr.org/english/\\_info/hitory\\_en.html](http://www.achpr.org/english/_info/hitory_en.html).

<sup>146</sup> The African Union (AU) replaced the OAU in 2001 and inherited the Charter.

<sup>147</sup> Ouguerouz (n 25 above) 485 discusses the African Commission.

<sup>148</sup> Art 30 of the Charter.

<sup>149</sup> Art 45 of the Charter.

<sup>150</sup> Yemet (n 26 above) 279.

<sup>151</sup> Ouguerouz (n 25 above) 518.

<sup>152</sup> Ouguerouz (n 25 above) 518, 519.

### 3.3.2 Realising rights through the African Commission

In terms of rights realisation, the protective mandate of the African Commission appears to be more relevant.<sup>154</sup> Yet it is suggested that the African Commission pays more attention to its promotional mandate.<sup>155</sup> The two identifiable aspects to the protective mandate of the Commission are the state communication procedure and the individual communication procedure. The state communication procedure is provided for in article 47 of the Charter. It empowers the Commission to consider communications brought by one state Party against another. Discussing the protective mandate, Ouguergouz emphasises that it has to be done ‘under the conditions laid down’ by the African Charter.<sup>156</sup> This emphasis is made to suggest that read together with article 47 in which reference is made to violations of provisions of the Charter and not just violations of the chapter on human and peoples’ rights, there is a theoretical possibility for the Commission to also enforce individual duties contained in the Charter. Hence, a state party could bring a communication against another state party for its failure to enforce individual duties within its territory.<sup>157</sup> The significance of this line of argument to this study is that in respect of realising the right in article 24, a state party could bring a communication against another state for failing to enforce the duties the article imposes on non-state actors within its territory.

However, Ouguergouz himself rejects the viability of such an interpretation and argues against any attempt by the Commission to deal with a failure to observe duties imposed by the Charter.<sup>158</sup> In any case, since its inception, the Commission has received only one state communication and this line of interpretation remains largely speculative.<sup>159</sup> State communications could also be relevant to the realisation of article 24 in the event that the term ‘peoples’ in that article is interpreted to mean ‘people-state’ as suggested by some commentators.<sup>160</sup> In such a situation, the state victim would be competent to bring the complaint under this procedure. However, that interpretation has been rejected. Thus, the state communication procedure is not very relevant to the realisation of article 24 in that respect.

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<sup>153</sup> As above.

<sup>154</sup> Viljoen (n 144 above) 429.

<sup>155</sup> Ouguergouz (n 25 above) 519.

<sup>156</sup> Ouguergouz (n 25 above) 550. Also Yemet (n 26 above) 284.

<sup>157</sup> Ouguergouz (n 25 above) 551.

<sup>158</sup> As above 551.

<sup>159</sup> Communication 227/99, *DRC V Burundi, Rwanda & Uganda*.

<sup>160</sup> See chapter two.

The individual complaints procedure is the other aspect of the Commission's protective mandate. An essential point to note is that some commentators argue that the Charter does not empower the Commission to consider individual complaints except in situations of 'a series of serious or massive violations' under article 58 of the Charter.<sup>161</sup> However, this has been settled in the *Jawara v The Gambia* decision<sup>162</sup> where the Commission asserted a right in this respect under article 55 of the Charter even in the absence of serious or massive violations.<sup>163</sup> It is arguable that environmental degradations resulting in an allegation of a violation of article 24 would be serious or massive enough to fall under the article 58 provision so that there need not be reliance on article 55 for the right to bring a complaint of such a violation. However, this has been overtaken as the Commission's right to consider individual complaints is now settled.

As Gumedze notes, the African Charter is silent as to who, other than a state party under the state communication procedure, can bring a communication before the Commission.<sup>164</sup> But it is clear from the Rules of Procedure of the Commission (Rules) and from its jurisprudence that an individual or a group of individuals, where applicable, can bring a complaint.<sup>165</sup> Generally, the question of *locus standi* before the Commission is thought to be liberal.<sup>166</sup> The significance of this with respect to the realisation of article 24 is in the fact that it is wide enough to accommodate prospective applicants however article 24 is read in terms of its beneficiary.

Although article 56 of the Charter which sets out the preconditions for admissibility of communications is silent on the point, a combined reading of articles 45 and 47 of the Charter as well as of Rule 102(2) of the Rules indicates that only violations by state parties to the African Charter can be brought before the African Commission.<sup>167</sup> In essence, the question of non-state actor duty and responsibility in respect of article 24 becomes moot before the Commission except to the level of state party responsibility for a breach of such duty. Article 56 of the Charter has been the subject of much discourse and it will not be be-laboured here.<sup>168</sup> It is just important to note that by article 56(5) requires the exhaustion of local remedies before a complaint can be admissible. This

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<sup>161</sup> R Murray 'Decisions by the African Commission on Human and Peoples' Rights on individual communications under the African Charter on Human and Peoples' Rights' (1997) 46 *International and Comparatively Law Quarterly* 412, 413.

<sup>162</sup> *Sir Dawda K Jawara v The Gambia*, (2000) *African Human Rights Law Reports* (AHRLR) (ACHPR 2000) 107.

<sup>163</sup> Heyns (n 140 above) 163.

<sup>164</sup> S Gumedze 'Bringing communications before the African Commission on Human and Peoples' Rights' (2003) 3 *African Human Rights Law Journal* 118,121.

<sup>165</sup> As above.

<sup>166</sup> JC Mubangizi 'Some reflections on recent and current trends in the promotion and protection of human rights in Africa: The pains and gains' (2006) 6 *African Human Rights Law Journal* 146 148.

<sup>167</sup> Ouguergouz (n 25 above) 558.

<sup>168</sup> See for eg F Viljoen 'Admissibility under the African Charter' in Evans & Murray (eds) (2002).

condition is only waived in special circumstances.<sup>169</sup> Thus, generally, the domestic legal system of the respondent in every communication has to be given the first opportunity to hear the case. Hence, subject to the relevant exceptions, a communication alleging a violation of article 24 has to be heard in the domestic courts before it can be brought before the Commission.

Another point to note is that the Commission does not have a clear mandate to make remedial orders at the conclusion of a communication. However, the Commission has taken advantage of its power to make its own rules of procedure under article 42(2) to create room for such orders as it deems necessary.<sup>170</sup> In any case, the Commission has stressed that the object of its individual Communication procedure is to 'initiate a positive dialogue' which will result in an amicable resolution between the complainant and the state concerned.<sup>171</sup> Such a resolution is expected to remedy the prejudice complained of. The *SERAC* decision provides a good opportunity to assess the realisation of article 24 of the Charter and will be the next focus of this study.

### 3.3.3 The *SERAC* case

The Social and Economic Rights Action Center (*SERAC*) and the Centre for Economic and Social Rights (*CESR*) jointly brought this communication on behalf of the Nigerian Ogoni tribe against Nigeria. The communication alleged that the oil exploration activities in Ogoniland were carried out without regard for the health or environment of the local communities in violation of several articles of the African Charter including article 24.<sup>172</sup> The *SERAC* decision has attracted much comment and is considered here only to the extent of examining the realisation of article 24 of the Charter by the African Commission.<sup>173</sup>

The first point to note is that the communication was brought by a coalition of Non Governmental Organisations (NGOs).<sup>174</sup> The communication was brought on behalf of a group of people – 'people-ethnic group' rather than an individual or a 'people-state'. While the issue was not canvassed and was not pronounced upon by the Commission, it is apparent that the right in article 24 accrues to 'peoples' and not an individual. But more importantly, it confirmed the argument that the term 'peoples' as used in article 24 of the Charter does not refer to the 'peoples-state'.<sup>175</sup> In

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<sup>169</sup> As above.

<sup>170</sup> Viljoen (n 144 above) 430.

<sup>171</sup> *Free Legal Assistance Group and Others v Zaire* (2000) AHRLR 74 (ACHPR 1995) para 39.

<sup>172</sup> Facts of the *SERAC* decision are reported in the 2001 edition of the *African Human Rights Law Reports*. Van der Linde and Louw (n 6 above) provide an analysis of the decision.

<sup>173</sup> See also DM Chirwa (2002) cited by Nwobike (n 8 above).

<sup>174</sup> Para 49 of the decision affirms the recognition of *actio popularis* under the African Charter.

<sup>175</sup> See chapter two of this study.

addressing the question of admissibility, the Commission noted that Nigeria has incorporated the Charter but also took cognisance of the ouster of the jurisdictions of the Nigerian courts at that time. Consequently, the communication may have failed for non-exhaustion of local remedies if not for the 'special situation' of the ousters.<sup>176</sup>

On the merits, the Commission recognised the right of the state party to explore its natural resources but balanced this against the right of the applicants to a satisfactory environment. This is relevant to the extent that the Commission was saddled with the task of balancing conflicting rights of development and environmental demands. Of further interest to this inquiry is the acknowledgement by the Commission that private actors may perpetrate violations of the Charter.<sup>177</sup> Yet, the Commission remained silent on the question of non-state actor accountability and took the option of state party responsibility failure to prevent private violations.<sup>178</sup> The danger is in the allowance for continued impunity of non-state actors for their violations of article 24. One last issue of interest is the finding of the Commission. Commentators like Viljoen applaud the innovative approach of the Commission in this decision as a clear departure from its usual approach, especially in terms of implying a follow-up.<sup>179</sup> However, Van der Linde and Louw expressed doubts on the viability of the recommendations.<sup>180</sup> There is also no evidence that the Nigerian government ever 'reported' back to the Commission. In any case, there was hardly any effect of this decision on the non-state actors acknowledged to have contributed to the violations. Perhaps a significance of the decision may be in its potentiality to influence decisions of domestic courts in Nigeria.<sup>181</sup>

### 3.4 Realisation through the African Court

The Court Protocol was adopted in June 1998 by the defunct Assembly of Heads of State and Governments of the OAU, and came into effect on 25 January 2004. After initial hiccups resulting from a proposed merger with the Court of Justice of the African Union, the African Court came into being on 2 July 2006 with the inauguration of the 11 judges of the Court.<sup>182</sup>

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<sup>176</sup> Part of the criticism of the *SERAC* decision by Prof M Hansungule during lectures at the LLM in Human Rights 2006 programme at the University of Pretoria is the inadequate consideration of the exhaustion of local remedies.

<sup>177</sup> At para 57 of the *SERAC* decision (n 3 above).

<sup>178</sup> Nwobike (n 8 above) 141.

<sup>179</sup> Viljoen (n 144 above) 457. J Harrington 'The African Court on Human and Peoples' Rights' in Evans & Murray (2002) 305 notes the difficulty in the area of remedies.

<sup>180</sup> Van der Linde & Louw (n 6 above) 185.

<sup>181</sup> Ebeku (n 128 above) 166.

<sup>182</sup> See report at the Interights Web page, <http://www.interights.org/page.php?dir=News#Inauguration%20headline>

Pityana notes that the perception among NGOs and human rights experts that the African Commission was 'largely ineffectual' was the driving force for the creation of the African Court.<sup>183</sup> Though the African Court has only just emerged, it has been the subject of scholarly scrutiny for a while. Harrington in examining article 3 of the Court's Protocol observes that the Court has a 'broad and almost unlimited' substantive jurisdiction.<sup>184</sup> However, she points out that there is no provision allowing individuals and NGOs to directly access the Court.<sup>185</sup> Article 5(3) allows direct access only on the condition that the state party concerned has made a declaration in terms of article 34(6) of the protocol. But as Heyns points out, African States are not likely to make such a declaration in a hurry.<sup>186</sup> The effect is that apart from access through the Commission there is no opportunity for a complaint to be brought before the Court against all but one of the state parties.

Unlike the Commission, the ACtHR is empowered to make appropriate remedial orders upon a finding of violation and such orders are to be enforced by the political institutions of the African Union.<sup>187</sup> However, as Ouguerouz observes, only state parties can be respondent before the Court.<sup>188</sup> In respect of the realisation of article 24 of the Charter, this shuts out the possibility of redress against non-state actors. In any case, Tomuschat makes a critical point that the cost of pursuing a case before the African Court would be higher than most African victims can bear.<sup>189</sup>

Although Harrington argues that the Court is clearly intended to go beyond the African Commission in its protective mandate,<sup>190</sup> and Pityana suggests that even in the absence of a hierarchy the African Court will be the final arbiter and interpreter of the African Charter,<sup>191</sup> there is little hope of successful realisation of the article 24 right by individuals before the Court.

### **3.5 Challenges of realising article 24 through the supranational system in Africa**

The scope of this study does not permit a discussion of the overall challenges of realising human rights through the supranational institutions in Africa. Thus, the focus is on the challenges for realising the right to a satisfactory environment using these institutions. Commenting generally on

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<sup>183</sup> NB Pityana 'The African Court on Human and Peoples' Rights in municipal law', paper presented to seminar at Gaborone, Botswana, December 2003.

<sup>184</sup> Harrington (n 179 above) 318.

<sup>185</sup> As above. See arts 5 & 6 of the Court Protocol.

<sup>186</sup> Heyns, (2001) (n 140 above) 170. As at October 2006 only one state party had made a declaration in terms of art 34(6).

<sup>187</sup> Harrington (n 179 above) 324.

<sup>188</sup> Ouguerouz (n 25 above) 725.

<sup>189</sup> C Tomuschat *Human Rights* (2003) 214.

<sup>190</sup> Harrington (n 179 above) 326.

<sup>191</sup> Pityana (n 183 above) 6.



the international human rights regime, Callingsworth notes that it is a shortcoming of the contemporary regime to focus on states and assume that national law will regulate private actors.<sup>192</sup> Specific to environmental rights, Osofsky amplifies the challenge in observing that supra national fora carry a structural limit for direct non-state actor accountability as only states can be brought before the relevant institutions.<sup>193</sup> These comments apply in the African system with respect to the realisation of the right to a satisfactory environment under the African Charter.

Quite apart from its perceived inadequacy and ineffectiveness in ensuring human rights protection in Africa,<sup>194</sup> the African Commission does not have jurisdiction over non-state actors. This completely shuts out any hope of redress against the direct violators of environmental rights there.<sup>195</sup> The ACtHR is no different as it can also only exercise jurisdiction over state parties. An additional challenge for the Court is that not all state parties to the Charter are parties to the Court Protocol. This limits its influence even among states. One big irony in this regard is that it is common knowledge that some non-state actors are economically stronger than some African states and 'punishing' the state for the violations of a wealthier non-state actor defeats the goals of the system. Another challenge with realisation through the Court is in the fact that as it currently stands, individuals and NGOs lack direct access to the Court and as practice has shown, states are usually reluctant to sacrifice their sovereignty at the alter of international human rights supervisory institutions. This reduces its usefulness as an option for realisation of article 24.

A further challenge with respect to realisation before the African Commission is the weight of its orders. As Van der Linde and Louw note, the recommendations of the Commission do not bind states as the Commission is not a judicial body nor is there any provision for a follow-up to its recommendations.<sup>196</sup> Thus even if, as in the *SERAC* decision, the Commission makes a finding of violation and makes the necessary remedial orders, there is little hope for voluntary compliance by the state, even a dimmer hope for the state holding non-state actors responsible and certainly no hope for enforcement of such orders by any regional institution. While the Court may not have

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<sup>192</sup> T Callingsworth 'The key human rights challenge: Developing enforcement mechanisms' (2002) 15 *Harvard Human Rights Journal* 184.

<sup>193</sup> HM Osofsky 'Learning from environmental justice: A new model for international environmental rights' (2005) *Stanford Environmental Law Journal* 100.

<sup>194</sup> K Hopkins 'The effect of an African Court on the domestic legal orders of African states' (2002) 2 *African Human Rights Law Journal* 234.

<sup>195</sup> Nwobike (n 8 above) 141.

<sup>196</sup> Van der Linde & Louw (n 6 above) 180.

similar problems as already noted, access remains a problem.<sup>197</sup> Separate from these institutional defects, there are also the further challenges of costs and delays before these institutions.<sup>198</sup>

A final point to note is that contrary to the goals of the Commission, the victims of violations of environmental rights are more interested in compensations necessary to remedy their situations than in unenforceable amicable resolutions or the 'shaming' of states.<sup>199</sup> If this is so, then as Tomuschat notes, international law has not developed to the level of granting full reparations to individuals. That duty lies elsewhere.<sup>200</sup> These are challenges that arise with seeking to realise the right to a satisfactory environment under the existing supranational institutions in the regional human rights system.

### 3.6 Conclusion

This chapter has explored the Charter supervisory institutions in Africa and their relation to the realisation of the right to a satisfactory environment as guaranteed under article 24 of the Charter. It has shown the potentials and the challenges inherent in the system. Specifically, the discourse here has shown that the African Commission has developed a fairly formidable human rights protection mechanism despite the criticisms against it. With respect to environmental rights, it made a breakthrough in being the first regional complaints mechanism to give a binding recognition to a contentious right.<sup>201</sup> Yet, the shortcomings of the Commission are also numerous and those most relevant to the realisation of article 24 have been examined.

The ACtHR has also been examined on the basis of its Protocol. This chapter has shown that there are huge challenges against effective realisation of article 24 under the system. The discourse has also confirmed observation that despite its rapid development over the past few years, international law still has only rudimentary enforcement mechanisms.<sup>202</sup> Herz's reflections that international law has failed to provide appropriate fora for realising the rights it guarantees cannot be truer than in the African context.<sup>203</sup>

A way out may be to return to the domestic systems as they have been acknowledged as remaining crucial in the enforcement process to fill the gap left by the dearth of international

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<sup>197</sup> See page 25 above.

<sup>198</sup> See Tomuschat (n189 above) 214, Heyns (n 140 above) 165. Oloka-Onyango (n 9 above) also includes a lack of political will among state parties as a major challenge of the system.

<sup>199</sup> Clapham (2006) (n 18 above) 233. Amicable solutions sometimes involve the order of compensations.

<sup>200</sup> Tomuschat (n 189 above) 305.

<sup>201</sup> Van der Linde & Louw (n 6 above) 177.

<sup>202</sup> B Stephens 'Translating Fila'rtiga: A comparative and international law analysis of domestic remedies for international human rights violation' (2002) 27 *Yale Journal of International Law* 34

<sup>203</sup> Herz (n 39 above) 549.

enforcement measures.<sup>204</sup> The next part of this work examines the prospects and challenges of realising the right in domestic law and against non-state actors.

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<sup>204</sup> Stephens (n 202 above).

## Chapter Four

### The case for horizontal application of article 24 at the domestic level

#### 4.1 Introduction

The discourse in the last chapter has shown that despite the giant strides it has made, the existing framework for the realisation of human rights in Africa has left gaps which need to be filled in order to achieve better human rights protection in the continent. The right in article 24 of the Charter provides a special challenge as it is mostly violated by non-state actors that fall outside the jurisdictions of the supranational institutions currently engaged in supervising compliance with the Charter. Meeting this challenge requires a multi-facet approach and this has resulted in calls for the involvement of the domestic legal systems in interpreting and applying the Charter.<sup>205</sup> Though Odinkalu sees the domestic legal systems as a fundamental part of the African human rights system,<sup>206</sup> the idea of a resort to domestic systems to tackle non-state actor impunity for human rights violations raises questions of domestic application of the Charter and the emerging area of horizontal application of human rights.

As Steinhardt observes, the domestic courts do not offer perfect solutions to the inadequacy of human rights standards, but they do offer an alternative.<sup>207</sup> Indeed, if as Clapham suggests 'compensation rather than retributive justice' is the aim of complaints against non-state actors,<sup>208</sup> the relevance of domestic courts becomes more. However, the questions to be answered are 'whether the African Charter can be applied in the given domestic courts' and if so, 'whether the Charter can apply horizontally'. This part of the study engages these questions separately and jointly.

#### 4.2 Domestic application of the African Charter

Domestic application of the African Charter is regulated by the general rules of law concerned with the relation between international law and domestic law. Brownlie identifies monism and dualism as the two main theories affecting the application of international law in domestic legal systems.<sup>209</sup> Monists assert the supremacy of international law in a single hierarchy of law and see it as directly applicable in the domestic legal system. Dualists regard international law as part of a separate

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<sup>205</sup> R D'sa 'The Domestic application of the African Charter on Human and Peoples' Rights' in developing human rights jurisprudence' (1989) *Colloquium* 116.

<sup>206</sup> CA Odinkalu 'The role of case and complaints procedure in the reform of the African regional human rights system' (2001) 1 *African Human Rights Law Journal* 227.

<sup>207</sup> RG Steinhardt 'The role of domestic courts in the protection of international human rights: A comparative perspective' (2006) (Unpublished)1.

<sup>208</sup> Clapham (n 18 above) 265.

<sup>209</sup> n 124 above 31.

legal system and thus, requiring legislative action to be applicable in the domestic system.<sup>210</sup> Reacting to what he perceives as Maluwa's opinion that this theoretical debate is irrelevant to the question of applicability of the African Charter in domestic systems, Hopkins points out that the mere fact that a state has ratified the Charter does not guide a domestic judge on the application of the Charter in the domestic system.<sup>211</sup> Hopkins argues that this would require a measure of incorporation but observes that the Charter is silent on the issue.<sup>212</sup> However, Hopkins concedes that article 1 of the Charter requires states to give effect to the rights contained in it.<sup>213</sup> Ouguergouz argues that article 7 of the Charter is concerned with ensuring implementation of all the other rights by states at the domestic level.<sup>214</sup> This requires domestic judiciaries to redress the failure to implement at that level. It is only the failure of proceedings at that domestic judicial level that should warrant the exercise of jurisdiction by the supranational supervisory institutions.<sup>215</sup> Hence, the requirement of exhaustion of local remedies is a statement that the African Charter should first apply in the domestic courts of state parties.<sup>216</sup> Viljoen suggests that article 7(1) of the Charter could be interpreted as a right to enjoy the rights guaranteed by the Charter 'even before local courts', but notes that 'to a large extent, the judicial application of the Charter depends on the status that international norms enjoy in a local legal system'.<sup>217</sup> Thus, it is arguable that in the so-called 'monist states', the Charter is directly applicable in local courts by the mere fact of ratification. Conversely, in the so-called 'dualist states', the Charter is applicable upon reception or incorporation into domestic law.<sup>218</sup>

Viljoen states further that incorporation of international into domestic systems can either be by explicit reference or through reception.<sup>219</sup> Viljoen's study indicates that out of about 16 state parties considered in 1999, nine had incorporated the African Charter either by reference or reception.<sup>220</sup> Though he came to the conclusion that the Charter was sparingly employed in domestic courts at that time, Viljoen observed that 'when the Charter could not be invoked as an enforceable right, it

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<sup>210</sup> As above. Also Hopkins, (n 194 above) 236.

<sup>211</sup> Hopkins (n 194 above) 237.

<sup>212</sup> As above.

<sup>213</sup> As above.

<sup>214</sup> Ouguergouz (n 25 above) 136.

<sup>215</sup> As above.

<sup>216</sup> HJ Steiner & P Alston *Human rights in context* (2000) 1013.

<sup>217</sup> Viljoen (n 17 above) 1.

<sup>218</sup> The cases cited by Viljoen indicate this is not always the case.

<sup>219</sup> n 17 above. Nigeria for eg incorporated the Chapter by reception.

<sup>220</sup> Viljoen (n 17 above).

was sometimes used as an interpretative guide'.<sup>221</sup> Though in a different context, Knop sees such use of international law as a 'translation' of into domestic law.<sup>222</sup> While it is desirable that the Charter be applied in a binding manner as that would guarantee full enjoyment of the rights at that level, interpretative use is a viable application of the Charter at domestic level as it holds the potential for developing national law in tune with the spirit of international obligation.<sup>223</sup>

The significance of domestic courts in the enforcement of international human rights is well recognised.<sup>224</sup> Against the state, the supranational institutional framework of the African human rights system offers a complementary alternative for the realisation of rights. But against non-state actors, the domestic courts remain the only option. In any case, as Skogly notes, non-state actors are subject to the jurisdiction of the states in which they operate.<sup>225</sup> Whether applicable as an enforceable right or as a means of interpretation to flesh out national legislature, Viljoen's study confirms that the African Charter is applied in domestic legal systems of state parties.

### 4.3 The horizontal application debate

Traditionally, human rights evolved as a reaction to the misuse of state power.<sup>226</sup> With the emergence of different milieus of power, focus has begun to shift from a complete state-centric paradigm to one that recognises the potentiality of non-state actor violation of human rights. One result of this shift is the on-going debate on the horizontal application of human rights. Teubner describes horizontal application as the question whether human rights 'impose obligations not only on governmental bodies but also directly on private actors'.<sup>227</sup> For Van der Walt, vertical application of rights refers to the application of these rights to the vertical relation between state and subject while horizontal application refers to the 'relation between private subjects or individuals'.<sup>228</sup> Hence, he states that the term 'horizontal application' is invoked when rights find application in disputes between private persons.<sup>229</sup> Wahi sees it similarly as 'the direct enforceability of ... rights by one

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<sup>221</sup> n 17 above 16.

<sup>222</sup> K Knop 'Here and there: International law in domestic courts' (1999 – 2000) 32 *New York University Journal of International Law and Politics* 501 517.

<sup>223</sup> Steiner & Alston (n 216 above) 1013.

<sup>224</sup> S Liebenberg 'The protection of economic and social rights in domestic legal systems' in Eide *et al* (2001)55. Also Tomuschat (n 189 above) 308.

<sup>225</sup> SI Skogly 'Economic and social rights, private actors and international obligations' in Addo (n 18 above) 253.

<sup>226</sup> Ouguergouz (n 25 above) 384.

<sup>227</sup> G Teubner 'The anonymous matrix: human rights violations by "private" Transnational actors' (2006) 2.

<sup>228</sup> Van der Walt (n 13 above) 312.

<sup>229</sup> As above. Van der Walt opines that only the South African legal system may understand it in terms of direct horizontal application.

private party against another.<sup>230</sup> Although other usages of the term exist, its use in this study is as the application of international rights in disputes between private parties in domestic legal systems.<sup>231</sup>

The debate on horizontal application of rights operates at different levels. Firstly, there are those who oppose the idea of applying rights, especially arising from an international instrument, to relationships other than the vertical relation between a state and its subjects.<sup>232</sup> At another level, the debate is whether horizontal application should be direct or indirect.<sup>233</sup> Wahi points out that while direct application implies grounding a substantive right held by a private person against another private person on the Bill of rights, indirect application involves situations where a court's interpretation of rights and duties in a private dispute is influenced by the Bill of rights.<sup>234</sup> The horizontal application debate has raged in other parts of the world but it has been accepted as being used in various forms in Ireland,<sup>235</sup> Germany,<sup>236</sup> and India.<sup>237</sup> With respect to South Africa, despite the resistance by some commentators, the use of direct horizontal application by the South African Court in *Khumalo v Holomisa*<sup>238</sup> has been interpreted as a confirmation that section 8(2) of the South African Constitution 'demands' direct horizontal application in appropriate cases.<sup>239</sup> In contradistinction, Brinktrine argues that the German theory of *mittelbare Drittwirkung* amounts to an indirect horizontal application of rights to the extent that individual rights permeate throughout the law and as such affects private relations.<sup>240</sup> He contends that in that form, the idea of human rights having a horizontal effect and influencing private relations is 'quite familiar to several legal systems all over the world.'<sup>241</sup> For Brinktrine, indirect horizontality of rights has a consequence of

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<sup>230</sup> Wahi (n 21 above) 385. Wahi cites Ireland as eg.

<sup>231</sup> Van der Walt also sees it as the question whether a bearer of legal subjectivity is involved in the privatisation of the political process or the public sphere. (n 13 above). Though mostly used in terms of constitutional law, Wahi thinks it can be transplanted to international human rights in a supranational forum (as above) 376. This study prefers its application to international human rights duties in a domestic forum.

<sup>232</sup> See P Alston *Non-State Actors and Human Rights* (2005) 21.

<sup>233</sup> See C Sprigman & M Osborne 'Du Plessis is not dead: South Africa's 1996 Constitution and the Application of the Bill of rights to private disputes' (1999) 15 *South African Journal on Human Rights* 25.

<sup>234</sup> Wahi (n 21 above) 380. In this study, Bill of rights reads African Charter.

<sup>235</sup> See *Meskeil v Coras Iompair Eireann* [1973] I.R. 121. Also S Gardbaum 'The horizontal effect of constitutional Rights' (2003) 102 *Michigan Law Review* 387.

<sup>236</sup> *Lüth*, 7 BverfGE (1958) 198 cited by Wahi (n 20 above) 394.

<sup>237</sup> *Mehta v Kmal Nath* (1997) 1 S.C.C 388 involves application of the right to a clean environment against a private concern.

<sup>238</sup> 2002 5 SA 401 (CC).

<sup>239</sup> Currie & de Wall (n 28 above) 51.

<sup>240</sup> R Brinktrine (2001) 421.

<sup>241</sup> As above 422.

placing the legislature in the first line of giving effects to the rights.<sup>242</sup> Notwithstanding the debate, Wahi concludes that horizontal application is now widely accepted.<sup>243</sup> In the African context, the horizontality debate has only been prominent in the South African system. However, there is some evidence of horizontal application of rights in other legal systems. For example, article 46 of the 2004 Mozambican Constitution imposes a duty on all citizens to respect the fundamental rights in that Constitution. Nigeria has no similar constitutional provision placing such a duty but fundamental rights have been applied in strictly private disputes.<sup>244</sup> These do not represent the entire continent, but they are evidence of the possibility of horizontal application of human rights in domestic legal systems in Africa.

At the level of international human rights law, some commentators have pressed the argument for horizontal applicability of rights while others maintain resistance to it. Merrills suggests that only states have legal duties at international law but a moral duty rests on non-state actors and this could translate into a legal duty in appropriate cases.<sup>245</sup> Clapham argues that it is possible to accept that states alone generate international law but reject the view that international law only imposes duties on states.<sup>246</sup> He cites international criminal law as an example of international law imposing duties on non-state actors.<sup>247</sup> Addo,<sup>248</sup> Frynas<sup>249</sup> and Steinhardt<sup>250</sup> all subscribe to the horizontality of international human rights law especially against the TNCs. But apart from cases of criminal indictment, horizontal application of international human rights cannot occur in international fora. Hence, Kinley and Tadaki observe that:<sup>251</sup>

To a significant degree, international human rights law relies on domestic law implementing its provisions, not only with respect to a state's own actual or potential violations of individual rights (vertical application), but also, importantly, with respect to actions between private actors (horizontal

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<sup>242</sup> As above 426. Sprigman & Osborne (n 233 above) hold a similar view.

<sup>243</sup> Wahi (n 21 above) 401.

<sup>244</sup> For eg *Onwo v Oko* (1996) 6 NWLR (pt 456) 584 and *Aniekwe v Okereke* (1996) 6 NWLR (pt 452) 61.

<sup>245</sup> Merrill (n 44 above) 35.

<sup>246</sup> Clapham (2006) (n 18 above) 29.

<sup>247</sup> As above. Also J Woodroffe 'Regulating multinationals in a world of nation states' in Addo (n 19 above) 135.

<sup>248</sup> Addo (n 19 above).

<sup>249</sup> Frynas (n 7 above)

<sup>250</sup> RG Steinhardt 'Corporate responsibility and the internal law of human rights: The New *Lex Mercatoria*' in Alston (2005).

<sup>251</sup> Kinley & Tadaki (n 12 above) 937.



application). Where such horizontal application of domestic law is found wanting, calls for direct regulation under international law may be heard

The arguments for horizontal application of international human rights law and the cases in that regard before domestic courts confirm that it is not the nature of human rights but the excessive focus on a 'handful of jurisdiction' that hinders such possibilities.<sup>252</sup> Applied to article 24 of the Charter, this study proceeds to explore the case for its horizontal application at the domestic level.

#### **4.4 Domestic, horizontal application of article 24**

Despite the argument for horizontal application of international human rights law, there have only been isolated calls for it to take place at the international level.<sup>253</sup> As Clapham notes, the shift to non-state actor obligation for human right is qualified by the phrase 'within their spheres of activity and influence'.<sup>254</sup> Though he meant the nature of operation, it can also be read as the *loci* of operation so that the domestic level where the operation takes place should be responsible to apply the rights. Clapham had suggested earlier that the European Court seems to presume that national courts of the state parties to the ECHR are to protect Convention rights between private persons.<sup>255</sup> Hence, it is arguable that domestic courts in Africa ought to apply Charter rights in private disputes.

Similar to article 24, Wahi notes that in India though it is couched as a state duty, the right to a clean and healthy environment 'has been enforced primarily against private industry'.<sup>256</sup> Handl also points out that the notion of a substantive international environmental right has only been judicially tested in domestic proceedings.<sup>257</sup> In the African context, Ferris and Tandl argue that article 24 of the South African Constitution is horizontally applicable before the courts.<sup>258</sup> Together, these could ground the case for horizontal application of article 24 of the Charter in domestic courts.

##### **4.4.1 Desirability of domestic, horizontal application**

Justification for domestic, horizontal application of article 24 is the focus of this part of the study. Clearly, the growth of international human rights norms far outpaces its implementation and enforcement. Scholars have thus argued in favour of employing the existing structure of domestic

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<sup>252</sup> Clapham(2006) (n 18 above) 57.

<sup>253</sup> Kinley & Tadaki (n 12 above).

<sup>254</sup> Clapham, (2006) 230

<sup>255</sup> Clapham (1993) (n 18 above) 181.

<sup>256</sup> Wahi (n 21 above) 388.

<sup>257</sup> Handl (n 114 above) 311.

<sup>258</sup> n 38 above 258. Sec 24 of the South African Constitution has been horizontally applied in *Shadrack v Gencor Ltd* Suit no 19895/2003 for eg.

legal systems in this regard.<sup>259</sup> In relation to human rights law, Higgins notes that unlike other international treaties, inter-state reciprocity is not the focus. Rather, states agree to guarantee rights to the individual.<sup>260</sup> Accordingly, there is a presumption of justiciability for such rights to have any meaning. In the absence of an appropriate international forum, it is desirable that domestic systems fill the void.<sup>261</sup> This is amplified by the fact that even where they are available, international mechanisms may be inaccessible to disadvantaged groups that are often the victims. Local institutions and remedies become the ready alternative.<sup>262</sup> Resort to horizontal application at domestic level becomes more desirable when the aim of seeking accountability for violation is compensation rather than criminal retribution or idealism.<sup>263</sup> Frynas notes that domestic litigation against the TNC was what was needed to attract its attention in the Papua New Guinean *Ok Tedi* case.<sup>264</sup>

Furthermore, article 24 of the Charter raises issues of sustainable development against environmental concerns. This is better resolved at the domestic rather than an international level.<sup>265</sup> In any case, as Jochnick points out, the impunity of non-state actors before international fora is unexplainable before victim-communities.<sup>266</sup> Horizontal application at domestic level allows local people influence policy,<sup>267</sup> and enables national courts contribute to international jurisprudence.<sup>268</sup> The emerging principle of 'polluter pays' is also implemented as non-state actors who violate article 24 of the Charter cannot escape liability by hiding behind state responsibility.<sup>269</sup> Hence, the risk of obfuscating the real violators is avoided.<sup>270</sup> Finally, it can be argued that horizontal application affords the citizenry the opportunity to by-pass national governments that deliberately neglect to enforce environmental laws or regulate non-state actors.<sup>271</sup> For all these

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<sup>259</sup> For eg Liebenberg (n 224 above) 55.

<sup>260</sup> R Higgins in Conforti & Francioni (n 16 above) 38.

<sup>261</sup> Stephens (n 202 above) 14. Also, Simma in Conforti & Francioni (n 16 above) 71.

<sup>262</sup> Liebenberg (n 224 above) 55.

<sup>263</sup> Clapham (2006) (n 18 above) 265.

<sup>264</sup> *Rex Dagi v Broken Hill Property Company Ltd* [1995] 1 VR 428 (S Ct Vic.) in (n 7 above) 124.

<sup>265</sup> Boyle (n 5 above) 64. See also C Miller *Environmental rights* (1998) 18.

<sup>266</sup> C Jochnick 'Confronting the impunity of non-state actors: New field for the promotion of human rights' (1999) 21 *Human Rights Quarterly* 58.

<sup>267</sup> Boyle (n 5 above) 64.

<sup>268</sup> Ferris & Tladi (n 38 above) 264.

<sup>269</sup> D Shelton 'The environmental jurisprudence of international human rights tribunals' in Picolotti & Taillant (2003) 23.

<sup>270</sup> Clapham (2006) 32.

<sup>271</sup> Frynas (n 7 above) 116. Also R Picolotti & S Bordenave 'The enforcement of environmental law from a human rights perspective' (2002)

reasons, it is desirable that horizontal application of article 24 of the African Charter be encouraged at the domestic judicial level.

#### 4.4.2 Prospects for domestic, horizontal application

In addition to the justifications for horizontal application at the domestic level, its feasibility needs to be established to ground the argument for its use. That is the focus of this section of the study. The first point to note is that the concept of individual duty is already known to the African Charter.<sup>272</sup> Whereas the position of the state as duty bearer is explicit in some other articles of the Charter, this is not so in respect of article 24. It is therefore possible to read both a state duty and a non-state actor duty in article 24 of the Charter.<sup>273</sup> As Ouguergouz notes, the ambiguities in the African Charter can be its 'chief quality' in the sense that it would allow for greater flexibility of implementation.<sup>274</sup> Article 24 provides one such opportunity for advantageous use of ambiguities in the African Charter.

States ratification of the African Charter also holds prospects for horizontal application in domestic legal systems. By ratifying the Charter, states take on duties to implement the Charter rights and grant individuals access to independent courts to seek those rights.<sup>275</sup> As Viljoen notes, there is a commitment in article 7(1) by states to guarantee the Charter rights in the local courts.<sup>276</sup> For D'sa, massive ratification translates into acceptance and creates an opportunity for judiciaries and lawyers in African states to apply the concepts at the domestic level.<sup>277</sup> If state parties implement their Charter duties of granting access to national remedies and ensuring independence of the judiciary, potential barriers to horizontal application at the domestic level will be removed and space opened for horizontal application in national courts.<sup>278</sup>

In the US, though the suits based on environmental rights are recorded to have failed on grounds that there is no recognisable right to the environment at international law, non-state actors have faced actions for violation of international law in domestic courts.<sup>279</sup> This could persuade African states to allow the application of international human rights in domestic courts against non-state

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<sup>272</sup> See Ouguergouz (n 25 above) 776.

<sup>273</sup> Yemet (n 26 above).

<sup>274</sup> Ouguergouz (n 25 above) 778.

<sup>275</sup> Arts 1 and 7.

<sup>276</sup> Viljoen (n 17 above) 1.

<sup>277</sup> D'sa (n 205 above) 102.

<sup>278</sup> See art 26 of the Charter .

<sup>279</sup> Clapham (2006) 252.

actor. Furthermore, unlike the cases brought in the US under the Alien Tort Claims Act,<sup>280</sup> the affirmation of the existence of a binding legal duty in article 24 of the Charter by the African Commission in the *SERAC* decision demonstrates that under the Charter, environmental rights can base successful actions either as a substantive right standing on its own or as a complement to another right.<sup>281</sup> This is especially as the Charter is potentially applicable in domestic legal systems of state parties either as part of local law received by reference or by reception.<sup>282</sup> In extreme cases, the Charter may be applicable as an interpretative guide.<sup>283</sup>

The recognition under the Charter that entities other than states have human rights duties, coupled with a legally binding environmental right and an existing duty of states to ensure access to national remedies as a first line of rights guarantee, are prospects that need to be explored by human rights advocates and practitioners in the search for an effective realisation of the right to a satisfactory environment under the African Charter. However, there are other factors that challenge these prospects.

#### **4.4.3 Challenges of domestic, horizontal application**

The first challenge for horizontal application of article 24 of the Charter at domestic legal systems lies in the fact that national laws determine the status of international law in each system. For this purpose, legal systems in Africa can be divided into several groups and sub-groups. Firstly, there are states operating a monist approach to international law<sup>284</sup> and those operating a dualist approach.<sup>285</sup> For the monists, legally there should be no obstacle to direct application of the Charter as international law applies upon ratification by the state without more.<sup>286</sup> For the dualists, there is a requirement for legislative action to adopt the Charter into domestic law.<sup>287</sup> The challenge here is in the fact that the legislative action required to bring the Charter into domestic law is scarce in Africa.<sup>288</sup> One would reply that the jurisprudence of the African Commission does not show that a state's failure to 'domesticate' the Charter has been a strong consideration in the determination of the requirement to exhaust local remedies. Hence, lawyers still have a duty to

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<sup>280</sup> See Steinhardt (n 207 above). The Act is important to the extent that it has based the most number of cases hinged on international environmental rights claims.

<sup>281</sup> Similar to Bangladesh and Indian cases. See F Du Bois ' Social Justice and the Judicial Enforcement of Environmental Rights and Duties' in Boyle & Anderson (1996) 153.

<sup>282</sup> Viljoen ( n 17 above)

<sup>283</sup> As above.

<sup>284</sup> Algeria for eg.

<sup>285</sup> Eg Nigeria.

<sup>286</sup> However this may only be theoretical. See Viljoen (n 17 above) 1.

<sup>287</sup> To the best of this writer's notice, only Nigeria has done so.

<sup>288</sup> Viljoen raised this concern during the dissertation exercise at the Farm Inn, Pretoria in July 2006.

'ask' the local court for the right, failing which there can be resort to the supranational institutions. The single step would test the applicability of the Charter and satisfy the requirement for exhaustion of local remedies. On the other hand, incorporation of the Charter could be by reception or reference.<sup>289</sup> Where it is reception, parties need only apply the national provisions mirroring article 24 of the Charter. For states incorporating by reference, actual resort to the Charter is required. This may be done by associating article 24 of the Charter with a recognised constitutional right. States can also be grouped into those with constitutional guarantee of environmental rights and those without such guarantees. In states with such guarantees, the use of article 24 of the Charter could be for interpretative purposes while in states without such guarantees, article 24 can be cumulatively applied with an existing constitutional right.

Another challenge to applying article 24 is the argument that environmental rights in international instruments lack sufficient specificity for justiciability at domestic courts.<sup>290</sup> Use of comparative approaches by courts could address this concern.<sup>291</sup> Deliberate obstruction of the judicial process by national governments seeking to attract foreign investment<sup>292</sup> and the ability of the wealthy non-state actors to escape the reach of the domestic system<sup>293</sup> constitute further challenges. Furthermore, this area requires a culture of litigation.<sup>294</sup> These challenges can only be addressed by practical approaches and regular resort to the domestic courts.

The argument for state responsibility rather than private responsibility at international law, the perception that the duty to implement Charter rights lies more in legislative action than in judicial guarantees and domestic judicial resistance to international law also pose challenges to domestic, horizontal application.<sup>295</sup> Reorientation is needed to effect a change of these attitudes. Added to other concerns not noted here, this study recognises that there are challenges to the call for horizontal application of the article 24 right in domestic legal systems. However, as it has been so applied in a Nigerian case, that case is briefly considered.

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<sup>289</sup> Viljoen, (n 17 above).

<sup>290</sup> Osofsky (2005) 117 cites the decision in *Sarei v Rio Tinto Plc* (2002) 221 F. Supp. 2d 1116, 1120 C .D. Cal on this point. Also D'sa (n 205 above).

<sup>291</sup> Indian and Bangladeshi courts are known to have applied environmental rights horizontally in some cases.

<sup>292</sup> Clapham, (2006) 238.

<sup>293</sup> Osofsky (2005) 100.

<sup>294</sup> Stephens, (n 202 above) 3,4.

<sup>295</sup> D Brown 'Promoting environmental human rights in Ghana' (1998) 4.

#### 4.5 The *Gbemre* case

In July 2005 Jonah Gbemre brought an action in the Benin division of the Federal High Court of Nigeria (FHC) for himself and the Iwherekhan community in Nigeria against the Shell Petroleum Development Company of Nigeria (SPDC), the state owned Nigerian National Petroleum Corporation and the Attorney General of Nigeria. Upon the facts, the plaintiff sought certain declarations including that the rights to life and dignity as guaranteed by the Nigerian Constitution<sup>296</sup> and 'reinforced by articles 4, 16 and 24 of the African Charter'<sup>297</sup> include the right to a 'clean poison-free, pollution-free and healthy environment'.<sup>298</sup> The contention was that gas flaring and other oil exploration related activities of SPDC violated articles 33(1) and 34(1) of the Nigerian Constitution as 'reinforced by articles 4, 16, and 24 of the African Charter'. Although the defendants opposed the application on several grounds including that the enumerated articles of the African Charter Enforcement Act<sup>299</sup> do not create rights enforceable by the Nigerian Fundamental Rights Enforcement Procedure Rules,<sup>300</sup> they failed to follow up their arguments for a number of procedural reasons. On 14 November 2005, the FHC gave judgment to the plaintiff without any findings of facts. Although the matter is now on appeal before the appellate courts in Nigeria, the case is significant, albeit temporarily, for its procedural implications.

As Nwauche notes, the decision is significant to the extent that there is no justiciable right to environment under the Nigerian Constitution.<sup>301</sup> Yet the FHC seems to have relied on a cumulative use of article 24 of the African Charter and the constitutional rights to life and dignity to recognise and apply the right to a healthy environment. While the opportunity to understand the reasoning of the Court was lost as the Court failed to motivate its decision, Nwauche opines that the Court was influenced by the *SERAC* decision.<sup>302</sup> The FHC does not make reference to the *SERAC* decision but some links can be found between the two decisions. Firstly, as there is no right to the environment in the Nigerian Constitution, the FHC could only have relied on the Commission's pronouncement that recognised the article 24 right as directly applicable in Nigeria. Although the Nigerian Supreme Court's decision in *Abacha v Fawehinmi*<sup>303</sup> has established the direct applicability of the Charter in Nigeria as a consequence of incorporation, it had been suggested

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<sup>296</sup> Secs 31& 34.

<sup>297</sup> n 1 above.

<sup>298</sup> *Gbemre* case (n 15 above).

<sup>299</sup> Act A9 of 2004.

<sup>300</sup> 1979.

<sup>301</sup> ES Nwauche 'Emerging perspectives on environmental litigation in the aftermath of *Gbemre*' (2006) 1 *The Justice Gazette* 25.

<sup>302</sup> As above 27.

<sup>303</sup> (2000) 6 NWLR (pt 660) 228.

this applies only rights to recognised by chapter four of the Nigerian Constitution.<sup>304</sup> By this decision, the FHC may have relied on the *SERAC* decision to set the stage for a resort to the African Charter for rights not guaranteed by national law. Secondly, the *SERAC* decision set precedence for reliance on the interdependency of rights to protect non-explicit rights adopting a cumulative approach and the recognition of non-state actor duty. The *Gbemre* case exemplifies horizontal application of human rights law in Nigeria.<sup>305</sup>

While the circumstance prevents complete analysis, the *Gbemre* case is an innovation that announces the possibility of horizontal application of article 24 domestically. Significantly, it has forced the reaction of SPDC as opposed to the nonchalant reaction the same non-state actor gave to the *SERAC* decision. While awaiting the verdict of the appeal, the *Gbemre* case is a call to action by human rights practitioners in Africa.

#### 4.6 Conclusion

Documentation of domestic application of the Charter is rare as focus has been on enforcement against states before the supranational institutions than implementation at the domestic level. For several reasons, the growing concept of horizontal application of human rights has also not been popular in Africa. This may give a false impression that only states violate human rights in Africa yet the activities of non-state actors affect the rights of more people daily. Clearly, violation of the right in article 24 of the Charter has been more by non-state actors than by states. Consequently, there is need to extend the framework of implementation to cover non-state actors in a binding manner. This raises the challenges of 'what norm' and 'which forum'.

In respect of the norm, Addo suggests the answer lies in appreciating existing law in broader terms.<sup>306</sup> For forum, exploring jurisdictions other than supranational institutions has been suggested.<sup>307</sup> With the duty already on states to provide avenues for remedies in local jurisdictions and the perceived ambiguity of the Charter, there is space for innovation by lawyers and judges in Africa. Though not an excellent example, the *Gbemre* case exemplifies the potentials of horizontal application of rights in domestic courts. It also indicates that non-state actor impunity for violation of international human rights law can be addressed with reasonable cost and comparative success by engaging existing local judicial options. The will of practitioners and the dynamism and progressiveness of judges are all it takes for African judiciaries to lift the realisation of the right to a satisfactory environment as provided in the Charter to a level of reality for the benefit of the continent.

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<sup>304</sup> Nwauche (n 299 above) 25.

<sup>305</sup> As above 38.

<sup>306</sup> Addo (n 19 above) 12.

<sup>307</sup> Clapham (2006) 268.

## Chapter Five

### Conclusions and Recommendations

#### 5.1 Conclusions

The interrelation of human rights overrides the superficial categorisation that legal literature imposes. Hence, the relation between the right to a certain quality of environment which is often categorised as a third generation right, the right to health (a second-generation right), and the right to life that is in the first generation cannot be overemphasised. Although this interdependence has been recognised at the universal level since the 1960s, it has not yet translated into the recognition of a binding right to the environment or the inclusion of such a right in any universally binding human rights system. Several reasons may account for this, including the difficulty in finding a generally accepted form and content of such a right.

Despite blazing the trail by becoming the first binding international human rights instrument to guarantee environmental rights by the inclusion of the right to a satisfactory environment in article 24 of the Charter, the African human rights system remained unable to contribute much to shaping jurisprudence on the right. The inclusion of article 24 in the Charter rather attracted skepticism from commentators as it was seen as too vague to confer any justiciable rights or any binding duties. However, the *SERAC* decision by the African Commission has affirmed the existence of a binding right to a satisfactory environment. While it created jurisprudence on the scope of the right in article 24 and vaguely acknowledged that non-state actors could violate or contribute to the violation of article 24, the failure of the Commission to ascribe responsibility on the non-state actors remained a sore point in that decision. This was another indication of the general failure of international human rights law to fit non-state actors into its existing mechanism and to develop an effective enforcement mechanism.

As the inquiry in this study indicates, the existing supranational supervisory mechanism of the African human rights system does not cover non-state actors. The challenge in respect of the realisation of article 24 lies in the fact that its violation is more on the part of TNCs in the exploration industry than by state parties. It is inevitable therefore that a human rights system developed with state parties in mind will widen the space for non-state actor impunity for human rights violations. This is especially as African states seem to pick and choose what decisions of the supervisory institutions they will comply with. As Nigeria's reaction to the *SERAC* decision indicates, states are either unwilling or unable to regulate the TNCs or enforce compliance with the decisions of the Charter supervisory bodies.<sup>308</sup> This is where the need for horizontal application of the African Charter arises.

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<sup>308</sup> No evidence of payment of compensation is available.



Domestic application of the Charter has not been popular though it is inevitable for several reasons including its requirement as a precondition for seizure of the Charter's supervisory institutions. Horizontal application of international human rights law is more controversial as even human rights practitioners and commentators resist it. The reasons for resistance range from a rejection of the argument that human rights treaties impose duties on non-state actors to cynicism about the ability of national judiciaries in Africa to effectively adjudicate and apply Charter rights against TNCs. However, a multi-dimensional approach that includes a framework for non-state actor accountability is needed if the protection of human rights in this age of globalisation is to be effective.<sup>309</sup> Essentially, there is nothing in the nature of human rights preventing horizontal application except the traditional attitude of human rights lawyers to 'over-focus' on specific jurisdiction for the realisation of rights.<sup>310</sup>

The consensus among commentators is that the African Commission has not been very effective in its protective mandate. With respect to the realisation of article 24 of the Charter, there is nothing to indicate that the ACtHR, operating on the basis of its present protocol, will be more effective than the Commission. In the face of such bleakness, it may be time to return to domestic courts for the realisation of the right to a satisfactory environment against the actual violators.

The capacity of human rights law to be elastic enough to meet new challenges has been crucial to its continued existence. This elastic character may thus be necessary for African lawyers and judges to overcome theoretical and doctrinal barriers to horizontal application of the Charter in domestic legal system of state parties. The *Gbemre* case as decided by the Nigerian FHC has demonstrated that innovative application and a will to ride over mental barriers can open new frontiers for human rights realisation in Africa. In view of the threat environmental degradation poses to the overall enjoyment of human rights and its peculiar nature of susceptibility to non-state actor violation, the right to a satisfactory environment needs to be applied in domestic jurisdiction across Africa. It is against this background that this study prescribes the exploitation of the existing framework to achieve a more effective realisation of article 24 of the African Charter.

## 5.2 Recommendations

A multi-dimensional approach to human rights litigation that creates room for horizontal application in domestic legal systems in a regime of multiple jurisdictions need not result in contradictory exercise of jurisdiction as it is possible to consider different jurisdictions as complimentary parts of

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<sup>309</sup> Alston (2005) 4,6.

<sup>310</sup> Clapham (2006) 57.

a single system.<sup>311</sup> In recommending a return to domestic legal system for effective realisation of article 24, this study amplifies previous acknowledgement of the significance of national legal systems in the protection of rights guaranteed in the African Charter.

The point to note is that a combined reading of articles 1, 7 and 56(5) of the Charter already requires that state parties allow domestic application of the African Charter. A starting point will be to build a culture of domestic application. This can begin with a clarification by the African Commission on the duty of states to incorporate the Charter into domestic legal systems. In its promotional mandate, the Commission needs to encourage state parties to adopt any of the accepted modes of incorporation of the Charter. Through its seminars, the Commission could also elaborate that whatever mode of incorporation adopted, states need to enable the implementation of the Charter in their own courts. The obligation of states to ensure the existence of an independent judiciary has to be emphasised.<sup>312</sup> In line with its position in the *SERAC* decision, the Commission can use its mechanisms to reinforce the fact that the African Charter also imposes duties on non-state actors and to specify rights that have horizontal effects. Human rights educators also need to contribute to the removal of stereotypes by expanding the horizons of emerging lawyers beyond the vertical application mindset.<sup>313</sup>

The role of vibrant judiciaries in domestic application of the Charter cannot be overemphasised. Training programmes for judges need to be organised to encourage new perceptions and reduce judicial resistance to the Charter. Judges need to see their role as one of translating the Charter into domestic contexts rather one of enforcing foreign law.<sup>314</sup> In states where incorporation has not occurred, judges should be encouraged to apply the Charter in the application of national law and call the attention of the other arms of government to discrepancies between national legislation and Charter duties.<sup>315</sup>

Considering their roles, lawyers also need Charter specific trainings to enhance a reorientation that allows for more frequent reliance on the provisions of the Charter in litigation before domestic courts. Cooperation between the Commission, national Bar Associations and non-governmental organisations involved in the promotion of the Charter is needed to sensitise lawyers on the possible uses of the African Charter. The cumulative use of national constitutional provisions and Charter guaranteed rights is an innovative perspective that needs to be encouraged.

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<sup>311</sup> Odinkalu notes that domestic courts form part of the African human rights system (n 205 above).

<sup>312</sup> Article 26 of the Charter obliges states in this regard.

<sup>313</sup> Formal and informal trainings like the moot court competitions can be useful in this regard.

<sup>314</sup> Oloka-Onyango supports this, (n 9 above) 75.

<sup>315</sup> K Eso *Further thoughts on law and jurisprudence* (2003) 180.

This study does not pretend to have invented any new concepts. It is only a renewed call to introspection in a manner that will maximise the potentials that already exist within the Charter when it is applied in support of provisions in national constitutions in Africa.

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