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THE JURISPRUDENCE OF REGIONAL HUMAN RIGHTS COURTS IN THE PROTECTION OF ENVIRONMENT: PROMISES AND CHALLENGES

BY

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Abstract

The interpretation of the rights enshrined in the regional and international human rights instruments are of fundamental in respond to the protection of environment. The rights contained in these instruments offer wide and powerful tools to enhance environmental justice. The illumination of two major questions has been the object of discussion throughout this paper. First is the extent of readiness of the court to adopt an extensive interpretation of the rights in the Conventions to protect the environment. The other is whether the courts have tendency to expand the traditional principles of human rights. In answering these questions, the paper looks into the approach of the courts through case law for a proper evaluation of the right-based approach to the protection of environment.

1. INTRODUCTION

The regional instruments on human rights such as the African Charter on Human and Peoples' Rights, the American Declaration of Human Rights and the European Convention on Human Rights were drafted at a time when the protection of environment was not in contemplation and as such, they do not provide explicit provisions for the protection of environment. However, there are no provisions in those instruments that limited their application and relevance to the time when they are made. Considering the numerous existing and growing environmental laws, standards and regulations at both international and domestic level, it is worth noting what stand to be gained by resorting to a right-based approach to the protection of environment. Regional courts more and more are being asked to examine the correlation between the degradation of the environment and the enjoyment of guaranteed rights. In some situation, the complaints instituted have not been based upon a particular right to a safe environment, instead upon right to life, property, healthy, information, family and home life. Judicial trends have demonstrate a number of benefits of employing one or more of the rights-based approaches to problems associated with the environment. At the domestic level, some constitution of states now contained express provisions establishing the right to a safe and healthy environment.² The main argument in favour of such a right is that it raises the entire field of environmental matters as an essential value of society, to a level

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²See for example, the Constitution of Angola, Argentina, Belarus, Belgium, Burkina Faso, Cameroon, Cape Verde, Chad, Chechnya, Chile, Colombia, Congo, Ecuador, Finland, Georgia, Ghana, Hungary, India, Mexico, Niger, Namibia, Portugal, Russia, Romania, Sao Tome, Saudi Arabia, Slovakia, Ukraine, Zambia.

equivalent to other rights and enjoins priority over ordinary legislation. In the absence of express provision on the right to environment in the constitution, other rights have been invoked to protect the environment. Consequently, human right court at various regions has employed interpretation as a legal weapon to expand the scope of the list of substantive rights protected in the Convention to ensure the protection of environment. History has shown that courts at various levels have expanded and interpreted the existing rights to create new rights that are not expressly foreseen by the drafters of these Conventions. This trend is feasible in the light of the decisions of most human rights bodies. Hence, the protection of environment as emerging global concern of humanity has not been barred from this development. Therefore, this article explores how regional human courts or commissions have utilized some basic rights in the Convention to create enforceable environmental rights. The article is organized as follows: after the introduction, section II examines the concept of environmental rights. The examination reveals whether the term environment deserves to be accorded a right status. Section III discusses through case law the approach of the examined regional courts in the protection of environment through the expansion of the rights included in the Conventions. Section IV examines some challenges that may limit access to these courts in the quest for environmental justice and protection. Section V then concludes.

2. ENVIRONMENTAL RIGHTS

The twentieth century can be regarded as the period of emergence of the links between the protection of human rights and environment. It was the Stockholm Declaration that first acknowledged environmental aspects as fundamental to the well-being of humankind and full realisation of internationally recognized human rights. Though it did not proffer detail information as to the implementation of human rights to protect environment; it initiated the foundation of a right framework for the protection of environment. Thus, this declaration created awareness both internationally and domestically as to the interrelationship between a healthy and clean environment and the enjoyment of basic human rights. Since twentieth century, the foremost question remains how to define the concept of environmental rights.

The question of what constitutes environmental rights has been a subject of intense debate by both environmentalists and human rights activist. The discrepancy as to the scope and qualitative content of the concept of environmental rights make it very difficult and impracticable to give a universally acceptable definition of the concept. To say that there is widespread acceptance of the emerging concept of

environmental rights on the domestic and international plane is not to say that there is a complete agreement about the qualitative context and scope of environmental rights. Similarly, to say that there is much disagreement as to the qualitative content of environmental rights is not to deny the existence of such concept. The issue is not owing to lack of idea but one of agreeing to it. The theoretical discourse as to the qualitative content of environmental rights is not within the scope of this paper as Anderson rightly posited when he said that, the question of what environmental rights entail is merely a jurisprudential interest and nothing more.³ According to him, the notion of human rights and environment has come to stay in the world legal order and as such, defining its content and scope is bound to suffer from indeterminacy.⁴ Hence, divergent views of the concept would not defeat the existence of such concept as many terms are bound to suffer from indeterminacy. The issue of definition may not even be necessary because the concept of human rights itself is yet to receive a universal acceptable definition. On this note, it is better to adopt the alternative approach as suggested by Kiss and Shelton. An alternative proposed by Kiss and Shelton, is to ignore the stress of defining environmental rights in abstract terms but to let courts develop their own interpretations as they have done for many other human rights.⁵

The question however to be answered in this paper is whether the term environment deserves to be accorded a right status. With respect to this, Alston have recommended a list of criteria probably appropriate to determining whether a claim meets the requirement of human right.⁶ Alston argues that the proposed concept should among other things having a high level of consensus at international level and must be able of asserting enforceable rights.⁷ Another author has recommended two stages of analysis in their definition. That is, studying human rights on the origin of their source or on the premise of their nature and substance.⁸ The first has to do with the question from where we get human right. The second ask the question: what kind of an interest should be considered a human right. In this respect, it has

³Michael R. Anderson, "Human Rights Approaches to Environmental Protection: An Overview" in Alan Boyle and Anderson (ed) *Human Rights Approaches to Environmental Protection*, Clarendon Press, Oxford, 1996, 11.

⁴Ibid.

⁵Kiss and Shelton, *International Environmental Law* cited in Alan Boyle, "The role of International Human Rights Law in the Protection of the Environment" in Alan Boyle and Anderson (ed) *Human Rights Approaches to Environmental Protection*, Clarendon Press, Oxford, 1996, 51. See also Shelton, "Human Rights, Environmental Rights and the Right to the Environment" (1991) 28 *Stanford JIL*, 103.

⁶Philip Alston, "Conjuring up New Human Rights: A Proposal for Quality Control" (1984) 78 *Am. J. Int'l L.* 607-621 at 614-615.

⁷Ibid. See also Richard Bilder "Rethinking International Human Rights: Some Basic Questions" (1969) *Wis. L. Rev.* 171; Jacobs F.G. "The Extension of the European Convention on Human Rights to include Economic, Social and Cultural Rights" (1978) 3 *Hum. Res. Rev.* 166-178.

⁸See Jack Donaghy, *The Concept of Human Rights*, New York, St. Martin's Press, 1985, 1, cited in Noralee Gibson, "The Right to a Clean Environment" (1990) 54 *Saskatchewan L. R.* 5-7; Iveta Hodkova "Is There a Right to a Healthy Environment in the International Legal Order?" (1991) 7 *Connecticut J. Int'l L.* 65-80.

been contended that for an interest to be accorded a human right, it must among other things, be of essential social importance, globally recognised, and be compatible with the existing human rights.⁹

It is submitted that there are indeed more in environmental issues than the requirements stated by Alston and other authors to accord it a right protection. The reason is that since 1972 when the first conference on environment was held at Stockholm, environmental issues has grown sporadically and enjoy universal recognition and acceptance even than any other aspect of international law which calls for its human rights approach. In fact, the universal aspiration is indeed evident in the preamble to the Stockholm Declaration.¹⁰ Thus, if the saying that environmental degradation poses negative impact on the enjoyment of basic rights is correct, then environmental protection can be brought through the instrumentality of human rights. Klaus Toepfer, Executive Director of the United Nations Environment Programme, mirrored this approach in his statement to the 57th session of the Commission on Human Rights.¹¹ He said:

Human rights cannot be secured in a degraded or polluted environment. The fundamental right to life is threatened by soil degradation and deforestation and by exposures to toxic chemicals, hazardous wastes and contaminated drinking water. Environmental conditions clearly help to determine the extent to which people enjoy their basic rights to life, health, adequate food and housing, and traditional livelihood and culture. It is time to recognize that those who pollute or destroy the natural environment are not just committing a crime against nature, but are violating human rights as well.¹²

It is therefore contended that looking at damage caused to the environment by human activities, the need to frame environmental issue under the scope of human rights became necessary in order to guide against environmental destruction, which have resultant effect on the enjoyment of basic human rights. Hence, there is nothing inconsistency framing environmental protection within the purview of human rights because the degradation or pollution of environment can adversely affect the enjoyment of basic human rights.

⁹ See generally, Gudmundur Alfredsson and Alexander Ovsioyk, "Human rights and the Environment" (1990) 60 *Nordic J. Int'l L.* 19-27; Jennifer Downs, "A Healthy and Ecologically Balanced Environment: An Argument for a Third Generation Rights" (1993) 3 *Duke J. Comp. & Int'l L.* 351-385. Paul W. Gornley, "The Legal Obligation of the International Community to Guarantee a Pure and Decent Environment: the Expansion of human rights Norms" (1990) 3 *Georgetown Int'l Env'l L.J.* 85-116; Alexander Kiss, "An Introductory Note on a Right to Environment" in Edith Brown Weiss, *Environmental Change and the Environment: New Challenges and Dimensions*, Tokyo, UN University Press, 1992, 199-204.

¹⁰ See the Stockholm Declaration, 1972.

¹¹ 57th session of the Commission on Human Rights in 2001.

¹² *Ibid.*

3. REGIONAL HUMAN RIGHTS COURTS AND THE PROTECTION OF ENVIRONMENT

A. European Courts of Human Rights

The complainants for the evaluated cases founded their actions in a number of Articles of the European Convention on Human Rights. However, Article 8 of the Convention, Article 1 of Protocol 1 to the Convention, with Article 2 of the Convention is mostly used as a basis for court's judgments. Hence, this paper will only accentuate the judgments based on the rights included in these three Articles: the right to respect for private and family life (Article 8), the right to property (Article 1 of the Protocol), and the right to life (Article 2). For ease of clarity and presentation of argument and to really appreciate and understand the judgments of the Court that are examined below, it is necessary to reproduce the provisions of the Convention.

Article 8 of the Convention states that:

Everyone has the right to respect for private and family life, his home and his correspondence. There shall be no interference by a public authority with the exercise of this right except such as in accordance with law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of other.

Article 1 of the Protocol 1 states that:

Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.

The preceding provisions shall not however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties."

Article 2(1)

Everyone's right to life shall be protected by law. No one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law.

In Europe, earlier decisions were based on the premise that if it can be established that the activities, which has interfered with the citizens right to freedom from interference was for the purpose of economic well-being of the country, then no action would be entertained for the violation of the right to freedom from interference and enjoyment of the property. This line of thought informed the

European Commission on Human Rights decision in *S v France*,¹³ *Rayner v United Kingdom*,¹⁴ *Yearncombe v United Kingdom and Federal Republic of Germany*¹⁵ and *G and E v Norway*.¹⁶ In the case of *Arrondelle v United Kingdom*,¹⁷ the applicant complained that noise from Gatwick Airport and a nearby motor way violated her rights under Article 8 of the European Convention on Human Rights. The application was declared admissible by the commission but the matter was eventually resolved by means of a friendly settlement. Similarly, in *Baggs v United Kingdom*,¹⁸ the applicant also complained that a noise from Heathrow Airport violated his right under Article 8 of the European Convention. The case though admitted by the commission as one that can be instituted under the said provision but again was resolved by means of friendly settlement. It therefore follows that the two cases has not offered any guidance or precedence as to whether noise pollution could amount to a violation of Article 8 because, the commission was never given the privilege to make its pronouncement on the question. However, the case of *Lopez-Ostra v Spain*¹⁹ set a standard as to the need to balance economic well-being of the community with the citizens' right to the enjoyment of their property, privacy, homes and family life. In this case, the applicant suffered serious health problems from the fumes from a tannery waste treatment plant, which had begun operating only a few meters away from her home. Her attempt to obtain compensation from the Spanish courts was completely unsuccessful. The European Court of Human Rights held that there had been a breach of Article 8 of the European Convention on Human Rights. The court stated that the Spanish authorities did not succeed in striking a fair balance between the interest of the local municipality's economic well-being and the applicant's effective enjoyment of her right to respect for her home and private and family life. The European Court of Human Rights stated:

Severe environmental pollution may affect individuals' well-being and prevent them from enjoying their homes in such a way as to affect their private and family life adversely, without, however, seriously endangering their health.

The Court, in reaching its decision had to evaluate the general interest, represented in the governmental interference by the Defendant State, and individual rights protected under Articles 2 and 8 of the Convention. The Court further evaluated whether the defendant had maintained a fair balance or had exceeded the discretion permitted. Consequently, the Court purposefully considered the rule of legality,

¹³ Application 13728/88, 63 D & R [1990], 250

¹⁴ Application 9310/81, 47 D & R [1986], 5, 1-14

¹⁵ Application 12816/87, 59 D & R [1989], 186

¹⁶ Joined Application 9278/81 and 9415/81, 35 D & R [1984], 30

¹⁷ Application No. 7859/77, Report of 13 May 1983, 26 DR

¹⁸ Application 9310/81, 44 D & R [1985], 13.

¹⁹ [1994] 20 Eur. Ct. H.R. 277

legitimate purpose, and proportionality to weigh the conflicting interest. The Court finally concluded that there had been a violation of the applicants' rights, and ruled in favour of the applicants. Thus, the Court took a sagacious and solid approach when assessing the effect of interference with the claim of the applicants' rights. Obviously, the Court did not consider the simple existence of the relevant reasons to be sufficient but rather whether the selected means or reasons were *decisively* needed to accomplish the genuine governmental purpose desired. Deciding in favour of the applicants, the Court based its decisions on the premise that the key basis put forward by the States, the protection of the economic well-being of the country, cannot be well thought-out to be satisfactory and enough to justify the first paragraphs of both Articles 2 and 8 of the Convention. On this note, the defendant's States was held not to have strike a fair balance between the competing interests.

In *Hatton and Others v The United Kingdom*,²⁰ the applicants in this case reside near the Heathrow Airport. The applicants alleged that the noise of the aircraft at night regularly disturbed their sleep, which unjustifiably interferes with the right to the enjoyment of their property and private life. They also alleged that the government policy on night flights at Heathrow Airport gave rise to a violation of their rights under Article 8 of the Convention and that they have been denied an effective domestic remedy for this complaint, contrary to Article 13 of the Convention. The court held that since Heathrow Airport and the aircraft, which used it were neither owned, controlled nor operated by the government or its agents, the United Kingdom could not be said to have "interfered" with the applicants' private or family lives. Instead, the court analysed the applicants' complaints in terms of a positive duty on the State to take reasonable and appropriate measures to secure the applicants' rights under Article 8. The Court further held that Article 8 protects the individual's right for the respect of his or her private and family life, home and correspondence. The Court added that though there is no precise right in the Convention to a clean and quiet environment, but where an individual right is directly and seriously affected by noise or other pollution, an issue might arise under Article 8.²¹

The right to the enjoyment of property and freedom from interference has also been held to be violated where the court failed to observed its positive obligation under

²⁰ Judgment of 7 October 2001, para. 94.

²¹ For further reading, see Jean-Pierre Marguenaud, *Droits de L'homme à L'environnement et Cour Européenne des Droits de L'homme (Human Rights for the Environment and the European Court of Human Rights)*, 2 REVUE JURIDIQUE DE L'ENVIRONNEMENT (JUDICIAL REVIEW OF THE ENVIRONMENT) 15/s, 16/s-19/s (2007); Yves Wintgenstein, *La Jurisprudence de la Cour Européenne des Droits de L'homme et L'environnement*, 2 REVUE JURIDIQUE DE L'ENVIRONNEMENT (JUDICIAL REVIEW OF THE ENVIRONMENT) 213, 215 (2003); Harry Post, *The Judgment of the Grand Chamber in Hatton and Others v the United Kingdom or: What is left of the "indirect" right to a healthy environment?*, 4 NON STATE ACTORS AND INTERNATIONAL LAW 135 (2004).

the relevance international instruments. This means that the government is under a positive obligation to inform its citizens of immediate risks and potential danger they may face through environmental interference. Concerning this obligation, the Court has stated that the State may be liable for failure to fulfill the positive obligation by providing an effective and available procedure to enable citizens to have access to all germane and proper information that would allow them to assess any threat to which they may be exposed during their involvement in the tests. By so doing, the Court has gone further than the conventional concept of negative duty as far as the traditional human rights are concerned. For instance, In *Guerra v Italy*,²² the applicants all live in a town approximately 1 kilometer away of the Enichem agriculture company's chemical factory. In 1988 the factory, which produced fertilizers was classified as 'high risk'. The applicants said that in the course of its production cycle the factory released large quantities of inflammable gas, which they alleged violated their rights to freedom from interference stipulated under Article 8 of the European Convention. The Court reiterates that severe environmental pollution may affect individuals' well-being and prevent them from enjoying their homes in such a way as to affect their private and family life adversely. The Court holds, therefore, that the respondent State did not fulfill its obligation to secure the applicants' right to respect for their private and family life and therefore, in breach of Article 8 of the Convention. The courts stated thus:

The applicants complained not of an act by the State but of its failure to act. The object of Article 8 was essentially that of protecting individual against arbitrary interference by public authorities. It did not merely compel State to abstain from such interference: in addition to that primarily negative undertaking, there might be positive obligations inherent in effective respect for private or family life. In the present case all that had to be ascertained was whether the national authorities had taken the necessary steps to ensure effective protection of the applicants' right to respect for their private and family life...

It is submitted that there is no doubt the European Court of Human Rights has made a significant input to the concept of environmental protection owing to the wider elucidation and construction of the right to privacy, property and the right to life as guaranteed under the Convention and other enabling instruments. The Court looked at the harmful effects on human health of different kinds of environmental pollution, such as nighttime disturbances by way of noise and light and adverse impacts feasible from some industrialized facilities in reaching its decision.

²² App. No. 14967/89, Reports 1998-I, no. 64. See also the case of *Tuskin and Others v Turkey*, App. No. 46117/99, 2004 Eur. Ct. Hum. Rts. 621 (10 Nov.)

Complaints relating to the failure of States to inform citizens of the possible danger of activity also have been considered under the purview of the right to privacy and property as an alternative of the right of information included in Article 10 of the Convention. Hence, the court through the expansion of the classical human rights as understood have immensely contributed in the jurisprudence of a right-based approach to the protection of environment.

B. African Commission on Human Rights

The adoption of the African Charter on Human and Peoples' Rights is without doubt a courageous footstep taken by African states to deal with the prevalent and systematic breaches of human rights in the African region through the late 1980s. The African Charter contained provisions for protection of civil and political rights and on economic, social and cultural rights devoid of discrimination of any kind such as race, ethnic group, color, sex, language, religion or political or any other opinion, national and social origin, fortune, birth or other status. The African Charter established the African Commission on Human and Peoples' Rights (ACHPR). The Commission has the mandate to promote and protect the rights provided in the Charter. By article 45 of the Charter, the ACHPR has three most important responsibilities: the protection of the human and peoples' rights protected by the African Charter; the promotion of the human and peoples' rights protected by the African Charter; and the interpretation of the human and peoples' rights protected by the African Charter. Unlike the European Court of Human Rights that has grown sporadically over the years in its approach to the protection of environment through the instrumentality of human rights, the African Commission is still developing. Thus, the Commission has demonstrated willingness to adopt an expansive interpretation to the protected rights in the Charter. The sole and emerging case to be examined here is the case of *Social and Economic Rights Action Center and the Center for Economic, and Social Rights .V. Federal Republic of Nigeria*.²³ The fact of this case as follows: In March 1996, two NGOs, Social and Economic Rights Action Centre (SERAC) based in Nigeria and the Centre for Economic and Social Rights (CESR) in New York brought a complaint on behalf of the people of Niger Delta especially the Ogoni People in whose area Nigeria exploit vast of its oil resources. The complaint alleged series of violations of basic rights of the people of the region protected under the Charter and the Nigeria Constitution. The complainants in their communication alleged that:

1 The Communication alleges that the military government of Nigeria has been directly involved in oil production through the State oil company, the Nigerian National Petroleum Company

²³ Communication 153/96, *The Social and Economic Rights Action Center and the Center for Economic, and Social Rights / Nigeria*.

- (NNPC), the majority shareholder in a consortium with Shell Petroleum Development Corporation (SPDC), and that these operations have caused environmental degradation and health problems resulting from the contamination of the environment among the Ogoni People.
- 2 The Communication alleges that the oil consortium has exploited oil reserves in Ogoni land with no regard for the health or environment of the local communities, disposing toxic wastes into the environment and local waterways in violation of applicable international environmental standards. The consortium also neglected and/or failed to maintain its facilities causing numerous avoidable spills in the proximity of villages. The resulting contamination of water, soil and air has had serious short and long-term health impacts, including skin infections, gastrointestinal and respiratory ailments, and increased risk of cancers, and neurological and reproductive problems.
 - 3 The Communication alleges that the Nigerian Government has condoned and facilitated these violations by placing the legal and military powers of the State at the disposal of the oil companies. The Communication contains a memo from the Rivers State Internal Security Task Force, calling for "ruthless military operations".
 - 4 The Communication alleges that the Nigerian government has destroyed and threatened Ogoni food sources through a variety of means. The government has participated in irresponsible oil development that has poisoned much of the soil and water upon which Ogoni farming and fishing depended. In their raids on villages, Nigerian security forces have destroyed crops and killed farm animals. The security forces have created a state of terror and insecurity that has made it impossible for many Ogoni villagers to return to their fields and animals. The destruction of farmlands, rivers, crops and animals has created malnutrition and starvation among certain Ogoni Communities.

It could be observed that the focus of these complaints is based on environmental impacts of oil exploitation in the Niger Delta with its concomitant violations of human rights. The extent of these violations have denied people access to means of fulfilling their basic human rights because the natural environment, which serves as the resources base and means of livelihood to the people has marginally been altered. In terms of the African Charter, the above allegations are based on violations of Articles 2 (non-discriminatory enjoyment of rights), 4 (right to life), 14 (right to property), 16 (right to health), 18 (family rights), 21 (right of peoples to

freely dispose of their wealth and natural resources) and 24 (right of peoples to a satisfactory environment). The most important of these articles are article 4, article 16 and article 21 respectively which are reproduced below:

Article 2 provides thus:

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

Article 16 states:

Every individual shall have the right to enjoy the best attainable state of physical and mental health. 2. States Parties to the present Charter shall take the necessary measures to protect the health of their people and to ensure that they receive medical attention when they are sick.

Article 24 provides:

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

After considering the complaints, the African Commission stated that article 4, 16 and 21 are closely related to the protection of environment and safety of the people. It found that the people of Niger Delta have suffered immensely from the oil exploitation activities that take place within their vicinity. The Commission held that article 24, which provide for the right to a general satisfactory environment has been violated due to the degradation of the environment arising from the activities of oil industries operating in the Niger Delta. The Commission also found violation of article 4, which protected the right to life on the premise that the degradation of environment has destroyed the food sources that the people depend upon for survival. By this, the court has given expansive construction to the right to life to include the right of access to food. Article 16, that is, the right to health was held to have been violated because the degradation of environment has made living in Niger Delta a nightmare and have exposed the people to various health symptoms that threaten life. Outline the positive obligation of the Nigerian Government to prevent environmental pollution and its resultant effect on human rights, the Commission extensively stated:

The right to a general satisfactory environment, as guaranteed under Article 24 of the African Charter or the right to a healthy environment, as it is widely known, therefore imposes clear obligations upon a government. It requires the State to take reasonable and other measures to prevent pollution and ecological degradation, to promote conservation, and to secure an ecologically sustainable development and use of natural resources. Article 12 of the International Covenant on Economic, Social and Cultural Rights (ICESCR), to which Nigeria is a party, requires governments to take necessary steps for the improvement of all

aspects of environmental and industrial hygiene. The right to enjoy the best attainable state of physical and mental health enunciated in Article 16(1) of the African Charter and the right to a general satisfactory environment favourable to development (Article 16(3)) already noted obligate governments to desist from directly threatening the health and environment of their citizens. The State is under an obligation to respect the just noted rights and this entails largely non-interventionist conduct from the State for example, not from carrying out, sponsoring or tolerating any practice, policy or legal measures violating the integrity of the individual. The Commission continued and said:

The Commission notes that in the present case, despite its obligation to protect persons against interferences in the enjoyment of their rights, the Government of Nigeria facilitated the destruction of the Ogoniland. Contrary to its Charter obligations and despite such internationally established principles, the Nigerian Government has given the green light to private actors, and the oil Companies in particular, to devastatingly affect the well-being of the Ogonis. By any measure of standards, its practice falls short of the minimum conduct expected of governments, and therefore, is in violation of Article 21 of the African Charter.

The decision of the Commission in this case was a landmark decision because it represents the turning point where the provision of the Charter was interpreted broadly to incorporate the protection of environment. This decision pointed to the indivisibility of human rights and environmental pollution. The Commission through wisdom and creativity has been able to found a violation of the right to life and health through interpretation of the enabling provisions beyond their traditional connotation. This case serves as an eye opener to the people of Niger Delta and Nigerians as whole on the role and potency of human rights in the protection of environment and enhancement of environmental justice to curb the regime of impunity of environmental degradation in Nigeria.

C. The Inter-American Commission on Human Rights

The Inter-American Commission of Human Rights has taken a similar approach in cases relating to logging, oil extraction and mining on land that belongs to the indigenous peoples. Some basic rights such as the right to life and the right to enjoyment of property have played significant role in this regard. For instance, in the case of *Awas Tingni Mayagana (Sumo) Indigenous Community v Nicaragua*,²⁴ the petitioner and challenged protested government-sponsored logging of timber on

²⁴ *Mayagana (Sumo) Awas Tingni Cmty. V. Nicaragua*, 2001 Inter-Am. Ct. H.R. (ser. C) No. 79 (Aug. 31, 2001)

indigenous forest lands in Nicaragua. The government granted the logging concession without consulting the Awas Tingni community, despite having agreed previously to do so. The community alleged violation of the rights to cultural, property and participation in government. In 1998, the Commission found in favour of the community and submitted the case to the Inter-American Court on August 31, 2001. The court issued its judgment declaring that the right to property guaranteed under article 21 of the American Convention on Human Rights has been violated. It unanimously held that the state must adopt domestic laws, administrative regulations, and other necessary means to create effective surveying, demarcating and title mechanism for the properties of the indigenous communities, in accordance with customary law and indigenous values, uses and customs. By this decision, the court has interpreted the right to property in a more broad sense to ensure the protection of indigenous properties, which the community depend upon for subsistence. Similar decision was held by the Commission in the case of *Maya Indigenous Community of the Toledo District v Belize*²⁵ where the Commission emphasized on the need to strike a balance between development project and the rights of indigenous people to the enjoyment of their indigenous properties. The Commission states that:

This Commission similarly acknowledges the importance of economic development for the prosperity of the populations of this Hemisphere. As proclaimed in the Inter-American Democratic Charter, '[t]he promotion and observance of economic, social, and cultural rights are inherently linked to integral development, equitable economic growth, and to the consolidation of democracy of the states of the Hemisphere.' At the same time, development activities must be accompanied by appropriate and effective measures to ensure that they do not proceed at the expense of the fundamental rights of persons who may be particularly and negatively affected, including indigenous communities and the environment upon which they depend for their physical, cultural and spiritual well-being.).

Similarly, in the case of *Yanomani v Brazil*,²⁶ the Inter-American Commission established a link between environmental quality and the right to life in response to a petition brought on behalf of the Yanomani Indians of Brazil. The petition claimed that the government had violated the American Declaration of the Rights and Duties of Man by constructing a highway through Yanomani territory and authorizing exploitation of the territory's resources. These actions led to the infiltration of non-indigenous who brought contagious diseases, which remained

²⁵ [2004] Case 12,053, Report No. 40/40, I.A.C.H.R., OEA/Ser.L/V/II.122 Doc. 5 rev. 1 at 727

²⁶ Case 7615 (Brazil), INTER-AM.C.H.R., 1984-1985 Annual Report 24, OEA/Ser.L/V/II.66, doc. 10, rev. 1 (1985)]

untreated due to lack of medical care. The Commission found that the act of the government had violated the Yanomani right to life, liberty and personal security guaranteed by Article 1 of the Declaration, as well as the right of residence and movement and the right to the preservation of health and well-being. The Commission interpreted the right to life in this case to include a positive obligation on the part of the government to prevent and regulate activities likely to endanger human life. Furthermore, an expansive interpretation was as well given to the right to life in the case of *Eastern Navajo Diné v United States*.²⁷ The petitioner in that case, Eastern Navajo Diné, an NGO brought this case against the Government of United States on behalf of Dine Community. The case of petitioner was that the acts and omissions of the US Government has contaminated and will continue to contaminate natural resources in the Diné communities of Crown point and Church Rock and as such, the State has violated Petitioners human rights and breached its obligations under the American Declaration of the Rights and Duties of Man. The petitioner argued that despite the ongoing public health and environmental crises that have resulted from the State's failure to reasonably regulate the uranium mining and milling industry in the past, the State continues to license uranium operations that it acknowledges will contaminate natural resources within the Navajo Nation. In 1998, the NRC United States Nuclear Regulatory Commission) granted a source and byproduct materials license to Hydro Resources, Inc. (HRI) to conduct uranium mining, using *in situ* leach technology, at four sites in the Navajo communities of Church Rock and Crownpoint in northwestern New Mexico. By granting a uranium mining license, the petitioner argued it will pollute Navajo community aquifers with uranium and other heavy metals and cause contamination to air, soil, water, and other natural resources on lands traditionally used and occupied by the Diné. Hence, the petition claimed that the State has violated Articles 1 (Right to Life), 3 (Right to Religious Freedom), 11 (Right to Health), 13 (Right to Culture) 23 (Right to Property) of the American Declaration of the Rights and Duties of Man. With regard to the right to life, the Commission expanded the meaning of the right to life to include the right to clean water. Based on this, it was held the granting of license to conduct uranium is a violation of the right to life because of its threat to safety of the use of which is likely to endanger the life of the Dine people. The Commission also interpreted the right to life to include the right a health and that exposure to uranium would threaten the life of the people in the area. In one of its remark, the Commission said:

By licensing a project it knows will contaminate good quality groundwater that the Navajo Nation has indicated is and will be an important source of drinking water in the Church Rock and

Crownpoint communities, the State has failed to insure minimum conditions for a dignified life for the people in those communities, including Petitioners.....The State's failure to protect the Petitioners' right to life is amplified when the above described licensing decision is put in the context of ongoing contamination from past uranium mining and milling.

Finally, in the *Case of the Yakye Axa Indigenous Community v. Paraguay*,²⁸ the Inter-American Court specifically found that Paraguay had failed to protect the petitioners' right to life under the American Convention on Human Rights by divesting them of their ancestral lands. The Inter-American Court concluded:

One of the obligations the State must inescapably undertake as guarantor, to protect and ensure the right to life, is that of generating minimum living conditions that are compatible with the dignity of the human person and of not creating conditions that hinder or impede it. In this regard, the State has the duty to take positive, concrete measures geared toward fulfillment of the right to a decent life, especially in the case of persons who are vulnerable and at risk, whose care becomes a high priority.

The above expositions of Inter-American Commission decisions show the readiness to interpret the language of human rights guaranteed in the international human rights instruments to include the positive right to a clean and healthy environment. This approach is a clear manifestation of changing circumstances that warrant the interpretation of protected rights both in international, regional and national human rights instruments beyond their traditional foundation.

The discussions on the approach of human rights to the protection of environment before the regional courts offer lot of promise to litigants to ventilate their grievances under the umbrella of human rights in the quest for environment justice. One of the major objections to an autonomous right to environment lies in the problems of definition. It is in the light of this that courts have made a noteworthy contribution. When a claim is instituted under a specific article of human rights provision in the constitution or regional human rights documents, this permit the court to found a violation of this article without the necessity of defining environmental right as such. All that the court requests to do is to define the right before it in the context of the fact of the case. Consequently, a court may find a threat to life, or damage to health, on the facts before it and set a standard of environmental quality in defining the right litigated. A right-based approach has

²⁸Case of the Yakye Axa Indigenous Community v. Paraguay at 167, Complaint No. 12.313, Judgment (Merits, Reparations and Costs) (June 17, 2005).

proved to be effective in various jurisdictions and it has given ways to citizens, dissent groups and non-governmental organisations to initiate proceedings successfully to protect the environment without the need of having to prove a special interest or personal injury.³⁰ It has also injected the spirit of responsiveness in public authorities to be conscious of their decisions having potential effects on the environment and right of the populace.³¹ It has also given ways for a departure from common law rules of special interest where individuals and groups can now bring actions through public interest litigation to safeguard the environment.³²

It is true that environmental concerns were not on the worldwide agenda when these regional Conventions were adopted. The decisions of regional courts and commission have clearly shown that in the light of the circumstances of today's world, there is nothing inconsistent with using the provisions European Convention on Human Rights, American Convention on Human Rights and the African Charter on Human and Peoples' Rights to protect the environment. This fact evidently reveals the significance and priority of interpretation as a method of law. Therefore, the courts at regional levels should assume more tasks to consider environmental concerns when interpreting the existing instrument approach, which is by now established under its jurisprudence. They have made noteworthy contribution to this interpretation in two different ways: the first is via the protection of the right to privacy against different kinds of environmental dilapidation; the other is through the justification of restrictions, particularly on the right to property in the general interest of protecting the environment. Surely, a plausible step has been taken through the extensive interpretation of the right to privacy admitting that severe environmental pollution amount to a breach of this right. Finally, it should be noted that the increase in environmental awareness in societies would be a formative cause in the speeding up of all steps to be taken on the discussed analysis. The growing of severe adverse effects of the environmental problem will amplify such a consciousness, and it would be unavoidable for the Court to pursue a more teleological interpretation that reflects the new concerns as circumstances may require.

4. CHALLENGES

Since the adoption of the Universal Declaration of Human Rights in 1948, the international and regional human rights systems have been fundamental in the definition and protection of human rights, and have contributed substantially to the improvement of the Rule of Law in various different regions. These mechanisms, in many cases, have been the final remedy available to victims when local institutions

³⁰See Kibangi Budo, *Environmental and Developmental Rights in the Southern African Development Community with Specific Reference to the Democratic Republic of Congo and the Republic of South Africa* (PhD Thesis, University of South Africa), 2010, 321-396.

³¹Ibid.

³²Ibid.

failed or were unwilling to protect their rights. Accordingly, in addition to a protection mechanism, they represent a source of hope in adverse local political contexts. A range of factors is affecting access to regional courts or commission as the case may be. There are numerous of these factors both internally and externally. However, this paper intend to focus exclusively on some of the factors affecting right of access to these courts and even lack of interest on the part of a victim to approach the court. The factors, which this paper intends to examine, are non-ratification of enabling convention, exhaustion of domestic remedies, limitation of time, and non-compliance with the decision of the courts in cases where the victim is victorious.

i. Ratification of the Enabling Convention

Ratification of international or regional human rights instruments simply connotes accepting to the terms and condition of the instruments. By ratifying a human right convention, the concerned state has agreed to observe and protect the rights guaranteed in the convention.³² As a general matter, human rights treaties specify the rights of persons that the state must respect. In assuming an obligation under a human rights treaty, a state usually assumes an obligation not only to other state parties and their citizens but also (indeed, often most centrally) to the state's own citizens.³³ In ratifying the convention, states consent not to violate the protected rights in the convention and must not permit third party to violate it. Thus, a positive obligation is imposed on states to prevent violation of human rights.³⁴ However, where a state has not ratified a convention, such state is not under any obligation to implement the convention. Hence, a party can only complain to the Court about violations of convention, which have been committed by or are attributable to a State that is bound by it or else the Court will hold a complaint inadmissible. A complainant needs not to be a national of the State that he or she intends to file complain about. It is enough that the person is within the jurisdiction of that State when the supposed violation happened. Hence, jurisdiction not only relates to the physical territory of the State but may also apply where State actors exercise some form of jurisdiction abroad. Therefore, where a state has not ratified a convention, then such convention has not created any legal rights capable of being enforced by citizens.

³² Palmer A, Tomkinson J, Phung C, "Does Ratification of Human-Rights Treaties Have Effects on Population Health" (2009) *Lancet*, 373; Green M. "What We Talk About When We Talk About Indicators: Current Approaches To Human Rights Measurement" (2001) 23 *Hum Rights Quarterly*, 1062-1097.

³³ Ibid.

³⁴ Economic and Social Council Economic, Social and Cultural Rights: report of the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health, Paul Hunt. E/CN.4/2006/48. <http://daccessdds.un.org/doc/UNDOC/GEN/G06/114/69/PDF/G0611469.pdf?OpenElement>. (accessed June 5, 2013); Hunt P. Promotion and protection of all human rights, civil, political, economic, social, and cultural rights: report of the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health, Paul Hunt. A/HRC/7/11. <http://daccessdds.un.org/doc/UNDOC/GEN/G08/105/03/PDF/G0810503.pdf?OpenElement>. (accessed June 5, 2013).

II. Exhaustion of Available Domestic Remedies

Before a person can make an application to the Court, such person must first use all the available remedies in the country concerning the alleged violation. Generally, this indicates instituting a court case and an appeal to the apex court. It is after the intending party must have exhausted the available judicial remedies at national level, which is unsatisfactory to him or her before making a further application to the regional court or commission. Otherwise, the court will hold the complaint inadmissible.³⁵ Where available remedies at national level have not been used, the complainant will have to show that it was unsuccessful to secure such remedy under the Convention. The purpose of this rule is to give national authorities (primarily the courts) the opportunity to adjudicate on the alleged violations and to provide a remedy at the national level. This is known as the rule of subsidiarity, which signify that the Court will not assume jurisdiction until the national authorities have made a final decision in relation to the complaint and there is no other domestic remedy available. For instance, in the case of *EHP v Canada*,³⁶ a group of Canadian citizens brought an action under the International Covenant on Civil and Political Rights asserting that the storage of radioactive waste near their homes threatened the right to life of the present and future generations in the area. The Human Rights Committee, while acknowledging that the case raised serious issues with regard to the obligation of the states parties to protect human life, declares that the application is inadmissible for non-exhaustion of domestic remedies. It is the view of the author that the requirement for the exhaustion of available domestic remedies should be made optional rather than being mandatory. For instance, some jurisdictions are yet to receive wisdom in the jurisprudence of a right-based approach to the protection of environment. Therefore, it will initially practicably impossible for the intending

³⁵ In *Communication No. 71/92 Recontre Africaine pour la Defense des Droits de l'Homme (RADDHO) v Zambia*, 10th Annual Activity Report: 1996–1997, the Commission held that “[w]hen the Zambian government argues that the communication must be declared inadmissible because the local remedies have not been exhausted, the government then has the burden of demonstrating the existence of such remedies”. In 147/95 *Sir Dawda K Jawara v The Gambia*, 13th Annual Activity Report: 1999–2000. In this Communication, the Commission clarified the rationale of the local remedies rule, which it said was “to ensure that before proceedings are brought before an international body, the state concerned must have had the opportunity to remedy the matter through its own system”. This prevents the Commission from acting as a court of first instance rather than a body of last resort. Three major criteria could be deduced from the practice of the Commission in determining this rule, namely, the remedy needs to be available, effective, sufficient, and not unduly prolonged. The remedy is considered *available* if the petitioner can pursue it without impediment; it is deemed *effective* if it offers a prospect of success; and it is found *sufficient* if it is capable of redressing the complaint (*RADDHO v Zambia*, *ibid*). The Communication set the tone that “[t]he rule requiring the exhaustion of local remedies as a condition of an international claim is founded upon, amongst other principles, the contention that the respondent state must first have an opportunity to redress by its own means within the framework of its own domestic legal system, the wrong alleged to have been done to the state”. It went on to say “[t]his does not mean, however, that complainants are required to exhaust local remedy which is found to be, as a practical matter, unavailable or ineffective”.

³⁶ *Communication No. 67/1980, EHP v Canada*, selected decisions of the Human Rights Committee (1990), 20

party to obtain satisfactory judgment under the umbrella of human rights. The rule should be seen as one of procedures and not substance. The position in these two instances is differed. The construction of the rule exhaustion of local remedies lies in the question as to the precise moment when the responsibility of a state arises in international law. If it operates as one of substance, then state responsibility under international law would only arises after the fruitless resort to domestic remedies. However, if it operates as one of procedure, then state responsibility and liability arises under international from the moment a right is violated. This paper argued that the rule of exhaustion of domestic remedies should be one of procedure and not substance. By this, approach, intending complainant need not to wait for a local remedies to be exhausted before approaching the regional court or commission as the case may be.

iii. **Limitation of Time**

The European Convention for instance lays down a "six month rule". This means that you have only six months from the date of the final decision by the competent national authorities to lodge an application with the Court. After that period your application cannot be accepted. An applicant cannot extend the six month time limit. Thus, when an action is not instituted within the time framed, it automatically becomes statute bar. This means that upon the expiration of the time limit, the intending applicant would be deemed to have waived its right to petition the court. It is the view of the author that the prescription of time limit is undesirable looking at the circumstances that may surround the filing of a case before the court. More cases have come before the court from developing countries and as such the intending applicant may not have the necessary resources to prosecute the case diligently. In fact, access to NGOs may not be within the reach of the affected person. It is suggested that the six months rule be expunged from the conditions of bringing action before the court. In the alternative, the various regional courts or commission can begin to work on the mode of making access to court more easily reachable to the people through the establishment of divisions at willing states. This may prove to be expensive but it is not impossible through a joint effort of states' parties and regional human rights bodies.

iv. **Non-Compliance with Decisions of the Court or Commission**

Non-compliance with the decisions of the court is one of the major constraints affecting the effectiveness of the court. The state party may refuse to recognize or enforce the decision of the court. In domestic jurisdiction, there is a complete system of disputed settlement, including a system of compliance and enforcement. There are bodies at domestic level whose responsibly are to ensure that judgment or

decisions of the court are complied with. For instance, in the case of criminal conviction, there are police officers and prison warders that ensure that the convicted person goes to prison to serve the time or to await death sentence, which is to be carried out by executive machinery. Similarly, in civil litigation, there are courts' sheriffs whose duties are to enforce or execute the decision or order of the court. In short, there seems to be effective machineries at domestic levels to ensure adequate compliance with decisions and ruling of the court. Even the court at domestic level can convict a person for contempt of court as a result of refusal to carry out court's order. At international plane, there is no assurance that the required decisions of the international courts will be complied with and there is no mechanism for enforcement. Notwithstanding express provisions in the regional conventions that oblige states' party to abide by the decision of the court or commission, compliance still remains a great challenge.³⁷ Hence, the decisions of these bodies are mere recommendations and can only be binding or enforced in honour. Victims of human rights abuses, which have obtained remedy from the Commission, have not actually appreciated it due to lack of enforcement and recognition. While this is a general concern in that other instruments including United Nations based human rights instruments are as well mocked by states. Thus, the problem is that the court has not been provided with sufficient teeth with which to bite those found to have flouted its decisions. For instance, as commendable as decision of the commission was in the case of *Social and Economic Rights Action Center and the Center for Economic, and Social Rights .V. Federal Republic of Nigeria*,³⁸ the Nigerian Government is yet to implement the decision and recommendations of the commission concerning great violations of human rights in the Niger Delta. The argument continues on the usefulness of world machinery for the enforcement of binding decisions of international and regional courts, but for the moment it may not be a pressing issue because the creation of enforcement mechanism at regional level is not an end itself but a means to an end. Thus, in addition, it requires commitment and goodwill on the part of states' parties to honour, enforce, and comply with the provisions of the enabling regional statutes, which they themselves have consented to.

³⁷ For instance, According to Article 46(1) of the Convention, Member States of the Council of Europe undertake to "abide by the final judgments of the Court in any case to which they are parties." See also Article 46 of the Protocol on the Statute of African Court of Justice and Human Rights, 2004.

³⁸ Communication 155/96, *The Social and Economic Rights Action Center and the Center for Economic, and Social Rights / Nigeria*.

1. SUMMARY

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