Social and Economic Rights Action Centre (SERAC) and the Centre for Economic and Social Rights (CESR) v Nigeria: two decades on – questioning the continued implementation gap

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ABSTRACT: Nearly two decades after the landmark decision in *Social and Economic Rights Action Centre (SERAC) and the Centre for Economic and Social Rights (CESR) v Nigeria*, in which the African Commission on Human and Peoples' Rights found that Nigeria had breached its obligations to protect, promote, and fulfil the rights of the Ogoni people in the country's Niger Delta region, it is relevant to enquire how the decision has been implemented and whether it has significantly improved the situation of the Ogoni people. After the announcement of the Commission's decision and the return to democratic rule in Nigeria, the general expectation was that Nigeria would without further delay implement the Commission's recommendations. However, 20 years after the decision the Ogoni people are still demanding for their basic rights to be respected. This article, which mainly looks at the Commission's decision from the perspective of the victims and through a socio-legal perspective, exposes this implementation gap. By doing so, it also points to the ineffectiveness of the monitoring mechanism of compliance with the Commission's recommendations.

TITRE ET RÉSUMÉ EN FRANCAIS:

***Social and Economic Rights Action Centre (SERAC) et Centre for Economic and Social Rights (CESR) c. Nigeria* après deux décennies: questionnement au tour du déficit persistant de mise en œuvre**

RÉSUMÉ: Près de deux décennies après la décision historique rendue dans l'affaire *Social and Economic Rights Action Centre (SERAC) et Centre for Economic and Social Rights (CESR) c. Nigeria*, dans laquelle la Commission africaine des droits de l'homme et des peuples a estimé que le Nigeria avait violé ses obligations de protéger, promouvoir et réaliser les droits du peuple Ogoni dans la région du delta du Niger, il est important de s'interroger sur la manière dont la décision a été mise en œuvre et si elle a amélioré de manière significative la situation du peuple Ogoni. Après l'annonce de la décision de la Commission et le retour à un régime démocratique au Nigeria, on s'attendait généralement à ce que le pays applique sans plus tarder les recommandations de la Commission. Cependant, 20 ans après la décision, le peuple

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Ogoni continue de réclamer le respect de ses droits fondamentaux. Cet article, qui examine principalement la décision de la Commission du point de vue des victimes et dans une perspective socio-juridique, met en évidence ce manque de mise en œuvre. Ce faisant, il met également en évidence l'inefficacité du mécanisme de suivi de mise œuvre des recommandations de la Commission.

KEY WORDS: African human rights system, environmental degradation, *Ogoni* case, Niger Delta, Ogoniland, implementation gap

CONTENT:

1 INTRODUCTION

The aim of this article is to focus on the implementation side of decisions of the African Commission on Human and Peoples' Rights (African Commission). To secure compliance with the African Charter, the founding fathers opted for a quasi-judicial organ with broad competences including to promote, interpret and ensure the rights recognised under the African Charter on Human and Peoples' Rights (African Charter or Banjul Charter).[1] As a quasi-judicial organ the African Commission has the power to issue decisions which are of a recommendatory nature. As with the universal human rights system, also in Africa there is a tendency in human rights practice to go beyond what the drafters of human rights treaties envisaged and attribute a certain legal value to the findings of human rights treaty bodies.[2] The African Commission has similarly defended the idea that their findings, as a sort of authoritative interpretations of the African Charter, must possess the legal value proper to that instrument.[3] While these issues certainly bear upon the question of compliance with the African Charter and affect the implementation of the

1 Article 54 African Charter on Human and Peoples' Rights.

2 International Law Association Committee on International Human Rights Law and Practice 'Final report on the impact of the work of the United Nations treaty bodies on national courts and tribunals' (adopted at the 2004 Berlin Conference).

3 Communication 137/94-139/94-154/96-161/97; a related issue that has been discussed in legal doctrine is the *res interpretata* value of pronouncements of human rights supervisory bodies. See eg O Jonas '*Res interpretata* principle: giving domestic effect to the judgments of the African Court on Human and Peoples' Rights' (2020) 20 *African Human Rights Law Journal* 736-755; OM Arnadottir '*Res interpretata*, *erga omnes* effect and the role of the margin of appreciation in giving domestic effect to the judgments of the European Court of Human Rights' (2017) 28(3) *European Journal of International Law* 819-843; C Giannopoulos 'The Reception by Domestic Courts of the *res interpretata* effect of jurisprudence of the European Court of Human Rights' (2019) 19(3) *Human Rights Law Review* 537-559. The *res interpretata* principle is mainly used as an argument to convince domestic courts and non-parties to a dispute to nevertheless follow the body of human rights pronouncements. For parties to a dispute, as is the case addressed in this contribution, it is less relevant because there are other legal means to push them to respect the human rights pronouncement in question.

Commission's findings, it is not the focus of our article. What we want to analyse, however, is how state parties to the African Charter react to a Commission's pronouncement stating that they have violated the Charter and what effect it has on the claimants. This, we contextualise through the first order (civil and political rights) and second order (socio-economic rights) compliance mechanisms which for Viljoen, impose different kinds of obligations on states.[4] In both contexts, compliance is shaped by a process of norm diffusion, social learning and norm internalisation, and the important role of institutions and norms in the construction of identities, which all drive societal forces to put pressure on decision makers to conform to rules and norms of the African Charter.[5] Even though the African Commission has developed a whole system to monitor the implementation of its findings,[6] the question of implementation remains an under-researched topic. Little attention is indeed given in legal doctrine to the ways African states are addressing decisions of the African human rights supervisory bodies with the consequence that little is known on what happens in practice with Commission's decisions and even less about the question whether the plight of victims have been addressed.

This contribution has the objective to shed some light in this domain by focusing on one specific case and querying whether and how victims of the violations have seen their situation change in the post-decision phase. For this purpose, we took one of the emblematic cases decided by the African Commission 20 years ago with the idea that this lapse of time gives us sufficient distance to evaluate what happened on the ground. Two decades ago, the African Commission concluded in *Social and Economic Rights Action Centre (SERAC) and the Centre for Economic and Social Rights (CESR) v Nigeria* (*Ogoni* case) that Nigeria had breached its obligations to protect, promote, and fulfil the rights of the Ogoni people. The importance of the case cannot be underestimated. Wachira for example, acknowledged the case as one of

4 F Viljoen 'The African human rights system and domestic enforcement' in M Langford C Rodríguez-Garavito & J Rossi (eds) *Social rights judgments and the politics of compliance: making it stick* (2017) 351-398.

5 V Carraro 'Promoting compliance with human rights: the performance of the United Nations' Universal Periodic Review and treaty bodies' (2019) 63 *International Studies Quarterly* 1079 at 1093.

6 The African Charter is very vague on the question how decisions of the African Commission needs to be implemented. The Rules of Procedure of the African Commission partly give some guidance with this regard. Adopted in 1988 and revised in 1995, they were replaced by new Rules of Procedure in 2010 to respond to the creation of the African Court on Human and Peoples' Rights. Rule 98(4) requests the state parties to report to the African Commission on the measures taken to implement provisional measures. Rule 112 details the steps, timing and organs involved in the follow-up of the recommendations of the Commission. If the state party has refrained to implement the Commission's findings or has not complied with the provisional measures requested within the timeframe defined in Rule 112 the Commission can seize the Africa Court on Human and Peoples' Rights. The Court will then address the case even if the state party has not recognised the competence of the Court to handle individual complaints. Finally, Rule 125 allows the Commission to request the AU Assembly of Heads of State and Government, when it submits its activity report, 'to take necessary measures to implement its decisions' and/or to 'bring all its recommendations to the attention of the Sub-Committee on the implementation of the decisions of the African Union Permanent Representatives Committee'.

the most important jurisprudential contributions of the African Commission with regards to the protection of minority peoples' rights in Africa.[7] To Nwobike, it was a giant stride towards the protection and promotion of economic, social and cultural rights of Africans.[8] And for Dina Shelton, the African Commission's initiative in getting justice for indigenous people was important because the Commission went head-on to determine a contentious case involving violations of the majority of human rights yet focusing specifically on the right to a general satisfactory environment[9] and articulated the duties of governments in Africa to monitor and control the activities of multinational corporations.[10] As known, the case was linked to the 'irresponsible' oil exploitation in Nigeria leading to the use of violence, accompanied by significant environmental degradation in the Niger River Delta region and causing important health problems to the Ogoni inhabitants of the region. The case itself addressed a wide variety of rights recognised under the African Charter and established principles that would resonate as precedents in many cases decided afterwards.[11] The case was also relevant for recognising the peoples' rights protected under the African Charter and the possibility of a group to seek the protection and enforcement of these rights.[12] Following the decision and the return to democratic rule in Nigeria, the general expectation was that Nigeria would quickly implement the Commission's recommendations. However, nearly 20 years after the decision, the Ogoni people are still claiming from their basic rights to be respected.

This article mainly looks at the Commission's decision from the perspective of the Ogoni people and seeks to expose, from a sociolegal perspective, the implementation gap while also pointing to the ineffectiveness of the monitoring mechanism of compliance with the Commission's recommendations. Our view here is that in the context of the Niger Delta, an existential contestation is framing out among the forces of the state, corporate capital and local communities, culminating in what Debord describes in his *Society of Spectacle* as commodity enjoying fetishist status and dominating society.[13] The

7 GM Wachira *African Court on Human and Peoples' Rights: ten years on and still no justice* (2008) 9.

8 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 Centre (SERAC) and the Centre for Economic and Social Rights (CESR) v Nigeria*' (2005) 1(2) *African Journal of Legal Studies* 129-146.

9 D Shelton 'Decision regarding communication 155/96 (*Social and Economic Rights Action Centre & Centre for Economic and Social Rights v Nigeria*) Case ACHPR/COMM/A044/1' (2002) 96(4) *American Journal of International Law* 941. See also C Okoloise 'Circumventing obstacles to the implementation of recommendations by the African Commission on Human and Peoples' Rights' (2018) 18 *African Human Rights Law Journal* 27-57.

10 Shelton (n 9).

11 Nwobike (n 8) 139-141.

12 G Lynch 'Becoming indigenous in the pursuit of justice: the African Commission on Human and Peoples' Rights and the Endorois' (2012) 111 *African Affairs* 37.

13 G Debord *The society of the spectacle* (translated and annotated by Ken Knabb) (2014) 13.

sociolegal perspective will require posing several questions including how far Nigeria has gone to ameliorate the lives of the victims but also how the Ogoni people have reacted to the measures taken by the government. Through the voices emerging from the Ogoni and other Niger Delta communities, the article assesses, beyond the traditional legal analysis, what the decision meant for the Ogoni and takes stock of the current state of affairs. This is done with a view to contribute to the debate on the post-decision phase and give more weight to the victims' side of the story. However, because the article uses a sociolegal approach and that this is not very common in the classical legal literature we start with a short methodological note.

2 METHODOLOGICAL NOTE

The article will besides the classical approach drawing information from written sources also use a sociolegal approach based on the narrative inquiry methodology. This methodology will allow us to engage with the voices of the local oil-bearing communities in Ogoniland and the broader Niger Delta region. The methodology brings to life personal accounts by creating fictional, non-identifiable characters who narrate their experiences. What we seek to achieve is a process of narrating data[14] with all identifying information removed. Through this, we can show how Niger Delta communities have developed coping strategies to mitigate the effects of their human, social and environmental rights violations originating in the oil exploitation. We are conscious of some of the criticism against this methodology: its propensity to overextend its reach without specificity; its perceived transience as an 'intellectual fad' likely to disappear at any moment and its tendency to 'undermine the very efforts it was thought to support'.[15] However, following Freeman and Ricoeur, we find value in the narrative inquiry methodology because of its capacity to strike a balance among methodology, theory and practice.[16] This shows in through the relationship between time and the oil communities' narrative, focusing on the 'phenomenon of hindsight, the process of looking backward over the terrain of the personal past'.[17] Through this,

14 A Knight 'Research methodologies employed by writers of fiction' (2011) *Ethical imaginations: Refereed conference papers of the 16th annual AAWP conference* 6. For a detailed engagement with this approach, see also O Bello *The dynamics of Nigeria's oil and gas industry's environmental regulation: Revealing/storying neglected voices and excluded lives of environmental encounters and affects*, PhD thesis awarded in 2021 by the University of Westminster http://www.westminster.ac.uk/westminsterresearch (accessed 7 February 2022).

15 M Freeman 'Narrative as a mode of understanding: method, theory, praxis' in A De Fina & A Georgakopoulou (eds) *The handbook of narrative analysis* (2015) 21.

16 P Ricoeur *Time and narrative* (1984) *1*; P Ricoeur *Time and narrative* (1985) 2; P Ricoeur *Time and narrative* (1988) *3*; P Ricoeur 'Life in quest of narrative' in D Wood (ed) *On Paul Ricoeur: narrative and interpretation* (1991) 20-33.

17 Freeman (n 15) 22.

the 'myriad ways' in which the oil communities' narrative is 'woven into the fabric of life itself'[18] become more discernible.

It is important to stress that our choice of the narrative inquiry methodology is not borne out of any desire to dismiss the salience of the established quantitative and qualitative methodology forms. Rather, following Webster and Mertova, we desire to retell the 'whole story' as captured and told by the local Niger Delta communities. We also find justification for this in quantitative and qualitative methodology's inherent drawbacks of omitting important 'intervening' stages[19] of the critical events as they unfold. The narrative inquiry method allows for documentation of valuable critical life events in 'illuminating detail', revealing 'holistic views and qualities that give stories valuable potential for (further) research'.[20]

3 THE *OGONI* CASE AND ITS AFTERMATH

It is not our objective in this article to analyse the *Ogoni* case in detail. Others have done it before.[21] What we will do in turn is start by recalling the context of oil exploitation in the region and how it lead to massive human rights violations in the Niger Delta region to then point to the findings of the case while also enumerating the recommendations made by the African Commission. This is done with the aim to have a clear view of what the Commission requested from Nigeria when it entrusted the state party to bring the situation in conformity with the African human rights standards. Analysing Nigeria's reactions to these recommendations will show that very little has been done to conform to the recommendations and that this is confirmed by the narratives of those living in Ogoniland and the broader Niger Delta region.

Oil was discovered in Nigeria in the 1950s and the exploitation, extraction and production of it have consistently been the source of controversies, ambiguities and social tensions.[22] In the Niger River Delta, where most of Nigeria's oil production is concentrated, the operation of the NNPC-SPDC joint venture caused extreme environmental problems and social unrest, a result of irresponsible operations and a lack of adequate production infrastructure: excessive oil spills, water contamination and natural gas flaring were sadly quite

18 Freeman (n 15) 22.

19 Freeman (n 15) 4.

20 Freeman (n 15) 13.

21 F Coomans 'The *Ogoni case* before the African Commission on Human and Peoples' Rights' (2003) 52 *International and Comparative Law Quarterly* 749-760; CI Obi 'Globalisation and local resistance: the case of the *Ogoni versus Shell*' (1997) *New Political Economy* 137-148; 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 Centre (SERAC) and the Centre for Economic and Social Rights (CESR) v Nigeria*' (2005) 1(2) *African Journal of Legal Studies* 129-146

22 T Lambooy & M-E Rancourt 'Shell in Nigeria: from human rights abuse to corporate social responsibility' (2008) 2 *Human Rights & International Legal Discourse* 229-235.

common.[23] The local Ogoni population, who saw its health affected, its fishing grounds depleted and its agricultural lands confiscated or destroyed to serve oil exploitation, reacted against this dire situation. In 1970, several Ogoni chiefs petitioned the Military Governor of the Rivers state to request the assistance of the Government in alleviating the suffering of the people of the Ogoni division by revising the petroleum and land laws as well as demanding compensation from the oil companies for the damages caused and the threats to their well-being, and even their very lives. Unfortunately, the Government did not respond to the demand. Moreover, the Government did not take any concrete measures to address the concerns that were raised.

Confronted with increased violence, and seeing no serious attempts to respond to their demands, Ogoni elders tabled an *Ogoni Bill of Rights*, which called for Ogoni political and economic self-determination by demanding 'political control of Ogoni affairs by Ogoni people, control and use of Ogoni economic resources for Ogoni development, adequate and direct representation as a right for Ogoni people in all Nigerian national institutions and the right to protect the Ogoni environment and ecology from further degradation'.[24] At the same time, the Movement for the Survival of the Ogoni People (MOSOP) was created to put into effect the objectives set forth in the *Ogoni Bill of Rights*.[25] As the number of demonstrations increased more brutal and extreme force was used in response, bringing the region into a quasi-civil war situation.

Oil installations were sabotaged and, on the other hand, houses and properties were destroyed.[26] According to various reports, at the height of the confrontation in November 1995, 27 villages were razed, 800 000 Ogonis were displaced and 2 000 were killed.[27] International NGOs echoed the demands of the Ogoni and campaigned against Shell in their home countries. The Nigerian government, led at the time by Sani Abacha, responded by implementing measures to ban public gatherings, severely punishing those hindering oil production or those calling for self-determination.[28] Shell lost control over many of its production facilities when strikes broke out and their staff was physically threatened. Following the numerous actions in and outside Nigeria, Shell reevaluated its strategies and temporarily pulled out of the region to concentrate its activities in other parts of the country.[29]

23 KSA Ebeku 'The right to a satisfactory environment and the African Commission' (2003) 3 *African Human Rights Law Journal* 156-159.

24 CR Ezetah 'International law of self-determination and the Ogoni question: mirroring Africa's post-colonial dilemma (1997) 19 *Loyola of Los Angeles International and Comparative Law Journal* 817-818. See also Lambooy & Rancourt (n 22) 236.

25 Ezetah (n 24) 236.

26 RT Ako & P Okonmah 'Minority rights issues in Nigeria: a theoretical analysis of historical and contemporary conflicts in the oil-rich Niger Delta region' (2009) 16 *International Journal on Minority and Group Rights* 58.

27 SI Skogly 'Complexities in human rights protection: actors and rights involved in the Ogoni conflict in Nigeria' (1997) 15 *Netherlands Quarterly of Human Rights* 48 (referring to *The Guardian*, 8 November 1995, 26).

28 Ezetah (n 24) 819-821.

Tensions culminated in the arrest of Ken Saro-Wiwa, the renowned playwright and MOSOP chairman, and eight of his companions for incitement to murder of four pro-governmental Ogoni chiefs.[30] José Ayala-Lasso, the UN High Commissioner for Human Rights at the time, as well as various Rapporteurs for the UN Commission on Human Rights, repeatedly intervened on their behalf before the Nigerian government.[31] All efforts produced little effect and, at the beginning of November 1995, the nine activists were convicted by a military-appointed tribunal and quickly killed thereafter. International human rights NGOs, such as Amnesty International, have qualified the trial as politically motivated and not meeting the internationally recognised fair trial standards.[32]

Drawing from this background, the communication submitted to the African Commission in 1996 by the Nigerian NGO Social and Economic Rights Action Centre (SERAC) and its American counterpart the Centre for Economic and Social Rights (CESR) argued that the military government of Nigeria was responsible for the situation as it was directly involved in oil production as a majority shareholder in the NNPC-SPDC consortium. As it was alleged in the communication, that the consortium

> has exploited oil reserves in Ogoniland 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, increased risk of cancers, and neurological and reproductive problems.[33]

The communication further referred to the fact that the Nigerian government condoned and facilitated these violations by placing the legal and military powers of the state at the oil companies' disposal.[34] Also, no free, prior and informed consent was given or even envisaged as the Ogoni were not involved in the decision-making process about

29 KSA Carew 'David and Goliath: giving the indigenous people of the Niger Delta a smooth pebble-environmental law, human rights and re-defining the value of life' (2002) 7 *Drake Journal of Agricultural Law* 515.

30 Lambooy & Rancourt (n 22) 238.

31 Skogly (n 27) 50.

32 Amnesty International news service 'Nigeria: Amnesty International condemns death sentences imposed on Ken Saro-Wiwa and other Ogoni detainees after blatantly unfair trials' (1 November 1995) https://www.amnesty.org/download/Documents/172000/afr440261995en.pdf (accessed 7 February 2022); for a detailed summary see generally PD Okonmah 'The 'judicial' murder of nine environmental and human rights activists in Nigeria and the implications for the enjoyment of human rights in Nigeria' (1998-1999) 7 *Tilburg Foreign Law Review* 393-428.

33 *The Social and Economic Rights Action Centre and the Centre for Economic and Social Rights v Nigeria* African Commission on Human and Peoples' Rights, Communication 155/96 [*Ogoni*] at para 2 *African Human Rights Law Reports* (2001).

34 *SERAC v Nigeria* (n 33) para 3.

the development of their land by either the government or the oil companies.[35] The Ogoni were not informed of the potential dangers posed by oil exploration in the area and independent scientists and environmental organisations were even prevented from carrying out environmental impact assessment studies.[36] Finally, the government had also ignored the concerns of Ogoni communities regarding oil development while the non-violent campaigns by the MOSOP were met with violent reprisals on villages by security personnel and security forces who created a state of terror and insecurity leading to the executions of Ogoni leaders and the killing of civilians and the destruction of houses, farmland, crops and animals.[37] The complainants therefore, alleged that the government of Nigeria had violated Articles 2 (non-discrimination in the enjoyment of rights), 4 (right to life), 14 (right to property), 16 (right to health), 18(1) (family rights), 21 (right of peoples to freely dispose of their wealth and natural resources) and 24 (right of peoples to a satisfactory environment) of the African Charter.

Soon after receiving the communication, a decision on the admissibility was reached by the African Commission in October 1996 but it took the Commission until October 2001 before being able to pronounce its final decision on the merits as the lack of cooperation by the Abacha military regime hampered the process. The African Commission followed the complainants on most of their arguments and found that Nigeria had violated a large spectrum of human rights recognised under the African Charter including the right not to be discriminated in the enjoyment of rights, the right to life, the right to property), the right to health, family rights, the right of peoples to freely dispose of their wealth and natural resources and finally the right of peoples to a satisfactory environment.[38] Five concrete recommendations were given to Nigeria with the aim to guide its government in bringing the situation back in conformity with the human rights continental standards. Nigeria was asked to (1) stop all attacks on Ogoni communities and leaders by the Rivers state internal security task force and permit citizens and independent investigators free access to the territory; (2) conduct an investigation into the human rights violations described above and prosecute officials of the security forces, NNPC and relevant agencies involved in human rights violations; (3) ensure adequate compensation to victims of the human rights violations, including relief and resettlement-assistance to victims of government sponsored raids, and undertake a comprehensive cleanup of lands and rivers damaged by oil operations; (4) ensure that appropriate environmental and social impact assessments were prepared for any further oil development and that the safe operation of any further oil development be guaranteed through effective and independent oversight bodies for the petroleum industry; and (5) provide information on health and environmental risks and

35 *SERAC v Nigeria* (n 33) paras 4-6.
36 *SERAC v Nigeria* (n 33) para 5.
37 *SERAC v Nigeria* (n 33) paras 7-9.
38 *SERAC v Nigeria* (n 33) para 70.

meaningful access to regulatory and decision-making bodies to communities likely to be affected by oil operations.[39] We will first explain how these recommendations were received by Nigeria and how it responded to them to then answer the question whether they significantly improved the situation of the victims referred to in the Commission's decision?

Research has shown that the levels of compliance with the rulings of the African Commission are far from satisfactory.[40] When questioning why African states fail to implement the decisions of the Commission's recommendations and decisions, Okolosie explains that the Commission has over time discharged its mandate judiciously and has steadily 'evolved as an apparatus for entrenching human rights and democratisation in Africa'.[41] However, a combination of factors has hampered the Commission's enforcement capability. These include the constant friction between the Commission's responsibility as a monitor and the 'obligation of states as primary implementers of human and peoples' rights'.[42] Also, the Commission is only a quasi-judicial body, hence has no legal status comparable to the African Court as a continental court of law.[43] This, for Okolosie, arguably accounts for why its decisions and recommendations often are considered as non-binding on state parties.[44] In a very comprehensive study, Viljoen and Louw also analysed the reasons for (non-)compliance with the decisions of the African Commission. They pointed to a wide variety of factors accounting to noncompliance some of them relating to the African Commission (maturity of the African system, the time needed to handle the communication, state involvement in the procedure, in-depth reasoning supporting the findings, formulation of the remedy and follow-up by the Commission), other related to the nature of the communication (nature of the rights involved, nature of the state obligation, scale of the violation and the remedial action required), the complainant and the respondent state (corruption, type of government, change of government after the finding and level of stability of the

39 *SERAC v Nigeria* (n 33) para 71.

40 F Viljoen & L Louw 'The status of the findings of the African Commission: from moral persuasion to legal obligation' (2004) 48 *Journal of African Law* 1-22; GM Wachira 'Twenty years of elusive enforcement of the recommendations of the African Commission on Human and Peoples' Rights: a possible remedy' (2006) 6 *African Human Rights Law Journal* 465-492; F Viljoen & L Louw 'State compliance with the recommendations of the African Commission on Human and Peoples' Rights 1994-2004' (2007) 101(1) *American Journal of International Law* 1-34; R Murray, D Long, V Ayeni & A Somé 'Monitoring implementation of the decisions and judgments of the African Commission and Court on Human and Peoples' Rights' (2017) 1 *African Human Rights Yearbook* 150-166; D Inman, S Smis, E Amani Cirimwami & C Bahati Bahalaokwibuye 'The (un)willingness to implement the recommendations of the African Commission on Human and Peoples' Rights: revisiting the *Endorois* and the *Mamboleo* decisions' (2018) 2 *African Human Rights Yearbook* 400-426.

41 C Okoloise 'Circumventing obstacles to the implementation of recommendations by the African Commission on Human and Peoples' Rights' (2018) 8 *African Human Rights Law Journal* 31.

42 Okoloise (n 41) 31.

43 Okoloise (n 41) 31.

44 Okoloise (n 41) 31.

country), or even the involvement of civil society, the media and international pressure. They, however, concluded that the most important factors influencing compliance are political rather than legal.[45] The manner in which Nigeria has responded to the Commission's findings and recommendations shows the pertinence of the factors suggested by Okolosie, Viljoen and Louw.

Between 1996 and 2000 the Nigerian government did not respond officially to the communication.[46] Under the Sanni Abacha military regime, the government had indeed cut off relations with most international human rights institutions. After the return to democratic rule in November 2000, the Obasanjo government eventually sent a response via a *note verbale*, admitting the violations alleged by the claimants in the case[47] and acknowledged that 'a lot of atrocities were and are still being committed by the oil companies in Ogoniland and indeed in the Niger Delta area'.[48] While the government maintained that it was taking remedial measures[49] regarding the rights that have been violated at the same time it delivered an opposite message by reforming the country's Constitution[50] to limit the justiciability of claims of violations socio-economic rights beyond the domestic courts.[51] In *Socio Economic Rights and Accountability Project v Nigeria*,[52] for instance, Nigeria could then submit that the rights alleged to have been violated are not justiciable under the Nigerian Constitution of 1999.[53] Nigeria has in other words put in place a nuanced process to water down the efficacy of the Commission's terms of reference and the African human rights system with the consequence that two decades after the decision, the Nigerian government, after

45 Viljoen & Louw (n 40) 32.

46 Shelton (n 9) 938.

47 Shelton (n 9) 938.

48 Decision Regarding Communication 155/96 *(Social and Economic Rights Action Centre/Centre for Economic and Social Rights v Nigeria*) Case ACHPR/COMM/A044/1, *Note verbale*, Reference 127/2000 para 42; Shelton (n 9) 938.

49 Shelton (n 9) 938.

50 Sec 6(6)(c) Constitution of the Federal Republic of Nigeria (as amended) provides: 'The judicial powers vested in accordance with the foregoing provisions of this section- (c) Shall not, except as otherwise provided by this Constitution, extend to any issue or question as to whether any act or omission by any authority or person or as to whether any law or any judicial decision is in conformity with the Fundamental objectives and directives principles of state policy set out in Chapter II of this Constitution'.

51 This has been discussed in several papers, including U Edih & B Ganagana 'Justiciable or non-justiciable rights: a debate on socio-economic and political rights in Nigeria' (2020) 8(4) *Global Journal of Politics and Law Research* 78-85; OVC Ikpeze 'Non-justiciability of chapter II of the Nigerian Constitution as an impediment to economic rights and development' (2015) 5(18) *Developing Country Studies* 48-56.

52 Communication 300/05: *Socio Economic Rights and Accountability Project v Nigeria* (2005).

53 *SERAC v Nigeria* (n 52) para 51.

repeated calls for the implementation of the Commission's recommendations, has to a great extend remained deaf[54] or at best has paid lip service to the decision. Some of the numerous appeals to successive Nigerian governments testify this. For example, on 12 April 2005, during an oral submission to the UN Commission on Human Rights, an Ogoni representative complaint that, years after the Commission's decision, the Nigerian government continued to disregard the decision and failed to institute a comprehensive action plan for the remediation of Ogoniland and the Niger Delta region in general.[55] For him, it became necessary to 'further petition the African Commission to refer the Ogoni decision for certification by the newly established African Court on Human and People's Rights'.[56] It is also instructive to invoke the UN Environment Programme's (UNEP) assessment of Ogoniland in 2011 which concluded with similar recommendations to those of the African Commission.[57] It is revealing that by 2014, more than a decade after the *Ogoni* case, the Centre for Economic and Social Rights, one of the original plaintiffs in the action before the African Commission, claimed that there had not been any action on the part of Nigeria.[58] Contrasting with these appeals in its 2015 Concluding Observations and Recommendations on the 5th Periodic Report of the Federal Republic of Nigeria on the Implementation of the African Charter on Human and Peoples' Rights, the African Commission acknowledged the significant steps that were taken by the government of Nigeria to promote and protect human rights in general and in particular 'commended Nigeria's interventions in the Niger Delta Region, in order to fulfil its human rights obligations vis-à-vis the people living in that part of the country who have specific needs due to the oil exploitation and conflicts'.[59] At the same time it remained concerned about the 'allegations of lack of an acceptable level of transparency in the exploitation of natural resources such as oil, and lack of respect for environmental standards'.[60]

54 See UNPO 'Ogoni representative calls for human rights implementation in Delta region' (12 April 2005) https://www.unpo.org/article/2311 (accessed 7 February 2022).

55 UNPO 'Ogoni representative calls for human rights implementation in delta region - Transcript of the oral statement delivered by the anti-racism information service before the 61st Session of the UN Commission on Human Rights oral submission by Mr Legborsi Saro Pyagbara' (12 April 2005) Anti-racism information service http://www.unpo.org/article/2311 (accessed 10 May 2021).

56 FC Morka *'The Social and Economic Rights Action Centre and the Centre for Economic and Social Rights v Nigeria* – matters arising' (2005) http://www.crin.org/docs/FileManager/felix.doc accessed 10 May 2021).

57 UNEP (2011) *Environmental assessment of Ogoniland* (2011).

58 ESCR-Net (2014) *'Update: Social and Economic Rights Action Centre & the Centre for Economic and Social Rights v Nigeria* (Communication 155/96)' (2004) International Network for Economic, Social & Cultural Rights https://www.escr-net.org/caselaw/2006/social-and-economic-rights-action-center-center-economic-and-social-rights-v-nigeria (accessed 7 February 2022).

59 African Commission on Human and Peoples' Right 'Concluding observations and recommendations on the 5th periodic report of the Federal Republic of Nigeria on the implementation of the African Charter on Human and Peoples' Rights (2011- 2014)' para 51.

60 Concluding Observations (n 60) para 84.

The Nigerian government maintains today that it has started to unroll a process of remediation of Ogoniland devastated by oil spills and for that purpose often invokes its Hydrocarbon Pollution Remediation Project (HYPREP).[61] However, that exercise ameliorating the human and environmental rights of the inhabitants of the region, has in reality little bearing with the African Commission's recommendations but more with the involvement of UNEP. When it inspected Ogoniland in 2011, UNEP evidenced high scales of contamination of water in the creeks, coastal and mangrove vegetation and therefore recommended immediate remediation of the damage observed.[62] UNEP's recommendations lead to the establishment of HYPREP as a unit of the Ministry of Petroleum Resources in 2016. This was followed by a 1 billion US Dollar clean-up and restoration program of Ogoniland, set in motion in August 2017.[63] By 2018, HYPREP had embarked on the construction of an Integrated Contaminated Soil Management Centre in Bori New City.[64] It also claimed that it successfully completed clean-up work on five out of the 21 polluted sites it started in January 2019.[65] While these remain small steps, they admittedly contributed to set in motion a process that eventually might lead to the realisation of some of the Commission's recommendations. In terms of monitoring, several NGOs and civil society organisations (including Stakeholder Democracy Network and the Centre for Environment, Human Rights and Development)[66] have also teamed up to build the capacity of civil society (as well as the government) to carry out an effective, independent assessment of the Ogoniland clean-up, create a database of technical samples and other data from impacted communities and document and analyse the progress made.[67] This might also have a bearing on the recommendations made by the African Commission. However, there have been claims and counterclaims about the issues of lack of transparency on the part of HYPREP.[68]

Given the uncertainties and conflict among the bodies tasked with the remediation process, the conclusion we draw is that the reality of achieving

61 HYREP 'Remediation works: Report of HYPREP activities in the month of March 2021' https://hyprep.gov.ng/remediation-work (accessed 7 February 2022).

62 UNEP (n 57).

63 UNEP 'Nigeria launches $1 billion Ogoniland clean-up and restoration programme' (7 Aug 2017), https://www.unep.org/news-and-stories/story/nigeria-launches-1-billion-ogoniland-clean-and-restoration-programme (accessed 7 February 2022).

64 UNEP (n 63).

65 D Iheamnachor 'Ogoni clean up: HYPREP, ERA disagree over remediation on 5 Sites' (10 August 2020) *Vanguard* https://www.vanguardngr.com/2020/08/ogoni-clean-up-hyprep-era-disagree-over-remediation-on-5-sites/ (accessed 7 February 2022).

66 Stakeholders democracy network 'Monitoring the Ogoni clean-up, 2020-2025' (2019) https://www.stakeholderdemocracy.org/projects/monitoring-the-ogoni-oil-spill-clean-up-niger-delta/(accessed 7 February 2022).

67 Democracy network (n 66).

68 For instance, Environmental Rights Action Nigeria (ERA) has disputed HYPREP's project coordinator, Dr Marvin Dekil's claims that it had completed the cleanup of the five sites cited above and was 'waiting for internal and external verification of samples collected from the said sites, as well as the final results from statutory environmental regulatory bodies in the country'. ERA's executive director, Dr Uyi Ojo, alleged that the sites claimed to have been cleaned by HYPREP were done

the remediation of Ogoniland, and the rest of the Niger Delta, is very meagre. This probably explains the reasons for the plethora of recent private and local community litigation against Shell and other oil multinationals in their home jurisdictions in Europe and the USA. Good illustrations are the recent landmark decisions in *Okpabi and others v Royal Dutch Shell Plc and another* (*Okpabi v Shell)* and *Four Nigerian Farmers and Milieudefensie v Nigeria (Four Nigerian Farmers v Nigeria).* In *Okpabi v Shell* 40 000 inhabitants of the Niger Delta region initiated court proceedings in the United Kingdom against Royal Dutch Shell (RDS) and one of its Nigerian subsidiaries Shell Petroleum Development Company of Nigeria Ltd (SPDC) alleging that pollution linked to oil exploitation by SPDC caused extreme environmental damage to the region affecting their drinking water, fishing grounds and agricultural lands. According to the claimants, RDS is directly responsible for the damage caused by its subsidiary because RDS' duty of care had been breached as it failed to prevent or remedy the extensive damage encountered by the claimants and exerted significant control over SPDC and its operations. The case is not yet in its merits phase but an important step has nevertheless been taken on the issue of jurisdiction with the consequence that the British courts can now hear the case. In a unanimous decision on 12 February 2021, the Supreme Court of the UK reversed the earlier decision of the Court of Appeal and basing itself on the recent *Vedanta Resources Plc & another v Lungowe and others*[69] case concluded that on the basis of the degree of control and de facto management, the parent company owed a duty of care to the claimant Nigerian citizens in respect of alleged environmental damage and human rights abuses by Shell's Nigerian subsidiary.[70] *Four Nigerian Farmers v Nigeria* is quite similar to Okpabi for the facts are related but also the Dutch judges borrowed heavily from their British counterparts in order to apply the common law principles, the duty of care. This time, it was four farmers who, confronted with oil-spillage in their villages in the Niger Delta and who decided to circumvent the Nigerian judiciary, used Dutch courts to proceed against RDS and SPDC. In a historic judgment pronounced on 29 January 2021, The Hague Court of Appeals decided for the first time that a parent company is liable for breach of the duty of care regarding abuses committed abroad by its foreign subsidiary company.[71] As Tiruneh has observed, applicants can now 'circumvent the principle of limited liability and claim redress from parent companies'.[72]

Thus while Nigeria's responses to the findings and recommendations of the African Commission are far from satisfactory,

'below set standards and had no certification from NOSDRA. On his part, Nyesom Wike, the Governor of the host state, accused the federal government of not engaging with the remediation program with sincerity of purpose; rather it has been carried out only when it is politically expedient for the federal government.

69 *Vedanta Resources PLC and another v Lungowe and others* [2019] UKSC 20.

70 *Okpabi v Royal Dutch Shell Plc* [2021] UKSC 3.

71 *Four Nigerian Farmers and Milieudefensie v Shell* ECLI:NL: GHDHA:2021:132.

72 W Tiruneh 'Holding the parent company liable for human rights abuses committed abroad: the case of the *four Nigerian farmers and milieudefensie v Shell*' (19 February 2021) *EJIL Talk* http://ejiltalk.org/holding-the-parent-company-liable-for-human-rights-abuses-committed-abroad-the-case-of-the-four-nigerian-farmers-and-milieudefensie-v-shell/(accessed 7 February 2022).

new strategies are being developed by the local communities in the Niger Delta to respond to the continued violations of their basic rights by trying to pierce the corporate veil. This strategy will likely set new beacons in the litigation against oil multinationals and might at the long run even be more efficient in addressing the African Commission's recommendations than the way it is provided in the Commission's rules of procedure.

4 NARRATING DATA: VOICES OF ANGUISH FROM THE DELTA

While the euphoria after the decision of the African Commission has transformed into frustration for human rights advocates and alternatives had to be found for the Nigerian justice system, it has also brought disillusionment to the local communities in Ogoniland and the entire Niger Delta who have seen no change in their situation after all these years. Through the narrative inquiry methodology, we have tried to give the communities in Ogoniland and other parts of the Niger Delta a voice. The information was collected during field research undertaken in 2018-2019. Some of the collected material is accompanied by field research notes contextualising the interventions.

9:00am 13 June 2019: Ogoniland – We had been in Ogoniland Rivers State for over one week, surveying the level of environmental degradation in the hotbeds of oil spill communities of Bomu, Korokoro and Bodo. The villages were lined with dilapidated buildings used as homes for the dwellers, although a few modern structures interrupt the shanty-looking horizons. The coastal waters were jet black and glistening from the previous spill from the oil companies' oil wellheads around all the creeks. But on this day, we approached and spoke to a group of local fishermen who were about to embark on a probably futile journey to fish in the Atlantic Ocean. This is because the common knowledge among the villagers is that the many oil spills over the last thirty-five years across the Ogoni waters and coast have literally wiped out the marine life. Already used to the stream of researchers and investigators coming to verify the level of damage, Mr G, a semi-literate young man, said the following:

> It seems we are still suffering from the actions of our main son and leader Ken Saro Wiwa who spoke to the world about the activities of Shell in our land. If not so, why has the government, during the time of Abdusalam Abubakar, Obasanjo, Yar'Adua, even our or clansman, Goodluck Jonathan, and now Muhammad Buhari, not come to help us. We know a big court has told them to come and repair our land, houses and give us money and jobs. But since, we 'never see anything'. The worse thing is that the oil still spills into our waters every day, as you must have read or heard about Bodo which made the community take Shell to court. We cannot find fish anymore.

At this point, a young man heading toward a sturdier boat with three others, Mr Tee, interjected in pidgin English as follows:

> *We don tell you to forget the fish, dem don die finish from oil. Una just dey waste una time. Come do sand job for inside water you no wan gree. This government no go ever do anything for us, na so we go do till we pai* (You are just wasting your time going into the deep waters to fish; we have told you repeatedly to forget about fishing in the waters as oil spills have wiped out the fish stock in our waters. We

> have told you to come join us in our new trade of sand dredging from the depth of the waters to sell to builders, but you are reluctant. This government will never do anything to alleviate our predicament till we all die).

What we gathered from the young man was that the main means of survival for many young men in Ogoniland and across the Niger Delta, who are not inclined to engage in militancy and oil bunkering is sand digging from the oil-ravaged waters. As we eventually saw them from the shore, two of the young men would dive into the water with buckets and soon emerge with the other two on the boat pouring the sand into the belly of the boat to be transported and sold to builders waiting at the shores. Across the creeks, this was the similar pattern of lived experiences that unfold every day.

9:00am 2 July 2019: Warri South Delta State – Arriving in the Ijaw parts of the Delta in early July, our observations took us through Egwa I, Egwa II and Jones Creek, all creek villages located in Warri South Local Government Area of Delta State. At this time, there was no expectation of a significant difference in the level of degradation we anticipated to find. Instead, it ran deeper into the mangroves which line the edges of the coastal waters. The remarkable thing common to these three communities is the absence of hospitals or health centres, neither is there electricity (everyone lives on power generators), and pipe-borne water. Drinkable water (sachets and bottles) is brought by boat from Warri to be sold to the community. More bizarrely for oil-bearing and wealth-making communities is the total disconnection from the rest of the world in terms of mobile telecommunication, and this in the twenty-first century! It is only at Jones Creek that the youths have managed to contribute towards purchasing a 'receiver'. Yet to be able to receive or make a call, you would have to come from your house to sit under the receiver to get any sort of signal. At Egwa II, there was an eerie silence and inactivity on the Tuesday morning we arrived, just like a ghost community. The edges of the community have loose wooden structures serving as their bathrooms and toilets. Youths hung around idly, the women of the village tending to their paltry merchandise and children. However, an octogenarian man, who claimed to have worked for one of the oil multinationals, welcomed us warmly and was eager to share the community's story of displacement and dispossession. Pointing in the direction of the oil wellhead and pipeline along the sandy coast, Pa Gbe, as we tag him narrated:

> The oil company that operates here in Egwa II first arrived in 1968. I was lucky to be picked to work to get a job at Port Harcourt in 1970 with the company and have been retired since 1990. When they came, we had our homes, shrines, and market very close to the shore. But we were told to pack our belongings as the government needed the land for big projects. We had to move deeper into the land and all our ancestral history was destroyed. No one would listen to us then. And even now, how many people have heard about Egwa II? Everybody talks about the Ogoniland but we have seen worse. There are two wellheads close to us here that have been disused since 1998 but oil still leaks into our waters from them.

At Jones Creek, we were treated to probably the most glaring life contrasts we witnessed. On one side of the creek is the location of an oil platform with all the modern amenities provided for the staff workers. However, the jetties to the village side are thick and dark with oil residues. Yet, it is from here that the local community gets the water to bath and cook. In our interaction with the community's youth leader,

simply called Pastor, we discovered a new dimension to the complexities of the human and environmental violations we read about every day regarding the Niger Delta. As he narrated:

> We are happy you are here to see how go through our days and night in total submission to the wishes of Chevron and Shell who control the oilwells in our areas. As you can see, we live bare life here, yet, the barrels of oil moved by foreign ships from our backyards are enough to feed other countries. Our mothers suffer; the boys and girls have no access to quality education; we all live in poverty. But we must not blame the oil companies alone. The federal and state governments have never done anything to develop our community. So, if our own leaders abandon us, why would the oil companies care?

The youth leader then suddenly put a twist to his narrative, saying:

> And even our so-called community leaders who negotiate with the oil companies, we have found out, have been making our case worse because of their corruption. They take money from the oil companies with the promise to execute projects for us, but we see nothing. Five weeks ago, our mothers and women took matters into their hands by protesting naked across on the premises of Chevron facility whose Community Liaison Officer promised to address our lack of electricity. The CDC (Community Development Committee) went behind to negotiate after the protest but since nothing has been done. We have been made to understand that the Committee has been given money to commence the project but all we know is that most of the members have recently acquired new cars in Warri where they mostly live.

Going back to the allegation of corruption of community leaders, we took this seriously and decided to get responses from the leaders to whom we were directed. However, they refused to meet us to answer the allegations. The conclusions we reached was that there must be a truism to the allegations. Thus, the violation of the human and environmental rights of the communities of the Niger Delta must be seen holistically as a 'collusion' by all the powerful stakeholders in the Nigerian oil and gas industry.

By presenting our data through the narratives of the local oil communities, we have given the marginalised voices in the Niger Delta a higher value through a kind of empiricism Deleuze sees as 'transcendental', creating with 'intensity', a difference in the perception of effects of their daily lived experience.[73] Hearing the inhabitants of Ogoniland and the larger Niger Delta speaking shows that not much has changed for the last decades. They are still facing the effects of extreme environmental degradation caused by oil exploitation and the responses proposed by the Nigerian authorities to initiate more human rights-friendly ways to run the industry have not been sufficiently effective to make a difference on the ground. To further validate these realities and to show the extent of the state's non-compliance with the Commission's recommendations, one could highlight some cases of oil spills in the Niger Delta reported by NGOs and the international media. The community of Bodo near the island of Bonny (Ogoniland), hosts a Shell export terminal and a liquified natural gas facility. Between 2008 and 2009, several leaks from the feeder pipelines to the terminal

73 G Deleuze *Difference and repetition* (1994) 56-57.

devastated the creek community.[74] According to Environmental Rights Action, the last large leak late in 2009 has made local people continue, and we confirmed this during our trip in 2019, to contending with the consequences with the restoration of the natural environment.[75] Fishermen can barely find any fish fit for consumption and the mangrove forests where many fish and crustaceans had been caught traditionally have been burnt off in previous leaks.[76] Another report states that in the early morning of 4 June 2011, at a Shell-controlled collecting station near the village of Ikarama, a 'fountain of oil' began spouting into the river flowing into the creek. Although Shell technicians quickly succeeded in solving the problem, the cause of the accident was never investigated by Shell.[77] On 15 August 2011, in the same locality, a leak developed from a pipeline to an oil well with a local security guard promptly informing Shell.[78] However, a joint investigation visit required by law was not carried out and the village community 'only found out something was going on when Shell personnel were seen leaving in an all-terrain vehicle after inspecting the leak'.[79] The last highlighted case is the massive Shell Bonga Spill of 20 December 2011, emanating from a Shell facility near Bonga village. Approximately 40,000 barrels of crude oil spilled into the Atlantic Ocean affecting the fishermen 'whose source of livelihood is the ocean waters'.[80] Although the Nigerian agency responsible for oil spill response, the National Oil Spill Detection and Response Agency (NOSDRA) took swift action by ordering the fishermen out of the waters, the effect was to suspend the fishermen's activities[81] and livelihood. It caused hardship and 'loss of income for about 30,000 fishermen across five states of the Niger Delta'.[82]

The daily life of the local oil community dwellers shows a radical shift from the normal understandings of the rule of law,[83] human rights

74 Environmental Rights Action 'Shell's oil leaks in Nigeria continue' (2011) Environmental Rights Action/Milieudefensie, January 2011 Action http://www.eraction.org. See also Amnesty International 'Nigeria: Hundreds of oil spills continue to blight Niger Delta' https://www.amnesty.org/en/latest/news/2015/03/hundreds-of-oil-spills-continue-to-blight-niger-delta/ and Deutsche Welle 'Oil spills keep devastating Niger Delta' http://www.dw.com/en/oil-spills-keep-devastating-niger-delta/a-18327732 (accessed 7 February 2022).

75 Environmental Rights Action (n 74).

76 Environmental Rights Action (n 74).

77 Environmental Rights Action (n 74).

78 Environmental Rights Action (n 74).

79 Environmental Rights Action (n 74).

80 UN Human Rights Council 'Cases of environmental human rights violations by Shell in Nigeria's Niger Delta' joint written statement submitted by the Europe-Third World Centre (CETIM) and Environmental Rights Action/Friends of the Earth Nigeria (ERA/FoEN) A/HRC/26/NGO/100 (26 May 2014) https://www.cetim.ch/cases-of-environmental-human-rights-violations-by-shell-in-nigeria%E2%80%99s-niger-delta/ (accessed 7 February 2022).

81 UN Human Rights Council (n 80).

82 UN Human Rights Council (n 80).

83 LM Coleman 'Rights in a state of exception: The deadly colonial ethics of voluntary corporate responsibility for human rights' (2018) 8(6) *Oñati Socio-legal Series* 879.

and of democracy. On the one hand, the state and the oil multinationals have assumed a position of total domination of the communities' life. Yet on the other hand, militant activities on the part of disaffected youths have taken the law into their own hands by brazenly blowing up oil pipelines, setting up illegal refineries through oil bunkering, and also contributing to the violations of the people's and environmental rights. Also, significantly, the spectacle of kidnapping of expatriates for ransom, sometimes resulting in the killing of these expats has continued to portray the oil communities as those of 'environmental terrorists'.[84] That arguably accounts for why today, a majority of the creeks hosting oil facilities are heavily militarised. What we can draw from these dynamics is that the oil communities have been forced into living in an Agamben-like state of exception. However, in this case, the Nigerian state through the regulation of the oil environment, prioritised by the petro-dollar, has made the rule of law to operate between a 'paradoxical threshold' of legality and exception, by authorising 'deadly economic policies that are – from the perspective of formally recognised rights – illegal'.[85] As a 'society of spectacle', therefore, capital logic has abstracted all commodities into 'a kind of representation, and what people consume is not commodity itself, but its representation relationship a value system'.[86] This value system shows in the region's social power relations, mediated by images of 'oppression and inequality in reality and nonparticipation and non-dialogicality'[87] of the oil community as important strategies of control.

5 CONCLUSIONS: LOOKING INTO THE FUTURE FOR THE NIGER DELTA

The inability of the African Commission to fully enforce its recommendations in the cases it has adjudicated often hampers the full enjoyment of individual and people's rights which constantly are being sacrificed by state parties who, interestingly, subscribe to the African Charter. It is not different with the inhabitants of Ogoniland who despite the Commission's findings and recommendations two decades ago continue to face the dire effects of environmental degradation in the Niger Delta. The recommendations requested that violence against the Ogoni people should be investigated and stopped not to forget that the Ogoni victims should be compensated for the human rights violation they had encountered. The whole approach to oil extraction should also be revised and made more human rights friendly so that safe operations should be guaranteed more specifically through the introduction of

84 A Zalik 'The Niger Delta: "Petro violence" and partnership development' (2004) 31(101) *Review of African Political Economy* 401.

85 Coleman (n 83).

86 Z Haibo 'The critique of society of spectacle and production of urban space' (2008) *International Symposium in Developing Economies: Commonalities Among Diversities* 620 http://www.irbnet.de/daten/iconda/CIB18169.pdf (accessed 7 February 2022).

87 Haibo (n 86).

environmental and social impact assessments and the creation of independent oversight bodies but also give a voice to the affected communities in the decision making with regard to oil operations. While some small steps have been made addressing the recommendations, the voices emerging from the affected communities prove that twenty years after the Commission's pronouncement little has changed for the local communities. The Ogoni are to a great extent still facing the same human rights violations today for which Social and Economic Rights Action Centre and the Centre for Economic and Social Rights petitioned the African Commission in 1996.

All involved stakeholders in the *Ogoni* case could play a role in addressing the situation. Now that it works in tandem with the African Court on Human and Peoples' Rights, it is time that the African Commission took advantage of the Court's important procedural route to enforce state compliance in cases of evidenced and established violations and non-compliance with prior Commission's recommendations.[88]

On the state's part, our suggestion is for Nigeria to go back, regardless of the current HYPREP exercise, to the African Commission's recommendations and put in process, more concrete measures to implement them. This is not just to ensure that the Ogoniland and the wider Niger Delta environment that has been severally devastated is remediated; it must do so with a strong political will and transparency. Alongside this, we align with Jaja and Obuah's suggestion of the institutionalisation of independent mechanisms for monitoring the performance of oil companies regarding their compliance with international human rights and environmental standards and contribution to developing the communities in the Niger Delta.[89]

Civil society organisations and NGOs also have a role to play to initiate new cases before the African Commission. However, in addition to these, we suggest that they push for automatic access to the African Court, instead of relying on the indirect access status they are granted through the Commission. As noted by Okolosie, in the current regime, state party's civil societies can only access the Court directly where the state in which they operate and make a complaints has ratified the Protocol and made a declaration pursuant to article 34(6).[90] This was also demonstrated in *Alexandre v Cameroon and Nigeria*.[91] Thus, as Okolosie opines, without such declaration, civil societies cannot directly access the Court to 'either seek redress for a breach of the substantive Charter provisions or enforce compliance with recommendations'.[92] The implementation gap can only be bridged

88 African Court Protocol art 5(1)(a).

89 JM Jaja & E Obuah (2019) 'The politics of the Ogoni clean-up: challenges and prospects' (2019) 13(3) *African Research Review* 111.

90 Art 5(3) African Court Protocol. See also Okoloise (n 9) 54.

91 *Alexandre v Cameroon and Nigeria*, App 008/2011, para 10. The case is also cited in Okoloise as above.

92 Okoloise (n 9) 54-55.

when all involved stakeholders take their responsibility to address the dysfunction that the *Ogoni* case had exposed twenty years ago. Without that it will be difficult for the communities of the Niger Delta region to cherish the hope to one day be delivered from this continuous state of human rights violations.