



LAW  
ENVIRONMENT AND  
DEVELOPMENT  
JOURNAL

# LEAD

**ENHANCING ENVIRONMENTAL PROTECTION AND SOCIO-ECONOMIC DEVELOPMENT IN  
AFRICA: A FRESH LOOK AT THE RIGHT TO A GENERAL SATISFACTORY ENVIRONMENT  
UNDER THE AFRICAN CHARTER ON HUMAN AND PEOPLES' RIGHTS**

Emeka Polycarp Amechi

ARTICLE



VOLUME  
5/1

*LEAD Journal (Law, Environment and Development Journal)*  
*is a peer-reviewed academic publication based in New Delhi and London and jointly managed by the*  
*School of Law, School of Oriental and African Studies (SOAS) - University of London*  
*and the International Environmental Law Research Centre (IELRC).*

*LEAD is published at [www.lead-journal.org](http://www.lead-journal.org)*

*ISSN 1746-5893*

*The Managing Editor, LEAD Journal, c/o International Environmental Law Research Centre (IELRC), International Environment  
House II, 1F, 7 Chemin de Ballexert, 1219 Châtelaine-Geneva, Switzerland, Tel/fax: + 41 (0)22 79 72 623, [info@lead-journal.org](mailto:info@lead-journal.org)*

## ARTICLE

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This document can be cited as  
Emeka Polycarp Amechi, 'Enhancing Environmental Protection and Socio-Economic Development in Africa: A Fresh Look at the Right to a General Satisfactory Environment under the African Charter on Human and Peoples' Rights',  
*5/1 Law, Environment and Development Journal* (2009), p. 58  
available at <http://www.lead-journal.org/content/09058.pdf>

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# 1

## INTRODUCTION

The African Charter on Human and Peoples' Rights, which is the foremost regional human right document, was adopted by African Heads of States and government during the eighteenth ordinary assembly of the defunct Organisation of African Union (OAU) in 27 June 1981, at Nairobi, Kenya.<sup>1</sup> The Charter which presently enjoys region-wide ratification came into force on 21 October 1986. The Charter provides for a variety of human and people's rights including the right of all people to a general satisfactory environment favourable to development.<sup>2</sup> The Charter also obligates its State parties to '...recognise the rights, duties and freedoms enshrined in [the] charter and to 'undertake to adopt legislative or other measures to give effect to them'.<sup>3</sup> This provision is mandatory and thus with regard to legislative measures, parties are obliged to incorporate the Charter into their municipal systems.<sup>4</sup>

Most, if not all States parties have incorporated the provisions of the Banjul Charter into their municipal laws.<sup>5</sup>

However, the right as provided under the Banjul Charter is linked to development.<sup>6</sup> Such linkage has been interpreted by some commentators as giving economic development preference over environmental measures in the event of conflict between two and thus, the provisions of Article 24 of the Charter can only be invoked where it will not infringe the requirements of socio-economic development.<sup>7</sup> The purpose of this article is not to add to the debate on whether the right to environment under the Banjul Charter can only be claimed where it will not infringe the requirements of socio-economic development. However, it should be noted that flowing from the decision of the African Commission on Human and Peoples' Rights (African Commission) in *Social and Economic Rights Action Center (SERAC) and another v Federal Republic of Nigeria*,<sup>8</sup> it is

1 The African Charter on Human and Peoples' Rights, Nairobi, 27 June 1981, OAU Doc.CAB/LEG/76/3 rev.5, 21 *Int'l Leg. Mat* 58 (1982). [Hereafter Banjul Charter].

2 *Id.* Article 24.

3 *Id.* Article 1.

4 This obligation applies irrespective of whether a country practices either 'monism' where international agreements are automatically integrated into their municipal system and normally have the same standing as municipal laws, or 'dualism' whereby such agreements need to be formally incorporated into the municipal legal order through the enactment of a special law. See Fatsah Ouguergouz, *African Charter on Human and Peoples' Rights: A Comprehensive Agenda for Human Dignity and Sustainable Democracy in Africa* 51-52 (New York: Kluwer Law International, 2003); U. Oji Umzurike, *The African Charter on Human and Peoples' Rights* 110 (The Hague/Boston/London: Martinus Nijhoff Publishers, 1997) and Nsongurua J. Udombana, 'Between Promise and Performance: Revisiting States' Obligations Under the African Human Rights Charter', 40 *Stanford Journal of International Law* 105, 124-126 (2004). See also *Amnesty International v. Zambia*, Decision of the African Commission on Human and Peoples' Rights, done at Bujumbura, 5 May 1999, Communication No. 212/98, Twelfth Annual Report of the Commission-1998/99, at paras. 59-60 & 62; *Legal Resources Foundation v. Zambia*, Decision of the African Commission on Human and Peoples' Rights, done at the 29th Ordinary Session, held in Tripoli, Libya from 23 April to 7 May 2001, Communication No. 211/98, at paras. 59-60 and *Purobit v. Gambia*, Decision of the African Commission on Human and Peoples' Rights, done at the 33rd Ordinary Session of the African Commission held from 15 to 29 May 2003 in Niamey, Niger, Communication No. 241/2001, at para. 43.

5 For a summary of African countries providing for the right in their municipal laws, see Carl Bruch, Wole Coker and Chris Van Arsdale, 'Breathing Life into Fundamental Principles: Implementing Constitutional Environmental Protection in Africa', 7 *South African Journal of Environmental Law & Policy* 21 (2000), and the Appendix to Marcello Mollo et al., *Environmental Rights Report: Human Rights and the Environment*, Materials for the 61st Session of the United Nations Commission on Human Rights Geneva, 14 March – 22 April 2005, 86-108 (Oakland, CA: Earth Justice, 2005). (Showing the Report's appendix containing constitutional provisions relating to environmental protection).

6 Cf Article 18 of the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (adopted in July 2003 and not yet in force). (Providing that '[w]omen shall have the right to live in a healthy and sustainable environment').

7 Robin Churchill, 'Environmental Rights in Existing Human Rights Treaties', in Alan E. Boyle and Michael R. Anderson eds, *Human Rights Approaches to Environmental Protection* 90, 106 (United Kingdom: Oxford University Press, 1998), Sumudu Atapattu, 'The Right to a Healthy Life or the Right to Die Polluted?: The Emergence of a Human Right to a Healthy Environment Under International Law', 16 *Tulane Environmental Law Journal* 65, 88 (2002) and Morne van der Linde and Lorette Louw, 'Considering the Interpretation and Implementation of Article 24 of the African Charter on Human and Peoples' Rights in Light of the SERAC Communication', 3 *African Human Rights Law Journal* 167, 176 (2003).

8 *Social and Economic Rights Action Center (SERAC) and another v. Federal Republic of Nigeria*, Communication 155/96, Decision of the African Commission on Human and Peoples' Rights, done at the 30th Ordinary Session, held in Banjul, Gambia, 13th to 27th October 2001, (interpreting this right under the African Charter) available at <http://www.cesr.org/downloads/AfricanCommissionDecision.pdf>. [Hereafter SERAC communication].

now apparent that while the right can be balanced against development, it will not necessarily take a back seat if it impacts negatively on socio-economic development.<sup>9</sup>

The purpose of this article is to evaluate the utility of the right in the achievement of sustainable development in Africa through the enhancement of environmental protection and the promotion of socio-economic development. Such evaluation is necessary as the New Partnership for Africa's Development (NEPAD) has identified rising poverty levels and environmental degradation as the two major inter-related factors that are presently militating against the achievement of sustainable development in Africa.<sup>10</sup> This article commences with a discussion of the history underpinning the adoption of the Banjul Charter. This is very important as it sheds light on why the drafters of the Charter decided on the novel idea of incorporating the right to a satisfactory environment among the Charter's guaranteed rights, as well as why the drafters made the right conditional to development, rather than creating an unencumbered environmental right. Secondly, the content of the right under the Banjul Charter is analysed. This analysis offers an insight into the character of the right as well as the quality of the environment that States are required to promote and protect under the right. Thirdly, the implication of the right for the achievement of sustainable development in Africa is considered. Finally, the article is concluded with some recommendations on how the right can be realised in the region.

## 2 HISTORICAL PERSPECTIVES

The Banjul Charter was adopted to promote and protect human and people's rights and freedoms in a continent where human rights violations are the norm.<sup>11</sup> As observed by Ouguergouz, the impetus for the adoption of the Charter 'was a series of events in the continent

of Africa itself which lead directly to the decision of African rulers to lay the foundations for regional human rights legislation. The focusing of international public opinion on the, to say the least, singular conduct of some of their colleagues meant that African leaders could no longer remain indifferent as they saw Africa's image in the world being tarnished still further'.<sup>12</sup> The Charter is innovative and different from existing human rights instruments as it embodies Africa's perception of human rights.<sup>13</sup> This is evident from the fact that the aim of the African experts that drafted the Charter was to create an instrument embodying a scheme of human rights norms and principles founded on the historical traditions and values of African civilisations, and responsiveness to the real needs of Africa.<sup>14</sup> With regard to the real needs of Africa, the most important of such needs as identified in the process leading to the drafting of the Charter is the achievement of socio-economic development in the region.<sup>15</sup> In essence, the African experts did not wish to create an instrument that simply reproduce or try to administer the norms and principles derived from the historical experiences of Europe and the Americas.<sup>16</sup>

<sup>12</sup> *Id.*

<sup>13</sup> *Id.* at 41-42. See also Rachel Murray, *The African Commission on Human and Peoples' Rights and International Law* 10 (Oxford: Hart Publishing, 2000).

<sup>14</sup> This is reflected in the fourth and fifth preambular paragraphs of the Charter which provide that '[r]eaffirming the pledge they solemnly made in Article 2 of the said [OAU] Charter to eradicate all forms of colonialism from Africa, to coordinate and intensify their cooperation and efforts to achieve a better life for the peoples of Africa...', and '[t]aking into consideration the virtues of their historical tradition and the values of African civilization which should inspire and characterize their reflection on the concept of human and peoples' rights'. The tone for this underlying philosophy was laid down by the late President Leopold Senghor in his opening address to the meeting of the African experts held in Dakar, Senegal, from 28 November to 8 December 1979. In his address, he urged the experts to use their imagination and draw inspiration from African traditions, keeping in mind the values of civilisation and the real needs of Africa. See OUA/DOC/CAB/LEG/67/5. Cited in Ouguergouz, note 4 above at 41.

<sup>15</sup> See the observation of the discussion leader in *Seminar on the Study of New Ways and Means for Promoting Human Rights with Special Attention to the Problems and Needs of Africa*, page 22, para. iii, Dar es Salaam, 23 October - 5 November 1973, UN Doc ST/TAO/HR/48 (1973). Cited in Ouguergouz, note 4 above at 31.

<sup>16</sup> See H.W.O. Okoth-Ogendo, 'Human and People's Rights: What Point is Africa Trying to Make', in R. Cohen, G. Hyden and W. Nagen eds, *Human Rights and Governance in Africa* 76 (Florida: University Press of Florida, 1993).

<sup>9</sup> *Id.* Para. 54.

<sup>10</sup> New Partnership for Africa's Development (NEPAD), Action Plan of the Environment Initiative of the New Partnership for Africa's development, 2003, paras. 1 & 3.

<sup>11</sup> See Ouguergouz, note 4 above at 37.

The Banjul Charter therefore provides for extensive civil and political rights as well as socio-economic and cultural rights. These rights are essential to the achievement of poverty reduction and promotion of human dignity and socio-economic development, as they ensure empowerment, voice, access to social services, and equality before the law.<sup>17</sup> Most importantly, the Charter recognises that an individual can only enjoy his dignity if he enjoys not only his civil and political rights, also his socio-economic and cultural rights, and therefore places both sets of rights on the same pedestal by treating them as indivisible, interlinked and mutually reinforcing.<sup>18</sup> Such mutual reinforcements create 'synergies that contribute to poor people securing their rights, enhancing their human capabilities and escaping from poverty'.<sup>19</sup> The Charter also incorporates peoples' rights or the so-called 'rights of solidarity' as well as the concept of duties of the individual.<sup>20</sup> Under the group rights, the Banjul Charter was the first binding albeit regional instrument to expressly embody a substantive environmental right. This is evident in the provisions of Article 24 of the Charter which provides that 'all people shall have the right to a general satisfactory environment favourable to their development'.

The inclusion of this right in the Banjul Charter constitutes an acknowledgement by its framers of the importance of a healthy environment to Africa's socio-economic development as well as the realisation of other human rights in Africa. This is based on the ground that the right aims to promote an environment of such quality that is favourable *to the development of African people*. As observed by Ouguergouz:

For a great many African peoples, these various aspects of the problem of the natural environment are of vital importance. For them as others, a 'general satisfactory environment favourable to the development' also means a quality environment: in other words, relatively

unpolluted air and water, the protection of the flora and fauna which are particularly important as they sometimes form an integral part of the traditional way – food and medicine for example – of certain African people.<sup>21</sup>

However, while the inclusion of the right in the Banjul Charter is novel, the rationale underpinning its inclusion by the African experts as well as the linkage to development, is not original as it was gained from Africa's historical traditions and values. This is due to the fact that the protection of the environment was an integral part of the religious, cultural and social life of Africans. In most rural parts of Africa, practices aimed at the protection of the environment that have stretched many generations still subsist. These include the designation of sacred forests, groves, rivers, and animals; designated market periods and locations; designated bathing and laundry places in streams and rivers; and prohibition of defecating or urinating in village amenities like roads, rivers and stream.<sup>22</sup> Infringement of these practices are generally regarded as taboo and are usually met with strict sanctions like payment of fines, appeasement of the gods through sacrifices and in extreme cases, excommunication.<sup>23</sup>

These conservation practices were based on the traditional African notion of the unity of humanity and nature and therefore emphasised conservation and

21 See Ouguergouz, note 4 above at 364.

22 In the authors rural town, Ukpör in Nnewi South Local Government Area of Anambra State in Nigeria, the small python and green snakes are regarded as sacred animals dedicated to the gods of the land. In addition, the 'Ubu' river that flows through Ukpör and other neighbouring towns is generally regarded as sacred. The killing of these animals for whatever purpose or fishing in the river is strictly prohibited. See also Achoka Awori, 'African Perspective on Environment and Development', available at <http://www.un-ngls.org/orf/documents/publications.en/voices.africa/number5/vfa5.04.htm> and James C. Murombezi, *Pre-colonial and Colonial Conservation Practices in Southern Africa and their Legacy Today*, 2003, available at <http://dss.ucsd.edu/~ccgibson/docs/Murombezi%20-%20Pre-colonial%20and%20Colonial%20Origins.pdf>.

23 See G.O. Anoliefo, O.S. Isikhuemhen and N.R. Ochije, 'Environmental Implications of the Erosion of Cultural Taboo Practices in Awka-South Local Government Area of Anambra State, Nigeria: Forest, Trees, and Water Resource Preservation', 16 *Journal of Agricultural and Environmental Ethics* 281, 289-293 (2003).

17 See United Nations Development Programme (UNDP), *Human Development Report: Human Rights and Human Development 74-77* (New York: UNDP, 2000) [hereafter HDR 2000].

18 See para 7 of the preamble to the Banjul Charter, note 1 above. See also Ouguergouz, note 4 above at 13-14 and Umzurike, note 4 above at 41-42.

19 See UNDP, note 17 above at 73.

20 See Banjul Charter, note 1 above at Articles 20-29.

sustainable utilisation of natural resources by man.<sup>24</sup> These practices to a large extent, account for the pristine condition of the natural environment in Africa before colonisation.<sup>25</sup> As observed by James Murombezi, 'by the time the 'great adventurers'... in the mould of Henry Morton Stanley, or the missionaries in the form of the Moffats and Livingstone arrived in the region, they could report that the region was teeming with wildlife, that the forest were dense and unscathed, and that the landscape was generally pristine'.<sup>26</sup> These practices which still exist in varied forms in modern Africa have been responsible for the wholesome environment that can be found presently in some rural areas of Africa.<sup>27</sup> Furthermore, such practices guarantee that the inhabitants of such villages would enjoy a healthy or wholesome environment. Hence, the argument that while the express recognition of the right to environment in Africa is innovative, what the right embodies that is the right of every African to an environment that is not harmful to their health and well-being is implicit in these ancient conservation and management practices. The fact that the right embodies the main principle of ancient environmental conservation and management practices perhaps explains why the inclusion of the right was not a contentious issue during the negotiation of the Charter.

### 3 CONTENT OF THE RIGHT TO A SATISFACTORY ENVIRONMENT

The procedural content of the right to a satisfactory environment under the Banjul Charter is not contentious as it invariably implicates procedural rights such as the

<sup>24</sup> See Awori, note 22 above and Murombezi, note 22 above.

<sup>25</sup> There is the argument that in the areas of wild life, because of technological limitations, indigenous hunter-gatherers did not adversely affect the population of big game. See Murombezi, note 22 above at 1.

<sup>26</sup> *Id.*

<sup>27</sup> For example, in my village Amihe Ukpok, the 'Onyeukwu' forest, a pristine old growth forest dedicated to the principal deity of the village 'Onyeukwu' is still practically untouched. While the villagers are allowed to collect firewood and other non-timber products from the forest, the felling of timber is strictly prohibited.

right to have access to information affecting one's environment, the right to participate in decisions affecting the environment including prior environmental impact assessment, and right to seek redress in the event of environmental degradation.<sup>28</sup> However, the substantive content is difficult if not impossible to define as the right is phrased in a vague and ambiguous manner.<sup>29</sup> This can be seen from the fact that the Charter gave no indication of what is meant by the phrase 'general satisfactory environment favourable to development' or the range of issues that it might embrace.<sup>30</sup> This has led to different interpretations as to the exact meaning and substantive content of the right.<sup>31</sup> This definitional problem is not helped by the fact that most African countries that have adopted the right in their constitutions and environmental laws use various adjectives that represent environmental

<sup>28</sup> See SERAC communication, note 8 above, para. 53. See also *Director, Mineral Development, Gauteng Region and Sasol Mining (Pty) Ltd v. Save the Vaal Environment and others*, Supreme Court of Appeal of South Africa, 1999 (2) SA 709, and *Rodger Muema Nzioka and 2 others v. Tiomin Kenya limited*, High Court of Kenya, Mombasa, Civil case No.97 of 2001, para. 2. See also Alan Boyle, 'The Role of International Human Rights Law in the Protection of the Environment', in Boyle and Anderson eds, note 7 above at 59-63; Atapattu, note 7 above at 90-96, Van der Linde and Louw, note 7 above at 175 and Dinah Shelton, 'Decision Regarding Communication 155/96 (Social and Economic Rights Action Center/Center for Economic and Social Rights v Nigeria). Case No. ACHPR/COMM/A044/1', 96 *American Journal of International Law* 937, 942 (2002).

<sup>29</sup> It has been argued that such ambiguity is symptomatic of the vague and laconic way in which much of the Charter is drafted. See Churchill, note 7 above at 106.

<sup>30</sup> *Id.*

<sup>31</sup> *Id.* See also Ouguergouz, note 4 above at 3641; Boyle, note 28 above at 50; Michael R. Anderson 'Human Rights Approaches to Environmental Protection: An Overview', in Boyle and Anderson eds, note 7 above at 10-11; Van der Linde and Louw, note 7 above at 174-176 and Morne van der Linde, 'African Responses to Environmental Protection', 35 *Comparative and International Law of Southern Africa* 99, 106 (2002).

standards of varying specificities.<sup>32</sup> In view of the difficulty in having a generally acceptable definition of the substantive content of the right to a general satisfactory environment under the Banjul Charter, it has been suggested that the best way out of this definitional muddle is to allow supervisory institutions and courts to develop their own interpretations, as they have done for many other human rights.<sup>33</sup> As argued by Dinah Shelton:

Establishing the content of a right through reference to independent and variable standards is used in human rights, especially with regard to economic entitlements. Rights to an adequate standard of living and to social security are implemented in varying measures by individual states based on general treaty provisions, according to changing economic indicators, needs, and resources. No precise standard exists, nor can such a standard be established in human rights treaties. Instead, the conventions state rights to 'adequate' living conditions for health and well-being and to social security without defining the term further. The 'framework' treaty

allows national and local regulations to elaborate on these rights, since norms are easier to define and amend on the local level and are more responsive to the needs of the community. A similar approach should be utilized to give meaning to a right to environment.<sup>34</sup>

This article agrees with above suggestion. This is based on the ground that national and international supervisory institutions and courts which have historically provided substantive interpretation to vague and abstract terms found in local and international human rights instruments are equally capable of bringing substantive content to the right to a general satisfactory environment under the Banjul Charter.<sup>35</sup> However, in determining the substantive content of this right, the supervisory institutions and courts will have to weigh the conflicting visions and values of human (African) society, while their decision must reflect the society's perception of the environment which should be preserved and from which each person should benefit.<sup>36</sup> With regard to weighing conflicting visions and values, many human rights presently allow a significant 'margin of appreciation' to those who interpret and apply them nationally subject to a measure of international 'boundary control'.<sup>37</sup> The European Court of Justice has affirmed this doctrine of margin of appreciation on numerous occasions in environmental cases before it under the provisions of Article 8 of the European Human Rights Convention.<sup>38</sup> Recently in *Fadeyeva v Russia*,<sup>39</sup> the Court reiterated this doctrine as follows:

32 See Dinah Shelton, 'Human Rights, Environmental Rights, and the Right to Environment', 28 *Stanford Journal of International Law* 103, 134-135 (1991). For the national constitutions and environmental and human rights legislations, see Article 24(1), the Constitution of the People's Republic of Angola, 1992; Article 27, Constitution of the Republic of Benin, 1990; Article 29, Constitution of the Republic of Burkina Faso, 1991; Article 70 (1), Constitution of The Republic of Cape Verde, 1992; Article 47, Constitution of the Republic of Chad, 1996; Article 46, Constitution of the Republic of the Congo, 1992; Article 44 (1), Constitution of the Federal Democratic Republic of Ethiopia, 1995; Article 15, Constitution of the Republic of Mali, 1992; Article 72, Constitution of the Republic of Mozambique, 1990; Article 27, Constitution of the Republic of Niger, 1996; Section 20, Constitution of the Federal Republic of Nigeria 1999 and Article 24, African Charter on Human and People's Rights (Ratification and Enforcement) Act, Cap A9, Vol. 1, LFN 2004; Article 38, Constitution of the Republic of Seychelles, 1993; Article 24, Constitution of the Republic of South Africa, 1996; Article 41, Constitution of the Republic of Togo, 1992; and Environmental Management and Co-ordination Act, Act No. 8 of 1999, Kenya.

33 See Alexandre Kiss and Dinah Shelton, *International Environmental Law* 23-25 (Ardsley-on-Hudson, NY: Transnational Publishers Inc, 1991). See also Van der Linde and Louw, note 7 above at 175-176, (also advocating a contextual approach).

34 See Shelton, note 32 above at 136.

35 See Kiss and Shelton, note 33 above at 23-24; Shelton, note above 32 at 135 and Luiz E. Rodriguez-Rivera, 'Is the Human Right to Environment Recognized under International Law? It Depends on the Source', 12 *Colorado Journal of International Environmental Law and Policy* 1, 13 (2001).

36 See Shelton, note 32 above at 135 & 137.

37 See Boyle, note 28 above at 51.

38 See *Powell and Rayners v. the United Kingdom*, European Court of Human Rights, Judgment of 21 February 1990, 1990 ECHR 2; *Taskin and others v. Turkey*, European Court of Human Rights, Judgement of 3 June 2004, Application no. 46117/99 (Chamber); *Oneryildiz v. Turkey*, European Court of Human Rights, Judgement of 30 November 2004, Application no. 48939/99 (Grand Chamber) and *Hutton and others v. the United Kingdom*, Judgement of 8 July 2003, 2003 ECHR 338 (Grand Chamber).

39 *Fadeyeva v. Russia*, European Court of Human Rights, Judgement of 9 June 2005, Application no. 55723/00 (Chamber).

The Court recalls that in deciding what is necessary for achieving one of the aims mentioned in Article 8 (2) of the Convention, a margin of appreciation must be left to the national authorities, who are in principle better placed than an international court to evaluate local needs and conditions. While it is for the national authorities to make the initial assessment of necessity, the final evaluation as to whether the justification given by the State is relevant and sufficient remains subject to review by the Court (see, among other authorities, *Lustig-Prean and Beckett v. the United Kingdom*, nos. 31417/96 and 32377/96, 27 September 1999, §§ 80-81).<sup>40</sup>

The fact that supervisory institutions and courts are better placed to articulate the substantive content of this right is evidenced by the decision of the African Commission in the *SERAC* communication.<sup>41</sup> This decision was pursuant to a complaint brought against the Federal Republic of Nigeria alleging *inter alia* the violation of Article 24 of the Banjul Charter. The communication provided the African Commission with the opportunity to formally interpret the content of this right. In its decision, the African Commission held that the right to a general satisfactory environment:

[R]equires the State to take reasonable and other measures to prevent pollution and ecological degradation, to promote conservation, and secure an ecologically sustainable development and use of natural resources.... Government compliance with the spirit of Article 24...must also include ordering or at least permitting independent scientific monitoring of threatened environments, requiring and publicising environmental and social impact studies prior to any major industrial development, undertaking appropriate monitoring and providing information to those communities exposed to hazardous material and activities, and providing meaningful opportunities for individuals to be heard and to participate in the

development decisions affecting their communities.<sup>42</sup>

These obligations as spelled out by the African Commission have both substantive and procedural aspects. The procedural aspect reflects generally recognised procedural environmental rights. The substantive aspect of the obligations includes the prevention of pollution and ecological degradation, promotion of conservation, and securing an ecologically sustainable development and use of natural resources.<sup>43</sup> These substantive obligations identify the substance of the right that is the level of environmental quality that the States are obliged to respect, promote and protect through legislative and other measures.<sup>44</sup> By doing so, it can be argued that the above decision gave meaning to the substantive content of the right to a general satisfactory environment guaranteed under the Banjul Charter.<sup>45</sup> However, the decision did not entirely exhaust the question of the substantive content of the right as the African Commission failed to pronounce itself on the core content and minimum obligation of Article 24 of the Charter.<sup>46</sup>

As a result, the African Commission left unanswered the question of the degree of pollution and environmental degradation that the States are obliged to prevent and the degree that should be allowed in a given situation in order not to stultify socio-economic development in the region. In addition, it left open the question of the kind of conservation envisaged by the right. Concerning the latter, it is submitted that despite this omission, the environmental conservation envisaged under the right is the type that will enhance the well-being of Africans by securing for them an ecologically sustainable development and use of natural resources. This is apparent from the provisions of Article 24 of the Banjul Charter, which guarantees for Africans an environment of such quality that is favourable to their development. Therefore, it will be contrary to the spirit of Article 24 if States adopt and promote conservation

<sup>40</sup> *Id.* Para. 102. See also *Hatton* case, note 38 above at para. 98.

<sup>41</sup> See *Social and Economic Rights Action Center (SERAC) and another v. Federal Republic of Nigeria*, note 8 above.

<sup>42</sup> *Id.* Paras. 52-53.

<sup>43</sup> See Van der Linde and Morne, note 7 above at 178.

<sup>44</sup> See *HTF Developers (Pty) Ltd v. Minister of Environmental Affairs and Tourism and others*, South African High Court, Transvaal Division, 2006 (5) SA 512, at 518E-G.

<sup>45</sup> *Id.*

<sup>46</sup> This is in contrast to its decision regarding the right to housing in paragraphs 60 & 61 of the judgement. See Van der Linde and Louw, note 7 above at 179.

policies that focus exclusively on protectionism and human exclusion from ecological resources.<sup>47</sup> This is implicit in the decision of the Kenyan High Court in *Abdikadir Sheikh Hassan and 4 others v. Kenya Wildlife Service*,<sup>48</sup> where the applicants sought an injunction preventing the respondent (KWS) from translocating a rare and endangered species of animal called the 'hirola' on the ground that such action would deprive their local community of a species that forms part of their natural heritage and local ecology.<sup>49</sup> The injunction was granted but however on the ground that the Kenyan Constitution and other relevant statutes relied upon by the respondent did not entitle it to translocate the animals.<sup>50</sup>

With regard to pollution and ecological degradation, it will be far-fetched to assume that the African Commission envisaged an ideal environment free from all types of pollution and ecological degradation as not only is such an environment virtually impossible to attain but also such environment may not be conducive to the socio-economic development of Africa.<sup>51</sup> Even the Commission implicitly recognised the impossibility of

having such an ideal environment in Africa. This was apparent from the decision of the Commission under the *SERAC* communication in upholding the right of Nigeria through the Nigerian National Petroleum Corporation (NNPC) and its joint partners to produce oil despite the associated oil pollution and other ecological degradation, of which the income derived thereon, will be used to fulfil the economic and social rights of Nigerians.<sup>52</sup> However, this was made subject to the proviso that the Nigerian government must take necessary steps to protect its citizens especially the inhabitants of the host villages and towns from the adverse effects of such pollution and environmental degradation.<sup>53</sup>

It is apparent from the decision that the African Commission's reference to prevention of pollution and ecological degradation does not imply an ideal environment totally free from pollution and ecological degradation. However, this does not answer the question of the degree of pollution and ecological degradation that the States are obliged to prevent by Article 24. To ascertain this, this article will have recourse to other regional and national courts decisions on the right to environment.<sup>54</sup> The European Court of Justice (ECJ) has repeatedly held that not every instance of pollution or ecological degradation will lead to a violation of Article 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms that is usually invoked in cases involving environmental concern.<sup>55</sup> According to the Court, 'the crucial element which must be present in determining whether, in the circumstances of a case, environmental pollution has adversely affected one of the rights safeguarded by paragraph 1 of Article 8 is the existence of a harmful effect on a person's private or family sphere and not simply the general deterioration of the environment'.<sup>56</sup>

47 This is very important as most poor Africans and households are dependent on environmental resources for their sustenance. Thus, adopting such policies will adversely impact on their food security, culture and livelihood thereby exacerbating poverty. See Dilys Roe, 'The Millennium Development Goals and Natural Resource Management: Reconciling Sustainable Livelihoods and Resource Conservation or Fuelling a Divide?' in David Satterthwaite ed., *The Millennium Development Goals and Local Processes: Hitting the Target or Missing the Point?* 55, 55 & 61 (London, UK: International Institute for Environment and Development, 2003).

48 *Abdikadir Sheikh Hassan and 4 others v. Kenya Wildlife Service*, High Court of Nairobi, Civil Case No. 2059 of 1996.

49 The translocation was for conservation purposes.

50 Note that the decision can be justified under Articles 22 and 24 of the African Charter to which Kenya is a party. It must be noted that while the respondent may have the conservation and management of the animal in mind, the fact the translocation will adversely affect the socio-cultural development of the indigenous community made it contrary to the spirit of the Charter.

51 The fact that Africa and other developing countries need to pollute to certain extent in order to sustain their socio-economic development, which is reflected in the international environmental principle of Common But Differentiated Responsibility, has been recognised in the Climate Change Convention and its Kyoto Protocol leading to lack of binding commitments on developing countries. See Article 3, United Nations Framework Convention on Climate Change, New York, 9 May 1992, 1771 UNTS 107 and Article 5, Montreal Protocol on Substances that Deplete the Ozone Layer, Montreal, 16 September 1987, 1522 UNTS 29.

52 See *Social and Economic Rights Action Center (SERAC) and another v. Federal Republic of Nigeria*, note 8 above, para. 54.

53 *Id.*

54 This is line with Articles 60 & 61 of the Banjul Charter that allow the Commission to consider other relevant international and regional human rights principles, customs recognised as laws, general principles of law recognised by African states and legal precedent and doctrines.

55 See *Hatton and others v. the United Kingdom*, note 38 above, paras. 129 & 130 and *Powell and Rayners v. the United Kingdom*, note 38 above, para. 45.

56 See *Kyrtatos v. Greece*, European Court of Human Rights, Judgement of 22 May 2003, Application no. 41666/98, 2003 ECHR 242, para. 52.

The Court further held that such harmful or adverse effects of pollution and ecological degradation must attain a certain minimum level or severity if they are to fall within the scope of Article 8.<sup>57</sup> This can be attained when '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'.<sup>58</sup> The assessment of the minimum level or severity by the Court is relative and depends on all the circumstances of the case such as the intensity and duration of the nuisance, its physical and mental effects, and general environmental context.<sup>59</sup> Thus, the Court will usually find no arguable claim under Article 8 if 'the detriment complained of was negligible in comparison to the environmental hazards inherent to life in every modern city'.<sup>60</sup> This was evident in *Moreno Gomez v. Spain*,<sup>61</sup> where the applicant complained of noise and disturbances from nightclubs near her home, the Court held that '[i]n view of its [noise] volume – at night and beyond permitted levels – and the fact that it continued over a number of years, ... there has been a breach of the rights protected by Article 8'.<sup>62</sup>

Most national courts in Africa have adopted the same position as the European Court of Human Rights with regard to the degree of pollution and environmental degradation that should be tolerated and which will not amount to a violation of the right in Africa. This position is reflected in the South African case of *Hichange Investments (Pty) Ltd v Cape Produce Co (Pty) Ltd and others*,<sup>63</sup> where the applicant sought for an order directing *inter alia* investigation, evaluation and assessment of the impact of the noxious gases emitted from the first respondent's tannery, and a directive that the fourth respondent who is the head of the Eastern Cape

Department of Environmental Affairs and Tourism should take whatever steps that may be necessary in the light of the findings of the investigation. While granting the application,<sup>64</sup> the Court held that:

[E]ven if the Court had the power of making such an order [closure of the respondent's polluting factory], the exercise thereof had to be determined largely by proof of the level and severity of the offending pollution. One would be far more inclined to direct closure of a factory where there is evidence of persistent, serious and ongoing pollution than in a case where, even if there was a degree of pollution, it could neither be regarded as particularly serious, nor likely to persist indefinitely in the future'.<sup>65</sup>

It further held:

'[I]t is clear from the evidence as whole that there has been a pollution of the environment... at a level which had to be regarded as 'significant'.... The undisputed evidence showed that even the most minute concentration of [the malodorous hydrogen sulphide] in the atmosphere was detected by the human nose as a stink similar to rotten eggs. Therefore, the [hydrogen sulphide] generated by the first respondent would regularly have been detectable to the persons working nearby on the premises of the applicant. One should not be obliged to work in an environment of stench and to be in an environment contaminated by [hydrogen sulphide] was adverse to one's well-being'.<sup>66</sup>

The above case was not brought under Section 24 of the Constitution of the Republic of South Africa,<sup>67</sup> which guarantees the right to an environment that is not harmful to health or well-being in South Africa but rather under Articles 28 and 32 of the National Environmental Management Act.<sup>68</sup> It however expressly set the baseline pollution level that a developing country

57 See *Fadeyeva v. Russia*, note 39 above, para. 69.

58 *Lopez-Ostra v. Spain*, 1994 ECHR, series A, No. 303C, para.

51. See also *Guerra and others v. Italy*, European Court of Human Rights, Judgement of 19 February 1998, 1998 ECHR 7, para. 57.

59 See *Fadeyeva v. Russia*, note 39 above at para. 69.

60 *Id.*

61 *Moreno Gomez v. Spain*, European Court of Human Rights, Judgement of 16 November 2004, 2004 ECHR 633.

62 *Id.* Para. 60. See also *Hatton and others v. the United Kingdom*, note 38 above, para. 118.

63 *Hichange Investments (Pty) Ltd v. Cape Produce Co (Pty) Ltd and others*, High Court of South Africa, Eastern Cape Division, 2004 (2) SA 393.

64 *Id.* at 418F/G-G/H.

65 *Id.* at 410H-I/J.

66 *Id.* at 415A/B-E.

67 Constitution of the Republic of South Africa, Act No. 108 of 1996.

68 National Environmental Management Act, Act No. 107 of 1998, South Africa.

like South Africa can tolerate and which will not amount to a violation of the right to environment in the country. Prior to this decision, South African courts have not hesitated in finding a violation of this right in instances of severe environmental pollution.<sup>69</sup>

Like South Africa, Nigerian Courts appear to take the view that the pollution and ecological degradation must be significant to amount to a violation of the right to a general satisfactory environment. This is evident in the decision of the Federal High Court in *Jonah Gbemre v. Shell Petroleum Development Company Nigerian Limited and others*,<sup>70</sup> which is the only Nigerian court decision dealing specifically with violation of the right to environment. It should be noted that the applicant in his supporting affidavit contends that the massive, relentless and continuous gas flaring by the 1<sup>st</sup> and 2<sup>nd</sup> respondents in his community adversely affect the community's right to a healthy environment as well as their constitutionally guaranteed rights to life and dignity of human person by *inter alia* poisoning and polluting their environment; exposing them to an increased risk of premature death, respiratory illnesses, asthma and cancer; polluting food and water; causing painful breathing, chronic bronchitis, decreased lung function and death in the community; and reducing their crop production as well as adversely impacting on their food security.<sup>71</sup> The Court appears to have agreed with the applicant's argument by holding that 'the actions of the 1st and 2<sup>nd</sup> respondents in continuing to flare gas in the course of their oil exploration and production activities is in the Applicant's community is a gross violation of their fundamental right to life (including healthy environment) and dignity of human person as enshrined in the Constitution'.<sup>72</sup>

Similarly in Kenya, the Nairobi High Court held in *Peter Kinuthia Mwaniki and others v. Peter Njuguna Gicheba and others*,<sup>73</sup> that the plaintiffs' 'entitlement to a clean and healthy environment is 'likely to be contravened' if the defendants...., start their operations of the slaughter of animals in the butchery they have built and in defiance of all directions to stop the construction of a butchery whose operation will breach the provision of the Act [Environmental Management and Co-ordination Act].<sup>74</sup> It should be noted that the basis of this decision was the unchallenged evidence of the plaintiffs that the defendants, if allowed to operate the butchery, were likely to infringe their right to a healthy environment as noxious odours and effluents from the butchery would constitute a permanent nuisance,<sup>75</sup> and therefore adversely affect their health, homes and farms.<sup>76</sup>

Based on the above regional and national court decisions, it can be argued that the pollution and environmental degradation that States are obliged to prevent under Article 24 of the Banjul Charter, must be of such significant level, severity or persistence as to render impossible the enjoyment of an environment that is favourable to human health and well-being.

## 4 IMPLICATIONS OF THE RIGHT FOR SUSTAINABLE DEVELOPMENT IN AFRICA

It is apparent from the discussion in the preceding section that the right to a general satisfactory environment under the Banjul Charter envisages not only the conservation of the environment and prevention of pollution and ecological degradation, but also the promotion of socio-economic development. It

69 See *Minister of Health v. Woodcarb (Pty) Ltd and Another*, High Court of South Africa, Natal Division, 1996 (3) SA 155.

70 *Jonah Gbemre v. Shell Petroleum Development Company Nigerian Limited and Others*, Federal High Court of Nigeria, Benin Division, Judgement of 14 November 2005, Suit No: FHC/B/CS/53/05.

71 The verifying affidavit is available at <http://www.climatelaw.org/cases/country/nigeria/case-documents/nigeria/ni-pleadings.doc>. For adverse impacts of gas flaring on human health and environment in the Niger Delta region of Nigeria, see Environmental Rights Action (ERA) and The Climate Justice Programme, *Gas Flaring in Nigeria: A Human Rights, Environmental and Economic Monstrosity* 19-29 (Amsterdam, Netherland: ERA, 2005).

72 See *Jonah Gbemre v. Shell Petroleum Development Company Nigerian Limited and Others*, note 70 above, para. 4.

73 *Peter Kinuthia Mwaniki and Others v. Peter Njuguna Gicheba and Others*, High Court of Kenya, Civil Case 313 of 2000, 2006 eKLR.

74 *Id.* at 9-10.

75 There was no evidence on record that the defendants have made adequate provisions for waste disposal. See *Peter Kinuthia Mwaniki and Others v. Peter Njuguna Gicheba and Others*, at 9.

76 *Id.* at 2-5.

is also apparent that the drafters of the Charter by linking the right to development envisage that African citizens should not only be able to live in an undegraded environment but also should be able to access the resources provided by their environment in order to develop their full potential.<sup>77</sup> In essence, the right as provided under the Charter is a composite right and thus, measures taken to protect the environment in terms of this right must also promote socio-economic development.<sup>78</sup> Therefore, it can be argued that the right offers a blueprint for merging the pursuit of environmental protection and socio-economic development in Africa.<sup>79</sup>

The composite nature of the right has made its realisation very important for the achievement of sustainable development objectives including poverty reduction in Africa. This has important implications on the activities of African governments, intergovernmental organisations (IGOs), non-governmental organisations (NGOs) and donors that have interest in the sustainable development of the region. For African governments, it means that the institution of the relevant regulatory frameworks for the protection of the environment and realisation of this right is essential if they are to enhance the achievement of sustainable development in the region. This is due to the fact that the environment

underpins the economy of most African nations and provides many products and services that are essential to improving per capita income and poverty reduction.<sup>80</sup> The environment is important to majority of African citizens particularly the rural poor who are highly dependent on environmental resources for their livelihood and sustenance.<sup>81</sup> For these poor Africans, the importance of a well-conserved environment that will improve their livelihood options as well as lead to their enjoyment of the right to a satisfactory environment and other guaranteed human rights under the Banjul Charter cannot be overemphasised.<sup>82</sup> As aptly observed by Bakary Kante,<sup>83</sup> '[f]or the poor, nature offers a series of goods of inestimable value, on which they depend absolutely: That sums up their life. Environmental damage, which represents a financial loss for the rich, is a much more serious matter for the poor, leading to the loss of their livelihood'.<sup>84</sup>

Furthermore, African governments must not undertake or sponsor actions that degrade the environment thereby adversely affecting the realisation of the right even under the guise of promoting socio-economic development in their respective countries. This is due to the fact that despite the linkage of the right to development under the Banjul Charter, the framers never intended for governments to promote its realisation only where it will not infringe the requirements of socio-economic development. Subscribing to a contrary argument will lead to a situation whereby governments would ignore the sufferings of a community or group of communities

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77 See Ouguerouz, note 4 above at 364. See also Better Environment, Better Tourism: Building the Age of Hope in South Africa, (An Address by the Deputy Minister of Environmental Affairs and Tourism, the Honourable Rejoice Mabudafhasi to the National Council of Provinces (NCP) on 8 June 2006), available at [http://www.deat.gov.za/NewsMedia/Speeches/2006Jun8/08062006\\_2.pdf](http://www.deat.gov.za/NewsMedia/Speeches/2006Jun8/08062006_2.pdf), (admitting that unless communities living in and around protected areas derive tangible benefits from natural resources, that the government will be failing to discharge its responsibilities to its people).

78 See *Social and Economic Rights Action Center (SERAC) and another v. Federal Republic of Nigeria*, note 8 above, para. 52. For similar national decision, see *HTF Developers (Pty) Ltd v. Minister of Environmental Affairs and Tourism and Others*, note 44 above at 518E-I; *Fuel Retailers Association of SA (Pty) Ltd v. Director-General, Environmental Management, Department of Agriculture, Conservation and Environment, Mpumalanga, and Others*, Constitutional Court of South Africa, Judgement of 7 June 2007, Case CCT 67/06, para. 45 and *Department of Agriculture: MEC Conservation and Environment and another v. HTF Developers (Pty) Limited*, Constitutional Court of South Africa, Judgement of 6 December 2007, Case CCT 07/32, para. 24. (Hereinafter *HTF Developer case II*).

79 See Shelton, note 28 above at 942.

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80 See Walter V. Reid et al., *Ecosystem & Human Well-Being: Synthesis* 40 (Washington DC: Island Press, 2005), (hereinafter MA General Synthesis) and International Food Policy Research Institute (IFPRI), *Ending Hunger in Africa: Prospects for the Small Farmer 2* (Washington, DC: IFPRI, 2004).

81 See Sue Mainka, Jeff McNeely and Bill Jackson, *Depend on Nature: Ecosystem Services Supporting Human Livelihoods* 16-17 (Gland, Switzerland: IUCN, 2005).

82 See Reid et al., note 80 above at 49 & 61; United Nations Environment Programme (UNEP), *African Environmental Outlook 2: Our Environment, Our Wealth* 88-90 & 157-158 (Nairobi: UNEP, 2006) and Paul Steele et al, *Linking Poverty Reduction and Environmental Management: Policy Challenges and Opportunities* 14 (Washington, DC: The World Bank, 2002).

83 Director, Division of Environmental Policy Development and Law (DPDL), United Nations Environment Programme (UNEP), Nairobi.

84 Bakary Kanté, 'The Environment, the Wealth of the Poor?', *Poverty & Environment Times*, No. 2, March 2004.

occasioned by the environmentally degrading activities of government agencies or private bodies, on the basis of that such activities will boost government's revenue and subsequent socio-economic development of the country. In essence, the Banjul Charter does not require that persons or communities endure the violations of their right to a general satisfactory environment in order to promote the development of their country. This has been upheld by the African Commission in the *SERAC* communication where it states that although '...the government of Nigeria...has the right to produce oil, the income from which will be used to fulfil the economic and social rights of Nigerians. But the care should have been taken... and which would have protected the rights of the victims of the violations complained of was not taken'.<sup>85</sup>

In addition, African governments must unequivocally promote the protection of the environment as an integral aspect of their sustainable development agenda including the achievement of the Millennium Development Goals.<sup>86</sup> This is due to the fact that anything to the contrary will not only undermine the prospect of protecting the environment but also the achievement of holistic economic and social development in Africa. This is evident in the complaints under the *SERAC* communication regarding the activities of multinational oil companies in conjunction with the statutory Nigerian National Petroleum Corporation (NNPC) on the environment, health and general well-being of the Ogoni people of Niger Delta region of Nigeria. It is therefore not surprising that the African Commission found that the Nigerian government by encouraging and sponsoring the environmentally-degrading activities of oil consortiums have not only violated the communities' rights to a satisfactory environment, but also their rights to health, adequate housing or shelter, food, life, and freedom to dispose of their wealth and natural resources.<sup>87</sup> Presently, the New Partnership for Africa's Development

(NEPAD) which constitutes a holistic and comprehensive integrated strategic framework for the socio-economic development of Africa identifies the environment as one of its sectoral priorities.<sup>88</sup> It also recognises that a healthy and productive environment is a prerequisite for NEPAD as it is vital to creating the social and ecological base upon which the partnership can thrive.<sup>89</sup>

African governments must also integrate socio-economic considerations in their pursuit of environmental protection. This is not only consonance with the requirements of the right but also the principle of sustainable development as well as the traditional philosophy underlying the adoption of the entire Charter. As aptly observed by the Constitutional Court of South Africa in *Fuel Retailers Association of SA (Pty) Ltd v. Director-General, Environmental Management, Department of Agriculture, Conservation and Environment, Mpumalanga, and others*, dealing with a similar provision in the South African constitution:

The Constitution recognises the interrelationship between the environment and development; indeed it recognises the need for the protection of the environment while at the same time it recognises the need for social and economic development. It contemplates the integration of environmental protection and socio-economic development. It envisages that environmental considerations will be balanced with socio-economic considerations through the ideal of sustainable development. Sustainable development and sustainable use and exploitation of natural resources are at the core of the protection of the environment [in South Africa].<sup>90</sup>

The composite nature of the right also has some implications on the activities of NGOs, IGOs and the wider international community that are interested in promoting sustainable development in Africa. This is due to the fact that the right cuts across the entire spectrum of sustainable development activities in Africa vis-à-vis environmental protection, human rights, and

85 See *Social and Economic Rights Action Center (SERAC) and Another v. Federal Republic of Nigeria*, note 8 above, para. 54.

86 See *MEC for Agriculture, Conservation, Environment & Land Affairs v. Sasol Oil (Pty) Limited and another*, Supreme Court of Appeal of South Africa, Judgement of 16 September 2005, 2006 (5) SA 483. (Upheld the decision of the MEC not to grant the respondent an authorisation to build a filling station on environmental grounds).

87 See *Social and Economic Rights Action Center (SERAC) and Another v. Federal Republic of Nigeria*, note 8 above.

88 See The New Partnership for Africa's Development (NEPAD), The NEPAD Framework Document, October 2001.

89 *Id.* Paras. 138 & 142.

90 See *Fuel Retailers Association of SA (Pty) Ltd v. Director-General*, note 78 above.

development. Thus, human rights organisations cannot afford to ignore the promotion of the right by not insisting on the protection of the environment. This is due to the fact that environmental degradation adversely affects the realisation of most guaranteed human rights in the region as evident from the complaints in the *SERAC* communication and many other cases of environmental degradation in Africa.<sup>91</sup> The same is applicable to organisations involved in promoting economic development in the region as the heavy dependence of African nations and their citizens on environmental resources shows that they cannot ignore the promotion of the right to a satisfactory environment or environmental protection in their activities.<sup>92</sup> This has been acknowledged by Mark Malloch Brown, UNDP Administrator, who not only observes that the location of most of the world's biodiversity in some of the poorest countries presents the poor with an opportunity for local economic development,<sup>93</sup> but also states that:

We need to go down a path that recognises that for rural people living in poverty, development can't happen without the conservation of biodiversity. The real key to a sustainable future is to remember that our efforts towards poverty reduction and conservation are mutually reinforcing. In other words, our programmes should focus on 'biodiversity for development' not 'biodiversity or development'.<sup>94</sup>

For environmental organisations in Africa, the promotion of this right requires that their activities be broadened to include socio-economic considerations. It should be noted that it cannot be lightly assumed that the promotion of this right is inherent in every environmental conservation endeavours. This is evidenced by the designation of some national parks and other protected areas which although are done for conservation purposes, have excluded the surrounding

local communities from having access to natural resources which they had previously depended for their sustenance.<sup>95</sup> Broadening the scope of activities of environmental organisations to include the promotion of socio-economic developments will not only help in the realisation of the right but also enhance the conservation of the environment especially protected areas that are managed by these organisations. This is based on the fact that it will help in de-stimulating overexploitation, as local people, who usually experience forced displacement and loss of access to natural resources as a result of the siting of protected areas, will no longer have the incentive to prioritised short-term gains over longer-term sustainability.<sup>96</sup>

## 5 CONCLUSION

The discussion in this article shows that the right to satisfactory environment under the Banjul Charter is important to the achievement of sustainable development in Africa. The utility of the right in this regard is due to its composite nature as it aims not only at enhancing the protection of the environment but also at the promotion of socio-economic development. The importance of this right to the achievement of sustainable development highlights the need for African governments to respect, protect, promote and fulfil the obligations they assumed under the Banjul Charter with regard to this right. These include not only incorporating the right under their municipal legislations but also providing opportunities for persons whose environment has been degraded or threatened to inter alia, obtain access to environmental information, participate in decisions affecting their environment, and/or obtain

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91 For examples of such instances of environmental degradation, see EarthJustice, note 5 above at 46-53.

92 See Roe, note 47 above at 65-69 and Dilys Roe and Joanna Elliott, 'Meeting the MDGs – Is Conservation Relevant?', in Dilys Roe ed., *Millennium Development Goals and Conservation: Managing Nature's Wealth for Society's Health* 7, 12-17 (London UK: International Institute for Environment and Development, 2004).

93 As cited in Roe & Elliot, note 92 above at 16.

94 As cited in Roe & Elliot, note 92 above at 17.

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95 See Roe, note 47 above at 58 & 61 and Neema Pathak, Ashish Kothari and Dilys Roe, 'Conservation with Social Justice? The Role of Community Conserved Areas in Achieving the Millennium Development Goals', in Tom Bigg and David Satterthwaite eds, *How to Make Poverty History: The Central Role of Local Organisations in Meeting the MDGs* 55, 56 (London, UK: International Institute for Environment and Development, 2006) 55.

96 See Pathak, Kothari and Roe et al., note 95 above at 61-70.

redress when their environment has been degraded or for actual or potential threat to their environment. However, the incorporation of the right in municipal laws must be done in such a manner that it is justiciable as against the practice of some African countries in incorporating the right under the non-justiciable directive principle chapter of their constitutions.<sup>97</sup>

Most importantly, there must be a shift in the attitude of African governments towards the protection or conservation of the environment if African citizenry are ever to enjoy the right to a general satisfactory environment favourable to their development. African leaders through NEPAD already recognised the environment as indispensable to the achievement of sustainable development in the region and have further adopted an action plan that will be used in addressing the region's numerous environmental challenges while simultaneously promoting sustainable development and combating poverty.<sup>98</sup> The major challenge for African leaders is to translate the ideals of NEPAD into concrete plans for the sustainable development of the region. This will include not only implementing its environmental initiatives but other initiatives such as the Democracy and Political Governance Initiative, and the Economic and Corporate Governance Initiative which are vital not only to poverty reduction but in creating the enabling environment under which the citizenry can protect their environment and enforce their right to a satisfactory environment.

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<sup>97</sup> For a discussion on constitutional directive principle in Africa, see Dejo Olowu, 'Human Rights and the Avoidance of Domestic Implementation: The Phenomenon of Non-Justiciable Constitutional Guarantees', 69 *Saskatchewan Law Review* 39 (2006).

<sup>98</sup> See NEPAD-EAP, note 10 above.

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