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Programmatic and Conceptual Paralysis in Protecting and Promoting Economic, Social and Cultural Rights in Africa

Sam Amadi

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By Sam Amadi¹

1. Introduction:

I will try to map out in fairly bird's eye view some of the problems of enforcing and protecting ESC rights in Africa. I do not claim to have expert knowledge of the domestic situation in most African countries. So my analysis will concentrate more on the regional framework for the protection of human rights in the Africa continent; that is, the African Charter on Human and Peoples' Rights and the Commission charged with the responsibility of promoting these rights. I will inquire how well the commission has accomplished this charge, what are problems the commission has encountered and what measures and orientation are needful to revitalize the commission and unbound the Prometheus that will ensure the reality of the noble ideals of the preamble of the African Charter. I will also inquire how African countries have utilized the domestic mechanism of governance to realize these ideals. Of course, in this respect I will focus more on the Nigerian situation and, especially, the efforts of the Social and Economic Rights Action Center (SERAC), an organization I consult, in breathing life to words in the context of promoting ESC rights.

The status of ESC rights in the discourse of human rights has improved tremendously relative to what use to be the situation during the last decade. This improvement may be due to increase in extreme poverty² among so many people in so many countries of the world; increased realization by the disputants and the discussants in privileged center of intellectualism in the rich northern countries that both libertarian values and the quest for growth in global economics are imperiled as long as eradication of poverty through concerted and rights-based approach is not emphasized; and the emergence in the dying days of the last century of democratic regimes that, at least, pay lip service to civil and political rights, thereby making their advocacy less urgent and challenging. But the greater momentum for global consensus on the importance of ESC rights seems to be the reconfiguration in power dynamics and intellectual dialectics at the end of the cold war. With the triumph of the USA as the ultimate superpower, and with this triumph the emergence of a forced consensus on liberal values and institutions prefigured in Fukuyama's end of history thesis; the high ways of the discourse of right was cleared of the ideological shibboleths and pretensions that beclouded perception of the existential realities and imperatives of humankind. The West, notably the USA has challenged the claims of ESC right, partly out the historic and ideological antecedents of these claims and partly, out of fear of the distributive effects of these rights to property rights. Since the world is seemly unified in the liberal ideology of individual rights and social welfare and all institutions are being forced to converge at the best set of social practices, the Washington Consensus, there is no need to continue to disclaim ESC rights.

But if ESC rights were neglected and disclaimed in the rich advanced western countries because of ideological and psychological opposition to the socialist orientation and distributive effects of their claims, what accounts for the failure of African countries to attempt programmatically to realize ESC rights? This query is more underlined in the context of the ideology of economic development that characterized the practice of state building in Africa

after independence, and the oft-repeated claim of egalitarianism and economic welfare of traditional African societies. Upon attaining independence, most African nationalist leaders argued that their most important challenge was to build a strong economy in order to better the life of their citizens. They felt justified in this regard to overstep some of the niceties of civil and political rights associated with liberal democracy. Most became one party dictatorships and single party military oligarchies. Even as they repeated the rhetoric of economic development they failed and consciously neglected to economically empower the masses of their country. The rhetoric and ideology of community and collectivism of traditional African societies served to evade the responsibility of good governance and inclusive political leadership but failed to compel rigorous pursuit of the economic welfare of the people.

The irony is that whilst the rhetoric of ESC rights and the right to development obsessed African political commentators and nationalist leaders the need for practical realization of these rights evaded their concern. Even with arguably meager resources available to the post-colonial states, they failed to “progressively” improve the economic welfare of the citizens. Whilst the western states that debunked the validity of ESC rights and prioritized civil and political rights ahead of ESC rights seemed to consistently better the economic welfare of the poor in their society³. This irony is a key conceptual tool to unlock the mystery of poor record of enforcement of ESC rights in the continent. This mystery can be posed as a question: why is it in the African states that failed to guarantee civil and political rights, especially, right to political participation that notoriously fails to enforce and implement programs that actualize the claims of ESC rights? Is the realization of ESC inextricably tied to guarantee of civil and political rights? Perhaps, answering these questions transform the problematic of parity and relationship between ESC rights and civil and political rights. This is not the focus of my inquiry. But suffice it to restate the observation of Amartya Sen that grave economic crises like famine never happened in functional democracy partly because as he puts it, “Political rights, including freedom of expression and discussion, are not only pivotal in inducing political responses to economic needs, they are also central to the conceptualization of economic needs themselves”.⁴ I will not bother about the empirical and logical strength of this claim but rather pursue latter in this presentation the lead that organized political participation of the excluded poor in structures of governance provides opportunity for ‘face and voice’ that is necessary to effective articulation of economic deprivations and remedial measures. For me ‘face and voice’ for the poor has implication for the concept of democracy and structuring of sovereignty.

2. African Charter and the Promise of ESC Rights

Discussion about the African Charter on Human and Peoples Rights is bound to provoke mixed reactions. Whilst some commentators praise the charter for pioneering a new approach to constituting human rights that avoided the schismatic heritage of the UN human rights by pronouncing the indivisibility and interrelatedness of all human rights, others disparage the failure of the charter to provide important referents and context to some of the important rights it barely declares. What is not controversial is that the charter proceed from a novel perspectives that articulates a seemingly unified view of human rights as well as slant this expression in a direction that claims to reflect African cultural values. Para. 8 of the preamble of the charter argues that: “It is henceforth essential to pay a particular attention to the right to development and that civil and political rights can not be disassociated from economic, social and cultural rights in their conception as well as universality and that the satisfaction of economic, social and cultural rights is a guarantee for the enjoyment of civil and political rights”.

Beautiful expressions, you might say. The question is why those leaders who signed and ratified the charter failed to pay any regard to its obligations. An uncharitable answer might be that since the charter perceives that 'satisfaction of economic, social and cultural rights is a guarantee for the enjoyment of civil and political rights', and African dictators did not dread political rights, it was prudent to deny the satisfaction of ESC rights. A less phlegmatic answer requires knowledge of the genealogy of the charter. Makau Matua and others have argued that it was a bit of a miracle that the charter was negotiated by despots could contain such important provisions on rights. The charter has an infamous parentage. Of all the Heads of States who gathered in Nairobi, Kenya to adopt the charter none was freely and fairly elected and only Botswana, Senegal and Gambia had a nominal democracy. So why did dictators and despots feel obliged to saddle themselves with the obligation of guaranteeing their citizens human rights? The sensible answer is that those leaders did not really mean to abide by these obligations but were rather pandering to the politics of international human rights. They wanted to look good in the eyes of the western world. The domestic analogue to this halfhearted commitment is the fact that it was the military dictatorship of Gen. Babangida that domesticated the charter into Nigerian law.

The absence of political will signified by the despotic characteristics of the regimes in Africa that signed the charter resulted in the creation of a commission that lacks power and resources to effectively promote human rights in the continent. In the context of a continent awash with dictators and the legal framework of the charter that subordinates the commission to the Assembly of Heads of States, the African Commission was a political fiction. The commission is a toothless bulldog. This fact is brought home by the inability of the commission to play a significant role during the political crises that engulfed Nigeria during the annulment of the June 12 election and the execution of environmental and ethnic rights activist, Ken Saro-Wiwa. The commission did not engage with these crises either by the appointment of a special reporter or special investigation panel, nor did it not focus on the political dimension of human rights violation during that period while considering state reports from Nigeria. The best the commission did was to issue an advisory that action be stayed in the execution of the death penalty against the Ogoni leaders pending determination of complaint filed by the Constitutional Rights Project (CRP), a Nigerian NGO. SERAC at the aftermath of the Ogoni crises filed an ESC rights complaint with the African Commission alleging violations of economic, social and cultural rights of Ogoni people resulting from direct acts of neglect and commission. Up till date the Commission has not determined this communication because of alleged intricacies and complexities of the issues raised.

The Commission has failed more so in promoting ESC rights. The casework of the commission reveals that it has done comparatively little or no work in developing the jurisprudence of ESC rights and in enforcing ESC obligations through its promotional and enforcement activities. There are many possible explanations for this failure. It may be a result of institutional incapacity or lack of ideological or conceptual connection to issues of social and economic rights among the commissioners. It is also possible to draw a functional relationship between the political economy of African states with their thriving civil or military dictatorship and repressed civil society and the inability of the commission to rise up to the challenge of monitoring protection of these rights. But before analyzing the performance of the commission I intend to examine more closely menu list of social and economic rights provided in the charter.

Chidi Anselm Odinkalu has broadly categorized rights in the charter into what he calls cross-cutting rights, new rights, classic social and economic rights and special rights of women in culture and tradition.⁵ Crosscutting rights he describes as rights “that straddle, underlie, or facilitate the exercise of both civil and political rights and economic, social, and cultural right”. Examples of these rights are prohibition against discrimination, right to human dignity, right to equality before the law, etc. Judicial tribunals in jurisdictions like India have interpreted these rights in a creative manner that so many other rights are derived from them through extrapolation or analogy.⁶ The ‘new’ rights are rights that had not been guaranteed by any of the international instruments which African states are signatories to or have ratified. These rights provided in Articles 13 and 14 of the charter include the right of participation in political governance of one’s country, right of equal access to the public service and right to equality of access to public property of one’s country. The charter also guarantees an express right to property. This may appear awkward in a continent where decades of colonialism and neo-colonial imposition of property regimes occasion massive deprivation and social discontent. The charter ameliorates this tension by providing for a most insidious kind of claw-back.⁷ In addition the charter provided for traditional economic, social, and cultural rights. Unlike other international human rights instruments, the charter articulated ESC rights together with civil and political rights in one document. Not only formal integration, the charter conceptually articulates the indivisibility and interdependence of ESC and civil and political rights. Rights are indivisible if one cannot be enjoyed without the other, and they are interdependent where the level of enjoyment of one determines the level of enjoyment of the other.⁸

The main innovation of the charter is the indivisibility and interdependence of rights provided under it. Moreover, ESC and civil and political rights are connected in a seamless manner with the right to development. It is noteworthy that the charter was drafted long before the Declaration on the Right to Development. Paragraph 8 of the preamble states succinctly: “... it is henceforth essential to pay particular attention to right to development and that civil and political rights cannot be dissociated from economic, social and cultural rights in their conception as well as universality and that the satisfaction of economic, social and cultural rights is a guarantee for the enjoyment of civil and political rights”. Paragraph 8 can be said to articulate a right-based approach to development long before the present attempt by development and human right expert in that direction. The essence of conceiving development in the perspective articulated by the preamble is that protection of human rights- both ESC and civil and political rights is no longer merely the probabilistic consequence of development but rather, its definition. The implication of the approach is that “fulfilling civil and political rights would be as important as fulfilling economic and social rights, not just in the instrumental roles but also in their substantive constitutive role. A violation of any of the right would be tantamount to a failure to realize the right to development”.⁹ The articulation of the ESC and civil and political rights in the context of the right to development is not a happenstance of linguistic and drafting skills. It follows from the background political ideology of development, which the late Nigerian political economist, Claude Ake identified as an overwhelming obsession of African post-colonial leaders, and evidenced by the words of former president of Senegal, Leopold Sedar Senghor urging the expert who met in Dakar to draft the charter to pay attention to African peculiar values and political needs.¹⁰ Arguably, concern for peculiar values resulted in the autochthony of the charter and recognition of the special needs of African states culminated in the right to development as a framework to realize the human rights of African peoples.

Some of the classic ESC rights guaranteed under the charter include the right to work (Article

15), the right to the best attainable state of physical and mental health (Article 16), the right to education and the right to participate in the cultural life of the community. The right to work in the charter is expressed as the right to every body to “work under equitable and satisfactory conditions” and to “receive equal pay for equal work”. It is argued that the right to work in the charter is deficient for focusing on the condition of work rather than right to work as such. Equally, there is no provision of the right to social security and welfare for those who economically displaced, right to food, or adequate standard of living, housing, etc. In the context of underdevelopment and extreme poverty in the continent these rights are very important and the failure to include them has been construed as a deflation of the high-sounding promise of the preamble. Joseph Oloka-Onyango argue that ‘the first point is that the contents of the articles is a significant let down from the promise of the preamble, and belie what could have been an altogether novel and radical approach to the interconnectedness of the two categories of right. The focus of these rights is thus primarily the external dynamic-the elements of historical exploitation and contemporary bad governance- without a parallel approach to the inequities of the domestic arena’.¹¹

The charter is also criticized for its inadequate and problematic guarantee of the right to physical and mental health. The criticism is focused on the lack of specificity and content to the provision. A mere guarantee of the right to health without providing benchmarks and standards will be a disability to both implementation, assuming there is political will to do so, and to judicial and agency review in action for enforcement. For instance it is left to argument whether a right to the best attainable “state of physical and mental health” includes the right to free emergency treatment. Possibly, the enunciation of the parameters of the right to health is best left to judicial interpretation. Nevertheless, the lack of standards is a problem.

The most significant fact about the provisions of the charter on economic, social and cultural rights is that it abandons the ‘progressive realization’ language of other international and regional instrument. The obligations are immediate and a state parties is required to guarantee to its citizens the right to physical and mental health immediately and irrespective of the availability of the resources. In respect of the right to education Prof. Umozurike, former chairman of the African Commission argues against the language of immediate implementation for failing to take into consideration the resources and capacity of the state.¹² This critique makes sense when we consider programmatic implementation of the rights. But the language of immediate obligation serves useful purpose of signaling that these rights are not compromised by any bureaucratic politics. Notwithstanding these critiques the charter’s ESC rights provisions are innovative in the way there are integrated with civil and political right and the right to development and by denoting them in the language of immediate enforceability. The charter makes ESC rights the most important components of African human rights regimes. But notwithstanding the prominence granted to ESC rights both the commission and natural agencies have failed largely to deplore both the rhetoric and practice of ESC rights to overcome the issues of poverty and underdevelopment which in the first compelled the need for the charter. This dismal failure is a mixture of both institutional and cultural factors.

3. Appraising the Performance of the African Commission in Protection of Economic, Social and cultural right

The African Commission is the regional body charged with the protection, promotion and monitoring of the implementation of the rights in the charter. The commission was formed in 1987; a year after the charter came into force. It is composed of eleven Africans who serve in

their personal capacity charged with three broad responsibilities: to promote human rights; ensure the protection of human and peoples' right under conditions laid down by the charter; and interpret the provisions of the charter at the request of a member state.¹³ Although the charter charged the commission to 'promote human and peoples' rights and ensure their protection in Africa, it failed to sufficiently empower the commission to effectively fulfill its charge. Even though it is to 'ensure the protection of human rights', it must do so under 'conditions laid down by the present charter'. Its interpretive mandate under article 45 is constrained by the requirement of a referral from a state party. This constraint is more than rhetorical in a context where many of the egregious violations are by the states.

Nevertheless, the charter provides important facilities for the commission to perform its responsibilities. These facilities are the state reporting procedure under Article 62 and the communications procedure in Article 45(2). State parties are required by the charter to submit every two years 'report on the legislative and other measures taken with view to giving effect to the rights and freedoms recognized by the present charter'. Although the charter was silent on who receives the reports the commission won the right to receive and consider the reports, and in furtherance of this issued Guidelines to enable the states appraise the commission of efforts they are making to effectively protect the rights. The Guidelines outlines many thematic schemes to examine the legislative and other measures adopted by the reporting state for the realization of human rights.

The Guidelines are critical for the success of the reporting system of the African Charter. If they are drafted in a way that allows the states show in coherent details the various programs they have adopted and the results of those programs on the economic, social and cultural conditions of the people, and the commission staff to review these programs according to baseline standards, then the promise of the reporting system will be actualized. The first Guidelines for state reporting were criticized as too detailed and extensive. They required states to furnish information on each right. For example, the Guidelines required detailed information on progress made and measures taken "to promote, safeguard or regulate trade union right"; in the context of right under Article 16(2), the Guidelines sought to examine arrangements made by reporting states sickness benefits, maternity benefits and unemployment benefits. The Guidelines were drafted to conform to the character of models from other regional systems. In 1998, the commission adopted new Guidelines, this time they are simplified and specific. Instead of requiring information on each right and on many thematic schemes, they simply require the state to provide information with respect to ESC rights, on how it is 'implementing the following rights protected by the charter'.

Besides, the question of the adequacy of the Guidelines, the real problem of the reporting procedure is the lack of political will on the commission to subject the states to rigorous scrutiny on its reports and the weak legal and institutional framework in the charter to ensure that the states comply with the recommendations of the commissions regarding their reports. State parties do not take their reporting obligations seriously and often times because of national bureaucratic setup officials with relevant information are not the ones drafting the reports, such that the reports are both vacuous and misleading.

In spite of these limitations the commission has by its Guidelines and review process enunciated favorable comments on the scope and status of ESR in the charter. The commission has as at 1988 examined 20 reports presented by 18 states. Thirteen of these states presented their initial reports, 2 states have presented a second report and one state has submitted a

third report. In one of these reports the commission interpreted the obligation to protect ESC rights under the charter to obligate states to include ESC rights in their constitution.¹⁴ In another case the commission declared “(W) e cannot talk about human rights without insisting on the need to emphasis (sic) social, economic and cultural rights and to allow a major part of our population to have minimum living standards”. The commission argued that the promotion of minimum living standards means a commitment to eliminate poverty and ensure the availability of basic social services like drinking water and electricity.¹⁵ The commission paid closer attention to issues of poverty, economic disempowerment and economic policy in considering the report from Ghana at the Fourteenth Session about the violation of the right to work in the aftermath of massive retrenchment as a consequence of its structural adjustment program.

Apart from the state reporting system the commission has expanded the jurisprudence and scope of the economic, social and cultural rights in the charter in its casework. Articles 46-59 and its Rules of Procedure regulate the casework of the commission. The most important issue about the communications procedures is the requirement of exhaustion of local remedies. The rule excludes communications unless they filed after the authors have exhausted legal and administrative remedies in the respondent state. This rule is a constraint to the promotional and protective work of regional human rights bodies. The African commission has in its interpretive jurisdiction expanded the exceptions to the rule of exhaustion of remedies so as to liberalize access to African Commission. In one of the cases the commission held that the requirement of the rule is subject to three principles of availability, adequacy and effective so that where the Zambian government dismissed several West African nationals from Zambia the commission ruled against its opposition to admissibility on the ground that as a practical matter local remedies were not available.¹⁶ In the case of World Organization Against Torture et al v. Zaire the commission held that where there is massive violation of human rights, the rule of exhaustion of remedies is dispensed. In the words of the commission “The commission can not hold the requirement of exhaustion of local remedies to apply literally in cases where it is impractical and undesirable for the complainant to seize the domestic courts in the case of individual complaint. Due to the seriousness of the human rights situation as well as the number of people involved, such remedies as might theoretically exist in the domestic courts are as a practical matter unavailable, or in the words of the charter, “unduly prolonged”¹⁷

Through creative interpretation the commission has expanded the scope of ESC rights by broadening access to its proceedings for the purpose of critiquing state parties’ violation of these rights. Although, recommendations of the commission on communications before it go to the Assembly of Heads of States for approval and enforcement, a situation that is sorry because of the unholy fraternity of the body made up in the recent past of sundry dictators, the very enunciation of standards of ESC rights enforcement help to build the philosophy and jurisprudence of the charter rights.

Besides interpretations of the rule of exhaustion of local remedies, the commission has dealt with substantive ESC rights provisions in deciding communications from NGO’s and other non-state parties. In the case of Nigeria, the commission, in determining the communication of the Constitutional Rights Project, Civil Liberties Organization and Media Rights Agenda v. Nigeria in respect of draconian decrees ban several newspaper and sealing their offices in the wake of the civil protest against the annulment of the June12 Presidential Elections, held

that actions of the Nigerian military government is both a violation of the right to free expression and the right to work under Article 14 of the charter. The commission reasoned that the right to property presupposes the right to have access to one's property and not have it encroached.¹⁸ The interpretative approach has mutually reinforced both civil and economic rights. With the same factual situation the commission finds both violations of civil and political and ESC rights. This gives expression to the indivisibility of human rights. For example it has held mass expulsion of foreign nationals as violation of all categories guaranteed in the charter. In *Union Inter African des Droits de l'Homme et al v. Angola* in determining a communication by several NGO's the commission held that mass expulsion of any category of persons on the basis of race, religious or ethnic identity violates the whole range of human rights in the charter including the right to property, work, education and the obligation to nurture and protect the moral and physical health of the family¹⁹

The important fact that flows from these cases is the manner the commission has engaged the existential issues of social and economic development as they relate to the protection of economic, social and cultural rights. Obviously, the commission has done fairly well to enunciate the scope and content of these rights, and review some administrative actions of African states in their impact on these rights. Regrettably, these efforts are insufficient and are mere tokens in the suffocating welterweight of violation of social and economic rights in African. Even where the commission has expressed intention to receive and consider communications it has failed to rise up to the challenge of pressing the issues involved to logical conclusion. A notable example of such half-hearted engagement is the inability of the commission to determine a communication filed jointly by a Nigerian NGO, Social and Economic Rights Action Center (SERAC) and New York based Center for Economic and Social Rights (CESR) since 1996 alleging massive violation of the ESC rights of Ogoni People by the Nigerian military rulers.

Equally noteworthy is the large-scale failure of the commission to respond effectively to the widespread issues of poverty, economic exclusions and social injustice consequent on the economic restructuring programs embarked by African state in the 1980's at the behest of international financial institutions. This constitutes the gravest failure of the commission. These misguided program and the resulting economic doldrums resulted in massive violation of economic, social and cultural rights as states dismantled all the infrastructure of social security and economic welfare. The failure to address the problem of poverty, its socio-economic creation and sustenance in Africa in its holistic ramification, especially as it connects to the regime of market-oriented reforms in Africa through any of its adjudicative procedure or in furtherance of its promotional activity is a betrayal of the high promise of the charter. Notwithstanding the infamous parentage of the charter as the offspring of unholy alliance of military dictators and one-party autocrats it articulates a framework for the political and economic transformation of the iniquitous and inequitable institutions of colonial rule in Africa. The integration of civil and political, economic, social and cultural rights and the right to development presents a potent rhetorical and programmatic toolbox to achieve this transformation. It is arguable that the commission could not perform creditably because of the incompetent and unenthusiastic engagement of national institutions. After both the communication and reporting procedures of the commission are not self-initiating. How far were the NGO's able to put the causes and consequences of poverty on the front burner of the commission?

4. The African Charter and Local Struggles for ESC Rights

Economic, social and cultural rights are inherently local issues because of their centrality to the struggles of man everywhere and under all conditions of life to survive the harsh realities of existence. The right to food, to healthy livelihood and basic necessities of life constitute the hallmarks of human rights because they relate to the most basic of human need. The subordination to civil and political rights during the political heydays of the cold war is one of those tragedies Plato attributes to the Republic. The new consensus on the normative quality of economic, social and cultural among western liberal scholar is not a discovery but a recovery of basic commonsense. And it is something of pride that the African Charter was the first to recover the sense and courage to articulate the integration of human rights.

ESC rights ought to be important to African leaders and civil society actors because of the very parlous economic situation of African states. The framework of protection of economic, social and cultural rights affords the best organizing principle for economic and political development of the continent. It is a little surprise that the rhetoric of development which African leaders adopted at independence did not lead them toward commitments to protect ESC rights. This failure exposes post-colonial rhetoric and ideology of development as just authoritarian gambit. Some African leaders argued against a full complement of civil and political rights on claim that economic, social and cultural rights are more relevant to context of their countries' developing economies and emergent politics and yet failed glaringly to protect such rights.

In the 80's the Nigerian military governments in spite a professed nationalist ideology and several development plans, dismantled the structures of free primary education, withdrew funding for health care and social security and commercially public amenities although per capital income drastically dwindled and the armies of the very poor grew by leaps and bounds. Even as military governments deliberately embarked on programs that resulted directly in violations of ESC rights what did civil society groups do to resist such violation or organize around these rights? The Nigerian human rights community ironically was strongest under military dictatorship. The struggle for civil liberties was taken to high height and the military found it increasingly difficult to contend against the upsurge of civil and political rights. It is perhaps, a measure of that era that it was the military government of Gen. Ibrahim Babangida who finally enacted the charter as a local law. The domestication of the African charter in Nigeria provided strong empowerment for civil and political advocacy as the court stood on the pedestal of its norms to override draconic decree that negated constitutional rights. In one of such cases the Court of Appeal held that the charter is superior to the constitutional decrees of the military government.²⁰

The relative space for the protection of civil and political rights was negotiated by intense civil society struggle. Such struggle involved some kind of collaboration with the African commission. In 1995 a Nigerian NGO was able to obtain a staying order from the commission against the execution of Ken Saro-Wiwa until the communication challenging his trial was determined. Before then the same NGO has successful moved a High court in Lagos to order a stay of execution of a death sentence on Zamani Lekwot. It is irrelevant that in all these cases the military rulers did not directly obey these rulings. The collaboration shows the desired partnership between the charter norms, the commission and local agents and institutions. It is this type of collaboration that is critical but missing in the protection and promotion of ESC rights in African states.

The charter and the rule of procedures allow NGO's and national institutions to play signifi-

cant role in shaping the work of the commission. There has been very little communications on ESC rights violations in Africa. Even the few such communications on ESC rights do not go far enough to foreground the policy and structural context of ESC rights violation. Again, the communication has not significantly engaged with civil society in promotional activities like seminars and workshops for the purpose of substantial review of ESC rights in the continent. Such issues as structural adjustment program, market-oriented reforms and the HIV pandemic provide context for such activities. In 1999 the Social and Economic Rights Action Center (SERAC) organized a workshop on the African Commission and economic, social and cultural rights, but not with the collaboration of the commission. The lack of engagement on economic, social and cultural rights under-develops the capacity of the commission to discharge its charge.

Another manifestation of this disengagement is that the few norms developed by the commission on issues related to ESC rights are not internalized in the legal and political culture of the member state. Even in those countries like Nigeria where the charter has been incorporated into local law the jurisprudence of the commission completely underdetermines judicial pronouncements on these rights. There is no dialogue between the commission and national institutions in any sustainable manner that allows for the engendering of economic, social and cultural norms in the polity of these member states. The works of the commission are not publicized widely and the importance of the commission remains in the knowledge of few elites who attend periodic sessions of the commission.

The alienation of the masses from the discourse and politics of ESC rights is the major cause of the absence of rights culture in Africa in spite of the posturing of human rights NGOs. ESC rights are facilitative of the conscious claim and enjoyment of civil and political rights. The main tragedy of rights politics in Africa is failure to perceive the imperative of participatory governance as the framework for transparent and accountable leadership in Africa. The latest fad is democracy movement. But democracy is conceived essentially as promotion of institutions of liberal democracy, especially, series of abstract civil and political rights that reinforce the illusion of transformation. But the kind of democracy African needs is participatory governance where local areas become sites for the recovery of self-determination and collective accountability. This kind of democracy begins with empowering the poor and the excluded through integration to the process of power and contestation. This reconnection to the power apparatuses through local initiatives is rooted in the protection of economic, social and cultural rights and enables the masses easily reach for other civil and political rights.

The realization of this sort of democracy requires certain rhetoric and an organizational mode: the rhetoric of empowerment and human needs and the organization mode of working with, not for, the people. The process of realizing ESC right is an intense struggle. Since it involves a radical redistribution of resources to respond to erstwhile neglected needs, there is a disinclination on the part of elites to embrace the demand of this process. It is the poor and the excluded that have enough inclination and incentive to wage the struggle with the determination required. The poor must fight for themselves and the role of the elites is to assist them make sense of their condition and necessity and strategy for the struggle. Wexler succinctly puts it: "Poverty will not be stopped by people who are not poor. If poverty is stopped, poor people will stop it. And poor people can stop poverty only if they work at it together... If all the lawyers in the country worked full time, they could not deal with even the articulate problems of the poor. And even if somehow lawyers could deal with the articulate problems, they would

not change very much the tangle of unarticulated legal troubles in which poor people live... The proper job for a poor people lawyer is helping poor people to organize to change things so that...no one is poor"²¹

We have learnt first hand this lesson in the Maroko case in Nigeria. Maroko was a sprawling community of about 300,000 people with the full complement of community life-schools, churches and mosques and social and recreational facilities. Maroko adjoins Victoria Island, Lagos' choice residence for the high and mighty. Everybody who profited from the oil boom in Nigeria and the reckless kleptomania of the military regimes desired a princely land in Victory Island. Pressure for land in the Island forced speculators to focus on Maroko. Soon conspiracy built up and the Military Governor announced the demolition of Maroko. The Civil Liberties Organization went to court to stop the demotion pending its suit challenging Maroko. A complicit court refused to issue restraining order and before date for adjourned hearing, a trunk load of soldiers stomped the community, raped women, maimed and killed thousands and render in a fell swoop 300,000 people homeless and desolate. This was in 1991 and over a decade the legal challenge to this nefarious violation of the ESC rights of the Morako people continues in courts, having traveled to and fro the Supreme Court. The Maroko struggle is both popular and international and the pressure of the clamor for resettlement and compensation is political weighty such that the government of Lagos that has remained unconcerned about the sufferings of the people are committed to addressing the issue of resettlement with unusual candor and urgency.

Why is the government suddenly realizing its responsibility to settle the Maroko sage after many years of nonchalance? The simply reason is the leadership and commitment of the Maroko people. The Maroko sufferings have a name and a voice. After years of speaking for the community, we began to allow them speak for themselves. The community formed an evictee community and secured for themselves a political platform. The process of mobilizing the people has resulted in a powerful right consciousness, a sense of dignity and self-worth and a tireless demand for justice. The Maroko people through the mobilization of the SERAC have realize their predicament is socially construct by deliberate policies and has a solution. They have cognized their suffering in terms of violation and the solution is a remedy. The language of violation and remedy demystifies social exclusion and deprivations and re-orientates public policy.

5. Conclusion

The work of connecting the poor and excluded to the processes of power, the work of helping them recover voice and face and confront entrenched interests with demands for justice is the challenge of an effective protection of economic, social and cultural right in African states. To do this requires revitalizing the African Commission and linking it in programs and in discourse to active national institutions and civil society groups visible in political contestation. There is no alternative to politics if ESC rights are to translate to freedom from hunger, misery and destitution. The politics of human rights requires recognition of the malleability of human rights. Rights can be deplored to arrest movement towards social justice. It can also be deplored to dislodge entrenched privileges and distribute fairly. The right activist ought to bear in mind the words of Annette C. Baier that claims about rights, "even ones cast in universal or pseudo-universal form beginning with the phrase "all men..." or even "all persons...", can be used to shore up and protect traditional privileges (by which I mean merely rights or power that not all have, although most would like to have them), as well as to attempt to claim power

or liberties not yet possessed. Bills or rights can serve either a conservative or a radical reforming purpose. What they do depends on the relation of their content, and understood scope, to the political and social system within which they are made".²² We need a high-energy politics of ESC right if the high promise of the charter and the imperative of combating poverty will be more a pipe dream.

Footnotes

¹ Sam Amadi is a Doctoral Student at the Harvard University and Director, Research & Public Policy, Center for Public Policy & Research, Lagos, Nigeria

² The statistics on poverty are deeply distressing and bewildering. In 1998, it was reported that about 800 million people were living in extreme poverty in South Asia and Sub-Saharan Africa alone measured by a standard of living of US\$1 per day or less. Worldwide, about 8 million children die yearly of preventable diseases caused by poor drinking water and air pollution. 150 million children under 5 years old are gravely malnourished and another 260 million suffering from chronic ailments associated with nutritional deficiencies. See F. Morka, "Combating Poverty Through International Human Rights Framework" quoting Human Rights and Extreme Poverty. Report submitted by Ms. A-M. Lizin, independent Expert, pursuant to Commission resolution 2000/12, E/CN. 4/2001/54. 16 Feb. 2001.

³ We must draw a distinction between the antagonism of the US to ESC right within the corpus of international human rights and the bland claim that ESC rights are absent in the domestic legal system. Most of the welfare program are required and enforced by law and have been advanced by constitutional judgment. Example is the decision of the US Supreme Court in *Goldberg v. Kelly* recognizing that welfare rights is not a privilege but an entitlement which can not easily be denied with a justification of overriding necessity.

⁴ See Amartya Sen, "Freedoms and Needs" *The New Republic* (January 10 and 17, 1994) page 32

⁵ Chidi Anselm Odinkalu, "Analysis of Paralysis or Paralysis of Analysis? Implementing Economic, Social, and Cultural Rights Under the African Charter on Human and Peoples' Rights" *Human Rights Quarterly* 23 (2001) 327 at 337-343

⁶ See the Indian case of *Bandhua Mukti Morcha v. Union of India* (1984) 2 S.C.R. 67, where the Supreme Court of India held that the right to live with dignity includes the "the protection of the health and strength of workers, men and women, and of the tender age of children against abuses, opportunities and facilities for children to develop in a healthy manner and in conditions of freedom and dignity, educational facilities, just and humane conditions of work and maternity relief".

⁷ The recent unrest and turmoil over the issue of land and the debilitating political crisis it has caused in Zimbabwe underscore the potent danger of an improperly entrenched property regime in Africa.

Article 14 provides that the right to property may be "encroached upon in the interest of public need or in the general interest of the community and in accordance with the provisions of appropriate laws.

⁸ See Arjun Sengupta analysis of the indivisibility and interdependence of rights under the Declaration on the Right to Development. Fourth Report of the Independent Expert on The Right to Development E/CN.4/2002/WG.18/2 dated 20 December 2001

⁹ Arjun Sengupta (supra) p. 5

¹⁰ Address of President Senphor to the Dakar meeting of experts preparing the draft African Charter On Human and Peoples' Rights OAU DOC. CAB/LEG/67/X quoted by Chidi Anselm Odinkalu see note 5

¹¹ Cited in Joseph Otey, Costly Inaction The African Commission and the Realization of Economic, Social and Cultural Rights Under the African Charter (unpublished) p. 11

¹² Oji Umozurike, The African Charter on Human and Peoples' Rights p. 47

¹³ Article 45

¹⁴ African Commission on Human and Peoples' Rights: Examination of State Report Twelfth Session OCT. 1992

¹⁵ African Commission on Human and Peoples' Rights, Twenty-third Ordinary Session 16 1998

¹⁶ RADDHO v Zambia Communication 71/92

¹⁷ World Organization Against Torture v. Zaire Ninth Annual Activity Report of the African Commission on Human and Peoples' Rights 1995-96 para.56-57

¹⁸ Reported in 6 INT'L HUM. RTS. REP. 828

¹⁹ See the Eleventh Annual Activity Report of the African Commission on Human and Peoples' Rights

²⁰ Fawehinmi v. Abacha (1996)

²¹ Wexler, Stephen. "Practicing Law for Poor People" Yale Law Journal 79 (1970): 1049 at 1053

²² Annette C. Baier, "Claims, Rights, Responsibilities" in Gene Outka & John Reeder (ed.) Prospect For a Common Morality 1993 page 153