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Case study: SERAC vs. Nigeria examining the role of international law in supporting social movement goals

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A Thesis Submitted to the

Department of Law

in partial fulfillment of the requirements for the degree of Master of Arts in International Human Rights Law

By

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Supervised by Thomas Skouteris

ABSTRACT

The struggle to curtail environmental degradation and enhance local control over resource use in the Niger Delta region provides a context to examine the role of international human rights law in supporting the goals of social movements. Oil exploitation has done incredible damage to the Niger Delta since the mid 20th century. Regular oil spills and constant gas-flaring have wreaked havoc on the ecosystem and destroyed the livelihoods and lifestyles of the peoples that inhabit the Delta, engendering a variety of resistance from these peoples. The resistance to oil exploitation in the Delta included both the ongoing local social movement for autonomy and environmental control, and a groundbreaking case before the African Commission on Human and Peoples Rights, SERAC V. NIGERIA . The SERAC case led to a communication in which the Commission enumerated environmental and peoples rights in new ways and for the first time insisted on state responsibility for the right to environment. The case is widely commented on for opening new ground in environmental and human rights activism. The coincidence of the social movement in the Delta and the SERAC case allows for a study examining the usefulness of international human rights law in supporting the goals of social movement activism. Following a survey of the history of oil in the Delta, the SERAC case, and the social movement, the present work will argue that in this case and similar struggles, international human rights law has a limited role to play supporting a broad, local, ongoing social movement standing in complex relation to the state, holding it responsible and recognizing its limitations. This framing reduces the possible limitations of the use of human rights law. Anti-black global biases, replicated in human rights, undermine international solidarity in favor of a local/regional focus and language of legal disputes limits articulation of social movement goals requiring a broad ongoing movement to push full aspirations of peoples for autonomy and local environmental control.

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I. Introduction

> The call for a theory of resistance that addresses the need to understand social movement action should not be misunderstood as a call for a rejection of international legal order. Rather, international law and institutions provide important arenas for social movement action, as they expand the political space available for transformative politics.[1]

A new achievement in expanding the interpretation of human rights through case law is an exciting development for international law practitioners who have come to the practice through an interest in human rights advocacy and activism. New precedent is set for protecting rights and new opportunities opened for others to bring their concerns to the international arena. There is a danger to focus only on the gains in the field and not ask "is this the best thing right now for the people effected?". Too strongly focusing on the gain of new reasoning and precedent risks losing emphasis on concrete realities of exploited people in favor of advances in an abstracted discourse. For those who come to the practice or study of international law from an activist framework, the question of how international law best suited to support the goals of the people on the ground must remain in focus. The Niger Delta provides a context in which to address this question concretely.

This paper will examine the case of SERAC vs. Nigeria[2] as one such achievement in which international lawyers worked within the history and groundwork laid by the social movements in the Niger Delta and expanded the understanding of international law to back a small part of the movements' claims. The case significantly impacted international law by findings of the African Commission that environmental rights are justiciable and by combining articles of the African Charter on Human and Peoples Rights to enunciate new rights that are not explicit in the charter.[3] It will be argued that the SERAC case is one in which the international legal challenge had a limited and limiting role to play within broad, local, ongoing social movements that stand in complex relation to the state. The goal is to add the analysis of one specific case which may provide understandings of the interactions between social movements and human rights law that would be transferable to the causes of similarly situated social movements as to how to utilize international law in the most advantageous and least limiting ways to support their goals.

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1 Anghie, Antony an Makua, Matua, *What is TWAIL*, 94 Proceedings of the Annual Meeting (American Society of International Law) 31-40, 39 (2000).

2 Hereinafter the SERAC case or SERAC

3 Fons Coomans, *The Ogoni Case before the African Commission on Human and Peoples' Rights*, 52 Int'l & Comparative L. Q. 749-760 (2003).

The case study will begin with a historical overview of the environmental and political climate in the Delta that led to the resistance social movements and the SERAC Case. This is a situation of environmental degradation and political disenfranchisement of the peoples indigenous to the Delta.[4] The relations of the the Nigerian state to the Trans National Corporations that precipitated this degradation inherited their structure from the earlier colonial networks established for the slave and palm oil trades,[5] and have made Nigeria a rentier state, that has been argued to be more dependent on resource revenues than its people for legitimacy.[6]

The second factor to be examined is the history of the social movements in the Delta. It will be shown that they have grown alongside the environmental and political problems and have developed a multifaceted resistance.[7] Primary attention will be paid to the Movement for the Survival of the Ogoni People[8] and the the ways that they have called on all levels of the world community to join them using a language of human rights and autonomy.[9]

The final section of the background is a description of the SERAC case. The African Commission for Human and Peoples Rights[10] was one of the international bodies called on by the Ogoni people to support their cause.[11] This cause was taken up by the NGOs (Social and Economic Rights Action Committee of Nigeria and Committee for Economic and Social Rights of New York) that brought the case before the Commission and the rights claimed by the Ogoni people were translated into a frame of Nigerian state violations of parts of the African Charter on Human an Peoples Rights.[12] The Commission largely followed the legal reasoning of the

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4 This background will draw on V. T. Jike, *Environmental Degradation and the Resurgence of Non-violent Protest by Women in the Warri Metropolis of Southern Nigeria*, 23 J Soc Sci 207-212 (2010); Olayiwola Owalabi and Iwebunor Okwechime, *Oil and Security in Nigeria: The Niger Delta Crisis*, 32 Afr. Dev. 1-40 (2007); Kaniye S.A. Ebeku, *The Right to a Satisfactory Environment and the African Commission*, 149 Afr. Hum. Rts. L.J. 149-165 (2003), (last visited Nov 9, 2010); Okonto, Ike and Douglas, Oronto, Where Vultures Feast: Shell, Human Rights, and Oil in the Niger Delta (2001).

5 Okonto and Douglas *supra* note 4.

6 See generally Kenneth Omeje, *The Rentier State: Oil-related Legislation And Conflict In The Niger Delta, Nigeria*, 6 Conflict, Security and Development 211-230 (2006); Terisa Turner, *Multinational Corporations and the Instability of the Nigerian State*, 5 Review of African Political Economy 63-79 (1976).

7 Okonto and Douglas *supra* note 4.

8 Sany Osha, *The Birth of the Ogoni Protest Movement* 1-33 (2005).

9 Movement for the Survival of the Ogoni People, Ogoni Bill of Rights (1992).

10 Hereinafter the Commission or African Commission

11 Movement for the Survival of the Ogoni People *supra* note 9

12 SERAC and CESR, Communication.

complaint after a lack of cooperation by the state of Nigeria creating a new recognition of environmental rights as actionable human rights within the context of international law and precedent[13].

The paper will then analyze the limitations of the SERAC case's role in the Ogoni's movement for environmental rights and autonomy that are related to the global racial structure of anti-blackness. The Nigerian state and people have been formed by a history of slavery that erases the humanity of the people and the sovereignty of the state through the commodification that it entails.[14] The African state was created by and within the colonial system and remains fractured and struggling for legitimacy because of it[15]. This weakened state inherited an extraction economy already dominated by foreign corporations that pushes it to a relationship of dependency.[16] Addressing any of these concerns is complicated because the culture of human rights is also an outgrowth of the anti-black world and both carries and perpetuates racial hierarchy.[17] These factors make it hard to separate the state from its people in relation to slave history, marginalization within the human rights movement, and weakness towards transgressions of TNCs[18] suggesting a need for a complex rather than simply adversarial relationship with the state and call into question the reliability and good faith of the international community making a national and regional focus more logical than attempts at international solidarity.

Within the racial context the paper will also examine the language of violations and obligations that is necessary to pursue a case in an international forum like the Commission. Social movements using language of aspirations can address their desire for what future situations should look like, while complaints of violations can only address grievances that have already occurred. Even in the case of wrongs already committed they must be framed as violations of existing law or precedent to be

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13 Communication 155/96 SERAC and another V. Nigeria, *supra* note 2.

14 See Achille Mbembe, *Necropolitics*, 15 Public Culture 11-40 (2003); and its criticism in Jared Sexton, *People-of-Color-Blindness Notes on the Afterlife of Slavery*, 28 Social Text 31-59 (2010).

15 Described brilliantly by Matua along with suggestions for re-organizing African states that do not seem relevant to the present study in Makua Mutua, *Why Redraw the Map of Africa: A Moral and Legal Inquiry*, 16 Mi J. Int'l L. 1113-1174 (1994).

16 Terisa Turner, *Multinational Corporations and the Instability of the Nigerian State*, 5 Rev. Afr. Pol. Econ. 63-79 (1976); Kenneth Omeje, *The Rentier State: Oil-related Legislation And Conflict In The Niger Delta, Nigeria*, 6 Conflict, Sec. & Dev. 211-230 (2006).

17 Examined primarily in the metaphor of Makua Mutua, *Savages, Victims, and Saviors: The Metaphor of Human Rights*, 32 Harvard Int'l Law J. 201-247 (2001).

18 Hereinafter TNCs

addressed. A strength of the SERAC complaint and the Commissions rulings is creative connections used to expand legal reasoning in regards to what constitutes a violation of the right to environment[19]. The language of violations is based in incidents and not relationships, so it is impaired in addressing issues of power structures[20]. The other side of the coin to the language of violations is the language of obligations which is also limiting because it can only serve to set a minimum bar, again as opposed to framing ideal relationships, and has the potential to freeze social movement gains at that minimum. This language was also created by and continues to serve the racial hierarchies of the human rights movement. These factors make it so that human rights language is incapable of encapsulating the broad goals of a movement like that of the Ogoni people requiring that it be embedded in a broader ongoing movement to be able to move towards larger goals and not allow it to become an end-point rather than a stepping stone in the struggle. The language is also best suited to limited use within the regional human rights structure in order to minimize playing into the racial hierarchy of the international system.

II. BACKGROUND

There are three topics that require introduction in order to set the stage for using the SERAC case as a study in the way international law is limited in its interactions with and support of social movements. First, a brief history of oil exploitation and its effect on the Delta gives some understanding of why social movements would arise to confront this reality. Second, a description of the movements in Ogoniland gives a background to realities and concerns that the SERAC case was interacting with. Third and finally a brief description of the case itself and some significant factors in its reasoning will provide the understanding to be able to come back and analyze its place in the broader movement.

II. A History of the oil trade and its effects

The oil exploitation in the Niger Delta has roots that go back to the slave trade. The trade routes and economic relations that the British instituted during the slave trade have evolved

[19] Coomans, *supra* note 3.
[20] Richard Falk, *The Iran Hostage Crisis: Easy Answers and Hard Questions*, 74 Am. J. Int'l L. 411-417 (1980).

into the current relationships of oil exploitation.[21] When they were shipping slaves the British made connections in the coastal areas of the Delta and used the local kings and chiefs as middlemen to facilitate the theft of persons to be traded.[22] This use of some part of the population against others led to a new flourishing of inter-ethnic fighting in the Niger Delta region. As the slave trade became illegal at the beginning of the 19th century much the same group of traders switched their focus and continued using the same routes and connections to facilitate a trade in palm oil from the delta. With this new development they began to expand their influence further into the delta to cut out the leaders on the coast that had been their middlemen and increase their profits. This new trade in palm oil was a necessary building block of the newly evolving industrial economy of Europe as it was used to lubricate the machines that characterized the industrial revolution.[23] As oil became a more important commodity the Colonial Mineral Ordinance gave Shell exclusive exploration and prospecting rights. This Ordinance was followed a year later by the Colonial office giving Shell a license for oil exploration that included the whole territory of the country[24] The first wells were discovered by Shell in 1958 in Ogoniland in the Niger Delta. These were followed by the first oil refinery, also in Ogoniland, in 1965.[25]

The oil business has been fundamental in shaping the state. Before Nigeria gained independence in 1960 the Petroleum Profits Tax Ordinance was passed in '59 setting up a 50/50 profit sharing arrangement between the state and foreign companies.[26] As stated above Shell already had exclusive oil rights at this time, but it is significant to add that although profits were shared, Shell had full control over operational decisions in its partnership with the state.[27] Outsiders control over the oil wealth of the Delta was one of the driving forces behind the Biafra war from '67 to '70. During this time period Nigeria received support in putting down the succession of the south-eastern region from Britain. Okonto and Douglas, in their book on the history of Shell in the Niger Delta, cite a briefing document from the war period states clearly that the only interest that Britain had in the conflict was the stability of their trade and investment, mostly oil.[28] That oil control was among the central issues is evident

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21 Jennifer Wenzel, *Petro-magic realism: toward a political ecology of Nigerian literature*, 9 Postcolonial Studies 449-464, 453 (2006).

22 Okonto and Douglas *supra* note 4

23 *Id.* at 7.

24 *Id.* at 23.

25 Eghosa E. Osaghae, *The Ogoni Uprising: Oil Politics, Minority Agitation and the Future of the Nigerian State*, 94 Afr.Affairs 325-344, 329 (1995).

26 Okonto and Douglas *supra* note 4 at 23.

27 Richard Boele, Heike Fabig, and David Wheeler, *Shell, Nigeria and the Ogoni. A Study in Unsustainable Development:. The Story of Shell, Nigeria and the Ogoni Peope –Environment, Economy, Relationships: Conflict and Prospects for resolution*, 9 Sustainable Dev. 74-86, 75 (2001).

28 Okonto and Douglas *supra* note 4 at 23.

from the fact that before the war had even ended, but after the oil fields were re-conquered the military rulers passed Petroleum Decree no. 51 which nullified the possibility of giving oil producing communities more control over revenues and transferred all oil rights to the Federal Military Government.[29] In order to protect the oil interests of the Federal government a military occupation force was installed in the Delta in '94 with the financial backing of Shell.[30]

The environmental effects of oil have been devastating on the Delta. This devastation is happening in one of the worlds biggest wetlands that was an incredible source of biodiversity.[31] Some of the best summary of the environmental effects comes from the complaint in the SERAC case:

> The water, soil and air contamination caused by oil production in Ogoniland has endangered the life of plants, fish, crops and the local population. Local communities are exposed to a variety of water and air-born contaminants linked to serious health problems. While few studies have been done of the region, communities report a range of illnesses associated with the pollution, including gastrointestinal problems, skin diseases, cancers and respiratory ailments. Contamination has also caused the death of most aquatic organisms and rendered much of the agricultural land infertile. Accordingly, communities that have long relied on fishing and farming have been deprived of their principal food sources.[32]

The complaint links these effects to three major causes. The first cause is the exceptional level of oil spillage in the region; they report 2,976 spills over a five year period. The second cause is dumping production waste instead of treating it, allowing it to permeate surrounding environment. The third cause is as flaring, with some of the flares having never been extinguished for a period of 30 years.[33] This damage is not only alleged by opponents of the oil companies, but was also acknowledged by a survey done by officials of the state oil company in 1983. Their report referred to the environmental effects as "slow poisoning" and admitted that the government and oil companies have not responded to the damage.[34] Shell acknowledges that the environment of the Delta is damaged but tries to shift the discussion to other factors such as over-population, over-farming, deforestation, and industrialization.[35]

The Ogoni people, like other oil producing communities (OPCs), receive little compensation from the production process. These groups have never had any control over how oil revenue is spent, which power is reserved only for the federal government.[36] While Shell claims to spend 20 million dollars a year on development projects in the Delta, these projects rarely materialize. Local NGOs estimate that Ogoniland actually saw about $200,000

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[29] *Id.* at 22.
[30] *Id.* at xi.
[31] Boele, Fabig and Wheeler, *supra* note 27 at 76.
[32] SERAC and CESR, COMMUNICATION 4.
[33] SERAC and CESR, COMMUNICATION.
[34] OKONTO AND DOUGLAS *supra* note 4 at 64.
[35] Boele, Fabig, and Wheeler *supra* note 27 at 77.
[36] *Id.* at 76.

in the period between 1970 and 1988. Shell also makes the claim that because of the large share of profits that fall to the government of Nigeria, the government should be the party making up any gaps in development.[37] The OPCs also have very little chance of redress, either in the form of clean-up or financial reparation, for damage done in the process. A senior Shell official publicly implied that shell had not bothered to clean up after spills in Ogoniland because no one cared other than the Ogoni.[38] Because of the governments backing and outdated value assessments Shell has incredible leeway in the amount that it delivers when it actually does pay compensation for damage.[39] When the OPCs have fought for greater compensation Shell has requested, received, and paid for military intervention from the state of Nigeria to contain their demands.[40]

II. B. History and Context of the Ogoni Social Movement

It should be no surprise that the history and current effects entailed by oil exploitation in the Niger Delta and in Ogoniland specifically would have a counter-history of resistance. A combination of minority politics and environmental and economic concerns framed the growth of the movement up to a peak in the late nineties that provides the social movement context for the examination of the SERAC case that will follow.

The Ogoni movement has a long history and strong connections to struggles by other minority and oil producing communities in Nigeria. In 1945 the Ogoni Central Union was created to work for a distinct Ogoni homeland within Nigeria.[41] In the '50s and '60s minority groups were fighting for their own separate states in order to gain a more just representation in the Nigerian federation.[42] During this time period the Ogoni State Representative Assembly worked in coordination with neighboring minority groups for the creation of a separate Rivers State that would unite them outside the control of majority ethnic groups.[43] In 1970 leaders of various clans joined together in the Ogoni Divisional Committee to petition the government regarding the activities of Shell in Ogoniland.[44]

The Ogoni people are one of the minority groups that make up the population f the

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37 OKONTO AND DOUGLAS *supra* note 4 at 105.
38 *Id.* at 77.
39 An example given of the compensation rates paid is 25 cents for a destroyed mango tree which could yield $800 worth of fruit in a year *Id.* at 109 and 111.
40 Boele, Fabig, and Wheeler, *supra* note 27 at 78.
41 Eghosa E. Osaghae, *The Ogoni Uprising: Oil Politics, Minority Agitation and the Future of the Nigerian State*, 94 AFRICAN AFFAIRS 325-344, 329 (1995).
42 *Id.* at 325.
43 *Id.* at 329.
44 *Id.* at 329.

Niger Delta. The Ogoni population is comprised of about 500,000 people.[45] Prior to the damage caused by oil exploitation the Ogoni people primarily made their living from the land with fishing and farming being major occupations. Oil exploration and discovery caused a dramatic shift in the livelihoods of the people and in their relations with each other and the state. The destruction of the Ogoni land and livelihoods gave impetus for them to create stronger organizational bonds with each other,[46] and the recognition that the state was failing to protect them from the consequences of oil exploitation gave them reason to organize direct resistance to the oil corporations.[47] In this new mobilization of the Ogoni people self determination became a central theme.[48] This demand for self determination was fleshed out in the Ogoni Bill of Rights, which was drafted in 1990.[49] Shortly after the Bill of Rights was drafted the umbrella organization, Movement for the Survival of the Ogoni People (MOSOP), was formed.[50] In the beginning MOSOP used media and tours through Ogoniland to reach out to the people and traditional leaders garnering support in order to convince their base that they had a stake in the movement.[51] Since its founding MOSOP has worked to build international recognition for the situation and demands of the Ogoni people. One of the first international ties made by the organization was in joining the Unrepresented Nations and Peoples Organization in 1993. This led to the movement receiving international press for the first time in TIME magazine. In this same time period they also issued an ultimatum to the oil producers for payment of damages to the Ogoni people for the effects of oil exploitation in their land. Due to a lack of action on the part of the oil companies (both the TNCs and the state company) MOSOP declared them to be unwelcome in Ogoniland in January of 1993.[52]

The organization in Ogoniland was intended to be and acted as a touchstone for mobilization throughout the Delta. A variety of other ethnic groups shortly followed the Ogoni in organizing themselves to confront the oil companies operating in the Delta. The Ijo nation formed the Movement for the Survival of the Izon Ethnic Nationality in 1992 and created a charter similar to the Ogoni Bill of Rights. The youth in Ogbia began to organize and published a charter later that same year that demanded changes in legislation, compensation for damages, greater national representation, more oil employment, and changes in oil infrastructure in their region. Their organizing led to the formation of The Council of the Ikwerre Nationality to push their demands. These and other groups recognized that they would

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45 *Id.* at 327.
46 *Id.* at 329.
47 Boele, Fabig, and Wheeler, *supra* note 27 at 79; Osaghae, *supra* note 41 at 333.
48 Osaghae, *supra* note 41 at 327.
49 Movement for the Survival of the Ogoni People, OGONI BILL OF RIGHTS (1992).
50 Boele, Fabig, and Wheeler, *supra* note 27 at 79.
51 Osaghae, *supra* note 41 at 334.
52 Boele, Fabig, and Wheeler, *supra* note 27 at 79.

have greater leverage together and created the Southern Minorities Movement to coordinate their work.[53]

The organization in these communities was largely a coalition of women, peasants and other unwaged workers. These people form the base that is necessary for the oil exploitation to take place and are the most effected by the changes it creates in society. The organization in Ogoniland saw them coming together in order to marginalize elites who were in collaboration with the TNCs and remove them from their role as a buffer between the corporations and the communities effected by their extraction activities. Because this group makes up the majority of the people in the Delta they have at times been able to mount significant challenges to extraction activity.[54] This base provides for an ongoing broad local coalition that continues to challenge the oil TNCs in the Delta.

The peak of international attention for MOSOP and the Ogoni cause, as well as the circumstance immediately preceding the SERAC case, was the trial and execution of Ken Saro-Wiwa and the rest of the Ogoni nine. This was the name given to nine MOSOP leaders who were arrested and accused of murder in the 1994 deaths of four Ogoni chiefs who had been rivals of Saro-Wiwa's within MOSOP. The murders took place during meeting of more conservative chiefs and one of the men attending had heard rumors that some chiefs might be murdered and alerted the police. After this warning there was a strong police presence in the village where the meeting was taking place, but none of the police arrived on the scene until after the murders had been accomplished the killers of the four chiefs had escaped. The same day military "wasting" operations began in Ogoniland that left thousands dead, homeless, and raped by government forces while they rounded up the 9 MOSOP leaders who were accused of the murders.[55] The nine were tried before a military tribunal that had no international credibility[56] The trial was met with campaigns undertaken for release of the defendants by a variety of religious, environmental, and human rights groups.[57] Throughout the trial there were allegations that Shell had paid bribes to undermine MOSOP and even that the corporation was involved in the deaths of the murdered chiefs[58] In spite of all these factors the nine were found guilty. When asked to comment Brian Anderson, the top Shell executive for Nigeria at the

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53 Okonto,and Douglas, *supra* note 4 at 142–143

54 Terisa E. Turner and Leigh S. Brownhill, *Ecofeminism as Gendered, Ethnicized Class Struggle: A Rejoinder to Stuart Rosewarne*, 17 Capitalism Nature Socialism 87-97 (2006); Terisa Turner, *Oil Workers and Oil Communities in Africa: Nigerian Women and Grassroots Environmentalism*, 30 LABOUR, Capital and Society 66-89 (1997); Terisa E. Turner and Leigh S. Brownhill, *Why Women are at War with Chevron: Nigerian Subsistence Struggles Against the International Oil Industry*, 45 J. Asian & Afr. S. (2010).

55 *Id.* at 129–131.

56 Boele, Fabig, and Wheeler, *supra* note 27at 81.

57 Okonto, and Douglas, *supra* note 4 at 165.

58 *Id.* at 158.

time, said that it was not the role of a foreign corporation to interfere in state sovereignty. The defendants were eventually hanged by Nigeria on November 10, 1995.[59] The international reaction to the murders took Nigeria and Shell by surprise and included mild sanctions from the United States, suspension from the commonwealth,[60] shareholder actions against Shell, boycotts (by local governments, academics, and academic societies), and campaigns by environmental groups.[61]

II. C. Description of the SERAC case

The SERAC case came right after the executions of the Ogoni Nine at the peak of international attention to the Niger Delta and Ogoni cause. The findings of the Commission in this case show it to be flexible (in the sense that it was willing to combine rights already guaranteed to articulate other rights that were not explicit) responsive to the reasoning and requests of complainants, willing to expand new territory in its own jurisprudence, and in line with trends in international interpretations of economic cultural and social rights that fit with the Charter's assertion that all rights are inseperable.

The SERAC case was based in a communication submitted to the African commission on March 14, 1996 by the Social and Economic Rights Action Committee (SERAC) of Nigeria and the The Center for Economic and Social Rights (CESR), a New York based NGO. In their communication on behalf of the people of Ogoniland the NGOs alleged that the state f Nigeria was in violation of a series of articles of the African Charter on Human and Peoples Rights. The articles they claimed were violated were; 16 and 24, relating to the right to health and the right to a healthy environment; the right to housing which was, deduced from combining the right to property (Article 14), the right to health (Article 16) and the right to family (Article 18); the right to food which was deduced from the right to life (Article 4) and the right to health (Article 16); the right to non-discrimination (Article 2) ad the right of peoples to freely dispose of their resources (Article 21).[62] The Commission decided that it had the right to hear the case because Nigerian ouster clauses made local remedies irrelevant. The case was repeatedly postponed and finally taken on the face value of the complaint due to lack of response from the state.[63] Five years into the case the new civilian government of

[59] Boele, Fabig, and Wheeler, *supra* note 27 at 81.
[60] Peter m. Lewis, *Nigeria: An End to the Permanent Transition?*, 10 J. Democracy 141-156, 148 (1999).
[61] These groups included The Body Shop, Amnesty International, and Greenpeace Boele, Fabig, and Wheeler, *supra* note 27 at 81.
[62] SERAC and CESR, Communication.
[63] The only response from the Nigerian state came in 2000 from the new civilian government and confirmed the seriousness of the claims made in the complaint Fons Coomans, *supra* note 3 at 750

Nigeria submitted a *note verbale* that admitted the gravitas of the claims and said that is had created several new governmental bodies to help address environmental and human rights concerns.[64] Finally after a six year process the Commission reached a decision finding that the state of Nigeria was indeed in violation of the rights it was alleged to have breached.[65]

The commission showed a flexibility in adopting a concerted and integrated reasoning to derive rights not spelled out in the charter by combining articles that are explicit.[66] There was precedent for this type of expansive interpretation in previous decisions of the Commission.[67] This method of legal reasoning was essential for the commission to find the violations that it did of the right to housing and the right to food. Though neither of these rights are explicit in the ACHPR they were both found to be supported by combinations of articles and the government was found in violation of the articles that the reasoning was based in for its allowance of and participation in the destruction of the Ogoni peoples homes and agricultural lands.[68]

There is precedent in the African Commission for taking facts of a case at face value if the state declines to respond, as the commission did in the SERAC case.[69] The commission also went a step further by also taking some of the legal reasoning from the complaint, and making recommendations that closely mirrored those of the complaint. The commission showed receptiveness to the reasoning of complainants through accepting the combination of articles to construct the right to housing that were suggested in the complaint (Article 14 the right to property, Article16 right to health, and Article18 right to family).[70] It also showed receptiveness in making a set of recommendations that covered all of the same concerns as those raised by the complaint including several direct quotes in it's language.[71]

The communication of the Commission broke new ground by asserting that Economic, Cultural, and Social Rights (ECSR) are justiciable in it's jurisprudence. With the division between ECSR and Civil and Political rights it has often been the case that only those rights that are divided into the civil and political category are seen as enforceable while ECSR are relegated to the realm of goals.[72] The Commission was able to make this step in part

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64 Communication 155/96 SERAC and another V. Nigeria, Fifteenth Annual Activity Report, 4.
65 Communication 155/96 SERAC and another V. Nigeria, Fifteenth Annual Activity Report.
66 Shedrack C. Agbakwa, *Reclaiming Humanity: Economic, Cultural and Social Rights as the Cornerstone of African Human Rights*, 5 Yale Hum. Rts. & Dev. L.J. 177-137, 207–212 (2002).
67 Coomans, *supra* note 3 at 751.
68 Communication 155/96 SERAC and another V. Nigeria, *supra* note 2.
69 *Id.* at 40.
70 SERAC and CESR, *supra* note 1 at III(A); Communication 155/96 SERAC and another V. Nigeria, *supra* note 2 at 11.
71 Communication 155/96 SERAC and another V. Nigeria, *supra* note 5 at 14; SERAC and CESR, *supra* note 1 at 11.
72 Chidi Anselm Odinkalu, *Analysis of Paralysis of Paralysis by Analysis: Iplementing Economic Cultural And social Rights under the African Charter on Human and Peoples Rights*, 23 Hum. Rts.

because of its basis in the ACHPR which is very intentional in not separating the rights as other international instruments have done. The ACHPR also lacks the language of progressive realization that often accompanies ESCR.[73] This combination of insisting on the indivisibility of rights and not having the progressive realization language, which is very hard to judge compliance with, opens the door for a framework of violations. Because the rights are assumed to be equal and implementable the Commission is able to look for cases in which they are not implemented and rule that those cases are violations of the treaty obligations of states that are signatory to the ACHPR.[74]

The Commission also used this case to further the framework of levels of obligation in protecting ECSR. There are obligations related to each right guaranteed in the ACHPR or deduced from it to respect protect promote and fulfill the enjoyment of that right.[75] This structure means that the state incurs both negative and positive obligations in relation to each right. The first level of respecting rights is basically a negative duty to not do anything that interferes with the enjoyment of the right in question. The obligation to protect may be seen as the negative obligation not to allow others within the states jurisdiction, in this case Shell in the Niger Delta, to act in ways that infringe on the guarantees of the right. The obligations to promote and fulfill rights both have a positive character with promoting actions and structures that create the possibility of enjoying the right, like awareness building, and creating institutions and policies that actually make sure that the right is enjoyed.[76] This structure of obligations is not original to the SERAC case, the Commission refers to it as being part of the "Internationally accepted ideas of the various obligations engendered by human rights" and cites the work of Asbjorn Eide in its reasoning on the case.[77] A very similar framework is also expounded in the Maastricht Guidelines that were developed for interpreting the International Covenant on Economic, Social and Cultural Rights which were established in 1997 (after the complaint in this case was filed out before the decision).[78] The use of this structure then shows that the Commission was in line with some of the current international thought at the time as to how to make ECSR justiciable. It should be noted that in choosing which streams in international legal thought to relate to the Commission chose those that are compatible with the vision of the charter that rights are indivisible in opposition to other common views that continue to sideline ECSR in favor of civil and political rights.

Q. 327-370 (2001); Agbakwa, *supra* note 66.

73 Odinkalu, *supra* note 72 at 332–335.

74 Coomans, *supra* note 3 at 758.

75 COMMUNICATION 155/96 SERAC AND ANOTHER V. NIGERIA, *supra* note 2 at 6.

76 COMMUNICATION 155/96 SERAC AND ANOTHER V. NIGERIA, *supra* note 2 at 44–47.

77 *Id.* at 44.

78 The Maastricht Guidelines on Violations of Economic, Social and Cultural Rights, 6 (1997).

III. The Effects of Anti-blackness on Social Movements use of International Human Rights Law

> One of the more remarkable features of contemporary international relations and international law is the disappearance of race- and its related concepts of "civilized"/"uncivilized"- as a term which is central to the self definition of the discipline. This situation contrasts with that which existed in the late nineteenth century when international law was defined as the law applicable to civilized nations. Despite the absence of such distinctions in contemporary international law, racialized hierarchies persist and are furthered by ostensibly neutral international law and institutions.[79]

Following the assertion from Angie at the beginning of this section the examination of the SERAC case to the Ogoni social movement will begin by trying to place racialized hierarchies into the struggle. Racial hierarchies effect the usefulness on international human rights law to a social movement in an African State with a resource based economy through its history in the slave trade, the history of the European creation of the African state, the anti-black framework of the human rights movement and the rentier relation of the resource state. Each of these factors will be examined in turn and some conclusions drawn as to the usefulness of human rights for achieving social movement goals in the context they create.

III. A. The Roots of Anti-blackness in the African Slave Trade and the Unreliable Nature of International Solidarity

The first of the racial factors that effect the use of the SERAC case by the Ogoni social movement is the underlying thread of anti-back racism in the world system. The oil relationship in Nigeria and the broader relationship of the state and its people to the rest of the world are rooted in the history of the trans-Atlantic slave trade. In the background section of the paper it was mentioned that oil trade has its roots in the earlier palm oil and slave trades. This history is shared in varied forms by all of sub-Saharan Africa. The history of the slave trade gives a foundation for understanding, not just economic patterns, but the structure of political value given to the peoples and states of Africa. Achille Mbembe begins his analysis of the colony with the observation that in slavery the enslaved experienced "loss of a "home," loss of rights over his or her body, and loss of political status" and became valuable as property.[80]" The point of persons becoming property is central to what anti-back racism means. The difference between black people, and by connection Africa, and other non white races is that they were traded as property as opposed to being conquered as subject peoples. Being treated as property is dehumanizing while being conquered is dis-empowering. This history leads to an ongoing relation which, though it has permutations connects blackness and Africa with slavery; "blackness serves as the basis of enslavement in the logic of a transnational political and legal culture, it permanently destabilizes the position of any nominally free black population."[81] While the western slave trade was not the first or only instance of slavery it had different effects in marking Africa and blackness than previous slave relations because of the use of race as the logic defining who was, or could be enslaved.[82] One

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79 Antony Anghie,and Matua, Makua, *What is TWAIL*, 94 Proceedings of the Annual Meeting (American Society of International Law) 31-40, 39 (2000).

80 Achille Mbembe, *Necropolitics*, 15 Public Culture 11-40, 20 (2003).

81 The assertion of this permanency is partially in critique of Mbembe's move from the plantation to the colony to lay the basis for a third world, anti-colonial analysis. Jared Sexton, *People-of-Color-Blindness Notes on the Afterlife of Slavery*, 28 Social Text 31-59, 36 (2010).

82 This shift is discussed in the essay, *The Souls of White Folk,* in W.E.B Du Bois DARKWATER: VOICES FROM WITHIN THE VEIL (1920)

of the clearest examples of how this distinction has played out was in the Dred Scott case before the US Supreme Court in which the majority opinion was against Scott based not on whether or not he was owned but on the claim that he did not have legal standing because he was black and descended from Africa.[83]

The permanence of this destabilization allows for the understanding that there is commonality with other post-colonial subjects in the role they play in the present global political economy, but the commonality is always undercut by the dehumanized position of blackness as contrasted to the subjugated position of other colonial subjects. More simply it remains true that "(1)It is best to be white and (2) it is worst to be black."[84] The nature of this commonality and distinction is argued through the comparison of the struggle of the people of the Niger Delta to those of the Zapatista movement in Mexico by Tryon Woods.[85] In his paper he argues that the difference in the modest levels of international attention and solidarity that the movements of the Delta have been able to garner in comparison to the much larger and more consistent levels that the Zapatista movement enjoys are grounded in the continuation of this system of anti-blackness and the distinction between having been colonized and having been, at least potentially, owned (the distinction between being conquered and being dehumanized).[86] This continuation of value, though it changes in form, is termed by Jared Sexton "the afterlife of slavery" to emphasize the reality that the value remains through different structures rather than being nullified in the end of the slave trade.[87] Again to state it more simply, the distinction between former slaves, and potential slaves, and other non whites remains in place in different forms, but it is better to belong to a people that was conquered than one that was owned in terms of the respect you may expect for your human dignity, because humans are conquered but things are owned. Though history moves on and structures evolve the past remains , under the surface, and conditions current realities.

The anti-black bias in the structure of world politics suggests decisions in what strategies to use in capitalizing on a decision of the commission. It makes sense that an African social movement should not overly assume or rely on international solidarity as a given for meeting its goals. One of the primary strategies for using a ruling or international precedent is as a moral force to try to get outside governments or forces to bring pressure on the government for change. This would not seem to be the best strategy in a world that often continues to marginalize Africa. Another way that a ruling can be used is through the value that the ruling may add to internal organizing.[88] This value can be utilized as another argument to add to pressure put on the state or it may be used in the national court system. This use within the national courts is what Obiora Okafor calls 'trans-judicial communication'.[89] This is a strategy in which the same type of case is pressed as well on the national level and the fact of the ruling in the International system allows for there to be precedents and legal reasoning

[83] The implications of this reasoning are discussed in the context of the ongoing anti-black bias in US legal proceedings in Frank B Wilderson III, *The Vengeance of Vertigo: Aphasia and Abjection in the Political Trials of Black Insurgents, In*Tensions J. 1-41, 15 (2011)

[84] Tryon Woods, *The Fact of Anti-Blackness Decolonization in Chiapas and the Niger River Delta*, HUMAN ARCHITECTURE: JOURNAL OF THE SOCIOLOGY OF SELF-KNOWLEDGE 319-330, 323 (2007).

[85] *Id.*.

[86] *Id.* at 328.

[87] Jared Sexton, *People-of-Color-Blindness Notes on the Afterlife of Slavery*, 28 Social Text 31-59 (2010).

[88] Okafor argues that during the time period in which the SERAC case was brought there was significant correspondence (actions of the state that were in line with rulings of the commission, even if not necessarily in direct response to its rulings) because of the creative use of the Commission's rulings by social movements. He never mentions the SERAC case, but as will be seen below the case was also effective in forming legal reasoning in the national system. Obiora Okafor, *The African system on Human and Peoples' Rights, quasi-constructivism, and the possibility of peacebuilding within African states*, 8 Int'l J. Hum. Rts. 413-450, 425 (2004).

[89] *Id.* at 426.

to draw on for the lawyers who are working with the social movement as well as for any judge in the national system who may be inclined to rule in their favor but need to have some basis for standing against the mainstream of national policy or practice.[90] The SERAC case does seem to have helped to open room for a Nigerian judge to rule that the right to environment was applicable and justiciable under the Nigerian constitution because of the constitutions inclusion of the ACHPR in the case of Gembre vs Shell.[91] The Ogoni people have used both internal mobilization, for which the value added strategy would be appropriate, and appeals to the international community, which would lead to using a decision of the Commission to try to draw pressure from international actors. In spite of the fact that both approaches were used during the time period of the SERAC case there was very little in the way of international pressure put on the Nigerian state,[92] except for immediately following the execution of Ken Saro-Wiwa and the other MOSOP leaders.[93] This would seem to confirm that in utilizing the decision of the Commission the Ogoni movement, and other similarly situated movements would be better to use the value added approach within the national structure.

III. B. Anti-blackness in the History of African State Formation: Reinforcing the Need for a National/ Regional Focus for Social Movement use of Human Rights

The states created by the colonial powers were rooted in their own interests and not in the context of African history.[94] The division of Africa into spheres of influence was negotiated to legitimize the colonies and to avoid conflicts between the colonial powers. The people who were being colonized were not present and considered unnecessary because the Europeans knew best.[95] Contact between these colonial powers and the societies of Africa ha begun with the slave trade and was expanded when Europe felt a need for foreign markets.[96] Thus the African state is not an organic outgrowth of the societies it contains, but an imposition of former colonial powers.[97]

A declarative theory of state sovereignty, that bases sovereignty in fulfilling the roles of a state, would have to have accepted many pre-colonial African entities as states.[98] Because the dominant understanding of sovereignty at the time was through recognition, and recognition by the European powers, these pre-colonial societies were not accorded

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[90] *Id.* at 425.

[91] James Donnelly-Saalfield, *IrreparableHarms: How the Devastating Effects of Oil Extraction in Nigeria Have Not Been Remedied by Nigerian Courts, the African Commission, or U.S. Courts*, 15 HASTINGS W.-NW. J. ENVT'L L. & POL'Y 371-432 (2009); Kaniye S.A. Ebeku, *Constitutional Right to a Healthy Environment and Human Rights Approaches to Environmental Protection in Nigeria: Gbemre v. Shell Revisited*, 16 RECIEL 312-321 (2007); Jedrzaj George Freynas, *Social and environmental litigation against transnational firrms in Africa*, 42 J. MODERN AFR. ST. 363-388 (2004).

[92] *Id.* at 421.

[93] The strength of the international reaction to this event is noted in the background section.

[94] Makua Mutua, *Why Redraw the Map of Africa: A Moral and Legal Inquiry*, 16 MICH. J. INT'L L. 1113-1174, 1114 (1994).

[95] *Id.* at 1127.

[96] *Id.* at 1126.

[97] Nsongurua Udombana, *Articulating the Right to Democratic Governance in Africa*, 24 MICH. J. INT'L L. 1209-1289, 1213 (2002).

[98] Traditional ethnic communities living under various socio-political arrangements (called traditional African political systems). These arrangements, ranging from the simple to the complex, embodied elements of traditional forms of democracy and human rights embedded in the religion and culture of these communities. Pre-colonial history came to an end with European contact .El-Obaid, Ahmed El-Obaid and Kwadwo Appiagyei-Atua,, *Human rights in Africa: A New Perspective on Linking Past to Present*, 41 MCGILL L. J. 819-856, 821 (1885); Mutua, *supra* note 94 at 1124–1125.

sovereignty.[99] Not being recognized as states, they were considered to be territories that could be possessed.[100] The European states that created the colonial map of Africa defined themselves as the civilized world when they met in the Council of Vienna in 1815 and declared Africa to be *terra nullis*.[101] In the beginning of the 20th century the colonial spheres of influence were consolidated into the colonial states which divided people groups by boundaries and included groups who had been in tension with each other within these boundaries based on trade, political, and religious disputes internal to Europe.[102]

Throughout the process of the European creation of Africa International bodies lent their support to these boundaries. The League of nations Covenant helped to solidify acceptance of the European map of Africa,[103] and the UN Charter does not challenge the boundaries in its championing self-determination, but rather limits self-determination to internationally recognized territories.[104] Organization of African Unity heads of state re-affirmed borders from independence in Cairo 1964 when they met to discuss borders.[105]

The decolonization proved to be more a continuation of colonial history than a break from it.[106] The withdrawing colonial powers left in place the governing structures an elites that they had created. This process is described succinctly by Matua:"At independence the West decolonized the colonial state, not the peoples subject to it. In other words the right to self-determination was exercised not by the victims of colonization but their victimizers, the elites who control the international system."[107] The new rulers who were the old elites, were left with the task of trying to make the newly labeled post-colonial legitimate to the people[108] However these new rulers inherited systems that were created for the extraction of resources and concentration of wealth.[109] The lifestyle of the elites within the African state could not exist without the divisions created by the European drawn boundaries[110] This leads to a system in which offices of state are seen as an opportunity to get access to foreign power and finances and to pass that advantage through the relations of the office holder (pre-bendalism.)[111]

This history and the fractured state with its crisis of legitimacy that it created is another factor that effects the ways that human rights law can be used by a social movement in the African context. The need for the states to protect the power that they have has led to the creation of a culture within the African system that is very protective of state sovereignty and resistant to dealing with the internal structure of states or with any changes to their inherited boundaries. The artificial and imposed nature of the states makes any challenge seem the possibility of opening a floodgate for all African states to be challenged. This means that the Commission is likely not good ground for pushing people's claims for autonomy, though self-determination of peoples is contained in Article 20(1) of the Charter,[112] even if this was a

[99] Mutua, *supra* note 94 at 1124–1125.
[100] *Id.* at 1126.
[101] El-Obaid, Ahmed El-Obaid and Appiagyei-Atua,Kwadwo, *supra* note 98 at 821; Mutua, *supra* note 92 at 1120.
[102] *Id.* at 1136.
[103] Mutua, *supra* note 94 at 1138.
[104] *Id.* at 1140.
[105] *Id.* at 1163.
[106] Udombana, *supra* note 97 at 1215.
[107] Mutua, *supra* note 94 at 1116.
[108] *Id.* at 1145.
[109] Udombana, *supra* note 97 at 1215.
[110] Mutua, *supra* note 94 at 1120.
[111] Kenneth Omeje, *The Rentier State: Oil-related Legislation And Conflict In The Niger Delta, Nigeria*, 6 Conflict, Security and Dev. 211-230, 212 (2006); Because government officials control economic access, the political contest within the state becomes one about capturing these gate-keeping roles and using them to the advantage of the politicians personal networks. Terisa Turner, *Multinational Corporations and the Instability of the Nigerian State*, 5 Rev. Afr. Pol. Econ. 63-79, 64 (1976).
[112] Organization of African Unity, AFRICAN (BANJUL) CHARTER ON HUMAN AND PEOPLES'

central claim of the Ogoni people[113] it is not addressed in the complaint of the SERAC case.

While the preceding effects of the fractured state are a detriment to bringing the goals of a movement like that of the Ogoni people to the Commission, the divisions in the state also open room for a social movement to maneuver and bring pressure and find allies within the state. Because the state is constantly trying to prove that it is legitimate it has an incentive to pacify the people within its territory, This can be dangerous because the state may choose to pacify the people through either concessions or violence and throughout the history of the Ogoni struggle the state has used both, but has not found repression alone to be sufficient, and thus also has a history of making minor concessions to keep the allegiance of its subjects.[114] It does seem though that the creation of the new environmental and human rights bodies by the new civilian government could reasonably be seen as an example of a concession and may have been influenced at least in part by the attention of the Commission. Though these bodies have been strongly criticized for inefficiency and corruption,[115] that is they continue to carry the legitimacy problems of the state of which they are a part, they do add new avenues for the movement to address its grievances and desires. Thus the fractured nature of the state provides another reason for local movements to work within it to empower those actors who are sympathetic to their cause.

III. C. The Anti-black Framework of Human Rights: Self Redemption as an added Detriment to Sustainable Solidarity

> The SvS [Savage, Victim, Savior] metaphor of human rights carries racial connotations in which the international hierarchy of race and color is re-entrenched and revitalized. The metaphor is in fact necessary for the continuation of the global racial hierarchy. In the human rights narrative, savages and victims are generally non-white and non-Western, while saviors are white. But there is also a sense in which human rights can be seen as a project for the redemption of the redeemers, in which whites who are privileged globally as a people-- who have historically visited untold suffering and savage atrocities against non-whites-- redeem themselves by"defending" and "civilizing" "lower," "unfortunate," and "inferior" peoples. The metaphor is thus laced with the pathology of self-redemption. [116]

In the above quote, Matua summarizes the racial basis of human rights. International law in the sense of "rules and principles governing relations between organized political society" has a long history, but the system of international law as it functions now was created by and for the European powers.[117] Customs of non-Western (non-white) cultures and societies have not been included in forming the basis of human rights law, nor are the histories of a variety of struggles that could have been rich ground for helping to form the discipline Instead the history of the human rights movement falls within the trajectory of the civilizing mission of the European powers.[118] This section will be comprised of brief summaries of each of the parts of the 'savage, victim, savior' metaphor and their implications for using the regional human rights system for social movements and relation to the SERAC case.

In the metaphor of Matua the abuser of human rights plays the role of the

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RIGHTS 6 (1981).

[113] Movement for the Survival of the Ogoni People, Ogoni Bill of Rights (1992).

[114] Obiora Okafor, *On the Significant (But Limited) Impact of Human Rights NGOs on Legislative and Executive Behaviour in Nigeria*, 48 J. Afr. L. 23-49, 45 (2004).

[115] Dimieari Von Kemedi, *The Changing Predatory Styles of International Oil Companies in Nigeria*, 30 Rev. Afr. Pol. Econ. 134-139, 135 (2003).

[116] Makua Mutua, *Savages, Victims, and Saviors: The Metaphor of Human Rights*, 32 Harvard Int'l L. J. 201-247, 207–208 (2001).

[117] Mutua, *supra* note 94 at 1114.

[118] Mutua, *supra* note 116 at 210.

savage. Although the major international human rights NGOs were created to address violations in Europe they have evolved to mostly focus on violations by third world states.[119] Through this focus by the human rights movement on the abuses of third world states human rights abuse is racialized in the form of the 'black, dark, or non-Western race'".[120] Because the state is a vessel, when a states is critiqued for human rights abuses it is a critique of the normative culture that the state carries or represents.[121]

African states are very aware of the bias of the human rights system against them and its basis in colonial history. Even in cases where the leaders of the state are collaborating with foreign powers an anti-colonial rhetoric can be useful to them in deflecting criticism of their human rights record. This rhetoric is not useful in combating critiques from within the African community. This dynamic makes it harder for the African state to brush of criticism from the African community and African human rights system than that from Western states or human rights actors.[122] This means that a social movement within the African state is wise to direct their energy for international pressure towards the Commission and African community. This choice also allows for the Commission to expand its rulings as it id in the SERAC case and move towards its stated goal of creating a system of human rights that reflects African values.

Because, like the savage, the victim is found in the third world "the face of the prototypical victim is non-white," [123]The characterization of the state as the savage by the human rights movement often adds to the invalidation of the victims of the human rights abuses because the state becomes the representative of the people and culture it contains[124] and the victims are also located in that culture.[125] This targeting of the cultures of the third world helps to continue the racialized structure of human rights. The "victim" is also dis empowered by the assumption of their powerlessness in the face of the state or culture that is abusing them.[126] This racial view of the victim is both dis-empowering to social movements and marginalizing of their concerns. Because the victim is supposed to be weak and in need of help there is a pressure for people whose rights are violated to portray themselves as such if they want the attention of the international human rights movement. This dynamic is not useful for trying to organize locally to get a community to take power. It may though help in explaining why the Ogoni people had the peak of international support after it lost a strong leadership to state murders.

The white savior continues the civilizing mission in line with the missionaries of the past. Inherent to any universalizing creed is an unyielding faith in the superiority of at least eh beliefs of the proselytizer over those of the potential convert, if not over the person of the

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[119] *Id.* at 216.
[120] *Id.* at 226.
[121] *Id.* at 220–221.
[122] Okafor, *supra* note 88 at 427–428."It is reasonably clear from an analysis of the events surrounding this matter that in a psychological sense, the condemnations by the African leaders and by the Commission seemed to hurt the regime's moral composure much more than those of other international entities whose actions could easily be dismissed in post-colonial Nigeria as improperly motivated."
[123] Mutua, *supra* note 114 at 230.
[124] *Id.* at 220–221.
[125] African women who were campaigning against genital cutting made scathing critique of western feminists that used this racial dynamic to cast them as backwards, uncivilised, and weak while supposedly supporting their causem*Id.* at 226.
[126] *Id.* at 229.

convert.[127] As noted in the previews paragraphs INGOs mostly target situations in the third world to find the savages to be opposed and the victims to be saves. They also are generally western based and white.[128] These same organizations generally focus their work on civil and political rights, which are more likely to be violated in the third world states and continue to sideline economic and cultural rights.[129] This focus adds to the dynamic by focusing most on those violations in which the African state is the most direct violator as opposed to economic, cultural, and social rights which are very likely to implicate global economic and racial heirarchies.

The self-redemption focus of human rights makes for unreliable allies. If solidarity is about making the international community feel better about itself then it can only be sustained by a constant constantly translating the goals of the movement to the current concerns of the international community.[130] The picture of the white savior also lends credence to the hand of abusers by making PR campaigns on behalf of Western, thus "white", actors more likely to be effective. Shell has exploited this dynamic with its huge expenditures on green-washing and corporate social responsibility campaigning.[131]

III. D. The Rentier State: The Necessity of Holding the State Responsible While Realizing its Limitations in Controlling Non-State Actors

The Nigerian state is primarily dependent on oil and on the taxes it receives from TNC as well as the profits gained from its joint ventures with these companies.[132] Because all oil industry in Nigeria is constructed as a joint venture between the state and TNCs the interests of the state are substantially the same as the oil companies, thus the state is very involved in protecting the interests of the TNCs.[133] As with other African states there is a crisis of internal legitimacy because state is run by elites for their international backers,[134]but in the case of Nigeria these foreign interests are primarily related to oil and oil interests have incredible influence over the state.[135] As evidence of this dependency an American environmental group reported in 97 that Shell supplied half of the revenue for Abacha's regime which was in power in Nigeria during the period when all of the SERAC case was brought before the Commission .[136] The financial power to be gained for government officials by mediating these oil profits strengthens the system of prebendalism which was created by the colonial division of Africa discussed above.[137] Because the elites come from communities outside the Delta their self interest lies against the empowerment of the Delta communities.[138] This weakness of the state my be challenged as a flaw of the leadership rather than in the inherited global structure citing other oil producing states that have a greater history of regulating international interests, but this argument is undercut by the structure of anti-blackness described above that erases the sovereignty of the African state through its commodification and external imposition in

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[127] *Id.* at 233.
[128] *Id.* at 241.
[129] *Id.* at 217.
[130] Terisa E. Turner and Leigh S. Brownhill, *supra* note 53; Turner, *supra* note 53; Terisa E. Turner and Leigh S. Brownhill, *supra* note 53.
[131] Okonto and Douglas, *supra* note 4 at 73
[132] Omeje, *supra* note 6 at 212; Turner, *supra* note 53 at 64. In Nigeria,state income has been largely generated since 1970 by the production and export of oil, which is organized foreign firms." Turner, *supra* note 53 at 64.
[133] Omeje, *supra* note 6 at 227.
[134] Mutua, *supra* note 94 at 1118.
[135] Omeje, *supra* note 6 at 212; Okonto, Ike and Douglas, Oronto, *supra* note 4 at 58.
[136] Okonto, Ike and Douglas, Oronto, *supra* note 4 at 58.
[137] Omeje, *supra* note 6 at 212.
[138] *Id.* at 214.

conjunction with the extraction economy.

In this context it does not make sense to expect the state to contain the TNCs. This does not mean that pressuring the state to exert what power it does have cannot or should not fit into a broader multifaceted challenge to the undue power of the TNCs over peoples lives and livelihoods, nor does it mean that the state is not responsible for its role in regulating actors in it jurisdiction. The state is not in the position to effectively dictate the behavior of the TNCs on which it is dependent. At the same time, the social movements of the Delta have continued to address their concerns on multiple fronts and it only makes sense that pressure on the complicit state power would be one of those fronts. To deny the role of the state in regulating actors in its jurisdiction, even if there is a power imbalance, is to agree with the world structure of anti-blackness that has robbed African states of their sovereignty from the beginning. Including the state as an actor is a way to challenge the marginalization of Africa by recognizing the agency of Africans to govern themselves[139]; "Any successful rebirth of African statehood must redefine the states relationship with dominant global forces such as multinational corporations and international finance institutions in such a way that the state recaptures sovereignty."[140] This combination of factors leads to a need to continue to pressure the state to repudiate its complicity with the TNCs while recognizing that the social movement also must wield any other leverage that it can against the corporations to destabilize them and make the state more capable of resisting their influence. The state is responsible and should be held to that responsibility, but in order to make that responsibility a reality it is important that there be a sustained focus on on weakening the international actors that impede the states sovereignty. The Ogoni movement has been an example of this multipronged approach: organizing protests and strikes against the oil companies, challenging complicity with the TNCs from local and national leaders,[141] and connecting with other ethnic movements to build power.[142] To rely on either a purely state focus of responsibility or to ignore the state both play into anti-black black structures. As noted in the discussion of the anti-black structures of human rights casting the state as the savage also imputes savagery to the peoples and cultures it contains, while ignoring the state plays into the white savior dynamic.

IV. The Language of dispute Settlement as Limitation on social Movement Goals

In addition to the dynamics of anti-blackness, the language of dispute settlement is one of the factors that limits the role tat it can play in support of social movement goals. Any social movement that wants to make meaningful change in society will face challenges and limitations in articulating its goals in the setting of a court r tribunal. A complaint brought before an international body must be constructed in language that that body can meaningfully act on, and the outcome will also be created in legal language that will effect its usefulness for continued social movement actions. The complainant in an international human rights forum is required to state their claim within the language of violations of rights and state obligations to uphold those rights for the claim to fall within the jurisdiction of any international legal

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[139] This internal challenge is legitimating for the state and its people as they acknowledge its reality and jurisdiction. In contradiction to the external challenges to the African state by white saviors that function as an indirect attack on the cultures and peoples it contains as discussed by the Savages. The validation does not extend to the global community which is still a part of the anti-black structure, but does function within the community of the state. This distinction of internal validation as opposed to status in the world community could be explained through the concept o f social life in social death by Jared Sexton, People-of-Color-Blindness: A Lecture by Jared Sexton - YouTube YouTube (2011), http://www.youtube.com/watch?v=qNVMI3oiDaI (last visited Nov 14, 2011).

[140] Mutua, *supra* note 94 at 1118.

[141] Terisa Turner, *Oil Workers and Oil Communities in Africa: Nigerian Women and Grassroots Environmentalism*, 30 LABOUR, Capital and Society 66-89 (1997).

[142] Augustine Ikelegbe, *Civil Society, oil and conflict in the Nier Delta region of Nigeria: ramifications of civil society for a regional resource struggle*, 39 J. Modern Afr. St. 437-469 (2001).

body. This language of dispute settlement confines cases to a narrower set of claims than those often made by social movements, and specifically those made by the Ogoni people of the Delta, it has the potential to play into the racial hierarchy, as well as other hierarchies, of international law, and, if allowed to become the central claim of the movement it limits the overall ability of the movement to work towards its desired ends.

In order to look at the limitations of legal language some comparisons will be made in this section of the paper between the complaint filed in the SERAC case, the decision in in that case and the Ogoni Bill of Rights. The choice to use the Bill of Rights as representative of the demands of the movement is imperfect because the movement has been ongoing both before and after the drafting of the Bill of Rights. This means that referencing it freezes the demands at one point in their development. Still the choice as been made to use the comparison for the sake of convenience, and is justifiable because issuing the bill of rights was a formative moment in the Ogoni struggle[143] and the Bill of Rights continues to be referenced as a basic statement of demands by actors in the Ogoni social movements at the time of writing[144]. The document is thus both influential and has stood the test of time. This does not mean that the complaint in the SERAC case should be understood to be a direct translation of the Bill of Rights or the full goals of the Ogoni people into human rights language, but rather that the comparison is useful for looking at how a case deploying the legal language of human rights seeks to address the same situation.

The limitations of the language of dispute do not mean that there is no ground to be gained in this arena. As discussed above the SERAC case was groundbreaking in its declaration tat ECSR are justiciable. It accomplished this through a legal reasoning that applied the categories of violations and obligations to these rights, recognizing their equality with with civil and political rights which have more typically been assumed to be justiciable in the system of international human rights law.[145] While this is a step forward, showing that the categories of violations and obligations can be broadened to protect a greater spectrum of rights claims, The language remains limiting in what types of claims may be made. In order to show these limitations the concepts of violations and obligations are examined below, in the context of the SERAC case with consideration of both the gains they have made for human rights and the way they limit the usefulness of human rights in social movements.

IV. A. The Language of Violations and its Limiting role in Articulating/ Addressing Social Movement Goals

One consideration of how dispute settlement language effects the articulation f social movement goals is the category of violations. For an international court to be able to make a ruling against a state they must be able to find something that it is doing wrong in the context of international law. That is, it must be reduced to a series of facts or questions of aw that can be interpreted into a decision for or against by a court.[146] This requires that those who would choose this type of challenge as a part of their strategy focus their arguments on finding an proving such violations. [147]The language of violations necessarily limits the types of claims that those representing the goals of a social movement may make in several ways.

First a violations approach is necessarily backwards looking. To find violations a complainant must look to actions or in-actions of the state that have already occurred. This provides for the possibility of rulings that may prevent the same, or similar, occurrence in the

[143] Boele, Fabig, and Wheeler, *Supra* note 4 at 79

[144] Movement for the Survival of the Ogoni People, Ogoni Bill of Rights Movement for the Survival of the Ogoni People, http://www.mosop.org/ogoni_bill_of_rights.html (last visited Oct 19, 2011).

[145] See generally, Fons Coomans, *supra* note 3

[146] Sir Robert Jennings, *Reflections on the Term "Dispute,"* in ESSAYS IN HONOUR OF WANG TIEYA 401-406, 403 (1993).

[147] Sabelo Gumedze, *Bringing communications before the African Commission on Human and Peoples' Rights*, 3 Afr. Hum. Rts. L. J. 118-148, 123 (2003).

future but does little to address structures that are likely to be abusive if the abuse does not continue to take the same form. It also disregards context unless that context is relevant to legal interpretation of the points at hand.[148] An example of this gap would be the Bill of Rights claim to "the full development of Ogoni culture."[149] A claim like this is impossible to quantify in the frame of past violations It is possible that the framers of the SERAC case could have included some violations of cultural rights, but the *full development* of a culture is a forward looking aspiration that is open ended and could never be addressed through a language that requires a past focus.

Second a violations approach requires that attention be focused on certain instances. A complainant may list a series of ways in which the responding state is violating a given right, but they cannot just point out that the balance of power is skewed to make it likely that the state will overlook their input and rights, the violations alleged must be specific[150]. This requirement to overlook context in favor of the specific violations created by that context once again weakens the ability to deal with structures of power and the aspirations of a social movement for what those relations could or should be.

These limitations can be seen in the comparison of the language of the Ogoni Bill of Rights to that of the SERAC case. Te fundamental claim of the Ogoni movement has always been a claim to the right to autonomy from which to address the issues that effect the land and people in the forms of environmental problems and political and economic marginalization. As seen in the background section the claims of the Ogoni and other people of the Delta to autonomy predate the discovery of oil in the territory and were only exacerbated by the income inequality and environmental destruction that followed in the wake of the intrusion of the oil companies into the Delta. This history is recounted in the Ogoni Bill of rights in which the first 6 of the facts laid out as background to their claim relate to the history that has artificially included the people in political arrangements that were not of their choosing and of the resistance they carried out before the time oil was discovered.[151] While there are similarities in the violations claimed and the recommendations of the SERAC case to the complaints and demands of the Bill of Rights what is completely lacking in the SERAC case is this framework of autonomy. This lack is a necessary limitation of dispute language which is suited through its focus on violations to address past grievances and recommended reparations, but not alterations in structures of power.

The limitations of the language of violations mean that the concept is useful for addressing past wrongs, but if it is to be useful in creating the societal changes that a social movement like that of the Ogoni people seek it needs to stay embedded in that movement. In this case seeking redress for violations helps to gain ground against those specific violations being repeated and the broader movement can use other means (direct actions, campaigns for restructuring government, strikes, etc) to apply pressure that is necessary for broader change not accessible through the violations language.

Placing the language of violations within the racial structure described previously yields another weakness of the language for a movement like that of the Ogoni people. Because violations require a violator and the jurisdiction of the commission only extends to the state, in order to bring a case the state must be cast in the role of the Savage within the metaphor of human rights. This compounds the antagonism between the state and the social movement while it may actually be in the interest of the social movement to strengthen the state in relationship to the TNCs. The finding of state violations may help to give leverage to those actors in the fractured state that are sympathetic to the goals of autonomy for the people the

[148] For example the Iran hostages case in which the larger context of us actions was not considered in the breech of diplomatic immunity by Iran Falk, *supra* note 20.

[149] Movement for the Survival of the Ogoni People, OGONI BILL OF RIGHTS 6 (1992).

[150] Gumedze, *supra* note 4 at 131.

[151] Movement for the Survival of the Ogoni People, OGONI BILL OF RIGHTS 4 (1992)

movement represents, but it may also play into the hands of a world community that often uses the language of human rights to coerce states that step out of line with the interests of Western states and as an excuse for deposing leadership that attempts to support sovereignty against global markets. The language of the Ogoni Bill of Rights show this complicated relationship to the state in its proclamation of loyalty to the Nigerian state combined with its clear demands for the restructuring of that state to reflect the autonomy of the Ogoni people and other peoples within the state.[152]

IV. B. The Concepts of Obligations and Minimum Threshold: The Danger of Setting an Accepted Standard rather than a Minimum Bar

The concept of state obligation in international law is based on the duty to avoid violating international agreements it has taken on, customary law, general principals, binding decisions of international bodies thus creating victims[153]. Within the reasoning of the Commission in the SERAC case this obligation is based on some, contested, minimum level of protection that a state must provide for the enjoyment of a right. This minimum is established by examining the duties of the state to respect, protect, promote and fulfill the right in question, that is the combination of the states negative and positive duties in relation to that right[154]. Because of the basis of international law in state sovereignty this minimum is addressed to what must be provided but cannot address how it should be provided. Social movements, through their frequent combining of cultural issues with the discourse of rights, most often contain within their goals some definition of just how it is that they want to see their rights guaranteed. These questions of how are rooted in the experience of the people involved and are particularly suited to their own understanding of their context and future. In the case of the Ogoni this how is rooted in autonomy within the state of Nigeria. Obligations are not able to address this level of context which is generally left to the discretion of the state party, as in this case were the complaint and the decision bot recommend effective and independent oversight of oil activities, but the structure of this oversight is left to the state.[155] The framework of obligations is thus week in being able to address structures of government and other relations of power.

As with the language of violations, obligations place the agency for protecting rights on the state. This again falls prey to being a possible tool for TNCs and the international community to scapegoat the state for violations that the state is weak to address. Scapegoating the state by extension dehumanizes the people and cultures of the state. The chief executive of Shell in Nigeria evidenced this passing of blame when refusing to exert pressure on behalf of the MOSOP leadership before their executions, which were clearly related to their disruption of Shell's oil exploitation, saying that Shell could not interfere with the sovereignty of the state it was operating within.[156] The state should be understood to have obligations towards protecting the rights of its people, but relying on state obligation runs the risk of letting other perpetrators, who have been advantaged against the state by racial and colonial history, of the hook. This is again a case where legal human rights language must not be allowed to become the sole communications of a social movement if it is going to pursue autonomy in the face of grievances that are largely created by non-state actors.

When a claim is made or a decision taken within the framework of the language of obligations it may be seen as a step forward. The legal claim, and more the legal decision, sets a minimum bar in relation to the claims of the social movement. While, because of the language it must be framed in, it will likely be incapable of encompassing the fullness of the goals that the movement seeks to attain it does lay a groundwork to protect a piece of the

[152] *Id.* at 1.
[153] Mutua, *supra* note 116 at 226
[154] Communication 155/96 SERAC and another V. Nigeria, Fifteenth Annual Activity Report, 6–7.
[155] *Id.* at 14.; SERAC and CESR, Communication 12.
[156] Okonto, and Douglas, Oronto, *supra* note 3 at 157

goals sought. This minimum, can also be understood as a danger to the achievement of movement goals. This danger comes in the sense that an expressed minimum has the possibility of becoming the standard, because it has been articulated by an international body, instead of a minimum if consistent local pressure is not applied to move towards fuller goals. This is yet another argument that international fora should not be used outside the context of an ongoing local movement,

To show this double sided advantage/danger of having a threshold set we will look at the example of environmental impact of oil exploitation.[157]The Ogoni Bill of Rights called for " the right to protect the Ogoni environment and ecology from further degradation."[158] After their argument that the state of Nigeria ad violated the right to environment the complainants in the SERAC case translated this demand to the last three recommendations of the complaint:

> 8. ensure that appropriate environmental and social impact statements are prepared for any future oil development;
> 9. ensure the safe operation of any further oil development through effective and independent oversight bodies for the petroleum industry;
> 10. provide information on health and environmental risks and meaningful access to regulatory and decision-making bodies to communities likely to be affected by oil operations. [159]

The Commission, in its communication on the case, followed the NGOs in finding Nigeria in violation of the right to environment and followed their recommendations for what redress the state was obligated to closely, combining them into two of the recommendations it made:

> -Ensuring that appropriate environmental and social impact assessments are prepared for any future oil development and tat safe operation of any further oil development is guaranteed through effective and independent oversight bodies for the petroleum industry; and
> -Providing information on health and environmental risks and meaningful access to regulatory decision-making bodies to communities likely to be affected by oil operations.[160]

Though this finding must be considered a victory for the complaint, as it got the ruling it asked for, this level of obligation is not the right of the Ogoni to protect their environment that they put forward in their claims to autonomy. The right to information on the environmental and social effects of a project gives more knowledge for the people to know whether or not they would want that project to take place in their territory. The right of meaningful access to decision-makers while possessing this information means that they have a better chance of having their desires fulfilled. Thus it is a step closer to the goal of autonomy than the situation without this right of access to information. If at least this much of the movements demands is not met there is a new level of leverage already accepted in international law. This leverage is meaningful to the extent that it continues to be used to push forward the cause. It requires a vigilance to take advantage of the information that is now a right and use it to block further damages from happening, demanding the information when it is not forthcoming.

This partial victory also comes with dangers to the ability of the movement to fully

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[157] Agbakwa, *supra* note 66 at 212–215.
[158] Movement for the Survival of the Ogoni People, Ogoni Bill of Rights 6 (1992)
[159] SERAC and CESR, *supra* note 12 at 11–12.
[160] Communication 155/96 SERAC and another V. Nigeria, *supra* note 2 at 14.

realize its goals. Because a standard has been set there is room for the state, or the private actors under its jurisdiction, to claim that this is *the* standard. This means that when the people continue to push for autonomy over their land and decisions regarding its use the actors that they are opposing also have an international ruling to point to with a set of obligations. They then can use the ruling to say either that if they have provided impact assessments, independent monitoring, and access to decision-makers then they may move ahead with whatever decisions made about oil production in Ogoniland with no more duties to the people. This possibility of turning the partial victory into a limitation requires an active ongoing movement that continues to push the boundaries of gains made and that does not limit its struggle to the courts even if continuing to use them as one approach.

IV. C. The Expertise Required by Dispute Settlement Language: Avoiding Creating a a Privileged Elite that is Separated from the Movement

The need to use the language of human rights legal language also plays into the continuation of the system of prebendalism created by the rentier state. The flip side of using local elites to gain access to oil is the local lawyers who make their living through their ability to use the language of law to challenge the oil companies. These lawyers are most often located in the cities, away from the base of the social movement, and charge exorbitant percentages of any claim in order to bring cases for compensation against the oil companies.[161] Thus they are not truly aligned with the Ogoni people beyond a case by case basis and continue the exploitation through taking a large share of resources that could further the movement for themselves. The broader movement allows for complaints to become a part of a whle and not just a means to enrich these disconnected lawyers.

V. Conclusion

The goal of this paper has been to examine the case of SERAC vs Nigeria in the context of the Ogoni social movement to ascertain how international law might be best utilized by similarly situated social movements and how to best avoid the limitations present in the system of international law. It has been argued that using the regional system within the context of a broad, ongoing, local social movement with a national and regional focus a that holds the state responsible while recognizing its limitations is the most appropriate approach within the confines created by racial hierarchies and the language of dispute settlement. To remove the

[161] Freynas, *supra* note 91 at 374–375.

case from the context of the Ogoni movement or to make it central to the movement would likely have lead to it limiting rather than furthering the goals of the social movement. To focus strongly on using human rights to gain support outside of the local and regional context is an unreliable focus and risks perpetuating racial hierarchies. This conclusion is a continued challenge to the international human rights movement to address it's inherent racial bias and truly become a movement that can support self-determination for all peoples, Such an evolution will require abandoning a civilizing and self-redeeming framework that is inherently racist and specifically anti-black. It is not for the peoples of Africa to wait for this transformation when there is the option of moving forward with their concerns in spite of the world system that is biased against them.

Within the current framework, the use of the regional system is optimal for an African social movement because it advances the possibility of creating an African culture of human rights. This regional culture, rooted in the the inseparability of rights expressed in the Charter, is a challenge to the western domination of the creation of human rights understandings and precedents. Using the regional system acknowledges the state by using a system explicitly rooted in the coalition of African states. This acknowledgment undercuts the likelihood of the state using an anti-colonial stance as a cover for not acting on decisions and precedents that could easily be deployed if the pressure came from outside the regional system. The choice to use the regional system also recognizes the ability of Africa to solve its own problems in opposition to any perceived need for the the world to “save” Africa, paying into the white savior archetype of western human rights activists. By using this system the SERAC case gave the space for the Commission to set precedent in developing the unified system envisioned by the African Charter, creating a model for environmental activists from elsewhere to look towards for a human rights approach to the environment. In this case the decision of the commission is a victory not only for the claimants but for the regional system and for the continent as well.

The strong connection to the ongoing local social movement is necessary. Without maintaining this connection the use of human rights language is likely to fall prey to the unreliable nature of solidarity in anti-blackness and the related un-trustworthiness of self redemption as a motivation for advancing social change. If the social movement relies on its own base to continue to push its goals it can incorporate the modest gains made in international law without having to wait for them to coincide with the current goals f other international movements or their latest feelings of responsibility. Throughout the period of this case the Ogoni people and MOSOP addressed themselves to the international community in addition to their local work. The period in which these attempts at international connection

was the most fruitful was immediately following the state murder of the Ogoni leadership, hardly the type of situation that a social movement would want to manufacture to gain attention and support.

The connection to a local social movement is also necessitated by the limitations of dispute language in addressing broad goals. Without this connection the backwards and incident specific language of disputes will limit how the goals can be articulated. In contrast, within the context of a local movement this language can serve as a stepping stone to continue to move towards the full aspirations of a people without becoming trapped in the past. Continued pressure by an organized base also allows the movement to constantly articulate that any minimum threshold is in fact the minimum to be built from and not the standard to be reached. A social movement incorporating human rights language, through its continued self-advocacy, can avoid allowing NGOs or lawyers who are geographically and culturally removed, as in the case of urban based organizations representing the rural people of the Delta or an international NGO representing Nigerians, from becoming the primary voice of the movement and can mitigate the centrality of lawyers who are involved primarily for financial gain rather than connection to the community. The Ogoni people have not stopped to the present in their push for autonomy and environmental control, not leaving any excuse for the Nigerian state, oil TNCs, or international community to consider that portion of their demands that can be fitted into the language of disputes as the full picture or final goal.

A national focus in the use of a decision or precedent is preferable for many of the same reasons as those expressed for making the claim within the regional system. Using regional precedents creatively within the state helps to create a local culture that recognizes the goals of the movement, legitimizes the state as a possible ally, undercuts the possibility of rejecting the rights claimed as a colonial intervention and avoids reliance on white saviors. A national focus also addresses the fractured reality of the state by directing itself to the actors within the state who are possible allies (for example by providing plausible legal reasoning to sympathetic judges within the independent judiciary). This use of the Commissions ruling within the state by the activist judiciary in Nigeria created the precedent to view environmental rights as enforceable human rights within the state system in the Gembre case. Because this case came years later, if the SERAC ruling had not been accompanied by ongoing local environmental struggle within the state it would likely have never been realized, showing that this local pressure must be continuous.

Holding the tension of demanding state responsibility while recognizing the limitations of the state is an important approach because, again, it enhances the possibility of creating a national culture that strengthens the concerns of the movement. Demanding state

responsibility validates the African ability to self-govern without calling for international intervention, which is rooted in a history of racial hierarchy and colonial arrogance. While not relying on calls for outside intervention which undermine the state such an approach also realizes that the movement itself needs to continue to exert pressure against the non-state actors to weaken their power vis-a-vis both the community and the state and make regulating their activities a more real possibility. In regards to a movement like that of the Ogoni people, that has from its beginnings criticized the relations of power within the state while declaring its loyalty, it allows the struggles to change the nature of state power and the relations to international markets to work together for the type of autonomy and connection that the movement envisions in the claims it makes

While the realities of the interaction of the SERAC case and the Ogoni movement suggest the necessity of rooting the use of human rights and international law in a broad, local and ongoing movement that uses precedents of the regional system creatively within the national culture, they also stand as a challenge to international law and the human rights movement. If the human rights movement desires to become universal in usefulness it must abandon the universal claims of western history and its racial/colonial structure to listen to and follow the lead of those who have been cast as not-human and in need of saving. The example of the Ogoni people and the self-organization that they have created and sustained over time to determine their own future and relation to the land that they have historically depended on invalidates any movement that would approach their struggle in condescension and superiority.

The SERAC case and the recognition from the commission that followed created a new space in international law and human rights for the enforceability of environmental rights. This expanded reasoning translated itself into the national system of Nigeria through the incorporation of the the Charter and the constitutional system in the case of Gembre vs. Shell. Through the continued work of the social movements of the Ogoni and the other peoples of the Delta these legal understandings may become more effectively incorporated in the reality of the relation between the state, its peoples and the TNCs. The challenge this raises for international rights is one of how to support the process without either attempting to interfere in the direction of the movement or co-opting the advances it makes.

Whether or not international law and the human rights movement as a whole prove themselves capable of discarding their biases and embracing the peoples and concerns that have been marginalized through the hierarchies they help to reify, the Ogoni movement illuminates the relation between international law, human rights, racial hierarchy, and social movements and may serve as one case that parallels might be drawn from to help in building a

theory and practice of social movements utilizing what is most useful and avoiding the inherent limitations of these structures