

certainty and the competition between the powers of government will be weighed up in this complex political context.

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African Court on Human and Peoples' Rights—environment—corporate accountability—human rights—business and human rights—corporate liability—corporate responsibility—African Charter on Human and Peoples' Rights

LIGUE IVORIENNE DES DROITS DE L'HOMME AND OTHERS V. COTE D'IVOIRE. App. No. 041/2016. At <https://www.african-court.org/cpmt/storage/app/uploads/public/64f/ebd/f77/64febdf77f811512395983.pdf>.

African Court on Human and Peoples' Rights, September 5, 2023.

On September 5, 2023, the African Court on Human and Peoples' Rights rendered its judgment in *Ligue Ivoirienne des Droits de l'Homme and Others v. Cote d'Ivoire* before the African Court on Human and Peoples' Rights (ACtHPR, African Court). The case was initiated due to highly toxic waste dumped at several sites in Abidjan, Ivory Coast, by the ship Probo Koala, which was chartered by Trafigura limited, one of the largest independent traders of oil and petroleum products in the world. The incident led to the death of seventeen people from toxic gas inhalation, as well as numerous health issues and serious consequences to the environment. The case went to the ACtHPR after failed efforts to secure justice through Ivory Coast's domestic courts. It is particularly noteworthy for its developments of corporate accountability for human rights violations. Indeed, this is the first decision rendered by the ACtHPR regarding the obligation of state parties relating to corporate activities.

The three plaintiffs, the organizations *Ligue Ivoirienne des Droits de l'Homme* (LIDHO), *Mouvement Ivoirien des Droits Humains* (MIDH), and International Federation for Human Rights (FIDH), alleged the violation of five principal rights by Ivory Coast (para. 16).¹ The African Court concluded that the Ivory Coast had violated all five.

First, the African Court found that the Ivory Coast violated the right to an effective remedy (para. 163). It reasoned that, given the magnitude of the disaster, "the domestic courts had the obligation to extend the scope of the investigations in order to take into account the cases of all the victims and award them the reparations as necessary"

¹ These were the right to an effective remedy (Article 7(1)(a) read in conjunction with Article 26 of the Charter; Article 2(3) of the International Covenant on Civil and Political Rights (ICCPR); Article 2(1) of the International Covenant on Economic, Social and Cultural Rights (ICESCR); Article 4(1) and 4(4)(a) of the Convention on the Ban of the Import into Africa of Hazardous Wastes and the Control of Transboundary Movements of Hazardous Wastes Within Africa (Bamako Convention)); the right to respect for life and physical and moral integrity of the person (Articles 4 of the Charter and 6(1) of the ICCPR); the right to enjoy the best attainable state of physical and mental health (Articles 16 of the Charter and 11(1), and 12(1) and (2)(b) and (d) of the ICESCR); the right of peoples to a general satisfactory environment favorable to their development (Article 24 of the Charter); and the right to information (Articles 9(1) of the Charter and 19(2) of the ICCPR).

(para. 157). It further underscored that the Ivorian government had not fully identified the victims and that its remediation operations on sites contaminated by the toxic waste were inadequate (paras. 159–61). Lastly, the ACtHPR asserted that the Ivorian government had breached its obligation to ensure the right to an effective remedy by virtue of the Memorandum of Understanding (MoU) with Trafigura, which provided for the renunciation of any future suit against the company and its agents before Ivorian courts (para. 6). The MoU not only rendered domestic remedies unavailable to victims other than those who initiated court proceedings but also prevented the prosecution and punishment of entities and individuals liable for the toxic waste dumping (paras. 156, 162), thereby shielding the company in a “regime of impunity” (para. 156).²

As there is no autonomous right to remedy under the Charter, the African Court interpreted such a right into Articles 1 (adopt legislative or other measure to implement the rights of the Charter) and 7 (right to be heard and right to appeal before national authorities for violations of their legal rights) (paras. 150–51). Indeed, it determined that the Article 1 obligation “to adopt legislative or other measures” (*id.*) to give effect to the Charter rights included the obligations to investigate, punish, and redress the human rights violations resulting from Trafigura’s wrongful act.

Second, the African Court found that the Ivory Coast violated the right to life (para. 144). It considered that the Charter requires Ivory Coast to take positive steps to protect human life from corporate activities, underlining that the right to life entails four layers of obligations on states: the duty to respect, to protect, to promote, and to implement this right (para. 131). Although all these obligations are relevant in this case, the duty to protect was particularly important. The African Court articulated what the duty to protect entails as follows:

States parties must take appropriate measures to protect persons against deprivation of life by other States, international organizations, and foreign companies operating on their territory or in other areas under their jurisdiction. They must also take legislative or other measures to ensure that any activity taking place in all or part of their territory or in other locations under their jurisdiction must be compatible with Article 4 of the Charter. Such an obligation applies to all acts having direct and reasonably foreseeable impact on the right to life of persons outside their territory, including activities carried out by companies based in their territory or under their jurisdiction. (135)

Articulating the duty to protect the right to life with Article 4 of the Convention on the Ban of the Import into Africa of Hazardous Wastes and the Control of Transboundary Movements of Hazardous Wastes Within Africa (Bamako Convention), which provides for an obligation on state parties to “take appropriate legal, administrative and other measures within the area under their jurisdiction to prohibit the import of all hazardous wastes, for any reason, into Africa from non-Contracting Parties” (para. 136), the African Court pointed out states’ obligations to take steps to prevent the importation into their territory of toxic waste whose impact on human life they should be aware of and ensure the provision of necessary measures to mitigate the harmful effects on human life if toxic waste is on their territory (para. 137). It therefore found that the Ivory Coast had failed in its obligation to protect the right to

² For more on the MoU, see paras. 6–7.

life under Article 4 of the Charter due to its failure to prevent toxic waste dumping and mitigate the adverse effects on human life.

The Court also denounced the company Trafigura, stating that it has the responsibility to uphold human rights and should therefore develop a human rights policy and continuously undertake human rights due diligence (para. 142). Echoing the jurisprudence of the African Commission on Human and Peoples' Rights (ACHPR) in *IHRDA and Others v. DRC*,³ the African Court thus extended corporate responsibility to respect human rights by referring explicitly to the United Nations Guiding Principles on Business and Human Rights (UNGP) (*id.*).⁴ However, the ACtHPR did not go so far as to hold Trafigura liable for the violation of the right to life resulting from the dumping of the toxic waste.⁵ Although it acknowledged that it is “incumbent” on companies, particularly, multinational companies, to respect international law (*id.*), it ruled that “the main responsibility for human rights violations resulting from the dumping of the toxic waste in Abidjan is, ultimately, borne by the Respondent state” (para. 143). It is therefore the Ivory Coast that failed in its obligation to ensure that the company tasked with treating waste was indeed capable of doing the job and that they took every necessary step to do it while guaranteeing the right to life (para. 139). In contrast, only indirect responsibilities toward the multinational Trafigura were recognized.⁶

Third, the ACtHPR found that the Ivory Coast violated the right to health, which encapsulates the right to the enjoyment of the best attainable standard of physical and mental health (para. 174). In clarifying its content, the African Court stated that “the right to health presupposes the existence of the following essential and interrelated elements: availability, accessibility, acceptability and quality” (para. 171). It then determined that the right to health under Article 16 of the Charter involves states' obligation to take positive measures to protect persons within their territory from infringements of the right to health by private actors, including businesses (paras. 170–71). This entails the obligation to prevent breaches of the right to health by corporations, a duty which the Ivorian government failed to fulfill, as well as the obligation to ensure affected persons full access to quality health care (para. 174). In doing so, the African Court echoed the jurisprudence of the ACHPR in *SERAC v. Nigeria*.⁷

Fourth, the ACtHPR found that the Ivory Coast violated the right to a general satisfactory environment (para. 186). In its analysis, the ACtHPR drew inspiration from, *inter alia*, the African Commission's *SERAC v. Nigeria* case to clarify states' environmental obligations under Article 24 of the Charter (para. 179). In *SERAC v. Nigeria*, the African Commission stated that: “The right to a general satisfactory environment, as guaranteed under Article 24 of the African Charter . . . imposes clear obligations upon a government. It requires the state to

³ Institute for Human Rights and Development in Africa and Others v. Democratic Republic of Congo, Decision, Afr. Comm'n. Hum. Peoples' Rts. No. 393/10 (June 2016) [hereinafter *IHRDA and Others v. DRC*].

⁴ In *IHRDA and Others v. DRC*, *supra* note 3, the African Commission neither articulated the responsibilities of corporations nor made explicit reference to UNGPs.

⁵ Solomon Dersso & Elsabé Boshoff, *Extending Human Rights Accountability for Corporate Actors in the LIDHO v. Cote d'Ivoire Case of the African Court*, EJIL:TALK! (Feb. 21, 2024), at <https://www.ejiltalk.org/extending-human-rights-accountability-for-corporate-actors-in-the-lidho-v-cote-divoire-case-of-the-african-court>.

⁶ Sfiso Nxumalo, *Beyond State Responsibility: The Trafigura Case and Corporate Accountability in Africa*, OXFORD HUM. RTS. HUB BLOG (Feb. 27, 2024), at <https://ohrh.law.ox.ac.uk/beyond-state-responsibility-the-trafigura-case-and-corporate-accountability-in-africa>.

⁷ Social and Economic Rights Action Center (SERAC) & Center for Economic and Social Rights (CESR) v. Nigeria, Decision, Afr. Comm'n. Hum. Peoples' Rts. No. 155/96 (Oct. 2001) [hereinafter *SERAC v. Nigeria*].

take reasonable and other measures to prevent pollution and ecological degradation, to promote conservation, and to secure an ecologically sustainable development and use of natural resources.”⁸ The African Court further quoted General Comment No. 14 of the United Nations Committee on Economic, Social and Cultural Rights, which defines the right to a healthy environment as “*inter alia*, the prevention and reduction of the population’s exposure to harmful substances such as radiation and harmful chemicals or other detrimental environmental conditions that directly or indirectly impact upon human health” (para. 180). Lastly, it made a reference to Article 2 of the Algiers Convention, which reads: “The contracting States shall undertake to adopt the measures necessary to ensure conservation, utilization, and development of soil, water, flora and faunal resources in accordance with scientific principles and with due regard to the best interests of the people” (para. 181).⁹

With reference to the above, the ACtHPR underscored that the Ivory Coast is required to take all necessary measures “to act not only to prevent the dumping of the waste without putting in place the necessary conditions, but also to ensure full and effective decontamination once the waste had been dumped” as a part of its obligation under Article 24 of the Charter in conjunction with its obligation under Article 2 of the Algiers Convention (para. 183). Due to its failure “to take appropriate legal, administrative and other measures to prohibit the importation of dangerous wastes on its territory” and to “effectively and promptly clean[] up the polluted sites,” the Ivory Coast was found to have violated its obligation under Article 24 of the Charter (paras. 184–86). Similar to how the human rights obligations of companies could have been further elaborated, so too could the environmental responsibilities of companies.

Finally, the African Court found that the Ivory Coast had violated the right to information under Article 9(1) of the Charter (para. 200). This was due to its failure “to provide the general public with meaningful information on the long-term consequences of the toxic waste dump, the circumstances of the dumping, the exact composition of the waste, whether it had an impact on other areas or the number of people affected,” as well as “to provide information on the health risks to which the population was exposed” (para. 198). In its interpretation of the right to information in relation with the adverse effects of the toxic waste dumping on people and the environment, the ACtHPR underlined that “before, during and after dumping, [the Ivory Coast] ha[s] a duty to provide persons affected or likely to be affected with available, accessible and practical information provided on an equal and non-discriminatory basis” (para. 193). Such an obligation entails an “obligation to make information on public health and other public affairs available to citizens” (para. 195). Moreover, the African Court stressed that the Ivorian government was required to, *inter alia*, provide, collect, evaluate, and update information, which implies to “investigate the actual and potential human rights implications of hazardous substances and waste throughout their life cycle and to provide the public and stakeholders with data on the said implications” (para. 194).

Having upheld the five violations invoked by the three organizations in this judgment, the ACtHPR then awarded reparations. In terms of pecuniary reparations, it considered that it would be appropriate to establish a compensation fund for the victims after it has consulted them, to award all of them damages on their suffered prejudice (para. 212). It also requested

⁸ *Id.*, paras. 52–53.

⁹ African Convention on the Conservation of Nature and Natural Resources, adopted Sept. 15, 1968, 14689 UNTS 3.

that moral pecuniary reparations be paid: a symbolic franc (one CFA franc per Applicant) as reparation for moral prejudice suffered (para. 221). While it denied the need for satisfaction in the form of a public apology by the Ivory Coast (para. 228), it ordered the state to ensure victims receive adequate and appropriate medical and psychological assistance (para. 239).

In its order of reparations, the Court placed emphasis on measures to be taken with respect to the corporation. Broadly speaking, it ordered the Ivory Coast to implement legislative and regulatory reforms prohibiting the import and dumping of hazardous waste in its territory in line with Bamako and other conventions (para. 245). More specifically, it required the government to carry out institutional and legal reforms entitling victims of business-related human rights abuses to hold companies civilly and criminally liable before courts (para. 246). It also ordered the government to amend its laws with the aim to ensure the responsibility of corporate entities with respect to acts relating to the environment and the handling of toxic waste (para. 247). Finally, the respondent was requested to strengthen the capacity of its civil servants of human rights and environmental protection issues through training and to include these courses in school and university curricula (para. 249).

* * * *

While obligations of state parties to the Charter to protect human rights from business activities and to investigate, prosecute, and redress corporate human rights abuses were directly and comprehensively addressed in the ACtHPR's landmark decisions in *SERAC v. Nigeria* and *IHRDA v. DRC*,¹⁰ *Ligue Ivoirienne* goes further. It specifically underpins the responsibilities of corporations to respect human rights by reference to the United Nations Guiding Principles on Business and Human Rights and its Principle 11 on corporate responsibility (para. 142). Furthermore, the ACtHPR stresses the obligation of states to impose environmental duties for companies in their national legislation (paras. 135, 245). Lastly, this judgment highlights the state's obligation to ensure adequate and effective remedies for victims of corporate-induced human rights violations. This is significant due to the structural, legal, and practical barriers relating to business human rights violations in Africa.¹¹

Despite these advancements, both judges and scholars have critiqued the African Court for not going far enough.¹² Indeed, the approach of admitting to only indirect responsibilities of *Trafigura* is likely due to the longstanding interpretation of the African Charter as regulating only state conduct.¹³ However, a broader interpretation is also possible. Unlike other universal and regional human rights instruments that exclusively attribute human rights obligations

¹⁰ *SERAC v. Nigeria*, *supra* note 7; *IHRDA and Others v. DRC*, *supra* note 3.

¹¹ Oyeniyi Abe, *The State of Business and Human Rights in Africa*, FRIEDRICH-EBERT-STIFTUNG AFRICAN UNION COOPERATION OFFICE (Aug. 2022), at https://www.researchgate.net/profile/Oyeniyi_Abe/publication/370897275_THE_STATE_OF_BUSINESS_AND_HUMAN_RIGHTS_IN_AFRICA/links/6467d23fc9802f2e72ea2023/THE-STATE-OF-BUSINESS-AND-HUMAN-RIGHTS-IN-AFRICA.pdf. See also UN Office of the High Commissioner for Human Rights, Business and Human Rights (BHR) Africa Project, at <https://www.ohchr.org/en/business/bhr-africa> (last visited Apr. 26, 2024).

¹² Dersso & Boshoff, *supra* note 5; *Ligue Ivoirienne des Droits de l'Homme (LIDHO) and Others v. Côte d'Ivoire*, para. 52 (diss. op., Tchikaya, J., Sept. 5, 2023), at <https://www.african-court.org/cpmt/storage/app/uploads/public/650/d64/473/650d644739d6f587166974.pdf>.

¹³ Anumeha Mishra, *State-Centric Approach to Human Rights: Exploring Human Obligations*, QUEBEC J. INT'L L. 49 (2020), available at https://www.persee.fr/doc/rqdi_0828-9999_2019_hos_1_1_2422; ACHPR, State Reporting Guidelines and Principles on Articles 21 and 24 of the African Charter Relating to Extractives Industries, Human Rights and the Environment, para. 56 (2021), at <https://achpr.au.int/en/node/845>.

to states, the African Charter also spells out the duties of individuals—beyond states’ obligations—in Articles 27 to 29. For example, Article 27(1) provides that every individual shall have duties toward their family and society.¹⁴ In elaborating what this means regarding the responsibilities of business entities, the African Commission has indicated that “if this obligation can be imposed on individuals, there is an even stronger moral and legal basis for attributing these obligations to corporations and companies.”¹⁵ In his dissenting opinion, Judge Blaise Tchikaya considered that this case was an opportunity for the ACtHPR to extend the positive obligations contained in the Charter to multinational companies.¹⁶ Despite this, the case law provides evidence that the ACtHPR can be a venue for victims of business-related human rights abuses. It therefore constitutes an important contribution to enhancing corporate liability for human rights abuses in Africa.

This judgment also adds to the rich jurisprudence on environmental protection within the African human rights system. Indeed, Article 24 of the African Charter, reading that “All peoples shall have the right to a general satisfactory environment favourable to their development” has led to the development of jurisprudence by both the African Commission reinforcing and clarifying this provision, and confirming the violation of other human rights provisions in the Charter. The abovementioned *SERAC v. Nigeria* before the African Commission—concerning harmful oil extraction operations by the Nigerian government and Shell in Ogoniland—is the most well-known of these as it established, *inter alia*, the obligations to respect, protect, fulfill, and promote in the context of environmental protection.¹⁷ This judgment marks the first instance in which the African Court, as opposed to the Commission, has judged on the merits with respect to Article 24.¹⁸ This case goes further than the Commission’s *SERAC v. Nigeria* decision, as it emphasizes that the right to a general satisfactory environment implies the state’s obligation to adopt measures to remedy environmental damage when it occurs (para. 183). *SERAC v. Nigeria*, in contrast, makes no explicit reference to this obligation.¹⁹

Finally, from a procedural standpoint, this case stands as another testament to the African Court’s acceptance of *actio popularis*: a “right [of a] resident in any member of a community to take legal action in vindication of a public interest.”²⁰ Indeed, the NGO applicants, who did not claim to be direct or indirect victims of the alleged violations, had *locus standi* to bring the case before the African Court as a condition of admissibility (para. 122). This fits squarely

¹⁴ African Charter on Human and Peoples’ Rights, Art. 27(1), adopted June 27, 1981, 1520 UNTS 217.

¹⁵ *Id.*, para. 56.

¹⁶ Dissenting Opinion of Judge Blaise Tchikaya, *supra* note 12, para. 52.

¹⁷ Elinor Buys & Bridget Lewis, *Environmental Protection Through European and African Human Rights Frameworks*, 26 INT’L J. HUM. RTS. 949, 951 (2022), at <https://www.tandfonline.com/doi/full/10.1080/13642987.2021.1986011?scroll=top&needAccess=true>; Centre for Minority Rights Development (Kenya) and Minority Rights Group International on Behalf of Endorois Welfare Council v. Kenya, Decision, Afr. Comm’n. Hum. Peoples’ Rts. No. 276/2003 (Nov. 2009) (emphasizing the rights of Indigenous peoples is also noteworthy).

¹⁸ The other relevant case, *Collectif des Anciens Travailleurs du Laboratoire ALS v. Republic of Mali*, Ruling, Afr. Court H. Peoples’ Rts. No. 042/2016 (Mar. 28, 2019), was deemed inadmissible.

¹⁹ *SERAC v. Nigeria*, *supra* note 7, paras. 52–53.

²⁰ *South West Africa Cases (Eth. v. S. Afr. and Liber. v. S. Afr.)*, Second Phase, 1966 ICJ Rep. 47, para. 88 (July 18); see generally JUSTINE BENDEL & YUSRA SUEDI, *PUBLIC INTEREST LITIGATION IN INTERNATIONAL LAW* (2023).

with the underlying rationale of the African Charter to guarantee not only individual but collective rights.²¹

The African human rights system is renowned for its procedural acceptance of *actio popularis*, in contradiction to its European and Inter-American counterparts.²² However, the European Court of Human Rights seemingly also accepted this practice in *Klimaseniörrinen* (April 2024), when it ruled that associations sometimes have standing in the climate context, even if those whom they represent do not fulfill the criteria for victimhood as individuals.²³ The outcome in *Klimaseniörrinen* reaffirmed what has long been known and practiced on African continent: that *actio popularis* is a potentially potent tool for environmental and climate justice before regional human rights courts.

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²¹ Stephen C. Neff, *Human Rights in Africa: Thoughts on the African Charter on Human and Peoples' Rights in the Light of Case Law from Botswana, Lesotho and Swaziland*, 33 INT'L COMP. L. Q. 331, 341 (1984).

²² Françoise Hampson, Claudia Martin & Frans Viljoen, *Inaccessible Apexes: Comparing Access to Regional Human Rights Courts and Commissions in Europe, the Americas, and Africa*, 16 INT'L J. CON. L. 161, 180 (2018).

²³ Verein Klimaseniörrinen Schweiz and Others v. Switzerland, App. No. 53600/20, para. 502 (ECtHR Apr. 9, 2024), at <https://hudoc.echr.coe.int/eng?i=001-233206>.