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Obinna James Edeh¹

ABSTRACT

Socio-economic rights were presented in domestic, Nigerian Law, in chapter II of the 1979 Constitution of Nigeria. The protection of Socio-Economic rights has been retained in subsequent constitutions and also features in the 1999 (current) Constitution of Nigeria. Of particular interest to this paper is section 6 of the 1999 Constitution (as amended) which empowers the judiciary to interpret all laws made by the legislature. However, sub section (6)(c) limits the powers of the courts to adjudicate on any matter that relates to the implementation or enforcement of socio-economic rights in Nigeria. Despite its recognition in domestic, Nigerian Law, these rights are not justiciable in Nigeria. The implication is that where socioeconomic rights such as right to education, health and housing are violated, the courts cannot entertain such matters or grant any remedy thereto. However, a series of judgments of the Court of Justice of the Economic Community of West African States ('ECJ'), the *SERAP* cases have, consistently and persuasively called on Nigeria to consider its obligation under international human rights law and to recognise the justiciability of Socio-economic rights albeit the constitutional limitation in section 6(6)(c) of the 1999 Constitution (as amended). Using a human rights approach, this paper examines one of these decisions per *SERAP v. Nigeria and Anor (2010 and 2012)* to ascertain how this developing jurisprudence has influenced judicial reasoning towards implementing socioeconomic rights in Nigeria.

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1. Introduction

Socio-economic rights are designed to protect and promote the welfare of individuals as subjects of as global citizens.² Therefore International human rights laws enjoin States to take positive measures towards respecting, providing and fulfilling those conditions that ensures the wellbeing of an individual within the state.³ In adopting this position, nation-states have codified similar provisions in domestic legislation. In Nigeria, the entire Chapter II of the constitution lays out the socio-economic rights recognized and to be protected by the Nigerian state. However, Section (6)(c) of the same constitution restrains the judiciary from entertaining questions on ‘whether any person or authority or as to whether any law or judicial decision is in conformity with the socio-economic rights therein referred to as the Fundamental Objectives and Directives Principles of State Policy and contained in Chapter II of the Constitution’. Therefore, in order to challenge the violation of socioeconomic rights in Nigeria, activist forces and private litigants seek forum at the ECOWAS Court of Justice (ECJ). The objective of this paper is to examine through the cases, the effect of the non-justiciability of socioeconomic rights in Nigerian courts and the impact of the decision of the ECJ on domestic jurisprudence since the first case was decided in 2010. Thus, the paper will analyse how litigants have harnessed the norms, processes and creative spaces made available by the ECJ to promote socio-economic rights’ enforcement in Nigeria.

This desk research, adopts the human rights method to contextualize the challenges faced in protecting socioeconomic rights in Nigeria. Furthermore, it studies the developments that has followed the decisions of the ECJ in protecting socioeconomic rights in Nigeria. The first section provides an overview of the state of the state of socioeconomic rights enforcement prior to the intervention of the ECJ, thus signposting the focus of this paper. The second section will briefly

² Waldron, Jeremy, "Socioeconomic Rights and Theories of Justice" (2010). New York University Public Law and Legal Theory Working Papers. Paper 245

³ Paragraph IV to the preamble of the International Covenant on Civil and Political Rights (ICESCR) contains a covenant by State Parties to create conditions whereby everyone may enjoy his economic, social and cultural rights, as well as his civil and political rights;



examine the jurisprudence and jurisdiction of the ECJ while the following section will study the relevant cases and pronouncements from the court. The concluding section will examine the developments around socioeconomic rights enforcement in Nigeria since these pronouncements. The objective is to determine whether there has been any progress around enforcing these genere of human rights in Nigeria. The paper will further recommend how activist forces and individuals in Nigeria can protect their socioeconomic rights despite the difficulties foisted on the courts by the constitution.

2. The Enforcement of Socio-economic Rights in Nigeria

Since the adoption of the Universal Declaration on Human Rights (UDHR), and the subsequent adoption of the International Bill of Rights, there has been not a few controversy regarding the status of the so-called second generation rights. However, it is a settled principle of law that all human rights are indivisible, inter-dependent and of course, inter-related.⁴ Therefore, all rights are designed to be equally respected, protected and promoted irrespective of generation or its categorization.⁵

In discussing the background of socioeconomic rights, Maurice noted the foundation to the welfare demands that fashioned out the Universal Declaration on Human Rights (UDHR) and the subsequent adoption of the International Covenant on Economic Social and Cultural Rights (ICESCR).⁶ Scholars agree that the struggle for the enjoyment of the right: to education, housing, adequate standard of living and quality (basic) healthcare is at the root of human rights.⁷

⁴ See the Maastricht Guidelines on Violations of Economic, Social & Cultural Rights, reprinted in 20 *Hum. Rts. Q.* 691-705 (1998); Limburg Principles on the Implementation of the International Convention on Econ. Soc. & Cultural Rights at UN. Doc, E/CN/4/1987/17; Vienna Declaration and Programme of Action (VDPA) 1993 WCHR Vienna 14-25 June, 1993; Committee on the Rights of the Child, General Comment No. 15 on the Rights of the Child to enjoy the Highest Attainable Standard of Health, 62nd session, U.N Doc. CRC/C/GC/15 (2013). Monica Feria Tinta: 'Justiciability of Economic, Social and Cultural Rights in the Inter-American System of Protection of Human Right: Beyond Traditional Paradigms and Notions' 29 *Hum. Rts. Q.* (2007) 431.

⁵ Vienna Declaration and Programme of Action (VDPA) 1993 WCHR Vienna 14-25 June, 1993.

⁶ Cranston Maurice, "What are Human Rights?" (1973) London: Bidley Head; Sadurski Wojcieck, *Rights before Courts: A Study of Constitutional Courts in Post-Communist States of Central and Eastern Europe*: Netherlands: (Springer 2008)

⁷ Langford Malcolm, Porter Bruce, Brown Rebecca and Ross Juliera, "The Optional Protocol to the International Covenant on Economic, Social and Cultural Rights: A Commentary" (2016); Pretoria University Law Press.



In Nigeria, socio-economic rights, particularly the right to education,⁸ healthcare,⁹ employment,¹⁰ shelter,¹¹ and water protection are not justiciable.¹² The classification of these types of rights as non-justiciable is not exclusive to Nigeria. In the countries where such categorizations exist,¹³ these rights are placed as ‘fundamental objectives’ and ‘directives principles’ devoid of enforcement mechanisms.

Interestingly, Nigeria is a State Party has committed itself to respect the fundamental principles of socioeconomic rights which it has acceded. Thus, one wonders whether commitment to international law does not translate to an obligation to strictly apply the norms at the domestic level. According to *Neumayer*, a commitment to international human rights law should lead to improved respect for human rights, primarily with democratically accountable governments and strong civil society.¹⁴ Therefore, the ratification of these treaties equally provides civil society organizations with the platform to mobilize and push for the protection and promotion of these rights.¹⁵ On other hand, Ozekhome & Kachikwu, argue that socio-economic rights belong to the realm of political party manifestoes and thus, have nothing to do with the Constitution and justiciability.¹⁶ They contend that a document as serious as the Constitution should not contain pious declarations which are ultimately unenforceable.¹⁷ Ojo, adds that, the non justiciability of socio-economic rights has

⁸ Section 18 of the Nigerian 1999 Constitution (as amended)

⁹ Section 17 (3) (d) *ibid*

¹⁰ Section 17 (3)

¹¹ Section 16 (2) *ibid*

¹² The position of the government hinges on the fact that these rights are aspirations which depend on the availability of resources. However, academics puncture this opinion and insist that a socioeconomic right is the foundation of social justice which is the major of the social contract between the Nigerian people and their government. See: Joshua Alabi, ‘The Dynamics of Oil and Fiscal Federalism: Challenges to Governance and Development in Nigeria *University of Leeds* (2010); Rhuks Ako, ‘Environmental Justice in Developing Countries: Perspectives from Africa and Asia-Pacific (2013); New York: Rutledge

¹³ For instance, India

¹⁴ E. Neumayer: ‘Do international human rights treaties improve respect for human rights?’ 49(6), *Journal of conflict resolution* (2005) pp; 925-953

¹⁵ Emile M. Hafner-Burton & Kiyoteru Tsutsui: ‘Human Rights in a Globalizing World: The Paradox of Empty Promises (2005); *American Journal of Sociology* Vol. 110 (5); pp. 1373-1411

¹⁶ Ozekhome & Kachikwu: ‘Extending the Frontiers of Constitutionalism: Should Constitutions Contain Legal Rules *Stricto Sensu?*’ *I*(1979-1988) 3 *Nig. J.R* 86.

¹⁷ *Ibid*



reduced the contents within the Constitution to mere moral adjurations and admonitions which should not have a place in a federal Constitution.¹⁸

However, another school of thought believes that the socio-economic rights should be part of the Constitution just as the civil and political rights., *Nwabueze* posited that a Constitution that imposes enforceable restraints upon the state should not jettison its function of affirming the fundamental objectives-which themselves serve to inform and inspire governmental relations along desirable lines.¹⁹ This paper adopts this same position because; placing socioeconomic rights outside the constitution could banish them as thus, making it more difficult to create the needed awareness for its justiciability. Furthermore, this paper shares the view advanced by *Nwabueze* that the promotion and protection of socio-economic rights ought to inform every government decision because free education, good health, safe environment are fundamental to the legitimacy and stability of the state. It is at the basis of a social contract and should direct objectives of a democratic government. The position is supported by General Comment No. 11 of the ICESR- which restated that a State Party cannot escape her obligations owing to lack of funds. In the event where the resources are clearly unavailable, the state receives assistance from the international community through the official development assistance.²⁰ Therefore, the ECJ in line of cases on this subject (discussed below) that Nigeria has no reason to evade her obligation to protect socioeconomic rights of citizens.

3. The ECOWAS Court of Justice

The Protocol establishing the ECOWAS Court as a permanent institution authorized it to decide on the interpretation and application of Community legal instruments and proceedings instituted by a

¹⁸ According to *Abiola Ojo*, most of the socio-economic rights provided for in the second chapter of the Nigerian Constitution are in the realm of political manifestoes should not be found in the constitution nor should it be justiciable. See *Ojo A.O: "The Objectives and Directives must be expunged"* in *Ofonogoro (ed), The Great Debate – Nigeria's Viewpoint on the Draft Constitution (Lagos: Daily Times, 1977) p.47*

¹⁹ *B. O Nwabueze* . "Fundamental Objectives and Directive Principles of State Policy: Its Nature and Functions, in *Ofonogoro, et.al. op cit: p. 49*

²⁰ General Comments No. 11: Plans of Action for Primary Education (Article 14 of the Covenant) adopted 10th May, 1999. See also Article 2 of the International Covenant on Economic, Social and Cultural Rights which provides that: Each State Party to the present Convention undertakes to take steps individually and through international assistance and co-operation, especially economic and technical, to the maximum available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant by all appropriate means, including particularly the adoption of legislative measures.



member state on behalf of her nations or institutions of the Community.²¹ *McAllister* believes that the timing of the court's inauguration coincided with the period when there was a global need to protect the interests (and rights) of the poor through a sub-regional court system.²² Access to the court is open to member states for actions brought for failure of other states to fulfill their obligations. The court is also open to the Council of Ministers and the Commission, for the determination of the legality of an action in relation to the community text. Furthermore, the Court is open to individuals and corporate bodies complaining about the violation of their rights.²³

One of the innovative features of the ECJ is the non-inclusion of the requirement to exhaust local remedies before approaching the court.²⁴ The effect is that complaints can be filed directly to the Court at first instance.²⁵ Furthermore, matters can also move from national courts to the ECOWAS Court without the need to go through the string of appellate processes. But against the background of this "wide access" is the obtruding question as to concurrence of this procedure to established international law and practice. This concern stems from the popular narrative that the requirement to exhaust domestic remedies as an aspect of international law jurisprudence is a customary international law. Some critics of the ECOWAS Court system hold the position that the Court is bound by the 'exhaustion of local remedy notwithstanding that its constitutive charter is silent on this requirement.²⁶ Following the same argument, Ebobrah warned that a complete negation of this requirement could engender unhealthy conflicts and rivalries between the national courts and the ECOWAS Court.²⁷

The International Court of Justice (ICJ) has in cases brought before it maintained that domestic remedies under the law of the respondent state must be exhausted by an individual before the individual's state of nationality can maintain a suit on the individual's behalf at the international

²¹ See Article 9 (2) of the ECOWAS Protocol, 1991.

²² R. McAllister, Karen Alter and Laurence Helfer: A New International Human Rights Court for West Africa: the ECOWAS Community Court of Justice: 104(4) *American Journal of International Law*; (2013)

²³ See article 4 of the 2005 Supplementary Protocol

²⁴ Enabulele, Amos O. "Sailing Against the Tide: Exhaustion of Domestic Remedies and the ECOWAS Community Court of Justice (2012) *Journal of African Law*, Vol. 56(2); 268-295

²⁵The 2005 Supplementary Protocol A/SP.01/01/5 of 19 January 2005 which amended the 1991 Protocol ensured that such obstacles were not placed in the way of litigants

²⁶ Ibid

²⁷ S. T. Ebobrah, "Critical Issues in the Human Rights Mandate of the ECOWAS Court of Justice; 54(1) *Journal of African Law*; (2010) PP: 1-25.



level.²⁸ Thus, where a state is suing another on behalf of her citizen(s), international law prescribes that the individual/or applicant state must exhaust all internal remedies in the respondent state before it can approach an international court/tribunal.²⁹ The purpose is to give primacy to the court of the municipal state and also to ensure there is no conflict between the two courts. This rule shall apply except where the applicant does not have any direct relationship with the legal system of the defendant state. In this case, it would be unconscionable to expect the hapless applicant to exhaust domestic remedies.³⁰

However, the ECOWAS Court, citing the supplementary protocol A/SP.01/01/5 of 2005 maintain the position that the principle is not applicable to it. This is because the law is completely silent on this issue thereby giving the Court the opportunity to receive cases even at first instance.³¹ Some authors argue that despite the silence of the 2005 supplementary protocol in this regard, the exhaustion of domestic remedies is an established principle of both customary international law and treaties.³² In the *Hajatou case*, defence counsel argued that since Article 4 of the Revised ECOWAS Treaty enjoins member states to adhere to the human rights declarations as enshrined in the African Charter, the provisions of the Charter which provided for the exhaustion of domestic remedies must apply and be recognized by the court. In rejecting this submission, the Court insisted there is nothing to show from Article 4 (g) that the Court's modalities for the protection and promotion of human rights should be those provided for by the Charter.³³ Rather, it held that the exhaustion of domestic remedies rule mentioned in Article 50 of the African Charter has no relevance in cases brought under the purview of the 2005 Protocol which introduced the new Article 10(d) into the Protocol of the Community Court of Justice.³⁴

²⁸ *Switzerland v. United States of America*, ICJ rep 1959, 6

²⁹ *ibid*

³⁰ See the dictum of the ICJ in *Israel v. Bulgaria* (preliminary objections) ICJ Reps 1998, 275 at 303

³¹ H. Duffy "Hadijatou Mani Koroua v. Niger: Slavery Unveiled by the ECOWAS Court (2009), 9 (1) *Human Rights Law Review*, pp: 151-170

³² See Enabulele: *supra*

³³ *Hadijatou Mani Joraou v. The Republic of Niger*: Application No: ECW/CCJ/APP/08/08 delivered on 27 October, 2008

³⁴ Article 4 of the 2005 Supplementary Protocol amended the previously existing Article 10 by introducing a sub (d). The provision is to the effect that Access to the Court shall be open to: (d) individuals on the condition that the application is not anonymous and that *the same matter is not before another international judicial body for adjudication* (emphasis added).



Since the formation or formalization of the Court, experts have assessed the potential of the Court to meet the human rights demands from the community members. *Okafor*³⁵ examined the importance of regional and sub-regional court systems as platforms for the enforcement of human rights by non state actors. He alluded that the pressure from activist forces and the boldness of these courts have the potential to positively change the narrative on the enforcement of human rights in Africa.³⁶ Indeed, civil society organizations have been in the forefront of efforts to hold government to account for the promotion of human rights in Nigeria. This position is supported by *Viljoen*³⁷ and *Murray*³⁸ who examined and reaffirmed the indispensable role of domestic actors towards promoting international human rights at national and sub-national levels. The liberalization of the rules relating to *locus standi* and the negation of the requirement to exhaust internal remedies have made the ECOWAS Court attractive to non-state actors wishing to enforce socio-economic rights of the citizens.

4. Review of cases from the ECOWAS Court

This section of the research reviews the position of the ECJ relating to the enforceability of socioeconomic rights in Nigeria. In analyzing these cases, the section offers insight into the jurisprudence of the ECOWAS Court and the norms established in relation to these cases. The materials for these analyses are sourced from law reports, the Revised Treaty of the ECOWAS, court records, as well as the supplementary protocol. The analyses of the case examines how the court approached the issue of jurisdiction, justiciability, the interpretation of regional and international human rights instruments in relation to domestic legislation and practice in Nigeria and the award of compensation.

A) SERAP V. NIGERIA & ANOR 2010

The Socio-economic Rights and Advancement Project (SERAP) instituted this public interest litigation following an enquiry they independently conducted into the activities of the Universal

³⁵ Obiora C. Okafor: *The African Human Rights System, Activist Forces and International Institutions* (Cambridge: CUP, 2007).

³⁶ Ibid. See generally, chapter 4.

³⁷ F. Viljoen, 'Exploring the Theory and Practice of the Relationship between International Human Rights Law and Domestic Actors', 22 *Leiden Journal of International Law*, (2009) 1

³⁸ R. Murray: *The role of national human rights at the international and regional levels: The experience of Africa* (Bloomsbury Publishing 2000);



Basic Education Commission (UBEC).³⁹ At the end of the investigation, several fiscal irregularities were identified within the Commission. SERAP submitted their findings to Nigeria's anti-corruption watchdog⁴⁰ which conducted a further investigation based on the lead provided by *SERAP*.

In line with her mode of operation, the Anticorruption Commission produced a report alleging grand corruption with the particulars showing embezzlements, contract splitting and racketeering, misappropriation and mismanagement of funds contributed by the Federal Government of Nigeria and the federating units. The funds were earmarked for the payment of teachers and improvement of primary education across public schools in Nigeria. In other to interrogate the violation of rights resulting from this sleaze, *SERAP* insisted that several socio-economic rights have been violated and need to be remediated.⁴¹ The civil society organization initially took Nigeria and the UBEC before the Court for breaching several articles of the African Charter on Human and Peoples Right.⁴² *SERAP* told the court that as a consequence of this grand corruption, over five million children were out of school and a lot more are without education and in sub-human conditions.⁴³ Relying on Article 4(g) of the Revised Treaty of ECOWAS and the extant provisions of the African Charter⁴⁴ to challenge Nigeria's alleged violation of education; they made the case that the right to education envisaged within the African Charter will only be fulfilled when the right to economic

³⁹ Created by the Free Universal Basic Education Act (2004), the agency is charged with coordinating the assistance of the Federal Government to the States and Local Governments in Primary Education across Nigeria. The Commission is charged with ensuring the smooth operation of the Free and Compulsory Education Scheme launched by the government of Nigeria in 1999. They are also responsible for reducing drop-out, improving the quality and efficiency of basic education. Section 9 of the Compulsory, Free Universal Basic Education Act, 2004

⁴⁰ The Independent Corrupt Practices and Other Related Offences Commission was inaugurated on 29 September 2000. It owes its existence to the Corrupt Practices and Other Related Offences Act 2000. The Act seeks to prohibit and prescribe punishment for corrupt practices and other related offence. It vests the Commission with the responsibilities to investigate and prosecute offenders thereof.

⁴¹ These rights include; right to quality education, right to human dignity, right of peoples to their wealth and natural resources, and the right to socioeconomic development. *SERAP v. Nigeria & Anor* ECW/CCJ/JUD/07/10.

⁴² Articles 1,2,17, 21 and 22

⁴³ On July 25, 2017, the British Broadcasting Corporation reported that Nigeria has the highest number of out-of-school children around the world. At the time of the report, about 10.5 million children of school-age were out of school. Source: BBC News: <https://www.bbc.com/news/world-africa-40715305> (25 July, 2017). At the time of this research, the situation has not changed as UNICEF reported that despite the increase in enrollment, Nigeria with 10.5 million out of school children ranks highest across the globe. Majority of these persons reside in the northern part of the country. <https://www.unicef.org/nigeria/education.html> (accessed, 11/6/2018)

⁴⁴ Article 17 of the African Charter on Human and Peoples Rights (ACHPR) provides that every individual shall have the right to education. Article 11 of the African Charter on the Welfare of the Child equally provides that every child shall have the right to education.



and social development is protected. In sum, *SERAP* prayed the court to make six (6) orders geared towards compelling the Nigerian government to recognize the right to education, fund UBEC and implement the report of the Anti Corruption Commission.

The Court granted two (2) of the prayers while dismissing the remaining four prayers. In recognizing the right to education as an enforceable right despite its non-justiciability under the Nigerian Constitution, the Court held that *every Nigerian child is entitled to free and compulsory basic education*. It dismissed the statement of Nigeria which indicated that the right to education was not justiciable in the country. *According to the court, since Nigeria has ratified the African Charter on Human and Peoples Rights and the International Covenant on Economic, Social and Cultural Rights, the country is bound by the provisions therein, and thus, the right to education shall be justiciable in relation to Nigeria. On the embezzlement of funds for basic education, the court held as follows:*

“We have earlier referred to the fact that embezzlement or theft of part of the funds allocated to the basic education sector will have a negative impact; this is to be expected as shortage of funds will affect the sector from performing as envisaged by those who approved the budget. Therefore, while steps are to be taken to recover the funds or prosecute the suspects as the case may be, it is in order that the first defendant (Nigeria) should take the necessary steps to provide the money to cover the shortfall to ensure a smooth implementation of the education programme, lest a section of the people should be denied a right to education.”⁴⁵

The judgment marked the first time the Nigerian government was taken to a sub-regional court and held responsible for neglecting to respect and fulfill the right to basic education of Nigerians. The ECOWAS Court in an unprecedented move dismissed the defence of non-justiciability of the right to basic education. Thus, the Court affirmed the justiciability of socio-economic rights in Nigeria and across the sub-region. In establishing a progressive jurisprudence, the judges reaffirmed that Nigeria was under obligation under the International Human Rights Law to promote, respect and fulfill the right to education of every Nigerian; this is notwithstanding the non-justiciability provisions in the Constitution. Furthermore, it viewed as unfortunate, the action of the Nigerian government to ignore an investigative report into a massive corruption in the Universal Basic

⁴⁵ See para 26, 28 of the Judgment



Education. According to the Court, such anomaly amounted to Nigeria's neglect of her international and domestic responsibility. Thus, to reiterate, the Court restated that Nigeria can no longer rely on domestic legislations to divest herself of her socio-economic responsibility.⁴⁶

B) SERAP V. NIGERIA & 8 ORS 2012

The case which was instituted in 2009 named the Nigerian government and seven oil giants operating in the Niger Delta region of Nigeria as the co-defendants. In the papers it filed with the Court, *SERAP* alleged that on 28 August 2008, the Trans-Niger pipeline developed a fault which resulted in a significant oil spill in the Bodo Creek, situated in Ogoni Land, South of Nigeria. The oil seeped into the swamp around the creeks for weeks, covering the area in a thick slick of oil, damaging the aquatic habitat, killing the fishes and thus, endangering the economic mainstay of the people. Video evidence presented by the organization indicated widespread damage, both on the ground and in the sea. The burst pipeline belonged to the Shell Petroleum Development Company (SPDC). The company admitted that the spill was reported over a month before it took any action to shut the flow. As a result of the delay, the oil caught fire and damaged the properties of over 42 communities. The water supply system was contaminated leading to health problems particularly respiratory infection. The poorest of the people numbering over 100 who could not find alternative shelter remained homeless. Majority of the people lost their means of livelihoods and had to contend with extreme hunger occasioned by the environmental damage.

In its prayer, *SERAP* asked the Court to declare that the people of the Niger Delta are entitled to environmental protection and socioeconomic development; to also declare that the systematic denial of access to information to the people of the Niger Delta is a violation of the ACHPR, the ICCPR, and the ICESCR; that the complicity of the Nigerian government with the companies is a violation of International Human Rights Law. The organization therefore asked the Court to direct the defendants to protect and respect the environmental and socioeconomic rights of the people. They also sought a complete clean-up of the place and a monetary compensation of 1 Billion Dollars (USD) to the victims of the human rights violation in the communities of Niger Delta.

In their response, the defendants raised three objections challenging the locus *standi* of *SERAP* to institute the action, jurisdiction of the court to hear the action, and the fact that the case was already status barred. Dismissing the objection of the Nigerian government, the Court held Nigeria to be in breach of several human rights instruments particularly, the International Covenant on Civil and

⁴⁶ Para 26, 28 of the judgment



Political Rights, the International Covenant on Economic, Social and Cultural Rights as well as the Universal Declaration on Human Rights. According to the Court, international human rights instruments which the Member States are parties are applicable within the Court, for the Court to decide matters before it. Even though ECOWAS does not have a specific human rights instrument, the Court in exercising her mandate would adopt and apply international and regional human rights instruments adopted and ratified by States Parties. The Court noted that a Member State that accepts the Protocol setting up the Court have also agreed to be bound by the human rights instruments applicable within the court. Furthermore, that attestation to the protocol implies recognition of a state or individual to have recourse to the court to enforce the rights stated in International Human Rights Law.

The Court noted that it has already dealt with the issue of *locus standi* in the *SERAP V. UBEC* case, and thus referred the parties to its conclusions on this issue. Furthermore, on the issue of limitation of time, the Court held that there is nowhere in the Protocol where it is stated there is a three year time frame to bring an action before the Court. However, the complaints that occurred prior to 2005 (when the supplementary protocol was adopted) cannot be considered by the Court, because the Protocol will not apply retroactively. The Court distinguished the present case (which occurred persistently) with isolated human rights violations. It declared that in a case of persistent violations, the law of limitation would only apply upon the cessation of the unlawful conduct or omission.

In the opinion of the court, the Nigerian government has a duty to ensure that the activities conducted within the country do not, in any way cause damage to the environment and to the people. Thus, by virtue of Article 1⁴⁷ and 24⁴⁸ of the ACHPR, and the decision of the International Court of Justice in the *Legality of Threat or Use of Nuclear Weapons*, Advisory Opinion,⁴⁹ the

⁴⁷ It provides that the Member States of the Organization of African Unity (now, African Union) parties to the present Charter shall recognize the rights, duties and freedoms enshrined in this Charter and shall undertake to adopt legislative or other measures to give effect to them.

⁴⁸ “All peoples shall have the right to a general satisfactory environment favorable to their development.

⁴⁹ *Legality of the Threat or Use of Nuclear Weapons Advisory Opinion*, I.C.J Reports, 1996, p. 226, International Court of Justice (ICJ), 8 July 1996, full report available at: <https://www.icj-cij.org/files/case-related/95/095-19960708-ADV-01-00-EN.pdf> (Accessed November 8, 2018). Relevant facts: By a letter dated 19 December 1994, filed in the Registry of the ICJ on 6 January 1995, the Secretary-General of the United Nations officially communicated to the Registry a decision taken by the General Assembly, by its resolution 49/75 K adopted on 15 December 1994, to submit to the Court for advisory opinion, the following question: “Is the threat or use of nuclear weapons in any circumstance permitted under international law?” The Court used the opportunity to lay emphasis on two cardinal principles: (a) States must never make civilians the object of attack and must consequently never use weapons that are incapable of



omission of the Nigerian government to prevent the brazen destruction of the environment in the Niger Delta or hold the companies accountable is a violation of her obligations under international human rights law.

5. Summary and conclusion

The cases and the decisions discussed in the previous section highlight the successes and the prospects offered by the ECOWAS Court towards the enforcement of socio-economic rights in Nigeria and West Africa. In the first case discussed, the Court held the Nigerian government responsible for neglecting her responsibility towards providing quality primary education to the people. It dismissed the objection of the government as to the non-justiciability of these rights, thus, reaffirming the justiciability of socio-economic rights in particular the right to education. This is the first time that a Court would hold that education is an enforceable right at the sub-regional level. In the second case, the Nigerian government was held responsible for not doing enough to protect the environment and economic mainstay of her people. According to the Court, the environment is a living space, and represents the quality of life and the health of all human beings including the unborn. Therefore, rights of the people to all constituents of good health-particularly clean environment as their source of food and income must be protected by the government. In the third and final case reviewed, the Court awarded equitable compensations to victims of arbitrary eviction leading to loss of job or employment. According to the Court, the action of the State is a violation of the socio-economic right to work guaranteed by regional and international human rights instruments. Also, in recognizing the pursuits and struggles of the civil society organizations towards advancing human rights in the sub-region, it affirmed the position of *Okafor* that civil society organizations are making great efforts towards facilitating human rights awareness and advancing the reliance on human rights norms both at the level of the African Commission, the ECOWAS Court and within Nigeria.⁵⁰ There is no doubt that if this tempo is maintained, Nigeria would in a short time remove the limitations placed on the justiciability of socio-economic rights.⁵¹

distinguishing between civilian and military targets; (b) unnecessary suffering should not be caused to combatants. Summary report available at: <https://www.icj-cij.org/en/case/95> (accessed on November 8, 2018)

⁵⁰ Obiora Okafor, *The African Human Rights System, Activist Forces and International Institutions* (Cambridge: CUP, 2007) at 263

⁵¹ Professor Okafor identified eight conditions which must be fulfilled towards ensuring that the African system realizes its capacity to shape the trans-judicial communications and self-understanding within domestic institutions. The conditions are as follows: a) strong and dynamic activist forces with interest to function at the domestic level; b) constant engagement with the African System and participation in the work of the African Commission (c) a reasonably



It cannot be gainsaid that the presence or absence of corruption is a critical determinant to the extent to which socio-economic rights and general development goals are realizable within a particular jurisdiction.⁵² Bearing these factors in mind, the ECOWAS Court commendably continues to offer the platform for the enforcement of socio-economic rights in Nigeria. Considering the rising corruption and growing poverty, there is no better time for local courts to hold government accountable to ensure the welfare of the citizens of Nigeria and West Africa. The courts can leverage on the decisions of the ECOWAS Court or on the gaps created by the Nigerian Constitution. For instance, section 12 of the Constitution provides that all international instruments domesticated by the National Assembly become part of Nigeria's *corpus juris*. Relying on this, the courts have the opportunity to start with the provisions of African Charter on Human and Peoples Rights which by virtue of its domestication⁵³ is part of Nigerian laws.

Furthermore, item 60(a) of the exclusive legislative list within the Constitution empowers the National Assembly to make laws to promote and enforce the observance of the socio-economic rights contained in Chapter II of the Constitution. The implication according to *Nnamuchi*, is that the National Assembly is empowered to unshackle the Courts from the stranglehold of Section 6 (6)(c) which ousted the jurisdiction of the Courts from enforcing socio-economic rights in Nigeria.⁵⁴ Indeed, the enactment of the National Health Act testifies to the fact that with the political will, socio-economic rights could become justiciable in Nigeria,⁵⁵ despite the non-

activist and independent judiciary; (d) some window of political dissent must exist within the country; (e) African Charter must form part of the domestic laws of the country; (f) the African Commission must actively identify the human rights struggle that rage within the country; (g) the African Commission must be seen to be closer to the people and speak the language of human dignity. (h) the African system and the civil society organizations must drive its domestic impact to pay more attention to Economic, Social and Cultural Rights and ensure a conducive atmosphere for the enjoyment of and enforcement of these rights. Obiora Okafor: *The African Human Rights System, Activist Forces and International Institutions*; (Cambridge; CUP 2007) at 270.

⁵² Obiajulu Nnamuchi: 'Kleptocracy and its Many Faces: The Challenges of Justiciability of the Right of Health Care in Nigeria (2008), *Journal of African Law*, Vol. 52 (1) 1-42

⁵³ The Charter has been domesticated via the African Charter on Human and Peoples Rights (Enforcement and Ratification) Act 1983

⁵⁴ O. Nnamuchi: 'Securing the Right to Health in Nigeria under the Framework of the National Health Act', *First Public Lecture of the National Open University of Nigeria*, 16 June, 2017; pp 19

⁵⁵ The National Health Act was passed in 2014; and this became the first time a law would be promulgated to create a Health System that would protect, promote and fulfill the rights of the people of Nigeria to have access to health (see Section 1 (e) of the Act. Basking on the euphoria of this success, the Nigerian Senate invited the public for a public hearing on the Bill to enact the National Health Insurance Commission Act. However, in written memoranda submitted by the Federal Ministry of Justice, the Senate was warned that once the laws become operational, Nigerians would be able to demand their right to health from the government as the law would make the right to health enforceable. Citing



justiciability provisions in the Constitution.⁵⁶ This position has been successfully tested in Nigerian courts.

In *LEDAP v. Federal Ministry of Education & Anor*, Nigeria's Federal High Court, for the first time, relying on the jurisprudence from the ECOWAS Court declared that every Nigerian child has a constitutional right to free and compulsory primary education.⁵⁷ The Court held that the non-justiciability of the right to education has been superseded by the action of the National Assembly in promulgating the Compulsory, Free Universal Basic Education Act (2004).⁵⁸ Clearly, the plaintiff rode on the success of the *SERAP V. UBEC* case earlier discussed to move the Court to hold that the socio-economic right to education (albeit at the basic level) is enforceable in domestic Courts.

the case of *SERAP v. UBEC* (on the right to education), the memoranda asked the Senate to beware in passing the law as it would institutionalize a national health insurance scheme thereby foisting on the government the same results from the *SERAP v. UBEC* case. (Source: Federal Ministry of Justice, "Draft Memorandum to the Senate of the Federal Republic of Nigeria: Committee on Health" (12 March, 2017) 6

⁵⁶ The Nigerian courts have variously held, in supporting this position that where the National Assembly makes an Act in relation to a matter within the non-justiciable sections of the Constitutions, such enactment would activate the section and automatically make it justiciable. See: *Olafisoye v. Federal Republic of Nigeria* (2004) 4 NWLR (Pt. 864) 580. *Attorney General of Ondo State v. Attorney General of the Federation* (2002) 9 NWLR (Pt. 772) 222

⁵⁷ Suit No: FHC/ABJ/CS/978/15 (2017)

⁵⁸ Section 18(3) of the 1999 Constitution proves that the Government shall strive to eradicate illiteracy, and to this end, Government as and when practicable shall provide (a) Free, compulsory and universal primary education, (b) free secondary education, (c) free university education and (d) free adult literacy education. Section 2(1) and 3(1) of the Free Universal Basic Education Act, 2004, the right to free universal primary education and free junior secondary education for every Nigerian child is guaranteed. Although Section 18 of the Constitution falls within the non-justiciable provisions, it has become justiciable by the combined effects of sections 2 and 3 of the Compulsory, Free Universal Basic Education Act, 2004.