

**THE ECOWAS COURT, ACTIVIST FORCES, AND THE PURSUIT OF  
ENVIRONMENTAL AND SOCIOECONOMIC JUSTICE IN NIGERIA**

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## ABSTRACT

The thesis has two objectives. The first (and central) objective is to examine the Community Court of Justice of the Economic Community of West African States, or ECOWAS Court (a sub-regional international court in West Africa), and its role within the West African region, especially how the Court has served as a resource for the Activist Forces that operate in the sub-region, in their pursuit of Environmental and Socioeconomic Justice in Nigeria. The second goal of this thesis, which is ancillary to the first, is to investigate the Court's jurisprudence in three landmark cases: *SERAP v. Nigeria & Anor (2010)*; *SERAP v. Nigeria & 8 Ors (2012)*; and *SERAP & 10 Ors v. Nigeria & 4 Ors (2014)*. The purpose of these case studies is to advance the first thesis objective by analyzing how the ECOWAS Court has advanced the justiciability of environmental and socioeconomic rights despite domestic limitations. This is significant for poor and marginalized populations e.g. those in the Niger Delta region of Nigeria where natural resource extraction has for decades been largely unfavorable to the wellbeing and development of the people. This thesis contributes to the legal literature on human rights systems in Africa by analyzing how the norms, processes and creative spaces made available by the ECOWAS Court has contributed to the struggles waged by local activist forces in Nigeria. In the process of developing this analysis, it deploys theories propounded by several quasi-constructivists, particularly *Okafor's* theory of "correspondence", a unique model for estimating the extent of the "internalization" of human rights norms without abandoning the regular "compliance" model for assessing the fulfillment by states of their international human rights law obligations.

## **DEDICATION**

To my father, Chief Obiorah “Nnayelugo” Effoduh, for his love and encouragement.

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## LIST OF ABBREVIATIONS

|         |  |
|---------|--|
| ACHPR   | African Charter on Human and Peoples Rights, 1981                                |
| AFRILAW | African Law Foundation   |
| APP     | Application  |
| AU      | African Union  |
| CASADE  | Council on African Security and Development                                      |
| CCJ     | Community Court of Justice   |
| CCR     | Center for Constitutional Rights   |
| CDHRDA  | Centre for Defence of Human Rights and Democracy in Africa                       |
| CEDAW   | Convention on the Elimination of All Forms of Discrimination against Women, 1979 |
| CESCR   | UN Committee for Economic Social and Cultural Rights                             |
| CESR    | Center for Economic and Social Rights  |
| CRC     | Convention on the Rights of the Child, 1989                                      |
| CREDC   | Community Research and Development Centre Nigeria                                |
| CSA     | Civil Society Actors   |
| ECOMOG  | ECOWAS Monitoring Group  |
| ECOWAS  | Economic Community of West African States  |
| ECOSOC  | United Nations Economic and Social Council                                       |
| ECW     | ECOWAS   |
| EIA     | Environmental Impact Assessment  |
| EFCC    | Economic and Financial Crimes Commission   |
| EPA     | Environmental Protection Agency (of the U.S.)                                    |
| ESJ     | Environmental and Socioeconomic Justice  |
| EurSJ   | European Scientific Journal  |
| FCPA    | Foreign Corrupt Practices Act (of the U.S.)                                      |
| FEPA    | Federal Environmental Protection Agency  |
| FME     | Federal Ministry of Environment  |
| FPIC    | Free, Prior and Informed Consent   |
| GMO     | Genetically Modified Organisms   |

|        |   |
|--------|---|
| HOMEF  | Health of Mother Earth Foundation                                   |
| HRC    | Human Rights Council  |
| HYREP  | Hydrocarbon Pollution Restoration Project                           |
| ICCPR  | International Covenant on Civil and Political Rights, 1966          |
| ICESCR | International Covenant on Economic Social and Cultural Rights, 1966 |
| ICJ    | International Court of Justice                                      |
| ICPC   | Independent Corrupt Practices and Other Related Offences Commission |
| IHIs   | International Human Rights Institutions                             |
| IHRL   | International Human Rights Law                                      |
| IMF    | International Monetary Fund   |
| IR     | International Relations   |
| JSC    | Justice of the Supreme Court  |
| JUD    | Judgement   |
| MOSOP  | Movement for the Survival of the Ogoni People                       |
| NAACP  | National Association for the Advancement of Colored People          |
| NAFTA  | North American Free Trade Agreement                                 |
| NBMA   | National Biosafety Management Agency, 2015                          |
| NDDC   | Niger Delta Development Commission                                  |
| NESREA | National Environmental Standards Regulations and Enforcement Agency |
| NGO    | Non-Governmental Organizations                                      |
| NOSCP  | National Oil Spill Contingency Plan                                 |
| NOSDRA | National Oil Spill Detection and Response Agency                    |
| NWLR   | Nigeria Weekly Law Reports  |
| NYUJ   | New York University Journal   |
| OAU    | Organisation of African Unity                                       |
| OECD   | Organization for Economic Co-Operation and Development              |
| OHCHR  | Office of the United Nations High Commissioner for Human Rights     |
| OUP    | Oxford University Publishing  |



|         |  |
|---------|--|
| OPRC 90 | International Convention on Oil Pollution Preparedness, Response and Cooperation |
| RICO    | Racketeer Influenced and Corrupt Organizations Act                               |
| SADC    | Southern African Development Community   |
| SAN     | Senior Advocate of Nigeria   |
| SERAC   | Social and Economic Rights Action Center   |
| SERAP   | Socio-Economic Rights and Accountability Project                                 |
| SPDC    | Shell Petroleum and Development Company  |
| TNC     | Transnational Corporation  |
| UBEC    | Universal Basic Education Commission, Nigeria                                    |
| UDHR    | Universal Declaration of Human Rights, 1948                                      |
| UK      | United Kingdom   |
| UN      | United Nations   |
| UNDP    | United Nations Development Programme   |
| UNEP    | United Nations Environment Programme   |
| UNFCCC  | United Nations Framework Convention on Climate Change                            |
| UNGP    | United Nations Guiding Principles on Business and Human Rights                   |
| UNHRC   | United Nations Human Rights Council  |
| UNDRIP  | United Nations Declaration of the Rights of Indigenous Peoples, 2007             |
| UNODC   | United Nations Office on Drugs and Crime   |
| UPR     | Universal Periodic Review  |
| USA     | United States of America (Also U.S.)   |
| USD     | United States Dollars  |
| VDPA    | Vienna Declaration and Programme of Action, 1993                                 |
| WACP    | West Africa Currency Project   |

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## DEFINITION OF KEY TERMS

ACHPR Phenomenon “An ACHPR (African Charter on Human and Peoples’ Rights) Phenomenon is best realized when local activist forces especially CSAs [i.e. civil society actors] lead a process of trans-judicial communication that involves the creation of a virtual network among the African system as well as the deployment by these activist forces of the norms and/or processes of the African system within key domestic institutions, such as the judiciary, the legislature, and the executive, in ways that can often enable previously unavailable arguments to become available and acquire even more persuasive power; increase the success rate of these arguments; and facilitate alterations in the logics of appropriateness, conceptions of interest, and self-understandings that had hitherto prevailed within the relevant domestic institutions.”<sup>1</sup>

Activist Forces “The expression ‘activist forces’ refers to the activist judges and civil society actors (CSAs) who openly... challenge... and continue to fight to ameliorate human rights violations in countries like Nigeria... While these groups are described... as activist because they tend to possess this “resistance character,” it is worthwhile to note, even at the outset, that the activist orientation of any of these actors does not settle the question of the nature of its political ideology. While most of these activist forces will be considered by most observers as progressive rather than regressive elements, this cannot always be said for every such actor. To be clear, reference to

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<sup>1</sup> Obiora Chinedu Okafor, *The African Human Rights System, Activist Forces and International Institutions* (Cambridge: Cambridge University Press, 2007) at 4.

CSAs... (as a sub-group of activist forces) are meant to include one or more of the following: self-professed human rights CSAs, activist lawyers, women's groups, faith-based groups, trade unionists, university students... professional groups (such as the Nigerian Bar Association), independent journalists and other actors."<sup>2</sup> While Okafor uses this concept to describe a broad range of actors (especially as they engage with the African Commission), this thesis uses "Activist Forces" to mostly describe NGOs (especially as they engage with the ECOWAS Court).

African Human Rights System "The African Human Rights System refers to the main more general human rights system which is operational on the continent, and which was established by the African Charter on Human and Peoples' Rights in 1981 and physically set up in 1987. This more general African system consists in the main of the African Charter, the African Commission on Human and Peoples' Rights, the new Protocol on the Rights of Women in Africa, and the new African Court of Human and Peoples' Rights. As such, references in this work to the system includes reference to the African Charter (the treaty on which the system is founded and which iterates the system's goals and norms), to its Protocols (on the establishment of a Court and on women's rights), and to the African Commission (which was established by that treaty, inter alia, to monitor the observance of states with its provisions.)"<sup>3</sup>

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<sup>2</sup> *Ibid* at 3.

<sup>3</sup> *Ibid* at 2.

## Brainy relays

“Brainy relays (or intelligent transmission-lines) between the African system, and various institutions and actors within Nigeria (such as courts, the executive, and the legislature) by transmitting and contributing actively to the development and strengthening of both Nigerian and African Human Rights systems;<sup>4</sup> or bridging a jurisdictional gap;<sup>5</sup> or “easing the normative system’s energy and values;”<sup>6</sup> “mediating the impact of the African Charter locally;”<sup>7</sup> or helping to facilitate the percolation of the African system’s norms into Nigeria’s domestic sphere.

## Compliance

*Compliance* in this work relates to the degree to which state behavior conforms to what an international treaty, law or agreement prescribes or proscribes. It is central to international law’s role in regulating the interaction of nations and I can describe it as a rule of international law under which states are held responsible to facilitate the fulfilment of international norms domestically, yet within their sovereignty. It is a contested concept in the literature and it is a much broader phenomenon than is used in this thesis.

According to *Okafor*,<sup>8</sup> the concentration of *compliance* in international human rights law has been on “mapping its presence or absence in the conduct of states actors within international institutions; a subscription to an enforcement-based conception of the impact of international norms and institutions (enforcement-centric approach.)<sup>9</sup> A broader view

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<sup>4</sup> *Ibid* at 94.

<sup>5</sup> *Ibid* at 128.

<sup>6</sup> *Ibid* at 164.

<sup>7</sup> *Ibid* at 167.

<sup>8</sup> *Ibid* 33 – 38.

<sup>9</sup> *Ibid*.

of compliance is the “inter-subjective production of meaning regarding appropriate behavior, identities, and interests, in an institutional atmosphere of interaction amongst relevant actors (or a calculation of interests in the light of the existing distribution of power). There is also a sub-approach (voluntary compliance based sub model) positing that the absence of enforcement is not necessarily indicative of weak institutional capacity.”<sup>10</sup> These models have their limitations.

## Constructivism

“Constructivist theorists view norms as shared understandings that reflect legitimate social purpose. According to the constructivist thesis, the study of the impact of international institutions must take very seriously the ways in which these institutions can shape, have shaped, and do constitute, the self-understandings, preferences, and interests of states.”<sup>11</sup> Okafor is convinced that the constructivist analytical framework is a very powerful and perceptive one, especially in relation to attempts to explain IHIs.<sup>12</sup> Indeed, his work is best understood through a constructivist optic but he recognizes a gap in the constructivist account of the impact of international institutions that some scholars he describes as quasi-constructivists have attempted to bridge. He has drawn on the work of these scholars to develop his own quasi-constructivist proposal.

*See the definition of “Quasi-Constructivism” below for how the concept relates to this work.*

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<sup>10</sup> *Ibid.*

<sup>11</sup> *Ibid* at 27.

<sup>12</sup> *Ibid* at 28.



## Correspondence

*Correspondence* refers to the “production of the desired kinds of thinking and action within key domestic institutions that is attributable, at least in part, to an IHI. Such correspondence almost always occurs in the context of the significant deployment of IHIs on the domestic level by local agents.”<sup>13</sup>

According to Okafor, relevant activist forces have worked as the “virtual network” partners of the African system, and have been as important as the African system in the generation of “correspondence” between the system’s norms and goals, and the content and orientation of executive, judicial, and legislative action within the relevant states. “The broadly constructivist process via which modest alterations in logics of appropriateness and/or conceptions of interest have been fostered in the relevant states have in nearly every case been brokered and/or facilitated by these activist forces (be they activist lawyers, CSAs, or activist judges.)”<sup>14</sup>

*Correspondence* per Okafor, is not coerced compliance, which is associated with ‘top down’ directives by a treaty body, but rather comprises altered and altering practices indicative of greater awareness of and reliance human rights instruments among activist forces.<sup>15</sup>

## Engagement

This includes activities of influence, communication, strategy or collaboration as between activist forces, domestic

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<sup>13</sup> *Ibid* at 277 – 288.

<sup>14</sup> *Ibid* at 251.

<sup>15</sup> *Ibid*.

institutions, individuals, institutions and/or even States (including technical support, motivation and funding).

**Environmental Justice** An investigative framework that considers the injustice experienced by people and communities who are differently and unfavorably affected by the quality of the environment. Environmental injustice borders on the partial or total restraint to the access to natural resources due to systemic discrimination, and based on factors such as class, autonomy locality, race or even gender. Legal literature on this subject has covered three constructs within the concept of environmental justice namely: *Distribution*; *Recognition*, and *Procedure*.

**IHI Effectiveness** (Effectiveness of International Human Rights Institutions). Refers to “how the efficacy of IHIs have been assessed,”<sup>16</sup> especially by the capacity of these IHIs “to command, cajole, or attract state compliance.”<sup>17</sup> The overall hypothesis of IHI effectiveness within Nigeria that is offered by Okafor is that “an equally important barometer among a menu of several very important measures of IHI effectiveness within states is their ability to garner broad social/popular legitimacy within relevant states.”<sup>18</sup>

Most quasi-constructivists (as well as most other kinds of constructivists) will agree with *Sikkink’s* theory of IHI effectiveness and worth. “According to her: The [international issue] networks [made up of private Western charities, local

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<sup>16</sup> *Ibid* at 4.

<sup>17</sup> *Ibid*.

<sup>18</sup> *Ibid* at 174.

and international NGOs and IHIs] were influential within states because they contributed to a reformulation in the understandings of national interest [and thus of “human rights discourse”] at times when traditional understandings of sovereignty and national interest were called into question by changing global events.”<sup>19</sup>

No general and complete theory of IHI effectiveness or value is advanced by Okafor but he offers a conceptual analysis that seeks to supplement and complement pre-existing conceptual approaches to IHIs. In this sense, Okafor points towards an enlarged conceptual optic for understanding IHI worth.

Logic  
of appropriateness

of “The logic of appropriateness is a perspective on how human action is to be interpreted. Action, policy making included, is seen as driven by rules of appropriate or exemplary behavior, organized into institutions. The appropriateness of rules includes both cognitive and normative components. (Within the tradition of a logic of appropriateness, actions are seen as rule-based. Human actors are imagined to follow rules that associate particular identities to particular situations, approaching individual opportunities for action by assessing similarities between current identities and choice dilemmas and more general concepts of self and situations.)”<sup>20</sup>

*See the use of the term “logic of appropriateness” in the description of “ACHPR phenomenon” above.*

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<sup>19</sup> *Ibid* at 59.

<sup>20</sup> James G. March and Johan P. Olsen, “The Institutional Dynamics of International Political Orders” 52 (1998) 951.

|                      |  |
|----------------------|--|
| Norm Cascade         | <i>See the description of the “Norm Life Cycle” below.</i>   |
| Norm Emergence       | <i>See the description of the “Norm Life Cycle” below.</i>   |
| Norm Internalization | <i>See the description of the “Norm Life Cycle” below.</i>   |
| Norm Life Cycle      | From Finnemore and Sikkink’s “the norm life-cycle:” <sup>21</sup> a three-stage process of <i>norm emergence</i> , <i>norm cascade</i> , and <i>norm internalization</i> . “Norm emergence occurs when a handful of states (norm leaders) are persuaded by norm entrepreneurs, usually civil society actors (CSAs), especially human rights non-governmental organizations (NGOs), to embrace new norms. Norm cascade occurs when these norm leaders attempt to socialize other states, eventually causing the norm to ‘cascade’ throughout the society of states, leading at the far end to norm internalization (when norms acquire a ‘taken-for-granted’ quality). In their view, actors conform to this ‘strategic social constructivism’ model because such actors, in fact, make detailed ‘end-means calculations’ to maximize their utilities, but the utilities they want to maximize involve changing the other player’s utility function in ways that reflect the normative commitments of the actor.” <sup>22</sup> |
| Publics              | Communities of people at large (whether organized as groups or not) that have a direct or indirect association with an institution or state. Citizens, NGOs, media etc. Okafor uses  |

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<sup>21</sup> From Martha Finnemore and Kathryn Sikkink, *International Norm Dynamics and Political Change* 52 (International Organisation, 1998).

<sup>22</sup> Okafor, *supra* note 1 at 29.

the word once in the context of describing “the discerning ‘publics’ of states parties.”<sup>23</sup>

#### Pursuit

The action (or attempt) to achieving a goal. In this work, it is used within the context of advancing towards socioeconomic and environmental justice.

#### Quasi-Constructivism

Okafor uses this term to capture the work of several scholars who have applied and/or urged a synthesis of constructivist and rationalist schools of thought. He references scholars like Martha Finnemore and Kathryn Sikkink. These scholars have used various terms to describe the import of their own work but Okafor use this label to capture a range of scholarship that includes all of them.<sup>24</sup>

Per Okafor, “Quasi-Constructivism, at least in part, is a recognition of the existence of a gap in the constructivist account of the impact of international institutions that has led several scholars to seek to rethink aspects of constructivism, and propose revised and eclectic forms of that analytical framework. Perhaps the best-known version of this kind of revised and eclectic form of constructivism, a tendency that he refers to as ‘quasi-constructivism,’ is Martha Finnemore’s and Kathryn Sikkink’s concept of a ‘strategic social constructivism’ that emphasizes the role of norms in the constitution of the identities and interests of actors, and yet accords at least as equal a value to the ‘rational strategizing’ of relevant actors.”<sup>25</sup>

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<sup>23</sup> *Ibid* at 283.

<sup>24</sup> *Ibid* at 21.

<sup>25</sup> *Ibid*.

“In their view, the real fights within international institutional theory are not, and should not be, about whether or not rationality plays some kind of a role in norm-based behaviour. In their view, it obviously does play some kind of role. Rather this debate should be about the precise nature of the link between rationality and norm-based behaviour. This ‘liberal’ kind of constructivism (that co-emphasizes rational strategizing and the constitutive roles of norms/institutions) has also featured in the work of *Thomas Risse (“Ideas Do Not Float Freely: Transnational Coalitions, Domestic Structures, and the End of the Cold War” 1994).*”<sup>26</sup>

According to *Okafor*, the quasi-constructivist model can still be reinforced by certain insights such as the “critical importance or significance of the leadership of the ‘issue networks’ or ‘advocacy networks’ (which often serve as the engines for the processes through which IHIs exert domestic influence) by local (as opposed to foreign or ‘international’) activist forces.”<sup>27</sup> Another insight is the fact that the role which coercive pressure has played in producing the transformations in the domestic thinking and practice is more often than not, not all that great.<sup>28</sup>

Socioeconomic Justice Socioeconomic justice entails the application of the principles of justice from both social and economic lines especially within the scope of human rights such as the right to education, right to housing, right to adequate standard of

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<sup>26</sup> *Ibid* at 28.

<sup>27</sup> *Ibid.*

<sup>28</sup> *Ibid.*

living, right to health and the right to science and culture. As a framework, socioeconomic Justice centers around poverty and inequality, pro-poor economic policy, resource rights, corporate accountability, social policy and even gender parity.

“Social justice revolves around the development and understanding of retributive and distributive principles, their association with historical situations and the political economy, the impact of their institutionalization on both the individual and social development, and their assessment through various criteria and/or processes.”<sup>29</sup> Economic justice on the other hand is a component of social justice. “It is a set of moral principles for building economic institutions, the goal of which is to create an opportunity for each person to create a sufficient material foundation upon which to have a dignified, productive, and creative life beyond economics.”<sup>30</sup>

Socioeconomic and Environmental Justice Linked together and used to describe the social transformation directed towards meeting basic human needs and enhancing the quality of life. It is about economic quality, health care, housing, food, jobs, human dignity, environmental protection, and security. In linking the cause of socioeconomic and environmental justice, the approach here seeks to challenge the abuse of power and constitutional non-justiciability which results in people, especially the poor, having to suffer serious effects of socioeconomic abuses and environmental damage caused by many factors including the greed and corruption of others. This also includes habitations

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<sup>29</sup> UK Essays, “What Is Socio Economic Justice Politics Essay” (July 2017). Online: UK Essays <<https://www.ukessays.com/essays/politics/what-is-socio-economic-justice-politics-essay.php>>

<sup>30</sup> Investopedia, “Economic Justice” (Online: Investopedia) Online: <<http://www.investopedia.com/terms/e/economic-justice.asp>>

exposed to dangerous chemical pollution, and rural communities left without necessary resources like land, food and even water.

Trans-judicial  
communication

Per *Okafor*, this refers to the “brokered transnational transmission of norms, ideas, or knowledge between the African system (which in reality functions in a kind of quasi-judicial mode) and the key domestic institutions of some states parties to that system. This transmission of norms has been brokered and facilitated by the activist forces, especially human rights CSAs which operate within these states.”<sup>31</sup>

This expression has also been used by *Anne-Marie Slaughter* to describe the phenomenon of “communication among courts - whether national or supranational - across borders. They [the type of communication] vary enormously, however, in form, function, and degree of reciprocal engagement. The dialogue... suggests the possibility of a relationship of collective deliberation on common legal problems... or a... less interactive process of intellectual cross-fertilization. Alternatively, taking account of the position of fellow national courts in accepting the obligations of a common treaty may simply be an instance of taking advantage of a quick source of information about the degree of reciprocal acceptance of these obligations, without any overlay of special ‘judicial’ communication.”<sup>32</sup>

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<sup>31</sup> Okafor, *supra* note 1 at 3.

<sup>32</sup> Anne-Marie Slaughter, “A Typology of Transjudicial Communication” 29 U. Rich. L. Rev. 99 (1994) at 101.



## Virtual Network

(Also, virtual human rights network or partnership or alliance). Here it is a virtual network of “like-minded institutions,”<sup>33</sup> that foster “a level of correspondence,<sup>34</sup> or which enables a human rights system to “exert a significant level of influence within Nigeria or any other country,”<sup>35</sup> linking the ‘system’ to an ‘institution’ through “design, facilitation, oiling or consolidation.”<sup>36</sup>

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<sup>33</sup> Okafor, *supra* note 1 at 102.

<sup>34</sup> *Ibid* at 133.

<sup>35</sup> *Ibid* at 94.

<sup>36</sup> *Ibid* at 300.

## **CHAPTER ONE: INTRODUCTION**

This thesis is divided into four (4) major chapters. The first chapter introduces the thesis by describing the extant environmental and socioeconomic situation in Nigeria. This description is done by providing a “snapshot” of the Niger Delta region of the country (which is a region that is widely known for its environmental damage). The first chapter also discusses the constitutional limitations to securing environmental and socioeconomic justice in Nigeria, and then describes how activist forces have approached several human rights adjudicatory mechanisms, in their pursuit of environmental and socioeconomic justice for the people of the Niger Delta. As a foundation of the thesis, the first chapter includes a discussion of the methods used in this work, and provides the expected results from the research. It then conducts a literature review by analyzing the three (3) overarching concepts of the thesis, which are: the ECOWAS Court; the concept of environmental and socioeconomic justice; and, the theory of Quasi-Constructivism.

Chapter two (2) of this thesis investigates the jurisprudence of the ECOWAS Court on environmental and socioeconomic justice by conducting a study of three (3) landmark cases that were instituted by activist forces in pursuit of environmental and socioeconomic justice in Nigeria, particularly those suits launched by an activist force, the Socio-Economic Rights and Accountability Project (SERAP), an NGO. The study of these cases will expand on the first part of the thesis by demonstrating how the ECOWAS Court through its norms, processes and jurisprudence has acted as a resource to activist forces who pursue environmental and socioeconomic justice in Nigeria. The analysis of these three (3) cases will also demonstrate how the ECOWAS Court has interpreted and

applied the standards of international human rights law (IHRL) to environmental and socioeconomic justice matters in Nigeria.

The third chapter of this thesis builds on the first and second chapters by analyzing how the ECOWAS Court has (and through the jurisprudence in the three (3) cases), has exerted significant impact within Nigeria. In conducting this “impact-analysis,” this part of the work uses a quasi-constructivist lens to deduce the influence of the decisions from the ECOWAS court within three (3) domestic governance institutions in Nigeria: The Executive, the Legislature, and the Judiciary. The overarching goal of this “impact-analysis” is to trace the pursuits of activist forces from their engagement with the ECOWAS Court (in their pursuit of environmental and socioeconomic justice in Nigeria), to any changes that these pursuits may have fostered within key domestic institutions in Nigeria.

The fourth chapter concludes the thesis with a summary of the work done and provides some key findings that emerged from this research.

*This thesis has two objectives:*

The first (and central) objective is to examine the Community Court of Justice of the Economic Community of West African States, or ECOWAS Court (a sub-regional international court in West Africa), and its role within the West African region, especially how the Court has served as a resource for the Activist Forces that operate in the sub-region, in their pursuit of Environmental and Socioeconomic Justice in Nigeria.

The second goal of this thesis, which is ancillary to the first, is to investigate the Court's jurisprudence in three landmark cases: *SERAP v. Nigeria & Anor (2010)*; *SERAP v. Nigeria & 8 Ors (2012)*; and *SERAP & 10 Ors v. Nigeria & 4 Ors (2014)*.

The purpose of these case studies is to advance the first thesis objective by analyzing how the ECOWAS Court has advanced the justiciability of environmental and socioeconomic rights despite domestic limitations. This is significant for poor and marginalized populations e.g. those in the Niger Delta region of Nigeria where natural resource extraction has for decades been largely unfavorable to the wellbeing and development of the people.

This thesis contributes to the legal literature on human rights systems in Africa by analyzing how the norms, processes and creative spaces made available by the ECOWAS Court has contributed to the struggles waged by local activist forces in Nigeria. In the process of developing this analysis, it deploys theories propounded by several quasi-constructivists, particularly *Okafor's* theory of "correspondence", a unique model for estimating the extent of the "internalization" of human rights norms without abandoning the regular "compliance" model for assessing the fulfillment by states of their international human rights law obligations.

## 1.1. RESEARCH QUESTIONS

*How* have Activist Forces utilized the ECOWAS Court in the efforts to pursue environmental and socioeconomic justice in Nigeria? And how has the ECOWAS Court facilitated such pursuits? How have these activist forces (and other actors in Nigeria), effectively deployed and harnessed the norms, processes and creative spaces that have been made available to them by the ECOWAS Court? As “brainy relays,”<sup>1</sup> have they facilitated any form or process of “trans-judicial communication”<sup>2</sup> between the Court and key domestic institutions? Perhaps one that has produced, in some measure, what *Okafor* theorises as “correspondence”?<sup>3</sup>

## 1.2. BACKGROUND AND ISSUE CONTEXT

In March 2017, I visited Goi Community — just a few kilometers from Bodo where almost one year ago the prestigious Cleanup launch event held... I saw men walking on the muddy riverbed to fetch firewood on the other side just like the biblical Moses and the Children of Israel except that this time the men were walking on oil. Women were fetching from a puddle of polluted water by the bank to do their laundry while children were bathing in it. Dumka, a little boy playing at the muddy bank, ran towards me with a small lobster he just caught. I opened the lobster and there was crude oil inside. “[B]ecause of the pollution, we have lost all our shellfish...we often ride our canoe towards Bonny island on the Atlantic to get food for consumption” ... Most times we only consider the environmental impact of oil spills but this opened my eyes to its impact on the food of the people affected... “There’s

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<sup>1</sup> Obiora Chinedu Okafor, *The African Human Rights System, Activist Forces and International Institutions* (Cambridge: Cambridge University Press, 2007) at 286.

<sup>2</sup> *ibid.*

<sup>3</sup> *ibid* at 251.

nothing like human right in this country only riches right...I no longer trust the judiciary.”<sup>4</sup>

Testaments that describe the environmental and socioeconomic situation in the Niger Delta region of Nigeria have been resounding the world over. However, what is surprising about the testament reproduced above is that it was made in 2017. This is six years after the Federal Government of Nigeria had commissioned and received the United Nations Environment Programme (UNEP) report recommending that the government, the oil and gas industry and communities begin a comprehensive cleanup of the Niger Delta region, and restore the polluted environments in that region from oil contamination.<sup>5</sup> The cleanup was formally launched and celebrated but it has still not really commenced.<sup>6</sup> 2017 is also eleven years after the Nigerian government established her National Oil Spill Detection and Response Agency (NOSDRA) in response to the frequent incidence of oil spillage in the Niger Delta region.<sup>7</sup>

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<sup>4</sup> Ebenezer Wikina, “Oil in our Creeks - A Tale of Two Oil Spills: A Story of Rage and Resilience in Ogoniland” (October 2017), *Contrast VR and AJE Online* Online: <<http://contrastvr.com/oilinourcreeks/>>.

<sup>5</sup> In *August 2011*, the United Nations Environment Programme (UNEP) released its Environmental Assessment report on Ogoniland which was commissioned by and delivered to the Federal Government of Nigeria. It makes recommendations to the government, the oil and gas industry and communities to begin a comprehensive cleanup of Ogoniland, restore polluted environments and put an end to all forms of ongoing oil contamination in the region: The UNEP Environmental Assessment of Ogoniland, online: Shell <<http://www.shell.com.ng/sustainability/environment/unep-environmental-assessmen-of-ogoniland.html>>.

<sup>6</sup> As at *June 2017*, activist forces in the Niger Delta still expressed disappointment over the delay in implementing the Ogoni Cleanup. Davies Iheamnachor, *Ogoni cleanup: We're disappointed, nothing's happening* – Ken Saro-Wiwa Associates (13 June 2017) Online: Vanguard <<http://www.vanguardngr.com/2017/06/ogoni-cleanup-disappointed-nothings-happening-ken-saro-wiwa-associates/>>.

<sup>7</sup> The National Oil Spill Detection and Response Agency (NOSDRA) was established in 2006 as an institutional framework to co-ordinate the implementation of the National Oil Spill Contingency Plan (NOSCP) for Nigeria in accordance with the International Convention on Oil Pollution Preparedness, Response and Cooperation (OPRC 90) to which Nigeria is a signatory. Online: NOSDRA <<http://nosdra.gov.ng>>.

What is more, 2017 is five years after residents and indigenes of the Niger Delta region had filed cases in the courts of the United Kingdom;<sup>8</sup> nine years after a similar court action was filed at The Hague in Netherlands;<sup>9</sup> and twenty-one years after three such cases were initiated in the United States<sup>10</sup> which led to a settlement of 15.5 million U.S dollars in 1996, to compensate the plaintiffs and establish a trust for the benefit of the *Ogoni* people. 2017 is also six years after the United Nations Human Rights Council unanimously endorsed the “Guiding Principles for Business and Human Rights”<sup>11</sup> as a global standard for preventing and addressing the risk of the adverse impact on human rights linked to certain business activity.<sup>12</sup> In 2017, despite the disbursements of international development aid to the region, including some funding from Canada,<sup>13</sup> it still

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<sup>8</sup> Members of the Bodo community in Nigeria filed a lawsuit against Shell in London High Court on 23 March 2012, seeking compensation for two oil spills, which occurred in 2008 and 2009 in the Niger Delta. The 15,000 plaintiffs ask for compensation for losses suffered to their health, livelihoods and land, and they ask for clean-up of the oil pollution. They allege that the relevant pipelines caused spills because they were over 50 years old and poorly maintained, and that Shell reacted too slowly after being alerted to the spills.

<sup>9</sup> Four Nigerians and campaign group Friends of the Earth filed suits in 2008 in The Hague, where Shell has its global headquarters, seeking reparations for lost income from contaminated land and waterways in the Niger Delta region, the heart of the Nigerian oil industry.

<sup>10</sup> *Wiwa v. Royal Dutch Petroleum Co.*, No. 96 Civ. 8386; *Wiwa v. Brian Anderson*, No. 01 Civ. 1909 and *Wiwa v. Shell Petroleum Development Corp.*, No. 04 Civ. 2665. Online: Center for Constitutional Rights <<https://ccrjustice.org/home/what-we-do/our-cases/wiwa-et-al-v-royal-dutch-petroleum-et-al>>. The *Wiwa* family lawsuits against Royal Dutch Shell were three separate lawsuits brought by the family of Ken Saro-Wiwa against Royal Dutch Shell, its subsidiary Shell Nigeria and the subsidiary's CEO Brian Anderson, in the United States District Court for the Southern District of New York under the Alien Tort Statute, the Torture Victim Protection Act of 1992 and Racketeer Influenced and Corrupt Organizations Act (RICO). They were charged with complicity in human rights abuses against the Ogoni people in the Niger Delta, including summary execution, crimes against humanity, torture, inhumane treatment, arbitrary arrest, wrongful death, and assault and battery. The lawsuits were filed by the Center for Constitutional Rights (CCR) and co-counsel from EarthRights International in 1996.

<sup>11</sup> Human Rights Council, ‘New Guiding Principles on Business and Human Rights endorsed by the UN Human Rights Council’ (16 June 2011), Online: OHCHR <[www.ohchr.org](http://www.ohchr.org)>. Human Rights Council, ‘Guiding Principles on Business and Human Rights: Implementing the United Nations “Protect, Respect and Remedy” Framework’, (21 March 2011) A/HRC/17/31. Hereinafter referred to as “UNGPs”.

<sup>12</sup> Deva Surya, ‘Guiding Principles on Business and Human Rights: Implications for Companies’ (March 26, 2012) 9 *European Company Law* 2 at 101-109; University of Oslo Faculty of Law Research Paper 2012-10. Online: SSRN: <<https://ssrn.com/abstract=2028785>>.

<sup>13</sup> From perusing documents from the Canadian High Commission in Nigeria and documents from Online: Government of Canada <<http://www.canadainternational.gc.ca>> I found that Canada uses a “whole-of-government approach” through Global Affairs Canada and other Government departments to “engage” with Nigeria when it comes to issues around environmental and socio-economic justice. Nigeria ranks 8<sup>th</sup> when it comes to Canada’s country prioritization in the distribution of Canada’s international assistance. International

seemed as if nothing had changed for the people of the Niger Delta region since the killing of *Ken Saro-Wiwa*.<sup>14</sup> It can be said that the Nigerian government's weak regulatory enforcement and the questionable compliance practices of the oil companies has led to the serious degradations experienced in the socioeconomic and environmental conditions in which the people of the Niger Delta live. Before the discovery of crude oil in the region, agriculture, fishing and boat-making constituted the major economic activities within the area.<sup>15</sup> However, since crude oil was discovered in commercial quantities around 1956, the people of Niger Delta have since borne pains of despoliation, exploitation and state sponsored repression. Peaceful protests against these social conditions have, all-too-often, been forcefully repelled by the state,<sup>16</sup> while some environmental activist forces have either been ignored or mowed down by security agents.<sup>17</sup>

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disbursements to development projects in Nigeria for 2014 – 2017 alone amounted to 32.16 million Canadian dollars with environmental related causes constituting an estimated 2.2% of the total sum. (major chunk of the disbursements went to humanitarian assistance/material relief, maternal health, democratization and other development projects). Yearly disbursements are similar, with at least one project bordering on improving the environmental or socio-economic condition of the Niger-Delta.

<sup>14</sup> Kenule Beeson "Ken" Saro-Wiwa (10 October 1941 – 10 November 1995) was a Nigerian writer, television producer, environmental activist, and winner of the Right Livelihood Award and the Goldman Environmental Prize. Saro-Wiwa was a member of the Ogoni people, an ethnic minority in Nigeria whose homeland, Ogoniland, in the Niger Delta has been targeted for crude oil extraction since the 1950s and which has suffered extreme environmental damage from decades of indiscriminate petroleum waste dumping. Initially as spokesperson, and then as president, of the Movement for the Survival of the Ogoni People (MOSOP), Saro-Wiwa led a nonviolent campaign against environmental degradation of the land and waters of Ogoniland by the operations of the multinational petroleum industry, especially the Royal Dutch Shell company. He was also an outspoken critic of the Nigerian government, which he viewed as reluctant to enforce environmental regulations on the foreign petroleum companies operating in the area. At the peak of his non-violent campaign, he was tried by a special military tribunal for allegedly masterminding the gruesome murder of Ogoni chiefs at a pro-government meeting, and hanged in 1995 by the military dictatorship of General Sani Abacha. His execution provoked international outrage and resulted in Nigeria's suspension from the Commonwealth of Nations for over three years. Online: Wikipedia <[https://en.wikipedia.org/wiki/Ken\\_Saro-Wiwa](https://en.wikipedia.org/wiki/Ken_Saro-Wiwa)>.

<sup>15</sup> Omofonmwan Samuel Imasogie & Odia Osaretin Lucky, "Oil exploitation and conflict in the Niger-Delta region of Nigeria" (2009) 26 *Journal of Human Ecology* at 25.

<sup>16</sup> Ukiwo Ukoha, "From "pirates" to "militants": A historical perspective on anti-state and anti-oil company mobilization among the Ijaw of Warri, Western Niger Delta" (2007) *African Affairs* 425 at 587.

<sup>17</sup> *Ibid.*



It has been argued that the more contemporary escalation of militancy and insurgency in the Niger Delta region can be traced to the ashes of injustice, repression and impoverishment of the people in the region.<sup>18</sup> As the *Goldman Environmental Prize* has correctly noted:

Since Royal Dutch Shell struck oil on Ogoni lands in 1958, an estimated \$30 billion worth of oil has been extracted. In return, the Ogoni, a group of 550,000 farmers and fishermen inhabiting this coastal land, have received little except a ravaged environment. Farmland that was once fertile turned to contaminated fields from oil spills and acid rain. Uncontrolled oil spills dotted the landscape with puddles of ooze the size of football fields. Virtually all fish and wildlife have vanished. Meanwhile, out of Shell's Nigerian workforce of 5,000, less than 100 jobs went to Ogoni.<sup>19</sup>

Several research findings have demonstrated the sufferings of "Niger-Deltans" and largely Nigerians, from serious abuses of socioeconomic and environmental rights infringements.<sup>20</sup> As Nigeria's richest ecological region, the Niger Delta has the largest mangrove eco zone in Africa.<sup>21</sup> It is the largest wetland in the world comprising four ecological zones.<sup>22</sup> The region has some of the largest ethnic minorities in Nigeria<sup>23</sup> and

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<sup>18</sup> Obi Cyril, "Oil extraction, dispossession, resistance, and conflict in Nigeria's oil-rich Niger Delta" (2010) 30 *Canadian Journal of Development Studies* at 219.

<sup>19</sup> The Goldman Environmental Prize, "Ken Saro-Wiwa 1995 Goldman Prize Recipient" Online: Goldman Prize <<http://www.goldmanprize.org/recipient/ken-saro-wiwa/>>.

<sup>20</sup> Maurice Ayodele Coker and Ugumanim Basse Obo, "Crisis of governance and the violations of human rights: The Nigerian experience 1999 to 2007" (2012) *African Journal of Political Science and International Relations* Online: <<http://www.academicjournals.org/AJPSIR>> at 62-73; World Evangelical Alliance and Socio-Economic Rights and Accountability Project, "Universal Periodic Review 17<sup>th</sup> Session of the UPR Working Group (Nigeria)" *Joint Stakeholders Report*. Online: <<http://www.worldevangelicals.org>>; Obiora Chinedu Okafor and Basil Ugochukwu, "Inventing Legal Combat: Pro-Poor "Struggles" in the Human Rights Jurisprudence of the Nigerian Appellate Courts, 1999–2011" (2014) 7 *The African Journal of Legal Studies* 429-456 online: <<http://digitalcommons.osgoode.yorku.ca/>>.

<sup>21</sup> John Campbell, "Nigeria: Dancing on the Brink" (2011) Maryland: Rowmand and Littlefield at 63.

<sup>22</sup> Mangroves, coastal barrier islands, fresh water swamp forests and lowland rainforests.

<sup>23</sup> It is inhabited by minority ethnic groups of Ijaw, Urhobo, Efik, Ibibio, Itsekiri, Edo, Yoruba and Igbo to mention but a few.

a total population of about 32 million people.<sup>24</sup> This huge habitat is remarkable for its diverse and delicate ecosystem. Its wetland covers an estimated area of seventy thousand kilometers.<sup>25</sup> With so many unique plant and animal species,<sup>26</sup> the Niger Delta contains extraordinary biodiversity.<sup>27</sup> It is thus particularly troubling that this region is now known for its large scale environmental damage which can be attributed to long years of exploitation and neglect from both the Nigerian government and the multinational oil companies which operate in the region.

The Niger Delta is indeed a classic (if not also the most critical) example of severe environmental and socioeconomic rights abuse in the entire West African sub-region. This is ironic especially as the Niger Delta is in a country where the *grund norm* (the Nigerian Constitution) provides that: “The State shall protect and improve the environment and safeguard the water, air and land, forest and wild life of Nigeria”.<sup>28</sup> The Constitution also provides that “governmental actions shall be humane;”<sup>29</sup> and that the “exploitation of human or natural resources in any form whatsoever for reasons, other than the good of the community, shall be prevented.”<sup>30</sup> The same document states that “the independence,

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<sup>24</sup> Okechukwu Ibeanu, “Civil Society and Conflict Management in the Niger Delta” (2006) CLEEN Foundation Monograph Series (2) at 13.

<sup>25</sup> Uyigwe Etiosa & Agho Matthew, “Coping with climate change and environmental degradation in the Niger Delta of southern Nigeria” Community Research and Development Centre Nigeria CREDC (2007) at 24.

<sup>26</sup> Niger Delta harbors many locally and globally endangered species, and approximately 60-80% of all plant and animal species found in Nigeria. The Delta’s unique biogeographical attributes are responsible for the complex and rich milieu of habitats that enabled the evolution of this biological diversity.

<sup>27</sup> Government of Nigeria, “Niger Delta Biodiversity Project” UNDP Project Document Online: <<http://www.undp.org/content/dam/undp/documents/projects/NGA/>>.

<sup>28</sup> Constitution of the Federal Republic of Nigeria, 1999, c 2, s 20.

<sup>29</sup> *Ibid* at s 17 (2) (c).

<sup>30</sup> *Ibid* at (d).

impartiality and integrity of courts of law, and easy accessibility thereto shall be secured and maintained.”<sup>31</sup>

The above stated constitutional obligations to protect the environment, prevent exploitation and promote accessibility to justice is significantly limited by the provisions in the same constitution on the non-justiciability of claims based on these obligations.<sup>32</sup>

These enforcement “barricades” also extend to other socioeconomic entitlements which citizens require for their development: The right to adequate shelter,<sup>33</sup> food,<sup>34</sup> water protection,<sup>35</sup> employment,<sup>36</sup> healthcare,<sup>37</sup> and education,<sup>38</sup> all cannot be enforced in Nigeria’s national courts.

For more than sixty years after the adoption of the Universal Declaration of Human Rights (UDHR), the status of socioeconomic rights (usually referred to as the second generation of human rights),<sup>39</sup> was controversial because socioeconomic rights were commonly

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<sup>31</sup> *Ibid* at (e).

<sup>32</sup> The Constitution of the Federal Republic of Nigeria in Section 6 (6) (c) is to the effect that Nigerian citizens cannot obtain redress from the national courts if denied their socioeconomic, developmental and other rights provided for in Chapter II of the constitution. Chapter II of the Constitution is described as Fundamental Objectives and Directive Principles of State Policy which are guidelines to the Federal and State governments of Nigeria to promote social order. As framed, the objectives appear to encompass social inclusiveness with a view to reducing socioeconomic inequality in status and opportunities among individuals and corporate entities but they are non-justiciable.

<sup>33</sup> *Ibid* at s 16 (2) (d).

<sup>34</sup> *Ibid*.

<sup>35</sup> *Ibid* at s 20.

<sup>36</sup> *Ibid* at s 17 (3) (a) – (c).

<sup>37</sup> *Ibid* at (d).

<sup>38</sup> *Ibid* at s 18.

<sup>39</sup> Philp Alston and Ryan Goodman, *International Human Rights* (OUP 2012) 277.

viewed as “positive rights” which were too resource-intensive, too broad or too ambiguous, to be justiciable.<sup>40</sup>

Today, however, it is all-but-settled in international law that socioeconomic rights and civil/political rights are indivisible, interrelated, and interdependent, and that therefore there is a universal need to implement and respect all rights irrespective of their classification, category or the “generation of rights” they fall under.<sup>41</sup>

The imposition of constitutional limitations on the justiciability of environmental and socioeconomic rights is not exclusive to Nigeria. These rights are categorised as “policy objectives” or “directives” in several constitutions around the world. This constitutional category or status has been largely criticised and evaluated in academic papers for decades,<sup>42</sup> and such categorisation of socioeconomic rights is traced to international law.<sup>43</sup> However the spread of such categorisation in constitutions across the globe

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<sup>40</sup> Lanse Minkler and Shawna Sweeney, “On the Indivisibility and Interdependence of Basic Rights in Developing Countries” (2011) 33:2 HRQ at 352.

<sup>41</sup> Vienna Declaration and Programme of Action (VDPA), 1993. WCHR, Vienna, 14 – 25 June 1993, UN Doc A/CONF157/24 (Part I) at 20 (1993), 32 ILM 1661 (1993), Para 5. Including the 2005 resolution that established the HRC.

<sup>42</sup> Sisay Alemahu Yeshanew, *The justiciability of economic, social and cultural rights in the African regional human rights system: theory, practice and prospect* (2013) Cambridge: Intersentia, 392 pages; Alston P and Goodman R, *International Human Rights* (Oxford University Publishing 2013); A Eide, C Krause and A Rosas (Ed.), *Economic, Social and Cultural Rights*. Martinus Nijhoff The Hague, Netherlands; Tushnet M, *Weak Courts, Strong Rights: Judicial Review and Social Welfare Rights in Comparative Constitutional Law*, (2008) Princeton University Press, Princeton, New Jersey, to mention but a few.

<sup>43</sup> Since the end of World War II, the protection of individuals through subjective rights became a central concern of public international law. Numerous human rights instruments of regional and universal vocation bear witness to this development. Traditionally, a distinction is made between two categories of rights: civil and political rights on the one hand and economic, social and cultural rights on the other. While both categories of rights are recognized in principle, considerable differences exist with respect to their domestic implementation.

occurred by replication, including through the dissemination of “British constitutionalism”<sup>44</sup> before the subsequent witnessing of a form of “transformative constitutionalism.”<sup>45</sup>

Activist forces have, however, challenged the non-justiciability of socioeconomic rights in several jurisdictions. For example, the “Indian experience”<sup>46</sup> exemplify how activist forces, through strategic litigation have used domestic courts to challenge the non-justiciability of socioeconomic and environmental rights.<sup>47</sup> Described as “judicial activism,”<sup>48</sup> the “Indian experience” continuously attracted the attention of activist forces around the world, and inspiring action by “discernible methodological maturity”<sup>49</sup> well beyond the country’s borders.

In the case of Nigeria, activist forces in the region continually “forum-shopped”<sup>50</sup> in pursuance of environmental and socioeconomic justice. With over 170 “failed attempts”

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<sup>44</sup> Trilsch Mirja, “What’s the Use of Socio-Economic Rights in a Constitution? - Taking a Look at the South African Experience” *Verfassung Und Recht in Übersee / Law and Politics in Africa, Asia and Latin America*, vol. 42, no. 4, 2009, pp. 552–575. Online: JSTOR, <[www.jstor.org/stable/43239540](http://www.jstor.org/stable/43239540)>.

<sup>45</sup> Karl Klare, “Legal Culture and Transformative Constitutionalism, *South African Journal of Human Rights*” 14 (1998), p. 1.

<sup>46</sup> In *Francis Coralie Mullin v The Administrator, Union of Delhi & Ors* 1981 SCR (2) 516 and *Maneka Gandhi v Union of India* 1978 SCR (2) 621 through cases instituted by activist forces in the country, the Indian supreme court expanded the constitution’s respect for the right to life to include the right to food, clothing, shelter and more.

<sup>47</sup> M Langford (ed.), *Social Rights Jurisprudence: Emerging Trends in International and Comparative Law* (2008) Cambridge University Press. This book offers an overview of issues related to the justiciability of ESCR, the specific national experiences of South Africa, India, South Asia, Colombia, Argentina, Brazil, Venezuela, the United States, Hungary, France, the United Kingdom and Ireland, and examples and developments of different international and regional human rights mechanisms.

<sup>48</sup> Activist forces charged the Court to take “an active and fairly independent path.” Mirja, *supra* note 41 at 557.

<sup>49</sup> *Ibid* at 557.

<sup>50</sup> “A growing trend in international human rights law: the submission of petitions by aggrieved individuals to multiple human rights courts, tribunals, or treaty bodies, each of which is authorized to review the petition and to determine whether rights have been violated” - Laurence R. Helfer, ‘Forum Shopping for Human Rights’, 148 *University of Pennsylvania Law Review* (1999) 285 at 301.

to denounce the non-justiciability principle of the constitution,<sup>51</sup> (or what may be described as over 170 strikes at the enforcement “barricade”, activist forces in Nigeria were finally able to shift (but not remove) this barricade in 2002. In 2002, the Supreme Court of Nigeria (Apex Court) held that although environmental and socioeconomic rights remain mere unenforceable constitutional declarations, it would be a failure of duty and responsibility of State organs if they acted in clear disregard of these constitutional declarations. In the Court’s view, these declarations can be made justiciable by sub-constitutional legislation.

According to the Supreme Court:

... the Directive Principles need not remain mere or pious declarations. It is for the Executive and the National Assembly, working together, to give expression to any one of them through appropriate enactment as occasion may demand.<sup>52</sup>

The essence of the above decision is that the Courts can enforce any of the non-justiciable provisions of the Constitution where the National Assembly has enacted specific laws for their enforcement. This decision was in respect of the country’s promulgation of a “Corrupt Practices and Other Related Offences legislation”<sup>53</sup> despite

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<sup>51</sup> Using the most widely reported and comprehensive law report in Nigeria, (the Nigerian Weekly Law Report, NWLR), I carried out a personal count of the decided cases before superior courts of record in the country from October 1999 up to July 2012, and by considering only the cases where the action instituted (in full or partially), challenged; relied on; or made mention of Chapter 2 of the Nigerian Constitution (Fundamental Objectives and Directive Principles of State Policy) as being non-justiciable before the courts. I identified 170 cases. The final judgements (and in several instances rulings) of the court, emphasized the barrier to the justiciability of socioeconomic rights. (This was mostly done by quoting Section 6 (6) of the constitution as the limitation clause). On identifying up to 170 cases, I stopped counting. My count ended at Part 1302 of the NWLR. (The NWLR produces a collection of reported cases every week and serialises each week’s publication in “Parts”. The NWLR has been published since October 1, 1985, and as at Monday the 10<sup>th</sup> of July 2017, it published Part 1571). This count was done periodically from May 16, 2017 to July 10, 2017.

<sup>52</sup> *Attorney General of Ondo State v. Attorney General of the Federation* (2002) 9 NWLR (Pt. 772) 222 Uwaifo, J.S.C.

<sup>53</sup> *Corrupt Practices and other Related Offences Act 2000*. The Act prohibits and prescribes punishment for corrupt practices and other related offences. It also establishes an Independent Corrupt Practices and Other

the non-justiciability of the constitutional provision abolishing all corrupt practices and abuses of power.<sup>54</sup>

The same logic above was applied by the court after an activist force instituted another action before the court challenging the non-provision of fully effective free universal basic education for children.<sup>55</sup> The National Assembly had passed into law a statute instituting compulsory, free universal basic education in the country,<sup>56</sup> an Act premised on the “mere” directive principle of the constitution which conditions the government’s objective to provide free education for all.<sup>57</sup> On this premise, the Court in support of the claim of the particular activist force that brought the suit before it, declared that because of the enactment of this statute by the National Assembly, the specific provisions of the Constitution covered by it had become justiciable and enforceable by the Courts.<sup>58</sup>

A number of pieces of domestic legislation have progressively institutionalized the protection and development of the environment in Nigeria.<sup>59</sup> Nigeria has also enacted

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Related Offences Commission (ICPC), vesting it with the responsibility for investigation and prosecution of offenders thereof. The Act also protects whistle blowers.

<sup>54</sup> “The State shall abolish all corrupt practices and abuse of power.” - Constitution of the Federal Republic of Nigeria, 1999, c 2, s 15 (5).

<sup>55</sup> *Legal Defence and Assistance Project (LEDAP) Gte & Ltd V. Federal Ministry of Education & Anor* (2017) FHC/ABJ/CS/978/15.

<sup>56</sup> *Compulsory Free and Universal Basic Education Act 2004*.

<sup>57</sup> “(1) Government shall direct its policy towards ensuring that there are equal and adequate educational opportunities at all levels. (3) Government shall strive to eradicate illiteracy; and to this end Government shall as and when practicable provide - (a) Free, Compulsory and universal primary education; (b) Free secondary education; (c) Free University education; and (d) Free adult literacy programme.” - Constitution of the Federal Republic of Nigeria, 1999, c 2, s 18.

<sup>58</sup> LEDAP, *supra* note 52. The court held that federal and state governments had constitutional duties to provide adequate funding for the free education scheme. The court held that “By the combined effect of section 18(3)(a) of the 1999 Constitution and section 2 (1) of the Compulsory, Free Universal Basic Education Act, 2004, the right to free and compulsory primary education and free junior secondary education for all qualified Nigerian citizens are enforceable rights in Nigeria.

<sup>59</sup> Key environmental legislation in Nigeria are: *National Environmental Standards Regulations and Enforcement Agency (NESREA) (Establishment) Act, 2007* Cap E12 LFN 2004 - this is the major federal

many progressive domestic laws that conform to international environmental standards,<sup>60</sup> including laws dealing with mitigation, adaptation and finance matters related to greenhouse gas emissions.<sup>61</sup> As far back as 1988, Nigeria's laws covered the issues of biodiversity conservation and the sustainable development of Nigeria's natural resources,<sup>62</sup> including the initiation of policy in relation to environmental research and technology.<sup>63</sup> Recently, in a move toward the provision of a regulatory framework and an administrative mechanism for the application of modern bio-technology in Nigeria, the

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body responsible for protecting Nigeria's environment and enforcing all environmental laws, regulations, guidelines, and standards, including to enforce environmental conventions, treaties and protocols to which Nigeria is a signatory; *Environmental Impact Assessment Act (EIA Act)* Cap E12 LFN 2004) - this law sets out the general principles, procedures and methods of environmental impact assessment in various sectors; *Harmful Waste (Special Criminal Provisions etc.) Act* Cap H1 LFN 2004 - this law prohibits the carrying, depositing and dumping of harmful waste on land and in territorial waters; *Endangered Species (Control of International Trade and Traffic) Act* Cap E9 LFN 2004 - this provides for the conservation and management of wildlife and the protection of endangered species, as required under certain international treaties; *National Oil Spill, Detection and Response Agency Act, 2006 (NOSDRA)* - the objective of this law is to put in place machinery for the co-ordination and implementation of the National Oil Spill Contingency Plan for Nigeria to ensure safe, timely, effective and appropriate response to major or disastrous oil pollution; *National Park Services Act* Cap N65 LFN 2004 - this makes provision for the conservation and protection of natural resources and plants in national parks; *Nigerian Minerals and Mining Act, 2007* for the purposes of regulating the exploration of solid minerals, among other purposes; *Water Resources Act* Cap W2 LFN 2004 - this aims at promoting the optimum development, use and protection of water resources; *Hydrocarbon Oil Refineries Act* - the Act is concerned with the licensing and control of refining activities; *Associated Gas Re-injection Act* deals with gas flaring activities by oil and gas companies. Prohibits, without lawful permission, any oil and gas company from flaring gas in Nigeria and stipulates the penalty for breach of permit conditions; *Nuclear Safety and Radiation Protection Act* regulates the use of radioactive substances and equipment emitting and generating ionising radiation. In particular, it enables the making of regulations for protecting the environment from the harmful effects of ionising radiation; and the *Oil In Navigable Waters Act* which is concerned with the discharge of oil from ships. It prohibits the discharge of oil from ships into territorial waters or shorelines.

<sup>60</sup> *Ibid.*

<sup>61</sup> Nigeria is party to the United Nations Framework Convention on Climate Change (UNFCCC) and ratified the Kyoto Protocol in December 2004. Nigeria submitted her National Adaptation Plan of Action to the UNFCCC in 2011. Nigeria also signed the Paris Agreement on the 22<sup>nd</sup> of September 2016, ratified same on the 16<sup>th</sup> of May 2017 which came into force on the 15<sup>th</sup> of June 2017. The Paris Agreement entered force on 4 November 2016, thirty days after the date on which at least 55 Parties to the Convention accounting in total for at least an estimated 55 % of the total global greenhouse gas emissions have deposited their instruments of ratification, acceptance, approval or accession with the Depositary. < [http://unfccc.int/paris\\_agreement/items/9444.php](http://unfccc.int/paris_agreement/items/9444.php)>.

<sup>62</sup> *Federal Environmental Protection Agency Act of 1988 (FEPA Act)* now repealed by the *National Environmental Standards Regulations and Enforcement Agency (Establishment) Act 2007 (NESREA Act)*.

<sup>63</sup> The following Regulations were made pursuant to the FEPA Act: National Environmental Protection (Effluent Limitation) Regulations; National Environmental Protection (Pollution Abatement in Industries and Facilities Generating Wastes) Regulations; and National Environmental Protection (Management of Solid and Hazardous Wastes) Regulations.



National Assembly passed a law to prevent the adverse effect of genetically modified organisms (GMO) on human health, animals and plants in the country.<sup>64</sup> Despite the progressive bent of the legal framework at the domestic level, the Niger Delta still exemplifies the gap in the realisation of environmental justice and the socioeconomic justice caused in large measure by resource extraction and the lack of environmental conservation.

Still in the pursuit of socioeconomic and environmental justice by activist forces, and with little or no success on the domestic front, two activist forces,<sup>65</sup> went beyond the country's judicial system and "tabled the situation" of the Niger Delta (as evidence of socioeconomic and environmental degradation) before a regional adjudicatory body: The African Commission on Human and Peoples Rights.<sup>66</sup> The Commission is not described as a judicial body because its recommendations do not bind states (as the judgments of a court would),<sup>67</sup> but it is characterized as a quasi-judicial body, because it considers inter-

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<sup>64</sup> *National Biosafety Management Act, 2005.*

<sup>65</sup> Social and Economic Rights Action Center (SERAC) and Center for Economic and Social Rights (CESR). Both are Non-Governmental Organizations (NGOs) working in Nigeria.

<sup>66</sup> The African Commission on Human and Peoples' Rights hereinafter referred to as "the Commission" is a quasi-judicial body tasked with promoting and protecting human rights and collective (peoples') rights throughout the African continent as well as interpreting the African Charter on Human and Peoples' Rights (ACHPR) and considering individual complaints of violations of the Charter. The Commission was inaugurated on 2 November 1987 in Addis Ababa, Ethiopia. The Commission's Secretariat has subsequently been in Banjul, The Gambia. In addition to performing any other tasks which may be entrusted to it by the Assembly of Heads of State and Government, the Commission is officially charged with three major functions: the protection of human and peoples' rights; the promotion of human and peoples' rights; and the interpretation of the ACHPR (*Article 45* of the ACHPR).

<sup>67</sup> It has nevertheless been argued that it is not important whether such "recommendations" bind the state parties and thus limit their sovereignty and power but "what is relevant is the moral and legal authority which governments and other members of the international community attach to published reports and conclusions of the organs concerned" - M Tardu, "The protocol to the United Nations Covenant on Civil and Political Rights and the Inter-American system: A study of coexisting petition procedures" (1976) 70 (4) *American Journal of International Law* 784, quoted in R Murray *The African Commission on Human and Peoples' Rights and international law* (2000) 53 - 54.

state and “other communications”<sup>68</sup> which are within the broad construct of judicial functions, especially in the then absence of a “Continental court,” the African Court on Human and Peoples’ Rights (African Court), which was established subsequently.<sup>69</sup>

The two activist forces referred to above made complaints to the Commission asserting that that through irresponsible oil exploration, the Nigerian government destroyed and threatened the health and food sources of the people of the Ogoni people of the Niger Delta through a variety of means, one of which was poisoning much of the soil and water upon which farming and fishing depended. They also complained that through raids on villages, Nigerian security forces have created a state of terror and destroyed crops and killed farm animals making it impossible for many villagers to return to their fields and

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<sup>68</sup> The African Commission in most communications acts quasi-judicially using the rules of natural justice such as *audi alteram partem* if the state is co-operative. In his view the recommendations may not have the judicial flavour of a court of human rights but they approximate to those of the former European Commission and the Inter-American Commission – Oji Umzurike, “*The African Charter on Human and Peoples’ Rights*” (1997) 80.

<sup>69</sup> The African Court on Human and Peoples’ Rights (the Court) is a continental court established by African countries to ensure the protection of human and peoples’ rights in Africa. It complements and reinforces the functions of the African Commission on Human and Peoples’ Rights. The Court was established by *Article 1* of the Protocol to the African Charter on Human and Peoples’ Rights on the Establishment of an African Court on Human and Peoples’ Rights, (the Protocol) which was adopted by Member States of the then Organization of African Unity (OAU) in Ouagadougou, Burkina Faso, in June 1998. The Protocol came into force on 25 January 2004. One of the reasons for the creation of an African Court is the fact that a Court can deliver judicially binding judgments. The legal value of the Court’s decisions combined with the fact that the Protocol provides for a follow-up mechanism to be overseen by the AU Council of Ministers is viewed as important in the strive towards ensuring state compliance within the African regional human rights system. The African Commission will, however, co-exist with the Court and the prospect of a Court should therefore not diminish the importance of finding ways of achieving state compliance to its recommendations. As at June 2017, only eight (8) of the thirty (30) States Parties to the Protocol had made the declaration recognizing the competence of the Court to receive cases from NGOs and individuals. The eight (8) States are; Benin, Burkina Faso, Côte d’Ivoire, Ghana, Mali, Malawi, Tanzania and Rep. of Tunisia. The 30 States which have ratified the Protocol are: Algeria, Benin, Burkina Faso, Burundi, Cameroon, Chad, Côte d’Ivoire, Comoros, Congo, Gabon, Gambia, Ghana, Kenya, Libya, Lesotho, Mali, Malawi, Mozambique, Mauritania, Mauritius, Nigeria, Niger, Rwanda, Sahrawi Arab Democratic Republic, South Africa, Senegal, Tanzania, Togo, Tunisia and Uganda. The Court has jurisdiction over all cases and disputes submitted to it concerning the interpretation and application of the African Charter on Human and Peoples’ Rights, (the Charter), the Protocol and any other relevant human rights instrument ratified by the States concerned. Specifically, the Court has two types of jurisdiction: contentious and advisory.

livestock. The destructions of farmlands, rivers, crops and animals had also created malnutrition and starvation among certain communities.<sup>70</sup>

In response to this complaint, the African Commission, described the degree of socioeconomic and environmental injustice in the Niger Delta region of Nigeria as “humanly unacceptable”<sup>71</sup> and a “nightmare”.<sup>72</sup> The Commission held that the government of Nigeria was in violation of the African Charter,<sup>73</sup> and appealed to them to ensure protection of the environment, health and livelihood of the people by ensuring adequate compensation to victims of the human rights violations (including relief and resettlement assistance); comprehensive cleanup of lands and rivers; environmental and social impact assessments; etc.<sup>74</sup>

Ten years after the Commission released its communication on this matter, some activist forces contended that “no progress”<sup>75</sup> had been made in remediating the socioeconomic and environmental injustice in the region.<sup>76</sup> This “lack of remediation” prompted another activist force in Nigeria<sup>77</sup> to pursue the same cause by approaching the ECOWAS Court.<sup>78</sup>

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<sup>70</sup> African Commission on Human and Peoples’ Rights, Decision on communication of The Social and Economic Rights Action Center and the Center for Economic and Social Rights/Nigeria (155/96), para 9. Decision made at the 30th Ordinary Session of the African Commission of Human and Peoples’ Rights, Banjul, 13-27 October 2001, Online: <<http://www.achpr.org/communications/decision/155.96/>>.

<sup>71</sup> *ibid* at para 67.

<sup>72</sup> *ibid*.

<sup>73</sup> *ibid* at para 70 (*Articles 2, 4, 14, 16, 18(1), 21 and 24 of the African Charter on Human and Peoples’ Rights*).

<sup>74</sup> *ibid*.

<sup>75</sup> Environmental Rights Action (Centre for Environment, Human Rights and Development, Friends of the Earth Europe, Platform, Amnesty International), “No Progress: An Evaluation of the Implementation of UNEP’s Environmental Assessment of Ogoniland, Three Years On”.

<sup>76</sup> *ibid*.

<sup>77</sup> The Socio-Economic Rights and Accountability Project (SERAP).

<sup>78</sup> Officially referred to as the Community Court of Justice (CCJ) of the Economic Community of West African States (ECOWAS). Hereinafter referred to as “the ECOWAS Court” or “the Court.” The 2005 ECOWAS

The activist force, SERAP, approached the ECOWAS Court challenging the Nigerian Government over the environmental injustice in the Niger Delta region of Nigeria. SERAP also instituted two other cases that border on environmental or socioeconomic rights before the ECOWAS Court, all three cases challenging the Federal Government, but with different causes of action. These three cases will be analysed in this thesis.

### 1.3. METHODS

This work was based on a desk study. It is, in part, based on the case studies of the decisions of the ECOWAS Court in three cases instituted against Nigeria: *SERAP v. President of Nigeria & Anor*,<sup>79</sup> *SERAP v. President of Nigeria & 8 Ors.*,<sup>80</sup> and *SERAP & 10 Ors. v. Federal Republic of Nigeria & 4 Ors.*<sup>81</sup> It also evaluates the treaty documents of the ECOWAS Court and the laws that concern environmental and socioeconomic rights in Nigeria. For the case studies, qualitative and in-depth analyses of the decisions in *Case 1*, *Case 2* and *Case 3* was conducted but limited to the issues relating to the scope of this work. Some background materials, such as pleadings, affidavits and transcripts, were also collected and analyzed, where possible. The analysis of these materials was vital in understanding the issues determined, arguments developed, and the reasoning of the

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Supplemental Protocol expands the jurisdiction of the Community Court of Justice to hear human rights cases and enlarges the admissibility rules to include disputes between individuals and their own member states. As a result of these amendments, the Court can consider cases brought by individuals on application for relief for violation of their human rights; individuals and corporate bodies to determine whether an ECOWAS official has violated their rights; member states and the Executive Secretary, to bring an action against a state for failure to fulfill treaty obligations and member states, the Council of Ministers, and the Executive Secretary for determination of the legality of any action related to ECOWAS agreements. (Supplementary Protocol A/SP.1/01/05 Amending the Preamble and *Articles 1, 2, 9 and 30* of Protocol A/P.1/7/91 relating to the Community Court of Justice and Art 4 Para 1 of the English version of the said Protocol).

<sup>79</sup> ECW/CCJ/JUD/07/10. (Identified as “Case 1” in this thesis).

<sup>80</sup> ECW/CCJ/JUD/18/12. (Identified as “Case 2” in this thesis).

<sup>81</sup> ECW/CCJ/JUD/16/14. (Identified as “Case 3” in this thesis).

Court in the three cases at hand. It also helped the author gain an in-depth understanding of the cases and how they were determined. Analyzing the ECOWAS Treaty and the relevant domestic legislation that apply to the issues was also significant for this thesis research because domestic laws influence the decisions and activities of the relevant activist forces. Reviewing them helped the author elicit meaning and gain a better understanding of the texts as they affect the current enquiry. A review of the ECOWAS Supplementary Protocol of 2005, the Revised Treaty, and ECOWAS Court's Rules of Procedure<sup>82</sup> also helped reveal the "living" ambit of the relevant ECOWAS "law".

The relevant international human rights standards on environmental and socioeconomic rights, as well as the existing literature on environmental and socioeconomic justice, were also analyzed and evaluated in accordance with the focus of this thesis.

The secondary sources consulted for this research include academic articles, books, the annual reports of the ECOWAS Court, and NGO reports. With the books and articles, the intent was to find analyses on the human rights jurisdiction of the ECOWAS Court, especially how it has been theorized and studied. Literature relating to the concepts of "activist forces," "the theory of quasi-constructivism" and "correspondence" are also germane to this work because of the centrality of these concepts to the arguments made in this thesis (therefore the conceptual framework undergirding these terms are examined in this thesis, before employing them to describe the pursuit of environmental and

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<sup>82</sup> The ECOWAS documents are mostly published in three languages: English, French and Portuguese. The author was restricted to English-only documents as that is the official language used in Nigeria and the only language the author is familiar with among the three. (However, all the ECOWAS documents that are not published in English are translated into English hence they hardly vary in context).

socioeconomic justice before the ECOWAS Court). Published reports and news articles issued by *SERAP* (the NGO that instituted the three cases before the court that are examined here), as well as those issued by other NGOs and journalists, are examined. Although this is grey literature, they helped provide practical information that augmented the understanding of the academic concepts obtained from the other sources.

The combination of the above-mentioned methods and sources which are utilized in researching this thesis provided a diversity of perspectives.

#### **1.4. ANTICIPATED ANALYSIS**

This thesis will shed significant light on the extent to which activist forces have utilized the ECOWAS Court in their pursuit of environmental and socioeconomic justice in Nigeria, despite the prevailing domestic social, political and legal limitations. By using a “quasi-constructivist” lens especially through Okafor’s theory of “correspondence,” this thesis will also reveal how the ECOWAS Court has influenced normative change within the human rights landscape of Nigeria, particularly the impact of the Court’s jurisprudence within key domestic institutions in Nigeria viz: The Executive, Legislature and the Judiciary.

#### **1.5. KEY CONCEPTS AND LITERATURE REVIEW**

The three (3) major concepts and ideas that characterise this work include: The “ECOWAS Court”, “Environmental and Socioeconomic Justice”, and the “Theory of Quasi-Constructivism.” Significant literature that border on these three (3) overarching concepts were reviewed independently in order to lay the foundation for this research.

These reviews consisted in attempted analyses of the three (3) major concepts that characterise this work but attempted to demonstrate linkages, distinctions and gaps that exist within them. This is relevant in establishing how the existing literature on the subject matter of this thesis informs this work, and it will also provide an understanding of these concepts which are a prerequisite to presenting and recognizing the ideas and contributions of this work.

### **1.5.1. ON THE ECOWAS COURT**

For the literature review on the ECOWAS Court, this section examined some of the literature relating to the history, jurisdiction and prospect of the ECOWAS court for advancing human rights as well as environmental and socioeconomic justice (or otherwise). This section will also describe the human rights mandate of the ECOWAS Court.

Engel, Jakob, and Marie-Agnes Jouanjean make claims that the ECOWAS was formed around Nigeria's plan to organize her neighbors into an economic union towards protecting her interests within the sub region.<sup>83</sup> This claim is arguable. Nigeria, which at the time was, and remains, the political and economic powerbase of the region, had just struck oil and was at the verge of joining the oil producing nations across the globe. What is more, Engel *et al* are challenged by scholars like Okom who has noted "only good reasons" for an economic (and even a political) union.<sup>84</sup> The good reasons include the

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<sup>83</sup> Engel, Jakob, and Marie-Agnes Jouanjean, "Political and Economic Constraints to the ECOWAS Regional Economic Integration Process and Opportunities for Donor Engagement" (2015).

<sup>84</sup> Okom Michael P, "Economic Integration in ECOWAS: 40 Years After" (2016) European Scientific Journal, EurSJ 12 at 19.

thinking that open markets attract foreign investment and thus encourage development. Therefore, since the ECOWAS States are geographically proximate and share contiguous borders, the assumptions are valid. Okom also believes that another such good reason was to promote security within the region because a threat to one member state could inspire instability in another state.<sup>85</sup> Similarly, according to Olawuyi, the formation of the new Community was engineered to foster political unity, and advance peace, security and immigration across the sub-region<sup>86</sup>. But apart from the economic imperatives of other sub-regional states joining forces with Nigeria, it was also necessary for the smaller states to form a common defense pact as most of their armed forces were ill-equipped and unprepared for combat operations.<sup>87</sup>

As importantly, the ECOWAS Treaty makes copious references to the need for judicial cooperation among member states. It enjoins member states to cooperate in judicial and legal matters with a view to harmonizing their judicial and legal systems.<sup>88</sup> It seemed to make sense to the authors of this treaty that National policies and programmes in both economic and related legal matters are to be regulated through a sub-regional regime, tailored towards the ECOWAS system and in conformity with international law and procedures.<sup>89</sup>

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<sup>85</sup> *Ibid.*

<sup>86</sup> Damilola Olawuyi, "The Increasing Relevance of Rights-Based Approaches to Resource Governance in Africa: Shifting from Regional Aspiration to Local Realization" (2015), 1 McGill J.S.D.L.P. 293-337.

<sup>87</sup> At the formation of community, Nigeria was the only country with a strong standing military. Coming out of a thirty months civil war, the Nigerian military was basking in that euphoria, and thus well positioned to provide leadership for a common defence project. Also, Peter Arthur, "ECOWAS and Regional Peacekeeping Integration in West Africa: Lessons for the Future" (2010) Africa Today, Vol. 57 (2) 3-24.

<sup>88</sup> Revised ECOWAS Treaty, Article 57.

<sup>89</sup> *Ibid* at Article 3(2).



Using Mosler's portrayal of "international society as a legal community," the conditions necessary for setting up a judicial institution were present.<sup>90</sup> It was no surprise then that a conflict resolution mechanism was soon set up within the community, and an independent legal system granting rights and imposing obligations was also established.<sup>91</sup> Indeed, right from the inception of the organization, it had been resolved that an institution should be created to adjudicate over disputes arising from the interpretation of Community rules and regulating the relations between the various political organs of the organization. However, the actualization of this system was left unattended for more than two decades. It was only in 1991 that a blueprint for the creation of an international judicial tribunal to interpret community legal instruments, and disputes related to them, was introduced via the 1991 protocol.<sup>92</sup> Alter, Helfer & McAllister believe that this aligned with the global need at the time to shift supranational and sub-regional systems from serving a largely capitalist purpose to a pro-poor mandate of fulfilling the rights of individuals.<sup>93</sup>

Viljoen, Murray, and Okafor have significantly investigated the theory and practice of the work that domestic actors do in the international human rights system.<sup>94</sup> Notably, using

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<sup>90</sup> Hermann Mosler, "International Society as a Legal Community, in *Recueil des Cours Vol 4*, (1980) Maryland, USA.

<sup>91</sup> As found in similar communities such as the European Union, it was imperative to have a judicial body with a duty to resolve disputes and set parameters for the enforcement of community rules and regulations as agreed by the member states.

<sup>92</sup> Banjo Adewale, "The ECOWAS Court and the politics of access to justice in West Africa" (2007); *Africa Development*, 32(1).

<sup>93</sup> Karen J. Alter, Laurence R. Helfer, and Jacqueline R. McAllister, 'A New International Human Rights Court for West Africa: the ECOWAS Community Court of Justice, *American Journal of International Law*, Vol. 107, No.4 (2013).

<sup>94</sup> Frans Viljoen, 'Exploring the Theory and Practice of the Relationship between International Human Rights Law and Domestic Actors' *Leiden Journal of International Law* Vol. 22, Issue 01 (2009); Rachel Murray, 'The Role of National Human Rights Institutions at the International and Regional Levels: The Experience

an African viewpoint, three of them have contributed to developing the literature on the domestic/international human rights. They have each assessed the potential of the African system to accommodate the demands of domestic human rights forces, but Okafor even goes deeper by exploring the significance of both the regional and sub-regional systems for local Nigerian actors, institutions and *publics*.

Ebobrah's writings on the ECOWAS Court started with an examination of how a Community of states for economic integration could create an 'influential supranational court.'<sup>95</sup> A human rights court at the sub-regional level, especially in Africa, caught the interest of several scholars. Alter, Helfer & McAllister appraise the court's "path-breaking cases," broad access, and its unique standing rules,<sup>96</sup> but they also argue that the human rights system in Africa is "weak".<sup>97</sup> This notion about the African system being "weak" has, however, been comprehensively challenged by Okafor.<sup>98</sup>

On the human rights jurisdiction of the ECOWAS Court, Ebobrah, as well as Buergenthal describe the Court as "positive" because it is distinctive from the tiered structure in other regional human rights systems where a commission would initially vet complaints, and grant optional jurisdiction thereby limiting activist forces from bringing cases to the court.<sup>99</sup>

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of Africa', Oxford: Hart, 2007; Obiora Chinedu Okafor, *The African Human Rights System, Activist Forces and International Institutions* (Cambridge: Cambridge University Press, 2007).

<sup>95</sup> Solomon Tamarabakemi Ebobrah, "Critical Issues in the human rights mandate of the ECOWAS Court of Justice" (2010) *Journal of African Law* (54) 01; 1-25.

<sup>96</sup> Alter, Helfer & McAllister, *supra* note 93 at 737.

<sup>97</sup> *Ibid* at 743.

<sup>98</sup> Okafor, *supra* note 1.

<sup>99</sup> Solomon Tamarabakemi Ebobrah, "Litigating Human Rights Before Sub-Regional Courts in Africa" (2009) 17 *African Journal on International and Comparative Law*, 79; Thomas Buergenthal, "The Evolving International Human Rights System", 100 *AJIL* 783, (2006) 791-801.

It is noteworthy here that Buergenthal's assessment of the ECOWAS Court is from the point of view of the experience of the European Union and its relationship with the European Court of Human Rights.<sup>100</sup>

Helfer appraises the value of the Court for socioeconomic and environmental rights struggles. He argues that its design has ensured that no ECOWAS legal instrument prescribes which human rights document its judges can or cannot adjudicate. Therefore, in forum shopping for human rights, activist forces can benefit from "charter shopping" towards attaining socioeconomic and environmental wins.<sup>101</sup> But Viljoen warns that the existence of multiple international venues for adjudicating human rights claims in Africa may lead to divergence in jurisprudence resulting in comparisons and activists playing one forum against the other.<sup>102</sup>

Notwithstanding that the ECOWAS lacks its own human rights charter, the Court primarily applies the provisions of the ACHPR. The Court also applies the UDHR and other IHRL instruments.<sup>103</sup> According to the first President of the ECOWAS Court (*as she then was*), Justice Hansine Napwaniyo Donli:

[E]ven though there is no cataloging of the rights that the individuals or citizens of ECOWAS may enforce, the inclusion and recognition of the African Charter in Article 4 of the Treaty of the Community behooves on the

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<sup>100</sup> Buergenthal Thomas, "Proliferation of International Courts and Tribunals: Is it Good or Bad?" 14 (2001), *Leiden Journal of International Law* (2) 267-275.

<sup>101</sup> Laurence R Helfer, "Forum Shopping for Human Rights", 148 *University of Pennsylvania Law Review* 285, 301 (1999).

<sup>102</sup> Frans Viljoen, *International Human Rights Law in Africa* 297, 487 (2nd ed. 2012).

<sup>103</sup> Jörg Kleis, *African Regional Community Courts and their Contribution to Continental Integration* (Germany: Nomos 2016) at 312

Court by Article 19 of the Protocol of the Court to bring in the application of those rights catalogues in the African Charter.<sup>104</sup>

The ECOWAS Court can cherry-pick from different human rights instruments and statutes; therefore, the Court has a wide level of flexibility in the application of human rights law and in the adjudication of the cases before it. However, from inception till date, the Court has referenced and applied more articles of the ACHPR than any other instrument, but has also made strong reference to different instruments including provisions of the ICJ.<sup>105</sup>

The rationale for this “buffet-style” application of human rights instruments and statutes by the Court could be because human rights instruments (both international and regional) is already saturated with very similar provisions, hence there was no need for ECOWAS to create its own and treaty to add to the bulk. Another possible rationale could be that ECOWAS didn’t want to engage in a “sovereignty battle” with its Member States by urging the creation of its own “community human rights treaty.” But does this mean that the power of the Court will stop where state sovereignty begins? Addressing this question at the Conference on The Law in the Process of Integration in West Africa,<sup>106</sup> Justice Awa

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<sup>104</sup> *Jerry Ugokwe v. The Federal Republic of Nigeria & Anor* ECW/CCJ/APP/02/05 (7 October 2005) p 14, para 29.

<sup>105</sup> According to the “About Us” section of the ECOWAS Court Website, the description of the Court’s applicable is stated as follows: “The Court applies the Treaty, the Conventions, Protocols and Regulations adopted by the Community and the general principles of law as set out in Article 38 of the Statute of the International Court of Justice. In the area of human rights protection, the Court equally applies, inter alia, international instruments relating to human rights and ratified by the State or States party to the case.” Online: ECOWAS Court <<http://www.courtecowas.org>>

<sup>106</sup> Held in Abuja, Nigeria from the 12<sup>th</sup> to the 14<sup>th</sup> of November 2006.

Nana Daboya, of the ECOWAS Court,<sup>107</sup> described the jurisdiction of the Court as it relates to its territorial competence on human rights adjudication. Her Lordship said:

Territorial competence, in human rights issues [before the ECOWAS Court], goes well beyond the geographical zone, and extends to any links that may be established between the complaint made and the law of the country cited.<sup>108</sup>

As progressive as this sounds, it may be disputing the age long applicability of the Westphalian theory of sovereignty.<sup>109</sup> What is indisputable here, however, is that the Head of States and working committee that deliberated on the formation of the Court understood that the creation of “community rights” would be much work and would not serve any better purpose than the option of using the existing legal mechanisms of both national courts and the regional system to “improve movement of persons, goods and capital,”<sup>110</sup> amongst other objectives. The jurisprudence of the ECOWAS Court has so far emphasized “human rights” as against any claim of constructing “community rights.”<sup>111</sup>

The human rights mandate of the Court can be traced to Article 4(g) of the ECOWAS Revised Treaty which affirms the agreement made by the ECOWAS Member States to

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<sup>107</sup> (President of the ECOWAS Court from 2009 – 2011).

<sup>108</sup> Femi Falana, “Compendium of the International Conference on “The Law In The Process Of Integration In West Africa,” Abuja, Nigeria (Nov. 13–14, 2007) 143.

<sup>109</sup> Westphalian sovereignty is the concept of nation-state sovereignty based on territoriality and the absence of a role for external agents in domestic structures. It is an international system of states, multinational corporations, and organizations that began with the Peace of Westphalia in 1648. A sovereign state in international law is a nonphysical juridical entity that is represented by one centralized government that has sovereignty over a geographic area. International law defines sovereign states as having a permanent population, defined territory, one government, and the capacity to enter into relations with other sovereign states. It is also normally understood that a sovereign state is neither dependent on nor subjected to any other power or state.

<sup>110</sup> Jerry Ukaigwe, *ECOWAS Law* (Springer International Publishing, 2016) at 172.

<sup>111</sup> *Ibid* at 173.

adhere to the “recognition, promotion and protection of human and peoples’ rights in accordance with the provisions of the ACHPR.”<sup>112</sup> The ECOWAS Court is however the only sub-regional international court that applies as its primary instrument, a regional instrument, that has been explicitly incorporated into its body of “law.”<sup>113</sup> Since the Court applies the rights catalogued in the ACHPR,<sup>114</sup> it is not surprising that most applications that the Court has taken up were brought under the ACHPR.<sup>115</sup>

Political science analysis from Alter, Helfer & McAllister considered the Question: “How can a Court of Justice established by an institution for economic integration produce socioeconomic and environmental justice?”<sup>116</sup> Their consideration strongly relates to a theoretical framework that has been adapted by some socio-legal scholars which speaks of “legalized transnational political opportunity structures.”<sup>117</sup> According to Graubart these are, in fact, quasi-judicial mechanisms that offer transnational political platforms for non-state activists, and can involve a mediating process set forth by treaty.<sup>118</sup> However, Alter, Helfer & McAllister posit that the broad delegation of human rights authority to the Court is likely to provoke incredulity.<sup>119</sup> This is echoed in rational functionalist international

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<sup>112</sup> Art 4(g) of the ECOWAS Revised Treaty.

<sup>113</sup> In the case of *Alhaji Tidjani v. Federal Republic of Nigeria* (ECW/CCJ/APP/01/06), the court stated: “the Plaintiff’s application to this court is rooted in Article 6 of the African Charter on Human and Peoples’ Rights which guarantees the right of every individual to his liberty and freedom from arbitrary arrest and detention. Thus, the right that the plaintiff complains about is one that is recognized by the African Charter on Human and Peoples’ Rights, and ‘a fortiori’, by the Revised Treaty of Economic Community of West African States (ECOWAS)” (28<sup>th</sup> of June 2007) p 9, para 29.

<sup>114</sup> Article 4 (g) Revised Treaty, but the court can also have regard to other international instruments on human rights e.g., Universal Declaration on Human Rights 1948; *Jerry Ugokwe v. The Federal Republic of Nigeria & Anor* ECW/CCJ/APP/02/05 (7 October 2005) p 14, para 29.

<sup>115</sup> Ukaigwe, *supra* note 117 at 175.

<sup>116</sup> Alter, Helfer & McAllister, *supra* note 93.

<sup>117</sup> Jonathan Graubart, “Politicizing a New Breed of Legalized Transnational Political Opportunity Structures Labor Activist Uses of NAFTA’s Citizen-Petition Mechanism,” 26 Berkeley J. Emp. & Lab. L. 97 (2005).

<sup>118</sup> *ibid.*

<sup>119</sup> Alter, Helfer & McAllister, *supra* note 93.

relations theory, which assumes that states delegate authority to international institutions only when doing so furthers narrowly conceived functional objectives.

About the significance of the Court for Nigerian and activist forces, Alter, Helfer & McAllister suggest that the creation of a far-reaching and domestically intrusive international human rights review mechanism in West Africa is futuristic but they are not surprised that an international institution created to achieve the objectives of economic cooperation and integration in the West African sub-region has evolved towards the benefitting activist forces.<sup>120</sup> They contrast rational functionalist theories with historical institutionalist accounts, which recognize that institutions that play on the level of states and governments can be constricting due to principles of sovereignty and self-determinism, but can also evolve to become a successful platform for activist forces to pursue justice causes, which may be quite different from what the founders first envisioned.<sup>121</sup>

Through a series of publications, Ebobrah has not only provided a detailed analysis of the human rights jurisprudence of the ECOWAS Court but also assesses the socioeconomic and environmental rights issues addressed by the Court.<sup>122</sup> Although he initially argues that the Court's jurisdiction is overbroad and does not have the benefit of an institution

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<sup>120</sup> Alter, Helfer & McAllister, *supra* note 93.

<sup>121</sup> *ibid.*

<sup>122</sup> Ebobrah, "Taking children's rights litigation beyond national boundaries: The potential role of the ECOWAS Community Court of Justice" in M Killander (ed) *Human Rights Litigation and The Domestication of Human Rights Standards in Sub Saharan Africa* (2008) AHRAJ Casebook Series, International Commission of Jurists, ICJ – Kenyan Section; "The future of Socio-economic rights litigation in Nigeria" *Chapter in Called to the Law: Essays in honour of Late Justice E Igoniwari* (Peer reviewed collection of Essays) (2009) Lagos: Malthouse Press. Also, Ebobrah, *supra* note 95; *supra* note 99.

with powers of coercion to enforce its judgments, he subsequently posits that the ECOWAS can rely on the pressure generated by the political arms of the Community; the indulgence of national executives; and the goodwill of domestic courts to bring to help advance the struggle for socioeconomic rights in the sub-region.<sup>123</sup> For Eboerah, the ECOWAS Court offers Nigerian activist forces a way to minimize the obstruction, haggling, and delay that they would observe if they stuck only with the domestic or continental human rights system. He suggests that through sub-regional litigation on “non-justiciable” rights, activist forces might open a reformist path, away from the limited avenues of legal recourse available to victims of socioeconomic and environmental rights violations in domestic courts in West Africa.<sup>124</sup>

### **1.5.2. ON ENVIRONMENTAL AND SOCIOECONOMIC JUSTICE**

For this literature review on the concept of environmental and socioeconomic justice, this section will first examine “socioeconomic justice” as a distinct concept from “environmental justice”, before analyzing how and where they merge in the literature. The two concepts share very close parallels and they complement each other, hence the combination of both concepts into a single framework for use in this thesis.<sup>125</sup> This review of the literature will also attempt to provide an account of the origins of environmental and socioeconomic justice in the literature, including an attempt to retrace a gap in the account.

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<sup>123</sup> Eboerah, *supra* note 95; *supra* note 99.

<sup>124</sup> *Ibid*; *supra* note 122.

<sup>125</sup> Where “environmental justice” is used in this thesis, it refers to the combination of both “socioeconomic justice” and “environmental justice” as concepts.



On the concept of socioeconomic justice, Cranston, Alston and Sadurski all trace socioeconomic justice to the welfare demands that helped fashion the Universal Declaration of Human Rights (UDHR), and the resulting adoption of the International Covenant on Economic Social and Cultural Rights (ICESCR)<sup>126</sup>. With abundance of literature and jurisprudence on the *status*,<sup>127</sup> *justiciability*,<sup>128</sup> and *reasonableness*<sup>129</sup> in the application of socioeconomic rights, Falana, Chinkin, Alston & Goodman and Langford, Porter, Brown & Rossi amongst others, all agree that the struggles for the enjoyment of the rights to education, housing, adequate standard of living and healthcare are valid human rights struggles.<sup>130</sup> This is now a settled question.

For environmental justice, Schlosberg considers it an investigative framework that considers the injustice experienced by people and communities who are differently and

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<sup>126</sup> Cranston Maurice, *“What are Human Rights?”* London: Bodley Head, 1973; Alston Philip, “U.S. Ratification of the Covenant on Economic, Social and Cultural Rights: The Need for an Entirely New Strategy”, *American Journal of International Law*, 84.2 (1990): 365-393; Sadurski Wojcieck, *Rights before Courts: A Study of Constitutional Courts in Post-Communist States of Central and Eastern Europe*. The Netherlands: Springer, 2008.

<sup>127</sup> Mureinik Etienne, “Beyond a Charter of Luxuries: Economic Rights in the Constitution”, *South African Journal on Human Rights*, 8.4 (1992): 464-474; Liebenberg Sandra, “The Protection of Economic and Social Rights in Domestic Legal Systems”, *Economic, Social and Cultural Rights: A Textbook*. Eds. Eide, Asbjørn, Krause, Catarina and Alan Rosas. 2 ed. Martinus Nijhoff, 2001.

<sup>128</sup> Justice Muralidhar S, “Economic, Social and Cultural Rights: An Indian Response to the Justiciability Debate”, *Economic, Social and Cultural Rights in Practice: The Role of Judges in the Implementing Economic, Social and Cultural Rights*.” Eds. Ghai, Yash and Jill Cottrell. INTERIGHTS, 2004. 23-32; Palmer Elizabeth, “Resource Allocation, Welfare Rights – Mapping the Boundaries of Judicial Control in Public Administrative Law”, *Oxford Journal of Legal Studies*, 20.1 (2000): 63-88.

<sup>129</sup> Ryan James, “Schools, Race and Money,” *Yale Law Journal*, 109.2 (1999) 249-316; Steinberg, Carol, “Can Reasonableness Protect the Poor? A Review of South Africa’s Socio-Economic Rights Jurisprudence” *South African Law Journal*, 123.2 (2006): 264-284.

<sup>130</sup> Aborishade Femi, “The imperative of justiciability of socio-economic rights in Nigeria: Lecture in honour of Femi Falana (SAN), “Friends of Femi Falana” Centre for Labour Studies, Ibadan (2013); Chinkin Christine, “The Protection of Economic, Social and Cultural Rights Post-Conflict,” paper series commissioned by the Office of the High Commissioner for Human Rights (2009); Philip Alston and Ryan Goodman, *International Human Rights* (Oxford University Publishing 2013) 146; Langford Malcolm and Porter Bruce and Brown Rebecca and Ross Julieta, “The Optional Protocol to the International Covenant on Economic, Social and Cultural Rights: A Commentary” (June 3, 2016) Pretoria University Law Press, 2016.

unfavourably affected by the quality of the environment.<sup>131</sup> According to Schlosberg's instructive definition, environmental injustice concerns the partial or total restraint of access to natural resources due to systemic discrimination, and based on factors such as class, autonomy locality, race or even gender.<sup>132</sup> Legal literature on this subject has covered three constructs within the concept of environmental justice namely: *Distribution*,<sup>133</sup> *Recognition*,<sup>134</sup> and *Procedure*.<sup>135</sup> These three themes are broadly instrumental in understanding environmental justice especially within the framework of this thesis.

On the convergence of both constructs i.e. environmental *and* socioeconomic justice, Dugard and Alcaro have established that both frameworks are reciprocal.<sup>136</sup> They recount this amicable and established relationship as being inseparable especially when pursuing justice for the poor and marginalized.<sup>137</sup> Schlosberg described the advancement of environmental justice to include instances where natural resources claims are used as factors to pursue social justice.<sup>138</sup> Agyeman & Evans as well as Bulkeley & Walker illustrate how environmental justice causes question socioeconomic inequality,

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<sup>131</sup> David Schlosberg, *Defining Environmental Justice* (Oxford: Oxford University Press, 2007).

<sup>132</sup> *Ibid.* And also Karen Bell, *Achieving Environmental Justice. A Cross-National Analysis* (Bristol, UK: Policy Press, 2014).

<sup>133</sup> Schlosberg, *supra* 145. Distribution: The challenging, unfair distribution of environmental harms and resources.

<sup>134</sup> *Ibid.* Recognition: The recognition of minority groups who are mostly affected by decision-making.

<sup>135</sup> *Ibid.* Procedure: Procedural justice, including meaningful participation in environmental decision-making.

<sup>136</sup> Jackie Dugard and Anna Alcaro, "Let's work together: Environmental and socioeconomic rights in the courts" *South African Journal on Human Rights* 29 (1) 14 - 31.

<sup>137</sup> *Ibid.*

<sup>138</sup> Schlosberg David, "Theorising environmental justice: the expanding sphere of a discourse" (2013) *Environmental Politics*, 22:1, 37-55; "Reconceiving Environmental Justice: Global Movements and Political Theories, *Environmental Politics*" (2007) 13:3, 517 - 540.

participation, and access to socioeconomic rights.<sup>139</sup> Ewall and Walker have individually identified and written about the existence of the indicators of socioeconomic and environmental injustice especially how the location and the type of environment people live in dictate their socioeconomic situation as well as their exposure to harm. Culture, tradition, dependence on natural resources, governance and ways of relating with the land are also critical factors.<sup>140</sup>

Walker describes the concept of “environmental equity”<sup>141</sup> by positing that it is a prerequisite to achieving both socioeconomic and environmental justice. Equitable treatment requires that these unequal routes of impacts be addressed through different solutions, through different legal and policy treatments in face of development proposals, both in procedural and substantive ways. Equitable treatment, therefore, is about using specific criteria, actions, and procedures to balance the powers between the people who propose and conduct development and the people that are affected by it.<sup>142</sup>

Particularly touching on the Nigerian context, Ako argues that the provision of socioeconomic resources is accurately emphasized for environmental justice in Nigeria because it is directed at meeting the basic human needs and enhancing the quality of life

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<sup>139</sup> Agyeman J & Evans B, “Just sustainability’: the emerging discourse of environmental justice in Britain?” (2004) *The Geographical Journal*, Vol. 170, No. 2, pp. 155 – 164; Walker Gordon P & Bulkeley Harriet, “Geographies of Environmental Justice” (2006) *Geoforum*, vol.37, no (5), pp.655 - 659.

<sup>140</sup> Mike Ewall, “Legal Tools for Environmental Equity vs. Environmental Justice” (2013) 13 *Sustainable Development Law and Policy* 4 – 13; Gordon Walker, “Environmental Justice, Impact Assessment and politics of Knowledge. The Implications of Assessing the social Distribution of Environmental Outcomes” (2010) 30 *Environmental Impact Assessment Review* 312.

<sup>141</sup> *Ibid.*

<sup>142</sup> *Ibid.*

of Nigerians.<sup>143</sup> Ako describes the Nigerian context of environmental and socioeconomic justice as interdependent because the domestic approach of many activist forces is to challenge the abuse of power and constitutional non-justiciability which results in people, especially the poor, having to suffer serious effects of socioeconomic abuses and environmental damage caused by many factors including greed and corruption.

Environmental and socioeconomic justice in Nigeria per Alabi, Agbonifo and Ako, is about economic quality, health care, housing, food, jobs, human dignity, environmental protection, and security.<sup>144</sup> Ako posits that States' compliance to international human rights law is a *sine qua non* for realizing positive socioeconomic and environmental impact.<sup>145</sup>

On the history of environmental (and socioeconomic justice), it may be difficult to trace its origin to a particular jurisdiction because for many decades, poor people and marginalized communities around the world have suffered from extreme poverty and socioeconomic deprivation, with their environment severely polluted, and ignored. The concept of environmental justice as an activist construct, and a justice cause, first gained global attention in 1982 when activist forces publicly protested a landfill siting in Warren County, North Carolina, U.S.A.<sup>146</sup> The National Association for the Advancement of Colored

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<sup>143</sup> Rhuks Ako, "Environmental Justice in Developing Countries: Perspectives from Africa and Asia-Pacific" (2013) New York: Routledge [Ako].

<sup>144</sup> Alabi Joshua, "The Dynamics of Oil and Fiscal Federalism: Challenges to Governance and Development in Nigeria" (2010) PhD Thesis, University of Leeds; Agbonifo John, "Development as Conflict: Ogoni Movement, the State and Oil Resources in Niger Delta, Nigeria" (2009); Rhuks Ako, "Environmental Justice in Developing Countries: Perspectives from Africa and Asia-Pacific" (2013) New York: Routledge.

<sup>145</sup> *Ibid* Ako.

<sup>146</sup> A small, predominately African-American community in the United States that was designated to host a hazardous waste landfill. This landfill would accept PCB-contaminated soil that resulted from illegal

People (NAACP), in collaboration with other activist forces staged a persuasive protest against the landfill.<sup>147</sup> The action taken by these activist forces failed to prevent the siting of the disposal facility but the protest drove massive awareness and consciousness on environmental injustice in the U.S. and this led to an environmental justice movement.<sup>148</sup>

The situation of Warren County in North Carolina was one out of several activisms against the environmental injustice in the U.S. at the time. A similar situation also existed in Kettleman City in California, U.S.A.<sup>149</sup> These poor communities were continuously left out of the environmental and other decision-making processes, and they were left only to deal with the negative results of such decision-making.<sup>150</sup> Following the Warren County

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dumping of toxic waste along roadways. After removing the contaminated soil, the state of North Carolina considered a number of potential sites to host the landfill, but ultimately settled on this small African-American community.

<sup>147</sup> It was recorded that more than 500 protesters were arrested: U.S Department of Energy “The Environmental Justice Movement” Online: < <http://www.learnnc.org/lp/editions/nchist-recent/6173>>

<sup>148</sup> Bradford C. Mank, “Is There a Private Cause of Action Under EPA's Title VI Regulations? The Need to Empower Environmental Justice Plaintiffs” (1999) 24 Colum. J. Env. L. 1, 18.

<sup>149</sup> Also in the 80s, residents of Kettleman City discovered the existence of a toxic waste dump located just a few miles from their town. Kettleman City is a small farm worker town located in California’s San Joaquin Valley. At the time the dump was discovered, the community was 95 percent Latino, many of whom were monolingual Spanish speakers. The residents discovered that Chem Waste, (the owner of the dump) proposed building an incinerator that would burn up to 108,000 tons of toxic waste each year. Practically, this meant that 5,000 truckloads of toxic waste, in addition to the hundreds of daily trucks bound for the toxic dump, would pass through their area putting residents at risk of exposure to toxic waste spillage, in addition to the air pollution created by the incineration of the waste. The people formed an activist force and called it “El Pueblo para el Aire y Agua Limpo” (People for Clean Air and Water). The members of El Pueblo also discovered a 1984 report commissioned by the California Waste Management Board which suggested to companies and localities seeking to site garbage incinerators that rural communities, poor communities, communities with low educational levels, communities that were highly Catholic, communities with fewer than 25,000 residents, and communities whose residents were employed in resource-extractive jobs like mining, timber, or agriculture would offer the least resistance. On Chem Waste, they found out that the incinerators were located in neighbourhoods that were comprised of 75 percent or more residents of colour. The incinerator caused black smoke plumes to spew into the air and instead of addressing the pollution issue, Chem Waste turned off the incinerator’s air monitoring equipment so nobody would know the level of pollution coming out of the plant. This practice occurred regularly over a period of months. J Mijin Cha, “Access to environmental justice in the United States: Embracing Environmental and Social Concerns to Achieve Environmental Justice” in Andrew Harding, ed, *Access to Environmental Justice: A Comparative Study* (The London-Leiden Series on Law, Administration and Development, 2007).

<sup>150</sup> *Ibid.*

protest, several activist forces in other jurisdictions gained influence and began to organize organically, especially around the poor minority communities which were mostly affected by environmental injustice. These activist forces challenged several industries and the governments for the activities that threatened their environment including the use, storage, and disposal of toxic chemicals and how these toxic waste products produced high accounts of environmental-related illnesses.<sup>151</sup> The environmental justice pursuits in the U.S. eventually influenced legal changes in key domestic institutions. In 1994, the then U.S. President issued an Executive Order.<sup>152</sup> He directed federal agencies to identify and address two issues: The “disproportionately high and adverse human health or environmental effects of their actions on minority and low-income populations;”<sup>153</sup> and the lack of existing strategy by the U.S. agencies for implementing environmental justice.<sup>154</sup>

The environmental justice activism in the U.S inspired some activists in other parts of the world to pursue environmental justice causes within their own states. Some of these activism outside the U.S however begun organically. Examples of countries where environmental justice activism followed after the U.S include Ghana’s Accra;<sup>155</sup> India’s

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<sup>151</sup> *Ibid.*

<sup>152</sup> Popularly referred to as “*Order 12898*”.

<sup>153</sup> U.S. Environmental Protection Agency, “Order 12898: Federal Actions to Address Environmental Justice in Minority Populations and Lo-Income Populations” Online: <<https://www.epa.gov/law-regulations/summary-executive-order-12898-federal-actions-address-environmental-justice>>

<sup>154</sup> *Ibid.*

<sup>155</sup> James S Read, “Access to Environmental Justice in Ghana” in Andrew Harding, ed, *Access to Environmental Justice: A Comparative Study* (The London-Leiden Series on Law, Administration and Development, Koninklijke Brill 2007) Cap 2.

Garden City Bangalore;<sup>156</sup> Malaysia's Kuala Lumpur;<sup>157</sup> Pakistan's Karachi;<sup>158</sup> as well as communities in the South West Pacific,<sup>159</sup> including in Indonesia,<sup>160</sup> China,<sup>161</sup> and the United Kingdom.<sup>162</sup>

It may be important to note that whilst many of the historic accounts in the literature of the origins of environmental justice, trace it to the activism in the U.S, environmental justice activism had been evident way earlier in West Africa, more than a decade before the protest in North Carolina. In the late 1960's, in the Niger Delta region of Nigeria, the Ogoni Chiefs handed a petition to the local Military Governor of Nigeria at the time, complaining about the oil multinational, Shell (then operating a joint venture with BP). According to the petition from the Ogoni Chiefs, Shell was seriously threatening their well-being, and even their very lives.<sup>163</sup> These Ogoni activist forces protested by writing letters and obstructing meetings, including giving silent-treatment to the Shell workers (by refusing to talk to

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<sup>156</sup> Amanda Perry-Kessaris, "Access to Environmental Justice in India's Garden City (Bangalore)" in Andrew Harding, ed, *Access to Environmental Justice: A Comparative Study* (The London-Leiden Series on Law, Administration and Development, Koninklijke Brill 2007). Cap 3.

<sup>157</sup> Andrew Harding and Azmi Sharom, "Access to Environmental Justice in Malaysia (Kuala Lumpur)" in Andrew Harding, ed, *Access to Environmental Justice: A Comparative Study* (The London-Leiden Series on Law, Administration and Development, Koninklijke Brill 2007). Cap 5.

<sup>158</sup> Martin Lau, "Access to Environmental Justice: Karachi's Urban Poor and the Law" in Andrew Harding, ed, *Access to Environmental Justice: A Comparative Study* (The London-Leiden Series on Law, Administration and Development, Koninklijke Brill 2007). Cap 7.

<sup>159</sup> Nicholas Pain, "Access to Environmental Justice in the South West Pacific" in Andrew Harding, ed, *Access to Environmental Justice: A Comparative Study* (The London-Leiden Series on Law, Administration and Development, Koninklijke Brill 2007). Cap 9.

<sup>160</sup> Adriaan Bedner, "Access to Environmental Justice in Indonesia" in Andrew Harding, ed, *Access to Environmental Justice: A Comparative Study* (The London-Leiden Series on Law, Administration and Development, Koninklijke Brill 2007). Cap 4.

<sup>161</sup> Michael Palmer, "Towards a Greener China? Accessing Environmental Justice in the People's Republic of China" in Andrew Harding, ed, *Access to Environmental Justice: A Comparative Study* (The London-Leiden Series on Law, Administration and Development, Koninklijke Brill 2007). Cap 8.

<sup>162</sup> Jean-Jacques Paradissis and Michael Purdue, "Access to Environmental Justice in United Kingdom Law" in Andrew Harding, ed, *Access to Environmental Justice: A Comparative Study* (The London-Leiden Series on Law, Administration and Development, Koninklijke Brill 2007). Cap 11.

<sup>163</sup> Platform London, "Background of the Ogoni struggle" Online: <<http://platformlondon.org/background/the-ogoni-struggle/>>.

them).<sup>164</sup> The Chiefs gained little or nothing with their activism until 1970 when there was a major oil rupture at the Bomu oilfield in Ogoni which lasted for several weeks causing widespread environmental pollution and public outrage. This time, their activism moved from “soft” to “hard” pursuits.<sup>165</sup> The activism in the Niger Delta didn’t however gain any global attention only until a decade after these protests took place.

The Niger Delta region of Nigeria which has harbored (and still harbors) a huge portion of the country's oil resources has been beset by serious environmental and socioeconomic problems arising from unfair distribution of the country's oil wealth, and the harms from alleged negligent and unfavourable resource extraction. The environmental and socioeconomic human rights abuses which affected (and still affects) the health, environment and sustenance of the people of this area are still extant issues in the country. What is peculiar in the lived experience of the people of the Niger Delta (and other marginalized and disenfranchised communities suffering environmental injustice), is not only the inequity committed against them through environmental decision-making,<sup>166</sup> but also the injustice experienced<sup>166</sup> by them due to being dissimilarly and negatively affected by the quality of the environment.

### **1.5.3. ON THE THEORY OF QUASI-CONSTRUCTIVISM**

For this literature review on the theory of Quasi-Constructivism, this section will examine some of the theories propounded by several quasi-constructivists, especially *Okafor's*

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<sup>164</sup> Ken Saro Wiwa Jr, “We Inherited a Fight: Sweat, Blood and Oil” *The Ogoni Chronicles* (2009) p 2.

<sup>165</sup> *Ibid.*

<sup>166</sup> Laura Westra, *Environmental Justice and the Rights of the Indigenous Peoples, International and Domestic Legal Perspectives* (London, UK: Earthscan, 2008).



theory of “correspondence”, a unique model for estimating the extent of the “internalization” of human rights norms (without abandoning the regular “compliance” model for assessing the fulfillment by states of their international human rights law). Whilst *Okafor* employed this concept in his study on the African Human Rights system, this theory is adopted for this thesis to the extent that it is able to describe “correspondence-style” trans-judicial communication among the trio of activist forces, the ECOWAS Court and key domestic institutions in Nigeria.

Drawing from his research findings, *Okafor* proffers an ideology of human rights impact in which such impact is judged through the broader lens of “correspondence” rather than the narrower measure of state “compliance.”<sup>167</sup> The latter may be the score for success at the international level, but the former is more relevant and useful in the case of Nigeria where the state may not be mostly “complying”, but there is still evidence of a dynamic form of success in implementing international human rights norms domestically (e.g. in legal arguments, policy documents, constitution, and legislation). Through his concept of “trans-judicial communication,” *Okafor* denotes the transmission of transnational norms, ideas, or knowledge between the continental human rights system and the key Nigerian institutions as players in that system.<sup>168</sup> He employs what he termed as a “quasi-constructivist” theory and approach<sup>169</sup> (drawing from earlier work by Finnemore &

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<sup>167</sup> *Okafor*, *supra* note 1 at 277 – 288.

<sup>168</sup> *Ibid* at 3.

<sup>169</sup> “Quasi-Constructivism, at least in part, is a recognition of the existence of a gap in the constructivist account of the impact of international institutions that has led several scholars to seek to rethink aspects of constructivism, and propose revised and eclectic forms of that analytical framework. Perhaps the best-known version of this kind of revised and eclectic form of constructivism, a tendency that he refers to as ‘quasi-constructivism,’ is Martha Finnemore’s and Kathryn Sikkink’s concept of a ‘strategic social constructivism’ that emphasizes the role of norms in the constitution of the identities and interests of actors, and yet accords at least as equal a value to the ‘rational strategizing’ of relevant actors.” *Ibid* at 21.

Sikkink),<sup>170</sup> and grounded in his fieldwork on non-governmental organizations in Nigeria.<sup>171</sup> This helped him to map and analyze the ways in which activist forces contribute “to the alterations in understandings,” as well as in “logics of appropriateness at the local level.”<sup>172</sup>

Okafor uses this concept of quasi constructivism to describe the work of Martha Finnemore and Kathryn Sikkink.<sup>173</sup> Finnemore and Sikkink developed a theory that stresses the agency of “norm entrepreneurs” as critical to stimulating social change within a political system and within the “life cycle” of a given norm. This happens at a three-stage cycle of “emergence”, “cascade” and “internalization”.<sup>174</sup> Using this kind of quasi-constructivist view, Okafor suggests that the critical question to ask is *not* what an International Human Rights Institution can do *for* the oppressed, and but what the oppressed can do *with* an IHI (as a resource to be deployed creatively within domestic institutions.)<sup>175</sup> He reviews the existing legal scholarship on human rights, dividing it into groups such as the realist, neoliberal, and social constructivist, approaches. However, he

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<sup>170</sup> Martha Finnemore and Kathryn Sikkink, ‘International Norm Dynamics and Political Change’ (1998) 52 International Organisation.

<sup>171</sup> Obiora Chinedu Okafor, *Legitimizing Human Rights NGOs: Lessons from Nigeria* (Asmara, Eritrea: Africa World Press Inc., 2006).

<sup>172</sup> (Subtle transformations. e.g. forcing the relevant military regimes to publicly alter their own expressed logics regarding the appropriateness of certain legislative provisions)

<sup>173</sup> Martha Finnemore & Kathryn Sikkink, ‘International Norm Dynamics and Political Change’ (1998), 52 (4) International Organization 887 – 917.

<sup>174</sup> *Ibid.* (Each of these terms having extensive meanings for their application.) “Norm emergence”: Here Norm Entrepreneurs arise (randomly) with a conviction that something must be changed. These norms use existing organizations and norms as a platform from which to proselytize (e.g. UN declarations), framing their issue to reach a broader audience. In the first stage, states adopt norms for domestic political reasons. If enough states adopt the new norm, a “tipping point” is reached. In the second stage is the “Norm cascade”. Here states adopt norms in response to international pressure - even if there is no domestic coalition pressing for adoption of the norm. They do this to enhance domestic legitimacy and then at the last stage of “Norm internalization”, over time, these norms are internalized - Professionals press for codification and universal adherence. Eventually, conformity becomes so natural there ceases to be the visibility of a norm.

<sup>175</sup> Okafor, *supra* note 1 at 51.

shifts the academic scholarship from simply looking at the formal efficacy of international human rights law to include a more bottom-up perspective that is much more sensitive to the experiences of local activist forces. This reasoning can be modelled for environmental and socioeconomic causes because activist forces can creatively deploy international texts, processes and pressures within the Nigerian space by using whatever is within their influence (including the funding they receive from donors), combined with the opportunities presented to them of utilizing the ECOWAS Court system as one more resource with which to apply pressure on the government in to pursuit of their struggles for environmental and socioeconomic rights.

The theory of Quasi-constructivism is thus very useful for this research. Okafor makes a convincing and in-depth argument that the influence of international human rights systems in Africa cannot be fully appreciated without a fuller understanding of the ways that domestic institutions and publics integrate these international human rights systems (and their decisions into their local thinking, agenda, and action).

In this thesis, the author utilizes this theory after analyzing the jurisprudence of the ECOWAS Court in three of its cases instituted by activist forces who pursue environmental and socioeconomic justice in Nigeria, and how the Court's jurisprudence has influenced domestic influences in Nigeria. These Cases include *SERAP v. President of Nigeria & Anor* (Hereinafter referred to as "Case 1");<sup>176</sup> *SERAP v. President of Nigeria*

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<sup>176</sup> Law Report of the Community Court of Justice of the ECOWAS. Judgement: ECW/CCJ/JUD/07/10.

& 8 Ors. (Hereinafter referred to as “Case 2”);<sup>177</sup> and *SERAP & 10 Ors. v. Federal Republic of Nigeria & 4 Ors.* (Hereinafter referred to as “Case 3”).<sup>178</sup>

## 1.6. CONCLUSION

As the foundation of this thesis, this first chapter has analysed the three (3) key concepts of this work, and conducted a literature review of these (3) concepts which are fundamental to this thesis. These key concepts include the ECOWAS Court, environmental and socioeconomic justice, and the theory of Quasi-Constructivism. In laying proper groundwork for this thesis, this chapter also described the methods employed in the research, and the anticipated outcome of the entire work.

This chapter has been able to describe the extant environmental and socioeconomic rights condition in Nigeria by describing “a case in point” within the country: the Niger Delta region. The Niger Delta is a resource-rich and ecological endowed region, but natural resource extraction has been unfavourable to the well-being and the development of the people and their environment for many decades. The constitutional limitations to the justiciability of environmental and socioeconomic rights is one of the many limitations to securing environmental and socioeconomic justice in the country, hence the reason why some activist forces have openly challenged (and continue to fight to ameliorate environmental and socioeconomic violations in Nigeria). Some of these activist forces have had to “forum-shop” beyond their domestic spaces in pursuit of environmental and socioeconomic justice. With “little or no progress” from the action taken by SERAC and

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<sup>177</sup> *Ibid.* ECW/CCJ/JUD/18/12.

<sup>178</sup> *Ibid.* ECW/CCJ/JUD/16/14.

CESR (two activist forces, NGOs) in approaching the African Commission on Human and People's Rights (on behalf of the people of the Niger Delta), another activist force, SERAP, (an NGO), approached the ECOWAS Court over the same environmental and socioeconomic injustice in the Niger Delta. SERAP instituted three (3) cases before the ECOWAS Court that bordered on environmental and socioeconomic justice. These cases challenged the Nigerian Government (and others) on the environmental and/or socioeconomic rights infringements in the country. The three (3) cases will be analysed in the next chapter of this work.

## CHAPTER 2: ACTIVIST FORCES IN PURSUIT OF ENVIRONMENTAL AND SOCIOECONOMIC JUSTICE BEFORE THE ECOWAS COURT

In this chapter, the judgement of the ECOWAS Court in three (3) prominent cases will be reviewed. These three cases border on environmental and/or socioeconomic justice pursuits instituted by activist forces before the ECOWAS Court. Coincidentally (and impressively too), the three (3) cases were instituted by the same activist force: an NGO named SERAP.<sup>179</sup> By analyzing these cases, this chapter will offer an insight into the character of the jurisprudence and norms of the ECOWAS Court especially as they relate to environmental and socioeconomic justice. The sources of literature that is used for this case-study analysis include (but are not limited to) case files from the Court's registry, factums of the parties, law reports, the ECOWAS Revised Treaty, ECOWAS Court Protocol (including the Supplementary Protocol), and treaty provisions from the laws cited in the judgements of the Court.

The jurisprudence from the three (3) cases reviewed in this chapter will reveal how the ECOWAS Court in each case, adjudicated on one or more of the following issues:

- The *locus standi* of activist forces to institute human rights cases relating to environmental and/or socioeconomic justice pursuits in West Africa.

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<sup>179</sup> The Socio-Economic Rights and Accountability Project (SERAP) was created in 2004 and registered as a non-governmental, non-profit organization under Nigerian laws.

- The justiciability of environmental and socioeconomic rights, and the interpretation of the specific kinds of environmental and socioeconomic rights contained in the ACHPR (as the primary “human rights treaty” of the ECOWAS Court) as well in other IHRL sources such as: the UDHR, the ICCPR, the ICESCR, the CEDAW, the CRC etc.
- The ECOWAS Court’s application of some key principles and standards in IHRL as they relate to environmental and socioeconomic justice. For example, the right of a people or community to exercise their right to “free, prior and informed consent (FPIC)” in situations where industrial action (like natural resource extraction) takes place in their community. This is to accord local and indigenous communities (like the Niger Delta in this case), the ability to give or withhold consent to a project that may affect them or their territory.
- The application of damages (and other judicial remedies) in human rights cases that relate to environmental and socioeconomic justice.

The above list is not exhaustive. They will also not be addressed in the order listed above. The three (3) cases focused in this chapter will be analyzed one after another, by addressing the above issues when they apply to the particular case at hand. This chapter will also reveal the unique norms, processes and procedures of the ECOWAS court system, and its “law.” The chapter responds to the key research question of this thesis: How have activist forces utilized the ECOWAS Court in the efforts to pursue environmental and socioeconomic justice in Nigeria? And what has been the Court’s jurisprudence on these issues?

## 2.1. THE CASE OF SERAP V. NIGERIA & ANOR 2010.<sup>180</sup>

This was the first case instituted by SERAP before the ECOWAS Court. Before the case was instituted, SERAP had consulted with other activist forces in and out of the region,<sup>181</sup> and then decided to “test” the “progressive” jurisdiction of the ECOWAS Court system.<sup>182</sup> As a human rights NGO with interest in public accountability, transparency and socioeconomic rights,<sup>183</sup> SERAP initiated this case based on a tip from a whistleblower, and consequent upon an investigation they carried out themselves on the activities of Nigeria’s Universal Basic Education Commission (UBEC).<sup>184</sup> They submitted their investigation as a petition to the Independent Corrupt Practices Commission (ICPC),<sup>185</sup> who took action on the case and produced a report alleging “massive corruption”<sup>186</sup> based on the discovery of embezzlement, misappropriation and the mismanagement of funds

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<sup>180</sup> ECW/CCJ/JUD/07/10. (Identified as “Case 1” in this thesis).

<sup>181</sup> What Okafor will describe as “Engagement”. For a definition of “engagement”, please see the “Definition of Key Words” section in the introductory section of this work.

<sup>182</sup> Eze Anaba, “The SERAP v Nigeria Case” *Nigerian Chronicles: Media Activists in the News* (2016) at 3.

<sup>183</sup> SERAP, “Who We Are” Online: <<http://serap-nigeria.org/who-we-are/>>.

<sup>184</sup> An administrative body established by the government with the aim of ensuring basic primary education in Nigeria. The Universal Basic Education (UBE) Programme was introduced in 1999 by the Federal Government of Nigeria as a reform programme aimed at providing greater access to, and ensuring quality of basic education throughout Nigeria. The UBE Programme objectives include ensuring an uninterrupted access to 9-year formal education by providing free, and compulsory basic education for every child of school-going age under 6 years of Primary Education, and 3 years of Junior Secondary Education Providing Early Childhood Care Development and Education (ECCDE); and reducing school drop-out and improving relevance, quality and efficiency; and acquisition of literacy, numeracy, life skills and values for lifelong education and useful living. (Universal Basic Education Act of Nigeria, 2004) [Emphasis mine].

<sup>185</sup> The Independent Corrupt Practices Commission (ICPC), (in full the Independent Corrupt Practices and Other Related Offences Commission) was inaugurated in 2000 to receive and investigate reports of corruption and in appropriate cases prosecute the offenders; to examine, review and enforce the correction of corruption prone systems and procedures of public bodies, with a view to eliminating corruption in public life, and to educate and enlighten the public on and against corruption and related offences with a view to enlisting and fostering public support for the fight against corruption. The Corrupt Practices and other Related Offences Act 2000 governs the activities of the ICPC.

<sup>186</sup> In 2006 SERAP received information from whistleblowers alleging massive corruption by UBEC. SERAP undertook initial investigations between 2005 and 2006, and submitted a petition to ICPC in January 2007 to undertake a formal investigation. The ICPC investigation concluded in October 2007 that 3.3 Billion Naira (26.2 million Canadian Dollars) had been lost in 2005 and 2006 to the illegal and unauthorized utilization of funds. SERAP Online: <<http://serap-nigeria.org/category/publications/>>.



allocated to UBEC, (which were meant for the education sector). To confront what they claimed is a violation of several rights: the right to quality education, the right to human dignity, the right of peoples to their wealth and natural resources, and the right of all peoples to socioeconomic development,<sup>187</sup> SERAP challenged Nigeria and UBEC before the ECOWAS Court claiming a breach of five (5) of the provisions of ACHPR.<sup>188</sup> SERAP estimated that, as a direct consequence of corruption, more than five million more children in Nigeria now lack access to primary education.<sup>189</sup>

SERAP relied on *article 4(g)* of the *1993 Revised Treaty of ECOWAS*,<sup>190</sup> as well as the provisions in the ACHPR as grounds to challenge Nigeria's alleged violation of the right to education,<sup>191</sup> including positing that the right to education within the African Charter is intrinsically linked to the right of the people's economic and social development.<sup>192</sup> SERAP sought six (6) reliefs from the ECOWAS Court,<sup>193</sup> two of which were granted by the court. The Court granted the first and the third one and dismissed the other four (4).

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<sup>187</sup> *SERAP v. Nigeria & Anor* ECW/CCJ/JUD/07/10. ("Case 1").

<sup>188</sup> ACHPR, *arts 1, 2, 17, 21 and 22*.

<sup>189</sup> UNICEF information sheet, "Girls' Education, Nigeria Country Office" (September 2007) <[http://www.unicef.org/wcaro/WCARO\\_Nigeria\\_Factsheets\\_GirlsEducation.pdf](http://www.unicef.org/wcaro/WCARO_Nigeria_Factsheets_GirlsEducation.pdf)>

<sup>190</sup> Which provides that the ECOWAS must adhere to the following principles: "recognition, promotion and protection of human and peoples' rights in accordance with the provisions of the African Charter on Human and Peoples' Rights."

<sup>191</sup> ACHPR, *art 2, 17, 21 and 22*.

<sup>192</sup> Application document by SERAP before the ECOWAS Court ECW/CJ/APP/12/07 (*SERAP v. Nigeria & Anor* ECW/CCJ/JUD/07/10).

<sup>193</sup> 1) *Ibid*. A declaration that even Nigerian child is entitled to free and compulsory education by virtue of Article 17 of the African Child's Rights Act, Section 15 of the Child's Rights Act 2003 and Section 2 of the Compulsory Free and Universal Basic Education Act 2004;

2) A declaration that the diversion of the sum of 3.5 billion naira from the UBE fund by certain public officers in 10 states of the Federation of Nigeria is illegal and unconstitutional as it violates Articles 21 and 22 of the ACHPR;

3) An order directing the defendants to make adequate provisions for the compulsory and free education of every child forthwith;

4) An order directing the defendants to arrest and prosecute the public officers who diverted the sum of 3.5 billion naira from the UBE fund forthwith;

On recognizing the right to education as a fundamental right that should be enforceable despite domestic constitutional limitations, the ECOWAS court held (and for the first time ever) that:

[E]very Nigerian child is entitled to free and compulsory basic education. What the first defendant [Nigeria] said was that the right to education was not justiciable in Nigeria, but the court... in this case, decided it was justiciable under the ACHPR. The applicant is saying that following the diversion of funds, there is insufficient money available to the basic education sector. 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 normal since shortage of funds will disable the sector from performing as envisaged by those who approved the budget. Thus, whilst steps are being 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.<sup>194</sup>

For the first time, the Nigerian government was held responsible by a supranational adjudicatory body for its non-fulfilment of the right to primary education of its people. The ECOWAS court in this case dismissed the “excuse” of non-justiciability of the right to

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5) An order compelling the government of Nigeria to fully recognize primary school teachers' trade union freedoms, and to solicit the views of teachers throughout the process of educational planning and policy-making;

6) An order compelling the government of Nigeria to assess progress in the realization of the right education with particular emphasis on the Universal Basic Education: appraise the obstacles, including corruption, impeding access of Nigerian children to school; review the interpretation and application of human rights obligations throughout the education process.

<sup>194</sup> *Ibid* para 26, 28 of the Judgement [Emphasis mine].

primary education and affirmed the justiciability of socioeconomic rights (including the right to education) in Nigeria (and in the rest of West Africa).

The ECOWAS court was progressive in establishing three (3) things in this case: One, that Nigeria is obligated under IHRL to fulfil the right to education of its people, beyond its domestically non-justiciable, albeit constitutional, fundamental objectives and directive principles of state policy; Two, that the failure of Nigeria to investigate and address the systemic corruption in the UBEC amounted to a breach of her legal “responsibility to protect” the human rights of its people. As the court noted, this was deeply “a failure to seriously address all allegations of corruption at the highest levels of government and the levels of impunity that facilitate corruption... lest a section of the people should be denied a right to education;”<sup>195</sup> And three, that the socioeconomic right to education is justiciable.

## **2.2. THE CASE OF SERAP V. NIGERIA & 8 ORS 2012.**<sup>196</sup>

This suit is built upon many years of activist pursuits and struggles. The backdrop and origins of this claim for environmental and socioeconomic justice in the Niger Delta region can be traced to the movement-building of local activist forces that took place in the sixties in Nigeria.<sup>197</sup> The consideration by SERAP to use litigation and human rights law to secure environmental and socioeconomic justice for the Niger-Deltans came from the human rights-consciousness that had built up over the years.<sup>198</sup> The “engagements” of activist

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<sup>195</sup> *Ibid.*

<sup>196</sup> ECW/CCJ/JUD/18/12. (Identified as “Case 2” in this thesis).

<sup>197</sup> Platform London, “Background of the Ogoni struggle” Online: <<http://platformlondon.org/background/the-ogoni-struggle/>>.

<sup>198</sup> Cyril Obi & Siri Aas Rustad, *Oil and Insurgency in the Niger Delta: Managing the Complex Politics of Petro-violence* (Africa Now, 2011).

forces who desired environmental and socioeconomic justice, produced similar desires for justice, in and out of the region. Activist forces such as MOSOP, SERAC, and even CESR from North America transmitted ideas around a “network” of human rights activists. This “network” leveraged on their desire to challenge the unparalleled environmental and socioeconomic injustice that existed and still exists in the country, and these activist forces gradually won more people into their fold. They converged at community workshops, seminars, focus groups, town hall meetings, etc. and they designed, facilitated, oiled and consolidated ideas for similar justice causes, including to challenge the military regime at the time.<sup>199</sup>

In 1996, they decided to approach the African Commission. The reason and outcome from exploring the African Commission as a mechanism for seeking justice for the people of the Niger Delta was briefly recounted by one of them in a case study thus:

Between 1996 and 1998... Nigeria was still ruled by a brutal military dictatorship, which had replaced the bill of rights and other important constitutional provisions with draconian military decrees. Under the decrees the authority of the courts to intervene in human rights or political cases was drastically limited. Thus, the prospect of judicial intervention was dim, and the military junta would have probably ignored any judicial order... For these reasons, SERAC along with community leaders decided not to rely on litigation as their primary tactic. The possibility of using international and regional human rights mechanisms was also considered. In 1996, in collaboration with the Center for Economic and Social Rights,

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<sup>199</sup> Okechukwu Ibeanu, “Insurgent Civil Society and Democracy in Nigeria: *Ogoni Encounters with the State, 1990 – 1998*” Research Report for ICSAG Programme of the Centre for Research and Documentation (CRD), Kano.

SERAC filed a communication with the Banjul-based African Commission on Human and Peoples' Rights regarding massive violations of the economic, social, and cultural rights of the Ogoni community in the oil-rich Niger Delta region... However, the commission's highly politicized history, and its well-known delay in processing cases, did not inspire any confidence in its capacity to issue an unbiased and timely judgment. In any event, the commission's lack of compulsory jurisdiction and capacity to enforce its decisions also made that prospect unappealing.<sup>200</sup>

On the communication about the issues in the Niger Delta which was initiated by SERAC and CESR at the African Commission, the Commission held Nigeria to be in violation of *articles 2, 4, 14, 16, 18, 21 and 24* of the ACHPR. The African Commission "appealed" to the Nigerian government to ensure protection of the environment, health and livelihood of the people of Ogoniland by ceasing attacks on the community, investigating human rights violations and prosecuting offenders. The African Commission also asked Nigeria to provide adequate compensation to victims and ensure appropriate environmental and social impact assessments are prepared for any future oil development.<sup>201</sup> The

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<sup>200</sup> Morka Felix, "A Place to Live: Resisting Evictions in Ijora-Badia, Nigeria" *How African Activists Reclaim Human Rights to Challenge Global Poverty* ed. Lucie E. White & Jeremy Perelman (Stanford University Press) 2014 p 66.

<sup>201</sup> The African Commission requested the Nigerian Government to do the following: Stop all attacks on Ogoni communities and leaders by the Rivers State Internal Securities Task Force and permit citizens and independent investigators free access to the territory; Conduct an investigation into the human rights violations and prosecute officials of the security forces, NNPC and relevant agencies involved in human rights violations; Ensure adequate compensation to victims of the human rights violations, including relief and resettlement assistance to victims of government sponsored raids, and undertake a comprehensive cleanup of lands and rivers damaged by oil operations; Ensure that appropriate environmental and social impact assessments are prepared for any future oil development and that the safe operation of any further oil development is guaranteed through effective and independent oversight bodies for the petroleum industry; and then providing information on health and environmental risks and meaningful access to regulatory and decision-making bodies to communities likely to be affected by oil operations. [[http://www.achpr.org/files/sessions/30th/comunications/155.96/achpr30\\_155\\_96\\_eng.pdf](http://www.achpr.org/files/sessions/30th/comunications/155.96/achpr30_155_96_eng.pdf)] para 69.

Commission urged Nigeria to keep the Commission abreast of the development in the region.<sup>202</sup> This communication gained global attention but activist forces decry that even after a decade of the communication, “no progress” was made to resolve or end the environmental and socioeconomic injustice inflicted on the Niger Delta and its people.<sup>203</sup> The activist forces in the pursuit of environmental and socioeconomic justice for the region had to return to the drawing board.

Though progressive, the communication made by SERAC and CESR to the African Commission exposes two longstanding impediments to accessing pursuits of ESJ in the region. First, *article 56* of the ACHPR requires the prior exhaustion of domestic remedies in order to approach the African Commission. The rationale for the exhaustion of local remedies is to give the domestic courts an opportunity to decide upon cases before they are brought to an international forum, thus avoiding contradictory judgements of law.<sup>204</sup> It could also be to conserve the application of quasi-judicial and judicial resources. Second, the African Commission held in four of its previous communications, that a state party

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<sup>202</sup> *Ibid* “The African Commission urges the government of the Federal Republic of Nigeria to keep the African Commission informed of the outcome of the work of: The Federal Ministry of Environment which was established to address environmental and environment related issues prevalent in Nigeria, and as a matter of priority, in the Niger Delta area including the Ogoniland; The NDDC enacted into law to address the environmental and other social related problems in the Niger Delta area and other oil producing areas of Nigeria; and The Judicial Commission of Inquiry inaugurated to investigate the issues of human rights violations.”

<sup>203</sup> Environmental Rights Action (Centre for Environment Human Rights and Development, Friends of the Earth Europe, Platform, Amnesty International), “No Progress: An Evaluation of the Implementation of UNEP’s Environmental Assessment of Ogoniland, Three Years On”.

<sup>204</sup> Under the African Charter, the exhaustion of local remedies rule is applicable in respect of both communications by state parties and the so-called other communications under articles 47 and 55 respectively. The latter has largely underpinned communications by activist forces especially NGOs. With regard to communications by the state parties, Article 50 of the Charter provides: “The Commission can only deal with a matter submitted to it after making sure that all local remedies, if they exist, have been exhausted, unless it is obvious to the Commission that the procedure of achieving these remedies would be unduly prolonged.”

should be given notice of any human rights violation within its jurisdiction so as to have the opportunity to remedy the violation before being called to account by an international tribunal.<sup>205</sup> These two limitations have been extinguished from the West African supranational adjudicatory procedure hence they do not apply under the ECOWAS system.<sup>206</sup> Therefore, as SERAC had “fought for the Niger-Deltans” before the African Commission and had “contributed its own bit in the struggle” for environmental and socioeconomic justice,<sup>207</sup> SERAC figuratively handed the baton to SERAP (note that they have similar names but are different organizations) to continue the pursuit of environmental and socioeconomic justice for the people of the Niger Delta. SERAP took up the pursuit by instituting “Case 2” before the ECOWAS Court. Before launching this case, SERAP (and other activist forces) had carried out advocacy on the environmental and socioeconomic conditions of the Niger Delta. Various activist forces had engaged with the press; with other activist forces; the government (in both public private meetings); and some international stakeholders about this issue.<sup>208</sup> The Nigerian publics, and the ECOWAS Court itself was “aware” of the environmental and socioeconomic justice problems in Niger Delta.

SERAP in this case (“Case 2”) sought environmental and socioeconomic justice for the people of the Niger Delta.<sup>209</sup> It instituted this case in 2009 against the Nigerian

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<sup>205</sup> ACHPR Communications 25/89, 47/90, 56/91 and 100/93.

<sup>206</sup> Protocol A/P.1/7/91 relating to the Community Court of Justice as amended by Protocol A/SP.1/01/05 art 9.

<sup>207</sup> Nnimmo Bassey, “Economic Social and Cultural Rights in the Niger Delta” *The Guardian* (12 June 2017) 34.

<sup>208</sup> Evande Grant, “Human rights and the environmental human rights: re-imagining adjudicative paradigms” in *Research Handbook on Human Rights and the Environment* (Edward Elgar Publishing 2015) at 379.

<sup>209</sup> *SERAP v. President of Nigeria & 8 Ors.* ECW/CCJ/JUD/18/12. (Identified as “Case 2” in this thesis).

government and seven (7) oil companies operating in the Niger Delta region (as co-defendants).<sup>210</sup> In its originating application at the ECOWAS Court, SERAP described the aspect of the Niger Delta that the case was concerned with thus:

On 28 August 2008, a fault in the Trans-Niger pipeline resulted in a significant oil spill into Bodo Creek in Ogoniland. The oil poured into the swamp and creek for weeks, covering the area in a thick slick of oil and killing the fish that people depend on for food and for livelihood. The oil spill has resulted in death or damage to a number of species of fish that provide the protein needs in the local community. Video footage of the site shows widespread damage, including to mangroves which are an important fish breeding ground. The pipe that burst is the responsibility of the Shell Petroleum Development Company (SPDC). SPDC has reportedly stated that the spill was only reported to them on 5 October of that year... However, the leak was not stopped until 7 November.

On 25 June 2001 residents of Ogbobo in Rivers State heard a loud explosion from a pipeline, which had ruptured. Crude oil from the pipe spilled over the surrounding land and waterways. The community notified Shell Petroleum Development Company (SPDC) the following day; however, it was not until several days later that a contractor working for SPDC came to the site to deal with the oil spill. The oil subsequently caught fire. Some 42 communities were affected as the oil moved through the water system. The communities' water supply, which came from the local waterway, was contaminated... People in the area complained of numerous symptoms, including respiratory problems. The situation was so dire that some families reportedly evacuated the area, but most had no means of leaving... Hundreds of thousands of people are affected, particularly the

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<sup>210</sup> The defendants in this case were: President of the Federal Republic of Nigeria, the Attorney General of the Federation, Nigerian National Petroleum Company, Shell Petroleum Development Company, ELF Petroleum Nigeria Ltd, AGIP Nigeria PLC, Chevron Oil Nigeria PLC, Total Nigeria PLC and Exxon Mobil.



poorest and other most vulnerable sectors of the population, and those who rely on traditional livelihoods such as fishing and agriculture.<sup>211</sup>

The above testament is quoted from SERAP's factum before the ECOWAS Court, describing the situation in the region. This account may have been the umpteenth time that an activist force had had to recount the environmental and socioeconomic condition of the Niger Delta in Nigeria. As far back as 1995, SPDC Petroleum, admitted that its infrastructure needed work and that corrosion was responsible for 50 per cent of oil spills.<sup>212</sup> Yet, in the same year, 1995, Ken Saro-Wiwa (a prominent activist force and the then president of MOSOP) was hanged by the military dictatorship for his activism.<sup>213</sup> The allegation however was that he was responsible for the murder of a number of prominent Ogoni men.<sup>214</sup>

SERAP made several demands before the ECOWAS Court: They sought a declaration that Niger-Deltans are entitled to environmental protection and socioeconomic development;<sup>215</sup> that the complicity of the Nigerian government is a violation of IHRL;<sup>216</sup>

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<sup>211</sup> SERAP's application document before the ECOWAS Court at p1; repeated in the Judgement of the Court. SERAP v. Nigeria & 8 Ors. ECW/CCJ/JUD/18/12 at para 18. ("Case 2").

<sup>212</sup> *Ibid.*

<sup>213</sup> Ken Saro-Wiwa's life and story is documented on the Encyclopedia Britannica "Ken Saro-Wiwa, Nigerian Author and Activist" Online: <<https://www.britannica.com/biography/Ken-Saro-Wiwa>>.

<sup>214</sup> *Ibid.*

<sup>215</sup> "A Declaration that everyone in the Niger Delta is entitled to the internationally recognised human right to an adequate standard of living, including adequate access to food, to healthcare, to clean water, to clean and healthy environment; to social and economic development; and the right to life and human security and dignity," *para 19 (a)*.

<sup>216</sup> "A Declaration that the failure and /or complicity and negligence of the Defendants to effectively and adequately clean up and remediate contaminated land and water; and to address the impact of oil-related pollution and environmental damage on agriculture and fisheries is unlawful and a breach of international human rights obligations and commitments as it violates the International Covenant on Economic, Social and Cultural Rights, the International Covenant on Civil and Political Rights, and the African Charter on Human and Peoples' Rights." *Ibid* at (b).

that the failure of Nigeria to monitor the human impact of oil exploration is a violation of the ACHPR, the ICCPR and the ICESCR,<sup>217</sup> and that the systematic denial of access to information to the people of the Niger Delta is also a violation of the ACHPR, the ICCPR and the ICESCR.<sup>218</sup> SERAP sought orders from the Court to direct the defendants to fulfill the environmental and socioeconomic development rights of the people and secure their justice from violations of environmental and socioeconomic development rights. Finally, SERAP sought an effective clean-up to the environmental pollution of the region and monetary compensation of 1 Billion Dollars (USD)<sup>219</sup> to the victims of human rights violations in the Niger Delta.<sup>220</sup>

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<sup>217</sup> “A Declaration that the failure of the Defendants to establish any adequate monitoring of the human impacts of oil-related pollution despite the fact that the oil industry in the Niger Delta is operating in a relatively densely populated area characterized by high levels of poverty and vulnerability, is unlawful as it violates the International Covenant on Economic, social and Cultural Rights, the International Covenant on Civil and Political Rights and the African Charter on Human and peoples’ Rights.” *Ibid* at (c).

<sup>218</sup> “A Declaration that the systematic denial of access to information to the people of the Niger Delta about how oil exploration and production will affect them, is unlawful as it violates the International Covenant on Economic, Social and Cultural rights, the international Covenant on Civil and Political Rights, and the African Charter on Human and Peoples’ Rights.”

<sup>219</sup> (About 1.3 Billion Canadian Dollars).

<sup>220</sup> “e) An Order directing the Defendants to ensure the full enjoyment of the people of Niger Delta to an adequate standard of living, including adequate access to food, to healthcare, to clean water, to clean and healthy environment; to socio and economic development; and the right to life and human security and dignity.

f) An Order directing the Defendants to hold the oil companies operating in the Niger Delta responsible for their complicity in the continuing serious human rights violations in the Niger Delta.

g) An Order compelling the Defendants to solicit the views of the people of the area throughout the process of planning and policy-making on the Niger Delta.

h) An Order directing the government of Nigeria to establish adequate regulations for the operations of multinationals in the Niger Delta, and to effectively clean-up and prevent pollution and damage to human rights.

i) An Order directing the government of Nigeria to carry out a transparent and effective investigation into the activities of oil companies in the Niger Delta and to bring to justice those suspected to be involved and /or complicit in the violation of human rights highlighted above.

j) An Order directing the Defendants individually and/or collectively to pay adequate monetary compensation of 1 Billion Dollars (USD) (\$1 billion) to the victims of human rights violations in the Niger Delta, and other forms of reparation that the Honourable Court may deem fit to grant.”

Nigeria challenged this case on grounds of jurisdiction,<sup>221</sup> *locus standi*,<sup>222</sup> and that the case was statute barred.<sup>223</sup> All three claims by Nigeria were thrown out by the Court.

First: on jurisdiction, the ECOWAS Court justified its reliance on IHRL (especially the ICCPR and the ICESCR) despite being a sub-regional court with no normative instrument of its own. According to the Court:

Even though ECOWAS may not have adopted a specific instrument recognizing human rights, the Court's human rights protection mandate is exercised with regard to all the international instruments, including the African Charter on Human and Peoples' Rights, the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights, etc., to which the Member States of ECOWAS are parties.<sup>224</sup>

The Court did have solid justification for this conclusion. It supported its stand by citing the Protocol that establishes the Court.<sup>225</sup> The Court held that by agreeing to this Protocol, Nigeria is bound by the human rights law "contained in international instruments, with no

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<sup>221</sup> Nigeria maintained that the Court has no jurisdiction to examine the alleged violations of the ICCPR and the ICESCR as those are none of the court's instruments.

<sup>222</sup> Nigeria maintained that SERAP is not a victim or an aggrieved party hence has no "standing" to sue.

<sup>223</sup> The Nigerian government contended that some of the facts pleaded by the plaintiffs occurred before the 1990, 1995, 2001, 2003 and 2005 all fall under the three-year statute bar pursuant to paragraph 3, Article 9 of the 2005 Supplementary Protocol (A/SP.1/01/05) which provides that "Any action by or against a Community Institution or any member of the Community shall be statute barred after three (3) years from the date when the right of action arose."

<sup>224</sup> *SERAP v. President of Nigeria & 8 Ors.* ECW/CCJ/JUD/18/12. ("Case 2") at para 28.

<sup>225</sup> The new Article 9(4) of the Protocol on the Court as amended by Supplementary Protocol A/SP.1/01/05 of 19 January 2005 provides: "The Court has jurisdiction to determine cases of violation of human rights that occur in any Member State." This provision, which gives jurisdiction to the Court to adjudicate on cases of human rights violation, results from an amendment made to the 6 July 1991 Protocol A/P1/7/91 on the ECOWAS Court. The *raison d'être* of this amendment is Article 39 of the 21 December 2001 Protocol A/SP1/12/01 on Democracy and Good Governance, which provides: "Protocol A/P1/7/91 adopted in Abuja on 6 July 1991 relating to the Community Court of Justice, shall be reviewed so as to give the Court the power to hear, inter-alia, cases relating to violations of human rights..."

exception whatsoever.<sup>226</sup> The Court also noted that by attesting to the Protocol, any individual or organization is free to have recourse to any court or institution established within the framework of an IHRL instrument.<sup>227</sup>

Second: on *locus standi*, the court referred to the initial SERAP Case before it, establishing the competence of activist forces to institute action before the Court in representative capacity.<sup>228</sup>

Third: on the case being statute barred, the Court noted that the Protocol does stipulate a 3-year time frame for action to be instituted before the court.<sup>229</sup> And facts that occurred before the Protocol came into force in 2005 cannot be taken into consideration because the said Protocol cannot be applied retroactively. However, in this case, the Court distinguishes between an isolated human rights violation versus as a persistent and continuous violation, that lasted until the date the complaint was filed with the Court and is still ongoing:

It is trite law that in situations of continued illicit behaviour, the statute of limitation shall only begin to run from the time when such unlawful conduct or omission ceases. Therefore, the acts which occurred after the 2005

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<sup>226</sup> Judgement of “Case 2” *supra* note 224 at para 27. [Emphasis mine].

<sup>227</sup> The preamble of the Supplementary Protocol as well as paragraph (h) of its Article 1 stipulates the principles of constitutional convergence common to the Member States, which provides: “The rights set up in the African Charter on Human and Peoples’ Rights and other international instruments shall be guaranteed in each of the ECOWAS Member States ; each individual or organisation shall be free to have recourse to the common or civil law courts, a court of special jurisdiction, or any other national institution established within the framework of an international instrument on Human Rights, to ensure the protection of his/her rights.”

<sup>228</sup> *SERAP v. Federal Republic of Nigeria and Universal Basic Education Commission* ECW/CCJ/JUD/07/10 (“Case 1”).

<sup>229</sup> *Supra* note 225, 2005 Protocol, art 9.

Protocol came into force, in relation to which the Federal Republic of Nigeria had a conduct considered as omissive, are not statute barred.<sup>230</sup>

In effect, the Court establishes that for this case, the problem has been enduring, and the failure of Nigeria to prevent the damage or hold anyone to account was continuing, hence the suit was not time-barred.

The ECOWAS Court established that the Nigerian government has a duty to ensure that the activities (by any other person) within its jurisdiction and control do not cause damage to the environment and the people. Any derogation from that duty is a violation. The ECOWAS Court provides its own description of the environment as follows:

*The environment... is not an abstraction but represents the living space, the quality of life and the very health of human beings, including generations unborn... It must be considered as an indivisible whole, comprising the biotic and abiotic natural resources, notably air, water, land, fauna and flora and the interaction between these same factors. The environment is essential to every human being. The quality of human life depends on the quality of the environment... [E]very State [is] to take every measure to maintain the quality of the environment understood as an integrated whole, such that the state of the environment may satisfy the human beings who live there, and enhance their sustainable development.*<sup>231</sup>

The ECOWAS Court unprecedentedly connects environmental rights to socioeconomic survival of people. In arriving at its holding above, the Court interestingly relied on three

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<sup>230</sup> Judgement of "Case 2" *supra* note 224 at para 62.

<sup>231</sup> *Ibid* at para 100, 101.

documents: ACHPR;<sup>232</sup> ICJ Advisory Opinion of 8 July 2006;<sup>233</sup> and the International Law Institute's, Resolution of 4 September 1997.<sup>234</sup> By virtue of the above international environmental standards, and *Article 1* and *24* of the ACHPR, Nigeria's omission to act, to prevent damage to the environment of the people of the Niger Delta, and to make accountable the activities of the oil companies, characterizes violation of Nigeria's obligations under the ACHPR. The Court held Nigeria in violation of twenty-nine (29) different articles from a string of IHRL instruments including the UDHR.<sup>235</sup>

"Case 2" is celebrated for its ground-breaking feat and precedent-setting value to human rights adjudication; and for its impact in the recognition of environmental and socioeconomic justice in the region. This is the most cited case decided by the ECOWAS Court.

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<sup>232</sup> Particularly Article 24 of the ACHPR which provides thus: "All peoples shall have the right to a general satisfactory environment favourable to their development."

<sup>233</sup> "The Court also recognizes that the environment is not an abstraction but represents the living space, the quality of life and the very health of human beings, including generations unborn. The existence of the general obligation of States to ensure that activities within their jurisdiction and control respect the environment of other States or of areas beyond national control is now part of the corpus of international law relating to the environment." -ICJ Reports, *Legality of Threat or Use of Nuclear Weapons*, Advisory Opinion of 8 July 2006, ("Nuclear Weapons Advisory Opinion) para 28.

<sup>234</sup> "The breach of an obligation of environmental protection established under international law engages responsibility of the State (international responsibility), entailing as a consequence the obligation to re-establish the original position or to pay compensation. The latter obligation may also arise from a rule of international law providing for strict responsibility on the basis of harm or injury alone, particularly in case of ultra-hazardous activities (responsibility for harm alone). Civil liability of operators can be engaged under domestic law or the governing rules of International law regardless of the lawfulness of the activity concerned if it results in environmental damage. The foregoing is without prejudice to the question of criminal responsibility of natural or juridical persons." – The Institute of International Law (Eight Commission) Responsibility and Liability under International Law for Environmental Damage Resolution adopted on September 4, 1997, *art 1*.

<sup>235</sup> Judgement of "Case 2" *supra* note 224 at para 91.

### 2.3. THE CASE OF SERAP & 10 ORS V. NIGERIA & 4 ORS 2014.<sup>236</sup>

I am from Bundu waterfront and I was shot at home. I had earlier heard gunshots, went outside and learnt soldiers were shooting. I was in the house when the bullet hit me on the leg and I was taken to Teme Clinic, where my leg was operated on. I was admitted for about four days and discharged while the iron they put in my leg was left inside for about 6 months. I was a student and I lost a school-year due to the injury.<sup>237</sup>

The above is part of the testimony from PW3, one of the five (5) plaintiff witnesses who testified on the facts alleged by SERAP in this case. She was one of the several indigenes who was shot by security agents sent by the government to quell the protesters of Bundu Ama. The locals were protesting against the implementation of the decision of the government of Rivers State to carry out enumeration in preparation for the “urban-renewal” project in their community.<sup>238</sup> This plaintiff witness (like many others in the community) was in her home when a bullet fired by one of the security officials hit her.

From the factums submitted by both parties to the court, the Rivers state government of Nigeria was planning a large-scale demolition of the villagers’ waterfront settlement without adequate consultation with the relevant communities.<sup>239</sup> The Njemanze waterfront

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<sup>236</sup> ECW/CCJ/JUD/16/14. (Identified as “Case 3” in this thesis).

<sup>237</sup> Plaintiff Witness (PW3) paraphrased from the records of the court as recorded by the Court. ECW/CCJ/JUD/16/14; *SERAP & 10 Ors. v. Federal Republic of Nigeria & 4 Ors* (“Case 3”).

<sup>238</sup> Nigeria practices a federal system of government whereby the devolution of self-governance by Nigeria is to its federated states, who share sovereignty with the Federal Government. Rivers State is one of the 36 states in Nigeria with its own State Government.

<sup>239</sup> It is important to highlight what “adequate consultation” entails in IHRM especially for when the government plans to take over land in an indigenous or local community, or where the government is aiming for an “urban renewal project” like in this case. Article 10 of the United Nations Declaration of the Rights of Indigenous Peoples (UNDRIP) states that: “Indigenous peoples shall not be forcibly removed from their lands or territory. No relocation shall take place without the free, prior and informed consent of the indigenous people, and after agreement on just and fair compensation and, where possible, with the option of return.” *Article 8* require states to provide “effective mechanisms” to prevent any action which aims or

was one of the waterfronts close to the Bundu Ama area in Rivers State which was demolished in August of 2009. SERAP claimed that between 13,800 and 19,000 people were forcibly evicted from their homes and that this was done without adequate notice, compensation, alternative accommodation or legal remediation.<sup>240</sup>

According to the plaintiffs, on the morning of the 12<sup>th</sup> of October 2009, government authorities accompanied by security agents including the Army and the Nigerian Police,<sup>241</sup> went to Bundu waterfront community to conduct the planned enumeration exercise and assess the structures earmarked for demolition, when they met some of local activists including women and children singing and chanting songs in protest. An armored vehicle from the security agents drove into the crowd and without notice, soldiers began to shoot. They chased the protesters and shot at them from behind, injuring many, including people who were in their homes but sustained wounds from bullets permeating the structures they lived in.<sup>242</sup>

The defendants alleged that the waterfront settlements ear-marked for demolition were densely populated and were used as hideouts by hoodlums and miscreants. The

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has the effect of “dispossessing them of their lands, territory or resources”. Article 32 (2) of UNDRIP then mandates that states to consult with the people in order to obtain their free, prior, and informed consent before any project “affecting their lands, territory and other resources, particularly in connection with development, utilization, or exploitation of minerals, water, or other resources” may be undertaken.

<sup>240</sup> Judgement of “Case 3” *supra* note 237 at para 20.

<sup>241</sup> The security agents were described in the statement of claim by SERAP as wearing: regular Army camouflage uniforms and camouflage head gear; camouflage uniforms and red berets; Mobile police uniforms, Mobile police uniforms and “RSVG” flak jackets, police uniforms and “S.O.S”/swift Ops. Squad flak jackets, and plain clothes agents wearing “JTF” flack jackets’. Judgement of “Case 3” *supra* note 247 at para 21.

<sup>242</sup> This is a brief summary of the facts of the case from the plaintiff, from the judgement of the court. The application document of the plaintiff contains a more detailed narration (ECW/CCJ/APP/10/10). The ECOWAS Court also has the audio recordings of the proceedings in court.



defendants also stated that the landlords of the waterfront had been invited for several meetings and were in support of the demolition on satisfactory terms. They alleged that the surveyors who were sent to the community to ascertain the number of structures, take census and calculate the value of properties were beaten up by hoodlums. They posit that when they sent another set of surveyors they met a confrontation with barricades and villagers blocking the entrance to Bundu. While attempting to remove the barricade a conflict ensued which led the defendants to call for security back up and led to some villagers getting shot and injured.<sup>243</sup>

This case touches on several civil and political rights (such as the right to life; the right to dignity of the human person, the right to peaceful protest and demonstration; freedom of assembly and association; and freedom of expression, to mention but a few). These rights are fundamental and enforceable as domestic constitutional rights. They are also protected rights under the ACHPR, as well as under the ICCPR and other IHRL instruments.<sup>244</sup>

As a Member State of the ECOWAS, Nigeria owes its citizens the legal obligation under the ACHPR, the ICCPR and the ICESCR to protect their environmental and socioeconomic rights. The right of everyone to adequate shelter and housing has been broadly interpreted to include the right to live in security, peace and dignity.<sup>245</sup> Nigeria

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<sup>243</sup> *Ibid*, this is a brief summary. The full account of the statement of facts and statement of defense is contained in the Judgement record of the court from *para 19 – 29* and *30 – 51* respectively.

<sup>244</sup> ACHPR arts 1, 2, 3, 4, 5, 6, 10, 11, 12, 13, 14 and 16; UDHR arts 2, 3, 5, 7, 9, 12, 13, 17, 20, 21 and 25; ICCPR arts 2, 3, 6, 9, 10, 12, 22 and 26; ICESCR arts 2, 3, 5, 10, 11 and 12.

<sup>245</sup> Human Rights Council, Report of the Special Rapporteur on adequate housing as a component of the right to an adequate standard of living, and on the right to non-discrimination in this context, Miloon Kothari UN doc. A/HRC/7/16 (13 February 2008), para.4.

owes the people of Bundu Ama the obligation to ensure a degree of security of tenure, which guarantees their legal protection against any form of forced evictions, or threats, or harassments. Forced evictions constitute prima facie violations of a wide range of internationally recognized human rights and can only be carried out under exceptional circumstances and in full accordance with IHRL.<sup>246</sup>

The ECOWAS Court did not address this case from a “right to shelter” or a “right to housing” perspective. One hypothesis for this gap could be that SERAP did not approach the court seeking a socioeconomic and environmental remedy. From the six reliefs sought by SERAP,<sup>247</sup> only one of the reliefs (the fourth one) mentioned the “urban renewal” plan

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<sup>246</sup> According to the *Principles and Guidelines on the Implementation of Economic, Social and Cultural Rights* in the ACHPR (adopted by the African Commission on 24 October 2011), reference is made to the prohibition of forced evictions and guidance provided in the basic principles and guidelines on development-based evictions and displacement. According to the guidelines, states have an obligation to provide all, regardless of their type of tenure, a degree of security of tenure which guarantees legal protection against forced eviction, harassment and other threats. “Urban renewal” projects premised on “public interest”, or “public good” as a ground for development-based evictions or displacement need to conform to a number of conditions or standards of human rights. For example, the UN OHCHR released a fact sheet on forced evictions in 2014 (*UN Habitat Fact Sheet No. 25/Rev. 1*) listing the conditions for displacement on grounds of “urban renewal” or development projects which should include the following - that it must be “reasonable” and must be carried out as a last resort when no alternative is available; it must also be “proportional” (evaluation of the decision’s impact on and potential benefit for various groups, including through an eviction impact assessment) and needs to promote the general welfare of the people and show evidence of such an outcome; it must be “foreseeable” and defined in law, and non-discriminatory in both law and in practice; it must be subject to control to evaluate their conformity with the constitution and the State’s international obligations and finally, It must also be subject to consultation and participation (free, prior and informed consent “FPIC”), with effective recourse to mechanisms that should be available for those directly or indirectly affected.

<sup>247</sup> Judgement in *SERAP & 10 Ors. v. Nigeria & 4 Ors.* ECW/CCJ/JUD/16/14 (“Case 3”). The reliefs sought by the plaintiffs are as follows:

- 1) A declaration that the indiscriminate shooting into the crowd of unarmed protesters is unlawful and unjustifiable under any circumstance and a violation of international human rights obligations and commitments.
- 2) A declaration that the indiscriminate shooting was unlawful and a violation of the right to life and dignity of the human person, the right to security and health.
- 3) That the failure of the Defendants and their agents to investigate and prosecute the perpetrators of the incident is unlawful.
- 4) An order of injunction restraining the Defendants and their agents from implementing any plan to carry out any enumeration in preparation for the “urban renewal” as non-conformity to the requirements under international human rights law would lead to further violation of the Plaintiffs guaranteed human rights.

by the government as not in conformity with IHRL.<sup>248</sup> SERAP did not ask for a declaration from the court to pronounce the “urban renewal” project as inimical to the protection of the right to shelter and the right to environment of the Bundu Ama people. Instead SERAP sought an injunction to restrain the defendants from implementing the plan to carry out enumeration. As in the common law systems (such as Nigeria’s), the court is likened to an umpire, she will not add to a claim or descend into the “game,” between both parties, here also, the ECOWAS Court worked only with the application brought before her. SERAP’s claim focused on the civil and political rights of the people to assembly, association, dignity, consultation and a compensation for arbitrary abuses suffered.

While the applicable human rights law of the Court (the ACHPR) does not have a specific provision on the right to “housing” or “shelter,” it is inferred from a combination of several articles of the ACHPR such as articles 14, 16 and 18 which provides for the right to enjoy the best attainable state of mental and physical health; the right to property, and; the protection of family life, respectively (which in interpretation extends to the protection of family shelter from destruction). This corollary linkage and intersection of the three (3) ACHPR provisions to establish the socioeconomic right to shelter under the ACHPR is not new. The African Commission had interpreted and established this nexus in 2001.<sup>249</sup> Through the Commission’s communication on SERAC and CESR,<sup>250</sup> the African

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5) An order directing the Defendants and their agents to promote, respect, secure, fulfil and ensure the rights of the 2nd -11th Plaintiffs previously listed.

6) An order directing the Defendants and their agents to pay adequate monetary compensation in the sum of \$100,000,000 (One Hundred Million Dollars) to the Plaintiffs for violation of their rights and to provide other forms of reparation which may take the form of restitution, satisfaction or guarantees of non-repetition.

<sup>248</sup> *Ibid* at para 29.

<sup>249</sup> 155/96 Social and Economic Rights Action Center (SERAC) and Center for Economic and Social Rights (CESR) / Nigeria at para 61 <<http://www.achpr.org/communications/decision/155.96/>>.

<sup>250</sup> *Ibid*.

Commission underscored two elements for realizing the right to housing under the Charter: First, that State Parties should not forcibly evict people from their houses and Second, that state parties should not obstruct the efforts by individuals and communities to rebuild lost homes: “The right to housing goes beyond having a roof over one’s head. It extends to embody the individual’s right to be let alone and live in peace-whether under a roof or not.”<sup>251</sup> Any obstruction to the enjoyment of the contents of the right to housing therefore is a violation of the ACHPR.

The right to adequate shelter and housing is protected by Article 17 of the ICCPR, Article 11 of the ICESCR, Article 14(2) of CEDAW, Articles 16(1) and 27(4) of the CRC. Nigeria has ratified all of the above cited human rights treaties. The UN Committee on Economic, Social and Cultural Rights in its General Comment stated that the right to housing should be interpreted broadly beyond a structure, and that instances of forced eviction are *prima facie* incompatible with the requirements of the ICCPR.<sup>252</sup> The State must refrain from forced evictions and ensure that the law is enforced against its agents or third parties who carry out forced evictions.<sup>253</sup>

The ECOWAS Court did not leverage on any of the above standards to protect and advance the shelter and environmental rights of the people of Bundu Ama. What the Court then does in this case (and uniquely so since the plaintiffs did not institute this action as a socioeconomic rights issue) is to award equitable compensation to the victims by taking

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<sup>251</sup> *Ibid* at para 61.

<sup>252</sup> CESCR, General Comment No 4, *The Right to Adequate Housing*, 13/12/91 at para. 6, 7.

<sup>253</sup> CESCR, General Comment No 7 at para 8.

into consideration all the events including the injuries, distress and the loss they may have incurred from being out of work or employment. The right to work is clearly a socioeconomic right and it is categorically provided for under the ACHPR in Article 15.<sup>254</sup> An award of equitable compensation to the victims is a socioeconomic justice reparation. The Court first ordered compensation of five hundred thousand naira (500, 000) to each of the 10 plaintiffs (2<sup>nd</sup> to 11<sup>th</sup>) for the violation of their rights to assembly. It also awarded three million naira (3, 000, 000), two million naira (2, 000, 000) and one million naira (1,000, 000), respectively, to the plaintiffs who had suffered various socioeconomic injustices during the incident at issue here.

The ECOWAS Court noted that the “urban-renewal” objective by the government which would clearly alter the environmental and socioeconomic rights of the poor communities which lived by the waterfront, even though with good intentions towards “development” still needed to conform to requirements of IHRL.<sup>255</sup>

The ECOWAS Court used this case to emphasize that it is not subject to any domestic “stand-still” by articulating its unique jurisdiction and mandate as a court of first and direct recourse when it comes to human rights. The defendant had claimed that the current case was an abuse of court process, being similar to a suit pending before the National Court.

The ECOWAS Court rejected this claim by holding thus:

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<sup>254</sup> *Article 15* of the ACHPR provides thus: “Every individual shall have the right to work under equitable and satisfactory conditions, and shall receive equal pay for equal work.” Also in *Article 29 (1)* “The individual shall also have the duty to preserve the harmonious development of the family and to work for the cohesion and respect of the family; to respect his parents at all times, to maintain them in case of need.”

<sup>255</sup> Judgement in *SERAP & 10 Ors. v. Nigeria & 4 Ors.* ECW/CCJ/JUD/16/14 (“Case 3”) at para 78 - 79.

[T]his Court has stressed that its jurisdiction cannot be in doubt once the facts adduced are related to human rights violation... The mere allegation that there has been a violation of human rights in the territory of a Member State is sufficient *prima facie* to justify the jurisdiction of the Court... The Community Court of Justice cannot give up its jurisdiction in favour of a domestic court...<sup>256</sup>

The Court had earlier held in the case of *Valentine Ayika v. Republic of Liberia*,<sup>257</sup> that the pendency of a suit before a domestic court cannot oust its jurisdiction to determine a case of an alleged human rights violation. This isn't the case with some other sub-regional adjudicatory systems which require the exhaustion of domestic remedies before approaching them.<sup>258</sup>

Another remarkable point made by the Court in this case is the emphasis that NGOs as activist forces have been the most active players in advancing justice causes within the framework of the ACHPR. As referenced in the judgment, the ECOWAS Court held that she must show respect to NGOs who have been lodging complaints "on behalf of individuals, who for any reasons, are deprived of means to have access to justice."<sup>259</sup> The Court took two (2) of the pages of the decision to affirm this point and to counter the

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<sup>256</sup> *Ibid* at para 71, 72, 74.

<sup>257</sup> ECW/CCJ/APP/07/11.

<sup>258</sup> For example, Under *article 15(2)* of the Protocol on the Southern African Development Community (SADC) Tribunal. It provides that no person may bring an action against a Member State unless he or she has exhausted all available remedies or is unable to proceed under the domestic jurisdiction. The European Convention on Human Rights and Fundamental Freedoms of 1950 (the European Convention) provides in Article 26 that "The Commission . . . may only deal with a matter after all domestic remedies have been exhausted, according to the generally recognized rules of international law..." Even the ACHPR provides in *article 50* that "the Commission can only deal with a matter submitted to it after making sure that all local remedies, if they exist, have been exhausted, unless it is obvious to the Commission that the procedure of achieving the remedies would have been unduly prolonged."

<sup>259</sup> Judgement of "Case 3" *supra* note 255 at para 59.

defendant's objection to the plaintiff's standing to sue. By citing the previous SERAP case as precedent,<sup>260</sup> the Court held that an NGO may enjoy standing to file a complaint (or even join one) even when they have not been directly affected by the violation complained of. Quoting the presiding Justice B.M. Ramos:

In the African context and in the framework of the African Charter... it is worthy to note that since inception, the African Commission on Human and Peoples' Rights has not been raising any objection to Non-governmental organizations standing to lodge complaints on behalf of individuals... As recognized by the doctrine, *"Although the African Charter in Article 55, by referring to communications other than those State Parties' does not specifically identify or recognize the role of NGOs in the filing of complaints regarding human rights violations, in practice the complaints procedure before the Commission has been used mainly by NGOs who have filed complaints on behalf of individuals or groups alleging violation of human and peoples' rights enshrined in the African Charter"*- **The African Charter on Human and People's Rights, The System in Practice 1986-2000, page 257.**<sup>261</sup> The same favourable approach to the NGO's standing to lodge complaints for human rights violations, even when they are not direct victims, can be found in Rule 33, Section 1, paragraph (d) of the African Court on Human and Peoples' Rights Rules.<sup>262</sup>

The ECOWAS Court recognizes the struggles, pursuits and contribution made by activist forces (especially NGOs) who have for many years worked hard to advance human rights in the sub-region and the continent. NGOs have been "brokering and facilitating the

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<sup>260</sup> Registered Trustees of the Socio-Economic Rights & Accountability Project (SERAP) v. The President of the Federal Republic of Nigeria & 8 Ors ECW/CCJ/JUD/18/12 ("Case 2").

<sup>261</sup> *Supra* note 255 at para 59.

<sup>262</sup> *Ibid* at para 60.

‘correspondence’ of human rights awareness and the reliance of human rights norms” both at the level of the African Commission, the ECOWAS Court and within Nigeria.<sup>263</sup>

## 2.4. CONCLUSION

For the first time (as analysed in “Case 1”), the Nigerian government was held responsible by a supranational adjudicatory body for its non-fulfilment of the right to primary education of its people. The ECOWAS court dismissed the “excuse” of non-justiciability of the right to primary education and affirmed the justiciability of socioeconomic rights (including the right to education) in West Africa and Nigeria (despite domestic constitutional limitations). This was the first time that a court pronounced education in Nigeria as an enforceable and fundamental human right.

In “Case 2” the ECOWAS Court also held that by Nigeria agreeing to the Protocol of the Court, she is bound by the human rights law “contained in international instruments, with no exception whatsoever.” The Court emphasized that the Nigerian government has a duty to ensure that the activities (by any other person, including corporations) within its jurisdiction and control does not cause damage to the environment and the people. A rationale the court provided for this decision included the Court’s description of the environment as representing the living space, the quality of life and the very health of human beings, including generations unborn. Therefore, according to the Court, the Niger Delta must be considered as an indivisible whole, comprising the biotic and abiotic natural

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<sup>263</sup> Obiora Chinedu Okafor, *The African Human Rights System, Activist Forces and International Institutions* (Cambridge: Cambridge University Press, 2007) at 251.



resources, notably air, water, land, fauna and flora and the environmental and socioeconomic interaction between these factors.

In awarding damages for human rights violations, the ECOWAS Court in “Case 3” awarded equitable compensation to the victims by taking into consideration all the events that affected the victims, including the injuries, distress, and the loss they may have incurred from being out of work or employment as the latter amounts to an infringement of their socioeconomic right to occupation.

The unprecedented outcomes from the ECOWAS Court in “Case 1”, “Case 2” and “Case 3” were facilitated by SERAP’s action before the Court in its pursuit for environmental and socioeconomic justice in Nigeria. The progressive prospects and the unique jurisdiction of the ECOWAS court attracted SERAP to approach the court with its pursuits of challenging environmental and socioeconomic injustice in Nigeria, thereby initiating the three cases analyzed in this chapter. As an open access court, SERAP was able to approach the Court first-hand (the Court grants direct access to individuals as well as activist forces in representative capacity, to challenge human right violations in any of the Member States). Also, with the funding SERAP receives as an NGO, and their support and strategy from their “networks”, including their competence in litigation, all of these components contributed towards the outcome of the three (3) cases analysed in this chapter.

The case studies in this chapter highlighted some successes, but also underscored some challenges (e.g. the Court's indisposition to address "Case 3" from a "right to shelter" or a "right to housing" perspective). Analysing these cases also provided insight on the practice and procedures of the ECOWAS Court and how its normative influence has supported SERAP's pursuit of environmental and socioeconomic justice in Nigeria.

The next chapter will now build on this chapter (and the previous one) by attempting to demonstrate how the ECOWAS Court and the jurisprudence from these three (3) cases had exerted modest but significant impact within Nigeria's key domestic institutions. The domestic institutions include Nigeria's Executive, Legislative, and the Judicial branches of Government. The overarching goal is to find out if the Court's jurisprudence has led to any changes within the key institutions of Government in Nigeria.

**CHAPTER THREE:  
CORRESPONDENCE BETWEEN THE ECOWAS COURT, ACTIVIST FORCES AND  
KEY DOMESTIC INSTITUTIONS IN NIGERIA.**

In furtherance of the key purpose of this thesis, which is to examine the ECOWAS Court and its role as a resource for the activist forces that pursue environmental and socioeconomic justice in Nigeria (and how the Court has advanced the justiciability of environmental and environmental rights despite domestic limitations), this chapter will attempt to achieve two (2) objectives. First, this chapter will conduct an impact-assessment of three (3) decisions from the ECOWAS court (“Case 1”, Case 2” and “Case 3”) by addressing if and how these cases have influenced decisions within spaces of Nigeria’s legislature, executive and judiciary. Secondly (and in relation to the first objective of this chapter), this impact-assessment will attempt the utilization of a quasi-constructivist lens to deduce the correspondence between the ECOWAS Court, activist forces and these key domestic institutions in Nigeria. The overarching goal is to build on the previous chapters by analyzing the relevant material in order to discover if the mobilization of the court by activists (as exemplified by the three cases discussed in the last chapter) has exerted any influence on key institutions of government in Nigeria, and how? The chapter will also consider what this means for the “internalisation” of environmental and socioeconomic human rights norms in Nigeria?

The judgement in *SERAP v Nigeria & 8 Ors* (“Case 2”) is progressive (from the point of view of environmental and socioeconomic justice activists) because it held the Nigerian government accountable for environmental injustice and socioeconomic rights

infringements.<sup>264</sup> More so, it gave activist forces who pursue justice in this area an opportunity to enhance their networks (real and “virtual”) by bolstering alliances and partnerships to do even more. For example, MOSOP, AFRILAW and another activist force took action following the decision in “Case 2” by writing a letter to the Nigerian Ambassador (and Permanent Representative) to the United Nations in Geneva informing him of the success from the case at the ECOWAS Court and asking him to mobilise action at the level of the UN to ensure that what was secured from the ECOWAS Court could be implemented.<sup>265</sup>

The outcome of the three SERAP cases reviewed in Chapter 2 of this thesis created levers with which a modest yet significant measure of correspondence was fostered in Nigeria. There is an indication that the ECOWAS Court’s decision could have affected activities within the executive, legislative and judicial branches of government in Nigeria. These influences within these domestic institutions supports Okafor’s broad constructivist approach to International Human Rights Institutions (IHIs). The discussion that follows

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<sup>264</sup> Nigeria: Ground-breaking ECOWAS Court judgment orders government to punish oil companies over pollution online: <<http://www.amnesty.ca/news/public-statements/nigeria-ground-breaking-ecowas-court-judgment-orders-government-to-punish-oil>> December 2012.

<sup>265</sup> “Dear H.E Dr. Umunna Humphrey Orjiako: We, the undersigned call on you to demonstrate your leadership and commitment to human rights at the June 2014 UN Human Rights Council session... Some victims of abuses involving companies have sought legal remedies... in ECOWAS court where the villagers claimed harms from pollution before the Court of Justice of the Economic Community of West African States. The court dismissed the companies, but ruled the government’s failure to stop pollution was a human rights violation... It is time we were able to hold corporations accountable not only in the countries where they cause or contribute to violations, but also in other countries and internationally if required. There are numerous cases of community human rights impacts such as rights to water, food, health and land, violence linked to the oil industry operations and lack of transparency of revenues and contracts & contribution of revenues to the fulfilment of social & economic rights.” Online: <[https://business-humanrights.org/sites/default/files/media/documents/nigeria\\_csos\\_letter\\_of\\_support\\_for\\_un\\_treaty\\_on\\_business\\_and\\_human\\_rights.pdf](https://business-humanrights.org/sites/default/files/media/documents/nigeria_csos_letter_of_support_for_un_treaty_on_business_and_human_rights.pdf)>.

focuses on the impact of three examples of the ECOWAS Court's environmental and socioeconomic justice decisions.

### **3.1. IMPACT ON THE EXECUTIVE BRANCH OF GOVERNMENT IN NIGERIA**

In a bid to implement the UNEP Report, the Nigerian Government established the Hydrocarbon Pollution Restoration Project (HYPREP) as a means of cleaning up Ogoniland and other affected areas in the Niger Delta region.<sup>266</sup> A HYPREP Governing Council was created, comprising of representatives from the Ministry of Petroleum Resources, Federal Ministry of Environment, Ministry of Finance, representatives from Ogoniland, activists (NGOS), etc.<sup>267</sup> Several consultations were made between the Ministry of Environment and stakeholders.<sup>268</sup> In one of the consultations held by the

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<sup>266</sup> At the request of the Federal Republic of Nigeria, the United Nations Environment Programme (UNEP) conducted an independent assessment of the environment and public health impacts of oil contamination in Ogoniland, in the Niger Delta, and options for remediation. The report represents the best available understanding of what has happened to the environment of Ogoniland and the corresponding implications for affected populations and provides clear operational guidance as to how that legacy can be addressed. Over 4,000 samples collected for analysis from more than 200 sites. The choice of Ogoni for UNEP's study was part of a faltering reconciliation process in 2005/2006. It took almost three years for the UNEP study to get started before two years of substantive work were completed between 2009 and 2011. In the period of its work, UNEP has come under criticism from several sides. It has had to defend the rationale of accepting funding for the study solely from Shell. Also, the findings of the UNEP assessment contain close to 100 pages of the 262-page main report on the method followed by the team. UNEP's field observations and scientific investigations found that oil contamination in Ogoniland is widespread and severely impacting many components of the environment. Even though the oil industry is no longer active in Ogoniland, oil spills continue to occur with alarming regularity. Ogoni people live with this pollution every day. At one site, Ejama-Ebubu in Eleme local government area (LGA), the study found heavy contamination present 40 years after an oil spill occurred, despite repeated clean-up attempts. The assessment found that overlapping authorities and responsibilities between ministries and a lack of resources within key agencies has serious implications for environmental management on the ground, including enforcement. See the full report here: online: <<https://www.zaragoza.es/contenidos/medioambiente/onu//issue06/1130-eng-sum.pdf>>.

<sup>267</sup> Cletus Ukpogon "Buhari names governing council, board of trustees for Ogoni Clean-up – FULL LIST" *Premium Times* (5 August 2016), Online: Premium Times Newspaper online: <<https://www.premiumtimesng.com/news/top-news/208098-buhari-names-governing-council-board-trustees-ogoni-clean-full-list.html>>.

<sup>268</sup> The Federal Ministry of Environment was established at the inception of the new Civilian Administration in June 1999 to ensure effective coordination of all environmental matters, which hitherto were fragmented and resident in different line Ministries. The creation was intended to ensure that environmental matters are adequately mainstreamed into all developmental activities.

National Environmental Standards and Regulations Enforcement Agency (NESREA, an agency of the Federal Ministry of Environment), a review of the SERAP decision from the ECOWAS Court (including several other cases from both domestic and international courts on the Niger Delta) was conducted.<sup>269</sup> One key issue raised from the review of the cases was a dearth of consultation between the government and the people, and a lack of community license (including the failure of the government and the oil companies to satisfy international human rights standards of “FPIC”).<sup>270</sup>

Subsequent meetings were held by the Ministry of Environment and Ogoni representatives in Abuja, Nigeria, followed by a meeting of stakeholders in Geneva, Switzerland, in November of 2014, and another meeting in July 2015, where stakeholders committed to a “no re-pollution” agreement and a decision from the Ogoni locals (through their representatives) to support the clean-up exercise.<sup>271</sup> In the meetings held in both Abuja and Port Harcourt (both cities are in Nigeria), the Ministry of Justice (in collaboration with the Ministry of Environment) provided implementation guidelines which included

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<sup>269</sup> Ojogbo Victor, “National Policy on the Enforcement of Environmental Standards and Pollution control” (NESREA) 2016. (Legal and Technical working group) 12; NESREA is charged with the responsibility of enforcing environmental laws, regulations and standards in deterring people, industries and organizations from polluting and degrading the environment. NESREA has responsibility for the protection and development of the environment, biodiversity conservation and sustainable development of Nigeria’s natural resources in general and environmental technology including coordination, and liaison with, relevant stakeholders within and outside Nigeria on matters of enforcement of environmental standards, regulations, rules, laws, policies and guidelines. Online: <<http://www.nesrea.gov.ng>>.

<sup>270</sup> Free, Prior and Informed Consent (FPIC) is a specific right that pertains to indigenous peoples and is recognized in the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP). It extends to local communities where industrial action takes place to allow them to give or withhold consent to a project that may affect them or their territories. Once they have given their consent, they can withdraw it at any stage. Furthermore, FPIC enables them to negotiate the conditions under which the project will be designed, implemented, monitored and evaluated. This is also embedded within the universal right to self-determination. <<https://www.un.org/development/desa/indigenouspeoples/publications/2016/10/free-prior-and-informed-consent-an-indigenous-peoples-right-and-a-good-practice-for-local-communities-fao/>>.

<sup>271</sup> Federal Ministry of Environment, “Ogoniland: Background” online: <<http://environment.gov.ng/index.php/ogoni>>

adhering to the judgement of the ECOWAS Court in “Case 2” to ensure that the Nigerian government exercises its duty to take responsibility for the environmental activities of the oil companies and their agents operating in Nigeria.<sup>272</sup>

Since the delivering of the judgement by the ECOWAS Court in “Case 2,” SERAP and MOSOP have been engaged in several consultations by the Ministry of Environment. Of note was the stakeholder consultation towards the development of the environmental impact assessment exercise where SERAP was invited on the grounds of their interest in the Ogoni region (through the case they instituted at the ECOWAS Court) and the actions they have taken in representative capacity on behalf of the people of Ogoni.<sup>273</sup> SERAP was also one of the NGOs asked to make submissions on best practices for engaging the Ministry to realise its mandate for the Ogoni cleanup exercise.<sup>274</sup> Following the launch of the Ogoni Cleanup, however, MOSOP and other activist forces now decry the very slow pace of the effort.<sup>275</sup>

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<sup>272</sup> A Stakeholders' Sensitization Meeting was held in Port Harcourt, Rivers State on Thursday 28th April 2016. The meeting further secured the commitment of the people of Ogoniland and other stakeholders in the support of the clean-up project as well as an agreement of no re-pollution after clean-up. At the meeting, the Honourable Minister of Environment promised to constitute four (4) Adhoc Committees to commence preparation for activities on the clean-up project using the case from the ECOWAS Court as one of the rationales for the cleanup exercise. The Nigerian Minister of Environment inaugurated these committees and Task Team on the 24th May 2016. Nigeria's President Muhammadu Buhari launched the clean-up of Ogoniland on June 2nd, 2016 in Bodo, Rivers State. This was attended by the Vice-President, Yemi Osinbajo (SAN). This Same Bodo region is the region described in the SERAP case (“Case 2”) as being ravaged by devastating oil spillage in the last 10 years, destroying farmlands, aquatic life, and unleashing monumental and multiple forms of land, air and water pollutions in the process. Online: <<http://www.environment.gov.ng/ogoni.html>>.

<sup>273</sup> Alfred Akuki, “Taking Public Interest Advocacy to New Heights” *Independent* (28 July 2016) Online: <<http://independent.ng/seraps-adetokunbo-mumuni-taking-public-interest-advocacy-to-new-heights/>>

<sup>274</sup> Nigerian Ministry of Environment, “Environmental Impact Assessment Report: Stakeholder and Public Engagement during Environmental Impact Assessment in Nigeria” (February 2017) at 11.

<sup>275</sup> Cletus Ukpong & Agency Report, “MOSOP, others decry slow pace of Ogoni clean-up” (17 August 2017), *Premium Times Nigeria* (Newspaper) online: <<http://www.premiumtimesng.com/regional/south-south-regional/240532-mosop-others-decry-slow-pace-ogoni-clean.html>>.

Environmental and socioeconomic justice-consciousness are reflected in several portions of Nigeria's 58-page National Policy on the Environment which was revised in 2016 to include the ambition that the Ministry of Environment will look-beyond the non-justiciability provision in the Nigerian constitution to ensure that it (the ministry) empowers citizens "to have legal standing and access to justice to be able to protect and enforce the protection of a clean and healthy environment for sustainable development."<sup>276</sup> Para 8.1. of that Policy Document provides:

The Nigerian constitutional provision on environmental protection as at now is too tokenistic and inadequate. Likewise, other extant environmental laws, including related laws, policies and regulations, require revision, harmonisation and updating in line with global best standards and practices. This policy shall be put in its proper legal context for effectiveness and impact... Government recognizes that everyone in Nigeria has the right to (i) an environment that is not harmful to her or his health or wellbeing; (ii) have the environment protected, for the good of present and future generations through reasonable laws and other way of; (iii) preventing pollution and ecological degradation; (iv) promoting conservation and; (v) securing ecologically sustainable development and use of our natural resources, while at the same time promoting valid economic and social development.<sup>277</sup>

The above statement is the first statement of its kind to be published by a Federal Ministry in Nigeria, as a National Policy, that relocates or shifts the legal framework of the Ministry, from the sovereign constitution (as its governing law), to supplementing it with

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<sup>276</sup> *Infra.*

<sup>277</sup> Revised Nigeria's National Policy on the Environment (2016) Online: <<http://environment.gov.ng/media/attachments/2017/09/22/revised-national-policy-on-the-environment-final-draft.pdf>> at 49 [Emphasis Mine].



international human rights standards as a way of framing its goals. This revised National Policy on Environment (issued by the Ministry of Environment in 2016), was adopted by the Federal Executive Council in February 2017.<sup>278</sup> This National Policy was first adopted in 1991 and was last revised in 1999, before the adoption of the current version. The Ministry justified this revision by stating the need to “catch up” with recent trends in environmental protection and to improve its strategies in tackling the inter-sectorial issues that border on the environment in Nigeria, which includes the need to secure environmental and socioeconomic justice for indigenous communities, and those affected by environmental and socioeconomic injustices, like the people of the Niger Delta.<sup>279</sup> What is more, while developing the Ministry’s legal framework within its revised National Policy, the Ministry of Environment captured eleven (11) critical “trends” that have arisen on Nigeria’s environmental landscape, the sixth (6<sup>th</sup>) is the justiciability of environmental and socioeconomic rights in Nigeria as adjudicated by the ECOWAS Court through the decisions in “Case 1” and “Case 2”.<sup>280</sup>

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<sup>278</sup> Vanguard, “FEC approves new policy on environment” (22 February 2017) <<https://www.vanguardngr.com/2017/02/fec-approves-new-policy-environment/>>.

<sup>279</sup> Federal Ministry of Environment Nigeria, “Revised Environmental Legal Framework and Management Policy for the Niger Delta” FME/P/LFMP/2/2017 at 13 – 14.

<sup>280</sup> *Ibid.* (1) National Resource Management: Federal Ministry of Environment, National Environmental, Economic and Development Study (NEEDS) for Climate Change in Nigeria, (2010). (2) Reduction in deforestation: Food and Agriculture Organization (FAO) of the United Nations declaring Nigeria with the highest rate of deforestation in the world. (2005). (3) Declaration of National Environmental Emergency: Climate change and the impact of oil spills – both combining to create a serious threat to national security. NOSDRA to respond to areas of specific resourcing to achieve key objectives. (4) Environmental Protection Framework: 1 year on the emergency program for the environment and how this is situated within an ongoing plan for sustained response and a demonstration of strong environmental leadership by placing the issue at the center of implementing a development accord with the people of the Niger Delta. (5) Environmental Management and Stewardship: Supporting State-level commissions for environment to create systems for tracking land use change via monitoring systems that use satellite imagery to track destruction of forests and mangroves over time. (6) Legality of environmental and human rights: Community Court of Justice of the Economic Community of West African States (ECOWAS) rulings and judgements (SERAP v FRN 2010, 2012). (7) Oil Sector Environmental Management and Regulation: Nigeria emits more carbon dioxide into the atmosphere through gas flaring than the rest of the African continent together, an estimated 16 million tonnes yearly: U.S. Energy Information Administration, Country Analysis Brief: Nigeria, (Washington, D.C.: US department of Energy, 2015). (8) Oil spills and gas flaring reductions: 2,000 spills

The Consultative Draft of the National Action Plan for the Promotion and Protection of Human Rights in Nigeria for four (4) years: 2017 to 2021,<sup>281</sup> was published by the National Human Rights Commission in Nigeria.<sup>282</sup> The chapter on “Economic, Social and Cultural

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reported since January 2014 (NOSDRA, Nigerian Oil Spill Monitor. Available Online: [oilspillmonitor.ng](http://oilspillmonitor.ng)) The amount of gas being wasted through gas flaring is enough to add 27,000 Mega Watts (MW) to national power generation capacity (Federal Ministry of Environment, Gas Flare Tracker. Available Online: [gasflaretracker.ng/](http://gasflaretracker.ng/)) Addressing oil spills will require immediate strategic steps to reverse and remediate the impact of environmental degradation, alongside implementation of pre-emptive measures to minimize potential further pollution. Applying these measures will significantly improve the standards of living of host communities, and contribute to combating deforestation and the loss of biodiversity. (9) Implementation of the United Nations Environment Programme Report Recommendations: The proposed Ogoni clean-up has been repeatedly flagged as a key starting point for a wider program of clean-ups across the region. This is situated within widespread dissatisfaction with the quality of clean-up interventions by oil companies to date, and a truly massive acreage of land and mangrove territory that has seen no clean-up activity at all. (10) Waste Management and Sanitation: In the Niger Delta, billions of Naira have repeatedly been allocated to water projects (and lesser sums to sanitation) that should have addressed many of the problems faced. However, poor contracting, an almost complete lack of local ownership, and outright corruption have caused shocking failure rates. Over 75 percent of NDDC water projects were measured to have failed when a brief survey was done in 2013. (11) Sanitation and Clean Water Provision: Establish a National Regulatory Commission, with State-level presence, by restructuring and merging sanitation and water agencies, which at the moment function distinctly; Increase Federal budget allocation on sanitation from less than 0.1 percent of GDP; and Support the completion of the preparation of State Water Policies. [Emphasis mine].

<sup>281</sup> National Human Rights Commission, “National Action Plan for the Promotion and Protection of Human Rights in Nigeria (2017 to 2021) *Federal Republic of Nigeria* Consultative Draft online: <<http://www.nigerianbar.org.ng/index.php/downloads/send/8-publications/34-national-action-plan-for-the-promotion-and-protection-of-human-rights-in-nigeria>>.

<sup>282</sup> The National Human Rights Commission (NHRC) is the National Human Rights Institution of Nigeria. Its mandate, as outlined in the National Human Rights Commission Act of 1995 (as amended in 2010), is in line with the Paris Principles, which require that a National Human Rights Institution “be given as broad a mandate as possible, which shall be clearly set forth in a constitutional or legislative text.” The mandate of the NHRC covers both the protection of human rights as well as their promotion. This means that they have the mandate to investigate and prevent human rights violations as well as to create awareness of human rights in the country. The NHRC is empowered to conduct a wide array of activities: investigating allegations of human rights abuse, recommending legal reforms, providing input to the government’s treaty reports at the international level, submitting its own independent reports, taking part in state examination, and helping to develop the list of issues with the treaty bodies. The NHRC is also mandated to disseminate knowledge about human rights obligations in Nigeria, build national capacity on human rights, and increase stakeholder engagement with civil society, media, parliament and government in the implementation of Nigeria’s human rights commitments. The National Action Plan for the Promotion and Protection of Human Rights (NAP) is a response to the recommendation of The Vienna Declaration and Programme of Action adopted at the World Conference on Human Rights in Vienna, Austria in 1993. This requested that: “Each State considers the desirability of drawing up a national action plan identifying steps whereby the State would improve the protection and promotion of human rights”. The development of a National Action Plan on Human Rights is an opportunity to assess the current measures in place to protect and promote human rights; identify areas that need improvement and enable a commitment to improve the protection and promotion of human rights. Although the NHRC facilitated the consultative process around the National Action Plan, the responsibility for the final adoption and implementation of the Plan rests with the government.

Rights” states that socioeconomic rights in Nigeria have now “been developed... by applications for enforcement of Fundamental Rights... through the ECOWAS Court,” and are therefore “now enforceable.”<sup>283</sup> All the cases so far on socioeconomic rights that have been instituted against Nigeria before the ECOWAS Court (and produced jurisprudence from the court), were instituted by SERAP. This proves that the National Action Plan is clearly referring to the jurisprudence of the Court from any or more than one of the (3) SERAP cases. The National Human Rights Commission stated in the National Action Plan that having regard to the nature of the Nigerian Government’s obligations to respect, protect and fulfill environmental and socioeconomic rights in Nigeria, the government recognizes the need to establish necessary institutions to realize these environmental and socioeconomic rights.<sup>284</sup>

After instituting the case against the Nigerian Government (and the oil companies) over the environmental injustices in the Niger Delta region (“Case 2”), SERAP did not end its environmental justice pursuit with the “victory” it obtained from the ECOWAS Court in “Case 2”. They also (in their activist character) forged ahead with the pursuit of environmental justice by engaging with the Nigerian Government (through the ministry of Environment and other stakeholders) in consultations on how to address the environmental and socioeconomic issues in the region. Therefore, beyond challenging the government through litigation, SERAP and other activist forces (NGOs such as MOSOP, HOMEF, et al) engaged in non-adversarial (or “cooperative”) activities to advance their pursuit of environmental justice for the people of the Niger Delta. This didn’t

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<sup>283</sup> *Ibid* at 49.

<sup>284</sup> *Ibid*.

stop them however, from decrying the very slow pace of the enforcement of the decision of the ECOWAS Court to “restore the environment of the Niger Delta” through the effective cleanup of the region. The role they played before the ECOWAS court (at a supranational level) as well as within Nigeria (domestically), demonstrates the production of correspondence between the decisions from the ECOWAS Court and the policies/actions of the Nigerian Government.

### **3.2. IMPACT ON THE LEGISLATIVE BRANCH OF THE GOVERNMENT IN NIGERIA**

At the 2015/2016 legal year commencement of the ECOWAS Court which held in Nigeria’s capital, and speaking about the Court’s role in advancing “Rule of Law, Democracy and Good Governance,” the representative of Nigeria’s Attorney General and Minister of Justice admitted that beyond the development of human rights and social justice, the Court has also “prompted legislative response.” From his account: through the cases instituted by SERAP before the Court, stakeholders (including the government) became aware of the gaps in the law which needed closure, thereby inspiring the mobilization (in both government and civil society spaces) for better laws that will protect citizens from human rights violations committed by either persons, companies or governments.<sup>285</sup> On responding to “the steps taken by government to enforce the decision of the court”, the Solicitor-General of the Ministry of Justice alluded to the Ministry’s preparation of draft bills and submission of proposals to the National Assembly, to

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<sup>285</sup> Apata Dayo, “From the Office of the Attorney General of the Federation and Ministry of Justice on the 2015/2016 Legal Year of the Community Court of Justice of the Economic Community of West African States” (22 October 2015).

address the environmental and socioeconomic concerns from the judgement of the court in the SERAP cases.<sup>286</sup>

Although no mention was made of the exact bills proposed to the National Assembly (or the prospect of these bills to eventually be promulgated into law), but a statement by the government (though the office of the Ministry of Justice) acknowledging gaps uncovered from the jurisprudence in “Case 2” (e.g. the responsibility to protect citizens from human rights violations committed by either persons or companies), and a decision by the government to take steps in enforcing the decision of the ECOWAS Court, proves a line of correspondence between the ECOWAS Court, the activist forces (SERAP and its networks), and the Nigerian Government (in this case, the Ministry of Justice and its preparation of draft bills and submission of proposals to the Legislature).

In 2015, the National Assembly passed the National Biosafety Management Agency (NBMA) Act establishing an agency to provide regulatory framework to adequately safeguard human health and the environment from potential adverse effects of modern biotechnology and genetically modified organisms, while harnessing the potentials of modern biotechnology and its derivatives, for the benefit of Nigerians.<sup>287</sup> The Minister of Environment,<sup>288</sup> cited three documents: the UNEP Report, the *Amicus Curiae* brief

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<sup>286</sup> *Ibid* at II.

<sup>287</sup> The Act came into force in April 2015, with the appointment of a Director General and Chief Executive Officer. The UN international agreement known as *Cartagena Protocol on Biosafety* which Nigeria signed is an environment protocol and it requires members to domesticate the agreement through a law. The Biosafety Act is therefore to domesticate the Protocol and address Nigeria’s National Biosafety requirements.

<sup>288</sup> (Amina Mohammed was the Minister of Environment before she resigned from Nigerian Federal Executive Council on 24 February 2017 to take up the position of the Deputy Secretary-General of the United Nations).

(submitted by Amnesty International in “Case 2”), and the Judgement of the ECOWAS Court in the same case. These three (3) documents was relied on to justify the Niger Delta as one of the priority areas to improve on wetland values in relation to socioeconomic development, and to manage the biodiversity of the country. This decision was made because the oil and gas exploration in the region has had deleterious effects on the ecosystem and local biodiversity.<sup>289</sup> The Director General of the National Biosafety Management Agency (NBMA) in his welcome address of June 24, 2017 stated that one of his objectives as the Director General was to liaise, not only with the UN and the AU, but also with the ECOWAS because of the role that the ECOWAS has played, through its Court, in recognizing issues that touch on the biosafety of the Niger Delta, and that these supranational institutions (UN, AU and ECOWAS) can help Nigeria in meeting her Biosafety Management plan.<sup>290</sup> “Case 2” is the only case so far from the ECOWAS Court that has touched on biosafety in Nigeria therefore any reference to the ECOWAS Court’s contribution to biosafety would be a referring to “Case 2”.

Addressing the Nigerian House of Representatives on the 6<sup>th</sup> of July 2017, House Member Hon. Bede Eke Uchenna who sponsored the amendment of the extant Environment Impact Assessment Act of Nigeria said: “Once we make this amendment to the Environment Impact Assessment Act, I don’t think we will have any more law suits against the government regarding the Niger Delta.”<sup>291</sup> Although he didn’t mention if these

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<sup>289</sup> Amina J Mohammed, “Presentation of the Federal Republic of Nigeria: National Biodiversity Strategy and Action Plan 2016 – 2020” (December 2015) online: *hestories*: <<http://www.hestories.info/federal-republic-of-nigeria-national-biodiversity-strategy-and.html>>.

<sup>290</sup> Dr. Rufus Ebegba, Director-General/CEO, National Biosafety Management Agency (NBMA) “DG’s Welcome Message” (June 24, 2017) Online: <<http://nbma.gov.ng/2017/06/24/dgs-welcome-message/>>.

<sup>291</sup> Nigerian Television Authority Live, “National Assembly House of Reps Plenary” (6 July 2017) online: <<https://www.youtube.com/watch?v=xUH5pOq8Gw0>> at 00h 01:47.05.

law suits he referred to were the domestic cases against the Nigerian government or the supranational cases (or both), but he also said the government “is tired of being dragged to court over the same issue of the Niger Delta,” making reference to the decision of the ECOWAS Court on SERAP v Nigeria.<sup>292</sup>

In 2014, the National Health Act was passed. This became the first time that Nigeria is establishing a National Health System to protect, promote and fulfil the rights of the people of Nigeria to have access to health.<sup>293</sup> Unlike previous versions of the Health Act ( or Health Bill, before it became law), the promulgated version recognizes the effect of the environment on the human body.<sup>294</sup> Leading from this legislative feat on the National Health Act, a call was made on the 2<sup>nd</sup> of May 2017 by the Senate Committee on Health for a public hearing on a *Bill to Enact The National Health Insurance Commission Act*.<sup>295</sup> The Federal Ministry of Justice (invited by the Senate Committee),<sup>296</sup> submitted a written memoranda connecting both the National Health Act and the proposed Bill to establish that once both laws become operational, Nigerians will be able to demand their right to health from the government because the “proposed new Insurance Commission law” will institutionalize the right to health which will then make the right to health obligatory.<sup>297</sup>

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<sup>292</sup> *Ibid.*

<sup>293</sup> *National Health Act of Nigeria, 2014, s 1 (e).*

<sup>294</sup> *Ibid*, s 64. This section seems to be taking after CESCR General Comment No 14 on the Right to the Highest Attainable Standard of Health (art 12) adopted at the Twenty-second Session of the Committee on Economic, Social and Cultural Rights, on 11 August 2000 (Contained in Document E/C.12/2000/4).

<sup>295</sup> HB534, *National Health Insurance Scheme Act (Repeal and Re-enactment) Bill, 2016* Policy and Legal Advocacy Centre Online: <<http://placbillstrack.org/upload/HB534.pdf>>.

<sup>296</sup> Medical Advertorials, “Senate Committee on Health Call for Memoranda/ Invitation to Public Hearing” online: Medical World Nigeria <<https://www.medicalworldnigeria.com/2017/05/senate-committee-on-health-call-for-memoranda-invitation-to-public-hearing#.WbDRZa2ZPBI>>.

<sup>297</sup> Federal Ministry of Justice, “Draft Memorandum to the Senate Federal Republic of Nigeria: Committee on Health” *Re: Senate Committee on Health Call for Memorandum/Invitation to Public Hearing* (12 May 2017) at 6.

These memoranda cited the SERAP v. UBEC case (“Case 1”) under the section “Lessons from Africa” as one of the cases that informed the recommendation provided by the Ministry of Justice to the Senate Committee on Health.<sup>298</sup> The Ministry advised the Committee to be aware that by the combined effect of the extant National Health Act and the proposal to “institutionalize” a national health insurance scheme, this will mean (as similar to the decision made by the ECOWAS Court in the SERAP Case), an “enforceable right to healthcare provision,” hence the Senate Committee on Health was advised to put into consideration the combined effect of the provisions in both legislations towards the promulgation of the *Bill to Enact The National Health Insurance Commission Act*.<sup>299</sup> This example may not have established a strong influence from the decision of the ECOWAS Court in “Case 1,” but the consideration of this case by the Ministry of Justice in advising the Senate Committee on Health of the National Assembly, is still a significant (although modest) form of correspondence.

### **3.3. IMPACT ON THE JUDICIAL BRANCH OF THE GOVERNMENT IN NIGERIA**

On the 1<sup>st</sup> of March 2017, the Federal High Court of Nigeria (Abuja Division) in the case of *LEDAP & Anor v. Federal Ministry of Education & Anor*<sup>300</sup> made a ground-breaking decision by declaring that every Nigerian child has the constitutional right to free and compulsory primary education. The court held that the non-justiciability to the right to education as provided for in the constitution does not hold water anymore because the right to primary

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<sup>298</sup> *Ibid* at Appendix I, 64.

<sup>299</sup> *Ibid* at 24.

<sup>300</sup> FHC/ABJ/CS/978/15 [2017] NGHC 2 Online: Nigeria Legal Information Institute online: <<https://www.nigerialii.org/ng/judgment/high-court/2017/2.html>>.



education became activated by the National Assembly enacting the Compulsory, Free Universal Basic Education Act, of 2004. Just like the case of SERAP v UBEC (Case 1), and on the exact same issue of Universal Basic Education for Children in Nigeria (as in Case 1), the Courts on both levels; The ECOWAS Court, and the Federal High Court in Nigeria,<sup>301</sup> have both declared the right to primary education enforceable as a fundamental human right - with no excuse to non-justiciability.

What may look like a coincidence is actually a strong evidence of trans-judicial communication between the ECOWAS Court in 2010 and the Nigerian Federal High Court seven years after. The written address of the plaintiffs in this case, makes the exact same arguments that was made in “Case 1” (including the reliefs sought before the domestic court being the same as the reliefs sought in the factum of SERAP in “Case 1”).<sup>302</sup> This is not surprising because the subject matter is the same, and besides, the plaintiff in this case is also an activist force who had instituted several cases before the ECOWAS Court,<sup>303</sup> and has actively, and visibly used the jurisprudence from the ECOWAS court for domestic

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<sup>301</sup> (Before Honourable Justice J.T Tsoho an activist judge whose decisions have in the past attracted public interest and media reaction).

<sup>302</sup> (Addressing the issue as to whether by the combined effect of *Section 18* of the *1999 Constitution* and *Section 2 (1)* of the compulsory, *Free Universal Basic Education Act 2004*, the right to compulsory and universal primary education and free junior secondary education for all qualified Nigerian Citizens are enforceable rights in Nigeria?) The core submissions relating to this question are contained in paragraphs 3.4 to 3.6 of the Plaintiff's Written Address where the Plaintiff submitted that irrespective of the provisions of *Section 6 (6) (c) of the 1999 Constitution*, some provisions of *Chapter 2 of the Constitution* will become enforceable if the Constitution provides otherwise in another section. It was further submitted that where the National Assembly enacts a law on any Section or sections of *Chapter II of the Constitution*, such section (s) will become automatically enforceable. The plaintiff Referred to the Cases of *Olafisoye v. Federal Republic of Nigeria (2004) 4 NWLR (Pt. 864) 580* and *Attorney General of Ondo State v. Attorney General of the Federation (2002) 9 NWLR (Pt. 772) 222*. The plaintiffs also relied on the *African Charter on Human and People's Rights (Ratification and Enforcement Act) of Nigeria* and cited *SERAP v UBEC & Anor. ECW/CCJ/JUD/07/10*.

<sup>303</sup> IHRDA, IHRDA, LEDAP trained Nigerian Lawyers, CSOs on litigating women's rights Institute for Human Rights and Development in Africa, Online: Institute for Human Rights and Development in Africa (23 March 2017) online: <<http://www.ihrda.org/2017/03/ihrda-ledap-train-nigerian-lawyers-csos-on-litigating-womens-rights/>>.

activism and vice versa (including training other lawyers on how to file applications before the ECOWAS Court on human rights issues).<sup>304</sup> The plaintiff counsel in this case cited

“Case 1.” From the Originating Summons of the plaintiff in this case, it was stated thus:

Section 18 (3) of the 1999 Constitution provides that the Government shall strive to eradicate illiteracy; and to this end Government shall as and when practicable provide (a) free, compulsory and universal primary education; (b) free secondary education; (c) free university education; and (d) free adult literacy programme. By virtue of sections 2 (1) and 3 (1) of the Compulsory, Free Universal Basic Education Act, 2004; the right to free universal primary education and free junior secondary education for every Nigerian child is guaranteed. They provide thus: 2 (1) Every Government in Nigeria shall provide free, compulsory and universal basic education for every child of primary and junior secondary school age; 3 (1) The services provided in public primary and junior secondary schools shall be free of charge. Although section 18 of the Constitution falls under the non-justiciable fundamental objectives and directive principles of state policy, it has however become justiciable or enforceable by the combined effect of that section and sections 2 and 3 of the Compulsory, Free Universal Basic Education Act, 2004. The justiciability of this right to education is also supported by the cases of **SERAP v UBEC & Anor. ECW/CCJ/JUD/07/10**, *Olafisoye v. FRN* (2004) 4 NWLR (Pt. 864) 580 and *A - G, Ondo State v. A - G., Federation* (2002) 9 NWLR (Pt. 772) 222.<sup>305</sup>

The case above demonstrates the ECOWAS Court’s version of the ACHPR phenomenon because the ECOWAS Court enabled what was previously unavailable: The right to

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<sup>304</sup> Few of the cases LEDAP has instituted before the ECOWAS Court are *Sa’adatu Umar (Represented by Chino Obiagwu) v Federal Republic of Nigeria (Represented by Yusuf Bado Mok) ECW/CCJ/APP/12/11*; *Aliyu Tasheku v Federal Republic of Nigeria ECW/CCJ/APP/12/11*; *Ousainou Darboe & 32 Ors v. The Republic of Gambia* (2016).

<sup>305</sup> *LEDAP & Anor v. Federal Ministry of Education & Anor FHC/ABJ/CS/978/15* [2017] (Factum of Plaintiff, 23<sup>rd</sup> of March 2017) [Emphasis mine].

education to then be an enforceable human right in Nigeria and even acquired a more direct application through this case. Here, one activist force (LEDAP), leveraged on the “success” of its colleague, SERAP (both of whom have engaged with the ECOWAS Court and are within similar networks in the pursuit of environmental and socioeconomic rights in Nigeria). LEDAP relied on the jurisprudence from the ECOWAS Court as instituted by SERAP (at a supranational level), to contribute towards securing the enforcement of the socioeconomic right to education in Nigeria (at a domestic level) by instituting a case at Federal High Court of Nigeria which was determined in their favour. This describes “correspondence-style” trans-judicial communication among the trio of the activist forces in this instance, the ECOWAS Court and the Judiciary of Nigeria. Several media reports have appraised this domestic realization of the right to education.<sup>306</sup>

According to Okafor, there are eight (8) minimum conditions that must be present for the African system to realise its capacity to optimally help in shaping the logics of appropriateness, conceptions of interest, or self-understandings held within key domestic institutions in Nigeria.<sup>307</sup> Although, these minimum conditions are for the optimal

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<sup>306</sup> Africa Independent Television, “Free Basic Education An Enforceable Right; Court Declares” Online: <[http://www.aitonline.tv/post-free\\_basic\\_education\\_an\\_enforceable\\_right\\_court\\_declares](http://www.aitonline.tv/post-free_basic_education_an_enforceable_right_court_declares)>; Joseph Onyekwere, “Court declares free compulsory education enforceable right” *The Guardian* (2 March 2017) online: <<https://guardian.ng/news/court-declares-free-compulsory-education-enforceable-right/>>; Tope Alabi, “Court declares Free Basic Education An Enforceable Right” Information Nigeria (3 March 2017) online: <<http://www.informationng.com/2017/03/court-declares-free-basic-education-enforceable-right.html>>.

<sup>307</sup> The eight (8) minimum conditions are as follows:

“These are that: (i) strong (that is, dynamic, creative, and courageous) activist forces (especially CSAs) must function locally; (ii) these CSAs must engage actively and extensively with the African system (especially by participating actively in the work of the African Commission, filing and arguing Communications before the African Commission, and deploying the African Charter within domestic institutions); (iii) a reasonably activist and independent judiciary (or at least a significant activist and independent wing of the judiciary) must exist in the given country; (iv) a reasonably sufficient amount of space for political dissent must exist within the country, whatever the character of its regime-type; (v) the African Charter must form part of the domestic laws of the given country; (vi) the African Commission, or

realisation of the “ACHPR phenomenon,” and they may apply differently to the ECOWAS mechanism, they still share strong parallels. The ECOWAS Court is also a mechanism within the African system (with the ACHPR at the core of the “ECOWAS law”), hence these conditions should be applicable to the ECOWAS.

The domestic influences discussed in this chapter above have demonstrated the attainment of some of the minimum conditions that Okafor prescribed in the context of the African system, thereby evidencing a phenomenon that is quite similar to the ACHPR phenomenon. “Case 1”, “Case 2” and “Case 3” have each influenced some activities within the executive, legislative and judicial branches of government in Nigeria. These examples substantiate the existence of some correspondence between the ECOWAS Court and governmental institutions in Nigeria, of a kind that was brokered by activist forces in this case (mainly NGOs).<sup>308</sup>

It may be difficult to establish that the modest but significant impact discussed thus far in this chapter occurred only as a result of the work of activist forces that approached the Court and the activist judges of the ECOWAS Court. There may be other intervening and/or co-factors. This thesis is not seeking to establish that the ECOWAS court is solely

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other institution of the African System, must actively and positively identify with the human rights struggles that rage within that country; (vii) the African Commission should make more effort to speak the other languages of human dignity that bring it much closer to the vast majority of Africans; (viii) that the African system and the activist forces that drive its domestic impact should pay much more attention to ESC rights [economic, social and cultural rights. In other words, for it to germinate, flower, and yield an optimal harvest, the seed of the African system must find sufficiently fertile soil in the place in which it has to be planted.” Okafor Obiora Chinedu *The African Human Rights System, Activist Forces and International Institutions* Cambridge University Press (2007) at 270 - 1.

<sup>308</sup> *Ibid* (making a case for centering the study of correspondence – a phenomenon theorized and styled by Okafor which clearly encompasses, but reaches beyond State compliance).

responsible for the legislative, executive and judicial developments cited above. However, the indicators here are sufficient enough to attest to the notion that activist forces have acted as “intelligent transmission lines”<sup>309</sup> causing a flow of normative energy from the ECOWAS Court to key institutions in Nigeria. The examples above also give sufficient grounds to continue to other aspects of the analytical framework of a quasi-constructivist optic to analyze the available evidence further. The examples above have shown the “production of the desired kinds of thinking and action”<sup>310</sup> within Nigerian governmental institutions that is attributable, at least in part, to the work of ECOWAS Court and the “relay” efforts of some activist forces. Thus, the “broad constructivist process via which modest alterations in logics of appropriateness and/or conceptions of interest”<sup>311</sup> have been fostered in Nigeria, in part as a result of the ECOWAS Court and activist forces, have in nearly every case been brokered and/or facilitated by the NGO elements within these activist forces. This will be demonstrated in the next section of this chapter.

#### **3.4. FOSTERING MODEST ALTERATIONS IN LOGICS OF APPROPRIATENESS AND/OR CONCEPTIONS OF INTEREST ON ENVIRONMENTAL AND SOCIOECONOMIC JUSTICE IN NIGERIA.**

*“Ideas do not float freely,”* but activist forces can chart the sail. Thomas Risse has written about the need to pay more attention to the causal mechanisms and processes by which

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<sup>309</sup> *Ibid* at 94.

<sup>310</sup> *Ibid* at 277 – 278.

<sup>311</sup> *Ibid* at 251.

norms and ideas spread.<sup>312</sup> Per Risse,<sup>313</sup> ideas may look like they float freely but they actually do not, because historical accounts have shown that decision makers are always exposed to several and often contradictory policy concepts but they get to choose one and ignore the other. What are the conditions under which one specific idea is selected and the other is not? There has to be some intervening variables or conditions under which specific ideas are selected or preferable. Seeds of international human rights norms are more likely to germinate locally if they are planted on fertile land. To make the land fertile however, some actors and agents work on the nutrient levels, structures and organic content of the land to prepare it for a normative change. These local agents in the context of this thesis are activist forces who float environmental and socioeconomic justice to sail into both the region and the institutional spaces in the country.

Rationally, environmental and socioeconomic justice should make sense. It is only logical that human beings should be able to have guaranteed access to food, clean water, healthcare, education and sustenance. If not what kind of life would they be living? Shouldn't the environment that people live in be favourable to them and not detrimental instead? When TNCs and governments extract resources from the land (that ultimately belong to the people even in instances where the laws place ownership in the government), shouldn't the inhabitants of that land enjoy some of those resources and not suffer as a consequence?

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<sup>312</sup> Thomas Risse-Kappen, "Ideas do not Float Freely: Transnational Coalitions, Domestic Structures, and the End of the Cold War" *International Organization* (The MIT Press Vol. 48, No. 2, Spring 1994), pp 185-214 online: <<http://www.jstor.org/stable/2706930>>.

<sup>313</sup> *Ibid.*

This rational or commonsensical notion of how things should be does not automatically reflect in the kind of laws that are accepted and the ones that are not. If civil and political rights are just as valid as socioeconomic rights why are they in two separate international instruments? Why is the former a directive principle and the latter a fundamental right under the Nigerian constitution? Why did the ECOWAS Court hold the government responsible for environmental justice violations in the Niger Delta but didn't do the same for the oil companies in "Case 2"? Did we settle that States should "protect" human rights but companies should "respect" human rights instead - even when some businesses commit more human rights atrocities than governments (and more sixty percent of the top 100 economies in the world are businesses not states)?<sup>314</sup> Why does "hard law" attach to individuals who commit international crimes but soft law is proposed for companies who violate human rights? What is the rationale for these differences in accountability and responsibility? These are questions that this thesis cannot possibly address, and are actually beyond the scope of same. However, these distributions of accountability and responsibility are not without politics, and they are also not without their drivers: the people who "facilitate alterations in the logics of appropriateness, conceptions of interest, and self-understandings" of a norm or subject matter.

When a people have to choose from a set of ideas, or have to make a choice from options available to them (say, a set of presidential candidates in a democratic election), these options may have been influenced or constricted by some "human forces" or a smaller

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<sup>314</sup> Nicholas Freudenberg, "The 100 Largest Government and Corporations by Revenue" *Corporations and Health* online: <<http://www.corporationsandhealth.org/2015/08/27/the-100-largest-governments-and-corporations-by-revenue/>>.

group of people, but unknown or unaware to the people. Even when the public exercises their right to choose or not, a decision may have been made for them, without their knowledge, awareness or permission.<sup>315</sup>

Ideas do not always float from logic neither do they always abide by “rationality.” They are many times moved, oiled, engineered and pushed by forces. Examples of such “forces” are NGOs, activist lawyers, human rights groups, individuals, independent journalists, academicians and even activist judges who act as “human rights engineers”, working for the advancement of environmental and socioeconomic justice within a state or system. These are activist forces. In the context of this thesis, they are forces who have engaged the ECOWAS Court directly or by proxy, through their real and virtual networks, to promote the pursuit for environmental and socioeconomic justice in Nigeria.

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<sup>315</sup> To illustrate this point (of a force or small group of people deciding for others without them knowing or caring), I will like to use the example of fashion trends which most people believe float freely without realizing that many times these trends are orchestrated and facilitated by a smaller group of people, affecting everybody. In the award-winning movie titled, “The Devil Wears Prada” starred by Anne Hathaway and Meryl Streep, Andy (Anne Hathaway) is a recent college graduate with big dreams. Upon landing a job at the prestigious Runway fashion magazine, she finds herself the assistant to the feared and revered editor, Miranda Priestly (Meryl Streep). Andy, knowing little or nothing about fashion, questions her ability to survive as Miranda's assistant and in one of the scenes, Miranda (with her subordinates in the room) is trying to make a decision between two identical-looking belts before a magazine shoot when Andy makes a throw-away comment about how the two belts look the same to her, and that she is “still learning about this stuff,” Meryl Streep replies, witheringly: “This s-stuff? Oh, you think this has nothing to do with you? You go to your closet and you select, oh, I don't know, that lumpy blue sweater [pointing to what Andy is putting on] because you're trying to tell the world that you take yourself too seriously to care what you put on your back. But what you *don't* know is that sweater isn't just blue; it's not turquoise, it's not lapis, it's actually cerulean. You're also blithely unaware that in 2002 Oscar de La Renta did a collection of cerulean gowns, and then it was Yves Saint Laurent who showed cerulean military jackets. And then cerulean showed up in the collection of six different designers. And then it filtered down into the department stores and trickled on down into some tragic, *casual* corner where you no doubt fished it out of a clearance bin. *However* — that blue represents millions of dollars and countless jobs and its sort of *comical* that you think you've made a choice that exempts you from the fashion industry when in fact, you're wearing a sweater that was selected for you, by people in this room. From a pile of *stuff*.” - *The Devil Wears Prada*, ed (United States of America, 2006).



Okafor's quasi-constructivist account emphasizes the role of norms in the formation of the characteristics and interests of actors but he agrees with Sikkink's theory of IHI effectiveness that;<sup>316</sup> local or international networks can be influential within states because they can contribute to a "reformulation in the understandings of a human rights discourse"<sup>317</sup> especially at opportune moments when conventional or "traditional understandings of sovereignty and national interest"<sup>318</sup> are interrogated by international events. The strands of judicial, executive and legislative alterations to environmental and socioeconomic issues in Nigeria did not occur by happenstance but spiked at the same time when the barometer for socioeconomic and environmental justice was reading at a high pressure both internationally and sub-regionally. Activist forces leveraged on the opportunity and pursued their causes or supported same depending on their activist roles e.g. as individuals, media practitioners, lawyers, funders or NGOs.

What may have started with grassroots activism by individuals in local Nigerian villages grew into several coordinated meetings with other local activist forces across states. These activist forces comprising mostly of CSAs became aware of justice struggles around the world and gained human rights-consciousness from the political and socioeconomic realities around them at the time. Through workshops, town hall meetings and seminars, the virtual network of these activist forces in Nigeria grew stronger and they began to engage with other activist forces from the West. With varied forms of

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<sup>316</sup> Obiora Chinedu Okafor, *The African Human Rights System, Activist Forces and International Institutions* (Cambridge: Cambridge University Press, 2007) at 59.

<sup>317</sup> Martha Finnemore and Kathryn Sikkink, "International Norm Dynamics and Political Change" 52 (International Organisation, 1998) 887 at 910.

<sup>318</sup> *Ibid.*

activism (some succeeded and some did not), some of these activist forces decided to submit a complaint to the African Commission on Human and Peoples Rights which was at the time “ripe” to deliberate on environmental justice causes. (SERAC and their Western counterpart, CESR instituted the communication before the African Commission). The result was ground-breaking: the African Commission held Nigeria liable for environmental and socioeconomic injustice in the Niger Delta of Nigeria. This “win” made many scores around advocacy spaces, courts, media institutions and even academia. The situation in the Niger Delta however remained with “no progress”.

Several years later, some activist forces, also in their “resistance character,”<sup>319</sup> and what can be described as a no-giving-up attitude leveraged on the unique jurisdiction of the ECOWAS Court to institute an action. A local activist NGO represented the people of the Niger Delta region, and then the foreign activists they engaged with, filed amicus curiae brief in support of the claim before the court. Worthy of note is the “engagement” and allyship between local and foreign activist forces on both occasions and in both levels of adjudication. At the African Commission, SERAC (local) and CESR (foreign) activist forces both filed the complaint before the African Commission, and at the ECOWAS Court, SERAP (local) and Amnesty International (foreign) filed the action and amicus brief to support the plaintiffs, respectively.

After several cases before the court recognizing environmental and socioeconomic justice, the struggles so far may not have refurbished the dwelling spaces of Niger-

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<sup>319</sup> As described by Okafor in his book. *Supra* note 316 at 3.

Deltans, or ordained the people with the socioeconomic and environmental justice entitlements they deserve, but this process has effectuated normative changes in key domestic institutions in Nigeria by effecting action at the level of the Nigerian Legislature, Executive and Judiciary. The struggles so far may not have resulted into a constitutional amendment in Nigeria (to make all socioeconomic and environmental rights as justiciable as the civil and political rights), and neither had it facilitated a codification of the ICESCR in a separate single domestic document. However, the environmental and socioeconomic justice struggles analysed in this work have given credence to Okafor's theory of "correspondence" in IHRL which demonstrates a need for a modest expansion of the conventional "compliance" optics through which we view international human rights institutions.

### **3.5. CONCLUSION**

This chapter conducts an impact-assessment on how Case 1, Case 2 and Case 3 (the cases analyzed in chapter 2) have influenced some decisions within Nigeria's legislature, executive and judiciary. This impact assessment was done to connect the environmental and socioeconomic rights decisions of the ECOWAS Court to the work of specific activist forces and then to their influence on key domestic institutions in Nigeria. This chapter demonstrates that as a result of the cases that activist forces instituted before the ECOWAS Court, the resulting jurisprudence from these cases (at the supranational/sub-regional adjudicatory level of the ECOWAS Court), effected some measure of impact within key domestic spaces in Nigeria. This chapter asserts that the observance of this

measure of “correspondence” in relation to the ECOWAS Court and Nigeria’s domestic governmental institutions supports Okafor’s broad constructivist approach to International Human Rights Institutions (IHIs). This constructivist approach proffers a theory of human rights impact in which such impact is judged through the broader lens of “correspondence” rather than merely via the narrower measure of state “compliance”. The latter may or may not be the score for success at the international level, but the former is the more relevant and helpful approach in Nigeria where the state may not be mostly “complying”, but still evidences a dynamic form of success in implementing international human rights norms domestically (in legal arguments, policy documents, constitution, and legislation).

The next chapter will conclude this work by highlighting key findings from this research and proffering some recommendations.

## **CHAPTER FOUR: SUMMARY OF WORK AND KEY FINDINGS**

### **4.1. SUMMARY OF WORK**

Throughout this thesis one would find the pursuits and struggles of activist forces who have in many ways used the ideas, spaces, networks, knowledge and the strategies available to them to advance environmental and socioeconomic justice causes. More specifically, this thesis features an activist force (SERAP, an NGO) who has worked within and with the jurisdiction of the Community Court of Justice of the Economic Community of West African States (“ECOWAS Court”), a sub-regional international court in West Africa, to pursue environmental and socioeconomic justice in Nigeria, especially for the benefit of poor and marginalised people/communities like the Niger Delta region of Nigeria where natural resource extraction has been largely unfavorable to the wellbeing and development of the people. “Activist forces” as used in this thesis refer mostly to the NGOs (and their networks) who have leveraged on the norms, processes and creative spaces of the ECOWAS Court to advance environmental and socioeconomic justice in Nigeria, despite domestic constitutional limitations. However, the description of “activist forces” also extend to human rights activists, lawyers, activist judges, community chiefs and even journalists, some of whom also apply incidentally to the scope of this thesis.

Through case studies and the analysis of three (3) important cases from the court, this thesis explored the conceptions and standards of environmental justice and socioeconomic rights within the ambit of three (3) levels of human rights law viz:

international human rights law, regional human rights law (in Africa), and the domestic laws of Nigeria, albeit with major focus on the African regional system. This is because the African Charter on Human and Peoples Rights is considered a primary “human rights treaty” of the ECOWAS Court. The analysis of the decisions from the ECOWAS Court in this work has highlighted the jurisprudence from the Court, and its successes in the relevant respects, and also underscored some challenges and proffered some ideas regarding the pursuit of environmental and socioeconomic justice in Nigeria (and West Africa). Analysing these cases also provided insight on the practice and procedures of the ECOWAS Court and how its modest but significant normative influence supported the pursuit of environmental and socioeconomic justice in Nigeria.

This thesis contributes to the legal literature on regional human rights systems in Africa. By deploying *Okafor’s* theory of “correspondence”, this thesis also affirms and exemplifies the quasi-constructivist model for estimating the extent of the “internalization” of human rights norms (without abandoning the regular “compliance” model for assessing the fulfillment by states of their international human rights law obligations). This work shows the broad conditions of how the ECOWAS Court (as a sub-regional IHI “International Human Rights Institution”) modestly helped in shaping and/or reshaping the “logics of appropriateness, conceptions of interest, and self-understandings around environmental and socioeconomic justice in Nigeria. It did so by particularly showing impact-examples from activities in the legislature, executive and judiciary of Nigeria.

## 4.2. SOME KEY FINDINGS

Some key findings of this research include the following:

The Niger Delta situation is indeed still the most critical case of severe environmental degradation and socioeconomic rights abuse in the entire West African sub-region. This is ironic especially as the Niger Delta is in the richest country on the continent (as popularly declared), and a country whose Constitution provides that: “The State shall protect and improve the environment and safeguard the water, air and land, forest and wild life of Nigeria”.<sup>320</sup> The Constitution also provides that “governmental actions shall be humane;”<sup>321</sup> and that the “exploitation of human or natural resources in any form whatsoever for reasons, other than the good of the community, shall be prevented.”<sup>322</sup> The above stated constitutional obligations to protect the environment, prevent exploitation and promote accessibility to justice is significantly limited and “barricaded” by the non-justiciability provision in the same constitution hence even socioeconomic entitlements which citizens require for their development such as the right to adequate shelter, food, water protection, employment, healthcare, and education, to some extent cannot be enforced in Nigeria’s national courts.<sup>323</sup>

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<sup>320</sup> Constitution of the Federal Republic of Nigeria, 1999, c 2, s 20.

<sup>321</sup> *Ibid* at s 17 (2) (c).

<sup>322</sup> *Ibid* at (d).

<sup>323</sup> The Constitution of the Federal Republic of Nigeria in Section 6 (6) (c) is to the effect that Nigerian citizens cannot obtain redress from the national courts if denied their socioeconomic, developmental and other rights provided for in Chapter II of the constitution. Chapter II of the Constitution is described as Fundamental Objectives and Directive Principles of State Policy which are guidelines to the Federal and State governments of Nigeria to promote social order. As framed, the objectives appear to encompass social inclusiveness with a view to reducing socioeconomic inequality in status and opportunities among individuals and corporate entities but they are non-justiciable.

From the cases instituted at the ECOWAS Court (particularly “Case 2”), the Court made a ground-breaking decision by holding that the non-justiciability of socioeconomic and environmental rights in Nigeria is only a “thesis”<sup>324</sup> and that to invoke a lack of justiciability to socioeconomic or environmental rights is unfounded.<sup>325</sup> The ECOWAS Court aligns its above position as being consistent with the “restriction and derogation criteria” set by the ICESCR.<sup>326</sup> According to the ECOWAS Court, to invoke non-justiciability to socioeconomic or environmental rights is “completely baseless.”<sup>327</sup> The ECOWAS Court has done two (2) things by holding the above positions. First the court is holding Nigeria (and the other ECOWAS states) responsible for the international treaties they have acceded to and ratified. Second, the Court is ensuring that Nigeria will have to satisfy the criteria applicable under IHRL to resort to any derogations of environmental and socioeconomic rights. The Court however did not expressly attach any violation or responsibility by the oil companies who carried out business activity in the Niger Delta that resulted in environmental damages.

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<sup>324</sup> SERAP’s application document before the ECOWAS Court at p1; repeated in the Judgement of the Court: *SERAP v. Nigeria & 8 Ors.* ECW/CCJ/JUD/18/12 (“Case 2”) at para 18 “It should also be noted that the sources of Law that the Court takes into consideration in performing its mandate of protecting Human Rights are not the Constitutions of Member States, but rather the international instruments to which these States voluntarily bound themselves at the international level, including the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights and the African Charter on Human and Peoples’ Rights... Once the concerned right for which the protection is sought before the Court is enshrined in an international instrument that is binding on a Member State, the domestic legislation of that State cannot prevail on the international treaty or covenant, even if it is its own Constitution.” – para 35.

<sup>325</sup> *Ibid* at para 38.

<sup>326</sup> The ICESCR provides in *Article 5, paragraph 2* that “No restriction upon or derogation from any of the fundamental human rights recognized or existing in any country in virtue of law, conventions, regulations or custom shall be admitted on the pretext that the present Covenant does not recognize such rights or that it recognizes them to a lesser extent”. Nigeria has been a party to the ICESCR by adhesion since 29 July 1993.

<sup>327</sup> Judgement in “Case 2” *supra* note 324 at para 38.



In the “difficult” pursuit of environmental and socioeconomic justice for the people of the Niger Delta (and for Nigerians in general), some activist forces have deployed both conventional and innovative ways to further their cause. In their “resistance character” to ameliorate human rights violations in Nigeria, these activist forces have challenged the non-justiciability of environmental and socioeconomic rights (as contained in the Nigerian constitution) by forum shopping for justice both within domestic courts and supranational adjudicatory systems. Even where the outcomes from the cases they instituted before the courts may not be favourable to their pursuits, these activist forces leveraged on their various networks and employed new ways of challenging the status quo. Examples are the utilisation of strategic litigation (as employed by SERAP and LEDAP), the filing of amicus briefs (as employed by Amnesty International in “Case 2”), the use of story-telling and the media (as employed by MOSOP), and worthy of mention is the financial support that these NGOs receive from their local and international funders, without which they won’t be able to finance some of their activities.

More so, these activist forces as “agents of change” are able to float environmental and socioeconomic justice norms to sail into the region as well as the government spaces of the country. On the one hand, they challenged the government into “legal battles” before domestic and supranational courts, and on the other hand they sit with the government officials and stakeholders in meetings and consultations to mutually find solutions (and influence) policies to tackle the environmental and socioeconomic issues in the country. These activist forces also act as watchdogs and representatives for the people represent (e.g. HOMEF is representing NGOs on the Governing Council set up by Nigeria’s

President for the Ogoni Cleanup and the President of MOSOP is one of the representatives of the Ogoni Stakeholders on the Governing Council),<sup>328</sup> to ensure that the decision from the ECOWAS Court is enforced and the promises made by the government to its citizens are fulfilled. These activist forces do the above and still have to garner broad social/popular legitimacy within Nigeria.

The activities of activist forces are not without many criticisms, but their role in the production and the brokering of the “desired kinds of thinking and action”<sup>329</sup> on environmental and socioeconomic justice in Nigeria cannot be overemphasized. Activist forces are just as important as the other players (e.g. the United Nations, or in this instance the ECOWAS Court) in the promotion and advancement of environmental and socioeconomic rights in the region. This is supported by a type of “correspondence” that activist forces have generated between the ECOWAS Court system’s norms and goals, and the content and orientation of executive, judicial, and legislative action within Nigeria. “The broadly constructivist process via which modest alterations in logics of appropriateness and/or conceptions of interest”<sup>330</sup> on environmental and socioeconomic justice, have been fostered in Nigeria (at least modestly so, as demonstrated in this thesis), have in nearly every case been brokered and/or facilitated by these activist forces. It is therefore not only worthy but pertinent to recognise the value and contribution

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<sup>328</sup> Nsima Ekere, “Niger Delta Clean Up: Mr President today inaugurated Nsima Ekere as member of Implementation Committee Governing Council” (4 August 2016), *Nsima Ekere* (blog), online: <<http://nsimaekere.ng/2016/08/04/niger-delta-clean-mr-president-today-nominated-member-implementation-committee-bot/>>.

<sup>329</sup> Obiora Chinedu Okafor, *The African Human Rights System, Activist Forces and International Institutions* (Cambridge: Cambridge University Press, 2007) at 277 – 288.

<sup>330</sup> *Ibid* at 251.

of activist forces in advancing environmental and socioeconomic human rights in Nigeria and beyond.

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# APPENDIX A

ECONOMIC COMMUNITY OF  
WEST AFRICAN STATES  
(ECOWAS)

## REVISED TREATY

PUBLISHED BY THE  
ECOWAS EXECUTIVE SECRETARIAT,  
ABUJA, NIGERIA

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### REVISED TREATY OF THE ECONOMIC COMMUNITY OF WEST AFRICAN STATES (ECOWAS)

We, the Heads of State and Government of the Member States of the Economic Community of West African States (ECOWAS);

- The President of the Republic of BENIN;
- The President of BURKINA FASO;
- The Prime Minister of the Republic of CAPE VERDE;
- The President of the Republic of COTE D'IVOIRE;
- The President of the Republic of The GAMBIA;/
- The President of the Republic of GHANA;
- The President of the Republic of GUINEA;
- The President of the Republic of GUINEA BISSAU;
- The President of the Interim Government of National Unity  
the Republic of LIBERIA;
- The President of the Republic of MALI;
- The President of the Islamic Republic of MAURITANIA;
- The President of the Republic of NIGER;
- The President of the Federal Republic of NIGERIA;
- The President of the Republic of SENEGAL;
- The Head of State and Chairman of the National Provisional  
Ruling Council of the Republic of SIERRA LEONE;
- The President of the TOGOLESE Republic.

**REAFFIRMING** the Treaty establishing the Economic Community of West African States signed in Lagos on 28 May, 1975 and considering its achievements;

**CONSCIOUS** of the over-riding need to encourage, foster and accelerate the economic and social development of our States in order to improve the living standards of our peoples;

**CONVINCED** that the promotion of harmonious economic development of our States calls for effective economic co-operation and integration largely through a determined and concerted policy of self-reliance;

**BEARING IN MIND** the African Charter on Human and People's Rights and the Declaration of Political Principles of the Economic Community of West African States adopted in Abuja by the Fourteenth Ordinary Session of the Authority of Heads of State and Government on 6 July, 1991;

**CONVINCED** that the integration of the Member States into a viable regional Community may demand the partial and gradual pooling of national sovereignties to the Community within the context of a collective political will;

**ACCEPTING** the need to establish Community Institutions vested with relevant and adequate powers;

**NOTING** that the present bilateral and multilateral forms of economic co-operation within the region open up perspectives for more extensive co-operation;

**ACCEPTING** the need to face together the political, economic and socio-cultural challenges of the present and the future, and to pool together the resources of our peoples while respecting our diversities for the most rapid and optimum expansion of the region's productive capacity;

**BEARING IN MIND ALSO** the Lagos Plan of Action and the Final Act of Lagos of April 1980 stipulating the establishment, by the year 2000, of an African Economic Community based on existing and future regional economic communities;

**MINDFUL OF** the Treaty establishing the African Economic Community signed in Abuja on 3 June, 1991;

**AFFIRMING** that our final goal is the accelerated and sustained economic development of Member States, culminating in the economic union of West Africa;

**BEARING IN MIND** our Decision AIDEC. 10/5/90 of 30 May, 1990 relating to the establishment of a Committee of Eminent Persons to submit proposals for the review of the Treaty;

**AWARE** that the review of the Treaty arises, inter alia, from the need for the Community to adapt to the changes on the international scene in order to derive greater benefits from those changes;

**CONSIDERING ALSO** the need to modify the Community's strategies in order to accelerate the economic integration process in the region;

**ACCEPTING** the need to share the benefits of economic co-operation and integration among Member States in a just and equitable manner;

**HAVE DECIDED** to revise the Treaty of 28 May, 1975 establishing the Economic Community of West African States (ECOWAS) and have accordingly agreed as follows:

## CHAPTER I

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### Article 1: DEFINITIONS

For the purpose of this Treaty,

**"Arbitration Tribunal"** means the Arbitration Tribunal of the Community established under Article 16 of this Treaty;

**"Authority"** means the Authority of Heads of State and Government of the Community established by Article 7 of this Treaty;

**"Chairman of the Authority"** means the current Chairman of the Authority of Heads of State and Government of the Community, elected in accordance with the provisions of Article 8.2 of this Treaty;

**"Council"** means the Council of Ministers of the Community established under Article 10 of this Treaty;

**"Commission"** means the Specialized Technical Commission established under Article 22 of this Treaty;

**"Community"** means the Economic Community of West African States referred to under Article 2 of this Treaty;

**"Community citizen or citizens"** means any national(s) of Member States who satisfy the conditions stipulated in the Protocol defining Community citizenship;

**"Court of Justice"** means the Court of Justice of the Community established under Article 15 of this Treaty;

**"Import Duties"** means customs duties and taxes of equivalent effect, levied on goods by virtue of their importation;

**"Executive Secretary"** means the Executive Secretary appointed in accordance with the provisions of Article 18 of this Treaty;

**"Economic and Social Council"** means the Economic and Social Council established under Article 14 of this Treaty;

**"Executive Secretariat"** means the Executive Secretariat established under Article 17 of this Treaty;

**"Export Duties"** means all customs duties and taxes of equivalent effect levied on goods by virtue of their exportation;



**"Fund"** means the Fund for Co-operation, Compensation and Development established under Article 21 of this Treaty;

**"Member State"** of **"Member States"** means a Member State or Member States of the Community as defined in Paragraph 2 of Article 2 of this Treaty;

**"Non-Tariff Barriers"** means barriers which hamper trade and which are caused by obstacles other than fiscal obstacles;

**"Parliament of the Community"** means the Parliament established under Article 13 of this Treaty;

**"Protocol"** means an instrument of implementation of the Treaty having the same legal force as the latter;

**"Region"** means the geographical zone known as West Africa as defined by Resolution CM/Res.464 (XXVI) of the OAU Council of Ministers;

**"Statutory Appointees"** includes the Executive Secretary, Deputy Executive Secretaries, Managing Director of the Fund, Deputy Managing Director of the Fund, Financial Controller and any other senior officer of the Community designated as such by the Authority or Council;

**"Third Country"** means any State other than a Member State;

**"Treaty"** means this revised Treaty.

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## CHAPTER II

### ESTABLISHMENT, COMPOSITION, AIMS AND

### OBJECTIVES AND FUNDAMENTAL PRINCIPLES

### OF THE COMMUNITY

#### ARTICLE 2: ESTABLISHMENT AND COMPOSITION

1. THE HIGH CONTRACTING PARTIES, by this Treaty, hereby re-affirm the establishment of the Economic Community of West African States (ECOWAS) and decide that it shall ultimately be the sole economic community in the region for the purpose of economic integration and the realization of the objectives of the African Economic Community.
2. The members of the Community, hereinafter referred to as "the Member States," shall be the States that ratify this Treaty.

### **ARTICLE 3: AIMS AND OBJECTIVES**

1. The aims of the Community are to promote co-operation and integration, leading to the establishment of an economic union in West Africa in order to raise the living standards of its peoples, and to maintain and enhance economic stability, foster relations-among Member States and contribute to the progress and development of the African Continent.
2. In order to achieve the aims set out in the paragraph above, and in accordance with the relevant provisions of this Treaty, the Community shall, by stages, ensure;
  - a) the harmonization and co-ordination of national policies and the promotion of integration programmes, projects and activities, particularly in food, agriculture and natural resources, industry, transport and communications, energy, trade, money and finance, taxation, economic reform policies, human resources, education, information, culture, science, technology, services, health, tourism, legal matters;
  - b) the harmonization and co-ordination of policies for the protection of the environment;
  - c) the promotion of the establishment of joint production enterprises;
  - d) the establishment of a common market through;
    - i. the liberalisation of trade by the abolition, among Member States, of customs duties levied on imports and exports, and the abolition, among Member States, of non-tariff barriers in order to establish a free trade area at the Community level;
    - ii. The adoption of a common external tariff and a common trade policy vis-à-vis third countries;
    - iii. the removal, between Member States, of obstacles to the free movement of persons, goods, services and capital, and to the right of residence and establishment;
  - e) the establishment of an economic union through the adoption of common policies in the economic, financial, social and cultural sectors, and the creation of a monetary union.
  - f) the promotion of joint ventures by private sector enterprises and other economic operators, in particular through the adoption of a regional agreement on cross-border investments;
  - g) the adoption of measures for the integration of the private sectors, particularly the creation of an enabling environment to promote small and medium scale enterprises;
  - h) the establishment of an enabling legal environment;

- i) the harmonisation of national investment codes leading to the adoption of a single Community investment code;
- j) the harmonization of standards and measures;
- k) the promotion of balanced development of the region, paying attention to the special problems of each Member State particularly those of landlocked and small island Member States;
- l) the encouragement and strengthening of relations and the promotion of the flow of information particularly among rural populations, women and youth organizations and socio-professional organizations such as associations of the media, business men and women, workers, and trade unions;
- m) the adoption of a Community population policy which takes into account the need for a balance between demographic factors and socio-economic development;
- n) the establishment of a fund for co-operation, compensation and development; and
- o) any other activity that Member States may decide to undertake jointly with a view to attaining Community objectives.

#### **ARTICLE 4: FUNDAMENTAL PRINCIPLES**

THE HIGH CONTRACTING PARTIES, in pursuit of the objectives stated in Article 3 of this Treaty, solemnly affirm and declare their adherence to the following principles:

- a. equality and inter-dependence of Member States;
- b. solidarity and collective self reliance;
- c. inter-State co-operation, harmonisation of policies and integration of programmes;
- d. non-aggression between Member States;
- e. maintenance of regional peace, stability and security through the promotion and strengthening of good neighborliness;
- f. peaceful settlement of disputes among Member States, active co-operation between neighbouring countries and promotion of a peaceful environment as a prerequisite for economic development;
- g. recognition, promotion and protection of human and peoples' rights in accordance with the provisions of the African Charter on Human and Peoples' Rights;
- h. accountability, economic and social justice and popular participation in development;

- i. recognition and observance of the rules and principles of the community;
- j. promotion and consolidation of a democratic system of governance in each Member State as envisaged by the Declaration of Political Principles adopted in Abuja on 6 July, 1991; and
- k. equitable and just distribution of the costs and benefits of economic co-operation and integration.

#### **ARTICLE 5: GENERAL UNDERTAKINGS**

1. Member States undertake to create favourable conditions for the attainment of the objectives of the Community, and particularly to take all necessary measures to harmonise their strategies and policies, and to refrain from any action that may hinder the attainment of the said objectives.
2. Each Member State shall, in accordance with its constitutional procedures, take all necessary measures to ensure the enactment and dissemination of such legislative and statutory texts as may be necessary for the implementation of the provisions of this Treaty.
3. Each Member State undertakes to honour its obligations under this Treaty and to abide by the decisions and regulations of the Community.

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### **CHAPTER III**

#### **INSTITUTIONS OF THE COMMUNITY**

##### **ESTABLISHMENT COMPOSITION AND FUNCTIONS**

#### **ARTICLE 6: INSTITUTIONS**

1. The Institutions of the Community shall be:
  - a) the Authority of Heads of State and Government;
  - b) the Council .OfMinisters;
  - c) the Community Parliament;
  - d) the Economic and Social Council;
  - e) the Community Court of Justice;
  - f) the Executive Secretariat;

- g) the Fund for Co-operation, Compensation and Development;
  - h) Specialised Technical Commissions; and
  - i) Any other institutions that may be established by the Authority.
2. The Institutions of the Community shall perform their functions and act within the limits of the powers conferred on them by this Treaty and by the Protocols relating thereto.

**ARTICLE 7: AUTHORITY OF HEADS OF STATE AND GOVERNMENT ESTABLISHMENT,  
COMPOSITION AND FUNCTIONS**

1. There is hereby established the Authority of Heads of State and Government of Member States which shall be the supreme institution of the Community and shall be composed of Heads of State and/or Government of Member States.
2. The Authority shall be responsible for the general direction and control of the Community and shall take all measures to ensure its progressive development and the realisation of its objectives.
3. Pursuant to the provisions of Paragraph 2 of this Article, the Authority shall:
  - a) determine the general policy and major guidelines of the Community, give directives, harmonise and co-ordinate the economic, scientific, technical, cultural and social policies of Member States;
  - b) oversee the functioning of Community institutions and follow-up implementation of Community objectives;
  - c) prepare and adopt its Rules of Procedure;
  - d) appoint the Executive Secretary in accordance with the provisions of Article 18 of this Treaty;
  - e) appoint on the recommendation of Council, the External Auditors;
  - f) delegate to the Council, where necessary, the authority to take such decisions as are stipulated in Article 9 of this Treaty;
  - g) refer where it deems necessary any matter to the Community Court of Justice when it confirms, that a Member State or institution of the Community has failed to honour any of its obligations or an institution of the Community has acted beyond the limits of its authority or has abused the powers conferred on it by the provisions of this Treaty, by a decision of the Authority or a regulation of the Council;

- h) request the Community Court of Justice, as and when necessary, to give advisory opinion on any legal questions; and
- i) exercise any other powers conferred on it under this Treaty.

#### **ARTICLE 8: SESSIONS**

1. The Authority shall meet at least once a year in ordinary session. An extraordinary session may be convened by the Chairman of the Authority or at the request of a Member State provided that such a request is supported by a simple majority of the Member States.
2. The office of the Chairman shall be held every year by a Member State elected by the Authority.

#### **ARTICLE 9: DECISIONS**

1. The Authority shall act by decision.
2. Unless otherwise provided in this Treaty or in a Protocol, decisions of the Authority shall be adopted, depending on the subject matter under consideration by unanimity consensus or, by a two-thirds majority of the Member States.
3. Matters referred to in paragraph 2 above shall be defined in a Protocol. Until the entry into force of the said Protocol, the Authority shall continue to adopt its decision by consensus.
4. Decisions of the Authority shall be binding on the Member States and institutions of the Community, without prejudice to the provisions of paragraph (3) of Article 15 of this Treaty.
5. The Executive Secretary shall publish the decisions thirty (30) days after the date of their signature by the Chairman of Authority.
6. Such decisions shall automatically enter into force sixty (60) days after the date of their publication in the Official Journal of the Community.
7. Decisions shall be published in the National Gazette of each Member State within the period stipulated in paragraph 6 of this Article.

#### **ARTICLE 10: THE COUNCIL OF MINISTERS ESTABLISHMENT, COMPOSITION AND FUNCTIONS**

1. There is hereby established a Council of Ministers of the Community.

2. The Council shall comprise the Minister in charge of ECOWAS Affairs and any other Minister of each Member State.
3. Council shall be responsible for the functioning and development of the Community. To this end, unless otherwise provided in this Treaty or a Protocol, Council shall:
  - a) make recommendations to the Authority on any action aimed at attaining the objectives of the Community;
  - b) appoint all statutory appointees other than the Executive Secretary.
  - c) by the powers delegated to it by the Authority, issue directives on matters concerning co-ordination and harmonisation of economic integration policies;
  - d) make recommendations to the Authority on the appointment of the External Auditors;
  - e) prepare and adopt its rules of procedure;
  - f) adopt the Staff Regulations and approve the organisational structure of the institutions of the Community;
  - g) approve the work programmes and budgets of the Community and its institutions;
  - h) request the Community Court of Justice, where necessary, to give advisory opinion on any legal questions;
  - i) carry out all other functions assigned to it under this Treaty and exercise all powers delegated to it by the Authority.

#### **ARTICLE 11: MEETINGS**

1. The Council shall meet at least twice a year in ordinary session. One of such sessions shall immediately precede the ordinary session of the Authority. An extraordinary session may be convened by the Chairman of Council at the request of a Member State provided that such request is supported by a simple majority of the Member States.
2. The office of Chairman of Council shall be held by the Minister responsible for ECOWAS Affairs of the Member State elected as Chairman of the Authority.

#### **ARTICLE 12: REGULATIONS**

1. The Council shall act by regulations.
2. Unless otherwise provided in this Treaty regulations of the Council shall be adopted, depending on the subject matter under consideration, by unanimity, consensus or by a two-thirds majority of Member States, in accordance with the Protocol referred to in Article 9 Paragraph 3 of this Treaty. Until the entry into force of the said Protocol, the Council shall continue to adopt its regulations by consensus.

3. Regulations of the Council shall be binding on institutions under its authority. They shall be binding on Member States after their approval by the Authority. However, in the case of regulations made pursuant to a delegation of powers by the Authority in accordance with paragraph 3(t) of Article 7 of this Treaty, they shall be binding forthwith.
4. Regulations shall be published and shall enter into force within the same period and under the same conditions stipulated in Paragraphs 5, 6 and 7 of Article 9 of this Treaty.

#### **ARTICLE 13: THE COMMUNITY PARLIAMENT**

1. There is hereby established a Parliament of the Community.
2. The method of election of the Members of the Community Parliament, its composition, functions, powers and organisation shall be defined in a Protocol relating thereto.

#### **ARTICLE 14: THE ECONOMIC AND SOCIAL COUNCIL**

1. There is hereby established an Economic and Social Council which shall have an advisory role and whose composition shall include representatives of the various categories of economic and social activity.
2. The composition, functions and organisation of the Economic and Social Council shall be defined in a Protocol relating thereto.

#### **ARTICLE 15: THE COURT OF JUSTICE, ESTABLISHMENT AND FUNCTIONS**

1. There is hereby established a Court of Justice of the Community.
2. The status, composition, powers, procedure and other issues concerning the Court of Justice shall be as set out in a Protocol relating thereto.
3. The Court of Justice shall carry out the functions assigned to it independently of the Member States and the institutions of the Community.
4. Judgments of the Court of Justice shall be binding on the Member States, the Institutions of the Community and on individuals and corporate bodies.

#### **ARTICLE 16: ARBITRATION TRIBUNAL, ESTABLISHMENT AND FUNCTIONS**

1. There is hereby established an Arbitration Tribunal of the Community.
2. The status, composition, powers, procedure and other issues concerning the Arbitration Tribunal shall be as set out in a Protocol relating thereto.



## **ARTICLE 17: THE EXECUTIVE SECRETARIAT, ESTABLISHMENT AND COMPOSITION**

1. There is hereby established an Executive Secretariat of the Community.
2. The Secretariat shall be headed by the Executive Secretary assisted by Deputy Executive Secretaries and such other staff as may be required for the smooth functioning of the Community.

## **ARTICLE 18: APPOINTMENTS**

1. The Executive Secretary shall be appointed by the Authority for a 4-year term renewable only once for another 4-year period. He can only be removed from office by the Authority upon its own initiative or on the recommendation of the Council of Ministers.
2. The Ministerial Committee on the Selection and Evaluation of the Performance of Statutory Appointees shall evaluate the three (3) candidates nominated by the Member State to which the statutory post has been allocated and make recommendations to the Council of Ministers. Council shall propose to the Authority the appointment of the candidate adjudged the best.
3. The Executive Secretary shall be a person of proven competence and integrity, with a global vision of political and economic problems and regional integration.
4. a) The Deputy Executive Secretaries and other Statutory Appointees shall be appointed by the Council of Ministers on the proposal of the Ministerial Committee on the Selection and Evaluation of the Performance of Statutory Appointees following the evaluation of the three (3) candidates nominated by their respective Member States to whom the posts have been allocated. They shall be appointed for a period of 4 years renewable only once for a further 4-year term.  
  
b) Vacancies shall be advertised in all Member States to which statutory posts have been allocated.
5. In appointing professional staff of the Community, due regard shall be had, subject to ensuring the highest standards of efficiency and technical competence, to maintaining equitable geographical distribution of posts among nationals of all Member States,

## **ARTICLE 19: FUNCTIONS**

1. Unless otherwise provided in the Treaty or in a Protocol, the Executive Secretary shall be the chief executive officer of the Community and all its institutions.
2. The Executive Secretary shall direct the activities of the Executive Secretariat and shall, unless otherwise provided in a Protocol, be the legal representative of the Institutions of the Community in their totality.

3. Without prejudice to the general scope of his responsibilities, the duties of the Executive Secretary shall include:
- a) execution of decisions taken by the Authority and application of the regulations of the Council;
  - b) promotion of Community development programmes and projects as well as multinational enterprises of the region;
  - c) convening as and when necessary meetings of sectoral Ministers to examine sectoral issues which promote the achievement of the objectives of the Community;
  - d) preparation of draft budgets and programmes of activity of the Community and supervision of their execution upon their approval by Council;
  - e) submission of reports on Community activities to all meetings of the Authority and Council;
  - f) preparation of meetings of the Authority and Council as well as meetings of experts and technical commissions and provision of necessary technical services;
  - g) recruitment of staff of the Community and appointment to posts other than statutory appointees in accordance with the Staff Rules and Regulations;
  - h) submission of proposals and preparation of such studies as may assist in the efficient and harmonious functioning and development of the Community;
  - i) initiation of draft texts for adoption by the Authority or Council.

**ARTICLE 20: RELATIONS BETWEEN THE STAFF OF THE COMMUNITY  
AND MEMBER STATES**

1. In the performance of their duties, the Executive Secretary, the Deputy Executive Secretaries, and other staff of the Community shall owe their loyalty entirely and be accountable only to the Community. In this regard, they shall neither seek nor accept instructions from any government or any national or international authority external to the Community. They shall refrain from any activity or any conduct incompatible with their status as international civil servants.
2. Every Member State undertakes to respect the international character of the office of the Executive Secretary, the Deputy Executive Secretaries, and other staff of the Community and undertakes not to seek to influence them in the performance of their duties.
3. Member States undertake to co-operate with the Executive Secretariat and other institutions of the Community and to assist them in the discharge of the duties assigned to them under this Treaty.

**ARTICLE 21: FUND FOR CO-OPERATION, COMPENSATION AND DEVELOPMENT  
ESTABLISHMENT, STATUS AND FUNCTIONS**

1. There is hereby established a Fund for Co-operation, Compensation and Development of the Community.
2. The status, objectives and functions of the Fund are defined in the Protocol relating thereto.

**ARTICLE 21: FUND FOR CO-OPERATION, COMPENSATION AND DEVELOPMENT  
ESTABLISHMENT, STATUS AND FUNCTIONS**

1. There is hereby established a Fund for Co-operation, Compensation and Development of the Community.
2. The status, objectives and functions of the Fund are defined in the Protocol relating thereto.

**ARTICLE 22: TECHNICAL COMMISSIONS ESTABLISHMENT AND COMPOSITION**

1. There is hereby established the following Technical Commissions:
  - a) Food and Agriculture;
  - b) Industry, Science and Technology and Energy;
  - c) Environment and Natural Resources;
  - d) Transport, Communications and Tourism;
  - e) Trade, Customs, Taxation, Statistics, Money and Payments;
  - f) Political, Judicial and Legal Affairs, Regional Security and Immigration;
  - g) Human Resources, Information, Social and Cultural Affairs; and
  - h) Administration and Finance Commission.
2. The Authority may, whenever it deems appropriate, restructure the existing Commissions or establish new Commissions.
3. Each commission shall comprise representatives of each Member State.
4. Each Commission may, as it deems necessary, set up subsidiary commissions to assist it in carrying out its work. It shall determine the composition of any such subsidiary commission.

**To be continued...**

## APPENDIX B

### SUPPLEMENTARY PROTOCOL A/SP.1/01/05 AMENDING

#### THE PREAMBLE AND ARTICLES 1, 2, 9 AND 30 OF

#### PROTOCOL A/P.1/7/91 RELATING TO THE COMMUNITY

#### COURT OF JUSTICE AND ARTICLE 4 PARAGRAPH 1 OF

#### THE ENGLISH VERSION OF THE SAID PROTOCOL

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#### THE HIGH CONTRACTING PARTIES,

**MINDFUL** of Articles 7, 8 and 9 of the Treaty establishing the Authority of Heads of State and Government and defining its composition and functions;

**MINDFUL** of Article 33 of Protocol A/P.1/7/91 relating to amendment to the Protocol on the Community Court of Justice;

**MINDFUL** of the Rules of Procedure of the Community Court of Justice;

**MINDFUL** of the Regulation C/REG.15/01/03 dated 23rd January, 2003 as amended by Regulation C/REG.5/6/03 of 27th June, 2003 establishing an ad hoc Ministerial Committee on the harmonization of Community legislative texts, particularly Article 2 thereof, which defines the terms of reference of the Committee;

**CONSIDERING** that the Article of the Treaty referred to in the Protocol relating to the Community Court of Justice are Articles of the Treaty of 28th May, 1975 and that it is therefore necessary to harmonize such references with Articles of the revised treaty adopted on 24th July 1993;

**CONSIDERING** the need to align the English version of Article 4 paragraph 1 of the Protocol relating to the Community

Court of Justice with the French version of the text so as to ensure consistency;

**CONSCIOUS** of the role the Court of Justice can play in eliminating obstacles to the realization of Community objectives

and accelerating the integration process;

**CONVINCED** of the need to empower the Community Court of Justice to play their part in effectively ensuring that Member States fulfill their obligations.

**DESIRING** also to take all necessary measures to ensure smooth operations of the Court and guarantee effective implementation of its decisions;

**CONSIDERING** the report of the fifty-second Session of the Council of Ministers held in Abuja on 16th and 17th July 2004, on the draft Protocol amending the Preamble and Articles 1,2, 9, 22 and 30 of Protocol A/P.1/7/91 relating to the Community Court of Justice and Article 4 paragraph 1 of the English version of the Protocol;

**HEREBY AGREE AS FOLLOWS:**

**Article 1:**

References in the Protocol to the Treaty of 28th May 1975 reconciled with references in the Revised Treaty of 1993.

All references to the Articles of the Treaty of 28th May 1975 in the Protocol relating to the Community Court of Justice are

hereby deleted and replaced by references to the revised ECOWAS Treaty adopted on 24th July 1993 as follows:

- a) In the Preamble, references to Articles 4(1), 5, 11 and 56 of the Treaty are replaced by Articles 6, 7, 15 and 76(2) of the revised Treaty respectively;
- b) In Article 1, references to Articles 1, 5, 6, 8(1), 8(2) and 11 of the Treaty are replaced by Articles 2, 7, 10, 17(1), 17(2) 15 of the revised Treaty respectively;
- c) In Article 2, the reference to Article 11 of the Treaty is replaced by Article 15 of the revised Treaty; and
- d) In Article 9, the reference to Article 56 of the Treaty by Article 76(2) of the revised Treaty.

**Article 2:**

Amendment of Article 4(1) of the English version of the Protocol of the Court reconciled with the French version.

Article 4 paragraph 1 of the English version of the Protocol relating to the Community Court of Justice is amended as follows:

“Article 4: Terms of office of Members of the Court. Members of the Court shall be appointed for a period of five (5) years. Their term of office may be renewed for another term of five (5) years only, except that for members of the Court appointed for the first time, the terms of office of the three (3) members shall expire at the end of three (3) years and the term of the other four (4) members shall expire at the end of five (5) years”.

**Article 3:**

Article 9 of the Protocol on Community Court of Justice substituted. Article 9 of the Protocol relating to the Community Court of Justice is hereby deleted and substituted by the following new provisions: “Article 9: Jurisdiction of the Court.

1. The Court has competence to adjudicate on any dispute relating to the following:
  - a) The interpretation and application of the Treaty, Conventions and Protocols of the Community;

- b) The interpretation and application of the regulations, directives, decisions and other subsidiary legal instruments adopted by ECOWAS;
  - c) The legality of regulations, directives, decisions and other legal instruments adopted by ECOWAS
  - d) The failure by Member States to honor their obligations under the Treaty, Conventions and Protocols, regulations, directives, or decisions of ECOWAS;
  - e) The provisions of the Treaty, Conventions and Protocols, regulations, directives or decisions of ECOWAS Member States;
  - f) The Community and its officials; and
  - g) The action for damages against a Community institution or an official of the Community for any action or omission in the exercise of official functions.
2. The Court shall have the power to determine any non-contractual liability of the Community and may order the Community to pay damages or make reparation for official acts or omissions of any Community institution or Community officials in the performance of official duties or functions.
  3. Any action by or against a Community Institution or any Member of the Community shall be statute barred after three (3) years from the date when the right of action arose.
  4. The Court has jurisdiction to determine case of violation of human rights that occur in any Member State.
  5. Pending the establishment of the Arbitration Tribunal provided for under Article 16 of the Treaty, the Court shall have the power to act as arbitrator for the purpose of Article 16 of the Treaty.
  6. The Court shall have jurisdiction over any matter provided for in an agreement where the parties provide that the Court shall settle disputes arising from the agreement.
  7. The Court shall have the powers conferred upon it by the provisions of this Protocol as well as any other powers that may be conferred by subsequent Protocols and Decisions of the Community.
  8. The Authority of Heads of State and Government shall have the power to grant the Court the power to adjudicate on any specific dispute that it may refer to the Court other than those specified in this Article.

#### **Article 4:**

##### Insertion of a new Article 10 in the Protocol of the Community Court of Justice.

The Protocol on the Community Court of Justice is amended the insertion of the following new Article as follows:

“Article 10: Access to the Court.

Access to the Court is open to the following:

- a) Member States, and unless otherwise provided in a Protocol, the Executive Secretary, where action is brought for failure by a Member state to fulfill an obligation;
- b) Member States, the Council of Ministers and the Executive Secretary in proceeding for the determination of the legality of an action in relation to any community text;
- c) Individuals and corporate bodies in proceedings from the determination of an act or inaction of a Community official which violates the rights of the individuals or corporate bodies;
- d) Individuals on application for relief for violation of their human rights; the submission of application for which shall:
  - i. Not be anonymous; nor
  - ii. Be made whilst the same matter has been instituted before another International Court for adjudication;
- e) Staff of any Community institution, after the Staff Member has exhausted all appeal processes available to the officer under the ECOWAS Staff Rules and Regulations;
- f) Where in any action before a court of a Member State, an issue arises as to the interpretation of a provision of the Treaty, or the other Protocols or Regulations, the national court may on its own or at the request of any of the parties to the action refer the issue to the Court for interpretation.”

#### **Article 5:**

##### Renumbering of the former Articles 10 to 22.

The former articles 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21 and 22 are hereby renumbered to read 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22 and 23 respectively.

#### **Article 6:**

Insertion of a new provision, which becomes Article 24 of the Protocol of the Court of Justice.

The Protocol of the Community Court of Justice is amended by the insertion of a new provision, which becomes the new

Article 24 and reads as follows:

#### **“Article 24: Method of implementation of Judgments of the Court:**

1. Judgments of the Court that have financial implications for nationals of Member States or Member States are binding.
2. Execution of any decision of the Court shall be in form of a writ of execution, which shall be submitted by the Registrar of the Court to the relevant Member State for execution according to the rules of civil procedure of that Member State.
3. Upon the verification by the appointed authority of the recipient Member State that the writ is from the Court, the writ shall be enforced.
4. All Member States shall determine the competent national authority for the purpose of recipient and processing of execution and notify the Court accordingly.
5. The writ of execution issued by the Community Court may be suspended only by a decision of the Community Court of Justice.”

#### **Article 7:**

Renumbering former articles 23 to 33. The former articles 23, 24, 25, 26, 27, 28, 29, 30, 31, 32 and 33 are hereby renumbered to read 25, 26, 27, 28, 29, 30, 31, 32, 33, 34 and 35 respectively.

#### **Article 8:**

Substitution of Article 30 of the Protocol of the Community Court of Justice

The Protocol of the Community Court of Justice is amended by the substitution of Article 30 by the following:

“Article 30: Budget of the Court. The budget of the Community Court of Justice shall be dealt with in accordance with the relevant provisions of the Revised Treaty”.

#### **Article 9:**

Substitution of Article 31 of the Protocol of the Court.

The Protocol of the Community Court is amended by the substitution of Article 31 by following:



**“Article 31: Official languages”**

The Official languages of the Court shall be English, French, and Portuguese”.

**Article 10:**

The provisions of any other prior Protocol that is inconsistent with the provisions of this Protocol shall to the extent of the inconsistency be null and void.

**Article 11:**

Entry into force

1. This supplementary Protocol shall enter into force provisionally upon signature by the Heads of State and Government.

Accordingly, signatory Member States and ECOWAS hereby undertake to undertake to start implementing all provisions of this Supplementary Protocol.

2. This Supplementary Protocol shall definitively enter into force upon the ratification by at least nine (9) signatory States, in accordance with the constitutional procedure of each Member State.

**Article 12:**

Depository Authority This Supplementary Protocol and all instruments of ratification shall deposited with the Executive Secretariat which shall transmit certified true copies to all Member States and notify them of the dates of deposit of the instruments of ratification and shall register this Protocol with the African Union, the United Nations Organization and such other organizations as the Council may determine.

**IN FAITH WHEREOF, WE, THE HEADS OF STATE AND GOVERNMENT OF THE MEMBER**

**STATES OF THE ECONOMIC COMMUNITY OF WEST AFRICAN STATES (ECOWAS), HAVE SIGNED THIS SUPPLEMENTARY PROTOCOL**

**DONE AT ACCRA, THIS 19TH DAY OF JANUARY 2005.**

**IN A SINGLE ORIGINAL, IN THE ENGLISH, FRENCH AND PORTUGUESE LANGUAGES,**

**ALL TEXTS BEING EQUALLY AUTHENTIC.**

# APPENDIX C

## Community Court of Justice

### PROTOCOL (A/P.I/7/91):

ON THE

### COMMUNITY COURT OF JUSTICE

#### PROTOCOL A/P.I/7/91 ON THE COMMUNITY COURT OF JUSTICE

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THE HIGH CONTRACTING PARTIES

**MINDFUL** of Article 5 of the Treaty of the Economic Community of West African States, establishing the Authority of Heads of State and Government and defining its composition and functions;

**MINDFUL** of the provisions of Article 4 paragraph (e) and Article 11 of the Treaty relating respectively to the Institutions of the Community and the establishment of a Community Court of Justice;

**AWARE** that the essential role of the Community Court of Justice is to ensure the observance of law and justice in the interpretation and application of the Treaty and the Protocols and Conventions annexed thereto, and to be seized with responsibility for settling such disputes as may be referred to it in accordance with the provisions of Article 56 of the Treaty and disputes between States and the Institutions of the Community;

**DESIROUS** of concluding a Protocol defining the composition, competence, statutes and other matters relating to the Community Court of Justice.

HEREBY AGREE AS FOLLOWS

#### Article 1: Definition

In this Protocol, the following expressions shall have the meanings assigned to them hereunder;

**"Treaty"** means the Treaty of the Economic Community of West African States and includes Protocols and Conventions annexed thereto;

**"Community"** means the Economic Community of West African States established by Article 1 of the Treaty;

**"Member State" or "Member States"** means a Member State or Member States of the Community;

**"Authority"** means Authority of Heads of State and Government of the Community established by Article 5 of the Treaty;

**"Chairman of the Authority"** means the current Chairman of the Authority of Heads of State and Government of the Economic Community of West African States;

**"Council"** means the Council of Ministers of the Community established by Article 6 of the Treaty;

**"Executive Secretariat"** means the Executive Secretariat established in accordance with Article 8(1) of the Treaty;

**"Executive Secretary"** means the Executive Secretary of the Community appointed under Article 8(2) of the Treaty;

**"Court"** means the Community Court of Justice established by Article 11 of the Treaty;

**"Member of the Court"** or **"Members of the Court"** means a person or persons appointed as judge or judges in accordance with the provisions of Article 3.2 of the Protocol.

## **Article 2: Establishment of the Court**

1. The Community Court of Justice established under Article 11 of the Treaty as the principal legal organ of the Community shall be constituted and execute its functions in accordance with the provisions of this Protocol.

## **Article 3: Composition**

1. The Court shall be composed of independent judges selected and appointed by the Authority from nationals of the Member States who are persons of high moral character, and possess the qualification required in their respective countries for appointment to the highest judicial officers, or are jurisconsults of recognised competence in international law.
2. The Court shall consist of seven (7) members, no two of whom may be nationals of the same State. The members of the Court shall elect a President and Vice President from among their number who shall serve in that capacity for a term of three (3) years.
3. A person who for the purposes of membership of the Court could be regarded as a national of more than one Member State shall be deemed to be a national of the one in which he ordinarily exercises civil and political rights.
4. The Members of the Court shall be appointed by the Authority and selected from a list of persons nominated by Member States. No Member State shall nominate more than two persons.
5. The Executive Secretary shall prepare a list in alphabetical order of all the persons thus nominated which he shall forward to the Council.
6. The Authority shall appoint the Members of the Court from a shortlist of fourteen persons proposed by the Council.
7. No person below the age of 40 years and above the age of 60 years shall be eligible for appointment as a member of the Court. A member of the Court shall not be eligible for reappointment after the age of 65 years.

#### **Article 4: Terms of Office of Members of the Court**

1. Members of the Court shall be appointed to serve in such office for a period of five years and may be eligible for reappointment for another term of five years only; provided, however, that of the members of the Court appointed for the first time, the terms of office of four members shall expire at the end of three years and the terms of the other three members shall expire at the end of five years.
2. The members of the Court whose terms are to expire at the end of the above-mentioned initial periods of three and five years shall be chosen by lot to be drawn by the Chairman of the Authority immediately after the first appointments have been made.
3. At the expiration of the term of a member of the Court, the said member shall remain in office until the appointment and assumption of office of his successor. Though replaced, he shall finish any cases which he may have begun.
4. In the absence of the President, or where it becomes impossible for the President to continue to carry out his duties and functions, the Vice-President shall assume these assignments of the President.
5. In the temporary absence of a member of the Court, another member shall be nominated to replace him in accordance with the provisions of the Rules of Procedure.
6. Where a member of the Court can no longer perform his duties, the Executive Secretary shall inform Council thereof. Council shall then propose to the Authority that a new member be appointed to replace him.
7. In the event of gross misconduct, inability to exercise his functions or physical or mental disability on the part of one of its members, the Court shall meet in plenary session to take cognisance of the fact. The Court shall then draw up a report which will be promptly transmitted to the Authority which may decide to relieve the member in question of his post.
8. Where the President of the Court cannot participate in the proceedings of a given case, he shall be replaced by the Vice President or where the latter is absent he shall be replaced by another member of the Court appointed in accordance with the Rules of Procedure of the Court.
9. Where a member of the Court cannot participate in the proceedings of a given case, he shall inform the President of the Court who shall replace him with another member of the Court for the purposes of that case.
10. Whenever the Vice-President or any member of the Court replaces the President in accordance with the provisions of paragraph 8 of this Article, he shall exercise all the authority and powers vested in the office of the President of the Court.
11. No member of the Court may exercise any political or administrative function or engage in any other occupation of a professional nature.

#### **Article 5: Oath of office or Solemn Declaration**

1. Before assuming office, members of the Court shall take an oath of office or make a solemn declaration before the Chairman of the Authority.
2. The oath or declaration shall be as follows:

*"I..... solemnly swear (declare)' that I will perform my duties and exercise my powers as Member of the Court honorably, faithfully, impartially and conscientiously".*

#### **Article 6: Privileges and Immunities**

1. The Court, and its members shall during the period of their tenure, enjoy privileges and immunities identical to those enjoyed by diplomatic missions and diplomatic agents in the territory of Member States, as well as those normally accorded to international courts and the members of such courts.
2. **In** this capacity, members of the Court shall not be liable to prosecution or arrest for acts carried out or statements made in the exercise of their functions.

#### **Article 7: Resignation**

1. Member of the court may resign at any time by addressing a letter of resignation to the Executive Secretary, who shall forward the letter to the Authority.
2. **In** case of resignation of a member of the Court, his duties shall end. However, such a member shall continue to hold office until the appointment and assumption of office of his successor.
3. **In** case of resignation of any member of the Court, the Executive Secretary shall inform Council which shall propose two persons to the Authority who shall appoint one to fill the vacant post.

#### **Article 8: Replacement of any member of the Court**

A person nominated to replace a member of the Court, whose term of office has not expired shall be appointed under the same conditions as his predecessor and shall hold office for the remainder of his predecessor's term.

#### **Article 9: Competence of the Court**

1. The Court shall ensure the observance of law and of the principles of equity in the interpretation and application of the provisions of the Treaty.
2. The Court shall also be competent to deal with disputes referred to it, in accordance with the provisions of Article 56 of the Treaty, by Member States or the Authority, when such disputes arise between the Member States or between one or more Member States and the Institutions of the Community on the interpretation or application of the provisions of the Treaty.

3. A Member State may, on behalf of its nationals, institute proceedings against another Member State or Institution of the Community, relating to the interpretation and application of the provisions of the Treaty, after attempts to settle the dispute amicably have failed.
4. The Court shall have any powers conferred upon it, specifically by the provisions of this Protocol.

#### **Article 10: Advisory Opinion**

1. The Court may, at the request of the Authority, Council, one or more Member States, or the Executive Secretary, and any other institution of the Community, express, in an advisory capacity, a legal opinion on questions of the Treaty.
2. Requests for advisory opinion as contained in paragraph 1 of this Article shall be made in writing and shall contain a statement of the questions upon which advisory opinion is required. They must be accompanied by all relevant documents likely to throw light upon the question.
3. Upon receipt of the request referred to in paragraph 2 of this Article the Chief Registrar shall immediately inform Member States, notify them of the time limit fixed by the President for receipt of their written observations or for hearing their oral declarations.
5. In the exercise of its advisory functions, the Court shall be governed by the provisions of this Protocol which apply in contentions cases, where the Court recognises them to be applicable.

#### **Article 11: Application to the Tribunal**

1. Cases may be brought before the Court by an application addressed to the Court Registry. This application shall set out the subject matter of the dispute and the parties involved and shall contain a summary of the argument put forward as well as the plea of the plaintiff.
2. The Chief Registrar of the Court shall immediately serve notice of the application and of all documents relating to the subject matter of the dispute to the other party, who shall make known his grounds for defence, within the time limit stipulated by the rules of procedure of the Court. Each party to a dispute shall be represented before the Court by one or more agents nominated by the party concerned for this purpose. The agents may, where necessary, request the assistance of one or more Advocates or Counsels who are recognised by the laws and regulations of the Member States as being empowered to appear in Court in their area of jurisdiction.

#### **Article 12: Representation before the Court**

Each party to a dispute shall be represented before the Court by one or more agents nominated by the party concerned for this purpose. The agents may, where necessary, request the assistance of one or more Advocates or Counsels who are recognized by the laws and regulations of the Member States as being empowered to appear in Court in their area of jurisdiction.

### **Article 13: Proceedings before the Court**

1. Proceedings before the Court shall consist of two parts; written and oral.
2. Written proceedings shall consist of the application entered in the Court, notification of the application, the defence, the reply or counter-statement, the rejoinder and any other briefs or documents in support.
3. Documents comprising the written proceedings shall be addressed to the Chief Registrar of the Court in the order and within the time limit fixed by the Rules of Procedure of the Court. A copy of each document produced by one party shall be communicated to the other party.
4. The oral proceedings shall consist of the hearing of parties, agents witnesses, experts, advocates or counsels.

### **Article 14: Sittings of the Court**

1. The President shall issue summons to the parties to appear before the court. He shall determine the roll of the Court and preside over its sittings.
2. Sittings and deliberations of the Court shall be valid when the President and at least two judges are present, but such that any sitting of the Court shall comprise of an uneven number of its members.
3. Sittings of the Court shall be public. The Court may however, sit in camera at the request of one of the parties or for reasons which only the Court may determine.

### **Article 15: Production of Documents**

1. At any time, the Court may request the parties to produce any documents and provide any information or explanation which it may deem useful. Formal note shall be taken of any refusal.
2. The Court may also request a Member State which is not involved in the dispute or any Community Institution to make available any information which it deems necessary for the settlement of the dispute.

### **Article 16: Enquiries and Expert Opinion**

The Court may, in any circumstance, and, in accordance with its Rules of Procedure, order any manner of judicial enquiry summon any person, organisation or institution to carry out an enquiry or give an expert opinion.

### **Article 17: Examination of Witnesses**

1. Witnesses upon whom a summon has been served must appear before the Court. They shall be heard under conditions specified in the Rules of Procedure of the Court.

- 2 Experts may testify as witnesses under oath, in accordance with the provisions of the Rules of Procedure of the Court.
3. All hearings shall be recorded and signed by the President and the Chief Registrar of the Court.

#### **Article 18: Deposition Upon Request**

1. The Court may request the judicial authority of his place of residence to hear the evidence of a witness or an expert.
2. Such a request shall be made to the judicial authority in accordance with the conditions stipulated in the Rules of Procedure of the Court. Documents emanating from such hearing shall be transmitted to the Court under the same conditions.
3. Expenses incurred by this procedure shall be borne by the parties to the dispute.

#### **Article 19: Decisions of the Court**

1. The Court shall examine the dispute before it in accordance with the provisions of the Treaty and its Rules of Procedure. It shall also apply, as necessary, the body of laws as contained in Article 38 of the Statutes of the International Court of Justice.
2. Decisions of the Court shall be read in open court and shall state the reasons on which they are based. Subject to the provisions on review contained in this Protocol, such decisions shall be final and immediately enforceable.
3. The Court shall give only one decision in respect of each dispute brought before it. Its deliberations shall be secret and its decisions shall be taken by a majority of the members.

#### **Article 20: Provisional Measures and Instructions**

The Court, each time a case is brought before it, may order any provisional measures or issue any provisional instructions which it may consider necessary or desirable.

#### **Article 21: Application for Intervention**

Should a Member State consider that it has an interest that may be affected by the subject matter of a dispute before the Court, it may submit by way of a written application a request to be permitted to intervene.

#### **Article 22: Exclusivity of Competence and Recognition of the Decisions of the Court**

1. No dispute regarding or application of the provisions of the Treaty may be referred to any other form of settlement except that which is provided for by the Treaty or this Protocol. .
2. When a dispute is brought before the Court, Member States or Institutions of the Community shall refrain from any action likely to aggravate or militate against its settlement.



3. Member States and Institutions of the Community shall take immediately all necessary measures to ensure execution of the decision of the Court.

### **Article 23: Interpretation of Decisions**

If the meaning or scope of a decision or advisory opinion is in doubt, the Court shall construe it on application by any party or any Institution of the Community establishing an interest therein.

### **Article 24: Legal Costs**

Unless the Court shall decide otherwise, each party to the dispute shall bear its own legal expenses.

### **Article 25: Application for Revision**

1. An application for revision for a decision may be made only when it is based upon the discovery of some fact of such a nature as to be a decisive factor, which fact was, when the decision was given, unknown to the Court and also to the party claiming revision, provided always that such ignorance was not due to negligence.
2. The proceedings for revision shall be opened by a decision of the Court expressly recording the existence of the new fact, recognising that it has such a character as to lay the case open to revision and declaring the application admissible on this ground.
3. The Court may require prior compliance with the terms of the decision before it admits proceedings in revision.
4. No application for revision may be after five (5) years from the date of decision.
5. The decision of the Court has no binding force except between the parties and in respect of that particular case.

### **Article 26: Seat of the Court**

1. The seat of the Court shall be fixed by the Authority.
2. However, where circumstances or facts of the case so demand, the Court may decide to sit in the territory of another Member State.

### **Article 27: Session of the Court**

1. Sessions of the Court shall be convened by its President.
2. The dates and duration of the sessions shall be fixed by the President and shall be determined by the roll of the Court.
3. The President and other members of the Court shall be bound to attend all sessions of the Court unless they are prevented from attending by any reasons duly explained to the Authority or the President of the Court, as the case may be.

- 4(a) Subject to the provisions of this Protocol and its Rules of Procedure, the Court shall meet in plenary session when it is composed as stated in Article 3, paragraph 2 of this Protocol.
- 4(b) Where, however, the Court being thus constituted and one of its members cannot continue to participate in the proceedings, the Court may, nevertheless, continue its hearing provided that the parties to the dispute, so agree.
5. The Court may form one or more Chambers, composed of three or more members when in its opinion, the nature of the business of the Court so requires.

#### **Article 28: Remuneration and fringe Benefits**

Subject to the provisions of this Protocol, the remuneration, allowances and all other benefits of the President and other members of the Court shall be determined by the Authority.

#### **Article 29: Registrars and other Staff of the Court**

1. The Court Registrar shall be by a Chief Registrar and Registrars. Subject to the provisions of this Protocol, the number of Registrars, the conditions of their appointments and their duties shall be determined by the Rules and Procedure of the Court.
2. Before taking office, the Chief Registrar and Registrars shall take an oath, or swear to a written declaration before the President of the Court as prescribed by the Rules of Procedure of the Court.
3. The Community shall appoint and provide the Court with the necessary officers and officials to enable it carry out its functions.

#### **Article 30: Expenses of the Court**

All the operational expenses of the Court shall be charged to the budget of the Executive Secretariat of the Community.

#### **Article 31: Official Languages**

The official languages of the Court shall be English and French.

#### **Article 32: Rules of Procedure**

The Court shall establish its own Rules of Procedure to be approved by the Council. Amendments thereto shall likewise be approved by Council.

#### **Article 33: Amendments**

1. Any Member State or the President of the Court may after Consultation with the other members, submit proposals for amendments of this Protocol.

2. All proposals shall be transmitted to the Executive Secretariat which shall forward them to Member States within thirty days of receipt. Such amendments shall be examined by the Authority on the expiration of the thirty days notice to Member States.

**Article 34: Entry into Force**

1. This Protocol shall enter into force, provisionally, upon signature by the Head of State and Government of Member States and, definitively, upon ratification by at least seven (7) signatory States in accordance with the constitutional regulations in force in each Member State.
2. This Protocol and all instruments of ratification shall be deposited with the Executive Secretariat of the Community which shall transmit certified true copies of the Protocol to all Member States notify them of the date of deposit of the instruments of ratification and register the Protocol with the Organisation of African Unity, the United Nations and any other Organisation which may be determined by Council.
3. This Protocol is annexed to the Treaty and shall form an integral part thereof.

**IN FAITH WHEREOF, WE THE HEADS OF STATE AND GOVERNMENT OF THE  
ECONOMIC COMMUNITY OF WEST AFRICAN STATES HAVE SIGNED THIS  
PROTOCOL.**

**DONE AT ABUJA,**

**THIS 6TH DAY OF JULY, 1991**

**IN SINGLE ORIGINAL IN ENGLISH AND FRENCH**

**BOTH TEXTS BEING EQUALLY AUTHENTIC.**

APPENDIX D

COMMUNITY COURT OF JUSTICE,  
ECOWAS  
COUR DE JUSTICE DE LA COMMUNAUTE,  
CEDEAO  
TRIB UNAL DE JUSTIÇA DA COMUNIDADE,  
CEDEAO



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IN THE COMMUNITY COURT OF JUSTICE OF THE ECONOMIC COMMUNITY OF  
WEST AFRICAN STATES (ECOWAS)

HOLDEN AT ABUJA, NIGERIA

This 30<sup>th</sup> day of November, 2010

SUIT NO: ECW/CCJ/APP/12/07

JUDGEMENT NO: ECW/CCJ/JUD/07/10

BETWEEN

THE REGISTERED TRUSTEES OF THE SOCIO-ECONOMIC  
RIGHTS AND ACCOUNTABILITY PROJECT (SERAP)

PLAINTIFF

VS

1. THE FEDERAL REPUBLIC OF NIGERIA
2. UNIVERSAL BASIC EDUCATION COMMISSION (UBEC)

DEFENDANTS

BEFORE THEIR LORDSHIPS

HON. JUSTICE HANSINE .N. DONLI  
HON. JUSTICE ANTHONY .A. BENIN  
HON. JUSTICE SOUMANA D. SIDIBE

Assisted by Tony Anene-Maidoh Esq.

REPRESENTATION

PLAINTIFF:

1. A. A. MUMUNI Esq.
2. SOLA EGBEYINKA Esq.

DEFENDANTS:

1. YEMI PITAN Esq.
2. TOLU ODUPE Esq.
3. JOHN GAUL Esq. (for the 2<sup>nd</sup> Defendant)

IN THE COMMUNITY COURT OF JUSTICE, ECOWAS, SITTING AT  
ABUJA, FEDERAL REPUBLIC OF NIGERIA

THE REGISTERED TRUSTEES OF THE SOCIO-ECONOMIC RIGHTS  
AND ACCOUNTABILITY PROJECT (SERAP).....PLAINTIFF

V.

1. THE FEDERAL GOVERNMENT OF NIGERIA.....1<sup>ST</sup> DEFENDANT

2. UNIVERSAL BASIC EDUCATION COMMISSION (UBEC).....2<sup>ND</sup>  
DEFENDANT

SUIT NO. ECW/CCJ/APP./12/07

JUDGMENT NO. ECW/CCJ/JUD/07/10

Dated 30<sup>th</sup> November 2010

BEFORE:

Hon. Justice Hansine N. Donli-----Presiding

Hon. Justice Anthony A. Benin-----Member

Hon. Justice Soumana D. Sidibe-----Member

ASSISTED BY:

Tony Anene-Maidoh-----Chief Registrar

Judgment of the Court

**1. Parties and lawyers**

The plaintiff is a human rights non-governmental organization registered under the laws of the Federal Republic of Nigeria. The first defendant is a member state of the Economic Community of West African States. The second defendant is body set up by the first defendant to ensure the success of basic education in the country. The applicant was represented by A. A. Mumuni and Sola Egbeyinka. The first defendant was represented by Yemi Pitan and Tolu Odupe, whilst the second defendant was represented by John Gaul.

**2. Subject-matter of the proceedings**

The initiating application complains of violation of the human right to quality education, the right to human dignity, the right of peoples to their wealth and natural resources, and the right of people to economic and social development, guaranteed by Articles 1, 2, 17, 21 and 22 of the African Charter on Human and Peoples' Rights. (ACHPR)

**Facts of the case.**

3. The genesis of this matter, according to the Applicant, is a report of investigations conducted into the activities of the second defendant. Indeed the investigation centred on the mismanagement of funds allocated for basic education in ten states of the Federation of Nigeria. This report was submitted to the Presidency on April 13, 2006. The exact amount though has not been disclosed.
4. Besides, in October 2007, the Independent Corrupt Practices Commission (ICPC) reported having more than 488 million naira of funds looted from state offices and headquarters of the second defendant and was still battling to recover another 3.1 billion naira looted by officials of the second defendant.
5. The Applicant contends that this is not an isolated case but an illustration of high level corruption and theft of funds meant for primary education in Nigeria. The result is that Nigeria is unable to attain the level of education that she deserves in that over five million Nigerian children have no access to primary education, among others. The Applicant catalogued a number of factors that have negatively affected the educational system of the country, including failure to train more teachers, non-availability of books and other teaching materials etc etc.
6. The charge against the first defendant is that she has "contributed to these problems by failing to seriously address all allegations of corruption at the highest levels of government and the levels of impunity that facilitate corruption in Nigeria."
7. The result is that this has "contributed to the denial of the right of the peoples to freely dispose of their natural wealth and resources, which is the backbone to the enjoyment of other economic and social rights such as the right to education.....SERAP contends that the destruction of Nigeria's natural resources through large scale corruption is the sole cause of the problems denying the majority of the citizens access to quality education."

## 8. Pleas in law

The Applicant quoted the provisions of Article 4(g) of the 1993 Revised Treaty of ECOWAS, as well as Articles 1, 2, 17, 21 and 22 of the ACHPR and submitted that the first defendant has violated the right to education, the right of the people not to be dispossessed of their wealth and natural resources and the right of the people to economic and social development.

## 9. Reliefs and Orders sought.

- i. A declaration that every Nigerian child is entitled to free and compulsory education by virtue of Article 17 of the African Child's Rights Act, Section 15 of the Child's Rights Act 2003 and Section 2 of the Compulsory Free and Universal Basic Education Act 2004.
- ii. A declaration that the diversion of the sum of 3.5 billion naira from the UBE fund by certain public officers in 10 states of the Federation of Nigeria is illegal and unconstitutional as it violates Articles 21 and 22 of the ACHPR.
- iii. An order directing the defendants to make adequate provisions for the compulsory and free education of every child forthwith.
- iv. An order directing the defendants to arrest and prosecute the public officers who diverted the sum of 3.5 billion naira from the UBE fund forthwith.
- v. An order compelling the government of Nigeria to fully recognize primary school teachers' trade union freedoms, and to solicit the views of teachers throughout the process of educational planning and policy-making.
- vi. An order compelling the government of Nigeria to assess progress in the realization of the right education with particular emphasis on the Universal Basic Education; appraise the obstacles, including corruption, impeding access of Nigerian children to school; review the interpretation and application of human rights obligations throughout the education process.

## The defence case

10. For their part, the defendants totally rejected the claims by the applicant. The defendants filed separate statements wherein they identified some issues as being material to a determination of this matter. The first defendant formulated three issues relating to the following: 1. The court's jurisdiction over this

matter. 2. Failure on the part of the applicant to exhaust local remedies before coming to this court. 3. Failure by the applicant to establish their claims.

11. The second defendant set out a number of issues, namely; 1. Whether the second defendant is the competent body to answer the allegations made by the applicant. 2. Whether the proper parties are before the court. 3. Whether the applicant has established their case. 4. Whether the applicant has satisfied the condition precedent to bringing an action before this court that is exhaustion of local remedies.

## **12. Preliminary issues**

On 27<sup>th</sup> October 2009, the court issued a ruling in an application for preliminary objection raised by the defence. These issues about the court's jurisdiction in this matter as well as the exhaustion of local remedies were decided in that ruling. It is thus inappropriate for Counsel to raise the same issues again. The principle of law is clear that when a court has decided on some issues in the case, the decision creates issue estoppel as between the parties and/or their privies in the present and any subsequent proceedings in which same issue/s is/are raised. Besides, the decision of this court is final and can only be altered through a revision if the correct procedure is followed. In view of the foregoing, the court cannot re-open these two issues about its jurisdiction and exhaustion of local remedies.

## **Analysis of the main issues**

13. The key issue is whether, having regard to the record before the court, the applicant has established a case against the defendants or any of them. The other issue about whether the second defendant is answerable for the education units of the states who they regard as the proper parties to this case will be addressed first. This is because if the second defendant is a wrong party sued, there will be no point discussing the main issue with reference to them.

14. Among other duties they are mandated by law to perform, the second defendant stated that they 'receive block grant from the Federal Government and allocate to the States and Local Governments and other relevant agencies implementing the Universal Basic Education.....provided that the Commission shall not disburse such grant until it is satisfied that the earlier disbursements have been applied in accordance with the provisions of the Act'



15. It is clear from even a cursory reading of this provision in the Act which the second defendant themselves relied upon that they have a responsibility to ensure that the funds they disburse to the States, inter alia, are utilised for the purposes for which they were disbursed. Thus the second defendant cannot be heard to say that if funds given to the States are not properly accounted for they are not responsible, albeit vicariously. It is clear from the use of the mandatory expression 'shall not disburse' that the Act has placed the onus on them to be satisfied that the funds are properly utilised, hence the power given to them to refuse further disbursements. The language of the statute is so clear and unambiguous requiring no interpretation. Thus the second defendant is a proper party in this action, despite the fact that the ten States mentioned in the Report might also have been joined to this action.

16. Turning next to the main issue, the applicant relies largely on the ICPC Report which they annexed to their papers filed in this case. The ICPC report uncovered corrupt practices in the management of funds allocated for education. The applicant further contends that the "allegations of high level corruption have contributed to series of serious and massive violations of the right to education, including lack of access to quality primary education in Nigeria".

17. The defendants are alleged to have contributed to the denial of education to a lot of Nigerians by failure to seriously address all allegations of corruption at the highest levels of government and the levels of impunity that facilitate corruption in Nigeria. This situation has contributed to the denial of the right of the peoples to freely dispose of their natural wealth and resources, which is the backbone to the enjoyment of the right to education and other economic and social rights.

18. To begin with, the ICPC report is the product of investigations into the affairs of the basic education sector. And in law such investigative report is not conclusive of the facts stated therein, nonetheless they provide prima facie evidence of the facts investigated. If the report finds that there is evidence of corruption, it behoves the appropriate authority to act further on it, and secure a judicial verdict. It is only then that a person investigated can be said to be guilty of the allegations or findings of corruption contained in the report. And the fact that the report is not conclusive of the facts stated therein explains the use of such words and expressions as "allegedly", "reportedly", "according to reports", in the initiating application.

19. And coming to the crux of the matter, granting that the ICPC report has made conclusive findings of corruption that per se will not amount to a denial of the right of education. Admittedly, embezzling, stealing or even mismanagement of funds meant for the education sector will have a negative impact on education since it reduces the amount of money made available to provide education to the people. Yet it does not amount to a denial of the right to education, without more. The reason is not far to seek. The Federal Government of Nigeria has established institutions, including the 2<sup>nd</sup> defendant to take care of the basic education needs of the people of Nigeria. It has allocated funds to these institutions to carry out their mandate. We believe these are all geared towards fulfilling the right to education. Some officers charged with the duty of implementing the education mandate, are said to have misused, misapplied, embezzled or even stolen part of the funds. The Federal Government and the 2<sup>nd</sup> defendant are said to have failed to act against such persons and for that reason, they are said to have denied the right of the peoples of Nigeria to education. There must be a clear linkage between the acts of corruption and a denial of the right to education. In a vast country like Nigeria, with her massive resources, one can hardly say that an isolated act of corruption contained in a report will have such devastating consequence as a denial of the right to education, even though as earlier pointed out it has a negative impact on education.

20. The applicant appreciated this last point and so went on to argue that “this is not an isolated case but an illustration of high level corruption and theft of funds meant for primary education in Nigeria.” This Court cannot accept such sweeping conclusion. It is a serious indictment on authorities of the Federal Republic of Nigeria which calls for strict proof, being a criminal matter. In the absence of such proof, the Court will reject any suggestion of high level corruption in the educational sector which has resulted in a denial of the right to education.

21. The Court takes note that in the course of implementing policies, especially financial policies, if funds are stolen or embezzled or misapplied, it behoves the matter to be dealt with internally, that is at the domestic level. This Court will only hold a State accountable if it denies the right to education to its people. Funds stolen by officers charged with the responsibility of providing basic education to the people should be treated as crime, pure and simple or the culprits may be dealt with in accordance with the applicable civil laws of the

country to recover the funds. Unless this is done, every case of theft or embezzlement of public funds will be treated as a denial of human rights of the people in respect of the project for which the funds were allocated. That is not the object of human rights violation in this Court where every breach or violation must be specifically alleged and proved by evidence.

22. Indeed the ICPC report itself did not recommend prosecution in the first place. Paragraph (viii) of its recommendations is pertinent and germane to the ongoing discussion, and it reads: "All illegal and unauthorized payments including transfers, diversion, misapplied funds or fictitious claims discovered during the course of investigation should be refunded to the government, failure to accede to this request will lead to criminal prosecution of those involved or the Agency".

23. The Court notes that there is no time frame set in the report for the funds to be recovered. The applicant has jumped the first step in the implementation of the report and is calling for prosecution which is the last resort.

24. Be that as it may, even if the report had recommended prosecution, this Court will not have the power to order the defendants to arrest and prosecute anybody to recover state money. It is the duty of the Attorney-General to decide on what matter or who to prosecute, and that power is entirely his to exercise. And the Attorney-General is not a community official, within the meaning of Article 10(c) of the Supplementary Protocol on the court, no. A/SP./1/01/05 that could be ordered for having failed to perform official act.

25. Another order sought by the Applicant was that the government of Nigeria should recognize school teachers' trade union freedoms, and to solicit the views of teachers throughout the process of educational planning and policy-making. There is no evidence in support of this. Besides, this is not a human rights issue, whether the government will include another organization in the planning and execution of its programmes. Be that as it may, the Act which established the second defendant, which they annexed to their document, shows that the teachers are not ignored as the applicant wants to imply from the order sought. The Nigeria Union of Teachers, as well as the National Parents/Teachers Association of Nigeria, and the National Teachers Institute are all represented on the board of the second defendant.

#### Decision

26. In the light of the foregoing analysis of the facts, the Court is able to decide as follows:

Relief 1. The defendants do not contest the fact that every Nigerian child is entitled to free and compulsory basic education. What they earlier on said was that the right to education was not justiciable in Nigeria, but the court in its earlier ruling of 27<sup>th</sup> October 2009 in this case, decided it was justiciable under the ACHPR.

27. Relief 2. As stated already, the report provides only prima facie and not conclusive evidence of the facts stated therein, and there is no judicial pronouncement on these findings. Also the alleged suspects are not parties before us in this action, so this court is unable to make any declaration of illegality or unconstitutionality in this matter.

28. Relief 3. The applicant is saying that following the diversion of funds, there is insufficient money available to the basic education sector. 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 normal since shortage of funds will disable the sector from performing as envisaged by those who approved the budget. Thus, whilst steps are being taken to recover the funds or prosecute the suspects, as the case may be, it is in order that the first defendant 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.

29. Relief 4. The court cannot grant this order for the arrest and prosecution of the alleged suspects for reasons already explained.

30. Reliefs 5 and 6. For lack of evidence these orders are refused.

31. In conclusion, subject to reliefs 1 and 3 which the court grants in terms as stated above, the court rejects all the other reliefs and orders sought.

32. Costs.

Since the matter succeeds in part the parties shall bear their own costs.

This decision has been read in open court in Abuja this 30<sup>th</sup> day of November 2010 in the presence of:

Hon. Justice Hansine N. Donli-----Presiding *Hnd*

Hon. Justice Anthony A. Benin.....Member *Anthony A. Benin*

Hon. Justice Soumana D. Sidibe.....Member *Soumana D. Sidibe*

Assisted by Mr. Tony Anene-Maidoh.....Chief Registrar *Tony Anene-Maidoh*



APPENDIX E

COMMUNITY COURT OF JUSTICE,  
ECOWAS  
COUR DE JUSTICE DE LA COMMUNAUTE,  
CEDEAO  
TRIBUNAL DE JUSTIÇA DA COMUNIDADE DA  
CEDEAO



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**THE COURT OF JUSTICE OF THE ECONOMIC COMMUNITY OF WEST  
AFRICAN STATES (ECOWAS)**

**HOLDEN AT IBADAN, IN NIGERIA  
THIS 14 DAY OF DECEMBER 2012**

**Between  
SERAP**

**Applicant**

*Lawyers : A. A.  
Mumuni  
Sola Egbeyinka*

**And**

**Federal Republic of Nigeria**

*Lawyer : T.A. Gazali*

**Defendant**

**GENERAL LIST N°ECW/CCJ/APP/08/09**

**JUDGMENT N° ECW/CCJ/JUD/18/12**

**Before their Lordships**

|   |                          |
|---|--------------------------|
| <b>Hon. Justice Benfeito Mosso Ramos</b>          | <b>- Presiding</b>       |
| <b>Hon. Justice Hansine Donli</b>                 | <b>- Member</b>          |
| <b>Hon. Justice Anthony Alfred Benin</b>          | <b>- Member</b>          |
| <b>Hon. Justice Clotilde Médégan<br/>Nougbodé</b> | <b>- Member</b>          |
| <b>Hon. Justice Eliam Potey</b>                   | <b>- Member</b>          |
| <b>Assisted by Tony Anene-Maidoh</b>              | <b>- Chief Registrar</b> |

**Delivers the following Judgment:**

## **PARTIES**

1. The Plaintiff, the Socio-Economic Rights and Accountability Project, SERAP, is a non governmental organization registered in Nigeria with Office at 4 Akintoye Shogunle Street Off Awolowo Way Ikeja, Lagos, Nigeria. The Plaintiff is represented by Mr. A. A. Mumuni with Sola Egbeyinka.
2. The First Defendant is the Federal Republic of Nigeria while the Second Defendant is the Attorney General of the Federation and the Chief Law Officer of the Federation. The First and the Second Defendants are represented by Mr. T.A. Gazali.

## **PROCEDURE**

3. This case originated from a complaint brought on 23 July 2009 by the Registered Trustees of the Socio-Economic Rights and Accountability Project (SERAP) pursuant to Article 10 of the Supplementary Protocol A/SP.1/01/05 against the President of the Federal Republic of Nigeria, the Attorney General of the Federation, Nigerian National Petroleum Company, Shell Petroleum Development Company, ELF Petroleum Nigeria Ltd, AGIP Nigeria PLC, Chevron Oil Nigeria PLC, Total Nigeria PLC and Exxon Mobil.
4. The Plaintiff alleged violation by the Defendants of the rights to health, adequate standard of living and rights to economic and social development of the people of Niger Delta and the failure of the Defendants to enforce laws and regulations to protect the environment and prevent pollution
5. The Application was served on the Defendants in line with the provisions of Articles 34 of the Rules of Procedure of this Court.
6. Upon receipt of the Application, the 3<sup>rd</sup> to 9<sup>th</sup> Defendants raised Preliminary Objections to the jurisdiction of this Court to entertain the Application on various grounds.

7. After careful consideration of the issues raised in the Preliminary Objections, the Court, in Ruling No. ECW/CCJ/APP/07/10 delivered on 10 October 2010, ruled that the Plaintiff is a legal person and has the locus standi to institute this action.
8. The Court also held that it has no jurisdiction over the 3<sup>rd</sup> to 9<sup>th</sup> Defendants who are corporations and struck out their names in the suit.
9. Consequently the Plaintiff on the 11<sup>th</sup> of March 2011 filed with the leave of court an amended application against the President of the Federal Republic of Nigeria and The Attorney General of the Federation.
10. On the 10<sup>th</sup> day of March 2011, the Defendants filed a joint statement of defence to the suit to which the Plaintiff replied on the 8<sup>th</sup> of July 2011.
11. Both parties subsequently filed and exchanged written addresses of counsel. The Plaintiff for the first time attached a copy of the Amnesty International report to its address and the Defendant objected to the admissibility of that report on the ground that it is too late and not in accordance with the rules. The Court then asked both parties to address it on the admissibility of the report and reserved its ruling for judgment.

## **THE FACTS OF THE CASE**

12. The Plaintiff contended that Niger Delta has an enormously rich endowment in the form of land, water, forest and fauna which have been subjected to extreme degradation due to oil prospecting.
13. It averred that Niger Delta has suffered for decades from oil spills, which destroy crops and damage the quality and productivity of soil that communities use for farming, and contaminates water that people use for fishing, drinking and other domestic and economic purposes. That these spills which result from poor maintenance of infrastructure, human error and a consequence of deliberate vandalism or theft of oil have pushed many people deeper into



poverty and deprivation, fuelled conflict and led to a pervasive sense of powerlessness and frustration.

14. It further contended that the devastating activities of the oil industries in the Niger Delta continue to damage the health and livelihoods of the people of the area who are denied basic necessities of life such as adequate access to clean water, education, healthcare, food and a clean and healthy environment.
15. The Plaintiff submitted that although Nigerian government regulations require the swift and effective clean-up of oil spills this is never done timorously and is always inadequate and that the lack of effective clean-up greatly exacerbates the human rights and environmental impacts of such spills.
16. It admitted that though some companies have engaged in development projects to help communities construct water and sanitation facilities and some individuals and families received payments these were inadequate.
17. It submitted that government's obligation to protect the right to health requires it to investigate and monitor the possible health impacts of gas flaring and the failure of the government to take the concerns of the communities seriously and take steps to ensure independent investigation into the health impacts of gas flaring and ensure that the community has reliable information, is a breach of international standards.
18. It averred specifically that:
  - In 1995 SPDC Petroleum, admitted that its infrastructure needed work and that the corrosion was responsible for 50 per cent of oil spills.
  - On 28 August 2008, a fault in the Trans-Niger pipeline resulted in a significant oil spill into Bodo Creek in Ogoniland. The oil poured into the swamp and creek for weeks, covering the area in a thick slick of oil and killing the fish that people depend on for food and for livelihood. The oil spill has resulted in death or damage to a number of species of fish that provide the protein needs in the local community. Video footage of the

site shows widespread damage, including to mangroves which are an important fish breeding ground. The pipe that burst is the responsibility of the Shell Petroleum Development Company (SPDC). SPDC has reportedly stated that the spill was only reported to them on 5 October of that year. Rivers State Ministry of Environment was informed of the leak and its devastating consequences on 12 October. A Ministry official is reported to have visited the site on 15 October. However, the leak was not stopped until 7 November.

- On 25 June 2001 residents of Ogbobo in Rivers State heard a loud explosion from a pipeline, which had ruptured. Crude oil from the pipe spilled over the surrounding land and waterways. The community notified Shell Petroleum Development Company (SPDC) the following day; however, it was not until several days later that a contractor working for SPDC came to the site to deal with the oil spill. The oil subsequently caught fire. Some 42 communities were affected as the oil moved through the water system. The communities' water supply, which came from the local waterway, was contaminated. SPDC brought ten 500-litre plastic tanks of water to Ogbodo, but only after several days. Although SPDC refilled the tank every two to three days, 10 tanks are insufficient for their needs, and are emptied within hours of refilling.
- People in the area complained of numerous symptoms, including respiratory problems. The situation was so dire that some families reportedly evacuated the area, but most had no means of leaving
- Though companies have engaged in development projects to help communities construct water and sanitation facilities and some individuals and families have received payments however, some of these development projects and compensations have been criticised as inadequate and poorly executed.
- Hundreds of thousands of people are affected, particularly the poorest and other most vulnerable sectors of the population, and those who rely on traditional livelihoods such as fishing and agriculture.

## ORDERS SOUGHT BEFORE THE COURT

19. The Plaintiff prays the Court to make the following orders:

- a) A Declaration that everyone in the Niger Delta is entitled to the internationally recognised human right to an adequate standard of living, including adequate access to food, to healthcare, to clean water, to clean and healthy environment; to social and economic development; and the right to life and human security and dignity.
- b) A Declaration that the failure and /or complicity and negligence of the Defendants to effectively and adequately clean up and remediate contaminated land and water; and to address the impact of oil-related pollution and environmental damage on agriculture and fisheries is unlawful and a breach of international human rights obligations and commitments as it violates the International Covenant on Economic, Social and Cultural Rights, the International Covenant on Civil and Political Rights, and the African Charter on Human and Peoples' Rights.
- c) A Declaration that the failure of the Defendants to establish any adequate monitoring of the human impacts of oil-related pollution despite the fact that the oil industry in the Niger Delta is operating in a relatively densely populated area characterised by high levels of poverty and vulnerability, is unlawful as it violates the International Covenant on Economic, social and Cultural Rights, the International Covenant on Civil and Political Rights and the African Charter on Human and peoples' Rights.
- d) A Declaration that the systematic denial of access to information to the people of the Niger Delta about how oil exploration and production will affect them, is unlawful as it violates the International Covenant on Economic, Social and Cultural rights, the international Covenant on Civil and Political Rights, and the African Charter on Human and Peoples' Rights.

- e) An Order directing the Defendants to ensure the full enjoyment of the people of Niger Delta to an adequate standard of living, including adequate access to food, to healthcare, to clean water, to clean and healthy environment; to socio and economic development; and the right to life and human security and dignity.
  - f) An Order directing the Defendants to hold the oil companies operating in the Niger Delta responsible for their complicity in the continuing serious human rights violations in the Niger Delta.
  - g) An Order compelling the Defendants to solicit the views of the people of the area throughout the process of planning and policy-making on the Niger Delta.
  - h) An Order directing the government of Nigeria to establish adequate regulations for the operations of multinationals in the Niger Delta, and to effectively clean-up and prevent pollution and damage to human rights.
  - i) An Order directing the government of Nigeria to carry out a transparent and effective investigation into the activities of oil companies in the Niger Delta and to bring to justice those suspected to be involved and /or complicit in the violation of human rights highlighted above.
  - j) An Order directing the Defendants individually and/or collectively to pay adequate monetary compensation of 1 Billion Dollars (USD) (\$1 billion) to the victims of human rights violations in the Niger Delta, and other forms of reparation that the Honourable Court may deem fit to grant.
20. The Federal Republic of Nigeria maintains that the Court has no jurisdiction to examine the alleged violations of the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR). It equally asks the Court to make a declaration that it is not competent to sit on the case, for, as it contends, the Plaintiff failed to annex to its Application, the report by Amnesty International; in so doing, it violates the provisions of the Rules of the Court and deliberately infringes on

the rights of the Defendant. It adds that if in any extraordinary manner, the Court holds that it has jurisdiction to examine the case, it will nevertheless have to conclude that the report adduced by the Plaintiff does not meet the universally accepted criteria for it to be admitted in evidence.

21. Besides, the Federal Republic of Nigeria affirms that the Plaintiff does not have locus standi to bring the instant action and maintains, moreover, that by virtue of the provisions of the new Article 9(3) of the Protocol on the Court as amended by the 19 January 2005 Protocol, certain facts brought by the Plaintiff have come under the three-year statute bar, and therefore its action is foreclosed.
22. The Federal Republic of Nigeria therefore concludes that the Plaintiff's Application is not founded and must be dismissed.

## **IN LAW**

23. The Court considers that certain issues raised by the Federal Republic of Nigeria, notably – (1) that the Court lacks jurisdiction to examine the alleged violations of the said Covenants ; (2) lack of locus standi on the part of the Plaintiff ; (3) the Plaintiff's failure to produce the Amnesty International report at the time of lodgment of the substantive application; and (4) that certain facts pleaded by the Plaintiff have come under a three-year statute bar. These questions present a preliminary aspect which touches on the jurisdiction of the Court and the admissibility of the Application. The Court therefore intends to analyse them before any analysis is made on the merits of the case.

## **I- PRELIMINARY QUESTIONS**

- (i) *Whether the Court lacks jurisdiction to examine the alleged violations of the said Covenants*

24. The Federal Republic of Nigeria argues notably, that the Constitution of Nigeria only recognises the jurisdiction of the domestic courts of Nigeria, as far as competence to examine violation of the rights contained in the ICCPR is

concerned, and that ICESCR did not provide that the rights contained in the said instrument were justiciable. The Federal Republic of Nigeria added that the Court has jurisdiction to adjudicate only in cases regarding the treaties, conventions and protocols of the Economic Community of West African States.

25. The new Article 9(4) of the Protocol on the Court as amended by Supplementary Protocol A/SP.1/01/05 of 19 January 2005 provides: ***“The Court has jurisdiction to determine cases of violation of human rights that occur in any Member State”*** .
26. This provision, which gives jurisdiction to the Court to adjudicate on cases of human rights violation, results from an amendment made to the 6 July 1991 Protocol A/P1/7/91 on the Community Court of Justice. The raison d’être of this amendment is Article 39 of the 21 December 2001 Protocol A/SP1/12/01 on Democracy and Good Governance, which provides: ***“Protocol A/P1/7/91 adopted in Abuja on 6 July, 1991 relating to the Community Court of Justice, shall be reviewed so as to give the Court the power to hear, inter-alia, cases relating to violations of human rights...”*** .
27. When the Member States were adopting the said Protocol, the human rights they had in view were those contained in the international instruments, with no exception whatsoever, and they were all signatory to those instruments. Thus attests the preamble of the said Protocol as well as paragraph (h) of its Article 1, which stipulates the principles of constitutional convergence common to the Member States, which provides: ***The rights set up in the African Charter on Human and Peoples’ Rights and other international instruments shall be guaranteed in each of the ECOWAS Member States ; each individual or organisation shall be free to have recourse to the common or civil law courts, a court of special jurisdiction, or any other national institution established within the framework of an international instrument on Human Rights, to ensure the protection of his/her rights .***
28. Thus, even though ECOWAS may not have adopted a specific instrument recognising human rights, the Court’s human rights protection mandate is exercised with regard to all the international instruments, including the African

Charter on Human and Peoples' Rights, the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights, etc. to which the Member States of ECOWAS are parties.

29. That these instruments may be invoked before the Court reposes essentially on the fact that all the Member States parties to the Revised Treaty of ECOWAS ***have renewed their allegiance to the said texts, within the framework of ECOWAS.*** Consequently, by establishing the jurisdiction of the Court, they have created a mechanism for guaranteeing and protecting human rights within the framework of ECOWAS so as to implement the human rights contained in all the international instruments they are signatory to.
30. This reality is consistently held in the Court's case law [See Judgment of 17 December 2009, Amouzou Henri v. Republic of Côte d'Ivoire § 57 to 62; Judgment of 12 June 2012, Aliyu Tasheku v. Federal Republic of Nigeria §16].
31. As to the justiciability or enforceability of the economic, social and cultural rights, this Court is of the view that instead of a generalistic approach recognizing or denying their enforceability, the appropriate way to deal with that issue is to analyse each right in concrete terms, try to determine which specific obligation it imposes on the States and Public Authorities, and whether that obligation can be enforced by the Courts.
32. Indeed there are situations in which the enjoyment of the economic, social and cultural rights depends on the availability of State resources. In those situations, it is legitimate to raise the issue of enforceability of the concerned right. But there are others in which the only obligation required from the State to satisfy such rights is the exercise of its authority to enforce the law that recognises such rights and prevent powerful entities from precluding the most vulnerable from enjoying the right granted to them.
33. In the instant case, what is in dispute is not a failure of the Defendants to allocate resources to improve the quality of life of the people of Niger Delta, but rather a failure to use the State authority, in compliance with international

obligations, to prevent the oil extraction industry from doing harm to the environment, livelihood and quality of life to the people of that region.

34. The Court notes that behind the thesis developed by the Federal Republic of Nigeria is the principle contained in its own Constitution that the economic, social and cultural rights, being mere policy directives, are not justiciable or enforceable.

35. But it should also be noted that the sources of Law that the Court takes into consideration in performing its mandate of protecting Human Rights are not the Constitutions of Member States, but rather the international instruments to which these States voluntarily bound themselves at the international level, including the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights and the African Charter on Human and Peoples' Rights.

36. As held by the jurisprudence of this Court, in the Ruling of 27 October 2009, *SERAP v. Federal Republic of Nigeria and Universal Basic Education Commission*, once the concerned right for which the protection is sought before the Court is enshrined in an international instrument that is binding on a Member State, the domestic legislation of that State cannot prevail on the international treaty or covenant, even if it is its own Constitution.

37. This view is consistent with paragraph 2, Article 5 of the International Covenant on Economic, Social and Cultural Rights which Nigeria is party to by adhesion since 29 July 1993 which provides:

*No restriction upon or derogation from any of the fundamental human rights recognised or existing in any country in virtue of law, conventions, regulations or custom shall be admitted on the pretext that the present Covenant does not recognise such rights or that it recognises them to a lesser extent".*

38. In these circumstances, invoking lack of justiciability of the concerned right, to justify non accountability before this Court, is completely baseless.



39. It is thus evident that the Federal Republic of Nigeria cannot invoke the non justiciability or enforceability of ICESCR as a mean for shirking its responsibility in ensuring protection and guarantee for its citizens within the framework of commitments it has made vis-à-vis the Economic Community of West African States and the Charter.
40. The Court adjudges that it has jurisdiction to examine matters in which applicants invoke ICCPR and ICESCR.

*ii) That the Plaintiff lacks locus standi*

**Argument advanced by the Federal Republic of Nigeria**

41. The Federal Republic of Nigeria maintained that SERAP has no *locus standi* because its Application was filed without the prior information, accord and interest of the People of Niger Delta, and that SERAP acts in its own name, with no proof that it is acting on behalf of the people of Niger Delta.

**Argument advanced by the Plaintiff**

42. The Plaintiff countered this plea-in-law by citing Ruling N°ECW/CCJ/APP/07/10 delivered by the Court on 10 December 2010 on the preliminary objections raised by the oil companies who were summoned to appear in court.

**Analysis of the Court**

43. The Court recalls that this issue has already been examined in the above-cited ruling among the numerous preliminary objections raised by the oil companies and it concluded that the NGO known as SERAP has locus standi in the instant case (see §62 of the Ruling).
44. However, the Court notes that the Federal Republic of Nigeria did not take part in the proceedings relating to the said objections. But, by virtue of the relative effect of the decisions of the Court, the 10 December 2010 decision affect only the parties who pleaded their cases during that hearing. The authority of that decision cannot therefore be applied to the Federal Republic of Nigeria.

Consequently, the Court declares that this argument advanced by the Federal Republic of Nigeria is admissible.

45. Nevertheless, the Court does not find in the arguments advanced by the Federal Republic of Nigeria any determining factor capable of compelling it to set aside the previous decision. Consequently, the Court adjudges that SERAP, in the instant case, has locus standi.

*iii) As to the admissibility of the report by Amnesty International*

### **Argument advanced by the Federal Republic of Nigeria**

46. The Federal Republic of Nigeria maintained that at the time of lodgment of the initial application, and even the amended application, the Plaintiff did not produce the report by Amnesty International, which it had listed among the annexed schedule of exhibits. By acting in such manner, and deliberately so, the Plaintiff violated the provisions of Article 32 of the Rules of Procedure – particularly paragraphs 1, 4, 5 and 6 – which it was bound to respect, and thus violated its right to defence. It added that the Plaintiff thus contributed to a systematic denial of fair hearing in the suit.

### **Argument advanced by the Applicant**

47. Plaintiff counsel maintained that the admissibility of the document is at the discretion of the Court, and urged the Court to discountenance the argument brought by the Defendant, which falls under technicality, to the detriment of substantial justice. Moreover, the Plaintiff argued that the report is a piece of evidence he intended to rely on. He added that the failure to produce the report is due to an omission on the part of counsel to the Plaintiff, which should not result in injury to the Plaintiff. He prayed the Court to admit the said document.

### **Analysis of the Court**

48. Paragraphs 1, 4, 5 and 6 of Article 32 of the Rules of Procedure of the Court provides:

*"1. The original of every pleading must be signed by the party's agent or lawyer. The original, accompanied by all annexes referred to therein, shall be lodged together with five copies for the Court and a copy for every other party to the proceedings. The party lodging them in accordance with Article 11 of the Protocol shall certify copies.*

*4. To every pleading there shall be annexed a file containing the documents relied on in support of it, together with a schedule listing them.*

*5. Where in view of the length of a document only extracts for it are annexed to a pleading, the whole document or a full copy of it shall be lodged at the Registry.*

*6. Without prejudice to the provisions of paragraphs 1 to 5, the date on which a copy of the signed original of a pleading, including the schedule of documents referred to in paragraph 4, is received at the Registry by telefax or any other technical means of communication available to the Court shall be deemed to be the date of lodgment for the purposes of compliance with the time-limits for taking steps in proceedings, provided that the signed original of the pleading, accompanied by the annexes and copies referred to in the second subparagraph of paragraph 1 above, is lodged at the Registry no later than ten days thereafter*

49. The Court recalls that it is not for the parties to indicate the procedure to be followed by the Court and that parties are required to abide by the provisions of the Court's Protocol and Rules of Procedure. The lawyers and counsels are under obligation to assist the parties with all the diligence and professionalism required.

50. The Court is of the view that failure to produce an exhibit in evidence is akin to the situation provided for in paragraph 6, Article 33 of the Rules of Procedure thus:

*If the application does not comply with the requirements set out in paragraphs*

*1 to 4 of this Article, the Chief Registrar shall prescribe a period not more than thirty days within which the applicant is to comply with them whether by putting the application itself in order or by producing any of the above-mentioned documents. If the applicant fails to put the application in order or*

*to produce the the required documents within the time prescribed, the Court shall, after hearing the Judge Rapporteur, decide whether the non-compliance with these conditions renders the application formally inadmissible”.*

51. Thus, the sanctioning of any failure to comply with the provisions of Article 32 of the Rules of Procedure comes under the discretionary power of the Court and the latter exercises that power in accordance with the provisions of the texts of the Court and the dictates of an efficient administration of justice.

52. In that regard, paragraph 1 of the new Article 15 of the Protocol on the Court as amended by the 19 January 2005 Supplementary Protocol A/SP.1/01/05, and Articles 51 and 57(1) of the Rules of the Court provide respectively as follows :

**Article 15.1 :** *“At any time, the Court may request the parties to produce any documents and provide any information or explanation which it may deem useful. Formal note shall be taken of any refusal.*

**Article 51 :** *“The Court may request the parties to submit within a specified period all such information relating to the facts, and all such documents or other particulars as they may consider relevant. The information and/or documents provided shall be communicated to the other parties.”*

**Article 57(1) :** *“The Court may at any time, in accordance with these rules, after hearing the parties, order any measure of inquiry to be taken or that a previous inquiry be repeated or expanded*

53. The Court recalls that as soon as it noticed that the Amnesty International report was produced along with the Plaintiff’s final written submission and that an objection had been raised by the Defendant, it decided to reopen the oral procedure, under Article 58 of its Rules of Procedure, to allow the Parties to address that issue.

54. After receiving oral and written submissions of the Parties on the admissibility and content of that report, the Court reserved its decision for the judgment.

55. Consequently, the Court concludes that even if Plaintiff Counsel failed to produce the report initially, he made up for that omission in accordance with the Rules of the Court, and that in the instant case, it cannot be successfully

maintained that there has been infringement on the Defendant's rights to fair hearing. The Court adjudges, without prejudice to the authenticity of the report, that the Amnesty International report, as produced by the Plaintiff, is admissible.

*iv) That certain facts brought by the Plaintiff have come under a three-year statute bar*

### **Argument advanced by the Federal Republic of Nigeria**

56. The Federal Republic of Nigeria maintained that the facts which occurred before 1990, in 1995, on 25 June 2001 (oil spill in Ogbodo), on 3 December 2003 (oil spill in Rukpokwu, Rivers State), in June 2005 (oil spill in Oruma, Bayelsa State), on 28 August 2008 and on 2 February 2009 (oil spills in Bodo, Ogoniland), have come under a three-year statute bar in line with the new paragraph 3, Article 9 of the 19 January 2005 Supplementary Protocol A/SP.1/01/05 which provides :

«            *any action by or against a Community Institution or any member of the Community shall be statute barred after three (3) years from the date when the right of action arose* »

### **Argument advanced by the Plaintiff**

57. Conversely, the Plaintiff affirmed that "the Defendants' arguments are fundamentally flawed, based on outdated or mistaken principles of law and cannot be sustained having regard to sound legal reasoning established by the ECOWAS Court's own jurisprudence, and other national and international legal jurisprudence". The Plaintiff argued that the position of the Federal Republic of Nigeria conceals the cumulative effect of the various causes of pollution experienced by the Niger Delta region for decades. It stressed that there is a considerable difference between an isolated event of pollution or of environmental damage and the continuous and repeated occurrence of the same event in the same region for years. It further contended that in regard to the facts it is relying on, notably the recent report by Amnesty International (2009), the Federal Republic of Nigeria cannot validly argue that the current events and situation have come under a three-year statute bar. It is the view of

the Plaintiff that the violations are still continuing as a result of the unceasing nature of the oil spills and the damage done to the environment. The Plaintiff concluded that Article 9(3) does not apply to the instant case.

### **Analysis of the Court**

58. In the instant case, the issue of statute of limitation raised by the Defendants based on facts that took place more than three years before the complaint was filed with the Court may be analysed in line with the date of the enactment of the ECOWAS 2005 Protocol which entrusted the Community Court of Justice with jurisdiction to entertain cases of human rights violation.
59. The facts that occurred before the Protocol of 2005 came into force cannot be taken into consideration in this case for the simple reason that the said Protocol cannot be applied retroactively.
60. As for the facts that occurred after the enactment of that instrument, their subjection to the statute of limitation depends on their characterisation as an isolated act or as a persistent and continuous omission that lasted until the date the complaint was filed with the Court.
61. Indeed, in the application lodged by the Plaintiff, the Federal Republic of Nigeria is faulted for omission over the years in taking measures to prevent environmental damage and making accountable those who caused the damage to the environment in the Niger Delta Region.
62. It is trite law that in situations of continued illicit behaviour, the statute of limitation shall only begin to run from the time when such unlawful conduct or omission ceases. Therefore, the acts which occurred after the 2005 Protocol came into force, in relation to which the Federal Republic of Nigeria had a conduct considered as omissive, are not statute barred.

## II- CONSIDERATION OF THE ALLEGED VIOLATIONS

63. The Plaintiff alleged violation of Articles 1, 2, 3, 4, 5, 9, 14, 15, 16, 17, 21, 22, 23 and 24 of the Charter, Articles 1, 2, 6, 9, 10, 11, 12.1, 12.2, 12.2(b) of the International Covenant on Economic, Social and Cultural Rights, Articles 1, 2, 6, 7 and 26 of the International Covenant on Civil and Political Rights, Article 15 of the Universal Declaration of Human Rights. The Plaintiff particularly brings claims in respect of violation of the right to an adequate standard of living – including adequate food – and the violation of the right to economic and social development.

### **Argument advanced by the Plaintiff**

64. Plaintiff argues that Article 11 of the International Covenant on Economic Social and Cultural Rights establishes “the right of everyone to an adequate standard of living-- including adequate food”. The right to adequate food requires States to ensure the availability and accessibility of food. Availability includes being able to feed oneself directly from productive land or other natural resources. They submit that the Nigerian government has clearly failed to protect the natural resource upon which people depend for food in the Niger Delta, and has contravened its obligation to ensure the availability of food in that thousands of oil spills and other environmental damage to fisheries, farmland and crops have occurred over decades without adequate clean-up. They referred to African Commission’s decision in the Ogoni case to the effect that Nigeria had violated the right to food by allowing private oil companies to destroy food sources and submitted that several years after this decision, the government of Nigeria has continued to violate its obligations under the Covenant and the African Charter by failing to take effective measures to enforce laws to prevent contamination and pollution of the food sources (both crops and fish) by private oil companies in the Niger Delta.

65. They submit that Article 6 of the ICESCR obliges State Parties to recognize the right of everyone to the opportunity to earn their living by work and as such the Government of Nigeria is obliged to take all necessary measures to prevent infringements of the right to earn a living through work by third parties.

66. On the right of everyone to an adequate standard of living they submit that it is linked with the rights to food and housing, as well as the right to gain a living by work and to the right to health.
67. On the right to health they refer to Articles 16 and 24 of the African Charter and Article 12.1 of the ICESCR and submit that the government of Nigeria has failed to promote conditions in which people can lead a healthy life due to its failure to prevent widespread pollution as a consequence of the oil industry which has directly led to the deterioration of the living situation for affected communities in the oil producing areas of the Niger Delta.
68. Frequent oil spills are a serious problem in the Niger Delta. The failure of the oil companies and regulators to deal with them swiftly and the lack of effective clean-up greatly exacerbates the human rights and environmental impacts of such spills.
69. Clean-up of oil pollution in the Niger Delta is frequently both slow and inadequate, leaving people to cope with the ongoing impacts of the pollution on their livelihoods and health.
70. There has been no effective monitoring by the Defendants of the volumes of oil-related pollutants entering the water system, or of their impacts on water quality, fisheries or health.
71. The Federal Government is yet to put in place modalities and logistics for the protection of the Niger Delta people as well as laws that will regulate activities in the Niger Delta and has not acted with due diligence to ensure that foreign companies operating in the Niger Delta do not violate human rights.
72. Plaintiff submits that by failing to deal adequately with corporate actions that harm human rights and the environment, the government of Nigeria has not only compounded the problem but has aided and abetted the oil companies operating in the Niger Delta in the violation of human rights.



### **Argument advanced by the Federal Republic of Nigeria**

73. The Defendants deny all the material allegations of fact put forward by the Plaintiff and required the strictest proof of the averments contained therein.
74. In denying the allegation that the oil spill led to poverty in the area, the Defendants contend that the oil exploration has no direct relation with poverty in the region and that the allegations thereof are speculative.
75. The Defendants, while admitting oil spillage, aver that most of the spillage is caused by the errant youths of the Niger Delta who vandalise the oil pipelines and kidnap expatriates and oil workers thereby making it difficult for the government to function there.
76. Defendants deny the allegation of avoidance to pay compensation by the oil companies and state that these companies had on many occasions paid compensation to identified victims of leakages and pollution on account of court orders or out of court settlements.
77. The Defendants further aver that compensation had always been paid to victims and any delays in the payments are brought about by internal disagreement among claimants.
78. While denying the Plaintiff's allegation of neglect, Defendants aver that by the provisions of the Constitution of the Federal Republic of Nigeria, 13% of the oil revenue goes to the oil producing areas.
79. They also aver that the Federal Government established OMPADEC (Oil Minerals Producing Area Development Commission) which later crystallised into NDDC (Niger Delta Development Commission) with the responsibilities among others to ***formulate policies ,implement projects and programmes, liaise with the various oil mineral producing companies on all matters of pollution prevention and control, tackle ecological and environmental problems that arise from the exploration of oil mineral and advise the Federal***

***Government on the prevention and control of oil spillages, gas flaring and environmental pollution of the Niger-Delta area.***

80. The Federal Ministry of works also issues contracts for the construction of roads, bridges and other essentials of life in the Niger Delta.
81. The Federal Government established the Ministry of Niger Delta saddled with the responsibility of catering for the basic needs of the people of the Niger Delta and has put in place necessary legal tools for the protection of the Niger Delta Region as well as avenues for compensation to any inevitable victim of oil spill or pollution through various legislations which include the Oil Pipeline Act 1956, Petroleum Regulation Act 1967, Oil in Navigable Waters Regulation 1968, Petroleum Act 1969, Petroleum (drilling and production) Regulations 1969, Federal Environmental Protection Act 1988, Impact Assessment Act 1992, Oil and Gas Pipeline Regulations, 1995, Environmental Standards and Regulation Enforcement Agency (Establishment) Act 2006, The Environmental Guidelines and Standards for the Petroleum industry 2002, National Oil Spill Detection and Response Agency (Establishment) Act 2006, Harmful Waste Special Criminal Provision Act 1990 among others.
82. That it is the responsibility of a holder of a licence to take all reasonable steps to avoid damage and to pay compensation to victims of oil pollution or spill and any delays in payment of compensation are on account of challenges in courts as to who are rightly entitled to compensation.
83. They conclude that the Plaintiff has not established any of the allegations levelled against them as they are not in breach of any of their international obligations.
84. The Defendants also deny all the allegations by the Plaintiff on Defendants' lack of concerted effort to check the effect of pollution and recounted the legal frameworks put in place for the enforcement of rights by persons injured, regulation of the activities of oil prospectors and of sanctioning defaulters all in an effort to ensure a safe environment.

85. They point out that the Environmental Impact Assessment Act 1992 was adopted and applied towards assessing the possible impact of any planned activity before embarking on it. They referred to section 20 of the Nigerian Constitution which provides for the protection of the environment and submit that Defendants have put in place adequate legislative framework.
86. They submit that Article 2(1) of ICESCR lays down the basis for determining States' non compliance with the provisions of the Covenant. In that regard, the Defendant by virtue of section 13 of the Constitution adopted policies aimed at implementation of the provisions of the Covenant. That through the instrumentality of the Niger Delta Development Commission, the people of Niger Delta have been enjoying the rights contained in the Covenant and that the Defendants have discharged their obligations under the Covenant.
87. They refer to Plaintiff's allegation of violations of Article 16 of the African Charter and Article 12(1) of ICCPR and submit that in so far as Plaintiff made no prayers on them and led no evidence in proof, they are deemed abandoned.
88. On Plaintiff allegation of pollution, they submit that the existence of pollution needs to be proved by expert evidence or at least evidence of people affected supported by medical report; that having failed to so prove the Plaintiff's averments remain mere allegations.
89. They admit oil spillage but aver that as admitted by the Plaintiff, the spills are mainly as a result of vandalisation of pipelines and sabotage by youths of Niger Delta.
90. They refer to the Land Use Act which vests ownership of land in the Federal Government and submit that the issue of infringement of Article 14 of the African Charter does not therefore arise.

### **Analysis of the Court on the merits**

91. The Court notes that the Plaintiff alleges violation of several articles of the African Charter on Human and Peoples' Rights, the International Covenant on

Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights. The Court finds that considering all the instruments invoked, including the Universal Declaration of Human Rights, 29 articles were alleged to have been violated.

92. The success of an application for human rights protection does not depend on the number of provisions or international instruments the applicant invokes as violated. When various articles of different instruments sanction the same rights, the said instruments may, as far as those specific rights are concerned, be considered equivalent. It suffices therefore to cite the one which affords more effective protection to the right allegedly violated.
93. At any rate, it is incumbent upon the Court to shape out the dispute along its essential lines and examine no more than the violations which, in regard to the facts and circumstances of the suit, appear to it to constitute the heart of the grievances brought.
94. For the Court, the heart of the grievances is to be looked for in relation to the facts of the case it considers as established. In that light, although the report produced by Amnesty International may be in the public domain and may contain well known facts reported by other numerous sources (international organisations, the media, etc.), the Court is of the view that this report cannot on its own, alone, be considered as conclusive evidence. The report, as well as other well-known facts, constitutes for the Court a kaleidoscope of elements and indices that may specifically help enlighten it on the actual existence and scope of the problem. In the instant case, the Court upholds as decisive and convincing the facts on which there is agreement among the parties or those on which one of the parties does not raise objection while in a position to do so.
95. From the submissions of both Parties, it has emerged that the Niger Delta is endowed with arable land and water which the communities use for their social and economic needs; several multinational and Nigerian companies have carried along oil prospection as well as oil exploitation which caused and continue to cause damage to the quality and productivity of the soil and water;

the oil spillage, which is the result of various factors including pipeline corrosion, vandalism, bunkering, etc. appears for both sides as the major source and cause of ecological pollution in the region. It is a key point that the Federal Republic of Nigeria has admitted that there has been in Niger Delta occurrences of oil spillage with devastating impact on the environment and the livelihood of the population throughout the time.

96. Though the Defendant's contention is that the Plaintiff allegations are mere conjectures, this Court highlights and takes into account the fact that it is public knowledge that oil spills pollute water, destroy aquatic life and soil fertility with resultant adverse effect on the health and means of livelihood of people in its vicinity. Thus in so far as there is consensus by both parties on the occurrence of oil spills in the region, we have to presume that in the normal course of events in such a situation, to wit, consequential environmental pollution exist there. [Cf. Torrey Canyon (1967), Amoco Cadiz (1978), Exxon Valdez (1989), Erika (1999), Prestige (2002), Deepwater Horizon (avril 2010)]
97. In the face of this finding, the question as to the causes or liability of the spills is not in issue in the instant case. What is being canvassed is the attitude or behaviour of the Defendant, as ECOWAS Member State and party to the African Charter. Indeed, it is incumbent upon the Federal Republic of Nigeria to prevent or tackle the situation by holding accountable those who caused the situation and to ensure that adequate reparation is provided for the victims.
98. As such, the heart of the dispute is to determine whether in the circumstances referred to, the attitude of the Federal Republic of Nigeria, as a party to the African Charter on Human and Peoples' Rights, is in conformity with the obligations subscribed to in the terms of Article 24 of the said instrument, which provides: "*All peoples shall have the right to a general satisfactory environment favourable to their development*".
99. The scope of such a provision must be looked for in relation to Article 1 of the Charter, which provides: "*The Member States of the Organization of African Unity parties to the present Charter shall recognise the rights, duties and*

*freedoms enshrined in this Charter and shall undertake to adopt legislative or other measures to give effect to them. ”*

100. Thus, the duty assigned by Article 24 to each State Party to the Charter is both an obligation of attitude and an obligation of result. The environment, as emphasised by the International Court of Justice, “*is not an abstraction but represents the living space, the quality of life and the very health of human beings, including generations unborn*” (*Legality of the threat or use of nuclear arms*, ICJ Advisory Opinion of 8 July 2006, paragraph 28). It must be considered as an indivisible whole, comprising the “*biotic and abiotic natural resources, notably air, water, land, fauna and flora and the interaction between these same factors*” (International Law Institute, Resolution of 4 September 1997, Article 1). The environment is essential to every human being. The quality of human life depends on the quality of the environment.
101. Article 24 of the Charter thus requires every State to take every measure to maintain the quality of the environment understood as an integrated whole, such that the state of the environment may satisfy the human beings who live there, and enhance their sustainable development. It is by examining the state of the environment and entirely objective factors, that one judges, by the result, whether the State has fulfilled this obligation. If the State is taking all the appropriate legislative, administrative and other measures, it must ensure that vigilance and diligence are being applied and observed towards attaining concrete results.
102. In its defence, the Federal Republic of Nigeria exhaustively lists a series of measures it has taken to respond to the environmental situation in the Niger Delta and to ensure a balanced development of this region.
103. Among these measures, the Court takes note of the numerous laws passed to regulate the extractive oil and gas industry and safeguard their effects on the environment, the creation of agencies to ensure the implementation of the legislation, and the allocation to the region, 13% of resources produced there, to be used for its development.

104. However, compelling circumstances of this case lead the Court to recognise that all of these measures did not prevent the continued environmental degradation of the region, as evidenced by the facts abundantly proven in this case and admitted by the very same Federal Republic of Nigeria.
105. This means that the adoption of the legislation, no matter how advanced it may be, or the creation of agencies inspired by the world's best models, as well as the allocation of financial resources in equitable amounts, may still fall short of compliance with international obligations in matters of environmental protection if these measures just remain on paper and are not accompanied by additional and concrete measures aimed at preventing the occurrence of damage or ensuring accountability, with the effective reparation of the environmental damage suffered.
106. As stated before, as a State Party to the African Charter on Human and Peoples' Rights, the Federal Republic of Nigeria is under international obligation to recognise the rights, duties and freedoms enshrined in the Charter and to undertake to adopt legislative or other measures to give effect to them.
107. If, notwithstanding the measures the Defendant alleges having put in place, the environmental situation in the Niger Delta Region has still been of continuous degradation, this Court has to conclude that there has been a failure on the part of the Federal Republic of Nigeria to adopt any of the "other" measures required by the said Article 1 of African Charter to ensure the enjoyment of the right laid down in Article 24 of the same instrument.
108. From what emerges from the evidence produced before this Court, the core of the problem in tackling the environmental degradation in the Region of Niger Delta resides in lack of enforcement of the legislation and regulation in force, by the Regulatory Authorities of the Federal Republic of Nigeria in charge of supervision of the oil industry.
109. Contrary to the assumption of the Federal Republic of Nigeria in its attempt to shift the responsibility on the holders of a licence of oil exploitation (see paragraph 82), the damage caused by the oil industry to a vital resource of such

importance to all mankind, such as the environment, cannot be left to the mere discretion of oil companies and possible agreements on compensation they may establish with the people affected by the devastating effects of this polluting industry.

110. It is significant to note that despite all the laws it has adopted and all the agencies it has created, the Federal Republic of Nigeria was not able to point out in its pleadings a single action that has been taken in recent years to seriously and diligently hold accountable any of the perpetrators of the many acts of environmental degradation which occurred in the Niger Delta Region.
111. And it is precisely this omission to act, to prevent damage to the environment and to make accountable the offenders, who feel free to carry on their harmful activities, with clear expectation of impunity, that characterises the violation by the Federal Republic of Nigeria of its international obligations under Articles 1 and 24 of the African Charter on Human and Peoples' Rights.
112. Consequently, the Court concludes and adjudges that the Federal Republic of Nigeria, by comporting itself in the way it is doing, in respect of the continuous and unceasing damage caused to the environment in the Region of Niger Delta, has defaulted in its duties in terms of vigilance and diligence as party to the African Charter on Human and Peoples' Rights, and has violated Articles 1 and 24 of the said instrument.

## **REPARATIONS**

113. In the statement of claims the Plaintiff asks for an order of the Court directing the Defendants to pay adequate monetary compensation of 1 Billion Dollars (USD) (\$ 1,000,000,000) to the victims of human rights violations in the Niger Delta, and other forms of reparation the Court may deem fit to grant.
114. The Court acknowledges that the continuous environmental degradation in the Niger Delta Region produced devastating impact on the livelihood of the population; it may have forced some people to leave their area of residence in search for better living conditions and may even have caused health problems



to many. But in its application and through the whole proceedings, the Plaintiff failed to identify a single victim to whom the requested pecuniary compensation could be awarded.

115. In any case, if the pecuniary compensation was to be granted to individual victims, a serious problem could arise in terms of justice, morality and equity: within a very large population, what would be the criteria to identify the victims that deserve compensation? Why compensate someone and not compensate his neighbour? Based on which criteria should be determined the amount each victim would receive? Who would manage that one Billion Dollars?
116. The meaning of this set of questions is to leave clear the impracticability of that solution. In case of human rights violations that affect indetermined number of victims or a very large population, as in the instant case, the compensation shall come not as an individual pecuniary advantage, but as a collective benefit adequate to repair, as completely as possible, the collective harm that a violation of a collective right causes.
117. Based on the above reasons, the prayer for monetary compensation of one Billion US Dollars to the victims is dismissed.
118. The Court is, however, mindful that its function in terms of protection does not stop at taking note of human rights violation. If it were to end in merely taking note of human rights violations, the exercise of such a function would be of no practical interest for the victims, who, in the final analysis, are to be protected and provided with relief. Now, the obligation of granting relief for the violation of human rights is a universally accepted principle. The Court acts indeed within the limits of its prerogatives when it indicates for every case brought before it, the reparation it deems appropriate.
119. In the instant case, in making orders for reparation, the Court is ensuring that measures are indicated to guide the Federal Republic of Nigeria to achieve the objectives sought by Article 24 of the Charter, namely to maintain a general satisfactory environment favourable to development.

## **DECISION**

For these reasons, and without the need to to adjudicate on the other alleged violations and requests,

### 120. THE COURT,

Adjudicating in a public session, after hearing both parties, and after deliberating:

- Adjudges that it has jurisdiction to adjudicate on the alleged violations of the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights;
- Adjudges that SERAP has locus standi in the instant case;
- Adjudges that the report by Amnesty International is admissible;
- Adjudges that the Federal Republic of Nigeria has violated Articles 1 and 24 of the African Charter on Human and Peoples’ Rights;

## **CONSEQUENTLY,**

### 121. Orders the Federal Republic of Nigeria to:

- i. Take all effective measures, within the shortest possible time, to ensure restoration of the environment of the Niger Delta;
- ii. Take all measures that are necessary to prevent the occurrence of damage to the environment;
- iii. Take all measures to hold the perpetrators of the environmental damage accountable;

Since other requests asking for declarations and orders from the Court as to rights of the Plaintiff and measures to be taken by the Defendant, and listed in the subparagraphs of paragraph 19, have already been considered albeit implicitly, by this decision, the Court does not have to address them specifically.

## **COSTS**

122. The Federal Republic of Nigeria shall bear the costs.

123. The Federal Republic of Nigeria shall fully comply with and enforce this Decision of the Community Court of Justice, ECOWAS, in accordance with Article 15 of the Revised Treaty and Article 24 of the 2005 Supplementary Protocol on the Court.

Thus made, declared and pronounced in English, the language of procedure, in a public session at Ibadan, by the Court of Justice of the Economic Community of West African States, on the day and month above.

124. **AND THE FOLLOWING HEREBY APPEND THEIR SIGNATURES :**

– Hon. Justice Benfeito Mosso Ramos Presiding

– Hon. Justice Hansine Donli Member

– Hon. Justice Anthony Alfred Benin Member

– Hon. Justice Clotilde Médégan Nougbodé Member

– Hon. Justice Eliam Potey Member

125. **ASSISTED BY** Tony Anene-Maidoh Chief Registrar

APPENDIX F

COMMUNITY COURT OF JUSTICE,  
ECOWAS  
COUR DE JUSTICE DE LA COMMUNATE,  
CEDEAO  
IBUNAL DE JUSTICA DA COMUNIDADE,  
CEDEAO



No. 10 DAR ES SALAAM CRESCENT,  
OFF AMINU KANO CRESCENT,  
WUSE II, ABUJA-NIGERIA.  
PMB 567 GARKI, ABUJA  
TEL/FAX: 234-9-6708210/09-5240781  
Website: [www.court.ecowas.org](http://www.court.ecowas.org)

IN THE COMMUNITY COURT OF JUSTICE OF THE ECONOMIC  
COMMUNITY OF WEST AFRICAN STATES (ECOWAS)

HOLDEN AT ABUJA  
JUDGMENT DELIVERED ON 10<sup>TH</sup> JUNE, 2014

SUIT N°ECW/CCJ/APP/10/10  
JUDGMENT N°ECW/CCJ/JUD/16/14

BETWEEN:

THE REGISTERED TRUSTEES OF  
THE SOCIO-ECONOMIC  
RIGHTS & ACCOUNTABILITY  
PROJECT (SERAP) & 10 ORS

PLAINTIFFS

AND

THE FEDERAL REPUBLIC OF NIGERIA  
& 4 ORS

DEFENDANTS

BEFORE THEIR LORDSHIPS

|                                  |           |
|----------------------------------|-----------|
| Hon. Justice Benfeito M. Ramos   | Presiding |
| Hon. Justice Clotilde N. Medegan | Member    |
| Hon. Justice Eliam M. Potey      | Member    |

Assisted by: Mr. Tony Anene-Maidoh - Chief Registrar

Representations:

1. A. A. Mumuni with Olatigbe Olakitan & Shola Egbeyinka for the Plaintiffs.
2. Mr. R. N. Godwins, Solicitor-General, River State with O. Gbasam Esq. for the 3<sup>rd</sup>, 4<sup>th</sup> & 5<sup>th</sup> Defendants

**PARTIES:**

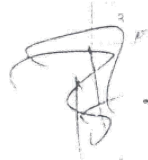
1. The 1<sup>st</sup> Plaintiff is a human rights Non-Governmental Organization registered under Nigerian laws, while the 2<sup>nd</sup> to 11<sup>th</sup> Plaintiffs are indigenes of Bundu Ama and neighbouring communities in Rivers State of Nigeria.
2. The 1<sup>st</sup> defendant is the Federal Republic of Nigeria, while the 2<sup>nd</sup> Defendant is the Chief Law Officer of the Federal Republic of Nigeria. The 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> defendants are the Governor and Chief Executive Officer, the Chief Law Officer and a public officer of the Rivers State Government, respectively.

**PROCEDURE**

3. By application dated 28<sup>th</sup> October, 2010 and lodged at the Registry of the Court on 29<sup>th</sup> October, 2010, the plaintiffs sued the defendants for alleged violations of the rights guaranteed by Articles 1, 2, 3, 4, 5, 6, 10, 11, 12, 13, 14 and 16 of the African Charter on Human and Peoples Rights; Articles 2, 3, 5, 7, 9, 12, 13, 17, 20, 21 and 25 of the Universal Declaration of Human Rights; Articles 2, 3, 6, 9, 10, 12, 22 and 26 of the International Covenant on Civil and Political Rights; Articles 2, 3, 5, 10, 11 and 12 of the International Covenant on Economic, Social and Cultural Rights.



4. The application was duly served on the defendants.
5. On the 12<sup>th</sup> of November, 2012, the plaintiffs filed an application for accelerated hearing, dated 11<sup>th</sup> day of November, 2010.
6. On 21<sup>st</sup> June 2011, the 3<sup>rd</sup> – 5<sup>th</sup> defendants filed an application dated 21<sup>st</sup> June for extension of time to file their defence and for deeming the attached statement of defence duly filed and served.
7. On 22<sup>nd</sup> June 2011, the 3<sup>rd</sup> to 5<sup>th</sup> defendants also filed a notice of preliminary objection to the jurisdiction of the Court to entertain the action due to 1<sup>st</sup> plaintiffs' lack of standing to institute same.
8. By application dated 19<sup>th</sup> September, 2011 and filed on 20<sup>th</sup> September, 2011, the 1<sup>st</sup> and 2<sup>nd</sup> defendants sought for extension of time to file their defence and for deeming the attached statement of defence as duly filed and served.
9. On 20<sup>th</sup> September 2011, the 1<sup>st</sup> and 2<sup>nd</sup> defendants filed a notice of preliminary objection to the Court's jurisdiction



dated 19<sup>th</sup> September 2011 on the 1<sup>st</sup> plaintiff's lack of standing to institute the action.

10. The plaintiffs filed two counter affidavits, dated 20<sup>th</sup> October 2011, in opposition to the Preliminary objections raised by the 1<sup>st</sup> and 2<sup>nd</sup> defendants and by the 3<sup>rd</sup>-5<sup>th</sup> defendants respectively.

11. Both parties made written submissions on the issues raised in the preliminary objection and, in view of the nature of the issues canvassed, decision on the preliminary objection was deferred to be taken at final judgment stage.

12. On 28<sup>th</sup> December 2011, the Amnesty International filed an *Amicus Curiae* brief pursuant to the inherent jurisdiction of the Court.

13. On 17<sup>th</sup> February 2012, the plaintiff filed an application pursuant to Article 43 of the Rules to call witnesses.

14. On 11<sup>th</sup> December 2012, the 3<sup>rd</sup> – 5<sup>th</sup> defendants filed a motion for leave to call witnesses.



15. On 12<sup>th</sup> February 2014, the 1<sup>st</sup> and 2<sup>nd</sup> defendants filed an application to withdraw their preliminary objections dated 19<sup>th</sup> September 2011.

16. On 3<sup>rd</sup> March 2014, plaintiffs filed their final address.

17. On 28<sup>th</sup> March 2014, the 1<sup>st</sup> and 2<sup>nd</sup> defendants filed a motion for extension of time to file their final address and for deeming the attached final address duly filed and served.

18. On 14<sup>th</sup> April 2014, the 3<sup>rd</sup> – 5<sup>th</sup> defendants filed an application for extension of time to file their final written address and for deeming the attached address duly filed and served.

#### **FACTS AS PRESENTED BY PLAINTIFFS**

19. The plaintiffs' case is that the Rivers State Government, with the complicity or support of the Federal Government, was planning a large-scale demolition of the City's waterfront settlement without adequate consultation with affected communities.

20. In July 2008, Rivers State announced that all waterfronts will be demolished and the Njemanze waterfront, a





community close to Bundu Ama, was demolished in August 2009. It is estimated that between 13, 800 and 19, 000 people were forcibly evicted from their homes. These evictions were carried out without adequate prior consultation with the residents and without giving adequate notice, compensation, alternative accommodation or legal remedies. Thousands of people, including children, women and the elderly, were left homeless and vulnerable to other human rights violations.

21. Also, on the morning of 12 October, 2009, government authorities, accompanied by security agents, wearing: regular Army camouflage uniforms and camouflage head gear; camouflage uniforms and red berets; Mobile police uniforms, Mobile police uniforms, and "RSVG" flack jackets, police uniforms and "S.O.S"/swift Ops. Squad flack jackets, and plain clothes agents wearing "JTF" flack jackets, went to Bundu waterfront community to conduct an enumeration and assess the value of building structures earmarked for demolition.

22. An enumeration had been attempted a few days earlier, on 6 October, but residents had gathered together at the entrance of the community. The security forces did not enter and the enumeration was not conducted. The



community vice-chairman, who was among those who had gathered to protest the enumeration, told Amnesty International he was manhandled by the security officers and threatened with lethal force.

23. Residents had learned of the second planned enumeration the day before and, on 12 October, a crowd gathered at the entrance to the community, next to the City's prison, to protest against the enumeration and the proposed demolitions. Those present at the protest described it as peaceful, with many women and children singing and chanting songs. At around 8.30am, two Mobile police (MOPOL) armoured personnel carriers approached the entrance of the community and parked next to the prison. At 9:00 am, a convoy of approximately 10 police agents and Army vehicles approached the prison junction. A small armoured vehicle leading the convoy, drove into the crowd.

24. Without any warning, the soldiers started shooting. They first fired shots in the air and drove their vehicles to the end of the road. Members of the community who were leading the protest told people not to run because, at the time, they believed that the government would not shoot to kill. The soldiers started shooting again, but this time, they fired shots into the crowd. Tamuno Tonye Ama, a 34 year-old man who

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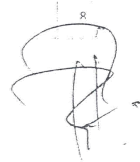

took part in the protest, was shot on his left thigh and the bullet is still lodged in his flesh.

25. The protesters tried to run away but they were chased and fired upon by the security agents, who fanned out through the community. Apart from those who were shot in their homes, most people were shot from behind, as they ran.

26. As people ran away, members of the security forces followed them into the waterfront, shooting as they went. According to witnesses, security forces continued right through the waterfront up to the waters' edge. There were bullet holes in buildings and structures along the route that the security forces used.

27. After the shooting, members of the security forces accompanied enumerators into the waterfront to continue with their work.

28. The plaintiffs contend that the above highlighted human rights, economic, social and cultural rights as well as civil and political rights, are recognized and guaranteed by the African Charter on Human and Peoples' Rights, the International Covenant on Economic, Social and Cultural Rights and the International Covenant on Civil and Political



Rights and other relevant human rights treaties to which Nigeria is a State party.

29. They thus ask the Court for the following reliefs:

- a. A declaration that the indiscriminate shooting into a crowd of unarmed protesters is unlawful and unjustifiable under any circumstance and a violation of international human rights obligations and commitments.
- b. A declaration that the indiscriminate shooting was unlawful and a violation of the right to life and dignity of the human person, the right to security and health.
- c. That the failure of the defendants and their agents to investigate and prosecute the perpetrators of the incident is unlawful.
- d. An order of injunction restraining the defendants and their agents from implementing any plan to carry out any enumeration in preparation for the "urban renewal" as non-conformity to the requirements under international human rights law would lead to further violation of the plaintiffs guaranteed human rights.
- e. An order directing the defendants and their agents to promote, respect, secure, fulfill and ensure the rights of the 2<sup>nd</sup>-11<sup>th</sup> plaintiffs previously listed.
- f. An order directing the defendants and their agents to pay adequate monetary compensation in the sum of \$100,000,000 (one hundred million dollars) to the plaintiffs, for violation of



their rights, and to provide other forms of reparation which may take the form of restitution, satisfaction or guarantees of non-repetition.

### DEFENDANTS' CASE

30. The 1<sup>st</sup> and 2<sup>nd</sup> defendants, in their defence, denied all material allegation of facts in their statement of claim, except for paragraphs B1, 2, 3, Di, ii, iii, vi, vii and viii, which were expressly admitted.

31. In addition, the 1<sup>st</sup> and 2<sup>nd</sup> defendants raised a preliminary objection to the jurisdiction of the Court to hear the case on the following grounds that:


- a. The 1<sup>st</sup> plaintiff lacks standing to institute the action.
- b. That under chapter iv Section 46(1) of the 1999 Constitution of the Federal Republic of Nigeria, it is the High Court of Nigeria that has the jurisdiction to hear this action.

32. The 3<sup>rd</sup> – 5<sup>th</sup> defendants, in their defence, averred that the occupiers of the building at the said waterfront were mere squatters.

33. That though Rivers State Government had plans to carry out some Urban Development Projects, including the demolition of illegal structures and buildings in Port Harcourt, it never intended to demolish all waterfront settlements. Further, the waterfront settlements ear-marked for demolition were those densely populated areas, including the Bundu waterfront, that were used as hideouts by hoodlums and miscreants, who have been deemed security risk to River State and other neighbouring States.

34. That before any demolition exercise was effected, the landlords of the waterfront were invited for meetings with the defendants, to discuss issues on settlement of the inhabitants, payment of compensation or outright purchase of the buildings in order to ameliorate their sufferings. And that most of the landlords were in support of the demolition exercise on satisfactory terms.

35. That in the case of the Bundu waterfront, earmarked for demolition, the Special Adviser to the 3<sup>rd</sup> defendant held meetings with the stakeholders and proposed alternative

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settlement or outright purchase and the stakeholders opted for outright purchase.

36. The Special Adviser then sent independent established Surveyors and Valuers to ascertain the number of structures at Bundu, to take census of its population, and calculate the value of the properties.

37. The Special Adviser with the surveyors visited 23 out of the 41 waterfronts in Rivers State, without any hindrance, successfully on the 6<sup>th</sup> day of October, 2009.

38. Having the same intention, they visited Bundu, but were harassed and beaten up by some hoodlums, who claimed that they had not been paid homage.

39. The Special Adviser, Mr. Theodore Georgewill, did an air broadcast to solicit for their understanding and to reassure them that what was being done was for the benefit of the owners of the squatter settlements and the government.

40. On the 12<sup>th</sup> of October, 2009, he went back to Bundu with another group of surveyors, as the first group of surveyors refused to go back due to the beatings.

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41. On getting there, they found that the entrance to Bundu had been barricaded with cars, commercial buses owned by the Bundu residents and crowd.

42. While attempting to remove the barricade, they heard gun shots directed at them, emanating from all directions especially from one uncompleted building.

43. For security reasons, they went to the Bundu waterfront with some mobile policemen to protect the surveyors against the reoccurrence of the previous incident and, when the shots got very serious, they called for backup, who came and shot 5 canister of tear gas in the direction of the shooting, which created pandemonium. As a result, people started running, resulting in some getting injured.

44. After the people ran away, the enumerators entered into the waterfront and carried out the exercise, as intended, in collaboration with the landlords of Bundu.

45. At about 4pm, on the 12<sup>th</sup> of October, 2010, the date of the incident, the police, led by Mr. Oni Johnson, the Chief Security Officer to the Governor of Rivers State, and others who went for the valuation and enumeration exercise, were

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informed that some Bundu residents were killed by the policemen.

46. No dead bodies were produced by any Bundu residents, despite enquiries by the police or soldiers for the State Criminal Investigation Department to carry out post-mortem exercise.

47. Then, between the 20<sup>th</sup> and 26<sup>th</sup> of October, 2009, the defendants saw publications in the "Weekly Star" and "Verite", containing photos of 2 dead people that were alleged to have been killed in the Bundu incident.

48. Defendants state that this was a set-up, as one of the dead persons had earlier died by drowning and his parents asked the police to release his corpse for burial and this was carried out.

49. That pursuant to the aforesaid Newspaper publications, the then Attorney General of Rivers State, Ken Chikere Esq., wrote the police asking for detailed investigation on the matter by the letter dated 9<sup>th</sup> November, 2009 and the police replied that the death occurred from the Bundu incident by the police report dated 23<sup>rd</sup> November, 2009.

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50. The police invited and obtained statements from the publishers of the Newspaper, who denied knowledge of the publication and admitted that the authors of the publications did so without verifying the circumstances of the death of Onyebuchi Ngozi, the deceased who was allegedly killed in the Bundu incident, and the 2 publishers, Prince Okaranto and Owei Sikipi, were charged for the offences.

51. In addition, the 3<sup>rd</sup> to 5<sup>th</sup> defendants raised a preliminary objection on the jurisdiction of this Court to entertain this action, on the following grounds:

- a. That the allegation of breach of rights by the plaintiffs is misconceived and a deliberate ploy to interfere with the executive powers of the 3<sup>rd</sup> defendant.
- b. That the 3<sup>rd</sup> – 5<sup>th</sup> defendants are not proper parties to the suit, not being Member States.
- c. That the suit is an abuse of process, being a proliferation of similar suit pending before the National court.

#### ANALYSIS OF THE COURT

52. The defendants raised preliminary issues for determination by this Court, which are summarized as follow:

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- a. That the 2<sup>nd</sup> – 11<sup>th</sup> Plaintiffs, not being residents of Bundu, do not have sufficient interest in the dispute emanating from the planned demolition for urban renewal in that community and, as such, they lack the standing to institute and maintain the suit. For the 1<sup>st</sup> plaintiff, the lack of standing is also based on the fact that it has not been affected in any way by the acts attributed to the defendants and there is no public interest to legitimize the complaint.
- b. That the 3<sup>rd</sup> – 5<sup>th</sup> defendants are not proper parties to the dispute because, not being ECOWAS Member States, they are not under the jurisdiction of the ECOWAS Court of Justice. Therefore, it is only a High Court in Nigeria that is competent to hear the case and, as such, this Court lacks jurisdiction to entertain same.
- c. That the Plaintiffs have not disclosed any cause of action against the 1<sup>st</sup> and 2<sup>nd</sup> defendants.

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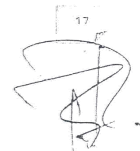

53. It is expedient to first consider these issues before delving into the substance of the Plaintiffs' case.

**On objection to Plaintiffs' standing to sue**

54. The Law of locus standi or standing to sue relates to the propriety of a litigant to institute an action. The standing focuses on the right of the party in the matter, either in terms of injury suffered or special interest possessed which is worthy of protection.

55. The plaintiffs' case, in a nutshell, is that because the defendants were planning to demolish the Bundu waterfront without due process, they embarked on a peaceful demonstration during which the defendants used armed security officers to disrupt the demonstration and, in the process, shot and wounded the 2<sup>nd</sup> -11<sup>th</sup> Plaintiffs. They allege that the police use of live ammunition on peaceful demonstrators is unjustified and a violation of their fundamental rights.

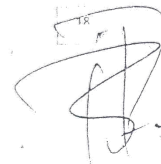
56. The arguments put forward by the defendants on plaintiffs' lack of standing due to their non-residence at the waterfront is made without due regard to the totality of the averments in the plaintiffs' pleadings and, so, misconceived. In situations



such as those described in the instant case, residence or lack of it, is not a condition for standing to sue, as their claim is not based solely on the demolition but also on the alleged violation by the defendants of the 2<sup>nd</sup> to 11<sup>th</sup> Plaintiffs' right to peaceful demonstration, through the use of force, such as shooting at the protestors. The 2<sup>nd</sup> to 11<sup>th</sup> plaintiffs therefore have the standing to institute the present action.

57. As to the 1<sup>st</sup> plaintiff, a Non-governmental Organization, the defendants contend that there is no public interest in the matter as to warrant it to institute and maintain this action.

58. The Court acknowledges that, according to a strict literal construction, only those directly affected by an act or omission violating their human rights can enjoy status of victim and have standing to lodge a complaint against the perpetrators of the said violation. However, even those jurisdictions which started embracing a strict literal interpretation of the concept of victim, for the purpose of human rights protection, have evolved into a more flexible approach in order to allow other persons, not directly affected by the alleged violation, to have access to the Court and seek justice, on behalf of the actual victim and to hold accountable the perpetrators. See this Court's decision in *ECW/CCJ/RUL/01/14 Mrs. Stella Ifeoma Nnalue & 20 Ors*



v. *Federal Republic of Nigeria* delivered on 31<sup>st</sup> January, 2014.

59. In the African context and in the framework of the African Charter, to which this Court has to pay due regard, it is worthy to note that since its inception, the African Commission on Human and Peoples' Rights has not been raising any objection to Non-governmental organizations standing to lodge complaints on behalf of individuals who, for any reasons, are deprived of means to have access to justice. As recognized by the doctrine, "*Although the African Charter in Article 55, by referring to communications other than those of States Parties' does not specifically identify or recognize the role of NGOs in the filing of complaints regarding human rights violations, in practice the complaints procedure before the Commission has been used mainly by NGOs who have filed complaints on behalf of individuals or groups alleging violation of human and peoples' rights enshrined in the African Charter*" – **The African Charter On Human and Peoples' Rights, The System in Practice 1986-2000, page 257.**

60. The same favourable approach to the NGO's standing to lodge complaints for human rights violation, even when they



are not direct victims, can be found in Rule 33, Section 1, paragraph (d) of the African Court on Human and Peoples' Rights Rules.

61. With the same purpose to ease access to Justice on Human Rights issues by the most vulnerable individuals and by impoverished communities, which, most of time, do not have means to lodge a complaint by themselves, in particular when the opposite party is a very powerful entity, the ECOWAS Court of Justice has reiterated in many instances that, in case of serious human rights violation, a Non-Governmental Organization may enjoy standing to file a complaint on their behalf or to join them in the same complaint, even if the applicant has not been directly affected by the violations it is complaining of. See this Court's decision in *Registered Trustees of the Socio-Economic Rights & Accountability Project (SERAP) V. The President of the Federal Republic of Nigeria & 8 Ors.*

62. In the light of the above, the objection on the standing of the plaintiffs cannot therefore be sustained.

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On whether the 3<sup>rd</sup> to 5<sup>th</sup> Defendants are proper parties and whether the Court has jurisdiction to entertain the case.

63. In considering whether the 3<sup>rd</sup> -5<sup>th</sup> Defendants are proper parties before this court, two issues need to be clarified. The first is the issue of involvement of the 3<sup>rd</sup> – 5<sup>th</sup> defendants in the facts exposed by the plaintiffs, while the second issue relates to the jurisdiction of this Court over the 3<sup>rd</sup> to 5<sup>th</sup> defendants

64. In addressing the first issue, there is need to consider the facts alleged by the plaintiffs, to make up their cause of action, which, in a nutshell, are the following: the Rivers State Government's plan to demolish the waterfront in Budun Community, where at least some of the plaintiffs resided; the readiness to conduct enumeration exercise and assess the value of buildings earmarked for demolition while there was a pending contention on compensation; the demonstration by the residents against the said demolition, without guarantee of being awarded just compensation; and, finally, the decision by the security agents to disperse the demonstration, resulting in the shooting and injuries to some of the plaintiffs.

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65. The above synopsis of the allegation by the plaintiffs shows the involvement of the 3<sup>rd</sup>- 5<sup>th</sup> defendants in the action complained about. The defendants, who did not deny their involvement in the events, justified the shooting of 5 canister of teargas by the security agents as a reaction to previous shot that had been fired by somebody placed at a building in the vicinity. In any case, they denied having wounded the plaintiffs or any other protester.


66. The plaintiffs, on their part, reiterate the allegation made in their pleadings, attributing to the security agents, acting under defendants' order, the initiative to disperse a peaceful gathering through shootings at the protesters which resulted in injuries on some of them. Therefore, according to the plaintiffs, both Rivers State and the Federal Republic of Nigeria are responsible for what they describe as violation of their human rights.

67. Based on the contentions of the parties, the issue of proper parties to stand as defendant in this dispute and the Court's jurisdiction over them arises because, as this Court has consistently maintained, only States that are contracting parties to the ECOWAS Revised Treaty and to the African Charter on Human and Peoples' Rights and other similar

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Human Rights Treaties can be sued before it, for alleged violation of human rights occurring in their territory. See, among others, the decision in *Peter David v. Ambassador Uwechue*, reported in 2010 CCJELR, where the Court held that only ECOWAS Member States and Community Institutions can be proper parties in disputes for alleged human rights violation. See also, in Suit no. *ECW/CCJ/APP/08/09 Registered Trustees of the Socio-Economic and Accountability Project V. The President of the Federal Republic of Nigeria & 8 Ors*, (supra).


68. Applying the above principles to the instant case, and taking into consideration that the Rivers State is neither an ECOWAS Member State, nor a contracting party to the African Charter on Human and Peoples' Rights or other similar human right Treaties whose enforcement is sought by plaintiffs, the Court holds that it has no jurisdiction over that defendant, for the same reasons put forth in *Peter David*, which also applies to 4<sup>th</sup> and 5<sup>th</sup> Defendants, who are mere officials of the said State. Therefore, those three defendants are not proper parties to this suit.

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69. With respect to the 1<sup>st</sup> defendant, the Federal Republic of Nigeria, the situation is different, since it is a contracting party to ECOWAS Revised Treaty and related protocols, as well as to African Charter and other human rights treaties invoked by the plaintiffs. In fact, by signing and ratifying those instruments, the Federal Republic of Nigeria solemnly accepted the jurisdiction of the Court over complaints lodged against it for alleged violation of human rights that occurs within its borders, no matter which entity is seen as responsible before the municipal law.

70. In fact, by virtue of Articles 9(4) and 10(d) of the Supplementary Protocol A/SP.1/01/05, this Court has jurisdiction to determine cases of violation of human rights that occurs in any ECOWAS Member State and it is for the concerned State, as a sovereign country, to respond before the ECOWAS Court of Justice for alleged breach of its international obligations arising from a treaty to which it is a party.

71. In its judgment in the action between Private Alimu Akeem and Federal Republic of Nigeria, Judgment N° ECW/CCJ/RUL/05/11, this Court stressed that its jurisdiction cannot be in doubt once the facts adduced are related to human rights violation, as indicated by its own

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case law (Cf Judgment N° ECW/CCJ/RUL/02/10 of 14 May, 2010 APP/07/08, Hissein Habre v Senegal, paragraphs 53, 58 and 59; Judgment N° ECW/CCJ/JUD/05/10 of 8<sup>th</sup> November, 2010, in the case ECW/CCJ/APP/05/09 of Mamadou Tandja v Niger paragraph 18(1)(b).

72. As has been consistently held by this Court, the mere allegation that there has been violation of human rights in the territory of a Member State is sufficient *prima facie* to justify the jurisdiction of this Court on the dispute, surely without any prejudice to the substance and merits of the complaint which has to be determined only after the parties had been given opportunity to present their case, with full guarantees of fair trial.

73. The Federal Republic of Nigeria contends that the competent court to adjudicate on the dispute between the parties is a domestic court, more precisely the Rivers State High Court, where the case is pending.

74. However, that argument seems to be misconceived, because when the complaint is based on allegations of human rights violations, as it is in the instant case, the



Community Court of Justice cannot give up its jurisdiction in favour of a domestic court, on the assumption that local remedies shall be exhausted, since this is not a requirement imposed on the victims to have access to the ECOWAS Court of Justice. In fact, what the Protocol on the Court establishes, in Article 10 Section (d) Subparagraph (ii), as an impediment to the Court's jurisdiction is the fact that "*the same matter has been instituted before another international court for adjudication*".

75. Therefore, the circumstance that the matter is already pending not before an international court, but before a national court, cannot be taken as an obstacle to the ECOWAS Court jurisdiction. See, among several cases, the decision in *Suit no. ECW/CCJ/APP/07/11 Valentine Ayika V. Republic of Liberia*.

76. In applying the above decisions to the present case, the Court holds that pendency of the suit before a domestic court cannot oust its jurisdiction to determine this case on alleged human rights violation.

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ON DEFENDANTS OBJECTION ON THE CAUSE OF ACTION

77. A cause of action can be described as the reason or the facts that entitle a person to sue or bring his case to the court, or a factual situation that entitles one person to obtain from the court a remedy against another person. (Letang v. Cooper [1960] 2 All ER 929.

78. According to the facts alleged by plaintiffs in their pleadings, the reason why they bring the case against the defendant, the Federal Republic of Nigeria, is that a public entity was planning to demolish a waterfront in Bundu Community for urban renewal purpose, without giving the residents previous assurance of being awarded just compensation. For that reason, the plaintiffs and other residents decided to embark on a peaceful demonstration to express their opposition to that exercise. According to plaintiffs' narration, that peaceful demonstration had been dispersed by security agents, who shot at the demonstrators injuring some of them, namely the plaintiffs. Considering that the planned demolition and the action by the security agents, who dispersed their peaceful demonstration with the use of force, substantiate a violation of their human rights, whose enjoyment the Federal Republic of Nigeria is under international obligation to ensure, they decided to bring that

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defendant to the Court to seek justice and remedy for the said violation.

79. We are thus persuaded that the plaintiffs, by alleging facts from which can be inferred, at least *prima facie*, a remote possibility that the Defendants may have violated their human rights, have established in their pleadings an arguable cause of action.

#### ON THE MERITS

80. Having dealt with all preliminary objections raised by the defendants, it is now time to move into the merits of the case.

81. In the bid to establish their case, the plaintiffs called five witnesses who testified on the facts alleged in their pleadings. Through the witness testimonies, plaintiffs also tendered documentary evidence that were admitted by the Court for further consideration.

82. PW1, in his evidence, stated that, on 12 October, 2009, he was on his way to work when he saw many people, children, women and men protesting at Bundu Junction; that he saw

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armoured cars and Hilux vehicles loaded with military and police men moving towards the crowd; that the security men started shooting at the protestors who started running away; that in the process he was shot. He was taken to a hospital where he was operated upon and the bullet removed. He tendered the medical report. Under cross examination, he admitted not knowing the type of gun the bullet came from but maintained he was shot by the police.

83. PW2 told the court that, on 12 October 2009, the community town crier announced that residents should all go to Bundu to protest against the proposed demolition and so they all went with placards, singing and dancing. That he saw an armoured car driving towards the protesters, followed by some Hilux vehicles loaded with soldiers who then jumped down and started shooting at the protesters. He was running when he felt an impact on his left-side and blood rushing out of him. He realized he was shot and shouted for help at one Tanye Ama, who was running in front of him, before he passed out, and later recovered consciousness in a hospital, where he had been admitted and treated. He was discharged from hospital on 18<sup>th</sup> October, 2009. He tendered his medical reports. He concluded by saying that the injury has affected his work as a bricklayer and, as a result, his income has greatly reduced due to his inability to perform strenuous masonry jobs.

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84. PW3 testified that she is from Bundu waterfront and was shot while at home. That she had earlier heard gunshots, went outside and learnt soldiers were shooting. She was in the house when the bullet hit her on the leg and she was taken to Teme Clinic, where her leg was operated on. She was admitted for about four days and discharged while the iron they put in her leg was left inside for about 6 months. She said she was a student and lost a school-year due to the injury.

85. PW4 told the Court that on 12<sup>th</sup> October 2009, he, in company of others, walked to Bundu to join the people about the protest; That when he arrived at the Bundu waterfront, he saw two APC armoured tankers and about 7 to 10 Hilux vehicles filled with soldiers and policemen parked close to the prison and he called the Director of CMAP, Michael Umemedimo, and told him what was happening; That the armoured car was manned by a man in Army camouflage uniform; That the armoured tanker driver drove towards the protestors and started shooting at the protestors while the security officers in the Hilux vehicles also jumped down and started shooting at the protestors; That he observed two people shot before he ran into the NPA Quarters for safety; That he then called one Ankio Briggs and Lucy Freeman and told them what was

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happening and, also, sent text messages to Senator George Sekibo, Barrister John Kalipa, a Member of House of Representatives, as well as the Governor to inform them of the happenings and ask for their intervention. He also narrated the steps he took to send the injured to hospital for treatment. He also stated that he recorded some of the events of that day with his camera. Under cross-examination, the witnesses confirmed that some of the people whose houses were demolished in another settlement were compensated but insisted that not all the people were compensated. He affirmed that it is the responsibility of the 3<sup>rd</sup> – 5<sup>th</sup> defendants to embark on the development of the state. He agreed that he is not a resident in Bundu but was involved in organizing the protest.

86. PW5 told the Court how he was alerted by PW4 of the happenings on the 12<sup>th</sup> of October, 2009 and the part he played. He tendered a video clip of some of the events recorded by PW4 and himself. Under cross-examination he stated that he contributed materials for the Amnesty International report but that he is not a staff of Amnesty International. He stated that he learnt that someone was killed, as contained in two newspaper reports but that he has no medical report of the death. He admitted that the Governor refuted the incident of the 12<sup>th</sup> of October but

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stated that he verified the governor's statement and found them to be false. He admitted not discussing with the Governor, as he did not consider it necessary

87. The 1<sup>st</sup> and 2<sup>nd</sup> defendants called no witnesses, while the 3<sup>rd</sup> to 5<sup>th</sup> defendants called one witness.

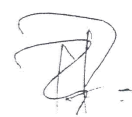
88. DW1 states that he is the Special Adviser to the Governor of Rivers State on Waterfront Development. He based his evidence on the video clip tendered by PW5, as well as the briefing he got from field staff. He stated that the video clip did not show that any of the plaintiffs suffered injuries at the hands of the defendants. He tendered the master plan of the Urban Renewal Project of the waterfronts and maintains that it is the Federal Government that controls the police and military in Nigeria. Under cross-examination, he admitted that the protest was peaceful and, as such, there was no need to call for security reinforcement.

89. It is trite that an evidence that is uncontroverted is taken as admitted. The statements made by the plaintiffs' witnesses, which were not in any way challenged by the Defendant, the Federal Republic of Nigeria, provide this Court with enough



grounds to establish as truth the allegation that, on 12<sup>th</sup> October, the 2<sup>nd</sup> to 11th plaintiffs were taking part in a peaceful demonstration against the proposed demolition of Bundu waterfront settlement by the Rivers State Government, when in a bid to disrupt the protesters the military personnel shot and injured some of the plaintiffs. No serious reason has been given, no evidence has been led or read during the trial to justify the decision taken by the security forces to disrupt that peaceful demonstration and to shoot at the demonstrators injuring some of them. Even the single witness called by the Defendant, the Rivers State, confirmed under cross-examination that the demonstration was peaceful and that there was no need to call for reinforcement of security agents. He went further to state that in the Federal Republic of Nigeria, police and military are under Federal Government control. The Federal Republic of Nigeria did not challenge that testimony in any way.

90. This Court also takes judicial notice of the fact that in Nigeria, the Police and Armed Forces, are under the exclusive control of the Federal Government. The police and army are thus agents of the Federal Government.



91. Article 11 of African Charter on Human and Peoples'

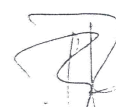
Rights provides that *"every individual shall have the right to assemble freely with others. The exercise of this right shall be subject only to necessary restrictions provided for by law, in particular those enacted in the interest of national security, the safety, health, ethics and rights and freedom on others"*.

92. Article 21 of International Covenant on Civil and Political

Rights also guarantees the same right, in the following terms: *"The right of peaceful assembly shall be recognized. No restrictions may be placed on the exercise of this right other than those imposed in conformity with the law and which are necessary in a democratic society in the interests of national security or public safety, public order (ordre public), the protection of public health or morals or the protection of the rights and freedoms of others ».*

93. According to a definition given by OSCE Guidelines,

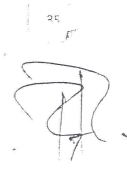
*"freedom of peaceful assembly is a fundamental right that can be enjoyed and exercised by individuals and groups, unregistered associations, legal entities and corporate bodies. Assemblies may serve many purposes, including the expression of diverse, unpopular or minority opinions. The*



right can be an important strand in the maintenance and development of culture, such as in the preservation of minority identities. The protection of freedom to peacefully assemble is crucial to creating a tolerant and pluralistic society in which groups with different beliefs, practices or policies can exist peacefully together.” – **Guidelines on Freedom of Peaceful Assembly, p. 15.**

94. In the words of some experts, “the purpose of the right to peaceful assembly is to allow people to come together and express, discuss, and protect their common interest” (Harris, O’ Boyle and Warbrick, Law of the European Convention on Human Rights , Oxford University Press, 2009, p. 417).

95. For INTERIGHTS “The freedoms of peaceful assembly and association provides space for the development of civil and political society, an arena for people to express different views, values and interest, and a platform for such views, values and interests to be heard”. – **INTERRIGHT, Freedom of Peaceful Assembly and Association under the European Convention on Human Rights, a Manual for Lawyers, July 2010, p. 2.**



96. The Federal Republic of Nigeria is a contracting party to both the African Charter on Human and Peoples' Rights and the International Covenant on Civil and Political Rights and, as such, is under strict obligation to ensure the free enjoyment of the right to peaceful assembly by all individuals living in its territory.

97. By failing to prevent the violation of the plaintiffs' right to peaceful assembly or to carry out a thorough investigation on the violation of that right, in order to hold accountable those responsible for the unlawful disruption of that peaceful demonstration that took place in Bundu Community on 12 October, 2009, and to provide remedy for the victims of the arbitrariness of the security agents acting under public authority control, the Federal Republic of Nigeria has breached its international obligation arising from the African Charter on Human and Peoples' Rights and the ICCR and shall be held accountable, accordingly.

98. The Court has reiterated in many instances that, in case of serious violation of Human Rights, the victim may be awarded an equitable compensation. In the instant case, taking into consideration all circumstances surrounding the

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events, namely the injuries and distress suffered by the plaintiffs, equitable reparation shall be awarded to them.

99. Plaintiffs Jonathan Gbokoko, Joy Williams and Mark Bomowe presented documentary evidence of injuries suffered and the reduction in their earning capacity as a result of the actions of the security forces of the Federal Republic of Nigeria.

#### DECISION

For these reasons,

The Court adjudicating in a public hearing, and after hearing both parties and after deliberations, hereby:

- a) Holds the Application filed by the Plaintiffs admissible
- b) Declares that it has no jurisdiction over the 3<sup>rd</sup> to 5<sup>th</sup> Defendants, which are not proper parties in the suit.
- c) Holds the Defendant, the Federal Republic of Nigeria, in violation of its obligation to guarantee the Plaintiffs' right to peaceful assembly, as provided by Article 11 of the African Charter on Human and Peoples' Rights and Article 21 of the International Covenant on the Civil and Political Rights.

