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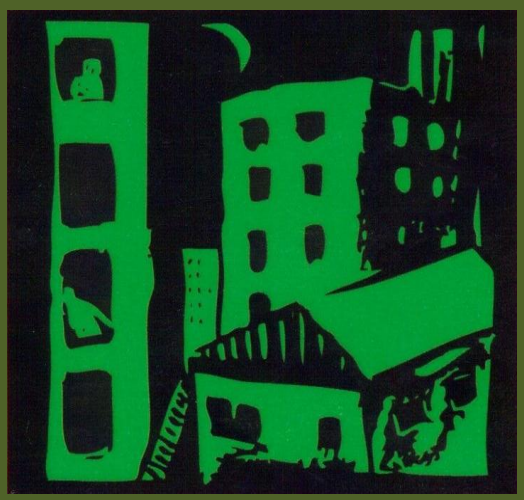

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Human rights litigation using international human rights law: The IHRDA experience

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1 INTRODUCTION

Africa is a continent with its own unique peculiarities and a complex cycle of problems: poverty, hunger and malnutrition; deeply rooted gender inequalities and inequities; discrimination based on ethnic differences; marginalisation of minorities; diseases; persistent civil strife; abuse of state power and

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resources as shown by arbitrary detentions, extra-judicial executions, and rampant corruption; foreign exploitation of resources; as well as impunity and many other forms of ills that frustrate meaningful enjoyment of human rights by all.[1] Confronting these ills requires a reinforcement of multiple strategies and efforts by various stakeholders including states and civil society.

The emergence of the African Charter on Human and Peoples' Rights (ACHPR) and a proliferation of kindred instruments establishing bodies with the mandate to handle communications[2] alleging violations of human rights that have not been effectively redressed by national jurisdictions, stands as a set of concrete steps showing a semblance of commitment by states towards respect and promotion of human rights on the continent. In the main, the existence of these bodies with flexible practices and procedures for handling complaints provides an excellent opportunity for litigation to be used for the vindication of rights where domestic systems either fail, or are reluctant to remedy violations. To date, litigation before supra-national bodies is spearheaded by non-governmental organisations (NGOs) acting on behalf of individual victims or indeterminate numbers of victims.

The experiences of various NGOs in prosecuting communications before the African human rights protection mechanisms, speak to interesting lessons that should inform a broader agenda for reform of these mechanisms and their practices and procedures, towards better delivering of human rights to people. In the ensuing discussion, the author endeavours to highlight a few successes and challenges in litigating human rights before supra-national bodies, using the ACHPR and related instruments, by relating the experiences of the Institute for Human Rights and Development in Africa (IHRDA) in litigating human rights violations, using the ACHPR and related human rights instruments enforceable before African human rights protection mechanisms.

2 IHRDA AND ITS LITIGATION OBJECTIVES, STRATEGIES AND EXPERIENCES

IHRDA is a pan-African NGO established in 1998; amongst other objectives,[3] it aims to contribute towards the realisation of an African continent where all have access to

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[1] Dankwa EVO "Foreword" in Viljoen F *International human rights law in Africa* (2007).

[2] The African Commission on Human and People's Rights' established under Art 30 of the ACHPR; the African Court on Human and Peoples' Rights (ACtHPR) established under the Protocol to the ACHPR on the Establishment of an ACtHPR (Court's Protocol); and the African Committee of Experts on the Rights and Welfare of the Child (ACERWC) established under the African Charter on the Rights and Welfare of the Child (ACRWC).

[3] IHRDA's work is comprehensively modelled as "defend, educate, and inform." Litigation, which entails provision of pro bono legal services to victims of human rights violations and/or launching cases on their behalf falls under the "defend" category. The 'educate' label refers to capacity building in the justice sector. Among others, IHRDA trains judicial officers, lawyers, police officers, human rights activists and other justice sector players on international human rights standards, and the practice and procedure of African supra-national human rights complaints handling mechanisms. The "inform" label refers to IHRDA's publication work which includes online reporting of case law and related materials from all the African continental and sub-regional human rights complaints handling mechanisms.

justice based on human rights standards, as proclaimed primarily in sub-regional, regional, and global instruments to which African states are parties. Towards this vision, IHRDA conducts impact litigation before supra-national mechanisms and before national courts, in addition to other established but evolving strategies for advancing human rights.

2.1 IHRDA's litigation objectives

IHRDA ardently believes that litigation can effectively achieve strategic outcomes that would bridge the gap between *rightoric*[4] and actual enforcement of rights to ensure the ultimate enjoyment of rights by all. Notably, litigation can document and confront a legal system's failures and inequities, in so doing helping to reform existing laws, policies and entrenched institutional practices that hinder or prevent vulnerable groups from participating effectively in society. Litigation can also declare new rights[5] and enforce rights that existing laws guarantee, but which remain esoteric in practice. In emerging democracies characterised by lack of awareness or knowledge about human rights, litigation plays the educational utility of: teaching courts about human rights norms and the legal possibilities for vindication of rights; increasing public awareness; and emboldening apathetic victims of human rights violations to come forward and seek remedies.

Furthermore, litigation confronts impunity by helping change bureaucratic and adverse social attitudes towards the law, thereby nurturing a culture in which government and private entities respect and enforce human rights. Underlying IHRDA's[6] litigation work are the objectives of contributing to the development of strong and sound African human rights jurisprudence, and securing the integration of as many international human rights norms as possible into domestic legal systems, which are more accessible to the greater majority than supra-national mechanisms. Thus more broadly, litigation complements a robust socio-political movement, or fosters mobilisation of critical stakeholders into coalitions that drive political action towards genuine social changes.

IHRDA's publication work is aimed at providing the necessary information and tools for human rights defenders to achieve their goals in the protection of human and peoples' rights.

[4] "Rightoric" is derived from "rhetoric" and "rights", and refers to the credibility gap between the proclamation of rights and their enforcement. See Dankwa (2007).

[5] For example the African Commission on Human and Peoples' Rights has declared that even though the right to housing and shelter is not expressly guaranteed under the ACHPR, it is still guaranteed by a combined reading of the rights to property, the best attainable state of health, and protection of the family as a basic unit of society: see Communication No. 155/96 – *Social Economic Rights Action Centre (SERAC) and another v Nigeria*. Available at http://caselaw.ihrda.org/doc/155.96/view/ (accessed 11 April 2013).

[6] Hershkoff H & McCutcheon A "Public Interest Litigation: An International Perspective" in McClymont M & Golub S (eds) *Many Roads to Institute for Human Rights and Development in Africa (IHRDA) and Open Society Justice: The law-Related Work of Ford Foundation Grantees Around the World* (2000) at 283.

2.2 IHRDA's litigation approach

To achieve these objectives, IHRDA uses international human rights law: seeking the application of international human rights standards in domestic courts and taking cases to supra-national mechanisms where domestic efforts do not succeed. In this regard, IHRDA chooses strategic cases and victims, with reform interests in mind, in addition to securing justice for the victims. Such strategic cases are also used to discover broader patterns of entrenched inequities, which are then sought to be addressed by litigation, thereby initiating desired social changes. Consequently, IHRDA's litigation strategies are often informed by a model of "private enforcement for public benefit" or group representation, where a single case is used to vindicate the rights of many individuals or their broader communities.

It is necessary to point out that litigation does not always end in favour of the complainants or secure a desired objective. Some cases are dismissed for various reasons, and the implications of such a result can boomerang on the goals of the actual complainants, and jeopardise the interests of communities. However, even where this is the case, the mere fact that a complaint was formally raised to confront a particular injustice, helps to focus public attention and initiate socio-political dialogue, which eventually shapes public opinion in favour of reform. The following discussion highlights how IHRDA has used international human rights law at regional and domestic levels in pursuit of the aforementioned objectives using a combination of the above approaches.

2.3 IHRDA's litigation experiences

Since its establishment in 1998, IHRDA with its strategic partners has worked on cases at both regional and domestic levels, and recently supported and contemplated litigation before sub-regional mechanisms, all in Africa. The cases have dealt with a range of themes, including: political rights in Mauritania; refugee rights in Guinea; detainee rights in Congo-Brazzaville; the right to be protected from torture and the right to life in Democratic Republic of Congo (DRC); fair trial rights in Ethiopia; citizenship, nationality and children's rights in Kenya; migrants rights in Angola; political rights in Swaziland; freedom of expression in Zimbabwe; and non-discrimination (indigene-settler divide), right to housing in the context of development/urbanisation related forced evictions, right to life (extra-judicial executions), and fair trial(pre-trial detention) in Nigeria. Again, the case outcomes have varied. The ensuing account will not tackle all the above mentioned cases, but rather focus on a few to demonstrate how the strategic objectives highlighted above were pursued, and suggest the efficacy of litigating human rights violations, especially at the regional level.

2.3.1 *Confronting systemic marginalisation of children of Nubian descent in Kenya*

IHRDA & OSJI v. The Government of Kenya [7] was before the African Committee of Experts on the Rights and Welfare of the Child (ACERWC). It dealt with the systematic denial of Kenyan nationality and consequent rights to children of Nubian descent born and living in Kenya. The brief facts are the following. The Nubians descended from the Nuba Mountains in present day Sudan and were forcibly conscripted into the colonial British army in Kenya in the 1900s. Upon demobilisation, their request to be returned to Sudan was allegedly declined by the colonial authorities and consequently they were forced to remain in Kenya. They were given land including the present day slum of Kibera in Nairobi, the capital of Kenya, but were not given any British citizenship. Upon Kenya's independence the question of Nubians' citizenship was not addressed and the Kenyan government regarded them as aliens because they did not have any ancestral homeland in Kenya and could not therefore also be granted Kenyan nationality.

The denial of Kenyan nationality was alleged, and the ACERWC found it, to be the root of many problems facing Nubians generally, such as, claims to land. The difficulties to be registered at birth and the subsequent denial of, or the arduous and unduly prolonged vetting process for acquiring Kenyan nationality led to children of Nubian descent remaining stateless. Consequently, owing to lack of recognition as Kenyan nationals, children of Nubian descent have difficulty in accessing health services and goods, and education compared to children born from persons recognised as proper Kenyan nationals. For example, locations inhabited mainly by people of Nubian descent were found to have fewer facilities for the provision of education and health services and goods compared to other locations inhabited mainly by those of different national origins. There was thus a discernible pattern of systematic marginalisation and discrimination based on national or ethnic origin, and this persisted for several generations without meaningful or any redress by the Kenyan government.

IHRDA and OSJI (Open Society Justice Initiative) launched the Communication on behalf of all children of Nubian descent affected by the above pattern of marginalisation with a view to securing changes that would see children of Nubian descent in Kenya enjoy the same status and rights as other Kenyan children. The case was launched before the ACERWC and alleged violations of Article 6 of the African Charter on the Rights and Welfare of the Child (ACRWC) relating to children's rights to be registered at birth and to acquire a nationality, and a breach of the obligation to

> undertake to ensure that Constitutional legislation recognize the principles according to which a child shall acquire the nationality of the State in the territory of which s/he has been born if, at the time of the child's birth, he is not granted nationality by any other State in accordance with its laws.

[7] *Institute for Human Rights and Development in Africa (IHRDA) and Open Society Justice Initiative (OSJI) (on behalf of Children of Nubian descent in Kenya) v The Government of Kenya*, (ACERWC) Decision No. 002/Com/002/2009 available at http://caselaw.ihrda.org/doc/002.09/view/ (accessed 7 August 2013).

Unfortunately, the respondent state did not defend the case. However the ACERWC endeavoured to deal with all the issues raised, including by anticipating and dealing with possible arguments from the respondent state. In the final analysis the ACERWC found the denial of and difficulties to be registered at birth and to acquire Kenyan nationality experienced by children of Nubian descent to amount to violations of their rights under Articles 6(2) and (3), and a breach of the obligation under Article 6(4) of the ACRWC. The ACERWC also found that imposing the above difficulties on children of Nubian descent only was unjustifiably discriminatory contrary to Article 3 of the ACRWC. As a necessary consequence, the ACERWC also found that the skewed neglect to provide the basic necessities for the best attainable state of health and access to education was in violation of the children's rights to access the best attainable state of health and to access education.

The finding of violations was the first layer of success in confronting the pattern of systematic marginalisation of children of Nubian descent. For the most part, being the first communication to be conclusively dealt with by an African complaints handling body, the decision is of ground-breaking utility in laying down African human rights jurisprudence in the area of children's rights. The second limb relates to the recommendations made as remedies for the identified patterns of violations, and herein lies the efficacy of addressing human rights violations using African mechanisms of the present prototype regarding the authority of their decisions and remedies. The bulk of consequent remedial recommendations made by the ACERWC were largely more of a restatement of state obligations laid down under the ACRWC and related instruments. In particular, the first recommendation required the respondent state to take all necessary legislative, administrative and other measures to ensure that children of Nubian descent acquire nationality and proof thereof at birth.

This is the essence of the obligation under Article 6(4) of the ACRWC. Skipping the second recommendation for a moment, the third recommendation required the state to implement its birth registration system in a non-discriminatory manner in accordance with Article 3, and to take all measures to ensure that Nubian children are registered at birth in accordance with Article 6(4) and the general obligations under Articles 1(1) and (2) of the ACRWC. The fourth recommendation relating to health and education was also formulated on the model of the general state obligation under Articles 1(1) and (2) of the ACERWC. It is perhaps only the second recommendation that could be said to have been specifically designed to address the unique circumstances of this case: the ACERWC recommended that children of Nubian descent whose Kenyan nationality is not recognised should be *systematically* availed the benefits of the measures to be adopted *as a matter of priority*.[8]

Thus in essence, what were stated as recommendations, were broadly restatements of the obligations of which the respondent state is already aware or should be deemed so. Indeed the requirement to report on the recommended measures within six months seems to have added little, if at all, to the process which the state might already have embarked on in discharge of its obligations at its own pace and on

[8] Emphasis supplied.

its own terms. Notably there is yet no formal report on the status of implementation of the recommendations, if any, even though follow-up missions by the ACERWC have reportedly been made. Moreover, as with the African Commission on Human and Peoples' Rights (ACmHPR), the prevailing attitude appears to be that recommendations of the ACERWC are not in the nature of a binding judgment, and states would generally treat the recommendations as such, maintaining that they reserve the right to decide whether to ultimately implement the recommendations or not. Until a formal report is published, the status of implementation of the recommendations remains uncertain.

The status of implementation of recommendations notwithstanding, as noted above, the case stands as ground-breaking in being the first decision laying down the jurisprudence of the ACERWC which is the only specialised body with a complaints handling mandate in respect of children's rights in the world. Further, the case helped to expose the systematic marginalisation of Nubian-Kenyan children, and bring to the attention of the international community the genesis of the social inequalities and inequities that inundate Nubian people living in the slum of Kibera and other locations largely inhabited by people of Nubian descent.[9] Incidentally, the fact that this was the first decision of the ACERWC also served to publicise the protective mandate of the body.

2.3.2 *Exposing vindictive justice in Ethiopia: Communication No. 301/05*

Haregewoin Gabre-Selassie and IHRDA (on behalf of former Dergue Officials) v. Ethiopia[10] was heard before the ACmHPR. It concerned fair trial rights of officials of the Mengistu regime (*Dergue* Officials) in Ethiopia which was ousted in 1991. Upon the overthrow of the Mengistu regime, the Dergue officials surrendered and were detained for collective responsibility for policies and abuses allegedly committed by the regime. A law was passed establishing a Special Public Prosecutor's Office to investigate and prosecute the officials and other persons responsible for various crimes during the regime's existence. The law suspended the application of provisions on time limitations for criminal proceedings, which stated that detainees could be held for as long as the Special Prosecutor wished. Habeas corpus was also suspended for Dergue officials. The detainees had no legal counsel for four years prior to the trial, only to realise during the trial, that they had been charged as a collective, with serious offences potentially involving consequences as serious as capital punishment. Their requests to be tried separately or by an international tribunal were declined. The detainees remained in detention for 15 years, and 12 years in, their trials had not been concluded.

A spouse of one of the detainees filed *Communication 301/05* before the ACmHPR in 2004 on behalf of the detainees, but was threatened and feared for her life and as a result she withdrew from the case. IHRDA applied and was allowed to join the case as complainant on behalf of the detainees. The Communication alleged violations of

[9] A related case dealing with the rights of adults of Nubian descent in Kenya, was born out of this Communication, and is before the ACmHPR and still pending determination.

[10] *Haregewoin Gabre-Selassie and IHRDA (on behalf of former Dergue Officials) v. Ethiopia* ACmHPR Communication 301/05.

the rights to be presumed innocent as guaranteed under Article 7(1)(b); to a speedy trial (tried within reasonable time) as guaranteed under Article 7(1)(d), and to equality before the law under Article 2, and breaches of general obligations under Article 1, all of the ACHPR.

The ACmHPR took about seven years to render a decision on the Communication, which it finally delivered on 24 October 2011. The parties were only notified of the decision about a year and a half thereafter. In its decision, the ACmHPR found the Federal Republic of Ethiopia to have violated the Dergue officials' rights to be presumed innocent, to a speedy trial, and to equality before the law, and to be in breach of the obligation to recognise the rights and freedoms guaranteed under the ACHPR and adopt legislative or other measures to give effect to them. Consequently, the ACHPR recommended that the respondent state should pay compensation to the victims for the violation of their right to be presumed innocent until proven guilty by a competent court or tribunal, and to be tried within reasonable time by such a court or tribunal. The ACmHPR required the state to report on the implementation of the recommendations within three months.[11]

To a great extent, the object of the outcome of *Communication No. 301/05* was the enforcement of rights recognised by the Federal Republic of Ethiopia at domestic and international levels, considering that Ethiopia is not only a party to various international treaties providing for the rights in question, but which also are part of the domestic law of Ethiopia by virtue of Article 9(4) of its Constitution. These rights were however ignored in respect of the Dergue officials who were alleged to have committed crimes by virtue of being officials of the deposed regime. The detentions and unduly prolonged prosecutions smack of vindictive justice demonstrated by the special prejudicial measures adopted by the government, including the passing of a specific law that suspended or simply glossed over the detainees' fair trial rights. In circumstances where officials of the deposed regime and their relations were threatened into silence, *Communication No. 301/05* served to expose the violations by the Ethiopian government in prosecuting them, while also securing an award of compensation for the victims. Whether the recommendation for compensation will be implemented remains to be seen.[12] .

2.3.3 *Mass expulsion of migrants from Angola*

In 2004, the Angolan government embarked on a campaign of expelling foreigners. The campaign was characterised by a systematic process of identifying and rounding up foreigners residing and working in the diamond mining regions of Angola, followed by detention and deportation. Esmaila Connateh and 13 others Gambian nationals were among the non-nationals rounded up and deported. They were in Angola with legal residence and work permits. The Angolan authorities did not give any reasons for the campaign, apart from the desire not to have foreigners working in the mining sector.

[11] This period is either an abridgment of the time stipulated under Rule 112(2) of the ACmHPR's Rules of Procedure (180 days), or a mistake on the part of the ACmHPR.

[12] The parties had barely been notified at the time of authoring this article.

The rounding up occurred without prior notice and without reasons being given. The abrupt manner of arresting non-nationals meant that they had no opportunity to arrange for the safekeeping of their property, let alone to engage the local authorities and challenge the deportations. During the arrests they were beaten, their immigration documents were confiscated, and money and other valuables were extorted from them. Before deportation, they were detained in filthy conditions that had, amongst other issues, no proper sanitation facilities, no proper food, and no provision for medical care.

IHRDA filed *Communication No. 292/04*[13] before the ACmHPR on behalf of Esmaila Connateh and 13 others, alleging that their deportation and the manner of their arrest, detention and deportation amounted to violations of their rights to equal protection of the law and prohibition of discrimination; to dignity and prohibition of torture, inhumane and degrading treatment; to personal liberty and protection from arbitrary arrest; to appeal to competent national authorities for vindication of rights; not to be arbitrarily expelled if legally admitted in a country, and the prohibition of mass expulsion of non-nationals; and to work, all as guaranteed under the ACHPR.

The ACmHPR claimed first that since the victims had no opportunity for recourse to local courts to challenge their arrests, detention and deportation, local solutions which ought to be exhausted in terms of Article 56(5) of the ACHPR were not available and therefore could not have been exhausted. Consequently the Communication was declared admissible. Secondly, the ACmHPR found the respondent state to have violated all the rights alleged to have been violated as above. The ACmHPR adopted several recommendations by way of remedy. However, only one recommendation was relevant in directly addressing the actual violations suffered by the victims. The particular recommendation required the respondent state to establish a Commission of Inquiry to investigate the circumstances under which the victims were expelled and ensure the payment of adequate compensation to all whose rights were violated. Notably, the case took four years from 2004 when it was filed to 2008 when it was decided. To date the respondent state has not complied with the recommendation in respect of the actual victims.

2.3.4 *Using international human rights law to confront forced evictions and discrimination in Nigeria*

As it is rightly put, "the struggle for human rights will be won or lost at national level."[14] This partly informs IHRDA's litigation at domestic level, such as in Nigeria, where attempts to address a range of issues through litigation are ongoing. IHRDA uses and develops innovative ways of using international human rights law before domestic courts. The experiences in Nigeria offer astounding lessons about what constitutional models for the reception and application of international law before domestic courts entail in terms of enjoyment and enforcement of human rights at a domestic level. The

[13] *IHRDA (on behalf of Esmaila Connateh & 13 others) v Angola* ACmHPR Communication No. 292/04.

[14] Donnelly J "Post-Cold War reflections on the study of international human rights" (1994) 8 *Ethics & International Affairs* 236 at 252.

author will consider two separate cases dealing with different endemic issues in Nigeria.

The first relates to the spate of forced evictions of entire communities (considered as squatters) and destruction of housing and other settlement edifices for purposes of urban development in Abuja, the Federal Capital of Nigeria. For quite some time the Federal Government of Nigeria has been forcibly evicting people from villages they have inhabited for several decades, some predating the very existence of the present state of Nigeria (considered indigenes). The evictions in Abuja are part of clearing what was by enactment acquired and designated as federal territory for purposes of developing Abuja as a capital to modern standards. The evictions have been fraught with irregularities, such as lack of or inadequate notice, lack of consultation with the affected communities prior to the evictions, lack of compensation or resettlement, all with debilitating impact on the livelihood of the evictees, with a skewed configuration of women and children.

IHRDA worked with its local partners and identified one strategic village of about 10,000 inhabitants that was under threat of imminent eviction in 2007/8. A case was lodged before the Federal High Court alleging that forced evictions without notice, consultation, compensation and resettlement would be a violation of a range of rights including the rights to property, and housing and shelter.[15] The case was, in addition to preventing the evictions, designed to declare the right to housing and shelter as a fundamental human right that is justiciable before Nigerian courts as implicitly guaranteed under the ACHPR, which Nigeria has not only ratified, but also enacted into domestic law. This was against the backdrop of the prevailing legal position that housing and shelter are not subject to legal protection as enforceable rights because they are prescribed as merely fundamental objectives and directive principles of state policy which by constitutional design cannot be the subject of adjudication in Nigeria. This position prevails in spite of domestication of the ACHPR under which the right to housing and shelter is implicitly guaranteed as declared by the ACmHPR.[16] Indeed the case was advanced mainly on the basis of international human rights jurisprudence.

However, the case was dismissed on the grounds that the members of the village earmarked for eviction being squatters according to Nigerian law, had no property rights to the land they occupied that could be protected by the Court. Further, the Court dismissed the claim about the right to housing and shelter, holding that it is not justiciable in Nigeria, the domestication of the ACHPR notwithstanding. The holding on non-justiciability of the right to housing and shelter was based on several authorities explicating upon the implications of domesticating the ACHPR. In the main, the courts have held that the ACHPR as domesticated, is legislation of an international flavour that is unlike other ordinary legislation and that it makes the provisions of the ACHPR enforceable before domestic courts. However, as with other similar constitutional

[15] *Yagba Tsav and 6 others v The Minister of the Federal Capital Territory Administration and the Federal Capital Development Authority*, Federal High Court, Abuja Division CV/437/08 (unreported).

[16] *Social and Economic Rights Action Centre (SERAC) and another v Nigeria* ACmHPR Communication 155/96. Available see (n 5 above) http://caselaw.ihrda.org/doc/155.96/view/ (Accessed 7 August 2013).

models, the Constitution is the supreme law and any law inconsistent with its provisions is void to the extent of the inconsistency. The enactment domesticating the ACHPR being a statute (albeit of an international flavour) is subordinate to the Constitution, and therefore cannot declare rights which the Constitution has expressly excluded from judicial enforcement. Accordingly, housing and shelter is one of the items under the fundamental objectives and directive principles of state policy which are expressly excluded from adjudication and thus cannot become justiciable by virtue of the generic enactment of the ACHPR into domestic law. Notably, Nigerian courts have not been keen to hold that the enactment of the ACHPR into domestic law amounts to the enactment of the corresponding items under the fundamental objectives and directive principles of state policy, into rights that are justiciable at domestic level. Moreover, the Court also held that the inhabitants, whether indigene or settler, would not be entitled to compensation upon forcible eviction. In short, the suit was dismissed *in toto* with one implication being that the Federal Government can proceed with the evictions without any consideration for compensation or resettlement – almost wantonly.

The following is a demonstration of the possibility of adverse outcomes from litigation. The case also illustrates the implications of a dualist constitutional model on the relationship between international and municipal laws, and what legislative domestication may entail for international human rights law. However as noted above, even though it was dismissed, the case helped to focus public attention on the plight of people facing arbitrary forced evictions in Nigeria. It was also a building block for further litigation, including litigation before supra-national bodies which, with the exception of the Economic Community of West African States (ECOWAS) Community Court of Justice, invariably require that domestic remedies should be exhausted before approaching an international tribunal.[17] Indeed the case is now pending filing before the ECOWAS Court.

The second case relates to discrimination and the attendant denial of rights based on ethnic origin and place of origin of Nigerians within Nigeria. Briefly, Nigeria is a federal state. Within the local government areas of each state, residents are classified, registered and issued with certificates as indigenes or settlers. Indigenes are basically those with ancestral ties to, and therefore natives of, a given local government area, while settlers are those considered to have migrated from other states or locations and settled within a given local government area. For settlers the period of time for which they have settled in a particular area does not change their status of being settlers, even for those born generations ago, as long as their origin is traceable to a migrant to the area. The means of ascertaining whether one is an indigene or a settler are not prescribed and therefore the determination is left to the discretion of local authorities

[17] *Article 19 v Eritrea* ACmHPR Communication 275/03. Available at http://caselaw.ihrda.org/doc/275.03/view/ (Accessed 7 August, 2013). The ACmHPR noted that "it is a well established rule of customary international law that before international proceedings are instituted, the various remedies provided by the state should have been exhausted." See also *Institute for Human Rights and Development in Africa (IHRDA) (on behalf of Esmaila Connateh and 13 others) v Angola* Communication No. 292/04. Available at http://caselaw.ihrda.org/doc/292.04/view/ (Accessed 7 August, 2013).

charged with the responsibility of issuing the certificates, and the process is fraught with abuses, corruption and ethnic and religious prejudices. The indigene settler classification has far-reaching consequences. Among others, in practice it is difficult to enrol for tertiary education in institutions of a state where one lives as a settler. It is equally almost impossible for a settler to run for political office or get employment in a given state or local government area. The indigene settler classification has been in existence for a considerable period of time and has resulted in the marginalisation of settlers in various ways.

IHRDA worked with local partners and assisted a group of systematically identified applicants who filed a case before the Kaduna Division of the Federal High Court against the Federal and State Governments and the Local Authorities of selected areas. The suit alleged, among others, that the indigene settler classification and the attendant disadvantages faced by those classified as settlers in accessing employment, education, political office and other benefits, amount to discrimination contrary to section 42(1) and several other provisions of the Constitution. The suit also alleged violation of several provisions of the ACHPR (Ratification and Enforcement) Act;[18] the ACHPR; the International Covenant on Economic Social and Cultural Rights (ICESCR); and the International Covenant on Civil and Political Rights (ICCPR). The primary object of the suit was to challenge the classification and its discriminatory ramifications faced by Nigerians considered settlers in given areas which results in their exclusion from certain benefits and opportunities.

However, ruling on preliminary objections raised by the respondent, the Court dismissed the suit for want of jurisdiction both in respect of the parties and the subject matter in accordance with applicable Nigerian procedural law. Hitherto the indigene settler classification and its ramifications had not been formally raised by way of complaint before a court of law. The case therefore raised public awareness of the phenomenon and its implications. It is also believed to have initiated discourse at multiple levels, which would eventually lead to innovative strategies for tackling the incidence thereof. Moreover, as with the evictions case, the case formed the basis for further litigation, including those before supra-national mechanisms, thereby raising the issues to a broader audience and stakeholders.

3 OBSERVATIONS ON THE EFFICACY OF SUPRA-NATIONAL MECHANISMS FOR THE ENFORCEMENT OF HUMAN RIGHTS

From the foregoing discussion, a few observations can be made in respect of the struggle to deliver the benefits of human rights as espoused in international human rights law to the people that need them most (because of the vulnerable position they occupy in society). First, supra-national human rights protection mechanisms provide a veritable alternative for victims to pursue justice for violation of their rights when national jurisdictions fail to deliver justice. The reasons for the failure of a domestic system may include the non-justiciability of certain categories of rights, such as, socio-

[18] Cap A9, Volume 1 of the Laws of Nigeria.

economic rights; weak, corrupt, and conservative judicial system; political intolerance shown by exacting reprisals on those seeking justice; and many others. Further, supra-national mechanisms have helped develop a critical African human rights jurisprudence which will gradually permeate domestic legal systems thereby contributing towards better protection of human rights at a domestic level.

The second observation relates to the efficacy of supra-national mechanisms to deliver justice based on human rights norms – a somewhat broader issue that cannot be exhausted here. I highlight two major concerns which are slowly adversely weighing on the hope that the dawn of supra-national mechanism excited.

The first concern relates to the effectiveness of remedies granted by international bodies of the kind we have currently. As noted above, remedies from the ACmHPR and the ACERWC are by way of recommendations by design, and this has regrettably led to the impression that decisions of these bodies are not in the nature of binding judgments. Whether the remedies recommended will eventually be implemented for the benefit of the victims has thus been left to the whims of the states found to have violated those rights. Indeed, a pervasive lack of implementation of the decisions of the ACmHPR remains a vexing issue to date. There are many other cases, such as the case of Gambian nationals deported from Angola, which illustrates the prevailing attitude that states have adopted towards recommendations of the ACmHPR.[19] It may legitimately be feared that decisions of the ACERWC may generally face the same challenge, since they are of the same nature as decisions of the ACmHPR. The genesis of the problem lies in the normative and institutional framework that was preferred for the enforcement of human rights at the African regional level. The possible solutions therefore lie in the reform of the obtaining enforcement framework, where solutions are recommendations with the inevitable consequence that states believe they possess latitude of discretion on how to implement the recommendations, or whether to do so at all. The advent of the African Court on Human and Peoples' Rights (ACtHPR) spells a new wave of hope in respect of the legal force of its decisions and possibility of implementation of the solutions it will order offending states to execute. However, this too is beset by a range of obstacles, especially relating to limitation of access to the Court by individuals, as many states have yet to make the requisite declaration accepting the jurisdiction of the Court to handle communications filed by individuals against them in accordance with Article 34(6) of the Protocol on the Establishment of the ACtHPR.[20]

The second concern relates to the time communications take to be concluded by these regional bodies. It is a long established and respected concept that "justice delayed is justice denied". Indeed, delaya in providing a solution to a violated right may

[19] *Institute for Human Rights and Development in Africa (IHRDA) (on behalf of Esmaila Connateh and 13 others) v Angola* ACmHPR Communication No. 292/04. Available at http://caselaw.ihrda.org/doc/292.04/view/ (Accessed 7 August 2013).

[20] Article 34(6) of the said Protocol provides that "at the time of ratification of this Protocol or any time thereafter, the State shall make a declaration accepting the competence of the Court to receive cases under Article 5(3) of this Protocol." Article 5(3) of the Protocol entitles NGOs with observer status before the ACmHPR and individuals to bring cases before the Court.

eventually render the solutions illusionary and of no practical benefit to the victim. As the ACmHPR noted, for example, in *Communication No. 301/05*[21], more than ten of the *Dergue* officials of the Mengistu regime died two years after the Communication was filed and five years before a decision was eventually delivered. It is even yet to be ascertained how many of the concerned detainees are still alive and would have access to the judgment awarded by the ACmHPR, if the state honours the decision of the ACmHPR with its implementation.

It is needless to point out that, save for a few legally permitted exceptions, cases are not considered by these regional bodies unless they have had a day in court at the domestic level and the desired solutions could not be obtained.[22] This means, in practical terms, that victims will have been struggling with domestic remedies, which in most jurisdictions are equally beset with delays for a range of reasons. To delay rendering a decision after so much time and effort have already been wasted at a domestic level often leaves victims drained and disenchanted. Over time, these endemic delays tend to discourage victims from asserting their claims for relief, with the ripple effect that people may increasingly not regard their problems (often involving social and economic conditions) as amenable to legal redress. Indeed, the delay in deciding communications by the ACmHPR is a current topical concern.

4 CONCLUSION

The foregoing discourse has highlighted the usefulness of the ACHPR and related international human rights instruments and mechanisms in advancing human rights through litigation. Using the experience of the IHRDA, it has also highlighted some of the objectives and strategies of human rights litigation at domestic and regional levels using a few cases that have been litigated by the IHRDA. In passing, a few setbacks facing the regional mechanism have been highlighted. From the experiences highlighted above, it is concluded that whereas the regional normative and institutional framework for the protection of human rights has demonstrable gains, euphoria about their existence and use should not dissuade efforts at reforming domestic legal systems to deliver the promises of justice and equity for all, as espoused by international human rights standards. It cannot be overemphasised, that the struggle for human rights will be won or lost at the domestic level. Thus, even when African regional bodies find states to have violated rights and require them to take remedial steps, ultimate remediation of violations remains the whim of the relevant states. There is thus still a lot of thinking and related work to be done in terms of making these regional systems more effective in discharging their complaints handling mandates. Until then, the full benefits of the ACHPR and related international human rights instruments remain ideals to be pursued.

[21] See above at paragraph 2.3.2 hereof.

[22] This is pursuant to the customary international procedural law rule that cases will only be considered by international tribunals after local remedies have been exhausted.

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