



NIGER DELTA UNIVERSITY
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**EXTRA-CONSTITUTIONAL ADJUDICATION
OF RIGHTS AND THE DESACRALISATION
OF THE NIGERIAN COURT: END OF THE
BEGINNING OR BEGINNING OF THE END?**

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DEDICATION

This work is dedicated first, to the memory of my late father and my late mother, and then to the victims of rights violation who have been denied access to justice.

PROTOCOL

The Vice Chancellor, Niger Delta University;
Principal Officers of the Niger Delta University;
The Provost, College of Health Sciences;
Dean of Postgraduate School and Deans of the Faculties;
Directors and Heads of Departments;
My Lords, Justices and Judges of the various courts;
Honourable Members of the BYHA and Honourable
Commissioners;
Distinguished Professors and Scholars of the Niger
Delta University.
And of sister institutions;
My colleagues from the Faculty of Law;
Officials and Members of the Nigerian Bar Association
Eminent and distinguished guests;
Ladies and Gentlemen;

1. Opening remarks

Permit me to first of all seize this opportunity to express my gratitude to the management of the Niger Delta University under the able leadership of the Vice Chancellor, Prof. Humphrey Ogoni, for giving me the opportunity to stand before this august assembly to deliver this inaugural lecture. I am also grateful to everyone who has taken time off their busy schedules and perhaps, from even more beneficial activities to listen to me. I hope that this lecture will be worth everyone's time, therefore I have endeavoured to accommodate the variety in the composition of this audience. Like a number of eminent scholars before me, my goal this afternoon, is to present to you an impressionistic summary of the main thrust of my academic work –past, current and future research– while drawing our collective attention to certain aspects of my research that I think all of us, or at least the Nigerian legal community should pay a little more attention to. This research is in the area generally known as the law of international institutions, but this lecture, hopefully, spans issues of Constitutional law, the Philosophy of Law or Jurisprudence and International Law.

Mr Vice Chancellor sir, in this lecture, I intend to trigger a debate on the question whether the task of judicial protection of rights within our national legal system or space – fundamental rights (as captured in Chapter IV of the 1999 Constitution of the Federal Republic of Nigeria) or human rights (as contained and guaranteed in international human rights treaties, particularly but not restricted to the African Charter on Human and Peoples' Rights) – is the exclusive preserve of the courts established under our constitutional framework. I would propose that the general understanding in the legal community is that our national courts collectively hold a sacred position and exclusive jurisdiction to rights protection in our national judicial space. However, I shall argue that unbeknown to us, or at least to majority of us, international law is upon us. And international law has come with its own institutions, including international

courts which have subtly gained a foothold within the constitutionally protected national legal space, transforming that space into a shared judicial space. I shall also try to demonstrate that while we continue to focus legal education on the traditional institutions of our legal system, these alien protective invaders continue to grow in significance and influence, touching on issues that were previously exclusively within the jurisdiction of the national courts. I shall then argue that unless actors in our legal system respond to engage with these alien protective invaders, our national courts may well become the outsiders in rights adjudication in this country. My hope is that this lecture will expose the variegated consequences that the on-going international, if extra-constitutional adjudication of rights has for our courts and our legal system generally. I do not suggest that we shut our legal system to these international courts. I rather propose that it is time to positively engage them in order to create a complimentary relationship for the overall benefit of the Nigerian citizen.

2. Introduction

Why are all these issues worthy of anyone's attention, let alone the subject of an academic/research career in the field of law? Mine, is a story of relationships – the relationship between the body of laws that we know as Nigerian law (by whatever criteria we select those laws) and what is known as International Law; the relationship between provisions in our Constitution, and the relationship between our national courts in the context of our national legal system (together with its rules and principles) and international courts, including especially the Community Court of Justice of the Economic Community of West African States. These relationships are important because one of the main consequences of the modern Westphalian nation-state is the claim to sovereignty over a given territory along with the existence of a distinct legal system within that territory. As sovereign equals, each state (country) reserves legislative and

judicial competence over their own territory. Hence, some Positivist legal thinkers define law in terms of the sovereign while others propose that there are rules of recognition by which a given legal system sets out criteria for the identification of 'law' in *that* legal system. Such 'rules of recognition are generally personified by' or contained in 'its constitution which is *that* state's supreme law'. The law that regulates individual, group and governmental conduct within any sovereign territorial space is *that* state's *municipal law* and is different from *international law* which classically only governed relations between sovereign states. The relationship between these two bodies of laws is generally explicated in the twin theories of *monism* (that which sees law as a unitary concept with international law on top of the order) and *dualism* (under which the municipal and international are separate and distinct legal orders each supreme within its own sphere, with municipal law retaining authority to determine the terms of engagement with international law). As some commentators eloquently put it, 'according to that [strict monism – dualism] dichotomy, international law is either an authoritative external body of law which directly penetrates the national legal order or a corpus of foreign law which must be filtered first through the prism of national constitutional'.

Mr Vice Chancellor, distinguished colleagues and guests, ours is a municipal legal system with the 1999 Constitution of the Federal Republic of Nigeria at its peak. Commonly seen as a dualist-oriented legal system, we have been taught that our Constitution insists that international law cannot be part of the Nigerian legal system unless our national legislators (or with respect to certain subject matters, both national and state legislatures) enact legislation to give such norms of international law the force of law in our municipal system. This is in spite of the fact that section 12 of the 1999 Constitution only speaks to a certain kind of relationship: that involving a

'treaty between the Federation and any other country,' whereas international law encompasses far more than treaties. Accordingly, as far as human rights are concerned, distinct from the body of international human rights law (including treaties, customary international law, general principles of law and the jurisprudence of international courts), Chapter IV of the 1999 Constitution contains a Bill of Rights that guarantees fundamental rights that Nigerians are entitled to claim. As for the vast body of international human rights law, the Nigerian courts have interpreted the Constitution to say that those can only have force of law if, and when they are enacted into national law. My point up till now, is that the rights that Nigerians are entitled to enjoy are guaranteed in both international law norms and in or through the 1999 Constitution. As I have argued elsewhere, other sources of rights exist in our legal system, but today is a focus on the Constitution. My story of relationships is concerned, first, with the current relationship between our constitution and international law. I am particularly interested in showing how despite the best (or perhaps worse) efforts of our legal actors, international law still seeps into our legal space to do good.

Just as an understanding of the sources and substance of rights is important to enjoyment of those rights, so is an appreciation of the institutional framework for the application of these rights – municipal and international equally important. For as some have suggested, 'there is something peculiarly exasperating about a broad affirmation of fundamental human rights unaccompanied by any machinery for giving them effective legal protection'. In the modern state, courts are the institutions endowed with 'power to make an authoritative determination of peoples' legal situation'. Hence, one early United States Chief Justice, John Marshall aptly claimed, 'It is emphatically the province and duty of the judicial department to say what the law is'. But, does he mean national courts only or are there

international courts empowered to make such authoritative determinations of our legal situations, especially vis-à-vis our governments, and to declare what the law is? As a result of the classical structure of international law, enforcement has been a notorious challenge associated with that system of laws. That structure has not changed much even in our present world. Accordingly, most legal writers and commentators agree that independent national courts 'are the ultimate guardians of individual rights in every case that may arise under the Common Law, Statute Law and ... Constitutional Law'. This much is recognised and captured in the national constitutions. How about those human rights that exist in international instruments? National courts apparently still hold the ace. In fact, for one eminent retired British Law Lord, the very idea of an international court enjoying and exercising jurisdiction over concrete 'application of ... rights in different countries' amounts to a 'basic flaw' of the legal regime that allows it.

In other words, in the context of our legal system, the constitution sets out the condition on which international law becomes part of our body of laws and empowers the national courts to adjudicate on our enjoyment of rights –whether those rights are originally part of the national legal order or they are imported from the international legal order. Thus, the second ambit of my concern is the relationship between these municipal or national courts and the international courts that operate in our part of the world. As the scholarship on the experience from other systems show, not only do national courts invent creative techniques to limit the influence of international law within municipal legal systems, it is not uncommon to find power tussles between national courts and international courts. In this lecture, I shall try to show how actors in the Nigerian legal system continue to resist the influence of international law and international courts when the focus should be on building a mutually beneficial relationship between the institutions and the two bodies of law.

3. The Constitution, its courts and the other courts:

The sacred versus the invading protectors

Mr Vice Chancellor sir, in this part of my lecture, I intend to establish how the 1999 Constitution sets out the 'rules of recognition' by which applicable human rights norms in our polity can be identified. I will then argue that the Constitution delimits and protects our national judicial space for certain courts – the Nigerian courts – explicitly named in the Constitution. The effect is that as far as rights adjudication within our legal system is concerned, the Nigerian courts are sacred institutions enjoying constitutional protection of their exclusive judicial authority. But then, there are the other courts – the international courts that have emerged. They do not belong to our legal system. They are not acknowledged in our constitutional architecture of courts. Is it therefore the **sacred versus the alien invaders**? I hope to also demonstrate that in spite of its ostensibly protectionist posture towards national law and national courts, our Constitution is not necessarily hostile towards international law. The Constitution contains provisions which obligate the organs of government to respect international law and its processes, including adjudication by international courts. In the midst of all these, some of the unanswered or unsatisfactorily answered questions will probably emerge.

Although, it is not the subject of today's lecture, allow me to remind us that a constitution is that legal framework by which a political society is legally organised. The Constitution defines what qualifies as law in our polity; outlines the powers of government, establishes the institutions of government setting out their functions and the limits of their powers; and states the rights of the citizens (and residents) and the relation between government, its officials and the governed. My concern for today are the provisions that guarantee rights or import rights into our constitutional framework; the institutions empowered

to make authoritative determination of those rights in relation to the governed and; the relationship between constitutional norms and institutions on the one hand and international norms and institutions on the other hand.

Beyond any dispute, Chapter IV of the 1999 Constitution – the Bill of Rights - enumerates what our Constitution recognises as fundamental rights. As is the case with most constitutions around the world, the Bill of Rights in the Nigerian Constitution essentially guarantees civil and political rights. As far as adjudication is concerned, section 46 (1) of the Constitution proclaims that 'a High Court' in the state is the judicial authority competent to receive, hear and determine claims alleging that any of the rights guaranteed in Chapter IV has been, is being, or is likely to be contravened. This provision has been interpreted to mean exclusive jurisdiction for either the Federal High Court or a State High Court – both of which are national courts. By the structure of courts in Nigeria as set out in section 6(5) of the 1999 Constitution, appeals from these High Courts go the Court of Appeal and from there to the Supreme Court. Thus, as far as claims based on Chapter IV are concerned, the High Courts enjoy original jurisdiction while the Court of Appeal and the Supreme Court enjoy appellate and supervisory jurisdiction over the High Courts. The Sharia Courts of Appeal and the Customary Courts of Appeal arguably have no constitutional authority to engage in Chapter IV based rights adjudication even though they are listed in section 6(5) of the Constitution as courts in which the judicial powers of the federation vest. Thus, in theory, Chapter IV guarantees rights whose adjudication is constitutionally reserved for select Nigerian courts.

There is also Chapter II of the 1999 Constitution – the Fundamental Objectives and Directive Principles of State Policy – which is popularly considered to represent an embodiment of the economic, social and cultural rights in our Constitution. This is in spite of the fact that the Constitution does not mention 'economic, social and cultural rights'

anywhere and, to the best of my knowledge, no court has pronounced that Chapter II is dedicated to this category of rights. As I have previously argued elsewhere, Chapter II is not a catalogue of economic, social and cultural rights even though certain provisions of that Chapter impose duties on government, which duties if implemented, will result in assuring citizens' enjoyment of rights in that category. Apart from the fact that Chapter II is a cocktail of diverse issues ranging from the political character of the Nigerian federation to the national motto, the provisions which are considered to represent 'economic, social and cultural rights' are not couched in rights language but presented as policy statements and state duties which do not necessarily confer legal rights on any one. The character of the contents of Chapter II arguably captures the distinction between 'subjective constitutional rights' and 'mere objective constitutional law'. Understanding this distinction is significant because it forms the basis of the debatably dubious claim that economic, social and cultural rights are not justiciable under our constitutional framework. This in turn forms the foundation of the suggestion that any other law guaranteeing justiciable socio-economic rights is in conflict with the Constitution. I humbly disagree with both positions. However, notwithstanding my own reservations, apparently based on the court's consideration of section 6(6)(c) of the Constitution in the specific context of the facts before it, the case of *Okogie v Governor of Lagos State*, is commonly held out as judicial authority for the twin assertion that Chapter II is a miniature catalogue of economic, social and cultural rights and that by section 6(6)(c) of the 1999 Constitution, no court in Nigeria, not even a Nigerian court, is competent to entertain any claim for economic, social and cultural rights. Despite these controversies surrounding Chapter II of the Constitution, it is important to draw attention to section 13 of the Constitution which imposes a clear duty on all organs of government and all authorities and persons exercising legislative, executive and

judicial powers under our constitution to 'conform to, observe and apply' the provisions of Chapter II. Strangely, the essence of this express call to action has never really been judicially explained. It hangs in the air but it does not go away.

Whatever it may mean for economic, social and cultural rights, Chapter II of the 1999 Constitution demands attention for another reason. Section 19 in Chapter II of the Constitution sets out Nigeria's foreign policy objectives, which in sub-section (d) provides that all organs of government, persons and authorities in Nigeria shall have 'respect for international law and treaty obligations as well as the seeking of settlement of international disputes by negotiation, mediation, conciliation, arbitration and adjudication'. It would be observed that unlike section 12, this provision expressly mentions and distinguishes between 'international law and treaty obligations'. This has to mean a recognition that international law means more than just treaties that require municipal legislation in order to qualify as law in our legal system. At the very least, this provision would mean that as a country, we respect international law and its processes, including international adjudication. It should then mean that notwithstanding the fact that a litigant cannot approach the courts to demand compliance with the provisions of Chapter II, the duty on the legislature, the executive and the judiciary to respect international law is a constitutional duty that is not taken away. While I shall return to this point, it needs to be asked whether section 12 requiring domestic legislation as precondition for giving the force of law to treaties trumps the section 13 (read together with section 19) duty to respect international law. In other words, do the provisions of section 6(6)(c) and section 12 overwrite the entire Chapter II of the 1999 Constitution? Does it not mean that all organs of government should 'take international law into account' in their discharge of their functions? Does Chapter II even belong in our Constitution? Does the chapter have a place in our constitutional and legal framework?

Mr Vice Chancellor, apart from the Constitution-based fundamental rights, there is a category of rights that I would like to term Constitution-authorised rights. They include the rights contained in the African Charter on Human and Peoples' Rights (Ratification and Enforcement) Act, Laws of the Federation 2004 and the Child Right Act 2003, both of which include rights that span the various generations of rights – first generation (civil and political); second generation (economic, social and cultural) and third generation (the so-called group rights). While the African Charter Act does not expressly provide for the mechanisms for its implementation within the Nigerian legal system, the court in *Ogugu v the State* decided that the Act should be enforceable by the same High Courts that have authority to adjudicate on Chapter IV of the Constitution. If there were any doubts in this regard, the Fundamental Rights (Enforcement Procedure) Rules 2009 has laid such doubts to rest by defining rights contained in the Act as 'fundamental rights' and specifying that the Federal High Courts and the State High Courts are the appropriate courts to approach for enforcement of the Act. As for the Child Rights Act, Magistrate Courts, Family Courts, the High Courts, and the appellate courts all enjoy original and appellate jurisdiction respectively over claims arising from that Act. The critical point for the purposes of this lecture, is that in relation to each Act under this category, notwithstanding the supervisory body established under the relevant treaty framework, enactment of the treaties into Nigerian law creates and confers exclusive jurisdiction on Nigerian courts insofar as adjudication within the Nigerian legal system is concerned. At this point, it needs to be recalled that on the authority of the judgment in *Abacha v Fawehinmi*, the municipal versions of the treaties become national law falling somewhere between regular legislation and the constitution. It is not clear what happens to the competence of the supervisory bodies established under those treaties to

supervise implementation at international law. Do they become acknowledged as part of our legal system by reason of the incorporation or domestication law? Do their decisions and jurisprudence take on any significance within our legal system? While they may not share the exact same concerns that I have, it is not surprising that some other scholars agree with my conviction that our Constitution is equivocal on the status of international law in, and its relationship with our legal system.

Before I introduce the invading protectors, I have to confess that this chauvinistic approach to human rights and the mechanism for rights protection is not unique. The British thinker, Jeremy Bentham, in his criticism of the French Declaration of Rights was probably one of the first to challenge the idea of human rights being anything but local and national. Even though I do not necessarily agree with it, in my thinking, this idea constitutes a theoretical foundation for any nationalistic approach to human rights. Lord Hoffmann agrees with Bentham's position that rights are essentially of a national character and should be 'embedded in the national legal system'. In his analysis of the American civil rights experience, Hoffmann argued that 'at the level of abstraction, human rights may be universal' but insists that 'at the level of application ... the messy details of concrete problems, the human rights which these abstractions have generated are national'. This, he argues further, is because 'their application requires trade-offs and compromises, exercises of judgments which can be made only in the context of a given society and its legal system'. For Hoffmann, political structure, legal and political cultures and the like are crucial elements in determining the final juridical translation of abstract philosophies into concrete rights. If we agree with him, then we would also agree that there is a certain sacredness to municipal adjudication of rights. It would mean that rights have to be adjudicated before national courts in order to legitimise both the process and the outcome of adjudication.

For me, in my position as a citizen of a developing democracy, one problem is that this position assumes a certain level of maturity of the municipal system and the existence of an acceptable level of institutional balance within the national legal system. If national political actors continue to hold the feeling that 'the courts ... have "merely judgments" such that 'they would exercise neither force nor will,' it is open to debate whether the application of rights at the municipal level is anything but utopia. Hence, in legal systems where the Rule of Law tradition has attained a level of maturity, guaranteeing an independent judiciary to which individual members of the legislative and executive arms of government are subject, such fierce fidelity to national application of rights may not be unthinkable. This is why, for instance, in the American case of *United States v Yunis*, the US District Court of Appeals, DC Circuit is recorded to have insisted that judges as 'appliers of international law and as participants in the federal system' have a 'duty to enforce the constitution, laws and treaties of the United States, not to conform the law of the land to the norms of customary international law'. The judge expressly owes his allegiance to his constitution. And even in cases where the United States has been dragged to international courts, the government of the United State insists that the international court 'does not exercise any judicial power of the United States, which is vested exclusively by the Constitution in the United States federal courts' and therefore it cannot overrule the courts of the United States. This approach is affinity to what de Burca and Oliver Gerstenberg refer to as the 'bounded-community of the national state'. It stands in stark contrast to the approach in Europe where national courts work hand in glove with regional (international) courts such as the European Court on Human Right and the European Court of Justice (now Court of Justice of the European Union) to protect the rights of citizens against invasion by governments. Interestingly, the United Kingdom from which we got our legal culture and some of our

constitutional values subscribes to the European model. In that culture, the national court is not so sacred. The question is: have we been successful in defending our national judicial space and the sacredness of the Nigerian courts? Before I supply the evidence to prove that we have not, permit me to briefly introduce two international courts that are representative of these alien invading protectors.

Although, a number of judicial and quasi-judicial international institutions claim or enjoy jurisdiction over the Nigerian state, I shall briefly introduce the African Court on Human and Peoples' Rights (African Human Rights Court) and the ECOWAS Community Court of Justice (ECOWAS Court or ECCJ). However, the rest of the lecture will zoom in on the ECOWAS Court as that court best represents the issues that this lecture is about. As I have discussed elsewhere, the African Human Rights Court is a late addition to the supervisory structure of the African Charter on Human and Peoples Rights (African Charter). As such, it is established on the platform of the African Union (formerly the Organisation of African Unity) by a separate international treaty which requires independent ratification. In other words, unlike the African Commission which is part and parcel of the African Charter, states that sign up to the African Court Protocol do so on their own volition. Nigeria ratified this Protocol on 20 May 2014. Consisting of eleven judges of different African nationalities assisted by a registry, the African Court has both contentious and advisory jurisdictions. The contentious jurisdiction extends to cases involving the interpretation and application of the African Charter, the Protocol of the Court and any other relevant human rights instrument ratified by the states concerned. This implies that, insofar as Nigeria has ratified an international human rights either on the platform of the African Union or any other platform (United Nations, ECOWAS or even a bilateral treaty), such a treaty is applicable against Nigeria before that court,

notwithstanding what section 12 of the 1999 Constitution says. The African Court can receive complaints from other states, the African Commission and individuals or Non-Governmental Organisations (NGOs) insofar as the affected state has made a declaration allowing for submission of cases by individuals and NGOs. Since, Nigeria has not yet made the relevant declaration, only another member state of the African Union or the African Commission (usually at the prompting of individuals or NGOs) can currently bring a case against Nigeria before the African Human Rights Court. Very importantly, as is the general rule in international adjudication, a case can only be brought before the African Human Rights Court after all reasonable attempts have been made to exhaust local remedies within Nigeria. This means, a prospective litigant or the alleged victim ought to try to exhaust the original and appellate jurisdictions in Nigeria, except they are unavailable (for instance, as a result of an ouster clause) or they are unduly delayed. Mr Vice Chancellor, since this Court is not part of our court structure, this sort of adjudication is arguably extra-constitutional. Does it then not desacralize the sacred sanctity of the Nigeria Courts? Does this court stand as an appellate court – a court of fourth instance – over the Supreme Court of Nigeria? A number of other questions emerge, some of which I still hope to address soon. But that, in brief is the African Court of Human Rights – and till date, no case has been brought against Nigeria before this court. Another international court that is relevant, nay that is the main focus of attention in this lecture is the ECOWAS Court. Originally conceived under a 1975 Treaty as a Community Tribunal for the settlement of dispute among members of the Economic Community of West African States (ECOWAS), this court emerged as a Community Court of Justice under a 1991 Protocol with a primary mandate to interpret and apply the Treaty and protocols of ECOWAS. A significant feature of the ECOWAS under its 1991 Protocol was that it was strictly an inter-state court so that individuals and NGOs had no access or

right of appearance before the court. With the amendment of its 1991 Protocol in 2005, the ECOWAS was transformed from a regular community court for regional integration into a quasi-human rights court open to individuals alleging a violation of their human rights within the territory of an ECOWAS member state. The ECOWAS Court is made up of seven judges, nationals of ECOWAS member states who sit full time at the seat of the Court in Abuja, Nigeria. Endowed with a human rights mandate that is not linked to any specific human rights catalogue as ECOWAS itself does not have a dedicated human rights instrument, the ECOWAS Court has resorted to applying all relevant human rights treaties ratified by the state concerned even though the African Charter has stood out as its preferred source of rights. Significantly, the 2005 Supplementary Protocol which confers an unlimited human rights jurisdiction on the ECOWAS Court only sets two conditions for admissibility of claims – that the application to the court should not be anonymous and should have been instituted before another international court. There is no requirement that local (national) remedies be exhausted under the ECOWAS human rights regime. Nigeria ratified the 1991 Protocol of the ECOWAS Court on 1 July 1994.

Vice Chancellor sir, to the best of my knowledge, no national legislation currently exists in Nigeria regarding any of the treaties that established these two courts. Permit me to highlight that in their current form, both of these courts are transnational courts – distinct from the interstate dispute resolution courts that classical international had. The significance is that whereas classical international courts 'reflected the interstate regulating nature of public international law' and were accessible only to states, these courts in their 'transnational' character allow 'expansive access' to non-state actors (people like you and I) and in some cases, 'enforcement of their decisions are legally insulated from the will of individual governments'. That is to say, transnational courts can make decisions affecting legal

situations and relations within a municipal legal system and seek to directly enforce such judgments even without the involvement of the government of the country. Effectively, 'states lose their gatekeeping capacities in pure ideal situations or in actual practice, these capacities are attenuated'. But even more interesting for me as we shall see, is the fact that these bodies have moved from dispute settlement to engage in judicial review of governmental conduct and even laws.

On these grounds, I insist that notwithstanding what our Constitution says about the norms that can apply in our polity and the role it gives the Nigerian courts as sacred gatekeepers to ensure that only norms allowed by the people as represented by parliament can have legal force in our legal system, there are alien invaders who have slipped in! They are alien and extra-constitutional in two main ways – they are not listed as courts in our Constitution and the treaties establishing them have not been incorporated (domesticated) in our legal system. Yet, they are actual and potential competitors to our sacred judicial institutions. This is where the battle line was drawn. In the next section, I shall argue that the first part of the battle – the beginning has actually ended already.

4. How has the beginning ended?

Mr Vice Chancellor, distinguished colleagues and guests, my claim in this section is that right under our nose a battle of sort has been raging even if the combatants do not know it or have refused to acknowledge it. And as far as that battle goes, the first part, the beginning has ended with victory for international law and its institutions. The ECOWAS Court, the prime example of this in our part of the world is right within our judicial spaces, in the middle of our legal system and this, without the prior approval of the gatekeeper – the national courts. Recall that, even if our Constitution is silent on the point, in line with British legal and diplomatic traditions, the executive has retained the power to enter into and commit to treaties on behalf of the

Nigerian state. Recall further that those treaties are not expected to have force of law in our legal system until the legislature enacts national law to allow their entry into our legal system. Ultimately, the gatekeepers, the national courts have to decide whether the relevant law has been made, in the required manner so that these national courts, and them alone, can apply those norms to determine our legal status vis-à-vis our governments and our fellow citizens – natural or legal. In other words, it is not just a battle of sovereignty, but also one concerning internal institutional competences – perhaps, another manifestation of the separation of powers principle. Well, as the cases I have selected from the jurisprudence of the ECOWAS Court will indicate, nothing is scared anymore. If there was ever an intention, conscious or unconscious, to guard the national legal space and keep out unpermitted international norms and institutions, the implementation of that intention has not very successful. Our legal space has been invaded in a positive way, and the obstacles for the enjoyment of rights mounted by legal and political cultures and national institutions appear to be falling apart already in the hands of the ECOWAS Court. That 'alien court' **i)** exercises jurisdiction over our governments, its agencies and our citizens, **ii)** allows expansive access, **iii)** in respect of every conceivable subject-matter, **iv)** including economic, social and cultural rights that are supposed to be 'unconstitutional', **v)** applying international instruments that have not even been incorporated or domesticated, **vi)** engaging in judicial review of the conduct of government but also of the national courts, **vii)** is recognised by our most senior lawyers, **viii)** creates jurisprudence that is normative and leaves us wondering what to do with its jurisprudence.

i) Exercise of jurisdiction over governments, their agencies and citizens

Admittedly, in this era of extensive transnational adjudication, it is now almost common-place for international courts to

exercise jurisdiction over governments and (in the case of international criminal courts) over individuals. This generally occurs in the context of international proceedings brought by one nation-state against another nation-state, or (in the case of human rights) in proceedings brought by individuals and NGOs against a nation-state. In all cases, the respondent is usually the national government of the affected state (country). Before the ECOWAS Court however, in addition to the Federal Government of Nigeria, component states, governmental agencies and other citizens have been respondents or defendants in a number of cases. For instance, in the case of the *Registered Trustees of the Socio-Economic Rights Accountability Project (SERAP) v the Federal Government of Nigeria & Another (Education case)*, the ECOWAS Court claimed and exercised human rights jurisdiction over the Nigerian state, but also over the Universal Basic Education Commission. The ECCJ had been invited to declare that the corrupt practices of UBEC officials had led to a denial of education to Nigerian children. In the case of *David v Uweche*, although, the ECOWAS Court ultimately declined to exercise jurisdiction, a Nigerian Policeman dragged a former Nigerian Ambassador to the ECCJ for alleged failure to pay his entitlements. In another case brought by SERAP, the ECOWAS Court was faced with a claim against Nigeria, the Nigerian National Petroleum Company (NNPC) the Shell Petroleum Development Company, ELF Petroleum Nigeria Ltd, AGIP Nigeria PLC, Chevron Oil Nigeria PLC, Total Nigeria PLC and Exxon Mobil alleging a violation of rights arising from the spillage of oil in the Niger Delta. Further, state governments in Nigeria have been joined in actions before the ECCJ in the cases of *Hassan v Governor of Gombe State and Another* (involving allegation of unlawful killing in Gombe State; *Aminu v Government of Jigawa State and Others* (involving alleged violation of human rights arising from unlawful detention and prosecution initiated by the Jigawa State Government); *SERAP*

& 10 others v The Federal Republic of Nigeria and 4 others (involving allegations of violations against River State arising from demolition activities in the Bundu Waterfront in Port Harcourt), *Association Avocats Sans Frontieres & Another v Federal Republic of Nigeria & Another* (involving alleged violations arising from execution of death penalty in Edo State) and in *Abdulummini v Federal Republic of Nigeria and 2 Others* (involving alleged violation of rights arising from the imposition of the death penalty in Katsina State. The Nigerian Army, the Department of State Security and the Inspector General of Police are all agencies of the Nigerian government that have been brought before the ECCJ in spite of section 6(6) (b) of the 1999 Constitution which confers jurisdiction in the national courts. Although, the ECOWAS Court has since begun to decline jurisdiction over some of these bodies, it has done so *suo muto*. In any case, the point is that constitutional restrictions have not prevented these cases from appearing at the ECCJ. That alien court is already receiving cases that our national courts ought to hear.

ii) Encouragement of expansive access

One of the sticking points in fundamental rights adjudication in Nigeria had been the question of locus standi. Following the decision of the Supreme Court in *Adesanya v The President of the Federal Republic of Nigeria* in which it was strangely declared that section 6(6)(b) defined the criteria for access to the courts, Nigerian courts have been very strict in their insistence on victimhood as a basis for standing. Although, the 2009 Fundamental Rights (Enforcement Procedure) Rules have sought to liberalise standing in fundamental rights enforcement cases, it is not uncommon to continue to find courts sticking to the traditional position. This is another area in which the ECOWAS Court has defied the traditions and dictates of our legal system. In the cases involving SERAP and in a handful of other cases, the ECCJ has overruled objections by the Nigerian

state contesting the standing of litigants. The Court has maintained that it favoured the global human rights preference for liberal access. Thus in *Registered Trustees of the Socio-Economic Rights Accountability Project (SERAP) v the Federal Government of Nigeria & Another* (Education case), *Registered Trustees of the Socio-Economic Rights Accountability Project (SERAP) v the Federal Government of Nigeria & Other* (Oil companies case), *SERAP & 10 others v The Federal Republic of Nigeria and 4 others* (Bundu water front case) and in *Association Avocats Sans Frontieres & Another v Federal Republic of Nigeria & Another*, the ECOWAS Court allowed NGOs and other public spirited persons to bring actions on behalf of victims. In this regard, the ECCJ has taken litigation in a more expansive direction than is allowed in the national legal system.

iii) Reception of cases involving a wide range of issues

By section 6(6)(b) of the 1999 Constitution, the judicial powers of the Nigerian courts 'shall extend to all matters between persons or between government .. for the determination of any question as to their civil rights and obligations ...' But, this is not the case anymore as the same 'all matters' now come before the ECOWAS Court. In perhaps, one of the most notorious cases before the Court, on 4 October 2016, the ECOWAS Court delivered its judgment in the case brought by Col. M.S Dasuki against the Federal Republic of Nigeria. Having failed to get the Nigerian government to obey orders of the Nigerian courts releasing him on bail, Col. Dasuki approached the ECOWAS Court asking *inter alia*, for a declaration that his continued detention 'in defiance of orders for his bail granted by Courts of competent jurisdiction in Nigeria' was a violation of his human rights. It is worthy to note that Mr Dasuki had approached and secured orders of both the Federal High Court and the High Court of Abuja. In addition to other declaratory reliefs that he sought, it was to the ECCJ that Mr Dasuki now turned for an

order for his release. In *Bayi and Others v Nigeria and Others*, it was foreign sailors and seamen who sought succour from the ECOWAS Court against Nigeria for alleged unlawful detention and for being paraded before the press in Nigeria without first being convicted of any crime. In *Incorporated Trustees of Fiscal & Civic Right Enlightenment Foundation & Others v the Federal Republic of Nigeria & 2 Others*, it was the Nigerian government along with the Nigerian Army and the DSS that were dragged to the ECCJ over the unlawful killings in a 2013 raid by Nigerian security forces on an uncompleted building in Abuja in search of Boko Haram agents. In the *SERAP v Nigeria (Bundu Waterfront)* case, it was the shooting of unarmed protesters in nearby Port Harcourt that was the root of the action. In *SERAP v Nigeria (oil companies)* case, it was the failure to clean up the Niger Delta after several oil spills, the refusal to release information of Environmental Impact Assessment and the failure of the Nigerian state to adequately monitor 'the human impact of oil-related pollution' in the Niger Delta that resulted in the action before the ECCJ. In *Akeem v Federal Republic of Nigeria*, it was a Private in the Nigerian Army, a former guard at the private residence of Gen. Victor Malu who had been detained for over two years over the loss of a rifle from Gen. Malu's house that came before the court for succour. In *Hope Democratic Party & Another v Federal Republic of Nigeria & 5 Others (including former President Jonathan and the PDP)*, it was the PDP's raising of billions of naira in Presidential campaign fund that was considered a violation necessitating action before the ECOWAS Court. In *Nnalue & 20 Others v Federal Republic of Nigeria*, the applicants were complaining about the alleged unlawful killing and/or disappearance of five persons who were in Police custody in Edo state. And in *Aminu v Government of Jigawa State & Others*, it was the arrest of a boy for alleged insult to former Gov. Sule Lamido on Facebook that gave rise to the action. Any lawyer or judge seated in this hall today will

recognise any and all of these issues as matters that can and should be in the cause-list of a court in Nigeria. By taking these matters to the ECCJ, litigants and their lawyers successfully transform a local dispute into an international matter drawing global or at least, regional attention to the dispute. Whether or not, the Constitution anticipated it or whether our courts allowed it or not, these cases now come before the ECCJ sometimes before any court in Nigeria has had a chance to hear them, at other times while a case on similar facts is still pending in the national courts, and yet at other times, after the litigant(s) is frustrated before the national courts. Essentially, there is now an alternative. The monopoly of the Nigerian court is gone.

iv) Adjudication of economic, social and cultural rights claims

Mr Vice Chancellor sir, as I indicated earlier, a consultation of the most basic text on Nigerian Constitutional Law or Human Rights in Nigeria will tell you that on the authority of the case of *Okogie v Governor of Lagos State*, economic, social and cultural rights are not justiciable in Nigeria because they are contained in Chapter II of the Constitution. Any Nigerian lawyer will then tell you that an attempt to seek an order of court for those rights on the basis of any other law will be in conflict with the Constitution and by virtue of section 1(3) of the 1999 Constitution, such a law and the action will be null and void. Well, the ECOWAS Court does not seem to care. In the *SERAP v Nigeria (education)* case, the ECOWAS Court accepted a claim for a declaration that every child in Nigeria is entitled to free and compulsory education – which is exactly one of the educational objectives in section 18 (3) of the 1999 Constitution. And the ECCJ was not moved by the express objection raised by the Nigerian government that economic, social and cultural rights are not justiciable under the Nigerian Constitution. In the *SERAP v Nigeria (oil companies)* case, not only did the ECCJ admit the claim for the rights to an adequate standard of living,

access to food and health care, access to clean water and a clean and healthy environment, the Court went on to order that effort be made to restore the environment and to hold the oil companies more responsible. Effectively, it does not matter anymore what the Nigerian courts think or say. Socio-economic rights can be claimed in our legal system as far as one can get to the ECOWAS Court.

v) Application of unincorporated (non-domesticated) treaties

At this point in this lecture, everyone knows that section 12 of the Constitution requires prior national legislation incorporating treaties before such treaties can have the force of law in the Nigerian legal system. This also does not matter if the claimant is ready to approach the ECOWAS Court. In virtually all its case-law, the ECCJ has consistently applied international human rights instruments ratified by Nigeria even if such treaties have not been domesticated. Thus, the International Covenant on Civil and Political Rights (ICCPR), the International Covenant on Economic, Social and Cultural Rights (ICESCR) and even the Universal Declaration on Human Rights (UDHR) – a declaration and not a treaty - have at various times been applied against the Nigerian state by the ECCJ. Technically, undomesticated treaties still do not apply. But, if the national courts are indeed the gatekeepers, to keep out undomesticated treaties, they have not succeeded much as Nigerians are able to invoke these treaties without involving the national courts. For instance, in all the cases involving SERAP before the ECOWAS Court, reliance has been placed on both the domesticated African Charter and the undomesticated International Covenant on Economic, Social and Cultural Rights.

vi) Judicial review of government conduct and 'supervision' of national courts

As I have pointed out earlier in this lecture, an important

difference between the classical international courts and modern international courts such as the ECOWAS Court is the movement from being strict interstate dispute settlement mechanisms to assumption of the role of quasi-constitutional courts engaging in judicial review. In exercising the power of judicial review, a court claims authority to declare laws and the conduct of government officials unconstitutional. In all the cases before the ECCJ that I have referred to in this lecture, that Court brings the actions and omissions of the Nigerian government and its agencies under scrutiny. It is important to note however, that unlike the Nigerian courts that have a duty to apply the Nigerian Constitution for the purpose of judicial review, the ECOWAS Court applies international human rights instruments for the same effect despite the fact that it is often presented with relevant provisions of the Nigerian Constitution and sometimes, even appears to assess the governments' conduct by the constitutional provisions. Effectively, the ECOWAS Court is in the process of constitutionalising the African Charter and other treaties in the same way its counterpart in Europe did with the European Convention. In other words, actions of the Nigerian government have to be constrained now, not only by limiting provisions in the Nigerian Constitution, but also by international treaties. Some writers express the fear that in extreme cases, judicial review could result in 'government by judges' since elected officials would require judicial approval for their every action. While this may appear like a slight exaggeration, it makes the point that in the Nigerian situation for instance, the actions of government now also depend on the approval of the ECOWAS Court.

An even more interesting evidence of the end of the beginning of the battle is the submission of Nigerian courts to scrutiny by the ECOWAS Court. Two cases best exemplify this point. In *Aminu v Government of Jigawa State & Others*, the Jigawa State judiciary (represented by the Chief Registrar) was sued as a party before the ECOWAS Court. Represented by the

Attorney General of Jigawa State, who also represented the Jigawa State Government, the Jigawa State Judiciary filed processes and submitted records of the proceedings that place before the Chief Magistrate Court in Dutse to the ECCJ for scrutiny. Similarly, in *Abdulumuni v Federal Republic of Nigeria & Others*, although the High Court itself was not before the ECCJ, it was the procedure leading to the sentencing to death of the applicant that was under scrutiny by the ECOWAS Court. Despite the argument put forward by the Nigerian state that appeals from the High Court ought to be to the Court of Appeal, the ECOWAS Court assumed and exercised jurisdiction, and came to a finding of violation. Again, this is evidence that the ECCJ is already in our judicial space.

vii) Appearance of senior lawyers before the ECOWAS Court

If the Nigerian legal system is a 'bonded community', lawyers, especially the senior lawyers are a significant part of that Community. Another small but significant evidence of the successful entry of the ECCJ into the Nigerian legal space is the growing presence of members of the inner bar in cases before the Court. Although, some lawyers have been consistent before the Court, constituting 'repeat players' in its process, in the last one to two years, the number of senior lawyers appearing before the ECCJ has increased. At the very least, this constitutes some evidence of the seriousness that is now attached to the ECCJ as an increasingly important actor in the Nigerian legal space. For instance, in the case of the *Incorporated Trustees of Fiscal & Civic Right Enlightenment Foundation v Federal Republic of Nigeria and Others*, no less than three senior advocates of Nigeria entered appearance for parties in the action. Similarly, in the case of *Hope Democratic Party & Another v Federal Republic of Nigeria & Others*, at least two senior advocates of Nigeria also appeared for the parties. Some of the most eminent members of the Nigeria bar may be announcing their

acceptance of the ECCJ as a player in our legal system. Their loyalty is no longer only to the Nigerian courts, professional attention is shared between the Nigerian courts and the ECOWAS Court.

viii) Creation of normative jurisprudence

A final point that I offer as evidence that the ECOWAS Court has slipped into our legal system and the beginning has ended is the fact that the ECCJ's own jurisprudence has begun to take root so much so that that jurisprudence is offered to the court in support of arguments made by litigants. Put differently, the ECOWAS Court has begun to utilise its own decisions as authority for legal position – it has begun to self-reference. Arguably, this is an indication of recognition within the court-community that the ECCJ's pronouncements are authoritative enough to create an expectation that parties will structure future conduct in line with those pronouncements. Admittedly, references to the ECCJ's jurisprudence has for now, mostly been in the area of the court's own procedure. For instance, in the case of *Aminu v Jigawa & Others*, the respondents/defendants (different authorities and agencies) in the Nigerian state variously cited ECCJ jurisprudence such as *Tidjani v Federal Republic of Nigeria & Others*, *SERAP v The President, Federal Republic of Nigeria*, and *Akeem v Federal Republic of Nigeria*. In order to establish the responsibility of a state-party for the conduct of its officials and agencies, the ECOWAS Court itself referred to its own judgment in *Konte & 1 Other v Ghana*. By these references, I submit that the ECOWAS Court demands, and its audience, particularly counsel citing those decisions agree, that the court has set normative standards that the court-community is expected to respect and apply to regulate future conduct. Thus, when the ECCJ stated in the *SERAP v Nigeria (Bundu Waterfront)* case that as a state party to both the African Charter and the ICCPR, the Nigerian state 'is under strict obligation to ensure the free enjoyment of the right to peaceful

assembly by all individuals living in its territory', there is an expectation raised that future conduct of the Nigerian state (and indeed, of other states within the court's jurisdiction) will be measured by this pronouncement. Future litigants will refer to this and demand a condemnation of the state if it fails to live up to this expectation. Similarly, when the ECCJ in the same *Bundu Waterfront* case reasoned that by failing to prevent a violation of the right to peaceful assembly or to carry out thorough investigation on the violation of that right, hold perpetrators accountable and to remedy the victims, Nigeria had breached its international obligation, the ECOWAS Court is not simply determining the legal position of the Nigerian state, it is simultaneously setting normative standards for the Nigerian state and other state. This authority to set normative standards for the Nigerian state though judgment was previously the preserve of a Nigerian court. It is now shared. Surely, the first part of the battle is won and lost.

Essentially, the summary of my claim in this section is that while national courts continue to find and deploy creative and innovative strategies to shut out international law and its processes from the national constitutional and legal spaces in Nigeria, a court like the ECOWAS Court is already operating within the national space. Contrary to the insistence that 'the ultimate legitimate source of coercive legal norms within a democratic legal order is the democratic process itself', I have offered evidence that the ECOWAS Court, which is not part of the national order may have succeeded in imposing normative standards in diverse areas, and extracting the acquiescence of critical actors in the 'bonded community'. So what exactly have we found out about this 'alien protective invader'? How have we endeavoured to understand this court?

Unmasking the alien judicial masquerade:

Mr Vice Chancellor sir, it is with utmost humility that I now present a modest account of my personal scholarly contribution

to the understanding of the ECOWAS Court and other international courts in Africa. Following established scientific practices in law, the social sciences and humanities generally, I consider the task of understanding these institutions to be in three main parts – the historical and descriptive; the practical; and the theoretical. In the first tranche of my work, I have focused on describing international courts in Africa, without completely overlooking their histories. In my current work, I am looking more at practical aspects of their work, including especially their relationship with the national legal systems and their respective user-groups and court communities. My hope is that in my future research, there would be enough data on these courts to support serious attempt at building theory.

In 2007, about two years after the transformation of the ECOWAS Court from a regular Community Court of Justice with complete focus on regional integration into a quasi-human rights court, I made what was arguably the first serious scholarly attempt at understanding the human rights work of the court. In my work, I examined the legal framework of the ECCJ and exposed its salient features, for instance, drawing attention to what I considered to be the strange absence of the requirement to exhaust local remedies prior to accessing the court. My next contribution was to examine the prospects of utilising the ECOWAS Court and similar courts as fora for judicial protection of the rights of children. Soon afterwards, I considered the difficulties of socio-economic rights litigation in Nigeria and examined whether the ECOWAS Court could be the future of socio-economic rights litigation in Nigeria. I concluded that the ECCJ was a possible forum for litigating socio-economic rights in view of the dubious constitutional obstacles within the Nigerian legal system. The growing socio-economic rights jurisprudence of the ECCJ seems to have vindicated my position. In 2008, I took a deeper look at the human rights mandate of the ECOWAS Court and pointed out

what I considered to be the legal root of the mandate, highlighted the complexities I found in its evolving jurisdiction and reviewed the content of the court's mandate. Since then I have produced and published no less than twenty (20) peer reviewed scholarly outputs in different parts of the world, on various aspects of the human rights work of international courts in Africa. As a result, I have triggered interest and debates among African and non-African scholars on the work of these institutions. From my research work, we now know that the ECCJ was originally intended to be a classical international court for inter-state dispute resolution - which accounts for some of its features that appear unsuited for transnational adjudication involving non-state actors. That the ECCJ's role in the West Africa integration process was supposed to mirror the role played by the European Court of Justice in advancing the European integration agenda but the ECCJ's mimicry was partly unsuccessful, probably as a result of stark differences in regional political and legal cultures. My research has also demonstrated that the trajectory of the ECCJ was dramatically changed in a dynamic way from inter-state dispute settlement to ensuring the maintenance of domestic equilibrium through advancement of greater respect for human rights within the national legal systems of ECOWAS member states.

My research also exposed the indeterminacy of the ECCJ's human rights mandate, a mandate to hear all cases alleging violation of all kinds of human rights arising from the territories of ECOWAS member states; which mandate is not tied to any particular human rights instrument thereby allowing the ECCJ to receive claims based on all international instruments ratified by the state concerned, even though the African Charter stands as its preferred catalogue of rights. My work has also shown that in the face of the ECCJ's position that there is no requirement to exhaust local remedies and that it stands in an 'integrated relationship' with national courts such that it cannot exercise appellate jurisdiction over national courts, access to the ECCJ is

easier but the potential for jurisdictional competition with national courts is higher. I have also shown the ECCJ's insistence that as an international court, it cannot accept complaints against non-state actors. Within the period of my work in this area, I have also presented research papers at conferences and workshops, focusing on practical aspects of the work of these institutions and their relationship with the national system. I have, at the respective invitations of the African Court on Human Rights, the East African Court of Justice, the ECOWAS Court and the old Southern African Development Community Tribunal, presented research papers on topics ranging from judicial dialogue and complementarity between international courts in Africa to legitimacy of international courts and the implementation deficit and its attendant effects on the work of the courts. At workshops and conferences in Africa, the Americas and Europe, I have also presented research papers on topics ranging from the nature of authority of the international courts in Africa to the mechanisms for enforcement of decisions of these courts. In the course of this work, I have come to the conclusion that there are a number of questions that have not been answered and I have been left wondering if we have come to the beginning of the end either for the regional (international) courts or for the role of the Nigerian courts in human rights adjudication. Some of my thoughts in that regard form the next section of this lecture.

5. Is this the beginning of the end?

Mr Vice Chancellor sir, since I think that the beginning has ended in this battle-game of trans-system judicial politics, do I also think that the end has begun either for the international courts or for the national courts? Have courts like the ECOWAS Court bitten far more than they can chew and will those who opened the window for them to enter – the national executive organs – shut down the operations of these courts and close the window? Or, in the face of growing evidence that litigants find

the international forum a more fertile and receptive ground for the vindication of rights claims, will litigants abandon the Nigerian courts for courts like the ECOWAS Court such that our national courts will have little or no roles to play as far as the adjudication of human rights is concerned? Will international human rights courts draw power away from the national courts? Or, perhaps, is there a middle game within which all sides can engage to find equilibrium for the benefit of the citizenry? I think this is time to play the middle game. Being acutely conscious of the inadequacy of data especially from the side of the national courts, I might engage in some speculative conjectures and hypothesize on some of these issues. Hopefully, it will also allow me point to the future direction of possible research in this area, some of which I intend to undertake myself. If you permit me, I shall make some quick small points before I conclude this lecture.

The first point I would like to make in this section is to ask the question: why are we even talking about the beginning of an end? Have we really begun to see 'changing legal consciousness, in both elite and popular opinion' regarding the benefits of transnational, international and/or supranational adjudication? I submit that more than a change of consciousness, if that already exists, it is the existence of a protection gap at the national level that accounts for the growing involvement and influence of international courts in rights adjudication. In response to critics who felt that courts were making too many orders for reform in Alabama's prisons and mental homes, United States District Court Judge Frank Johnson was quoted to have said: I didn't ask for any of these cases. In an ideal society all of these ... decisions should be made by those to whom we have entrusted these responsibilities. But when governmental institutions fail to make these ... decisions, in a manner which comports with the constitution, the federal courts have a duty to remedy the violation'. In like fashion, I imagine that if national courts will

not creatively apply the vast potentials in rights adjudication and judicial review that our constitution allows, and will not take advantage of the constitutional allowance for the application of international norms to mediate the extremely skewed balance of power between the citizen and those temporarily entrusted with governmental powers, there is no reason why citizens will not look for alternatives and no reason why courts like the ECCJ will not step up to fill the protection gap. As a perusal of the literature indicates, national courts across the world at some point or another have sided with governments against powerless citizens, declining to support civil liberties and human rights; prioritising acclaimed national interest (shorthand for interest of the government of the day) over the well-being of the populace; and resorting to the deployment of 'deference strategies' to exclude international law and its processes from coming to the rescue of the disempowered citizen. Our courts may well be following this route. While, analysis of the human rights jurisprudence in our national legal system exposes the obstacles that the Nigerian courts have allowed themselves to be used to throw on the part of the citizen, it is less obvious to identify their resistance to the influence of international law, international adjudication and the other processes of international law because such 'domestic manifestations of resistance' have taken invisible forms of 'indifference, silence and [only rarely, active] resistance'. Unlike some courts that actively pronounce their resistance, our courts have resisted courts such as the ECOWAS Court by ignoring them and pretending they do not exist. So, instead of harnessing the potentials in the existence and functioning of these alien courts to collectively hold governments to account on the basis of national and international law, we have preferred to resist them through silence and non-acknowledgement.

Unfortunately, Mr Vice Chancellor, we cannot escape. We need to deal with the presence of these courts if our courts are to avoid

triggering the beginning of the end. Since, we have been unable to prevent their entry (not that some of us see any reason to do so), we are unable to address the so-called 'counter-majoritarian implications of transnational judicial influences' by which supposedly alien court unilaterally restrain national parliaments and governments and even set normative standards to guide all of us. Should our courts not contribute to a dialogue to shape this? If international courts rightly (in my view) claim competence to address the normative component of rights, should they also set the tone for the programmatic components of rights? In our hierarchy of courts, where do courts like the ECOWAS Court fit in? While the ECCJ itself admits that it is not an appellate court over national courts, can it review the work of all courts in our system, including the Supreme Court of Nigeria? What is the legal consequence of the judgments of the ECOWAS Court with respect to its precedent value? What courts in our system, if any, should be bound by the decisions of the ECCJ? Should our courts apply the norms in the judgments of the ECOWAS Court in their judicial review of governmental actions? Should our national courts not be involved in securing compliance with the judgments of the ECOWAS Court? Should both systems not reinforce each other in securing accountability of government to the people? Should our courts not crave the trust and support of the citizenry over the companionship of government? Do our national courts share the values that the ECCJ seems to promote? If there is a convergence of values, why should our courts resist courts like the ECOWAS Court? Mr Vice Chancellor, I have my own ideas on some of these questions. But, in my humble view, in order to avoid the beginning of the end for either our national courts or courts like the ECOWAS Court, it is necessary that the courts work together to jointly find or give us answers to these questions. In this regard, I am greatly attracted to the views of a British Lady Judge who said:

What I am concerned with is how we absorb Strasbourg and

Luxembourg jurisprudence into our legal system, how we manage the case load to which it gives rise, how we maximise the potential for working together, how we contribute to the creation of their jurisprudence and how we can have most influence on their work.

As Lady Justice Arden correctly points out, the 'existence of supranational courts establishing human rights principles, also empowers the domestic judiciary and strengthens their independence as against other institutions of their own state'. In fact, research indicates that in fiercely nationalist states in Europe such as Germany and the United Kingdom, national courts, even the highest courts of the land, attune their decisions to the jurisprudence of the European Court of Human Rights and enforce the judgments of the Court of Justice of the European Union, of course, not without engaging in formal and informal judicial dialogue with those courts to shape the jurisprudence. This is because, that kind of judicial dialogue allows the national courts influence the judgements by stating the position of the national norm. I also think we do not need to think of the end of the beginning if our national courts can shift paradigm from passive resistance to active engagement with our alien protective invaders. Like other scholars, I do not call for international law and its processes to take an 'overriding' position but for our courts to allow for its persuasive influence and for Nigerian courts to strive for a convergence of values by taking into account the existence and potentially positive effects of the judgments of these international courts. I agree with the lucid wisdom that 'International and constitutional norms should be understood as contextually competing rule of law values rather than as conflicting legal sources vying against one another'. There need not be the beginning of the end for any of these courts. They only need to play a beneficial middle game.

6. Conclusion

Mr Vice Chancellor, distinguished colleagues and guests, it is my sincere hope that I have managed in the preceding pages, to demonstrate that as a result of a growing dissatisfaction with the state of human rights adjudication in our national legal system, a protection gap has emerged. And further that, in search of alternatives to fill this gap, litigants who are supposed to be key actors in our 'bonded-community' of national constitution, national norms and national courts have resorted to finding succour before international courts, the prime example of which is the ECOWAS Court. I also hope I have shown that as a result of the non-involvement of the legislature in this area, extra-constitutional adjudication of rights is going on – involving courts that our Constitution does not mention but also does not prohibit and norms that require nationalisation yet have not been nationalised. I believe I have also shown that this extra-constitutional adjudication is gradually desacralising our erstwhile sacred national courts and resulting in rebranding of their previously constitutionally protected judicial space as a shared national space. I think I have made the argument that the evidence points to the fact that we are already at the end of the beginning and that there are so many questions that leave us wondering whether we are also seeing the beginning of the end. However, I am not so pessimistic. I am convinced that there is the middle game and it provides clear opportunity for constructive institutional engagement to translate all of these into benefits for the people of this country. In this intriguing interplay of constitution, norms and institutions, the beginning has ended, but the end has not yet begun. Thank you for listening.

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In the case of *Uzoukwu v Ezeonu & Ors*, (1991) 6 NWLR (Pt 200) 708 at 761, Nasir (PCA) took the view that there is a distinction between 'fundamental rights' and 'human rights'. For him, 'When the United Nations made its declaration, it was in respect of "human rights" as it was envisaged that certain rights belong to all human beings irrespective of citizenship, race, religion and so on. This has now formed part of International Law. Fundamental Rights remain the realm of domestic law. They are fundamental because they have been guaranteed by the fundamental law of the country, that is by the Constitution'. Order 1 of the Fundamental Rules (Enforcement Procedure) Rules 2009 defines "Fundamental Rights" to mean 'any of the rights provided in Chapter IV of the Constitution, and includes any of the rights stipulated in the African Charter on Human and Peoples' Rights (Ratification and Enforcement) Act'. The Rules simply say that "Human Rights" include fundamental rights'. For the purpose of this lecture, these understandings of the terms will be maintained.

For a good historical account of the emergence of the Westphalian state, see L Gross, 'The Peace of Westphalia 1648 – 1948' (1948) 42 *American Journal of International Law* 20.

See for instance, John Austin and his Command Theory which defines law in terms of an identifiable Sovereign whose commands constitute 'law' for those who find themselves within the territory of that Sovereign (their State) and find themselves in habitual obedience to that Sovereign

Generally see HLA Hart, *The Concept of Law*... According to Hart, a developed legal system is one which boasts of primary rules (that impose duty), and secondary rules (that confer power on officials and institutions) as well as rules of recognition by which officials and citizens can identify the law of the given legal system.

William C Starr, 'Hart's Rule of Recognition and the E.E.C' (1977) 28(3) *Northern Ireland Legal Quarterly* 258 at 260.

One of the characteristics of modern international law, as we shall see from this lecture, is that it has moved beyond regulating inter-state relations into the national legal space where it regulates the relationship between states and individuals (citizens and non-citizens alike) and even set standards for state regulation of the relationship between non-state actors within the territories of states.

Grainne de Burca and Oliver Gerstenberg, 'The denationalization of constitutional law' (2006) 47 (1) *Harvard International Law Journal* 243, 244.

Generally see s. 12 of the 1999 Constitution.

See **ST Ebobrah**, 'International Human Rights Law in the Hands of the Nigerian Judge: A Critique of Current Practice' [2011] 1 *Nig. N. H. Rights Comm. Journal*, 98 (how judicial focus has been on the relationship involving international treaties but not other aspects of international law). . Also see Christian N. Okeke, 'International law in the Nigerian legal system' (1997) 27 *Cal. W. Intl L. J.* 311, 336 who observes that successive Nigerian constitutions have not been sufficiently clear on the

relationship between international law and municipal law in Nigeria.

The case of *Abacha v Fawehinmi* (2000) 4 SCNJ 400 stands out in this area.

See Ebobrah (2011), n 9 above, 105 – 111.

Harry Street and Rodney Brazier (eds) *Constitutional and administrative law de Smith* (4th ed) (1983) Penguin Books, 447

Joseph Raz, 'The Institutional Nature of Law' (1975) 38(5) *Modern Law Review* 489, 493

Welch, Gruhl, Steinman and Comer, *American Government* (4th edition) (1992) St Paul: West Publishing Company, 390

Andre Nollkaemper, *National Courts and the International Rule of Law* (2011), Oxford: Oxford University Press, 5

CF Strong, *Modern Political Constitutions*, (1966) London: ELBS, 284.

Vicki C Jackson, *Constitutional Engagement in a Transnational Era* (2010), Oxford: Oxford University Press, 3.

Generally, see for instance, A Slaughter and W Burke-White, 'The Future of International Law is Domestic (or, the European Way)' (2006) 47(2) *Harvard International Law Journal* 327.

Lord Hoffmann, 'The Universality of Human Rights', 19 March 2009, available at <http://www.brandeis.edu/ethics/pdfs/internationaljustice/bij/BIIJ2013/hoffmann.pdf> LH, 13.

Eyal Benvenisti, 'Judicial misgivings regarding the application of international law: An analysis of attitudes of national courts' (1993) 4 *EJIL* 159, 183; Richard B. Lillich, 'The role of domestic courts in promoting international human rights norms' (1978–79) 24 *New York Law School Review* 153, 155.

Lady Justice Arden, 'Peaceful or Problematic? The relationship between national supreme courts and supranational courts in Europe' (2010) 29(1) *Yearbook of European Law* 3–20.

James Bryce?

Chap IV includes rights such as the rights to life, dignity, fair hearing, Association, Assembly etc.

See *Tukur v Government of Gongola State*, [1989] 4 NWLR (Pt 117), 517. Also see order 1 of the Fundamental Rights (Enforcement Procedure) Rules 2009 which defines "Court" to mean 'the Federal High Court or the High Court of a State or the High Court of the Federal Capital Territory'.

See secs 233 and 240 of the 1999 Constitution on the appellate powers of the Court of Appeal and the Supreme Court.

Generally see Falana, 2010, 13 and Udu, 2011, 203.

See **ST Ebobrah**, 'The future of economic, social and cultural rights litigation in Nigeria' in Emiri & Deinduomo (eds), *Law, Oil and Contemporary Development Issues in Nigeria* (2008) Lagos: Malthouse Press, 177, 180.

What Lord Hoffmann calls a constitutional statement of moral or political philosophy, which is not intended to create legal rights. See Hoffmann, (2009) n 19 above, 2.

See R Alexy, *A theory of Constitutional Rights*, (2010) Oxford: Oxford University Press, xxiv.

(1981)2 NCLR 337, 350

It must be noted however, that based on the decision *AG of Ondo State v AG of the Federation*, (2002) 27 WRN1, some legal commentators have downgraded the original stance to now agree that legislation can create statutory basis for such rights.

This is the essence of sec 6(6)(c) of the Constitution.

Enacted on 17 March 1983 as Act no 2 of 1983. This Act is to incorporate or 'domesticate' the regional human rights treaty, the African Charter on Human and Peoples' Rights in accordance with sec 12 of the 1979 Constitution of Nigeria (which is reproduced verbatim as sec 12 of the 1999 Constitution).

Enacted on 16 July 2003 as Act no 26 of 2003. Although, it is not so stated in the Act, reference to duties to undertake state-reporting duties to the United Nations Committee of the Rights of the Child and the African Committee of Experts on the Rights and Welfare of the Child suggest that the Child Rights Act is a legislation that incorporates or 'domesticates' the global and regional human rights treaties in line with sec 12 of the 1999 Constitution. However, see the case of *The Registered Trustees of National Association of Community Health Practitioners & Ors v Medical and Health Workers Union of Nigeria*, [2008] 2 NWLR (Pt 1072), 525 (which I discuss briefly in Ebobrah (2011) n 9 above) where the Supreme Court of Nigeria took the view that sec 12 requires active incorporation through legislation and not mere coincidence of content been an international treaty and a municipal legislation.

For an interesting article on the generation of human rights, generally see P Macklem, 'Human Rights in International Law: Three Generations or One?' [1994]9 NWLR (Pt 366) 1, 7

See Orders I and II of the FREP Rules 2009.

In the case of the African Charter, the verbatim reproduction of the text of the Charter in the Schedule to the Act should mean that Charter provisions establishing the African Commission on Human and Peoples' Rights form part of Nigerian Law. However, while this raises the question whether it is incumbent on the authorities to therefore implement the decisions of that Commission as having the force of law within our polity, there has been no suggestion that the Commission itself becomes part of our national rights enforcement architecture.

supra

See for instance, Christian N. Okeke, 'International law in the Nigerian legal system' (1997) 27 *Cal. W. Intl L. J.* 311 CO, 336

Hoffmann, (2008), n 19 above, 2

Hoffmann, (2008) n 19 above, 8

Expression attributed to American founding father, Alexander Hamilton, in Welch, Gruhl, Steinman and Comer, *American Government* (4th edition) (1992) St Paul: West Publishing Company, 389

See Strong, 283 for a description of a mature Rule of Law regime.

US v Yunis, 924 F2d 1086, 288 US App DC 129 (DC Circuit 1991)

See Andreas L Paulus, 'From neglect to defiance: The United States and international adjudication' (2004) 15(4) *EJIL* 783, 789 and 799
de Burca and Oliver Gerstenberg, 246.

See **ST Ebobrah**, 'International Human Rights Courts' in CPR Romano, KJ Alter & Y Shuval (eds), *The Oxford Handbook on International Adjudication* (2014) Oxford: Oxford University Press, 225, at 227 – 228. Also see F Viljoen, *International Human Rights in Africa* (2nd edn) (2010) Oxford: Oxford University Press

The Protocol to the African Charter on Human and Peoples' Rights Establishing the African Court on Human and Peoples Rights. The Protocol was adopted on 9 June 1998 and entered into force on 25 Jan 2004.

The ratification table is available at

[https://www.au.int/en/sites/default/files/treaties/7778-sl-](https://www.au.int/en/sites/default/files/treaties/7778-sl-protocol_to_the_african_charter_on_human_and_peoplesrights_on_the_establishment_of_an_african_court_on_human_and_peoples_rights_17.pdf)

[protocol_to_the_african_charter_on_human_and_peoplesrights_on_the_establishment_of_an_african_court_on_human_and_peoples_rights_17.pdf](https://www.au.int/en/sites/default/files/treaties/7778-sl-protocol_to_the_african_charter_on_human_and_peoplesrights_on_the_establishment_of_an_african_court_on_human_and_peoples_rights_17.pdf).

See articles 3 – 5 of the African Court Protocol.

On the potential for conflict between the African Human Rights Court and the supervisory mechanisms of given human rights treaties, see **ST Ebobrah**, 'Towards a positive application of complementarity in the African Human Rights System: Issues of functions and Relations' (2011a) 22 (3) *European Journal of International Law* 663, 675.

See art 5 of the African Court Protocol.

See for instance, African Institute for Human Rights and Development (on behalf of Sierra Leonean Refugees in Guinea) v Guinea, (2004) AHRLR 57

See **ST Ebobrah**, 'Litigating human rights before sub-regional courts in Africa' (2009) *African Journal of International and Comparative Law* (RADIC) Vol 17, No 1, 79; **ST Ebobrah**, 'The role of the ECOWAS Community Court of Justice in the Integration of West Africa: Small strides in the wrong direction?' in L Hamalai & M Obadan (eds) *40 Years of ECOWAS, A book of Readings*, 2015 Lagos: NIALS, 210 at 217.

Protocol AP.1/7/91 on the Community Court of Justice, signed on 6 July 1991, entered into force provisionally in 1991 and definitely on 5 Nov 1996.

See art 3 and 4 of the 2005 Supplementary Protocol A/SP.1/01/05 Amending

Protocol A/P.1/7/91 relating to the Community Court of Justice reproduced in **ST Ebobrah** and A Tanoh (eds) *Compendium of African Sub-Regional Human Rights Document* (2010) Pretoria: Pretoria University Law Press, 286. Also see **ST Ebobrah**, 'Critical issues in the human rights mandate of the ECOWAS Court of Justice'(2010a) 54(1) *Journal of African Law* 1

See **ST Ebobrah**, 'Human rights realisation in the African Sub-regional institutions' in M Ssenyonjo (ed) *The African Regional Human Rights System* (2012) Lieden: Martinus Nijhoff, 283, 296.

See **ST Ebobrah**, *A Critical Analysis of the Human Rights Mandate of the ECOWAS Community Court of Justice* (2008a) Copenhagen: DIHR 28. Application of the African Charter is not unique to the ECOWAS Court as other sub-regional courts in Africa also adopt and apply the African Charter. In this regard, see **ST Ebobrah**, 'Application of the African Charter by African Sub-Regional Organisations: Gains, Pains and the Future' (2012a) 16 *Law, Democracy and Development*, 49.

See art 4 of the 2005 Supplementary Protocol of the ECOWAS Court inserting a new art 10.

On the potential dangers of the absence of a requirement to exhaust local remedies, see Ebobrah, (2008a) n 60 above, 48.

See ECOWAS Commission, (2007) 'Status of Ratification of the ECOWAS Revised Treaty, Protocols and Conventions as at 2007'. On file with me. The 2005 Supplementary Protocol entered into force provisionally after signature.

RO Keohane, A Moravcsik and Anne-Marie Slaughter, 'Legalised dispute resolution: Interstate and transnational' (2000) 54(3) *International Organisations* 457–488

As above, 457–458.

See also, Grainne de Burca and Oliver Gerstenberg, 'The denationalization of constitutional law' (2006) 47 (1) *Harvard International Law Journal* 243, 245.

For instance, see Slaughter & Burke-White (supra)

Suit No: ECW/CCJ/APP/08/08 discussed in **ST Ebobrah**, 'Human rights developments in African sub-regional economic communities during 2009', (2010b) 10 *African Human Rights Law Journal* 233, 249

Suit No. ECW/CCJ/APP/04/09. Also see a brief analysis of the Uweche case in **ST Ebobrah**, 'Human rights developments in African sub-regional economic communities during 2010', (2011b) 11 *African Human Rights Law Journal* 216

Registered Trustees of the Socio-Economic Rights Accountability Project (SERAP) v the Federal Government of Nigeria & Others, Suit No. ECW/CCJ/APP/12/07. See Ebobrah (2011b)

Suit no ECW/CCJ/APP/03/10

Suit no. ECW/CCJ.APP/06/11

ECW/CCJ/APP/10/10

Suit no. ECW/CCJ/APP/14/13

Suit no. ECW/CCJ/APP/15/13

(1981) 1 AllNLR 1 358

Dasuki v The Federal Republic of Nigeria, Unreported Suit No. ECW/CCJ/APP/01/16.

ECW/CCJ/APP/01/06

ECW/CCJ/APP/02/14

Supra, n 73.

Supra, n 70.

Suit no ECW/CCJ/APP/03/09

Suit no. ECW/CCJ/APP/04/15

Suit no ECW/CCJ/APP/1/12

Supra, n 72.

Supra, n 30.

Supra, n 68.

Supra, n 70.

Generally see Ebobrah, (2008) supra

See the cases where litigants claimed violation of rights both under treaty law and on the basis of the Nigerian Constitution.

Harry Street and Rodney Brazier (eds) Constitutional and administrative law de Smith (4th ed) (1983) Penguin Books, 448.

Supra, n 72.

Supra, n 75.

Supra, n 79.

Supra, n 83.

Supra, n 72.

Suit no. ECW/CCJ/APP/01/06

Supra, n 73.

Supra, n 82.

Unreported, Suit no. ECW/CCJ/APP/17/12

de Burca and Gerstenberg, (2006), 245.

See ST Ebobrah, 'A rights-protection goldmine or a waiting volcanic eruption? Competence of, and access to the human rights jurisdiction of the ECOWAS Community Court of Justice' (2007) 7 African Human Rights Law Journal 307

ST 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

ST Ebobrah, 'The future of Socio-economic rights litigation in Nigeria' CALS Review of Nigerian Law and Practice Vol. 1(2) 2007; also published as ST Ebobrah,

'The future of Socio-economic rights litigation in Nigeria' Chapter in O Emiri and D Gowon (eds) *Called to the Law: Essays in honour of Late Justice E Igoniwari* (Peer reviewed collection of Essays) (2009) Lagos: Malthouse Press

ST Ebobrah, 'A critical analysis of the human rights mandate of the ECOWAS Court of Justice (2009) (Monograph) Danish Institute for Human Rights

For instance, as was the case in Southern Africa where the SADC Tribunal as we knew it was shut down and is currently being reorganized to exclude transnational adjudication involving non-state actors. See KJ Alter, JT Gathii & LR Helfer, 'Backlash against International Courts in West, East and Southern Africa: Causes and Consequences' (2016) 27 (2) *EJIL* 293 - 328

Also see Vicki C Jackson, *Constitutional Engagement in a Transnational Era* (2010)

I have not undertaken research to come to such a conclusion.

Cited in Welch, Gruhl, Steinman and Comer, *American Government* (4th edition) (1992) St Paul: West Publishing Company, 406

As above, 392.

A. Nollkaemper, *National Courts and the International Rule of Law* (2011) 6; Eyal Benvenisti, 'Judicial misgivings regarding the application of international law: An analysis of attitudes of national courts' (1993) 161.

Benvenisti (1993) 161; Richard B. Lillich, 'The role of domestic courts in promoting international human rights norms' (1978 – 79) 24 *New York Law School Review* 153, 155; Andreas L Paulus, 'From neglect to defiance: The United States and international adjudication' (2004) 15(4) *EJIL* 783, 802.

See Vicki C Jackson, *Constitutional Engagement in a Transnational Era* (2010), 32.

See for instance, **ST Ebobrah** and N Nkhata, 'Is the SADC Tribunal under judicial siege in Zimbabwe? Reflections on *Etheredge v Minister of State for National Security Responsible for Lands, Land Reform and Resettlement and another*' (2010) 43 *Comparative and International Law Journal of South Africa*, 1.

See Nollkaemper, 5

See the views of United States Justice A Scalias and Australian High Court Judge John Dyson cited by Nollkaemper, 17.

Lady Justice Arden, 'Peaceful or Problematic? The relationship between national supreme courts and supranational courts in Europe' (2010) 29(1) *Yearbook of European Law* 3, 4.

As above, 11.

de Burca & Gerstenberg, 'The denationalization of constitutional law' (2006) 244

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