

## The rights to life, health and development: The Ebola virus and Nigeria

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### Summary

*The Ebola virus disease outbreak in West Africa which started in Guinea in December 2013, as confirmed by the World Health Organisation in March 2014, was reported to have killed approximately 11 310 people in Guinea, Liberia and Sierra Leone between December 2013 and March 2016. On 20 July 2014, the virus was imported into Nigeria through an infected Liberian-American citizen who had travelled from Liberia to Nigeria, arriving at the Murtala Mohammed International Airport in Lagos. The article examines the duty of the Nigerian government to protect Nigerian citizens from contracting and dying from Ebola by ensuring, in practical terms, that the right to life of every Nigerian, as enshrined in section 33 of the Constitution of the Federal Republic of Nigeria 1999, is protected. Furthermore, it is argued that the Nigerian government owes a duty of care to its citizens to a level that ultimately ought to enable each Nigerian to enjoy adequate medical services and infrastructural development in the healthcare sector. This duty of care can be traced to article 22 of the African Charter on Human and Peoples' Rights which confers a legally-binding right to development on African*

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*peoples. The article examines the justiciability of these rights under domestic and international law and identifies the potential legal liability of the Nigerian government, as well as the possible remedies available to the relatives of victims of the virus in Nigeria in the event of such liability. More broadly, the authors use Ebola to explore the notion of 'pragmatic development' – and ask what this means (or ought to mean) in a contemporary African context, within Nigeria's socio-economic rights framework, and the role that international human rights law can play in helping to solve Nigeria's chronic healthcare services and infrastructural deficit.*

**Key words:** *international human rights; constitutional law; right to development; Ebola virus outbreak*

## 1 Introduction

According to the World Health Organisation (WHO), 28 616 suspected and confirmed cases of the Ebola virus disease (EVD) was reported in West Africa, with 11 310 confirmed deaths between December 2013 and March 2016 when the Public Health Emergency of International Concern (PHEIC) related to Ebola in West Africa was lifted.<sup>1</sup> The outbreak started in Guinea in December 2013 and was confirmed as such by the WHO in March 2014.<sup>2</sup> On 20 July 2014, the virus was imported into Nigeria through Mr Patrick Sawyer, an infected Liberian-American citizen who had travelled to Nigeria from Liberia, arriving at the Murtala Mohammed International Airport in Lagos.

On arrival in Nigeria, Mr Sawyer collapsed at the airport and was rushed to First Consultants, a leading private hospital in Obalende, Lagos Island. There he was treated by a team of medical personnel led by the late Dr Ameyo Adadevoh, who was able to diagnose EVD after Sawyer had spent four days at the institution. Sawyer was treated for malaria, having initially denied any previous contact with EVD-infected persons. Once the Lagos State government was informed of the diagnosis, a frantic effort to contain the spread of the disease began at all levels of government – from tracking all primary and secondary contacts to quarantining them for the 21-day period mandated by the WHO. Thankfully, through these proactive measures, Nigeria's last case was reported on 8 September 2014 and the country was declared free from EVD on 20 October 2014.<sup>3</sup>

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1 World Health Organisation 'Situation report: Ebola Virus Disease 10 June 2016' [http://apps.who.int/iris/bitstream/10665/208883/1/ebolasitrep\\_10Jun2016\\_eng.pdf?ua=1](http://apps.who.int/iris/bitstream/10665/208883/1/ebolasitrep_10Jun2016_eng.pdf?ua=1) (accessed 6 April 2017).

2 World Health Organisation 'Ebola virus outbreak' (Ebola Situation Report 2 March 2015) <http://who.int/csr/disease/ebola/en/> (accessed 15 March 2016).

3 World Health Organisation 'Nigeria is now free of Ebola virus transmission' (Ebola Situation Assessment 20 October 2014) <http://www.who.int/mediacentre/news/ebola/20-october-2014/en/> (accessed 15 March 2016).

That the Nigerian government (with some help from the international community) reacted swiftly and effectively in handling the outbreak of EVD in the country is not in contention, and the government has received international commendation for this. However, although Nigeria has been declared Ebola-free,<sup>4</sup> to better prepare for the future a critical appraisal must be conducted of the actions or inactions that led to the introduction of EVD into Nigeria and even the perceived lapses in the government's response, in order to distil important lessons for future health challenges from such deadly viruses.

The article examines the duty of the Nigerian government to protect Nigerian citizens from contracting and dying from EVD by ensuring, in practical terms, that the right to life of every Nigerian, as enshrined in section 33 of the Constitution of the Federal Republic of Nigeria 1999 (CFRN), is protected. Furthermore, it may be argued that the Nigerian government owes a duty of care to its citizens to ultimately enable each Nigerian to enjoy adequate medical services and infrastructural development in the healthcare sector. This duty of care can be traced to article 22 of the African Charter on Human and Peoples' Rights of 1981 (African Charter), which confers a legally-binding right to development on African peoples.

The article examines the justiciability of these rights and identifies the potential legal liability of the Nigerian government by virtue of duties conferred on the government by the relevant international human rights norms, the African Charter and the CFRN, as well as the possible remedies available to the relatives of victims of EVD in Nigeria in the event of such liability. More broadly, the authors utilise the Ebola case to explore the notion of 'pragmatic development' and what this means (or ought to mean) in a contemporary African context, within Nigeria's socio-economic rights framework; and what role international human rights law can play in helping to solve Nigeria's chronic services and infrastructural deficit in the healthcare sector. This endeavour has become important in light of the rapid increase in the number of infectious diseases presently ravaging the world and the cross-border transmission of these diseases.<sup>5</sup> Part two of the article analyses the legal basis, meaning and scope of the rights to life and health within the context of the EVD outbreak, the obligations of states with respect thereto and the nexus or implication between these two rights and the right to development. Part three sets out the legal basis of the right to development and articulates what development should mean within an African context. Part four

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4 As above.

5 See, eg, Yahoo Health 'Zika virus declared global health emergency' <https://www.yahoo.com/health/zika-virus-declared-global-health-emergency-185933502.html> (accessed 2 February 2015); 'Government screens for Zika at airports, borders' *The Guardian* <http://www.ngrguardiannews.com/2016/02/govt-screens-for-zika-at-airports-borders/> (accessed 12 February 2016).

applies this analysis to the Ebola case in Nigeria, while part five concludes with recommendations for the future.

## 2 Government's legal liability in relation to the rights to life and health in the Nigerian public health setting

This section interrogates the meaning and content of the rights to life and health within the context of the outbreak of epidemics and infectious diseases and sets out the obligation of states in relation thereto.

### 2.1 Meaning, scope and legal liability of Nigeria in relation to the right to life in the context of public health

Among the rights guaranteed by human rights norms and standards, the right to life occupies pride of place. It is agreed that the right has become part of the corpus of customary international law. The reason for this assertion is simple: The right to life, by popular consensus of states, first provided for in article 3 of the Universal Declaration of Human Rights (Universal Declaration) appears to have become part of some provisions of the Declaration that have been incorporated into the corpus of customary international law binding on all states.<sup>6</sup> This can be gathered from the fact that the right has become an important feature, even if on paper, of international,<sup>7</sup> regional<sup>8</sup> and domestic bills of rights of most civilised states.<sup>9</sup> Although the right to life is provided for in many international, regional and domestic bills of rights, as mentioned above, only the provisions of the Universal Declaration, the International Covenant on Civil and Political Rights (ICCPR), the African Charter and the CFRN in relation to the right to life will be examined in the article. The reason for this is that only these instruments have either been ratified and/or domesticated.<sup>10</sup>

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6 Hannum has, correctly in our view, argued in this regard that while there may be controversy whether all the provisions of the Universal Declaration have become part and parcel of customary international law, there appears to be little argument that many provisions of the Declaration today reflect customary international law. H Hannum 'The Universal Declaration in national and international law' (1998) 3 *Health and Human Rights* 148-149.

7 Arts 3 & 6 Universal Declaration and ICCPR respectively.

8 Art 4 American Convention on Human Rights; art 2 European Convention for the Protection of Human Rights and Fundamental Freedoms; art 4 African Charter.

9 See eg sec 33 of the CFRN.

10 Although the Universal Declaration has not been ratified by Nigeria, Nigeria's legal liability in relation thereto can be found under customary international law, as discussed above. The ICCPR, on its part, was ratified by Nigeria on 29 July 1993. See OHCHR 'Status of ratification by treaty and by country' [http://tbinternet.ohchr.org/\\_layouts/TreatyBodyExternal/Treaty.aspx?CountryID=127&Lang=EN](http://tbinternet.ohchr.org/_layouts/TreatyBodyExternal/Treaty.aspx?CountryID=127&Lang=EN) (accessed 15 December 2015). As regards the African Charter, Nigeria ratified and domesticated the Charter in 1983 via the African Charter (Ratification and Enforcement) Act Cap A9 LFN 2004.

Having made this preliminary point, we below proceed to examine the particular content of the right to life and the obligation on Nigeria within the context of the outbreak of epidemics and infectious diseases.

As stated earlier, the Universal Declaration is the first international human rights instrument which provides for the right to life. Article 3 of the Universal Declaration affirms 'the right of everyone to life, liberty and security of the person'. Article 6(1) of the ICCPR echoes this provision of the Universal Declaration and provides that '[e]very human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life.' The right to life is a right which appertains to every person as a result of being human. It has, therefore, been argued correctly that a reference to the right to life as an inherent right in the ICCPR suggests that the right exists quite apart from any recognition in positive law.<sup>11</sup>

In its interpretation of article 6 of the ICCPR, the United Nations (UN) Human Rights Committee (HRC), the quasi-judicial body responsible for the interpretation and enforcement of the ICCPR, explains that the right to life is a supreme right which cannot be derogated from even in times of a life-threatening public emergency.<sup>12</sup> In addition, the right is said to have assumed the status of peremptory norms of international law, the arbitrary deprivation of which is prohibited by the international law rule of *jus cogens*.<sup>13</sup> In the view of the HRC, state parties have the supreme obligation to prevent all acts which may cause the arbitrary deprivation of life and, broadly interpreted, the right to life includes the obligation of states in the public health setting to adopt positive measures to increase life expectancy through the prevention and elimination of epidemics.<sup>14</sup>

The African Commission on Human and Peoples' Rights (African Commission), the quasi-judicial body mandated with the interpretation and enforcement of the African Charter, echoed this interpretation of the right to life by the HRC above. In the recent case of *Sudan Human Rights Organisation & Another v Sudan*,<sup>15</sup> the Commission explains that the right to life in article 4 of the African Charter<sup>16</sup> is a basic and supreme right of human beings without which all other rights are meaningless. According to the African Commission, this right in its broad interpretation includes a positive

11 See, eg, CH Heyns *Report of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions A/68/382* (13 September 2013) para 31 <https://www.justsecurity.org/wp-content/uploads/2013/10/UN-Special-Rapporteur-Extrajudicial-Christof-Heyns-Report-Drones.pdf> (accessed 10 December 2015).

12 HRC General Comment 6 para 1.

13 HRC General Comment 24 paras 8 & 10; Heyns (n 11 above) para 30.

14 HRC General Comment 6 para 5.

15 (2009) AHRLR 153 (ACHPR 2009) para 146.

16 Art 4 of the African Charter provides: 'Human beings are inviolable. Every human being shall be entitled to respect for his life and the integrity of his person. No one may be arbitrarily deprived of his right.'

obligation on state parties to take positive and proactive steps to protect citizens from outbreaks of infectious diseases.<sup>17</sup> Thus, where the state has not been proactive or has failed to exercise sufficient care and due diligence to prevent events and circumstances that may occasion the loss of life of persons within its jurisdiction, this may generate a responsibility for the state notwithstanding the fact that the violating act(s) is not directly imputable to the state, as is the case with the importation of EVD into Nigeria by Patrick Sawyer. The state is also obliged to provide reparations to victims of violations.

With regard to the CFRN, the right to life is guaranteed under section 33. Section 33(1) guarantees to every person the right not to be intentionally deprived of life except with respect to carrying out the sentence of a court for a criminal offence of which a person has been found guilty in Nigeria. Section 33(2) of the CFRN, however, provides seven different limitations of the right to life guaranteed under section 33(1). According to the provisions of section 33(2), a person shall not be deemed to have been deprived of his life in contravention of section 33(1), if such person dies from (i) force reasonably necessary to protect any person from unlawful violence; (ii) force reasonably necessary to defend property;<sup>18</sup> (iii) force reasonably necessary to effect a lawful arrest; (iv) force reasonably necessary to prevent the escape of a person who is lawfully detained;<sup>19</sup> (v) force reasonably necessary to suppress a riot; (vi) insurrection; or (vii) mutiny.<sup>20</sup> Thus, if a person dies from the application of reasonable and proportionate force in furtherance of any of the seven purposes or objectives outlined above, such death is not regarded as the deprivation of life within the meaning of section 33 of the CFRN.

Section 33 of the CFRN consequently has been rightly criticised as the very negation of the religious concept of the right to life which presupposes that life and the accompanying right to it is God-given and can, therefore, be taken only by God.<sup>21</sup>

However, it is suggested that despite the numerous exceptions to the right to life under the CFRN outlined above, the obligation on states under international human rights standards and norms identified earlier in the article to act with due diligence to increase life expectancy through the elimination of epidemics in the public health setting are equally applicable to Nigeria by virtue of its subscription to, ratification and domestication of the human rights instruments examined here.

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17 African Commission General Comment 3 para 41.

18 Sec 33(2)(a) CFRN.

19 Sec 33(2)(b) CFRN.

20 Sec 33(2) CFRN.

21 A Uchegbu 'The concept of "right to life" under the Nigerian Constitution' in JA Omotola (ed) *Essays in honour of Judge TO Elias* (1987) 136.

Having identified and discussed the Nigerian government's legal liability in relation to the right to life above, we proceed to examine the Nigerian government's liability in relation to the right to health.

## 2.2 Meaning, scope and legal liability of the Nigerian government in relation to the right to health in the context of public health

The right to health is an essential right without which other rights may be meaningless.<sup>22</sup> A person who is critically ill with no access to appropriate and adequate healthcare is unlikely to appreciate, much less exercise, the rights to personal liberty, freedom of movement, religion, expression, shelter, privacy, among others. Such a person is also most likely to have his or her dignity and autonomy, values central to human rights norms, impacted in significant ways. Thus, although the right to health may not yet have attained the notoriety in recognition nearing that of the right to life, the right is nevertheless also an important feature of international<sup>23</sup> and regional<sup>24</sup> instruments and an emerging feature of domestic bills of rights.<sup>25</sup>

The right to health has two components. The first relates to the availability of timely and appropriate healthcare, while the second relates to the protection of public health through measures such as the provision of potable water and health-related education and information.<sup>26</sup> It is important to note here that the public health dimension of the right to health through the prevention of diseases and the safeguarding of the health of the general populace is much more important in the African context than the availability and provision of health care for individuals because of the issue of resource constraints in poor countries.<sup>27</sup>

However, the use of the term 'right to health' is not without objection. Some scholars have argued that 'the right to healthcare' and 'the right to health protection' are a more apt description of the legal guarantee of the right to health because health itself cannot be guaranteed.<sup>28</sup> It has, however, been argued that the legal guarantee of the right to health goes beyond the mere provision of healthcare and health protection; that the term 'right to health', therefore, is more inclusive and a better reflection of the different components and entitlements under the rubrics of the right to health as provided for in

22 See also *Purohit & Another v The Gambia* (2003) AHRLR 96 (ACHPR 2003) para 80.

23 Arts 25(1) & 12 Universal Declaration and ICESCR respectively.

24 Eg, art 16 African Charter.

25 Secs 27(a) & (3) Constitution of the Republic of South Africa, 1996; secs 43(1)(a) & (2) Constitution of Kenya, 2010.

26 AR Chapman 'Core obligations related to the right to health and their relevance for South Africa' in D Brand & S Russell (eds) *Exploring the core content of socio-economic rights: South African and international perspectives* (2002) 45.

27 Chapman (n 26 above) 53.

28 B Toebes 'Towards an improved understanding of the international human right to health' (1999) 21 *Human Rights Quarterly* 662-663.

international, regional and some domestic human rights instruments.<sup>29</sup> In addition to this, Ngwena and Cook argue that there is necessarily no real conflict between the different terms since the ultimate objective of the different nomenclatures is the 'realisation of highest attainable standard of health'.<sup>30</sup> Consequently, the term 'right to health' will continue to be used in the article to refer to the right under examination in this subsection, except where the texts or provisions of an instrument examined dictate otherwise.

Although the right to health is guaranteed under other international and regional human rights instruments, some of which Nigeria is a party to,<sup>31</sup> dealing with the thematic issues of women, children and other minority and vulnerable groups within the context of the present discussion, however, only the provisions of the International Covenant on Economic, Social and Cultural Rights (ICESCR), the African Charter and the CFRN will be considered as they are relevant because of their ratification and/or domestication.<sup>32</sup>

When the right to health under international law is mentioned, article 12 of the ICESCR generally is regarded as the most comprehensive reference point. According to article 12(1) of the ICESCR, state parties to the Convention 'recognise the right of everyone to the enjoyment of the highest attainable standard of physical and mental health'. As to the meaning of the right to health, the Preamble to the Constitution of the WHO has defined it as the 'state of complete physical, mental and social well-being and not merely the absence of disease or infirmity'.<sup>33</sup> This meaning of the right to health, however, was rejected by the Committee on Economic, Social and Cultural Rights (ESCR Committee), the quasi-judicial body responsible for the exposition and enforcement of the ICESCR.<sup>34</sup>

According to the ESCR Committee, the right to health is not a right to be healthy, but rather is composed of certain freedoms and entitlements.<sup>35</sup> These freedoms include the freedom to have charge and dominion over one's health and body and the freedom to be free from undue intrusion and coerced medical experimentation and treatment, while entitlements include a system of health protection which guarantees equal opportunities for people to enjoy the highest possible standard of health. The ESCR Committee reiterates that the

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29 As above.

30 C Ngwena & R Cook 'Rights concerning health' in D Brand & C Heyns (eds) *Socio-economic rights in South Africa* (2005) 107-108.

31 See eg Ngwena & Cook (n 30 above) 108-111 for a review of some of the relevant instruments.

32 The ICESCR was ratified on the same day Nigeria ratified the ICCPR, on 29 July 1993. See OHCHR 'Status of ratification by treaty and by country' [http://tbinetnet.ohchr.org/\\_layouts/TreatyBodyExternal/Treaty.aspx?CountryID=127&Lang=EN](http://tbinetnet.ohchr.org/_layouts/TreatyBodyExternal/Treaty.aspx?CountryID=127&Lang=EN) (accessed 15 December 2015).

33 Cited by Toebe (n 28 above) 663.

34 ESCR Committee General Comment 14 para 4.

35 General Comment 14 para 8.



notion of 'highest attainable standard of health' is to be understood only as the entitlement of a person to the enjoyment of requisite facilities, conditions, goods and services that make the realisation of the highest attainable standard of health possible.<sup>36</sup>

Five different obligations of states are deduced by the ESCR Committee from the exposition of article 12 of the ICESCR, namely, the general obligation of states; the specific obligation of states; the international obligation of states; the core obligation of states; and the obligation of states to provide reparations and remedies for violations of the Covenant.<sup>37</sup>

In the context of public health, the focus of the present discussion, the fourth obligation, namely, the core obligation of states, is the most germane.<sup>38</sup> This obligation mandates states to ensure access to health facilities, goods and services, especially for vulnerable groups without discrimination; to ensure everyone's freedom from hunger by ensuring access to a minimum essential supply of nutritionally-adequate and safe food; to ensure access to basic shelter and sanitation and an adequate supply of potable water; the provision of essential drugs; and equitable distribution of health facilities, goods and services.<sup>39</sup> More importantly for the present discourse, this obligation also entails the provision of immunisation against major infectious diseases in the community; the prevention, treatment and control of epidemic and endemic diseases; the provision of education and information about the main health problems in the community, including methods of prevention and control; and the provision of appropriate training for health personnel.<sup>40</sup>

According to the ESCR Committee, the core obligation of states identified above is non-derogable under any circumstances whatsoever.<sup>41</sup> Thus, unlike other obligations of states which may be subject to the availability of resources in furtherance of article 2(1) of the ICESCR, states cannot use the non-availability of resources as an excuse for not complying with their core obligation under article 12 of the ICESCR. This stance marks a departure from the earlier position of the ESCR Committee in General Comment 3 where the Committee appeared to be of the view that the non-availability of resources may excuse states from discharging its minimum core obligation to realise socio-economic rights.<sup>42</sup>

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36 General Comment 14 para 9.

37 General Comment 14 paras 30-62.

38 General Comment 14 paras 43-45.

39 General Comment 14 para 43.

40 General Comment 14 para 44.

41 General Comment 14 para 47.

42 See also Ngwena & Cook (n 30 above) 117. It should be pointed out here that the concept of the minimum core obligation of states in the realisation of socio-economic rights is not a generally-accepted concept. It has, eg, been rejected by the South African Constitutional Court which in its stead substituted the concept of reasonableness review, which is limited to enquiring whether governmental acts

In addition to the stated obligations above, states are also obliged to provide remedies and reparation to victims of violations of the right to health.<sup>43</sup> Reparations and remedies may be in form of restitution, compensation, satisfaction or assurances of non-repetition.<sup>44</sup>

According to the ESCR Committee, therefore, the prevention, control and treatment of epidemics and endemic diseases are one of the core obligations of state parties to the ICESCR for which no derogation is permitted.

The meaning and scope of the right to health and obligations imposed, as espoused by the ESCR Committee above, have been echoed by the African Commission with respect to article 16 of the African Charter.<sup>45</sup> Although the Commission did not define the right to health, it concedes that it is not a right to be healthy.<sup>46</sup> In addition, the African Commission sets out the components of the right to health as an inclusive right which consists of both health care and underlying preconditions of health as described by the ESCR Committee above; access to requisite health-related information and education; the right to be free from unwarranted intrusion; coerced medical treatment and experimentation; and freedom from compelled sterilisation and inhuman and degrading treatment.<sup>47</sup>

The obligations of state parties under article 16 of the African Charter also include a minimum core obligation in terms similar to that espoused by the ESCR Committee.<sup>48</sup> These include the formulation of national plans, policies and systems; cross-cutting obligations to respect and protect the right to health; and disease-specific obligations which, in relation to endemic and epidemic diseases, include the obligation of state parties to establish a national mechanism for the prevention and treatment of such diseases;<sup>49</sup> and the provision of effective domestic remedies for victims of violations.<sup>50</sup>

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and omissions and laws and policies adopted to further the realisation of socio-economic rights are reasonable in the circumstances. See, eg, *Government of the Republic of South Africa & Others v Grootboom & Others* 2000 (11) BCLR 1169 and *Minister of Health & Others v Treatment Action Campaign & Others* (No 2) 2002 (10) BCLR 1033 (CC).

43 ESCR Committee General Comment 14 paras 59-62.

44 General Comment 14 para 59.

45 Art 16 of the African Charter provides: '(1) Every individual shall have the right to enjoy the best attainable state of physical and mental health. (2) States Parties to the present Charter shall take the necessary measures to protect the health of their people.'

46 African Commission on Human and Peoples' Rights *Principles and Guidelines on the Implementation of Economic, Social and Cultural Rights in the African Charter on Human and Peoples' Rights* (African Commission Principles and Guidelines) para 61 [http://www.achpr.org/files/instruments/economic-socialcultural/achpr\\_instr\\_guide\\_draft\\_esc\\_rights\\_eng.pdf](http://www.achpr.org/files/instruments/economic-socialcultural/achpr_instr_guide_draft_esc_rights_eng.pdf) (accessed 30 December 2015).

47 African Commission (n 46 above) paras 60-66.

48 Apart from having content similar to that of the ESCR Committee, the African Commission also views the minimum core obligation of states on socio-economic rights as non-derogable. See African Commission (n 46 above) para 17.

49 African Commission (n 46 above) para 67.

50 African Commission paras 21-25.

With regard to the provisions of the CFRN, the right to health is provided for in section 17(3)(d). According to the provisions of this sub-section, 'the state shall direct its policy towards ensuring that ... there are adequate medical and health facilities for all persons'. The nature and scope of Nigeria's socio-economic rights regime, of which the right to health is a part, have been discussed more adequately elsewhere.<sup>51</sup> We, therefore, think that no useful purpose will be served in repeating the same here. However, suffice it to say here that the right to health, like other socio-economic rights contained in the Fundamental Objectives and Directive Principles of State Policy Chapter (Chapter II) of the CFRN, cannot be enforced before any court of law in Nigeria.

The above conclusion notwithstanding, that is not to say that the interpretation or argument for the non-justiciability of socio-economic rights in Nigeria in principle is correct. There are at least three reasons for this contention. First, it is a clear rule of international law that a state cannot rely on the provisions of its domestic law to violate its international law obligations. This conclusion finds support in the decision of the Economic Community of West African States (ECOWAS) Court of Justice in *Registered Trustees of the Socio-Economic Rights and Accountability Project (SERAP) v Nigeria*,<sup>52</sup> where the Court held that Nigeria could not rely on the provisions of its domestic law to violate its obligations under an international treaty, in this case the African Charter.

Second, Nigeria has a separate obligation under international law to take legislative and other measures to transform socio-economic rights into subjective rights in Chapter II of the CFRN.<sup>53</sup> This Nigeria appears to have done through the domestication of the African Charter and the enactment of other socio-economic rights-related statutes in Nigeria.

Third, there is also a separate obligation incumbent upon the Nigerian judiciary to interpret, as far as possible, domestic laws in conformity with the state's obligations under international law.<sup>54</sup> At least two cases from the Nigerian High Courts have, in apparent furtherance of the latter principle, affirmed the right to health in article 16 of the African Charter. In the first, *Odafe & Others v Attorney-General & Others*,<sup>55</sup> the court read the torture and non-discrimination provisions of the CFRN and the African Charter together to find a violation of the right to health of HIV-positive prisoners who were denied the requisite medical treatment. In the second, *Gbemre v Shell*

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51 AE Akintayo 'Planning law versus the right of the poor to adequate housing: A progressive assessment of the Lagos State of Nigeria's Urban and Regional Planning and Development Law of 2010' (2014) 4 *African Human Rights Law Journal* 562-567.

52 (2009) AHRLR 331 (ECOWAS 2009).

53 See eg African Commission (n 46 above) para 21.

54 African Commission (n 46 above) para 25.

55 (2004) AHRLR 205 (NgHC 2004).

*Petroleum Development Company Nigeria Limited & Others*,<sup>56</sup> the court read the right to life and dignity provisions of the CFRN and the African Charter together with the right to health to find a violation of the right to a healthy environment of the people of the Nigerian Niger Delta whose environment and health were being negatively impacted by the gas-flaring activities of the first respondent. These cases clearly show that some civil and political rights in the CFRN and the African Charter can be interpreted to protect important aspects of the right to health.

The foregoing suggests that notwithstanding the claim of non-justiciability of socio-economic rights under the CFRN, Nigeria is bound by and has the various obligations espoused above in relation to the right to health in Nigeria.

However, having said that, it is pertinent to point out that a close connection exists between the full realisation of other human rights and the right to development.<sup>57</sup> As rightly noted by Uchegbu, for instance, the right to life in modern time must now be related to the quality of life.<sup>58</sup> According to him, it is useless for the law to guarantee the mere right to exist without also guaranteeing the availability of basic facilities such as food, health, shelter and education, which will make such existence and life meaningful and worthwhile.<sup>59</sup> The ESCR Committee has rightly observed that socio-economic rights are significantly related to the right to development.<sup>60</sup> Thus, the rights to life and health are related to other rights and significantly connected to the right to development. The impact of the EVD in Liberia, Sierra Leone and Guinea, three countries with significantly less-developed economies and health care systems than Nigeria, where the virus killed thousands of people as opposed to about nine who lost their lives to the disease in Nigeria, drives this point home very strongly. Related to this are the immense resources needed to ensure the adequate and ongoing presence of requisite mechanisms and facilities needed to secure and fully realise the rights under discussion. There, therefore, is no doubt that the rights to life and health in the context of the EVD importation into and outbreak in Nigeria are rights which are unrealisable in the general environment of extreme poverty and under-development obtainable in most countries in sub-Saharan Africa, including Nigeria. The foregoing scenario directly implicates and calls into being the right of Nigerian citizens to development. We consequently turn to an examination and analysis of the scope and contours of the right to development.

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56 (2005) AHRLR 151 (NgHC 2005).

57 See eg ESCR Committee General Comment 3 paras 8 & 14.

58 Uchegbu (n 21 above) 151.

59 Uchegbu 151-152. See also, on the same point, JN Aduba *The right to life under the Nigerian Constitution: The law, the courts and reality* (2011).

60 ESCR Committee General Comment 3 paras 8 & 14.

### 3 Right to development under regional and international human rights law

Perhaps the most nebulous of rights conferred on Nigerian citizens in the present instance pertains to peoples' right to development (PRTD) as contained in the African Charter as well as the right to development (RTD) in the Universal Declaration of the Right to Development of 1986 (UNDRTD).

#### 3.1 Right to development under the African regional framework

In 1981, the African Charter was adopted by all African states to promote and protect the human rights and basic freedoms of Africans across the continent. Article 22 of the African Charter confers a legally-binding right to development on African people.<sup>61</sup> This is currently the only explicit article dedicated solely to the right to development.<sup>62</sup> However, the conversion of this right into justiciable law under national constitutions of African countries has been limited, as demonstrated by the Nigerian Constitution. Based on the wording of the African Charter and the duties imposed by it on states as well as individuals, at least on paper, the African system became an example of a human rights regime that is duty-oriented, particularly duties on individuals, than the universal human rights system.<sup>63</sup> Significantly, the African Charter went further than the universal human rights framework of the day and the European and American regional human rights systems with the introduction of the first legally-binding article expressly conferring an individual and collective right to development.<sup>64</sup>

Article 22(1) of the African Charter provides:

All peoples shall have the right to their economic, social and cultural development with due regard to their freedom and identity and in the equal enjoyment of the common heritage of mankind.

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61 Organisation of African Unity (OAU) *African Charter on Human and Peoples' Rights*, 27 June 1981 CAB/LEG/67/3 Rev 5, 21 ILM 58 (1982) art 22 <http://www.achpr.org/instruments/achpr/> (accessed 14 April 2014).

62 N van der Have 'The right to development: Can states be held responsible?' in D Foeken et al (eds) *Development and equity: An interdisciplinary exploration by ten scholars from Africa, Asia and Latin America* (2014) 159.

63 As above; H Steiner & P Alston (eds) *International human rights in context: Law, politics and morals* (2000) 920.

64 TF Yerima 'The African Charter on Human and Peoples' Rights: A critique, and in comparison with other regional and international human rights instruments' in A Ibadapo-Obe & TF Yerima (eds) *International law, human rights and development* (2004) 63.

Article 22(2) complements this position by presenting the duty of states, individually or collectively, to ensure the exercise of the right to development.<sup>65</sup> In article 22, the drafters of the African Charter appear to draw from both article 22 of the Universal Declaration<sup>66</sup> and Article 1(1) of the ICESCR<sup>67</sup> in an attempt to convey a comprehensive right, with an attendant duty.

However, although the PRTD has been called for by African human rights activists since the 1960 and 1970s, the volume of advocacy on article 22 of the African Charter has been far less than expected. Out of over 220 communications submitted to the African Commission since its inauguration in 1987,<sup>68</sup> only seven have expressly relied on article 22 in their claims. The first of these claims was submitted in 1994 against the government of Zimbabwe, but was later withdrawn.<sup>69</sup> Furthermore, of these seven communications, only four were decided on the basis of the merits of the case.<sup>70</sup>

As a result, the African Commission has had only a handful of opportunities to make pronouncements on the PRTD. Unfortunately, the Commission was deprived of an important opportunity to make an express pronouncement on article 22 in its landmark decision

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65 See art 22 of the African Charter. Other treaties of the era with development components include the International Convention on the Elimination of all Forms of Racial Discrimination; the Declaration on Permanent Sovereignty over Natural Resources; the Convention for the Prevention and Punishment of the Crime of Genocide; the International Convention on the Suppression and Punishment of the Crime of Apartheid; the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, among others.

66 Art 22 of Universal Declaration states: 'Everyone, as a member of society, has the right to social security and is entitled to realisation, through national effort and international co-operation and in accordance with the organisation and resources of each state, of the economic, social and cultural rights indispensable for his dignity and the free development of his personality.'

67 Art 1(1) of the ICESCR states: 'All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.'

68 The African Commission was established to provide oversight and interpretation of the African Charter and is a quasi-judicial body. Although the Commission only gives recommendations that are not legally-enforceable judgments, these judgments are persuasive and generally well respected.

69 *Social and Economic Rights Action Centre (SERAC) & Another v Nigeria* (2001) AHRLR 60 (ACHPR 2001); *Centre for Minority Rights Development & Others v Kenya* (2009) AHRLR 75 (ACHPR 2009) (*Endorois* case) (decided on merits); *Sudan Human Rights Organisation & Another v Sudan* (2009) AHRLR 153 (ACHPR 2009) (decided on merits); *Socio Economic Rights and Accountability Project v Nigeria* (2008) AHRLR 108 (ACHPR 2008) (ruled inadmissible); *Bakweri Land Claims Committee v Cameroon* (2004) AHRLR 43 (ACHPR 2004) (ruled inadmissible); *Democratic Republic of the Congo v Burundi, Rwanda and Uganda* (2004) AHRLR 19 (ACHPR 2004) (decided on merits); *Association pour la Sauvegarde de la Paix au Burundi v Kenya, Uganda, Rwanda, Tanzania, Zaire and Zambia* (2003) AHRLR 111 (ACHPR 2003) (decided on merits); *Courson v Zimbabwe* (2000) AHRLR 335 (ACHPR 1995) (withdrawn).

70 Four cases were decided on merit, two ruled inadmissible, and one was withdrawn.

involving the Nigerian government in 2001, *Social and Economic Rights Action Centre (SERAC) v Nigeria*,<sup>71</sup> when it made a number of important development-related pronouncements on the African Charter. In that case, SERAC alleged that the (then) military government of Nigeria had been involved directly in oil production through the state-owned oil company, the Nigerian National Petroleum Company (NNPC), and as the majority shareholder in a consortium with Shell Petroleum Development Corporation (SPDC), and that these operations caused environmental degradation and health problems resulting from the contamination of the environment among the Ogoni people of Southern Nigeria. The Commission went on to state that, *inter alia*, the last layer of the government's obligation requires the state to fulfil the rights and freedoms it willingly undertook under the various human rights regimes by actively deploying the state's machinery towards the practical realisation of such rights.<sup>72</sup>

The situation has since been remedied partly by the African Commission's landmark decision in the *Endorois* case.<sup>73</sup> In this case, the complainants alleged violations of the PRTD resulting from the displacement of the Endorois community, an indigenous community in Kenya, from their ancestral lands without adequate consultation or compensation for their loss of property, the disruption of the community's pastoral enterprise or the right to practise their religion and culture as the Endorois people.<sup>74</sup> According to the Endorois, by creating a game reserve on their land over 30 years ago, the Kenyan government had disregarded national law, Kenyan constitutional provisions and, most importantly, numerous articles of the African Charter, including the right to development.<sup>75</sup> Citing the African Commission's reasoning in *SERAC* above, the Endorois community noted the importance of choice to the rights holders' well-being and the 'liberty of their action', which is tantamount to the choice embodied in the right to development and must, therefore, be respected by the Kenyan government. In pronouncing their findings of a violation of the complainants' PRTD by the respondents, the African Commission stated:<sup>76</sup>

The African Commission is of the view that the right to development is a two-pronged test, that it is both constitutive and instrumental, or useful as both a means and an end. A violation of either the procedural or substantive element constitutes a violation of the right to development.

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71 *SERAC* (n 61) above.

72 *SERAC* para 47.

73 *Endorois* case (n 69 above) paras 22 & 297-298.

74 Citing itself in the *Ogoni* case, the African Commission ruled that the Endorois are a 'people', a status entitling them to benefit from the importance of community and collective identity in African culture, which is recognised throughout the African Charter.

75 *Endorois* case (n 69 above) para 75.

76 *Endorois* case para 277.

Fulfilling only one of the two prongs will not satisfy the right to development.

In finding against the respondent state, The African Commission noted that the Endorois community had suffered a violation of article 22 of the Charter,<sup>77</sup> and went on to enumerate the duties of the Kenyan government, stating that it 'bears the burden for creating conditions favourable to a peoples' development'. The respondent state is obligated to ensure that the Endorois are not left out of the development process or benefits.

While the jurisprudence from the *Endorois* case is extremely helpful, the PRTD is still being considered from the position of the state's internal obligations to its own citizens.<sup>78</sup> What remains untested is the external duty of an African state to any group of African people. In the current analysis of the Ebola case study, apart from the direct analogy regarding the duty of the Nigerian government to peoples on Nigerian territory in the area of due diligence and care, as well as the provision of adequate healthcare systems, this situation credibly raises the question of the liability of the government of Liberia to the Nigerian people with respect to the entry of the EVD into Nigeria from Liberia.

### 3.2 Right to development under international law

Milestones in the evolution of the universal right to development, and later rights-based development, are well demarcated in the literature.<sup>79</sup> Generally, the International Bill of Rights, comprising the Universal Declaration, the ICCPR and the ICESCR, is the precursor to the RTD.<sup>80</sup> Although none of these international instruments expressly mentions the RTD, article 22 of the Universal Declaration states as follows:

Everyone, as a member of society, has the right to social security and is entitled to realization, through national effort and international cooperation and in accordance with the organization and resources of each state, of the economic, social and cultural rights indispensable for his dignity and the free development of his personality.

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77 *Endorois* case para 290.

78 M Salomon *Global responsibility for human rights* (2007); M Salomon 'Legal cosmopolitanism and the normative contribution of the right to development' in S Marks (ed) *Implementing the right to development: The role of international law* (2008) 17.

79 A Sengupta 'Conceptualising the right to development for the twenty-first century' in Office of the High Commissioner for Human Rights *Realising the right to development: Essays in commemoration of 25 years of the United Nations Declaration on the Right to Development* (2013) 67.

80 See M Craven *The International Covenant on Economic, Social, and Cultural Rights: A perspective on its development* (1998).



The RTD also echoes article 28 of the Universal Declaration in seeking international co-operation among states.<sup>81</sup> It recognises that '[e]veryone is entitled to a social and international order in which the rights and freedoms set forth in this Declaration can be fully realized'. Salomon has noted that the RTD derives its 'intellectual origins and legal claims'<sup>82</sup> jointly from articles 28, 55 and 56 of the United Nations Charter. It is upon this foundation that the building blocks of the United Nations Declaration on the Right to Development and the RTD that it proclaims have their origin.

Originally perceived as a 'third generation' or 'solidarity' right,<sup>83</sup> which was generally propagated by developing countries, the RTD was universally established by article 1(1) of the UNDRTD, which states:

The right to development is an inalienable human right by virtue of which every human person and all peoples are entitled to participate in, contribute to, and enjoy economic, social, cultural and political development, in which all human rights and fundamental freedoms can be fully realised.

Furthermore, articles 2(3) and 3(3) declare a duty on states to formulate appropriate national development policies, and to co-operate with each other in ensuring development and eliminating obstacles to development respectively.<sup>84</sup>

It is now generally accepted that these provisions allude to both an individual and a collective right, and that the actual holders of this collective right are 'the people', with obligations resting on national governments as well as a duty of international co-operation amongst governments.<sup>85</sup>

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81 S Fukuda-Parr 'The right to development: Reframing a new discourse for the twenty-first century' (2012) 79 *Social Research* 839.

82 Salomon *Global responsibility for human rights* (n 78 above) 4; Salomon 'Legal cosmopolitanism and the normative contribution of the right to development' (n 78 above) 17.

83 S Marks 'The human right to development: Between rhetoric and reality' (2004) 17 *Harvard Human Rights Journal* 137. In the 1970s and 1980s the RTD was introduced as one of several rights belonging to a third 'generation' of human rights. The first generation consisted of civil and political rights conceived as freedom from state abuse. The second generation consisted of economic, social and cultural rights, claims made against exploiters and oppressors. The third generation consisted of solidarity rights belonging to peoples and covering global concerns such as development, environment, humanitarian assistance, peace, communication and common heritage.

84 As above.

85 Fukuda-Parr (n 81 above). RTD commitments have implications for numerous questions of public expenditure priorities, incentive policies, and regulation. They extend to both national and international domains, and apply to co-operative action with other states in areas of trade, migration, finance, technology transfer, environmental commons, peace and security.

Although the UNDRTD is a declaratory statement of the UN General Assembly, elements of the RTD have subsequently been echoed in various treaties,<sup>86</sup> and arguments have been made that the UNDRTD has attained the status of customary international law.<sup>87</sup> In the 1990s the United Nations Development Programme (UNDP), with the launch of its Human Development Reports, shifted the focus of the international community onto human well-being, and not economic growth, as the purpose and end of development.<sup>88</sup> Nevertheless, unresolved issues around the conceptualisation, legality and justiciability of the RTD still persist.<sup>89</sup>

In the 1990s a renewed focus on the RTD took the form of instituting a follow-up mechanism by the appointment of an Independent Expert in 1998 (and later a High Level Task Force), as well as the establishment of an Open-Ended Working Group on the RTD (WG) by the UN Economic and Social Council on the recommendation of the Commission on Human Rights.<sup>90</sup> The High Level Task Force (HLTF), supporting the WG, articulated the 'core norms' of the RTD as<sup>91</sup>

the right of peoples and individuals to the constant improvement of their well-being and to a national and global environment conducive to just, equitable, participatory and human-centred development respectful of all human rights.

This definition of the RTD as going beyond mere economic development to encompass the constant improvement of the well-being of persons in an environment conducive to equitable, participatory and human-centred development which is respectful of all human rights is the one adopted here.

Prior to this, the Independent Expert on the RTD at the time, prominent Indian economist Arjun Sengupta, further articulated the RTD in his reports.<sup>92</sup> He stipulated four key components of the RTD, stating that '[t]he human right to development is a right to a particular process of development in which all human rights and fundamental freedoms can be fully realised'.<sup>93</sup> He stated that the RTD

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86 T Kunayakam 'The declaration on the right to development in the context of United Nations standard-setting' in Office of the High Commissioner for Human Rights (n 79 above) 17-48.

87 Van der Have (n 62 above) 157.

88 K Manzo 'Africa in the rise of rights-based development' (2003) 34 *Geoforum* 437.

89 B Hamm 'A Human rights approach to development' (2001) 23 *Human Rights Quarterly* 1005; Sengupta (n 79 above) 67-74.

90 Marks (n 83 above) 139. The independent expert was to present a study on the current state of progress in the implementation of the right to development to the working group at each of its sessions as a basis for a focused discussion, taking into account the deliberations and suggestions of the working group. The purpose of the working group was to monitor and review the progress of the independent expert and report back to the Commission.

91 Report of the High Level Task force A/HRC/15/WG.2/TF/2/Add.2, 8 March 2010 8.

92 Sengupta (n 79 above).

93 As above.

requires both negative (prevention) and positive (promotion or protection) actions from states.<sup>94</sup>

In applying the RTD to the present case, the problems of non-justiciability and poorly-defined state liability make it difficult to hold the Nigerian government accountable for a breach of a duty under the RTD. However, an interesting discussion, which falls outside the purview of the current article, is the level of accountability which can be imputed to the global community of states and international organisations to ensure that Ebola, whenever it again appears in West Africa or elsewhere, receives prompt and adequate assistance under the duty of 'international co-operation' highlighted in several universal human rights declarations and conventions, including those mentioned above. The response of the international community to the crisis in West Africa was delayed, with unfortunate results.

#### 4 Development human rights and the Ebola case in Nigeria

Having dealt with the meaning and scope of the right to development above, we turn below to an assessment of the Nigerian state's action and inaction to the importation and outbreak of EVD in Nigeria *vis-à-vis* the state's obligations under norms of human rights discussed above. In order to set the proper tone for that analysis, however, we first describe the types and characteristics of EVD and the nature of its outbreak in Nigeria.

EVD is a deadly disease, the fatality rate of which is put at around 50 per cent and sometimes ranges between 25 and 90 per cent.<sup>95</sup> EVD is caused by a virus of the *Filoviridae* family of the Ebola virus genus.<sup>96</sup> Five species of EVD have been identified: the Zaire ebolavirus; the Sudan ebolavirus; the Tai forest ebolavirus; the Bundibugyo ebolavirus; and the Reston ebolavirus.<sup>97</sup> The Reston ebolavirus has not yet been implicated in any human infection, and the 2014 outbreaks in West Africa has been traced to the Zaire ebolavirus species.<sup>98</sup>

EVD is found in monkeys, gorillas and chimpanzees and is transmitted to humans. It is spread among humans through contact with the bodily fluids of infected persons; for instance, the sweat, saliva, faeces, urine, vomit or blood of infected persons, and surfaces and material contaminated with any such fluids.<sup>99</sup> Even the semen

94 Sengupta (n 79 above) 67-74.

95 WHO 'Ebola virus disease: Fact sheet' <http://www.who.int/mediacentre/factsheets/fs103/en/> (accessed 7 April 2017).

96 CDC 'Ebola (Ebola Virus Disease)' <https://www.cdc.gov/vhf/ebola/pdf/ebola-fact-sheet.pdf> (accessed 7 April 2017).

97 As above.

98 As above.

99 WHO (n 95 above).

and vaginal fluid of infected persons are said to be suspect.<sup>100</sup> EVD can also be transmitted through contact with the corpses of persons that had died from the disease.<sup>101</sup> Outbreaks of the disease used to occur in remote villages, but major urban centres and rural areas are becoming hotspots of recent outbreaks.<sup>102</sup> In hot, humid and densely-populated urban centres of sub-Saharan Africa where direct contact with people and their fluids, especially sweat, is almost unavoidable and where funeral ceremonies and contact with the bodies of the dead is almost routine, the mode of transmission of EVD is potentially a particularly serious public health problem.

EVD is also very difficult to detect. Detection of the virus is only possible after the onset of symptoms. Even then, it may take up to three days after symptoms appear before the virus reaches detectable levels in persons infected and, although several experimental treatments for Ebola are available, there is yet no known cure or approved vaccine for the virus. Therefore, recovery from the disease largely depends on the quality of care received and the immune system of an infected person.<sup>103</sup>

As stated in the introduction, the index case, Mr Patrick Sawyer, an infected Liberian-American citizen, introduced EVD into Nigeria on 20 July 2014. This introduction started an outbreak in Nigeria which lasted 93 days and infected 19 people of which seven died.<sup>104</sup> Once the introduction of EVD into the country was confirmed, the Nigerian government and other stakeholders and its international partners swung into action to contain the outbreak. Several strategies, ranging from contact tracing, isolation, quarantine, effective supportive management of those infected and massive public education were employed to contain the outbreak. Screenings at Nigeria's port of entry were also stepped up. According to Oleribe et al, 'more than 890 persons were followed up, isolated or quarantined within the period [of the outbreak]'.<sup>105</sup> The promptness of the Nigerian government's response and the robustness of the strategies employed defied 'mathematical projections' of the outbreak in Nigeria and led to the early and successful containment of the outbreak for which the

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100 CDC (n 96 above).

101 WHO (n 95 above).

102 As above.

103 CDC (n 96 above).

104 WHO 'WHO declares end of Ebola outbreak in Nigeria' <http://www.who.int/mediacentre/news/statements/2014/nigeria-ends-ebola/en/> (accessed 20 April 2017). There is a discrepancy in the literature regarding the number of the people who were infected with or died from EVD in Nigeria. Oleribe et al, for instance, put the number of infected and deceased at 20 and nine people respectively. OO Oleribe et al 'Nigerian response to the 2014 Ebola viral disease outbreak: Lessons and cautions' (2015) 22 *The Pan African Medical Journal* <http://www.panafrican-med-journal.com/content/series/22/1/13/full/#.WP8PuKK1vDc> (accessed 24 April 2017).

105 Oleribe et al (n 104 above); WHO 'Ebola situation in Port Harcourt, Nigeria' <http://www.who.int/mediacentre/news/ebola/3-september-2014/en/> (accessed 24 April 2017).

government received world accolades.<sup>106</sup> This, however, is not without some lapses before the outbreak and during the containment process. The specifics of some of these lapses will be discussed below when Nigeria's response to the outbreak is assessed. As stated in the introduction, Nigeria was declared Ebola-free by the WHO on 20 October 2014. Having briefly described EVD, its outbreak in Nigeria and the response of the Nigerian government thereto, we now turn to an assessment of the Nigerian government's response in keeping with its human rights obligations.

The existence of duties on the part of the Nigerian government to provide continuous development in the nation's boundaries, in this case, through the provision of improved healthcare services and the protection of the lives and livelihood of human beings, is enshrined in the CFRN as well as other regional and international conventions to which Nigeria is a party, as pointed out above. What remains to be properly ascertained is the level of obligations placed on states to foster the development of citizens – whether as individuals or peoples. In this context, it becomes important to question what the notion of 'development' means (or ought to mean) in its most pragmatic sense in a contemporary African context. Indeed, what role can international human rights law and development policy play in helping to solve Africa's chronic underdevelopment in the future, particularly in areas such as healthcare systems and delivery, as seen in the incidence of the current EVD outbreak in West Africa?

With the expiry of the 2015 deadline for the attainment of the world's Millennium Development Goals (MDGs) and its replacement with Sustainable Development Goals (Global Goals) on 25 September 2015, it has been rightly noted that while there has been some improvement under the MDGs' initiative, the development statistics regarding a large part of sub-Saharan Africa still contrast sharply with the situation in other regions of the world, particularly Organisation for Economic Co-Operation and Development (OECD) countries.<sup>107</sup> The healthcare deficit is particularly glaring in the areas of maternal and infant mortality available to people living in this region, which touches on their right to life, health and development in a larger context. Nevertheless, the duty owed to Nigerians by the Nigerian government is to provide readily-available, affordable, high-quality healthcare to every Nigerian. This can be achieved if the government prioritises its duty in this regard, with the realisation that the state can

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106 Oleribe et al (n 104 above).

107 N Udombana 'The summer has ended and we are not saved! Towards a transformative agenda for Africa's development' (2005) *San Diego International Law Journal* 5. Udombana quoted the defunct Organisation of African Unity (OAU) as stating: 'We have noted, at the close of the 20th century, that of all the regions of the world, Africa is indeed the most backward in terms of development from whatever angle it is viewed and the most vulnerable as far as peace, security and stability are concerned.' In a similar vein, he noted that 'Africa remains the poorest continent despite being one of the most richly-endowed regions of the world'.

be held accountable for a failure to execute (or reasonably attempting to execute) its duties in this area.

Nevertheless, the Nigerian government at both federal and state levels rose to the 'EVD occasion', receiving international acclaim. Despite this international acclaim, however, Bello has pointed out that there is a robust legal regime in Nigeria to effectively and adequately respond to the EVD threat, but that the Nigerian government is remiss in its response and management of the outbreak in at least three instances.<sup>108</sup> First, prior to the importation of EVD into Nigeria by Sawyer, the President of Nigeria could have declared the neighbouring countries of Liberia, Sierra Leone and Guinea infected areas and issued travel restrictions on persons entering and coming from these countries to Nigeria. This was indeed essential because of the virulent nature of the disease and the mobility of Nigerians and other West African citizens who are known to travel to and from Nigeria from all parts of West Africa and beyond. Second, the government of Nigeria could have initiated compulsory submission to medical examination and screening at all ports of entries into Nigeria. This, Bello said, could have detected the first case. Third, Bello argues that the proactive enforcement of the relevant Nigerian laws would have ensured that the necessary force was used to prevent those under quarantine for suspected EVD cases and those undergoing treatment from leaving the isolation centres. The failure of the Nigerian government to do this resulted in some people evading the isolation centres and precipitating the outbreak in Port Harcourt, which led to an increase in the infection and death toll from EVD in Nigeria.<sup>109</sup>

Of course, the adoption of these coercive measures, among others, are potential violations of the rights to freedom of movement, personal liberty, privacy and non-discrimination, among other rights, not only of those already infected with the disease but also those who were at risk of infection. This concern became even more important when regard is had to the fact that the use of coercion in the context of EVD was a key concern during the outbreak of the disease in Guinea, Sierra Leone and Liberia, where governments resorted to extreme coercive measures to keep people and communities suspected of having the disease at bay.<sup>110</sup> However, while it is generally accepted that measures to enforce public health must be underlined by a rights-based approach that recognises the human rights, agency and participation of individuals and the accountability of the state, these individual rights are to be balanced against the rights of the public to be protected against outbreaks of infectious

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108 A Bello 'A review of the legal framework for managing outbreak of infectious diseases in Nigeria' (2015) *The Journal of Private and Property Law* 60-61.

109 WHO (n 105 above).

110 PM Eba 'Ebola and human rights in West Africa' [http://www.thelancet.com/journals/lancet/article/PIIS0140-6736\(14\)61412-4/abstract](http://www.thelancet.com/journals/lancet/article/PIIS0140-6736(14)61412-4/abstract) (accessed 20 April 2017).

diseases and epidemics such as EVD, and where there is a conflict between the two, the rights of the public must take precedence.<sup>111</sup>

It should, therefore, be noted that the adoption of measures to increase life expectancy through the prevention and treatment of epidemics, to act with due diligence to prevent violations of rights and where violations have taken place, to provide victims with reparation are minimum core obligations of the Nigerian government in relation to both the rights to life and health, as pointed out previously. It has also been pointed out that these minimum core obligations are non-derogable on any ground whatsoever, including the non-availability of resources. The failure of the Nigerian government to prevent the entry of EVD into Nigeria in spite of the availability of a robust legal regime to do what is necessary, and the lapses in the proper enforcement of the requisite quarantine, which led to the escape of some people from quarantine and the consequent spread of the outbreak in Port Harcourt, are violations of the Nigerian government's obligation to protect citizens' rights to life and health from violations by third parties and a breach of the state's minimum core obligations, as pointed out above.

In addition, while the declaration of neighbouring countries as EVD-infected areas and the issuance of travel restrictions can be done easily enough, the medical examination and screening at all Nigeria's ports of entry and the forcible quarantine of all suspected cases are things that require an immense deployment of resources, personnel and equipment to effectuate. This is the development dimension of the omission. The failure by the Nigerian government to deploy the necessary resources, personnel and equipment to ensure the protection of the relevant rights is also a violation of the country's obligation under the right to development to ensure the constant improvement of the well-being of persons within its jurisdiction in an environment conducive to equitable and human-centred development respectful of all human rights.

The article has demonstrated that in the case of Ebola, the Nigerian government had the obligation to protect the rights of every person living within its borders in terms of a duty of care to prevent the deadly virus from coming into the country by taking adequate precautions to prevent its spread. A similar duty can also be imposed on the government of Liberia for failing to take sufficient steps to prevent the exit of the first case from its territory into Nigeria and, by extension, also the governments of Guinea and Sierra Leone. While the Nigerian government has rightly received international accolades for its management of the EVD outbreak in Nigeria, the article has shown that Nigeria could have done better had it been more proactive and diligent. This lack of due diligence, which resulted in

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111 L London 'What is a human rights-based approach to health and does it matter' (2008) 10 *Health and Human Rights* 65.

the violation of the rights to life, health and development, will give rise to the obligation of the state to pay reparations.

Although no amount of compensation or reparation is an adequate substitute for human life, the payment of some kind of compensation or reparation nevertheless in this instance serves as a vindication of the rights of the victims of EVD in Nigeria. It, therefore, is suggested that all relatives and dependants of those who lost their lives in the unfortunate incident, especially the medical personnel that bore the brunt of the disease in Nigeria, should be adequately compensated. Those who survived the infection should be compensated for having their rights to health imperilled. The First Consultants Hospital, where EVD first surfaced, and which was shut down for months, should be compensated for their loss of income during the period of the closure and for other incidental losses arising from EVD in the hospital. This in fact is the least that the Nigerian government can do in relation to the rights violated for its negligence and lack of due diligence which occasioned EVD in Nigeria.

## 5 Conclusion

At present, the jurisprudence on the PRTD in Africa may not have had much impact in the universal human rights arena. Apart from the difficulty in adjudicating socio-economic rights cases on the continent,<sup>112</sup> this presumed lukewarm attitude on the part of advocates might not be unconnected to the fact that while article 22(2) of the African Charter confers an obligation on African states, individually and collectively, to 'ensure' that the PRTD is protected or attained, there is insufficient guidance as to what this duty entails in practice and how the duty could or should be achieved. Thus, perhaps influenced by the nebulous nature of the RTD at the universal level, a perceived vagueness about the level of a legally-enforceable implementation of a state's duty to ensure African peoples' development could be responsible for the minimal application of article 22 by advocates across the continent.

However, in order to promote an in-depth understanding of what 'development' is or ought to mean, and the obligations that can lawfully be imputed to states for the violation of this right in Africa, we have in the article attempted to articulate the core content of what development is or should mean within the African context. This was done through the examination and analysis of the meaning and contents of the rights to life and health, their links with the right to development and the obligations imposed on the Nigerian state in the context of the EVD scourge in Nigeria.

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112 T Bulto 'The indirect approach to promote justiciability of socio-economic rights of the African Charter on Human and Peoples' Rights' in R Murray (ed) *Human rights litigation and the domestication of international human rights standards in Africa* (2010) 134-167.



As we look to the future of the PRTD and its contribution to international human rights law, more Africans must deliberately and actively engage in article 22 advocacy with a view to realising the continent's development. The justiciability of the PRTD presents a germane opportunity to African peoples, which should be fully maximised, and the EVD case in Nigeria could well test the effectiveness of this right as a development tool on the continent. It is toward the realisation of this objective that the article is geared.