



**COMPENDIUM OF SEMINAR PAPERS PRESENTED AT THE
INTERNATIONAL CONFERENCE ORGANIZED BY THE ECOWAS
COMMUNITY COURT OF JUSTICE**



**THEME:
TWENTY YEARS OF ECOWAS COURT OF
JUSTICE: ACHIEVEMENTS, CHALLENGES AND
PROSPECTS**



UNHCR
The UN Refugee Agency



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FOREWORD

The ECOWAS Court of Justice which is the principal legal organ of the Economic Community of the West African States (ECOWAS), was set up in 2001 following the swearing-in of the seven pioneer Judges of the Court on 30th January 2001, in Bamako, Mali by the then Chairman of the Authority of Heads of State and Government of ECOWAS and President of the Republic of Mali, His Excellency Alpha Oumar Konare.

The ECOWAS Court of Justice organized an international conference to mark its twentieth-year anniversary at Lomé, Togo between 22nd and 25th November, 2021. The theme of the conference was “*Twenty Years of ECOWAS Court of Justice: Achievements, Challenges and Prospects*”. The plenary sessions of the conference were held under the following seven sub themes: Achievements, Challenges and Future Prospects; ECOWAS Court of Justice: a Community Court or a Human Rights Court?; ECOWAS Human Rights Regime: Human Rights Protection as a Core Value of the Community; The Relationship between the ECOWAS Court of Justice and the national Courts of Member States; Enforcement of the Judgments of the ECOWAS Court of Justice; Remedies and Reparations; and Strategies for Strengthening the Effectiveness of the Court.

The conference was very well attended by key stakeholders in the sub region, including Hon. Ministers and High Government Officials of the Republic of Togo, Chief Justices/ Presidents of Supreme Courts of some Member States, Heads of ECOWAS Institutions, Hon. Judges and Staff of the ECOWAS Court of Justice, Heads of ECOWAS National Offices, the President of the African Bar Association, Presidents of National Bar Associations of some Member States, Resource Persons, Professors of Law, Scholars and Jurists, representatives of International Development Partners, Civil Society Groups, and Members of the Press.

The opening ceremony of the conference was held on 22nd November, 2021. The welcome address was delivered by the President of the Supreme Court of Togo, Hon. Justice Yaya Bawa Abdoulaye. The other Statements, Goodwill Messages and Keynote Addresses were presented by the President of the ECOWAS Court of Justice, Hon. Justice Edward Amoako Asante, the President of the ECOWAS Commission, H.E Jean Claude Kassi Brou, Hon. Speaker of the ECOWAS Parliament, Hon. Sidie Mohamed Tunis, Director General of GIABA, representative of the President of EBID, representative of the Director General of WAHO, President of the African Bar Association, UNHCR Regional Director for West and Central Africa and Prof. M. T Ladan (the keynote speaker). The Opening Speech of the conference by His Excellency Faure Essozimna Gnassingbe the President of the Republic of Togo was delivered on his behalf by the Hon. Minister of Justice and Legislation of Togo, who also declared the conference open.

At the plenary sessions, 24 seminar papers were presented by eminent resource persons which were interrogated by the participants in intellectually stimulating debates. The conference commended the Court for the giant strides it has made in the first 20 years of its existence including the establishment of a bold, unique and authoritative ECOWAS human rights mechanism. The conference also acknowledged the challenges the Court is facing but noted that the ECOWAS Court of Justice has a very bright future. The conference adopted a Communiqué and a Report with far reaching recommendations.

In order to document the proceedings and the outcome of the conference for posterity and for the benefit of Scholars and Jurists, the ECOWAS Court of Justice, collaborated with UNHCR an Agency of the United Nations that the Court has had a cooperation agreement with since 2015, to publish this Compendium of the conference. The cooperation between the two institutions has been reaffirmed and strengthened through the Memorandum of Understanding signed on 15 July 2022, in order to better uphold the rights of refugees, asylum seekers, returnees, internally displaced persons, State-

less persons and those at risk of Statelessness. The 24 Seminar Papers that were presented by the resource persons at the conference, the speeches, Statements, goodwill messages and keynote address that were presented at the opening ceremony, the communique and report of the conference are all published in this compendium. It is our hope that Hon. Judges, Scholars, Researchers, Jurists and Law Students will find this compendium very useful for the continuous and relentless promotion of international human rights.

Hon. Justice Edward Amoako Asante

President

Community Court of Justice, ECOWAS

Ms. Millicent Mutuli

Director

Regional Bureau for West and Central Africa,
UNHCR

CONCEPT NOTE

*INTERNATIONAL CONFERENCE TO BE ORGANISED BY THE ECOWAS COURT OF JUSTICE
IN CELEBRATION OF ITS TWENTIETH YEAR ANNIVERSARY*

**THEME: TWENTY YEARS OF ECOWAS COURT OF JUSTICE: ACHIEVEMENTS,
CHALLENGES AND PROSPECTS**

VENUE: LOME, TOGO

BETWEEN: 21st & 26th NOVEMBER, 2021

INTRODUCTION

Pursuant to the Lagos Treaty of 28th May, 1975, a Regional Economic Community (REC) known as the Economic Community of West Africa States (ECOWAS) was established in the West African sub-region. Article 1 of the Treaty provided as follows; By this treaty, the HIGH CONTRACTING PARTIES establish among themselves an Economic Community of West African States (ECOWAS) hereinafter referred to as the Community. The Members of the Community hereinafter referred as the Member States" shall be the States that ratify this Treaty and such other West African States as may accede to it". ECOWAS currently consists of 15 Member States from the West African sub-region.

Article 4 of the Treaty listed the institutions of the Community amongst which was the Tribunal of the Community. Specifically, Article 11 of the Treaty provided as follows; "There shall be established a Tribunal of the community which shall ensure the observance of law and justice in the interpretation of the provisions of this Treaty. Furthermore, it shall be charged with the responsibility of settling such disputes as may be referred to it in accordance with Article 56 of this Treaty". Unfortunately, this Tribunal never saw the light of day.

In 1991, the Community adopted Protocol A/P.1/7/91 relating to the Community Court of Justice. It established the Court as an interState Court and as the principal legal organ of the Community. In 1993, the Community adopted a Revised Treaty. Article 15 of the Revised Treaty provides as follows; "There is hereby established a Court of Justice of the Community". Twenty years after the adoption of the initial Protocol on the Court, the seven pioneer Judges of the Court were finally, sworn into office on 30th January, 2001. Between January 2001 and January, 2005, the Court was virtually redundant, because Member States and Institutions of the Community that had direct access to the Court failed to approach the Court. Only two Applications were lodged by individuals within the period, and they were ruled inadmissible. In 2005, the Community adopted Supplementary Protocol A/SP.1/01/05 which amended the 1991 Protocol on the Court, by expanding the jurisdiction of the Court, expanded access to the Court to individuals for certain causes of action and provided for the method of enforcement of the judgments of the Court. The most significant feature of the Supplementary Protocol was that it granted jurisdiction to the Court to determine cases of violation of human rights that occur in any Member State.

Following the adoption of the Supplementary Protocol, the Court now has four distinct mandates which are as follows: Mandate as a Community Court, Mandate as an ECOWAS Public Service Tribunal, Mandate as a Human Rights Court and Mandate as an Arbitration Tribunal. Although the primary mandate of the Court is the interpretation of the ECOWAS Revised Treaty and the annexed Protocols and Conventions, the focus of the Court has shifted to its human rights mandate. Despite its initial challenges, the Court has succeeded in establishing an ECOWAS human rights mechanism with very unique features when compared with other regional human rights protection mechanisms. This has attracted global attention. Without doubt, the ECOWAS Court of Justice has faced a lot of challenges in its twenty years of existence. It has also recorded a lot of achievements, particularly in respect of its human rights mandate. The Twentieth anniversary of the setting up of the ECOWAS

Court of Justice, offers the Court and all relevant stakeholders the opportunity to sit back and review the journey so far and its future prospects.

Periodically, the Court organizes international conferences on important legal themes in order to develop ECOWAS Community Law, review the exercise of its judicial mandate and keep abreast with international best practices. The conferences avail the Court the opportunity to present for discussion, important legal themes and sub themes on topical issues bordering on its judicial mandate, ECOWAS Community Law and International Law in general. It therefore provides a forum for the Court to interact and exchange ideas with selected stakeholders, judicial officers from Member States and other regional Courts, scholars and jurists of international repute and the civil society. In the past, the Court successfully organized such international conferences in Dakar, Abuja, Cotonou, Accra, Guinea Bissau and Bamako.

The themes that have been discussed in these past International Conferences organized by the Court are as follows: Protecting the Rights of ECOWAS Citizens through the ECOWAS Court of Justice, 18th – 20th October, 2004, Dakar, Senegal. An Appraisal of the Implementation of ECOWAS Community Law and Future Perspectives; Free Movement of Persons and Goods within the ECOWAS Landscape. 25th – 26th November, 2004, Abuja, Nigeria. The Law in the Process of Integration in West Africa, 13th – 14th November, 2007, Rockview Hotels, Abuja, Nigeria. Strategies for Strengthening the Effectiveness of ECOWAS Court of Justice. 18th – 22nd January, 2011, Accra, Ghana. Human Rights as a Fundamental Value of ECOWAS: An Analysis of the Jurisprudence of the ECOWAS Court of Justice, 17th – 21st March, 2015 Azalai Hotel Guinea Bissau. Protection of Human Rights: A Factor for Peacebuilding in West Africa, 18th – 21st April, 2018, Bamako, Mali. Economic Integration in West Africa: Challenges and Prospects, 21st - 24th October, 2019, Mesnvc Hotel, East Legon, Accra, Ghana.

THEME

The Theme for the 2021 International Conference is “Twenty Years of ECOWAS Court of Justice: Achievements, Challenges and Prospects”

SUB THEMES

The following are the seven sub themes and the issues for consideration under each sub theme:

SUB THEME 1

ACHIEVEMENTS, CHALLENGES AND FUTURE PROSPECTS

Issues for consideration

- Historical Development of the Court
- Composition and tenure of the Judges
- Mandates of the Court.
- ECOWAS Human Rights regime.
- Overview of the jurisprudence of the Court.
- Strength and Weakness
- Achievements and Challenges.
- Future Prospects

SUB THEME 2

ECOWAS COURT OF JUSTICE: A COMMUNITY COURT OR HUMAN RIGHTS COURT?

Issues for consideration

- Role of ECOWAS Court in the integration process.
- Role as a human rights Court.
- Regional Integration and human rights protection Regionalization of human rights protection.
- Refocusing on the economic integration objectives of the Community.
- ECOWAS Community Law.
- The role of Member States.
- The role of the ECOWAS Commission.

SUB THEME 3

ECOWAS HUMAN RIGHTS REGIME: HUMAN RIGHTS PROTECTION AS A CORE VALUE OF THE COMMUNITY

Issues for consideration

- Evolution of human rights as cardinal and fundamental value of the Community.
- Unique features of the human rights mandate of ECOWAS Court of Justice.
- State Responsibility – Holding Member States accountable for their Treaty obligations.
- Comparative analysis of ECOWAS Human Rights regime and other regional human rights Mechanisms.
- Expanding Access to individuals – failure by a Member State to fulfil its obligations to the Community.
- Role of the ECOWAS Commission

SUB THEME 4

THE RELATIONSHIP BETWEEN THE ECOWAS COURT OF JUSTICE AND THE NATIONAL COURTS OF MEMBER STATES.

Issues for consideration

- Community Legal Order.
- ECOWAS Legal regime
- Judicial Dialogue – Implementing the Preliminary Ruling Procedure.
- Concurrent jurisdiction of National Courts of Member States and the ECOWAS Court – Avoiding conflicts.
- Domestication of ECOWAS Community texts by Member States.
- Enhancing co-operation.

SUB THEME 5

ENFORCEMENT OF THE JUDGMENTS OF THE ECOWAS COURT OF JUSTICE.

Issues for consideration

- Enforcement Mechanism of the Judgments of the ECOWAS Court of Justice.
- Pacta Sunt Servanda and the need for Member States to fulfill their Treaty Obligations in good faith.
- Challenges of the Enforcement Mechanism of the ECOWAS Court of Justice: The Dilemma of the National Courts
- Monitoring the implementation of the judgments of the Court.

- Comparative Analysis of the Enforcement Mechanism of the ECOWAS Court of Justice and other Regional Courts: International Best Practice.
- Granting access to individuals and corporate bodies for Enforcement.
- The Role of ECOWAS Commission.

SUB THEME 6

REMEDIES AND REPARATIONS

Issues for consideration

- Approach of ECOWAS Court of Justice to Remedies and Reparation for Human Rights Violations.
- Forms of Reparation: Restitution, Compensation, Rehabilitation, Satisfaction, Guarantees of Non-Repetition.
- Need for Guidelines and Consistency in Quantum of Monetary Reparation
- Amicable Settlement.
- Comparative Analysis of the award of Remedies and Reparations by ECOWAS Court of Justice and other Regional Courts: International Best Practice.
- Way forward.

SUB THEME 7

STRATEGIES FOR STRENGTHENING THE EFFECTIVENESS OF THE COURT.

Issues for consideration

- Factors militating against the effectiveness of the Court
- Composition and tenure of the Members of the Court.
- Compliance by Member States with the judgments of the Court.
- Failure by Member States to fulfill their obligations to the Community – Expanding access for enforcement.
- Implementation of Community Law by the National Courts.
- The way forward.

OBJECTIVES OF THE CONFERENCE

The general objective of the International Conference is to appraise the achievements and challenges of the ECOWAS Court of Justice in the last twenty years and its future prospects, while the specific objective of the conference is to propose strategies for strengthening the effectiveness of the Court. Participants will examine the role of the Court in the integration process, with particular attention on its human rights mandate. They will also examine the composition and tenure of the Members of the Court. In the absence of an ECOWAS Community text defining the relationship between the ECOWAS Court of Justice and the national Courts of the Member States, participants will examine ways of improving the relationship between the Court and the national Courts of Member States and to give effect to the preliminary ruling procedure. The participants will also review the approach of the Court to reparations and the enforcement of judgment mechanism of the Court.

NUMBER OF PARTICIPANTS

In the light of the global COVID- 19 pandemic, the maximum number of participants expected to physically participate in the conference from Member States, ECOWAS Institutions, some International Organizations and some of the resource persons is seventy, while seventy other participants

will participate remotely through Zoom, making a total of one hundred and forty (140) participants. The Covid-19 Protocols will be strictly observed.

VENUE

The conference will be held in Lome, Togo. The venue of the conference and the Zoom Meeting ID will be communicated to the participants in due course.

METHODOLOGY

The proposed International Conference will be a four-day hybrid conference plus two traveling days. The conference will be held partially in person and partially remotely, between 21st & 26th November, 2021. It would hold in plenary sessions and there will be an opening ceremony and one session on the first day and three sessions each on the second and third day. The adoption of the conference report/recommendations and the closing ceremony will take place on the fourth day.

Each Session will be moderated by one of the Hon. Judges of the Court or the President of a Regional Court or the Supreme Court of a Member State. Each sub theme will have at least 4 resource persons. Fifty percent of the resource persons will be physically present, while the rest will make their presentations remotely via Zoom. It is expected that each presenter will discuss in his or her paper at least three of the issues for consideration under his or her sub theme. Each panel of discussants will collectively have between one hour and one hour twenty minutes, depending on the number of presenters. Specifically, each presenter has twenty minutes for his or her presentation. This will be followed by general discussions by participants for one hour under the moderation of the chair of the session.

The recommendations from each session will be drawn up from the presentations of the panel of discussants and the contributions by the other participants. The resource persons will consist of jurists from Member States, ECOWAS Institutions and other International Organizations and Development Partners. The conference will be conducted in the three official languages of the Community; English, French and Portuguese. In order to enable the translators and rapporteurs to do their jobs in a timely manner and to facilitate the compilation and publication of the proceedings of the conference, it is recommended that each resource person should send to the Court, via email, a copy of his/her presentation, not later than 30th September 2021 to the following email addresses:

a) Tony Anene-Maidoh, Chief Registrar: tamaidoh@yahoo.com; tanenemaidoh@Courtecowas.org

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Tony Anene-Maidoh

Chief Registrar,

Community Court of Justice, ECOWAS

Abuja- Nigeria

WELCOME ADDRESS BY THE HON. PRESIDENT OF THE ECOWAS COURT OF JUSTICE, HON. JUSTICE EDWARD AMOAKO ASANTE AT THE OPENING CEREMONY OF THE INTERNATIONAL CONFERENCE ORGANIZED BY THE COURT TO MARK ITS TWENTIETH ANNIVERSARY

AT LOME, TOGO, 22nd November 2022

Protocol

Introduction

1. Your Excellencies, it is a thing of great joy for me, that I have the rare privilege this morning, to warmly welcome on behalf of the ECOWAS Court of Justice, His Excellency, the President of the Togolese Republic, Faure Gnassingbe Eyadema, to the opening ceremony of the international conference being hosted by the Court in this serene city of Lomé, to mark its twentieth year anniversary. We are indeed very delighted that His Excellency was able to spare time from his very busy schedule, to personally be with us at this opening ceremony and to declare open the conference.
2. Your Excellencies, may I also avail myself of this opportunity to also welcome the Chief Justices of Member States, here present, Honourable Ministers and high Government officials of the Republic of Togo here present, His Excellency the President of the ECOWAS Commission, Jean Claude Kassi Brou, Heads of other ECOWAS Institutions, the Auditor General of ECOWAS Institutions, the former President of the ECOWAS Court of Justice and currently, Mediator of the Togolese Republic and President of the High Commission for Reconciliation and Strengthening of National Unity (HCRRUN) of the Togolese Republic, Heads of ECOWAS National offices in the Member States, Your Excellencies, Members of the Diplomatic Corps, our distinguished Guest Speaker and other resource persons, fellow participants, ladies and gentlemen of the press and all our other collaborators.
3. Your Excellencies, permit me, on behalf of the ECOWAS Court of Justice, to express our profound appreciation to His Excellency, the President of the Togolese Republic, the Government and the good people of the Togolese Republic, for agreeing to collaborate with the Court in hosting this anniversary conference and for the very warm reception that has been accorded to the ECOWAS Court of Justice delegation and all other participants in this conference, since our arrival in this very beautiful city of Lomé. We wish to place on record that the Government of the Togolese Republic provided some facilities for the hosting of this conference. We are indeed very grateful for this kind gesture and collaboration and for the very brotherly African hospitality. It was therefore a fitting decision, for the Court in coming to Lomé to celebrate our twentieth year anniversary.

Establishment of the Court

4. The ECOWAS Court of Justice was established by Article 15 of the ECOWAS Revised Treaty and listed in Article 6 of the Treaty as one of the Institutions of the Community. The initial Protocol clearly provides that the Court is the principal legal organ of the Community. As was provided in the 1975 ECOWAS Treaty, the preamble to the initial Protocol on the Court provides that the essential role of the Court is to ensure the observance of law and justice in the interpretation and application of the Treaty and the Protocols and Conventions annexed thereto, and to be seized with responsibility for settling such disputes as may be referred to it in accordance with the provisions of the Treaty as well as disputes between States and the Institutions of the Community.

5. Although the initial Protocol on the Court was adopted on the 6th day of July, 1991 the Court did not come into existence until the 30th day of January, 2001 when the seven pioneer Judges of the Court were sworn in to office in Bamako, Mali, by the then Chairman of the Authority of Heads of State and Government and President of the Republic of Mali, His Excellency, Alpha Omar Konare. Since the swearing in of the pioneer Judges of the Court in 2001, three other sets of Judges have also been sworn into office in 2009, 2014 and 2018, respectively.

6. Your Excellencies, although the Court was established as an Inter State Court, the 2005 Supplementary Protocol that amended the initial Protocol on the Court, granted the Court a human rights mandate, amongst others and granted access to the Court to non-State actors. This has led to a paradigm shift in the judicial functions of the Court. Human rights protection has therefore become the mainstay of the judicial functions of the Court. We are proud to say that despite the indeterminate nature of the human rights mandate, the Court has fashioned out, a unique and vibrant human rights mechanism for our sub region.

7. Despite the teething problems that the Court encountered at the beginning, since it did not have a seat of Court or staff at its inception, we are proud to say that we have overcome, and we have a lot to thank God for in celebrating the numerous achievements of the Court in the past twenty years. We thank you all for joining us in celebrating the ECOWAS Court of Justice.

Mandate

8. The mandate of the Court is clearly spelt out by the 1991 Protocol on the Court as amended. It is pertinent to mention that the contentious competence of the Court, includes the interpretation and application of the Revised Treaty, Protocols, Conventions, Supplementary Acts, Regulations, Directives, Decisions and all other subsidiary legal instruments adopted within the ECOWAS framework. The Court also has the jurisdiction to review the legality of the instruments that I have just mentioned. The Court also serves as an administrative tribunal for ECOWAS public servants. It is also empowered to act as an Arbitration tribunal. Its non-contentious competence includes the giving of advisory opinion to Member States and ECOWAS Institutions.

9. Your Excellencies, the Court is aware of its key role in the integration process of the Community and as the guardian of the Community law and protector of human rights. It is significant to note that the human rights mandate of the Court has become the dominant aspect of its judicial functions. We are proud to note that due to its bold decisions on human rights complaints, the international Community has recognized the evolving ECOWAS human rights regime. The unique feature of this human rights regime is that there is no requirement for the exhaustion of local remedies. Community citizens therefore have the option of lodging complaints for human rights violations before their National Courts or the ECOWAS Court of Justice without the need to exhaust local remedies. We therefore wish to acknowledge with pride, the interest that has been shown in the jurisprudence of the ECOWAS Court of Justice by scholars and researchers from all over the world. With all humility, the ECOWAS Court of Justice is a source of pride for our Community.

Theme of the Conference

10. Your Excellencies and distinguished participants, the theme of this conference is Twenty Years of ECOWAS Court of Justice: Achievements, Challenges and Prospects. The theme was chosen to celebrate the twenty years of existence of the Court, and to examine the achievements, challenges and future prospects of the Court. Without doubt, the Court is the pacesetter amongst regional Courts in Africa. We are proud of the achievements and the numerous landmark judgments that the Court has delivered. We are also concerned by some of the challenges that are posing as an existential threat to the Court. We are however convinced that if these challenges are addressed, the future prospects of the Court will be very bright. This conference therefore gives our stakeholders and other collaborators the opportunity to evaluate the journey of the Court in the past twenty

years, our achievements, challenges and future prospects.

11. The seven themes and numerous issues for consideration under each sub theme that will be discussed at this conference are very important thematic areas. They relate to the historical development of the Court and its human rights mandate, the jurisprudence of the Court, Regional integration and human rights protection, economic integration objectives of the Community and ECOWAS Community Law, and the relationship between the Court and the national Courts of Member States. Other thematic areas include; the judgment enforcement mechanism of the Court, remedies and reparations and the strategies for strengthening the effectiveness of the Court. We are glad to note that all these thematic areas will be fully discussed at this conference, not only by those physically present in Lomé, but by other presenters and participants, remotely, since this is a hybrid conference.

12. Your Excellencies, it is of critical importance that we do not lose sight of the primary purpose of setting up the Court. It is to facilitate the economic integration of the Community, and with the overall responsibility of treaty supervision and oversight. It is therefore imperative for the Court to re-focus attention on its primary mandate, but that cannot be done until non-State actors are given access to the Court in respect of matters pertaining to the economic integration agenda of the Community and failure by Member States to honour their treaty obligations to ECOWAS. National Courts of Member States must also play their role by making referrals to the ECOWAS Court of Justice in accordance with the protocol on the Court. It is only through this doctrine of preliminary ruling, that we can effectively develop ECOWAS Community Law.

Score card

13. Your Excellencies, we are conscious of the fact that we have in our midst today, important stakeholders in our regional integration project. May I therefore seize the opportunity to present our score card since the inception of the Court. A total of 561 initiating applications have been lodged before the Court and it has delivered 130 Rulings and 301 Judgments. The Court has also registered 38 applications for revision of judgments and has delivered 24 decisions on applications for revision. It has also given 5 advisory opinions. The Court has held a total of 1226 Court sessions. Let me therefore seize this opportunity to appreciate the effort of all the past and serving judges of the ECOWAS Court of Justice that have contributed to this impressive judicial record. Currently, there are 166 cases pending before the Court. The outbreak of the Covid-19 pandemic halted judicial activities of the Court from March to June 2020. The Court therefore adopted a new Practice Direction that enabled electronic case management and virtual Court sittings via Zoom. I must therefore express my appreciation to my colleagues the Honourable Judges and the registry and IT staff of the Court who have worked tirelessly in bridging the gap created by the pandemic.

Constraints

14. Your Excellencies, permit me to highlight a few of the constraints militating against the optimal performance of the Court. The reduction, in 2018, of the number of judges of the Court from seven as provided for in the initial Protocol on the Court to five, is of grave concern to us as it is having an adverse effect on the operations of the Court. Despite the best efforts of the current set of judges, the number of cases pending before the Court continues to grow astronomically. In the light of the increasing caseload of the Court, it is obvious that a Court composed of only five Members cannot cope. It is also difficult to form more than one chamber in the Court, since a chamber requires a minimum of three judges. It is therefore suggested that the Member States should consider restoring the composition of the Court back to seven Members as provided for in the initial Protocol on the Court as soon as possible.

15. Secondly, the reduction of the tenure of the judges from five years renewable for another term of five years, to four years non-renewable, is also not in the interest of the Court or the Community, as there is no international Court or tribunal that has such an abridged tenure for its judges. It is not advisable to model the tenure of the judges of the Court in line with that of the tenure of the commissioners in the Commission, who are political appointees. There is no Regional Economic

Community (REC) that has this model, since the tenure of judicial officers is different from the tenure of political appointees. Furthermore, the complete renewal of the Membership of the Court, as was done in 2014 and 2018, as opposed to the staggered tenure of the judges as envisaged under the initial Protocol, is also not in the interest of the Court and the Community, as this leads to compete loss of institutional memory.

16. Your Excellencies, the poor rate of compliance with the judgments of the Court, which currently stands at about thirty percent, is also of grave concern to the Court. We regret that only six Member States have appointed the competent national authorities for the enforcement of the judgments of the Court in their respective Member States. These are the Republic of Guinea, Nigeria, Mali, Burkina Faso, Togo and Ghana. We will continue to appeal for the remaining Members to do the needful. There is also the need to review the organogram of the Court in order to increase the number of staff in the Language services and IT Divisions of the Court. It is necessary to strengthen the capacity of these two divisions. We need to recruit adequate number of Interpreters, Translators and Revisors in English, French and Portuguese, as delays in the translation of Court processes, is making the quick and speedy dispensation of justice difficult to achieve. As the Court has concluded the design of its electronic case management platform that will enable litigants and their lawyers to file and argue their cases remotely before the Court from the comfort of their homes and offices anywhere in world, it has become necessary to recruit more IT Staff in order to ensure the smooth operations of this electronic case management platform.

Tribute

17. Your Excellencies, permit me at this juncture to pay tribute to the founding fathers of ECOWAS, particularly Gen. Yakubu Gowon of Nigeria and Late Gen. Gnassingbe Eyadema of Togo for their foresight in leading the establishment of our Regional Economic Community, ECOWAS. May I also pay tribute to our heads of States in the Authority of Heads of States and Government for their excellent leadership and for giving the Community a sense of direction. Permit to also pay tribute to the Members of the ECOWAS Council of Ministers for their supervisory role in our integration process. I wish to single out for special mention all the past and present Judges of the ECOWAS Court of Justice, for their various contributions towards the development of the Court and its rich jurisprudence. You have indeed written your names in gold, and posterity will reMember your service to the Community. May I also pay tribute to all the pioneer staff of the Court who played important roles in the development of the Court in the past twenty years and all those that joined the service of the Court, midstream. Your various contributions are highly appreciated.

Conclusion

Your Excellencies, the ECOWAS Court of Justice has been a success story. In the life of an international Court, twenty years is a short time, therefore to all intents and purposes, the ECOWAS Court of Justice is a young institution, but one that has made giant strides in its short life-span. The ECOWAS Court of Justice is therefore worth celebrating. When the opportunity presents itself, we shall give twenty hearty cheers to this dynamic institution that has made our sub region proud.

Your Excellencies and all the distinguished participants, in conclusion, may I once more express the profound appreciation of the ECOWAS Court of Justice, to His Excellency, the President of the Togolese Republic, for graciously honouring us with his presence at this opening ceremony. May I also express our gratitude to the Chief Justices of the Member States, here present, Honourable Ministers and high Government Officials of the Togolese Republic, here present, and all our distinguished participants at this conference, for accepting to be part of this epoch-making event. We are indeed confident, that this 20th anniversary conference of the Court, will be very fruitful and stimulating intellectually, and that the outcome of the conference will be very useful in charting the course of the Court in the years ahead.

I thank you for your attention.

Hon. Justice Edward Amoako Asante

President,

Community Court of Justice, ECOWAS
Abuja - Nigeria

OPENING STATEMENT BY DR. SIDIE MOHAMED TUNIS, SPEAKER, ECOWAS PARLIAMENT

Lomé, 22nd November 2022

Protocol

It is with a mixed sense of humility and pride that I stand here, to address this august body at such an auspicious event which marks the opening of a conference in celebration of the 20th anniversary of the ECOWAS Court of Justice. This certainly represents a milestone of historic proportion in the evolution of ECOWAS, and we are honored to commemorate with you, this rich history of dispensing justice, protecting human rights and the interpretation of the ECOWAS Revised Treaty, Annexed Protocols, and Conventions. After 20 years, the Community Court continues to act as a beacon of regional justice, and we have already seen and heard how its decisions have led to myriad changes in law and practice across the West African sub region.

Permit me to recall that last November, the ECOWAS Parliament attained the age of twenty. Unfortunately, that was during the heat of the outbreak of the coronavirus pandemic and we could not have met to celebrate as is being done today. However, due to the importance of Togo to our integration process and its historic role in the formation of the ECOWAS Parliament, we were honored to have commemorated the day in a small way here in Lomé. I was joined by the Honorable Speaker of the National Assembly of Togo in this very hall, where we cut the ECOWAS Parliament's historic 20th anniversary cake. Interestingly, whether by coincidence or design, we are here to celebrate another 20th Anniversary, this time around being that of the Community Court of Justice. I do not know if there is an anniversary cake to cut, but I can sense that there must be something unique about the Republic of Togo and anniversary celebrations. It therefore gives me pleasure to thank His Excellency President Faure Gnassingbe and the good people of Togo for always opening the doors of the Republic to the Institutions of ECOWAS, which is a true demonstration of commitment, dedication and brotherhood.

Excellencies, Your Honors, Ladies and Gentlemen,

In 1991, the Community adopted Protocol A/P.1/7/91 relating to the Community Court of Justice. The protocol established the Court as an interState Court and as the principle legal organ of the Community. This came after the unsuccessful attempt to establish a Tribunal for the Community as provided for by article 11 of the Lagos Treaty. To strengthen its powers, a supplementary protocol was adopted in 2005, thus expanding the jurisdiction of the Court, expanding access to the Court to individuals, and providing for the methods of enforcement of the judgement of the Court. This provided a greater degree of prioritization, with the Court shifting its focus to the protection of human rights and establishing the regional human rights mechanism which has ultimately attracted global acclamation.

20 Years on, it comes as a welcome development that the Court periodically organizes these conferences to develop and review the Community Laws, as well as bring itself into contact with new information on international best practices in the dispensation of justice. As a testament thereof, we celebrate the success of the Court and its enviable records in overcoming the storms of discrimination, prejudice, intolerance, abuse of human rights across the region, as well as its comprehensive diagnosis and recommendations for reforms. The Court, as the custodian of fundamental rights and freedoms, is obliged to play a very significant role in consolidating the gains we have made in entrenching the rule of law in Member States and protecting against the arbitrary exercise of power. These key principles are characteristic of a society where the rule of law is upheld. However, one of

our current challenges to the rule of law is a lack of public understanding as to what it really means. That is why the Court is under continuous obligation to ensure that content of the laws should be accessible, reasonably clear and consistent.

We also take due cognizant of the fact that the reputation of the Court is being brought into disrepute by slow, partial, and even non implementation of its ruling. The Community Court was established to ensure the observance of law and of the principles of equity in the interpretation and application of the provisions of the Revised Treaty, as well as all other subsidiary legal instruments adopted by the Community. This, in the minds of the framers, would ensure the fair, impartial and independent administration of justice, so that each citizen is treated with respect, dignity and fairness, and receives a fair treatment in the application of our laws. Sadly, this is not the case. State Actors now decide which ruling or opinion of the Court to honor. This does not just undermine the integrity of the Court but creates a serious reputational risk for ECOWAS. I reiterate my call on all Attorneys General in all Member States, to, as a matter of grave concern, not only to our people, but to the International Community, urgently organize a special meeting to address this ugly trend. All Laws must be obeyed, and all Court rulings must be adhered to. Failure to do so has the propensity to drift any society into anarchy.

Excellencies, Your Honors, Ladies and Gentlemen,

As I close this brief remark, I make this final appeal to you, Honorable Ladies and Gentlemen of the Highest Judicial body in the ECOWAS region – Please do our region proud. Please stay united and resolved in the dispensation of Justice. Be an institution beyond reproach, independent doing the Peoples’ business – only the Peoples’ business. Our democracy can only be sustained through you and our development can only be sustained through democracy. Dear Honorable Justices, I thank you for the exceptional level of cooperation which has existed between the ECOWAS Court of Justice and the ECOWAS Parliament. I thank you for the Courtesies and cooperation which you have extended to me personally, as Speaker of the Parliament, and to the entire Parliament. May you be guided as you make the critical decision that will have lasting implication for our dear sub-region. I once again congratulate you for your remarkable achievements after 20 years and wish you all the best for decades to come. May your deliberations be fruitful and long live regional integration and justice ! Long live ECOWAS !

Thank You

Merci

Obrigado

KEYNOTE ADDRESS BY PROFESSOR MUHAMMED TAWFIQ LADAN

Lomé, 22nd November 2022

Protocol

Your Excellencies, the President of the ECOWAS Community Court of Justice and Members of the Diplomatic Corps here present; Eminent Judges of the ECOWAS Court, the Chief Registrar and Distinguished experts, Ladies and Gentlemen.

It is with profound gratitude to the President and management of this honourable Court that I stand here to address you on the theme of this year's international Conference: - TWENTY YEARS OF ECOWAS COURT OF JUSTICE: - ACHIEVEMENTS, CHALLENGES AND PROSPECTS.

Distinguished audience, this honourable Court has, and will continue to uphold the Supranationality of ECOWAS introduced by the 1993 Revised Treaty into its decision-making process for the progressive realization of the Community Integration objectives. Accordingly, the Court has been holding Member States accountable for their treaty obligations and has refused to be constrained by the domestic laws of Member States, including national constitutions that are inconsistent with their treaty obligations.

Distinguished audience, I would like to raise and attempt to provide responses to some fundamental questions that may guide us in a fairly objective assessment of the performance of the ECOWAS Court in the 20 last years.

What were the key challenges to the ECOWAS Court that limit its effectiveness or wider impact?

Although the ECCJ was established thirty years ago by the 1991 Protocol Relating to the Community Court of Justice, confirmed by Article 15 of the ECOWAS Revised Treaty, 1993, it became operational ten years after its establishment on 30th January 2001, when the pioneer judges were sworn into office.

The first key challenge to the Court between 2001 and 2005 was its limited function under Article 9 of the 1991 protocol to adjudicate over disputes among Member States regarding the interpretation and application of the Treaty and other legal texts of the Community, for which direct access to the Court was only available to Member States (on their own behalf and on behalf of their citizens) and specific Community institutions.

The resultant consequence of this unaddressed challenge within this 5-year period of operationalisation of the Court, was that it was practically redundant or under-utilized, because Member States and specific community institutions that had direct access to the Court failed to approach the Court. Only two applications were lodged by individuals within the period, and they were ruled inadmissible.

Table I below reveals the effectiveness Criteria for an institutional mechanism like the ECCJ.

Table 1: - Effectiveness Criteria for an Institutional Mechanism

S/N	CRITERIA	COMMENT
1	Utility	Value (added to the subject matter) or usefulness (to target group): as opposed to outdatedness or outliving its usefulness.
2	Responsiveness	To the conflicting and competing societal interests; human needs, problems and challenges facing humanity and societies.
3	Compliance Monitoring	For improved human rights observance results when human rights law and policy are complied with. Compliance reinforces the credibility of human rights protection efforts for sustainable development and the legal systems that support them.
4	Enforcement	Legal action, where necessary to compel compliance and to impose sanctions as a consequence for violating the law or posing a threat to continental and national interest. An effective enforcement strategy (Judicial, prosecutorial, administrative and non-litigious such as ADR) helps ensure fairness for those who willingly comply with legal and policy standards.
5	Evaluation	Calls for periodic review and reform of Practice law and policy
	Implementation	Require strategies (Administrative, Budgetary, judicial, voluntary etc.) for discharging obligations, responsibilities or duties.

The second challenge is lack of political Support from Member States manifested in their non-implementation of the Court's decisions, including refusals to implement or enforce Judgements of the Court that are binding on Member States, Institutions of the Community, Corporate bodies and Individuals (as community Citizens); failure by many Member States, to appoint competent National Authorities for the enforcement of its decisions as prescribed by the Supplementary Protocol; the slow pace or reluctance of national Courts to make referrals to the ECCJ on any issue that arises in any action before them regarding the interpretation of ECOWAS Community Legal texts. All these factors limit the ECOWAS Court's effectiveness in the discharge of its primary and exclusive mandate / Jurisdiction of interpretation and application of Community legal texts, including trade, investment and Competition rules / codes.

The third challenge inhibiting the Court from an activist role in advancing the regional economic integration agenda of ECOWAS through interpretation and rulings, is the reluctance by Member States and the ECOWAS Commission to trigger their rights to initiate Legal action on matters relating to economic integration, despite the growing body of relevant Community legal and policy instruments on trade, investment and competition, Since 2008 (almost 13 years now). This missed opportunity would have afforded the ECCJ the opportunity to activate its redundant power to act as a Community Arbitration Tribunal.

The fourth challenge is essentially operational in nature threatening not only the effective discharge of its mandate, but the Court's very existence. Recent disturbing trends militating against the optional performance of the Court, despite its increased workload include the reduction of the number of

Judges from seven to five; the reduction of the tenure of Judges from five years renewable to four years non-renewable and no longer staggered as was envisaged under the 1991 Protocol of the Court; and the reduction of the number of translators in the organogram of the Court slows down translation of Court processes into the three official languages needed to facilitate the work of the Judges, can only lead to inordinate delays in the administration of Justice.

From a limited mandate to a four-fold mandate Court (2005-2021): Any success story?

The 2005 Supplementary Protocol that amended the 1991 Protocol on the Court, expanded the Jurisdiction of the Court (by granting it human rights mandate under Article 9(4)); expanded access to the Court to individuals for certain causes of action (Article 10); and provided for the method of enforcement of the judgements of the Court.

Applying Article 4 (g) of the 1993 Revised ECOWAS Treaty, the Court has delineated its scope of human rights jurisdiction based on certain guiding principles as the basis for holding Member States accountable for their Treaty obligations without been constrained by the domestic laws of Member States, (see especially decisions of the Court between 2009 and July 2021 against Gambia, Nigeria, Togo etc.).

The Court has become increasingly useful and very busy since 2005. Between 2015 and July 2021 alone, the Court had delivered about 152 decisions. As at 2019, it had rendered a total of 355 decisions; held about 1000 (one thousand) Court sessions since inception to handle about 500 (five hundred) cases lodged before it.

Although the ECCJ became globally popular more as a human rights Court than as an administrative tribunal, or Arbitration Tribunal or a Community Court of Justice, because most of the above judicial statistics on its achievements were human rights based and not on advancing its core mandate of regional economic integration.

Nevertheless, the Court's success story lies in the body of human rights jurisprudence established from these cases, which reinforces the view that respect for human rights and rule of law provides a foundation for durable peace and security as well as sustainable development.

For the past fifteen (15) years out of twenty of its operationalisation, the Court has charted a viable path for the protection of human rights in the region. It has brought renewed hope and optimism within the African human rights system, and position itself as a pivotal instrument in the continent's quest for regional economic integration, peace, security, unity, good governance and sustainable development.

Future Prospects of the ECOWAS Court "WE want"

As the Court continues to grow and deliver more judgements, its impact as a mechanism for the advancement of human rights, good governance and the rule of law in the region has become apparent.

Your Excellencies, distinguished participants and experts, a Supranational Court like the ECCJ cannot efficiently serve as an engine of regional integration if Member States do not internalize the fact that economic integration cannot be achieved effectively without some measure of supranationalism. The experience of ECOWAS region, though not perfect, confirms that unless Member States give up some parts of their national sovereignty and empower regional integration institutions to make binding decisions on their behalf, and implement them at national level, little progress can be made. For effective delivery of Justice and realization of Community economic integration objectives, it is very imperative for Member States to demonstrate greater political will in addressing the earlier identified key Challenges.

One derivative lesson from the first Twenty years Success story of the European Court of Justice (1950 -1970) relevant to regional integration lies in the tight advocacy network of pro-integration lawyers and judges that actively Lobbied national level Judges, and facilitated communication and Subsequent cooperation with the European Court of Justice through, for instance, preliminary ruling procedures. The European Court seized the opportunity and used technical issues like taxes on gingerbread, import duties on chemicals and privatization of the electricity sector to make judgements on totally different topics. It shows that Member States' political will or a political climate in favour of regional integration is NOT always a decisive factor in explaining successful integration efforts by Supranational Courts like the European Court or the ECOWAS Court of Justice.

Hence the need to consolidate and strengthen the human, technical, material and financial capacity of the ECCJ to enable it perform better than in the last 20 years, moving forward.

Need for constructive engagement and continuing dialogue with Member States as well as more outreach programmes beneficial to relevant stakeholders in order to create a better understanding of the strategic role, mandate and activities of the ECOWAS Court in the region

Thank you for listening

GOODWILL MESSAGE BY MADAM MILLICENT MUTULI, DIRECTOR OF THE UNHCR REGIONAL BUREAU FOR WEST AND CENTRAL AFRICA

Lomé, 22nd November 2022

Protocol

It is with great pleasure that I join you today to mark the twentieth anniversary of the ECOWAS Court of Justice; to celebrate the journey thus far; and to look at ways in which we can continue our fruitful partnership to strengthen the work of our two institutions towards our shared objectives: allowing Members of the West African community to lead productive and meaningful lives, able to participate and contribute as full Members of their communities. Central to this, is access to justice.

The legal community, in this region, as around the world, has been at the forefront of securing important social protections for forcibly displaced people, refugees and Stateless persons. In recent years we have seen notable progress related to law reforms on asylum, legal and/normative frameworks, and civil documentation across the region. In this regard, UNHCR strongly believes that the Court, through its advisory and contentious role, holds a unique mandate to be able to support the promotion of a regional asylum and solutions framework and encourage States to implement the 1993 Revised Treaty and subsidiary legal instruments – namely the Protocol on Free Movement.

However, we can all agree that law reforms alone cannot resolve all the challenges that forcibly displaced people, refugees and Stateless people are faced with. As we speak, the West Africa region is beset by conflict and violence, a rise in social tensions and a breakdown in the social fabric of communities – the rule of law is being called into question. These phenomena have driven millions of people to flee their homes, and while the majority remain inside their countries of origin, many also cross borders in search of safety – becoming refugees. Others due to border disputes or a lack of civil documentation are at risk of becoming Stateless. Today, there are 5,5 million forcibly displaced people in ECOWAS countries, 5,1 million IDPs and 450.000 refugees.

In order to effectively respond to human rights violations, a whole-of-society approach must be engaged to ensure access to justice. This includes: ensuring unfettered access to protection for forcibly displaced people, refugees and Stateless persons by advocating for the implementation of relevant legal instruments and enhanced accountability for Member States in meeting their treaty obligations and other international commitments; educating communities about the competence and remedies available through the Court, as well as the procedures to access such remedies; and facilitating access to the Court's Legal Fund in order to allow people who would otherwise not be able to afford legal representation to benefit from strategic litigation.

This Conference provides a timely opportunity to discuss a range of specific legal themes, to explore ways to broaden cooperation by identifying new areas of engagement, based on mutual interest and consequently provide protection for the rights of forcibly displaced people, refugees and Stateless persons, and contribute to addressing the root causes of forced displacement, while upholding the rule of law and holding Member States accountable for their Treaty obligations.

The Court, Bar associations, lawyers, academics all have key roles to play in the administration of justice and the protection and promotion of human rights. Lawyers are instrumental to securing strong and independent judicial decisions that articulate State obligations and interpret key legal principles in accordance with international law.

The 1951 Convention on the status of refugees and the OAU Convention Governing the Specific

Aspects of Refugee Problems in Africa have inspired the development of refugee law frameworks at national and regional levels around the world and on our continent. The same applies to the Statelessness Conventions of 1954 and the 1961, or to the Kampala Convention on IDPs. In order to enhance the competence, independence, and impartiality of the judiciary and legal process in refugee cases, all judges and lawyers must receive adequate training on these international instruments.

Judicial engagement takes many forms from individual representation to strategic litigation and legislative advocacy. These tools are key to ensuring judicial decisions and interpretations are consistent with the obligations of States under international refugee and human rights law. Strategic litigation can be particularly effective, whether through representing individuals or groups, or intervening through amicus curiae briefs, in cases presenting a contentious or undecided legal issue. This is an important means of securing a more definitive, progressive, and consistent interpretation and application of the law.

UNHCR relies on judicial engagement to: i) preserve the integrity of asylum and protection systems for refugees, IDPs, returnees and Stateless; (ii) advocate for recognition and respect for the rights of these populations; (iii) support their inclusion within the ECOWAS Community.

Distinguished Guests,

Ladies and gentlemen,

The Community Court of Justice of the Economic Community of West African States is an increasingly active and bold adjudicator of Human Rights. Since it acquiring this Human Right jurisdiction in 2005, the Court has issued numerous decisions, shedding light on, and providing recourse for human rights violations by its Member States, however, significant challenges exist in ensuring redress for displaced persons.

The number of applications filed by refugees, internally displaced people, Stateless and returnees in the sub-region, for example, is noticeably low. This may be attributed to a variety of factors, such as the limited visibility of the Court in Member States; limited knowledge and awareness of its mandate; lack of jurisprudence on international refugee law and human rights law, as well as barriers in accessing justice. Through your engagement, by drawing lessons from other regional human rights mechanisms, and ensuring greater access for displaced people, these often marginalized populations will be empowered, protected by the law, and supported to find their way towards greater stability.

By continuing to work with the Court, UNHCR hopes to reinvigorate a mutually beneficial collaboration allowing us to better address the rights of forcibly displaced people, refugees and Stateless persons, ensuring the proper interpretation and application of relevant international and national laws.

To this end, UNHCR remains at the disposition of the Court to accompany it as it implements its mandate as a Community Court, an Administrative Tribunal, a Human Rights Court and an Arbitration Tribunal, supporting its capacity in responding to matters under international human rights law, international refugee law and international humanitarian law.

This was the objective of the recent retreat held between our institutions on 10 and 11 November in Lagos, where UNHCR committed to support the Court in the discharge of its mandate, under the proposed Action Plan. Please allow me to thank the Court for its openness and willingness to pursue fruitful partnership with UNHCR. This Action Plan will be focused on i) developing the capacity of judges and lawyers on relevant laws and policies under refugee law ii) enhancing the capacity of UNHCR staff and our UN, NGOs and Civil society partners on the Court mandate and functions; iii) Ensuring knowledge of the public on the Court mandate, functions and promoting access to the Court; iv) Acting as an intervenor in Court through amicus curiae and legal opinions.

We are thrilled by this new era of cooperation that is opening between our Institutions.

Distinguished Guests,

Ladies and gentlemen,

This Conference provides a unique opportunity for legal professionals from across the region to interact and exchange ideas on many issues of importance to refugees, asylum seekers, Stateless and persons at risk of Statelessness, returnees and IDPs; and I believe the discussions will play a critical role in advancing protection agenda in West Africa. Moreover, I am hoping that the discussions that ensue will also serve to inform a strengthened partnership between UNHCR and the ECOWAS Court of Justice.

And on that note, I wish you all a fruitful discussion and Happy Twentieth Anniversary to the Court!

Thank you for your attention.

SUB-THEME 1

ACHIEVEMENTS, CHALLENGES AND FUTURE PROSPECTS

ADVOCACY FOR REFORM OF THE HUMAN RIGHTS PROTECTION SYSTEM OF THE ECOWAS

By

Mr. Ibrahima Kane

Head African Union Advocacy Programme of the African Regional Office, OSIWA

For more than a year, the Commission of the Economic Community of West African States (hereinafter the ECOWAS Commission) has been engaged in a series of consultations with political, economic, social, legal, and cultural actors of the Community, with a view to obtaining their views on the new draft ECOWAS vision, known as Vision 2050.

Through this new initiative, the regional organisation aims to deepen West African regional integration by promoting *“a community of peoples fully integrated in a peaceful and prosperous region with strong institutions, respectful of fundamental freedoms and striving for an inclusive and sustainable development.”*¹

This vision, centred on the citizens of the region, is broken down into five (5) strategies which aim, in particular, to make the region the safest, most stable, and most peaceful part of the continent because it is endowed with strong institutions that respect the rule of law and fundamental freedoms.

It replaces a previous vision, 2020 called “Towards a Democratic and Prosperous Community,” whose primary intention was to **“consolidate the gains that were created by the establishment of peace and stability throughout the region,” and through the deepening of regional experiences and the strengthening of relevant national and regional institutions.** ²

In Vision 2020, Member States also committed themselves not only to **“recognize and respect the rights of all citizens and populations,”** but above all, to **“build a society in which all citizens can freely and openly express themselves, regardless of their religion, ethnicity, gender or social status.”**³

More fundamentally, it called on Governments to **“be accountable to their citizens and to each other (and) to account for the way they manage public resources,”** and called on citizens to **“show particular interest and involvement in ECOWAS affairs from the highest levels to those of ordinary citizens.”**⁴

It was, however, clarified, on the one hand, that **“the realisation of the vision imperatively and urgently requires the strengthening and entrenchment of the institutions of democratic governance based on appropriate international standards as an important element in strengthening democratic governance within the Community, ECOWAS human rights regulations and guidelines (should) be updated to internationally acceptable benchmarks.”**⁵ On the other hand, that **“the culture of implementation of ECOWAS protocols and commitments, which must enshrine the transformation of words into deeds, has not yet been clearly demonstrated by all Member States,”** and that every effort should be made to **“correct this deficiency.”**⁶

As ECOWAS prepares to adopt a new vision, as a layman I would like to share some observations and proposals on the current functioning of the human rights protection system in West Africa, drawn from my experience as a user of this system and as a human rights activist, who is very familiar with the international rights system, in the hope that they may contribute to improve its functioning.

I should point out that I understand a system of law to mean “a set whose elements do not come together at random but constitute an “order”, in that they are linked to each other and to the whole itself by links that one cannot consider in isolation from its surroundings without falsely analysing it.”⁷

I would like to focus on the situation of the Community Judges and the fate accorded by the States to the 401 judgments and orders issued by them since 2003.

¹ See ECOWAS Vision 2020; Towards a democratic and prosperous community, June 2010, page 23.

² See ECOWAS Vision 2020; Towards a democratic and prosperous community, June 2010, page 23.

³ See ECOWAS Vision 2020; Towards a democratic and prosperous community, June 2010, page 28.

⁴ See ECOWAS Vision 2020; Towards a democratic and prosperous community, June 2010, page 39.

⁵ See Jean COMBACAU, «Le droit international bric à brac ou système» in Archives de philosophie de droit, Vol. 31 le système juridique, Sirey 1986, page 86

The situation of the Community Judge

The Court was established with a cohort of 7 judges. In 2017, ECOWAS decided, for financial reasons, to reduce the number to 5, as part of a reorganisation of the functioning of the regional organization.

Since then, it has not been able to fulfil its mission effectively, despite its high reputation in the region: the number of pending cases has risen from 63 in 2016 to 164 in 2021, despite the increase in the number of sessions from 76 in 2017 to 127 in 2021.

ECOWAS is in the process of developing a vision 2050, by which time the region's population will be around 800 million, or one third of the African population. The issue of the number of judges will therefore have to be addressed, by establishing objective criteria for determining the number of judges. If the expectations of Community citizens are to be met, five or even seven judges are insufficient to deal solely with human rights issues, which are becoming increasingly sophisticated.

It brings us to the question of the selection and status of a community judge.

A. The Selection

- The current system was a great innovation when it was introduced but has, over time, shown its limitations.
- However, it deserves some adjustments since the African Union has put in place new standards for the selection of staff for its organs and institutions.

Substantive conditions:

- a. Intellectual quality and moral standing of judges.
- b. Other conditions: Language representation, age limit, over specialization? Gender.

Structural conditions

- a. The selection procedure at national level
 - No clear procedure. Selection made according to proximity to the power, which may have consequences on the impartiality of the judge.
 - Establishment of national mechanisms/call for applications and transparency of the selection procedure
- b. The selection procedure at regional level
 - Limitations of the current system (knowledge of international law by national judges? Inability to verify the moral qualities of the judge.
 - Importance of the AU mechanism (enquiries on diplomas, professional experience, background checks, etc.)

B. The statute

The duration of terms

- The doctrine supports long-term mandates to ensure certain continuity in the case law and to guarantee the independence of judges.
- Re-election must be possible for "those who have rendered genuine service to the system through an informed and impartial administration of justice"
- Prohibition of re-election prevents excessive aging of judges, but risks discouraging young

and worthy candidates concerned about their future once they have completed a single term.

- International practice: a minimum of 5 years and a maximum of 9 years.
- All judges should not leave the Court at the same time.

Security of tenure: “Unless, if in the unanimous opinion of the other judges, (s)he ceases to meet the required conditions of a judge” Refer to the provisions of the Protocol relating thereto.

The organisation of the Court of Justice

- a. Organization of the Registry
 - No provision in the protocol on such an essential structure;
 - Specify in the Protocol the structural links with the office of the Court, etc.
- b. Budgetary procedures
 - Clarification of the Court’s independence in determining its budget;
 - Clarification on the Court’s external financial relations

i. The execution of the decisions of the Community Court

- Under the current system, the Court deals directly with States on the implementation of its decisions;
- Of the 15 States, only 6 or 7 have given indications on which body should be responsible for implementation at national level
- Since the 2012 reform, the refusal to apply a decision of the Court is considered as failure of the State in question to fulfil its community obligations, which must necessarily involve the other Community bodies, the Commission, and the Authority of Heads of State.

A. The inefficiency of the current system of enforcement of decisions

1. Non-operational national mechanisms

- a. Confusion of roles between different Ministries
- b. Government interference in the implementation of decisions
- c. Negligible role given to the National Supreme Court

2. A total absence of Community bodies

- a. No organ feels involved in the implementation of the Court’s decisions;
- b. Little or no activism from the Court towards Community bodies

B. The necessary involvement of Community bodies

The prominent role of the ECOWAS Commission

- It coordinates the activities of all institutions of the community;
- It oversees the implementation of decisions of the Authority and the implementation of the regulations, directives, and decisions of the Council of Ministers;
- It receives the activity reports of the institutions or any element that should contribute to the elaboration of the Commission’s Report on the State of the community;
- It is the legal representative of the Community.

The decisive role of the Authority of Heads of State and the Council of Ministers

- Determines the sanctions to be imposed on States that do not honour their obligations to the Community;
- Refers a case to the Court when it finds that a State has not honoured its obligations

Conclusion

ACHIEVEMENTS, CHALLENGES AND PROSPECTS OF THE ECOWAS COMMUNITY COURT OF JUSTICE

By

Mr. Femi Falana

Human Rights Activist and Senior Advocate of Nigeria

Introduction

The Community Court was inaugurated in 2001 and became operational in 2002. The two cases filed in the registry from 2002 to 2004 by aggrieved Community citizens were struck out due to want of jurisdiction on the part of the Judges. As the Judges were becoming redundant a campaign was launched by the management of the Court and concerned civil society organisations for the expansion of the mandate of the Court to entertain cases of human rights violations. I was privileged to have led the newly established West African Bar Association (WABA) which effectively led the campaign. Happily, on January 19, 2005 the Heads of State and Government of the Member States of the ECOWAS unanimously approved the recommendation of the Council of Ministers for the amendment of the Protocol on the Court to the effect that the Court be vested with jurisdiction to hear and determine cases of human rights violations.

Based on the independence displayed by the Judges some Member States became uncomfortable and sought to whittle down the powers of the Court. In the case of **Ebrima Manneh v Republic of The Gambia**⁶ the defendant raised a preliminary objection against the jurisdiction of the Court to entertain the case of the Plaintiff who had alleged that he was illegally arrested and detained. As soon as the objection was dismissed the Defendant withdrew from the case and other matters pending in the Court. As if that was not enough the defendant proceeded to sponsor an amendment, sometime in September 2009, to make the exhaustion of domestic remedies as a precondition for accessing the Court by individuals and NGOs. But following the campaign mounted against the amendment by the WABA and the human rights community the amendment was rejected by the ECOWAS.

Having collaborated with other colleagues in the legal profession and the human rights community to defend the independence and integrity of the Court for over two decades my presentation is going to be informed by my personal experience. More so, that I have been privileged to approach the Court on behalf of many aggrieved community citizens and individuals from outside the region who complained of the infringement of their human rights in the Member States of the ECOWAS. Notwithstanding the challenges faced by the Court it has been a success story having regard to its rich human rights jurisprudence. This presentation will therefore address the achievements, challenges and the future of the Court on the basis of the decisions of the Court as well as the efforts of the Judges and the staff of the Court to ensure that it remains the leading human rights tribunal in Africa.

Establishment of the Community Court

The Community Court of Justice was established pursuant to Articles 6 and 15 of the Revised Treaty of the Economic Community of West African States (ECOWAS). As the principal juridical organ ECOWAS the Community Court of Justice is saddled with the statutory responsibility of creating an enabling legal environment in the Member States of ECOWAS. The Court is empowered to interpret and apply the Revised Treaty, protocols, conventions and subsidiary legislations and human rights instruments which have been ratified by ECOWAS. The Protocol for the establishment of the Court which was adopted on July 6, 1991 by Member States came into force in 1996, while the first set of seven Judges of the Community Court were appointed in 2000 by the Authority of Heads of State and Government.

Even though the Court became operational in 2001, its limited jurisdiction had adverse effects on its capacity to play any significant role in the promotion of regional integration through the rule of law. As the jurisdiction of the Court was limited to the resolution of disputes between the institutions and Member States of the Community *inter se*, the two cases filed by individual community citizens were struck out for want of *locus standi*⁷. However, due to pressure from civil society organizations led by the West African Bar Association, the jurisdiction of the Court was expanded in January 2005 to

6 (2009) CCJLR (PT 2) 116

7 **Olajide Afolabi v Republic of Nigeria** (2004-2009) 1 and **Chief Frank Ukor v Rachad Laleye & Anor** (2004-2009) 19

grant access to individuals and corporate bodies to secure the enforcement of fundamental rights. Since then, the number of cases filed in the Court has been on the ascendancy.

No doubt, access to the Court to challenge human rights violations in the Member States of ECOWAS has awakened the interest of community citizens and other stakeholders in the Court. The reason for this development is not unconnected with the nature of the Court. Unlike other regional Courts and international tribunals which only entertain cases after the exhaustion of domestic remedies, the ECOWAS Court is unique. It is a regional tribunal of first and last resort in the interpretation and application of community law. It is indisputable that the Court has, through its several decisions, contributed to the development of human rights jurisprudence in Africa. Since majority of the decided cases pertain to human rights abuse, the Court has increasingly become an established forum for ensuring that the provisions of the African Charter on Human and Peoples' Rights and other relevant human rights instruments are recognized, respected and vindicated in the region.

Achievements

The Court has promoted regional integration by protecting the human rights of community citizens under the rule of law. The Court has resolved conflicts among institutions of the ECOWAS, defended democracy and political stability in the region. Owing to confidence in the independence and impartiality of the Court the institutions of the Commission usually request for the interpretation of community texts in order to resolve disputes⁸ and seek the Advisory Opinions of the Court in respect of certain contentious matters.⁹

Recently, the ECOWAS Parliament asked the Court to interpret Articles 18.1 (g) and 18.2 (a and b) of the Supplementary on the enhancement of the powers of the Parliament, which relate to the status of Members nominated from the transitional parliaments from Member States.¹⁰

Protection of socioeconomic and solidarity rights

Unlike municipal Courts in the Member States of the ECOWAS which restrict the observance of human rights to political and civil rights the ECOWAS Court upholds the socioeconomic rights and solidarity rights of community citizens including the right to environment and development. Thus, in the **Registered Trustees of Socio Economic and Accountability Project (SERAP) v. Federal Republic of Nigeria**¹¹ the Court held that every Nigerian has a right to education in line with Article 17 of the African Charter on Human and Peoples Rights. In **SERAP v Nigeria**¹² the Court of Justice found the Nigerian government was responsible for abuses traceable to the oil companies operating within its the Niger Delta region, in violation of Article 24 of the African Charter of Human and Peoples' Rights.

The judgments handed down by the Court in many other cases have contributed to the rich human rights jurisprudence in Africa. Apart from awarding damages to the next of kin and family Members of community citizens who were unlawfully killed, the Court has established the principle that Member States have a legal obligation to investigate the unlawful killing of community citizens and prosecute the culprits. The explanation of the defendants that they were not directly responsible for such deaths was rejected on the ground that the Member States have a duty to safeguard the life of every person living in their territories.

In protecting freedom of expression, the Court has struck down provisions of the law pertaining to sedition in The Gambia and cyber stalking in the Cybercrimes Act of Nigeria. Both countries were

8 See **ECOWAS Parliament v ECOWAS Council of Ministers** (2012) CCJLER (PT 3) 186; (2004 – 2009) CCJLER 29

9 See Advisory Opinion No: ECW/CCJ/ADV.OPN/01/05 (2004-2009) CCJL:ER 55; Advisory Opinion No: 001/08 ECW/CCJ/ADV.OPN/01/08 (2004-2009) 201.

10 See Suit No: ECW/CCJ/ADV: OPN/01/21..

11 (2010) CCJELR 183

12 (2012) CCJELR 317

ordered to repeal the offensive provisions of the laws. The Court has ruled in favour of journalists whose rights were violated on account of the implementation of anti-media laws; ordered the release of detained journalists and awarded payment of reparation to them in deserving cases. The Court also held that the shutting down of Internet in Togo was illegal while it restrained the Government of Nigeria from prosecuting any person for using Twitter after its suspension in Nigeria.

In defence of the right to dignity of persons, the Court has upheld the rights of women to freedom from discrimination, slavery and Inhuman treatment. The Court condemned gender based violence in cases of **Hadijatou v Niger Republic**, **Dorothy Njemanze**¹³; **Mary Sunday v Republic of Nigeria**¹⁴ and **Aminata vs. Diantou Diane** .¹⁵ For the first time, the Maputo Protocol was applied in the Njemanze's case. Other international human rights instruments applied by the Court to uphold the rights of women include the Universal Declaration of Human Rights 1948, Convention on the Political Rights of Women 1952, International Covenant on Civil and Political Rights 1966, International Covenant on Economic, Social and Cultural Rights 1966, Convention on the Elimination of All Forms of Discrimination Against Women 1979, African Charter on Human and People's Rights 1981 and Declaration on the Elimination of Violence Against Women 1993.

Limitation of Time

In **Femi Falana v Republic of Benin** the Court struck out the case on the ground that it was filed 4 months after the occurrence of the human rights violation complained of by the Applicants. It was the view of the Court that any human rights case not filed within a maximum period of three years was liable to be struck out for want of jurisdiction on the part of the Court. But the Court has reviewed its position and ruled that the application for securing the enforcement of human rights cannot be defeated by limitation of time. Thus, by overruling its previous decisions on the limitation of time within which to file human rights cases the Court has abolished the application of any form of statute of limitation.

Refusal of the Court to stop the trial of leaders for crimes against humanity in local and international Courts

In order not to encourage impunity in the region the Court has consistently refused to grant applications seeking to stop the prosecution of leaders allegedly involved in crimes against humanity and other serious crimes. In **Laurent Gbagbo & Anor v Republic of Cote d'Ivoire**¹⁶ the plaintiffs, former President Laurent Gbagbo and his wife filed an application in the ECOWAS Court with a view to preventing their trial for alleged crimes against humanity at the International Criminal Court in the Hague. In its considered judgment the Court declined to entertain the application on the ground that its jurisdiction does not cover the subject matter of the complaint of the applicants. In the same vein, the Court struck out the case of **Hama Amoudu v Republic of Niger**.¹⁷ The Plaintiff, a former Prime Minister of Niger Republic filed the case following the decision of the defendant to try him for the offence of rape. The application was dismissed for want of jurisdiction.

In **Hussein Habre v Republic of Senegal**¹⁸ the Court ruled in favour of the plaintiff and granted an injunction restraining the defendant from trying him under a retrospective law. But another application¹⁹ filed by the plaintiff challenging the validity of the resolution of the African Union to have him tried in a Senegalese criminal Court was refused by the ECOWAS Court for want of jurisdiction. It was the unanimous decision of the Judges that the Court is not competent to determine the validity of the resolution of the African Union. By dismissing these cases the Court has sent a strong message

13 Suit No ECW/CCJ/JUD/08/17)

14 (Suit No ECW/CCJ/JUD/11/18)

15 ECW/CCJ/JUD/14/18

16 (2012) CCJELR 109

17 (ECW/CCJ/JUD/31/19)

18 (2010) CCJELR 71)

19 (2013) CCJLER 287)

to leaders (who hide under immunity to commit grave offences) that they will not be shielded from prosecution whenever the law catches up with them.

Ironically, some former Heads of State and Government who did not comply with the judgments of the Court when they were in office have filed applications in the Court to secure the enforcement of their human rights. Such leaders include the late President Mamoudou Tandja of Niger; Moutar Ouane and Bah Ndaw, former interim Prime Minister and President of Mali, 12 former Members of the National Committee for the Recovery of Democracy and the Restoration of the State in Mali. At different times, the Court declared the detention of such leaders illegal and ordered that they be released from illegal custody. Other leaders who have sought legal redress in the Court include former President Charles Taylor (Liberia); former Vice President Sam Sumana (Sierra Leone) and former Vice President Gay (Liberia) and several parliamentarians from Togo and Mali and Nigeria.

The Court also became the saving grace for the Members of the political party of former President Blaise Compaore when they were banned by the transition government in Burkina Faso from contesting elections in April 2015. Thus, in **Congress for Democracy and Progress (CDP) & Others v Burkina Faso**²⁰ – the Court held that the amendment of the defendant's Electoral Code was a violation of the right to political participation in contravention of Articles 13 and 20 of the African Charter on Human and Peoples Rights. Consequently, the Court ordered the defendant to remove all obstacles to participation in elections arising from the amendment. But due to the refusal of the defendant to comply with the decision of the Court, the interim national government was removed by a *coup d'Etat*. Armed with the judgment of the Court, the democratic space was opened up for all political parties and participants.

It is a good development that former leaders are compelled to apply to the Court to secure the enforcement of their human rights. The development will deepen the campaign for compliance with the judgments of the Court by Member States. However, the Court has equally entertained human rights cases filed by other persons who are not community citizens. Such persons include former President Hissen Habre (Chad) and Ambassador Alex Saab (a dual national of Venezuela and Columbia) and Beast (American); Djot Bayi & 13 Ors (Ukraine) who are not community citizens also sought legal redress in the Court. An American company, Taakor Tropical Hardwood Company Limited also sought legal redress in the Court.

Limitation of time for filing human rights cases

With respect to temporal jurisdiction the ECOWAS Court had maintained a time limit of 3 years for the enforcement of human rights. In **Femi Falana & Anor. v. The Republic of Benin & 2 Ors**²¹ the application was filed in October 2007 regarding an alleged human rights violation that had taken place in April 2004. While relying on Article 9 of the Court's Supplementary Protocol the Court ruled that the application was inadmissible. But in **Faj and Ors v The Gambia**²² the Court clarified a long-outstanding point of contention when it held that there is no time limit for filing complaints concerning human rights violations. The Court also clarified that it accepted the doctrine of continuing human rights violations.

In overruling its previous decisions on the matter, the Court clarified today that, for interpretation purposes, the French version of the Supplementary Protocol is the preferred version. Accordingly, the Court said, claims for the enforcement of human rights against Member States cannot be barred by the limitation period Stated in the Supplementary Protocol. The Court explicitly Stated that any previous decisions stating the contrary had been overruled. Thus, with the decision in Faj's case the ECOWAS Court has been said to have established itself as the most progressive human rights Court

20 Suit No ECW/CCJ/JUG/16/15

21 (2010) CCJLR (Pt 3) 113

22 ECW/APP/36/15

in Africa.

Enforcement of Decisions of ECOWAS Court

The Judgments of this Court are binding on the Member States, Institutions of ECOWAS, Individuals and Corporate bodies. Pursuant to Article 24(4) of the Protocol A/P.1/7/91 relating to the ECOWAS Community Court of Justice (as amended by the Supplementary Protocol A/SP.1/01/05) Member States shall “determine the competent national authority for the purpose of receipt and processing of execution,” of the decisions of the Court and “notify the Court accordingly. So far, only six Member States namely Burkina Faso, Guinea, Nigeria, Mali, Togo and Ghana have appointed the national authority for the enforcement of the decisions of the Court.

During the opening ceremony of 2019/ 2020 Legal year of the ECOWAS Community Court of Justice, the President of the ECOWAS Court of Justice, Justice Edward Asante appealed to Member States to enforce judgment passed by the Court an issue he noted was a major challenge of the Court. According to Asante, the Court was concerned on the unsatisfactory rate of compliance with the judgments of the Court. He explained that the protocol establishing the Court gives the responsibility for the enforcement of the judgments of the Court to Member States in accordance with their Rules of Civil Procedure and that it also requires each Member State to appoint a competent National Authority for the purpose of receipt and processing of the execution of judgments of the Court .²³

At the just concluded annual conference of the African Bar Association which held in Niamey, Niger Republic, the Vice President of the Court, Honorable Justice Gberi-be Ouattara has revealed that out of the total of 446 cases lodged with the ECOWAS Court of Justice since its establishment 20 years ago, 233 judgments, 117 rulings and 30 interim orders were delivered during the period. The Judge however cautioned that despite the exemplary performance of the Court as evidenced by its enviable jurisprudence, the Court faces an “existential threat” by the twin problems of the reduction in the number of the judges from seven to five and their tenure from five years renewable to four years non-renewable instead of the former practice of a staggered tenure. ²⁴

Even the ECOWAS Commission has lamented the disrespect of the Community’s Court decisions by Member States. But no concrete measures have been adopted by the Commission to ensure compliance with the judgments of the Court ²⁵.

It is worrisome to note that some of the Member States that appointed competent national authorities for the purpose of receipt and processing of the execution of judgments of the Court have been accused of not complying with decisions of the Court. It is common knowledge that the rate of compliance with the judgments of the Court is embarrassingly low. Indeed, the Government of Cape Verde announced that the country is not bound by the judgment of the ECOWAS Court in the case of **Alex Saab v Republic of Cape Verde**²⁶ delivered on March 15, 2021. The reason adduced for the defiance is that Cape Verde did not sign the 2005 Supplementary Protocol of the ECOWAS Court.

However, it has been argued that even though Cape Verde did not sign the Supplementary Protocol it is bound by the judgment of the Court under the doctrine of estoppel. Apart from the fact that Cape Verde took part in the drafting of the Supplementary Protocol in the meetings of the Council of Ministers and approval of same in the Summit of the Heads of State and Government of the Member States the Republic submitted to the jurisdiction of the ECOWAS Court in the case of Alex Saab. Indeed, Cape Verde further submitted to the jurisdiction of the Court by filling two separate applica-

23 <https://www.vanguardngr.com/2019/09/ECOWAS-Court-judge-appeal-Member-States-on-enforcement-of-its-judgments/>

24 http://www.CourtECOWAS.org/2021/10/08/four-hundred-and-forty-six-cases-lodged-with-ECOWAS-Court-in-twenty-years_

25 <https://nnn.ng/commission-frow ns-at-disrespect-of-ECOWAS- Court-decisions-by-Members/>

26 ECW/CCJ/APP/43/2020

tions praying the Court to set the judgment aside on ground of lack of jurisdiction. It is hoped that ECOWAS leaders will address the defiance of Cape Verde to avoid setting a dangerous precedent in the community.

Future Prospects

In looking into the future it has been suggested that the question of exhaustion of local remedies should be revisited. Professor Ebobrah has canvassed that “Despite opinion to the contrary and the position of the ECCJ itself it may be necessary to reconsider the question of exhaustion of local remedies before human rights cases come before the ECCJ...it would be beneficial in the long run to defer to some sense of the principle of subsidiarity by giving national Courts the first opportunity to remedy human rights violation, subject of course to availability and efficiency of local remedies.”²⁷ In the same vein, Professor Ladan has described the omission of exhaustion rule a “design flaw” which ought to be remedied.²⁸

In order to address the challenge of non-compliance with the judgments of the Court by Member States the demand for the creation of the appeal chamber of the Court is going to be intensified. The appeal chamber will provide opportunity for litigants who are dissatisfied with the judgments of the Court to test same on appeal. It will also reduce the number of applications filed for the review of the judgments of the Court

Legal Aid for indigent Citizens

GA former President of the Court Justice, Honourable Justice Traore Jerome once listed the obvious challenges faced by the Court to include the lack of a Legal Aid Fund to facilitate access to justice for victims of human rights abuses that cannot afford legal representation. It was his view that the establishment of the legal aid fund would strengthen the Court.²⁹

It is pertinent to note that the campaign for the provision of legal aid for indigent community citizens has been addressed by the challenge of Covid 19 pandemic. As lawyers and litigants no longer travel to the seat of the Court in Abuja the cost of litigation has reduced. Electronic filing of processes and adoption of virtual sitting by the Court has also reduced the cost of litigation.

Hence, Justice Asante has noted that “The parties are in the countries with their lawyers, we have set up a system where they see us and we see them while the hearing goes on. This is very good for us and for them as well. So parties do not need to travel to Abuja by air, they do not have to house their lawyers in hotels, so it is virtually free because they also bring their documents by email. The ECOWAS Court is meant for indigent parties, it is not meant for the rich; therefore for parties to fly themselves and their lawyers to Abuja to have hearings was a problem for us and we sympathised with them.”³⁰

However, legal aid is still required to hire the services of lawyers to handle cases for poor and vulnerable people on *pro bono* basis.

Synergy between ECOWAS Court and national Courts

In order to ensure full cooperation between the ECOWAS Court and national Courts the domestication of the Protocols of the Court by Member States ought to be carried out. According to the Attorney General and Minister of Justice of Ghana, Hon. Godfred Dame Yeboah, Ghana has begun the

27 Solomon T Ebobrah: A critical analysis of the human rights mandate of the ECOWAS Community Court of Justice. The Danish Institute for Human Rights, 2008 p. 49

28 M.T. Ladan – Access to Justice as a Human Rights under the ECOWAS Community Law, Being a Paper presented at the Commonwealth Regional Conference on the theme: the 21st Century Lawyers: Present Challenges and Future Skills under the auspices of the Commonwealth Laws Association and Nigeria Bar Association at Abuja on 8th – 11th April, 2018 Page 17.

29 <https://alliancesforafrica.org/strengthening-the-ECOWAS-court-of-justice-enhancing-access-to-justice-in-the-west-african-region/>

30 <https://guardian.ng/news/virtual-sessions-stay-after-covid-19-ECOWAS-Court/>

process of ensuring the ratification of all Protocols related to the ECOWAS Court in order to facilitate the enforcement of the decisions of the Court.³¹

It is hoped that the process will soon be completed while other Member States are called upon to emulate the commendable example of Ghana.

Community judicial council

Despite the Membership of the Chief Justices and other Heads of Courts of the Member States in the Community Judicial Council no step has been taken to integrate the Court with national Courts. However, the Nigerian Fundamental Rights Enforcement Procedure Rules, 2009 made pursuant to the Nigerian Constitution by the Chief Justice of Nigeria has directed all Judges to apply regional and international human rights instruments. Thus, in addition to the African Charter on Human and Peoples Rights, Nigerian Courts are empowered to apply the human rights provisions contained in the ECOWAS Protocol on Democracy and Good Governance and Protocol on the Court as amended by Supplementary Protocols.

Enforcement of ECOWAS Judgments in national Courts

In the case of **Chude Mba v Republic of Ghana**,³² a the plaintiff sued the defendant over alleged abuse of his human rights and the disruption of his business. The defendant did not file a defence to the case. In a default judgment delivered in the case the Court awarded the sum US\$800,000.00 (Eight Hundred Thousand United States Dollars) as damages and N500, 000.00 (Five Hundred Thousand Naira) only as cost of the action. As the Defendant refused to pay the damages the plaintiff filed an application for enforcement of the judgment in the Court. The plaintiff applied to the High Court in Accra, Ghana for registration and enforcement of the judgment. In its ruling delivered on 2nd February 2016, the High Court dismissed the application on the ground that the Republic of Ghana has not domesticated.

With respect, the High Court erred in law and misdirected itself as it failed to realize that the Constitution of Ghana has made special provisions for the automatic application of human rights treaties and protocols. Section 33 (5) of the 1992 Ghanaian Constitution provides that, “The rights, duties, declarations and guarantees relating to the fundamental human rights and freedoms specifically mentioned in this chapter shall not be regarded as excluding others not specifically mentioned which are considered to be inherent in a democracy and intended to secure the freedom and dignity of man.” In **New Patriotic Party v Inspector General of Police, Accra**³³ the Supreme Court of Ghana applied the provisions of the African Charter of Human and Peoples’ Rights even though Ghana has not domesticated it.

Application of the doctrine of locus standi

The Court has whittled down the rigid application of the doctrine of locus standi. Through the adoption of the principle of *actio populari* the Court has encouraged public interest litigation. In the case of **Socio-Economic Rights and Accountability Project v. Republic of Nigeria**³⁴ the Court held that “in public interest litigation the Plaintiff need not show that he has suffered any personal injury or has a special interest that needs to be protected to have standing”. Similarly, in **National Coordinating Group of Departmental Representatives of the Cocoa-coffee Section v. Republic of Cote D’Ivoire**³⁵ the Court rejected the plea of admissibility and held that there is a presumption of existence of legal personality of the association given the detailed presentation on the name, the legal basis of its establishment, the address and the full name of its legal representative.

31 <http://www.CourtECOWAS.org/2021/05/03/ghana-begins-process-for-ratification-of-protocols-related-to-regional-Court/>

32 (ECW/CCJ/APP/22/16)

33 (2000) 2 HRLRA 1 at 62-63

34 (2010) CCJELR 184

35 (2004 -200) CCJELR 311

In **Centre for Democracy & Development v Mamadou Tandja & Anor**.³⁶ the Court ruled that the Plaintiff lacked *locus standi* to challenge the validity of the third term plan of the 1st Defendant as President of Niger Republic on the ground that “the human rights invoked by the Applicants are not rights for corporate bodies as constituted by them, that as such, they do not have any specific interest at stake”. The Court further said that “when an application is brought before it, it is done necessarily by a person who is a victim of the said violation against one or several Member States of the community and not against individuals, natural or legal persons.”

Curiously, in **Femi Falana v. ECOWAS Commission**³⁷ the Plaintiff averred that he and his many clients whose cases had been determined were dissatisfied with some of the decisions. They could not appeal against the said decisions due to the refusal of the Defendant to set up the appellate division of the Court in accordance with the decision of the Council of Ministers of June 2005. In the unchallenged evidence before the Court the Plaintiff proved that the action of the Defendant constituted a violation of his right to fair hearing under Article 7 of the African Charter on Human and Peoples Rights. Curiously, the Court upheld the preliminary objection of the Defendant and ruled that the Plaintiff lacked *locus standi* to institute the action on the ground that an individual or corporate body does not have access to the Court.

A critical review of the aforementioned cases filed by corporate bodies including NGOs has shown some inconsistency in the application of the doctrine of *locus standi* by the Court. However, in order to control the floodgate of cases the Court has held that only direct victims of human rights abuse or NGOs authorised by victims of human rights abuse have the *locus standi* to file applications for the enforcement of human rights before the Court. While the desire of the Judges to control the volume of cases filed in the Court there is the urgent need to review the apparent conflicting positions of the Court on *locus standi*. The review should be carried out in a way that public interest litigation by concerned individuals and NGOs is not discouraged by the Court.

Delay in the publication of Law Report of ECOWAS Court

On account of its contribution to the development of human rights jurisprudence in Africa the judgments of the Court are in high demand. But the publication of the law report of the Court by the management has not been regular. In fact, the last edition of the report was published in 2014! It is suggested that once the judgments of the Court are delivered the registry should ensure that they are immediately uploaded and published electronically.

Challenges

Effect of Covid 19 Pandemic on the Court

The Court has faced several challenges over the years. But it has continued to address them within its limited resources. The greatest challenge in recent time is the Covid 19 pandemic which had adverse effect on the ECOWAS like other judicial institutions across the world. In fact, the Court was compelled to suspend sittings for 3 months in the wake of the crisis. In a virtual press conference addressed on June 24, 2020 by the President of the Court, Honourable Justice Asante, it was disclosed that about 71 cases were affected by the suspension of sittings including 27 judgments whose delivery was already scheduled by the Court.

However, the Court moved swiftly to address the challenge of the pandemic by investing in appropriate technology. Thereafter, the President promulgated the Practice Directions on Electronic Case Management and Virtual Court Session of the ECCJ which entered into force on the 13th of May 2020. Basically, the ECCJ Practice Direction provided for electronic filing and service of Court processes and other legal documents; conducting virtual Court sessions, conducting physical Court sessions. Pursuant to the provisions of the Practice Directions, processes are filed by email and

³⁶ (2011) CCJELR 103

³⁷ (2013) CCJELR 111

served electronically by the registry while virtual sittings are held by the Court. In confirming that the system has come to stay Justice Asante said that “The ECOWAS Court of Justice says it is not going back on holding virtual sessions, judgments and Court processes, especially in view of its affordability to the common citizens of the community.

Justice Asante said that the virtual processes introduced due to the COVID-19 pandemic had proved to be the solution to the high cost of pursuing Court cases by community citizens. Now that this one has come, at the cost of \$138,000 we purchased all the gadgets, processes, systems and software; that is a huge expenditure by the Court and, therefore, it has come to stay. Whether there is COVID-19 or no COVID-19 we are going to do virtual hearings.³⁸ Adedamola Gbolahan has opined that “the new practice direction is a big step in the right direction, and it introduces two major developments. First, if properly maintained, the Electronic Case Management Solution platform may put a permanent end to physical filing and also improve the storage and filing systems of the Court. Secondly, the conduct of virtual Court sessions will afford parties and their counsels from the different Member States the opportunity to access the Court without having to travel from their respective countries to Abuja, Nigeria where the Court is situated.”³⁹

Threat to democracy in the region

The President of the ECOWAS Court of Justice, Justice Edward Amoako Asante has warned that the recent political upheavals in Guinea and Mali portend grave danger to West Africa’s march towards the consolidation of democratic governance in the region. The Judge opined that the “disruptions are indicative of a malaise with our approach to multi-party democracy, whose normative underpinnings such as zero tolerance for unconstitutional change of government, abolition of tenure elongation beyond the two terms of office, the conduct of free, fair and credible elections as well as the scrupulous adherence to the separation of powers are under threat.”

No doubt, Justice Asante was expressing the concern of the Judges of the Court over the resurgence of military rule in the region. Through judicial pronouncements the Court has since demonstrated its revulsion against unconstitutional change of government in the region in the case of **Republic of Mali v ECOWAS Commission**. In that case the military junta challenged the legality of the August 18, 2020 sanctions imposed on Mali by the ECOWAS following the military coup against President Ibrahim Keita. The Court held that while the Court was not persuaded by the arguments canvassed by the ECOWAS Commission, it “cannot situate the Statement of the President of the Commission either as a decision, recommendation, opinion or a directive” that the Court could adjudicate.”⁴⁰

Reduction of number of Judges

In December 2014, the Authority of Heads of State and Government decided to reduce the number of staff of all the institutions of the ECOWAS in order to cut down the costs of running them. Consequently, the number of Judges of the ECOWAS Court was reduced from seven (7) to five (5). The decision was taken notwithstanding the phenomenal increase in the number of cases filed in the registry of the Court. To avoid delay in the hearing of the cases the management of the Court called for the review of the decision of the Authority. As the call was ignored the plaintiff in **Femi Falana v Republic of Benin & Others(supra)** the Plaintiff challenged the legal validity of the decision of the Authority of the Heads of States and Government as it was not backed up by an amendment of the Protocol on the Court. It is curious to note that the Court struck out the case on the ground that the plaintiff lacked locus standi even though he had complained of the violation of the right to fair hearing contrary to article 7 of the African Charter as cases filed by him and his clients were unduly delayed due to the reduction in the number of Judges of the Court.

38 <https://www.thecable.ng/ECOWAS-Court-to-continue-with-virtual-sessions-post-covid-19/amp>

39 <https://business-school.open.ac.uk/news/covid-19-ECOWAS-community-Court-justice-west-africa>

40 <https://punchng.com/breaking-ECOWAS-Court-dismisses-suit-challenging-mali-sanctions/>

Unlike the practice in the Court whereby the tenure of judges was renewable to ensure stability and institutional memory Judges of the Court are appointed for a single term of 4 years the number of Judges has been reduced from seven (7) to five (5). The single term of 4 years and reduction in the number of Judges are not in tune with the practice in international law. For instance, the East African Court of Justice, the African Court on Human and Peoples Rights, and the European Human Rights Court have 10, 11 and 47 Judges respectively. In view of the power vested in the ECOWAS Court to exercise jurisdiction as an administrative tribunal for ECOWAS, a human rights Court, a Court of arbitration, and an inter-State dispute resolution tribunal the number of Judges should be increased from 5 to 15 by the Authority of Heads of State and Government. It is suggested that the Protocol of the Court be amended to facilitate the appointment of more Judges and staff including translators.

Provision of a new Court complex

Owing to the inadequacy of the temporary main office, the Court rented an annex office in 2007 as a short-term measure to redress its desperate accommodation challenges. But the Nigerian government made a property available for the use of the ECOWAS Community Court of Justice as its new headquarters in the serene Gudu district of Abuja. The property deemed acceptable by the Court for its purpose will enable the Court to house all its departments, Judges and staff in the facility.⁴¹

Conclusion

No doubt, the future of the Court is bright. The Court has justified its existence through the several judgments that have been delivered in the area of human rights and interpretation of Community texts. The advisory opinions expressed by the Court have assisted the institutions of the ECOWAS to resolve disputes. With more confidence in the Court, it is expected that corporate bodies will request the Court to intervene in arbitral matters. With the return of military rule in a couple of countries and the extension of tenure of elected President in others with attendant intimidation of opposing political figures the Court is going to be tasked by community citizens to defend democracy and human rights.

There is however the fear that the Court may lose its relevance if its judgments are continuously treated with disdain by the Member States of the ECOWAS. The challenge can be seriously tackled with the establishment of the appellate division of the Court by the ECOWAS leadership and the domestication of the Protocol on the Court by the parliaments of the Member States of the ECOWAS. In view of the increasing workload of the Court the suggestion that the jurisdiction of the Court on human rights be hinged on exhaustion of domestic remedies can no longer be ignored. But the Court cannot *suo motu* introduce exhaustion of local remedies as a precondition for accessing the Court as suggested by some advocates. It is a proposal that will require an amendment of the Protocol of the Court.

Finally, it has to be realized by political leaders, judges and lawyers that civil and political rights are of no relevance to the majority of community citizens without economic empowerment. Since the principal objective of the ECOWAS is the promotion of regional economic integration and development of the Member States, community citizens are enjoined to approach the Court for the protection of their socioeconomic rights and solidarity rights enshrined in the African Charter on Human and Peoples Rights and other relevant international human rights instruments.

⁴¹ <https://www.premiumtimesng.com/news/top-news/439050-ECOWAS-Court-gets-new-headquarters-in-abuja.html>



THE ECOWAS COMMUNITY COURT OF JUSTICE AS A SUPRANATIONAL COURT AND ENGINE OF REGIONAL INTEGRATION IN WEST AFRICA

By

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Introduction

The ECOWAS Community Court of Justice was established by virtue of Article 6 of the Revised Treaty of ECOWAS of 1993 and the Protocol (A/P1/7/91) on the Community Court of Justice 1991 (as amended by the Supplementary Protocol 2005), with a fourfold mandate as a Community Court, an administrative Tribunal, a human rights Court and an arbitration Tribunal.

The amendment of the 1991 Protocol by the 2005 Supplementary Protocol, expanded the jurisdiction of the Court to adjudicate on cases of human rights violations that occur in within the jurisdiction of the Member States, which has enabled the Court to utilize its powers to ensure the protection of the human rights of ECOWAS citizens.

Furthermore, the Protocol (as amended by the Supplementary Protocol 2005) has eliminated the limiting requirement of the exhaustion of local remedies found in most international tribunals, thus facilitating the timely dispensation of justice to victims of human rights violations in the sub-region.

Objectives

- To examine the achievements and challenges faced by the ECCJ in the last 20 years;
- To identify the prospects of a better Justice delivery and promotion of regional integration in West Africa.

Achievements

i. Operational efficiency and effectiveness in the discharge of its mandate.

Compared with other regional economic integration Courts / tribunals in Africa, in terms of impactful deliverable outputs or performance appraisal consistency, boldness, though in some cases very controversial, richness in human rights Jurisprudence and above all, demonstrable maturity, it is perceived by many analysts as the strongest and most independent of all in Africa.

Since the amendment of the Protocol in 2005 till date, the Court has received a total of 559 cases, delivered 130 rulings and 301 judgments, most of which relate to the human rights mandate of the Court. It is gladdening that the Court continues to receive more complains on a daily basis. There is therefore no gainsaying that the Court plays a very vital role in the protection of human rights in the sub-region.

The Court recognizes that despite these achievements, many ECOWAS citizens are unaware of its existence and are therefore unable to access the Court for the protection of their rights. For this reason, it has put in place strategies for enhanced visibility. In this wise, the Court has intensified efforts to enhance awareness of its existence through its external sessions, the publication of its judgments both online and in the Law Report for dissemination within the sub-region and beyond. The Court also undertakes sensitization missions to Member States to raise awareness of key stakeholders about its work.

Furthermore, the Court is in the process of creating a Legal Aid Fund to facilitate access to justice for victims of human rights abuses that cannot afford legal representation. When established, the Legal Aid Fund will be a milestone achievement for the ECOWAS sub region.

Additionally, The Court collaborates with international organisations to improve on the protection of human rights, the United Nations High Commissioner for Refugees being one of such.

Unfortunately, as is the case with other victims of human rights violation, the lack of awareness are amongst other factors inhibiting refugees, migrants, internally displaced persons and Stateless persons to petition the Court as it concerns the violation of these rights by Member States.

This accounts for the sad situation where the Court has not yet been seized of any complain of violations affecting the rights of refugees, asylum seekers, internally displaced persons, Stateless persons and persons at risk of Statelessness.

ii. ECCJ's established Unique Human Rights Jurisprudence

Although the ECCJ became globally popular more as a human rights Court than as an administrative tribunal, or Arbitration Tribunal or a Community Court of Justice, because most of the above judicial statistics on its achievements were human rights based and not on advancing its core mandate of regional economic integration.

Nevertheless, the Court's success story lies in the body of human rights jurisprudence established from these cases, which reinforces the view that respect for human rights and rule of law provides a foundation for durable peace and security as well as sustainable development.

For the past fifteen (15) years out of twenty of its operationalization, the Court has charted a viable path for the protection of human rights in the region. It has brought renewed hope and optimism within the African human rights system, and position itself as a pivotal instrument in the continent's quest for regional economic integration, peace, security, unity, good governance and sustainable development.

As the Court continues to grow and deliver more judgements, its impact as a mechanism for the advancement of human rights, good governance and the rule of law in the region has become apparent.

Developing its own human rights Jurisprudence, the Court, applying Article 4 (g) of the 1993 Revised ECOWAS Treaty, carefully and boldly delineated its scope of human rights Jurisdiction based on certain guiding principles.

First, the Court will not admit of any application which does not clearly indicate the alleged human rights violation. In Moussa Leo Keita's case, the Court held that even if it were competent to adjudicate in cases of human rights violation, the applicant had not indicated any proof of a characteristic violation of a fundamental human right.

Second, the Court will continue to uphold the supra-nationality of ECOWAS introduced by the Revised Treaty into its decision making for the realization of Community integration objectives. Accordingly, the Court has been holding Member States accountable for their Treaty obligations and has refused to be constrained by the domestic laws of Member States, including national constitutions that are inconsistent with their Treaty obligations. The Court's Jurisprudence on the supra-nationality of ECOWAS and the ECOWAS Court of Justice in Musa Saidykhan, SERAP, Mukhtar Ibrahim Aminu and Peter David, is anchored on Articles 9 (4), 12 (3) and 15 (4) of the 1993 Revised ECOWAS Treaty and cemented by the provisions of Articles 1-7 of the Supplementary Protocol Amending the Revised Treaty, especially, the new Article 9 on the new legal regime of the Community earlier discussed above.

Third, triggering Article 10 (d) of the Supplementary Protocol, 2005, on access to the Community Court by individuals on application for relief for human rights violation, the Court's emphatic Jurisprudence is that exhaustion of local remedies is NOT a requirement under the Community Law for human rights litigation. Neither is the lack of provision for it, a lacuna in the law that the Court can fill in, using its Judicial discretion.

Fourth, notwithstanding the rationale behind the requirement of exhaustion of local remedies, the ECOWAS Court, in its Jurisprudence on the application of the conditions in Article 10 (d) (ii) of the 2005 Supplementary Protocol, has ruled the case of Valentine Ayika v. Republic of Liberia, admis-

sible notwithstanding the fact it was alleged to be pending before the Supreme Court of a Member State (in this case Liberia). But in a related case of *Mme Azieblevi Yovo et 31 Antres v. Societe Togo Telecom et Etat Togolais*, the Court declined Jurisdiction on the ground that the matter was previously instituted before the OHADA Court, which is an international Court within the condition of Article 10 (d) ii.

Fifth, based on relevant authorities and the need to enhance access to the Community Court for Justice and human rights protection in the African context, the Court's Jurisprudence favours duly registered NGOs under national laws of ECOWAS Member States and enjoying observer status with ECOWAS institutions, as having the right to institute actions for human rights violations, especially public interest litigations involving group rights.

Sixth, while clearly the Community Court does not have appellate Jurisdiction over the decisions of national Courts, it has correctly emphasized its international character within the scope of its human rights Jurisdiction. Accordingly, it has declined Jurisdiction in an action by an individual against another individual for human rights violations; and has dismissed applications for human rights violations instituted by or against limited liability companies due to lack of Jurisdiction. The Court has rightly ruled that only Member States and Institutions of the Community can be sued before the Court for human rights violations.

Finally, for the progressive realization of the aims and objectives of the regional economic integration agenda for West Africa, the Community Court is mandated, inter alia, to adjudicate on any dispute relating to the interpretation, application and legality of the ECOWAS Community Law, and the failure by Member States to honour their obligations thereunder.

Trend of ECCJ Jurisprudence delineating the nature and Scope of its Human Rights Mandate

i. No Catalogue and Delimitation of human rights mandate

The human rights mandate of the ECOWAS Court of Justice is still evolving, and it is a subset of African human rights system. The ECOWAS human rights regime is developing at a fast pace and has very distinct features that have set it apart from other regional human rights systems. The most distinctive features are that it is fluid and indeterminate with no catalogue of rights of its own and that there is no requirement for exhaustion of local remedies as a condition for victims of human rights violations to access the Court.

The non-requirement of exhaustion of local remedies, contrary to the rule of customary international law, which may be referred to as the ECOWAS model, has proved to be very controversial and has attracted the curiosity of scholars. It has however proved to be very beneficial to the Court and victims of human rights violations, who now access the Court directly without the need to exhaust local remedies. This is mainly responsible for the increasing number of cases of human rights violations lodged before the Court.

ii. No specific applicable Evidence Provided

The ECOWAS Court of Justice does not have a specific text in respect of evidence. Although Article 38 of the Statute of the International Court of Justice, the texts of the Court do not have specific provisions in respect of the applicable rules of evidence with the exception of provisions in its Protocol and Rules on the production of documents and the summoning and examination of witnesses and experts (Articles 43-49). The Court has therefore allowed the practice of International Tribunals in respect of evidence.

iii. Human Right Jurisdiction of the Court cannot be ousted by the national Constitutions/domestic Laws of Member States/ Non-domestication of Treaties

The Court regards the constitution of a Member State as part of its law and is not obliged to refer to it as the Court is not concerned with the existing hierarchy of the national judicial order. The Court will therefore not allow a State to rely on its constitution to avoid its Treaty obligations, or obligations under legally binding treaty under international law. Therefore, concerning its human rights jurisdiction, the Court relies on its protocol and not on the constitutions of Member States.

In *Linda Gomez & Ors v. Republic of the Gambia* Suit No. ECW/CCJ/APP/18/12), the Court held as follows;

“Thus, the human rights jurisdiction of this Court cannot be ousted by the constitution or other domestic legislations of ECOWAS Member State. This Court is empowered by the Provisions of article 4(g) of the Revised Treaty of ECOWAS to apply the provisions of the African Charter on Human and Peoples’ Rights in determining the human rights cases that come before it. Article 19 of the Protocol on the Court as amended also empowers this Court to apply the provisions of Article 38 of the Statutes of the international Court of Justice. There is no doubt that these provisions have an international character and are applicable irrespective of the domestic legislations of Member States of ECOWAS”.

Key problems

The ECCJ has lamented on the key twin problems regarding its human rights mandate namely; lack of enforcement of its Judgments and no referral to it by Member States. There are other constraints to access the Court.

i. Problem of Enforcement of ECCJ Decisions

The problem of lack of enforcement of ECCJ decisions by Member States remains a recurring decimal and undermines the efficacy of the Court’s human rights mandate. There are ECOWAS Community texts that provide that the decision of the Court are binding on Member States of ECOWAS and also give them the responsibility of implementing the decisions of the Court in accordance with their Rules of Civil Procedure. For instance Article 15(4) of the ECOWAS Revised Treaty provides that the “Judgments of the Court of Justice shall be binding on Member States, the Institutions of the Community and on individuals and Corporate bodies”. See also Article 2(3) of supplementary Act A/SP. 13/02/12 on Sanctions against Member States that fail to honour their obligations to ECOWAS of 16 to 17 February, 2012. Furthermore Article 22(3) of Protocol A/PI/7/91 on the Community Court of Justice also provides that “Member States and Institutions of the Community shall take immediately all necessary measures to ensure execution of the decision of the Court”.

The protocol on the Court as amended also provides in Article 24(2) Execution of any decision of the Court shall be in the form of a writ of execution, which shall be submitted by the Registrar of the Court to the relevant Member State for execution according to the rules of civil procedure of that Member State. The National Courts of Member State therefore have the responsibility of implementing the decisions of the Community Court of Justice on behalf of the Member States. However, the decision of a High Court of Justice in Ghana in *Chude Mba vs Ghana* (ECW/CCJ/APP/01/12) shows that the issue has not been finally resolved. In the absence of domestication of ECOWAS texts by Ghana, the Ghanaian High Court refuse to enforce the judgment of the ECOWAS Court of Justice in this particular case. (See Suit. No. HRCM/376/15).

ii. Lack of Referral by Member States

Although there is provision in the amended Protocol for National Court of Member States to refer questions for interpretation of the Treaty, Protocol or other ECOWAS legal texts to the ECOWAS

Court of Justice, no such referral has been received from any Member State.

iii. Factors inhibiting Access to the Court

Notwithstanding the clear provision of Article 10 (d) (ii) of the Protocol on the Court as amended, on access rules to the Court, there are other factors that inhibit access to the ECOWAS Court of Justice. The first constraint is the geographical location of the seat of the Court at Abuja Nigeria which makes it difficult for Community citizens to have unfettered access to the Court because of the huge distance to Abuja from most parts of the Community and transportation difficulties. Secondly, there is no provision in the Protocol or Rules of the Court for Legal Aid for indigent litigants. It is believed that the establishment of sub-Registries of the Court in Member States of the Community will facilitate greater access to the Court.

The creation of a Legal Aid Fund to provide legal aid for needy litigants has also been proposed. (See generally Report of the 10th year Anniversary of the ECCJ, held at Accra-Ghana, 21-25 Feb. 2011).

The principal difficulty in using the ECCJ lies not with the Court itself, but with the enforcement of its judgements. Unless Member States who fail to comply voluntarily with the judgements are compelled to do so by triggering the sanctioning power of the ECOWAS Authority under Article 77 of the Revised Treaty, and under the 2012 Supplementary Act on Sanctions Against Member States that fail to honour their obligations to ECOWAS, the confidence in the Court will be eroded.

This leads us to the following challenges facing the Court as recently identified and considered at the Court's July, 2019 Judicial Retreat at Goshen City, near Abuja: -

the regrettable reduction in the composition of the Judges from seven to five and the unfortunate change in the tenure of the Judges from five years renewable as provided in the 1991 initial protocol of the Court to four years non-renewable, a development that is neither in the interest of the Court nor the community citizens. No other regional Court has this type of composition and tenure of Judges, and the Court should continue to engage all stakeholders/relevant authorities to redress this anomaly in recognition of the peculiarity of the Court as the principal Judicial Institution of the community.

the need to establish an appellate chamber of the Court in line with the 2006 agreement by the ECOWAS Council of Ministers in order to avail litigants of their fundamental right of appeal. A right of appeal is indeed a fundamental right, and it must be noted that the 2018 new organogram of the Court reflects the intention for the creation of an appellate division of the Court.

The need to address the controversial issue of amicus curiae which has led to some conflicting decisions because of the divergence in legal traditions in the ECOWAS region so as to bring the necessary cohesion in the Court.

The need to articulate clear guidelines on reparation which has occasioned wide disparities in the quantum of awards in similar situations depending on particular panels of the Court.

Prospects

The growing body of relevant community legal and policy instruments between 2008 and 2020 on the phases of regional economic integration in West Africa, requiring URGENTLY, Judges and staff of this honorable Court to bridge the knowledge gap and develop competencies through seminar/conference series and technical workshops on the contents and application of the relevant instruments for effective settlement of disputes and efficient administration of Justice.

For example, on the 19th December, 2008, the Authority of the Heads of State and Government adopted the following three supplementary Acts on: - Competition Rules; Investment Rules; and the

establishment of a competition Authority.

With the Common External Tariff (CET) which took off in January 2015, Member States will be paying a uniform tariff at all borders in the region. With this development, an improvement of the implementation of the ECOWAS Trade Liberalization Scheme (ETLS) can now also be safely expected. The CET is an important milestone on the road to the creation of a customs union for West Africa.

Also, the ECOWAS Common Investment Code and Policy were adopted on 18 December 2018 and signed by Member States in June 2019.

Finally, on 29th June 2019, the Authority of ECOWAS Heads of States and Governments adopted the ECO single currency to be issued in January 2020 but shifted to 2022 due to operational reasons. This aims at boosting cross border trade and commerce among Member States and community citizens.

The above raises another fundamental challenge/question: - is ECOWAS Court of Justice a Trade and Investment Tribunal? The reason being that the community Court is little known outside the human rights community. This is odd, given ECOWAS's broad economic integration objectives and programmes since 1975 and the Court's powers since 2001. In fact, the ECCJ has the potential of serving as a forum/tribunal for the settlement of at least some disputes between foreign investors and host Member States. In addition to disputes arising under the community law, the ECCJ has jurisdiction on any matter provided for in an agreement where the parties provide that the Court shall settle disputes arising from the agreement. The ECCJ's power to act as the Community Arbitration Tribunal, is yet to be functionally activated or utilized. Nevertheless, by means of an appropriately worded forum selection clause, the ECCJ can also serve as a forum for the settlement of investor contractual disputes with host States.

Moreover, the ECCJ is also the default mechanism for the settlement of investor-State disputes under the ECOWAS Supplementary Act on investments adopted in 2008 pursuant to its investment competence.

Conclusion

In conclusion, it is evident from the above that, economic integration cannot be effectively achieved without some measure of supra-nationalism. The experience of the ECOWAS region, though not perfect, confirms that unless Member States give up some parts of their national sovereignty and empower regional integration institutions to make binding decisions on their behalf, and implement them at national level, little progress can be made.

For effective delivery of Justice and realization of Community economic integration objectives, it is very imperative for Member States to demonstrate greater political will in the enforcement of the Court's judgements as required by the Community law. Fast-tracking the creation of the appellate chamber of the Court will boost community citizen's confidence in the realization of their right to appeal against any judgement by the Court they are not satisfied about.

Your Excellencies, this honourable Court may borrow a leaf from the 2013 Study Report on the Right to Reparation in the African Human Rights system, containing some basic principles and guidelines for the ECOWAS Court of Justice to address the earlier mentioned wide disparities in the quantum of awards in similar situations.

To bring the necessary cohesion in the ECCJ on *Amicus curiae*, I wish to recommend resort to the experience of the inter-American Court of Human Rights on Liberal admission of such briefs in its proceedings.

References

- Musa Leo Keita v. The Republic of Mali ECW/CCJ/JUD/03/07 at pp. 63- 76.
- In this context, supra-nationality refers to a situation where an international institution is endowed with powers to take decisions binding on Sovereign States either generally or in specific areas of State activity. In effect, most legal instruments adopted by ECOWAS are now directly applicable within Member States. See also the Supplementary Protocol Amending the Revised Treaty.
- See Musa Saidykhan v. Republic of the Gambia (2009) ECW/CCJ/APP/11/07, See paras 48- 50 of the Ruling of 30th June 2009.
- Registered Trustees of the SERAP v. Federal Republic of Nigeria and UBEC (2009), ECW/CCJ/APP/08/08, ruling of 27th October 2009 at paras 18 – 20.
- Mukhtar A.I. v. Government of Jigawa State (2011) ECW/CCJ/APP/02/11 Ruling of 7 July 2011 paras 42- 45.
- Peter David v. Ambassador Ralph Uwechue ECW/CCJ/APP/04/09.
- Although it is a well-recognized principle of customary international law, and the most important requirement for admissibility of cases before the African Human Rights Commission and other international human rights bodies, the African Commission has created eight exceptional grounds where a complainant need not exhaust local remedy. See Centre for Human Rights, University of Pretoria, South Africa (2011): - A Guide to the African Human Rights System:- Celebrating the African Charter at 30 years, at p. 26.
- See the following cases: - Prof. Etim Moses Essien v. Republic of Gambia, ECW/CCJ/APP/05/05 –ECW/CCJ/JUD/05/07, CCJELR (2004- 2009) at pp. 113- 130; Hadijatou Mani Koraou v. the Republic of Niger ECW/CCJ/APP/08/08 – ECW/CCJ/JUD/06/08, CCJELR (2004- 2009) at pp. 217; Musa Saidykhan, op. cit; Femi Falana v. Republic of Senegal ECW/CCJ/APP/05/08-ECW/CCJ/RUL/01/10 of 27 – 4- 2010.
- ECW/CCJ/APP/07/11- ECW/CCJ/JUD/04/12 of 1st January, 2012.
- Suit No. ECW/CCJ/APP/08/11 – ECW/CCJ/JUDG/04/12 of 31 January, 2012.
- OHADA refers to the Organization for the Harmonisation of Business Law in Africa. Set up by a Treaty adopted on October 17, 1993 in Port Louis, Mauritius. OHADA establishes the Supremacy and the direct effect of OHADA Uniform Laws. OHADA business law is applicable to 16 west and Central African countries, including all the 8 Francophone ECOWAS and Lusophone Guinea-Bissau. Its permanent secretariat is at Yaounde, Cameroon. See www.ohada.com.
- The OHADA Common Court of Justice and Arbitration, based in Abidjan, Cote d'Ivoire, advises Member States on the Uniform application and interpretation of common OHADA business Law; reviews decisions rendered by Courts of Appeal of Member States in relation to OHADA business law; and monitors the arbitration proceedings conducted pursuant to the OHADA Uniform Arbitration Act.
- See Ladan M.T., (2010) Access to Justice as a Human Right under the ECOWAS Community Law. A paper presented at the Commonwealth Regional Conference on the 21st Century Lawyer- present challenges and future skills. Organized by the Commonwealth Lawyers

Association, UK, in collaboration with the Nigerian Bar Association. Held at Transcorp Hilton Hotel, Abuja, Nigeria on April 8- 11, 2010.

- See SERAP v. President of Federal Republic of Nigeria and 8 ors, ECW/CCJ/APP/08/09, Ruling of 10 December, 2010. Also see SERAC v. Nigeria (2001) AHRLR60.
- See Frank Ukor v. Rachad Laleye and Anor ECW/CCJ/APP/04/05- ECW/CCJ/JUD/06/07, CCJELR (2004- 2009) at pp. 131- 150.
- See Peter David v. Ambassador Ralph Uwechue ECW/CCJ/APP/04/09, Ruling of 11 June, 2010, paras 40- 41.
- See SERAP v. Federal Republic of Nigeria ECW/CCJ//APP/08/09, Ruling of 10 December 2010; Starcrest Investment Ltd v. President, Judgment of 8th July, 2011; and Ocean King Nig. Ltd v. Senegal. ECW/CCJ/APP/05/08, Judgment of 8 July 2011.
- Rightly because since they cannot, as a rule, be sued before the domestic Courts/Jurisdiction, the only avenue left to the victims of human rights violations for seeking redress for grievance against those institutions is the Community Court of Justice.
- Article 9 (i) (d) 2005 Supplementary Protocol on the Community Court of Justice, op.cit.
- Articles 19(2) of the Protocol (A/P1/91) on the Community Court of Justice and Article 24(2) and (3) Supplementary Protocol of the ECOWAS Court.
- Adopted in 2012.
- Article 15(3) and (4) Revised ECOWAS Treaty.
- Supplementary Act on Community Competition Rules within ECOWAS, 2008.
- Supplementary Act on ECOWAS Investment Rules, 2008.
- Supplementary Act on Establishment of ECOWAS Regional Competition Authority, 2008.
- See Article 3(2)(d)(i) ECOWAS Revised Treaty.
- See Articles 15(3) and (4) 1993 ECOWAS Revised Treaty.
- Article 9 Supplementary Protocol Amending the ECOWAS Revised Treaty, 2006.

SUB-THEME 2

ECOWAS COURT OF JUSTICE: A COMMUNITY COURT OR A HUMAN RIGHTS COURT?

ECOWAS COURT OF JUSTICE: A COMMUNITY COURT OR A HUMAN RIGHTS COURT?

By

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ECOWAS Court of Justice

Introduction: Relevance of the question asked

The questioning form of the title of our paper is certainly necessary. Indeed, almost twenty-five years after its establishment, the ECOWAS Court is now considered more as a jurisdiction for the protection of human rights than as a Court in charge of ensuring the proper application of the standards of economic integration, which is the very aim of the international organisation from which it was established, namely ECOWAS. And indeed, the Court is referred mainly, if not exclusively, on matters of human rights rather than on issues related to the economic community made up of the Member States.

This is not necessarily something to be absolutely delighted about. Human rights litigation is unique in that it is somewhat “spectacular”, sometimes with an obvious political background, which makes it so appealing from a media perspective. The reflection on the Court’s original vocation, as well as the very neglect of integration litigation, are serious causes for concern. While it is not a question of abolishing or denying the Court’s current human rights jurisdiction, and it is even possible to justify it from the point of view of the Court’s original mission (II), it is equally imperative to emphasize that this Court, whose jurisdiction in the field of integration remains intact, would benefit from renewing this jurisdiction, for several reasons (II)

I. Justification for the extension of the Court’s jurisdiction to human rights violations

The point here is to show that while retaining its vocation as an integration Court, the ECOWAS Court can delve into the field of human rights as it is doing today. There are three orders of reasons for this, the first two are “general” in the sense that they can be applied to jurisdictions of the same nature, and the last is specific to ECOWAS. We will present them successively.

The first factor that may justify human rights jurisdiction is that international economic law itself - recall that ECOWAS is an economic integration organisation - has been sensitive to the issue of human rights and has “internalized” it. Three examples of this development can be given:

First, the United Nations has developed the *Guiding Principles on Business and Human Rights*. Principle 12 emphasizes “the responsibility of business enterprises to respect internationally recognized human rights, namely, at a minimum, those expressed in the International Bill of Human Rights and the principles concerning fundamental rights set out in the International Labour Organisation’s Declaration on Fundamental Principles and Rights at Work”

Further the Agreement establishing the European Bank for Reconstruction and Development (EBRD), created in the aftermath of the fall of the Berlin Wall, States that the Contracting Parties remain “committed to the fundamental principles of multiparty democracy, the rule of law, respect for human rights, and the market economies...”⁴²

In the Wake of the 1993 Vienna Conference on Human Rights, the idea of including human rights issue in the work of all UN development bodies was launched.

The second factor that explains the interest in human rights, is the dynamics of certain rights that were initially considered only from an economic perspective. An example is the right to non-discrimination or the right to freedom of movement. Initially confined to the economic sphere, these rights have moved on to become “fundamental rights” and not just economic freedoms. The example of the European Union is illustrative. Initially defended within the framework of the “common market” (1957 Treaty of Rome creating the EEC), these freedoms acquired the status of “citizens” rights with the 2009 Lisbon Treaty.⁴³ With regard to ECOWAS, these economic freedoms have been “phagocytized,” “absorbed” by “human rights.” In other words, whenever they were raised before the Court, they were

⁴² Forward of the Agreement establishing the EBRD, concluded on 29 May 1990.

⁴³ Part 2 of the TFEU, entitled “Non-discrimination and citizenship of the Union”.

not raised as economic freedoms, but as “human rights.” In this context, it is sufficient to give the examples of the judgments “Kemi Pinheiro v. Republic of Ghana” (judgment of 6 July 2012)⁴⁴ and “Sunday Charles Ugwuaba v. the State of Senegal” (judgment of 28 June 2019).⁴⁵

Third and finally, to justify the extension of the Court’s jurisdiction to human rights, there is the evolution of ECOWAS itself. Initially conceived exclusively as an economic organisation, ECOWAS has gradually moved into the political domain. This shift is evident in three notable legal instruments that have been adopted by Member States:

- The 1991 Declaration of Political Principles, in which Member States undertake “to respect human rights and fundamental freedoms in all their plenitude, including in particular the freedom of thought, conscience, association, religion and belief for all our peoples without distinction as to race, sex, language or creed;”
- The 1999 Lomé Protocol creating a Conflict Prevention and Resolution Mechanism, whose preamble recalls the 1991 Declaration of Political Principles and Article 2 “the protection of fundamental human rights, freedoms and the rules of international humanitarian law;”
- The 2001 Protocol on Democracy and Good Governance, which not only emphasizes respect for human rights through several of its provisions,⁴⁶ but - we tend to forget this crucial provision - establishes jurisdiction in this matter in favour of the Court of Justice, in the following terms: “Protocol A/P.1/7/91 (...) relating to the Community Court of Justice shall be reviewed to extend jurisdiction of the Court to hear, inter-alia, cases relating to violations of human rights, after exhaustion (...) of local remedies.”

These different legal instruments indicate an investment in political issues by ECOWAS, issues which include human rights. The Court’s jurisdiction can therefore be justified from this point of view. Is it necessary, however, to “refocus” on the Court’s original vocation, which is to judge the application of economic integration standards? The answer, from our point of view, must be absolutely affirmative, for several reasons which we will now explain.

II. The need to “refocus” on the objectives of economic integration

This phrase “refocusing on objectives of economic integration” appears literally on the concept note for this Conference, so we did not coin it.

But it certainly makes sense for us, too. Let us refer on this specific point to the contents in our book *Le contentieux de la violation des droits de l’homme devant la Cour de justice de la CEDEAO (Hu-*

⁴⁴ The petitioner, a Nigerian national, wanted to open a second law firm in Accra but faced the obstacle of nationality. He filed an appeal before the Court against Ghana for impeding his freedom of movement and establishment. However, the appeal soon proved to be inappropriate because it was in fact an appeal for failure to fulfil obligations, targeting a State which had precisely “failed” to fulfil its obligations as a Member of the Community. However, such an appeal can only be made by a State or by the ECOWAS Commission through its President - without prejudice, of course, to a referral to the domestic Court exercising a conventionality review. The Court recalls this in these terms: “(...) A Community citizen who has been the victim of an alleged violation by a Member State of a right enshrined in the Community Protocol has only two alternatives:

a. Request its own State to defend its interests and to file an appeal before the Community Court of Justice against the defaulting Member State, in accordance with Article 10(a);

b. Decide to bring an action against the defaulting Member State before the domestic Court of the State where the alleged violation of its rights took place”.

As a result, the claimant cannot use any of the available remedies to challenge a violation of freedom of movement and can only present the violation as a transgression of “human rights”. This hinders the development of a body of case law on freedom of movement. This is a first illustration of the “jurisprudential difficulty” of migration law.

⁴⁵ In this case, the applicant is a Nigerian citizen generally residing in The Gambia. An international businessman engaged in cross-border activities within ECOWAS. Particularly active in the export of fish from The Gambia to Nigeria through the borders of Senegal, Mali, Burkina Faso, the Republic of Benin, and Nigeria, he has brought the State of Senegal before the Court because the latter had closed its borders with The Gambia, thereby causing a deterioration of the merchandise that his trucks were transporting (fish, indeed a highly perishable commodity). Before the Court, the applicant invokes both provisions relating to freedom of movement in the ECOWAS area, but above all, violations of human rights, in particular the provisions of the African Charter on Human and Peoples’ Rights relating to the right to come and go.

⁴⁶ Art 1, 2, 22, 3, 33 etc.

man Rights Violation Cases before the ECOWAS Court of Justice), published in 2019. In an article entitled “The future of the ECOWAS Court of Justice,” we argued for the need for a recentring, a “refocusing,” to speak like the Court itself – of its mission on economic integration standards.

Indeed, we tend to forget today that the Court is not only a human rights judge but remains a judge of economic integration.

There are at least three reasons for this “return to the roots.”

The first one arises from the need to *bring the texts to life*. It is not healthy, or good, for whole sections of a legal order to remain ineffective; the disregard of the law, its neglect or its non-application is always a worrying phenomenon because it reveals at least in reality, the weak anchoring of the standard. The remedies put in place in the context of the mission to promote economic integration remain under-utilised or even completely ignored. These are for example infringement remedies, remedies for the annulment of Community acts, and remedies for liability. The focus on human rights litigation is a sign that there is hardly any integration litigation, although the Court is first and foremost an integration Court, the judicial body of an integration organisation. This vocation is at least a minimum; one cannot imagine the ECOWAS jurisdiction not being concerned with the very mission of this international organisation. It is therefore necessary to affirm and reaffirm that the vocation of the Court is to apply the standards of economic integration, and not to be exclusively a Court of Human Rights, the litigation mechanisms originally devised for this purpose must be revived.

A second reason for the imperative of “refocusing” on economic integration is that this return to the roots is *the guarantee of the autonomy of ECOWAS law*. The reasoning here is very simple: the litigation of human rights violations involves rules that are not all enacted by the Community at all, whereas the integration litigation involves rules conceived, elaborated, and shaped by ECOWAS. If, therefore, a certain Community legal specificity is to emerge, it can only do so with reference to these standards of economic integration. The rules that the Court applies in the field of human rights are exogenous rules, rules that are external to it, and which come sometimes from the United Nations United Nations (Universal Declaration of Human Rights of 1948, Covenants of 1966, Convention on the Rights of Women, Children and Persons with Disabilities, Refugees etc), sometimes the Organization of African Unity/African Union (African Charter on Human and Peoples’ Rights, Protocol on Women’s Rights to this Charter or African Convention on the Rights of the Child etc). In other words, the Court involves itself in conventional processes that have their own judges (UN Committees, African Commission and Court on Human and Peoples’ Rights). As the Court does not apply Community rules, it cannot develop a logic of autonomy from Community law. And the more the judge applies this exogenous law, the more a sub-regional legal specificity will emerge later, as the technical perfection of the norms or their interpretative deepening presupposes that the judge’s work concerns them. One conclusion must be drawn: the development of human rights litigation, while it has its advantages and justifications - as we have seen above - has the major disadvantage of relegating authentically Community standards to the background and thus delaying the advent of the autonomy of ECOWAS law.

However, the issue of autonomy is crucial for a particular legal order such as that of ECOWAS, a legal order that intends to build itself on the margins of general international law, which therefore wants to develop a specific, deliberately discriminatory, i.e., preferential, regional law, a law of solidarity that stands alongside the essentially relativistic and egoistic law that pits State sovereignties against each other. In this respect, it is sufficient to consider the role of a Court such as the Court of Justice of the European Community, now the European Union, a body which, through its interpretative and praetorian powers, has developed principles such as the direct applicability and primacy of Community law (the “Van Gend en Loos” judgment of 5 February 1963 and the “Costa v Enel” judgment of 15 July 1964).

Finally, there is a third reason to return to the Court's mission as an integration Court. It has to do with *the very perception of this institution, what it represents for the Member States of the Community*. A human rights Court might not be well regarded by States because not only does it operate on politically sensitive ground - human rights precisely - but because it could quickly come across as a "bogeyman", a body of repression only. The Court would spend most of its time antagonizing States, not promoting economic development and integration, it would play a "negative" role, not a "positive" one. From time to time, as is well known, certain Member States of the Community do not hesitate to display a sort of defiance or hostility towards the Court, and not only through their unwillingness to execute Court decisions. Under these conditions, one may think that by returning to its mission as an integration judge, the Court would regain a more "positive" image with the States, without, of course, abdicating its mission to ensure respect for human rights. It would then restore some sort of balance and be seen as less "severe."

But it is certainly easier to justify "refocusing" in theory than to indicate the ways and means by which it can actually be achieved. In fact, the "rediscovery" of the Court's original function cannot be "decreed", no authority can decide it in an act of will, neither a political authority nor a judicial authority. By this we mean that this return to the roots will depend on the cases submitted to the Court and will therefore depend on the plaintiffs themselves and not on the judge, who cannot take matters into his own hands. However, the statistics are also telling on this subject: the ECOWAS Court is very rarely - if ever - approached with a case involving the rules of economic integration. The real question is why this State of affairs persists.

To answer this, we believe that at least two facts can be mentioned.

The first is simply insufficient knowledge of these standards of economic integration. Surprising as it may seem - and our stay at the Court allowed us to verify this once again - the national judicial actors - in particular the lawyers registered at the bars of the Member States - are not always familiar with the Court itself, the procedure in force before it and even less with the substantive law of the Community (content of the protocols, supplementary acts, regulations, directives, etc.) Moreover, it is not for nothing that the Court itself has long included in its agenda "sensitization visits" in the Member States or training sessions addressed to national judges and lawyers. "Refocusing" on economic litigation therefore involves increasing knowledge of Community law.

This task goes beyond the Court's "public relations" policy; it involves taking account of this law "at the beginning," i.e., in the university teaching cycles or in the training of judicial actors. To date, it has not been stated that the teaching of Community law is included in the curricula of universities in all Member States.

It should be added that the Court itself can go beyond the two previously mentioned modalities of "popularization" of ECOWAS law. It is also conceivable that the Court could disseminate its decisions better and more widely, for example by keeping its website up to date or by distributing the bulletin of its judgments or its internal magazine - it is not known whether the latter still exists - to the supreme Courts of the Member States or to university libraries.

A second explanation for the non-existence of economic litigation is, more fundamentally, the weakness of intra-community trade, which is regularly deplored in the annual activity report of the ECOWAS Commission. However, no trade, no litigation: this is an elementary law of the sociology of law. Litigation, i.e., referral to the Courts, arises from opposing interests, differences which, by definition, only arise when trade takes place. The following theorem could therefore be posited: the volume of litigation is proportional to the volume of trade; it is trade that determines litigation. The solution to this difficulty - the weakness of trade - cannot therefore be found in the Courtroom, but in the economic structures and elements of the market.

Conclusion

The final finding may therefore seem somewhat disappointing for anyone who calls for a “refocusing” on the Court’s mission as a body for integration. It should be reMembered, however, that law, as the Marxists say, remains to a large extent a “superstructural” phenomenon when the economy is the “structure”. In the specific area we are concerned with, this can probably be accepted. When Europeans set up the European Economic Community in March 1957 (the Treaty of Rome creating a common market), three-quarters of their trade was already among themselves. This is undoubtedly one of the reasons why the judicial institution - the Court of Justice - has had no difficulty in dealing with cases concerning economic integration and has been quick to develop jurisprudential theories highlighting the originality of European construction. Hopefully, with time, and by acting on the levers, some of which have been suggested above, economic litigation will become a reality in West Africa.

In the meantime, the human-rights attainments will not be discarded. In addition to the fact that it confers political and democratic legitimacy on the integration process, it should be noted that the Court’s mission as a judge of rights certainly has an undeniable cathartic dimension: the ECOWAS Court is the body to which people turn, sometimes judiciously, when, rightly or wrongly, they have lost all hope in the national system.

ECOWAS COURT OF JUSTICE: A COMMUNITY COURT OR A HUMAN RIGHTS COURT?

By

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1. Introduction

The question raised would not have been of much interest during the early years of the ECOWAS Court of Justice (ECJ). The reasons for this are well known. When it was established by the Economic Community of West African States (ECOWAS), the ECJ was only responsible for community integration cases. In fact, ECOWAS was primarily an economic⁴⁷ integration organization⁴⁸ established by the original 1975 Treaty,⁴⁹ with the main objective of promoting cooperation and development in all areas of economic activity. To this end, the organization has equipped itself with the necessary resources to work towards building a vast West African common market.⁵⁰ This judicial body was established to contribute to achieving this integration.

It was only in the 1990s that ECOWAS gradually took an interest in human rights, thanks to the wind of democratization that contributed to the proclamation of fundamental rights in the constitutions of Member States.⁵¹ This change occurred in two stages. First, the 1991 Declaration of Political Principles led to the inclusion of human rights in the Community's policy. Subsequently, the revised 1993 Community Treaty raised human rights to the level of fundamental principle.⁵²

Over a decade later, the protection of human rights became an additional area of jurisdiction for the Community Court of Justice. Indeed, the reform undertaken through the adoption of the Supplementary Protocol A/SP.1/01/05⁵³ on January 19, 2005 by the ECOWAS Conference of Heads of State and Government has broadened, among other things, the competence of the Community Court to human rights litigation, thus opening its Courtroom to private persons from the fifteen Member States.⁵⁴

Since then, the ECJ has handed down remarkable judgments that have become jurisprudential references and have made it famous not as a Court of community integration but rather as a Court of human rights.⁵⁵ Indeed, it has distinguished itself in recent decades as one of the outstanding juris-

47 Established on May 28, 1975 following the Lagos Treaty (Nigeria), on the initiative of Presidents Yakubu Gowon of Nigeria and the late Gnassingbé Eyadema of Togo, by fifteen Member States later joined by Cape Verde in 1976, the Economic Community of West African States is an international organization for economic integration

48 According to Jean Salmon, "Integration is the goal of an international organization which aims to progressively unify, through appropriate mechanisms, the economy or even the political system of Member States", See J Salmon (ed.), Dictionary of Public International Law, Brussels, Bruylant, 2001, p. 591

49 The original 1975 ECOWAS treaty establishing the Community focused essentially on the economic integration of the sub region; no mention was made of the promotion, let alone the protection, of human rights. It was not until the declaration of political principles of the Assembly of Heads of State of the Community in 1991 that human rights were mentioned for the first time in the Community's policies.

50 See Article 2 of the original ECOWAS Treaty of 28 May 1975

51 See K Ahadzi, "The new trends in African constitutionalism: The case of the French-speaking Black African States", *Afrique Juridique et Politique*, CERDIP Journal, vol.1, n° 2, July-December 2002, pp. 51-53

52 See Article 4 (g) of the revised Treaty of the Economic Community of West African States

53 This Supplementary Protocol amends the preamble, Articles 1, 2, 9, 22 and 30 of the Protocol (A/P1/7/91) on the Community Court of Justice and Article 4(1) of the English version of the said Protocol

54 West Africa comprises a total of sixteen countries, including Benin; Burkina Faso; Cape Verde; Côte d'Ivoire; Gambia; Ghana; Guinea; Guinea-Bissau; Liberia; Mali; Mauritania; Niger; Nigeria; Senegal; Sierra Leone and Togo. But in 2001, Mauritania withdrew from ECOWAS, so the jurisdiction of the CCJ is limited only to the fifteen States parties to the Community's treaty.

55 This is the case of *Hadijatou vs. Niger*, which attracted a great deal of attention, to the point where some observers have described this judgment as historic. On this point, see the commentary on the judgment by Delphine Dallivy Kelly. Available at: <http://combatsdroitshomme.blog.lemonde.fr/2009/05/10/le-juge-africain-entre-dans-l-histoire-cour-de-justice-de-la-cedeao-by-delphine-dallivy-kelly>. For others, this case also has the merit of highlighting the responsibility of the State for human rights violations committed on its territory and, above all, the merit of having stigmatized slavery and discrimination against women. **BADET (G.)**, "Commentary on the judgment on the case of *Madam Hadijatou Mani Koraou v The Republic of Niger* (ECOWAS-COURT OF JUSTICE)", *Revue Béninoise des Sciences Juridiques et Administratives*, n°23, 2010, pp.153-

dictions for the protection of human rights, to the point where its original competence is somewhat overlooked: cases of economic integration, to be precise. However, its influence as a human rights Court does not make it any less a Court of community integration. Even if its jurisprudence in this area is very modest, it would be premature to declare that it is lost.

The question then arises as to how the Court's jurisprudential activity can be rebalanced or reframed in light of the objective of community integration.

The question is relevant because of the imbalance in the case law of the ECJ, which is less inclined towards integration litigation than towards human rights. This bias is obviously detrimental to economic integration, or rather, to integration law, and it is important to find appropriate and lasting solutions in this regard.

Before addressing the modalities for reviving community integration related litigation, it will be interesting to analyze the factors that explain the Court's human rights bias

2. The ECJ: A more human rights oriented than community-oriented Court

An analysis of the Court's rulings reveals a considerable gap between the increase in human rights cases and that of integration cases. Since the 2005 reform, there has been a decline in integration cases, while human rights cases have increased in number.

2-1. The paucity of integration cases

Two factors seem to justify the paucity of integration cases. These are: (1) the ineffectiveness of economic integration and (2) apathy towards community law.

A. Ineffective economic integration

A process of unifying economic policies among different countries or economic integration is a powerful tool for development and economic growth. To this end, it aims at the partial or total abolition of tariff (taxes, customs duties) and non-tariff restrictions to trade between countries of the region. In short, the ultimate objective of economic integration is to create a block or a union in which economic relations are as close as possible to those of the various regions within a given country.

However, a quick diagnosis of the integration process shows that things are not as straightforward as they seem. Although the free movement of persons and goods is one of the goals of the Community's integration process, it is still far from being a reality. The infrastructure deficit, the low level of trade and lack of competitiveness of the private sector are the main obstacles

These challenges are compounded by another even greater problem which is the persistence of protectionism. Just crossing the borders of neighboring States is enough to quickly realize that the freedom of movement in an area integrating several national legislations remains so far pure illusion. After several decades, the West African integration law has failed considerably on this score. For example, in August 2019, Nigeria unilaterally closed its land borders with Benin, Cameroon, Chad and Niger. Only the movement of people was allowed, while the movement of goods was prohibited. According to Nigerian officials, the aim was to curb the smuggling of goods, especially rice.⁵⁶ Whatever the arguments put forward to justify this protectionism, it remains a reprehensible practice, contrary to the spirit of integration.

Any successful integration must involve the social grounding of the integration process through the mobilization and representation of the populations concerned. For there to be disputes, citizens must, first of all, have the feeling of belonging to an integrated economic area in which they can claim

194. H Adjolahoun, "The ECOWAS Court as a human rights promoter? Assessing five years' impact of the Koraou slavery judgment", *Netherlands Quarterly of Human Rights*, Vol. 31/3, 2013, pp.345-346

56 <https://www.jeuneafrique.com/1108899/politique/frontiere-benin-nigeria-ce-que-patrice-talon-a-propose-a-muhammadu-buhari/>.

privileges before a Court. However, when we are faced with countries that are still displaying a high degree of sovereignty, and when the free movement of goods remains an illusion, it is understandable that belonging to an integrated economic area is the least shared feeling, and that other formal or informal mechanisms for settling disputes are preferred to bringing cases before the integration judge. This beginnings of West African integration are not without effect on the law designed to govern it.

B. Apathy towards the integration law

It seems that the current problem with community law stems not so much from a lack of knowledge but rather from its adoption. Like any law conceived to create a common awareness among peoples with the aim of achieving integration, ECOWAS law must enjoy a minimum level of adherence from the citizens to ensure its recognition and influence among them and thereby facilitate its promotion.

Indeed, the West African community law is based on the dogma of the “building of a vast common market” abstractly conceived. It is assumed that even if the countries are different due to demographic, ideological or even language factors, all the Member States would agree on one point: “economic independence”, in other words, the fact that they would all have an internal market in harmony with their production system, allowing them to balance their external trade through the free movement of persons and goods. However, in reality, this law as applied remains only an ideal, still elusive for the West African people.

It seems to be more a law for Member States, or rather for officials, than for citizens. It is therefore understandable that citizens are less attracted or less inclined to know or master its technicalities and fundamental principles, especially to claim its benefits before the integration judge. Clearly, the ECOWAS law is structurally struggling to achieve its own ambitions and respond to the aspirations of the peoples who are finally turning away from it to seek the protection of their human rights.

Even Member States that can bring cases before the community judge for non-compliance with integration laws seem to be uninterested. As proof, the closure of the borders of the State of Nigeria to its neighboring countries in 2020 did not give rise to any suit before the Community Court.

Is it that an indecent veil has been cast over the Community law like a curse? Do we really still need this law? The question is of great interest in an economic area where emerging principles such as the imperative of democratization and constitutional globalization tend to overshadow issues of free movement of persons and goods. In any case, the answer should be positive, provided that it does not remain a law for only Member States, but also a Community law for citizens. The fact remains that ECOWAS vision 2020, which should transform the “ECOWAS of States” into the “ECOWAS of peoples”, must become a reality. If the challenge is being addressed through human rights, it must also be tackled through the Community law..

2-2. Predominance of human rights cases

A. Advantages of the predominance

The predominance of human rights cases is evident in several respects. The first is citizens’ access to the Court. It should be recalled that access to justice generally implies the possibility for the petitioner to be heard on the merits of his or her claim so that the judge can decide whether it is well founded or not.⁵⁷ As a result, access to the Court of any jurisdiction must be easy for the petitioner, a prerequisite for good justice.⁵⁸ With regard to the ECJ, it should be noted that the 2005 reform made access to its Courtroom more flexible for individual petitioners, thus breaking with the traditional pat-

⁵⁷ FM Sawadogo, “Access to justice in francophone Africa: challenges and prospects. The Case of Burkina Faso”, op.cit. p.295

⁵⁸ See R Cassin, in: Duality of jurisdictions, justice, Paris, P.U.F., p.720, quoted by R Degni -Segui, in: “Access to justice and its obstacles “, in: The effectiveness of fundamental rights in the countries of the French-speaking community, Proceedings of the colloquium held from 29-30 September and 1st October 1993, Port Louis, Republic of Mauritius, Montreal, AUPELF-UREF, 1994, p.241



tern of filing cases only through Member States.⁵⁹

Having become flexible and direct as a result of this reform, it is quite obvious petitions would multiply to the point of burdening the Court. It could not be otherwise, since the referral of cases to the Court is no longer dependent on the applicant being a citizen of a Member State of the Community, but rather based on the allegation of a prejudice suffered on the territory of a Member State.

In the case of (*CNDD*) *v* *Côte d'Ivoire*, the judge of the Court himself outlined the conditions for the referral:

the possession of a legal personality by the applicant, whether he is a natural or legal person, and also the proof that the applicant is the victim (...) are sufficient to establish that the conditions for referral are fulfilled.⁶⁰

The second reason is without a doubt setting aside the exhaustion of domestic remedies as a condition for receiving petitions at the ECJ. Unlike other similar Courts,⁶¹ the petitioner is not obliged to first submit to the national Courts a grievance arising from an alleged violation of one of his or her inalienable rights before submitting it to the Court in Abuja. Clearly, any alleged victim can bring his or her grievances before the Community Court, without having to prove that he or she has first exhausted remedies available at the national level.

Besides, it should also be noted that the attractiveness of the human rights judge is fundamentally aided by the range of legal texts that can be invoked in support of an application alleging a human rights violation. The ECJ, unlike its European counterparts, does not have a specific instrument to be used as a basis for its jurisdiction. It is therefore possible for petitioners to invoke any text for the protection of human rights, even if it was drawn up outside the Community

Lastly, the possibility for petitioners to win their cases and be compensated by the States, following a ruling by the ECJ, also contributes to the upsurge of cases. It is true that not all judgments are executed by the States. However, the fact remains that some resounding judgments rendered by the EJC have gone down in the annals of history.

Moreover, it is understandable that the opening of the Court to individuals, with the possibility for them to rely on a wide range of legal instruments and to win their cases, contributes to the proliferation of applications and, consequently, to the increase in the number of human rights cases. In essence, the impetus given to the Court due to cases filed by community citizens is in direct conflict with the States' interest.

B. Disadvantages of the predominance

In practice, the legislative, constitutional, and even constituent trend of the Court's jurisprudence in its role as a defender of human rights can be observed. On closer examination, it is clear that, for the Court, the objective of protecting human rights is achieved first and foremost through the intrusion into the constitutional space of Member countries. Indeed, very often on the continent, serious human rights violations are the result of a constitutional dysfunction. If they are resolved upstream, these violations will be avoided downstream. In other words, building the political rule of law is a way of protecting human rights.

While this case law option is defensible, it is nonetheless liable to a major pitfall. That is the endless competition between the competence of a jurisdiction and the affirmation of State sovereignty in

⁵⁹ Under Article 9(3) of the 1991 Protocol on the ECJ: "A Member State may, on behalf of its nationals, institute proceedings against another Member State or an institution of the Community concerning the interpretation and application of the provisions of the Treaty, if attempts at an amicable settlement have failed. Thus, the access of individuals to the EJC was indirect and similar to diplomatic protection. On this point, see G Cohen-Jonathan & JF Flauss, "The European Court of Human Rights and International Law", *AFDI*, 2007, pp. 779-796

⁶⁰ ECOWAS CJ, (*CNDD*) *vs.* *Côte d'Ivoire*, par.23.

⁶¹ These include of course the ECHR Court, the IHR Court and the AHPR Court.

international law.

The issue was revived when Benin challenged the Court's authority to rule on human rights violations on its territory. In fact, a citizen filed an appeal for the "annulment of all the decisions rendered by the ECJ with respect to Benin on the basis of Article 9 of the Supplementary Protocol A/SP.1/01/05", and the Constitutional Court of Benin made a ruling that dealt a heavy blow to the momentum of the community judge in his position as defender of human rights. In fact, in a decision of April 30 2020, the Constitutional Court of Benin Stated that the Supplementary Protocol A/SP.1/01/05 of January 19, 2005 was not enforceable in Benin because it was not ratified by a law voted by the National Assembly, promulgated and published in the Official Gazette.

Does Benin's opposition, through the jurisprudence of its Court, to the predominance of the community judge in his role as defender of rights, imply that ECOWAS Member States are taking back control of matters that they once considered to be under their sovereignty? Or should it be seen as a way for the States to tell the ECJ judge that he is not only a human rights judge, but also and above all a community judge?

In any case, this isolated incident, which is no less destabilizing, cannot undermine the predominance of human rights cases to the point of completely eliminating them. Human rights cases remain, contrary to what one might have thought after the Benin episode, the ultimate weapon available to citizens of the Community to ensure respect for the rule of law on the territory of Member States. To wish for a blockage is to disempower the ECJ, whose intervention as a judge of Community law is very weak, or even almost non-existent, and therefore deserves to be revived.

3. ECJ: A community Court to be revitalized

3-1. The Community's responsibility

The revitalization of the ECJ as a Court of law for integration cases will necessarily require measures from two bodies that have been in a State of functional lethargy until now. These are: (1) the ECOWAS Commission and (2) the ECOWAS Parliament

A. Action by the President of the Commission

The President of the Commission is first and foremost the head of ECOWAS administration; he heads the Commission which is the secretariat of the Community. As the one responsible for the day-to-day administration of the organization, the President of the Commission ensures the proper application of the Community law. In this regard, Article 10 (a) of the 2005 Supplementary Protocol requires him to bring an action before the Court of Justice in cases of failure of compliance with the law.

It is therefore understandable that his contribution to the revitalization of the West African organization is crucial. Indeed, through his strategic plan, which reflects his intentions and resources, the President of the Commission is called upon to contribute to the achievement of the Community's objectives. The annual reports provide him with the opportunity to present the State of the organization and unveil his vision, priorities and proposals for its effective management.

It is against this backdrop that, like his predecessors, Jean-Claude Kassi Brou, President of the ECOWAS Commission, presented the Commission's strategic plan and a report on the State of the Community to the Community's parliamentarians on 15 May 2018 in Abuja, Nigeria. He stressed that significant progress had been made in the implementation of several community programs, particularly in areas such as economic integration, regional peace and security, political governance and sectoral policies, while also affirming that "efforts would be continued to address the challenges that remain enormous, complex and varied."

While this example, chosen among many others, illustrates the actions taken by the presidency of

the Commission, the fact remains that their actions regarding the revitalization of the integration law have remained insignificant. It is one thing to make observations, but another to take concrete actions.

It is unfortunate that leaders of the Commission have not been able to distinguish themselves like their European counterparts. Indeed, within the framework of the European Union, the President of the Commission ensures the compliance and application of the European law and secondary legislations, warns and sanctions Member States in case of non-compliance with European treaties. One would have hoped that the President of the ECOWAS Commission would follow the example of his counterpart. This is not the case here. The lack of action by the President of the Commission does not in any way promote integration.

Moreover, this inaction on the part of the President of the Commission seems more understandable in the light of the statute establishing it. Following the example of his AU counterpart,⁶² the appointment of the President of the ECOWAS Commission⁶³ is now a matter of State policy. This situation, which is likely to undermine the autonomy of the President of the Commission also constitutes a serious obstacle to his actions. Thus, he can only partially play his role as legal representative of all the institutions of the Community,⁶⁴ including the ECJ. Therefore, it will take greater ambition and determination for the President of the Commission to effectively contribute to the revitalization of the ECJ..

B. Role of the Community Parliament

The lethargy of the ECOWAS Parliament is so striking to such an extent that the Citizens of the Community it is supposed to represent do not have any knowledge of it. Indeed, you have to study ECOWAS to realize that it exists as an assembly of the peoples of the Community. Its Members, who are regional parliamentarians, are notably responsible for promulgating uniform laws and rigorous legislations that will ensure the establishment of a borderless, peaceful, prosperous and coherent region built on good governance.

It is therefore clear that the community parliament has a decisive role to play in revitalizing the ECJ as a Court of law for integration. It is up to the parliament to promote it among the people it is ultimately intended to serve and even propose reform projects.

Indeed, through a legislative initiative, the Parliament can ask the Commission to submit legislative proposals with a view to making the integration Court more attractive to citizens. This is what it is all about, making integration law attractive to citizens or making it less of a technical or State law.

As community integration efforts continue to intensify, the extensive discussions in this regard should lead to the revitalization of the ECJ as an integration Court that citizens will be able to turn to without hesitation.

3-2. Contribution of Member States and citizens of the Community

Beyond the Community, Member States and citizens have an essential role to play in revitalizing the integration law Court. The first is to encourage the use of the preliminary ruling mechanism and the second is to renew confidence in integration justice.

A. Promotion of the preliminary ruling system

The preliminary ruling is defined as an instrument of jurisdictional cooperation between the national judge and the Community judge. In the European Union, as the framework for the initiation of the general Community law, the legislator makes a distinction between an application for interpretation and

⁶² See AGBA (K.), The President of the African Union Commission, Masters 2 thesis, International Law and International Organizations, UAC-Benin, Cotonou, 2013, p. 50

⁶³ See article 18 paragraph 1 of the Supplementary Protocol A /SP. 1 /06/06 amending the revised ECOWAS Treaty of 1993.

⁶⁴ See article 19 § 2 of the above-mentioned protocol

an application for assessment of legality. The aim is to contribute to the harmonization of Community jurisprudence, in order to truly establish a “common law” for Member States.

The reference for a preliminary ruling is now presented as the most common legal remedy in European Community law. In this respect, the *VAN GEND EN LOOS* judgment of February 5, 1963, has become a standard in the case law of the European Union: it was the first preliminary ruling given by the Court of Justice of the European Communities. As an unprecedented practice at the time, the preliminary ruling in European Community law is today the foundation of an authentic school of precedents.

Returning to this example, it appears that the preliminary ruling is a system that allows a national Court to ask the ECJ about the interpretation or validity of integration law in relation to a dispute before it. Although this system is recognized by the Community texts, its practical use is still very limited. Preliminary rulings are absent from the case law of the ECJ. Yet the effective application of Community law depends on cooperation between the national Courts and the Community Court.

If the national judge is reluctant to use the preliminary ruling because it has not been filed by the Member States or citizens of the Community, not everything would work smoothly for the integration Court that ECOWAS represent. Should we see it as a refusal of the latter to dialogue with its counterpart at the Community level, who clearly does not want to compete with the national Courts on their own ground, in this case, in the interpretation of national laws?

In any case, it will be up to the States to create the appropriate frameworks to encourage the use of preliminary rulings by their Courts.

B. Renewal of confidence in the integration justice system

Justice can never be taken for granted. It is a constant battle, to use Clemenceau’s expression, “*a continuous creation*.” Are we finally witnessing a crisis of confidence in the integration justice? Nothing is less certain.

- The citizens will have to give the integration Court the same chance they give it as a human rights Court;
- It will involve pursuing the integration justice in the same way as that of human rights

FROM NON-INTERFERENCE TO NON-INDIFFERENCE ECOWAS COURT OF JUSTICE - A COMMUNITY COURT AND HUMAN RIGHTS COURT

By

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I. Introduction

When they emerged into Independence from the domination of the countries of the then relatively new European Economic Community (EEC) in the decade of the 1960, African countries approached their sovereignty with a sense of insecure jealousy. On this, as a legal matter, they were on solid grounds, the Permanent Court of International Justice (PCIJ) having held in *SS Lotus* that “restrictions upon the independence of States cannot therefore be presumed.” The import of this was and remains that constraints on sovereignty of independent States require the consent of those States. The irony did not seem immediately evident at the time that African States all being cut loose separately at the same time that the metropolitan powers from whom they won Independence were pooling their sovereignties.

Among the African countries, initial debates over the idea of a “Union Government” floated by Ghana’s founding president, Kwame Nkrumah, failed to find traction with his African peers, all of whom appeared quite enamoured of the principle of domestic jurisdiction in Article 2(7) of the United Nations Charter as the crowning glory for their struggles against foreign domination. It was not surprising, therefore, that the principal purpose agreed among African States at the formation of the (now defunct) organization of African Unity (OAU) in 1963 to “defend their sovereignty, their territorial integrity and independence.” Where Article 2(7) of the United Nations Charter provided for domestic jurisdiction in terms of “non-intervention” in “in matters which are essentially within the domestic jurisdiction,” the OAU Charter proclaimed a fundamental principle of “non-interference in the internal affairs of States.” In comparison to the UN Charter, the threshold of the OAU Charter for assertions of domestic jurisdiction appeared more subjective. With no clear definition of what these matters were, every assertion by a State claiming a matter as being an internal affair was liable to be respected as a trump.

In the result, the continent quickly retreated into a collection of despotisms with hardly any underlying or shared values. A mere six years after the foundation of the OAU, one of its founders, Tanzania’s President Julius Nyerere, accused the organization of bringing domestic jurisdiction into disrepute through their indifference to the massacre of hundreds of thousands in the Nigerian civil war, and The Gambia’s founding president, Dawda Jawara, would later complain that the early practice of the African States tended “to overstate the principle of non-interference in the affairs of other African States.”

As the contest over the framing, scope and practice of domestic jurisdiction in Africa’s emerging inter-State system deepened with a pattern of growing post-colonial instability, the continent confronted the challenge of how to manage or constrain sovereignty. The indifference of the OAU compelled the Franco-African Summit to order an inquiry into alleged massacres of children by Central African Republic’s self-styled emperor, Jean-Bedel Bokassa, leading ultimately to his ouster from power in 1979. Contemporaneously, finding pretext in a dispute over a little-known strip of territory, Tanzania’s President Nyerere invaded Uganda and overthrew the government of Idi Amin also in 1979.

The notion of constraining sovereignty in this context reflected concerns about the deterioration of governance and human rights records around the continent. Two options presented themselves. The dominant pathway was the establishment of a continental human rights system. In the end, the first option exercised was an experiment in regional integration, with the foundation of the Economic Community of West African States (ECOWAS), in 1975. This experiment in regional integration would eventually help to persuade African countries in the OAU to evolve varying mechanisms of shared values, beginning with the establishment of a regional human rights system in 1981, to the point where, by the end of the Millennium, they could agree in the Constitutive Act of the African Union to affirm as a foundational principle of the Union “the right of the Union to intervene in a Member State pursuant to a decision of the Assembly in respect of grave circumstances, namely: war

crimes, genocide and crimes against humanity.”

This paper briefly explores the major landmarks in the narrative and institutional evolution of the constraints on sovereignty in the African inter-State system and illustrates it with an attention to the context of the ECOWAS and the record of the Court of Justice of the ECOWAS. It recognizes that the significance of ECOWAS and its Court of Justice transcends its own record as a regional economic community in its own right. It did not merely play a pioneering role in influencing the re-design of the ground rules and institutions of Africa’s inter-State system, it also helped to re-shape the relationships of regional economic integration and human rights in Africa into a mutually reinforcing one. In so doing, the ECOWAS Court of Justice has helped to reconfigure the institutional landscape for the protection of human rights on the continent and constitutes a major contribution to the regional protection of human rights globally. At a time when international co-operation is itself in peril, the project of supra-national supervision of domestic jurisdiction is under attack, this model deserving of attention not merely for historical purposes but also for its adaptability to confront the challenges of contemporary authoritarianism and fragmentation.

II. ECOWAS: Institutional Landmarks

The ECOWAS was founded on 28 May 1975 to advance regional economic integration among fifteen West African States, colonised respectively by France, Portugal and the United Kingdom. At its creation, ECOWAS was mostly, if not exclusively, seen as a regional zone of preference allowed under Article XXIV of the GATT.

Three contemporaneous externalities helped to propel this development. First, the weaponisation of hydrocarbons with the escalations in the Arab-Israeli conflicts restructured the international oil markets as well as petroleum prices, such that “between December 1970 and September 1973, official oil prices jumped from \$1,21 to \$2,90 per barrel, while spot values topped \$5,00”, representing an increase of over 413%. Following the Arab-Israeli (Yom Kippur) war of October 1973, the posted price would further rise by another 387% by the end of 1973. For many emerging and developing countries in Africa, this triggered a balance of payments crisis. Nigeria, an emerging regional oil producer with growing pan-African credentials and proponent of regional integration in West Africa was ready to offer support and solidarity in addressing this problem. Second, the United Kingdom, which had colonized four of the original Member States of ECOWAS, having initially stayed outside the EEC, decided to join it in 1973 and, subsequently, voted overwhelmingly in favour of joining in a referendum in June 1975. In its drive towards ECOWAS, Nigeria drew some inspiration from the UK’s change of policy in favour of European integration. Thirdly, the establishment of the community at this point in time was facilitated in some measure by the collapse of the Iberian dictatorships in Portugal and Spain between 1974 and 1975 liberating Guinea Bissau and Cape Verde, both Portuguese colonies, into Independence. Guinea Bissau became a founding Member of ECOWAS and Cape Verde later joined the community in 1976.

The 1975 Treaty contained no reference to human rights. It was subsequently supplemented by a Protocol on Non-Aggression and another Protocol Relating to Mutual Assistance in Defence. Both Protocols elevated regional defence and security in the priorities of ECOWAS, formalising a departure from the norm of non-interference in inter-African affairs in the important spheres of defence and security. The Protocol on Mutual Assistance appeared merely to envisage the deployment at the request of a host government of regional forces. Given that most of the regimes in the Community at the time were military and unelected, it could be argued that these Protocols existed to undermine or even subvert human rights to the extent that they appeared more amenable to be invoked by authoritarian regimes in order to keep themselves in power. Although these protocols articulated a rather narrow concept of peace and security that failed to necessarily define social justice, human rights, and democratic governance as elements of regional security, they did provide bases subsequently to

evolve in that direction. This concession also made it more agreeable for African countries in 1979, at the beginning of the negotiation that would ultimately result in the adoption two years later of an African Charter on Human and Peoples' Rights, to accept as their point of departure the proposal that "the question of human rights should be of universal concern and not only of that State within whose borders the gross violations are allegedly occurring."

The onset of conflicts in Liberia in 1989 and in Sierra Leone in 1991 compelled a re-examination of the role of human rights in guaranteeing regional stability and security in ECOWAS. On 25 August 1990, at the invitation of the then government of Liberia, ECOWAS deployed a plurinational cease-fire Monitoring Group (ECOMOG), comprising military contingents contributed by respective Member States of ECOWAS, to restore peace in Liberia. At the request of the government of Sierra Leone, ECOMOG's remit was later extended that country. This development provided inspiration for the OAU to finally establish a standing Conflict Resolution Mechanism within its organs in 1993. By the end of the next decade in 2001, ECOWAS Member States could agree that "good governance and press freedom are essential for preserving justice, preventing conflict, guaranteeing political stability and peace and for strengthening democracy." Back in the ECOWAS, the logic of its involvement in Liberia compelled the Member States of the community in August 1996 to threaten the armed factions in Liberia with "the establishment of a war crimes tribunal to try all human rights offences against Liberians." This was a first in inter-African relations. When, therefore, the African Union committed to the principle of non-indifference in its Constitutive Act less than three years later, it had evidence of inter-African State practice from the ECOWAS to draw up.

The institutional processes that led to the evolution of this treaty-based consensus began in July 1991, when ECOWAS Heads of State adopted a Declaration of Political Principles, the preamble of which reaffirmed the need for the creation of a stable and secure region in which peoples of West Africa can live in freedom under law and for concerted regional action to promote democracy "on the basis of political pluralism and respect for fundamental rights as embodied in universally recognized international instruments on human rights and in the African Charter on Human and Peoples' Rights." In the Declaration, the ECOWAS States undertook as follows:

We will respect human rights and fundamental freedoms in all their plenitude, including in particular, freedom of thought, conscience, association, religion or belief for all our peoples without distinction as to race, sex, language or creed. We will promote and encourage the full enjoyment by all our peoples of their fundamental human rights, especially their political, economic, social, cultural, and other rights inherent in the dignity of the human person and essential to his free and progressive development.

Prior to the adoption of this Declaration, ECOWAS convened in 1990 a Committee of Eminent Persons to review the 1975 Treaty. Among its conclusions and recommendations, the Committee urged ECOWAS, through a revised treaty, to "shift from its exclusive focus on government to government, to involving the people, NGOs and private sector" and adopt "provisions establishing organs such as the Parliament of the Community composed of representatives elected by the peoples of the Member States, and an Economic and Social Council (ECOSOC) comprising socio-professional groups drawn from all sections and categories of the population of the Member States." The Committee suggested that effective protection of human rights in West Africa was the principal rationale for regional integration in West Africa, arguing that:

Efforts towards the establishment of an economic community embracing all the States of the West African region were initiated in the early sixties, not long after most of the countries had emerged from colonial domination into independence and Statehood. In this formative State, the natural inclination of the countries was in the direction of consolidating their independence and preserving and enhancing national sovereignty. Additionally, inter-State relations in the region were generally

plagued by deep suspicions and political and ideological differences. Perceptions about national sovereignty and the principle of non-interference in the internal affairs of other States are now undergoing gradual transformation as the world shrinks more and more into a “global village”.... Gross abuse of human rights in a State, for example, now elicits prompt international reaction, often in the form of coercive and other measures. More and more countries are now opening their internal political processes, including the subjection of general elections to international observation in order to earn legitimacy for their governments.

The Committee proposed a new draft treaty with significant new amendments to the 1975 treaty. In the Revised ECOWAS Treaty, including its accompanying protocols, human rights are recognized as fundamental principles of the Community, rights in factor mobility, substantive State obligations, and as obligations enforceable by the ECOWAS Court of Justice. This was effectively the first supra-national Court in the African continent. In existence over a decade from 1967 to 1977, the defunct East African Court of Appeal, a left-over from the colonial-era East African Federation, was merely the apex Court of the countries of East Africa established by an international treaty. Established under the Treaty for the East African Co-operation of June 1967, the East African Court of Appeal indeed would later rule to uphold the supremacy of national sovereignty over the treaty organs and abjure any role for itself in asserting supra-national oversight of African States. At its establishment in 1993, therefore, the ECOWAS Court of Justice was the first supra-national Court to be constituted or authorised as such by any African States.

III. From Non-Interference to Integration

The Economic Community of West African States, ECOWAS, is the most evolved regional economic community (REC), in Africa. Regional integration is a hugely complex and specialized area of international law involving aspects of international economic and trade laws and – as will become evident below - human rights, institutional law and, increasingly, peace and security. Regional economic integration is perhaps the most widely studied form of regionalism but by no means the only form. Regional human rights systems have also become a popular form of regionalism. Common to both is the tendency to constrain sovereignty by the voluntary act of States. According to Haas, integration is “the process whereby political actors in several distinct national settings are persuaded to shift their loyalties, expectations and political activities towards a new and larger centre, whose institutions possess or demand jurisdiction over the existing national States.” This de-concentration of sovereignty has both procedural and substantive dimensions. Bella Balassa points out that regional economic integration is:

A process and a State of affairs. Regarded as a process, it encompasses measures designed to abolish discrimination between economic units belonging to different national States; viewed as a State of affairs, it can be represented by the absence of various forms of discrimination between national economies.

The “process” involves the voluntary decision making by States to constrain the scope of their sovereign prerogatives. It has additionally been said that economic integration denotes “a State of affairs or a process which involves the amalgamation of separate economies into larger free trading regions.” This “amalgamation” has consequences for the scope and traditional prerogatives of Statehood. It produces institutions, constrains sovereignty as we know it, and creates obligations. If it is to work, therefore, integration must be underpinned, by shared values. Joseph Nye affirms this outcome, and asserts that integration is “process leading to political community – a condition in which a group of people recognizes mutual obligations and some notion of common interest.”

While integration may be for economic purposes, therefore, its viability could depend substantially on the existence of shared values and institutions. In effect, it is the anti-thesis of non-interference and is premised on mutual obligations among of non-indifference within the functional scope of integration.

Once this principle is accepted, it is only a matter of time before the functional scope encompasses normativity and shared institutions for the enforcement of such shared values.

The most far reaching of such shared values in integration processes and logics are the values of adherence to human rights and the rule of law. The rationale, nature and scope of the relationship between regional integration and human rights in Africa generally and in ECOWAS in particular, has been somewhat controversial and evolved incrementally. The literature was for the most part limited, grudging or tentative in recognising or exploring this relationship and the historical narrative in the African inter-State system has been largely unexplored.

Quashigah, for instance, suggested that the acknowledgement by the African Charter on Human and Peoples' Rights of the existence of other African human rights instruments extends the scope of the African human rights system to include the instruments and institutions of regional economic communities, "particularly the African Economic Community Treaty and the ECOWAS systems, which both have human rights aspects" While recognizing that regional and sub-regional economic arrangements are primarily directed at economic integration rather than the promotion and protection of human rights, Viljoen merely conceded that "the potential of these arrangements for human rights is evident", and admits that several of them "include a concern for human rights within their mandates." Mubiala sounded rather prayerful in arguing that Africa's human rights system should include sub-regional economic communities in different parts of Africa, while Fareda Banda's study of women and human rights law in Africa considered the norms (but not the institutions) of sub-regional economic integration as part of the African human rights system.

Even when the relationship was acknowledged between regional integration and human rights, it was not always easy to say how the relationship was constituted or derived. Evarist Baimu, for instance, acknowledged "the linkage between human rights and development and its linkage to regional integration in the context of globalization." This was the approach favoured the early thinkers on regional integration in Africa, and affirmed in the early practice of the OAU. But this approach appeared to have relegated human rights in priority to an ill-defined notion of development pursued through overriding nation-building projects, precisely the albatross of the OAU and the reason for the search for alternative models of continental institution building. By reinforcing unaccountable government and massive abuses of human rights, it ended up advancing neither integration nor development, and cannot, therefore, explain the evolution from non-intervention to non-indifference.

The predominant view in contemporary discourses within the continent appears increasingly to be that the advancement of human rights is both a pre-condition for and an inherent element of effective regional integration. This mirrors developments in the European Union, (which has provided historical and contemporary inspiration for modelling integration in Africa) where the Charter of Fundamental Rights is binding on both European Union Institutions and on Member States when "implementing Union law." This approach posits the relationship between regional integration and human rights mutually contingent, entailing that the realization of one is predicated on the pursuit of or commitment to the other. Conceptually, this negates any possibility of programmatic chronology between them – human rights and regional integration should be pursued simultaneously or not attained at all. This transforms human rights from an optional extra or to a fundamental value of regional integration.

IV. From Integration to Non-Indifference: Discursive Logics, Rationales and Adaptations

It must seem counter-intuitive to be theorizing about the evolution from a regional norm of non-interference to one of non-indifference or a sovereign obligation of solidarity and humaneness at a time when the efficacy of international institutions and the democratic legitimacy of regional institutions is under assault from unrelenting forces of populism, autocracy and violence. These issues, however, are not exactly new, even if they have become somewhat more strident in international relations. It is arguable that the appearance of a tendency towards the decomposition of the institutional author-

ity of regional mechanisms should offer an opportunity to re-examine the appeal of the values that should underpin them. A time of great global dissonance, as demonstrated above in the externalities that affected the formation of ECOWAS, should also argue for more active regional solutions.

The advancement of human wellbeing in a territorialized universe requires regimes of both norms and institutions in diverse fields of peace and security, economic laws and human rights. Integration expands the territorial frontiers for the pursuit of development and economic activity, notionally enhancing the odds of success with respect to both security and economic freedoms, assuming the existence of minimally capable governance. Human rights guarantee the minimal entitlements of the participants in these processes and insure against State arbitrariness that could undermine their goals. Processes of integration and the protection of human rights are accompanied by procedural and institutional guarantees recognizing individuals and human communities as bearers of rights as well as participants in and beneficiaries of integration.

The relationship between human rights and regional integration can therefore be constructed as both intrinsic and instrumental. Fundamentally, both integration and the regional protection of human rights involve varying degrees of permitted exception to global or universalist regimes. In the field of economic law, this is allowed under Article XXIV of the General Agreement on Tariffs and Trade, GATT, for instance. In general, international and institutional laws, Article 52(1) of the United Nations Charter allows for the creation of “regional arrangements or agencies”, subject at all times to the primacy of the Charter provisions in the event of a conflict in accordance with Article 103 thereof.

Intrinsically, States in regional integration arrangements agree to pool sovereignty. In economic integration, the pooling evolves into a fusion of sovereignty across independent territories. Similarly, a regional human rights regime institutes supra-national constraints on State conduct and establishes mechanisms for monitoring compliance with these constraints.

Functionally, the essential elements of economic integration, especially factor mobility, including free movement of persons and services, are framed in human rights terms, and the judicial oversight institutions of regional integration in Africa, such as the ECOWAS Court of Justice, have over time acquired or been afforded significant jurisdictional scope over human rights protection.

Instrumentally, within varying contexts and with variable consequences, both human rights and regional integration are intrinsically anti-majoritarian. Human rights norms and institutions provide protections against the potential for governmental or majoritarian arbitrariness. The anti-majoritarianism of integration occurs in the context of inter-State relations and is reflected in the principle of variable geometry which recognizes that different States within an integration arrangement can attain integration standards at different speeds. The anti-majoritarian logic of variable geometry necessitates different adaptations from internal compensation mechanisms to common political values founded on shared commitment to non-discrimination as the cornerstone of economic integration and on more general human rights standards.

Implicit in the foregoing, therefore, the point must be made that human rights define the common political values in the absence of which integration is both unattainable and unsustainable. However, human rights are not the alter ego of integration nor absolute in their rationale or application. In the context of integration, human rights “must be, therefore, be considered in relation to their social function.” Human rights guarantee in regional integration arrangements may be understood and operationalized in terms of their functional contribution to the processes and outcomes of integration. At face value, this runs counter to the popular philosophical characterization of human rights as inherent in human beings without reference to any calculus of their social utility. However, in practice, it provides alternative and additional frameworks for the enforcement of human rights in different forums. For instance, the closure of a media house by the government of, say, Zimbabwe may be

framed as a straightforward case of protection of freedom of expression, within the African Charter on Human and Peoples' Rights. It could also be pursued as a case of interference with rights of investment and economic activity before the Court of Justice of the Common Market of East and Southern Africa (COMESA), of which Zimbabwe is a Member. For affected citizens, integration in this context potentially offers them multiple forums for remedies, where they may have been left with none or few.

Yet, while it is not difficult to compute the benefits of a Customs Union or Common Market (respectively as forms of regional integration arrangements) in material terms, the benefits of a human rights regime may be less tangible even if no less real. For developing States reluctant to cede hard-won sovereign prerogatives, therefore, it may be easier to prioritize the former over the latter. Although economic integration and human rights regimes may be theoretically inter-dependent, in practice, the former may still be a more appealing or compelling project than the latter to a developing country as an institutional proposition. There is thus a coherence to the philosophical rationales and practical logics of regional integration as the beginning of an experiment in the diminution of non-interference in the African inter-State system. Christof Heyns reaches the self-evident conclusion that:

Trade and other links must exist between State parties before a regional human rights system can be enforced effectively. Without trade, diplomatic communication, travel and other links between States Parties, the conditions to impose sanctions to affect the behaviour of States do not exist.

This conclusion is supported by major landmarks in inter-African State practice. For instance, when the major Partner States in the East African Community disagreed fundamentally on the human rights record of Uganda's military dictator, Idi Amin, the result was the suspension and eventual dissolution of the Community in 1977. Similarly, the evolution of the contemporary architecture of regional human rights and regional integration regimes in Africa goes back to common origins in which African States explicitly acknowledge the organic inter-dependence of regional integration, human rights, and development.

Flowing from this inter-dependence is recognition of the importance of a more accountable African State system with more capable regional institutions. Regional integration constructs an inter-State framework of functional accountability in which individuals were originally only beneficially interested. Initially inaccessible to individuals and non-State entities, various regional integration arrangements in Africa, including the AU, have now evolved systems for active participation by non-State actors, including individuals, civil society, and the private sector. How the ECOWAS pioneered this evolution bears some brief description:

Human rights as "fundamental principles"

Unlike the 1975 Treaty, the Revised ECOWAS Treaty of 1993 refers to the African Charter on Human and Peoples' Rights in its preamble. Under Article 3(1) of the revised Treaty, the aims of the Community are to promote co-operation and integration leading to the establishment of an economic union in West Africa in order to raise the living standards of its peoples, and to maintain and enhance economic stability, foster relations among Member States and contribute to the progress and development of the African continent.

To achieve this aim, the States parties to the revised Treaty undertake through the Community to pursue a set of objectives including harmonization and co-ordination of national policies and the promotion and integration of programmes, projects and activities in, inter alia, transport, natural resources, food and agriculture, economic reform policies, human resources, education, information, culture, science, the environment, health, tourism and legal matters. The Authority of Heads of State and Government adopts necessary decisions and protocols to implement the obligations under the Revised Treaty.

The Revised Treaty defines “Fundamental Principles of the Community” to include: maintenance of regional peace, stability and security through the promotion of good neighbourliness, peaceful settlement of disputes among Member States, recognition, promotion and protection of human and peoples’ rights in accordance with the provisions of the African Charter on Human and Peoples’ Rights, accountability, economic and social justice and popular participation in development, promotion and consolidation of a democratic system of governance in each Member State, and equitable and just distribution of the costs and benefits of economic integration. Commitment to the African Charter on Human and Peoples’ Rights and to protection of both fundamental human rights and international humanitarian laws are also fundamental principles of the ECOWAS Mechanism for Conflict Prevention, Management, Resolution, Peace-Keeping and Security.

These Fundamental Principles have the same significance and role in the Revised ECOWAS Treaty as they do in the Constitutive Act of the AU. In the case of *Hon. Dr. Jerry Ugokwe v. Federal Republic of Nigeria & Hon. Dr. Christian Okeke & Others Intervening*, the ECOWAS Court of Justice held that the legal effect of the reference to the African Charter on Human and Peoples’ Rights as a fundamental principle of the Community in Article 4(g) of the Revised Treaty is to enable the Court to “bring in the application of those rights catalogued in the African Charter.” Thus the Court claims jurisdiction over the enforcement and application of the African Charter on Human and Peoples’ Rights and the Universal Declaration of Human Rights. It follows that, to the extent that the ECOWAS treaty is a supra-national treaty instrument directly applicable within its Member States, domestic application of the African Charter on Human and Peoples’ Rights through the Fundamental Principles of ECOWAS could be both automatic and mandatory. This is achieved entirely through the instrumentality of the Revised ECOWAS Treaty. The Charter is not just a source of law for the Court; it is also a legal instrument that frames the ECOWAS Court’s human rights jurisdiction. This is confirmed in the Supplementary Protocol on Democracy and Good Governance where ECOWAS Member States agree to a set of principles of constitutional convergence, including “zero-tolerance for power obtained or maintained by unconstitutional means,” and that the rights contained in the African Charter on Human and Peoples’ Rights and other international instruments shall be guaranteed in each of the ECOWAS Member States.

Factor mobility as a human right

One major objective of the Community is the liberalization of cross-border trade and movement among its Members involving, inter alia, the removal of obstacles to the free movement of persons, goods, services and capital, and to the rights of residence and establishment. Factor mobility is an entitlement of citizens of the ECOWAS Member States. The scope of this entitlement extends to freedom to travel to or relocate to another Member State for employment purposes, pursue economic activities or establish in other Member States a trade or profession under the same conditions as citizens of such States, and freedom to provide or receive services on an equal footing with citizens of the host Member States, without discrimination on the basis of nationality.

The ECOWAS Authority of Heads of State and Government has adopted a variety of Protocols to implement factor mobility incrementally in three phases over a four decades, beginning with the establishment of right of entry and abolition of visas. To facilitate the right of free movement of persons in the Community, ECOWAS established an ECOWAS Travel Certificate, which is obtainable from the governments of Member States. The second phase establishes the right of residence within the Community which is also presently operational. Community citizens resident in a country other than their country of nationality are entitled to a special ECOWAS residence card. The relevant protocols extend the rights of residence and establishment to natural and legal persons.

ECOWAS citizens enjoy rights of free movement within the sub-region including rights of residence and establishment in Member States. For this purpose, the Supplementary Protocol on the Imple-

mentation of the Third Phase (Right of Establishment) of the Protocol on Free Movement of Persons, Right of Residence and Establishment, places States within the Community under an obligation to accord Community Citizens national treatment on a non-discriminatory basis in the establishment of businesses and services. It defines the right of establishment as:

the right granted to a citizen who is a national of the Member State to settle in or establish in another Member State other than his State of Origin, and to have access to economic activities as well as to set up and manage enterprises and, in particular, companies, under the same conditions as defined by the legislation of the host Member State for its own citizens.”

Among the protections contained in the Protocols, citizens of ECOWAS Member States “shall have in the territories of other Member States, under the same conditions as their citizens, freedom to prosecute and defend their rights under any jurisdiction.” Discriminatory expropriation of property on grounds of nationality is prohibited.

A code of conduct regulates the rights of migrants in the Community. This code of conduct enjoys treaty status having been adopted as one of the implementing protocols to the revised Treaty. It obliges Member States to respect the “fundamental human rights” of Community migrants in respect of illegal migration, expulsion, and the treatment of intra-community migrants, including migration caused by forced displacement. Fundamental human rights are defined to mean “the right of any individual recognized by the International (sic) Declaration of Human Rights adopted on 10 December 1948 by the United Nations General Assembly”, extending, under the third phase, to all the rights granted to migrant workers under the relevant Conventions of the International Labour Organization relating to the protection of migrant workers.

There are three main features of the rights attached to factor mobility in the Revised Treaty and its implementing Protocols. First, they reinforce and supplement the prohibition African Charter’s against discrimination in the ECOWAS countries. Second, the Revised ECOWAS Treaty transforms the Universal Declaration of Human Rights and the ILO migrant workers conventions into treaty law obligations binding on the Member States. Thirdly, the Protocols also guarantee access to national remedies on a non-discriminatory basis. Non-availability of accessible, effective, and non-discriminatory recourse is, therefore, recognized as a violation of Community obligations.

Revised ECOWAS Treaty, a human rights instrument?

Niyungeko offers that “a “human rights instrument” is any legal written document pertaining to the fundamental rights and freedoms inherent in the dignity of any human being,” and suggests that such an instrument could be a treaty or non-treaty in nature. The African Court on Human and Peoples’ Rights has held that the Revised ECOWAS Treaty is human rights instrument whose enforcement can be triggered through invoking the jurisdiction of the Court.

Member States of the Community agree in Article 56(2) of the Revised Treaty to co-operate for the purpose of realizing the objectives of several instruments, including the African Charter on Human and Peoples’ Rights. Chapter X of the Treaty contains general provisions relating to other aspects of human rights, including immigration, regional peace and security, legal and judicial matters, women and development, health and labour rights, information, radio and television, and the press. For instance, in relation to sex and gender discrimination, ECOWAS States agree under Article 63(2) of the Revised Treaty to take all measures to:

- (a) Identify and assess all constraints that inhibit women from maximizing their contribution to regional development efforts; and
- (b) Provide a framework within which the constraints will be addressed and for the incorporation of women’s concerns and needs into the normal operations of society.

To attain these goals, they undertake, at the level of the Community to “stimulate dialogue among themselves on the kinds of projects and programmes aimed at integrating women into the development process...” and “establish a mechanism for cooperation with bilateral, multilateral and non-governmental organizations.” Under Article 66, Member States of the Community agree also to maintain within their borders and between one another, freedom of access for professionals of the communications industry and for information sources, facilitate exchange of information between their press organs, and ensure respect for the rights of journalists. The African Court on Human and Peoples’ Rights enforced these provisions in Konate’s case, finding that the conviction of the applicant for the crime of “criminal defamation,” which was followed by a sentence of imprisonment for 12 months accompanied by a fine of about three thousand Dollars, violated Burkina Faso’s undertakings under the Revised ECOWAS Treaty to “respect the rights of journalists.”

In relation to the right to democratic participation, ECOWAS States adopted in 2001 a Supplementary Protocol on Democracy and Good Governance which sets regional standards on elections and independence of the legal profession and the judiciary and, like the AU, prohibits power obtained or maintained by unconstitutional means. The African Court has equally held and applied this Supplementary Protocol as a human rights instrument.

ECOWAS Court of Justice: A multi-dimensional human rights Court

The Revised ECOWAS Treaty creates a Community Court of Justice as one of the principal organs of the Community. In 1991, the Community adopted a Protocol on the Establishment of a Community Court of Justice. The ECOWAS Court of Justice is four Courts in one: it is the judicial organ of the Community with composite treaty supervision and oversight functions; the administrative tribunal Court of the ECOWAS; pending the establishment of the Arbitration Tribunal provided for under Article 16 of the Revised Treaty, it is a Court of arbitration; and it is also the human rights Court for the West African sub-region. The Court initially comprised seven “independent” Members elected by the Authority of Heads of State and Government of ECOWAS for renewable terms of five years each, but the composition has been reduced now to five who serve respectively for a single term of four years. Neither the Revised ECOWAS Treaty nor the ECOWAS Court Protocol require judges of the ECOWAS Court to have expertise in human rights or indeed in international economic law.

Originally, access to the ECOWAS Court was restricted to States and Community Institutions. In its report in 1992, the Committee of Eminent Persons had recommended that this should be extended to individuals and non-State entities. In 2001, the Member States of the Community agreed to extend the jurisdiction of the Court explicitly to cover human rights violations. This was implemented through a Supplementary Protocol adopted in January 2005. Under the Protocol Relating to the Community Court of Justice as amended by this Supplementary Protocol, the Court has subject-matter jurisdiction over the interpretation and application of the Revised Treaty, conventions, protocols, regulations, directives, decisions and other subsidiary legal instruments of the community. In particular, Court has jurisdiction over cases of violation of human rights that occur in any Member State. Proceedings relating to the failure of Member States to fulfil their obligations can only be instituted by Member States or the Executive Secretary. In addition to Member States and the Executive Secretary, the Council of Ministers may also initiate proceedings to determine the legality of official action in relation to a Community instrument. Individuals and corporate bodies also have standing in cases to determine whether an act or omission of a Community official violates their rights.

Individuals may apply to the Court “for relief for violation of their human rights.” Cases in this last category must satisfy two conditions: they must not be anonymous nor be initiated while the same matter is pending before another international Court for adjudication. National Courts may also refer to the Court questions of interpretation of ECOWAS instruments that arise in domestic proceedings.

These provisions confer on the ECOWAS Court of Justice jurisdiction over “any violation of human

rights in any Member States” brought before the Court by individuals. Notably, the admissibility conditions in Article 10(d) of the amended Court of Justice Protocol omit any reference to the exhaustion of domestic remedies. The Court has, thus, held that the Community legal order is monist, thereby dispensing with any requirement for exhaustion of domestic remedies. According to the Court:

Appealing against the decision of the national Court of Member States does not form part of the powers of the Court; the distinctive feature of the Community legal order of ECOWAS is that it sets forth a legal monism of first and last resort in Community law....the kind of relationship existing between the Community Court and these national Courts of Member States are (sic) not of a vertical nature between the Community and the Member States, but demands an integrated Community legal order. The ECOWAS Court of Justice is not a Court of Appeal or a Court of Cassation.

This opinion confirms the supra-national effect of ECOWAS legal instruments and judicial decisions but saddles the Court with the responsibility of being, incongruously, a forum of first instance, primary fact-finder and last resort in essentially international proceedings. The Court has been inclined to give the widest possible interpretation to its human rights jurisdiction, extending it to application of the African Charter on Human and Peoples’ Rights, global human rights standards applicable to West African States, and arguably, to the national Bills of Rights.

In its first decade of operations, the Court held 532 Court sessions and received 201 cases. Of this, the Court delivered 86 final judgments, 82 interlocutory rulings, 12 review decisions, and three Advisory opinions. 56 cases remained pending. 17 of these judgments were against institutional organs of the Community. It also delivered three advisory opinions. Most of these decisions were on human rights issues. Over this period, the Court has decided some seminal cases. For example, in *Hadijatou Mani Koraou v. Niger*, the Community Court of Justice found in favour of the applicant whose case alleged violations of the prohibition against slavery and required the State party to make reparations. In *Hissene Habre v. Senegal*, the Court upheld the principle of accountability for former heads of State for international crimes, providing an unprecedented mechanism for its conduct in and by Africa. In *Amnesty International & Others v. Togo*, the Court struck down an internet shutdown by the respondent State holding it to be in an unjustifiable violation of freedom of expression in violation of the fundamental values of the community.

ECOWAS Court of Justice and the African Court on Human and Peoples’ Rights

One upshot from the role of the ECOWAS Court of Justice in adjudication of human rights cases is the question of the relationship between the regional Courts of justice in Africa, of which the ECOWAS Court is a flagship and the African Court on Human and Peoples’ Rights as the continental Court human rights Court. Established by a Protocol to the African Charter on Human and Peoples’ Rights, the African Courts jurisdiction is defined by the African Charter on Human and Peoples’ Rights. The ECOWAS Court, by contrast, does not exist as such under the African Charter system by has competence to interpret and adjudicate on violations of the Charter as an international treaty. Regional Courts of justice in Africa, such as the ECOWAS Court, are established by the treaties of Regional Economic Communities in Central, East, Southern and West Africa. It is notable that “most subregional treaties make reference to the “recognition, promotion and protection of human and peoples” rights in accordance with the African Charter” as a “fundamental principle” guiding the accomplishment of their objectives.” This easily brings the African Charter, as the primary instrument of the African Court system, within the purview of the Courts of justice of the RECs, enabling them also to interpret the Charter in the context of regional integration and trade laws.

Although the African Commission and Court are established by Treaty and conferred with competence to implement the African Charter, there is neither exclusivity of jurisdiction in this regard nor a hierarchy between the various judicial institutions on the continent endowed with this competence, including the Courts of Justice of the REC’s. It has been argued that “with the power to interpret

the African Charter reposed in the African Court and the African Commission, interpretations of the African Charter by the two bodies will have strong persuasive authority for the trade Courts when faced with questions of interpreting economic principles in the light of the African Charter.” In the Advisory Opinion on Regional Rotation in the Pan African Parliament, the African Court may have suggested the contrary, with the following dictum: “rules on jurisdiction in other regions and globally reveal a trend to specialization that entrusts Courts of Justice with competence to examine general affairs and interpretation of treaties of a general nature, including community law, as opposed to human rights treaties.” This observation did not necessarily arise from the questions framed for the Court and was not necessary for the determination of those issues. The existence of such a trend as suggested in this observation by the Court is difficult to establish in the face of ample evidence to the contrary. The Court of Justice of the ECOWAS long ago affirmed jurisdiction over violations of human rights in any Member State brought before it, including those involving the African Charter on Human and Peoples’ Rights. Even if such a trend were to be shown to exist, it would not necessarily deny the competence of regional Courts of justice in Africa to pronounce on the African Charter as an instrument incorporated into their founding treaties.

An understandable desire to harmonise the jurisprudence on the African Charter could impel the Courts of justice to defer to the jurisprudence of the African Commission and Court in this regard but there is no obligation on them to do so. One way to advance this goal would be through requests for advisory opinions from the regional Courts of justice to the African Court on questions involving the interpretation of the African Charter. While this may be desirable, it faces two obstacles, one practical and the other doctrinal. With respect to the former, whether or not a regional Court of justice can transmit such a request to the African Court will depend on the texts of the treaties under which they are established. So far, no such request has been made or transmitted and there is nothing in the existing texts of the regional Courts of justice to indicate that such jurisdiction exists or was contemplated. Equally, and perhaps more importantly, this is also not explicitly precluded although it could ultimately be more prudent to confer such capacity on the Courts of justice of the RECs explicitly by treaty rather than seek to attain it interstitially by interpretation of existing treaty texts.

With regard to the latter, even if the Courts of Justice of the RECs were to be conferred by their respective Treaties with jurisdiction to request advisory opinions from the African Court, the question would still arise whether or not they have standing to do so under the African Court Protocol. It is clear that they do not fall into the categories of African States, the African Union or organs of the African Union specified in Article 4(1) of the African Court Protocol. The Courts of justice of the RECs can only acquire such capacity if they can be shown to fall into the final category of “African organisations recognised by the African Union.” Unquestionably, they are African organisations. The dispositive issue is whether they meet the criteria established by the African Court for being seen as recognised by the AU. These Courts, as international institutions, do not have Observer Status with the AU nor do they indeed have MoUs with it as determined by the African Court in the Advisory Opinion on the Standing of the African Committee of Experts on the Rights and Welfare of the Child before the African Court on Human and Peoples’ Rights. Ordinarily, therefore, it is arguable that they do not fit the constitutive criteria as African organisations recognised by the AU.

However, in 2008, the AU did reach an MoU with the RECS on peace and security in Africa. The material scope of this MoU covers “matters relating to the maintenance of peace, security and stability in Africa.” This Protocol makes no direct reference to the African Charter as such but one of its declared objectives is “to contribute to the full operationalization and effective functioning of the African Peace and Security Architecture (APSA).” The APSA is established under and is part of the instruments of the Protocol Relating to the Establishment of the Peace and Security Council of the African Union. The objectives of this protocol include the protection of human rights and fundamental freedoms, and among its declared principles is a commitment to “respect for the rule of law, fun-

damental human rights and freedoms, the sanctity of human life and international humanitarian law.” Under Article 19 of the Peace and Security Council Protocol, the APSA is required to “seek close cooperation with the African Commission on Human and Peoples” Rights in all matters relevant to its objectives and mandate.” It is, therefore, inferable that the African Charter is within the material scope of the underlying legal instrument within which the MoU was reached between the AU and the RECs. A functional reading of Article 19 of the Peace and Security Council Protocol yields the conclusion that close co-operation between the Courts of justice of the RECS and the African Court is not just desirable but also mandated.

While they do not themselves have Observer Status with the AU or an MoU with it, the Courts of justice of the RECs are judicial organs of regional institutions which in fact have such an MoU applicable to issues within the specialized mandates of the Courts of justice. Therefore, the conclusion must be that the Courts of justice of the RECs are recognised by the AU as African institutions and would be able to request for advisory opinions from the AU if their founding legal instruments authorize them to do so.

V. Conclusion

The story of the place of human rights in regional integration in Africa generally, and in ECOWAS in particular, reflects the evolution substantially of accountable governance in the region and the continent. ECOWAS has been a leader in this story. The ECOWAS Court of Justice has given vent to this relationship in its jurisprudence, emerging easily as the most ambitious judicial institution in regional integration in Africa. There is a considerable body of path-breaking jurisprudence from the Court in its first decade showing how human rights have become a fundamental value in integration and affirming that human rights and regional integration are mutually inter-dependent. In its first two decades, the signal achievement of the ECOWAS Court of Justice has been the establishment of human rights not merely as fundamental value of the Community but, even more importantly, as an indispensable preoccupation of regional integration in Africa.

SUB-THEME 3

ECOWAS HUMAN RIGHTS REGIME: HUMAN RIGHTS PROTECTION AS A CORE VALUE OF THE COMMUNITY

ECOWAS HUMAN RIGHTS REGIME: THE PROTECTION OF HUMAN RIGHTS AS A FUNDAMENTAL VALUE OF THE COMMUNITY

By

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It all started with economic integration! Indeed, by signing the ECOWAS Constitutive Act on 28 May 1975, the then Heads of State and Government were driven by the “compelling need to encourage, stimulate and accelerate the economic and social progress of their States with the aim of improving the standard of living of their respective peoples. This is inevitable since they were convinced that “promoting the harmonious economic development of States requires effective economic cooperation and integration, which essentially requires a determined and concerted policy of self-sufficiency.” This means that, at the beginning, Community construction was alien to the issue of fundamental rights. At least the option was not clearly expressed on the issue of the protection of fundamental rights. The construction of ECOWAS was based, first and foremost, on economic considerations. This is also true for economic integration organisations that were born at a time when the protection of human rights and democracy was not a shared value in international relations. With regard to the European construction Robert Schuman write of “a solidly united and strongly structured Europe. A Europe where the standard of living will rise thanks to the pooling of production and the expansion of markets, which will lead to lower prices.”⁶⁵ This economic orientation has been achieved through the Treaties of the European Coal and Steel Community, the European Atomic Energy Community and the European Economic Community. Like the Treaty establishing ECOWAS, Article 2 of the Treaty of Rome stipulated that “the Community shall have as its task, by establishing a common market and progressively approximating the policies of the Member States, to promote throughout the Community a harmonious development of economic activities, a continuous and balanced expansion, an increase in stability, an accelerated raising of the standard of living and closer relations between the States belonging to it”. It was therefore only gradually that human rights were able to enter the Community agenda under the impetus of the European Community Court of Justice. Indeed, it is reMembered that, in its early stages, this Court Stated that “community acts must, if not invalid, be compatible with the fundamental human rights of the individual, which are included in the general principles of the law the observance of which it ensures”. Later, it considered as the source of these fundamental rights international instruments for the protection of human rights to which Member States have cooperated with or acceded to”.⁶⁶

The same observations can be made of the South African Development Community, Economic Community of Central African States.

But, as Jean Rivero noted, “institutions, unlike satellites, rarely remain in the orbit in which their creator intended them to be. They are beyond the control of the constituent or legislator who gave them life. The event, the environment, the personality of the men who embody them determine their trajectory”.

The transformation of the ECOWAS Court of Justice (hereinafter ECJ), established by the Treaty in its Article 15, into a Court of law was initiated by Supplementary Protocol A/SP.1/01/05 amending Protocol A/P1/7/91 on the Community Court of Justice. One of the major revolutions of the 2005 Protocol that will transform the ECJ is contained in Article 9.4. This textual evolution will be finalized by a case-law revolution.

In its new role as an integration Court and guardian of fundamental rights, the ECJ intends to play a full part in building an integration community that is enamored with fundamental rights and freedoms. The fact remains that, on the issue of human rights, the ECJ is known for its jurisprudential activism, which is celebrated by some and decried by others. But it is true of institutions and men that, after a lifetime, one can look in the rear-view mirror to question the past, and with the help of the elements provided by the present, reflect on the future, i.e., the prospects. Thus, at the time of diagnosis, assessment and prospects, the question that arises is: What views can be formed of the ECJ in the fulfilment of its human rights mission?

65 Opening Statement by Robert Schuman of 9 May 1950, v. European Union website.

66 Nold, ECCj 14 May 1974 case. 4/73, rec., 491.

The analysis of the case law of the ECJ since 2008 shows that it has positioned itself as a custodian Court of the fundamental rights of Community citizens. This is an undeniable achievement. However, the views of States in the face of the rise of the ECJ, leads us to conclude that the Court is at a crossroads, where the desirable is confronted with the mistrust of States.

I. Undeniable achievements: A Court as custodian of fundamental rights

The democratisation of the jurisprudence of the ECJ and the bold jurisprudence on human rights will be discussed in turn.

A. “A small step for the Court, a big step for the citizens of the Community

This concerns the question of democratising the referral of cases to the Court. It should be noted in this respect that everything starts from the Supplementary Protocol. In this respect, two categories of referrers can be distinguished. The first comprises of the staff of the Community institutions. They are entitled to refer any professional dispute to the ECJ after having exhausted without success the remedies provided for in the Community’s Staff Regulations and Staff Rules.⁶⁷ Referral is also open to “national Courts or the parties concerned, when the Court has to give a preliminary ruling on the interpretation of the Treaty, Protocols and Regulations.” Similarly, national Courts may “decide themselves, or at the request of one of the parties to the dispute, to bring the matter before the Community Court of Justice for interpretation.

The second category concerns natural or legal persons. They may, under Article 10 (c) and (d) bring proceedings before the Court “for the determination of the legality of any act of the community with which they are aggrieved,” or when they are victims of “violations of human rights.” However, two conditions are set. On the one hand, requests should not be anonymous. On the other hand, they should not be brought “before a competent permanent international Court.”⁶⁸ The Protocol opens the Courtroom to victims of human rights violations almost unconditionally.

The Protocol brings about a decisive change in the Office of the ECJ. Indeed, before it, the ECJ was a conventional Community Court responsible for deciding disputes relating to the application or interpretation of Community texts. Its referral was reserved for his organs. This is the barrier, if any, that has been broken with the 2005 Protocol, which is in fact the product of a reform, whose first glimmers were announced in 1991 and which began to materialise in 2001, with the adoption in Dakar on 21 December 2001 of Protocol a/SP/12/01 by the Authority of Heads of State and Government. It is an additional instrument to the Protocol relating to the Mechanism for Conflict Prevention, Management, Resolution, Peacekeeping and Security adopted on 10th December 1999 in Lomé. Article 39 of the 2001 Protocol had provided that “Protocol A/P.1/7/91 adopted in Abuja on July 6th, 1991, relating to the Community Court of Justice shall be reviewed to extend jurisdiction of the Court to hear, inter-alia, cases relating to violations of human rights, after exhaustion (...) of local remedies.” It should be noted here that the issue of exhaustion of remedies has not been overlooked. But, by omitting this condition, has the 2005 Protocol democratized the right of referral to the ECJ? A comparison with practices in other regional Courts shows, for example, that in the inter-American system for the protection of human rights, the initial jurisdiction lies with the Commission on Human Rights, whereas the Court of Human Rights has jurisdiction only after the exhaustion of appeals before the Inter-American Commission on Human Rights. The Commission on Human Rights is responsible for the promotion of the observance and defence of human rights as enshrined in the American Declaration of the Rights and duties of Man and the American Convention on Human Rights. The Inter-American Commission on Human Rights is responsible for ensuring the application and interpretation of the Convention on Human Rights, and hears, after a Member State has expressly recognised its competence, petitions from individuals containing denunciations or complaints relating to violations of the American Convention on Human Rights. In addition, it is also competent to hear

67 See art. 10 of the 2005 Protocol.

68 See art. 10 d (iii) of the Protocol

cases in which a Member State alleges that another Member State has violated the human rights enshrined in the Convention.

This procedure is a little different from the jurisprudence of the EJC and cannot be used as a reference. However, it is closer to that established within the African Regional Human Rights Mechanism, through the African Court on Human and Peoples' Rights and the Commission. As for the African regional system, it is known that the application, subject to inadmissibility, must meet a number of conditions: the application must be compatible with the Constitutive Act of the African Union, it must not be based exclusively on information from the media. It must respect the rule of exhaustion of local remedies and be introduced within a reasonable time after the exhaustion of local remedies. The exhaustion of local remedies coupled with the referral within six months of the decision is a particular condition for the admissibility of applications to the European Court of Human Rights. It is therefore understandable that the fact that the Court of Justice has not made this condition applicable to individual applications constitutes the exception that proves the rule.

The fact remains that it is this case law, which is now constant at the ECJ, which has enabled the Court to carry out a Copernican revolution in the protection of human rights.

B. The ECJ's bold human rights jurisprudence.

The boldness in the field of human rights was demonstrated very early in the Ms. Hadjijatou Mani Koraou judgment of 27 October 2008,⁶⁹ which can be considered in this particular area as the Blanco judgment of the ECJ. It will be remembered that in order to regain complete freedom from her "master," Dame H. Koraou brought the case before the Courts of her country, and without waiting for the outcome of this proceeding, brought the case before the ECJ in order to have Niger condemned for violation of the African Charter on Human and Peoples' Rights. The ECJ considered on this occasion that "the applicant's slave situation, even if it emanated from an individual acting in a supposedly customary or individual context, was entitled to protection by the authorities of the Republic of Niger, whether they be administrative or judicial. That, therefore, the defendant becomes responsible under both international and national law for any form of violation of the applicant's human rights based on slavery because of the tolerance, passivity, inaction, and the abstention of these same authorities in the face of this practice." But to reach this conclusion, and to justify its competence to hear a case based on the African Charter on Human and Peoples' Rights (ACHPR), the Court had to stretch its reasoning. It points out that by referring to the ACHPR in Article 4(g) of the Revised Treaty, "the Community legislator simply wanted to integrate this instrument into the law applicable before the ECOWAS Court of Justice." It adds that "the Community's adherence to the principles of the Charter means that even in the absence of ECOWAS legal human rights instruments, the Court ensures the protection of the rights set out in the Charter..." Although the reference to Article 4(g) might justify the Court's jurisdiction to hear case based on the ACHPR, the question arises in relation to the ECJ's reference to the Convention on the Elimination of All Forms of Discrimination against Women. In any case, the ECJ concluded that the State of Niger was liable for the inaction of its administrative and judicial authorities. This reasoning is reminiscent of the terms of the Siliadin judgment of the European Court of Human Rights. In this case, France was condemned for not having taken the necessary positive measures, notably legislative and judicial, to avoid the State of servitude in which the Lady Siliadin lived for a certain period.

It should nevertheless be noted that some decisions have not had the same glory as that of the KORAOU judgement. For sometimes sensitive cases, the ECJ torn between the need to protect human rights and the fear of attracting criticism from offending States, seems to have opted for a "Solomon's judgment." The case of Mrs AMEGANVI Manavi Isabelle and others versus the State of Togo and the case of Simone Ehivet GBAGBO and Michel GBAGBO against the State of Cote

69 Judgement ECW/CCJ/RUL/ APP/08/08 of 27 October 2008.

d'Ivoire can be cited for reflection.⁷⁰ In the first case, after their exclusion from the National Assembly of Togo, nine opposition deputies brought a case before the ECJ to declare the exclusion, following the submission of a blank letter of resignation by the leader of their party, as an infringement of their rights and freedoms and called for the condemnation of Togo for violation of their right to defence on the basis of the ACHPR. The Court noted that "the applicants never expressed their intention to resign, by handing in or sending a letter to the President of the National Assembly; on the contrary, they refuted before the plenary of the National Assembly" that they had any intention of resigning, which was confirmed by the creation of a new parliamentary group."⁷¹ On the basis of this observation, the ECJ should have asked the State of Togo to reinstate the said MPs. Against all expectations, it limited itself to condemning Togo to paying three million CFA Francs to each of the victims for "human rights violations." In the second, the GBAGBO family asked the ECJ to note, in particular, the arbitrary nature of their arrest and detention under house arrest, and the violation of their rights to an effective recourse, to freedom of movement and residence. Having considered the case of Michel Gbagbo, the ECJ declared that the arrest and detention of the plaintiff "in connection with his house arrest is illegal, arbitrary and constitutes a violation of Article 6 of the ACHPR." In these circumstances, the Court should have ordered the release of Mr. Michel Gbagbo. However, the Court returns to the issue by stating that since Mr Michel GBAGBO being indicted and detained before national Courts for other reasons," his request for release could not be accepted.

However, this ECJ's proven case law architecture faces significant challenges.

II. A Court at Crossroads: The desirable tested against risks of mistrust

While it is true that the Koraou decision ushered in the resurrection of the ECJ, it is also true that the ensuing case law brought the ECJ into an area of turbulence driven by others. This is evident through the challenges faced by the ECJ.

A. The KORAOU ruling, a thorn in the Court's flesh.

However, to reach this conclusion, the ECJ had to respond to a plea of inadmissibility of the plaintiff's application put forward by the State of Niger. The Republic of Niger challenged the Court's jurisdiction on the grounds, on the one hand, that local remedies had not been exhausted and, on the other hand, that the case in question was still pending before its national Courts. "In fact, while recognizing that the rule of exhaustion was not enshrined in the 2005 Protocol, The Nigerien authorities argued that this was a loophole to which the Court had to rectify by relying on Article 56(7) of the ACHPR referred to in Article 4-9, by the revised ECOWAS Treaty. In rejecting the appeal of the republic of Niger, the Court relied on somewhat complex reasoning. First, it considers that, while it is true that the protection of human rights by international mechanisms remains subsidiary, this subsidiarity loses its rigor as a result of a "very flexible interpretation of the rule of exhaustion of local remedies." It cites the case law of the European Court of Human Rights, which in its judgment in *Wilde, Ooms and Versyp v. Belgium* held that, in accordance with the evolution of international practice, States may waive the benefit of the rule of exhaustion of local remedies."⁷² But is the silence kept by the States on this subject a sign of renunciation? Beyond the fact that this jurisprudence is not transferable to the ECOWAS context, it should be noted that article 39 of the 2001 Protocol, which served as the basis for the revision of the 2001 Protocol, recalled that "Protocol A/P.1/7/91 adopted in Abuja on July 6th 1991 relating to the Community Court of Justice shall be reviewed to extend jurisdiction of the Court to hear, inter-alia, cases relating to violations of human rights, after exhaustion (...) of local remedies." It is clear that the States, while calling for an evolution of the ECJ in terms of human rights jurisdiction, did not intend to abolish the principle of exhaustion of remedies. In addition, in the silence of the texts, did the Protocol intend to authorise direct appeal? For the ECJ judge, by

⁷⁰ Judgement ECW/CCJ/RUL/09/11 of 07 October 2011.

⁷¹ See paragraph 63 of the judgment.

⁷² See art. 10 d (ii) of the Protocol

omitting to include this rule in the 2005 Protocol, the Member States intended to comply with this new case law of the European Court of Human Rights. But then, what is the body of corroborating evidence that could have allowed the Court to support this position? The ECJ does not mention any. Nevertheless, the Court considered that there was “no reason to regard the absence of prior exhaustion of local remedies as a shortcoming which its practice must rectify, since the latter cannot, without violating the rights of individuals, impose on them conditions and formalities more onerous than those provided for by the Community texts.”⁷³ As recalled by Prof. Koffi AHADZI-NONOU even though the context was favourable for the judge to rule against a retrograde slavery practice, his argument is far from convincing. Indeed, “the omission of the rule of exhaustion of domestic remedies in the 2005 Protocol does not necessarily mean that the signatory States intended to renounce it. The rule of prior exhaustion of local remedies is a customary rule of international law and therefore applicable even in the absence of a text.”⁷⁴ In the *Interhandel* case between Switzerland and the United States, the ICJ observed that the exhaustion of local remedies “is a well-established rule of customary international law,” “that the State where the injury was committed should be able to remedy it by its own means, within the framework of its internal legal order”⁷⁵ before resorting to international procedures. For its part, the Institute of International Law recalled that “where a State claims that an injury to its person or property suffered by one of its nationals has been committed in violation of international law, any diplomatic or judicial claim belonging to it on this ground shall be inadmissible, if there are remedies available in the internal legal order of the State against which the claim is made which are likely to be effective and sufficient, and as long as the normal use of such remedies has not been exhausted.” It can therefore be concluded that the ECJ should have found the application of Ms. H. KORAOU inadmissible. Wasn’t this case law at the root of some States’ mistrust of the ECJ?

B. The mistrust observed: the resistance of sovereignism

It seems that the ECJ’s self-initiated transformation is not to the liking of some States. This is the case of Benin, for example. Indeed, in its decision of 30 April 2020, The Constitutional Court of Benin considers that “Supplementary Protocol A/SP.1/01/05 of 19 January 2005 can only be invoked against the State of Benin after it has been duly introduced into the domestic legal order by a ratification decree adopted by the National Assembly, promulgated by the President of the Republic and published in the Official Gazette of the Republic of Benin.” After noting the impact of this Protocol on the legal and institutional order of Benin, in particular that the protocol establishes the Community Court of Justice as a supranational judge of the violation of human rights supposedly committed in Benin and modifies the organisation of national jurisdictions and the laws that govern them, “it observes that the Protocol should have been ratified in accordance with the procedure instituted by Article 145, paragraph 1 of the Constitution.” Thus, in the absence of this substantial formality, the Protocol cannot take effect in the Beninese legal order. As a result, the acts resulting from the implementation of the Supplementary Protocol in question are null and void with regard to Benin. Clearly, the Constitutional Court of Benin is opposed to the ECJ competing with it on the issue of human rights. Through the Court, it is in fact the Beninese State that is opposing the implementation of the 2005 Supplementary Protocol in its regard. It is also known that following the order of 17 April 2020 on provisional measures by which the ACHPR Court asked the State of Benin to “suspend the holding of the municipal and communal councillor elections scheduled for 17 May 2020 until the Court renders a decision on the merits of the case”, and the order of the same Court of 22 April 2020 requesting that Ivory Coast “suspend the execution of the arrest warrant issued against Guillaume Soro, report to the Court on the implementation of the provisional measures ordered... within thirty days of its receipt;” these two countries not only withdrew their declaration granting referral to the ACHPR to individuals and non-governmental

⁷³ See paragraph 45 of the judgment.

⁷⁴ Koffi AHADZI-NONOU, «Remarques sur la jurisprudence de la Cour de justice de la Communauté économique des Etats de l’Afrique de l’Ouest», *Mélanges en l’honneur du doyen François HERVOUËT*, Paris, LGDJ, p. 26.

⁷⁵ *Interhandel (Switzerland v. United States)*, Preliminary Objectives, 1959, ICJ, Rep. 6 - 27 (21 March) retrieved from <http://www.icj-cij.org>.

organisations, but also ignored the Court's injunctions. Although in these two cases the ECJ was not involved, it can be noted that both States are Members of ECOWAS and both cases deal with human rights.

Beyond such situations, the refusal of certain States to appear before the Court can be analysed. One example is the case of Prof. ETIM Moses Essien v Republic of The Gambia, and the University of Gambia and the case of Chieh Ebrimah Manneh v Republic of The Gambia.

In the second case, "after the hearing of the Court on the merits, the defendants, as well as their lawyers, neither appeared nor were represented, however, they sent a letter dated 26 April 2007 to the President of the ECOWAS Commission to express their dissatisfaction with the decision rendered by the Community Court of Justice, and to request the President of the Commission to intervene to allow them to appeal,"⁷⁶ even though Article 15(4) of the ECOWAS Treaty States that "the judgments of the Court of Justice shall be binding on Member States, Institutions of the Community, and natural and legal persons". Subsequently, they sent another letter to the Court in which they Stated: "The defendants will not participate in any other session of the Court of Justice of the Community until the question of jurisdiction is definitively settled by the establishment of an independent Court of Appeal; the defendants will not take part in the session scheduled for 18 June 2007 or in any other session until the Commission finds a solution to this problem."⁷⁷

In the second case, the Gambian State refused to appear despite the efforts made by the Court.

Conclusion

In the face of such mistrust of the Court, should other gaps in the case law be opened, in particular by extending the right to bring actions for failure to fulfil obligations to natural persons, i.e., to Community citizens?

The procedure for bringing an action for failure to fulfil obligations is provided for in Article 10a of the 2005 Protocol. It States that "any Member State, and unless otherwise provided in a Protocol, the Executive Secretary, [may bring an action to the Court] for failure by Member States to fulfil obligations." This remedy is contained in Articles 258 to 260 of the TFEU. It is reserved for the Member States and the Commission.

Should this recourse be extended to natural persons? We would like to say no. The little experience of the ECJ shows that ECOWAS Member States are reluctant to be summoned before this Court, even for acts that violate freedoms. There is a feeling of rejection of jurisdictional dispute resolution. They prefer what Kwam Kouassi calls "the solitary diplomacy as Pilgrims of peace."⁷⁸ Indeed, African States prefer to resort to "political dispute settlement procedures as they are non-binding and perfectly adapted to African conflicts which are essentially political and highly personalised."⁷⁹ Should we maintain the status quo and not move forward? We do not think so either. But we believe that in the face of States' mistrust of the Court's authority due to the lifting of the requirement of prior exhaustion of local remedies, it will be necessary to raise the profile of the ECJ and prevent States from jumping ship. It will be best to keep them on board and hope that they get used to the authority" of the ECJ rather than having them on the outside. At the moment, ECOWAS Member States lack the spirit of integration. But isn't integration without a spirit of integration the ruin of integration?

76 Judgement ECW/CCJA/RUL/05/07 of 29 October 2007, §14.

77 Idem, §16.

78 Kwam KOUAASI, *African International organizations*, Worlds in the making-XXXII, Manuals BL-9, Berger-Levrault, 1987, p. 201.

79 M-C DJENA WEMBOU, L'OUA à l'aube du XXI^e siècle ; Bilan diagnostic et perspectives, Paris, LGDJ, 1995, p.82.

HUMAN RIGHTS PROTECTION AS A CORE VALUE OF THE COMMUNITY: WHITHER THE ECOWAS COURT AS A COURT OF JUSTICE?

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I. Introduction

It is felicitous to begin this lecture with a tribute to the Founders of ECOWAS and to the men and women that have participated in the refinement of the Institutions of ECOWAS and the progressive expansion of the rights of ECOWAS citizens. Without their commitment and efforts, we would not be here today to celebrate twenty years of the Court of Justice of ECOWAS – a momentous and towering Institution of the Bloc and one without which the task I have been asked to perform today would be hollow and meaningless.

My task is to explore human rights as a core value of the ECOWAS with specific focus on the evolution of human rights as a cardinal and fundamental value of the community; State responsibility (holding Member States accountable for their treaty obligations to the community; expanding access to individuals; and the role of the Commission.

As you can see, my task today is a full package for which I must commend those who chose the topic and devised its components. Taking a cue from the sheer broad-sightedness of those who chose this topic, I took the liberty to amend the topic of my lecture to adequately foreshadow and cover what I believe are its various parts. My discussion proceeds in five parts. Part II discusses the evolution of human rights as a cardinal and fundamental value of ECOWAS. Here, I will be focusing on general international law, relevant provisions of the 1975 and 1993 Treaties, Relevant ECOWAS Protocols, including those of the Court as well as its jurisprudence. Part III discusses State responsibility (holding Member States accountable for their treaty obligations to the Community). It focuses on human rights and sought to show that the responsibility for human rights enforcement against a defaulting State, despite the ability of individuals to claim through the ECOWAS Court, remains that of the Member States. Part IV discusses the need to expand access to individuals in the litigation of their treaty rights. Part V discusses the role the ECOWAS Commission has to play in the actualisation of treaty safeguards for individuals and maturation of the integration agenda of the Community. The lecture concludes in part VI.

II. Evolution of Human Rights as a Cardinal and Fundamental Value of ECOWAS

I would like to begin this enquiry from the 1975 ECOWAS foundation Treaty with a view to exposing that human rights have always pervaded the idea of ECOWAS. The first human rights anchor in the 1975 Treaty is in the very first preamble which aimed at “improving the living standards of [the] peoples” of the Member States. It continues in article 2(2)(d), in addition to the fact that the economic provisions in article 2(2)(a) and (b) are the enablers of individual economic activities. Furthermore, article 27 of the Treaty provides for visa-free movement within the Community for Community citizens, defined as citizens of Member States.

It is thus important to recall, from the outset, the indisputable doctrine of the inalienability of human rights, which naturally means that wherever individuals are permitted to participate in any treaty regime, the individual brings with him his inalienable rights, whether expressly provided for in the treaty instruments or not.

This understandably explains why, despite acknowledging that “[a] striking feature of the 1975 ECOWAS Treaty from a human rights perspective is that it does not make any mention of human rights and completely avoids any use of human rights language,”⁸⁰ Ebobrah opined that the very fact that the rights were crafted as States rights did not eliminate human rights from the stable, as what it does was simply to transfer those rights to the individuals through their States.⁸¹

The idea of creating a community intended to benefit individuals as nationals of Member States (al-

⁸⁰ Solomon T. Ebobrah, “Critical Analysis of The Human Rights Mandate of The ECOWAS Community Court of Justice”, Research Partnership 1/2008, The Danish Institute for Human Rights, p. 9

⁸¹ *Ibid*

beit through their States of nationality), carries with it the inalienable rights of the individual, so much so that it could rightly be said that human rights always permeates any arrangement of this nature even to the extent that it could be asserted that human rights gives meaning and purpose to the arrangement. While it is true that under the 1975 Treaty, ECOWAS was neither “a human rights actor”⁸² nor “an arena for the vindication of rights”⁸³ and I sympathise with the suggestion that the Member States wanted to avoid the complications that would follow from a mix of human rights and economic freedoms at that initial stage, I dare say that economic freedoms cannot exist without human rights, at least since 1945. How, for instance, can a State with poor human rights record engender free movement of goods and services?

If nothing else, the European Union (EU) experience provides an enlightened guide, given the fact that, like the 1975 ECOWAS Treaty, the European Communities founded in the 1950s were almost entirely devoted to economic integration and left the task of human rights protection to the Council of Europe’s European Court of Human Rights in Strasbourg.⁸⁴ In fact, in the Court of Justice of the European Union’s (CtJEU) in *Bosphorus Hava Yolları Turizm ve Ticaret Anonim Şirketi v. Ireland*, the Court was careful to declare that respect for human rights was a “condition of the legality of Community Acts”.⁸⁵ This human rights yardstick for measuring legality in the EU has also been demonstrated by the ECOWAS Court in the manner it has used its human rights jurisdiction to protect community rights.⁸⁶ Indeed, the inalienable nature of human rights and its customary international law (CIL) *jus cogens* status make it inevitable that human rights permeated the Treaty provisions. As Nigel D White argued:

The legal bases upon which human rights are applicable to all UN activities can be derived first of all from the inherent nature of human rights. Human rights are part of being a human being and therefore such rights are automatically part of the legal framework applicable to those with power to affect the enjoyment of those rights. Secondly, there is a delegation by Member States to the UN of their responsibilities under human rights law. States cannot set up an autonomous international actor that can obviate human rights standards that the States themselves are bound by.⁸⁷

This stretches into article 103, United Nations Charter, which establishes the supremacy of UN Charter obligations over other international agreements. The human rights protection obligations flowing from the Charter as progressively encapsulated in successive instruments, including the International Covenant on Civil and Political Rights, 1966 (ICCPR), and the International Covenant on Economic Social and Cultural Rights, 1966 (ICESCR). This is not to discount the influence of the Universal Declaration of Human Rights, 1948 (UDHR) in the human rights treaty space and its arguable status of CIL. ECOWAS and other treaty based community of States, whose Members are parties to the UN Charter must reflect the Charter obligations of Member States.⁸⁸

This is more so as CIL has always recognised the rights of an individual as rights of his State of nationality to protect as its own⁸⁹ by way of diplomatic protection, even when it was not a condition for

82 *Ibid*, p. 7

83 *Ibid*

84 Grainne de Burca, “Beyond the Charter: How Enlargement Has Enlarged the Human Rights Policy of the European Union”, 27(2) *Fordham International Law Journal* 679 (2003)

85 [GC], No. 45036/98, 30 June 2005, para 159

86 *Sunday Charles Ugwuaba v. Senegal* ECW/CCJ/JUD/25/19; *Mba v. Ghana*, Suit No: ECW/CCJ/APP/22/16

87 Nigel D White, “Towards a Strategy for Human Rights Protection in Post-Conflict Situations”, in N. White and D. Klaasen (eds), *The UN, Human Rights and Post Conflict Situations*, 463, 464 (2005).

88 See Tawhida Ahmed and Israel de Jesús Butler, “The European Union and Human Rights: An International Law Perspective” 17(4) *EJIL* 771, 772 (2006).

89 *The Mavrommatis Palestine Concessions* (Objection to the Jurisdiction of the Court) Series A No. 2, (holding that “By taking up the case of one of its subjects and by resorting to diplomatic action or international judicial proceedings on his behalf, a State is in reality asserting its own rights - its right to ensure, in the person of its subjects, respect for the rules of international law”).

the entry of the subject into the territory of the violating host State. Thus, Diallo did not enter into the territory of the Congo by reason of any agreement between Congo and Guinea in Ahmadou Sadio Diallo⁹⁰ but that did not deny Guinea the right to protect Diallo's rights in the International Court of Justice (ICJ). The very fact of individual involvement therefore comes with human rights.

As a confirmation of the point already made, it is essential to State that the cloud of human rights under the 1975 Treaty was thickened by several Protocols and Decisions made thereunder with the intention to benefit individuals. To mention but a few: Decision A/DEC.5/10/98 Relating to the Regulations on Transhumance between ECOWAS Member States, placed obligations on host Member States to protect the fundamental rights of Herdsmen accompanying transhumant livestock and who are legally admitted into the host State and to guarantee those rights by their judicial institutions.⁹¹ Article 11 of Protocol relating to Free Movement of Persons, Residence and Establishment⁹² protects the security and property of a citizen, subject to expulsion. Supplementary Protocol on the Second Phase (Right of Residence) on Protocol on Free Movement of Persons, the Right of Residence and Establishment;⁹³ articles 3 and 7 of Supplementary Protocol On the Code of Conduct for the Implementation of the Protocol on Free Movement of Persons, the Right of Residence and Establishment;⁹⁴ Supplementary Protocol on the Implementation of The Third Phase (Right of Establishment) of The Protocol on Free Movement of Persons, Right of Residence and Establishment⁹⁵ recognised fundamental rights of migrant workers in its preamble and provided for non-discrimination in article 4.

Thankfully, the 1993 Reversed ECOWAS Treaty spared me the labour of eliciting human rights from corollary of express provisions, so that the fact that article 4(g) of the Treaty "solemnly affirm[ed] and declar[ed] that "recognition, promotion and protection of human and peoples" rights in accordance with the provisions of the African Charter on Human and Peoples" Rights" as one of the fundamental principles of ECOWAS, needs not delay us here. It is however right to say that though ECOWAS, by this provision, became a human rights "actor," it actually did not become a consummate human rights "arena" until the subjective capacity to approach the ECOWAS Court of Justice (albeit limited) was granted individuals vide Supplementary Protocol A/SP.1/01/05, Amending Protocol A/P.1/7/91 Relating to the Community Court of Justice.⁹⁶ I would like to argue that ECOWAS did become a human rights arena in 1993 with the adoption of article 4(g) which automatically engaged article 9 of the 1991 Protocol of the Court to permit States to litigate human rights of their nationals before the Court. The fact that this was ineffective, resulting in the adoption of broader jurisdiction *rationes personae* should not betray the engagement of these fundamental instruments in 1993.

Although, ECOWAS has no catalogue of rights of its own, *Jerry Ugokwe v. Nigeria*⁹⁷ and several other cases teach us that article 4(g) of the revised ECOWAS Treaty enables the application of the African Charter in the context of articles 9 and 10 of the 2006 Supplementary Protocol of the Court. In the case, the Court took the view that though there is no specification or cataloguing of various human rights in articles 9 and 10 of the Supplementary Protocol, "the inclusion and recognition of the African Charter in Article 4 of the Treaty of the Community behoves on the Court by Article 19 of the Protocol of the Court to bring in the application of those rights catalogued in the African Charter."⁹⁸

90 (*Republic of Guinea v. Democratic Republic of the Congo*), Merits, ICJ Rep 2010, 639

91 Official Journal Vol. 35 of the Economic Community of West African States (ECOWAS) English Edition October 1998, article 16

92 A/P.1/5/79

93 A/SP.1/7/86, Vol. 9, Official Journal of ECOWAS, July, 1986, article 24

94 A/SP.1/7/85, Vol. 7, Official Journal of ECOWAS, July, 1985

95 A/SP.2/5/90

96 As further amended by Supplementary Protocol A/SP.2/06/06 Amending article 3 Paragraphs 1,2 and 4, Article 4 Paragraphs 1, 3 and 7 and Article 7 Paragraph 3 of the Protocol on the Community Court of Justice

97 ECW/CCJ/JUD/03/05

98 *Ibid*, para 29

III. State Responsibility

In this part, I would try to show that State responsibility for human rights abuses is now fully settled, and would as such endeavour to show that, in human rights cases predicated on treaties, there is the duty to protect, preserve and fulfil the rights and freedoms contained in the treaty, the responsibility to fulfil that duty is not really owed to the individual but to the State parties to the treaty *inter se*; more so, to the State of nationality of individuals, where cross-border element is envisaged. This is irrespective of the availability of the right of the individual to directly enforce the treaty right against State parties by an international mechanism. In which case, the enforcement right in the individual is only a limited one, as they can only challenge particular violations concerning them, unlike the State parties that need not prove injury in that the failure to implement the treaty by another State party, even if the failure of the latter State affects only its subjects, yet engages the international responsibility of the latter State. For the avoidance of doubt, by entering into a human rights treaty, the State parties remove human rights protection from matters within their exclusive competence.

This gives me sufficient scope to speculate on whether it is beneficial to continue to view the duty to respect, protect and fulfil as the basis of State responsibility under human rights law, rather than as duties owed to individuals within the territories of each of the contracting States, the breach of which engages the international responsibility of the defaulting State *vis a vis* the other contracting States. While yet developing my thesis in this regard, I would like to dispel any expectation that I would discuss State responsibility for human rights on the basis of the aforesaid three types or levels of obligations on States parties – the obligations to respect, protect and fulfil⁹⁹ – to which a chunk of work has been dedicated, for the reason I already gave and for the fact that space would not permit me to combine that discussion with the discussion of State responsibility for human rights as I would like to address it. It is therefore my sincere hope that other discussants would do justice to that.

Simply put, international responsibility is the accountability of a State for violation of international law obligation. In other words, “any violation by a State of any obligation, of whatever origin, gives rise to State responsibility.”¹⁰⁰ Accordingly, States are responsible for internationally wrongful acts committed against another State, by reason of which the international responsibility of the offending State is engaged “immediately as between the two States”.¹⁰¹ With regards to ECOWAS, the Court has repeatedly declared that “...as regards material competence, the applicable texts are those produced by the Community for the needs of its functioning towards economic integration: the Revised Treaty, the Protocols, Conventions and subsidiary legal instruments adopted by the highest authorities of ECOWAS. It is therefore the non-observance of these texts which justifies the legal proceedings before the Court.”¹⁰² This includes the failure of a Member State to comply with the judgment of the Court as this engages the State’s international responsibility assumed in article 15(4) of the Revised Treaty of ECOWAS and article 24 of the Protocol of the Court, for which action could be taken against the State under article 77 of the Revised Treaty and Supplementary Act on Sanctions of 17 February 2012, except that breach of ECOWAS obligations by States has basically been institutionalised and placed above consequences thereof, since neither the Member States nor the Commission seems to bother.

International responsibility had in the past arisen from the refusal of German authorities to allow the *S.S Wimbledon*¹⁰³ access to the Kiel Canal on the basis of her internal neutrality law in violation of

99 See Ebobrah, note 1, p. 33

100 *Case Concerning the Difference between New Zealand and France concerning the Interpretation or Application of Two Agreements concluded on 9 July 1986 between the two States and which related to the Problems Arising from the Rainbow Warrior Affair*, (1990) 20 RIAA 215, 251, para 75 (*Rainbow Warrior case*)

101 *Phosphates in Morocco*, 1938, PCIJ, Series A/B, No. 74, p. 10, 28

102 *Keita v Mali*, ECW/CCJ/APP/05/06, para 27, cited in Solomon T Ebobrah, “Human Rights Developments in Subregional Courts in Africa During 2008”, 9 AHRLJ, 312, 324, (2009)

103 1923, PCIJ., Series A, No. 1, p. 15, 30

the 1919 Treaty of Versailles; in *Corfu Channel*, the international obligation of Albania was engaged by its failure to warn passing ships of mines within its territorial sea;¹⁰⁴ in *Military and Paramilitary Activities in and against Nicaragua*, the international responsibility of the United States of America was engaged for breach of its obligation under customary international law not to intervene in the affairs of another State.¹⁰⁵

With specific attention to human rights, my view is that State responsibility for human rights violations, as is now known, is quite a recent phenomenon that may be traceable to the United Nations' epoch of international law dating from 1945. It is absolutely not in doubt that prior to the enthronement of the 1945 epoch, the relationship between the State and their citizens was absolutely a matter within the reserved domain of sovereign States, beyond the purview of international law. This is not to say that international law was not interested in how a host State treated an alien; as the cases tell us, CIL intervened, through the State of nationality of an alien for treatments that were contrary to international law standards nor would it mean that there were no instances at all where individuals had the faculty to assert international law rights.¹⁰⁶ My point is that in the former instances, the claims were not based on human rights violations nor was there the assertion of rights based under any catalogue of rights in the latter. There was, therefore, no occasion, in those days, where a State's international responsibility would be engaged under any human rights treaty.

The human rights protection foreshadowed in the Charter of the UN, got its first footing in the non-binding Universal declaration of human rights, 1948, and subsequently the 1966 International Covenants on Civil and Political Rights and the one on Economic and Social Rights. The watershed for the individual, however, is the 1951 European Convention on Human Rights, 1950, which progressively opened the way for individuals to hold States, including their own State of nationality accountable for human rights violations by an international mechanism. This has since been followed by similar Conventions, not least the African Charter on Human and Peoples' Rights, 1981. All of these created treaty obligations for State parties and as such their international responsibility could be engaged for breach of any of the treaties relevant to them.

It is also arguable that, with the Universal Declaration forming the tableau to which the ideological strings of the various other human rights treaties are fitted, that human rights (particularly the first generation rights) have become CIL, binding on all States, resulting in the possibility of the responsibility of a State to be engaged under CIL for human rights violation. Thus, whether a treaty or CIL obligation, the reasoning of the ICJ in *Barcelona Traction, Light and Power Company, Limited*, that an essential distinction should be drawn between the obligations of a State towards the international community as a whole, and those arising vis-à-vis another State in the field of diplomatic protection. By their very nature, the former are the concern of all States. In view of the importance of the rights involved, all States can be held to have a legal interest in their protection; they are obligations erga omnes.¹⁰⁷ Furthermore, the Court confirmed that by virtue of its Membership in the international community, a State has a legal interest in the protection of certain basic rights and the fulfilment of certain essential obligations. Among these are "... the principles and rules concerning the basic rights of the human person."¹⁰⁸

The question that had in the past arisen is the relationship of human rights law and State responsibility. Following the trajectory of this lecture, it is clear that I see no argument regarding the relationship between the two, insofar as the duty to respect, protect and fulfil arises from an agreement between

104 *Corfu Channel case, (UK v. Albania)* Merits, ICJ Rep, 1949, 4, 23

105 *(Nicaragua v. USA)*, Merits, ICJ Rep 1986, 14, 142, para 283, and 149, para 292

106 *Jurisdiction of the Court of Danzig*, Series B No. 75, pp. 17-18 (holding that "the very object of an international agreement, according to the intention of the contracting Parties, may be the adoption by the Parties of some definite rules creating individual rights and obligations and enforceable by the national Courts")

107 *(New Application: 1962) (Belgium v. Spain, Second Phase)* ICJ Rep 1970, 3, 32, para. 33

108 *Ibid*, p. 32, para. 34

States and intended to be governed by international law. In *Interpretation of Peace Treaties with Bulgaria, Hungary and Romania*, the Court declared that “refusal to fulfil a treaty obligation involves international responsibility.”¹⁰⁹ Simply put, insofar as the failure to fulfil its obligation under a human rights treaty, amounts to “breach of ... [international law] engagement”,¹¹⁰ such a failure undeniably engages the international responsibility of the defaulting State. I therefore align myself with the observation of Chirwa that human rights law and the general international law principles of State responsibility should be regarded as forming parts of a single whole in that they are complementary and mutually reinforcing.¹¹¹ It must be acknowledged, however, the point made by the ICJ in *Gabcikovo-Nagymaros Project*, on the distinct scope of the law of treaties and the law of State responsibility. While indeed, a determination of whether a State has complied with its human rights treaty obligation is to be made pursuant to the law of treaties, an evaluation of the extent to which non-compliance with the treaty provisions, engages the responsibility of the State has to be made under the law of State responsibility.¹¹²

Going forward, there are three important remarks I would like to make in the following paragraphs.

The first is that, from the wealth of international law materials on this subject, State responsibility is likened to the biblical saying that where there is no law, there is no iniquity, so that it is absolutely impossible for the responsibility of a State to be engaged except the State has violated a rule of CIL (binding on the State in the sense of the State not being a persistent objector); or violation of a treaty to which the State has consented. The ace of State responsibility, therefore, is the existence of an international obligation of whatever nature *vis-à-vis* other States and the violation of same. It is important to State that the relevant law here is not the internal law of any of the States, except that the presence of a contrary internal law or the absence of a requisite internal law may constitute the violation; but it can never be the case that a State is allowed to set up its internal law as a defence for a breach of its international obligation.¹¹³

An ancillary point to this is that State responsibility is not to individuals but to State parties *inter se*, irrespective of the fact that some treaties accord individuals the right to directly ventilate their claims against their State or a third State before an international mechanism. State responsibility is an “act being attributable to the State and described as contrary to the treaty right of another State,”¹¹⁴ regarding which “international responsibility would be established immediately as between the two States.”¹¹⁵ This involves the right of other State parties to demand the observance of the provisions of the treaty in good faith. In the world of State responsibility, individuals are no more than beneficiaries of a treaty gesture recognised in the *Danzig case*¹¹⁶ as far back of 1928; the gesture of entering into a treaty obligation intended to benefit individuals and under which the individual may exercise certain rights and privileges. The individual has no say in the extent of the right granted them nor the duration of such grants. This is further amplified by the fact that beyond the right of individuals to benefit under the treaty, it is not the individual but the contracting States that have the locus to take action in respect of the treaty under the Vienna Convention of the Law of Treaties, 1969. Indeed, the duty imposed on States by international human rights law to protect people from violations of their human rights by both State and non-State actors is a duty undertaken by States *inter se* and not a duty that is effective between States and the benefitting individual.

109 Second Phase, Advisory Opinion, ICJ Rep 1950, 221, 228

110 *Factory at Chorzów*, Jurisdiction, Judgment No. 8, 1927, PCIJ, Series A, No. 9, p. 21

111 Chirwa, Danwood Mzikenge “The Doctrine of State Responsibility as a Potential Means of Holding Private Actors Accountable for Human Rights” 5(1) Melb J Int Law, 1 10 (2004)

112 (*Hungary v. Slovakia*), ICJ Rep 1997, 7, 38, para 47

113 *Treatment of Polish Nationals and Other Persons of Polish Origin or Speech in the Danzig Territory*, Advisory Opinion, 1932, PCIJ, Series A/B, No. 44, p. 24

114 *Phosphates in Morocco*, Judgment, 1938, PCIJ., Series A/B, No. 74, p. 10, at p. 28

115 *Phosphates in Morocco*, Judgment, 1938, PCIJ., Series A/B, No. 74, p. 10, at p. 28

116 Above, note 26

Notwithstanding therefore that many human rights instruments allow individuals or groups to enforce their human rights at the regional level, the general international law rules of State responsibility do not recognise the right of individuals or groups to enforce international law. It is only a State that has the right to bring an action against another State for violations of international law. The enforcement of treaty rights by individuals or groups is not an enforcement of international law, in the strict sense, but an enforcement of an obligation encapsulated in international law. It might thus be helpful to State that the point I have been labouring to make is that, despite the competence of individuals before the ECOWAS Court, the responsibility to ensure that Member States comply with their responsibility under ECOWAS laws primarily remains with Member States whose duty it is “to ensure, in the person of ... [their] subjects, respect for the rules of international law.”¹¹⁷

On the second point, I recall the well-established principle of international law that “one of the cornerstones of the law of State responsibility [is] that the conduct of any State organ is to be considered an act of the State under international law, and therefore gives rise to the responsibility of the State if it constitutes a breach of an international obligation of the State.”¹¹⁸ A State is thus internationally responsible for human rights violations carried out by any of its organs, and even those committed by private actors when the acts of those actors could be assimilated to the act of the State either by actively supporting it or by not taking action to forestall or remedy the violation.¹¹⁹

Thirdly, a State whose international responsibility is engaged for the commission of an internationally wrongful act is under obligation to make reparation in adequate form.¹²⁰ Reparation may be in form of compensation to individual in the case of direct individual claim, the individual’s State of nationality in the event of diplomatic protection claim; or to the injured State in the event of violation not involving the rights of individuals. Reparation does not always have to be compensatory, as in some cases, undertaking of non-repetition may suffice or it may be restitution.

In the final analysis, the international responsibility of ECOWAS States is engaged for failure to fulfil obligations – be it human rights, freedom of movement, customs and tariff – undertaken under the ECOWAS legal regime. This is irrespective of the State of their municipal law, which itself may be the breach complained of.

IV. Expansion of Access to Individuals

The ECCJ is so popular among its users nowadays that its main instruments – the Protocol of 1991 and the Supplementary Protocol of 2005 – are very well known. What most stakeholders do not really bother about, or lose sight of is the fact that the Court is not a human rights Court but essentially a Court of Justice. The Court’s community should be bothered that the Court has so far slipped into the mode of a human rights court, or be browbeaten into that mode by inadequate treaty provisions, which means that the Court is still encumbered by its congenital pre-2005 disease in yet very significant way, as I shall soon.” show It does appear that critical stakeholders in the Court went to sleep after the 2005 Supplementary Protocol was achieved. If I may ask, as we speak, has there been any case in which the Court has properly assumed jurisdiction to interpret and apply ECOWAS laws? If, as I know, there is none, distinguished Colleagues, permit me to awake you to the reality that we have all been roaming within a stagnated legal regime.

Let me remind you that the absolute desuetude suffered by the Court in the years preceding 2005 was the result of granting (in article 9) States and the Authority the exclusive competence to seize the jurisdiction of the Court to the exclusion of individuals. In fact, as Alter et al rightly noted, the

¹¹⁷ *The Mavrommatis Palestine Concessions*, above note 10

¹¹⁸ Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro), Judgment, I.C.J. Reports 2007, p. 43, 202 paragraph 385

¹¹⁹ *United States Diplomatic and Consular Staff in Tehran, (USA v. Iran)* ICJ Rep 1980, 3, 29, para. 56; *Velásquez Rodríguez v Honduras*, [1988] Inter-Am Court HR (ser C) No 4. 88; Communication No 155/96 (2001) *SERAP v Nigeria*

¹²⁰ *Factory at Chorzów*, above, note 31, p. 21

absence of [individual] access in the 2005 reforms is one of the most puzzling aspects of the Court's transformation."¹²¹ Thus, while amending the 1991 Protocol to grant the competence to seize the Court to individuals, however, articles 9 and 10 of the Supplementary Protocol did not go far enough in that the jurisdiction of the Court in certain matters is reserved to the Member States, the Council of Ministers and the Executive Secretariat (Now the ECOWAS Commission). These matters are: the interpretation and application of the Treaty, Conventions, Protocols of the Community, the regulations, directives, decisions and other subsidiary legal instruments adopted by ECOWAS; the legality of regulations, directives, decisions and other legal instruments adopted by ECOWAS; the failure by Member States to honour their obligations under the Treaty, Conventions and Protocols, regulations, directives, or decisions of ECOWAS; proceeding for the determination of the legality of an action in relation to any Community Text.

In keeping with these provisions, the Court has consistently affirmed that individuals lack the locus to proceed against a Member State in matters arising from ECOWAS Treaty texts. The Court could not have been clearer when it declared in *Pinheiro (SAN) v. Ghana*,¹²² that:

...the Protocol on the Court does not empower individuals with the locus standi to sue a Member State for violation of its obligations enshrined in Community texts. According to Article 10(a), only a Member State or the ECOWAS Commission has access to the Court to compel a Member State to fulfill an obligation.¹²³

The Court reaffirmed this position in the recent case of *Alex Nain SAAB Moran v. Republic of Cabo Verde*,¹²⁴ wherein the applicant filed an application requesting the Court to order the ECOWAS authority of Heads of State and Government to impose sanctions on the Respondent, pending compliance with the earlier judgement of the Court. The Court confirmed that, being an individual, the Applicant lacked locus to bring action against a Member State for breach of its obligations enshrined in Community texts.¹²⁵ In *Karim Meissa Wade v. Republic of Senegal*,¹²⁶ also, the Court took the same position, asserting that its jurisdiction to examine actions brought for failure by an ECOWAS Member State to honour its obligation is exclusive to Member States to the exclusion of individuals and so Mr. Karim Meïssa Wade's suit was incompetent. Unfortunately, the judgment even went as far as taunting the claimant with the following rhetorical question "[o]ne may ask, what human rights of the Plaintiff have been or are about to be breached by the defendants to clothe him with this action? In the candid view of this Court, this not a human rights action, and it must fail as such."¹²⁷ In my humble view, it is important for the Court to bear in mind at all times that the failure to allow individuals litigate community texts affects the Court in a significant way as well.

The Court must thus be conscious of the fact that it is a Court of Justice and that the scope of its jurisdiction far exceeds human rights litigation. It should demonstrate this consciousness by a purposive interpretation of its jurisdictional provisions; this it may do by a combined interpretation of article 10(d) and 20 of its Protocol to give an expansive meaning to the word, "right," used in article 10(d) of its Protocol. It is arguable that the fact that the article did not limit "right" to human rights could be used to bring the individual within the province of article 20, which permits the Court to leverage the provisions of article 38(1) of the ICJ. By so doing, it is possible for the Court to hold that so long as individuals enjoy "rights" under ECOWAS treaty texts, those rights are enforceable by the Court at the suit of individuals as rights contained in Convention, as recognised by article 38(1) of the Statute

121 Karen J Alter et al, "A New International Human Rights Court for West Africa: the ECOWAS Community Court of Justice", 107 AJIL 737, 773 (2013)

122 ECW/CCJ/JUD/11/12, para 47-49

123 *Ibid*, para 48

124 ECW/CCJ/APP/43/20, para 359

125 *Ibid*, para 364

126 ECW/CCJ/AAP/13/19

127 *Ibid*, para 20

of the ICJ. As I counselled in my 2019 lecture in Accra, Ghana, regarding *Omar Jallow v Republic of The Gambia*,¹²⁸ the Court must seize every tenable opportunity to “build jurisprudence (albeit obiter) around community legal texts, rather than focusing only on its [human rights] jurisdiction.”

Intriguingly, in *Chude Mba v. the Republic of Ghana & Ors*, the same Mba that had locus to enforce his human rights under the African Charter was told he could not enforce rights bestowed on him by ECOWAS laws in that he lacked the locus to seek a declaration that Ghana was in breach of its treaty obligations by not complying with the decision and orders of the Court made in the Applicant’s favour.¹²⁹ Interestingly, Nigeria, the applicant’s State of nationality, was among the pack that looked on while Mba was engaged in this titanic legal battle. Would it be the same Nigeria or any other ECOWAS State in its position that would be expected to invoke article 10(a) and (b) of the Protocol of the Court to hold a defaulting Member State to account for failure to fulfil its obligation under the Treaty?

I suppose we all are conscious of where the identified deficiency in the Protocol and the current interpretative disposition of the Court leave an individual whose guaranteed right under any ECOWAS Treaty text has been violated. At the moment, unless the injury can be disguised as a human right claim, the individual has no right of action, neither before a national Court or the ECOWAS Court.

The exclusion of individuals from the list of those having competence to litigate community texts has two significant consequences: (a) it creates a huge gap in the ability of the Court to contribute to the integration process, thus widening the gap between community law and the citizens; and between community laws and municipal systems. These minimise the functions of the Court as a Court of Justice; and (b) exposes individuals to a minimisation of their claim for violation of their economic freedoms. I shall now discuss these two aspects in the following sub parts.

(a) Minimisation of the Functions of the Court as a Court of Justice

To all intent and purposes, the ECOWAS Court was created to function as the Court of Justice of the Community, with the powers and jurisdiction of a Court of Justice of which human rights is but a little aspect. While it is true that the Court actually has the powers and jurisdiction of the Court of Justice of the Community, the limitation imposed on the wider jurisdiction of the Court as a Court of Justice has made that jurisdiction a mere pensioner of its human rights jurisdiction, so much so that both the Court and community citizens have become content with the human rights frequency wherein the Court now almost absolutely operates. Indeed, if I were to hazard a guess, I would say that 99% of the cases the Court has decided since its inception are human rights cases, and this I should add, is only a conservative estimate. This cannot but highlight the extent of the problem, given that it is not every economic freedom claim that can adequately be addressed as human rights claim. The claim brought to the EACJ by the *British America Tobacco limited v. AG Uganda*,¹³⁰ relating to giving preferential treatment to national products at the expense of community products, for instance, cannot be addressed as a human rights claim. In the case, Uganda had sought to place certain duties on the Applicant’s cigarette manufactured in Kenya for export to Uganda for sale. The EACJ promptly held that the taxation imposed on the Applicant’s cigarette amounted to discrimination in favour of Ugandan brand and thus violated the EAC Treaty. Indeed, as exemplified by *Costa v. ENEL*,¹³¹ and several other cases¹³² in which the CtJEU promoted the integration process by ruling against barriers to the economic freedom, the Court was able to play this role because interested individuals and

128 ECW/CCJ/JUD/06/17

129 Above, note 7, pp. 17-18

130 Reference 7 of 2017, para 84

131 Case 6/64 *Flaminio Costa v. ENEL*, 257, [1964] ECR 585, 593

132 Case 11/70 *Internationale Handelsgesellschaft mbH v Einfuhr-und Vorratsstelle fur Getreide und Futtermittel* 261; [1970] ECR 1125 (“The validity of such measures can only be judged in the light of Community law”)

companies were able to full participate in the community judicial process.

The minimisation of the functions of the Court has three effects: the first is that it has removed from the Court, its ability to contribute to the integration process, through a purposive interpretation of community text, that is needed to create what I may call a “jurisprudence union” comprising the legal systems of all the fifteen States in matters of Community law. Indeed, and as we have seen from the European Union experience and the emerging jurisprudence of the EACJ, the jurisdiction of a community Court to interpret and apply integration provisions is critical to the consummation of the integration drive of any supranational community of States. More so, the limitation on the Court’s jurisdiction relegates the importance of the Court as a principal institution of ECOWAS, and removes it from the scene of absence Community governance.

The Second effect is that it creates a tendency in the Court to rely on remotely applicable law to justify its desire to justify its jurisdiction in doubtful cases. In *Sunday Charles Ugwuaba v. Senegal*,¹³³ for instance, the Court relied, curiously in my view, on article 12 of the African Charter to hold Senegal to account for violation of intra-community free movement. In the case, the Applicant, a Community citizen with Nigerian nationality, ordinarily resident in The Gambia, brought an application before the ECOWAS Court against the respondent for violation of his human rights to free movement of persons, goods and services, guaranteed by the combined effects of, *inter alia*, articles 1, 2, 4 and 12 of the African Charter on Human and Peoples’ Rights, the articles 3(2) (d) (iii), 4(g), 45(2), and 46 of the ECOWAS Revised Treaty, and articles 2(2) and 27 of the Protocol on Free Movement of Persons, Right of Residence and Establishment (economic freedoms). The Applicant’s case was that he was on one of his business trip from The Gambia to Nigeria across the borders of Senegal, Mali, Burkina Faso, Republic of Benin and Nigeria, but was refused passage by Senegal, leading to damage of his goods.

In the first place, had the Applicant the competence to litigate the relevant ECOWAS Treaty texts, he would have simply relied on those texts, which were the applicable texts here, rather than couching his claim as a human rights claim to cross border free movement, which does not actually exists. In its desperation, perhaps, was the Court lured into the following curious decision:

The right to free movement is provided for in several international and regional instruments for the protection of human rights, namely, the Article 4 of the Universal Declaration of Human and Citizen Rights of 1789, the Article 13 of the Universal Declaration of Human Rights of 1948, the Article 12, 2 of the International Covenant on Civil and Political Rights of 1966 and the Article 12 of the African Charter on Human and Peoples’ Rights of 1981.... In addition to the above provisions, it should be noted that one of the fundamental ideas of ECOWAS, of which the Defendant State is a Member, is that of “a borderless ECOWAS,” wherefore the management of immigration and borders is deeply rooted in the overall *raison d’être* of the Community.¹³⁴

Rightly so, that the right to free movement is provided for in the human rights instruments cited by the Court above, but I dare maintain that the free movement there is a territorial free movement, not different from constitutionally guaranteed free movement but different from the free movement enabled by community law, as rightly captured by the Court below:

The ECOWAS, anchored in the 1975 Treaty, with the aim of progressively strengthening co-operation between Member States through the free movement of goods, capital and people, and thus helping to consolidate the peace, stability and security of the region, adopted the Protocol on the Free Movement of Persons, Residence and Establishment (1979), which was later expanded by four supplementary protocols. The aforementioned Protocol, the

133 Above, note 7

134 *Ibid*, p. 18

ECOWAS Revised Treaty of 1993 and the Protocol on the Mechanism for Conflict Prevention, Management, Resolution, Peace-keeping and Security (1999), form the basis of the legal framework for the management of immigration and the borders within ECOWAS. Thus, the ECOWAS Revised Treaty (1993) provides that “abolition, among Member States, of customs duties levied on imports and exports, and the abolition among Member States...”¹³⁵

While the foregoing reasoning clearly shows that the Court well understood the scope of application of the different regimes of laws mentioned previously, the Court yet, perhaps, in its desire to accommodate the claims, concluded that:

As can be seen in accordance with the Articles 12 of the African Charter on Human and Peoples’ Rights and of the International Covenant on Civil and Political Rights, the right to freedom of movement of persons, goods and services can only be subject to restrictions laid down by the law which are necessary to protect national security, public order, public health or morality ... Such restrictions were not claimed by the defendant, it pleaded only on the aforementioned pleas in law which the Court does not uphold. Accordingly, this Court considers that the conduct of the defendant’s agents, by preventing the applicant from entering its national territory, by not being subject to the exceptions provided for in Article 12(2), since they were not even claimed by the defendant, then constitutes a violation of the right of the applicant to free movement of persons, goods and services guaranteed by Articles 13 of the Universal Declaration of Human Rights, 12 of the African Charter on Human and Peoples’ Rights, Articles 3 and 59 of (ECOWAS Revised Treaty (1993) and Article 2(1) of the Protocol A/P.1/5/79 on Free Movement of Persons, Residence and Establishment (1979).¹³⁶

When a similar issue of impediments on economic freedom arose in the East Africa Court of Justice (EACJ) case of *Samuel Mukira Mohochi v The Attorney General of the Republic of Uganda*,¹³⁷ the Court had no difficulty holding on the basis of the articles 104 and 7 of the Treaty Establishing the East African Community (EAC Treaty) and the East African Common Market Protocol (EACMP), respectively, that the Applicant’s arrest in the circumstances of the case constituted a violation of his right to residence and, consequently, of his freedom of movement. In fact, the Court was of the firm view, and rightly too, that a cause of action based on the alleged infringement of a Partner State’s Treaty obligations lies outside the territory of Human Rights.¹³⁸ In the case, the Applicant, a Kenyan national, challenged his arrest, deportation and designated as a prohibited immigrant by Uganda, on the basis of the free movement guaranteed by the EAC Treaty.

It is noteworthy that this decision was based on article 7(1) of the EACMP, which, like article 59 of ECOWAS Revised Treaty, provides for the intra-community free movement of Community Citizens. The bottom line is that there is absolutely no way a Court can decide a cause of action based on violation of economic freedoms as human rights claims without running into difficulties. As I argued earlier, it probably would have been possible for the Court to undertake an expansive definition of the word “right” in article 10(d) in cases of this nature.

The third effect is the distortion of Judicial Economy, which also leads to a situation, where the Court has to continuously reinvent the wheels, as adjudication on an economic freedom claim as a human rights claim, is incapable of curing the root cause of the case; the necessary implication is that more and more cases would arise therefrom. Take for, instance, a situation where the enactment of a municipal law, such as the Ghana Investment Act, 1994, leads to a violation of the economic freedoms guaranteed under successive Community Texts¹³⁹ and by extension human rights, if the Court has

135 *Ibid*, pp. 17-18

136 *Ibid*, para 20, 21 and 26

137 Reference No. 5 of 2011

138 *Ibid*, para 30

139 Kofi Oteng Kufuo, “When Two Leviathans Clash: Free Movement of Persons in ECOWAS and the Ghana Investment Act of

the power to litigate Community rights and an individual brings the case as a community rights claim, the Court would be in the position to nullify that law or mandate the government to take steps to deal with it and thereby lay to rest the possibility of another violation occurring as a result of that law or similar laws within the community. But a situation where violations arising therefrom are treated in individual cases as human rights violation, the law is left active to continue to generate violations that would also continue to flow to the Court as human rights cases. This robs the Court of judicial economy.

In *Federation of African Journalists & Ors v. The Republic of The Gambia*,¹⁴⁰ for instance, the claim was for a declaration, *inter alia*, that by maintaining the contentious law on sedition, the Republic of The Gambia was acting in gross violation of the Applicants rights and in breach of their obligations under the Revised ECOWAS Treaty, African Charter and the ICCPR. Again the Court dealt with the matter under the human rights instruments, which unlike the Treaty Text, lacks the normative strength of nullifying the offending pieces of legislation. This is notwithstanding that the Court directed the Defendants to immediately repeal and /or amend its laws in question in line with its obligations under international law especially article 1 of the African Charter on Human and Peoples Rights, the ICCPR and the ECOWAS Revised Treaty.¹⁴¹

This is because to use the African Charter as the basis for nullifying municipal law is to overstretch the application of the Charter, which is itself applicable as municipal law in most of the Member States and does not command the aura a Community text would command in that regards. In making this point, I not unaware of instances even at the municipal Court level,¹⁴² where the Courts have found certain municipal laws that are incompatible with the Charter, to be subservient to the Charter, the point I am making is that this is not the same as using the Charter to nullify municipal law. In a community as ours, the best guarantee against inconsistency is the use of the relevant Community Text to invalid inconsistent laws. As the content of the African Charter is majorly replicated in constitutional provisions, inconsistent laws are usually dealt with on a constitutional basis, anyway.

In the EACJ case of *Mohochi v The Attorney General of the Republic of Uganda*, on the other hand, having found that the violation in question occurred on the basis of section 52 of Uganda's Citizenship and Immigration Control Act and reasoning that "Sovereignty cannot act as a defence or justification for non-compliance, and neither can it be a restraint or impediment to compliance,"¹⁴³ the Court held that for its inconsistency with the provisions of the EAC Treaty and the EACMP, that the inconsistent provisions were rendered inoperative and have no force of law, as of the respective dates of entry into force of the Treaty and the Protocol as law applicable in the Republic of Uganda.¹⁴⁴ Similarly, in *Burundian Journalists Union v. The Attorney General of the Republic of Burundi*,¹⁴⁵ having declared that Article 19(b), (g), (i) and part of (j) of the Burundian Law No.1/11 of 4th June 2013 amending Law No.1/025 of 27th November 2003, to be in violation of the principles enshrined in Articles 6(d) and 7(2) of the Treaty, the Court ordered Burundi to take measures, without delay, to implement this Judgement within its internal legal mechanisms.

Needless to analyse articles 12(1) and (2) of the Charter beyond stating that they are clear and leave no room for ambiguity, but suffices to stress that the right of free movement guaranteed by free movement Protocol is different from the right to movement guaranteed by human rights texts. The former deals with cross boundary (community movement) while the latter in intra-State movement

1994", 6 African Journal of Legal Studies 1, 1 (2013)

140 Suit No: ECW/CCJ/APP/36/15

141 *Ibid*, para 55-56

142 See the Nigerian case of *Abacha v. Fawehinmi*, (2000) 6 NWLR, (Pt. 660) 228

143 Above, note 58, para 130 (ii)

144 *Ibid*, para 123 and 130 (v)

145 Reference No.7 of 2013, para 123

and no more. I am not unaware *Rashidi v. United Republic of Tanzania*,¹⁴⁶ where the African Court of Human and Peoples' Right, applied section 12(1) of the Charter to the case of a national of the Democratic Republic of Congo who was arrested, detained and deported along with his wife and children for allegedly residing illegally in the territory of Uganda. However, I take cognisance of the realisation of the Court that it was not using article 12(1) as the basis of the entry of the Applicant into the territory but merely applied the article to an already valid and lawful entry of the Applicant into the territory by means of a valid entry Visa.

(b) Minimisation of the Claims of the Individual

The exclusion of individuals from the competence to seize the Court for ECOWAS Treaty Texts basically leaves the individual at the mercy of host States in matters that cannot be fully litigated as human rights claim or compels them to couch their grievances in human rights terms, bearing in mind that "[fundamental rights ... could ... be regarded as different from the free movement rights, which are economic in nature, derive their status from the Treaty and cannot exist outside..."¹⁴⁷ the specific Treaty Community. The differences between the two regimes become substantial when viewed against the peculiarities and broadness of economic freedoms rights over human rights claim to reveal the importance of the nature of the claims that comes under free movement rights to integration. In *Mbugua Mureithi Wa Nyambura v The Attorney General of the Republic of Uganda & Ors*,¹⁴⁸ the EACJ held that the cause of action in the case was based on the alleged infringement of a Partner State's Treaty obligations which lies outside the territory of Human Rights. This point was also made by the ECOWAS Court in *Pinheiro (SAN) v. Ghana*, where it reasoned, and rightly too, that, the legal point raised by the Plaintiff, that the Defendant has violated his rights recognized by Articles 1, 2 and 12 of ECOWAS Protocol A/S.P.2/5/90 on Free Movement of Persons, Right of Residence and Establishment, according to the definition inserted in Article 1 of the Protocol on the Right of Establishment, it means: "the right granted to a citizen who is national of the Member State to settle or establish in another Member State other than his State of origin, and to have access to economic activities, ... under the same conditions as defined by the legislation of the host Member State for its own nationals."¹⁴⁹

Even a superficial look through the decided cases of the Court would quickly reveal that the individuals themselves who bring matters to the Court do know that their grievances cannot adequately be addressed as human rights but are forced to bring them as human rights claim, anyway. As the following cases (just a few of them) would reveal, litigants do try to show that their real intention is to litigate relevant Community Text, which they always also base their claims alongside human rights treaties; but the Court, and rightly too, given its limitations, simply just ignore those Community Texts, which are actually its primary pieces of legislation. In *Amnesty International Togo & Ors v. the Togolese Republic*,¹⁵⁰ the Applicants sought to hold the respondent accountable for shutting down the internet, under, *inter alia*, Article 66 (2) (c) of the Revised ECOWAS Treaty, the African Charter and the International Covenant on Civil and Political Rights. The Court simply avoided accessing the violations against ECOWAS laws, but accessed them only against human rights instruments. In *Festus A.O. Ogwuche Esq & Anor v. Federal Republic of Nigeria*,¹⁵¹ the Applicant also sought a declaration that the act of the Defendant's agency National Broadcasting Commission in directing that all live political broadcasts by Broadcast Stations in Nigeria be referred to it tantamount to censorship

146 Application No. 009/2015 Judgment (Merits and Reparations), para 79 - 81

147 E. Spaventa, "Federalisation Versus Centralisation: Tensions in Fundamental Rights Discourse in the EU", in M. Dougan & S. Currie, 50 Years of the European Treaties: Looking Back and Thinking Forward, 2009, p. 355. Cited in Sybe A. de Vries, "Balancing Fundamental Rights with Economic Freedoms According to the European Court of Justice" 9(1) Utrecht Law Review (January, 2013) 169

148 Reference No.11 of 2011

149 Above, note 43, para 41

150 ECW/CCJ/APP/61/18

151 ECW/CCJ/APP/10/15

of the press and is contrary to the fundamental freedom enshrined and guaranteed under *inter alia* the ECOWAS Protocol on Democracy and Good Governance, the Court did not discuss ECOWAS Protocol on Democracy and Good Governance in holding, based on the basis of the African Charter that the rights of the Applicants were violated. In *Benson Oluwa Okomba v. Republic of Benin*,¹⁵² the Applicant's claim was for violation of his right to freedom of movement as recognized by article 12 of the African Charter on Human and Peoples' Rights and Article 32 of the Revised Treaty of ECOWAS and the Protocol on free movement of persons and Goods and Article 4(g) of the Revised Treaty of ECOWAS by the Defendant. The plaintiff is a citizen of the Federal Republic of Nigeria, who was molested at a Republic of Benin border post on his way from Lome. Again, the Court merely relied on the human rights Treaties without discussing the ECOWAS Texts relied upon by the Applicant.

The danger in the inability of an Applicant to disguise their claim as human rights claim to suit the competence criteria of the Court played out in *Pinheiro (SAN) v. Ghana*, where despite reasoning that there is no doubt that any Member State that fails to implement its obligations arising from Community texts to which it is bound, can be brought before the ECOWAS Court of Justice, the Court yet held that the Applicant had no locus to litigate the violation and that he should look up to his State of nationality or the ECOWAS Commission,¹⁵³ neither of which is willing to seek enforcement.

The question to be asked then may be, how far have we progressed beyond the situation that prevailed in *Afolabi Oladjide v. Nigeria*?¹⁵⁴ Is it not very obvious that, should the same claims filed by Afolabi, pre the 2005 Supplementary Protocol, be filed today, 20 years after the Supplementary Protocol, the result would still be the same? For the avoidance of doubt, Afolabi's case, which arose from the closure of the Nigerian border by Nigeria, was hinged on the provisions of the Revised Treaty, which no Afolabi (individual) still has the competence to litigate.

The differences between the regimes of human rights and fundamental freedom also tell us that they do also intersect and or sometimes conflict, thus necessitating the need for a Community Court to be able to hear such cases at the suit of individuals with the advantage of being able to control the balancing between human rights and economic freedoms. We have seen this happen in the EU. In *Schmidberger*,¹⁵⁵ a fundamental right, the right to freedom of expression and assembly, had to be balanced with economic freedoms – the free movement of goods. The case involved a demonstration by environmentalists on the Brenner motorway in Austria, thereby closing the motorway to traffic for nearly 30 hours. Permission for this demonstration was (implicitly) granted by the Austrian authorities. The question was whether the Austrian authorities could be held liable for an infringement of EU law under article 34 TFEU (the free movement of goods) in conjunction with the principle of Community loyalty, as the Austrian authorities had not completely banned the demonstration on such an important motorway.

The CtJEU acknowledged that the case raised the question of the need to reconcile the requirements of the protection of fundamental rights in the Community with those arising from a free movement rights enshrined in the Treaty and, more particularly, the question of the respective scope of freedom of expression and freedom of assembly, guaranteed by articles 10 and 11 of the European Convention on Human Rights, and of the free movement of goods, where the former are relied upon as justification for a restriction of the latter.¹⁵⁶

In resolving the conflict, the CtJEU found that the free movement of goods as laid down in article 34 TFEU was indeed restricted, but held that the restrictions were justifiable by the protection of fundamental rights, which form an integral part of the general principles of EU law. The Austrian Court had

152 ECW/CCJ/APP/27/14

153 Above, note 43, para 48

154 ECW/CCJ/JUD/01/04

155 *Eugen Schmidberger, Internationale Transporte und Planzüge v. Republik Österreich*, case C-112/00, para. 78

156 Ibid, para 77

explicitly asked whether the free movement of goods should prevail over the fundamental rights at issue. In answering that question the Court held that the freedom of expression and assembly is not absolute and must be viewed in relation to its social purpose.¹⁵⁷ The Court yet balanced economic freedoms against such fundamental right as the right to life and came to the conclusion that such rights as the right to life or the prohibition of torture and inhuman or degrading treatment or punishment admit of no restriction.¹⁵⁸

Another aspect to this is that the fact that individuals may end up without a remedy for certain violation would consequentially discourage them from taking advantage of Community benefits and thus limit the integration drive of the Community. There are no doubt claims that would arise that cannot be disguised as human rights claims. For example, what the EACJ was called upon to determine in *British America Tobacco Limited v. AG Uganda*¹⁵⁹ was purely on the prohibition of the Partner States from giving preferential treatment to domestic products over those from other Partner States. The Court held that the taxation imposed on the applicant's cigarette manufactured in its sister company in Kenya for sale in Uganda amounted to discrimination in favour of Ugandan brand and thus violated the Treaty. There is no way the ECOWAS Court would have been able to entertain of claim of this nature except at the suit of a State or the Commission.

For completeness, it is essential to State that the situation would not have been as frustrating as it is now had the reference procedure in article 10(f) of the Court's Protocol been in use. That would have given individuals the opportunity to litigate ECOWAS Treaty Texts through the Courts of Member States. The total foreclosure of the individual from taking advantage of any or both of the routes for litigating Community Texts is unacceptable and casts a huge doubt on the intention of Member States as well as relevant ECOWAS institutions to achieve complete integration. A situation, for instance, as we saw in Ghana, where the Court of Member States, which, according to the Court, are also Community Courts,¹⁶⁰ is still goaded by law to hold that the decision of the ECOWAS Court cannot be enforced by the municipal Court of the State because the State has not domesticated the Protocols of the ECOWAS Court of Justice,¹⁶¹ is absolutely unacceptable and should not be encouraged. I am not particularly concerned about the correctness of the procedure to apply to the High Court for enforcement as I am with the fact that the response of the Ghanaian Court is reflective of the general attitude to Community legislation in Member States. Until this aspect of our community legal system is seriously addressed, the much desired synergy between municipal law and ECOWAS laws will remain a pipe dream.

V. The Role the ECOWAS Commission

At the inception of the revised treaty, what is now known as the ECOWAS Commission was the Executive Secretariat, so that there is at all no mention of the ECOWAS Commission in the Revised Treaty. The ECOWAS Commission replaced the Executive Secretariat and took over its function by virtue of article 1 of the Supplementary Protocol A/SP.1/06/06 Amending the Revised Treaty.¹⁶² In addition to the powers provided for the commission in the revised treaty, the amended gave the Commission power to, *inter alia*, "the Commission shall exercise its powers to ensure the smooth functioning of the Community and protect the overall interest of the Community ..." ¹⁶³ and in the performance of their duties, the President of the Commission and the Commissioners (etc.) "shall owe their loyalty entirely and be accountable only to the Community. In this regard, they shall neither seek nor accept instructions from any government or any national or international authority external

157 *Ibid*, para 80

158 *Ibid*, para 80

159 Reference 7 of 2017, paragraph 84

160 *Pinheiro (SAN) v. Ghana*, above, note 43, para 50

161 *Mba v. Ghana*, above, note 7, p. 4

162 Article 1

163 Article 19(4)

to the Community. They shall refrain from any activity or any conduct incompatible with their status as international civil servants.”¹⁶⁴ In other words, the Commission enjoys complete independence in the performance of its functions.

Obviously the Commission has pivotal roles to play in the ECOWAS project, but the scope of this lecture would permit me only to focus on its role in the actualisation of treaty safeguards for individuals. The role as encapsulated in the Revised Treaty has been severally acknowledged by the Court as already shown above in *Pinheiro (SAN) v. Ghana*, for example. In the case, the Court made it clear that the Commission and Member States are the only entities permitted to file an action before the Community Court against the defaulting Member State, pursuant to Article 10(a) of the Protocol of the Court.¹⁶⁵

It is obvious that, like Member States, the Commission has slept on its right. It is in fact more complicit than Member States even to the extent of accusing it of being derelict in its duties. In fact, not even when all the Member States and the Commission were sued by Chude Mba to awake them to their responsibility under the ECOWAS Treaty and the Protocol of the Court did they awake from their self-induced slumber.¹⁶⁶ In fact, the duty Mba took upon himself to request the Court to compel Member States by “[a] declaration that the 1st Defendant is in breach of its treaty obligations by failing to take the necessary steps to domesticate the ECOWAS Protocols setting up this Honourable Court, the ECOWAS Court of Justice so as to render the decisions of this Court enforceable within its territory,” was actually the duty of the Commission.

During the formative years of the European Union, the European Commission demonstrated great capacity with demonstrable intention to focus on its mandate by seizing the jurisdiction of the CtJEU in deserving cases. Examples are *Commission v. Luxembourg & Kingdom of Belgium*, wherein the European Commission moved the CtJEU to hold that certain actions of the Italian State constituted infringements of the Treaty.¹⁶⁷ In *Commission v Italy*, the CtJEU, at the suit of the Commission held that by applying increased customs duties on goods imported from other Member States the Italian Republic failed in its obligations under the Treaty.¹⁶⁸

When will the ECOWAS Commission take action to nullify unilateral actions – such as the unilateral decision of the Nigerian Government to close her borders to other ECOWAS States or the Ghanaian Investment Act – that are done in violation of the obligations of Member States under ECOWAS law? We can only hope that such a day would come.

VI. Concluding Remarks

It is obvious from the trajectory of my thoughts so far that my concern is with the need to enhance the capacity of the Court to truly and indeed function as a Court of justice, and not a symbol of it. Though achieving the human rights jurisdiction at the suit of individual was a great feat, we must celebrate cautiously for the fact that the Court is not a human rights Court. Thankfully, the Court’s human rights jurisdiction and its enviable record have firmly established it as a Court that is prepared to rise up to the occasion: to protect individuals; promote integration through law; and hold States accountable for breach of their international obligations. What is missing is that the two entities that currently have the mandate to invoke the community texts jurisdiction of the Court have seemingly conspiratorially agreed never to do that.

The third entity – the municipal Courts of Member States – are yet encumbered by their own conservatism and needless rivalry from invoking the reference procedure hiding behind the convenient

164 Article 20 of the Revised Treaty

165 Above, note 42, para 47-49, particularly 48

166 Above, note 7

167 Case 12/74

168 Case 10/61

excuse of want of domestication of ECOWAS treaty. While that may be a hindrance, the fact that municipal Courts have basically shunned the jurisprudence of the Court, which do not require any legislation, speaks volume of how they are likely to treat the reference procedure. Nevertheless, the failure of Member States to fulfil their obligations under ECOWAS laws engages their international responsibility according to the fundamental principle of international law that it is incumbent on a State that has entered into an international obligation to adopt necessary legislation in its internal law to fulfill the obligation.¹⁶⁹ The Commission is entitled to take enforce this obligation against Member States; will it?

In any event, there is the urgent need to amend the Court's Protocol to allow individuals, who have been bearing the brunt of repressive State behaviours to be able to seise the Court and by so doing give the Court the opportunity to play its role in the integration process as a Court of justice. Thankfully, we have article 30(1) and (2) of the EAC Treaty to learn from, thus:

Subject to the Provisions of Article 27 of this Treaty, any person who is resident in a Partner State may refer for determination by the Court, the legality of any Act, directive, decision or action of a Partner State or an institution of the Community on the grounds that such Act, regulation, directive, decision or action is unlawful or is an infringement of the provisions of this Treaty; (2) The proceedings provided for in this Article shall be instituted within two months of the enactment, publication, directive, decision or action complained of, or in the absence thereof, of the day in which it came to the knowledge of the complainant, as the case may be.

Pending when this is achieved, the Commission needs to wake to its responsibility and show the needed leadership, both to take up cases of treaty breaches, especially to seek a declaration that the failure of Member States to give municipal effect to ECOWAS laws engages their international responsibility for which they must make amends. Opening the jurisdiction of the Court to individuals, either through the activation of the reference procedure or through an amendment of article 10 of the protocol (or both) to enable them seise the Court respecting treaty texts, would broaden the ECOWAS judicial space and make its law a living and not the stagnated law that it is today.

At the risk of boring you with repetitions, again, I remind all that the Court is the Community Court of Justice!

Thank you.

¹⁶⁹ *Questions Relating to the Obligation to Prosecute or Extradite, (Belgium v. Senegal)* ICJ Rep 2012, 422, 452, para 76-77; 460 para 113

THE ECOWAS COMMUNITY COURT TWENTY YEARS ON: PROTECTION OF HUMAN RIGHTS AS A CORE VALUE

By

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I. Introduction

Twenty-Eight years ago in *Cotonou* the various Heads of State and Government of Member States revised the ECOWAS Treaty.¹⁷⁰ Among the fundamental objectives set out in the Revised Treaty is “**the recognition, promotion and protection of human and peoples’ rights**” in accordance with the provisions of the African Charter on Human and Peoples’ Rights.¹⁷¹

The declaration that the recognition, promotion and protection of human and peoples’ rights, had become a “Fundamental Objective”, was not sufficient in itself, without a defined road-map to the realization. As with International Organizations, a Code has to be complemented by a Court, as well as an enforcement regime.

The journey to realizing the human rights mandate set out in the Revised Treaty did not happen overnight. Even getting the Court to fully function as an Inter- State Court was more herculean than imagined, in the absence of a willingness by Member States to put the Court to work.

Prior to the 1993 revision of the Treaty, a Protocol of 1991 had *inter-alia*, granted the Court, original and final jurisdiction over its decisions. But the envisaged Court remained largely an interState Court, dealing with disputes referred to it by Member States, and providing interpretation to Treaty Provisions.

The Political and Economic agenda of the sub-regional body trumped the need for setting up a Court. It is not clear whether the Members were averse to judicial interventions, or that the key actors preferred diplomatic channels to settling their disputes. The result was the long delay in operationalizing the Court, even though it was obvious that a successful regional economic and political integration required the presence of Court.

Therefore, when in 1993 the Revised Treaty declared the protection and promotion of human rights as a fundamental objective of the Community, it was unclear the route to be navigated in realizing that lofty aim, given, not only the absence of a judicial arm beyond the paper¹⁷², but also the attitude of African governments on issues affecting human rights on the continent in general.

Eight years were to pass before the Court was inaugurated, in 2001; sadly it was to remain dormant since the Member States were still not keen on engaging it, on any of its mandate. Whereas the States displayed an initial lack of desire to engage the Court, Community Citizens, were eager to put the Court to the test.

Thus in 2003, two years after the judges were sworn in, the first case was filed by a community citizen against a Nigeria.¹⁷³ The Applicant through his counsel urged the Court to exercise Jurisdiction in a bid to give life to the Fundamental Principle Stated in Article 4(g) of the Revised Treaty. This was not to be, as the Court declined Jurisdiction on ground that access to the Court was not available to non-State actors.¹⁷⁴

170 The First ECOWAS Treaty was adopted in Lagos, in 1975, establishing the Economic Community of West African States, which itself was an epoch event signaling a breakthrough on the years of hard work by the promoters of the regional economic bloc. The participants and signatories to the Treaty had envisaged a Tribunal to ensure the observance of law and justice in Treaty interpretations, as well as settle disputes referred to it by Member States.

171 Revised ECOWAS Treaty 1993, Art.4 (g). The African Charter on Human and Peoples Rights thus, became the substantive human rights legislation which the ECOWAS Court of Justice was to apply in protecting the rights of citizens of the ECOWAS Community.

172 Another eight years was to pass before the Court of Justice was set up.

173 *Olajide Afolabi v Federal Republic of Nigeria*, Case **ECW/CCJ/APP/01/03** decided in 2004

174 Under Article 15 of the Revised Treaty which established the Court of Justice, the status and powers of the Court were left out; these were to be provided under a Protocol envisaged by the Revised Treaty. The Provision of Article 15(4) which Stated that “Judgments of the Court of Justice shall be binding on the Member States, the Institutions of the Community and on Individuals and Corporate bodies” did not confer standing on individuals. The judgement referred to under that provision, related to judgments emanating from the matters over which the Court had jurisdiction as contained in Article 76, that is, those emanating either from Treaty Interpretation or cases brought for resolution by Member States (that is interState and inter agency matters).

If the journey had terminated there, the many achievements recorded by the Court through the years, might have been lost. It is on record that many persons including the judges of the Court were to “mount pressure” on the Authority of the Assembly of Heads of States and Governments to expand the reach of the Court, if the human rights ideals of the ECOWAS was to make any head way.

By 2005, a watershed was achieved. A further Supplementary Protocol¹⁷⁵ was adopted by Member States. Article 3 which deleted Article 9 of the 1991 protocol, enacted a new Article 9, detailing the jurisdiction of the Court, and Article 10 granting access to individuals to seek the Court’s intervention on human rights violations opened a new vista for the Court.

The 2005 protocol granted the Court the Jurisdiction to **determine cases of violation of human rights that occur in any Member State**. This became the first step in the movement towards realizing the human rights mandate the ECOWAS had set for itself as a Community, and its Institutions, including the Court of Justice.

Additionally, the Protocol of 2005¹⁷⁶ which amended the Protocol of 1991 and expanded the jurisdiction of the Court, in granting access to the Court to individuals whose rights have been violated in any Member State, also provided that such access, will not to be denied on ground of non-exhaustion of local remedy¹⁷⁷. This became a distinctive feature.

The Multiple mandate of the Court firmly established since 2001 has been fully discussed by notable scholars.¹⁷⁸ It is its human rights mandate and the challenges faced by the Court in the last 20 years of operations which inhibit the Court’s effectiveness and limits its claims to full *defacto* authority, as a human rights Court, that we are concerned with.

This celebration of the 20th year anniversary of the existence and operation of the ECOWAS Court of Justice will be approached from different perspectives by the speakers; some of the thoughts and presentations may be repeated, if that happens, it is more for emphases than to create boredom.

II. The ECOWAS Court of justice and human rights: Foundational obstacles

Twenty years in the life of an organization is itself a milestone. As the saying goes, “the journey of a thousand miles begins with a step.” That initial first step has since become strides. It is impossible to fully capture the challenges faced by the pioneering set of judges and the support staff of the Court as they set out on an uncharted sea. Surmounting the foundational obstacles in order to meet the expectations of community citizens, while also not bruising the ego of the States, required a careful balancing act.

Before one takes a side in assessing the twenty years record of the Court, it is well to appreciate where the Court has traveled from. For this, we will be reminded that in 1975 when the treaty of Lagos was signed, which created the Economic Community of West African States (ECOWAS), *the protection of human rights was not one of the aims of those who set up the regional body*.

A cursory overview of the aims of the ECOWAS as set out in Article 2 shows basically that the promotion of Economic co-operation and development among Member States was the key aspiration. Nowhere in any of the sub articles or paragraphs was the idea or ideal of **human rights of community citizens** mentioned as a concern for the heads of States and governments. But this is not surprising; of the fifteen Member States parties to the Treaty of Lagos, only five were under democratically

175 A/SP.1/01/05

176 A/SP.1/01/05

177 Article 10 declared that the non -exhaustion of local remedies was not a bar to the jurisdiction of the Court in entertaining cases bordering on alleged human rights violations.

178 See for example ,S.T Ebobrah, *Dual mandate, varied Authority: The skewed authority of the ECOWAS Community Court of Justice*, iCourts Working Paper Series, No. 57, 2016 Electronic copy available at <http://ssrn.com/abstract=2776615>

elected government.¹⁷⁹ The rest were presided over by heads of Military juntas, and civilian despots who had transmuted from the Military to civilian.

Even the idea of a tribunal for ECOWAS contained in Article 4, cannot be interpreted as an indication of a willingness by the founding fathers to submit to any Court. This is evidenced by the provisions of Articles 56,¹⁸⁰ and 61.¹⁸¹ Not even the reference to “Rights” in some of the Supplementary Protocols from 1979 to 91, gave rise to the promotion and protection of the rights of community citizens within the concept of Institutionalized rights.

Although democratization was becoming fashionable in the 90s when the decision to revise the treaty was made, it is well to observe that many of the States were still under military dictatorship, or under coup plotters turned civilians, whose disdain for human rights was legendary.¹⁸² Even in those States under civilian regimes, individuals suffered from the highhandedness of their sit tight and dictatorial leaders, mostly less disposed to judicial interference and accountability.

Given this mindset and foundational discrimination and disdain, it is no doubt that the State parties would continue to treat the Court with minimal respect. This has been made evident in the initial and perhaps continued antagonism towards the rulings and decisions of the Court as well as their reluctance to effect execution of the judgements of the Court.

In light of the foregoing observation, any shortcoming of the Court can directly be linked to the unwillingness of Member States to strengthen it and make it more effective not only as an inter- State Court, but even as a human rights Court. In the same vein the justices of the ECOWAS Community Court should be congratulated for their tenacity in the face of all the odds.

The willingness of the Court to forge on, to remain committed to the promotion and protection of human rights within the sub region is appreciated; the sheer number of Applications brought before the Court in the course of the twenty years of its experience is testimony of the confidence which community citizens have in the Court; some of these applications no doubt, would have been completely unnecessary if the national justice environment in many Member States is conducive for the ventilation of the rights of the applicants.

III. Building blocks: Enter the supplementary protocol and unrestricted access

The first test of the willingness to ECOWAS Court of Justice to protect the human rights of Community citizen, in realization of the fundamental principle 4(g) contained in the Revised Treaty of 1993, began in 2003. The Court would rather find a convenient escape, and perhaps rightly too, by holding that there was no access to individual complaints within the Court’s mandate.

This changed when in 2005 with the Supplementary Protocol; this protocol as Stated earlier, established the rights of individuals to have access to the Court, for redress where there is an alleged breach of human rights in the territory of any Member State. In the absence of this important access right, the ECOWAS Court of Justice remained a Court for Member States and of the Community Institutions.

The Protocol did not only expand access to include individuals, but also, in granting this access, made it unnecessary for applicants to exhaust local remedies.¹⁸³ This gave the needed impetus to

179 The Republic of the Gambia under *Sir Dawda Jawara*; The Republic of Guinea-Bissau under H.E. *Mr. Luiz Cabral*; The Republic of Liberia under H.E. Dr. William Tolbert; the Republic of Senegal under H.E. *Mr. Abdou Diouf* and The Republic of Sierra Leone under H.E. *Dr. Siaka Steven*.

180 In Article 56, the preference was “amicable settlement” of disputes. Recourse to the tribunal was secondary, and was only on issues of discontent between Member States.

181 Article 61 which set out the Institutions to be set up, excluded the Tribunal. This is further evidence that the founders were not interested in a judicial review of their actions.

182 Only a handful of States were under democratic regimes, and quite a few had a record of human rights protection or promotion in their States.

183 The non-exhaustion of local remedy as a distinctive feature of the the Court’s mandate was discussed in a paper presented

individuals who allege that their human rights are infringed upon by the Member States, thus, also constituting the Court into a Human Rights Court.

Despite opposition from Member States and notwithstanding the various objections raised to the non-exhaustion of local remedies-the argument being that the State concerned should at least be allowed internally to redress the breach before the applicant can approach the Court, the Court has continued to exercise jurisdiction since 2005 when the first case was heard¹⁸⁴

This argument is not without merit; yet, given the slow nature of the judicial process in many Member States, as well as the lack of transparency occasioned by political interference and a degree of lack of judicial integrity in many Member States, many victims are always left without a remedy, which is itself, a contravention, of the established principle of justice: *ubi jus ibi remedium* enshrined in international human rights treaties.

For instance, Article 8 of the Universal Declaration of Human Rights, and Article 2(3) of the International Covenant on Civil and Political Rights grant everyone the right to an effective remedy by the competent national tribunals (for acts violating their fundamental rights), by the constitution or by law of their States. Effective remedy is hardly available to community citizens within their national Courts. It is this fact, among others that makes the non-exhaustion of local remedy a welcome innovation.

The realization and fulfillment of the fundamental principle contained in Article 4(g)¹⁸⁵ of the Revised 1993 Treaty hung in the balance, if those individuals whose rights had been infringed upon by State actors, or agents and officials of States acting in their behalf, could not approach the Court to seek redress, without either suing through their States or even exhausting local remedies.

Thus, the 2005 amendment which granted the Court the jurisdiction to determine cases of violations of human rights *that occur in any Member State*¹⁸⁶, irrespective of the non-exhaustion of local remedy, has given fillip to the Court and impetus to community citizens which they appropriated, hence the deluge of cases filed since 2005.¹⁸⁷

IV. The human rights mandate: which and whose human rights?

The idea of human rights has been sufficiently discussed and there is hardly any need to spend precious time and space on the idea and philosophy of rights. It is only sufficient to reiterate that human rights are universal and apply to every human being without distinction or discrimination.

In discussing the human rights mandate of the Court, the clear wordings of the Revised Treaty makes it evident that the subject matter of the Court's jurisdiction covers **all the human and peoples rights enumerated in the African Charter on Human and Peoples Right**. It is therefore irrelevant as some have argued that the Treaty itself did not make a list of the Rights to be protected.

The Court itself has ruled on many occasions that once there is an alleged breach of human rights enshrined in the African Charter, its jurisdiction is established.¹⁸⁸ As *Ebobrah* wrote, not only is the Court's human rights mandate not tied to any particular rights catalogue, no significant preconditions

at the Conference held in Bamako Mali in 2018.

184 The case of *Essien v The Gambia & Anor.* (2007) AHRLR 131 (ECOWAS 2007) In the case of *Koraou v Niger* (2008) AHRLR 182 (ECOWAS 2008) the Court, affirming this, Stated that the requirement of non-exhaustion of local remedies was a deliberate choice of the law makers. The Court in several of its judgements has continued to emphasize this.

185 The Recognition, Promotion and Protection of human and peoples rights in accordance with the provisions of the African Charter on Human and Peoples Rights

186 Article 9 (4)

187 It is reported that the number of cases filed in the 20 years of the Court's operation stands at four hundred and forty-six. This is available from the Court's official website <http://www.Courtecowas.org/2021/10/08/four-hundred-and-forty-six-cases>. Accessed on October 8, 2021.

188 See for instance the case of *OGWUCHE V FEDERAL REPUBLIC OF NIGERIA*, ECW/CCJ/APP/09/15, Judgement number ECW/CCJ/APP/02/18; *PRIVATE ALIM V FEDERAL REPUBLIC OF NIGERIA*, ECW/CCJ/RUL/05/11 Unreported

are stipulated for submission of claims to the Court.¹⁸⁹ On this, it is to be noted that the Court has adopted an expansive interpretation of the jurisdiction conferred by Article 9 of the Revised Treaty; it has adopted not only the Substantive law of the African Charter on Human and Peoples Rights, but also rights protected in International Instruments.

In **SAMUEL SAM-SUMANA V REPUBLIC OF SIERRA LEONE**¹⁹⁰ for example, the Court declared that “The African Charter on Human and Peoples Rights and other legal instruments invoked by the Applicant are indeed legal instruments the Court refers to when considering cases of human rights violations that occur in any Member State...”

In **ETIM M ESSIEN V THE REPUBLIC OF GAMBIA**¹⁹¹ the Court declared that “the principal question to be posed is whether the facts of the case constitute a violation of human rights of the plaintiff and whether the rights being claimed by the plaintiff are fundamental human rights guaranteed by the African Charter on Human and Peoples Rights and the Universal Declaration of Human Right.”

The Human Rights mandate of the Court is expansive; encompassing all the rights protected by the African Charter on Human and Peoples Rights, as well as the rights protected by the Universal Declaration of Human Rights and International Covenants on Human Rights.

In the course of these twenty years of operation the Court has intervened in cases involving all manner of human rights brought before it. In assuming Jurisdiction it has not closed its doors to any litigant once an identifiable human rights violation is disclosed in the Application. A few examples will suffice:

- i. The violation of the right to freedom from slavery and servitude¹⁹²;
- ii. The violation of the right to fair hearing¹⁹³;
- iii. Deprivation of the right to personal liberty through unlawful detention¹⁹⁴;
- iv. Unlawful detention without appropriate warrant¹⁹⁵;
- v. The right to participate in governance of one’s country¹⁹⁶
- vi. Violation of the right to privacy and the right to property¹⁹⁷;
- vii. The case of a missing person last seen in the custody of the State.¹⁹⁸
- viii. The Question: Which rights, has been answered. We shall now turn attention to “**whose right**”?

Axiomatically, human rights are the rights of every human being. The Court’s mandate is triggered, once it is shown that there is an infringement of the rights of *any individual in the territory of a Member State*, the victim does not have to be a citizen of an ECOWAS Member States. This is clearly in tune with established human rights protection regimes. Again, a few illustrations will suffice.

189 *S.T.Ebobrah*, *supra*, note 9 @page 19

190 ECW/CCJ/JUD/19/17

191 ECW/CCJ/RUL/04/07

192 The case of KADIJATOU MANI KARAOU V THE REPUBLIC OF NIGER, (2008) AHRLR 182 (2008 ECOWAS)

193 Cases like MOHAMMED EL TAYYIB BAH V REPUBLIC OF SIERRA LEONE, ECW/CCJ/APP/20/13, Judgement number ECW/CCJ/JUD/11/15; MANNEH V REPUBLIC OF GAMBIA 2009 are only but a few of such cases

194 See for instance case of BENSON OKOMBA v REPUBLIC OF BENIN, ECW/CCJ/AP/27/14, Judgement number ECW/CCJ/JUD/05/17

195 Alex Nain Saab Moran v Republic of Cape Verde, ECW/CCJ/APP/47/20, Judgement number ECW/CCJ/JUD/07/2021

196 SAMUEL SAM-SUMANA V REPUBLIC OF SIERRA LEONE, (*supra*); KENNETH ROBERTS & ORDS V FEDERAL REPUBLIC OF NIGERIA & ANOR, ECW/CCJ/APP/49/18, Judgement number ECW/CCJ/JUD/38/21

197 OGWUCHE V FEDERAL REPUBLIC OF NIGERIA, *supra*, note 18

198 EBRIMAH V THE GAMBIA (2008) AHRLR 171 (2008 ECOWAS)

The case of **OUMAR DIAWARA V COTE D'IVOIRE**¹⁹⁹ involved a *Congolese* businessman whose rights were infringed upon by the Ivorian authorities. In an Application to ventilate his human rights, the Court held that the Ivorian Government had violated the Applicant's rights to fair hearing "by failing to avail him of the opportunity to defend himself" before issuing an Order confiscating his property. The Court found that the Applicant had been denied the right to be tried by an impartial Court or tribunal, as well as the right of appeal as provided by Articles 7 (a),(b) and (c) of the African Charter on Human and Peoples Right.

Another case which illustrates the point that the ECCJ's human rights mandate covers all persons whose rights are breached within the territories of a Member State, is the case of **ALEX NAIN SAAB V REPUBLIC OF CAPE VERDE**²⁰⁰ which involved a *Colombian/Venezuelan* citizen intercepted in the Republic of Cape Verde, when the aircraft he was travelling in, made a landing to refuel. He was detained without a lawful warrant awaiting extradition to the United States where he was to face criminal charges. Though the Court did not grant his request to hold Cape Verde responsible for breaching her treaty obligations, the Court ruled that his initial arrest and detention without a warrant lawfully obtained, violated his human rights.

The jurisprudence of the Court establishes several important principles on both the jurisdiction *materiae* and *personae* of the Court which everyone with interest in the activities of the Court should be pay attention to. This helps to foster a better understanding and also, hopefully save the judges and the Court the labor of sitting over cases which should not be brought before the Court.

Over the Course of 20 years, the Court has moved cautiously but firmly in establishing itself. As Its jurisprudence becomes clearer and better expressed, litigants and their representatives are better guided as to issues of admissibility of their cases and of the Court's competence. Equally, States and their counsel will do well to understand when not to spend time and energy challenging the Court's jurisdiction.

We will attempt to extract some of the established principles to guide a better understanding of the human rights mandate of the Court.

*The Human Rights Jurisdiction of the Court is triggered once an Applicant in his/her Application filed before the Court alleges the violation of a right guaranteed under the African Charter on Human and Peoples Rights, International Conventions to which the State or States in whose territory the alleged violation took place is a Party.*²⁰¹ In **BAKARE SARR V REPUBLIC OF MALI**²⁰² the Court held that "Once a human rights violation which involves the international or community obligations of a Member State is alleged, it will exercise jurisdiction over the case." Also, in **REGISTERED TRUSTEES OF SERAP V FEDERAL REPUBLIC OF NIGERIA AND ORDS**²⁰³ the Court held that "The plaintiffs, by alleging facts from which it can be inferred, at least *prima facie*, a remote possibility that the defendants may have violated their human rights, have established in their pleadings an arguable cause of action."

Exercising jurisdiction over a case does not mean the Court can proceed to deliver judgement on the merits of the case. The parties must be the proper parties; and **the Applicant must adduce substantial evidence in support of the allegation contained in the Application.** In **LAWRENCE JOCTHAN AND ORDS V FREDERAL REPUBLIC OF NIGERIA**²⁰⁴ the Court dismissed the claims by persons and communities against the Applicants for losses sustained to lives and property as a

199 ECW/CCJ/APP/17/21

200 Supra, Note 23

201 OGWUCHE V FRN ,supra; PRIVATE ALIM V FEDERAL REPUBLIC OF NIGERIA (ECW/CCJ/RUL/05/11

202 (2011)CCJELR,59

203 (2014) CCJELR 249 at page 268

204 Unreported, ECW/CCJ/APP/11/19

result of herdsmen and farmers clashes in Adamawa State of Nigeria. The applicants had sued for themselves as victims, and in representative capacity for the seven communities listed in the suit. In denying the claims the Court found “*In this particular case that the facts alleged by the applicants is devoid of evidence sufficient to support the loss of life and property suffered by the applicants either as direct or indirect victims.*”

Relying on its jurisprudence the Court Stated that “it will not act on mere allegations of violation but that each allegation must be substantiated with some concrete facts as the case may require.”²⁰⁵

The specific human rights violated must be Stated in the initial Application.²⁰⁶ In HOPE DEMOCRATIC PARTY AND ANOR V THE FEDERAL REPUBLIC OF NIGERIA AND OTHERS²⁰⁷, the Court denied the application against the First Respondent because the Applicant could not establish a specific human right violated by the respondent.

The Application must reveal a cause of action for it to proceed. In ELHAJI MAME ANDON GAYE V THE REPUBLIC OF SENEGAL²⁰⁸ the Court reiterated that a cause of action must be disclosed for it to assume jurisdiction; a cause of action being “a legal right predicated on facts upon which an action may be sustained...often used to signify the subject matter of a complaint or claim on which a given action or suit is grounded, whether or not it is maintainable.”²⁰⁹

The fact that the infringement complained about has an available local remedy is not a bar to the Court’s Jurisdiction. In SERAP V FGN & UBEC²¹⁰ the Court declared that it had jurisdiction over human rights enshrined in the African Charter and the fact that the same rights are domesticated in the municipal law of the Federal Republic of Nigeria cannot oust its jurisdiction.

A State cannot which is brought before the Court cannot plead its municipal law as bar to her obligations under the ECOWAS Treaty.²¹¹ In AZALI ABLA & ANOR V REPUBLIC OF BENIN²¹² the Court declared thus: “ECOWAS is indeed an international organization, to which States have undoubtedly ceded power and remits; and once so ceded, primacy is accorded to norms adopted by the over-arching body constituted as ECOWAS, over and above the domestic norms of the individual Member States forming that international organization...Constituent Members may not, by the same token, invoke their domestic law as a means of shirking their community obligations under ECOWAS”

Exhaustion of local remedy is not a condition precedent before the Court can exercise jurisdiction.²¹³ This has been sufficiently discussed.

A violation of rights which is continuous cannot be statue barred²¹⁴. In OGWUCHE V FRN²¹⁵, counsel to the respondent had argued unsuccessfully that the harm complained about by the applicant was statue barred, having occurred years before the application. The Court would not counte-

205 See: “ECOWAS COURT DISMISSES CLAIMS BY PERSONS ...” News Report on the Court’s website.<http://www.Courtecowas.org/2021/10/23/4580>. Accessed on October 30, 2011

206 MOUSA LEO KEITA V THE REPUBLIC OF MALI, (2004-2009) CCJELR, 63

207 ECW/CCJ/JUD/19/15

208 ECW/CCJ/RUL/11; also case of EBERE ANTHONIA AMADI & ORDS V THE FEDERAL REPUBLIC OF NIGERIA ECW/CCJ/JUD/38/21.

209 cases of THE REGISTERED TRUSTEES OF JAMA’A Foundation & ORDS V FEDERAL REPUBLIC OF NIGERIA, ECW/CCJ/JUD/04/20@ 20; also case of OBINNA UMEH & ORDS V FEDERAL REPUBLIC OF NIGERIA (2020) ECW/CCJ/JUD/ ;

210 (2010) CCJELR 189

211 KENNETH ROBEERTS & 4 ORDS V FEDERAL REPUBLIC OF NIGERIA . ECW/CCJ/APP/49/18, JUDGEMENT NUMBER ECW/CCJ/JUD/38/21

212 (2015) CCJELR 13@22; Also HANS CAPEHART WILLIAMS SR AND ANOR V LIBERIA AND OTHERS ECW/CCJ/JUD/25/15

213 KARAOU V REPUBLIC OF NIGER (2010) CCJLR (PT3) 17

214 VALENTINA AYIKA V REPUBLIC OF LIBERIA (2011) CCJELR; INCORPORATED TRUSTEES OF SERAP V FEDERAL REPUBLIC OF NIGERIA & ANOR; OGWUCHE V FEDERAL REPUBLIC OF NIGERIA

215 ECW/CCJ/JUD/02/18

nance the argument, and held that since Ogwuche's call to the bar certificate and other documents were still with the EFCC, the violation was continuing and not time barred.

The Court does not exercise criminal jurisdiction. It cannot hold individuals accountable for breaches of criminal law or for breaches occasioned by acts or omissions of an individual.²¹⁶

That a case is pending before a national Court is not a bar to the jurisdiction of the ECOWAS Court of Justice.²¹⁷ Also the Court is not bound by the decisions of national Courts.

The only bars to the jurisdiction of the Court are Stated in Art 10(d); that the Application is not made anonymously and that the same case is not before another International Court.²¹⁸

The ECCJ is not an appellate Court over the decisions of national Courts. The Court will not concern itself with the correctness or not of a decision reached by a national Court²¹⁹. In HANS CAPEHART WILLIAMS SR AND ANOR V REPUBLIC OF LIBERIA AND OTHERS the Court made it clear that in the absence of a manifest breach of "Applicants" right to fair hearing, the Court had no jurisdiction to decide on the correctness or not of a decision reached by the Court in Liberia, in a trial for murder over which the applicants were accorded full participation; the Court will not be drawn into the issue of a proper or improper application of evidence by the national Court.

Although the Court does not interfere in the internal affairs of Member States, or with matters of enforcement of domestic laws of Member States,²²⁰ **the Court has jurisdiction to look into a matter to ascertain whether any rights violation has occurred.**²²¹ This is even so where the rights involved are protected by the laws domesticated by the Member State under reference.²²²

The human rights mandate of the Court covers only individual applicants, not political parties²²³ or groups unless in clear cases where a mandate is granted by a group to sue in a representative capacity. The Applicant must show that he/she is a victim of a human rights violation. The Court has established in many cases that the "victim" status is cardinal to granting the Applicant a standing before the Court. For example in ALHAJI MUHAMMED IBRAHIM HASSAN V GOVERNOR OF GOMBE STATE AND THE FEDERAL REPUBLIC OF NIGERIA²²⁴ the Court held thus: By virtue of Article 10(d) of the supplementary protocol, for every action relating to human rights protection, cases must be filed by an individual or a corporate body which fulfils the requirement of being a victim.²²⁵ The victim status was extended to indirect victims, in AMNESTY INTERNATIONAL TOGO & ORDS V THE TOGOLESE REPUBLIC.²²⁶ An interesting aspect of the victim status was reached when the Court granted an extension to "the potential" victim. Thus in CONGRESS POUR LA DEMOCRATIE ET LE CONGRES CDP & ORDS V BURKINA FASO²²⁷ the Court Stated that "...in Principle, a human rights violation in question is found *aposteriori*, by way of the evidence that the violation in question has occurred...However, it may occur that in specific circumstances, the risk of a future violation confers on an applicant the status of a victim. Thus, there may be reasonable and

216 CDD AND ANOTHER V MAMADOU TANDJA AND THE REPUBLIC OF NIGER (2011) CCJELR 105

217 VALENTINE AYIKA V LIBERIA ECW/CCJ/APP/07/11

218 ELHAJI MAME ABDOU GAYE V THE REPUBLIC OF SENEGAL (2011) CCJELR 25;

219 JERRY UGOKWE V FEDERAL REPUBLIC OF NIGERIA (2004-2009) CCJLR 63; HAMMANI TIDJANI V FEDERAL REPUBLIC OF NIGERIA (2004-2009) CCJLR 77

220 HOPE DEMOCRATIC PARTY AND ANOR V FGN AND OTHERS

221 MOHAMMED EL TAYYB BAH V REPUBLIC OF SIERRA LEONE. ECW/CCJ/APP/20/13, JUDGEMENT NUMBER ECW/CCJ/JUD/11/15

222 MUSA SAIDYKHAN V REPUBLIC OF THE GAMBIA. (2010) CCJELR 159 at Paragraph 48

223 HOPE DEMOCRATIC PARTY & ANOR V FEDERAL REPUBLIC OF NIGERIA AND ORDS. ECW/CCJ/APP/04/2015. Judgement number ECW/CCJ/JUD/19/15

224 (2012) CCJELR 81 at 96

225 See also BAKARY SARR & 28 ORDS V MALI

226 ECW/CCJ/JUD/09/20

227 2015

convincing indications of the probability of the occurrence of the actions. The Court may perfectly adjudicate the case.”

The Jurisprudence of **the Court does not have room for horizontal application of human rights obligations**. Therefore, only State Members of the Community can be sued. **The Court will not entertain cases brought against individuals by another individual.**²²⁸

Where the infraction complained about, was occasioned by an agent or someone acting in official capacity, **the right party to sue is the State in whose territory or on whose behalf the person or persons acted.**²²⁹ **Only Member States and Institutions of the Community can be brought before the ECCJ for human rights violations.**²³⁰ That the appropriate Respondent in a human rights violation suit before the ECCJ is the State and not the individual or an organ of State was reiterated in *TIJANI KONTE V REPUBLIC OF GHANA*²³¹ thus:

the conduct of an organ of State shall be considered as an act of the State under international law, whether that organ belongs to the constituent, legislature, executive, judiciary or other power, whether its functions are international or subordinate position in the organization of the State.

V. Role of Member States

Member States play a crucial role in the realization of the Court’s effectiveness. If they do not obey or enforce the judgements handed down by the Court then the existence of the Court lacks meaning since the Court itself lacks the enforcement capability.

In Article 1 of the African Charter on Human and Peoples Right which is the primary human rights document for the ECCJ, State parties are obligated to recognize the rights, duties and freedoms enshrined thereunder, by adopting legislative and other measures to give effect to them.

In *OGWUCHE V FRN* the Court held, as against the Republic of Nigeria, that as a State party to the African Charter...the defendant is under an international obligation to recognize those rights and to take steps to give effect to them.

The challenge has always been how to get the States to abide by their treaty obligations. In international law, only States Members of the treaty in question can sue to ensure compliance. In our opening remarks we traced the mindset of the political leaders of the various States; seemingly averse to litigating the failures of each other with respect to their treaty obligations, rather preferring amicable settlement.

This characteristic of our political leaders hampers the realization of human rights treaty obligations, because, peaceful settlement of disputes is only appropriate in cases on inter-State disputes. It does not provide relief to an individual whose rights are violated often with impunity, by the States and their organs. The individuals suffering violations and requiring States to abide by their treaty obligations have no standing before the ECCJ to compel such action.

This then is the conundrum. And in the recent case involving *ALEX NAIN SAAB MORAN V REPUBLIC OF CAPRE VERDE*²³², this dilemma became real. The Court declined jurisdiction to compel Cape Verde to discharge her treaty obligations. The Court clearly lacked that power and could not

228 This is illustrated in cases such as *CHIEF FRANK UKOR V R LALEYE & OTHERS*. ECW/CCJ/APP/01/04; *HANS CAPEHART WILLIAMS SR AND ANOR V REPUBLIC OF LIBERIA AND OTHERS* ECW/CCJ/APP/06/14 Judgement ECW/CCJ/JUD/25/15; *UGWOKE V OKEKE* (2008)CCJLR 149

229 In *OGWUCHE V NIGERIA* the Court was clear that the Applicant was right in suing the Federal Republic of Nigeria for the alleged violation of his rights by Economic and Financial Crimes Commission (EFCC) which is an arm of the Executive branch.

230 The Court has so held in many cases, and this understanding, is critical when parties litigate human rights violation before the Court. See for example, *HARUNA WAKANI & 3 ORDS V ECOWAS COMMISSION & ANOR*

231

232 ECW/CCJ/JUD/07/21

also impose sanctions on Cape Verde as requested by the Applicant. Because the Court cannot also entertain the case under its non-human rights mandate, since the applicant is neither a State nor a community institution, the reparation for breach of an international obligation is not available to him.

VI. Concluding remarks

The existence of the Court and its human rights mandate has helped to bring succor for many community citizens, who might never have had the opportunity within their domestic Courts to receive protection or indeed effective remedy. To illustrate aspiration and impact of the Court during these twenty years, we will select three cases.

In 2005, the case of enslavement of Kadijah Karaou by some men who were clearly above the law in Niger Republic would have gone without a remedy. For 9 years the lady practically cried for justice, never got it. Her plight through the years of enforced slavery and human servitude was beyond description, and all through that period the judicial system in Niger Republic offered no protection; the State offered her no protection either against those who abused her and took away her dignity. It took the intervention of the ECCJ in 2005 to hold the Republic of Niger accountable for failure to provide the Applicant protection from violations within the country's territorial space.

Again, consider the plight *Ogwuche* went through in the hands of the Economic and Financial Crimes Commission of Nigeria. The facts as extracted from the decision of Court established that he represented an accused person in a matter in which the EFCC was involved. He had withdrawn from a case with the approval of the trial of the Court. The accused was in the custody of the State and the Court had ruled that she remained there until she perfected her bail. Years later she jumped bail. The lawyer was no longer representing her. And the agents of the State, without just cause, broke into his chambers, manhandled him and his colleagues, he was detained and his certificate was confiscated. His efforts of many years to get his property released failed. He approached this Court which held that there had been a violation of his rights to privacy and the right to property, having found that "In the absence of any convincing evidence from the defence...the alleged seizure of the plaintiff's certificate (for 8 years) is unjustifiable, unwarranted, unnecessary and disproportionate and has not been proved to pursue a legitimate aim."

The third case is *Mohammed El Tayyib Bah v Republic of Sierra Leone*. The applicant approached the Court after suffering for nine years in the hands of agents of the Respondent who had dismissed him without fair hearing. He had lost his home, his income, his wife who deserted him during the course of his ordeal; of his condition, the ECCJ found that the applicant *had suffered pain, mental, psychological trauma and deprivations*.

He tried to but was denied remedy in Sierra Leone. The Court held that his dismissal from the Police in 1994 which was confirmed in a letter of 2013, is illegal null and void and of no effect as it violates the plaintiffs right to fair hearing enshrined in Article 7 of the ACHPR.

Succor came his way when the Court made an Order of his reinstatement to his appropriate post and for the payment of all his outstanding salaries, benefits, entitlements, including promotion. He was also awarded damages to the tune of two hundred and fifty thousand United States dollars for all the years of deprivation and humiliation by the State.

From the discourse presented, it is clear that the ECOWAS Court of Justice has so far discharged its mandate creditably within the short period of its existence. The Court is making its presence known and felt to community citizens through its decisions as well as outreach programs. Also, by moving to different locations to hear cases when occasions warrant, the Court grants easier access to those unable to travel to its headquarters in Abuja.

Hopefully, the State, Members will come around to embrace the Court and take steps to strengthen

its operations by cooperating to ensure that decisions are executed. States which are yet to designate the appropriate authorities for implementation of judgements are urged as matter of living true to their obligations, to do so.

The Court still has a lot to do, and in the coming years, it is hoped that the State Members will also adequately fund the operations of the Court and expand the Court by engaging extra judges or even having *ad hoc* judges to help clear the backlog of cases in deserving circumstances.

Thank you.

THE IMPETUS OF THE ECOWAS COURT IN EXPANDING ACCESS TO JUSTICE FOR HUMAN RIGHTS PROTECTION AND ADJUDICATION: A DOCTRINAL AND COMPARATIVE ANALYSIS

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Abstract

That the ECOWAS Community Court of Justice (ECOWAS Court) has extricated itself from the initial yoke of cynicism that welcomed its establishment as a regional human rights institution twenty years ago is not debatable. What remains sparsely scrutinised is the degree to which meta-normative factors have determined and are determining the outcomes or behaviours of foreign policy and how the Court's ingenuity in evolving its human rights jurisdiction demonstrates its distinctiveness and vantages over similar regional institutions, through an analytical and comparative prism. The parameters for comparing the work of the ECOWAS Court with similar entities are bifurcated. On one part is the normative character in which the basic constitutive frameworks of the ECOWAS Court are grounded while on the other hand are the decisions and pronouncements of the Court that constitute the empirical data through which the overall outlook and future promise of the Court can be assessed in a balanced way. In its thematic context, this paper focuses on the uniqueness of the mandate of the ECOWAS Court, its expansive approach to access to justice and some of its notable comparative differences from similar regional human rights entities. To this end, the paper summarily examines the African regional human rights system, the Southern African Development Tribunal, and the East African Court of Justice, as primary vectors of comparison and juxtaposes their normative foundations, viewpoints, and performances. The comparative discourse brings into sharp focus the backdrop against which the two decades of the ECOWAS Court should be evaluated while accentuating the trajectories for its enhancement.

Keywords: ECOWAS Community Court of Justice; Human Rights; Access to Justice; Subsidiarity Principle.

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I. Introduction

In the growing ascendancy of global governance and global policymaking, it is understandably unusual for emerging institutions, actors, norms, and values to depart from the trajectories of nuanced patterns and systems that are already created by established institutions. This mentality reflects the fact that much of the contestation over global issues among governments, non-governmental organisations (NGOs), regional and transnational institutions draws its vigour from conceptual analogies with “traditional rule”. Such contestation often assumes that institutions of global and regional governance exercise public authority in similar ways as domestic government and reclaims central norms of the domestic political tradition, such as sovereignty, democracy, human rights, and the rule of law, in the global and regional context.

Within the context of regional human rights normativisation, institutionalisation and adjudication, the prominent place and pace of the European regional human rights system often becomes the yardstick against which any other regional human rights arrangement is often measured. It is therefore not surprising that the regional human rights system emerging from the West African subregion would have naturally drawn the attention of writers and commentators for purposes of doctrinal analysis and overall comparative assessment.

Ranging from the fundamental questions pertaining to the legitimacy of the mandate of Economic Community of West African States (ECOWAS) or any of its organs to deal with human rights issues to the indeterminate corpus of human rights norms that form the fulcrum for the ECOWAS Court’s human rights work, and from the expressed uncertainties about the capacity of the body to sustain its new-fangled foray into the field of human rights, there has not been a dearth of scepticism articulated by scholars, jurists, activists and other commentators from within Africa and beyond. Many have queried the effectiveness of the decisions of the Court considering the recalcitrant attitude of many West African governments towards compliance with and implementation of human rights standards within their domestic systems.²³⁴

While there are indeed valid grounds for much of the queries around the Court’s mandate, operational procedures and capacity, this paper accentuates some of the inimitable novelties of the ECOWAS Court in normative and procedural terms that have impacted human rights jurisprudence beyond what was ever known within any other regional human rights system.

Over the course of two decades and almost 500 cases (with about half of that figure decided),²³⁵ this paper accentuates the efforts of the successive role actors who have assiduously worked to bestow on this Court its ground-breaking doctrinal footholds and notable departure from the doctrinal bulwarks that impeded comparable institutions in the region.

In its comparative context, therefore, this paper appraises how the ECOWAS Court has extricated itself from the principle of subsidiarity which is a core pillar of the European regional arrangement and how the Court’s ingenuous approach could serve as impetus for other regional and subregional human rights institutions in Africa in promoting broader respect for human rights on the continent.

The necessity for the comparative assessment of the ECOWAS Court is neither esoteric nor superfluous when it is borne in mind that the African Union (AU) vide the Agreement Establishing the African Continental Free Trade Area (AfCTA) recognises eight regional economic communities

²³⁴ See, e.g., Solomon T. Ebobrah, “Critical Issues in the Human Rights Mandate of the ECOWAS Court of Justice” (2010) 54(1) *Journal of African Law* 1; Henry C. Alisigwe and Chimere A. Obodo, “Judicialism and Regional Protection of Human Rights: An Overview of the ECOWAS Paradigm” (2019) 2 *University of The Gambia Law Review* 256; Kehinde Ibrahim, “The Puzzling Paradox Presented within the African Supranational Judicial Institutions: The ECOWAS Court of Justice” (2020) 28 *Supplement African Journal of International & Comparative Law* 86.

²³⁵ ECOWAS Court of Justice, “Four Hundred and Forty-Six Cases Lodged with Ecowas Court in Twenty Years”, 8 Oct 2021, <http://www.Courtecowas.org/2021/10/08/four-hundred-and-forty-six-cases-lodged-with-ecowas-Court-in-twenty-years/> (accessed 9 Oct 2021).

(RECs), namely, the Arab Maghreb Union (UMA); the Common Market for Eastern and Southern Africa (COMESA); the Community of Sahel-Saharan States (CEN-SAD); the East African Community (EAC); the Economic Community of Central African States (ECCAS); the Economic Community of West African States (ECOWAS); the Intergovernmental Authority on Development (IGAD) and the Southern African Development Community (SADC).²³⁶ Among these eight RECs, the EAC, the ECOWAS and the SADC have judicial organs that have ever assumed or still exercise jurisdiction in human rights matters. It is therefore apposite to juxtapose these vital entities in shaping the future for human rights protection and promotion in Africa in the spirit of Agenda 2063.

II. Overview of the Evolutionary Processes of the ECOWAS Court

The Economic Community of West African States (ECOWAS) was founded on 28 May 1975 by a treaty concluded by 15 independent States of West Africa, namely, Benin, Côte d'Ivoire, Gambia, Ghana, Guinea, Guinea-Bissau, Liberia, Mali, Mauritania, Niger, Nigeria, Senegal, Sierra Leone, Upper Volta (later renamed Burkina Faso), and Togo.²³⁷ The foremost goal of ECOWAS was to promote co-operation and integration, leading to the establishment of an economic union in West Africa in order to raise the living standards of its peoples, and to maintain and enhance economic stability, foster relations among Member States and contribute to the progress and development of the African Continent²³⁸

In its form and substance, therefore, the ECOWAS Treaty was meant to be the pathway towards regional economic cooperation and integration in the West African sub-region.

In 1991, a Community Court of Justice was created pursuant to Protocol A/P.I/7/91.²³⁹ This was with the aim of resolving disputes among ECOWAS Member States, and that Court initially had jurisdiction over disputes relating to the interpretation, application or legality of ECOWAS regulations, disputes between ECOWAS and its Member States and those relating to liability either for or against ECOWAS.²⁴⁰ Article 9 of the 1991 Protocol of the Court granted it no specific human rights mandate and only the Member States and institutions of ECOWAS had direct access to the Court. Private individuals or corporations had no direct access to it and individuals could only access the Court when represented by their Member State. The Court was practically hamstrung under this arrangement.

Under the subsequent Revised Treaty of the Economic Community of West African States of 1993, the ECOWAS Community Court of Justice was created as one of the principal organs of the ECOWAS, with elaborate jurisdiction. The Court commenced its operations in 2001 following the appointment of the first set of seven judges. In 2005, there was a radical change in the mandate of this Court when a Supplementary Protocol was added,²⁴¹ which allowed individuals to come before the Court if they had a case of human rights violation against any ECOWAS Member State. With the implementation of the Supplementary Protocol A/SP.1/01/05, which followed the adoption of Protocol A/SP1/12/01 on Democracy and Good Governance,²⁴² requiring that the Court be given “the power to hear, inter-alia, cases relating to violations of human rights...”, the Court gained “jurisdiction to determine case(s) of violation(s) of human rights that occur in any Member State.”²⁴³

236 Art 1(t) Agreement Establishing the African Continental Free Trade Area (AfCTA), 2018.

237 Treaty of the Economic Community of West African States (Treaty of Lagos), 28 May 1975, 1976 UNTS 17. Cape Verde joined the body in 1977. Note that Mauritania left the ECOWAS in 2000.

238 Above, art 3(1). For insightful reading on the ECOWAS, see Clement Emenike Adibe, “ECOWAS in Comparative Perspective”, in TM Shaw & JE Okolo (eds), *The Political Economy of Foreign Policy in ECOWAS*. International Political Economy Series (London: Palgrave Macmillan, 1994) 187-217.

239 Protocol A/P.I/7/91 on the Community Court of Justice, 6 July 1991.

240 Arts 9 and 10.

241 Supplementary Protocol A/Sp.1/01/05 Amending the Preamble and Articles 1, 2, 9 And 30 of Protocol A/P.1/7/91 Relating to the Community Court of Justice and Article 4 Paragraph 1 of the English Version of the Said Protocol, 19 January 2005.

242 Protocol A/SP1/12/01 on Democracy and Good Governance Supplementary to the Protocol relating to the Mechanism for Conflict Prevention, Management, Resolution, Peacekeeping and Security, 21 December 2001.

243 Art 39.

By the combined intendment of the main treaties as well as other subsidiary legal instruments adopted by Community, therefore, the Court has jurisdiction to examine cases involving:

- an alleged failure by a Member State to comply with Community law;
- a dispute relating to the interpretation and application of Community acts;
- dispute between Community institutions and their officials;
- Community liability;
- human rights violations, and
- the legality of Community laws and policies, in addition to providing advisory opinions on the meaning of Community law.

Today, the ECOWAS Court of Justice is the principal judicial arm of the ECOWAS and is tasked with resolving disputes related to the Community's array of treaties, protocols, and conventions. The ECOWAS Community Court of Justice has competence to hear individual complaints of alleged human rights violations. The ECOWAS Court has its seat in Abuja, Nigeria, and carries out its mandate in accordance with its Rules of Procedure.²⁴⁴ Article 5(3) of the ECOWAS Revised Treaty, creates an obligation for Member States to respect their obligations under the treaty and to abide by the decisions and regulations of the Community from time to time.

III. The ECOWAS Court and the Core Distinctive Features of Its Human Rights Mandate

3-1 Jurisdiction

Even though the initial ECOWAS Treaty of 1975 did not contemplate a Community Court, article 4(e) of the Treaty made provision for the establishment of the "Tribunal of the Community". Based on articles 4(e) and 11 of the ECOWAS Treaty, 1975, the ECOWAS Heads of State and Government originally established the Community Court in 1991 through a Protocol.²⁴⁵ The ECOWAS Court was listed in article 15 of the 1993 Revised Treaty of ECOWAS as one of the institutions of ECOWAS. The Supplementary Protocol of 2005 to amend the 1991 Protocol of the Community Court established the jurisdictional competence of the Court. The combined effect of article 4(g) of the 1991 Protocol; the Revised ECOWAS Treaty, 1993; and the Supplementary Protocol, 2005, provides the normative framework for the human rights adjudicatory system that resulted in the ECOWAS Community Court of Justice

This principle was firmly established by the Supplementary Protocol of 2005 that the ECOWAS Court has jurisdiction to entertain human rights cases and expands the admissibility rules to include disputes between individuals and their own Member States. As a result of the litany of applicable instruments, the ECOWAS Court is four Courts rolled into one: an administrative tribunal for the ECOWAS, a human rights Court for the subregion, a Court of arbitration, and an inter-State dispute resolution tribunal. Under this arrangement, therefore, the Court can consider cases brought by:

- (a) Individuals on application for relief for violation of their human rights,
- (b) Individuals and corporate bodies to determine whether their rights have been violated by an ECOWAS official,
- (c) Member States and the Executive Secretary, to bring an action against a State for failure to fulfil treaty obligations,
- (d) Member States, the Council of Ministers, and the Executive Secretary for determination of the

²⁴⁴ Rules of the Court of Justice of the Economic Community of West African States, 2002.

²⁴⁵ Protocol A/P/1/7/91 of 6 July 1991, note 6 above.

legality of any action related to ECOWAS agreements.,

- (e) ECOWAS staff who have exhausted remedies under ECOWAS Rules and Regulations, and
- (f) Member States' national Courts who may request to refer an issue related to the interpretation of ECOWAS agreements to the ECOWAS Court.²⁴⁶

Since the first decision of the ECOWAS Court in *Olajide Afolabi v Nigeria*,²⁴⁷ where the applicant's allegation that Nigeria's unilateral closure of its borders with Benin Republic violated various treaties was struck out because the action was decided upon the 1991 Protocol, the Court has progressively established its foothold as both a Court of regional integration and a Court of human rights as its ample jurisprudence has shown.

Notwithstanding the absence of a catalogue of human rights specifically applicable to the ECOWAS subregion, the litany of human rights instruments mentioned in the relevant treaties and protocols give the Court a broad scope of human rights provisions that form the normative basis for the corpus of human rights that fall under the Court's jurisdiction.²⁴⁸

3-2 Access to Justice

Beyond the formalism of merely allowing litigants and victims to file cases against their perceived violators, access to justice entails the process of aiding the removal of any procedural obstacles that would foil the free exercise of their rights and entitlements. Seen in this light, where an elaborate human rights adjudicatory arrangement is unapproachable, it will be unproductive if its beneficiaries are constrained from the arrangement because of overwhelming procedural hindrances. Procedural rules give content to substantive rights, and must aid the actual realisation of human rights, not impede it. There has been an assertion that

...[a] substantive right on paper is of no use unless it is harnessed to an effective procedural remedy which allows the litigant to actually bring the case before the Court in good time and without excessive cost. Legal gateways are important determinants of what kind of justice can be achieved. ... Legal procedures not only determine whether the poor can get access to legal remedies, and how quickly and effective such remedies will be, they can also influence the way that a particular dispute is construed by the law, and the kinds of outcomes which are possible.²⁴⁹

In more than one way, the ECOWAS Court operates as a *sui generis* regional human rights body. Lacking a bill of rights specifically tailored for the West African subregion, the Court's decisions on human rights matters interpret the African Charter on Human and Peoples' Rights, 1981, considered by article 1(h) of Protocol A/SP1/12/01 to contain "constitutional principles shared by all Member States" as legally binding on ECOWAS Member States. Corporations and individuals can therefore submit complaints alleging human rights violations by State actors within the Community.²⁵⁰ The ECOWAS Court is devoid of the requirement for the exhaustion of remedies within national Courts which would ordinarily limit the Court's jurisdiction, meaning that individuals do not need to pursue national judicial remedies before laying their complaints before the ECOWAS Court.²⁵¹ Instead, the

²⁴⁶ *Ukor v Rachad Laleye* Suit No. ECW/CCJ/APP/01/04 7 para 23. See Solomon T. 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(2) *African Human Rights Law Journal* 307.

²⁴⁷ Suit No: ECW/CCJ/APP/01/03; Judgment No: ECW/CCJ/JUD/01/04, 27 April 2004. See commentary in Adewale Banjo, "The ECOWAS Court and the Politics of Access to Justice in West Africa" (2007) 32(1) *Africa Development* 69-87.

²⁴⁸ See Solomon T Ebobrah "Subregional Mechanisms for the Protection of Socio-Economic Rights in Africa: Reflections on the Budding Jurisprudence of the ECOWAS Court" (2010) (11) 3 *ESR Review* 9-11.

²⁴⁹ Michael R. Anderson "Access to Justice and Legal Process: Making Legal Institutions Responsive to Poor People in LDCs" (IDS Working Paper 178) Institute of Development Studies (Feb 2003) 15.

²⁵⁰ Article 4(g) of the Revised Treaty.

²⁵¹ See *Musa Saidy Khan v. The Gambia* (2010) CCJELR 115, where the defendant objected to the Court's competence to hear

most important requirements are that the application be not anonymous and that the matter be not pending before any other international Court.²⁵²

In terms of its expansive jurisdictional outlook and jurisprudential output, the ECOWAS Court's foremost human rights decisions have included the momentous ruling on slavery in *Hadijatou Mani Koroua v. Niger*,²⁵³ where the Court held the State of Niger accountable for failing to protect its citizen from enslavement by passively tolerating the practice, and another decision in *SERAP v. Federal Republic of Nigeria and Universal Basic Education Commission*,²⁵⁴ where the Court ordered the Federal Government of Nigeria to provide adequate financial support for public education in order to fulfil its obligation under the African Charter on Human and Peoples' Rights to provide free and compulsory basic education to every Nigerian child.

Furthermore, the Court adjudicated on claims involving due process in *Ebrimah Manneh v. Republic of the Gambia*,²⁵⁵ the rights of women and children in *Amouzou Henry v. Republic of Côte d'Ivoire*,²⁵⁶ and the right to work in *Essien v. Gambia and University of Gambia*,²⁵⁷ among others. The case of *Emmanuel Akpo v. G77 South South HealthCare*,²⁵⁸ presented the Court with the opportunity to adjudicate the right to health and on healthcare delivery programme. In a subregion where political high-handedness and intolerance is rife, the ECOWAS Court seized the opportunity of *Hissein Habré v. Republic of Senegal*,²⁵⁹ in establishing that the former President of Chad could not be tried by a Senegalese Court for international crimes committed in Chad because that would amount to a violation of the prohibition of retroactive criminalisation. Numerous other decisions continue to emerge that contribute to the evolving jurisprudence of the ECOWAS Court²⁶⁰

One might ask how the Court was able to get ECOWAS Member States to initially agree to giving it the power to allow individuals to approach the Court for human rights remedies, when so many Member States have been so recalcitrant towards the ECOWAS Court prior to its creation and even its judgements thereafter. This is a rational interrogation but the response is not clear-cut. The case of *Afolabi v. Nigeria*,²⁶¹ is a starting point of reference. Soon after the FGN closed the Nigeria-Benin border, Afolabi was unable to perform several contracts and he approached the ECOWAS Court to remedy the violation of his right to freedom of movement. The ECOWAS Court could not grant relief for this right, despite it being a right enshrined in the ECOWAS treaty, because individuals were not permitted to sue Member States for such matters. The scenario in that case impelled the ECOWAS Council of Ministers and particularly the judges of the Court themselves, along with NGO activists, to agitate for the enlarged jurisdiction of the Court to grant access to non-State actors, and the ensuing modification was achieved without much resistance as the incongruity in affording rights laden with the inability to defend them was made obvious by the Afolabi case and other cases that were simi-

the case for non-exhaustion of local remedies by the applicant placing reliance on the provisions of Article 50 of the African Charter. The Court rejected this argument. See also *Valentine Ayika v. Republic of Liberia*, Suit No. ECW/CCJ/AAP/07/11, where the ECOWAS Court ruled the complaint was admissible notwithstanding the fact that the case was alleged to be pending before the Supreme Court of the respondent State.

252 See *Hadijatou Mani Koroua v. Republic of Niger*, Judgment No. ECW/CCJ/JUD/06/08, 27 October 2008. Article 10 of the Protocol further provides that the CCJ may express an advisory opinion on requests of the Treaty if the Authority, Council, or one or more Member States requests it.

253 Above. See a brilliant exposition on the case in Helen Duffy, "Hadijatou Mani Koroua v Niger: Slavery Unveiled by the ECOWAS Court" (2009) 9(1) *Human Rights Law Review* 151.

254 Judgment No. ECW/CCJ/APP/0808, 27 October 2009.

255 Judgment No. ECW/CCJ/JUD/03/08, 5 June 2008.

256 Judgment No. ECW/CCJ/JUG/04/09, 17 December 2009.

257 Merits, ECW/CCJ/APP/05/07, IHR 3116 (ECOWAS 2007), 29th October 2007.

258 ECW/CCJ/APP/01/07, Ruling No. ECW/CCJ/RUL/04/08, 16 October 2008.

259 Judgment No. ECW/CCJ/JUD/06/10, 18 November 2010.

260 See The Community Court of Justice, ECOWAS, "Decisions", at <http://www.Courtecowas.org/decisions-3/> (accessed 11 Oct 2021).

261 Above note 14.

larly struck out such as *Ukor v. Rachad Laleye*.²⁶²

In widening access to justice in the West African subregion, the Court has dispensed with the limit to its temporal jurisdiction as it once upheld in cases like *Femi Falana & Anor. v. The Republic of Benin & 2 Ors.*²⁶³ In the later case of *Federation of African Journalists (FAJ) and others v. The Gambia*,²⁶⁴ the Court laid to rest the controversy regarding time limit within which complaints against human rights violations could be filed, and simultaneously endorsed the doctrine of continuing human rights violations.

Whichever way one views the ECOWAS Court, taking cognizance of its earlier hazy beginnings as a human rights institution, the efforts of the Court are remarkably commendable as it has translated its perceived fundamental weakness into its most veritable strength by enlarging the scope of access to justice to Members of the Community. In this regard, the efforts of the successive generations of judges of the Court must not go unnoticed for their proactive stance on human rights issues under the originally limited and narrow mandate of the Court.

3-3 Comparative Issues and Analysis: Subsidiarity Principle, Exhaustion of Domestic Remedies and Margin of Appreciation

Underlying human rights protection within the context of multi-level governance, such as we see in regional arrangements in many parts of the world, is the subsidiarity principle which roughly translates into the delegation of responsibilities in monitoring and adjudication to the lowest level from which an adequate result can be achieved.²⁶⁵ At one level, the kernel of the principle of subsidiarity is that regional and subregional organisations should be the sequential reference point for the resolution of problems transcending national borders while at the lower level is that national platforms should be the initial starting point for redressing violations, leaving the larger international community and global organisations like the UN to deal only with those problems that cannot be solved at lower levels – a tripod arrangement of sorts. Popularly conceptualised as indicating a “rebuttable presumption for the local,”²⁶⁶ or favouring lower levels of political organisation and decision-making more generally, many writers on the subject draw their conceptual inspiration from the European regional milieu where the principle has become an entrenched fundamental norm. Within the European Union (EU) context, subsidiarity debuted in the 1992 Treaty of Maastricht,²⁶⁷ and is currently integrated as Article 5(3) of the Treaty on European Union.²⁶⁸ An additional protocol also provides national parliaments with monitoring rights as to the EU’s compliance with the principle.²⁶⁹ In the context of the European Convention of Human Rights (ECHR),²⁷⁰ subsidiarity is a cardinal principle that has featured as part of the bifurcated legal and philosophical doctrines of “exhaustion of domestic remedies” and “margin of appreciation” which were meant to grant respondent States some freedom of choice regarding how they interpret and prioritise their Convention obligations at the local level. Various other interventions have also been adopted by treaty law or are being proposed to squarely make

262 Above note 13.

263 Application No. ECW/CCJ/APP/10/07, Judgement No. ECW/CCJ/JUD/02/12, 24 July 2012.

264 Application No. ECW/CCJ/APP/36/15, Judgment No. ECW/CCJ/JUD/04/18, 13 Feb 2018. Compare *Alade v. Federal Republic of Nigeria*, Judgment No. ECW/CCJ/JUD/10/12, 11 June 2012 and *Hydara v. The Gambia*, Judgment No. ECW/CCJ/APP/30/11, 10 June 2014.

265 Amos O. Enabulele, “Sailing against the Tide: Exhaustion of Domestic Remedies and the ECOWAS Community Court of Justice” (2012) 56(2) *Journal of African Law* 268; Kai Striebinger, *Coordination between the African Union and the Regional Economic Communities* (Stockholm: IDEA, 2016).

266 Andreas Føllesdal, “Subsidiarity and International Human-Rights Courts: Respecting Self-Governance and Protecting Human Rights—Or Neither?” (2016) 79(2) *Law & Contemporary Problems* 147, 148.

267 Treaty on European Union, arts. B & G (5), Feb. 7, 1992, 1992 O.J. (C 191) 1, 6 (introducing new article 3(b) on the subsidiarity principle into the Treaty Establishing the European Economic Community).

268 See Consolidated Version of the Treaty on European Union, art. 5(3), 2012 O.J. (C 326) 13, 18.

269 See Protocol (No 2) on the Application of the Principles of Subsidiarity and Proportionality, 2010 O.J. (C 83) 206.

270 Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, 213 U.N.T.S. 221, E.T.S. no. 5.

these principles legal imperatives within European regional human rights system.²⁷¹ A long list of the jurisprudence emanating from the ECHR reinforce the hallowed place of the principle of subsidiarity. In *Hartman v Czech Republic*,²⁷² for instance, the ECHR emphasised that

the rule of exhaustion of domestic remedies...obliges those seeking to bring their case against the State before the Court to use first the remedies provided by the national legal system. Consequently, States are dispensed from answering for their acts before they have had an opportunity to put matters right through their own legal system.²⁷³

While the principle and its connotations are well-established in the European regional human rights system, what is unsettling is the unmitigated campaign and advocacy to make subsidiarity an inevitable and coterminous component of international law that other regional systems must adopt.²⁷⁴ Although a phenomenon more pronounced among non-African commentators, it has been gaining some traction among African writers in recent times.²⁷⁵

While there have been elaborate rationalisations for the inclusion and ascendancy of the subsidiarity principle within the European regional human rights system, including the imperative of balancing the sovereignty of contracting State parties with the need to secure the protection of the human rights treaties binding on them,²⁷⁶ no such principle is found within the normative frameworks of the ECOWAS Court and, in the absence of any such inference, none should be imputed.

To the credit of the ECOWAS Court, its judges have staunchly maintained their untrammelled human rights jurisdiction by rejecting numerous attempts to read in elements of the subsidiarity principle that were never part of its mandate.²⁷⁷ Indeed, in *Etim Moses Essien v. The Gambia*,²⁷⁸ the Court emphatically rejected the preliminary objection raised on the ground of non-exhaustion of local remedies. In the words of the Court,

Whereas the defendant argued that the Court is devoid of its jurisdiction for non-exhaustion of the local remedy as provided in article 50(5) of the African Charter on Human and Peoples' Rights; the Court decides that article 50(5) of the African Charter on Human and Peoples' Rights are available in the proceedings before the Commission on African Charter on Human and Peoples' Rights; and that article 10(d) of the Protocol gave no condition precedent in accessing the Court except where the action *lis pendens* before another international Court.²⁷⁹

In terms of its temporal jurisdiction, it is worthy to mention that compared to any other regional human rights body in Africa and beyond, the ECOWAS Court established itself as a ground-breaking

271 See Protocol No. 15 Amending the Convention for the Protection of Human Rights and Fundamental Freedoms art. 1, June 24, 2013, C.T.E.S. no. 213; see also Protocol No. 16 to the Convention for the Protection of Human Rights and Fundamental Freedoms, Preamble and art. 1, Oct. 2, 2013, C.T.E.S. no. 214 (establishing the right of the highest national Courts to request ECtHR advisory opinions in order to "reinforce implementation of the Convention, in accordance with the principle of subsidiarity").

272 Application No. 53341/99, Judgment of 10 July 2003.

273 Ibid, para 56. For further insights on the place of the subsidiarity principle in the European regional human rights system, see Peter Van Elswege, "On the Boundaries between the European Union's First Pillar and Second Pillar: A Comment on the *Ecovas* Judgment of the European Court of Justice" (2009) 15(3) *Columbia Journal of European Law* 531; Andreas von Staden, "Subsidiarity in Regional Integration Regimes in Latin America and Africa" (2016) 79 *Law and Contemporary Problems* 27.

274 See generally, Andreas Føllesdal, "Subsidiarity as a Constitutional Principle in International Law", (2013) 2 *Global Constitutionalism* 37; Paolo G. Carozza, "Subsidiarity as a Structural Principle of International Human Rights Law" (2003) 97 *American Journal of international Law* 38; Yuval Shany, "Toward a General Margin of Appreciation Doctrine in International Law?" (2005) 16 *European Journal of international Law* 907; Jorge Contesse, "Contestation and Deference in the Inter-American Human Rights System" (2016) 2 *Law & Contemporary Problems* 123.

275 See e.g., Sanele Sibanda, "Beneath It All Lies the Principle of Subsidiarity: The Principle of Subsidiarity in the African and European Regional Human Rights Systems" (2007) 40(3) *The Comparative and International Law Journal of Southern Africa* 425-448; Solomon T. Ebobrah, "A Rights-Protection Goldmine", above note 13; Enabulele, above note 32.

276 See Andreas von Staden, "Subsidiarity, Exhaustion of Domestic Remedies, and the Margin of Appreciation in The Human Rights Jurisprudence of African Sub-Regional Courts" (2016) 20(8) *The International Journal of Human Rights* 1113-1131.

277 So irked was Andreas von Staden that he lamented that the words "subsidiarity", "margin of appreciation" and "deference" never appeared in any of the judgments of the ECOWAS Court to date. See von Staden, above note 43 at 1120.

278 Ruling No. ECW/CCJ/APP/05/05, 14 March 2007.

279 Ibid, para 27(3). See also *Manneh v. The Gambia*, Judgment No. ECW/CCJ/JUD/03/08, 5 June 2008; ECOWAS Court, *Saidykhan v. The Gambia*, Ruling No. ECW/CCJ/RUL/05/09, 30 June 2009, para 11.

human rights adjudicatory institution when it rejected time bar on human rights violations and recognizing the doctrine of continuing violations (“continuous harm”) in *FAJ and Others v. The Gambia*.²⁸⁰ The essence of this decision is that the ECOWAS Court stands out as a protective mechanism for human rights where complaints for human rights violations are unlimited by time.

The sharp distinctions between the African regional human rights system, the East African regional human rights system, and the Southern African regional human rights system, on the one hand, and the West African regional system, on the other, deserve some discussion here.

*I. African Regional Human Rights System*²⁸¹

The African Court on Human and Peoples Rights (“African Court”) is the regional human rights adjudicatory body with advisory and contentious jurisdiction concerning the interpretation and application of the African Charter on Human and Peoples’ Rights, 1981 (“African Charter”) and other relevant instruments. Its jurisdiction extends to those States that have ratified the Protocol to the African Charter on Human and Peoples’ Rights on the Establishment of an African Court on Human and Peoples’ Rights, 1998.²⁸² In addition to deciding cases, the Court may issue advisory opinions and adopt thematic reports. The Court also has jurisdiction to hear cases brought by individuals and NGOs that have observer status before the African Commission on Human and Peoples’ Rights, but only when the relevant State has accepted this jurisdiction by making a declaration to that effect pursuant to article 34 of the Protocol.

Although the African Commission had already been in existence for some time before the ECOWAS, it has continually faced many challenges, chiefly among them is the fact that it is not a real judicial body; the States that have ratified the Charter have no obligation to obey the Commission’s recommendations, and as such the Commission had never been the most effective possible mechanism, making Member States unaccountable for their human rights violations. The African Court that emerged many years afterwards to strengthen the African regional human rights system has also been mired in its own inherent normative, structural and operational limitations, including the doctrinal challenges of subsidiarity that had been integral in the system from inception.²⁸³ With various scholars, jurists, activists and other stakeholders steadfastly advocating the conceptualisation of the African regional system and institutions in terms of the practices and procedures of the European regional system, including the doctrine of subsidiarity and its attendant requirements,²⁸⁴ it is not out of place to rationalise why and how ECOWAS Member States have continuously exploited the loopholes in the regional system’s normative frameworks.²⁸⁵ In terms of mandate, approach and jurisprudence, the ECOWAS Court has etched a distinct character for itself, untainted by the African Commission or the African Court and there is no compelling legal or philosophical reason to subsume the ECOWAS Court under the African regional system or any other model of regional human rights adjudication.

280 Above note 31. See further discussion in Nani Jansen Reventlow, “ECOWAS Court Clarifies Its Human Rights Jurisdiction: No Time Limit Barring Human Rights Complaints and Continuing Violations Are Recognised”, *IntLawGrrls*, 14 Feb 2018, <https://ilg2.org/2018/02/14/ecowas-court-clarifies-its-human-rights-jurisdiction-no-time-limit-barring-human-rights-complaints-and-continuing-violations-are-recognised/> (accessed 11 Oct 2021).

281 For insightful readings on the African regional human rights system, see Gina Bekker, “The Protection of Asylum Seekers and Refugees Within the African Regional Human Rights System” (2013) 13(1) *African Human Rights Law Journal* 1-29.

282 OAU/LEG/MIN/AFCHPR/PROT(I)Rev2.

283 See art 56, African Charter on Human and Peoples’ Rights (“African Charter”), 27 June 1981, CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982). For further exposition, see Nsongurua J. Udombana, “So Far, so Fair: The Local Remedies Rule in the Jurisprudence of the African Commission on Human and Peoples’ Rights” (2003) 97(1) *The American Journal of International Law* 1-37; The International Justice Resource Center (IJRC), *Exhaustion of Domestic Remedies in the African Human Rights System* (San Francisco, CA: IJRC, 2017), 1-11.

284 See, e.g., Andreas O’ Shea, “A Human Rights Court in an African Context” (2000) 26(2) *Commonwealth Law Bulletin* 1313; Chidi Anselm Odinkalu, “The Role of Case and Complaints Procedures in The Reform of The African Regional Human Rights System” (2001) 1(2) *African Human Rights Law Journal* 225.

285 On this point, see the discussion of various cases that were found inadmissible by both the African Commission and the African Court, in IJRC, above note 50.

ii. East African Regional Human Rights System²⁸⁶

The East African Community (EAC) is the regional integration organisation comprising Burundi, Kenya, Uganda, Tanzania, Rwanda, and South Sudan as Member States. The Community's goals are free movement of people and goods, economic integration, and political union among the Member States. Article 6(d) of the Treaty for the Establishment of the East African Community catalogues the fundamental principles designed to guide the EAC as:

good governance including adherence to the principles of democracy, the rule of law, accountability, transparency, social justice, equal opportunities, gender equality, as well as the recognition, promotion and protection of human and peoples' rights in accordance with the provisions of the African Charter on Human and Peoples' Rights.

Article 7(2) of the EAC Treaty States that "[Member States] undertake to abide by the principles of good governance, including adherence to the principles of democracy, the rule of law, social justice and the maintenance of universally accepted standards of human rights. Under article 9 of the EAC Treaty, the East African Court of Justice (EACJ) was established as the judicial organ tasked with the responsibility of resolving disputes involving the East African Community and its Member States. Article 27 of the Treaty provides.

The Court shall have such other original, appellate, human rights and other jurisdiction as will be determined by the Council at a suitable subsequent date. To this end, the Partner States shall conclude a protocol to operationalise the extended jurisdiction.

In sum, while there are spatters of recognition of human rights in the basic law of the EAC, there was no explicit human rights mandate for the EACJ.²⁸⁷ Notwithstanding that the EACJ lacked specific jurisdiction to hear human rights cases and despite the stiff official resistance to its jurisdiction at its onset which is still ongoing, the EACJ has addressed cases involving violation of individual human rights through the expansive interpretation of its mandate under the treaty.

In the case of *James Katabazi & 21 ors v. Secretary General of the East African Community & anor*,²⁸⁸ the EACJ was approached to determine the lawfulness of the detention of some Ugandan prisoners. The EACJ conceded that even though jurisdiction with respect to human rights requires a determination of the Council and a conclusion of a protocol to that effect, both of those steps have not been taken. It follows, therefore, that this Court may not adjudicate on disputes concerning violation of human rights per se... [and that] while it will not assume jurisdiction to adjudicate on human rights disputes, it will not abdicate from exercising its jurisdiction of interpretation under Article 27(1) merely because the reference includes allegation of human rights violation.²⁸⁹

The EACJ also determined that "it will not abdicate from exercising its jurisdiction of interpretation under Article 27(1) merely because the reference includes allegation of human rights violation."²⁹⁰ The Court thus proceeded to "interpret" and "apply" articles 6(d), 7(2) and 8(1)(c) of the EAC Treaty and made a finding that the facts of the case disclosed a violation of the principle of the rule of law

²⁸⁶ For insightful readings on the East African regional human rights system, see Henry Onoria, "Botched-Up Elections, Treaty Amendments and Judicial Independence in the East African Community" (2010) 54 *Journal of African Law* 74; James T. Gathii, "Mission Creep or a Search for Relevance: The East African Court of Justices Human Rights Strategy" (2013) 24 *Duke Journal of Comparative & International Law* 249.

²⁸⁷ See Ally Possi, "Striking a Balance Between Community Norms and Human Rights: The Continuing Struggle of the East African Court of Justice" (2015) 15(1) *African Human Rights Law Journal* 192.

²⁸⁸ Reference No. 1 of 2007, East African Court of Justice, Judgment of 20 November 2007.

²⁸⁹ Ibid, 14-15.

²⁹⁰ Ibid, 16.

and, consequently, a contravention of the Treaty. While the EACJ did not evaluate the claims within a human rights framework, the Court found that the respondent had violated the principle of the rule of law and consequently contravened the Treaty.²⁹¹

In the absence of any clear-cut mention of the subsidiarity elements of exhaustion of domestic remedies or margin of appreciation, the EACJ has shunned applying the usage of these expressions in the human rights cases before it. Notably, and just like the ECOWAS Court, in *Attorney General of Rwanda v. Rugumba*,²⁹² the Court emphatically rejected the requirement of exhaustion of domestic remedies when it held, inter alia, that “[u]nlike other legal regimes in this field, the EAC Treaty provides no requirement for exhaustion of local remedies as a condition for accessing the East African Court of Justice”.²⁹³ It must be pointed out, however, that the EACJ has recognised and applied the margin of appreciation doctrine in disputes related to EAC common market rules.²⁹⁴

iii. Southern African Regional Human Rights System²⁹⁵

The Southern African Development Community (SADC) was established pursuant to the Treaty of the Southern African Development Community, 1992,²⁹⁶ to advance socio-economic cooperation and integration, and political and security cooperation among 15 southern African States, namely: Angola, Botswana, Democratic Republic of Congo, Lesotho, Madagascar, Malawi, Mauritius, Mozambique, Namibia, Seychelles, South Africa, Swaziland, Tanzania, Zambia, and Zimbabwe.

Under article 9 of the SADC Treaty, the Southern African Development Community Tribunal (“SADC Tribunal”) was established, with the function of ensuring adherence to and the proper interpretation of the SADC Treaty and its subsidiary instruments as well as deciding disputes.

While there was no definitive provision in the SADC Treaty or its Protocols on access to the Tribunal by natural and legal persons, besides State Parties, in *Mike Campbell (Pvt) Ltd and Others v. Zimbabwe*,²⁹⁷ the SADC Tribunal ruled that it had competence to hear individual complaints of alleged human rights violations under the purview of its broad mandate. In the Campbell case, a Zimbabwe national had claimed that his human rights had been violated because of the expropriation without compensation of his private property by the Zimbabwean government. The SADC Tribunal upheld this claim.²⁹⁸ It is significant to note that Zimbabwe’s key opposition to the suit was that the claimant had not exhausted local remedies – an allusion to the principle of subsidiarity which the Tribunal rejected.

In the aftermath of this ruling, following a vigorous campaign by Zimbabwe and backed by Tanzania, SADC Summit of Heads of State and Government suspended the Tribunal, agreeing to create a new Court with a mandate limited strictly to the adjudication of inter-State disputes arising from the SADC Treaty and its protocols, rather than international human rights norms. The SADC Tribunal has remained suspended since 2010.

291 See also *Sitenda Sebalu v. Secretary General of the East African Community et al.*, Reference No. 1 of 2010, where the Court held that the failure to extend the jurisdiction of the Court pursuant to Article 27 violated the applicant’s legitimate expectations that the matter be expedited and contravened the principles of good governance stipulated in Article 6 of the Treaty. For a comprehensive review of the work and jurisprudence of the EACJ, see Ally Possi, “An Appraisal of the Functioning and Effectiveness of the East African Court of Justice” (2018) 21 *Potchefstroom Electronic Law Journal* 1.

292 Appeal No. 1 of 2012, EACJ judgment, delivered 1 June 2012.

293 Above, para 35.

294 See, e.g., *East African Law Society v. Secretary General of the EAC*, Case No. 1 of 2011, EACJ Judgment of 14 February 2013; *Kahoho v. Secretary General of the EAC*, Appeal No. 2 of 2013, EACJ Judgment of 28 November 2014.

295 For a comprehensive review of the work and jurisprudence of the SADC Tribunal, see Shane Meckler, “A Human Rights Monster that Devoured No One: The Far-reaching Impact of Dismantling the SADC Tribunal” (2015-2016) 1007-8 *NYU Journal of International Law & Politics* 48; Jörg Kleis, *African Regional Community Courts and their Contribution to Continental Integration* (Berlin: Nomos, 2016) 101-107.

296 Treaty of the Southern African Development Community, 17 August 1992, 32 ILM 120.

297 Case No. SADC (T) 2/2007, Main Decision of 28 November 2008.

298 See also *Barry L.T. Gondo and Others v. Zimbabwe*, Case No. SADC (T) 05/2008, Main Decision of 9 December 2010.

Although the suspension of the SADC Tribunal limits our explorations into its contemporary value, it must nonetheless be mentioned that some of its prominent decisions provide insight into the doctrinal fluidity of the Tribunal. In *Cimexpan v. Tanzania*,²⁹⁹ the Tribunal considered claims of torture in connection with the applicant's deportation. The Court determined that the applicant had not exhausted legal remedies and that he had failed to substantiate his claims of ill-treatment. Ostensibly, in resolving this case, the SADC Tribunal adopted the established doctrinal principles of European regional human rights law, rather than applying any one specific human rights treaty relevant to the SADC region as the ECOWAS Court would do.

The foregoing consideration of the comparative regional human rights regimes broadly reflects the risks and threats engendered by the fluid normative arrangements for human rights protection and adjudication in Africa. Unlike comparable Courts, such as the European Court of Human Rights, the exhaustion of domestic remedies is not a prerequisite for approaching the ECOWAS Court. This allows any individual to entirely circumvent their own country's judicial systems, something which may be desirable for many reasons, such as a belief that they may not get justice within their own State due to corruption or institutional weaknesses, or that they will get a more expeditious and unfair trial through the ECOWAS Court.

While indeed the principle of subsidiarity is relevant and functional within the European regional system, there is no compelling reason to extend its application or operations to the ECOWAS regional system. Three factors buttress this assertion. First, admittedly, the continued embrace and application of the subsidiarity principle aligns well with the experiences of European countries as established democracies and stable polities but the same cannot be stretched to West African States most of which are fragile and weak. Second, related to the earlier point is that in a subregion where democratic tenets and human rights practices are tenuous, the preoccupation of a regional human rights institution with the dual mandate of integration and cultivation of a human rights ethos cannot be in the finer rules and finesse of legal philosophy but in laying solid foundations for the rudiments of human rights to be planted. As at this moment, commitment to, and compliance with human rights treaties remain problematic issues in many West African States. The ECOWAS Court had (and still has) an urgent task of protecting and promoting the catalogues of human rights norms, including social and economic rights, that had remained largely hollow promises for the majority of West Africans. Third, and finally, advocates of the subsidiarity principle often forget that the target audience of the ECOWAS Court are not primarily the States per se but the organized civil society, activists and the ordinary peoples of West Africa who would facilitate the facts and complaints that would feed the Court with the raw materials it requires to ignite human rights culture and conscientisation that the subregion desperately needs. There is no gainsaying the fact that the ECOWAS Court is gaining tremendous goodwill and popularity among ordinary West Africans, a factor that has further enhanced its legitimacy.

IV. The ECOWAS Court and the Impediments to the Fulfilment of Its Human Rights Mandate

Although, by and large, the ECOWAS Court has recorded remarkable impact in its foray into the human rights field despite initial stagnation and lack of jurisdictional clarity in its earlier years, several formidable challenges beleaguer the Court, some of which are intrinsic in its character as a regional adjudicatory body for disparate countries, among which are some of the poorest in the world in terms of democratic practice, respect for human rights, and economic indicators. Other challenges accrue from its expansive jurisdiction on human rights matters. Some other challenges militating against the greater success of the Court are external to its control or capacity.

Some of the more pronounced challenges of the Court pertain to limited infrastructure and operational logistics; number and tenure of judges; absence of an appellate chamber; lack of a legal aid

299 Case No. SADC (T) 01/2009, Main Decision of 11 June 2010.

scheme to assist poor litigants; lack of effective mechanisms for the enforcement of, and compliance with its judgement, including the tenuous relationship between the Court and national Courts; absence of horizontal jurisdiction; and general lack of awareness among the ordinary peoples of West Africa. It will be worthwhile to discuss some of these problems at this juncture.

4-1 Operational Logistics

Although article 26(2) of the Court's Protocol enables the Court to hold its sittings outside the seat of the Court, this provision is hampered by budgetary constraints since the Court is only statutorily allowed two sittings in a year. The effectiveness of the Court is thereby limited in interfacing with the millions of West African peoples who are located across the frontiers of 15 States. It is also no longer a secret that judges and support staff of the ECOWAS Court work under harsh conditions. According to the President of the Court, the personnel of the Court have perennially faced serious accommodation crunch, as the Court does not have sufficient space to accommodate them.³⁰⁰ To these must be added the insufficient numbers of translators whose numbers were reduced from nine to six in the recent organogram of the Court instead of the 12 required. While article 31 of the Protocol of the Court prescribes the languages of the Court to be English, French, and Portuguese, the excessive tardiness in translating Court processes remains an intractable problem.³⁰¹

4-2 Number and Tenure of Judges

Another formidable challenge is the staggered tenure of judges of the Court as well as the reduction of the tenure of the judges from five (5) years renewable to four (4) years non-renewable.³⁰² The decrease in the number of judges from seven to five imposes a massive obstacle in the composition of panels to hear cases, an issue that also implicates the competence of the Court whose Protocol clearly provides that the Court shall consist of seven Members.³⁰³ The staggered nature of the terms of office robs the Court of stability and institutional memory required of an effective supranational judicial body.

4-3 Legal Aid Scheme

Despite the commendable widening of access to justice for individuals, the location of the Court in Abuja, Nigeria, and the associated complications of transportation across the Member States also threaten the people's engagement with the Court. Even with the updated practice of the Court in accepting the electronic filing of cases, the high levels of illiteracy and poverty in the subregion is a threat to its effectiveness. The absence of a legal aid scheme to assist access to justice for victims of human rights abuses who cannot meet the costs of travel, case filing, and legal representation is a formidable threat for the sustained relevance and efficacy of the Court.

4-4 Enforcement and Compliance Mechanisms

Whereas the ECOWAS Revised Treaty and the Protocol on the Court have provisions in respect of the binding nature of the judgments of the Court,³⁰⁴ the efficacy and enforceability of the judgements of the Court have been problematic since the beginning. While judgments of the Court are not appealable, Member States have been picking and choosing what they comply with and how they comply with the Court's orders. At one level of this manifest disconnection is the ineffective process of enforcing judgments while at the other is the disharmony in the relationship between the ECOWAS

300 See News Agency of Nigeria (NAN), "ECOWAS Court Judge Appeal Member States On Enforcement Of Its Judgments", *Vanguard Online*, 30 Sept 2019, <https://www.vanguardngr.com/2019/09/ecowas-court-judge-appeal-member-states-on-enforcement-of-its-judgments/> (accessed 11 Oct 2021).

301 ECOWAS Court, ECOCOURT Newsletter, Special Edition - August 2018, <http://www.Courtecawas.org/wp-content/uploads/2019/02/Special-Edition-Handover-August-2018.pdf> (accessed 11 Oct 2021).

302 See Article 4(1) of the English version of the Protocol of the Court.

303 See art 3(1) of the Protocol A/P.I/7/91 (1991). See also ECOCOURT Newsletter, Special Edition - August 2018, <http://www.Courtecawas.org/wp-content/uploads/2019/02/Special-Edition-Handover-August-2018.pdf> (accessed 11 Oct 2021).

304 Article 5(3) of the ECOWAS Revised Treaty.

Court and the domestic Courts of the Member States.³⁰⁵

Although ECOWAS Member States are required under article 24 of the 2005 Supplementary Protocol of the Court to determine the competent national authority for the receipt and processing of execution of the judgements of the Court in accordance with the rules of civil procedure in each State, only six of the 15 Member States, namely, Burkina Faso, Ghana, Guinea, Nigeria, Mali and Togo, have notified the Court of the designation of the focal points for the enforcement of the decisions of the Court.³⁰⁶

This particularly worrisome challenge was the fulcrum of In the Matter of an Application to Enforce the Judgment of the Community Court of Justice of the ECOWAS against the Republic of Ghana and In the Matter of Chude Mba v. The Republic of Ghana, where the High Court of Ghana declined to order the enforcement of the reliefs granted by the ECOWAS Court in Mr Chude Mba v. The Republic of Ghana,³⁰⁷ where the High Court of Ghana declined to order the enforcement of the reliefs granted by the ECOWAS Court in Mr Chude Mba v. The Republic of Ghana,³⁰⁸ on the singular ground that the decisions of the ECOWAS Court cannot be enforced by the Courts in Ghana because the Republic of Ghana has not domesticated the Protocols of the ECOWAS Court of Justice. The follow-up case in Chude Mba v. Ghana & 15 Ors.,³⁰⁹ for the enforcement of the ECOWAS Court's decision, laid bare the stark reality of the recalcitrance of Member States towards compliance with the Court's orders. The Chude Mba judgment as well as numerous other judgments of the ECOWAS Court that have remained unenforced have only further deepened renewed scepticism about the Court and cynicism in its sustainability.³¹⁰

4-5 Horizontal Application

In the two decades of the ECOWAS Court, the position is now established through a long line of cases that the Court precludes the horizontal application of its jurisdiction. In other words, only Member States of the ECOWAS can be defendants before the Court and not individual persons. This was the tone resoundingly set by the Court in *Peter David v. Ambassador Ralph Uwechue*,³¹¹ *Mamadou Tandja v. Republic of Niger and General Sabou Djibo*,³¹² *The Registered Trustees of the Socio-Economic Rights and Accountability Project (SERAP) v. The President of the Federal Republic of Nigeria*,³¹³ where the Court declined jurisdiction despite the provision of article 9(4) of the 2005 Supplementary Protocol.³¹⁴ The trend set by these decisions limit the material jurisdiction of the Court. It is curious that the Court did not consider that the complaints laid in the three cases implicated socio-economic issues which should have been of concern for a regional economic adjudicatory

305 For a comprehensive discussion on this matter, see Edefe Ojomo, "Competing Competences in Adjudication: Reviewing the Relationship between the ECOWAS Court and National Courts" (2014) 7(1) *African Journal of Legal Studies* 87; Ibrahim, note 1 above.

306 See Hon. Justice Gberi-be Ouattara, "An Overview of the Community Court of Justice, ECOWAS", paper delivered at the annual conference of the African Bar Association (AfBA) in Niamey, Republic of Niger, Oct 2021.

307 Suit No. HRCM/376/15, High Court Ghana, 2 February 2016.

308 Application No. ECW/CCJ/APP/01/13, decided 6 November 2013.

309 Application No. ECW/CCJ/APP/22/16, Judgment No. ECW/CCJ/JUD/30/18, 11 December 2018.

310 See generally, Richard Frimpong Oppong, "The Higher Court of Ghana Declines to Enforce an ECOWAS Court Judgment" (2017) 25(1) *African Journal of International and Comparative Law* 127; David Abraham, "ECOWAS Community Court against the Gambia: A Step Forward and a Step Backward" (2018) 1 *University of The Gambia Law Review* 18; Ibrahim, note 1 above; Cajetan Osisioma, "Is the ECOWAS Court of Justice a Toothless Bulldog that Only Barks? Issues Arising from the Decision of the High Court of Accra in *Mr. Chude Mba v. The Republic of Ghana*", 4 March 2016, SPA AJIBADE & CO., Lagos, Nigeria, http://www.spaajibade.com/resources/wp-content/uploads/2016/03/Is-the-ECOWAS-Court-of-Justice-a-Toothless-Bulldog-that-Only-Bark1.pdf?utm_source=Mondaq&utm_medium=syndication&utm_campaign=LinkedIn-integration (accessed 11 Oct 2021); Sègnonna Horace Adjolohoun, "The Njemanze ECOWAS Court Ruling and "Universal" Jurisdiction: Implications for the "Grand African Human Rights System", Int'l J. Const. L. Blog, Nov. 16, 2017, <http://www.iconnectblog.com/2017/11/the-njemanze-ecowas-court-ruling-and-universal-jurisdiction-implications-for-the-grand-african-human-rights-system> (accessed 11 Oct 2021).

311 Ruling No. ECW/CCJ/RUL/03/10, delivered 11 June 2010.

312 Judgment No. ECW/CCJ/JUD/05/10, delivered 8 November 2010.

313 Suit No. ECW/CCJ/APP/07/10, delivered 10 December 2010.

314 Art 9(4) of the 2005 Supplementary Protocol granted direct access to individuals to the ECCJ for "the violation of human rights that occur in any Member State".

body implementing the broader mandate of regional economic integration.³¹⁵

4-5 Awareness and Visibility

Because of the low levels of literacy and inadequate dissemination of the activities of the ECOWAS Court, the awareness about the Court is invariably limited to the mass of West Africans and observers outside the region who have the capacity for accessing literature about the Court, in hard print or electronically. This limitation has the tendency to make the Court appear elitist. To further worsen this problem, the ECOWAS Court's presence on the internet is limited and its published information and newsletters are often outdated as a quick survey of the Court's website's shows.³¹⁶

V. Advancing the Human Rights Mandate of ECOWAS Court into the Future

Even though theoretically, the ECOWAS Court has etched its footprints in placing human rights squarely on the policy agenda of the ECOWAS beyond where the organisation started from in 1975, there remains quite a lot of efforts to be mustered in making the Court an all-round successful intervention. The reduction in the number of its judges from seven to five, contrary to its original governing instruments, is a subject that the ECOWAS Authority of Heads of State and Government must deal with as a matter of urgency. A corollary to this is the question of increasing the funding to the Court which directly implicates the other problems of the shortage of translators and infrastructure.

Since it was the sovereign States of West Africa that voluntarily created the ECOWAS Court, it is at their desk that the task of enhancing its future must begin. The excuse of lack of fiscal resources to fund the ECOWAS Court is tenuous when the grand corruption and fiscal wastages of some West African States are considered. The solution lies in adequate budgetary prioritisation rather than lack of resources. The visibility of the ECOWAS Court can be increased through regular and periodic hosting of various sectors of the West African society at the seat or the Court as well as well-publicised visitations of the Court's judges and personnel to the populations of Member States. The interface being suggested here goes beyond the customary meetings and seminars with the organised civil society (NGOs) and legal fraternity in Member States but envisages students' bodies, artisans, market women, and other less privileged human groups in these States. Member States should be urged to disseminate the activities and relevance of the Court via national television, radio, other State-owned media and pamphlets in local languages that the ordinary populations will understand. Traditional leaders as well as community-based organisations can also be veritable vehicles of reaching the people at the grassroots. The bottom-line here is repositioning of the Court beyond its seemingly elitist clusters of rapport with West Africans.

Of more crucial importance is how to turn around the culture of non-compliance with and non-enforcement of the judgments of the Court by the ECOWAS Member States

Member States made commitments to comply with the decisions of the Court and the enforceability of the judgments of the Court should not be an issue for legal theatrics as we have seen in contemporary times. By the combined effect of article 15(4) of the ECOWAS Revised Treaty, article 2(1) of the Supplementary Protocol, and article 24(2) and (3) of the Supplementary Protocol, the decisions of the Court are binding on all the Member States, the institutions of the Community, individuals and corporate bodies. Furthermore, article 22(3) of the Protocol and article 5(2) of the ECOWAS Revised Treaty mandate Member States to immediately take all necessary measures to ensure the enactment and dissemination of such legislative and statutory texts as may be necessary for the

315 Enyinna S. Nwauche, "The ECOWAS Community Court of Justice and the Horizontal Application of Human Rights" (2013) 13(1) *African Human Rights Law Journal* 30.

316 The published Bulletins of the Court are only for June 2009 – Jan 2010; Jan – June 2009 and Jan – March 2008. See ECOWAS Court of Justice "Bulletins", <http://www.Courtecawas.org/bulletin/> (accessed 17 Oct 2021). The only available Newsletters are for 2018. See ECOWAS Court of Justice "Newsletters", <http://www.Courtecawas.org/bulletin-2/> (accessed 17 Oct 2021). The Annual Reports available on the Court's website are only for the 2002, 2003, 2004, 2007, 2008, and 2009-2011 periods. See ECOWAS Court of Justice "Annual Reports", <http://www.Courtecawas.org/annual-reports-2/> (accessed 17 Oct 2021).

implementation of the provisions of the Treaty including the execution of the decisions of the Court, in accordance with their constitutions. Why then should we continue to encounter the superficial bottlenecks around compliance and enforcement?

It is submitted that until the provision of article 77 of the ECOWAS Revised Treaty which empowers the Authority of Heads of State and Government of ECOWAS to impose sanctions on any Member State that fails to fulfil its obligations to the community through suspension of new community loans or assistance, suspension of disbursement on on-going community projects or assistance programmes, exclusion from presenting candidates for statutory and professional posts and suspension from participating in the activities of the community, is applied, there may be no change in the fortunes of litigants. NGOs, activists and lawyers within the region have a responsibility not to allow this crucial saving provision to fall into abeyance.

It is further suggested that where the ECOWAS Revised Treaty is directly applicable in a State such as in the monist countries in the subregion, the judgment of the ECOWAS Court is superior to and binding on the national Courts without much ado. In dualist countries where the Revised Treaty is not directly applicable until domesticated, immediate action should be taken by the organised civil society in those countries to submit applicable bills to the appropriate legislative authorities in this regard.

Furthermore, ECOWAS Member States should be galvanised to synchronise their municipal laws with the Court's Protocol by way of constitutional amendments and additionally enact local statutes to authorise applicable superior Courts to enter judgments of the ECOWAS Court as they would do to foreign judgments. Of course, there is always the rhetoric of lack of political will, but these are positive steps that can be taken to advance the legalism of the present dilemmas. Ordinary West Africans and the civil society should embrace this task head-on.

VI. Conclusions

The evolution of the ECOWAS Court to the establishment of the right of access to justice marked a watershed where substantial obstacles that were placed in the way of unrestrained access to Courts were consigned to history. The anachronistic prohibition of legal proceedings against the State by individuals; the bulwarks of subsidiarity principle (including exhaustion of domestic remedies and margin of appreciation doctrines) as well as restrictive time limit have all become historical relics as far as the ECOWAS Court is concerned.

In procedural and substantive terms, the ECOWAS Court has enlarged the scope of access to justice for West African peoples more than ever seen before. On many fronts, the Court has carved a niche for itself as a progressive regional human rights Court in the 21st century. The kernel of the arguments and advocacy in this paper is to advance the retention of the ECOWAS Court in its own character rather than rendering it subservient, through flawed normative interpretations or other extrinsic persuasions, to any other regional human rights system model that might weaken its potentials.

While not shying away from the problems and challenges that limit the efficacy of the ECOWAS Court, this paper has examined the ways in which the mandates and jurisdictions of the ECOWAS Court, among other subregional Courts, transitioned from its original mandate as a regional integration Court to a vibrant human rights Court. Contending and indicating that jurisdiction and mandate are essential to the pursuit of human rights before RECs, this paper accentuated the specific ways in which the mandates and jurisdiction that States, activists, RECs, and the Courts themselves interact to deploy, enlarge or reduce the mandates and jurisdictions of the REC Courts under analysis. The effort here demonstrates through doctrinal and empirical analysis how African REC Courts provide veritable platforms for activists and victims of human rights violations in West Africa to seek justice and hold their governments accountable. It is shown that severe restrictions or lack of access to a

regional human rights Court is the most formidable impediment to the aims of pursuing remedies in such fora that many populations who are affected by human rights issues have. Unmistakably, the paper showed how activists and local populations can utilise the ECOWAS Court to force accountability and transparency from otherwise recalcitrant governments in the West African subregion.

Far from being an ex-cathedra pronouncement on all the dynamics that should inform modalities for enhancing the ECOWAS Court in its future roles and responsibilities, this paper would have served its purpose if it stimulates further discourses in these regards

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SUB-THEME 4

THE RELATIONSHIP BETWEEN THE ECOWAS COURT OF JUSTICE AND THE NATIONAL COURTS OF MEMBER STATES

JUDICIAL INTERACTIONS IN THE ECOWAS FRAMEWORK: TRAVAILS OF AN INCHOATE LEGAL ORDER?

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I. Introduction

If the reflections of one of the founding fathers of the Economic Community of West African States (ECOWAS) are anything to go by, at inception, ECOWAS was not intended to operate in a manner that allowed for the transfer of significant governmental powers from its Member States to the organisation or its organs and institutions.³¹⁷ For General Yakubu Gowon and his peers, integration in West Africa, as far as it was taking place under the ECOWAS framework, was to occur in an intergovernmental and not a supranational fashion. No new legal order was envisaged beyond the existing national and international legal orders. The feeling was that “a highly developed sense of participation seemed to promise better and more lasting results both in the short and long term, than a brief and pointless display of high-handed efficiency by bureaucrats who lack the means to impose their policies”.³¹⁸ In other words, in line with regular international law, the founding Treaty of ECOWAS was signed and ratified by the contracting Member States in accordance with their national constitutional requirements, and ECOWAS was to be governed by the Member States themselves making treaties by whatever name they choose. Neither the organs nor the institutions of ECOWAS were supposed to make rules for Member States and their national institutions.

As for the ECOWAS judicial organ, the founding fathers, according to Gowon, conceived only of “a Community Tribunal to adjudicate disputes among Member States arising from the application of the Treaty ...” notwithstanding the fact that the Tribunal was also “viewed as an embryo Court of Appeal for the region as a whole”...³¹⁹ A definite and limited role was intended for the judicial organ in the integration of West Africa. While the idea of a regional “Court of Appeal” suggests that there was an expectation of a concrete, (possibly) hierarchical relationship with the Courts of Member States, nothing seemed to have followed such an expectation. Instead, since like the “bureaucrats”, the Community Tribunal would have lacked the “means to impose their policies” or decisions, even the 1975 founding ECOWAS Treaty had very little to say about the Tribunal or its future relationship with the national legal systems of ECOWAS Member States.³²⁰ The 1991 Protocol³²¹ which eventually brought the ECOWAS judicial organ into existence as the Community Court of Justice also had little or nothing to say about the Court’s relationship with the national Courts of ECOWAS Member States. Forty six (46) years after ECOWAS came into existence and twenty (20) years after the establishment of the ECOWAS Community Court of Justice (ECCJ), a few questions have emerged and remain unanswered. This paper engages two of such important and somewhat connected questions relating to ECOWAS and the functioning of the ECCJ. First, this paper asks and tries to answer questions on the present nature of the legal order operational in ECOWAS. In this regard, this paper teases questions such as whether there is such a thing as “the ECOWAS Community Order” distinct from the generally operating principles of public international law, and what comprises in an ECOWAS Legal Regime, if such a regime actually exists. This paper further, modestly investigates the nature of the relationship, if any, existing between the ECCJ and national Courts of ECOWAS Member States, as well as the interactions envisaged and occurring to date, between the ECCJ and national Courts. The main thesis of the paper is that there is as yet no clear interactions between the ECCJ and national Courts of Member States because of the inchoate character of the emerging ECOWAS legal order. In order to establish the thesis, I engage in a critical analysis of archival and current documents as well as the case law of the ECCJ and of some national Courts (the latter, mostly from

317 See generally, Y Gowon, (1984) *The Economic Community of West African States: A Study in Political and Economic Integration*, unpublished PhD thesis submitted to the University of Warwick, p24 stating that “we did not ... envisage a strong regional administration for the community, or delegation of substantial powers to its executive institutions...”

318 Gowon (1984) 24.

319 Gowon (1984) 403.

320 Arts 4(e) and 11 of the 1975 ECOWAS Treaty simply established the Tribunal and mandated the ECOWAS Authority (Heads of governments of Member States) to prescribe the parameters for its functioning.

321 See ECOWAS Supplementary Protocol A/SP.1/01/05 Amending the Preamble and Articles 1, 2, 9 and 10 of Protocol A/P.1/7/91 Relating to the Community Court of Justice and Article 4 Paragraph 1 of the English Version of the Said Protocol (2005 Court Supplementary Protocol).

secondary source materials). In parts of the paper, a modest comparative approach is applied with the European Union and its organs and institutions as the main comparators.

II. Delineating and identifying the ECOWAS legal order

It was Hans Kelsen who described a **legal order** as “an aggregate or a plurality of general and individual norms that govern human behaviour that prescribes in other words, how one ought to behave”.³²² Kelsen then went further to contend that “a plurality of norms is an order if the norms constitute a unity, and they constitute a unity if they have the same basis of validity.”³²³ To prepare the grounds for examining the nature of judicial interactions within the ECOWAS framework, this section of my paper engages the question whether there is such a distinct, identifiable and recognisable thing as an ECOWAS Community legal order or any similar juridical framework on which judicial interactions do or can take place.

In the much-celebrated case of **Koraou v Niger**,³²⁴ the ECCJ made reference to “the Community lawmaker of ECOWAS.” While this reference by the ECCJ was not the first and certainly not the only use of “Community” as a prefix in the context of ECOWAS or ECOWAS governance framework, the Court’s usage triggered the image of a distinct and autonomous legal system or order, complete with its own law-making, law-interpreting and law-executing organs.³²⁵ In some ways, the ECCJ’s references to Community law and other acts and Statements within the ECOWAS space relating to the imagery of a distinct governance structure invokes a comparison with the European Union (EU)’s claim to an autonomous legal order. And as some commentators have pointed out, the EU’s “claim to a legal order autonomous from Member State law” is “the single most far-reaching and probably most disputed principle of the European Community (EC) and of the European Union ...”³²⁶ In fact, it is the European Court of Justice (ECJ) (now the Court of Justice of the European Union (CJEU)) that led the EU’s claim to an autonomous legal order when it pronounced in its ruling in **Van Gend en Loos v Nederlandse Administratie der Belastingen (Van Gend & Loos)**,³²⁷ that the conclusion to be drawn from its holistic reading of the relevant documents of the EC was that “the Community constitutes a new legal order of international law for the benefit of which the States have limited their sovereign rights, albeit within limited fields, and the subject of which comprise not only Member States but also their nationals.”³²⁸ Some of the implications of the claim to a distinct and autonomous “new legal order of international law” were outlined by the ECJ in the same ruling when that Court said “Independently of the legislation of Member States, Community law therefore not only imposes obligations on individuals but it is also intended to confer upon them rights which become part of their legal heritage.”³²⁹

The significance of the “new legal order of international law” both for the EC/EU and for organisations like ECOWAS that are largely fashioned on the model of the EC/EU³³⁰ is best appreciated by taking a step back to summarise the legal orders that existed prior to the emergence of the European legal order. First, there is the national legal order of each Member State of the EC/EU. The national legal

322 H Kelsen, “The Concept of a Legal Order”, (1982) 27(1) The American Journal of Jurisprudence, 64.

323 Ibid..

324 (2004 – 2009) CCJELR, 200 at 227.

325 See Kelsen (n6 above) on the description of a legal order establishing bodies that further the division of the labour of governance and administration of law in terms of legislative, judicial and administrative functions.

326 See T Schilling, “The autonomy of the community legal order: An analysis of possible foundations”, (1996) 37(2) Harvard International Law Journal, 389.

327 Case 26/62 Van Gend & Loos [1963] ECR 1 -30.

328 Van Gend (as above), 12. See for instance, Alec Stone Sweet, „The Juridical Coup d’Etat and the Problem of Authority, 8 (10) German Law Journal, 915 for the idea that the twin principles of supremacy of the EC Treaty and direct effect of the Treaty and EC Directives is a creation of the European Court of Law not provided for, or contemplated by the EC Member States at the negotiation and adoption of the relevant treaties.

329 Van Gend & Loos, as above, n 11

330 See Gowon, n1 above, who asserts that the EC and the old East African Community (EAC) were some of the inspirations that the founding fathers of ECOWAS looked up to in their creation of ECOWAS.

order is the traditional legal system comprising of the Austinian sovereign (with authority to make binding law through the legislature, which is then interpreted by the Courts, and executed by the government or administration). Following HLA Hart's analysis, a mature national legal order combines primary or basic rules (that confer rights and impose duties with or without the consent of those affected); and secondary rules that confer powers on individuals or institutions to introduce new primary rules or extinguish or modify existing primary rules by their words or acts.³³¹ The secondary rules, as rules of recognition, once accepted, provide both private persons and officials with "authoritative criteria for identifying primary rules of obligations."³³²

Usually, in the Constitution of each State, the officials or offices with authority to create binding legal obligations by words and or acts are spelt out in the same way conditions upon which primary rules from elsewhere can become binding in the legal system are also spelt out.³³³ In these national legal orders, law is generally made by the parliament (or those to whom parliament delegates its powers) or by the Courts through their judicial pronouncements in the form of case law.³³⁴ No intervening action is required to create binding rights or obligations on the citizens. The norms of the given legal order function and derive their validity from the highest norm of the self same order, requiring no permission from elsewhere, and neither making compulsory reference to, nor deferring to norms of another order in the interpretation and application of the national norms.³³⁵ Thus, each national legal order is a complete autonomous legal system recognised by both its officials and citizens as such. Once a rule or law proceeds from a source validated by the applicable rules of recognition, officials and citizens do not hesitate to apply and or comply with the rule of law. Another distinctive feature of the national legal order is that it is "bordered" so that its force is restricted to the national territorial borders.³³⁶ Interpretation and judicial application of (national) law in the national legal order is assigned to a network of Courts and other similar bodies belonging to, and existing in, a hierarchical relationship within that national legal order.

The international legal order also predates the European legal order. It is generally accepted that the international legal order operates in a manner distinct from the national legal order in the sense (amongst others) that, it ordinarily lacks a sovereign of the Austinian mould. Thus, a major feature of the international legal order is that traditionally, States that are the objects and subjects of the legal order are also simultaneously the law makers and law executors, usually only engaging bureaucrats to undertake administrative jobs and legal experts for interpretation of instruments and dispute settlement.³³⁷

Significantly, the legislative, policy and other similar outputs of a regime operating under the international legal order would only create binding legal effects on States and (to some extent) international organisations and individuals at the *international level*. This means effectively that national Courts would ordinarily lack material jurisdiction over sources that belong to the international legal order.

331 Generally, see HLA Hart, (1994) *The Concept of Law* (2nd Ed), Oxford: Oxford University Press, (1994) - 81 – 102.

332 Hart, (as above) 100.

333 For instance, sections 4, 5 and 6 of the 1999 Constitution of Nigeria spells out the arms of government and expressly or implicitly confers authority on incumbents to bind Nigerian citizens with primary rules arising from the words and or acts of the incumbents. Section 12 of the 1999 Constitution of Nigeria then spells out the conditions upon which primary obligations arising from treaties can become binding in the Nigerian legal system.

334 Kelsen, n6 above 73, also asserts that „the norms of a legal order are created by individuals who are empowered by the legal order to do so“.

335 See also Stone Sweet, n12 above, 925 on the idea of a national Court making decisions with reference and deference to norms of another legal order.

336 Also see A Wiener, "The embedded Acquis Communautaire Transmission Belt and Prism of New Governance" (1998) 3 *European Journal of Law*, 294 on the general idea of how "*debordernisation*" distinguishes the EU legal order.

337 Again, I refer to Kelsen, n6 above, 73, who differentiates the international legal order from the national legal orders primarily on the ground that unlike the national legal order which operates in States where the legal order is centralised with established division of labour and separation of powers, the international legal order is akin to a primitive legal order where in the absence of bodies comparable to those that function in the national orders, „norms are created by way of customary practice and are applied by are the legal subjects themselves“.

Accordingly, in actions before such national Courts, citizens may only enjoy and or invoke rights and suffer detriments arising from sources of the international legal order if there is some sort of intervening national legislative or other action.³³⁸ Thus, international law, whether at its highest level of operation (what Kelsen christians „the so-called general international law“ by which he means customary international law applicable to all States) or the relatively lower level (treaty-based international law that applies only to States that are party to the given treaty regime) does not constitute a frame of reference for national norms and national Courts.³³⁹ The international legal order is therefore essentially a large and common canvass on which States may relate and condition their own behaviour (sometimes with consequences for non-State actors) while operating either on the basis of customary international law or the law of treaties. On this large canvass known as the international legal order, groups of State may create or establish regimes but not independent legal orders. Regime in this sense may be what Krasner broadly defines as „implicit or explicit principles, norms, rules and decision-making procedures around which actors“ expectations converge in a given area of international relations“.³⁴⁰ Regime may equally be understood as „multilateral agreements among States which aim to regulate national actions within an issue-area.“³⁴¹

Separate and distinct from the national and the international orders described above is the EC/EU“s „new legal order of international law“ which stands out as a third possible type of legal order. Scholars and other informed commentators on the EC/EU and European law generally seem to agree with the ECJ/CJEU that there is a distinct legal order and it is different from either the national legal order or the international legal order.³⁴² Weiler and Haltern try to capture the distinctiveness of this „new order“ in their observation that „the „newness“ of the legal order is characterised as „constitutional“ and the the process of „constitutionalization.“³⁴³ They quickly add that the „subjects of the new order are said to be not only States, but also individuals“.³⁴⁴ In a different paper, Weiler describes „constitutionalism“ as the „DOS or Windows of the European Communities“.³⁴⁵ He asserts that „Constitutionalism, more than anything else, differentiates the community from other transnational systems“.³⁴⁶ This constitutionalism in the EC/EU which distinguishes it from the other two legal orders is described by Alec Stone Sweet as „the process by which the EC treaties evolved from a set of arrangements binding upon sovereign States, into a vertically integrated legal regime conferring judicially enforceable rights and obligations on all legal persons and entities, public and private within the sphere of application of EC law“.³⁴⁷ de Areilza captures Europe“s new legal order in different words. He asserts that „the originality of the EC governance is typically summarised in the word supranationalism.“³⁴⁸

338 The nature of the intervening national action or other action usually depends on whether the State falls under the broad categorisation of dualist or monist legal systems.

339 Generally see Kelsen, n6 above, 73 - 74. Kelsen also mentions what he calls an even lower level of international law - comprising of norms „posited by international bodies that are established by State treaty“. This lowest level is perhaps the starting point of Community legal frameworks as we find in ECOWAS and may well have been the take off point for more sophisticated transnational system like the EC/EU. I intend to briefly describe this latter level of the international order as a separate order under the EU framework. As such, I leave it out at this point.

340 S Krasner, „Structural Causes and Regime Consequences: Regimes as Intervening Variables“, (1982) 36(2) International Organizations, 185, 186.

341 O Young, Resource Regimes: Natural Resources and Social Institutions, cited in H Stephan and BA Simmons, „Theories of International Regimes, (1987) 41(3) International Organization, 491, 495.

342 See generally, JHH Weiler & UR Haltern, „The Autonomy of the Community Legal Order - Through the Looking Glass“ (1996) 37 Harvard International Law Journal, 411; E Stein, „Lawyers, Judges and the Making of a Transnational Constitution (1981) 75(1) American Journal of International Law, 1; H Lindahl, „Acquiring a Community: The Acquis and the Institution of European Legal Order“, (2003) 9(4) European Law Journal 433.

343 Weiler & Haltern, n26 above, 420.

344 As above.

345 JHH Weiler, „The Reformation of European Constitutionalism“, (1997) 35 journal of Market Studies, 97.

346 Weiler (1997), n29 above, 98.

347 Cited by Weiler (1997), n29 above, 97.

348 J de Areilza, „Sovereignty or Management? The Dual Character of the EC“s Supranationalism Revisited“ (1995) available at <https://jeanmonnetprogram.org/archive/papers/95/9502ind.html> (last accessed 21 Oct 2021).

The literature and commentaries on the EC/EU thus, push the argument that this idea or concept of constitutionalization is different from the operational model of the international legal order. Hence, Stein for instance makes the point that „from its inception ... the Court has construed the European Communities Treaties in a constitutional mode, rather than employing the traditional international law methodology.“³⁴⁹ Weiler and Haltern also make reference to what they term „rupture with, or mutation from public international law into a constitutional legal order.“³⁵⁰ In other words, this new legal order of the EC/EU creates legal and policy possibilities that are unavailable and perhaps impossible in the more widely known and accepted international legal order. In some ways, the emergence of the „new legal order“ from the canvass of the international legal order could well even be described as a breach of that international order to the extent that basic operating rules in the manual of the international legal order are breached in the process of creating Europe’s new legal order.³⁵¹ Hence, most observers will agree that the doctrines of supremacy of European law, and of direct effect amongst others, are peculiar to the EC/EU and are not compatible with the general idea of how public international law in general and the law of treaties in particular are known to operate. Weiler and Haltern frame it differently in their contention that the features that „distinguish the European legal order from public international law“ include „the different hermeneutics of the European order, its system of compliance which renders European law in effect a transnational form of „higher law“ supported by enforceable judicial review as well as the removal of the traditional forms of State responsibility from the system.“³⁵²

Notwithstanding whatever reservations anyone may have about the accuracy of the details of the new legal order, the preceding discussion arguably shows that the EC/EU’s claim to a distinctive legal order can not be taken lightly. The question that then arises is whether ECOWAS as we know it today can stake an equal or comparable claim to a distinct, identifiable and recognisable Community legal order that operates in contradiction and in violation of the rules of the national and international legal orders.

The 1975 founding ECOWAS Treaty is perhaps the best evidence that at inception, ECOWAS, like the EC/EU and most other congregation of sovereign States was intended to proceed on the broad canvass of, and thus, the principles of public international law.³⁵³ As already demonstrated earlier in this paper, that meant that prospective Member States of ECOWAS negotiated a treaty in international law through their governments (or representatives of such governments) and opened up the agreed treaty for ratification by those States that were still willing to belong to the newly established organisation.³⁵⁴ The requirement for ratification and the description of the organs and institution of the Community and the powers of each organ are indications that the founding fathers did not desire and did not envisage that their newly established organisation operate outside the generally accepted rules of inter-State relations under the law and practice of treaty making in public international law. Further, in the 1991 Protocol establishing the ECCJ, the competence required for appointment as a judge of the Court was „recognised competence in international law.“³⁵⁵ This position does not appear to have been advanced beyond the expectations of the founding fathers up until the amendment of the 1975 founding ECOWAS Treaty by the 1993 Revised Treaty. However, in the two decades after the adoption of the Revised Treaty, the heads of States and governments of ECOWAS Member States have adopted supplementary protocols that seem to suggest a desire

349 Stein, n26 above, 1.

350 Weiler & Haltern (1996) 420.

351 Also see Lindahl, n26 above.

352 Weiler & Haltern (1996) 420.

353 In relation to the EC/EU on this point, see A Stone Sweet, „The Juridical Coup d’Etat and the Problem of Authority“, 8(10) German Law Journal 915, stressing the point that „the Member States neither provided for the supremacy of the Treaty, nor for the direct effect of the Treaty or of EC Directions“.

354 Generally see Gowon, n1 above.

355 see art 3 of the 1991 Protocol of the ECCJ.

to push towards the emergence of a distinct community legal order or at least something beyond the operational practice of regular public international law.

Two examples will suffice to make the point. First in further amendment of the Revised ECOWAS Treaty, Member States tried to introduce a new „Legal Regime of the Community“ by substituting a new article 9 for the original article 9 of the Revised ECOWAS Treaty.³⁵⁶ By that amendment, ECOWAS Member States sought to introduce the principle of direct effect such that for instance, „Supplementary Acts“ which were to replace protocols and treaties as the legislative instruments of ECOWAS were to be „binding on Community institutions and Member States, where they shall be directly applicable ...“. ³⁵⁷ Apart from the fact that this new regime may have since been abandoned as indicated by a return to the previously existing status quo,³⁵⁸ adoption of the new regime was an inaugural step that was not concluded as it was not met with a critically required corresponding national legislative action by the same Member States.³⁵⁹ Kelsen recognises the challenge in seeking to validate two contradictory legal norms without some unifying action.³⁶⁰ Etinski seems to corroborate this position in the view that „the establishment of compatibility between certain legal systems requires sometimes, a substantial change in one of them.“³⁶¹ So for instance, in order for the European legal order to successfully operate within the national legal orders of States like the United Kingdom and Ireland, deliberate constitutional actions were required to accommodate European law.³⁶² To the best of my knowledge, no comparable legislative or other constitutional action was - or has - been taken by any ECOWAS Member State to accommodate the supranationality sought to be introduced by the 2006 Supplementary Protocol to create a distinct ECOWAS Community legal order.

A second, seemingly minor legislative action by the ECOWAS heads of State and government that occurred in the same year 2006 with significance for our subject matter was the amendment of the competence requirement for appointment as a judge of the ECCJ. A new article 3(1) introduced to amend the 1991 Protocol expanded the requirement to read „competence in international law, particularly in areas of Community Law or Regional Integration Law.“³⁶³ While it is clear that the drafters and or the heads of State and government may have recognised that international law may be distinct from community law or regional integration law (hence, recognition that a distinct community legal order is possible), it is not clear if they intended to inaugurate or to merely proclaim the existence of such an ECOWAS Community legal order; or even whether they assumed that a global Community legal order based on regional integration law exists. Either way, this is insufficient to affirm the existence of an ECOWAS Community Order that operates in some contradiction to regular international law. Having gone to all this length to prove that no such ECOWAS Community Legal Order currently exists or at least to show that if it exists, it is obviously not identifiable and recognisable as distinct from the public international law legal order, I adopt a short cut by relying on my earlier mention of the idea of a regime to suggest that in the multitude of legal instruments and case law available in the ECOWAS framework, it is safe to assert that an ECOWAS legal regime does exist. It is on the framework of such an ECOWAS legal regime that I examine the bases for judicial interaction between the ECCJ and national Courts of ECOWAS Member States.

356 See art 2 of Supplementary Protocol A/SP.1/06/06 of 2006.

357 See the introduced art 9 in Supplementary Protocol A/SP.1/06/06 of 2006.

358 Supplementary Act A/SA.3/01/10 Amending New Article 9 of the ECOWAS Treaty as Amended By Supplementary Protocol A/SP.1/06/06 provides for a new art 9(3) which provides that „It is incumbent on Member States and Institutions of the Community to abide by the Supplementary Acts ...“.

359 On the idea of crafting a new order into being by actions or pronouncements that constitute an inaugural step, see Lindahl, n26 above.

360 Kelsen, n6 above, 74 - 75.

361 R Etinski, „Various Types of Interactions between legal systems within European and International Legal Order“, (2017) LAW Series of the Annals of the West University of Timsoama, 5, 6.

362 As above. Also see P Norton, „Divided Loyalties: The European Community Act 1972“ (2011) The Parliamentary History Yearbook, 53 (showing the deliberate constitutional actions taken by the United Kingdom to accommodate European law).

363 See art 2 of Supplementary Protocol A/SP.2/06/06 Amending Article 3 Paragraphs 1, 2 and 4, Article 4 Paragraphs q, 3 and 7 and Article 7 Paragraph 3 of the Protocol of the Community Court of Justice.

III. Bases for judicial interaction in the ECOWAS framework

A proper starting point for the discussion in this section of this paper is to recall the revelation that in some quarters, even before it was established, the judicial organ of the ECOWAS Court (the Community Tribunal under the 1975 founding Treaty) was already conceptualised as a future „Court of Appeal for the entire region.“³⁶⁴ However, as already shown earlier in this paper, the details of the functioning of the judicial organ was left for the heads of State and government to determine by sovereign legislative action. Indeed, as set out in the original article 9(4) of the 1991 Protocol, the ECCJ was expected to have and exercise the powers “conferred on upon it, specifically by the provisions of this Protocol“. This invites an interpretation that the clear message to the ECCJ was that it was not allowed, and so could not exceed the express powers conferred by the political drivers of ECOWAS. While it is speculative, a thinly veiled message to the Court in the provision would be a directive to stick to strictly literal as against a robust and teleological approach to interpretation by the ECCJ of its judicial mandate and powers. This may well explain the approach adopted by the ECCJ in the very early case of *Afolabi Olajide v Federal Republic of Nigeria*³⁶⁵ where the Court after hearing the parties on the preliminary objections raised by the Respondent, first acknowledged the preeminence of the Member States in the ECOWAS regime,³⁶⁶ then declared a strict and limited role for itself.³⁶⁷ In other words, if the political actors - the Member States - have made no express indication of an intention to permit interactions between the ECOWAS regime (and the ECCJ) on the one hand, and national legal orders and national Courts, on the other hand, such interactions were not going to happen.

It is also significant to recall that in the original article 9(1), the competence of the ECCJ was to “ensure the observance of law and the principles of equity in the interpretation and application of the provisions of the Treaty“.³⁶⁸ The original article 9(3) of the 1991 Protocol relating to the right (or obligation) of a Member State to institute proceedings on behalf of its citizen against another Member State before the ECCJ is in relation to „the interpretation and application of the provisions of the Treaty“. The 1991 Protocol made no provisions for the preliminary ruling, even though at the time of its adoption, the European model and practice of the preliminary ruling procedure was available to inspire both the drafters and the heads of State and government, that option was not seized. However, in article 18 of the 1991 Protocol, provision was made to permit the Court to “request the judicial authority of his place of residence to hear the evidence of a witness or an expert“ in accordance with the Rules of the ECCJ. Thus, it is safe to conclude that under the 1975 founding Treaty and the 1991 original Protocol of the ECCJ, there was no intention to facilitate any interactions between the ECCJ and the national Courts of ECOWAS Member States beyond the rare possibility of requesting a national Court to take evidence on behalf of the ECCJ in accordance with ECOWAS Community law. It is therefore not surprising that no such interactions occurred before the adoption of the 2005 Supplementary Protocol of the Court.

A clear departure from the regime of restricted judicial operation described in the preceding paragraph can be discerned right from the Revised Treaty up to the 2005 Supplementary Protocol and onwards. Unlike the very bare provisions in article 11 of the 1975 Original ECOWAS Treaty relating to the Tribunal of the Community, article 15 of the 1993 Revised ECOWAS Treaty was expansive enough to recognise the right of the ECCJ to “carry out the functions assigned to it independently of the Member States and the institutions of the Community“. For what it is worth, in the face of such

364 Gowon, n1 above.

365 (2004 - 2009) CCJELR, 1.

366 *Afolabi Olajide* case as above, para 52 where the Court declared that the contracting parties are the Member States and therefore, the duty of the Court was to „collect from the nature of the subject, from the words and from the context of the Protocol, the true intent of the contracting parties when the provisions of a statute are apt and clear“.

367 Para 55 of the *Afolabi Olajide* case, where the ECCJ stressed the point that „the Court is not here to change the provisions of the Protocol but to apply it when it is clear or interpret it when it is abstruse and ambiguous“.

368 It has to be borne in mind that these provisions have changed slightly since then.

provisions, an activist Court would not feel bound to remain within the confines of a judicial mandate narrowly defined by Member States. The room for judicial manoeuvre and thus, room for self directed interaction with the national Courts of Member States arguably also opened up for the ECCJ with the change in the tone and language of provisions relating to the Court in the protocols adopted after the *Afolabi Olajide* case. Thus for instance, in the preamble to the 2005 Supplementary Protocol, Member States expressed consciousness “of the role the Court of Justice can play in eliminating obstacles to the realization of Community objectives and accelerating the integration process.”³⁶⁹ Member States also went on to express a conviction „of the need to empower the Community Court of Justice to play their part in effectively ensuring that Member States fulfill their obligations.”³⁷⁰ Similarly, in a 2006 Supplementary Protocol on the ECCJ, ECOWAS Member States acknowledged the „need to appoint to the Community Court of Justice competent judges who can contribute, through the quality of their decisions, to the development of Community law, capable of consolidating and speeding up the regional integration process.”³⁷¹ With these expressions of intention to involve or at least allow the ECCJ to play an independent facilitating role in the integration through the adjudicatory process, the stage is set for examining how the legal framework envisages ECCJ interactions with national Courts for the realisation of integration objectives. No less than four different forms of interactions are identifiable in the ECOWAS legal framework, with different implications for the nature of the interactions. I present the possible forms of interaction in no particular order of importance.

Apparently based on inspiration drawn from the EC/EU integration experience, the new article 10 (f) relating to the preliminary ruling procedure is one important form of potential interaction between the ECCJ and national Courts.³⁷² The provision permits national Courts (either on their own or at the request of a party) to refer an issue involving the interpretation of a source of ECOWAS Community law to the ECCJ for the latter Court’s interpretation. In the European legal order, the preliminary ruling procedure is the backbone of the integration project.³⁷³ It is equally the “formal avenue” and recipe for dialogue in the European legal order.³⁷⁴ A significant point to note is that in the context of Europe, jurisdiction over the sources of law are considered to be shared between the ECJ/CJEU and national Courts since national Courts are deployed as European Courts for the purpose of integration. While European scholars insist that there is no relationship of hierarchy in the preliminary ruling procedure, with national Courts (apart from Courts of final instance) under no compulsion to refer cases but bound by decisions of the CJEU where a reference has been made and a ruling delivered, outsider views may not align with this position. A critical element however, is that the ruling only interprets and speaks to the application of European law. The ECJ/CJEU has no competence to rule on or annul national law. Only the referring national Court or other national Courts following the ruling in their own contexts can annul national law.

The seeming fixation on the functioning of the preliminary ruling procedure is necessitated by the dearth of ECOWAS experience in this area. However, based on the formulation of the provisions, it can be speculated that the ECCJ is not intended to act as a Court of appeal or a supervising Court over national Courts even in relation to matters of ECOWAS law. Similarly to Europe, the ECCJ may “advise” national Courts on the interpretation of ECOWAS law but the decision to apply to the case before it is totally that of the national Court. Further, similar to Europe, the ECCJ cannot claim or exercise powers to review and or invalidate national law.

369 See the 7th paragraph of the Preamble to the 2005 Supplementary Protocol of the ECCJ.

370 Para 8 of the Preamble to the 2005 Supplementary Protocol of the ECCJ.

371 Para 7 of the Preamble to Supplementary Protocol A/SP.2/06/06 Amending Article 3 Paragraphs 1, 2 and 4, Article 4 Paragraphs q, 3 and 7 and Article 7 Paragraph 3 of the Protocol of the Community Court of Justice.

372 See art 4 of the 2005 Supplementary Protocol of the ECCJ.

373 C Lacchi, „Review by Constitutional Courts of the Obligation of National Courts of last instance to refer a Preliminary Question to the ECJEU”, 16(6) German Law Journal 1663, refers to the preliminary ruling procedure as the keystone of the EU judicial system.

374 M Claes & M de Visser, „Are you networked yet? On dialogue in European Judicial Network, Utrecht Law Review

In Article 24 of the ECCJ Protocol,³⁷⁵ the hint of another potential for interaction can be detected in the provision relating to the implementation of the judgments of the Court. Article 24 (2) requires that at the issuance of a writ of execution by the Registrar of the ECCJ, Member States are to ensure execution of the judgment “according to the rules of civil procedures”. Implicit in this provision is room for interaction between the ECCJ that has delivered the judgment and the national Courts based on whose rules of procedure execution of the judgment may take place. The provision also implicitly invites judicial dialogue between the ECCJ and national Courts if the procedure in those Courts require judicial examination of the judgment to be implemented as a precondition for execution. The interaction envisaged under this procedure cannot be hierarchical as it envisages the cooperation of the national Court more than anything else.

As already mentioned above in this work, under the old article 18 of the 1991 Protocol,³⁷⁶ the ECCJ may invite a national Court to take evidence of a witness or an expert on behalf of the ECOWAS Court. While this procedure has not been put to use (to the best of my knowledge), it is another potential opportunity for judicial interaction between the ECCJ and the national Courts. Here as well, no relationship of hierarchy is envisaged as the national Court would only be cooperating with the ECCJ at its discretion.

The human rights mandate of the ECCJ represents another opportunity for interaction with the national Courts. This is where the ECOWAS framework has experienced the highest, if not the only number of interactions between the ECCJ and the national Courts. While as the ECCJ itself has acknowledged, an “integrated relationship” is what is envisaged in this interaction,³⁷⁷ the human rights mandate of the ECCJ also holds the highest potential for conflict between the Court and national Courts. Among other things, the current execution of this mandate allows the ECCJ to share jurisdiction with national Courts over the same subjects (litigants) applying the same sources of law. As I have argued elsewhere, this creates room both for jurisdictional and jurisprudential conflicts.

IV. Current Manifestations of interaction

At this point, the question that arises is how have these potentials for interaction been put to use or manifested in the twenty years of the Court’s existence. In terms of the preliminary ruling procedure, the records do not indicate that any significant reference has been made to the ECCJ by a national Court. As I have previously argued, this reality can be explained by the fact that the ECOWAS legal regime continues to operate at an inter-State and intergovernmental level, with very little, if any actual impact on the day to day business of most citizen beyond the free movement regime. Considering that ECOWAS has not adopted or enacted laws and policies that intrude significantly in the national space and Member States have not domesticated ECOWAS laws and policies in a manner that those laws and policies become the subject of both horizontal and vertical litigation before national Courts, the national Courts have had no need to refer cases. This is evidence of the implication of the current inchoate nature of the ECOWAS integration scheme.

With regards to interactions arising from the duty to implement or enforce judgments of the ECCJ, while the need exists, the actual manifestation has remained in the range of neutral to negative. This is in the sense that where States have complied with the judgments of the ECCJ, there is no indication that such compliance or implementation involved the civil procedure rules of the national Courts of that State. In this regard, the Courts are not involved so that the interaction can be said to be neutral. On the negative end, a few national Courts have either resisted or scolded the ECCJ. A few examples will prove the point. In relation to the Valentine Ayika judgment against the Republic of Liberia, the full bench of the Supreme Court of Liberia confronted with the judgment of the ECCJ,

375 introduced by art 6 of the 2005 Supplementary Protocol.

376 Now art 19 by virtue of art 5 of the 2005 Supplementary Protocol

377 See *Jerry Ugokwe v Federal Republic of Nigeria*

ruled that the judgment of the ECCJ was not binding on the Republic of Liberia.³⁷⁸ Earlier in February 2016, the High Court of Ghana had in the case of *Mba v Ghana*,³⁷⁹ the Ghanaian Court ruled that the decisions of the ECOWAS Court cannot be enforced by the Courts in Ghana because the Republic of Ghana has not domesticated the Protocols of the ECOWAS Court.³⁸⁰ The most recent case of *Saab v the Republic of Cape Verde* is another case where a national Court resisted the ECCJ and failed or refused to acknowledge, let alone implement its judgment.³⁸¹ All of these cases of resistance have arisen in the context of the ECCJ's human rights work.

V. Conclusion

In the pages above, I have endeavoured to examine the nature of the operating legal order of the ECOWAS Community. I believe that the analysis has demonstrated that whereas there are snippets of indication that the political actors and authorities of ECOWAS Member States are evolving from a mind set of pursuing integration on the basis of the traditional intergovernmental approach within the public international law order to a more engaged supranational or quasi-supranational approach akin to the European experience, the intention has not been matched with action by the same States. Consequently, I have shown that no ECOWAS Community legal order distinct from the international legal order has emerged in the years of the existence of ECOWAS. However, it has also, hopefully been established that an ECOWAS legal regime does exist, in the basis of which at least four different forms of interactions can take place between the ECCJ and national Courts.

Despite the existence of the potential for interaction between the Courts on the platform of the ECOWAS framework, this paper has supplied modest evidence to show that for the most part, no interaction is taking place. In the limited intersection of human rights and national Courts' enforcement of judgments of the ECCJ, the paper has rather shown neutral to negative interactions. If this State of affairs must improve, the ECOWAS legal framework may need to seep more into the day to day affairs of citizens of Member States who are also claimed by ECOWAS as its citizens.

378 GJ Borteh, West Africa: Ecowas' Court Ruling Not Binding On Liberia - Supreme Court Says in Ayika's U.S.\$508,200 Case, available at <https://allafrica.com/stories/201307251585.html>

379 In Suit No. HRCM/376/15 – In the Matter of Mr. Chude Mba vs. The Republic of Ghana.

380 See „Is the ECOWAS Court of Justice a Toothless Bulldog that Only Barks? Issues Arising from the Decision of the High Court of Accra in Mr. Chude Mba v The Republic of Ghana" available at <https://www.mondaq.com/nigeria/international-trade-investment/489494/is-the-ecowas-court-of-justice-a-toothless-bulldog-that-only-barks-issues-arising-from-the-decision-of-the-high-court-of-accra-in-mr-chude-mba-v-the-republic-of-ghana>

381 Cape Verde Court ignores ECOWAS order, approves extradition of Venezuelan man to U.S. available at <https://www.premiumtimesng.com/foreign/west-africa-foreign/434923-cape-verde-court-ignores-ecowas-order-approves-extradition-of-venezuelan-man-to-u-s.html>

BETWEEN THE ECOWAS COURT OF JUSTICE AND NATIONAL COURTS

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I. Introduction

Reflecting on the issue of relations between the ECOWAS Court of Justice and national Courts amounts to raising questions as to whether there are actually institutional mechanisms that govern and frame the functional relations between these bodies, located at various levels of the jurisdictional architecture in the ECOWAS region, and within the framework of the ECOWAS Common Market under construction.

The ECOWAS common market is so far marked by the enactment of a set of Community legal texts or Community law, which are still only timidly applied by national Courts and the regional Court.

II. Interpretation of Community law

Any judge who is competent to apply a law is logically competent to interpret it, especially since the two operations can hardly be separated. The fact remains that the interpretation of Community law cannot be left to the many national judges called upon to apply it. It is an inherent requirement for the very existence of the common market that the law governing its establishment and operations must have equal meaning and scope in all parts of the market. In other words, the rights that this law confers on individuals and the obligations that it imposes on them must be the same, regardless of where these individuals and the adjudicating judge are located.

However, the multiplicity of national Courts creates the risk of this requirement not being met, and thus irremediably undermining the very existence of the common market. To ensure uniformity in interpretation, the Treaties have given the Court of Justice an autonomous interpretation function and to avoid this risk, they have made available to the national Courts a procedure designed to prevent the establishment in the various Member States a case law that is divergent or, in itself, contrary to Community law.

III. Assessment of validity

This is a second justification. While the Court of Justice has been given exclusive jurisdiction to review the legality of the acts of Community institutions, the national Court is, for its part, radically not competent to rule on matters that call this legality into question in disputes where the solution depends on the application of such acts. It is therefore essential that the national Court should be able to obtain from the Community Court dealing with legality an answer on the issue of validity, since this form the basis for the decision that it must take on the substance.

From this flows a second justification for the cooperation between the national judges and the Court of Justice. Though different from the first one, it is no less similar when it comes to uniformity.

IV. Technique of cooperation

Cooperation between national judges and the Court of Justice is technically achieved through a preliminary ruling procedure.

The Court has presented this procedure as a particular form of judicial cooperation by which the national judge and the Court, in the light of their own competences, are called upon, directly and reciprocally, to take a decision with a view to ensuring the uniform application of Community law throughout the Member States (C.J.C.E., 1.12.1965, Firma Schwartze, 16/65, p. 1081, concluded. J. Gand - Cah. dr. eur. 1966; n°23 - 16.07.1992, Lourenço Dias, C-343/90, I, p. 4673, concl. G. Te-sauro).

V. General observations on cooperation modalities

Even before conducting the study of this operation, it is useful to make three general observations about it.

The first is to note that cooperation can only take place between a national judge and the Court of Justice, as a referral to the institutions is excluded and the establishment of the Court of First Instance has not altered the Court's exclusive jurisdiction in this respect. The new wording of Articles 32 quinto ECA, 168a ECA, as it flows from the European Union Treaty, is perfectly clear in this respect: "The Court of First Instance shall not have jurisdiction to hear and determine cases referred for a preliminary ruling...».

It should also be noted that the Court of Justice, having thus been given jurisdiction to interpret the treaty, is by the same token, competent to interpret the provisions of the treaty that governs the case referred. The Court is therefore in a position to determine, by way of interpretation, the conditions and consequences of cooperation as regards both the role of the national Court and its own role. In the conception it has thus adopted, this cooperation is not part of what would be a sharing of jurisdiction, with all the rigidity that this entails, but must be understood as the result of a division of functions, in accordance with modalities to be determined by the Court.

Finally, and most importantly, it should be noted that the rules of the procedure do not in the least take into account the differences in justification and purpose that distinguish between referral for validity assessment and referral for interpretation.

Despite the criticism that this situation has generated for a long time, the European Union Treaty has not made any change. The regime of identity that this regulation imposes generates similarities that alter the nature of each of the referrals, and more particularly that of the referral for assessment of validity. We will therefore be led, in the study that will be conducted, to make a certain number of distinctions.

VI. Procedure

Insofar as it is achieved through the implementation of a procedure, cooperation between national judges and the Court of Justice involves three phases. The first takes place before the national Court hearing a case challenging Community law; the second occurs before the Court of Justice, which is questioned by a national Court; the third takes place again before the national judge who, being in possession of the Court's answers to the questions it has put before it, resumes the examination of the case and provides a solution.

Therefore, it might seem obvious to divide subsequent developments into these three phases. In fact, a presentation of the third phase is not essential, since it boils down to the application of the answers given by the Court, meaning to the authority of the judgments given by the Court in the exercise of its functions during the second phase.

We will therefore consider, in two successive chapters, firstly the referral by the national Court; and subsequently, the judgment on the referral by the Court of Justice.

THE ECOWAS COURT, MEMBER STATES, AND THE EVOLVING SUPRANATIONAL COMMUNITY LEGAL ORDER: TAKING A HARD LOOK

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Introduction

The establishment of ECOWAS and its progressive evolution has come with the inevitable expectation of greater integration and reach in the lives of its citizens. Consistent with regional bodies of similar ilk, ECOWAS adopted the model of structuring and deploying autonomous legal institutions and order designed to regulate and direct the behavior of national authorities within the region. Notable among these is the ECOWAS Community Court of Justice (ECCJ) established as the apex judicial institution with a mandate to interpret the laws of ECOWAS and promote human rights within the sub-region. Within the context of regional integration initiatives, law has always been used as a legitimating tool for reinforcing the competencies of regional institutions both against their “intrusive overreach” in the domestic constitutional and jurisdictional spheres of Member States, and also defining their powers and authority. In another breadth, promoting the rule of law through a structured judicial system helps shape the institutional architecture of the regional integration project by defining the context of the integration initiative, its designed mission and functional evolution through a constant and consistent reinterpretation of the text of the treaty. In this vein, it bears arguing that the legal system established within a regional integration arrangement has a transcendental effect on the policy and political institutions as well as citizen behavior within the geo-legal space of the integration body.

The establishment of the ECOWAS Court as an apex sub-regional judicial body represents an attempt by the body to concretize Community legal norms through judicial elucidation and enforcement. Since its establishment, the Court has built a body of jurisprudence that has already marked it out as an agenda-setting body dedicated to constructing a path for the development of a system of sub-regional rule of law within West Africa. But the effectiveness and stability of the evolving legal system under the ECOWAS is dependent on a variety of factors not the least of which is a clear delineation of the extant or normative structural relationship between the ECCJ and the national Courts or other legal institutions of Member States. This article reviews the relationship that exists or ought to exist between institutions Member States and the ECCJ and the extent to which this impacts the substantive evolution of the ECCJ. The relevance of considering relational subjects within a justice project may seem counterintuitive to some particularly to those who focus on formalists aspects of the Court’s operation. These observers will likely find any such urgings towards cooperation troubling given the fact that regional community Courts are fundamentally designed to rein in heedless claims to sovereignty and wrongful deployment of State power against citizens and for which external accountability may be called for.

I. Imperatives and model of the Court of Justice

The establishment of a Court of justice came as an appendage to the larger regional integration initiative and the evolution of the ECCJ reflects the shift in thinking of the ECOWAS integration effort. In this vein, while some may argue that the ECCJ represents an ancillary structure within the scheme of arrangements of ECOWAS, it bears noting that the adoption of the ECCJ system reflects an attempt by the framers of the integration reforms to deepen accountability and ensure a micro-level impact of the operation of ECOWAS as a supranational organization. In a sense, the planned adoption of a community tribunal systems-a precursor to the ECCJ represented an earlier Statement of intent of the designers to ensure the effectiveness of the ECOWAS framework by including a judicial system within the economic integration initiative. However, the fact that a judicial arrangement was not incorporated in the original conception of ECOWAS in 1975 is not surprising given the overly political nature of the initial project and the centrality of sovereignty to the national policies of the founding Members of the grouping at the time. Given those judicial institutions quintessentially numb the assertion of sovereignty within the scope of compliance with rules, the subsequent addition of tribunal, and later the Court, is telling of the evolving assumptions informing the establishment of ECOWAS and the needs of an effective regional integration project.

The ECOWAS ECCJ fits Grossman's definition of an international adjudicative body given its feature of deciding disputes between actors at least one of whom is a State.³⁸² While the functional autonomy and legitimacy of the ECCJ is taken for granted both by the Court and the States who created it, the literature on the imperatives informing its establishment still remains open ended. This is not surprising given the fixation with the issue or subject of institutional effectiveness *per se* and the capacity of the Court to make real and meaningful impact on the integration effort as opposed to an evaluation of the functional and historical justifications for its establishment. The subject of effectiveness itself invariably trumps variables of institutional importance or utility in projects of integration especially on the African continent where some of these initiatives have floundered notwithstanding lofty and well-intentioned ideals informing their initial adoption.

In terms of the actual imperatives informing the establishment of a trans-national judicial institution within the panoply of bodies under ECOWAS, a number of reasons can be adduced and justifiably derived from the overall structuring of institutions within community. In this sub-unit, I discuss briefly the justifications for including an official judicial institution within a largely political arrangement underpinned by treaty obligations. In this vein, I am mindful of the counter-narrative which challenges the role of judicial institutions in regional integration efforts and international legal arrangements in general. A key critique levelled against regional Courts have been their tendency to remain insulated or compartmentalized in their treatment of complaints and this creates resistance at local levels once decisions or opinions are issued.³⁸³ Within the context of human rights adjudication, a new strand of the critique argues that given that sub-regional integration projects are fundamentally economic in outlook, Courts that are established in the vein of those initiatives, their ability and commitment to embrace the role of human rights protection is questionable.³⁸⁴

In this section, I identify three main justifications informing the establishment of the ECCJ.

(a) ECCJ as Interpreter of Community Law

Regional integration efforts are political projects held together by legal rules. The adoption of a treaty of the union of necessity implies the assumption by Member States of obligations and corresponding liabilities for the evolving union established. On the other hand, the interpretation of the text and underlying rationales for the constitutive community text is often left to a professionally neutral and independent body often in the character of a judicial organ. The establishment of the ECCJ advances that model and the approach adopted within ECOWAS is one designed to promote the rule of law across the States of the sub-region while reinforcing the external accountability of the Member States. Within the context of the latter, the ECCJ, like others of similar ilk, has been designed to rein in the abuse of State authority in a country's treatment of its citizens relative to human rights and further in the manner and extent to which Member States comply with their obligations under the treaty and consequential protocols assumed thereunder.

In order to understand the foregoing, reference to the jurisdiction of the Court is instructive. Fundamentally, the Court has power to hear cases involving human rights abuses and also to interpret the text of the treaty.³⁸⁵ In terms of the substantive power of defending human rights abuses against the unlawful uses of State authority, the Court's jurisdiction invariably extends to receiving complaints against the abuses of human rights from citizens of Member States. This aspect of the Court's jurisdiction sets it up as a mainstream remedial chamber in which the Court hears complaints of violation and issues orders compelling actions to be taken by offending States. The powers of international

382 Nienke Grossman, Legitimacy and International Adjudicative Bodies, 41 George Washington International Law Review, Vol. 41, p. 107, 2009 (published in August 2010)

383 Valeska David, Cultural Difference and Economic Disadvantage in Regional Human Rights Courts, Intersentia, March 2020

384 Lucy Nkatha Murungi & Jacqui Galinetti, The Role of Sub-Regional Courts in the African Human Rights System, <https://sur.conectas.org/en/role-sub-regional-courts-african-human-rights-system/>

385 Supplementary Protocol A/SP.1/01/05 of 2005 and (A/SP.1/06/06) of 2006

judicial bodies to assume jurisdiction in respect of human rights violations have always been deemed intrusive resulting in collisions between countries and these bodies but the interpretive powers of regional Courts make them indispensable in ensuring minimum flexibility in the implementation of treaty rules and obligations. The tension between regional Courts and national authorities is hardly surprising given the fact that very often the character of these orders compel the reversal of executive actions and in some cases extensive review of existing procedural and substantive policy as well as implementation of a variety of changes in a country's internal order. The Court has adopted an activist jurisprudence on the protection of human rights in keeping with the original motivations for establishing it. This is exemplified in its handling of the subject of jurisdiction in cases like the Registered Trustees of the Socio-Economic Rights & Accountability Project (SERAP) v. Federal Republic of Nigeria & Another, when it asserted *inter alia*,

....For this Court to have subject-matter jurisdiction over the suit as instituted by the Plaintiff, the subject matter of the suit must fall within the confines of Article 9 of the Supplementary Protocol to the Court The Court has jurisdiction over human rights enshrined in the African Charter and the fact that these rights are domesticated in municipal laws of the Federal Republic of Nigeria cannot oust the jurisdiction of the Court.... This Court clearly has subject matter jurisdiction over human rights violations in so far as these are recognized by the African Charter on Human and Peoples' Rights, which is adopted by Article 4(g) of the revised Treaty of ECOWAS...

The framing of this boundary-delineating judgment sets the tone for the Court to actively assume jurisdiction over cases that are deemed otherwise to fall within the purview of local Courts. From the standpoint of Court watchers, this posture implicates judicial activism and could be deemed to be good for the rapid development of community law. In another vein, the Court's activist dynamics may prove functional given the need to rein in the operations of local Courts in their administration of justice and the rule of law system prevalent in a given country in general. Given that the standing of community citizens before the Court derive essentially from the deficits of legal local institutions in their administration of justice, the need to ensure that there exists a body in the character of a Court with adequate reach in administering enforcing the rules and administering justice beyond the enforcement of treaty rules affecting the political establishment *per se*, become rather obvious.

The establishment of the ECCJ thus finds ample justification on grounds of promoting an effective system of the rule of law within the ECOWAS regime while ensuring that the principles of constitutionalism are at work in the relationship between governments and their citizens *inter se*. At its optimal operation therefore, the ECCJ can become a beacon for the enforcement of community rules and a path for the construction of standard principles and guiding rules for the development of the treaty. While the point may rather sound obvious at first, it bears pointing out the fact that the binding effect of judicial interpretation of treaty rules settles the contested claims of political disagreements on the nature and meaning of specific aspects of the treaty and this enables a quicker and more efficient resolution to disputes surrounding the interpretation of the treaty and its protocols.

(b) Court of Justice as Chamber of Human Rights

An important reason that inspired the establishment of the ECCJ is the protection of human rights. The fact of the widespread prevalence of human rights abuses across the continent speaks to the need to establish a sub-regional body that oversees the protection of human rights across borders. It has been argued that the human rights jurisdiction of the Court is historically derivative and appears to have largely been initially "taken" by the Court in light of its interpretive functions³⁸⁶. The issue is now well beyond the scope of controversy given that the human rights jurisdiction of the ECCJ was subsequently textually codified in the 2005 Protocol to the Court in which the jurisdiction was expressly recognized and conferred.

386 See <https://www.justiceinitiative.org/publications/ecowas-community-court-justice>

The judicial protection of human rights inevitably brings the Court into the zone of jurisdictional conflict with Member States and their Courts given that the ECCJ has relaxed the rules of admissibility and compromised on the stringency of the exhaustion of domestic remedies in the commencement of actions at the Court. This point will be subsequently revisited although it suffices for now to stress the point that the protection of human rights jurisdiction of the Court seem largely inspired by the need to ensure a robust and effective sub-regional regime on human rights in which the principles and ethos of human rights will be deemed *prima facie* to transcend the limits imposed by local law. Consequently, the competence of the Court to pronounce on and enforce the African Charter on Human & Peoples' Rights (ACHPR) reflects a trend in which ECOWAS is using the instrumentality of the Court to give the Charter the needed bite within the municipal terrains of the sub-region. By imbuing the Court with this jurisdiction, the Treaty and Protocol establishing the Court have empowered it to develop transcendental jurisprudence through which the Court can promote the broad values and principles contained under the ACHPR.

Yet, the Court's power to adjudicate human rights violations within the scope of the ACHPR can prove problematic, its broad advantages notwithstanding. For example, the ACHPR as a regime has been criticized for being retrogressive gauged from the standpoint of its claw-back clauses which repeatedly vest the African State with a wide margin of appreciation and latitude for deviation on grounds of extraneous factors.³⁸⁷ In other words, the prevalence of wide-ranging claw-back clauses in the ACHPR implies that the jurisprudence of the Court may suffer from the contagion effect of dabbling in restrictive interpretation in which the rights conferred will very often be seen in the guises of those strictures. This is so notwithstanding the Court's decision in cases such as *Hadijatou Mani Korooua v. Niger* in which it adopted an expansive interpretation to the liability of the defendants by applying the concept of *passive liability* to the action of Niger in tolerating the practice of slavery even if it did not actively partake in the practice as a State. *Karoua*, while watershed in defining the scope of State liability within the jurisprudence of the Court, nonetheless did little to assuage the fears of some regarding the effectiveness of the Court as an instrument of human rights advancement in the ECOWAS region. Critics still hold on to the position that the overall effectiveness of the Court is tenuous when gauged from the standpoint of compliance and implementation complexities vis-à-vis Member States and their Courts' posture when dealing with judgments of the ECCJ.³⁸⁸ This relationship dynamic will be revisited.

A related difficulty however is the issue of the very competence of the Court to pronounce on human rights case in spite of the obvious now textual allocation of the power to the Court under the 2005 Protocol. It has been argued that given that the original Treaty establishing the ECOWAS was not cast in "right" terms and hardly contained anything on human rights *qua* rights, the subsequent inclusion of human rights as a significant sub-category within the jurisprudence of the Court constitutes a deviation from the mandate of ECOWAS and may be accordingly wrong. Arguing that the interpretation of treaties should be strictly confined to enumerated powers, Ebobrah stresses that powers that are not textually assigned or allocated to any entity or body should be deemed to be excluded and accordingly not exercisable by that person or body.³⁸⁹ In his opinion, this position remains overarching notwithstanding the application of the principles of implied powers which fundamentally authorizes an international body to assume such powers and authority as may be necessary for the effective exercise of conferred powers.³⁹⁰

387 Loveness Mapuva, Negating the Promotion of Human Rights Through "Claw-Back" Clauses in the African Charter on Human and People's Rights, <https://core.ac.uk/download/pdf/234670951.pdf>

388 Richard Frimpong Oppong, "The High Court of Ghana Declines to Enforce an ECOWAS Court Judgment", 25(1) AJICL

389 Olomom T. Ebobrah, "Critical Issues in the Human Rights Mandate of the ECOWAS Court of Justice", 54, No. 1 (2010) Journal of African Law, pp. 1-25

390 See Rama-Montaldo, International Legal Personality,

(c) The Court of Justice: Relationship with judicial institutions of Member States

International tribunals occupy a peculiar space in the legal ordering of institutions and their legitimacy within the structures of State. Apart from being supranational in orientation, they are often dependent on the collective consent of Member States to enforce their decisions and to ensure that their jurisdictions are accorded domestic recognition and effectiveness. This tendency has resulted in debates over the independence of international judicial bodies and the vexed question of whether these Courts or tribunals ought to have or be concerned about having relationships with local Courts in order to be effective. This is especially so in the case of the ECCJ and its overall effectiveness as it seeks to have its judgments respected and enforced within the Member States of ECOWAS. Devising a principled and effective path for the Court's operations relative to the legal institutions of the component countries of ECOWAS remains crucial for the stability of its work and an outcome-driven jurisprudence. In this sub-section, I review the case for ensuring a relationship between the Court and the legal and judicial institutions of Member States and how the Court can adopt a nuanced but pragmatic approach that helps attain its carve a relational niche without compromising on its mandate and judicial competence. Critics have generally argued that the tendency for the Court to operate without reference to the jurisdictional sensitivities of Member States is counterproductive and appears to be negatively impacting the performance of the Court. Proponents of judicial engagement with State Courts argue that the converse leads to sub-optimality in the enforcement of the decisions of regional Courts and the ECCJ's post-judgment performance may appear to be reflecting that outcome.

Of specific concern is the Court's competence to assume concurrent jurisdiction in respect of cases that may be pending in national Courts, coupled with its relaxation on the rules on the exhaustion of local remedies. Critics have stressed the chilling effect the assumption of a concurrent jurisdiction has on local Courts given the obviously "superior" status of the ECCJ and how that implicitly tends to have a negative effect on the jurisdiction of local Courts in matters of human rights. As will be further revisited in this piece, the assumption of concurrent jurisdiction by the ECCJ has the prospect of encouraging forum shopping speculative institution of actions. By offering competing fora to would-be litigants, the ECCJ model may just encourage not only the making of qualitative calculations on the part of persons seeking to commence cases, but also that parties may decide to start multiple proceedings with the view to selecting whichever gives them the most favorable outcomes in the end.

It is accordingly argued that the Court adopt or constructive a path of self-restraint grounded in the exercise of deferred jurisdiction under which cases pending before national Courts would not be heard until the outcome of these pending cases are known. The suggestion here differs from the requirement of exhaustion of domestic remedies at least in one material respect, namely the fact that there is no suggestion that the jurisdictional competence of the Court cannot be activated until internal remedies are exhausted. The suggested model of deferred jurisdiction gives the option of coming before the ECCJ with its complaints during the pendency of an action before local Courts, and the Court merely suspending hearing pending the outcome of an ongoing action in the local Courts. The model has two key advantages, namely the fact that the suspensory status of the Court's jurisdiction activated pending the ongoing action serves to ensure an active oversight of the proceedings in the domestic Courts which in turn could promote quality adjudicatory processes in local Courts. In other words, the suggested model would operate in a contingent fashion by reason of which the Court will only proceed to hear a case instituted while the same case has been started in a local Court only if the action in the local Court is a sham, ineffectual or promotes laws that are inimical to human rights or the rule of law. The oversight instilled through deferred jurisdiction can help promote the rule of law and build institutional discipline in the operations of judicial bodies within ECOWAS in the long run. Secondly, the Court's assumption of deferred jurisdiction will operate in effect to make the jurisdiction of the ECCJ in human rights matters functionally residual relative

to the operations of domestic Courts and this will bolster perceptions of greater autonomy of local Courts in the enforcement of human rights. This will of necessity reduce the prospects or likelihood of conflict between local tribunals and the ECCJ as to which one should have the responsibility or even authority to pronounce on matters of abuses of human rights in the first instance. From a pure theoretical position, it is arguable that breaches of human rights rules should be matters of domestic law unless those breaches are not effectively addressed under municipal law and the violations find expressions under the ACHPR. Asserting rival jurisdiction over impugned acts of States at the first instance without specific and a case-by-case situations of failures or unwillingness on the part of local Courts to administer substantive justice could only exacerbate claims of intrusion and “over-reach” and this threatens the harmony of any relationship that could develop between the ECCJ and Courts of Member countries and the countries themselves.

Employing the suggested deferred jurisdictional model could also promote greater qualitative adjudication at the level of the Court. This is especially so given the fact that by holding off jurisdiction pending the conclusion of ongoing cases in local Courts, the ECCJ would have constituted itself into a *de facto* supervisory or appellate Court whose subsequent intervention would help cure or correct deficiencies in the application of human rights rules and the protection human rights in general. Even more crucially, the ECCJ’s deferred jurisdiction over the case would have accorded it the opportunity of it forming its opinions after local Courts have had the benefit of pronouncing on the complaints. This would likely advance relatively superior judicial positions on cases considered in view of the possible clarity of context derived from the prior decision of local Courts as well as the comparative frame offered the ECCJ’s opinion relative to the decisions of local Courts on these cases. In another sense, the nuanced approaches adopted by local Courts can provide lenses through which the ECCJ could evaluate arguments by the State grounded on claimed margins of appreciation in its defense of the impugned action and the experiences of other regions around the world offer useful options to look at.

Exercising deferred jurisdiction could enhance the overall structural and systemic cohesion of the established legal order under ECOWAS underpinned by the ECCJ in which the latter would be playing the role of a higher normative body overseeing the protection of human rights in ECOWAS. The current model of assuming coordinate jurisdiction with local Courts can create anomalous situations in which the competing jurisprudence of local Courts and the ECCJ on points of law may not be necessarily congruent even though they are not incompatible with one another. While some may consider this prospect a real-life problem to contend with, the need for systemic harmony in a nascent regime like the ECCJ is important and should not be lightly dismissed. This is the case even when considered from a more optimistic perspective where it can be argued that creating a parallel system like that of the ECCJ in which the established regional Court is to serve as a counterweight to local Courts and tribunals. Proponents of this view will further point to the likelihood of the jurisprudence of the ECCJ becoming predictive of the adjudicating dynamics of local Courts thereby ensuring improvement in the latter’s work. Indeed, the fact that local Courts and legal institutions in the ECOWAS region are generally weak and often lack independence is generally taken for granted given the reality of the situation. When considered in the context of the Court’s establishment and the reasons informing its reform over time, the fact that the ECCJ was designed to exert a benchmarked pressure on the performance of local Courts in human rights adjudication becomes virtually axiomatic. Yet exerting this pressure through its exercise of deferred as opposed to coordinate or concurrent jurisdiction attains arguably much more effective outcome in light of the appellate and supervisory impressions of the latter mode of jurisdiction exercised in relation to local Courts.

Similarly, the exercise of a deferred jurisdiction of the ECCJ could allow the Court to then factually evaluate the existence of certain variables in its determination of whether local Courts have properly adjudicated on particular cases that came before them. Factors such as the political neutrality or

independence of the forum, respect for the rights of litigants and compliance with standard rules of evidence and procedure, and reasoned judgments are some of the considerations whose factual occurrence are necessary to enable a determination of the degrees of compliance on a case-by-case basis. Determining these during the exercise of parallel or concurrent jurisdiction could only likely result in errors of assessment and conclusions that can at best be described as insular.

At the extreme end of the equation, the exercise of concurrent jurisdiction by the ECCJ however benefits claimants prosecuting actions against human rights violations. In the minimum, the competing fora presented by the ECCJ and local Courts enable qualitative judgments to be made by the party claiming violation of his rights to decide on which forum best meets his/her expectations for the vindication of his/her rights. The existence of multiple fora, while presenting forum shopping challenges could invariably allow parties to human rights litigation to opt for more efficient and effective forums which best maximizes outcomes in their claims. Yet as earlier argued, the nature of the concurrent jurisdictional competence exercised by the ECCJ would seem to suggest that parties can permissibly dabble in speculative litigation in which actions are commenced in both local Courts and in the ECCJ with the view to benefitting from whichever for a turns out to be more favorable to their causes.

The tendency for parties to engage in speculative forum activation offered under the ECCJ model could further reinforce and deepen suspicions of judicial usurpation on the part of the ECCJ. This is especially dangerous for the evolving supra-national legal system developing under the ECOWAS regime. In other words, the fact that a party can, under the current system, choose to commence proceedings concurrently under the ECCJ and also within local Courts with the option to elect which decision to enforce in the end may potentially result in local Courts feeling a sense of usurpation where their decisions are ignored in favor of the more favorable decisions of the ECCJ. While the history of human rights jurisprudence in international tribunals generally suggests that this prospect is both inevitable and perhaps desirable even, it is important to note that this perception and negative tendency will not be the case where the ECCJ exercises a deferred as opposed to concurrent jurisdiction. Yet the current system has its strong defenders and many will argue that given that the international adjudication of human rights cases arose in the first place out of the recognition of a *de facto* weaknesses and unwillingness on the part of local legal institutions to protect the rights of citizens, the options offered by transnational bodies like the ECCJ even if exercised concurrently provide an overall advancement of those rights, the likely abuses of forums notwithstanding.

The foregoing therefore forces any reviewer to question the State and necessity of any relationship that exists or ought to exist between the ECCJ and local Courts. Any meaningful evaluation of the ideal or extant relationship between the ECCJ and local Courts must begin with an acknowledgement that short of the requirement of the exhaustion domestic remedies, international tribunals whether situated within the context of regional integration initiatives or otherwise do not generally respond to the dynamics of local Courts and how these affect the relationship between the respective entities. Should the ECCJ therefore be sensitive to the nature and implications of a relationship between it and local Courts? Are there practical dividends offered by in regional Court's intentional engagement with local Courts by reason of which it should be more deliberate about carving a relationship with these Courts? Effectively answering these questions require a recognition of the inherent political and legal weaknesses existent in the structure of ECOWAS and how the ECCJ arrangement of itself depends on State cooperation for effectiveness. In other words, an admission that the ECCJ and its decisions are not self-executing but depends on a host of other factors the most prominent of which is voluntary State compliance often through its municipal judicial and legal institutions is materially important to overcoming the deficit of enforcement suffered by the ECCJ in the realization of its decisions by persons seeking to enforce them. Cooperation indubitably deepens perceptions of legitimacy and reduces the prospects of conflicts. Building a constructive relationship with local Courts and institutions through its jurisprudence would also ensure that the extent to which political

pressure and sanction is needed to be employed as an instrument of enforcement of judicial orders under the ECCJ arrangement is reduced to the barest minimum.

Judicial cooperation between supranational institutions like the ECCJ and local Courts can present a complicated picture however. In principle, it is arguable that cooperation with external entities is not a core part of a judicial body's work. On the other hand, if cooperation implies a compromise on the articulation of a stringent jurisprudence, the ECCJ would invariably find itself reflecting the weak and substandard dynamics of local Courts in the sub-region and this would be defeatist of the reasons for its establishment. Charting a path of collaboration which mutually promotes the respect for the autonomy of local Courts while asserting the jurisdiction of the ECCJ remains key to maintaining a fluid relationship between local Courts and the ECCJ. Employing mechanisms such as the deferred jurisdiction of the Court could create a mutual system of recognition over time and greater effectiveness of the ECCJ in the countries of ECOWAS. The spillover effect of this could be the institutionalization of community law within the domestic spheres of the countries in the sub-region and this would in effect ease compliance with community law and human rights and the implementation of the decisions of the ECCJ. The optimal and incremental compliance with the decisions of the ECCJ would likely have the effect of enhancing the potency of community law and the ACHPR, and could lead to the substantive inclusion of community law as part of the overall legal ordering of these countries.

Judicial cooperation within the region is a functional necessity given its importance in helping build the weaker capacities of Courts of the countries in the sub-region. Cooperation between the ECCJ and local Courts could lead to the development of appropriate legal strictures that accord preliminary autonomy and deference to local Courts in their consideration of cases brought in the two forums. As earlier argued, the exercise of deferred jurisdiction by the ECCJ would promote healthy respect and reciprocity on the part of the ECCJ and local Courts, and help leverage the former's impact among the legal and judicial institutions within the countries of ECOWAS. This is especially important given the absence of a layered or structured application of community law on human rights and the ECCJ's desire to promote direct compliance at the national level through its jurisprudence.

A similar area of complexity that requires attention is the issue of the ultimate jurisdiction of constitutional Courts and the concurrent exercise of jurisdiction by the ECCJ in human rights cases with constitutional jurisdictional twists. These are cases in which the ECCJ may be called upon to adjudicate on matters that implicate human rights violation but which are deemed to also raise questions on the constitutionality of acts or omissions in respect of which constitutional Courts are vested with the exclusive jurisdiction to make pronouncements. Likely questions to be raised in the wake of the assumption of jurisdiction by the ECCJ are, (1) the municipal constitutionality of the ECCJ to assume jurisdiction when the issue is exclusively confined to the apex local Court; and (2) the interpretive competence of the ECCJ to make conclusive determinations on issues of local law even if same provision(s) seem to have found expression in the ACHPR. The first question inevitably challenges the ECCJ to defer to the interpretive competences of national in matters involving the construction of national constitutions. Conceived so broadly, the assertion consigns the prerogative of interpretation to local constitutional Courts and crowds out the supervisory authority of the ECCJ. When viewed in combination with the second question, the outcome may seem to suggest that the ECCJ's jurisdiction in matters involving the interpretation of national constitutions is fully ousted even if these implicate issues of human rights contemplated under the ACHPR. But a broad application of this approach would obviously be problematic and result in the gradual erosion of the "supervisory" powers of the ECCJ in matters involving the protection of human rights as apex national Courts will likely broaden the scope of subjects considered to fall under the spectrum of "constitutional cases."

In order to deal with this difficulty while maintaining the jurisdictional autonomy of local Courts in constitutional matters, the ECCJ will need to move ahead and delineate or construct the scope of subjects that will be considered purely constitutional and those that implicate mix human rights and

constitutional complaints for which the ECCJ may have some jurisdiction even if limited. Assuming jurisdiction even in cases of the latter comes with manifold complexities given the practical difficulty of separating the human rights aspects from the parts of cases involving constitutional interpretation. Proactively constructing clear principles for determining or ascertaining the boundaries of constitutional cases and separating them from human rights cases would build confidence in the jurisprudence of the ECCJ and avoid conflicts between the Court and national constitutional Courts. Pre-empting the prospects of national Courts claiming greater latitude in assuming exclusive jurisdiction in cases involving human rights and constitutional interpretation is not a perfunctory exercise given the known judicial practice of Courts jealously guarding their jurisdictional terrain and according expansive interpretation to the scope of their mandate and authority.

(d) Toward a system of structural dualism in ECOWAS

It is evident that as the ECCJ seeks to reinforce its effectiveness as the preeminent judicial chamber within ECOWAS, it needs to strengthen its relationship with local Courts through the establishment and adherence to defined legal parameters and strictures. The Court continues to face muted judicial opposition in Member States resulting in the refusal of some Courts to enforce its decisions when presented for recognition and implementation. It has been suggested in this piece that a good way of overcoming the enforcement deficit is for the ECCJ to build and deepen, rather than challenge the jurisdiction of local Courts in their application of rules in which the ECCJ exercises jurisdiction under the principles of the “direct effect” of the application of rules.

As the current model operated under the ECCJ arrangement evolves, there is the need to finetune or refine the relational dynamics that exists between the ECCJ and national Courts. From a normative standpoint, any such relationship will have to reflect the ECCJ’s aspiration of perfecting the implementation of community law and human rights norms through the rule of law, while ensuring that weak domestic institutions of Member States are nurtured to growth with a symbiotic mindset. This entails the ECCJ upholding minimum dualism in its work in which it actively projects the jurisdictional autonomy of local Courts.

One model which has been suggested in other works is what can aptly be described as the “instructional model of engagement” between international tribunals and local Courts.³⁹¹ Under this model, the ECCJ while exercising its power of deferred jurisdiction can remit complaints made activating its jurisdiction to local Courts with clear guidelines and instructions that the case shall be heard in the first instance by local Courts, with “appellate” options or supervisory oversight available at the best of the ECCJ in the event of dissatisfaction on the part of the complainant at the conclusion of hearing. This will represent a further development of the deferred jurisdiction of the ECCJ while enabling it oversee the protection of human rights through its instructional orders remitting cases to local Courts. While the Courts initial position on this has been to reject the added layer of inconvenience on the party seeking to access its jurisdiction, it represents a pragmatic way of overcoming the tension and conflict that characterizes the use of the concurrent model of adjudication which may be seen as paternalistic by some. Jurisdictional dualism can be developed by the Court’s refinement of the circumstances for ripeness and standing before the ECCJ as well as the mechanics of its exercise of supervisory control of proceedings within national Courts. Indeed, the development of substantive and procedural rules and systems for ensuring that local Courts abide by minimum standards is by no means easy but the fact that a failure on the part of local Courts to meet minimum thresholds in proceedings brought before them will activate the jurisdiction of the ECCJ will act as the requisite incentive to goad them into compliance and higher self-regulation.

Conclusion

The establishment of the ECCJ represents a historic addition to the body of institutions established

391 “André Nollkaemper, “The Duality of Direct Effect on International Law”, 25 (2014), EJIL 105–125

to help attain the goals of ECOWAS as an evolving sub-continental integration project. But clearly, the economic mobilization incentives that initially drove the agenda in ECOWAS appears to have given way to the overarching desire to protect human rights and place the needs of the community's citizens at the center of that initiative. The ECCJ provides the best mechanism yet to ensure that core legal obligations assumed under the treaty and corresponding protocols are respected and upheld. Experience however has shown since the establishment of the Court that the effectiveness of the ECCJ like many regional Courts depends on a host of extra-legal factors such as the Court's relationship with local Courts and rule of law institutions in the component countries of the ECOWAS. Fashioning out an appropriate engagement model in the midst of its own treaty limitations provides a litmus test of its own evolution as a sustainable legal entity within a larger political project. The Court can learn from and adapt the experiences of other regional Courts and fashion out contextual factors for remitting cases and deferring jurisdiction as a means of "supervising" national Courts and ultimately assuming jurisdiction when local Courts fail to meet the test of effectively administering justice or in appellate capacity when an aggrieved party challenges judgments given. The initial deference shown local Courts is likely to lead to reciprocal recognition of judgment and higher levels of enforcement when sought through local Courts.

SUB-THEME 5

ENFORCEMENT OF THE JUDGEMENTS OF THE ECOWAS COURT OF JUSTICE

THE EXECUTION OF DECISIONS OF THE ECOWAS COURT OF JUSTICE

By

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Mr. Albert EINSTEIN, a physicist by profession, in his work entitled “How I see the world”, expressed himself as follows “It is not enough to create an international Court of last resort. It is also necessary that covenants provide the assurance that the decisions of this Court will be executed in common by all nations...”³⁹² This assurance of the execution of judicial decisions, which Einstein mentioned, also led the drafters of the Statute of the Court of Justice of the Economic Community of West African States (ECOWAS)³⁹³ to enshrine in the Treaty establishing ECOWAS the principle that “the judgments of the Court shall be binding on Member States, on Community institutions, and on natural and legal persons”³⁹⁴. Similarly, the Supplementary Protocol relating to the Court provides that those judicial decisions are “[...] immediately enforceable and not subject to appeal,”³⁹⁵ and that the States and institutions of the Community must “[...] take without delay all appropriate measures to ensure the execution of the Court’s decision”³⁹⁶. These provisions place us at the centre of the discussion on the enforcement of decisions of the ECOWAS Court of Justice, the subject matter of this brief reflection.

The execution in question refers to the effective implementation, enforcement or realisation of a particular judgment or act. In other words, “fulfilling one’s obligation”.³⁹⁷ In the present case, it is appropriate to speak of “the performance by a subject of law of the acts necessary to fulfil the obligations resulting for him from a judicial decision,”³⁹⁸ i.e. the fact of complying with a judgment.³⁹⁹ Indeed, according to domestic law, “the enforcement of an agreement, an administrative or judicial decision consists of enforcement measures, i.e., the use of physical coercion by a competent public officer authorised by law to do so.”⁴⁰⁰ As a result, the notion of enforcement refers, on the one hand, to the realisation of the right because “from this point of view, the judgment is based on the right, and it is already, in a sense, its enforcement.”⁴⁰¹ On the other hand, this is so because coercion is closely linked to the judgment: “the judgment is an enforceable order which can, as such, be accompanied by a fine and enforced by coercive procedures.”⁴⁰² Enforcement is thus a procedural method of implementing Court decisions in domestic law.

By contrast, in the international legal system, the enforcement of obligations is not a matter of international law - in the absence of a public authority superior to States - but of general international law, which “leaves to the discretion of States the definition of the means of bringing to an end the breach of an international obligation and of obtaining reparation for the injury resulting therefrom, provided that in so doing, it respects the rules of international law limiting the use of coercion”⁴⁰³.

Judicial decision, is above all, a generic term “encompassing any judgment whatever its author, subject, etc.”⁴⁰⁴ In a broad sense, it encompasses “decisions of an administrative (and not judicial)

392 Quoted by BANI, A., in *Citations & Adages Juridiques*, 1st Edition, National Library of Benin, Cotonou, 2018, p. 186.

393 It should be recalled that ECOWAS was established in 1975. Its Constitutive Treaty was substantially revised in 1993 and again in 2006. In the 1975 Treaty, it was foreseen to provide the Community with a “Court”, but this was never created. It was only with the 1993 revision that ECOWAS was provided with a judicial body, the “Court of Justice” established in Abuja (Nigeria). See SALL, A., *La justice de l’intégration. Réflexions sur les institutions judiciaires de la CEDEAO et de l’UEMOA*, Editions CREDILA, Dakar, 2011, pp. 15 et seq.; DIEYE, A., «La Cour de Justice de la CEDEAO et les juridictions nationales des Etats membres», Proceedings of the colloquium organised by CREDILA, University of Dakar, April 2006, pp. 27-28; *Les Nouvelles Annales Africaines*, No. 1, 2007, pp. 185-187.

394 See Article 15 of the Revised ECOWAS Treaty, in ECOWAS Commission, Revised Treaty, 1993, reprinted 2010, Abuja, available at: <http://www.ecowas.int> (accessed 2/09/2021).

395 See Article 20 (new) of the Supplementary Protocol (A/SP/1/01/05 amending the Supplementary Protocol (A/P.1/7/91) on the ECOWAS Court of Justice, 19 January 2005.

396 Article 23, *ibid*.

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nature emanating from a judge: a measure of judicial administration. The term also implies a normative act obtained at the end of a deliberation. More specifically, it means “what is contained in the operative part.”⁴⁰⁵ This is the jurisdictional decision understood as “an expression used generically to designate any act of an international Court which is binding on the addressees.”⁴⁰⁶

As far as the Court is concerned, in its legal sense, it takes the “name given to certain Courts because of the high level they occupy in the judicial hierarchy [...] or in consideration of their organisation and their special competence [...]; designates, according to the case, either the institution itself, or, at the hearing, the training of the magistrates who sit, or the premises where the Court is located”⁴⁰⁷. Indeed, the Court is a “pre-constituted and, in principle, a permanent Court. It is characterised by a predetermined composition of judges and has rules of procedure which are also fixed in advance, generally by the Court itself, in accordance with the provisions of its Statute.”⁴⁰⁸ This is the case with the ECOWAS Court called the Court of Justice (ECCJ), which has the above-mentioned characteristics.

As an institution responsible for dispensing justice for and on behalf of ECOWAS, the Court of Justice is also exemplified by the authority of its decisions. Indeed, the judges of the ECOWAS Court of Justice render decisions that are *res judicata*, i.e. the “quality attributed to the operative part of any final jurisdictional act [...], designating the legal effects attached to it, namely, for the parties, the force of legal truth (*Res judicata pro veritate habetur*) and finality”⁴⁰⁹. This authority is, according to a principle common to all legal systems, relative, i.e. it concerns only the dispute decided (the object and cause of the claim) and the parties to the proceedings (*Res inter alios judicata, aliis prodesse, nove nocere potest*)⁴¹⁰. It follows that the decision rendered by the ECOWAS Court of Justice is binding only on the parties to the dispute and only in the case decided by it²¹. This is referred to as “the relativity of *res judicata*, which is opposed to the transposition of the principle of the common law principle of *stare decisis*,”⁴¹¹ a rule according to which “the principles of law laid down by a judicial decision are binding, so long as they have not been abandoned by a subsequent decision emanating from a higher Court or a Court of the same rank.”⁴¹² For this reason, a distinction must be made between the principle of *res judicata* and the principle of enforcement, even though they are both intended to ensure the effectiveness of the judgment. Indeed, “*res judicata* is a specific quality of the judicial decision”⁴¹³ while “enforceability is an order added to it.”⁴¹⁴ The enforcement of decisions, which is the subject of our study, is therefore based on the fact that the parties must comply with the judgment and take the necessary action in good faith, in accordance with Article 22 paragraph 3 (new Article 23) of the Supplementary Protocol A/P.1/7/91 establishing the ECOWAS Court of Justice.⁴¹⁵

Reflecting on the enforcement of decisions rendered by the ECOWAS Court of Justice implies ques-

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409 SALMON, J. (ed.), *Dictionnaire de droit international public*, op. cit, p. 170.

410 Ibid.

411 According to Article 15(4) of the revised ECOWAS Treaty, “the judgments of the Court of Justice shall be binding on Member States, Community institutions, and natural and legal persons”. Article 76(2) of the same Treaty States that “in the absence [of direct agreement between the parties], the dispute shall be referred by one of the parties, by any Member State or by the Authority, to the Court of Justice of the Community whose decision shall be binding and without appeal”. See in this sense also Articles 59 and 60 of the Statute of the International Court of Justice (ICJ) annexed to the United Nations Charter of 26 June 1945. According to Article 59 of the ICJ Statute, “the decision of the Court shall be binding only upon the parties to the dispute and in the case which has been decided”. Article 60 of the ICJ Statute provides that “the judgment shall be final and without appeal. In case of dispute as to the meaning and scope of the judgment, it shall be for the Court to interpret it, at the request of any party”.

412 BASDEVANT, J., *Dictionnaire de la terminologie du droit international*, Paris, Sirey, 1960, p. 581.

413 NEMER CALDEIRA BRANT, L., «L»autorité des arrêts de la Cour internationale de Justice», in APOSTOLIDIS, Ch (ed.), *Les arrêts de la Cour internationale de Justice*, Editions Universitaires de Dijon, 2005, p. 141.

414 Ibid.

415 See also in the same vein Article 94 of the ICJ Statute, according to which “each Member of the United Nations undertakes to abide by the decision of the International Court of Justice in any dispute to which it is a party”.

tioning the implementation of these decisions, their compliance with or enforcement in good faith by Member States. In other words, it is a matter of looking, on the one hand, at the spirit of loyalty and honesty that consists of ECOWAS Member States not attempting to undermine their legal obligations under the ECOWAS Treaty and the Supplementary Protocol relating to the Court of Justice. On the other hand, we are concerned with the conduct that ECOWAS Member States are legally bound to abide by in the enforcement of decisions rendered by the judges of the Court of Justice, by virtue of the fundamental general principle of law - *Pacta sunt servanda* - the binding force of which is confirmed by copious and recurrent practice and case law. Hence, the legal, doctrinal, jurisprudential and even political interest of the subject.

Indeed, it is necessary to carry out this study because one can first of all make the bitter observation that there is a lack of overall reflection on enforcement procedures in public law.⁴¹⁶ This question is therefore not very contemporaneous and not very well dealt with in international law. Secondly, it is useful to study the enforcement of legal decisions in the international legal system because it refers to the means of enforcement, which is a question that is very little dealt with or developed because there is an imperative principle of enforcement of decisions made by international Courts. This element is linked to the imperium of the decision itself, without the need for an enforcement formula. However, State practice has shown that the active collaboration of domestic authorities is indispensable for the proper enforcement of decisions of international Courts.

For example, though the doctrine agrees on the usefulness for the ECOWAS Court of Justice to have a mode of enforcement of judgments enshrined in the Supplementary Protocol A/SP.1/01/05 amending that of 1991 relating to the Court, practice has shown all the limitations of such a mechanism in the sense that the Community legal system is not absolved from the pitfalls noted in the regional and international legal system in terms of enforcement of judgments or decisions rendered by international Courts of an administrative or criminal nature. Thus, despite the enforceable and final nature of the decisions of the ECOWAS Court of Justice, Member States and Community institutions confronted with certain delicate internal and/or external legal-political situations often find it difficult “to immediately take all necessary measures to ensure the execution of the Court’s decision.”⁴¹⁷ Thus, this situation brings this Court *de facto* closer to other regional or international Courts whose decisions are reasoned and deemed enforceable but are not because of the unwillingness or bad faith of States, or their reluctance (resistance) or other reasons, both legal and political. These are all reasons for comparison that make it possible to conduct a critical analysis of the mechanism for executing the judgments of the ECOWAS Court of Justice and other regional or international Courts in order to anticipate prospects for improving strict compliance by States with the commitments entered into by virtue of the Treaties they have sovereignly subscribed to at the regional and international levels.

To achieve this, it is necessary to carry out analyses as close as possible to the legal and political realities of ECOWAS Member States; this makes it possible to examine the fate of the decisions of the ECOWAS Court of Justice and, in so doing, to analyse, on the one hand, consecrated or formal enforcement (I) and, on the other hand, to scrutinise the weakness of the enforcement mechanism in order to highlight its limitations; this is reflected in the actual or limited enforcement (II) of the Court’s decisions.

I. The consecrated or formal execution

Formal enforcement is a principle enshrined not only in the revised ECOWAS Founding Treaty but also in its supplementary texts, in particular the Supplementary Protocol establishing the ECOWAS Court of Justice, as well as its amending text and the Court’s Rules of Procedure. These various

416 DRAGO, G., «Vers une procédure d’exécution forcée des décisions du Conseil constitutionnel», in *La semaine Juridique* Edition Générale n° 15, 12 April 2021, doctrine, pp. 417 et seq.

417 Article 23 (new) of the ECOWAS Court of Justice Supplementary Protocol A/P.1/7/91.

texts clearly enshrine a principle that is already known at international and regional level.

A. A principle enshrined in ECOWAS texts

The revised ECOWAS Treaty, the Supplementary Protocol A/P1/7/91, and the Rules of Procedure of the Community Court of Justice enshrine the principle that the judgments or decisions of this Court “shall be binding”²⁹ from the day of their delivery³⁰; they are above all, *judgments that are “immediately enforceable and are not subject to appeal”*³¹. Moreover, even “*a judgment by default is enforceable.*”³² As regards the modalities of execution of judgments and decisions of the Court of Justice, the Supplementary Protocol A/P1/7/91 provides that “*the Member States and the institutions of the Community shall be required to take all necessary measures without delay to ensure the execution of the decision of the Court*”³³. Furthermore, in case of non-compliance with obligations, including non-compliance with a judgment or decision of the Court of Justice, the ECOWAS Treaty vests the Authority of Member States with the competence to impose sanctions in very clear terms: “[...] (b). *Such sanctions may include:*

- i. *Suspension of further Community loans and assistance;*
- ii. *Suspension of disbursement for all loans, for all on-going Community projects or assistance programmes;*
- iii. *Rejection of applications for statutory and professional posts;*
- iv. *Suspension of voting rights; and*
- v. *Suspension of participation in the activities of the Community*”³⁴.

Better still, Supplementary Protocol A-SP.1-01-01-05 went so far as to lay down the means of enforcement of judgments or decisions of the ECOWAS Court of Justice. Indeed, according to Article 24 of the said Protocol,

1. Judgments of the Court which impose a pecuniary obligation on persons or States shall constitute an enforceable order.
2. Enforcement, which shall be submitted by the Registrar of the Court of the Member State concerned, shall be governed by the rules of civil procedure in force in that Member State.
3. The enforcement order shall be appended to the instrument, without any further control than verification of its authenticity, by the national authority which the government of each Member State shall designate for this purpose.
4. Member States shall designate the national authority competent to receive or execute the Court’s decision and shall notify the Court of this designation.
5. *Enforcement can only be suspended by virtue of a decision of the Court of Justice of the Community.*

From the foregoing, it follows, on the one hand, that the ECOWAS Member States in dispute, taken individually, have the obligation to comply with the decisions and judgments rendered by the Court of Justice and to execute them diligently - as soon as they are delivered - by taking the necessary internal measures. This execution is intended to be voluntary, i.e., in compliance with the commitments entered into under the Revised Treaty and the Supplementary Protocols thereto. Such enforcement is normally the responsibility of the executive and, more specifically, the Ministry of Justice. On the other hand, it is easy to see that the provisions of the Revised ECOWAS Treaty combined with those of the Supplementary Protocol A-SP.1-01-01-05, make it feasible to maintain that, in their mutual relations, ECOWAS Member States can take justice into their own hands through the Authority of

Heads of State and Government, which can impose sanctions in the event of non-enforcement of a decision or ruling handed down by the ECOWAS Court of Justice. This is an array of measures which, if complied with, could obviously dissuade all States reluctant to respect the enforcement of the Court's judgments. ECOWAS Member States have therefore deemed it useful to use force individually to ensure that the judgments of the Court of Justice, which entail a financial obligation on the part of individuals or States, are respected and enforced. Though this forced execution of decisions or judgments rendered by the Court of Justice is a matter for the sovereign power of each Member State, both in terms of procedural rules and the guarantee of their correct enforcement, the power to suspend forced execution is the exclusive preserve of the ECOWAS Court of Justice, which must, under these circumstances, issue a decision.

B. An internationally and regionally known principle

The principle of the enforcement of Court decisions is a legal asset shared both by the different legal systems. Indeed, this principle is well known in international and Community law.

Thus, with regard to the International Court of Justice (ICJ), while States Parties to its Statute are not compelled to recognise the jurisdiction of the ICJ - because it is optional⁴¹⁸ - once they have validly consented to be bound by it in a given case, they must accept the decision. Article 94 of the UN Charter provides that if a State Party fails to comply with its obligations under a judgment of the Court, another State Party may have an option to go to the Security Council. The Security Council, if it deems it necessary, may make recommendations or decide on measures to be taken to enforce the said judgment, which is final and without appeal. But it must be said - as will be seen in the following developments that

- the use of force to demand the execution of an ICJ judgment is a mere textbook case in view of the decentralised nature of the international community, marked by the absence of a central body with formal and material powers of coercion.

At the African regional level, it should be noted that the Protocol establishing the African Court on Human and Peoples' Rights⁴¹⁹ also enshrined the principle that the decisions of the Court are not subject to appeal and are binding on States Parties⁴²⁰. The judgments and decisions of the African Court have in many cases been executed by States, but there is reluctance to execute a number of them, as will be seen below.

Still at the regional level, with regard to the Organisation for the Harmonisation of Business Law in Africa (OHADA), it should be noted that its texts provide for the Common Court of Justice and Arbitration (CCJA), whose awards "have the authority of *res judicata* and enforceability. They shall be enforced in the territory of each of the States Parties under the same conditions as decisions of national Courts. In the same case, no decision contrary to a judgment of the Common Court of Justice and Arbitration may be enforced in the territory of a State Party."⁴²¹ Similarly, the CCJA Arbitration Rules require the parties to enforce the various arbitral awards without delay.⁴²² These "may be enforced by the Court in the territory of a State Party. These "may be enforced by virtue of an *exequatur* decision" pursuant to Article 25 of the Treaty, which gives the CCJA exclusive jurisdiction to issue such an

418 Article 36(2) of the ICJ Statute States that "The States Parties to the Statute may at any time declare that they recognize as compulsory *ipso jure* and without special agreement, in relation to any other State accepting the same obligation, the jurisdiction of the Court in respect of all legal disputes [...]".

419 The African Court on Human and Peoples' Rights (hereinafter the African Court) was established by a Protocol to the 1981 African Charter on Human and Peoples' Rights. The Protocol establishing the African Court was adopted in Ouagadougou, Burkina Faso, on 9 June 1998 and entered into force on 25 June 2004. The Court was established to complement the protection mandate of the African Commission on Human and Peoples' Rights.

420 See Rule 61 (4) and (5) of the Rules of Procedure of the African Court.

421 Article 25 of the OHADA Treaty signed in Port Louis (Mauritius) on 17 October 1993 revised on 27 October 2008.

422 Article 27.1 of the CCJA Arbitration Rules of 23 November 2017 provides that an arbitral award rendered under the auspices of the CCJA "shall be binding on the parties and shall have the same final authority as decisions rendered by the Courts of the State".

exequatur decision in the OHADA⁴²³ region. As for the modalities of the implementation of the forced execution of awards, they are determined by the Rules of Procedure of the CCJA,⁴²⁴ under terms and conditions almost identical to those provided by the Supplementary Protocol A-SP.1-01-01-05 of the ECOWAS Court of Justice.

Finally, in West Africa, it should be noted that in accordance with the Supplementary Protocol No. 1 on the supervisory bodies of the West African Economic and Monetary Union (WAEMU), “the judgments of the Court of Justice shall be enforceable in accordance with the provisions of its Rules of Procedure.”⁴²⁵ Under the Rules of Procedure of the WAEMU Court of Justice,⁴²⁶ “the judgment is binding from the day it is delivered.”⁴²⁷ It is also envisaged that judgments given by the Court of Justice may be enforced, especially since, according to the Rules of Procedure, “the costs incurred by a party for the purpose of enforcement shall be reimbursed by the other party in accordance with the prevailing rate in the State where the enforcement takes place.”⁴²⁸

This means that judgments or decisions of international and regional Courts, or even sub-regional Courts, are supposed to be executed without delay by the States parties to the various legal instruments that bind them. Failing that, States have envisaged the possibility of forced execution in the face of resistance from some of them. In reality, this well-regulated mechanism of forced execution has not made it possible to resolve cases of refusal or resistance to execute decisions or judgments rendered by international or Community Courts. These are the limitations of full-scale or actual enforcement.

II. Actual or limited enforcement

It is true that the decisions or rulings handed down by the ECOWAS Court of Justice are binding and final on Member States, Community institutions and natural and legal persons; they constitute a legal obligation. However, it must be noted that the Court of Justice is limited when it comes to the power to sanction the State or the recalcitrant party to respect the judgments or decisions of the said Court. The weakness of this system of forced execution of the decisions of the Court of Justice is reflected in the disregard of international principles and rules in the face of legal and often political stakes; this translates, on the one hand, into non-execution in disregard of certain international obligations and, on the other hand, may lead to forced execution, or even to the bringing into play of the international responsibility of the defaulting State.

423 Article 25 of the OHADA Treaty provides that arbitral awards “may be enforced by virtue of an exequatur decision. The Common Court of Justice and Arbitration has sole jurisdiction to issue such a decision”.

424 See Article 46 of the Rules of Procedure of the Common Court of Justice and Arbitration of 18 April 1996 as amended and supplemented by Regulation No. 001/2014/CM/OHADA of 30 January 2014, on the enforcement of arbitral awards rendered by the CCJA, in CCJA-OHADA, Manuel des textes usuels. Matières contentieuse et consultative, 2017 Edition, Abidjan, p. 42; CCJA-OHADA Information Brochure, Abidjan, 2006, pp. 33-34.

The exequatur confers on the arbitral award an enforceable character in all the States Parties to the OHADA Treaty. This is what some authors have called “Community exequatur”. According to Article 30.1 of the CCJA Arbitration Rules of 23 November 2017, “the exequatur is requested by a request addressed to the President of the Court, with a copy to the Secretary General. The latter shall immediately transmit to the Court the documents enabling the existence of the arbitral award and the arbitration agreement to be established”. The Secretary General shall deliver to the most diligent party a copy of the award with a certificate of enforceability (Article 31.1 of the Arbitration Rules). On the basis of this document, the competent national authority of the State party will affix the enforcement formula as it is in force in that State (Article 31.2 of the Arbitration Rules). Though the exequatur is Community-wide, the enforcement formulas are national. According to Article 30(4) of the Rules of Arbitration, “the decision of the President granting the exequatur is not subject to appeal”. See CCJA, Guide de l’arbitrage de la CCJA-OHADA, 2nd Edition, Abidjan, 2018, pp. 35-36. See also LENDONGO, P., Bilan et perspectives de la gestion des affaires portées devant la Cour Commune de Justice et d’Arbitrage de l’OHADA de l’installation à 2017, March 2018, pp. 65-66

425 Article 20 of Supplementary Protocol No. 1 on the supervisory bodies of the WAEMU.

426 The WAEMU Court of Justice is one of the supervisory bodies of the Union provided for in the 1994 Constitutive Treaty.

For a study on this Court, see MBACKE M. M., La Cour de Justice de l’Union économique et monétaire ouest africaine (UEMOA), Editions juridiques africaines, Dakar, 1999; IBRIGA, L. M., «L’UEMOA : une nouvelle approche de l’intégration économique régionale en Afrique de l’Ouest», African Yearbook of International Law, vol. 6, 1998, pp. 23-64; SY, D., «L’activité de la Cour de Justice de l’UEMOA», Colloquium on «Les droits communautaires africains», Proceedings of the colloquium organised by CREDILA, University of Dakar, 27-28 April 2006, Les Nouvelles Annales Africaines, pp. 207-239; MELEDJE DJEDJRO, F., «L’appropriation des normes communautaires par les milieux universitaires et le monde judiciaire», Third Interjurisdictional Meeting of the Community Courts of WAEMU, CEMAC, ECOWAS and OHADA, Dakar, 4-5 May 2010.

427 Article 57 of Regulation No. 1/96/CM on the Rules of Procedure of the WAEMU Court of Justice.

428 Article 62 of the Rules of Procedure of the WAEMU Court of Justice.

A. Non-performance in disregard of certain international obligations

Non-compliance with a judgment or decision rendered by a permanent Court, established by an international treaty, constitutes a violation of the obligations contained therein as well as those arising from the Supplementary Acts to which it refers. Thus, by becoming parties to the revised ECOWAS Treaty and the Supplementary Protocol on the Court of Justice, the Member States of the Community have sovereignly subscribed to the obligations contained in these two international legal instruments. Under the ECOWAS Treaty, these States are bound by a primary obligation - that is, an “obligation arising from a primary norm (or rule) [...] It imposes in itself a specific conduct, setting out the content of an international commitment of a substantive nature”⁴²⁹ Pursuant to the provisions of the Supplementary Protocol relating to the ECOWAS Court of Justice, States are bound by a so-called secondary obligation, that “arising from a secondary norm (or rule) [...] It relates to establishing or implementing primary obligations or to sanctioning for their non-observance. Its content is formal or procedural. In particular, [it is an] obligation defining the legal consequences of the breach of a primary obligation, namely the new legal relations arising from that breach. Indeed, according to the general rule - *Pacta sunt servanda* (“agreements must be honoured in good faith”)”⁴³⁰ - “recognised as belonging to positive international law by the Vienna Conventions codifying the law of treaties, which expresses the binding force of treaties on the parties.”⁴³¹ This is also reflected in the transitional provisions and the safeguard clause of Article 92 of the Revised Treaty:

“From the entry into force of this Revised Treaty, in accordance with the provisions of Article 89, the provisions of the United Nations Vienna Convention on the Law of International Treaties, adopted on 23 May 1969, shall apply to the definition of the rights and obligations of Member States under the ECOWAS Treaty of 1975 and this Revised Treaty. It follows that the States Parties to the above-mentioned ECOWAS legal instruments are bound by “a meta-legal principle, which is the basis for the binding nature of treaties;”⁴³² they are also bound by “a principle which would be the axiomatic basis for the binding nature of any rule of international law based on consent.”⁴³³ On the basis of this principle and many others similar to it, the ECOWAS Member States are bound to give effect to the judgments and decisions of the Court of Justice.

In other words, they must apply these judgments or decisions in good faith, i.e. in a way that “parties are legally bound to observe, in the execution and interpretation of their rights and obligations, irrespective of the fact that they are not bound by them”. In other words, they must apply these judgments or decisions in good faith, i.e., “a conduct which the parties are legally bound to observe, in the execution and interpretation of their rights and obligations, whatever their source, by virtue of a general principle of law whose binding force is recalled by recurring practice and case law.”⁴³⁴

Thus, in State practice, it should first be noted that the principle of good faith is enshrined in the Vienna Convention of 23 May 1969 on the Law of Treaties with regard to the performance of treaty obligations⁴³⁵. Secondly, the United Nations Charter of 26 June 1945 provides that “Members of the United Nations ... shall fulfil in good faith the obligations which they have assumed under the present Charter.”⁴³⁶ Thirdly, the Hague Convention on the Law of Treaties provides that the principle of good faith is to be observed in the performance of treaty obligations. Finally, the 1907 Hague Convention

429 SALMON, J (ed.), *Dictionnaire de droit international public*, op. cit, p. 772.

430 According to Roberto AGO, the principle of *pacta sunt servanda*, “a fundamental rule of the law of treaties [...] is a rule of general customary law which recognises the binding nature of treaty rules”, *Yearbook of the Courts of the Academy of International Law*, The Hague, 1964, vol. 1, p. 30.

431 SALMON, J (ed.), *Dictionnaire de droit international public*, op. cit, p. 797.

432 Ibid.

433 Ibid.

434 Ibid, p. 134.

435 According to Article 26 of the Vienna Convention of 23 May 1969 on the Law of Treaties, “every treaty in force is binding upon the parties and must be performed in good faith.

436 Article 2 paragraph 2 of the United Nations Charter signed on 26 June 1945 in San Francisco.

for the Settlement of International Disputes expressly provided that “recourse to arbitration implies an undertaking to submit in good faith to the award.”⁴³⁷ In view of the stipulations of these various treaties, it seems that ECOWAS Member States must be convinced that the principle of good faith is anchored in the practice of the majority of Member States of the international community, which encourages them to honour their commitments in respect of this sacrosanct principle.

With regard to the case law referring to the duty to fulfil international obligations in good faith, it is appropriate to limit ourselves to the case law developed by the International Court of Justice. Indeed, the ICJ first considered that “one of the basic principles governing the establishment and performance of legal obligations, whatever their source, is good faith. Mutual trust is an inherent condition of international cooperation [...]”⁴³⁸ In the second instance, the ICJ referred to this principle in relation to compliance with the declaration of recognition of its compulsory jurisdiction: “In fact, declarations, although being unilateral acts, establish a series of bilateral links with other States which accept the same obligation in relation to compulsory jurisdiction, taking into consideration conditions, reservations and stipulations of duration. In the establishment of this network of commitments constituted by the optional clause system, the principle of good faith plays an essential role [...]”⁴³⁹

These examples of international jurisprudence demonstrate that ECOWAS Member States, acting in good faith, cannot continue to ignore the effects of treaties between themselves, including all the obligations and consequences realised or expected from their implementation, which result from the provisions contained in the Revised Treaty and the Supplementary Protocol on the Court of Justice.

But it is easy to see that, despite consent based on the principle of *pacta sunt servanda* and good faith, States often want to avoid the enforcement of decisions or judgments rendered by international Courts. To be convinced of this, it suffices to review some rather illustrative examples from case law and practice.

Firstly, with regard to judgments rendered by the ECOWAS Court of Justice that have not been executed, it should be noted that the report drawn up by the Committee responsible for taking stock of decisions or judgments shows that out of the 289 decisions or judgments rendered by the Court, 114 have been executed while one hundred and seventy-five (175) have not.⁴⁴⁰ It follows that there is a higher number of judgments not or partially executed by ECOWAS Member States. Among these, two illustrative examples should be mentioned.

Firstly, Burkina Faso refused to implement the ruling of the Court of Justice that the Electoral Code, as amended by Law No. 005/2015/CNT of 7 April 2015, is, on the one hand, a violation of the right to free participation in elections and, on the other hand, the State of Burkina Faso must remove all obstacles standing in the way of persons deprived of the right to participate in these elections, in view of these amendments.⁴⁴¹

Benin then distinguished itself by Decision DCC No. 20-434 of 30 April 2020 by which a citizen filed an appeal for the “annulment of all the decisions rendered by the Court of Justice of the Community with regard to Benin on the basis of Article 9 of Supplementary Protocol A/SP.1/01/05.” In response, the Constitutional Court of Benin ruled that “[...] the Supplementary Protocol A/SP.1/01/05 of 19 January 2005 is not opposable to the State of Benin for not having been ratified by virtue of a law voted by the National Assembly, promulgated and published in the Official Gazette; [...] that the successive governments that have followed up on the various proceedings initiated on the basis of the ECOW-

437 Article 37 of the first Hague Convention of 1907 for the settlement of international disputes.

438 ICJ, Nuclear Tests Case, Judgment of 20 December 1974, Reports 1974, p. 268, § 46.

439 ICJ, Case concerning Military and Paramilitary Activities in and against Nicaragua (Jurisdiction and Admissibility), Judgment of 26 November 1984, Reports, 1984, p. 418, § 60.

440 Committee on status of enforcement of judgements, Community Court of Justice, Report of the Committee on the Status of Enforcement and Compliance with the Judgements of the Court, 15 September 2021, 38 pages.

441 ECOWAS Court of Justice, Judgment ECW/CCJ/JUD/16/15, CDP and others v Burkina Faso, 13 July 2015.

AS Supplementary Protocol A/SP.1/01/05 of 19 January 2005 in the absence of a ratification law promulgated and published in the Official Gazette, have violated Article 35 of the Constitution; [...] that all acts resulting from the implementation of the ECOWAS Supplementary Protocol A/SP.1/01/05 of 19 January 2005 are null and void with respect to Benin”.⁴⁴²

Secondly, concerning the judgments rendered by the WAEMU Court of Justice, it is worth noting the non-execution by Benin of judgment No. 005/2020 of 8 July 2020. Indeed, by letter dated 21 January 2020, the President of the WAEMU Commission referred the matter to the Court of Justice for the implementation of Article 14 of the Supplementary Protocol No. 1 relating to the supervisory bodies of WAEMU. This request follows decision No. 19-187 of 22 August 2019 of the Constitutional Court of Benin where manifestly erroneous interpretations of Community law were found concerning the application of the provisions of Regulation No. 5/CM/WAEMU of 25 September 2014 on the exercise of the profession of lawyer. The UEMOA Court of Justice said that “the primacy of the legal system of the Union in its entirety over the national legal systems implies that no administrative, legislative, jurisdictional or even internal constitutional provision can be used to override Community law”⁴⁴³. Despite this ruling, the Constitutional Court of Benin refused to reconsider its position. Indeed, the Constitutional Court had been seized by the Registrar of the WAEMU Court of Justice for the purpose of notifying judgment No. 005/2020 of 8 July 2020. The letter of notification invites the Beninese constitutional judge to “appropriate the written and enumerated facts of the judgment and comply with them.”⁴⁴⁴ In so doing, the Constitutional Court considered that it should “take appropriate measures to execute the judgment”, on the understanding that it was up to it to “decide on the consequences of the judgment”.⁴⁴⁵ The Court concluded that the judgment had no precedence over other judgments. But it concludes that national law takes precedence by virtue of the authority of its decision DCC No. 19-287 of 22 August 2019, which is not subject to appeal and which “is binding on the public authorities and all civil, military and jurisdictional authorities.”

Thirdly, it should be recalled that despite the commitment of States to execute without delay the various arbitral awards rendered by the OHADA CCJA, States circumvent this obligation. Two examples suffice to illustrate this State of affairs: the first is judgment No. 35/GCS-2016 of 30 November 2016 by which the Supreme Court of the Republic of Congo purely and simply annulled judgment No. 168/2015 delivered on 17 December 2015 by the CCJA, which annulled judgment No. 20/GCS-014 of 23 January 2014 of the Supreme Court of Congo in favour of the accused company Elco Construction. Indeed, the latter claims that, in annulling Judgment No. 26 of 22 May 2013, it ruled on a question that was strictly a matter of the domestic law of the Republic of Congo, namely whether the pre-trial judgment rendered by the High Court of Pointe-Noire on 26 November 2012 was an interlocutory or preparatory judgment.

The second example is provided by judgment No. 183/21 of the Ivorian Court of Cassation, meeting in plenary session, by which this High Court suspended judgment No. 199 rendered on 28 May 2020 by the CCJA in favour of Mr. Diallo Marouf André, while arguing that

“The execution of judgments No. 57 of 20 April 2018 of the Presidential Chamber of the Abidjan Court of Appeal and No. 199 of 28 May 2020 of the OHADA CCJA, is likely to cause a serious disturbance of public order, particularly in economic matters, especially as the DPCI company, invested with a public service mission, would find itself paralysed and would have no choice but to abruptly end its activities, with all that this would entail in terms of supply difficulties for pharmacies and medical analysis laboratories at a time of health crisis caused by the coronavirus pandemic, not to

⁴⁴² Constitutional Court of Benin, Decision DCC No. 20-434 of 30 April 2020.

⁴⁴³ UEMOA Court of Justice, judgment No. 005/2020 of 8 July 2020.

⁴⁴⁴ NGANDO SANDJE, R., «La primauté du «droit communautaire» dans la jurisprudence des cours africaines», *African Journal of Public Law*, Vol. X, No. 21, Special 2021, p. 157.

⁴⁴⁵ Ibid.

mention the loss of jobs for the qualified staff who work there.”⁴⁴⁶

Fourthly, it should be noted that the African Court on Human and Peoples’ Rights is competent to render decisions or judgments on the interpretation and enforcement of the African Charter, the Additional Protocol to the Court and any other human rights instrument ratified by the State concerned. In this regard, some States, although bound by these obligations, do not respect them. For example, Côte d’Ivoire has been known to fail to comply with certain decisions of the African Court on Human and Peoples’ Rights, as evidenced by the cases of Guillaume Kigbafori Soro and Actions pour la protection des droits de l’homme (APDH) against that State. Thus, the African Court on Human and Peoples’ Rights has twice ordered Côte d’Ivoire to suspend the execution of the arrest warrant issued against the applicant,⁴⁴⁷ as well as all acts taken against him, and to take all necessary measures to immediately remove all obstacles preventing him from enjoying his rights to elect and be elected in the October 2020 presidential elections until the decision on the merits.⁴⁴⁸

Notwithstanding these provisional measures, Côte d’Ivoire convicted Guillaume Kigbafori Soro, who declared himself a candidate for the presidential election on 28 April 2020, “without first notifying him of the act of referral to the Court and the charges against him.”⁴⁴⁹ This denial by the Ivorian State to execute the decisions rendered by the African Court on Human and Peoples’ Rights is not new, as Côte d’Ivoire has refused to execute the provisional measures issued by the same Court in the case of Laurent Gbagbo against this State.⁴⁵⁰ Similarly, Côte d’Ivoire has already refused in the past to comply with a ruling of this Court that ordered it to amend Law No. 2014-335 of 18 June 2014 on the Independent Electoral Commission (IEC) to bring it into line with regional human rights legal instruments to which this State is a party⁴⁵¹. This tug of war between the African Court on Human and Peoples’ Rights and the Republic of Côte d’Ivoire is in line with the attitude observed by Benin⁴⁵² towards this Court, which resulted in the pure threat of withdrawal of their instrument of accession to this Court.

Finally, with regard to the ICJ, it should be noted that three judgments have encountered real difficulties in execution. In the Corfu Channel case, Albania refused for many years to pay the compensation awarded by the Court to the UK. However, an agreement between the two parties was finally reached on 8 May 1992.⁴⁵³ In the Fisheries Jurisdiction case, the solutions adopted by the ICJ were quickly overtaken by developments in the Law of the Sea and were therefore not implemented by Iceland. Finally, in the dispute between Nicaragua and the United States of America, the ICJ judgment of 27 June 1986 was only partially executed and the case was only concluded by Nicaragua withdrawing its claim only after a change of political leadership in Managua, a reorientation of relations between the two countries and the resumption of US financial aid to Nicaragua.⁴⁵⁴

446 Court of Cassation, plenary session, judgment no. 183/21, according to appeal no. 2020-276.susp/ASP dated 08 July 2020.

447 African Court on Human and Peoples’ Rights, Case of Guillaume Kigbafori Soro and Others v. Republic of Côte d’Ivoire, Order (Interim Measures-1) of 22 April 2020.

448 African Court on Human and Peoples’ Rights, Case of Guillaume Kigbafori Soro and Others v. Republic of Côte d’Ivoire, Application No. 012/2020, Order (Provisional Measures-2) issued on 15 September 2020.

449 Ibid.

450 African Court on Human and Peoples’ Rights, Case of Laurent Gbagbo v. Republic of Côte d’Ivoire, Application No. 025/2020, Order (Provisional Measures) 25 September 2020.

451 African Court on Human and Peoples’ Rights, APDH v. Côte d’Ivoire (Merits), Judgment of 18 November 2016.

452 African Court on Human and Peoples’ Rights, Case of Sébastien Germain Marie Aikoué Ajavon v. the Republic of Benin, Application No. 027/2020, Order (Provisional Measures), 27 November 2020.

453 “According to the Memorandum of Understanding of 8 May 1992, the Government of the United Kingdom will approve the release to Albania of approximately 1,574 kilograms of gold previously reserved for allocation to Albania from the mass of gold held by the Tripartite Commission. The agreement correspondingly settles the British claims by a lump sum. In connection with the gold handover, the Government of Albania will pay the Government of the United Kingdom the sum of one million pounds, whereas Albania had been ordered to pay 842,142 pounds. GOY, R., “The fate of the monetary gold looted by Germany during the Second World War”, French International Law Yearbook, 1995, pp. 390-391

454 GUILLAUME, G., “De l’exécution des décisions de la Cour internationale de Justice”, op. cit. pp. 431-447. 73 Articles 77 of the Revised ECOWAS Treaty and 24 of the Supplementary Protocol A-SP.1-01-05 on the Court of Justice.

All in all, it is up to the States - acting through their national Courts or ministries of justice - to take the necessary measures to enforce Court decisions. Though there is a manifest lack of will or a notable incapacity on their part, two attitudes are possible: either to assert the measure of coercion - forced execution or measure of purely internal law in order to carry out a judgment or a decision of justice - or to engage the responsibility of the defaulting State.

B. From enforcement...to the international responsibility of the defaulting State

Though it is true that forced execution exists in domestic law, it is equally true that it is an exception in international law. In the latter case, the ECOWAS Protocol, like the texts of other international organisations (United Nations, UEMOA, CCJA, for example), provides for the exceptional use of coercive measures,⁷³ knowing very well that sanctions are not the only instrument that guarantees the effectiveness of judgments or Court decisions. For example, in the ECOWAS region, the record of cases of non-compliance with Court decisions is generally positive. Many ECOWAS Member States execute the judgments of the Court of Justice without too much difficulty or resistance. However, it is true that it often happens that the Court's decisions are not executed, as may be the case elsewhere; this prompts the use of means of coercion provided for in a legal instrument.

It is true that provision is made for the enforcement of judgments of the ECOWAS Court of Justice and for sanctions in the event of non-compliance with the relevant obligations, but it is also true that these mechanisms have never been implemented to judge whether or not they are in conformity with the rules of forced execution of the Court's decisions.

That said, there are similar cases at the international level where the sanctions mechanism has been provided for and implemented, admittedly in a piecemeal fashion. For example, Article 94(2) of the UN Charter delegates to only the Security Council, "if it considers it necessary," the power to make recommendations or decide on measures to be taken to implement the ICJ judgment.

Moreover, in practice, the Security Council has only been seized once on the basis of Article 94, paragraph 2 of the UN Charter. This referral was made by Nicaragua following the decision of the ICJ on 27 June 1986 in the case against the United States of America concerning certain military and paramilitary activities committed in or against its territory. It should be noted, however, that the Resolution proposed by Nicaragua met with a negative vote by the United States of America and was therefore not adopted. The matter was then submitted to the General Assembly which, on the basis of Article 10⁴⁵⁵ of the Charter, only made recommendations to the parties in dispute. The force of such recommendations is limited⁴⁵⁶. However, the illustration of a positive intervention by the United Nations to verify the execution of an ICJ judgment is found in the case concerning the territorial dispute between the Libyan Arab Jamahiriya and Chad.⁴⁵⁷ Indeed, on 4 April 1994, Chad and Libya concluded an agreement on the practical modalities for the execution of the ICJ judgment.⁴⁵⁸ By this agreement, Libya agreed to withdraw its troops from the Aouzou Strip, under the supervision of UN observers, by the end of May 1994. The two disputing States also agreed to demarcate their border in accordance with the Court's ruling, to establish joint patrols to monitor the border, to determine certain crossing points and to define a process to clear the territory of mines. The Security Council, for its part, authorised the deployment, for a period of forty days, of a team of observers (the United Nations Observer Group in the Aouzou Strip - GONUBA), in accordance with a recommendation by the Secretary General. In a joint declaration of 30 May 1994, the two States noted that the Libyan

⁴⁵⁵ Article 10 of the UN Charter provides that "the General Assembly may discuss any questions or any matters within the scope of the present Charter or relating to the powers and functions of any organs provided for in present Charter, and, subject to the provisions of Article 12, may make recommendations to the Members of the United Nations, to the Security Council, or to the Members of the United Nations and the Security Council, with respect to any such questions or matters."

⁴⁵⁶ GUILLAUME, G., «De l'exécution des décisions de la Cour internationale de Justice», *Revue suisse de droit international*, vol. 4, 1997, pp. 431-437.

⁴⁵⁷ See ICJ, Judgment of 3 February 1994, in *Reports of Judgments*, 1994, pp. 6-42.

⁴⁵⁸ S/1994/402 and 424, 13 April 1994, text published in the *Revue générale du droit international public*, 1994, pp. 801-802.

administration and forces had withdrawn from the Aouzou Strip “to the satisfaction of the parties.”⁴⁵⁹

Moreover, by ignoring the execution of a judgment or decision of an international tribunal, the State is certainly opting for the preservation of certain sovereign values held to be hierarchically higher than its image and in compliance with its international obligations.

However, this State may see its international responsibility called into play by one or more other States which may demand that measures be taken to enforce the decision or judgment rendered. Indeed, in international law, it is quite clear that a binding norm must be respected, as well as the obligations arising from it, and that the violation of this norm constitutes a wrongful act⁴⁶⁰ at the international level which engages the international responsibility of its author⁴⁶¹. For example, it was quite possible to engage the international responsibility of West African States, following their refusal to execute the above-mentioned decisions or rulings by the ECOWAS Court of Justice. This principle of the international responsibility of the State for non-compliance with a decision rendered by an international Court was laid down in the judgment of 15 June 1939 of the Permanent Court of International Justice (PCIJ) in the case of the *Société Commerciale de Belgique*.⁴⁶²

Ultimately, it should be reMembered that though the ECOWAS Court of Justice represents the desire and embodies the commitment of West African States to resolve disputes in a binding and final manner by submitting to the decisions or rulings of this Court, it must inspire confidence and arouse the interest of these States to “respect and ensure respect” for the law in order to guarantee and preserve peace and security in the long term; this will enable them to gain credit from the international community as a whole. For this to happen, it will be necessary to follow some lines of thought with a view to improving the mechanism for enforcing the decisions of the ECOWAS Court of Justice. The Court must be able to deal not only with non-enforcement arising from the violation of certain principles and thus entail the responsibility of the State concerned, but it must also have the power to deal with the enforcement of its own decisions. To this end, it could be envisaged that questions of enforcement of decisions be brought directly before the ECOWAS Court of Justice by citizens/individuals and national human rights institutions - including non-governmental organisations - where the State against which the complaint is brought is a party to the Supplementary Protocol on the Court of Justice. This is the enforcement of its decisions by the Court of Justice itself, of course with the support of an external group of individuals, but it is the one in control of the enforcement, i.e. it imposes its decision only through its automatic imperium and not through the internal mechanisms of enforcement that the administration uses for this purpose. Here, the idea is to reinforce the authority of the decisions of the ECOWAS Court of Justice by “strategically” using its own powers. The aim is to give credibility to the decisions rendered by the Court in the absence of concrete enforcement or practical enforcement mechanisms for these decisions.

Furthermore, it is possible to envisage the need to improve the enforcement of the Court of Justice’s decisions by ensuring that, on the one hand, the States in dispute entrust the Court of Justice, by means of a compromise, with the competence to deal with the enforcement of decisions, as can be seen in the practice of international arbitration.⁴⁶³ On the other hand, it is desirable to enshrine the rule that any litigant (of a State Party) who has obtained a decision of the Court of Justice against a Member State may obtain the assistance of the public authority of one or more other States in order

459 KOSKENNIEMI, M., “The Case of the territorial dispute (Libyan Arab Jamahiriya v. Chad, ICJ judgment of 3 February 1994”, *Annuaire français de droit international*, 1994, pp. 442-464.

460 According to Article 2 of the International Law Commission (ILC) Draft Articles on State Responsibility, “an internationally wrongful act of a State occurs when conduct consisting of an action or omission: (a) is attributable to the State under international law; and (b) constitutes a breach of an international obligation of the State”.

461 According to Article 1 of the ILC Draft Articles on State Responsibility, “every internationally wrongful act of a State entails its international responsibility”.

462 GUILLAUME, G., «De l’exécution des décisions de la Cour internationale de Justice», *op. cit.*, pp. 431-447.

463 See *Tacna/Arica Boundary Case*, Award of 4 March 1925, UNRIIAA, vol. II, New York, 1949, p. 952; *Chile-Argentina Boundary Case*, United Nations Reports of Arbitral Awards, vol. XVI, New York, 1969, p. 120.

to obtain the forced execution of this decision against the State lacking the will to do so. As a result, in this case, enforcement measures appear to be an extension of the litigation. Thus, the State may request the cooperation of the other Member States of the Community, or even appeal to the domestic Courts of these States to obtain the execution of decisions or judgments of the Court of Justice, as the French Constitutional Council has suggested in very clear terms:

“Bearing in mind that any judicial decision is enforceable; that any judgment may thus give rise to enforcement, the public force having to assist in this execution if required; that such a rule is the corollary of the principle of the separation of powers [...]”⁴⁶⁴

464 Constitutional Council, Decision DCC No. 98-403 of 29 July 1998, Recueil du Conseil constitutionnel, p. 276.

THE EXECUTION OF DECISIONS OF THE ECOWAS COURT OF JUSTICE

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The ECOWAS Court of Justice is the principal judicial body of the community which exercises its functions in accordance with the provisions of Protocol A/P1/7/91 of 06 July 1991. Its establishment was formalized in Article 15 para 1 of the 1993 Revised Treaty of the Community in the following terms: “There is hereby established a Court of Justice of the Community.”⁴⁶⁵ This revision marked the birth of the ECCJ-and its entry into the fold of international Courts.

The ECCJ officially started its activities in 2001, although the protocol for its entry into force dates back to 1991. Its organization as the Court of an economic community is first detailed in Protocol A /P1 /7/91 which will then be amended both by Supplementary Protocol A/SP1/01/05 of 19 January 2005 and Supplementary Protocol A/SP2/06/06 of 14 June 2006.

This succession of texts provides information on the referral, composition, and field of intervention of the Court, which will extend to the protection of human rights. The extension in this field will even become the main activity of the Community Court, considering the large number of rulings rendered compared to cases involving strictly economic matters of the organization.

Ultimately, the Community Court intends to become an independent, reliable, effective community judicial institution with guarantees of establishing and maintaining a viable and credible community environment. To achieve its goal, since 2018, it has been working with 5 independent judges appointed by the Authority of Heads of State and Government for a non-renewable 4-year term, on the recommendation of the judicial Council of the community, because of their profile of jurists competent in international or community law or regional integration⁴⁶⁶

Like any jurisdiction, the effectiveness of judgements and rulings of the Court can only be effective if they are respected by their recipients. However, although the accepted principle is the obligation to execute the judgments rendered, the fate of the decisions rendered is uncertain.

I. The obligation to execute judgments

This is the novelty brought by the new texts of the organization because previously Article 11 of the ECOWAS Treaty of 1975 did not allude to it and the freedom was left to States to follow up on the Court’s rulings. Henceforth, the judgments of the ECCJ are not only binding but also irrevocable.

A. The enforceability of judgments

Enforcement means: “*the whole set of mechanisms, of procedure ensuring the implementation of a decision whether or not, by its recipients, according to the authority of the latter in order to ensure the effectiveness of that decision.*”⁴⁶⁷ The enforceability of rulings is contained in a number of texts.

According to Article 19 paragraph 2 of the 1991 Protocol on the ECOWAS CJ: “*Decisions of the Court are (...) immediately enforceable.*”⁴⁶⁸ Article 23 paragraph 3 of the same Protocol adds: “*The Member States and the institutions of the Community are required to take without delay all necessary measures to ensure the execution of the Court’s decisions.*”

Article 62 of the Rules of the same Court States that: “*The judgment of the Court shall be binding from the date of its delivery.*” Also, it is important to add that in the preamble to the Supplementary Protocol of January 19, 2005, the States Parties have expressed their desire to take all measures that promote the proper functioning of the Court and guarantee the execution of its decisions.

These different texts imply that the decisions of the Community Court, as soon as they are made public, must be executed by the parties regardless of their status and the execution of the judgments

⁴⁶⁵ Article 15 para 1 of the 1993 Revised Treaty,

⁴⁶⁶ We went from 7 to 5 judges since 2018. This amends Article 3(2) of Protocol A/P1/7/91 which provides that: “the Court shall consist of seven (7) Members, no two of whom may be nationals of the same State...”

⁴⁶⁷ DRAGO (G.), L’exécution des décisions du Conseil constitutionnel, Economica, PUAM, 1999, p.95

⁴⁶⁸ Art. 19 para. 2 of the 1991 Protocol on the CCJ

must be done within a reasonable time.

In clear terms, once the Court renders a decision against a Member State, the latter must in principle start enforcing the decision from the day of delivery. It is established in international law that States must not evade. Moreover, the obligation to execute the judgments of the ECCJ, is in accordance with a general principle derived from the law of international responsibility of States and is based on the principle that: “*States are required to fulfil the obligations enshrined in international treaties in good faith (pacta sunt servanda)*.”⁴⁶⁹ The spontaneous and good-faith execution of the judgments lead to the recognition of the Court’s jurisdiction as: “*Judge of the Community law of ECOWAS and judge of human rights*.”⁴⁷⁰

Furthermore, this obligation to enforce the judgments of the ECCJ is imposed in the internal legal order of the Member States, with three consequences: First, the obligation to execute the Court’s judgments is imposed on both the Member State and the various national authorities. Secondly, it requires the national authorities to remove from the legal system, provisions that are incompatible with the commitments of the Member State on the basis of their own national procedures. Finally, this implies a certain prevalence of Community law over national law. For this purpose, the supremacy of the Community Court, results from the one generated by its own decisions.

It should also be stressed that the other positive aspect of the obligation to execute the judgments of the ECCJ is that the victims have the possibility to use the judgment and its benefits in the domestic order. The enforceability of the ECCJ’s judgments thus guarantees the effectiveness of its decisions.

The decision of the ECCJ condemning and ordering a State to compensate for damages caused to a victim cannot therefore be left unenforced. Thus, States condemned for human rights violations, in view of the enforceability of the judgments of the ECCJ, must execute them, at the risk of being sanctioned for failure to fulfil a community obligation.⁴⁷¹

Moreover, the Court itself provides modalities for the execution of its own decisions. It is even envisaged that decisions rendered will be forcibly enforced. Article 24 of the Supplementary Protocol is clear on this point:

- “1. The writ of execution, which shall be submitted by the Chief Registrar of the Court to the relevant Member State for execution, shall be governed by the rules of civil procedure of that Member State.
2. The binding formula shall be affixed without any further control than the verification of the authenticity of the writ by the national authority that the Government of each of the Member States shall designate for that purpose.
3. Member States shall determine the competent national authority for the purpose of receiving and procession of execution and shall notify the Court accordingly.”

It is clear that the Chief Registrar must notify the State authorities of the decision rendered, but each State is free to indicate the course of action to be taken to comply with the decision rendered.

This idea of enforcement is not bad in itself, but it is implementation that always remains problematic. In this context, the experience of the United Nations, which led to the adoption of a charter for the enforcement of ICJ decisions with Chapter 7, could serve as a model and inspire the Authority of Heads of State and Government of ECOWAS.

The failure to execute the judgments of the CCJ is therefore likely to lead to an appeal for non-ful-

469 Art. 26 of the 1969 Vienna Convention on the Law of Treaties

470 CJ v ECOWAS, Hissein HABRE v. Senegal Judgment No. ECW/CCJ/RUL/05/ of 2013; para. 37

471 Failure to comply with the rulings of the CCJ constitutes a breach of the Community obligations of ECOWAS Member States. For, under Article 15 paragraph (4) of the revised ECOWAS Treaty “*Judgments of the Court of Justice shall be binding on the Member States, on Institutions of the Community, and on Individuals and corporate bodies*”.

filment of obligations,⁴⁷² or even the imposition of sanctions provided for in the revised Treaty of ECOWAS.⁹ Sanctions are provided for in Article 77 of the revised Treaty and may even include loan suspensions, refusal of support for candidacies, for statutory or professional positions, suspension of the right to vote or participate in community activities, etc. In addition to the enforceability of judgments rendered by the ECCJ, it is also important to emphasize that they are irrevocable.

B. The irrevocability of judgments

Not only are the decisions of the ECCJ binding, but they are also final and cannot be appealed. In other words, they have the authority of *res judicata*. The authority of *res judicata* requires that, for legal certainty, everyone must submit to the decision of the Community judge, not only the Member States but also the national authorities and individuals.⁴⁷³ In addition, it prohibits appeals relating to decisions of *res judicata* and grants *de jure* supremacy to the decisions of the Community judge.

In general international law, the Permanent Court of International Justice (PCIJ), has confined the effects of the judgment to two components: finality and binding. According to it: *“recognizing the res judicata arising from an award, means nothing other than recognizing that the provisions of the award are final and binding.”*⁴⁷⁴

Thus, the binding force attached to the judgments of the CCJ means that the decision of the Community Court gives a binding answer to the request submitted to it, and that every national Court is bound by the response given by the Community Court. This authority of *res judicata* by the CCJ, undoubtedly gives assurance to the victims of human rights violations that the judgments rendered in their favor by the Community Court, puts a definitive end to the conflict.

It is therefore understandable that, whatever the justification given for the obligation to respect it, *res judicata* is perceived as a principle prohibiting the questioning of jurisdictional decisions or the obstruction of their execution.⁴⁷⁵ It thus constitutes, it seems to us, a label of credibility of the Community Court. It follows from the above that the binding nature of the decisions of the CCJ and the authority of *res judicata* with which they are vested constitute a certain guarantee of the effectiveness of its decisions, of the effectiveness of the supervision carried out, and therefore of the effectiveness of the protection provided.

Even in the event of a preliminary reference, which is a technique of collaboration between the ECCJ and the national Courts, the decisions rendered by the ECCJ are binding whenever it rules as the last instance.⁴⁷⁶ Despite this double character attached to the judgments rendered, their fate remains uncertain.

472 Under Article 10(a) of the 2005 Supplementary Protocol, any Member State of ECOWAS and the Executive Secretary may refer cases of failure of Member States to comply with their obligations to the CCJ

473 According to Gérard Cornu *res judicata* is: “The quality attributed by law (C. civ., a. 1350) to any final judgment; that is to say, more precisely, to any jurisdictional decision (judgment, arbitration award), in relation to the dispute that it resolves, and which prevents, subject to the recourse procedures, the same thing from being tried again between the same parties in another lawsuit (so-called relative authority)”. CORNU (G.), *Vocabulaire juridique*, PUF, Paris, 1987, p.135., For Jean Salomon, *res judicata* is “what has been decided by the judge to end a dispute”. SALMON (J.), (ed.), *op. cit.*, 2001, p. 170.

474 Reference is made to Professor Gaston JEZE who Stated already in 1913 that: “when a judge has regularly made a finding with the force of legal truth, it is important for social peace that everyone bows to these findings: not only the individuals involved, but also third parties, public authorities, Courts of all kinds, and administrative agents. What damage to the prestige of the Courts, if a Court is not obliged to accept as legal truth the finding made by itself or by another Judge”. JEZE (G.), « De la force -e vérité légale attachée par la loi à l’acte juridictionnel », *RDP*, 1913, pp. 439-440, cited by ADELLOUI (A.J.), in : “L’autorité de la chose jugée par les Juridictions Constitutionnelles en Afrique n, in, *Revue Béninoise des Sciences Juridiques et administratives*, n°26, 2011, p. 141.

475 See Melin-SOUCRAMANNEN (F.), *Constitutional Law*, Armand Colin, 23 ed., 2004, p. 700. Reference is made to the thesis that “since the constitutional reforms in Africa, the authority of *res judicata* has become a label of credibility for constitutional jurisdictions.” ADELLOUI (A.J.), “L’autorité de la chose jugée par les juridictions constitutionnelles en Afrique”, *op.cit.*, p.141. ⁹s the treaty establishing an international organization is its “constituent instrument”, in other words the “constitution” of the international organization. See COMBACAU (J.), ON (S.), *Public International Law*, Paris, Montchrestien, 2012, 10th ed., p. 7. Thus, the Treaty establishing ECOWAS is the primary source to which the Community refers, and therefore the primary source of reference for the CCJ

476 See art15 of the Rules of Court

II. The uncertainty of the fate of judgments rendered

It is established that a judgment rendered by a Court is binding on the parties. This is a minimum requirement for the protection of the rights covered by the various international and regional instruments. And yet Court decisions are still far from reaching. Not only are they theoretically binding, but they are also subject to abuse by the Member States who claim sovereignty.

A. Theoretically binding judgments

There is no coercive means or power of injunction to make States to comply with the judgments of the Court. There is therefore no grip on States to ensure the proper execution of judgments. The freedom is thus left to States to make decisions for themselves. This situation can lead to several scenarios: States either systematically refuse to execute the decisions rendered or they can partially execute the decisions. The good faith of States can thus be put into play.

In the case of *Isabelle Manavi Ameganvi et al. v State of Togo* of 7 October 2011, the execution of the decision was partly carried out by the Togolese State. In this case, the Togolese authorities felt that the community judge did not speak of a reinStatement of the MPs but of a compensation in market value. However, in his decision, the judge, in spite of the criticisms that may be levelled at him, stated that *“the MPs never properly expressed their desire to resign.”* This means, in the Court’s view, *“that there is a violation by the State of Togo of fundamental rights of the applicants to be heard as provided for in Articles 10 of the UDHR and Article 7 of the African Charter on Human and Peoples’ Rights.”*

Partial execution of a decision is a violation of the texts; it shows bad faith. In principle, sanctions must be imposed. However, it is well known that this is envisaged in this context, even to the exclusion of a Member State. Except that there are doubts about the application of such a sanction on the part of the organization. In the history of the organization, we have not yet recorded any exclusion for non-compliance with the rulings of the Community Court.

It is also true that the means of enforcement of the Court was provided for in Article 24 of the 2005 Protocol: The execution of the Court’s judgments, which are otherwise binding in some cases, must be in form of a writ of execution. Without other checks than that of verification of the authenticity of the writ, the States having to designate the national authority competent to receive or execute the decision of the Court. But who can ensure this role of monitoring decisions?

Article 50 of the European Convention on Human Rights has shown the way that could inspire: *“If the decision of the Court declares that a decision taken or a measure ordered by a judicial authority or any authority of a Contracting Party is wholly or partly in conflict with obligations under this Convention, and if the internal law of that party allows only partial reparation to be made for the consequences of that decision or measure, the decision of the Court shall, where appropriate, afford just satisfaction to the injured party.”*⁴⁷⁷ Since such a provision does not exist in our context, it is not excluded that the parties themselves seek the means of an acceptable compensation.

From a comparative perspective, it is known that the judgments of the African Court on Human and Peoples’ Rights are binding, and the Council of Ministers of the African Union has the task of ensuring their implementation. In doing so, politics becomes involved in the enforcement of the decisions. The question is whether the pressure of the Council of Ministers alone is enough to bend the position of recalcitrant States, which can always claim that their sovereignty is their exclusive right.

⁴⁷⁷ The European Court of Human Rights clearly stated in the *Papamichaleopoulos* case that “a judgment finding a violation entails a legal obligation on the part of the respondent State under the Convention to put an end to the violation and to erase its consequences in such a way as to re-establish, as far as possible, the situation prior to the violation”, *Papamichaleopoulos and others v. Greece* (Article 50) judgment of 31 October 1995

B. Judgments challenged by the sovereignty of States

The problem with the decisions rendered is that the States that receive them use their sovereignty as blackmail. The recurrent observation is that the decisions that offend the States are not respected, and the Court is simply defied by the Member States. In the long run, we may witness a denial of justice.

Some cases in which the sovereignty of the State has prevented compliance with the decisions of the Court of Justice are worthy of note

The behaviour of the Gambia is significant in this regard. In the case of Etim Moses Essien versus the Republic of The Gambia and the University of The Gambia of October 29, 2007, the judge noted that “the defendants and their lawyers neither appeared nor were represented.”⁴⁷⁸ They made a point of writing letters to the President of the Commission on two occasions to express their dissatisfaction with the decision rendered by the Community Court of Justice and to “ask the President of the Commission to intervene to allow them to appeal.” According to Professor Alioune SALL, by adopting this “inappropriate” attitude, the Gambian State has “superbly defied the Court.” Indeed, by allowing political authority to intervene in the judicial sphere at a time when the procedure is in its normal course, it means on one hand giving no credit to the judicial authority, challenging even its attributes.” and, on the other hand, suggesting that judges are placed under the authority of political institutions. This implicit suggestion of the processual and substantive superiority of the political decision over the jurisdictional decision is detrimental to the Court because it seriously undermines the protection of human rights.

In another ruling rendered on June 5, 2008, still involving the Gambia (Chief Ebrimah Manneh against the Republic of the Gambia), the defendant adopted the same behaviour towards the Court. The Gambian State refused to appear “despite all the efforts made by the Court to get it to take part in the trial.”⁴⁷⁹

In other cases, namely Hissein Habré, Gbagbo, Tandja, Kpatcha Gnassingbé, etc. the Community Court was challenged by the States concerned.

In the case of Hissein Habré, the ECOWAS Court issued a ruling on 18 November 2010 against Senegal. The applicant had claimed the violation of a number of his rights and the Court effectively held that there had been a disregard for the provisions of Article 7, Paragraph 2 of the African Charter on Human and Peoples’ Rights and Article 11 paragraph 2 of the ICCPR on non-retroactivity of a criminal provision.⁴⁸⁰

In Cote d’Ivoire, the applicants Simone Ehivet and Michel Gbagbo seized the Court for violations of their political rights mainly related to the post-election crisis. Without going into the details of this case, the Court held that Michel GBAGBO’s right to an effective recourse before the national Courts had been violated⁴⁸¹.

In the case of the coup in Niger, Mamadou Tandja filed a complaint against General Salou Djibo and the State of Niger for his arbitrary arrest and detention. The Court of Justice actually ordered his release.⁴⁸²

In Togo, in the case of Kpatcha Gnassingbé, accused of conspiracy against the security of the

478 See ECW/CCJ/RUL/05/07 para 24 of 29 October 2007

479 A. SALL, *the Litigation of Human Rights violations before the ECOWAS Court of Justice*, Dakar, Harmattan-Senegal, 2019, p.257

480 See ECW/CCJ/JUD/06/10 Judgment of 19 November 2010, case of Hissein Habre versus the republic of Benin

481 See ECW/CCJ/RUL/03/13/ of 22 June 2013

482 See ECW/CCJ/RUL/05/10 of 08 November 2010, case ECW/CCJ/app/05

Togolese State and detained, led the person concerned and his co-detainees to take the case to Court, which concluded that their trial was not just and ordered the cessation of the violations of the respondents by condemning the State for cruel, inhuman, and degrading treatment and to pay a sum of 500 million as compensation.⁴⁸³

In another case reported in Togo involving a businessman, *Sow Bertin Agba*, who was arrested for international conspiracy in connection with fraud against an Emirati of Abu-Dhabi, the ECOWAS Court of Justice upheld the applicant's allegations of human rights violations. In particular, torture, arbitrary detention and the moral injury suffered and ordered the Togolese State to pay the sum of 8 million FCFA.⁴⁸⁴

This tendency to emphasize sovereignty in order to block the execution of judgments rendered also exists within the African Court on Human and Peoples' Rights, with decisions by that Court that have led a number of States (Tanzania, Rwanda, Benin and Côte d'Ivoire) to withdraw their declaration of recognition of jurisdiction.

In the tradition of the ECOWAS Court of Justice, it is not even permissible for an applicant to obtain favours from this Court to enforce decisions. The Court dismisses the case, leaving the States to their treaty obligations. In the case of Mamadou Tandja against the State of Niger of November 8, 2010, the Court was, one cannot be more clear: "Considering that ECOWAS Member States are obliged to execute the decisions of the Court in accordance with Article 22 of the Revised Treaty and Article 24 of the Supplementary Protocol relating to the Court, that in this regard, States must take all necessary measures to comply with these provisions; that the Court thus has no need to order the immediate execution of its own decisions, which are binding on the States as soon as they are notified."⁴⁸⁵ This trend is furthermore maintained by the community Court, which reiterated it in another case that pitted Bodjona Pascal against the Togolese State in its decision of May 17, 2016: "the Court considers that it is not up to it to interfere in the execution of a decision of justice by it and that it is up to each party concerned to follow the legal ways provided for this purpose by the legislative texts of the ECOWAS. »"⁴⁸⁶

From the above, it should be noted that the States formally undertake to recognize the legitimacy of the community Court but refuse to respect the decisions rendered as soon as this affects their sovereignty; this situation can only be overcome by forced enforcement, whose ways and means are still in the hands of the States themselves. Perhaps the involvement of political bodies could help States to execute.

Wait and see.

483 Judgment of 13 July 2013

484 Judgment of 26 April 2013

485 Ruling ECW/CCJ/RUL/O5/10, para.5

486 Ruling ECW/CCJ/RUL/ 06/15, para 21- 22

EXECUTION OF DECISIONS OF THE ECOWAS COURT OF JUSTICE

By

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Introduction

Since the enlargement via the Supplementary Protocol⁴⁸⁷ (A/SP.1/01/05) dated 19 January 2005 relative to the mandate of the ECOWAS Court of Justice inclusion of the protection of human rights and the recognition of the right of Member States citizens to bring up individual⁴⁸⁸ petitions before it, contentious proceedings on human rights violations before the Community Court has witnessed a remarkable increase.⁴⁸⁹ The abundance, audacity and relevance of the case law of the regional jurisdiction in the field of human rights protection make it undoubtedly the most advanced human rights protection mechanism on the African continent.

However, as it is generally agreed, despite the multitude of relevant Court judgments, there is still the need to ensure the effectiveness of a judicial system, which is designed to protect rights, and ultimately to impose sanctions and remedies against the violation of these rights. The effectiveness and efficiency of a human rights protection mechanism are more pertinent in relation to the enforcement of the Court's judgments more than the delivery of such judgments thereof. The prompt and comprehensive enforcement of the judgment contributes to the enhancement of the legitimacy of the Court which delivered it and is a pointer to the result of the fundamental right to a fair trial for the applicant. To this end, the right of individual petition granted to natural and legal persons under private law before the Community Court of Justice would be illusory if a final, binding and enforceable Court judgment of this judicial body remains inoperative for a sentenced Member State.

Today, more than ever before, the rapid upsurge in litigations on human rights violations before the Community Court and the effectiveness of this regional human rights protection system are facing a major hurdle which, if not properly addressed, would not only undermine efforts geared towards strengthening or truly taking into account the protection of the fundamental rights of the community's citizens within the integration mechanism under the purview of the sub-regional organisation, but also the role played by the Court of Justice in the construction and consolidation of the rule of law within the Community. This is the central issue with regards to the enforcement or non-enforcement thereof of the Court's judgments by the Member States.

The Registry's records show that as of 30 September 2020, 77 judgments delivered by the Court were unenforced. Out of the 77 judgments, 62 have been followed up with the national authorities, with 7 being fully enforced and only one partially enforced. This suggests that 55 judgments are pending enforcement by the Member States. These statistics are valuable indications of the reality in terms of the enforcement of the Community Court's judgments. The Court's activism⁴⁹⁰ since 2017 through its sensitisation and outreach missions to Member States so as to establish a permanent dialogue with all stakeholders for them to take ownership of the work of the regional Court confirms this timid stance or even inertia or better still the refusal of Member States to promptly enforce its judgments. In view of this State of affairs, it is apt to consider the existence and effectiveness of a mechanism for the enforcement of the Court's judgments by Member States and the challenges of human rights protection linked to the enforcement of the judgments of the sub-regional judicial body.

487 Article 9(4) of the 2005 Supplementary Act provides that: "*The Court shall have jurisdiction in cases of violations of human rights in the territory of all Member States*".

488 Article 10 of the 2005 Supplementary Act States that: "*Any person who is a victim of human rights violations (...) may apply to the Court...*".

489 According to the 2019 Interim Report of the President of the ECOWAS Court: "The number of judgments delivered by the Court in 2019 improved significantly to 21 compared to 11 for the same period in 2018. Out of the 21 judgments rendered, there were 16 judgments and the remaining five were decisions whereas in the same period last year, 10 judgments and one decision were rendered. The number of pending cases also increased to 104, compared to 97 for the same period in 2018," available at Court.ecowas.org/wp-content/uploads/2019/04.

490 The Court periodically sends information and outreach missions to State Parties to exchange ideas with national judicial systems, academics and civil society stakeholders. From 12 to 18 February 2019 and from 22 to 28 February 2020, the Court's mission led by its Vice-President, Honourable Gbérigbè OUATTARA, held meetings in Côte d'Ivoire and Senegal respectively.

This paper is aimed at opening up general discussions on the obligations of State Parties relative to the enforcement of the judgments of the Community Court of Justice (I), and analysing the mechanisms that could contribute to overcoming the challenges around the diligent enforcement of Court judgments by the Member States appearing before the Court (II).

I- Enforcement of the judgments of the ECOWAS Court of Justice

The sub-regional integration process in the ECOWAS Region required the Member States to ratify the Revised Treaty of 24 July 1993. Like any international convention, this West African instrument places obligations on the High Contracting Parties, by virtue of the *Pacta Sunt Servanda* rule, which, if not fully assumed, will compromise the objectives underpinning the political will of the Community. Thus, the implementation of the judgments of the Community Court is in line with this conventional obligation imposed on all the organisation's Member States (1), with a view to reaffirming their common commitment to strengthening the sub-region's human rights protection system (2).

A conventional obligation on State Parties to the Treaty

With regards to the work of the Strasbourg-based human rights Court, Justice Françoise Tulkens writes that: *"a judgment of the European Court of Human Rights is not an end in itself: it is the promise of a change for the future, the beginning of a process that must allow rights and freedoms to become effective."*⁴⁹¹

The promise of change for the future exemplified by the objectives of sub-regional integration can only be fulfilled within the framework of ECOWAS through State Parties' compliance with the treaty obligations. The Community is perfectly aware of this, just as it is aware that States in general do not always demonstrate a more proactive policy for the enforcement of international Court judgments. This is what Andréa Giardana underscored when she argues that *"the enforcement of international judgments as well as the implementation of decisions of international organisations have always posed serious and intricate problems in diplomatic and judicial circles. Indeed, issues concerning the implementation of international judgments and decisions have always been linked to more general issues relative to the effectiveness of the international system as a whole, or its character as a genuine legal order."*⁴⁹²

In view of this general observation, the West African community adopted the Supplementary Act A/SA.13/02/12 of 17 February 2012 on the regime of sanctions applicable to Member States that do not honour their obligations towards ECOWAS. Article 1 of this Act provides that: *"Member States shall be obliged to implement and comply with the Acts of the ECOWAS Authority of Heads of State and Council of Ministers, namely the ECOWAS Treaty, Conventions, Protocols and Supplementary Acts, Regulations, Decisions and Directives of the Community, as well as the Judgments of the Community Court of Justice."* The implementation of the judgments of the sub-regional Court, whose spontaneous enforcement and in good faith appears to be the corollary of the recognition of the competence and legitimacy of this Court, constitutes a community obligation⁴⁹³ for the State Parties. And Member States that are recalcitrant in respecting this commitment are liable to sanctions pursuant to Article 3 paragraph 1 of the Supplementary Act, which stipulates *inter alia*: *"Member States that do not honour their obligations to the Community shall incur judicial and political sanctions...."*

It is noteworthy that this Community obligation relative to the enforcement of Court of Justice judgments is binding on the Member States regardless of the underlying issues relating to the modalities

⁴⁹¹ F. TULKENS, "The execution and effects of judgments of the European Court of Human Rights. The role of the judiciary", in European Court of Human Rights, Dialogue between judges, Council of Europe, Strasbourg, 2006, p.12.

⁴⁹² Andréa Giardana, "The enforcement of judgments and international decisions at the national level", RCADI, 1979, t. 165-IV, p. 243 3

⁴⁹³ Under Article 26 of the 1969 Vienna Convention on the Law of Treaties, States are bound by the obligations contained in the conventions they ratify.

of its implementation. This obligation is linked to the immediate⁴⁹⁴ enforcement of the Court's judgments, thereby obliging the Member States and the Community Institutions "to (...) immediately take all necessary measures to ensure ..." ⁴⁹⁵ their enforcement.

Under the provisions of Article 15 of the Revised Treaty and Article 24 of the 2005 Supplementary Protocol, the judgments and other decisions of the ECOWAS Court of Justice are not only binding, but also directly and immediately enforceable in the Member States. This obligation to comply with the judgments of the Community Court thus entails the State's responsibility to guarantee respect for human rights on its territory by adhering to the protection instruments of which the sub-regional Court is a subsidiary guarantor. It should be noted that this obligation is not only imposed on the Executive branch of government, but on all State authorities, in particular the National Judge, whose main task is to protect the citizens' fundamental rights. The National Judge's role is essential in this respect as it ensures that the primacy of the Community legal order prevails and that these judgments are complied with internally. To this end, it is essential to achieve a harmonious cohabitation between the internal legal orders within the States and the sub-regional judicial system for the protection of human rights, which are fully and eloquently exemplified by the ECOWAS Court of Justice. The institutionalisation of a permanent judicial dialogue between the Community order and the internal legal orders appears in this sense as one of the appropriate ways to ensure the obligation to comply with the Court's judgments.

Twenty years after its establishment, the Community Court of Justice has developed a jurisprudence which is rich, relevant and human rights protection-friendly. Over time, human rights protection has gradually emerged as one of the regional policy priorities towards a successful integration. States Parties to the regional Treaty are becoming aware of the need to fulfil their obligation to comply with the Court's judgments. The enforcement of Judgments No. ECW/CCJ/JUD/ of 26 April 2021, Kodjo Alain Victor v. Côte d'Ivoire and N°. ECW/CCJ/JUD/10/21 of 28 April 2021, Union Sociale Libérale (USL) v. Senegal are some of the latest and not the least illustrations of this promising momentum of the community obligation of Member States to implement the judgments of this Court. Indeed, the two States have undertaken reforms of their respective legislation challenged in the dispute over the violation of the rights of their citizens referred to the Court by taking general measures. The regional Court ordered the former, in addition to individual measures concerning the applicant, to abolish Article 605 of its Penal Code procedure, which the State undertook by convening a commission to rewrite this criminal provision. As for the second, after saying that its electoral code as amended by Law No. 2018-22 of 4 February 2018 violated the right to free participation in elections, the Court ordered Senegal "to remove all obstacles to free participation in elections resulting from this amendment by abolishing the system of electoral sponsorship." Senegal did not hesitate to do so by undertaking the requested reform.

However, compliance with the obligation to enforce the judgments of the Court of Justice remains a real challenge for the sub-regional body, which constantly reminds Member States during its sensitisation and outreach missions. In Senegal, the Court's judgments in the Karim Wade and Khalifa Sall cases are yet to be implemented. Likewise, the Federal Republic of Nigeria is yet to enforce 26 enforceable judgments, the oldest of which pertains to the case *ECW/CCJ/APP/10/06 of 28 January 2009, Djotbayi Talbia & 14 others v. Federal Republic of Nigeria*. The demographic, economic, diplomatic and military weight of this country within the Community justifies the acuteness of the concern related to the enforcement of the Court's judgments.

It is nevertheless necessary to maintain and encourage the ongoing dynamic of the full implemen-

494 Article 19.2 of Protocol A/P.1/7/91 on the Community Court of Justice provides that: "The judgments of the Court shall be read in open Court and reasons shall be given for them. They shall, subject to the provisions of this Protocol relating to revision, be immediately enforceable and shall not be open to appeal."

495 Article 22.3 of Protocol A/P.1/7/91 on the Community Court of Justice.

tation of the Court of Justice's judgments by the State Parties. This will constitute a reaffirmation of their common commitment to strengthening the sub-regional human rights protection system.

A reaffirmation of the common commitment towards strengthening the sub-regional human rights protection system

Human rights are one of the essential pillars for building the ECOWAS region. Over the years, and especially since the revision of the ECOWAS Treaty in 1993, the organisation created institutions towards promoting the overarching principles of political governance and human rights. The Court of Justice is responsible for protecting the rights of the Community's 300 million citizens, a mission it fulfils fully and effectively within the scope of its mandate. Thus, the enforcement of its judgments is not only the fulfilment of a Community-wide obligation by the Member States, but above all a reaffirmation of their common commitment to strengthening this sub-regional human rights protection mechanism, which is indispensable for the success of the policies adopted for the benefit of the West African people.

Indeed, of what use is a final and binding judgment of the Court if such a judgment were to remain unenforced? What would be the point of having a Community Court of Justice if the judgments delivered by this Court for the benefit of citizens in matters of violation of their rights are not enforced? This would be a far cry from the objectives underlying the creation of this Court that the State Parties to the Treaty agreed to set up. We would be denying the Court any legitimacy concerning its role of protecting fundamental rights in the region.

In this regard, it can be said that the enforcement of the judgments of the Community Court stems out of the right of access to the judge and the right to a fair trial guaranteed to all citizens. The Community citizens would be denied their fundamental⁴⁹⁶ rights if the Member States appearing before the Court refuse to implement the judgments of the Court. In addition, the Member States as a whole and the Institutions of the Community would have failed in their commitment to uphold a democratic environment and guarantee the effective protection of human rights.

To this end, each time a Member State voluntarily fulfils its Community obligation by enforcing the judgments of the Court of Justice, this act should be perceived as a renewal of the confidence and credibility granted to this body, but also as a willingness to strengthen the sub-regional human rights protection system.

Thus, it is essential to take an interest in the follow-up or monitoring of the enforcement of the judgments of the regional Court so as to find solutions to the issue of the non-spontaneous and in good faith implementation of the judgments, in the light of what obtains in the other regional models.

II- Monitoring the enforcement of the judgments of the ECOWAS Court of Justice

The enforcement of judgments of the ECOWAS Court of Justice seems to enjoy a certain guarantee provided by judicial and political control mechanisms. However, the situation whereby a plethora of judgments are either not enforced or partially enforced by the Member States raises questions as to the effectiveness of these mechanisms, hence the need to explore and consider the implementation of tried and tested models elsewhere in the Community's legal and institutional framework.

A. The existing monitoring mechanisms on the judgment of the Community Court

The existence of judicial monitoring-enforcement mechanisms

The Community Court does not lack a guarantee in terms of the review of its judgments. This guarantee is preventative in nature or aims at sanctioning a Member State that fails to fulfil its Community obligation.

⁴⁹⁶ Since *Hornsby v. Greece*, 19.3.97, § 40 and *Dubenko v. Ukraine*, 11.1.2005, 2nd section, § 44, the enforcement of Court decisions has become a fundamental right and an integral part of the right to a fair trial.

In fact, as its case law has developed over the last few years, the ECOWAS Court of Justice has given itself a means of preventing the non-implementation of its judgments by Member States by granting them a specific time limit to report back to it on the measures they have taken for the enforcement of its judgments. Thus, in cases no. *ECW/CCJ/JUD/ of 26 April 2021, Kodjo Alain Victor v. Republic of Côte d'Ivoire and N°. ECW/CCJ/JUD/10/21 of 28 April 2021, Union Sociale Libérale (USL) v. Senegal*, the respondent Member States were urged to submit a report on the enforcement of the judgments against them within one month and six months respectively, from the date of notification.

The preventative monitoring of the non-enforcement of its judgments is not the sole prerogative of the ECOWAS Court of Justice. It also exists at the level of the African Court on Human and Peoples' Rights, which does not hesitate to set a time limit for State Parties⁴⁹⁷ to the protocol establishing it to enforce its judgments, both in terms of general and individual measures. Much as the effectiveness in making the State concerned give way leaves much to be desired, this mechanism is nonetheless a means that is available to the Community Court for it to exercise pressure and conduct monitoring of its judgments relative to a sentenced Member State. Just like non-compliance with a judgment itself, it also throws up the possibility, for the Court, to impose sanctions on the Member State concerned for failure to comply with a Community obligation, by way of a limited application before the Court.

Article 1, 2 (2) and 3 of the Supplementary Act A/SA.13/02/12 of 17 February 2012 expressly States that failure to comply with a judgment of the Court of Justice shall constitute a breach by the Member State of its obligations to the Community. And ***"Member States which do not honour their obligations (...) shall incur judicial and political sanctions ..."*** These judicial sanctions shall be imposed by the Community Court. Up until now, there are no cases based on these provisions in the case law of the Court. This lends credence the Statement made by Honourable Gbérilè OUAT-TARA, Vice-President of the Court, who declared during an awareness-raising mission in Abidjan that *"once the Court has delivered its judgment, it does not have the power to control and supervise the enforcement of its judgments."*⁴⁹⁸

Monitoring the enforcement of the judgments by the Community's political organs

Ordinarily, it is truism that the function of judging a case should be dissociated from the enforcement stage of the judgments of international and regional Courts. This phase is generally entrusted to the political organs of the Organisation, of which the judiciary is part and parcel. The ECOWAS Court of Justice is not an exception to this rule.

Indeed, ECOWAS opted for a political mechanism geared towards challenging State Parties in case of failure to comply with the judgments of the judicial body. Recourse to the latter for judicial sanctions is only open to the political entities of the Community, notably States, the President of the Commission and the Authority of Heads of State. However, it could be noted that such an action, even if it is implemented and results in the pronouncement of a judicial sanction, one could still be faced with the refusal of the sentenced State to comply with the new ruling. This is why the Supplementary Act does not exclude the possibility of imposing political sanctions on the recalcitrant State so as to ensure the enforcement of the judgments of the Community Court. It will then behove the President of the Commission to report to the cases of non-compliance with the judgments of the Community Court to the Authority of Heads of State.

In contrast, the enforcement of the judgments of the African Court on Human and Peoples' Rights

⁴⁹⁷ In *APDH v. Republic of Côte d'Ivoire*, Case No. 001/2014 and Judgment dated 18 November 2016, the African Court ordered the Republic of Côte d'Ivoire to take measures to reform its law relative to its Independent Electoral Commission in order to bring it into conformity with international instruments.

In the case of *Guillaume Kigbafori SORO and others v. Republic of Côte d'Ivoire*, Application No. 012/2020, Order on interim measures of 15 September 2020, it ordered the stay of execution of all acts taken against the applicant and the taking of measures to remove all obstacles preventing him from exercising his rights to elect and be elected, particularly during the October 2020 presidential election.

⁴⁹⁸ In article by journalist Casimir DJEZOU, published on 23 February 2020 on the website <https://www.fratmat.info/article/202107/tranger/cedead/>

appears to be similarly guaranteed, albeit in stronger way. Its judgments are notified to the African Union Commission, which is the legal representative of the Union, and to the Council of Ministers, which ensures their implementation on behalf of the Assembly of AU Heads of State and Government. Article 31 of the Protocol complements this mechanism by providing that at each ordinary session of the Assembly, *“the Court shall submit a report on cases in the event a State has failed to implement its judgment.”*

However, no measures are foreseen to sanction non-compliance with the Court’s decisions as opposed to a Member State’s failure to pay up its contributions to the budget and to comply respect the Union’s decisions and policies.⁴⁹⁹

However, this political model for monitoring and supervising the enforcement of the judgments of these Courts is somewhat ineffective in terms of solidarity between Member States in high-level political organisations in which political and diplomatic issues take precedence over many other aspects such as human rights protection considerations.

Thus, it would certainly not be superfluous to explore ways of strengthening the existing mechanisms for the purpose of monitoring the enforcement of judgments at the ECOWAS Court of Justice in the light of their weaknesses, and new mechanisms whose implementation could sufficiently and effectively guarantee the enforcement of the Court’s judgments.

B. The need to strengthen the mechanisms for the enforcement of judgments of the ECOWAS Court of Justice and the new implementation mechanisms

The need to strengthen the mechanisms for monitoring and supervising the enforcement of judgments of the ECOWAS Court of Justice

The legal and institutional framework for monitoring the enforcement of Community Court judgments as stipulated in the Revised Treaty and the Supplementary Act of 17 February 2012 have certain shortcomings which should be noted in order to explore ways of strengthening them.

Indeed, the right to bring a legal action before the Court for failure to comply with the Community’s obligation to respect its decisions is restricted to certain political bodies of the Organisation (States, President of the Commission and Conference of Heads of State). Citizens of the region, who are generally the beneficiaries of unenforced judgments in human rights cases, are deprived of this right. To date, all the actions for failure to fulfil obligations brought against Member States before the Court of Justice by beneficiaries of unenforced judgments of the Community Court have been unsuccessful, the Court having declared them inadmissible either for lack of standing on the part of the applicants or for lack of jurisdiction. This was the case in rulings No. ECW/CCJ/JUD/19/13 of 19 July, Karim Meissa WADE v. Republic of Senegal,⁵⁰⁰ No. ECW/CCJ/JUD/25/16 of 11 October 2016, Djibril Yipene BASSOLE and Léonce Siméon Martine v. Burkina Faso,⁵⁰¹ and No. ECW/CCJ/JUD/30/18 of 11 December 2018, Chude MBA v. 15 ECOWAS Member States and President of the

⁴⁹⁹ Article 23 of the Constitutive Act of the African Union provides for a regime of sanctions for States that do not comply with the decisions and policies of the Union and do not pay their contributions to the budget. In the first case, the matters covered are only those relating to links with other Member States in the field of transport and communications, and any other measures determined by the Assembly in the political and economic fields. In the second case, the sanctions envisaged (deprivation of the right to speak at meetings, the right to vote, the right of nationals of the Member State concerned to hold any post or office in the Organs of the Union, to benefit from any activity or to perform any commitment within the framework of the Union) only concern the non-payment of contributions.

⁵⁰⁰ In the case of Karim Meissa WADE, the applicant brought an application before the ECOWAS Court of Justice against Senegal for refusing to respect its international commitments and to execute judgment No. EWC/CCJ/JUG/04/13 of 22 February 2013 of the Community Court, which found a violation on the applicant’s freedom of movement due to the unlawfulness of the measure banning him from leaving the country and his right to the presumption of innocence, by a judgment of the Repression of Illicit Enrichment Court before which he was prosecuted.

⁵⁰¹ The applicants appealed to the Court to complain about the disregard of its judgment No. ECW/CC/JUG/16/15 of 13 July 2015 by Decisions No. 2015-21/CC/EI of 25 August 2015 and No. 2015-26/CC/EPF of 10 September 2015 of the Constitutional Council of Burkina Faso, and requested that Burkina Faso be ordered to respect the authority of the Community Court and the international agreements to which it is a signatory.

ECOWAS Commission⁵⁰².

This legal obstacle to the admissibility of actions for failure to fulfil a Community obligation brought against a Member State by natural and legal persons who are beneficiaries of unenforced judgments could not only justify the low rate of contentious proceedings on non-enforcement before the Community Court, but could even be one of the causes of the failure of State Parties to effectively implement judgments.

Correcting this weakness in the system would require reforming a Community legislation that would make it possible for natural or legal persons to institute proceedings before the Court for failure to fulfil obligations. This could serve as a first tool against the inaction or inertia of the political bodies which currently are the sole entities that can take this action. Such a reform would have the merit of being a step forward compared to the model that prevails before the EU Court of Justice sitting in Luxembourg. Only the EU Commission or a Member State can make use of the infringement procedure before the latter, which is not accessible to private individuals, whose complaints can only be brought before the Commission to point out a failure by a Member State to comply with EU law and the judgments of its Courts. However, the reform advocated within the framework of the ECOWAS Court of Justice could go further by drawing inspiration from the possibility for the Luxembourg Court to impose a lump sum and/or penalty payment on the defaulting State, a sanction likely to soften resistance to the enforcement of the judgments. Thus, a genuine dispute and case law on the issue of non-compliance with Community judgments would be developed before the Court. This would lead to an improvement in terms of the level of enforcement of the judgments.

However, this process of judicialization or reinforced jurisdictionalization to resolve the lack of compliance with judgments would only achieve the desired effectiveness of the mechanism for monitoring and controlling the enforcement of judgments of the Community Court with an increased role for the political bodies involved. Indeed, there should be complementarity between the actions of the Community's institutions in order to make the West African human rights protection system more effective.

Just like in the Council of Europe model, the ECOWAS Commission could have a Commissioner for Human Rights supported by a Human Rights Directorate responsible for monitoring and overseeing the implementation of the norms and decisions of the Community bodies, which would serve as the Commissioner's Secretariat. The Commissioner's assistance in the enforcement of the Court's judgments would take the form of field visits, technical assistance and strong interaction with the national bodies responsible for the enforcement of the Court's judgments, and periodic reporting to the President of the Commission on States' failures and challenges encountered. The agenda of the meetings of the Council of Ministers and the Authority of Heads of State could include the presentation and discussion of these reports. This political approach with the existing implementation mechanism would place the issue at the core of the priorities of the Organisation's decision-making bodies so that the guarantee and effectiveness of the human rights protection system could be assured and effective.

Implementation of new mechanisms for guaranteeing the enforcement of Community Court judgments

The Council of Europe's system of human rights protection with the European Convention for the Protection of Human Rights and Fundamental Freedoms has, since the advent of the Interlaken Conference in Switzerland on 18 and 19 February 2010, introduced innovative mechanisms, which have created a certain dynamic situation and induced notable progress for the enforcement of the

⁵⁰² The appeal before the ECOWAS Court of Justice for breach of an international obligation brought by Mr Chude MBA, beneficiary of a judgment not executed by Ghana, was directed against the 15 ECOWAS Member States and the President of the ECOWAS Commission.

judgments of the Strasbourg-based European Court of Human Rights. Monitoring judgment enforcement falls within the purview of the Committee of Ministers of the Council of Europe, made up of the Ministers of Foreign Affairs of 47 Member States, acting on behalf of the Council by virtue of Articles 13 et subsequent clauses of its Statute.

The West African framework of ECOWAS could extend the mandate of its Council of Ministers to monitor the enforcement of the judgments of the Community Court of Justice. Indeed, this body could be notified of the Court's rulings by the President of the Commission and be the recipient of reports on Member States' failure to comply with Community standards and rulings prepared by a Human Rights Commissioner. Taking a cue from the Committee of Ministers of the European Council, the ECOWAS Council of Ministers should, in order to remain effective, be conferred with the powers to sanction a Member State that refuses to implement a judgment of the Court of Justice. One could think of the types of sanctions provided for in Article 23 of the Constitutive Act of the African Union, including depriving the defaulting Member State of the right to speak at meetings and notably the right to vote, the right of nationals of the Member State concerned to hold any post or office in the Community organs, and the right to benefit from any activity or to carry out any engagement within the framework of the Community.

A synergy of actors within the Community institution on the issue of the enforcement of the Court's judgments would not be superfluous. The ECOWAS Parliament, the Assembly of the Peoples' Community, could, like the Parliamentary Assembly of the Council of Europe, play a role in this matter by proposing uniform Community legislation on the implementation of the Court's judgments. In the majority of Member States, and perhaps all of them, there is no clear and coherent legislation defining the process of enforcement of judgments of international Courts such as the ECOWAS Court. Thus, synergy of action could encourage and support Community parliamentarians to take action at the level of their national parliaments to adopt legislative or regulatory measures aimed at establishing coherent procedures for the effective enforcement of Community Court judgments.

Finally, the mechanism of setting up a Human Rights Trust Fund, similar to that of the Council of Europe, would make it possible to support the efforts of Member States to respect their commitments under Community standards and decisions in the area of human rights. This fund, funded directly through the support of ECOWAS international partners, bilateral and multilateral partners or other contributors financing programmes for the promotion and protection of human rights in Member States, would constitute an incentive for States to implement the Court's judgments. It could be used to provide technical assistance not only to the national authorities responsible for the enforcement of the Court's judgments, but also to finance the improvement of the judicial and prison systems of the Member States that demonstrate exemplary implementation, which should be an eligibility condition for benefitting from the fund. Complementarity between the Court and the national Courts in the Member States should be encouraged in this respect, so as to strengthen the authority of the Community Court itself and of its qualitative jurisprudence, to which the national judges, the primary guarantors of fundamental rights, could refer in their judicial work.

Moreover, Article 10(f) of the Supplementary Protocol of 19 January 2005 does not fail to provide for a tool for close cooperation between the Community and national judicial bodies, through the preliminary ruling procedure, which has not yet been used in the dialogue that should exist between the two bodies. The preliminary ruling procedure allows the national Court of a Member State to refer, of its own accord or at the request of one of the parties to the dispute before it, a matter relating to the interpretation of the Treaty, the Protocols and Regulations to the ECOWAS Court of Justice. It appears to be an effective mechanism for dynamic interaction between the Community Court and the national Courts, which will thereby take ownership of the former's jurisprudence. *"Through this, the ECJ (European Court of Justice) has filled the gaps in case law between national Courts and the ECJ in the interpretation and application of EU laws. The great contribution made to EU law by the ECJ would not have been possible without the preliminary ruling procedure. These fundamental*

*principles of direct applicability and primacy of EU law have been made possible and strengthened by the preliminary ruling procedure,*⁵⁰³ emphasises Professor AMOS ENABULELE.

Though these mechanisms are not perfect, they do provide answers to the perennial issue of non-enforcement of the judgments of the ECOWAS Court of Justice, could nevertheless be seen as good attempts at finding solutions to this issue. Thus, it would be advisable to adopt them and adapt them to the context of the West African Organisation, drawing lessons from the inadequacies and weaknesses of the European model.

Conclusion

In conclusion, it should be recalled that human rights in the ECOWAS region are one of the fundamental pillars of the sub-regional integration process. The construction of a system for the protection of the rights of the Community's citizens requires Member States and the Organisation's bodies to respect and effectively and fully implement the judgments of the Court of Justice. This is essential for the systems' credibility and survival, in which the regulatory function of relations between the Member States themselves, the Member States and the citizens of the Community, as well as between the States, the citizens and the institutions of the Organisation, must not be considered as a mere adjunct to the whole structure.

It is suggested that a permanent interactive dialogue be maintained between all the Institutions and the Member States and that the latter should improve the procedures thereto related so as to ensure the effective and immediate enforcement of the judgments of the Court of Justice. This is essential for successful regional integration. And, one must have faith in the potential of the ECOWAS Court of Justice to achieve this success.

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503 In DR. AMOS ENABULELE, "Enforcement of judgments of the ECOWAS Court of Justice: issues at stake," p.26.

SUB-THEME 6

REMEDIES AND REPARATIONS

TWENTY YEARS OF ECOWAS COURT OF JUSTICE: ACHIEVEMENTS, CHALLENGES AND PROSPECTS: REMEDIES AND REPARATIONS

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Introduction

The Black's Law Dictionary puts the terms remedies and reparations in perspectives when it defines remedies as: "the field of law dealing with the means of enforcing rights and redressing wrongs,"⁵⁰⁴ and reparation as: "making amends for a wrong; compensation for an injury or wrong arising from breach of an international obligation".⁵⁰⁵ Viewing remedies and reparations through the lens of customary international law (CIL), some scholars consider the right already established in CIL,⁵⁰⁶ while others see it as an emerging rule.⁵⁰⁷ On a more general note, reparation has a fundamental place in law; it is synonymous with law itself.⁵⁰⁸

In the case of *Chorzow Factory*,⁵⁰⁹ the Permanent Court of Justice (PCIJ) laid the foundations for reparation in international law, which "must, as far, as possible, wipe out all the consequences of the illegal act and re-establish the situation which would, in all probability, have existed if that act had not been committed." The focus of the PCIJ – and of international law at the time, was on the rights and obligations owed by one State to another State, rather than on the obligations of States vis-à-vis an individual. However, a further push for remedies and reparations was achieved when the United Nations General Assembly, in 1948, adopted the Universal Declaration of Human Rights (UHDR)⁵¹⁰, which made a strong Statement on the possibility and indeed the willingness of the international community to recognise that individuals were capable of enjoying human rights through the vehicle of international law.

During the past five decades, many human rights treaties have entered into force.⁵¹¹ For example, Article 2(3) of the International Covenant on Civil and Political Rights 1966 (ICCPR), requires State parties to "ensure that any person who suffers a violation of the Covenant shall have an "effective remedy" and that "any person claiming the right to an effective remedy has the right to have their claim assessed by a competent judicial, administrative or legislative authority"⁵¹² There is a truth that these developments have proved impactful. But having said that, making the content of remedies and reparations regimes meaningful raises profound concerns, which I hope to examine in this paper.

This paper seeks to look at the human rights mandate of the ECOWAS Court of Justice from the perspectives of remedies and reparations. To this end, the paper is divided into five main sections; the first will appraise the approach of the ECOWAS Court to remedies and reparations for human rights violations, while in the second, the forms of reparation available will be examined; in the third, the need for guidelines and consistency in quantum of monetary reparation will be distilled; comparative study of the jurisprudence of regional human rights systems and conclusion will be done in four and five.

504 *Black's Law Dictionary*, 10th edn, by Bryan A. Garner, 1485.

505 *Ibid*, 1490

506 Shelton, *Remedies in International Human Rights Law*, p. 238; Kalshoven and Zegveld, *Constraints on the Waging of War*, 217: "Treaty based and customary law reflect the principle that States' nationals and aliens should have the right to a remedy for violations committed within a State's territory."

507 Pisillo Mazzeschi, "Reparation Claims by Individuals for State Breaches of Humanitarian Law and Human Rights", pp. 339-47

508 Bin Cheng, *General Principles of Law as Applied by International Courts and Tribunals* (Stevens & Sons 1953) 389.

509 [1927] PCIJ Rep Series A No 9, 21.

510 The foundation of human rights is established in the UN Charter.

511 All States have adhered to at least one of the core human rights Conventions

512 International Covenant on Civil and Political Rights, General Assembly (GA) resolution 2200 (XXI) of 16 December 1966, entry into force 23 March 1976; see also Articles 9 (5) and 14 (6) of the ICCPR, providing for a right to compensation in cases of unlawful arrest or detention or wrongful conviction.

I. Approach of ECOWAS Court of Justice to Remedies and Reparations for Human Rights Violations.

The approach of the ECOWAS Court of Justice to remedies and reparations for human rights violations, through the lens of the 2005 Protocol is a good starting point. The Supplementary Protocol in the main, redefined the jurisdiction of the ECOWAS Court. In particular, Article 3, revising Article 9 of the 1991 Protocol, lists each ground of the Court's jurisdiction. Further, paragraph four States: "The Court has jurisdiction to determine the cases of human rights violations that occur in any Member State."⁵¹³ As a corollary, Article 4 of the 2005 Supplementary Protocol, adds a new Article 10 to the 1991 Protocol, and identifies the litigants who have access to the ECOWAS Court. It includes a subparagraph authorizing the Court to receive complaints from "individuals on application for relief for violation of their human rights."⁵¹⁴ It is important to note that the ECOWAS legal instrument constitutive of the Court is silent on which human rights its judges should apply.⁵¹⁵ So, in a sense, it is up to the ECOWAS Court to creatively⁵¹⁶ navigate the contours of remedies and reparations generous frontiers in pertinent international human rights jurisprudence⁵¹⁷.

With that said, there are two conditions to be met before the Court can exercise jurisdiction over an application for remedies and reparation. First, "there must be an allegation of human rights violation."⁵¹⁸ Second, "such violation must have occurred within the territorial jurisdiction of the Member State against which the application was brought."⁵¹⁹ It is important to note that the expansion of the (ECOWAS Court) jurisdiction over human rights complaints in 2005, has translated into nearly one hundred and fifty-two merits judgments, majority of which concern human rights.⁵²⁰ And consistent with the human rights mandate of the ECOWAS Court, its judgments, understandably, have reflected international human rights jurisprudence as it relates to remedies and reparations as it should. Indeed, the jurisprudential progress of the ECOWAS Court, reflects international human rights nuanced delimitation of different forms of reparation as it relates to monetary and non-monetary forms of remedies.

It should be emphasised that the approach of the ECOWAS Court is to treat each basis of jurisdiction independent of national laws⁵²¹. This notwithstanding, the Court does assume jurisdiction to examine national legislation, when it violates or threatens to violate human rights.⁵²² The Court has applied the African Charter on Human and Peoples' Rights, ratified by ECOWAS Member States, which impose on them the duty to respect and protect the rights contained therein. It is important to bear in mind that reflective of its approach to human rights violations, the ECOWAS Court in its judgments

513 Article 3 (revising Article 9 (4) of the 1991)

514 Article 4 (inserting Article 10 (d) into the 1991 Protocol). Article 10 (d) provides that applications alleging human rights violations may not be anonymous and may not be made while the same matter is pending before another international Court.

515 The Supplementary Protocol 2005 provides the conditions for the human rights jurisdiction of the Court, namely: the application must not be anonymous and the application must not be brought when same is already pending before another international Court. In other words, the exhaustion of local remedies is not a condition precedent.; In the case of the European, Inter-American, and African Courts they are to interpret and apply their respective regional human rights charters. See also Laurence R. Helfer, *Forum Shopping for Human Rights*, 19 EUR. J. INT'L. 101, 102 (2008)

516 *SERAP v. Federal Republic of Nigeria & Anor* 2010 CCJELR, p.195-197. ("the Court noted that the doctrine of "*actio popularis*" was developed under the Roman law in order to allow any citizen to challenge a breach of a public right in Court as a way ensuring that the restrictive approach to the issue of standing would not prevent public spirited individuals from challenging a breach of a public right in Court."

517 *Federation of African Journalist & 4 Others v. The Republic of The Gambia*, ECW/CCJ/JUD/04/18 p 18-20 The Court used the French version of Article 9(3) of the Supplementary Protocol, instead of the English version which on the face of it placed a three-year limitation period on all actions brought against a Member State of the Community etc. This position is in accord with international best practices.; In *Bakare Sarre & 28 Ors v Republic of Mali*, Judgment ECW/CCJ/JUD/03/11, in CCJRL 2011, 67, para 25; (the Court opined that: "the competence of the Court to adjudicate in a given case depends not only on its text but also on the substance of the initiating application").

518 *Sawadogo Paul & 3 Ors v. Republic of Burkina Faso*, Judgment No. ECW/CCJ/JUD/07/20 para 21

519 Ibid

520 From the docket of the Court as of September 2021.

521 Hissien Habre v. Senegal (2010 CCJELR) p. 65

522 *Messrs Abdolaye Bucket & Ors v. Republic of Senegal*, Judgment No. ECW/CCJ/JUD/04/13 pg 22 para 72; *Incorporated Trustees of Laws & Rights Awareness Initiatives v. Nigeria*, Judgment No. ECW/CCJ/JUD/16/20

has repeatedly traced the origins of remedies and reparations in human rights law to the adoption of the Universal Declaration of Human Rights (UDHR) in 1948. In particular, the Court has relied on Article 8 of the UDHR, which States as follows: “Everyone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or by law.”⁵²³

The ECOWAS Court approach to awards is exemplified in the case of *Ebere Anthonia Amadi & 3Ors v. The Federal Government of Nigeria*,⁵²⁴ where it held that: “.....its principal object of an award in human rights violation is to vindicate the injured feelings of the victim and to restore his rights....”, and that an Applicant will be awarded nominal damages where a violation has been proved but no loss suffered.⁵²⁵ Is this approach not counterintuitive? To understand the processes leading to awards in cases of human rights violations, it is necessary to examine the various forms of reparation and the interrelationships between them.

II. Forms of Reparation: Restitution, Compensation, Rehabilitation, Satisfaction, Guarantees of Non-Repetition

To begin with, “Reparation is a generic term that covers the various ways a State may make amends for international responsibility it has incurred (*restitutio in integrum*, payment of compensation, satisfaction, guarantees of non-repetition among others).”⁵²⁶ In the case of *Federation of African Journalist & 4 Others v. The Republic of The Gambia*,⁵²⁷ the ECOWAS Court alluded to this State of affairs as follows: “curiously, with regard to reparation the Applicants did not ask for any specific sum.” While it is not in doubt that States have a duty to right violations of human rights, the reparation vary according to the right violated, the gravity of the violation, the harm done or the persons affected.

As far as the content and forms reparations are concerned, the jurisprudence of the International Court of Justice (ICJ), the PCIJ, Regional Human Systems, arbitration tribunals and claims commissions are surely helpful. Importantly, the International Law Commission (ILC) referred to the jurisprudence of human rights bodies, in particular the Inter-American and European Courts of Human Rights, to formulate its commentaries of the Articles on State Responsibility for Internationally Wrongful Acts, adopted by the ILC.⁵²⁸ These articles are products of human right jurisprudence and two fields of reparation: injured States and private parties. The Inter-American Court of Human Rights (IACtHR), has held in the *Aloeboetoe* case that Article 63 (1) of the American Convention on Human Rights (ACHR), which regulates the right to reparation, “codifies a rule of customary law which, moreover, is one of the fundamental principles of current international law...”⁵²⁹

With that said, the following forms of reparation: Restitution, Compensation, Rehabilitation, Satisfaction, and Guarantees of Non-Repetition, will now be considered.

(a) Restitution

The UN Principles on Reparation define restitution as follows:

Restitution should, whenever possible, restore the victim to original situation before the gross violations of international human rights or humanitarian law occurred. Restitution includes, as appropriate: restoration of liberty, enjoyment of human rights, identity, family life and citizenship, return to one’s place of residence, restoration of employment and return of

523 UN General Assembly. “Universal Declaration of Human Rights”. United Nations, 217 (III) A, 1948, Paris, Article 8

524 ECW/CCJ/JUD/22/19 at p. 19.

525 *Hon. Justice Aladetoyinbo v. The Federal Republic of Nigeria*, Judgment No. ECW/CCJ/JUD/18/20 pg 31 para 111

526 *Loayza Tamayo v Peru (Reparations)*, I/ACtHR, Judgment of 27 November 1998, Series C No. 52, para 85.

527 ECW/CCJ/JUD/04/18 at p. 7

528 See ILC Commentary to Article 30 of the Articles on State Responsibility for Internationally Wrongful Acts, (2001) II (2) *Yearbook of the ILC*, Commentary to Article 36, para 19, and Commentary to Article 38, para 5.

529 *Aloeboetoe et al v Suriname (Reparations)*, I/ACtHR, Judgment of 10 September 1993, Series A No. 15, para 43.

property.⁵³⁰

Simply put, restitution is the reconstitution of the *status quo ante*, the situation that would have existed if the violation had not occurred. In general, the primary objective of reparation is restitution or *restitutio in integrum*.⁵³¹ That said, restitution is not possible in most cases of serious human rights violations.

However, Article 35 of the ILC Articles on Responsibility of States for Internationally Wrongful Acts, is to the effect that States are under an obligation to make restitution, provided restitution “does not involve a burden out of all proportion to the benefit deriving from restitution instead of compensation.”⁵³² This means that if restitution entails efforts or costs out of proportion, then instead of restitution, the State can pay compensation.⁵³³

Some Measures of Restitution

Right to reopening of criminal proceedings

Restoration of legal rights⁵³⁴

Restoration of liberty⁵³⁵

Restoration or recognition of citizenship

Return to one’s place of residence⁵³⁶

Restoration of employment or similar employment

(b) Compensation

The term compensation is the provision of economically assessable damage, proportionate to the gravity of the violation⁵³⁷ and the circumstances of the case. Suffused in the term are: material damages: loss of earnings: including legal loss; immaterial/moral: physical or mental harm;⁵³⁸ costs of medicine⁵³⁹ and medical services⁵⁴⁰, and psychological and social services.⁵⁴¹ Many human rights treaties contain provisions on the right to compensation.⁵⁴² While the right to compensation is read

530 UN Principles on Remedy and Reparation, Principle 19.

531 See Case Concerning the Factory At Chorzow (Claim for Indemnity) (Merits), PCIJ, Series A No. 17, 13 September 1928, p. 47.

532 Article 35 of the ILC Articles on Responsibility of States for Internationally Wrongful Acts

533 Report of the International Law Commission on the Work of Its Thirty-Seventh Session, U.N. Doc. A/40/10 (1985)

534 *Federation of African Journalist & 4 Others v. The Republic of The Gambia*, ECW/CCJ/JUD/04/18 p. 57 (The Court directed Gambia to repeal and / or amend its laws in line with its obligations under international law especially Article 1 of the African Charter on Human Peoples Rights, the ICCPR and the ECOWAS Revised Treaty.)

535 Ibid

536 *The Moiwana Community Case*, I/ACtHR, Judgment of 15 June 2005, Series C No. 124, para 212.

537 Working Group on Enforced or Involuntary Disappearances, General Comments on Article 19 of the Declaration on the Protection of All Persons from Enforced Disappearance, UN Doc E/CN. 1/1998/43 para 73.

538 *Dedjo Komla Sena v. The Republic of Togo*, ECW/CCJ/JUD/26/21 pg. 33 paras. 114-117 (The Respondent was found in violation of the Applicants right to torture, fair hearing and right to work. The Court held that restitution may not be appropriate in the circumstances of this case. On damages, the Court held that a colossal sum of One Hundred Million (100,000,000) FCFA as prayed for in the circumstances of this case is slightly outrageous. The Court assessed an all-inclusive sum of Forty Million (40,000,000) FCFA as compensation for torture, cruel and inhuman treatment and the violation of the Applicant’s right to work. The ordered the Military Command to allow the Applicant access to their medical facility for life free of charge for life.

539 Ibid

540 Ibid

541 See, UN Principles on Remedy and Reparation, Principle 20.

542 CAT, Article 14; ILO Indigenous and Tribal Peoples Convention 1989 (No. 169), Article 16 (4) and (5); Rome Statute of the International Criminal Court, Article 75 (1); Declaration on the Protection of all Persons from Enforced Disappearance, Article 19; Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, Principle 12; Declaration on Human Rights Defenders, Article 9 (2). In regional instruments, see: ACHR, Article 63 (1); Inter-American Convention to Prevent and Punish Torture, Article 9; Treaty of European Community, Article 288 (2); Charter of Fundamental Rights of the European Union, Article 41 (3); AfrCHPR, Article 21 (2); Protocol to AfrCHPR on the Establishment of an African Court on Human and Peoples’ Rights, Article 27 (1).

into other formulations such as “reparation” or “just satisfaction.” Many treaties have given effect to compensation for human rights violations for unlawful arrest, detention or conviction recognised in CIL.⁵⁴³

(c) Rehabilitation

Article 14 (1) CAT provides that “each State Party shall ensure in its legal system that the victim of an act of torture obtains redress and has enforceable right to fair and adequate compensation, including the means for as full rehabilitation as possible”⁵⁴⁴. Rehabilitation measures include but not limited to the following: assistance for medical and psychological care, legal and social services and so on. Rehabilitation measures are often within compensation awards. It should be noted that measures, such as legal rehabilitation through rectification of criminal records, or invalidation of unlawful convictions are under restitution also.

(d) Satisfaction

This is a broad term that covers a series of non-financial form of reparation for moral damage or damage to the dignity or reputation⁵⁴⁵. Measures of satisfaction have been recognised to include: investigations and sanctions against perpetrators, protection of witnesses and the victim’s relatives, searching for the whereabouts of the disappeared, public disclosure of the truth about violations, and official recognition of State responsibility, along with public apologies and commemorations to victims. The ICJ held in the *Corfu Channel Case* that its declaration constituted in itself just satisfaction.⁵⁴⁶ However, in cases of gross human rights violations, a judgment alone without compensation may not constitute adequate reparation.

(e) Guarantee of Non-Repetition

Guarantees of non-repetition take diverse forms. The body of jurisprudence accommodates the following measures: review and reform of laws that allow violations, institutional reforms of the security architecture, as well as human rights training for police and armed forces.

Clearly, the place of forms of reparation in human rights jurisprudence cannot be over emphasised. Closely connected to the above subject matter, is the vexed issue of quantum of reparation. In the next section, the need for guidelines and consistency in quantum of monetary reparation will be discussed.

III. Need for Guidelines and Consistency in Quantum of Monetary Reparation

Judgments of human rights Courts regularly provide only the briefest of justification for awards. The ECOWAS Court, like ECtHR assessments, are often on an equitable basis, or having regard to the relevant circumstances of the case. Although there are rumours that the ECtHR is using a set of tables to determine the amounts and maintain consistency⁵⁴⁷, the ECtHR has refused to publish these since this would limit the inherent discretionary nature of the award and would lead to additional disputes regarding expected sums.⁵⁴⁸ Some have interpreted the ECtHR’s refusal as proof that no table exists and that the quantum of monetary reparation is determined on a case-by-case basis, “often without considering or distinguishing cases involving similar facts”.⁵⁴⁹ Others have argued that

543 See: Article ((5) ICCPR; Article 5 (5) ECHR; Article 10 ACHR; Article 16 of the Arab Charter on Human Rights, and Article 85 of the Rome Statute of the International Criminal Court.

544 *Dedjo Komla Sena v. The Republic of Togo*, ECW/CCJ/JUD/26/21

545 *Hon. Justice Aladetoyinbo v. The Federal Republic of Nigeria*, Judgment No. ECW/CCJ/JUD/18/20 p. 32 para 116 (The Court held that the letter of warning issued to the Applicant emanating from an incompetent Committee violates his right to fair hearing, and that the judgment in itself is a just satisfaction, and awarded fifty Naira only as nominal damages.

546 *Corfu Channel Case (Merits)*, (1948) ICJ Reports 1, at 35

547 *Cocchiarella v Italy*, app. 64886/01, 9 March 2006

548 D. Harris, M. O’Boyle, E. Bates, and C. Buckley, *Law of the European Convention on Human Rights* (Oxford, OUP 2014) 156.

549 P. Leach, “Access to the European Court of Human Rights-From a Legal Entitlement to a Lottery”, (200) 27 HRLJ 11-25

damages are awarded intuitively.⁵⁵⁰ The uncertainty in the practice of human rights provides little clarity as to how non-pecuniary damage ought to be determined.

However, in the case of the ECtHR, an empirical study by scholars from the Max Planck Institute found that the “frequently voiced academic reproach that the Court’s practice is arbitrary or unprincipled” is incorrect. They found that the Court does follow the hierarchy (or “ranking”) inherent in the Convention and awards higher damages for absolute rights violations compared to procedural breaches.⁵⁵¹ It should however be pointed out that the study only investigated a year of the Court’s practice and apart from ranking, did not identify other variables that may affect the determination of damages.

It is unclear, for example, whether monetary reparation is aimed at redressing the suffering of the victim, affirming his or her rights under international human rights law, or whether it is aimed at governments and intended to primarily act as a serious and effective means of dissuasion of repetitive unlawful conduct. These questions are not merely about which variables potentially affect the Court’s approach to damages. In my view, they go to the very heart of the Court’s identity.

The ECOWAS Court so far has taken a creative approach to reparations and sought to interpret damages and reparation as broadly as possible. For instance, in the case of *Madam Sessi Mele v. State of The Togolese Republic*,⁵⁵² it was established that the Respondent State, through its agents, violated the rights of the Applicant not to be subjected to torture, inhuman or degrading treatment, freedom of assembly and security. Consequently, the Court held that: “every person who is a victim of human rights violations has the right to fair and equitable compensation”, but noted that in matters of human rights violations, full reparation is, as a rule, impossible. The Applicant prayed the Court to order the respondent to pay her the amount of 150,000,000 (One Hundred Fifty Million) FCFA, for damages suffered. The Applicant was awarded the amount of 30,000,000 (Thirty Million) FCFA for immaterial damages suffered. The Court considered the gravity of the rights violated and their consequences for the Applicant, coupled with a global and evaluation regime to arrive at the amount.

There is guidance from the jurisprudence of the Inter-American Human rights system. In the case of *Loayza Tamayo*, the petitioner had been detained and convicted in violation of the provisions of the American Convention on Human Rights (ACHR). The Court held that all the consequences of the violations had to be reversed.⁵⁵³ That the State had to ensure restoration of employment; if this was not possible because of the moral damage caused to the victim, then the authorities had to guarantee salary, social security and employment benefits.⁵⁵⁴ Lost earnings in the IACtHR are based on the victim’s earnings before the violation. In the case of victim’s death, compensation for lost earnings is awarded to relatives and other third parties. The IACtHR has established the following parameters: first, the payment sought must be based on effective and regular contributions made by the victim to the claimant; second, the nature of the relationship between the victim and the claimant which should provide some basis for the assumption that the payments would have continued, had the victim not been killed; third, the contributions must have been based on a financial need of the recipient. The reference is the average life expectancy in the State in question. Where there is no detailed or reliable information, the reference for the IACtHR is the minimum wage in national law. The IACtHR then calculates the lost earnings on the basis of twelve annual salaries and the benefits granted under national legislation, less 25% for personal expenses, to which it adds current interests.⁵⁵⁵

550 Franz Bydlinski, “Methodological Approaches to the Tort Law of the ECHR”, in Attila Fenyves, Ernst Karner, Helmut Koziol & Elisabeth Steiner eds., *Tort Law in the Jurisprudence of the European Court of Human Rights* (De Gruyter, 2011) 176.

551 S Altwicker, T. Altwicker, A Peters, “Measuring Violations of Human Rights: An Empirical Analysis of Awards in Respect of Non-Pecuniary Damage Under the European Convention on Human Rights” *Journal of International Law* (HJIL)76 (2016), 1-51, 43

552 ECW/CCJ/JUD/29/2021pg. 46-47 paras 193-195

553 *Loayza Tamayo v. Peru (Reparations)*, I/ACtHR, Judgment of 27 November 1998, Series C No. 42, para 122.

554 Ibid, paras 113-116

555 *Villigran Morales et el v Guatemala, Street Children Case* (Reparation I/ACtHR, Judgment of 29 August 2002, Series C No.

There is also guidance as to the appropriate compensation in the field of diplomatic protection, especially in cases of injury to the person or damage to or expropriation of property. As the ILC notes, in the jurisprudence on diplomatic protection: “Compensable personal injury encompasses not only associated material losses, such as loss of earnings and earning capacity, medical expenses and the like, but also non-material damage suffered by the individual (sometimes, though not universally, referred to as “moral damage” in national systems”⁵⁵⁶

IV. Comparative Analysis of the award of Remedies and Reparations by ECOWAS Court of Justice and other Regional Courts: International Best Practice

Let us turn to the award of remedies and reparations through a comparative study of the jurisprudence of regional human rights systems. In this section, I will attempt to showcase the nuanced contributions of some regional human rights Courts.

(a) ECOWAS Court of Justice

As noted above, in granting access to individuals on application for relief for violation of their human rights” article 4(d) of the 2005 Supplementary Protocol did not specify the international human rights instruments to be applied by the Court. As earlier noted, the unique capacity of the Court is salutary. When read together with Article 19 (now Article 20) of the Protocol of the Court, the jurisdiction of the ECOWAS Court to apply the African Charter and any other international human rights instrument to which a respondent State is party (though not expressly Stated in the Protocol of the Court) would become established under Article 38 (1) (a) of the Statute of the ICJ.⁵⁵⁷ Article 19 permits the Court to apply the sources of law mentioned in Article 38 of the Statute of the ICJ. The Court has affirmed the obligation of States under Article 1 of the African Charter on Human and Peoples” Rights and Article 2 of the Convention against Torture, to protect and take adequate measures to ensure an independent and effective investigation of complaints of torture.

It is worthy of mention that the concept of exhaustion of local remedies does not apply to the ECOWAS Court. In the case of *Valentine Ayika v. Republic of Liberia*,⁵⁵⁸ the Court ruled that the application was admissible notwithstanding the fact that the case was alleged to be pending before the Supreme Court of the State. What has also become clear in its sixteen years of operation as a human rights Court are the legal and political concerns the Court has engendered. To its credit, the Court has remained resolute, wide ranging and imaginative in its search for coherence in the jurisprudence of the Court.

This is evident in some of its judgments. First, in *Aliyu Tasheku v. Federal Republic of Nigeria*⁵⁵⁹ and *Sa’adatu Umar v. Federal Republic of Nigeria*,⁵⁶⁰ the Court rightly noted, with concern, that the claims of the Applicants were essentially the same as those claimed before Nigerian Courts and that the pleadings and remedies sought before the ECOWAS Court were the same with the remedies sought and obtained before Nigerian Courts in the respective cases. The ECOWAS Court held that it was not possible to grant a claim for which compensation had already been obtained from national Courts. The cases were declared inadmissible. It appears the errors of the applicants and their lawyers may have indirectly arisen from jurisprudence of the Court that exhaustion is not a condition precedent to seising the Court.⁵⁶¹ Second, the Court found Niger liable for allowing a customary practice of female slavery ordered Niger to pay the equivalent of 20,000USD to the woman who had been enslaved.⁵⁶² The money was paid and the former master prosecuted. It would appear the Court

95, para 81.

556 ILC, Commentary to the Article 30 of the Articles on State Responsibility for Internationally Wrongful Acts, (2001) II (2) *Yearbook of the ILC*, Commentary to Article 36, para 16.

557 A. O. Enabulele and B. Bazuaye, Basic Topics in Public International Law, (Lagos: Malthouse Press Limited, 2019), 435

558 Suit No.: ECW/CCJ/AAP/07/11

559 ECW/CCJ/RUL/12/12

560 Ibid., para 17

561 A. O. Enabulele and B. Bazuaye, Basic Topics in Public International Law, (Lagos: Malthouse Press Limited, 2019), p. 435

562 *Hadijatou Mani Kouraou v. Niger*, Case No. ECW/CCJ/APP/08/

made compliance easy for Niger by refusing the applicant's requests to find fault with the laws, practices, and customs that gave rise to the violations in the first place. The judges' circumspection with regard to the quantum of reparation in monetary terms is telling.

Regarding enforcement, by virtue of Article 15(4) of the ECOWAS Revised Treaty and Article 2(1) of the Supplementary Protocol, the judgments of the Court are binding on all the Member States, the institutions of the Community, individuals and corporate bodies. The provision of Article 19(2) of the Protocol (A/P1//91) of the Community Court of justice provides that the decisions of the Court are final and immediately enforceable. It must be noted that Article 24(2) and (3) of the Supplementary Protocol of the ECOWAS Court provides that:

...execution of any Judgment of the Court shall be in the form of a writ of execution, which shall be submitted by the Registrar of the Court to the relevant Member State for execution according to the rules of civil procedure of that Member State. Upon the verification by the appointed authority of recipient Member State that the writ is from the Court, the writ shall be enforced.

Article 22(3) of the Protocol and Article 5(2) of the ECOWAS Revised Treaty mandates Member States, in accordance with their Constitutional provisions to immediately take all necessary measures to ensure the enactment and dissemination of such legislative and statutory texts as may be necessary for the implementation of the provisions of the Treaty including the execution of the decisions of the Court. By virtue of these provisions, Member States of ECOWAS are mandated to ratify and domesticate the ECOWAS Treaty, protocol and other legal instruments for the effective and unimpeded implementation of the provisions of the Treaty including the enforcement of the judgements of the Court. By Article 24(4) of the Supplementary Protocol, each Member State in an attempt to effectively enforce the decisions are expected to determine a competent national authority that will be responsible for the enforcement of the Court's decisions in accordance with her own rules of civil procedure. Interestingly, Nigeria has put in place mechanisms for the enforcement of judgments of the Court.

However, in the event that Member States fail to voluntarily comply with the terms of the judgments of the Court, Article 77 of the ECOWAS Revised Treaty empowers the Authority of Heads of State and Government of ECOWAS to impose certain sanctions on any Member State who fails to fulfil its obligations to the Community through suspension of new Community loans or assistance, suspension of disbursement on on-going Community projects or assistance programmes, exclusion from presenting candidates for statutory and professional posts and suspension from participating in the activities of the Community.

(b) European Court of Human Rights (ECtHR)

The Council of Europe created a human rights systems with the mandate to deliver legally binding and enforceable judgments on remedies. the European Convention on Human Rights (ECHR), which entered into force in 1953. Upon comparison, the ECHR⁵⁶³ in its Article 13 affirms the right to an effective remedy, while Article 41 allows the Court to deploy just satisfaction if the internal law in the State party allows only partial reparation to be made. The phrasing of Article 41 accords great discretion to the Court and imposes few, if any, limits on the Court's powers. Perhaps, that is why the jurisprudence of the ECtHR is said to be inconsistent, euphemistically described as not always "speaking with one voice"⁵⁶⁴

At first sight, "satisfaction" appears to be differentiated from monetary damages and may consist in an acknowledgment of the breach, an expression of regret, a formal apology or another appropriate

563 The Convention entered in force in 1953.

564 J. Bonello, concurring opinion, *Al-Skeini v. The United Kingdom Appl. No. 55721/07*, ECHR Grand Chamber, Judgment, 7 July 2011.

modality. In this sense, “satisfaction” under the Convention could refer to other type of remedies than compensation. The ECtHR, for example, insists that since the Convention seeks to protect human rights, all rights-infringing conduct assaults the dignity and equality of the victim. The Court argues that when an Applicant has suffered trauma, pain and suffering, distress, anxiety, the award seeks to give recognition to the fact that moral damage occurred as a result of a breach of human rights and to compensate the victim and place them in the same position as they would have been had no injury occurred; in other words, restitution in integrum. However, if the nature of the injury suffered is such that it may make it impossible to return to the situation existing prior to the breach, then the only claim the Applicant can make is for just satisfaction, i.e. monetary damages.⁵⁶⁵

The ECtHR has played an important role in developing human rights jurisprudence as the first institution to issue legally binding decisions.⁵⁶⁶ Nevertheless, the reluctance of the ECtHR to define and expand the concept of just satisfaction in conjunction with Article 13 cannot be ignored.⁵⁶⁷ Nevertheless, the ECtHR drawing from Humanitarian law, developed its jurisprudence affirming the positive obligations of States, to include not only what are directly attributable to State agents. The ECtHR routinely awards both pecuniary and non-pecuniary damages, as well as compensation for legal costs.⁵⁶⁸

It would appear the ECtHR is a step toward award of rehabilitation for victims of torture. In the case of *Danev v. Bulgaria*,⁵⁶⁹ the Court stressed that the adverse effects of unlawful detention on a person’s psychological condition remains after release and critiqued the State for having refused to provide reparation. While in the case of non-pecuniary damages, the ECtHR does an assessment of the victim’s moral conduct and, in the case of deceased victims, of his relationship or her relationship with the family Member presenting the claim.⁵⁷⁰ The ECtHR does not have the faculty to review legislation and overturn national judgments.⁵⁷¹ This is however without prejudice to the capacity of the Court to requests States to conduct effective investigations, *ex officio* if necessary, to establish accountability and inform complainants about investigation efforts undertaken.

In *Aksoy v. Turkey* the ECtHR Stated that: “the notion of an effective remedy entails, in addition to the payment of compensation where appropriate, a thorough and effective investigation, capable of leading to the effective identification and punishment of those responsible and including effective access for the complainant to the investigatory procedure.”⁵⁷² In 1994, the Applicant was killed, allegedly for bringing the claim to the ECtHR. His father continued his application, and the ECtHR awarded the full amount claimed, including 25,000 Euros for non-pecuniary damage.⁵⁷³

In the case of *McCann and Others v. United Kingdom*,⁵⁷⁴ the ECtHR after finding violations of the right to life, denied damages to the family Members of the three suspected IRA terrorists killed. In *Gulec v. Turkey*⁵⁷⁵ the ECtHR reduced the damages awarded to the family of a fifteen-year-old boy killed in a demonstration, on the ground that his presence at the demonstration indicated a mitigating factor in relation to State responsibility. Damages are not available as of right. In practice, the Court has

565 M. Nowak, “The Right to Reparation for Victims of Gross Human Rights Violations”, in G. Ulrich and I. Krabbe Boserup (eds), *Human Rights in Development, Yearbook 2001* (The Hague: Kluwer Law International, 2002). Pp. 277-308.

566 C. Evans, *The Right to Reparation in International for Victims of Armed Conflict* (New York: Cambridge University Press, 2012) p. 57

567 Nowak, UN Covenant on Civil and Political Rights, p.74

568 Ibid, note 63 at 63

569 *Danev v. Bulgaria*, ECtHR, Judgment, 31 October 1995.

570 L. Wildhaber, “Article 41 and Just Satisfaction in the European Convention on Human Rights”, *Baltic Yearbook of International Law*, 3 (2003), 6, 13

571 Shelton, *Remedies in International Human Rights Law*, pp. 199, 238

572 *Aksoy v. Turkey*, ECtHR, Judgment, 18 December 1996, para. 98

573 Ibid

574 *McCann and Others v. United Kingdom*, ECtHR, Judgment, 27 September 1995

575 *Gulec v Turkey*, ECtHR, Judgment, 27 July 1998.

frequently held that the finding of a violation is sufficient satisfaction without any further award. Even if a violation has been established, an award of damages is not guaranteed. Instead, the Applicant will have to have suffered some loss, and the intensity of his suffering will have to be such as to “justify an award of compensation for non-pecuniary damage”⁵⁷⁶

In the case of loss of earnings, the European Court of Human Rights takes into consideration the presence of a clear causal connection between the damage claimed and the violation of the Convention and may in the appropriate case, include compensation in respect of loss of earnings. In the case of *Isayeva v Russia*⁵⁷⁷ the applicant claimed that there was a causal link between her son’s death in violation of Article 2 and the loss by the applicant of the financial support which he could have provided her. She claimed that she is entitled to a third of her son’s income for the rest of her life if he had not been killed and calculated the sum of lost earnings on the basis of the average life expectancy in Russia.⁵⁷⁸

The European Court of Human Rights awards compensation for material damages such as loss of house and other property,⁵⁷⁹ loss of livestock,⁵⁸⁰ additional expenditures,⁵⁸¹ cost of alternative housing,⁵⁸² cost of removals, or higher living costs in a new residence resulting from the violations.⁵⁸³ In the event the evidence do not justify material damages, the Court award damages on equitable basis.⁵⁸⁴ Legal costs and expenses for proceedings are reimbursed as a matter of practice.

Unlike the ECOWAS Court, despite increase in the number of cases filed and the ECtHR rejects in principle collective claims or *action popularis*⁵⁸⁵. However, the Court has sought to apply the pilot procedure, a solution to the Court’s increasing workload which allows the Court to summarily deal with hundreds of repetitive claims against a State and require that the State adopt legislative and administrative measures to address the systemic problem. This approach may gradually orient the ECtHR towards ordering reparations that have policy impact in order to assert guarantees of non-repetition of violations.

The implementation rate of judgments in the European system is considerably higher. The role of the Committee of Ministers, a political body with a specific mandate, in accordance with Article 46 of the European Convention, to monitor the domestic compliance with judgments cannot be over emphasised. Worthy of note too, is the Human Rights Trust Fund established at the Council of Europe with the aim of assisting States in the full and timely execution of judgments. The support offered is not for individual victims, but to support States to implement the ECtHR judgments through promotion of the rule of law and the compatibility of national legislation and administrative practices with the Convention.

(c) The Inter –American Court System⁵⁸⁶

The jurisprudence of the Inter-American Human rights system has the most innovative jurisprudence on reparations.⁵⁸⁷ Article 25 of the American Convention on Human Rights (ACHR) affirms the right to a legal remedy, and Article 63 of the ACHR specifies the right to a remedy and fair compensation.

576 Silver v UK, Series A 67 (1983), 6 EHRR 62, 10

577 *Isayeva v Russia*, ECtHR, Judgment of 24 February 2005, para 234

578 *Ibid.*

579 *Selcuk and Asker v Turkey*, ECtHR, Judgment of 24 April 1998, Reports 1998-II, para 106.

580 *Ipek v, Turkey*, ECtHR, Judgment of 17 February 2004, paras 228, 229.

581 *Ibid.*, paras 232, 233.

582 *Bilgin v Turkey*, ECtHR, Judgment of 16 November 2000, paras 138-152

583 *Orhan v Turkey*, ECtHR, Judgment of 18 June 2002, para 438.

584 *Selcuk and Asker v Turkey*, ECtHR, Judgment of 24 April 1998, Reports 1998-II, para 106

585 Van Dijk and Van Hoof, *Theory and Practice of the European Convention on Human Rights*, p.46

586

587 The American Convention on Human Rights entered into force on 18 July 1978

Unlike the ECOWAS human rights system, the ACHR has two human rights monitoring bodies. A Commission as the first instance, which has competence to investigate and recommend friendly settlements⁵⁸⁸ and, as a final resort, refer cases to the Inter-American Court of Human Rights (IACtHR)

The IACtHR has ordered the re-trial of persons convicted in violation of the principles of fair trial.⁵⁸⁹ The Inter-American Commission, in cases concerning capital punishment in which it found a violation of the American Convention on Human Rights, recommended that the State grant the victim an effective remedy⁵⁹⁰, including “retrial in accordance with the due process protections prescribed under Article 8 of the Convention or, where a retrial in compliance with these protections is not possible, his release, and compensation.”⁵⁹¹

In the case of *Cantoral Benavides*, the IACtHR awarded lost earnings to the victim, who at the time of his detention was a biology student, for income he would have had in his profession had he not been detained and prevented from pursuing his studies.⁵⁹² In *Bamaca Velasquez*, who was a guerrilla fighter at the time in which he disappeared, the Court did not award compensation for lost of income as a guerrilla fighter. The IACtHR awarded an amount for lost earnings in equity for the fictitious life span after the peace accord (based on the average life expectancy. The IACtHR reasoned that after the peace accord in Guatemala in 1996, he would have joined the labour force and had an income.⁵⁹³

(d) African Court of Human and Peoples’ Rights (ACtHR)

The ACtHR was established in Article 1 of the Protocol to the African Charter on Human and Peoples’ Rights on the Establishment of an African Court on Human and Peoples’ Rights. By Article 27(1) of the Protocol of the ACtHR, if the Court finds in its judgment that there has been a violation of human rights it shall make appropriate orders to remedy the violation, including the payment of fair compensation or reparation. Article 27(2) empowers the Court, in cases of extreme gravity and urgency, and when necessary, to avoid irreparable harm to persons, to adopt such provisional measures as it deems necessary. By Article 30, State parties to the Protocol undertook to comply with the judgment in any case to which they are parties within the time stipulated by the Court and to guarantee its execution.

(e) East African Court of Justice (EACJ)

The EACJ is a judicial body established on November 30, 1999 under the treaty for the establishment of the East African Community (EAC)⁵⁹⁴. It consists of a First Instance Division and an Appellate Division⁵⁹⁵. The Court is established as a judicial body which shall ensure the adherence to law in the interpretation and application of, and compliance with the EAC Treaty. The Court is yet to have jurisdiction to deal with human right cases, as that jurisdiction was by Article 27 (2) to be subsequently conferred by a protocol which is yet to be made. Despite the need to extend the jurisdiction of the Court to human rights violations, the EAC Council which is the political entity responsible for the adoption of the protocol is reluctant to do so. State parties are unwilling to extend the jurisdiction to entertain human rights cases on the basis of State sovereignty. The Court has so far relied on Article 6 (d) as its authority for dealing with cases bordering on human rights, not qua human rights

588 In *Vincent Agu & 19 Others v. Federal Republic of Nigeria & 5 Others* the terms of settlement in Suit No ECW/CCJ/APP/06/2012 dated the 23rd of October, 2017 and filed on the 24th of October, 2017 was adopted as the judgment of the Court in the terms and conditions set out in the terms of settlement.

589 *Castillo Petruzzi et al Case*, I/ACtHR, Judgment of 30 May 1999, Series C No. 52, paras 217-221

590 *Nnenna Obi, On Behalf of other death row Prisoners in Nigeria v Federal Republic of Nigeria*, ECW/CCJ/JUD/27/16

591 Joseph Thomas (Jamaica), I/ACoMHR, Report No. 127/01, Case 12.183, 3 December 2001, para 153 (1) (right to a remedy, including retrial or release).

592 *Cantoral Benavides v Peru (Reparations)*, I/ACtHR, Judgment of 3 December 2001, Series C No. 88, paras 47-49.

593 *Bamaca Velasquez v Guatemala (Reparations)*, I/ACtHR, Judgment of February 22, 2002, Series C No. 91, para 51 (b)

594 The East Africa Community (EAC) consist of Burundi, Kenya, Rwanda, Tanzania and the Republic of Uganda. The Treaty came into force on July 7, 2000.

595 Article 23 (2), EAC Treaty

cases, but as cases requiring the application of the rule of law. The result is that the EACJ has been restrained in its award of reparations in the cases alleging human rights violations before it.

V. Conclusion

Owing to its multifaceted nature, it could easily be argued that the most important topic in international law, is the law of remedies and reparations. However, reparations cannot completely remedy all the harm or consequences caused by gross violations of human rights. As mentioned earlier, some measures play an important part in signalling the return to common values and to the rule of law. In this connection, a better way to reconnect with such shared values is to effectively implement remedies and reparations, by developing more clarity in the jurisprudence of the human rights system, and the monitoring of implementation of secondary obligations to make reparations for human rights violations. Behind the demand that adjudication according to rules is a rational process of decision-making, lies a belief in formal justice that is satisfied by giving like cases like treatment. Such a demand presupposes a standard against which “like” can be measured and this, it must be admitted, is not easy to construct⁵⁹⁶ Nevertheless, the quantum of monetary reparations could be determined on a case-by-case basis in deserving cases. While similar facts should deserve similar treatment. The parameters established towards consistency in quantum of reparation from the jurisprudence of the Inter-American Human rights system is telling, and deserves some attention by the ECOWAS Court, going forward.

596 See Hart, *The Concept of Law* (1994), pp. 157-167

REMEDIES AND REPARATION: ELEMENTS TO BE ADDRESSED ACCORDING TO THE FRAMEWORK LETTER

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Introduction

The flurry of human rights litigation in West Africa provides an opportunity⁵⁹⁷ to examine the reparations awarded by the ECOWAS Court of Justice (ECOWAS CJ). According to the ECOWAS CJ, “its competence in matters of human rights violations allows it not only to establish the said violations but also to order their reparation if necessary.”⁵⁹⁸ Specifically, the Court States that “everyone who is a victim of a human rights violation is entitled to fair and just compensation.”⁵⁹⁹ Without presumption, it can be said that every time the ECOWAS CJ condemns a State for human rights violations, it provides appropriate reparation.

In order to avoid confusing the notion of reparation with other related notions, it seems necessary to clarify it. The term repair comes from the Latin reparatio and reparare which means to restore.⁶⁰⁰ Reparation “means the indemnification of an injury by the person who is responsible for it.”⁶⁰¹ It is also the “restoration of the equilibrium destroyed by the damage, consisting in replacing it and, if possible, putting the victim back in the situation he or she would have been in if the damage had not occurred.”⁶⁰² Reparation can also be understood as “the moral satisfaction given to the victim of an offense.”⁶⁰³ It assumes the existence of a wrong, an injury or a damage. It is the means by which justice orders the person responsible for a damage to compensate for his misconduct.⁶⁰⁴

In international law, reparation is governed by the principle of *restitutio in integrum*⁶⁰⁵ which “presupposes the return of the parties to the status quo ante.”⁶⁰⁶ The Permanent Court of International Justice Stated in this regard that “the essential principle, which follows from the very notion of a wrongful act and which seems to emerge from international practice, in particular from the case law of arbitral tribunals, is that reparation must, as far as possible, wipe out all the consequences of the wrongful act and re-establish the State which would probably have existed if that act had not been committed”. In reality, it is the affirmation of the principle of *restitutio in integrum*, “that is, the restoration of things to their original State constitutes, in international law as in domestic law, the most natural form of reparation. It goes without saying that it excludes any case where it is materially impossible, for example as a result of the destruction of the object to be restored. (...)”⁶⁰⁷ The requirement of *restitutio in integrum* is not only to grant satisfaction but also to erase all the consequences of the wrongful act. In this regard, “the person who is arbitrarily detained must be released; the foreigner who is wrongly forbidden by the authorities to reside in the territory requests the annulment of an expulsion;⁶⁰⁸ a person who is the victim of a trial found to be contrary to Article 6 of the ECHR Convention wishes

597 The Protocol on the Statute of the African Court of Justice and Human Rights, in its Article 45 entitled “Compensation”, provides that “without prejudice to its competence to rule on issues of compensation at the request of a party by virtue of paragraph 1(h), of Article 28 of the present Statute, the Court may, if it considers that there was a violation of a human or peoples’ right, order any appropriate measures in order to remedy the situation, including the granting fair compensation”. G. GHERAIRI, « Aspects de la procédure devant les juridictions relatives aux droits de l’homme », in R. BEN ACHOUR et S. LAGHMANI (dir.), *Justice et juridictions internationales*, Paris, Pedone, 2000, pp. 189 – 206.

598 No ECW/CCJ/RUL/01/09 of 28 Jan. 2009, Djot Bayi Talbia & 14 others v. Federal Republic of Nigeria,

599 NO. ECW/CCJ/RUL/01/09, 28 JAN. 2009, Djot Bayi Talbia & 14 others v. Federal Republic of Nigeria. See also case SERAP v. Federal Republic of Nigeria, Judgement No. ECW/CCJ/RUL/18/12 of 14 December 2012

600 *Dictionary Larousse*, Paris, 2018, bicentenary edition.

601 G. CORNU (dir.), *Vocabulaire juridique*, Association Henri CAPITANT, Paris, PUF, 18^e éd.

602 *Idem*

603 *Idem*; MALAURIE, L. AYNES and P. STOFFET-MUNCK, *Droit civil : les obligations*, Paris, 4^e éd. Defrenois, n°748-751.

604 F. TERRE, Ph. SIMLER et Y. LEQUETTE, *Droit civil : les obligations*, 9^e éd. Dalloz, Paris, 2005, No. 459, p.463.

605 _LW_PS_] *Restitutio in integrum* finds its legal basis at the heart of the human rights protection normative framework, among the regional institutions safeguarding human rights. Article 41 of the ECHR Convention, Article 63 of the Inter-American Convention and Article 27 of the Ouagadougou Protocol establishing the African Court.

606 C. GASSAMA, “Le principe de *restitutio in integrum* dans le contentieux international des droits de l’homme”, *Miskolc Journal of International Law*, V.2, 2005, n° 1, p.1 ; H. AUBERT, *De l’In Integrum Restitutio envisagée comme voie de recours contre les jugements*, Paris, Ernest Thorin, Librairie –Éditeur, 1884, p. 1

607 J. VERHOEVEN, *Droit International Public, Précis de la Faculté de Droit de l’Université Catholique de Louvain*, Larcier, Bruxelles, p. 641.

608 Case of Djeroud v. France, App No.: 13446/87, 23 January 1991, A191-B

*that justice be rendered in the course of new proceedings or by any other means such as the granting of an amnesty, a pardon, or the rectification of the criminal record restitutio in integrum with the execution or the payment of a sum due.. Indeed, restitutio in integrum goes further in that it can also include a rectification of the illegal act, a restitution.*⁶⁰⁹

There are several forms of reparation in international law. These include restitution, rehabilitation, satisfaction, a guarantee of non-recurrence and the award of damages, which consists of the fixing of an amount. The judge may order one form of reparation or several simultaneously.

The issue of reparations has become a hot topic in international Courts. The Hissène Habré case,⁶¹⁰ tried by the Extraordinary African Chambers was the crucible for debates on the choice of the form of reparation, and the modalities of payment of compensation amounts. Professor Flaus, did not hesitate to denounce *the “commercialisation”*⁶¹¹ of reparations litigation, which has supposedly become an *“eldorado for victims.”*⁶¹²

One wonders if the victims are able to revel in this new environment of reparations. In comparative law, it is noted that *“the jurisprudence of the Inter-American Court (IACHR) differs from the jurisprudence of the European Court of Human Rights (ECHR)”*⁶¹³ because of the importance given to non-pecuniary measures in the litigation of reparation. *The Court has established very different forms of reparations, individual, and increasingly collective and non-pecuniary reparations.*⁶¹⁴

A look at the panorama of history shows that the ECOWAS Court of Justice has been in an awkward position when it comes to pronouncing reparations. In fact, the texts that govern the Court do not provide for the modalities of reparations. The Court had to be ingenious, despite its youth. This has boosted its reputation. In, *Djot Bayi Talbia & 14 others v. The Federal Republic of Nigeria*, the Court was faced with a request for redress. In the absence of an explicit text enabling, it to act, the Court decided that Article 19 of the 1991 Supplementary Protocol⁶¹⁵ allows it to apply the general principles of law as provided for in Article 38 of the Statute of the International Court of Justice (ICJ)⁶¹⁶. Thus, the Court appropriated the general principle of international law of the obligation of compensation for victims of human rights violations laid down by the now defunct Permanent Court of International Justice in the *Chorzow factory case*: *“The Court notes that it is a principle of international law, even a general conception of law, that any breach of a commitment carries with it an obligation to make reparation.”*⁶¹⁷

For its part, the ECOWAS CJ affirmed that *“the principle that every victim of a violation of his rights*

609 Case Castillo Algar v. Spain, Case No.: 28194/95, 28 October 1998, Digest 1998-VIII.

610 A. SALL, *L’affaire Hissène Habré. Aspects judiciaires nationaux et internationaux*, Dakar, L’Harmattan, ; S. THIAM, « Les droits de la défense dans le procès Hissène Habré », *Revue africaine de sciences criminelles*, n°1, 2020, pp. 45 – 79.

611 J.-F. FLAUSS, « Réquisitoire contre la mercantilisation excessive du contentieux de la réparation devant la Cour européenne des droits de l’homme. A propos de l’arrêt Beyeler c. Italie du 28 mai 2002 », *Rec. Dalloz*, 2003, p. 227, A. SALL, *L’émotion et la raison. L’Afrique face à la justice internationale*, Dakar, L’hamattan, 2020, 288 p.

612 J.-F. FLAUSS, « Le contentieux de la réparation devant la Cour européenne des droits de l’homme : Eldorado pour les victimes et fonds de commerce pour les conseils ? », in *Mélanges Jean-Pierre SORTAIS*, Bruxelles, Bruylant, 2002, pp. 155 – 180.

613 G. MALINVERNI, « Brèves réflexions sur le contentieux de la réparation dans la jurisprudence de la Cour européenne des droits de l’homme », in P. TAVERNIER, *La France et la Cour européenne des droits de l’homme. La jurisprudence en 2008*, Bruylant, Bruxelles, 2010, pp. 51-63

614 E. T ABDELGAWAD et K. MARTIN-CHENUT « Réparer les violations graves et massives des droits de l’homme : la Cour Interaméricaine, pionnière et modèle ? », *Revue de la Société de législation comparée*, 2010, p. 26

615 Art. 19 para 1 of the 1991 protocol provides that *“the Court shall examine the dispute before it in accordance with the provisions of the Treaty and its Rules of Procedure. It shall also apply, as necessary, the body of law as contained in Article 38 of the Statutes of the International Court of Justice”*

616 Article 38 of the Statute of the ICJ provides that: *“1. The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply: a/ international conventions, whether general or particular, establishing rules expressly recognized by the contesting States; b/ international custom, as evidence of a general practice accepted as law; c/ the general principles of law recognized by civilized nations; d/ subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.*

2. This provision shall not prejudice the power of the Court, to decide a case ex aequo et bono, if the parties agree thereto “

617 PCIJ, Chorzow Factory case, 13 Sept. 1928, Serie A, n°17, §. 29.p.17.

is entitled to just and equitable reparation may be retained by the Court of appeal (...). It is important to provide a remedy of an equitable nature for all applicants who are entitled to it.” Indeed, “the obligation to grant compensation for human rights violations is a universally accepted principle. The Court is indeed acting within its prerogative when it indicates for each case brought before it the remedy it deems appropriate”⁶¹⁸. In addition, the Court further Stated: “It is therefore clear that the objective of human rights instruments is to put an end to human rights violations and, in cases where the violation has already occurred, to restore the person to the rights in question. Reparation is granted in order to ensure equitable satisfaction and nothing else. The objective of the protection of human and peoples’ rights, in particular the ACHPR on which the present case is based, is not to award punitive damages against violators of these instruments. However, a victim of human rights violations who has won a case in a Court of law may claim compensation for damages, if any, including special damages, if they have been pleaded and proven at trial.”⁶¹⁹ The Court uses several modalities of reparations drawn from the soft law, in particular the “Basic Principles and Guidelines on the Right to an Effective Remedy and Reparation for Victims of Gross Violations of International Human Rights Law”⁶²⁰

The Court’s approach calls for a better analysis and comparison with the approaches of other international jurisdictions that protect human rights. In addition, the case law of the ECOWAS Court of Justice reveals that the office of the Court is impacted when the remedy is driven by an amicable settlement when the case had already been filed.

In the light of these preliminary observations, it is appropriate to examine the ECOWAS Court’s approach to the choice of remedies (I) and to assess its impact (II).

I. The Court’s approach to selecting reparations

The Court systematized its approach to determining the appropriate remedy by first relying on specific criteria that it defined on its own (A). Once the guiding principles are identified, the Court mobilizes various forms of redress to address the harm caused by human rights violations (B).

A. The affirmed selection criteria

It was not until 2012 that the Court explicitly articulated the elements that guide its choice of remedies. It affirmed that “when it finds violations of human rights, it prescribes measures which have as their main purpose the cessation of such violations and reparation. For this purpose, it takes into account the specific circumstances of each case to indicate the appropriate measures. The legitimacy of these measures and their chances of implementation are the principles that guide the Court when examining a case which relates to a legal proceeding underway in a Member State, its decisions are not intended to interfere with the decisions that national Courts would be required to take. The Court cannot order measures whose execution would undermine or destroy the authority and independence of the national judge in the conduct of the cases before it.”⁶²¹ This solution has two criteria. The pragmatism of the proposed remedy (1) and the preservation of the Office of the national judge (2)

618 CASE NO. ECW/CCJ/APP/10/06, CCJ ELR (2004-2009). Case NO. ECW/CCJ/RUL/08/09, p.374 par. 118.27.174. In addition, in *Farimata Mahamadou & 3 others v. Republic of Mali*, 16

619 ECW/CCJ/RUL03/08, 5 June 2008, Chief Ebrimah Manneh v. State of Gambia, par. 38; See the observations of Professor SALL under this judgment: A. SALL, *La justice de l’intégration. Réflexions sur les institutions judiciaires de l’UEMOA et de la CEDEAO*, 2^e ed., Dakar, CREDILA, 2018, pp. 340 – 343.

620 Including No VII and IX §19, which provide that “reparation may be made, among other things, by: (1) Restitution, if possible, by returning the victim to the situation he or she was in before the violation of the law occurred; (2) Compensation, which must be granted for each economic loss, as appropriate and proportionate to the gravity of the violation and the circumstances of each individual case resulting from the violation of international human rights law. Compensation may be awarded for physical or mental injury; loss of opportunity, including employment, education or acquired social benefits, material loss and loss of earnings and emotional loss, etc.... (3) Rehabilitation, Which must include medical and psychological care as well as access to legal and social services, (4) satisfaction, which must include, where appropriate, one of the measures listed in paragraph 22(a) to (h) of this document; and (5) guarantees of non-repetition, which shall include, where appropriate, one of the measures contributing to prevention listed in point 23(a) to (h) of this document”.

621 ECW/CCJ/RUL//12, 31 Oct. 2012, Baldini Salfo v/Burkina Faso.

The pragmatism of the measures

The pronouncement of a reparation measure for victims is conditioned by a contextual analysis of the specific situation of each case. The Court does not establish a standard that would apply mechanically to all cases. In reality, the Court is confronted with the diversity of violated human rights. Typically, the ECOWAS Court of Justice deals with problems of arbitrary arrest and detention, violations of the elements of a fair trial, violations of political rights including free participation in elections, and sometimes the rights of a dismissed employee. Moreover, the political contexts of the Member States that generated the dispute are different. Sometimes the political weight and the degree of predictable readiness of the authorities to bend to judicial demands are indicators of the pulse of the measures to be employed. Indeed *“when it finds violations of human rights, it prescribes measures which have as their main purpose the cessation of such violations and reparation.”* The purpose of the measure is to provide respite for the victim. Two cases must be distinguished in this regard. On one hand, the situation of the victim whose violation has occurred and is over and who brings the case to Court for redress. In this context, the purpose of the proposed remedy will be to compensate for the violation that has already occurred. On the other hand, this is the situation in which the infringement in question is still ongoing. This is the case of a victim who is deprived of his or her liberty in criminal proceedings in the absence of a final judgment. This is also the case of the victim, whose fair trial rights are violated in criminal proceedings. The cases relating to arbitrary detention illustrate this situation well. In this situation, the reparation measure that will be pronounced by the ECOWAS CJ will aim at the cessation of the said violation.

The Court *“takes into account the specific circumstances of each case to indicate the appropriate measures”* mirroring the jurisprudence of the ICJ, which States that *“what constitutes adequate reparation (...) depends, obviously, on the factual circumstances of each case and the exact nature and extent of the injury.”*⁶²² The concern for adequacy is explained by the purpose of adapting the measure to the specific case. This concern is reinforced by the search for the relevance of the measure so that it is effective. There is no point in retaining a reparation measure that would be unpopular and unfeasible. The Court rightly recalled this by stating that *“the legitimacy of these measures and their likelihood of implementation are the principles that guide the Court when it examines a case which relates to legal proceedings underway in a Member State.”* The Court is taking a cautious approach because the use of an ineffective form of reparation can lead to the desertion of its Courtroom by rebellious States, as is the case with the African Court on Human and Peoples’ Rights. Moreover, the Community Court is concerned with the preservation of the office of the national judge.

The preservation of the office of the national judge

The Court’s lucidity allows it to adjust its office to a particular situation. This is a referral for human rights violations while domestic legal proceedings are underway. This is due to the possibility for victims to bring matters before the Court without first exhausting domestic remedies. One comes then to the recognition of an instantaneous processual parallelism because two legal procedures are in progress with actors and objects not necessarily identical, but which influence each other. So, an imperative emerges. This is the obligation to avoid a conflict of authority between ECOWAS judges and national judges. Schematically, the situation is as follows: a person charged in a case that is being investigated before a national investigating judge, refers the matter to the ECOWAS Court of Justice for violation of his or her fundamental rights in the ongoing national judicial proceedings. There is a risk that the remedy provided by the Court may notoriously influence and undermine the independence of the national judge. It is for this reason that the ECOWAS CJ considers that *“its decisions are not intended to interfere with the decisions that national Courts would have to take. The Court cannot order measures whose execution would undermine or destroy the authority and*

622 Case of Avena and other Mexican nationals, (Mexico v. United States of America), Ruling, ICJ, [2004], pp. 12-72.

*independence of the national judge in the conduct of the cases before it.*⁶²³ In doing so, the Court is already projecting the scope of its remedies. A kind of teleological analysis. The requirement that the enforcement of the measure does not undermine the authority and independence of the national judge in the conduct of the case becomes a guiding principle in the choice of remedy. Human rights litigation could be seen as an incident in parallel with the main national litigation.

In reality, the Court is self-limiting. Tacitly, it refuses to pronounce reparation measures that would normally be appropriate but that could call into question the independence and authority of the national judge. For example, when the ECOWAS Court of Justice orders a release while the investigation is before the investigating judge and it is the latter who has requested a detention warrant against the accused, or when it finds that there has been a violation of fair trial, it may order a review of the domestic proceedings.

On another level this approach can be analysed as a sharing of reparation measures. One part would be pronounced by the ECOWAS Court of Justice and another part by the national judge who would have to establish the consequences of the conviction for human rights violations. The ECOWAS CJ would not substitute itself for the national judge in its role. For example, the Court would find a violation of rights at the hearing and award damages, but it is up to the national judge to proceed with the release. This prudential approach is wise but will only allow reparations to be holistic and optimally effective if national judges play their role in drawing the consequences of the community condemnation to pronounce adequate complementary reparations. For us, the ECOWAS Court of Justice should go beyond this paradigm by pronouncing optimal restorative measures because national judges are quite reluctant.

Yet, the requirement of *restitutio in integrum* is not only to grant satisfaction but also to erase all the consequences of the wrongful act. This second-choice criterion does not allow the Court to apply the principle of *restitutio in integrum*. Nevertheless, the Court spares no effort to mobilize several forms of reparations.

B- The forms of reparation employed

The Court employs several forms of reparation, which it sometimes takes the liberty of combining in the same case. However, the observation of the Court's case law shows an assumed preference for the compensatory form (1) and a subsidiarity of the non-compensatory forms (2).

The main characteristic of the compensatory form

The ECOWAS CJ never fails to award compensation every time it condemns a State. In a concrete term, the Court awards damages. The Court usually assesses the victim's injury and awards a lump sum. This practice is called cash or its equivalent compensation. Money became the instrument of measuring the penalties suffered by the victim of human rights violations. According to the doctrine, *"the right to compensation concerns material loss, moral loss, the disruption of life plan and the distribution and payment of the compensation."*⁶²⁴ The international Court of justice extends it to ecological loss.⁶²⁵

For the ECOWAS Court of Justice, *"this reparation must, as far as possible, restore the victim to the situation in which he or she was before the violation of his or her right, and relate solely to the prejudice, the causal link between the unlawful act and the alleged damage being established and*

623 ECW/CCJ/RUL//12, 31 Oct. 2012, Baldini Salfo v/Burkina Faso.

624 L. BONNEAU, « le droit à réparation des victimes de violations des droits de l'homme : le rôle pionnier de la Cour interaméricaine des droits de l'homme », *Revue droits fondamentaux*, 2007.

625 ICJ, Ruling of 2 February 2018, certain activities carried out by Nicaragua in the border region (Costa Rica v. Nicaragua), compensation payable by the Republic of Nicaragua to the Republic of Costa Rica, not yet published in the Digest; J.-C. Martin, « La pratique de la Commission d'indemnisation des Nations Unies pour l'Irak en matière de réclamations environnementales », in SFDI, *Le droit international face aux enjeux environnementaux*, Pedone, Paris, 2010, pp. 257-274.

proportionate to the violation found.”⁶²⁶ It is inferred from this that reparation must not be punitive and that there must be an equivalence between reparation and violence. In this regard, in Chief Ebrimah Manneh v. the State of Gambia,⁶²⁷ the Court proceeded to precisely identify the types of damage suffered by the victim before determining compensation. If the Court carries out a case-by-case assessment, it is undeniably based on the objective elements of assessments. It is possible to conclude from this that the Court applies the principle of full reparation⁶²⁸ and would refuse any mitigation of damages on the part of the victim.

In addition, the remedies for victims are controlled. The Court imposes objectivity in fixing the amount sought by the applicant. Objective justification of expenses is required. In fact, the Court requires the production of the elements of evaluation of the damage. For example, invoices of expenses, possible real losses caused by the violation. The Court expressly Stated that *“the applicant must provide evidence in support of his application; in this case the applicant could not provide evidence justifying his claim for the sum of 5 million dollars.”*⁶²⁹ In the case of Aziali Abia and others v. the State of Benin⁶³⁰ *“the Court regrets that in support of such a claim, the applicants have not produced documents which could give an idea of the expenses they have incurred since the ills and traumas they have suffered were inflicted on them.”* On the other hand, in Djelou Agbelengo Kodjovi v. State of Togo, it ruled that *“in the light of the above, the Court has sufficient evidence to award the applicants, as compensation for the damages approved by them, the following amounts ...”*⁶³¹ When the victim does not make a claim for damages or does not provide enough information to assess the damages, the Court proceeds with a self-assessment of the situation based on the facts. It ruled that, *“it does not ignore however neither the intensity of the physical and psychological sufferings endured by the victims nor of course, the expenses that the necessary medical treatments had to entail. In this respect, the Court cannot disregard the modest condition of the plaintiffs; having regard to all these data and to its practice in the matter of awarding compensatory indemnities, it considers that it is reasonable that, in remedy of the damage suffered by the victim, she be awarded the sum of 20 million CFA francs to be paid by the Beninese State.”*⁶³² In addition, it relies on fairness to determine the amount of the award for damages. It thus held that *“the applicant did not produce elements to assess and evaluate the damages suffered, the Court in such a situation relied on fairness to award compensation.”*⁶³³ The *“Court considers that it has discretionary power in the assessment of compensation for prejudice resulting from the violation of a right, however, subject to a number of elements which would objectify the application. In its assessment the Court may take into account fairness considerations.”*⁶³⁴

At the risk of the Court using its remedial power,⁶³⁵ the victim must be proportionate in his application

626 ECW/CCJ/RUL/22/20, 26 October 2020, LAYS CATHERINE JOSEPHINE CLAIRE GHISLAINE v. State of Senegal.

627 ECW/CCJ/RUL/03/08, 5 June 2008, Chief Ebrimah Manneh v. State of Gambia

628 G. CORNU, *Legal Vocabulary, Henri Capitant Association*, PUF, Paris, 2018 – 2019, “this is the principle under which compensation must cover all damage without victim enrichment”

629 ECW/CCJ/RUL/03/08, 5 June 2008, Chief Ebrimah Manneh v. State of Gambia

630 ECW/CCJ/APP/01/05, Aziali Abia and others V/ Togo.

631 ECW/CCJ/RUL/17/15, 6 Oct. 2015, Djelou Agbelengo Kodjovi and others v/ State of Togo.

632 ECW/CCJ/RUL/04/15, 23 April 2015, Eli Haggarmi v. State of Niger; ECW/CCJ/RUL/06/13, 3 July 2013, Kpatcha Gnassingbé and others v. State of Togo; ECW/CCJ/RUL/03/19, 6 Feb. 2019, Dexter Oil Limited v. the State of Liberia

633 ECW/CCJ/RUL/04/15, 23 April 2015, Eli Haggarmi v. State of Niger; ECW/CCJ/RUL/06/13, 3 July 2013, Kpatcha Gnassingbé and others v. State of Togo; ECW/CCJ/RUL/03/19, 6 Feb. 2019, Dexter Oil Limited v. the State of Liberia

634 ECW/CCJ/RUL/22/15, 23 Oct. 2015, Mamadou Baba Diawara v. the State of Mali

635 ECW/CCJ/RUL/22/20, 26 October 2020, LAYS CATHERINE JOSEPHINE CLAIRE GHISLAINE v. State of: Senegal *“The applicant seeks compensation d’the amount of five billion CFA francs (5 000 000 000 FCFA), but does not justify how it obtained this amount, as damages. However, the Court considers that in this case, an appropriate remedy is compensation, which must be proportional to the gravity of the human rights violation that has occurred, it is understood that the purpose of compensation for moral loss is not to restore the situation that would exist if the injurious fact had not occurred, but rather to compensate or give satisfaction to the injured party, which also has a function of sanction. Thus, in view of the gravity of the facts and their consequences for the applicant and also taking into account the standards of compensation generally adopted by this Court, it is considered appropriate to set the compensation due, at the amount of one hundred fifty million (150 000 000) CFA francs”.*

with supporting documents.⁶³⁶ Nevertheless “the payment of a fair satisfaction may prove unsatisfactory or insufficient, and it is sometimes possible to return, at least partly, to the situation that prevailed before the violation”⁶³⁷ The use of other, so-called subsidiary forms of redress is appropriate.

The subsidiary character of the non-compensation forms

Non-compensatory forms are designed to compensate for the violation suffered by the victim without paying the victim money directly. These repairs are sometimes inapplicable. For example, violations of the right to the presumption of innocence and the right to be tried within a reasonable time where judgment has already been rendered can only be remedied by damages.⁶³⁸ The forms of reparations are “restitution, rehabilitation, which must include medical and psychological care as well as access to legal and social services, satisfaction, guarantees of non-repetition.”⁶³⁹ Restitution is expressed through mechanisms that aim to “restore the victim to the original situation that existed before the human rights violations occurred.”⁶⁴⁰ This form of reparation includes the restoration of freedom, the enjoyment of human rights, the return to the place of residence and the restitution of employment or property. For example, the judge may order the return of property that has been confiscated from the victims.⁶⁴¹ This can also consist of ordering the release of an accused person. To our knowledge, the ECOWAS Court of Justice has not yet issued a restitution order in favor of a victim. In our opinion, for this to be done, the Court must abandon its doctrine of respect for the authority and independence of the national judge and in general its principled refusal to interfere in national affairs.

In addition, the rehabilitation measure is another form of reparation that takes the form of medical and psychological care for victims as well as access to legal and social services. It has not yet been pronounced by the Court. This is justified in so far as generally; applicants have the possibility to refer to national Courts and to access national social administrative services. Only a situation of apartheid or serious restriction could lead to the pronouncement of such a measure.

Furthermore, the measure of satisfaction refers to a broad category of measures ranging from those aimed at stopping violations, to the following measures: search for the truth, search for missing persons, identification and restitution of victims” bodies to their families, judicial and administrative sanctions, public recognition by the State of the facts and of its international responsibility; publication and dissemination of the Court’s judgment, moral and symbolic rehabilitation of the victims; elimination of criminal records from public registries, security guarantees for the voluntary return of displaced persons, distribution of goods and provision of basic services, and establishment of collective titles on ancestral lands. This form of reparation is that which has been the showcase of the normative power of the ECOWAS CJ. Indeed, the Court created a new human right, which is the right to the truth of the victims and endorsed the right to justice of the victims. In the Mainassara ruling,⁶⁴² having

636 ECW/CCJ/RUL/20/20, 3 Feb. 2020, Prof. Joseph Adelegan v. ECOWAS Bank for investment and development.

637 E. LAMBERT, « La pratique récente de réparation des violations de la Convention européenne de sauvegarde des droits de l’homme et des libertés fondamentales : Plaidoyer pour la préservation d’un acquis remarquable », *Revue trimestrielle des droits de l’homme*, 2000 avril, n°42, p. 202 ; G. COHEN- JONATHAN, « Quelques considérations sur la réparation accordée aux victimes d’une violation de la Convention Européenne des droits de l’homme », *Mélanges en hommage à Pierre Lambert*, Bruylant, Bruxelles 2000, p. 130.

638 ECW/CCJ/RUL/17/15, 6 Oct. 2015, Djelou Agbelengo Kodjovi and others v/ State of Togo. In a comparative approach, the Court imposes in the Community public service litigation, a time limit for the execution of the reparation. By way of illustration, the Court ordered the resumption of a recruitment process which had not complied with Articles 13 para. 1 of EBID’s Statute to EBID within 30 days

639 Remarks by the President of HCRRUN Togo Mrs. Awa Nana Daboya at the program launch ceremony, former President of the ECOWAS CJ. Accessed at <http://lavoixdelanation.info/justice-transitionnelle-a-decouverte-formes-de-reparation/?print=pdf>

640 *Idem*

641 ECW/CCJ/RUL/12/19 of 28 Feb 2019, Nancy Bohn-Doe v. State of Liberia: In this case, the Court merely noted that the forfeiture of former Liberian President Samuel Doe’s property violated the property rights of his widow and children in the absence of a judicial process that called for it.

642 See our article: F. AGBOKA, « La cour de justice de la CEDEAO au secours des victimes par le recadrage des effets d’une loi d’amnistie : analyse à partir de l’arrêt « Les ayants droits IBRAHIM MAINASSARA BARE c/ Niger du 13 octobre 2015, n° ECW/CCJ/APP/25/13 », *Bulletin du CEDHOP*, 2021, n°2, p. 6.

upheld the violation of the assassinated former Nigerien President's right to life, the ECOWAS CJ affirmed that it *"could not share such a tyrannical conception of the effects of an amnesty measure."*⁶⁴³ It questions the refusal to conduct investigations or to open a judicial inquiry by the Nigerien criminal justice authorities, in particular the prosecutor and the investigating judge. For it, *"the laws of amnesty cannot constitute a forced veiling of the past, a peremptory refusal to any company legitimately curious to know the truth. The amnesty law leaves intact the victims' right to truth."*⁶⁴⁴ This Court's stance may suggest that it is advocating the negation of amnesty laws, even though they have been sovereignly adopted; this may indicate that States are forbidden from adopting amnesty laws, even though they are a guarantee of political stability and regulate social appeasement. But, in an effort to control proportionality and reconcile imperatives, the Court States that *"it is of the opinion that if the need for collective forgetfulness or forgiveness may be necessary for a society at some point in its history. This necessity cannot be allowed to override the right to know, the right to access the truth that the victims of the acts in question may have. It does not ignore the sovereign right of a State to adopt, in a given situation, amnesty measures; nor does the Court seek to paralyze all the effects attached to such penal aspects of the facts in question, which should in no way affect the civil reparation due to the victims of these facts. It considers, in other words, that the amnesty law only erases penal incrimination, but leaves intact the right to reparation for victims, whatever forms that reparation may take."* Clearly, the reparation in this case is for the victims to know the truth. By affirming *"that it would indeed be iniquitous to completely ignore the situation of those who suffered from the events in question, on the grounds that State authorities have declared that the events are either written off or are actually supposed to have never existed. For the Court, amnesty does not justify inertia and respect for victims' rights is not incompatible with the need for social reconciliation."* The ECOWAS CJ operates a proportionality check between the retroactive extinguishing effects of an amnesty law and the resentment of the victims. The result was the consecration of the victims' right to the truth⁶⁴⁵, which is considered a *"right all the more important because it is, in this case, carried by people who had special emotional ties with the victim (...). The Court deplores the fact that the pain and desire to know, which are those of any other victim in these similar conditions, have not been properly treated"*. In doing so, the Court seeks to combat impunity.⁶⁴⁶ In keeping with this doctrine, the Court intervened in the case concerning assassination of former Guinea-Bissau President Gomes de Pina. Indeed, from the date of his death in 2009 to referral to the Court in 2018, the judicial information was not complete. The Court then proclaimed the obligation of States not to allow a crime to go unpunished, which *"translates in practice into the implementation of diligence necessary to establish the truth, in particular through the opening of a judicial investigation and the holding of a trial so that the perpetrators of the facts are identified and punished, and that the victims,*

643 « Les ayants droits IBRAHIM MAINASSARA BARE c/ Niger du 13 octobre 2015, n° ECW/CCJ/APP/25/13 » Para 52., D. KORFF, *Le droit à la vie. Un guide sur la mise en œuvre de l'article 2 de la Convention européenne des Droits de l'Homme*, éditions du Conseil de l'Europe, Précis sur les droits de l'homme n° 8, 2007

644 Les ayants droits IBRAHIM MAINASSARA BARE v. Niger of 13 October 2015, No. ECW/CCJ/app/25/13, Para 54

645 R. QUILLLOT (dir.), *La vérité*, Paris : Ellipses, 1997, 189 p. Article 18 of the United Nations Declaration against enforced Disappearances (1992) refers specifically to the right to the truth; L. WALLEYN, *Victimes et témoins de crimes internationaux : du besoin de protection au droit à la parole*, Paris, Dalloz, 2000, p. 85 : *"Understanding the right to know is simple, because it is inherent in any justice process"* See the *Declaration of basic Principles of Justice for victims of crimes and abuse of power*, adopted by the United Nations General Assembly in Resolution 40/43 of November 29, 1985; O. De SCHUTTER et S. Van DROOGHENBROECK, *Le droit international des droits de l'homme devant le juge national*, Bruxelles, Larcier, 1999, p. 31. The author speaks of the "right to know."

646 Instead, the Court had announced the colors of this form of reparation, in *ECW/CCJ/RUL/05/11 of 8 February 2011, Sidi Amar Ibrahim and others against the State of Niger*, which dealt with Ruling no. 2009 – 19 of October 23, 2009, on amnesty for acts that took place between 2005 and 2009 and Stated that *"while it took note of the existence of this ruling and accepted the decision taken by the Nigerien authorities to dismiss any legal proceedings in relation to the acts in question, it had nevertheless Stated the ineffectiveness of an amnesty law in the case of serious and massive violations of fundamental human rights."*

In another case *ECW/CCJ/RUL/06/19, 26 Feb. 2019, Rev. SOLOMON MFA and 11 others v. State of Nigeria, General Buhari Muhammadu and 3 others*, the Court criticized the State of Nigeria for violating the obligation to conduct independent investigations into the attacks and deaths perpetrated by the Fulani community and then bring the perpetrators to justice. It appreciated the opening of investigations when there were allegations of torture and simple physical harm. There is then an obligation on the State to investigate the facts, identify, judge and sanction those responsible for violations of a fundamental right: *ECW/CCJ/RUL/07/16, 20 April 2016, AMETEPE Koffi v. State of Togo*.

*who take legal action, obtain reparation to the fullest extent possible.*⁶⁴⁷

Finally, measures to guarantee non-repetition are a set of measures designed to prevent the violations committed and reported from being perpetrated again in the future. In summary, it is the adoption of measures of a legislative, political, administrative, and economic nature aimed at protecting against violations. These measures may consist of the Court's request to the convicted State to review its legislation or practice to bring them into alignment with international standards. This was the case in electoral matters, particularly in the case of *CDP v. the State of Burkina Faso*⁶⁴⁸, the Court criticized the violation of the principle of equality in participation in elections in order to gain the leadership of the country. Also, the Court has recently invited Senegal to review its electoral code in a ruling of April 18, 2021, in that the sponsorship system for the presidential election violates the right to free participation in elections. But specifically, it was in the *Federation of African Journalists & 4 Ors v. State of The Gambia* judgment⁶⁴⁹ that the Court first noted the disproportionate nature of Gambia's criminal sanctions against journalists and expressly invited the Gambian State to review its legislation to bring it into line with international standards⁶⁵⁰.

*In short, "in international law, the measures of satisfaction result from the general obligation of full reparation arising from the wrongful act, and these measures are addressed solely to the victims and to the "liquidation of the past". Whereas guarantees of non-repetition belong to the primary obligations of States, are future-oriented, more general and have as their goal the incitement of the State not to violate human rights again. »*⁶⁵¹

What about the scope of the ECOWAS CJ's approach?

II. The influence of the Court's approach

The approach of the ECOWAS Court of Justice is salutary and stems from an edifying case law construction. But it must be noted that sometimes the Court loses all its latitude of control (A). It would then be interesting to compare the Court's approach with other international Courts (B) in order to better assess it.

A. The reduction of the Court's control over reparations

The Court's power of control is diminished when, during the course of the proceedings, the parties decide to settle out of Court (A). This raises the possible risk of imperfect reparation (2).

The preponderance of the parties' will in the event of amicable settlement

The human rights litigation of the ECOWAS CJ offers broad powers to the parties. Indeed, they are regarded as the masters of the Court. For example, the search for evidence is their responsibility. This litigation is akin to a civil trial in many ways. Similarity is even more crystallized in the amicable settlement mechanism of disputes. The parties have the availability of the dispute. Article 73 of the Rules of Procedure of the ECOWAS CJ provides that *"if the applicant informs the Court in writing that he wishes to discontinue the proceedings, the President shall order the case to be removed*

647 ECW/CCJ/RUL/15/18, 24 May 2008, Ms. Nazare GOMES DE PINA v. State of Guinea Bissau

648 Judgment No. ECW/CCJ/RUL/16/15, CDP and others v. The State of Burkina, CE 13 July 2015, § 25.

649 Federation of African journalists & 4 Ors v. The Gambia (Judgment No.: ECW/CCJ/RUL/04/18), ECW/CCJ/RUL/31/18, 11 DECEMBER 2018,

650 Deyda Hydara JR. and Anor v. The Gambia (Case No.: ECW/CCJ/APP/30/11 Judgment N°: ECW/CCJ/RUL/17/14); Chief Ebrimah Manneh v. The Gambia (2004 – 2009) CCJELR, 181; Musa Saidykhan v. The Gambia (2010) CCJELR, 139. 58; FESTUS A.O. OGWUCHE v State of Nigeria; R. BINGHO "the Human Rights powers of the ECOWAS Court of Justice, a look from the inside" available at https://lechemindudroit.net/les-competences-de-la-cour-de-justice-de-la-communaute-cedeao-en-matiere-de-droits-de-lhomme-un-regard-de-linterieur/#_ftn

651 S. CHEVALLIER, "The particularity of the case law of the Inter-American Court of Human Rights on non-pecuniary measures of reparation and its influence on the recent evolution of the case law of the European Court of Human Rights", accessed on August 26, 2021, at https://blogs.parisnanterre.fr/content/le-particularisme-de-la-jurisprudence-de-la-cour-interam%C3%A9ricaine-des-droits-de-l%E2%80%99homme-en--0#_ftnref55

from the register and shall give a decision as to costs in accordance with Article 66". To this end, under ECOWAS law, the essential purpose of litigation is the interest of the victim. When the parties agree to settle the dispute amicably, then the dispute fades away and becomes moot. Article 72 of the Rules of Procedure provides that "if, before the Court has given its decision, the parties reach a settlement of their dispute and intimate to the Court the abandonment of their claims, the President shall order the case to be removed from the register and shall give a decision as to costs in accordance with Article 66(8), having regard to any proposals made by the parties on the matter". In fact, the parties can control the outcome of the proposed solution. In domestic law, this is called a transaction. In human rights litigation, this technique is often used when States want to avoid international jurisdictional humiliation. In turn, they avoid damaging their reputation and sometimes even becoming a pariah in the international community. This results in a severe and diplomatically disastrous handicap. Isn't one saying, "a bad settlement is better than a good trial?"

Victims, on the other hand, often plan for a comfortable remedy for their violation. Therefore, sometimes, the parties go along this path and find a negotiated solution, against the backdrop of a negotiated amount of compensation. After this agreement, the parties inform the Court of their agreement. Article 72 of the Rules of Procedure deprives the Court of a right of control over the amount of compensation. The Court only ensures the sincerity of the terms of the agreement and the absence of any consent defects of the parties. This was the case in *Kagbara Bassabi and Babalé Philomène v. the State of Togo*.⁶⁵² In this case, the ECOWAS Court of Justice noted that the parties had reached a conciliation agreement approved by the President of the Court of Lomé granting compensation of 20 million CFA francs to the applicants. Clearly, the power to control the nature and amount of the reparation eludes the Court, which is often presented with a *fait accompli*. This creates the risk of an imperfect reparation.

The possible risk of an imperfect reparation

By denying the ECOWAS Court of Justice control over the negotiated solution, the rules of procedure open the door to the application of an inappropriate form of reparation. Indeed, the Court remains guided by a principle of applying the appropriate form of reparation based on a careful analysis of the case before it.

In concrete terms, it is noted that the outcomes negotiated between the parties have always resulted in compensation. However, this form of reparation may not be sufficient. Optimal reparation would require the addition of non-compensatory measures such as an obligation on the part of the State to initiate a judicial investigation and prosecute the alleged perpetrators of the violation, or an invitation to the State to reform the procedural practice of its judicial system. In the event that compensation alone is sufficient, it is regrettable that the Court does not have a say in the amount. However, the amount may not be significant. In fact, the parties' attitude is akin to a withdrawal of proceedings. The Court has no real power of approval over the settlement agreement.

But, in reality, the victims hardly complain about it. This may indicate that this risk is a fantasy. Nevertheless, it is preferable that the legal heuristic be able to make fairly extensive use of its residual power of control.

The protective vocation of the ECOWAS Court of Justice requires an expansion of the Court's powers either through a modification of the Rules of Procedure or proprio – *motu* when an imperfect reparation case occurs. Similar to what the IACHR did in *Trueba Arciniega et al. v. State of Mexico* (Ruling of November 27, 2018. Ruling of November 20, 2018, Series C No. 364) where it "approved a settlement agreement in which Mexico recognizes its international responsibility for the arbitrary execution of a civilian committed by Members of the army. It found that there had been a violation

⁶⁵² ECW/CCJ/RUL/04/16, 16 February 2016, *Kagbara Bassabi and Babalé Philomène v. State of Togo*. See also: ECW/CCJ/RUL/14/15 of 30 June 2015, *Association des travailleurs partants volontaires à la retraite V. State of Mali*.

of the victim's right to life (article 4.1) and the victim's right to personal integrity (article 5.1)), as well as of the victim's right to legal guarantees (article 8.1) and to legal protection of the family (article 25.1)). (...) the Court then recalled that the maintenance of domestic public order and the safety of citizens must be entrusted primarily to the civil police; the involvement of the armed forces must be exceptional because it may involve a risk to human rights. The Court then found that the amicable settlement agreement proposed by the Mexican State complies with the formal and substantive conditions for its approval (Article 48.1(f)). It was signed by the parties, who were given the opportunity to comment; it ended the controversy over facts, rights, and reparation; and its content was compatible with the Convention. Finally, the Court examines the reparation measures mentioned in the amicable settlement agreement and is called upon to monitor their proper implementation. It notes that:

- First, in accordance with the obligation to investigate, the Mexican State recognizes the victims' right to justice and truth, and is committed to reviewing the decision in light of international standards;
- Second, as part of the rehabilitation measures, the State undertakes to provide medical and psychological assistance to the victim's family;
- Third, as part of the reparation measures, the State undertakes to pay compensation to one of the victim's brothers to help him in his professional activity, to provide furnished housing to the victim's mother and to pay a sum of money for the improvement of the victim's father's home; it also undertakes to publish a Statement of recognition of responsibility in national media;
- Fourth, is a guarantee of non-repetition, the State commits itself to train State agents as well as investigative and trial authorities on the excessive use of force, human rights, citizen security, and procedural guarantees;
- Fifth, the State undertakes to compensate the moral damage in full.⁶⁵³

So, what about the reparation practices of other international jurisdictions?

B. Comparison of the Court's practice with other regional Courts

The analysis will crystallize around a comparison with regional Courts whose mission is to protect human rights, including the African Court on Human and Peoples' Rights (AfCHPR), the European Court of Human Rights (ECHR) and the Inter-American Court of Human Rights (IACHR). The similarity of the functions of these Courts with the ECOWAS Court of Justice makes it possible to analyse their practice (1) and to foresee the perspectives of the ECOWAS Court of Justice (2).

The practice of the other regional Courts

In general, we find that there is a textual framework for reparations in the other regional jurisdictions. The issue of reparations has a textual basis.

At the level of the AfCHPR Article 27 of the Protocol on the African Charter on Human and Peoples' Rights provides that "1. If the Court finds that there has been violation of a human or peoples' right, it shall make appropriate orders to remedy the violation, including the payment of fair compensation or reparation."⁶⁵⁴

The claim for compensation must be contained in the victim's petition with a justification of the damages due to the principle of certainty of damages. According to Rule 40 – 4 of the Rules of Procedure of the AfCHPR, "any applicant who on his/her own behalf or on behalf of the victim, wishes to be

⁶⁵³ N. BOUMENDIL, E. CAMPARIO, F. DE OLIVEIRA REZENDE, E. PIC ET R. PLUCHET, « Chronique de jurisprudence de la Cour interaméricaine des droits de l'homme (2018-2019) », *La revue des droits de l'homme*, Actualités Droits-Libertés, [Online] 05 January 2020, Accessed 25 August 2021. URL: <http://journals.openedition.org/revdh/7635>; DOI: <https://doi.org/10.4000/revdh.7635>

⁶⁵⁴ In addition, Rule 71 of the Rules of Procedure of the African Court on Human and Peoples' Rights (AfCHPR) of 1 September 2020 requires that "1. The judgment shall contain:(...) i) the decision, if any, on reparations costs."

granted reparation pursuant to Article 27(1) of the Protocol, shall include the request for reparation in the Application, in accordance with sub-Rule 2 above. The supporting documents and evidence relating thereto shall be submitted together with the Application or within a time limit set by the Court.”

The European Convention for the Protection of Human Rights and Fundamental Freedoms of 04 November 1950, provides in Article 41 that *“if the Court finds that there has been a violation of the Convention or the Protocols thereto, and if the internal law of the High Contracting Party concerned allows only partial reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured party.”* The new rules of procedure of the ECHR, which entered into force on 1 August 2021, provides more detail on the Court’s approach to reparation, in particular through the practical instructions to the Registry issued by the President of the Court under the Article 32 of the rules of procedure of 28 March 2007.⁶⁵⁵ It is deduced from this that the pronouncement of reparation is first conditioned by the absence of erasure measures in domestic law. The ECHR then has a secondary power of reparation

Moreover, the modalities for implementing the action for reparation are provided. The practical instructions to the Registry issued by the President of the Court under Article 32.⁶⁵⁶

On forms of reparation that can be mobilised, the Rules of Procedure of the ECHR provide for a preference for financial reparation.⁶⁵⁷

Finally, Article 63.(1) of the American Convention on Human Rights of 22 November 1969 States that *“if the Court finds that there has been a violation of a right or freedom protected by this Convention, the Court shall rule that the injured party be ensured the enjoyment of his right or freedom that was violated. It shall also rule, if appropriate, that the consequences of the measure or situation that constituted the breach of such right or freedom be remedied, and that fair compensation be paid to the injured party.”*

This textual basis is supported by a bold case-law deployment. Are the guiding principles for granting reparations set forth in the AfCHPR ruling, *Rev. Mtikila v. United Republic of Tanzania* (judgment on

⁶⁵⁵ It is provided that “1. The award of just satisfaction shall not follow automatically from a finding by the European Court of Human Rights that there has been a violation of a right guaranteed by the European Convention on Human Rights or its Protocols. This is clear from the wording of Article 41 of the Convention, which stipulates that the Court shall only grant just satisfaction only if the consequences of a violation can only be partially remedied by domestic law and, even then, only “where appropriate. (If necessary, in the English text) to do so.

2. The compensation allocated under Article 41 of the Convention must be “fair” (just in the English text) in the light of the circumstances of the case. The Court must therefore take into account the characteristics of the case before it. It may consider that the finding of violation of the Convention constitutes in itself sufficient just satisfaction for such or such alleged injury and that there is no need to grant monetary compensation. It may also detect grounds of fairness to award an amount less than the value of the damage actually suffered or the costs and expenses actually incurred, or even to award no compensation. This may be the case, for example, if the situation complained of, the amount of the damage or the level of the costs are attributable to the fault of the applicant himself. In determining the amount to be awarded, the Court may also consider the respective situations of the applicant, as the party injured by a violation, and the Contracting Party, as the party responsible for the general interest. Finally, the Court usually takes into account the economic situation of the respondent State, 3. When granting compensation under Article 41 of the Convention, the Court may decide to refer to domestic standards. But it is never bound by them.

⁶⁵⁶ The Regulation of 28 March 2007 provides that “Article 60 of the Regulation lays down the time limits and other formal conditions to be respected in order to submit an application for just satisfaction. Its relevant passages read: 1. An applicant who wishes to obtain an award of just satisfaction under Article 41 of the Convention in the event of the Court finding a violation of his or her Convention rights must make a specific claim to that effect. 2. The applicant must submit itemised particulars of all claims, together with any relevant supporting documents, within the time-limit fixed for the submission of the applicant’s observations on the merits unless the President of the Chamber directs otherwise. 3. If the applicant fails to comply with the requirements set out in the preceding paragraphs the Chamber may reject the claims in whole or in part. (...) . The Court therefore requires specific requests, supporting documents, without which it allocates no compensation. It dismisses request presented in the application forms but not reiterated at the appropriate stage of the proceedings It also rejects late applications.”

⁶⁵⁷ “Any reparation awarded by the Court usually takes the form of a sum of money to be paid by the respondent Contracting Party to the victim or victims of the violations found. Only in very exceptional cases may the Court consider inviting the respondent Contracting Party to take certain measures to end or remedy the violations in question. However, the Court has the right to give indications as to how its judgments should be implemented (Article 46 of the Convention).

25. The Court fixes, on its own right, a time limit for any payment to be made; this time limit is usually three months from the date on which the judgment becomes final and enforceable. The Court also orders the payment of simple moratory interest in the event of an intervening payment”

reparations), June 14, 2014, § 37, observed at the AfCHPR level. The first is: The requirement for the applicant to *have “sufficient evidence”* establishing a causal link between the facts of the case and the compensation claimed. The second is the need to provide “sufficient evidence”. It is derived from Article 26, paragraph 2, of the Protocol to the African Charter on Human and Peoples’ Rights.⁶⁵⁸ Finally, *“the applicant must provide evidence to support the allegation that the injury was caused directly by the facts of the case.”*⁶⁵⁹ In this major judgment, the AfCHPR dismissed the applicant’s claims for pecuniary loss for lack of evidence and held that its June 14, 2013, declaration of wrongfulness (in the first ruling on liability) in itself constitutes a sufficient form of compensation for non-pecuniary loss. The Court opted for the non-compensatory form of reparation, namely satisfaction, which in this case consists of a denunciation of the non-conformity of domestic law with international legality⁶⁶⁰. In the same vein, the AfCHPR prescribes non-compensatory measures of reparation such as the cancellation and suspension⁶⁶¹ of arrest warrants,⁶⁶² the obligation to review legislative texts which violate human rights *notification of the present*⁶⁶³ and finally *the injunction to provide a report within a precise time of the measures for the execution of judgments.*⁶⁶⁴

The pragmatic and bold character of the Inter-American Court of Human Rights is also noted. *“The Court’s autonomy from the domestic law of States allows it to directly issue non-pecuniary orders to States.”*⁶⁶⁵ In its judgment *Velásquez v. Honduras*⁶⁶⁶, the IACHR States that *“no part of this article [63.1] mentions or conditions the provisions of the Court to the effectiveness of existing instruments of reparation in the domestic law of the State Party responsible for the offense, in such a way, reparation is not based on the defects, imperfections or shortcomings of national law, but rather on the independence of it.”* In its view, *“all aspects of the obligation of reparation (scope, nature, modalities, and identification of beneficiaries) are defined in international law, it cannot be modified by the State invoking the provisions of its domestic law.”*⁶⁶⁷ The American judge is notoriously indifferent to the domestic Courts. According to the IACHR, the State has *“a legal duty to take reasonable measures to prevent human rights violations and to use the means at its disposal to seriously investigate violations in an environment under its jurisdiction, in order to identify those responsible, to impose appropriate sanctions and ensure adequate reparation for the victim.”*⁶⁶⁸

The old approach of the IACHR was to tilt toward the compensatory form of award of damages because restitution is impossible, inappropriate, insufficient [...] given the irreversible nature of the damage caused.

658 It provides that “ *the Court receives any means of evidence (written or oral) that it considers appropriate and on which it bases its decisions*”; G. NIYUNGEKO, *La preuve devant les juridictions internationales*, Bruxelles, Bruylant, 2005, 480 p. 29 ; H. TIGROUDJA, « La preuve devant la Cour européenne des droits de l’homme », in RUIZFABR H. et SOREL J.-M., *La preuve devant les juridictions internationales*, Paris, Pedone, Coll. Contentieux International, 2007, pp. 114-140.

659 AfCHPR, Rev. Mtikila v. United Republic of Tanzania (Judgment on reparation), 14 June 2014, § 37

660 M. DUPU, « Responsabilité et légalité », in SFDI, *Colloque du Mans sur La responsabilité dans le système international*, Pedone, Paris, pp. 263-297, p. 274. 39 ; R. NEMEDEU, « Commentaire de l’article 27 du protocole relatif à la Charte africaine des droits de l’homme et des peuples » in KAMTO M. (dir.), *La Charte africaine des droits de l’homme et des peuples et le protocole y relatif portant création de la Cour africaine des droits de l’homme : commentaire article par article*, Bruylant, Bruxelles, 2011, pp. 1466-1480, p. 1471 et s.

661 Req. No. 012/2020, Ord. AfCHPR/Reg/APPL/01/2020/009? 22 APRIL 2020, AFF. Guillaume Kigbafori Soro v. Republic of Ivory Coast

662 Sébastien Germain Ajavon v. Republic of Benin, CAFDHP, Application No. 013/2017, Judgment (merits) (29 March 2019), § 110 AfCHPR.

663 AfCHPR, case Sébastien Germain Marie Aïkoue Ajavon v. republic of Benin Application N°062/2019, 4 December 2020

664 AFCHPR *Actions for the Protection of Human Rights (APDH) v. The Republic of Ivory Coast*, Judgment, 18 November 2016, § 153, pp. 34-35.

665 S. CHEVALLIER, “The particularity of the case law of the Inter-American Court of Human Rights on non-pecuniary measures of reparation and its influence on the recent evolution of the case law of the European Court of Human Rights”, accessed on August 26, 2021, at <https://blogs.parisnanterre.fr/content/le-particularisme-de-la-jurisprudence-de-la-cour-interam%C3%A9ricaine-des-droits-de-l%E2%80%99homme-en--0#.ftnref55>

666 IACHR *case Velásquez Rodríguez v. Honduras*, Reparations and costs. Ruling of 21 July 1989. Series C No.

667 IACHR, La *Cantuta v. Peru*, Series C No. 162, 29 November 2006, § 200

668 IACHR, 29 July, 1988, *Velásquez Rodríguez v. Honduras* (fondo), C Series No. 4, §§166, 174. For the Court, this obligation constitutes *the “cornerstone of the system of international human rights protection, since it implies the commitment of States to limit the exercise of their power...”*

However, since the *Loayza Tamayo* case,⁶⁶⁹ the IACHR has ordered an end to arbitrary detention, to release the victim, to return her to her job, to compensate her for the wages she should have received during the entire period of her arrest, to guarantee her right to retirement, re-enter his name in the pension records retroactively from the date on which she was deleted and finally adopt the necessary internal measures to ensure that none of the judicial decisions taken against Mrs Maria Loayza Tamayo have any effect.

The IACHR has undertaken in its jurisprudence many non-pecuniary reparation measures, especially those aimed at eliminating the effects of judgments, in particular the release of victims, annulment of judicial decisions and deletion of criminal and civil records⁶⁷⁰, the reopening of judicial proceedings and the refrainment from applying laws allowing the death penalty. For example, it imposed on the Colombian State an obligation to guarantee the return of victims of forced displacement.⁶⁷¹ Another frequently used reparation is the reinStatement of workers dismissed in violation of the right to a fair trial, as in the case of *Baena and others V. Panama*.⁶⁷²

In the event of a violation of the right to life, the IACHR imposes an obligation at the time of reparation on the State to investigate the facts, identify, judge and sanction those responsible.⁶⁷³ In the *Carpio Nicolle* case, the Court Stated that “*the right to truth is an important form of reparation, well recognized in international human rights law*.”⁶⁷⁴ The IACHR added that the investigation and trial, in the context of the implementation of the obligation to investigate violations of the right to life, must take place in accordance with the Inter-American Convention on Human Rights. That is, the investigation must be made within a reasonable time, objectively with all the necessary diligences without any aspect being concealed. The Court thus avoids farces investigations, aim at just pretending while a denial of the reparations affirmed by the IACHR is maintained. It reinforced its previous position by affirming in the case of *Bamaca velazquez*⁶⁷⁵ that “*society has the right to know the truth about these crimes in order to be able to prevent their repetition in the future. The right to truth as a measure of satisfaction is then a general measure and does not apply only to the case at hand and would therefore be a guarantee of non-repetition*.” In summary, the IACHR considers that the measures of reparation “*that come closest to restituo in integrum in the event of a violation of the right to life are: The adaptation of domestic law to the American Convention on Human Rights and the obligation of the State to carry out investigations, to identify, judge and sanction those responsible; measures which also constitute guarantees of non-repetition of violations*.”⁶⁷⁶

Furthermore, we also note the evolving practice of the ECHR on reparations. Indeed, it has remained for a long time limited to the pronouncement of monetary measures on the basis of just satisfaction. The ECHR broke free from this old interpretation, which prevented it from fully applying the principle of *restitutio in integrum* from the year 2000 onwards. It now prescribes non-pecuniary measures against States, including release,⁶⁷⁷ in the case of *arbitrary detention*,⁶⁷⁸ *the reopening of a trial*,⁶⁷⁹

669 IACHR, *Case Loayza Tamayo v. Peru*, **Reparations and costs**. Ruling of 27 November 1998. Series C No. 42

670 IACHR case *Cantoral Benavides V. Peru*. Reparations and costs. Ruling of 03 December 2001. Series C No. 88

671 IACHR, case *Raxcacó Reyes C. Guatemala*, merits, reparations and costs. Ruling of 15 September 2005. Series C No. 133

672 IACHR, case *of the massacres of Ituango V. Colombia*, preliminary exception, merits, reparations and costs. Ruling of 01 July 2006. Serie C No. 148

673 IACHR, *Goiburú and others v. Paraguay*, merits, reparations and costs. Ruling of 22 September 2006. Series C No. 153

674 IACHR, *Carpio Nicolle v. Guatemala*, merits, reparations and costs. Ruling of 22 November 2004. Serie C N° 117

675 IACHR *Bámaca Velásquez v. Guatemala*, Reparations and costs. Ruling of February 2002. Series C No. 91

676 IACHR, *Case Barrios Altos V. Perou*, **Reparations** and costs.

677 ECHR, *Assanidze v. Georgia*, N° 71503/01, 8 April 2004

678 ECHR, *Ilascu and others v. Moldova and Russia*, N° 48787/99, 8 July 2004: The ECHR orders Russia to end arbitrary detention, based on Article 46 on the binding force of judgments. It thus States that the continued detention would be “*a serious extension of the violation of Article 5 found by the Court and a breach of the obligations respondent States under Article 46, § 1 of the Convention to comply with the judgment of the Court*”

679 ECHR, *Gençel v. Turkey*, No. 53431/99, 23 October 2003; ECHR, *Akkas v. Turkey*, No52665/99, 23 October 2003.

legislative amendment⁶⁸⁰ and the obligation to open investigations following an attack on life⁶⁸¹ or crimes of torture.⁶⁸² The ECHR, like the ECOWAS CJ and the IACHR, condemns amnesty measures that prevent the establishment of the truth about serious violations, torture and enforced disappearances and assassinations⁶⁸³. In summary, “the European Court, which had always refused to order non-pecuniary measures, now orders not only individual but also general non-pecuniary measures, thus interfering in State affairs.”⁶⁸⁴

2 - THE PERSPECTIVES OF THE COURT BASED ON THE PRACTICES OF OTHER REGIONAL COURTS

The doctrines of the ECHR, IACHR and the AfCHPR are part of the offensive approach with the power of injunction that consolidates jurisdictional efforts to provide holistic and adequate reparation to victims. This has led to the adoption of Protocol 14 of 1 June 2010 by the Council of Europe, now allowing the Court of Human Rights, when faced with repetitive cases and which relate to a structural problem of the State, to order the State to adopt measures and to adjourn cases pending before it, while the State complies with the measures ordered. But there is no doubt that the systems of the AfCHPR and the IACHR are the best because they issue appropriate reparations with more assertive injunctive power. Moreover, they do not take into account the existence or non-existence of national reparation measures, contrary to the system of the ECHR, which is based on the subsidiarity of the Court, which can only pronounce reparations in the event of the absence or insufficiency of adequate national reparation measures.

The ECOWAS CJ should be more dynamic by recommending non-monetary reparation measures to the condemned States, like other regional Courts. The preservation of the authority of the national judge will be undermined, but the effective redress of human rights violations requires it. The amendment of the texts governing the ECOWAS CJ to allow the Court to be more offensive is necessary. Or the President of the Court may issue instructions or orders new instructions which will govern appeals for award of damages. But the office of the Court must be bolder, particularly by prescribing measures for immediate release in the case of pre-trial detention and the review of domestic Court proceedings in the event of a violation of fair trial. It is by doing so that the Court could apply the general principle of international law that guides reparations: *restitutio in integrum*.

It is desirable that States also adopt national rules which allow the effects of violations found in the domestic order to be erased. All international jurisdictions take a more holistic approach to reparation, aiming to fully erase the effects of the violation. The ECOWAS CJ can no longer remain on the side lines of this trend. Moreover, the Court must justify the choice of refusal of measures other than financial compensation. The cases *Khalifa Sall v. the State of Senegal*, *Michel and Simone Gbagbo v. the State of Ivory Coast* and *Mamadou Tandja v. the State of Niger* are noteworthy because the Court did not dare to pronounce the measure of freedom despite the arbitrary detention noted. The financial reparation cannot be validly adapted for a person arbitrarily detained. The case of *Les ayant droits IBRAHIM MAINASSARA BARE v. Niger* of 13 October 2015, No. ECW/CCJ/APP/25/13” could have been an opportunity for the Court to affirm a review of the judicial proceedings at the national level. Unfortunately, the Court lacked courage. However, it is in the appropriate reparation measures that the supranational framework of domestic law can be more perceptible.

680 ECHR, *Öcalan v. Turkey*, No. 46221/99, 12 May 2005; ECHR, *L. v. Lithuania*, No 27527/03, 11 September 2007
ECHR, *Hassan and Eylem v. Turkey*, No 1448/04, 9 October 2007

681 ECHR, *Mccann v. United Kingdom*, N° 19009/04, 13 May 2008

682 ECHR, *Alikhadzhiyeva v. Russia*, N° 68007/01, 5 July 2007.

683 ECHR, *Ely OUL Dah v. Mauritania*, N° 13113/03, 17 March 2009; ECHR, *Abdulsamet Yaman v. Turkey*, No 32446/96, 2 November 2004

684 S. CHEVALLIER, “The particularity of the case law of the Inter-American Court of Human Rights on non-pecuniary measures of reparation and its influence on the recent evolution of the case law of the European Court of Human Rights”, accessed on August 26, 2021, at https://blogs.parisnanterre.fr/content/le-particularisme-de-la-jurisprudence-de-la-cour-interam%C3%A9ricaine-des-droits-de-l%E2%80%99homme-en-0#_ftnref55

It is desirable for the ECOWAS Court of Justice to develop the adversarial approach to the quantum of reparations, by allowing the defendant States to criticize the amount requested, before the Court uses its discretionary power, as it happens before the AfCHPR. But the practice of deciding the issue of reparations in a ruling separate from the main judgment on the violation is not desirable. This would cause an additional burden on the Court, whose number of Judges is now reduced to five, with implications for the expediency of cases. It would be welcome to require the victims to set a quantum of financial compensation in their application so that the defendant can make observations and not sometimes wait for the Court itself to set an amount *proprio motu* and *in situ* because of the silence in the application. By doing so without obtaining an observation from the defendant, the ECOWAS Court of Justice is guilty of not respecting the adversarial process.

Nevertheless, one must not lose sight of the fact that the ECOWAS Court of Justice has a dual role: That of Community jurisdiction and regional (West African) international jurisdiction. This dual nature is a specificity compared to other jurisdictions which are only regional international with the requirement of exhaustion of domestic remedies. Moreover, the political context in which the Court operates requires heightened caution at the risk of creating a rebellion of actors in national legal systems.

REMEDIES AND REPARATIONS BEFORE THE ECOWAS COURT OF JUSTICE

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Introduction

International justice, wrote Jean-Pierre COT, had been profoundly “*shaken by a formidable appetite for law and Courts. The role of the International Court of Justice has grown. International Courts of all kinds have proliferated (...). This proliferation of international justice is renewing the law of nations, introducing new actors and new needs.*”⁶⁸⁵ These new needs have given man, the subject of international law, a prominent place. The evolution of his relationship with the State has given rise to the idea of protecting his fundamental rights. However, it would be pointless to claim to protect and defend human rights without mechanisms and structures dealing exclusively with the subject, both at the domestic and international levels. Thus, the community of African States, like their European and American peers, has created supranational bodies, including judicial and legal bodies for human rights protection.

We will forego a review of the organs of the human rights instrument for the promotion and protection of human rights and fundamental freedoms in Africa, namely the African Charter on Human and Peoples’ Rights, also known as the Banjul Charter; and focus on the organ at the community level, the Court of Justice of the Economic Community of West African States (ECOWAS).

The ECOWAS Court of Justice (ECJ) is the principal judicial organ of the Community. It was established by the founding Treaty of the Community in 1975 in its Article 15. This was followed by the protocol signed in 1991 on the organisation, composition and remit of the said Court.

Although the 1991 Protocol practically organised the Court, it was not until 2001 that it began to function with the appointment of the first judges, known as the *Pioneer Judges*. the Court major role is to ensure respect for the law and the principles of equity in the interpretation and application of the provisions of the Revised Treaty and other subsidiary legal instruments adopted by the Community. The ECOWAS Court of Justice (ECJ) hears disputes referred to it by States in the interpretation of the provisions of the Revised Treaty. Furthermore, it may give an advisory opinion on issues requiring the interpretation of the provisions of the Treaty, when referred to it by the Authority (of Heads of State and Government), the Council (the Council of Ministers), or by one or more Member States, or by the Executive Secretary (now President of the ECOWAS Commission) and any other Institution of the Community (**Article 10 of the Protocol of 6 July 1991**)

Considered inactive since its creation, the ECJ was revitalised by the adoption of Supplementary Protocol A/SP.1/01/05 of 19 January 2005. This text determines its composition and assigns it a precise mandate, through more extensive powers. Indeed, according to the provisions of Article 9§4 of the Protocol of 19 January 2005, “**the Court shall have jurisdiction to hear cases of violations of human rights in any Member State**”. Following amendments made to its initial Protocol through the Court’s 2005 Supplementary Protocol, the jurisdiction of the ECJ is now extended to cover cases of human rights violations in ECOWAS Member States without the classical prerequisite of exhaustion of domestic remedies, which moreover marks its specificity compared to other regional or even international Courts.

In any case, the ECOWAS Court of Justice (ECJ) is in operation and its copious jurisprudence attests to this fact.

With regard to the theme of our paper, “Remedies and Reparations before the ECOWAS Court of Justice (ECJ)”, we will dwell on the human rights component, given that we work within a National Human Rights Institution (NHRI) and that since 2005, the ECJ has undeniably earned a reputation as a human rights protection Court, following the example of such prestigious Courts as the European Court of Human Rights, the Inter-American Court of Human Rights and the African Court of Human and Peoples’ Rights.

⁶⁸⁵ Jean-Pierre COT, «Le monde de la justice internationale», in *Société française pour le droit international*, La juridictionnalisation du droit international, colloquium at Lille, Pedone, Paris, 2003, pp. 511-512

Before delving into an in-depth analysis of this theme, we need to clarify the key terms that make it up.

Definitions of key terms

Remedy. The notion of remedy, in terms of human rights, is a means available to States, individuals or NGOs to denounce a violation and demand sanctions and adequate reparation. The aim of the remedy is to have a violation of the law established, to obtain a conviction with a view to reparation for the violation established. The remedy may be of a judicial or non-judicial nature. It is part of the mechanisms for protecting or safeguarding recognised human rights.

Reparation. Reparation for human rights violations is a fundamental principle of international law. Reparations do justice by eliminating or minimising the consequences of the unlawful act, and also play a role in preventing and deterring violations.

Human rights. The term human rights refers to a set of prerogatives that any individual can enjoy. For the purposes of this analysis, it refers to human rights as proclaimed by the African Charter on Human and Peoples' Rights, without prejudice to their proclamation in other relevant human rights instruments.

So, what is the ECOWAS Court of Justice's approach to remedies and reparations? What are the forms of redress? What about amicable settlement before the Court? Finally, in terms of comparison, what are the similarities and specificities of the Court in relation to the practice of other regional Courts?

Approach of the ECJ to remedies and reparations for human rights violations

ECOWAS aims to promote economic and political cooperation between States. However, the States Parties have decided to give the Court of Justice jurisdiction over human rights. Created to resolve disputes arising from the application and interpretation of the texts of the Economic Community of West African States (ECOWAS), the ECOWAS Court of Justice (ECJ) has been empowered, since 2005, to hear cases of violation of the fundamental human rights enshrined in the African Charter on Human and Peoples' Rights. Since 2005, therefore, the Court has been empowered to rule on human rights violations through a specific complaint procedure. **(Article 11 of Protocol A/P.1/7/91 on the Community Court of Justice)**

The major reform implemented by ECOWAS is certainly the possibility granted to individuals to access the human rights jurisdiction of the ECOWAS Court without exhausting domestic remedies for human rights cases.⁶⁸⁶ This could explain the exponential growth of individual applications.

Since 2005, people have the opportunity of referring complaints of human rights violations directly to the ECJ. This reform has removed the State screen and put an end to the Afolabi⁶⁸⁷ jurisprudence. It gives the individual the status of a right of people.

The applicable human rights are those which the Member State has undertaken, by treaty or by custom, to respect and ensure respect for. These are the Universal Declaration of Human Rights (UDHR), the African Charter on Human and Peoples' Rights etc.

An action before the Court can be brought against an ECOWAS Member State, provided that the alleged human rights violation is committed on the territory of a Member State.

For example, in 2008, in the case of Ms. Hadijatou MANI KORAOU against the Republic of Niger, the

⁶⁸⁶ The Supplementary Protocol A/SP.1/01/05 of 19 January 2005 amending Protocol A/P.17/91 on the ECOWAS Court of Justice. This new text introduces the human rights dimension into the new jurisdiction of the ECOWAS Court of Justice.

⁶⁸⁷ ECOWAS CJ, AFOLABI OLAJIDE v. Republic of Nigeria, 27 April 2004. This is the first judgment of the ECOWAS Court of Justice that will be rejected in the absence of direct referral to the Court by individuals under Article 9.3 of the 1991 Protocol.

Court, in its judgment *No. ECW/CCJ/JUD/06/08 of 27 October 2008* concerning slavery, condemned the State of Niger for having violated the human rights of one of its citizens.⁶⁸⁸ Although the Court considered that Niger was not itself the perpetrator of the alleged discrimination, due to its tolerance, passivity, inaction and non-intervention with regard to this practice, it was ordered to pay reparations in the amount of ten million (10,000,000) CFA francs to the victim. The Court considered that the Republic of Niger had violated its international obligations to protect Ms. Hadijatou from slavery, both under international and national law. This judgment was described as historic, as it was one of the first cases of slavery to be condemned at the international level.

The system established by ECOWAS to guarantee these rights is in many ways beneficial. However, the absence of a specific mechanism for filtering individual petitions risks creating a handicap in the task of ECOWAS judges, due to the exponential growth of individual petitions relating to cases of human rights violations. This is a slow process in the consideration of applications; the institutional machinery would be slowed down by the number of applications to be processed.

What about forms of reparation?

Forms of reparation

The UN Basic Principles and Guidelines on the Right to a Reparation and Remedy identify five forms of reparation, recognising that these are not exhaustive. These are **restitution, compensation, rehabilitation, satisfaction and guarantees of non-repetition**. An award of reparation may include one or more of these forms of reparation, depending on the violation to be remedied and the particular harm to the victims.

As the African Commission on Human and Peoples' Rights has observed, *"the myriad of rights guaranteed by the African Charter would be a hollow proclamation if it were not backed by a guarantee of a right to restitution or compensation in case of violation."*

It would therefore be interesting to review each of these forms of reparation as referred to in **Resolution 60/147 adopted by the United Nations General Assembly on 16 December 2005**, before looking at how the Community Courts have applied these principles and guidelines in some of their decisions.

Restitution: Restitution is the act of putting an end to any ongoing violation and restoring the victim, as far as possible, to his or her original situation, by reversing the effects of the violation. It most often corresponds to the needs and wishes of the victims. Failing that, when restitution is impossible, the Courts impose other forms of reparation, such as monetary compensation for the victims, known as indemnification

Compensation: Compensation, i.e., the awarding of money, is the most requested form of reparation and therefore the most awarded by regional human rights bodies and Courts. It is, however, **only an "alternative solution."** It cannot, for example, restore or replace rights that have been violated, redress harms such as torture, resurrect family Members who have been killed or restore the physical capacities of those who have been injured or maimed,

Rehabilitation: Rehabilitation attempts to restore the health and well-being of those affected by the violation through the provision of medical and psychological care, legal and social services. These services may be needed for long periods of time, as victims confront and heal the harm that has been done to them and deal with their feelings of sadness, anger, humiliation, fear and even depression.

Satisfaction: Satisfaction refers to measures that recognise the violation, aim to put an end to any ongoing violation and restore the dignity and reputation of the victim. As Stated by the Inter-Amer-

⁶⁸⁸ ECOWAS CJ, ECW/CCJ/JUD/06/08, *Hadijatou Mani Koraou v. Republic of Niger*.

ican Court of Human Rights *in Villagran Morales v. Guatemala*, these measures allow for “**the rehabilitation of the memory of the victims, the restoration of their reputation, the consolation of their loved ones, or the transmission of a message of official condemnation of the human rights violations in question, and a commitment to make the necessary efforts to ensure that they do not recur.**” As many Courts have noted, at a basic level, a judgment in favour of a victim is in itself a form of satisfaction.

Thus, it can be said without any iota of doubt that many of the Court’s judgments, in addition to other forms of reparation, have gone some way towards giving real satisfaction to individual beneficiaries. Examples are the following judgments:

- Judgment No. ECW/CCJ/JUD.... of 26 April 2021 in the case of KODJO ALAIN VICTOR Claude against the Republic of Côte D’Ivoire: in addition to ordering his immediate release, the Respondent State was ordered to pay the applicant the sum of fourteen million (14,000,000) CFA francs for the moral prejudice suffered as a result of his abnormally prolonged pre-trial detention;
- Judgment No. ECW/CCJ/JUD/3/8 OF 5 JUNE 2008, in the case of CHIEF EBRIMAH MANNEH v. THE STATE OF THE GAMBIA, ordering the Respondent State to pay the sum of one million (1.000, 000) US dollars to Mr. CHIEF EBRIMAH MANNEH for all the damages suffered as a result of his detention in flagrant violation of Articles 2, 4; 5 and 7 of the African Charter on Human and Peoples’ Rights.
- Judgment No. ECW/CCJ/JUD/17 of 23 November 2017 in the case of THANKGOD LEGBARA David and four (4) others v/the Federal Republic of Nigeria ordering the Federal Republic of Nigeria to pay to the dependants of LEGBARA David, the total sum of thirty million (30,000,000) naira, as a result of the violation of the right to life and bodily integrity of their father, brother and husband by a Police officer of the Federal Republic of Nigeria.

Guarantees of non-repetition: Guarantees of non-repetition aim to prevent similar human rights violations or international crimes against the same or other victims. These measures are based on the recognition that human rights violations and international crimes are frequently the result of a broader context of abuse that needs to change systemically in order to prevent future harm. As the African Commission has Stated, “*The overall objective of guarantees of non-repetition is to eliminate the structural causes of violence in society, which are often conducive to the environment in which human rights violations take place and are not publicly condemned or adequately punished.*” Guarantees of non-repetition impinge on other forms of reparations, as all reparations can act as a deterrent to future violations.

With regard to this form of reparation, *the case of KODJO ALAIN VICTOR Claude V the Republic of Côte d’Ivoire, cited above, is a perfect illustration. Indeed, in this judgment, the Community judge, considering that Article 605 of the Code of Criminal Procedure of the Republic of Côte d’Ivoire does not comply with the principles of international treaties relating to the right to liberty and security of persons, because it risks being used as a tool for the unlimited detention of accused persons, ordered in its operative part that the Respondent State delete the said Article from its Code of Criminal Procedure.*

The ECJ has a whole catalogue of judgments on reparation. These are, for example, in addition to the above-mentioned

- Judgment No. ECW/CCJ/JUD/12/19 of 28 FEBRUARY 2019 rendered by the Court in the case of NANCY BOHN-DOE, citizen and former First Lady of Liberia AGAINST THE REPUBLIC of Liberia

The factual background that gave rise to this judgment of 28 February 2019 is straightforward. The plaintiff alleges a violation of her rights, including her property rights by the refusal of the Liberian State through its agents, to allow her access to her late husband's accounts and the information contained therein.

The Court notes in substance that the Republic of Liberia seems to have forgotten that as a Member State of ECOWAS, it is a signatory to the African Charter on Human and Peoples' Rights and other international instruments for the protection of human rights, and that in this capacity, the State alone has the obligation to protect and defend the rights arising from these international instruments. We agree with the Court's position insofar as by ratifying human rights instruments, the State becomes accountable to the international community, to other signatory States, as well as to its own citizens. According to the Latin phrase *Pacta sunt servanda*, an expression affirming the principle that treaties, and more generally contracts, must be respected by the parties that have concluded them. In international law, this is stated in Article 26 of the 1969 Vienna Convention: "*Every treaty in force is binding upon the parties and must be performed by them in good faith.*" This is the principle of the binding nature of the contract. In the present case, the Respondent State was genuinely ill-advised to argue that it has no control over the activities of the domestic Courts, even though it is responsible for ensuring the proper functioning of all State services, including its judicial system. This argument from Liberia shows that there is poor governance of public affairs in that country. In this case, the slowness and inefficiency of the judicial system suggests that hopes for further proceedings in the Liberian Courts are definitely dashed, as efficient public services are a key principle of good governance.

The decision of the Community judge is positive insofar as the judge is bold in denouncing the shortcomings of the Liberian judicial system which causes a violation of the applicant's rights. In the end, the Court ordered the Liberian government to pay the total sum of US\$18,130,778.09, consisting of sums deposited in various banks by former President Samuel Doe, plus interest accrued to Mrs. Nancy Bohn-Doe, widow and administrator of his estate.

What about the notion of amicable settlement before the ECJ?

The ECJ and amicable settlement

An amicable settlement is a process facilitated by a Court or human rights body to enable the State and the victims and/or applicants to reach an agreement that resolves allegations of human rights violations, rather than resorting to litigation. These settlements offer parties a quicker solution to their disputes while giving States the opportunity to right their wrongs before the Court intervenes.

Therefore, the ECJ is not meant to settle, the process depends on the willingness of the parties. Therefore, both parties must agree to the procedure and be willing to participate in the negotiations. Thus, it may happen that during the course of a trial, the parties ask the Court for a delay in order to try to reach a friendly settlement. In such cases, the Court will postpone the proceedings to give the parties a chance to reach an agreement.

However, there are limits because amicable settlement must be inspired by respect for human rights - amicable solutions must respect fundamental rights which cannot be sacrificed on the altar of dialogue and conciliation. As a reminder, the purpose of adequate, effective and prompt reparation is to promote justice by remedying gross violations of international human rights law or serious violations of international humanitarian law.

Therefore, in the practice of some human rights bodies, the process is left entirely to the discretion of the parties and the body expects a communication from them that they intend to settle their dispute amicably. Other human rights bodies make their good offices available to the parties concerned with

a view to an amicable settlement of the dispute, but do not have any specific measures to take to encourage or promote amicable settlements. The European Court and the Inter-American Commission, however, have adopted much more active approaches to amicable settlement, bearing in mind that in any event, reparation should be commensurate with the seriousness of the violation and the harm suffered, whether in litigation or in the dynamics of an amicable settlement. As a result, they intervene more frequently and more directly with the parties with a view to amicable settlement. If the European Court establishes, for example, that an application is not manifestly inadmissible and that it concerns a subject on which there is a large body of case law, the Registrar will communicate a proposal for an amicable settlement to the parties and send them the initial communication at the same time. In such cases, the Registrar will, in fact, send the parties a complete draft settlement with concrete proposals for reparations based on previous similar cases decided by the Court.

On reflection, the ECJ, having made its way, particularly in terms of decisions rendered on reparation cases, should be inspired by this practice to ensure that the final amicable settlement results in fair and proportional reparation of the harm suffered by the victim and/or his or her dependants.

Comparative analysis of remedies and reparations by the CJEU with other regional Courts

In terms of comparison, the CJEU has specificities and some similarities with other sub-regional Courts at different levels.

Indeed, the CJEU is one of the few Courts of an international economic organisation that has been given an explicit mandate to rule on cases of human rights violations without exhausting domestic remedies. In Europe, the CJEU can hear fundamental rights disputes, but individuals' access to the Court remains very limited. The Tribunal of the Southern African Development Community (SADC) and East African Court of Justice (EACJ) have an implicit mandate in relation to human rights, democracy, the rule of law and non-discrimination.

In terms of time limits, before the CJEU, human rights cases must be brought within three (3) years of the cause of action arising. In cases where violations are ongoing, it gives rise to a *die in diem* (day by day) cause of action and defers the passage of time. Before its twin sister, the East African Court of Justice, this time limit is reduced to a period of two (2) months from the date of the alleged violation. It should be noted that in addition to the patent nature of the time limit for appeal, the concept of continuous violation is also unknown to it. However, on the exhaustion of remedies, the two Courts have a common approach, namely that there is no need to exhaust domestic remedies before any referral to them.

As regards admissibility before the CJEU, this is not applied as strictly as in other Courts; however, it is important to note that applications which are lodged cannot be pending before another Court of similar jurisdiction. (Inadmissibility on grounds of *litis pendens*). Furthermore, the CJEU will not hear cases that have been decided on the merits by national Courts and will not have appellate jurisdiction over those Courts.

Moreover, unlike the CJEU, which has a trial division and an appeal division; the former administering justice and applying the relevant law, the latter confirming, reversing or amending decisions taken by the former, the decisions of the CJEU are not subject to appeal, except in the case of an application for review as prescribed by Article 25 of Protocol A/P.1/7/91 of 6 July 1991 on the Court of Justice of the Community.

Conclusion

All victims of human rights violations have the right to an effective remedy and reparation. The right to reparations for victims of human rights violations is an important aspect of the international human rights system. Reparations help to reduce the likelihood of the same harm occurring in the future

by addressing the root causes of the violations by changing the laws, policies, structures or systems that made the violations possible. To achieve these objectives, the ECJ has adopted various approaches to the remedies under consideration in its remedial decisions. The problem of implementing the judgments on effective reparation for victims of human rights violations in our Community system remains to be resolved. This is an obligation of the States Parties, which we hope will be increasingly inclined to respect it.

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REPARATIONS FOR HUMAN RIGHTS VIOLATIONS: AN EXAMINATION OF THE JURISPRUDENCE OF THE ECOWAS COURT OF JUSTICE

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I. Introduction: An overview of the ECOWAS Court of Justice

The idea of an ECOWAS Court or tribunal dates back to the inception of the organization in 1975. Article 11 of the Lagos Treaty 1975 provided for the establishment of a Community Tribunal to settle disputes relating to the interpretation and application of the Treaty.⁶⁸⁹ That Tribunal was never created until July 1991 when the Ecowas Authority of Heads of State and Government adopted a Protocol to establish what is now the Community Court of Justice.⁶⁹⁰ Even so, the Court would not become operational until ten years later in 2001. Meanwhile, to revitalise the organisation, the 1975 Lagos Treaty was terminated and replaced with the Ecowas Revised Treaty 1993. Articles 6(e) and 15(1) of the Revised Treaty provide for a Community Court of Justice as the principal judicial organ of Ecowas.⁶⁹¹ However, since the Revised Treaty saved existing Ecowas Protocols including the 1991 Protocol on the Community Court of Justice, the Court is deemed to be established pursuant to Articles 6(e) and 15(1) of the Revised Treaty although its Protocol predates the Treaty.⁶⁹²

Under the 1991 Protocol, the Court is designed to comprise seven judges appointed from among nationals of the Member States.⁶⁹³ The first judges appointed to the Court were sworn into office on 30 January 2001 marking the official start of the operations of the Court. The initial years of the Court's operation were however uneventful. No cases were filed by Member States and Ecowas organs that had direct access to the Court. By 2005, the only cases that had reached the Court's docket were two individual complaints that were ruled inadmissible. A 2005 Supplementary Protocol amended the 1991 Protocol of the Court and expanded the Court's jurisdiction to cover matters including human rights. This breathed life into what was hitherto a dormant Court. With the 2005 expansion, the Court now has four broad heads of jurisdiction or mandate. It is at the same time the Community Court of Justice, the Community Arbitration Tribunal, the Community Public Service Court, and the Community Human Rights Court.

The Court's mandate as the Community Court of Justice is its primary mandate. Under this mandate, the Court has the jurisdiction to interpret and apply the Ecowas Revised Treaty and its covered agreements or protocols⁶⁹⁴ as well as Community regulations, directives, and other subsidiary legal instruments.⁶⁹⁵ This jurisdiction also extends to all questions whether a Member State has complied with its obligations under any of the aforementioned legal instruments;⁶⁹⁶ and to questions concerning the liability of the Community arising from the acts or omissions of its institutions or officials.⁶⁹⁷ Finally, the Court as part of its primary mandate has jurisdiction over any matter where Members States have by Agreement designated the Court as the forum to settle disputes arising from the Agreement.⁶⁹⁸ The Court's jurisdiction under this primary mandate may be exercised in the context of contentious proceedings or on a request for advisory opinion by a Member State or a competent organ of the Community.⁶⁹⁹

689 Ecowas Treaty 1975, Article 11 and 56.

690 See Protocol A/P. I/7/91 on the Community Court of Justice 1991 as amended by 2005 Supplementary Protocol (hereafter "Amended Protocol of the Court").

691 Article 15(2) of the ECOWAS Revised Treaty provides that "the status, composition, powers, procedure and other issues concerning the Court shall be set out in a Protocol relating thereto".

692 Ecowas Revised Treaty 1993, art 92(3).

693 Amended Protocol of the Court, art 3(2).

694 Ibid, art 9(1)(a).

695 Ibid, art 9(1)(b).

696 Ibid, art 9(1)(e).

697 Ibid, art 9(1)(g). In *Vision Kam Jay Investment Limited v President of the Commission and ECOWAS Commission*, Suit No ECW/CCJ/APP/37/15 (4 June 2016), the Plaintiff, a limited liability Company incorporated under the laws of Nigeria entered into a two-tranche contract with the Defendants for the supply, installation and maintenance of power and Associated Equipment. The Plaintiff instituted an action against the Defendants for breach of contract and failure of the Defendants to pay the Plaintiff the full sum Stated in the contract, after duly discharging its obligations thereunder. The Court assumed jurisdiction and admitted the matter for determination.

698 Amended Protocol of the Court, art 9(6).

699 Ibid, arts 4, 9 and 10.

Article 16 (1) of the ECOWAS Revised Treaty provides for an Arbitration Tribunal of the Community whose status, composition, powers, and procedure are to be set out in a Protocol.⁷⁰⁰ The 2005 Supplementary Protocol amended the 1991 Protocol of the Court and gave the arbitral jurisdiction to the Community Court of Justice pending the establishment of the Arbitration Tribunal of the Community. Therefore, in the interim, the Court has an additional mandate as the Community Arbitration Tribunal pursuant to Article 9(5) of the Amended Protocol of the Court and Article 16 of the ECOWAS Revised Treaty.

The Court's mandate as the Community Public Service Court relates to its competence to adjudicate disputes between the Community and its officials after an aggrieved officer has exhausted all appeal processes available to the officer under the ECOWAS Staff Rules and Regulations.⁷⁰¹ In this capacity, the Court functions as the Administrative Tribunal of last resort within the Community.

And as earlier noted, the 2005 Supplementary Protocol expanded the jurisdiction of the Court to include human rights disputes.⁷⁰² With that, the Court is now the human rights Court of the West African sub-region with the jurisdiction to determine cases of human rights violations occurring in Member States.⁷⁰³ Article 11 of the Court's Protocol governs the admissibility of human rights cases. It provides that an application alleging a violation of human rights must not (1) be anonymous or (2) be the subject of proceedings before another international Court. These requirements are supplemented by Rule 33 of the Rules of the Court which provides that human right applications brought under Article 11 of the Protocol should indicate (a) the name and address of the applicant; (b) particulars of the respondent; (c) the summary of facts constituting the alleged violations and points (pleas) of law on which they are based; (d) the reliefs sought by the applicant and (e) if relevant, the nature of evidence to be led. The net effect of Rule 33 and Article 11 is that a "vague and ghost" application (which does not disclose the subject matter of the dispute, the parties involved, and the summary of the argument put forward as well as the prayers of the applicant) is inadmissible before the Court.⁷⁰⁴ The Court has upheld this requirement in cases including *Mohammed El Tayyib Bah v Sierra Leone*⁷⁰⁵ and *El Hadji Aboubacar v BCEAO and the Republic of Niger*.⁷⁰⁶ In *El Hadji*, the Court observed that it is sufficient if the Applicant recites enough facts showing that alleged human rights violations observable from the facts "constitute the main subject matter of the application" and that "the pleas in law and evidence adduced if proven will establish such violations."⁷⁰⁷ Where an individual submits an application on behalf of a victim of human rights violation, the application is not admissible unless it is submitted with the victim's consent or there are circumstances that justify submission without the victim's consent. In *Nosa Ehanire Osaghae and Three Others v Nigeria*,⁷⁰⁸ the applicants approached the Court in their personal capacity and on behalf of the people of the Niger Delta regarding alleged human rights violations arising from oil exploration activities in the Niger Delta. On the question of admissibility, the Court observed that "for the plaintiffs to access the Court for and on behalf of the people of Niger Delta, they need the mandate upon which they act and when questioned must establish consent of the people or a justification for acting without such consent."⁷⁰⁹ Interestingly, the Court was of the view the requirement to obtain a victim's consent did not apply to

700 ECOWAS Revised Treaty, art 16(2).

701 Amended Protocol of the Court, art 9(1)(f). It is worth noting that Article 73 of the 2005 Staff Regulations preserves the right of staff Members to seek redress before the Court.

702 See article 3 of the Supplementary Protocol adopted on 19 January 2005. Article 3 of the Supplementary Protocol amended article 9 of the 1991 Protocol of the Community Court of Justice.

703 Amended Protocol of the Court, art 9(4).

704 See *Ibid*, art 10(d); *Ocean King Nigeria Limited v Senegal* [2011] CCJELR 139; *Aziagbade Kokou and Others v Togo* [2013] CCJELR 167 pp 174.

705 [2015] Suit No ECW/CCJ/APP/20/13

706 [2011] CCJELR 8.

707 [25] (emphasis added).

708 *Nosa Ehanire Osaghae and Three Others v Nigeria* [2017] Suit No ECW/CCJ/APP/20/15

709 *Ibid* [9.3].

NGOs. Its explanation for this distinction between individuals and NGOs rested on a rather unusual point that “NGOs enjoy a wide range of access to the Court on behalf of individuals” whereas individuals have mainly access only in their personal capacity.⁷¹⁰ Therefore, an individual approaching the Court with a human rights case in a representative capacity must obtain the consent of the victims, but it is “different where the application is brought by an NGO.”⁷¹¹

Apart from the above, the only other admissibility requirement evident from Article 11 of the Protocol is that the application should not be pending before another international Court.⁷¹² Conspicuously missing from its admissibility rules is the requirement to exhaust local remedies. In due regard for the sovereignty of States and their role as the primary implementers of international law including human rights norms, international human rights bodies are considered to have a subsidiary and complementary role to domestic Courts in enforcement of human rights.⁷¹³ This is why international human rights mechanisms require that local remedies in a State are exhausted or proven to be unduly prolonged or unavailable before the State is sued in an international Court.⁷¹⁴ Yet, unlike other human rights regimes, access to the Court in human rights cases (whether by individuals or NGOs) is not predicated on exhaustion of local remedies. The Court has reasoned that the lack of a local remedies requirement is neither an inadvertent omission nor a flaw in the Court’s human rights mandate, but a deliberately chosen element of its judicial architecture that can only be changed by amending the Court’s Protocol.⁷¹⁵

This paper focuses on the Court’s jurisprudence on remedies for human rights violations. It examines the extent to which the Court has correctly analysed, adapted and/or applied the forms of reparation known in general international law to cases of human rights violations brought before the Court.

Following this introduction, Part II of the paper discusses the forms of reparation under international law generally. Part III discusses how human rights Courts have interpreted and applied the various forms of reparation in human rights cases. In Part IV, the discussions focus on the Court’s jurisprudence on reparations for human rights violations. Drawing on selected cases decided by the Court between 2015 and 2021, Part IV examines the standards and legal principles by which the Court has granted or refused remedies sought by applicants. The discussions also highlight the strengths and weaknesses of the Court’s reparations jurisprudence. Part V ends the paper with some concluding observation on best practices of other regional Courts that the Court could draw inspiration from.

II. Reparations under general international law

When a State commits an internationally wrongful act by breaching rules of customary law or its treaty obligations, the need arises to determine what legal consequences or liabilities the State must bear. The area of international law we turn to for answers to such questions is State responsibility. “Responsibility” in this context is the international lawyer’s shorthand for a State’s liability for failure to observe its obligations. To this end, the law of State responsibility is primarily concerned with determining whether a State is liable for an internationally wrongful act by breaching primary legal obligations binding on it under international law and what legal consequences must attend such

710 Ibid.

711 Ibid, of *The Incorporated Trustees of Fiscal and Civic Rights Enlightenment Foundation and 19 Others v Nigeria* [2016] Suit No ECW/CCJ/APP/02/14, pp 15-16.

712 The Court has held that it has jurisdiction to hear a case pending before a national Court as Article 11 of the Protocol only renders inadmissible cases before international Courts. See *Valentine Ayika v Liberia* [2011] CCJELR 237 [13].

713 See *Jawara v The Gambia* AHLR 107 (ACHPR 2000) [30]-[31].

714 See African Charter on Human and People’s Rights 1981, art 56(5); Optional Protocol to the ICCPR 1966, art 5(2)(b); and *Purohit and Moore v The Gambia* [2003] AHRLR 96 [25].

715 See *Hadijatou Mani Koraou v Niger* ECW/CCJ/JUD/06/08 (27 Oct 2008) [36]-[45]. See also *The Incorporated Trustees of Fiscal and Civic Rights* (n 23), (p. 19) where the Court held that “it cannot impose other extraneous conditions on litigants other than the ones provided for in [the Court’s] Protocol”.

liability.⁷¹⁶ To make a finding of responsibility, one must demonstrate (a) conduct (whether an act or omission) attributable to the State and (b) the non-conformity of the conduct with an international obligation binding on the State.⁷¹⁷ Where these two elements are established, the State is responsible for an internationally wrongful act and must make reparation. Thus, it is a trite principle of international law that “any breach of an engagement involves an obligation to make reparation.”⁷¹⁸ According to Shelton, reparation encompasses “various methods available to a State to discharge or release itself from State responsibility for a breach of international law.”⁷¹⁹ Under general international law, these methods are restitution, compensation, satisfaction, and guarantees of non-repetition.⁷²⁰

(a) Restitution

Restitution is the act of ending any ongoing violations and restoring the innocent State or individual victim, to the greatest extent possible, to its or his original situation before the wrongful act was committed. Article 35 of the Articles on State Responsibility provides that a State responsible for an internationally wrongful act is under an obligation to re-establish the situation which existed before the wrongful act was committed, provided and to the extent that restitution is not materially impossible⁷²¹ or does not impose a burden which is disproportionate to the benefit deriving from restitution instead of compensation.⁷²² Restitution may take the form of material restoration, the reversal of some juridical act, or a combination of them. Examples of material restitution include the release of detained individuals,⁷²³ the handing over of persons arrested in a State’s territory to their State of nationality, the release or return of ships or other types of property, including documents or works of art.⁷²⁴ Where a juridical act of a State or other legal situation is the basis of an internationally wrongful act, then its reversal constitutes restitution. This may take the form of revoking or amending a legislative provision that violates international law or rescinding an administrative or judicial order unlawfully made in respect of a person or property protected by international law.⁷²⁵ Because of its power to undo the effects of the violation, Shelton notes that restitution is the preferred remedy for breaches of international law.⁷²⁶

(b) Monetary Compensation

A State responsible for an internationally wrongful act must compensate for the damage caused if the damage is not made good by restitution.⁷²⁷ Compensation covers any financially assessable damage including loss of profits that can be established.⁷²⁸ The aim of compensation is not to punish the offending State.⁷²⁹ Rather, its proper function is to address the actual losses incurred

716 Peter Malanczuk, *Akehurst’s Modern Introduction to International Law* (7th edn, Routledge, New York 1997) 225. See also, K Zemanek, “Responsibility of States: General Principles” (1987) 10 *EPIL* 362–73; R Wolfrum, “Internationally Wrongful Acts” (1995) 2 *EPIL* 1398–1403.

717 See E Jimenez de Aréchaga, “International Responsibility” in M Sørensen (ed) *Manual of Public International Law* (London 1968) 531, 534; H Mosler, *The International Society as a Legal Community* (Dordrecht 1980) 157.

718 *Chorzów Factory* [1928] PCIJ Series A, No. 17 p. 29. See generally, J Crawford, *The International Law Commission’s Articles on State Responsibility* (Cambridge 2002).

719 Dinah Shelton, *Remedies in International Human Rights Law* (3rd ed, Oxford University Press 2015) 33. See also, *Loayza-Tamayo v Peru* IACtHR (*Reparations and Cost*) (1987).

720 See International Law Commission, *Articles on Responsibility of States for Internationally Wrongful Acts 2001*, art 34 (hereafter “Articles on State Responsibility”).

721 See for example, the case concerning the *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Serbia and Montenegro)* [2007] ICJ Reports 109 where the ICJ held that restitution is impossible where the property to be restored has for instance been lost or deteriorated to such an extent as to be valueless.

722 *Gabcikovo–Nagymaros Project Case (Hungary v Slovakia)* [1997] ICJ Reports 7 [85].

723 See *United States Diplomatic and Consular Staff in Tehran (United States v Iran)* [1980] ICJ Reports 3.

724 Articles on State Responsibility, art 35 (Commentary [5]).

725 Ibid, art 35 (Commentary [5]).

726 Dinah Shelton (n 31) 298.

727 Articles on State Responsibility, art 36(1). cf *Gabcikovo–Nagymaros Project* (n 34) [152].

728 See for instance the case of *Asian Agricultural Products vs Sri Lanka* [1990] 4 ICSID Reports 245, where a claim for lost profits by a newly established business was rejected for lack of evidence of established earnings.

729 See *Velasquez Rodriguez v Honduras*, IACtHR, (1988) [170].

as a result of the internationally wrongful act.⁷³⁰ As such, compensation generally takes the form of monetary payment although parties may agree to other forms of value. In the *Corfu Channel* case,⁷³¹ the United Kingdom sought compensation in respect of three heads of damage: loss of its ship *Saumarez*, damage sustained by another ship *Volage* and the deaths and injuries of its naval personnel.⁷³² In respect of *the Saumarez*, the Court found that the true measure of compensation was the replacement cost of the ship at the time of its loss and awarded £700,087.⁷³³ With respect to the second ship, an amount slightly lower than £93,812 was also awarded.⁷³⁴ In addition to the amounts awarded for the damage to the two ships, the Court upheld the United Kingdom's claim for £50,048 representing the cost of pensions and other grants made by it to victims or their dependents, and for costs of administration, and medical treatment.⁷³⁵

Where a State makes a claim in respect of personal injuries suffered by its officials or nationals, the compensation is not only limited to material losses such as loss of earnings and earning capacity and medical expenses, but also non-material damage suffered by the individual.⁷³⁶ Non-material damage is generally understood to encompass loss of loved ones, pain, anguish, sadness, inconvenience, distress, fear, anxiety, reputational harm, humiliation, and suffering caused by the violation.⁷³⁷ Thus, although it is difficult to financially assess non-material damage, it does not prevent it from being the subject of a claim for compensation.⁷³⁸ In the case of a wrongful death, the compensation may be awarded to the representatives of a deceased person.⁷³⁹

If compensation is sought for loss of property, the loss is usually assessed by reference to specific heads of damage relating to compensation for capital value, compensation for loss of profits and incidental expenses.⁷⁴⁰ Compensation for capital value is usually calculated based on the fair market value of the property lost.⁷⁴¹ In the *Chorzow Factory* case,⁷⁴² the Permanent Court of International Justice held that the injured party should receive the value of the property by way of damages not as it stood at the time of expropriation but at the time of indemnification.⁷⁴³ While compensation may also be awarded for loss of profits,⁷⁴⁴ Courts and tribunals are generally hesitant to grant compensation for claims with such inherently speculative elements.⁷⁴⁵ This is borne out of the fact that profits are vulnerable to commercial and political risks. Accordingly, claims for future profits may be upheld only if the attainment of future profit was certain.⁷⁴⁶ All other incidental expenses are compensable if they

730 Ibid [170].

731 [1949] ICJ Reports 4.

732 Ibid 7.

733 Ibid 9.

734 Ibid.

735 Ibid.

736 *Holy Synod of the Bulgarian Orthodox Church v Bulgaria* [2010] ECHR App. Nos 412/02 & 35677/04.

737 *Aydin v Turkey* [1997] ECHR App. No 23178/94.

738 *The "Lusitania"* case [1923] 7 UNRIAA (Sales No 1956. V.5) 32 p 39. In this case, it was Stated that international law provides compensation for mental suffering, injury to feelings, humiliation, shame, degradation, loss of social position or injury to credit and reputation, such injuries being "very real", and the mere fact that they are difficult to measure or estimate by money standards makes them none the less real and affords no reason why the injured person should not be compensated.

739 *The "Lusitania"* Case 39. (The quantum of damages in cases of wrongful death is usually determined by reference to the losses suffered by the surviving heirs or successors. In the *Lusitania* case, Umpire Parker laid down certain factors that may be considered in assessing the quantum of damages in cases of wrongful death. They are (i) the amount the deceased may have contributed to the claimant had they not been killed; (ii) the pecuniary value of the deceased's property in the possession of the claimant; and suffered by the claimant as a result of mental shock caused by the death of the deceased. The sum of these estimates reduced to its present cash value, will generally represent the loss sustained by claimant.)

740 Articles on State Responsibility, art 36 (Commentary [21]).

741 *American International Group Inc v Iran* [1983] 4 CTR 96 p 106.

742 *Chorzow Factory* Case (n 30).

743 Ibid [127].

744 Articles on State Responsibility, art 36(2); *Sapphire International Petroleum Ltd v National Iranian Oil Company* [1963] 35 ILR 136 pp 187–89.

745 See Articles on State Responsibility, art 36 (Commentary [27]).

746 See Articles on State Responsibility, art 36 (Commentary [27]); See Whiteman, *Damages in International Law* (3rd ed,

were reasonably incurred to repair the damage or mitigate losses arising from the breach.⁷⁴⁷

(c) Satisfaction

An internationally wrongful act of a State may cause injuries that are not financially assessable. An injury of this kind is usually symbolic in nature or insulting and arises simply from the fact of the breach.⁷⁴⁸ Such “non-material” injury may include insults to the symbols of a State, ill-treatment of leaders of a State, diplomats or other protected persons and violation of diplomatic or consular premises.⁷⁴⁹ For such injuries which cannot be remedied by restitution or compensation, the appropriate form of reparation is satisfaction. Accordingly, Article 37(1) of the Articles on State Responsibility provides that where the injury caused cannot be made good by restitution or compensation, the responsible State must give satisfaction for the injury caused by the act. Satisfaction may be an acknowledgment of the breach, an expression of regret, a formal apology,⁷⁵⁰ or another appropriate modality⁷⁵¹ such as disciplinary or criminal proceedings against the persons who caused the injury and guarantees or assurances of non-repetition.⁷⁵² It was also held in the *Corfu Channel Case* that a declaration by a Court that the respondent State committed an internationally wrongful act may itself be a form of satisfaction. In that case, the Court declared (in granting the prayer of Albania) that a mine sweeping operation the British Navy carried out in Albania’s territorial waters following the Corfu Channel incident was unlawful and violation of Albania’s sovereignty. “This declaration”, the Court said, “is in accordance with the request made by Albania through her Counsel and is in itself an *appropriate satisfaction*.”⁷⁵³ Whichever form satisfaction may take, a cardinal rule is that it should not be out of proportion to the injury and should not take a form humiliating to the responsible State.⁷⁵⁴

(d) Guarantees of non-repetition

Guarantees of non-repetition can be a form of satisfaction, although they are treated in certain cases as a separate or additional remedy.⁷⁵⁵ For instance, the International Law Commission’s commentaries on Article 37 of the Articles of State Responsibility indicate assurances or guarantees of non-repetition as one of the modalities of providing satisfaction.⁷⁵⁶ Yet, it notes that because guarantees of non-repetition are forward looking and often aimed at repairing and reinforcing a continuing legal relationship between the parties, rather than to remedy a past wrong, it is best treated as a separate remedy.⁷⁵⁷ In other words, reparations (whether in the form of restitution, compensation, or satisfaction) are reliefs for actual losses or injuries arising from already committed breaches of international law. In contrast, guarantees of non-repetition are forward looking and seek to guard against future breaches, hence their treatment as a separate or additional remedy. Another reason the Commission offers for the separate treatment of guarantees of non-repetition is the fact that within the context of inter-State relations, a State other than the injured State may demand

United States Government Printing Office, Washington DC, USA 1943)1837. (“In order to be allowable, prospective profits must not be too speculative, contingent, uncertain, and the like. There must be proof that they were reasonably anticipated; and that the profits anticipated were probable and not merely possible.”)

747 Articles on State Responsibility, art 36 (Commentary [34]).

748 Ibid, art 36 (Commentary [34]).

749 Ibid, art 37 (Commentaries [4]).

750 See the *Rainbow Warrior Arbitration* [1990] 82 ILR 499; *Miguel Castro-Castro Prison v Peru* (Merits and Reparations dated 25 November 2006 (Inter-American Court of Human Rights, “IACtHR”); *Fernandez Ortega v Mexico*, IACtHR (*Preliminary Objections, Merits, Reparations, and Costs*) (30 August 2010).

751 Articles on State Responsibility, art 37(2).

752 Ibid, art 37 (Commentary [5]).

753 It must however be noted that declarations are not intrinsically linked to the remedy of satisfaction. A Court with power to adjudicate has the authority to determine the lawfulness of conduct in question and to make a declaration of its findings, as a necessary part of its process of determining the case.

754 Articles on State Responsibility, art 37(3).

755 See Ibid, art 30 (Commentary [11]).

756 Assurances of non-repetition are differentiated from guarantees of non-repetition by the fact that assurances are mostly offered verbally, while guarantees go beyond verbal assurance to include more concrete steps by the State.

757 See Articles on State Responsibility, art 30 (Commentary [11]).

such guarantees.⁷⁵⁸ But whatever the context, guarantees of non-repetition may comprise positive or negative acts of an offending State giving an assurance that it would not commit or repeat the same or similar violation against the injured party.⁷⁵⁹ They may include ratification of relevant treaties related to the subject matter of the violation;⁷⁶⁰ amendment of laws or constitutional provisions;⁷⁶¹ nullification or repeal of laws that violate human rights;⁷⁶² establishment of administrative procedures or practices to ensure that violations are not repeated;⁷⁶³ and ensuring that complaints are properly investigated and that perpetrators are brought to justice and held accountable.⁷⁶⁴ Review of State policies and procedures with respect to prosecution and the creation of standard protocols for forensic investigations may also be regarded as guarantees of non-repetition.⁷⁶⁵

I. The application of reparations to human rights contexts

The right to a remedy or reparations for breach of human rights is a fundamental principle of international law recognised in numerous human rights treaties⁷⁶⁶ and affirmed by a range of international human rights bodies and Courts.⁷⁶⁷ Reparations for human rights violations are intended to bring relief to the victims by removing or redressing the consequences of the wrongful acts and to assure non-repetition of the violations.⁷⁶⁸ A State's obligation to ensure that victims of human rights violations receive appropriate reparation is regarded as a central part of its duty to take all measures to protect human rights and provide effective remedies for violations.⁷⁶⁹ To this end, the Human Rights Committee has observed that without reparations to individuals, a State's obligation to provide effective remedies for human rights violations is not discharged.⁷⁷⁰ In light of these, this section examines how human rights bodies or Courts have interpreted and applied the various forms of reparation to remedy human rights violations.⁷⁷¹ The discussions draw on the jurisprudence of the African Court on Human and Peoples' Rights (AfCHPR), the Inter-American Court on Human Rights (IACtHR), the United Nations Human Rights Committee (HRC) and the European Court of Human Rights (ECHR) as well as practice directions of these bodies or Courts.

(a) Restitution

In a human rights context, restitution extends to ending any ongoing violations and restoring the victim, to the greatest extent possible, to his or her original situation before the commission of the

758 See Ibid.

759 Shelton (n 34) 384.

760 *Gomes Lund v Brazil*, IACtHR (24 November 2010), [287].

761 *Mtikila v Tanzania (Judgment on Reparations)* [2014] AfCHPR App. No 011/2011 [42]– [43].; *Actions Pour la Protection des Droits de l'Homme (APDH) v Côte D'Ivoire* [2016] AfCHPR App. No 001/2014 [157].

762 *Cantoral-Bernavides v Peru*, IACtHR (*Reparations and Costs*) 3 December 2001 [77]– [78].

763 *Hansungule v Uganda*, AfCmHPR Comm No 1/2005, (19 April 2013)

764 *Norbert Zongo v Burkina Faso (Judgement on Reparations)* [2014] AfCHPR App. No 013/2011 [111]

765 *Fernandez Ortega* (n 62) [256].

766 See for example, the Protocol of the African Court on Human and Peoples' Rights, art 27(1) ("If the Court finds that there has been a violation of a human or peoples' rights, it shall make appropriate orders to remedy the violation, including the payment of fair compensation or reparation"); European Convention on Human Rights, Art 41; The American Convention of Human Rights, art 63(1); Universal Declaration of Human Rights 1948; International Covenant on Civil and Political Rights 1966, arts 2(3), 9(5) and 14(6).

767 E.g., *Konaté v Burkina Faso* [2014] AfCHPR App. No 004/2013 (*Judgment on Reparations*) [15] ("[A] State found liable of an internationally wrongful act is required to make full reparation for the damage caused"), AfCHPR; *Velázquez-Rodríguez v Honduras* IACtHR (*Reparations and Costs*) (1989) [25] ("every violation of an international obligation which results in harm creates a duty to make adequate reparation"); African Commission General Comment No 4 on the *African Charter on Human and Peoples' Rights: The Right to Redress for Victims of Torture and Other Cruel, Inhuman or Degrading Punishment or Treatment* (adopted by the African Commission in March 2017); Practice Directions of the European Court of Human Rights.

768 See *Konaté* (n 79) [15].

769 See ICCPR, Art 2(3); Human Rights Committee, General Comment 31 [16].

770 Human Rights Committee, General Comment No 31: *The Nature of the General Legal Obligations Imposed on States Parties to the Covenant* (adopted on 29 March 2004), [16].

771 The other forms of reparations are as discussed under section 2.1 of this part.

human rights violation.⁷⁷² Thus it was held in *Assanidze v Georgia*⁷⁷³ that a judicial finding that a State has breached human rights creates an obligation for the State to “put an end to the breach and to make reparation for its consequences in such a way as to restore as far as possible the situation existing before the breach”.⁷⁷⁴ But often in human rights cases, it may not be possible to make restitution. The Inter-American Court acknowledged this difficulty in *Roche Azana et al v Nicaragua*⁷⁷⁵ noting that where restitution is “not feasible, as occurs in most cases of human rights violations, the Court will determine measures to guarantee the rights that have been violated and redress the consequences of those violations.”⁷⁷⁶ It follows that a Court may only order restitution for a human rights violation if it is possible in the circumstances for the victim to be restored to the *status quo ante*. However, where it is not possible to grant restitution, other forms of reparations such as monetary compensation, rehabilitation and guarantees of non-repetition may be awarded to the victim of the violation.⁷⁷⁷ Be that as it may, the contexts within which international human rights Courts have deemed restitution possible for human rights violations include nullification of criminal convictions;⁷⁷⁸ retrial on criminal charges;⁷⁷⁹ restoration of liberty by release from prison or detention;⁷⁸⁰ return of seized property;⁷⁸¹ restoration of employment and its accompanying benefits;⁷⁸² and expungement of criminal records.⁷⁸³

(b) Monetary Compensation

Monetary compensation is the commonly sought and granted reparation in human rights matters.⁷⁸⁴ Even so, it is a “substitute remedy”⁷⁸⁵ as it cannot for example “restore or replace rights that have been violated, undo harms such as torture, return family Members who have been killed, or restore the physical capacities of those who have been injured”.⁷⁸⁶ Nevertheless, it affords some redress when there is no way to undo the effects of the violation through other measures such as restitution or rehabilitation. For example, monetary compensation may permit a victim who has been injured or disabled to afford means that allow him or her to undertake activities he or she previously enjoyed or to find new activities.⁷⁸⁷ In cases where a family Member has been killed, monetary compensation is commonly ordered to help the surviving next-of-kin to afford necessities that the deceased used to provide.⁷⁸⁸ Human rights Courts generally award monetary compensation for pecuniary and non-pecuniary losses suffered by the victim as a result of the violation.⁷⁸⁹ Regarding pecuniary losses, monetary compensation may be awarded to compensate financial losses of the victim, including any expenses made or any special or consequential losses incurred as a result of the violation.⁷⁹⁰ Thus, compensation may be awarded for lost income and loss of future earnings, lost property, lost

772 *Cantorai-Bernavides* (n 74) [41]; *Assanidze v Georgia* [2004] ECHR Application No 715/03 (8 April 2004) [198; Human Rights Committee, *Report of the Working Group on Enforced or Involuntary Disappearances* (28 January 2013), [55].

773 [2004] Application No 715/03 (8 April 2004).

774 *Assanidze* (n 84) [198].

775 *Roche Azana et al v Nicaragua* IACtHR (*Reparations and Costs*) (3 June 2020) [104].

776 *Ibid.*

777 *See Caballero-Delgado and Santana v Colombia* IACtHR (*Reparations and Costs*) (29 January 1997) [17].

778 *Palamara-Iribarne v Chile*, IACtHR (22 November 2002)

779 *Castillo Petruzzi et al v Peru*, IACtHR (30 May 1999); *Fermín Ramírez v Guatemala*, IACtHR (20 June 2005).

780 *Thomas v Tanzania* [2017] AfCHPR App No 001/2007 (28 September 2017).

781 *Bueno-Alves v Romania* [2001] ECHR App. No 28342/95 (23 January 2001).

782 *Baena-Ricardo et al v Panama*, IACtHR (2 February 2001)

783 *Cantorai-Bernavides* (n 74); *Issa Konaté* (n 79).

784 Shelton (n 31).

785 *Thomas* (n 92) [90].

786 *Institute for Human Rights and Development in Africa v Democratic Republic of Congo*, AfCmHPR Comm No 393/10 (June 2016) [150].

787 Shelton (n 31) 315.F

788 *Norbert Zongo* (n 76) [111].

789 *Ibid.*

790 *Gomes Lund* (n 72) [298]

opportunities, (including employment, education, and social benefits), medical expenses, and legal costs.⁷⁹¹

Non-pecuniary losses (or moral injury) on the other hand encompasses loss in dignity and reputation of the victim, as well as mental and emotional harm.⁷⁹² To this end, moral damages (i.e., compensation for moral injury) may be awarded to compensate the victims for psychological harm, anguish, grief, sadness, distress, fear, frustration, anxiety, inconvenience, humiliation, and reputational harm caused by the violation.⁷⁹³ Moral damages may also be awarded to communities, particularly indigenous communities, who are victims of human rights violations.⁷⁹⁴ This is particularly the case with indigenous communities who have been displaced from their traditional lands or whose lands have been damaged –lands which inform their culture, traditions, religious rites, and therefore their identity.⁷⁹⁵

(c) Satisfaction

In the context of human rights violations, satisfaction has been variously held to include (1) locating and identifying remains of deceased victims and delivering them to their next of kin;⁷⁹⁶ (2) investigating the facts surrounding a violation and holding the perpetrators accountable, including through prosecutions as appropriate;⁷⁹⁷ (3) publishing the judgment of the Court in which the claim for human right violations had been instituted;⁷⁹⁸ or (4) establishing a monument or memorial or other forms of tribute to victims of the human rights violations.⁷⁹⁹ It is apparent from the foregoing, that the purpose of satisfaction as a remedy in international human rights law is to memorialize the victims, restore their reputation, console their family; or register an official condemnation of the violations and secure guarantees of non-repetition.⁸⁰⁰

(d) Rehabilitation

This form of reparation is commonly ordered in cases involving human rights violations.⁸⁰¹ Rehabilitation aims to restore the health and well-being of the persons whose rights have been infringed through the provision of “medical and psychological care as well as legal and social services”.⁸⁰² This stems from the recognition that victims of human rights violations as well as their families and communities often suffer physical, mental and social trauma.⁸⁰³ Rehabilitation helps to heal the anger and frustration of victims occasioned by the human rights violations and prevents vigilante justice that could perpetuate a cycle of violence and abuse.⁸⁰⁴ In cases where the victims of the human rights violations are few, individualized rehabilitation methods may be ordered by the Courts.⁸⁰⁵ However, there have been cases where the Courts have ordered collective rehabilitation. An example is the

791 See African Court on Human and Peoples' Rights, *Comparative Study on the Law and Practice of Reparations for Human Rights Violations* (Sept 2019) p. 52; Available at <<https://www.african-court.org/wpafc/wp-content/uploads/2020/11/Comparative-Study-on-the-Law-and-Practice-of-Reparations-for-Human-Rights-Violations.pdf>> (hereafter “African Court’s Comparative Study”)

792 *Mtikila* (n 73) [33]-[36].

793 *Ibid* [34].

794 *Xákmok Kásek Indigenous Community v Paraguay* IACtHR (*Merits, Reparations and Costs*) [172], [174–82], [321].

795 *Ibid*.

796 *Caballero–Delgado and Santana v Colombia*, IACtHR (*Reparations and Costs*), (29 January 1997) p. 15.

797 *Norbert Zongo* (n 76) [111].

798 *Mtikila* (n 73) [45]; *Issa Konaté* (n 79) [60].

799 *Institute for Human Rights and Development in Africa* (n 98) [154]

800 *Case of the “Street Children”, Villagran-Morales et al v Guatemala*, IACtHR (*Reparations and Costs*), 26 May 2001[84]

801 See United Nations, “Basic Principles and Guidelines on the Rights to a Remedy and Reparations for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law” on (16 December 2005) pp 1–9 (hereafter “UN Basic Principles”)

802 UN Basic Principles.

803 African Court’s Comparative Study (n 103) p. 55

804 *Ibid* 55–56.

805 *Ibid* 56.

case of *Purohit and Moore v The Gambia*⁸⁰⁶ where the African Commission strongly urged the Government of The Gambia to provide adequate medical and material care for persons suffering from mental health problems in the country on finding that Gambia had breached their right to health contrary to Article 16 of the African Charter.⁸⁰⁷ Where the violation results in physical or psychological ailments, the Courts may order the State to provide medical or psychological treatment through the State's health institutions.⁸⁰⁸ Rehabilitation orders may also extend to family Members of victims. In *Cantorai-Bernavides v Peru*⁸⁰⁹ the IACtHR ordered that medical and psychiatric treatment be given to the mother of the victim, who had suffered mental illness due to her son's incarceration. The Court ordered that the future medical and psychiatric expenses of the victim's brother be catered for as well.⁸¹⁰ Rehabilitation may also take the form of orders directing the provision of education,⁸¹¹ medical and psychological care,⁸¹² and basic goods and services.⁸¹³

II. A review of the reparations jurisprudence of the ECOWAS Court

A. Overview of the Reparations Jurisprudence of the Court

Since the inception of its human rights mandate in 2005, the Court has received several human rights cases on its docket. In hearing and deciding these cases, the Court has granted, and in some cases declined, the reparations sought by applicants. A review of selected cases of the Court decided between 2015 and 2021 reveal that the form of reparation mostly sought from the Court is monetary compensation. Restitution, satisfaction, guarantees of non-repetition, and rehabilitation are sought less frequently. This section focuses on compensation, restitution, satisfaction and guarantees of non-repetition, the most recurring forms of reparation in the selected cases reviewed for this paper. The discussions highlight the principles and factors, if any, applied by the Court in granting or refusing those remedies.

1. Monetary Compensation

Generally, the Court awards general or special damages for pecuniary losses sustained by a victim of human rights violations.⁸¹⁴ Special damages are awarded as compensation for losses that can easily be quantified or proved.⁸¹⁵ Where the amount claimed cannot be sufficiently justified, a request for special damages cannot succeed.⁸¹⁶ General damages on the other hand have been usually awarded for pain and suffering, future health problems and crippling effect of an injury, loss of ability to perform various acts, shortening of lifespan, mental anguish, loss of companionship, loss of reputation, and loss of anticipated business.⁸¹⁷ Compensation is always awarded at the discretion of the Court having regard to the peculiar circumstances of each case.⁸¹⁸ However, in the absence of factors which will enable the Court to make an accurate assessment of the harms suffered by the applicant, the Court may adjudge and fix a lump sum as reparation for the prejudice

806 [2003] AHRLR 96.

807 Ibid [83].

808 See decision of the UN Committee on the Elimination of Discrimination against Women in *RPB v Philippines*, Communication No 34/2011, (21 February 2014) [9].

809 *Cantorai-Bernavides* (n 74) [37].

810 Ibid [37].

811 *Centre for Human Rights (University of Pretoria) and La Rencontre Africaine pour la Defense des Droits de l'Homme v Senegal*, AfCHPR App. No 003/Com/001/2012, (15 April 2015) [82].

812 *Centre for Human Rights* [48].

813 *Xákmok Kásek Indigenous Community v Paraguay*, IACtHR (*Merits, Reparations and Costs*) (24 August 2010) [194]–[217], [301].

814 See *Aminata Diantou Diane v The Republic of Mali*, ECW/CCJ/JUD/14/18, p. 15; *Chief Ebrimah Manneh v The Gambia*, ECW/CCJ/JUD/03/08, p15.

815 *La Societe Bedir Sarl v Niger* [2020] Suit No ECW/CCJ/APP/09/17 (1st July 2020) [98].

816 Ibid.

817 Ibid [99].

818 Ibid.

caused the applicant.⁸¹⁹ In addition to awarding general and special damages, the Court also awards moral damages for all non-pecuniary losses incurred by a victim of human rights violations.⁸²⁰

A review of selected cases of the Court decided between 2015 and 2021 reveals that in determining whether to grant or refuse a claim for monetary compensation, the Court is guided by some general principles of law. Cardinal among them is the rule which requires an applicant to demonstrate that the violation of human rights occurred because of conduct (whether and act or omission) attributable to the respondent State.⁸²¹ This requirement has been upheld in decisions of the Court including *Mohammed El Tayyib Bah v Sierra Leone*⁸²² and *The Incorporated Trustees of Fiscal and Civic Rights Enlightenment Foundation and 19 Others v Nigeria*,⁸²³ where the Court held that a claim for monetary compensation will only be determined on a finding that there has been a violation of human rights attributable to the State. In the *El Tayyib* case, the Court awarded the Applicant \$250,000 on finding a breach of the Applicant's right to fair hearing following his dismissal from the Sierra Leonian Police Force without a hearing. Similarly, in *The Incorporated Trustees* case, the Court considered and awarded monetary compensation on finding the Respondent liable for the violations of the right to life and dignity guaranteed under the African Charter.⁸²⁴ The violations, as the Court found, were caused by a counter-terrorism operation by Nigerian security forces during which individuals suspected to be Boko Haram operatives were shot.⁸²⁵

The Court has also established that to be able to successfully claim for monetary compensation for a human rights violation, the injury suffered by the victim must be foreseeable and a direct consequence of the act constituting the violation.⁸²⁶ In *Justice Aladetoyinbo v Nigeria*,⁸²⁷ the Court noted that "where there is an established violation, it is paramount to link the violation to the harm or alleged prejudice/harm; in other words, there must be a proof of a causative link".⁸²⁸ In this case, the Court awarded the Applicant 50 naira as a symbolic gesture to vindicate the violation of the Applicant's right to fair hearing.⁸²⁹ It however declined to award compensation for Applicant's claim of torture because it was not an immediate consequence of the violation found on the facts of the case.⁸³⁰

In furtherance of the causation principle, the Court has held that there is no causation if the victim could have avoided the harm resulting from the violation of human rights by taking reasonable measures in the circumstances.⁸³¹ In *Sunday Charles Ugwuaba v Senegal*,⁸³² the Applicant, a Nigerian businessman based in The Gambia, was denied entry into Senegal with his goods (boxes of fish) due to the closure of Senegalese borders at the time. After a 63-day delay at the border, the Applicant's goods perished. He sued in the ECOWAS Court claiming compensation from the Respondent for limiting his freedom of movement and thereby causing the loss of his goods. The Court ruled that if the applicant had been diligent and adopted the behavior of a reasonable man ("bonus pater familias") he could have avoided the damage, by returning to Gambia timeously since

819 Ibid.

820 *Cheikh Gueye v Senegal* [2020] App. No ECW/CCJ/APP/21/16 (26 October 2020) [120] – [121].

821 See *Godswill Tommy Udoh v Nigeria* [2016] Suit No ECW/CCJ/APP/17/15 (12th October 2016) p 22; *Cheikh Gueye* (n 132) [120] – [121]; *La Societe Bedir Sarl* (n 127) [98], [99].

822 [2015] Suit No ECW/CCJ/APP/20/13 (4th May 2015).

823 [2016] Suit No ECW/CCJ/APP/02/14 (7 June 2016).

824 [2016] Suit No ECW/CCJ/APP/02/14 (7 June 2016) p 48.

825 *The Incorporated Trustee* (n 23) [59].

826 *Mohammed El Tayyib Bah* (n 17) 17; *Cheikh Gueye* (n 132) [105] – [106].

827 [2020] Suit No ECW/CCJ/APP/27/18 (14 July 2020).

828 [94]

829 *Justice Aladetoyinbo* (n 139) [116].

830 Ibid [116].

831 See below *Sunday Charles Ugwuaba* p 25.

832 *Sunday Charles Ugwuaba v Senegal* [2019] Suit No ECWCCJ/APP/27/17 (28 June 2019).

he knew the perishable nature of the commodity he carried.⁸³³

In awarding compensation, the Court is also guided by whether the Applicant has sufficiently proved the losses or injuries sustained from the human rights violation.⁸³⁴ Thus, in *Registered Trustees of Jama'a Foundation v Nigeria*,⁸³⁵ the Court noted "a party claiming for compensation for a loss or harm must prove same in detail and value."⁸³⁶ In that case, the Applicants claimed for compensation for alleged injuries sustained from pre-election sectarian violence which the Government failed to prevent. The Court observed that the Applicants did not plead particulars of any physical injuries linked to the acts or omission of the State. Nor did they produce any medical reports to substantiate any such claims of physical injuries. The Court held that "in the absence of specific details of the injury sustained by the Applicant and proof thereof" the claim for compensation could not succeed.⁸³⁷ An exception to the rule requiring strict proof of injuries or losses arising from human rights violations is a claim of compensation for moral damage. In *Cheikh Gueye v Senegal*,⁸³⁸ the Court held that where the claim is for a moral damage involving emotional suffering and anguish, there is no need to prove it as the prejudice can be presumed from the character of the abuse or violation.⁸³⁹ The Court took the view that while there is no precise mathematical formula by which the monetary value of such losses may be determined, if possible, the victim should receive an amount approximate to the injury suffered.⁸⁴⁰ Thus, in such cases, the Court must determine the amount of compensation guided by what is fair in all the circumstances of the case.⁸⁴¹

Another important factor the Court considers in awarding compensation is the egregiousness of the violation. In *Hembadoon Chia and Others v Nigeria*,⁸⁴² the Applicants sought compensation for the unlawful arrest and torture of their father by officers of the Nigeria Police that led to his tragic death. The Court held that the killing of the deceased by the agents of the Respondent was unlawful, arbitrary and a gross violation of his rights to life and human dignity guaranteed under Articles 4 and 5 of the African Charter. It concluded that Applicants suffered a great loss because of the unjustified and unreasonable acts of the Respondent's agents that had caused the unlawful killing of their sole benefactor. Given the circumstances, the Court awarded the Applicants a compensation of 50 million naira.⁸⁴³

Lastly, the Court has established the rule that monetary compensation must be commensurate or proportional to the extent of the harm sustained by the victim of a human rights violation.⁸⁴⁴ In *Justice Joseph Wowo v The Gambia*,⁸⁴⁵ the applicant who was a former Chief Justice of The Gambia claimed that he was dismissed without due process on allegations of corruption which were later found to be meritless. He claimed that the dismissal prejudiced his efforts to seek other employment. He therefore sought a declaration and compensation of \$20,000,000 (plus 6% interest per annum) for violation of his human rights. The Court found the Respondent liable for breaching the Applicant's right to fair hearing contrary to Article 7 of the African Charter⁸⁴⁶ and awarded him nominal damages

833 Ibid 25.

834 *Rev Fr Solomon Mfa and Others v Nigeria* [2019] Suit No ECW/CCJ/APP/11/16 (26 February 2019); *The Registered Trustees of Jama'a Foundation and 5 Others v Nigeria* [2020] Suit No ECW/CCJ/APP/26/13 (20 March 2020).

835 *The Registered Trustees of Jama'a* (n 146) [143].

836 Ibid.

837 Ibid.

838 *Cheikh Gueye* (n 132) [120] – [121].

839 Ibid.

840 Ibid [120].

841 Ibid [121]; See *Kodjo Alain Victor Claude v Cote D'Ivoire* [2021] Suit No ECW/CCJ/APP/01/21 (26 April 2021) [91].

842 *Hembadoon Chia and Others v Nigeria* [2018] Suit No ECW/CCJ/APP/07/16.

843 Ibid 31–33.

844 *Martin Guggenheim and 4 Others v Nigeria* [2021] ECW/CCJ/APP/23/20 (4 March 2021); *La Societe Bedir Sarl* [99].

845 [2019] Suit No ECW/CCJ/APP/06/18 (27 February 2019).

846 Ibid 32–33.

of \$150,000 but awarded no compensation for special pecuniary losses arising from Applicant's dismissal.⁸⁴⁷ In coming to this conclusion, the Court noted, among others, that compensation for human rights violations must be to ensure "just satisfaction" and that in doing so, the circumstances of each case must be thoroughly examined.⁸⁴⁸ The Court thought that the declaration made in the Applicant's favour had remedied any prejudice from the dismissal that prevented him from securing other employment.⁸⁴⁹ Since he would now be able to find other employment following his vindication, the Court considered the declaration as a "just satisfaction" to the Applicant, making it unnecessary to grant him compensation for lost opportunities.⁸⁵⁰

2. Restitution

In appropriate cases, the Court has considered and ordered restitution to remedy human rights violations. Its orders in this regard have included the restoration of property unlawfully seized, the release of persons unlawfully detained, repeal of law in conflict with international law and reinstatement of employment benefits. The case of *Martin Guggenheim and 4 Others v Nigeria*⁸⁵¹ dealt with restitution of seized property. In that case, the Applicants sought, among other reliefs, an order directing the Respondent to release the passport of the first Applicant who had been under illegal arrest. The Court noted that there was no justification for the continued retention of the passport by the Respondent since the seizure of the passports was unlawful. The Court held that:

[R]eparation should as much as possible restore the Applicants to the position they were before the violation of their rights and should be proportionate to the violations found depending on the circumstances of the case. Any delay in the release of the said passport to the Applicant has the potency to further exacerbate the already volatile predicament the Applicant finds himself in rather than restoring his *status quo ante*. The Court therefore finds no impediment in ordering via *restitutio integrum*, the immediate release of the Applicant's [German passport] to him and the Court hereby directs the Respondent to immediately release the Applicant's said passport to him.⁸⁵²

Similarly, in *Col Mohammed Sambo Dasuki v Nigeria*,⁸⁵³ the Court ordered the Respondent to immediately release the Applicant from detention and restore to him cars and other properties that were unlawfully seized during police raids of his home on the 16 and 17 July 2015.

In *Kodjo Alain Victor Claude v Cote D'Ivoire*,⁸⁵⁴ the Court considered restitution in the context of an unlawful and arbitrary detention of a person under a law which was itself inconsistent with international law. The Applicant claimed that he had been in detention beyond the maximum period set in the Respondent's criminal procedure code under which he was detained.⁸⁵⁵ He also claimed that his right to be presumed innocent was being violated since by the very fact of his prolonged detention, he was being treated as though he was already guilty of the charges against him.⁸⁵⁶ Among others, the Applicant sought an order for his immediate release from detention. The Court found that the Respondent State violated the Applicant's right to liberty and security of his person because his arrest and detention was arbitrary and unlawful.⁸⁵⁷ It further noted that the provision of the law on which Respondent relied for the Applicant's detention was susceptible to arbitrariness and abuse

847 Ibid 35.

848 Ibid 34–35.

849 Ibid 35.

850 Ibid.

851 [2021] ECW/CCJ/APP/23/20 (4 March 2021).

852 *Martin Guggenheim* (n 156) [136] – [137].

853 [2016] Suit No ECW/CCJ/APP/01/16 (4 October 2016).

854 *Kodjo Alain Victor Claude v Cote D'Ivoire* [2021] Suit No ECW/CCJ/APP/01/21 (26 April 2021).

855 Ibid [30].

856 Ibid [77].

857 Ibid [56], [74].

and therefore inconsistent with international law.⁸⁵⁸ Finally, the Court found the Applicant's prolonged detention without trial or sentence by a competent Court to be indicative of a presumption of guilt.⁸⁵⁹ Having made these findings, the Court recalled that a State which has been found liable for human rights violations is required to restore the victim to the position in which he would have been had his rights not been violated.⁸⁶⁰ On the strength of this principle, the Court ordered the immediate release of the Applicant from detention to end the continuing violation of his rights and also ordered the Respondent to repeal the provision of the criminal procedure law under which the applicant was unlawfully and arbitrarily detained.⁸⁶¹

Finally, the Court has held that restitution orders may be granted to reinstate a victim to their pre-violation employment status and benefits including pension. This is illustrated by the cases of *Mohammed El Tayyib Bah v Sierra Leone*⁸⁶² and *Dr George Boley v Liberia*.⁸⁶³ In the *Mohammed El Tayyib* case, the Court in addition to awarding monetary compensation to the Applicant on finding a violation of his rights, ordered the Respondent to reinstate the Applicant in his appropriate position in the Police Force and pay him all outstanding emoluments.⁸⁶⁴ In the *George Boley* case, the Applicant claimed that the government's refusal to pay his pension and other entitlements violated, among others, his rights to health, property and freedom from discrimination.⁸⁶⁵ The Court, on finding that the non-payment of the Applicant's pension was a breach of his right to property, ordered the Respondent to "immediately restore the pension and other entitlements due the Applicant."⁸⁶⁶

3. Satisfaction and guarantees of non-repetition

While they may not be expressly stated, measures of satisfaction and guarantees of non-repetition can be observed in the Court's jurisprudence. They often take the form of declaratory judgments vindicating the rights of the victims of human rights violations and consequential orders directing the offending State to conduct impartial investigations, to prosecute violators of human rights and to provide measures necessary to prevent further violations. In *Aircraftwoman Beauty Igbobie Uzezi v Nigeria*,⁸⁶⁷ the Applicant was raped and subjected to other abuses by agents of the Respondent State. In what can be deemed as a measure of satisfaction, the Court ordered the Respondent to carry out an impartial investigation into the rape and prosecute the perpetrator and his accomplices.⁸⁶⁸ Another instance of satisfaction can be observed in *Wing Commander Danladi Angulu Kwasu v Nigeria*.⁸⁶⁹ Here, the Applicant's son who had enrolled in military training school died by drowning during one of their training sessions. The Court found that although the Respondent was responsible for the circumstances under which the Applicant's son died, it had failed to conduct any investigation into the incident. In the circumstances, the Court ordered the Respondent to investigate the incident with the view to identifying, prosecuting, and punishing the persons whose conduct led to the deprivation of the life of the Applicant's son.⁸⁷⁰ In *Rev Fr Solomon Mfa and Others v Nigeria*,⁸⁷¹ the Court made orders which had the effects of both satisfaction and guarantees of non-repetition. In this case, the Applicants alleged that for several years, their communities in Nigeria's Benue State had been the object of attacks by Fulani herdsmen resulting in mass killings, destruction of property and other

858 Ibid [75].

859 Ibid [84].

860 Ibid [87].

861 Ibid, Part XII.

862 [2015] Suit No ECW/CCJ/APP/20/13 (4th May 2015).

863 [2019] Suit No ECW/CCJ/APP/46/17 (28 June 2019).

864 *Mohammed El Tayyib* (174) 18.

865 *George Boley* (n 175) [52].

866 Ibid [73].

867 [2021] Suit No ECW/CCJ/APP/32/2019 (30 April 2021).

868 Ibid 60.

869 [2016] Suit No ECW/CCJ/APP/24/15 (10 October 2016).

870 Ibid (pp 28-29).

871 [2019] Suit No ECW/CCJ/APP/11/16 (26 February 2019).

atrocities. The Court found that despite several years of such reported killings and other atrocities, the Respondent had taken no action to contain the situation. Nor had it conducted an impartial, prompt, and independent investigation into the incidents. Having found these to be a violation of the Respondent's obligation to protect the rights of the affected communities, the Court ordered the Respondent (i) to investigate the alleged mass killings and destruction of properties in the affected communities, identify and prosecute the perpetrators and provide redress to the victims ("a measure of satisfaction"); and (ii) provide adequate security by deploying more security personnel to the area to protect the community and prevent further attacks ("guarantees of non-repetition").⁸⁷²

B- Strengths and Weaknesses of the Court's Reparations Jurisprudence

Unlike other human rights Courts, the constitutive instruments of the Court do not provide any guidance on how the Court may consider reparations for human rights violations. The Court acknowledged this challenge in *Martin Guggenheim and Others v Nigeria* when it noted that "[t]he ECOWAS Court of Justice does not have such a mechanism in the texts governing its mode of function which would enable it to fix accurately the compensations to be awarded to the Applicants who are victims of human rights violations."⁸⁷³ Despite this gap in its legal framework, the Court's reparations jurisprudence has been largely consistent with the basic principles of international law governing the application of such remedies in a human rights context. On compensation, the Court has held that an applicant must demonstrate that the acts or omission forming the basis of violation is attributable to the State; that the violation is the cause of the material or non-material injuries the applicant has suffered; and that the applicant has sufficiently proven the losses or injuries for which the applicant seeks compensation. This approach is consistent with how other human rights Courts have considered claims for compensation. For instance, in *Konaté v Burkina Faso (Judgement on Reparations)* the African Court held that to obtain a reparation including compensation, not only must the applicant show that the respondent State is liable for an internationally wrongful act (a human rights violation), but the applicant must also (1) establish a causal link between the wrongful act and the material or non-material injuries suffered; and (2) justify the amount of compensation claimed by sufficient proof.⁸⁷⁴ On restitution, the Court's orders for restoration of unlawfully seized property, release of wrongfully detained individuals and reinstatement of employment and/or employment benefits comport with principles governing restitution in international law⁸⁷⁵ and the precedents of other human rights Courts.⁸⁷⁶ The same can be said for the declaration and orders of the Court relating to satisfaction and guarantees of non-repetition.⁸⁷⁷

That said, there are a few areas of the Court's reparations jurisprudence that require improvement. One such area is the quantification of monetary compensation. It does not seem that the Court has succeeded in articulating clearly defined principles to govern the amount of compensation that should be awarded an applicant in a case. In almost all cases where a human rights violation has been established, the Court has been inclined to award compensation but almost always failed to explain how it arrived at the amount or quantum of compensation awarded. In other words, the lack of defined principles on quantifying the losses of victims has left the Court unguided and prone to arbitrarily fixing amounts of compensation without clearly articulated basis.⁸⁷⁸

There are many instances of such cases, but a few will suffice in illustrating the point. In *Benson Olua*

⁸⁷² *Rev Fr Solomon Mfa* (n 146) [67]

⁸⁷³ [2021] ECW/CCJ/APP/23/20 (4 March 2021).

⁸⁷⁴ *Konaté* (n 79) [15]. See also *Mtikila* (73) [31].

⁸⁷⁵ See Article on State Responsibility, art 35 and its commentaries.

⁸⁷⁶ See *Thomas* (n 92) ; *Bueno-Alves v Romania* [2001] Application No 28342/95 (ECHR); *Baena-Ricardo et al v Panama* IACtHR (2 February 2001).

⁸⁷⁷ See *Roche Azaña et al. v Nicaragua* (IACtHR) (*Reparations and Costs*) (3 June 2020); *Montesinos Mejía v Ecuador* (IACtHR) (*Judgment on Reparations*) (27 January 2020).

⁸⁷⁸ E.g., *The Incorporated Trustees* (n 23); *Col Mohammed Sambo Dasuki (Rtd)* (n 165); *Wing Commander Danladi* (n 181); *Benson Olua Okomba v Benin* [2017] Suit No ECW/CCJ/APP/27/14 (10 October 2017).

Okomba v Benin,⁸⁷⁹ the applicant sought 25 million naira for physical, emotional, and psychological trauma caused by his unlawful detention and assault. The Court found in favour of the Applicant but varied the claim for 25 million naira and ordered the Respondent to pay 8 million CFA francs without detailing how it financially assessed the Applicant's injuries. In *Mrs Nazare Gomes de Pina v Guinea Bissau*,⁸⁸⁰ the Applicant sued for the arbitrary deprivation of the life of her husband who until his assassination in a coup d'état was the elected President of Guinea Bissau. The Court found that there had been an arbitrary deprivation of the life of the Applicant's husband attributable to the Respondent. The Court then awarded the applicant and her three children a total of 40 million francs as compensation. The only explanation for this amount was a Statement that "owing to all the factors to be taken into consideration" it was reasonable to award 10 million francs each to the Applicant and her three children. Yet, there was no elaboration of what these factors were and how they informed the amount of compensation awarded. Similar line of cases includes *Dorothy Chioma Njemanze and Others v Nigeria*,⁸⁸¹ where the Court awarded 6 million naira for the violation of the Applicants' rights to dignity and liberty without stating how the injuries or losses sustained from the violations were quantified, and *Federation of African Journalist and Others v Gambia*,⁸⁸² where the Court awarded 3 million Gambian dalasi for unlawful detention of the Applicants without showing how it arrived at that amount. The absence of defined principles has not only affected quantification of pecuniary losses, but it has also left in doubt questions regarding the assessment of non-pecuniary losses. For such losses, the Court has said that it would be guided by "what is fair in the circumstances."⁸⁸³ Yet, this is a vague concept that clearly shows the need for well-defined standards and factors that could guide the Court in fixing the quantum of monetary compensation.

Another area of difficulty with the Court's reparations jurisprudence is the seeming non-recognition or reluctance to award collective compensation in case of gross or widespread violation where it is difficult to ascertain each person's share of the losses or injuries sustained. For example, in *Rev Fr Solomon Mfa and Others v Nigeria*,⁸⁸⁴ the Court found the Respondent liable for the widespread destruction of the properties of the Applicant's community by Fulani herdsmen which the Respondent had failed to prevent. Yet, the Court rejected the Applicants' claim for "communal compensation" on the basis that the properties destroyed had not been specifically identified nor their value indicated. It reasoned that since there was no record of the details of the victims, their names, gender, age, and address, it could not award monetary compensation. The Court observed:

[I]f pecuniary compensation was to be granted to individual victims in such cases, a serious problem could arise in terms of justice, morality, and equity within a very large population. What would be the criteria to identify the victims that deserve compensation? Why compensate someone and not compensate his neighbor?"⁸⁸⁵

Clearly, the reasoning of the Court on the need for specificity cannot be faulted. However, what is problematic is the assertion that communal compensation cannot be awarded in the absence of evidence identifying each victim of the human rights violations and their individual share of the losses or injuries arising from the violation. Gross and widespread violations of human rights such as those that occur in the context of armed conflicts may affect large populations that may be hard to individually identify. There are also violations that may be directed at the community or a group as a whole. These could be genocidal acts directed against a whole community of people resulting in physical and mental trauma for a large part of the group, or the destruction of cultural or religious

879 [2017] Suit No ECW/CCJ/APP/27/14 (10 October 2017).

880 [2018] ECW/CCJ/JUD/15/18 (24 May 2018).

881 [2017] Suit No ECW/CCJ/APP/17/14 (12 October 2017).

882 [2018] ECW/CCJ/APP/36/15 (13 February 2018).

883 See *Martin Guggenheim* (n 156) [136] – [137]; *Cheihk Gueye* (n 132) [121].

884 [2019] Suit No ECW/CCJ/APP/11/16 (26 February 2019).

885 cf *The Registered Trustees of Jama'a Foundation* (n 146).

monuments in which a group has collective interest. There is also the case of communal land or other property which are collectively held by groups such as indigenous peoples. Strictly going by the reasoning of the Court in *Rev Fr Solomon Mfa* would mean that human rights violations affecting a large group, or the rights and interests collectively held by such a group cannot be compensated unless we can ascertain each person's share of the injuries or losses. Such an approach would be inconsistent with the concept of collective rights in international human rights law and precedents of other human rights Courts.⁸⁸⁶

III. Conclusion

This paper has discussed the nature of reparations generally under international law and how international human rights Courts have contextualised and applied reparations to remedy human rights violations. Importantly, it has examined the ECOWAS Court's approach to reparations in human rights cases. The discussions reveal that, overall, the Court's reparations jurisprudence is consistent with international principles and best practices of other human rights Courts. The two areas of difficulty identified are the Court's approach to quantifying losses or injuries for purposes of compensation and the Court's seeming reluctance to award communal compensation. Drawing on the jurisprudence and practices of other Courts, this concluding part of the paper offers some guidance on how the Court may approach those areas of difficulty.

In all other Courts just as the ECOWAS Court, compensation is a form of reparation that is most frequently sought. Yet, quantifying losses for purposes of monetary compensation is "often a difficult and imperfect exercise".⁸⁸⁷ Some losses may be inadequately documented, some wrongs may not be fully accounted for or quantifiable, and some losses may have competing means by which they can be assessed.⁸⁸⁸ More importantly, certain kinds of compensation, such as those for future losses, may be inherently uncertain due to the impossibility of knowing what might have happened without the violation.⁸⁸⁹ In fact, even those wrongs that initially appear to call for straightforward evaluation, such as the loss of property, may have innumerable consequences on the victim, entailing not only the immediate financial loss of the property itself, but also the loss of rights related to the property and emotional harms.⁸⁹⁰ Nonetheless, depending on the head of pecuniary damages being claimed, human rights Courts like the ECHR and the IACtHR have developed some guidelines for computing the amount of compensation that is appropriate in the circumstances of a particular case.

Generally, where the claim is for lost income and loss of future earnings, the amount of pecuniary loss is calculated based on the actual income of the victim.⁸⁹¹ If the victim's actual loss is not readily assessable, the Courts may consider factors like victim's educational or professional qualifications, the minimum wage in the respondent country,⁸⁹² the average income in the victim's profession, and/or experts' estimations of incomes⁸⁹³ to determine the salary the victim would likely have earned.⁸⁹⁴ Where the victim is unemployed or information available is insufficient to calculate loss of income, the Courts compute and award the compensation on the basis of equity.⁸⁹⁵ In calculating future wages, the amount should include any annual bonus to which the victim would have been entitled under

⁸⁸⁶ See for instance *Saramaka People v Suriname* IACtHR (28 November 2007), and *CEMERIDE (on behalf of Endorois Welfare Council) v Kenya* AfCmHPR Comm No 276/2003 (25 November 2009) ("the Endorois case") where collective compensation was awarded by the Inter-American Court and the African Commission respectively.

⁸⁸⁷ African Court's Comparative Study (n 103) 76.

⁸⁸⁸ Shelton (n 31) 315.

⁸⁸⁹ See for instance the case of *Kurić v Slovenia* [2014] ECHR App. No 26828/06 (12 March 2014) [82].

⁸⁹⁰ African Court's Comparative Study (n 103) 52.

⁸⁹¹ *Ghimp and Others v Moldova* [2012] ECHR App. No 32520/09 (30 October 2012) [57], [64–65].

⁸⁹² *Villagran-Morales et al* (n 112).

⁸⁹³ *Utsayeva and Others v Russia* [2008] ECHR Application No 29133/03 (29 May 2008), [208] – [219].

⁸⁹⁴ *Bueno-Alves v Argentina*, IACtHR (11 May 2007)

⁸⁹⁵ *Río Negro Massacres v Guatemala* IACtHR (4 September 2012) [308] – [309].

domestic law or company policy.⁸⁹⁶ In addition, where the primary victim has died, the Court may reduce the total amount of wages by a percentage reflecting the portion of the victim's wages that would likely have been spent on personal expenses and therefore would not have been available to the surviving family Members for their support.⁸⁹⁷

In claims for lost property, Courts use the current market value of the property, namely, the value of the property if it were sold at the time of the judgment.⁸⁹⁸ Yet, where the violation had the effect of decreasing the value of the property, Courts have alternatively looked to the value of the property prior to the violation.⁸⁹⁹ Other methods of valuation include value per square meter (for houses), annual income per acre (for cultivated land), and per capita estimates (for cultivated land and livestock).⁹⁰⁰ Courts are often also guided by expert evaluations.⁹⁰¹

In claims for loss of opportunities, the quantum is difficult to assess. However, a Court may still award damages on equitable grounds recognizing that, at least, some losses were incurred and that it would be unfair not to award damages due to the uncertainty of the amount.⁹⁰² Finally, where they are specifically pleaded and proven, the Courts may award compensation for medical expenses and all other expenses that flow from the human rights violation such as cost of funeral, transport fares, or cost of investigating the violations.⁹⁰³ The above principles on establishing losses and determining the quantum of compensation could offer some guidance to the Ecowas Court.

Similarly, on the question of collective or communal compensation, the Court could draw inspiration from the jurisprudence of the IACtHR and the African Commission which have developed creative ways of compensating material and moral damage suffered collectively by a community or large group of people. In *Saramaka People v Suriname*,⁹⁰⁴ the IACtHR found that mining and logging concessions granted by the State on lands historically occupied by the Saramaka had left a "legacy of environmental destruction" and "despoiled subsistence resources" but without any share in the material benefits or profits for the people.⁹⁰⁵ The Court held that this was a violation of the property rights of the Saramaka people. Given that it would have been impossible to ascertain the losses or injuries suffered by each Member of the Saramaka community, the Court awarded collective compensation. Thus, for the material and non-material damage caused to the people, the Court ordered the State to pay a total of US\$675,000 into a community development fund to finance educational, health, agricultural and other projects for the people.⁹⁰⁶ Similarly, in the *Endorois case*,⁹⁰⁷ the African Commission found that Kenya violated the property rights of the Endorois by evicting them from their historically occupied lands and by granting mining concessions on such lands without consulting with the people. As reparation, the Commission recommended that Kenya take steps to recognise and restore the Endorois community to their traditional lands; pay compensation to the community for the losses they had suffered; and pay royalties to the community from existing economic projects on their lands.⁹⁰⁸ Such measures were to be implemented in coordination and consultation with the leadership of the community.

896 *Villagran-Morales et al* (n 112) [81].

897 *Ibid* [48], [50].

898 *Chiriboga v Ecuador*, IACtHR (3 May 2011).

899 *Ibid* [89].

900 *Akdivar v Turkey*, ECHR (1 April 1998) [17] – [19].

901 *SL and JL v Croatia* ECHR App. No 13712/11 (6 October 2016) [18] – [20].

902 See African Court's Comparative Study (n 103) 81 (emphasis added).

903 *Ibid* 82.

904 *Saramaka People v Suriname* IACtHR (28 November 2007)

905 *Ibid* [153].

906 *Ibid* [199]–[201].

907 *Centre for Minority Rights Development (CEMERIDE) and Minority Rights Group (on behalf of Endorois Welfare Council) v Kenya* [2009] AfCmHR Comm. No 276/2003 (25 November 2009)

908 *Endorois case* (Recommendations of the Commission)

Thus, contrary to what the ECOWAS Court seems to suggest, it is conceivable and possible for collective reparation in the form of compensation to be awarded. The Court only needs to be innovative in its approach. Such innovation could, for instance, be brought to the procedure of the Court. In *Rev Fr Solomon Mfa and Others v Nigeria*,⁹⁰⁹ the Court declined to award monetary compensation to the Applicants because they had failed to prove the ownership, identity, type and form of properties lost as a result of the human rights violation. It may well have been that the Applicants simply did not have evidence to prove their claims. Yet, even if they did, it does not appear that the procedure of the Court would have afforded them sufficient opportunity to prove the losses. Under its current procedure, the jurisdictional, merits and reparations phases of cases are all conducted in one proceeding. Gathering evidence on all aspects of a case and presenting it in one proceeding can be difficult for an applicant especially if it's a case of gross or widespread violation of human rights. The procedure of other Courts where a case is bifurcated into a "jurisdictional and merits phase" and a "reparations phase" allows for complex cases to be resolved in a manner that offers ample opportunity to applicants to prove their case. At the jurisdiction and merits stage, the Applicant can focus on proving the violations. If successful, the case then goes to the reparations stage, where the applicant could then be allowed to present more evidence to prove his or her losses, call expert witnesses to assess the material or non-material injuries, among others. If the Court adopts such an approach and the applicant is still not able to establish his or her losses to warrant compensation, then a conclusion like the one reached in *Rev Fr Solomon Mfa* may be justified.

909 *Rev Fr Solomon Mfa* (n 146) [68].

SUB-THEME 7

STRATEGIES FOR STRENGTHENING THE EFFECTIVENESS OF THE COURT

STRATEGIES FOR STRENGTHENING THE EFFECTIVENESS OF THE ECOWAS COMMUNITY COURT OF JUSTICE

By

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Introduction

The foremost intergovernmental organization in West Africa is the Economic Community of West African States (ECOWAS), which was established in 1975 with the adoption of the Lagos Treaty by the leaders of fifteen West African countries.⁹¹⁰ Under the 1975 Treaty, integration was expected “to promote cooperation in all fields of economic activity . . . for the purpose of raising the standard of living of . . . people, of increasing and maintaining economic stability, of fostering closer relations among . . . Members and of contributing to the progress and development of the African continent.”⁹¹¹

One of the constitutional challenges of regional integration is how to manage the limitation of national judicial sovereignty of Member States to ensure that community law is recognized as superior to national law and is accordingly applied and interpreted by national Courts at the instance of community citizens. This challenge arises from the national ordering of legal systems and the fact that States are the primary parties to agreements in which they limit their sovereignty in favour of the success of the community. The ECOWAS Community Court of Justice (ECCJ) was established as a sub-regional international Court in 1991 by Protocol (A/P1//91) on the Community Court of Justice, it was inaugurated in 2001 and subsequently reestablished as an Institution of ECOWAS in articles 6(e) and 15 of the ECOWAS Revised Treaty, 1993 (ECOWAS Revised Treaty). Pursuant to the provisions of article 10 of Supplementary Protocol A/SP.1/01/05 of the Court adopted in January 2005 by the Authority of Heads of States and Government, individuals, corporate bodies and governmental organizations have access to the Court for the enforcement of human rights. Thus, by the combined provisions of **Article 15(4) of the ECOWAS Revised Treaty** and **Article 2(1) of the Supplementary Protocol**, the judgments of the Court are binding on all the Member States, the institutions of the Community, individuals and corporate bodies.⁹¹²

Regarding the question of the enforceability the judgment of the ECOWAS Community Court, the provision of **Article 19(2) of the Protocol (A/P1//91) on the Community Court of justice** provides that the decisions of the Court are final and immediately enforceable. It must be noted that **Article 24(2) and (3) of the Supplementary Protocol of the ECOWAS Court** provides that, “execution of any Judgment of the Court shall be in the form of a writ of execution, which shall be submitted by the Registrar of the Court to the relevant Member State for execution according to the rules of civil procedure of that Member State. Upon the verification by the appointed authority of recipient Member State that the writ is from the Court, the writ shall be enforced.”⁹¹³

Article 22(3) of the Protocol and Article 5(2) of the ECOWAS Revised Treaty mandates Member States, in accordance with their constitutional provisions to immediately take all necessary measures to ensure the enactment and dissemination of such legislative and statutory texts as may be necessary for the implementation of the provisions of the Treaty including the execution of the decisions of the Court. By virtue of these provisions, Member States of ECOWAS are mandated to ratify and domesticate the ECOWAS Treaty, protocols and other legal instruments for the effective and unimpeded implementation of the provisions of the Treaty including the enforcement of the judgments of the Court. Thus, any refusal, failure and/or neglect by any Member State to implement the above provisions shall not render the judgments of the Courts unenforceable, it thereby lead to depriving a successful party of the enjoyment of the fruits of his judgment.

It is important to also mention that the ECOWAS Court in the exercise of its human rights jurisdiction is not constrained by the fact that the ECOWAS protocols have not been domesticated by any given

910 The original Members of the Community were the Republic of Benin, Burkina Faso, Cote d'Ivoire, the Gambia, Ghana, Guinea, Guinea-Bissau, Liberia, Mali, Mauritania, Niger, Nigeria, Senegal, Sierra Leone and Togo. Cape Verde was admitted in 1978, bringing the Membership to 16, but Mauritania withdrew its Membership in 2000, bringing the Membership back to 15.

911 Article 2(1), ECOWAS Treaty, 1975

912 Osisioma, Cejetan: “Is the ECOWAS Court of Justice a Toothless Bulldog that only Barks? Issues arising from the Decision of the High Court of Accra in *Mr. Chude Mba v. The Republic of Ghana*” March 2016, available at www.spaajibade.com

913 **Article 24(2) and (3) of the Supplementary Protocol of the Court**

Member States. Nigeria, on the 1st of July, 1994 ratified the Revised Treaty, thus is bound by the judgment of the Court by the international law principle of “*pacta sunt servanda*” (agreements are binding).

As it stands today, the compliance rate with the judgments of the Court remains unsatisfactory. Member States have not sent in feedback regarding the status of the decision and judgments complied with so far, except responses from lawyers and parties involved in some cases. This shows that the Court is still facing challenges in the enforcement of its judgments by Member States.

In line with the focus of this paper, it intends to address issues relating to factors militating against the effectiveness of the Court, composition of the Court, compliance, enforceability and the way forward. The study adopted doctrinal method. Secondary documents were used and the experience of the author plays a prominent role in shaping this paper.

Overview of ECOWAS Community Court of Justice

One of the institutions established under the 1975 ECOWAS Treaty was the Tribunal of the Community. The Tribunal was charged with the responsibility of ensuring the “observance of law and justice in the interpretation of . . . [the] Treaty” and settling disputes amongst Member States of the Community.⁹¹⁴ While the Treaty in Article 11(1) provided for the establishment of the Tribunal, Article 11(2) empowered the Authority of Heads of State and Government to determine the operational elements of the Tribunal.⁹¹⁵ This meant that the Tribunal would only become operational upon the exercise by the Authority of its power under Article 11(2). The Authority never exercised this power in relation to the operation of a “Tribunal of the Community”, until 1991, when it adopted Protocol A/P.1/A1/1991 on the “Community Court of Justice.”⁹¹⁶ In Article 1 of the Protocol, “Court” is defined as “the Community Court of Justice established by Article 11 of the Treaty,” even if Article 11 makes reference to a “Tribunal of the Community”. Although it would be nice to think that the change in nomenclature from a “Tribunal”, as contained in the 1975 Treaty, to a “Court of Justice,” could be attributed to an attempt to implement a substantive modification of the relevant provisions of the 1975 Treaty, particularly those relating to the functions of the Tribunal, the language of the Protocol seems to ignore the modification and treat it as though there had been no change whatsoever.⁹¹⁷

The functions of the Court under the 1991 Protocol are similar to the functions of the Tribunal under the 1975 Treaty, referring to Article 56 of the Treaty, restricting the competence of the Court to cases involving the interpretation of the Treaty and the resolution of disputes between Member States *inter se* and between Member States and institutions of the Community.⁹¹⁸ The Court was therefore established as an international tribunal for the settlement of disputes between States and intergovernmental organisations.

⁹¹⁴ Article 11(1), 1975 ECOWAS Treaty, States the function of the Tribunal, and refers to Article 56 for the jurisdiction of the Tribunal with regard to the settlement of disputes. Article 56 provides that “[a]ny dispute that may arise among the Member States regarding the interpretation or application of this Treaty shall be amicably settled by direct agreement. In the event of failure to settle such disputes, the matter may be referred to the Tribunal of the Community by a party to such disputes and the decision of the Tribunal shall be final”.

⁹¹⁵ Article 11(2), 1975 ECOWAS Treaty provides that “The composition, competence, statutes and other matters relating to the Tribunal shall be prescribed by the Authority”.

⁹¹⁶ The Preamble of the Protocol makes reference to Article 5 of the 1975 Treaty (on the establishment, composition and functions of the Authority), Article 4(e) of the 1975 Treaty (the accurate Article listing the Tribunal as one of the institutions of the Community was Article 4(d), so this was an error) and Article 11 of the 1975 Treaty (on the establishment of the Tribunal) as the basis for the establishment of the Community Court of Justice, evincing an intention of the Authority to establish a Court rather than a Tribunal.

⁹¹⁷ Article 11 of the Protocol refers to “Applications to the Tribunal”. This is the only place in the Protocol where the institution is referred to as a tribunal.

⁹¹⁸ Although Article 56 only refers to disputes between Member States, the Protocol includes institutions of the Community as competent parties before the Court.

Factions militating against the effectiveness of the Court

It is an established principle of international law that treaties are binding on parties to it. Accordingly, “every treaty in force is binding upon the parties to it and must be performed by them in good faith.”⁹¹⁹ This is usually expressed as the rule of “*Pacta Sunt Servenda*”. The doctrine enjoins States to fulfill their commitments they undertake pursuant to a treaty, whether bilateral or multilateral. It underlines a significant general principle of international law, one that underlines the entire system of treaty-based relations between States. This principle enjoining one to perform one’s solemn obligation is not unique to international law but can be found in the law of contract of many domestic legal traditions in the world. Every agreement of a legal nature obliges the parties to fulfil their obligations in good faith. In line with this principle, the commentary of the International Law Commission (ILC) reads:

The rule that treaties are binding and must be performed in good faith is the fundamental principles of the law of treaties. There is authority in the jurisprudence of the international tribunals for the proposition that in the present context the principle of good faith is a legal principle which forms an integral part of the rule *Pacta sunt Servanda*. Thus, speaking of certain valuation to be made under Articles 95 and 96 of the Act of Algeciras, the Court said in the case concerning Rights of Nationals of the United States of America in Morocco Case,⁹²⁰ The power of making the valuation rests with the Customs authorities but it is a power which must be exercised reasonably and in good faith”

Similarly, the Permanent Court of International Justice in applying a Treaty Clause prohibiting discrimination against minorities, insisted in a number of cases, that clauses must be so applied to ensure the absence of discrimination in fact as well as in law; in other words, the obligation must not be evaded by a merely literal application of the clauses. Numerous precedents could also be found in the jurisprudence of arbitral tribunals. To give only one example, in the North Atlantic Coast Fisheries Arbitration, the Tribunal dealing with the Great Britain’s right to regulate fisheries in Canadian waters in which she had granted certain fishing rights to the United States nationals by the Treaty of Ghent said “...from the Treaty results an obligatory relation whereby the right of Great Britain to exercise its right of sovereignty by making regulations is limited to such regulation as are made in good faith, and not in violation of the Treaty.”⁹²¹

It follows that the bindingness of a treaty on parties includes their exercise of utmost good faith in observing and carrying out their obligations under it. Thus, parties in observing their obligations under it cannot approbate and reprobate at the same time. This principle applies to all treaties by whatever name called-pact, memorandum, exchange of letters, covenants, protocols and the likes. It appears that this principle embodies general principles of law recognized by civilized nations as one of the sources of international law.⁹²² No wonder the Declaration on Principles of International Law Concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations succinctly States that “all Members of the United Nations must carry out obligation assumed under the Charter, general principles of international law and other valid treaties. Thus, State parties to a treaty are enjoined to refrain from acts capable of hampering the outcome of the treaty.”⁹²³

Lauterpacht has rightly observed that unquestionably, the obligation to act in accordance with good faith being a general principle of law” is also part of international law. The element of good faith includes the requirement that a party should not invoke the provision of its internal law as justifica-

919 See Article 26 of the Vienna Convention on the Law of Treaties 1969.

920 (1910) Reports of International Arbitral Awards (I.A.A) Vol.11 P.188, judgement of August 27, 1952.

921 Year Book of the International Law Commission (Y.B.I.L.C) 1966, Vol. 2. P.211

922 See Art. 38 of the Statute of the ICJ

923 UN General Assembly Resolution 1970

tion for its failure to perform a treaty. This is however, without prejudice to Article 46 of the Vienna Convention on Law of Treaties.⁹²⁴ There is a plethora of judicial and arbitral authority for the rule that a State cannot rely on the provision of its municipal law to avoid its international obligations in the Alabama Claims Arbitration,⁹²⁵ the Tribunal faulted and rejected the British argument that because its constitutional law as it did not grant it power to interfere with the construction and sailing of the ships in question, Great Britain had not violated its obligations as a neutral in the United States Civil war by allowing the construction and sailing to occur⁹²⁶. According to the Tribunal, the government of Her Majesty cannot justify itself for a failure in due diligence on the plea of insufficiency of legal means of action which it possessed.

This portion is equally reinforced by the Draft Declaration on Rights and Duties of States 1949 to the effects that:

Every State has the duty to carry out in good faith its obligations arising from treaties and other sources of international law, and it may not invoke the provisions in its construction or its laws as an excuse for failure to perform this duty.⁹²⁷

The ECOWAS Community texts that provide that the judgments of the Court are binding have their basis in “*Pacta Sunt Servanda*” as discussed above which has its basis in Article 26 of the Vienna Convention on the Law of Treaties of 1969, in respect of implementation of decisions, which provides that every treaty in force is binding on parties to the treaty and must be executed in good faith. The treaty requires that States meet their obligations good faith. Failure to meet obligations has been the major impediment to the realization of enforcement and effectiveness of the ECOWAS Court.

Again, the 2012 Supplementary Act A/SA.13/02/12 on Sanctions Against Member States that fail to Honour their Obligations To ECOWAS also has a similar provision. The Court’s Protocol A/P.1/7/91 also provides that the decisions of the Court shall be final and immediately enforceable. The Protocol further provides that Member States and Institutions of the Community shall immediately take all necessary measures to ensure execution of the decisions of the Court. Although the Court’s Protocol A/P.1/7/91 did not provide the method of enforcement, the lacuna was filled by article 24 of the Protocol as amended by Supplementary Protocol A/SP.1/01/05 which prescribed, for the first time, the method of enforcement of the judgments of the Court. However, an intriguing dimension was introduced by article 24(1) which provides that: judgments of the Court that have financial implications for nationals of Member States or Member States are binding.

Lack of domestic legal framework for the enforcement of the judgments of ECCJ by National Court

The absence of municipal legislation by Member States in respect of the enforcement of the judgments of the ECOWAS Court of Justice is another challenge confronting the Court. National Courts do not have domestic legislation which specifically mentions the judgments of the ECOWAS Courts of Justice and the specific method of enforcement on which to anchor applications for enforcement of the judgments of the Court. This has been variously discussed by policy makers and international scholars. In the words of Enabulele:

The need for a complete synergy between the Community Court Protocol and the laws of Community States is further stressed by the fact that Article 24 of the Protocol relies on the institutions of the Community States in line with the relevant Civil Procedure Rules for the enforcement of its judgment. In this regard the relevant constitutions of Community States must be obliged by their municipal law to receive and enforce the judgment of a non-forum

924 See Art. 27 Vienna Convention on Law of Treaties 1969

925 United States V, Great Britain (1872) 1 International Arbitration (I.A.A) 49 5 at 656.

926 See generally, D.J Harris, Cases and Materials on international Law, London: Sweet and Maxwell, p. 69-70.

927 Art 13, Draft Declaration on Rights and Duties of States 1949 (Y.B.I.L.C) p. 286.

Court. This underscores the enactment of legislation permitting the recognition and enforcement of foreign judgments to give legal backing to forum Courts to recognize and enforce same.⁹²⁸

Composition and tenure of the Members of the Court

Within the past few years, the composition of the Court and the tenure of the judges of the Court have been altered in a manner that threatens the work of the Court. While the initial treaty stipulated a five-year once renewable tenure for seven (7) judges, recent amendments have reduced the number of judges to five (5) and introduced a new disruptive arrangement of a single tenure of non-renewable four years. One implication of this alteration, is that all the judges are appointed the same time, assume office the same time and depart the same time; a clear departure from the earlier tradition of a staggered tenure system that had existed for members of the Court, which guaranteed continuity in the Court's operations. This negates the principle in the Protocol of the Court that allowed for staggered tenure of members, and as a result, has now created "a grave concern for the Court because of the attendant loss of institutional memory when the tenure of all the judges expire at the same time."

By article 3 of the 1991 Protocol on the Community Court of Justice, the qualification for appointment as a judge of the ECCJ is "high moral character and ... the qualification required in their respective countries for appointment to the highest judicial offices" or by being a "jurisconsult of recognised competence in international law. This provision has been amended by a 2006 Supplementary Protocol which substitutes the original article 3 with a new article 3. The only addition in terms of qualification for the office of a judge of the ECCJ is that "jurisconsults of recognised competence in international law" should be versed "particularly in areas of Community law or Regional Integration."⁹²⁹ Clearly, experience or qualification in international human rights is not a consideration for appointment as a judge of the ECCJ. It can be argued that judges in national Courts do not need any special human rights qualification to be appointed, yet are expected to provide the first layer of protection in the event of alleged human rights violation. However, as Besson⁹³⁰ notes, an entity claiming the status of a post-national human rights institution needs some "global-know how" in the field of human rights.⁹³¹ The practicality of this requirement lies in the need for international Courts involved in human rights protection to provide leadership and guidance for national Courts in the application of human rights instruments. Such leadership becomes even more relevant for legitimacy of the system considering the gap between international judges and direct domestic mandates. It is the "global know how" that would prompt the sort of indebt analysis of human rights issues that international Courts need if their decisions are to be taken seriously. In this respect, the original composition of the ECCJ poses challenges for the credible exercise of its human rights mandate in terms of not requiring any specific human rights qualification for appointment.

Compliance by Member States with the judgements of the Court

The combined provisions of **Article 15(4) of the ECOWAS Revised Treaty** and **Article 2(1) of the Supplementary Protocol**, the judgments of the Court are binding on all the Member States, the institutions of the Community, individuals and corporate bodies.⁹³²

On the question of the enforceability the judgment of the ECOWAS Community Court, the provision

928 Enabulele, A.O, reflections on ECOWAS Community Court Protocol and the Constitutions of Member States, *International Community Law Review*, 12, 2010:111-138

929 New article 3 in art 2 of Supplementary Protocol A/PS.2/06/06 Amending Article 3 Paragraphs 1,2 and 4, Article 4 Paragraphs 1,2 and 7 and Article 7 Paragraph 3 of the Protocol of the Community Court of Justice.

930 Besson S, "The European Union and Human Rights: Towards a Post-National Human Rights Institution?" (2006) 6 Human Rights Law Review 328

931 Ibid

932 Osioma, Opcit

of **Article 19(2) of the Protocol (A/P1/91) on the Community Court of justice** provides that the decisions of the Court are final and immediately enforceable. It must be noted that **Article 24(2) and (3) of the Supplementary Protocol of the ECOWAS Court** provides that, “execution of any Judgment of the Court shall be in the form of a writ of execution, which shall be submitted by the Registrar of the Court to the relevant Member State for execution according to the rules of civil procedure of that Member State. Upon the verification by the appointed authority of recipient Member State that the writ is from the Court, the writ shall be enforced.”⁹³³

Again, Article 22(3) of the Protocol and Article 5(2) of the ECOWAS Revised Treaty mandates Member States, in accordance with their Constitutional provisions to immediately take all necessary measures to ensure the enactment and dissemination of such legislative and statutory texts as may be necessary for the implementation of the provisions of the Treaty including the execution of the decisions of the Court. By virtue of these provisions, Member States of ECOWAS are mandated to ratify and domesticate the ECOWAS Treaty, protocol and other legal instruments for the effective and unimpeded implementation of the provisions of the Treaty including the enforcement of the judgments of the Court. Thus, any refusal, failure and/or neglect by any Member State to implement the above provisions shall not render the judgments of the Courts unenforceable, it thereby lead to depriving a successful party of the enjoyment of the fruits of his judgment.

It is important to also mention that the ECOWAS Court in the exercise of its human rights jurisdiction is not constrained by the fact that the ECOWAS protocols have not been domesticated by any given Member States. Nigeria, on the 1st of July, 1994 ratified the Revised Treaty, thus is bound by the judgment of the Court by the international law principle of “*pacta sunt servanda*” (agreements are binding).

The Nigeria involved case of *Moukhtar Ibrahim Aminu v. Government of Jigawa State & 3ors*⁹³⁴ is worthy of mention. In that case, the 1st and 2nd Defendants, had contended that the Court did not have the jurisdiction to entertain the action on the ground that the protocol of the Court which gave it power to hear and determine issues of violation of human rights by individuals has not been domesticated in Nigeria as provided for under **Section 12 of the Constitution of the Federal Republic of Nigeria**. The Court rejected this argument and held thus it is trite that the question of domestication is entirely a local duty of the State to comply with its domestic laws including its Constitution. However, the fact that Nigeria intended to abide by the contents of the Treaty, having enacted into law the African Charter on Human and People’s Rights, (which is incorporated into the Revised Treaty by virtue of article 4(g)) made the objection of the 1st and 2nd defendants a non-issue and immaterial. In any event, a State cannot approbate and reprobate in respect of domestication of Treaties, that it derives benefits from its application.

The ECOWAS Court also expounded this principle in the case of *Musa Saidykhan v. The Republic of Gambia*⁹³⁵ where it held as follows:

ECOWAS is a supra national authority created by the Member States wherein they expressly ceded some of their sovereign powers to ECOWAS to act in their common interest. Therefore, in respect of those areas where the Member States have ceded part of their sovereign powers to ECOWAS, the rules made by ECOWAS supersedes rules made by individual Member States if they are inconsistent. The Revised Treaty of ECOWAS was ratified by all the Member States of ECOWAS... this Court is the offspring of the Revised Treaty; and this Court is empowered by the Supplementary Protocol on the Court of justice, which is part of the instruments of implementation of the Treaty and has the same legal force as the Trea-

933 **Article 24(2) and (3) of the Supplementary Protocol**

934 Suit No.: ECW/CCJ/APP/02/11

935 Suit No.: ECW/CCJ/APP/11/07

ty, to adjudicate on issues of human rights arising out of the Member States of ECOWAS. Therefore, it is untenable for a Member State of ECOWAS to claim that a matter is essentially within its domestic jurisdiction when it had expressly or by necessary implication granted ECOWAS powers to act solely or concurrently with national jurisdiction in respect of that matter.

It is worthy of mention that the concept of exhaustion of local remedies does not apply to the ECOWAS Court. The case of *Valentine Ayika v. Republic of Liberia*⁹³⁶ was ruled admissible notwithstanding the fact that the case was alleged to be pending before the Supreme Court of the State.

Also, by article 24(4) of the Court's 2005 Supplementary Protocol, each Member State is, towards the effective enforcement of the decisions of the ECCJ, expected to determine a competent national authority that will be responsible for the enforcement of the Court's decisions in accordance with her own rules of civil procedure. Interestingly, Nigeria has put in place mechanisms for the enforcement of judgments of the Court, by appointing a Competent National Authority.

However, enforcement of judgments of the ECOWAS Court has been a major problem and this relates to the fact that neither the ECOWAS Revised Treaty, nor the Court's Protocol (as amended) or other legal instruments make provisions regarding the means of enforcing the issued writ of execution where Member States fail to voluntarily comply with the terms of the judgments of the Court. This is notwithstanding that article 77 of the ECOWAS Revised Treaty empowers the Authority of Heads of State and Government of ECOWAS to impose certain sanctions on any Member State who fails to fulfil its obligations to the community through suspension of new community loans or assistance, suspension of disbursement on on-going community projects or assistance programmes, exclusion from presenting candidates for statutory and professional posts and suspension from participating in the activities of the community..

This power is however yet to be exercised by the apex organ of ECOWAS. Thus, unless Member States are compelled to comply with the judgments of the ECOWAS Court, the confidence in the Court will completely be eroded so much so that the Court may be unable to entertain any applications from any person in respect of the violations of the fundamental rights of the citizens of ECOWAS. On the question of whether or not the judgment of the Court has been enforced by the Nigerian government though a Member State, two cases would be referred to; the case of **SERAP v. Federal Republic of Nigeria & Anor**⁹³⁷ and the more recent case of **Sambo Dasuki v. Federal Republic of Nigeria**.⁹³⁸ In the SERAP case, the ECOWAS Court ruled that the Federal Government of Nigeria should provide free and compulsory basic education to every Nigerian child but it has not been enforced by the Government though it was a judgment gotten in 2010. Also, in the Sambo Dasuki case, the Federal Government was ordered to release the former National Security Adviser which the Government is still yet to obey.

The impact of domestic constitutional realities and judicial politics on national attitudes to enforcement of decisions of the ECCJ cannot be discountenanced. Statement of the Supreme Court of Nigeria in the case of **General Sani Abacha & ors v. Fawehinmi**⁹³⁹ is to be noted. The Court held that "an international Treaty entered into by the government of Nigeria does not become binding until enacted into law by the National Assembly. Also, the provision of the Constitution of the Federal Republic of Nigeria which provides that any law which is inconsistent with any Section of the Constitution shall to the extent of its inconsistency be null and void."⁹⁴⁰ Thus, it may seem that the Treaties relating to the ECOWAS Court are not binding on Nigeria as they have not been expressly ratified.

936 Suit No.: ECW/CCJ/AAP/07/11

937 ECW/CCJ/APP/08/08

938 ECW/CCJ/APP/01/16

939 (2000) NWLR (pt. 660) p. 247

940 Section 1 of the Constitution of the Federal Republic of Nigeria 1999 (as amended)

However, the position of the Court in the **Moukhtar Ibrahim Aminu v. Government of Jigawa State & 3ors**⁹⁴¹ case in my opinion takes precedence. Thus, a country like Nigeria should tow the path of honour and responsibility in enforcement of the law whether or not it is in her favour.

I however bear in mind, the fact that the two decisions are not from the same judicial order, as things presently stand in practice. Therefore, the position taken by each of the courts is valid within their respective spheres – the Supreme Court, being an organ of municipal law and the ECCJ, being an organ of international law. That is the practical reality of today, irrespective of what it is in theory.

Failure by Member States to fulfil the obligations to the Community – expanding access for enforcement

The non-domestication of the Revised Treaty and Protocols on the Courts of Member States in line with the Revised Treaty has constituted a challenge militating against the Court. According to Article 5(2) of the Revised Treaty succinctly provides that:

Each Member State shall, in accordance with its constitutional procedures, take all necessary measure to ensure the enactment and dissemination of such legislative and statutory texts as may be necessary for the implementation of the provisions of this treaty.

The refusal of Member States to domesticate the Revised Treaty and the Protocol of the Court as required by the provision, constitutes a major challenge for the enforcement of the judgments of the Court by national Courts of Member States especially from the perspective of dualist common law countries, since ECOWAS community texts do not have the force of law without domestication.

Implementation of Community law by the national Courts

Under the Protocol on the Court as amended, Member States are given the responsibility of executing the judgments of the Court in accordance with their Rules of Civil Procedure. “Accordingly execution of any of the Court shall be in the form of writ of execution, which shall be submitted by the Registrar of the Court to the relevant Member State for execution according to the Rules of Civil Procedure of that Member State.”⁹⁴² It further provides that “upon the verification by the appointed authority of the recipient Member State that the writ is from the Court, the writ shall be enforced.”⁹⁴³ Furthermore, that “all Member States shall determine the competent national authority for the purposes of receipt and processing of execution and notify the Court accordingly.”⁹⁴⁴ The writ of execution issued by the Court may be suspended only by a decision of the Community Court of Justice.⁹⁴⁵

There is no rule on the exhaustion of local remedies in the Protocols relating to the ECOWAS Court. Nevertheless, the Court has had to entertain matters that call into question its relationship with Member State Courts where such actions have been heard in national Courts or remain pending before them.

From the provisions of Article 10(d) of the 2005 Supplementary Protocol on the ECOWAS Court, the two statutory restrictions to the admissibility of actions before the Court are the submission of anonymous applications and the pendency of the same matter before another international Court.⁹⁴⁶ These are the treaty-based jurisdiction-regulating rules; in addition, the Court has also made declarations on the (positive) determinants of its jurisdiction. In *Manneh v. the Gambia*,⁹⁴⁷ the Court confirmed the

941 Ibid

942 Article 24(2) Supplementary Protocol A/SP.13/02/12 on Sanctions Against Member States that fail to Honour their Obligations to ECOWAS.

943 Art. 24(3)

944 Art. 24(4)

945 Art. 24(5)

946 The latter is an expression of the *electa una via* rule, which is a non-hierarchical horizontal jurisdiction-regulating rule.

947 ECW/CCJ/JJD/03/08 (June 2008), available in Ebobrah and Tanoh, *Compendium of African Sub-Regional Human Rights Documents* (Pretoria University Law Publications, Pretoria, 2010), p. 265

rules governing its jurisdiction as laid down in *Alhaji Hammani Tidjani v. Nigeria and 4 Others*⁹⁴⁸ thus,

... the combined effect of article 9(4) of the Protocol of the Court, as amended, article 4(g) of the Revised Treaty and ... the African Charter on Human and Peoples' Rights is that the plaintiff must invoke the Court's jurisdiction by (i) establishing that there is a right recognized by ... the African Charter on Human and Peoples Rights; (ii) that this right has been violated by the defendant; (iii) that there is no action pending before another international Court in respect of the alleged breach of his right; and (iv) that there was no previously laid down law that led to the alleged breach of abuse of his rights.⁹⁴⁹

From the above, it is clear that the jurisdiction of the Court will not be restricted by judicial or other proceedings pending in domestic Courts or institutions of Member States. This confirms that the exhaustion of local remedies rule is not a compulsory jurisdiction-regulating rule in resolving competing jurisdictional claims between domestic and international tribunals, but rather, that its omission can signify the definition of the relationship between such tribunals. Although the exhaustion of local remedies rule is recognized as a rule of customary international law, its original application applied mainly to the original reference to diplomatic protection. Amerasinghe notes that:

The systematic protection of the national against his own State ... can only be based on a broader acceptance of substantive rules and principles relating to human rights which apparently are only coming to be recognized, if at all, in customary international law. In any case, the remedies for the protection of human rights as such come through the medium of conventions and agreements. The implementation of protection remedially can only be determined by the provisions of such instruments, since there is no procedure at customary or general international law to secure the implementation of such protection, particularly against national States of the injured individual. Thus, at present it is to the instruments by which such protection is implemented that resort must be had in order to discover whether and to what extent the rule of local remedies is applicable to the scheme of such protection.⁹⁵⁰

Therefore, the application of such jurisdiction-regulating rules, in the case of international protection of human rights, is usually restricted to the provisions of the treaty or agreement granting jurisdiction, the content of which are imperative to the interpretation of the jurisdiction of international tribunals. In this regard, the relevant documents for the interpretation of the jurisdiction of the ECOWAS Community Court of Justice are the 1991 Protocol, the 1993 Revised ECOWAS Treaty, the 2001 Supplementary Protocol, and the 2005 Supplementary Protocol. A collective interpretation of these instruments does not limit the jurisdiction of the Court to cases that have been exhausted in domestic tribunals or which are not pending before domestic tribunals. In fact, the Court has Stated on several occasions that the determination of its jurisdiction is limited to these statutes. In *Registered Trustees of the Socio-Economic Rights & Accountability Project (SERAP) v. Federal Republic of Nigeria & Another*,⁹⁵¹ the Court noted that:

It is a well-established principle of law that jurisdiction is a creature of statute. The statute that spells out the jurisdiction of this Court is the Supplementary Protocol on the Court of Justice, specifically Article 9 thereof. For this Court to have subject-matter jurisdiction over the suit as instituted by the plaintiff, the subject matter of the suit must fall within the confines of Article 9 of the Supplementary Protocol to the Court. ... The Court has jurisdiction over human rights enshrined in the African Charter and the fact that these rights are domesticated in the municipal law of the Federal Republic of Nigeria cannot oust the jurisdiction of the

948 ECW/CCJ/APP/01/06 (June 2007)

949 Ebobrah and Tanoh

950 Amerasinghe, C.F. *Local Remedies in International Law*, 2nd edn (Cambridge University Press, Cambridge, 2004).

951 ECW/CCJ/APP/0808 (October 2009), in Ebobrah and Tanoh,

Court. . . This Court clearly has subject matter jurisdiction over human rights violations in so far as these are recognized by the African Charter on Human and Peoples' Rights, which is adopted by Article 4(g) of the Revised Treaty of ECOWAS.

Also, in *Keita and Another v Mali*,⁹⁵² the Court Stated that:

In addition, the omission of the local remedies rule in the relevant texts of the Community Court can only be regarded as intentional. Before the expansion of access to the Court to include applications by individuals, the Community leadership had thought it fit to adopt the rule relating to the exhaustion of local remedies under the 2001 Supplementary Protocol. This was an expression of the rule in its original historical context, which is in the area of diplomatic protection. Therefore, under the 2001 Supplementary Protocol, the rule would apply in actions brought by States against other States for the protection of the rights of the former's citizens.⁹⁵³ However, the Community did not intend to extend this requirement to exhaust local remedies to the more contemporary practice of human rights applications by the individual and, hence, left it out of the 2005 Supplementary Protocol.⁹⁵⁴ This has been confirmed in *Koraou v. Niger*,⁹⁵⁵ where the Court noted that:

In refraining from making the rule of preliminary exhaustion of local remedies a condition for admissibility of applications filed before the Court, the Community lawmaker of ECOWAS has undoubtedly responded to . . . [a call for States to renounce the rule of exhaustion of local remedies in response to the evolution of international practice]. The renunciation of such a rule is binding on all the Member States of ECOWAS.

This shows that there was a deliberate renunciation of the rule based on the intention of the drafters of the 2005 Protocol to expand the jurisdiction of the Court beyond traditional limits to ensure that the Court exercises jurisdiction under circumstances that would be otherwise restricted in other international tribunals.⁹⁵⁶ The Court has made this clear in its judgments. In *Essien v. The Republic of the Gambia and Another*,⁹⁵⁷ the Court noted that Article 50 of the African Charter on Human and Peoples' Rights, which contains the provision on the exhaustion of local remedies, would not affect its own jurisdiction as "the said article refers not to any organization but the Commission. Consequently that provision of article 50 cannot be applied *stricto sensu* to this case pertaining to the exhaustion of local remedy and its relevance to this Court," and the Court Stated further that "it is trite that competence of the Court is enshrined in articles 9 and 10 of the Supplementary Protocol."⁹⁵⁸

The way forward

1. All parties to the treaty should as a matter of fact obligation that enforcement of the judgment of ECOWAS Court is carried out in their national system. This will further enhance the credibility of the Court.
2. Again, the appointment of judges with staggered appointment should be adhered to whereby all the judges will not leave at the same time. Leaving at the same time will not enhance

952 ECW/CCJ/APP/03/07 (March 2007), in Ebobrah and Tanoh

953 Amerasinghe, C.F. *Local Remedies in International Law*, 2nd edn (Cambridge University Press, Cambridge, 2004).

954 The Loewen Group, Inc. and Raymond L. Loewen v. The United States of America (ICSID Case No. ARB(AF)/98/3) at para 73, where the Arbitration Tribunal held that "We accept that an important principle of international law should not be held to have been tacitly dispensed with by an international agreement, in the absence of words making clear an intention to do so (*Eletronica Sicula SpA (Elsi) (United States v Italy)* (1989) ICJ 15 at 42). Such an intention may, however, be exhibited by express provisions which are at variance with the continued operation of the relevant principle of international law."

955 ECW/CCJ/JJD/06/08 (October 2008), in Ebobrah and Tanoh, *supra* note 68, p. 286, para. 40

956 Ebobrah, S. "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". 7 *African Human Rights Law Journal* (2007), 307–327, at p. 327, where the author argues that the failure to include the local remedies rule in the relevant texts does not signify an absolute renunciation of the rule

957 W/CCJ/APP/05/05 (March 2007), in Ebobrah and Tanoh, *supra* note 68, p. 271

958 Ojomo, E. *Competing Competences in Adjudication: Reviewing the Relationship between the ECOWAS Court and National Courts*, *African Journal of Legal Studies* 7 (2014) 87–1

continuity as the new judges will take time to study the system before understanding the workings. If the staggered appointment is adhered to, the new judges will learn quite fast as there will be existing judges that will show them the nitty-gritty of the Court.

3. Member States should legislate, recognize and enforce the judgment of ECOWAS Court of Justice.
4. Domestication of the Revised Treaty, protocol on the Court and other ECOWAS texts by Member States in accordance with Article 5(2) of the Revised Treaty
5. The Court should be empowered to send its own Annual Report to the ECOWAS Council of Ministers or the Authority of Heads of State and Government on the status of compliance of its judgments like in the Inter-American Court of Human Rights enforcement mechanism.
6. The Court should be empowered to include specific time-limits or general guidelines for compliance with its decisions and judgments. After the expiration of such time or on the initiative of the winner, the winning party could reapply unilaterally for a declaration of non-compliance.

Conclusion

In 2006, ECOWAS transformed its institutions to make itself more accessible to Community citizens, so the focus of the Community shifted from States to individuals or people. This meant that the Community's institutions changed their focus from broad development goals that focused on State institutions to more concise goals targeted at Community citizens. Among the transformations during this period was the transformation of the Community Court of Justice, established pursuant to the 1975 Treaty establishing the Community, empowering it to entertain applications from individuals for the protection of their internationally guaranteed human rights. This modified access to the Court is very wide, such that the Court may serve as a tribunal of first instance in relevant matters, without the requirement that applicants exhaust domestic remedies before approaching the Court. Based on relevant discussions about the relationship between national and international tribunals, this reveals a non-hierarchical relationship, in which the competing competences of the national and international systems provide access to alternate judicial systems, so that the demands and expectations of citizens are met.

STRATEGIES FOR STRENGTHENING THE EFFECTIVENESS OF THE ECOWAS COMMUNITY COURT OF JUSTICE

By

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Introduction

Pursuant to the 1975 founding Treaty of the Economic Community of West African States (ECOWAS), the ECOWAS Court of Justice (the “Court” or the “ECCJ”) was established in 1991 as a sub-regional international court. However, it was only in 2001 (under the regime of article 15 of the 1993 revised ECOWAS Treaty) that the Court became operational with the inauguration of its first set of judges. The combined provisions of Article 15(4) of the ECOWAS Revised Treaty and Article 24(1) of the Supplementary Protocol render the judgments of the Court binding on all Member States, the institutions of the community, individuals and corporate bodies. In addition, the decisions of the Court are rendered final and immediately enforceable by virtue of Article 19(2) of the Protocol (A/P1/7/91) on the Community Court of Justice (the “Protocol”). Furthermore, by virtue of Article 22(3) of the Protocol and Article 5(2) of the ECOWAS Revised Treaty, Member States are mandated (in accordance) with their constitutional provisions to immediately take all necessary measures to ensure the enactment and dissemination of such legislative and statutory texts as may be necessary for the implementation of the provisions of the Treaty, including the execution of the decisions of the Court.

It is against this backdrop that my paper will interrogate the challenges and factors militating against the effective and efficient execution of the Court’s decisions.

No doubt, the Court has become very attractive to citizens of the Community and its human rights jurisdiction is undeniably an added advantage. Statistics have shown that since 2001 till date, applications to the Court have blossomed in geometric progression. In trying to address the obstacles to implementation of the Court’s decision, I propose to examine the following issues: (a) Factors militating against the effectiveness of the Court; (b) Composition, jurisdiction and tenure of the Members; (c) Compliance by Member States with the judgments of the Court; (d) Failure by Member States to fulfil their obligations to the Community – expanding access for enforcement; (e) Implementation of the Community law by the national Courts; and (f) the way forward.

I. Composition, jurisdiction and tenure of Members of the Court

The ECOWAS Community Court of Justice or ECCJ established under Article 11 of the Treaty as the principal legal organ of the Community was stipulated to be constituted and executed its functions in accordance with the Protocol (Article 2 Protocol (A/P1/7/91)).

Article 3 of the 1991 Protocol States that the Court shall be composed of 7 independent judges selected and appointed by the authority from nationals of the Member States who are persons of high moral character, and possess the qualification required in their respective countries for appointment to the highest judicial officers, or are jurisconsults of recognised competence in international law. No two of the Members of the Court shall be from the same State and no person below the age of 40 years and above the age of 60 years shall be eligible for appointment as a Member of the Court. The Members of the Court shall elect a president and vice president from among their number who shall serve in that capacity for a term of three (3) years.

As regards the competence of the Court, the Court shall ensure the observance of law and of the principles of equity in the interpretation and application of the provisions of the Treaty. The Court shall also be competent to deal with disputes referred to it, in accordance with the provisions of Article 56 of the Treaty, by Member States or the Authority, when such disputes arise between the Member States or one or more Member States. A Member States may, on behalf of its nationals, institute proceedings against another Member State or institution of the Community, relating to the interpretation and application of the provisions of the Treaty.

By virtue of Article 10 of the Protocol, the Court can also offer advisory opinion on questions of the Treaty.

Article 9 of Supplementary Protocol (A/SP.I/01/05) is quite explicit on the jurisdiction of the Court. Apart from disputes between Member States, failure by Member States to honour their obligations under the Treaty, Conventions and Protocols, regulations, directives or decisions of ECOWAS, the Court's jurisdiction has been extended to cases of violation of human rights that occur in any Member State.

The jurisdiction conferred on the Court to adjudicate human rights violation disputes undoubtedly have increased the cases before the Court. More importantly, it has made the Court more attractive to litigants and therefore more popular too.

II. Compliance by Member States with the judgements of the Court

The ECOWAS Revised Treaty provides that judgments of the Court are binding on Member States, institutions of the Community, individuals and corporate bodies (Article 15(4) of the 1993 Treaty). Article 19(2) of the 1991 Protocol on the Community Court of Justice makes the Court's decisions "final and immediately enforceable." The Protocol further provides that Member States and institutions of the Community shall take immediately all necessary measures to ensure execution of the decisions of the Court.

It is instructive to note, however, that unlike other international Courts, the ECCJ does not have the benefit of institutions with powers of coercion to enforce its judgments and therefore can only rely on pressure generated from the political arm of the Community, the indulgence of national executives or the goodwill of national Courts.

The 1991 Protocol therefore made no provision for the method of enforcement of the judgments of the Court. Article 24 of the 2005 Supplementary Protocol, which amended the 1991 Protocol, however made provision for the method of enforcement and placed the responsibility of enforcement on the Member State in accordance with the its Rules of Civil Procedure.

Article 24(3) of the Supplementary Protocol of the Court prescribes that each Member State should appoint a National Authority for the purpose of reception and processing of execution of its judgment.

Notwithstanding the provisions of Article 24(3), not many decisions of the Court have been enforced. Indeed, report available indicates that out of 15 Member States, only four, i.e. Mali, Guinea, Nigeria and Burkina Faso have appointed the required National Authority. Research also shows that more than 55 judgments of the Court are not yet enforced.

III. Failure by Member States to fulfil their obligations to the Community – Expanding access for enforcement

Member States of ECOWAS are mandated to ratify and domesticate the ECOWAS Treaty Protocols and other legal instruments for the effective and unimpeded implantation of the provisions of the Treaty, including the enforcement of the judgments of the Court. These obligations are entirely within the domestic affairs of Member States. Non-refusal or neglect by Member States to implement the provisions render the judgments of the Court unenforceable, thereby depriving a successful party of the enjoyment of the fruits of their victory.

Another noticeable failure by Member States to fulfil their obligations in this regard is the inability to appreciate the basic principle governing the enforcement of judgment of international Courts – *PACTA SUNT SERVANDA* – "Sanctity of agreement" enunciated in Article 26 of the Vienna Convention on the Law of Treaties of 23rd May, 1969. This principle underlines the entire system of treaty-based relations between sovereign States. ECOWAS Member States should be prepared to be guided by this principle.

Member States have an obligation to comply with decisions of the Court since they form part of their

treaty obligations.

Still on failure to enforce judgments of the Court, Article 5 of the Supplementary Act on Sanctions against Member States that fail to honour their obligations provides that:

“The Community Court of Justice shall deliver judgments which include but not limited to financial sanctions against Member States in application of Article 24 paragraph 1 of the Protocol relating to the Community Court of Justice as amended by Article 6 of Supplementary Protocol A/SP.1/01/05 of 19th January 2005 when it notices that they have failed to honour their obligations as Stated in the community texts”.

The Supplementary Act A/SP.13/02/12 on sanctions against Member States that fail to honour their obligations to ECOWAS provides for political and judicial sanctions against Member States or their leaders who fail to honour their obligations to the Community, including the judgments of the Court.

Also of significance is the import of Supplementary Act on Sanctions against Member States that fail to honour their obligation. Articles 5 to 11 of the Supplementary Act clearly stipulate that the sanctions defined shall be enforced in increasing order of severity.

IV. Implementation of the Community by national Courts

Ordinarily, it should be expected that judgments of a supranational Court like the ECCJ should be honoured by Courts of Member States by virtue of the treaty agreement that is binding on all Member States. Secondly, the decisions of the ECCJ should be directly applicable in Member States because its basis is community law, which ought to be of superior weight to decisions of national Courts.

Some have argued that Member States’ Courts should receive and enforce the judgments of ECCJ. The contrary position however that is it should be treated as foreign judgments in accordance with the rules of enforcement of foreign judgments in other jurisdictions.

The reality on the ground however is that national Courts are wary to implement the decisions of ECCJ. Indeed there are many instances that national Courts have failed, refused or neglected to enforce the judgments of ECCJ.

V. The way forward

The major strategies for strengthening enforcement of compliance of the Court’s judgment include:

- a. Immediate appointment of National Authorities by all Member States.
- b. Give vitality to the provisions of Article 5(2) of the Revised Treaty which provides:
“Each Member State shall, in accordance with its constitutional procedures, take all necessary measures to ensure the enactment and dissemination of such legislative and statutory texts as may be necessary for the implementation of the provisions of the treaty.”
- c. Establishment of viable enforcement mechanisms for ECCJ decisions.
- d. Comprehensive publicity of the activities of ECCJ as a backlash to refusal of Member States to enforce decisions of the Court.
- e. ECCJ to play a more proactive role in order to secure a viable compliance enforcement mechanism for its judgments. This will entail the Court responding forcefully to the situation both in its jurisprudence and in actions outside the Courtroom.
- f. Partner with other supranational bodies to ramp up pressure for compliance with its decisions in a more forceful way.

- g. Quality of proceedings before the ECCJ must be at the level of international best practices. The decisions from such world class proceedings will potentially encourage more compliance by Member States.
- h. ECCJ to moderate on human rights pronouncements in order not to be viewed as too activist in nature. An overly activist posture or perception of the Court has the tendency of weakening compliance with its judgments.
- i. ECCJ must manage its growing number of cases and its increasing popularity in a positive manner.

STRATEGIES FOR STRENGTHENING THE EFFECTIVENESS OF THE ECOWAS COMMUNITY COURT OF JUSTICE

By

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Introduction

Established with the aim of juridictionalizing the ECOWAS⁹⁵⁹ Community law system,⁹⁶⁰ the ECOWAS Court of Justice (ECOWAS CJ) has seen a gradual expansion in its jurisdiction. Its original jurisdiction covered a wide range of issues for a Court that was still in the early stages of development⁹⁶¹. The Court was already a judge in many ways. Cases involving the ECOWAS community law, ECOWAS community civil service, extra-contractual liability for acts or normative acts, subject to grievance, institutions or agents of the Community in the exercise or on the occasion of the exercise of their functions have not escaped its jurisdiction.⁹⁶² The Court is even an arbitrator, pending the establishment of the ECOWAS Community Arbitration Tribunal. In other words, the Court is multi-tasking.

Notwithstanding this position, the Court has not succeeded in expressing its full mission as regulator of the Community legal system. It has thus been notable by its “absent presence” “through its silence, certainly due to the paucity of cases.

This apparent lethargy was remedied by the community parliament which, in its wisdom, widen the jurisdiction of the ECOWAS Court of Justice to include the protection of human rights.⁹⁶³ It was these new changes that allowed the Court to deploy its full potential. The Court thus left the stage of institutional dwarf to the status of community Hercules. Slowly but surely, the Court began to regulate the pulse of human rights protection through innovative and bold jurisprudence.⁹⁶⁴

This new jurisdiction will thus overshadow the former ones to constitute the Court’s flagship. Prior to the adoption of the January 2005 protocol, the ECOWAS Court had only seen about ten referrals.

959 The Economic Community of West African States (ECOWAS) was established by the Lagos Treaty of May 28, 1975. It comprises fifteen countries since the withdrawal of Mauritania: Benin, Burkina Faso, Cape Verde, Côte d’Ivoire, Ghana, Gambia, Guinea Bissau, Guinea, Liberia, Mali, Niger, Senegal and Sierra Leone, Togo. The organization of the ECOWAS Court of Justice is based on Protocol A/PI/91 adopted on 6 July 1991 by the Conference of Heads of State and Government. This Protocol was amended by a Supplementary Protocol amending the 1991 Protocol, adopted on 19 January 2005. Articles 4 and 11 of the original 1975 Treaty provided for the establishment of a “Tribunal”; it was not until the adoption of the Abuja Protocol in 1991 that its powers and functioning were prescribed and its name was changed: the “Tribunal” was replaced by the “Community Court of Justice”. The Lagos Treaty of 18 May 1975 was signed by Côte d’Ivoire, Dahomey, Gambia, Ghana, Guinea, Guinea-Bissau, Liberia, Mali, Mauritania, Niger, Nigeria, Senegal, Sierra Leone, Togo and Upper Volta. The Cotonou Revised Treaty of July 24, 1993 changed the name again and opted for the simple term “Court” (Article 15).

960 D. SANOU, *The Jurisdictionalization of Regional Economic Integration Organizations in Africa*, Thesis, Paris I, 2012, p. 384; S. N. TALL, *Law of African International Organizations. General Theory, Comparative Community Law, Human Rights, Peace and Security*, Paris, L’Harmattan, 2015, p. 48. Z. TOGBA, *The Law of Economic Integration Organizations in Africa (ECOWAS-CEMAC-UEMOA-WAMZ)*, Paris, L’Harmattan, 2014, 372 p. G. ISAAC, *General Community Law*, Paris, Masson, 4th ed. 1989. P. CAHIER, “The internal legal system of international organizations”, in R.-J. DUPUY, *Manual of international organizations*, Paris, 2nd ed., LGDJ, 1992, p. 377; J.-C. GAUTRON, “An autonomous and hierarchical legal system”, in J. RIDEAU (ed.), *From community law to union law, continuity and European avatars*, Paris, LGDJ, 2000, pp. 25-64; CJEC, 5 Feb 1963, Van Gend et Loos, Aff. 26/62.

961 The Supplementary Protocol (a/sp.1/01/05) amending the preamble, articles 1, 2, 9, 22 and 30 of protocol a/p1/7/91 on the Community Court of Justice, as well as article 4 paragraph 1 of the English version of the said protocol provides in its article 10 that “*The Court may be seized by : a) any Member State and, unless otherwise provided for in the Protocol, the Executive Secretary, in respect of actions for failure to fulfil obligations by Member States; b) any Member State, the Council of Ministers and the Executive Secretary in respect of actions for assessment of the legality of an action in relation to Community texts; c) any natural or legal person in respect of actions for assessment of the legality of any act of the Community adversely affecting him or her; d) any person who has been the victim of a violation of human rights; the application submitted to this effect: (i) shall not be anonymous; (ii) shall not be brought before the Court of Justice of the Community where it has already been brought before another competent international Court; (e) any Member of the staff of the institutions of the Community after unsuccessful exhaustion of the remedies provided for in the Staff Rules and Regulations of the Community; (f) the national Courts or the parties concerned, where the Court is required to give a preliminary ruling on the interpretation of the Treaty, Protocols and Regulations; the national Courts may decide themselves, or at the request of one of the parties to the dispute, to refer the matter to the Community Court of Justice for interpretation.*”

962 See Articles 9 and 10 of Protocol A/PI/91 adopted on July 6, 1991 by the Conference of Heads of State and Government.

963 According to Article 9(4) of the Supplementary Protocol A/ SP 1/ 01/ 05 of 19 January 2005 amending Protocol A/ P1/7/91 on the ECOWAS Community Court of Justice, “(d) *any person who is a victim of a human rights violation may apply to the Court (...): (i) the application submitted for this purpose shall not be anonymous, (ii) the application shall not be brought before the Community Court of Justice when it has already been brought before another competent international Court*”. The ECOWAS CJ in its judgment No. ECW/ CCJ/JUG/19/16 of July 1, 2016, on the case of *Djibril Bassolé v. Burkina Faso*, ruled that “the Court does not have the power to review the actions of an investigating judge, unless they substantially affect the rights of a person.

964 For example, as of November 5, 2014, the Court had recorded 182 cases, held 532 hearings, and issued 168 rulings. V. A. BAMBA, “The ECOWAS Court of Justice wants to make itself better known to the citizens of the community space,” *Le Journal*, September 22, *Bi-Weekly Journal of General Information*, No. 499.

A look at the statistics of the Court reveals that in 2018, eleven (11) decisions had been rendered and in 2019, twenty-one (21) judgments were pronounced. In this matter, the Court has received four hundred and sixty-six (466) cases since 2003, when the first case was brought to its attention. From that time until June 19, 2020, the West African Court has held 1,048 hearings, rendered 235 judgments, 121 preliminary rulings and received 34 applications for review of judgments. The Court also issued 18 review decisions, 31 orders, and 4 advisory opinions.⁹⁶⁵ 2018 was a very prolific year for the Court, because in addition to the 116 cases that were pending before the Court, 61 new cases were brought before it. This growth is likely to continue.⁹⁶⁶ This increase in cases has led to progress in the construction of the Court's doctrine. Thus, for example, the Court took into account the deprivation of applicants in the case of *Mani Koraou v. State of Niger*.⁹⁶⁷ This situation led Professor Sall to say that *"it may not be superfluous to suggest that a more systematic reflection on the issue is necessary."*⁹⁶⁸

In reality, this new competence did not come as a surprise. Some believe that *"the inclusion of fundamental rights as 'ambitious instruments of Community construction' is the result of doctrinal activism and the activities of human rights organizations. The ruling in Olajide Afolabi v. Federal Republic of Nigeria of 27 April 2004, which refused to examine an individual application, despite the proven violation of the applicant's fundamental rights, was the trigger for this activism, which led to the substantial reform that introduced the protection of fundamental rights into Community law"*⁹⁶⁹. Others presume that this new competence was the result of an imposition by Western technical and financial partners, for whom respect for human rights is a prerequisite for any constructive partnership. Indeed, *"the growing importance of fundamental rights is also perceptible, because respecting them is part of the perquisites that are now taken into account in international relations, particularly in terms of development cooperation. Respect for fundamental rights thus appears as a conditionality, i.e. the precondition for external partners to act. For example, the repeated violations of fundamental rights by certain ACP States, which are signatories to the Lomé Convention (Lomé I), has highlighted the need for the European Union to include, alongside the right to development, which has been the only priority until now, civil and political rights, in particular fundamental rights, the right to democracy, the right to good governance and the rule of law. This is the essence of the discourse underlying the Lomé II Convention, which was marked in part by the principle of freedom and human rights". As Professor Babacar Guèye pointed out, in summarizing the Lomé III compromise: "the ACP countries have accepted that human rights be included in the Convention,"⁹⁷⁰ a measure they had always considered inappropriate .»⁹⁷¹ The European Parliament, in its resolution 161/61 of May 17, 1983, affirmed for the first time that *"respect for civil and political rights is one of the conditions for devel-**

965 <http://www.pressafrik.com/27-ans-d'existence-la-cour-de-justice-de-la-cedeao-expose-ses-misères> (Accessed on August 16, 2021), The President of the ECOWAS CJ, Justice Asante noted in this regard that "due to the number of pending cases inherited by the current judges, which was 108 in 2018 and increased to 119 in 2019, we were committed to reducing this number with a view to preserving the confidence of ECOWAS citizens in the Court as a Court of appeal for the timely administration of justice. As part of this commitment, between September 16, 2018 and September 15, 2019, the Court rendered 35 rulings including 28 judgments and 7 preliminary rulings".

966 Speech by Aminata Mallé SANOGO at the start of the 2007-2008 judicial year, published in the Court's bulletin, No. 1, Vol. 1, January-March 2008, p. 11. The former president of the Court, Mrs. Aminata Mallé SANOGO, Stated in her speech at the start of the 2007-2008 judicial year that "the justice of the ECOWAS community cannot be the justice of the wealthy". In reality, she was laying the groundwork for the idea of legal aid to be granted to NGOs, notably the NGO Osiwa and the West African Bar Association. Although this idea has not yet been put into practice, there have been cases in which NGOs have helped plaintiffs bring cases to Court (such as the case of the cutting off of the Internet connection during political demonstrations)

967 ECW/CCJ/JUD/06/08 October 7, 2008, Hadidjatou Mani Koraou v. State of Niger, *"the applicant in fact invoked her difficult material and financial situation to ask the Court, invited to collect evidence, to move to Niamey in order to avoid the cost of travel to Abuja. The Court granted this request and the case thus has the singularity of having been adjudicated outside the seat of the Court"*.

968 A. SALL, The Justice of Integration: Reflections on the Changes in ECOWAS and WAEMU, Dakar, CREDILA, 2011, p. 395.

969 B. AMADOU ADAMOU, Constitutionalism in the test of integration in the ECOWAS space: contribution to the study on the protection of fundamental rights since the democratic reform in Africa, Paris, L'Harmattan, 2020,

970 Making reference to CADHP.

971 B. GUËYE, "The inclusion of a human rights clause in the Convention - The attitude of African States", *Revue internationale de droit africain*, Édition juridiques africaine, EDJA, n° 28, 1996, pp. 7- 42, spec. p.30.

opment.⁹⁷² In this regard, “The Lomé IV Convention of December 15, 1989,⁹⁷³ allowed for the introduction of a clause on democracy with reference to human rights, democratic principles and the rule of law, and the mid-term review, based on the Mauritius Agreement signed on November 4, 1995, pave the way for its implementation. Henceforth, respect for democratic principles and human rights is also taken into account and is considered an essential element of the UN system’s cooperation agreements with third countries.⁹⁷⁴ Respect for fundamental rights has become a criterion of good governance. The latter is a condition for aid from international donors.⁹⁷⁵ This involves “making the partnership dependent on certain requirements, such as respect for certain democratic standards”⁹⁷⁶ in reference to the conclusion of Economic Partnership Agreements (EPAs). Any economic partnership with the European Union and the United States is therefore tied to the respect of the rule of law.

However, one can also add the desire for conformity based on the fashionable effect of having a regional system for the protection of human rights with judges closer to the West African reality. This new competence, however, has not been pushed to the limit. Indeed, DIOP Omar notes that “the ECOWAS Court of Justice does not have jurisdiction to hear cases of massive human rights violations under this provision. It cannot therefore deal with cases such as crimes of genocide, crimes against humanity and war crimes.”⁹⁷⁷ Yet, West Africa is not immune to international crimes.

Judges exercise their mandate with bravery and a duty of ingratitude. This acquired autonomy was not so obvious in a West African society marked by a predominance of political powers that absorb the judicial authorities. The Court of Justice remains an example of independent justice with a renewed hope of democratization through the legal protection of fundamental rights. The quality of its work is reflected in a few major judgments on the following cases: CDP v. Burkina - Faso⁹⁷⁸ decision, Baré Mainassara v. Nige⁹⁷⁹, Hissène Habré v. Senegal,⁹⁸⁰ the ANC MP v. State of Togo, Kpatcha Gnassingbé v. Togo⁹⁸¹, the judgment of April 18, 2021 on the case between the Social Liberal Union and Senegal, in which the Court denounced the system of sponsoring presidential candidates provided for in the Senegalese electoral code following its reform in 2018 for the presidential elections of 2021.

The Court’s record is honourable. The Community legal system has become more attractive and the Court has become the showcase of an ECOWAS that is under increased political criticism. The

972 JOCE C 161/61 paragraph V, 17/05/1983

973 Entered into force on September 1, 1991; S. GANDOLFI and P. MEYER-BISCH, (eds.), *Conditionality in International Cooperation, Proceedings of the Yaoundé Colloquium July 20-22, 2004*, Publication of the UNESCO Yaoundé Office, 132 p.

974 B. AMADOU ADAMOU, Constitutionalism put to the test by integration in the ECOWAS region: a contribution to the study of the protection of fundamental rights since the democratic change in Africa, op.cit. p. 38.

975 D. KOLACINSTKI, Economic analysis of human rights, Presses universitaires de Rennes, 2004, 348 p.

976 A. SALL, ECOWAS External Relations, op. cit, p. 203; B. FAUCHEUX, B. HERMELIN, J. MEDINA, The Impact of the Economic Partnership Agreement between the EU and West Africa, Paris, GRET, 2005/12, 37 p. D. KOLACINSTKI, Economic analysis of human rights, Presses universitaires de Rennes, 2004, 348 p.

977 O. DIOP, « ECOWAS Court of Justice, judge of arbitrary detention », in Mélanges en l’honneur à Robert Dossou, L’amphithéâtre et le prétoire. Au service des droits de l’homme et de la démocratie, F. J. AÍVO, J. du BOIS de GAUDUSSON, Ch. DESOUCHES and J. MAÍLA (dir), L’Harmattan, 2020, p. 500.

978 ECW/CCJ/JUG/16/15, CDP et al. v. The State of Burkina, EC July 13, 2015 (in this ruling the Court intervened in the Burkinabe electoral political game by censoring a provision making former supporters of the president deposed by the revolution ineligible).

979 ECW/CCJ/APP/25/13, Oct. 23, 2015, The Assigns Ibrahim Mainassará Bare v. State of Niger, (the Court sidesteps the effects of an amnesty law in the name of the victims’ right to the truth resulting in the preservation of the obligation for the investigating judge and the public prosecutor to open a judicial inquiry).

980 ECW/CCJ/JUD/CCJ/06/10 of November 18, 2010, Hissène Habré v. Senegal; ECW/CCJ/RUL/05/13 of November 5, 2013 aff. Habré Hissène v. Senegal. A. SALL, The Case of Hissène Habré. National and international legal aspects, Paris, L’Harmattan, 2013; B. OKIEMY, “ The judicial path of Mr. Hissène Habré before the Senegalese Courts ”, Legal and Political Journal of French-speaking Countries, No. 3, 2006, pp. 362-390 (the Court is paving the way for an international trial under the auspices of an ad hoc international criminal Court)

981 ECW/CCJ/JUD/06/13 of July 3, 2013, Kpatcha Gnassingbé and others v. Togo; ECW/CCJ/JUD/08/15 of April 24, 2015, case of Gnassingbé Kpatcha and 6 others v. State of Togo (Kpatcha II judgment); ECW/CCJ/JUD/10/16 of May 17, 2016, Pascal Bodjona Akoussoulelou v. State of Togo

ECOWAS Court of Justice is now often referred to as the “watchdog of political rights.”⁹⁸² Moreover, this work of the Court is corroborated by a regulatory anchoring of the Court’s judgments which have force of law⁹⁸³, authority of *res judicata*⁹⁸⁴ and authority of interpretation.⁹⁸⁵ Moreover, the Court did not hesitate to recall the supranationality of these judgments to which are added the principles of primacy and direct effect of the community norms.

However, it is worth noting that this improvement conceals a real test of the Court’s effectiveness. In concrete terms, through its unbridled and pro-active action, the Court does not fail to denounce and condemn countries. As a result, the Court sometimes faces the refusal of countries to execute its judgments. Despite the heading “means of enforcement” contained in the amended 1991 Supplementary Protocol relating to the Court, it is clear that the binding and enforceable nature of the judgments enshrined in the texts are ignored by Member States. This attitude contrasts with the principle of community loyalty and the rule of law, which is however celebrated in the ECOWAS legal space. The environment of the Court seems hostile to it. The highly political resonance of certain decisions does not sit well with the judicial outcome of disputes. The impression created is that the judge’s voice is not heard. To compound this situation, the president of the commission, a political body par excellence, does not always seem to be fulfilling his role. He, who has the same right as the Member States to bring an action for failure to fulfil obligations, seems to be mired in a questionable silence. He thus shows his inability to exert any pressure on the Member States so that they comply with their Community obligation to execute the judgments. Such a situation obviously undermines the requirement that the Court’s decisions should be effective.

Other difficulties affect the effectiveness of the Court. These include the lack of human and techno-

982 S. T. EBOBRAH; “Human rights instruments in the work of the ECOWAS Community Court of Justice, is there a need for a Community Charter of Rights?”, paper presented at the International Conference of the Court held in Bamako, Mali from 18 to 21 April 2018.

983 Article 24 of the Supplementary Protocol A/ SP 1/ 01/ 05 of 19 January 2005 amending protocol A/ P1/7/91 entitled “Enforcement of judgments of the Court” provides that “1. *judgments of the Court which impose a pecuniary obligation on persons or States shall constitute an enforceable instrument.* 2. *The enforcement, which will be submitted by the Registrar of the Court of the Member State concerned, shall be governed by the rules of civil procedure in force in that Member State.* 3. *The enforcement formula shall be appended, without any other control than verification of the authenticity of the instrument, by the national authority which the Government of each Member State shall designate for this purpose.* 4. *Member States shall designate the national authority competent to receive or enforce the decision of the Court and shall notify the Court of this appointment.* 5. *Enforcement may be suspended only by virtue of a decision of the Community Court of Justice. These provisions are corroborated by article 22 of the said protocol, which States that “the judgments of the Court shall be immediately enforceable and shall not be subject to appeal”.*

984 Article 6 of the Court’s rules of procedure provides that “*the judgment shall be binding from the date of its pronouncement*”. Secondly, article 154 of the revised ECOWAS treaty of 1993 provides that “*the judgments of the Court of Justice shall be binding on Member States, on the institutions of the Community, and on natural and legal persons.* Article 22 of Protocol A/P.1/91 on the Court of Justice provides that “*the judgments of the Court of Justice shall be binding on Member States, institutions of the Community, and natural and legal persons*”.

985 . Article 19.2 of the Supplementary Protocol A/ P1/7/91 on the Community Court of Justice provides that: “*the decisions of the Court shall (...) subject to the provisions of this Protocol relating to review, be immediately enforceable and shall not be subject to appeal.*”

logical resources,⁹⁸⁶ the inadequate number of translators and the lack of office space⁹⁸⁷. In the same vein, a former President of the Court, Judge Traoré, mentioned the lack of space and the discussion with the host government for the provision of appropriate buildings for the Court.⁹⁸⁸

Moreover, it is worth noting that the national Courts are on the fringe of this Community judicial process, though they are in the forefront and represent the common law jurisdictions of the Community law. However, national judges hardly apply the Community. Between assumed aversion and ignorance of their function as community judges, the causes of this trend are the early signs of a regional integration in search of reference points.

These many difficulties do not adversely affect the quality of the Membership and mandate of the Court. A textual analysis reveals a measure of methodical rigor in the process of recruiting judges at various stages. The tenure of judges is organized in such a way that the Court is not hijacked by judges of the same nationality or by gerontocrats. This process of emulation ensures confidence.

Following these preliminary observations, the analysis of strategies for strengthening the effectiveness of the Court requires us to review, on the one hand, the poor context of decision-making by the ECOWAS Court of Justice (I) and, on the other hand, the limited execution of the Court's judgments (II).

I. The poor context of decision making by the ECOWAS Court of Justice

The Court's judicial function is marked by a perfectible structure and a noted aversion of national judges to Community law.

A. Perfectible structuring of the ECOWAS Court of Justice

An analysis of the Court's architecture reveals some concerns that are consistent with a harmonious textual organization. The composition of the Court is far from being approved by a discerning eye (1) and the profiling of the judges' mandate shows a lack of optimal supervision.

B. A deceptive composition of the Court

The composition of the ECOWAS Court of Justice is outlined in Article 3 of Protocol A/P 1/7/91 on the Community Court of Justice.⁹⁸⁹ Some elements stand out at a glance: the selection criteria for judges, the number of judges and the age requirements. With regard to the selection criteria, it is important to note the requirement of independence of future judges, high moral value, being a citizen

⁹⁸⁶ <http://www.pressafrik.com/27-ans-d'existence-la-cour-de-justice-de-la-cedeao-expose-ses-misères>

(Accessed on August 16, 2021). *The president of the Court, Justice Edward Asante, noted that "Overall, the Court has only three IT staff, as indicated in its 2018 organizational chart. It owes the success of its three-week virtual Court training to all three IT staff and to the equipment vendors whose involvement has just ended. So it might as well be said that without the constant presence of at least two IT people in the Courtroom and another in the Registry to support the system, this whole structure would break down."* And "if the three available IT people focus on the five- to six-hour Court hearings every day, the other parts of the Court would not work. And if they just take care of the other departments, the Court itself would be paralyzed. Hence the urgency, according to Mr. Asante, of support for his Court to immediately hire at least three new IT staff to fully meet all its IT needs. President Asante expressed concern about the reduction in the number of translators from nine to six in the 2018 organizational chart. He explained, "Judges need timely translation of pleadings into the three official languages to facilitate their work. However, insufficient capacity in the Language Services Division can only lead to excessive delays in the administration of justice. At present, there are 431 proceedings awaiting translation, of which 98 are in English, 89 in French and 224 in Portuguese.

⁹⁸⁷ During the inauguration speech of the new judges in August 2018, the Court's chief registrar, Tony Anene-Maidoh, "listed other constraints faced by the Court, including the insufficient number of translators, whose number has been reduced from nine to six in the Court's new organizational chart, instead of the 12 needed to ensure efficiency of work, as well as the lack of office space." <http://www.courtcowas.org/fr/2019/02/14/lhonorabile-juge-edward-asante-elu-president-de-la-cour-de-la-cedeao> (accessed August 16, 2021)

⁹⁸⁸ Idem

⁹⁸⁹ JO CEDEAO, Juillet 1991, vol 19, p. 5.

of a Member State, qualification for the highest judicial offices or being a renowned jurisconsult in the field of international law, and appointment by the Conference. The number of judges is seven (7), with the impossibility for a country to have two Members. Concerning the age requirements, the prospective judges must be at least 40 years old and at most 60 years old at the time of their appointment. They are not eligible for reappointment if they are over 65 years of age. The above elements tend to demonstrate a robust and diversified composition of the Court, which should ensure its effectiveness.

However, on closer scrutiny, the analyst can make a few observations. While the presence of women in the Court is to be welcomed, this quality cannot hide the highly political nature of the appointment of judges. Indeed, the recruitment of judges seems to be open, but a system of implied sponsorship seems to emerge, as it is ultimately the Heads of State who appoint after a screening by the ECOWAS judicial council composed of the presidents of the supreme Courts of Member States. The emerging sponsorship system is highly questionable in terms of the impacts it could have. The recruitment procedure also requires that unqualified candidates for the highest judicial offices must have a qualification in international law. However, experience has shown that political arrangements have allowed this requirement to be set aside. Some judges have not made any publications on international law and have not been Members of any international Court in the past.⁹⁹⁰

Professor Alioune Sall, who to date has been the only academic to have been a Member of the Court, has deplored the absence of scholars within the jurisdiction. They are all career magistrates⁹⁹¹, and there is no lawyer, no scholar, no jurisconsult.

Moreover, the lack of specialization of the judges weakens, without a doubt, the effectiveness of the Court. This is so because the Court is increasingly confronted with specialized litigation, whether in criminal or civil matters.

Similarly, since July 2018, the number of judges has been reduced to 5. Such a reduction in the number of judges has automatically led to a latent paralysis of the institution and is having a lasting effect on the Court's efficiency. Moreover, the prospects of organizing the Court into several specialized chambers are being undermined by the reduction in the number of judges, while the number of cases is growing rapidly.

It is important not to lose sight of the language issue. The emphasis could have been placed on the pro rata representation of English, Portuguese and French speaking judges. The rules of rotation mean that we can end up with a Court that is mono-coloured from a language point of view.

What about the tenure of the judges?

990 A. SOW " The dissemination of West African Community law ", Civitas Europas, 2016/2, n° 37, pp. 351 - 370, spec. 367.

991 <http://www.Courtecowas.org/fr/2019/02/14/lhonorabile-juge-edward-asante-elu-president-de-la-cour-de-la-cedeao> (accessed on August 16, 2021): "Justice Asante, 54, was a judge of the High Court of Sekondi, the capital of the Sekondi-Takoradi Metropolitan District in the Western Region of Ghana, and a supervising judge in the region. The judges also elected the Honourable Justice Gberi-Bê Ouattara, from Côte d'Ivoire, as Vice President. Until his appointment to the ECOWAS Court, the 57-year-old Vice President was an Advocate General in the office of the Attorney General at the Supreme Court of his country. The two elections took place hours after the new judges took office after being sworn in on July 31, 2018 before the former President of the ECOWAS Conference of Heads of State and Government, President Faure Gnassingbé of Togo. The other three judges of the Court who were also sworn in are Honorable Justice Dupe Atoki of Nigeria, Honorable Justice Keikura Bangura of Sierra Leone and Honorable Justice Januaria Tavares Silva Moreira Costa of Cape Verde. Hon. Justice Atoki is the former Director General of the Consumer Protection Council of Nigeria, while Hon. Justice Bangura was a judge of the High Court of Sierra Leone. The fifth Member of the panel of judges of the Court, the Honorable Justice Costa, was a judge of the Supreme Court of Cape Verde and a Member of the Superior Council of the Judiciary

C. An insufficiently defined tenure for judges

Article 4 of the 1991 protocol, entitled the tenure of office of Members of the Court, States the duration of the term of office (4.1), the conditions for the replacement of judges (4.2), the cases of inability to serve (4.4, 4.5, 4.6), sanctions in case of misconduct (4.7), cases of deportation of judges (4.8, 4.9, 4.10) and incompatibilities (4.11). The wording of Article 4 of the Protocol makes it possible to lay down the foundations to guarantee the independence of judges⁹⁹². However, it seems obvious that we can go further. The limitation of the term of office to two constitutes a barrier, but we could have gone further by establishing the permanent tenure for judges. Similarly, the duration of the mandate can be considered short in comparison with the nine-year mandate of the European Court of Human Rights. The model of renewal every three years lacks clarity. A clearer wording of this paragraph would be more enlightening. There is no requirement for judges to declare their assets. Such a requirement would enhance the credibility and accountability of judges. Things have been complicated even further by the reduction of the tenure of the judges to a single term of four (4) years.

By not requiring judges to recuse themselves when a case involves their home State, the texts create a perception of doubt about the Court's role. Indeed, the political nature of the appointment of Members and the impact of judgments call for the establishment of such safeguards. In the same vein, there is no list of the causes of incompatibility of the function of judge and the exercise of other professional activities. The only references to notorious misconduct and physical and mental incapacity are few. A code of ethics for judges of the Court would have been desirable to add to the existing arsenal. The decision-making context is still compounded by the aversion of national judges to Community law.

D. Observed aversion of national judges to Community law

The key to successful integration is undeniably the interest of national judges in Community law. In the ECOWAS region, judges do not always make regular reference to community sources (1). Consequently, the case law on integration is a real elusion.

E. Irregular reference to Community sources

The normative structure of the ECOWAS legal system is now very dense. On the one hand, there are written norms such as treaties, regulations, decisions, directives, protocols and Supplementary Protocols, which are essentially written norms with binding value. On the other hand, there are written norms resulting from case law and community practice that can be described as customary. However, a general overview of the judicial decisions of national judges reveals a virtual absence of Community sources. It is surprising that the normative force of the Court's judgments and the benefit of the primacy and direct effect characteristics do not lead national judges to refer to the judgments of the ECOWAS Court of Justice. These contain interpretations of international human rights conventions and indicate the meaning to be applied. Also, sometimes general principles of law are created and international community customs are discovered. In addition, the Court imports foreign norms into the community system. These norms do not always serve as sources of inspiration for the judge in order to construct a jurisprudential rule, but the Court uses them directly as a major part of its argument and as a basis for its rulings.

The fact is that neither the litigants nor the judges refer to Community case law as a relevant legal argument that should lead national judges to change their national case law or even to remove their incompatible national text. By enshrining the constitutional principles common to the Member States in the Supplementary Protocol of 2001, the Community legislator went beyond the logic of constitutional identity, which is moreover absorbed by the common Community objectives. The consolidation of democracy and the protection of human rights have become the key precepts of the community norms. Consequently, national judges should revere community law, which has a more assertive

992 J. I. SOW, *The judicial function in the WAEMU and ECOWAS community systems*, L'Harmattan, Paris, 2021, p. 63

legitimacy. To a certain extent, the rather general character of community texts could allow national judges to rectify national flaws. For example, the 2001 protocol deals with several aspects, including fair trial, constitutional and electoral law...

Unfortunately, the national judge still refuses to carry out proprio motu conventionality checks, which would have made it possible to clean up several national provisions, even if they were constitutional. It is interesting in this perspective to welcome the reference to a Supplementary Protocol of ECOWAS by the Constitutional Court of Togo. This initiative has attracted the attention of scholars who have seen in it the beginnings of a communitarization of constitutional law. However, this approach appeared to be undermined when the Togolese constitutional Court declared that it had endorsed the president of the republic as chair of the superior council of the judiciary, whereas the 2001 ECOWAS protocol upholds a separation of powers.

To date, the ECOWAS Court of Justice has not recorded a single preliminary ruling concerning community standards from national Courts. This shows a lack of dialogue between national Courts and the ECOWAS Court. One author notes that *"for all that, the mechanism for incorporating community law into the domestic legal system of seems to be dysfunctional. The case law of the Court of Justice should logically have led to the inclusion of national Courts among the bodies responsible for protecting the fundamental rights referred to in Community texts. The mechanism provided for in Article 10(f) of the Accra Protocol should allow national Courts to be included in the preliminary ruling mechanism, and consequently create relations between the domestic legal systems of Member States and the Community Court of Justice. However, the lack of inclusion of Community texts within the States does not encourage interaction or judicial cooperation between the systems, as intended by the ECOWAS Treaty. This lack of incorporation of community texts into the different national legal systems is not likely to weaken the scope of the innovations introduced in judicial matters."*⁹⁹³ The reasons for the absence of references to community sources are manifold. Professor Sall believes, for example, that it is the paucity of integration litigation due to the very limited trade flow in the West African region that primarily explains the situation. But beyond that, it is necessary to note the lack of initial and continuous training of magistrates and lawyers in ECOWAS community law, corroborated by the transparency of the Court's jurisprudential work. Publications on the Court are insignificant and hardly encouraged.

As common law judges of Community law, national judges should be ingenious in proposing jurisprudential constructions to make integration law effective or to bring it down to the everyday life of citizens.

Lack of a case law on integration

The implementation of integration law in national legal systems is the responsibility of national judges. The European example is quite edifying and allows us to appreciate the pre-eminent role of judicial audacity. In fact, it is in the nature of countries, especially political actors, to resist the undermining of their normative sovereignty. The suppression of this resistance is based on jurisprudential theories⁹⁹⁴ constructed on the fringe of any text. The case law for the implementation of Community law has been a major strategy for integration in Europe. The trigger was the work of the ECJ itself, which affirmed the leading principles of the Community.⁹⁹⁵ It also Stated that the effectiveness of

993 B. AMADOU ADAMOU, Constitutionalism put to the test of integration in the ECOWAS space: a contribution to the study of the protection of fundamental rights since the democratic opening in Africa, op.cit., p. 75; P. PESCATOR, "Cooperation between the community Court, national jurisdictions and the ECHR in the protection of fundamental rights", Journal of the Common Market and the European Union, n° 466/March 2003, pp. 151-159; A. SALL, Changes in the integration of States in West Africa: an institutional approach, op. cit. pp. 170 - 178.

994 R. ABRAHAM, "The norms of Community law and international law before the French administrative judge", in SFDI, International law and Community law, Current perspectives, Paris, Péroné, 2000, p. 284; SIMON, The Community legal system, op.cit., pp 442 - 443; CE, 10 Jan. France Nature

995 The UEMOA CJ has moreover ruled that "primacy is beneficial to all community norms, both primary and national administrative, legislative, jurisdictional and even constitutional, because the community legal system prevails in its entirety over national

Community law implies that “the competent national authorities are prohibited by law from applying a national provision that is recognised as incompatible with the Treaty and, where appropriate, are obliged to take all necessary steps to ensure that Community law is fully effective.”⁹⁹⁶ National judges have relied on these principles to deduce the blocking effect of Community law, which involves exceptionally holding the State responsible for laws that disregard an international commitment. The Gardedieu⁹⁹⁷ decision of the French Council of State was the first to hold the French government liable. Similarly, in the decision on the company “*société d’éditions et protection route*,” the French judge held the French State liable for the French legislator’s disregard of European Union standards, specifically the unwritten general principles of legal certainty and legitimate expectation established by European case law.⁹⁹⁸ Finally, remarkably, in Gestas⁹⁹⁹ ruling, the Council of State held the State liable for the violation of EU law attributable to itself in a judgment, yet the Darmont¹⁰⁰⁰ case law excluded this possibility because of the requirement to respect the authority of res judicata when the case has been judged by a supreme Court. In doing so, the ECOWAS CJ appears as “*the centre-piece of the system and the national judges as the “executors” of Community law in their respective legal systems.*”¹⁰⁰¹

National integration case law is lacking in the judicial constructions of national judges in the ECOWAS region. They must draw inspiration from the creative solutions developed by their counterparts in order to give vitality to integration. However, the ECOWAS Court of Justice has already shown the way by affirming the principle of the supranationality of community standards in the Aziabli Abia and others v. Benin case: “*ECOWAS is an international organization, to which, once the States confer powers and competences, its norms to take precedence over those of the Member States. By adhering to the international organization, by subscribing to its norms as an autonomous legal person, the States renounce a part of their freedom and accept that the will of the organization is imposed on them. As a result, they cannot invoke their own national law to escape their Community obligations. In this case, it is inconceivable that the government of Benin would hide behind constitutional provisions¹⁰⁰² to ignore its duties under the ECOWAS treaty and all the acts that follow, including the protocols governing the Court.*”¹⁰⁰³ The constructions of the national judges must go in the direction of consolidating the common objectives of ECOWAS¹⁰⁰⁴ for which the ECOWAS Court of Justice is the

legal systems”; F. SAWADOGO and L. IBRIGA, “The Implementation of UEMOA and OHADA Community Laws by the National Judge”, Paper presented at the regional sensitization seminar on legal and judicial security of economic activities within UEMOA, ECOWAS and OHADA, Ouagadougou, 6 to 10 Oct. 2003, www.juriscopie.org, (accessed 24 Oct. 2015), p. 16; M. MABCE, La CJ UEMOA. Its organization, competences and rules of procedure, African Legal Publishers, Coll. African Community Law, 1999, 118 p.

996 ECJ, July 13, 1972, Commission v. Italy, Rec. p. 529.

997 CE, Feb. 8, 2007, Gardedieu, Rec. , p. 78 : “*Whereas the responsibility of the State due to the laws is likely to be engaged, on the one hand, on the basis of the equality of the citizens with regard to the public duties, to ensure the compensation for losses resulting from the adoption of a law, on the condition that this law did not intend to exclude any compensation and that the loss for which compensation is requested, being of a serious and special nature, cannot, therefore, be considered as a burden normally incumbent on the interested parties, on the other hand, because of the obligations which are the responsibility of the State, cannot, therefore, be regarded as a burden normally incumbent on the persons concerned, and secondly, by reason of its obligations to ensure compliance with international conventions by the public authorities, to make reparation for all the damage resulting from the intervention of a law adopted in disregard of France’s international commitments.*”

998 EC, Feb. 8, 2007, Sté Arcelor Atlantique and Lorraine and others, Rec. p. 55.

999 EC, June 18, 2008, Gestas, Rec. p. 230: “by virtue of the general principles governing the liability of the public authorities, a gross negligence committed in the exercise of the jurisdictional function by an administrative Court is likely to give rise to a right to compensation. While the authority that attaches to res judicata precludes such liability in cases where the alleged gross misconduct results from the actual content of the Court decision and where that decision has become final, the State’s liability may nevertheless be engaged where the content of the Court decision is vitiated by a manifest violation of Community law.

1000 EC, 29 Sept. 1978, Darmont, Rec., p. 542

1001 J. MOLINIER, J. LOTARSKI, European litigation law, op. cit. p. 100.

1002 Article 11 of the Beninese constitution States that: “*the constitutional Court is the highest jurisdiction in constitutional matters (...) it guarantees the fundamental rights of the human person and public freedoms*”.

1003 ECW/CJ/APP/01/05, case Aziabli Abia and others v. State of Benin. But before this judgment, the ECOWAS Court of Justice, in its judgment in the case of Professor Etim Moses Essien v. Republic of the Gambia of March 14, 2007, reminded States of their obligations under community texts by implicitly affirming the principle of primacy.

1004 Article 5 of the revised ECOWAS Treaty of 1993 States that “*1. Member States shall undertake to create conditions conducive to the attainment of the objectives of the Community; in particular, they shall take all necessary measures to harmonize their strategies and policies and shall refrain from any action likely to jeopardize their attainment. 2. Each Member State undertakes to take all*

great conductor and the national judges the instrumentalists.

In sum, the Community law still has a long way to go to achieve recognition in the Courts of national judges. Nevertheless, one remains doubtful as to the rapid fulfilment of this goal because of the limited execution of ECOWAS Court judgments.

II. Limited implementation of the ECOWAS CJ judgements

Considered as a component of a fair trial, the right to enforcement of a Court decision is sometimes difficult in the ECOWAS region. The Court remains helpless with regard to the difficulties observed (A). These difficulties therefore call for proposals on how to remedy the situation (B).

A. Difficulties observed

There is reluctance and frustration in the execution of ECOWAS Court judgments. The assessment made by Mr. Tounkara¹⁰⁰⁵ on the attitudes of Member States towards the Court sufficiently confirms this *contra communis* reality of the community. They are reflected in the persistent political constraints and the apathy of national jurisdictions.

B. Persistent political constraints

The political repercussions of the Court's decisions sometimes lead to resistance from the political authorities of Member States. In fact, the Court sometimes disagrees with some national political authorities. This judicial disapproval is sometimes perceived as an affront and a clash of political agendas. The attitude of the States reveals a certain distrust of the Court, which they consider to be invasive, particularly when the judgments have a strong political connotation.¹⁰⁰⁶ Several cases attest to this. For example, in the case of Abdoulaye Baldé, Karim Wade and others, the then Minister of Justice, Aminata Touré, had announced even before the ECOWAS Court of Justice decision that the Senegalese authorities would not comply with the decision if it did not go the way the government wanted. It has been noted that the decision of the community judge declaring the violation of the applicants' freedom of movement has not been applied by the Senegalese government. In the case of Mamadou Tandja, the community judge had unsuccessfully considered his continued detention under house arrest by the military junta as a violation of his freedom of movement and arbitrary detention. In the same vein, when Cote d'Ivoire was condemned for the arbitrary arrest and imprisonment of Simone and Michel Gbagbo, the Ivorian authorities refused to apply the consequences of this decision.¹⁰⁰⁷ Togo has also taken part in this movement of defiance of the community justice

appropriate steps, in accordance with its constitutional procedures, to ensure the enactment and publication of the laws and regulations needed to implement the provisions of this Treaty. 3. Each Member State shall undertake to fulfil its obligations under this Treaty and to comply with the decisions and regulations of the Community. Furthermore, Article 57 of the ECOWAS Treaty of 28 May 1975 provides: "1. Member States shall undertake to promote judicial cooperation with a view to harmonizing their judicial and legal systems..."

1005 D. TOUNKARA, "West African Public Order", Malian Journal of Legal, Political and Economic Sciences of Bamako, special issue no. 3, 2016, pp. 317 - 353: According to the author, three attitudes are observed with regard to the Court's decisions: "*The first positive attitude involves the execution of the Court's judgments. Thus, each time they have been ordered by the Court to pay reparative compensation to an applicant, the States have always responded favorably. The most prominent example is Niger. The Court ordered the State of Niger to pay the sum of 10,000,000 (ten) million CFA francs, or 7,500 euros, to Mrs. Hadijatou Mani Koraou for moral damages resulting from the State of slavery in which she was reduced. The second is negative and is the failure to comply with the Court's power of injunction. On several occasions, the Court has enjoined several countries, without much success, to release arbitrarily and illegally arrested persons as soon as possible. Thus, the injunctions for the immediate release of Mr. Mamadou Tandja and Mr. Michel Gbagbo have not been carried out by the States of Niger and Côte d'Ivoire respectively. Similarly, we can regret the attitude of the Senegalese authorities in a similar case. Condemned by the ECOWAS Court of Justice to lift the ban on the exit of the national territory of the applicants Karim Wade and others, the State of Senegal has also refused to implement this decision. The third, concerning the Gambian Former President Jammeh, was not only the refusal to abide by the Court's decisions, but also, and above all, the denial of the Court's jurisdiction over human rights violations. Thus, in the case against the applicant Ebrimah Manneh, the Gambia did not even come to the hearing to present its arguments, arguing that the dispute did not fall within the jurisdiction of the West African judge.*"

1006 J. BERGE and M-L NIBOYET (eds.), *The acceptance of Community law in the private law of the Member States*, Brussels, Bruylant, 2003, 316 p; J. RIDEAU, *Institutional law of the European Union and Communities*, Paris, L.G.D.J., 1999, p. 165 et seq; J.- P. JACQUÉ, "Practices of the Community Institutions and Development of the Community Institutional Structure", in R. BIEBER, G. RESS (eds.), *Die Dynamik des Europäischen Gemeinschaftsrechts*, Nomos Baden-Baden, 1987, p. 377 et seq.; P. PESCATOR, "The Legal Order of the European Communities. Study of the sources of Community law", in F. PICOD (ed.) *European Union Law*, Brussels, Bruylant, 2006, p. 188

1007 D. BAPIDI, *ECOWAS in the Ivorian crisis: 2002-2007*, Academics, Abidjan, 2015, p. 63; S. KUATE TAMEGHE, *Justice, its functions, its procedures* - OHADA, AU, ECCAS-CEMAC, ECOWAS-UEMOA, United Nations, Cameroon, L'Harmattan,

system. The political authorities had refused to implement the decision of the ECOWAS Court of Justice rejecting the expulsion of Members of the National Assembly.”¹⁰⁰⁸

Recently, when the Court condemned the State of Senegal because of its sponsorship system established for the presidential elections, the reaction of the Senegalese government spokesperson, the Minister of Local Government and Territorial Development on the decision was harsh. She told RFI that *“sponsorship was discussed during the political dialogue and was also the subject of a law in the national assembly. From a legality perspective, the sponsorship system is more than legal in relation to our constitution and our legislation (...) it is a rather surprising decision, Senegal is among the most democratic countries of ECOWAS. We are in the process of affirming our sovereignty, sponsorship is a legal democratic modality, to organize our elections in the best conditions with regard to the number of parties that we have.”*¹⁰⁰⁹ In the era of emulation of the ECOWAS community legal regime, many political leaders still cling to their prerogatives of sovereignty and consider that the reference for democracy is compliance with the constitution. In reality, the benchmark is now the international conventions interpreted by the community regulator.¹⁰¹⁰

Moreover, the former Senegalese Minister of Justice, Professor Ismail Madior Fall, severely criticized the posture of the Court in its decision which denounced the sponsorship system as violating the right to free participation in elections. In his opinion, “the Court simply screwed up”. The Court’s completely abandoned its jurisprudence and made three errors of law that undermine its legal content. The first error of law is the interpretation of its jurisdiction to hear the law on sponsorship. The second error is that the Court behaved, contrary to its founding text and its jurisprudence, as a constitutional Court judge to rule on national legality. *The third error is that the Court ruled on opportunity and not on law. The Court ruled ultra vires and contradicted itself. This diversion by the Community judge’s office must be stopped.*»¹⁰¹¹ The revival of political reservations is clearly noticeable. It reflects the mischief of Member States that claim to be the champions of human rights and consider themselves to be the leaders of human rights protection. However, all it takes is for the ECOWAS Court of Justice to consider their conduct contrary to human rights for them to resist the Court’s ruling. But who is better placed to protect human rights than the supranational judge? This institutional hypocrisy tends, moreover, to spread to national jurisdictions.

C. The apathy of national jurisdictions

It is possible to State today that the areas that were once considered to be the preserve of national legislation are now subject to the jurisdiction of the Community Court. This is true of criminal, constitutional and electoral matters. Nevertheless, the community judge allows the Member States¹⁰¹² some room for manoeuvre through his official doctrine built around his non-interference in the internal affairs of Member States. In fact, this doctrine is an invitation for national Courts to work through a kind of enforcement channel of Court decisions, which cannot actually go into detail. Unfortunately, it is a recoiling of the national jurisdictions that is being observed. Following the condemnation of

Yaoundé, 1462 p.

1008 Quoted by D. TOUNKARA, “West African public order”, Op.cit.p. 349, A.- D. ZINZINDOHOUE, “Legal authority of international Courts with regard to national Courts: the case of the UEMOA Court of Justice”, in Internationalization of law and internationalization of justice, Proceedings of the 3rd Congress of the AHJUCAF of 21-23 June 2010, pp. 22-29.

1009 Reported by the site <https://www.banouto.bj/article/politique/20210504-parrainage-au-senegal-le-gouvernement-reagit-a-la-decision-de-la-cour-de-la-cedeao>. (Consulted on 16 August 2021).

1010 M. BLANQUET, “Cooperation between Member States and Community institutions”, in The European Union. Crossroads of cooperation, LGDJ, Paris, 2002, pp. 115-181; V. CONSTANTINESCO, “Article 5 of the EEC Treaty: good faith to community loyalty”, Liber amicorum P. PESCATORE, Baden-Baden, Nomos, 1987, p. 97; M. G UYOMAR, “Relations between the national Courts and the ECHR”, Dalloz, 2020, p. 497.

1011 <https://www.senegal7.com/decision-de-la-cedeao-sur-le-parrainage-pr-ismaila-m-fall-releve-les-erreurs-de-la-cour/>; P. R. BILGHO, Protection of political rights before the ECOWAS Community Court of Justice, Dissertation, University of Nantes,

1012 M. DELMAS-MARTY and M.-L. IZORCHE, “National margin of appreciation and internationalisation of law”, Comparative Review of International Law, 2000, p. 753.

Togo¹⁰¹³ for violating the adversarial principle in the case of the expelled ANC MPs, the constitutional Court ruled that there was no question of reinstating them. The Togolese Court reaffirmed the principle of the absolute authority of its decision.¹⁰¹⁴ We are not far from fearing a review of the constitutionality of a decision of the ECOWAS Court of Justice, particularly by the Constitutional Court of Benin, which has distinguished itself in two ways. Firstly, it initiated a legal battle with the WAEMU CJ, where it carried out a constitutionality review of the WAEMU CJ's decision, which had sought to reorient the Beninese wise men following an erroneous interpretation of the community regulation¹⁰¹⁵ on the legal profession. The Benin constitutional Court considered that it "is not integrated in any judicial hierarchy and is not placed under any other national or community power."¹⁰¹⁶ Then, when confronted with the question of the legal value of ECOWAS Court judgments in its internal legal system, it sidestepped the issue and Stated that "*Supplementary Protocol A/SP.1 /01/05 of January 19, 2005 is not applicable to the State of Benin because it has not been ratified by virtue of a ratification law, promulgated and published in the official gazette; that the successive governments that have followed up on the various procedures initiated on the basis of the ECOWAS Supplementary Protocol A/SP.1/01/05 of January 19, 2005 in the absence of a ratification law, promulgated and published in the official gazette, have violated Article 35 of the Constitution.*"¹⁰¹⁷ The much-criticized decision contradicts the provisions of the 2005 Supplementary Protocol relating to the Court, which provides that it shall enter into force with respect to a signatory State by virtue of its signature and with respect to all other States, following its ratification by nine Member States. In addition, it was very inconsistent to prohibit citizens of Benin from appealing to the community Court again, even though in many previous cases the Benin Court was the defendant. Is this not a violation of the constitutional provisions that call on the authorities to build African community organizations? Finally, the greatest challenge came from the Burkina Faso Constitutional Court, which ruled that "Whereas the State of Burkina Faso has not implemented the decision of July 13, 2015 of the ECOWAS Court of Justice; whereas, therefore, Article 166 of the Electoral Code is a provision that remains in force; Whereas, under the terms of Article 166.3 of the Electoral Code, (. ...) : all persons who have supported an unconstitutional change of regime that undermines the principle of democratic alternation, in particular the principle of presidential term limits that led to an insurrection or any other form of uprising [...]" are also ineligible.¹⁰¹⁸ Indeed, the judges of the countries of upright men ignored the condemnation by the ECOWAS Court of Justice¹⁰¹⁹ of the violation of the principle of equal participation in the elec-

1013 These are Decision DC No. 18/10 of November 22, 2010 of the Constitutional Court of Togo; ECW/CCJ/JUD/06/12 of July 13, 2015, Ameganvi Isabelle Manavi v/ State of Togo; A. ADELOUI, "The authority of res judicata by constitutional Courts in Africa", RTSJ, 2012, pp. 54 - 71. This position is not isolated, the ECHR has reviewed a constitutional decision of Turkey and basically censured it. ECHR, 11 June 2002, Selim Sada and others v. Turkey, para 40, no. 25.144/94

1014 Constitutional Court of Togo, E-002/2011 of June 22, 2011: the Court ruled that "no civil or military authority, no institution, be it international, can oppose a decision of the Court; thus, the decisions of the constitutional Court have an irrevocable character and its decisions must be absolutely obeyed (...)" ; In France: Const. Council., 16 Jan. 1962, DC. No. 62-18: "Whereas, on the one hand, under the terms of article 62 in fine of the Constitution, the decisions of the Constitutional Council are binding on the public authorities and on all administrative and jurisdictional authorities; whereas the authority of the decisions referred to in this provision applies not only to their operative part but also to the reasons which constitute their necessary support and the very basis "; Benin Constitutional Court, Jan. 31, 1962. 31 January 2006, DCC 06-116; G. JEZE, "From the truth of the legal force attached by the law to the jurisdictional act", Public Law Journal, 1913, pp. 439-440. T. RENOUX, "Authority of res judicata or authority of the Constitution. About the effect of the decisions of the Constitutional Council", in P. PACTET. (ed.), The Spirit of the Institutions. The balance of powers, Mélanges Pierre Pactet, Paris, Dalloz, 2003; D. ROUSSEAU (ed.), The issue of the authority of decisions of the Constitutional Council, Paris, L'Harmattan, 2004

1015 Constitutional Court of Benin, 22 August 2019, DC, n°19 -287 of Benin, 22 August 2019, DC, n°19 -287: "that it flows from the preamble of the constitution, from its title II, together with title IX, that is not contrary to the constitution a national legislative provision which grants to the citizens" rights more advantageous than those resulting from a community or international norm, the previous or subsequent community shall apply as long as it does not diminish or restrict the rights recognized by the constitution and the laws in general in favour of the persons that it would be otherwise only if the provision contained in the previous or posterior national legislation set obligations or imposes higher constraints than these conventions duly ratified by the republic of Benin ".

1016 Constitutional Court of Benin, Nov. 19, 2020, DCC 20 - 641. According to article 11 of the Benin Constitution, which States that: "the Constitutional Court shall be the highest Court in constitutional matters (...) it shall guarantee the fundamental rights of the human person and public freedoms".

1017 Benin Constitutional Court, 30 April 2020, DCC n°20-434.

1018 Decision No. 2015-021/CC/EL of August 25, 2015 on the appeal of Mr. DABIRE Ambaterdomon Angelin for the purpose of declaring candidates ineligible for the legislative elections of October 11, 2015.

1019 Decision No. 2015-021/CC/EL of August 25, 2015 on the appeal of Mr. DABIRE Ambaterdomon Angelin for the purpose of

tions, in particular because of the exclusion of supporters of the regime of former president Blaise Compaoré. In this regard, the comparison with European law is instructive. Indeed, it is a given that “(...) the interpretation given by the European judge can lead the internal constitutional judge to review his jurisprudence and the interpretation of his own constitution in order to make it compatible with the requirements of the Union law”.¹⁰²⁰ In its decision¹⁰²¹ on “Mr. Jeremy F”, the French Constitutional Council changed its position by agreeing to refer a preliminary question to the EUCJ¹⁰²² on the European arrest warrant before annulling certain provisions of the criminal procedure code, when examining a priority question of constitutionality.¹⁰²³ Consequently, we note the very recent creation of a new preliminary opinion procedure before the ECHR on the basis of Protocol No. 16 to the ECHR, which institutes a primary question of conventionality.¹⁰²⁴

These hegemonic attitudes of constitutional judges should not overwhelm community law judges when they find the constitutional decision essentially clumsy. In the Central African Republic, the Court of Cassation deviated from a constitutional interpretation. Indeed, “The Constitutional Court of the Central African Republic, in its decision No. 003/CC/98 of June 9, 1998, had declared, following a posteriori review, that articles 259, 260 and 264 of the CIMA Code were not consistent with the Constitution. Following the criticisms generated by this decision, in the national and international legal and insurance professional circles, to resolve the problem, the Central African Court of Cassation, by decision No. 001/2000, after having noted the superiority of international treaties over the Constitution and concluded that it was incongruous to review their constitutionality a posteriori, recommended that the judicial Courts apply the CIMA Code in all its provisions, despite the constitutional principle of *res judicata*¹⁰²⁵ attached to the decisions of the Constitutional Court. The considerations regarding compliance with international commitments that underlie the failure to comply with the Constitutional Court’s decision should be noted.”¹⁰²⁶ However, “the shift by States from their internal legal system to the Community legal system of rights and obligations corresponding to the provisions of the Treaty implies (...) a permanent limitation of their sovereign rights, which cannot be reversed by a subsequent unilateral act incompatible with the concept of Community.”¹⁰²⁷

In addition, the Senegalese judicial judge adopted a very questionable attitude in the Khalifa Sall case. Indeed, the victim was detained because of legal proceedings against him. This led to a first judgment by the Senegalese criminal law judge. In the meantime, the ECOWAS Court of Justice rendered its decision, which observed the violations of Mr. Sall’s rights, particularly his right to a fair trial.¹⁰²⁸ The Court did not order his immediate release, but it did award financial compensation to him. It was logical that on appeal, the Senegalese judge would draw the implications of the decision and

declaring candidates ineligible for the legislative elections of October 11, 2015.

ECW/CCJ/JUG/16/15, CDP and others v. State of Burkina, EC July 13, 2015

1020 R. LECOURT, *The Europe of Judges*, Brussels, Bruylant, 2009, p. 153.

1021 No. 2013-314 QPC of April 4, 2013, “M. Jeremy F”; CJEU, May 30, 2013, *Jeremy F.*, C-168/13; Constitutional Council June 14, 2013, No. 2013 - 314, QPC (decision on repeal)

1022 O. DUBOS, *National Courts, Community Judge*, thesis, Paris, Dalloz, 2001, 1015 p.; p. 75.

1023 X. MAGNON, “The Community path of the Constitutional Council: between light and darkness. Principles and consequences of the constitutional specificity of Community law”, *Europe*, August/September 2004, p. 6.

1024 Article 2 of Protocol No. 16 signed on Oct. 2, 2013 allows for “requests for advisory opinions on issues of principle relating to the interpretation or application of the rights and freedoms defined by the ECHR and the protocols.”

1025 J. HERON (J.) and Th. LE BARS, *Private Judicial Law*, Domat droit privé, Paris, Montchrestien, 5th ed., 2012, p. 281. “The authority of *res judicata* is the particular authority attached to judgments alone, different in this respect from any other legal act

1026 T. ONDO, “The authority of decisions of constitutional jurisdictions in French-speaking Black Africa”, *Legal and Political Journal*, 2012, n°4, p. 471-472; C. HAGUENEAU, *The effective application of Community law in domestic law. Comparative analysis of the problems encountered in French, English and German law*, Brussels, Bruylant, 1995, 619 p; J. DUTHEIL DE LA ROCHERE (dir.), *The execution of Union law, between Community mechanisms and national laws*, Brussels, Bruylant, 2009, 300p

1027 ECJ, 15 July 1964, *Costa v Enel*, case 6/64; ECJ, 3 April 1968, *Firma Molheri*, case 28/67, ECR 1968, p. 221.

1028 ECW/CCJ/JUD/17/18 of June 29, 2018, *Khalifa Sall v. State of Senegal*: As a result, the Court assessed the damage at 35 million CFA francs for the applicant. The ECOWAS CJ noted that “in the current case, the Court has concluded that there has been a violation of the right to counsel, the right to presumption of innocence and the right to a fair trial for the applicants and that the detention of Mr. Khalifa Ababacar Sall, for a specific period of time, is arbitrary and that the responsibility of the State of Senegal must be retained».

release the defendant. Before the Dakar Court of Appeal, “the question arose as to the influence of the integration judge’s ruling on an ongoing judicial procedure, especially since the lawyers of Mayor Khalifa Ababacar Sall had requested the release of their client.»¹⁰²⁹ The Court of Appeal of Dakar, in a ruling of July 18, 2018 declared: “on the nullity of the proceedings and immediate release or ex officio release as a result of the judgment of June 29, 2018 by the ECOWAS Court of Justice sought by Khalifa Sall et al. Considering that it is worth recalling that since the judgments rendered by the ECOWAS Court of Justice do not impact the decisions pending before the national Courts of the Member States as has been amply demonstrated above, there are grounds for rejecting the requests for nullity and ex officio release made by the defendants “¹⁰³⁰. The Court of Appeal inferred that: “the binding and enforceable force attached to the judgments of the Court of Justice, which is essential for the introduction of Community law into the national legal systems, does not authorize the Community Court to replace the national Courts or to compete with them on their own ground, which is that of the interpretation of national texts, as was rightly Stated in an “obliter dictum.””¹⁰³¹ Regretting the position of the Court of Appeal, one author noted that “*these interventions whereby the national judge refuses to draw conclusions of the judgments of the Community Court are more indicative of the authority of the decisions and the lack of effectiveness of the law of integration, especially with regard to the protection of human rights. The national judge invokes the sovereignty of the State to refuse the application of the decisions of the community judge. The situation is much more difficult to grasp when the fundamental rights of Community citizens are at stake. By recognizing the binding and enforceable force attached to the judgments of the Court of Justice, the national judge did not have, in our opinion, to divide the judgment of the ECOWAS Court -in two parts-, in order to make effective the reparations granted to the applicant and not to draw the conclusions of the violation of his fundamental rights in the continuation of the trial. Consequently, the Court of Appeal should, in the trajectory traced by the integration judge, pronounce the release of the applicant.*”¹⁰³² These difficulties require that the analyst to come up with remedies to overcome them.

D. Plausible remedies

The depth of the problem calls for appropriate remedies. Reforms must be undertaken (1) in order to foresee positive prospects.

E. Potential reforms

The regulatory framework for the execution of judgments does not guarantee optimal satisfaction for victims. In fact, the principles of Community loyalty and pacta sunt servanda should lead to a smooth implementation of decisions. Moreover, the erga omnes effect is an additional basis for the effectiveness of the decisions in a Community area where the principle of the rule of law is enshrined. But in reality, what can be done to a State that refuses to execute a judgment? If the idea of an appeal in domestic law to evoke the violation of the principle of the rule of law or community law with the possibility for the judge to give injunctions to the executive is evocable, it seems very likely that the West African context marked by a fear of attacking the State before its own justice system, inhibits the efforts. It is obvious that this is a violation of a Community obligation and that the appropriate course of action is to seek an injunction for failure to comply.

According to Article 3(1) (d) of the 2005 Protocol, the ECOWAS Court of Justice is competent to hear “cases of non-compliance by Member States with their obligations under the Treaty, Conventions

1029 Quoted by O. DIOP, “The ECOWAS Court of Justice, judge of arbitrary detention”, in Mélanges en l’honneur à Robert Dossou, L’amphithéâtre et le prétoire. At the service of human rights and democracy, F. J. AÏVO, J. du BOIS de GAUDUSSON, Ch. DESOUCHES and J. MAÏLA (dir), L’Harmattan, 2020, p. 506.

1030 Idem.

1031 Idem.

1032 O. DIOP, « ECOWAS CJ, arbitrary detention judge », in Mélanges en l’honneur à Robert Dossou, L’amphithéâtre et le prétoire. At the service of human rights and democracy, F. J. AÏVO, J. du BOIS de GAUDUSSON, Ch. DESOUCHES and J. MAÏLA (dir), L’Harmattan, 2020, p. 506 ; J. DU BOIS DE GAUDUSSON, “The complexity of the participation of supreme Courts of developing countries in the dialogue of judges”, Les Petites Affiches, n° 112, 2008, pp. 22- 25.

and Protocols, regulations, decisions and directives. ¹⁰³³ The ECOWAS Court of Justice ruled that “it is not up to the Court to interfere in the execution of its decisions and that each party concerned must follow the legal procedures provided for in the ECOWAS legislative texts, in particular Supplementary Protocol A/SP.1/01/05 dated January 19, 2005 and Supplementary Act A/SA.13/02/12 dated February 17, 2012.” ¹⁰³⁴ Similarly, it decided that “in the case of a breach of a Community obligation by a Member State, the applicant (...) has no right to bring an action before the Court”. ¹⁰³⁵

The ECOWAS Court of Justice affirmed in the cases of Hissène Habré v. State of Senegal and Karim Wade v. State of Senegal ¹⁰³⁶ that litigation concerning the execution of ECOWAS Court of Justice decisions are governed by Article 15 of the Supplementary Act of 17 February 2012 and Article 10 of the Supplementary Protocol of 19 January 2005. Under these articles, only Member States or the president of the commission can refer a case to the Court to establish that a State has failed to comply with a community obligation, in this case the non-execution of a judicial decision of the ECOWAS CJ. There are tools available for this purpose. However, it is hard to imagine a good Samaritan Member State taking the matter to Court to denounce the failure of another Member State to enforce a Court decision, especially when the victim is not its own national. The president of the commission, for his part, was appointed by the Heads of State, which does not give him the necessary room to act. It is therefore important to reform the appeal for failure to fulfil obligations by extending the persons eligible to do so. But this work must take into account the sanctions provided for failure to fulfil an obligation. ¹⁰³⁷ This requires ingenious solutions.

Furthermore, it would be interesting to be inspired by the practice of the Court of Human Rights, which involves requesting a report on the execution of judgments from convicted States, with publication of their content. This has the advantage of monitoring the effectiveness of the measures imposed as reparation and of avoiding the minimalist execution of judgments ¹⁰³⁸. In its recent ruling of April 18, 2021 opposing the Social Liberal Union to the Senegal, the Court Stated that “the Senegalese electoral code, as amended by Law 1102018-22 of February 04, 2018 violates the right to free participation in elections; Orders consequently Senegal to remove all obstacles to free participation in elections resulting from this amendment by abolishing the system of electoral sponsorship; Grants it a period of six (6) months from the notification that will be made to submit to the Court a report on the implementation of this decision .” ¹⁰³⁹ This posture is welcome. ¹⁰⁴⁰

Also, one avenue to explore would be the introduction by Member States of an appeal for review under domestic law following ECOWAS Court of Justice sentences. Indeed, article 24 - 2 of the 2005 Supplementary Protocol relating to the ECOWAS Court of Justice provides that “the enforcement of

1033 See M. de Villiers, General Public Law, Paris, Litec, 2006, p. 180: “The failure to fulfil obligations may be constituted as much by positive conduct on the part of the national authorities (adoption and/or application of incompatible national provisions, express refusal, material activities), as by an abstention from taking the measures required by Community law.”

1034 ECW/CCJ/JUD/10/16 of 17 May 2016, Pascal Bodjona Akoussoulelou v. State of Togo.

1035 ECW/CCJ/JUD/21/15, October 23, 2015, Alternative citoyenne and Roch Gnahoui David v. State of Benin.

1036 ECW/CCJ/JUD/ 18/13, 19 July 2013, Karim Wade v. Senegal: “*the Court has jurisdiction to hear any dispute relating to the examination of a Member State’s failures to comply (...) Consequently, the application filed on such a subject by a natural or legal person other than a Member State and/or the president of the commission must be declared inadmissible for lack of standing.*”

1037 However, Article 77 of the revised ECOWAS Treaty entitled “Sanctions applicable in case of non-compliance with obligations” provides that “1. Without prejudice to the provisions of this Treaty and the protocols thereto, where a Member State fails to honour its obligations towards the Community, the Assembly may adopt sanctions against that Member State. 2. Such sanctions may include: suspension of the granting of any new loan or assistance by the Community; suspension of disbursement of all outstanding Community loans, projects or assistance programmes; rejection of candidature for statutory and professional posts; suspension of voting rights; and suspension of participation in the activities of the Community. The last paragraph of this article provides that “the Conference shall determine the modalities for the application of the provisions of this article”.

1038 J. TIEHI “Minimalist execution of judgments of the African Court of Human and Peoples’ Rights in the case “Actions for the Protection of Human Rights (APDH) v. Republic of Côte d’Ivoire”: much ado about nothing? Human Rights Journal, n° 18, <https://journals.openedition.org/revdh/9978>

1039 <https://yerimpost.com/suppression-du-parrainage-voici-la-decision-integrale-de-la-cour-de-justice-de-la-cedeao/> (consulted on 15 september 2021)

1040 K. SANWE. “The Impact of African Regional Law on the Constitutional Law of Francophone West African Countries”, French Journal of Constitutional Law, vol. 110, n° 2, 2017, pp. 413-436.

judgments, which shall be submitted by the registrar, shall be governed by the rules of civil procedure in force in the said Member State". For the Court, "it thus results from this provision that "the beneficiary of a decision of the Court which intends to proceed to its execution against a Member State, must refer to the State law of this Member State, and particularly to the rules of civil procedure."¹⁰⁴¹ This judgment is a real challenge that should lead Member States to quickly develop remedies in domestic law to allow for the review of legal and judicial acts marked by human rights violations and established by the ECOWAS Court of Justice¹⁰⁴² or, failing that, for a Supplementary Protocol to be adopted to this effect. French comparative law¹⁰⁴³ can serve as an example. The French law n° 2000-516 of June 15, 2000 reinforcing the protection of the presumption of innocence and the rights of the victims¹⁰⁴⁴ make it possible to reform the final criminal convictions in case of convictions of the European Court of Human Rights. This is the most effective way to overcome the inertia of the opponents of the judgments of the ECOWAS CJ.

The number of judges could have been increased to fifteen (15), i.e. one per State, as is the case with the European Court of Human Rights¹⁰⁴⁵ and the Court of Justice of the European Communities.¹⁰⁴⁶ The implementation of these reforms will allow us to dream with great optimism.

Potential prospects

The Court remains a cornerstone of the Community architecture. But it cannot keep on its shoulders the burden of the effectiveness of community standards. In this regard, a frank, permanent and interactive dialogue must be established with the national Courts. Indeed, it is possible to invite judges from the supreme Courts and constitutional Courts of Member States to sit at the ECOWAS Court of Justice without voting rights in order to create emulation and frank dialogue. This will avoid the isolation and judicial pride of national judges. Each will be able to immerse itself in the environment of the other and the community ideal which remains the goal for all.

The future would also lie in the boldness of the Community judges who must find the right formula in the drafting of judgments that would encourage national judges to seize the opportunity to play their part in the Community. More creativity and audacity are the best wishes for the Court.

¹⁰⁴¹ ECW/CCJ/JUD/29/16, Dec. 6, 2016, Aziagbé Kokou and 33 others, Tomépké Abra Lanou and 29 others, Atsou Komlanvi and 4 others v. Togo.

¹⁰⁴² F. DESPORTES and L. LAZERGES-COUSQUER, Treaty on Criminal Procedure, Economica, Paris, 2010, p. 2040: " Review offers the possibility of re-examining a case when a new element emerges that casts doubt on the guilt of the convicted person, while re-examination ensures the effectiveness in domestic law of the decision to convict France by the ECHR ". J. - F. RENUCCI, " A review of a final Court decision in the interest of human rights ", Dalloz, 2000, n°44, p. 656 ; A. ÖZTEZEL, The review of a criminal decision following a judgment of the European Court of Human Rights, in comparative French and Turkish law, University of Lorraine Faculty of Law, Thesis, 2013, p.53 : " the review is based on a factual error and the reconsideration on a legal error ". J. PRADEL, Criminal Procedure, 2010, 15th ed., Cujas, Paris, p. 816: according to the author, " The (French) judge is not reproached for having committed a factual error leading to an unfounded conviction, but for having acted contrary to the requirements of the ECHR Convention ".

¹⁰⁴³ O. PETTITI, " The re-examination of a French criminal decision after a judgment of the ECHR: the French law of June 15, 2000 ", RTDH, 2001, pp.3 - 12; M. HOTELLDER, " The re-examination of certain cases following judgments of the European Court of Human Rights ", RTDH, n° 47, July 1, 2001, p. 715; S. PERDU, " Towards a re-examination of a final decision of the French administrative judge after a European condemnation ", RTDH, n° 57, January 2004, p. 175 ; L.-M. RASSAT, Treaty on criminal procedure, Paris , PUF, 1st ed., 2001, Paris, p. 820 ; M. ORILLARD- LENA, Remedies in criminal matters, an attempt at a general theory, Thesis, 2007, Panthéon-Assas University (Paris II), p. 234 F. FOURMENT, Criminal Procedure, Manual 2005-2006, Paradigm, Orléans, p.311.

¹⁰⁴⁴ It provides that "the review of a final criminal judgment may be requested for the benefit of any person convicted of an offence where it appears from a judgment of the European Court of Human Rights that the conviction was in violation of the provisions of the Convention for the Protection of Human Rights and Fundamental Freedoms or its Supplementary Protocols, if, by its nature and gravity, the violation found entails harmful consequences for the convicted person which the "just satisfaction" awarded on the basis of Article 41 of the Convention could not put an end to".

¹⁰⁴⁵ F. SUDRE et alii, European and International Human Rights Law, PUF, Paris, 2021, p. 56.

¹⁰⁴⁶ A. GRASSO and J.-L. SAURON, European Procedural Law - Proceedings before the Court of Justice, the General Court and the European Court of Human Rights, Legitech, Paris, 2021, p. 169



THE ECOWAS COURT OF JUSTICE IN THE QUEST FOR STRATEGIES TO BUILD ITS CAPACITY

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The Community Court of Justice, as the key judicial body of the Community, plays an important role in the integration process of West African States.

The independence of this Court gives it the capacity to design, promote and develop a legal regime specific to the Community¹⁰⁴⁷.

While in theory, the Court has become aware of the importance of its role in building an integrated community law as a basis for economic integration, in practice there is a predominance of human rights litigation in the cases brought before it¹⁰⁴⁸. The protection of human rights constitutes, to this day, its stomping ground.

This suggests that the Court is increasingly becoming more of a human rights Court than the main judicial body of a regional integration organization like the WAEMU or European Union Court of Justice.

This change in the function of the Court shows that, in the West African model of integration, there is a fairly close link between the construction of an integrated economic community and the issue of human rights¹⁰⁴⁹.

Thus, with the honor of being the only Community Court with explicit competences in the field of human rights attributed by the Community,¹⁰⁵⁰ the Court does not hesitate to carry out activities to promote human rights.¹⁰⁵¹

In terms of protecting and promoting human rights, the Court's record is generally positive. Within the space of two decades, the Court has positioned itself as the leading judicial institution that plays a pioneering role in the field of protection and safeguarding fundamental rights in Africa.

However, in spite of this positive record, the Community Court of Justice is faced with major difficulties which may, in the more or less long term, paralyze and render it ineffective, to the great displeasure of the Community's litigants.

In this regard, what should we do? In other words, what strategy can we develop to preserve the Court while strengthening its effectiveness?

The answer to these questions is considered at the institutional and normative levels.

¹⁰⁴⁷ If we take the example of the European Court of Justice, we can see that it has been able to develop an independent Community legal regime, i.e. distinct from both the international and national legal regimes of Member States of the European Union. It has thus been able to safeguard the particularity of the Community construction but also to defend the identity of the Communities. It is in this vein that the direct effect of Community law in the national legal regime (see CJCE 5-2- 1963, Aff. 26/62 Van Gend En Loos rec. P.21 GA tome 1 n01); the primacy of Community law over national laws (see. CJCE 15-7-1964, aff. 6/64 Costac/ ENEL, Rec. p.1.141, GA, tome 1 n031) or the principle of alignment of external jurisdictions with internal jurisdictions (see- CJCE judgment of 1 March 1971 Commission/Council Aff. 22/70 Rec. P.263) have been affirmed.

¹⁰⁴⁸ From the date of its establishment in July 1991 to October 12, 2021, the Court has received 555 petitions; held 1199 sessions; rendered 290 judgments, 130 preliminary rulings, 23 decisions under review, 35 orders, and 4 advisory opinions. 166 cases are pending. See the statistics of the Court's registry.

¹⁰⁴⁹ From the Court's perspective, Community law plays a subsidiary role. The Court may occasionally make incursions into Community law in a human rights case. This is the case, for example, in the interpretation of its Rules or international human rights instruments. This is the case, for example, in *Ocean King Nigeria Limited vs. The Republic of Senegal*, judgment of 27 April 2010; *Miyetti Allah Kautal Socio-Cultural Association (Incorporated trustees) (For and on behalf of the Fulani Community of Plateau State vs. the Federal Republic of Nigeria)*, judgment of 13 July 2011; *Moukhtar Ibrahim v. The State of Gigawa and 3 others*, judgment of 7 July 2011; or *Afolabi v. the Federal Republic of Nigeria*.

¹⁰⁵⁰ Under Article 9, paragraph 4, of the Supplementary Protocol of January 19, 2005, the Court shall hear "cases of human rights violations committed in any Member State" of ECOWAS. This confers on it, in the human rights jurisdictional dispute, a role of protection and sanction. A review of these various decisions of the Court shows the reality and effectiveness of the protection of fundamental rights in the Community. It has given content and meaning to the rights specified in international human rights instruments, in particular the African Charter on Human and Peoples' Rights

¹⁰⁵¹ The very idea of promoting human rights is absent from the Court's legal system. This is understandable insofar as the promotion of fundamental rights is the responsibility of States, associations or human rights NGOs. However, over time, the ECOWAS Court of Justice has arrogated to itself a competence that is not expressly attributed by the instruments that govern it. The Court has undertaken outreach missions in all the Member States of the Community. These missions are diverse in nature and purpose. For example, it has carried out audiovisual awareness-raising campaigns aimed at the press in general, i.e. missions specifically targeting journalists from the print and audiovisual media.

I. Institutional strategy for strengthening the effectiveness of the Court

A. Structure of the Community Court of Justice

Composition of the Court

The Court comprises five (5) independent judges chosen from among personalities of high moral standing who are nationals of ECOWAS Member States.

The judges of the Court must have the qualifications required to hold judicial office in a Supreme Court or in a Court of the same rank.¹⁰⁵²

Jurisconsults with proven competence in international law, community law or regional integration law are also eligible to become judges of the ECOWAS Court of Justice.

Applicants for the position of judge at the Court must also have at least 20 years of professional experience.

It should be stressed that the Court is independent of ECOWAS institutions in the exercise of its functions. This independence, which is guaranteed by Article 15.3 of the Revised Treaty and Article 3 of the 1991 Protocol¹⁰⁵³, explains the distinctive procedure for the selection and appointment of judges.

Appointment procedure and tenure of judges

The selection and appointment procedure is provided for in Article 4 paragraph 1 of the Decision of 2 June 2006 establishing the Judicial Council of the Community.

Under Article 4, it is the responsibility of the Community Judicial Council “to shortlist three (3) candidates per Member State, from among the applicants who are nationals of Member States to which the positions have been assigned. The Council shall interview shortlisted applicants and propose to the Council of Ministers to recommend the appointment of judges to the ECOWAS Court of Justice.”

According to Article 2 paragraph 1 of the above mentioned Decision, the Judicial Council of the Community shall be composed of Presidents of Supreme Courts of the Judiciary or their representatives from States to which the positions of Judges have not been attributed. It should be noted that it is the Conference of Heads of State and Government that appoints the judges of the Court.

Judges who have a non-renewable 4-year term of office cannot be considered as the representatives of the government of their country or any other ECOWAS Member State.

They cannot be coerced in the performance of their duties by any ECOWAS Member State or Institution. Likewise, they cannot be subject to injunctions from stakeholders of the Community. They are expected to render their decisions or rulings with complete impartiality.

The independence of judges is guaranteed by immunity from suits for the actions related to their function, a special disciplinary regime and an absolute incompatibility with any other political or administrative function.¹⁰⁵⁴

It is this functional independence of the Court that essentially allows it to play a fundamental role in the resolution of conflicts.

¹⁰⁵² See article 3 paragraph 1 of the Supplementary Protocol of 14 June 2006 revising the Protocol on the ECOWAS Court of Justice,

¹⁰⁵³ Thus, according to article 15.3, in the exercise of its functions, the Court is independent of the Member States and the institutions of the community

¹⁰⁵⁴ It should also be emphasized that the secrecy of deliberations guarantees the independence of judges. The special nature of the judges’ functions no doubt explains why the idea of their evaluation by the Council of Ministers has been abandoned. In any case, the independence of the Court does not exclude cooperation or consultation with other ECOWAS institutions or even with the Member States of the Community.

Bureau of the Court

The bureau of the Court is made up of the President, the Vice-President and the Dean of judges. They are elected by the Members of the Court.

In accordance with Article 3 of the Regulations of 13 June 2006, the Bureau is responsible for the strategic direction of the Court. It oversees the management and administration of the Court. The Bureau is also responsible for reviewing the Court's draft work program and determining the broad outlines of its budget.

In addition, it defines procedures for the internal organization of the Court.

As presented, this mechanism has the merit of guaranteeing the independence of the judges in terms of their appointment. The procedure for selecting the judges is outside the purview of the States. This new procedure above mentioned has significantly reduced the politicization that characterized the old regime.

It is more open and transparent.

Beyond this merit, which makes the Community system distinct, it must be recognized that in many respects, the reform of the Court initiated in 2006 already sowed the seeds of a functional paralysis of this jurisdiction.

B. A structure different from that of other jurisdictions of regional integration or cooperation organizations

Regarding the composition, the reduction in the number of judges from seven (7) to five (5) stems from the Supplementary Act of 22 December, 2018, amending the new paragraph 1 of Article 3 of the 2006 Supplementary Protocol on the Community Court of Justice.

This reduction is justified in the preamble of the above-mentioned Supplementary Act by the need to rationalize the administrative costs of the Court's operations, provide it with an organizational chart to enable it to carry out its functions in an optimal manner, and provide the human resource it needs to function efficiently.

Certainly, the current structure of the Court is unique. The reform did not take into account the specificity of the Court. It did not reflect the practice in the Courts of similar regional integration organizations.

It is unique in its kind.

Based on the comparison of institutional laws,¹⁰⁵⁵ it can be observed that there is a correlation between the composition of regional organizations and the number of judges making up the jurisdiction of these organizations. For example, within the framework of West African Economic and Monetary Union (WAEMU), the number of judges is eight (8), with one judge per Member State. The same applies to the European Union (EU), with a total of 27 judges, one per Member State.

Furthermore, the reduction in the number of judges in the ECOWAS Court of Justice does not take into account the language realities within the Court, nor does it take into account the possibility of forming panels to hear, within a reasonable time, cases submitted to the Court in a context marked by an influx of petitions.

This reduction has had negative effects on the functioning of the Court¹⁰⁵⁶.

¹⁰⁵⁵ Subsequent developments are based on the work done jointly by the Commission and the ECOWAS Court of Justice in 2018 leading to the adoption of the draft Supplementary Act which corrects the regulatory and institutional gaps in the current texts governing the Court.

¹⁰⁵⁶ We can mention, for example, the excessive workload on translators, judges, the unusually long delays in the administration

Concerning the tenure of judges, it should be recalled that it has evolved. Under the former regime of the Protocol of July 6, 1994, Members of the Court were appointed for a period of five (5) years, renewable only once.

In 2006, it was reduced to four (4) years non-renewable. The reduction of the term of office of judges was motivated under the Supplementary Protocol of June 2006 by the need to harmonize the terms of office in all the institutions of the Community.

This negative deconsolidating reduction raises a problem from three (3) angles:

The tenure of the Court's judges has no equivalent in any international organization in the world. By way of comparison, it can be noted the tenure of judges at the WAEMU Court of Justice is a renewable term of 6 years; at the CEMAC Court of Justice 6 years renewable; at the SADC Tribunal 5 years renewable; at the COMESA Court of Justice 5 years renewable; at the ICJ 9 years renewable; the European Union Court of Justice 6 years renewable; International Tribunal for the Law of the Sea 5 years renewable; International Criminal Court 9 years renewable; European Court of Human Rights 9 years non-renewable; Inter-American Court of Human Rights 6 years renewable once.

Thus, the analysis of international standards in this field shows that in all international jurisdictions, the statutory regimes applicable to judges provide either for a long non-renewable term of office, or for a renewable term of lesser duration.

The adoption of a long tenure for judges constitutes an additional guarantee of independence and at the same time makes it possible to take into account the need to give the international Court concerned the opportunity to have sufficient time to establish and stabilize its jurisprudence.

Aligning the tenure of judges with the tenure of the executive branch is in contradiction with the practice of universal international or regional organizations. This alignment does not exist in any international organization. The tenure of the judicial body is longer than that of the administrative or executive body. Thus, for example, in WAEMU, Members of the Commission have a 4-year renewable term of office, the judges of the Court 6 years renewable; in CEMAC, 5-year renewable mandate for the Members of the Commission, 6 years renewable once for the judges; in the EU, 5 years non-renewable for the Members of the Commission, 6 years renewable for the judges etc....

Moreover, renewal of the Court within such a short time frame will generate additional costs for ECOWAS.

Indeed, at each renewal, certain benefits will be systematically granted, including duty, equipment and housing allowances to be mobilized every four years for the new judges, as well as entitlements and severance pay due outgoing Members.

Beyond these considerations, improving the Court's institutional efficiency implies an increase in the number of judges. In the absence of having one judge per Member State, i.e. 15 judges, it is reasonable to increase the number of judges from 5 to 7 or 9. This increase will have the major effect of allowing the Court to set up 2 or 3 panels to settle disputes.

This increase in the number of judges would necessarily lead to an extension of the judges' terms of office for the reasons Stated above.

II. Regulatory strategy for strengthening the Court's effectiveness

A. An inadequate and fragmented legal framework

Terms of the problem

At the regulatory level, one observation stands out when reviewing the legal system that governs the of justice.

organization and operations of the Community Court of Justice. Indeed, there are gaps linked to the inadequate, fragmented, inappropriate and anachronistic nature of the texts governing the Community's jurisdiction.

In addition to the relevant provisions of the revised Treaty, the Court is governed by the 1991 Protocol and the 2005 as well as 2006 Supplementary Protocols.

In these texts, there are still provisions that were repealed by previous reforms.

In addition, the exact reference to a provision is now very uncertain because of the renumbering and cross-referencing of one article to another, which occurred during the reforms. The fragmentation of the texts makes them difficult to use and to understand for the Court as well as petitioners.

Remedies

To strengthen the effectiveness of the Court, it is important to consolidate and harmonize all these texts, fill in the legal gaps, introduce innovations inspired by best practices and improve the wording of some existing provisions.

This requires, in fine, the reformulation of some articles, the deletion of others and the overall reorganization and updating of the Court's legal arsenal.

B. Limited access to community justice

A fluid conception of persons eligible to refer matters to the Court

Under article 10 (d) of the Supplementary Protocol of 2005, beyond Community extra-contractual liability and Community public service litigations, an individual may petition the Court also in matters of human rights or legality of Community actions.

Based on **Article 10 (d) of the 2005 Supplementary Protocol**, which States that **"any person who has been the victim of human rights violations"** may also institute proceedings before the Court, the Community Court has given a broad conception of persons eligible to file fundamental rights cases.

In cases such as **Starcrest Investment v. President ECOWAS Commission, July 8, 2011; Ocean King Nigeria Limited v. Republic of Senegal, July 8, 2011; and Center for Democracy and Development, Center for the Defense of Human Rights and Democracy v. Mamadou Tandja and Republic of Niger**, the Court excluded legal persons from rights litigation on the grounds that they could not be victims of human rights violations. This reasoning is also supported by the letter and spirit of the English version of Article 10, which refers to an individual, as a natural person whose human rights have been violated.

In paragraph 24 of its judgment on **Aziagbede Kokou and 33 others, Astou Komlavi and 4 others, and Tomekpe A. Lanou and 29 others v. Togolese Republic** case, the Court explained its conception of a victim. According to the Court, **"in order to claim to be a victim, there must be a sufficiently direct link between the applicant and the harm he or she claims to have suffered as a result of the alleged violation"**. In the context of human rights, the victim cannot be a legal person.

However, in other cases such as **Coordination nationale des producteurs de cacao v. Republic of Côte d'Ivoire** ruling of 17 December, 2009, or **Rencontre africaine pour la défense des Droits de l'homme, RADHO, v. Republic of Senegal** ruling of 6 July, 2012, the Court seemed to have gone against its position of principle.

In these cases, the Court admitted that legal entities could be victims of human rights violations and therefore could apply to the Court to enforce their rights. This decision does not seem to have been

challenged by the Court in its judgment of April 24, 2015 in **Société Agriland v. the State of Côte d'Ivoire or in the case of "La société Anonyme (Maseda Industries) v. Republic of Mali, 2017.**

This change in case law can be explained by the Court's interpretation of the French version of article 10 (d) of the Supplementary Protocol, which refers to any "person" who is the victim of a human rights violation, and not to "an individual". The term "person" is understood by the Court as both a legal person and a natural person.

From these developments, it is clear that when it comes to the protection of human rights, access to Community justice is open to natural and legal persons.

For NGOs, their access is subject to the legality of their establishment and their action can only be brought on behalf of victims. These conditions were highlighted by the Court in its **judgments of 30 November and 10 December, 2010 in the cases of SERAP v. Federal Republic of Nigeria and Universal Basic Education and SERAP v. The President of Federal Republic of Nigeria.**

Better still, for other types of associations of political nature, the Court considers, **in its judgment of July 13, 2015 on the case of Congrès pour la démocratie et le progrès (CDP) and others v. the State of Burkina Faso**, that "it would be purely artificial and unreasonable for the Court to deny political parties the right to bring a case before it when rights associated with their vocation as electoral competitors are violated."

This development in the Court's case law has the merit of clarifying persons who are victims of a violation of their fundamental rights. In other words, it explains article 10 (d) of the 2005 Supplementary Protocol.

While the opening up of the Court's access to cases has allowed victims to bring cases directly before the ECOWAS Court of Justice¹⁰⁵⁷, the fact remains that access to the Court is still limited.

The absence of legal aid approval

Recourse to the Community Court of Justice only makes sense if the victims of human rights violations have the means to bring their case before it and to assert their fundamental rights.

Indeed, Community justice has a cost. According to article 12 of the 1991 Protocol, parties to proceedings shall be represented before the Court by one or more lawyers or advisers to whom the laws and regulations of the Member States grant the right to plead before their Courts.

A reading of the provision of Article 12 suggests that the parties shall bear the costs of their representation. From this point of view, poor victims who do not have the means to access the Court, cannot go to Court when their fundamental rights are violated.

Since the Community has not instituted a legal aid fund, the poor victims are helpless in the face of the omnipotent State, which is the perpetrator of the violation of their rights.

In this regard, there is a breach of the equality before the Community Law for nationals or residents of the Community.

This absence of legal aid fund is compounded by the geographical location of the Court.

The Court is far from the Member States of the Community. This does not facilitate access to the Court.

¹⁰⁵⁷ This is a major progress compared to the former regime where an individual could not directly bring a case before the Court. Indeed, under Article 9(3) of the 1991 Protocol, only a Member State could bring proceedings relating to the interpretation and application of the provisions of the Treaty against another Member State or an institution of the Community, if attempts at an amicable settlement failed.

It was proposed that sub-registries are established in each Member State as a remedy to the geographical distance of the Court.

Without doubt, parties can file a case with the Court by electronic means, in addition to the obligation to submit their application by DHL.

A. Limits to the prerogatives of the Court

The ECOWAS Court of Justice has set limits to the discharge of its functions relating to the protection of fundamental rights.

Through its interpretation functions, the Court has shown that its area of relevance in terms of protecting fundamental rights is not as broad as the texts that govern it would suggest.

From the outset, the Court excluded from its jurisdiction some categories of human rights violations. In other words, not all cases of human rights violations can be referred to the Community Court of Justice.

In its 8 July 2010 *Edoh Kokou v. ECOWAS Commission* judgment, the Court noted, for example, that physical assault, mistreatment and endangering the life of a staff Member constitute criminal offenses that do not fall under its jurisdiction.

It also affirmed in its judgments of 27 October 2008 in the cases of *Hadijatou Mani Karaou v. Republic of Niger* and *Hissene Habré v. Republic of Senegal* that crimes against humanity do not fall within its jurisdiction. This means that a whole range of cases of human rights violations fall outside the Court's jurisdiction.

These are mostly massive violations of human rights, such as crimes of genocide, crimes against humanity or war crimes. These crimes requiring criminal sanctions do not fall within the jurisdiction of the Court.

In the *Hadijatou Mani karaou* case, the Court noted, with regard to slavery that: "while it is true that slavery is listed as a crime against humanity, it is important to specify that in order to constitute a crime against humanity, the said slavery must be part of a widespread or systematic attack as set out in article 7 of the Statute of the International Criminal Court. However, such assessments fall within the competence of other international mechanisms, and more specifically, international criminal Courts. The Court has therefore no jurisdiction to assess the merits of the complaint based on this ground".

Without doubt, in the framework of its advisory capacity, it can recognize cases of massive human rights violations, but not sanction them as such.

It also does not intervene in electoral processes. As it strongly reaffirmed in its judgment of 13 July, 2015 in the case "*Congress for Democracy and Progress and Others v. The State of Burkina*", "..... It is out of the question for the Court to police elections that Member States organize." However, the Court States, "it can be validly seized when it appears that the electoral process is marred by human rights violations, for which the sanction falls within its competence ».

As early as 2005, in the case of *Dr. Jerry Ugokwe v. Federal Republic of Nigeria*, the Court Stated that "in the current State of applicable ECOWAS legal texts, no general or specific provision authorizes the Court to rule on electoral matters or electoral disputes».

The Court also considers that it is not a Court of appeal, still less a Court of cassation. It has no jurisdiction to review decisions rendered by national Courts of Member States. It has reiterated this position of principle in several of its judgments.

We can cite the judgments of 7 October, 2005 (*Jerry Ugokwe v. Nigeria*), 22 March, 2007 (*Moussa*

Léo Keita v. Republic of Mali); 28 June, 2007 (Elhadj hammani Tidjani v. Federal Republic of Nigeria); 3 July, 2013 (Kaptcha Gnassimbe v. Togolese Republic); 6 July 6 2012, (Rencontre africaine pour la défense des droits de l'homme (Raddho) v Republic of Senegal); 28 January 2014 (Mr. Alimu Akeem v. Federal Republic of Nigeria) or the judgment of 23 April, 2015 (Convention démocratique et social Rahana v. the Republic of Niger).

The Court also considers that it does not interfere in the course of a trial under the risk of infringing on the freedom of the national judge (judgment on the case Messrs Aziagbede Kokou and 33 others, Atsou and 4 others, Tomekpe A. Lanou and 29 others v. Togolese Republic).

Furthermore, in the case of Messrs Wiyao Gnadakpa and others v. Togolese Republic, the Court considers that it is not a judge for the constitutionality or legality of acts or actions committed by Member States.

This decision was strongly reaffirmed in its judgment of 23 October, 2015 in the case of Mamadou Baba Diawara v. Republic of Mali.

For the Court, it is not responsible for assessing the reasons for a judicial decision, it is neither a judge of national legality in the broad sense, nor an appeal or cassation body for decisions rendered by a national judge. It is therefore not within its competence to give any opinion on trials that have taken place, in this case, in Mali.

It stresses once again that it merely refers to international standards that are binding on Member States of the Community.

The Court has constantly affirmed that it does not have the power to assess the legislation of Member States. In the case of Madam Hadijatou Mani KORAOU v. Republic of Niger, the Court affirmed that its “role is not to review the national legislation of the Member States of the Community” It has often recalled this constant position as in the case of Abdoulaye BALDE and others v. Republic of Senegal or Karim Wade v. Republic of Senegal.¹⁰⁵⁸

From these developments, it can be concluded that an important area of violation of fundamental rights falls outside the jurisdiction of the Court. The question has arisen, and still arises as to whether the Court’s jurisdiction should not be extended to cover massive violations of human rights.

In a way, it is a question of giving the Court criminal jurisdiction.

In addition to this proposal, there is the need to encourage dialogue between the national judge and the Community judge. In other words, it is desirable to make preliminary rulings effective in order to promote a uniform interpretation of the law within the Community.

B. Non-compliance with the Court’s decisions and lack of appeal procedures

Non-compliance with the Court’s decisions

The scope of the Court’s decisions

According to Articles 15.4 and 76.2 of the Revised Treaty, decisions of the Community Court of Justice are binding and without appeal. This provision is important.

In its judgment of 30 June, 2009 concerning the case Mus Saidykhon V. Republic of The Gambia, the Court noted the supranational character of ECOWAS and deduced the superiority of ECOWAS law over the national law of Member States.

¹⁰⁵⁸ An issue that has not yet been resolved and is likely to arise is that of conventionality review, the assessment of a national standard in relation to a convention to which a Member State is a party.

Once the principle of monism with the primacy of Community law is accepted as the prevailing principle in the ECOWAS region, the obligation to implement the Court's decisions is binding on all institutions of Member States.

Thus, a national judgment cannot, for example, overturn a judgment of the Community Court of Justice on matters defined in the Revised Treaty or in related instruments such as the Protocol on the Free Movement of Persons.

To reinforce the binding nature of the Court's decisions, Article 24 of the 2005 Supplementary Protocol established a procedure for the mandatory execution of the Court's judgments.

Consequently, under Article 24(2), the mandatory enforcement of judgments by the Court is governed by the rules of civil procedure in force in Member States of the Community. Member States are responsible for designating, in accordance with Article 24(4), the national authority competent to receive or enforce the Court's judgment, which must be notified to the Court.

Enforcement can only be suspended by a decision of the ECOWAS Court of Justice.

The question may arise if a Member State refuses to comply with the Court's decision. Does the Court have any means of coercion against the recalcitrant State?

Undoubtedly, the Community Court of Justice has no direct power of coercion. It relies largely on ECOWAS Member States to enforce its decisions.

In this regard, the Community has set up a specific procedure to ensure that Member States comply with their Community obligations, such as submitting to the decisions of the Court.

Mechanism for seeking redress against the Community's failure to fulfil its obligations

From a Community law perspective, the purpose of an action for failure to fulfil obligations is to penalise infringements of Community law by Member States and ensure that Community law is effectively restored.

In this respect, the availability of a specific procedure to ensure compliance by Member States with their Community obligations is one of the main expressions of the distinct nature of Community building.

Pursuant to **Article 9(1) (d)**, the Court has jurisdiction over any dispute concerning "the **review of the failure of Member States to fulfil their obligations under the Treaty, conventions and protocols, regulations, decisions and directives.**"

Moreover, under **Article 10(a)**, an action for failure to fulfil obligations is only open to Member States and the Executive Secretary (now the President of the Commission). In practice, neither the States nor the President of the Commission have had to bring an action before the Court against another State for failure to fulfil its obligations under the Community's original law or secondary legislation.

It is especially in the context of human rights litigation that actions for failure to comply have been brought before the Court. For example, in the judgment of 23 October, 2015 on the case concerning *Alternative citoyenne Roch Gnahoui David v. Republic of Benin*, the petitioner's appeal sought a declaration by the Court that the State of Benin had failed to fulfill its obligations under the provisions of the Protocol on Democracy and Good Governance.

The appellants claims were held to be inadmissible on the grounds that they could not bring such an action before the Court because it is reserved exclusively for Member States of the Community.

This decision was consistent with the Court's earlier decision of **19 July, 2013 in Karim Wade v.**

Republic of Senegal.

This case is symptomatic of a distorted case of action for failure to comply with obligations. In this case, having noted that Senegal had not complied with the decision rendered by the ECOWAS Court of Justice, Karim Wade's lawyers found it useful to report Senegal's failure to comply with the decision to the President of the Commission in order to call for sanctions against it.

Based on the Supplementary Act of 17 February, 2012 on the regime of sanctions against Member States that do not fulfill their obligations to ECOWAS, the President of the Commission issued a note to Senegal to comply with the Court's decision. Senegal has done so. To date, this is the only case in which the President of the Commission has issued a formal notice to a Member State to comply with its community obligations.

This action for failure to fulfil obligations mechanism designed for individuals is unique. It is unique in its kind. In the WAEMU and the EU, the infringement procedure provides for a dual pre-litigation and litigation procedure. And in both procedures, the Commission, as guardian of community law, plays a fundamental role. It is in charge of prosecuting a Member State that does not fulfil its obligations. The competence of the Community jurisdiction is mandatory, permanent and exclusive.

Undoubtedly, within the framework of ECOWAS, sanctions were taken by the Conference of Heads of State and Government of the Community against Guinea, Côte d'Ivoire, Mali and Niger in a context of political crisis or civil war. These sanctions were decided at the initiative of the Conference.

However, the mechanism is hampered by a problem of consistency between the Court's powers to bring actions for failure to fulfil obligations and the powers of the President of the Commission, who has the authority to issue a formal notice to the recalcitrant State and to recommend sanctions to the Conference through the Council of Ministers.

Currently, the Community Court of Justice does not hesitate to give formal notice to Member States that are guilty of human rights violations to execute its judgments within a given period. The inclusion of this obligation in its judgments is undoubtedly a step forward.

However, the path chosen by the Court to reinforce the execution of its judgments can be a source of litigation if a culpable State refuses to comply with the Court's injunction.

In any case, according to the data from the Court's Registry, as of 30 September 2021, out of 290 judgments rendered by the Court, 114 have been executed, 176 are still pending.

The Registry has adopted a strategy aimed at identifying all the unexecuted judgments, the list of States that have not executed the judgments concerning them, their classification, etc.

It regularly follows the fate of the judgments rendered by the Court. It is undoubtedly necessary to improve the existing legal system by introducing penalty payment as a means of ensuring that Member States guilty of violating fundamental rights comply with the Court's decisions.

Lack of appeal against the Court's judgments

The problem facing applicants is the lack of appeal procedures to challenge the Court's decisions.

This is one of the missing links in the Community's legal system as regards guaranteeing the rights of the defense. The Community Court of Justice rules at first and last instance. Its decisions are enforceable and without appeal according to Article 79 of the revised Treaty.¹⁰⁵⁹

This provision is hardly comprehensible in the context of human rights protection. Unsuccessful par-

¹⁰⁵⁹ This provision is reStated in article 19 paragraph 2 of the 1991 protocol. No doubt, there are procedures for reviewing, third-party opposition or interpretation. These are exceptional cases where the effects of the Court's decision may be nullified. In general, the judgments of the Court are not subject to appeal or cassation.

ties should be able to appeal against the Court's decisions.

The Commission and the Community Court of Justice are reflecting on the need to create an autonomous Community appeal Court or an appeal chamber within the Court. The choice between the unity of jurisdiction and the duality of jurisdiction has been debated but without conclusion.

To rationalize costs, we can consider the creation of an appeal jurisdiction within the Court.

In the light of these developments, it is clear that the Community Court of Justice plays an important role in the resolution of conflicts, and, for that matter, in the process of integration of ECOWAS Member States through peace and law.

Within the twenty (20) years of its existence, the Court of Justice has been able to establish its jurisprudence on the protection of fundamental rights, give content to the relationship between the national legal systems and the Community legal system, the law of Member States and Community law, by entrenching legal monism with the primacy of Community law.

Today, the Court is seen as the cornerstone of the integration process in Africa. It inspires confidence. It deserves to be preserved and strengthened.

Strengthening the Court will necessarily involve increasing the number of judges, extending their tenure and jurisdiction to massive human rights violations, and adopting its Rules of Arbitration.

It is also necessary to create sub-registries or to make new technologies available to facilitate access to the Court, create an appeal jurisdiction or chamber to guarantee the rights of the defense, create a legal aid fund, make preliminary rulings available to individuals, especially in matters of legality review, and finally adopt the principle of *amicus curiae*.

FINAL COMMUNIQUE

Introduction

From 22 to 25 November 2021, an International Conference organised by the ECOWAS Court of Justice was held at the Hotel 2 Février in Lomé, Togo.

A. Justification

The Court, principal legal organ of ECOWAS, was established by Article 11 of the Treaty of 28 May 1975 and the Protocol of 06 July 1991, confirmed by Article 15 of the Revised Treaty of 24 July 1993.

Originally established as an interState Court, the jurisdiction of the Court was expanded to include human rights jurisdiction, among others, according to the 2005 Protocol.

Since 2001, when its first judges were sworn in, the Court has come a long way and has encountered several challenges and achieved many successes that have enabled it to carve out a place for itself in the West African jurisdictional mechanism for the protection of human rights, its most sought-after area of jurisdiction to date.

The twentieth anniversary of its creation is therefore undoubtedly an opportunity for its stakeholders at all levels to come together to look at what has been done without inhibitions and to draw up new prospects for its development and influence. This is why this year the International Conference, one of the essential activities that the Court organizes, is dedicated to an evaluation and prospective reflection exercise following the theme:

“Twenty Years of the ECOWAS Court of Justice: Achievements, Challenges and Prospects”

B. Objectives

The overall objective of the international conference was to assess the achievements and challenges of the ECOWAS Court of Justice during the last twenty years and to define its prospects. It was specifically for the presenters to propose strategies to strengthen the effectiveness of the Court after having identified its difficulties in functioning as a regional Court both community and human rights. To this end, the participants discussed the role of the Court in the integration process, with particular attention to its human rights jurisdiction. They also discussed the composition and tenure of the Members of the Court, ways to improve the relationship between the Court and the national Courts of the Member States, the approach of the Court to reparations to victims and the mechanism for the execution of its judgments.

C. Participation

The Conference was attended by H.E. Mr. Pius Kokouvi AGBETOMEY Minister of Justice and Legislation representing H.E. Mr. Faure Essozimna GNASSINGBE, President of the Republic of Togo who was accompanied by several other national political authorities. Also present was HE Mr. Jean Claude Kassi BROU, President of the ECOWAS Commission.

Given the Covid-19 pandemic, the Conference was attended by nearly one hundred and fifty participants in person and another fifty by video conference. In addition to the Honourable Members of the Court and some staff involved in its organization, the speakers came for the most part from the judicial sector, the national cells of the Member States, the academic world of the ECOWAS space, the Civil Society human rights activists, the ECOWAS Institutions as well as the Partner Organizations

of the Court.

D. Methodology

The entire work of the Conference was conducted in seven (7) plenary sessions, each devoted to one of the subtopics indicated in the Conference program. Each session was moderated by one of the judges of the Court, or by a president of a high Court of a Member State. Each sub-theme was addressed by three or four resource persons with a focus on relevant issues proposed in the programme. All presentations were submitted to the participants for deliberation and a thematic report was produced at the end of each session, the draft recommendations from the conference were therefore developed from these presentations and the ensuing discussions.

E. Plenary Sessions:

The work of the Conference took place in plenary sessions around the following sub-themes:

- i. Sub-theme 1: Achievements, Challenges and Prospects
- ii. Sub-theme 2: ECOWAS Court of Justice: A Community Court or a Human Rights Court?
- iii. Sub-theme 3: ECOWAS Human Rights Regime: Human Rights as a Core Value of the Community
- iv. Sub-theme 4: Relationship of the Court with the National Courts of Member States
- v. Sub-theme 5: Execution of decisions of the Court
- vi. Sub-theme 6: Award of Damages and Reparations by the Court
- vii. Sub-theme 7: Strategies for strengthening the effectiveness of the Court

F. Conclusions and Recommendations from the Conference

Conclusions

From the entire proceedings of the conference, a few major conclusions can be drawn.

- i. The participants in the Conference unanimously recognized the value of the Court and congratulated it for the work it has done over the past twenty years, making it a major instrument for the protection of human rights in the sub-region. To this end, they paid tribute to all the actors, in particular the former and current judges of the Court, including the staff. They wished the Court a happy birthday and encouraged it to continue the same course despite the challenges it faces.
- ii. The participants recognized the current fragile situation of the Court, which threatens not only its effectiveness but also its existence. This fragility can be observed at three levels
 - The insufficient number of its judges which constitutes a real handicap in its functional organization where it is not possible to constitute two panels of judges at the same time under the current composition of the Court of only five judges.
 - The abnormally short tenure of the judges and their complete renewal of the Court, which leads to loss of institutional memory of the Court.
 - The refusal of Member States to execute its decisions in good faith.
- iii. Participants also noted that the challenges currently facing the Court can no longer be handled by the Court alone. They suggested that the other institutions of the Community, namely the Parliament and the Commission, in particular should support it. More precisely, they

noted on the double role of the Commission in the follow-up and in the execution of the decisions of the Court, especially the implementation of the prescribed sanctions, and in the revitalization of the Community law and its application by the domestic Courts of the Member States.

- iv. Participants noted that the jurisdiction of the Court in matters of human rights violations has taken precedence over that of the interpretation and application of economic integration law and noted the need to revitalize the application of community law both at the level of Member States and at the level of ECOWAS institutions.
- v. The Conference noted that the lack of a legal aid fund and a mechanism for appealing decisions is a barrier to equal access to the Court. Indeed, it would be fairer if the possible error of the community judge could be corrected on appeal and the indigent citizen could apply to the Court to have his case heard despite his situation.
- vi. Finally the participants noted the poor relationship between the national Courts and the ECOWAS Court of Justice and highlighted the need to reinforce the relationship through community Acts and implementing municipal laws of the Member States with emphasis on the provision on referrals.

Recommendations

After intense deliberations during the plenary sessions, the participants, in view of the conclusions reached, made the following recommendations on the different sub-themes:

On the Achievements, Challenges and Prospects of the Court:

- i. The Conference commended the Court for its excellent performance in the last twenty years and asked that Member States and Institutions should give more support to it.
- ii. It was recommended that the Court be given a direct hearing at the Authority of Heads of State and Government and the Council of Ministers. Consequently, it should be able to present its own annual report during the Summits of Heads of State and Government and to report Member States that have failed to comply with the judgments of the Court.
- iii. It was suggested that Civil Society organizations be co-opted in sensitizing Member States on the harm being done to the Community by their refusal to comply with the judgments of the Court and to encourage them to comply with their Treaty obligations.
- iv. It was also suggested that the conference resolutions be conveyed to the current Chairman of the Authority to ensure rapid implementation of its recommendations.
- v. While acknowledging that individuals cannot bring cases of non-enforcement to the Court due to the limitation of access to only Member States and the President of the ECOWAS Commission to trigger the sanctions mechanism as contained in the 2012 Supplementary Act, it is recommended that the President of the Commission should play his role to facilitate the enforcement of the said sanctions mechanism in the case of the refusal by Member States to comply or enforce decisions of the Court.
- vi. Due to the reduction of the number of judges from seven to five and their tenure from five years renewable to four years non-renewable, contrary to international standards, the participants recommended an increase in the number of judges to 9 or 11 by the Authority of Heads of State and Government and call for the respect of the partial renewal of the Membership of the Court in accordance with the 1991 Protocol on the Court.
- vii. Participants called for the establishment of a Legal Aid Fund to facilitate access to justice for

indigent victims of human rights violations.

- viii. Participants called for the creation of an Appellate Chamber within the Court to give litigants who are dissatisfied with the judgments of the Court the possibility of appeal.

On the Court: Community Court or human rights Court

- i. The participants noted the strong relationship existing between community integration law and human rights law and noted that the Court should be considered as both a Community Integration Court and a Human Rights Court. The participants however recommended, that the ECOWAS Commission should organize meetings with the Court and national judges to reflect on the implementation of ECOWAS community law.

On the ECOWAS human rights regime: Human Rights as a core value of the Community

- i. The participants recommended that the Court should involve the ECOWAS national offices in the Member States in the sensitization programme of the Court in the Member States.
- ii. That the Court should collaborate with the Bar Associations of the Member States and the African Bar Association to put pressure on the Member States for the enforcement of the judgments of the Court.
- iii. Furthermore, that the African Bar Association should set up a committee of eminent persons including former Heads of States to monitor and supervise the implementation of the judgments of the Court.

On the Relationship between the Court and the National Courts:

- i. The participants noted that there is a poor relationship between the ECOWAS Court of Justice and national Courts of Member States and therefore recommended that there is an urgent need to strengthen the relationship between the Court and national Court of Member States.
- ii. The Commission should encourage ECOWAS Member States to domesticate the ECOWAS revised Treaty, Protocols, Conventions and Supplementary Acts by incorporating them into their national laws to enable national Courts to implement ECOWAS Community law.
- iii. The ECOWAS Commission should organise meetings between the Court and national Courts to reflect on the implementation of Community law.

On the Execution of the Judgments of the Court:

- i. The Court should publish the judgments against any Member State in the popular daily newspapers of the Member State concerned in order to put pressure on its implementation.
- ii. National human rights institutions of the Member States should be involved in the enforcement process of the decisions of the Court.
- iii. The Court should publish in its annual report the list of States that have not complied with its decisions.
- iv. The Commission must adopt measures to ensure compliance with the judgments of the Court, supervise the enforcement of the decisions and present an annual report on the level of enforcement.
- v. The ECOWAS Council of Ministers should be given the power to sanction a Member State that refuses to implement a judgment of the Court.

- vi. A dialogue mechanism should be put in place between the Commission and the Court on the implementation of the judgments of the Court.
- vii. The right of action against a State that refuses to execute a decision of the Court must be granted to the beneficiary of that decision, be it an individual or a legal entity, as well as human rights protection institutions.

On the Award of Damages and reparations by the Court:

- i. The Court should refer to general principles of law to determine the remedies to be granted pending a policy text.
- ii. The Court must adopt a framework for determining reparations for victims.
- iii. The Court should try to create an adversarial process between the parties on claims for reparations. This will enable the Court to better elucidate its decisions.
- iv. The Court should avoid granting exorbitant reparations, especially for violations of political rights or to political actor's victims.
- v. The Court may consider exercising jurisdiction in certain cases involving violations of international humanitarian law or international criminal law with human rights aspects such as loss of life.

On strategies to enhance the effectiveness of the Court:

- i. It was recommended that the Directorate for Legal Affairs of the Commission should play a more active role in bring to the attention of the Commission the challenges of the Court. It must also propose ways and means of finding solutions to them in order to improve the functioning of the Court.
- ii. It was also suggested that, if possible, a committee of eminent persons such as former Heads of State could be formed to champion the cause of the Court and follow up on all relevant issues affecting it, such as the recommendations of this Conference.

